



Cell Phone Laws and Trends in Various Jurisdictions

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On Dec. 2, 2011, the Federal Motor Carrier Safety Administration (FMCSA) published a rule restricting the use of hand-held cell phones by drivers of commercial motor vehicles (CMV). The rule took effect on Jan. 3, 2012. See 49 CFR § 392.82; see also 76 FR 75470.

The rule restricts a CMV driver from (1) holding a cell phone to make a call; (2) dialing, answering or ending a call by pressing more than a single button or by pressing the cell phone screen more than once; or (3) reaching for a cell phone. "Reaching" is defined as any action that the driver cannot complete while the seat belt is buckled and the driver is in the normal driving position.

A CMV driver must have his or her cell phone located within an arm's length, i.e., where the driver is able to initiate, answer or terminate a call by touching a single button while he or she is in the seated driving position, properly restrained by a seat belt and without bending or turning. If a cell phone is not within the CMV driver's arm's length while he or she is in the upright, seated, properly restrained position, then the CMV driver is considered to be reaching for the cell phone, an act prohibited under the rule.

Under the FMCSA regulation, hands-free use of a cell phone is permitted. This includes the use of a wired or wireless earpiece, speakerphone functions, voice-activated dialing or other hands-free features. However, in order to comply with the rule, a CMV driver must not reach for the cell phone or violate the single-button rule when using hands-free options.

The push-to-talk function violates the rule because such function involves holding the cell phone. Pursuant to the rule, "driving" includes not only operating a CMV on the highway but also operating a CMV while temporarily stationary because of traffic, a traffic control device, or other momentary delays. "Driving" does not include when the driver has pulled the CMV to the side of or off a highway and is stationary.

TEXTING

All CMV drivers are prohibited from texting while driving under the rule. The rule does, however, provide for a limited exception to allow CMV drivers to text and/or use a hand-held cell phone if necessary to communicate with law enforcement officials or other emergency services.

APPLICABILITY TO NON-CDL OPERATORS

The rule applies not only to commercial driver's license (CDL) holders, but also anyone driving a vehicle on a highway in interstate commerce if the vehicle (1) has a gross vehicle weight or 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, including the driver, not for compensation; or (4) is

transporting any quantity of hazardous materials requiring placards to be displayed on the vehicle.

PENALTIES AND FINES

Violations of these rules will have consequences for CMV drivers, carriers, and companies. Under the rules, CMV drivers may be fined up to \$2,750 for a first conviction. A violation of the cell phones rules is considered a serious traffic violation. Therefore, if a CMV driver is convicted of two violations of the rule within a three-year period, a 60-day disqualification may be imposed and a 120-day disqualification may be imposed for additional convictions during the same time period.

The rule does not require CMV employers and/or carriers to establish written company policies regarding cell phone use by their drivers, but they are prohibited from allowing or requiring their drivers to use hand-held cell phones. Under the regulations, CMV employers and/or carriers could incur a fine up to an amount of \$11,000 per violation as a result of a violation by their driver, regardless of whether a company cell phone policy is in place.

RECOMMENDATIONS

As a result of the rules explained previously, we recommend that our clients and all CMV carriers and/or companies amend their current policies to ensure compliance with the FMCSA regulations by prohibiting cell phone use in violation of such regulations. Such policies should be strictly enforced in order to deter CMV driver violations.

VARIOUS MID-ATLANTIC STATE LAWS

We surveyed state cell phones laws in Maryland, New Jersey, New York, Ohio, Pennsylvania and West Virginia.

No state has gone so far as to completely ban all cell phone use by CMV drivers. Therefore, the single-touch rule and the FMCSA regulations described previously apply to all CMV drivers in these states. Following is a summary of the respective cell phone laws related to CMV and non-CMV drivers in each state.

In Maryland, all drivers, both CMV and non-CMV, are prohibited from using hand-held cell phones while the motor vehicle is in motion. Therefore, every driver in Maryland must use hands-free options. The same rules apply to all drivers in New Jersey, New York and West Virginia.

New Jersey contains an exception for two-way radios used by CMV drivers. New York amended its Vehicle and Traffic Law to specifically add the provisions of the FMCSA regulations regarding cell phone use by CMV drivers.

DRIVING ALSO MEANS WHEN THE VEHICLE IS STOPPED

Like the FMCSA regulations, "driving" in Maryland, New Jersey, New York and West Virginia includes while temporarily stationary because of traffic, a traffic control device or other momentary delays. Thus, all drivers in these states must be pulled to the side of the road in order to properly use a hand-held cell phone.

NON CMV/CDL DRIVERS IN OHIO AND PENNSYLVANIA MAY USE A HAND-HELD PHONE

In Ohio and Pennsylvania, non-CMV adult drivers are permitted to use hand-held cell phones while driving. Local municipalities in Ohio, however, are permitted under state law to enact their own cell phone restrictions, and at least six cities have passed their own laws banning the use

of hand-held cell phones. Also, in Ohio, there is a complete ban on the use of cell phones, hand-held or hands-free, for drivers under the age of 18. Regarding CMV drivers, the Pennsylvania Motor Vehicle Code has been amended to add the specific provisions of the FMCSA cell phone regulations.

