



by Brian C. Sinclair and Carlos Dominguez

Driving Under The Influence Of A Cell Phone: Can Employers Be Held Liable?

Beginning July 1, 2008, the Wireless Telephone Automobile Safety Act will prohibit the use of wireless telephones by drivers operating motor vehicles in California, unless the phone being used is specifically configured for hands-free use. The law includes a number of limited exceptions (e.g., emergency service personnel). The law permits the use of a hands-free device, which allows the driver to use both hands while operating the vehicle. While this law is not specific to employers and employees, it will have a significant impact on employers.

Below, we explore the Act in more detail, followed by a discussion of the potential liability of an employer for accidents caused by employees who utilize cell phones and PDAs while driving. We will also explore the importance of training and policies to minimize liability.

The "Hands-free" Cell Phone Law

The new law (Senate Bill 1613; new Vehicle Code Section 23123) provides that, effective July 1, 2008, it is illegal to drive a motor vehicle while using a wireless telephone, unless that telephone is designed and configured to allow hands-free listening and talking operation, and is used in that manner while driving. A violation will be punishable by a fine of \$20 for a first offense and \$50 for each subsequent offense.

Specifically, the law will:

- Prohibit the use of wireless phones by drivers unless the driver is using a hands-free device starting July 1, 2008.
- Allow drivers of commercial vehicles to use push-to-talk phones until July 1, 2011.
- Will not apply to persons who use wireless telephones to contact a law enforcement agency or other public safety entity for emergency purposes.
- Will not apply to an emergency services

professional while he or she operates an authorized emergency vehicle.

Additionally, the law does not apply to a person driving a school bus or transit vehicle that is subject to certain existing wireless telephone usage restrictions, or to a person while driving a motor vehicle on private property.

While the law does not specifically prohibit the use of Personal Digital Assistants (PDAs), such as Blackberries and Treos, using the wireless telephone function of these devices while driving would likely be prohibited. In addition, employers may be held liable when an employee uses such devices for other purposes (e.g., e-mailing, text messaging) in the course of their employment, as discussed further below.

Why Can An Employer Be Held Liable?

Every type of company can be sued for accidents caused by the use of cell phones and PDAs. Picture this: A stockbroker driving and talking on his cell phone while en route to a non-business event kills a twenty-four-year-old motorcyclist. Even though the company did not provide the employee with a cell phone, the stockbroker said that he was making "cold calls" when the accident occurred. Other employees testified that making "cold calls" on personal time is necessary in order to contact hard-to-reach individuals. The plaintiff claimed that the stockbroker was acting within the scope of employment at the time of the accident and that the company was negligent in encouraging employees to use cell phones without any warning or training on potential hazards. Can the company be held liable?

Under the theory of respondeat superior, an employer is liable for the actions of an employee if the employee was acting within the scope of his or her employment at the time of the accident. Courts in other states have already held

that conducting employer business via a cell phone at the time of an automobile accident is within the scope of an individual's employment.

Although an employer is not generally liable for accidents occurring before or after business hours, if the employee is conducting business via a cell phone at the time of the accident, the employer might still be indirectly liable. The employer might still be liable because conducting business via a cell phone provides a benefit to the employer. Under respondeat superior, courts consider whether the act in question, at least in part, provides a benefit to the employer. If such a benefit was provided, then the courts reason that the employer should absorb the cost of harm caused by the tortious conduct of the employee who was acting to benefit the employer.

Conduct may also be within the scope of employment when the employee acts within the authorized time and space limits prescribed by the employer. The authorized limits become expanded when the employer encourages employees to fulfill the employer's profit expectations outside normal work hours. As a result, an employer may be liable to an accident victim if an employee is conducting business that furthers the employer's aims, even if outside normal work hours.

Plaintiffs may also be able to sue under a second theory of liability — negligence. Plaintiffs can just as easily claim that the employer is directly negligent in permitting employees to use cell phones for

business purposes without adequate training or without providing a hands-free device. Liability could also attach if a court decides that an employer has enough control over an independent contractor's actions to be responsible for that agent's negligence.

How Can An Employer Mitigate Liability?

Employers should consider implementing new policies for their employees' use of cell phones and PDAs while working. Among other things, the policy should prohibit employees' use of wireless telephones and PDAs, or require the use of hands-free units, while operating vehicles. A written policy, along with instructions outlining safe operation of the cell phone or PDA, may help mitigate an employer's liability. The policy should be documented, disseminated, and strictly enforced.

A company may consider requiring employees to sign an acknowledgment form that phones are not to be used while operating automobiles or other equipment. Several other measures can also be created to reinforce company policy. Company-owned cell phones should carry a warning sticker that warn that the use of phones while driving is dangerous and should be done only in an emergency. Another option is an outright ban on employees' use of cell phones while employees are operating company-owned vehicles, while employees are operating personal vehicles for work purposes, and while employees are using phones furnished or required by the firm at the same time as operating any vehicle. A good policy often includes a training program to communicate that policy. Adequate training may include

the implementation of written policies and instructions, videos, feedback surveys, properly communicated disciplinary measures, and periodic refresher training.

Conclusion

More and more accidents are foreseeable given the commonplace use of cell phones and PDAs, as well as their likely use for business purposes while driving. Courts have held employers liable for cell phone related accidents under various legal theories, and there appears to be little case law contrary to this result. Employers can protect themselves from such liability through employee training, clearly enunciated policy guidelines, or restrictions on employee cell phone use. ●

Brian C. Sinclair is a partner in the Employment and Labor Law Department of Rutan & Tucker. Mr. Sinclair represents employers before state and federal courts and administrative agencies in a broad range of employment litigation, including individual and class action litigation involving wage and hour issues, misappropriation of trade secrets, unfair competition, wrongful termination, sexual harassment, and employment discrimination. Mr. Sinclair also counsels employers in all aspects of the employer-employee relationship. He can be reached at (714) 641-3430 or by email at bsinclair@rutan.com.

Carlos Dominguez is an Associate in the Employment and Labor Law Department of Rutan & Tucker. Mr. Dominguez also represents employers in all aspects of the employer-employee relationship. He can be reached at (714) 641-5100 or by email at cdominguez@rutan.com.

Maneuvering through traffic while talking on the phone increases the likelihood of an accident five-fold and is actually more dangerous than driving drunk, U.S. researchers report.

That finding held true whether the driver was holding a cell phone or using a hands-free device, the researchers noted.



"As a society, we have agreed on not tolerating the risk associated with drunk driving," said researcher Frank Drews, an assistant professor of psychology at the University of Utah. "This study shows us that somebody who is conversing on a cell phone is exposing him or herself and others to a similar risk — cell phones actually are a higher risk."

