

ACCIDENT REPORT

MINIMIZING LIABILITY IN FLEET OPERATIONS

Proper precautions can help a fleet survive a potential lawsuit should an employee become entangled in an accident claim. **By Dona Szak and C. David Mee**

Given the time and expense of defending a lawsuit — regardless of whether the suit has merit — what are steps to take to avoid the possibility of a suit, or if sued, to mount an effective defense? Discussed are the major grounds for liability, key steps in the claims process, and preventive measures that can help minimize liability.

AT A GLANCE

To minimize liability, fleet managers can:

- Implement PM programs to avoid maintenance-related accidents.
- Develop and enforce policies addressing use of cell phones, GPS, telematics, and other electronics.
- Provide periodic driver safety training and keep records of such training.
- Screen driver motor vehicle records, in compliance with local law.

Two Legal Theories Relevant to Fleet Users

The two primary legal theories of concern to fleet users and employers are respondeat superior (“let the master answer”) and negligent entrustment.

Laws vary from state to state, but in general, respondeat superior allows an injured party to sue an employer for damages caused by the wrongful conduct of an employee acting in the course and scope of the employer’s business, even if the employer personally is not at fault.

The rationale is the employer directs an employee’s activity and probably receives some benefit from the employee’s action. For example, if the driver of a delivery van negligently ignores a stop sign while en route to a customer’s business and hits another car, the driver’s employer is responsible for the resulting damage.

It is important to note the employer would be liable even if the driver were using his personal vehicle for business purposes, provided driving is part of the

employee’s job responsibilities.

Negligent entrustment is a legal doctrine that allows an injured party to recover damages from an employer who knows, or has reason to know, that a driver’s use of the company’s vehicle creates a risk of harm to others. Unlike respondeat superior, negligent entrustment does not require the accident occur while the driver is working.

Negligent hire, negligent supervision, and negligent maintenance are additional grounds for employer liability. With any legal theory, the claimant typically requests compensation for damage to the vehicle, physical injuries, pain and suffering, lost earnings, and perhaps punitive damages.

Responding to an Accident

If an accident occurs, the first priority should be to call for emergency assistance, if needed. The driver should report the accident to the police and exchange information to the extent required by law and fleet policy, and immediately report the acci-

dent to his or her employer.

If the fleet is insured, report the incident to the insurer per the terms of the insurance and fleet policy. Fleet management should know beforehand not only the policy coverage, but also how to report a claim, if need be.

The driver should obtain basic information on others involved in the accident, and if practical, the identity and contact information of witnesses. It may not be feasible for the driver to talk to witnesses, but even basic information such as whether witnesses were present, and if so, their height, sex, and vehicle type, can be helpful.

Ideally, drivers should carry incident report forms and complete a form in the event of an accident. The report should be purely factual, without guesswork or conjecture. Act on the assumption the report will be used as evidence if a lawsuit is filed.

Telematics can provide key evidence in the event of a lawsuit, and telematic evidence should be retained if an accident occurs. Be aware that telematic evidence, like any evidence, has the potential to help or hurt a case. Regardless, if such evidence is held, it must be preserved and turned over should a suit be filed.

Key Steps in a Claims Process

Frequently, the first notice of a claim will come in the form of a demand letter from a lawyer. If either a demand letter or a lawsuit is received, promptly send the papers to the insurer and company's lawyer.

There are time limits for responding to a lawsuit and important deadlines must be met. Further, the sooner the insurer and lawyer receive the claim, the more time they have to investigate and prepare a strong response.

Even if the claim is settled before a suit is filed, the company's lawyer should be involved, since a properly drafted release of liability will be required to ensure the claimant cannot come back and demand more in the future.

In most jurisdictions, a company is



required to keep all documentation of an accident once on notice of a claim. Courts can impose severe penalties upon a party who intentionally alters or destroys evidence.

Parties to a lawsuit have the right to review each another's accident documentation. The documentation may be introduced into evidence in court.

