Cell Phones & Liability: Part 2, How to Create an Effective Cell Phone Ban

Banning your employees from talking on the cell phone when they drive on company business can be a controversial policy. But it's a fight worth fighting, especially if you're in charge of safety at your workplace. After all, traffic accidents are the leading cause of workplace fatalities and among the leading causes of lost-time injury. And while it's not all the fault of cell phone use, the fact of the matter is that employees who talk on the cell phone while they drive are more likely to get into accidents than workers who don't. And, as we saw last month in Part 1, if the accident was the result of cell phone-induced distractions, your company is at serious risk of liability.

Last month, we showed you how to make the *legal* case for such a ban. But getting your company to accept such a ban is just the beginning of the solution. You can win the battle and still lose the war if the cell phone policy you adopt isn't appropriate for your organization. "If the policy isn't carefully thought through, people will simply ignore it," cautions a Vancouver employment lawyer.

Unfortunately, it seems that many companies in Canada don't do a good job of writing a cell phone ban. The *Insider* looked at literally dozens of policies and found loopholes that you can almost literally drive a truck through. We'll explain what the common loopholes are and show you how to plug them. There's also a Model Policy on page x that combines the strongest features of what we considered to be the best cell phone policies in Canada and the U.S. You can adapt our model to fit your own needs and circumstances.

The Importance of a Policy

There are two reasons you need to put your cell phone ban in writing:

To Clarify Expectations: Some safety rules are rooted in common sense and instinct. For example, an untrained employee probably doesn't need to be told to keep away from dangerous machines having nothing to do with their jobs. But cell phone bans don't necessarily dovetail with instinct. The dangers of cell phone use on the job are far from apparent. Ask the average worker (or union representative) and they'll tell you that cell phones enhance productivity by allowing for "multitasking." So employees who use cell phones when they drive on company business aren't likely to feel like they're doing anything wrong. On the contrary, they might think they're actually doing the company a favor. A direct and clear written policy is necessary to disabuse

employees of this misconception.

To Minimize Liability: As we discussed in Part 1, if an employee speaking on a cell phone gets into a traffic accident, the victim might try to hold the company liable for negligence. Having a written cell phone policy can help the company defend itself against such a charge because it shows that you did in fact take steps to prevent the risk. It also makes it harder for the victim to show that the employee was an agent of the company. Why? Because an employee who violates a written company policy is less likely to be considered to have been acting "within the scope of his or her employment."

Writing The Policy

Now let's discuss how to create an effective policy banning the use of cell phones while driving. As a starting point, we'll note that some companies ban employees from *having* cell phones and other wireless communication devices in their vehicles. Or they insist that the devices be turned off when a company vehicle is being driven for work-related tasks. This approach has the virtue of simplicity and straightforwardness. Get rid of the equipment and you remove the distractions.

But this is one of those cases where the cure is worse than the disease. "There are important safety reasons that employees *should* have cell phones and radios with them when they drive," explains an Ontario safety coordinator. In addition, the OHS laws of at least eight provinces—AB, BC, MB, NT, NU, PE, SK and QC—expressly require employees who work in isolation to carry communication devices. Banning cell phones and other devices in vehicles might run afoul of those "working alone" regulations. Moreover, a ban on having equipment in the vehicle is likely to be ignored, says the Ontario safety coordinator.

Impact: Your cell phone policy shouldn't ban the equipment; it should impose restrictions on its use. Here's how to do that.

Plug 6 Loopholes

Banning cell phone use while driving is trickier than it might sound. These are the six common traps that companies fall into and how to sidestep them:

1. Banning Just Cell Phones

The Loophole: Many of the policies we saw tell employees that they may not use their "cell phones" while driving. But the problem isn't confined to cell phones. There are plenty of other communication devices that can cause problems. "CB radios are a major source of distractions and traffic accidents," notes the Ontario safety coordinator.

How to Plug It: Make sure your policy covers not just the use of cell phones but all "wireless communication devices," including mobile phones, text pagers and two-way radios (Policy, I (a)).

2. Not Specifically Covering Personally-Owned Vehicles & Equipment

The Loophole: Some policies apply only to cell phones and communication equipment furnished by the company and/or to company vehicles. That leaves employees free to talk on their personally-owned equipment and in their own vehicles.

How to Plug It: Specify that the ban applies to all equipment and vehicles "whether

owned by the company or the worker" (Policy, I (b)).

