

MANAGING LEGAL LIABILITY

SCDTSEA Annual Meeting | December 6, 2024

| **HAYNSWORTH
SINKLER BOYD**

ABOUT HAYNSWORTH SINKLER BOYD

- Established over 135 years ago
- Full-service law firm with five offices in South Carolina and North Carolina
 - Charleston, Columbia, Greenville, Florence and Raleigh
 - 110+ attorneys



ABOUT YOUR SPEAKERS



Mac McQuillin

843.724.1120

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A versatile trial attorney with deep ties to his native Charleston, South Carolina, Mac McQuillin blends an established litigation and local government practice with a growing mediation practice as a certified Circuit Court Mediator. He advises individuals, local businesses and government entities in complex matters, and has extensive experience with both jury and non-jury trials.

In 2014, Mac was elected to serve on the Berkeley County School District Board (the fourth largest school district in South Carolina). He was re-elected in 2018 and 2022.

ABOUT YOUR SPEAKERS



Boone Aiken

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Boone Aiken is an associate in Haynsworth Sinkler Boyd's Charleston office and maintains a multifaceted practice, providing advice and counsel on transactional matters and litigating disputes.

Boone assists business owners and individuals with a variety of corporate matters, including entity formation and structure, mergers and acquisitions and commercial contracts. He also represents clients with their litigation needs, handling disputes involving contracts, financial transactions, corporate governance issues, and breaches of fiduciary duty.

ABOUT YOUR SPEAKERS



Chloë Satzger

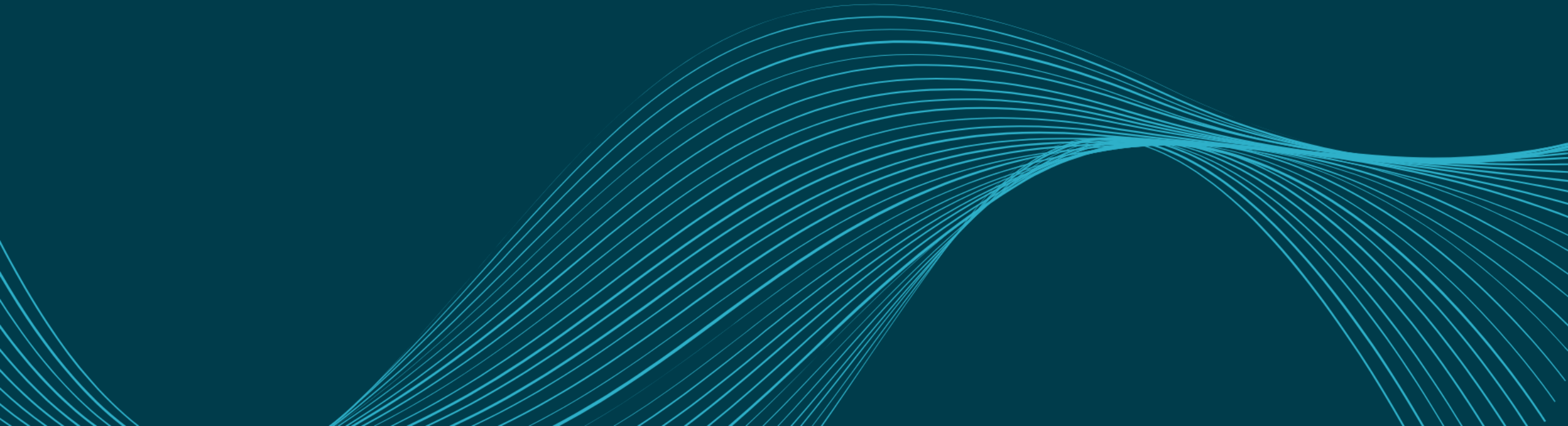
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A recent graduate of the University of South Carolina School of Law, Chloë Satzger is an associate in Haynsworth Sinkler Boyd's Charleston office and works on various litigation matters, including defending auto accident cases, contract disputes, and business disputes.

While in law school, Chloë served as an Associate Editor-in-Chief of the *South Carolina Law Review* and as a research assistant. Chloë is proficient in Spanish and studied abroad in Spain as an undergrad.

WHAT SHOULD YOU DO IF YOU GET IN AN ACCIDENT?



THE BAD NEWS

A series of thin, light blue lines that flow and curve across the bottom half of the page, creating a sense of motion and depth.

Wrecks happen!

