THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

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Developments in Wired and Wireless Permits

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Over the past nine months, the Michigan Legislature has made significant statutory changes concerning right-of-way permits for telecommunications, video services and wireless applicants. The result is a statutory framework that is unfamiliar to County Road Commissions, and frankly, one that is quite confusing to navigate. This article takes the first step at providing a "ten thousand foot" overview of the changes. MCRCSIP has also partnered with this law firm to create an informational presentation that can be given in person to your Boards, staff and other key local government officials. The first such presentation will be given at the Road Commission of Kalamazoo County in June 2019. Please contact MCRCSIP if you are interested in hosting the presentation at your Road Commission.

The New MCL 224.19b

In July 2018, changes to the right-of-way permit statute, MCL 224.19b, took effect which created special rules for telecommunication provider and video service provider permits. If the permit applicant meets the definition of either of those terms, as set forth in MCL 484.2102 or 484.3301, the new rules apply. We loosely refer to this group of applicants as "wired applicants," because wireless service providers are excluded from both definitions. Generally, the new rules relate to permit fees, inspection costs, security, insurance requirements, application content requirements, and civil fines for working in the right-of-way without a permit or the prescribed security.

The Small Wireless Communications Facilities Deployment Act

The Small Wireless Communications Facilities Deployment Act took effect March 12, 2019. It provides wireless service providers and wireless infrastructure providers the ability to locate small cell wireless facilities within public right-of-ways and regulates the terms and conditions of permits to do so. For example, an applicant may submit a single permit application for up to twenty small cell wireless facilities. Where a right-of-way is shared between governmental authorities – as are all county right-of-ways in Michigan – the applicant must obtain small cell wireless facility permits from all applicable authorities. Within 25

Continued on Page 2

IN THE CUE

PAGE

Wired and Wireless Permits
Continued from Page 1

days after receiving an application, a Road Commission must notify the applicant whether the application is complete. If it is incomplete, the notice must identify each way in which it is incomplete. A Road Commission must approve or deny an application within 60 days if it seeks to collocate a wireless facility on a utility pole, or within 90 days if it seeks to install a new or replacement utility pole and associated wireless facility. A Road Commission may deny an application only for certain reasons specified in MCL 460.1315(2)(i), and it may request that the wireless facility be moved up to 75 feet from its originally proposed location. A Road Commission may charge a permit fee of $200 for a wireless facility alone, or $300 for a combination wireless facility and new utility pole. Once the permit is issued, a Road Commission can only revoke it for the reasons specified in MCL 460.1315(2)(i). A Road Commission may not require an additional permit to replace the wireless facility with another one that is the same size, or smaller, or for routine maintenance of the wireless facility. The Act also imposes bonding and insurance requirements on applicants.

The small cell wireless act expressly permits Road Commissions to require a separate MCL 224.19b permit for activities that will unreasonably affect traffic patterns or obstruct vehicular or pedestrian traffic.

