

PUT THE PHONE DOWN: AT THE END OF THE DAY WHAT DO THE NEW RULES ON TEXTING AND CELL PHONE USE MEAN TO YOU?

Maureen E. Maney, Esq. and William H. Major, III, Esq.¹

On January 3, 2012, the Federal Motor Carrier Safety Administration (“FMCSA”) instituted a rule restricting the use of hand-held cell phones by commercial motor vehicle (“CMV”) drivers during operation of CMVs. The new rule prohibits a CMV driver from holding a cell phone to make a call; from texting, calling, browsing the Internet or using any other application that requires pressing more than a single button; and from reaching for a cell phone in such a way that the CMV driver is no longer seated and restrained by a seat belt.

RATIONALE

According to the National Highway Traffic Safety Administration, motor vehicle accidents caused by distracted driving resulted in the deaths of 5,474 people in 2009 on U.S. roadways, accounting for 16% of all traffic fatalities that year.² In 2011, while the number of people killed in motor vehicle accidents involving a distracted driver dropped to 3,331, some 387,000 people were injured in such accidents.³

A driver distraction is defined as “the voluntary or involuntary diversion of attention from primary driving tasks due to an object, event, or person.”⁴ Driver distractions can be classified into four categories:⁵ (1) a *visual* distraction involves a driver taking his or her eyes off the road;⁶ (2) a *manual* distraction involves a driver taking his or her hands off the motor vehicle’s steering wheel;⁷ (3) a *cognitive* distraction involves the driver driving while thinking about something other than the road and driving conditions;⁸ and, (4) an *auditory* distraction involves a driver listening to the radio or other music or to someone else talking.⁹

¹ Maureen E. Maney, Esq. is a partner in the law firm of Hancock Estabrook, LLP, 1500 AXA Tower, 100 Madison Street, Syracuse, New York 13202, telephone: (315) 565-4500, e-mail mmaney@hancocklaw.com. William H. Major, III, Esq. is a partner in the law firm of Hawkins Parnell Thackston & Young, LLP, 4000 SunTrust Plaza, 303 Peachtree Street, NE, Atlanta, Georgia 30308-3243, telephone (404) 614-7400, e-mail wmajor@hptylaw.com. Special thanks to Ross M. Greenky for his assistance in the preparation of this article.

² *National Highway Traffic Safety Administration Traffic Safety Facts*, DOT HS 811 379, “Research Note” (2010).

³ “What Is Distracted Driving?” *Distraction.Gov*, <http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html> (last visited July 22, 2013) [“Facts & Statistics: Distracted Driving”].

⁴ “Facts & Statistics: Distracted Driving”, *supra* note 2; “Drivers of CMVs: Restricting the Use of Cellular Phones”, 76 *Fed. Reg.* 75470-01, 75471, Federal Motor Carrier Safety Administration (2011), available at http://www.fmcsa.dot.gov/rules_regulations/administration/rulemakings/final/Mobile_phone_NFRM.pdf [hereinafter “Final Rule”].

⁵ “Facts & Statistics: Distracted Driving”, *supra* note 3.

⁶ “Final Rule”, *supra* note 4, at 75471.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

A driver's use of a hand-held cell phone may pose a higher safety risk than an activity such as eating or drinking while driving because it can involve all four categories of driver distraction simultaneously.¹⁰ For example, when a driver reaches for, dials, or otherwise uses a handheld cell phone, the driver is manually distracted, and each act requires visual distraction to complete.¹¹ Focus on a conversation involves cognitive distraction, and participation in a conversation involves auditory distraction.

Research shows that drivers take their eyes off the road for an average of 3.8 seconds when they dial a handheld cell phone and for an average of 4.6 seconds when they text.¹² At a driving speed of 55 miles per hour, these times equate to a driver traveling greater than the length of a football field without watching the road or holding the steering wheel with two hands.¹³ The clear conclusion is that a driver who texts or uses a handheld cell phone is less likely to safely operate a motor vehicle.

