THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL
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INNOCENT THIRD-PARTY RULE ELIMINATED FROM MICHIGAN NO-FAULT LAW

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The Michigan Court of Appeals has recently published two decisions which provide a potential windfall to private no-fault insurers. That windfall, however, may very well come at a significant cost to government self-insurance pools such as MCRCSIP. In *Bazzi v Sentinel Ins. Co.* and *State Farm Mutual Auto Insurance v Michigan Municipal Risk Management Authority (MMRMA)*, the Court of Appeals eliminated the "innocent third-party" rule from Michigan no-fault law. Prior to these decisions, where an innocent third-party (i.e., someone other than the insured) had been injured in a motor vehicle crash, insurance companies were prevented from rescinding the insured's policy retroactively based on misrepresentations in the application for insurance. The rule was developed out of a sense of fairness and to help guarantee that innocent third-parties would have the full protections of the no-fault act available to compensate them for their injuries. However, under the new rule of *Bazzi* and *State Farm*, if there is some technical inaccuracy in the insurance application (even if it is wholly unrelated to the circumstances of the motor vehicle collision), insurers can retroactively rescind the insurance policy in order to avoid payment of no-fault benefits to both the insured and an innocent third-party.

This change in the law presents a potential problem for governmental self-insurers, including MCRCSIP, which provide no-fault benefits to their members. It is not difficult to imagine scenarios where, after a commercial insurer rescinds a policy, a governmental self-insurer like MCRCSIP is left solely responsible for an injured person's first-party benefits. The incentive created by the elimination of the innocent third-party rule is concerning because it rewards commercial insurance companies for performing due diligence into an insured's background only ***after*** a claim against the policy has been made.

Because of these concerns regarding the elimination of the innocent third-party rule, MCRCSIP will submit an amicus brief in *State Farm v MMRMA* supporting the MMRMA's appeal to the Michigan Supreme Court. As the law now stands, however, there is no longer an innocent third-party rule. If you are aware of any situations involving the retroactive rescission of a no-fault insurance policy, please contact MCRCSIP with those details.

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IN THE CUE

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NEW FLSA OVERTIME REGULATIONS: PREPARING FOR COMPLIANCE

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The new Fair Labor Standards Act (FLSA) overtime regulations take effect on December 1, 2016. As a result, the exempt status of millions of workers will be directly impacted. Employees of state-created Road Commissions are covered by the FLSA and, thus, Michigan Road Commissions should be aware of the new FLSA changes and be ready to comply.

What has changed?

Generally, employees are exempt from being paid overtime if they (1) meet certain tests regarding their job duties (the "duties" test), and (2) are paid a fixed amount not subject to reduction for variations in quality or quantity of work that *meets a specific salary threshold*. The new regulations mandate significant increases to the salary threshold amounts. They do not modify the duties tests. Under the new regulations, the salary thresholds are as follows:

- The new minimum salary threshold will be $913 per week (or $47,476 per year). This is up from the current $455 per week (or $23,660 per year). Thus, if your employees are not making at least $913 per week, they cannot be classified as exempt and are entitled to overtime.

- The minimum salary threshold will be adjusted every three years. This increase will be based on the 40th percentile of the lowest-wage census region of salaried employees. This indexing could result in the necessary reclassification of employees every three years.

- The salary threshold for the highly compensated employee rule will be $134,004. Generally, if salaries paid are high enough, employees are considered "highly compensated" and their duties tests for exempt status are more relaxed. The new salary threshold for highly compensated employees is up from the current $100,000 threshold. Thus, if your employees are not making at least $134,004 per year, they must meet the more stringent duties tests to qualify for exemption.

- The salary threshold for highly compensated employees will be adjusted every three years. This will be based on the 90th percentile of all U.S. salaried workers. Such indexing could also result in the necessary reclassification of highly compensated employees every three years.

- Non-discretionary bonuses or incentive payments can be used to satisfy the salary threshold. Up to ten percent of the salary threshold amount can be satisfied by the payment of non-discretionary bonuses or incentive payments, paid quarterly or more frequently.

