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Law Enforcement Action Forum

Newsletter

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Comments on "Regularly Employed" and Another U.S. 6th Circuit Court of Appeals Case on Privacy of Information

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When John Engler was Michigan's governor, he mandated that the Michigan Commission on Law Enforcement Standards (MCOLES) define a term the legislature had failed to in Public Act 203 of 1965. This failure had created confusion, particularly since compliance with the term is required to be licensed as a peace officer in Michigan. That term is "Regularly Employed" and the Governor order that a standard be developed that could be understood and followed by all law enforcement employers.

In September of 2001, Ray Beach, Executive Director of MCOLES, joined a LEAF meeting to discuss a variety of issues that the Commission was about to address. One of these was trying to define "Regularly Employed." The LEAF members listened to Director Beach's presentation and spent a significant amount of time discussing the issue during this and subsequent meetings. Big concerns were what the term actually meant to the members and what, if any, unintended consequences might arise from placing time requirements on the use of part-time officers. This was especially a concern of the several LEAF members from smaller departments.

LEAF members finally agreed that "Regularly Employed" probably entails a fixed number of hours that a person needs to work to keep his or her license active. The group, by consensus, was more inclined to first define what it means to be "Regularly Employed" before attempting to attach a number of hours to the term. In a 2002 letter to MCOLES, LEAF committee members wrote:

> The membership agrees that being "Regularly Employed" means that officers need to be on duty frequently enough to understand their departments' dynamics, philosophy, policies, practice, and enforcement priority. They need to work frequently enough to remain current with information from sources both inside and outside the department. Officers have to work often enough, so they are able to remain proficient in the technology in use by the department. They have to work frequently enough to keep pace with the rapidly changing procedures for policing in the State of Michigan.
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> To be "Regularly Employed," officers must receive training and maintain proficiency in the same areas required of full-time officers. This means, for example, that general patrol officers need training in firearms at least twice a year. They need training in vehicle operations yearly

with actual driving at least once every three years. They must have Haz-Mat training once every two years. They need Use of Force, Defensive Tactics, and Aerosol Spray training annually. They must have First Aid, CPR, Bloodborne Pathogen as well as Legal Update training yearly. They have to have Michigan Right-to-Know and Fire Extinguisher training. They must receive training on their duty to protect those individuals that they take into custody. They must be able to recognize whether people they come in contact with or take into custody are in a medical or psychological crisis and they must having training in what to do!

Training can address some of these needs. However, others can only be met by the experience of performing the task repeatedly. How much time does a part-time officer need to work to become proficient in the areas that MCOLES has identified as essential job functions or job tasks? In many departments, full-time officers go through a Field Training Program that is very strict and serves to wash out those trainees who do not meet the department's performance standard. Some of these same departments do not use the same training and performance criteria when they hire part-time officers.

LEAF committee members made it very clear that there was not agreement on what the actual number of hours should be due to the local and financial issues that can influence the final numbers. After long deliberation, LEAF recommended that MCOLES should establish a minimum number of hours each year that an officer must work to be considered "Regularly Employed." Most importantly, LEAF felt that the minimum number of hours should consider the time necessary for training and for obtaining the experience that an officer needs to work safely for the department and the public

MCOLES was very deliberate in establishing the number of hours necessary to be "regularly employed." They took the time to learn the potential ramifications of their decision, listened to those most affected, and took into consideration any ideas that came to the table. MCOLES' goal was to come up with a definition that resolved the issue but did not have a dramatic impact on the end users, knowing that no matter what decision they made, there would be critics.

~~Now MCOLES has established 520 hours as the number of total hours of all paid activity that peace officers must work to maintain their licenses. Hence, any paid activity that the employer designates, including training, counts toward the "Regularly Employed" hours.~~ **{EDITORS NOTE: In October of 2011, MCOLES replaced the 520 hour rule previously adopted and set a 120 hour standard with training. What this means is that an officer should work, at minimum, 120 hours in a year and complete the prescribed training. The Rule is considered an "Advisory Recommendation" and will be followed by the establishment of relevant training topic areas that officers should receive to be in compliance. The information contained in this Newsletter remains relevant with the exception of the mandatory compliance. Loss Control will remain committed to advising officers and their departments to comply with the Recommendation for it will be viewed as a defacto standard. Go to http://www.michigan.gov/mcoles for more information.]**

Some decry the loss of experienced retired officers who can provide occasional specialized services when departments need them or to those occasional workers with years on the job who will be cut out. While losing these people if they choose not to maintain their licenses is unfortunate, LEAF believes that, in reality, municipal entities must decide whether a person providing specialized services has to be a licensed officer and/or whether past experience, without continued growth and education, really has the value being claimed.

