THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL
Volume XXX Issue 1 January 2020

Welcome to 2020!

MCRCSIP has PLANS for this year and I wanted to give you a sneak peek ….

- Our Origami Software is ready to go live. We are looking forward to better information for our Members and better data for us!
- Charlie Pike is ready to begin integrating our Claims Department with Loss Control in order to more effectively use our claim data for targeting loss control efforts. We have also hired Jackson (Jack) Hill as our new Loss Control Representative, and Mike Shultz has moved his retirement date to March 31, 2020 to assist Charlie and Mike Phillips with the transition.
- The MCRCSIP Administrative team has a new Assistant Administrator, CFO. Lori Friedlis, CPA, moved over from the Eaton County Road Commission in November to take control of our administrative and financial processes. She is already cleaning up, clearing out and tightening up how we manage our business processes. Not an easy task considering our office's move to the second floor!
- The exterior building renovation is finished. Our second-floor office is just about finished. We will next be converting CRASIF's former office space into a kitchen area and small conference room and renovating the second-floor hallway and rest rooms.
- Our Board of Directors has a new Director. Brett Laughlin, Managing Director of the Ottawa County Road Commission, was appointed by our Chairman, Alan Cooper, to fill the position that opened when Dorothy Pohl's road commission was taken over by the Ionia County Board of Commissioners on October 28.
- The Board has set a primary focus for 2020: **"To establish an effective program to educate others about MCRCSIP**".

We have generally chosen to stay in the background and allow our work to speak for our Pool. However, we have recently become the target of a disinformation campaign aimed at undermining the perception of our value. In the past, phenomena like that would eventually subside, but that doesn't appear to be happening this time. We suspect this is because changes in the road commission community have created a knowledge gap that we need to cure. These changes include: The large number of retirements of long-term road commission leaders; the hiring

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of new leaders that have no history with MCRCSIP; new laws; county takeovers of road commissions; lawsuits against our Pool by successors of former members trying to overturn our governing documents; and the new processes we use to improve our claim management. The world's understanding of MCRCSIP is not as universal as it once was. We need to correct the record. And, we can't get that done by standing quietly in the background. So, we plan to engage.

Board discussions have also identified the need for us to increase our work with legislators in order to protect our Pool and better position our Membership for the future. We also believe there is an opportunity for us to work with legislators to impact No Fault legislation and other insurance issues, as well as help control liability exposure for our Members.

- We have hired Bob DeVries from GCSI to help us work with our legislators and implement our new education campaign. As part of his work, Bob will be explaining to legislators and other decisionmakers about MCRCSIP's expertise and value so that our point of view may be appropriately considered when they are considering legislative changes or other important matters.

Here, at MCRCSIP, we are all looking forward to being part of this new and improved MCRCSIP 2020 and are excited to use this progress to bring even better service to our Members.

Happy New Year, and Best wishes to all of you! ~g

Clarifying MCRCSIP v. MMRMA Ionia Comparison

On December 8, 2019, the Chair of the Ionia County Board of Commissioners went on the record with the Ionia Sentinel-Standard Newspaper reporting,"There was also a $90,000 savings to the liability insurance for the road department, Hodges announced."We already found one savings," he said.

We obtained a copy of the contribution breakout and coverage documents for the Ionia County Road Department's coverage with the MMRMA for January 1, 2020 - January 1, 2021. Here is the comparison:

Cost Comparison: MMRMA and MCRCSIP

	MMRMA	MCRCSIP
Auto Liability, Vehicle Physical Damage, Public Officials Liability, Other Liability and Property	72,667	152,755
Crime and Cyber Security		1,423
State Assessment	?	12,964
TOTAL	72,667	167,142
Ionia CRC's 2019 Refund		73,151

There is a $94,473 cost difference in the total charged, before considering refunds. After considering the refund amounts, the difference shrinks to $21,322. I am not sure how MMRMA handles the State Assessments; we treat them as a passthrough.

But wait! The coverage is also different.

Out-of-Pocket Comparison: MMRMA and MCRCSIP

	MMRMA	MCRCSIP
Auto Liability, Public Officials Liability, Other Liability	$150,000 per occurrence	small or no deductible
Sewer Disposal Systems Events	excluded	covered
Vehicle Physical Damage	$15,000 per vehicle/ $30,000 per occurrence	$500 per event
Replacement Cost Coverage	?	Yes

Those are the big differences.

