

## PENNSYLVANIA LEGAL UPDATE

### SPRING 2009 ISSUE

#### NO IDLE THREAT

If you own a business that takes deliveries from trucks, start your stopwatch when the truck driver arrives. And if you own or rent any property where any deliveries are made by commercial trucks or where any commercial trucks regularly park, you must post signs against diesel engine idling and actively take steps to prevent engine idling.

The Diesel-Powered Motor Vehicle Idling Act makes it a minor crime to leave a large diesel-powered truck engine idling for more than five minutes in any 60-minute period. The Act does not just punish truck drivers who idle more than the permitted five minutes—it imposes responsibility on owners and tenants at any location where idling trucks park or make deliveries.

Anyone who owns or rents a location where diesel trucks with a gross weight of 10,001 pounds or more make deliveries or park is responsible for stopping truck drivers from letting the engine idle longer than five minutes. Drivers who allow their vehicles to idle excessively are liable for summary criminal fines from \$150 up to \$300 and can also receive an additional \$1,000 civil penalty. Truck owners can be held responsible for the costs of prosecuting the drivers. What about property owners and their tenants? Their liability for fines is exactly the same as that of the truck drivers: They can be fined from \$150 to \$300 per incident and can also face potential civil penalties of \$1,000.

#### Permanent Signs

Effective February 6, 2009, both landlords and tenants *must* post “permanent” signs to inform truck drivers that idling is restricted. The signs must comply with PennDOT’s Handbook of Approved Signs, available online at [www.dot.state.pa.us](http://www.dot.state.pa.us).

Both landlords and tenants are responsible for preventing excessive idling. Posting the signs does nothing to protect you if visiting diesel vehicles violate the five-minute rule. Under the Act, all landowners and tenants are broadly responsible for preventing excessive idling, and no defenses or excuses are included in the language of the Act. Particularly if you have a high number of truck deliveries on your property, or if trucks regularly park and idle in your parking lot, you must train your employees to require that all drivers obey the five-minute limit.

### Exceptions

There are certain exceptions, however. The five-minute limit does not apply to any diesel vehicle that exhibits a label issued by the California Air Resources Board showing that the vehicle's engine meets certain idling emission standards.

The Act also excludes motor homes and farm equipment from the vehicles subject to the Act. Emergency vehicles actually involved in emergency response or training may be idled as necessary but not simply for the "convenience of the driver." Armored vehicles may idle if a person remains in the vehicle and the idling is limited to the period of loading and unloading.

The Act permits cargo refrigeration trucks to idle if necessary for public health reasons. School bus drivers with students aboard may idle for 15 minutes and may idle longer to maintain temperatures necessary to protect special-needs students. Waste haulers who are "actively" picking up trash or recyclables can idle during pickups. And, until May 1, 2010, truck drivers with sleeping berths can idle their engines while they rest to maintain heat or air conditioning under limited circumstances. Thereafter, they will not be permitted to idle the engine during rest periods unless they are parked at a facility that provides stationary idle-reduction technology.

## FOODBORNE ILLNESS RESPONSE

Injuries from spoiled food range in severity from the minor upset stomach to the tragic

death of a child. The law of foodborne illnesses is a tangled web of federal and state law. Many food industries have secured some federal protection from liability to consumers. Pennsylvania, like most states, treats retailers, wholesalers, restaurants, caterers, and manufacturers differently, depending on the precise facts of the case.

If you own a business that sells or prepares food, state and federal law as well as your own industry standards provide you with health and safety guidelines. If you fail to meet those guidelines, you can be found presumptively negligent. Be sure that you meet all applicable safety standards and that you keep written records of your food safety practices and employee training.

#### Check Your Insurance and Your Contracts

Before you find yourself a defendant in a foodborne illness outbreak, check your insurance coverage to see if you have liability and attorney's fee coverage for foodborne illness losses and lawsuits. Meet with your insurance agent to explore all possible levels of coverage and analyze the cost of the coverage in comparison to your potential losses if you are without coverage. Review your own loss coverage—do you have business interruption insurance and coverage for the losses you will suffer if you have to discard inventory?

Examine your contracts with your food suppliers. You can require that your suppliers “indemnify” you against liability—that they pay if you sell their contaminated products. Also examine existing contracts to see if you have already indemnified suppliers or customers. Many contracts, purchase orders, and invoices in the food industry contain indemnification language.

You need to know if you are accepting responsibility for another business. Track your supplies and ingredients as carefully as possible, particularly if you use multiple suppliers for the same food item. You need to be able to trace the path that a contaminated product took, both into and out of your business.

If you or a family member falls ill from a foodborne illness, you should take all possible steps to preserve evidence. Ask your health-care providers to preserve blood and stool samples. The best evidence that your illness was related to a particular outbreak is an actual lab sample

from your body that contains the particular pathogen. Public health officials trace and identify the path of foodborne illness outbreaks, and their investigation and reports can be helpful to your claims.

Where an injured person cannot distinguish precisely which company or individual in a group produced or sold the contaminated food he or she ingested, the law imposes a burden on the group of responsible defendants to prove which among them was the most likely source. In order to shift the burden to a group of defendants, the injured claimants must prove that each defendant was responsible for making or selling the contaminated food.

#### COURT REINSTATES CANCELED LIFE INSURANCE POLICY

When an 88-year-old Pennsylvania businessman died without life insurance coverage, his family business was able to have its canceled life insurance policy reinstated when a Pennsylvania court declined to apply a law called “the mailbox rule.”

