mBurse

Mobile Employees and Risk

A "Crash" Course.

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INTRODUCTION:
Mobile Employees and Risk

Mobile employee: Someone who needs a vehicle to fulfill his or her job responsibilities, often working in sales, light service, account management, or merchandising.

If you employ mobile employees, your company faces a specific set of risks every time one of these employees gets behind the wheel during the workday. The more mobile employees, the greater the risk of an employee-involved accident. And when an accident does occur, you face serious questions about liability, insurance coverage, and even personal injuries or fatalities.

But that's not the only kind of risk. There's also the risk of labor code violations and class action suits resulting from improper reimbursement of employee expenses. Some states require complete indemnification of employees from work expenses.

This book is designed to help you understand and manage the kinds of risks your organization faces in relation to its mobile employees.

In This eBook:

We'll provide an in-depth look at each type of risk and guide you to best practices that can prevent costly complications.

CHAPTER 1:
Identifying Your Mobile-Employee Risks

Mobile employees are often the face of an organization, meeting with clients and establishing new relationships. But they also add to their employer's risk profile, whether they drive personal vehicles or company cars.

The risk generated by mobile employees can be categorized in three ways:

1. **General liability –** If employees drive personal vehicles, does the company set sufficient car insurance minimums? If the company supplies vehicles, are these vehicles sufficiently insured?
2. **Negligent entrustment –** Does the company have a formal driver safety policy and conduct regular motor vehicle record (MVR) checks?
3. **Class action lawsuits and labor code violations** – Some "pro-employee" states indemnify employees from all work-related expenses. Does the company sufficiently reimburse all mobile employees and comply with the law?

Let's examine each category and consider the ramifications of failing to adequately address these risks in your business vehicle policies.

General liability from car accidents

The amount of car insurance that an employee carries on their personal vehicle can affect the whole company. If an employee does not carry adequate insurance, a car accident can land the employer in court.

The Department of Motor Vehicle Safety recorded a car accident every six minutes in the United States for 2015. Each year, 20,800 accidents occur during the conventional business hours

of 9 a.m. to 5 p.m. It's only a matter of time before one of your employees winds up in an accident.

The complications arise when the employee's insurance cannot fully cover the cost of the accident. If the employee is at fault, and the damages exceed the employee's liability limits, the plaintiff will likely go after the employer. With lawyers involved, they will seek as much as they can get. If an injury or fatality resulted, your organization could suddenly find itself facing a personal injury or wrongful death lawsuit. One split-second mistake by a driver can change a company forever.

This is why it's vital to set minimum insurance amounts for employees and to set them high. It's also highly important to verify employees' insurance coverage regularly. If you do not enforce the policy, it's worthless. In chapter 2, we'll examine how to minimize the risks of company liability for the costs of an accident.

Negligent entrustment

If an employee causes a car accident, and the injured party can demonstrate that the employee was unfit to operate that vehicle for work, then the employer can be held responsible under a tort law action called negligent entrustment. The company therefore assumes responsibility for vetting all employees and making sure they remain fit to carry out the job. If a driver's incompetence causes injuries to another, the employer takes the blame.

By entrusting an employee with responsibilities that require driving, a company implies that the employee can fulfill those responsibilities without unduly threatening the safety of others.

Lawsuits resulting from negligent entrustment can cost millions of dollars and badly damage a company's reputation. It is therefore vital to establish and enforce policies that check each employee's driving records on a regular basis and that require specific actions if an MVR check raises a concern or if an incident occurs. At what point do you terminate the employee? When do you instead require safety training or some other constructive step?

The legal definition of negligent entrustment varies from state to state. In chapter 3, we'll explore how to navigate the various risks associated with negligent entrustment through robust policies that protect the company.

Labor code violations

A number of states have amended their labor codes to add specific protections to the take-home pay of employees. If employers do not fully protect their employees' pay in accordance with the law, they can be subject to fines and lawsuits.

