

TEXTING AND DISTRACTED DRIVING AND WORKING: EMPLOYER LIABILITIES UNDER OSHA, TORT, AND CRIMINAL LAWS (OMG!)

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On your daily commute, have you noticed how many other drivers are either holding a phone to their ear or looking down at their hands, fingers clicking away, while only intermittently glancing back at the road? You look over at a truck driver with a phone in one hand and hear him shifting gears with the other. An obviously lost floral delivery van abruptly jams on the brakes to avoid rear-ending a motorcycle because the delivery driver was tapping an address into his cell phone to call up a map. A group of teenagers rolls by in a convertible with tires halfway into the shoulder as the driver punches in a text with her right thumb, steering only with the edge of her left palm because her fingers are otherwise occupied holding a lit cigarette. A police car drives by in the opposite direction, the officer too busy talking on his own cell phone to observe these other drivers' misdeeds. As you think of your family members sharing the road with these "[expletive] idiots," your blood begins to boil. Just after you are done cussing and judging their irresponsibility in your own mind, you hear the familiar message-received tone emanating from your own phone. You don't even hesitate to grab it to read that not-at-all-urgent message that most certainly could have waited until you reached your destination. You then realize what you just did, shrug off your own hypocrisy, and hopefully live to drive another day. Sound a little too familiar?

Somehow, despite the all-too-obvious dangers and risks of messaging and texting while driving, the practice has become ubiquitous on the roads. It's not just a teen problem. And it's not just a private, personal problem. These "idiots" are someone's employees. Some of them may be texting or emailing and driving while working for you, either because they are accustomed to doing it in their personal vehicle or because they think it necessary or required to perform their jobs. Others engage in the practice simply because the employer has no policy against it or, worse yet, the employer doesn't enforce its policy or issue discipline as long as the job gets done—"I didn't see that...wink, wink."

In the last few years, texting and distracted driving has become quite a hot topic, and government is moving to curb it. In 2009, President Obama signed an executive order prohibiting federal employees from engaging in text messaging while working. In 2010 and 2011, respectively, the Federal Motor Carrier Safety Administration (FMCA) and the Pipeline and Hazardous Materials Safety Administration passed

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regulations prohibiting commercial truck drivers and bus drivers from texting while driving. The FMCA followed up with a full ban on hand-held cell phone use by commercial truckers in 2011. OSHA issued a 2012 publication outlining the dangers of distracted driving. In it, OSHA threatened employers with violations grounded in the Occupational Safety and Health Act's section 5(a)(1) "general duty clause" for workplace-related hazards that arise out of texting and driving, especially in cases where the employer organizes work in a way that makes the practice a "practical necessity" to perform the work. Vehicle and traffic laws have also proliferated. To date, more than 40 states, the District of Columbia, and Puerto Rico have passed laws banning all drivers from texting. Twelve states, the District of Columbia, and Puerto Rico also ban hand-held cell phone use for all drivers, while 37 states ban all cell phone use for novice drivers. And nearly all states—48 so far—now include at least some form of distracted driving as a causal category on police accident investigation forms.

But the dangers and risks of distractions caused by texting, messaging, and cell phone use are not just limited to vehicles traveling public roads and highways. They also arise in nearly any work environment. Consider the forklift driver who reads an email message while moving and stacking 5,000-pound pallets around your warehouse. Or the construction or utility worker who takes a call while positioned 20 feet up on a ladder or utility pole. How about the person in the booth who is supposed to be watching the pressure gauge or computer readouts but is too busy trying to figure out how to order a pizza online. Did you consider the nurse who is having an ongoing text conversation while simultaneously charting or transcribing a doctor's prescription and treatment orders into the computer? The farmer texting instructions to his farmhands while driving farm equipment along a busy road? Examples of how cell phone and texting can cause dangerous distractions in nearly any workplace are endless, though not commonly identified or considered by employers. And this is precisely why employers need to be more vigilant about their specific workplaces and their company cell phone and texting policies. These types of day-to-day risks don't garner the media hype that surrounds texting while driving a motor vehicle. But distracted driving and working can nonetheless lead to tremendous exposures for employers, often on multiple fronts and sometimes in indirect and non-obvious ways.

Suppose, for example, we take our floral delivery driver and assume he was distracted enough that he didn't see the motorcycle or just couldn't stop in time. The delivery driver is injured in the resulting crash. The florist immediately faces a workers compensation claim, loses a needed worker for a period of time, has to record a lost work time incident on the OSHA 300 logs, and has a wrecked van. The florist also suffers a dip in revenues and profit because deliveries are curtailed until both the driver and the van can be replaced. The police investigate and determine that the accident occurred because the delivery driver was distracted by his attempt to use the phone to find the delivery location. The results of that investigation are detailed on the police report and distracted driving and cell phone use violations are issued to the driver. OSHA learns of the incident through a police referral, conducts its own investigation, and finds that the florist knew—or maybe even implicitly encouraged—its drivers to use cell phones to effectuate deliveries, but provided no training or instructions on cell phone safety or the dangers while driving. OSHA issues a willful violation under the general-duty clause with a \$70,000 proposed penalty. In the meantime, the motorcyclist dies from the severity of his injuries. An aggressive district attorney, wanting to make a point about distracted driving and joining the growing trend of criminal enforcement, elects to charge the florist's driver with criminally negligent homicide and also charges the florist as an accessory. The motorcyclist's family also hires a lawyer and sues the florist and the driver for millions of dollars. The florist, however, has limited insurance that may not cover the eventual civil judgment, and now the business and its assets are at risk. Due to the circumstances, the florist's liability and workers compensation insurers also either substantially raise premiums or decline to

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renew.

While this may seem to some to be an extreme example, it really isn't. These facts are well within a reasonable possibility of happening. The point to be drawn, however, is that employers need to recognize how far and wide the exposure can extend and realize that nearly every workplace that fails to ban cell phone use and texting while working likely faces some level of risk. An employer cannot control everything its employees do, especially when off-site. But that does not necessarily make the employer any less responsible for them. At a minimum, employers should implement a formal distracted driving/working policy prohibiting cell phone use, texting, messaging, and other distracting behaviors while working. Where the use of such technologies are necessary, the employer should develop and train employees on acceptable and appropriate protocols for how and when the employee may utilize these technologies in a safe manner. It may take a minute or two more for them to accomplish something, but that is a small price to pay for what a few seconds of distraction might cause.