

## ***Cell Phones and Other Handheld Devices in Motor Vehicles***

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**V.C. § 23123:** Driving a Motor Vehicle While Using Wireless Telephone; Penalty;  
Exceptions:

*Elements:*

A person shall not drive a motor vehicle while using a wireless telephone;

Unless that telephone is specifically designed and configured to allow hands-free listening and talking; *and*

Is used in that manner while driving (Subd. (a));

Except as provided below.

*Note:* The section does not define the phrase, “*while using.*”

*Punishment:* A violation of this section is an infraction:

First offense: \$20 fine.

Second and subsequent offense: \$50 fine. (Subd. (b))

*Exceptions:* This section does not apply to:

A person using a wireless telephone for emergency purposes, including, but not limited to an emergency call to:

A law enforcement agency;

A health care provider;

A fire department; *or*

Another emergency services agency or entity. (Subd. (c))

An emergency services professional using a wireless telephone while operating an authorized emergency vehicle, as defined in V.C. § 165, in the course and scope of his or her duties. (Sub. (d))

V.C. § 165 lists emergency vehicles including, but not limited to fire, police, ambulances (public and private), local, state and

federal emergency vehicles, etc.

A person when using a digital two-way radio that utilizes a wireless telephone that operates by depressing a push-to-talk feature and does not require immediate proximity to the ear of the user, *and* the person is driving one of the following vehicles, that requires either a commercial class A or class B driver's license to operate (subd. (e)(1)):

A motor truck, as defined in V.C. § 410;

A truck tractor, as defined in V.C. § 655 (Subd. (e)(1)(A))

The exemption under subparagraph (A) does not apply to a person driving a pickup truck, as defined in V.C. § 471. (Subd. (e)(1)(B))

An implement of husbandry that is listed or described V.C. §§ 36000 et seq., in Chapter 1 of Division 16. (Subd. (e)(2))

A farm vehicle that is exempt from registration and displays an identification plate as specified in V.C. § 5014 and is listed in V.C. § 36101. (Subd. (e)(3))

A commercial vehicle, as defined in V.C. § 260, that is registered to a farmer and driven by the farmer or an employee of the farmer, and is used in conducting commercial agricultural operations, including, but not limited to, transporting agricultural products, farm machinery, or farm supplies to, or from, a farm. (Subd. (e)(4))

A tow truck, as defined in V.C. § 615. (Subd. (e)(5))

*(Note: Subd. (e) is deleted as of 7/1/2011.)*

This section also does not apply to:

A person driving a schoolbus or transit vehicle that is subject to V.C. § 23125. (Subd. (f))

A person while driving a motor vehicle on private property. (Subd. (g))

This section is operative as of July 1, 2008, and shall remain in effect only until July 1, 2011, and, as of July 1, 2011, is repealed. (Subd. (h))

**V.C. § 23124:** Driving a Motor Vehicle While Using Wireless Telephone; Minor Drivers; Penalty; Enforcement; Exceptions:

*Elements:*

No person under the age of 18 years (subd. (a)) shall drive a motor vehicle while using:

A wireless telephone; *or*

A mobile service device;

Except as provided below;

Even while equipped with a hands-free device. (Subd. (b))

*Note:* The section does not define the phrase, “*while using.*”

*Punishment:* A violation of this section is an infraction:

First offense: \$20.

Second and subsequent offense: \$50) (Subd. (c))

*Enforcement Restrictions:*

A law enforcement officer shall not stop a vehicle for the sole purpose of determining whether the driver is violating subdivision (b). (Subd. (d))

Subd. (d) does not prohibit a law enforcement officer from stopping a vehicle for a violation of V.C. § 23123.

*Exceptions:*

This section does not apply to a person using a wireless telephone or a mobile service device for emergency purposes, including, but not limited to an emergency call to:

A law enforcement agency;

A health care provider;

A fire department; *or*

Another emergency services agency or entity. (Subd. (f))

*Definitions:*

”*Mobile service device:*” Includes, but is not limited to:

A broadband personal communication device;

A specialized mobile radio device;

A handheld device; *or*

A laptop computer with mobile data access, pager, and two-way messaging device. (Subd. (g))

This section is operative as of July 1, 2008. (Subd. (h))

**VC § 23123.5:** Motor vehicles: Electronic Wireless Communications Device:  
(Effective, 1/1/09)

*Elements:*

A person shall not drive a motor vehicle while:

Using an electronic wireless communication device;

To write, send, or read a text-based communication. (Subd. (a))

*Definitions:*

To “*write, send, or read a text-based communication*” means using an electronic wireless communications device to manually communicate with any person using a text-based communication, including, but not limited to, communications referred to as a text message, instant message, or electronic mail. (Subd. (b))

But see Subd. (c), under “Exceptions,” below.

