

2021 Updates for Public Safety

Disciplinary Update-

Attorney Robert Baumann

AB 392/Use of Force:

Responded to multiple officer involved shootings, both occurring with Southern California agencies. In both instances Attorney Baumann was able to successfully navigate the new Use of Force law in California, particularly as it relates to officer involved shootings. In one of instance there was a potential concern for the use of deadly force since one officer chose not to use deadly force while another officer deemed the circumstances necessary to use deadly force. This instance was a good example of the reasonable versus necessary analysis under the new law. Attorney Baumann was able to successfully navigate this issue despite the potential competing perceptions of the two officers. At this point the investigation is still pending but the information received indicates the District Attorney's office is not planning on filing any charges and will likely "clear" the officers of any excessive force used in the incident.

Military Leave:

Numerous officers are currently under federal investigation regarding the use of military leave. Most of these officers will not face federal prosecution for fraud and embezzlement because of being paid while out on military leave due to the departments failure to have any policy or training on how military leave is to be utilized. Although this is the first instance of allegations involving misuse of military leave, it is important for officers who are also serving in the military to request and review military leave policies to ensure they are within policy and protected against any potential federal investigation/allegations/charges. It is paramount that officers who are serving in the military understand that although their city/county/department may not have proper guidance regarding the use of military leave, this does not protect them from federal investigation/prosecution. Therefore, these officers must make sure they within their department's military leave policy, or when one is lacking make sure Human Resources explains the proper procedure, in order to protect themselves against any future investigation.

Attorney Jennifer Krikorian

A peace officer's 80-hour suspension and removal from special detail for one year was reduced post-Skelly to a 20-hour time bank deduction and written reprimand. After responding to a call and making efforts to detain a suspect without using lethal force, the officer was accused of taking action without being authorized. Ultimately, the officer's good intentions of eradicating crime from the community surfaced at the forefront of the Skelly review, appealing to the reasoning behind maintaining the officer's position in the special detail and significantly lowering the time deduction.

Attorney Samuel Rose

Southern California law enforcement officer was disciplined after a third alleged domestic violence

incident. The department intended to suspend the officer for 36 hours. At the Skelly hearing, Attorney Samuel Rose argued that the alleged incident had occurred about a year before the administrative interview and that the officer had voluntarily attended counseling, attended alcohol support groups, and moved over an hour from the other party. The Skelly officer found that the officer had recognized the negative influences in his life and voluntarily sought to resolve them and reduced the suspension to 12 hours.

Attorney Chris Torres

Trend: Accusations of Bias Policing

Officers and their respective departments are being accused of violating newly adopted Hate Crime policies. In response to the George Floyd incident, many departments have added or expanded their Hate Crime policies to include a much broader definition of what is considered a “Hate Crime” or “Hate Incident.” During political protests, officers are being called by protesters to investigate various accusations of simple battery by unknown suspects. Sophisticated activists film the numerous interactions with officers and request copies of these police reports. Civil complaints are then filed against the officers for failing to investigate the incidents as a hate crime and using any discrepancies in the report with cell phone footage as proof of bias policing. These civil complaints have led to large scale internal affairs investigations naming dozens of officers as principals. Officers and departments need to be fully aware of this growing trend particularly if the city is experiencing an increase in political protests.

WHAT IS HAPPENING IN LOS ANGELES COUNTY?

Jennifer Krikorian Esq

Newly elected Los Angeles County District Attorney George Gascon intends to release more than just a wave of policy changes in the criminal justice infrastructure of Los Angeles. Gascon is bringing many jolting adjustments to Los Angeles County including policies to decline prosecution of numerous misdemeanor crimes, eradicate the ability for prosecutors to add a sentencing enhancement after evaluation of the circumstances surrounding commission of a crime, and a commitment that his deputy district attorneys will not oppose modification or removal of conditions of release of defendants on their own recognizance.

Gascon has also listed Penal Code §148(a)(1) Resisting Arrest as a crime that will not be prosecuted. There are limited exceptions that allow for PC 148 to be charged in conjunction with some crimes, but not with many of the crimes that invariably lead to altercations such as disturbing the peace and public intoxication.

[Special Directive 20-07, <https://da.lacounty.gov/about/inside-LADA/misdemeanor-case-management>]

Quoted directly from the newly issued Special Directive on sentencing enhancements: “. . . sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in **any cases** and shall be **withdrawn in pending matters.**” Further, “DDAs are instructed to **not oppose** defense counsel’s request for **resentencing**,” thereby allowing Gascon’s new policy to *retroactively* apply to sentences that occurred six months prior to the new directive. (*emphasis added*).

