

MEDICARE COMPLIANCE

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Emails Aside, CMS Says Yes to Secure Texting Except for Orders, Consistent with 2016 Memo

Hospitals may use secure texting to communicate patient information with the exception of physician orders, according to a Dec. 28 memo from the director of CMS's Survey & Certification Group to state survey agency directors. The memo was a big relief to hospitals, because they were briefly unsure whether texting—a routine part of hospital operations—was compliant. The uncertainty was caused by an exclusive story in *Report on Medicare Compliance*, which reported that CMS told two hospitals that texting is not permitted (*RMC 12/18/17, p. 1*).

Ten days after the story was published, CMS issued the memo, "Texting of Patient Information among Healthcare Providers," which states that "texting patient information among members of the health care team is permissible if accomplished through a secure platform." CMS cautioned, however, that providers can't text orders even if the platform is secure, adding that computerized provider order entry (CPOE) is the preferred method of order entry.

"The Dec. 28 memo was a favorable step forward by CMS in clarifying all the chatter," says David Behinfar, chief privacy officer of UNC Health Care System in Chapel Hill, N.C. "It's quite OK to text PHI [protected health information] except when texting orders." The texts just have to be accurate and have the proper security controls and authentication, he says. Texting is becoming as common as email in the health care industry, with hospitals relying on it to summon physicians quickly, for example, and physicians texting each other to consult on cases.

Hospitals thought texting was a settled matter because CMS and The Joint Commission addressed it in a December 2016 memo, which said secure text messaging for patient care orders was "not acceptable." Otherwise, though, CMS and The Joint Commission stated that "All health care organizations should have policies prohibiting the use of unsecured text messaging—that is, short message service (SMS) text messaging from a personal mobile device—for communicating protected health information." The joint memo also favors CPOE "as it allows providers to directly enter orders into the electronic health record (EHR)."

But then came the CMS emails. As *RMC* reported, the "Hospital Team" at CMS's Survey & Certification Group sent emails to two hospitals saying CMS doesn't allow texting, and that included secure texting applications. "After meeting with vendors regarding these products, it was determined they cannot always ensure the privacy and confidentiality of PHI of the information being transmitted.

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This resulted in the no texting determination,” CMS said in a Nov. 30 email. CMS also based its opinion on the Medicare Conditions of Participation relating to 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, the hospital manager who received the email told RMC.

Now CMS essentially has superseded the emails, with the Dec. 28 memo setting the world on its axis again. “CMS in the emails made it appear as if all usage of texting was unauthorized, which was different than the current understanding,” says Alexander Laham, information security manager at Lawrence General Hospital in Massachusetts. But with the new memo, “basically, nothing has changed since their 2016 decision to disallow texting of orders.”

Surveyors May Look at Texting

Even though the survey and certification letter is addressed to state survey directors, hospitals are now on notice that state surveyors may look at texting policies and procedures and actual use during their surveys for compliance with the Medicare Conditions of Participation, says San Francisco attorney Judy Waltz, with Foley & Lardner LLP. Hospitals accred-

ited by The Joint Commission will already be aware of these requirements because CMS’s position mirrors The Joint Commission’s. “What this letter might provide are specific grounds for a complaint survey,” she notes. “Someone could call CMS or the state survey agency and say, ‘Dr. Smith is texting all his orders, and the hospital is acting on the texted orders. You need to check it out.’”

There’s an inevitability to texting because it’s efficient and effective, Behinfar says. “Everyone has a smartphone in their pockets,” he says. It’s up to health systems to make sure they’re used in a compliant manner. That means purchasing secure apps and training clinicians to use their smartphones in compliance with hospital policy. Secure apps are not a one-stop shop for privacy and security compliance. Patient health information still could be sent by text to the wrong person, the same way faxes are misdirected, Behinfar says.

There are many instances where texting PHI occurs within a hospital, he says. For example, it’s not uncommon to find residents at teaching hospitals texting attending physicians pictures of patient wounds without using secure messaging applications to ask the attending physicians their opinion on the proper course of treatment. “Depending on what else is in the text message, it could be a HIPAA violation if not sent securely,” Behinfar notes.

Laham says CPOE is the preferred way to order services because it’s safe and because many EHR systems are going mobile. “Many texting solution providers are beginning to offer integration of their solutions with EMR systems, and that will take careful evaluation on behalf of the hospital prior to integration to ensure that the organization is able to meet the security requirements outlined in the CMS guidance,” he explains. “It was the ban on standard communication that seemed so bizarrely out of place in this case. I’m glad to see that the reality is what we had hoped it would be.”

Contact Waltz at jwaltz@foley.com, Laham at alexander.laham@lawrencegeneral.org and Behinfar at david.behinfar@unhealth.unc.edu. View the survey and certification memo at <https://tinyurl.com/yc5wopne>. ✧

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