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**“CELL PHONES CAN COST YOU”**

by

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Despite the growing reliance on cell phones to communicate on the go, employee use of cell phones while driving can be detrimental to your health as an employer. Cell phone use has become a common part of modern life. People increasingly rely on their cell phones to make and take calls while traveling, using time spent waiting in lines, walking down the street, sitting in restaurants, or driving to catch up on calls and messages. While recent studies published in medical and scientific journals offer conflicting information on the impact of cell phone use on driver performance, public opinion is that the most dangerous time to use a cell phone is while driving.

Employers should be concerned about losing good employees to cell-phone caused accidents, as well as the potential of facing significant financial liability if the phone is being used in connection with company business. Employers should prohibit use of cell phones while driving, whether in company owned or privately owned vehicles, whether company owned or privately owned cell phones, and whether during or outside normal working hours.

Employers may be held responsible for actions of their employees, including the harm caused to others, while employees are acting within the scope of their employment. Thus, in the case of an automobile accident allegedly caused by an employee's work-related cell phone call, liability may extend to the employer. In one case, a Pennsylvania employer was sued for wrongful death when a motorcyclist was struck and killed by an employee who allegedly ran a traffic signal while picking up a dropped cell phone. There was no evidence that the employee was using the cell phone at the time of the accident. Evidence demonstrated that the employer owned neither the cell phone nor the car, and that the accident occurred on a Saturday night while the employee was driving to a non-work related dinner. The family sued on the theory that the employer was liable because the employee was using the phone for business purposes – a position supported by the employee himself! Damaging testimony from co-workers revealed that sales calls to potential clients were often made on personal time, and sometimes using personal cell phones. Fearing an even more substantial award, the employer settled the case for \$500,000.

In a Virginia case, an attorney making a business-related call on her cell phone while driving struck and killed a teenage pedestrian. Believing she had struck a deer, the attorney continued to drive home. The teenager's father filed a wrongful death suit against the attorney, her husband and the law firm, seeking \$30,000,000 in compensatory and punitive damages. The theory of recovery against the law firm was that the driver was making a business call on her cell phone at the time of the accident. She was clearly acting within the scope of her employment, since the law firm had billed for her time.

A Florida jury recently awarded a 78 year old woman and her husband \$20.98 million for the severe injuries she suffered in a car crash that left her ventilator dependent. The plaintiffs sued the driver that struck her, as well as the driver's employer. The woman's attorneys argued that the defendant driver had to have been distracted since there were absolutely no marks evidencing any attempt to stop. During his deposition, the defendant driver admitted that he had a cell phone, but claimed he had only used it to call 911 after the accident. However, the employee-driver's cell phone records not only showed the call to 911, but also showed he had been on the phone for 45 seconds prior to making the 911 call. Five days after the jury delivered its verdict, the case settled for \$16.1 million.

In light of the cases, employers must recognize the need for a written cell phone policy prohibiting cell phones use while driving on company business, regardless of who owns the phone or the car being used. The policy should also prohibit employees from using cell phones for company business, even while driving for non-business purposes. In the event of a suit, such a policy will at least enable an employer to argue that an employee using a cell phone while driving, was acting outside the scope of his authority, and in violation of company policy. For best results, employees should have to sign a copy of the cell phone policy.

Employers who are unwilling to issue such a restrictive policy should at a minimum implement a policy encouraging safer cell phone practices on the road. Pulling over to make or take calls, hands-free phones, and speed dialing are all worthy of consideration. Employers who provide employees with a vehicle and/or cell phone should also consider posting such warnings in the vehicle and on the cell phone itself.

The popularity and convenience of cell phones cannot outweigh the safety issues, and employers must consider their liability exposure as well!