



# The "Law Enforcement Officers Safety Act" – A Legal Quagmire

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# Law Enforcement Action Forum NEWSLETTER

## The Purpose of the Act

President Bush signed Public Law 108-277, the "Law Enforcement Officers Safety Act" (Act) in July of 2004. The Act allows active and retired law enforcement officers who are firearms qualified to carry concealed weapons even when local and State agencies prohibit this. On its surface, the purpose of the Act is to eliminate some of the problems officers face if they live or work in locations that abut states or municipalities that have restrictions against carrying a weapon concealed even though they face the same type constituency and criminal element on both sides of the border.

During a June 15, 2004 hearing of the Subcommittee on Crime and Terrorism and the Homeland Security Subcommittee, the Honorable Howard Coble, Chairman, indicated that the law's purpose is to give current and retired law enforcement officers the ability to protect themselves at all times from being victims of crime

However, the rhetoric during the Committee hearing, the markup of the bill by the Committee and statements by the FOP and other credible sources leave the impression that the federal government is giving officers the ability to carry a weapon so they can take police action no matter where they are. They contend that the law will allow tens of thousands of trained law enforcement officers to continually serve and protect our communities regardless of jurisdiction or duty status at no cost to taxpayers. Among the supporters are Chuck Canterbury, National President of the Grand Lodge, Fraternal Order of Police (FOP), and FOP Executive, Director Jim Pasco.

For example, after the bill-signing ceremony in the Oval Office, Chuck Canterbury stated, "The President has truly made this country a safer place . . . By enacting this legislation, President Bush has ensured that when officers are confronted with a situation to which they must react, they have the tools necessary to ensure their own safety, and the safety of their families and the public they have been sworn to protect." (FOP press release).

The National Grand Lodge of the Fraternal Order of Police also published the following statement on its web site:

Law enforcement officers are a dedicated and trained body of men and women, who, unlike other professionals, are rarely 'off-duty'. When there is a threat to the peace or public safety, be it crime or terrorism, the police officer is sworn to answer the call of duty. Officers who are traveling from one jurisdiction to another do not leave their instincts, skills, or training at home; but without their firearm, that knowledge and training is rendered virtually useless. This bill will provide the means for law enforcement officers to enforce the law and keep the peace--enabling them to put to use that training and answer the call of duty when the need arises.



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The purpose of the Act is to protect officers as they travel around the country. However, the Committee apparently believed that it would be beneficial to have these armed, trained, and capable citizens available should something bad happen. If officers are armed, then they might be able to intercede and stop the event. Comments from the FOP suggest that this is interpretation of the Act's purpose is gaining currency. In summary, this Act seems to give licensed police officers and retirees the ability to carry concealed weapons -- with some restrictions as to specific locations -- in any state in the United States. It would be very surprising if this Act does not face a number of challenges that subject it to legal interpretation.

Although the Act seems to provide a simple solution to a problem, its passage raises a variety of issues about the nature and extent of control an employing municipal entity can exert if officers decide to carry a concealed weapon in another state and about officers' safety if they decide to take police action in another state while armed. For example, the Act does not afford the officer any more protection than a private citizen taking action would receive. Because of gaps such as this, LEAF felt it was important to discuss the issues that departments should address concerning the Act, thereby helping law enforcement executives to understand the MML Pool and Fund's position on insurance coverage issues.

### **How the Act Affects the Management of Law Enforcement Activities**

Under this legislation, an employing law enforcement agency may not restrict licensed police officers from carrying a weapon concealed. However, employers have the authority and responsibility to direct their officers by policy and regulation. The Act does not eliminate the employer's ability to hold employees accountable for the weapons they carry or their behavior and actions. This is especially important should an officer, acting in the capacity of a private citizen, violate the law or local regulations in a state that they may be visiting. Having reviewed many departments' rules and policies, LEAF feels that only minor modifications and additions will be necessary to convey and enforce this point.

Unless specifically directed to carry their firearm by the top law enforcement executive or his designee, officers, while off duty or on leave time, taking action outside their jurisdiction – especially outside of Michigan – are generally acting outside the scope of their employment with the governmental agency. When acting outside scope of their employment they cannot have the governmental immunity protections afforded by State law. Since they would be acting without color of law, they would not receive the qualified immunity protection available under federal law. In addition, since the actions are outside their employment, it is unlikely that will have the municipal entities' insurance protection or the legal representation that accompanies the cloak of governmental employment.

Officers must also be aware that most homeowner insurance policies do not have coverage for intentional acts. Pulling a gun to intercede in an incident – even in self-defense – could result in the determination that the act was intentional, and, as a result, the insurer may not offer coverage or defense.

The reality is that officers who exercise their right to carry arms under this Act and take action, or violate the law, are without many legal protections and are at great personal risk should criminal charges or litigation follows. In these situations – no matter the outcome – attorney fees may be out of the individual's pocket. Retirees have no legal or municipal entity protection no matter where they are or what actions they take. They are at even greater risk than an active officer is.

Law enforcement must also consider the numerous threats to personal safety that an off-duty officer or retiree faces when taking police action in street clothes without the equipment, weapons or implements that they have at their disposal when working.

