

Services

[Employee Benefits and Executive Compensation](#)

[Fiduciary Duties and Governance](#)

[Qualified Retirement Plans](#)

[Taft-Hartley Plans](#)

[Health and Welfare Plans](#)

[Government Plans](#)

[Higher Education](#)

[Employee Stock Ownership Programs \(ESOPs\)](#)

[Executive Compensation and Nonqualified Plans](#)

[ERISA and Benefits Litigation](#)

[College Savings and ABLE Plans](#)

[Mandatory Paid and Unpaid Leave](#)

[Audits and Investigations](#)

No-Gag Clause Rule Update

Effective December 27, 2020, a health plan cannot enter into an agreement with a health care provider, network, third-party administrator, or other service provider offering access to a network of providers if that contract directly or indirectly restricts the plan from providing or accessing specified information (a “gag clause”). A health plan must submit an attestation annually to the federal government that the plan complies with this rule.

On February 23, 2023 the Departments of Labor, Health and Human Services, and Treasury (“Departments”) issued guidance on the “no gag clause” rule that was added as part of the Consolidated Appropriations Act, 2021 (“CAA”). More information on the CAA may be found in our [January 2021 Client Alert](#) and [November 2021 Client Alert](#).

To comply with this gag clause prohibition, a plan fiduciary should verify that its health plan is not party to a contract (e.g., service agreement, business associate agreement) that contains a gag clause prohibiting the plan from:

- (i) providing provider-specific cost or quality care information or data to the plan sponsor or participants;
- (ii) electronically accessing de-identified claims information for each participant, including per-claim financial information, provider information, and service codes; or
- (iii) sharing such data with a business associate.

A health plan subject to the rule must also submit an attestation that it is not party to a contract that contains a prohibited gag clause. These attestations are submitted electronically through the online CMS Health Information Oversight System Portal.

Entities required to submit an attestation include fully insured and self-insured group health plans, such as ERISA plans, non-federal governmental plans, and church plans subject to the Internal Revenue Code. Excepted benefits (e.g., most dental, vision, and employee assistance plans), short-term limited duration insurance, Medicare plans, and certain other arrangements are exempt from the attestation rule. A self-insured plan should consider negotiating an agreement with its third-party administrator to provide the attestation on the plan’s behalf. A fully insured plan should coordinate with the insurer and confirm in writing that the insurer will submit the attestation on the plan’s behalf. Unless the insurance carrier or third-party administrator agrees in writing to prepare and submit the attestation on behalf of the plan, the employer must do so.

Contacts

John E. Schembari

Omaha

402.231.8886

john.schembari@kutakrock.com

Michelle M. Ueding

Omaha

402.661.8613

michelle.ueding@kutakrock.com

William C. McCartney

Omaha

949.852.5052

william.mccartney@kutakrock.com

P. Brian Bartels

Omaha

402.231.8897

brian.bartels@kutakrock.com

Ruth Marcott

Minneapolis

612.334.5044

ruth.marcott@kutakrock.com

Sevawn Foster Holt

Little Rock

501.975.3120

sevawn.holt@kutakrock.com

John J. Westerhaus

Omaha

402.231.8830

john.westerhaus@kutakrock.com

Robert J. Hannah

Omaha

402.661.8667

robert.hannah@kutakrock.com

Emma L. Franklin

Omaha

402.231.8842

emma.franklin@kutakrock.com

Aaron D. Schuster

Kansas City

816.960.0090

aaron.schuster@kutakrock.com

Jacob S. Gray

Minneapolis

612.334.5053

jacob.gray@kutakrock.com

The first attestation is due December 31, 2023, and will cover the period December 27, 2020 through December 31, 2023. If the health plan had multiple insurance carriers during this period, the health plan will need to submit multiple attestations. Beginning January 1, 2024, attestations will cover only the year in which the attestation is made. Failure to submit an attestation—or submitting a late attestation—may be subject to enforcement action by the Departments, which may be a \$100 tax under the Internal Revenue Code or civil penalty under ERISA.

If you need assistance with no gag clause compliance, contact a member of the Kutak Rock [Employee Benefits and Executive Compensation practice group](#).

