



# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## “NEW LAWS THAT AFFECT YOU AND YOUR DEPARTMENT”

I have selected for analysis a couple of amendments to existing laws that affect you either in your relationship with the Department, or with respect to your law enforcement duties and your career. I hope this discussion is helpful to you.

### Firearms Prohibitions As Conditions of Probation— Domestic Violence

We have seen some tragic developments in the careers of peace officers brought about by Family Law court orders prohibiting them from possessing firearms, even when on duty (see: LDT Training Bulletin, “How A Family Law Court Can Ruin Your Career”, Vol. II, Issue No. 1, January 1999). Typically, these arise out of domestic violence allegations made by a spouse or domestic partner; and the judge, exercising discretion to err, if at all, on the side of protection of both parties, will issue protective orders to prohibit the member’s possession of firearms.

First, it would be well to remember what the LAPD bumper stickers say: “THERE IS NO EXCUSE FOR DOMESTIC VIOLENCE”.

As newly amended, *Family Law Code Section 6304* requires the court to notify the parties, upon issuing a protective order, that the respondent is prohibited from possessing or owning, or *attempting* to own or possess, any firearm including “purchasing” or “receiving”. *Section 6389* prohibits the respondent (officer)

from possessing any firearm during the life of the order. As amended, the court is now *required* to order the respondent to relinquish any such firearm, and the court is *no longer required to find that the respondent is likely to use or display the firearm in any further act of violence*, before issuing the order.

Now, the court may grant an exemption for a peace officer who is required to carry a firearm when on duty. But, the court must find by a preponderance of the evidence, that the officer does not pose a threat of harm. Furthermore, before making such a finding, the court must order the officer to mandatory psychological evaluation, and may require the officer to participate in counseling or other remedial treatment.

The bottom line is, if such a protective order is granted, the officer is at extreme risk. Once again, family law lawyers representing peace officers in these circumstances need to be extremely diligent to protect members from unwarranted orders. But just as important, we need to avoid these situations - - domestic violence is plainly, a career-killer.

### Off-Duty Misconduct Charges

*Labor Code Section 96* has been amended to impact *potentially*, the Department’s ability to punish for conduct off-duty which is lawful, albeit perhaps, “unbecoming”.

Now before we get too far, this amendment is already subject to hot debate. AB 1689, amending *Labor Code Section 96(k)*, authorizes the Labor Commissioner to pursue "claims for loss of wages as the result of demotion, suspension, or discharge from employment for *lawful* conduct occurring during non-working hours away from the employer's premises.

The bill was originally proposed by the California Professional Firefighters, as a hedge against employer retaliation for participation in local politics.

The legislative declaration of purpose, however, states that the amendment is necessary to protect off-duty employees in the exercise of their civil liberties. Accordingly, regardless of the rationale offered, it is not in the public interest to permit employers to deprive off-duty employees of their civil liberties. Here's what §1 of AB1689 says:

*The Legislature finds and declares that, absent the protections afforded to employees by the Labor Commissioner, an individual employee is ill-equipped and unduly disadvantaged in any effort to assert the civil rights otherwise guaranteed by Article I of the California Constitution. The Legislature further finds and declares that allowing any employer to deprive an employee of any constitutionally guaranteed civil liberties, regardless of the rationale offered, is not in the public interest. The Legislature further declares that this act is necessary to further the state interest in protecting the civil rights of individual employees who would not otherwise be able to protect themselves.*

So-called "management lawyers" are taking

somewhat of a doomsday approach to this new legislation, positing that it could be interpreted to disallow an employer from punishing an employee for off-duty "misconduct" even though "job-related". There are many varieties of off-duty conduct that are considered inconsistent with the peace officer occupation, and that yet, are still "lawful". We tend to describe these in rules and regulations as "conduct unbecoming", "conduct which reflects unfavorably", or "conduct which impairs the public service". These rules have been upheld consistently by the courts, so long as the employer is careful to apply them only to off-duty conduct that really does pose a threat to the public service, i.e. actual or threatened "harm" to good order, morale, efficiency, discipline, esprit d' corps, or public confidence.

What will happen if the courts interpret *Section 96(k)* to prohibit application of such rules to off-duty peace officers who engage in "*lawful* conduct", which is clearly "unbecoming"? What a fight that will be.

Since the bill is specifically based upon the California Constitution, Article I, it will be asserted by labor lawyers that it is "against public policy" to violate the terms of *Section 96(k)*, and that a violation can lead to tort recovery by the affected employee (damages for emotional distress, and punitive damages, for example).

In my opinion, *Section 96(k)* will not be interpreted to drastically alter the peace officer/off-duty conduct jurisprudence that has been developing for years. Still, employers may run a risk of liability if the off-duty conduct which is the subject of discipline is viewed as exercise of a civil liberty (speech or association, for example) and bears little threat of harm to the agency.

We will be looking after this one for you, and keep you posted on developments. Meanwhile,

employees and their counsel should carefully look over any proposed discipline for lawful off-duty conduct in light of *Section 96(k)* to see whether the matter should properly be referred to the Labor Commissioner. Employers should likewise consider whether imposing discipline for off-duty, lawful conduct, will, in the facts of a particular case, implicate a "civil right" or "civil liberty", and if so, seek legal counsel before going ahead.

Stay safe!

- Michael P. Stone

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