MedeAnalytics®

Gag Clause Attestation Primer

What plan sponsors need to know and do by December 31, 2024

Under the Consolidated Appropriations Act of 2021 (CAA), group health plans and health insurance issuers are prohibited from entering into agreements with service providers that contain gag clauses. Plan sponsors and issuers must make a Gag Clause Prohibition Compliance Attestation (GCPCA) annually to confirm their compliance, with the first attestation due by December 31, 2024. This primer provides educational content to support plan sponsors with Gag Clause Prohibition Compliance Attestation (GCPCA).

Why should you care?

Possible Enforcement Action

Under the transparency provisions of the Consolidated Appropriations Act (CAA), group health plans and health insurance issuers are prohibited from entering into agreements with service providers that contain gag clauses. Plans and issuers that do not submit their attestation as required by year end may be subject to enforcement action.

Civil Litigation

Plaintiff or Class Action Attorneys could use your failure to comply with Gag Clause Prohibition Compliance Attestation as evidence of your failure to exercise fiduciary duty for your healthcare plan members.

Fiduciary Duty

There is an implication that, after December 31, 2023, you have complied with removing gag clauses and therefore can acquire cost and quality data and use this data as a health plan fiduciary.

Overview

Under the transparency provisions of the Consolidated Appropriations Act (CAA), group health plans and issuers must annually submit an attestation that the plan or issuer is in compliance with Code section 9824, ERISA section 724, and PHS Act section 2799A-9, as applicable. This is called the Gag Clause Prohibition Compliance Attestation (GCPCA).

The first Gag Clause Prohibition Compliance Attestation was due no later than December 31, 2023, covering the period beginning December 27, 2020, or the effective date of the applicable group health plan or health insurance coverage (if later), through the date of attestation. Subsequent attestations, covering the period since the last preceding attestation, are due by December 31 of each year thereafter.

A Gag Clause Prohibition Compliance Attestation (GCPCA) is an attestation of compliance with Internal Revenue Code (Code) section 9824, Employee Retirement Income Security Act (ERISA) section 724, and Public Health Service (PHS) Act section 2799A-9, as added by section 201 of Title II (Transparency) of Division BB of the CAA, as applicable.

These provisions prohibit group health plans and health insurance issuers offering group health insurance coverage from entering into an agreement with a health care provider, network or association of providers, third-party administrator (TPA), or other service provider offering access to a network of providers that would directly or indirectly restrict a plan or issuer from:

1. Providing provider-specific cost or quality of care information or data, through a consumer engagement tool or any other means, to referring providers, the plan sponsor, participants, beneficiaries, or enrollees, or individuals eligible to become participants, beneficiaries, or enrollees of the plan or coverage;
2. Electronically accessing de-identified claims and encounter information or data for each participant, beneficiary, or enrollee in the plan or coverage upon request and consistent with the privacy regulations promulgated pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Genetic Information Nondiscrimination Act of 2008 (GINA), and the Americans with Disabilities Act of 1990 (ADA), including, on a per claim basis —
    i. Financial information, such as the allowed amount, or any other claim-related financial obligations included in the provider contract;
    ii. Provider information, including name and clinical designation;
    iii. Service codes; or
    iv. Any other data element included in claim or encounter transactions; or
3. Sharing information or data described in (1) and (2), or directing such information be shared, with a business associate, as defined in 45 CFR 160.103, consistent with applicable privacy regulations promulgated pursuant to section 264(c) of HIPAA, GINA, and the ADA.

PHS Act section 2799A-9(a)(2) prohibits health insurance issuers offering individual health insurance coverage from entering into an agreement with a health care provider, network or association of providers, or other service provider offering access to a network of providers that would directly or indirectly restrict the issuer from:

1. Providing provider-specific price or quality of care information, through a consumer engagement tool or any other means, to referring providers, enrollees, or individuals eligible to become enrollees of the plan or coverage; or
2. Sharing, for plan design, plan administration, and plan, financial, legal, and quality improvement activities, data described in (1) with a business associate, consistent with the privacy regulations promulgated pursuant to section 264(c) of HIPAA, GINA, and the ADA.

Plans and issuers must annually submit an attestation of compliance with these requirements to the Departments of Labor, Health and Human Services, and the Treasury (collectively, the Departments). The Centers for Medicare & Medicaid Services (CMS) is collecting GCPCAs on behalf of the Departments.

The first GCPCA was due by December 31, 2023. Subsequent attestations are due by December 31 of each year thereafter.

What is the definition of a Gag Clause?

It is a contractual term or set of terms in an agreement with a health care provider, network or association of providers, third-party administrator (TPA), or other service provider that would directly or indirectly restrict (i) provider-specific cost or quality information sharing with plan members or (ii) claims data (including individual claims pricing) sharing with plan sponsors (and their service providers).

