Employer Liability for Distracted Driving Accidents

Why Simply Having a Cell Phone Policy is Not Enough
Introduction

Employers can and have been held liable for the actions of their employees. This includes lawsuits for negligence due to cell phone usage while driving. This white paper addresses why businesses should – and must care.

This paper:

- Discusses various legal theories of employer liability, including respondeat superior, or vicarious responsibility, which says that an employer can be held legally responsible for negligent actions of their employees, as well as other ways employers can be found liable. This liability exists even if the accident occurs in a jurisdiction that hasn’t yet specifically banned texting while driving.

- Addresses some misperceptions and misunderstandings, for example, the fact that employers can still be held liable, even when employees are using their personal phones or driving their own cars.

- Reviews a few high profile cases, including a case from Texas in 2012 where Coca-Cola was forced to pay a $24 million settlement to a woman who was injured by a Coca-Cola sales person in a car accident.

- Describes why laws against texting-while-driving may actually make situations worse for employers.

- Explains why although implementing a phone use policy can help, employers cannot rely on simply having a policy as a defense.

Kyrus Mobile prevents distracted driving by employees to reduce risk and minimize company liability. Rolling out a policy to prohibit cell phone usage while driving is not enough; employers must demonstrate that they have been actively monitoring and enforcing the policy. With the distracted driving solution from Kyrus Mobile, employers can demonstrate that they not only prohibited, but also actually prevented, employee usage of mobile devices while driving.
The Problem - Overview

Distracted driving is a serious problem, attributable for 28% of all crashes in the U.S. on an annual basis. This amounts to 1.6 million crashes, causing 636,000 injuries and 10,000 deaths annually. At least 170,000 crashes annually are directly attributable to the use of texting while driving. The rapidly rising adoption of smartphones mean more drivers than ever are equipped with a hugely distracting device at their fingertips, especially as more and more employees use them for work on a 24/7 basis.

According to the National Highway Traffic Safety Administration (NHTSA), 80% of crashes are caused by driver inattention, and by far the biggest source of this is cell phone use, with 11% of all drivers using phones at any given time. Drivers distracted by a mobile device are four times more likely to have an accident, while commercial truck drivers are an astounding 23 times more likely to crash.

According to the National Safety Council (NSC), most drivers believe they are more skilled at multitasking than other drivers when it comes to multitasking while driving. The NSC also says that multi-tasking is a myth. “Our brains flip quickly between one task and another. While we may think we can do two tasks at one time, because we’re requiring our brains to switch between multiple tasks, we actually face a compromise or degradation in performance.” Lastly, just like it is instinctive to answer a ringing phone, it is becoming more and more instinctive and second nature to reply to an incoming text or email immediately.

What Are the Costs to Employers?

Enterprises – not only fleet operators but any business for which employees use phones while driving – face liabilities in the form of financial losses (such as legal judgments, increased insurance premiums, workers compensations claims, fines and repair costs), and also reputational risk to the firm and business risk (e.g., damaged company vehicles which can result in slowed operations or failure to provide contractual services or products).

Astoundingly, NHTSA estimated that on-the-job crashes cost employers over $24,500 per crash, $128,000 per injury, and $3.8 million per fatality. These numbers are the sum of direct and indirect costs resulting from a crash. The cost of a crash can be broken down by the type of crash -- whether it’s only property damage, an injury is suffered, or a fatality occurs. The weighted average of all types of crashes (calculating the frequency that crashes result in an injury or fatality) is $53,469.

For further information on this topic, as well as an easy-to-use calculator to determine what your company’s costs are from distracted driving – and how much you can save – please see our ROI Calculator, available on our company website at www.kyrusmobile.com.

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3 Ibid.
The Basis for Employer Liability from Employee-Caused Accidents

There are a variety of different legal theories under which the employer may be found liable for the actions of an employee:

**Vicarious Liability:** The most common is vicarious liability for Respondeat Superior, which says a master (the employer) can be held responsible for harm done by its servant (an employee acting within the scope of employment). This applies both to employees and independent contractors, so long as there is an agency relationship.

There is a requirement that the employee’s actions were in the scope of employment. A driver making deliveries, as one example, is clearly acting within the scope of employment. The more ambiguous cases arise when an employee is commuting to work, or using company equipment on personal time (discussed below), but courts have defined “scope of employment” very broadly in the context of distracted driving cases.

The plaintiff’s attorney will not have to show that the employer should have known the employee might cause harm, or even that the employer did anything demonstrably wrong. If the employee caused the injury while acting within the scope of employment, the employer will be on the hook for damages incurred by the victim – this means that regardless of the employer’s best intentions, or policies put into place, if the employee causes an accident due to distracted driving while in the scope of her or his employment, the liability will trace back to the employer.

