

Employee Distracted Driving: Understanding Your Business Risk and Liability

An Aegis Mobility White Paper



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Distraction, whether it's hands-free or handheld, whether it's texting or talking, is deadly.¹

These were the words of Deborah Hersman, the Chairman of the National Transportation Safety Board (NTSB), an independent safety agency, when announcing the agency's recent call to action: the NTSB now recommends a total ban of all mobile device use while driving.² According to Hersman, distraction-related crashes killed 3,092 people in 2010, "the equivalent of a regional jet crash every week."³ In the 1987 movie "Wall Street," Gordon Gekko walks on the beach and growls into his brick-size cell phone: "This is your wake-up call, pal." For companies with employees (that is, every company), this is *your* wake-up call.

In Part 1 of this paper, we briefly review the science and statistics behind the distractions caused by mobile device use. Part 2 evaluates the legal landscape. And in Part 3, we discuss smart risk management, including smart technology solutions.

1 Science and Statistics

"[M]ore dangerous than drunk driving,"⁴ distracted driving is a "deadly epidemic" on our roads.⁵ The distractions include:

- *Visual*, when you take your eyes off the road;
- *Manual*, when you remove your hands from the wheel; and
- *Cognitive*, when your mind is pre-occupied with a non-driving task – such as a telephone conversation or text message exchange.⁶

Every year, drivers – distracted by the use of mobile devices – cause 636,000 crashes, 342,000 injuries, and 2,600 deaths.⁷ There is an accident every 24 seconds. The financial toll is staggering: \$43 billion per annum.⁸

While some politicians argue over the science behind distracted driving, experts agree: mobile device use impairs driving ability. According to a study at Carnegie Mellon University, talking on a mobile device reduces the amount of brain activity related to driving by thirty-seven percent.⁹ Further, recent studies show that hands-free mobile devices are no safer to use while driving than held-held mobile devices.¹⁰ In other words, the cognitive distraction caused by mobile device use is not solved by hands-free technology.¹¹ Distracted drivers have slower reaction

¹ Deborah Hersman, NTSB: Cellphone Ban Will Save Lives, *USA Today*, Dec. 15, 2011 (on file with author).

² Press Release, Nat'l Transp. Safety Bd., No Call, No Text, No Update Behind the Wheel: NTSB Calls For Nationwide Ban on PEDs While Driving (Dec. 13, 2011) (on file with author).

³ Hersman, *supra* note 1.

⁴ Michael Austin, Texting While Driving: How Dangerous is it?, *Car and Driver Magazine*, June 2009.

⁵ Ray LaHood, Driven with Distraction, *Washington Post*, Nov. 28, 2009.

⁶ National Highway Traffic Safety Administration, Publication No. DOT-HS-811-379, Sept. 2010 (on file with author).

⁷ Ashley Halsey, What Does it Take to Get Texting Off Roads?, *The Washington Post*, Oct. 5, 2009 (citing Harvard Center for Risk Analysis).

⁸ *Id.*

⁹ Marcel Adam Just et al., A Decrease in Brain Activation Associated with Driving When Listening to Someone Speak, *105 Brain Res.* 70, 70 (2008).

¹⁰ See, e.g., Matthew C. Kalin, The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use by Drivers, *39 Suffolk U. L. Rev.* 233, 252 (2005).

¹¹ *Id.* at 253.

times,¹² and the odds of a crash are four times more likely when a driver uses a mobile device.¹³ Critically, many scientists believe that these distractions make drivers as collision-prone as having a blood alcohol level of .08%, the legal limit.¹⁴

2 Legal Landscape

With an ever-increasing number of tragic accidents, and a mountain of confirming science, the issue of distracted driving has taken center stage. Ray LaHood, the former Secretary of the Department of Transportation (“DOT”), has warned:

Every single time you take your eyes off the road or talk on the phone while you’re driving – even for a few seconds – you put yourself and others in danger.¹⁵

For this reason, the Federal Railroad Administration (“FRA”) bans the use of mobile devices by locomotive engineers operating the controls of a moving train.¹⁶ The Federal Aviation Administration (“FAA”) prohibits pilots from using mobile devices during taxi, take-off, landing, and flight operations below 10,000 feet.¹⁷ And the NTSB has called for a total ban on the use of mobile devices while operating a motor vehicle.¹⁸ While no federal agency or state legislature has adopted the NTSB’s total ban, significant restrictions are now in place:

