Hidden Liability Risks in Business Text Messaging - Aaron Tifft

August 20, 2020

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The Journal Record

https://journalrecord.com/2020/08/19/gavel-to-gavel-hidden-liability-risks-in-business-text-messaging/

If your business sends text messages it is risking penalties of $500 to $1,500 *per message sent*. Failure to learn and comply with the applicable federal law and regulations can expose any business to massive civil liability. This liability can grow exponentially as a business increases its use of text messaging for marketing purposes.

The Telephone Consumer Protection Act ("TCPA") restricts how businesses can communicate via telephone and text message. Specifically, it mandates that a business obtain specific forms of consent from an individual before sending them marketing or informational text messages.

For marketing texts, a business must obtain ***prior express written consent*** to communicate via text messages. The consent must be written, signed by the person who received the text message, and contain specific disclosures presented in a "clear and conspicuous" fashion. These disclosures must discuss the technology used to send the messages and inform the individual that consent is not necessary to purchase goods or services.

Because of the highly specific consent requirements, the consent or "opt-in" language used by many businesses and organizations is insufficient under the TCPA. Numerous businesses obtaining generic text messaging consent in good faith may unknowingly be liable for improperly sending thousands of messages.

The TCPA provides that a business is subject to a $500 fine *per message sent* without proper consent. This penalty increases to $1,500 per message if a person can show the business sent the messages knowingly and willfully in violation of the TCPA.

The penalties are not limited to government enforcement. Private plaintiffs are empowered to seek relief under the TCPA and often do so by filing suit and asserting class action claims against a business defendant. These per message penalties and the plaintiff's attorneys' fees—asserted by a class of thousands—can balloon into fatal levels of liability and draw honest businesses into "bet-the-company litigation."

It is crucial that all businesses which use text messaging obtain the guidance of legal counsel experienced with the TCPA. How the law and courts define and regulate multiple aspects of the messaging and consent process is constantly in flux. Additionally, TCPA class action lawsuits are being filed at an increasing rate in Oklahoma and around the country. Taking action now to ensure compliance can make your business a less likely target for a class action suit, and help quickly end any litigation if a lawsuit is filed.

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