**Negligent Hiring, Supervision & Retention:** Another legal doctrine that may be applicable is known alternatively as negligent hiring, negligent hiring and retention, or negligent supervision. A majority of states now recognize this as a cause of action.

There are three elements required for liability to attach to the employer. First, employers that hire employees must train them in all foreseeable specific job responsibilities, if the failure to do so could result in harm. Thus, employees who will be operating a vehicle as part of their jobs must be trained to do so properly – including avoiding distracted driving – since the risk is clearly foreseeable. Second, the employer has a duty to properly hire, train and supervise employees. If the employer fails to do so, it breaches that duty. Lastly, there has to be causation between the conduct and the injury, which is usually not at question in these types of cases. By virtue of employees using mobile devices while driving, the employer will have breached its duty to supervise its employees and thus be held liable to the accident victims.

**Negligent Entrustment:** This is a rapidly growing tort that usually arises in cases of vehicle accidents. In commercial automobile operations, a case of “negligent entrustment” arises when the employer allows an employee to use a vehicle knowing, or having reason to know, that the use of the vehicle by the employee creates a risk of harm to others. The requirement to focus on here is where the employer has reason to know (or should have known) that the employee would have a likelihood of distracted driving. Evidence would typically include the employee making calls with other employees or customers, or responding to texts or emails while driving during business hours. Because this doctrine is so straightforward, many plaintiffs’ attorneys will make this claim because there is no requirement that the driving is within the scope of employment. The employer may be found liable if the distracted driving was caused by a personal call on personal time, but while operating a company vehicle.

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3 Ibid.
**Dangerous Instrumentality:** Currently, this doctrine is unique to the State of Florida, but plaintiffs’ attorneys in other states are still asserting it as a basis of liability, in the hopes of getting this doctrine recognized elsewhere. The Dangerous Instrumentality doctrine is an outgrowth of Negligent Entrustment, with the difference being that liability is now “strict liability” – the plaintiff is no longer required to show either actual knowledge or even constructive knowledge on the part of the employer that the employee would have a likelihood of distracted driving. So long as the employee caused an accident, the employer would be on the hook.

### Employer Liability Exists Even in Unexpected Circumstances

Under these various legal theories, it is clear that if a vehicle accident occurs, there are many ways that employers will be found liable. Companies and their insurers, including pharmaceutical companies, brokerages, trucking and even law firms have paid out hundreds of millions of dollars in lawsuit settlements and judgments for these accidents. Liability has been found even when employers have had cell phone policies in place; when drivers of company cars were on personal errands; when employee were making personal calls on company supplied phones; and even when employees were using personal phones and driving personal cars, when the distraction was business-related.

- In Texas in 2012: The Coca-Cola company paid $24 million ($14 million in compensatory and $10 Million in punitive damages) to woman injured by a Coca-Cola sales employee driving a company car and using a hands-free device. The court held that even though Coca-Cola had a policy in place, that policy alone was insufficient as a defense and Coca-Cola was negligent.

- Also in Texas, in 2010, a Cable One technician drove his work truck into a stopped vehicle at 71 mph, killing a mother and a grandmother. The technician admitted, “I was texting before the accident.” Cable One settled the case for a confidential amount, but it is likely to be in the 8-figure range.

- In Florida, the widow of a James L. Caskey, Jr., a bicyclist killed by a texting driver, brought a suit in April 2010 against Astella Pharmaceuticals Inc., alleging that their employee, a pharmaceutical representative, was texting when he struck and killed Caskey.

- In 2010, an insurance carrier agreed to pay $5 million to the widow of Thomas Hoskins, one of two bicyclists killed by driver Sharon King. The other death was settled for $2.5 million. King was driving a company car. Although the company argued that she was not working when the accident occurred, the company’s insurance company concluded that it might nevertheless be found liable and decided to settle the case.

- Tiburzi v. Holmes Transport (Missouri, Aug 2009) – an $18 million verdict for the plaintiff who sustained serious brain injury after being struck by an 18-wheel truck that was driven by an employee of the defendant. The judge found that at the time of the accident, the truck driver was checking messages on his phone. Holmes Transport was liable under the theory of vicarious responsibility.

- Bustos v. Leiva et al – (Florida, 2001) – a $21 million verdict, where an elderly woman was struck by a truck driven by an employee of lumber giant Dyke Industries. The employee’s cell phone records proved that he had been using his phone at the time the crash occurred. Dyke industries was held liable under the theory of vicarious responsibility. The case was subsequently settled for $16.2 million.

