



ROAD RISK - IS CELL PHONE USE BY EMPLOYEES A NEW AREA OF EMPLOYER LIABILITY?

New Risks, New Laws, and New Technologies are Changing the Rules for Today's Mobile Workforce

Executive Overview

Today eight people will die from drivers distracted by cell phone use. Yesterday eight people died. Tomorrow eight more will die — and every day thereafter. This reality opens up companies to a new world of risk and potential liability.

Today's mobile technology age means people can work anywhere, anytime. As a result, more people than ever are using smartphones to conduct business while driving. They are sending and receiving text messages, making phone calls, and browsing the Internet — all while driving down America's highways. But this convenience comes with a price for business owners: Distracted drivers who hurt or kill others expose their employers to serious liability issues.

This reality has become a major concern for legislators, public-interest groups, and insurance companies. Their attention to this matter is backed up by several leading research studies that are reporting startling results such as: drivers send 1.5 trillion texts a year, distracted driving causes 4,000 to 8,000 crashes each year, half a million people are injured each year by distracted drivers, and almost 3,000 people die annually at the hands of drivers using cell phones.

For employers, this critical issue has become a source of risk in several areas — including employee safety, public safety, and financial responsibility. Increasingly, the injured parties and their lawyers are targeting the companies that employ the workers who cause accidents due to cell phone distractions. Employers are recognizing that they have to take proactive action. Viable solutions are already available to help companies gain control of this escalating problem — including emerging technologies.



Introduction – Driven to Distraction

Texting, without a doubt, is an effective way of communicating. Nearly 70 percent of the U.S. population uses text messaging, according to a study. Another study found that people receive three times the number of text messages as compared to phone calls.

The popularity of driving while using cell phones has turned deadly on America's roads. There has been a spike in distracted driver related accidents and fatalities. According to a report by the National Safety Council, 28 percent of car accidents are caused by talking or texting while driving. Virginia Tech Transportation Institute reports that wireless devices are the number one source of driver inattention. It also says that using a cell phone while driving, whether hand-held or hands-free, delays a driver's reaction as much as having a blood-alcohol concentration at the legal limit of .08 percent. Carnegie Mellon reports that driving while using a cell phone reduces the amount of brain activity associated with driving by 37 percent. The Insurance Institute for Highway Safety says that drivers who use cell phones are four times as likely to get into crashes serious enough to injure themselves.

The issue of texting while driving is such a critical area of concern that it is appearing everywhere — from a ban issued by President Obama on cell phone use while driving for government employees, to a Pulitzer-prize winning newspaper exposé in The New York Time, to a national “No Phone Zone” campaign spearheaded by Oprah Winfrey. In addition, several new associations have been formed to educate the public and help eradicate the problem, such as Distraction.gov.

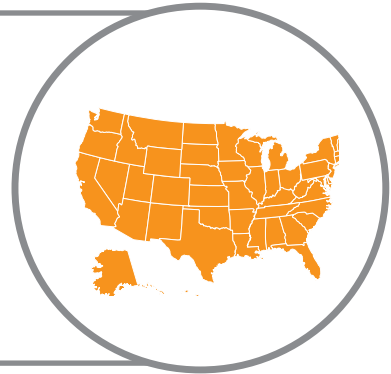
An entire vocabulary has formed around the burgeoning issue of distracted driving and the inherent liabilities such as: DWT (Driving While Texting). Cognitive distortion. Inattention blindness. Attention switching. Intentional misconduct. Conscious disregard. Gross recklessness. Vicarious liability.

A growing number of states have enacted legislation to help address the problem. Many states are starting to impose heavy fines to curb the growing problem. For example, in Oregon getting caught texting or talking while driving results in a \$720 ticket. In Utah, the state with the toughest laws, it will result in three months in jail, a \$750 fine, and a misdemeanor on the driver's record.



