

# EMPLOYEE BENEFITS LAW

## INFORMATION MEMO

SEPTEMBER 12, 2023

## Don't Choke on the Gag Clause Prohibition Compliance Attestation Requirement of the CAA

On or before Dec. 31, 2023, certain group health plans and health insurance issuers must submit an attestation to the U.S. Department of Health and Human Services (HHS) certifying their compliance with the “gag clause prohibition” created by the “No Surprises Act” incorporated into the Consolidated Appropriations Act of 2021 (CAA). The CAA prohibits plans and issuers from restricting access to certain information and requires plans and issuers to attest to compliance with the gag clause prohibition. Failure to comply with this attestation requirement could result in civil penalties. To avoid these penalties, group health plan sponsors should work with their insurance carrier (for insured plans) or third-party administrator (for self-funded plans) to ensure compliance with this attestation requirement, especially as this year draws to an end.

### The Gag Clause Prohibition Compliance Attestation Requirement

The CAA codified the “gag clause prohibition” in section 9824 of the Internal Revenue Code (IRC), section 724 of the Employee Retirement Income Security Act (ERISA), and section 2799A-9 of the Public Health Service Act (PHS). Each of these laws prohibits group health plans and health insurance issuers from entering into an agreement with health care providers, third-party administrators or any other service provider that prevents participants or enrollees from accessing information concerning provider-specific prices, provider-specific quality of care and de-identified claims data for each enrollee of the plan or coverage. Under recent guidance from HHS, the U.S. Department of Labor, and the U.S. Department of Treasury (collectively, the Departments), this prohibition on “gag clauses” is violated even if the agreement states that the plan, insurer or a service provider has “discretion” over the disclosure of such information.

These laws also require plans and insurers to annually submit an attestation to HHS that they are in compliance with the “gag clause” prohibition, which is known as the gag clause prohibition compliance attestation requirement.

The gag clause prohibition and attestation requirement applies to both fully insured and self-funded group health plans, including plans subject to ERISA, non-Federal governmental plans and church plans subject to the Code. However, these requirements do not apply to “excepted benefits,” which includes most dental, vision, health flexible spending account and employee assistance plans. In addition, the Departments will not enforce the requirement to submit a gag clause attestation against plans that consist solely of health reimbursement arrangements (including individual coverage health reimbursement arrangements) and other account-based group health plans.

The purpose of these laws, which are a part of the “No Surprises Act” incorporated into the CAA, is to promote greater awareness of healthcare costs and quality information.

### Compliance with the Requirement

To comply with the gag clause prohibition compliance attestation requirement, self-insured and partially self-insured group health plans and health insurance issuers may enter into an agreement with a third-

party administrator, pharmacy benefit manager, managed behavior health organization or other service provider whereby the service provider submits the attestation on behalf of the plan or insurer. However, even if a service provider has a contractual obligation to submit the attestation to HHS on behalf of a plan or insurer, the plan or insurer remains legally liable for noncompliance with the requirement. Employers who sponsor a self-funded group health plan should consult with their third-party administrator regarding satisfying the attestation requirement on behalf of the plan. Because the group health plan is ultimately responsible for the submission, an employer who contracts with a third-party administrator to complete the attestation on a group health plan's behalf should consider adding contractual language to the agreement providing the employer with protections in the event that the filing is not performed correctly. The attestation may be submitted electronically to HHS [here](#).

For fully insured group health plans, both the insurer and the group health plan are required to annually submit a gag clause attestation. However, when the insurance carrier submits a gag clause attestation on behalf of the plan, the Departments will consider the plan and the insurer to have satisfied the attestation requirement. Employers who sponsor a fully insured group health plan should consult with their insurance carrier to confirm that the carrier will be submitting a gag clause attestation that covers the plan.

### **Penalties for Noncompliance**

Although neither section 9824 of the IRC, section 724 of ERISA, nor section 2799A-9 of PHS specify a penalty for noncompliance with the "gag clause" prohibition or the attestation requirement, it is highly likely that the Internal Revenue Service would assess a civil penalty in the amount of \$100 per day for each individual affected by the violation pursuant to section 4980D of the IRC which imposes penalties for violations of group health plan requirements under the IRC.

### **Conclusion**

Sponsors of group health plans and health insurance issuers should review their agreements with service providers to ensure that there are no clauses therein that could directly or indirectly inhibit access by a participant or an enrollee to the information protected by the "gag clause" prohibition in the IRC, ERISA, and PHS. Moreover, group health plan sponsors should coordinate with their insurance carrier or third-party administrator to ensure that a gag clause attestation will be submitted on behalf of the plan to avoid potential civil penalties.

If you have any questions related to the information presented in this memo, please do not hesitate to contact [John M. Harras](#), any attorney in Bond's [employee benefits and executive compensation practice](#) or the Bond attorney with whom you are regularly in contact.

