



Gag Clause Attestation

Completion Tips

Overview

Effective December 27, 2020, the Consolidated Appropriations Act of 2021 (CAA) prohibited 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 (OSP)

that would directly or indirectly restrict the 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 referred to as “gag clauses.”

Requirements for Group Health Plans

As part of that prohibition, group health plans must make a formal attestation to the Centers for Medicare and Medicaid Services (CMS) of their compliance by December 31, 2023, and annually thereafter. Attestations are accepted throughout the calendar year. After the initial attestation, each subsequent attestation covers the period from the date of the prior attestation through the date of the subsequent attestation (the “Attestation Period”). For example, an attestation submitted on October 10, 2024, for a group health plan that submitted its initial attestation on November 30, 2023, would have an Attestation Period of December 1, 2023, to October 10, 2024.

Employer Action Item! [Updated FAQ guidance](#) issued in early 2025 clarifies three key points:

- When a group health plan has an agreement with a TPA or OSP to provide network access and the TPA or OSP has a downstream agreement that contains a gag clause, the

group health plan's agreement with the TPA or OSP indirectly restricts the plan and, therefore, violates the Gag Clause Prohibition.

- *For example, terms of an agreement between a TPA and the owner of a network that restrict the TPA from sharing the relevant information with a plan, except under certain conditions, indirectly restricts the plan, even if the plan is not a party to the agreement and, as a result, the plan would be in violation of the Gag Clause Prohibition.*
- If an agreement between a plan and a health care provider, network or association of providers, TPA, or OSP offering access to a network of providers prevents or limits a plan from sharing, or directing such information be shared, with a business associate (in a way that is consistent with applicable privacy regulations), the agreement violates the Gag Clause Prohibition.
 - *For example, if an agreement permits the plan to share de-identified claims data with a business associate only at the discretion of a health care provider, network or association of providers, TPA, or OSP offering access to a network, the agreement violates the Gag Clause Prohibition because it restricts the ability of the plan to provide de-identified claims data to a business associate even where such disclosure is consistent with applicable privacy rules.*
- The FAQ guidance is clear that the Departments expect plans to proactively address these issues, and include in their agreements, provisions that prohibit the TPA or OSP from entering into a downstream agreements that contain gag clauses. Employer plan sponsors should document their requests to TPAs or OSPs to remove any prohibited gag clause language, as well as any other steps they took with TPAs or OSPs to comply with the gag clause prohibition. **Depending on the plan's service providers and plan design, employer plan sponsors may need to engage legal counsel for this purpose.**

Where a TPA or OSP is Unwilling to Remove a Gag Clause

The FAQ guidance provides that where a TPA or OSP is unwilling to remove gag clause provisions, that information must be included in the employer's attestation. Specifically, plan sponsors must:

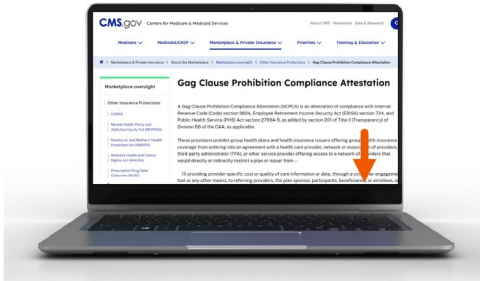
- Identify the non-compliant provision using the GCPCA webform system in the text box labelled "Additional Information," on Step 3 regarding "Responsible Entity's Details" (see below).
- Provide additional information, including, but not limited to, (1) the prohibited gag clauses that a TPA or OSP has refused to remove; (2) the name of the TPA or OSP with which the plan has the agreement with the gag clause, (3) conduct by the TPA or OSP that shows they interpret the agreement to contain a prohibited gag clause, (4) information on the plan requests to remove the prohibited gag clause, and (5) any other steps the plan or issuer has taken to come into compliance with the provision.

While the plan retains liability with respect to compliance with the gag clause prohibition, the Departments note that a plan that submits an attestation of compliance that includes the

additional information referenced above will be considered to satisfy the requirement to submit the attestation, and the Departments will take into account good-faith efforts to self-report a prohibited gag clause in any enforcement action.

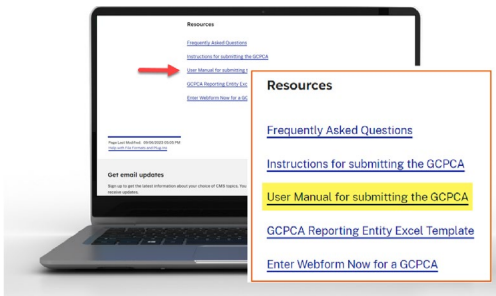


The attestation process is relatively simple, but it does require some familiarity with the CMS system.



To ensure your attestation process is brief and quick, we have prepared the following guidance for certain parts of the process that may be unclear.

In addition, the [CMS website](#) includes a host of helpful resources, including a [User Manual](#) that provides step by step guidance on the attestation process, complete with screen shots and examples.



We strongly recommend you review that manual before submitting your attestation.

