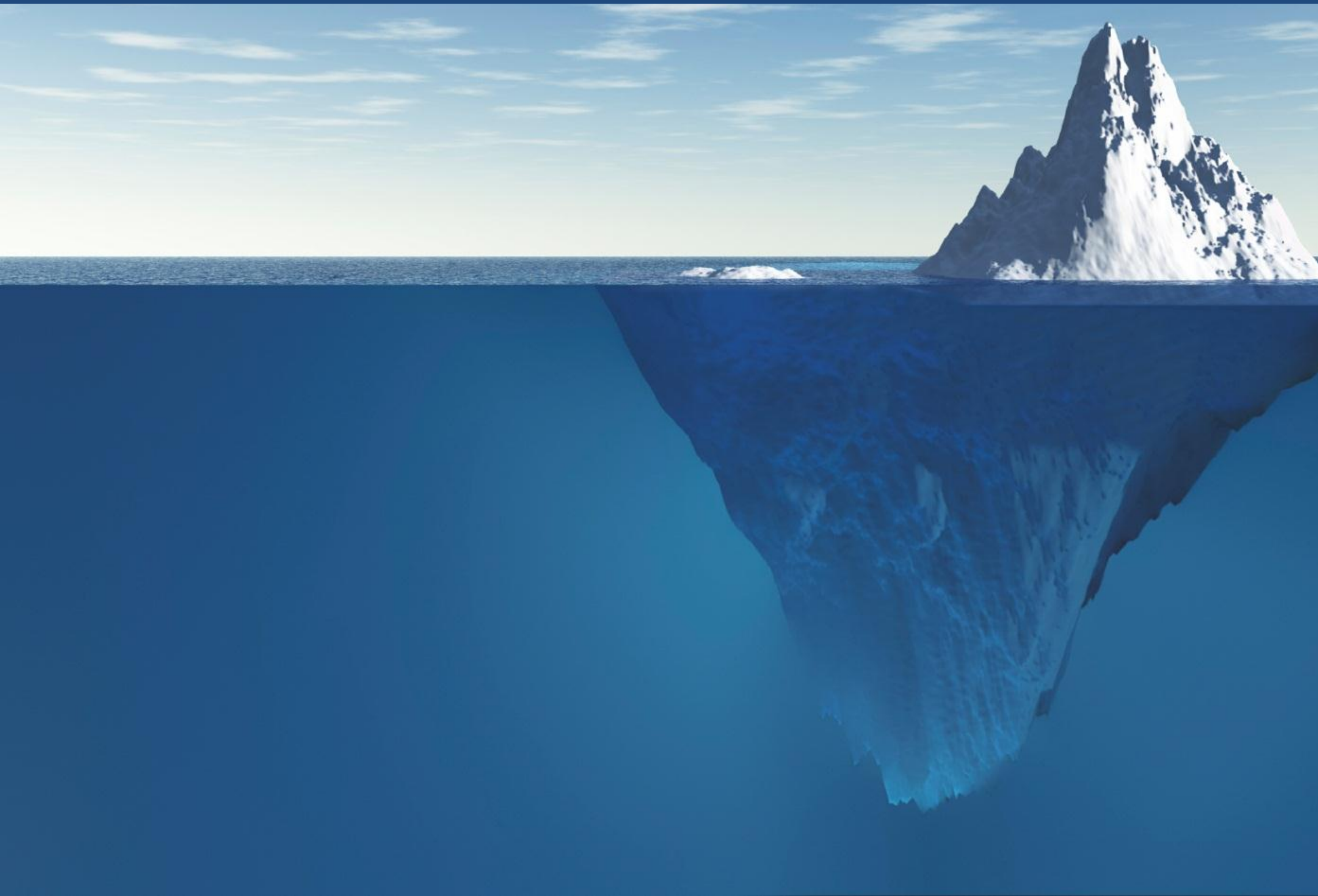
DECEMBER 2011

# FMCSA CELL PHONE RULES:

## A Compliance Guide for Truck and Bus Fleets



## TABLE OF CONTENTS



## I. ABSTRACT

The Federal Motor Carrier Safety Administration (FMCSA), through its Compliance, Safety, Accountability (CSA) program, works together with state and industry partners to proactively foster compliance with written safety rules.

