

VOLUME 1, Issue 1

Cell Phone Liability

When talk isn't cheap

By David S. Katz, Esq.

HOT TOPIC

- Employees using cell phones while operating motor vehicles

In response to a recent accident in which a 22 year-old woman was seriously injured by another driver using a cell phone, Massachusetts State Representative Peter Koutoujian has filed legislation that would prohibit the use of hand held or hand free cell phones while driving.

The use of cellular phones to conduct business has become a common practice for many employers around the country. While employers recognize the benefits of cell phones ranging from increased employee productivity to enhanced client service, not all employers may appreciate the attendant risks of personal injury concomitant with such usage. These risks fall mainly into two categories: Claims by third persons against a corporation and claims by employees. Third-party claims usually arise from auto accidents relating to the use of a cell phone by an employee. Plaintiffs searching for the proverbial “deep pocket” will not only sue the employee for negligence, but also his employer under the theory of respondeat superior. Under this theory of law, an employer may be held liable vicariously if the employee was acting within the scope of his or her employment at the time of the accident.

Over the past few years, and as evidenced in a recent *Boston Globe* article sent to you recently, juries have been returning verdicts against both employees and their employers for negligence resulting from accidents involving cell phones. Most importantly, the cell phones that have been at the epicenter of these cases are not just hand held cell phones, but hands free cell phones as well. The fact of the matter is that when an employee is operating either a hand held or a hands free device, concentration is diminished and attention to driving is compromised. Having said this, an employer cannot escape liability by resorting to hands free systems, but must develop policies that prohibit or strictly limit the use of all cellular phones.

Many recent articles on this topic have analyzed various cases from around the country. This article will not attempt to parrot those discussions. Rather, the focus of this news alert will be to provide comprehensive suggestions for the methods of dealing with this developing area of corporate liability. When compiling the following

*As reported by
Consumer Reports
Magazine in May
2003, the University
of Utah concluded in a
recent study that
hands free cell phones
are just as distracting
as hand held models.*

“It has become increasingly important for employers to establish a firm policy on cell phone and equipment usage while driving. Even though there is no guaranteed defense to liability in any situation, an employer with a program in place is going to be in a far better position to defend against a negligence action involving the misuse of a cell phone than an employer who either has not undertaken any policy initiative or whose policy fails to be sufficiently comprehensive.”

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Cell Phone Liability continued from page 1

suggestions, we enlisted the support of various human resource professionals to create the following ten-point program.

1. Several companies have adopted written, standardized policies prohibiting the use of cell phones as well as pagers and palm pilots while an employee is operating a vehicle. It would be wise to adopt a policy that includes all technological devices that could potentially detract from an employee's ability to operate a motor vehicle.
2. That the only exception to the above policy occur when the employee has parked his/her vehicle before using and cell phones or technological devices.
3. That the automobile must remain parked until the communication has ended.
4. Provide voice mail equipped phones to employees. In this way, no calls will be lost and the employee can return all such calls when the vehicle is parked.
5. Conduct training seminars to those employees who routinely use or need to use cell phones as part of their employment. This seminar also serves as another opportunity to reaffirm the company's policies toward cell phone use.
6. Placement of the policy on stickers on company issued cell phones and related technological equipment.
7. In connection with the establishment of a company policy regarding automobile cell phone usage, some companies require, as a condition of receipt of a company cell phone, that these phones are not to be used while operating automobiles.
8. Employers, of course, should maintain documentation, including written acknowledgments of their company policy, from employees when they are issued cell phones or related equipment. Document all training sessions and keep records in appropriate personnel files.
9. Employers who reimburse employees for business calls made from cell phones should require employees to certify that they did not use the phone in any way that violates company policy. Such certification can be added to the reimbursement form.
10. Establish a written, standardized policy that mandates that any violation of the company cell phone policy will result in disciplinary action. It should be demonstrated that as with any other aspect of employee relations that the employer is serious about this issue and enforces the same when necessary.

Talk can be cheap when it comes to cell phone plans. It can also be deadly.