

CONSTRUCTION
ISSUES

The Construction Practice Group at Murtha Cullina is pleased to provide clients and friends with information about topics of interest in the construction industry.

If you have questions about the issues addressed in this newsletter, or any other matters involving construction issues, please feel free to contact the following attorneys:

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DRIVING WHILE ON THE CELL PHONE:
Could Your Company be Held Liable for Your Employee's Accident?

A construction company executive is driving to work on a weekday morning. Traffic is moderate, the weather is clear. During the course of his drive, he reaches for his cell phone and begins to retrieve work-related voicemail messages. In doing so, he fails to notice the slowing traffic and slams into the sedan directly in front of him, severely injuring the sedan's driver. The result: the executive's *company* pays a multi-million dollar settlement. Similar examples abound in the news and case books: a Florida jury awarded a 78 year old woman and her husband \$20.9 million in damages where the other driver, an employee of an Arkansas construction firm, was placing a call to his co-worker on his way to a weekend fishing trip when the accident occurred; and in Massachusetts, an employer paid a \$3.25 million settlement after one of its employees, en route to a service call for a customer, was on his cell phone at the time of the accident. With construction employees regularly on the road visiting worksites, employers should be aware that their employees' cell phone usage could expose them to significant liability.

Cell phone use has proliferated tremendously over the past 10 years, and with that the number of accidents involving cell phones has likewise increased. Alarming studies suggest that driving performance while on a cell phone is as dangerous as – or even more dangerous than – driving while intoxicated. This comparison has led to the suggestion that courts may begin to award punitive damages to victims of cell phone-related car accidents in the same way they award such damages to victims and families of alcohol-related accidents.

Whether your company could be held liable for your employee's accident depends on the circumstances. Generally, an employer's liability for the acts of its employee turns on whether the employee is engaged in company business when the damage occurs. If an employee is discussing company business on the cell phone while driving and is involved in an accident, then the employer may be held liable and face significant financial consequences. When deciding whether the employer should be liable, courts have considered whether the cell phone was provided by the employer, whether the employer reimbursed the employee for the cell phone, and whether the employer requires or encourages employees to be available to clients and the employer at all times.

What You Can Do

In an effort to reduce their exposure, companies across the nation are implementing policies either banning or limiting cell phone use by employees while driving. Some Fortune 500 companies have prohibited their employees from using cell phones altogether while driving. In addition to prohibitions, employers can:

- Post warnings on employer-owned cell phones and inside employer-owned vehicles;
- Encourage drivers to pull off the road when making or receiving calls;
- Require the use of hands-free headsets or devices; and/or
- Prohibit cell phone use during inclement weather or heavy traffic flow.

In developing a company cell phone policy it is also helpful to state clearly and in writing that it is a violation of company policy if the employee is charged with traffic violations involving the use of cell phones while driving and have the employees acknowledge the policy by signing it. Employers also should review their cell phone policy periodically. Most importantly, it is necessary not only to inform employees of the company policy, but also to inform clients. Also, keep in mind these same concerns and policies should apply to your employees “texting” while driving. Implementing these policies will not bar liability completely, but it will support an employer’s argument that it acted reasonably and should not be held liable for the employee’s acts.

Understandably, your company has an interest in being able to contact your employees at all times and to advance your business interests as fast as possible. However it is important to realize that ignoring this growing legal concern could result in significant financial consequences.

This newsletter is one of a series of publications by Murtha Cullina LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have.

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