

Article

**Throwing Truckers Under the Bus? An Evaluation of
the Federal Ban on Hand-Held Mobile Telephone
Use By Operators of Commercial Motor Vehicles**

Brian C. Potts¹

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I. INTRODUCTION

Technology moves faster than law. The past decade has seen a proliferation in the use of hand-held mobile telephones while driving.² One commentator has referred to the phenomenon as potentially a new WMD – driving *with mobile device*.³ According to the federal government, and many States, the use of hand-held mobile telephones distracts drivers and causes accidents.⁴ The use of these devices can take a driver's eyes and mind off the road, and hands off the wheel.⁵

Recent laws responding to the danger posed by driving while using a hand-held mobile telephone will alter habits, and shape the development of technology. It is unclear, however, whether these laws will work, and whether they are appropriately tailored and directed.⁶

Despite the fact that perhaps 75% of all accidents involving trucks were caused by the negligence of drivers of cars,⁷ recent federal regulations have banned certain truck drivers from using hand-held mobile telephones while driving commercial motor vehicles.⁸ The Federal Motor Carrier Safety Administration lacks statutory authority to regulate non-CMV drivers.⁹ Drivers, and their motor carriers, who violate these regulations are subject to draconian penalties.

Drivers and motor carriers should take drastic steps to ensure compliance with the regulations.

Section II of this article will discuss the recent federal regulations that prohibit drivers of commercial motor vehicles from using hand-held mobile telephones. Section II will list prohibited and permitted activities. Section II will also list the penalties for violations.

Section III will present an evaluation of the regulations. Section IV will offer recommendations to drivers of commercial motor vehicles, and to motor carriers.

2. See Richard Codey, *The Fatal Dangers of Texting While Driving*, NJ Spotlight (Dec 27, 2013), <http://www.njspotlight.com/stories/13/12/26/the-fatal-dangers-of-texting-while-driving>.

3. Linda C. Fentiman, *A New Form of WMD? Driving With Mobile Devices and Other Weapons of Mass Destruction*, 81 UMKC L. REV. 133, 133-38 (2012).

4. See, e.g., Distraction.gov, www.distraction.gov (last visited Mar. 7, 2014); *Distracted Driving*, troopers.ny.gov, https://www.troopers.ny.gov/Traffic_Safety/Distracted_Driving/ (last visited Mar. 7, 2014).

5. *Frequently Asked Questions*, Distraction.gov, <http://www.distraction.gov/content/get-the-facts/faq.html> (last visited Mar. 7, 2014).

6. See Eric Jaffe, *Do Texting Bans Really Prevent Fatal Accidents?*, The Atlantic Cities (Mar 27, 2013), <http://www.theatlanticcities.com/commute/2013/03/do-texting-bans-really-prevent-fatal-accidents/5104/>.

7. *Truck Accidents*, justia.com, <http://www.justia.com/injury/truck-accidents/> (last visited Mar. 7 2014); *Trucking Statistics*, truckinfo.net, <http://www.truckinfo.net/trucking/stats.htm> (last visited Mar. 7 2014).

8. 49 C.F.R. § 392.82(a)(1) (2013).

9. 49 U.S.C.A. § 113

II. ISSUES WITH RECENT FEDERAL REGULATIONS

A. PROHIBITED ACTIVITIES

As of January 3, 2012, drivers may not use a hand-held mobile telephone while driving a commercial motor vehicle in interstate commerce.¹⁰

A mobile telephone is defined as a mobile communication device that falls under, or uses, any commercial mobile radio service.¹¹

A commercial motor vehicle (“CMV”) is defined as any vehicle used on a highway in interstate commerce to transport passengers or property, when the vehicle:

(1) Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 10,001 pounds or more, whichever is greater; or

(2) Is designed or used to transport more than eight passengers (including the driver) for compensation; or

(3) Is designed or used to transport more than 15 passengers (including the driver) and is not used to transport passengers for compensation; or

(4) Is used to transport hazardous material in a quantity requiring placarding.¹²

This regulation applies to many millions of drivers of CMVs.

