

# RISKY BUSINESS

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## *FYI...Drones Liability*

*By Tom Judy*

Did Santa bring you a new drone for Christmas? If so, you are in good company. A pre-Christmas headline said the Federal Aviation Administration (FAA) “feared” that over 1 million drones would be sold during the 2015 holiday season.

### Drones in the Public Sector:

Although most of these new drones are going to hobbyists and recreational users, the utilization of drones for commercial and government purposes is growing at a rapid pace as well. There are many intriguing potential uses for drones in the public sector, including:

- Crime, accident and fire scene investigation and documentation;
- Search and rescue;
- Law enforcement surveillance;
- Fire suppression activities;
- Monitoring and inspecting infrastructure;
- Aerial photography;
- Property inspections and appraisals.



Drone use, particularly in the public sector, is still relatively new so statistical data is incomplete regarding the risks. However, it is easy to see that a drone accident could cause significant bodily injury and property damage resulting from either technical failure or human failure. The nightmare scenario is a drone that interferes with a manned aircraft, but it is not difficult to imagine other scenarios that are less catastrophic, but more likely. Other risks from drone use include allegations of harassment, trespass, breaches of privacy and cyber exposures due to data stored on the drone.

## *FYI...Cont*

### **Drone Regulation:**

Drones are considered “aircraft” and subject to FAA regulation. The FAA is in the process of developing new regulations for the routine operation of drones. These regulations will replace the FAA’s current interim policy. The FAA missed its September 2015 deadline to finalize the new rules; they may – or may not – be ready in 2016. We will leave the content of the proposed regulations for a later discussion.

***Public Drone Operations:*** Under current rules, public sector use of drones is subject to regulation as “public aircraft operation.” Current rules require a Certificate of Waiver or Authorization (COA) from the FAA for public aircraft operations. A COA permits public agencies to operate a particular aircraft, for a particular purpose, in a particular area. The COA allows an operator to use a defined block of airspace and includes special safety provisions unique to the proposed operation, which may include flying only with visual observers and/or operating only in daylight hours. COAs usually are issued for a specific period – up to two years in many cases. COA applications are submitted online to the FAA. The FAA states the “typical” COA application approval process is completed within sixty business days of receipt, although there is an expedited process to grant one-time COAs for time-sensitive emergencies such as disaster relief and humanitarian efforts.

***Commercial Drone Operations:*** The FAA regulates commercial use of drones as “civil aircraft operation.” Commercial entities can apply for an exemption under Section 333 of the FAA Modernization and Reform Act of 2012 (a “Section 333 Exemption”) to receive authorization to operate a drone in controlled, low-risk situations.

***State and Local Regulation:*** More than half of state governments have adopted drone-related legislation. Some local governments have begun to regulate drones as well. Senate Bill 251 recently introduced in the Ohio Senate would require law enforcement to obtain a search warrant in most cases before using a drone in a criminal investigation.

### **Liability Coverage for Drones:**

Insurance coverage for drone liability is evolving. Commercial general liability policies exclude aviation risk. Stand-alone aviation liability policies are available in the commercial insurance market. Public entity pools are considering their approach to drone coverage. Currently, some pools cover drone-related liability claims, some pools exclude such claims and others provide limited coverage. These various approaches taken by pools illustrates a fundamental strength of public entity pooling. As member-owned and member-driven organizations, pools have the flexibility to craft coverage to meet its members’ unique needs based on the members’ collective risk tolerance.

### **MVRMA’s Approach to Drone Liability:**

The MVRMA Board has taken a common sense approach to drone coverage. At the December 2015 meeting, the MVRMA Board acted to provide liability coverage for drones provided certain conditions are met. First, the member must report certain information about their drone to MVRMA and secondly, the member must provide a copy of a valid Certificate of Waiver of Authorization (COA) received from the FAA for the operation of that drone. Upon receipt of that information, MVRMA will issue an endorsement extending liability coverage for the use of the drone. A third condition for coverage is that coverage will be afforded only for claims that arise while the drone is being operated within the terms of the COA. The key takeaway from the Board action is that it will be important for members to be knowledgeable of FAA requirements for the use of drones in the public sector.

