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Telecom Law:

Prevent employees from using phones while driving

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A telecom-savvy client of mine recently returned from a wireless trade show (Mobile Explosion) in Las Vegas.

None the worse for wear, she called me to ask some important questions about corporate management of wireless (aka "cell") phones.

At one presentation, an expert in the area of telecommunications expense management (TEM) correctly informed his audience the best way to manage the expense is to bring all devices "in house," and make wireless devices company property. In this way, economies of scale are easiest to achieve, with employees who use such devices having the sexiest features at the lowest cost, and the company has a single bill to manage instead of multiple bills and expense reports submitted whenever employees get around to it.

The speaker also correctly raised the issue of tax consequences to employees of this approach, but left at least one of the attendees a bit confused as to what she should take back to her company. "What do you think?" she asked.

My initial response was an emphatic "Whoa, Nellie!" — in a cowboy-style accent, of course. While the cost-conscious speaker likely was correct in terms of the pure cost efficiencies of wireless device management, he failed to address the myriad risks of employer-ownership of such devices. As is often the case (and is certain justification for the existence of the insurance industry), the real conflict lies between costs and risks. In this case, the most cost-effective solution in the short-term may prove to be extremely costly in the long run.

For those who remain unconvinced, ask some of the losers of recent court battles — or on the paying side of some healthy settlements — regarding employer liability in the event of an accident when an employee is using his/her wireless device while driving (see, for example, *Smith v. Beers Skanska*, a Georgia case settled out of court for \$4.75 million, or *Alicia Bustos and Ruben Bustos v. Lazaro L. Leiva and Dyke Industries Inc.*, Miami-Dade case no. 01-13370 CA 30, which settled for \$16.1 million after a \$20.98 million jury award).

Multimillion dollar settlements in favor of the victim(s) of these cases are the norm. For sure, this partially is due to the



MARTHA BUYER

fact that the employer has the deepest pockets. Beyond that, according to Gene Connors, a Reed Smith LLP labor and employment partner: "The employer in each case invited liability in failing to create, publish, enforce and get employee-signed acceptances to a policy that stresses 100 percent driving safety and forbids cell phone use and other distractions when driving 'for' their employer."

As such, it is my recommendation that cost savings should take a back seat to risk management. In this case, employers should not provide wireless phones to employees (but choose to

reimburse them for expenses incurred — yes, there are tax consequences to the employee in this scenario) and, secondly and absolutely, all employees, whether using a company-owned or personally-owned phone must sign a carefully drafted wireless device policy that states, in effect, "if you use a device while driving, you, and only you, are responsible for the subsequent actions."

The Insurance Information Institute published some striking statistics in its October 2007 newsletter (www.iii.org/media/hottopics/insurance/cellphones/). While the statistics are interesting in terms of growth in mobile phone usage, they also are sobering regarding the effects phone usage has on the severity and frequency of injuries caused. The bottom line is that phone usage while driving is distracting, and distracted drivers are involved in a disproportionate number of serious accidents.

The issue is particularly sensitive in the Rochester region, where five young women lost their lives last spring while the driver was alleged to be sending text messages while driving. Talk about a wake-up call: These families, and the girls' friends, will feel acute pain from the loss for a long time.

With this in mind, include the following in a mobile phone or device policy, which increases in importance when an employee also uses a company-supplied vehicle:

- ♦ A provision underscoring that safety in driving is of primary concern and that no one engaged in company business or in the use of any company-supplied vehicle is to engage in any activity that could or would divert attention

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Continued ...

or distract while driving. Also provide specific examples of activities to avoid.

- ♦ A provision specifically forbidding the use of a mobile phone for company business while an employee is driving. Voicemail capability enables an employee who is driving to leave the phone turned off until the employee has stopped moving in the vehicle. As an aside, whether an employee abides by the policy is his/her decision, but the company policy must be unequivocal. Driving while speaking on the phone is not acceptable.

- ♦ A requirement for the use of hands-free technology at all times.

- ♦ A requirement that an employee who uses his/her personal cell phone for company purposes must respect and adhere to all relevant company policies and laws relating to the use of wireless devices.

- ♦ Company-provided safety training relating to mobile

phone use.

- ♦ A provision addressing health concerns and providing that an employee who uses a wireless device does so at his/her own risk. This addresses employees who use such devices while not driving but otherwise use the devices.

- ♦ It is recommended, in the strongest possible terms, that the policy be signed by each employee and placed in his/her personnel file.

Finally, in order to minimize exposure, enforce the policy. Having a good policy is the first step but, without enforcement, the policy isn't worth much more than the paper it's printed on.

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