As of late 2010, Connecticut, New York, New Jersey, California, and D.C. have outlawed the use of cell phones while driving. Other states are currently taking into consideration over 130 bills that may regulate their use behind the wheel, according to the National Conference of State Legislatures. Other current legislative actions imposed by states as of this writing include:

- **30 states and D.C. have passed texting bans** (and 26 states have primary enforcement in place).
- **Eight states and D.C. have hands-free laws in place:** CA, CT, DE, OR, MD, NY, NY, and WA.
- **19 states and D.C. prohibit bus drivers from using cell phones while operating buses.**
- **28 states and D.C. prohibit new drivers from using cell phones while behind the wheel.**



These efforts will go a long way to help reduce the problem. But each company must also take the matter into its own hands to ensure optimum risk reduction for itself, its employees, and the public.

What Is Distracted Driving?

A text message is a short, fast, and convenient way to communicate. It might take all of four to five seconds to read or write a message. However, a person could drive the length of a football field in those few seconds.

Distracted driving is any non-driving activity a person engages in that has the potential to distract him or her from the primary task of driving and, thereby, increase the risk of crashing. There are three main types of distraction: (1) Visual — taking your eyes off the road; (2) Manual — taking your hands off the wheel; and (3) Cognitive — taking your mind off what you're doing. While all distractions can endanger drivers' safety, texting is the most alarming because it involves all three types of distraction.

Text messaging causes drivers to take their eyes and mind off the road and at least one hand off the steering wheel. One of the most obvious results when a driver is texting while driving is that the driver averts his or her eyes from the road for an average of five seconds. This is more than enough time for the vehicle in front to stop suddenly or for a person to run in front of the vehicle.



An online simulation test posted by The New York Times provided a visceral experience of the distractions of texting while driving. The person taking the test “steers” a vehicle through six lanes of traffic. Meanwhile, he or she reads and responds to three text messages. At the end, the driver is scored. While a person may receive a high score for keeping the car in the designated lanes, there is a kicker. The test asks if you noticed the person who appeared on the road during the test. Most people do not. This is the result of “inattention blindness,” which is when the mind is so preoccupied that it misses the obvious. As one researcher noted: “Even a gorilla could walk in front of the driver and he would not notice.”

Driving is an activity that requires full concentration — and composing, reading, and sending text messages compromises drivers’ concentration. There are an increasing number of studies that point to the same conclusion: Texting impairs drivers’ abilities.

Research Defines the Magnitude of the Problem

Several prominent recent studies are finding ample reason to worry about people who send text messages while behind the wheel. In fact, the results are reinforcing the fact that texting is one of the most dangerous hazards on the road today. There are two leading studies currently being cited by state lawmakers, safe driving advocates, and the media. One of the studies was conducted by the Virginia Tech Transportation Institute (VTTI) on the effect of personal technology on roadway safety. The second study was conducted by the University of Utah on driver distraction from cell phones and texting.

VTTI conducted several large-scale, naturalistic driving studies using sophisticated cameras and instrumentation in participants’ personal vehicles, which provided a clear picture of driver distraction and cell phone use under real-world driving conditions. Combined, these studies involved continuously observing drivers of light vehicles and trucks for more than six million miles of driving. Among the findings were that manual manipulation of phones such as dialing and texting of cell phones lead to a substantial increase in the risk of being involved in a safety-critical event (e.g., crash or near crash). Text messaging was associated with the highest risk of all cell phone-related tasks.

In addition, eye-glance analyses were conducted to assess where drivers were looking while involved in a safety-critical event and performing cell phone tasks. The tasks that draw the drivers’ eyes away from the forward roadway were those with the highest risk. VTTI’s research showed that text messaging, which had the highest risk of over 20 times worse



than driving while not using a phone, also had the longest duration of eyes-off road time (4.6 seconds over a six-second interval). This equates to a driver traveling the length of a football field at 55 mph without looking at the roadway.