- President Obama has banned all federal employees from typing on mobile devices while driving.¹⁹
- Two federal agencies – the Federal Motor Carrier Safety Administration (FMCSA) and the Pipeline & Hazardous Materials Safety Administration (PHMSA) – prohibit regulated drivers from texting and/or using hand-held mobile phones while driving.²⁰
- The Occupational Safety & Health Administration (“OSHA”) bans “the hazard of texting while driving.”²¹
- 39 states and the District of Columbia have laws that prevent texting while driving;²² and

¹² David L. Strayer & Frank A. Drews, Cognitive Distraction While Multitasking in the Automobile, *The Psychology of Learning and Motivation*, Vol. 54, Burlington: Academic Press, 2011, at 40-42.

¹³ Donald A. Redelmeier & Robert J. Tibshirani, Association Between Cellular-Telephone Calls and Motor Vehicle Collisions, *336 New Eng. J. Med.* 453, 456 (1997).

¹⁴ David L. Strayer et al., A Comparison of the Cell Phone Driver and the Drunk Driver, *Human Factors*, Vol. 48, No. 2, Summer 2006, at 381-91.

¹⁵ Ray LaHood, “A Message from Sec. LaHood” (on file with author) (emphasis added).

¹⁶ Restrictions on Railroad Operating Employees’ Use of Cellular Telephones and Other Electronic Devices, Final Rule, 75 Fed. Reg. 59580, 59603 (Sept. 27, 2010).

¹⁷ Prohibition on Personal Use of Electronic Devices on the Flight Deck, Notice of Proposed Rulemaking, 78 Fed. Reg. 2912-01, 2913 (Jan. 15, 2013). On January 15, 2013, the FAA initiated a rulemaking to extend the sterile cockpit rule to all pilot activity in flight. Id.

¹⁸ Nat’l Transp. Safety Bd., No Call, No Text, No Update Behind the Wheel: NTSB Calls For Nationwide Ban on PEDs While Driving (Dec. 13, 2011) (on file with author).

¹⁹ Federal Leadership on Reducing Text Messaging While Driving, 74 Fed. Reg. 51,225 (Oct. 1, 2009).

²⁰ FMCSA, Distracted Driving, What your Need to Know, available at <http://www.fmcsa.dot.gov/rules-regulations/topics/distracteddriving/-over-view.aspx> (last visited March 14, 2013).

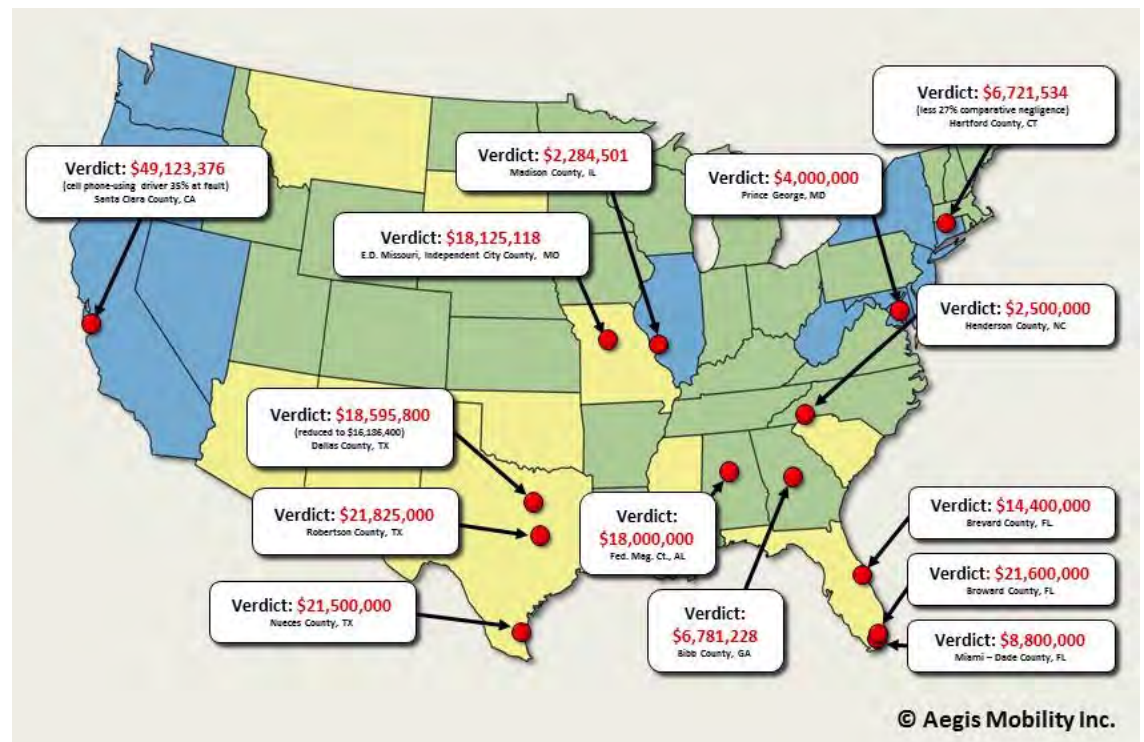
²¹ See Letter from David Michaels, Assistant Sec’y, OSHA, to Employers, Oct. 4, 2010, (on file with author) (“It [the employer’s] responsibility and legal obligation to create and maintain a safe and healthful workplace, and that would include having a clear, unequivocal and enforced policy against the hazard of texting while driving.”).

