

NEWSLETTER: FEBRUARY 2003

CELL PHONES AND YOUR EMPLOYEES: THE DANGERS OF BUSINESS CALLS ON THE ROAD



A case now before the Courts in Virginia is causing shivers among employers throughout the United States. In that case an attorney while driving and talking on her cell phone became distracted enough by the call that she swerved and hit and killed a teenage girl in the summer of 2000. The attorney eventually pled guilty to a felony and has already completed a one year work release program. Now the civil suit against her employer, the law firm Cooley Godward, begins and will clarify the issue of when the employer is liable for activities of an employee using the new technology that allows work to be done on the road, in airports, etc. The best bet is that the law firm will end up paying a hefty civil judgment even though they had not known or necessarily authorized the attorney to handle the case while driving along the road during dangerous traffic conditions.

Consider:

Using cell phones, lap tops, pagers, palms and the like, your employees can be engaged in business activities anywhere in the world any time of the day or night and you will not necessarily even know they are doing so.

Unlike the older cases which held employers liable for their employees' negligence if the employee was engaged in employer related activity or on the way to do so, the new technology now allows such activity to occur in places and in ways never before possible. Example: a customer calls for a

quote. The customer is in France and it is first thing in the morning there but Sunday evening in San Francisco and your employee is driving his family to a movie when the call comes in on his cell phone. He is a good employee and he gave his number to the customer and is delighted to help. While his wife frowns, he swerves in traffic while reaching for his laptop to get the program on quotations open, holding the wheel and the cell phone in one hand. In the back seat the kids squirm and are told to be quiet by the mother.

Before, your employee responded from his or her desk in an office you were required to make safe, or drove to a telephone booth and responded. Now, the employee, in a car speeding along at seventy miles an hour, picks up the message, leans over and opens his brief case or lap top, holding the phone under his chin, and looks through the brief case while muttering to the customer on the phone, the laptop open and perhaps modemed in by another cell phone.

And hits another car.

Or goes off the road and injures your employee and his family.

Or speeds by a police cruiser who pulls him over for reckless driving or for violation of a local ordinance against using cell phones while driving. (New York banned cell phone use by drivers in June of 2001. Six other states have some regulations.)



**Are you liable for any of that?
Do you have any policy
concerning it?**

The older technologies of CB radios and other forms of mobile communications were normally installed by the employers and were part of the job...truckers were expected to be reachable by the radios. The courts uniformly held the employer liable if accidents were caused by use of the radios.

The problem arising is that cell phones are now owned and used by everyone and with voice mail, you can find an employee using the telephone in a dangerous manner even though that employee normally works within an office. The same is true for computers, laptops, pagers and the like, and suddenly employers find their

employees are in dangerous locales engaging in work for the employer without the employer even knowing it, much less condoning it.

And this is likely to increase in volume. A recent Study found that while increased cell phone use had led to more crashes caused by drivers on the phone, the value people place on being able to call from the road "equals" the accident's cost according to various surveys. Harvard researchers, drawing on previous studies of cell phone and government figures for car accidents, report in the new study that there is increasing risk of accident. The Study, completed last December, indicates that drivers on the phone were responsible for about six percent of the accidents in the United States, killing an estimated two thousand people and injuring 330,000 people.

The Study concluded that the cost was 43 billion a year for the accidents. (One wonders how they value two thousand lives.) But the value the study placed on the ability to use the cell phones was roughly the same.

Or, put into everyday English, you and your employees are going to continue to use cell phones and laptops on the road and accidents will therefore be caused by such use.

So, what protective steps should you, as an employer, take?



1. Your employees (and you) are going to use cell phones and the like on the road. That is a practical fact of life and probably a good thing. Your task is to make appropriate policies to ensure safe use. A suggested memo is as follows:

Our firm's policy is to assure safe and appropriate working conditions for all of our employees and that includes using cell phones and laptops in a safe manner. The employee is not to use the cell phone in any location or driving situation that would endanger the safe operation of the vehicle. The employee should hang up and safely pull over to continue the conversation if the conversation will in any way interfere with the safe operation of the vehicle.

Further, all such conversations must be made in a way that confidential information is not overheard by the public or any other persons in the locale.

The same policy applies to lap tops, palm and pager communications. Safety of the employee and the public is always of the highest priority to our firm.

2. If you see an employee operating a cell phone in a dangerous or reckless manner, reprimand him or her and make a written notation in the file. If necessary, have a training session about such dangerous use of technology.
3. Consider installing "hands free" telephones in the cars of employees who are on the road a great deal.
4. See if insurance coverage is sufficient to cover the increased danger of such accidents occurring.
5. Restrict cell phone use of employees on the road to calls that are truly necessary and instruct employees, in writing, not to conduct business on cell phones during inclement weather or rush hour.
6. Monitor the billing for cell phones not only to make sure expenses are restricted but to make sure calls are appropriate in length and timing given the increased risk of accidents. Again, written memos in the file will help demonstrate to a judge and jury that you took reasonable steps to limit risk.
7. And if one of your employees is in an accident involving a cell telephone, eliminate the right of that employee to use such technology for company business. You are on "notice" in that event, and if further accidents occur, could face massive liability.



With every advance comes problems and increased risk. Your employees are now capable of working in more places more of the time. The international nature of business makes this inevitable. It is up to you, however, to take those common sense steps to limit your exposure and protect your employees and those of the public who may be

injured. Don't wait until you face a law suit to take appropriate action...remember what Barry LePatner said:

Good judgement comes from experience and experience comes...from bad judgement.

Better to use the experience of someone else to learn your lesson...like that attorney in Virginia!