



# Distracted Driving

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Your liability as an employer and what you can do

A recent letter to the Dear Abby® advice column complained of a car “swerving and weaving in and out of the next lane.” The car would erratically slow down and speed up, leading the writer of the letter to conclude that the driver was drunk. After pulling along side, the writer discovered to her dismay that the driver was speaking to a passenger in sign language – signing with both hands while watching the passenger rather than the road.<sup>1</sup>

Conversing in sign language may not be the most common distraction for drivers, but the effect is much the same as more frequently encountered distractions such as talking on the phone or texting – drivers lose their concentration and sometimes they lose control of their vehicles. According to the National Highway Traffic Safety Administration (NHTSA), almost 20 percent of all crashes in 2008 involved some type of distraction, resulting in 6,000 deaths and more than half a million people injured.<sup>2</sup>

Employers that require employees to drive as a part of their job should be vigilant about curbing distracted driving. The safety of employees and others is the principal concern, but employers also should be aware of the liability exposures distracted driving can produce. Lawsuits involving employees distracted by cell phones and other devices while driving have resulted in multi-million dollar settlements. Liability issues can be especially troublesome for employers that provide employees with, or require employees to use, cell phones or other portable communication or information devices.

## Driving distractions

Distracted driving has become a high-profile issue since the advent of mobile phones, but the problem is not restricted to newer technologies. Eating and drinking, grooming, changing radio stations, and reading maps have long been causes of distractions that lead to accidents. But with the now nearly universal use of mobile phones, and especially with the growth of “smart phones” that simplify texting and enable internet access almost anywhere, distracted driving has become an epidemic.

### **Distracted driving falls into three categories:**

- Visual, when the driver takes his or her eyes off the road
- Manual, when the driver takes his or her hands off the wheel, and
- Cognitive, when the driver’s mind is engaged in another activity and is no longer paying sufficient attention to what is happening on the road.

Using a mobile phone while driving often involves all three types of distractions: the driver looks at the phone to make a call or read a text message, handles the phone to make a call or to type a message, and becomes mentally absorbed in the conversation or text message exchange.

Numerous studies have shown that using a cell phone impairs driving ability. A University of Utah study found that using a cell phone while driving, whether hand-held or hands-free, delays a driver’s reactions as much as having a blood alcohol concentration at the legal limit of .08 percent.<sup>3</sup> While, talking on a mobile phone while driving is a serious problem, for obvious reasons texting, instant messaging and

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1 “Signing driver might be breaking law,” The Columbus Dispatch, November 7, 2010

2 “Statistics and Facts About Distracted Driving,” U.S. Department of Transportation (<http://www.distraction.gov/stats-and-facts/>)

3 Ibid

e-mailing can be far worse. A Virginia Tech Transportation Institute study concluded that texters are 23 times more likely to be involved in accidents or near-accidents than other drivers.<sup>4</sup> A study by CareerBuilder found that 54 percent of employees who use smart phones – including 66 percent of sales employees, 59 percent of professional and business services employees, and 50 percent of healthcare workers – admit to checking them while driving.<sup>5</sup>

Mobile phones are near-ubiquitous, but they are not the only type of technology that causes distractions. A GPS device, for example, can be enormously distracting if a driver attempts to program it while the vehicle is in motion. Laptop computers and DVD players also can be sources of distraction: an Ohio truck driver pleaded guilty to causing a fatal accident on a New York highway in December 2009 while viewing a pornographic video on his laptop.<sup>6</sup>

## Liability issues

Employers can be held liable for injuries caused by employees using cell phones and other devices while driving, especially if the employer provides the cell phones, or if cell phone use is a necessary or encouraged part of their job. Third party liability can be incurred based on the legal principle of vicarious liability, or *respondet superior*. This legal principle provides that an employer is responsible for the harm caused by an employee if the employee was acting within the course and scope of his or her employment at the time the accident occurred. Additionally, an employer may be considered directly negligent for its own conduct if it encourages or permits employees to use cell phones for business without adequate training or consideration of safety issues, or if it hires an employee whose driving record should have been a red flag.

Employers have long been liable for vehicle accidents involving employees who are acting “within the scope of their employment,” or even operating a company vehicle for personal use, but mobile phones dramatically expand employers’ potential liability. Mobile phones enable people whose job may be at a desk to work from a car, even when driving is not part of their job.

