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Texting While Driving Policies "ENCOURAGED" for Government Contractors

It is no secret that sending or reading e-mails or text-messages, or "texting," while driving is a hot topic for state legislatures. An estimated 16,000 fatalities occurred between 2002 and 2007 as a result of texting while driving,¹ causing regulation of what has become the preferred-communication medium for Generation Y. Today, thirty-four states ban texting while driving altogether, while an additional seven states prohibit novice drivers from texting behind the wheel.² Eleven of these states passed their respective laws as recently as 2010.³ Although these state laws are hardly surprising, a new procurement regulation might catch some government contractors and subcontractors off guard. On July 5th, the Government adopted as final Federal Acquisition Regulation ("FAR") clause 52.223-18. A September 29, 2010 interim rule was previously entitled "Contractor Policy to Ban Text Messaging While Driving."⁴ The final rule, which becomes effective August 4th, was re-named "*Encouraging Contractor Policies to Ban Text Messaging While Driving*" to better reflect its non-mandatory nature.⁵

¹ Stephanie Hanes, *Texting Caused 'Total Distracted Deaths' to Rise, Study Finds*, THE CHRISTIAN SCI. MONITOR (Sept. 23, 2010), <http://www.csmonitor.com/USA/Society/2010/0923/Texting-caused-total-distracted-driving-deaths-to-rise-study-finds>.

² *Cell Phone and Texting Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (July 2011), http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html.

³ Michael Schrier, Jackson Kelley PLLC, *Text Messaging While Driving Prohibited for Government Contractors*, GOV'T CONTRACTS MONITOR (MAR. 30, 2011), <http://govtcontractsmonitor.jacksonkelly.com/2011/03/text-messaging-while-driving-prohibited-for-federal-contractors.html>.

⁴ Federal Acquisition Regulation (interim rule); Contractor Policy to Ban Text Messaging While Driving, 75 Fed. Reg. 60,264 (Sept. 29, 2010).

⁵ Federal Acquisition Regulation (final rule); Encouraging Contractor Policies to Ban Text Messaging While Driving, 76 Fed. Reg. 39,240, 39,240 (Jul. 5, 2011) (to be codified at FAR 52.223-18).

The Executive Order providing the authority for FAR 52.223-18 was issued by President Obama in September 2009.⁶ The EO, entitled “Federal Leadership on Reducing Text Messaging While Driving,” requires federal agencies to “encourage” government contractors and subcontractors to adopt and enforce policies that ban texting while driving government or company owned vehicles, or driving any vehicle while performing work for the federal Government.⁷ Accordingly, the FAR was amended to include clause 52.223-18, which originally declared that contractors and subcontractors “should” adopt and enforce the anti-texting policies.⁸ A training requirement of the clause states that contractors and subcontractors “should” establish, or re-evaluate, programs that increase awareness of policies on texting while driving and the safety risks associated with such behavior.⁹ Finally, the language of FAR 52.223-18 must be inserted into all government contracts, subcontracts and solicitations issued after September 29, 2010 (which exceed the micro-purchase threshold, generally \$3,000).¹⁰ The only change to the final version of the rule is that “should” has been replaced with “encouraged to.”¹¹ This minor alteration is insignificant for practical purposes.

On the one hand, government contractors and subcontractors can rest assured that “[i]mplementing [texting while driving] policies in any contract or subcontract is not mandatory.”¹² But given the large number of states that have already banned texting while driving, FAR 52.223-18 should mean nothing new for many government contractors and subcontractors.

⁶ Exec. Order No. 13513, Federal Leadership on Reducing Text Messaging while Driving, 74 Fed. Reg. 51,225 (Oct. 6, 2009).

⁷ *Id.*

⁸ FAR 52.223-18(c) (2010).

⁹ FAR 52.223-18(c)(2) (2010).

¹⁰ FAR 52.223-18(d) (2010).

¹¹ Encouraging Contractor Policies to Ban Text Messaging While Driving, 76 Fed. Reg. at 39,240.

¹² *Id.* at 39,241.

On the other hand, as employers, government contractors and subcontractors should consider the possible benefits of implementing anti-texting policies.

- The Shield: A policy prohibiting employees from texting while driving where there is any connection to the organization's business could form the basis for a defense to a *respondeat superior* liability claim arising from an employee accident.¹³
- The Sword: A plaintiff's attorney could imply that a government contractor that did not adopt an anti-texting policy and train its employees accordingly is irresponsible and should bear liability for damages caused by its employees who text and drive.

Wise government contractors and subcontractors that have yet to adopt anti-texting while driving policies will strongly consider doing so.

Should you have any questions about the contents of this alert, please feel free to contact Holly Emrick Svetz (HSvetz@wcsr.com; 703-394-2261) or any member of our Government Contracts Team.¹⁴

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¹³ Schrier, *supra* note 3.

¹⁴ Special thanks to Summer Associate Brendan Mackesey for his contributions to this alert.