²² Truckinginfo, AAA Study: Behind-the-Wheel Cell Phone Users More Likely to Speed and Drive Drowsy, Feb. 1, 2013 (on file with author).

- 10 states, D.C., Puerto Rico, Guam and the U.S. Virgin Islands prohibit the use of mobile devices for making or receiving telephone calls without hands-free technology.²³

In the context of motor vehicles, these federal regulations and state laws set the floor – they are minimum standards.²⁴ In the event of a distracted driving accident, mere compliance will not absolve a company of liability, nor will it shield a business from a bankrupting verdict. And this is not a hypothetical risk. In the last 10 years, courts have seen an “explosion” of distracted driving cases.²⁵ In the last 5 years, juries – emboldened by a “profits over safety” trial theme – have rendered numerous multi-million dollar verdicts, as evidenced by the sample verdicts in Figure 1.

Figure 1 Representative Civil Verdicts Since 2007



The claims in these cases are easy to allege, but difficult to disprove. This is because the precise time of the accident often is not known,²⁶ and the telematics data and mobile device records – once obtained²⁷ – may show or suggest that the employee was talking on his mobile device, texting and/or emailing in close proximity to the

²³ *Governors Highway Safety Association, Cell Phone and Texting Laws, March 2013 (on file with author).*

²⁴ See, e.g., *National Safety Council, Employer Liability and the Case For Comprehensive Cell Phone Policies, 2012, at 5 (on file with author).*

²⁵ *Isaac A. Hof, Wake-Up Call: Eliminating the Major Roadblock That Cell Phone Driving Creates for Employer Liability, Temple Law Review, 84 Temp. L. Rev. 701, 701 (Spring 2012).*

²⁶ See *CLO White v. Lattimore, 236 Ga.App.839 (2003)*; see also *Hunter v. Modern Continental Const. Co., 287 Ga.App.689 (2007) (allegation that employee was on his mobile device near time of accident was sufficient to get issue of vicarious liability past summary judgment).*

²⁷ *In most cases, privacy concerns will not trump the discovery of mobile device records.* See *Detraglia v. Grant, 890 N.Y.S.2d 696 (2009) (allegation that driver was using electronic device gave plaintiff right to discovery related to all electronic devices in vehicle); B. Mitchell Simpson III, Don't Curse'Em, Sue Em: Cell Phone Use While Driving as Evidence of Negligence, 57 R.I. Bar J. 17, 17 (2009).*

time of the accident. Even if there was no actual distraction, a clever lawyer will argue that there is “circumstantial evidence” of driver distraction.²⁸ In *Hebert v. Old Republic Insur. Co.*,²⁹ the jury entered a verdict against the driver of a car involved in a two-vehicle collision. The injured plaintiff presented evidence that the driver was using a mobile device, but the driver denied this – unsuccessfully.³⁰

The typical distracted driving case involves multiple types of claims, including claims for driver negligence, vicarious liability, direct negligence, and punitive damages. These claims are summarized below.

2.1 Driver Negligence Claims

In states that ban texting and/or the use of hand-held cell phones while driving, an employee who is involved in an accident while violating these laws will be negligent *per se*.³¹ Under this doctrine, the mere act of using a mobile device while driving automatically makes the driver negligent.

