THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL
Volume XXVI Issue 3 August 2017

From left, Attorney Adam Tountas and Rep. Roger Victory

Why Green Lights?

By Wayne Joubert

Far from being a flashy new decoration on municipal vehicles, green lights are, in fact, a lifesaving innovation. Since June 2016, they have been legal in Michigan thanks to the efforts of Michigan road agencies, Attorney Adam Tountas of Smith Haughey Rice & Roegge, and Rep. Roger Victory (R-Hudsonville).

Tountas, one of MCRCSIP's lead liability defense attorneys, became passionate about the green light issue after speaking with MCRCSIP Administrator Gayle Cummings.

"We had just had a lawsuit where there was a horrific traffic accident that occurred in basically zero visibility conditions," Tountas said. "Had our truck been equipped with a green light, the accident probably would have been avoided altogether," he said.

In his discussion with Gayle, Tountas learned about a green light bill that had been introduced in the House by Rep. Rob VerHeulen (R-Walker) but had stalled. When he considered how to revive the bill, he immediately thought of Rep. Roger Victory.

"As a small business owner, Roger has always been conscious of liability issues. Also, the tragic accident that got me thinking about green lights happened in his home county, so I knew that would get his attention," Tountas said.

Tountas then set up a meeting with Victory and Gayle. That meeting breathed new life into the process. Victory subsequently met with Rep. VerHeulen to discuss the stalled bill.

"Instead of us introducing a bill on our own, we took an existing bill that had already been crafted, but then worked with it," Victory said. "Plus, I thought it was really important to work with a good colleague, because sometimes there is strength in numbers. Rob said, 'Here's this bill, work it, and anything you can work on to improve it, go ahead.'"

Ensuring the final bill included exclusivity language became important to Victory, Tountas, and MCRCSIP.

"Exclusivity mattered," Tountas said, "because we wanted to condition members of the motoring public to associate a green light with the roadway maintenance, as opposed to something else. My experience has taught me that members of the public are more cautious around emergency vehicles

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IN THE CUE

2017 Letter from Your Board Chairman

Tim Haagsma, Director of Traffic/Safety
Kent County Road Commission

It was my pleasure to present our Board's Report at the 33rd Annual Membership Meeting. We had a very successful year.

- One of our more significant items to report is that our lawsuits are at an all-time low. At March 31, 2017, we had only 15 open lawsuits. Eleven years ago we had over 100 open lawsuits. Your Board thinks it is important to tell you that we believe that this is a result of the excellent work done by our Administrator working with our legal team and claims staff.

- Because of our improved claims position, and our good investment results, we were able to raise our Best Capital Adequacy Rating (BCAR) from A- to A. The BCAR is an industry measure of an insurer's financial strength.

- Member contributions were reduced by 6% this year based on our favorable experience ratings.

- For last year, our new claims administration model produced a savings of over $500,000 compared to the cost when Specialty Claims handled our claims. We expect our costs to increase as we finish designing and building the department, but are happy to have this year's savings to invest on your behalf.

- Our investments earned 8.8%.

These results provided the Board the opportunity to authorize a refund of $10 million. Considering that our contributions for this year were $13.8 million, we think that is a great result. Since the inception of the Pool 33 years ago the Pool has refunded over $169 million ($45 million over the last 5 years).

Looking Forward

If you attended the workshop on July 19th, you heard about cyber security and cyber threats that exist. As a result of requests from members, the Pool has contracted with Thatch Computer Consultants to provide each member with a technology security review. The member will receive a security score and suggestions on how to fix security problems. The Pool will use the aggregated information from the reviews to examine our overall exposures and determine if there is a way to insure this exposure. Please take the time to fill out the forms and answer the consultant's questions.

The board and staff are always looking at ways to reduce costs and better serve our members. We have been looking at options for savings that include the formation of a captive insurer or raising our self-insured retention.

While MCRCSIP is outperforming expectations in managing claims and lawsuits, we always remember that we are much more than a liability pool. We insure over $1.5 billion in buildings and equipment, provide thousands of hours of loss control reviews and customized trainings each year, manage a complex investment portfolio of approximately $70 million in assets, and provide risk management consulting and guidelines to our members as needed (and/or requested). The success of this Pool is because of the dedication and cooperation of all our members and the hard work of the Pool staff and other team members.