In fact, CMV drivers who dial a cell phone while driving are almost six times more likely to be involved in a safety-critical event than those who do not.¹⁴ CMV drivers who reach for a cell phone while driving are three times more likely to be involved in a safety-critical event.¹⁵ Further, the odds of being involved in a safety-critical event increase by more than 23 times for a driver who is texting or typing on a cell phone.¹⁶ Safety-critical events include motor vehicle accidents, near accidents, crash-relevant conflicts, hard braking in response to another vehicle, or unintentional lane changes.¹⁷

Some suggest that simply talking on a cell phone without the use of hands while driving, without reaching or dialing, does not appear to pose as significant a risk. One study found that "talking or listening to a hands-free phone" and "talking or listening to a hand-held phone" are low risk activities.¹⁸ Based on such findings, the FMCSA has attempted to limit the new rule to restricting the higher risk activities, such as reaching for and dialing a cell phone while driving.

Many states have already taken steps toward minimizing the risk of using a cell phone while driving. As of October 1, 2013, 19 states and the District of Columbia will have prohibited all use of cell phones while driving a school bus.¹⁹ Meanwhile, eleven states and the District of Columbia prohibit all use of handheld cell phones while driving, regardless of whether the driver is operating a CMV.²⁰ And, as of October 1, 2013, 23

¹⁰ *Id.*

¹¹ *Id.*

¹² Jeffrey S. Hickman, Richard J. Hanowski, & Joseph Bocanegra, "Distraction in commercial trucks and buses: assessing prevalence and risk in conjunction with crashes and near crashes", FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION 53 (June 2010), available at <http://www.fmcsa.dot.gov/facts-research/research-technology/report/Distraction-in-Commercial-Trucks-and-Buses-report.pdf>

¹³ "Facts & Statistics: Distracted Driving", *supra* note 3.

¹⁴ "Final Rule", *supra* note 4, at 75472.

¹⁵ *Id.*

¹⁶ Rebecca L. Olson, Richard J. Hanowski, & Jeffrey S. Hickman, "Driver distraction in commercial vehicle operations", *Federal Motor Carrier Safety Administration* 147-48 (June 2009), available at <http://distraction.gov/download/research-pdf/Driver-Distraction-Commercial-Vehicle-Operations.pdf>; "No Texting Rule Fact Sheet", *Federal Motor Carrier Safety Administration*, available at <http://www.fmcsa.dot.gov/rules-regulations/topics/distracted-driving/texting-factsheet.aspx> (last accessed July 25, 2013).

¹⁷ Hickman, Hanowski, & Bocanegra, *supra*, note 12, at 7, 23.

¹⁸ Olson, Hanowski, & Hickman, *supra*, note 16, at 148.

¹⁹ "Cellphone and texting laws," *Insurance Institute for Highway Safety* (July 2013), <http://www.iihs.org/laws/cellphonelaws.aspx> (Two more states ban all hand-held cellphone use by school bus drivers).

²⁰ *Id.*

states and the District of Columbia will have prohibited all drivers from texting while driving.²¹

Since CMV drivers are held to a higher standard than the average motor vehicle driver, the FMCSA decided that a restriction on cell phone usage was needed.

THE RULE

Definitions

The Code of Federal Regulations and the FMCSA provide definitions of relevant terms in the rule such as “CMV,” “CDL program,” “driving,” “mobile telephone,” “texting,” and “use a handheld mobile telephone.” These definitions aim to ensure that the rule is clearly and correctly enforced, interpreted and followed.

CMV

A CMV is defined as “a self-propelled or towed vehicle used on the highways to transport persons or property in interstate commerce; and that either: (1) has a gross vehicle weight/gross vehicle weight rating of 10,001 pounds or greater; (2) is designed or used to transport more than 8 passengers (including the driver) for compensation; (3) is designed or used to transport more than 15 passengers, not for compensation; or (4) is transporting any quantity of hazardous materials requiring placards to be displayed on the vehicle.”²²

All CMV drivers are subject to FMCSA rules, including the cell phone restriction, with the exception of those employed by federal, state, or local governments.²³ Additionally, while school bus operations and small passenger-carrying CMVs are usually exempted from FMCSA rules,²⁴ this particular FMCSA restriction applies both to school bus operations and to small passenger-carrying CMVs that transport between 9 and 15 passengers, including the driver, without direct compensation.²⁵

CDL Program

The Commercial Driver’s License (“CDL”) program is a licensing program for drivers who operate certain large CMVs.²⁶ A CMV qualifies for the CDL program if it “(1) has a gross vehicle weight/gross vehicle weight rating of 26,001 pounds or greater; (2) is designed to transport 16 or more passengers including the driver; or (3) is used to transport certain quantities of “hazardous materials.”²⁷ If the CMV qualifies, a CDL is required if the CMV operates (transports persons or property) in interstate commerce or if its operation affects interstate commerce.²⁸

²¹ *Id.*

²² “Final Rule”, *supra* note 4, at 75473.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 75473, 75482.

