

## THE DANGERS OF TEXT MESSAGING: ARE YOUR EMPLOYEES DYING TO COMMUNICATE?

*If the answer to the above question is yes, then watch out because liability and exposure to verdicts is not too far behind*

All over the country both state and municipal governmental bodies are grappling with the issue of texting and driving. The year of 2009 saw distracted driving become a national hot-button issue with legislative activity focusing on text messaging behind the wheel. Congress has initiated legislation called the Alert Driving Act which would require that states ban drivers from sending text or email messages or risk losing 25% of their federal highway funding each year as long as they fail to comply. Nineteen states now ban text messaging while driving. A current list of state-by-state activity can be found at the Governor's Highway Safety Association website. In Massachusetts, for example, the House of Representatives is trying to get a ban on texting while the City of Boston is also in the midst of formulating a texting ordinance. With or without governmental regulation in this area, employers are well served to develop their own cogent policies toward texting and driving. Locally, Aiden Quinn drove a trolley for the Massachusetts Bay Transportation Authority (MBTA). During the spring of 2009, he was texting his girlfriend when he ran a red light and crashed into another trolley stopped in front of him. Over 40 people were injured. Quinn since has been fired. The MBTA is now facing a megabucks lawsuit by injured riders and some third parties. The MBTA only had a no cell phone policy and **no anti-texting policy**. An early settlement is expected according to sources close to the case.

The exposure to a company for an injury caused by an employee texting is considerable. If there is an accident, a plaintiff's lawyer would use the violation of the local ordinance as prima facie evidence of negligence in order to prove that the employee and therefore the employer, under respondent superior liability, is responsible for the accident. Having said this, employers should promulgate policies that put the use of texting while driving, outside of the scope of employment and to do so by policies as well as use of limited authorization forms to be signed by employees. Up to now, employers have only mandated that employees pull over to the side of the road to either text message or use a cell phone. These policies are not restrictive enough, however.

As companies struggle to integrate new technologies into existing safety procedures and as public officials struggle with whole new categories of risk, one thing is certain: the ubiquitous cell phone and related text messaging have taken a firm hold in our professional and personal lives. Look around and it is easy to see that such technology collectively has immersed itself in every facet of our daily life. Some businesses have already noted the number of injuries and rising costs associated with workplace distractions and responded by adopting policies that ban the use of cell phones. These employers understand that potential liability connected with driving and talking or texting. All you have to do is look back a few years to a company that had to settle a case for \$16 million because one of its salespeople, driving as he talked on a cell phone, struck and severely injured an elderly driver. Specifically, company human resource departments need to know the ramifications of the new technology in the workplace. They should put specific policy language into the employee handbook, properly train employees and vigorously and consistently enforce those policies. By so doing, companies can protect themselves from liability by demonstrating that the employee knowingly violated a written and enforced safety

rule. Needless to say, that the two companies most prominent in selling texting services, AT&T and T-Mobile, both have their own anti-driving/texting policies. What do they seem to know that many corporations are missing? AT&T, for example, recently has revised its own policies to forbid its 290,000 employees from texting while driving. T-Mobile has embarked on a less stringent campaign of only encouraging their employees to commit to not text and drive. As of this date, unlike AT&T, T-Mobile has no specific written anti-driving/texting policy.

Other major lawsuits are on the horizon as texting and accidents have become more commonplace. The corporate goal for this coming year should be to hit this issue head on and create policies that do not leave your employees dying to communicate.