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TCPA for the Cannabis Industry

A guide to TCPA risks face by the emerging business sector

Overview

Peter Tosh sang, "Legalize it, don't criticize it." In the United States, over the last few years, there has been, indeed, an ongoing process of legalizing "it"—with "it" meaning the use of marijuana for medical or recreational purposes. However, this emerging industry has found itself facing another legal hurdle, one relating specifically to its marketing practices: the Telephone Consumer Protection Act (TCPA).

Recreational marijuana use has been legalized in 11 states and medical marijuana use has been decriminalized to one extent or another in more than 20 additional states. But marijuana is still classified as schedule I substance under the Controlled Substances Act of 1970 and is illegal for any purpose at the federal level.

The legality of the cannabis industry varies wildly from state to state, and even between localities within individual states. Many cannabis companies spend considerable time and resources navigating this confusing legal and regulatory landscape. However, they often fail to understand another risky, similarly complex legal infrastructure: the world of telemarketing regulations. And the litigators are aware of this vulnerability, with the number of TCPA lawsuits against cannabis companies increasing noticeably over the last several months.

This guide will cover the unique TCPA risks faced by cannabis businesses, explore some relevant case studies, and provide some best practices.

Did You Know?
According to a recent report, the global legal marijuana market is expected to grow to the size of $73.6 billion dollars by 2027.

Risks

As members of a brand new field that has only started to emerge as a legitimate industry over the last few years, cannabis businesses face the unique challenge of building customer bases from scratch. Text message marketing is an important strategy that many cannabis companies use in this endeavor. And while it is certainly a valuable tool for customer outreach, it is also fraught with risks.

Vicarious Liability

It is a common practice for cannabis companies to market their products through the use of independent sales forces and lead aggregator websites. While these can be great sources for obtaining fresh leads, they can also be a trap for TCPA litigation.

If these third-party agents violate the TCPA, your business can be found vicariously liable for any resulting damages. Examples of possible violations include the third-party agents calling consumers without the proper consent, making calls or texts on your behalf using an automatic telephone dialing system or prerecorded voice, and not honoring opt-out requests.

When you don't fully control the strategies that lead generators use to conduct their campaigns, the risk of vicarious liability can be enormous. TCPA violations incurred by independent agents and lead generators acting on behalf of a business will draw that business into any related lawsuits.

Definition

Vicarious liability is defined as an attachment of responsibility to a party for harm or damages caused by another party in a lawsuit or civil action.

Case Study

A California company that specializes in customer relationship management for cannabis companies was sued for alleged TCPA violations committed by one of its clients. The company argued that it provides its clients with TCPA-compliant privacy policies and should not be held liable if the clients go outside those practices. A judge disagreed and ruled that they could be held liable for those alleged violations.

Hot Tip

Every caller should vet vendors and servicers thoroughly and never ignore non-compliant practices.

Consent

The most essential rule for avoiding TCPA violations is to obtain prior express written consent from the called party before placing marketing calls, text messages, or faxes.

As defined by the Federal Communications Commission (FCC), prior express written consent is a written agreement between the caller and the receiver of the call that clearly authorizes the caller, among other things, to deliver "advertisements or telemarketing messages using an automatic telephone dialing system or an artificial pre-recorded voice." This type of consent must specify the phone number to be called and must also include the receiver's written or electronic signature, which may be a signed piece of paper, or simply a button press affirming the agreement. You must also disclose that consent is not a condition of purchase.

Did You Know?
The TCPA does not offer explicit guidance on revocation of consent, but it is best practice to recognize and honor all consent revocation requests immediately.

Consent is associated with the called party, not the phone number. If a phone number is reassigned from one person to another, any consent previously acquired for that number becomes invalid, and any calls made to that number could be TCPA violations. Any company that makes a significant volume of marketing calls will need a strategy for dealing with reassigned numbers and their associated risks.

Case Study
A Nevada CBD dispensary faces a class action for alleged TCPA violations stemming from its marketing practices. The plaintiff alleges that the dispensary used an ATDS to send text messages marketing their products and did so without the express written consent of those who received the messages. The complaint includes a potential enormous (and costly) class of "All persons throughout the United States (1) to whom Defendant delivered, or caused to be delivered, a text message, (2) directed to a number assigned to a cellular telephone service, (3) by using an automatic telephone dialing system, (4) within four years preceding the date of this complaint through the date of class certification."

Best Practices

Don't call known litigators and serial plaintiffs
The easiest way to avoid a lawsuit is to not contact the people who are most likely to sue. TCPA litigators and professional plaintiffs infiltrate your data by filling forms on your lead generation websites and finding ways to get independent agents to contact them. The best defense is to remove these predatory individuals from all calling lists before reaching out.

Suppress numbers against the Do Not Call list
Telemarketers are required to suppress phone numbers on the National Do Not Call (DNC) Registry. Some states have their own local DNC lists as well, in addition to the federal list.

Check for reassigned numbers
With approximately 100,000 mobile phone numbers reassigned by wireless carriers every day, it is absolutely essential to check your data for reassigned numbers. Phone numbers may change, but the risk of TCPA liability is inevitable.

Get a Third Party Compliance Provider
When you're in a high-risk category like the cannabis industry, it is not enough to just have legal counsel. It is critical to have a TCPA compliance provider on your side. You will save money, headaches and prevent brand damage.

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