

Fiduciary Check In

Sharing Employer Experience on CAA Attestations: Is There a Sea Change Coming?

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Speakers



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Employer Insights to Consolidated Appropriations Act Attestation

CAA Survey Results Overview

Spring 2024



Survey Summary

The Consolidated Appropriations Act (CAA) Attestation Survey, a national poll of employers, was conducted March-April 2024

The survey gauged concerns and views of employers around their perspectives and experiences with the CAA including:

- Fiduciary responsibility
- Filing practices with CAA
- Influence factors including challenges and concerns
- Opportunities for improvements

The survey included 56 responses from private and public employers and purchasers across the country

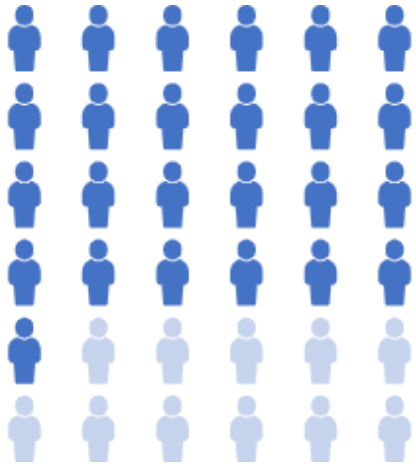
- Wide range of employer sizes (small <500 – jumbo sized employers 10,000+)
- Numerous industries

Navigating Fiduciary Responsibility

Employers express a preference for shared accountability and express skepticism about placing the full fiduciary burden on themselves

“Employers are reliant on their vendors to comply. So, there should be some ‘skin in the game’ for vendors.” - Survey Respondent

69%



Employers and carriers should share fiduciary responsibility jointly

15%



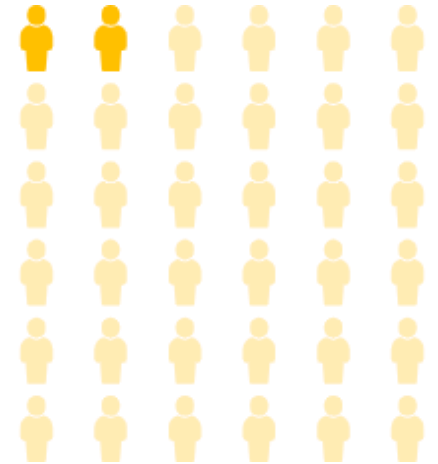
Not sure

12%



Employers should delegate fiduciary responsibility to carriers

4%



Employers should have sole fiduciary responsibility

Employer Compliance Attestation Experience

Employers are split between managing compliance independently (51%) or relying on third-party vendors (43%)

- Among employers surveyed, there is a near-even split between those who handle CAA document filing internally (51%) and those who enlist third-party vendors (43%), indicating a reliance on external assistance and potential gaps in employer knowledge
- 6% of employers were unsure about their company's filing method, signaling a need for increased understanding and education on CAA requirements

“I’m still a bit confused on what the CAA requires of us...”