Drones have the potential to be valuable tools for local governments and we suspect their utilization will grow significantly over the coming years. The risks can be mitigated by proper training, oversight and planning. For those accidents and claims that cannot be avoided, the MVRMA Board has acted proactively to make coverage available to its members. Please contact the MVRMA office if you have questions about this subject.

## Loss Control Lowdown

By Starr Markworth

### Working in the Cold



With winter and cold weather in full force, employees who work outdoors face an additional occupational hazard—exposure to the cold. Prolonged exposure to the freezing temperatures can result in health problems as serious as frostbite and hypothermia.

Each year in the United States, more than 1,500 people die of hypothermia. To help protect workers in cold environments, employers and workers need to take simple precautions.

#### How to Protect Workers

- Recognize the environmental and workplace conditions that lead to potential cold-induced illnesses and injuries.
- Learn the signs and symptoms of cold-induced illnesses/injuries and what to do to help workers.
- Train workers about cold-induced illnesses and injuries.
- Encourage workers to wear proper clothing for cold, wet and windy conditions. Layer clothing to adjust to changing environmental temperatures. Wear a hat and gloves, in addition to underwear that will keep water away from the skin (polypropylene).
- Be sure that workers take frequent short breaks in warm dry shelters to allow the body to warm up.
- Try to schedule work for the warmest part of the day.
- Avoid exhaustion or fatigue because energy is needed to keep muscles warm.
- Use the buddy system -- work in pairs so that one worker can recognize danger signs.
- Drink warm, sweet beverages (sugar water, sports-type drinks) and avoid drinks with caffeine (coffee, tea, sodas or hot chocolate) or alcohol.
- Eat warm, high-calorie foods such as hot pasta dishes.
- Remember, workers face increased risks when they take certain medications, are in poor physical condition or suffer from illnesses such as diabetes, hypertension or cardiovascular disease.

For free copies of [OSHA's Cold Stress Card](https://www.osha.gov/pls/publications/publication.athruz?pType=Industry&pID=38) in English or Spanish, click on OSHA's website, <https://www.osha.gov/pls/publications/publication.athruz?pType=Industry&pID=38>

## The Claims File

By Craig Blair

### 2015 at a Glance



The MVRMA program provides coverage for our members' auto, property and general liability claims. 2015 was a good year for the pool with fewer claims than recent trends. Claims usually average 350 to 400 per year, but last year only 322 were reported. However, there is potential for an additional 20 to 25 claims yet to be reported for 2015, some of which could be lawsuits due to the two year statute of limitations for the State of Ohio.

General liability is the line of coverage under which most claims are reported. To date for 2015 claims, general liability accounts for approximately 40% of the frequency of claims and 16% of the dollar amount (severity) paid. As these claims can also involve lawsuits, the severity can change significantly until the lawsuit has been resolved. Commercial property coverage totals 28% of the frequency of claims and 57% of the payments. These figures do not generally change after all repairs to damaged property have been made. Automobile coverage makes up 32% of the claims and 27% of the payments. The numbers for this line of coverage may change over time as pending injury claims are settled.

One of the value added services MVRMA provides to its members is handling subrogation claims. This is the reimbursement from third parties that damage city property or vehicles. MVRMA managed 130 subrogation matters for our members last year and \$87,216 was collected. Subrogation files are the only type of claims that are optional for the members to report, but members often choose to have MVRMA handle them as a convenience.

The good claims experience in 2015 contributed to a sound financial year for MVRMA. Good financial results accrue to the benefit of the members as the pool is entirely member-funded. With the closure of two loss years in 2015, the pool returned over two million dollars to the members. This emphasizes the main benefit of participating in a self-insured municipal pool – it is truly the members' money.



