



GAG CLAUSE PROHIBITION COMPLIANCE ATTESTATION (GCPCA)

RE: Provider/Network/Health System Carrier, TPA, PBM, and Direct **Contracting Gag Clause Prohibition**

Effective December 27, 2020 under CAA Title II Section 201 (Transparency)

Submitted Attestation Due Date: December 31, 2023 and Dec 31st annually each year thereafter – *SEE CMS EMAIL SENT TO YOUR EMPLOYER CLIENTS BELOW.*

Governed and Enforced By: IRS (IRC section 9824), ERISA (Section 724), PHS Act (Section 2799A-9)

What is the Gag Clause Prohibition Compliance Attestation?

Group health plans and **health insurance issuers offering group or individual health insurance coverage must annually submit a Gag Clause Prohibition Compliance Attestation (GCPCA)** to the Department of Health and Human Services (HHS), which is collecting the attestations on behalf of the Departments of Labor, HHS, and the Treasury (the Departments). The GCPCA is an attestation of compliance with Internal Revenue Code (Code) section 9824, Employee Retirement Income Security Act (ERISA) section 724, and Public Health Service (PHS) Act section 2799A-9, as applicable. **These provisions generally prohibit plans and issuers from entering into certain provider agreements that would prevent the disclosure of cost or quality of care information or data, and certain other information to active or eligible participants, beneficiaries, enrollees, plan sponsors, or referring providers, or restrict the plan or issuer from sharing such information with a business associate, consistent with applicable privacy regulations.** A health care provider, network or association of providers, or other service provider may place reasonable restrictions on the public disclosure of this information. These provisions became effective December 27, 2020. Plans and issuers should use this webform to satisfy the requirement to submit an annual attestation of compliance. Once you have successfully logged in to the GCPCA webform, you will have access to the instructions, a user manual, and an Excel template for multiple Reporting Entities. If you are submitting an attestation on behalf of more than one plan or issuer (a Reporting Entity), prepare a tab-delimited text file using the Reporting Entity Excel Template. Instructions for completing this template are included in sections 2.3 and 2.31 of the Instructions.

Which entities are required to submit a Gag Clause Prohibition Compliance Attestation?

- health insurance issuers offering group health insurance coverage;
- health insurance issuers offering individual health insurance coverage, including student health insurance coverage and individual health insurance coverage issued through an association; and
- **fully-insured and self-insured group health plans**, including ERISA plans, non-Federal governmental plans; and church plans subject to the Code.

Entities that are *not required* to attest include:

- plans or issuers offering only excepted benefits;
- issuers offering only short-term, limited-duration insurance;
- Medicare and Medicaid plans; & state Children's Health Insurance Program (CHIP) plans;
- the TRICARE program;
- the Indian Health Service program; and
- Basic Health Program Plans
- HRA only arrangements (not integrated with medical)



Employer Plan Sponsor & Broker Action Items:

Similar to RxDC reporting, **determine for both your fully insured and self-funded plans/clients if the carriers, TPAs will be providing the attestation to CMS on their clients behalf.** If yes, the agreement should be documented and in writing! *(Note: We assume based off the recent CMS FAQs released (Q10 2nd paragraph) that most fully insured plans will submit the attestation on behalf of their clients but self-funded clients will be left to do the attestation based off each TPAs, PBM, Carrier partner's written attestations to the client that they are in compliance.* If you have multiple vendors within your self-funded program, you'll need to gather proof they are compliant be each TPA, PBM, and vendor. Regardless, each employer plan sponsor will need to confirm this directly from all medical and pharmacy providers.

Warning: Just like RxDC reporting obligations, the legal requirement to provide timely attestation remains with the plan.

CMS'S FAQs & GUIDANCE RELEASED FEB 20, 2023: <https://www.cms.gov/files/document/aca-part-57.pdf>

Most carriers, TPAs, and PBMs are most likely auditing their contracts to ensure Gag Clauses are removed while determining themselves on how they will handle this new requirement for their clients based on funding, group segment, etc.

Direct Link to CMS's Gag Clause Prohibition Compliance Attestation Page

<https://www.cms.gov/ccio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance>

Recently Released Guidance, Carrier Communication Sample, & Details:

Per guidance released on February 23, 2023 by the Departments of Labor, Health and Human Services, and the Treasury (collectively, the "Departments"), the Gag Clause Prohibition Compliance Attestation (GCPCA) can now be submitted here. The first GCPCA is due by December 31, 2023, covering the period beginning 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 GCPCAs are due by December 31 of each year and cover the period since the last GCPCA was submitted.

