

DAILY REPORT

IN PRACTICE

Nearly half of all adults who text admit they have sent or read a text message while driving. Those texting adults could be your employees.



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Manage risk with cell phone policy

SIMPLE STEPS CAN HELP PROTECT businesses, their employees and the public from distracted driving

EMPLOYEES WHO MULTITASK while driving on company time pose a big risk to their employers. Employers can be held liable for an accident caused by an employee's distracted driving, if the employee is acting within the course and scope of his employment. Now there is a new risk on the road: employees who text while driving. In the past 10 years, the phenomenon of texting has grown exponentially. In 2002, the average monthly volume of text messages was 1 million and by 2008 that number had grown to 110 million.² Texting behind the wheel accounted for more than 16,000 deaths between 2002 and 2007.³

Contrary to popular belief, texting while driving isn't just for teenagers. A recent study found that adults are just as likely as teenagers to text while driving.⁴ Nearly half of all adults who text admit that they have sent or read a text message while driving.⁵ Those texting adults could be your employees. In the face of this texting mania, Georgia has recently joined the growing number of states that are combating texting-related automobile accidents by enacting laws that prohibit texting while driving.⁶ To protect themselves, their employees and the public, businesses should implement policies to ensure that employees aren't being driven to distraction by texting.

The fact that employers can be held liable for employees' negligence is nothing new. An employer can be held liable for an employee's negligence under the doctrine of respondeat superior, more commonly known as vicarious liability or imputed negligence. In Georgia, for example, employers can be held liable for their employees' negligent acts under O.C.G.A. § 51-2-2 which states that "[e]very person shall be liable for torts committed by his ... servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily." As the language of the law suggests, an employer will only be held liable for an employee's negligence when the employee is acting within the scope of his employment.⁷

Although vicarious liability has exposed employers to liability in the past, the existence of an anti-texting law can heighten the risk for employers by creating a presumption in civil cases that the employee's texting was negligent as a matter of law.⁸ If an employee texts while driving on company business, the employer could face liability for the damage caused by any resulting accident. Employers that

provide employees with company cars and company cell phones also have to worry about being held liable for negligent entrustment. If an employer entrusts an employee with a vehicle, knowing that the employee is incompetent for some reason, including a history of recklessness, the employer may be held liable for a resulting accident.⁹ No matter what the basis of the claim, texting behind the wheel is almost certainly negligent, and employers face the risk of vicarious liability when their employees text while driving.

With the growth of cell phones in American society, employers have faced liability for cell phone-related car accidents caused by their employees. In 2007, International Paper Co. settled a lawsuit in Fulton County, Ga., for more than \$5 million after an employee driving a company car, and allegedly using an employer-provided cell phone, rear-ended an Atlanta woman.¹⁰ The woman ultimately had to have her arm amputated due to medical complications caused by the accident.¹¹ Similar accidents have led to trouble for companies in other states as well. In *Bustos v. Dyke Industries, Inc.*,¹² a Florida jury awarded Bustos \$21 million for the severe injuries Bustos received after being hit by an employee of Dyke Industries, who was talking on his cell phone while driving. In *Ellender v. Neff Rental, Inc.*, an employee of Neff Rental caused an accident while talking on his company cell phone with another employee.¹³ Neff Rental was found to be vicariously liable because the employee was acting in the course and scope of his employment, talking on a company-issued cell phone, and the company had never prohibited the use of cell phones while driving.¹⁴ While all these cases involved employees who were talking on a cell phone while driving, texting may add an additional level of risk. A recent study found that drivers using cell phones exhibited greater impairment than drivers who were legally intoxicated.¹⁵ In fact, according to a study by the Virginia Tech Transportation Institute, drivers texting behind the wheel are 23 times more likely to be involved in a crash or near crash than non-distracted drivers.¹⁶

