



Risktopics

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Cell phone liability for employers

Introduction

Once considered an expensive and novel toy for the rich and technologically savvy, the cell phone has rapidly become the communication device of choice for people to stay connected to friends, family, customers and their businesses. From teenagers to business executives, cell phones have become an important communication tool for today's fast-paced lifestyle. The convenience of cell phones in instant access to communication and obtaining emergency help encourages many people to use them in cars and while driving. Despite the many positive benefits of wireless cell phone technology, distraction caused by cell phone use while driving raises some serious safety concerns. In addition, it may also result in potential vicarious liability exposure for employers from unsafe driving by employees using cell phones for business purposes while driving.

Driver distractions

The first major study in 1996 by the National Highway Traffic Safety Administration (NHTSA) estimated that driver distraction in all its forms probably contributed to 20-30 percent of all crashes. A driver is faced with many distractions while driving. These can include tuning a radio, eating, reading, and tending to a child and many more. New distractions are now emerging from the rapidly increasing use of in-vehicle electronic and navigation and communication devices. These devices, called "telematics", include cell phones, GPS route navigation systems, on-board computers that allow e-mail access, personalized internet-based information services and others.

Due to the rapidly increasing use of cell phones in all age groups in the United States, NHTSA and many other studies are now focusing on the safety impact of distraction caused by the use of cell phones while driving. Although there are several other types of potential distractions in a car, it is the use of a cell phone while driving, due to its mental engagement in interactive conversation, that is receiving the most attention for causing distracted driving and potential adverse impact on driving safety. An earlier NHTSA study has reported 75% of drivers using cell phones while driving.

Recent developments

Research reports and safety studies by several reputable sources (AAA Foundation for Traffic Safety-2003, NHTSA-2004, National Occupant Protection Use Survey- 2005-06, Virginia Tech Transportation Institute- 2006, and many others) have all reported increased reaction time and distraction from use of a cell phone while driving.

This increases the chance of a driver getting into an accident, particularly in congested traffic or inclement weather conditions.

Some of these studies have tried to make a distinction by focusing on use of hands-free versus hand-held cell phones. Simulator and results of other studies have concluded that the use of "hands-free" devices did not reduce the reaction time and driver distraction. While the "hands-free" features may address the issue of the task complexity of dialing and holding a cell phone while driving, the interactive conversation on a cell phone demands cognitive resources and this is believed to be primarily responsible for distracted driving. There are several studies in Europe and the United States that are currently focusing on this issue.

On their web site, the National Safety Council (NSC) notes in a statement (March 7, 2002) about multitasking that, "a driver's first responsibility is the safe operation of the vehicle" and that, "best practice is not to use electronic devices including cell phones while driving." A 2003 simulated study conducted by the University of Utah reported that drivers engaged in phone conversations had significantly slower response times to traffic signals than those listening to the radio. Another driver study in the UK that simulated distracted driving reported that using a cell phone while driving has a greater adverse impact on reaction time and stopping distances than driving under the influence of alcohol.

Emerging business liabilities

With the growing use of cell phones for business purposes, employers are facing a new emerging threat of vicarious liability for automobile accidents caused by distracted driving of their employees. Two recent court verdicts ruled that employers might be held vicariously liable if they permit employees to use cell phones for business purposes while driving. Bustos v. Dyke Industries, Inc. in Dade County, Florida was the first vicarious liability case to bring a verdict for the plaintiff, and jury awarded the plaintiff \$16 million in December 2001. In Yoon v. Wagner, et al., a court in Virginia allowed a claim of \$30 million for vicarious liability against the California-based law firm, Cooley Goddard, to proceed to trial. Although both are trial court verdicts that may be modified or reversed on appeal, these cases indicate an emerging trend in motor tort cases associated with vicarious liability for distracted driving and higher awards for the plaintiff. In 1999, Solomon Smith Barney settled a case for \$500,000 in a suit brought by the family of a motorcyclist who died in an accident involving a stockbroker who was reportedly using a cell phone for business purposes. In 1996, the City of Honolulu reportedly paid \$1.5 million for an accident involving a pedestrian who suffered permanent brain damage after being struck by a motorist using a cell phone.