- Roberts v. Smith Barney, Inc. (Pennsylvania, 2003) – a $500,000 settlement, a stockbroker employed by Salomon Smith Barney was driving to a non-business event when he struck and killed a 24 year-old motorcyclist. The stockbroker was on personal time, in a personal vehicle and using a personal cell phone, but admitted that he had been making “cold calls,” a common practice at the firm. Salomon Smith Barney recognized that in permitting and expecting its employees to make cold calls while driving, the company policy itself could be deemed negligent and was forced to settle the case.
• Ford v. International Paper Co. (Fulton, Georgia, 2008) – Debra Ford brought a personal injury claim against Vanessa McGrogan, an employee of International Paper, alleging that McGrogan was using a company-supplied cell phone when she rear ended Ford’s car. Ford, a widowed mother of four, had her arm amputated. International Paper argued that Georgia law requires drivers not to do things that are distracting. Ford’s attorneys said that McGrogan’s cell phone use was not reasonable. Even though International Paper had a cell phone policy that prohibited their use, the company nevertheless agreed to settle the case for $5.2 million.

• In 2001, Jane Wagner, a lawyer with international law firm Cooley Godward, struck and killed a 15 year old girl in Northern Virginia when she was driving home from work and conducting a business call on her cell phone. The jury awarded $30 million against Cooley Godward. The law firm ended up settling for an undisclosed amount.

Laws Against Texting-While-Driving Exacerbate the Situation for Employers

As of July 2012, thirty-nine states and eight Canadian provinces have enacted bans on texting while driving. As well, federal regulations ban it for commercial drivers and government employees. The reality is, however, these new laws have not diminished the number of people texting and have even slightly increased the number of accidents. It is very difficult to enforce these laws. Police departments admit that enforcement is difficult or impossible. The Governors Highway Safety Association states: “The reality of it is, we don’t have a good way to enforce texting bans yet.” Worse, the Highway Loss Data Institute reports that these laws have not resulted in fewer vehicle crashes.

Statistics aside, if the employer does not operate in one of those states that have banned the practice, does that mean there is no liability? Not at all. Whether a driver is negligent in his or her driving is a question of fact to be determined in court, regardless of whether it’s legally permissible or not. Ironically, the rapid enactment of these laws actually makes the situation worse for employers.

Not only is it easier to prove negligence in those states, these laws banning texting while driving make it much easier for plaintiffs to claim – and get – punitive damages. The violation of such laws goes to show reckless and outrageous indifference to a highly unreasonable risk of harm, greatly increasing the chances that punitive damages will be awarded.

New Government Regulations Increase the Cost

Assistant Secretary of Labor for OSHA David Michaels publicly announced to employers, “It is your responsibility and legal obligation to have a clear, unequivocal and enforced policy against texting while driving…Companies are in violation of the Occupational Safety and Health Act if, by policy or practice, they require texting while driving, or create incentives that encourage or condone it, or they structure work so that texting is a practical necessity for workers to carry out their jobs. OSHA will investigate worker complaints, and employers who violate the law will be subject to citations and penalties.”

OSHA has proclaimed that it will use its General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act, to issue citations and proposed penalties in these circumstances. OSHA considers “distracted driving” which can include texting and the use of cell phones for telephone calls to be a “recognized hazard” under the General Duty Clause to employee safety. Penalties for willful violations of the Act under the General Duty Clause can be as high as $70,000.

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Implementing a Phone Policy Does Not Absolve Employers of Liability

Although many companies are rolling out policies banning phone use, enforcement is ineffective, as punishments typically occur only after an accident has happened. Nearly 86% of companies have policies regarding the use of mobile devices while driving but few, if any, have procedures in place to enforce these policies.

While implementing a policy will help, just having a policy in place is not an absolute shield against liability. Indeed, the $24M verdict against Coca-Cola demonstrates that employers will be found liable, even with a properly worded phone use policy in place. The missing piece for most employers is the enforcement and auditing of these policies. Without that, policies may be deemed to be just boilerplate paperwork that employees blindly sign without even reading it, much less understanding the real risks involved.

Ira Leesfield, a noted trial attorney, states that “Lastly, even if the employer had a policy that banned the use of cell phones for business-related purposes while driving, if they did nothing to ensure that these policies are adequately communicated to its employees, they can still be held liable. The ‘ostrich with its head in the sand’ is never a good defense. In addition to policies and procedures, employers will be well served by demonstrating that they have properly trained employees on its policy and created an office culture that condemns this kind of reckless behavior.”

Without auditing and compliance monitoring, employers effectively have no way of knowing if phone use has stopped – until after the next accident has already happened.

Companies that aren’t actively preventing distracted driving don’t need to ask IF this will happen... they need to ask WHEN.

Summary

In summary, employers face huge risk every day for the negligent actions of their employees with regard to cell phone use. It is not enough to simply have a policy; the company must demonstrate that they did everything in their power to monitor their employees and enforce compliance with the cell phone policy.

There are technologies on the market today that are capable of disabling cell phones when a vehicle is moving and returning service when the vehicle has stopped. These solutions are a critical part of the enforcement and auditing requirements. The temptation to respond to cell phone distractions is just too great to leave it up to the employee. Responsible employers will remove the distraction to assure the highest levels of safety.