

THE POOL CUE

Volume XVII, Issue 2 May 2011

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

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."



ARRIVEDERCI

Fred L. Haring
MCRCSIP Administrator

Recently, I announced that I will be retiring as the Administrator of MCRCSIP at the end of July. My wife Rosalie has decided to retire from the Williamston Schools System at the end of the school year in June. With that decision, she and I thought this would be a great time to begin a new chapter in our lives of over thirty- nine together as "retirees".

I have worked in the Insurance and Risk Management profession for over thirty-eight years in Wisconsin and Michigan. For the last twenty-four years I have worked exclusively with self-insured entities including nine years as an Account Executive with The ASU Group working with CRASIF. Most recently, for the last five years, I have served MCRCSIP as their Administrator.

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GUIDELINES FOR ELECTED OR APPOINTED OFFICIALS REGARDING LEGAL MATTERS AND LAWSUITS

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Attorney
Smith, Haughey, Rice & Roegge

Although lawsuits generally are filed against governmental units as entities and not against individual elected or appointed officials, it is important that those officials understand their obligations with regard to legal issues faced by governmental units. The individual actions of government officials may have an unintended impact on those legal issues. Although not all-inclusive, these guidelines are offered to help elected/appointed officials avoid complications associated with potential or existing legal issues. Some officials may feel these guidelines are somewhat restrictive with regard to interaction with the public, but their primary purpose is to provide advice on how to avoid negatively influencing lawsuits against the governmental unit.

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Our first priorities after retirement will be completing the plans for our daughter's wedding in October in North Carolina, and some golf. Following that, we will be looking forward to our son's wedding in Ohio, with a date that is still to be determined. After that, hopefully there will be some more golf and traveling around photographing Michigan's waterfalls and lighthouses, and maybe a trip to Italy.

Don't be surprised if I stop by your road commission for a cup of coffee.

Thank you, for the pleasure has been mine working with Michigan County Road Commissions over the past fourteen years.



Guidelines for Elected or Appointed Officials
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1. Avoid discussions of specific operational or management issues or actions taken or planned by the governmental unit with individuals outside of the governmental unit or with individuals within the governmental unit other than (1) the primary management employee, (2) other members of your governmental commission or board or (3) legal counsel. Although governmental boards act collectively, your individual actions and/or comments might have adverse legal consequences later for the governmental unit. If a lawsuit or other legal proceeding is filed, your individual actions or comments could be considered an admission or result in your being included as a witness by a party adverse to the governmental unit.

2. If approached or contacted by individuals about specific operational or management issues facing the governmental unit, whether those individuals are from outside of the governmental unit or the governmental unit's own employees, direct them to follow proper and established channels within the organization for their type of issue as required by policy and contractual obligations. Individual members of the board or commission should not try to solve specific operational or management issues, whether they are employment issues or other types of issues.

3. Private conversations about governmental unit issues with other board or commission members, the primary management employee or the governmental unit's legal counsel should remain private unless disclosure is authorized by the governmental unit's legal counsel or otherwise required by law.

4. If a lawsuit is filed against you or the governmental unit, immediately notify the primary management employee of the lawsuit so that proper notice can be given to insurance carriers and other essential responses can be made. Remember, there are specific time deadlines for responses to lawsuits. Failure to respond in a timely manner may result in a default judgment against you and/or the governmental unit.

5. If a lawsuit is filed involving you and/or the governmental unit, DO NOT talk with anyone about it other than other members of the board or commission, the primary management employee, or the governmental unit's legal counsel. Remember, conversations with legal counsel are privileged from disclosure and officials should protect the confidentiality of those discussions.

6. Do not send emails about the lawsuit within the governmental unit or to any third parties except to the governmental unit's legal counsel. Those emails may be discoverable and could impact the governmental unit's legal position. Do not destroy anything or allow a document management process that deletes information to continue unabated. From the moment you receive a lawsuit, or even a notice of the possibility of a lawsuit, you have obligations concerning retention of documents, electronic data, and the like. "Spoliation" of evidence can have serious consequences.

7. The Open Meetings Act allows discussion of certain types of government business in closed session, including discussions with legal counsel regarding pending litigation. The content of those closed session discussions is confidential and should not be shared with anyone else unless disclosure is authorized by the governmental unit's legal counsel or otherwise required by law.