Specifically, while operating a CMV on a highway (defined as “any road, street, or way, whether on public or private property, open to public travel”) a driver may not:

(1) Use his hand to hold a mobile telephone to conduct a voice communication;

(2) Dial or answer a mobile telephone by pressing more than a single button; or

(3) Reach for a mobile telephone in a manner that requires him to maneuver so that he is no longer in a seated and properly restrained driving position.¹³

He may not hold a phone to his ear. He may not dial complete telephone numbers even on mobile telephones fixed to his dashboard.

Even if he stops at a red light, he may not use a hand-held mobile telephone. “Driving” includes temporary stops because of traffic, red lights, and other momentary delays.

The regulation encourages drivers to pull to the side of, or off, the

10. 49 C.F.R. § 392.82(a)(1) (2013).

11. 49 C.F.R. § 390.5 (2013).

12. *Id.*

13. *Id.*

road before using hand-held mobile telephones: “Driving does not include operating a commercial motor vehicle when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.”¹⁴

The regulations also prohibit motor carriers from allowing or requiring their drivers to use hand-held mobile telephones while driving CMVs.¹⁵

The ban on CMV drivers using hand-held mobile telephones follows a texting ban on CMV drivers, which became effective in January of 2012.¹⁶ “Texting” is defined as “manually entering alphanumeric text into, or reading text from, an electronic device.”¹⁷

Texting includes, but is not limited to:

“short message service, emailing, instant messaging, a command or request to access a World Wide Web page, pressing more than a single button to initiate or termination a voice communication using a mobile telephone, or engaging in any other form of electronic text retrieval or entry, for present or future communication.”¹⁸

This is a broad definition of “texting.” The term even includes dialing a multi-digit phone number.

“Texting” specifically does not include pressing a single button to initiate or terminate a call on a mobile telephone.¹⁹ “Texting” specifically does not include use of global positioning systems, navigation systems, fleet management systems, dispatching devices, smart phones (if used for purposes not otherwise prohibited), citizens band radios, and music players.²⁰

B. PERMITTED ACTIVITIES

The regulations do not prohibit a CMV driver from:

(1) Using a hand-held mobile telephone when the driver has moved the CMV to the side of, or off, the highway, and has halted in a location where the vehicle can safely remain stationary²¹;

(2) Using a hand-held mobile telephone when necessary to communicate with law enforcement officials or other emergency services²²;

14. 49 C.F.R. § 392.82(b) (2012).

15. 49 C.F.R. § 392.82(a)(2) (2012).

16. 49 C.F.R. § 392.80 (2012).

17. 49 C.F.R. § 390.5 (2013).

18. *Id.*

19. *Id.*

20. *Id.*

21. 49 C.F.R. § 392.82(c) (2012).

22. *Id.*

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(3) Using a hand-held mobile telephone when driving a vehicle which is not a CMV;

(4) Using a mobile telephone that is affixed to the interior of the cab, or just lying near him, so long as he can answer or dial with a single push of a button; or

(5) Using a citizens band radio, a two-way radio, or a walkie talkie.

Compliance with the laws, considering the stiff penalties, and the potential for increased safety, could be easy. Blue-tooth cellular phone devices lodged in the driver's ear generally comply with the regulations.²³ Dashboard communication devices controlled by the push of a single button generally comply.²⁴ Answering a simple cell phone which is lying in reach on the passenger seat and sending the call straight to speaker phone, all with a single press of a button, generally complies.

Applications for smart phones are capable of detecting when the phone is in motion and deactivating the phone.²⁵ Cell phone providers also offer similar services. Some cell phones can be plugged into vehicles, and automatically deactivated when the vehicle moves.²⁶ Voice detection technology allows some cell phone to be operated without hands.²⁷

C. PENALTIES

Failure to comply, on the other hand, could lead to harsh penalties.