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Similarly, human factors/ergonomics researchers at the University of Utah found that texters in a driving simulator had more crashes, responded more slowly to brake lights on cars in front of them, and showed impairment in forward and lateral control than did drivers who talked on cell phones while driving or drove without texting. Researchers Frank Drews and colleagues found evidence that attention patterns differ for drivers who text versus those who converse on a cell phone. In the latter case, the researchers say, “Drivers apparently attempt to divide attention between a phone conversation and driving, adjusting the processing priority of the two activities depending on task demands.” But texting requires drivers to switch their attention from one task to the other. When such attention-switching occurs as drivers compose, read, or receive a text, their overall reaction times are substantially slower than when they’re engaged in a phone conversation.



Utah Leads with Toughest Laws

While most states have passed laws prohibiting texting while driving, The New York Times reported in a Pulitzer-prize winning report on distracted driving that Utah has the nation's toughest law on texting while driving. Utah treats texting and driving as seriously as it pursues drunk driving. More Utah residents are killed in motor vehicle crashes caused by texting than from car accidents caused by motorists driving under the influence of drugs or alcohol.

Utah's strict legislation against texting and driving is the result of a 2006 Logan, Utah, car accident that killed two scientists. Reggie Shaw, 19, was texting while driving when he inadvertently crossed the center lane and crashed into the vehicle carrying James Furaro, 38, and Keith P. O'Dell, 50. The two men died from the injuries they sustained. Shaw served a 30-day prison sentence and is today an advocate for Utah's Zero Fatalities Campaign to eliminate texting while driving.

Since the implementation of the new law in May of 2009, if a police officer catches a motorist texting while driving, the motorist's faces up to three months in jail, a \$750 fine, and a misdemeanor on their record. If a motorist causes an auto accident that results in an injury or death as a result of texting, the at-fault motorist will be charged with negligent homicide, as it is considered reckless decision to choose to text and drive. The penalty is a felony charge, \$10,000 fine, and up to 15 years in prison.

While drowsy driving and texting while driving are both considered forms of distracted driving, a Utah motor vehicle collision caused by texting while driving is considered a criminal offense and not an accident. "It's a willful act," said Lyle Hillyard, a Republican state senator stated in a New York Times interview. "If you choose to drink and drive or if you choose to text and drive, you're assuming the same risk."

Insurance Companies Advocate for Stricter Rules

Insurance companies are paying close attention to developments around the issue of cell phone use while driving. Some companies are encouraging lawmakers to create and enforce legislation. Allstate Insurance Company is also actively promoting the risks: The company has added an email fanatic to its stable of multi-tasking safe driver advertisements. Nationwide Insurance conducted a national public survey of cell phone use while driving.



Zurich Services Corp., a global property and casualty insurance provider, has warned businesses that provide employees with mobile devices to be aware they may be caught in a situation of “vicarious liability” if they permit employees to use the technologies while driving. This could include operating a company-owned smartphone or mobile device. “We recommend that a prudent practice for every company to consider is developing an electronics usage policy and implementing it uniformly to help proactively manage this risk in their operations where physical exposures exist,” the company stated in a news article.

Noting that Wisconsin has become the 20th state to ban cell phone text messaging while driving, Zurich advised that now is the time for businesses to take the initiative to help protect their employees — and themselves — from the potential dangers of distracted driving. “Not only have businesses put people at risk over their laissez-faire attitude towards technology usage in their workplaces — in most cases, they encourage it if it means increased productivity,” said Jim Noble, Zurich’s line-of-business director, motor fleet. “But companies themselves — large and small — are now threatened if suddenly they’re faced with a hefty lawsuit caused by an employee’s negligence with an electronic device.”

Public Opinion Supports Restrictions

There is strong public support for legislation to restrict cell phone usage while driving, according to Nationwide Mutual Insurance Company’s public opinion survey. The results of the survey show there are varying degrees of support for different types of restrictions.

