

## Employer Liability for Texting While Driving

*Contributed by Jon Vegosen and Damon E. Dunn, Funkhouser Vegosen Liebman & Dunn Ltd*

A few years ago, many people thought that text messaging was a teenage fad that had little relevance to the business world. Nowadays, however, workers at all levels are texting, e-mailing, web surfing, and instant messaging on their mobile phones, whether at their desks or in their cars. A 2008 study found that 37% of people aged 18 to 27 and 14% of those aged 28 to 44 admit to messaging while driving — and the numbers have likely grown since then.<sup>1</sup> Another recent study by *CareerBuilder* shows that 54% of workers who have smart phones — including 66% of sales workers and 59% of professional and business services workers — admit to checking them while driving.<sup>2</sup>

Faced with increasing evidence of the risks created by drivers texting, many states and municipalities are enacting laws to restrict or even criminalize the practice. Some of these current and future laws could be broad enough to also encompass other electronic screen devices that allow drivers to type in text, potentially including GPS systems, dispatching devices, and laptop computers.<sup>3</sup> Almost all are broad enough to include e-mailing and instant messaging. Employers — particularly those whose employees are required to drive as part of their job descriptions — consequently are facing heightened risk of being held responsible for vehicular accidents caused by employees' use of such devices. While no absolute protection is available, employers can take steps to limit their potential exposure for accidents that occur when employees read or type messages at the wheel of a moving car.

### *Regulation of Texting and Driving*

In March of 2010, Wyoming became the 20th state to enact a law restricting text messaging while driving.<sup>4</sup> More states and municipalities are likely to follow. More than 200 "distracted driving" bills — most of which encompassed texting and other forms of messaging (referred to generically as texting by this article) — have been proposed by state legislators.<sup>5</sup>

The federal government has also begun cracking down. President Obama issued an executive Order on October 1, 2009 barring federal employees from texting while operating government owned vehicles.<sup>6</sup> The United States Department of Transportation earlier this year announced guidance under the Motor Carrier Safety Act of 1984 prohibiting texting by drivers of commercial vehicles.<sup>7</sup>

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Texting while driving laws do tend to encounter some resistance – for instance, Nebraska legislators have called a bill currently being considered in that state an attempt to "legislate common sense" and have argued that existing laws against reckless driving already give police the tools to deal with texters.<sup>8</sup> In Florida, legislators have expressed concern regarding how drivers can prove that they were not typing or reading a text message when pulled over.<sup>9</sup>

Nevertheless, anti-texting while driving legislation seems to be gaining popularity in light of statistical and anecdotal evidence on the dangers of the practice. Studies showing the magnitude of the risk have made frequent headlines in recent years. A study by the Virginia Tech Transportation Institute concluded that texters are 23 times more likely to be involved in accidents or near-accidents than other drivers. Further, the study found, texting while driving is more dangerous than driving while talking on a cell phone or reaching for a cell phone because of the longer amount of time that drivers spend with their eyes off the road.<sup>10</sup> The Harvard Center for Risk Analysis estimates that cell phone use contributes to 6% of car accidents, causing 33,000 injuries and 2,600 deaths annually.<sup>11</sup>

Studies like these add to the push for legislative action created by news of tragic texting related accidents, many of which involve employees on the job. For instance, in a highly publicized 2008 California freight locomotive accident that killed 25 people and injured 135, the train engineer, who was also killed, had sent and received several texts shortly before the crash.<sup>12</sup> Last summer, a New York tow truck driver who was texting on one cell phone and talking on another made headlines when he slammed his tow truck into a car and sideswiped a house before crashing into a swimming pool, injuring a 68-year-old woman and her 8-year-old niece.<sup>13</sup>

The scope and penalty provisions of the texting-while-driving regulations enacted in response to these studies and incidents vary widely. Some states' restrictions on texting apply to all drivers, while others apply only to minors and novices.<sup>14</sup> Some states regulate cell phone usage as a secondary offense – meaning that a driver's texting, alone, does not give police cause to pull over and ticket the driver – while others view it as a primary offense.<sup>15</sup> Some states even subject texters to similar penalties to those imposed upon drunk drivers<sup>16</sup> (which is consistent with recent studies showing that drivers' reaction times are reduced significantly more by texting than by drinking to the legal limit).<sup>17</sup>

### *Implications for Employers*

Most texting while driving statutes provide for criminal, rather than civil penalties. Still, many of these statutes operate to create either a rebuttable or conclusive presumption in a civil case that the driver's texting was negligent as a matter of law. Consequently, laws restricting texting while driving can increase employers' risk of being held vicariously liable in civil tort cases arising from accidents that occur while their employees text or use similar technologies behind the wheel.

