ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, Ken Johnson, Amy Heppner, and Laurie Kirkwood provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley, Carolyn, Ken, Amy, and Laurie are senior members in the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

TCPA COMPLIANCE AND HEALTH PLANS: IT'S YOUR CALL

As health plans and wellness and disease management programs continue to innovate in order to better educate participants about tools and services that may improve health outcomes and curb costs, plan sponsors and service providers need to be mindful of compliance issues from an unexpected source.

The Telephone Consumer Protection Act of 1991 (TCPA) generally restricts certain unauthorized calls and texts to residential and cellular phones, including some restrictions potentially applicable to health care messages.

A recent federal district court opinion serves as an important reminder that even if a plan is in compliance with all other applicable laws, including the privacy requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the plan, absent express consent, may still be in violation of the TCPA when reaching out to plan participants via texts and pre-recorded messages.

In today's world of robust wellness and disease management activity all aspects of participant engagement must be carefully reviewed to ensure compliance.

In *Fiorarancio v. Wellcare Health Plans, Inc.*,[1] a health plan allegedly violated the TCPA by contacting the plaintiff's cell phone twenty times over an eleven-month period, leaving eighteen voicemails and sending two text messages. While this case was merely allowed to proceed by surviving a preliminary motion to dismiss, it still serves as a clear warning concerning TCPA compliance issues.

The nature of the communications may be familiar to some plans that offer wellness or navigation programs: a free healthy living program; an educational health program; a free preventative care program; an in-home health assessment visit; and an additional service that was described as part of the plan's membership.

Other calls referenced "important information" and one of the calls invited the plaintiff to make an appointment for a dental check-up, referencing his coverage under the dental plan. The two text messages reminded the plaintiff to schedule a flu shot. Four calls allegedly used a prerecorded message. Emails were not part of this case and are not covered under the TCPA, even though emails can be received on a smartphone. [Note: communicating sensitive health information by email has its own compliance concerns under HIPAA].

The health plan allegedly violated the TCPA in two ways: (1) by calling the plaintiff more than once in a twelve-month period after he placed his name on the National Do Not Call Registry[2] and (2) calling him using a prerecorded voice and without his express consent.[3]

With regard to the first allegation, the regulations implementing the TCPA prohibit initiating a telephone solicitation to anyone who has registered his or her telephone number on the national-do-not-call registry.[4]

A "telephone solicitation" is a call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.[5] The health plan's position was that none of the calls mentioned or encouraged buying, renting, or investing in anything but rather sought to provide information, either about health care or about benefits, under the plan.

Free services or programs are not in the TCPA definition of "telephone solicitations," but the court noted that free offers often come with other requirements. For example, each of the messages the health plan left for the plaintiff required that he call back to obtain more information about, or take advantage of, the offer for free services.

So, while the health plan's messages may have been informational on their face, the court found that, because of the regularity and frequency of the communications—twenty in eleven months--it was possible for the messages to be part of a larger marketing scheme or other profit-making venture that could fall within the TCPA's prohibition.

The court stated that more information about the calls would need to be gathered before it could be determined whether the communications were purely informational, or whether they were a pretext.

With regard to the plaintiff's second allegation about the prerecorded messages, the TCPA prohibits the use of an artificial or recorded voice to call any telephone number assigned to a cellular telephone service without the prior *express* consent of the called party.[6]

The TCPA rules are complex, and the simplest way to understand them is to trace their evolution and purpose. First, the FCC prohibited ***all*** prerecorded phone calls ***unless*** they were made for emergency purposes or with the called party's consent.[7]

This first part was later changed and a carve-out was added for a heightened ***written*** consent for "any telephone call that includes or introduces an advertisement or constitutes telemarketing."[8] This heightened written consent applies to all calls that are advertising or telemarketing, unless the call delivers a health care message made by a covered entity or the business associate of a covered entity.

This exemption from written consent under the TCPA applies only when the communication is ***both*** advertising/telemarketing ***and*** a health care message. If the communication is not advertising/telemarketing, then the express written consent requirement ***still applies***.

The court granted the health plan's motion to dismiss with respect to the two text message flu shot reminders, but denied the motion for all the other communications the plan made to the plaintiff.

Health plans need to be mindful of how their third-party administrators are communicating with plan participants.

Even though the nature of the communication may be related to participant education or the availability of plan services and benefits, plans should review which mode of communication is being used (pre-recorded phone calls, texts, fax, email), the frequency of those communications (weekly, monthly, quarterly, annually, etc.), the content of the messages (targeted, personal health information or generic plan information), consent/authorization for use of contact information (opt-in and opt-out features), and whether any commercial transaction could ever result from the communications.

HIPAA is always a concern when sharing participant contact information with business associates who may initiate contact with participants, and service agreements may attempt to place the burden to obtain the proper consent and authorizations on the plan or plan sponsor.

Although the TCPA does not apply to email, it does apply to phone calls, voicemails, text messages, and faxes. Legal counsel should be consulted to review service agreements with business associates and other health plan vendors to ensure that the health plan is properly using participant information and complying with all aspects of applicable law, including the TCPA. ■

References

1 2022 WL 111062 (D.N.J. 2022)

2 47 C.F.R. § 64.1200(c)(2)

3 47 U.S.C. § 227(b)(1)(A)

4 47 C.F.R. § 64.1200(c)(2)

5 47 U.S.C. § 227(a)(4); see also 47 C.F.R. 64.1200(f)(15)

6 47 C.F.R. § 64.1200(a)(1)

7 47 C.F.R. 64.1200(a)(1)

8 47 C.F.R. 64.1200(a)(2). There is an exception for non-profits, which require only express consent rather than written consent.