

THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL
Volume XXII Issue 2 May 2016

SAVE THE DATE!
JULY 27-28

ANNUAL MEMBERSHIP MEETING

Our Annual Membership Workshop and Business meeting will take place on Wednesday and Thursday, July 27 and 28 at the Soaring Eagle in Mt. Pleasant.

On Wednesday, Mr. Gordon Graham, will present a program entitled “Managing Risks in Your Road Commission Operations.” The program will commence with some brief comments on the “cause” of tragedies in any occupation or profession, focusing on the difference between “proximate” cause and those problems “lying in wait,” sometimes for years, that went ignored and really led to the given tragedy. Following these preliminary comments, Mr. Graham will move onto some thoughts on the “Seven Rules of Admiral Hyman Rickover” and how these rules apply to the operations of your organization. These “rules” are a roadmap on how to create the “high reliability organization.”

Mr. Graham is an internationally recognized 33-year veteran (retired) of California law enforcement, and a practicing attorney with a background and formal education as a risk manager.

Our business meeting is scheduled for Thursday morning. We will report on our financial results, the Board Election results, and whether or not there will be a liability refund.

Hope to see you there!



WEIGHING THE RISKS OF ARMING WEIGH MASTERS

Charles F. (Chip) Behler, Attorney
Smith Haughey Rice & Roegge

Road commissions take great pride in developing and maintaining our roadways. This responsibility makes them inherently interested in monitoring load and axle requirements, which, if violated, can destroy our roadways. Consequently, Michigan law authorizes agents of road commissions, commonly weigh masters, to enforce several specifically enumerated laws related to wheel and axle load restrictions. Under this provision, a weigh master who suspects a driver is violating one of these laws can take immediate action by stopping the vehicle, weighing it, requiring it to be driven to a weigh station, detaining it until it meets load restrictions, or sending the driver to a magistrate. This law creates significant enforcement power for a weigh master, but not without risks.

As we’ve all surely seen in the news, stopping a vehicle for any traffic violation is characteristically dangerous. The officer or weigh master making the stop never knows whether the driver is armed

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or has reason to exert violence to elude the stop. Given these risks, Michigan law allows a weigh master who is specially certified to carry a firearm while exercising his authority to stop and weigh vehicles.

Deciding whether to arm weigh masters and ensuring the proper policies are implemented to comply with Michigan law requires careful consideration and planning. To obtain the required certification, a weigh master must receive training as mandated by the Michigan Commission on Law Enforcement Standards. It is important that any road commission considering arming its weigh masters become familiar with these training requirements and the methods by which training can be accomplished before it decides to arm its weigh masters. Similarly, any road commission authorizing weigh masters to carry firearms must put policies in place to ensure proper supervision and to protect against additional liability. Such a policy ought to take into consideration the potential for the road commission to incur liability directly or through the acts of the weigh master by virtue of the weigh master carrying a firearm. A road commission should consult a legal professional to assist in preparation of this policy.

Concerns regarding training or implementing a policy, though, should not table this important discussion. Properly training and supervising weigh masters authorized to stop motor vehicles - whether done while armed or not - could be the difference between life or death. Proper training, supervision, and implementation could provide your weigh masters with the necessary tools to stay safe while making stops.

If your road commission has never considered this issue or is interested in beginning the conversation about arming your weigh masters, contact the Pool. The Pool can connect your road commission with a lawyer who can help your road commission decide whether it ought to arm its weigh masters or whether it ought to encourage additional training for its unarmed weigh masters. If the decision is made to arm the road commission's weigh masters, the Pool can also connect you with a legal professional who can assist in preparing the appropriate policies and procedures to ensure compliance with Michigan law and proper training and to limit the road commission's liability.

MCRCSIP BOARD OF DIRECTORS ELECTION

This year, there are four open positions on our Board of Directors: two Upper Peninsula positions for three-year terms (2016-2019) and one At-Large position for a three-year term (2016-2019). The following people have submitted letters of candidacy:

(I) Denotes Incumbent

Upper Peninsula Positions

Dennis Stanek, Delta CRC (I)

Joe Valente, Marquette CRC (I)

At-Large Position

Dorothy Pohl, Ionia CRC (I)

Chris Sholander, Iron CRC

Voting for the Upper Peninsula Region positions is restricted to the counties that will be represented by those candidates. Official ballots will be sent to our Member contacts for mail-in voting. The results of the election will be announced during our Business Meeting on July 28th.



CLOSING THE DOOR ON ADVERSE POSSESSION

Bill Henn & Benjamin Dost
Henn Lesperance PLC

With the passage of Public Act 52 of 2016, which amends MCL 600.5821, property owned by county road commissions, municipal corporations, and other political subdivisions is no longer subject to claims for adverse possession, acquiescence, or prescriptive easement.