The latest rule with significant CSA implications was issued on November 23, 2011, and prohibits interstate truck and bus drivers from using hand-held cell phones while operating a motor vehicle.

This paper is divided into two parts:

- A summary analysis of the new rule in detail
- Recommendations for compliance

## II. ANALYSIS OF THE RULE

The new rule amends the Federal Motor Carrier Safety Regulations (FMCSRs) to:

1) Restrict the use of hand-held mobile phones by drivers of commercial motor vehicles (CMVs);
2) Modify disqualification sanctions for drivers who fail to comply with either FMCSA regulations or State or local laws that restrict the use of hand-held mobile phones while driving; and
3) Prohibit carriers from requiring or allowing CMV drivers to use hand-held mobile telephones[1]

### A. RATIONALE BEHIND THE RULE

In its rationale for this rule, FMCSA explains the rule is based both on "available data" and its regulatory mission that "hold CMV drivers to higher standards" than the average motor vehicle operator. The agency uses this definition of driver distraction: "the *voluntary or involuntary diversion of attention from primary driving tasks due to an object, event, or person*," and takes into account research showing that hand-held mobile phone use may create more risk than other distracting activities as it involves all four types of driver distraction: manual, visual, auditory and cognitive.

Further rationale comes from data collected during a 2010 DOT-sponsored Virginia Tech Transportation Institute (VTTI) naturalistic driving study. The study, which utilized in-vehicle video cameras to record behavior of 26,737 drivers over twelve months, found that use of a cell phone while driving increased the odds of involvement in a safety-critical event (e.g. a crash, near-crash, or unintended lane departure) by:

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[1] FMCSA (2011), "Drivers of CMVs: Restricting the Use of Cellular Phones [Final Rule]," Washington, DC: Federal Motor Carrier Safety Administration, http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/final/Mobile_phone_NFRM.pdf.

 

- 3 times when reaching for an object (e.g. a cell phone)
- 6 times when dialing a cell phone[2]

A previous DOT-sponsored VTTI study also found that texting/typing on a mobile phone increased the odds of involvement in a safety critical event by more than 23 times.[3]

Finally, the FMCSA noted that nineteen States and the District of Columbia "have gone further" by prohibiting all mobile phone use by school bus drivers.[4] Likewise, nine States and D.C. have enacted laws prohibiting all motor vehicle drivers (including CMV drivers) from any hand-held mobile phone use while driving. Additionally, public transit bus and motorcoach drivers are the subject of more stringent cell phone use rules in certain jurisdictions.

## B. COMMENTS FROM THE PUBLIC DURING THE PROPOSED RULEMAKING

In the months after FMCSA issued its Notice of Proposed Rulemaking (NPRM) in February 2011, it received considerable feedback: about 300 public comments from a variety of sources, including "associations representing trucking companies, motorcoach companies, school bus operations, public transportation, highway safety, utility providers, waste haulers, concrete manufacturers, and food suppliers" as well as from the legal and law enforcement communities and representatives of State governments and driver unions.[5]

FMCSA reported that the majority of commenters "supported the proposal to restrict hand-held mobile telephone use because of the potential safety benefits for all vehicle and pedestrian traffic sharing the highway with CMVs." Some commenters, however, felt that the proposed rule did not go far enough, while still others opposed any restriction on mobile phone use.

Table 1.0 below provides a summary of the key comments and the FMCSA's response:

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[2] Hickman, J., Hanowski, R. & Bocanegra, J. (2010), *Distraction in commercial trucks and buses: assessing prevalence and risk in conjunction with crashes and near crashes*, Washington, DC: Federal Motor Carrier Safety Administration, http://www.fmcsa.dot.gov/facts-research/research-technology/report/Distraction-in-Commercial-Trucks-and-Buses-report.pdf.

