

Employers Face Another Annual Disclosure for Their Group Health Plan Related to the No Surprises Act: “Gag Clauses”

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The No Surprises Act (the NSA) bans “gag clauses” that prevent disclosure of price or quality information in agreements between health plans and certain service providers. In addition, the NSA requires plan sponsors to attest annually that they comply with this requirement. The attestation requirements are explained in new guidance issued by the Departments of Labor, Health and Human Services and Treasury.

What is a “gag clause”?

Generally, a “gag clause” is a contractual provision that directly or indirectly restricts a health plan from providing certain information to another party. The “no gag clause” rule applies to contracts between a plan and a health care provider, a network or association of providers, a third-party administrator (TPA), or another service provider offering access to a network of providers.

What information is subject to a gag clause?

The NSA prohibits health plans and insurance issuers from entering into contracts with health care providers, provider networks, TPAs or other service providers that would restrict the plan from providing, accessing or sharing certain information. Specifically, contracts cannot restrict a plan from:

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- Disclosing or sharing provider-specific cost or quality of care information to referring providers, the plan sponsor, or participants,
- Electronically accessing de-identified claims and encounter information or data for each participant, or enrollee upon request and consistent with certain federal rules such as HIPAA, and
- Sharing the information described above or directing such information to be shared consistent with federal rules.

Who has to submit the gag clause attestation?

The following entities are required to submit an attestation:

- health insurance issuers offering group health insurance coverage; and
- fully insured and self-insured group health plans, including ERISA plans, non-federal governmental plans, grandfathered plans, and church plans subject to the Internal Revenue Code.

Attestation is not required for plans offering only expected benefits, or short-term, limited duration insurance, or plans that consist solely of health reimbursement arrangements (HRAs).

May one entity submit an attestation on behalf of another entity?

An issuer or plan may attest on its own behalf as well as on behalf of other issuers in the same controlled group. Additionally, an issuer or plan that contracts with a third party to enter into provider agreements on its behalf may have that third party attest on its behalf.

Self-insured group health plans may provide an attestation by entering into a written agreement where the service provider attests on the plan’s behalf, but the ultimate legal responsibility for filing a timely attestation remains with the plan.

For fully insured group health plans, the guidance provides that the requirement will be met for the plan if the insurance carrier/issuer submits the attestation on behalf of the fully insured plan.

When are the gag clause attestations due?

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The NSA guidance requires the first gag clause attestation to be submitted by December 31, 2023, which covers the period beginning December 27, 2020 (the effective date of the NSA’s gag-clause prohibition), through the date of attestation. Subsequent attestations will be due by December 31 of each following year.

How is the attestation filed?

The U.S. Departments of Labor, Treasury, and Health and Human Services posted instructions which provide additional details as to how the attestations must be filed.

How should plan sponsors prepare for this new disclosure requirement?

- Plan sponsors should review the agreements between their group health plan and the applicable service provider to verify there are no prohibited gag clauses.
- Employers that sponsor self-insured group health plans should discuss and confirm in writing whether their third-party administrator will be filing the attestation on the plan’s behalf.
- Similarly, employers that sponsor fully insured group health plans should coordinate with the insurer and confirm in writing that the insurer will submit the attestation on the plan’s behalf.

If you have any questions about the new guidance or need assistance reviewing an applicable service agreement, please contact an Employee Benefits Attorney at Laner Muchin.