



HEALTH CARE OVERVIEW

GAG CLAUSE PROHIBITION AND ATTESTATION REQUIREMENT

Effective in 2020, the [Consolidated Appropriations Act, 2021](#) (CAA) prohibits health plans and health insurance issuers from entering into contracts with health care providers, third-party administrators (TPAs) or other service providers that contain gag clauses (i.e., clauses restricting the plan or issuer from providing, accessing or sharing certain information about provider price and quality and de-identified claims).

Plans and issuers must annually submit an attestation of compliance with the CAA's gag clause prohibition to the Departments of Labor, Health and Human Services, and the Treasury (Departments). The attestation is due on Dec. 31 each year, covering the period since the last attestation.

Employers should review their contracts with issuers, TPAs or other health plan service providers to confirm they do not contain prohibited gag clauses. Also, employers should review what actions they may need to take to comply with the gag clause attestation requirement in advance of the deadline each year. Employers with fully insured health plans do not need to submit an attestation if the issuer of their health plan submits the attestation. Employers with self-insured health plans can contractually delegate this responsibility to their TPAs if their TPA is willing to submit the attestation.

LINKS AND RESOURCES

- + Frequently asked questions (FAQs) on the CAA's prohibition on gag clauses from [February 2023](#) and [January 2025](#)
- + [Website](#) for submitting gag clause attestations
- + The [latest instructions and user manual](#) for submitting attestations

KEY POINTS

- + Health plans must ensure their agreements with providers, TPAs and other service providers do not include prohibited gag clauses.
- + Health plans must submit an annual attestation of their compliance with the gag clause prohibition.
- + The Departments may take enforcement action against plans that do not submit the required attestations in a timely manner.

ATTESTATIONS

- + Employers with fully insured health plans do not need to provide an attestation if their plan's issuer provides the attestation.
- + Self-insured employers can enter into written agreements with their TPAs to provide the attestation, but the legal responsibility remains with the health plan.



HEALTH CARE OVERVIEW

PROHIBITION ON GAG CLAUSES

A gag clause is a contractual term that directly or indirectly restricts specific data and information that a health plan or issuer can make available to another party. The CAA generally prohibits group health plans and issuers from entering into agreements with health care providers, TPAs or other service providers that include certain gag clause language. Specifically, these contracts cannot restrict a plan or issuer from the following three actions:

1. Providing 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. Electronically accessing de-identified claims and encounter information or data for each participant, beneficiary or enrollee upon request and consistent with privacy rules under the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA); and
3. Sharing information or data described in 1 and 2 above or directing such information to be shared with a business associate, consistent with applicable privacy rules.

For example, if a contract between a TPA and a health 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 would be considered a prohibited gag clause.

GAG CLAUSE COMPLIANCE ATTESTATIONS

Health plans and issuers must annually submit an attestation of their compliance with the CAA's prohibition of gag clauses to the Departments. Attestations are due on Dec. 31 each year, covering the period since the last attestation. **The deadline for submitting the next attestation is Dec. 31, 2025.**

Gag clause attestations must be submitted electronically. The Departments have provided instructions for submitting the attestation, a system user manual and FAQs, all of which are available [here](#).

According to the Departments' [FAQs](#), health plans and issuers that do not submit their attestations by the deadline may be subject to enforcement action.

COVERED HEALTH PLANS

The attestation requirement applies to fully insured and self-insured group health plans, including ERISA plans, nonfederal governmental plans and church plans. Additionally, this requirement applies regardless of whether a plan is considered "grandfathered" under the ACA.

RELYING ON ISSUERS/TPAS TO SUBMIT ATTESTATION

With respect to fully insured group health plans, the health plan and the issuer are each required to submit a gag clause compliance attestation annually. However, when the issuer of a fully insured group health plan submits a gag clause compliance attestation on behalf of the plan, the Departments will consider the plan and issuer to have satisfied the attestation submission requirement. Thus, employers with fully insured health plans do not need to submit an attestation if the issuer of the plan submits the attestation.

Employers with self-insured health plans can satisfy the gag clause compliance attestation requirement by entering into a written agreement under which the plan's service provider, such as a TPA, will provide the attestation on the plan's behalf. However, even if this type of agreement is in place, the legal requirement to provide a timely attestation remains with the health plan. Also, some service providers have indicated they are unwilling to submit attestations for their self-insured groups. In this case, employers may need to submit the attestations for their health plans.