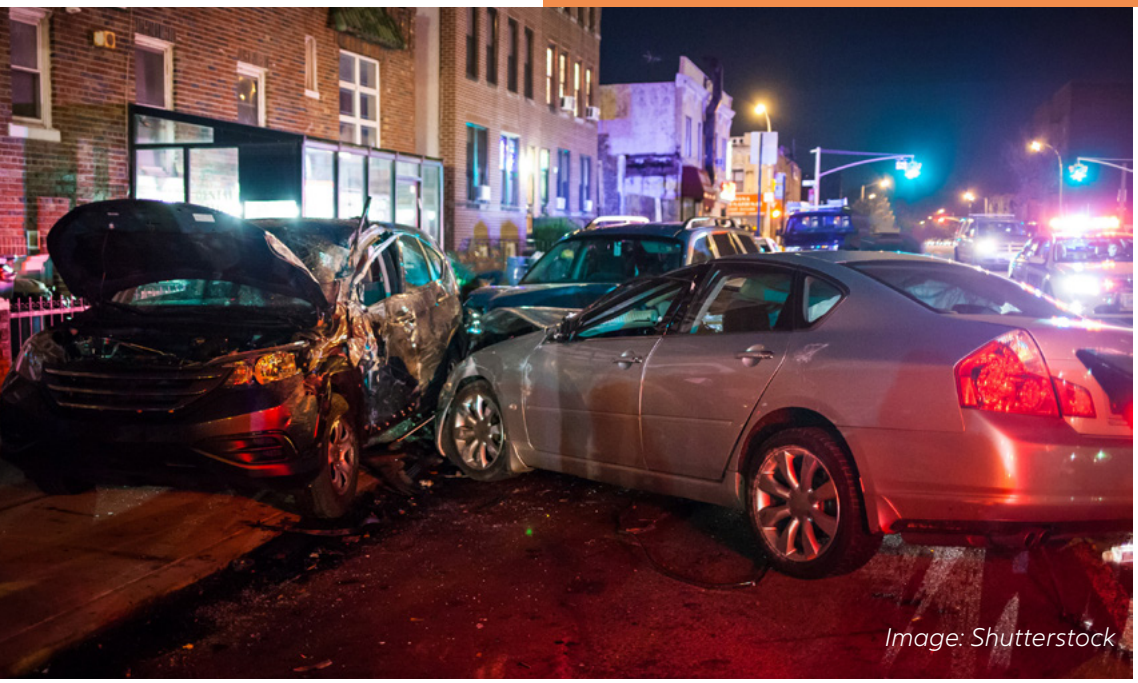
RISK BULLETIN

ALLIANZ GLOBAL CORPORATE & SPECIALTY®

NEGLIGENT ENTRUSTMENT

ALLIANZ RISK CONSULTING



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You hear about it in the news almost daily. A horrendous vehicle crash occurs and it is revealed that the driver that caused the accident had a string of serious motor vehicle violations.

"How could that person be behind the wheel?" you ask. "Didn't anyone check them out?"

It's a normal response. It is certainly the question that more and more injured parties are asking courts to decide.

As a result, the pursuit of negligent entrustment verdicts continues to increase. Judgments are often large and can include punitive damages, which, depending on jurisdiction, may not be covered by insurance. The risk of uninsurable multi-million dollar awards threatens your company's reputation, profitability and, ultimately, viability. Fortunately, there are basic steps that you can take to guard against the allegation of negligent entrustment.

What does negligent entrustment mean?

In simple terms, negligent entrustment means to charge someone with a trust or duty in an inattentive or careless fashion or without completing required process steps.

In commercial automobile operations, a case of "negligent entrustment" may arise when someone allows another person to use a vehicle knowing, or having reason to know, that the use of the vehicle by such a person creates a risk of harm to others.

There are two other theories of employer liability that are closely related to negligent entrustment: Respondeat Superior and Negligent Hiring

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Simply stated, Respondeat Superior holds an employer responsible for the conduct of an employee while the employee is acting within the scope of his/her employment.

Negligent Hiring holds an employer responsible for the conduct of an employee if the employer failed to use due care in hiring and retaining such employee. An example of a circumstance involving negligent hiring would be the employer's failure to check a driver applicant's driving record where it would have revealed a poor driving history.

Although the driver's own negligence in causing the accident is usually the primary issue, the two main focuses of the investigation of a negligent entrustment charge are your company's policies and practices. Basic questions are generally asked: Did your company have a policy regarding driver selection and training? Did your management team actually adhere to the terms and conditions of that policy?