- If you drive a car, you are likely to either be party to or observe a car accident at some point in your life
- Whether or not your driver is at fault, it is good to be prepared









THE GOOD NEWS

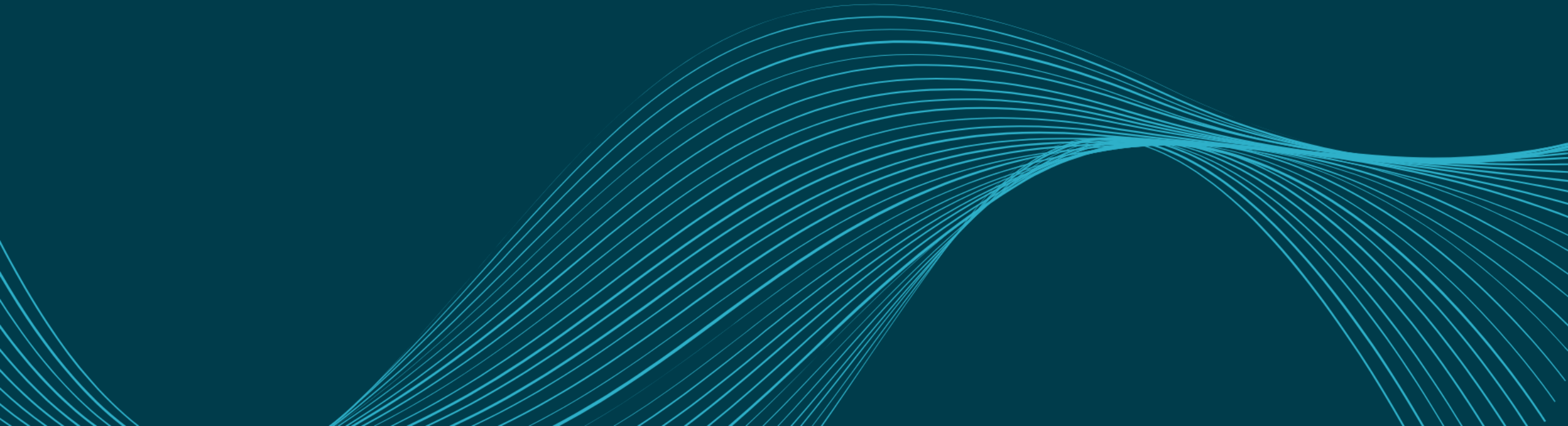
A decorative graphic consisting of numerous thin, light blue lines that flow and curve across the bottom half of the page, creating a sense of movement and depth.

Protecting yourself and your company from liability should be easy

- The key is having a well-established accident protocol already in place



What should your protocol look like?

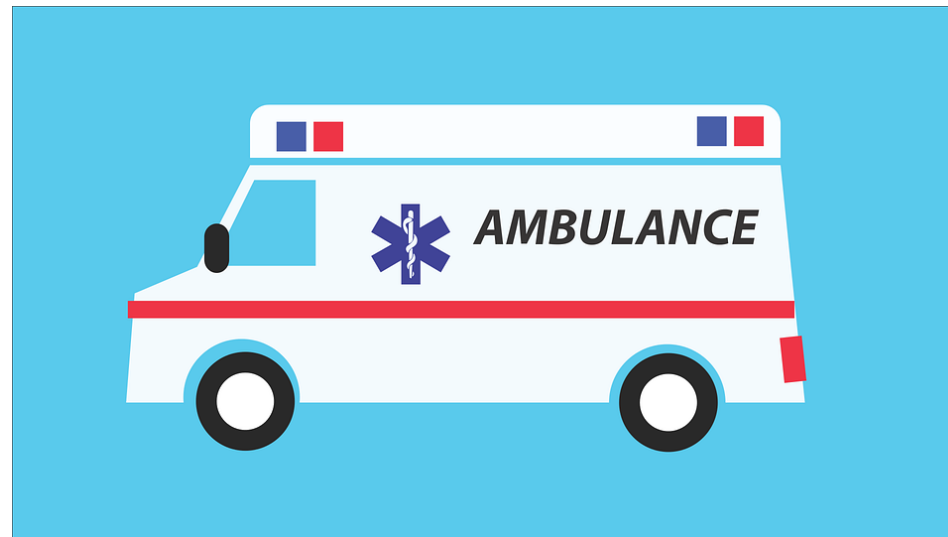


What do courts want to know?

- Were the parties involved behaving reasonably?
- Instructor
 - Was the instructor paying attention?
 - Was the instructor providing proper instruction?
- Driving Schools
 - Did the instructor receive proper training?

STEP ONE: Check for Injuries

- If anyone is injured, first check to determine whether any of the injuries are beyond first aid
- If so, call emergency services immediately



STEP TWO: Fill out an Incident Form

- Details, details, details!
 - Date
 - Time
 - Location
 - Description of what occurred
 - Speed of your car
 - Road conditions
 - Were there any injuries?
 - Was there any damage?
 - Witness names and contact information

What if you can't access a form?

- Use your phone!
- These days, almost everyone has a smart phone
 - Use your notes app to take as detailed of notes as possible to enter into the form at a later time (ASAP)



WITNESSES

- Witnesses are key when an accident enters into litigation
- If witnesses are present at the scene of the accident, ask them to stay if they are able
- If not, make sure to get detailed contact information before they leave

STEP THREE: Take photos—and lots of them!