Start at the Beginning: Traps and Pitfalls

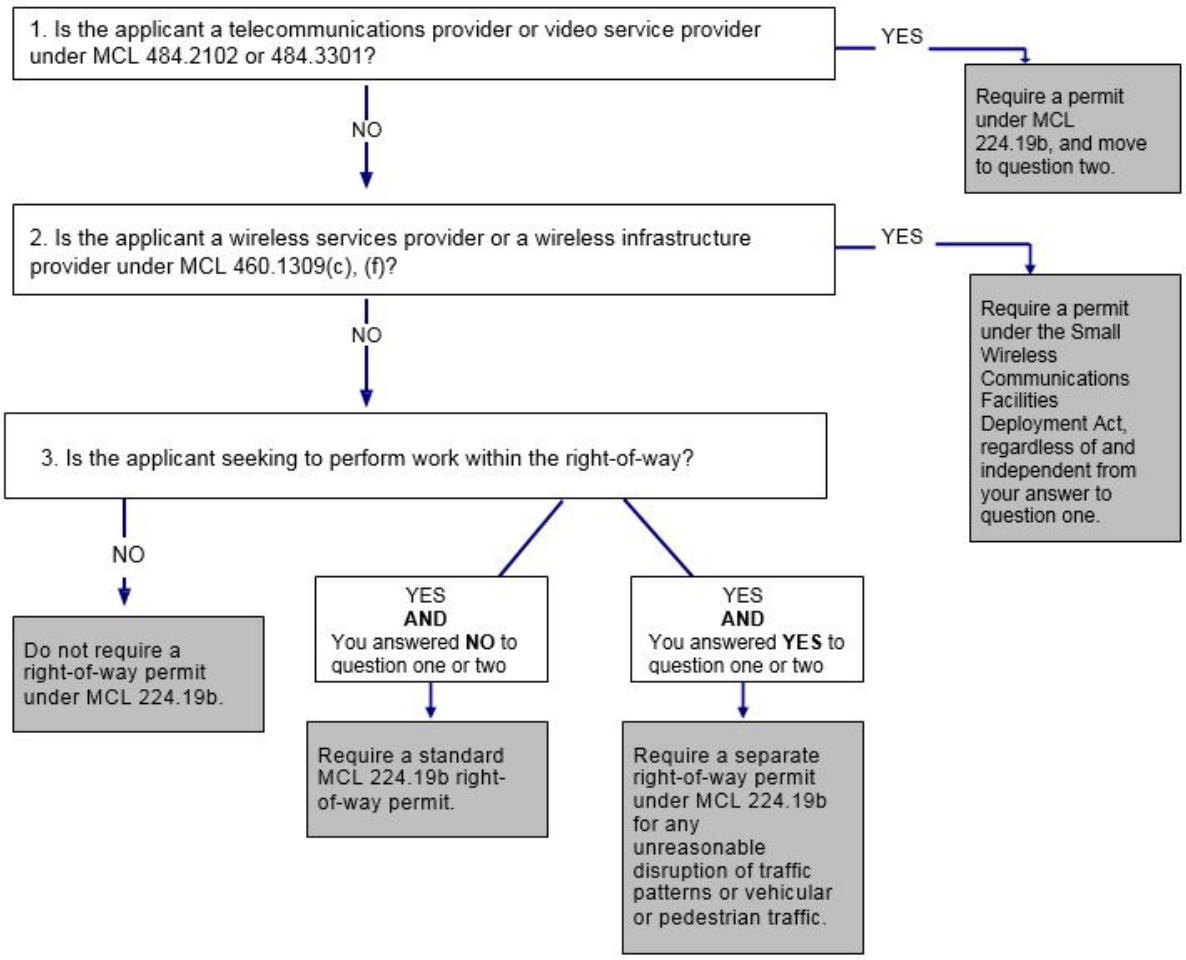
The first obvious dilemma facing Road Commissions is identifying the nature of the applicant so that the application can be processed under the correct statutory framework. This will require full disclosure from the applicant of the complete nature of its business, as well as a precise description of the proposed facility. Complicating this assessment is the known fact that many applicants have dual business models. For example, an applicant may be under a contract with a wireless provider to install and maintain a wireless facility, but the applicant's primary business may be providing landline (i.e., wired) telecommunications or Internet service. The fiber cable that feeds the wireless facility may simultaneously provide telecommunications or Internet services. Such an applicant should be required to obtain both a small cell wireless permit and a tele-communications permit.

This, of course, would involve both statutory frameworks, along with their separate provisions for fees, timing, insurance, bonding, etc. The final layer of complication that this article will discuss goes back to the original purpose of an MCL 224.19b permit – regulating construction-type activities within the right-of-way. The small cell wireless act expressly permits Road Commissions to require a separate MCL 224.19b permit for activities that will unreasonably affect traffic patterns or obstruct vehicular or pedestrian traffic. We envision this becoming the case whenever significant construction-type activities are necessary to install a wireless facility, such as excavation, heavy equipment siting, or lane closures. It is possible, then, that an applicant may be required to obtain three separate permits – one under the small cell wireless act, another under the telecommunications provider provisions of MCL 224.19b, and a third for right-of-way disruption under MCL 224.19b.

