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Navigating the Requirements for Email and Text Messages in Healthcare

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Melissa Krasnow
VLP Law Group LLP

Emily Duke
Amplifon Americas

CAN-SPAM ACT (15 U.S.C. §§ 7701 et seq. and 16 C.F.R. Part 316)

The CAN-SPAM Act has certain requirements for commercial emails and transactional or relationship emails and additional requirements for commercial messages

These requirements generally do not involve consent, *except*:

- A commercial email message must be clearly and conspicuously identified as an advertisement or solicitation (except if the recipient has given prior affirmative consent to receipt)
- A recipient's opt-out request must be honored within ten business days of receipt (except if the recipient provides affirmative consent after the opt-out request)

CAN-SPAM ACT (15 U.S.C. §§ 7701 et seq. and 16 C.F.R. Part 316) (Con't)

The Federal Trade Commission has authority to enforce violations of the CAN-SPAM Act as unfair or deceptive acts or practices under the Federal Trade Commission Act, and it may:

- Pursue injunctive relief
- Impose civil penalties of up to \$40,000 per email that violates the CAN-SPAM Act

Other officials or agencies also have authority to enforce the CAN-SPAM Act

TCPA (47 U.S.C. § 227 and 47 C.F.R. §§ 64.1200 et seq.)

The TCPA applies to text messages to wireless numbers and addresses consent

Prior express *written* consent of the recipient is required where the text message includes or introduces an advertisement or constitutes telemarketing (a text message that includes both informational and advertising/telemarketing is considered telemarketing)

TCPA (47 U.S.C. § 227 and 47 C.F.R. §§ 64.1200 et seq.) (Con't)

Prior express consent is required for a:

- Purely informational text message
- Text message made by or on behalf of a tax-exempt nonprofit organization
- Text message delivering a health care message made by, or on behalf of, a covered entity or its business associate

TCPA (47 U.S.C. § 227 and 47 C.F.R. §§ 64.1200 et seq.) (Con't)

No prior express consent is required:

- Where there is an exigency with respect to the text message and the text message has a healthcare treatment purpose, specifically:
 - (i) appointment and exam confirmations and reminders, (ii) wellness checkups, (iii) hospital pre-registration instructions, (iv) pre-operative instructions, (v) lab results, (vi) post-discharge follow-up intended to prevent readmission, (vii) prescription notifications or (viii) home healthcare instructions
- For a text message made for emergency purposes

TCPA (47 U.S.C. § 227 and 47 C.F.R. §§ 64.1200 et seq.) (Con't)

A recipient has a right to revoke consent at any time and by using any reasonable method, including orally or in writing, that clearly expresses a desire not to receive further messages

No. 02-278, FCC 15-72, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Federal Communications Commission Declaratory Ruling and Order (rel. Jul. 10, 2015)

Nothing in the Commission's order....should be understood to speak to parties' ability to agree upon revocation procedures

ACA International v. Federal Communications Commission regarding the above Ruling and Order (Mar. 16, 2018)

TCPA (47 U.S.C. § 227 and § 503 and 47 C.F.R. §§ 64.1200 et seq.) (Con't)

The Federal Communications Commission and other officials or agencies have authority to enforce violations of the TCPA

The TCPA also provides a private right of action for:

- Injunctive relief
- Actual monetary loss or \$500 in damages per violation, whichever is greater
- For willful or knowing violations, up to three times the actual monetary loss or \$1,500 in damages per violation, whichever is greater

SOME HHS HIPPA FAQ LINKS

<https://www.hhs.gov/hipaa/for-professionals/faq/570/does-hipaa-permit-health-care-providers-to-use-email-to-discuss-health-issues-with-patients/index.html>

<https://www.hhs.gov/hipaa/for-professionals/faq/2060/do-individuals-have-the-right-under-hipaa-to-have/index.html>

<https://www.hhs.gov/hipaa/for-professionals/faq/2061/is-a-covered-entity-responsible-if-it-complies/index.html>

<https://www.hhs.gov/hipaa/for-professionals/faq/2006/does-the-security-rule-allow-for-sending-electronic-phi-in-an-email/index.html>

BIOS

<https://www.vlplawgroup.com/attorneys/melissa-krasnow/>

Emily Duke was a commercial litigator for over 20 years, before starting her own cybersecurity boutique law firm in 2014. She recently went in-house at a global hearing aid provider and distribution company, Amplifon, where she is General Counsel for the Americas. Emily is also the Compliance Officer for Amplifon Americas.

Emily is a graduate of Yale University and Harvard Law School. Before becoming a lawyer, she worked for Fortune 100 companies such as General Electric Transportation Systems, General Electric Aircraft Engines, and General Motors. She has also taught cybersecurity law as an adjunct professor at the U of M Law School and Mitchell-Hamline's Cybersecurity and Data Privacy Certificate Program.