TCPA GUIDE TO THE CORONAVIRUS

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The current, novel coronavirus pandemic that is spreading COVID-19 is causing massive upheaval worldwide, as many countries institute various measures—from encouraging social distancing to enforcing mandatory quarantines—to attempt to reduce the spread of the disease. For telemarketers, this is creating uncertainty as to how regulations such as the Telephone Consumer Protection Act (TCPA) and state laws dictate what sorts of calls are allowed during such a period of emergency. Many telemarketers are wondering about what sorts of messages they can convey to their employees and to consumers about the coronavirus, or even how normal business should proceed. This guide will take you through the relevant regulations and help you answer some questions that you may have about telemarketing during this pandemic.

Content Matters

A useful framework for determining whether or not certain calls are allowed under the TCPA—during normal circumstances as well as emergencies—is to think in terms of exemptions. As a general rule, the main exemption to TCPA prohibitions is consent. Calls that meet the proper standards for consent are allowed. Of course, those standards vary based on such factors as calling method (e.g. manually dialed vs autodialed), who is being called (e.g. B2B vs. B2C), what sort of number is being called (e.g. landline vs. wireless), and, most importantly, call content.

Emergency Purposes Exemption

The TCPA's restriction on the use of an automatic telephone dialing systems (ATDS) contains certain specific exemptions, including calls initiated for emergency purposes, which are defined as "calls made necessary in any situation affecting the health and safety of consumers." This does not mean that all health-related calls are allowed. The distinction between informational and non-informational calls matters, as well.

FCC TCPA Declaratory Ruling on COVID-19

On March 20, 2020, the Federal Communications Commission (FCC) issued a Declaratory Ruling regarding COVID-19 and the "emergency purposes" exemption to the TCPA. In this ruling, the FCC interprets this exemption as narrowly as possible, applying it only to calls made by hospitals, health care providers, state and local health officials, and other government officials."

Calls That Are Exempt

The ruling sets forth two specific conditions for claiming the exemption:

"First, the caller must be from a hospital, or be a health care provider, state or local health official, or other government official as well as a person under the express direction of such an organization and acting on its behalf. Second, the content of the call must be solely informational, made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak."

Calls That Are NOT Exempt

The FCC specifically notes that sales and marketing calls—even those related to the COVID-19 emergency—do not qualify for the exemption:

"[C]alls that contain advertising or telemarketing of services do not constitute calls made for an 'emergency purpose' (e.g., advertising a commercial grocery delivery service, or selling or promoting health insurance, cleaning services, or home test kits). Calls made to collect debt, even if such debt arises from related health care treatment, are not made for an 'emergency purpose,' as those calls are not time-sensitive, do not 'affect the health and safety of consumers,' and are not directly related to an imminent health or safety risk. Such debt collection, advertising, or telemarketing automated calls require the prior express consent of the called party."

State-Level Regulations

In addition to the TCPA, two states have their own regulations that are relevant to the present circumstances. Both New York and Louisiana prohibit telemarketing during declared states of emergency, albeit with exemptions (see the "Crisis Checklist" on the last page of this guide for details).

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Collections

- Nevada's governor Steve Sisolak ordered all non-essential businesses to close for 30 days—beginning on March 17,2020—to fight the spread of the virus. A Deputy Commissioner of the Nevada Department of Business and Industry has subsequently recommended that all debt collectors licensed in the state cease operations during this time.
- In a similar action, the State of New York and the City of Chicago have shut down their collection operations. For the moment, private collectors are free to operate in those areas as normal.
- California governor Gavin Newsom and Pennsylvania governor Tom Wolf have issued orders closing non-essential businesses in their states. Both orders allow for teleworking and work-from-home arrangements, meaning that collections work may continue if it is done remotely.
- New York governor Andrew Cuomo issued a similar order that contains a provision explicitly instructs collections agencies to institute remote work policies "to the maximum extent possible."
- New Jersey governor Phil Murphy has also issued a statewide "Stay at Home" order. It does not specifically mention collections but it stands to reason that its mandate "that all businesses or non-profits, wherever practicable, must accommodate their workforce for telework or work-from-home arrangements" would apply to the collections industry.
- The Attorney General of Massachusetts released an emergency addendum to regulations restricting debt collection which place a prohibition on debt collection telephone calls, new collection lawsuits, initiating garnishment and other actions for an effective period of 90 days from March 27, 2020.

