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DRIVEN TO DISTRACTION: MITIGATING DISTRACTED DRIVING CLAIMS

Distracted Driving Prevention Program

Distracted driving has been defined by the National Highway Traffic Safety Administration (NHTSA) as the practice of driving a motor vehicle while engaged in another activity which distracts the driver's attention away from the road. Most states have laws regulating distracted driving. The General Duty Clause of the Occupational Safety and Health Administration (OSHA) bylaws provides that employers have a duty to provide a safe work environment free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees.

Distracted driving has dramatically increased over the last decade. It is both a national and international epidemic. According to the National Safety Council, a non-profit advocacy group, 4.57 million people are injured seriously enough to require medical attention in motor vehicle crashes and the cost to society is a staggering \$413.8 billion. Employers can take steps and go beyond state laws to minimize the impact and effect of distracted driving, including instituting a zero-tolerance policy, providing guidance and training to all employees, and implementing a distracted driver prevention program.

According to the NHTSA, there are three types of driving distractions:

1. Visual task – activity that causes a driver to divert his/her attention from the road.
2. Manual task – activity that causes a driver to remove one or both hands from the steering wheel.
3. Cognitive task – activity that causes a driver to wander beyond the task of driving.

The sources of distracted driving are both internal and external. The top 10 distractions are:

1. Eating and/or drinking.
2. Cell phones.
3. Using built-in car devices.
4. Adjusting climate or audio controls.
5. Grooming.
6. Daydreaming.
7. Other people in vehicle.
8. Rubbernecking.
9. Using or reaching for a device brought in the car.
10. Accessing and following directions or navigation system.

Due to the rise in distracted driving, it is imperative that employers take a proactive approach to control these risks and the associated exposure. When promoting distracted driving prevention, it

is important to not only consider the direct consequences (loss of life, serious injury and potential lawsuits), but also the indirect consequences (interrupted operations, loss of productivity, rehiring and retraining of employees, and loss of morale).

Without significant behavioral changes, distracted driving claims will continue to spiral out of control. Distracted driving is mostly due to texting or another mobile device use. It is not only resulting in motor vehicle accidents, but also workers' compensation claims for employee drivers. Employers should and must institute best practice hiring guidelines, including minimum age requirements and road experience, investigation of motor vehicle driving records, and establishing accountability programs for drivers such as telematics and cab cameras, a tracking and monitoring system. Also, consider devices on the market to block cell phones from calling, answering emails and texting while a vehicle is in motion. Employers should also consider retaining outside loss control experts depending upon the industry or business. Formal written policies for distracted driving are critical, and having employees sign off on the policy and maintaining the signed documentation of the policy in company business records is essential. Companies should regularly communicate these written policies at all companywide meetings and on all company mission statements, newsletters and bulletins.

People safety is an end to end strategy that is driven by "care" principles. It reflects any organization's attitude toward team members and is an essential component of "brand value." It is a strategy driven by shared commitment to everyone's safety, starting from the first day at work via training and orientation, and continuing through company procedures, resources and support systems. These practices will reflect a work culture of "keeping each other safe."

Defending Injuries Caused by Distracted Driving in Workers' Compensation

The role of the workers' compensation system in distracted driving incidences varies from state to state. Determining whether an incident arises out of the course and scope of employment is fact specific and is the exclusive remedy precluding an employee from filing other actions against the employer. However, there are exceptions to the exclusivity rule, including when the injury occurs as a result of the violation of a law or violation of a positive work order. In all situations raising distracted driving issues, conducting a prompt, diligent and thorough investigation with an effective and informed investigative team is necessary to control potential exposures.

Typically, injuries that arise out of and during employment are compensable. In most states, it is the injured worker's burden to prove that he or she has suffered a compensable work injury, i.e., an injury occurring in the course and scope of employment and arising out of employment. With the recent rise in the use of personal vehicles for business activities, it is good practice to create a vehicle safety plan that accounts for personal vehicle use. The fact that an injury occurs in the course and scope of employment does not automatically result in an award of workers' compensation benefits. Like many areas of the law, when the injury occurs at work, its compensability depends upon the specific facts of each case.

A thorough investigation is critical to determine whether an injury is compensable and to develop defenses to the potential claim. A key element in an investigation is assessing the cause of the injury and any contributing factors. It is prudent to gather cell phone records, statements, photos, any and all electronic devices and event data recorders (EDR), and police reports as part of the investigation. Determining whether the employee was at a place where he/she might reasonably be expected to be while performing job duties and whether he/she was performing those duties in furtherance of the interests of the employer's business when the incident occurred is paramount to assessing the compensability of the injury.

Liability Exposure and Third-Party Litigation

Cell phones are a convenient means of communication, but employers must recognize the financial and safety risks associated with their use while driving. Driving is typically the most dangerous activity most people participate in daily; therefore, full attention must be focused on that task. Several studies have found that the risk of a crash is four times more likely when a person is using a cell phone (handheld or hands-free). When an employer discovers that a behavior could expose employees (and the public) to a greater risk of injury (or death), they seek ways to discourage or eliminate that behavior.

