Email & Text Message – HIPAA & TCPA Compliance

Agenda

Compliance
About HIPAA and the TCPA
1. HIPAA Rules for Email & Text Messaging
   Key Definitions
2. 3 Step Safeguard – “Duty to Warn”
   Patient Emails & Text Messages
3. TCPA – Myth Busting
4. When You Must Encrypt
5. Tips for Enterprise-wide Compliance
Email & Text Message – HIPAA & TCPA Compliance

Paul R. Hales
Attorney at Law

Health Information Privacy – HIPAA

Protecting Patient Privacy is Our Job®

Legal Education – Not Legal Advice

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Email & Text Message – HIPAA & TCPA Compliance

HIPAA Compliance

HIPAA Rules – Easy to Follow
Step-by-Step
When You Know the Steps

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**HIPAA & TCPA**

Federal laws – both apply to

Health Care Text Messages

Coexist –

Complement each other –

Not Contradictory

FCC:

“We note at the outset that HIPAA regulations cover all communications regarding protected health information and all means of communication regarding such information.”


**Email & Text Message – HIPAA & TCPA Compliance**

**HIPAA**

**Health Insurance Portability and Accountability Act of 1996**

National Standards – Privacy and Security of Protected Health Information – PHI

**Enforced by:**

- Office for Civil Rights (OCR) of Department of Health & Human Services (HHS)
  - State Attorneys General and U.S. Department of Justice (DOJ)
- **No Private Right to Sue**

**Applies to Covered Entities and Business Associates**

- Health Care Providers, Health Plans, Health Care Clearinghouses
- Create, Receive, Maintain, Transmit PHI on behalf of CE

**2003 – The HIPAA Rules**

1. Privacy Rule
2. Security Rule
3. Breach Notification Rule
4. Enforcement Rule

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TCPA

**Telephone Consumer Protection Act of 1991**

National standards to prevent Nuisance and Invasion of Privacy
Restricts telephone solicitations and automatic dialing systems – “Autodialer”

1991 – Congressional hearings – Telephone Solicitations
Focus on Consumer – “Prior Express Consent” – TCPA “Safe Harbor”

Enforced by:
• Federal Communications Commission (FCC), State Attorneys General
• Consumers have **Private Right to Sue**

2003 – Internet to Phone Text Messages
2012 – Healthcare Pre-recorded Call Exemption
2015 – FCC Declaratory Ruling and Order
• “Healthcare Exemption” – 8 types of messages with treatment purpose

*Widely Misunderstood – Dangerous*

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Email & Text Message – HIPAA & TCPA Compliance

TCPA

**Telephone Consumer Protection Act of 1991**

**Important**

**Prior Express Consent** = TCPA “Safe Harbor”

**Private Right to Sue**

Significant Risks and Costs

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TCPA
Telephone Consumer Protection Act of 1991

Private Lawsuits
Amount of Money recovered by Plaintiff set by Law
Each Text Message is a Violation
Amount per Violation is Actual Monetary Loss or
• Actual Monetary Loss or $500 per Violation
  ➢ whichever is greater – and
• Up to $1500 per Violation – if Willful or Knowing 47 U.S.C. § 227(b)(3)

The Promised Land for Class Actions

Email & Text Message – HIPAA & TCPA Compliance

TCPA

TCPA Class Action Settlement Examples

<table>
<thead>
<tr>
<th>Case</th>
<th>Settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Krakauer v. Dish Network, LLC (Sales Agent)</td>
<td>$61 M</td>
</tr>
<tr>
<td>United States of America et al. v. Dish</td>
<td>$280 M</td>
</tr>
<tr>
<td>Network LLC</td>
<td></td>
</tr>
<tr>
<td>Ikuseghan v. Multicare Health System</td>
<td>$2.5 M</td>
</tr>
<tr>
<td>Gehrich v. JP Morgan Chase</td>
<td>$34 M</td>
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<tr>
<td>Allen v. JP Morgan Chase</td>
<td>$10.2 M</td>
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<tr>
<td>Ossola v. American Express Co.</td>
<td>$9.25 M</td>
</tr>
<tr>
<td>Midland Credit Management Inc., TCPA</td>
<td>$20.5 M</td>
</tr>
<tr>
<td>Litigation</td>
<td></td>
</tr>
<tr>
<td>Sirius XM TCPA Consolidated Settlement</td>
<td>$35 M</td>
</tr>
<tr>
<td>Birchmeier v. Caribbean Cruise Line Inc.</td>
<td>$76 M</td>
</tr>
</tbody>
</table>
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**HIPAA & TCPA**

