

# businesscompanion

## trading standards law explained

### Treating residents fairly

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As a care home owner or registered manager, it is important to understand the rights and principles set out in consumer law and your obligation to ensure that residents, potential residents and their representatives are treated fairly. You are responsible for practices carried out by your staff, and anyone acting on your behalf or in your name, so it is important to have clear processes in place to reduce the chances of infringing consumer law and to check that these processes are being followed. You should also ensure that your staff (and anyone acting for you or in your name) are properly trained in the key areas of consumer law.

An overview of the main consumer laws you need to be aware of, and how they may affect you and your care home, are outlined on the following pages.

### Consumer Contract Regulations 2013

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs) apply to most on-premises, off-premises and distance contracts between traders and consumers. The Regulations set out pre-contract information you should provide to consumers before they enter into a contract with you. This information should be clear and easy to understand. The CCRs also set out the cancellation periods for distance and off-premises contracts, as well as banning the use of premium-rate helplines for consumers contacting you in connection with a contract and negative option practices, such as the use of pre-ticked boxes to sell additional products.

### Types of contract

There are three types of contracts. The type of contract you enter into with a resident will determine the information you are required to give to them before they enter into a contract with you, and whether the

resident has any mandatory cancellation rights.

The three types of contract are explored here.

**Off-premises contracts:** these are contracts that are concluded when you are with a resident away from your business premises, such as contracts entered into at a resident's home or in the hospital. They may also cover situations where a resident or their representatives make an offer to enter into a contract at any of these places, or if they enter into a contract on a trip organised by your business to promote your services. Contracts concluded by distance means or on your business premises immediately after you have negotiated with the resident away from your business premises are also covered. For example, if you visit the resident at their home and then drive them to the care home to sign the contract straight after the visit.

**Distance contracts:** these are contracts negotiated and agreed by one or more organised means of distance communication, such as over the telephone or email, and without any face-to-face negotiation with the resident.

**On-premises contracts:** these are contracts which are not a distance contract or off-premises contracts. This includes contracts entered into at a care home by a resident.

If you only enter into on-premise contracts, the 'Care home communications booklet' on the [Business Companion website](#) sets out the information requirements you need to comply with, and when this information should be given. If you enter into off-premises or distance contracts, additional information about your responsibilities can be found below.

## Off-premises and distance contracts

If you enter into contracts with your residents that are off-premises or distance contracts, you must ensure that the resident and their representatives are made aware of any right they have to cancel the contract before they are bound by it. The cancellation period will normally be 14 days, starting the day after the day on which the contract was made.

In particular, you must give the resident certain additional information before they are bound by the contract, which includes:

- cancellation rights; including conditions, timings and methods of cancellation. Where a right to cancel exists, the resident and their representatives must be given the model cancellation form supplied in the CCRs
- the requirement to pay a reasonable amount for services supplied during the cancellation period, where they expressly request the service to start before the 14-day period ends

Failure to provide this information to residents who have entered an off-premises contract could mean that you commit a criminal offence under the CCRs. Failure to provide any of the other information requirements for an off-premises contract, or any required information for a distance contract, is a breach of your contract with your resident.

## Beginning a service within the cancellation period

Where a resident expressly requests that your service begins immediately, they must do this on a durable medium (such as in writing) if they have entered into an off-premises contract with you. For both off-

premises and distance contracts, residents and their representatives must have been made aware, before being bound by the contract with you, that they can cancel the contract within the 14-day period, but will have to pay a reasonable amount for any service that they have received up until the date of cancellation.

You will not be able to charge a resident for any services received during the cancellation period if you do not tell them (before entering into a contract with them) that they will have to pay a reasonable price for any services received during this time, or if you did not get their express permission to start the service within the cancellation period.

## Unfair trading regulations 2008

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibit traders from using unfair practices in their dealings with consumers. The CPRs apply to all care homes and your dealings with potential and existing residents, their family and other representatives.

The CPRs apply to any commercial practice you engage in with a resident either before, during or after they enter into a contract with you. They also apply if, for example, a potential resident makes enquiries with you and then decides that your care home isn't right for them and doesn't enter into a contract. The information you provide on your website, advertising materials and any information that is given to residents by phone, email or face to face, the way you enforce your terms and conditions and your complaints handling procedure are all considered commercial practices.

## Misleading actions and omissions

The CPRs prohibit unfair commercial practices, including misleading actions and misleading omissions. For a practice to infringe the CPRs, it must normally cause, or be likely to cause, the average consumer to take a different transactional decision as a result.

**Misleading actions:** these are where a practice contains false information about a wide range of things listed in the CPRs, or if its presentation is deceptive (even if the information is factually correct) and causes (or is likely to cause) the average resident, family member or representative to take a decision that they would not have taken otherwise. This includes information relating to your prices and how they are calculated, the main characteristics of your services (such as your accommodation and facilities) their need for a particular service, or your experience or qualifications.

**Misleading omissions:** these occur when your practice omits or hides 'material information' that the average resident or their representatives need to take an informed decision, or where you provide it in a way that is untimely, unclear, ambiguous or unintelligible. The practice must also cause, or be likely to cause, the average resident or their representatives to take a different transactional decision as a result. Material information must be provided to consumers when they need it, whether or not they have asked for it. See the Care home communications booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-communications](http://www.businesscompanion.info/focus/care-homes-communications)].