²⁶ *Id.* at 75473.

²⁷ *Id.*

²⁸ *Id.*

Driving

Driving for purposes of this rule means operating a CMV “on a highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays.”²⁹ In other words, if a CMV is stopped at a red traffic light or stuck in a bumper-to-bumper traffic jam, the rule continues to apply. The term “driving” does not, however, include the situation where “the driver has moved the [CMV] to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.”³⁰

Mobile Telephones

The rule modifies the Code of Federal Regulations (“CFR”) to comply with the new FMCSA policies. For instance, 49 CFR §§ 383.5 and 390.5 now include the definition of “mobile telephone.”³¹ The sections define “mobile telephone” as “a mobile communication device that falls under or uses any commercial mobile radio service.”³² Commercial mobile radio services include satellite telephone services and broadband radio services.³³

Use a Handheld Mobile Telephone

“Use a handheld mobile telephone” means “using at least one hand to hold a mobile phone to conduct a voice communication” or “dialing or answering a mobile phone by pressing more than a single button”.³⁴ Additionally, the term includes “reaching for a mobile phone in a manner that requires a driver to maneuver so that he or she is no longer in a seated driving position, restrained by a seat belt.”³⁵

Texting

Texting is defined as “manually entering alphanumeric text into, or reading text from, an electronic device” including “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 terminate a voice communication using a mobile telephone, or engaging in any other form of electronic text retrieval or entry, for present or future communication.”³⁶

Texting is not defined as including the use of a GPS or navigation system or “a device capable of performing multiple functions . . . for a purpose that is not otherwise prohibited.”³⁷ Under this definition, the use of fleet management systems, dispatching devices, smart phones, citizens band radios or music players is allowed as long as the driver is using the device in a way that has not been otherwise forbidden.³⁸

²⁹ “Final Rule”, *supra* note 4, at 75487; 49 CFR § 392.82.

³⁰ “Final Rule”, *supra* note 4, at 75487; 49 CFR § 392.82.

³¹ “Final Rule”, *supra* note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.

³² “Final Rule”, *supra* note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.

³³ “Final Rule”, *supra* note 4, at 75481.

³⁴ “Final Rule”, *supra* note 4, at 75487; 49 CFR § 390.5.

³⁵ “Final Rule”, *supra* note 4, at 75487; 49 CFR § 390.5.

³⁶ “Final Rule”, *supra* note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.

³⁷ “Final Rule”, *supra* note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.

³⁸ “Final Rule”, *supra* note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.

Texting also does not include a CMV driver's "[p]ressing a single button to initiate or terminate a voice communication using a mobile telephone."³⁹ In other words, pressing a single button to answer or hang up a phone call is not considered texting, which allows the definition of texting to coincide with the restrictions on handheld cell phone use.

The Restrictions

The FMCSA rule states that "no driver shall use a handheld mobile telephone while driving a CMV."⁴⁰ Under the new rule, a CMV driver is now prohibited from using one hand to hold a cell phone and make a phone call while driving.⁴¹ Furthermore, a CMV driver cannot dial, answer, or use a cell phone in any manner while driving if it takes more than pressing button to do so.⁴² As a result, this rule prohibits texting that involves "pressing more than a single button," which includes manually entering text or reading text from a cell phone. The texting restriction also prohibits using the Internet or other applications, as well as opening, reading, or writing an email.

The rule also prohibits a CMV driver from "reaching for a mobile phone in an unacceptable or unsafe manner", which includes reaching for a cell phone on the passenger seat, under the driver's seat, or into the sleeper berth.⁴³ A CMV driver cannot reach for a cell phone if that action requires moving from the seated driving position or unfastening the seat belt.⁴⁴ A CMV driver who wants to use a cell phone while driving must have a "compliant mobile telephone" in close proximity.⁴⁵

Finally, this rule applies not only when the CMV is in motion, but when it is temporarily stopped in a traffic jam or at a traffic light. The only time CMV drivers can use a handheld cell phone is when they move to the side of the highway and stop, or if they move off the highway altogether.⁴⁶ A handheld cell phone can be used only if the CMV is in a parked position, not on a roadway. Further, employers of CMV drivers cannot require or allow them to text or use hand-held cell phones while driving a CMV interstate.⁴⁷

Exceptions and Scope of Applicability

There is a limited exception to the prohibitions on texting and the use of handheld mobile phones when a CMV driver needs to communicate with law enforcement officials or other emergency services.⁴⁸ Additionally, the FMCSA rules only apply to drivers of CMVs while they are operating a CMV.⁴⁹ When CMV drivers are in their personal, non-commercial vehicles, the FMCSA rules are not applicable.