An employer can be held liable for the negligence of employees, agents and contractors – even where the employer itself did not act negligently – under the common law doctrine of *respondeat superior* or vicarious liability. *Respondeat superior* (Latin for "let the master answer") generally applies when an employee is acting within the scope of employment or for the benefit of an employer – for

example, while on an errand that was assigned by the employer or that is part of the employee's general job duties. Courts look to (1) whether an employee's conduct is the kind he is employed to perform; (2) whether it occurs within the authorized time and space limits of the employment; and (3) whether it is motivated by a purpose to serve the employer.<sup>18</sup>

Employers cannot escape *respondeat superior* liability by simply labeling workers as independent contractors, rather than employees. Courts determining whether to hold the employer liable will look beyond the label and consider several factors, primarily relating to the degree of control that the employer maintains over the worker. In February, 2010, for example, a federal appellate court reversed summary judgment for FedEx in a case where an allegedly negligent driver employed by a FedEx contractor was involved in a multi-car accident. The Court held that FedEx could be liable under a *respondeat superior* theory, despite contractual language disclaiming any employment relationship between the contractor's employees and FedEx.<sup>19</sup>

An employer usually will not be liable for accidents attributable to employees' texting with their own phones in their own cars during their regular commutes to or from work.<sup>20</sup> An employer, however, may be liable if the employee's texts were related to work, or if the employee texts on a company phone or in a company car.<sup>21</sup> Also, an appellate court recently held that an employer could be liable where the employee was commuting home from a business conference rather than from the office because the trip may have been a "special errand" on behalf of the employer. The court noted that the evidence that the employer had paid for the employee's accommodations during the conference created an inference that the purpose of the trip was to benefit the employer.<sup>22</sup>

Further, an employer can be liable for its own negligence in failing to adequately warn employees regarding the risks of texting while driving or failing to take other measures to reduce risk, or in negligently hiring or entrusting an employee whose driving record should have raised red flags to drive a vehicle.<sup>23</sup> It is conceivable that an employer could be found negligent if another employee texts an employee during a time when the employee knew that the employee was likely driving.

Although few precedents have yet arisen from texting while driving cases, examples abound in cases involving other cell phone usage on the road. In *Hunter v. Modern Continental Const. Co., Inc.*<sup>24</sup> for instance, the court reversed summary judgment for an employer where evidence showed that an employee might have been either on the phone with or distracted by a phone call from a co-worker at the time of an accident. In *Ellender*, the employer was found vicariously liable because it provided the employee with the cell phone he was using at the time of the accident and had not prohibited the employee from using the cell phone while driving.

Other cases have resulted in large settlements. In 2007, for example, International Paper Company settled a lawsuit for over \$5 million after one of its employees rear-ended a driver, causing her to lose an arm, while using a company cell-phone.<sup>25</sup> In *Bustos v. Dyke Industries Inc.*,<sup>26</sup> 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.

Employers can be liable for accidents caused by an employee's texting or cell phone usage even in states where texting at the wheel is not unlawful if the employee is found to have acted negligently. Absent a statute, however, the determination of whether the employee acted negligently is a fact intensive one, and a plaintiff has the burden of proof. A statute restricting texting while driving can make the plaintiff's burden easier to carry or relieve the plaintiff of the burden altogether. In some states, a violation of such a statute creates *prima facie* evidence, or a presumption, of negligence. In other states, a violation of a statute restricting texting may be conclusive evidence of negligence supporting a finding of negligence *per se*.<sup>27</sup> It is relatively easy to prove that an employee was texting at or near the time of an accident using records maintained by cellular service providers.

Although some state statutes explicitly provide that failure to comply is not negligence *per se*,<sup>28</sup> a court in those states could easily find a texter's conduct was negligent nevertheless and hold the employer responsible. In fact, while there may be a persuasive argument that a driver in certain circumstances was not acting negligently by talking on the phone while driving, it is difficult to imagine a scenario in which a jury is likely to accept the argument that texting at the wheel of a moving vehicle is not negligent conduct.

