COMMERCIAL FLEET:

Managing the Legal Risks of Vehicle Safety Technologies

A White Paper

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Every company whose business depends upon large industrial vehicle fleets is worried about vehicle accidents. Although the business cost of accidents is substantial, it is the risk of lawsuits and punitive damages that keeps many fleet and risk managers up at nights. One need only drive down the interstate and count the number of billboards advertising plaintiffs' attorneys and trucking accidents to have that idea reinforced.

How does it work? How do the lawyers behind those bill boards build cases that result in juries giving them tens-of-millions of dollars in actual and punitive damages? The short answer is that they try to persuade a jury that the company was negligent in entrusting their vehicle to the employee-driver. A company acts negligently if they fail to exercise a reasonable standard in the eyes of the jury. If a company is found negligent, they can be punished with punitive damages.

What is a reasonable standard of care? What is a company measured against? A reasonable standard of care is a legal standard for measuring whether or not a defendant acted negligently in a particular action. A corporate defendant will be measured by being compared to the standards and practices of its industry peers mixed with a healthy dose of the expectations of the community. As a defendant, you can be found to have been negligent in numerous areas.

What are the criteria on which the company can be measured? There are many, but the general categories are:

- Driver qualification requirements;
- Driver training programs;
- Driver conduct policies;
- Vehicle maintenance and inspection policies and procedures;
- Post-accident requirements and management; and
- Appropriate use and integration of Safety Technology.

Much could be written about each of these, but this white paper focuses specifically on the opportunities and risks presented by the appropriate use and integration of safety technology.

The first thing to acknowledge about safety technology is that it is a broad concept. There are many different types of safety technology and some are more beneficial than others, depending on the circumstances. The second thing to acknowledge is that integration of safety technology is not a straight-forward process. Technology must be studied, approved, purchased, installed, and then intertwined with the company's other processes and procedures. This is no small feat in a new vehicle and is even more daunting for existing vehicles, which must be taken out-of-service for any retrofit.

EXECUTIVE SUMMARY

Unfortunately, accidents do not wait for companies to fully integrate their safety technology. This white paper highlights an emerging theory of negligence: **The failure to integrate new safety technology which would have prevented the accident**.

This is a very powerful and persuasive argument to a jury. The accident has already occurred and the victims are severely injured or deceased. The jury is then told that the accident could have been prevented if the company had merely installed Brand X safety technology. Then imagine that the company's competitor already had the technology installed in its vehicles. This is a recipe for a negligence finding and punitive damages.

The question becomes: *How does a company balance the need to implement adequate levels of vehicle safety technology to avoid a negligence finding while still trying to maintain business and operational efficiencies?*

Have a Plan; specifically, a Safety Technology Integration Plan. The Plan is both a blueprint for managing and improving vehicle safety but also a self-serving document intended for litigation. Its purpose is to demonstrate and persuade a jury that the company made more than reasonable efforts to integrate vehicle safety technologies where it could and made reasonable business necessity decisions where it couldn't. Some of the factors to address in a good plan include:

- Recognition of important safety technologies
- Discussion of the cost of the technology relative to its impact on safety
- Comparison to what other companies in the industry are doing
- A reasonable timeline for integration and retrofitting
- Discussion of why particular technologies are not integrated; and
- Identification of technologies which offset the technology not used

The Plan should be flexible and scalable. At times, the company may need to deviate from the Plan and that's fine. But the deviation should be documented within the Plan along with an explanation of why the deviation is necessary and whether the company will make other changes to mitigate the deviation.

Having a Safety Technology Integration Plan demonstrates thoughtfulness and prudence on the part of the company. Rather than shy away from new technologies, the company embraced them and did everything reasonable to make its vehicle fleet safer. No Safety Technology Plan, nor even any safety technology, will ever fully prevent accidents. But after the accident occurs, the Plan becomes the corporate defendant's most powerful argument against allegations of negligence and claims for punitive damages.

INTRODUCTION

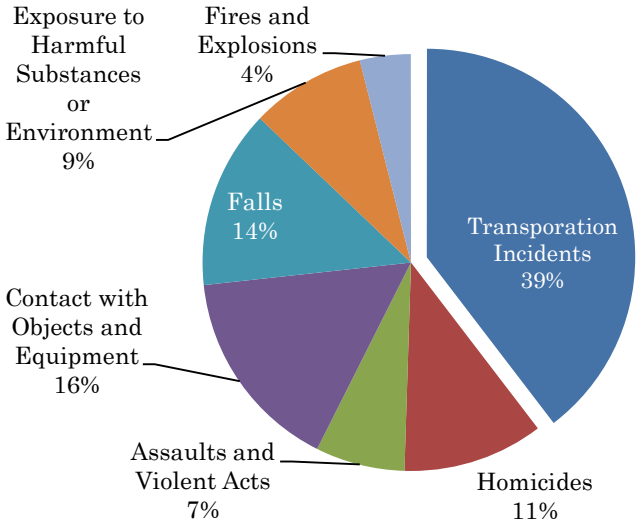
> **"Every 12 minutes someone dies in a motor vehicle crash, every 10 seconds an injury occurs and every 5 seconds a crash occurs."**[1]
>
> — The Occupational Safety and Health Administration

A great number of these accidents occur while the driver is working, whether directly on the job, commuting to or from work, or tangentially connected. In recent years, there has been a sharp increase in holding companies responsible for the driving behavior of their employees.

