

Compliant Communications: Know the Laws That Govern Phone Calls, Faxes, and Emails

Prepared for



American Staffing Association

Aug. 12, 2019

By

Daniel S. Blynn

Partner

Venable LLP

dsblynn@venable.com

202-344-4619

Annie H. Lee

Counsel

Venable LLP

ahlee@venable.com

212-370-6292

Compliant Communications: Know the Laws That Govern Phone Calls, Faxes, and Emails

The staffing business requires nonstop communication—with candidates, clients, and prospects. But before you dial or click the send button, make sure you're abiding by the law.

The Telephone Consumer Protection Act ("TCPA") regulates calls, text messages, and faxes. The Telemarketing Sales Rule ("TSR") regulates calls and text messages. And the CAN-SPAM Act regulates commercial email messages. The TCPA is enforced by the Federal Communications Commission ("FCC") and through private lawsuits, including class actions, while the TSR and CAN-SPAM Act are enforced generally by the Federal Trade Commission ("FTC"). Text messages are typically considered to be synonymous with "calls" under both the TCPA and TSR.

These rules fit atop myriad state telemarketing and do-not-call laws, some of which have similar operable definitions to the federal rules. Numerous petitions have been filed with the FCC asking that these state laws be preempted, but the FCC has ignored these requests for years.

Fortunately for staffing professionals, many of their communications with potential job candidates are not subject to the TCPA's and TSR's do-not-call restrictions, and such communications are typically subject to the less onerous autodialer and prerecorded message provisions of the two laws.

What Is the Purpose of the Call?

The TCPA imposes different restrictions on calls depending on the purpose of the call. Calls that are "telephone solicitations" or "outbound telephone calls" are subject to more restrictions than calls that do not fit these definitions. It bears noting that, while the TCPA generally applies to any type of call, the TSR (as its name suggests) applies only to "telemarketing" calls.

The TCPA defines a telephone solicitation as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." The TSR defines an outbound call as "a telephone call initiated by a telemarketer to induce the purchase of goods or services." For this article, we will refer to both as "**telemarketing**."

It has always been fairly clear that calls to job seekers are not telemarketing because there is no sale of a good or service involved, and both the FTC and FCC have provided express guidance on this point as well. For example, the FTC issued a letter explaining that its rules do not apply to calls that "do not ask the people you call to make a purchase or pay a fee," such as staffing calls.

In a letter to a firm that is a "recruiting company that calls consumers to offer them employment opportunities," the FCC explained, "If you do not ask people you call to make a purchase or pay a fee, then your calls would not be subject to [the do-not-call rules]."

In response to a petition from the same firm, the FCC included a footnote in a regulatory decision stating that "a recruiter calling to discuss potential employment or service in the military with a consumer is not making a 'telephone solicitation' to the extent the called party will not be asked during or after the call to purchase, rent, or invest in property, goods, or services." Courts are in

accord and have concluded, time and time again, that staffing and recruitment calls are not solicitations under the TCPA.

Thus, calls to job candidates (including initial calls to schedule screening interviews and later calls when positions become available) are not “telemarketing.” We will refer to these as “**staffing**” calls. As noted below, staffing calls are also generally subject to the lower level of simple prior express consent necessary for a staffing company to make autodialed staffing calls and/or calls that deliver prerecorded messages to cellphones (rather than the heightened prior express **written** consent requirement for autodialed and/or prerecorded message telemarketing calls to cellphones).

However, it is important to remember that calls to sell career placement services to individuals are telemarketing. For example, a call to provide counseling services or to edit a résumé would be covered if the person you are calling will be paying for those services. And mixed messages, or so-called “dual purpose” calls (i.e., staffing calls that also include a marketing message), will often be considered to be telemarketing under the TCPA and TSR.

With that background on distinguishing **telemarketing** from **staffing** calls, we now turn to the rules that apply to different kinds of calls.

How Are the Calls Made?

Calls to Businesses: Calls to businesses’ landlines are exempt from the do-not-call rules. Thus, calls to a client to offer your staffing firm’s services are not subject to the rules. Note that the FTC amended the TSR to clarify that this exemption extends only to calls inducing a sale or contribution from a business, and not to calls inducing a sale or contribution from individuals employed by the business. This was done to deter any attempts to circumvent the do-not-call registry by soliciting employees at their places of business. Also note that restrictions on calls to cellphones (see below) generally apply regardless of whether the cellphone belongs to an individual or a business. It is best to call business landlines to avoid issues with cellphones.