**Different Subjects – Purposes – Enforcement**

**HIPAA Rules**
Subject: Health Information
Purpose: Protect Health Information
Enforcement: Government Agencies, Civil Money and Criminal Penalties

**TCPA**
Subject: Telecommunication Content & Consent – Landline, Fax, Cell, Text
Purpose: Protect Consumers from Nuisance & Invasion of Privacy
Enforcement: FCC, State Attorneys General, Civil Fines

**Private Lawsuits** – Money Damages to Private Plaintiffs

**HIPAA and TCPA**
• Coexist
• Complement – not Contradict each other

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**Email & Text Message – HIPAA & TCPA Compliance**

1. **HIPAA Rules for Email & Text Messaging**

**Key HIPAA Definitions**

**Electronic Transmission**
Data in Electronic Form transmitted by media including the Internet and dial-up lines – 45 CFR § 160.103

*Emails & Text Messages*

**Encryption**
Transforms data into meaningless form – need confidential key – 45 CFR § 164.304

**PHI**
Health Information that:
• Identifies an Individual and
• Relates to the Provision of Health Care, the Individual’s Health Condition or Payment for Provision of Health Care – 45 CFR § 160.103

What identifies an Individual?
Email & Text Message – HIPAA & TCPA Compliance

1. HIPAA Rules for Email & Text Messaging

   18 “Identifiers” – 45 CFR §164.514(b)(2)

   1. Name
   2. Address
   3. Dates directly related to an Individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicating an Individual’s age, except elements indicating age 90 or older may be combined into a single category – age 90 or older
   4. Telephone number
   5. Fax number
   6. Email address
   7. Social Security Number
   8. Medical record number
   9. Health Plan beneficiary number
  10. Account Number
  11. Certificate/license number
  12. Vehicle Identifiers and serial numbers, including license plate numbers
  13. Device Identifiers and serial numbers
  14. Web Universal Resource Locators (URLs)
  15. Internet Protocol (IP) address number
  16. Biometric Identifiers, including finger and voice prints
  17. Full face photographic images and any comparable images
  18. Any other unique identifying number, characteristic, or code capable of identifying the Individual and not used for any other purpose

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From: Health Care Provider  
Sent: Friday, February 28, 2020 8:00 AM  
To: Paul Hales  
Subject: Appointment

Hi Paul,

Your appointment on March 4, 2020 is at 8:00 AM. If you need to cancel or postpone please notify us before 4:00 PM March 2 or you will be charged a No-Show Fee of $25.

Thank you,
Health Care Provider

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Email & Text Message – HIPAA & TCPA Compliance

1. HIPAA Rules for Email & Text Messaging
   Unencrypted Emails – Text Messages – Electronic Transmission
   Medical Identity Theft – Criminal Black Market

PHI = The GOLD Standard
Email & Text Message – HIPAA & TCPA Compliance

1. HIPAA Rules for Email & Text Messaging

Unencrypted Emails – Text Messages – Electronic Transmission

Only two things are needed for Medical Identity Theft
1. The Identity of a Provider
2. The Identity of a Patient

https://oig.hhs.gov/fraud/medical-id-theft/

2. 3 Step Safeguard – Patient Emails & Text Messages

Standard (Unencrypted) Emails & Text Messages

January 25, 2013 – 78 FR 5634

2014  Security Rule
PHI transmitted over Electronic Communications Network
February 6, 2014 – 79 FR 7302

2016  Privacy Rule
Individuals’ Right under HIPAA to Access their Health Information
https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html
January 7, February 25, May 23, 2016

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2. 3 Step Safeguard – Patient Emails & Text Messages
   Standard (Unencrypted) Emails & Text Messages

1. **Notify “Duty to Warn”**
   Some level of risk information in an Unencrypted Email or Text Message can be read by someone else.

