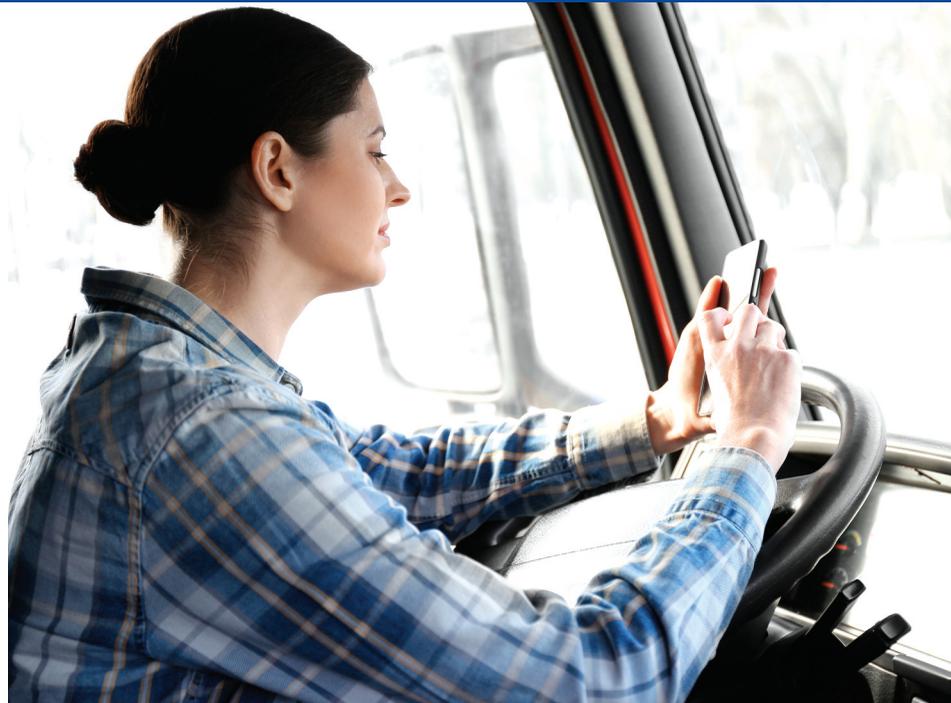


UPCOMING TRAININGS & CONFERENCES

- **NDAA's Prosecuting DUI Cases Online Course On Demand Training**
<https://ndaa.org/training/prosecuting-dui-cases/>
- **NDAA's Executive Course**
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- **NDAA's Building a Culture of Best Practices in Domestic Violence, Sexual Assault, and Human Trafficking**
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Distracted Driving Laws

The Federal Motor Carrier Safety Administration's restrictions on cellphones and electronic devices for Commercial Drivers Licenses (CDL) and all Commercial Motor Vehicle (CMV) drivers is a model for states to follow.

By Christopher J. Turner, Esq.

In this article the terms “mobile” and “cell” (phones) are used interchangeably as they are in the research provided and the statutes/regulations used as illustrations. A few of you reading this article will remember using a rotary phone and more of you will remember

the bricks that were the first mobile phones, possibly the envy of being able to take your phone with you. More of you still will remember the first Razor from Motorola as the most advanced portable technological wonder of cell phones and pondering what “texting” even was. Times have changed.

DISTRACTED DRIVING

Many people think of distracted driving as cell phone use in a vehicle, and while that is true, it is only one type of distraction. What exactly is distracted driving? The National Highway Traffic Safety Administration (NHTSA) *describes* distracted driving as “any activity that diverts attention from driving, including talking or texting on your phone, eating and drinking, talking to people in your vehicle, fiddling with the stereo, entertainment or navigation system(s)—any-

The National Highway Traffic Safety Administration (NHTSA) describes distracted driving as “any activity that diverts attention from driving, including talking or texting on your phone, eating and drinking, talking to people in your vehicle, fiddling with the stereo, entertainment or navigation system(s)—anything that takes your attention away from the task of safe driving.

thing that takes your attention away from the task of safe driving.”¹ NHTSA further *defines* distracted driving as “when a driver’s attention is diverted away from driving by a secondary task that requires focusing on an object, event, or person not related to the driving task.”² The Center for Disease Control (CDC) defines distracted driving as “driving while doing another activity that takes your attention away from driving.”³ While there are different specific definitions of distracted driving, it is commonly defined as “when a driver’s attention is diverted away from driving by a secondary task that requires focusing on an object, event, or person not related to the driving task.”⁴

Crash investigations and safety studies conducted by the National Transportation Safety Board (NTSB) in all modes of transportation underscore the dangers of using personal electronic devices while operating a highway vehicle, plane, train, ship or pipeline.⁵ With the advent of new mobile technology, specifically mobile phones, distracted driving has become an epidemic with

tragic consequences.⁶ In 2018, distracted driving was reported in crashes killing 2,841 people (7.8% of all fatalities), although many instances may go unreported.⁷