- ***8 in 10 drivers support some type of cell phone usage restriction.***
 - ***The majority of respondents say they are supportive of laws restricting any type of cell phone use while driving.***
 - ***80 percent of respondents support a ban on text messaging while driving.***
 - ***80 percent of respondents support a ban on e-mailing while driving.***
 - ***Two thirds (67 percent) of respondents say they are supportive of laws restricting phone calls while driving.***

- ***Of those who supported enacting some type of cell phone usage restriction, nearly three in four believed the law should apply to all drivers, not just specific groups.***



Company's Responsibility Escalates

Several legal cases indicate an emerging — and escalating — trend toward employer responsibility for injuries caused by drivers who cause accidents while using their cell phones. Since 2001, a growing number of settlements and jury awards have illustrated that businesses could be forced to pay a heavy price for their employees' distracted driving.

A Smith Barney stockbroker in Pennsylvania killed a 24-year-old motorcyclist while talking on his cell phone on the way to a non-business-related dinner. Although it was the employees' personal phone, he said he was making a business call. The firm decided to avoid the potential risk that an impassioned jury might make in a judgment, and awarded the victim's family a \$500,000 settlement.

The State of Hawaii agreed to pay \$2.5 million as its share of liability for an accident involving a state employee who allegedly was talking on her cell phone when she hit a tourist from New Jersey and caused him permanent brain damage. The state was found 20 percent liable for the plaintiff's injuries.

International Paper Co. settled a personal injury lawsuit for \$5.2 million with an Atlanta woman who lost her arm after being rear-ended by one of the company's employees. The employee was driving a company sedan and using her company-issued cell phone at the time of the accident.

Dykes Industries of Little Rock lost a \$20.9 million lawsuit for personal injuries sustained by a citizen in a car accident where a Dykes employee was using a cell phone at the exact moment of the accident.

A Virginia attorney from Cooley Godward hit and killed a teenage girl while using her cell phone to conduct firm business. Phone records reportedly showed that she was making work-related calls at the time of the accident. The firm was slapped with a \$30 million wrongful death suit. Fearing an enormous jury verdict, the law firm ultimately settled with the victim's family for an undisclosed sum.

If an employee injures someone because he or she was using a cell phone to conduct business while driving, a company may be liable for damages under the following theories of liability:



- **Respondeat superior.** Before the advent of smartphones, common law typically held that an employee driving to and from work, to and from lunch, or otherwise not engaged in traditional business-related activities was not acting in the course and scope of employment. As such, the employer could not be held liable under the doctrine of respondeat superior for accidents caused by the employee during those time periods. But as the cases above show, the law is changing. Now an employer may be liable even if the employee was driving his or her own car or making work-related calls outside of regular business hours.
- **Direct negligence.** In addition to being vicariously responsible, an employer may be directly negligent for the employee’s actions. An employer has a duty to exercise reasonable care for the safety of the public whenever its employees are acting within the course and scope of their employment. Thus, if the employer knew, or should have known, that employees were using their cell phones while driving for work-related purposes, and did not act affirmatively to stop the conduct, they may be liable.

A strong defense for employers to protect against liability is to adopt and implement written policies that effectively ban the use of mobile devices for work-related purposes while driving — and ensure that these policies are adequately communicated to employees. In addition to policies and procedures, employers will be well served by demonstrating that they have created an office culture that condemns this kind of reckless behavior.

Recent court decisions are sending employers a message: Adopt stricter cell phone policies or be prepared to pay. But are business rules and employee education programs effective enough? Many companies have decided they are not and are taking the next step in compliance — deploying cell phone control technology.

New Technology Addresses the New Business Risks

an employee operates a vehicle and uses a mobile device they pose a risk to themselves, the public, and their employer. The National Highway Traffic Safety Administration (NHTSA) estimates that on-the-job automobile crashes cost employers an average of: \$24,500 per crash-property damage, \$150,000 per injury, and \$3,600,000 per fatality. Beyond monetary losses, are losses that extend well beyond the dollar figures: loss of productivity, loss of industry reputation, loss of customers’ positive perception of the company, loss of employees’ morale, loss of the company’s future insurability, loss of employee’s physical capabilities, and, worse, loss of life.



