



POOLCUE

Volume 32 | Issue 4 | November 2022

A quarterly publication of the Michigan County Road Commission Self-Insurance Pool. Visit www.mcrcsip.org for past issues.

Upcoming Events

December 7
Board Meeting
Comfort Inn
Mt. Pleasant

Remote Work Strikes Back: Reasonable Accommodation or Impossible Situation?

Andrew Cascini
Henn Lesperance PLC

It can sometimes be difficult to remember how work was conducted prior to the COVID-19 pandemic. Even as our nation has largely “returned to normal” after COVID treatments became more manageable, it can often feel from an employer’s perspective that our employees’ expectations about working conditions haven’t followed suit. Consider this: prior to 2020, only 6% of employees nationwide worked primarily from home. Today, 84% of employees report that they’d prefer to perform their jobs from home even if that meant a reduction in pay or benefits. These shifting expectations can impact our Road Commission partners in a variety of ways.

Road Commissions are dissimilar from many employers because most Commission work must be performed in-person, whether from our facilities or on-site. But that doesn’t mean Commissions are immune from the effects of this societal change because they are competing for labor with other employers from other industries for talent from an increasingly-shrinking talent pool. Thus, unfortunately, remote work presents a practical problem for Road Commissions even if all its jobs require in-person performance and remained in-person throughout the pandemic. These Commissions are commonly facing employee retention issues as workers are lured into



alternative professions which offer more flexible working arrangements. To combat these problems, some Commissions have had success negotiating wage concessions with their labor partners or adopting more flexible vacation/PTO policies. But such decisions must always be made strategically.

Other Road Commissions are seeing a more direct impact of a growing preference for remote working opportunities. Specifically, this change is impacting employees for whom in-person or on-site work is not necessarily required – these employees are requesting alternative remote working arrangements more and more commonly. So, if an employee is asking to work from home on either a part-time or a full-time basis, what must a Road Commission employer do?

First, remember that there is no legal requirement for an employer to provide any employee with alternative working arrangements in a general sense. Terms and conditions of employment for employees belonging to bargaining

Continued on page 4

In This Issue

- Tips for Your ELDT Program and a Message on Training
- Closed Session Under the Open Meetings Act
- 2023 Annual Meeting
- EEOC Releases New Workplace Poster
- Right-of-Way Mowing Policies
- Use Your Equipment Schedule Like a Boss!



Tips for Your ELDT Program and a Message on Training

Charlie Pike, JD
Director of Loss Control, MCRCSIP

There is currently a shortage of CDL equipped drivers available to work for road commissions. Adding to the shortage of CDL equipped drivers is the new Entry Level Driver Training ("ELDT") that must be completed before drivers can take a skills test and obtain their CDL. Because of this, some road commissions have already signed up as ELDT providers on the Federal Motor Carrier Safety Administration's ELDT Registry. This allows the road commission to provide the ELDT training instead of sending the driver to an expensive training school.

Below are a few tips and reminders for those road commissions either already on the ELDT registry or for those road commissions who intend to sign up in the future:

1. Be sure to sign up as a private trainer when signing up on the FMCSA's ELDT registry. This means that you will not be offering the training to the public and only training your employees.

2. Your employee should be on the road commission payroll and clocked in when receiving the ELDT training. This ensures proper insurance coverage for both the road commission and your employee.

3. Virtual training programs (such as the modules that can be purchased on JJ Keller's website) can be used as helpful supplements to the training provided by the road commission. However, it should not be the exclusive means of training since the regulations require that the trainers meet specific specifications. For example, trainers must hold the same or higher class CDL to operate the CMV for which training is being provided. The requirements can be found on the FMCSA's website.

4. JJ Keller offers an ELDT training manual that can be purchased on their website and can be used to help design your program and to ensure the ELDT curriculum is being followed.

5. Once a driver completes the entry level driver training, be sure to submit the driver's certification information to the Training Provider Registry by midnight of the second business day following the trainee's completion of the training. This is required by the regulations.