- "A picture is worth a thousand words"
- Institute a minimum of 15 photos



STEP FOUR: Report to Appropriate Personnel

- Designate someone as your company's point person
 - Owner
 - Manager
 - HR Personnel
 - Safety Personnel
- This person can double check that protocol is being followed

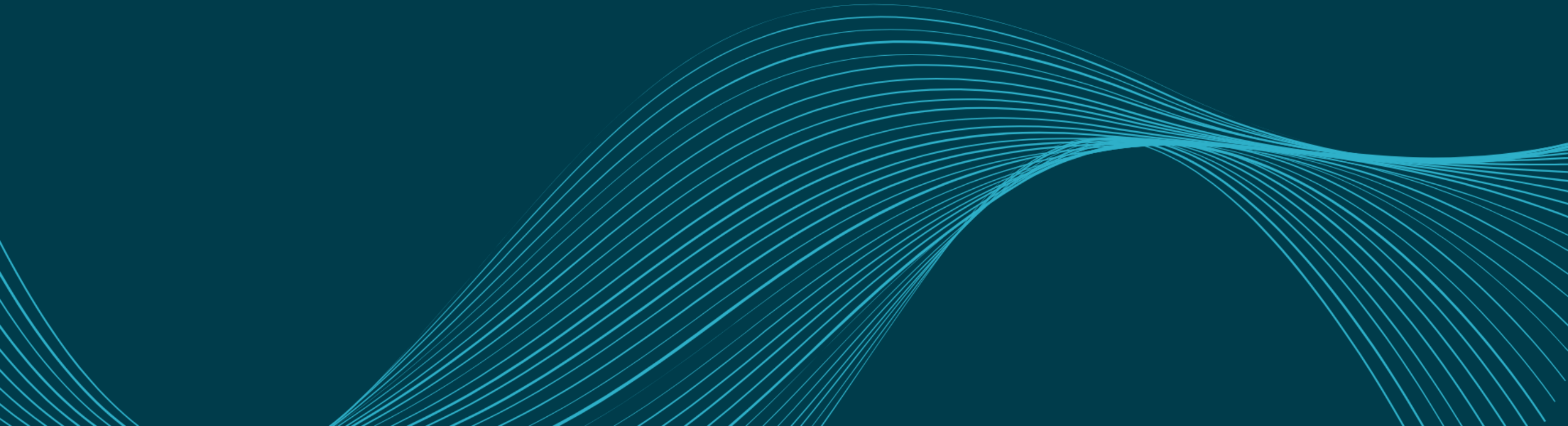
STEP FIVE: Post-Accident Drug Testing

- Require any employees involved in an accident to complete drug testing as soon as possible and within 24 hours of the accident
- This step creates additional evidence to protect your instructors and your company from potential allegations down the line

STEP ZERO: Training

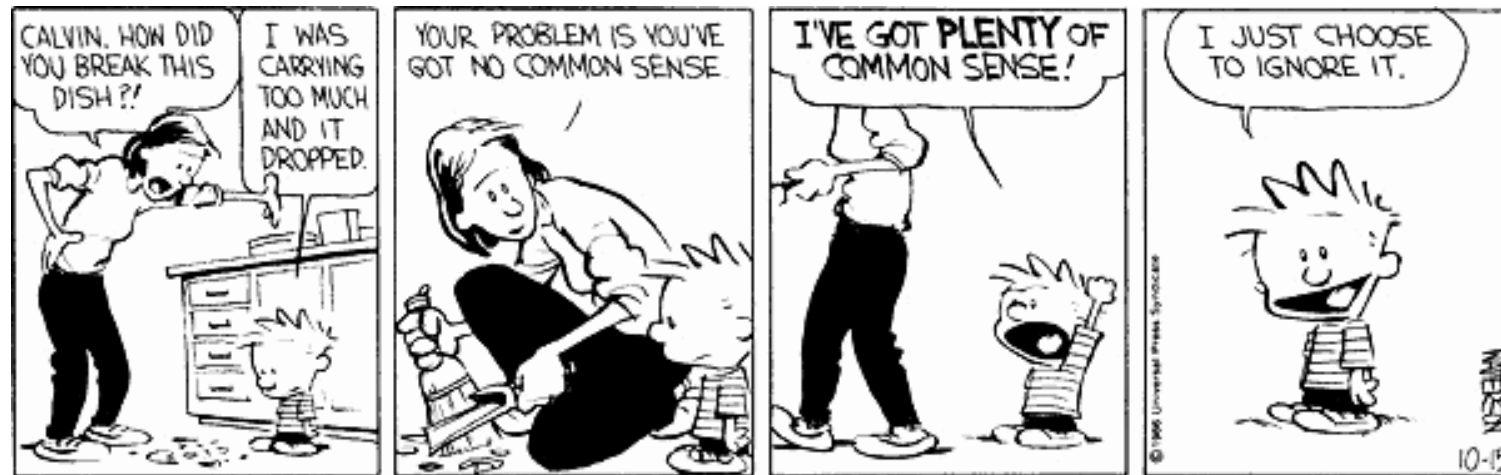
- A protocol is useless if your instructor doesn't know about it!