What can Road Commissions do to prepare?

Michigan Road Commissions should take action to ensure compliance as of December 1, 2016:

1. You should review your current exempt positions and determine which positions will be reclassified as non-exempt under the new regulations.

2. For the positions requiring reclassification, you should determine whether you want to maintain the exempt status and increase the position salary to meet the new threshold, or reclassify the position as non-exempt and pay the employee an hourly wage, subject to

overtime rules. In order to make this decision, it will be important for employers to evaluate hours worked during the previous year and to track time going forward in order to identify the appropriate hourly wages for the positions.

3. Once any reclassification decisions have been made, you should communicate with employees and explain why certain positions will no longer be exempt status in consideration of affected employees' possible morale issues due to their change in status.

4. Supervisors will need to be trained on the management of newly reclassified employees and other reclassification issues such as schedule management and timekeeping.

5. Newly reclassified non-exempt employees will need to be trained on timekeeping, overtime authorization rules, and working only during designated hours (e.g. no working during lunch periods or breaks and no off-the-clock working on smart phones, etc.).

6. You will need to determine whether reclassification will affect any current exempt-status employees subject to a collective bargaining agreement. If so, you should advise union business representatives of the anticipated classifications, understanding this could require re-opening of negotiations.

7. You will need to be proactive in actively budgeting for new overtime obligations that arise from increased overtime hours and/or increased salary threshold amounts as of December 1, 2016, and again for December 1, 2019.

Given the far-reaching effects of the final overtime regulations, it is important for covered employers, including Road Commissions, to take steps to mitigate their exposure to potential liability associated with misclassification and failure to pay overtime. The liability for misclassification of employees can be very expensive for employers, including back wages plus overtime pay on all hours worked over 40 hours per work week for each misclassified employee for a period of up to three years, liquidated damages in the amount of the unpaid wages, and attorney fees' and costs. As a result, employers should consult their employment counsel to expedite the process and ensure compliance.

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USE OF RESTROOM FACILITIES BY EMPLOYEES

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In the workplace, can employers legally restrict male employees from using the women's restroom and vice versa? On June 1, 2015, the Department of Labor's Occupational Safety and Health Administration ("OSHA") issued a guidance on the best practices for providing restroom access to workers. The guidance's core principle is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity.

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Use of Restroom Facilities By Employees
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Under OSHA's sanitation standard, 29 CFR §1910.141, employers are required to allow employees prompt access to sanitary facilities so that employees will not suffer adverse health effects that can result if toilets are not available when employees need them. Further, employers may not impose unreasonable restrictions on employee use of toilet facilities, including, for example:

- Restricting employees to using only restrooms that are not consistent with their gender identity, or
- Segregating them from other workers by requiring the employees to use gender-neutral or other specific restrooms.

OSHA notes that the employee should determine the most appropriate and safest option for himself or herself, and states that a best practice is that "employees are not asked to provide any medical or legal documentations of their gender identity in order to have access to gender-appropriate facilities."

If an employer chooses to issue any directive to its employees as to which restroom facilities they should use, it should do so by using the words "gender identity." In other words, it would be appropriate to say: "If you identify as a male, then you should use the men's restroom. If you identify as a woman, then you should use the women's restroom." If there is a complaint about an employee using the wrong restroom after any such directive is issued, it would need to be handled with sensitivity to the employee's possible gender identity, without requiring medical or legal proof of same.

Separate and apart from potential liability under OSHA, employers who fail to be sensitive to transgender issues may expose themselves to liability under Title VII of the Civil Rights Act of 1964. The EEOC has taken the position that Title VII, as written, protects individuals who are transgender from discrimination (under the theory that it is discrimination because of sex) and has recently begun pursuing actions against employers for discrimination against employees who are transgender. In particular, the EEOC has taken the position that denying an employee the use of a restroom consistent with the employee's gender identity is unlawful discrimination based on sex.

If a road commission is facing a particular known problem in this area, I would recommend they contact their legal counsel. Otherwise, any general announcements regarding use of restroom facilities should make reference to the employee's "gender identity," not simply his/her biological gender.