Ensuring the safety of workers and the public is ultimately the responsibility of the employer. This responsibility is compounded by the increasing mobility of today's workforce. Nearly every market has witnessed an almost 70 percent increase in their mobile workforce since 2005, and the numbers continue to grow — from the sales force, to service technicians, to delivery drivers. As a result, there are many stakeholders interested in helping the mobile workforce avoid accidents caused by distracted driving. The legal team wants to guard against litigation resulting from careless accidents. Fleet managers want to ensure that the vehicles are driven in a safe and responsible manner. And the CEO and CFO want to protect the bottom line.

Most companies have corporate risk mitigation strategies in place for a number of contingencies ranging from financial security, to IT disaster recovery, to facility safety. Now, the need for a protective solution for the use of smartphones while driving needs to be added to this list. Technology solutions are coming online that are specifically designed to address the problems, while helping companies balancing the need for mobile communication and ensuring risk reduction. With this technology in place, employers can strengthened and enforce communications policy, minimize smartphone abuse and personal phone use while on the job, and gain the security of knowing that they are protecting the lives of those who may be threatened by distracted driving.

The smartest technologies are not complicated. Many, like MobiLoc from MobileLutions, can easily be deployed on only a few or up to thousands of company smartphones in a user-friendly, web-based environment. Most of the technologies are delivered over the air using “push” technology, making them simple to install and activate on employees' mobile devices. Once activated, their flexibility allows companies full reign to tighten or expand restrictions based on corporate smartphone usage policies. Also, the flexible technologies allow any combination of inbound or outbound control features for emailing, texting, browsing, and voice calls.

Once deployed, the solutions provide employers with automated reporting that delivers updates on the status of each cell phone on the road. In this way, these technologies help companies enforce their rules of the road.



Employer Responsibility -The Bottom Line

Employer responsibility for accidents caused by their employees is a huge gray area. But laws and lawsuits are increasingly pointing toward some level of liability by employees. Here are some notable points on employer liability involving the use of smartphones by employees while they are driving:

Employers can be liable for problems or accidents created by employees' use of cell phones while driving if a company provides the phones, or if cell phone use is a necessary or encouraged option as part of their job.

Employers can incur liability whether or not the call is personal or business related.

Risks fall into two categories: claims by third persons and claims by employees.

Employer liability in cases involving a third party is based on a legal principal called "vicarious liability." It provides that an employer is responsible for the harm caused by its employees if the employees were acting within the course and scope of their employment at the time that an accident occurred.

Plaintiffs often claim that an employer is directly negligent for its own conduct in encouraging or permitting employees to use cell phones for business use without adequate training or consideration of safety issues.

A firm company policy and employee training can help, but are not an assurance that a company will not be charged and held liable for the negligent conduct of its employees who are driving while using cell phones.



Conclusion

Smartphones have brought with them many communication conveniences and luxuries. In the business world, employees on the road can keep up with work even when not at their desks. However, while the evolution of smartphone technology has created multiple benefits for today's workforce, there is one critical downside that must be addressed by every employer of mobile workers — the use of smartphones while driving. An unintended risk of being able to stay connected anytime, anywhere, is the risk of endangering employees and the public on U.S. highways.

Compounding this risk is that most smartphone users believe they are capable of driving safely while using their phones. But research and statistics are proving otherwise — serious accidents and deaths are occurring every day. State laws are being developed and enforced to deal with this growing problem. Insurance companies are becoming more stringent in their liability concerns. Lawyers are paying attention and helping their injured clients sue the employers of employees who caused accidents while “working” and driving. Very soon it is assumed that it will be a requirement for employers to manage their employees' use of smartphones while driving.

Today, new intelligent technologies are being deployed to address the risk of smartphone-created accidents. They help companies ensure that their corporate policies regarding smartphone use while driving are being strictly followed by every employee. Smart companies are already taking responsibility and control over this important area. They are deploying these technologies now — for the safety of their employees, for the safety of the public, and for their companies' risk reduction.