At the same time, there has been a dramatic increase in the types of safety technologies that companies have at their disposal. These safety technologies often address specific safety concerns, such as blind spots, backing, and other issues. For example, backing draws a great deal of attention: the National Safety Council estimates that one out of four vehicle accidents can be blamed on poor backing techniques.[2]

While everybody can agree that implementing new safety technologies fleet-wide will increase safety, immediate integration is not realistic. This white paper will examine the liability associated with fleet safety policies and the implementation of safety technologies, and will provide practical solutions for doing so in a realistic, financially-conscious, and reasonable manner—on your company's timetable and budget.

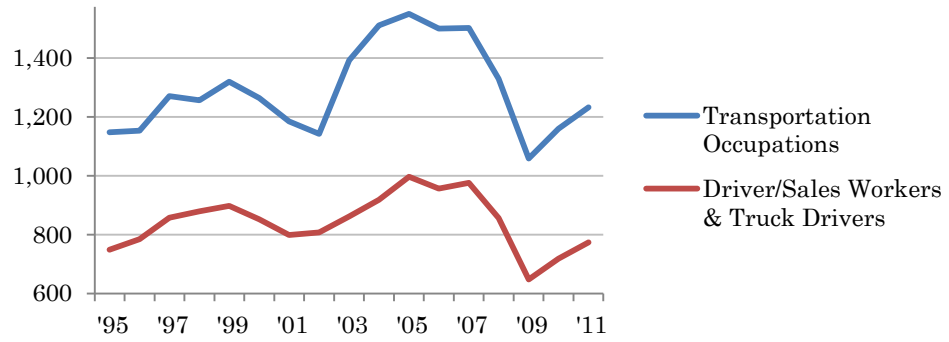
<u>Figure 1</u>: Manner in Which Fatal Work Injuries Occurred (2010)
U.S. Dep't of Labor, Bureau of Labor Statistics[3]



Highway incidents alone (at 22%) (a subset of transportation incidents) accounted for more than one out of every five fatal work injuries in 2010.[4]

RECENT TRENDS IN FLEET SAFETY

Figure 2: **Number of Transportation Occupation Fatalities (1995-2011)**
U.S. Dep't of Labor, Bureau of Labor Statistics[5]



Although fleet fatalities dropped in 2008 and 2009, likely as a result of the recession, their numbers have begun climbing again. Additionally, in recent years, there has been an increase in vehicle safety lawsuits.

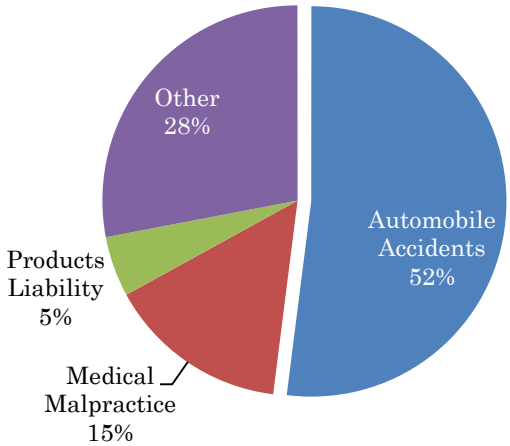
Causes for this include an enhanced public awareness and appreciation of the dangers that drivers pose on the road. An overwhelming contributing factor has been the increased use of cell phones and other technological devices while driving, resulting in "distracted driving."

This has enabled plaintiffs' attorneys to aggressively target companies that utilize a vast number of drivers, which, in turn, has further increased the public's awareness of the driver safety issue.

Plaintiffs' attorneys do not limit themselves to distracted driving cases, however. Plaintiffs' attorneys have shown themselves willing to go after all aspects of a company's driving and fleet management, including safety policies, maintenance, and the appropriateness of the vehicles for the task at hand.

Figure 3: **Breakdown of Personal Injury Lawsuits (2005)**
U.S. Dep't of Justice, Bureau of Justice Statistics[6]

In 2005, the last year the BJS conducted such a survey, over half of all personal injury lawsuits filed in the U.S. involved automobile accidents.[7]



A LOOK AT RECENT CASES

City of San Diego Settles for $18.5 Million in Case Where 9-Year Old Boy Hit By Garbage Truck[8]

In November 2011, a nine year old boy was struck by a garbage truck while skateboarding in the San Diego area. The city of San Diego settled with the boy's family for $18.5 million, even though the city maintained that the driver, with 19 years' experience, was performing a normal turn when the boy suddenly entered the intersection on his skateboard, without stopping or checking for traffic. The boy suffered numerous internal injuries and broken bones, and his left leg had to be amputated.

Victims of a 2007 Fatal Crash That Left Three People Dead Awarded $15.7 Million.[9]

In 2013, following a massive truck and car accident that occurred in November 2007, a Connecticut jury awarded the surviving family members and injured victims $15.7 million. The jury found that the company which owned the tanker truck that jumped the median and caused the accident had been negligent and reckless. The law firm representing the victims is continuing to pursue the parent company of the owner of the truck.

Maryland Couple Awarded $2 Million in Dump Truck Accident[10]

In October 2008, an elderly couple was walking home following lunch. Due to a construction zone that blocked the sidewalk, the couple was forced to walk in a closed lane of traffic. While doing so, they were struck by a dump truck owned by the construction company. One of the victims sustained a broken back and fractured wrist, while the other victim died from her injuries at the scene. The jury found that the construction companies had been negligent and awarded the couple $2 million in damages.

