

New mobile phone laws: employers' liability

The new regulation

Since 1 December 2003 it is an offence to use a hand held phone or other similar device which performs an interactive communication function whilst driving. There are two exemptions for this, which are two way radios (such as those by taxi drivers and the police) and emergency calls of 999 and 112 where there is no safe place to stop.

Drivers must pull over to a safe location and turn the engine off before making or receiving calls, text messaging or accessing the internet.

Drivers committing an offence under the new regulations are liable to pay a £30 fixed penalty or a maximum fine on conviction in court of £1000. (Lorries, bus and coach drivers face a fine of £2,500). The Department of Transport intends that in future the offence should also attract three penalty points and the fixed penalty fine be increased to £60.

Meanings under the regulations

“Hand held”

A mobile phone or other device falls into the “hand held” category under the new regulations (the road vehicles) construction and use (amendment) (4) regulations 2003 (2003/2695) if it is held at some point during the course of making or receiving a call or fulfilling some other interactive communication function.

An interactive communication function includes sending or receiving oral or written messages, facsimile documents, still or moving images, or accessing the internet.

The prohibition applies to hand held mobile phones or other such devices which are physically held, either in a driver's hand or between a person's ear and shoulder whilst driving ie there can be no defence of “look no hands”!

The new regulations also prohibit the use of hand held phones which are used with an ear phone and microphone, regardless of whether a wire or wireless connection is being used. The essential factor is whether the phone is being “held” by the driver.

“Hands free”

Some products which are marketed as “hands free” may still lead to an offence under the new regulations as they require the user to hold the phone in order to press buttons or to read a message on the phone’s screen.

The Department for Transport (“DfT”) has devised that the pushing of buttons on a phone while for example it is in a cradle, on the steering wheel or on the handlebars of a motorbike is allowed, provided that the phone is not held. Hands free products which do not require the driver to significantly alter their position in relation to the steering wheel in order to use them will not fall foul of the change in the law.

“Driving”

The new regulations apply in all circumstances other than when the vehicle is parked, with the engine off. This would mean that the prohibition applies even if a vehicle was paused at traffic lights, stopped in a temporary traffic jam, or in very slow moving traffic.

Employers’ Liability

The new regulations also create an offence of “causing or permitting” another person to drive whilst using a hand held phone or other similar device. Employers may, therefore, be prosecuted if they require, or knowingly permit, their employees to use their hand held phones when driving.

The DfT has stated that employers cannot expect their employees to make or receive mobile phone calls whilst driving. This must be reflected in the company’s health and safety policy and risk management policy. Information from the DfT indicates that employers will not be liable simply for supplying a telephone or for telephoning an employee who was driving. However, employers must send a clear message to employees that they are forbidden to use their hand held mobile phones whilst driving and their employer will not require them to make or receive calls when driving.

Employers should inform their staff that, when driving, hand held mobile phones should be switched off, or, if switched on, the calls should be left to go through to voicemail, and that a safe place to stop should be found to check messages and return calls. Company policy should specify that using a hand held phone or similar device whilst driving is a criminal offence and will be treated as a disciplinary matter.

If no policy is implemented and employers are shown to have permitted the use of a hand held mobile phone whilst driving employers may be:

- Liable under the Road Vehicles (construction and use) Regulations 2003;
- vicariously liable if an employee causes an accident while driving on business; and

- ▶ liable under the Health & Safety at Work Act 1974 - Employers are obliged to provide a safe system of work and to do what they reasonably can to ensure the safety of staff and others;
- ▶ liable if there is a fatal accident involving the use of a hand held mobile phone whilst driving where this practice was well known and encouraged throughout the company there could be the possibility of a criminal corporate manslaughter prosecution against directors, as has been the case with reference to working time regulations.

Hands free mobile phones

The DfT regulatory impact investment on the subject has stated that whilst the use of any mobile phones by drivers is not recommended, hands free kits are widely available and the use of these kits is still legal.

However, employers should be aware that the prohibition against the use of hand held phones whilst driving does not mean that drivers will be exempt from prosecution altogether if they use hands free kits.

Dangerous and careless driving can still be committed as separate offences under the Road Traffic Act 1988.

Extensive research shows evidence that using a hands free phone whilst driving distracts the driver and increases the risk of an accident, however, it is thought that a hands free ban would be unenforceable.

Nevertheless, employers should seriously consider if it is safest for them to ban employees using hands free equipment too. Many businesses have used "best practice" and employed an outright ban.

Employers who install hands free kits should balance the commercial advantage of this with the potential risk of future liability, were an employee to cause an accident whilst speaking on the phone and driving.

If employers provide employees with hands free kits a risk assessment should be carried out and very clear guidance on the use of such kits should also be provided; such as, to limit outgoing calls to emergency use and when it is safe to do so, use voice activation technology when making outgoing calls, tell all incoming calls they are driving and to keep calls short. Appropriate hands free sets should be provided (see above) and, if employees use their own, its standard should be checked.

