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ROOFING INDUSTRY LESSONS: What's Driving Claims Reducing Losses Through Best Practices and Contracts



Chicago Roofing Contractors Association
2024 Trade Show & Seminars

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BUREAU OF LABOR STATISTICS

December 19, 2023 - Report for 2022

- 5,486 fatal work injuries recorded in U.S. in 2022, a 5.7% increase from 5,190 in 2021.
- 2022 – 1,056 construction and extraction workers died on the job; a rate of 13 fatalities per 100,000 full-time workers, up from 12.5 deaths per 100,000 FTE workers in 2021.
- Construction and extraction occupations had the second most fatalities in 2022 compared to other occupation groups.
 - ✓ 811 construction trade workers
 - ✓ 113 supervisors of construction trade workers
 - ✓ 70 extraction workers



BUREAU OF LABOR STATISTICS

December 19, 2023 - Report for 2022

- Transportation and material moving occupations had the most fatalities (1,620) in 2022 due to an 11% increase in fatalities of driver/sales workers and truck drivers (14.1 per 100,000)
- Farming, forestry, fishing and hunting (23.5 fatalities per 100,000) had the highest rate of fatalities
- Roofing ranked as the 2nd most dangerous profession with 57.5 deaths per 100,000 workers (behind only loggers)
- 2,804,200 nonfatal injuries and illnesses, private industry in 2022 up 7.5% from 2021



BUREAU OF LABOR STATISTICS

December 19, 2023 - Report for 2022

Falls are the leading cause of workplace fatalities in the construction industry

- 423 construction worker deaths due to falls, slips or trips
- 105 roofer fatalities; 90 from falls, slips or trips
- 320 construction laborer fatalities; 119 from falls, slips or trips
- 431 fatalities from installation maintenance and repair occupations; 50 from falls, slips or trips
- 8 sheet metal worker fatalities; 4 from falls, slips or trips



FALLS – AT PERIMETERS

Best Practice - Positive Fall Protection

- Guard rails
- Tie-off
- Not warning lines and safety monitors for perimeter edge fall protection
- Warning lines could be used with personal fall arrest system



FALLS – THROUGH DECKS

§1926.501 (a)(2) The employer shall determine the walking/working surfaces on which employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.



FALLS – THROUGH DECKS

Need to Take Steps to Evaluate Deck Integrity Prior to Beginning Re-Roofing Operations

- ❖ Undertake an investigation to determine the structural integrity of the deck
- ❖ Thorough and then documented communications and conversations with the Owner's representatives, including property manager and roofing consultant if retained by the Owner asking the Owner:
 - ✓ Do you have any reason to question the structural strength and integrity of the deck before we place our roofing crew and machinery on the roof?
 - ✓ Are there areas where you have had persistent leaks?
 - ✓ What type of deck is it? Are there any areas of tectum?
 - ✓ Have there been areas of rusting of a metal deck?
 - ✓ Have there been areas of rotten wood?
 - ✓ Have there been areas of deteriorated gypsum or concrete?



FALLS – THROUGH DECKS

Steps to Evaluate Deck Integrity

- ❖ Ask the Owner to retain a structural engineer to assess the deck condition
- ❖ Ask the Owner to sign a statement: Owner understands that Roofing Contractor will be placing mechanical equipment and personnel on the existing roof. Owner states that to the best of its knowledge, after making an assessment, that the existing structure has the strength and integrity to support roofing operations. Owner is unaware of any condition that poses a safety hazard to Roofing Contractor personnel working on the roof.
- ❖ Include a contract provision in which the Owner and Property Manager represent they are not aware of any hazard or condition at or on the building that would endanger the life and safety of Roofing Contractor's personnel. (See proposed contract provision below.)
- ❖ Conduct your own investigation.



FALLS – THROUGH DECKS

Steps to Evaluate Deck Integrity

If you are dealing with a deck that is a potential hazard because, for example, there are areas of deteriorated gypsum, metal or wood that you know needs to be replaced, why take a chance that all the rest of the deck is structurally sound?

Err on the side of safety. Tie-off.



SKYLIGHTS AND HOLES

§1926.501(b)(4) Holes. (1) Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.



SKYLIGHTS AND HOLES

OSHA Interpretation Letter

May 12, 2000

Warning Lines & Skylights

“At 15 feet from the edge or hole (in the case of a hole, measure from the nearest edge of the hole), a warning line, combined with effective work rules, can be expected to prevent workers from going past the line and approaching the edge... Specifically, we will consider the use of certain physical barriers that fail to meet the standard for a guardrail a *de minimis* violation of the guardrail criteria in §1926.502(b) where all of the following are met:



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SKYLIGHTS AND HOLES

OSHA Interpretation Letter

May 12, 2000

1. A warning line is used 15 feet or more from the edge (or nearest edge of a hole).
2. The warning line meets or exceeds the requirements in §1926.502 (f)(2).
3. No work or work-related activity is to take place in the area between the warning line and the hole or edge.
4. The employer effectively implements a work rule prohibiting the employees from going past the warning line.



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SKYLIGHTS AND HOLES

Warning Lines §1926.502 (f) (2)

- Flagged at not more than 6-foot (1.8 m) intervals with high-visibility material.
- Lowest point (including sag) is no less than 34 inches (.9 m) from the walking/working surface and highest point is no more than 39 inches (1.0 m) from the walking/working surface.
- Capable of resisting without tripping over a force of at least 16 pounds applied horizontally against the stanchion 30 inches above the surface, with line having a minimum tensile strength of 500 pounds, and after being applied to the stanchions shall be capable of supporting, without breaking, the loads applied to the stanchions.



FALLS – SKYLIGHTS

- Be ridiculously safety conscious. Emphasize and focus on skylight safety.
- Have procedures in place at outset and enforce for the entire job.
- 100% tie-off of all personnel who will work on or adjacent to a skylight and any others who may come into contact with a skylight.
- Guard the skylight - Keep other personnel away from all skylights.