Jury Awards $2 Million to the Family of an Inmate Killed by a Dump Truck While on Work Detail.[11]

In August 2007, an inmate on work detail was struck and killed by a 39-ton dump truck while picking up trash on the inner loop of a highway exit ramp. Testimony at trial showed that the dump truck driver exceeded the posted speed limit and improperly crossed a solid white line while speeding up in an attempt to pass a tractor-trailer. The jury awarded the family of the inmate $2 million.

Large Pizza Chain Ordered to Pay $32 Million after Deadly Crash Involving Delivery Driver.[12]

In 2013, a Texas jury held a large pizza chain liable for $32 million after one its drivers lost control of his vehicle and slammed into the victims' car. The accident was found to have been caused by worn tires on the delivery vehicle. The jury found that the pizza chain was at fault for not enforcing a policy that drivers' vehicles be inspected.

Texas Jury Awards $22 Million for Not Uniformly Disseminating Safety Policy[13]

In 2012, a Texas jury awarded $22 million ($12 million in compensatory and $10 million in punitive damages) to a woman injured by a salesperson for a large corporation who was talking on her cellphone.

Integral to the jury's verdict was the fact that the corporation had a cell phone use policy that it has disseminated to a portion of its workforce, but not to the salesperson involved in the accident. The plaintiffs' attorney was able to use this fact to convince the jury that the corporation was aware of the risks associated with cell phone use and was negligent in taking steps to decrease those risks.

Louisiana Jury Awards $25 Million for Vehicle Accident, Relying on "Black Box" Technology[14]

Also in 2012, a Louisiana jury awarded $12.5 million each to an individual and his deceased passenger's daughter after they crashed into a vehicle abandoned on the highway by a drunk driver.

The jury analyzed "black box" technology from the abandoned vehicle in support of its finding that the driver of the abandoned vehicle had been intoxicated at the time he abandoned his vehicle on the side of the highway. In addition, the jury found that the driver's employer had negligently entrusted the driver with the vehicle. The damages were later reduced on appeal.

Implications

These cases, and many others like them, demonstrate certain themes. Juries have become very deferential to technology, and are very comfortable with the idea that technology can dramatically improve safety or lead to the truth during trial.[15] These types of cases also have great implications for the installation of safety technology on only a portion of a company's fleet. By doing so, a company inherently recognizes that there is a safety risk, and plaintiffs' attorneys will claim that the company was negligent in *not* implementing the technology on its *entire* fleet, especially if the vehicle involved in the incident was one of the company's vehicles without the new safety technology.

In any lawsuit involving a company driver, a plaintiffs' attorney will bring suit under one, or both, of two legal theories: vicarious liability (also known as *respondeat superior*) and negligent entrustment.

Vicarious Liability

Vicarious liability, or *respondeat superior*, makes an employer liable, irrespective of the employer's own fault, for the negligent driving of one of its employees in the scope of employment.[16]

> **Example:** In a case out of Arkansas, a delivery employee owned the truck involved in the accident, he was going somewhere with a friend, and had been drinking—a specific violation of company policy. Evidence was introduced in the case that the employee could complete his route at any time, provided that he did so within a reasonable time. The Supreme Court of Arkansas determined that the employee was "engaged in an employer-approved assignment, the details of which had been entrusted to his discretion." The employer was held liable.[17]

Employers may also face liability when employees use personal vehicles on company business.[18]

Negligent Entrustment

Negligent entrustment holds an employer liable for that employer's own negligence in choosing an employee to drive a vehicle. Most states impose liability when an employer knew or should have known that an employee was unfit to drive a vehicle.[19]

> **Example:** In the Louisiana case mentioned above, an employee, who was hired as a driver, had two prior convictions for DWI, was dismissed for substance abuse but then rehired, had speeding tickets, and had a ticket for improper passing. His employer did not perform a motor vehicle record check until after an accident occurred, when the employee lost control of the company-vehicle and abandoned it on the side of the road. It was subsequently hit by a semi-truck driver, injuring the driver and killing the passenger. The court found that the employer had negligently entrusted the vehicle to the employee.[20]

Plaintiffs' attorneys also look to an employer's negligence in selecting the vehicle for use, maintaining the vehicle, and otherwise putting the vehicle onto the roadway.

In the over-the-road long haul, waste, and other industries, both legal theories have enormous impact.

Vicarious Liability

Vicarious liability is likely to be found in almost all situations where an accident is caused by an employee-driver. This is because, due to the nature of these industries, the employee-driver will only be driving the vehicle if the driver is acting in the scope of employment. For example, a garbage truck is unlikely to be out on the road unless being driven to collect garbage. In this situation, the driver is acting in the scope of employment.

However, vehicle safety is still important when it comes to punitive damages. This is so because, as explained below, employers who take caution when it comes to vehicle safety will not have acted recklessly, willfully, or wantonly, and are much less likely to incur liability for punitive damages.

Negligent Entrustment

Negligent entrustment is more preventable in these industries than liability under *respondeat superior*. Even though the employee-driver may be acting within the course and scope of employment, the plaintiffs' attorney must prove that the company was negligent in its entrustment of the vehicle to that driver or the company's selection of that vehicle for use in order to make out a negligent entrustment claim.

