



# Telemarketing and Staffing Calls— **Know the Difference**

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In this scenario, **a man threatens to sue a recruiter for calling his cellphone without his consent**, under the Telephone Consumer Protection Act's autodialer and do-not-call rules. Do these rules apply to staffing companies? **Will the recruiter and her firm be held liable?**

**L**aura Bell is a top recruiter at Aberdeen, MS-based Work First Staffing. While making calls to candidates, Bell calls the number of Todd Smith, who submitted his résumé to Work First Staffing a couple years prior.

Unfortunately, although Bell dialed the correct number, she reached Mike Buford. Buford complains that he has not given Bell permission to call him, and threatens to sue.

Bell wonders about her firm's potential liability and turns to her most trusted source on laws affecting the industry—the American Staffing Association.

She learns that the Telephone Consumer Protection Act regulates calls, text messages, and faxes; the Telemarketing Sales Rule

regulates calls and text messages; and the CAN-SPAM Act regulates commercial email messages. The TCPA is enforced by the Federal Communications Commission and through private lawsuits, including class actions, while the TSR and CAN-SPAM Act are enforced generally by the Federal Trade Commission.

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

## **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.

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.” We will refer to both as “telemarketing.”

It always has 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. In a letter to a “recruiting company,” 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].” Courts also have concluded that staffing and recruitment calls are not solicitations under the TCPA.

Thus, calls to job candidates are not “telemarketing.” We will refer to these as “staffing” calls. Because Bell was calling a candidate to talk about employment opportunities and not to sell anything, her call would be considered a staffing call—and thus not subject to the do-not-call rules. 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 a fee is charged.

## How Are the Calls Made?

**Autodialed Calls to Cellphones:** Calls placed to cellphones using an autodialer 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 someone submits a résumé or fills out a job

application that includes his or her cellphone number, this should be sufficient to constitute “prior express consent” to receive job-related calls, because it is that person’s expectation that he or she will receive calls related to employment opportunities. The key to obtaining prior express consent, however, is that the candidate provide the telephone number voluntarily; you cannot find a candidate’s number, for example, through a directory.

### 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”) to landlines and cellphones without express consent. If the calls are for telemarketing purposes, then prior *written* consent is required.

“Prior express written consent” means a written agreement bearing (1) the signature of the person called that clearly authorizes 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 nontelemarketing robocalls to landlines (e.g., staffing calls), no consent is needed. For nontelemarketing robocalls to cellphones, prior express consent (as discussed above) is needed.

Since Bell manually dialed Buford’s cellphone, and the call was staffing-related, no consent was required.

## Whose Number Is It?

Finally, the FCC has discussed what happens when a person changes numbers. The FCC’s guidance is relevant in cases where an autodialer or prerecorded message is used to place a call to a person who has not given consent—so Bell is again safe because she called Buford manually. But what if she used an autodialer and/or prerecorded message? Callers in this situation (which would include text messages) must take steps to ensure that they are calling the right person, based on suggestions from the FCC. The FCC had also established a safe harbor which gave companies one free pass at calling a reassigned number. In 2018, however, the DC Circuit 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).

While the “reasonable reliance” standard has been confirmed by the FCC and some courts, other courts have been hesitant to apply it. But in 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. If a caller 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.

More information about the laws, as well as guidance on faxes and email messages, is available through an updated ASA issue paper, “Know the Laws That Govern Phone Calls, Faxes, and Emails,” at [americanstaffing.net/legalarticles](http://americanstaffing.net/legalarticles). ■

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