Thank you, again, for the opportunity to serve on this board.

MCRCSIP MISSION STATEMENT

"The Mission of the Michigan County Road Commission Self-Insurance Pool is to administer a self-insurance program and to assist members with risk management efforts."

Green Lights Continued from Page 1…

because their movements are less predictable. So, the thought was, if the public learned to associate green lights with roadwork, it would lead them to treat our vehicles more cautiously. That should cut down on injuries and lead to fewer lawsuits," he said.

For Victory, the green light exclusivity language resonated because of his familiarity with the Farm Bureau when the slow moving vehicle symbol was introduced exclusively for agricultural vehicles.

"We had to do public education saying, 'That is a symbol for a slow moving vehicle of husbandry. You cannot utilize this symbol for your snow mobile trailers,'" Victory said. "So green light exclusivity made sense right from the beginning because, in the case of agriculture, that symbol has been a lifesaver," he said.

Concerned that the exclusivity language might run into resistance, Victory and his legislative team decided to go on the offense, instead of waiting for someone to oppose it.

"We brought it through as a safety issue and were able to articulate among our colleagues that, when they see that green light, they'll know this is a municipality truck in a very distractive environment. In doing that, the opposition just wasn't there," he said.

Victory and his legislative team worked hard on the bill, which was introduced in mid-January 2016 and signed into law by Governor Snyder on June 1, 2016.

Although the bill has only been law for little over a year, Tountas has already seen the impact on MCRCSIP and its members.

"In the past, it seemed every spring 4-6 lawsuits would land on my desk related to winter plowing operations. There were none this year," Tountas said. "The proof is in the pudding. This is common sense legislation."

A sustained reduction in lawsuits means less expense coming out of the liability pool and more money going toward roads.

"Number one, green lights is a public safety issue, Victory said. "But the secondary result is that you don't have the litigation, the lawsuit liabilities. What does that actually mean for the taxpayer in Michigan? Better pavement, because now those dollars can go into road improvements," he said.

"From a personal point of view," Victory added, "I drive up and back to Lansing each day for my commute. In the wintertime, there have been some very snowy days. When I see the green light on a road commission truck, or a state highway truck, or a city truck, and I have better visibility, I'm thinking, 'Good job, Victory. Now I know why I drive to Lansing,'" he said.

Can Drones Work for You?

Bill Henn & Andrea Nester
Henn Lesperance PLC

From eye-in-the-sky news to on-line retailers dropping deliveries at your doorstep, the signs are unmistakable: drones are among us. Also referred to as unmanned aircraft or "UA's" by the Federal Aviation Administration, drones have great potential to assist County Road Commissions with tasks like surveying and highway inspections, among others. Before your drone program gets off the ground, however, there are important legal requirements and liability aspects to consider.

At present, there are both federal and state laws governing the operation and ownership of drones. Further, liability associated with drone operation is a developing area of law with more questions than answers at this point in time. The following brief summary is intended only to paint these laws and liability issues with broad brush strokes. It is highly

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recommended that you consult with an attorney and MCRCSIP before employing drones in the field.

The Federal Aviation Administration ("FAA") has created lengthy rules regarding drone or UA operation and ownership, found at 14 CFR part 107. Although these rules were recently vacated by a federal court as applied to the recreational use of UA's, the rules remain applicable to both commercial and governmental entities.

14 CFR part 107 contains requirements for qualification of UA pilots, for operation of the aircraft, and for technical aspects of the aircraft itself. For example, to become certified as a UA pilot, a person must:

- Pass an aeronautical test covering topics including: (1) regulations, (2) airspace classification, (3) operating requirements, (4) flight restrictions, (5) weather sources and the effect of weather on aircraft performance, (6) drone loading (i.e., with cameras, etc.) and general performance, (7) emergency procedures, (8) radio communication procedures, (9) aeronautical decision-making and judgment, and (10) airport operations; and

- Pass a TSA security background check.

Regarding operation of the UA or drone, the certified pilot (in conjunction with a designated visual observer) must, among other requirements:

- Keep the aircraft in sight;
- Fly under 400 feet;
- Fly only during the day;
- Fly at or below 100 mph;
- Yield right of way to manned aircraft;
- Not fly over people;
- Not operate the drone from a moving vehicle.