Isn't this all common sense?

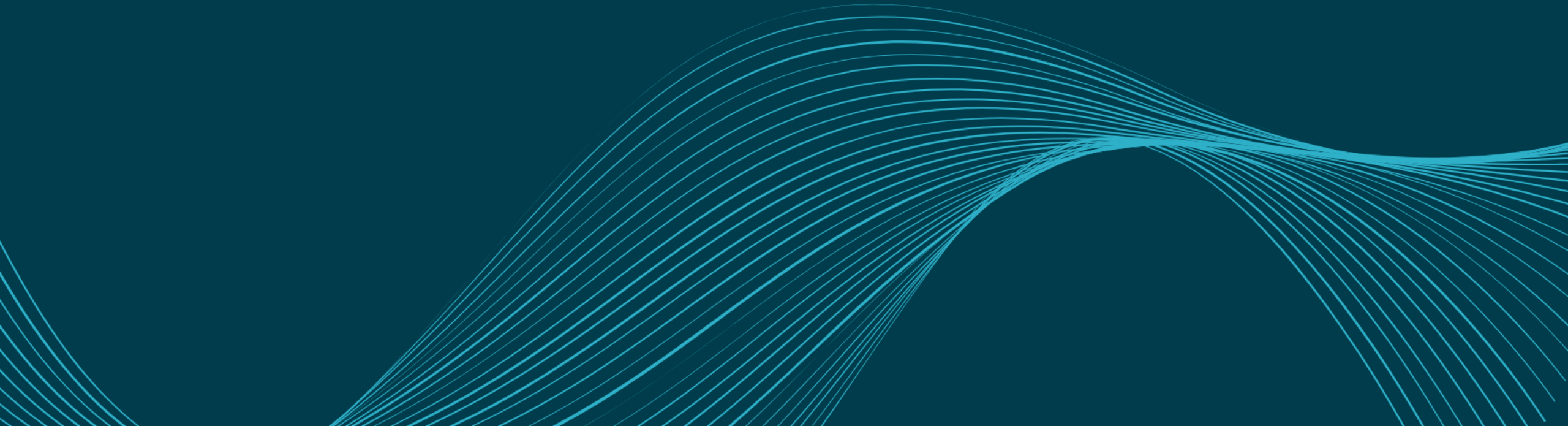


Yes!

- BUT, when you are in an accident, common sense can go out the window



Common Types of Lawsuits and Best Practices to Avoid Claims







You Hired a Bad Driving Instructor!

- Who gets sued and for what?





- An employer has a responsibility to exercise reasonable care in hiring its employees:
 - “In circumstances where an employer **knew of or should have known** that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring the employee.”

What you knew

90-167. Driver Training School Instructor Qualifications.

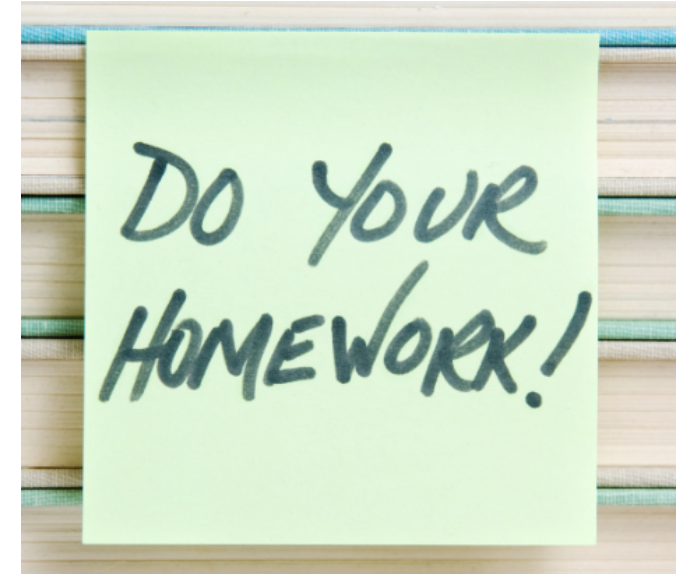
- A. Every person, in order to qualify as an instructor for a driving school, must, at the time of application, meet the following requirements:
- (1) At least twenty-one (21) years of age;
 - (2) Of good moral character;
 - (3) Hold a valid South Carolina drivers license;
 - (4) Have no record of suspension of driving privileges for moving violations for the past three (3) years;
 - (5) Have at least five (5) years of driving experience and no suspension for three (3) years;
 - (6) Successfully complete a Departmentally approved driver training instructor course which includes as a minimum thirty-four (34) hours of formal classroom instruction in driver education and a minimum of six (6) hours of actual behind the wheel training in driving instruction;
 - (7) Successfully complete a Departmentally approved written test which includes as a minimum testing of the ability of the applicant to give driver instruction to others and/or both written and demonstrative methods.
- B. The Department may, in its discretion, grant an applicant a temporary permit, by special examination, provided the driver training school has one qualified, licensed instructor. The temporary permit is valid for six (6) months or until an instructor's course is offered. If during the six months the applicant is unable to take an instructor's course, the temporary permit may be renewed one (1) time for an additional six (6) month period.