[3] Olson, R. L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009), *Driver distraction in commercial vehicle operations*, Washington, DC: Federal Motor Carrier Safety Administration, http://distraction.gov/download/research-pdf/Driver-Distraction-Commercial-Vehicle-Operations.pdf.

[4] FMCSA, "Drivers of CMVs: Restricting the Use of Cellular Phones [Final Rule]."

[5] Ibid.

 

| Public Comment | Industry or Public Comment | FMCSA Response |
|---|---|---|
| 1. Hand-held ban would negatively impact commerce | Restricting hand-held mobile telephone use by drivers operating CMVs in interstate commerce would impede business and require many more stops for drivers. | Drivers have other options available that do not require pulling over and stopping, so compliance will not create a burden on CMV drivers. Stops can be avoided by using technology solutions such as:<br>• A hands-free mobile telephone with a speaker phone function (available on most mobile phones)<br>• A wired or wireless earphone.<br>• Upgrading from a noncompliant phone to a compliant device (for as little as $29.99) |
| 2. A total ban would be better | FMCSA should ban both hand-held and hands-free mobile telephone use (a position supported by First Group America and the Advocates for Highway and Auto Safety). | Sufficient data does not exist to justify a ban of both hand-held and hands-free use of mobile telephones by drivers operating CMVs in interstate commerce. Two VTTI studies found that both "talking and listening to a *hands-free* phone" and "talking or listening to a *hand-held* phone" were relatively low-risk activities, involving only brief periods when the drivers' eyes were off the forward roadway. |
| 3. Push-to-talk (PTT) should be excluded | Push-to-talk functions are no different than that of a two-way or CB radio, and therefore PTT should be excluded from the proposed rule. | FMCSA uses the Federal Communications Commission's (FCC) definition of a mobile telephone: "a mobile communication device that uses any commercial mobile radio service". PTT is different from CB Radio use and is therefore forbidden because:<br>• PTT functions use commercial mobile radio service to send/receive voice communications;<br>• PTT use requires the driver or user to hold the device PTT function is non-essential and can be replaced with a compliant mobile phone, two-way radios or walkie-talkies |

