



# ARE YOUR DRIVERS THREATENING THE SURVIVAL OF YOUR BUSINESS?

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## ARE YOUR DRIVERS THREATENING THE SURVIVAL OF YOUR BUSINESS?

All organizations with vehicle operations, including those whose employees operate their own personal vehicles for business, are at risk for devastating negligent entrustment lawsuits. Learn how to protect your company.

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One of the greatest risks for any organization with commercial automobiles is negligent entrustment cases, defined as civil actions that hold employers liable because they are considered negligent in “entrusting” an employee or contracted driver with a vehicle that injured a third party. These cases can threaten the very survival of an organization.

Oftentimes, it’s mistakenly assumed that these risks apply only to those who operate large fleets of tractor trailers. In reality, any employer who operates vehicles for business purposes, including personal vehicles used by employees, are at risk for these civil actions. In fact, in Michigan’s largest-ever vehicle negligence verdict, the driver was in a pickup truck.

Based on the severity of the negligent conduct and if the evidence supports it, a judge can charge a jury that they are free not only to consider an award of compensatory damages, but also punitive damages (an additional award of damages to deter future similar conduct by the negligent parties). In fact, punitive damages are frequently requested by injured parties in cases where negligent entrustment is alleged. Commercial risks are favored targets for punitive requests in lawsuits, thus placing an additional burden on the employers.

But what triggers these large verdicts? In this white paper, we’ll answer that question and examine best practices for lowering your risk and improving your overall transportation safety program.

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## SCOPE OF NEGLIGENCE MOVES FAR BEYOND POOR MVRS

In negligent entrustment cases, the employer is held responsible for the driver, a practice known as vicarious liability. The backbone of a case is the doctrine of foreseeability, the idea that the employer knew—or should have known—that the driver had a poor driving history, was incompetent, or unsafe. These are characteristics that can be defined very broadly.

In recent cases, triggers for large negligence verdicts go beyond traditional factors such as driver selection and the driver's Motor Vehicle Record (MVR). In fact, law firms today specialize in specific triggers, such as distracted driving and driver fatigue.

With a large financial verdict on the horizon, plaintiffs will obtain records about the driver, employer, and its safety program, including cell phone records, driver safety scores, MVRs, and training documentation. And with many civil tort cases heard by a jury, photographs may be used to stir emotions and attain a large verdict.

### Distracted Driving: Having a Policy is Not Enough

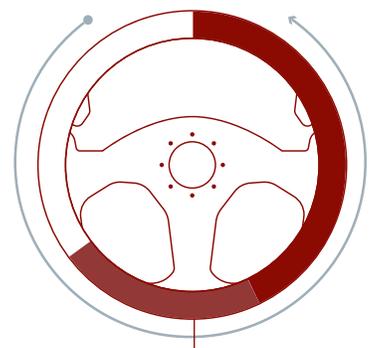
Distracted driving is a widespread problem. Most surveys show that respondents agree it's a dangerous practice but admit to doing it regularly. It is also a dynamic topic that triggers vehicle negligence verdicts and draws considerable attention in today's transportation safety program.

Most recently, the use of hands-free devices has come under scrutiny. A study on using cell phones while driving conducted by Virginia Tech Transportation Institute (which installed cameras in vehicles for 12 months) found that drivers' eyes were not on the road from 43 to 65 percent of the time while using a cell phone, even if they were using a hands-free device.<sup>1</sup>

In 2012, a Texas jury awarded \$21 million in damages to a woman who was struck by a Coca-Cola driver who was using her cell phone at the time of the accident.<sup>2</sup> The plaintiff's attorneys argued that Coca-Cola's cell phone policy was "vague and ambiguous" and said the company knew the dangers of cell phone use, but "withheld this information from its employee driver."

Issues arise from employers not adhering to distracted driving policies consistently. Many companies, even those with policies, call their drivers regularly. This practice, along with drivers taking other work-related calls, is often cited by juries in vehicle negligence verdicts.

### VIRGINIA TECH STUDY



**43 to 65% of the time while using a cell phone, drivers' eyes are not on the road**



## EMPLOYERS NEED DISTRACTED DRIVING POLICIES THAT ARE:



Specific



Enforced consistently



Not open to interpretation



State the consequences of failure to follow the policy



Document how policies are enforced

Exposure to vehicle negligence cases is not limited to commercial vehicles. In the Coca-Cola verdict described above, the driver was in a passenger vehicle. Transportation safety programs need to be applied to all vehicles used by employees, including personal vehicles.

