

Don't Text on Me! Avoiding TCPA Liability for Texting Drivers, Customers and Employees in the COVID Era

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Even *prior* to the COVID era, the transportation and logistics industry was seeing an increased prevalence of instantaneous technological contact, via texts, for all types of logistics protocols and practices. Transportation and logistics companies were (and still are) using text messaging to reach out to their employees, drivers and recruits, and also to initiate other communications related to shipment status, freight matching and load brokering. Unfortunately, many transportation and logistics companies, as they embark upon such a technological evolution, are unaware that there is a comprehensive and rigorous federal statutory regime, the Telephone Consumer Protection Act 47 U.S.C. § 227 ("TCPA"), that governs the methodology for such communications, and also contains significant penalties for improper texting in these contexts.

Since the outbreak of COVID-19, businesses have been sending more text messages as a means to communicate with prospective and current employees or customers. However, each "sent" text message falls within the ambit of the TCPA, which protects call and text recipients from receiving unwanted and unsolicited communications. Because text messages are regulated by the TCPA and are a normal part of business (more and more each day), logistics companies need to take the appropriate measures to comply with the law.

Compliance and liability depend upon a company's method of text messaging and the content of the text message. For example, businesses may contract with a third-party to send text messages; send text messages through the use of campaigns; or use a mobile application to send text messages. Liability also turns upon whether a business obtained prior consent from the recipient, since the TCPA exempts text message made with such consent.

So, one of the critical thresholds points in ensuring prevention of liability for unwanted text messages, is that the transportation companies should request clear, affirmative *consent* to be contacted. A documented consent process can limit and prevent TCPA liability. Commensurately, a *failure* to have a clear consent policy can result in lengthy TCPA litigation, and statutory liability. It is also important to design and implement a compliance program, including policies and procedures regarding text contacts, message content, "do not call"/contact lists, cross referencing of those lists, and training and enforcement relating to the TCPA itself.

The TCPA also imposes certain restrictions upon using certain specific telephonic technology. The most regulated types of calls are those with automatic telephone dialing systems (ATDS). Those are systems that *randomly*

generate sequential telephone numbers to call, with no human intervention, and no selected sequenced list of numbers. Companies wishing to use automated technology for text messages should thus be careful to ensure that they are not inadvertently using a technology that could be categorized as an ATDS in their jurisdiction. The logistics company should keep its own “do not call” list for specific requests that have been made to it for no further contact. There are also certain temporal restrictions as to *when* such texts can be sent and contact made, typically within the confines of the business day.

A potential plaintiff may assert a variety of TCPA violation theories in a lawsuit. These lawsuits can be costly. It is therefore important to understand how to best comply with the TCPA when communicating with prospective and current employees, drivers, recruits or customers, via text message.

For more information on TCPA compliance and defenses, contact **Eric L. Zalud** at ezalud@beneschlaw.com or (216) 363-4178, or **Laura E. Kogan** at lkogan@beneschlaw.com or (216) 363-4518.