



AN UNIDENTIFIED man talks on his cell phone as he drives along Route 1 in Lawrenceville, N.J., in June 2004. In New Jersey, drivers caught talking on cell phones while driving are subject to fines, but only if they are stopped for another driving offense.

● LIABILITY

Implementing Safe Cell Policies

In the eyes of the law, cell phones and driving don't mix. Still, the number of cell users behind the wheel continues to grow. BY MICHAEL THOMA

On your next commute, count the number of drivers on cell phones weaving across lane boundaries and failing to react quickly to brake lights and obstacles. You probably won't have any trouble spotting at least a handful of distracted drivers. At any given moment on U.S. roads, there are nearly 1 million drivers holding handsets to their ears, according to the National Highway Traffic Safety Administration. The number grows when you add the people speaking on hands-free devices, which, research has shown, are no less distracting. Driver cell-phone use continues to increase each year, and this problem is more than an annoyance. It is dangerous.

Cell-phone users are 500 times more likely to get into an accident than nonusers, and a study published in the *New England Journal of Medicine* found that the risk of having an accident while conducting a call was equivalent to the risk of driving drunk. Distracted drivers cause nearly \$40 billion in damages each year, and the Harvard Center for Risk Analysis estimates that the use of cell phones by drivers may result in approximately 2,600 deaths, 330,000 injuries and 1.5 million instances of property damage in the U.S. each year.

When the driver distracted by a cell phone is your employee, your business may be liable for any damages or injuries they cause. If an employee uses a cell phone to conduct business while driving, or takes a personal call in a business vehicle at the time of an accident, an employer can be held vicariously responsible for damages. This has been established in a number of cases, from Florida to Hawaii, where employers were found negligent for either tacitly endorsing cell-phone use while driving or not implementing cell-phone safety policies. In most cases, juries have not favored careless cell-phone users or the companies that fail to enforce safety policies, and plaintiffs have been awarded multimillion-dollar verdicts or settlements.

One of the largest awards came in a Florida case from Miami-Dade County, *Bustos v. Leiva*, where an employee driver rear-ended another car that had stopped in traffic. The defendant initially denied that he had been using a cell phone just before impact, but subpoenaed phone records indicated otherwise. The jury awarded the plaintiff, a 78-year-old woman who required permanent bedside care as a result of the

accident, more than \$20 million from the driver's employer—the largest personal injury verdict in Miami-Dade County's history at the time. The parties eventually settled for \$16.1 million.

EASY TARGETS FOR JURIES

Employers should not assume that their responsibility ends after their employees are no longer on the clock. The productivity-stretching qualities of mobile devices have also expanded the timeframe for employer liability. Numerous cases have established that if an employee is conducting business outside normal working hours—even simply checking office voicemails while driving—employers can be held at least partly responsible for accidents.

Smith Barney settled with a family of a motorcyclist killed by one of its brokers making cold calls on the way to a personal dinner. In another case, it was after 10 p.m. when an attorney for a Virginia law firm struck and killed a pedestrian while the attorney was talking on her cell phone with a client. The attorney's firm, Cooley Godward, was named as a defendant in the case, and the firm eventually settled with the victim's family for an undisclosed amount. A worker for a Georgia-based construction company on his way into work reached over to a hands-free, dash-mounted phone to check voicemail, and caused an accident that left another driver seriously injured. The company settled for \$4.75 million. The time of the call or accident is irrelevant.

It has become standard practice for litigators to secure cell-phone records in auto accident cases today. Certainly, phone calls are not the only distraction for drivers who often split their focus on the road among music, conversations with passengers and hot beverages. You name it, and chances are that someone has tried to do it while driving. But cell-phone usage, like a blood-alcohol level, is easily documented and generally frowned upon by juries. Drivers distracted by their cell phones make easy targets.

STEERING CLEAR OF RISK

The exposure for employers of distracted drivers can be greatly reduced if the company implements an effective cell-phone policy. It can be a relatively simple fix from a risk management perspective, especially when compared with the costs of litigating these cases. The absence of a policy can also tip the scales for insurance companies that may increase the price of a company's auto policy, or not underwrite the coverage at all.

Here are five tips to keep in mind as you develop a cell-phone policy:

Define safety. A cell-phone usage policy begins with a company's definition of safe cell-phone practices. Some companies educate employees on the dangers of cell-phone use while driving and advocate the use of hands-free devices. The evidence is mounting, however, that the cell-phone conversation itself, not simply the act of holding the phone, is what actually causes the most distraction. Experts say that the brain functions required for driving are the same ones used for conversing. In this light, many companies have followed the lead of Exxon Mobil and UPS in

Summary

- Cell phone users are 500 times more likely to get into an accident than nonusers.
- Some courts have held employers liable for an employee involved in an accident because of a work-related call.
- Employers will cut their exposure by implementing a cell-phone policy, and may even obtain cheaper auto insurance.

banning all use of cell phones while driving.