*Table 1.0*

<table>
<tr><th>Public Comment</th><th>Industry or Public Comment</th><th>FMCSA Response</th></tr>
<tr><td>4. Dialing vs. button touch should be clarified</td><td>The term "dial" is confusing and should be clarified:<ul><li>The word “dial” is archaic and could include voice/speed dialing</li><li>There should be a difference between dialing and a single button push to initiate or answer a call, either on the phone or the earpiece, or to enable voice-activated dialing</li><li>Dialing should be defined as entering a 7 to 10 digit phone number because the rule should allow the driver to use 1 or 2 button pushes to initiate a conversation</li><li>Consideration should be given to allowing limited key strokes for technological interaction</li><li>Some state laws allow a driver to "initiate or terminate a wireless telephone call or to turn on or turn off the hand-held telephone".</li></ul></td><td>The word dial as used in the rule indicates the placement of a call. The term "dial" is commonly used to mean "make a telephone call," whether the task is accomplished by entering a 7 to 11 digit phone number or by voice activation or speed dialing, and it is not necessary to introduce another term or create a new term in place of the word "dial."<br><br>If “dial” permitted 3, 4, or even 10 touches or button presses, enforcement of the rule would be difficult and nullify the fundamental issue of keeping drivers’ eyes on the forward roadway.<br><br>Language was added to the regulatory text that allows the driver only minimal contact (single button touch) with the mobile telephone, comparable to using vehicle controls or instrument panels, in order to conduct voice communication.</td></tr>
<tr><td>5. Definition of “reaching” should be clarified</td><td>Objections to FMCSA’s initial use of the term "reaching" include:<ul><li>Truck drivers can safely “reach” for and press buttons or turn knobs to operate various equipment so why not phones</li><li>Prohibiting reaching could be overly broad inhibit development of innovative technologies for the commercial vehicle fleet</li><li>In lieu of establishing the prohibition based on the reaching for phones, which is difficult to differentiate from reaching for other items, drivers could be fined for holding phones up to their ear</li><li>Drivers should be educated to place hands-free devices within close proximity</li><li>Why allow the radio, CB but prohibit the phone if all are located within an easy arm's reach</li></ul></td><td>Clarifications of the original regulatory text include:<ul><li>Allowing drivers to reach for the compliant mobile telephone (i.e., hands-free) provided the device is within the driver's reach while he or she is in the normal seated position, with the seat belt fastened. If a compliant mobile telephone is close to the driver and operable while the driver is restrained by properly installed and adjusted seat belts, then the driver would not be considered to be reaching. Reaching for any mobile telephone on the passenger seat, under the driver's seat, or into the sleeper berth are not acceptable actions</li><li>Therefore, in order to comply with this rule, a driver must have his or her compliant mobile telephone located where the driver is able to initiate, answer, or terminate a call by touching a single button</li></ul></td></tr>
<tr><td>6. Use of mobile phones while idling</td><td>Hand-held phone use while the vehicle is parked, with the engine running, does not have the same hazards as in a moving vehicle.</td><td>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.</td></tr>
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| Public Comment | Industry or Public Comment | FMCSA Response |
|---|---|---|
| 7. Use of phones for more than communications | Mobile phones are often used alone or synchronized with other electronic devices for fleet management purposes, including texting to create time-stamped fuel reports for tax reporting. | Synchronizing EOBRs or other technologies with mobile telephones or entering digits for fuel logging would require multiple steps that would result in a driver's eyes off forward roadway. Responsible drivers can accomplish this when the vehicle is not moving, while safely parked off of the highway. |
| 8. Other distractions | The proposal should extend to include other types of electronic devices and technologies that cause driver distraction. | The specific restriction of hand-held mobile telephone use is warranted because of the ubiquitous nature of mobile telephones. |
| 9. Fines & driver disqualification | The civil penalties are too high and there should be an appeals process for CDL disqualifications. | The applicable civil penalties for rule violations of this rule are provided by Congress and are consistent with current maximum penalties that can be assessed against an employer and driver for the violation of similar safety regulations. Commercial drivers caught violating the restriction will face federal civil penalties of up to $2,750 for each offense and disqualification from operating a commercial motor vehicle (i.e. suspensions of their commercial driver’s licenses) for multiple offenses. Commercial truck and bus companies will face a maximum penalty of $11,000 per incident. In addition, states may levy additional fines, penalties and suspensions. There is an appeals process for disqualifications. |
| 10. Employer liability | Employers should not be held responsible for an employee driver's use of a hand-held mobile telephone and employer sanctions are inappropriate where an employer has a policy banning hand-held phone use already in place or if it has taken good faith steps to ensure compliance. | A motor carrier is responsible for the actions of its drivers and must require its drivers to observe duties or prohibitions imposed by FMCSRs. Employers will generally be held accountable if the employee was doing his or her job, carrying out company business, or otherwise acting on the employer's behalf when the violation occurred. 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. |
| 11. Enforcement | Enforcement will be difficult as law enforcement officers might have challenges in accurately observing a CMV driver holding the mobile telephone, unless the driver were holding it to his or her ear. | FMCSA and its State partners, through CVSA and its Training Committee, will develop the procedures and methods to ensure uniform application of the rule. Questions about specific enforcement procedures are not a basis for not taking action to restrict CMV drivers from using hand-held mobile telephones while operating in interstate commerce. |
| 12. Emergency use | CMV drivers should be able to make emergency calls to law enforcement. | CMV drivers are permitted to use a hand-held mobile telephone when necessary to communicate with emergency services. |