The bill was passed to correct a surprising line of cases interpreting the prior version of MCL 600.5821(2). As recently as 2006, the Court of Appeals had interpreted MCL 600.5821(2) to mean that adverse possession claims are not viable against local units of government. *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365; 711 NW2d 391 (2006). However, in *Mason v City of Menominee*, 282 Mich App 525; 766 NW2d 888 (2009), the Court ruled that MCL 600.5821(2) insulates local units of government from adverse possession or similar claims only if the municipality brings the action. One of the judges noted the key flaw in the ruling: such an interpretation could lead to “inconsistent outcomes, depending on which party beats the other to the courthouse.” Because the plaintiff in *Mason* filed first, the claim for adverse possession survived. Shortly afterwards, in *Beach v Lima Twp*, 283

Mich App 504; 770 NW2d 386 (2009), the Court again ruled that a plaintiff could bring a claim for adverse possession against a municipality.

As a result of *Mason* and *Beach*, the landscape surrounding claims for adverse possession, acquiescence, and prescriptive easement against local governments was thrown into tumult. The matter was further complicated five years later by *Waisanen v Superior Twp*, 305 Mich App 719; 854 NW2d 213 (2014). There, a property owner brought an action against a municipality to quiet title to a portion of First Street, a roadway near the plaintiff’s lake front property. Specifically, a survey revealed that the plaintiff’s break wall encroached ten feet onto First Street, and the plaintiff’s newly constructed addition encroached about three feet onto First Street. Following the survey, the plaintiff filed an action to quiet title to the portion of First Street that included his break wall and addition. Importantly, the defendant municipality counterclaimed for the same portions of First Street. The defendant argued that the plaintiff’s claims for adverse possession and acquiescence were invalid because the defendant had filed a counterclaim—which constituted having brought an action for purposes of the statute. The Court disagreed, holding that the phrase “actions brought by any municipal corporations” meant that the municipal corporation must actually file the first action, rather than merely file a counterclaim in an already pending action.

In short, the law from 2009 forward was hostile to local units of government who sought to protect their property from claims of adverse possession, acquiescence or prescriptive easement. Whether any such claims were viable depended solely on who won the race to the courthouse.

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In 2016, responding to this line of cases, the Legislature voted 92-17 to amend MCL 600.5821. The new language in the statute eliminates the arbitrary distinction of deciding property rights based upon which party filed a lawsuit first, and instead specifically exempts local government units, including county road commissions, from claims for adverse possession, acquiescence, and prescriptive easement.

Some question remains whether the new statute will be applied retroactively. However, it is evident that after the amendment takes effect on June 20, 2016, a private citizen whose rights have not yet vested will no longer have a claim for adverse possession, acquiescence, or prescriptive easement against property owned by county road commissions.

WELCOME!

Welcome to Kristi Peña, our new Assistant Administrator-CFO.



NEW FLSA REGULATIONS WILL BE ISSUED SOON

Wendy S. Hardt, Attorney
Michael R. Kluck & Associates

The Department of Labor recently announced that it expects to release final rules on overtime exemptions by July 2016 (or even earlier). The regulations will be effective sixty (60) days after their publication or, in other words, no later than September 2016.

What changes should you expect in the new regulations? The proposed FLSA regulations issued for comment last year contained higher minimum salaries for exempt employees. To briefly recap, the FLSA generally requires that employers pay employees overtime, i.e. time plus one-half times their “regular rate” of pay, for every hour they work in excess of forty (40) hours in a particular workweek. However, certain groups of employees are exempt from the overtime pay requirements. In order for employees to fall within one of the exemptions, they must perform executive, administrative, or professional duties (the “duties” test) and make a certain weekly salary (the “salary level” requirement).

Presently, to qualify for exemption, employees generally must be paid not less than \$455 per week on a salary basis (\$23,660 annually). The most important proposed change to the regulations would increase the minimum weekly salary to the

40th percentile of weekly earnings for full-time salaried workers, based on Bureau of Labor Statistics (BLS) data. In 2013, that number would have equaled \$921 per week (or just under \$48,000 per year). The Department of Labor projects that the 2016 level will increase to \$970 per week, or \$50,440 per year. Importantly, for the first time in the FLSA's history, the salary and compensation levels would be indexed to this BLS data and updated annually, without the need to go through further rulemaking.

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to certain exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

The Department of Labor did not propose any changes to the duties test for the white collar exemptions. However, it is considering revising the "primary duty" component of the white collar exemptions. Currently, "primary duty" for a white collar exemption is defined to mean "the principal, main, major or most important duty that the employee performs." Some commentators speculate the final rules may revise the definition of an employee's "primary duty" to mean the primary duty an employee performs fifty percent (50%) of the time.

