

TEXTING WHILE DRIVING STATUTES INCREASE RISK OF EMPLOYER LIABILITY

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Widespread state, federal and municipal regulation of texting while driving (“TWD”) puts employers at increased risk of liability for automobile accidents caused by texting employees.

According to the Governors’ Highway Safety Association, 21

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states had TWD laws on the books as of April 1, 2010. Many municipalities have their own ordinances. A Guidance from The United States Department of Transportation under the Motor Carrier Safety Act of 1984 warns against texting by drivers of commercial vehicles. Federal employees are prohibited from TWD in government vehicles by an October 1, 2009 executive order that President Obama signed.

The scope of some current and future TWD laws also could encompass other common technologies besides texting, including GPS systems, dispatching devices, and laptop computers.¹ Almost all current laws include e-mailing and instant messaging while driving.

EMPLOYER LIABILITY

The legal doctrine of *respondeat superior* allows an injured plaintiff to recover against an employer for the negligence of employees, agents, and contractors, regardless of whether the employer itself acted negligently. Consequently, courts will hold an employer liable for an employee’s negligence

while acting within the scope of his or her employment duties or for the employer’s benefit. Thus, an employer can be liable for a TWD-related accident involving an employee whose everyday job involves driving a delivery truck. It can also be liable for a TWD accident that occurs when it assigns a task that requires driving to an employee whose regular job involves sitting at a desk, not at the wheel.

Employers also can be liable for conduct by independent contractors if a court finds that the employer controlled the contractor’s work. Earlier this year, an appellate court held that a shipping company could be liable for a contractor’s alleged negligence in a traffic accident despite contractual language disclaiming any employment relationship between the contractor’s employees and the company.² As this and other cases demonstrate, employers cannot escape *respondeat superior* liability by merely labeling their workers as contractors.

An employee’s commute to and from work normally will not be considered part of the “scope of employment.”³ There may be exceptions, though. For instance,

a court might find an employer liable for TWD accidents during an employee's daily commute if the employee's texts were work-related, or if the accident involves a company phone or car.⁴ Courts have also held that employers can be liable for accidents while employees commute to work-related conferences or business trips.⁵

Although TWD statutes mostly impose criminal penalties on the driver they can substantially increase the exposure of employers by making it easier for plaintiffs to obtain civil verdicts against texting drivers and, in turn, their employers. Before a plaintiff can recover from an employer for an employee's negligence, he or she must prove that the employee acted negligently. Proving negligence can be a complicated and expensive task, but many courts hold that a defendant's violation of a statute creates a conclusive or rebuttable presumption of negligence.⁶ This means that the mere fact that an employee was TWD at the time of an accident, which can be verified through cellular providers' records, can suffice to prove negligence.

Further, employers can also be liable for their own negligence, rather than an employee's. As recognition of the risks posed by TWD increases, employers are more likely to be found directly liable for failing to take preventive measures to minimize the risk of TWD accidents, including negligently hiring or entrusting an employee with a vehicle whose driving record should have raised red flags.⁷ It is also conceivable that an employer could be found negligent for texting an employee when the employer knew or had reason to know that the employee was driving.

WHAT EMPLOYERS CAN DO

TWD is a surprisingly common practice that employers must take seriously. A recent study by *Career-*

Builder 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.⁸ Many tragic and highly publicized accidents have involved TWD, including a 2008 California train accident that killed 25 people and injured 135.⁹ A study conducted by British researchers shows that texting drivers are more distracted than drivers who have consumed alcohol to the legal limit.¹⁰

Adopting a policy prohibiting employees from TWD can help minimize employer liability exposure for the actions of employees who disobey these policies. Policies should bar employees altogether from TWD on company time, for work-related purposes, or using employer-provided equipment, and provide disciplinary measures that will be taken if the policy is violated. While 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, a blanket ban is recommended.

Employers who issue company cell phones or vehicles to employees should take extra care. These employers should warn employees of the dangers of TWD 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, and provide regular reminders thereafter. Further, it is important that employers document employees' awareness of texting policies by having employees sign an acknowledgment of the policy.

Putting a policy on paper is not enough. Employers must act consistently with the policies they adopt. A court is not likely to be impressed by an anti-TWD policy if the employer disciplines employees for not responding to the employer's texts sent while

the employees were driving, or encourages the employees to text supervisors while they are driving.

In addition to adopting a policy, employers may wish to invest in technologies designed to prevent TWD altogether. The Associated Press recently reported on several available options, and more are sure to come.¹¹ These devices, however, can almost certainly be disabled by a savvy employee, so strong policies and enforcement mechanisms remain a must.

NOTES

1. See, e.g., DC Code §50-1731.02 (prohibiting driving while "engaging in any ... activity which causes distractions."). N.Y. Code §1225-d(a) (law applicable to any "handheld device with mobile data access," "broadband personal communication device," or "portable computing device").
2. *Huggins v. FedEx Ground Package System, Inc.*, 592 F.3d 853, 159 Lab. Cas. (CCH) P 60934 (8th Cir. 2010).
3. See, e.g., *Lobo v. Tamco*, 182 Cal. App. 4th 297, 105 Cal. Rptr. 3d 718 (4th Dist. 2010).
4. See, e.g., *Ellender v. Neff Rental, Inc.*, 965 So. 2d 898 (La. Ct. App. 1st Cir. 2007) (employer-provided phone).
5. See *Jeevarat v. Warner Bros. Entertainment, Inc.*, 177 Cal. App. 4th 427, 437, 98 Cal. Rptr. 3d 837, 74 Cal. Comp. Cas. (MB) 1075 (2d Dist. 2009).
6. See *Magna Trust Co. v. Illinois Cent. R. Co.*, 313 Ill. App. 3d 375, 382-383, 245 Ill. Dec. 715, 728 N.E.2d 797 (5th Dist. 2000).
7. See *Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 655 (Tex. App. Dallas 2002).
8. 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>.
9. Robert J. Lopez, et al., *Train Engineer Sent Text Message Just Before Crash*, LOS ANGELES TIMES, Oct. 2, 2008.
10. Paul Casciato, *Texting Drivers More Dangerous than Drunks: Study*, REUTERS, Sep. 18, 2008, available at <http://www.reuters.com/article/idUSL165189720080918>.
11. *Examples of Apps to Curb Texting While Driving*, ASSOCIATED PRESS, March 28, 2010, available at http://www.philly.com/philly/business/technology/20100328_ap_examplesofappstocurbtextingwhiledriving.html#axzz0rajFIOkg.