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Home Care Briefing® – Issue 25: Ethical Marketing

Minimizing the Risks of False Advertising



Many websites, advertisements and brochures used by home care providers contain superlative phrases such as “highest quality,” “complete satisfaction” and “expert caregivers.” Franchise owners must realize that these statements may be viewed as promises to clients and need to ask themselves if these promises can always be kept.

If a marketing campaign strays from the path of scrupulous accuracy, even unintentionally, the

franchise may be exposing itself to allegations of consumer fraud, which can have serious consequences for the organization and its leadership. Furthermore, in the event of a claim, a plaintiff attorney may submit examples of exaggerated or misleading advertising as evidence that the defendant organization failed to meet its own self-declared standards.

This *Home Care Briefing*® examines some of the legal and regulatory concepts governing healthcare advertising and offers basic guidelines for minimizing marketing-related risks.

Legal Background and Risks

False and exaggerated representations in advertising are illegal under federal law.

(*Section 5 of the Federal Trade Commission (FTC) Act, codified at 15 U.S.C. 41-58*). As such, the FTC is empowered to protect consumers against unfair or misleading acts or practices by businesses, including promises and statements made on the Internet. Similarly, state consumer protection statutes also govern advertising, which can mean additional rules to follow.

The FTC Act and the various state consumer protection statutes that supplement federal law are based upon the perspective of the “reasonable consumer,” i.e., a typical individual who draws

conclusions from the complete advertisement, including its visual elements. Under these statutes, deceptive advertising can take many forms, and the deception need not be deliberate for the advertisement to be deemed misleading. Home care providers, therefore, must ensure that printed advertisements and brochures, as well as social media and website postings, contain no implicit warranties – e.g., “Providing complete care for your loved one in the safety of her own home” – and are not subject to misunderstanding.

Consumer protection lawsuits can be challenging to defend against because they are generally based upon easily observable discrepancies between the image presented by advertising statements and actual policies and conditions. Depending upon the nature and extent of the violations, home care providers may be subject to significant fines and/or criminal penalties.

Advertising that inflates patient expectations or withholds relevant information also may expose home care providers to civil actions based on allegations of breach of contract, misrepresentation or bodily injury. Finally, deceptive marketing practices may have insurance consequences, as coverage for advertising-related injury is excluded under most general liability policies if the insured knowingly published false promotional material or

issued statements that do not reflect actual quality, performance or results.

Marketing Review Process

As consumer protection laws and related liability concepts can be complex, all advertising and promotional efforts, including websites and social media pages, should be reviewed by legal counsel. The panel of reviewers also should include supervisory personnel and senior leadership.

Instruct reviewers to evaluate promotional materials carefully. The goal is to ensure that all statements are accurate, in compliance with federal and state laws and regulations, and free of the following truth-in-advertising violations:

- *Deceptiveness* – Is the advertisement, social media posting or website likely to mislead a reasonable consumer, either by direct statement or suggestion and connotation?
- *Unfairness* – Is the advertised product or service likely to cause injury, which cannot reasonably be avoided and is not outweighed by potential benefits?
- *Implication* – Does the advertisement, social media posting or website contain any indirect, inferential or ambiguous messages that may unduly influence the purchasing decision?

- *Incompleteness* – Is pertinent information omitted, creating an erroneous impression?
- *Lack of reasonable basis* – Are marketing claims supported by objective evidence?

As healthcare organizations are held to a high ethical and legal standard in their promotional activities, instances of false advertising can have significant negative consequences. The information and guidelines contained herein can help home care providers evaluate the accuracy and honesty of their marketing communications, while minimizing exposure to lawsuits and regulatory sanctions.

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