

SPAM: WHAT YOU NEED TO KNOW BEFORE YOU PRESS 'SEND'

By *Linda Singer Roth*



In this sluggish economy, staffing companies, like many other businesses, are looking for fast and cost-efficient ways to market their services. Fax and email broadcasts can be an easy way to reach large numbers of potential customers and candidates with minimal financial investment. Such transmissions, however, are governed by a variety of laws and are regulated and enforced by the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC). Accordingly, you need to be aware of and comply with a variety of rules before you hit the send button.

FACSIMILE TRANSMISSIONS

Fax transmissions are governed by the Telephone Consumer Protection Act (TCPA) and the Junk Fax Prevention Act, which make it unlawful to send “unsolicited advertisements” to fax machines. Fax advertisements, however, may be sent to recipients with whom the sender has an “established business relationship,” as long as the recipient voluntarily provided the sender with the fax number.

DEFINITIONS

Unsolicited advertisement – “Any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”

Established business relationship – “A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.”

Senders of permissible fax advertisements (i.e., those sent under an established business relationship or with the recipient’s prior express permission) must notify recipients that they can “opt out” of future faxes and provide them with contact information for doing so. More specifically, opt-out notices must:

- Appear on the first page of the advertisement and be clear and conspicuous.
- State that the recipient may request that the sender refrain from sending future faxes and that failure to comply with the request within 30 days is unlawful.
- Include a telephone number, fax number and cost-free means by which the recipient can opt out of faxes. These numbers as well as the cost-free mechanism must enable consumers to make opt-out requests 24 hours a day, seven days a week.
- Fax senders who receive an opt-out request must honor the request within the shortest reasonable time but not later than 30 days after the opt-out request is received.

Sometimes businesses use professional fax broadcasters to send fax advertisements in bulk. It is important to realize, however, that even if you use such a service, the person or business on whose behalf a fax is sent or whose property, goods or services are advertised, is liable for a violation of the junk fax rules – even if it is not the party who actually sent the offending fax. The fax broadcaster may also be liable if it has a “high degree of involvement” in connection with the sender’s fax, such as supplying fax numbers or making representations about how to comply with the junk fax rules. If the services of a fax broadcaster are used, the name of the broadcaster must appear on the fax.

Unhappy recipients of unsolicited fax advertisements can file complaints with the FCC, and the FCC can issue warnings and fine companies that violate or are suspected of violating the junk fax rules. The FCC does not, however, award individual damages. Complaints can also be filed with state

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authorities including local or state consumer protection agencies or state attorney general's offices.

In addition, persons who receive fax advertisements in violation of the law may bring a private suit against the sender in an appropriate state court. In a private suit recipients of improper faxes can recover either the actual monetary loss resulting from the TCPA violation or up to \$500 in damages for each violation, whichever is greater. The court can also triple the damages if it finds that the sender willingly or knowingly violated the law. Companies planning to send fax advertisements should also be aware that courts have permitted class actions to proceed under the TCPA. Thus, a company that sends an unsolicited fax broadcast to a long list of recipients could potentially be liable for very significant monetary damages.

ELECTRONIC MAIL

Electronic mail is governed by the CAN-SPAM (Controlling the Assault of Non-Solicited Pornography and Marketing) Act. The CAN-SPAM Act applies to all commercial email – not just bulk transmissions – which the law defines as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service,” including email that promotes the content of commercial websites. Such emails are not prohibited but, much like faxes, must comply with certain content requirements and provide opt-out opportunities before they can be sent. While much of the CAN-SPAM Act was implemented to protect the public from large-scale email frauds and scams, legitimate businesses still must comply with the Act.

The Act does not apply to “transactional or relationship” messages, which are defined as messages the primary purpose of which is to facilitate, complete or confirm a commercial transaction, provide warranty information, provide notification of a change in terms or status regarding a transaction, provide account information or deliver goods and services.

The “From,” “To,” “Reply-To” and routing information, including the originating domain name and email address, must be accurate and properly identify the person or business who initiated the message. Similarly, the subject line must accurately reflect the content of the message. Thus, the subject line should not, for example, say that the recipient has won the lottery when the email is offering widgets for sale.

Promotional email messages must clearly and conspicuously disclose that they are advertisements. The FCC regulations, however, are not specific about how this must be done. Thus, commercial email senders can be creative about complying with this requirement or, to be cautious, can put the words “This is an advertisement” in bold or different-colored lettering at the top of the message.

Messages must include a valid physical address for the sender. This can be a current street address, a post office box registered with the United States Postal Service or a private mail box rented from a commercial mail receiving agency established in accordance with Postal Service regulations.

In addition, messages must include an easy-to-understand and conspicuous explanation of how the recipient can opt out of getting email solicitations and advertisements in the future. Other rules relating to opt-out procedures include:

- Opt-out mechanisms must be capable of processing opt-out requests for at least 30 days after transmission of the original message.
- Opt-out requests must be honored within 10 business days.
- Opt-out fees are prohibited.
- Opt-out procedures cannot require the party opting out to provide any personally identifiable information beyond an email address or make the party opting out do anything other than send a reply email or visit a single Internet page as a condition for processing or honoring an opt-out request.
- Once the sender of a commercial email has been notified that the recipient does not want to receive any further messages, the sender cannot sell or transfer the recipient's email address, even in the form of a mailing list.

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There are companies that can be hired to handle email marketing. These companies help develop content, coordinate the logistics of sending the messages and also help senders comply with the CAN-SPAM Act and process opt-out requests. The law is clear, however, that even if a company is hired to assist with email marketing, the true sender is still responsible for complying with the law. Both the company whose product and/or services are promoted and the company that actually sends the message may be held legally responsible.

The CAN-SPAM Act does not provide for a private right of action. This means that individual recipients of offending emails cannot sue to recover damages or statutory penalties. The Act can only be enforced by the FTC (or by certain other federal agencies with regulatory authority over particular industries) and by state attorney generals. Generally, violators of the CAN-SPAM Act are subject to damages in an amount calculated by multiplying the number of violations (with each separately addressed unlawful message treated as a separate violation) by up to \$250, up to a maximum of \$2 million.

The amount of damages can be tripled based on aggravating factors such as willful and knowing conduct and can be reduced even though the violation occurred if the sender made commercially reasonable efforts to comply with the requirements of the Act. The law also provides for criminal penalties for certain email-related conduct such as accessing someone else's computer to send spam without permission, harvesting email addresses or generating them through a dictionary attack (the practice of sending email to addresses made up of random letters and numbers in the hope of reaching valid ones), or sending emails for purposes of committing fraud or in furtherance of any felony under federal or state law.

CONCLUSION

Fax and email broadcasts can be effective, inexpensive ways to market staffing industry services. To protect your firm from legal exposure, however, you and your staff who are responsible for fax and email marketing campaigns need to comply with the rules outlined above.

About Linda Singer Roth, Counsel

Linda, Counsel in the Litigation Practice Group, focuses on commercial litigation. She has handled numerous matters involving breach of contract, unfair competition, misappropriation of trade secrets and fraud, and often works on cases related to the staffing industry. Linda can be reached at lroth@tarterkrinsky.com.