The FAA may issue a waiver for some or all of the above operational requirements; however, the application process can result in additional requests from the FAA, and the issuance of a waiver is not guaranteed. In other words, you may not be able to obtain a waiver if the FAA is not convinced that the drone will be operated in a safe manner.

Finally, each UA must be registered with the FAA, marked with its registration number, and both flight conditions (weather, "ground hazards," airspace, etc.) and the drone itself must be inspected in detail with each flight.

A governmental entity may apply for a blanket public Certificate of Waiver or Authorization ("COA"): an authorization issued by the Air Traffic Organization to a public operator for a specific UA activity. In conjunction with consideration of a COA application, the FAA conducts a "comprehensive operational and technical review." Limitations or specific requirements may be imposed, and there are no guarantees regarding approval of the application.

Michigan has also enacted its own UA legislation, found at MCL 259.301, et seq. The Michigan law—while also cross-referencing federal guidelines for a drone operator—also creates a taskforce on the issue of drone use and proscribes penalties for some invasion of privacy offenses.

Aside from the matrix of legal regulations, the issue of potential liability may cause concern. It is possible that courts would find liability on the part of a governmental agency if it violates the Federal regulations. Although MCRCSIP is examining whether UA ownership and operation can be insured, at present the MCRCSIP liability coverage agreement excludes liability arising from the ownership and operation of aircraft.

In sum, UA's have great potential to benefit Road Commissions in a variety of highway related tasks, but the operational legalities and potential liability must be considered before a drone is employed. We have little doubt that the finer points of the law and the liability risks will catch up with the technology and come into focus over time. Until that occurs, do not hesitate to contact MCRCSIP if you have any questions regarding purchase or use of a UA or, in the alternative, if others' failure to adhere to UA regulations interferes with your work, property, or personnel.

EMPLOYEE WORKPLACE RECORDINGS

Wendy Hardt, Attorney
Michael R. Kluck & Associates

Some employers may have policies in place prohibiting employee recordings in the workplace. A recent decision of the National Labor Relations Board (NLRB) gives reason to believe that such policies may be subject to attack as an unfair labor practice.

In December of 2015, the NLRB ruled that Whole Foods had violated the National Labor Relations Act by maintaining an overbroad no-recording policy. The company's policy prohibited all recording without management approval. Whole Foods stated that its purpose for the policy was to promote employee communication in the workplace. The NLRB saw it differently, ruling that the policy's overly broad language could "chill" an employee's exercise of Section 7 rights because it was not limited to controlling those activities in which employees are not acting in concert. Whole Foods appealed the NLRB's decision to the Second Circuit Court of Appeals, which recently issued its summary order affirming the NLRB's 2015 decision. The appellate court wrote that the NLRB's determination was supported by substantial evidence and was decided in accordance with law. In a footnote, however, the Court noted that not every no-recording policy will necessarily infringe on employees' Section 7 rights. A lawful policy would have to be drafted narrowly so that it protects the employer's interests without interfering with employees' protected activities.

This NLRB decision is not binding on the Michigan Employment Relations Commission (MERC) in interpreting the Public Employment Relations Act (PERA). Nonetheless, MERC often defers to the NLRB and relies on NLRB decisions in deciding cases under PERA. Therefore, MERC may similarly find that a very broad no-recording policy would violate PERA. In its decision, the NLRB specifically held: "[P]hotography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." Presumably then, if a policy were more narrowly tailored and justified by some overriding employer interest, it should pass muster under PERA.