Practical tips for employers

The main points on which employers should consider giving guidance to their employees should include:

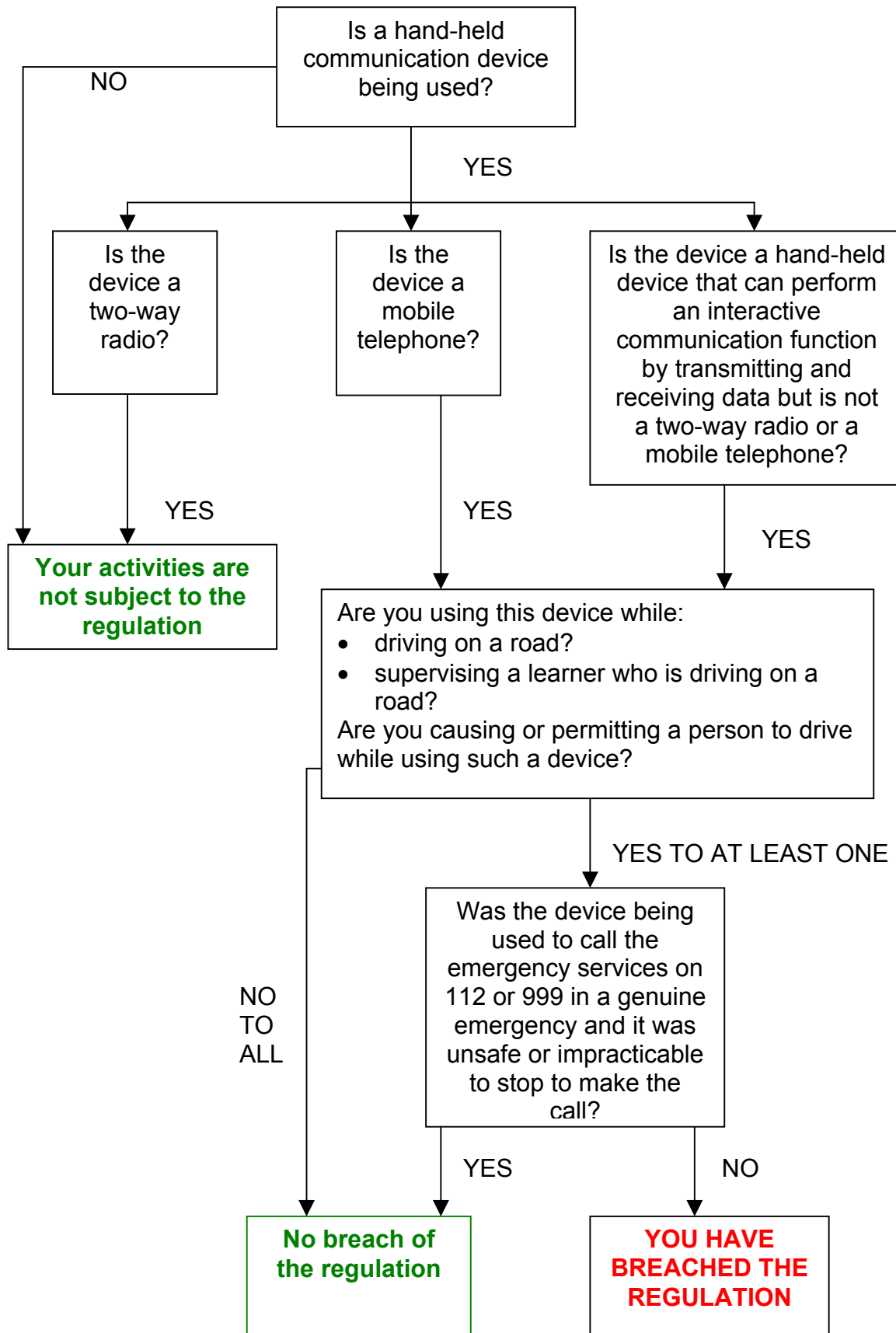
General guidance

- ▶ Switch off the phone whilst driving and let it take messages;
- ▶ Leave the phone switched on and let the call into voicemail;
- ▶ Ask a passenger to deal with the call;
- ▶ Find a safe place to stop before turning off the engine and picking up the messages and returning calls.

If hands free phones are to be permitted, as a minimum, guidance should be provided that:

- ▶ Limit outgoing calls to emergency use and when it is safe to do so;
- ▶ Use voice activation technology when making outgoing calls;
- ▶ Tell all incoming callers that they are driving and to keep the call short.

A clear section should be inserted into the company health and safety policy on Company procedure on the use of mobile phones and driving, this should be brought to the attention of all employees, breach of this policy should be a disciplinary offence and compliance with the policy monitored.



NOTE: Effective 1 December 2003 it will be an offence to use a hand-held mobile phone or similar device while driving or in certain other circumstances. This chart provides guidance as to what is and is not prohibited. This is only a simplified guide and, should you have any doubts as to whether an activity is lawful, you should seek your own legal advice.