1. *Civil monetary penalties*

A driver who uses a hand-held mobile telephone while driving a CMV is subject to a civil penalty of up to \$2,750.00 per violation.²⁸

A motor carrier that allows one of its drivers to use a hand-held mobile telephone while driving a CMV is subject to a civil penalty of up to \$11,000.00 per violation.²⁹

Note that these are maximum civil penalties *for each violation*. The

23. Stephanie Diffin, *Illinois "Hands-free" law goes into effect Jan. 1*, KSDK (December 30, 2013, 11:40 PM EST), <http://www.ksdk.com/story/news/2013/12/30/illinois-cell-phone-hands-free-law-pros-cons/4258567/>.

24. *New Colorado Driving Law*, ALIVE AT 25, <http://alivateat25.us/content/view/35/> (last visited Feb. 27, 2014).

25. Ben Coxworth, *cellCONTROL keeps mobile phones from working in moving cars*, GIZMAG (January 23, 2012), <http://www.gizmag.com/scosche-cellcontrol-disables-mobile-phones/21192/>.

26. *Sprint Drive First*, SPRINT, <https://drivefirst.sprint.com/welcome.htm> (last visited Feb. 27, 2014).

27. *Hands-free calling*, ONSTAR, <https://www.onstar.com/web/portal/connectionsexplore?tab=2&g=1> (last visited Feb. 27, 2014).

28. 49 C.F.R. Pt. 386, App. B § (a)(4) (2013).

29. 49 C.F.R. Pt. 386, App. B § (a)(3) (2013).

penalties could stack up if there are multiple violations in one trip.³⁰

Suppose a police officer sees a CMV driver holding a cell phone to his ear toward the end of a long haul. The officer stops the CMV driver. Just for that one call, the CMV driver faces a potential penalty of \$2,750.00. His motor carrier faces a potential penalty of \$11,000.00.

The officer scrolls through the call history (if the Fourth Amendment does not stop him) and finds a long string of calls recently made and received by the cell phone. The log books, and honesty, stop the CMV driver from claiming those calls took place while he was at rest stops. The nature of the device, and honesty, stop the CMV driver from claiming that he pressed only one button and did not otherwise use his hands in connection with those calls. Now the CMV driver and his carrier face huge penalties.

Also note that the regulation does not contain a *scienter*, or knowledge, requirement on the part of the motor carrier before a civil penalty can be imposed. The regulation does not simply prohibit a motor carrier from requiring its drivers to use hand-held mobile telephones. It also specifically prohibits a motor carrier from allowing its drivers to do so. The mere fact that a truck driver dialed a phone number while driving a CMV means, at least arguably, that the motor carrier allowed a violation to occur. Knowledge on the part of the motor carrier is not required for it to be held in violation of the regulation.

Other regulations in this field *do* contain knowledge requirements before a motor carrier can be held in violation. For example: “An employer must not *knowingly* allow, require, permit, or authorize a driver who is disqualified to drive a CMV.”³¹ The regulation against a motor carrier allowing its drivers to use hand-held mobile telephones while driving CMVs, however, does not contain a knowledge requirement.³²

The motor carrier might argue, “We’ve done everything we could to prevent this. We installed the latest technology in the cab to allow the driver to make a call with one press of a button. We implemented a zero tolerance policy. We trained our drivers regarding the regulation, and safety. We issued written guidelines. We posted catchy slogans. We required our drivers to leave their hand-held cell phones at the office. This driver smuggled a cell phone into the truck and dialed one phone number to call his wife about non-company matters.”

To which the judge might respond, “Tough. Pay \$11,000.00.”

30. *Drivers of CMVs: Restricting the Use of Cellular Phones*, U.S. DEPT OF TRANSP. FED. MOTOR CARRIER ADMIN., http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/final/Mobile_phone_NFRM.aspx (last visited Feb. 27, 2014).

31. 49 C.F.R. § 383.51(a)(2) (2013).