³⁹ "Final Rule", *supra* note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.

⁴⁰ "Final Rule", *supra* note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.

⁴¹ "Final Rule", *supra* note 4, at 75481, 75487.

⁴² *Id.* at 75475, 75481.

⁴³ *Id.*

⁴⁴ "Mobile Phone Restrictions Fact Sheet", *Federal Motor Carrier Safety Administration*, available at <http://www.fmcsa.dot.gov/rules-regulations/topics/distracted-driving/mobile-factsheet.aspx> (last accessed July 25, 2013).

⁴⁵ "Final Rule", *supra* note 4, at 75481.

⁴⁶ *Id.* at 75476.

⁴⁷ "Final Rule", *supra* note 4, at 75481; 49 CFR §§ 392.80(b) & 392.82(b).

⁴⁸ "Final Rule", *supra* note 4, at 75481; 49 CFR §§ 392.80(d) & 392.82(d).

⁴⁹ "Frequently Asked Questions (FAQ) - Ban on Mobile Phones", *Federal Motor Carrier Safety Administration*, available at <http://www.fmcsa.dot.gov/rules-regulations/topics/distracted-driving/faqs.aspx> (last accessed July 25, 2013) [hereinafter "FAQ"].

Fines and Penalties

If a CMV driver fails to comply with the FMCSA rule prohibiting the use of handheld cell phones, both the driver and his or her employer are subject to fines and penalties.⁵⁰ For example, a fine of up to \$2,750 can be imposed on a CMV driver for a violation.⁵¹ Additionally, a fine of \$11,000 may be imposed on an employer who fails to ensure compliance with the rule.⁵² Employers fail to ensure compliance if they allow or require a CMV driver to use a hand-held cell phone to text or call while driving.⁵³

Multiple violations of the rule may result in CMV driver disqualification.⁵⁴ Disqualification means that the driver is not allowed to drive a CMV.⁵⁵ If a CMV driver commits two or more violations of the FMCSA rule within three years, he or she will be disqualified from operating a CMV for at least 60 days.⁵⁶ If a CMV driver commits three or more violations of this FMCSA rule in a three-year period, he or she will be disqualified from operating a CMV for at least 120 days.⁵⁷

CDL holders are also subject to driver disqualification by a state if they are convicted of two or more state or local laws that classify as serious traffic violations.⁵⁸ By virtue of the rule, it is now a serious traffic violation if a CDL holder is convicted of a state or local law that restricts the use of handheld mobile telephones while driving.⁵⁹ Therefore, a CMV driver will be disqualified from operating a CDL-required CMV for at least 60 days if he or she commits two serious traffic violations of state or local law in a three-year period.⁶⁰ A CMV driver will be disqualified from operating a CDL-required CMV for at least 120 days if he or she commits three or more serious traffic violations in a three-year period.⁶¹ Meanwhile, “[a]n employer must not knowingly allow, require, permit, or authorize a driver who is disqualified to drive a CMV.”⁶²

Violations have another negative impact on employers, affecting their Safety Measurement System results.⁶³ Violations of this rule carry the maximum severity weight.⁶⁴

COMPLIANCE AND ENFORCEMENT

Successful enforcement of the FMCSA rule prohibiting the use of handheld cell phones is definitely feasible.⁶⁵ Two year-long pilot programs directed at commuters in Hartford, Connecticut and Syracuse, New York proved as much.⁶⁶ These programs, in

⁵⁰ “Final Rule”, *supra* note 4, at 74573, 74581.

⁵¹ *Id.* at 74573.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 74581.

⁵⁵ 49 CFR § 383.51(a)(1).

⁵⁶ “Final Rule”, *supra* note 4, at 75482; 49 CFR § 391.15.

⁵⁷ “Final Rule”, *supra* note 4, at 75482; 49 CFR § 391.15.

⁵⁸ “Final Rule”, *supra* note 4, at 75474; 49 CFR § 383.51(b).