*Punishment:* A violation of this section is an infraction:

First offense: \$20.

Second and subsequent offense; \$50. (Subd. (d))

*Exceptions:*

A person shall *not* be deemed to be “*writing, reading, or sending a text-based communication*” (see Subd. (b), above) if the person reads, selects, or enters a telephone number or name in an electronic wireless communications device for the purpose of making or receiving a telephone call. (Subd. (c))

An emergency services professional using a wireless telephone while operating an authorized emergency vehicle, as defined in V.C. § 165, in the course and scope of his or her duties. (Sub. (e))

*Note:* The violation is a reportable offense; however, DMV will not assign a violation point. (V.C. § 12810(a))

***Frequently Asked Questions; General:\****

When did the wireless telephone laws take effect?

July 1, 2008. V.C. § 23123.5 becomes effective as of 1/1/09.

What is the difference between V.C. §§ 23123 and 23124?

V.C. § 23123 prohibits *all* drivers from using a handheld wireless telephone while operating a motor vehicle. Motorists 18 years of age and older may use a “hands-free device.” V.C. § 23124 prohibits drivers under the age of 18 from using a wireless telephone or hands-free device while operating a motor vehicle.

What if I need to use my telephone during an emergency and I do not have a “hands-free” device?

The law allows a driver to use a wireless telephone to make emergency calls to a law enforcement agency, a medical provider, the fire department, or other emergency services agency.

What is the fine if I’m convicted?

The base fine for the first offense is \$20 and \$50 for subsequent convictions. With the addition of penalty assessments, the fine can be more than triple the base fine amount.

Will I receive a point on my driver license if I’m convicted for a violation of the wireless telephone law?

No. The violation is a reportable offense; however, DMV will not assign a violation point. (V.C. § 12810(a))

Will the conviction appear on my driving record?

Yes, but the violation point will not be added.

Are passengers affected by these laws?

No. These laws only apply to the person driving a motor vehicle.

Do these laws apply to out-of-state drivers whose home states do not have such laws?

Yes.

Can I be pulled over by a law enforcement officer for using my handheld wireless telephone?

Yes. A law enforcement officer can pull you over just for this infraction. However, an officer is forbidden from stopping a driver to check his or her age to substantiate a possible violation of V.C. § 23124.

What if my phone has a push-to-talk feature, can I use that?

No. However, the law *does* provide an exception for those operating a commercial motor truck or truck tractor (excluding pickups), implements of husbandry, farm vehicle or tow truck, to use a two-way radio operated by a “push-to-talk” feature. Also, a push-to-talk feature attached to a hands-free ear piece or other hands-free device is lawful.

What other exceptions are there?

Operators of an authorized emergency vehicle during the course of employment are exempt, as are those motorists operating a vehicle on private property.

### ***Frequently Asked Questions; V.C. § 23123:\****

Does the “hands-free” law prohibit you from dialing a wireless telephone while driving or just talking on it?

The law does not specifically prohibit “*dialing*,” and the phrase “*while using*” is not defined. Dialing a number can certainly be argued to come within the act of “using” a cell phone. However, V.C. § 23123.5(c) (effective 1/1/09) excludes from the definition of “*texting*” the acts of “read(ing), select(ing), or enter(ing) a telephone number or name in an electronic wireless communications device for the purpose of making or receiving a telephone call.” By inference, this could be interpreted to mean that such acts were not intended by the Legislature to be illegal under section 23123.

Is it legal to use a Bluetooth or other earpiece?

Yes, however you cannot have BOTH ears covered.

Does the “*hands-free*” law allow you to use the speaker phone function of your wireless telephone while driving?

Using the speaker phone function of a cell phone seems to be no more unsafe than using a hands-free system, and is likely be allowed. It is, however, an unresolved issue.

Does the “hands-free” law allow drivers 18 and over to text message (i.e., “texting”) while driving?

The law does not specifically prohibit texting, even though texting would seem to come within the prohibition of “using” a cell phone and is as, if not more, unsafe than simply talking on a cell phone while driving. However, effective 1/1/09, texting will specifically be illegal. (V.C. § 23123.5; see above.) Prior to 1/1/09, an officer can pull over and issue a citation to a driver of any age if, in the officer’s opinion, the driver was distracted and not operating the vehicle safely. Sending text messages while driving is unsafe at any speed and is strongly discouraged.

***Frequently Asked Questions; V.C. § 23124:\****

Am I allowed to use my wireless telephone “hands-free?”

No. Drivers under the age of 18 may not use a wireless telephone, pager, laptop or any other electronic communication or mobile services device to speak or text while driving in any manner, even “hands-free.” Exceptions are in emergency situations to call police, fire, or medical authorities.

Why is the law stricter for provisional drivers?

