

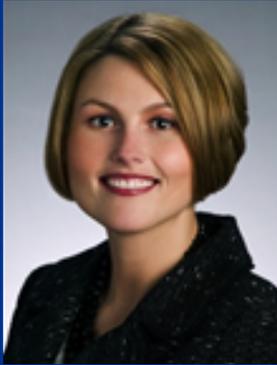


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TALK IS NOT CHEAP: WHY EMPLOYEE CELL PHONE USE IS COSTING EMPLOYERS MORE THAN THE PRICE OF THE PHONE

Increasingly, employers are providing employees with company cell phones to facilitate communication and increase productivity. Meanwhile, state legislatures and local governments are aggressively targeting cell phone use by drivers, only allowing use with a hands-free device and even prohibiting such use altogether for certain drivers. These newly-enacted statutes are fueling litigation against employers for accidents which occur when employees are using cell phones while driving.

Increasing Use of Cell Phones in the Car

The most recent estimates suggest there were 182 million cellular subscribers in the United States in 2004. More than 40 percent of Americans admit to using a cell phone while driving,¹ such that, at any given moment throughout the day, eight percent of the drivers on the road are using their cell phones.²

Accidents Caused by "DWT" – Driving While Talking

While no one would question the danger of driving while intoxicated, the danger of driving while talking is not always appreciated. Yet, studies show the performance of drivers who are using cell phones are *more impaired* than drivers who are intoxicated.³ According to one study, drivers on cell phones have more accidents and slower reaction times than drivers who are legally drunk.⁴ Interestingly, the authors of the study attributed the findings to an "inattention blindness," suggesting that the danger posed by cell phones is the cognitive distraction to the driver as opposed to the physical distraction of manually holding or manipulating a cell phone.⁵

Legislative Response

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Given these findings, state legislatures are enacting new driving laws, banning the use of handheld cell phones, banning the use of cell phones altogether for novice drivers, and banning text messaging.⁶ Currently, five states - California, Connecticut, New Jersey, New York, and Washington, the District of Columbia, and the Virgin Islands have enacted laws prohibiting the use of handheld cell phones while driving.⁷ Four states - Alaska, Minnesota, New Jersey and Washington - ban text messaging for all drivers, but many other states have introduced similar legislation.⁸ Finally, seventeen states and the District of Columbia have special cell phone driving laws for novice drivers, some of which include complete prohibitions on use of cell phones while driving.⁹

Sampling of DWT Lawsuits

Not surprisingly, given the increased focus on the dangers posed by using a cell phone while driving and the growing number of employers issuing cell phones to their employees, the victims of accidents (or their families) are filing civil actions against the employers, and, as illustrated by the following cases, are winning, either by way of a substantial settlement or jury award, and often recovering millions in damages:

- In 1999, a stockbroker struck and killed a motorcyclist on his way to a non-business-related event. The employee was making a sales call at the time of the accident. The employer paid \$500,000 to settle the case even though it did not provide the employee with the cell phone.
- In 2000, a lawyer struck and killed a teenage girl in Virginia. The attorney, who was returning from a work meeting, was allegedly talking on her cell phone with a client at the time of the accident. The deceased's family filed a \$30 million lawsuit against the employer. The employer law firm settled with the family for an undisclosed amount.
- In 2001, a Miami jury found an Arkansas lumber company liable for more than \$20 million in damages after one of its employees struck another car, gravely injuring a passenger. The employee was using his cell phone for a sales call when the accident occurred. The company settled the case for \$16.1 million.
- In 2001, an appeals court ordered the State of Hawaii to pay \$1.5 million in damages after a state teacher, who had just completed a cell phone call, struck a pedestrian while driving to work.

Legal Basis for Employer Liability

The general basis for liability is the theory of *respondeat superior*. Under this theory, an employer is liable for the negligent actions of an employee if the employee was acting within the scope of his or her employment at the time of the accident. As an initial matter, plaintiffs will likely have an easier time establishing the negligence of the employee if, at the time of the accident, the employee was in violation of one of the newly-enacted state statutes pertaining to cell phone use by drivers. Further, as the cases above illustrate, conducting employer business on a cell phone at the time of an accident, even if outside of normal business hours, is readily found to be within the scope of employment since it results in a benefit to the employer.

Another basis for liability is a direct claim of negligence against the employer. Essentially, the allegation is that the employer is negligent when it issues cell phones to employees or when it knows that employees are using their own cell phones to conduct business, without providing any sort of limitations, training or guidance, or prohibiting use while driving.

Hold that Call – Why it is Necessary to Have a Cell Phone Policy

The bottom line is that employers face substantial liability exposure for accidents caused by employees using cell phones to conduct business. Thus, regardless of whether cell phones are company-issued, employers must implement and enforce a written cell phone usage policy for its employees, the violation of which results in disciplinary action. While not an impermeable shield, the existence of such a policy should provide a strong argument for an employer that it was not negligent and that it cannot be held vicariously liable since the employee was acting outside the course and scope of employment. At the very least, a cell phone usage policy should mitigate any claims for punitive damages.

To be effective, a cell phone usage policy should be specifically tailored to the needs of the employer and to the job descriptions of the employees. For instance, a complete usage ban may be necessary for some employees, such as commercial truck drivers. For other employees, such as physicians required to be "on call," the requirement of a hands-free device may be most appropriate. While there is not a "one-size-fits-all" policy, consider the following

example:

Employer recognizes that the use of a cell phone while driving a motor vehicle can cause distraction to the driver, which can result in accident and injury. Employees are required to comply with all state and local laws regarding the use of cell phones while driving. Whenever possible, employees should not make or receive telephone calls while driving.

Employees should let incoming calls go to their voicemail and then find a safe place to pull over and park before initiating a call. If cell phone usage while driving is unavoidable, a hands-free device must be utilized.

Employees are prohibited, without exception, from using a handheld cell phone while driving. Further, under no circumstances should employees use cell phones, even with a hands-free device, while driving in adverse weather or difficult traffic conditions. Employer takes its cell phone usage policy seriously. Any violations of this policy will subject employees to disciplinary action, up to and including termination of employment.

If you have any questions regarding a cell phone usage policy for your business, or any other employment related issue, please contact tiffany.hawkins@strasburger.com.

¹ Mason-Dixon Polling & Research, Inc., *Drive for Life Annual National Driver Survey*, www.safedrivingtest.com/driversadmit.html (last visited June 21, 2008).

² Donna Glassbrenner, *Driver Cell Phone Use in 2004--Overall Results*, www-nrd.nhtsa.dot.gov/Pubs/809847.PDF (last visited June 21, 2008).

³ David L. Strayer & Frank A. Drews, *Multi-Tasking in the Automobile*, www.psych.utah.edu/AppliedCognitionLab/WickensChapterFinal.pdf (last visited June 21, 2008).

⁴ *Id.*

⁵ *Id.*

⁶ A complete list of the states with some sort of cell phone legislation can be found at: http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (last visited June 22, 2008).

⁷ http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (last visited June 22, 2008).

⁸ *Id.*

⁹ *Id.*

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