What elements "make up" negligent entrustment?

There are several issues which are generally examined in a case or claim alleging negligent entrustment:

- the driver must be incompetent
- the employer knew or should have known of this incompetence
- the employer must have entrusted the vehicle to the driver
- the driver was negligent on the occasion in question
- the driver's negligence proximately caused the crash

Let's examine each of these five issues in more detail.

How can it be shown that the driver is incompetent?

Cases in many jurisdictions have focused on establishing the minimum competency of drivers by using the Federal Motor Carrier Safety Regulations (FMCSR) as a reference. In simple terms, these regulations require that a driver:

- be of legal driving age for the state where his/her license was issued
- be able to read and speak the English language
- by reason of experience or training, be able to safely operate the vehicle
- by reason of experience or training, be able to determine whether the cargo is securely loaded
- be physically qualified to operate the vehicle
- hold a valid driver's license
- complete an application form for employment
- complete a driving test in the type of vehicle the applicant is expected to operate and be deemed qualified to operate the vehicle (have not committed a criminal offense)

A complete review of the FMCSR is beyond the scope of this document.

Although enacted to govern companies who are under the authority of the Department of Transportation (DOT), the Federal Motor Carrier Safety Regulations are increasingly being referenced as a benchmark to measure the qualifications of a "professional driver" (a person with driving as a regular part of their job duties). When allowed as evidence in cases involving companies who are not under the authority of the DOT, this principle can make a big impact on the outcome of a court decision.

Of course, the easiest way to demonstrate a driver's incompetence is a long history of traffic violations and/or collisions.

How can it be shown that the employer knew or should have known of the driver's incompetence?

Typically, all pertinent employment records of the driver will be reviewed by the plaintiff's counsel. They will also do a thorough investigation of the driver's background, including his driving record. If the employment records do not contain an accurate and complete driving history of that employee, then the plaintiff's attorney may assert that the employer "knew or should have known" of the incompetence. If the plaintiff's counsel independently discovers records indicating incompetency, then the employer should have been able to discover the same knowledge.

How can it be shown that the employer entrusted the vehicle to the driver?

If the vehicle was not taken without permission, the vehicle has presumably been entrusted to the driver by the employer.

How can it be shown that the driver was negligent on the occasion in question and that the driver's negligence proximately caused the crash?~~?~~

An investigation of the accident scene, interviews with the parties involved and witnesses, and presentation of other evidence, can be used to prove a finding of negligence.

What can my company do to reduce our exposure?

There are several areas of a human resources and safety program which should be examined:

- Driver recruiting and selection practices
- New hire evaluation and orientation
- Ongoing driver review and training
- Post-accident reviews and training

Driver recruiting and selection practices

How your company attracts and then selects drivers is very important. Regardless of negligent entrustment allegations, it just makes good business sense to attract and hire the very best candidates for the job.

When recruiting drivers, you should make it clear in the advertisement that the position requires driving, and that candidates, in order to be qualified, should possess certain qualifications. These qualifications should be spelled out in detail to avoid interviewing unqualified prospects. These qualifications will vary from job to job, but examples could include:

- possess a valid driver license
- possess a specific type of license (i.e., commercial license with applicable endorsements)
- have a clear Motor Vehicle Record
- have experience operating a vehicle similar to the one that they will use on the job

Some companies may need to focus on selecting people for their technical skills or sales skills as a first priority, and then consider their driving ability. In this situation, the company should set and follow certain standards for driving ability: if the person cannot meet those standards, they will not drive. If they meet the minimum standards, but are considered "conditional" (i.e., the candidate could fall below the standard with one new violation or accident), then a training and monitoring plan should be enacted to enhance their driving skills and to watch for inappropriate risk-taking behaviors which could endanger the driver or the public.

Companies with multiple locations that do not have centralized control of recruiting and hiring need to conduct audits to be sure that corporate guidelines are being carried out at every location. Exceptions to existing guidelines should not be tolerated.

Management teams should review their driver recruiting and selection practices annually to be sure that they continue to attract a suitably qualified driver for each position. The review should also note any changes in position descriptions, especially if driving time increases or is added to a position's responsibilities. Changes in state or federal regulations affecting the position should also be reviewed and incorporated into company policy as needed.

The bottom line is this: job requirements need to be clearly communicated and only qualified candidates should be placed into jobs requiring driving.