Statistics show that teen drivers are more likely than older drivers to be involved in crashes because they lack driving experience and tend to take greater risks. Teen drivers are vulnerable to driving distractions such as talking with passengers, eating or drinking, and talking or texting on wireless devices, which increase the chance of getting involved in serious vehicle crashes.

Can my parents give me permission to allow me to use my wireless telephone while driving?

No. The only exception is an emergency situation that requires you to call a law enforcement agency, a health care provider, the fire department, or other emergency agency entity.

Does the law apply to me even if I’m an emancipated minor?

Yes. The restriction applies to all licensed drivers who are under the age of 18.

If I have my parent(s) or someone age 25 years or older in the car with me, may I use my wireless telephone while driving?

No. You may only use your wireless telephone in an emergency situation.

Will the restriction appear on my provisional license?

No.

May I use the hands-free feature while driving if my car has the feature built in?

No. The law prohibits anyone under the age of 18 from using any type of wireless device while driving, except in an emergency situation.

Can a law enforcement officer stop me for using my “hands-free” device while driving?

For drivers under the age of 18, this is considered a “*secondary*” violation, which means a law enforcement officer may cite you for using a “hands-free” wireless device if you were pulled over for another violation. However, the prohibition against using a handheld wireless device while driving (V.C. § 23123) is a “*primary*” violation for which a law enforcement officer can pull you over.

### ***Frequently Asked Questions for Law Enforcement Officers:\****

What does the phrase “*while using*” mean, as used in section 23123?

The phrase is not defined in the statute and no one knows. As noted above, there are valid arguments for the proposition that “*using*” does *not* include:

- Dialing:  

V.C. § 23123.5(c) (effective 1/1/09), which makes “*texting*” illegal, specifically excludes from the definition of “*texting*” the acts of “read(ing), select(ing), or enter(ing)” a telephone number or name in an electronic wireless communications device for the purpose of making or receiving a telephone call.” By inference, this could be interpreted to mean that such acts were not intended by the Legislature to be illegal under section 23123.
- Using the speaker phone function so that the driver may talk and hear the other person without holding the phone to the ear:

While this certainly involves the “*using*” of a cell phone, it would appear to be no more unsafe than using a “hands-free” system and therefore, arguably, would be lawful.

- Sending or reading text messages:

This can be argued to come within the “*using*” prohibition of V.C. § 23123, and is certainly as unsafe, if not more so, than simply talking on a cell phone while driving. But either way, texting becomes illegal as of 1/1/09 under the new section 23123.5.

Can a law enforcement officer conduct a warrantless “*search*” of a cell phone for the purpose of substantiating a charge of “*using*” a cell phone?

Unless the driver is to be subjected to a “*custodial arrest*” (i.e., arrested and transported), the “*search incident to arrest*” theory is not available to justify a warrantless search of the cell phone. (See *Knowles v. Iowa* (1998) 525 U.S. 113; *People v. Brisendine* (1975) 13 Cal.3<sup>rd</sup> 528.)

However, with “*probable cause*” to believe the cell phone contains evidence that if not recovered might be lost forever, it is arguable that a warrantless search of the cell phone, as a “container found in a vehicle,” would be a lawful means of recovering evidence of its use. (*United States v. Ross* (1982) 456 U.S. 798; *California v. Acevedo* (1991) 500 U.S. 565, 580; *People v. Schunk* (1991) 235 Cal.App.3<sup>rd</sup> 1334, 1340-1343.) This, however, is an untested issue and must await an appellate court decision before the answer is known.

Is it entrapment for a police officer to call a suspect’s known cell phone number for the purpose of tempting him or her to answer it while driving, and then use this violation as probable cause for a vehicle stop?

The law is clear that entrapment has not occurred when an officer merely provides a person with the opportunity to violate the law. Rather, entrapment requires some excessive inducement sufficient to cause an otherwise law-abiding person to violate the law. It is unknown at this point whether calling someone on their cell phone is sufficient inducement to cause an otherwise law-abiding person to violate V.C. §§ 23123 or 23124.

I do not believe this tactic meets the standards for an unlawful entrapment. However, given the relative insignificance of a V.C. §§ 23123 or 23124 violation and how it does not likely require a lot of inducement to cause a person to violate it (most of us having a hard time resisting a ringing cell phone even while driving), I can see a court finding this investigative

technique to be offensive (i.e., just not “fair.”). So a trial court judge might well take advantage of the lack of appellate authority and label it as entrapment. But we’ll just have to await an appellate court decision on this issue before it is finally resolved.

\* The legal opinions expressed above under each of the “*Frequently Asked Questions*” sections are those of the author only and are not based upon any interpretations provided by any citable appellate court cases. Unless and until court decisions are published on the above points, the opinions expressed should not be used or interpreted as legal authority for contacting, detaining, arresting or searching any persons. An officer should consult his or her own department policies on these issues.