Cell Phones at the Workplace: Managing the Hazards

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Introduction

Business today is regularly conducted through cell phones, as a necessary tool for employees to communicate and access digital information. Bring Your Own Device programs and employee cell phone use present a range of employment and labor liabilities for employers: smartphones can be a forum for employees to engaged in protected concerted activity, an opportunity for unauthorized overtime work, and a tool to access inappropriate images and harass coworkers. Yet the biggest challenges posed by cell phones are their safety hazards. Distracted driving is the number one cause of workplace fatalities, and cell phones are the biggest cause of distraction in the forms of text messaging, talking, and game-playing. Cell phone distractions can impugn employees’ spatial awareness, recognition of hazards, and operation of dangerous equipment. Finally, studies show that defects in certain cell phone batteries have resulted in fires and explosions. Accordingly, employers with Bring Your Own Device programs or who provide cell phones for use at the workplace must understand and manage the safety risks these devices pose.

Distracted Driving

Employers whose businesses require the use of cars, vans or trucks must understand that their policies and training regarding the safe operation of those vehicles--and the inclusion of a clear prohibition against texting on a hand held cell phone while driving--are of strong interest to OSHA, the law enforcement community, insurance carriers and potential civil litigants. Failure to address this hazard can result in significant employer liability.

Federal OSHA maintains a Distracted Driving Initiative, in which it targets texting as a major cause of workplace injuries. In a 2010 open letter to employers, Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA) David Michaels said, “It is your responsibility and legal obligation to have a clear, unequivocal and enforced policy against texting while driving....Companies are in violation of the Occupational Safety and Health Act if, by policy or practice, they require texting while driving, or create incentives that encourage or condone it, or they structure work so that texting is a practical necessity for workers to carry out their jobs. OSHA will investigate worker complaints, and employers who violate the law will be subject to citations and penalties.” OSHA has used its General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act, to issue citations and proposed penalties in these circumstances. OSHA considers “distracted driving” which can include texting (and potentially the use of cell phones for telephone calls) to be a “recognized hazard” under the General Duty Clause to employee safety. Penalties for willful violations of the Act under the General Duty Clause can be as high as $124,709.
Even with a no-texting policy, OSHA may cite employers when employees are texting while driving, where texting is a common workplace practice. OSHA indicates that “when it receives a credible complaint that an employer requires texting while driving or who organizes work so that texting is a practical necessity, [OSHA] will investigate and where necessary issue citations and penalties to end this practice.” Accordingly, employers need to be wary of workplace texting, and make clear that texting while driving is prohibited.

**Distracted Operation of Industrial Machinery**

Cell phone distractions present safety hazards far beyond the driving of personal vehicles. At the most obvious, operators of Powered Industrial Trucks or other industrial machinery, including overhead cranes, can be distracted by cell phone use. OSHA regulations squarely forbid the use of cell phones in construction regulations pertaining to cranes and derricks (29 C.F.R. § 1926.1417(d)), but the hazard exists across any dangerous equipment. Accordingly, active operation during the use of industrial equipment should be strictly prohibited.

**Distracted Employees at the Workplace**

As any employer with industrial machinery knows, preventing accidents starts with making sure employees are aware of their surroundings. Distractions from cell phones imperil employees’ ability to recognize and react to hazards, such as passing forklifts, which can hit pedestrian employees. Of recent concern is the use of “augmented reality” games, such as Pokémon Go, in which players view the world through cell phone screens, walk around while distracted, and search real world sites for game-related information. These games encourage cell phone use and distraction while walking around, and should be prohibited from the worksite.

**Additional Liabilities for Distracted Employees**

Of course, OSHA citations and associated penalties are not the only liabilities that employers must be concerned about when it comes to cell phone distractions. For example, thirteen states ban the use of handheld phones while driving for talking. 46 states and the District of Columbia ban text messaging for all drivers, and in many of the remaining states similar bans are in place at the county or city level. These laws make texting while driving illegal and also open employers to liability for accidents that result from their employees’ distracted driving and improper use of cell phones.