The Department of Labor is also considering whether to permit non-discretionary bonuses and incentive payments to count toward a portion of the standard salary level test for the white collar exemptions and, if so, how to include such payments as part of the salary level test. However, even if such payments are ultimately considered, the Department of Labor is likely to put a cap on the amount of the salary requirement that can be satisfied through non-discretionary bonuses and incentive pay. The Department of Labor sought comments on the inclusion of such payments, as well as including commissions as part of these payments.

An ancillary issue is whether payment of extra compensation to an otherwise exempt employee violates the salary requirement. The Department of Labor's position on compensatory time for exempt employees is that extra pay above and beyond the salary does not violate the salary basis for the exemption. However, some court decisions have declared that the extra pay or compensatory time for "overtime" worked by such employees is inconsistent with the salary basis for the exemptions. Since the law is somewhat unsettled

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in this area, we generally recommend against providing compensatory time for FLSA-exempt employees. If it is used, we would generally recommend getting away from compensatory time on an hour-per-hour basis for employees who are clearly FLSA exempt.

An increase in the salary threshold required for FLSA exemption will mean employers will need to carefully evaluate their currently exempt employees to determine which, if any, will be impacted by the new regulations. If an exempt employee does not meet the anticipated salary threshold, employers should consider whether the anticipated financial impact will be greater by raising the salary of the employee to meet the new exempt standard or by allowing the employee to be eligible for overtime and more closely managing worked hours. Additionally, the increased salary required for FLSA exemptions will likely result in increased liability for misclassification of exempt employees. Accordingly, employers should take this opportunity to review FLSA exemption classifications to ensure exempt employees actually qualify for the FLSA exemption at issue.

MEET OUR CLAIMS DEPARTMENT STAFF



Tracey Maroney, Claims Manager; Shanda Eichelberger, Claims Adjuster; Jennifer Pappas, Administrative Assistant.

ROADSIDE TRACTOR USAGE IN CUTTING AND MOWING OPERATIONS

Michael E. Shultz
MCRCSIP Director of Loss Control/Training



Several months ago, a county tractor swing-arm mower unit was cutting roadside vegetation, including some medium diameter trees. Without warning, as the mower blade was fed into the side of the tree (see below 1), a mower blade broke (see below 2) and flew hundreds of feet penetrating a nearby residence (see below 3). Thank goodness no one was injured or in the room at that time. Nevertheless, the blade caused extensive damage. Luckily, the blade didn't strike electrical wiring, gas or water lines, etc.



(Photo 1)



(Photo 2)



(Photo 3)

After discussing this with the road commission, they came up with three potential causation factors:

- ✓ Mower misuse, cutting larger trees.
- ✓ Blade not designed for this type of cutting operation.
- ✓ Cold weather impacting the blade strength.
- ✓ Minimal pre-operational inspections to the condition, replacement and securement of the blade.

ACCIDENT PREVENTION: The best machinery the mower industry has to offer can fail even when all precautions are taken. In this instance, the brand of mower made no difference. In the interest of preventing similar accidents in the future, we came up with some suggestions for your consideration:

1. Communicate with your equipment manufacturer and ensure that the mower model and design is the best tool for the work being performed.
2. Share safety information with mower operators, including operator handbooks and safety training videos. Any training that addresses inspections, maintenance and proper mowing operations is helpful.
3. Have your own in-house safety rules and equipment inspection procedures.
4. Perform daily inspections, including visually checking the blades for excessive wear, broken or damaged components, loose bolts and broken welds.

5. Ensure safety flaps or chain guards are not missing or worn away. Sufficient length of rubber flap guards often helps contain flying objects under the mowing deck.
6. Identify a mower that is designed for cutting standing trees, allowing the swing-arm mower to remain as close to the ground as possible.
7. Establish a maintenance plan that requires blades to be removed and replaced after a specified number of operational hours.
8. Use extra precaution when the mower is in operation and approaching a residence or people outside, knowing that a damaged blade or flying material can strike and seriously injure or kill.

Mowing grass and trimming trees in the road right-of-way definitely enhances the natural beauty of the right-of-way and contributes to roadway safety for motorists. Keep in mind, the necessary safety precautions to protect the operator, nearby employees, approaching motorists, pedestrians, and now we know... “Residential or Commercial Buildings”! **Have A Safe Summer!**

ROADSIDE CRASH ASSESSMENT TRAINING

Thank you to all of you that attended our Roadside Crash Assessment Training on April 12th. We hope you found the training to be informative and helpful. If you would like our Loss Control Department to present the training at your Road Commission, please contact Mike Shultz, mshultz@mcrcsip.org.



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