2. **Let the Patient Decide**
   If the Patient prefers Unencrypted Email or Text Message the Patient has the right to receive them.

3. **Document in Writing**
   Your Warning and Patient’s Decision to receive Unencrypted Email or Text Message.

---

**Unencrypted Text Message – Email Language**

We offer helpful administrative information by regular text messaging and email like appointment reminders. There is some level of risk that information in a regular text message or email could be read by someone besides you. Please let us know if you would like us to communicate with you by text message or email.

- [ ] Yes – Please communicate with me by email. My email address is: 

  [ ] I will let you know right away if my email address changes.

- [ ] No – Please do not communicate with me by regular (unencrypted) email.

- [ ] Yes – Please communicate with me by text message. My cell phone number is:

  [ ] I will let you know right away if my cell phone number changes.

- [ ] No – Please do not communicate with me by regular (unencrypted) text message.
Email & Text Message – HIPAA & TCPA Compliance

2. 3 Step Safeguard – Patient Emails & Text Messages
   3 Step Safeguard if Patient says “No”
   1. **Do Not Send**
      Unencrypted Email or Text Message
   2. **Take Action to Prevent Sending**
      • Implement Measures to Block
      • Notify everyone responsible for sending Unencrypted Email and Text Message (Workforce or BA) of Individual’s Restriction
   3. **Document in Writing**
      Your Warning – Individual’s Response – Your Action and – Notice of Restriction to Business Associate

Email & Text Message – HIPAA & TCPA Compliance

2. 3 Step Safeguard – Patient Emails & Text Messages
   Standard (Unencrypted) Emails & Text Messages

**Important**

3 Step Safeguard for Emails & Text Messages with Patients

Complete HIPAA “Safe Harbor”

78 FR 5634, Jan. 25, 2013
79 FR 7302, Feb. 6, 2014
Email & Text Message – HIPAA & TCPA Compliance

2. 3 Step Safeguard – Patient Emails & Text Messages
   Training
   Your Audience
   Frontline Workforce
   Training Tips
   • Show your Respect
   • Quality – Pride – Esprit d’ Corps
   • **Provide form with correct step-by-step procedures**
   • Explain – why there is need to warn – Encourage questions
   • Training is not just for work – Personal Privacy Awareness
   • Be Brief – “Chunk it”

3. TCPA – Myth Busting
   2015 FCC TCPA Order
   “Healthcare Text Message Exemption”
   Does not cover calls or texts about:
   • Debt-collection
   • Billing
   • Accounting
   • Other financial content
   • Telemarketing
   • Solicitation
   • Advertising content

FCC 15-72 Declaratory Ruling and Order July 15, 2015, Paragraph 146

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Email & Text Message – HIPAA & TCPA Compliance

3. TCPA – Myth Busting

2015 FCC TCPA Order

“Healthcare Text Message Exemption”

Prior Express Consent is not required for 8 types of Healthcare Text Messages with a Treatment Purpose

<table>
<thead>
<tr>
<th>appointment and exam confirmations and reminders</th>
<th>post-discharge follow-up intended to prevent readmission</th>
</tr>
</thead>
<tbody>
<tr>
<td>wellness checkups</td>
<td>lab results</td>
</tr>
<tr>
<td>hospital pre-registration instructions</td>
<td>prescription notifications</td>
</tr>
<tr>
<td>pre-operative instructions</td>
<td>home healthcare instructions</td>
</tr>
</tbody>
</table>