The recently released guidance on the GCPCA, including Frequently Asked Questions, submission instructions, a submission user manual and the reporting template, is available here.

As with other CAA requirements, a self-insured plan can enter into an agreement to have their TPA, PBM or another third party submit the GCPCA on their behalf, but the legal responsibility to submit a timely attestation remains with the plan. Likewise, fully-insured group health plans may offload the responsibility for submission of the GCPCA to the health insurance issuer, if done in writing. An issuer that both offers group health insurance and acts as a TPA for self-insured group health plans can submit a single GCPCA on behalf of itself, its fully-insured group health plan policyholders, and its self-insured group health plan clients. However, to avoid duplication, the Departments recommend that issuers acting as TPAs first coordinate with each plan to ensure that the group health plan does not intend to attest on its own behalf for some or all of its provider agreements. There are specific instructions applicable if an entity is submitting the GCPCA on behalf of multiple plans.



WHAT YOUR EMPLOYER PLAN SPONSOR CLIENTS MAY HAVE RECEIVED ALREADY!

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

Good afternoon:

The purpose of this email is to inform you that the Centers for Medicare & Medicaid Services (CMS) are now collecting Gag Clause Prohibition Compliance Attestations (GCPCA) on behalf of the Departments of the Treasury, Labor, and Health and Human Services via the portal at <https://link.edgepilot.com/s/dc7a9a11/uayDaIaVU0ulN0zd5g77UQ?u=https://hios.cms.gov/HIOS-GCPCA-UI>.

A GCPCA is an attestation of compliance with Internal Revenue Code (Code) section 9824, Employee Retirement Income Security Act (ERISA) section 724, and Public Health Service (PHS) Act section 2799A-9, as applicable. These provisions generally prohibit plans and issuers from entering into an agreement with a health care provider, network or association of providers, third-party administrator (TPA), or other service provider offering access to a network of providers that would directly or indirectly restrict a plan or issuer from providing, accessing, or sharing certain information related to cost or quality of care or de-identified claims and encounter information.

Instructions for submitting the GCPCA and additional information are available at <https://link.edgepilot.com/s/781b0b3a/JwEcYx4gqUmI2SH1E9LNQg?u=https://www.cms.gov/ccio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance>. These materials explain, for example, which entities are required to file an attestation and the technical requirements for completing an attestation in the GCPCA website. Group health plans and health insurance issuers offering group or individual health insurance coverage must annually submit a GCPCA to the Departments. The first GCPCA is due no later than December 31, 2023, and subsequent GCPCAs are due by December 31 of each year thereafter.

If you need additional assistance, please contact the Marketplace Service Desk at:

- Phone Number: 1-855-267-1515
- Email Address: CMS_FEPS@cms.hhs.gov
- Hours of Operation: 9:00AM to 6:00PM ET, Monday through Friday.

Sincerely,

CMS

Review UHC's recent stance on the attestation process.



We are working to ensure NDAs with all customers are executed consistent with the prohibition on "gag clauses" in the CAA.

Who is responsible for handling the attestation for removal of all Gag rules in key documents? **Update 1/7/22**

UnitedHealthcare has remediated any existing contracts that contain gag clauses restricting disclosures of price and quality from health care provider or network/association of providers contracts with UnitedHealthcare and contracts between a group health plan third party administrator (TPA) or other service providers offering access to a network of providers. All new contracts prohibit these clauses.

When required by law including any subsequent regulations, UnitedHealthcare, as the health insurance issuer providing group health insurance coverage, will provide an appropriate attestation to the Secretary.

UnitedHealthcare will also provide relevant information in a certification document to self-funded group health plans to assist them in making necessary attestations. If the self-funded group has other networks, they will need to gather information from them to complete the attestation.

Will UnitedHealthcare support self-funded clients' requirement to attest to the removal of gag clauses? **New 5/24/21**

Yes, as the TPA UnitedHealthcare will provide the information to the self-insured customer so they can attest. If the self-funded group has other networks that are not administered through UnitedHealthcare, the group will need to gather that information to complete the attestation.

UHC's CAA FAQs – updated 2/27/2023 – See pages 90-93 specific to Transparency and GAG Clause.

<https://www.uhc.com/content/dam/uhcdotcom/en/HealthReform/PDF/Provisions/reform-CAA-external-faq.pdf>