If you have any additional questions regarding the ELDT registry, or if you want more information on how to start your own program, please feel free to reach out to MCRCSIP.

Finally, mother nature has seen fit to provide us a few extra days without snow this year. That means our

members will hopefully have additional time to sneak in some important training. To that end, below is a list of a few training programs that have been heavily requested this fall and well-received by members. If any of the trainings look like something your employees would benefit from, or if you want more information on the training options, please contact MCRCSIP's loss control department.

Popular Training Topics

- Winter Operations
- Reasonable Suspicion for Supervisors
- Crash Investigation
- Building Trusting Teams
- Backing and Blind Spots
- Truck Inspections
- Distracted Driving



Closed Session Under the Open Meetings Act

Adam Tountas
Smith, Haughey, Rice & Roegge

Under Michigan law, you're a "public body." This means your board's meetings are subject to the Open Meetings Act ("OMA"). That's not news to you. But, a few weeks ago, the Michigan Court of Appeals issued a published opinion that reiterated several of the OMA's requirements, including those relating to closed session. We thought that served as a good excuse to rehash some of those requirements for your benefit.

The specific case we're talking about is entitled *Mr. Sunshine v. Delta College Board of Trustees*, ___ Mich App ___, ___ NW2d ___ (2022) (Docket No. 358042). In that lawsuit, the plaintiffs claimed the defendant, a public body, violated the OMA. Specifically, the folks suing challenged the way that the defendant initiated a closed session. The plaintiffs' appellate arguments were convoluted and didn't make much sense. So, there isn't really any value in analyzing them. But, the way the Court disposed of those arguments draws attention to a couple important points. We discuss them below.

The Court began its opinion by reiterating that the OMA's purpose is to promote governmental accountability

by facilitating public access to official decision making. That's why, under the OMA, public bodies must conduct their meetings, make all their decisions, and conduct their deliberations (when a quorum is present) in a setting that's open to the public. There are statutory exceptions to this open meeting requirement. But, under Michigan law, those exemptions are construed narrowly. And, the public body has the burden of proving that a particular exemption exists.

The closed session exemption is contained in MCL 15.268. That provision says that, among other things, a public body may meet in a closed session for these reasons:

- "To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body." MCL 15.268(1)(e).
- "To consider material exempt from discussion or disclosure by state or federal statute." MCL 15.268(1)(h).

The first exemption is clear enough.

You're able to go into closed session to speak with your attorney about trial or settlement strategy in connection with pending litigation. It's important to note, however, that, in another published opinion, the Michigan Court of Appeals ruled that the pending litigation must be identified by name on the record before a public body goes into closed session. In other words, it's not enough for you to simply announce that you're going into closed session to discuss a "lawsuit." Rather, you should say that you're going into closed session to discuss "*Smith v. Jones*" with your attorney.

The second exemption is a little bit trickier. In *Mr. Sunshine*, the Court ruled that a public body may go into closed session to discuss a written legal opinion with an attorney because those matters are exempt from disclosure under the Freedom of Information Act. But, the Court also indicated that the discussions themselves can't go beyond the contours of the written legal opinion. And, it said that a public body goes beyond the contours of a written opinion when it discusses even somewhat-related nonlegal matters, like the economic ramifications of the

Continued on page 4



SAVE THE DATE

MCRCSIP ANNUAL MEETING
JULY 19-20, 2023
SOARING EAGLE CASINO & RESORT

6800 SOARING EAGLE BLVD.
MT. PLEASANT, MI

Remote Work Strikes Back: Reasonable Accommodation or Impossible Situation?

Continued from Page 1

units represented by labor unions must be bargained between the Commission and Union representatives, not necessarily individually. One exception, of course, applies when an employee has requested remote work as an accommodation for a disability. In such circumstances, your Commission should make reasonable and lawful inquiries to first obtain documentation from the employee's medical provider demonstrating (i) the existence of a disability and (ii) that remote work would allow the employee to perform all of the essential functions of his or her job. Assuming that such documentation is provided, the employer's next step is to determine whether it is possible for the employee to perform his or her job remotely – if it is not, then the employer should reject

the request (ideally through written communications drafted by legal counsel) and propose alternative accommodations. But even if remote work is possible, an employer is not necessarily obligated to concede to the request. Instead, the obligation is to engage in the "interactive process" and to discuss with the employee alternative accommodations that might work instead.