But only under

Specific Special Conditions

FCC 15-72 Declaratory Ruling and Order, July 15, 2015, Paragraph 146

Special Conditions include:

• Free to end-user
• 160 characters or less in length for text messages
• No more than 1 message per day & maximum of 3 per week
• Opt out by replying “STOP”
• Honor opt-out requests immediately

FCC 15-72 Declaratory Ruling and Order July 15, 2015, Paragraphs 147 and 148
Email & Text Message – HIPAA & TCPA Compliance

3. TCPA – Myth Busting
   2015 FCC TCPA Order

   “Healthcare Text Message Exemption”
   **Key Special Condition**
   Text Messages by or on behalf of Healthcare Provider
   “must comply with HIPAA privacy rules”
   FCC 15-72 Declaratory Ruling and Order July 15, 2015, Paragraph 147(3)

   HIPAA Compliance – Text Messaging Patients
   3 Step Safeguard
   Warning – Agreement – Documentation

Important
3 Step Safeguard must be Followed
To Comply with HIPAA
*and the TCPA*
Email & Text Message – HIPAA & TCPA Compliance

3. TCPA – Myth Busting

Special Instructions
This Form may be downloaded for word processing, modified as appropriate and included on your registration and information update forms.

Unencrypted Text Message – Email Language
We offer helpful administrative information by regular text messaging and email like appointment reminders. There is some level of risk that information in a regular text message or email could be read by someone besides you. Please let us know if you would like us to communicate with you by text message or email.

☐ Yes – Please communicate with me by email. My email address is:
☐ I will let you know right away if my email address changes.
☐ No – Please do not communicate with me by regular (unencrypted) email

☐ Yes – Please communicate with me by text message. My cell phone number is:
☐ I will let you know right away if my cell phone number changes.
☐ No – Please do not communicate with me by regular (unencrypted) text message

TCPA Healthcare Text Message Exemption = Worthless & Dangerous
Promotes Non-compliance with HIPAA

“Healthcare Text Message Exemption”

Key Special Condition

Text Messages by or on behalf of Healthcare Provider

“must comply with HIPAA privacy rules”

FCC 15-72 Declaratory Ruling and Order July 15, 2015, Paragraph 147(3)

Documents Prior Express Consent in writing

Prior Express Consent = TCPA “Safe Harbor”

HIPAA Compliance – Text Messaging Patients

3 Step Safeguard

Warning – Agreement – Documentation

Promotes Non-compliance with HIPAA
Email & Text Message – HIPAA & TCPA Compliance

3. TCPA – Myth Busting

2015 FCC TCPA Order

“Healthcare Text Message Exemption”

HIPAA Compliance – Text Messaging Patients

3 Step Safeguard

Warning – Agreement – Documentation

Documents Prior Express Consent in writing

Prior Express Consent = TCPA “Safe Harbor”

TCPA Healthcare Text Message Exemption = Worthless & Dangerous

Promotes Non-compliance with HIPAA

“Healthcare Text Message Exemption” Myth

Slippery Slope to Danger

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3. TCPA – Myth Busting

HIPAA Rules –
A Blueprint to
Avoid **TCPA Danger**

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Email & Text Message – HIPAA & TCPA Compliance

4. When You Must Encrypt
   Email containing PHI & not with Patients under 3 Step Safeguard

**2005** Security Rule Transmission Security – *Required*
Implement technical security measures to guard against unauthorized access to electronic protected health information that is being transmitted over an electronic communications network.