Calling During an Emergency

So after all of that, you may still be wondering whether or not you are able to make calls during the coronavirus crisis. The best way to determine this would be to ask and answer a series of questions:

Who am I calling? Employees? Existing customers? Consumers for whom I have express written consent to contact?

What is the purpose of my call? Is it related to the emergency? Is it purely informational or does it have some sort of marketing purpose (i.e. selling coronavirus supplies)?

Where do the called parties live? Do they live in New York or Louisiana? Do they live in another region that may not have specific laws regulating telemarketing during emergencies but have still been hit particularly hard by the crisis?

Each company needs to answer these questions and make these determinations for themselves before making any calls under such exigent circumstances.

Beyond Regulations

It is important to keep in mind that there are considerations beyond potential exposure to lawsuits and regulatory violations. These are extraordinary circumstances for nearly the entire world population. People are rightfully worried about their health and the well-being of their loved ones. They are possibly enduring some form of voluntary or mandatory quarantine. Many have lost or are at risk of losing their jobs. There is a distinct and palpable uncertainty that permeates this crisis. Nobody can say for sure how long it will last. People are likely not interested in receiving sales calls under such circumstances. You could risk serious damage to your brand by conducting technically legal but tone-deaf marketing campaigns at a time such as this.

Conclusion

One of the most salient features of this historical moment is the universality of the dangers of the novel coronavirus and COVID-19. Everybody is dealing with the risks and potential consequences of this pandemic. Telemarketers would be well served to bear this in mind when determining their business strategies during this time. Before you conduct any campaigns or make any calls, stop to consider the content of those calls, the locations of the called parties, and the appropriateness of the calls. We will all get through this but it is important to remember that this is not a time for business as usual.

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CRISIS CHECKLIST FOR CALL CENTERS

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The experts at Contact Center Compliance are here to help you continue to run your business during times of disaster. We have compiled a checklist to help you navigate the unusual circumstances that arise when conducting business during a crisis. Use it alongside your company's internal crisis plan to make sure your team stays on track.

Called parties are hyper-aware of your company and your possible mistakes.

- ☐ Comply with the Do Not Call List
- ☐ Maintain your internal Do Not Call list
- ☐ Comply with state-level Do Not Call regulations

Be aware of people you may be calling in disaster-affected areas and be aware of your legal exemptions.

- ☐ Identify those people in territories operating under states of emergency and remove them from your data
- ☐ Leverage DNC exemptions for established business relationships
- ☐ Track the expiration dates of various declared states of emergency

Call people only within the allowed time based on federal and state laws.

- ☐ Be aware of called party time zones and crisis curfews

Your call center reps may not be performing up to their normal capabilities. They may be distracted and may make mistakes.

- ☐ Review compliance policies with your reps
- ☐ Provide compliance training for all reps

Litigator wolves are waiting for an opportunity to blow your house down.

- ☐ Remove known litigators from your data
- ☐ Identify reassigned phone numbers

Follow TCPA consent best practices and keep meticulous records.

- ☐ Know your consent requirements based on line type
- ☐ Ensure that consent for the called party meets the standards for your dialing technology
- ☐ Identify wireless and VoIP numbers

Louisiana

Exemptions - Louisiana's exemptions to the prohibition on solicitation calls during a declared emergency include solicitations in response to an express request, solicitations in connection with an existing debt or contract, existing business relationship calls, non-profit, polling, political activity, and appointment setting.

B2B - Louisiana only prohibits telephone solicitation calls to a "residential telephonic subscriber."

New York

Exemptions - New York's prohibition on telemarketing calls during a declared state of emergency exempts calls made with consent or an established business relationship. Political & survey calls are also exempt because the restriction only applies to an" unsolicited telemarketing sales call", which is a call that is for the purpose of inducing payment or the exchange of any other consideration for any goods or services.

B2B - Both B2C and B2B calls are included in the prohibition because of the state's definition of "person."

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