8. Do not call, contact, or talk to the opposing party or opposing party's attorney about a lawsuit or potential lawsuit, even if you are asked to do so. If the opposing party or the opposing party's attorney attempts to discuss the lawsuit with you, refer them to the governmental unit's attorney. If a lawsuit has been filed, you have to consider the opposing party and his or her attorney as adversaries. The job of the opposing party's attorney is to help the opposing party win his or her case against the governmental unit, and anything you say might be turned against you or the governmental unit.

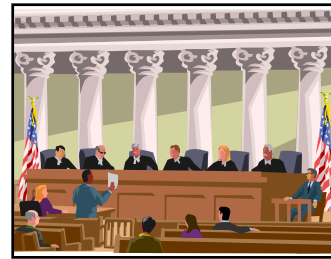
9. Do not speak with the media about specific operational or management issues, legal issues or lawsuits. Any and all media contact regarding legal issues and lawsuits should be handled through the governmental unit's legal counsel. Any and all media contact regarding operational or management issues should be handled through the primary management employee.

10. Work closely with the governmental unit's insurance carrier (if there is coverage) and/or the governmental unit's legal counsel. The governmental unit's legal counsel needs all of the facts regarding the lawsuit. Not giving the governmental unit's attorney all of the facts from the start handicaps his or her ability to handle the case. Remember, conversations with legal counsel are privileged, so be completely open and honest.

11. Finally, do not panic. Lawsuits are a fact of life in today's world. The governmental unit will defend itself and the operations of the governmental unit will continue.



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SUPREME COURT ISSUES A TRIO OF UNFRIENDLY EMPLOYER DECISIONS

Wendy S. Hardt
Michael R. Kluck & Associates

Three decisions issued this year by the United States Supreme Court potentially expand an employer's liability for discrimination and retaliation claims.

In Thompson v North American Stainless, the Supreme Court held that, under certain circumstances, a third party has standing to bring a retaliation suit under Title VII of the Civil Rights Act. In that case, the plaintiff and his fiancée worked at the same company. The fiancée filed a charge of sex discrimination against the employer with the EEOC. Shortly thereafter, the company terminated the plaintiff, who subsequently filed suit alleging he had been illegally retaliated against because his fiancée had filed a discrimination complaint. The Sixth Circuit Court of Appeals found that Title VII does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity. The Supreme Court disagreed, finding that, because he fell within the "zone of interests" protected by Title VII, the third-party plaintiff had standing to sue.

In this regard, the Court determined that because the plaintiff's termination was an unlawful means of punishing the employee who filed the discrimination charge, his concerns fell within the "zone of interests" sought to be protected by Title VII, and therefore, he was a "person aggrieved" and thus entitled to bring suit. The Court explained that this "zone of interests" test denies a right to review "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." The Court held that the term "aggrieved" in Title VII incorporates this test. Applied to the facts of Thompson, the Court reasoned that the plaintiff was not an

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accidental victim of retaliation, but rather a target to punish the individual - his fiancée - who filed the discrimination charge. Therefore, the Court held, he was well within the “zone of interests” sought to be protected by Title VII.

In Staub v Proctor Hospital, the Supreme Court held that an employer is liable under the Uniformed Services Employment and Reemployment Rights Act (USERRA) for the discriminatory intent of company officials who influenced - but did not make - the ultimate adverse employment decision. In that case, the plaintiff alleged that the Vice President of Human Resources, who ultimately made the decision to terminate his employment, was unduly influenced by lower level supervisors who harbored animosity about his military service. A jury found in his favor, but the Seventh Circuit Court of Appeals set aside that verdict and dismissed the case, finding that an employer can only be held liable for the unlawful motives of the formal decision maker, or another individual who “so dominated” the decision-making process as to constitute the “functional decision maker.” The Supreme Court reversed this decision.