For states that do not have texting and/or cell phone bans, courts look at the reasonableness of the driver’s accident-causing behavior.³² In evaluating behavior, courts will consider state laws,³³ federal regulations,³⁴ voluntary standards,³⁵ recognized best practices³⁶ and common sense. For example, in *Scott v. Matlack, Inc.*,³⁷ the court explained that “it is permissible for a trial court to admit [OSHA] regulations as evidence of the standard of care in the industry in a negligence action.”³⁸ Likewise, in *Peal by Peal v. Smith*,³⁹ the court observed that “the breach of a voluntarily adopted safety rule is some evidence of a defendant’s negligence.”⁴⁰

2.2 Vicarious Liability Claims

Vicarious liability stems from the common law doctrine of *respondeat superior*. In Latin, this literally means “let the superior make answer.”⁴¹ Under the legal theory of vicarious liability, an employer is liable for the negligent actions of its employee if

²⁸ Simpson, *supra* note 27 at 17

²⁹ Hebert v. Old Republic Insur. Co., 807 So.2d 1114 (La. Ct. App. 5th Cir. 2002).

³⁰ Id. at 1120.

³¹ Restatement (Second) of Torts § 286. In some jurisdictions, the doctrine of negligence *per se* gives rise only to a rebuttable presumption of negligence when a statute is violated. Yet, even in these jurisdictions, the presumption of negligence is often difficult to rebut.

³² See Hiscott v. Peters, 754 N.E.2d 839, 849 (Ill. App. Ct. 2001) overruled on other grounds by Thornton v. Garcini, 928 N.E.2d 804 (Ill. 2010); McCormick v. Allstate Ins. Co., 870 So.2d 547, 551 (La. Ct. App. 2004). See also Simpson, *supra* note 27, at 17, 21.

³³ See Williams v. Cingular Wireless, 809 N.E.2d 473, 477-78 (Ind. Ct. App. 2004) (discussing state statutes limiting cell phone use while driving); Hof, *supra* note 25 at 706 (“Violation of a statute may also be evidence of negligence.”).

³⁴ Wal-Mart Stores, Inc. v. Seale, 904 S.W.2d 718, 720 (Tex. App. 1995) (describing OSHA standards as “the cumulative wisdom of the industry on what is safe and what is unsafe”).

³⁵ Dupree v. Keller Industries, Inc., 404 S.E.2d 291, 295 (Ga. App. 1991) (“It is true that ANSI standards, as privately established guidelines, are admissible as evidence of negligence.”)

³⁶ Ira H. Leesfield & Mark A. Sylvester, Bad Call, 46 TRIAL 16, 18 (Aug. 2010) (discussing company policy prohibiting cell phone use); Hof, *supra* note 34, at 707 (knowledge of the dangers of cell phone driving can affect negligence claims, including the availability of punitive damages).

³⁷ Scott v. Matlack, Inc., 39 P.3d 1160 (Colo. 2002). This was not a driver distraction case, but the proposition applies equally to these cases.

³⁸ Id. at 1170.

³⁹ Peal by Peal v. Smith, 444 S.E.2d 673 (N.C. App. 1994). In Peal, the accident was caused by an intoxicated driver.

⁴⁰ Id. at 677.

⁴¹ Kalin, *supra* note 10, at 252.

he or she was acting within the scope and course of employment at the time of the accident.⁴² This analysis is fact intensive and often left to the jury to decide.⁴³

Generally stated, an employee acts within the scope of employment if his or her conduct *benefits* the employer – in any way.⁴⁴ Using this standard, courts have routinely allowed claims against employers to survive motions practice even when the accident occurred while the employee was:

- driving after normal business hours⁴⁵;
- in route to a personal event⁴⁶;
- sightseeing on a business trip⁴⁷;
- operating a personal vehicle⁴⁸; and/or
- utilizing a personal mobile device.⁴⁹

In *Clo White Co. v. Lattimore*,⁵⁰ the court held that a jury question remained as to whether the employer was vicariously liable for the accident-causing conduct of its employee because the employee “may have been” calling his employer’s office at the time of the collision.⁵¹ The accident occurred at or about 7:00 a.m., and mobile device records confirmed that the employee called his employer at 7:01 a.m., 7:02 a.m. and 7:03 a.m.⁵² The court recognized that under normal circumstances an employer would not be liable for an accident caused by an employee who was going to or coming from work.⁵³ But the fact an employee may have been on his mobile device conducting work-related business at the time of the accident creates “special circumstances” that justify an exception to the rule.⁵⁴