What about situations where an employee *who was permitted to work remotely during the pandemic* now requests resumption of remote work flexibility due to a disability? If the employer wishes to deny such an accommodation request, it should be prepared to demonstrate that although the employee's job can *feasibly* be done

remotely, remote work will cause an undue hardship upon the employer. Employers may demonstrate such hardships by showing that the employee's productivity will be vastly decreased or by showing that the employee's job included functions which may not have existed during the pandemic (in-person customer service, for instance) but which are now essential in a post-pandemic environment.

MCRCSIP can provide employers with help and resources to work through situations involving employees making remote work requests or with a variety of other employment and labor-related issues. Please do not hesitate to contact MCRCSIP for additional information.

Closed Session Under the Open Meetings Act

Continued from Page 3

legal opinion. Practically speaking, your attorney can help with this requirement by keeping your closed session discussions on track. It's just important that you realize the discussion must be kept on track to stay in line with the OMA's requirements.

The *Mr. Sunshine* opinion also offers a refresher on some of the OMA's procedural requirements. Specifically, there, the Court affirmed that a public body can only enter a closed session if a roll call vote of 2/3 of its members approves the action, and the roll call vote's results (and the purpose for calling the closed session) are entered

into the minutes of the meeting in which the vote was taken. So, if you're going into a closed session, make sure the clerk takes a roll call vote, and the board member moving for the closed session identifies, as part of his or her motion, the specific purpose.

Closed session is an important tool. But, if you're going to use it, it's important to do so properly. So, here are three friendly reminders: (1) if you're going into closed session to discuss trial or settlement strategy, make sure the motion to enter closed session identifies the case by name; (2) if you're going into closed session to discuss a

legal opinion, you are only allowed to remain in closed session as long as you are discussing the substance of that opinion; so, keep things on track; and (3) whenever you go into closed session, make sure you take a roll call vote, and identify both the purpose for the closed session and the board members who voted in favor of it.

As always, please know that the Pool and its team of professionals are here to assist you. So, if you have any specific OMA related questions, or want to discuss any of the issues addressed in this article, please don't hesitate to contact Gayle and her team.

EEOC Releases New Workplace Poster

Wendy Hardt, JD
Claims Director, MCRCSIP

Last month, the Equal Employment Opportunity Commission (EEOC) released a new “Know Your Rights” poster (<https://www.eeoc.gov/poster>), which updates and replaces the previous “EEO is the Law” poster. Covered employers (which includes state and local government employers with 15 or more employees) are required by federal law to prominently display the poster at their work sites. The poster should be placed in a conspicuous location in the workplace where notices to applicants and employees are customarily posted. In addition to physically posting, covered employers are encouraged to post the notice digitally on their web sites in a conspicuous location.

The poster summarizes the Federal laws prohibiting employment discrimination and explains that employees or applicants can file a charge if they believe that they have experienced discrimination. The poster shares information about discrimination based on:

- Race, color, sex (including pregnancy and related conditions, sexual orientation, or gender identity), national origin, and religion;
- Age (40 or older);
- Equal pay;
- Disability;
- Genetic information (including family medical history or genetic tests or services); and,
- Retaliation for filing a charge, reasonably opposing discrimination, or participating in a discrimination lawsuit, investigation, or proceeding.