A term stating: 'Residents must always pay their fees in full, and must not withhold payment of fees under any circumstances,' may be an unfair term and, if so, would not be binding on a resident. However, if a resident believed they were bound to follow the term, it may affect their decision to pay their fees in full or not where, for example, they have an arguable claim against you and could therefore be considered a misleading action.

If a resident is not given pre-contract information about their cancellation rights, their right to cancel the contract can be extended by up to an additional 12 months.

A practical guide summarising key consumer law areas to consider when planning your procedures, processes and training of staff can be found in the Consumer law checklist on this site.

## More information

For more advice relating to these types of contracts, read the [Consumer contracts: off-premises sales](#) and [Consumer contracts: distance sales guides](#) elsewhere on this website.

## Aggressive commercial practices

These are practices that intimidate or exploit consumers through harassment, coercion or undue influence, significantly impairing the average consumer's ability to make free or informed choices, and which cause, or are likely to cause, them to take a different transactional decision as a result. Aggressive practices include physical and non-physical pressure, such as psychological pressure, use of threatening language, or taking advantage of the consumer's position or vulnerability - for example, by threatening to evict the resident or impose a visitors' ban unless they withdraw a complaint.

## Transactional decisions

Under consumer law, the concept of 'transactional decision' should be interpreted broadly. It covers a wide range of decisions that are open to potential residents and their representatives, including making a decision to:

- browse your website
- make initial enquiries about your services
- visit your care home
- pay for additional services
- raise or pursue a complaint or concern
- leave your care home

## Banned practices

The CPRs set out a list of 31 specific practices (sometimes referred to as 'banned practices') that are considered unfair in all circumstances, whether or not they affect people's decision making. Examples of banned practices are likely to include:

- falsely stating you are signed up to a trade body's code of conduct
- advertising a room at a specific price where you either don't have any of those rooms available, or where you are using this price as 'bait', to then upsell a more expensive room to a resident, their family or representatives
- falsely stating a room/service is only available for a very limited time, or only available at a certain price for a very limited time, to put pressure on the resident and their representatives to make a decision
- describing any of your services as 'free,' 'gratis,' 'without charge' or similar if there is any cost to the

resident, their family or representatives, other than any unavoidable cost of responding to the offer

- making persistent and unwanted calls, faxes or emails, or visiting a resident's home or the homes of their family or representatives and refusing to leave, except in circumstances and to the extent justified to enforce a right under a contract

## The average consumer test

Outside of the banned practices, for your practice to infringe the CPRs you must consider whether it causes, or is likely to cause, the 'average consumer' to take a different decision to the one they would otherwise have taken. For care homes, the 'average consumer' test is likely to require you to consider the effect of your practices on the average resident and their representatives.

In assessing whether you are complying with consumer law, you will need to consider the needs of the average resident (bearing in mind that they may be frail and in poor health) and their family and representatives, who will likely be under time pressure and emotional stress, and the fact that they are unlikely to be familiar with the process of choosing a care home.

## You have a general duty to trade fairly

The CPRs also set out a general duty to trade fairly. You must not breach the requirements of professional diligence and materially distort the economic behaviour of the resident or their representatives. This means impairing a potential resident or their representatives' ability to make an informed decision that causes them to make a different transactional decision.

## CPR remedies: actions open to a resident

Action for breaches of the CPRs in certain circumstances; namely misleading actions and aggressive commercial practices that cause a resident to enter into a contract or pay money. The remedies available are:

- the right to 'unwind' the contract within 90 days from when the service began.** A resident can only use this remedy if the service has not been fully completed and they can still reject some of the service. The resident cannot unwind the contract if they have already claimed a discount in price for the service due to a misleading action or aggressive practice. Unwinding the contract means 'undoing' the contract and putting you and the resident in the positions you were in before it was made. The resident may be entitled to receive all, or a percentage of, the amount they paid for the service. If the resident has received the service for over a month, they have to allow for the benefits they have received under the contract; or
- the right to a discount.** This applies if the resident has lost their right to 'unwind' the contract because they are outside of the 90-day period, or the service has been fully performed, such as a short-term period of respite care. For services costing less than £5,000, the discounts range from 25 per cent for more minor issues to 100 per cent for serious cases. The behaviour of the person who engaged in the practice, its impact on the resident and the time that has elapsed must all be taken into account when deciding how serious it is

The remedies available to residents under the CPRs are only available if:

- an aggressive practice or misleading action has taken place. The remedies don't apply where there is a misleading omission or a breach of your general duty to trade fairly, for example:
  - the resident has entered into a contract with you for your services, or makes a payment to you for your services, even if they haven't signed a contract with you. See 'Trading fairly: an

introduction' later in this guidance for more information about taking payments before assessment, or offering the resident a place

- the misleading action or aggressive practice was a significant factor in the resident's decision to enter into a contract

Professional diligence means the standard of special skill and care that you may reasonably be expected to exercise towards your residents and their representatives, in line with honest market practice and good faith in your sector. Sector-specific laws, regulations and the standards or guidance published or enforced by sector regulators may inform the standard of professional diligence that you are expected to meet.

## When a resident can claim damages

A resident may also be able to claim damages where they have suffered financial losses as a result of your infringement of the CPRs. These damages may include compensation for any alarm, distress and physical inconvenience or discomfort, caused by a misleading or aggressive practice.

### **The CMA says...**

When considering whether a practice infringes the CPRs, it is important (and relevant under the CPRs) to remember that you are dealing with people who are especially vulnerable due to their age, illness and, in the case of their representatives, under significant emotional pressures or distress.

[< Introduction](#)

[> Consumer Rights Act 2015](#)

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