



## Text Message Outreach to Support SNAP and WIC Enrollment in California

Legal and Regulatory Considerations for Health Care Organizations

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CURRENT AS OF AUGUST 2021

### ABOUT THIS RESOURCE

Kaiser Permanente is elevating and addressing members' social health needs across the organization. Among social needs, access to healthy, affordable food is a priority for KP members across the country and one that KP seeks to address through our Food for Life strategy. As part of Food for Life, Kaiser Permanente began conducting digital outreach campaigns in California starting in August of 2019. The campaign focused on low income members across all lines of business to encourage and assist eligible members to apply for CalFresh benefits. In the first year, the effort helped more than 64,000 members in California apply for CalFresh benefits. This campaign has expanded to all of Kaiser Permanente's regions as part of a critical strategy to enable food security by increasing the purchasing power of members. To date, nearly 35,000 households, with more than 82,000 members, have applied for benefits, demonstrating the need for this timely intervention.

Kaiser Permanente is also supporting its safety net partners in California to launch similarly successful campaigns. Recognizing that organizations planning text-message based outreach are likely to face several common legal and regulatory considerations, Kaiser Permanente

partnered with the Center for Health Law and Policy Innovation of Harvard Law School to develop this resource.

The goal of this resource is to aid organizations in identifying and navigating applicable legal and regulatory frameworks. The resource does not and should not be construed to provide legal advice—organizations are encouraged to conduct and document their own analyses through the lens of their own specific facts and circumstances. For specific legal questions, please consult an attorney.

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## I. PRIVACY LAW AND POLICY

### A. Health Information Portability and Accountability Act (“HIPAA”)

- ❑ Secure appropriate patient authorizations/consents.

**NOTES:** An initial aspect of a HIPAA-related assessment is whether a signed patient authorization form is required. Under HIPAA, patient authorization to use or disclose Protected Health Information (“PHI”) is generally required for purposes other than treatment, payment, or health care operations. The definition of “health care operations” includes “population-based activities relating to improving health or reducing health care costs.”<sup>1</sup> The federal government has explicitly said that communications about government programs or government sponsored programs qualify as health care operations.<sup>2</sup>

Another aspect of this assessment is whether the modality of communicating with patients—i.e., by text message—is allowed under HIPAA. Texting is not specifically prohibited, but it is not always clear when/under what circumstances texting is permitted. Texting is more likely to be okay in the following scenarios:

- (1) Patients have consented to text-based communications (as part of an organization’s Notice of Privacy Practices, by completing a consent form, etc.).<sup>3</sup>
- (2) There are technological safeguards, such as encryption, in place.<sup>4</sup>
- (3) The content of the text message is broadly worded and not personalized to individual patients, minimizing the amount of sensitive PHI disclosed via the message.<sup>5</sup>

- ❑ Execute any necessary business associate agreements with third parties (e.g., a vendor that will be conducting the campaign).

**NOTES:** Some health care organizations participate in a regional health information organization (“RHIO”) and have a business associate agreement in place with the RHIO. In that instance, it may be sufficient for the RHIO to execute a subcontractor business associate agreement with the vendor. While the particulars of business associate agreements vary, they can authorize a business associate to use and disclose PHI in ways the covered entity itself is allowed to use and disclose PHI.<sup>6</sup>

### B. Telephone Consumer Protection Act (“TCPA”)

- ❑ Review permissibility under the TCPA.

**NOTES:** The TCPA, a federal law, strives to protect consumer privacy by restricting unsolicited telephone communications. In April 2021, the U.S. Supreme Court narrowly defined the types of communications to which the TCPA applies.<sup>7</sup> The TCPA does not apply to text messages from health care providers or health plans as long as the text messages are being directed to specific individuals and without the use of a random or sequential number generator.

### C. California State Law

- Review permissibility under the California Medical Information Act (“CMIA”).