States that have passed significant "pro-employee" legislation:

- California
- Illinois
- Massachusetts
- Michigan
- New York

If you have employees that work in these states, you need to pay attention to the laws that govern compensation. The strictest law is found in California Labor Code Section 2802. This law indemnifies employees from any work-related expenses. In other words, companies with employees operating in California cannot in any way, shape, or form pass on expenses to employees by failing to reimburse for an expense that could be construed as work-related.

When it comes to mobile employees, this goes beyond simply reimbursing for gas and other obvious travel expenses. Depreciation, tires, and car insurance all can be construed as work-related expenses.

Complicating matters is the elimination of the unreimbursed expenses deduction by the Tax Cut and Jobs Act passed in December 2017. Now that they have lost the ability to write off these expenses, employees will be more likely to file complaints or lawsuits to recover unreimbursed expenses.

In chapter 4, we will explore how to navigate indemnification laws by reimbursing employees properly.

Wisdom: knowledge applied

Your awareness of each type of risk associated with mobile employees will largely determine your ability to act preventatively. But if you fail to act on that knowledge, you are unwisely setting up the company for catastrophe. “It won’t happen to us” or “I’ll get to it next month” are dangerous words.

As you learn more about each category of risk throughout the rest of this book, it is crucial that you apply that knowledge by following the practical recommendations we provide for how to reduce risk and act proactively.

CHAPTER 2:
General Liability from Car Accidents

Given the frequency of car accidents, it's not a question of *if* but *when* one of your employees is involved in an accident on the job.

While there's no surefire way to prevent an employee-involved car accident, there is one effective measure you can take to decrease the chances of employer liability: requiring and enforcing minimum insurance coverage for all mobile employees.

In the age of mobile employees there are still quite a few companies that have no minimum insurance requirement or that only require the state minimum insurance, which is never enough. Before we look at best practices for minimum insurance requirements, let's lay out the components of a typical car allowance policy.

Employee liability limits and employer risk

Of all the types of insurance coverage, liability for bodily injury and property damage most directly impacts an employer's level of risk. Every insurance policy comes with a set of limits to the total amount the insurer will pay after an accident. If a mobile employee's liability limits are set too low, the injured party or property owner will seek redress from your company's insurance.

Types of car insurance coverage

Type of coverage	What it covers	Legally required?
Liability • **Bodily injury** • **Property damage**	Liability for accidents you cause. • Costs related to another person's injuries. • Damage to someone else's property.	In most states
Comprehensive	Damage to your car from storms, theft, fire, or vandalism, after you pay your deductible.	No**
Collision	Damage to your car from a collision, up to replacement at market value, after deductible.	No**
Medical payments	Costs of injuries to you, your passengers, and family members who drive the insured vehicle.	In some states
Uninsured motorist: bodily injury	Medical bills, if you are hit by a driver who doesn't have insurance.	In some states
Uninsured motorist: property damage	Damage to your car or other property when caused by a driver without insurance.	No
Underinsured motorist	Medical bills, if you are hit by a driver whose liability coverage is too low to cover your costs.	In some states

**Collision and comprehensive coverage are optional but may be required if you have a lienholder.

Three liability limits every policy sets:

1. **Bodily injury per person:** The maximum amount the insurer will pay for a single person's injuries, per incident.
2. **Bodily injury per accident:** The maximum total amount the insurer will pay for all injured persons, per incident.
3. **Property damage:** The maximum amount the insurer will pay for all damages to another person's property, per incident.

A typical policy might set these limits, respectively, at $100,000 and $300,000 and $50,000, expressed as a 100/300/50 policy. Here's how it works: A mobile employee with a 100/300/50 policy causes an accident that sends two people to the hospital, totals the other car, and damages a guardrail. The first victim incurs $58,000 in medical bills, the second victim incurs $98,000 in medical bills, and the property damage amounts to $34,000. In this case, the insurance company would pay for all these expenses because none of them exceeds the liability limits.

But what would happen if the driver had opted for an economy policy with much lower liability limits? You've got it—the victims would come after the employer to make up the difference.