[Special Directive 20-08, <https://da.lacounty.gov/about/inside-LADA/sentencing-enhancementsallegations>]

Additional detail regarding Gascon’s policy changes can be found directly on the LADA website:

<https://da.lacounty.gov/about/Inside-LADA>

WHAT DOES THIS MEAN FOR LAW ENFORCEMENT OFFICERS?

Policing is being policed by those who have never been officers, the public, and the media. In these trying times, officers as human beings and as concerned citizens are attempting to strike the balance between protecting the members of their communities and following new protocols that take a much more hands-off approach to enforcing the law. With sentencing enhancements almost completely gone, it feels futile for officers to further investigate suspects and crimes in the thorough manner they are akin to.

Policies within police departments now must adjust. Training on the law, consistent updates on changes in prosecution of crimes, and constant adaptation to the evolving law enforcement climate are key to keeping up with these changes. It is vital that police department policy changes ensure their adaptability to these times comes with attention to those officers in the line of fire. Officers across the county should not be finding themselves in the middle of Internal Affairs investigations within their own departments because of a lack of information or training.

Labor Update

Negotiating in the COVID Era--The Pros the Cons...and the Pros Stuart Adams Esq.

March 19, 2020, California Governor Gavin Newsome issues a mandatory stay at home order. This order sent employers scrambling to set up remote technology to allow employees to work from home. This includes public employers.

This order had a direct impact on the meet and confer process for negotiations. Public agencies and their Employee Associations turned to already existing video conferencing technology to handle negotiations. Programs such as Zoom, Teams, Hangout, Skype and the like became the standard operating procedure for meet and confer.

Long regarded as possibly compromising the ability of parties to negotiate in person, the pandemic forced the issue for video conferencing. The popular thought was that a certain level of information would be lost through the lack of physical presence. The theory was that tells would be missed. Subtle gestures and looks would be missed. This has proven to not be the case.

The Pros

Negotiations via video conferencing has made the negotiating process exponentially more efficient. This is especially true when clients are spread out throughout the State. It makes negotiating for Chula Vista, Redondo beach and Monterey agencies in one day possible. This would otherwise take a week due to travel logistics. This enables faster service to the clients.

Plus, the video conferencing has provided significant flexibility for scheduling purposes. Meetings can be set far more quickly due to not having to navigate people's logistics and schedules. Meetings can be set more frequently and more easily. Employees do not have to lose hours in travel coming into the agency to negotiate on days off. Rather, they can negotiate from home and as soon as the meeting is over, they find themselves at home.

The efficiency of video conference negotiations has been proven by the number of contracts that have been

negotiated since March 2020. Attorney Stuart D. Adams, Esq. for example has negotiated 10 contracts in less than 12 months through video conferencing: a feat hardly possible pre-COVID.

Also important is the ability for the groups to caucus separately. This can be done in several ways. The most common is done by setting up separate breakout rooms for the parties to meet separately. This is not without its problems as on occasion one party can inadvertently stumble into the other's breakout room.

One way to avoid this is to have the host keep the meeting open while the other side logs out and into their own separately established video conference link. When done, the returning party can contact the host and request to be let back in by clicking on the same link for the original invitation.

The Cons

The cons have not been anywhere near what was thought. The primary con that has proven not to be true is the belief that observations would be missed that would somehow be detrimental in the interpretation of conversations. On the contrary. Sometimes tells are more obvious.

The largest downside, and it is certainly far from insurmountable, is the technological glitches that will, (not might) happen. Most of it is due to an inadequate internet speed or connection. Glitches such as inability to log on, inability to use video, freezing, lack of sound synchronicity etc. These have proven to be no more than minor issues and almost always repairable. Then you have the non-technological glitches.

These are typically the product of failing to establish a suitable environment for the call. Failure to establish a quiet location where one is not going to be disturbed from the inevitable distractions that arise at home is the main culprit. Intrusive children, pets, family, blowers, lawn mowers etc. can be disruptive. It is very important to establish a location in the home as secure as possible from these distractions.

Moreover, an appealing background is also important. The electronic backgrounds are marginally good. They are certainly better than a background inside a laundry room. But it can be distracting to suddenly have portions of your counterpart cut off because of the electronic background. Try to pay attention to your backdrop making sure that it is organized and presentable.