3. Not Covering Business & Personal Conversations

The Loophole: Some policies ban employees from carrying on "personal conversations" when driving on company business. By implication, it's okay to hold a *business* conversation when driving.

How to Plug It: Ban the use of wireless devices to conduct any conversation, business or personal (Policy, I (b)).

4. Lack of Instructions on How to Handle Incoming Calls

The Loophole: Typical policies ban employees from making calls when driving but don't tell them how to handle incoming calls.

How to Plug It: In addition to warning employees not to make calls, tell them what to do when a call comes in. Our Model Policy lets employees answer or return the call as long as they pull off the roadway in a safe spot and remain parked until the conversation ends (Policy, I (d)).

5. Covering Only the Drivers

The Loophole: Most cell phone policies address only the driver. But, as safety coordinator Kathy Steck points out, "it takes two people to create the danger: the person driving the vehicle and the person on the other end of the line that he's talking to." "Whether we're a manager, a supervisor or a co-worker, when we take or make a cell phone call from or to an off-site worker who's behind the wheel of a vehicle, we're acting as enablers."

How to Plug It: Make sure your policy bans others in your organization from calling employees when they're driving. Also tell them what to do when receiving calls from employees behind the wheel (Policy, II (a)-(c)).

6. Not Providing for Enforcement

The Loophole: Cell phone policies often omit appropriate enforcement provisions. That's a problem because simply writing a clear policy is a waste of time if you don't enforce it. In fact, a policy not backed by discipline is worse than useless because it shows that you understood the danger but didn't try hard enough to correct it.

How to Plug It: Make it clear that violation of the cell phone policy is a serious offence that could lead to discipline up to and including termination. And make sure you actually do follow through when and if violations occur (Policy, III).

Model Cell Phone Policy

Here's a model policy that you can use to ban cell phone use by employees who drive. Although you should adapt the policy to fit your individual needs and circumstances, make sure you cover the same ground addressed by this policy.

Sample Company Cell Phone Policy

Purpose

The purpose of this policy is to protect your safety by banning you from using cell phones and other wireless devices when driving that may cause distractions that prevent you from concentrating 100 percent on safe operation of the vehicle and thus lead to accidents.

I. Rules For Drivers

a. Ban on Wireless Communication Devices. When you are on duty and driving, you may not use a wireless communication device of any type. This includes not only cell phones, but also mobile phones, text pagers, two-way radios and other wireless devices.

b. Scope. The ban on the use of wireless communication devices above applies:

- To all vehicles operated by workers while on duty, whether owned by the company or the individual worker;
- To all wireless devices, whether owned by the company or by the individual worker; and
- To all conversations, whether personal or business-related; and

c. Hands-Free Devices. The ban on using cell phones and other devices while driving applies to all devices, including the use of cell phones with hands-free headsets.

Handling Calls While Driving.

- **Incoming Calls:** Make sure your phone has caller ID and/or voice mail. If the phone rings, don’t answer it unless and until you pull over in a safe spot (or let a passenger answer the call). If it’s urgent, you may accept or return the call, provided that you remain parked off the roadway. You may not resume driving until your conversation ends.
- **Outgoing Calls:** You may not make outgoing calls while driving. If you want to place a call, pull over in a safe spot first.

II. RULES FOR SITE WORKERS

- **Ban on Calling Workers Who Are Driving.** If you know that a worker is driving, do not call him or her on the cell phone or other wireless device.
- **Procedures for Calling Workers Who Might Be Driving.** If you do not know if the worker is driving and the matter is urgent, you may place the call at the worker’s cell phone but must immediately ask the person if he or she is driving. If the worker is in fact driving, hang up after telling the worker to call you back when he/she pulls over or gets out of the vehicle.
- **Procedures for Receiving Calls from Workers Who May Be Driving.** If you receive a call from workers who are on their cell phone or other wireless device, ask them if they are driving. If they are, tell them to pull over and call you back. Hang up the phone as quickly as possible.

III. ALL WORKERS

Effect of Policy. Violations of the foregoing rules will be considered a serious offence and may result in the imposition of discipline up to and including termination.

Reminder: The use of cell phones and other wireless devices while driving leads to distractions that can result in traffic accidents. So, while we cannot force you to adhere to these rules when you are not on duty, we strongly urge you to do so for your own safety and well-being and that of family, friends and third parties on the roadways.

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I have read and will abide by the conditions as stated in this document regarding the operation of any vehicle for company business and while conducting work at the company's worksite.

Name (printed)_____

Signature _____ Today's date_____

Witness _____ Today's date_____