### Driver Fatigue

In 2015, a New Mexico grand jury awarded plaintiffs \$165 million in connection with a double-fatal collision that occurred when a FedEx truck hit a pickup truck. Plaintiffs' attorneys argued that FedEx failed to properly train its drivers, that the driver had been taking sleeping medication for issues related to night driving, and that FedEx had no training or safeguards for its drivers operating vehicles between midnight and 6:00 a.m., when accidents are seven times more likely.<sup>3</sup> The FedEx driver in this case was a contract driver. Contract drivers often have more than one job and are more susceptible to driver fatigue and related accidents, so they should be avoided.

In addition, poor route planning is a greatly understated root cause of driver fatigue and accidents. When truck routes are not planned well, it can encourage rushing and subject drivers to heavy traffic, more night driving, and erratic sleep schedules.

WHEN TRUCK ROUTES ARE NOT PLANNED WELL, IT CAN ENCOURAGE RUSHING AND SUBJECT DRIVERS TO HEAVY TRAFFIC, MORE NIGHT DRIVING, AND ERRATIC SLEEP SCHEDULES.

## BUILDING AN EFFECTIVE SAFETY PROGRAM

Given the trends in negligent entrustment cases, employers today need to look at every aspect of their transportation program to limit their exposure and improve driver safety.

### Hiring

Driver safety begins with the hiring process and should be conducted thoroughly and consistently by the appropriate personnel. When operational personnel are pressured to fill a position, they may rush through the process, disregarding important issues and standard protocol, sometimes even allowing a driver to start before reviewing an MVR.

The interview and candidate review process should look for signs that a candidate lacks professionalism or has behavior issues, recognizing that a driver's personality and off-the-road behavior are significant predictors of future driving behavior. These include:

- Personality traits like immaturity, irresponsibility, hostility, anger, impulsiveness, and thrill seeking
- Financial issues like credit problems or failure to pay child support
- Workplace issues like absenteeism, insubordination, and job hopping



### MVRs

Transportation safety programs today need to include much more than MVRs and driver selection, but MVRs are still a cornerstone. MVR reviews should be performed for all driver candidates and conducted annually for existing drivers, including those who use personal vehicles for business use. To carry out an MVR review correctly:

- **Use a national database.** While the MVR system is a state-by-state system, not all states share information and some consistently lack complete violation data. Using a national database helps employers maintain control over the quality of an MVR and gain the most complete and up-to-date information quickly.
- **Establish criteria for evaluating MVRs.** Insurance companies/Third Party Administrators (TPAs) can help employers establish these criteria. Employer checks of applicant/employee driving records should look back at least 36 months on a driver's record; however, a best practice is to review 5 to 10 years.
- **Consider accidents without violations.** Police often do not show up at accident sites, especially during peak traffic times, and when they do, it is difficult to determine who is at fault. In most accidents, both drivers are at fault, to some degree, and past accident involvement—regardless of fault or violations—is a very strong indicator of future accidents.
- **Include procedural or paperwork violations in MVR criteria.** Red flags include ignoring correspondence, fines, and expiration dates, and failure to meet deadlines.
- **Utilize resources** to understand MVR terminology, which varies from state to state.

## HIRING BEST PRACTICES

- Use employee referral **incentives**
- **Allow** non-operational company personnel (human resources, safety, etc.) to have **input** on selection
- **Train staff** on effective interview techniques, such as allowing candidate to provide open-ended responses and taking notes
- Use **multiple screening efforts**, including drug screens, criminal background checks, etc.
- Have **minimum standards**, such as age 21 and 3 years of U.S. driving experience
- **Never** make a hiring decision without reviewing the MVR
- **Inquire** if applicants for contract driver positions have other jobs, in particular, other driving jobs. The intent is to determine if applicant could potentially violate the hours of service requirements and to avoid fatigue issues.
- Do **reference checks** that ask if an applicant is eligible for rehire, and document efforts
- Reach a hiring decision by **consensus among all parties**—operations, human resources, safety, other managers
- If your company's procedure is to allow the operational staff to make the final selection, **promptly notify** all hiring team members of the decision

## Documentation

Transportation programs should maintain documentation related to actions taken to address driver shortcomings. Without these records, if a motor vehicle accident occurs and the employer's driver is at fault, the employer could face a costly verdict for failing to address a history of complaints against their driver.

It's also important to execute a program consistently. Plaintiffs' attorneys will spare no expense in examining driver records and will discover when programs are not carried through consistently or exceptions are made for key personnel.

