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Employee Benefits Compliance

More on Transparency: Departments Issue Guidance on "Gag Clause" Prohibition and Group Health Plan Compliance Attestation

Introduction

On February 23, 2023, the Departments of Labor (DOL), Health and Human Services (HHS), and Treasury (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 Consolidated Appropriations Act of 2021 (CAA). As background, the 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 of the above 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 this provision annually to HHS pending the issuance of subsequent guidance addressing how and when group health plans make a formal attestation. That guidance, requiring the first online Gag Clause Prohibition Compliance Attestation by December 31, 2023, is discussed in detail below. This requirement applies to all group health plans, including church plans, non-federal governmental plans and grandfathered plans.[1] Importantly, 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.

Gag Clause Guidance

Clarification on Gag Clauses

The FAQs include a review of the underlying CAA mandate to remove language that would constitute a "gag clause" and provide several helpful examples. The FAQs summarize the CAA rule as

[1] This requirement does not apply to excepted benefits. Although it technically applies to non-excepted account based plans (HRAs) the Departments have announced a non-enforcement policy as such accounts do not include underlying agreements with providers.

prohibiting group health plans and issuers from entering into agreements with providers, TPAs, or other service providers that include:

> (1) restrictions on the disclosure of provider-specific cost or quality of care information or data 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) restrictions on electronic access to de-identified claims and encounter information or data for each participant, beneficiary, or enrollee upon request and consistent with privacy regulations under HIPAA, GINA, and the ADA; and
>
> (3) restrictions on sharing information or data described in (1) and (2), or directing that such information or data be shared, with a business associate, consistent with applicable privacy regulations.

The FAQs also included the following examples:

> (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 is a prohibited gag clause.
>
> (2) if 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 is a prohibited gag clause.
>
> (3) if a term in a contract functions to restrict (but does not explicitly restrict) a plan or issuer from providing, accessing, or sharing the information or data described above, that language indirectly prohibiting disclosure is a prohibited gag clause.

From a practical perspective, many TPA service agreements have historically included language that constitutes a gag clause. As a result, 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. Note, however, a health care provider, network or association of providers, or other service provider may place reasonable restrictions on the *public* disclosure of this information.

The Attestation Process

The FAQs confirm that the first attestation is due December 31, 2023, and will cover 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.

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. Those materials are available here.

The Excel template includes basic fields and little specific plan data. Specifically: Name of the Reporting Entity, Employer Identification Number (EIN), Plan Number (ERISA plans only), Reporting Entity Type (Church plan, ERISA plan, non-federal governmental plan, or Issuer), Mailing Address for the Reporting Entity, Name of Reporting Entity Point-of-Contact, E-mail Address for Reporting Entity Point-of-Contact, Phone Number for Reporting Entity Point-of-Contact, Attestation is for All Provider Agreements (Medical, Pharmacy Benefits, Behavioral Health, Other Type(s) of Provider Agreement(s)).

The actual attestation submission is made here. Note that to access the user interface, a user must first obtain an authentication code by going to the Gag Clause Prohibition Compliance Attestation website and selecting "Don't have a code or forgot yours?" The user will be asked to provide the user's e-mail address. The system will generate an authentication code and send it to the e-mail address provided.

As noted above, insurance issuers, PBMs, and TPAs can submit the required attestation on behalf of the plan by entering into a written agreement with the employer plan sponsor. Insurance issuers should be amenable to entering into such agreements as they are separately required to attest to the removal of gag clauses. Importantly, an insurance carrier that also functions as a TPA can make an attestation on behalf of its entire book of both fully insured and self-insured business. This approach would be ideal for employer plan sponsors. TPAs should be willing to consider making this attestation on behalf of group health plans because they are in control of most, if not all, of the underlying provider agreements. However, employer plan sponsors may need to make attestations for non-integrated concierge care or telehealth arrangements separately.

Conclusion

Because this requirement was effective December 27, 2020, all gag clauses should have been removed from underlying provider or TPA agreements. However, with the new guidance on the attestation process, employer plan sponsors should again reach out to insurance issuers, TPAs and PBMs to ensure 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 as soon as possible. If, however, these partners are unwilling to assist with this process employers should familiarize themselves with the website for submitting attestations, instructions,

and Excel template in anticipation of making the first required submission by December 31. We will continue to provide updates as additional guidance is released.

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