

Employment Law Update

18 August 2009

Call on me (but not when I'm driving) - The impact on employers of the new cellphone ban

The Government has confirmed that from 1 November it will be unlawful to use a handheld cellphone while driving. This includes talking, texting or emailing on any portable electronic device and will apply to all vehicles, commercial and private.

There will be several exceptions to this prohibition:

- » Cellphones may be used with an appropriate hands-free arrangement, provided this does not require the pressing of more than one button to make, receive or terminate a call.
- » Two-way radios are allowed.
- » Cellphones may be used by a driver when the vehicle has stopped - but not when it is stopped in traffic (including at traffic lights).
- » A 111 call in a genuine emergency is allowed.
- » The prohibition will not apply to enforcement officers.

The penalty for breach is an \$80 fine and 20 demerit points.

Many businesses rely on a mobile workforce that is able to work on the move. This usually includes the use of cellphones and/or blackberries to keep in touch with colleagues and clients while out of the office.

How does this law change affect an employer's obligations to such employees?

Health and safety obligations

Employers must take all practicable steps to ensure the safety of their employees while at work. This includes

maintaining a safe working environment and dealing appropriately with workplace hazards. The law is clear that an employee's "place of work" will include any vehicle in which they perform their work.

Employers are obviously not responsible for all road hazards. There are however, driving hazards that are within the control of the employer. Some might say the use of cellphones in cars was always a "hazard", and that the amendments simply introduce a legal consequence for getting caught.

In any event, as of 1 November, it is clear that the use of a cellphone or equivalent while driving is a hazard. Employers will therefore be expected to take all practicable steps to ensure employees comply with the prohibition on cellphone use while driving.

A prudent employer should ensure all employees who are required to drive as part of their job are aware of the change to the law. Employees who are expected to use a cellphone while driving should be provided with a compliant hands-free device or alternative arrangements made. At a practical level, employers should not encourage breaches of the law, for example, by ringing employees who are known to be driving and who do not have compliant hands-free arrangements.

If your workplace has a motor vehicle use policy, care should be taken to ensure that it covers the amendments. It should include a specific prohibition on cellphone use in breach of the law and should state that it is an employee's obligation to pay any fine incurred and notify their employer of any instances of breach.

Misconduct

Will an employer be able to discipline an employee for breaking the cellphone ban?

The short answer will be yes - if an employee uses a mobile device while driving, their employer may have grounds to commence disciplinary action.

Whether disciplinary action is justified will depend on the circumstances. An employer will need to show that any disciplinary action taken was what a fair and reasonable employer would have done in all the circumstances. Such circumstances will include the extent to which the employer has clarified its expectations with regard to cellphone use and the consequences of non-compliance. Certainly, an employer would be wise to ensure that it is not tacitly

sanctioning communication with employees in breach of the law.

With the current focus on the dangers of the use of mobile devices while driving, employers should ensure that their expectations of employees comply with the law. Please feel free to contact us if you wish to discuss the impact of the new law on your business.

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