Compliant Texting



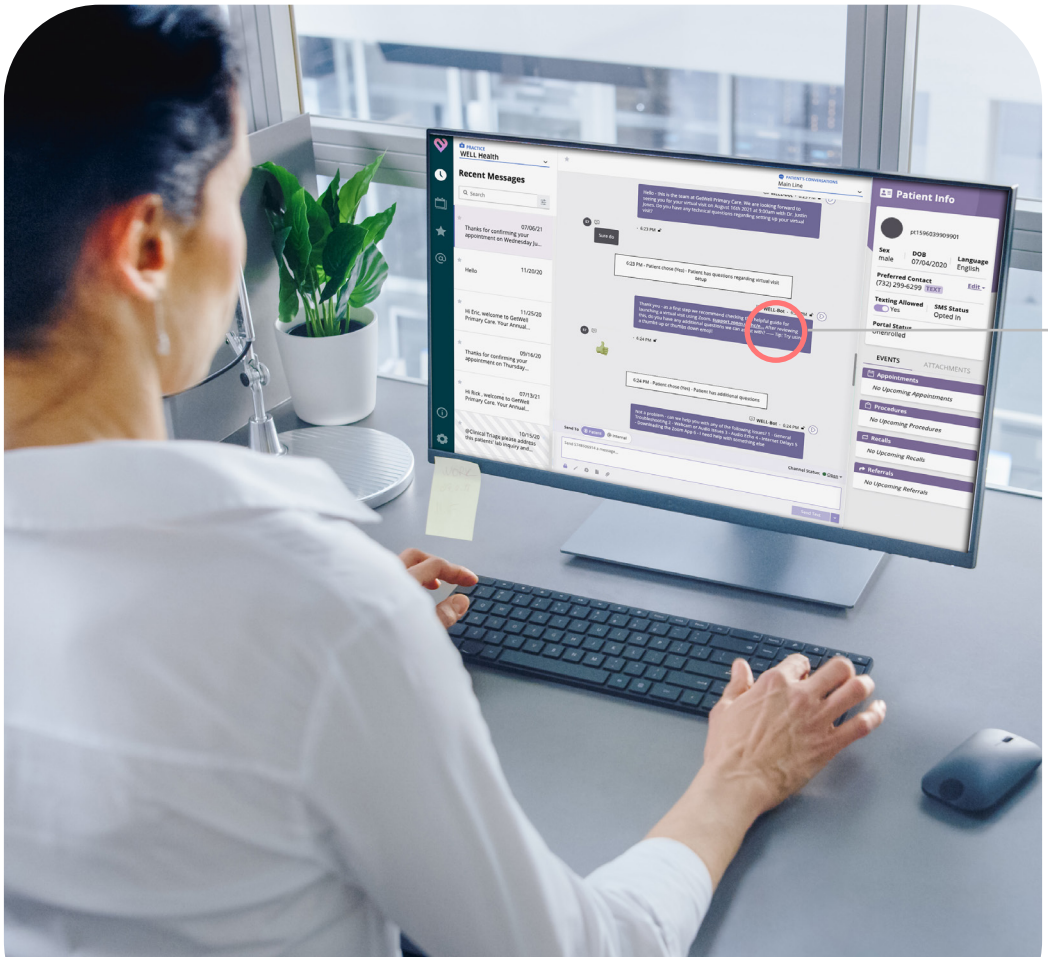
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Introduction

The ability to text patients has undeniable value – using the Artera patient communication platform can help reduce no-show rates, call volume, and staff workload while increasing referral conversion, portal enrollment, and appointment confirmations.

When it comes to texting and compliance, there are several items an organization should keep in mind. While each situation is unique, there are a few foundational questions for you to consider when assessing your organization's compliance related to your different texting use cases.

Keep in mind that SMS communication is regulated on both a federal and state level, so it is also important to review all applicable laws. For now, we'll just be discussing the role of the Telephone Consumer Protection Act (TCPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as well as best practices to consider.



Key Questions

Who is this message directed towards and what is our organization's relationship to them?

Does this message promote the utilization of goods or services?

Has the patient indicated different communication preferences?

The first item to consider is why your organization would like to contact this individual, as this is the foundation of compliant texting. More importantly, you should ask whether the message could be considered marketing. HIPAA and the TCPA have different definitions of marketing, so it is possible that a communication may be considered marketing under one law but not the other.

The simplest way to determine if it is likely that additional marketing laws apply is to determine whether the message promotes the purchase or use of goods or services -- while this may not be set in stone, it can be a helpful reference point. Lastly, if a patient has given an indication of their communication preferences, it is important to accommodate and honor those preferences.