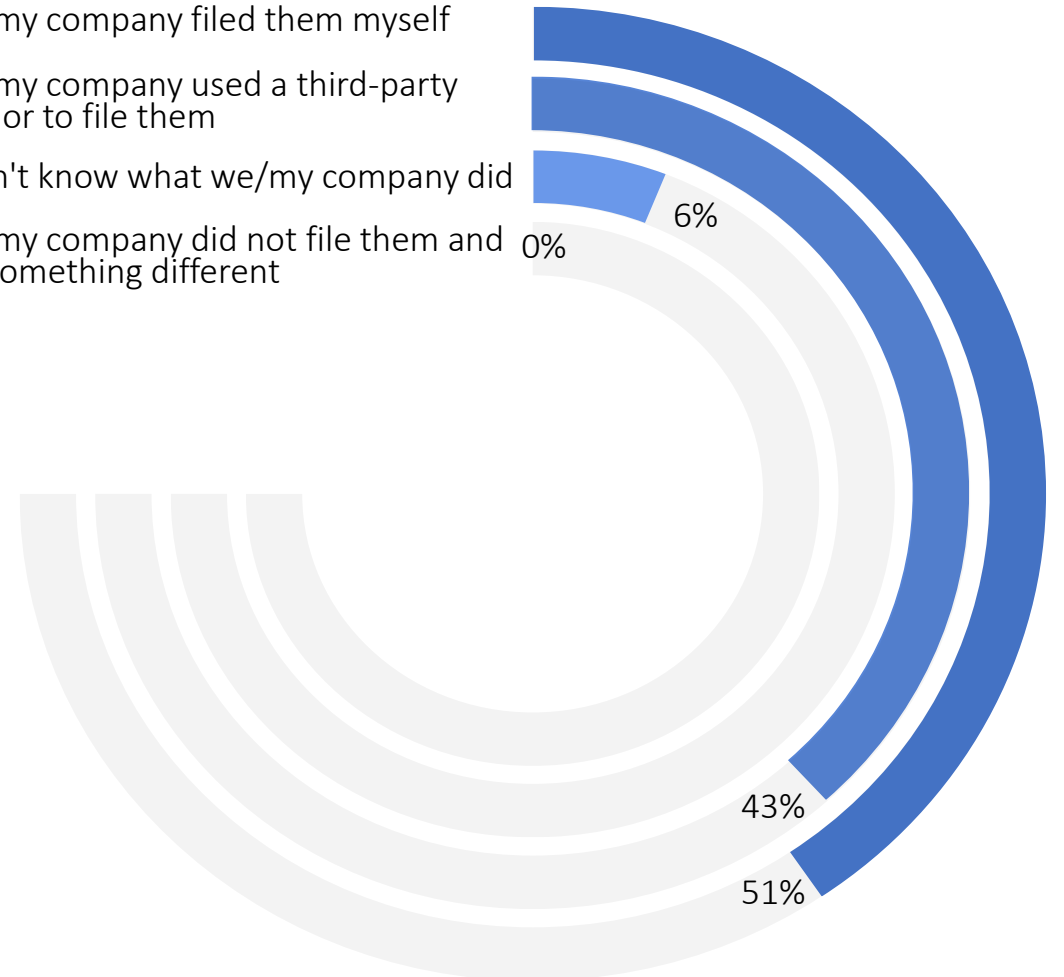
- Survey Respondent

We/my company filed them myself

We/my company used a third-party vendor to file them

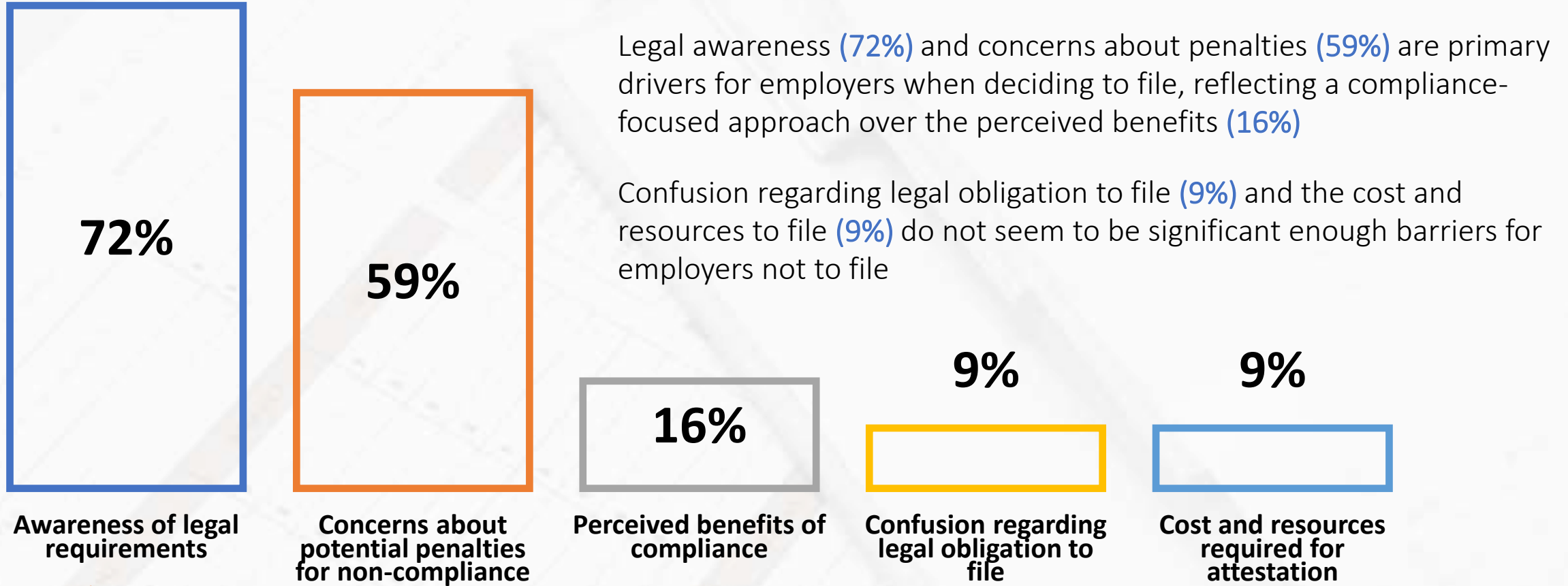
I don't know what we/my company did

We/my company did not file them and did something different



CAA Attestation Factors: Decision Influences

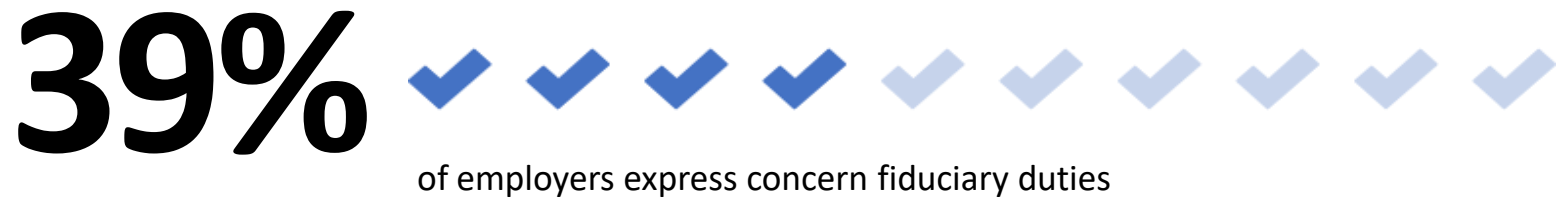
Employers prioritize requirements and concerns over perceived benefits when deciding to file CAA attestations



Primary Concerns for Employers

Concerns “keeping employers up at night” are healthcare costs (77%), fiduciary duties (39%) and recent litigation (35%)

“They are all connected, impactful financially, administratively and legally.” – Survey Respondent



Recent Litigation Effects on Compliance and Benefits

Despite 35% of employers being concerned about recent litigation employers express various responses to recent litigation and its potential future impacts