Employees face both individual civil and criminal liability for damages that result from accidents caused by texting while driving or engaging in other work. Likewise, employers face vicarious liability for the acts of their employees under agency law for personal injury or property damage they cause during the course of employment. When an accident happens as a consequence of distracted driving or operating machinery while the employee is on company time, the employer is potentially liable. Where the employer has not affirmatively prohibited texting while driving and enforced that policy, the employer faces potential liability as a result of the accident.

Vicarious liability, as it is called, is not a new legal concept. Employers have faced liability in similar situations for decades for the acts of their employees that occur during the course of the employment relationship. Consider the claims made against pizza delivery companies whose drivers were instructed to deliver a pizza in 30 minutes or less. In the context of distracted driving, the price of vicarious liability can be significant. In Florida, a lumber wholesaler settled for over $16 million after one of its salesman hit and severely disabled an elderly woman while talking on a cell phone.

Beyond potential OSHA administrative penalties and civil and criminal liability, employers should also consider how their policies and practices can affect their insurance rates. There is no question that with an increase in accidents caused by distracted employees, the cost of worker’s compensation and other insurance coverage will rise.
Cell Phone Fires and Explosions

Modern cell phones use lithium-ion batteries, which in reported cases have caused fires and sparks while in stand-by or charging. According to recent news reports, defective cell phones have produced smoke and grounded a flight, ignited a car, and smoldered on a child’s pillow. A cell phone manufacturer has reported 35 cases of its devices’ batteries burning or exploding while charging, and has issued a recall for millions of devices. The Federal Aviation Administration has issued a warning about a particular model of personal device, telling passengers “not to turn on or charge these devices on board aircraft and not to stow them in any checked baggage.”

Consequently, cell phones can represent a recognized fire hazard at the workplace. As the Agency’s understanding of the hazards develops, we anticipate that OSHA could address this issue under the General Duty Clause, citing employers who fail to protect employees from the recognized hazard of cell phone battery fires. Employees who work around flammable vapors or dust face enhanced risks from fires and explosions. It is a common practice at gasoline stations to have warnings that cell phones should not be used while fueling because of the potential for ignition of flammable gasoline vapors. Employers must manage and limit the fire hazards posed by recalled, dangerous cell phones in the workplace.

What Should Employers Do?

- Employers need to put in to effect clear policies that unequivocally prohibit texting and talking on a cell phone while operating any kind of motorized vehicle while performing work activities. This includes cars, buses, trucks, forklifts, construction and agricultural vehicles. The “workplace” includes any location that the employee is operating a vehicle in their role as an employee. For example, many employers require employees who operate motor vehicles to take the vehicle out of moving traffic lanes, stop the vehicle completely and then utilize the cell phone or electronic device to communicate.

- Employers should consider a prohibition on workplace cell phone in areas of the workplace that distractions would presents a hazard to employees. Employers could consider banning cell phone gaming or viewing obscene materials at the workplace entirely.

- Employers should also carefully evaluate existing policies and the nature of their workplaces to ensure that there are no incentives or un-written policies and practices that encourage the use of hand-held communication devices for texting or data entry while in a hazardous area or while operating a vehicle.

- Consider the use of certain applications in company-issued devices that can block the use of cell phones, including texting and internet access, while a vehicle is moving.

- Enforce bans on texting while operating a vehicle or in a hazardous area of a workplace. Enforcement of these policies must be consistent and cover both management and non-management employees alike.

- If texting or data entry is a necessary part of an employee’s job, consider devising a schedule that allows for routine breaks during which vehicles and dangerous activities are stopped to allow for the communication or data entry to be completed.

- Inform employees of the fire hazard posed by recalled, dangerous cell phones, particularly with regard to the ignition of flammable vapors. Prohibit recalled or dangerous cell phones from being used in the workplace.

Conclusion

As OSHA’s enforcement relating to employee cell phone use gains more notoriety, it can be expected that it will have a significant collateral impact on law enforcement at all levels to address this hazard. If the foregoing recommendations are considered and adopted by employers, they will reduce potential individual civil and criminal liability of employees as well as the vicarious liability of the employer.
NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mlies@seyfarth.com to be added to the address list.

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