HIPAA

For information about how to securely send messages in compliance with the HIPAA Security and Privacy Rules, please refer to Artera's whitepaper HIPAA, SMS, and Artera.

HIPAA defines marketing as: "a communication about a product or service that encourages recipients of the communication to purchase or use the product or service"; however, there are exceptions to this definition. Except when the covered entity or business associate receives financial remuneration in exchange for making the communication, marketing does not include communications:

- to describe a health-related product or service (or payment for such product or service) that is provided by, or included in a benefits plans of, the covered entity making the communication;
- for treatment of an individual by a healthcare provider, including case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, healthcare providers, or settings of care to the individual;
- for case management or care coordination for the individual, contacting of individuals with information about treatment alternatives, and related functions to the extent these activities do not fall within the definition of treatment.[1]



There are a few other limited exceptions and additional information about marketing under HIPAA at 45 C.F.R § 164.501 and 164.508(a)(3).

If the messaging can be considered marketing, HIPAA requires an authorization, regardless of the method by which that message is sent, except for face-to-face communication and communications about a promotional gift of nominal value. An authorization is a specific type of consent under HIPAA. Per HHS, "an authorization must specify a number of elements, including a description of the protected health information to be used and disclosed, the person authorized to make the use or disclosure, the person to whom the covered entity may make the disclosure, an expiration date, and, in some cases, the purpose for which the information may be used or disclosed. With limited exceptions, covered entities may not condition treatment or coverage on the individual providing an authorization," however, we encourage you to review the requirements at 45 C.F.R § 164.508.

1. 45 CFR § 164.501 (definition of "marketing").
2. The Department of Health and Human Services, "What is the difference between "consent" and "authorization" under the HIPAA Privacy Rule?"

TCPA



The TCPA prohibits calls or texts without the ***prior express consent*** of the recipient in cases where an automatic telephone dialing system (ATDS) or an artificial or prerecorded voice is used, unless in the event of an emergency. For TCPA purposes, and as interpreted by the Supreme Court, an ATDS is any device that has the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.

The TCPA does not explicitly apply to software that sends automated messages to a database of phone numbers that does not have the ability to generate random or sequential numbers, such as Artera's platform. Nevertheless, we are providing this guidance on TCPA for entities that choose to voluntarily comply with TCPA requirements, even if TCPA may not technically be applicable.

Under the TCPA, there are five key elements of compliance when collecting consents from and sending messages to patients. These include:

1. the opt-in process;
2. the content of the messages sent to patients;
3. the opt-out process;
4. the do-not-call requirements; and
5. messaging quiet hours.

A more complete list of the TCPA's compliance requirements can be found at 47 U.S.C. § 227, 47 C.F.R. § 64.1200, and in the TCPA's implementing orders adopted by the Federal Communications Commission (FCC).

Opt-In Process

Unless an exception applies, the type of ***prior express consent*** that the TCPA requires to send messages via an ATDS or using a prerecorded voice depends on the content of the message.

- If the message includes any marketing content (i.e., content aimed at encouraging or inducing the purchase of any goods or services), then the TCPA would require obtaining the ***patient's prior express written consent*** via the patient's affirmative agreement to a disclosure that meets the requirements laid out in 47 C.F.R. § 64.1200.
- If the message does not include any marketing content and is instead purely ***informational*** in nature, then the TCPA only would require obtaining the patient's ***prior express consent***, which can be obtained by the patient knowingly agreeing to receive ATDS or prerecorded voice messages by providing his/her phone number for the reasons served by the message or orally agreeing to receive such messages. The FCC has clarified that the "provision of a phone number to a healthcare provider constitutes ***prior express consent*** for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary." Courts have since held that the provision of a phone number on an intake form suffices as ***prior express consent***.
- If the message includes both marketing and informational content, TCPA would require obtaining the patient's ***prior express written consent***.



There are two separate exceptions to the TCPA's consent standards for certain health-care-related messages, which are referred to as the "Health Care Messages Exception" and the "Healthcare Treatment Purpose Exemption."

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Under the **Health Care Messages Exception**, only ***prior express consent*** is required for any ATDS-delivered message that includes "health care" content, even if the message includes marketing content. To qualify for this exception:

- The message must be sent by or on behalf of a "covered entity" or its "business associate" as those terms are defined in the HIPAA Privacy Rule; and
- The message must be for a "health care" purpose, as that term is defined under the HIPAA Privacy Rule at 45 C.F.R. § 160.103.