In response to the growing dangers of texting behind the wheel, Georgia passed the "Caleb Sorohan Act for Saving Lives by Preventing Texting While Driving."¹⁷ The requirements of the law differs slightly depending on the age of the driver. Drivers aged 18 and older are prohibited from texting while drivers under the age of 18 are prohibited from either talking or texting on their cell phones while driv-

ing. Drivers under the age of 18 may not engage in “wireless communication using a wireless communication device.”¹⁸ Engaging in wireless communication includes talking, writing, sending, or reading a text-based communication or listening on a wireless communications device.¹⁹ Drivers aged 18 and older, however, may not use “a wireless telecommunications device to write, send, or read any text based communication, including but not limited to a text message, instant message, e-mail, or Internet data.”²⁰ Adults who violate the law will be guilty of a misdemeanor punishable by a fine of \$150.²¹ Minors who violate the law are also subject to a \$150 fine and that fine will be doubled if the driver is involved in an accident while violating the law.²² Employers’ cell phone policies should reflect the fact that the law for adults prohibits both texting, e-mailing, and surfing the Internet.

Georgia is not the first state to enact such legislation. More than 30 states have some kind of law regulating texting while driving.²³ Even the federal government has gotten involved. President Obama has issued an executive order prohibiting federal employees from texting while driving on official government business or while using a government-provided electronic device while driving.²⁴ The rapid and widespread growth of anti-texting legislation highlights the importance of creating a company policy that prohibits the use of cell phones while driving. There are several steps that businesses should take to protect themselves, their employees and the public:

- Educate employees about the provisions of the new Georgia anti-texting law. Employees should understand what is prohibited and how they can comply with the law.

- Adopt a written policy that clearly explains the company’s policy on the use of cell phones while driving. The written policy should ban the use of wireless communication devices while driving or while stopped at a traffic signal. The policy should also include repercussions for failing to follow company rules.

- Include specific guidelines on how to avoid the temptation to use wireless devices while driving. For example, encourage employees to turn off their wireless devices, disable their cell phones’ “airplane mode” while driving, or place their cell phones in the trunks of their cars before beginning their journeys.

- Consider outlawing hands-free devices as well. In addition to hands-free calling devices, many cell phones have the capability to write texts through voice recording. Although this may seem safe, one study found that there was no difference in the level of impairment between drivers using hand-held cell phones and drivers using hands-free devices.²⁵

- Clearly communicate the company’s cell phone policy to employees. Distribute your written policy and reinforce the policy when providing company cell phones or company cars by reminding employees about company policy again.

- Ensure that supervisors understand their role. Employees in managerial positions should be prohibited from initiating phone calls or text conver-

sations with employees known to be driving and should not require employees to be available at all times while traveling.

- For an employee who is traveling, create a schedule by which the employee can stop to retrieve and respond to messages.

- For employees who regularly drive as a part of their employment, make sure to research their driving history and emphasize the importance of cell phone safety to avoid negligent entrustment claims.

- Finally, follow through by disciplining employees who don’t adhere to the cell phone policy. The protection that a written policy provides will be undermined if the policy is not enforced.

Employers simply cannot count on employees to familiarize themselves with, and obey, Georgia’s new anti-texting law. In fact, a recent study found that, despite the explosion of anti-texting legislation across the country, the number of texting-related accidents has actually increased.²⁶ In the study, researchers at the Highway Loss Data Institute (HLDI) calculated rates of collision claims for vehicles during the months immediately before and after driver texting was banned in four states, while collecting comparable data in nearby states without a ban during the same time period.²⁷ The study found that crashes increased in three of the four states studied that had enacted texting bans.²⁸ The president of the HLDI theorized that “[i]f drivers were disregarding the bans, the crash patterns should have remained steady. So clearly drivers did respond to the bans somehow, and what they might have been doing is moving their phones down and out of sight when they texted, in recognition that what they were doing was illegal.”²⁹

The good news is that company policies can have a big impact on employees’ use of cell phones behind the wheel. A major engineering firm instituted a policy banning cell phones while driving on company time and, just one year later, 84 percent of the company’s workers reported in an anonymous company survey that they had stopped or cut back on talking and texting while driving. If employers take these basic steps, they can help protect themselves, their employees, and the public from unnecessary accidents.³⁰ 

¹ The authors thank Katherine M. Smallwood for her assistance with this article.