The NLRB pointed to examples of workplace recordings by employees that are protected, such as images of protected picketing; documentation of unsafe workplace equipment or hazardous working conditions; and recordings that preserve evidence for use in administrative or judicial forums in employment-related actions. The NLRB also cited its own precedent in which surreptitiously recorded workplace interactions were admitted into evidence. This is somewhat at odds with the position MERC (and the NLRB previously) has taken on recordings over the years. In Saginaw Township -and- Police Officers Ass'n of Michigan (2005), MERC noted the following:

> As the ALJ acknowledged in his Decision and Recommended Order, "the Board excludes secret tape recordings of conversations that involve contract negotiations and contract proposals." ALJ Decision at 3, citing NLRB v

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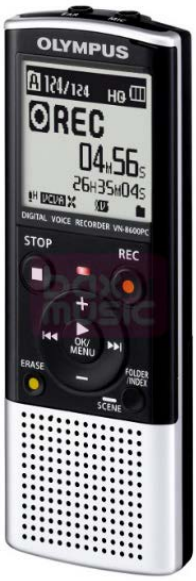
Workplace Recordings Continued from Page 5…

> Maywood Do-Nut Co, Inc., 659 F2d 108 (CA 9, 1981) and Carpenter Sprinkler Corp, 238 NLRB 974 (1978). In Carpenter Sprinkler Corp, 238 NLRB 974 (1978), enf'd 605 F2d 60 (CA2, 1979), the Board elaborated on the reasoning behind the exclusion of secret recordings of contract negotiations:
>
> > We are convinced that a rule permitting the introduction into evidence of surreptitiously prepared tape recordings of negotiations would inhibit severely the willingness of the parties to express themselves freely and would seriously impair the smooth functioning of the collective bargaining process. Accordingly, we hold that recordings of conversations which are part of negotiations and which are made without notice to a party to the conversations should be excluded from evidence in Board proceedings. Id. at 975.
>
> Since grievance meetings involve questions arising under the collective bargaining agreement, we find that the same rationale applies to the secret recording of these sessions.

Nonetheless, in that case, MERC found that the Employer had effectively waived its objection to such evidence at the hearing.

MERC has long held that tape recording of bargaining sessions is a "permissive" subject of bargaining. In Kenowa Hills Public Schools, 1980 MERC Lab Op 967 and Carrolton Twp, 1983 MERC Lab Op 346, employers were found to have violated their duty to bargain in good faith by refusing to meet to negotiate contract terms unless the unions agreed to permit the employers to tape record their negotiation sessions. In concluding that the employers unlawfully insisted to impasse on a permissive subject of bargaining, the administrative law judges in Kenowa Hills and Carrolton Twp held that the tape recording of negotiation sessions was a "threshold" matter unrelated to wages, hours or terms and conditions of employment. A party may make a proposal on a permissive subject of bargaining but cannot lawfully insist to impasse on that issue.

In terms of investigatory interviews, there has been no specific ruling by MERC one way or the other as to whether recordings by employees must be allowed. There are strong employer interests in not allowing such recordings by employees. First, it is not required by the employee for evidence purposes, since the employer will also typically be recording the interview. In such cases, the employee should be allowed to have a copy of the recording once the investigation has been concluded. Second, once the tape recorder leaves the room, the employer has no control over what is done with it and the information it contains. The questions and answers could be played for other witnesses, including the target of the investigation. Or the tape recording could be shared with other co-workers, who have no interest in the outcome of the investigation, with divisive consequences. Such sharing may implicate the confidentiality and privacy interests of other employees, particularly in the case of a harassment or civil rights investigation. Third, in these days of social media, the recording could be shared in a highly public forum. Investigative interviews are not intended for the internet, but that is certainly where they might end up, thereby effectively tainting the employer's investigation. If an employer were to prohibit employee recordings of investigative interviews, MERC might well find that these considerations outweigh any concern over interference with employees' rights under PERA.



If your road commission has adopted or is considering adoption of a "no-recording" policy, you would be well advised to consult with legal counsel to determine if the policy is enforceable.

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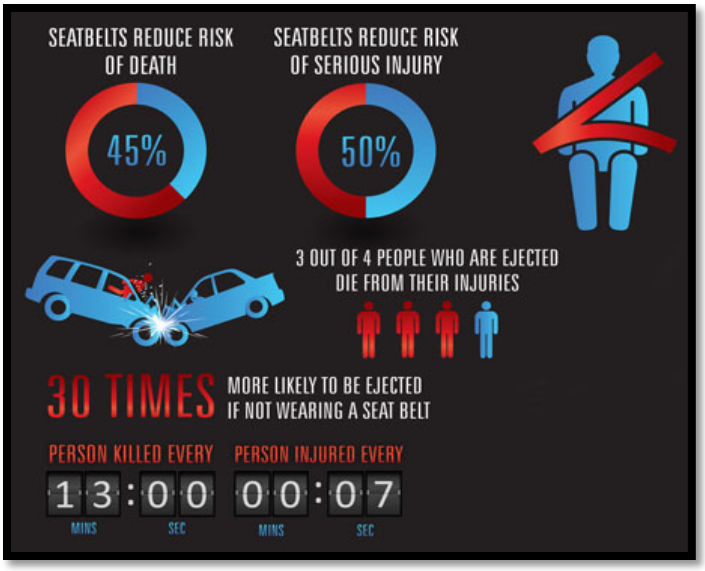
Seatbelts: Enforcement Is the Key

