



## Compliance Recap | March 2023

April 5, 2023

After a slow start to the year in compliance, March ramped up with FAQs from the Department of Labor (DOL), the Department of Health and Human Services (HHS), and the Internal Revenue Service (IRS) (the “Agencies”) on the gag clause provision of the Consolidated Appropriations Act (CAA), including how to submit the required annual attestation. Additional FAQs were provided by the IRS on paying or reimbursing nutrition, wellness, and general health expenses from a health flexible spending arrangement (FSA), health reimbursement arrangement (HRA), or health savings account (HSA).

### IRS Releases 2024 Employer Shared Responsibility Provision Penalties

The dollar amount used to calculate the employer shared responsibility provision penalties (ESRP) has been provided for 2024.

As background, the penalties can be assessed under Code § 4980H(a) if an applicable large employer (ALE) fails to offer minimum essential coverage to the required number of full-time employees (and their dependents) through a qualified group health plan for any month.

Additionally, ALEs may be subject to a Code § 4980H(b) penalty if they offer minimum essential coverage to the required number of full-time employees, but the offered coverage is not affordable or does not provide minimum value.

The adjusted penalty amount per full-time employee for non-compliance occurring in the 2024 calendar year will be \$2,970 under Code § 4980H(a) and \$4,460 under Code §4980H(b).

### Guidance on Gag Clause Prohibition for Health Plan Agreements

Additional guidance was issued by the Department of Labor (DOL), the Department of Health and Human Services (HHS), and the Internal Revenue Service (IRS) (the “Agencies”) on the gag clause provision of the Consolidated Appropriations Act of 2021 (CAA). The guidance addresses questions from stakeholders to help

people understand the law and promote compliance. The [FAQs](#) speak to the CAA’s annual attestation, prohibiting group health plans from preventing specific disclosures regarding provider cost or quality-of-care information as well as a gag clause prohibition. This prohibition specifically applies to agreements between group health plans or insurers and providers, third-party administrators (TPAs), or other service providers. Further, the FAQs explained that a gag clause is a “contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party.”

Health plans, insurers, and other health plan vendors must attest to their compliance with the gag clause prohibition annually, beginning no later than December 31, 2023, with subsequent attestations due each December 31. Visit the Centers for Medicare and Medicaid Services (CMS) website for [instructions, a user manual, and reporting template](#). Plans and issuers should submit an annual attestation of compliance at <https://hios.cms.gov/HIOS-GCPCA-UI>.

## CMS Fact Sheet Provides Fact Sheet for Consumers about End of COVID-19 Public Health Emergency

The Centers for Medicare & Medicaid Services (CMS) issued a consumer-facing [fact sheet](#) to help individuals know what to expect at the end of the COVID-19 Public Health Emergency (PHE). The Department of Health and Human Services is planning for the federal PHE and the COVID-19 national emergency to expire at the end of the day on May 11, 2023. This will trigger the 60-day countdown to the end of the outbreak period and the end of the tolling period for many plan-related deadlines.

This fact sheet covers COVID-19 vaccines, testing, and treatments; telehealth services; continuing flexibilities for health care professionals; and expanded hospital capacity by providing inpatient care in a patient’s home.

### IRS Issues FAQs on Nutrition, Wellness, and General Health Expenses

The IRS has provided [FAQs](#) to explain how health flexible spending arrangement (FSAs), health reimbursement arrangements (HRAs) and health savings accounts (HSAs) can be used to pay for or reimburse eligible medical expenses related to nutrition, wellness, and general health under Internal Revenue Code Section 213.

Medical expenses are defined as the costs of diagnosis, cure, mitigation, treatment, or prevention of disease, and for the purpose of affecting any part or function of the body and must be primarily to alleviate or prevent a physical or mental disability or illness. Not included are expenses that are merely beneficial to general health.

## IRS to Require Electronic Filing for Most Employer Returns Starting in 2024

A [final rule](#) issued by the IRS addresses a change in the way employers file certain forms. Beginning in 2024, employers will be required to aggregate most information returns, including W-2, 1099, ACA reporting Forms 1094-B/1095-B and Forms 1094-C/1095-C, and Form 5330 (Return of Excise Taxes Related to Employee Benefit Plans) among others. Once aggregated, forms totaling ten or more must be submitted electronically.

Previously, an employer was not required to file electronically unless were filing at least 250 of the same form.

Any corresponding corrected returns must also be filed electronically. Waivers may be available for those facing an undue hardship related to the cost of filing electronically. Applicable penalties will apply for non-electronic filing when electronic filing is required. See the [IRS website](#) for information on secure filing of electronic tax information.

## Question of the Month

Q. What is a “gag clause?”

A. In general a “gag clause” is a contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party. Gag clauses in this context might be found in agreements between a plan or issuer and any of the following parties:

- a health care provider
- a network or association of providers
- a TPA
- another service provider offering access to a network of providers

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