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## Ontario's cell phone ban for drivers and liability implications for employers

Ontario's ban on the use of hand-held devices while driving will take effect on October 26, 2009. The cell phone ban was introduced in Bill 118, the *Countering Distracted Driving and Promoting Green Transportation Act, 2009* which received Royal Assent on April 23, 2009. Bill 118 amends the *Highway Traffic Act* to prohibit drivers from using hand-held wireless communication devices (such as cell phones and Blackberries) and hand-held entertainment devices (such as iPods, or PlayStation Portables). The amendments also prohibit display screens in vehicles—such as DVD or MP3 players and laptop computers—if they are visible to the driver and unrelated to the driving task. Drivers who break the law may be required to pay fines up to \$500.

The government has announced its intention to provide a three-month period in which the focus for police officers will be on educating drivers about the new law. Following this period, on February 1, 2010, police will begin issuing tickets to enforce the ban.

The Bill 118 amendments are in response to recent studies, including one by the Ontario Medical Association, which indicate that the use of cell phones while driving dramatically increases the risks of accidents. Some studies suggest that the risks from cell-phone use while driving equal those from alcohol impairment.

### **HIGHWAY TRAFFIC ACT AMENDMENTS**

The amendments to the *Highway Traffic Act* prohibiting the use of hand-held devices while driving provide as follows:

78.1 (1) No person shall drive a motor vehicle on a highway while holding or using a hand-held wireless communication device or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages.

Entertainment devices

(2) No person shall drive a motor vehicle on a highway while holding or using a hand-held electronic entertainment device or other prescribed device the primary use of which is unrelated to the safe operation of the motor vehicle.

Hands-free mode allowed

(3) Despite subsections (1) and (2), a person may drive a motor vehicle on a highway while using a device described in those subsections in hands-free mode.

### **EXEMPTIONS**

The amendments to the *Highway Traffic Act* provide certain exemptions from the cell phone ban. Hands-free devices such as headphones, or Bluetooth devices, as well as Global Positioning Systems, if used to provide navigation information, are exempt from the ban. Drivers are permitted to use cell phones if their vehicle is not in motion, lawfully parked, and not impeding traffic. Drivers of vehicles for emergency services such as ambulances, fire trucks and police cars, as well as drivers who use a cell phone to contact emergency services, are all exempt from the restriction.

The new legislation provides the Minister of Transportation with the authority to prescribe by regulation further exemptions from the ban in addition to those contained in the *Highway Traffic Act*. The prescribed exemptions are currently provided in Ontario Regulation 366/09, which was filed on September 29, 2009.

Ontario Regulation 366/09 provides numerous exemptions for specific persons and devices. For example, law enforcement officers, while engaged in the performance of their duties, may drive while using a hand-held device. Law enforcement officers are also exempt from the display screen restrictions. Drivers of commercial motor vehicles, tow trucks, courier delivery vehicles, licensed taxi cabs, street cars, and road building machines are subject to a time-limited exemption that will last until January 1, 2013. Readers may consult the regulation for exemptions specific to their organization. The regulation can be found at:

[http://www.e-laws.gov.on.ca/html/source/regs/english/2009/elaws\\_src\\_regs\\_r09366\\_e.htm](http://www.e-laws.gov.on.ca/html/source/regs/english/2009/elaws_src_regs_r09366_e.htm)

## EMPLOYER MAY BE LIABLE

Even prior to the cell phone ban, cell phone use by employees, particularly where employees are required to travel as part of their work duties, presented legal issues for employers. Many employers provide their employees with electronic devices such as cell phones and Blackberries and may face considerable liability risks if an employee is involved in an accident while using such a device.

The principle of vicarious liability in the employment context says that employers are liable for the wrongful and/or negligent acts of their employees where the employee is acting within the course and scope of his or her employment at the time the wrongful or negligent conduct occurs. Therefore, if a driver is involved in an accident while using a cell phone to conduct business, or is otherwise considered to have been at work, the driver's employer could be held vicariously liable for the damages that arise from the accident.