In one recent court settlement in December 2007, International Paper Company reportedly paid \$ 5.2 million to a Georgia woman for a rear-end collision accident involving an employee use of company-issued cell phone while driving. It is interesting to note that the company had a policy that required use of a hand-free cell phone while driving. There are reportedly additional cases pending and in litigation.

A company may not be directly liable for its employees' actions, but it can be held vicariously liable for dangerous behavior and negligent actions of their employees while conducting company business.

The precedent was set many years ago for vicarious liability cases when pizza delivery drivers, encouraged by the 30 minutes pizza delivery promise of the pizza maker, displayed alleged negligent and dangerous driving behavior.

Legislative ban

Since the 2001 New York ban on use of cell phones while driving, many more municipalities (e.g. Chicago, Washington D.C. and others) and U.S. states (New York, New Jersey, Connecticut, Utah, Virginia and Washington) have passed restrictive laws to regulate use of cell phones while driving. In addition, as of 2008, about 17 states have banned or restricted use of cell phones by young drivers while driving. This is consistent with high-risk driving record and high use of cell phone and texting in this age group. Diversity of these regulations range from an outright ban on use of hand-held cell phones for all drivers to permitting exception for emergency purposes and also limited exception for professional drivers. Some allow hands-free accessories and features such as voice activated dialing and others ban texting (DWT- driving while texting). Sixteen states ban use of a cell phone by bus drivers when passengers are present.

A new hands-free law went into effect in California on July 1, 2008. It bans use of hand-held cell phones while driving. Although California law permits texting, it completely bans use of cell phones by drivers under 18 years of age. The law also bans use of other hand-held communication devices and laptop computers. Since many states and local jurisdictions are considering similar restrictions, details of regulations and current information by states should be obtained from reliable sources, such as http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (Governors Highway Safety Association).

Internationally, many countries including most European Union countries, UK, Australia, Switzerland, Japan, Singapore, South Korea, India, South Africa and others restrict use of cell phones while driving. Since initially passing the law to ban use of cell phones while driving, UK has toughened the law by increasing the penalties and a threat of jail term and even fines for employers under certain circumstances.

The potential hazard of distracted driving from cell phone use is clearly recognized but the actual risk of harm (function of likelihood and severity) is still a matter of controversy and debate among human factors researchers. Although simulator studies and other human factors research have clearly recognized the increased reaction time and adverse safety impact of distracted driving, undisputed field data are difficult to collect. In the absence of reliable and undisputed field data, NHTSA and state regulatory agencies are unlikely to act decisively. About 30 states have started collecting cell phone use data as part of accident crash reports and have started reviewing cell phone use just prior to actual accident. Although enforcement of these regulations will reduce accidents and save hundreds of lives, the enforcement is a major challenge. Experts recommend a strong public education effort to supplement the enforcement of these regulations.

The enforcement of these regulations also varies by jurisdiction. The fines are about \$100 for violation. In New Jersey, cell phone use and driving while texting are considered a primary offense, where as in Washington, it is considered a secondary offense that requires the driver being pulled over for a more grievous violation before ticketing for cell phone violation. New York has increasing fines after the first violation at \$100. Although legislative restrictions are likely to complicate the cell phone liability and litigation, the question that remains is how will it be enforced? Unless the enforcement is strong enough, it is not likely to discourage drivers in use of a cell phone while driving. In the meantime, it would be a prudent practice for a company to consider developing a cell phone usage policy and implement it uniformly to manage this risk proactively in their fleet operations for sales, delivery and maintenance vehicles.