Decision Tree

For categorizing permit applicants at the initial stages of an application, we suggest following this decision tree on Page 3.

Decision Tree for Categorizing Permit Applications



Wrapping Up

While this is certainly a lot of information to process (and there is much more that we could not possibly address in this short article), we are in this together and will work through all the nuances in time. Should you have any questions, or desire to schedule a presentation on these topics, please do not hesitate to contact MCRCSIP.

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SAVE THE DATE!

2019 LOSS CONTROL TRAINING

AUGUST 13, 2019
SOARING EAGLE, MT. PLEASANT

Topic:
Dealing with and responding to difficult clients

Speaker:
Hector Hernandez

A Friendly Reminder from One of Your Attorneys

D. ADAM TOUNTAS, ATTORNEY
SMITH HAUGHEY RICE & ROEGGE

All across the State, the number of litigated claims against the Pool's members is down. In my humble opinion, this is due, in part, to the Pool's regular and comprehensive litigation-related programing. Whether it's a seminar on accident reconstruction, a loss-prevention workshop, or something else, the Pool's educational investments are paying dividends.

That being said, it's always helpful to see a friendly reminder. So, here are three things to remember with regard to claims involving your employees or equipment. None of this is intended to serve as a substitute for the Pool's direct involvement, or the advice of the attorneys hired to represent you. But, if you keep these three things in mind, your lawyers will thank you later:

1. Investigate, Investigate, Investigate.

This cannot be stressed enough. The data you collect in the minutes and hours after an injury accident is invaluable to your defense. And, the more comprehensive this data, the better.

Recently, a plow truck owned by one of the Pool's members was involved in a motor vehicle accident. The damage to the member's truck was minimal. Based upon the photographs I reviewed, the damage to the other vehicle was significant. However, since the member didn't intend to file a claim for damage to its truck, no investigation was done. This isn't good.

During my career, I've seen lawsuits stem from even the most innocuous-seeming traffic accidents. Just because someone doesn't seem hurt at the scene of a crash, doesn't mean that, after they speak with a lawyer, you won't get sued. In fact, there is a whole cottage-industry built around plaintiff's attorneys sending their clients to very specific doctors so that even the most mundane injuries can be "blown up," and directly related to a crash. It's a fact with which we have to deal. And, your best possible defense against one of those claims is a prompt and thorough investigation.

A year or so ago, my Firm did an accident investigation seminar. We provided the Pool's members with forms; directions to follow; and steps that could be taken to document the immediate aftermath of an injury accident. Please use those forms to complete your investigation. Talk to people at the scene; take pictures and measurements; don't be afraid to take pictures (or video footage from a smart phone) of the injured party. Any piece of data you retrieve from the crash site will be the best possible evidence of what really happened. These investigations are particularly important if you intend to place your truck (or other piece of equipment) back in the field without any delay. Under those circumstances, you could actually get into trouble if you don't preserve information from the accident scene.

Here's the good news: the documents and materials generated during your investigations are, except in the rarest of circumstances, immune from discovery. They can't be FOIA'd, and you aren't required to produce them to the other side in the event of a lawsuit. They are generated at the behest of your attorneys in the anticipation of litigation. That is to say, they are yours alone. So, you have no good reason not to investigate.

2. If it's important enough to put in writing, then please be thorough.

More than a decade ago, I was defending an employment claim for one of my clients. They

had justifiably fired a bad employee. He later brought a civil rights claim, and asserted that his termination was the result of racial animus. While we were going through this former employee's personnel file, my client's HR Manager was laundry-listing all of the bad things the employee had done. Apparently, at one point in time, the former employee's manager, who no longer worked for the company, saw him selling cocaine in the parking lot. Unfortunately, the manager was too lazy to complete a "write-up" of the incident. My client wanted to rely on this drug transaction as one of the many reasons that justified the employee's termination. I told them to forget about it because, quite frankly, if the incident wasn't in writing, then it "never happened."

