

# Court Finds Communications Regarding Employment Opportunity Not Advertisement or Telemarketing Under the TCPA

Article By:

Nikku D. Khalifian

---

The TCPA's regulation of automated telephone calls differ based upon the purpose of the call and/or the content of the message communicated. Specifically, the TCPA imposes heightened requirements for calls that are deemed "telemarketing", "solicitations", or an "advertisement". One of the most important distinctions amongst those rules concerns consent: calls that are for telemarketing or solicitations purposes require heightened prior express *written* consent, while informational calls do not require consent be conveyed in writing.

Those distinctions commonly lead to legal disputes over whether the content of messages crosses the line from informational to advertising/telemarketing/soliciting. And in the context of employment recruiting, a new case helps keeps messages regarding employment opportunities on the informational side of that line.

In *Gerrard v. Acara Solutions*, No. 18-cv-1041-JLS-LGF, 2020 U.S. Dist. LEXIS 114317 (W.D. N.Y. June 30, 2020), Plaintiff alleged that Defendant used an ATDS to send more than 240 unsolicited, autodialed text messages to her cellular phone, 210 of which she received on a single day. The majority of the text messages, according to Plaintiff, contained the same message regarding a job opening with Defendant.

The Court explained, when the TCPA and regulations promulgated by the FCC are read together, the question is whether Defendant initiated, or caused to be initiated, a text message that "includes or introduces an advertisement or constitutes telemarketing."

The Court examined the definitions of "advertisement" and "telemarketing" set forth in the TCPA's implementing regulations, and concluded none of the text messages in the complaint fell within these definitions. The text messages "merely reference[d] an employment opportunity" and they did not involve "the commercial availability or quality of any property, goods, or services" or "encourag[e] the purchase or rental of, or investment in," any "property, goods, or services." For this reason, the Court found Plaintiff failed to state a claim under the TCPA and granted Defendant's motion to dismiss.

The holding in *Acara Solutions* is in line with other cases that have reached similar conclusions.

In *Reardon v. Uber Techs., Inc.*, 115 F. Supp. 3d 1090 (N.D. Ca. 2015), the Court found Uber's practice of sending text messages to recruit drivers did not constitute "advertisements" or "telemarketing" in violation of the TCPA because the messages were not attempts to promote goods to drivers, but rather an attempt to recruit drivers so that those potential drivers could provide services to riders. Similarly, in *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180 (E.D. Pa. 1994), the Court found faxes that a former employee and his business partner sent to a former employer looking to hire the former employer's current employees were not "advertisements" because the employment opportunities were not advertisements of goods, services, or property.

Importantly, the holding in *Acara Solutions* does not absolve a caller from obtaining prior express consent to communicate employment opportunities using an ATDS, or prerecorded voice. Instead, it helps clarify that such messages are not subject to the heightened written consent standards applicable to "advertisements" or "telemarketing."

Copyright © 2025 Womble Bond Dickinson (US) LLP All Rights Reserved.

---

National Law Review, Volume X, Number 184

Source URL: <https://natlawreview.com/article/court-finds-communications-regarding-employment-opportunity-not-advertisement-or>