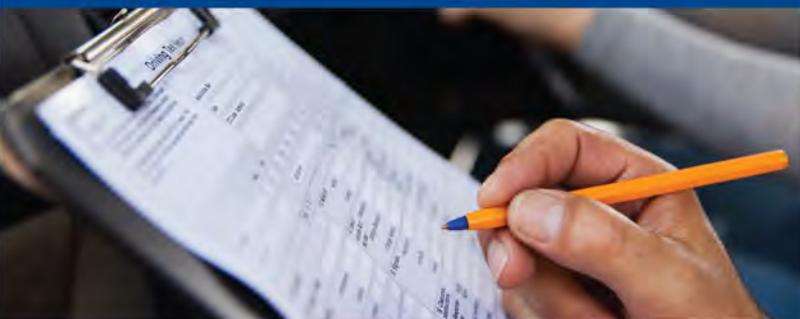
Accident investigations should be conducted through a documented process to determine if the accident was preventable and whether additional training is necessary. These investigations should look at the history of the driver, with a paper trail addressing those trends.

Finally, employers should document the required controls they have in place (hiring procedures, safe driving rules, etc.) for both commercial and non-commercial vehicles. The latter have been involved in some of the largest vehicle negligence settlements in recent years.

## ROAD TESTS

Road tests continue to be an important part of the evaluation and training process, as long as they are conducted properly. These tests should:

- Approximate actual driving route and conditions
- Be predetermined and documented
- Evaluate key driving behaviors: signaling, using mirrors, proper backing up, lane changing, following distances, etc.
- Have a company representative accompany the candidate in the vehicle
- Be conducted in the type of vehicle that normally will be operated



## VEHICLE RIDE-ALONGS

Vehicle ride-alongs are a longstanding safety technique valuable in revealing the root causes of accidents and identifying corrective actions. Along with observing driving behaviors, these can allow managers to:

- Determine if route stops are logically sequenced and in logical areas
- Observe loading of vehicles for route efficiency
- See if drivers are bogged down with superfluous tasks
- Determine the strength of training programs
- Evaluate company communications and adequacy of driver support



## Telematics and Monitoring

New advances continue to emerge in telematics, which tracks vehicles, often with GPS technology. Telematics can measure vehicle speed, fuel mileage, and seatbelt use, as well as fast starts, hard stops, and harsh cornering—signs of an aggressive driver. Technology is also available to detect cell phone use and disable electronic devices like cell phones and laptops.

Driver monitoring offers a low-tech but effective alternative (or supplement) to telematics. These programs put a decal on the back of a vehicle with a phone number, asking: “How is my driving?” Caller feedback identifies driving behaviors that cannot be reliably captured by telematics, such as tailgating, cutting off another vehicle, or pulling out in front of oncoming traffic. It can also link driving patterns to dangerous behavior, such as cell phone use when a vehicle is weaving on the road, with repeat calls identifying trends that need corrective action.

## SUMMARY AND ADDITIONAL RESOURCES

With law firms winning massive negligent entrustment verdicts for their clients, employers need to understand what triggers these settlements, examine their transportation safety programs, and make improvements. These actions can not only improve driver safety and lower transportation losses, but also ensure an organization’s survival and future growth.

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### Footnotes

1. Study conducted by Virginia Tech Transportation Institute, “The Impact of Hand-Held & Hands-Free Cell Phone Use on Driving Performance & Safety Critical Event Risk,” Virginia Tech Transportation Institute, April, 2013, p.45-46.
2. Risk Management Monitor, May 14, 2012.
3. The Santa Fe New Mexican, February 6, 2015

## About the Authors



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A graduate of the University of North Carolina-Chapel Hill, Mr. Danford holds Certified Safety Professional (CSP) and Associate in Risk Management (ARM) designations. He is a member of the Board of Certified Safety Professionals (BCSP).



**Kevin Warczyglowa** is a **Risk Control Specialist** at PMA Companies and leader of PMA's Transportation Team that specializes in consulting and providing services to PMA's commercial auto clients. He has over 15 years of risk control experience, including extensive commercial auto (fleet safety) risk management knowledge and experience. He works closely with PMA risk control management to develop service capabilities and best practices (driver selection, driver training/education, and overall fleet safety services).

Mr. Warczyglowa holds a Bachelor of Science degree in Safety and Environmental Management from Slippery Rock University and earned the Associate in Risk Management (ARM) designation. He is a member of the American Society of Safety Engineers (ASSE).

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