

S P E C I A L R E P O R T

DISTRACTED DRIVING

THE IMPACT ON EMPLOYER LIABILITY



It took decades, but society has made decent progress in battling drunk driving.

Unfortunately, the new century has witnessed the emergence of a new and potentially more virulent threat: distracted driving. Although distractions can have various sources, “distracted driving” has become code for driving while talking, texting or otherwise using cell phones and other handheld electronic devices.

Although some, especially telecommunication companies, deny the problem’s existence, numerous studies have proven that using cell phones does create distractions that make drivers more likely to get into traffic accidents.

But distracted driving is not only a highway safety but also a workplace safety issue. Some of the victims of distracted driving accidents are workers driving company vehicles or on company business. And distracted workers can also cause traffic accidents that result in liability to their employers.

In a recent dramatic example from the US, an employee for Coca-Cola was driving a company vehicle and talking on her cell phone when she got

into an accident, injuring a 37-year-old woman. The injured woman sued Coca-Cola and a Texas jury awarded her more than \$20 million (USD).

The Coca-Cola case is only the latest chapter in a developing story that affects just about any company in which workers drive on the job: employer liability for distracted driving by workers.

We created this SPECIAL REPORT to explain the liability risks of distracted driving by workers and how to manage those risks to ensure that:

- None of your workers maim or kill on the road because they’re distracted while driving; and
- Your company doesn’t suffer the same fate as Coca-Cola if they do.

The centerpiece of the SPECIAL REPORT is instructions on how to create an effective Distracted Driving Policy and a Model Policy that you can adapt for your company.



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DISTRACTED DRIVING & THE LAW

Technology changes faster than law. As a result, the OHS laws don't currently address cell phone use by workers much less distracted driving. But the fact is that employers *do* have a legal obligation to prevent distracted driving by their workers to protect not only the workers themselves but also any third parties they might injure. This obligation is rooted in three sets of laws:

1. General Duty Clause

Every jurisdiction's OHS law has a "general duty" clause that requires employers to take steps to ensure the health and safety of workers. A key component of this general duty is eliminating and controlling foreseeable hazards. So if distracted driving is a foreseeable hazard workers may face, the company *must* take steps to address the danger.

How do we know that the general duty clause covers distracted driving? Some jurisdictions have specifically said so. For example, Alberta's [Driving for Work: Developing Safe Practices for Employers and Workers](#) makes it clear that distracted driving is just like any other safety hazard that employers have to address. And a [fact sheet](#) on distracted driving from WorkSafeBC says, "As an employer, it is your responsibility to establish and maintain a safety program that addresses the risks your employees face when driving for work purposes."

2. Highway Safety Laws

With the exception of Nunavut, every jurisdiction in Canada has traffic laws barring the use of handheld cell phones and other electronic devices while driving (*see the chart on Page 6 for details*).

So workers who talk or text while driving are in violation of those laws and thus could be considered negligent if they cause an accident while doing so. The problem, of course, is that these laws impose liability on the driver, not the driver's employer. That is, they don't explicitly require employers to crack down on driving and texting by their workers.

But such an obligation might exist by implication.

Example: Your company is located in a jurisdiction that bans texting and driving. But it doesn't adopt a policy banning workers from texting while operating company vehicles. A worker texts while driving on the job and gets into an accident, injuring another driver. That driver could sue your company for damages, claiming that it was negligent for not adopting a ban on texting and driving. And the fact that the province or territory imposes such a ban would be evidence that not barring texting was negligent, as discussed below.

3. Negligence Law

Remember that not all legal obligations stem from statutes and regulations. People and companies also have duties under what's called common law—that is, law made up by judges in actual cases. Negligence is one type of common law. A company is liable for negligence when it has a duty to someone, fails to take reasonable steps to protect that person from foreseeable risks and that person gets hurt as a result. And failing to take reasonable steps to prevent workers from doing their jobs in a way that endangers the public is arguably negligent.



DISTRACTED DRIVING & THE LAW, *Cont'd*

Example: A worker is driving a company vehicle to deliver materials to a construction site and getting drop-off instructions from his supervisor on his cell phone. He's so distracted that he drives through a stop sign and runs over a pedestrian crossing the street.