FALLS – SKYLIGHTS

- Very limited number of individuals should ever be at a skylight.
- Everyone working at a skylight must be tied off.
- No one should be working within 15' of a skylight without being tied off.



FALLS - THROUGH OPENINGS IN THE DECK

Check that all openings, particularly for skylights and installation of mechanical equipment, are properly covered, secured and labeled prior to crew gaining access to the roof each day and after breaks if other trades are working in the area.

Tie-off when working in the vicinity of the opening for mechanical equipment.



UNFORSEEABLE EMPLOYEE MISCONDUCT DEFENSE

- Well-recognized by OSHRC and Courts.
- Sometimes referred to as “isolated” employee misconduct.
- A contractor **fully** committed to employee safety, including enforcement of its safety policies, should always be able to rely on this defense to vacate an OSHA citation.
- Four requirements must be satisfied.



UNFORSEEABLE EMPLOYEE MISCONDUCT DEFENSE

Four (4) Requirements to Invoke Unforeseeable Employee Misconduct Defense

1. The contractor established work rules to prevent the violation from occurring.
2. The contractor adequately communicated the work rules to employees.
3. The contractor took steps to discover violations of its work rules.
4. The contractor effectively enforced its rules and took action when there were employee violations.



CONTRACT PROVISIONS FOR SAFETY

To Insert in Contracts for Re-Roofing Projects

Deck Integrity

If Owner and Property Manager deem it necessary, Owner or Property Manager will retain a structural engineer to evaluate the safety of the structure and deck prior to commencement of re-roofing operations. Owner shall hold harmless and indemnify roofing contractor for known unsafe conditions including deteriorated deck that Owner failed to make known to roofing contractor prior to commencement of roofing work.



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CONTRACT PROVISIONS FOR SAFETY

Deck Integrity

Deck: Customer warrants that structures on which Roofing Contractor is to work are in sound condition and capable of withstanding roof construction, equipment and operations.



CONTRACT PROVISIONS FOR SAFETY

Electrocution Hazard

Roof Top Safety: Customer warrants there will be no live power lines on or near the roof servicing the building where Roofing Contractor will be working, and that Customer will turn off any such power supplies to avoid an electrocution risk to Roofing Contractor's employees. Customer will indemnify Roofing Contractor from personal injury and other claims and expenses if Customer fails to turn off power so as to avoid injury to Roofing contractor personnel or resulting from the presence of concealed electrical conduit and live electrical power.



CONTRACT PROVISIONS FOR SAFETY

Non-Roofing Personnel

Roofing Top Safety: Roofing Contractor is not responsible for the safety of persons on the roof other than its own employees. Customer and General Contractor agree to and shall indemnify and hold Roofing Contractor harmless, including attorneys' fees, from claims for personal injury by persons or entities whom Customer or General Contractor have allowed or authorized to be on the roof.



REDUCING CGL LIABILITY AND CLAIMS

- Commercial General Liability insurance covers personal injury claims exclusive of workers' compensation claims and property damage other than the Work itself.
- Objective is to reduce “action over” and 3rd party injury claims by limiting scope of indemnification and additional insured obligations.
- Objective is to reduce interior water damage claims.



CGL PROPERTY DAMAGE CLAIMS

WORK PRACTICES

- Implement procedures to ensure that daily tie-ins are secure.
- Document that tie-ins were secure.
- Pre-job inspection of interior for water damage
- Interior protection from roof debris
- Check and document condition of gym floor prior to job start



CONTRACT PROVISIONS TO REDUCE CGL LIABILITY

To Insert in Contracts for Re-Roofing Projects

Existing Sources of Leakage

Roofing Contractor is not responsible for leakage through the existing roof or other portions of the building that have not yet been re-roofed by Roofing Contractor. Roofing Contractor is not responsible for damages or leaks due to existing conditions or existing sources of leakage simply because the Roofing Contractor started work on the building.



CONTRACT PROVISIONS TO REDUCE PROPERTY DAMAGE CLAIMS

To Insert in Contracts for Re-Roofing Projects

Notify Tenants

Prior to roofing work being performed, Owner will notify affected building occupants who shall take steps to protect property located underneath where roofing work is to be performed.



CONTRACT PROVISIONS TO REDUCE PROPERTY DAMAGE CLAIMS

Clean-Up – Interior Protection: Customer acknowledges that re-roofing of an existing building may cause disturbance, dust, debris or fireproofing to fall into the interior depending on existing building conditions. Customer agrees to remove or protect property directly below the roof in order to minimize potential interior damage. Roofing Contractor shall not be responsible for disturbance, damage, clean-up or loss to interior property that Customer did not remove or protect prior to commencement of roofing operations. Customer shall notify occupants and tenants of re-roofing and the need to provide protection underneath areas being re-roofed. Customer agrees to hold Roofing Contractor harmless from claims from those who were not so notified and did not provide protection.



To Insert in Contracts for Re-Roofing Projects

Fireproofing

Roofing Contractor is not liable for fireproofing that may detach, fall or spall from the underside of the roof deck or structural members during roofing operations, including costs of clean-up and replacement of fireproofing.



CGL PROPERTY DAMAGE CLAIMS

Claims Resulting from Inadequate Roof Drainage

- Recommend Owner have mechanical engineer check adequacy and current code compliance for drainage.
- Check proper installation of drains to ensure they are not a source of leakage.
- Include contract provisions.



CONTRACT PROVISIONS TO REDUCE CGL & POLLUTION LIABILITY

Fumes and Emissions: Customer acknowledges that odors and emissions from roofing products will be released as part of the roofing operations to be performed by Roofing Contractor. Customer shall be responsible for interior air quality, including controlling mechanical equipment, HVAC units, intake vents, wall vents, windows, doors and other openings to prevent fumes and odors from entering the building. Customer is aware that roofing products emit fumes, vapors and odors during the application process. Some people are more sensitive to these emissions than others. Customer shall hold Roofing Contractor harmless from claims from their parties relating to fumes and odors that are emitted during the normal roofing process.