Having robust, clear, and reasonable policies goes a long way toward avoiding negligent entrustment liability ***and avoiding punitive damages.*** As will be addressed later in this white paper, avoiding negligent entrustment and other negligence claims requires an integrated approach—the development of robust policies and procedures that demonstrate the level of care taken by the employer.

Demonstrating the appropriate level of care is paramount when limiting liability and avoiding punitive damages. By establishing adequate forethought and reasonable preventative action, employers will put themselves in the best position to defend a vehicle safety lawsuit. This is also true when the claim is that the accident could have been prevented had the employer implemented safety technology on the vehicle involved in the accident and not just on a portion of its fleet.

THE RISK OF PUNITIVE DAMAGES

One of the greatest risks to companies with fleet operations is the risk of significant punitive damages. Punitive damages are especially worrisome because, in many states, employers' umbrella insurance policy may not cover such damages.

In order to justify an award of punitive damages, a plaintiffs' attorney must demonstrate willful and wanton disregard for a conscious indifference to the safety of others.[21] For example, in South Carolina, punitive damages are recoverable where there is evidence that the defendant's conduct was "reckless, willful or wanton."[22]

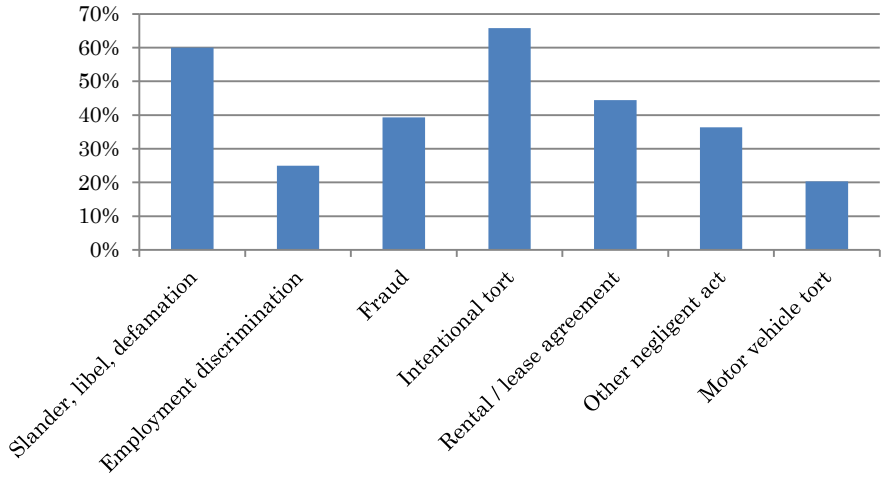
Recklessness is the doing of a negligent act knowingly. It is a conscious failure to exercise due care. "Willful and wanton" are synonymous with "recklessness" and import a greater degree of culpability than mere negligence.[23]

> **The test is whether a tort has been committed in such a manner or under circumstances that *a person of ordinary care or prudence would have been conscious of it as an invasion of the plaintiff's rights.*[24]**

It is true that punitive damages are not awarded in every case. However, in the latest survey from the Bureau of Justice Statistics, punitive damages were awarded in 20.3% of motor vehicle tort cases where the plaintiff won and punitive damages were sought.

Where punitive damages are awarded, the associated price tag is very high. Combine this with a lack of coverage by insurance policies and the fact that every plaintiffs' attorney will inevitably go after punitive damages, the recipe is ripe for disaster if your company ends up being one of that 20%.

Figure 4: **Percent of Cases Where Punitive Damages Awarded Trial Won by Plaintiff & Punitive Damages Sought (NCSC-BJS 2005 Civil Justice Survey)[25]**



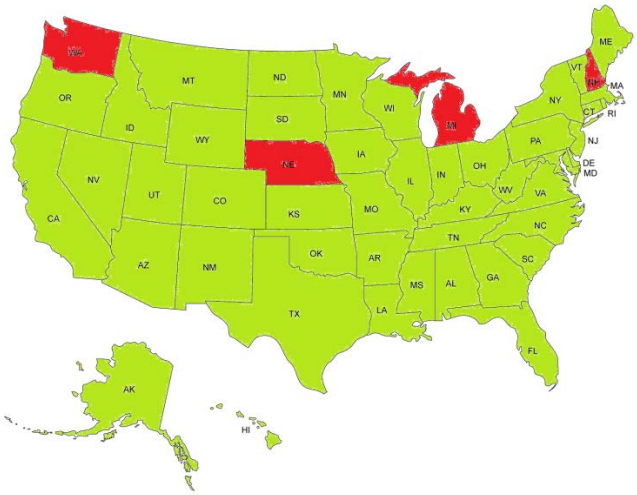
When a company installs safety technology on only a portion of its fleet, that company is on notice that safety may be an issue and that there is a method by which to limit the safety risk.

Punitive damages standards have ready application to the situation where a company did not do all that it could have done in order to ensure the safety of its drivers, vehicles, and the public. For example, in the case where the Texas jury awarded $22 million, the plaintiff's attorney was able to argue that the company knew of the dangers that cell phones posed to the public because the company had a cell phone use policy. Since the policy was not adequately disseminated to all of the sales people, the jury found the company to be reckless. Of the $22 million awarded, $10 million was awarded in punitive damages.[26]

Plaintiffs' attorneys will not fail to allege that a company acted in a reckless manner when a vehicle without safety technology is involved in an accident. The plaintiffs' attorney will argue that the lack of the safety technology was a conscious failure on the part of the company to exercise due care, and that a person of ordinary care or prudence would have been conscious that the lack of safety technology could result in injury to the plaintiff or to the public at large. In this scenario, especially relevant is the fact that the company implemented the safety technology in question on only a portion of its fleet.

