

Distracted Driving Policies: Improve Safety and Limit Exposure

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In this age of instant information gratification, it is easy to forget that the multitude of electronic devices we use for communication and entertainment (cell phones, mp3 players, and other multimedia devices) can have a downside. Electronic devices can command their users attention in a way that can have disastrous consequences, especially when driving. This phenomenon, called "distracted driving", presents unique challenges for employers who depend upon employees to perform errands, make deliveries, travel throughout work territories, or whose main function is to drive.

Following the increasing number of motor vehicle accidents attributed to "distracted driving", and because the leading cause of worker fatalities year after year is motor vehicle accidents, the United States Department of Transportation ("DOT"), in conjunction with the Office of Safety and Health Administration ("OSHA"), has ramped up efforts to encourage employers to enact safety policies prohibiting employees from using electronic devices while driving. This initiative follows President Obama's October 1, 2009 issuance of an Executive Order barring federal employees from texting while operating government owned vehicles. Also, the DOT earlier this year announced guidance under the Motor Carrier Safety Act of 1984 prohibiting texting by drivers of commercial vehicles.

In addition, approximately 30 states have existing laws to prevent some drivers from using cell phones or text messaging while driving. However, some states have laws that target only a segment of drivers, such as teenagers or those with learner's permits. Because a state may not have banned the use of these devices while driving, employers in these states should not be lulled into complacency. The potential for vicarious liability to employers for their employees' accidents while talking or texting should provide the incentive for employers to address this issue with their workforce now.

An employer can be liable for its own negligence in failing to adequately warn employees regarding the risks of use of electronic devices while driving or failing to take other measures to reduce risk. In *Elender v. Neff Rental, Inc.*, 965 So.2d 898 (La. Ct. App. 2007), the employer was found vicariously liable because, at the time of the accident, the employee was using a cell phone the employer had provided and also had never prohibited the employee from using the cell phone while driving. Other companies have been forced to settle costly cases arising from similar circumstances. For example, a Fortune 500 company settled a lawsuit for over \$5 million following an accident which occurred after one of its employees rear-ended a driver, causing her to lose an arm, while using a company cell-phone. In *Bustos v. Dyke Industries Inc.*, a lumber wholesaler settled for over \$16 million after one of its salesman hit and severely disabled an elderly woman while talking on a cell phone. In Virginia, a major San Francisco-based law firm was sued for \$30 million by the parents of a 15-year old girl, a pedestrian, who was killed by a car driven by one of the firm's lawyers. A jury ordered the attorney to pay the family \$2 million and the law firm settled for a confidential amount.

The safety and liability risks of not having a policy banning use of electronic devices while driving are becoming too great. Employers need to incorporate such a policy into their everyday operations.

When establishing a policy to prevent employee "distracted driving", employers may wish to consider the following:

- Make clear that safety, for both the employee and the public, is of utmost importance, which is why the employee cannot be distracted while driving.
- Ensure that all prohibited uses of electronic devices are clearly defined.
- Ensure the definition of the electronic device is broad and inclusive to cover all wireless communication devices, not simply cell phones. Policies should also include television screens, computers, and other entertainment devices.
- Ensure that everyone in the workplace (including management and contractors) is covered by the policy, and that both company-issued and personal devices are covered while an employee is on company time or business.
- Allow and explain when and where use of devices are permitted. For example, an employee may pull off the road into a safe area such as a parking lot to make a call.
- When an employee is on an extended trip, determine a schedule by which the employee can safely stop, retrieve messages, and provide responses to those inquiries in need of immediate follow up.
- Create consequences for those employees who violate the policy, and consistently enforce them.