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Gag Clause Prohibition and Attestation Reminder

Seth Bracelin | Millenium Insurance Group | (717) 354-4774 | sbracelin@millig.com

As previously reported, insurance carriers and plan sponsors of group health plans must submit information annually to the Centers of Medicare and Medicaid Services (“CMS”) attesting that their plan(s) do not include prohibited gag clauses. The first attestation is due December 31, 2023.

Carriers and TPAs are beginning to notify clients how they intend to comply with the Gag Clause Prohibition Compliance Attestation (“GCPCA”). At this time it seems there is no uniformity as to how the various carriers/TPAs will address the attestation requirements.

Although the first attestation is not due until December 31, 2023, CMS is currently accepting attestations.

Background

A gag clause is a contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party. These clauses may be found in agreements between a plan or carrier and any of the following parties:

- 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.

Fully insured plans: If the group health plan is fully insured, the plan and the carrier both have the obligation to file an attestation however, if the carrier submits the attestation on behalf of the fully insured arrangement, no further action should be required by the plan. However, plan sponsors should not assume the carrier will submit the attestation on their

behalf. The carrier may request information from the client to enable submission on the client's behalf or may decline to submit and place the obligation on the client to file the attestation.

Self-funded plans: A self-funded plan is responsible for the attestation however, the plan sponsor may enter into a written agreement with the provider (TPA, PBM) to submit the attestation on behalf of the plan. However, plan sponsors may be tasked with having to submit the attestation for their plans and may need to obtain written confirmation from the carrier/TPA that the contractual arrangements do in fact satisfy the gag clause prohibition requirements.

Plan sponsors who will need to file an attestation will submit their attestation via the webform by selecting the link for "Gag Clause Prohibition Compliance Attestation" at <https://hios.cms.gov/HIOS-GCPCA-UI>

Employer Action

Employers who sponsor group health plans should carefully review any communication provided by the carrier or TPA to ascertain what approach they will undertake for this initial attestation, which is due by December 31, 2023.

It is important to note that employers do not have to wait until December 31 to submit; employer may submit attestations now.