



National Compliance Update

USI EMPLOYEE BENEFITS

July 13, 2023

Gag Clause Prohibition and Attestation Reminder

As previously reported,¹ insurance carriers and plan sponsors of group health plans must submit information annually to the Centers for Medicare and Medicaid Services (“CMS”) attesting that their plan(s) do not include prohibited gag clauses. The first attestation is due December 31, 2023.

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. These clauses may be found in agreements between a plan or carrier and any of the following parties:

- a health care provider;
- a network or association of providers;
- a third-party administrator (“TPA”); or
- another service provider offering access to a network of providers.

Carriers and TPAs are beginning to notify clients how they intend to comply with the Gag Clause Prohibition Compliance Attestation (“GCPCA”). At this time, it seems there is no uniformity as to how the various carriers/TPAs will address the attestation requirements.

FULLY INSURED PLANS

If the group health plan is fully insured, the plan and the carrier both have the obligation to file an attestation; however, if the carrier submits the attestation on behalf of the fully insured arrangement, no further action should be required by the plan. Plan sponsors should not assume the carrier will submit the attestation on their behalf. The carrier may request information from the employer to enable submission on the employer’s behalf or may decline to submit and place the obligation on the employer to file the attestation.²

¹ For more information see USI’s Compliance Update, [FAQs Address Gag Clause Prohibition and Attestation](#) (March 9, 2023).

² It is our understanding and in accordance with [FAQs About Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 57](#), “when the issuer of a fully-insured group health plan submits a Gag Clause Prohibition

USI Note. While USI anticipates many carriers will file the attestation on behalf of fully insured group health plans, there are some carriers that have indicated they will not be filing the attestation. It will be important to confirm your particular carrier's approach.

SELF-FUNDED PLANS

A self-funded plan (including level-funded) is responsible for the attestation; however, the plan sponsor may enter into a written agreement with the provider (TPA, PBM) to submit the attestation on behalf of the plan. TPAs may request information from the employer to enable submission on the plan's behalf. That said, some TPAs have indicated they will not submit the attestation for the plan. If that is the case, plan sponsors will need to submit the attestation for their plans and should obtain written confirmation from the TPA and other service providers that the contractual arrangements do in fact satisfy the gag clause prohibition requirements.

Plan sponsors who will need to file an attestation will submit their attestation via the webform by selecting the link for "Gag Clause Prohibition Compliance Attestation" at <https://hios.cms.gov/HIOS-GCPA-UI>.

USI has developed a training that walks through the attestation process. Please reach out to your USI service team representative if you are interested in viewing this material.

Plan sponsors should carefully review any communication provided by the carrier or TPA to ascertain what approach they will undertake for this initial December 31, 2023 submission.

RESOURCES

- CMS Gag Clause Prohibition Compliance Attestation website, <https://www.cms.gov/ccio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance>

USI [usi.com/locations](https://www.usi.com/locations)

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Compliance Attestation on behalf of the plan, the Departments will consider the plan and issuer to have satisfied the attestation submission requirement." Further guidance would be helpful in this regard especially if carriers insist that their fully insured clients must submit their own attestation as well.