⁵⁹ “Final Rule”, *supra* note 4, at 75474.

⁶⁰ “Final Rule”, *supra* note 4, at 75474; 49 CFR § 383.51(b).

⁶¹ “Final Rule”, *supra* note 4, at 75474; 49 CFR § 383.51(b).

⁶² 49 CFR § 383.51(a)(2).

⁶³ “No Texting Rule Fact Sheet”, *supra* note 15; “Mobile Phone Restrictions Fact Sheet”, *supra* note 44.

⁶⁴ “No Texting Rule Fact Sheet”, *supra* note 15; “Mobile Phone Restrictions Fact Sheet”, *supra* note 44.

⁶⁵ “Final Rule”, *supra* note 4, at 75478.

⁶⁶ *Id.*

conjunction with public service announcements and media campaigns, aimed to test whether increased law enforcement efforts would lead to less cell phone use by drivers.⁶⁷ In Hartford alone, law enforcement cited 9,658 drivers who were given citations for texting or talking on cell phones while driving.⁶⁸ In Syracuse, drivers received 9,587 citations for illegal phone use.⁶⁹ The results indicated that texting and handheld cell phone use decreased by one-third in Syracuse.⁷⁰ Enforcement had an even larger effect in Hartford, where texting while driving decreased by almost 75 percent, and handheld cell phone use behind the wheel dropped 57 percent.⁷¹ The programs proved that tough laws, strong and highly-visible enforcement and public awareness can decrease the use of handheld cell phones while driving and help reduce accidents.⁷² As of December 2, 2011, FMCSA reported that there had been over 300 reported violations of the texting rule at roadside during the first thirteen months of its implementation.⁷³

Compliance and Enforcement by Employers

As stated above, employers are also liable if their CMV drivers violate the FMCSA rule, or state or local laws prohibiting the use of handheld cell phones while driving. As a result, while the FMCSA rule does not identify the specific steps that employers must take in terms of company policy or training to enforce the FMCSA rule, it does require some company action to attempt to ensure that their employees comply with the restrictions on cell phone use.

First, the FMCSA has stated that “a motor carrier should put in place or have company policies or practices that make it clear that a carrier does not allow or require hand-held mobile phone use while driving. A motor carrier is responsible for the actions of its drivers.”⁷⁴ Any such policy should describe both the prohibited behaviors associated with handheld cell phone use and the consequences of engaging in such behaviors. It may also include incentives for complying with the policy.⁷⁵

The FMCSA rule has so far prompted a number of employers of CMV drivers to promulgate written policies that define what constitutes acceptable use of cell phones by their employees while driving.⁷⁶ Of these written policies, 45 percent prohibit all use of cell phones while driving unless the phone is hands-free, while 41 percent prohibit the use of cell phones altogether, whether hands-free or not.⁷⁷ In contrast, 12 percent of the written policies reported by CMV driver employers prohibit only texting or browsing the

⁶⁷ “New Research Shows Enforcement Cuts Distracted Driving”, *National Highway Traffic Safety Administration* (July 11, 2011), <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2011/New+Research+Shows+Enforcement+Cuts+Distracted+Driving>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ “Final Rule”, *supra* note 4, at 75478.

⁷⁴ *Id.*

⁷⁵ Matthew Howard & Michael Riemer, “FMCSA Cell Phone Rules: A Compliance Guide for Truck and Bus Fleets,” *ZoomSafer* 11 (2011), available at <http://wegraham.files.wordpress.com/2012/02/fmcsa-cell-phone-regs-white-paper-dec2011-final.pdf>.

⁷⁶ “2013 Survey Finds Companies Remain Concerned About Employee Use of Mobile Devices While Driving,” *Aegis Mobility* (April 15, 2013), <http://www.aegismobility.com/distracted-driving/news/79-2013-survey-finds-companies-remain-concerned-about-employee-use-of-mobile-devices-while-driving> [hereinafter “2013 Survey”].

⁷⁷ Howard & Riemer, *supra* note 75, at 11.

Internet while behind the wheel.⁷⁸ This latter policy does not assure compliance with the FMCSA rules.