Live Calls to Landlines: Both the TSR and TCPA prohibit companies from placing telephone solicitation calls to those on the do-not-call list, unless an exemption applies. Other calls, such as traditional staffing calls, are not subject to this requirement because they are not considered “telemarketing.” The do-not-call rules apply regardless of the type of calling equipment used; however, keep in mind that if you place a telemarketing call to a landline that delivers a prerecorded message, you will need prior express written consent no matter what (as discussed in more detail below).

Autodialed Calls to Cellphones: The TCPA defines “autodialer” as equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers. Despite this definition, the FCC and the courts have taken a broad view of “autodialer” and consider the term to include any automated or computerized device that does not require a certain level of human intervention to place calls. Predictive dialers may be held to be autodialers if challenged, depending on the court. However, as courts recently have confirmed, there is a “significant fog of uncertainty” as to what is and is not an autodialer under the TCPA. Proceedings remain ongoing at the FCC to clarify the autodialer definition.

Calls placed to cellphones using an autodialer (whether the autodialing functionality is actually used to place the call, or the call is dialed manually using a device that also has the present capacity to autodial) require consent from the called party. As long as the content of the calls is not for telemarketing (e.g., staffing calls), then consent may be obtained orally. If a candidate submits a resume or fills out a job application with his or her cellphone number written on it, then this should be sufficient to constitute “prior express consent” to receive job-related calls because it is clearly that person’s expectation that, by providing the number, he or she will receive calls related to employment opportunities. The key to obtaining prior express consent, however, is that the candidate provide you with his or her telephone number voluntarily; you cannot find a candidate’s number, for example, through a directory and legally have obtained his or her prior express consent under the TCPA.

“Prior express **written** consent” is required to call or text a cellphone for **telemarketing purposes** using an autodialer. The prior express written consent requirements are described below. But again, these requirements generally are not applicable to the types of calls placed by staffing firms to candidates, as long as the call is offering a job and not selling a service.

Manually-Dialed Calls to Cellphones: If a company manually dials calls to cellphones—using a device that does not have the capacity to autodial—then no special consent is needed (assuming that it does not leave a prerecorded message). If the call is made for staffing purposes, nothing further is needed; if it is a telephone solicitation, then the do-not-call list must be checked.

Prerecorded Message Calls to Landlines or Cellphones: The TCPA also prohibits making prerecorded message calls (commonly called “robocalls,” although that is not a defined term under either the TCPA or TSR) to landlines and cellphones without express consent. If the calls are for telemarketing purposes, then prior express **written** consent is required.

“Prior express written consent” is a defined term in the TCPA (and subsumes the TSR’s analogous “express agreement, in writing” requirement) meaning a written agreement bearing (1) the signature of the person called (either traditional “wet” signature or an electronic/digital one that passes muster under the federal E-SIGN Act) that clearly authorizes the seller to deliver or cause to be delivered to the consumer telemarketing calls or text messages; and (2) the telephone number to which the consumer authorizes such telemarketing calls or text messages to be delivered. If the seller utilizes an autodialer and/or prerecorded message to place the telemarketing call or send the marketing text message to a cellphone or residential landline, then the written agreement with the consumer must also clearly and conspicuously disclose both that (a) the telemarketing call or text message may be delivered using an autodialer and/or prerecorded message, and (b) the consumer is not required to provide his or her consent as a condition of purchasing any goods or services.

For non-telemarketing robocalls to landlines (e.g., staffing calls), no consent is needed. For non-telemarketing robocalls to cellphones, prior express consent (as discussed above) is needed.

Text Messages to Cellphones: The FCC and FTC view text messages the same as a “call” under the TCPA and TSR, respectively. Therefore, prior express consent is required before sending an autodialed text message. If a staffing text is sent manually and without using an autodialer, no consent is needed. If the text message is for telemarketing purposes, then consent must be in writing. Other text messages do not require written consent. In addition, the FCC has recognized a limited

subset of would-be marketing texts—those sent in response to a consumer-initiated text message—that do not require formal consent. More specifically, these messages must be made in immediate response to a consumer-initiated text request for a specific response via text, and not include any additional marketing. Further, a company may only send a single text back in response (although there are methods of using that one-time responsive text as a means to obtain prior express written consent for future text messages). Nonetheless, as a best practice (if you will be communicating with potential employees by text message) you should include a clear statement that the person consents to receive text messages when the person provides his or her cellphone number.

Whose Number Is It?

Finally, the FCC has discussed what happens when a person changes numbers. For example, an applicant provides a cellphone number on a resume, changes numbers, and you then call the cell number provided with an autodialer. The question for such a call is whether you have violated the prohibition on placing an autodialed call to a cellphone to a person who has not given you consent.

