



COMPLIANCE CUE

GAG CLAUSE ATTESTATION FREQUENTLY ASKED QUESTIONS

DECEMBER 31ST DEADLINE

The Consolidated Appropriations Act, 2021 (CAA) is intended to promote transparency in health care. One provision of the CAA prohibits “gag clauses” in agreements between health insurers/group health plans and health care providers or other third parties. The ban on gag clauses was effective on December 27, 2020. The CAA also requires health insurers and group health plans to attest to their compliance with the gag clause prohibition. The first gag clause prohibition compliance attestation (GCPCA) must be completed by December 31, 2023, covering the period from December 27, 2020 through the date of the attestation. Subsequent attestations will be due each year by December 31. The attestation is made by completing a webform on the CMS website.

Please review the FAQs below to assist in determining your obligation to complete a GCPCA.

What is a gag clause?

A gag clause is a contractual provision that directly or indirectly restricts specific data that a group health plan or health insurer can make available to certain other parties. Specifically, contracts cannot restrict a plan or insurer 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

What types of entities might want a gag clause provision in their contracts?

Entities that might want a gag clause provision to protect information they deem to be proprietary include:

- health care providers
- provider networks
- third party administrators
- pharmacy benefit managers

My company sponsors a group health plan. Do I have to complete the GCPCA?

It depends. Any group health plan sponsor may complete their own GCPCA once they have confirmed that the plan, the health insurer, and all third-party service providers have certified compliance with the gag clause prohibition. These entities will generally provide a certificate or statement of compliance.

A health insurer may submit the GCPCA on behalf of a fully insured group health plan, and many insurance carriers have indicated they will do so. The health insurer is required to list all of the group





health plans on whose behalf the attestation is being made. However, we recommend that the plan sponsor of a fully insured group health plan submit a separate GCPCA if the health plan filed a Form 5500 for any plan year to which the attestation relates (generally plan years beginning in 2020 through 2022) so that the plan information in the attestation matches the information on the Form 5500 filings.

Group health plans that were self-insured at any time from December 27, 2020 through the present (including most level-funded plans and plans with stop loss coverage) will generally have to submit their own GCPCA. Before completing the attestation, the plan sponsor should obtain a certificate or statement of compliance from service providers and review contracts to confirm that no gag clauses are in place. A self-insured health plan may enter into a written agreement to have their third-party administrator complete the GCPCA on behalf of the plan, if the TPA is willing to do so. The GCPCA is not required for retiree-only medical plans, HRAs, HCFsAs or ICHRAs.

Hilb Group cannot confirm a plan's compliance (i.e., the absence of prohibited gag clauses) and cannot submit the attestation to CMS on behalf of a plan. Engage your legal counsel for any required contract review, revisions, and advice on uncooperative service providers.

If you are not certain whether your health insurer or TPA will complete the GCPCA on the plan's behalf, or if you need a copy of a certificate or statement of compliance from a health insurer or service provider, please contact your Hilb Group Benefit Advisor.

GCPCA RESOURCES

We have put together a set of resources to help you complete the GCPCA. [Click here](#) to visit the GCPCA Resources page.

Please note, the attestation process will generally take less than 15 minutes.

QUESTIONS?

Please contact your Benefit Advisor for more information on how to ensure your compliance with these notice requirements.

Disclaimer: The information provided in this bulletin does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available through this bulletin are for general informational purposes only.

