PSA
INSURANCE & FINANCIAL SERVICES

Benefit Minute

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First Quarter Compliance Updates

This issue provides a recap of some recent regulatory activity.

Gag Clause Prohibition & Attestation

The Consolidated Appropriations Act of 2021 (CAA) included numerous provisions to enhance group health plan transparency. Among the provisions was one that prohibits insurers and group health plans from entering into any agreement with a health care provider, a provider network, a third party administrator (TPA), or any other service provider that would restrict the insurer or plan from accessing or sharing certain information. These types of restrictions are referred to as gag clauses.

Specifically, agreements with these third parties cannot restrict an insurer or plan from:

- disclosing provider-specific cost or quality-of-care data, through a consumer engagement tool or similar means, to referring physicians, the plan sponsor, participants or eligible individuals
- electronically accessing de-identified claims information (in accordance with HIPAA, ADA, GINA)
- sharing the above information with or directing that it be shared with a HIPAA business associate

In a set of FAQs issued on February 23, 2023, the DOL, HHS and Treasury (the Departments) provided the following examples of gag clauses that are prohibited by the CAA:

- if a contract between a TPA and a plan states that the plan will pay providers at rates designated as "Point of Service Rates," but the TPA considers those rates to be proprietary and includes contract language stating that the plan may not disclose the rates to participants, that language barring disclosure would be a prohibited gag clause
- if a contract between a TPA and a 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

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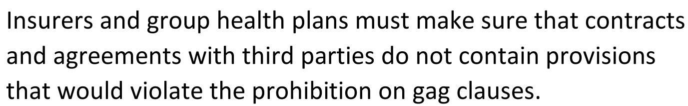

Insurers and group health plans must make sure that contracts and agreements with third parties do not contain provisions that would violate the prohibition on gag clauses.

The CAA states that insurers and group health plans must annually submit to the Departments an attestation that they are in compliance with these requirements. **The first Gag Clause Prohibition Compliance Attestation is due by December 31, 2023, covering the period from 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 preceding attestation, are due by December 31 each year. To satisfy the requirement, insurers and plans should submit their attestation via the Gag Clause Prohibition Compliance Attestation website at https://hios.cms.gov/HIOS-GCPCA-UI. Completing the attestation is simpler than the RxDC reporting process (another CAA requirement). Insurers and plans that do not submit their attestation by the deadlines may be subject to enforcement action, including penalties of up to $100/day.

With respect to fully insured group health plans, both the health insurer and the group health plan are required to annually submit a Gag Clause Prohibition Compliance Attestation. However, when the insurer submits an attestation on behalf of the plan, the Departments will consider both the insurer and the plan to have satisfied the attestation submission requirement. Each group health plan must be separately identified in the attestation.

Self-insured group health plans may make their own attestation or may satisfy the attestation requirement by entering into a written agreement under which the plan's service provider (such as a TPA, including an insurer acting as a TPA) will attest on plan's behalf. If the group plan utilizes more than one TPA, with each administering a subset of covered plan benefits (such as carved out prescription drug benefits), each TPA may attest on the plan's behalf with respect to the subset of benefits it administers. The TPA will make one attestation on behalf of all group health plans that have entered into the appropriate written agreement, but each plan will be separately identified in the attestation. However, if a self-insured plan chooses to enter into such an agreement with a service provider, the legal requirement to provide a timely attestation remains with the group health plan, so the plan should confirm that it has been completed by the deadline.

New IRS Electronic Filing Requirements

The IRS has finalized a regulation that will greatly expand electronic filing requirements for many types of information returns. Currently, electronic filing of returns is required if at least 250 returns of the same type are filed during the calendar year. The new regulation lowers the threshold to 10 returns, and requires filers to aggregate several types of information returns to determine if the threshold of 10 or more is met. Among others, the new requirement applies to Form W-2 and Form 1099 series, as well as Forms 1094/1095-B and Forms 1094/1095-C required under the Affordable Care Act. As a result, many smaller employers that have been submitting paper copies of these forms will need to find an electronic filing solution for information returns due in 2024.

Additional Relief for Telemedicine and HSA Eligibility

The Consolidated Appropriations Act of 2023 has additional relief for an individual to remain eligible to contribute to an HSA if they have access to telemedicine services at a cost that is less than the fair market value before the qualified high deductible health plan (QHDHP) minimum deductible is met. The new relief is available for plan years beginning after December 31, 2022 and before January 1, 2025, and follows prior relief from April 1, 2022 through December 31, 2022 and for calendar years 2020 and 2021. For calendar year plans, the extension means that first dollar telemedicine services can be made available for the entirety of the 2023 and 2024 plan years without causing participants to lose HSA eligibility. The extension appears to create a gap for non-calendar year plans because none of the relief granted applies to the months of the 2022 plan year that fall in 2023. This relief is permitted, not required, so health insurers and group health plans have flexibility to determine how telemedicine will be covered.

ACA Employer Mandate Penalties for 2024

The IRS has announced the ACA employer mandate penalties for 2024. The annual per employee amounts are (penalties are prorated by month):

- Section 4980H(a) "No Offer" penalty will be $2,970 as compared to $2,880 for 2023
- Section 4980H(b) "Not Affordable/Not Minimum Value" penalty will be $4,460 as compared to $4,320 for 2023

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