The reality is that distracted driving accidents expand employer liability. *Potter v. Shaw* is another illustrative case.⁵⁵ In *Potter*, the court held that an employee was acting within the course and scope of employment even though the accident occurred while he was sightseeing on an “off” day during a business trip. Applying a “foreseeability test,” the court found that sightseeing with coworkers on a day off was not “so unusual or startling that it would seem unfair to include the [resulting motor vehicle accident] among the other costs of [the employee’s] business.”⁵⁶ The holding in *Potter* demonstrates just how broadly courts are willing to define the course and scope of employment. Add millions of mobile devices and company vehicles to the equation and it is easy to see why this is a matter of great concern.

⁴² Reynolds v. L & L Management, Inc., 492 S.E.2d 347, 349 (Ga. Ct. App. 1997)

⁴³ Council on American Islamic Relations v. Ballanger, 444 F.3d 659, 663 (D.C. Cir. 2006).

⁴⁴ W. Page Keeton et al., Prosser & Keeton on the Law of Torts, 500-01 (5th ed. 1984).

⁴⁵ Yoon v. Wagner, CL 24892 (Va. Cir. Ct. filed June 14, 2001).

⁴⁶ Roberts v. Smith Barney, Inc., No. 97-CV-2727, (E.D. Pa. filed Feb. 12, 1999).

⁴⁷ Potter v. Shaw, No. 991255, 2001 WL 914203, at *2 (Mass. Super. May 29, 2001) (applying California law), aff’d, 60 Mass.App.Ct. 1112 (2004).

⁴⁸ Lattimore, supra note 26, at 382.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id. at 382-383.

⁵² Id.

⁵³ Id.

⁵⁴ Id. at 383.

⁵⁵ Potter, supra note 47, at 336.

⁵⁶ See id. (Although there was no evidence the employee was distracted by a mobile device, a mobile device very well could have contributed to the accident. Either way, the holding is significant, as discussed herein).

2.3 Direct Negligence Claims

In the event of an accident, the company should expect the injured claimant to allege that it was directly negligent. These claims spring from allegations that the company acted unreasonably in its hiring, retention, training and/or supervision of the employee who caused the accident.

These types of direct negligence claims generally require proof that the company knew or should have known that the hiring or retention of the employee – or the entrustment of a vehicle and/or mobile device to that person – created an undue or unreasonable risk of harm to the public.⁵⁷

When evaluating these claims, courts consider whether the company (1) organized work such that the employee was expected to use her mobile device while driving; (2) implemented adequate policies to prohibit or discourage mobile device use while driving; (3) had actual or constructive knowledge that the employee was engaging in risky behavior; (4) warned about the hazards and risks associated with distracted driving; and/or (5) hired an employee with a poor driving record.⁵⁸

2.4 Punitive Damages Claims

Mere negligence is insufficient to support a punitive damages award. Something more is always required. While there is no uniform national test, the general rule is that punitive damages are only appropriate when there is clear and convincing evidence of a willful and wanton disregard for, or a conscious indifference to, the safety of others.⁵⁹

In cases involving motor vehicle accidents, punitive damages are typically authorized when the collision results from outrageous volitional conduct, such as excessive speeding or driving while intoxicated, but not when the driver simply violates a rule of the road. For distracted driving to convert a garden-variety accident into a punitive damages case, courts look for a history of distraction-related behavior, prior accidents, an unenforced, untrained and/or non-existent corporate safety policy, and/or other evidence that would tend to show outrage or aggravating circumstances.⁶⁰

In *Boyle v. Pardall*,⁶¹ a case that may be a harbinger of claims to come, the court found that the injured plaintiff stated a colorable claim for punitive damages

⁵⁷ See *Hoskins v. King*, 676 F.Supp.2d 441, 446 (D.S.C. 2009) (employer may be held liable for negligent supervision when it “knew or should have known facts about [the employee] that would suggest that entrusting [the employee] with a cell phone and automobile would pose an unreasonable risk of harm to the public”); *Phillips v. TLC Plumbing, Inc.*, 172 Cal.App.4th 1133, 1139 (2009) (addressing the standard for negligent hiring/retention generally); *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 330 (S.C. 2008) (“In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public.”).

