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• **LIABILITY**

Driven to Distraction

A jury verdict against a distracted driver working for the Coca Cola Co. crosses the $14-million mark, and some companies impose bans on using phones while driving on company time.

BY STEVE YAHN

Companies are rethinking their in-vehicle cellphone policies following a surge in the severity of jury verdicts against corporations and stringent new federal and state regulations governing cellphone-related distracted driving.

The most high profile case involves Coca Cola Co., which was slammed by a Texas jury last May that awarded $21 million to 37-year-old Vanice Chatman-Wilson. Her car had been struck by a car driven by Araceli Venessa Cabral, a Coca-Cola Co. sales rep, who was talking on a cellphone while driving a company car.

Chatman-Wilson was left with severe neck and back pain that required surgery. For her pain and suffering, the court awarded her $14.44 million, $11.54 million in actual damages and $2.9 million in punitive damages.

In addition to the driver's negligence, the jury cited Coca-Cola's own gross negligence in failing to implement a sufficiently stringent cellphone policy in the face of its knowledge regarding the dangers of injury and death from cognitively impaired drivers using cellphones.

Coca-Cola, which previously had a hand-free policy, said it planned to appeal the ruling, a spokeswoman said. It has since adopted a zero cellphone usage policy for drivers of company vehicles.

"The Coca-Cola verdict was a wake-up call for a lot of people, but the entire area of distracted driving law has been evolving," said Darrin F. Meyer, managing partner, distracted driving defense at Adelson, Testan, Brundo & Jimenez, a national law firm based in Van Nuys, Calif., which was not involved in the case.

As many as 39 states restrict cellphone and text messaging use while driving, he said, and the U.S. Department of Transportation has broadly interpreted corporate responsibility for violations that can each result in fines up to $11,000 per infraction.

Meyer also noted that fines by the U.S. Occupational Safety and Health Administration can reach as high as $5,000 in distracted driving cases, and, like with DOT and state fines, these infractions are not insurable.

Bob Hilliard, who, along with Thomas J. Henry, represented the plaintiff in the Coca-Cola case, said he's seen a "shift in corporate mentality about the need to have a no-cellphone policy across the board."

"More and more, corporate America is realizing there is no safe cellphone use while you're driving," he said.

According to ZoomSafer's second annual survey of more than 900 transportation and fleet professionals, the number of fleet operators that have adopted written policies pertaining to employee use of cellphones while driving on the job increased 29 percent in the 12-month period ending in the spring.

As many as 80 percent of fleet operators had written policies in the spring of 2012, up from 62 percent in the spring of 2011, the survey found.

"The liability for all companies across the country, especially large ones like Coca-Cola that have fleets in various states in the United States, is very high," Henry said. "Companies have to realize that the new cellphone and texting environment is like the new drunk driving."

Paul Leary, a Philadelphia-based partner at the Cozen O'Connor law firm, said, "I think the implication is going to be — and I've already seen it with my clients — that a more explicit distracted driving policy will be called for, one that's going to require each driver to sign a statement, and it's going to be detailed."

Companies want to comply with the new federal regulations, but also want written protocols in the event there is an accident. If there are claims against the employer and the case goes before a jury, companies want to show they have a well-documented distracted driving policy, he said.

In addition to jury verdicts and new federal regulations, accidents from cellphone usage and texting raise the specter for corporations of workers' compensation payouts.

"On the defense side," said Meyer, "we're beginning to see that these distracted driving lawsuits are now turning into serious and willful workers' compensation claims." He noted that workers' compensation cases are a serious matter from an employer liability standpoint.

COMPANIES TAKE ACTION

One company that has made notable changes in its cellphone and texting usage policies is Farmington, Conn.-based OTIS Elevator Co., the world's leading manufacturer, installer and maintainer of elevators, escalators and moving walkways. OTIS has more than 3,000 vehicles on the road.

"Over the past year and a half or so, what we put in place is that we do not allow any usage of hand-held cellphones or texting while driving no matter what the policy in any given state," said Phil Schreiber, OTIS' fleet manager for North America.

"We do have hands-free solutions so drivers will avoid the temptation of using hand-held cellular phones," he said. "That's what they need to stick to. Unless it's an emergency, we prefer that drivers don't do anything until they come to the place they need to be and have parked their vehicle."

Schreiber said that the company has never suffered a fatal injury due to distracted driving, "but you can see the writing on the wall."

"It doesn't take a nuclear scientist to understand current conditions are just an accident waiting to happen," he said. "In today's fleet environment, you've got to be nuts to allow employees to talk on hand-held cellular phones while on the road. It's a completely losing proposition."

Another large company, Los Angeles-based Reliance Steel & Aluminum, instituted a strict no-cellphone usage policy for its 1,800-truck fleet last August.

"Our policy bans the use of any mobile electronic communication device," said Don Taylor, the company's manager of fleet safety. "Our drivers can't use a cellphone, they can't use an iPod, CB radio or text message — they can't do anything. The only time they can use an electronic device is when the truck is safely and legally parked."

Taylor added that, when a company vehicle is involved in an accident, one of the first things Reliance does is pull the cellphone records of the driver.

Michael Kruse, senior director of safety and loss control at Reliance, which distributes a full line of more than 100,000 metal products to more than 125,000 customers, said that drivers were terminated in some cases for violating the company's cellphone policy.

"All our commercial fleet policies are very detailed and we expect them to be strictly adhered to," he said.

In a big-picture sense, when it comes to fleet distracted driving cellphone and texting practices, developing the right corporate culture is seen by experts as the key to success.

Chris Hayes, Hartford, Conn.-based director of transportation services for Travelers Risk Control, said, "When we talk to our customers about reducing the risk of accidents from distracted driving, particularly around cellphones and texting, we talk not only about establishing a policy that would either eliminate or severely limit the use of technology while driving, but we also talk about the culture of their organization and how it is conveyed."

Hayes said that, if you're a manager trying to reach a driver on the road, the right practice is to either leave them a voicemail message or if they answer say, "I have some changes for you, call me when you're somewhere safe."

Once companies put strict cellphone usage policies in place, the next big issue is whether or not to adapt technology that blocks use of electronic devices in corporate vehicles.

Cellcontrol, a Baton Rouge, La.-based developer of solutions to battle distracted driving, said a year-long study it conducted found that only 5 percent of Fortune 500 companies are enforcing corporate policies regarding their drivers' use of cellphones by using one of the top five distracted driving technology vendors.

"The texting-while-driving concerns impact any corporate risk manager, fleet manager, CFO or CEO; they're all at risk," said Gerry Kennedy, president of Charles River Insurance Co., an agency based in Framingham, Mass. "And now they know that technology is coming out to protect them against cellphone misuse in company vehicles."

Corporations are "hiding behind the company manual," Kennedy said, assuming that written policies and practices are enough protection in distracted driving cases. But as the Coca-Cola verdict shows, policies often fall short.

Companies need to have physical, active technology that provides both prevention and auditing services, he said.

"We've trained ourselves that we need excellent communication between managers and drivers, but now the legal situation has come into play and that argues for technology applications," he said. "You can't legislate human nature. It just won't work."

Carriers are slow to promote new technology applications, Kennedy also said. "They need to be aware of the new technology, more of which is coming out every day. They have to realize that the times are changing."

Meyer said the future is best served by systems that can block the use of cellphone and text messaging entirely. "I don't think even a clear company policy is enough," he said. "I believe technology is the future, because just telling somebody they can't do something is not going to work."

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