CELL PHONES

Today's devices provide a tremendous resource to keep in touch with family and friends, and the ability to work and entertain ourselves on the go. We can maintain our calendar, make and update appointments, and keep key stakeholders apprised of events while looking up a recipe for tonight's dinner. There is a darker side, however, more fraught with inherent danger to ourselves and others when we use this technology while driving. As a retired law enforcement officer

Drivers are not simply texting anymore; now they blog, look at videos, create art, read the news, surf the web, watch movie previews, or movies, and who knows what else, all while behind the wheel of a car, truck, or commercial motor vehicle.

of 21 years, I have seen many instances of distracted driving. I remember when it was just eating a sandwich, maybe while reading a paper or book, then texting came about. Recently, I watched a crash video taken from a live blogger, blogging while driving. Drivers are not simply texting anymore; now they blog, look at videos, create art, read the news, surf the web, watch movie previews, or movies, and who knows what else, all while behind the wheel of a car, truck, or commercial motor vehicle.

Distracted driving has become a leading cause of all crashes in the U.S., and a significant causal factor in fatality collisions. To emphasize this point, in 2003, Americans sent about 2.1 billion text messages a month.⁸ By 2017, the number had exploded to 6 billion Short Message Service (SMS) messages each *day*, over 180 billion messages each month.⁹

As this is not a new or novel topic, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA), along with states and local jurisdictions, have enacted distracted driving laws aimed at cell phone or electronic device use. Ultimately, law enforcement officers must enforce these laws and the traffic prosecutors must prosecute the drivers. But there are challenges for both law enforcement and prosecutors. Traditionally, the most dangerous type of impaired driving has been drunk driving. Studies now show texting while driving can be six times more dangerous than drunk driving.¹⁰ Other studies have shown sending a text while driv-

ing impacted driver reaction times more negatively when compared with drunk driving, driving under the influence of marijuana, and reading an email.¹¹ Even though studies and research have clearly shown texting while driving is equally or more dangerous than drunk driving,¹² state texting bans treat it as a minor traffic infraction with little deterrent effect, no per se violation, and statutes with the numerous exemptions allowed for a driver utilizing a device.¹³

STATE LAWS

An examination of texting laws reveals the inherent complications behind enacting and enforcing cell phone prohibitions and exceptions. State legislatures have attempted to respond to the dangers of texting but, typically, these laws may be underinclusive and may not deter drivers. The laws also leave police with a minimally effective way to enforce them.¹⁴ The risk of being “caught” violating the texting or mobile phone bans is low. For example, Indiana’s texting ban (for all drivers) has been largely unenforced since it was passed in 2011.¹⁵ From 2011 to mid-2014, less than 400 citations were written for a violation of the texting ban.¹⁶

Indiana’s texting law provides:

(a) A person may not use a telecommunications device to:

- (1) type a text message or an electronic mail message;
- (2) transmit a text message or an electronic mail message; or
- (3) read a text message or an electronic mail message;

while operating a moving motor vehicle unless the device is used in conjunction with hands free or voice operated technology, or unless the device is used to call 911 to report a bona fide emergency.

(b) A police officer may not, without the consent of the person:

- (1) confiscate a telecommunications device for the purpose of determining compliance with this section;
- (2) confiscate a telecommunications device and retain it as evidence pending trial for a violation of this section; or
- (3) extract or otherwise download information from a telecommunications device for a violation of this section unless:

- (A) the police officer has probable cause to believe that the telecommunications device has been used in the commission of a crime;
- (B) the information is extracted or otherwise downloaded under a valid search warrant; or
- (C) otherwise authorized by law.¹⁷

While the code clearly prohibits texting, other dangerous cell phone use, such as GPS, searching the internet, Facebook, Instagram, and Pinterest, is not restricted. Having the phone in the driver's hand is not a presumption of violating the statute. Essentially, an officer would need a confession to enforce the statute.¹⁸

In another example, Kansas prohibits texting through K.S.A. 8-15, 111 which reads:

(a) As used in this section:

(1) "Wireless communication device" means any wireless electronic communication device that provides for voice or data communication between two or more parties, including, but not limited to, a mobile or cellular telephone, a text messaging device, a personal digital assistant that sends or receives messages, an audio-video player that sends or receives messages or a laptop computer. "Wireless communication device" does not include a device which is voice-operated, and which allows the user to send or receive a text based communication without the use of either hand, except to activate or deactivate a feature or function.

