FOR MORE INFORMATION

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Virginia (Telephone Privacy Protection Act)

Does your state have its own version of the TCPA?

The Commonwealth of Virginia has a version of the TCPA known as the Virginia Telephone Privacy Act. Va. Code § § 59.1-510 - 518 (VTPPA).

If so, please explain the distinction between the state's iteration of the TCPA.

The VTPPA and the TCPA regulate telemarketing. The TCPA is enforced primarily by the Federal Communications Commission, but the U.S. Attorney General can also enforce the Act. Private citizens are also able to file claims under the TCPA. The VTPPA will only apply within Virginia's borders and can be enforced by the state Attorney General, a local Commonwealth's Attorney (state prosecutor), counsel for a local municipality, or through a claim filed by an individual citizen. Both the VTPPA and the TCPA establish standards and requirements for solicitors to comply with. They require callers to identify themselves and on whose behalf they are calling, they prohibit calls being made between the hours of 9:00 PM to 8:00 AM, and they apply to solicitations made to land lines, mobile devices, and through text messages. The VTPPA does not create a statewide registry for citizens to enroll in so they may opt out of unwanted solicitations, but relies upon the National Do Not Call Registry maintained by the federal government pursuant to the Telemarketing Sales Rule. Generally the TCPA and the VTPPA will functional very similarly, but there are a few key differences to keep in mind.

Damages

An initial violation of the TCPA would result in a penalty of $500. A willful or knowing violation can result in a fine up to $1,500. A party that commits multiple violations will be assessed a penalty of $1,500. Under the VTPPA, the penalty for an initial violation is $500, a second violation is $1,000, and a third or subsequent violation results in a penalty of $5,000. If the court finds any violation to be a willful violation under the VTPPA, it may assess at its discretion a penalty of up to $5,000 for each violation.

There is no cap on damages under either the TCPA or the VTPPA. While a claim by an individual citizen is unlikely to be of significant value, a class action brought against a high-volume call center making willful violations could expose the bad actor to extensive damages. Damages can accumulate because a single call can lead to multiple violations of either act.

Virginia's Presumption for Joint and several Liability

Under the VTPPA, a telephone solicitation shall be presumed to have been made or initiated on behalf of or for the benefit of the producer of the good and/or service being offered in the solicitation. There is no requirement that any

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relationship exist between the solicitor making the call and the producer or provider of the good and/or service being solicited. A solicitor can make contact regarding goods or services from a company it has no relationship with and the presumption will be applied against the company that provides the goods or services. Virginia's presumption is more severe than the TCPA and causes companies to be more exposed to litigation. The presumption is rebuttable with clear and convincing evidence that there was no request for the calls to be made and the calls were made without the producer's knowledge. Virginia's statute allows for either the solicitor or the producer to be the responsible party, but the TCPA's terms for joint and several liability are more expansive and will allow for other potential defendants.

Established Business Relationships and Defenses

The TCPA and the VTPPA allow for affirmative defenses of consent, and safe harbor. Safe harbor is a showing by the defendant that it has established and implemented policies and procedures to effectively prevent unwanted solicitations. This includes compliance with the National Do Not Call Registry. Consent is the written permission to make the solicitation. Those are the two typical affirmative defenses, but calls are permitted under both acts if there is an established business relationship. If the person called executed a transaction with the company in question within eighteen (18) months prior to receiving the solicitation or an inquiry or application was made by the called party, then a business relationship is established. In Virginia the inquiry or application must have been made within three (3) months prior to the solicitation. The Virginia rule is looser because inquiry and application are not defined, nor are they required to be in writing. Under the TCPA, the business relationship typically only applies to calls to land lines.

Virginia Consumer Protection Statutes Often Paired with the TCPA and the VTTPA:

- Va. Code § 18.2-152.3:1 – Transmission of Unsolicited Commercial Electronic Mail Penalty (criminal)
- Va. Code § 8.01-40.1 – Action for Injury Resulting from Violation of Computer Crimes Act (civil)
- Va. Code §§ 59.1-21.1 – 21.7:1 – Virginia Home Solicitations Sales Act (civil)

Best Practices to comply with the VTTPA

To avoid penalties or an onslaught of frivolous lawsuits, companies should establish policies and procedures to ensure compliance with the VTTPA and the National Do Not Call Registry. Being able to produce proof of regular updating from the National Do Not Call Registry will show that the company is current on who may be called. Being able to produce a copy of such a policy and provide examples how the policy is implemented guarantees a company the use of the safe harbor defense.

Companies should also maintain current rosters of approved vendors, clients, and/or other parties who may make calls on the company's behalf. The rosters should be kept current and have accurate information of who may and may not execute solicitations on the company's behalf. It is unfortunately easy for a company to be subjected to litigation based on a telephone solicitation that a company had nothing to do with. By keeping accurate evidence of who is approved to solicit on your behalf, a company can sever any claimed association with a wrongful actor and distance itself from the presumption created by the VTPPA.

Keep records that establish existing business relationships. These can be sales records, receipts sent via email, recordings in which the called party expresses an interest or inquiry to receive more information about a good or service. While written consent is a strong affirmative defense, establishing an existing business relationship through an inquiry or a transaction provides a significant buffer from liability. The recipient of a call who requests additional information, or a party who reaches out to your company and requests information serves as an inquiry and establishes a business relationship.