INDEMNIFICATION

Key Issues in Evaluating Indemnification Provisions

What triggers the indemnification provision to apply?

- ✓ A claim, damage, loss or injury arising from or **arising out** of the roofing contractor's work or performance of its contract?

or

- ✓ A claim, damage, loss or injury due to the **negligence** of the roofing contractor?



INDEMNIFICATION

Key Issues in Evaluating Indemnification Provisions

- ❖ Are you (the indemnitor) being asked to indemnify others when there is no negligence or fault on your part?
- ❖ Are you (the indemnitor) being asked to indemnify others (indemnitees) when the claim, may have been caused by the indemnitee?
- ❖ Are you (the indemnitor) being asked to indemnify others when the claim may have been caused by the negligence of 3rd parties?



INDEMNIFICATION

What is a Reasonable Indemnification Provision?

Use the indemnification in the standard construction contract documents promulgated by the American Institute of Architect as an exemplar.

AIA Document A201-2077 General Conditions of the Contract for Construction, Article 3.18.1:

“To the fullest extent permitted by law ... the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to **bodily injury**, sickness, disease or death, or to **destruction of tangible property (other than the Work itself)**, but only **to the extent caused by the negligent acts or omissions** of the Contractor, a Subcontractor, anyone directly or



INDEMNIFICATION

What is a Reasonable Indemnification Provision?

indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.”



ADDITIONAL INSURED

Two Principal Issues Pertaining to Scope of Additional Insured Obligation

1. Whose fault is covered? Does it cover all claims “arising out” of your work or does it apply to claims that are due to your fault?
2. Does the additional insured coverage apply to completed operations?



ADDITIONAL INSURED

AIA A101-2017 Exhibit A Insurance and Bonds

§ A.3.1.3 To the fullest extent permitted by law, the Contractor shall cause the commercial general liability coverage to include (1) the Owner, the Architect, and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions for which loss occurs during completed operations. The additional insured coverage shall be primary and non-contributory to any of the Owner's general liability insurance policies and shall apply to both ongoing and completed operations. To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's consultants, CG 20 32 07 04.



ADDITIONAL INSURED

Contract Language to Insert to Limit Scope

Naming Contractor and Owner as additional insureds on Subcontractor's liability insurance policy and making that coverage primary is intended to apply only to the extent that a negligent act or omission by Subcontractor causes a claim to be asserted or a loss to be sustained by Contractor or Owner. Naming Contractor and Owner as additional insureds is not intended and shall not be construed to cause subcontractor's insurer to be liable either to defend or to indemnify Contractor or Owner for claims against or losses sustained by Contractor or Owner that are not due to the fault of Subcontractor



ADDITIONAL INSURED

Contract Language to Insert to Limit Scope

Subcontractors' obligation to provide defense and coverage to additional insureds applies only to the extent a claim against or loss sustained by the additional insured is caused by the negligence of Subcontractor.



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Negligent Entrustment

School of Risk Control Excellence (SORCE)

January 22, 2024



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Objectives



Understand

The concept of negligent entrustment and why it should be a concern to every organization



Recognize

How employers may be negligent in their driver and fleet management practices



Determine

Ways negligent entrustment risk can be limited with proper fleet management controls

Negligent Entrustment

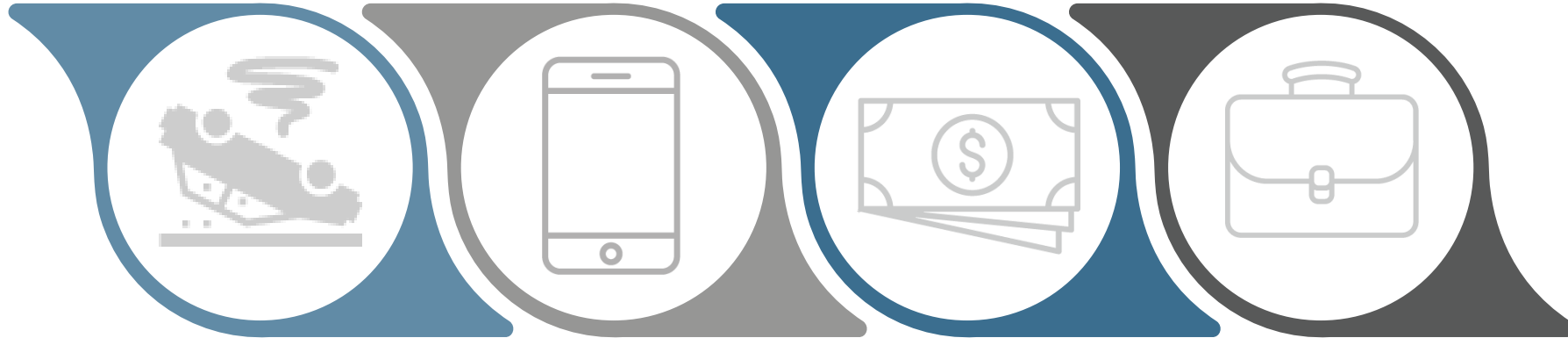
Introduction

Risky Behavior

Alcohol, Speeding and Distracted driving are the three key causes of fatal motor vehicle accidents.

Incompetent Driver

Drivers are judged to be incompetent if they are *intoxicated, unlicensed, inexperienced* or have a *record of reckless driving*



Occupational Fatalities

1,778 fatal occupational injuries in 2020 were transportation related.⁽¹⁾

Financial Impact

US Department of Transportation estimates the annual cost of roadway traffic crashes is over \$1 trillion.⁽²⁾

Trending Terms

Social Inflation



Rising litigation costs to defend a claim. The higher litigation and claim management costs impact policyholder premiums.

