



Addressing Distracted Driving: Employers Need To Keep Their Eyes On The Road

**Mark A. Lies, II
and
Meagan Newman***

INTRODUCTION

Employers whose businesses require the use of cars, vans or trucks must understand that their policies and training regarding the safe operation of those vehicles--and the inclusion of a clear prohibition against texting while driving--are of strong interest to OSHA, the law enforcement community, insurance carriers and potential civil litigants. Failure to address this hazard can result in significant employer liability.

OSHA Requires That Employers Ban Texting While Driving

In a recent open letter to employers, Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA) David Michaels said, "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 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 potentially 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.

* Mark A. Lies, II, is a Labor and Employment Attorney and Partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in Occupational Safety and Health Law and related employment law and personal injury litigation. Meagan Newman is also an attorney with Seyfarth Shaw LLP, specializing in occupational safety and health and environmental law. Ms. Newman can be reached at (312) 460-5969 or mnewman@seyfarth.com.

Costs Greater Than Regulatory Penalties

Of course, OSHA citations and associated penalties are not the only liabilities that employers must be concerned about when it comes to distracted driving. For example, thirty states have already enacted bans on texting while driving and in many of the remaining states similar bans are in place at the county or city level. Additionally, in 2009 more than 200 state bills were introduced that ban cell phone use--both texting and talking.[†] These laws make texting while driving illegal and also open employers to liability for accidents that result from their employees' distracted driving.

Employees face both individual civil and criminal liability for damages that result from accidents caused by texting while driving the vehicle. Likewise, employers face liability for the acts of their employees under agency law with increased costs. When an accident happens as a consequence of distracted driving while the employee is on company time or even running a work-related errand, which can include a quick trip to pick up lunch for himself and a supervisor, the employer is potentially liable. Where the employer has not affirmatively prohibited texting while driving and enforced that policy, the employer faces potential liability as a result of the accident.

Vicarious liability, as it is called, is not a new legal concept. Employers have faced liability in similar situations for decades for the acts of their employees that occur during the course of the employment relationship. Consider the claims made against pizza delivery companies whose drivers were instructed to deliver a pizza in 30 minutes or less. In the context of distracted driving, the price of vicarious liability can be significant. In Florida, a lumber wholesaler settled for over \$16 million after one of its salesman hit and severely disabled an elderly woman while talking on a cell phone. In Virginia, a major California-based law firm was sued for \$30 million by the parents of a 15-year old girl, who was killed by a car driven by one of the firm's lawyers while the lawyer was utilizing a cell phone. A jury ordered the attorney to pay the family \$2 million and the law firm settled for a confidential amount.

Beyond potential OSHA administrative penalties and civil and criminal liability, employers should also consider how their policies and practices can affect their insurance rates. There is no question that with an increase in accidents caused by distracted driving, the cost of worker's compensation and other insurance coverage will rise.

What Should Employers Do?

- Employers need to put in to effect clear policies that unequivocally prohibit texting and talking on a cell phone while operating any kind of motorized vehicle while performing work activities. This includes cars, buses, trucks, forklifts,

[†] There has been exhaustive analysis about the negative impact of the use of electronic devices on the ability of a driver to focus on the numerous road conditions that are constantly occurring while operating a vehicle. For example, see "Understanding the Distracted Brain, Why driving while using hands-free cell phones is risky behavior," National Safety Council, White Paper, March 2010.

construction and agricultural vehicles. The “workplace” includes any location that the employee is operating a vehicle in their role as an employee. For example, many employers require employees who operate motor vehicles to take the vehicle out of moving traffic lanes, stop the vehicle completely and then utilize the cell phone or electronic device to communicate.

- Employers should also carefully evaluate existing policies and the nature of their workplaces to ensure that there are no incentives or un-written policies and practices that encourage the use of hand-held communication devices for texting or data entry while operating a vehicle.
- While OSHA’s recent message addresses texting, employers should consider whether the use of other forms of hand-held communication or data entry while operating vehicles is creating a hazard. If the answer is “yes”--or even “maybe”--further evaluation of these policies and practices is needed to ensure that employees are protected from recognized hazards.
- Consider the use of certain applications in company-issued devices that can block the use of cell phones, including texting and internet access, while a vehicle is moving.
- Enforce bans on texting while operating a vehicle. Enforcement of these policies must be consistent and cover both management and non-management employees alike.
- If texting or data entry is a necessary part of an employees job while on the road, consider devising a schedule that allows for routine breaks during which vehicles are stopped to allow for the communication or data entry to be completed.

On October 4, 2010 OSHA announced a new online resource intended to inform workers of their rights, and employers of their responsibility to provide safe workplaces, and offer best practices and policies on achieving safe workplaces in motor vehicles. More information from OSHA is available at <http://www.osha.gov/distracted-driving>.

Additional information is available from the Network of Employers for Traffic Safety at <http://trafficsafety.org/drivesafelyworkweek/about-dsww.php>.

Conclusion

As OSHA’s enforcement of this new agenda gains more notoriety, it can be expected that it will have a significant impact on law enforcement at all levels to regulate this hazard. If the foregoing recommendations are considered and adopted by employers, they will reduce potential individual civil and criminal liability of employees as well as the vicarious liability of the employer.