

January 19, 2022

The Honorable Janet Yellen
Secretary
U.S. Department of Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201

Re: Request for Clarifying Guidance on Prohibited Gag Clauses

Dear Secretary Yellen, Secretary Walsh, and Secretary Becerra:

The ERISA Industry Committee (ERIC) writes on behalf of its member companies to request further agency guidance and clarification regarding specific provisions impacting health plan sponsors included in the Consolidated Appropriations Act of 2020 (CAA), specifically Title II, Section 201 of P.L. 116-260, banning gag clauses in contracts between providers and health plans. The clarifications we request will ensure that employers and employees have access to specific price and quality data so that they can make better informed decisions about their health care.

ERIC is a national nonprofit organization exclusively representing large employers that provide health, retirement, paid leave, and other benefits to their nationwide workforces. ERIC member companies are leaders in every sector of the economy, and provide health care coverage to tens of millions of employees and their families in every state. ERIC advocates on the federal, state, and local levels for policies that promote flexibility and uniformity in administering their employee benefit plans. You engage with an ERIC member company every day, when you drive a car or fill it with gas, use a cellphone or a computer, watch TV, dine out or at home, enjoy a beverage, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, go shopping, or use cosmetics.

ERIC advocated for the critical health care transparency provisions that were included as part of the CAA and appreciates the issuance of the [Frequently Asked Questions](#) earlier this year. Large employers welcomed the delay of enforcement to publish machine-readable files, the availability of the price comparison tool, and to report pharmacy benefits and drug costs to the Departments. The additional implementation time can only help our member companies as they prepare to make their covered items and services transparent for health care consumers who will make informed, cost-conscious health care decisions. The data required by the CAA can also help provide the insights our member companies need to offer employees and their families access to high-quality providers while improving health outcomes and lowering costs.

Section 201, which aims to increase transparency by removing “gag clauses” on price and quality information, still needs clarity so that providers, health plans, and plan sponsors can fully benefit from the legislation and Congress’ intent. While Section 201 allows enrollees, plan sponsors, or referring providers to see cost and quality data, it also extends to contracts between providers and group health plans. Currently, some plans and providers prevent plan sponsors from accessing de-identified claims data that could be shared, under Health Insurance Portability and Accountability Act (HIPAA) business associate agreements with third parties for plan administration and quality improvement purposes. It is evident through this provision that Congress intended to increase transparency in the health care system, but the Agencies need to do more to ensure that all stakeholders are held accountable.

ERIC specifically requests additional guidance and clarification on the:

- **Effective date.** The Agencies must clarify that the law applies to contracts and contract renewals entered into after the law’s enactment date of December 27, 2020.
- **Consistent enforcement of the CAA and Transparency in Coverage Rules.** Both laws have reforms to improve transparency and end surprise medical bills, but both measures must be consistently enforced so that plan sponsors have access to the required information from third-party administrators.
- **Effective date to remove gag clauses on price and quality information.** Clarifying when gag clauses must be removed will allow time for the issuers to comply while ensuring the information is made available by a specific date.
- **Appropriateness to include language to remove gag clauses in current Administrative Service Only (ASO) contracts.** Plan sponsors wish to comply with the law and want the price and quality information for their employees. Allowing plan sponsors to be proactive will bring about more accountability and transparency.
- **Non-disclosure agreements (NDAs) between health plans and third parties.** ERIC believes that Section 201 applies to and prohibits these agreements, and we seek your confirmation of this position.
- **Pricing information.** ERIC understands that the gag clause prohibition includes the combination of provider identifiers, billing codes, procedure codes, billed amount, and allowed amount. We urge you to clarify that this information should be made available immediately to the plan sponsor and their third party for their use in transparency tools or benchmarking solutions and plan administration.

Thank you in advance for considering our requests. We stand ready to serve as a resource for the Agencies as guidance is further developed to ensure that plan sponsors and their beneficiaries can obtain the needed transparency of health plan data, and that gag clauses will no longer be part of the system.

Sincerely,