32. *Id.*

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The police will look for the glow of hand-held devices on drivers' faces. The police will search cell phone histories if given the opportunity. Discovery of cell phone records is now routine even in civil lawsuits.³³ CMV drivers must assiduously comply with the regulations.

2. *Disqualifications*

In addition to having to pay monetary civil penalties, a truck driver could also be disqualified from operating a CMV for multiple violations.

For a second conviction, based on separate incidents within a three-year period, of violating a State or local law or ordinance prohibiting texting while driving a CMV, or violating a State or local law or ordinance restricting or prohibiting the use of a hand-held mobile telephone while driving a CMV, the driver could be disqualified from operating a CMV for 60 days.³⁴

For a third conviction, based on separate incidents within a three-year period, the driver could be disqualified from operating a CMV for 120 days.³⁵

Convictions of other offenses – such as speeding 15 miles per hour over the posted limit, driving recklessly, making improper or erratic lane changes, and following the vehicle ahead too closely – could also be used to augment the disqualification period.³⁶

For example, if a driver is convicted of using a hand-held mobile telephone while driving a CMV one time in one year, and is convicted of speeding over 15 miles per hour over the posted limit one time in the next year, and is convicted of following a vehicle ahead too closely one time in the third year, then the driver could be disqualified from operating a CMV for 120 days.³⁷

3. *Lowered ratings, and increased premiums*

Violations of the regulations could also lead to lower safety ratings by the Federal Motor Carrier Safety Administration.³⁸ Violations could also lead to increases in insurance premiums.³⁹

33. *Judge Allows Discovery of Cell Phone Records in Accident Case*, 11 No. 15 Andrews Telecomm. Indus. Litig. Rep. 5 (Dec. 11, 2007).

34. 49 C.F.R. § 383.51(c) (2013).

35. *Id.*

36. 49 C.F.R. § 383.51 (2014).

37. *Id.*

38. 49 C.F.R. § 385.7 (2014).

39. *See, e.g., Oklahoma Insurance Department Frequently Asked Questions*, Ok.gov, <http://www.ok.gov/oid/faqs.html#q1306> (last visited March 3, 2014) (noting that a citation may lead to an automobile insurance increase); *See, e.g., Consumer Frequently Asked Questions – Automobile Insurance*, Ny.gov, http://www.dfs.ny.gov/consumer/faqs/faqs_auto.htm (last visited March 3, 2014) (noting that a traffic ticket may increase auto insurance premium).

4. *Civil liability for accidents*

The regulations could also help plaintiffs' attorneys in court. If an accident occurs in connection with a violation of the regulations, plaintiffs' attorneys could have grounds to argue that the CMV driver and his motor carrier committed negligence *per se*, and are liable for the damages without any further proof of fault beyond the violation of the regulations.⁴⁰ Plaintiffs' attorneys could also use violations of the regulations to support claims for punitive damages.

In sum, a person driving a CMV may not:

- (1) Hold a mobile telephone in his hand to talk;
- (2) Dial or answer a mobile telephone by pressing more than a single button;
- (3) Reach for a mobile telephone by leaving a seated, properly retrained position;
- (4) Text with short message service;
- (5) Email;
- (6) Instant message; or
- (7) Surf the internet.

If he does, he is subject to civil penalties of up to \$2,750.00 per occurrence, and disqualification from operating a CMV for multiple violations in a three-year period. In addition, his motor carrier is subject to civil penalties of up to \$11,000.00 per occurrence, and lowered safety ratings.

III. LOOKING DOWN THE ROAD AHEAD

A. EVALUATION OF THE NEW REGULATIONS

The new regulations were intended to reduce the number and severity of traffic accidents by reducing the distractions faced by CMV drivers. The hope is that banning the use of hand-held mobile telephones will help keep CMV drivers' eyes and minds on the road, and hands on the wheel, so that accidents are less likely to occur. It is too early to determine whether the regulations have served their purpose. We have to wait for solid data to be collected and analyzed.