| Public Comment | Industry or Public Comment | FMCSA Response |
|---|---|---|
| 13. Certain industries should be exempt | Drivers in certain industries (utilities) could be classified as emergency services, and therefore should be exempt. | Public utility employees operate large or hazardous material-laden vehicles both day and night throughout the year, sometimes under the most adverse weather conditions, and have not previously been considered emergency services by FMCSA, so a blanket exemption is not necessary at this time |
| 14. Outreach and training | Young CMV drivers are operating their vehicles and are using their phones as if they were driving a car (e.g., texting, dialing, etc.), so CDL schools should be required to educate drivers about the dangers of cell phone use. | DOT already has in place distracted driving campaigns to educate all vehicle drivers on distracted driving, many of which are reaching the CMV driver population, both experienced and new drivers. Platforms for sharing distracted driving information include the Web site, www.Distraction.gov, as well as outreach on radio and television. |
| 15. The term “hands off the wheel” should be clarified | The use of the phrase "hand off the wheel" is too restrictive and implies that drivers must maintain both hands on the wheel at all times. | Drivers often must take a hand off the steering wheel to operate the many controls located in a CMV, including the instrument panel and to shift a manual transmission, and it is not the purpose of the rule to prevent a driver from doing necessary tasks required to safely operate the vehicle. |
| 16. Compliance will be difficult | Monitoring and enforcing the rule will be problematic and imperfect, making compliance more inconsistent. The FMCSA, by assuming 100% compliance, is overstating its potential benefit. | When estimating the costs and benefits of rules, the analysis must assume complete compliance. Such assumptions do not result in an overstatement of the potential benefits (or costs) of the rule. |
| 17. Costs and benefits | FMCSA’s own cost/benefit analysis shows that the highest net benefit would result from adopting a cell phone restriction that applies to all commercial drivers and to both hand-held and hands-free use of cell phones. | The Agency is not required to choose the regulatory option with the highest net benefit. In the NPRM, FMCSA offered its preference for Option Four (a restriction on the use of hand-held mobile telephones by all interstate CMV drivers) because it minimizes (for an entire CMV population) the costs of restricting mobile telephone use, including costs associated with inconvenience, disruption of patterns of business operations, and stifling technological innovations. Furthermore, it is not clear whether talking on a mobile telephone presents a significant risk while driving. |

## III. RECOMMENDATIONS FOR MANAGING COMPLIANCE

While FMCSA's new rule is crystal clear with regards to the liability and penalties employers face, it is silent regarding how motor carriers should enforce employee driver compliance. The rule states that carriers are responsible for the actions of their employees and will generally be held accountable for hand-held ban violations that occur when drivers are carrying out company business or otherwise acting on the employer's behalf. Further, FMCSA felt it unnecessary to make enforcement recommendations, choosing instead to clarify that an employer having a written policy in place is not deemed sufficient, and if a violation occurs, the employer will still be held accountable for the action of the driver.

### A. COMPLIANCE IS EASIER SAID THAN DONE

The process of ensuring that drivers comply with the rule is complicated for the follow reasons:

1. **Legislation Is Not Enough.** While laws and regulations (and written company policies) are critical components of a solution, by themselves they are not enough to change human behavior, especially when it comes to cell phone use while driving. Consider, for example, the State of California where the Insurance Institute for Highway Safety (IIHS) conducted a study which found that the State law banning hand-held use of cellphones while driving failed to reduce crashes.[6] Also consider the DOT's recently released National Survey on Distracted Driving Attitudes and Behaviors, which found that respondents rarely mentioned State laws in their decisions about using phones while driving.[7]

2. **Changing Mainstream Behavior Is Extremely Difficult:** Changing a single person's behavior is difficult enough. However, changing the majority of people's behavior is even more difficult. In this case, we're not talking about fringe behavior. We're talking about 60% of truckers who say they use their cell phones while on the road.[8] That's at least 2.4 million people who need to change the way they're accustomed to doing things. Additional research from Career Builder showed that more than 50% of all employees who carry smartphones admit to using them to

[6] Insurance Institute for Highway Safety (2010), "Laws banning cell phone use while driving fail to reduce crashes, new insurance data indicate," http://www.iihs.org/news/rss/pr012910.html.