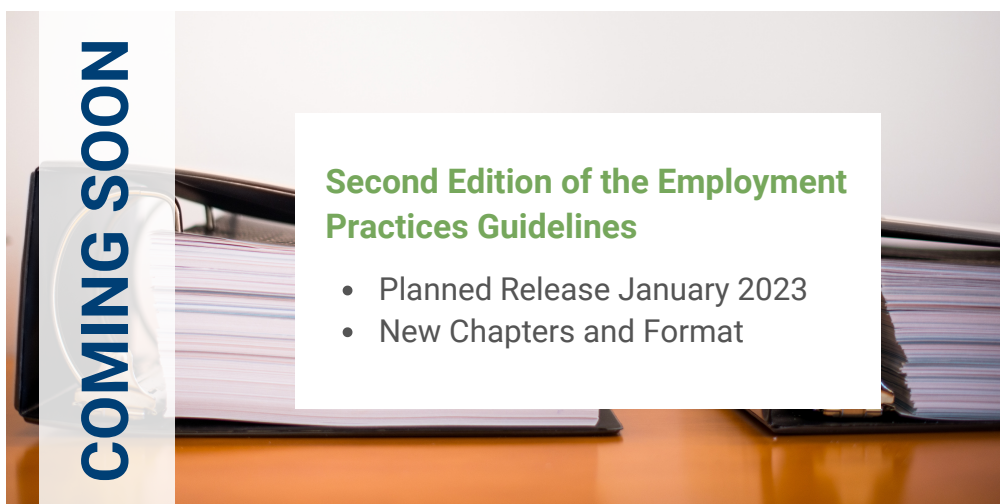


The new “Know Your Rights” poster includes these changes:

- Uses straightforward language and formatting;
- Notes that harassment is a prohibited form of discrimination;
- Clarifies that sex discrimination includes discrimination based on pregnancy and related conditions, sexual orientation, or gender identity;
- Adds a QR code for fast digital access to the how to file a charge webpage; and,
- Provides information about equal pay discrimination for federal contractors.

A copy of the new poster is available on the EEOC website. If you have not already done so, you should download and print a copy of the poster and make sure it is posted on the bulletin board(s) in your workplace where you normally post notices to employees. Make sure to use the version marked “(Revised 10/20/2022)”. Covered employers are subject to fines for noncompliance.

If you have any questions or require any assistance, please let us know.





Right-of-Way Mowing Policies

Bill Henn & Nik Artaev
Henn Lesperance PLC

In 1999, the Michigan legislature amended the Michigan Transportation Fund Act to add standards governing mowing within the public road rights-of-way. See MCL 247.665b. Interestingly, the amendment was prompted by a wildlife conservation group called Pheasants Forever, who wanted to preserve a more natural landscape along the roadside because the back slopes of highway ditches offer great nesting and brood rearing sites for pheasants and other birds. The mowing standards sought to balance the wildlife preservation efforts with the Road Commission's duty to maintain the rights-of-way in a safe condition by permitting mowing, but in a way that minimizes the impact on the ditch back slopes. These mowing standards currently apply to all rights-of-way that are at least 50 feet wide. MCL 247.665b(3).

In general, the mowing statute states that a right-of-way "may be mowed as necessary to maintain public health and safety." MCL 247.665b. Whenever possible, mowing must be no more than 12 feet or to the leading edge of a ditch, whichever is less, from the outside edge of the highway shoulders. MCL 247.665b(2). The entire right-of-way may be mowed only between July 16 through August 31, if needed, but the Road Commission must maintain "not less than 12 inches of grass height from the back of the ditch to the back of the right-of-way and within the median." *Id.* Any mowing of the back slope and wide median areas beyond the 12-foot width from the road edge must be performed in a manner that maintains a minimum 12 inches of grass by September 1 of each year, except for any areas designated for brush control. MCL 247.665b(4). Brush contained within a right-of-way must be moved back to



prevent it from becoming established. *Id.* Finally, brush and tree stumps must be spot treated with herbicide, as needed, for long term control.