It is possible that the regulations might reduce accidents. If this is the case, then lives will be saved. CMV drivers and their motor carriers will be subject to less liability and lawsuits. Safety ratings will improve. Insurance premiums will, eventually, decrease.

It is possible that the regulations will not have a measurable effect on the number or severity of accidents. The regulations leave a host of other distractions for CMV drivers uncurbed. The regulations present obvious

40. See Fentiman, *supra* note 3, at 157, 163.

enforcement difficulties. (Police officers have radar guns to detect speeding at a distance, but not to detect hand-held cell phone use, at least not yet.) Moreover, a sizeable majority of distracted driving accidents involving CMVs were apparently caused by the distracted driving of cars, not of CMVs. The federal regulations leave car drivers free to dial multiple numbers and to hold cell phones to their ears. Many States and local governments have passed laws and ordinances restricting the use of mobile devices by car drivers, but many other States and local governments have not.

It is possible that the regulations could have unintended consequences, which could undo whatever safety gains are made, and could actually increase the number or severity of accidents.

For example, the regulation requires CMV drivers to stop their vehicles before using hand-held mobile telephones.⁴¹ This might lead to an increase in the number of times a CMV driver stops on a trip. This increase in the incidence of stopping and then re-starting could itself lead to an increase in the number or severity of accidents. Moreover, the increase in the incidence of stopping might, in turn, delay the CMV drivers from reaching their scheduled destinations on time, and increase the pressure on the CMV drivers to speed and cut safety corners, which could actually lead to an increase in the frequency and severity of accidents. If the motor carriers and customers agree to longer trips and later delivery times to mitigate this problem, then profit margins might shrink.

As another, related example of a possible unintended, dangerous consequence, the regulation encourages CMV drivers to pull over and stop on the sides of highways to use hand-held mobile telephones.⁴² The regulation does not require CMV drivers to pull over at rest stops or other designated parking areas to use these devices.⁴³ It has been noted that the regulation will likely increase the number of CMV drivers pulling off and stopping on the shoulders of highways. This will result in an increase in the number of CMVs slowing down in high-speed traffic to pull onto shoulders, and an increase in the number of CMVs merging at low speeds from shoulders into high-speed traffic on highways. By increasing the frequency of these dangerous situations, the regulation might actually increase the frequency and severity of accidents.

As yet another example of a possible unintended, dangerous consequence, the regulations might have the effect of teaching CMV drivers that talking on hand-free devices (even for extended periods of time) while driving is safe because it is legal. The regulations therefore might

41. 49 C.F.R. § 392.82(a)(1) (2014).

42. 49 C.F.R. §392.82(b) (2014).

43. 49 C.F.R. § 392.82 (2014).

encourage CMV drivers to engage in extended conversations on hand-free devices. If, as has been suggested, short calls on hand-held mobile telephones are safer than extended calls on hand-free devices, then the regulations might actually lead to an increase in the frequency and severity of accidents by encouraging CMV drivers to replace a dangerous activity with an even more dangerous activity.⁴⁴

B. STATE LAWS INCREASING THE SCOPE OF THE BAN

For now, the federal regulations generally ban the use of hand-held mobile telephones while driving a CMV *interstate*.⁴⁵ The scope of this ban, however, will increase because the federal regulations require all States to enact laws by January 3, 2015, banning hand-held use of mobile telephones by anyone operating a motor vehicle under a commercial driver's license.⁴⁶

Some States have already enacted such bans. Once all States have enacted such bans, all use of hand-held mobile telephones while driving a CMV *intrastate* will generally be banned as well.

Many States have passed, or are considering passing, bans or restrictions on mobile telephone use while driving private passenger vehicles.⁴⁷

C. EFFORTS TO BAN OTHER FORMS OF DISTRACTED DRIVING

Several interest groups have called for bans on all cell phone use while driving a CMV. Other interest groups have called for bans on other forms of communication while driving a CMV.

Some have called for more bans on cell phone use while driving any sort of vehicle on a public road.