STEP 1: Prepare to Complete the Attestation Form

Submitter and Attester

The process requires both a **submitter** and an **attester**. This can be a single person or two people.

- A **submitter** is the person completing the online form.
- The **attester** is a person with authority to sign the attestation—and other plan-related documents—on behalf of the group health plan (i.e., the individual that signs your annual Form 5500 filing).



If two separate individuals will fulfill these roles, each person is required to sign into the portal at different points in the process to complete the submission.

Name of Submitter	Name of Attester

Plan Number and EIN

Have your ERISA group health plan number (i.e., 501) and Employer Identification Number (EIN) handy.

ERISA Group Health Plan Number	Employer Identification Number

Completing the Attestation Form

1. Go to the [CMS Gag Clause Prohibition Compliance Attestation](#) website.
2. Click on **Don't have a code or forgot yours?** Follow the prompt.
3. Return to your email inbox and retrieve your code (if you do not receive this within 10 minutes, please resubmit your request).
4. Return to the [CMS Gag Clause website](#), then enter your email address and code into the fields provided.
5. Complete the form noting the below tips.

Enter the Submitter's Contact Information

- When selecting the attestation year from the drop-down menu, select the current year (i.e., the year in which the attestation is being submitted, even if the attestation includes periods from the prior calendar year)
- For the question, **By what type of entity are you employed?** respond by checking the appropriate category of **Group Health Plan (GHP)**:
 - ERISA group health plan (GHP) or sponsor of ERISA plan, including a plan sponsored or established by a union
 - Non-Federal governmental group health plan
 - Church plan

Enter the Attester's Contact Information

- If you have authorization to sign on behalf of your organization, check the box that you are both Submitter and Attester.
- If not, you are the Submitter only. The Attester (person who has authority to sign) will have to log in later to review, sign and submit the form.

Enter Responsible Entity Details

- Are you submitting on behalf of more than one plan or one issuer?

- **Answer NO** if you have one ERISA Plan under which **all** your medical, pharmacy, and behavioral health coverage falls. This is the case whether you are attesting to the compliance of all or some of the coverages.
 - **Answer YES** if you have **multiple** ERISA Plans, e.g., you file multiple 5500s.
 - Download and complete the [CMS GCPCA Reporting Entity template](#). Please review pages 31-40 of the User Manual for detailed guidance on how to submit the attestation when submitting for multiple entities.
 - **Responsible Entity** is your organization.
 - **Responsible Entity type** is one of the following options:
 - **Church Plan**
 - **ERISA group health plan (GHP)**
 - **(Non-Federal) governmental group health plan**
 - **EIN:** Do not include the dash in your EIN. If you have multiple EINs, you can use the EIN associated with your organization's headquarters.
 - **Mailing address** will be the full address in one line.
- Are you attesting for all provider agreements?
 - **Select YES** if all your providers comply with the gag clause prohibition.
 - *This would be most common for self-funded plans where your vendor partners are not making an attestation on your behalf, but all vendors have indicated they are in compliance with the gag clause prohibition.*
 - **Select NO** if all your providers comply with the gag clause prohibition but some vendors will make that attestation on behalf of the plan.
 - *This would be common for Group Health Plans that have a mix of self-insured and fully-insured plans where the carriers submit on behalf of fully insured clients.*
 - In the secondary step, indicate the plans for which you are attesting to compliance.
 - If you are attesting for a Specific Provider Agreement other than or in addition to medical network, pharmacy benefit manager network, or behavioral health manager network, select **Other** and input the other provider agreement type in the text box provided.
 - If your TPA or OSP Agreement still contains prohibited gag clauses, you are required to report those using the "Additional Information" text box within this section. Specifically, you must provide additional information, including, but not limited to, (1) the prohibited gag clauses that a TPA or OSP has refused to remove; (2) the name of the TPA or OSP with which the plan has the agreement with the gag clause, (3) conduct by the TPA or OSP that shows they interpret the agreement to contain a prohibited gag clause, (4) information on the plan requests

to remove the prohibited gag clause, and (5) any other steps the plan or issuer has taken to come into compliance with the provision

- **Attestation Period**

- Enter the start and end date that your attestation covers. For those Group Health Plans with a prior attestation, the start date will be the day after the prior years' attestation date. The end date will be the date the attestation is submitted.
- **Note that** 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.

Review Submission and Attest

- Confirm all the details input are accurate.
- If you are the **Attester and Submitter**, click **Save and continue**.
- If you are the **Attester** but another individual from your organization will act as the **Submitter**, click **Save and exit**. You will be asked to confirm the Attester's email address.



Once confirmed, the Attester will receive an email from CMS and they will need to login, review, and confirm the information previously input.

Verify the entity type(s) you are attesting on behalf of

- All **Attesters** must complete this page.
- There are two sections and checkboxes on this page – click only the first checkbox:
 - Group health plans, including non-federal governmental plans, and health insurance issuers offering group health insurance coverage**



The name entered on the signature line must match the Attesters name as listed previously on the site.

