

Synopsis of the 2015 NSC
Whitepaper on Employer Liability

Presented by United Efficiency Inc.



Employer Liability

and the Case for Comprehensive Cell Phone Policies

SYNOPSIS OF THE NATIONAL SAFETY COUNCIL WHITEPAPER

MAY 2017 Additions to the paper from MAY 2015

Executive Summary

Cell phones first gained popularity as a business tool in the 1980s when they were called ‘car phones.’ Early adopters saw the potential in using their time on the road to communicate with anyone, anywhere. Now, research shows that cell phones can significantly impair driving skills. This impairment, combined with the large numbers of drivers using cell phones, increases the risk of crashes.

Companies with strong safety cultures will be reducing risks to protect their employees and the communities. CEOs of leading companies committed to best practices in safety understand that safety is good business.

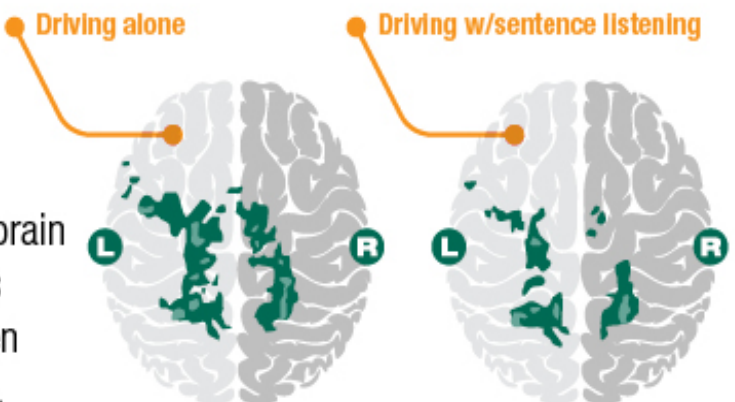
Employers have an obligation to protect their employees and others with whom they share the roads. With the cell phone’s origin as a corporate productivity tool, the concern that prohibiting its use while driving could affect productivity is understandable. However, an employer may be held legally accountable for negligent employee actions if the employee was acting within the scope of his or her employment at the time of a crash. The key phrase “acting within the scope of his or her employment” can and has been defined broadly in cases of crashes involving cell phones.

Employers can also identify safety loopholes in their policies by using the free NSC Cell Phone Policy Assessment Tool at nsc.org/policytool.

MULTI-TASKING: THE BIG FAT MYTH

The brain quickly toggles between tasks – but can’t do two things at the same time.

The activity in the area of the brain that processes moving images **decreases by up to 1/3** when listening to talking on a phone.



The diagram consists of two coronal cross-sections of a human brain. The left brain is labeled 'Driving alone' and shows a large, dark green shaded area in the posterior region, representing high activity in the visual cortex. The right brain is labeled 'Driving w/sentence listening' and shows a significantly smaller dark green shaded area in the same posterior region, indicating a decrease in visual processing activity. Both brains are marked with 'L' for left and 'R' for right.

Cases Study: When tragedy strikes . . .

Mindy and Peggye should have been safe

The morning of Jan. 25, 2010, Mindy Ragsdale, a 31-year-old stay-at-home mother of two, and her 82-year-old grandmother, Peggye Woodson, were on their way to Mindy's mother's home. Their sedan was stopped, waiting to make a left turn onto a heavily traveled two-lane rural highway. For 14 seconds prior to the crash, their vehicle should have been in full view of the driver of a cable TV utility pickup truck as it crested a hill and headed toward them with the cruise control set at approximately 70 mph.

But even though the truck's driver had a one-quarter mile visibility, the truck slammed into the rear of Mindy and Peggye's vehicle at full speed with the cruise control still engaged. Mindy and Peggye were killed on impact.

The crash's aftermath and its ripple effect were felt by many people. Why did this tragedy occur?

