

Labor & Employment Law UPDATE

*Practical and preventive information for managing
your workplace*

Federal Texting Ban Now in Effect for Commercial Motor Vehicles

The Department of Transportation (DOT) is cracking down to eliminate threats of driver distraction on the road. The Federal Motor Carrier Safety Administration (“FMCSA”), an administration within the DOT, recently announced regulatory guidance prohibiting text messaging by employees driving commercial motor vehicles, including large trucks and buses. Violators may be subject to civil or criminal penalties of up to \$2,750. Effective immediately, this ban sends a clear message to operators and their employers: put down the handheld device and focus on the road.

FMCSA announced the ban after completing a study on “Driver Distraction in Commercial Vehicle Operations.” The study revealed texting while driving substantially decreases one’s ability to safely operate a vehicle, as it involves a combination of visual, cognitive and manual distraction from the driving task. According to the study, drivers sending or receiving text messages during a safety-critical event (e.g., crashes, near crashes, lane departure) took their eyes off the forward roadway an average of 4.6 seconds out of every six seconds prior to the event. At 55 miles per hour, this means

the average driver traveled almost 371 feet, the approximate length of a football field including the end zones, without looking at the road. At 65 miles per hour, the driver traveled approximately 439 feet without looking at the roadway. The study concludes drivers who text behind the wheel are 23.2 times more likely to experience a safety-critical event than non-distracted drivers.

Currently, Iowa and Nebraska enforce no cell phone or text messaging bans applicable to commercial drivers. However, the federal ban applies to persons driving vehicles in interstate commerce to transport passengers or property if their vehicle meet one of the following requirements:

1. Has a gross weight rating, gross combination rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,000 pounds) or more, whichever is greater; or
2. Is designed or used to transport more than 8 passengers (including the driver) for compensation; or
3. Is designed or used to transport more

February, 2010
Volume 19, Number 2
Allison D. Balus, Editor

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than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

4. Is used in transporting hazardous materials in a quantity requiring placarding under federal regulations.

Please note the texting ban does not prohibit the use of fleet management systems, electronic dispatching tools, or cell phones for purposes other than texting. However, managers with an eye for safety should avoid requiring drivers to type or read messages while driving.

The FMCSA plans to issue more texting regulations in 2010. Until then, any business with vehicles engaged in significant interstate commerce should take action to comply with the texting ban, starting with re-evaluating company driving policies and driver training programs.

Todd A. West

because of unlawful sex stereotyping in that she was not “feminine” enough. Lewis described herself as having a “slightly more masculine” appearance, which her manager characterized as “an Ellen DeGeneres kind of look.” Lewis wore loose fitting male-style clothes, avoided makeup, had short hair, and had been mistaken for a male before.

Lewis worked overnight front-desk positions for three different Heartland hotels in various Iowa locations during her employment, was a valued employee, received compliments from her managers, and never received a customer complaint. Therefore, her immediate manager asked the Director of Operations for permission to offer Lewis a full-time day shift position at the front desk because of her good work. Without any interview or meeting Lewis in person, the Director gave permission to extend the offer to Lewis, and she accepted.

However, after the Director first saw Lewis in person a couple of weeks later, the Director told Lewis’ manager that “she was not sure Lewis was a ‘good fit’ for the front desk.” The Director expressed to Lewis’ manager that Lewis lacked the “Midwestern girl look” and that the front desk staff should be “pretty.” In the past, the Director had even advised another hotel manager to reject a certain applicant because she was not pretty enough.

Therefore, the Director ordered the hotel manager to move Lewis to the night shift, but the manager refused and was fired. Furthermore, a new policy happened to be implemented at that time requiring an interview to be held for all front desk positions. Therefore, the Director told Lewis she would have to come in for an interview to “confirm” her position, even though she had been working well in that position for nearly a month. Lewis protested to the Director that a second interview was unfair and was solely because

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Eighth Circuit Reverses Summary Judgment in Sex Stereotyping Discrimination Case

Last month, in *Lewis v. Heartland Inns of America, LLC*, the Eighth Circuit reversed a summary judgment decision in favor of the employer. In this case, Plaintiff Brenna Lewis alleged that she was terminated solely

she lacked Midwestern girl looks. She was subsequently fired.

Lewis filed suit. She did not challenge Heartland's dress code, which imposed similar professional appearance requirements for both genders. Rather, she claimed that "the evidence shows Heartland enforced a de facto requirement that a female employee conform to gender stereotypes in order to work the [day] shift. There was no such requirement in the company's written policies." The Iowa federal court granted summary judgment for the employer. The Eighth Circuit disagreed, reversing and holding that Lewis had generated an issue of fact, sufficient to survive summary judgment and go to trial. The court noted that "[l]ike the plaintiff in *Price Waterhouse*, Lewis alleges that her employer found her unsuited for her job not because of her qualifications or her performance on the job, but because her appearance did not comport with its preferred feminine stereotype."

The Eighth Circuit explained that Lewis was not required to show she was treated differently than similarly situated *men* to satisfy the elements of her Title VII claim in this situation. Rather, courts "consistently emphasize[] that the ultimate issue is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace." Therefore, the court held that Lewis only needed to show that she, *as an individual*, was discriminated against because of her gender. "The question is whether [the employer's] requirements that Lewis be 'pretty' and have the 'Midwestern girl look' were because she is a woman. A reasonable factfinder could find that they were since the terms by their nature apply only to women." The court held that while stray remarks do not inevitably prove discrimination, Lewis had offered evidence of more than mere stray remarks by the

primary decisionmaker.

The court further explained that "[e]vidence that Heartland's reason for the termination were (sic) pretextual include the fact that Lewis had a history of good performance at Heartland. She had no prior disciplinary record and had received two merit based pay raises. The two individuals who supervised her during the majority of her employment at Heartland both stated that they had no problem with her appearance, and at least one customer had never seen customer service like that Lewis had provided. On this record, a factfinder could infer a discriminatory motive in Heartland's actions to remove Lewis." The court stated that "an employer who discriminates against women because ...they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." Finally, Lewis also claimed she was fired in retaliation for protesting the second interview, and for the same reasons, the court held that her retaliation claim could also proceed.

This decision serves as a warning that the courts will not only look at whether employers are treating women and men equally, but also whether women or men are treated differently than members of the same class because they do not meet the stereotypes of their class.

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Heidi Guttan-Fox

Senator Lathrop Introduces Legislation to Expand Workers' Compensation Coverage to Include Mental Illness and Injury Without Physical Cause

On January 7, 2010, Senator Steve Lathrop of Omaha introduced LB 780, which would expand workers' compensation benefits to include mental injuries and mental illness suffered by first responders that are not caused by physical injury. LB 780 limits the expansion to "first responder," which is defined in the current bill to include "a firefighter, a law enforcement officer, a crime scene investigator, or an out-of-hospital emergency care provider." Similar legislation was proposed in 2008, but was not enacted by the Nebraska Unicameral.

Current Nebraska law only provides for coverage of mental illness or injury by Workers' Compensation if the illness or injury was caused by a physical accident or injury. It is well settled under current Nebraska law that a worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's physical injury and results in disability. *See Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004).

Nebraska employers and insurers have previously opposed legislation similar to

LB 780, based upon the rationale that any expansion of Workers' Compensation coverage to include coverage of mental illness or mental injuries that do not have a physical cause – even in a limited fashion – would undermine the current limited coverage of the Workers' Compensation Act, open the floodgates to additional legislative and judicial challenges to the current law, and generate significant additional costs for Nebraska employers. We encourage you to monitor this legislation and its potential amendment.

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