

Group Health Plans

Statute Overview

The No Surprises Act, part of the Consolidated Appropriations Act, 2021 (CAA), added several provisions regarding health plan cost transparency including one requiring disclosure of Covered Service Provider (a broker and/or consultant and their affiliates and subcontractors) compensation. Specifically, section 202(a) requires disclosure of direct and indirect compensation before an employer-sponsored health plan enters into a contract or arrangement for services. Section 202(a):

- Applies to employer sponsored small and large group health plans.
- Requires group health plan sponsors to obtain written disclosure of compensation for broker and consulting services from their broker and/or consultant prior to entering a contract to assess the reasonableness of the compensation to be paid to such broker and/or consultant and any potential conflicts of interest.
- Does not supersede any existing state disclosure laws and/or Form 5500 Schedule A, if applicable, requirements.
- Is effective December 27, 2021, for contracts entered, renewed, or extended on or after the effective date.

Disclosure Requirements

For arrangements that are expected to result in \$1,000 or more in compensation, including non-monetary compensation (that is greater than >\$250), the disclosure should describe:

- The services to be provided under the contract.
- Expected direct and indirect compensation, in the aggregate or by service.
- Indirect compensation arrangements and identification of specific payers for such arrangement.

Broker and/or Consultant Responsibility

- Make the disclosure regarding direct and indirect compensation to the group health plan or its fiduciary in a timely manner.
- Disclose compensation changes within 60 days of being informed of the change.
- Correct inadvertent errors and omissions within 30 days of discovery.
- Respond to any written compensation requests from the group health plan or its fiduciary within 90 days.

Employer Group Health Plan Responsibility

- Review broker compensation for reasonableness and any potential conflicts of interest prior to entering into the contract.
- Request disclosure in writing if the broker fails to provide the disclosure.
- Submit a formal notice to the Department of Labor (DOL) within 30 days of the broker's refusal to furnish the disclosure, or the broker's failure to respond within 90 days to the written request.

Kaiser Permanente's Role

Kaiser Permanente recognizes the requirement for brokers to report direct and indirect compensation received to employer groups. To support you, we can direct you to information about our compensation programs to help you with your disclosure obligation. We will not be providing an estimate of your compensation for a specific group, as calculating an estimate may depend on analyzing several factors, and we believe brokers are in the best position to develop a compensation estimate if required.

Broker and Consultant Compensation Disclosure FAQs

FREQUENTLY ASKED QUESTIONS – Group Health Plans

Who must disclose compensation under the new rule?

The law applies to Covered Services Providers (CSPs), defined as entities that receive \$1,000 or more in direct or indirect compensation in connection with providing brokerage or consulting services to an ERISA-covered group health plan.

Brokerage and consulting services subject to the new rules include:

- Brokerage services with respect to the selection of health insurance products (including vision and dental), recordkeeping, medical management, benefits administration, stoploss insurance, pharmacy benefit management, wellness services, transparency tools and vendors, preferred vendor panels, disease management, compliance services, employee assistance programs (EAPs), third-party administrators (TPAs); or
- Consulting services related to the development or implementation of plan design, insurance selection (including vision and dental), record-keeping, medical management, benefits administration, stop-loss insurance, pharmacy benefit management, wellness design and management, transparency tools, group purchasing organizations, preferred vendor panels, disease management, compliance, EAPs, and TPA services.

What types of compensation (compensation is defined as anything of monetary value) are required to be reported so an employer group can see how the broker / consultant is or may be compensated?

The following are the various types of direct and indirect compensation that may need to be disclosed:

- Base commission / fee
- Service fees for assistance in selecting, placing, and administering coverage under a consulting agreement with the plan
- Transaction compensation (e.g., per claim, per visit, per prescription, per person etc.)
- Retention and new sales bonus
- Contingent compensation - such as for growth target, volume target, or other specified goals
- Non-monetary compensation - such as meals, entertainment, gifts, or trips

What information must be disclosed?

Group health plans and/or their plan fiduciaries are required to obtain the following information from CSPs in advance of entering or renewing a contract for brokerage or consulting services.

- Description of services to be provided to the group plan under the contract or arrangement.
- If applicable, a statement that the service provider (or an affiliate or subcontractor) will provide, or expects to provide, fiduciary services to the covered plan.
- A description of all direct compensation the service provider (or an affiliate or subcontractor) expects to receive in connection with the provision of services.