NO TEXTING BY ANY DRIVER

Texting is banned for all drivers in each of these states, regardless of age or license status. This includes checking and sending texts while stopped because of traffic or a traffic control device. Each of these states also contain an exception where CMV drivers are permitted to use hand-held cell phones and send text messages in cases of emergency, i.e., calling 9-1-1, law enforcement, fire departments and other emergency personnel.

LEGAL RAMIFICATIONS AND OUR OPINIONS

In light of the FMCSA regulations and the fact that many states listed above have enacted statutes restricting the use of hand-held cell phones, allegations of negligence *per se* will arise in cases against CMV drivers and their companies regarding the use of cell phones while driving. Negligence *per se* is the legal doctrine whereby an act is considered negligent because it violates a statute or regulation—in this scenario, the FMCSA regulations and/or state statutes.

While CMV companies can avoid claims of negligence *per se* merely by complying with the FMCSA regulations, we expect that allegations of “single touch” and “reaching” rule violations will be hotly contested legal issues. There is a fine line between complying with and violating the FMCSA regulations, as there are a number of scenarios in which a CMV driver may easily violate the “single touch” rule. For example, when a CMV driver receives an incoming call, touching the “accept call” button and then the speaker function could violate the “single touch” rule.

INDUSTRY RESPONSE

As a result of this uncertain “single touch” rule, many CMV companies have implemented policies to completely ban the use of cell phones by their CMV drivers in order to ensure safety and avoid liability. For example, at least three of our clients, who are national CMV companies, have a CMV driver policy strictly prohibiting all cell phone use while the CMV is in operation. Some allow Bluetooth or one-touch use for a limited amount of time per hour.

Due to the practical difficulty in fully complying with the “single touch” rule, we recommend that our clients and other CMV drivers, carriers and/or companies avoid all cell phone use while the CMV is in operation, except in emergency situations. Proving that one “touch,” as opposed to multiple “touches,” took place may be difficult, as the evidence regarding a CMV driver’s hands-free functions may be difficult to prove if the records show that the driver “was on the phone.” Therefore, cases may become unnecessarily complex and focused on a CMV driver’s hands-free process. We advise avoiding this “gray area” by prohibiting cell phone use altogether.

Further, even if the CMV driver is in compliance, the issue of whether the use of the phone was a “distraction” will, in most cases, be a question for the jury. Thus, this issue will create one more fact that must be discounted to show that the driver was doing everything he or she could do.

Although many, many drivers, who would be prospective jurors, use a cell phone while driving whether it be legally or illegally, our experience is that they tend to hold a CMV driver to a “higher” standard even though this may not be legally permitted. We cannot change the way they feel about this, and in our present society the use of cell phones when driving is a “hot topic.”

Accordingly, we have seen an increase in requests for cell phone records from opposing parties and now routinely request these records from our driver at the outset as well as any other drivers.

We do not, however, recommend banning CMV drivers from having cell phones in the tractor with them. Cell phones are useful while the CMV is not in use or is lawfully pulled to the side of the road. Further, cell phones prove to be extremely helpful in the event of an accident or other emergency situations.

PUNITIVE DAMAGES

Can the use of a hand-held cell phone by a CMV driver be considered punitive damages?

In most jurisdictions, the general rule is that punitive damages are appropriate when an individual's actions are of such an outrageous or egregious nature as to demonstrate intentional, willful, wanton or reckless conduct. Wanton misconduct or reckless indifference means that the individual has intentionally acted unreasonably and in disregard of a risk known to him or her, and such risk is so great as to make it highly probable that harm would follow.

We believe that a colorable argument could be made that a CMV driver's use of a hand-held cell phone or violation of the FMCSA rule gives rise to a punitive-damages claim. However, for illustrative purposes, following are outlines of two cases in which courts have rejected claims for punitive damages due to cell phone use.

Moreover, these decisions were either issued before the new FMCSA rule or did not involve CMV drivers. We believe that if these courts and similar courts were to face the same claims pursuant to current hand-cell phone laws, they might consider hand-held cell phone use by CMV drivers to be reckless, thus subjecting CMV drivers and their companies to punitive-damages claims.

For example, in *Sipler v. Trans Am Trucking, Inc.*, 2010 U.S. Dist. LEXIS 126047 at *2-5, 2:10-CV-03550-DRD (D.N.J. Nov. 30, 2010), plaintiffs brought a punitive-damages claim against defendants, alleging that the defendant CMV driver was reckless, careless and negligent for talking on his cell phone at the time of the collision. Defendants moved for summary judgment, arguing that the CMV driver did not act with actual malice or wanton and willful disregard of the plaintiffs' safety by using a cell phone while driving.