The pedestrian could sue the worker for her injuries. But the worker might not have a lot of money. So the pedestrian and her lawyer might look for a so-called "deep pocket" to sue for negligence—such as your company. And the victim would have a good chance of winning such a lawsuit.

The victim would argue that the accident was caused by the company's negligence. A reasonable person would have recognized that letting workers talk on cell phones when they drive on company business creates a risk of traffic accidents and injuries. Thus, the victim could claim that the company's failure to implement a ban on workers' cell phone use while driving was negligent. And the fact the worker was talking to a *supervisor* while driving just compounds the company's negligence.

Those are the arguments successfully made in the Texas Coca-Cola case. As we'll discuss in more detail below, the jury found that Coke knew distracted driving was a danger but didn't do enough to protect its workers and the general public.

The Coca-Cola case isn't an aberration, either:

- A driver on a cell phone in a company car didn't react when traffic slowed, rear-ending a Honda in a chain-reaction that killed a 32-year-old woman. A jury awarded her family **\$21.6 million** (USD).
- A federal magistrate ordered an Alabama trucking company to pay **\$18 million** (USD) for an accident that happened when one of its drivers reached for a cell phone.
- International Paper settled for **\$5.2 million** (USD) after an employee on a cell phone caused a collision that cost a woman her arm.

Yes, all of these cases are from the US. But distracted driving is just as big of a problem in Canada. And it's only a matter of time before Canadian courts start seeing similar lawsuits.

THE STATISTICS DON'T LIE

In one survey:

- 85% of respondents admitted to using their cell phones while driving, 30% admitted doing it while driving on the highway and 27% said they talk on cell phones for at least 50% of the time they're actually behind the wheel;
- 84% of respondents in this study said they recognized that using a cell phone while driving greatly increases their likelihood of getting into an accident; and
- 81% of the respondents listed talking and texting on the phone as the two most dangerous behaviours that a driver can engage in behind the wheel.

Source: 2008 Statistics Canada

Another study concluded that texting while driving causes a 400% increase in time spent with eyes off the road. It also found that a driver:

- Dialing a cell phone is **2.8 times** more likely to get into a crash;
- Reaching for a cell phone is **1.4 times** more likely to get into a crash;
- Talking on a hands-free device is **1.3 times** more likely to get into a crash; and
- Texting is **23.2 times** more likely to get into a crash.

Source: 2008 Liberty Mutual Insurance Group study

According to a 2009 Virginia Tech Transportation Institute study, for every 6 seconds of drive time, a driver sending or receiving a text message spends 4.6 of those seconds with his eyes off the road.

DISTRACTED DRIVING & THE LAW, *Cont'd*

| Province/ Territory | Prohibitions on hand-held devices | Prohibitions on hands-free devices | Restrictions on other distractions |
|------------------------|--|--|---|
| BC | All hand-held electronic equipment is banned. | Novice drivers aren't allowed to use hands-free electronic equipment. | Careless driving legislation; TV sets can't be visible to the driver. |
| AB | Holding, viewing or manipulating a communications device or a hand-held or wireless electronic device is banned. | None | With exceptions (for example, GPS systems fixed to the car), electronic screens can't be visible to the driver; Reading, writing, hygiene or any other activity that distracts a driver. |
| SK | All hand-held communication equipment is banned. | Novice drivers aren't allowed to use hands-free communication equipment. | Careless driving legislation; Electronic screens visible to the driver must be attached to the car and can only be used to aid the driver with the task of driving. |
| MB | All hand-held electronic devices are banned. | None | Imprudent driving legislation. |
| ON | All hand-held wireless communication devices are banned. | None | Careless driving legislation; With exceptions (for example, GPS systems), electronic screens can't be visible to the driver. |
| QC | All hand-held devices that include a telephone function are banned. | Hands-free devices that include a telephone function are permitted. | Careless driving legislation. |
| NB | All hand-held electronic devices are banned. | None | Also banned: manual programming & adjusting of any GPS navigation system while driving. TV screens, monitors, DVD players and computer screens not permitted within the visual range of the operator of a motor vehicle. |
| NS | All hand-held cellular phones are banned; Text messaging is banned on any communications device. | None | Careless driving legislation; Screens can't be visible to the driver. |
| PE | All hand-held wireless communication devices are banned | None | Careless driving legislation; Operational TVs can't be in any position within a vehicle. |
| NL | All hand-held cellular phones are banned; Text messaging is banned on any communications device. | None | Programming GPS when car is in motion is banned; Careless driving legislation. |
| YT | Hand-held devices used for talking, texting, or emailing are prohibited. | Graduated Driver's license holders aren't allowed to use: hand-held electronic devices for talking, texting or emailing or any hands-free devices. | Exceptions: Citizen's band (CB) and other simple push-to-talk two-way radios may be used. |
| NWT | All hand-held electronic devices are banned. | None | Careless driving legislation. |
| NU | None | None | Careless driving legislation. |

