

## **Distracted Driving and Cell Phone Policies**

A White Paper on Implementation

*By Campbell Durrant Beatty Palombo & Miller PC*

A 2016 report by the U.S. Department of Transportation, National Highway Traffic Safety Administration found that 3,179 people were killed, and 431,000 people were injured, in motor vehicle crashes involving distracted drivers in 2014.<sup>1</sup> “Distracted driving” is defined as “when a driver’s attention is diverted away from driving by a secondary task that requires focusing on an object, event, or person not related to the driving task.”<sup>2</sup> Unsurprisingly, the use of cell phones significantly increases the dangers of distracted driving; studies show that the risk of a crash increases 3.6 times when a driver interacts with a handheld device.<sup>3</sup>

Meanwhile, the use of such devices is pervasive. A 2013 study showed that more than two third of U.S. drivers aged 18-64 had self-reported as having talked on their cell phone while driving at least once in the prior thirty (30) days, and nearly 1/3 of drivers had read or sent texts or emails while driving.<sup>4</sup> Research meanwhile demonstrates no difference in distraction levels between hands-free and hands-on cell phone usage, and some hands-free tools, such as speech-to-text, may make the distraction worse.<sup>5</sup> Meanwhile, a report from the National Safety Council concludes that the number of crashes involving cell phone usage is significantly underreported.<sup>6</sup> The problem of distracted driving due to the use of cell phones is, therefore, likely more prevalent than the evidence suggests.

In Pennsylvania, local governmental entities are generally immune from liability for tortious injury to other persons or property. *See* 42 Pa.C.S.A. § 8541 *et seq.* However, one of several exceptions to local government immunity applies when an injury arises from the operation of a motor vehicle in the possession or control of the local governmental entity.<sup>7</sup> Under the standards which have been developed by Pennsylvania courts, an injury caused by the operation of a motor vehicle will qualify for the exception to local government immunity, and a municipal entity may be held liable.

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<sup>1</sup> Traffic Safety Facts, Research Note, Distracted Driving 2014 (NHTSA Apr. 2016), *available at* <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812260> (last checked July 14, 2017).

<sup>2</sup> Investigation and Prosecution of Distracted Driving Cases (NHTSA May 2017), *available at* <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812407-distracteddrivingreport.pdf> (last checked July 14, 2017).

<sup>3</sup> *Id.*

<sup>4</sup> Morbidity and Mortality Weekly Report, Mobile Device Use While Driving—United States and Seven European Countries, 2011 (Centers for Disease Control and Prevention, March 15, 2013).

<sup>5</sup> Investigation and Prosecution of Distracted Driving Cases.

<sup>6</sup> Crashes Involving Cell Phones, Challenges of Collecting and Reporting Reliable Crash Data (on file).

<sup>7</sup> 42 Pa.C.S.A. § 8542(b)(1); *Bottoms v. Southeastern Pennsylvania Transportation Authority*, 805 A.2d 47 (Cmwlth. 2002).

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In light of the clear dangers presented by distracted driving, it is important that municipal entities enact, and enforce, policies which forbid employees from engaging in the types of behaviors which increase the risk of a crash while operating municipal vehicles or while driving in furtherance of municipal business.

The Pennsylvania Labor Relations Board has not yet addressed the issue of distracted driving policies. However, the Board has squarely confronted the issue of whether an employer must bargain a policy restricting cell phone use.<sup>8</sup> In that case, the Department of Public Welfare announced that it was instituting a policy restricting cell phone use to breaks, meal periods, and other off-duty time. The Department refused the Union's demand to bargain the policy, offering instead only to meet and discuss the policy. The Union brought an unfair practice charge, alleging that the Department's unilateral action in implementing the policy was a violation of the Public Employee Relations Act. The Board Secretary refused to issue a complaint on the Union's charge, and the Board affirmed that decision, holding that the implementation of the policy restricting cell phone usage was an inherent managerial prerogative because it impacted the usage of employee cell phones only during working time. If, however, a policy is not narrowly tailored to only affect employee working time, then it touches upon the terms and conditions of employment and is a mandatory subject of bargaining.

In a 2005 PLRB decision, the Board also held that an employer did not commit an unfair practice by unilaterally implementing a cell phone and computer usage policy which was narrowly tailored to apply only to employee work time, and which provided an exception for personal emergencies.<sup>9</sup> Under both PERA and Act 111, the Board has reaffirmed that a cell phone usage policy which impacted employees only during on-duty, working hours was a matter of inherent managerial prerogative not subject to bargaining.<sup>10</sup>

In contrast, in an earlier decision, a school district's unilateral implementation of a cell phone policy prohibiting teachers from receiving cell phone calls without prior written approval was found to be an unfair labor practice, because it restricted usage during preparation periods, lunch, and before and after students arrived at school.<sup>11</sup> The impact on employees during these non-work periods outweighed the school district's interests, and the policy thus impacted the terms and conditions of employment. The school district committed an unfair labor practice by unilaterally implementing the policy to the extent the policy impacted the employees' use of cell phones on non-work time.

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<sup>8</sup> See *Service Employees International Union, Local 668 v. Commonwealth of Pennsylvania, Department of Public Welfare*, 37 PPER 74, 2006 WL 6824712 (Final Order, June 20, 2006).

<sup>9</sup> See also *International Union of Operating Engineers, Local 542 v. Upper Southampton Township*, 36 PPER 112, 2005 WL 6716450 (Final Order, 2005).

<sup>10</sup> See *Fraternal Order of Police Lodge 32 v. City of Butler*, 41 PPER 116, 2010 WL 6808146 (Final Order, 2010).

<sup>11</sup> See *Monessen Education Association v. Monessen City School District*, 35 PPER 33, 2004 WL 6017676 (Proposed Decision and Order, March 26, 2004).

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Although the Pennsylvania Labor Relations Board has not yet addressed the issue of a unilateral implementation of a distracted driving policy, its prior recognition of the managerial prerogative of employers to adopt policies limiting cell phone usage while on duty, combined with its recognition of the inherent right of municipal employers to adopt policies on safety, make it very likely that the Board would permit the unilateral implementation of a carefully tailored distracted driving policy.<sup>1</sup> The policy prepared on this topic has been tailored to meet these objectives and to improve the likelihood of success before the PLRB. If you believe a more detailed or tailored driving policy is warranted, you should consult your solicitor or labor counsel

<sup>1</sup> See *SEPTA v. Transportation Workers' Union of America*, 525 A.2d 1 (Cmwlth. 1987); *Butler County Association*, 25 PPER 25117 (Proposed Decision and Order, Jun. 17, 1994).