The Supreme Court reasoned that the exercise of judgment by the decision maker does not prevent the earlier agent’s action (and hence the earlier agent’s discriminatory animus) from being the proximate cause of the harm. The Court also rejected the hospital’s argument that its independent investigation negated the effects of the prior discrimination. Applying its reasoning to the facts of the case, the Court found that there existed sufficient evidence for a jury to find that the plaintiff’s supervisors intended to use their power to indirectly cause his termination because of his military affiliation and that their actions were causal factors in the termination decision made by the Human Resources Vice-President. The Court examined the scope of imputed liability in the context of USERRA, but it noted that this statute “is very similar to Title VII”, raising the likelihood that this theory of liability will also be applied to discrimination claims based upon race, sex, religion, national origin, age and other protected characteristics.

Finally, in Kasten v St-Gobain Performance Plastics Corp., the Supreme Court examined whether an unwritten, oral complaint to the employer is protected under the FLSA’s anti-retaliation provisions and concluded that it was. In that case, the plaintiff claimed that, on several occasions, he complained to his supervisors and a Human Resources person that the location of the time clocks was illegal, because it prevented employees from being paid for time spent donning and doffing their required protective gear, and said that he might file a lawsuit. After frequently being warned about not recording his comings and goings on the time clock, the plaintiff was terminated. The Seventh Circuit Court of Appeals affirmed summary judgment in favor of the employer, holding that while internal complaints to an employer are protected under the FLSA, such complaints must be in writing because the term “filed” implies a writing.

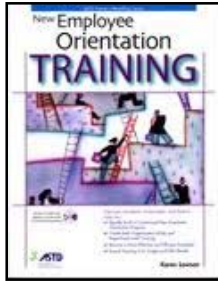
The Supreme Court reversed that decision, holding that unwritten, oral complaints are protected. However, in order to ensure fair notice to the employer, the Court held that the phrase “filed any complaint” contemplates “some degree of formality.” The Court articulated the following standard: a complaint is “filed” when “a reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act.”

These decisions should give employers reason for concern. The potential for liability under the various employment-related statutes has increased significantly. Consequently, now more than ever, employers need to tread carefully when it comes to matters of discipline and discharge of their employees.

MCRCSIP ANNUAL MEMBERSHIP MEETING

**July 20-21, 2011
Soaring Eagle Casino and Resort
Mt. Pleasant**

**Registration is available on MCRCSIP’s
website, www.mcrقسip.org.**



NEW EMPLOYEE SAFETY ORIENTATION “Give Them What They Need”

Michael Shultz
MCRCSIP Assistant Administrator
Director of Loss Control/Training

Although many road commissions have tightened their belts when it comes to hiring fulltime employees, some will continue to hire summer employment and winter seasonal drivers. During the summer months, college students are often hired to help fill in for a variety of summer duties to include (but not limited to), traffic counting, surveying crew, traffic regulating, grass trimming and patching blacktop. In the winter, members often hire former employees, or those that possess the necessary skills, licenses, and are willing to work part-time. Regardless of which end we are talking about, an orientation period is an opportune time for your organization and the new hire to size each other up!

This summer, seasonal labor can benefit your organization and provide the inexperienced workers valuable knowledge and job skills! Just remember, statistics indicate that a younger and/or inexperienced worker can be very vulnerable to accidents and injuries. Inexperience or lack of maturity can get a worker into trouble quickly in a road agency if specific instructions and proper guidance are not given. This is where good supervision and guidance play a valuable role! Never assume that “safe behavior” has been learned at home, in school or from a previous employer.

When it comes to the more experienced new hire, a safety orientation is just as important. Former employees generally understand what needs to be accomplished and are eager to work for the fall and winter seasons. Their tendency is to disregard some or most of a safety orientation, assuming they know the information. This

mistake can create a lot of additional time and effort managing that employee, because his/her best efforts may not be what you desire!

No one anticipates accidents, however, they do happen! Some are minor and some can be catastrophic. Remember that MIOSHA and your self-insurance representatives will be asking those all important questions: “Did that employee participate in a company safety orientation”? Did he/she receive safety training? Is there training documentation? Was the worker properly supervised?

A safety orientation can be as short as a few hours or take a full day, depending on your program and the complexity of the training the employee(s) requires. Those involved in the orientation may include the Managing Director, Superintendent(s), Human Resource Person and of course, your Safety Coordinator/Director. Utilizing your safety committee members can be a great opportunity to get extra mileage from that element of your program.