In the immediate aftermath of the collision, the truck's driver told an emergency medical technician that he had been texting prior to the crash. The driver was employed by a cable company, and the truck was owned by that corporation. For the driver **and the cable company**, this was only the beginning.

Mindy Ragsdale



31, mom of 2

Peggye Woodson



82, wife and grandmother

In 2010, the year of Mindy and Peggye's crash, motor vehicle crashes killed nearly 33,000 people in the United States.¹ Motor vehicle crashes are the **No. 1 cause of work-related deaths** and account for 24% of all fatal occupational injuries.² On-the-job crashes are costly to employers, incurring **costs of more than \$24,500** per property damage crash and **\$150,000 per injury crash.**³

Driver distraction is a significant factor in crashes, and cell phones have played an increasing role as cell phone use has grown rapidly in the past 15 years, from a small percentage of the population using cell phones to virtually everyone. Today there are more U.S. cell phone subscriptions than there are people living in the United States.⁴ (This number has increased every year since this study.)

The National Safety Council estimates that at least 27% of crashes in 2013 involved drivers using cell phones, including 1.2 million crashes where drivers were talking on cell phones and a minimum of 341,000 crashes where drivers were texting.⁵ These estimates include property damage, injury and fatal crashes.

Several research studies found that the risk of a crash is four times as likely when a person is using a cell phone – handheld or hands-free.^{6 7} Cell phone distraction involves all types of driver distractions: visual, manual and cognitive. More than 30 research studies have found that hands-free devices offer no safety benefit, because hands-free devices do not eliminate the cognitive distraction of conversation.⁸

2017 ADDITION: Current state restrictions

- **As of April 2017 - Talking on a hand-held cellphone while driving is banned in 14 states and the District of Columbia.**
- **The use of all cellphones by novice drivers is restricted in 37 states and the District of Columbia.**
- **Text messaging is banned for all drivers in 46 states and the District of Columbia. In addition, novice drivers are banned from texting in two states (Missouri and Texas).**
- **Many localities have enacted their own bans on cellphones or text messaging. In some but not all states, local jurisdictions need specific statutory authority to do so. In addition, most school bus drivers are banned from texting and using hand-held cellphones by state code, regulation or school district policy**

What does this mean for employers?

Employees who use their cell phones while driving expose themselves to a significant safety risk that they are seemingly willing to accept. This risk applies to all employees, not just commercial drivers or other employees whose work involves driving, such as field salespeople or service technicians. A recent National Highway Traffic Safety Administration survey found that drivers cite work-related communications as a reason to use phones while driving.

Employers who expect employees to use cell phones while driving as part of their business must recognize that doing so exposes their employees to preventable crash risk. Consider a situation in which an employer knew a behavior in some area of its operations exposed employees to a four times greater risk of injury. Would employers still expect or even encourage that behavior? That is precisely what happens when an employer permits or even encourages employee cell phone use while driving.

With the intense publicity surrounding cell phone distracted driving in recent years, it would be difficult for employers and employees to argue that they're not aware of the dangers. Beyond the safety issues, employers are now being held to legal responsibility.

Following the law isn't enough

Employers are responsible for ensuring their employees adhere to applicable federal agency regulations and federal, state and municipal laws. However, what is often not understood is that these regulations and laws are a minimum requirement and may not be enough to keep people safe.

2017 ADDITION: Does stricter laws reduce crashes?

"Texting bans haven't reduced crashes at all. In a perverse twist, crashes increased in 3 of the 4 states we studied after bans were enacted. It's an indication that texting bans might even increase the risk of texting for drivers who continue to do so despite the laws," says Adrian Lund, president of the Insurance Institute for Highway Safety.

New findings about texting, together with the organization's previous finding that hand-held phone bans didn't reduce crashes, "call into question the way policymakers are trying to address the problem of distracted driving crashes," Lund adds.

Employer role to protect employees and reduce liability

As a first step, employers must realize the full extent of their exposure to liability. The legal theory of “respondeat superior”, means that an employer may be held legally accountable for negligent employee actions if the employee was acting within the scope of his or her employment at the time of a crash, including cases of crashes involving cell phones.