The businessman was a partner in his family business. For many years the business itself had carried a life insurance policy on the man’s life so that the business would have money to buy the man’s share of ownership in the business upon his death. Each April, the insurance company sent an annual premium bill. Usually the dividends and earnings on the life insurance policy were large enough to pay the annual premium and the annual bill would show no balance due. But in 2001, when the annual premium doubled, the family business did owe a premium payment because the policy earnings were no longer enough to cover the premium.

In late 2001, months after the premium went unpaid, the insurance company issued a cancellation notice. The family business acted quickly to request a premium bill and paid it. The family business insisted that it never received the premium bill in April 2001.

Upon receiving the late payment, the insurance company inquired about a medical

questionnaire completed by the insured businessman. The family business was confused by the inquiry and was further confused by a subsequent letter from the insurance company returning the late premium payment. In the letter, the insurance company concluded that the family business had ignored a reasonable request for medical information and referred to the file on the policy as “closed,” but did not use the word “canceled.”

In the following year, the businessman died, and the insurance company denied coverage on the life insurance policy, claiming that it had canceled the policy when it closed its file, and that the acceptance of the return of the late premium showed that the business knew that it did not have life insurance in place.

The family business sued for reinstatement of the policy, maintaining that it never received a timely premium bill in the last year of the policy, that it never received a final cancellation notice, and that it accepted the refunded premium because it assumed that it was an overpayment.

The Pennsylvania court first noted that the family business was entitled to clear and timely annual premium bills. Even though the insurance policy did not require annual bills, the court ruled that where an insurance company establishes a pattern of sending bills the company must continue to do so.

The court further found that, where the consumer needs information and guidance about the amount owed on a life insurance policy, the company must send bills. Consumers are not obliged independently to investigate and monitor the status of their life insurance premium payments. Instead, it is the obligation of the insurance company to keep the consumer informed of the premiums owed on the policy.

#### Mailbox Rule

The court then found that the insurance company was not entitled to the protection of “the mailbox rule.” The mailbox rule provides that proof that something was mailed creates a “presumption” that the mailed item was actually received by the recipient. In order to take

advantage of the mailbox rule, the insurance company had to prove that it put an accurately addressed, postage-prepaid premium notice in a U.S. Post Office mail drop or that its employees, in the regular course of business, prepared and signed the premium notice and put it in the place they regularly used to send out mail.

All that the insurance company could prove was that its internal records showed a premium notice was created. It offered no testimony or records that the notice was put in an office mailroom or was deposited in a U.S. Post Office. In fact, its employees candidly testified that the automated mailing equipment they used sometimes ripped or destroyed some of the outgoing mail.

Because the insurance company could not prove that it mailed the premium notice and some of its subsequent communications, the policy was reinstated by the court.

The mailbox rule provides all litigants in any kind of lawsuit with a powerful presumption that a document was actually received. One of the best ways to secure proof of mailing is to use the U.S. Post Office Certificate of Mailing. Different from registered or certified mail receipts, the Certificate of Mailing simply serves as a receipt from the U.S. Post Office for a piece of outgoing mail.

Another way for a business to meet the mailbox rule is to have an employee make a memorandum of his or her actually mailing the item. Testimony by an employee that a particular item was mailed can be sufficient to trigger the mailbox rule.

## TREE REMOVAL

When Are Trees Just “Timber”?

A Pennsylvania man recently learned the tough answer to this question when he mistakenly cut down 13 mature trees on a wooded slope between his undeveloped lots and a neighbor’s home. No one disputed that the man was honestly mistaken in thinking the trees were

on his own land. No one disputed that the man cut the trees to sell as timber and was paid \$5,000 for them.

The dispute in the case centered on what the homeowner was owed in damages. Was he entitled to the \$5,000 or was he entitled to be made whole for the loss of his trees?

Pennsylvania law provides that a person who cuts or removes another person's "timber" is responsible for paying three times its value if the removal was deliberately wrongful, two times the value if the removal was carelessly wrongful, and only the actual market value if the remover was reasonable in his or her mistaken beliefs.

But when land is irreparably damaged by the wrongful removal of trees, the damages are measured not by the penalties for removal of timber but, instead, by the loss of market value of the property.

In this case, the location of the trees was vitally important because they served as a buffer between the owner's home and the Pennsylvania Turnpike. The fact that the trees served as a buffer to the noise and dust of the Turnpike led the court to decide that the loss in market value of the property was the proper award. The homeowner's appraiser testified that the loss was \$20,000, and the neighbor was required to pay that amount.

Whenever trees are not intended to be harvested for commercial use, wrongful removal of such trees, particularly those on residential properties or those that provide useful shade, will trigger damages awards that focus on the irreparable loss to the value of the real estate.

## RIGHT TO KNOW

Pennsylvania's Right to Know Law, also sometimes called the Open Records Act, requires that government agencies share documents and records with members of the public. The law was amended in 2008 to broaden the scope of open records and to set up an agency to assist citizens who seek access to public records.

The Office of Open Records has a website at [www.openrecords.state.pa.us](http://www.openrecords.state.pa.us), where you can find a copy of the Act, a Citizens' Guide to the Act, numerous forms, and additional information. You can also reach the office by telephone at (717) 346-9903.