Almost three quarters (73%) of employers note some type of impact to employee benefits and compliance regarding the Johnson & Johnson lawsuit and other recent litigation, yet the diverse responses (e.g., 38% see minimal impact, while 19% are not sure) suggest some misunderstanding of potential implications, and opportunities for enhanced education.

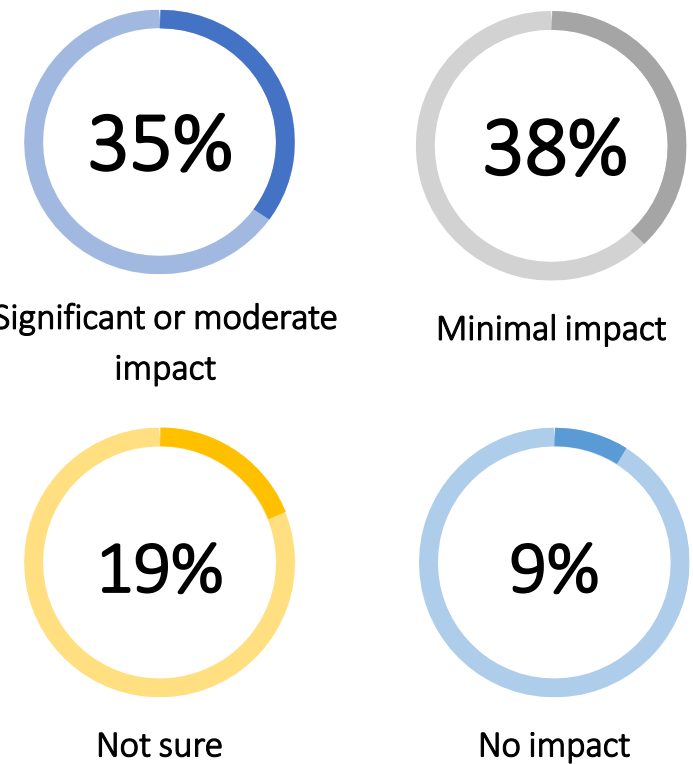
Quotes from Respondents

“Our leadership doesn't seem to be overly concerned about the current lawsuits as they want to see what the ultimate outcome is.”

“Need to educate myself on the J&J lawsuit and whether it could impact our organization.”

“Moderate, as we have been working and functioning as a fiduciary for our members and the plan all along.”

“Not an ERISA plan but concerned this could impact us in the future.”