Nuclear Verdict



An exceptionally high jury award that surpasses what should be a reasonable or rational amount

Reptile Theory



Trial strategy that uses fear and anger to solicit a higher award amount to the plaintiff

Negligent Entrustment Defined

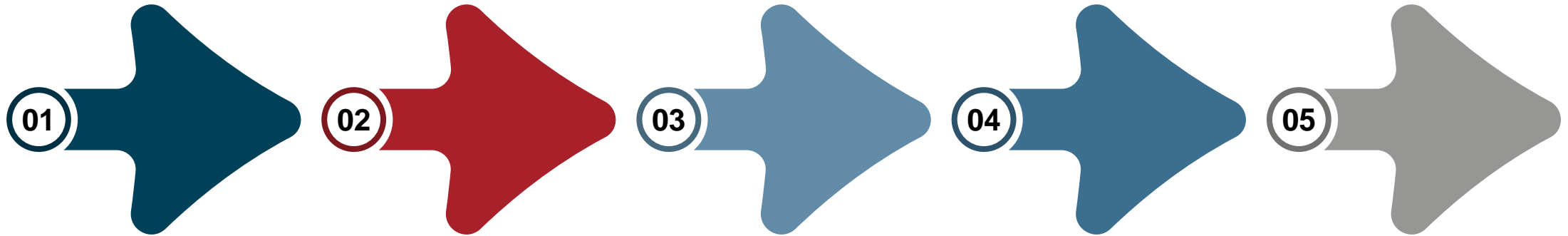
Elements to trigger a negligent entrustment scenario

Driver Incompetence

The driver was unlicensed, incompetent, negligent, or reckless during the scope of driving operations

Driver Negligence

The driver was negligent in the operation of the vehicle.



01 Vehicle Entrusted to Driver

The company entrusted the vehicle to the driver or person driving on behalf of the company

03 Company Knowledge

The company knew or should have known the driver was unlicensed, incompetent, or reckless (negligent retention).

05 Property Damage or Bodily Injury

The driver's negligence resulted in property damage or bodily injury

Negligent Entrustment Defined

Who are considered drivers?



Driver

- Hired by company to fulfill driving tasks for organization
- Typically assigned a specific vehicle, or type of vehicle



Employee

- Driving tasks are part of job duties, but not only task
- May have company assigned vehicle, or use personal vehicle



3rd Party

- Individuals not employed by organization, but either:
- Perform driving tasks for company, or
- Are provided a company vehicle for other uses



Hired and Non-Owned Auto



Employee

- Driving tasks are part of job duties, but not only task
- May have company assigned vehicle, or use personal vehicle (H/NO)

Hired and Non- Owned Auto

Non-Company Owned Vehicle

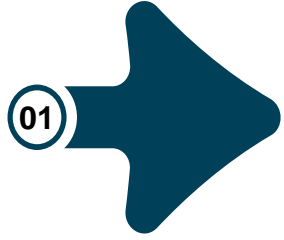
Rented, Borrowed, 3rd Party

Driving tasks related to company business needs

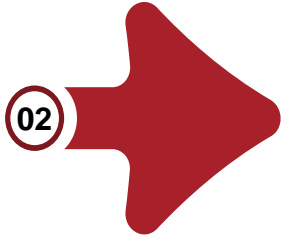
Offer of payment for vehicle use

Mileage reimbursement, vehicle allowance, or rental reimbursement

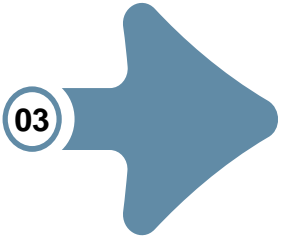
Driver Incompetence



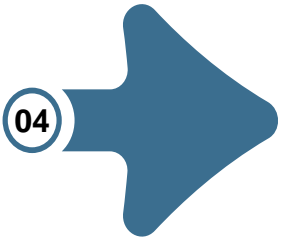
Not possessing a valid driver's license or driving with a suspended license



Not possessing a commercial driver's license (CDL) when it is required for the type of vehicle being operated, or the driver lacks proper experience