This is why it's vital to set sufficient minimum liability limits for all mobile employees and to verify compliance.

State minimums are not sufficient

Even though nearly all states require liability coverage, the minimum required coverage is typically much lower than the 100/300/50 policy described above. Many companies set their minimum employee car insurance coverage based on the state minimum liability limits. This is a serious mistake.

California, for example, only requires a 15/30/5 policy. In the previous scenario, a motorist with a 15/30/5 policy would only have sufficient insurance to cover $35,000—well short of the whopping total cost of $190,000. The victims could try to sue the at-fault driver to recover $155,000 in damages (if they don't have underinsured motorist insurance). But if that driver was on the job, it makes more sense to go after the company because the company has deeper pockets.

In 2013, the Insurance Research Council reported that the *average* bodily injury claim was $15,443.[1] If the average claim exceeds California's required bodily injury coverage, then anyone in that state with a 15/30/5 policy runs a huge risk.

California isn't alone in setting very low minimum liability limits. While Alaska is an outlier at 50/100/25, most states require something between 15/30/5 and 25/50/15—which might be fine for a fender-bender but not for a serious accident.

Aligning your company's risk with the varying and inadequate state minimums leaves your company exposed. An employee car accident is not a question of *if*, but *when*.

1. Insurance Research Council, Auto Injury Insurance Claims Study (2013). Cited by the Rocky Mountain Insurance Information Association at rmiia.org/auto/traffic_safety/Cost_of_crashes.asp

An **unenforced policy** equates **to no policy at all.**

Verify employee insurance every six months.

Establishing appropriate employee liability coverage

By setting required liability limits higher than average, you greatly limit the exposure of both the employee and the company. At a bare minimum, you should require all employees to carry 100/300/50 coverage.

Best practice dictates a 250/500/100 minimum policy, which often only adds a few dollars more per month to a driver's insurance premium compared to a 100/300/50 policy.

Accidents resulting in more than $300,000 in bodily injuries are rare, but with dozens or even hundreds of mobile employees on the road every day for your organization, that rarity becomes an increasing possibility over time. And if your business grows (as hopefully it does!), your risk also grows as your workforce expands.

Insurance verification: the final piece of the puzzle

Once you set a robust minimum insurance requirement, it's crucial to verify that all employees stay compliant. We recommend that you verify employee insurance coverage as part of the hiring process and then bi-annually afterward. Most car insurance policies renew every six months, so if an employee switches, drops, or reduces coverage, it will likely happen around the time of a renewal.

Don't forget to ensure that all employees can afford the insurance coverage your company requires. If you are requiring your employees to purchase more expensive coverage than they otherwise might choose (as you should), then it's only right to adjust your car allowance or mileage reimbursement upward to cover the added expense.

In summary, set the required liability limits as high as you can, verify employee compliance consistently, and boost employee compensation/reimbursement. The time and money you spend building a robust policy will pay for itself over time in the reduced risk of legal entanglements.

CHAPTER 3:
Motor Vehicle Negligent Entrustment

Negligent entrustment: the entrusting of a dangerous article (as a motor vehicle) to one who is reckless or too inexperienced or incompetent to use it safely. **– Merriam-Webster**

Any responsible organization vets its employees and ensures they are competent to perform their job responsibilities safely. Depending on the nature of the job, an employer may require a criminal background check, a credit check, or a motor vehicle record check (MVR). This is all part of the hiring process. Because most people operate vehicles on a daily basis, a driving record can change frequently. An organization with mobile employees that does not perform regular MVR checks sets itself up for serious risk of a negligent entrustment lawsuit.

Negligent entrustment lawsuits can cost companies millions of dollars when juries award plaintiffs compensatory as well as punitive damages. All it takes is a car accident in which a) the at-fault driver was carrying out job responsibilities and b) it can reasonably be demonstrated that the driver should not have been entrusted with the vehicle and/or the job.