**NOTES:** The CMIA is California’s state analog to HIPAA and, as with HIPAA, a central question is whether a signed patient authorization form is required. The CMIA generally allows disclosures of medical information without written patient authorization when “the disclosure is otherwise specifically authorized by law.”<sup>8</sup> One way to understand this provision is that, if HIPAA permits the disclosure, so, too, does the CMIA.

Additionally, protected information under the CMIA is individually identifiable information that includes a patient’s medical history, mental or physical condition, or treatment. California courts have held that CMIA protections for “medical information” do not apply to purely individually identifiable information, such as a phone number or name.<sup>9</sup>

- Review permissibility under Cal. Bus. & Prof. Code § 17538.41.

**NOTES:** This California law generally prohibits “text message advertisement.” A “text message advertisement” is defined as “a message, the principal purpose of which is to promote the sale of goods or services, or to promote a political purpose or objective, to the recipient, and consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, or advertising material for political purposes.”

There is no local guidance explicitly clarifying that communications regarding

government benefits are not “advertising” under the statute. There is, however, notice from the federal government that such communications are not “marketing” under HIPAA.<sup>10</sup> The reason provided by the federal government is the acknowledgment that “[t]here is no commercial component to communications about benefits available through public programs.”<sup>11</sup>

- Review permissibility under the California Consumer Protection Act (“CCPA”).

**NOTES:** This California consumer protection law imposes privacy requirements on certain businesses.<sup>12</sup> Health care organizations subject to HIPAA/the CMIA are exempt from having to comply with CCPA requirements.<sup>13</sup>

### D. Organizational Policy

- Review any relevant organizational policies, such as policies governing patient/member outreach and communications.

**NOTES:** Organizations that do not have a policy in place that addresses text message campaigns may want to adopt one. An organizational policy can streamline the development of population health messaging campaigns, support legal and regulatory compliance, and ensure a patient- or member-driven approach. These policies commonly address consent, opportunities for individuals to opt-in or opt-out, documentation, and other process-related considerations.

## II. ADDITIONAL CONSIDERATIONS FOR MEDI-CAL MANAGED CARE PLANS

- ❑ Consult Department of Health Care Services (“DHCS”) policy for text message campaign approvals.

**NOTES:** Medi-Cal managed care plans submit details of (1) texting programs, and (2) texting campaigns to DHCS for approval. “Texting program” refers to the overall program design and infrastructure used in text messaging campaigns. “Texting campaigns” are specific messages aimed to address an identified objective, such as SNAP education, to DHCS for approval.

- ❑ Review relevant provisions in contracts with DHCS and All Plan Letters governing communications with members.

**NOTES:** All Plan Letter 18-016 clarifies requirements for “Written Health Education Materials,” i.e., “materials designed to assist members to modify personal health behaviors, achieve and maintain healthy lifestyles, and promote positive health outcomes.”<sup>14</sup>

Written Health Education Materials communicated by text message must be “field-tested and meet sixth-grade reading level requirements prior to distribution.” When translating materials into other languages, plans “must work with qualified translators to ensure that the materials are accurately translated and are culturally and linguistically appropriate and easily understood in each language.”

## III. ADDITIONAL CONSIDERATIONS FOR HEALTH CARE PROVIDERS

- ❑ Health care providers may want to review their contracts with Medi-Cal managed care plans for any applicable provisions governing communications with a plan’s members.

## Conclusion

Text messaging campaigns that support SNAP and WIC outreach have the potential to improve access to food for and positively impact eligible individuals. Importantly, health care organizations can and do navigate legal and regulatory frameworks to launch these kinds of campaigns in the communities they serve.

An organizational policy that addresses patient/member rights, privacy protections, and regulatory compliance can support best practices, especially for health care organizations interested in engaging patients on a broader range of social needs.



## ABOUT THE CENTER FOR HEALTH LAW AND POLICY INNOVATION OF HARVARD LAW SCHOOL

The Center for Health Law and Policy Innovation of Harvard Law School (CHLPI) advocates for health and food justice, with a focus on the needs of systemically marginalized individuals. CHLPI works with a range of stakeholders to expand access to high-quality health care and nutritious, affordable food; to reduce health and food-related disparities; and to promote more equitable and sustainable health care and food systems. CHLPI's Health Law Lab advances health care system efforts to address social determinants of health and health-related social needs, improve health equity, and mitigate health disparities.