For the employer, relevant documentation includes not only the incident report form, but also written policies on vehicle use, vehicle maintenance records, the employee's driving history, and e-mails and correspondence concerning the incident.

The employee's company likewise can obtain documentation on the claimant's vehicle repair costs, medical treatment, lost wages, and other evidence backing up the request for damages. These records can be introduced into evidence to defend the claim.

Evaluating Whether to Settle or Go to Trial

There will come a point in the lawsuit when an employer will face a choice of whether to settle the case or continue to litigate the claim. In an effort to streamline trial dockets, many judges require parties try to negotiate a resolution. This frequently happens with the assistance of a third-party through the process of mediation.

Many factors come into play to determine whether a case should be settled or litigated.

One factor is the strength of the parties' respective cases. The strength of an employer's case will depend on, among other things, the driver's personal safety record and credibility as a

witness. The case will be more defensible if the employer can present solid evidence of a safety program and vehicle maintenance.

On the other hand, the plaintiff will have a strong case if he or she presents proof of actual injuries and can demonstrate the company's liability. The company's legal staff will be able to assess the merits of the plaintiff's case and the company's defenses, gauging the likelihood a loss at trial, and if a loss, the range of possible damages. This evaluation can help determine whether the case should be settled.

An additional factor is the time and expense of continued litigation. To prepare an auto accident case for trial, the company's lawyer will need to examine the evidence, interview witnesses, take depositions, hire one or more expert witnesses, prepare motions setting out legal arguments, and argue motions in court.

The company will be required to turn over documentary evidence and present employees for depositions. At trial, a company representative must be present, and others will need to appear and testify as witnesses.

Defending a case requires commitment by the company. This commitment, together with strong evidence and an aggressive defense lawyer, will go a long way toward a successful trial.

If the company has experienced a pattern of nuisance suits — that is, suits that have little merit — serious consideration should be given to declining settlement and instead taking one or more cases to trial. This can deter further nuisance suits by sending a signal that the company will not pay questionable claims.

Avoid Problems with Preventive Measures

Smart preventive measures can help avoid driving problems and minimize liability, should an accident occur.

One of the best ways to avoid a lawsuit is to implement programs of vehicle maintenance and driver safety, and keep complete records of the company's

compliance with these programs.

Hard evidence that a company takes safety seriously — such as written documentation of vehicle maintenance and driver safety training — can go a long way toward persuading a judge and jury the company is not negligent or that damages should be minimal.

Fleet management should develop and enforce policies addressing the use of cell phones, global positioning systems, telematics, monitors, and other electronics. Enforce a company-wide drug and alcohol policy. Provide guidance on what is and is not acceptable while driving on company business, including restrictions on who can drive company vehicles. To the extent possible, allow company vehicles to be driven only for company purposes.

Provide periodic driver education and safety training, and keep records of drivers who participate. Require

drivers to report all incidents (including near-misses, road rage, or unusual circumstances). Once programs and policies are introduced, records of compliance should be kept and penalties for violations enforced.

Screen drivers both at the time of hire and on a regular basis thereafter, making sure drivers have safe records and are properly credentialed.

Since driving records are protected by various privacy laws, obtain proper written authorization from drivers prior to running a records search. Also, determine whether specific federal or state laws apply to the fleet's situation.

A lack of awareness of a driver's violations or certification status is not a defense if an inquiry would readily disclose the information.

Decals provide an important advertising opportunity. However, if a decal vehicle is involved in an accident, any-

one on the street has a pretty good idea which company operates the vehicle, which can lead to specious claims. Nevertheless, even without a decal, driver's will need to share vehicle information should an accident occur.

The risk of nuisance suits does not outweigh the benefits of putting decals on company vehicles.

By taking the steps outlined in this article, a company can reduce the risk of groundless suits, and if sued, increase the ability to mount a successful defense. ■

About the Authors

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