It should be noted that an employer's implementation of a cell phone use policy, while essential, is not sufficient on its own to ensure compliance with the rule and to avoid liability due to a CMV driver's violation of the FMCSA rule.⁷⁹ In fact, only 32 percent of employers responding to a recent survey reported that they were "very confident" that their distracted driving policies are effective.⁸⁰ Such being the case, it is recommended that employers of CMV drivers have them sign a written acknowledgement that they agree to, and understand, the policy.⁸¹

It is also recommended that employers of CMV drivers have regular communication with and training for them on handheld cell phone use while driving a CMV.⁸² Finally, employers should implement technology enforcement tools to encourage compliance with the rule or with relevant state and local laws regarding cell phone use while driving.⁸³

Employers can also implement either passive or active technological tools to promote a CMV driver's safe and legal use of cell phones while driving a CMV.⁸⁴

Passive Technological Tools: Passive policy software is effective when used by a company where the CMV driver carries a personal cell phone and the vehicles are equipped with telematics systems.⁸⁵ This software analyzes and compares cell phone billing records with vehicle trip data to measure and report an employee's cell phone use while driving a CMV.⁸⁶ Passive compliance tools involve three components: (1) recording the employee's driving data, such as where and when the trips started, the road taken, and when and where the trip stopped; (2) recording employee phone usage data while driving; and (3) maintaining a secure portal for dashboard reporting and risk analysis.⁸⁷

The accessibility of employee phone usage data depends on the type of cell phone the driver is using. If a CMV driver is using a company-owned cell phone, the phone usage data is company billing data and belongs to the employer.⁸⁸ An employer can easily access this data with a simple letter of authorization from the employer to the telephone company.⁸⁹ Phone usage data is less accessible if a CMV driver is using a personal cell phone while driving.⁹⁰ Under the Federal Credit and Reporting Act, an employer can only access billing data from an employee's personal cell phone with the employee's authorization.⁹¹ If the employee provides authorization, an employer can obtain this data through the telephone company's secure website's automated process.⁹² The process of

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ "2013 Survey", *supra* note 76.

⁸¹ Howard & Riemer, *supra* note 75, at 11.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 11-12.

⁸⁸ *Id.* at 12.

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *Id.*

⁹² *Id.*

obtaining such data is analogous to the process followed by an employer that requires its employees to submit personal data regarding their DMV record, criminal history or drug testing results.⁹³

This method of enforcement system includes the use of fleet tracking and telematics systems such as Qualcomm, Peoplenet, and Xata, to name a few.⁹⁴ These systems record and measure the employee driving data, such as where and when a trip began and ended and the route driven, which is compared to the employee's cell phone billing records to measure and manage a CMV driver's cellphone use while driving a CMV.⁹⁵

Active Technological Tools: Active policy software solutions are available for employers whose CMV drivers have a company-owned smart phone or tablet.⁹⁶ Employers can install such software applications on their driver's smart phone or tablet.⁹⁷ Some of these applications, such as FleetSafer Mobile with SafeApp, integrate with a service trigger (e.g. Telematics or Bluetooth technology) to automatically activate the employer's set "policy mode" limitations when the vehicle is in motion.⁹⁸ SafeApp software allows an employer to prevent a CMV driver from accessing calls, texts, emails, the Internet browser and other applications. The employer can also use SafeApp to selectively allow certain applications that are permitted by company policy for use while driving, such as navigation.⁹⁹

Another active software application, SafeDial, not only prevents a CMV driver from texting, emailing, and browsing while driving, but also allows inbound and outbound call management.¹⁰⁰ When SafeDial is active on a CMV driver's phone, all alerts and notifications are silenced and the phone's keyboard and screen are locked.¹⁰¹ This software does not affect a CMV driver's ability to make emergency calls or engage in hands-free calls.¹⁰² Therefore, the use of these or similar software applications can almost guarantee that an employer and its CMV drivers will comply with the FMCSA cell phone restrictions.¹⁰³

Compliance by CMV Drivers

The easiest way for a CMV driver to comply with FMCSA rule is to use a cell phone that has at least one hands-free feature. One compliant hands-free cellphone would have the push-to-talk function.¹⁰⁴ CMV drivers may also use two-way radios, walkie-talkies, or a cell phone that is mounted close to the driver.¹⁰⁵ Additionally, drivers may use a cell

⁹³ *Id.*

⁹⁴ *Id.* at 11.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Howard & Riemer, *supra* note 75, at 13; "ZoomSafer Introduces Safe Dial™ Technology to Help FMCSA-Regulated Fleet Operators Enforce Cell Phone Use Policies", *BusinessWire* (March 13, 2012 08:37 AM), <http://www.businesswire.com/news/home/20120313005627/en/ZoomSafer-Introduces-Safe-DialTM-Technology-FMCSA-Regulated-Fleet> [hereinafter "Safe Dial"].