Current as of Jan. 5, 2012.

Source: Transport Canada

CREATE AN EFFECTIVE DISTRACTED DRIVING POLICY

So what must an employer do to prevent distracted driving by workers and protect itself from the resulting liability? Create and implement a distracted driving policy. More precisely, adopt a policy that bans—or at least severely restricts—use of cell phones and other electronic devices while operating a company vehicle or driving on company business.

In addition to minimizing liability risks, having an effective policy can help prevent distracted driving accidents from happening in the first place by making sure your workers understand the risks and how you expect them to eliminate or minimize those risks.

Don't assume that workers know the risks of distracted driving. Many workers may believe that texting or talking on cell phones while driving enhances productivity by allowing for "multitasking." So when they use cell phones while driving on the job, they may not feel like they're doing anything wrong. In fact, they might think they're actually doing the company a favor. A direct and clearly written policy is necessary to disabuse workers of this misconception.

SHOULD YOU BAN THE POSSESSION OF CELL PHONES?

It's tempting to try to prevent distracted driving by simply barring workers from having cell phones and other electronic devices in their vehicles at all. This approach is simple and straightforward—get rid of the equipment and you remove the distractions.

But there are important safety reasons why workers should have cell phones with them when they're on the road. For example, most OHS laws have requirements for workers who work alone. And those requirements generally include ensuring that the worker has a way to communicate with others and call for help if needed, such as by using a cell phone.

Bottom line: Your policy shouldn't ban cell phones; it should impose restrictions on their use.

Coke Case Shows Why Just Having a Distracted Driving Policy Isn't Enough

Many Canadian companies have adopted some form of written distracted driving policy. But just having a policy isn't enough to insulate a company from liability. The policy must also be effective.

COMPLIANCE CENTRE:

Tools, Model Policies, Best Practices and more...

OHSInsider is your leading guide to Canadian safety compliance. Access our [Cell Phones and Other Electronic Devices Compliance Centre](#) to get everything you need on this critical OHS topic.

Coca-Cola learned this lesson the hard way. The company had a written policy on distracted driving. But the victim's attorneys claimed the policy was "vague and ambiguous."

Their argument: Coke knew all about the dangers of distracted driving but deliberately withheld this information from drivers. In fact, the remarks the driver made immediately after the accident were key evidence supporting this claim. "If I'd known distracted driving was dangerous," the driver allegedly said, "I wouldn't have done it."

6 Distracted Driving Policy Loopholes to Avoid

The [Model Distracted Driving Policy](#), which is based on a model from the National Highway Transportation Safety Administration, is a good starting point. But there's no such thing as a one-size-fits-all policy.

You must tailor your distracted driving policy to reflect your operations, equipment, vehicles and OHS program. And it should comply with any relevant laws—OHS or otherwise—in your jurisdiction. For example, if your jurisdiction bars drivers from programming a GPS system while the vehicle is moving, include that ban in your policy. ([You can download a Word version of the Policy at OHSInsider.com to make tailoring it easier.](#))

One of the good things about the [Model Policy](#) is that it plugs six common loopholes that typically appear in distracted driving policies.

1. Banning Just Cell Phones & Calls

The Loophole: Many policies tell workers that they may not use their "cell phones" while driving. But the problem isn't confined to cell phones. There are plenty of other communications and electronic devices that can cause distractions. And the problem isn't limited to phone calls,

CREATE AN EFFECTIVE DISTRACTED DRIVING POLICY, *Cont'd*

either. Texting and emailing are just as distracting—if not more so.

