

OCTOBER 2024

## Gag Clause Attestation – Employer Letter

The Consolidated Appropriations Act, 2021 (CAA) amended the Employee Retirement Income Security Act (ERISA), the Public Health Services Act (PHSA), and the Internal Revenue Code to prohibit group health plans and health insurance carriers from entering into agreements with providers, TPAs, or other service providers that include language that would constitute a “gag clause” (i.e., contract provisions that restrict specific data and information that a plan can make available to another party).

The prohibition on gag clauses went into effect on December 27, 2020. Plans and issuers must annually submit an attestation of compliance with these requirements. The first attestation is due December 31, 2023 (attesting to compliance for 2021 – 2023). Subsequent attestations are due by December 31 of each year thereafter.

CMS created a webpage with information about how to comply with the gag clause prohibition as well as how to attest to compliance, which you can find here - <https://www.cms.gov/ccio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance>

### Which Plans Must Comply?

The gag clause prohibition and attestation requirements apply to virtually all employer-sponsored health plans, but not excepted benefits (e.g., stand-alone dental or vision, health FSA), retiree-only plans, or account-based plans (e.g., HRAs). Beyond the carriers and TPAs involved with the group medical plan, there may be additional service providers that need to be considered as part of the attestation to the extent that they are involved in contracting with providers on behalf of the employer’s group health plan. For example, provider contracts with and coordinated by PBMs, behavioral health vendors (e.g., network agreements for mental health providers), telehealth arrangements, direct primary care arrangements, and other medical providers (e.g., access to

preferred pricing for certain procedures if using particular providers) are also prohibited from having gag clauses and should be considered by the employer when attesting to compliance.

### Who Must Complete the Attestation?

Agency guidance indicates that carriers or TPAs may attest for the group health plan on behalf of sponsoring employers, but carriers and TPAs are taking a varied approach as to their willingness to attest on behalf of employers. If the carrier (on behalf of a fully-insured plan) or TPA (on behalf of a self-funded plan) indicates a willingness to attest on behalf of the plan, the employer can rely on that attestation. However, if the carrier, TPA or any other service providers will not attest to compliance on the plan's behalf, the employer will need to confirm that no gag clauses are present in the contracts they have entered into on behalf of the plan, or request confirmation of compliance from the service provider(s), and will then need to attest accordingly on behalf of the group health plan(s).

### Attestation Process Overview

The attestation requirement is a fairly straightforward process requiring only some plan identifying information, employer contact information, and a checked box and signature to indicate compliance. This is all done via a website portal. The website for submitting the attestation can be found here - <https://hios.cms.gov/HIOS-GCPA-UI>

The attestation process can be broken down into 4 general steps:

1. **Confirm compliance.** Review any group health plan contracts to confirm there are no prohibited gag clauses. Alternatively, reach out to all carriers, TPAs and any other service providers and ask for written confirmation that contracts they handle on behalf of the group health plan do not contain any prohibited gag clauses. Such documents should be kept in the employer's files.
2. **Obtain website access.** Go to CMS' portal link above, enter in an email address, and get a unique code to access the attestation form.
3. **Complete the attestation form.** Fill out the required information in 5 short sections of the form and then sign off on compliance with the gag clause prohibition requirements.

4. **Confirm submission.** Upon completion and submission of the form, download the submission receipt and file it away in case of future audit or questions.

## What Do Employers Need to Do Now?

### VERSION 1 | GENERIC ENDING

Employers should contact any carriers, TPAs, PBMs, or other service providers with contracts or agreements connected to their group health plans to determine whether the attestation will be handled by such service providers. If not, the employer should confirm compliance with the service providers and then attest to such compliance on behalf of the group health plan using the process described above. The attestation must be submitted no later than December 31, 2024.

### VERSION 2 | EMPLOYER SPECIFIC ENDING

We have contacted the carriers, TPAs, PBMs, and other service providers that have contracts or agreements connected to your group health plan and have determined that [the attestation will be handled on your behalf so long as you respond to your service provider by \_\_\_ using the following link: \_\_\_\_\_] or [you will need to attest to compliance with the gag clause prohibition requirements on behalf of your group health plan. You should confirm compliance with the service providers and then attest to such compliance on behalf of the group health plan using the process described above. The attestation must be submitted no later than December 31, 2024.]

**[Insert text as to whether your agency will assist in the attestation process and who to contact.]**

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