[7] U.S. Department of Transportation (2011), *National Survey on Distracted Driving Attitudes and Behaviors*, Washington, DC: U.S. Department of Transportation, http://distraction.gov/download/research-pdf/8396_DistractedDrivingSurvey-120611-v3.pdf.

[8] Jutilla, Dean (2011), "Mobile Usage by Truckers on uShip Surges 60%, Latest uShip Mobile App Available," http://blog.uship.com/us/2011/10/mobile-usage-on-uship-up-60-mobile-app-available.html.

text or email while driving.[9] As the next generation of "text-happy" drivers begin to infiltrate the workforce, this problem, unfortunately, will only get worse.

3. **Ownership and Control of Phones Is Fragmented.** It's very clear from the FMCSA rules that employers are responsible for the behavior of their employees.[10] What's not clear is how employers are supposed to enforce compliance with the rule, especially when a large percentage of drivers carry personally-owned, not company-owned, cell phones.[11] Further fragmentation stems from the presence of owner-operators who are commonly hired as contractors in support of commercial fleets, yet are not themselves employees of the corporate entity, and may, or may not, carry company-owned cell phones while driving on the job

4. **High-Visibility Enforcement Is Not Sustainable**. Specialized, high-visibility enforcement programs piloted by NHTSA in Syracuse, NY and Hartford, CT did show sustained and significant changes in driver behavior. However, these programs require substantially more manpower, funds and time than the average police department would be able to support. CITE NHTSA PILOT FINDINGS

Due to the complexities outlined above, the FMCSA and the entire trucking industry should temper their expectations as to how many drivers will voluntarily comply.

Without some type of active or passive enforcement capability, the simple truth is that commercially licensed drivers can continue to use their mobile phones however they want – provided, of course, they are not (a) caught in the act by limited law enforcement resources, or (b) caught after a crash via post-incident discovery and investigation.

[9] CareerBuilder (2010), "More Than Half of Workers Admit to Checking Their Smart Phones While Driving, Finds New CareerBuilder Survey," Chicago, IL: CareerBuilder, http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr558&sd=3/10/2010&ed=12/31/2010.

[10] ZoomSafer (2011), "DOT Bans Handheld Cell Phones for Interstate Truck and Bus Drivers; New Rule Is Clear on Employer Liability, Silent on Enforcement Methods," Herndon, VA: ZoomSafer, http://zoomsafer.com/buzz/2011/11/dot-bans-handheld-cell-phones-for-interstate-truck-and-bus-drivers/.

[11] ZoomSafer (2011), "FMCSA Bans Handheld Cell Phone Use While Driving. Now What?" http://zoomsafer.com/buzz/blog/fmcsa-bans-handheld-cell-phone-use-while-driving-now-what/.

 

## B. A PRACTICAL APPROACH TO COMPLIANCE

In order to ensure compliance among employee drivers, and thus avoid FMCSA penalties and associated liabilities, commercial fleet operators should not only implement cell phone use policies, but they should also adopt inexpensive technology to measure, manage and enforce compliance with the policies.

A practical compliance plan consists of the following components:

1. Written policy including prohibited behaviors, consequences, and incentives.
2. Employee acknowledgement that they agree to and understand the policy.
3. Regular communications and training.
4. Technology tools (active or passive) to encourage compliance.

## C. SELECTING A TECHNOLOGY ENFORCEMENT SOLUTION

Depending upon the environmental make up of your fleet (device type, device ownership, telematics, non-telematics), there are different types of technology tools that you can leverage to promote safe, legal and responsible use of phones while driving.

For fleets where drivers carry personal phones or feature phones and vehicles are equipped with telematics systems, passive policy software analyzes and compares cell phone billing records and vehicle trip data for purposes of measuring and reporting employee use of company-owned or personally-owned mobile phones while driving.

