FCC's Declaratory Ruling on the TCPA's "Emergency Purposes" Exception During COVID-19: Does it apply to Workplace Correspondence?

Article By:

Jason C. Gavejian

Maya Atrakchi

The Telephone Consumer Protection Act ("TCPA") generally prohibits the use of automated dialing equipment or prerecorded voice messages to make calls, send text messages, or send faxes absent prior consent of the called party. This includes calls or texts to cellular phone numbers as well as calls to residential lines. There are limited exceptions to the TCPA's consent requirements, including calls or texts sent for "emergency purposes", meaning calls or texts made necessary in any situation affecting the health and safety of consumers. On March 20, 2020 the Federal Communications Commission ("FCC") published a Declaratory Ruling confirming that the COVID-19 pandemic is an "emergency" that qualifies for the TCPA's "emergency purposes" exception.

FCC History Regarding the TCPA's "Emergency Purposes" Exception

Since the TCPA's enactment in 1991, federal courts and the FCC have interpreted the "emergency purposes" exception narrowly, and guidance has been limited. In 2016 the FCC issued a narrow Declaratory Ruling in Blackboard-Edison on the TCPA's "emergency purposes" exception, highlighting permissible automated calls from schools during "threat situations" affecting the "health and safety of students and faculty". The FCC also clarified in this ruling that utility companies "may make robocalls and send automated texts to their customers concerning matters closely related to the utility service, such as a service outage or warning about potential service interruptions due to severe weather conditions, because their customers *provided consent to receive these calls and texts when they gave their phone numbers to the utility company".* Finally, the FCC noted that the ruling was "tailoring relief to narrow circumstances presented in these petitions…without diluting the TCPA's core consumer protections".

FCC's March 2020 Declaratory Ruling on the COVID-19 Pandemic

Now in its March 2020 Declaratory Ruling, the FCC has again narrowly specified that during the COVID-19 pandemic certain calls and messages qualify for the "emergency purposes" exception under the TCPA. Such calls must meet the following requirements: 1) "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", and 2) "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."

TCPA "Emergency Purposes" Exception and Workplace Correspondence

First, it is worth noting that while common sense would dictate that an employee's provision of their telephone number to the employer should be viewed as consent to receive calls/texts (just as discussed above in *Blackboard-Edison*, where a utility company's customers consented upon provision of their telephone numbers to the company), the TCPA and FCC guidance is silent on whether workplace correspondence are subject to TCPA liability. In at least one case where a claim has been brought against an employer related to the TCPA, the court dismissed the claim finding that the application's language "authorizing [the employer] to collect, use….personal information provided for employment-related purposes" was consent.

Assuming, however, that an employer's automated calls/texts to their employees are subject to the TCPA's consent requirements, the question arises whether safety-related calls/texts made to an employee would qualify under the "emergency purposes" exception.   While this is unclear, given the two FCC Declaratory Rulings discussed above, there is a strong argument that such calls or texts would be considered as for "emergency purposes" and thus would be exempt from the TCPA's consent requirement.   This is particularly true as *Blackboard-Edison* applied the emergency purposes exception not just to students, but also to faculty (employees).

Further in the March 20 Declaratory Ruling the FCC emphasized that "*In the Blackboard-Edison Declaratory Ruling, the Commission made clear that automated calls to wireless numbers made necessary by incidents of imminent danger including 'health risks' affecting health and safety are made for an emergency purpose and do not require prior express consent to be lawful".* Interestingly, while the March 20 Declaratory Ruling is limited to calls made by hospitals, health care providers or health/government officials, this statement seems to indicate that the FCC intended *Blackboard-Edison* to apply more broadly.

Finally, the March 20 Declaratory Ruling also provided examples of inappropriate uses of the emergency purposes exception including calls that contain advertising or telemarketing of services like "advertising a commercial grocery delivery service, or selling or promoting health insurance, cleaning services, or home test kits" as well as "debt collection calls". This sheds some light on when the use of the TCPA's "emergency purposes" exception is appropriate or not generally, and it would seem that safety-related calls to employees, especially in light of the COVID-19 pandemic, would not fall into the category of inappropriate, based on these examples.

Takeaway

These are uncertain times, and of course, the safety and health of employees is critical. To avoid potential risks of a claim under the TCPA (including class actions), employers looking to implement programs to communicate quickly and timely with employees about health and safety risks, including those posed by COVID-19, should assess the applicability of the emergency purposes exception and/or consider obtaining additional consent.

National Law Review, Volume X, Number 113

Source URL:https://natlawreview.com/article/fcc-s-declaratory-ruling-tcpa-s-emergency-purposes-exception-during-covid-19-does-it