To highlight a few:

- A jury found that a driver and the corporation that owned the vehicle were liable for \$21.6 million because testimony revealed that the driver may have been talking with her husband on a cell phone at the time of the fatal crash.
- An off-duty police officer was texting moments before a fatal crash and because he was driving a police cruiser, his employer was held liable for \$4 million.
- An employee was involved in a fatal crash while making “cold calls” as he drove to a non-business- related event on a Saturday night. The firm did not own the phone or the vehicle, but the plaintiff claimed that the company was liable because it encouraged employees to use their “car phones”. His firm settled the lawsuit for \$500,000.

Understand what can happen if you are sued

We might expect an employer to be held liable for a crash involving a commercial driver’s license (CDL) holder who was on a cell phone with dispatch about a work-related run at the time of an incident – especially if the employer had processes that made drivers feel compelled to use cell phones while driving.

Attorney Todd Clement, based in Dallas, specializes in trucking and commercial vehicle cases where employees were involved in crashes while using cell phones, has stated “juries are generally motivated to award large verdicts not by sympathy or outrage; but rather when the jurors believe that such verdicts make themselves and their children safer. Crashes involving cell phone use appeal to a juror’s sense of self-preservation. Public opinion polls show that most people believe it is very dangerous for other drivers to use cell phones while driving.

Understand what you may face during legal discovery

A victim's attorney's job is to demonstrate the factors that led to negligence. In cases involving an employee in which any aspect of the crash scenario was workplace-related, a smart lawyer will follow the trail of evidence. This trail will lead not only to the employee, but to the employer as well. This is the legal discovery process.

Discovery can uncover:

- Driver cell phone records revealing the amount of time during the workday when the employee is using the phone
- Cell tower records where the calls begin in one location and end in another, thereby proving cell phone use while driving
- Texting records which may even include the actual texts
- Telemetric records which correlate with the phone records to provide an accurate picture of this risky behavior
- Details about the employer's cell phone policy, and the extent of its policy implementation and enforcement

An employer must demonstrate that a policy has been enforced. The policy must be more than words on paper. Further, an employer should not in any way develop a culture where employees feel that they need to use cell phones while driving.

2017 ADDITION: The “addictive” quality of cell phone use.

AT&T commissioned research by an addiction expert, Dr. David Greenfield, who stated in his report that using a phone sets off releases of a neurochemical called dopamine that makes it hard to resist. “If that desire for a dopamine fix leads us to check our phones while we’re driving, a simple text can turn deadly.”

According to Dr. Greenfield, “Dopamine is a ‘digital drug’ because we get a little squirt of it every time we get positive news from a friend or loved one by text, email or social media. Our brain is conditioned to seek that positive ‘hit’, leading many of us to check for messages compulsively.”

Conclusion

2017 ADDITION:

“Technology got us into this situation. Technology will get us out,” said Deborah Hersman, the president of the National Safety Council. However, she added, “We’re so afraid to tell people what they should do that you can kind of get away with murder under these conditions. The technology exists — we just don’t have the stomach to implement it,”

The problems of Distracted Driving are generally acknowledged as imminent and dangerous. Companies without a Risk Management plan to curtail distracted driving are at risk. Legislative solutions can take time and have not been proven to be effective. That leaves the immediate solution in the hands of the drivers and the companies that employ them.

If a company’s only plan is to can ask their Drivers to exercise self-control and simply “white-knuckle” through the addictive qualities that Dr. Greenfield has documented, then will they be liable for any incidents that may occur?

Companies like FleetMode, use technology that can block texts, redirect incoming calls, and impede the use of cell phone apps by locking the phone’s keyboard. It is a pro-active step to show due diligence in addressing this issue. Within programs, like FleetMode, are elements to help your drivers become better drivers.

Reduce your risk. Reduce your liability. Help to make our roads safer.