Sending or receiving a text takes a driver's eyes off the road for an average of 4.6 seconds. At 55 miles per hour, that amounts to the length of an entire football field.

Verdicts against employers have included:

- A Florida jury awarded \$214 million to a family whose member was killed in a rear-end collision;
- A federal magistrate in Alabama ordered a trucking company to pay \$18 million for an accident that occurred when one of its employees reached for a cell phone;
- A jury found a driver and her employer liable for \$216 million because testimony revealed that the driver may have been talking on her cell phone at the time of a fatal crash;
- An off-duty police officer was texting while driving a police cruiser moments before a fatal crash, and his employer was held liable for \$4 million;
- An employer settled a fatality claim for \$500,000 where evidence revealed that an employee was making cold calls as he drove to a non-business event on a Saturday night because it encouraged employees to use their car phones and lacked a policy governing safe cell phone use.

Forty-five percent of businesses surveyed prohibit the use of mobile devices, except when using hands-free technology, while 41 percent prohibit their use completely. Further, 12 percent of businesses have policies prohibiting texting, emailing and internet browsing. Overall, more than 85 percent of employers have taken some steps to enforce distracted driving policies, yet only 32 percent of businesses are "very confident" that their current methods are effective.

Effective policies must be in place to limit the use of cell phones, tablets, navigation devices and other distractions while driving on company time. The policy should include language requiring employees to pull over and park in legal parking spaces when using these technologies — no exceptions.

Policy change must start at the top. Obtain buy-in from senior management. Employers must:

- Educate employees.
- Monitor compliance.
- Enforce the policy.
- Address violations.

A strong policy should identify the consequences of violation. Employees should be educated on the policy and should be provided strong policy guidance.

Emergency Claims Response Management Plan

Distracted driving claims can run the gamut from worker fatalities to motor vehicle accidents. So, what can an organization do to mitigate losses? The first important step is to establish an Emergency Claims Response Management Plan.

Emergency claims require a prompt response from a qualified team to provide immediate claims support that is effective and reliable. This starts with a well-formulated and effectively executed Emergency Claims Response Management Plan. A well-built plan, beginning with the initial claim response guided by a triage team, ensures that the claim gets on the right path immediately by initiating a prompt and effective on-site scene investigation, post-accident investigation, and appropriate preservation of that investigation and evidence.

An Emergency Claims Response Plan begins with the assembly of an internal and external team. Once the team is established, all contact information for that team should be documented and distributed, and a 24/7 response line should be established. The team should be comprised of the right mix of personnel with expertise in all phases of claim response. Each team member has a vital role and, collectively, the team works together to provide early response and prompt reporting of the claim, as well as securing and providing supporting documentation to all insurance carriers, which is extremely critical to the claim's adjustment process. Each role (described in detail below) has an interdependency and synergy that makes the group much greater than the sum of its individual parts.

Team Members and Roles

Insurance Broker

Typically, a broker's claims consultant serves as the quarterback and architect of the team. When tragedy strikes, the insurance broker takes the lead to coordinate the response to a client's location to ensure the claim and the employer receive prompt attention, and to provide claims advocacy, technical support, regulatory intervention, accident investigation and an overall safety presence. In addition to assembling the team, the broker's risk control professionals are equipped to provide OSHA intervention, from the beginning of the investigation through the informal conference to conclusion. Also, a broker typically works with claims adjusters, insurance company representatives and attorneys to ensure that they gain access to sites, that all efforts are coordinated, and that information is exchanged. The broker also takes the lead in making any required claim notices to all insurance carriers and maximizing any policy resources, including media relations, employee assistance programs (EAP) and crisis management counselors, as well as elevating claim assignments so claims professionals are promptly engaged in the claim. This begins with drafting the loss notice, which includes detailed information from the exact date of the loss, a description of the loss, applicable insurance coverage information, location of the loss, brokerage contacts, insured contacts (cell and scene contact), claimants and witnesses, other relevant details and contact information. Finally, the broker ensures that the underwriters are kept apprised of the claim and the employer's risk management efforts.

Defense Counsel

Defense counsel provides legal advice and oversight of the investigation to protect privilege, ensures that the appropriate legal procedures are followed for the jurisdiction, assesses liability and preserves evidence. All members of the team work under the direction of defense counsel.

Independent Adjuster

This role provides the "boots on the ground" that enables your insurance carrier to respond on-site immediately to document and gather evidence (e.g. witness statements) and protects an employer's interest against liability claims.

Insurance Carrier Adjuster

An insurance carrier adjuster adjusts the claim and provides oversight to the independent adjuster.

Employer

All team members report to the employer, who is responsible for facilitating communication among senior leadership, human resources and employees. The employer also coordinates all claims and risk management efforts.

Forensic Consultant/Accident Reconstructionist

The responsibility of this role is to provide forensic investigation and accident reconstruction to assist in determining the cause of an accident. Regarding a traffic accident, they often use technology and, most notably, 3D scanning, which allows investigators to preserve a digital copy of a scene that can be viewed on a computer.