~~As of the April 2008 MCOLES meeting, the fact is that if licensed peace officers want to maintain their licenses, they are going to have to invest time. Moreover, as time passes, additional training standards will be~~

~~adopted and there will be more requirements for individuals wanting to be 'regularly employed" peace officers to meet.~~

During the debate over what "regularly employed" means some members of law enforcement indicated that they believed that training should have been the determining factor. That is an interesting point of view. Risk management representatives with the Insurance Pools that represent the municipal entities in Michigan with law enforcement departments have been pressing departments to train since the late 1980's. If you speak to the risk management representatives from those Pools, they will tell you how difficult it is to get departments to meet the required training for employees. The training requirements they refer to are those mandated by the law, court decision or administrative regulation and represent those tasks an officer is regularly expected to perform.

The MCOLES Regular Employment survey of departments asks questions that are very revealing when it comes to the emphasis departments place on training. Eighty-eight percent of the agencies responding indicated that they required their officers to attend in-service training. Twelve percent of those that responded do not. Twenty-four percent do not give new officers field training. Twenty-two percent of the departments surveyed did not respond. Who knows what they do. If one were cynical, one might decide that thirty-four percent of the departments do no training! That does not sound like a large number but it could represent seven thousand seventy two officers. That is a lot!

It is not unusual for a MML Loss Control Consultant to encounter a department that is deficient in providing some or even all of the required training. The department has an excuse for why it does not provide the training even though the department knows that training is designed to protect the employee from injury and the employer from liability. According to municipal officials, these are priorities for their entities.

MCOLES does not want to run police agencies and wants the decision making for compliance with their regulations to remain at the local level. If someone does not comply with a rule or standard, MCOLES will require the municipality to make corrections and then report to them what was done for their review or action. By placing the definition of "Regularly Employed" in hours of employment, the employer decides how to best use the employee for their operation. If MCOLES mandated training, entities would have no discretion and would have to comply with the specific regulations of time and content.

Even without MCOLES action, training is mandated not discretionary. The September 2007 issue of the LEAF Newsletter "*OFFICERS JUST DON'T GET IT: THEY ARE TRAINED IN MORE PLACES THAN THE CLASSROOM!"* outlines the law and thirteen areas in which all officers need to be trained. The law, regulation, or court decisions establish these requirements.

This Newsletter is about how compliance can be accomplished at the control and convenience of the employer and employee. All the hours spent, if paid by an employer, will apply to the "Regularly Employed" requirement. In the end, the only mandate from MCOLES on the employer is to report compliance.

What Does Work Experience Bring To The Table?

How does work experience translate to a learning tool or training? Having all the education in the world does not mean the person can apply it. It takes experience in handling complex issues. It takes work experience to understand what outcomes may be. It takes work experience to know how to read people who are under stress. It takes work experience to avoid behavior that may lead to violence. It takes work experience to recognize the subtle behaviors that a bad guy exhibits that would lead an officer to be able to articulate the reasons why he chose to take action and stop an offender, let alone pat them down. It takes work experience

to know what to do when faced with an incident involving abuse or neglect. It takes work experience to know how to recognize and handle a substance abuser or mentally ill person. It takes work experience to figure out where you are in the jurisdiction, especially in an emergency. Heck, it takes work experience to know how to fill out a UD 10 or traffic citation properly!

The experience we are talking about does not come from training. It does not come from working a midnight shift once every month to cover an open slot. Police skills do come with having worked someplace else for twenty-five years but they are rapidly lost if the officer does not keep them honed. The warrior mind set and survival instincts diminish if they are not regularly exercised. For example, using firearms effectively involves repetitive, mechanical skill training. This activity conditions the body to react when the brain tells it a threat exists. On the street, the body will react rapidly and precisely as it was trained. The key is the brain recognizing a threat before it is too late. Experience is the culmination of the conditioning.

LEAF supports MCOLES in their definition of "Regularly Employed". The definition of "Regularly Employed" acknowledges that work experience is key to keeping the officer and the community safe. Since the requirement includes all compensated hours, no matter what the assignment or no matter who the employer is, the limit becomes reasonable and attainable for most officers.

New 6th Circuit Case: LEAF Legal Advisor Cautions To Maintain Privacy of Information

In the LEAF Newsletter, *Bits and Pieces of the News* (March 2007), we addressed the need for police agencies to keep personal information held in their files confidential. We also pointed out how municipal entities dodged the bullet under the changes to the *Michigan Identity Theft Protection Act*, MCL 445.61 - MCL 445.77. Audrey Forbush, LEAF Legal Advisor, determined that the language in the new law defining "Agency" refers only to State Government. However, good news or not, it does not change the responsibility of local government to protect and keep confidential the personal information held in their files about the public.

A new Sixth Circuit case, *Lambert v Hamilton County*, 517 F.3d 433 (6th Circuit, 2008), involving privacy rights under federal law. In this case, Cynthia Lambert brought a 42 USC §1983 civil rights action because the Hamilton County Clerk's office posted a traffic citation that contained Lambert's personal information, including social security number, on the Web as part of a program designed to reduce the need for going to court. Lambert received a traffic citation on which the officer wrote the wrong driver's license number. It seems that some other web surfers had also found the web site and used the information, including the wrong driver's license number, to steal Cynthia Lambert's identification. The police captured the identity thief using the information that included the wrong driver's license number, and she was sentenced to 139 months in jail.

