

## LEGISLATION, LITIGATION, AND PERSONAL LIABILITY: COLORADO'S ENHANCE LAW ENFORCEMENT INTEGRITY ACT IS SIGNED IN TO LAW

Senate Bill 20-217, also known as the Enhance Law Enforcement Integrity Act, was signed into law by Governor Jared Polis on June 19, 2020. The omnibus legislation will likely have a sweeping impact on Colorado policing as it provides for civil, criminal, and professional penalties and for personal liability for law enforcement officers considered "peace officers" under Colorado law ("officers") who violate the law's mandates. The Act<sup>1</sup> aims to create increased accountability for officers through additional mandates and sanctions not previously imposed under Colorado law. Understanding the depth and breadth of the legislation is important for those involved in policing, corrections, supervision, oversight, certification, and civil litigation centered on the acts of officers.

This post seeks to identify and summarize pertinent portions of this legislation and focuses on the aspects of the Act having the greatest impact on policing and potential civil litigation in the State of Colorado.

### Colo. Rev. Stat. § 24-31-902 Will Require All Officers to Wear Body Cameras

Beginning July 1, 2023, the Act will require all local law enforcement agencies and the Colorado state patrol to issue body-worn cameras to their officers and will require all recordings of an incident be released to the public within 21 days after an agency receives a complaint of misconduct.

Under the Act, an officer will be required to wear and activate a body-worn camera when:

- Responding to a call for service;
- During any interaction with the public initiated by the officer; and
- When enforcing the law or investigating possible violations of the law.

An officer will be allowed to turn off a body-worn camera only to:

- Avoid recording personal information that is not case related;

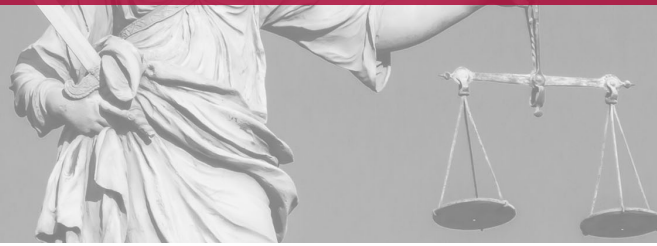
- When working on an unrelated assignment;
- When there is a long break in the incident or contact not related to the initial incident; and
- In administrative, tactical, and management discussions.

The Act also requires sanctions for failing to activate a body camera or dash camera or where an officer tampers with a body camera or footage. Where an officer is found to have failed to activate a body camera or tampers with body camera footage, the Act allows a permissive inference, in any investigation or legal proceeding, that the missing footage would have shown misconduct by the officer; however, this presumption will not apply to any criminal proceeding against the officer. Furthermore, the Act creates a rebuttable presumption of inadmissibility for any statement the prosecution seeks to introduce through the officer where the statement is unavailable due to an officer's failure to activate a body camera. This section appears to mandate a permissive inference in civil actions brought pursuant to C.R.S. § 13-21-131.

In addition to any other penalty provided by law, if a court, administrative law judge, hearing officer, or internal investigation determines the officer intentionally failed to activate his or her body camera, the law enforcement agency must discipline the officer. Discipline may include termination. If the officer is determined to have intentionally failed to activate his or her body camera with the intent to conceal unlawful or inappropriate acts or to obstruct justice, the P.O.S.T. Board will be required to suspend the officer's certification for a minimum of one year. Even further, if the officer fails to activate a body camera during an incident resulting in a civilian death, the P.O.S.T. Board will be required to permanently revoke the officer's P.O.S.T. certification.

This section also requires law enforcement agencies to establish and follow a retention schedule for body camera recordings, release unedited body camera footage in response to a complaint, and protect the privacy of individuals depicted in the footage. Agencies may delay the release of the video for up to forty-five (45) days if the release would jeopardize an ongoing investigation or prosecution; however, the prosecutor will have to prepare a written explanation justifying the delay.

<sup>1</sup> Although the Act is codified under various titles, articles, and code sections, this post will refer to all newly passed provisions as the Act.



### **C.R.S. § 24-31-903 Mandates Additional Reporting Requirements and Will Require Agencies to Submit Information to be Compiled in an Annual Report**

Beginning July 1, 2023, the Act will require the Division of Criminal Justice in the Department of Public Safety to create an annual report of certain information reported to the Division. The information will be aggregated and broken down by the state or local law enforcement agency that employs officers, along with the underlying data. Under the Act, each agency shall report:

- All use of force by its officers that results in death or serious bodily injury, including:
  - Date, time, and location of the use of force;
  - Demographic information of the individual on whom force was used;
  - Name of all officers present whether or not the officer used force on the subject;
  - Type of force used;
  - Severity and nature of force used;
  - Whether the officer suffered any injury;
  - Whether the officer was on duty;
  - Whether a weapon was unholstered;
  - Whether a weapon was discharged;
  - Whether the use of force resulted in an investigation;
  - Result of any investigation;
  - Whether the use of force resulted in a citizen complaint;
- All instances when an officer resigned while under investigation for violating department policy;
- All data relating to contacts conducted by its officers, including:
  - Demographic information of the individual contacted;
  - Date, time, and location of the contact;
  - Whether it was a traffic stop;
  - Duration of the contact;
  - Reason for the contact;

- The suspected crime;
- Result of the contact;
- All data related to the use of an unannounced (no-knock) entry by an officer, including:
  - Date, time, and location of the entry;
  - Demographic information of the subject of the unannounced entry;
  - Whether a weapon was unholstered; and
  - Whether a weapon was discharged.

The Division of Criminal Justice will also be required to maintain a statewide searchable database and publish the database on its website. Any state and local law enforcement agency which fails to meet its reporting requirements is subject to a suspension of its funding.