As a result, ensuring that your company's procedures are not reckless, willful, or wanton is paramount. This especially applies to the implementation or installation of safety technologies on company vehicles. It is very important to make clear that you thought of and analyzed the risks involved, and approached the issue in a reasonable and thoughtful manner.

<u>Figure 5</u>: State-by-State Punitive Damages Analysis[27]



Allows Punitive Damages
Does Not Allow Punitive Damages

MANAGING FLEET SAFETY IN GENERAL

Successfully dealing with fleet safety requires an ***integrated* approach**. The best protection against vehicle safety liability stems from a comprehensive accident prevention policy and successfully addressing multiple areas where liability can attach.

Fleet safety management requires an understanding of the causes of accidents and associated liability—the driver, his or her conduct, and the vehicle. Integral to any comprehensive fleet safety program is a thorough accounting of the company's application of safety technology.

Companies should address liability in five main areas: (1) driver qualification requirements; (2) driver training programs; (3) driver good conduct policies; (4) vehicle maintenance and inspection policies and procedures; and (5) post-accident requirements and management.[28 29]

As an indispensable complement to these policies, integrating safety technology into your fleet can go a long way toward reducing your liability exposure. Safety technology helps limit the amount of accidents in which your drivers are involved—the best way to reduce liability. For example, at a recent OSHA Stakeholders Meeting to discuss the prevention of backover injuries and fatalities, several companies spoke highly of a technology that automatically captures potentially dangerous driving situations on videotape.[30] In addition to helping educate drivers on safe driving, while at the same time monitoring driver behavior, one company even noticed a five-percent reduction in fuel consumption.[31] Implementing safety technologies such as these can have profound effects.

According to Liberty Mutual Insurance Company, based on its Executive Summary of Workplace Safety, 61% of surveyed business executives believed that their companies received a return-on-investment of $3.00 or more for every $1.00 they spent on improving workplace safety.[32]

Preventing accidents before they happen and taking appropriate steps to limit your exposure to negligence claims are all part of an integrated approach to reducing your company's overall liability exposure. Included in this integrated approach is an understanding that safety technology can limit liability. However, companies must also understand that, if not handled appropriately, safety technology can also increase liability. **The proper safety technology planning should be part of any company's overall vehicle safety strategy.**

IMPLEMENTING SAFETY TECHNOLOGY

First and foremost, safety technology only benefits the vehicles on which it is installed. In an ideal world, the most up-to-date safety technology would be fully installed on all fleet vehicles. However, the realities of business dictate where companies can invest their resources, and no company can outfit its entire fleet with the appropriate safety technology overnight. Fortunately, there are steps that companies can take to limit their liability exposure when transitioning to the appropriate safety technology.

Adopt a Safety Technology Implementation Plan and adhere to the particulars of the plan.

The Safety Technology Implementation Plan should emphasize the company's understanding and commitment to the safety of its drivers, employees, contractors, and the general public. It should outline that the company understands that the particular safety technology will further its goals and commitment to safety, and that it is implementing this Plan to facilitate the furtherance of those goals. The overarching theme throughout the Plan should be to describe how and why the company integrated technology in the way that it did. In addition, keep in mind that the document will, and should, be turned over to plaintiffs' counsel during discovery.

The Plan should outline the manner in which the company will go about meeting its goal of integrating safety technology on its entire fleet, whether by retrofitting its existing vehicles or by phasing out its older vehicles and replacing them with updated vehicles. Unfortunately, there is no specified or set standard; **the legal requirement is that the company act as a *person of ordinary care or prudence* would act**. The Plan, therefore, should be reasonable and designed to accomplish its stated goal.

The following should be included in the Plan:

- **Open with a discussion of the company's commitment to safety.**
- **Recognize the importance of technology.**
- **Discuss the cost vs. safety analysis used.**
- **Compare yourself with others in the industry.**
- **Lay out a timeline for integration.**
- **Identify the amount you intend to spend on safety-related upgrades each quarter/year.**
- **Discuss other safety equipment, training, and procedures that you are also implementing to show that you aren't being stagnant.**
- **Address safety technology you choose not to adopt.**

The exact particulars of how many vehicles to retrofit or replace within a given timeframe is a question that must be answered by the company. Financial considerations, the risks of the particular industry, and other company-specific factors will affect the appropriateness of any company's plan.

The Plan should be integrated and flexible.

The Plan should be integrated into your broader company safety plan. It should complement and take into account the manner in which your company addresses driver qualification requirements, driver training programs, driver good conduct policies, vehicle maintenance and inspection policies and procedures, and post-accident requirements and management.

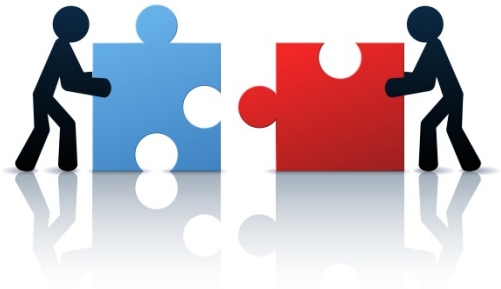
The Plan should be flexible, in order to be amended in accordance with the realities of your business. Strive to craft a plan that you can and will follow. However, if you deviate from the Plan, amend the Plan—explain why you are deviating and whether you intend to make any other changes.

