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Compliance Directions

Departments Issue FAQs Clarifying Gag Clauses

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In January, the Departments of Labor, Health and Human Services, and the Treasury (the Departments) issued FAQs Part 69, which provides additional guidance relating to the gag clause prohibition on group health plans under the Consolidated Appropriations Act, 2021 (CAA).

Background

The CAA prohibits group health plans from entering into contracts with a health care provider, network or association of providers, third party administrators (TPAs), or other service providers that contains a gag clause. A gag clause is a contractual provision that either directly or indirectly restricts specific data and information that a plan can make available to another party. Gag clauses have been prohibited since the CAA was enacted in December 2020. Moreover, group health plans must submit an attestation of compliance to the Centers for Medicare and Medicaid Services (CMS) each year by December 31.

Specifically, the CAA prohibits any restrictions on:

- Disclosing provider-specific cost information or quality of care information or data to referring providers, the plan sponsor, participants, beneficiaries, enrollees or individuals eligible to become a participant or beneficiary;
- Electronically accessing de-identified claims and encounter information or data for each participant, beneficiary, or enrollee upon request and consistent with the privacy regulations under HIPAA, the Genetic Information Nondiscrimination Act (GINA), and the Americans with Disabilities Act (ADA); and
- Sharing such information or data (as described above) or directing such information be shared with a business associate consistent with HIPAA privacy regulations.

New FAQ Guidance

The newly issued FAQs clarify that the gag clause prohibition not only precludes plans from entering into agreements that contain gag clauses, but it also prohibits any restrictions contained in downstream agreements. For example, terms of an agreement between a TPA and the owner of a network that restrict the TPA from sharing the relevant information with a plan, except under certain conditions, which have the effect

of restricting a plan from providing cost information to a business associate would indirectly restrict the plan, even if the plan is not a party to the agreement with the owner of the network. As a result, the plan would be in violation of the gag clause prohibition. To ensure compliance with the gag clause prohibition, the Departments encourage plans to adopt provisions in their direct contracts with TPAs or other service providers that prohibit any downstream agreements that do not comply with the CAA.

The FAQs also provide examples of restrictions that would amount to prohibited gag clauses. For example, FAQs state that plan agreements allowing data to be shared with a business associate only when the service provider approves sharing within their discretion would be considered an impermissible gag clause. Other examples note that agreements that include unreasonable limits on the "scope, scale, or frequency of electronic access" to de-identified claims and data are also prohibited. The FAQs give the following examples of impermissible gag clauses:

- Limiting access to a statistically significant or the "minimum necessary" number of de-identified claims;
- Limiting the scope of access to the data to specific, narrow puposes (such as limiting access to the context of an audit;
- Unreasonably limiting the frequency of claims reviews (e.g., no more than once per year);
- Limiting the number and types of de-identified claims that a plan or issuer may access;
- Restricting the data elements of a de-identified claim that a plan or issuer may access; and
- Providing access to de-identified claims data only on the TPA's or service provider's physical premises.

Lastly, the FAQs cover whether the annual attestation requirement still applies if a plan has knowingly entered into an agreement in violation of the CAA gag clause prohibition. Pursuant to the guidance, plans aware of any prohibited gag clauses that have not been removed prior to the annual reporting deadline must identify the offending provision(s) as part of their attestation under "Additional Information" on step 3 of the Gag Clause Prohibition Compliance Attestation (GCPCA) webform. The GCPCA instructions have not yet been updated to address this issue. The additional information input by the plan should describe the details of the prohibited gag clause, the TPA or service provider connected to the prohibited gag clause, actions interpreting the provision as a prohibited

gag clause, and steps taken to achieve compliance. Plans that do not submit an attestation may be subject to enforcement action, but the Departments will consider good faith efforts to self-report a prohibited gag clause in any enforcement action that they bring.

Employer Actions

While the additional guidance is welcome, it does place plan sponsors in a difficult position as they likely have no knowledge of the provisions contained in all applicable downstream agreements. As such, prudent plan sponsors may decide to put a process in place to ask all applicable health care providers, network or association of providers, TPAs, or other service providers to confirm that all their agreements are compliant with the CAA gag clause prohibition. The plan sponsor will also want to document their responses and retain those records if the Departments have any questions. Doing so will help those plan sponsors establish their good-faith efforts to comply with the CAA.

The intent of this article is to provide general information on employee benefit issues. It should not be construed as legal advice and, as with any interpretation of law, plan sponsors should seek proper legal advice for application of these rules to their plans.