¹⁰⁰ "Safe Dial", *supra* note 101; "Sprint and Aegis Mobility Help Commercial Fleet Managers Address Distracted Driving," *Aegis Mobility* (Jan. 17, 2013), <http://www.aegismobility.com/distracted-driving/news/70-sprint-and-aegis-help-commercial-fleet-managers-address-distracted-driving>.

¹⁰¹ Howard & Riemer, *supra* note 75, at 12-13.

¹⁰² *Id.* at 13.

¹⁰³ "Safe Dial", *supra* note 101.

¹⁰⁴ "FAQ", *supra* note 50.

¹⁰⁵ "Final Rule", *supra* note 4, at 75475; 49 CFR §§ 383.5 & 390.5; "Mobile Phone Restrictions Fact Sheet", *supra* note 44.

phone that has a speaker phone function with voice command.¹⁰⁶ Some speaker phones with voice command can only make calls while others, such as the iPhone with Siri, can write text messages or more.¹⁰⁷ If a driver's speaker phone function has poor sound quality or he or she does not want to mount a cell phone, wireless technology such as Bluetooth is a good alternative.¹⁰⁸ Bluetooth technology allows wireless communication between a cell phone and other products, whether the phone is in the driver's pocket, purse, or elsewhere.¹⁰⁹ If the technology is integrated with the vehicle, Bluetooth allows a driver to push a single button on the steering wheel to initiate, terminate, or answer a cell phone call.¹¹⁰ Most commercial vehicles do not come equipped with integrated Bluetooth.¹¹¹ Nonetheless, Bluetooth products, such as headsets, can be purchased separately and integrated into the vehicle.¹¹² Bluetooth products allow the CMV driver to terminate or answer calls by pushing one button on the product, and to dial by simply speaking a contact's name or number.¹¹³

Even if they intend to use hands-free cell phones or wireless technology, CMV drivers still cannot reach for their cell phone while they are driving.¹¹⁴ It is important that they remember to make sure that their cell phones are in close proximity and that any hands-free technology is turned on before driving.

Despite these suggestions, several surveys suggest that employers have been reactive rather than proactive in their efforts to enforce the FMCSA rule. For example, in February 2012, the most common employer enforcement mechanisms were "Random Safety Audits", "Post-Crash Discipline", and "Peer Reporting." So far this year, 86 percent of employers surveyed reported that they had taken at least some steps toward enforcing distracted driving policies.¹¹⁵

CONCLUSION

The FMCSA restrictions on handheld cell phone use are clearly driven by safety concerns due to distracted driving. Employers and CMV drivers alike will be held liable when the CMV driver holds and uses a handheld cell phone while behind the wheel of a CMV. While the extent of enforcement of this FMCSA rule is not yet known, there is already evidence that the FMCSA rule, combined with similar state laws, public awareness through media campaigns and visible enforcement efforts by local law enforcement agencies will achieve some measure of success in reducing the number of accidents due to distracted driving.

The FMCSA rule also, by including sanctions against employers for their drivers' violations of the restrictions on the use of handheld cell phones, provides incentives to employers to help enforce the rule. Employers can enhance their liability position by enacting an effective written cell phone usage policy and

¹⁰⁶ Don Jerrell, "Compliant Mobile Telephones Under the New FMCSA Restrictions", *HNi* (Dec. 5, 2011, 3:58 pm), <http://hni.com/blog/bid/68900/Compliant-Mobile-Telephones-Under-the-New-FMCSA-Restrictions>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ "Mobile Phone Restrictions Fact Sheet", *supra* note 44.

¹¹⁵ "2013 Survey", *supra* note 76.

requiring their drivers to sign a written acknowledgment of it. Employers should also implement employee training with respect to the rule, and may also install technology in their CMV vehicles to limit or monitor their employees' cell phone use while driving. The most effective tool, however, might be the availability for CMV drivers of hands-free cell phone features that allow them to make, receive, or initiate cell phone calls while driving without violating the FMCSA rule. One thing is clear: without an effective enforcement mechanism, it is likely that CMV drivers will continue to use cell phones, at least until they are involved in an accident or are caught by law enforcement officials.¹¹⁶

¹¹⁶ Howard & Riemer, *supra* note 75, at 10.