#### *What Employers Can Do*

To minimize liability, it is important for employers to update their policies to specifically address texting while driving. Policies should generally bar employees altogether from texting while driving on company time, in connection with work-related purposes, or using employer-provided equipment. While some employers choose to allow employees to talk on phones using a hands-free device (despite studies suggesting that most cell phone-related accidents result from cognitive distraction rather than use of hands),<sup>29</sup> there is obviously no hands-free option when it comes to texting. Some policies allow employees to pull over to text, or to text while their car is in park at a light or in standstill traffic, but a blanket ban is generally safer – employees could, for example, crash while attempting to pull over, or be unable to react as quickly because a car is in park.

Employers who issue company cell phones or vehicles to employees should also warn employees of the dangers of texting while driving and point them to the relevant policy – as well as applicable laws in their state – at the time the cell phone or vehicle is issued. Further, it is important that employers document their employees' acknowledgment of texting policies by having employees sign a copy of the policy.

Though employers may be afraid of losing a competitive edge by banning texting, e-mailing, or other business related mobile phone use while driving, research has shown that the risks are minimal. An international engineering and project management company banned its North American workers from using their phones while driving in 2005. In a survey taken a year later, 95% of workers said their productivity had not been affected. Further, the quality of work done or communications made behind the wheel is often low. Researchers say that, while driving, workers' memories are less effective and they are more easily manipulable – for instance, in an e-mail negotiation where one e-mailer is driving and the other is not, the non-driver has an advantage.<sup>30</sup>

Employers that emphasize the need for employees to constantly "check in" or "stay in touch" while away from the office should be particularly careful to make their priorities clear to employees. Employers should also avoid scheduling calls or texting employees at times when they know the employee will likely be driving. An executive at a restaurant chain recently told the New York Times that he has trained employees to send concise messages and e-mails so that he can read them on his Blackberry while driving on the highway visiting stores.<sup>31</sup> Such practices are likely to undermine even the best written policies. As an insurance executive was recently quoted saying, "if you have a policy but your internal practice encourages cell phone use while driving, the policy is essentially without merit."<sup>32</sup>

*Jon Vegosen is a founding member of Chicago-based law firm Funkhouser Vegosen Liebman & Dunn Ltd ("FVLD")(www.fvldlaw.com). He has received national recognition for his work in labor and employment relations. He has conducted many workshops for clients, professional and business groups, and at law schools on effective interviewing, preventing and investigating sexual and other harassment, and employment law updates. Jon has written articles for legal and other publications, and he has been interviewed on WMAQ-TV, an NBC affiliate, about employment issues.*

*Damon E. Dunn is a member of FVLD and one of the authors of the Labor Law Handbook (Illinois Institute for CLE). Damon has litigated or arbitrated numerous labor, employment, independent contractor and agency law questions for private and public companies and designed contractor delivery systems and freelance contributor standards for media entities.*

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<sup>1</sup> Craig Howie, *Driving While Texting – Do You Know the Cost?*, AOL Autos, Nov. 14, 2008.

<sup>2</sup> *More Than Half of Workers Admit to Checking Their Smart Phones While Driving*, Cellular News, March 10, 2010, available at <http://www.cellular-news.com/story/42338.php>.

<sup>3</sup> See, e.g. Alaska Stat. 28.35.161, which excludes GPS systems but provides that "[a] person commits the crime of driving with a screen device operating if . . . the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion; and . . . the monitor or visual display is operating while the person is driving." See also DC Code § 50-1731.02 (prohibiting driving while "engaging in any . . . activity which causes distractions."). N.Y. Code § 1225-d (law applicable to any "handheld device with mobile data access," "broadband personal communication device," or "portable computing device"); Wash. Rev. Code 46.61.668 (excluding only voice activated GPS devices); Stephen Markley, *New Jersey Bill Would Ban GPS Use While Driving*, Miami Herald, June 23, 2009.

<sup>4</sup> *Secretary LaHood: Wyoming Becomes the 20th State to Ban Texting While Driving*, Media Newswire, March 14, 2010, [http://media-newswire.com/release\\_1114281.html](http://media-newswire.com/release_1114281.html).

<sup>5</sup> Matt Richtel, *Bills to Curb Distracted Driving Gain Momentum*, N.Y. Times, Jan. 1, 2010.

<sup>6</sup> Available at [http://www.whitehouse.gov/the\\_press\\_office/Executive-Order-Federal-Leadership-on-Reducing-Text-Messaging-while-Driving/](http://www.whitehouse.gov/the_press_office/Executive-Order-Federal-Leadership-on-Reducing-Text-Messaging-while-Driving/).

