

The Consolidated Appropriations Act of 2021 (the CAA) requires group health plans to attest compliance with the CAA's gag clause prohibition on an annual basis. While the prohibition of gag clauses was effective December 27, 2020, the first annual attestation is due **December 31, 2023**. Group health plan sponsors should begin taking steps now to prepare.



WHICH PLANS MUST COMPLY WITH THE GAG CLAUSE PROHIBITION ATTESTATION?

Fully insured and self-funded* group health plans generally must submit the Gag Clause Prohibition attestation. This includes:

- Group health plans subject to ERISA;
- State and local governmental group health plans; and
- Church group health plans that are subject to the Internal Revenue Code.

WHAT IS THE GAG CLAUSE PROHIBITION?

Effective August 20, 2021, group health plans are prohibited from entering into an agreement with a health care provider, network or association of providers, third-party administrators, or other service provider offering access to a network of providers that would directly or indirectly restrict the plan or from:

1. Providing provider-specific cost or quality of care information or data to referring providers, the plan sponsor, participants, or eligible employees and their dependents;
2. Electronically accessing de-identified claims and encounter information or data for each participant in the plan upon request, including, on a per claim basis, certain financial and provider information, service codes or any other data element included in claim, or encounter transactions; or
3. Sharing information or data described in Nos. 1 or 2 above, or directing such information to be shared, with a business associate (as defined in 45 CFR § 160.103).

To the extent not already completed, group health plan sponsors should consider reviewing the service agreements for their plans to identify any problematic gag clauses.

WHEN IS THE GAG CLAUSE PROHIBITION ATTESTATION DUE?

The first attestation is due no later than December 31, 2023, and will relate to 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 the attestation. Subsequent attestations are due by **December 31 of each subsequent year** and will cover the period beginning from the previous attestation. Plans and issuers that fail to timely submit the attestation may be subject to enforcement action and may be subject to the general penalty for violations of the health care reform provisions of the Code: \$100 per day for each day an attestation is not filed.

HOW IS THE GAG CLAUSE PROHIBITION ATTESTATION SUBMITTED?

The attestation is submitted via the [Gag Clause Prohibition Compliance Attestation website](#). The FAQ directs users to select the “Don’t have a code or forgot yours?” button and to provide an e-mail address. The system will generate an authentication code and send it to the e-mail address provided. The user can then return to the Gag Clause Prohibition Compliance Attestation website, enter the e-mail address and code where indicated, and select “Login to the system” to proceed with submitting the attestation. Please refer to [The Gag Clause Attestation User Manual](#) for step by step instructions. Additional information and other resources can be found on the [CMS website](#).

In most instances (Anthem, UnitedHealthcare), the insurance carriers will be filing on behalf of their fully-insured groups. (Please note that Humana is an exception and has communicated that they will NOT file on behalf of their fully insured clients. They have provided confirmation of compliance however Humana fully insured employer groups will need to follow the instructions referenced in this document to attest by December 31, 2023).

Self-funded group health plan sponsors should confirm whether their plan service providers will submit the attestation on the plan’s behalf or be prepared to attest on their own behalf. Service providers include Prescription Benefit Managers (PBM) and Third-Party Administrators (TPA).

As of October 2023, Bim Group has confirmed the following approaches for Self-Insured clients in reference to TPA and PBM vendors:

Anthem- Self Insured: Anthem previously provided certification of compliance and communicated that they would attest on behalf of employer groups. Employers were given the option of opting for Anthem to attest on their behalf, if you are an Anthem self-insured employer group who did not opt for Anthem to attest on your plan’s behalf, you will need to follow the directions referenced above to attest by December 31, 2023.

Aspirant / CVS Caremark: Employer groups with Aspirant / CVS Caremark have been provided with certification of compliance by the TPA / PBM and will need to attest by December 31, 2023, following the directions referenced above.

UMR / Optum / UHC Level Funded **: Employer groups with UMR / Optum or UHC Level Funded plans have been provided with certification of compliance by the TPA or carrier and will need to attest by December 31, 2023, following the directions referenced above.

* Plan sponsors with self-insured group health plans can enter into a written agreement under which a service provider will attest on the plan’s behalf, but if the service provider fails to provide timely attestation, the plan sponsor remains liable for the failure.

**Employer groups with UMR as TPA and CVS / Caremark have been provided certification of compliance by UMR and CVS Caremark (provided by Aspirant via Bim Group) and will need to attest by December 31, following the directions referenced above.