(2) "Write, send or read a written communication" means using a wireless communication device to manually type, send or read a written communication, including, but not limited to, a text message, instant message or electronic mail.

(b) Except as provided in subsections (c) and (d), no person shall operate a motor vehicle on a public road or highway while using a wireless communications device to write, send or read a written communication.

(c) The provisions of subsection (b) shall not apply to:

(1) A law enforcement officer or emergency service personnel acting within the course and scope of the law enforcement officer's or emergency service personnel's employment;

- (2) a motor vehicle stopped off the regular traveled portion of the roadway;
- (3) a person who reads, selects or enters a telephone number or name in a wireless communications device for the purpose of making or receiving a phone call;
- (4) a person who receives an emergency, traffic or weather alert message; or
- (5) a person receiving a message related to the operation or navigation of the motor vehicle.

(d) The provisions of subsection (b) shall not prohibit a person from using a wireless communications device while operating a moving motor vehicle to:

- (1) Report current or ongoing illegal activity to law enforcement;
- (2) prevent imminent injury to a person or property; or
- (3) relay information between transit or for-hire operator and the operator's dispatcher, in which the device is permanently affixed to the motor vehicle.

(e) From and after the effective date of this act and prior to January 1, 2011, a law enforcement officer shall issue a warning citation to anyone violating subsection (b).

(f) This section shall be part of and supplemental to the uniform act regulating traffic on highways.¹⁹

The definition of a wireless communication device is fairly standard, not exceptional. More importantly is how this statute is flawed on its face. For example, in the Kansas law, the definition of a wireless communication device does not include a device “which is voice-operated, and which allows the user to send or receive a text based communication without the use of either hand except to activate or deactivate a feature or function.”²⁰ The problem in the plain language of the statute is every smart phone and even most flip phones “allow” the user to operate it by voice communication without the use of either hand.²¹ The statute does not require it be used that way, only that it have the functionality to do so.²² The statute excluded devices that have the feature from the definition of a wireless communication device, effectively rendering the statute useless on its face.²³ The Kansas statute also has numerous exemptions. For example a driver may use the phone to dial or enable maps/GPS; also, having the phone in your hand is not per se a violation of the statute.²⁴ Much like Indiana’s texting law, these exceptions in the statute render it difficult for law enforcement to enforce without a confession from the suspected offender.²⁵ Effective enforcement of the Kansas statute will require: 1) a legislative change; or 2) the courts to interpret legislative intent in the statute.

FMCSA PROHIBITS MOBILE PHONE USE IN A COMMERCIAL MOTOR VEHICLE

The Large Truck Crash Causation Study (mandated by the Motor Carrier Safety Improvement Act of 1999) found approximately 75% of all truck crashes were actually caused by the negligence of the driver of the other vehicle, not the commercial motor vehicle (CMV).²⁶ FMCSA does not have authority to regulate non-CMV drivers. FMCSA's authority does allow it to regulate commercial motor vehicle drivers' use of cell phones and it has done so. Specifically, while operating a CMV on a highway²⁷ (defined as "any road, street, or way, whether on public or private property, open to public travel") a driver may not:

- (a) Prohibition. No driver shall engage in texting while driving.
- (b) Motor carriers. No motor carrier shall allow or require its drivers to engage in texting while driving.
- (c) Definition. For the purpose of this section only, driving means operating a commercial motor vehicle, with the motor running, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the driver moved the vehicle to the side of, or off, a highway, as defined in 49 CFR 390.5, and halted in a location where the vehicle can safely remain stationary.
- (d) Emergency exception. Texting while driving is permissible by drivers of a commercial motor vehicle when necessary to communicate with law enforcement officials or other emergency services.²⁸

49 C.F.R. § 392.82 uses the same language to prohibit the driver from using a hand-held mobile telephone while driving a commercial motor vehicle. A driver may not hold a telephone, even to conduct voice communication, dial or answer a mobile telephone by pressing more than a single button; or reach for a mobile telephone in a manner requiring the driver to maneuver so they are no longer in a seated and properly restrained driving position.²⁹ Even if a driver stops at a red light, they may not use a hand-held mobile telephone. "Driving" includes temporary stops because of traffic, red lights and other momentary delays.

