

Protecting Your Cannabis Business from the Trappings of the Telephone Consumer Protection Act

Cannabis Business Legal News

By Darren Grady and John Ochoa on August 18, 2021

The emerging cannabis industry in Illinois has plenty of regulatory issues to contend with including labeling, packaging, destruction and disposal of cannabis, security, inventory, and recordkeeping just to name a few. Dispensaries and other cannabis related businesses should take care not to overlook another highly-regulated area—text message and telephone marketing.

The Telephone Consumer Protection Act (TCPA) regulates how companies can utilize telephone calls and text messages as part of their marketing strategies. All companies should take note, as the penalties for violating the statute are severe—it provides for a \$500 penalty per unlawful call or text message, with a possibility that the penalty will increase to \$1,500 for “willful or knowing” violations. To make matters worse, plaintiffs are permitted to bring their claim as class actions. This means that calls or text messages sent to as few as 5,000 phone numbers could be consolidated together into one case, and subject a company to, at a minimum, 2.5 million dollars of liability.

The large amount of damages available under the TCPA means that enterprising plaintiff’s attorneys are constantly on the lookout for new industries to target with class action lawsuits, and the emerging cannabis industry is no exception. Dozens of cannabis dispensaries have been hit with TCPA lawsuits for initiating unsolicited calls and text messages. In just the latest example, a California man sued a Los Angeles based dispensary, Kushism, in federal court in California after receiving two text messages advertising promotions Kushism was offering, including “delivery specials” and a mother’s day promotion. Plaintiff alleged that the text messages were sent using an automatic telephone dialing system, and were sent without his consent. The plaintiff seeks \$1,500 per violation for himself and a proposed class of all persons nationwide who received similar text messages over the last four years.

To protect your cannabis business from being the next target, it is important to understand what the TCPA prohibits, and how to ensure that your marketing strategies comply with the law. There are several main provisions of the TCPA that companies must be aware of:

- First, the TCPA prohibits the transmission of any call or text message made using an automatic telephone dialing system (ATDS) without the prior express consent of the recipient.
- Second, the TCPA prohibits placing calls using an “artificial or pre-recorded voice” without the prior express consent of the recipient.
- Third, companies must ensure they don’t make telemarketing calls or send texts to phone numbers appearing on the National Do Not Call Registry.
- Finally, if any of the calls or text messages placed by a company could be characterized as “telemarketing calls,” the recipient must have provided prior **written** express consent for the call.

Further, it is critical for cannabis businesses, in particular dispensaries, to know the nuanced local laws and regulations and how they may intersect with the TCPA. For instance, in Illinois, pursuant to the Cannabis Regulation and Tax Act (CRTA), in any application for a dispensary, the applicant must acknowledge that, out of concerns for customer confidentiality, the CRTA does not allow a point of sale system to capture personally identifiable information of consumers. Point of sale systems can check customers in as “retail customers,” instead of mandating the collection and storage of personal data. Customers are then allowed to opt in to a system that stores data (which could then potentially be used for marketing) if they would like to participate in any loyalty programs or membership benefits that the dispensary may make available. It is critical that dispensary owners review local cannabis statutes and regulations, such as the CRTA in Illinois, and speak with counsel as to the interplay with the TCPA.

In addition to these provisions, it is also vitally important that dispensaries who outsource some of their marketing efforts understand how their partners obtain consent (if at all), and the equipment and software used for placing calls and sending text messages. The TCPA, and its regulations are constantly being updated and refined by court decisions, so it is important to consult with attorneys well-versed in this area to ensure that your companies’ marketing efforts are in compliance with the law.

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