A motor vehicle record (MVR) with at-fault violations



An operator who is impaired while driving



Negligent Entrustment – Example 1

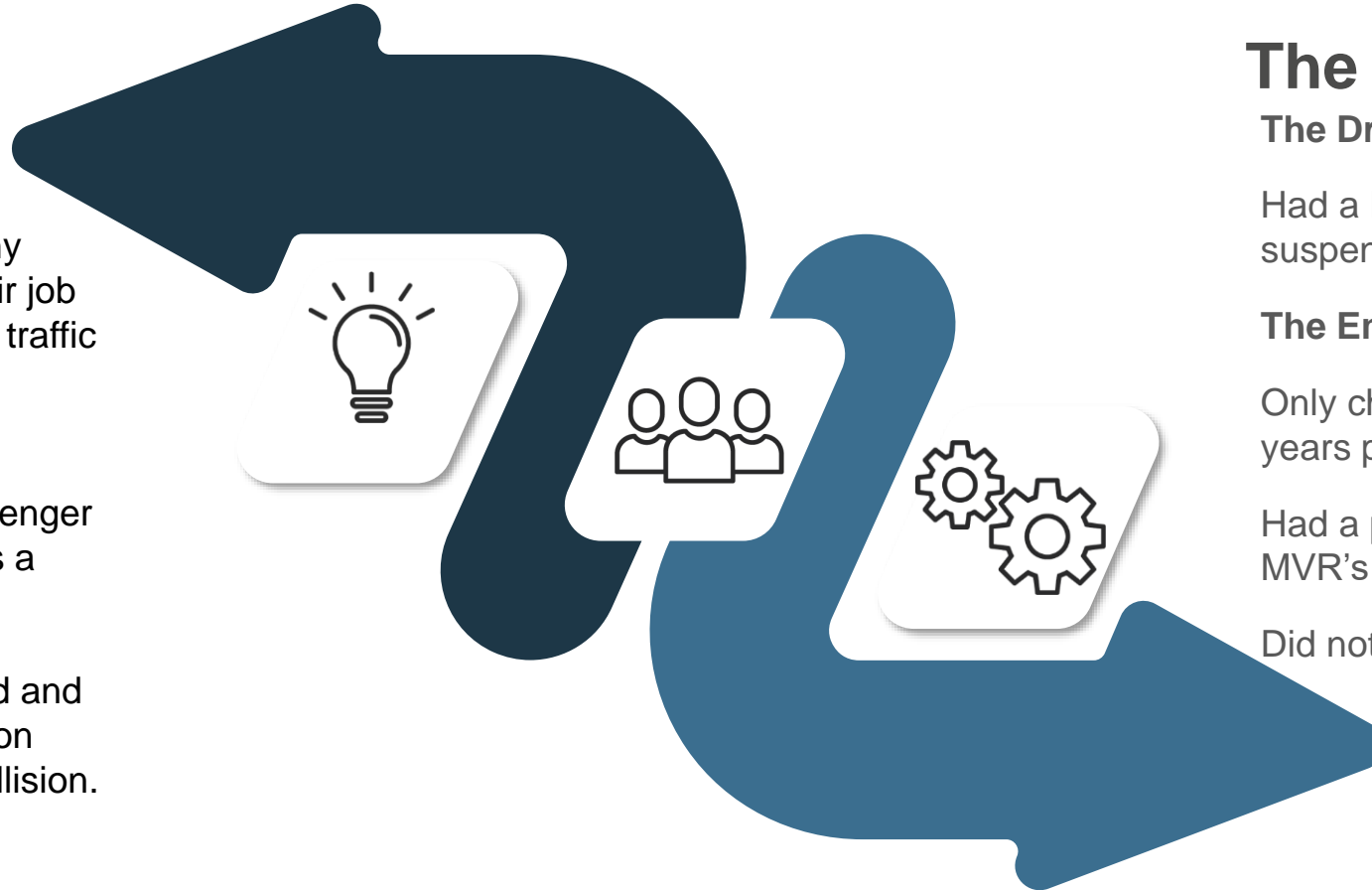
Example

The Accident

An employee driving a company vehicle during the scope of their job tasks turned left into oncoming traffic and collided with an oncoming motorist.

The other driver and their passenger sustained significant injuries as a result of the collision.

The at-fault driver failed to yield and was using navigation features on their phone near the time of collision.



The Issue

The Driver:

Had a DUI resulting in license suspension.

The Employer:

Only checked MVR at time of hire, 5 years prior.


Had a policy stating they conduct annual MVR's and outline qualification criteria.


Did not enforce their cell phone policy.

Was the Company Negligent?




 **Vehicle Entrusted to the Driver**
The driver was in scope of employment duties.

 **Driver Negligence**
Driver caused an at-fault accident. Element of distracted driving increases negligence.

 **Driver Incompetence**
Driver had past driving violations, including DUI and a suspended license.

 **Property Damage or Bodily Injury**
Injured parties and vehicle damage to third party.

 **Company Knowledge**
Company should have known of suspended license.

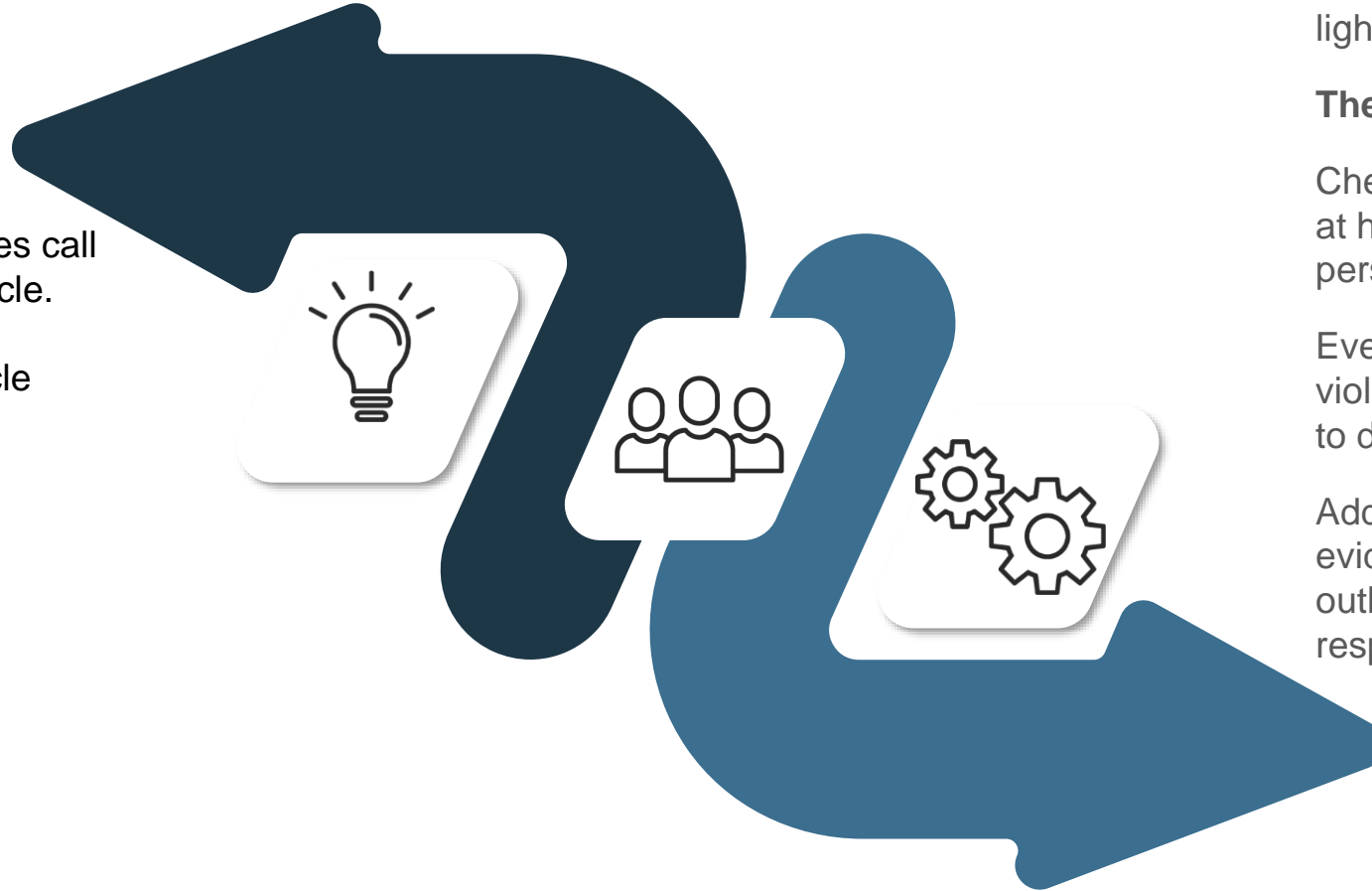
Negligent Entrustment – Example 2

Example

The Accident

An employee was driving their personal vehicle to make a sales call and rear ended a stopped vehicle.