In a 2015 order, the FCC said that callers in this situation (which would include text messages) must take steps to ensure that they are calling the right person. Suggestions from the FCC included:

- (1) Providing an interactive opt-out mechanism in all artificial—or prerecorded—voice calls so that recipients may easily report a reassigned or wrong number;
- (2) Implementing procedures for recording wrong number reports received by customer service representatives placing outbound calls;
- (3) Implementing processes for allowing customer service agents to record new phone numbers when receiving calls from customers;
- (4) Periodically sending an email or mail request to the consumer to update his or her contact information;
- (5) Utilizing an autodialer’s and/or a live caller’s ability to recognize “triple tones” that identify and record disconnected numbers;
- (6) Establishing policies for determining whether a number has been reassigned if there has been no response to a “two-way” call after a period of attempting to contact a consumer; and
- (7) Enabling recipients to update contact information by responding to any text message they receive.

In that same 2015 order, the FCC also established a safe harbor, which gave companies one free pass at calling or texting a reassigned number. In 2018, however, the DC Circuit vacated the FCC’s reassigned number liability conclusions, ruled that this “one-call” safe harbor was arbitrary and capricious, and replaced it with a “reasonable reliance” standard (i.e., if it is reasonable for the caller to rely upon the consent and number provided by the prior subscriber, then the caller should not be held liable for calling a reassigned number). For example, if a caller has no knowledge of a

reassignment, the caller's continued reliance on the prior subscriber's consent would be deemed "reasonable" under this standard.

While the "reasonable reliance" standard has been confirmed by the FCC and some courts, other courts have been hesitant to apply it. Hope is on the way, however. In December 2018, the FCC announced that it will create a reassigned numbers database to enable callers to verify the status of a phone number before placing a call. Much like the National Do Not Call Registry, if a caller subscribes to and scrubs against the reassigned number database, there will be a safe harbor from liability for calls placed to a reassigned number that does not appear within the database. It will take some time for the database to get up and running—but when it does, it will provide some much needed clarity to businesses.

More information about the TCPA can be found at fcc.gov; more information about the TSR can be found at fcc.gov.

I Fax You Because I Know You

The laws governing faxes generally apply to faxes that contain "unsolicited advertisements," defined as any material advertising the commercial availability or quality of any property, goods, or services transmitted to any person without the person's prior express invitation or permission.

A fax to a business advertising a staffing company's services would be an unsolicited advertisement covered by the rules.

But at least one federal court has held that a fax offering a person a job is not an unsolicited advertisement. And given the similarity in the definitions of "unsolicited advertisement" and "telephone solicitation," it is likely that the FCC would agree with this court's ruling.

Also note that under the Junk Fax Prevention Act, a company can send faxes containing unsolicited advertisements to those with whom it has an established business relationship. An "established business relationship" is defined to mean a prior or existing relationship between two businesses, or a business and a person, based on an inquiry about or sale of goods or services. Neither the act nor the rules establish a time limit on the duration of the business relationship.

When sending a fax pursuant to this "established business relationship" exception, the rules require that the fax number must be obtained directly from the recipient or from the recipient's internet site, directory, or advertisement. The rules also require an opt-out notice to be included on all unsolicited faxes that contain advertisements. The notice must appear on the first page of the fax and specify a cost-free method of opting out—such as a website, email address, or toll-free or local telephone or fax number. Companies have 30 days to honor an opt-out request, and such a request trumps an established business relationship.

More information about the Junk Fax Prevention Act can be found at fcc.gov.

Canning Spam

The federal anti-spam law, the CAN-SPAM Act, generally applies to messages “the primary purpose of which is the advertisement or promotion of a commercial product or service (including content on an internet website operated for a commercial purpose).”

Like the court’s decision in the fax case mentioned previously, an offer of a specific job to a candidate likely is not advertising a commercial product or service.

An email message advertising your staffing firm’s services to a potential client, however, is covered by the CAN-SPAM Act. The law requires commercial electronic mail to include the physical mailing address of the sender and allow recipients to opt out of receiving further email. The opt-out request must be honored within 10 days. In addition, the header information in the email message, including the “to” and “from” addresses, must not be false or misleading, and the subject line must not be deceptive.

The FTC has crafted a number of rules to determine when a message is commercial; when it is a transactional message, such as an account statement (which is exempt from the opt-out requirements); and how to classify a dual-purpose message (for example, a message that advertises both a specific job and career counseling services).

These rules, which are fairly complex, take into account the expectations of the recipient created by the subject line and the location of the commercial material in the body of the email. The rules can be found on the FTC’s website: ftc.gov.

The paper is intended as information and not legal advice. Readers requiring legal or other advice regarding the matters discussed in the paper should consult with experienced legal counsel.