CAA Insights: Employer Actions and Hurdles

Employers share mixed feelings about the CAA Attestation process

63% Have **not** enacted changes to business practices due to CAA requirements

28% Have enacted changes to business practices due to CAA requirements

9% Do not know if changes have been enacted

Among employers who have enacted changes (28%) improvements mentioned, include:

- Providing access to machine-readable files on company websites
- Implementing fiduciary processes
- Conducting regular reviews of CAA requirements in committee meetings
- Formalizing benefit committee processes

Employers offered improvements for efficiency to the CAA attestation process, including:

- Carriers need to be part of the solution by providing client specific reporting, not aggregate block of business reporting
- Improved communication and streamlining in the CAA process
- Confirmation emails regarding filing completion
- Clearer and more user-friendly instructions
- Better processes to address difficulty submitting and issues with submitting multiple vendors

PBGH Market Observations re: Gag Clause Prohibition

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Unfortunately, the letter and spirit of the CAA has been systematically undermined by service providers. At every turn, PBGH has observed health insurance companies, TPAs, and PBMs frustrating the ability of employers to realize the benefits of CAA § 201 to fulfill their fiduciary obligations to plan members. Here is an illustrative list of obstacles PBGH is aware of, which notably persist after the December 31, 2023 deadline:

- Service providers offer thinly worded “confirmations of compliance” that certify the service provider has removed its gag clauses from its own network provider agreements, which does not address the administrative service agreement (“ASA”) between the employer and their service provider.[†]
- Service providers offer confirmations that their ASAs are consistent with requirements under CAA § 201,[‡] but when pressed on this, have taken the position that nothing in CAA § 201 obligates them, as service providers, to do anything at all with respect to ASAs they have with their employer clients.[§]
- Service providers offer to attest compliance on behalf of their self-insured employer clients without any accompanying discussion of whether all gag clauses have, in fact, been removed from their ASAs with employers.
- Service providers remove gag clauses from their ASAs only to then include them in supplemental agreements beyond the current reach of CAA § 201, such as confidentiality, data use or non-disclosure agreements.
- Service providers simply refuse to provide purchasers unconditional access to their health care data, regardless of the ASA being free of gag clauses.

[†] See e.g., United Healthcare’s confirmation, which it offers as “support [for] customers [to do] their own attestation.” [\[Link\]](#); Blue Shield of CA’s confirmation, confirming only that BSCA, itself, is compliant. [\[Link\]](#) (As of 3/15/2024)

[‡] See e.g., Anthem and UMR’s respective confirmations, which represent their ASAs are “consistent with the requirements set forth” in CAA § 201. [\[Link\]](#) and [\[Link\]](#) (As of 3/15/2024)

[§] In Elevance’s (f/k/a Anthem) motion to dismiss *Bricklayers and Allied Craftworkers et al. v. Elevance*, Elevance writes “[The gag clause prohibition] does not prohibit Defendants, as service providers, from doing anything at all” because it “applies to Plaintiffs as the group health plans, not [service providers]” . . . “[the prohibition] does not impose any duty on Defendants.” See [\[Link\]](#) at p. 25. Likewise, in Anthem’s motion to dismiss *Owens & Minor Inc. v. Anthem Health Plans of Virginia*, Anthem writes “Because [the gag clause prohibition] does not prohibit Anthem, as an administrative services organization (i.e. service provider), from doing anything at all, Anthem simply is not within the ambit of . . . [the prohibition].” See [\[Link\]](#) at p. 12.

Extending Fiduciary Status to PBMs: Why?

- **Point:** “Service providers are not fiduciaries; the employer is.”

Counterpoint: Service providers can be determined to be *ad hoc* (“functional”) fiduciaries on the basis of their actions in certain circumstances.

- **Point:** “Alignment can be achieved through better contracts.”

Counterpoint: PBMs have opaque business models that make it difficult to ensure they are properly adhering to their contract. PBMs don’t just deny purchasers access to information; they’re denying the FTC in ongoing investigations. PBMs have often not shown good faith in their existing contracts with purchasers.

- **Point:** “What does fiduciary status *really* achieve?”

Answer: Fiduciary status would require services providers to avoid and mitigate conflicts of interest. It would mean they could not dodge working in the purchaser’s best interest by shifting their business model, since they would owe continual loyalty.

Speakers



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Together, we are
driving change in
healthcare

The National Alliance brings together coalitions and their members to ensure employers and other plan sponsors are a recognized force in driving health, equity and value.



About the National Alliance Purchaser Coalitions

For over 30 years, the National Alliance has united business coalitions and their employer/purchaser members to achieve high-quality care that improves patient experience, health equity, and outcomes at lower costs. Its members represent private and public sector, nonprofit, and labor union organizations that provide health benefits for more than 45 million Americans and spend over \$400 billion annually. To learn more, visit nationalalliancehealth.org and connect on [LinkedIn](#) and [X](#).

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