

NOTICE: TALENT TECHNOLOGY CORPORATION IS NOT PROVIDING LEGAL ADVICE. THE FOLLOWING IS GUIDANCE FOR THE USE OF CUSTOMERS IN THEIR DISCUSSIONS WITH THEIR LEGAL COUNSEL AND TALENT TECHNOLOGY CORPORATION SHALL HAVE NO LIABILITY FOR PROVIDING THIS GUIDANCE.

The Canadian Anti-Spam Legislation (“CASL”) for the first time imposes obligations on businesses that send commercial email to Canadians. Although the law has been passed, it has not been put in force. Regulations made under the Act are still being revised and industry groups are still lobbying government to address perceived issues in the Act. However, one thing is clear, CASL will not be going away and businesses will have to comply with some rules in how they conduct their business. In response to questions of how CASL may affect businesses in the recruiting area and in the use of the Talent Technology Corporation product HireDesk, we have set forth the following guidance on how we interpret the rules of CASL. We encourage all of our customers who are recruiting candidates located in Canada to review their specific workflows, websites, documents, and this guidance with their legal counsel so that they can comply with CASL in their specific circumstances. By its nature, this guidance is general and may not apply to all HireDesk customers or situations.

The first issue is: who must comply with CASL? In simple terms, if you are in Canada, or you send an email to a recipient who receives the email at a server in Canada then CASL applies to you.

The second issue is: what is caught by CASL? In general CASL applies to electronic messages that are related to encouraging participation in a “commercial activity”. CASL defines commercial activity as meaning: “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit...”. This raises the first issue of whether emails sent to job applicants fall under the definition of commercial activity. Later in the Act certain activities are included in what constitutes commercial activity including:

- a. offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
- b. offers to provide a business, investment or gaming opportunity;
- c. advertises or promotes anything referred to in paragraph (a) or (b); or
- d. promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.

Contacting an individual for the purpose of interest in a job or in response to a job application would not

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fit most people's view of commercial activity. If that is a correct interpretation such emails would not fall under the rules and obligations of CASL. However, given the broad range of activities CASL is intended to capture and the fact that there is a specific exemption for communications to existing employees contained in CASL, it is likely that regulators will see emails to potential employees as falling under the CASL rules. Ultimately, unless administrative guidance is published by the government if you are risk adverse you should assume that sourcing related emails fall under the CASL rules.

There are sections in CASL that would provide relief from the CASL obligations even if an email related to a job application was considered to be related to a commercial activity.

CASL has a general prohibition from sending commercial emails unless the recipient has consented (express or implied) and the form of the email is compliant with the act. There are several exceptions to this however none of these exceptions appear to apply clearly to the recruiting process.

Implied consent, as it relates to a job applicant, would be covered in CASL as:

“the person to whom the message is sent has disclosed, to the person who sends the message, the person who causes it to be sent or the person who permits it to be sent, the electronic address to which the message is sent without indicating a wish not to receive unsolicited commercial electronic messages at the electronic address, and the message is relevant to the person's business, role, functions or duties in a business or official capacity”.

Thus the provision of the applicant's email address in the application process for a job allows a company to send emails to that individual without the need for express consent. This eliminates the need for a specific pop-up box click through agreement with job applicants in the application workflow.

For sourcing activities implied consent is given if:

“the person to whom the message is sent has conspicuously published, or has caused to be conspicuously published, the electronic address to which the message is sent, the publication is not accompanied by a statement that the person does not wish to receive unsolicited commercial electronic messages at the electronic address and the message is relevant to the person's business, role, functions or duties in a business or official capacity”.

This would in many cases provide implied consent from business email addresses that are collected from the web or business cards and from candidates that include their email addresses in databases of job seekers (like job boards).

Finally an additional exception to CASL is under discussion (it is not yet a part of the regulations) around referrals, where the candidate is referred by a third party with which you have an existing relationship and the third party also has an existing relationship with the candidate, so long as the email makes reference to the name of the third party who provided the referral. This would apply in many circumstances in recruiting.

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In addition to the question of consent to send the email, the content of an email to be compliant under CASL must provide certain information in the commercial email. This includes

- The name by which the person sending the message carries on business and if the message is sent on behalf of another person, the name that person uses to carry on business. It must be clearly identified who is sending the message and on whose behalf the message is sent.
- The mailing address and either:
 - Telephone number,
 - Email address, or
 - Web addressof the sender of the message or, if there is one, the beneficial sender
- Unsubscribe information.

The unsubscribe information must:

- a. enable the person to whom the commercial electronic message is sent to indicate, at no cost to them, the wish to no longer receive any commercial electronic messages, or any specified class of such messages, from the person who sent the message or the person — if different — on whose behalf the message is sent, using
 - i. the same electronic means by which the message was sent, or
 - ii. if using those means is not practicable, any other electronic means that will enable the person to indicate the wish; and
- b. specify an electronic address, or link to a page on the World Wide Web that can be accessed through a web browser, to which the indication may be sent.

In essence, all emails need a statement in them to the effect of: “if you don’t wish to receive such emails in the future (unsubscribe) please forward this email to unsubscribe@company.com” and the company must have a mechanism to effect the non-subscription within 10 days.

What does all of this mean in practical terms? We recommend the following to minimize risk of non-compliance with CASL.

1. Add text to your career website to the effect that by applying for a position that the candidate is consenting to receiving electronic messages related to the consideration of the candidate for employment with the Company, including positions other than that for which the candidate may have originally applied and with subsidiaries and affiliates of the Company. While this seems to not be strictly required, informing candidates of this can’t hurt. If you are going to do this, don’t hide it in the fine print links of your website terms of service.
2. Add the required language to all of the email templates that you use to interact with candidates. You likely do this already as it is as simple as adding your business address information to the email signature. For example using Talent Technology:

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Talent Technology Corporation
200 – 13799 Commerce Parkway
Richmond, BC V6V 2N9
+1-604-278-4414
info@talenttech.com
www.talenttech.com

added to the signature would be compliant. Again, this should be a standard part of your email anyway in attracting a candidate to you.

3. Create an unsubscribe email address and add to your emails an unsubscribe statement. An example of this would be:
 “To unsubscribe from receiving emails related to employment opportunities at XYZ Corporation please forward this email to unsubscribe@XYZCorporation.com”.
4. Make sure you monitor your unsubscribe email address! You only have 10 days to affect an unsubscription so you need to set up a workflow in your organization to do this. Generally, a candidate that unsubscribes is no longer interested in a position with you so the easiest solution may be to mark the applicant record as ‘inactive’ with a note that they unsubscribed.
5. Recognize the uncertainty of whether email related to soliciting interest in a potential job is “Commercial Email” under the act and act accordingly. If it is Commercial Email then the act prohibits you from sending it without express or implied consent from the recipient with the implied consent falling into the definitions contained in the act. This would mean that you should exercise diligence when purchasing or obtaining lists, especially when the lists contain non-business email addresses. As well, understand that the most likely case where a complaint would arise is when you do not follow the proper notification and unsubscribe procedures in your emails. No one wants to be peppered with unsolicited email, especially if you have asked nicely for it to stop.

For help in configuring your email templates in HireDesk feel free to contact our support staff who can guide you in how this is done.

Remember, this is general guidance and you should consult with your legal counsel to ensure what you do is compliant in your individual company circumstances.