⁵⁸ See *Hof*, supra note 25, at 735-41; *Leesfield*, supra note 36 at 18.

⁵⁹ See *Lee R. Russ, Annotation*, Standard of Proof as to Conduct Underlying Punitive Damage Awards –Modern Status, 58 A.L.R. 4th 878 (originally published in 1987).

⁶⁰ See, e.g., *Lindsey v. Clinch County Glass, Inc.*, 718 S.E.2d 806, 807 (Ga. Ct. App. 2011).

⁶¹ *Boyle v. Pardall*, Order, No. LALA 005656, 2011 WL 2580714 (Dist. Ct. of Iowa, Lee County, April 1, 2011)

because the employee-driver “intentionally use[d] a cell phone while driving.”⁶² Critically, the court keyed in on the volitional nature of this conduct as the sole factor in deciding that the punitive damages claim should survive motions practice, and observed that the driver’s employer did not require the use of hands-free technology and did not issue written guidelines or precautions about the use of mobile devices while driving.⁶³

3 Managing Risk and Limiting Liability

“[F]ederal rules, regulations or state laws often leave employees vulnerable to injury and companies exposed to liability and financial costs.”⁶⁴

While the costs of distracted driving are high, smart risk management can save lives, reduce injuries, and limit a company’s business spend.

Employers have a legal duty to provide their employees with a reasonably safe workplace.⁶⁵ This includes developing adequate safety rules and policies,⁶⁶ and warning of potential hazards of which the employer is or should be aware.⁶⁷ Critically, “[c]ars are not simply for driving anymore.”⁶⁸ The modern workplace includes the mobile office, and distracted driving is a recognized hazard, if not “an extremely dangerous problem.”⁶⁹ Toward this end, an employer has a duty to exercise reasonable care to control the activities of its employees when they are acting on behalf of or for the company and/or are using an employer’s “chattel.”⁷⁰

To develop a reasonable mobile device safety program, companies should start a thoughtful, deliberative discussion with key corporate stakeholders – from accounting to legal; from management to staff. The conversation should focus on the risks and utility of mobile device use *for that company*. There is no single compliance solution. What works for one company may not work for another. The factors to consider include, among others, the company’s footprint, resources, safety culture, and risk tolerance. The National Safety Council (“NSC”) warns that “[e]mployers should set policies that exceed existing rules, regulations and laws.”⁷¹ The practical goal is to limit distracting behaviors; the aspirational goal is to eliminate them.

⁶² *Id.* at 6.

⁶³ *Id.* at 3.

⁶⁴ National Safety Council, Employer Liability and the Case For Comprehensive Cell Phone Policies, 2012, at 7 (emphasis added) (on file with author).

⁶⁵ See, e.g., Woodlawn Mfg., Inc. v. Robinson, 997 S.W.2d 544, 548 (1996) (“An employer must provide rules and regulations for the safety of its employees, furnish safe machinery and instrumentalities, provide a safe place to work, and select competent fellow servants.”).

⁶⁶ *Id.*

⁶⁷ See, e.g., Baltimore and Ohio R. Co. v. Taylor, 589 N.E.2d 267, 272 (1992) (“if an employer learns or should learn of a potential hazard, it must take reasonable steps to investigate and to inform and protect its employees, or it will be liable when injury occurs.”).

⁶⁸ David M. Cades, et al., “Driver Distraction is More than Just Taking Eyes off the Road,” ITE Journal (July 1022), at 26.

⁶⁹ *Id.* at 33.

⁷⁰ Killian v. Caza Drilling, Inc., 131 P.3d 975, 982 (2006). “Chattel” means [a]n article of personal property” – “[a] thing personal and movable,” such as a motor vehicle or a mobile device. Black’s Law Dictionary (6th ed.) at 236.

⁷¹ National Safety Council, *supra* note 64 at 7.