Another con is the absence of a video stream for the participants or where more than one participant shares a camera. Each party to the video conference should have video. On occasion where logistics do not allow for each person to appear on their own, sharing a camera can be tolerated but it is far from ideal. Each participant should appear via their own, individual video.

Additionally, participants attending off camera should not be allowed. That would defeat the benefits of being able to "read the room." You do not want a situation where messages are being shared that are not visible to all.

Equally important is the necessity that the cameras capture the gestures of the parties. Hands should be clearly visible, not just a person's head.

Ground Rules

To counteract these cons, every video conference negotiation should have these minimum ground rules in one form or another:

1. Every Participant must appear with separate audio and visual.
2. All participants and/or attendees to the meeting must be on camera.
3. Hands should be clearly visible, not just a person's head.
4. There shall be no unauthorized recording of the video conference.

5. No multi-tasking during the video conference.
6. Backgrounds should be as neat and professional as possible.
7. Every effort should be made to eliminate disruptions and distractions (children, pets' external noises etc.).
8. Caucuses shall be conducted in a secure manner that prevents one side from having access to the others private caucus.
9. Participants shall make every possible effort to ensure that their WIFI is adequate for the video conference to minimize technological glitches.

...And the Pros

In conclusion, there should be no reason why video conferencing should not be here to stay in whole or in part even after the pandemic is under control. There can be times where in person meetings may be held but to maintain the improved efficiency, video conferencing should be a permanent, viable option for years to come.

Workers Compensation Updates- John Ferrone Esq. and Ryan Trotta Esq.

Presumptions Update: Public safety officers are entitled to the workers' compensation presumption of injury for Cancer, Back—police, Cardiovascular, Blood-borne pathogens, TB, Hernia MRSA, Pneumonia, Meningitis and now PTSD and COVID-19. The new presumptions for PTSD and COVID-19 will help protect public safety officer's benefits who face the threat of violence and the pandemic.

Covid-19:

FOR ALL CLIENTS FROM MARCH 19, 2020 – JULY 5, 2020 LC 3212.86

After July --- LC 3212.87 Presumption

Creates a *disputable* presumption injury is AOE/COE if you show: (1) worked within 14 days from diagnosis' of COVID; (2) Diagnosed by a licensed professional; (3) diagnosed after May 6, 2020 (if before, must seek a certification of when you were TTD).

The law requires to burn sick time before TD kicks in. The statute has a weird provision relating to 4850/TD benefits which requires "If an employee has paid sick leave benefits specifically available **in response to COVID-19**, those benefits shall be used and exhausted."

For the first 45 days, they must be tested every 15 days to keep the presumption.

Waives the 90-day rule. Defendant is required to provide a denial or acceptance within the first 30 days, or it is deemed accepted. If we get a delay letter after 30 days, it is deemed accepted.

PTSD:

Labor Code section 3212.15 Presumption

Creates a rebuttable presumption for officers who are diagnosed with PTSD that has developed or manifested itself during employment. The presumption further extends post retirement as well. We expect litigation on this new presumption however, the new law will provide a significant advantage for officers facing litigation.

Light Duty/Work Comp Fraud Updates:

If your employer offers you a light duty position, do not turn it down. Turning down light duty positions raises a red flag with your employer and you could be targeted with video surveillance. Turning down light duty is saying, 'I am physically unable to perform the desk work assigned.' Once turned down, your employer may attempt to start filming you performing daily tasks such as taking out the trash or grocery shopping to show you violated your restrictions or materially misrepresented your physical abilities. This leads you down a dark path that you do not want to be on. If you are offered a light-duty position, accept it. If you believe that you are unable to

perform the light duty assignment, you need to get your work restrictions increased. Increased work restrictions may make it so the employer can no longer accommodate you in the light duty position offered.

If your employer can accommodate you via light duty, they have no obligation to pay off-work benefits. Simply put, if you turn down light duty offered, you will not receive workers compensation benefits and will be forced to use your own time bank.

Being off on temporary disability is *not* a vacation. Treating it as a vacation can have dire consequences. With employer's actively offering light duty, being off on injury is more complicated than before. It is imperative that you consult with a professional about your work status. If an issue arises or you have a question, you are welcome to reach out for assistance.