Please don't look at this analysis as a criticism of MMRMA. From what we know, they are an excellent Pool with a long track record of insuring municipal entities. But we did feel the need to clarify Mr. Hodges' claim of savings on liability coverage.

New FLSA Salary Thresholds Took Effect January 1st

WENDY HARDT
MICHAEL R. KLUCK & ASSOCIATES

On September 24, 2019, the Department of Labor announced that a new overtime rule will be going into effect on January 1, 2020. Specifically, that rule will:

- raise the "standard salary level" from the currently enforced level of $455 to $684 per week (equivalent to $35,568 per year for a full-year worker);
- raise the total annual compensation level for "highly compensated employees" from the currently-enforced level of $100,000 to $107,432 per year; and
- allow employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to ten percent (10%) of the standard salary level, in recognition of evolving pay practices.

This higher salary threshold will apply primarily to employees who would qualify under the executive, administrative, and professional exemptions to the overtime rules under the Fair Labor Standards Act.

Generally, to qualify for exemption from overtime under the FLSA, an employee (1) must be paid on a salaried basis (not hourly), and (2) must earn the "threshold" amount or more, and (3) must perform certain specified job duties depending on the type of exemption sought. The new overtime rule does not make any changes to the duties tests.

As you may recall, a new overtime rule was scheduled to go into effect on December 1, 2016, until it was enjoined by the U.S. District Court for the Eastern District of Texas on November 22, 2016 and subsequently invalidated by that Court. That rule would have taken the salary threshold much higher, from $23,660 to $47,476, and would have provided for triennial adjustments based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region. Such automatic adjustments are not included in the overtime rule that took effect on January 1st.

In order to assure compliance with the new overtime rule, it would be a good idea to review and make sure your "exempt" employees meet the appropriate duties test for their exemption. Although the current duties tests are not changing, it is certainly possible for employers to misclassify employees as exempt when they really should be non-exempt based on their job responsibilities.

For all employees who are properly classified as exempt, you must then determine whether any of their salaries are too low under the new threshold and, if so, determine whether to raise their salaries above the threshold or reclassify them as non-exempt. If you decide to do the latter, you will then need to keep track of the hours worked by those employees and pay time and one-half for any hours worked over forty (40) in a work week.

New Overtime Salary Thresholds

Effective 1.1.20

	CURRENT	NEW
Exempt Full-Time Salaried Workers	>$23,660	>$35,568
Exempt Highly Compensated	>$100,000	>$107, 432

Source: U.S. Department of Labor

Legal Update: Retroactivity of *Streng*

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HENN LESPERANCE, PLC

An issue that has arisen in several ongoing cases involving county road commissions is whether the Court of Appeals decision in *Streng v Bd of Mackinac Co Rd Commissioners* should be applied retroactively—meaning to cases that were pending at the time *Streng* was decided. *Streng* construed the written notice requirement of the highway exception to immunity, and therefore the viability of these pending cases literally hangs in the balance.

To determine whether an appellate opinion is "retroactive" (i.e., whether it should apply to all cases pending at the time the opinion was issued) or whether it should only apply to cases filed thereafter, Michigan courts apply a four-part test derived from the 2002 case of *Pohutski v City of Allen Park*.

The *Pohutski* test consists of a "threshold" question—whether the decision clearly established a new principle of law—followed by a balancing of three factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.

Pohutski's framework has been utilized to decide whether to apply judicial precedent retrospectively on the basis of what is "reasonable" in light of the "total situation" as presented to the reviewing court—and has resulted in unpredictable and inconsistent decisions on the issue of retroactivity.

The Michigan Supreme Court again considered the *Pohutski* test in the case of *W A Foote Mem Hosp v Michigan Assigned Claims Plan*. The Court of Appeals in *Foote* found that the holding of *Covenant Medical Center v State Farm*, a prior Michigan Supreme Court case interpreting the No-Fault Act, to be retroactive. However, the *Foote* Court did not base its decision on the multi-factor *Pohutski* test outlined above. Instead, the Court of Appeals found that this test had been effectively repudiated by a later decision of the Michigan Supreme Court which did not even make mention of the test or any of its factors. As such, the Court of Appeals concluded that *Pohutski* no longer applied to questions of whether a judicial opinion interpreting a statute was retroactive.