Should Have Known . . .

- Bad Driving Record
- Drugs or alcohol addition
- Prior drug or alcohol charges
- Prior Lawsuits
- Prior Employment Issues
 - Sexual Harassment; intoxicated at work

BEST HIRING PRACTICES

- Request prior Driving Record
- Run a background check
- Periodic Random Drug Tests
- Detailed employment applications
 - Ask about prior lawsuits
 - Ask if they have ever been terminated and for what
 - Request references from prior employers
 - Actually call them



BEST HIRING PRACTICES

- Put Driver Hiring Policies in writing.

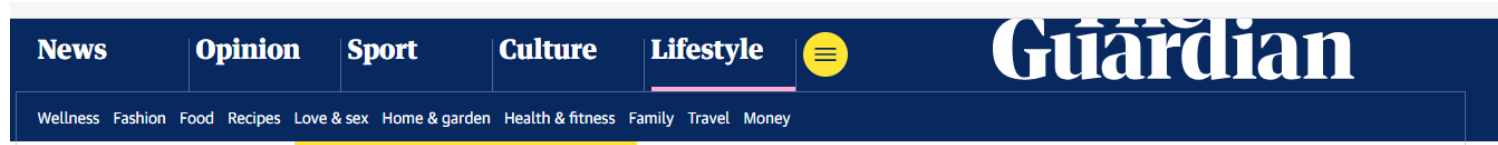
Establish consistent policies that can be applied across the board. Policies should name specific (not subjective) disqualifiers, and they should never fluctuate with the supply of applicants. Make your policies public and share them with all employees and applicants.



These actions demonstrate that the company made a good faith effort to ensure their employees don't pose a risk to others in the hiring process.

Sexual Harassment Claims

PORTLAND, Ore. -- A lawyer for three teenage girls who say they were sexually abused by their driver's education instructor has filed \$6 million in lawsuits against the instructor and Portland Community College.



Women

This article is more than 6 years old

'I felt sick': why are so many women assaulted by their driving instructors?

Lewd comments and groping - shocking numbers of women report being sexually harassed during their driving lessons. What can be done?



How a driving instructor allegedly got away with decades of harassment and abuse

You hired what appeared to be a good driving instructor but they are now accused of sexually harassing a student while employed.



Are you going to be sued for?

Common Claims Against Driving School

Negligent Training

The lack of training or inadequate training

- Customers may sue companies for problems they have experienced that are blamed on the lack of effective training.

Case law – 2012 Case

Sexual Harassment case.

Rio Grande Defensive Driving School argues the evidence was legally and factually insufficient to support the jury's finding that Wansey negligently hired, trained, and retained the driving instructor involved in the incident with the Smith's daughter. We disagree.

What evidence supported negligent training?

- "admitted **no written policies** regarding student-teacher relations and that he **does not perform background checks** on his employees"
- "**flippant response to the parents inquiries** is but further evidence of his indifference to the situation"
- " failed to act in a way that a driving school owner of ordinary prudence should act when operating a school for young students"
- NOT ENOUGH: "that he had informally warned employees against engaging students in an inappropriate way"

EFFECTIVE TRAINING PROGRAMS

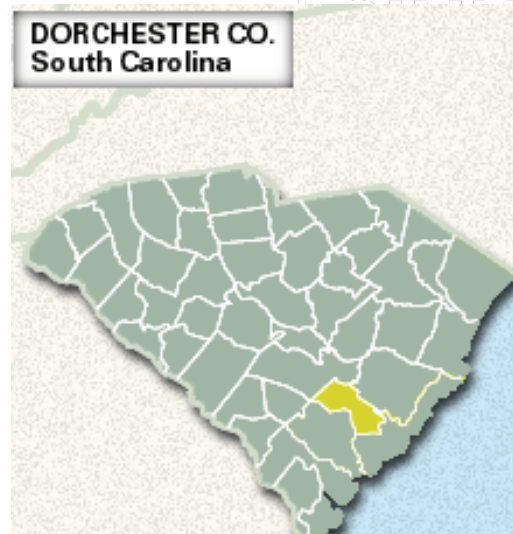
- Have written employment policies.
- Require the employee to read and initial each page, annually.
- Address common issues that arise in both the policy and regular training programs.
- Take reports seriously: If a student or another employee reports concerns about the conduct of an instructor, you have to address the concern.
 - If an incident were to occur and the lawyer finds out you ignored a red flag, you could be looking at hundreds of thousands in punitive damages for negligent retention.

