

## Distracted Driving by Employees May Result in Employer Liability

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By Joanne Deschenaux

A texting driver is 23 times more likely to have an accident or a near miss than a non-distracted driver, according to the results of a study released July 27, 2009, by the Virginia Tech Transportation Institute. In fact, another study conducted by *Car and Driver Magazine* showed that reaction time while texting is often twice as long as while legally intoxicated. And while the numbers are not as dramatic, use of a hand-held cell phone may also greatly increase driving risks, making an accident up to six times more likely, the Virginia Tech study found.

And employers have been sued for damages incurred in accidents caused by employees talking on cell phones while driving. In Virginia, a law firm settled for an undisclosed amount after being sued for \$25 million after one of its attorneys killed a 15-year-old girl in an automobile accident. The attorney was allegedly talking to a client on her cell phone while driving when she struck the girl, who was walking by the side of the road, Ingrid Culp, an attorney with Fredrikson & Byron PA in Minneapolis, told *SHRM Online*.

In another case, an Arkansas lumber wholesaler paid \$16.2 million to a woman who was severely disabled in a car accident involving one of its employees who was talking on his cell phone at the time of the accident, according to Russell Cawyer, an attorney with Kelly Hart & Hallman LLP in Fort Worth, Texas. In Florida, a jury ordered a company to pay almost \$21 million to a 78-year-old woman who was injured when a company salesman struck the woman's car while the salesman was talking on his cell phone as he traveled between appointments, Culp said.

These cases involved drivers who were allegedly distracted by talking on their cell phones, but the same principles would apply to texting or using a smart phone to check e-mail or the Internet while driving, Cawyer noted.

### **Adopt Policies Whether or Not State Has Law**

According to the American Automobile Association, 17 states and the District of Columbia have passed legislation banning texting while driving (Alaska, Arkansas, California, Colorado, Connecticut, Illinois, Louisiana, Maryland, Minnesota, New Hampshire, New Jersey, North Carolina, Oregon, Tennessee, Utah, Virginia and Washington). In addition, six states and D.C. have banned the use of hand-held cell phones while driving (California, Connecticut, New Jersey, New York, Oregon and Washington). Several other states impose restrictions only on drivers under 21 years of age (Delaware, Indiana, Kansas, Maine, Mississippi, Missouri, Nebraska, Rhode Island, Texas and West Virginia).

But, even if your state does not restrict texting or the use of a hand-held cell phone while driving, failing to adopt a written policy prohibiting these practices by employees may result in tort liability for the employer. "The laws don't change the reasons why an employer ought to have these policies," Cawyer said. "Even if you are in a state that doesn't have such a law, it is a best HR practice" to have some regulation of employees

who are using company-owned or -leased vehicles or phones that are provided at company expense.

There are two reasons to have these policies, Cawyer continued. "First of all, of course, is to keep your employees and other members of the driving public safe." Employees who follow the rules prohibiting texting and prohibiting or sharply limiting the use of hand-held cell phones are less likely to injure third parties. But, Cawyer added, if the employee is involved in an accident, having a policy shows that the employer has taken steps to control this dangerous behavior by employees and may limit the employer's liability for the resulting injuries.

The question of an employee texting is really a question of whether the employer has adhered to the required standard of care, said Manesh K. Rath, an attorney with Keller and Heckman LLP in Washington, D.C. The statute makes it easier to show that the standard of care has not been upheld. "An employer will always have to defend itself in an employee-related accident. The question for the employer is whether or not it is operating responsibly." And whether or not an employer is operating responsibly depends on whether the employer has a policy in place, Rath added.

### **What Policy Should Include**

Although Texas law does not yet regulate texting or hand-held cell phone use while driving, employers should still institute a policy prohibiting the practices and should also consider adding specific prohibitions against using laptop computers and GPS/navigation devices, Cawyer said.

Minnesota bans texting while driving but not hand-held cell phone usage. Nonetheless, Culp said that "most attorneys would advise employers to go above and beyond what the law allows and take some measures to require employees to engage in safe cell phone use while driving or talking for business purposes."

She said that the definition of "safe cell phone use" might vary from an outright ban to a more flexible policy, which could be stated more as an encouragement than a requirement. "From a legal liability standpoint, the stricter and broader the policy, the better," she suggested.

Further, just having a policy is not enough. "At least three things have to happen," Rath said. An employer must develop a policy. Then, it must make sure that the policy is communicated to all employees who might ever use a phone while driving on company business or use a phone for company business while driving. Finally, there has to be some monitoring of the policy and employees must be disciplined if it is discovered that they violated the rules.

The policy must be consistently enforced, Culp stressed. "Employers want to avoid a policy that looks good on paper but management knows that violations are rampant and takes no actions to address it." For this reason, she suggested carefully deciding what type of policy makes sense for your business before putting any policy in place.

Also, if an employer has employees who regularly handle phone calls or receive e-mail while moving from one place to another, that employer should consider providing equipment that allows them to do it safely, such as equipment with voice-activated dialing, push-to-talk phones and headsets, Rath added.

### **Federal Action May Be Coming**

The U.S. Department of Transportation has announced that it will hold a summit at the

end of September 2009 to address the dangers of text messaging and other distractions for drivers. Senior transportation officials, elected officials, safety advocates, law enforcement representatives and academics will meet in Washington, D.C., to discuss combating distracted driving.

"If it were up to me, I would ban drivers from texting, but unfortunately, laws aren't always enough," said Transportation Secretary Ray LaHood in a statement. "We've learned from past safety awareness campaigns that it takes a coordinated strategy combining education and enforcement to get results."

One enforcement action on the federal level might be Congress' passage of legislation conditioning the receipt of federal highway funds on states' adoption of bans on texting while driving, modeled on the seatbelt law. "I think we will see this in the next couple of years," Rath said.

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