For a template safety program, employers should review industry standard Z15.1⁷² from the American National Standards Institute (“ANSI”).⁷³ While this is a voluntary standard, it informs the standard of care. A company’s decision not to consider – or not to comply – with the standard can or may be used as evidence of negligence at trial.⁷⁴ Z15.1 was intended “to assist organizations in defining and developing an effective safety and risk management program for managing motor vehicle operations.”⁷⁵ It applies to all “licensed motor vehicles designed to be operated primarily on public roads.”⁷⁶ This includes any mechanically or electronically powered device, not operated on rails, *e.g.*, cars, motorcycles, trucks and tractor-trailers.⁷⁷

Under Z15.1, companies “shall” have a written safety program, and it “shall” include these key elements:

- Safety policy;
- Responsibilities and accountabilities;
- Organizational safety rules;
- Orientation and training;
- Regulatory compliance management; and
- Management program audits.⁷⁸

While a complete discussion of Z15.1 is beyond the scope of this paper, it is critical to understand that the standard requires a written safety policy that makes all drivers obey – at a minimum – applicable local, state, and federal laws and regulations.⁷⁹ The policy must expressly address the issue of driver distraction, including distractions caused by mobile device use.⁸⁰ The language of Z15.1 does not ban the use of mobile devices while driving, but the *sample* policy appended to Z15.1 does. It prohibits texting and states that because “hands-free devices do not necessarily reduce [the] risk . . . [of] cognitive distraction associated with a cell phone conversation”:

Employees may not use cell phones (including hands-free) or any other mobile electronic devices while operating a motor vehicle.⁸¹

As drafted, the sample policy applies to personal vehicles and any vehicle owned, leased or rented by the company.⁸² And it extends to the use of any mobile device provided by the company while “driving your own vehicle on personal business.”⁸³ The Z15.1 sample policy also requires, among other things, that the employee

⁷² ASTM Z15.1-2012

⁷³ ANSI is the “coordinator of the United States private sector voluntary standardization system.”

⁷⁴ See, e.g., Dupree v. Keller Industries, Inc., 404 S.E.2d 291, 295 (Ga. App. 1991) (“It is true that ANSI standards, as privately established guidelines, are admissible as evidence of negligence”).

⁷⁵ ASTM Z15.1-2012, § 1.2

⁷⁶ Id.

⁷⁷ Id. at § 2.10.

⁷⁸ These are not the only elements of a compliant Z15.1 program. For a complete recitation, see § 3.2.1.

⁷⁹ Id. at § 3.2.1.1.

⁸⁰ Id. at § 4.3.

⁸¹ Id. at Appendix E (emphasis added).

⁸² Id.

⁸³ Id.

modify his or her voice mail greeting to state that he or she is unavailable to answer calls or return messages while driving.⁸⁴ Z15.1 states that this policy should be signed by a senior executive and communicated to all employees and drivers.⁸⁵

But Z15.1 does not start or stop with a written mobile device policy. It also requires that companies know the legal landscape and implement a “system of responsibility and accountability,” including a process for hiring safe drivers, performing appropriate background checks, conducting a periodic review of state motor vehicle records, training employees, establishing effective disciplinary procedures, and implementing “an auditing process that monitors compliance” with the company’s program and policies. This monitoring process should “help assure that the driver is following organizational procedures.”⁸⁶ It can be accomplished by direct observation, records review, telematics monitoring and/or other active or passive controls.

When developing a Z15.1-type policy, consider these factors:

- **Know the law.** The use of mobile devices while driving is a highly regulated issue. Companies must know the law, including applicable federal regulations;
- **Understand the risk.** Businesses should audit their crash record, claims history and insurance profile;
- **Develop a policy that fits.** Companies should build the right policy for their specific business and do it by consensus – involve all stakeholders in the discussion;
- **Educate employees and drivers.** The final policy must be more than mere words on paper. Companies should warn and train all employees on the policy; and
- **Enforcement is key.** An unenforced policy will increase liability, not limit it. In determining how best to monitor and enforce a mobile device policy, businesses must evaluate available technology solutions.

But even the best safety program cannot insulate a company from all liability. In *Laidlaw Transit, Inc. v. Crouse*,⁸⁷ the court upheld a punitive damages award against an employer despite the fact that its employee – who crashed a school bus – was “high” on marijuana,⁸⁸ which is illegal and was prohibited by the employer’s corporate policy.⁸⁹ The court reasoned that “[a] wrongful act committed by an employee while acting in his employer’s business does not take the employee out of the scope of employment, even if the employer expressly forbids the act.”⁹⁰ Under this rubric, the only way to escape liability is to prevent or eliminate the offending conduct.

⁸⁴ Id.