Lambert filed suit claiming the Clerk's policy and practice violated her Fourteenth Amendment right to privacy and to substantive and procedural due process as well as her Fourth Amendment right to be free from unreasonable searches and seizures. She also alleged she had suffered "economic damages, damages to her personal credit rating, and damage to her reputation" because of the policy. Lambert also raised claims under the common law of Ohio for violation of her right to privacy and the tort of publication of private facts. She also wanted class action status for the hundreds of thousands of people who have had their social security numbers published.

The District Court dismissed her claim stating that Lambert did not meet Sixth Circuit precedent addressing the constitutional right to privacy of personal information. They concluded that Lambert's claim was without merit because the privacy interest she asserted did "not implicate either a fundamental right or one implicit in

the concept of ordered liberty." The Court pointed out that Lambert identified only a "risk of financial harm," and determined that this injury "bears no equivalence to the potential and actual harm" suffered by the plaintiffs in cases where the Sixth Circuit has recognized a Fourteenth Amendment right to privacy against the disclosure of personal information. The district court then granted the Defendants motion that Lambert's claim failed to state a claim under 42 U.S.C. § 1983, concluded that a ruling on her proposed amended complaint was unnecessary, and declined to exercise supplemental jurisdiction on the state claim. Lambert appealed.

It Has Always Been That Way!

The Sixth Circuit Court acknowledged that the Clerk putting private information on the web without regard for privacy was bad policy. The question that remained was whether the Clerk's policy of putting the information on the web was a privacy right that rose to the level of a constitutional violation. The court has recognized an informational-privacy interest of constitutional dimension in only two instances:

(1) where the release of personal information could lead to bodily harm (*Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998).

(2) where the information released was of a sexual, personal, and humiliating nature (*Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998).

Neither of these decisions fit the circumstances of this case, so in essence, Lambert was asking the Court to change their standard of assessing informational privacy rights. She wanted the Court to move from using the current standard of:

> .....whether the party alleging an invasion of privacy has a legitimate expectation of privacy in the information in question, to
>
> ...a broad constitutional right to informational privacy to be balanced against the public's interest and need for the invasion of privacy.

You May Be Right, but We Are Not Going to Change Our Mind!

The Court ruled the protection of a person's credit is a concept relating to one's finances and economic well-being, one that by its very nature bears no relationship to the kinds of interests that are "implicit in the concept of ordered liberty." *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2002) The court went on to say that Lambert has undoubtedly shown that, as a policy matter, the Clerk's decision to provide unfettered internet access to people's Social Security numbers was unwise. This much is evidenced by the fact that the Defendants have subsequently removed the citations in question from the website and changed the local rules to better protect sensitive personal information. But to make a harm of the type Lambert suffered a constitutional matter would be to open a Pandora's Box of claims under 42 U.S.C. § 1983, a step that the court was unwilling to take.

This case is one that protects a municipal entity should they make an error and release information that is considered private and otherwise protected as long as the damages are financial. With the 6th Circuit keeping the constitutional limits to the narrow interpretations they have taken in *Kallstrom* and *Bloch* there is still some protection at the federal level to stay out of civil rights violations concerning privacy expectations.

LEAF's Legal Advisor Audrey Forbush, Plunkett Cooney, reminds administrators that this case did not have all the facts that were strong enough to sway the Court to change their analysis of privacy rights. That does not mean that the next one won't. With the emphasis on information security and privacy concerns, administrators need to maintain their vigilance in redacting and protecting private information. Audrey felt it was important to remind everyone that they still must maintain security over the information they gather and reiterates the following Action Steps from the *Bits and Pieces of the News* LEAF Newsletter*:*

Action Steps

To make sure information is protected, Departments need to do the following:

- The Employer's Right to Search: Establish that employees have no expectation of privacy in the workplace and that all documents and equipment brought or used in the work environment are subject to inspection. (See LEAF Newsletter, A Public Employer's Right to Search, December 2005)
- Release of Information: The policy should outline what and how information can be released or removed from the department. Have one person ultimately responsible to release information from the department, especially for FOIA or any court order or subpoena. Regulate information that is removed from the department by employees in the course of doing business.
- Use of Computer Policy: The policy should include use of e-mail, the internet and LEIN. It is important to have an incident response plan that includes the use of a computer competent person who can move quickly to ensure records pertinent to the incident are preserved.
- Audit Policy: The department needs to have a regular internal audit process that requires periodic audits of the handling and release of information, audit of video recordings for officer performance, audit of computer security records and the inspection of equipment and materials used in the workplace by employees. Document all audits and inspections that are performed.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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