Death Benefits / Statute of Limitations: An officer's widow was denied death benefits after the officer passed away due to a work-related injury. That officer spent 44 years on the force, but that did not matter to the Dept. or its insurance carrier. Not a single penny was offered to the widow because the Dept. took the stance that it took too long for him to die. Despite others saying the case was unwinnable, AFF saw the true value in fighting for a spouse whose husband gave his life to the job. After nearly four years of litigation that traveled up and down the appellate system, AFF prevailed on a novel theory of law. When an injured worker suffers from an occupational disease or cumulative injury with no specific date of injury, only a doctor can place the injured worker on notice of entitlement to work comp benefits. This allows an injured worker (or their spouse) to still file a claim well-beyond the last date of actual work. A simple passage of time does not bar that claim. It requires knowledge that disability is work-related, which only a doctor can provide.

Stress-Induced Physical Injuries: There is no question that working as a firefighter or police officer is an inherently stressful environment. Less recognized is the fact that stress can lead to physical injury in the form of diabetes, hypertension, GERD, and IBS. Stress can play a major role in the development of these conditions. However, these physical injuries are not subject to the same higher standard that is set for a pure stress claim. A simple aggravation by work-related stress of these conditions can be sufficient to award work comp benefits. For one officer, work-related stress was found to be a factor in the officer's significant weight gain and subsequent development of diabetes. At Trial, AFF successfully argued that there is no need to file a stress claim, which allowed the officer to collect benefits without having to prove a separate stress claim.

Alternative Dispute Resolution (ADR) for Work Comp: More and more public safety agencies are realizing the ADR for work comp is a better process that resolves disputes and gets the officers the medical treatment faster. How does an ADR system work? The POA or FFA and the City or County negotiate a list of Independent Medical Examiners (IMEs) in different specialties, such as orthopedics and internal medicine. The IME's were selected based upon their knowledge and experience in the workers' compensation field. The IME's will rotate from top to bottom to allow a fair rotation on the cases. The IME's have agreed to a fast-track evaluation and reporting process- 30-day evaluation and 30-day report.

When a dispute arises in a case, like a Utilization Review treatment denial or whether the injury arose from work, the new ADR process requires the City or County to set an exam with the IME within 30 days. The IME is required to issue the medical report 30 days after. The goal of the expedited medical process is to get the issue resolved within 60 days. The current system can take over 6 to 9 months for a medical exam. The ADR system will expedite the resolution of the dispute and hopefully get the officers the medical treatment they need to return to work.

Cal PERS Litigation: There has been a major uptick in attempts to California safety officers and all public

safety face many challenges that expose them to a very real risk of serious injury and death. We are all aware of the pitfalls to the workers' compensation (Work Comp) system. However, peace officers face even more uncertainty when entering the Industrial disability retirement (IDR) process.

Recently, we have seen a ramp up of litigation in the IDR cases even when the work comp evidence confirms the [public] safety member **cannot return to full duty.**

Cities are referring the injured officer to a separate medical evaluation for the IDR PERS case. This evaluator may or may not confirm the safety member's disability. If the report states the member is NOT disabled, the IDR application will be denied, and the member will have to appeal the denial to an administrative hearing.

Furthermore, the PERS hearing will require the physical appearance of the medical expert to testify about the medical findings- which is a significant cost to the employee. The employers know safety officers do not have the funds to pay. If no expert appears, the application will be denied! Worse- the City can slow the process and the member ends up burning all their accrued leave.

Enter Huntington Beach FFA and POA to the fight. The FFA and the POA had been struggling with a dysfunctional approach the City relied on in denying cases. There were several pending IDR cases where there was no dispute in the work comp process -- the safety officer could not return to work. In each case, the previous City leadership retained an outside law firm, who advocated a new process- sending the safety officers to another medical evaluation, which then determined the member to be fit for duty! These members just fell into the IDR swamp because of this dysfunctional approach. There needed to be a change.

The City of HB and HB FFA and POA had previously negotiated a Labor-Management Agreements to expedite worker's compensation claims. To that end, the new (Alternate Dispute Resolution) ADR program utilized a list of Independent Medical Evaluators in various specialties to resolve all disputes. If a dispute arose, like ability to return to work, an IME would be assigned to the case within 30 days and the IME had to issue a report 30 days later. We collaborated with the FFA and the POA and suggested to design a side letter from the ADR agreement that will streamline the IDR process, reducing city costs and protecting the member.

The essence of the new agreement was to require the City to use the existing IME's from the work comp ADR panel and further allow the written report to be admissible if the case went to a hearing. The goal was to expedite the process by getting the current IME to issue a supplemental report addressing four important PERS issues (IDR). The goals were to reduce costs and delays to the members and the City. The new IDR process will save the City huge expenses in litigation and the costs of medical experts. More importantly, injured safety members have a fast track from the work comp system to the IDR. I cannot stress enough the importance of every association to strengthen their relationships in the community and government to overcome these and other deceptive tactics being used against members and their families. No more will safety members be facing the litigation swamp.