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WELCOME!

We would like to introduce you to our new Executive Assistant/Board Secretary, Debbie Schultz. Debbie joined the MCRCSIP staff in September. She is a Certified Administrative Professional (CAP) through International Association of Administrative Professionals (I.A.A.P.) Debbie is looking forward to meeting and working with the Road Commission members.

Debbie has three children Samantha (25); Dylan (23) and Sarah (19) and has been married for 28 years. Debbie enjoys the beautiful blue waters of Michigan and trips to the Mission Peninsula!

We are happy to have Debbie on our "team."

TIME FOR A NEW RULE

Bill Henn & Andrea Nester
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When the sufficiency of a highway defect notice is challenged on the grounds that a plaintiff failed to provide the names of all known witnesses, Michigan courts continuously refer back to a 50-year-old case that provided a definition of the term "witness" so narrow as to render the requirement almost meaningless: *Rule v Bay City*, 12 Mich App 503; 163 NW2d 254 (1968).

Specifically, in *Rule* the Court of Appeals concluded that, to be considered a witness for purposes of the highway defect notice statute, the person must have simultaneously observed ***both*** the accident and its cause. The most recent application of the Court's holding in *Rule* is *Kosis v City of Livonia*. In *Kosis*, the Court held that a person who was (1) standing outside of his residence at the time of the accident, (2) came to the scene within "seconds" to offer assistance, and (3) simultaneously observed and made statements about the alleged highway defect was ***not*** a "witness" under the notice statute. The reason being that - so far as the plaintiff knew - this person did not actually observe the accident. Therefore, the Kosis Court held that, under *Rule*, he was not a witness and plaintiff was not required to name him in the notice.

The City of Livonia has filed an application for leave to appeal with the Michigan Supreme Court and MCRCSIP has filed an amicus brief on behalf of its members, supporting the City's application and arguing against the continued application of *Rule.* As stated in the amicus brief, the continued application of *Rule* is particularly problematic because it was decided based on a line of opinions in which "liberal" interpretation of notice statutes was "highly favored" and notice was typically deemed sufficient even if the claimant only substantially complied with the statutory requirements. In contrast, the present well-established body of law addressing governmental immunity specifically (and repeatedly) affirms that the immunity conferred upon government agencies is broad and the statutory exceptions to this immunity must be narrowly construed. As such, any application of the immunity exceptions must be made in a way that narrows the meaning of those exceptions.

A definition of the word "witness" that excludes anyone who did not essentially have his or her eyes fixed upon the claimant *and* the alleged defect at the very instant of the accident does not result in an interpretation of the notice provision that is faithful to the above principles. As such, this case is an excellent opportunity for the Michigan Supreme Court to provide necessary direction to Michigan's lower courts and to restore clarity to the "notice" jurisprudence of this state.

Nevertheless, while waiting for the Supreme Court to intervene, it remains the case that *Rule* has never been explicitly overruled and is precedent (although not technically binding) with regard to the identification of witnesses in a highway defect notice. Additionally, the *Kosis* opinion was unpublished, and therefore is not binding on any court. In practical terms, this leaves plaintiffs and defendants alike in a state of uncertainty regarding the breadth of the term "witnesses" and who exactly must be named in the notice. As such, it is all the more important that members retain, record (including the manner of delivery), and quickly report all notices of intent to sue to MCRCSIP. In so doing, members will have the greatest opportunity to identify, locate and interview any witness omitted from the notice - providing the strongest defense for the member in the event that a lawsuit is filed.

MICHIGAN CENTER FOR TRUCK SAFETY DRIVER SIMULATOR TRAINING

Michael E. Shultz
MCRCSIP Director of Loss Control/Training

MCRCSIP is excited to announce that the MCTS – Driver Simulator Training Program is available to Road Commissions. The Center's Mobile Truck Simulator (shown below) offers training to commercial drivers ranging from very specific collision avoidance techniques all the way to the basic hazard perception methods. Simulators provide a controlled, risk free environment in which virtually any scenario can be recreated and practiced. Training courses are offered at no cost to Michigan companies, agencies or drivers. Several members (i.e. Kent) have indicated that the simulators are an excellent training tool for any professional driver.