In an Order entered in October, the Michigan Supreme Court ultimately affirmed the holding in *Foote*, concluding that *Covenant* should be given retroactive effect. However, it vacated the part of the judgment of the Court of Appeals finding that the *Pohutski* test had been "effectively repudiated" in the context of judicial decisions regarding statutory interpretation. Applying *Pohutski*, the Court concluded that "because this Court's decision in *Covenant* did not clearly establish a new principle of law, *Covenant* does not satisfy *Pohutski*'s threshold question, and the *Covenant* decision therefore applies retroactively."

MCRCSIP has been monitoring this area of the law closely and filed an amicus brief in *Foote* on behalf of its Membership late 2018. Whether the *Pohutski* test remains valid is directly applicable to the question presented in the line of cases with

Streng issues. The *Streng* Court held that written notice of a highway defect claim against a county road commission (as opposed to against the State, a city, or a village) must be provided pursuant to the 60-day notice period in MCL 224.21, rather than the 120-day period found under MCL 691.1404. Up until *Streng*, claimants were generally operating under the 120-day notice statutory provision. Therefore, some claims pending at the time *Streng* was issued may be barred by governmental immunity pursuant to the 60-day notice statute if *Streng* is applied retroactively.

Based on the Order of the Michigan Supreme Court in *Foote*, lower courts must continue to apply the *Pohutski* test, which will likely result in a patchwork of precedents. However, a strong analogy can be drawn from *Foote* to argue that *Streng*, which also involves an issue of statutory interpretation, should likewise be applied retroactively.

In other words, road commissions can assert that the interpretation of the statute in *Streng* did not create a "new rule of law" or trigger application of the other factors because it was interpreting a statute that had not changed. Therefore, like *Covenant*, *Streng* should be applied retroactively. Whether this argument will carry the day remains to be seen and MCRCSIP will continue to advocate in this area on behalf of its Membership. In the meantime, MCRCSIP and its legal team are always happy to answer any questions that you may have.

MCRCSIP MISSION STATEMENT

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

Learning Your Tolerance: Should Your Road Commission's Drug Policies Change in the Age of Legal Weed?

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HENN LESPERANCE, PLC

Let me tell you some things you already know: water is wet, grass is green, and recreational marijuana is now legal in the state of Michigan. In response, many employers represented by our firm from across the state have been asking our firm two questions: should we change our policies in light of marijuana's legalization? And if we should, what changes should we make?

Michigan's road commissions and departments aren't exempt from asking themselves (and us!) these same questions. From a certain vantage point, road commissions have an easier decision-making process than many other categories of Michigan employers. Commissions typically boast unusually high percentages of employees who must obtain and maintain commercial driver's licenses (CDLs) as a condition of their jobs, which simplifies the analysis substantially because the federal Department of Transportation's (DOT) applicable CDL standards

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refer to federal law with respect to marijuana, where weed is still categorized as an illegal Schedule 1 drug. Accordingly, commissions must maintain and apply their existing zero-tolerance drug and alcohol use policies on all CDL-required positions.

But what changes (if any) should road commissions make for non-DOT-covered employees? Should these employees be covered under "zero tolerance" drug and alcohol policies as well? Perhaps. It should go without saying that no commission should ever tolerate any employee to report for duty while intoxicated (whether by alcohol, marijuana, or any other drug), nor should any employee be permitted to consume drugs or alcohol while on duty. But weed isn't like alcohol in at least one respect: although a drug test can detect the presence of marijuana's metabolite in an employee's hair, spit, blood, or urine, the detectability of the metabolite long outlasts the intoxicating effect of the drug. Put it another way – there's no weed breathalyzer, and it's impossible to determine whether a positive test result came from an employee being high while at work (which is impermissible) versus getting high last Friday night (which you might not care about if he or she was off-duty at the time).

Perplexed? We suggest that all road commissions ask themselves the following six questions in the process of deciding what, if anything, they'd like to change about their drug policies in light of marijuana's legalization:

Step One: Ask yourself (and get real about) how many of your employees use marijuana.