When you choose not to adopt certain safety technology, explain why.

As a company, you will not choose to adopt every safety technology available on the market. Your Plan should address safety technology that is available, but not adopted by your fleet. The Plan should explain why the decision was made not to adopt certain safety technology, whether that technology is too expensive, corrects a problem already addressed through other means, or is outweighed by the negative aspects of the technology. The important thing is that the Plan addresses the safety technology and explains its non-use in a reasonable and coherent manner**. Remember, the standard is that the company acts as a person of ordinary care or prudence.**

What the Safety Technology Implementation Plan does: helps you meet the standard of a person of ordinary care or prudence.

The Plan demonstrates the reasonableness of the company's decision-making. It shows that the company cares about safety and is aware of the importance of safety technology. And it makes clear that the company is attempting to integrate safety technology in a cost-effect manner.



CONCLUSION

Vehicle safety lawsuits are not disappearing from the legal scene. In fact, their prevalence is likely only to increase in the foreseeable future. As a consequence, companies should be evaluating their safety procedures and protocols to determine their liability exposure.

Successfully combating vehicle safety liability requires an <u>integrated approach</u> across the entire spectrum of fleet safety practices, including driver qualification requirements, driver training programs, driver good conduct policies, vehicle maintenance and inspection processes and procedures, post-accident requirements and management, and a comprehensive and reasonable plan to adopt and implement safety technology.

Safety technology can and should play an important role in limiting a company's liability. First and foremost, safety technology can help limit liability before it occurs by preventing accidents. Second, safety technology can demonstrate that the company was not negligent; in fact, the company identified, evaluated, and addressed the risk.

However, safety technology must be correctly and thoughtfully implemented in order to ensure that the company is not opening itself up to additional liability when it has only part-way implemented a particular technology. In this regard, companies should adopt and adhere to a reasonable, well-thought out, and comprehensive Safety Technology Implementation Plan, emphasizing the company's commitment to safety and outlining the company's plan for accomplishing its goal of safety.

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It is common for Preco Electronics™ blind spot experts to be called to the stand as expert witnesses when blind spot accidents occur. Their role in these legal cases includes showcasing the strengths and weaknesses of various blind spot safety technologies, and the real world uses associated with the most common safety technologies available today.

Preco Electronics™ currently holds the patent on the pulsed technology used in rear and side collision awareness systems, currently marketed under various names, including PreView Radar®, WorkSight®, BackSense®, and Blindspotter®, to name a few. PreView Radar® systems have been credited with helping customers reduce accidents by over 75%, while providing the most consistent results for large commercial fleets. Learn more at www.PreViewRadar.com.

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RESOURCES

[1] Guidelines for Employers to Reduce Motor Vehicle Crashes, OSHA, at p. 1, *available at* http://www.osha.gov/Publications/motor_vehicle_guide.pdf.

[2] The Texas Dep't of Insurance, Division of Workers' Compensation, Vehicle Backing Safety FactSheet, *available at* http://www.tdi.texas.gov/pubs/videoresource/fsvehiclebackin/pdf.

[3] U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, 2012, *available at* http://www.bls.gov/iif/oshwc/cfoi/cfch0009.pdf.

[4] *Id.* "Highway incidents" are a subset of "transportation incidents."

[5] U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Census of Occupational Injuries (CFOI) – Current and Revised Data, *available at* http://www.bls.gov/iif/oshcfoi1.htm.

[6] Bureau of Justice Statistics, U.S. Dep't of Justice (2005); *see also* Staci A. Terry, *Personal Injury Lawsuits in the U.S.: A Brief Look*, The Legal Finance Journal (Aug. 26, 2011), *available at* http://legalfinancejournal.com/personal-injury-lawsuits-in-the-u-s-a-brief-look/.

[7] *Id.*

[8] *See* Angie Lee, "Local boy moving on after tragic trash truck accident," CBS, (Sept. 24, 2013), *available at* http://www.cbs8.com/story/23520024/council-approves-185m-settlement-for-family-of-boy-struck-by-trash-truck; *see also* Dana Littlefield, "Possible $18.5M settlement for boy hit by trash truck," U-T San Diego (May 20, 2013), *available at* http://www.utsandiego.com/news/2013/may/20/city-18M-settlement-crash-case/.

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[10] *See* "Maryland Jury Awards Family $2 Million in Wrongful Death Dump Truck Accident," Schwartzman Law, LLC, *available at* http://www.rs-atty.com/maryland-jury-awards-family-2-million-in-wrongful-death-dump-truck-accident/; *see also* "Maryland Dump Truck Accident Lawsuit Results in $2M Verdict," AboutLawsuits.com (Aug. 12, 2011), *available at* http://www.aboutlawsuits.com/maryland-dump-truck-accident-lawsuit-verdict-20288/.

[11] *See* Ruben Castenda, "Jury Awards $2 Million to Family of Md. Inmate Killed by Truck," The Washington Post (Jun. 25, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/24/AR2010062404836.html.

