

MEDICARE COMPLIANCE

Weekly News and Compliance Strategies on CMS/OIG Regulations, Enforcement Actions and Audits

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CMS Says No Texting Allowed, Citing HIPAA, CoP; Lawyer: 'Like Going Back to Dark Ages'

CMS has sent emails to at least two hospitals saying that “texting is not permitted” — and that includes secure text messaging applications. Citing concerns about privacy, security and the integrity of medical records, the “hospital team” from the Survey & Certification Group said CMS doesn’t allow texting.

“After meeting with vendors regarding these products, it was determined they cannot always ensure the privacy and confidentiality of PHI [protected health information] of the information being transmitted. This resulted in the no texting determination,” CMS said in the Nov. 30 email, obtained by RMC. CMS also based its opinion on the Medicare Conditions of Participation’s section about the retention of medical records and their confidentiality. Another hospital asked whether CMS intended the texting ban to apply to secure encrypted texting solutions, and CMS responded again that it means no texting, says the hospital manager who received the email.

The manager was thunderstruck by CMS’s position. “Secure texting is an integral part of a community platform for organizations. If you pull secure texting out of that pathway, you have disrupted a huge chain of communications that will have a broader effect,” says the manager, who prefers not to be identified.

A week earlier, he was signing up community physicians for a secure texting application so the hospital can immediately reach them in an emergency, for example, or to obtain orders. The physicians also text each other to consult on cases, sometimes sending pictures (e.g., of wounds or atypical fractures). Pagers will soon be a thing of the past.

Other compliance officers, lawyers and HIPAA experts were stunned by the no-texting development, saying it’s not unlike shutting down email because texting is part of the fabric of health care.

“Every hospital is probably using secure texting now,” a compliance officer says.

CMS is acting as if it has zero risk tolerance, but that’s never been the government’s position, attorneys say. The HIPAA security regulation only requires covered entities to identify and minimize their risks. “What they removed from the whole equation is an organization’s ability to risk its own scenarios,” the manager says.

Not allowing texts is a big setback for hospitals, says Washington, D.C., attorney Robert Hudock, with Epstein, Becker & Green. “If texting solutions are good for highly classified military applications, they’re probably appropriate for hospitals,” he says. “This is almost like going back to the dark ages. An argument could be made that no computers are secure and electronic health records in the cloud are not secure. Where do we draw the line? There is no such thing as 100% security.”

CMS explained that texting is problematic for multiple reasons. In the email, CMS said “At this time, CMS does not permit the use of texting. The receiving or sending phones may not always be secure and encrypted, the privacy of the patient and his/her personally identifiable information (PII) cannot be guaranteed, and the sender or receiver cannot always be identified potentially exposing PHI/PII.

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In addition, the information contained in the text messages would be required to be entered into the patient's medical record and available for retrieval."

At the same time, CMS said that Sec. 482.24 of the Medicare Conditions of Participation for hospitals applies:

"(b) Standard: Form and retention of record.

The hospital must maintain a medical record for each inpatient and outpatient. Medical records must be accurately written, promptly completed, properly filed and retained, and accessible. The hospital must use a system of author identification and record maintenance that ensures the integrity of the authentication [sic] and protects the security of all record entries.

(1) Medical records must be retained in their original or legally reproduced form for a period of at least 5 years...

(3) The hospital must have a procedure for ensuring the confidentiality of patient records. Information from or copies of records may be released only to authorized individuals, and the hospital must ensure that unauthorized individuals cannot gain access to or alter patient records. Original medical records must be released by the hospital only in accordance

with Federal or State laws, court orders, or subpoenas.

(c) Standard: Content of record...

(4) All records must document the following, as appropriate...

(vi) All practitioners' orders, nursing notes, reports of treatment, medication records, radiology, and laboratory reports, and vital signs and other information necessary to monitor the patient's condition."

This is a little different than The Joint Commission's recent position. Although it cracked down in 2011 on texting orders for patient care, The Joint Commission changed its tune in 2016, allowing physicians to text orders without jeopardizing their good standing in Medicare or violating HIPAA privacy and security rules, as long as hospitals monitored the use of texting (*RMC 5/30/16, p. 1*).

If the text ban truly is its interpretation, "CMS needs to set forth its requirements somewhere where they can be reviewed and addressed by providers," says San Francisco attorney Judy Waltz, with Foley & Lardner LLP. It's unusual for CMS to communicate a significant change in position through an email to specific providers, but it's faster than the rulemaking process. CMS also could have modified the State Operations Manual, which provides guidance to survey agencies, or written a state survey and certification letter. But it appears there are only the emails.

It looks like its statement on the Conditions of Participation gives CMS a way to enforce the text ban by using the survey process and requiring plans of correction, Waltz says. Once CMS officially communicates a position, hospitals will be on alert that if they use even secure messaging text applications, "they can and presumably will be cited for deficiencies" by state surveyors acting on behalf of CMS, she says.

Will This Affect Patient Care?

If that happens under Sec. 482.24(b), attorney Richelle Marting would challenge it. "There is not a prohibition on texting patient information in HIPAA or the Conditions of Participation, with the caveat you take reasonable administrative, technical and physical safeguards," says Marting, with the Forbes Law Group in Overland Park, Kan. It's almost unthinkable to end the use of texting because it's becoming as universal as email, she says. "Shutting down email would shut down health care businesses, and texting is becoming the same thing. You just have to find a way to protect it."

SBH Health System in New York City offers a secure text messaging app to physicians to download

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free on their phones, says Cassandra Andrews Jackson, compliance officer and HIPAA privacy officer. "We instruct all our providers to use it" because it's secure, and the hospital has a policy governing cell-phone use, she says. "We recognize there's a risk there will be unsecured texting [without the app], but it's too much for us to police. A lot of organizations may find themselves in the same position. We recognize that utilization is not on par with the number of providers we have considering how ubiquitous cell phone use is, but we simply can't police cellphone use." She's surprised to hear CMS said it doesn't allow texting. "If that's CMS's official and published position, then we would comply."

Hudock is worried that a ban on texting puts patients at risk. "The hospital's decisions about what is appropriate for patient care is being overridden by CMS," he says. "It's a knowledge tool. It allows you to consult with specialists immediately." Without texting, which allows a specialist to answer in 30 seconds, hospitals and physicians return to the phone and paging game. "How many people need to be harmed as a result of prohibiting a text-message solution? From a risk perspective, it's better just to allow it."

Brian Selfridge, a partner in Meditology Services, is holding out hope that CMS will allow secure text message apps. "Secure messaging is OK, as long as it integrates with the medical record and has appropriate technical security controls," he says. Right now CMS's intent is "ambiguous."

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