**Encryption** – whenever **appropriate** (*Addressable*)

**2014** HHS:
In general encryption is **reasonable and appropriate** to safeguard email transmissions

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4. When You Must Encrypt

Text Messages containing PHI & not with Patients under 3 Step Safeguard

December 28, 2017 CMS Official Statement – Secure Texting

Texting of Patient Information among Healthcare Providers

• **Secure Texting** of PHI permitted
  – Members of Health Care Team

• Texting of Orders Prohibited
  – CPOE Preferred for Order Entry
Email & Text Message – HIPAA & TCPA Compliance

4. When You Must Encrypt
   Email & Text Messages except with Patients under 3 Step Safeguard

   Encrypt
   All Emails and Text Messages containing PHI

5. Tips for Enterprise-wide Compliance
   Tools
   Review and Revise Enterprise-wide Procedures
   Ensure they are:
   • Compliant with HIPAA and
   • Consistent
   1. Encrypt All Emails and Text Messages containing PHI
   2. Exception – Patient Right to use Unencrypted Email & Text
      A. Follow 3 Step Safeguard
      B. Use Correct Form
      C. Train Workforce
Email & Text Message – HIPAA & TCPA Compliance

5. Tips for Enterprise-wide Compliance

Tools

January 23, 2020
AUTHORIZATION FOR MEDICAL TREATMENT AND FINANCIAL RESPONSIBILITY
By supplying my home phone number, mobile phone number, email address, and any other personal contact information, I authorize my health care provider to employ a third-party automated outreach and messaging system to use my personal information, the name of my care provider, the time and place of my scheduled appointment(s), and other limited information, for the purpose of notifying me of a pending or missed appointment.

I understand that notifications may be repeated multiple times per appointment and may exceed contacts more than three times per week.

I also authorize my healthcare provider to disclose to third parties, who may intercept these messages, notification of a pending or missed appointment.

January 30, 2020
AUTHORIZATION TO UTILIZE UNSECURE COMMUNICATIONS FOR APPOINTMENT REMINDERS
By supplying my home phone number, mobile phone number, email address, and any other personal contact information, I authorize ______________ to employ a third-party automated outreach and messaging system to use my personal information, the name of my care provider, the time and place of my scheduled appointment(s), and other limited information, for the purpose of notifying me of a pending or missed appointment.

I understand that notifications may use an autodialer and/or prerecorded or artificial voice and may be repeated multiple times per appointment and may exceed contacts more than three times per week.

I also authorize my healthcare provider to disclose to third parties, who may intercept these messages, notification of a pending or missed appointment.
Email & Text Message – HIPAA & TCPA Compliance

5. Tips for Enterprise-wide Compliance
   
   Tools

   Notice of Patient Privacy Practice (HIPAA)

   HOW WE MAY USE AND DISCLOSE HEALTH INFORMATION ABOUT YOU WITHOUT YOUR WRITTEN CONSENT OR AUTHORIZATION

   **Billing and Collection Purposes** - We may use or disclose your health information for the purpose of obtaining payment for services provided. You may be contacted by mail or telephone at any telephone number associated with you, including wireless numbers. Telephone calls may be made using pre-recorded or artificial voice messages and/or automatic dialing device (an “autodialer”). Messages may be left on answering machines or voicemail, including any such message information required by law (including debt collection laws) and/or regarding amounts owed by you. **Text messages or emails using any email addresses you provide may also be used in order to contact you.**
Email & Text Message – HIPAA & TCPA Compliance

5. Tips for Enterprise-wide Compliance
   Training

Preparation
   • Gather Facts –
   • Compliance Issues & Obstacles
   • Build a Team & a Strategy

Message
   • Health Information Privacy – Bedrock of High Quality Care
   • Calm, Evidence-based Explanation of Issues
   • Risks
   • Options

Email & Text Message – HIPAA & TCPA Compliance

5. Tips for Enterprise-wide Compliance

HIPAA Rules – Easy to Follow
Step-by-Step
When You Know the Steps
Email & Text Message – HIPAA & TCPA Compliance

5. Tips for Enterprise-wide Compliance

HIPAA Rules –
A Blueprint to Comply Calmly & Confidently

In conclusion we have reviewed Compliance About HIPAA and the TCPA
1. HIPAA Rules for Email & Text Messaging Key Definitions
2. 3 Step Safeguard – “Duty to Warn” Patient Emails & Text Messages
3. TCPA – Myth Busting
4. When You Must Encrypt
5. Tips for Enterprise-wide Compliance

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