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Under the **Healthcare Treatment Purpose Exemption**, ***no consent*** is required to send a limited set of messages to patients, which include and are limited to:

- Appointment and exam confirmations and reminders;
- Wellness checkups;
- Hospital pre-registration instructions;
- Pre-operative instructions;
- Lab results;
- Post discharge follow-up intended to prevent readmission;
- Prescription notifications; and
- Home healthcare instructions

Messages sent under the Healthcare Treatment Purpose Exemption ***cannot*** include any marketing, accounting, billing, or debt collection content and must meet a host of additional requirements, which have been laid out in orders adopted by the FCC.



Opt-Out Process

Regardless of whether a TCPA exception applies, patients should be removed from messaging campaigns if they make a reasonable request to be removed. Examples of reasonable opt-out requests include, but are not limited to:

- A customer replying to a message with the keyword "STOP," "QUIT," "CANCEL," "UNSUBSCRIBE," "END," or any variation thereof; or
- A customer calling into, emailing, or sending a letter to your organization's office or to one of your representatives requesting to be removed from future messaging campaigns.

A customer's opt-out request should be honored immediately. Opt-out directions must also be included (e.g., "Text STOP to stop") in the content of messaging to patients at least once a month.

Do-Not-Call Requirements

The TCPA's sister statute, the Telemarketing Sales Rule (TSR), prohibits sending any ***marketing*** messages – whether sent via an ATDS or manually dialed – to patients whose number is on the National Do-Not-Call Registry (NDNCR), any state do-not-call registry, or your organization's internal do-not-call list.

Importantly, there are exceptions to this prohibition that allow your organization to send messages to patients that are on any do-not-call list if:

- The patient has provided his/her ***prior express written consent*** and has not thereafter opted-out of future marketing messages;
- The message is in response to an inquiry submitted by the patient any time over the last 90 days; or
- The message is related to a transaction between your organization and the consumer that occurred over the last 18 months.

A more complete list of the TCPA's and TSR's do-not-call requirements can be found at 16 C.F.R. Part 310, 47 C.F.R. § 64.1200, and in the TCPA's and TSR's implementing orders adopted by the FCC and Federal Trade Commission.



Messaging Quiet Hours

Quiet hours are specific times during the day when sending text messages to patients should be avoided (e.g., early in the morning, late at night, etc.). The TCPA provides that such messages should not be sent before 8 a.m. or after 9 p.m. in the patient's local time zone.

States have also imposed messaging quiet hours and, in certain states, these hours are broader than the scope of quiet hours under the TCPA. Your organization should consult the telemarketing laws in the states where you are texting to ensure compliance with any differing rules.



