

The Consolidated Appropriations Act, 2021 (H.R. 133)

Gag Clause Attestation FAQs

(As of August 4, 2023)

General Overview

1. What are the general requirements of the gag clause prohibition?

Section 201 of the Consolidated Appropriations Act, 2021 (H.R.133) prohibits provider contracts from directly or indirectly restricting the provision and sharing of certain provider-specific cost and quality information and data to groups, brokers, members, and prospective members.

Group health plans and health insurance issuers must annually submit an annual attestation that its provider contracts do not prohibit the provision and sharing of such cost and quality information.

2. When is the first attestation submission due?

The first attestation is due no later than December 31, 2023, covering the period beginning December 27, 2020, or the effective date of the applicable self-funded health plan or fully insured coverage (if later), through the date of attestation. Thereafter, an annual attestation is due by December 31 of each year.

3. Who is required to submit the gag clause prohibition compliance attestation?

Group health plans and health plan issuers offering group or individual health insurance coverage are required to submit the annual attestation for their grandfathered, transitional (grandmothered) and non-grandfathered plans.

4. Are these gag clause prohibition compliance attestations required to be posted or distributed on a public website?

The required compliance attestation submissions are not required to be posted or distributed publicly and are intended solely for submission via an online CMS portal.

5. What time period is covered under the first gag clause prohibition compliance attestation?

The initial annual gag clause prohibition compliance attestation due December 31, 2023, covers the period beginning December 27, 2020, or the effective date of the applicable group health plan or health insurance coverage (if later), through the date of attestation.

6. What plans does the gag clause prohibition compliance attestation apply to?

The required annual gag clause prohibition compliance attestation applies to all commercial plans including all grandfathered, transitional (grandmothered) and non-grandfathered plans. The prohibition does not apply to Medicare, Medicaid, CHIP and TRICARE plans. Excepted benefit plans, such as stand-alone dental plans, are also exempt.

7. What types of contracts does the gag clause prohibition compliance attestation apply to?

The gag clause prohibition compliance attestation applies to all contracts for the provision of health care services such as hospital, provider, and pharmacy services. It also includes contracts that offer access to health care items or services through the contractor/supplier/vendor's network of providers/suppliers/vendors.

8. What is a gag clause?

A gag clause is a contractual term that directly or indirectly restricts the provision and/or sharing of specific data and quality information with groups, brokers, members, and prospective members.

Kaiser Permanente's Approach and Timeline

9. What is Kaiser Permanente's approach for complying with Sec. 201 of the CAA, 2021 provision related to the requirements for an annual gag clause prohibition compliance attestation?

Generally, for fully insured group coverage, Kaiser Permanente will insert language in the applicable contract that, notwithstanding other provisions of the contract to the contract, will allow for the sharing of cost and quality of care information and data as well as de-identified claims and encounter information and data to the extent permitted by applicable law (and the sharing of such information with business associates). Each Kaiser health plan issuer will submit the attestation prior to the deadline of December 31, 2023.

10. When will Kaiser Permanente submit the gag clause prohibition compliance attestations?

Kaiser Permanente plans to submit the required attestation on or before the deadline of December 31, 2023.

11. What format will Kaiser Permanente use to submit the gag clause prohibition compliance attestation?

Kaiser Permanente will use the standard attestation template and submit the attestation in tab-delimited text file format per the attestation submission instructions.

12. Can an employer group delegate the responsibility of submitting the gag clause prohibition compliance attestation to Kaiser Permanente?

Kaiser Permanente is currently working to revise group contracts to include the necessary non-duplication agreement.

13. Will there be any cost associated with the submission of the gag clause prohibition compliance attestation?

At this time, Kaiser Permanente does not plan to charge additional fees associated with the submission of the annual gag clause prohibition compliance attestation.

14. Will Kaiser Permanente submit the gag clause prohibition compliance attestation on behalf of fully insured employer groups?

Yes, Kaiser Permanente's appropriate reporting entities will complete the attestation submission prior to the deadline of December 31, 2023, on behalf of all fully insured employer groups.

15. Will Kaiser Permanente submit the gag clause prohibition compliance attestation on behalf of groups for self-funded and level-funded Plans?

Yes, KPIC, KFHPWA and KFHPWAO as the TPA will complete the attestation submission prior to the deadline of December 31, 2023, on behalf of its self-funded and level-funded customers that have entered into a non-duplication agreement.

16. Will Kaiser Permanente submit the gag clause prohibition compliance attestation on behalf of group health plan customers whose coverage is now terminated?

Yes, Kaiser Permanente's appropriate reporting entities will complete the attestation submission prior to the deadline of December 31, 2023, on behalf of all group health plan customers that had coverage during the attestation reference period, even if the group health plan's coverage has now ended.

17. Do groups need to complete any forms and/or any actions for Kaiser Permanente to be able to complete the gag clause prohibition compliance attestation submission on their behalf?

At this time, current employer groups do not need to provide any information or perform any action for Kaiser Permanente to complete the required gag clause prohibition compliance attestation due by December 31, 2023.

18. Does Kaiser Permanente have a written agreement with regards to the gag clause prohibition compliance attestation that self-funded and fully insured employer groups can reference and save for their records?

Yes, for fully insured customers, Kaiser Permanente will provide a written non-duplication provision in the group's contract with Kaiser Permanente. For self-funded employer groups, administrative services agreements will be updated.

19. Will Kaiser Permanente provide proof and confirmation of the gag clause prohibition compliance attestation submission?

Employer groups should work with their Kaiser Permanente account contact to confirm the status of the annual gag clause prohibition compliance attestation submission to CMS.