

# Health Law Alert: Federal Agencies Relax Rules with Goal of Aiding Health Care Providers in Delivering Care Remotely

March 26, 2020

*FCC Permits Automatic Calls Under TCPA in Limited Circumstances and OIG Issues Special Fraud Alert Permitting Co-Insurance Waivers for Telehealth Services*

## **TCPA Guidance Permits Automatic Calls**

The COVID-19 pandemic has endangered lives with a respiratory illness, requiring effective communications to be available to provide health and safety information to mitigate transmission of the illness. In order to ensure that public health authorities can effectively communicate vital health and safety information with the public, the Federal Communications Commission (FCC) issued a Declaratory Ruling on March 20, 2020 that the COVID-19 pandemic constitutes an "emergency" under the Telephone Consumer Protection Act (TCPA). As a result, hospitals, health care providers, state and local health officials, and other government officials may now communicate information as well as mitigation measures to the public about novel coronavirus without violating the TCPA.

Generally, the TCPA prohibits calls made with automatic telephone dialing systems or with prerecorded or artificial voice calls, including voice and text messages, to wireless telephone numbers and other specified recipients in most circumstances. By issuing the Order, the nation's health care system can effectively communicate with the public to address this health-related emergency without requiring express consent to be lawful. In order for a call to qualify as being made for an emergency purpose, it must meet the following guidelines:

- The caller must be from a hospital, or be a health care provider, state or local health official, or other government official as well as a person under the express direction of such an organization and acting on its behalf; and
- The content of the call must be solely informational, made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.

Certain types of calls do **not** qualify as being made for an "emergency purpose" and require the prior express consent of the called party, including:



- Calls containing advertising or telemarketing of services (i.e. advertising a commercial grocery delivery service, or selling or promoting health insurance, cleaning services, or home test kits, as those calls do not "affect the health and safety of consumers," and are not directly related to an imminent health or safety risk;
- Calls made to collect debt, even if the debt arises from related health care treatment, are not made for an "emergency purpose" as they are not time-sensitive, do not "affect the health and safety of consumers," and not directly related to an imminent health or safety risk.

Finally, consumers need to remain aware because some unscrupulous callers are making illegal robocalls involving telemarketing and fraudulent robocalls related to the pandemic.

### **OIG Issues Special Fraud Alert Permitting Co-Insurance Waivers for Telehealth Services**

The Office of Inspector General (OIG) at the U.S. Department of Health and Human Services issued a Special Fraud Alert indicating that health care providers will not face sanctions under the federal Civil Monetary Penalties Law or Anti-Kickback Statute for waiving or reducing any cost-sharing amounts beneficiaries may owe under federal health care programs like Medicare and Medicaid for telehealth services. The goal of the Alert is to permit health care providers the flexibility to offer services via telehealth at reduced cost without fear that doing so could be perceived as the impermissible transfer of remuneration (i.e., below cost health care services) as an inducement for the beneficiaries to obtain other services from the provider that can then be billed to Medicare or Medicaid.

The Alert sets forth two conditions that must be met for these waivers to be permitted:

1. The physician or other practitioner can only waive or reduce cost-sharing obligations (such as coinsurance or deductibles) that a beneficiary owes for telehealth services. The telehealth services need to be furnished in accordance with current coverage and payment rules. The Alert does not address waiving co-insurance for services outside of the telehealth benefit.
2. The telehealth services must be furnished during the time period covered by the COVID-19 declaration. The declaration was issued on January 27, 2020 and the Alert is effective retroactively to that date.

In issuing its guidance, the OIG also noted that nothing requires physicians or other practitioners to waive cost sharing amounts. The OIG also clarified that it would not treat the offer of free telehealth services alone to beneficiaries to constitute an inducement that is likely to influence future referrals payable under Medicare, Medicaid, or other federal health care programs.

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Lathrop GPM is ready to assist health care providers and entities as they are confronted with the novel legal and compliance challenges an emergency such as COVID-19 presents. If you have questions about TCPA, telehealth services, or the Anti-Kickback Statute and Civil Monetary Penalties Law, please contact Denise



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