In general, for the purposes of Code section 9824, ERISA section 724, and PHS Act section 2799A-9, a "gag clause" is a contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party.

Gag clauses in this context might be found in agreements between a plan or issuer and any of the following parties:

- a healthcare provider
- a network or association of providers
- a TPA
- another service provider offering access to a network of providers.

Plans and issuers must ensure that their agreements with health care providers, networks or associations of providers, or other service providers offering access to a network of providers, do not contain these or other provisions that violate the prohibition on gag clauses under Code section 9824, ERISA section 724, and PHS Act section 2799A-9.

What is the due date for the Gag Clause Prohibition Compliance Attestation?

The first Gag Clause Prohibition Compliance Attestation was due December 31, 2023, covering the period beginning December 27, 2020, or the effective date of the applicable group health plan or health insurance coverage (if later), through the date of attestation.

Subsequent attestations, covering the period since the last preceding attestation, are due by **December 31 of each year thereafter**.

What are scenarios where gag clauses limit data access?

Practically, gag clauses limit a plan sponsor's access to information required for a plan sponsor to act in their role as a fiduciary. Gag clauses may function to:

1. Prohibit sharing financial or pricing information.
2. Restrict the use of data for benchmarking.
3. Place restrictions on data for audits (government or otherwise)
4. Restrict the use or require the destruction of data after contract termination.
5. Prohibit the use of data to conduct financial analysis on carrier operations or financial condition.
6. Restrict data use for or in cost and price transparency tools including employee steering applications.
7. Restrict the use of data with competitors, carrier providers or in RFPs.
8. Restrict cross carrier or cross plan analysis that reveals pricing information.
9. Restrict the use of data in buying program like accountable care organizations, center of excellence or narrow networks in medical or pharmacy purchasing.
10. Restrict the use of data with certain sub-contractors or business associations.

TPA contracts can no longer require that network provider cost information be proprietary and confidential by blocking access to outside parties or otherwise imposing unreasonable restrictions on the public disclosure of such information.

Example 1:

If a contract between a TPA and a group health plan states that the plan will pay providers at rates designated as "Point of Service Rates," but the TPA considers those rates to be proprietary and therefore includes language in the contract stating that the plan may not disclose the rates to participants or beneficiaries, that language prohibiting disclosure would be considered a prohibited gag clause.

Example 2:

When a contract between a TPA and a plan provides that the plan sponsor's access to provider-specific cost and quality of care information is only at the discretion of the TPA, that contractual provision would be considered a prohibited gag clause.

Four examples of gag clauses from actual agreements:

Proprietary materials specifically include any data and information, including any data provided to Plan Sponsor in the form of a data extract or otherwise, related to the composition of the Carrier network of Participating Providers, the contracted (or "allowed" amounts) paid to Participating Providers, the terms of the agreement between Carrier and the Participating Providers, and the discounts to Carrier offered by Participating Providers. Proprietary Materials also consist of any analyses, compilations, studies, or other documents created on the basis of other Proprietary materials.[1]

All Proprietary Materials are the sole property of Carrier. Carrier will have the right to protect the confidentiality of the Proprietary Materials and will not be required to make such Proprietary Materials available to anyone. Plan Sponsor agrees to maintain the confidentiality of any Proprietary Materials Carrier provides, and Plan Sponsor will not provide any Proprietary Materials to any other person, including any data extracts or summary information, except to the extent such Proprietary Materials have been made available to the public without fault of the Plan Sponsor.[2]

Upon termination of the Agreement, each party, upon the request of the other, will return or destroy all copies of all of the other's Business Confidential Information in its possession, or control except to the extent such Business Confidential Information must be retained pursuant to, applicable law or cannot be disaggregated from [insurer's] databases.

[Plan Sponsor] acknowledges that it shall not be entitled to audit: (i) documents, in whole or in part, that [service provider] deems proprietary, confidential or trade secret; and (ii) documents, in whole or in part, that [service provider] is barred from disclosing by law or pursuant to an obligation of confidentiality to a third party. All information and records reviewed pursuant to this section shall be considered Confidential Information for purposes of this Contract.

Nothing in this paragraph shall prevent either the [Plan Sponsor] or its third-Party auditor from access to any document or record necessary to ensure the financial and performance obligations made under this Contact are being fulfilled.