ACCIDENTAL TOUCH PROTECTION

- Use of a Pointer
- In vehicle cameras
 - Policy to keep them on at all times
 - Periodic and Random checks
 - Policy to preserve video when an incident occurs and report it
 - Generally 3 year state of limitations

Recent Case and Verdict

- Motorcycle collision with an Amazon van
- Distracted driving case
- Really bad facts
 - 90 counts of distracted driving in his five months of employment
- Motorcyclist sustained a traumatic brain injury and numerous orthopedic injuries in September 2021 when an Amazon Delivery Associate failed to yield to the right of way and turned left directly into his path.



Recent Case and Verdict

- Amazon argued that driver was an independent contractor
 - WHY?
 - Under South Carolina law, a principal is generally not vicariously liable for the negligent acts of an independent contractor (as opposed to a W-2 employee).
 - The delivery driver was a direct employee of the Delivery Service Partner—not Amazon directly.
- Injured Driver argued was an agent of Amazon
 - “Amazon not only had the right to control; it exercised actual control over every aspect of the Delivery Service Partner and Delivery Associate hiring, training, execution, and delivery process. It collected data and measured the metrics of the drivers’ behaviors and deliveries on a weekly basis and used those metrics to determine payments to the Delivery Service Partners, it provided all of the tools of the job and it maintained the right to terminate or ‘offboard’ the drivers if they violated Amazon’s policies.”
- **Issue: Whether company can be held liable for acts of independent contractor driver?**



\$44.6 million verdict

Of which \$30 million was for punitive damages

2 Lessons— Insurance and Independent Contractor

Liability Insurance

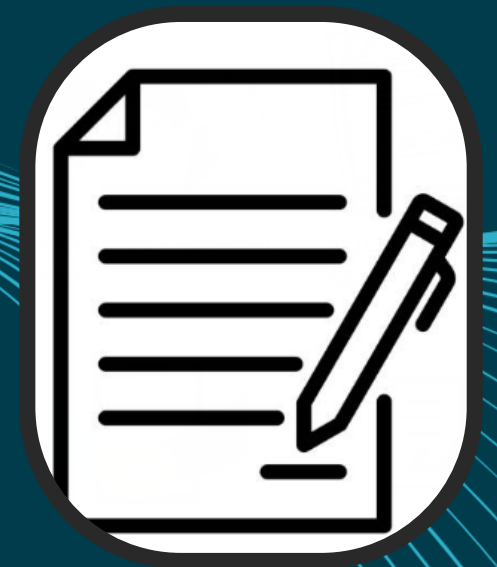
- The State Minimums are low!

90-165. Driver Training School Motor Vehicle Liability Insurance Minimums.

- A. No driving school may be licensed by the Department unless it maintains personal injury and property damage liability insurance on all motor vehicles owned, leased, or registered in the name of the driving school, while used in driving instruction, insuring the liability of the driving school, its certified driving instructors, and any person taking driving instructions, or any passengers within the vehicle, in the amount of fifty thousand dollars (\$50,000.00) because of bodily injury to or death of any one (1) person in any one (1) accident, and subject to such limits for one (1) person, one hundred thousand dollars (\$100,000.00) because of bodily injury or death to any two (2) or more persons in any one (1) accident, fifty thousand (\$50,000.00) because of injury or destruction to property of others in any one (1) accident.

***SO WHAT CAN YOU DO TO
PROTECT YOURSELF?***

Enhancing Liability Protection: Key Transactional Clauses for Driving Schools

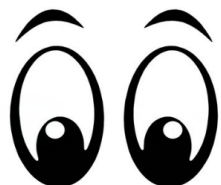


South Carolina Regulations on Driver Training School Contracts

- **Minimum Requirements:**
 - **Written Contracts:** All driver training schools must use written contracts or agreements with students. (S.C. Code Regs. 90-115(A))
 - **Essential Elements:**
 - Differentiation between classroom (theory) and behind-the-wheel training. (S.C. Code Regs. 90-115(A))
 - Clear statement of contract price and payment terms, including any additional fees. (S.C. Code Regs. 90-115(A)(1))
 - Type of vehicle used for instruction (e.g., automatic or manual transmission). (S.C. Code Regs. 90-115(A)(2))
 - Student's full name. (S.C. Code Regs. 90-115(A)(3))
 - Name and address of the driver training school. (S.C. Code Regs. 90-115(A)(4))
 - **Parental Involvement:**
 - For students under 18, a parent or guardian must sign the contract in the presence of the instructor. (S.C. Code Regs. 90-115(B))
 - **Prohibitions:**
 - Contracts cannot guarantee the student will receive a driver's license. (S.C. Code Regs. 90-118(A))
 - Schools cannot transfer or assign contracts without written consent from the student. (S.C. Code Regs. 90-115(B))

SAMPLE CONTRACT

Can you spot the issues?



~Questions to follow~

Driving School Contract

1. Parties

This contract is between **Sarah G.**, who is sixteen (16) years of age and a resident of South Carolina, and **Boone's Driving School, LLC** (the "School"), located at **123 John Doe Avenue, Columbia, SC.**

2. Training Program

- **Classroom Training:** Includes theory sessions covering traffic laws, road signs, and safe driving practices.
- **Behind-the-Wheel Training:** Practical driving sessions with an instructor.

