THE BEACON
Exclusive Compliance Alerts from MZQ Consulting
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GUIDANCE ISSUED ON GAG CLAUSE PROHIBITIONS

The new compliance obligations that the Consolidated Appropriations Act of 2021 (CAA, 21) created for employer-sponsored plans can seem endless at times. One of the lesser-known parts of the CAA, 21 is the prohibition on "gag clauses" within provider agreements that restrict access to price and quality information. Under the CAA, 21, these gag clauses have been prohibited since December 27, 2020, but they only gained prominence recently when federal guidance was issued on February 23, 2023 in the form of agency FAQs. The FAQs make it clear that: (1) gag clauses cannot be included in a health plan contract, and (2) attestations must be filed by or on behalf of the plans indicating that such gag clauses are not in place. The first Gag Clause Prohibition Compliance Attestation is due by December 31, 2023.

According to the new guidance, gag clauses include:

- Restrictions on disclosures of provider-specific cost or quality of care information;
- Restrictions on electronic access to de-identified claims and encounter information; and
- Restrictions on sharing such information with business associates.

Such clauses may be found in agreements between a plan or health insurance carrier and a health care provider, a network, a TPA, or another service provider offering access to a network of providers.

Technically, all employers that sponsor major medical plans are responsible for completing these attestations, including employers that offer fully insured coverage and group plan sponsors of self-funded and level-funded plans. However, the FAQs and the attestation directions include some relief for employers. With respect to fully insured plans, plan sponsors are allowed to rely on their carriers to satisfy this reporting requirement on their behalf. For self-funded and level-funded plans, the FAQs specifically acknowledge that employers may enter into a contract with their TPA to complete the attestation on their behalf; however, the legal obligation to file the attestation does ultimately remain with the plan sponsor.

Groups with fully insured coverage should verify that their carriers will be completing this requirement for them, as should those that offer self-funded or level-funded coverage. In all cases, verification should be in writing. Employers that offer self-funded or level-funded coverage should

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add language to their TPA or carrier administrative service agreement specifying that: (1) gag clauses may not be part of any plan contract, and (2) the TPA or carrier will file all attestations necessary on the group's behalf.

We anticipate that most employer plan sponsors will rely on their carriers or third-party administrators to complete these attestations. However, for those that wish to complete the attestations on their own, additional information is available on CMS's website. We will continue to monitor for additional information related to this CAA, 21 requirement and provide supplementary details as they become available.

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