⁸⁵ Id. at § E3.2.1.1.

⁸⁶ Id. at § 3.2.1, et seq., including, in particular, §§ 3.2.1.2 and 3.2.1.11.

⁸⁷ *Laidlaw Transit, Inc. v. Crouse*, 53 P.3d 1093, 1099 (Alaska 2002).

⁸⁸ As Albert Einstein once famously stated: “Genius has its limits, but stupidity knows no bounds.”

⁸⁹ *Laidlaw Transit, Inc.*, 53 P.3d at 1099.

⁹⁰ Id.

Fortunately, there are now a variety of technology solutions to help companies prevent what they want to prevent. Stated another way, companies can ensure that mobile devices are used safely and in compliance with federal, state and/or local laws. For practical purposes, these technologies can be categorized into two groups: “Active” controls and “Passive” controls. Active controls require software installed on the mobile device, and give the employer the ability to determine which features function while the employee is driving. Passive controls do not require software installed on the mobile device; instead, they utilize data from fleet management and wireless billing systems to empirically measure employee use of a mobile device while driving.

Table 1 Active and Passive Controls

Functionality	Active Controls	Passive Controls
Policy Control	<ul style="list-style-type: none"> • Automatically lock keypad and screen when driving • Optionally suppress inbound alerts • Optionally allow hands-free calls • Optionally reply to inbound calls, texts, and emails • Optionally permit approved applications (Navigation) 	<ul style="list-style-type: none"> • Empirically measure and report mobile device use while driving
Software on Mobile Device	Yes	No
Types of Devices Supported	<ul style="list-style-type: none"> • Smart OS support for Android, BlackBerry smartphones and tablet computers. • Feature OS support for J2ME phones • Smart OS support for iOS smartphones and tablets coming soon. 	All
Device Ownership	Company-provided Individual-provided	Company-provided
Context (Trigger) Method	Multiple methods including: Software-only GPS; Hardware-assisted OBD and telematics	Hardware assisted telematics
Portal	<ul style="list-style-type: none"> • System administration • Policy configuration • Reporting and Analytics • Alerts and notifications 	<ul style="list-style-type: none"> • System administration • Reporting and Analytics

When evaluating which technology solution is best for any given company, employers should consider these questions:

Policy Flexibility? Different employers have different policies. Some have “zero tolerance” policies that prohibit any and all use of mobile devices while driving. Others have hands-free policies that prohibit texting, emailing and browsing, but permit inbound and outbound hands-free phone calls. Therefore, when considering technology solutions it is important to choose a vendor that offers maximum flexibility with regard to policy configurations, device types, and implementation options.

Device Support? The rapid proliferation of mobile devices has led to significant fragmentation in terms of device types. Make sure to develop a solid understanding of the devices that are covered by various vendors. Also make sure to understand how the same application can behave differently on different device types. Finally, make sure to ask questions about each vendor's roadmap plans for developing additional device features and plans for iOS.

Trigger Methods? Large enterprise requirements are highly diverse and spread across many different types of vehicles, drivers and devices. Covering this fragmented environment demands technology designed with maximum flexibility and multiple trigger options (software only and hardware assisted). Software-only triggers (GPS-based) are desirable because they work in any type of vehicle and they do not require additional capital investment in hardware systems. The drawback to a software-only trigger is a small incremental drain on the mobile device battery and an inability to distinguish between driver and passenger. Alternatively, hardware-assisted triggers require an incremental capital investment in hardware and may not work in all types of vehicles. Ideally, a single vendor can offer both.

Administration, Analytics and Reporting? A proper technology solution should give the company the ability to easily set up and administer employee drivers. It should also allow the business to see how driving behavior is actually being modified (*e.g.*, number of distractions averted, safe driving hours logged, etc.). Such data informs the level of compliance and enables remedial action when necessary. Additionally, the ability to send alerts based on changes in driving status is a good and minimally intrusive way to keep management connected and moving forward toward the desired outcome.

Experience and References? Ultimately, the most important consideration when making a decision is to select a vendor that has successfully deployed software solutions in support of others so that the company can ask these other customers questions about the technology and their experience with it.

4 About the Authors

This paper was developed by Matt Howard, Chief Marketing Officer at Aegis Mobility, in collaboration with a national law firm specialized in defending corporate clients in complex litigation matters. For more information, please visit <http://www.aegismobility.com>.

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