3. Payment Terms

The total contract price is **\$100**. Payment terms include an initial deposit of **\$25**, with the balance due before the first driving session. Additional fees may apply for missed sessions or rescheduling.

4. Vehicle Type

Instruction will be conducted using a 2018 Honda Civic vehicle with **automatic** transmission.

5. Guaranty

Given the excellent instructors that the School offers, the School guarantees you will receive your driver's license after completion of our program.

6. Signatures

Student Signature: Sarah G
 Date: 12 6 24

School Representative Signature: Boone
 Date: 12 6 24



Beyond Compliance—Enhancing Contractual Protections



- **Opportunity for Additional Protections:**
 - South Carolina regulations set minimum standards.
 - Driving schools can include additional clauses to further mitigate liability.
- **Areas for Enhancement:**
 - *Liability Limitation Clauses:* Clearly define the extent of the school's responsibility.
 - *Behavioral Expectations:* Outline expected conduct from students during instruction.
 - *Indemnification Clauses:* Require students or guardians to cover certain losses or claims.
- **Objective:** Strengthen contracts to provide greater legal protection for the school and clarify obligations for all parties.

Incorporating Assumption of Risk Clauses

- **Purpose:** Inform students of the inherent risks associated with learning to drive.
- **Sample Clause:** *"The Student acknowledges that learning to drive involves inherent risks and voluntarily assumes all such risks during instruction."*
- **Benefits:**
 - Demonstrates that the student is aware of potential dangers.
 - Can reduce the school's liability if an accident occurs.



Enhancing Waiver and Release Provisions

- **Purpose:** Limit the school's liability for certain types of claims.
- **Sample Clause:** *"The Student releases the Driving School from any liability for injuries or damages arising from participation in driving lessons, except in cases of gross negligence or willful misconduct."*
- **Considerations:**
 - Cannot waive liability for gross negligence or intentional acts.
 - Must be clearly written and easily understood.



Parental Indemnification for Minors

- **Applicability:** Essential for students under 18 years old.
- **Sample Clause:** *"The Parent/Guardian agrees to indemnify and hold harmless the Driving School from any claims arising from the Student's participation in driving instruction."*
- **Benefits:**
 - Provides an added layer of protection when instructing minors.
 - Helps ensure parents are legally responsible for their child's actions.
- **Regulatory Requirement:** Contracts for minors must be signed by a parent or guardian in the instructor's presence. (S.C. Code Regs. 90-115(B))

Behavioral Expectations and Disciplinary Actions

- **Purpose:** Set clear guidelines for student conduct during instruction.
- **Key Components:**
 - *Compliance with Instructions:* Students must follow all instructor directions promptly.
 - *Prohibited Behaviors:* No use of mobile devices; no disruptive or unsafe actions.
 - *Sample Clause:* "Failure to adhere to these behavioral expectations may result in termination of lessons without refund."
- **Regulatory Support:** Schools may establish policies to ensure safety and effective instruction.



Incident Reporting Obligations for Students

- **Purpose:** Ensure prompt reporting of any accidents or incidents.
- **Sample Clause:** "The Student agrees to immediately report any accidents or incidents that occur during instruction to the Driving School and cooperate fully in any subsequent investigations."
- **Benefits:**
 - Facilitates timely response and proper documentation.
 - Aids in legal defense and insurance claims processing.
 - Regulatory Context: Schools are required to maintain records of instruction and incidents. (S.C. Code Regs. 90-112(A))



Confidentiality and Privacy Provisions

- **Purpose:** Protect both the student's and the school's sensitive information.
- **Sample Clause:** "Both parties agree to maintain the confidentiality of personal information and not disclose it to unauthorized individuals."
- **Benefits:**
 - Builds trust between the school and students.
 - Ensures compliance with privacy laws.
- **Regulatory Support:** Schools must keep records secure and available for inspection. (S.C. Code Regs. 90-116)

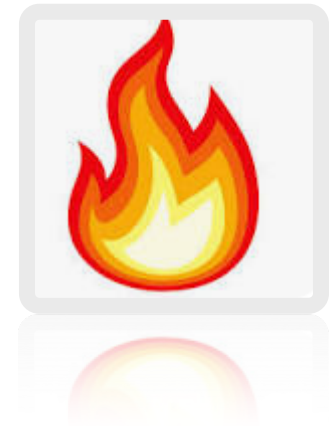


Payment Terms and Refund Policies

- **REQUIRED BY LAW (S.C. Code Regs. 90-117)**
- **Applicability:**
 - All licensed driver training schools, excluding duly accredited public colleges.
- **Full Refunds:**
 - Within 3 days of signing, minus fees.
 - Before classes start, minus \$100 and fees.
 - If not visited school before signing, cancel by end of first day, minus \$100 and fees.
 - Due to material misrepresentation by school.
 - If not meeting admissions requirements, minus fees (unless false info by student).
- **Pro-rata Refunds:**
 - After starting classes, based on days/hours completed, minus \$100 and fees.
 - No refund if over 50% of course completed.

