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COMMERCIAL RISK MANAGEMENT & LOSS CONTROL

TEXTING & DRIVING IS COSTLY BUSINESS

CELLPHONES & DRIVING DON'T MIX

BY IRA H. LEESFIELD

According to the National Safety Council, an estimated **200,000 crashes a year** are caused by drivers who are texting. And that doesn't include the near-misses. Added to that, a recent Car & Driver Magazine study found that texting and driving was more hazardous than drinking and driving, with texting drivers three to four times slower in their response rates than drunk drivers.

More people than ever are using cellphones to conduct business while driving-and they're not just making phone calls. People use their cellphones to receive and send documents, e-mails, and text messages, and even to perform research. Today's technological age means people can work anywhere, anytime, but this convenience comes with a price for business owners: distracted drivers who hurt or kill someone expose their employer to potential liabilities for their mistake.

Several cases indicate an emerging trend in the law regarding employer responsibility for injuries caused by drivers who cause an accident while using their cellphones or smart phones.

In 2004, a Virginia attorney hit and killed a teenage girl at 10:30 p.m., while using her cellphone to conduct firm business. Phone records from the attorney's firm reportedly showed that she was making work-related calls at the time of the accident. Fearing an enormous jury verdict, the law firm ultimately settled with the victim's family.

In 2007, International Paper Co. settled a personal injury lawsuit for **$5.2 million** with an Atlanta woman who lost her arm after being rear-ended by one of the company's employees. The employee was driving a company sedan and using her company-issued cellphone at the time of the accident.

If your employee injures someone because he or she was using a cellphone to conduct business while driving, you may be liable for damages under the following theories of liability:

RESPONDEAT SUPERIOR. Before the advent of cellphones, common law typically held that an employee driving to and from work, to and from lunch, or otherwise not engaged in traditional business-related activities was not acting in the course and scope of employment. As such, the employer could not be held liable under the doctrine of respondeat superior for accidents caused by the employee during those time periods. But as the cases above show, the law is changing. Now an employer may be liable even if the employee was driving his or her own car or making a work-related call outside of regular business hours.

DIRECT NEGLIGENCE. In addition to being vicariously responsible, an employer may be directly negligent for the employee's actions. An employer has a duty to exercise reasonable care for the safety of the public whenever its employees are acting within the course and scope of their employment. Thus, if the employer knew, or should have known, that employees were using their cellphones while driving for work-related purposes, and did not act affirmatively to stop the conduct, they may be liable.

A strong defense for employers to protect against liability is to adopt and implement written policies that effectively ban the use of mobile devices for work-related purposes while driving -- and ensure that these policies are adequately communicated to employees.

In addition to policies and procedures, employers will be well served by demonstrating that they have created an office culture that condemns this kind of reckless behavior.

Too many business owners have been lax about instituting or enforcing bans on their employees' use of cellphones while driving, essentially choosing productivity over safety. The results have proven deadly. Recent court decisions are sending employers a message: **adopt stricter policies or be prepared to pay**.

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