But vicarious liability is only one of the risks employers face when their employees are distracted by cell phones while driving. An employer could be found negligent for its own conduct in encouraging, or permitting, employees to use cell phones for business without adequate training or consideration of safety issues. Similarly, direct liability may attach to an employer where the employer has provided cars or cell phones to employees and is aware that employees make work-related calls while driving.

Direct liability could potentially arise under the occupational health and safety legislation if the employer fails to take steps to protect the health and safety of a worker, or if the employer does not warn employees of the dangers of talking on a cell phone while driving. An example of such a risk would be employer participation in a teleconference with an employee while he or she is driving.

## THE AMERICAN EXPERIENCE

The concept of an employer's vicariously liability is well-established in Canadian employment law. However the issue of an employer's vicarious liability stemming from an employee's cell phone use has not yet arisen in the Canadian jurisprudence. Several cases in the United States deal with the issue.

Perhaps the most publicized lawsuit involving a U.S. employer's vicarious liability for an employee's distracted driving was against Cooley Godward, a law firm. The law firm was sued after one of its associates, who was using a cell phone while driving, hit and killed a 15-year-old girl in 2000. The associate pleaded guilty to the felony crime of failing to stop at the scene of an accident. She served one year in jail, with a four-year suspended sentence. In the civil suit brought by the victim's family, a jury ordered her to pay more than \$2-million damages. Cooley Godward was also sued on the basis that it was vicariously liable for its employee's actions. The victim's family sued the law firm for \$30-million. The main issue at the trial would have centered on whether the associate was on a work-related call, and therefore whether the employer was vicariously liable.

The case did not go to trial. Instead the employer settled out of court with the victim's family for an undisclosed amount.

In Georgia another employer, International Paper Co., was sued when one of its employees, who was allegedly talking on a cell phone while driving, collided with another car. The other car rolled into a ditch and the victim suffered significant injuries. Once again, the parties settled out of court, with International Paper paying the victim damages of \$5.2-million.

## CELL PHONE USE POLICIES

In light of the cell phone ban and the risks associated with talking and driving, employers may find it prudent to implement new policies on the use of cell phones, and other wireless devices, to reduce the risk of liability. Employers who require employees to travel as part of their work duties may consider providing employees with hands-free technology, which is exempt from the cell phone ban. Despite the exemption, however, an employer could still face vicarious liability where the employee is distracted by a call and causes an accident. As a result, employers who provide their staff with hands-free technology should also develop policies to promote safe driving.

Cell phone policies should reflect the new provisions in the *Highway Traffic Act* by clearly outlining both acceptable and unacceptable use of cell phones and other wireless devices while driving. Employers might consider the following standards when developing their policies:

- The use of cell phones or other hand-held wireless devices is prohibited while operating a motor vehicle;
- Employees must leave the road and safely park the vehicle before using a cell phone or other hand-held device;
- While an employee is operating a motor vehicle, phone calls cannot be answered and must be directed to voice mail;
- Employees will not be disciplined for failing to answer a call while they are operating a motor vehicle.

Cell phone policies should be accompanied by an employee communication strategy prior to implementation. It might be advisable for some employers to accompany a new policy with an employee training program that shows the risks of distracted driving, as well as proper approaches to the safe use of hands-free technology. All cell-phone policies should be enforced consistently and fairly in respect of all employees and there should be an escalating disciplinary approach for violations of the policy.

### In Our View

Upon the coming into effect of the cell-phone ban, Ontario will join a number of other provinces, such as Newfoundland, Nova Scotia, and Quebec, that have passed similar legislation. Manitoba's prohibition against cell phone use while driving will be effective in 2010. British Columbia and Saskatchewan have each announced plans to introduce similar legislation in the near future.

For further information, please contact [JD Sharp](#) at (613) 940-2739.

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