<sup>7</sup> 75 F.R. 4305 (Jan. 27, 2010).

<sup>8</sup> Nate Jenkins, *Ban on Texting While Driving Advanced in Neb.*, Sioux City Journal, March 16, 2010.

<sup>9</sup> Cristina Silva, *Texting While Driving Puts Florida at Center of National Debate*, Miami Herald, March 11, 2010.

<sup>10</sup> Matt Richtel, *In Study, Texting Lifts Crash Risk by Large Margin*, N.Y. Times, July 27, 2009.

- <sup>11</sup> Tom Watkins, *Safety Counsel Urges Ban on Cell Phone Use While Driving*, CNN, Jan. 1, 2009, available at <http://www.cnn.com/2009/TECH/01/12/cell.phone.driving/>.
- <sup>12</sup> Syantani Chatterjee, *Train Engineer was Texting Just Before California Crash*, Reuters, Oct. 2, 2008, available at <http://www.reuters.com/article/idUSN0152835520081002>.
- <sup>13</sup> *Trucker Crashes into a Swimming Pool Texting on One Mobile Phone While he was Talking on Another*, Daily Mail, Aug. 2, 2009, available at <http://www.dailymail.co.uk/news/worldnews/article-1203395/Pictured-Trucker-crashes-swimming-pool-texting-mobile-phone-talking-another.html>.
- <sup>14</sup> See, e.g., Mo. Rev. St. § 304.820 (2009).
- <sup>15</sup> Compare N.Y. Code § 1225-d(6) with 625 ILCS 5/12-610.2.
- <sup>16</sup> See, e.g., Alaska Stat. 28.35.161(f) (violation a felony when it causes injury or death).
- <sup>17</sup> Paul Casciato, *Texting Drivers more Dangerous than Drunks: Study*, Reuters, Sep. 18, 2008, available at <http://www.reuters.com/article/idUSL165189720080918>.
- <sup>18</sup> *Feraci v. Mayo Clinic Arizona*, No. 1 CA-CV 08-0847 (Ariz. Ct. App. 2010).
- <sup>19</sup> *Huggins v. FedEx Ground Package System, Inc.*, 592 F.3d 853 (8th Cir. 2010).
- <sup>20</sup> See, e.g., *Lobo v. Tamco*, 182 Cal.App.4th 297 (Cal. Ct. App. 2010).
- <sup>21</sup> See, e.g., *Ellender v. Neff Rental, Inc.*, 965 So.2d 898 (La. Ct. App. 2007) (call on employer provider phone while driving to lunch).
- <sup>22</sup> *Jeewarat v. Warner Bros. Entertainment, Inc.*, 177 Cal.App.4th 427, 437 (Cal. Ct. App. 2009).
- <sup>23</sup> See *Rosell v. Ventral West Motor Stages, Inc.*, 89 S.W.3d 643, 655 (Tex. App. 2002).
- <sup>24</sup> 652 S.E.2d 583 (Ga. App. 2007).
- <sup>25</sup> Matt Richtel, *At 60 M.P.H., Office Work is High Risk*, N.Y. Times, Oct. 1, 2009.
- <sup>26</sup> Miami-Dade Case No. 01-13370 (2001).
- <sup>27</sup> See *Magna Trust Co. v. Illinois Cent. R. Co.*, 313 Ill.App.3d 375, 382–83 (Ill. App. Ct. 2000) (comparing Illinois law (*prima facie* evidence) with Kansas law (negligence *per se*)).
- <sup>28</sup> See, e.g., N.C. Gen. Stat. § 20-137.4A (c).
- <sup>29</sup> Marguerite Reardon, *Study: Distractions, not phones, cause car crashes*, cnet news, Jan. 29, 2010, available at [http://news.cnet.com/8301-30686\\_3-10444717-266.html](http://news.cnet.com/8301-30686_3-10444717-266.html).
- <sup>30</sup> Matt Richtel, *At 60 M.P.H., Office Work is High Risk*, N.Y. Times, Oct. 1, 2009.
- <sup>31</sup> *Id.*
- <sup>32</sup> David Needle, *Could Texting in Car Be an Employer Liability?*, Enterprise Mobile Today, Jan. 25, 2010, available at <http://www.enterprisemobiletoday.com/features/management/article.php/3860556>.