At a distracted-driving summit on April 26, 2012, United States Secretary of Transportation Ray LaHood called for a blanket federal ban on all talking or texting on a cell phone while driving any sort of vehicle on any road in America.⁴⁸ This was the first time he had publicly called for such a ban. The constitutionality of such a ban may be questioned in the future.

44. See Fentiman, *supra* note 3, at 179; See Robert W. Hahn & Patrick M. Dudley, *The Disconnect Between Law and Policy Analysis: A Case Study of Drivers and Cell Phones*, 55 ADMIN. L. REV. 127, 166 (2003).

45. 49 C.F.R. 390.3 (2014); 49 C.F.R. 392.82(a)(1) (2014).

46. 49 C.F.R. § 384.301(h) (2014).

47. See *Distracted Driving*, Distraction.gov, <http://www.distraction.gov/content/get-the-facts/state-laws.html> (last visited Mar. 2, 2014).

48. *U.S. Ban Sought On Cell Phone Use While Driving*, Reuters.com, <http://www.reuters.com/article/2012/04/27/usa-driving-idUSL2E8FQOK820120427>, (Apr. 26, 2012, 8:00 PM EDT) (Corrie MacLaggan & Philip Barbara eds., 2012).

On January 29, 2013, Secretary LaHood announced his retirement.⁴⁹ Anthony Foxx succeeded him on July 2, 2013.⁵⁰ It is unclear whether Secretary Foxx will focus on distracted driving to the extent that his predecessor did.

IV. RECOMMENDATIONS

CMV drivers should, of course, diligently and completely comply with the regulations. Relatively small changes in habits and technology will save money by avoiding civil penalties and disqualification, and could save lives and reduce liability.

Motor carriers should attempt to ensure diligent and complete compliance with the regulations. Motor carriers should consider the following:

- (1) Implementing additional employer-imposed penalties for violations of the regulations;
- (2) Implementing clear written and posted policies setting forth exactly what is banned, the regulatory penalties, and additional employer-imposed penalties;
- (3) Providing mandatory training to all CMV drivers regarding the regulations;
- (4) Requiring CMV drivers to sign affidavits promising not to text or use hand-held cell phones in violation of the regulations;
- (5) Investing in in-cab video monitoring of all CMV drivers;
- (6) Investing in satellite and/or other real-time monitoring that reveals violations of the regulations and alerts the motor carrier;
- (7) Investing in technology that allows drivers to communicate in compliance with the regulations;
- (8) Investing in technology that disables non-compliant devices when the CMV's ignition is on;
- (9) Random comparisons of cell phone / texting records with drivers' logs, like random drug tests, to search for violations of the regulations;
- (10) Forbidding drivers from bringing into the CMVs devices that could be used to violate the regulations, having drivers check such devices into the motor carrier's office, and ensuring that technology to allow legal communications is installed in the CMVs;
- (11) Implementing policies that reduce the temptation to violate the regulations, such as building more flexibility and breaks into the routes

49. *U.S. Transportation Secretary LaHood Announced That He Will Not Serve for a Second Term*, Dot.gov (Jan. 29, 2013), <http://www.dot.gov/briefing-room/us-transportation-secretary-la-hood-announces-he-will-not-serve-second-term>.

50. *Meet the Secretary*, Dot.gov, <http://www.dot.gov/secretary> (last updated July 15, 2013).

and schedules to allow time for the CMV driver to pull over, stop, and use a hand-held device.

These changes, although costly, could pay for themselves by preventing the imposition of the severe civil penalties. Moreover, they could increase safety, save lives, and limit liability exposure.

V. CONCLUSION

Over the long haul, these regulations could be good for the general public, and for the trucking industry. These regulations could save lives. These regulations could save motor carriers money by increasing safety, reducing liability exposure, and ultimately leading to lower insurance premiums.

It is too soon to tell whether the regulations have worked. The overwhelming trend for the last several years, however, has been toward increased federal and state regulations and prohibitions on mobile phone use. This trend is likely to continue, regardless of the results of preliminary data.