## ABOUT KAISER PERMANENTE

Kaiser Permanente is committed to helping shape the future of health care. We are recognized as one of America's leading health care providers and not-for-profit health plans. Founded in 1945, Kaiser Permanente has a mission to provide high-quality, affordable health care services and to improve the health of our members and the communities we serve. We currently serve approximately 12.5 million members in 8 states and the District of Columbia. Care for members and patients is focused on their total health and guided by their personal Permanente Medical Group physicians, specialists, and team of caregivers. Our expert and caring medical teams are empowered and supported by industry-leading technology advances and tools for health promotion, disease prevention, state-of-the-art care delivery, and world-class chronic disease management. Kaiser Permanente is dedicated to care innovations, clinical research, health education, and the support of community health.

The resource does not and should not be construed to provide legal advice—organizations are encouraged to conduct and document their own analyses through the lens of their own specific facts and circumstances. For specific legal questions, please consult an attorney.

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# Endnotes

- 1 See 45 C.F.R. § 164.501.
- 2 See Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53181, 53189 (Aug. 14, 2002).
- 3 In the case of unencrypted messages, the consent should: (a) inform patients of the risk that unencrypted messages can be read by other people; (b) receive confirmation that the patient wants to proceed with the form of communication; and (c) be documented. See Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules, 78 Fed. Reg. 5566, 5634 (Jan. 25, 2013).
- 4 See e.g., U.S. Dep’t of Health & Human Servs., Does the HIPAA Privacy Rule permit health care providers to use e-mail to discuss health issues and treatment with their patients?, HHS.gov, <https://www.hhs.gov/hipaa/for-professionals/faq/570/does-hipaa-permit-health-care-providers-to-use-email-to-discuss-health-issues-with-patients/index.html> (last visited June 23, 2021).
- 5 See e.g., U.S. Dep’t of Health & Human Servs., Does the HIPAA Privacy Rule permit health care providers to use e-mail to discuss health issues and treatment with their patients?, HHS.gov, <https://www.hhs.gov/hipaa/for-professionals/faq/570/does-hipaa-permit-health-care-providers-to-use-email-to-discuss-health-issues-with-patients/index.html> (last visited June 23, 2021).
- 6 See 45 C.F.R. § 164.504(e). See also U.S. Dep’t of Health & Human Servs., What may a HIPAA covered entity’s business associate agreement authorize a health information organization (HIO) to do with electronic protected health information (PHI) it maintains or has access to in the network?, HHS.gov, <https://www.hhs.gov/hipaa/for-professionals/faq/543/what-may-a-covered-entitys-business-associate-agreement-authorize/index.html> (last visited June 23, 2021).
- 7 *Facebook v. Duguid*, 592 U. S. \_\_\_\_ (2021).
- 8 Cal. Civ. Code § 56.10(c)(14).
- 9 *Eisenhower Medical Center v. Superior Court (Malanche)*, No. E058378, 2014 WL 2115216, at \*1 (Cal. Ct. App. May 21, 2014).
- 10 See Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53181, 53189 (Aug. 14, 2002). See also U.S. Dep’t of Health & Human Servs., Are communications concerning information to beneficiaries about government programs or government-sponsored programs “marketing” under the HIPAA Privacy Rule?, HHS.gov, <https://www.hhs.gov/hipaa/for-professionals/faq/293/are-communications-concerning-information-to-beneficiaries-marketing/index.html> (last visited June 23, 2021).
- 11 See Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53181, 53189 (Aug. 14, 2002).
- 12 Cal. Civ. Code § 1798.100 *et seq.*
- 13 Cal. Civ. Code § 1798.145(c).
- 14 Cal. Dep’t of Health Care Servs., All Plan Letter 18-016 - Readability and Suitability of Written Health Education Materials, <https://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2018/APL18-016.pdf> (Oct. 5, 2018).

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