

Gag Clause Prohibition Compliance

Frequently Asked Questions:

1. What is the gag clause prohibition and attestation requirement?

The Consolidated Appropriations Act, 2021 (CAA21) created a prohibition on group health plans and health insurance issuers from entering into any agreement with a health care provider, network, third-party administrator (TPA), or other service provider offering access to a network of providers that included “gag clauses” in their written agreements.

2. What is a “gag clause”?

A gag clause is a contractual term that directly or indirectly restricts plan sponsors and issuers from accessing specific plan data or information related to cost or quality of care; and further restricts their ability to electronically access and share that information with business associates.

3. Where would a plan be looking for gag clauses?

Gag clauses in this context might be found in agreements between a plan and any of the following:

- A health care provider
- A network
- A TPA
- A PBM
- Another service provider that offers access to a network of providers (e.g., hospital network in addition to carrier network)

4. What types of gag clause restrictions does the rule prohibit?

The CAA21 prohibitions are specifically related to:

- Restrictions on disclosing provider-specific cost or quality of care information or data to:
 - Active or eligible plan participants
 - The plan sponsor
 - Referring providers
- Restrictions on electronic access to de-identified claims data of plan participants upon request
- Restrictions on sharing such information or data with a business associate consistent with privacy regulations

5. Must restrictions be explicitly written?

No. to the extent a term in a contract, either directly or indirectly prevents a plan from providing, accessing, or sharing the information or data mentioned, that term in the contract violates the gag clause prohibition. The terms themselves may not reference explicit restriction language and may be more nuanced in the operational implications.

6. What is the gag clause attestation requirement?

In addition to the prohibition on gag clauses in agreements, applicable entities must also submit an annual attestation. Attestations are due by December 31st each year but may be done prior to the deadline. Generally, attestation years encompass one plan year, but some plans may fall at times that encompass more than one plan year or partial plan years as well.

7. Does the attestation cover an entire calendar year period?

Due to delays in implementation, the first gag clause attestation was due on December 31, 2023. The 2023 attestation year encompassed a period from December 27, 2020 through December 31, 2023. The subsequent attestation years follow a singular calendar year approach.

The attestation period generally begins the day immediately following the end of the last attestation period, and the attestation year corresponds to the calendar year in which the attestation is being submitted for. (See Question 8 for late attestations)

8. Can plans file a late attestation?

Yes, currently late attestations for prior years are being accepted. Plans will want to make sure they indicate which attestation year they are attesting to on their filings and any information collection forms from third parties helping them file.

9. Are any lines of coverage excluded from this requirement and the attestation entities?

Yes. Entities attesting do not have to include excepted benefit plans such as:

- Accident only
- Disability
- Workers compensation

- Standalone vision or dental
- Medicare supplemental
- Fixed indemnity
- Disease-specific coverage
- Employer on-site health clinics

10. Are any entities exempt from attesting completely?

Yes. Entities that are not required to attest include but are not limited to:

- Plans offering only excepted benefits
- Plans offering only short-term, limited duration insurance
- Medicare and Medicaid plans
- Self-employed individuals without employees (“groups of one”)
- Account-based plans only (e.g., HRAs, ICHRAs)
- Retiree-only plans
- Plans with no provider agreements in the US
- Basic Health Program plans

11. How are plans meeting this requirement?

Meeting this annual compliance requirement may depend on your plan funding level and specific service providers the plan is contracted with.

Fully Insured Plans

These plans will likely have a carrier attesting on behalf of their service agreements but will want to verify in that in writing for their plan. While the rules hold both the carrier and plan responsible for annual attestations, the Departments have released guidance that they will consider the plan and issuer satisfying this requirement when the carrier makes the attestation on behalf of their fully insured groups.

Level Funded Plans

These plans may have a carrier or TPA willing to attest on behalf of their plan. Many of these plan options are treated similarly to their fully insured counterparts. Plans will still want to ensure they have received confirmation in writing that their vendor is attesting for their plan. If the plan is contracted with more than one vendor willing to attest on behalf of their group’s benefits, they will want to ensure they have written agreements and confirmation with each that an attestation is being filed for their plan.

Note: All self-funded arrangements, including level funded plans, are required to get written confirmation that another third party is attesting on their behalf.

Self-Funded Plans

These plans may have a vendor offering to attest on their behalf, but these plans are more likely to need to attest on behalf of all or some of their contracted vendors. Self-funded plans have the legal obligation, under the rules, to ensure their agreements are attested to in a timely manner. As noted above, self-funded arrangements will need written confirmation that another third party is attesting on the plan's behalf.

12. What should employer plan sponsors do about gag clause compliance?

Step 1: Determine all of the vendor agreements or service providers applicable to this requirement for your plan. For each vendor or service provider do plan sponsors have:

- A copy of the contract or service agreement on hand, and
- Communication(s) from the vendor confirming there are no gag clauses in their agreement.

Step 2: If the vendor or service provider has not confirmed their written agreements are in compliance with the gag clause prohibition, plans may want to have legal counsel review the written service agreement.

Step 3: After reviewing or collecting confirmation(s) of gag clause compliance from all vendors, the plan will need to determine if they fall into one of three categories:

1. The plan can confirm all their agreements are in compliance and do not contain gag clauses
2. The plan can confirm the compliance of some of their agreements but not all of their service agreements.
3. The plan cannot confirm any of their agreements are free of gag clauses and are in compliance.

13. Who may attest to compliance on behalf of a plan if the vendor is not attesting for them?

A plan may authorize any appropriate individual employed or contracted for service by the plan sponsor to make their attestation. Plans may also, through a written agreement, authorize another entity to attest on the plan's behalf.

14. Where should I submit my attestation if I can make one?

Attestations are to be submitted through CMS's Gag Clause Prohibition Compliance Attestation (GCPCA) web platform. The Departments have provided a template for submissions and directions on navigating the GCPCA platform. The GCPCA submission page can be found [here](#).

15. What should my plan do if we are unsure about our gag clause compliance?

If you are unsure whether you can make your attestation to your plan's gag clause prohibition compliance and need to notify your plan vendors of your obligations, Lumelight is here to help! Lumelight understands the daunting task of annual compliance and the need to break down the process easily so you can get back to what you do best.

For questions or more information, please contact us at:

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<https://lumelight.com/solutions/compliance/gag-clause-analysis/>

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