

Upcoming Gag Clause Attestation Filing Deadline

On February 23, 2023, the Departments of Labor, Health and Human Services and the Treasury issued FAQs on the prohibition of gag clauses under the transparency provisions of the Consolidated Appropriations Act, 2021 (CAA). These FAQs require health plans and health insurance issuers to submit their first attestation of compliance with the CAA's prohibition of gag clauses by Dec. 31, 2023.

What is a Gag Clause?

When the Consolidated Appropriations Act, 2021 (the "CAA") was enacted on December 27, 2020, a provision was included that prohibits group health plans and health insurance carriers from entering into certain agreements that, either directly or indirectly, restrict the release of certain information related to provider networks and de-identified encounter data, among other things. Such restrictions are commonly referred to as "gag clauses."

Under the CAA, a gag clause is defined as:

1. Restrictions on the disclosure of provider-specific cost or quality of care information or data to parties such as the plan sponsor, participants, beneficiaries, or referring providers;
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 HIPAA, GINA and ADA privacy regulations, including, on a per claim basis—
 1. Financial information, such as the allowed amount, or any other claim-related financial obligations included in the provider contract;
 2. Provider information, including name and clinical designation;
 3. Service codes; or
 4. Any other data element included in claim or encounter transactions; or
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.

What plans do the gag clause restrictions apply to?

All group health plans (excluding FSAs, HRAs and other excepted benefits such as dental or vision) and insurance carriers are subject to these prohibitions. This includes self-funded and fully insured plans, grandfathered plans, on-ERISA plans sponsored by non-federal governmental employers, and church plans subject to the Internal Revenue Code.

What is the attestation requirement?

The CAA required group health plans and health insurance carriers to attest annually to the government that they have no “gag clauses” in their contracts. Plans and carriers must complete the GCPCA form electronically using the form provided by the Agencies.

The first attestation is due no later than December 31, 2023, and covers 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 of each year thereafter.

Who is responsible for completing the attestation for our group health plan?

Fully Insured plans: Carrier and group health plan are required to submit a **GCPCA**, however a carrier may submit a **GCPCA** with respect to a fully insured plan that will satisfy the plan's obligation.

Self-funded plans: The plan is ultimately responsible for ensuring the attestation is completed. However, the TPA and/or their PBM to can submit the attestation on behalf of the plan,

ACTION REQUIRED—Next Steps

Your group plan is subject to the attestation requirements because it is a self-funded plan governed by ERISA. You will need to submit a **GCPCA** for Medical, Pharmacy Benefits and Behavioral Health. For fully insured plans, please work directly with your carrier to coordinate the **GCPCA** for those plans.

BRMS can help

Please reach out to your assigned Account Executive and/or Client Manager if you would like BRMS to submit the attestation on behalf of your group's plan. As noted above, the plan is ultimately responsible for ensuring the attestation is timely completed. Failure to communicate to BRMS to submit the attestation on your plan's behalf may result in penalties.

Please notify BRMS no later than November 1, 2023

I prefer to handle all submissions

If you prefer to submit the attestation for your group plan, you may find instructions [here](#).

As a reminder, you will need to submit your attestations no later than December 31, 2023.

Your assigned Account Executive and/or Client Manager will follow-up with you to ensure you are aware of this requirement. Whether you submit on your own or request assistance, please notify BRMS.