Mowing of the area between the ditch bottom and the back slopes cannot occur between September 1 and the following July 15. *Id.* Mechanical brush and woody stem control may be completed to whatever height is necessary to provide control and safety, but can only be done between July 16 and the following March 1. *Id.* Up to 50% of county roads would be designated annually for brush control that includes mowing and herbicide treatment. *Id.* Annually 25% of medians must be designated for removal or spot spray treatment of unwanted brush and trees. *Id.*

In some cases, Road Commissions have encountered encroachments within the rights-of-way placed by adjacent property owners that interfere with the ability to follow the standards set forth by MCL 247.664b. Accordingly, Road Commissions are encouraged to adopt a mowing policy that is consistent with the statute and that will help to set the public's expectations. MCRCSIP has developed a sample policy for use by its Members.

As always, if your Road Commission has any questions about the prescribed mowing standards under MCL 247.665b, or any doubts as to how it should approach the removal of encroachments that interfere with mowing activities, please do not hesitate to contact MCRCSIP.



Use Your Equipment Schedule Like a Boss!

Shanda Eichelberger
Claims Adjuster, MCRCSIP

Doing a thorough review of your equipment schedule can be overwhelming, but once you understand the importance of scheduling properly it makes the overall process of managing it much easier! Demand for equipment is very high, along with ensuing supply chain disruptions, backordered parts, and labor shortages, so you should factor inflation into determining the asset valuation type when scheduling your equipment.

When managing your equipment schedules look at breaking your assets down into two categories: 1-Passenger vehicles and standard pickup trucks and 2-Equipment and other vehicles. Passenger vehicles and standard pickup trucks designed and used primarily for transportation must be scheduled as depreciated. Coverage provides actual cash value payout and is calculated by current replacement cost less depreciation. Equipment and other vehicles have two options:

1-Actual Cash Value or 2-Appreciated Value limited to current replacement cost. Vehicle and components should be scheduled separately if a component can be moved from one vehicle to another, to accurately reflect the cost of the units when they are not one piece of equipment (example: a snowplow can be taken off one truck and put on another, therefore, it should be put on your schedule separate from the vehicle).

Choosing appreciated or depreciated when scheduling your equipment and other vehicles that are not passenger vehicles/standard pickup trucks is vital so that when a loss occurs, you are not left underinsured or surprised by an unwanted total loss. Our system uses a "stated value" amount entered by you to serve as the purchase price, giving you freedom to keep up with cost increases. The intent behind appreciated coverage is to cover your larger pieces of equipment with "close to replacement coverage". It is not true replacement

coverage...but close. Payment for appreciated value assets is insured value on your schedule, limited to current replacement value. Make sure you know what you are covered at and periodically review your scheduled value versus current cost and market prices to be proactive before a loss occurs.

Check your equipment schedules often to make sure that all equipment that should be on there is listed so as to avoid a loss and then finding out that you did not have the equipment scheduled/insured at the time of the loss. You also want to check the schedule to make sure you still have everything that is on the list, as you do not want to pay for coverage on equipment that should have been removed due to a loss or it being sold. We are here to answer any questions you may have when it comes to scheduling your equipment and other vehicles or for any coverage questions you may have!

Helpful hints on making updates on your equipment schedule in MAPP:

Off-Road Equipment

Click On the "Description" of the unit to change or delete

Add Off-Road Equipment

Update Off-Road Equipment

Delete Off-Road Equipment

Licensed Vehicles

Click On the "Make" of the unit to change or delete

Add Licensed Vehicle

Update Licensed Vehicle

Delete Licensed Vehicle

MCRCSIP Holiday Hours

We will be closed on the following dates in observance of the holidays:

- Closed Thursday, Nov. 24
- Closed at noon Friday, Dec. 23
- Closed Monday, Dec. 26
- Closed at noon Friday, Dec. 30
- Closed Monday, Jan. 2



MICHIGAN COUNTY ROAD COMMISSION
SELF-INSURANCE POOL

417 Seymour Avenue, Suite 2
Lansing, MI 48933

The Pool Cue is published quarterly by the
Michigan County Road Commission
Self-Insurance Pool
417 Seymour Avenue, Suite 2
Lansing, MI 48933

www.mcrcsip.org

*Mission Statement: To administer a self-insurance program
and to assist members with risk management efforts.*