The driver of the stopped vehicle was killed upon impact.



The Issue

The Driver:

Had two speeding and one traffic light violation within the past 2 years.

The Employer:

Checked MVRs for their sales staff at hire for those who drive their personal vehicles.

Even though the driver had violations, employer permitted them to drive.

Additionally, the employer had no evidence of a fleet safety program outlining driver qualification and responsibilities

Was the Company Negligent?



✓ Vehicle Entrusted to the Driver

Even though this was not a company owned vehicle, there was an expectation of driving tasks with the job duties.

Employer entrusted the employee to drive.

✓ Driver Incompetence

Driver had past driving violations

✓ Company Knowledge

Company should have been monitoring all employees who are entrusted to drive for company purposes.

✓ Driver Negligence

Driver caused an at-fault accident.

✓ Property Damage or Bodily Injury

Injured parties and vehicle damage to third party.

Control Negligent Entrustment Risk

Driver Qualification

Motor Vehicle Record Checks
License & Certification Review
Substance Abuse Program

Vehicle Assignment

Personal Use Policy
Hired and Non-Owned Exposure
Appropriate Vehicle for Appropriate Driver

Distracted Driving

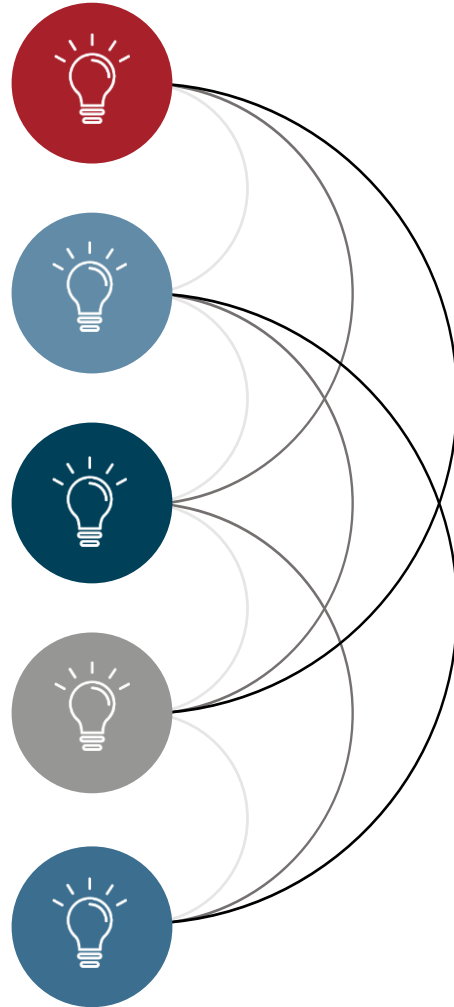
Cell Phone Policy
Telematics Integration
Workplace Well-Being

Driver Training

Road Tests (specific vehicles)
Pre-Use & Ongoing
Industry and Company Trends

Accountability

Enforced and Consistent
Outlined and Communicated
Driver Acknowledgement



Fleet Safety Program

ANSI Z.15 Standard

Regulatory Compliance

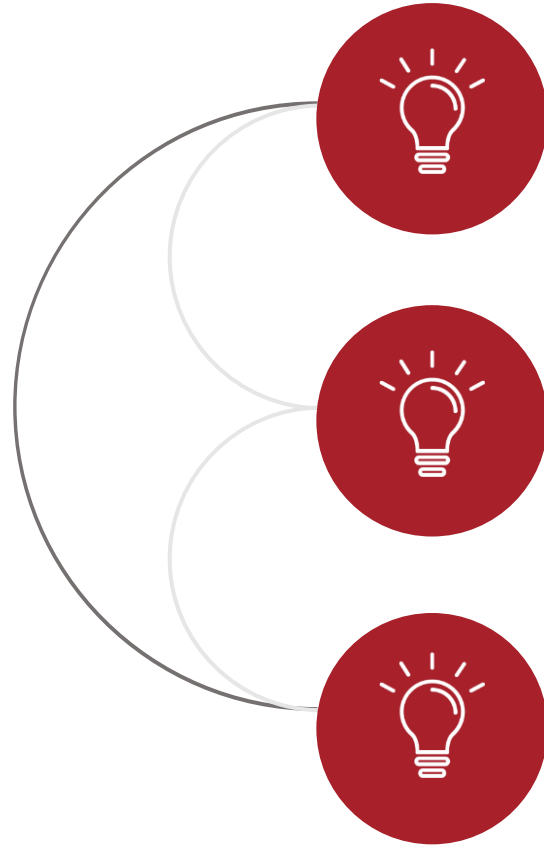


Control Negligent Entrustment Risk

5 Key Elements

Driver Qualification

Putting the right individuals at the wheel is the single most important action your company can take to ensure long-term success of your Fleet Safety Program



Motor Vehicle Record Checks

Include driver criteria in fleet safety program

Best practice is 5-year lookback when reviewing MVRs (check by state; some only allow 3-year)

License & Certification Review

Minimum standard of qualification

Regulatory requirements for commercial drivers license; review driver file and violation history through FMCSA

Substance Abuse Program

Ensure drivers comply with company and regulatory substance abuse program elements