Very importantly, we advise you not put off safety orientation for a “rainy day”! Before you know it, the season will be half over and the worker will not have received the orientation or proper training. Secondly, an orientation checklist will be a valuable document for performance evaluations, enforcement, discipline and termination in the event of an accident or litigation.

This article lists below six (6) orientation discussion/training areas that can be used and should be considered. NOTE: Additional SAMPLE checklists and handbooks can be made available upon request.

1. SAFETY PHILOSOPHY: Cover your organizations’ philosophy on safety and communicate your accident prevention program! Familiarize them with your safety program to include any safety committees, coordinator(s), and activities. This is an opportune time to cover your written safety policies and rules! If you have a safety manual or an employee handbook, that information should also be reviewed during the orientation. Point new employees to your bulletin boards for safety notices/posters including those labor laws required by State and Federal agencies.

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2. SAFETY ENFORCEMENT: Reinforce that accidents can be prevented and unsafe behavior will not be tolerated. Ensure that workers understand that creating unsafe conditions and working unsafely is unacceptable and will have consequences, up to and including termination! Address their responsibilities for safety and work safely at all times. If they can't follow your safety rules, they should not take the job!

3. REPORTING ACCIDENTS & UNSAFE CONDITIONS/ACTS: Accidents sometimes happen! Employees need to know what to do and who to contact. Ensure that they understand that in the event of an accident, reporting it promptly, regardless of how slight, is a requirement. Should an employee identify an unsafe condition or unsafe behavior, it is their responsibility to report it to their supervisor. Generally, new employees are reluctant to report anything, however, this is one responsibility that should be communicated!

4. PERSONAL PROTECTIVE EQUIPMENT: The best time to assign personal protective equipment is during the safety orientation and long before the employee begins a job assignment. Take the time to address how and when PPE should be worn! Let workers know the purpose and limitations of all safety equipment and how to maintain it. For example, PPE includes: hard hats, hearing, hand and face protection, safety glasses, traffic vests and work boots/shoes. Addressing work attire (i.e. shirts, blouses, trousers, slacks, footwear) and other personal matters (i.e. wearing of hair, nails, jewelry) should also be covered in the orientation.

5. EMPLOYMENT RIGHTS/PRACTICES: The employer should take the time to address worker rights and practices as they pertain to labor matters. For example, inappropriate communication and/or behavior and how it will be managed. Review your policies on the many employment practice categories with an emphasis on Discrimination, Harassment (Hostile Work Environment/Quid Pro Quo) and Violence (threats and fighting). Management should clearly communicate to whom he/she should see if they have a question or a problem. Don't forget about your "No Retaliation" policy! When a law gives employees a legal right, the

same law prohibits employers from retaliating against employees who complain that their rights are being violated.

6. EMERGENCY ACTION/RESPONSE PLAN:

Your organization should have an emergency action plan. During the orientation, make sure that new employees understand what to do and/or where to go in the event of an emergency.



Evacuations and emergencies pertaining to fires and extreme weather are just two of many events that should make up your organization's emergency procedures/plan.

Additional safety awareness training should be provided where applicable. Listed below are some of the subjects that can make up your new employee orientation program:

- General and Departmental Work and Safety Rules
- Warning Signs, Symbols and Alarms (For machinery and equipment)
- Machine Guarding and Lock Out (Recognition and awareness)
- Confined Space Environments (Recognition and awareness)
- Strain Prevention (Basics on back injury prevention, ergonomics, 3-point contact, etc.)
- First Aid and Blood Borne Pathogens (First aid kits, showers/eye washes, taking universal precautions, etc.)
- Vehicle and Equipment Safety (Dead space, backing hazards, etc.)
- Portable Fire Extinguishers (Availability and use)
- Hazard Communication (MSDS's, container labeling, chemical inventory, PPE, etc.)
- Tools, Specialized Machinery (proper use and inspections)
- Traffic Control and Traffic Regulating (proper procedures and precautions)



CERTAINTY IN AN UNCERTAIN WORLD

Mark D. Jahnke
Specialty Claims Services, Inc.

