

Employer liability for worker texting habits

QUESTION: One of my workers was walking through the warehouse at my worksite when she turned a corner and collided with a forklift. As a result, she is severely injured. When the incident occurred, she had her head down and was texting on her smartphone. Am I liable?

ANSWER: Likely, unless you, as the employer, are able to demonstrate you took all reasonable precautions to prevent the accident.

Unsafe use of a smartphone can lead to liability even where the underlying act is not illegal. Recently, a YouTube video went viral of a woman walking in a mall, head down while texting. Unaware of her surroundings and distracted by her phone, the woman fell into a fountain and is now suing the mall.

At present, no Canadian jurisdiction has enacted health and safety legislation specifically directed at smartphone activity in the course of employment.

However, every jurisdiction has some form of statutory requirement which requires an employer to take all “reasonable precautions” to protect the health and safety of workers.

An employer that fails to take all reasonable precautions may be the subject of a Ministry of Labour order or be charged and prosecuted for an offence under applicable health and safety law.

The phrase “all reasonable precautions” generally includes an employer having a clear policy in place, of which workers are aware and on which they are trained, that prohibits unsafe activity in the course of employment. The policy must also be consistently enforced.

When considering potential liability for a smartphone-related injury, employers should ask themselves the following:

- Does a policy exist that prohibits unsafe use of a smartphone in the course of employment?



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- To what type of conduct does the policy relate (such as texting, e-mailing and talking)?
- Are workers aware of the policy?
- Have workers been trained on the policy?
- Does the policy dictate where, when and how a Smartphone can be used in the workplace?
- Is the policy enforced transparently and consistently?
- Did the accident occur in a place, at a time or in a manner in which the worker might reasonably have been expected to be using a smartphone?
- Was the communication personal or business related?
- If the communication was personal, were the worker’s actions condoned by the employer?
- If the communication was business related, was the worker required by the employer to respond immediately or could she have waited?
- Was the worker’s conduct in flagrant disregard for the policy?
- Had the worker engaged in, and been disciplined for, similar conduct in the past?
- What did the employer know, or should the employer have known with reasonable diligence, about whether and to what extent the policy was being followed?

To minimize the risk of a smartphone-related injury, every employer should turn its mind to the issues and take reasonable precautions to

protect workers.

This includes developing a policy that specifically addresses smartphone activity.

The policy should include a general prohibition on unsafe Smartphone usage (including texting, e-mailing and cell phone talking); guidelines indicating where, when and how a smartphone can be used; an explicit prohibition on driving while using a smartphone unless in a hands free manner in accordance with the prevailing law; guidelines indicating whether personal usage is permitted and under what circumstances it is permitted; a statement encouraging workers to pay attention to their surroundings when using a smartphone; a statement encouraging workers to wait to respond to smartphone messages until they can do so safely; and a statement encouraging workers to avoid unnecessary smartphone use.

Workers should be given a copy of the policy and appropriate training, and the policy should be actively and transparently enforced.

The employer should also keep a record of any contravention of the policy as well as steps taken in response by the employer and worker.

To further prevent Smartphone incidents, managers should refrain from sending unnecessary Smartphone communication to workers and model good Smartphone behaviour.

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