The United States District Court for the District of New Jersey found no justification for awarding punitive damages to the plaintiffs. The court reasoned that the CMV driver "*did not violate any New Jersey motor vehicle laws or federal motor carrier safety regulations*" by talking on a cell phone at the time of the collision, nor did he act with actual malice or wanton and willful disregard of the plaintiffs' safety.

We note that this case was decided on Nov. 30, 2010. Since that time, the FMCSA has issued the rule banning the use of hand-held cell phones by CMV drivers. Further, New Jersey has since amended their traffic laws to prohibit the use of hand-held cell phones by all drivers. In addition, on Jul. 18, 2012, the New Jersey Legislature enacted a law which states, "Proof that the defendant was operating a hand-held wireless telephone while driving a motor vehicle ... may give rise to an inference that the defendant was driving recklessly." N.J. Stat. § 2C:12-1(c)(1).

Applying *Sipler's* facts to current cell phone laws, it is likely that the United States District Court for the District of New Jersey would allow a plaintiff's punitive damages claim because a CMV driver talking on a hand-held cell phone today would be in violation of both New Jersey motor vehicle laws and FMCSA regulations.

In the Pennsylvania case of *Pietrulewicz v. Gil*, No. 2014-C-0826 (Pa. Lehigh Cty. C.P. June 6, 2014), the use of a cell phone while driving did not rise to the level of recklessness or support the corresponding claims for punitive damages. Plaintiff was operating a motorcycle when a vehicle driven by defendant turned in front of him and collided with his motorcycle. Defendant was talking on her cell phone at the time of the accident.

The sole issue before the Court was whether plaintiff's allegations of recklessness and his demand for punitive damages were supported by the facts pled in his Complaint. The Court relied on *Piester v. Hickey*, decided in 2012, where that court ruled that punitive damages were not recoverable in Pennsylvania where only the allegation in support is that the defendant used a cell phone.

The *Pietrulewicz* Court ultimately concluded that defendant's use of her cell phone did not give rise to an evil motive or conscious indifference to plaintiff's safety and, thus, did not constitute reckless conduct sufficient to support plaintiff's punitive-damages claim.

Pietrulewicz was decided in 2014, and it and the cases it relied on only involved non-CMV drivers. In Pennsylvania, non-CMV drivers are allowed to use hand-held cell phones while driving.

However, the FMCSA rule applies in Pennsylvania, and Pennsylvania has recently amended the CMV provisions of its Motor Vehicle Code to specifically include the FMCSA rule. Thus, we suspect that federal and state courts in Pennsylvania would consider a punitive-damages claim against CMV drivers and their companies for using hand-held cell phones and violating the Federal Rule.

GLOBAL POSITIONING SYSTEMS ("GPS")

While the use of GPS is not prohibited under the FMCSA rules against hand-held cell phones and texting while driving, a similar distracted-driving analysis could be applied to GPS units.

For example, in *Steven Rockwell v. Glenn Knott and New Prime, Inc.*, C.C.P. No: 12-CV-1114 (2013), Judge Terrance R. Nealon of the Court of Common Pleas of Lackawanna County (Scranton), Pennsylvania, issued a lengthy opinion granting our Motion for Partial Summary Judgment and dismissing claims of punitive damages against a driver and his employer for the use of a handheld GPS at an intersectional accident.

In the opinion, Judge Nealon noted that "a motorist arguably may engage in recklessly indifferent conduct, and thereby be potentially liable for punitive damages, if he completely diverts his or her attention from the roadway to observe a low positioned GPS device and nevertheless continues to travel on the roadway until he collides with another vehicle."

Judge Nealon further noted that "if the GPS device is affixed to the dashboard or windshield of a vehicle, such that the operator maintains peripheral vision of the roadway, a motorist's split-second glimpse at its screen is akin to a momentary glance at a speedometer or side or rearview mirror, and does not constitute reckless indifference or wanton misconduct. However, if a driver completely diverts his or her attention from the roadway to view a GPS device which

is not located on the dashboard or windshield, and continues to travel in his or her vehicle without any view of the roadway or other traffic, he may be deemed reckless.”

While this case was ultimately decided in Rawle & Henderson LLP's favor, Judge Nealon's analysis demonstrates that plaintiffs can make colorable arguments for negligence and punitive damages by claiming driver distraction caused by inputting, selecting, or reading GPS information.

Therefore, we recommend that CMV drivers type in all relevant information and activate their GPS unit before they begin their trip. CMV drivers may also utilize a voice-activated GPS unit, or pull to the side of the roadway when holding, reading, or typing information into a GPS unit. We also recommend that CMV drivers mount GPS units in such a manner that does not divert the driver's attention from the roadway.

DISTRACTED DRIVING

Distracted driving has been a “hot” topic in the last few years, and we suggest that all drivers be encouraged to avoid not only cell phone use but also any activities that can be construed or interpreted as having caused a “distraction.” At 60 mph, a motor vehicle travels 88 feet in one second. How long does it take to look away, reach, and pick up one's coffee?

RECOMMENDATION

Drive when you are on the road and talk, text, eat and put your make-up on when you are parked or stopped off of the travel portion of the roadway.

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