New hire evaluation and orientation

Once an employee has been hired, additional verification of qualifications may be necessary.

Medical reviews, drug and alcohol screening, road testing and other types of required evaluations may need to be completed in order to meet state or federal regulations. Any newly discovered shortcomings should be documented and addressed. For example, a driver who demonstrates inappropriate behaviors during a road test should receive documented training aimed at improving those demonstrated behaviors. If a driver has serious problems in this phase, they should not drive until the problems have been corrected.

Management also has an opportunity to communicate the duties and expectations that come with the job. This may be accomplished in a number of ways:

- deliver a "driver handbook"
- deliver an "employee manual"
- provide classroom instruction

If delivering written materials, the employer should have the employee sign an acknowledgment that the employee has received the manual and is required to read it. It may also be necessary to follow up with each employee at a later time to verify that the manual has, indeed, been read.

Management should monitor driver orientation, testing and training programs to be sure that poor driving is discovered and addressed promptly. Periodic review of the effectiveness of the programs will ensure that programs which are becoming outdated can be replaced.

For a multi-location company, periodic reviews of each location should occur to make sure company evaluation and orientation standards are followed consistently.

Ongoing driver review and training

It is not prudent to qualify a driver only once, at the time of hire, and then never revalidate their qualifications. People change over time and so do their habits. Drivers who are subject to the Federal Motor Carrier Safety Regulations need to participate in an annual review of their performance conducted by their employer. This often includes obtaining an up-to-date motor vehicle record (MVR) from the driver's state of license.

Companies who are not subject to the authority of the DOT should carefully consider implementing some form of annual review. This may be as simple as obtaining an updated Motor Vehicle Report on each driver or as extensive as holding a formal performance review which includes annual road tests designed to validate behind-the-wheel performance.

Ongoing training is also helpful in maintaining safety awareness among drivers. Training can take many forms:

- skill training delivered via audio cassette (for the employee to listen to while operating the vehicle)
- video training programs (in the classroom)
- self-led training programs (at home)
- oral presentations by management or technical expert (in the classroom)

Safety posters, newsletters to drivers, and safety announcements in payroll checks can also build awareness of the Company's view of the importance of driver safety.

Training shows a commitment to safety by management, but attendance should be carefully documented to verify, precisely, which drivers actually attended and/or completed the coursework.

Post-accident reviews and training

Most companies have established specific accident reporting procedures. Typically, a driver completes a record-keeping kit at the scene of the collision, and then reports the details of the crash to a supervisor at the home terminal or headquarters location. Follow-up investigations may be completed by special teams, committees, specially trained managers or experts.

Although the purpose of these investigations is not to establish blame or fault, the records associated with the investigation may appear to do so. These records could

become evidence especially if the driver in question has had multiple accidents which have been investigated.

The process is important to improving safety by understanding why accidents happen. The investigations should not be abandoned simply because the report may be discoverable.

Investigators should exhibit care when documenting their case to avoid humorous remarks that could be misinterpreted and they should keep the file and its contents confidential.

Additionally, when it becomes clear that a lawsuit is being filed, the records should be secured to ensure their availability.

The results of any investigation should be carefully considered by management. If a gap in safety procedures is found, an action plan to correct the deficiency should be made and carried out. Ignoring the report's conclusions invites trouble by potentially painting a picture of management as indifferent towards safety results.

If the driver was responsible for the accident and specific behaviors or a lack of knowledge/ability was involved, a driver specific action plan should be planned and enacted.

This might include driver training or coaching by a supervisor. Again, to ignore skill or knowledge gaps may reflect poorly on management's commitment to safety.

What about contracted employees, loans of vehicles and use by non-employees?

Contract employees, occasional employee drivers, and non-employees who operate company owned or leased vehicles could expose your company to allegations of negligent entrustment. Examples of this type of situation could include:

- A contracted security guard who uses a company pool car for patrols
- A temporary employee (from an employment service) who takes a car to the post office
- A temporary employee (from an employment service) who makes deliveries
- A maintenance contractor who needs to run out for a part or another location to do work
- Transportation operations who contract with owner operators or run on other companies' DOT rights
- Loaning a company-owned delivery vehicle on the weekend to help with a household move to a new residence
- Permitting spouses of employees to use company cars

If these exposures exist, we recommend that you adequately qualify the operators of the vehicles or do not let them drive your vehicles, to avoid these risks.

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