

Transport Topics

The New 'Rules of the Road'

By **Steven Testan**
Founder and Managing Partner
and **Darrin Meyer**
Managing Attorney
Distracted Driving Defense
Adelson, Testan, Brundo & Jiminez

The recent \$21 million jury verdict against a leading beverage manufacturer whose employee struck a woman pedestrian while driving a company vehicle sent shock waves through the trucking and fleet industries regarding the potential financial consequences of distracted driving. Even though these issues have been on the trucking industry's radar screen for years, the award sends a wake-up call for employers to reexamine their own efforts to manage this exposure and make any necessary adjustments.

In addition to the jury verdict, employer liability for injuries in vehicular accidents has expanded significantly: 39 states have enacted statutes that prohibit using handheld electronic devices while driving, and the U.S. Department of Transportation has issued similar regulations.

DOT regulations that apply to commercial drivers text messaging or using handheld cellphones carry employer fines for as much as \$11,000 per violation. And the fines, awards of back wages in regulatory actions, or punitive damages awarded in civil suits generally are not insurable.

For employers, the implications of distracted driving exposures loom largest in the following areas:

■ **Workers' compensation** — Each year, employment-related distracted driving accidents result in more than 200,000 employee injuries. In addition, liability for "serious and willful misconduct" and Occupational Safety and Health Administration regulatory violations for injuries to employee passengers riding with an employee accused of distracted driving are uninsurable and require special handling. They could leave employers responsible for paying thousands of dollars in employee back wages and benefits and substantial OSHA fines. An employer's liability may increase if injured workers prove the company required the use of handheld electronic devices while driving.

■ **Employer liability** — A web of legal doctrines can be used to hold employers vicariously liable for damages from accidents involving employees using handheld electronic devices while driving. Per se negligence liability and punitive damages may apply to employers failing to take steps to prevent the use of the devices. Even when it proves an employee's use of handheld cellphones or text messaging violated company policy, an employer still may be liable. Employers are in worse shape legally if employees routinely violate their policies and government regulations.

DOT regulations may hold employers liable when the employer technically "allows" employees to drive while using handheld devices. Punitive damages may be added if an employer is found to have "ratified" such activity by sending text messages to drivers operating vehicles, or if the employer's phone bill lists charges for multiple text messages when employees are driving.

■ **Company policies and manuals** — Recent third-party lawsuits involving distracted drivers have exploited ambiguous language in company policies prohibiting handheld cellphone use, text messaging and the use of other devices. Court decisions underscore the importance of the wording of company policies, as well as the com-

pany's deployment of the most advanced available technology to prevent the use of distracting devices. Meanwhile, personal-injury attorneys hold employers accountable for ambiguous language in company handbooks and policy statements prohibiting handheld device use.

■ **Regulatory fines** — The DOT's maximum \$11,000 fines apply per violation; there are no restrictions on the issuance of cumulative fines for multiple violations by an individual employee. In addition, recent jury verdicts against employers of distracted drivers may prompt DOT to seek larger fines, and plaintiffs' attorneys have referenced the statutes. Employers that have not taken every precaution technologically available to thwart distracted driving could face extraordinary fines in the event of multiple violations of DOT regulations.

■ **Adverse employment decisions** — An employer's protection against employee violations of company policies may come down to enforcing progressive adverse employment measures, including termination. Such disciplinary actions need to be fair, and employees need to be well aware of the consequences of violating company policy.

To mitigate their exposures, including the size of fines and, in civil cases, the award of punitive damages, trucking firms should consider the following measures:

■ **Technology solutions** — Implement sophisticated technology to block employees from using handheld electronic devices while driving.

■ **Employee communication** — Update employee manuals to explain the company's deployment of technology to monitor the use of handheld electronic devices by employees occupying a vehicle. Articulate that using any such devices while driving is strictly prohibited and subject to progressive adverse employment consequences, including termination.

■ **Disciplinary actions** — Be consistent in the implementation of disciplinary actions against employees. Be sure to collect and maintain supporting data, including evidence of the violations and proof of employee notification (by e-mail) that the employer observed the violation.

There are comprehensive approaches to the problem of onboard electronics that can coordinate the articulation of company policy, relate communication to employees and prevent the use of handheld electronic devices while driving. For example, there are applications available that allow employers to block handheld cellphone calls and text messaging while driving — some triggered by the vehicle's speed — and/or to monitor employee compliance with company driving policies.

Implementing these programs may reduce the employer's liability not only by avoiding accidents, but by demonstrating to regulators the measures the company is taking to prohibit distracted driving by its employees.

Adelson, Testan, Brundo & Jiminez, Van Nuys, Calif., is a national law firm specializing in the defense of workers' compensation claims and related matters.



Testan



Meyer