### The following are only a few representative cases:

- In a highly publicized 2008 California train accident that killed 25 people and injured 135, the engineer had sent and received several texts immediately before the crash. Metrolink, the commuter rail service, and Connex Railroad, its former operating contractor, have proposed a \$200 million settlement to victims and families.<sup>7</sup>
- In a Dade County, Florida case, a lumber wholesaler, Dyke Industries, settled a lawsuit for over \$16 million after one of its salesmen hit and severely disabled an elderly woman while talking on a cell phone.<sup>8</sup>
- In December 2007, International Paper Co. agreed to pay a \$5.2 million settlement to a Georgia woman who was rear-ended by one of its employees. The employee was driving a company car and talking on a company cell phone at the time of the accident. The settlement was reached even though the employee had violated her company’s policy of requiring the use of hands-free headsets while driving.<sup>9</sup>

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4 Matt Richtel, “In Study, Texting Lifts Crash Risk by Large Margin,” *New York Times*, July 27, 2009.

5 “More Than Half of Workers Admit to Checking Their Smart Phones While Driving,” *Cellular News*, March 10, 2010, (<http://www.cellular-news.com/story/42338.php>)

6 “Trucker Who Was Watching Porn Before A Fatal Crash Pleads Guilty To Manslaughter,” *Transportation and Legal News* (<http://semi-accident.com/blog/2010/05/trucker-who-was-watching-porn-before-a-fatal-crash-pleads-guilty-to-manslaughter.html>)

7 “\$200 million settlement proposed in crash caused by texting,” *SafetyNewsAlert*, <http://www.safetynewsalert.com/200-million-settlement-proposed-in-crash-caused-by-texting/>

8 Paul Prentiss, “Commentary: Employers should protect themselves against liability”, *Daily Reporter* (Milwaukee, WI), Feb 24, 2003

9 “Company to Pay \$5.2M Settlement in Cell Phone Crash Case,” *ABA Journal* ([http://www.abajournal.com/news/article/company\\_to\\_pay\\_52\\_settlement\\_in\\_cell\\_phone\\_crash\\_case/](http://www.abajournal.com/news/article/company_to_pay_52_settlement_in_cell_phone_crash_case/))

Under certain circumstances, the risk of big damages may even extend beyond employer/employee relationships. A New York woman who was badly injured when her car was hit by a teenager who was driving while chatting on a cell phone won a \$28 million verdict against Chase Manhattan Automotive Finance, which had leased the car to the boy's father.

## Risk management

To avoid the risk that a call or text message may be blamed for accidents, employers have implemented policies concerning mobile phones and other devices, some of which are described below:

- Prohibit the use of cell phones and other handheld devices for business purposes while operating a motor vehicle, including “hands-free” phones;
- Institute a “total ban” on all mobile communication devices while driving;
- As a condition of receipt, require employees to sign an acknowledgement that company phones are not to be used while operating automobiles or other equipment;
- For employers who reimburse employees for business calls made from their private cell phones, require employees to certify that they did not use the phone in any way that violates company policy;
- Limit the scope of certain employees’ job descriptions so that it is clear that their positions do not include using cell phones while driving; and
- Discipline employees for violations of the policy.

Employers also need to encourage internal practices that support policies prohibiting mobile phone use in vehicles. Employers that emphasize the need for employees to regularly “check in” or to “stay in touch” while away from the office must be clear about their priorities. Employers also should discourage scheduling calls or sending text messages at times when they know an employee likely will be driving.

Employers need to stay abreast of the technologies used in their businesses and the potential liability issues they raise. Limousine services, for example, often manage reservations and dispatch cars through laptop computers, and need to assure that proper controls are in place so that the computers do not create distractions. GPS devices are now nearly essential for commercial drivers of all types, and policies should be implemented concerning their safe use. While there may be no cure for stupidity, companies nonetheless should make it clear that watching videos, playing video games, or engaging in other similar activities while driving on company business will result in immediate and severe disciplinary action.

So far, the law and standards of acceptable behavior lag the safety issues created by distracted driving, making it all the more imperative that companies address the issue with diligently enforced rules for safe technology usage. Driving while talking on the phone does not have the social stigma of driving while drinking, even though the result can be much the same, and state laws vary on the legality of cell phone

use in the car. While laws specifically addressing technology use while driving are still developing, good old-fashioned common law torts have proved quite adequate for holding companies liable for damage caused by their employees who are distracted while driving.

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