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Employee Benefits Compliance

The Departments Release Updated Gag Clause Attestation Instructions for Submissions Due by December 31, 2024

Introduction

On May 24, 2024, the Departments of Labor (DOL), Health and Human Services (HHS), and Treasury (the Departments) released updated [instructions](#) for the Gag Clause Prohibition Compliance Attestation (GCPCA) due December 31, 2024. As background, the Consolidated Appropriations Act of 2021 (CAA) included rules that prohibit group health plans from entering into 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 a group health plan from providing provider-specific cost or quality of care information, electronic access to de-identified claims and encounter information for enrollees in a plan, or sharing such information/data with business associates in accordance with HIPAA standards. Such restrictions are colloquially referred to as “gag clauses.” (For an example of gag clause language see [Gag Clause Sample](#).) This requirement was effective December 27, 2020.

The CAA also included a requirement for group health plans to report compliance with the GCPCA to HHS. The first “Gag Clause” attestation was due December 31, 2023, and covered 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 each year. This requirement applies to all group health plans, including church plans, non-federal governmental plans, and grandfathered plans. While insurance issuers, Pharmacy Benefit Managers (PMBs), and TPAs can submit the required attestation on behalf of the plan by entering into a written agreement with the employer plan sponsor, numerous vendor partners have indicated they are not willing to make blanket attestations, which means that many employer plan sponsors will need to submit this attestation.

Background on GCPCA Annual Submission Process

On February 23, 2023, the Departments released FAQ guidance on the attestation group health plans are required to make regarding the removal of gag clauses from certain agreements, as required under the CAA. For details see [Compliance Alert 2023-02](#). Concurrently with the FAQs, the Departments launched a [website](#) for submitting attestations along with instructions, a system user manual, and a Reporting Entity Excel Template for plans and issuers to submit the required attestation.

2024 Annual Submission Instructions

For the 2024 attestation year, the Departments have updated the [GCPCA annual submission instructions](#), [system user manual](#), and [Responsible Entity Excel Template](#) to submit the required attestation. Notable changes to the submission instructions for attestations made in 2024 include:

- Adding a webform selection for the attestation year, as well as a webform and Excel template field for the attestation period.
- The *attestation period* is the date range that the attestation covers from the date of the prior years’ attestation through the date the current attestation is submitted.
- The *attestation year* is the year in which the current attestation is made, even if the attestation period covers two calendar years (e.g., for an attestation period of December 1, 2023 – November 30, 2024, the attestation year is 2024).
- Changing the terminology used to identify a plan or issuer subject to the GCPCA from “Reporting Entity” to “Responsible Entity.”
- The Group Health Plan category used to identify the Submitter’s employer plan type was expanded from Group Health Plan (GHP) to church plan, ERISA group health plan (GHP), or (Non-Federal)

governmental group health plan (mirroring the options available for identifying the type of Responsible Entity).

While the attestation may be made at any time during the year prior to December 31, and the "attestation period" is not required to be a full 12 months, a general best practice to ensure timely and consistent compliance is for the plan to submit the attestation on the same day each year.

These changes are reflected in the Alliant Compliance [Gag Clause Attestation Completion Tips Guide](#) to support clients responsible for submitting this attestation.

Conclusion

As employer plan sponsors plan to submit their "Gag Clause" attestation by December 31, 2024, they should again reach out to insurance issuers, TPAs and PBMs for confirmation that all gag clauses have been removed. Plan sponsors should also request that insurance issuers, TPAs and PBMs make the attestation on behalf of the group health plan by written agreement. If, however, these partners are unwilling to assist with this process, employers should familiarize themselves with the website for submitting attestations, and the updated instructions and Excel template outlined above. It is likely that employer plan sponsors with nonintegrated concierge care or telehealth arrangements will need to make attestations for these coverages separately. Note that employer plan sponsors attesting on behalf of only one Responsible Entity should use the GCPA webform to provide the Responsible Entity's information while employer plan sponsors attesting on behalf of multiple Responsible Entities should use both the GCPCA webform and the Excel Template to report information about the Responsible Entities on whose behalf they are attesting.

If an employer plan sponsor has questions about submitting their GCPCA, they can contact the Help Desk at (855) 267-1515 or CMS_FEPS@cms.hhs.gov and include "GCPCA" in the subject line for faster service. Employer plan sponsors can typically expect a receipt confirmation within the same business day. Although a full resolution of the issue may require 1-2 weeks.

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