In my experience, your recordkeeping is largely a function of utility. This is a good thing, and you shouldn't change your practices. I'm not asking you to create a layer of recordkeeping simply to protect against future litigation. But, where you've got a policy that requires something to be in writing – like an incident report – then that piece of writing should be as thorough and complete as possible. Here's how to do that: avoid the use of vague pronouns like "he," "she," or "they." Use dates and times where applicable. Tell your employees to be descriptive in their narrative report of an incident. This doesn't require the use of adjectives and adverbs. Rather, it requires that your employee exhaustively describe whatever they saw, heard, or said. And, finally, make sure that the person completing the report signs it.

3. Heed the obvious warnings.

My sister-in-law is a dentist. A few weeks ago, she told me that bloody gums are the number one sign of most serious dental problems. Despite that, she reminded me that the majority of her patients will often ignore blood on their toothbrush for days, weeks, even months at a time. The reason is simple – the symptom isn't painful, and as soon as you rinse, the evidence is gone. Put another way, because the warning sign is short-lived, it's easy to ignore. But, in hindsight, it becomes very difficult to rationalize (or justify) ignoring that particular warning sign in the event something bad happens. The obvious warnings you encounter in your work life are no different.

Several weeks ago, one of the Pool's members had a plow truck involved in three separate crashes over the course of 48 hours. It turns out that the truck's "ABS Brake" light had been going off for months. No one did anything about it. Now, I'm not advocating that every time a warning light goes off, you need to take a truck out of service. That is unrealistic. But, in the event a lawsuit against this particular member is filed, the warning light will more than likely become an issue. And, while there is a good explanation for this member's reaction to the warning light, it may or may not ultimately satisfy the members of the jury. Most of them don't want to hear that the ABS Brake lights on a 38,000 pound plow truck went unheeded for weeks.

At the end of the day, you needn't be perfect in this regard – no one expects you to react instantaneously to every warning. But, if a light's been flashing for several weeks, make sure you have a good reason for continuing to ignore it. And, once you've looked into the warning further, make sure you write that down, too. A written record of your due diligence will also be helpful to your legal team.

Your job isn't easy, and you're on the front lines every day. Every lawyer who represents you is well aware of that fact. But, if you keep these three considerations in mind, you make our job – and your life – much easier in the event you are sued. And, most importantly, please know that the Pool and its network of professionals is happy to help you. Don't hesitate to make them your first call in the event of an accident.

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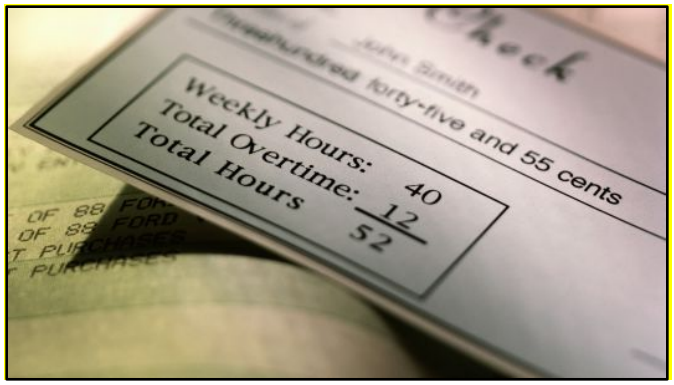

New Overtime Rules and More on the Michigan Paid Medical Leave Act

WENDY HARDT
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As you may recall, in 2016, the Department of Labor published new regulations to change the tests for exemption for salaried workers under the Fair Labor Standards Act (FLSA). Those regulations would have increased the minimum salary level for an exempt executive, administrative or professional employee from $455 per week ($23,660 per year) to $913 per week ($47,476 per year), among other things. Those regulations were set to go into effect on December 1, 2016, until a federal district court issued an injunction barring implementation of the new rules. That decision has been on appeal ever since then.