Negligent entrustment criteria

To establish the negligent entrustment of a motor vehicle, a plaintiff must prove the following elements:

1. The owner of the vehicle entrusted the vehicle to the driver, or the employer entrusted the driver of a personal vehicle to operate that vehicle on behalf of the employer.
2. The driver was incompetent, reckless, or unlicensed.
3. The owner/employer knew or reasonably should have known that the driver met one or more of the factors under element two.

4. The driver was negligent in his or her operation of the vehicle.
5. The driver's negligence caused damages.

For the employer, the third point is key: Did the employer know, or should the employer reasonably have known, that the employee was incompetent, reckless, or unlicensed? In order to avoid responsibility for the driver's behavior, the company must have proactive policies in place that a) discover evidence of incompetence, recklessness, or loss of license, b) deliver consequences for unsafe driving, and c) encourage safe driving habits.

TIP 1: **Conduct regular MVR checks**

Most organizations whose employees drive as part of work conduct an initial MVR check along with a criminal background check and verify that the driver has a valid license. But because incidents can occur outside of work hours, it is important that an employer maintain a window into each mobile employee's driving record.

Conducting annual MVR checks will help discover any incidents that could increase an employee's risk profile. It is vital that you enforce this policy. Getting lax about MVR checks opens up risks you cannot afford to take. If your organization operates a company fleet, your MVR checks should extend to your employees' family members who might operate a company vehicle outside of work hours.

By establishing and conducting annual MVR checks, you equip the company with defensible knowledge of employees' driving competence.

TIP 2: **Establish a formal safety policy**

If an MVR check discloses an incident, or an incident occurs at work, or a report of unsafe driving surfaces, you must have a mechanism for addressing the situation and ensuring future safety.

Some situations—a DWI, a loss of license—may be so egregious that the consequence is termination of the employee. Lesser incidents—a speeding ticket, an illegal U-turn—may instead be addressed via a required driver safety course or other constructive measure.

Every organization should establish a risk score system that helps identify

high-risk employees. After every MVR check, adjust the risk score of each employee based on any changes. Most states use a points system that can inform your organization's risk scoring system, but not all states confer the same number of points for the same violations. For example, driving without a license generates 10 points in Texas but only 2 points in California. For this reason, make sure to equalize points by attaching the same number of organizational risk points to the same types of incidents.

Next, establish clear guidelines for a level of risk that is tolerable, a level of risk that must result in a specific corrective action, and a level of risk that must result in immediate termination. Document every corrective action taken, and have employees acknowledge in writing that they understand the safety standards expected of them.

Remember also that insurance companies set premiums based on driving records. An employee who accumulates speeding tickets can become doubly risky for the company because the resulting higher insurance rates could lead the employee to reduce coverage—all the more reason to conduct bi-annual insurance verifications.

TIP 3: **Stay proactive with the safety policy**

An effective safety policy must do more than establish a risk profile for each employee and administer consequences when incidents occur. An effective safety policy must first and foremost equip employees to drive safely and prevent incidents in the first place.

Consider the common causes of car accidents: distracted driving, drowsiness, and poor time management that leads to speeding or running red lights. Establishing proactive policies can reduce the likelihood of these risk factors.

A 2013 report by the National Safety Council estimated that 27% of car accidents involved distraction due to talking or texting on a cell phone.[2]

Some states now ban all use of hand-held devices while driving; nearly all states ban text messaging. It is important to set and enforce a company-wide policy that governs the use of mobile phones across all states. Banning all hand-held device use is a good start, and you may want to consider banning hands-free devices, as evidence exists that even hands-free use of mobile devices can cause distracted driving. The key is to enforce the policy, establishing consequences for employees that show evidence of texting, emailing, etc. while driving.

You may also consider not only requiring a driver safety course of employees with higher risk profiles but also establishing a safety course for new employees and a periodic refresher course for employees with past incidents but no new incidents.

Any concrete, proactive steps you take to correct or to prevent accidents can help protect your company from accusations of negligence in the event of an accident.

