

Email & Text Message HIPAA-TCPA Compliance

Electronic Message Rules & Myths

 HCCA
St Louis Regional
Healthcare Compliance Conference

Paul R. Hales, J.D.
February 28, 2020

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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

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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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Email & Text Message – HIPAA & TCPA Compliance

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.”

FCC 12-21 Report and Order, February 15, 2012, Paragraph 62

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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**  **The Fundamental Rule**
- 2. Security Rule**
- 3. Breach Notification Rule**
- 4. Enforcement Rule**

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Email & Text Message – HIPAA & TCPA Compliance

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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Email & Text Message – HIPAA & TCPA Compliance

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

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Email & Text Message – HIPAA & TCPA Compliance

TCPA

TCPA Class Action Settlement Examples

| Case | Settlement |
|---|------------|
| Krakauer v. Dish Network, LLC (Sales Agent) | \$61 M |
| United States of America et al. v. Dish Network LLC | \$280 M |
| Ikuseghan v. Multicare Health System | \$2.5 M |
| Gehrich v. JP Morgan Chase | \$34 M |
| Allen v. JP Morgan Chase | \$10.2 M |
| Ossola v. American Express Co. | \$9.25 M |
| Midland Credit Management Inc., TCPA Litigation | \$20.5 M |
| Sirius XM TCPA Consolidated Settlement | \$35 M |
| Birchmeier v. Caribbean Cruise Line Inc. | \$76 M |

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Email & Text Message – HIPAA & TCPA Compliance

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?

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Email & Text Message – HIPAA & TCPA Compliance

1. HIPAA Rules for Email & Text Messaging

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

- | | | |
|--|---|---|
| 1. Name | 6. Email address | 14. Web Universal Resource Locators (URLs) |
| 2. Address | 7. Social Security Number | 15. Internet Protocol (IP) address number |
| 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 | 8. Medical record number | 16. Biometric Identifiers, including finger and voice prints |
| 4. Telephone number | 9. Health Plan beneficiary number | 17. Full face photographic images and any comparable images |
| 5. Fax number | 10. Account Number | 18. Any other unique identifying number, characteristic, or code capable of identifying the Individual and not used for any other purpose |
| | 11. Certificate/license number | |
| | 12. Vehicle Identifiers and serial numbers, including license plate numbers | |
| | 13. Device Identifiers and serial numbers | |

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Email & Text Message – HIPAA & TCPA Compliance

1. HIPAA Rules for Email & Text Messaging

Unencrypted Emails – Text Messages – Electronic Transmission



PHI

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

↑
↓
Not
Secure



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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*



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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/>

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Email & Text Message – HIPAA & TCPA Compliance

2. 3 Step Safeguard – Patient Emails & Text Messages

Standard (Unencrypted) Emails & Text Messages

2013 Privacy Rule – effective September 23, 2013 “Duty to Warn”

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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Email & Text Message – HIPAA & TCPA Compliance

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

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Email & Text Message – HIPAA & TCPA Compliance

2. 3 Step Safeguard – Patient Emails & Text Messages

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

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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

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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

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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”

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Email & Text Message – HIPAA & TCPA Compliance

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*

| | |
|--|--|
| appointment and exam confirmations and reminders | post-discharge follow-up intended to prevent readmission |
| wellness checkups | lab results |
| hospital pre-registration instructions | prescription notifications |
| pre-operative instructions | home healthcare instructions |

But only under

Specific Special Conditions

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”

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

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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

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Email & Text Message – HIPAA & TCPA Compliance

3. TCPA – Myth Busting

2015 FCC TCPA Order

Important

3 Step Safeguard must be Followed

To Comply with HIPAA

and the TCPA

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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

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☐ 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

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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
Prior Express Consent = TCPA “Safe Harbor”

3 Step Safeguard

TCPA Healthcare Text Message Exemption = Worthless & Dangerous
Warning – Agreement – Documentation
Promotes Non-compliance with HIPAA

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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

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Email & Text Message – HIPAA & TCPA Compliance

3. TCPA – Myth Busting

2015 FCC TCPA Order

“Healthcare Text Message Exemption”

3 Step Safeguard = Protection from TCPA Danger

If you comply with HIPAA

You *are complying* with the TCPA

Prior Express Consent = TCPA “Safe Harbor”

“Healthcare Text Message Exemption” Myth

Slippery Slope to Danger

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Email & Text Message – HIPAA & TCPA Compliance

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.

45 CFR § 164.312(e)(1)

Encryption – whenever appropriate (*Addressable*)

45 CFR § 164.312(e)(2)(ii)

2014 HHS:

In general encryption is reasonable and appropriate to safeguard email transmissions

79 FR 7302, February 6, 2014

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Email & Text Message – HIPAA & TCPA Compliance

4. When You Must Encrypt

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

December 28, 2017 CMS Official Statement – Secure Texting

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop C2-21-16
Baltimore, Maryland 21244-1850



Center for Clinical Standards and Quality/Survey & Certification Group

DATE: December 28, 2017 **Ref:** S&C 18-10-ALL
TO: State Survey Agency Directors
FROM: Director
Survey and Certification Group
SUBJECT: Texting of Patient Information among Healthcare Providers

Memorandum Summary

- **Texting patient information** among members of the health care team is permissible if accomplished through a secure platform.
- **Texting of patient orders** is prohibited regardless of the platform utilized.
- **Computerized Provider Order Entry (CPOE)** is the preferred method of order entry by a provider.

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Email & Text Message – HIPAA & TCPA Compliance

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

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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

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Email & Text Message – HIPAA & TCPA Compliance

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

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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.

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Email & Text Message – HIPAA & TCPA Compliance

5. Tips for Enterprise-wide Compliance

Tools

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.

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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.**

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Email & Text Message – HIPAA & TCPA Compliance

5. Tips for Enterprise-wide Compliance

Training

Your Audience

Compliance Colleagues

Senior Management

- Senior Management is Responsible
- Delegate Authority to Compliance Officials

Tips

- Diplomacy & Tact
- Avoid Blame – Stick to Facts
- Present Opportunity
- Build Consensus

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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

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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

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Email & Text Message – HIPAA & TCPA Compliance

5. Tips for Enterprise-wide Compliance

HIPAA Rules – A Blueprint to Comply Calmly & Confidently

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Email & Text Message – HIPAA & TCPA Compliance

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

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Thank You!

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February 28, 2020

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