How to Plug It: Make sure your policy covers not only the use of cell phones but also other “electronic devices,” including mobile phones, text pagers, two-way radios, MP3 players, tablets and laptops. It should also apply to all uses of these devices, including phone calls, texts and emails [Policy, I(a)].



2. Not Specifically Covering Personally-Owned Vehicles & Devices

The Loophole: Some policies apply only to cell phones and electronic devices provided by the company and/or to company vehicles. This omission leaves workers free to talk or text on their personally-owned equipment and in their own vehicles while on the job.

How to Plug It: Specify that the ban applies to all devices and vehicles “whether owned by the company or the worker” [Policy, I(b)].

3. Not Covering Business & Personal Conversations

The Loophole: Some policies ban workers from carrying on “personal conversations” when driving on company business. By implication, it’s okay to hold a business-related conversation when driving.

How to Plug It: Ban the use of all electronic devices to conduct any conversation or communication, business or personal [Policy, I(b)].

4. Failing to Provide Instructions on How to Handle Incoming Calls

The Loophole: Typical policies ban workers from making calls when driving but don’t tell them how to handle incoming calls or other communications.

How to Plug It: In addition to warning workers not to use electronic devices, tell them what to do when a call, text or other communication comes in. Our [Model Policy](#) lets workers answer or return the call as long as they first pull off the roadway in a safe spot and remain parked until they’re done [Policy, I(d)].

5. Covering Only the Drivers

The Loophole: Most distracted driving policies address only the driver. But it takes two people to create the danger: the person driving the vehicle and the person on the other end of the line. Whether you’re a manager, supervisor or co-worker, when you take or make a cell phone call or text from or to a worker who’s behind the wheel of a vehicle, you’re acting as an enabler.

How to Plug It: Make sure your policy bans others in your company from calling or contacting workers when they’re driving. Also, tell them what to do when receiving calls or texts from workers who are behind the wheel [Policy, II].

6. Not Providing for Enforcement

The Loophole: Distracted driving policies often omit

CREATE AN EFFECTIVE DISTRACTED DRIVING POLICY, *Cont'd*

appropriate enforcement provisions. That's a problem because simply writing a clear policy is a waste of time if you don't enforce it. In fact, a policy not backed by discipline is almost worse than not having a policy at all because it shows that you understood the danger but didn't try hard enough to correct it.

How to Plug It: Make it clear that violating the distracted driving policy is a serious offense that could lead to discipline up to and including termination. And make sure you actually follow through when and if violations occur [Policy, III].

Handheld v. Hands-Free

You'll notice that there's one provision in the **Model Policy** that we didn't address above. Paragraph I(c) bars drivers from using both handheld electronic devices and devices that can be used hands-free.

DOWNLOAD NOW:

For more resources that can help you properly implement a distracting driving policy, go the OHS Insider's **Cell Phone and Other Electronic Devices Compliance Centre**, where you'll find, among other things::

- a **Distracted Driving Infographic**
- a **Music Device Policy** that addresses use of MP3 players such as iPods on the job
- a **video** on how cell phones kill in the workplace.

Remember that Coke had a distracted driving policy but the jury thought it was "vague and ambiguous." One reason Coke's policy may have failed the jury's scrutiny was that it wasn't tough enough. It didn't say drivers couldn't use cell phones while operating motor vehicles; it just said that they had to use hands-free devices.

As Coke pointed out in its post-verdict press release, requiring use of hands-free devices while driving was not only consistent with but also stricter than Texas highway safety laws.

Although Coke is correct, it's missing a key point. We-followed-the-law arguments are unlikely to hold much sway with juries, especially in cases pitting sympathetic victims against corporate giants.

Jurors in the Coke case were probably less interested in Texas law than in why the company, knowing what it knew

about distracted driving, didn't just ban all cell phone use. In the jurors' eyes, letting workers use hands-free devices while driving suggests that Coke wanted its drivers to multi-task and was willing to risk their safety and the safety of others on the roads in the interest of efficiency.

In addition, studies have shown that hands-free devices aren't any safer to operate when driving than handheld ones.