² Karen Kaplan, “Researchers Calculate the Death Toll from Texting While Driving,” *L.A. Times*, Sept. 24, 2010.

³ *Id.*

⁴ Mary Madden, “Adults Text While Driving Too!” (June 18, 2010), available at <http://pewresearch.org/pubs/1633/adults-texting-talking-on-cellphone-while-driving-like-teens>.

⁵ *Id.*

⁶ O.C.G.A. § 40-6-241.1 (2010).

⁷ *Atlanta Hub Co. v. Jones*, 171 S.E. 470, 471 (Ga. App. 1933).

⁸ See O.C.G.A. § 51-1-6 (2010). “When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action

is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby.” *Id.* This statute is commonly referred to as “Georgia’s negligence per se statute.” See *Morris v. United States*, No. 1:06-CV-2535-GGB, 2007 WL 1100465, at *3 (N.D. Ga. Apr. 11, 2007); *Amick v. BM & KM, Inc.*, 275 F. Supp. 2d 1378, 1381-82 (N.D. Ga. 2003); *Combs v. Atlanta Auto Auction, Inc.*, 650 S.E.2d 709, 714 (Ga. App. 2007).

⁹ *Parker v. Silviano*, 643 S.E.2d 819, 822 (Ga. App. 2007).

¹⁰ “Driving While Calling,” Lawyers and Settlements (Mar. 21, 2008), available at <http://www.lawyersandsettlements.com/settlements/11312/international-paper-cell-phone-crash.html>. See also Matt Richtel, “Driven To Distraction: At 60 MPH, Office Work Is High Risk,” *N.Y. Times*, Sept. 30, 2009, at 5, available at <http://www.nytimes.com/2009/10/01/technology/01distracted.html?pagewanted=all>.

¹¹ *Id.*

¹² Miami-Dade Case No. 01-13370 (2001).

¹³ 965 So. 2d 898, 900 (La. Ct. App. 2007).

¹⁴ *Id.*

¹⁵ David L. Strayer, Frank A. Drews & Dennis J. Crouch, “Fatal Distraction? A Comparison of the Cell-phone Driver and the Drunk Driver” 5 (2003), available at <http://www.psych.utah.edu/AppliedCognitionLab/DrivingAssessment2003.pdf>

¹⁶ Sherri Box, “New Data From Virginia Tech Transportation Institute Provides Insight Into Cell Phone Use and Driving Distraction” 2 (2009), available at <http://www.vtnews.vt.edu/articles/2009/07/2009-571.html>.

¹⁷ S. 360, 111th Cong. (2009).

¹⁸ O.C.G.A. § 40-6-241.1(b) (2010).

¹⁹ O.C.G.A. § 40-6-241.1(a)(1) (2010).

²⁰ O.C.G.A. § 40-6-241.2(b) (2010).

²¹ O.C.G.A. § 40-6-241.2(d) (2010).

²² O.C.G.A. § 40-6-241.1(d)(1)-(2) (2010).

²³ See Insurance Institute for Highway Safety, Cell Phone Laws Chart (Oct. 2009), available at <http://www.iihs.org/laws/cellphonelaws.aspx>.

²⁴ Exec. Order No. 13513, 74 Fed. Reg. 51225 (Oct. 1, 2009).

²⁵ Strayer, et al., *supra* note 15, at 4.

²⁶ Insurance Institute for Highway Safety, Status Report, p. 2 (Vol. 45, No. 10, Sept. 28, 2010), available at <http://www.iihs.org/externaldata/srdata/docs/sr4510.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Jeff Casale, “Texting-while-driving bans don’t reduce crashes: Study,” *Business Insurance* (Sept. 28, 2010), available at <http://www.businessinsurance.com/article/20100928/NEWS/100929929>.

³⁰ Maggie Jackson, “Can’t Talk Now — More Firms Are Banning Employees From Driving and Using Cell Phones,” *BOSTON.COM*, May 31, 2009, at 1, available at http://www.boston.com/business/articles/2009/05/31/more_companies_are_imposing_cellphone_bans/.