For fleets where drivers are equipped with company liable smartphones or tablets, active policy software solutions consist of a client software application installed on the phone or tablet. These applications integrate with a variety of different service-triggers (Telematics, Bluetooth® technology, OBD, JBUS) to automatically activate and deactivate employer-defined “policy mode” whenever the employee starts or stops driving.

## D. PASSIVE POLICY ENFORCEMENT

Passive compliance solutions consist of three major components:

- Employee driving data
- Employee phone usage data
- Secure portal for dashboard reporting and risk analysis

Prominent fleet tracking and telematics systems (e.g. Qualcomm, Peoplenet, Xata, etc.) all contain information pertaining to employee driving data – when and where a trip started, the path driven and ultimately when and where a trip stopped. Such information is used to support existing applications such as hours-of-service compliance, dispatch, and routing just to name a few. When analyzed against cell phone billing events, this same information can be leveraged to measure and manage employee use of cell phones while driving.

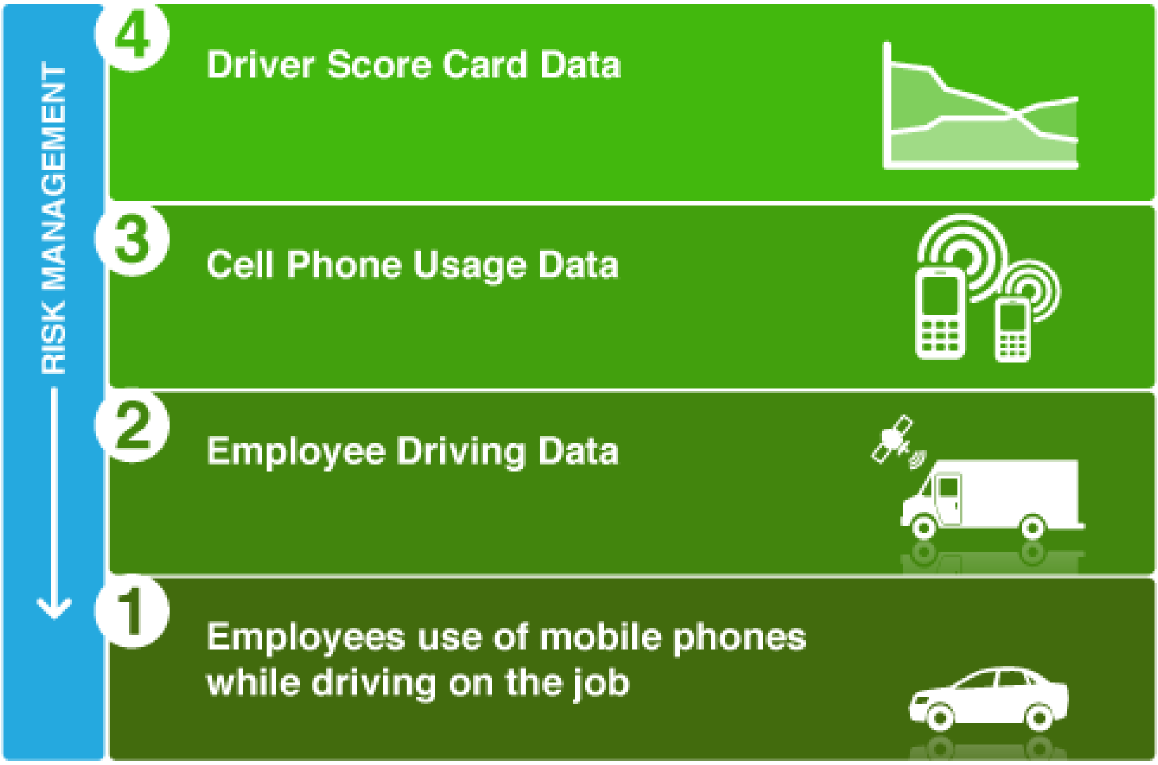


*Figure 1.0*

*Company Billing Data:* Billing data associated with company-owned cell phones is owned by the employer and therefore such data is easily accessible with a simple letter of authorization.