### **C.R.S. § 24-31-904 Will Revoke an Officer's P.O.S.T. Certification after Certain Convictions**

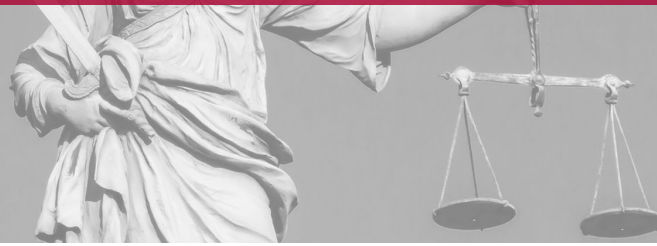
If any officer is convicted, pleads guilty or nolo contendere to a crime involving the unlawful use or threatened use of physical force, found civilly liable for the unlawful use of force, or fails to intervene in a criminal or civil unlawful use of force, the P.O.S.T. Board must revoke the officer's certification permanently. Also, the P.O.S.T. Board will be prohibited from reinstating the officer's certification or granting new certification to the officer unless the officer is exonerated by a court. The P.O.S.T. Board will also be required to maintain a database of decertified officers.

This provision of the Act has been given immediate effect.

### **C.R.S. § 24-31-905 Will Prohibit Certain Law Enforcement Actions in Response to Protests**

In response to a protest or demonstration, a law enforcement agency, officer, and any person acting on behalf of the law enforcement agency will be prohibited from:

- Discharging kinetic impact projectiles and all other non- or less-lethal projectiles in a manner that targets the head, pelvis, or back;
- Discharging kinetic impact projectiles indiscriminately into a crowd; or
- Using chemical agents or irritants, including pepper spray and tear gas, prior to issuing an order to disperse in a sufficient manner to ensure the order is heard and repeated if necessary, followed by sufficient time and space to allow



compliance with the order.

This provision of the Act has been given immediate effect.

### **C.R.S. § 13-21-131 Creates a Civil Action Against Officers for Deprivation of Civil Rights and Does Not Allow for Qualified Immunity, Immunity under the Colorado Governmental Immunity Act ("CGIA"), or Any Caps on Economic or Noneconomic Damages**

The Act creates a civil action for a person who has a constitutional right, secured by the Bill of Rights set forth in Article II of the Colorado Constitution, which is alleged to have been infringed by an officer. A plaintiff who prevails in a lawsuit brought pursuant to this provision is entitled to reasonable attorney fees. A prevailing defendant would be entitled to recovery of reasonable attorney fees as well, but only to the extent a Court determines the claim was frivolous.

Qualified immunity is not a defense to a state law civil action brought under C.R.S. § 13-21-131. Statutory immunities and statutory limitations on liability, damages, or attorney fees do not apply to claims brought pursuant to the section, nor does the Colorado Governmental Immunity Act ("CGIA") apply. The Act will also require a political subdivision of the state to indemnify its employees for such a claim; except if the agency determines its officer did not act upon a good-faith and reasonable belief his or her action was lawful. In those cases, the officer would be personally liable for five (5) percent of the judgment or \$25,000, whichever is less. If the judgment is uncollectible from the officer, the agency must satisfy the entire judgment.

This provision of the Act has been given immediate effect.

### **C.R.S. § 18-1-707 Changes the Use of Force Guidelines for Officers**

The Act creates a new use of force standard by limiting the use of physical force by officers, limiting the use of deadly force by officers, and limiting the scenarios where physical force is authorized by officers. Importantly, the Act also prohibits an officer from using a "chokehold." Chokeholds include holds that place pressure on the windpipe, or make it difficult for a subject to breathe, and holds that place pressure on an individual's carotid arteries.

The chokehold provisions of this section have been given immediate effect. The remaining provisions will go into effect September 1, 2020.

### **C.R.S. § 18-8-202 Creates a Duty to Report Uses of Force by Officers and Creates a Duty to Intervene**

The Act requires an officer to intervene when another officer is using unlawful physical force and requires the intervening officer to file a report regarding the incident. If an officer fails to intervene when required, the P.O.S.T. Board is mandated to decertify the officer. The failure to intervene will also be a class one (1) misdemeanor and the officer may also be charged with a higher-level crime where appropriate.

This provision of the Act has been given immediate effect.

### **C.R.S. § 24-31-303 Will Allow the P.O.S.T. Board to Independently Revoke Certification**

Beginning, January 1, 2022, the Act will require the P.O.S.T. Board to create and maintain a database with information related to an officer's:

- Untruthfulness;
- Repeated failure to follow P.O.S.T. board training requirements;
- Decertification; and
- Termination for cause.

The Act will allow the P.O.S.T. board to revoke peace officer certification for an officer who has failed to complete required peace officer training after giving the officer 30 days to satisfactorily complete the training.

### **C.R.S. § 24-31-309 Will Require Officers to Identify Themselves After Every Stop and Will Require Officers to Report Certain Information Concerning Interactions**

The Act requires an officer to have a legal basis for making a contact. After making a contact, an officer shall report to his or her employing agency the information the agency is required to report to the Division of Criminal Justice under C.R.S. § 24-31-903 as discussed above. The Act will also require officers to provide to any person stopped, but not cited or arrested, identifying information concerning the officer in the form of a business card containing the officer's name, division, precinct, badge number, telephone number that may be used to report a complaint, and information about how to file a complaint. This information must be provided without being asked.

This provision of the Act has been given immediate effect.

For any further questions regarding the Act, please feel free to contact [Mark S. Ratner](#), (303) 628-3337 or [Aaron J. Thompson](#), (303) 628-3428.