[12] *See* Mary Beth Quirk, "Jury Orders Domino's To Pay $32M In Lawsuit Over Deadly Crash Involving Delivery Driver," Consumerist (Aug. 30, 2013), *available at* http://consumerist.com/2013/08/30/jury-orders-dominos-to-pay-32m-in-lawsuit-over-deadly-crash-involving-delivery-driver/; *see also* Associated Press, "Texas Family Awarded $32M in Suit Against Domino's," CBS DFW (Aug. 29, 2013), *available at* http://dfw.cbslocal.com/2013/08/29/texas-family-awarded-32m-in-suit-against-dominos/.

[13] *Vanice Chatman-Wilson v. Araceli Venessa Cabral and Coca-Cola Enterprises, Inc.*, Case No. 10-61510-2, in the State of Texas, County of Nueces, County Court (May 4, 2012); *see also* Steve Yahn, *Driven to Distraction*, Risk & Insurance (Oct. 1, 2012), *available at* http://www.riskandinsurance.com/story.jsp?storyId=533351203.

[14] *Thistlethwaite v. Gonzalez*, 106 So.3d 238 (La. Ct. App. 2012). In this case, the driver was driving a company pick-up truck down the highway at 4:00 a.m., when he lost control and crashed. *Id.* at 243. The driver left the vehicle obstructing the left lane of the highway. *Id.* at 243-44. The driver had been drinking prior to the crash. *Id.* at 244. A semi-truck struck the driver's vehicle shortly after he left it, resulting in the cab of the semi catching on fire and a passenger in the semi-truck being killed. *Id.* The plaintiffs (the semi-truck driver and the deceased passenger's daughter) used the "black box" on the driver's vehicle to show that the driver had been travelling at 89 mph five seconds before the crash and that the driver was braking when he crashed—to help prove that the driver was intoxicated at the time of the accident. *Id.* at 247. In part based on the "black box" data, the jury found that the driver was intoxicated at the time of the accident and that his intoxication while operating a motor vehicle was a cause-in-fact of the damages resulting from the accident. *Id.* at 250. Furthermore, the jury found that the employer had negligently entrusted the vehicle to the driver—the driver had two prior convictions for DWI, had been dismissed for substance abuse and rehired by the employer, had speeding tickets, had a ticket for improper passing, and the employer had not conducted a background check on the driver until after the accident. *Id.* at 257. The jury awarded exemplary damages in the amount of $12.5 million to each plaintiff (the damages were later reduced on appeal). *Id.* at 250.

[15] *See, e.g., Snyder v. Dominguez*, 202 P.3d 135 (Okla. 2009) (where the police officer who investigated the accident had concluded that the vehicle had crossed the center line prior to the collision and thus the driver was at fault, but where the driver used "black box" technology to argue that his vehicle had never crossed the center line).

[16] *See, e.g., Diaz v. Carcamo*, 51 Cal. 4th 1148, 1152 (Cal. 2011).

[17] *See J.B. Hunt Transport, Inc. v. Doss*, 899 S.W.2d 464 (Ark. 1995).

[18] *See, e.g., Lobo v. Tamco*, 182 Cal.App.4th 287 (Cal. Ct. App. 2010). This case demonstrates the scope of liability an employer might face when an employee regularly uses a personal vehicle for company business. There, the employee was leaving the premises of his employer to go home. He failed to notice three motorcycle policemen approaching with lights and sirens activated. One of the policemen was unable to avoid colliding with the employee's car and was killed. *Id.* at 299. The employee was a metallurgist for a steel manufacturer. One of his responsibilities was to answer all customer complaints, including, if necessary, traveling to customer facilities. When the employee used his own car to visit a customer site, he was reimbursed for mileage. However, the employee testified that he had used his own car 10 times or fewer over a 16 year period. *Id.* at 301-302. The court found that the employee's personally-owned vehicle was an express or implied condition of employment. The employee, by making his personal vehicle available for company business, benefited the employer by ensuring that he could respond promptly to customer complaints and by allowing the company not to provide him with a company car. *Id.* at 303. Thus, under the court's rationale, the employer derived benefit from the employee making his personally-owned vehicle available to the employer. As such, the court found that the employer could be held liable under *respondeat superior*, even though the employee was headed home.

See also Ellender v. Neff Rental, Inc., 965 So.2d 898 (La. Ct. App. 2007). Here, a rental company employed a regional sales manager. The sales manager's territory included several offices in various cities. Thus, he was required to travel a great deal. The company paid the sales manager $600 per month to compensate him for the use of his personal vehicle and provided him with a company credit card to purchase his fuel. *Id.* at 899-900. The company also provided the sales manager with a cell phone. The company had no policy against using a cell phone while driving. *Id.* at 900. The sales manager was involved in an accident while driving and talking on his cell phone. The court held that the rental company was liable because the sales manager was acting in the scope of his employment. *Id.* at 902.

[19] *See, e.g., Magee v. G & H Towing Co.*, --- S.W.3d ---, 2012 WL 1065856 (Houston [1st Dist.] Mar. 29, 2012); *Goodyear Tire and Rubber Co. v. Mayes*, 236 S.W.3d 754 (Tex. 2007). Texas's articulation of the tort of negligent entrustment is a good benchmark. There the elements of the tort are: (1) the employer entrusted the vehicle to the driver; (2) the driver was an unlicensed, incompetent, or reckless driver, (3) at the time of the entrustment, the employer knew or should have known that the driver was unlicensed, incompetent, or reckless; (4) the driver was negligent on the occasion in question; and (5) the driver's negligence proximately caused the accident.