Force Majeure Clause

- **Purpose:** Limit liability in case of events beyond control (e.g., natural disasters, pandemics).
- **Sample Clause:** *"The Driving School shall not be liable for any failure to perform due to causes beyond its reasonable control, including acts of God, war, or government regulations."*
- **Benefits:** Protects both parties from contractual obligations during unforeseen events.



Governing Law and Dispute Resolution

- **Purpose:** Specify how and where disputes will be resolved.
- **Sample Clauses:**
 - Governing Law: *"This agreement shall be governed by the laws of the State of South Carolina."*
 - Dispute Resolution: *"Any disputes arising from this agreement shall be resolved through mediation or arbitration before resorting to litigation."*
- **Benefits:** Provides clarity and can reduce legal costs.



Adding an Entire Agreement Clause

- **Purpose:** Ensure that the written contract is the complete and final agreement.
- **Sample Clause:** *"This contract constitutes the entire agreement between the parties and supersedes all prior understandings or agreements."*
- **Benefits:** Prevents misunderstandings due to verbal agreements or promises.

Employment Agreements with Instructors — Indemnification

- **Purpose:** Protect the school from claims resulting from instructors' actions.
- **Sample Clause:** *"The Instructor agrees to indemnify and hold harmless the Driving School from any claims arising out of the Instructor's negligent or intentional misconduct."*
- **Benefits:** Assigns responsibility to the instructor for their own actions.
- **Regulatory Requirement:** Instructors must meet specific qualifications and comply with laws. (S.C. Code Regs. 90-106)



Non-Compete and Non-Solicitation Clauses

- **Purpose:** Prevent instructors from competing with the school after leaving.
- **Sample Clause:** *"For a period of one year after termination, the Instructor shall not provide driving instruction within a 20-mile radius or solicit any students of the Driving School."*
- **Considerations:** Must be reasonable in scope and duration to be enforceable under South Carolina law.



Confidentiality Agreements with Instructors

- **Purpose:** Protect proprietary information and trade secrets.
- **Sample Clause:** *"The Instructor shall not disclose any confidential information of the Driving School to any third party during or after employment."*
- **Benefits:** Safeguards business interests and competitive advantage.

CONFIDENTIAL

Employment Policies—Cell Phone Usage

- **Purpose:** Ensure safety by minimizing distractions during instruction.
- **Policy Language:** *"Instructors are prohibited from using personal mobile devices during instruction except in emergencies."*
- **Enforcement:** Clear disciplinary actions for violations.
- **Benefits:** Enhances safety for both students and instructors.
- **Regulatory Context:** Instructors must ensure safe operation of training vehicles. (S.C. Code Regs. 90-109(A))



Incident Reporting Procedures for Instructors

- **Purpose:** Standardize the process for handling incidents.
- **Policy Requirements:**
 - Immediate verbal notification to management.
 - Written incident report within 24 hours.
- **Benefits:** Ensures timely action and proper documentation.
- **Regulatory Requirement:** Schools must maintain records of instruction and incidents. (S.C. Code Regs. 90-112(A))



Training and Compliance with Regulations

- **Purpose:** Ensure instructors are knowledgeable about state laws and school policies.
- **Policy Elements:**
 - Regular training sessions.
 - Acknowledgment of understanding and compliance.
- **Sample Clause:** *"Instructors must attend annual training on state regulations and school policies."*
- **Benefits:** Promotes a culture of compliance and safety.
- **Regulatory Requirement:** Instructors must meet qualification standards and maintain compliance. (S.C. Code Regs. 90-106)

Insurance Requirements

- **Purpose:** Ensure adequate coverage is in place.
 - For the School: Maintain liability insurance as required by SC regulations. (S.C. Code Regs. 90-105(A))
 - For Instructors: If using personal vehicles, provide proof of insurance.
- **Sample Clause:** "The Driving School maintains liability insurance; instructors using personal vehicles must provide proof of insurance meeting state minimum requirements."
- **Regulatory Context:** Insurance policies must cover the school, instructors, and students. (S.C. Code Regs. 90-105(A)-(D))



Key Takeaways and Action Steps

- **Summary**: South Carolina regulations provide a foundation for contracts. Additional clauses can significantly enhance liability protection.
- **Next Steps**:
 - Review Current Contracts: Identify gaps or areas lacking protection.
 - Consult Legal Counsel: Ensure new clauses comply with SC law and are enforceable.
 - Implement Changes: Update contracts and policies accordingly.
- **Regulatory Reminder**: Always ensure compliance with South Carolina regulations and consult the specific provisions when updating contracts.

SPOT THE I 
(Hint: 3 Total)



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School Representative Signature: Boone
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Thank you – any QUESTIONS?



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