## 21st Century Policing

We all have seen a growing distrust between the public and law enforcement agencies. This distrust is likely fueled by media coverage, prominent activists in the community, and a number of other reasons whether legitimate or not. Regardless of the reasons, this is the new reality in our society and something all of your entities must be prepared to deal with.

This distrust has raised concerns in Washington, D.C. as well, and in December 2014, President Barack Obama signed an executive order establishing the Task Force on 21st Century Policing. This task force's responsibility was to identify best practices and offer recommendations on improving policing practices. The main goal of this initiative is to improve the relationship between local police and the communities they protect and serve.

The task force was given 90 days to conduct hearings, review the research, and make recommendations to the President. The recommendations, each with action items, were organized around six main topic areas or "pillars:"

- Building Trust and Legitimacy
- Policy and Oversight
- Technology and Social Media
- Community Policing and Crime Reduction
- Officer Training and Education
- Officer Safety and Wellness

During this time, the task force heard testimony from government officials; law enforcement officers; academic experts; technical advisors; leaders from established nongovernmental organizations, including grass-roots movements; and other members of the public who wished to comment. In the end, they came up with a number of recommendations to include action items, but there were two over reaching recommendations:

1. The President should support and provide funding for the creation of a National Crime and Justice Task Force to review and evaluate all components of the criminal justice system for the purpose of making recommendations to the country on comprehensive criminal justice reform.
2. The President should promote programs that take a comprehensive and inclusive look at community-based initiatives that address the core issues of poverty, education, health, and safety.

These two over reaching recommendations don't do a lot for your entities on their own but included in the 102 page report are pages of recommendations and action items your communities can implement to help address this growing issue. We encourage all of you to take the time to review this report and ask yourselves what else your entities can be doing to get ahead of this growing problem in our society. The entire report can be found at the link below.

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiJ7Iru2srJAhWJ7D4KHYQvACsQFggfMAA&url=ht tp%3A%2F%2Fwww.cops.usdoj.gov%2Fpdf%2Ftaskforce%2Ftaskforce\\_finalreport.pdf&usq=AFQjCNG-oiknMbl7Gp--sCkSN7hiPknU3w&sig2=QiBcK0YABr\\_oVDX9tbC2eQ&bvm=bv.108538919,d.dmo](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiJ7Iru2srJAhWJ7D4KHYQvACsQFggfMAA&url=ht tp%3A%2F%2Fwww.cops.usdoj.gov%2Fpdf%2Ftaskforce%2Ftaskforce_finalreport.pdf&usq=AFQjCNG-oiknMbl7Gp--sCkSN7hiPknU3w&sig2=QiBcK0YABr_oVDX9tbC2eQ&bvm=bv.108538919,d.dmo)

## Counselors' Comments

### By Dinsmore and Shohl



#### Avoiding Whistleblower Suit

A recent Ohio Supreme Court case provides a reminder that Ohio's "whistleblower" statute and its remedies may be triggered when a municipal employee has been terminated or has otherwise been subject to an adverse employment action. Although the defendant in the case, the Village of Cardington, ultimately prevailed, the case took two years and reached Ohio's highest court before it was resolved.

Ohio's Whistleblower Statute, R.C. 4113.52, provides protection to employees of municipal corporations, counties, townships, school districts, and other political subdivisions who are subject to discipline or retaliatory action for engaging in activity protected by the statute. To that end, Section 4113.52(A)(1)(a), protects employees who report violations of any state or federal statute or regulation. The employee must orally notify his or her supervisor of the violation and subsequently file with that supervisor a written report describing the violation. Section 4113.52(A)(2), does not require an employee to first notify his employer before reporting to an outside agency, so long as the violation is one enumerated in that section. Under either section, the employee must have a reasonable basis for reporting the violation.