On March 8, 2019, the Department of Labor published a Notice of Proposed Rulemaking to resolve the issues with the previous regulations. The newly proposed rule would rescind the 2016 regulations and increase the salary level requirement more modestly from its current $455 per week ($23,660 per year) to $679 per week ($35,308 per year). The newly proposed rule would also increase the "highly compensated employee" minimum salary requirement from $100,000 per year to $147,414 per year. Similar to the 2016 rule, the Department of Labor included a provision allowing employers to count nondiscretionary bonuses, incentives, and commissions for up to ten percent (10%) of the exempt employee salary threshold. Notably, the newly proposed rule does not include any automatic increases to the above-noted salary levels. Rather, it states it will propose salary level adjustments every four (4) years using the rulemaking process.

There is a sixty (60) day comment period (i.e., until May 7) open to the public. Once the comment period closes, the Department of Labor will take some time to consider the comments and then issue a final rule. The Department anticipates that a final rule will go into effect sometime in 2020.

The Michigan legislature enacted a new series of increases to the State's minimum wage in December 2018, at the same time as it enacted the Michigan Paid Medical Leave Act. Under the new overtime law, the current minimum wage is $9.45 per hour. This is scheduled to increase each year until reaching $12.05 per hour in 2030.

Both the enacted changes to the minimum wage law and the Michigan Paid Medical Leave Act are being challenged as unconstitutional by employee advocacy groups. Given these challenges, the State Legislature has requested the Michigan Supreme Court to issue an advisory opinion on whether the State Legislature acted constitutionally when it amended the ballot initiatives and enacted these laws. In response to this request, the Supreme Court has scheduled oral argument for July 17, 2019. Following oral argument, the Supreme Court will decide:

(1) whether it should exercise its discretion to grant the request to issue an advisory opinion;

(2) whether the Michigan Constitution permits the Legislature to enact an initiative

petition into law and then amend that law during the same legislative session; and

(3) whether the Paid Medical Leave Act and the revisions to the minimum wage law were enacted in accordance with the Michigan Constitution. If the Michigan Supreme Court issues an advisory opinion that the Legislature's actions were not permitted by the Constitution, then the original version of the ballot initiatives would be restored, which would have a significant impact on all Michigan employers.

For now, all employers with more than fifty (50) employees should be displaying a poster outlining the requirements of the Michigan Paid Medical Leave Act at the employer's place of business, in a conspicuous place that is accessible to eligible employees. For a copy of that poster, please go to: https://www.michigan.gov/documents/lara/Paid_Medical_Leave_Act_Poster_644565_7.pdf.

Also, please note that if you have employees who are covered by a collective bargaining agreement in effect on March 29, 2019 (the effective date of the Act), then the Act will not apply to those employees until beginning on the stated expiration date in the collective bargaining agreement, notwithstanding any statement in the agreement that it continues in force until a future date or event or the execution of a new collective bargaining agreement.

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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."

To Intentionally Impact Your Workplace

One Way to develop leadership in your organization is to allow employees to make mistakes. While continuous error on the part of employees is unacceptable, making mistakes is a part of the growing process. In many cases, it means that you, as a manager, have stretched the employee beyond their comfort zone, which long-term is a good thing. As coach John Wooden used to say, **"If you're not making mistakes, then you're not doing anything."**

Employees tend to develop an unhealthy fear of failure in organizations where managers react negatively and publicly to mistakes. This pessimistic view of work leads staff to avoid challenging tasks, take fewer risks, and become less creative.

Whereas allowing employees to make mistakes can have a positive effect on morale and productivity, and encourage employees to acknowledge their error and take appropriate actions to avoid a similar misstep in the future.

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