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What is the TCPA and Why is it of Concern to Long Term Care Facilities?

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The Telephone Consumer Protection Act (TCPA) was enacted in 1991 to protect consumers, especially cell phone consumers, from unwanted robocalls and texts. The Act applies to virtually any company that utilizes auto-dialing technology. You may be aware of the Act because the Federal Communications Commission (FCC) amended its rules under the TCPA to implement the national Do-Not-Call list.

There once existed a split among courts as to whether the Act even applied to health care providers. The FCC recently issued a ruling, however, which made it clear that the health care exemption applies *only to health care-related calls* (such as post-discharge follow-up, appointment notifications, etc.) and **not account-related communications and payment matters** – i.e., collections calls.

Because of this new ruling, many long term care facilities (LTCFs) are behind the curve with respect to their policies on collections calls. According to some experts, the FCC ruling not only requires that LTCFs obtain the specific consent of the resident for their billing/collection services to contact them by cell phone, but also that the consent contain a number of detailed elements and disclosures.

In light of this ruling and the general rise in consumer class actions alleging violations of the TCPA, it is wise for LTCFs to review their internal collection policies and practices. The aforementioned FCC ruling will inevitably lead to more litigation. Many of the suits filed under the TCPA seek millions of dollars, with statutory damages at \$500 to \$1,500 *per unlawful call or text message*. Clearly, the dollars have the potential to add up quickly, and plaintiffs' lawyers around the country are taking note, even going to the airwaves to solicit claims under the TCPA.

The TCPA requires a consumer's *express written consent*, demonstrating that the consumer received "clear and conspicuous disclosure" that the consumer authorizes the use of his or her phone number to receive future calls that deliver prerecorded or autodialed messages by or on behalf of a specific provider and/or its authorized agent(s).

With all that being said, what should LTCFs do in response to this ruling? Is it a simple addition to the resident admission/intake form, authorizing contact by cell phone, or something much more substantial required in a separate consent document? We suggest the following as a checklist of requirements for written consent:

1. Identify the provider and its agents to whom consent is being provided.
2. Identify the consumer's telephone number.
3. Indicate a clear and affirmative agreement (i.e., "I agree/consent").
4. Disclose that the consumer is authorizing the provider and its agents to contact the consumer at the phone number(s) provided *for all matters*, including but not limited to payment.
5. Disclose that the calls may be made using automated technology.
6. Disclose that the consumer is not required to provide consent as a condition of receiving services.
7. Obtain the consumer's signature (either electronically through E-SIGN or handwritten).

Note that the FCC has ruled that an individual gives express consent to receive autodialed or prerecorded collection calls from creditors or third-party collectors by providing his/her cell phone number in connection with an existing debt if the number was provided by the consumer to the creditor *during the transaction that resulted in the debt owed*. As such, utilization of the above suggested language, in the resident admission/intake form, and the resident/financial representative's consent thereto, would pass muster under the TCPA.

We believe that LTCFs should revise their current resident admission/intake forms to add this consent. As is clear from the regulation and subsequent FCC ruling, it would be helpful if the consent were executed simultaneously with the form signed by the customer that outlines the patient's financial responsibilities. It needn't be an entirely separate document, but the consent should be clear and unambiguous and should reflect that the consumer is giving his/her consent for receipt of all calls, *including but not limited to* those seeking collection of a debt.

Our team is eager to provide assistance in drafting or revising your resident admission/intake forms to ensure compliance with the TCPA, its regulations and subsequent FCC rules.