2. National Safety Council. "Annual Estimate of Cell Phone Crashes 2013." http://www.nsc.org/DistractedDrivingDocuments/CPK/Attributable-Risk-Summary.pdf

Is continuous monitoring right for your organization?

Negligent entrustment lawsuits can cost companies millions of dollars. Because the potential cost is so high, some organizations opt for continuous monitoring of driver records in lieu of annual MVR checks. This alternative is expensive, but it informs the employer immediately when an employee has been charged with a moving violation.

Continuous monitoring is considered best practice with CDL and high-risk industries (hazardous materials or heavy equipment). Unfortunately, the costs associated with continuous monitoring are not the best fit for many organizations with mobile employees. You have to consider whether the extra expense is worth the peace of mind.

Continuous monitoring can instead be an intervention for "high-risk" drivers. It may be prohibitively expensive to monitor all employees, but combining continuous monitoring with the driver safety course could be an effective way to retain an employee while protecting the company from a negligent entrustment suit.

Final negligent entrustment considerations

Around 95% of car accidents result from human errors.

You must have a policy to reduce the risk from these accidents. The policy must promote safe driving, hold employees accountable for unsafe driving, and keep records of all incidents and interventions. A responsible employer must continually make an effort to improve this policy and make sure that management consistently enforces the policy. In the event of an accident this will help limit exposure to negligent entrustment lawsuits and judgments.

CHAPTER 4:
Labor Code Indemnification

California Labor Code Section 2802(a): ***"An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."***

Many states have laws designed to shield employees from disadvantageous relationships with their employers. But when it comes to protecting employees' income from employers' costs, California leads the charge. Under California Labor Code Section 2802(a), employers must fully reimburse employees for all expenses actually and necessarily incurred.

If you have mobile employees who work in the state of California, it is vital that you understand the labor code and the risks of not carefully adhering to the law.

When it comes to mobile employees, Section 2802(a) requires reimbursements for all expenses related to operating a vehicle for work. This includes fuel, insurance, maintenance, depreciation, and more. Employees can elect to calculate the actual costs of using their vehicle for business, but most organizations opt for the IRS mileage reimbursement rate to avoid this time-consuming calculation process. There are other ways to comply with the law as well.

Four ways to comply with California requirements

Type	Description	Pros/Cons
Mileage Reimbursement	Employees track their mileage and are reimbursed per mile at the IRS mileage rate or other standard cents-per-mile rate.	• Simple to administer. • May over-reimburse high-mileage drivers and under-reimburse low-mileage drivers.
Actual Expense	Employees track the actual expenses for their business vehicle use and are reimbursed for that exact amount.	• The most precise method. • Administratively difficult; requires tedious record-keeping and tracking receipts.
Lump Sum or Allowance	Employers provide an agreed-upon amount per month. Also known as a flat, taxable car allowance.	• Simple to administer. • Taxes greatly reduce the take-home amount, making this method the most inefficient.
Fixed and Variable Rate (FAVR)	Employers pay a set monthly amount plus a variable mileage rate based on cost data for each employee's territory.	• Considered best practice: enables precision without tracking receipts. • Administratively complex.

The consequences of non-compliance

If an employee can prove that his or her employer has not properly reimbursed vehicle expenses, the employer could be subject to not just a fine but even a lawsuit. The costs of violating California's labor code can be summarized in what one California law firm calls "the 4 P's"[3]:

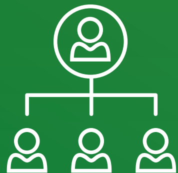
THE FOUR P'S

PENALTIES

Employees can recover not only lost wages or reimbursements but also additional penalties.

PLAINTIFF'S ATTORNEY FEES

Prevailing employees are entitled to collect all attorney fees incurred in the recovery of reimbursements.



PERSONAL LIABILITY

As of January 1, 2016, if a business owner, director, officer, or managing agent can be shown to have knowingly violated the labor code, he or she can also be found personally liable.