[1, 2] *Provided courtesy of Fiduciary in a Box*

Here is the text to which a plan sponsor must attest:

I attest that, in accordance with section 9824(a)(1) of the Internal Revenue Code, section 724(a)(1) of the Employee Retirement Income Security Act, and section 2799A-9(a)(1) of the Public Health Service Act, the group health plan(s) or health insurance issuer(s) offering group health insurance coverage on whose behalf I am signing will not enter into an agreement, and has not, subsequent to December 27, 2020, entered into an agreement with a health care provider, network or association of providers, third-party administrator, or other service provider offering access to a network of providers that would be directly or indirectly restrict the group health plan(s) or health plan(s) or health insurance issuer(s) from:

1. Providing provider-specific cost or quality of care information or data, through a consumer engagement tool or any other means, to referring providers, the plan sponsor, participants, beneficiaries, or enrollees, or individuals eligible to become participants, beneficiaries, or enrollees of the plan or coverage.
2. Electronically accessing de-identified claims and encounter information or data for each participant, beneficiary, or enrollee in the plan or coverage, upon request and consistent with the privacy regulations promulgated pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the amendments made by the Genetic Information Nondiscrimination Act of 2008 (GINA), and the Americans with Disabilities Act of 1990 (ADA), including, on a per claim basis:
    a. Financial information, such as the allowed amount, or any other claim-related financial obligations included in the provider contract.
    b. Provider information, including name and clinical designation.
    c. Service codes; or
    d. Any other data element included in claim or encounter transactions.
3. Sharing information or data described in items (1) or (2), or directing that such data be shared, with a business associate as defined in section 160.103 of title 45, Code of Federal Regulations (or successor regulations), consistent with the privacy regulations promulgated pursuant to section 264(c) of HIPAA, the amendments made by GINA, and the ADA.

I am attesting on behalf of group health plans, including non-federal governmental plans, and health insurance issuers offering group health insurance coverage.

FAQ

Which entities must report?

- Church plans
- ERISA plans
- Non-federal governmental plans
- Health insurance issuers

Where are attestations made?

The Centers for Medicare & Medicaid Services (CMS) is collecting GCPCAs on behalf of the Departments.
Attestations can be made here.

Can service providers attest on behalf of a plan sponsor?

Third parties, including TPAs, PBMs, and service providers, may attest for a plan sponsor. Nevertheless, the ultimate responsibility and liability for the information's accuracy lies with the plan sponsor.

For self-funded plan sponsors delegating GCPCA reporting duties to a service provider, a written agreement specifying such delegation is imperative.

Fully insured group health plans will typically delegate GCPCA submission to their health insurance issuer.

An issuer providing both group health insurance and TPA services for self-insured plans may submit a single GCPCA for itself, its fully insured policyholders, and self-insured clients. To prevent overlap, issuers in a TPA role should liaise with each plan, confirming the plan's intention regarding attestations for its provider agreements.

Learn more

Government entities

CMS: **Gag Clause Prohibition Compliance Attestation**

CMS: **FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation**

US Dept. of Labor: **Health Insurance Oversight System (HIOS) Gag Clause Prohibition Compliance Attestation User Manual**

CMS: **Gag Clause Prohibition Compliance Attestation Annual Submission Webform Instructions**

CMS: **GCPCA Reporting Entity Excel Template**

Law firms

Bradley Arant Boult Cummings LLP: **First Gag Clause Attestations Due December 31, 2023 – What Group Health Plan Sponsors Need to Know**

National Law Review: **Making First Gag Clause Attestations – Quick Reference Guide**

Foley: **Health Plans' Gag Clause Attestations Due December 31, 2023**

Bolton: **Health Plans Must Submit Gag Clause Attestations by December 31, 2023**

Ballard Spahr: **Gag-Clause Attestation Due by End of Year**

Insurers, brokers and consultants

United Healthcare: **CAA Gag Clause Prohibition Compliance Attestation Required by December 31, 2023**

Mercer: **Plans and issuers will need to submit "gag clause" attestations by Dec. 31, 2023**

Lockton: **No gag clauses allowed: Plans must submit first annual attestation by December 31**

Videos

HealthcareReporting.com: **Gag Clause Attestations**

HealthcareReporting.com: **Gag Clause Annual Requirement**

About the MedeAnalytics SubPop Health solution

For plan sponsors that still need to comply with CAA gag clause compliance attestation, MedeAnalytics SubPop Contract Analytics quickly and thoroughly identifies whether you have gag clauses in your healthcare benefit contracts and provides you a comprehensive report showing you where you do. Using AI within our contract analysis to quickly and cost effectively identify gag clauses (augmented by human quality control), we help you save time as a third-party without bias or conflicting interests. To learn more about receiving your bespoke contract gag clause analysis, please visit **medeanalytics.com/employer-solutions**.

Please note: This article provides general information only and is not intended as, nor should it be construed as, legal advice. Its contents are not exhaustive and may not address all relevant scenarios. Seek counsel from your legal advisors for implications specific to your situation.

MedeAnalytics®

www.MedeAnalytics.com

© 2024 MedeAnalytics, Inc. | EB1124_CORP_SP