Enforcement of Retroreflectivity Requirements of the MUTCD

Every highway agency or jurisdiction must have implemented a Retroreflectivity Program for Regulatory and Warning Signs by June 13, 2014. The FHWA has proposed five different methods to meet this requirement.

To our knowledge, there is no formal, organized program to assure that jurisdictions have met this requirement. Neither FHWA nor ODOT will review or issue advisory opinions about whether a particular jurisdiction’s Retroreflectivity Program satisfies federal or state law.

The resulting challenge for a city, county or other local highway department is that there is no advance, “seal of approval” that would prevent or limit the ability of an injured motorist from accusing the department of negligence, in the event of a crash where a sign does not meet retroreflectivity standards. Certainly, if a road department does not establish such a program at all, its liability exposure will dramatically increase.

A jurisdiction may select any one method, or combination of them that have been specified to assure that sign retroreflectivity for a jurisdiction has been maintained. However, none of the methods can assure that each and every sign in the jurisdiction will meet the retroreflectivity standard, as measured by a retroreflectivity meter. That would only be assured if each sign were evaluated with a retroreflectivity meter. So the legal liability of the jurisdiction at a location could be in question if a crash happens at a location at night, and measured retroreflectivity of the sign is less than the standards. In this case, the jurisdiction’s defense could rely on the jurisdiction’s “Discretionary Immunity.”

Discretionary Immunity for Retroreflectivity

There is a significant risk management incentive to follow the MUTCD, including the new provisions about reflectivity. To the extent a state or local government governing body adopts the MUTCD as “policy” for that jurisdiction, then its highway department will likely have “discretionary immunity” against tort claims suggesting that more extensive, and expensive, safeguards should have been in place. Governmental Discretionary Immunity applies when making “spending decisions based on balancing the allocation of scarce public resources with public safety concerns.”

Governmental discretionary immunity generally applies to choices involving public policy by a person or body who has the responsibility or authority to make such a choice. However, the immunity may not apply to choices a public employee makes as part of the employee’s routine job duties.

Thus, for a jurisdiction to be able to claim Discretionary Immunity for their Retroreflectivity Program with certainty that it will be accepted, the highest decision-making body, i.e., city council or county commission must review and adopt the Retroreflectivity Program. It is not sufficient for the engineer or maintenance staff to develop and implement the program, for Discretionional Immunity requirements to be met.

The review must assure the program meets the requirements of one of the potential MUTCD retroreflectivity programs. An assessment of the resources required to implement the selected program must also be made. The council/commission must adopt the program that is affordable within jurisdictional resources and meets the safety objectives for the jurisdiction. This must be done with the knowledge and blessing of the legal counsel for the jurisdiction.

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1 “Does Governmental Discretionary Immunity Apply when a Public Employee Makes Facility Design Decisions,” latest Oregon updates, Smith Freed and Eberhard, P.C.