Each class (3 per day) is 2.5 hours in length with four students in each class. The training instruction covers the following areas:

- Circles of influence (decision making, hazard perception)
- Adverse conditions (bad weather, low visibility)
- Emergency maneuvers (vehicle control, collision avoidance)
- Space management (following distance, space cushion)
- Speed management (vehicle handling, stopping distance)

NOTE: It would be helpful, if possible, to schedule training classes in the same council region. This approach would help reduce simulator training unit travel time and cost from one road commission training site to another. If you are interested, contact Chuck Simmons at MCTS (800-682-4682) or Michael Shultz (616-283-1103) for additional information and assistance.

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PREVENTING RUNOVER ACCIDENTS

Michael E. Shultz
MCRCSIP Director of Loss Control/Training

A road construction contractor working on US-131 in northern Michigan, had an employee gravely injured on Monday, August 22, 2016. The accident involved an asphalt roller that knocked down and rolled over a co-worker.

According to news sources, the operator was trying to move a traffic control device when his shirt or traffic vest became tangled on the roller hydraulic drive control. This caused the machine to activate (move ahead) without warning, striking the co-worker. The injured employee was rushed to a nearby hospital. Latest news update, the employee was still in the hospital in very serious condition. His injuries will likely have caused permanent lifelong disabilities.

In addition to this tragic event, imagine if the roller machine had suddenly entered into nearby moving traffic. The possible chain reaction of braking and swerving now could escalate into multiple collisions injuring motorists and crews working nearby.

This tragic event could happen to any crew when machinery safety precautions are not followed. A few (but not limited to) safety suggestions are listed below that could be applied to most construction off road equipment. Importantly, always follow the manufacturer's manual of safety recommendations regarding inspecting, entering, exiting, operating and servicing construction equipment:

- Implement a training program specifically tailored to operators of any off road equipment;
- Provide worker training for hazard recognition and avoidance, along with safe work practices in work areas that have workers on the ground and around moving traffic;
- Ensure that all employees wear seatbelts during operation of any heavy equipment equipped with Roll Over Protective "ROP" Structures;
- Make sure all machine safety devices are functioning, such as emergency brake setting and power kill switch to operator seat. NOTE: Kill switches shut off the roller's engine when operator weight is lifted off the seat;
- Climbing off and/or entering onto the roller machine on the side opposite the operator controls;
- General repairs must not be made to powered equipment until workers are protected from movement of equipment or its parts. All workers must comply with roller Lockout/Blockout requirements. Authorized employees only!
- Ensure all audio warning devices are operating;
- Equipment and systems must be checked for proper operation and condition at the start of each shift. A pre-inspection checklist for rollers can guide employees;
- Do not fuel the roller while the roller is running or when the engine is hot;
- Any pinch points which pose a threat to the operator during normal operation must be guarded;
- Do not work or stand in the articulating area of a roller any time the machine is running;
- Warning decals should be posted at/near hazard on machine;
- Ensure that all controls are in the neutral, stop, or off position before starting the roller;
- Ensure that the area is clear of all personnel before moving the roller;
- Be prepared for quick starts and stops when operating an asphalt roller;
- Always set the parking brake when leaving the operator's station;
- Do not rely on the hydraulic direction control to hold the machine at a stop since the vibration may shift the control to drive;
- Keep speed low when traveling over rough grade;
- Never place any body part directly in front of, or behind a roller drum while the engine is running;
- Stop the roller slowly, evenly, and completely before reversing direction;
- Ensure that all co-workers are aware of the roller when operating near personnel. Never assume a person is aware of your presence.
- Whenever possible, co-workers should avoid working with their back to running or moving machinery.

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CONGRATULATIONS!!
To all County Road Commissions
celebrating their
Centennial Celebration!
"Happy 100th Year Anniversary"

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