The **Model Policy** takes the most conservative approach by barring all use of electronic devices—whether handheld or hands-free. But if you decide to allow workers to use hands-free devices while driving—and your jurisdiction permits the use of hands-free devices—modify the **Model Policy** accordingly.

The collage features several posters with the following text:

- CAUTION** (large yellow text)
- DON'T DREAM AND DRIVE** (top left)
- 3 signs you are a good driver** (top right)
- Driving** (top right)
- FACT or FICTION?** (middle right)
- For Injury Prevention** (center)
- HONK SCREECH** (center)
- all that separates us. Y GOES BOTH WAYS.** (bottom left)
- Give The Road Your Full Attention** (bottom center)
- Weather Demands Better Driving** (bottom right)

Get your Safe Driving Awareness Posters

at **safetyposter.com**
A Bongarde Site

MODEL DISTRACTED DRIVING POLICY

DISTRACTED DRIVING IS DANGEROUS

Of increasing concern to [insert name of company] (“the Company”) are the dangers posed by distracted driving. Recent deadly crashes involving drivers distracted by talking and texting while driving highlight a growing danger on our roads. Numerous studies have demonstrated how the use of cell phones while driving poses a significant safety risk to motorists, their passengers and others on the road. For example, according to Alberta Transportation, 20% to 30% of all collisions involve driver distraction.

PURPOSE

The purpose of this policy is to protect your safety by banning you from using cell phones and other electronic devices when driving, which may cause distractions that prevent you from concentrating 100% on safe operation of the vehicle and thus lead to accidents.

I. RULES FOR DRIVERS

- a. **Ban on Use of Electronic Devices.** When you are on duty and driving, you may not use an electronic device of any type, including, but not limited to, cell phones, mobile phones, text pagers, two-way radios, MP3 players, tablets and laptops, for any purpose, including phone calls, texts and email.
- b. **Scope.** The ban on the use of electronic devices above applies:
 - To all vehicles operated by workers while on duty, whether owned by the Company or the individual worker;
 - To all electronic devices, whether owned by the Company or the individual worker; and
 - To all conversations or communications, whether personal or business-related.
- c. **Hands-Free Devices.** The ban on using cell phones and other electronic devices while driving applies to *all* devices, including the use of such devices with hands-free headsets, regardless of whether the use of hands-free devices is permitted by highway safety law.
- d. **Handling Calls While Driving.**
 - **Before You Leave:** Turn off your cell phone or set it to vibrate before starting the vehicle. Turn off all other electronic devices.
 - **Incoming Calls:** Make sure your phone has caller ID and/or voice mail. If the phone rings or you receive a text or other communication, don’t answer it unless and until you pull over in a safe spot (or let a passenger answer). If it’s urgent, you may accept or reply, provided that you remain parked off the roadway. You may not resume driving until you are done.
 - **Outgoing Calls:** You may not make outgoing calls or communications while driving. If you want to place a call, text or email, pull over in a safe spot first.

II. RULES FOR NON-DRIVERS

- a. **Ban on Contacting Workers Who Are Driving.** If you know that a worker is driving, do not call or contact him or her on the cell phone or other electronic device.
- b. **Procedures for Contacting Workers Who Might Be Driving.** If you do not know if a worker is driving and the matter is urgent, you may call or contact the worker but must immediately ask the person if he or she is driving. If the worker is, in fact, driving, tell the worker to call you back when he/she pulls over or gets out of the vehicle and then hang up.
- c. **Procedures for Receiving Calls from Workers Who May Be Driving.** If you receive a call, text or other communication from workers who are on their cell phone or other electronic device, ask them if they are driving. If they are, tell them to pull over and call you back. Hang up as quickly as possible.

III. ALL WORKERS

Effect of Policy. Violations of the rules in this policy will be considered a serious offence and may result in the imposition of discipline up to and including termination.

Reminder. The use of cell phones and other electronic devices while driving leads to distractions that can result in traffic accidents. So although the Company cannot force you to adhere to these rules when you are not on duty, we strongly urge you to do so for your own safety and well-being and that of family, friends and third parties on the roadways.

I have read and will abide by the conditions as stated in this document regarding the operation of any vehicle for Company business and while conducting work at the Company’s worksite.

Name (printed) _____

Signature _____ Today’s date _____

Witness _____ Today’s date _____