

## DOT Announces Federal Ban on Texting for Commercial Truck Drivers

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By Allen Smith

U.S. Department of Transportation (DOT) Secretary Ray LaHood announced federal guidance on Jan. 26, 2010, to expressly prohibit texting by drivers of commercial vehicles such as large trucks, buses and vans. The prohibition is effective immediately and applies to interstate truck drivers and commercial bus and van drivers who carry more than eight passengers. Truck and bus drivers who text while driving commercial vehicles may be subject to civil or criminal penalties of up to \$2,750.

"Today we're sending a strong message: We don't merely *expect* you to share the road responsibly with other travelers—we require you to do so," said LaHood. "This is an important safety step, and we will be taking more to eliminate the threat of distracted driving."

"We want to make it crystal clear to operators and their employers that texting while driving is the type of unsafe activity that these regulations are intended to prohibit," stated Anne Ferro, administrator for the Federal Motor Carrier Safety Administration (FMCSA).

Gregory Hare, an attorney with Ogletree Deakins in Atlanta, observed in a Jan. 26, 2010, interview that distracted driving is a much bigger problem in the workplace than just with truckers and bus and van drivers.

"Distracted driving is a problem that persists in any business where employees travel in a vehicle as part of their daily tasks," he cautioned.

"Whether the employee is a territory manager, account representative, home health care nurse or any of the dozens of occupations that involve traveling among multiple locations during the workday, their supervisors expect them to remain in constant communication. This certainly enhances efficiency and productivity among the team members, but obviously creates the attendant dangers of pressuring employees to constantly communicate via handheld devices, even when driving—which of course is highly undesirable."

The DOT directive has been "a long time in the making. We needed it," added Margaret Spence, president of Douglas Claims & Risk Consultants Inc. in West Palm Beach, Fla., and a member of the SHRM Employee Health, Safety and Security Special Expertise Panel. She noted that a few years ago in her own neighborhood the driver of a school bus was involved in an accident while either reaching for a cell phone in her purse, talking on the phone or texting, and a child on the bus was killed. Before the DOT directive, Spence said "everyone was waiting for someone else to do something about it."

### Safety Risks Highlighted

FMCSA research shows that drivers who send and receive text messages take their eyes off the road for an average of 4.6 seconds out of every 6 seconds while texting. At 55 miles per hour, this means that the driver is traveling the length of a football field, including the end zones, without looking at the road.

"Researchers at Virginia Tech found that truck drivers who send text messages on a cell phone are about 23 times more likely to get into some type of crash or near miss than drivers who keep their eyes on the road," LaHood remarked.

During a September 2009 Distracted Driving Summit, the secretary announced the department's plan to pursue this regulatory action as well as rulemakings to reduce the risks posed by distracted driving.

President Barack Obama signed an executive order directing federal employees not to engage in text messaging while driving government-owned vehicles or with government-owned equipment. Federal employees were required to comply with the ban starting on Dec. 30, 2009.

The regulatory guidance on the latest announcement is in the Jan. 27, 2010, *Federal Register*.

LaHood promised that "in the months ahead, we'll propose additional legal remedies and develop new tools that will help us work alongside the law enforcement community, safety advocates, researchers and others to find new ways to raise awareness and bring an end to the terrible dangers posed by distracted driving."

### **Workers' Compensation Exposure**

It isn't just the DOT prohibition and guidance that employers should be concerned about, Hare cautioned. In addition to the safety risks to employees and the public, employers already have heightened exposure to workers' compensation and tort claims when employees cause car accidents because of distracted driving on the job. In addition, some state laws prohibit texting while driving.

Such claims could arise even late at night or on the weekend, even though these are typically nonworking hours for many employees, he added. "If evidence showed that the employee was participating in a work-related phone call, or was pecking away on a work-related text message when the traffic accident occurred, the employee quite plausibly could claim that his injuries arose out of and in the course of employment, such that the injuries should be covered by workers' compensation," Hare said.

### **Educate Employees**

He noted that an employer should take steps to anticipate and prevent any harmful situation. Whether a drug-free workplace policy, anti-harassment policy or use of personal technology policy is involved, Hare said a company will be well-served to show that it:

- Implemented a policy.
- Trained and educated employees on the policy's application.
- Distributed the written policy to each employee.
- Required each employee to sign an acknowledgment of the policy, stating that he or she received, read and promised to comply with the policy.

If there is a vehicle accident caused by a texting employee, an employer "can defend against any tort-based claims by asserting that it warned the employee to refrain from texting behind the wheel, yet the employee knowingly disregarded the employer's written rule," he noted.

"Of course, the rule primarily is designed to prevent accidents from happening," Hare added. And the risk for accidents due to distracted driving is great. A January 2010 **report** from ZoomSafer highlights National Highway Traffic Safety Administration's (NHTSA) and Virginia Tech Transportation Institute's (VTTI) finding that 25 percent of car crashes are due to drivers distracted by mobile phone usage. The report also notes that the *New England Journal of Medicine* has determined that the risk of accident because of cell phone use is equal to the risk because of legal intoxication.

Policies and training won't keep some employees from texting while they drive. "But even if 100 percent prevention is not possible, perhaps the employer at least can successfully shield itself from tort liability by proving that the employee should have known better, and the employer did everything in its power to prevent reckless conduct by its workers," Hare said.

Don't just pigeonhole your safety training on policy for commercial drivers, Spence cautioned. Most commercial drivers already have gotten safety training and get it because "it's been hammered into their brains," she added. But other employees, like administrative assistants who

run errands for their bosses at lunch or members of the field sales force typically are overlooked for safety training, even though it often is every bit as relevant to them as it is for commercial drivers.

If a company has internal safety professionals on staff, HR should work with the safety staff to create a comprehensive program that addresses the DOT directive, Spence said. She noted that at one of her clients, dispatchers were creating problems for drivers by calling them during deliveries and giving them new instructions or directions while employees continued to drive.

Dispatchers and drivers were trained they could not give new information to drivers while they were driving, but instead would have to call the drivers, and instruct them to pull off at the next exit and find a safe place to stop. Then only after the drivers had stopped were they provided with directions.

Another common feature of a policy is to require that employees not use cell phones while driving unless they are using headsets and to keep headset use to a minimum since studies have shown that drivers on headsets also are more distracted, she observed. This type of policy should apply regardless of whether the cell phone is the employee's or employer's, although if the cell phone is an employer's and it tracks an employee with a global positioning system, it can monitor whether the employee is violating the cell phone policy with a company phone.

Employers that do not have internal safety employees on staff should go to the DOT

**web site** or Occupational Safety and Health Administration **web site** and pull down information already there on distracted driving and create a policy and training program, Spence recommended. Don't just hand out a policy, she cautioned.

Really coach employees on how this is for their own safety, Spence noted, saying the employer should explain that it's not overreaching, but instead "wants to send you home safely."

*Allen Smith, J.D., is SHRM's manager of workplace law content.*

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