- After entering their name and clicking submit, a **Submission successful** pop-up box should appear.
 - *We encourage the Attester to click the **Download receipt** option. The receipt and any documentation from vendor partners indicating their compliance should be saved together.*



Note that the CMS official instructions offer this support

If you have questions about submitting your Gag Clause Prohibition Compliance Attestation, contact the Help Desk at **(855) 267-1515** or CMS_FEPS@cms.hhs.gov. Include "GCPCA" in the subject line for faster service. You can typically expect a receipt confirmation within the same

business day. A full resolution of your issue may require 1-2 weeks. Please consider this time frame in your submission preparation time.

Frequently Asked Questions

Are group health plan sponsors required to submit gag clause attestations for their dental, vision, and employee assistance plans (EAP)?

Probably not. The requirement to submit a Gag Clause Prohibition Compliance Attestation (GCPCA) broadly applies to fully insured and self-funded group health plans, but does not apply to excepted benefits including retiree-only plans or limited scope dental or vision plans. Most EAPs are also structured as an excepted benefit, but plan sponsors should confirm this status. EAP excepted benefit status requires the following: (1) The plan cannot provide significant benefits in the nature of medical care; (2) Benefits cannot be coordinated with benefits under another group health plan, meaning: (a) Plans cannot require exhaustion of supplemental benefits before being eligible for benefits under another group health plan (cannot be used as a gatekeeper). (b) Participant eligibility for benefits cannot be dependent on participation in another group health plan; (3) No employee premiums or contributions may be required; and (4) There can be no cost-sharing.

Are group health plan sponsors required to submit gag clause attestations for their point solutions?

Maybe. Group health plan sponsors will need to determine if the point solution vendor is a service provider that provides access to a network of providers. If the answer is no, the plan sponsor does not need to submit a gag clause attestation for that benefit. If the answer is yes, the plan sponsor will next need to determine if the point solution is an excepted benefit. If the point solution is an excepted benefit, the plan sponsor does not need to submit a gag clause attestation for that benefit. Telemedicine and concierge care arrangements generally provide access to a network of providers and are rarely designed to be excepted benefits, so a gag clause attestation is likely required for those point solutions.

We offer both fully insured and self-funded medical plan options. The insurance carrier will submit a gag clause attestation for the fully insured plan, but our TPA will not submit a gag clause attestation for their self-funded clients. How do we handle the requirement to submit gag clause attestations for our plans?

Fully-insured plan sponsors are deemed to have satisfied the attestation submission requirement when their health insurance issuer submits the attestation on behalf of the fully-insured plan. If a TPA is not submitting the attestation on behalf of the self-funded plan, the plan sponsor will need to submit the attestation. When entering the Reporting Entity details on the attestation form, the plan sponsor will indicate that they are not attesting for all provider agreements and list only the plans for which they are attesting compliance. The plan sponsor should not list the fully insured plan, because the carrier will be submitting for the fully insured plan on their behalf.

Are group health plan sponsors required to submit gag clause attestations for health reimbursement arrangements (HRAs)?

No, recent guidance confirms that a Gag Clause Prohibition Compliance Attestation is not required solely for an HRA (e.g., an insured major medical plan for which the carrier is attesting is integrated with an HRA). Although the law does not include a clear exclusion from this requirement for HRAs, the Departments have acknowledged that the structure of HRAs precludes the need to enter into agreements with providers, therefore, making the concepts related to the prohibited gag clauses inapplicable. Additionally, HRAs generally must be integrated with other major medical coverage or will be otherwise exempt from these requirements as excepted benefit HRAs. Therefore, no attestation is required.

Are group health plans required to disclose the existence of violations of the Gag Clause Prohibition in their annual attestation?

Yes. To the extent plans and issuers have an agreement that violates the Gag Clause Prohibition (including because a TPA or service provider entered into a downstream agreement with a separate entity that restricts the use of such relevant information or data) and have been unable to remove the non-compliant provision from the agreement, plans and issuers must identify the non-compliant provision as part of their attestation, and may use the attestation webform system in the text box labelled "Additional Information," on Step 3 for this purpose. Such additional information should include, but is not limited to, any prohibited gag clauses that a service provider has refused to remove; the name of the TPA or service provider with which the plan or issuer has the agreement containing the prohibited gag clause; conduct by the service provider that shows the service provider interprets the agreement to contain a prohibited gag clause; information on the plan's or issuer's requests that the prohibited gag clause be removed from such agreement; and any other steps the plan or issuer has taken to come into compliance with the provision. Reported violations of the Gag Clause Prohibition may be subject to enforcement action by the Departments. However, the Departments will take into account good-faith efforts to self-report a prohibited gag clause in any enforcement action brought by the Departments.

Disclaimer: This material is provided for informational purposes only based on our understanding of applicable guidance in effect at the time and without any express or implied warranty as to its accuracy or any responsibility to provide updates based on subsequent developments. This material should not be construed as legal or tax advice or as establishing a privileged attorney-client relationship. Clients should consult with and rely on their own independent legal, tax, and other advisors regarding their particular situations before taking action. These materials and related content are also proprietary and cannot be further used, disclosed or disseminated without express permission.