Offer training and assistance



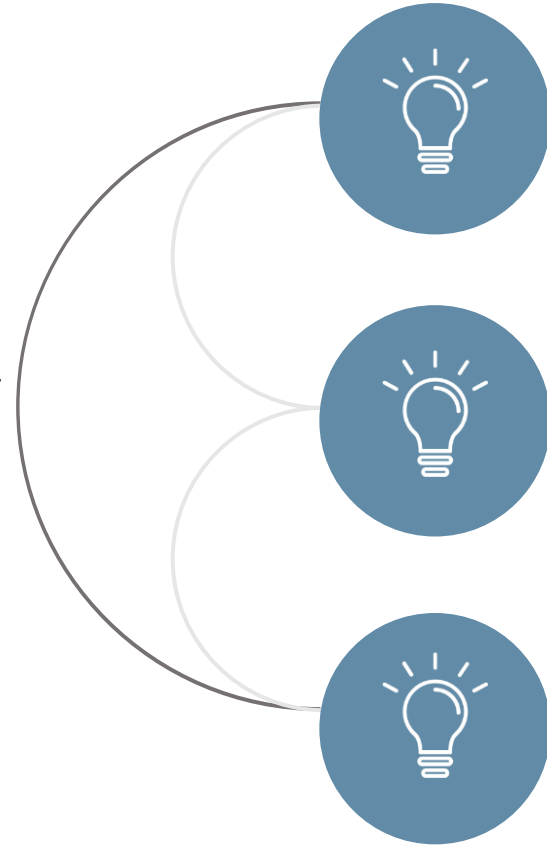
Control Negligent Entrustment Risk

5 Key Elements

Vehicle Assignment

Aids in ensuring the proper driver has been assigned the proper vehicle for their specific operational needs.

Assigning vehicles to a specific driver provides an additional layer of driver accountability.



Personal Use Policy

Company policy should outline position on drivers using a company owned vehicle for personal use.

If allowed, strict guidance and adherence to policy guidelines

Hired and Non-Owned

Guidance required for H/NO drivers to include confirmation that drivers have personal insurance & appropriate limits.

Must be included in driver selection, training, & accountability.

Appropriate Vehicle – Appropriate Driver

Ensure drivers are properly qualified to drive the assigned vehicle.

Outline accountabilities and responsibilities for each driver.



Control Negligent Entrustment Risk

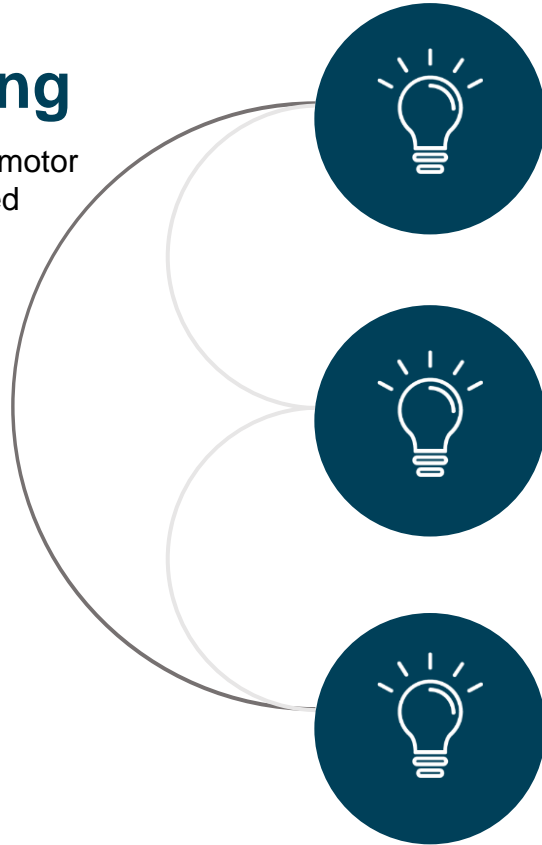
5 Key Elements

Distracted Driving

In 2020, over 3,100 were killed in motor vehicle crashes involving distracted drivers.⁽¹⁾

Distractions in Different Forms⁽²⁾:

- Visual
- Auditory
- Manual
- Cognitive



Cell Phone Policy

Develop and implement a policy to restrict cell phone use

Manage expectations of cell phone use and operational logistics⁽³⁾

Telematics Integration

Technology solutions can alert drivers of distracted driving activities

Continuous monitoring and real-time feedback drive results

Workplace Well-Being

Consider how overall work and home environment may impact a driver's cognitive distractions

Provide support and assistance to all employees for wellness efforts



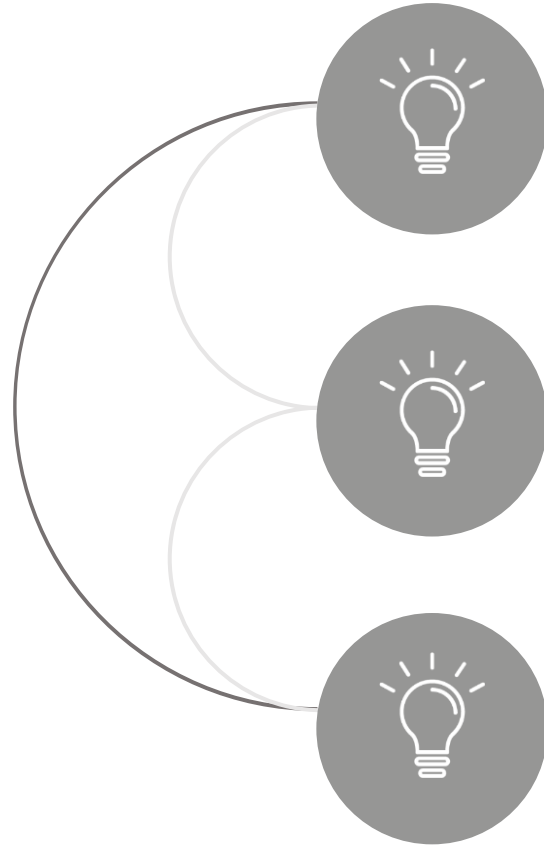
(1) [NHTSA Distracted Driving](#) (2) [NIOSH Motor Vehicle Safety at Work](#) (3) [Governors Highway Safety Association - Cell Phone Laws by State](#)

Control Negligent Entrustment Risk

5 Key Elements

Driver Training

Training should encompass aspects such as situational awareness and accident prevention as well as what to do in the event of an accident.



