National Association of Benefits and Insurance Professionals
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Subject: Feedback on DOL FAQ 8 – Gag Clause Prohibition

On behalf of the National Association of Benefits and Insurance Professionals (NABIP)'s Employer Working Group, we appreciate the opportunity to provide input regarding the Department of Labor's FAQ 8 on the Gag Clause Prohibition published on January 14th. Our group represents professionals working daily to assist employers in managing their health benefits while ensuring compliance with ERISA and other regulatory mandates. As an association representing more than 100,000 licensed health insurance professionals, NABIP is dedicated to ensuring that employer-sponsored health plans operate with transparency, efficiency, and accountability.

We provide NABIP's 2024 response to the Committee's request for information regarding the Employee Retirement Income Security Act of 1974 (ERISA) for your review.

We commend the Committee's ongoing efforts to strengthen ERISA protections and improve plan sponsors' ability to access and utilize their data to enhance cost efficiency and ensure transparency in health plan administration. While the recent FAQ guidance provides necessary clarifications regarding prohibited gag clauses, our working group members have identified additional areas where further explanation is required to ensure full enforcement of the gag clause prohibition.

1. Prohibition of Non-Disclosure Clauses That Limit Plan Administration: Some service provider agreements continue to include non-disclosure provisions that prevent employer-sponsored plans from using their own claims data to negotiate better rates or make data-driven plan changes. These contractual limitations effectively function as gag clauses and restrict employers from fulfilling their fiduciary responsibilities by preventing them from leveraging claims data to evaluate and adjust plan design, negotiate with providers, or assess network performance.

2. Lack of Clarity Regarding Provider Taxpayer Identification Numbers (TINs): Employers continue to encounter restrictions on accessing provider TINs, which are essential for cost comparisons, network analysis, and fraud detection. While FAQ 8's fifth bullet references restrictions on claim data elements as a prohibited gag clause, the absence of a specific reference to provider TINs leaves room for misinterpretation by service providers. The Departments should clarify that provider TINs are a fundamental component of de-identified claims data and must be accessible to plan sponsors upon request.

3. Inconsistent Access to Prescription Drug Claims Data: Many employer plans carve out pharmacy benefits to separate Pharmacy Benefit Administrators (PBAs) or incorporate cost-mitigation services, such as “Save on Specialty” programs or international sourcing arrangements. In these cases, plan sponsors frequently encounter barriers to accessing Rx claims data, particularly when it is held by a third-party entity separate from the primary PBM. FAQ 8 should explicitly state that all claims’ data includes prescription drug claims, regardless of whether the plan contracts with a PBM, PBA, or other service provider. This clarification would ensure plan sponsors retain access to critical pricing and utilization data for prescription drug benefits.

4. Addressing Non-Contractual Practices That Function Like Gag Clauses: While the FAQ appropriately addresses contractual restrictions, it does not consider non-contractual industry practices that effectively limit employer access to plan data. For example, even when contractual agreements comply with the gag clause prohibition, some TPAs and PBMs: (1) intentionally delay data-sharing with employers often dealing with response times of six months or more when requesting claims data preventing them from making timely plan adjustments; (2) impose excessive per-request changes or annual subscription fees just for employers to access their plan data; or (3) provide claims data in formats (disorganized, non-searchable PDFs) that are difficult to analyze rather than analyzable formats such as Excel or CSV files. Congress should direct the Departments to strengthen enforcement mechanisms to prevent service providers from using non-contractual practices to circumvent data-sharing requirements.

To ensure full enforcement of the gag clause prohibition and ensure full transparency, we recommend that the Committee consider the following actions:

- Shift compliance responsibility from employer plan sponsors to service providers, who control the terms of data-sharing agreements and hold the relevant claims information.
- Establish financial penalties for service providers that impose undue restrictions on employer access to de-identified claims data.
- Require standardized, real-time electronic reporting for all de-identified claims, including provider TINs, prescription drug claims, and cost-containment program data.
- Expand the scope of the gag clause prohibition to explicitly include non-contractual practices that restrict data access through indirect means.

NABIP and its Employer Working Group appreciate the Committee’s commitment to ensuring employer-sponsored health plans operate with transparency and accountability. While FAQ 8

provides an important step forward, additional action is necessary to close loopholes hindering employers' ability to access and utilize their plan data effectively.

We appreciate the Committee's leadership and welcome the opportunity to collaborate further on this issue to support the Committee's efforts to enhance the enforcement of the gag clause prohibition and improve health plan transparency. If you have any questions or need additional information, please do not hesitate to contact the Government Affairs team at NABIP, legislative@nabip.org.

Sincerely,
Employer Working Group
National Association of Benefits and Insurance Professionals (NABIP)