Some states are more liberal or more conservative in their definitions. For example, South Carolina has expressly limited negligent entrustment to situations where the employer knew, or should have known, of a driver's addiction to intoxicants or a driver's habit of drinking. *Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc.*, 648 S.E.2d 585, 588 (S.C. 2007).

[20] *Thestlethwaite*, 106 So.3d at 257-58.

[21] *See* Lee R. Russ, *Annotation*, Standard of Proof as to Conduct Underlying Punitive Damage Awards—Modern Status, 58 A.L.R.4th 878 (originally published in 1987).

[22] *Fairchild v. South Carolina Dep't of Transp.*, 727 S.E.2d 407, 411-12 (S.C. 2012).

[23] *Berberich v. Jack*, 709 S.E.2d 607, 612 (S.C. 2011) ("Evidence that the defendant's conduct breached this higher standard entitles the plaintiff to a charge on punitive damages.") (quoting *Marcum v. Bowden*, 643 S.E.2d 85, 88 n. 5 (S.C. 2007).

[24] *Fairchild*, 727 S.E.2d at 412.

[25] Theodore Eisenberg, Michael Heise, Nicole L. Waters, Martin T. Well, *The Decision to Award Punitive Damages: An Empirical Study*, Cornell Law Faculty Publications (Oct. 1, 2010), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1184&context=facpub.

[26] The jury awarded Ms. Chatman-Wilson $21,544,873, with the following breakdown: $149,873—past medical costs; $10,000,000—punitive exemplary damages; $45,000—past lost earnings capacity; $900,000—future lost earnings capability; $1,000,000—future disfigurement; $300,000—past physical pain and mental anguish; $500,000—past physical impairment; $5,000,000—future physical pain and mental anguish; $3,000,000—future physical impairment; and $650,000—past disfigurement. *See* Verdict Search, *Vanice Chatman-Wilson v. Araceli Venessa Cabral and Coca-Cola Enterprises, Inc.*, No. 10-61510-2 (search ran on Mar. 18, 2013).

[27] Punitive Damages Review, Wilson Elser Moskowitz Edelman & Dicker, L.L.P. (July 211), *available at* https://www.travelers.com/business-insurance/specialized-industries/excess-casualty/docs/punitivedamages.pdf.

[28] The specifics of these policies are beyond the scope of this white paper. In general, however, the policies should include:

(1) Driver Qualification Requirements: the most fundamental part of establishing an employee's competence to operate a vehicle, whether company-owned or personally-owned, is the driver qualification file. At a minimum, an inquiring plaintiffs' attorney should find: a comprehensive job description for each position that requires driving, including all of the duties that the driver will be expected to perform; an application form specifically designed to gather the information specified in the job description; a complete and thorough follow-up on all of the employee's application information; a thorough evaluation and complete record of this in the employee's file; and a system for periodic review of the employee's qualifications.

(2) Driver Training Programs: drivers should be regularly and thoroughly trained on all aspects of safe driving and company policies. In particular, drivers should be trained prior to beginning any driving duties for the company, and continuing training should be conducted on a yearly basis. Proof of all training should be consistently and adequately documented.

(3) Driver Good Conduct Policies: the following policies should be in pace and clearly disseminated to all employees who drive vehicles on company business, whether company-owned or personally-owned: safety policy, cell phone use policy, business use policy, personal use policy, driver-owned / leased vehicles used for business purposes policy, and rental car policy.

(4) Vehicle Maintenance and Inspection: an employer can not only be held liable for negligently allowing an unfit employee to operate a vehicle, but the company may also be held liable for negligently allowing an unfit vehicle to be operated. Policies that should be in place include: vehicle acquisition policy, modifications to vehicles policy, emergency equipment policy, vehicle inspection, maintenance & repair policy, periodic visual checks of vehicles, and vehicle compliance with state laws.

(5) Post-Accident Procedures: there should be adequate procedures in place to properly address an accident once it does happen. These policies include: reporting of motor vehicle incidents and collisions policy, accident response & investigation team, personal cell phone records surrender policy, incident review and analysis policy, incident review report policy, and corrective actions.

It is also paramount that all policies be enforced consistently and in a uniform manner. Non-enforcement of an existing policy can be problematic. For additional information on safety standards for motor vehicle operations see ANSI/ASSE Z15.1-2006, *Safe Practices for Motor Vehicle Operations*, American Society of Safety Engineers, American National Standards Institute (April 28, 2006).

[29] It is very important to check the privacy laws and the laws governing criminal background checks in the state of each particular facility. Some states are more liberal than others with what information employers may consider. In addition, last year the Equal Employment Opportunity Commission issued regulations concerning the use of criminal arrest and conviction information when hiring and has recently filed several high profile lawsuits against companies alleging that their background check policies have a disparate impact on minority job applicants. Furthermore, the Fair Credit Reporting Act requires certain disclosures when utilizing a third-party to perform a criminal background check. All these limitations need to be taken into consideration.

[30] *See* Stakeholder Meeting on Preventing Backover Injuries and Fatalities, Meeting Summary Report-Afternoon Session, OSHA (Mar. 14, 2013), *available at* http://osha.gov/doc/topics/backover/02052013_tx_afternoon_stakholder_meeting.pdf.

[31] *Id.*

[32] *Guidelines for Employers to Reduce Motor Vehicle Crashes*, OSHA, at p. 5, *available at* http://osha.gov/Publications/motor_vehicle_guide.pdf.