A 2016 study conducted by Marist University determined that approximately 18.5% of all United States residents consumed marijuana "once or twice" in the last year, with about 11.4% of all US residents qualifying as "monthly" marijuana users. There's reason to think that those rates will increase based on a generational effect – the National Institute on Drug Abuse (NIDA) determined that 37% of all graduating high school seniors used marijuana once or twice a year, and that 23% were monthly users. And there's also reason to believe that Michigan's decision to legalize the use of marijuana will result in a sharp increase in monthly users. If Michigan's monthly usage rates match the spike in monthly usage rates experienced by Colorado after it became the first state to legalize the use of recreational marijuana in 2012, we can predict that 32.3% of 18-to 26-year-olds and 20.1% of Michiganders over the age of 26 are likely to use marijuana monthly by 2021. We can infer two takeaways from these stats – it's statistically probable that some of your employees already use marijuana on at least a monthly basis; and between one-fifth and one-third of each commission's workforce will soon on average fail a randomly-administered commission-wide drug test. Yikes.

Step Two: Make sure your commission has a drug policy, and if you do, ask yourself if you've updated it in the past decade.

Things that were popular in the 90s: pogs, day-glo plastic jewelry, and "zero tolerance" drug free workplace policies. Although maybe your board may ultimately elect to stay zero tolerance for all commission employees after wisely considering all of the applicable circumstances, it's time to at least revisit the policy to ask if your commission should still be following a policy it first established 25 years ago and which hasn't been revised since. Does it need an update for the practical reality of what you know to be true within your workforce? Or worse, do you not have a drug policy at all? In either instance, pen needs to be put to paper to solve those problems, and you can consult employment and labor counsel to assist.

Step Three: Ask yourself if your commission wants to be "zero tolerance" across the board for all employees.

As previously mentioned, commissions must maintain a DOT regulation-compliant drug policy for all its DOT-covered employees, which will necessarily mean that zero tolerance is the only answer for those folks. But you're certainly allowed to maintain separate policies enforcing separate standards for DOT and non-DOT employees, and many employers have elected to move away from zero tolerance drug policies for the latter. Popular alternatives may include "multi-strike" programs where employees are given a number of chances to fail a drug test before termination; "gold star" drug policies where an employee with otherwise-perfect attendance and disciplinary history may receive one chance to fail a drug test; or "last chance agreement" policies where offending employees will be offered an LCA before termination. One recommendation? If the failed test is a result of a reasonable suspicion analysis suggesting that the employee was high at work, your policy must allow for immediate termination. And whatever you elect to change, make sure such change is compatible with all applicable collective bargaining agreements before you unilaterally implement them if your employees are unionized.

Step Four: Ask yourself what you want to do about pre-employment and random drug screening for all non-DOT employees.

Reasonable suspicion and post-accident drug testing policies are one thing – they are intended to send an employee in to see whether or not he or she had drugs in his or her system if there's some objective evidence to suggest he or she may have been high at work, or high when an accident occurred. But if your commission has decided it doesn't care about off-duty use, do pre-employment and random drug screens for marijuana metabolites make sense? Many employers have decided that they don't any more. One alternative is testing for marijuana only when reasonable suspicion or post-accident drug testing occurs, and eliminating marijuana from the screening panel for pre-employment and random screens. Another is to eliminate pre-employment and random drug testing entirely. Each commission needs to decide which approach is right for them.

Step Five: Ask yourself if the policy you decide on can actually be followed.

If you have a zero-tolerance drug policy, and if you know (or suspect) some of your employees smoke weed off-duty, you don't really have a zero-tolerance drug policy. In actuality, such employers are like ostriches burying their head in the sand, and acting only when forced to act even though policy violations are occurring left and right. Worse, when a flagrant violation of the policy is placed directly in the face of a commission, the employer might be tempted to make an exception for highly-performing employees while actually following the policy when it comes to a weaker or newer employee. This violates the cardinal rule of employment law: whatever policy we choose to enforce, we must apply it consistently and even-handedly. Otherwise, employers are simply lying to themselves and exposing their organizations to liability.

Step Six: Ask yourself if your employees know what your policy actually says.

In our firm's professional experience, about 90% of all employees just want to show up to work and meet their employer's reasonable job expectations. So is your drug policy so muddled and confused that you're sending mixed messages about what's expected? Do your employees understand that just because weed is now legal doesn't mean they can use it at work? On-site training or brief, easy-to-read memoranda can sometimes clear up this issue, which is on the mind of most of your workforce.

Want help working through the six steps? Please feel free to contact Andrew Cascini to discuss your commission's individual circumstances in more depth. He can be reached at his office line at 616.940.5164, by cell at 616.460.5493, or by email at aac@hennlesperance.com.

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