Ultimately, the Emergency Claim Response Management Plan is the playbook for responding to an emergency claim and coordinating response activities in a measured way, away from the loss site, and provides the roadmap to minimize impact, expedite claims processing, facilitate insurance recovery and manage claim information.

Handling Third-Party Liability Claims – Who Pays for Injuries Due to Distracted Driving?

In many cases, distracted driving leads to claims from third parties when someone files a claim against a driver and their automobile insurance company, the negligent driver and, at times, the driver's employer. Liability claims for others injured and who sustained property damage because of an accident can cause millions of dollars in compensation claims. Nothing opens you up faster to liability than if you or your driver were driving distracted at the time of an accident. A distracted driver is often found to be legally responsible or liable for damages they cause. Everyone has a duty of care or an obligation to take reasonable steps to avoid causing harm to others. Looking out for their own safety, the safety of their passengers and everyone else on the road is every driver's responsibility. When that duty is breached by distracted driving (eating, texting, reaching for a device, yelling at the kids, changing controls in the vehicle, etc.), the driver will likely be found negligent for any resulting accident and be held responsible for damages.

Distracted driving claims are costing insurance companies billions of dollars and the expenses are being passed down to consumers in the form of higher premiums. Most insurance carriers will say distracted driving accidents comprise 25 percent of their claims. Claims involving severity in accidents and injuries have increased due to people who are texting and driving at full speed. They hit someone and aren't trying to use their brakes to avoid the collision. Insurance companies are reporting that for every dollar they take in, they spend \$1.50 in claims, so they need to increase rates to keep up with the cost. According to NHSTA, there was a seven to eight percent increase in vehicle accidents resulting in fatalities or serious life-threatening injuries in 2015. Technology

does exist for just about any kind of scenario. The challenge is in keeping pace with our needs along with our bad habits; especially those behind the wheel. Some companies are trying to curb distracted driving by offering discounts. Some are having drivers install an app on their iPhones which records whether you use the phone while you're driving. Discounts are given to drivers who are not using the phone while driving. Devices that can be placed under the steering wheel near the brake and gas pedals will monitor hard braking, which is a sign someone may not be paying attention. Most distracted driving accidents are caused by texting or talking on the phone. According to the NHSTA, talking on the phone takes 37 percent of the brain activity away from the main task of driving.

Injured parties will look to a negligent driver for compensation for property damage and/or personal injury. They will look to their own automobile policy for potential coverage under PIP or UM/UIM and the negligent driver's automobile policy, employer's commercial automobile and general liability policies and any umbrella policy, as well as any personal assets, if necessary, to be compensated for their loss. Liability for distracted driving can be extended to other individuals and businesses. Owners of vehicles who negligently lent those vehicles to poor drivers, along with corporations for making their employees instantly accessible 24/7, can be held responsible for damages. Liability against the driver is based on common law and liability against the employer is based upon respondent superior, as well as improper training and inadequate or a lack of policies and procedures.

As discussed previously, distractions come in a variety of forms. Anything that takes your eyes off the road is a distraction. Not all distractions are viewed equally. Admitting liability is not always the best route to take when handling distracted driving claims. In the case of serious injuries and/or fatalities, the claims professional should thoroughly investigate all circumstances surrounding the accident and, when necessary, enlist the assistance of counsel to set up a strategy to defend the claim. The initial claims investigation is key to determining whether distracted driving was involved and will set the stage to develop a strategy to defend the claim. Investigating every possible avenue is crucial prior to conceding liability to help facilitate the settlement of a case. Claims professionals must make sure that the injured party's own negligence or distraction did not contribute to the loss, or that there were no intervening or superseding events or circumstances unrelated to either driver that may have been the cause. Various defenses may be available that can help mitigate or even eliminate the claim against the distracted driver. Performing a complete investigation and obtaining all the facts as to the cause of loss or fault can help to successfully defend a distracted driving claim.

Items to consider and to investigate in distracted driving claims include:

- Cell phone records (many companies can now differentiate between speaking and texting).
- Cell tower records.
- Texting records (possibly include actual texts).
- If texting was involved, who was on the other end of the text/did they know the person they were texting was driving?
- Witness reports.
- Police reports.
- Traffic camera footage.
- GPS/hard drive data.
- Dash cam video.
- Employer policies and procedures manuals/employee handbook – extent of implementation and enforcement.
- Auto manufacturers/cell phone service providers and manufacturers.
- Driver's personnel file, including prior disciplinary action for policy violations.

An employer's liability for distracted driving can be costly. In some cases, an employer's policy on distracted driving or the lack thereof is a critical issue. Does the company have one? If so, do they enforce it? If not, should they have one? Does it mirror state law or is it more restrictive? In serious injury cases, claims professionals should look to raise the dangers of devices that visually and cognitively distract drivers. Claims professionals should look to all sources of potential liability and contribution in evaluating claims involving distracted driving.