Corporate policy

The primary goal of any corporate policy should be to proactively prevent an undesired outcome for the corporation. Having a cell phone usage policy in place does not necessarily guarantee a successful defense in every case, but it will send a clear safety message to employees. Experts believe that a company with a well-written policy is clearly in a much better defensive position than a company with no policy at all. Here are some possible approaches and options to consider in development of a corporate policy on cell phone use by employees.

- Total ban on all cell phones and communication devices
- Permitting only emergency use with a statement for safety- such as pull over safely, etc.
- Ban on hand-held phones but permit use with "hands free" devices (many U.S. cities and municipalities such as New York and Chicago have passed such laws)
- Restrictive policy limited to use of cell phones in company vehicles only (no reference to rental or leased vehicles)
- Broad restrictive policy on business use of company-issued cellular phones and wireless devices (even in personal vehicles)

Although experts are divided on the specific provisions and enforcement of such company policies, many experts are suggesting consideration of the following points when developing a corporate policy on in-vehicle cell phone usage.

- It is important to develop a policy that balances business needs with realities of driving safety and potential for high legal liability risks. A proactive, balanced policy will demonstrate a company's commitment to safety and prevention of accidents and will help with a defense in case of litigation.
- The policy should be clearly articulated, broadly communicated and uniformly enforced.
- Before developing any cell phone policy, review current cell phone usage and practices in light of business needs and environment. If there is no compelling reason for employees to talk on a cell phone while driving and constant communication is not vital to your business, it is prudent to ban the use of cell phones while driving.
- The strongest policies have prohibited use of company-issued cell phones completely while driving a company or rental vehicle. Some companies even require employees to turn the cell phone off while driving. Some companies have considered expanding restrictions or bans on use of pagers, digital assistant, laptop computers and other electronic communication devices in addition to cell phones.
- A less restrictive policy may permit use of cell phones with hands-free devices in limited circumstances. Guidelines may limit prolonged conversations, particularly in adverse weather and traffic conditions. Some policies may allow emergency usage with some guidelines such as reporting car trouble or an accident, or in case of an imminent danger.
- If a company is providing cell phones, employees should be required to sign and acknowledge the receipt of the corporate policy. Some companies have chosen to place a warning sticker on company-provided cell phones reminding employees about the dangers of distracted driving.

Some companies have included a training component (including a booklet, etc) to supplement and reinforce their policy. It is also important to ensure proper documentation of employee acknowledgement of the policy information and any training by means of a written sign-off. This awareness training can be part of a new employee orientation program or when a company car and/or cellular phone/wireless communication devices are assigned to an employee. Periodic coaching and reminder from managers can also be helpful in reinforcing the policy. This may be particularly important if use of cellular phones and wireless communication is essential for the job. Due to practical difficulties and challenges in enforcing a cell phone use policy, employees have to realize (self-empowerment) the seriousness of management policy to ensure compliance and their own safety.

Whether a total ban or a less restrictive cell phone usage policy, uniform and consistent application of policy is important including disciplinary action for any violations. The disciplinary actions have ranged from a written reprimand for the first violation to more serious disciplinary actions to ensure uniform enforcement of the policy. Interestingly, this has some similarities with enforcement challenges for a corporate policy on driving a company vehicle while intoxicated.

Conclusion

The employment related law for this emerging liability is still evolving. Research on this issue by NHTSA, university research projects, the automobile and wireless communication industries probably have a long way to go before they can provide any conclusive guidelines. In the meantime, a "wait and see" approach is not prudent risk management in light of the emerging trend in litigation and large settlements. Accidents involving distracted driving requires a plaintiff to prove that the accident was caused by the cell phone use and also that the conversation was business related. It is unlikely that a jury will be sympathetic to a business in the absence of a corporate policy on cell phone use or company policies and practices that condone or even encourage the cell phone usage for increased productivity. Experts recommend efforts towards stronger awareness of this risk among employees, and a balanced cell phone usage policy that considers the realities of the business environment and that is realistic to enforce uniformly. It will help demonstrate a company's commitment to safety and the prevention of accidents.

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