*Personal Billing Data:* Under US privacy law (Fair Credit and Reporting Act - FCRA), billing data associated with personally-owned cell phones requires employee authorization to access the data. The process for obtaining such data is automated through a secure web site and is analogous to trucking companies who regularly require employees to submit criminal background data, drug test data, and DMV data for purposes of determining employment eligibility.

## E. ACTIVE POLICY ENFORCEMENT

An active policy enforcement solution also has three major components:

- Software deployed on smartphones and or tablet device
- One of several different context services to “trigger” the policy app on/off
- Secure portal for managing policy, alerts and reporting

The on-device software turns on and off based on context from one of several different external services. When the software is active on the phone, all alerts and notifications are silenced, and the keyboard and screen are locked to prevent access to text, email, browser and other applications as defined by the employer's policy. Emergency calling is always allowed and the ability to make and receive hands-free calls is also permitted based on employer preference.

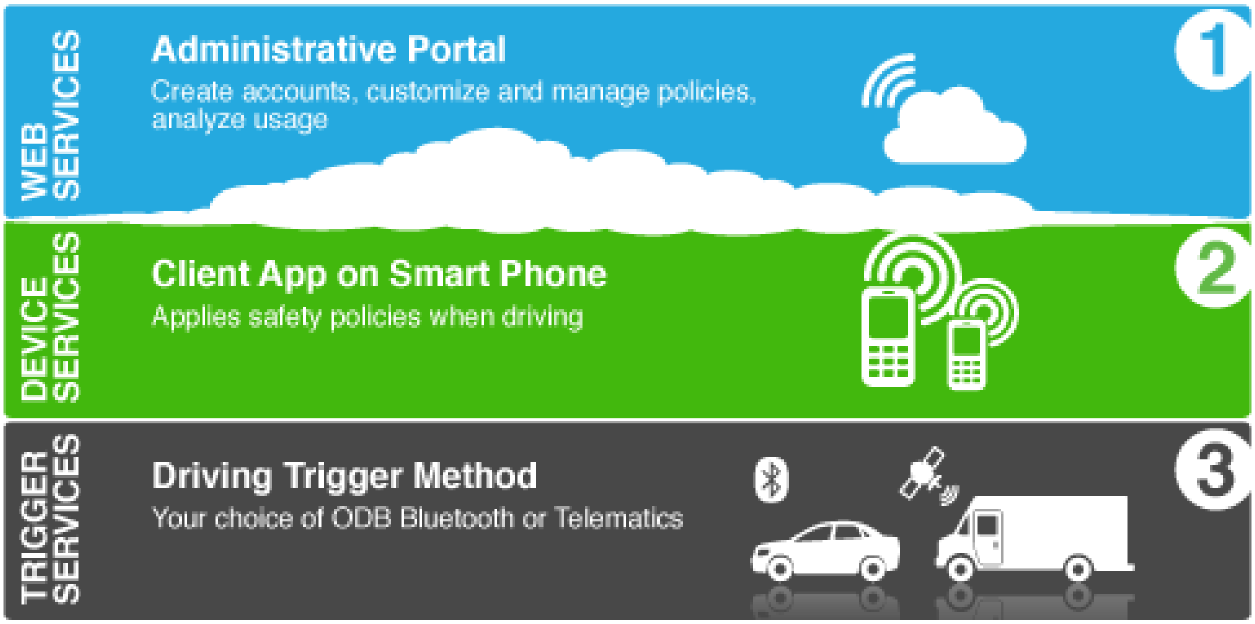


*Figure 2.0*

The administrative portal provides tools to define custom policies, track application usage, and empirically measure reductions in risk.

 

## IV. ABOUT THE AUTHORS

Matthew Howard and Michael Riemer are co-founders of ZoomSafer, the leading provider of innovative software solutions to help commercial fleets promote safe and legal use of cell phone and tablets when employees are driving on the job. For more information, please visit www.zoomsafer.com.