



Selecting and Monitoring Drivers To Avoid Punitive Damages

Are you properly screening your drivers and enforcing your written rules for the use of your company vehicles? If not, punitive damages are possible under the theory of negligent entrustment, and they are not insurable under California Insurance Code Section 533.

Negligent Entrustment:

Under the theory of negligent entrustment, you could have punitive damages imposed on your company as the owner of a vehicle. Establishing negligent entrustment generally requires a plaintiff to offer clear and convincing evidence to a civil jury that an employee's moving violations and convictions, combined with the employer's knowledge of these prior circumstances, made an automobile accident foreseeable because of the employee's incompetence.

Punitive damage allegations of negligent entrustment include:

- The driver was incompetent.
- The employer knew or should have known of this incompetence, and entrusted the vehicle to the driver anyway.
- The incompetent driver's negligence caused the accident.

In many jurisdictions, establishing the minimum competency of drivers is tested by using the Federal Motor Carrier Safety Regulations. Some competency standards are:

Driver must be:

- of legal driving age and hold a valid driver's license,
- physically qualified to safely operate the vehicle,
- able to independently determine whether cargo is securely loaded,
- qualified to operate a type of vehicle; proper class of license.

When these standards are not objectively met, a plaintiff's lawyer will attempt to build a case of the driver's incompetence. This foundation is usually coupled with employment records. When there is no MVR or background check that documents the employee's driving record, the notion of employer's misconduct begins. A plaintiff's lawyer goal is to prove that the employer knew of the employee's incompetence and still entrusted the employee with a company vehicle. By virtue of this knowledge, the door is now cracked open for punitive damages.

Punitive Damages:

California Evidence Code Section 1104, an employer can usually be successful in avoiding a negligent entrustment cause of action by admitting liability pursuant to respondeat superior and thereby prevent the admission of any inflammatory and prejudicial evidence. Unfortunately, nothing is easy, California Civil Code Section 1394 allows clear and convincing evidence to prove punitive damages. An employer can be found liable for punitive damages if the employer had knowledge of the unfitness of the employee and allowed the employee to use a company vehicle with a conscious disregard of the rights or safety of others. After a punitive damage award, some business entities are shocked to learn that they have to satisfy the punitive damages award themselves without insurance proceeds because their automobile insurer is not liable for punitive damages in California.

Your Insurance:

Even without punitive damages, frequent automobile accidents equal higher premiums for your company, but not just for your commercial automobile insurance. Your umbrella coverage is at risk too by high jury verdicts that have become quite common in California. You can also factor in the added costs for workers' compensation claims arising from employees injured in those accidents. Of course, a safety program may sometimes contain your company's accidents but one large workers' compensation claim can dramatically increase your experience modification rate (EMR) for three years and you pay for it. Not screening and tracking all of your employees and how your vehicles are being used during and outside of business hours is an invitation for much higher automobile and workers' compensation insurance premiums. Poor driving histories compound the problem because those employees with a history of accidents will usually be the repeat offenders.

Solutions:

