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DRIVING, TEXTING...& WORKING? NOT OUR EMPLOYEES

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By RBS Lawyers

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How do your employees stay in touch when out on the road? Do they phone, text and email you? Are they behind the wheel when they call? Let's hope not.

British Columbia's amendments to the *Motor Vehicle Act* came into force in February, 2010. The new law makes unlawful the use of cell phones while driving, but is broader than that. Entitled "Use of Electronic Devices while Driving", the new provisions make it illegal even to "hold" or to "watch" an "electronic device" while driving. For absolute clarity, even televisions made the naughty list. (Of course the new law includes exceptions based on "hands-free" use, use in a "safely parked" vehicle, and use by emergency personnel. ICBC's website is a helpful reference for how the law works in practice).

Employers ought to reflect on the new legislation, and on employee cell phone use while driving generally. We highlight below some of the issues raised for the workplace.

DISCIPLINE

Inevitably, some employees will disregard this law, and employers may have little tolerance. But will cell phone use while driving constitute "just cause" for termination? Typically, mere breach of a regulatory law like this one will not provide grounds for termination, even if it leads to an accident. This is why a prudent employer will want to have in place a clearly worded written policy, perhaps including "zero tolerance" language that prohibits such activity. An existing Employee Policy Manual should be amended, or a memo circulated to employees. Either way, the employees should be required to "sign off" on the policy and the written evidence of their acceptance should be maintained on file. These steps will significantly strengthen the position of the employer if an employee alleges that a termination for cell phone use while driving is wrongful.

LIABILITY AND INSURANCE

Typically an employer is liable for the negligent actions of an employee acting in the course and scope of his





or her employment. If an employee drives during work, the employer is liable for damages arising from accidents caused by the employee. This will be the case whether or not the use of a cell phone while driving contributes to the accident. The point worth emphasizing is that, as has been statistically proven, drivers are far more likely to cause accidents while using a cell phone. Therefore an employer who does not clamp down on the behavior is far more likely to be met with legal proceedings arising from car accident related injuries, with all of the headaches, wasted time and possible negative consequences for insurance premiums that such proceedings will bring.

Consider also whether cell phone use while driving could possibly put an automobile insurance policy at risk. Under British Columbia's *Insurance (Vehicle) Act*, insurance coverage is forfeited if the driver is convicted of a *Criminal Code* driving offence. In British Columbia, the new "Use of Electronic Devices while Driving" provisions do not create a criminal offence, but that is not the end of the analysis. Section 249 of the *Criminal Code* criminalizes "dangerous driving", whether causing bodily harm or not, if the circumstances demonstrate that the driving at issue demonstrated a "marked departure" from standards of reasonably safe driving. It is not difficult to envision scenarios where blatant use of a cell phone meets the "marked departure" standard, especially as society's tolerance for distracted driving falls.

Criminal "dangerous driving" scenarios may arise from *employees* using cell phones while driving (note that numerous criminal charges for dangerous driving in Canada involve truckers - ie: people working - operating poorly maintained vehicles). Consider therefore the employee who can be proven to have been in regular use of a cell phone while driving, perhaps even texting at the very point of impact. And what if the electronic communications are to the employer, and it can be proven that the employer actively encouraged this practice in blatant disregard for the law? This scenario is not unlikely (we all know it happens daily on our roads). Nor is it a stretch to believe that a *Criminal Code* "dangerous driving" charge could follow, and perhaps an "aiding and abetting" charge for the employer. These circumstances could put insurance coverage at risk and trigger devastating financial exposure where personal injury has resulted.

We are not aware of any criminal dangerous driving convictions in Canada that are based on cell phone use. But they may come, and a "marked departure" should be easier to prove where a driver brazenly flouts a regulatory prohibition.

REPUTATION

The employer's concerns about cell phone use behind the wheel should extend beyond the prospect of legal consequence. Consider: your company logo is emblazoned on the side of the new company vehicle. But your employee never gets off his cell phone. This simple marketing strategy fails, as reputation is





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completely undermined by the lasting impression of your company's disregard for safety.

The careless employee then kills a pedestrian while on the phone. A highly publicized lawsuit follows, in which the media daily drags your company through the mud. Reputation is further damaged, perhaps irreparably.

CONCLUSION

As a society, we have quite properly determined that using cell phones while driving is dangerous, and it has been banned by law. The prudent employer will take steps to ensure that workplace policies and habits conform with society's views. Turning a blind eye could have dire effect.



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