Balance productivity and risk.

A strong cell-phone safety policy doesn't necessarily mean that employee productivity is lost while on the road. Many policies simply require that drivers pull off the road to a safe location before taking or making calls.

Inform and remind employees.

The policy itself can be issued in letter form that employees must sign, either at the time when cell phones or vehicles are issued, or as a supplement to the employee handbook. A policy-reminder label can be applied to company-issued cell phones and fleet-vehicle interiors. Employees should be informed that any traffic violations or liabilities involving the use of a cell phone while driving will be their sole responsibility.

Consistently enforce policies.

As with all policies, consistent enforcement of cell-phone guidelines is critical. Employees who regularly receive calls from superiors who are navigating through traffic, or that are expected to take calls during their own commutes, are essentially being told to ignore the cell-phone policy. Juries will make a distinction between policies that are actively enforced and those that are implemented without conviction. Violations of the policy should be documented and met with disciplinary action, and employees that misuse company-issued devices

and vehicles should have equipment and vehicle privileges revoked.

It may seem disproportionate to discipline someone for using a cell phone while driving, but keep in mind the multiple studies that show that the activity is equivalent to driving under the influence.

Keep abreast of changing laws.

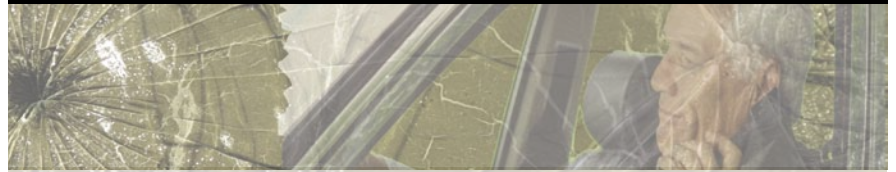
Of course, your policy must comply with all local and international laws where you do business. A number of states and municipalities have restricted the use of handheld cell phones by drivers, and the practice is regulated or illegal in more than 40 countries worldwide. Varying and evolving ordinances have compelled most businesses to stay ahead of lawmakers by banning cell-phone use by employee drivers altogether.

As the number of cell phones continues to grow—225 million U.S. subscribers by last count—and as attention-grabbing services like mobile e-mail and video become more prevalent, businesses should take steps to make sure employee drivers keep their focus on the road ahead.

Cell-phone safety policies should originate with risk managers who must take an active role in enforcing and updating the policy so safety becomes the primary focus for all concerned.

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Driving Drivers to Distraction



Inattention is a big factor in automobile crashes, according to driving accident studies, and using cell phones while driving is a major source of the inattention.

According to Matthew Sundeen, program principal with the National Conference of State Legislatures, the Virginia Tech Transportation Institute found in a study last year that "driver inattention was the primary contributing factor in most crashes, and that hand-held wireless devices were among the highest distraction-related factors in crashes and were the leading distraction-related factor in near-crashes."

Sundeen, writing in a research paper published last year, cites further evidence from a 2003 article published by the Harvard Center for Risk Analysis, showing that cell-phone use by drivers may cause approximately 2,600 deaths, 330,000 moderate to critical injuries and 1.5 million instances of property damage in America per year.

In 2000, however, an HCRA analysis of the risks posed by the use of cell phones while driving concluded that the risks appeared small in comparison with other dangers on the road, according to Sundeen.

Another study, conducted at the University of Utah, found that talking on a cellular phone reduced young drivers' response times so significantly that they reacted to brake lights in front of them as slowly as drivers between 65 and 74 years old. That study also found, writes Sundeen, "that all drivers who used cell phones, regardless of age, were 18 percent slower hitting their brakes, had a 12 percent greater following distance to compensate for paying less attention to road conditions, and took 17 percent longer to regain the speed they lost when they braked than drivers who did not use cell phones."

In yet another study, researchers from the University of North Carolina Highway Safety Research Center found that cell phones ranked eighth in a list of distractions that caused crashes, below activities such as adjusting the radio or eating and drinking, according to Sundeen. Yet the researchers found it difficult to provide a definitive answer as to which driver distractions carry the greatest risk of crash involvement.

Sundeen writes that 33 states in 2004 considered driver-distraction laws. Only four states have laws prohibiting hand-held-phone use while driving.

—Cyril Tuohy