If an employer takes disciplinary action as a result of an employee making a report protected by one of these two sections, the employee may file a civil action and could be entitled to reinstatement, payment of back wages, as well as attorney's fees and litigation costs. The Lee v. Village of Cardington, 2014-Ohio-5458 (2014) case provides an example of a typical scenario where an employee may attempt to bring a whistleblower suit.

Lee was a crew chief for the village's waste treatment plant. Beginning in 2000, Lee began to notice equipment disruptions at the plant resulting from an unknown pollutant. He notified a representative at the Ohio Environmental Protection Agency, and when the problems became worse in 2007, he convinced the Ohio EPA to conduct an investigation into the source of the pollutant. That investigation ultimately revealed that a local automotive-parts manufacturer was responsible for introducing the pollutant into the village's water supply.

Lee then turned his attention to repairing and preventing the damage caused by the pollutant. His efforts included discussing the problems with the village administrator and voicing his concerns at village council meetings. Importantly, Lee told the council that although the water treatment plant had not yet violated its operating permit, if repairs were not made, it would in the future. After the village terminated Lee in 2009 (the parties dispute the reason for Lee's termination), he filed suit alleging a violation of Ohio's whistleblower statute. The trial court initially granted summary judgment for the village, but the court of appeals reversed, holding that there was an issue of material fact as to whether Lee engaged in activity protected under the statute.

The Ohio Supreme Court ultimately reversed the court of appeals and reinstated the trial court's judgment in a divided 5-2 opinion. Lee's claim under Section 4113.52(A)(1) failed because he did not satisfy that section's requirement that he provide his supervisor with a "written-report" detailing the village's alleged violation. Although Lee prepared a written report for his supervisor in 2009 identifying equipment problems that resulted from the pollutant, the report did not qualify for two reasons. First, it did not describe a crime involving the village because it only discussed ways to *prevent* the waste treatment plant from committing a permit violation—the waste treatment plant never lost its permit and Lee's report did not reveal that the village was knowingly placing the pollutant into the water supply. Second, as the court stated, his written report was "too late." Because Lee did not file the report until after discussing the issue with the EPA, he did not give the village an opportunity to correct the violation.

The state's high court also dismissed Lee's claim under Section 4113.52(a)(2). Although that section neither requires a written report nor that a whistleblower first notify his employer, it does require a violation of certain enumerated criminal offenses and at a minimum an oral report to an agency that has regulatory authority over the employer and the industry. Lee was in communications with the EPA, however, he never notified the EPA that the village had committed one of the qualifying crimes. Again, the waste treatment plant was still in compliance with its permit when Lee was in contact with the EPA and, further, the waste treatment plant was not the party responsible for discharging the pollutant into the water supply.

In Lee, the Village ultimately prevailed on its former employee's whistleblower suit. However, the litigation took several years to resolve, and as the differing and split decisions at the trial and appellate levels demonstrate, the outcome of these cases can be unpredictable, and are highly fact specific. Ohio public employers need to be cognizant of Ohio's whistleblower statute and how it can be triggered whenever they are contemplating disciplinary action against an employee.

# Calendar of Events



## *Upcoming Training Events*

Please continue to check our website, [mvrma.com](http://mvrma.com) for upcoming training dates:

### Back Safety Training

February 10, 2016

City of Beavercreek—Maintenance

February 18, 2016

City of Piqua—Council Chambers

April 6, 2016

City of Mason—Fire Station

## *Upcoming Board Events*

### Board Meeting

March 21, 2016, 9:30 AM

MVRMA Office

## *From The Board Room*

Actions taken at the December 21, 2015 Board meeting included approval of:

- 2016 MVRMA liability coverage document
- 2016 Crime Liability Coverage Renewal
- 2016 Liability Renewal with GEM and Genesis
- Pinnacle Actuarial Services Contract
- 2016 Budget
- Changes to Personnel & Compensation Policy
- 2016 Officers