The 2011 NFL Draft is now history. As predicted by many, Heisman Trophy winner, Cam Newton, was selected No. 1 overall by the Carolina Panthers. Regarded as the best talent in the draft and having the highest “ceiling” of all draft-eligible players, is it now certain that he will become a franchise player around whom the Panthers will be able to build a championship-caliber team?

NFL teams invest thousands of miles in travel, hundreds of hours in tape review and several weeks in daylong meetings to prepare for the draft. And even with all that groundwork, they still don’t always make the right choices. This is true even at the very top of the draft. When faced with the challenge of simply choosing the best or second best college player in the country it would seem to be a “lock” that a player would be chosen who would become a leader on his team and Pro Bowl material for many years. Surprisingly, even No. 1 and No. 2 picks, seemingly “sure things”, often don’t pan out. Remember Ryan Leaf? Charles Rogers? More recently, JeMarcus Russell?

Some actuaries may disagree with the following statement, but it’s well-known that “You can’t predict the future”. Uncertainty is a fact. With uncertainty comes risk, the concept upon which insurance is based. Managing risk for its members has been the business of MCRCSIP since the Pool’s inception in 1984. MCRCSIP has met with great success in adding certainty to the uncertain world of liability and property claims management. Despite making decisions in an environment where the answers are rarely black and white, MCRCSIP has provided the membership with consistency in coverage, contribution level and an important voice regarding the disposition of claims.

Achieving the right outcomes is no simple process. Securing the most complete and certain data upon which

to base decisions is critical, and our goal at Specialty Claims Services is to provide the Pool Board with the information necessary to make proper claims decisions. Three primary functions of a claims administrator are to “investigate, evaluate and negotiate”. While all three functions are critical to optimizing claims performance, Specialty Claims’ first priority is to “investigate, investigate, investigate”. Have all proper parties been interviewed? Has the accident scene been photographed and diagramed? Has all physical evidence been inspected, photographed and preserved? Have all pertinent records been obtained? Claims evaluations are the critical byproduct of a thorough investigation. If the latter is incomplete, then how can the former be conducted appropriately? Only by securing all necessary documentation can there be a fair and accurate assessment of coverage, liability and damages which are equally important elements of the claims decision. With a thorough understanding of the facts and the law, an informed decision can be made relative to the disposition of a claim. Do we have good facts that warrant taking the inherent risks of a jury trial or is a negotiated settlement indicated? Negotiations, although often contentious and adversarial, are an integral component of the claims process and an activity over which Specialty Claims’ personnel retains control. The struggling economy has resulted in an uptick in insurance claims opportunism, and we are meeting these new challenges with proven, successful, negotiation tools and strategies.

Prior to the formation of the Pool, road commissions faced a great deal of uncertainty when trying to secure adequate coverage for their liability exposures. In the late 1970’s and early 1980’s, the legal climate was bleak, losses were ever-mounting and many insurance carriers were adopting a “hands off” policy as to road commissions, preferring not to undertake such a risk. Now in 2011, it’s sometimes hard to imagine those days of uncertainty and a good percentage of current road commissioners and staff have never had to experience difficulties when trying to secure adequate liability coverage. Although a great deal of uncertainty remains when choosing the No. 1 college player in the NFL draft, Pool members can rest easy and rely on one certainty in their uncertain environment, that excellent liability coverage and services are available to them provide by MCRCSIP’s dedicated team of risk management professionals.

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

MCRCSIP Board Meeting Schedule

**May 12-13, 2011
MCRCSIP Office – Lansing**

**June 23-24, 2011
St. Ives – Stanwood**

**July 20-21, 2011
Annual Membership Meeting
Soaring Eagle Resort – Mt. Pleasant**

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**Past and present issues of the Pool Cue are available on the MCRCSIP website –
www.mcrcsip.org.**



THINK SAFETY

THE CRASIF CONNECTION

THEY'RE NOT REALLY ACCIDENTS

Buz Haltenhoff
Senior Loss Control Consultant
The ASU Group

Ac-ci-dent - 1. An unexpected and undesirable event.

This is the first definition listed for the word accident in Webster's dictionary. Most other definitions of the word accident are essentially the same. Accidents on the job cause far too many painful injuries and claim far too many lives. **But most accidents are really not accidents.** A better word to use in place of accident would be "incident" because the accident implies no fault or cause. Accidents shouldn't be unexpected because more than 80% of all accidents (or incidents) at work are caused by the unsafe acts of employees or unsafe conditions not corrected by employers - both of which can be controlled.