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 commu-

nication using a mobile telephone, or engaging in any other form of electronic text retrieval or entry, for present or future communication.”³⁰

Drivers violating the law by using a hand-held phone while driving a CMV are subject to civil penalties up to \$2,750 per violation.³¹ Motor carriers allowing its drivers to violate this prohibition are subject to a civil penalty of up to \$11,000 per violation.³² These are maximum civil penalties for each violation, which could stack if there are multiple violations on one trip.³³ If a police officer sees a CMV driver holding a cell phone, the driver faces the penalty of \$2,750 and the carrier \$11,000.³⁴ If a driver’s log book shows the driver on duty and driving when the call history shows he made or received a call, there is potential for a violation for each existing call, resulting in significant penalties.³⁵

Studies show the odds of being involved in a critical event in a CMV are more than 23 times greater for a CMV driver who texts verses a CMV driver who does not text.³⁶

DIFFICULTIES FOR LAW ENFORCEMENT

Law enforcement officers must be familiar with the distracted driving statutes in their state. All states place legal responsibilities on drivers to operate in a safe manner through enactment of safe driving statutes (*e.g.*, speed restrictions, turn signals, DUI) and most of these laws are written plainly and consistently. However, distracted driving laws vary across the U.S., both in what they prohibit and how they may be enforced.³⁷ Some state laws may prohibit drivers from talking on hand-held devices altogether, some only apply to vehicles in motion or to drivers in a travel lane, some only focus on “texting” (omitting other forms of mobile phone use as examined in Indiana), and some on composing or viewing messages or texts.³⁸

These variances, loopholes, and exceptions create difficulty for officers and prosecutors alike. Officers essentially have two ways to enforce these statutes: 1) by seeing the driver violate the statute; or 2) by using the vehicle in motions cues, which are consistent with DUI vehicle in motion cues.³⁹

Once a driver is stopped for a vehicle in motion indicator, further absence of evidence may become significant.⁴⁰ If the officer stops the driver based on a driving indicator and further testing or an observation reveals the driver is not impaired, the officer can focus on other possibilities for the driving indicator, such as texting.⁴¹

Exacerbating the difficulty of enforcement are laws that only ban typing, sending, and reading text messages (leaving other phone functions unrestricted), making enforcement nearly

impossible.⁴² To determine whether the driver is engaging in the prohibited activity or actually using their phone for an accepted use, the officer essentially must gain a confession from the driver.⁴³

CONCLUSION

Once the advent of the mobile device was viewed as helpful while driving, with GPS, and hands-free communication, thinking distraction would be less. Now, the unprecedented ability to be connected everywhere has created a dangerous driving environment with fatal consequences. These consequences threaten lives, with nearly a hundred people dying each day in motor vehicle crashes. In addition to the cost of lost lives, fatal, injury and property damage crashes result in billions of dollars in damage, lost revenue, lost employee productivity and medical expenses resulting in increased insurance premiums for automobiles and higher health care costs.

Officers can rely on driving cues similar to driving while under the influence cues to stop a vehicle and the driver's absence of further cues of impairment can steer the officer to consider distracted driving as a reason for the poor driving. However, the problem remains that most of the laws have enough loopholes they nearly require a confession from the driver to the officer to be enforceable.

States have responded by enacting distracted driving laws. These laws vary in their scope and exceptions to the laws. Some laws only prohibit sending or reading a text but say nothing of email, internet pages, or social media. In other words, they leave holes in the statute making it difficult for law enforcement to take action. Officers can rely on driving cues similar to driving while under the influence cues to stop a vehicle and the driver's absence of further cues of impairment can steer the officer to consider distracted driving as a reason for the poor driving. However, the problem remains that most of the laws have enough loopholes they nearly require a confession from the driver to the officer to be enforceable.

Federally, the U.S. Department of Transportation, through the FMCSA's rule making process, implemented a total ban for hand-held devices in CMVs. The federal bans have significant first-time fines for both the driver and the motor carrier. Because federal bans do not allow the driver to hold the device, law enforcement is able to readily enforce the federal ban.

Strict enforcement (combined with the certainty of being caught), and heavy fines (severity of punishment) make the federal ban an effective enforcement model for states to follow. This federal ban serves as a good model for states to strengthen their individual laws.

ABOUT THE AUTHOR

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The Commercial Vehicle Safety Alliance (CVSA) is a nonprofit association comprised of local, state, provincial, territorial and federal commercial motor vehicle safety officials and industry representatives. The Alliance aims to achieve uniformity, compatibility and reciprocity of commercial motor vehicle inspections and enforcement by certified inspectors dedicated to driver and vehicle safety. Our mission is to improve commercial motor vehicle safety and uniformity throughout Canada, Mexico and the United States by providing guidance and education to enforcement, industry and policy makers. For further information about CVSA, please visit its website at <https://www.cvsa.org/>.

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⁸ Emma Gormley, Indiana's Texting-While-Driving Ban: Why Is It Not Working and How Could It Be Better?, 91 Ind. L.J. Supplement 87, 102–04 (2015).

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- ¹² See *Indiana's Texting-While-Driving Ban*, *supra* note 8.
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- ¹⁴ *Id.*
- ¹⁵ *Id.*
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- ¹⁷ Ind. Code Ann. § 9-21-8-59 (West).
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