



# SALES NEWS

Florida Blue   
Your local Blue Cross Blue Shield

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## Annual Gag Clause Attestation Process

**Sales Audience:** SG, Mid-Group, NLGP, Truli for Health, Minimum Premium Program (MPP)

### Summary

Section 201 of the Consolidated Appropriations Act, 2021 (CAA) established a prohibition on “gag clauses” in contracts with health care providers. A “gag clause” is a contractual term that directly or indirectly restricts specific data and information that a health plan or insurer can make available to another party, such as health care providers, third party administrators (TPAs), or other service providers.

### Details

The CAA’s gag clause prohibition bans gag clauses in contracts between group health plans/health insurers with providers that:

- Prevent enrollees, plan sponsors, or referring providers from seeing cost and quality of care data.
- Prevent plan sponsors from accessing de-identified claims data that could be shared, under HIPAA business associate agreements, with third parties for plan administration and quality improvement purposes.

[Guidance issued in February 2023](#) requires group health plans and health insurance issuers to annually attest that they comply with this provision. More information on how Florida Blue will implement this new requirement is provided below. These changes are part of the broader price transparency provisions of the CAA, which also include the patient protections against surprise billing, prescription drug cost reporting, machine-readable file cost disclosures, and member-level cost-sharing disclosures.

### Frequently Asked Questions

- How has Florida Blue implemented the requirement to eliminate gag clauses in its provider contracts?
  - When the CAA was passed in December 2020, Florida Blue sent a notification to all of our providers that any gag clauses in existing provider contracts will no longer be honored (or permitted in future contracts) in order to comply with the law.
- When do gag clause attestations have to be submitted?
  - Group health plans and health insurers must submit an attestation each year to confirm that they have not entered into any prohibited contractual restrictions with providers. The first attestation is due by December 31, 2023, and covers the time period from December 2020 through December 2023. Subsequent attestations will be due by December 31 of each year for that calendar year.

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- What types of group health plans are subject to this attestation?
  - The attestation requirement applies to both fully insured and self-insured group health plans, including ERISA plans, non-federal governmental plans, and church plans, regardless of their grandfathered status. It does not apply to excepted benefit plans or Health Reimbursement Accounts (HRAs), including Individual Coverage HRAs (ICHRAs) and other account-based group health plans.
  
- Who will be required to submit the attestation?
  - For fully insured group health plans, the group health plan (generally the employer) and the health insurer are each required to annually submit the attestation. However, when the insurer submits the attestation on behalf of the plan, the guidance ([Q/A 10](#)) confirms the Departments will consider both the plan and the issuer to have satisfied the attestation submission requirement.
  - For self-insured group health plans, including level funded plans and other partially self-insured arrangements, the guidance ([Q/A 9](#)) confirms that the employer may satisfy the attestation requirement by entering into a written agreement under which the TPA will complete the attestation on the plan's behalf. Note that the employer retains ultimate responsibility for compliance—even where contractually delegating the attestation to the TPA.
  
- How will Florida Blue handle the annual gag clause attestation for its group clients?
  - Florida Blue will file the annual gag clause attestation on behalf of all of our groups administered on our Florida Blue and new ASO operational platforms, regardless of group size or funding type, for the provider contracts that we directly control. Each attestation will include all active and former groups who were under contract during the reporting period.
  - For our Partner Plan groups: BCBS South Carolina will attest for active groups only, while BCBS Alabama will attest for both active and former groups. Group health plans administered by these companies will receive additional instructions on the attestation process. Group health plans administered by Highmark (as well as those formerly with BCBS South Carolina) will be included in the Florida Blue attestation.
  
- How will Florida Blue handle attestations for groups with carve out benefits?
  - As with the Section 204 prescription drug reporting, Florida Blue will only attest for the provider contracts that we directly control. Therefore, if a group carves out a benefit (such as pharmacy coverage), it will need to work directly with that vendor to coordinate a separate submission of an attestation for that contracted benefit.
  
- Will Florida Blue create separate agreements with groups to document this process?
  - We are developing a compliance notice outlining our attestation process that groups may request from their Account Manager for their records. We will also develop new contract language that outlines our intent to complete the annual attestation.
  
- Will Florida Blue be asking groups to submit information to support the annual attestation?
  - Not at this time. Based on the current attestation data requirements, we do not anticipate requesting additional information from our employer groups.
  
- Will Florida Blue be charging groups a separate fee for this annual attestation?
  - Not at this time. However, this is subject to change if there are future revisions to the data requirements for subsequent attestations.
  
- Where can I get more information on the gag clause attestation requirement?
  - The Centers for Medicare & Medicaid Services (CMS) has [additional information about this requirement](#), including frequently asked questions, the template to be used for attestation purposes, and related instructions.

## Next Steps

Review the information in this article and the frequently asked questions so that you are prepared to answer questions from members and groups regarding the annual gag clause attestation process.