PAGA

Under the Private Attorneys General Act (PAGA), a single employee can bring a suit on behalf of other employees without having to form a class and recover reimbursements and penalties for *all* affected current and former employees.

3. Shivani Sutaria, "High Cost Violations: The 4 P's of California's Wage and Hour Laws" (2016). http://www.sutaria-law.com.

The expense of labor code violations in California can add up quickly. In April 2015, medical device company Stryker Corp. paid a $3 million settlement in a suit alleging failure to properly reimburse its sales reps. It's not unusual for violations and alleged violations to cost a company millions of dollars, so it pays to choose a reimbursement approach that ensures full compliance.

How the new tax code affects reimbursements

The 2017 Tax Cuts and Jobs Act (TCJA) lowered taxes for both individuals and corporations. But the new law also removed until 2025 the opportunity for taxpayers to deduct unreimbursed expenses like home offices and automobile costs. Many organizations in the past have used this "loophole" as a way to lower expenses by having employees write off unreimbursed costs on their taxes.

Employees will now increasingly look to their organizations to cover their costs. This new tax code could become a catalyst for increased reports of labor code violations in California as employees seek ways to recover unreimbursed expenses. Similarly, states that are more employee friendly may seek to strengthen their labor laws to force employers to fully reimburse expenses.

In light of California's labor code and the 2017 tax reform, it is crucial that you review all reimbursement policies and ensure that every employee is fully reimbursed for all expenses.

CONCLUSION:
Tighten Up Your Policy with Best Practices

Knowledge of the business risks associated with mobile employees is helpful, but wisdom means putting that knowledge into practice.

Anyone who runs a business knows that it's impossible to eliminate all risks. But you can put a plan in place to prevent risks and to limit the damage when risk becomes reality. Here's a summary of best practices to help you protect your organization from the three main areas of risk associated with mobile employees.

General liability due to car accidents

- Require all employees to carry auto insurance with liability limits set at 250/500/100.
- Increase your car allowance, mileage reimbursement rate, or compensation to cover the higher premiums associated with higher liability limits.
- Verify employee compliance every six months and take immediate action if an employee drops or reduces coverage.

Negligent entrustment

- Conduct motor vehicle record (MVR) checks when hiring any employee who will drive as part of the job—even if the job requires infrequent driving.
- Conduct annual MVR checks of all employees who operate vehicles for work, as well as family members of employees who may drive a company vehicle.
- Establish and update a risk profile for each mobile employee, accompanied by a set of required actions when an employee's risk score exceeds certain thresholds.

- Create a robust driver safety policy that details expected driving practices and bans unsafe practices such as mobile phone use while driving.
- Enforce all policies consistently. Never let an incident go unaddressed, keep written records of all policies and interventions, and don't hesitate to terminate an employee whose risk profile exceeds established thresholds.

Labor code violations

- Evaluate whether *all* your mobile employees are being sufficiently reimbursed. Make sure to account for differences in expenses due to geographically sensitive costs and territory size.
- Adopt a fair and accurate reimbursement policy that controls costs. Because employees experience varying levels of cost, increasing a car allowance or mileage rate to ensure full reimbursement of *all* employees can become cost-prohibitive and over-reimburse many employees.
- Choose FAVR – fixed and variable rate reimbursement. Other than actual expense reimbursement, only FAVR can precisely reimburse employees while controlling costs. A properly managed FAVR program, however, is far less time-consuming than actual expense reimbursement.

How mBurse can help you

At mBurse, we specialize in developing and administering FAVR reimbursement programs and helping clients create and enforce robust risk management policies.

Contact Us

Contact us today to learn more about FAVR or to receive more specific guidance regarding model policies to reduce risk. We also would be happy to audit your current policies and give specific feedback for improvement.

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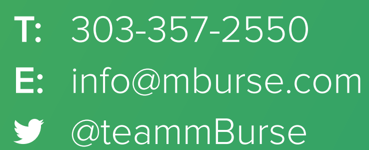

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