As a worker, you control the first cause - **Unsafe Acts**. For example: A worker uses equipment that is defective or damaged, or they may use good equipment in a careless or other unsafe manner. Other examples of unsafe acts include: failure to wear a seatbelt, disregarding safe procedures, failure to wear proper PPE, working too close to power lines, handling hazardous materials improperly, putting your body or any part of it too close to a machine, or lifting incorrectly.

The second accident factor or cause is **Unsafe Conditions**, which also can be found in many workplaces. Examples include: inadequate excavation guarding, insufficient illumination, poor ventilation, electrical hazards, blocked fire exits, unlabeled containers, poor housekeeping -- these are just a few of many unsafe conditions that may be caused by you, your co-workers, or even subcontractors at your site.

You can make a difference by performing your work safely and immediately reporting any unsafe condition you discover to your supervisor. You'll find that practicing workplace safety procedures will go a long way in preventing accidents from occurring again.

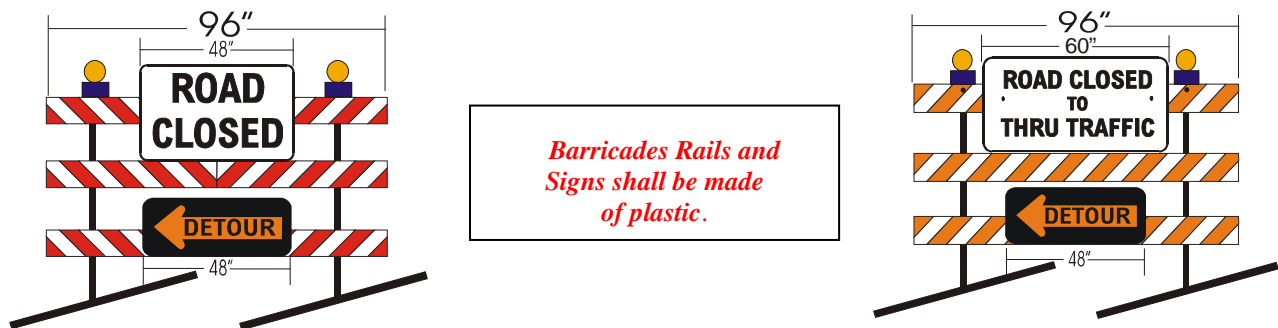
Visit our web site at www.CRASIF.org.
Please call if we can be of any assistance in managing your risk.

A NEW CRASH-WORTHY OPTION FOR TYPE III BARRICADES

Bruce Gasaway
The ASU Group

Through the coordinated efforts of CRASIF, The Muskegon County Road Commission, and The ASU Group, the Federal Highway Administration (FHWA) has recently approved another option of crash-worthy Type III barricades using plastic retro-reflective rails and plastic signs.

- Part 6 of the Michigan Manual of Uniform Traffic Control Devices (MMUTCD) in Section 6F-63 and Figure 6F-7 define the standards for barricades.
- MMUTCD Part 6, Section 6F-03 page 6F-7 states: Signs mounted on Type III barricades should not cover more than 50% of the top two rails or 33% of the total area of the three rails. The Type III barricades below illustrate how R11 and M4 Series 48" and 60" plastic signs can be placed on barricades to meet the above requirements.



- Figure 6F-7 on page 6F-32 states: The sides of barricades facing traffic shall have retro-reflective faces. Exception, the above left barricade illustration where the Road Closed sign is used and the stripes slope down inward where the road is closed from all traffic except work vehicles.
- Type III barricades shall meet all other NCHRP 350 requirements for lights, uprights, and bases. For more information about type III hardware crash-worthy requirements go to: http://safety.fhwa.dot.gov/roadway_dept/road_hardware/wzd.htm
- MMUTCD Part 6, Section 6F-63. Standard: Stripes on barricade rails shall be alternating orange and white retro-reflective stripes sloping downward at a 45% in the direction road users are to turn or pass.

If you have any questions contact:

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THINK SAFETY