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- A description of all indirect compensation the service provider (or an affiliate or subcontractor) expects to receive in connection with the provision of services (including incentives paid to a brokerage firm not solely related to the covered plan), a description of the arrangement between the payer and the recipient of such compensation, a description of the services for which compensation is received, and identification of the payer.
- If compensation is paid to the service provider, the service provider's affiliate, or the service provider's subcontractor on a transaction basis (such as commissions, finder's fees or other similar incentive compensation), a description of any such arrangement and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor).
- A description of any compensation the service provider (or an affiliate or subcontractor) expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.
- A description of how any direct or indirect compensation will be received by the service provider (or an affiliate or subcontractor).

What is direct and indirect compensation?

- Direct compensation is compensation paid directly from a covered plan.
- Indirect compensation is compensation received from any source other than the group health plan, the plan sponsor, or the CSP (including affiliates). Indirect compensation generally includes compensation received from subcontractors except in certain circumstances.

Do CSPs need to disclose commissions and bonuses from Kaiser Permanente?

Commissions and bonuses are indirect compensation that must be disclosed.

What is a reasonable method to estimate compensation?

In those situations when a CSP's compensation cannot be determined in advance, they may use a reasonable method (such as a formula to disclose the compensation) to estimate their expected compensation, so long as the description of the method to calculate the compensation allows the plan fiduciary to review and determine the reasonableness of the compensation.

In what format should the disclosure be made?

No particular form is required, but the disclosure must be in writing. CSPs may reference existing documents or existing disclosures.

Can disclosure notices be sent in an electronic format?

Yes. A written request can be electronic if that is the normal means of communication.

Are there penalties for non-compliance or risks?

Yes. In order to satisfy existing Employee Retirement Income Security Act (ERISA) requirements that a plan's assets are spent appropriately, the covered plan itself or through its fiduciaries must determine that CSPs are being paid reasonable compensation. If the covered plan or its fiduciary does not ask for

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the disclosure, and/or the CSP does not provide it, the contract would violate ERISA's prohibited transaction provisions, subjecting both the CSP and the plan fiduciary to potential penalties or other consequences, such as retroactive termination of the contract between the CSP and the covered plan.

When do the new requirements go into effect?

These disclosure rules apply on or after December 27, 2021 (one year after enactment).

When should the disclosure be made?

The disclosure should be made reasonably in advance of the date in which the contract or arrangement is entered into, extended, or renewed. "Reasonably in advance" is not defined in the regulation.

How does this disclosure obligation differ from Form 5500 Schedule A?

There are three main differences between the two disclosures:

1. Form 5500 Schedule A reports compensation *retrospectively* on an annual basis, whereas this disclosure is required *at the time of entering, renewing, or extending a contract*.
2. This disclosure is more detailed than Form 5500 Schedule A.
3. The intent of the disclosure is different; Form 5500 Schedule A is for tax and monitoring purposes, whereas this disclosure is to afford sponsors and fiduciaries the ability to determine if the compensation is reasonable and if any conflicts of interest exist prior to the commencement of the contract's term.

Kaiser Permanente's Approach

How will Kaiser Permanente support a CSPs' efforts to comply with the regulation?

Based on the new disclosure requirements effective December 27, 2021, we are working to develop tools to assist brokers and consultants with fulfilling their obligation to Kaiser Permanente group health plan customers.

What types of compensation are required to be reported so an employer group so that they can see how the broker / consultant is or may be compensated?

The following are the various types of direct and indirect compensation that may need to be disclosed:

- Base commission / fee
- Service fees for assistance in selecting, placing, and administering coverage under a consulting agreement with the plan
- Transaction compensation (e.g., per claim, per visit, per prescription, per person etc.)
- Retention and new sales bonuses
- Contingent compensation - such as for growth target, volume target, or other specified goals
- Overrides - such as general agent fees
- Non-cash compensation that has monetary value greater than \$250 such as meals, entertainment, gifts, or trips

Broker and Consultant Compensation Disclosure FAQs

Will Kaiser Permanente provide CSPs with information on where to access compensation information they have with Kaiser Permanente?

Yes. Brokers and consultants will have access to information on compensation programs from Kaiser Permanente.

Can Kaiser Permanente provide brokers with estimates for all their compensation rather than just formulas or percentages?

No. If the broker wishes to provide a dollar estimate of their compensation, it is the broker's responsibility to calculate and provide the compensation information to their clients.

Where can brokers find their commission rate for a specific group?

Brokers can find the commission rate for a specific group in their broker agreement or in the group rate quote.

What if I have additional questions that are not answered here? Where can I go for further information?

Additional questions can be forwarded to your sales executive or account manager.