Urgent Reminder About Gag Clause Attestations and Electronic Filing Requirements

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We want to remind you of two fast approaching deadlines: (1) certain group health plans are required to attest by December 31, 2023 that the plans comply with a prohibition on gag clauses; and (2) employers previously excluded from the electronic filing requirements may now need to file certain information returns electronically.

Gag Clause Attestation Due December 31

The Consolidated Appropriations Act, 2021 (CAA) requires certain group health plans to submit an annual attestation that the plan complies with the CAA's prohibition on gag clauses. The first such Gag Clause Prohibition Compliance Attestation must be submitted **by December 31, 2023**.

Background on Gag Clauses

The CAA amended ERISA, the Internal Revenue Code, and the Public Health Services Act to prohibit group health plans and health insurance issuers that offer group health insurance coverage from entering into prohibited gag clauses with their service providers. A prohibited gag clause is an agreement with a health care provider, network or association of providers, third-party administrator, or other service provider offering access to a network of providers that would directly or indirectly restrict a group health plan or health insurance issuer offering such coverage from:

1. providing provider-specific cost or quality of care information or data, through a consumer engagement tool or any other means, to referring providers, the plan sponsor, participants, beneficiaries, or enrollees, or individuals eligible to become participants, beneficiaries, or enrollees of the plan or coverage;

2. electronically accessing de-identified claims and encounter information or data for each participant, beneficiary, or enrollee in

the plan or coverage upon request and consistent with the applicable privacy regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA), including, on a per claim basis—

1. financial information, such as the allowed amount, or any other claim-related financial obligations included in the provider contract;

2. provider information, including name and clinical designation;

3. service codes; or

4. any other data element included in claim or encounter transactions; or

3. sharing information or data described above in (1) and (2), or directing such information be shared, with a business associate consistent with applicable privacy regulations promulgated pursuant to HIPAA, GINA, and the ADA.

FAQs issued by the Department of Labor, the Department of Health and Human Services, and the Department of the Treasury (the Departments) on February 23, 2023 (found here), list several types of plans for which an attestation is required.

While fully-insured and self-insured group health plans, including ERISA and non-Federal governmental plans, are subject to the gag clause prohibition and are compelled to submit an annual Gag Clause Prohibition Compliance Attestation, the FAQs provide that the Departments will not enforce the requirement to submit a Gag Clause Prohibition Compliance Attestation against plans that consist solely of health reimbursement arrangements (HRAs), or other account-based group health plans. For purposes of this non-enforcement policy, an HRA or other account-based group health plan is defined as "an employer-provided group health plan that provides reimbursements of medical care expenses with the reimbursement subject to a maximum fixed dollar amount for a period." The FAQs also confirm that the attestation requirement does not apply to excepted benefits, such as limited scope dental and vision plans.

Attestation Action Steps

Confirm that you have filed the required attestation if applicable. In connection with the attestation, we recommend that sponsors of group health plans take the following steps:

- Identify all vendors and agreements that are covered by the gag clause attestation.
  - Include third party administrators and other service providers that offer access to a network of providers.
  - Exclude vendors that only provide services to retiree-only plans, limited scope dental and vision plans, and Federal governmental plans.
  - Exclude vendors for plans that consist solely of HRAs or other account-based group health plans.
- Determine if the vendor is going to file the gag clause attestation on behalf of the group health plan. If not, then ask the vendor to confirm that its services are provided in a manner consistent with the

requirements of the CAA. If the vendor will not confirm that it operates in compliance with the attestation, then the plan sponsor will need to determine whether there is another basis to attest that the plan is in compliance.

If you have questions about the attestation process, contact your Vorys attorney.

Important Reminder of Enhanced Electronic Filing Requirements

Employers who have been filing paper "information returns" need to verify whether they are impacted by Treasury Regulations which were finalized in February, 2023. These regulations significantly change the threshold for filing certain information returns electronically for most information returns filed in and after 2024. The threshold was reduced from 250 forms to 10 forms.

An "information return" for this purpose includes the Form 1094 series, Form 1095-B, Form 1095-C, Form 1099 series and Form W-2. Most importantly, in determining whether an employer has reached the threshold, employers are required to aggregate all information returns of any type for the calendar year to determine whether the numeric threshold applies.

Employers who have historically filed paper forms and who exceed the lower threshold will need to make arrangements to file these information returns electronically beginning in 2024.