Road Tests

Confirm the drivers are qualified to use the vehicle in question. Conducting road tests.

Pre-Use & Ongoing

Training can be in-person, online, or one-on-one.

Training should be ongoing and adjusted to the needs of each individual driver.

Industry & Company Trends

Educate employees on both industry and company trends.

Bring awareness to hazards and risks all drivers should consider.

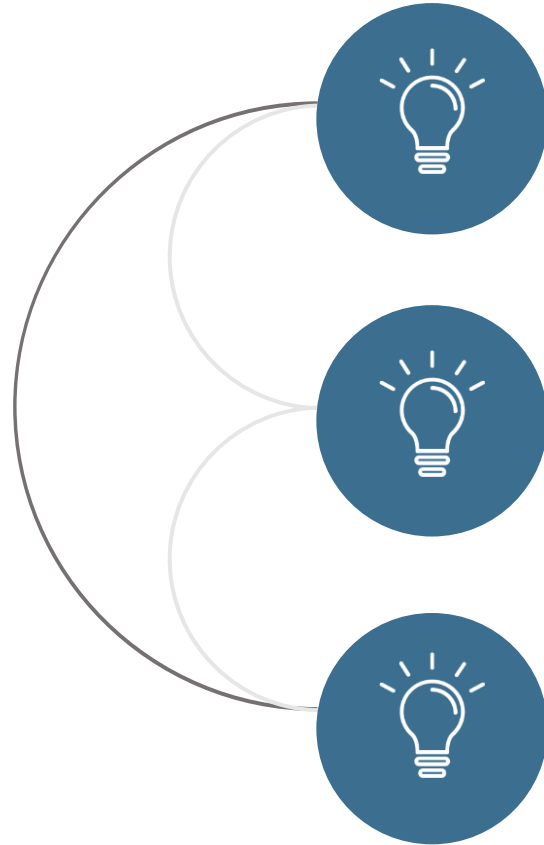


Control Negligent Entrustment Risk

5 Key Elements

Accountability

Provides a means for enforcing a fleet safety policy.



Enforced & Consistent

Standards must be applicable to all drivers.

Variations in enforceability is prohibited. Exceptions lead to noncompliance.

Outlined & Communicated

Provide clear and concise requirements for driver accountability.

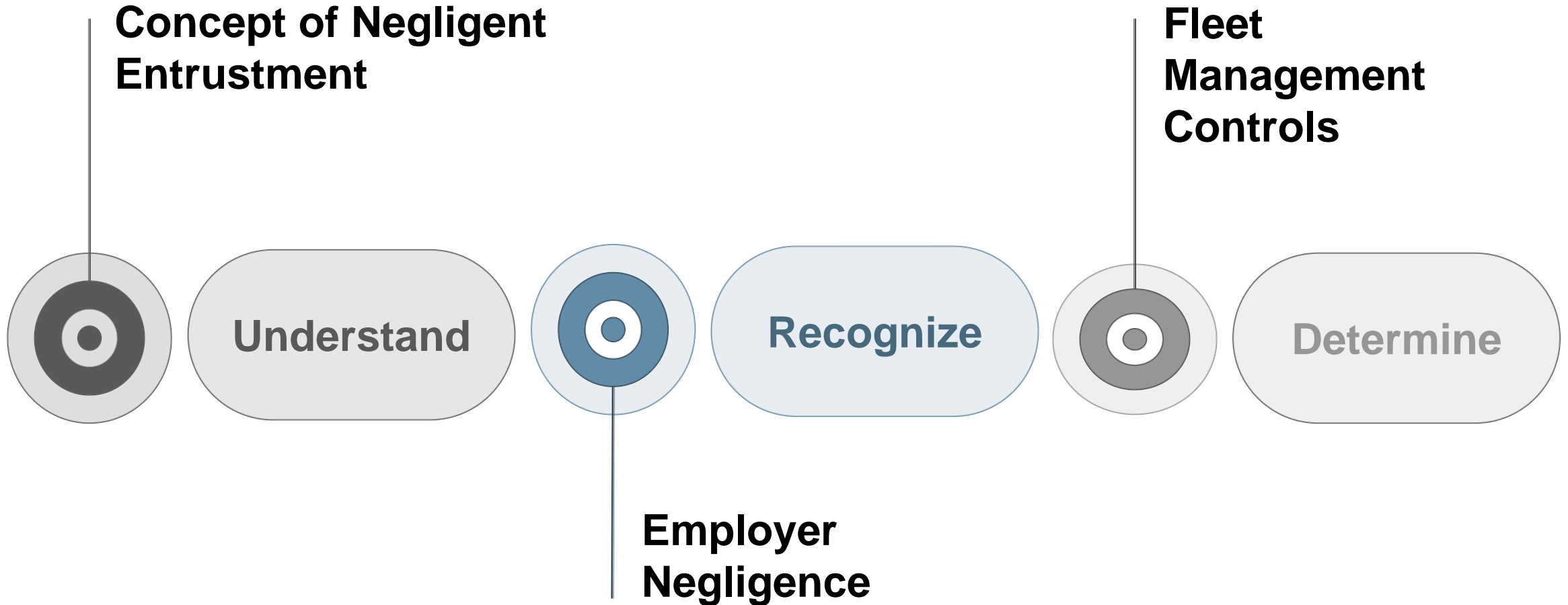
Ensure driver policies are properly communicated, and received.

Driver Acknowledgement

Formal review and signed acknowledgement of expectations.



Negligent Entrustment Review



Questions?