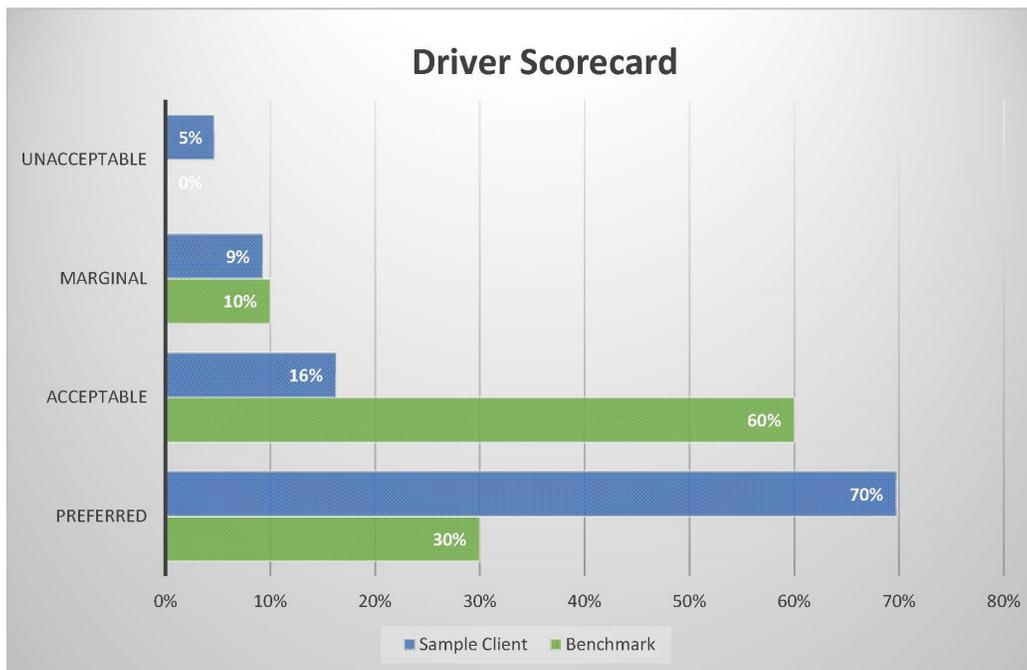
It is critical to document the driving history of your employees and not allow employees to operate vehicles without the proper class of license under any circumstance. Do not allow employees with poor driving histories to be custodians of your company's vehicles. Moreover, follow your formal fleet management plan/guidelines regarding all drivers that are associated to your business. This plan should include your company vehicles, employees' vehicles occasionally used in your business and rented vehicles. Make sure your employees read the fleet management plan, and have them acknowledge it in writing (signature and date). Driver guidelines that are established in the plan should be followed without exception.

Below are a few ideas to consider for your company to contain insurance costs:

- Driver safety training should be conducted once a year.
- Require all new hires to have driver safety training before they get behind the wheel of a company vehicle and then road test their skills.
- A vehicle inspection and maintenance program should be in effect and service records should be kept for each company vehicle.
- Form an auto accident review committee spearheaded by senior management. It demonstrates to your employees that driver safety is taken very seriously by your company.
- An in-house point system can be put in place by management so traffic violations are tracked.
- Use the DMV Employer Pull Notice (EPN) Program. Any time there is an action, e.g. an accident, a conviction or license suspension, it is recorded and management is immediately notified.
- An enhanced fleet safety program must include what is acceptable for personal use of company vehicles and what is prohibited.
- Start a "1-800 How's My Driving" program to reward good drivers and weed out the risky drivers.

Recommendation:

At a minimum, implement a Driver Scorecard with the six auto risk control measures as outlined below.



Preferred - Clear driving record

Acceptable - One moving violation, one accident, one speeding ticket (not excessive speed), one cell phone violation, or any combination of moving violations or preventable accidents for a total of two.

Marginal - Two moving violations, two accidents, any combination of moving violations or preventable accidents for a total of three, one DUI 5+ years.

Unacceptable - DUI/DWI/Drugs within the past five years, hit & run/evading police/resisting arrest, driving without a valid license (including a suspended license) within the past five years; three or more moving violations in 36 months; excessive speed; more than one at-fault accident in 36 months; more than two accidents of any type in 36 months.

Auto Risk Control Measures:

- Employer Pull Notice Program (EPN)
- Written Fleet Management Plan
- Pre-Employment Drug Testing
- Cell Phone Use Policy
- Seat Belt Policy
- Personal Use of Vehicle Policy

Your primary goal is to keep all claims within the torts (negligence) covered by your policy of insurance. Through the use of the Driver Scorecard and the six auto risk control measures, your company can clearly document when a driver is competent, and fend off the potential exposure of punitive damages.

Please feel free to contact PentaRisk Insurance Services if you need help with this process or need guidance on updating your written fleet management plan.

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