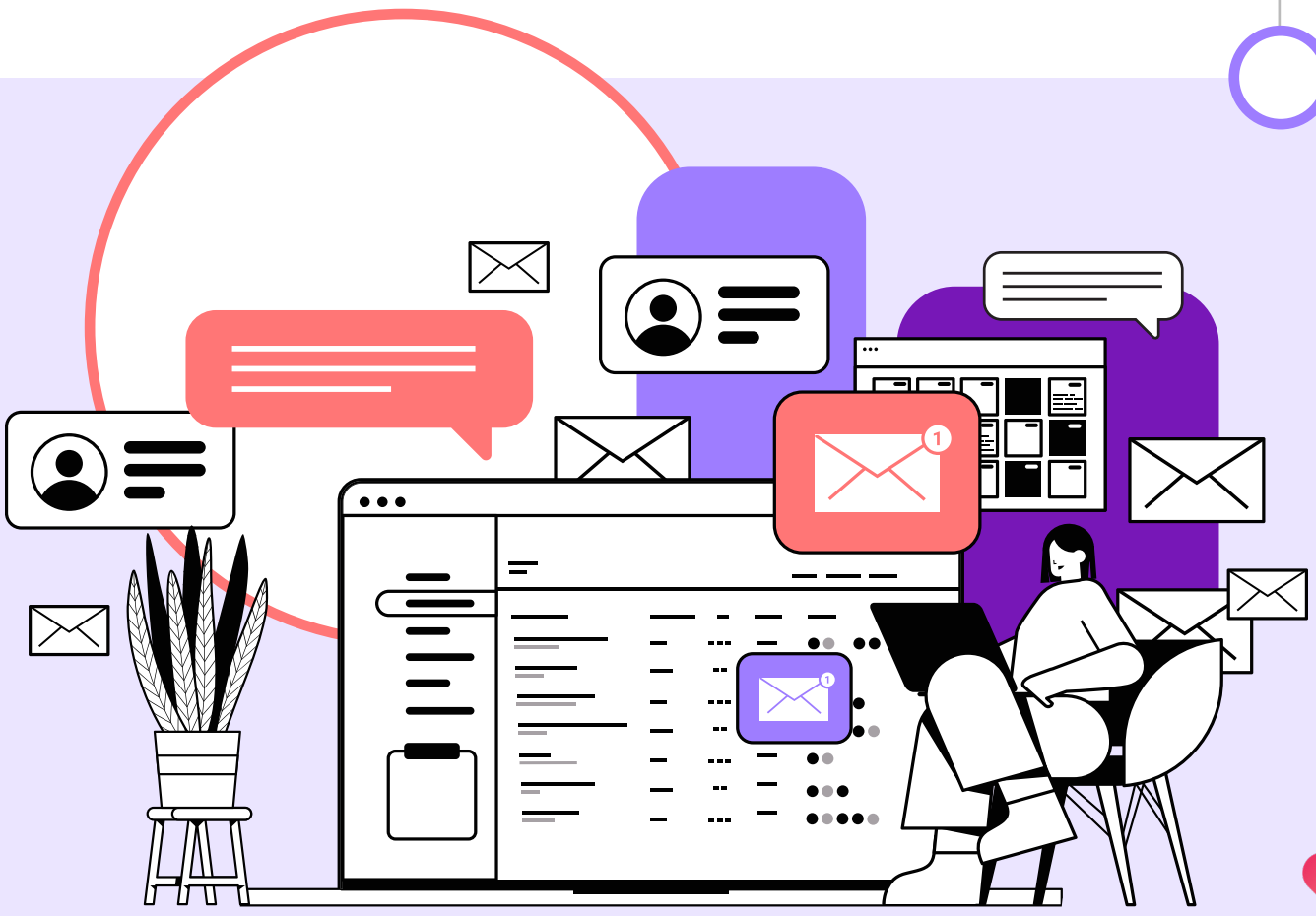
State Mini-TCPAs

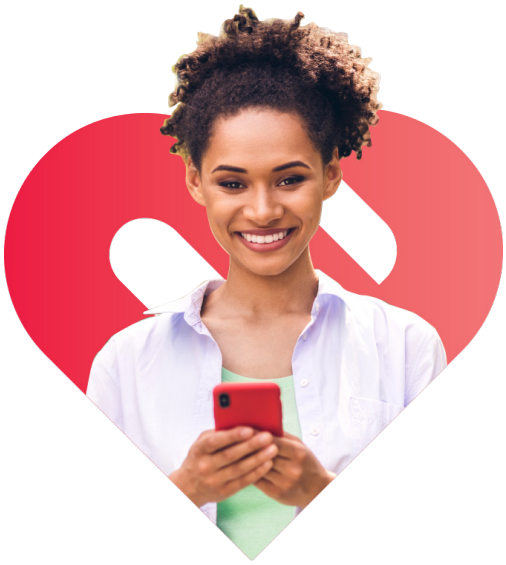
In addition to the federal TCPA, several states have also adopted new laws restricting how messages can be sent to individuals – the most stringent of which have been adopted in Florida and Oklahoma. Like the federal TCPA, these state mini-TCPAs prohibit the use of an "automated system" to make "commercial telephone sales calls" without the message recipient's ***prior express written consent.*** "Automated system" is significantly broader than the federal TCPA's ATDS term and includes any system "for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called."

Unlike the federal TCPA, the state mini-TCPAs do not have an exception to the ***prior express written consent*** standard for healthcare-related messages. Therefore, any message for a marketing purpose or that includes marketing content sent via an automated system can only be sent to patients with their ***prior express written consent***.

More information about the Florida mini-TCPA's requirements can be found at Fla. Stat. § 501.059. More information about the Oklahoma mini-TCPA's requirements can be found in Okla. Stat. § 775c, et seq.

Other states are considering adopting similar mini-TCPA laws. Your organization should always consult the telemarketing laws of each state in which you will be sending messages to ensure compliance with all applicable rules and regulations related to the sending of messages to patients.





Conclusion & Best Practices

- **Always consult with your internal compliance team to verify what safeguards are in place and what your organization considers appropriate.**
- Obtaining consent and capturing communication preferences in the patient's chart can assist in demonstrating patient consent over time.
- Legal counsel may be able to assist your organization in determining if other laws, particularly more stringent state laws, apply.

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Does Not Constitute Legal Advice

Please note that this whitepaper is designed to serve as an educational resource, and does not constitute legal advice. Artera always recommends collaborating with your legal counsel regarding these matters to determine the best course of action for your organization. It is also helpful to keep in mind that each organization has its own approach to HIPAA, TCPA, and other regulatory compliance policies and strategies, so be sure to collaborate with your compliance team and adhere to any internal policies and procedures.