By Mike Phillips,
Senior Loss Control Specialist

We know that seatbelts save lives. We know seatbelts are required by law. Wearing seatbelts is such an easy thing to do, and it can make a big difference in the outcome of an accident. So why, then, does this issue continue to be such a problem for our employees? We have put on training program after training program, handed out informational sheets, and even posted signs all over our facilities, and yet the message continues to be ignored.

Could the fault lie with us? As supervisory and managerial personnel, are we reluctant to enforce basic safety rules, things we assume every employee should be doing to protect themselves? The answer to this question might reveal more about the culture of our organizations than many of us would like. After all, what's important to the supervisor is important to the employee.

You might be surprised to know that during our Work Zone Reviews, MCRCSIP regularly finds that the most basic safety rules, like the wearing of seatbelts, are not being enforced. The highly hazardous operations, such as road closures and traffic regulators, are usually well done. It's the little stuff that gets us.



Part of the problem is that our supervisors are so focused on ensuring quality and production to make the public happy, that sometimes safety isn't a priority when they roll up onto the job. So if your operation is struggling to enforce basic safety rules, my suggestion would be to make a checklist. This would be a short list of about five things a supervisor should check every time he or she arrives on a project. This could include seatbelts, PPE, beacons, parking, signs, or any of several other issues. If something isn't right, it should be addressed immediately. Don't accept excuses. Every employee will have an excuse.

The decision to enforce seatbelt use is up to you, but before you put it on the back burner along with cleaning out your truck and returning your mother-in-law's voicemail messages, check out the statistics in the graphic above.

Seatbelt use continues to be one of the areas where our operations could improve. Of course, MCRCSIP has Roadside Chats and training programs to help, but seatbelt use and some of those other basic safety issues need to become part of the culture. After all, if it's important to the supervisor, it will be important to the employees too.

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SAVE THE DATE!!

MCRCSIP ANNUAL MEMBERSHIP MEETING

JULY 18-19, 2018

SOARING EAGLE RESORT
MT. PLEASANT

Michigan County Road Commission Self-Insurance Pool
417 Seymour Avenue, Suite #2
Lansing, Michigan 48933

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EMPLOYMENT PRACTICES LIABILITY TRAINING

2017 Fall Loss Control Meetings

DATES AND LOCATIONS

- October 24 – Delta CRC, Escanaba
- October 25 – Quality Inn, St. Ignace
- October 26 – Roscommon CRC, Prudenville
- November 7 – Genesee CRC, Flint
- November 8 – Kalamazoo CRC, Kalamazoo

8AM - NOON

Mid-Morning Break
Coffee and
Refreshments

WENDY HARDT
EPLI TOPICS

- CDL Medical/Physicals
- Hiring/Discharging
- Promotions/Advancements
- Open Meetings
- Electronic Communication

MIKE SHULTZ
CRASH ASSESSMENT REVIEW

- 1-hour review of recent CAT programs

WHO SHOULD ATTEND?

CRC managers, HR professionals, clerks, supervisors, or anyone interested in EPLI

REGISTRATION FORM

Name _____

Title _____

CRC _____

Email _____

Please check the session you are registering for.

☐ Oct.24 – Escanaba
☐ Oct. 25 – St. Ignace
☐ Oct. 26 – Prudenville
☐ Nov. 7 – Flint
☐ Nov. 8 – Kalamazoo

Mail to: MCRCSIP, 417 Seymour Ave., Lansing, MI 48933

REGISTER ONLINE AT MCRCSIP.ORG