

News & Insights

Wave of Class Actions Against Cannabis and CBD Companies Under the Federal Telephone Consumer Protection Act (TCPA)

May 5, 2020

Hall Estill Enews

<https://conta.cc/2YDAtmq>

With a rising wave of class actions against cannabis and CBD companies under the federal Telephone Consumer Protection Act (TCPA), any business that communicates with customers using automated text messages should be aware of the TCPA. The TCPA was passed by Congress in 1991 in order to provide a remedy to consumers that receive unsolicited electronic communications from advertisers. Originally the TCPA focused on robo-calling and blast faxes, but now the law and current litigation trends are focused on mass text messaging (although robocalls and faxes are still governed by the TCPA). The cannabis and hemp industry has become a particular target in recent months.

Permitted text messages: In order for your business to legally send any consumer a text message marketing your products or services, that person must have given you their “prior express written consent” to send such messages. Consent—or “opting-in”—requires that (1) you request permission from the consumer to send them automated or autodialed telemarketing and advertising text messages to the phone number that the consumer has provided to you, (2) you advise the consumer that their consent is not a condition to them purchasing any goods or services from you, and (3) the consumer be advised that they can opt-out at any time from receiving messages after they have consented by replying STOP to a text message. These disclosures must be clear and conspicuous. Also, it is critical that your business keep an accurate record of every communication sent along with any opt-in or opt-out that it receives from a consumer during the course of the business relationship.

Potential penalties: The failure to comply with the TCPA can lead to potentially devastating consequences, including a statutory fine of \$500 to \$1,500 for each message sent in violation of the statute. Even more problematically, an aggrieved consumer can seek to certify a class action of all consumers who received illegal texts (or calls) from your business. For many businesses, the potential liability can easily run into nine-figure exposure.

Exceptions: There are exceptions to the TCPA for certain emergency calls, calls that are purely informational in content only and for not-for-profits that use text messages to communicate with their clients or constituents. The TCPA likewise does not apply to e-mail, and it only applies to communications

using automation or an auto-dialer capable of sending messages using random or sequential number generation. Telemarketing or advertising calls or texts sent by a human to a single consumer are not generally actionable under the TPCA.

Further resources: If your business advertises or markets to consumers using automated or auto-dialed text messages and you have any concerns or questions regarding whether your business is in compliance with the TCPA, please contact John T. Richer, who has significant expertise and experience in advising clients on TCPA compliance and in defending clients in class action lawsuits filed by aggrieved consumers.

If you need any assistance or have any questions, please contact your Hall Estill Attorney directly.

Practices

- Cannabis Law