Civil Litigation Update

On-Duty Vehicle Accidents

Mark Peacock, Esq. & Megan Bartlett, Esq.

Peacocklaw, a.p.c.

Due in large part to COVID there are more uninsured and under-insured drivers (i.e., drivers who have no insurance or have too little insurance) on the road than ever before. So, what do you do if you are involved in an on-duty auto accident and are injured by one of these types of drivers? You have three options to pursue:

1. File a workers' compensation case.

2. File a civil case against the other driver; and
3. File an uninsured/underinsured (UM/UIM) claim with your own personal insurance – yes, your own insurance! This update will focus on this third option.

Note: In some cases, all three of these may be available to you. **Do all 3! Do not lose money you and your family may be entitled to!**

Using Your Personal Insurance for an On-Duty Accident: Uninsured/Underinsured Motorist (UM/UIM)

Often, that other driver will be an “underinsured motorist” (UIM) – which means they have insurance but just not enough to cover your injuries and/or damages. An underinsured driver or motorist is very common. Another possibility: the other driver might be an uninsured motorist (UM) and have no insurance to cover your injuries and/or damages - also very common. This is where you can protect yourself (and your family) by making sure you have the highest limits of UM/UIM coverage you can afford (note: it is very inexpensive). Having UM/UIM coverage means you are insuring/protecting yourself (and your family) against other negligent drivers who either do not have insurance or do not have enough insurance. And yes - even if you were injured on duty while driving a department vehicle, your UM/UIM coverage will cover you.

Benefits of UM/UIM Coverage

UM/UIM coverage has many benefits (too many to list here). However, here are some highlights: first and foremost, it is very inexpensive and highly valuable (you really get your money’s worth). By the way: filing a UM/UIM claim will not cause your rates to be raised nor will it result in your carrier dropping you. We get these types of concerns presented to us all the time. While coming from an honorable spot, they are nevertheless misplaced. No need to worry – you are paying for the coverage and you should use it. Plus, do not feel bad for your insurance company... believe us, they take care of themselves!

Additional benefits of UM/UIM claims are generally higher recoveries; are paid faster; have nowhere near as much litigation; and ultimately, have a higher value to you (their insured). It is your own insurance company... you are their insured. What that means is they will treat you better than the insurance company of the other driver. Fun fact: Your employer is not entitled to reimbursement from your UM/UIM recovery (i.e., they cannot get any of it – no liens!).

Additional benefits of UM/UIM include not just on the job benefits. It applies anywhere/everywhere. You do not have to be in a vehicle. You could be getting into your car, pumping gas, on a skateboard, on a bike, etc. while hit by an uninsured or underinsured vehicle and coverage applies. It also applies not only to you but to family members who live in the same house, passengers, etc.

Amount of Recovery with UM/UIM Claims

If you are hit by an uninsured driver while on duty, you can recover the difference of your own UM policy limit and the amount paid by workers’ comp for your claim. If you are hit by an underinsured driver while on duty, you can recover the difference of your UIM policy limit and amount paid by workers’ comp plus what you put in your pocket in your case against the other driver. These offsets are why it is so crucial to have as high of limits as you can afford.

Recent Case Resolutions (on-duty vehicle accidents)

\$2,000,000 settlement for Parole Agent

Seven figure settlement (*confidential*) for Police Officer

\$570,153.09 Judgment for Parole Agent

\$250,000 (*policy limits*) for Correctional Officer

\$250,000 (*policy limits*) for Police Officer

Active case: California POA President – involved in on-duty vehicle accident – found to be at fault in Traffic Collision Report – Peacocklaw filed – other driver paid their entire policy – Peacocklaw filed UIM claim – POA President will recover more money because he (and his wife) had higher amounts of UIM coverage – in a nutshell that is how it works.

Feel free to reach out with any questions.

ADAMS, FERRONE & FERRONE serves as general counsel to over 130 public safety associations and is the largest firm in Southern California exclusively specializing in the representation of police, corrections and fire in labor and contract negotiations, workers' compensation disciplinary investigations, critical incidents, criminal defense, personal injury litigation, employment litigation and disability retirement law. Please contact us toll free at 866-373-5900 or jferrone@adamsferrone.com.

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