

***First Wednesday — A Monthly Discussion of Employment Law  
Issues and Other Hot Topics for Management***

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***By Jeffrey A. Snyder - Issue No. 62: June 4, 2008***

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**Look Boss, No Hands!**

The new cell phone laws are here. Beginning July 1, 2008, California law will prohibit all drivers from using a handheld cell phone while operating a motor vehicle. Drivers over the age of 18 may use a cell phone equipped with a hands-free device while driving and talking. (Drivers under the age of 18 cannot use a cell phone even with a hands-free device.) The base-level fine for the first offense is \$20, and \$50 for subsequent convictions. With the addition of penalty assessments, the first offense can reach \$76, and a second offense \$190. An exception allows all drivers to use a cell phone to make emergency calls to a law enforcement agency, a medical provider, the fire department, or other emergency services agency.

Another exception applies to drivers operating a commercial motor truck or truck tractor (excluding pickups), certain agricultural vehicles, a tow truck or other commercial vehicle, when using a two-way radio operated by a “push-to-talk” feature. The push-to-talk feature must be attached to a hands-free earpiece or other hands-free device. Also, drivers of authorized emergency vehicles are exempt during the course of employment, as are people driving on private property.

There is no further grace period. These laws were passed in 2006 as part of the California Wireless Telephone Automobile Safety Act. Drivers can be stopped and cited

beginning July 1, 2008 (Vehicle Code §§23123 and 23124). California is the fifth state to enact such laws, joining Connecticut, New York, New Jersey and Washington (the latter two states also prohibit “texting”). While California does not specifically prohibit texting, a citation can be issued if the driver was distracted and not operating the vehicle safely. The California Highway Patrol strongly discourages texting while driving which it considers “unsafe at any speed.”

For drivers under the age of 18, they may not use a cell phone, pager, laptop, Blackberry or any other type of wireless device to speak or text while driving, even if equipped with hands-free devices. Again, the only exception is in emergencies, to call police, fire or medical authorities.

### ***Why Should Employers Care?***

Employers should take notice of the new laws based on the large number of drivers who use a cell phone while driving, combined with increasing safety and risk issues. A 2007 study by Nationwide Insurance found that 73% of 1,200 drivers said they talk on the cell while driving. Other studies show that cell phone talkers are at least as dangerous as intoxicated drivers.

Undoubtedly, many of these drivers are talking while on the job, or using a company car, or company-owned cell phone, any of which can subject the employer to the payment of fines and civil liabilities. If the job requires that the employee drive and talk, or if there is an expectation of keeping in touch at all times, the employee might seek company reimbursement of his fines. Thus, at a minimum, companies should revise their handbook policies to require compliance with these new laws, including mandatory use of hands-free devices, and possibly provide those devices. Employees should then be educated about the new laws and any new company policies.

### ***Employer’s Civil Liability***

Many employers are taking this very seriously because of safety concerns and large settlements in injury cases where it is argued that the employer is liable because its driver was acting within the scope and course of employment. The issue is typically framed as: “whether the risk of a company employee driving and talking on the cell

phone conducting company business (or using a company phone) and getting into an accident was a risk that may be fairly regarded as typical of or broadly incidental to the company's business." A thorough discussion of this so-called "respondeat superior" liability is found in the recent California appellate court case of *Miller v. American Greetings Corp.*, 74 Cal.Rptr.3d at 776 (2008), in which Ms. Miller suffered severe injuries after being hit by an American Greetings employee with his pickup truck. The Court found for American Greetings as it could not be proven that he was actually on the phone when he hit Ms. Miller. The link between the phone use and the accident fell into a "gray zone," as described by the Court:

"Appellants have no evidence Magdaleno [the driver] was on the phone when he hit Miller. They instead have evidence he called his crew chief eight or nine minutes before the accident and spoke for less than a minute. **We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, as when an employee is on the phone for work at the moment of the accident. Oftentimes, the link will fall into a gray zone, as when an employee devotes some portion of his time and attention to work calls during the car trip so that the journey cannot be fairly called entirely personal. But sometimes, as here, the link is de minimis – one call of less than one minute 8 or 9 minutes before an accident while traveling on a personal errand of several miles' duration heading neither to nor from a work site. When that happens, we find no respondeat superior as a matter of law.**"

This holding should prove to be very influential precedent in future cases. While the Court held in favor the employer, it recognized that the law involving "mobile" offices inside an employee's car is "unsettled."

Of the notable cases to date regarding this subject matter, one involving International Paper Company settled for \$5.2 million due to the employee's use of a company-supplied cell phone while driving. The exact timing and purpose of the call were not proven. The driver rear-ended a vehicle driven by the victim, pushing her into a ditch, where it overturned and caused a widowed mother of four to have her arm

amputated almost up to the shoulder. Another case, involving an attorney at a large law firm in Virginia, resulted in the firm settling for an undisclosed amount after the attorney struck and killed a 15-year-old girl. She served one year in jail for a hit-and-run incident. The allegation in the civil case was that the attorney was driving home from work and conducting a business call on her cell phone when she struck the girl, drove off thinking she had hit a deer, only to continue working at home.

In summary, this issue has become important due to the passage of the new laws and increasing tort liability for distracted cell phone users and “deep-pocketed” related parties, including their employers. Employers can best minimize the risks in connection with cell phone use while driving by adopting and enforcing policies prohibiting all use of cell phones and PDAs while driving on company business or company time, or using company-issued phones. If the employee’s job requires that he use the cell phone for business, then he must use a hands-free device (possibly supplied by the company) or better yet, should pull off the road before using the phone.

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