Another issue is that, in a different jurisdiction, the protocol for a police officer's use of force may differ vastly from what they have learned at home. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989) governs the evaluation of the use of force by a police officer. The court said that police conduct must

undergo examination to determine *“whether the officers’ actions are [objectively] reasonable in light of the facts and circumstances confronting them, without regards to their intent or motivation; ...* This is to be judged from the perspective of the officer on the scene, rather than with the benefit of 20/20 hindsight.” In Michigan, several cases support Connor. The problem that officers may face if they use force in a jurisdiction other than the one in which they received training is that their frame of reference may be inappropriate. In addition, officers are acting as private citizens, not as officers, so the evaluation of their actions could be from a wholly different legal perspective. In many states, a private citizen has the duty to retreat from the threatening situation and can only use force as a last defense. The officer must know the specific requirements of the state or locale where they are located at the time of the incident. If they do not, their actions may easily conflict with the law and the officers might find themselves criminally charged. Supporters of the Act do not address these serious concerns as they describe the purpose of the Act.

Of particular concern to officers is Section 2, Subsection (b) of the law that indicates that an officer, whether active or retired, carrying a weapon outside the state would have to master a confusing range of local and state ordinances restricting the presence of firearms on a particular piece of property. For example, Subsection (b)(2) of the Act gives states the right to prohibit or restrict the possession of firearms on state or local governmental property, specifically mentioning buildings, bases and parks. This would include state campgrounds, state and local parks, and athletic venues. The Act also gives private persons, businesses or organizations the right to prohibit or restrict the possession of a concealed weapon on their property. Examples could include clubs, restaurants, bars, amusement parks, ballparks, theaters to mention a few.

### **Taking Action**

Although, there is nothing that a municipality can do to stop an officer who chooses to carry a weapon concealed in another state, the MML Pool and Fund Loss Control recommends that municipal entities take action to protect themselves. They should educate their officers about the risks they assume if they decide to carry a weapon or use it under the Act. First, law enforcement executives should

develop and adopt a policy that does not allow employees to take department issued equipment outside the state except when they are performing a job function as part of a departmental assignment. Examples include picking up a prisoner out of state or being on an investigation. Departments can exercise discretion when making determinations about other activities such as conferences or training. The restriction of the use of department equipment reinforces the idea that officers, acting outside the municipal entity for which they work, are private citizens and have no police power.

Departments should rescind any rule or policy that requires officers to carry arms while off-duty. Policies that require officers to carry arms off-duty tie the department to officers no matter where they are or what they are doing. Carrying a weapon off duty then becomes a requirement and eliminates discretion.

Departments should consider adding the following recommended language to their weapons policy. This language will help to manage the exposure of the municipal entity and their officer's under the Act. At the same time, the language will reduce the department's exposure should an officer decide to obtain a Concealed Pistol License.

- This department does not require the carrying of a firearm by sworn officers while off-duty. The department requires any officer who chooses to carry a firearm while off-duty to conform to department policy and rules.
- Police officers may not transport department-owned equipment, weapons, or implements outside the State of Michigan unless they are on duty and on department assignment that the (Chief, Sheriff or Director) or designee has authorized.
- Law Enforcement powers granted by the (Enter the Governmental Entity Name) will not be exercised while off-duty and outside the State of Michigan.
- Employees possessing a Concealed Pistol License from the State of Michigan cannot carry any department owned equipment, weapons or implements while off-duty. Any officer carrying a weapon while off-duty

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➤ who has obtained a Concealed Pistol License is doing so as a private citizen and without authorized police powers granted by the (Enter the Governmental Entity Name).

At this point, "Law Enforcement Officers Safety Act" is full of ambiguity and has loopholes that may allow states not to comply. Until the Department of Justice or the federal legislature fixes some of the problems, LEAF strongly recommends that departments strongly caution officers and retirees not to rely on this law when carrying a firearm concealed outside the state of Michigan. Departments should also caution officers that any action they take or violation they make will be judged by the rules, regulations and policies of the department independently of any action taken by any one else.

Furthermore, municipalities who are feeling pressure from retirees who want help in complying with the Act must resist it. Retirees no longer have an employment relationship with the municipal entity and are private citizens. Keep in mind that providing firearms training to private citizens, even if they pay for the training, makes the municipal entity an entrepreneur and may remove its governmental immunity protection should a retiree do something that results in litigation. Furthermore, for retirees to meet the requirements of the Act, they must receive certification that they meet the mandatory requirements making them eligible to carry a firearm under federal law. Michigan has no state mandatory requirements. The Act only allows departments to issue an identification card.

If a department attempts to certify that retirees have met training requirements, it is doing them a great disservice. In this situation, retirees, who are private citizens, would receive the same training as officers do. However, they cannot act like officers and the courts will not judge them as officers. As tough as it sounds, especially when a former employees have given many years of service, municipal entities should not train retirees. In doing so, they may create a responsibility or attachment that is not necessary or in their best interest.

Raymond Beach, Director of The Michigan Commission on Law Enforcement Standards met with LEAF in September to discuss -- among other issues -- what the LEAF members thought about the administration of the retiree

certification and training requirements. A very frank discussion ensued during which attendees explored many sides of the issues. In addition, participants discussed the consequences of the decisions that law enforcement must make. Mr. Beach assured LEAF that MCOLES was looking at its options and, with other states and the Department of Justice, was reviewing the Act with the Michigan Attorney General in order to clarify it. He also informed LEAF that MCOLES was working with the State Legislature to be ready for any modification in current State law that may become necessary. He advised patience and suggested

that departments instruct any retiree who inquires about the Act that they have to wait until all the issues are resolved. LEAF agreed with Mr. Beach MCOLES is in the best position to work toward the standardization of firearms training for the state. LEAF assured Mr. Beach of its support and asked to participate as needed in the development of a firearms training standard for law enforcement in Michigan.

The major problem with the "Law Enforcement Officers Safety Act" is that no one can predict with any degree of accuracy as to what consequences officers or retirees might face if they are found to be in possession of a concealed firearm in another state and to have violated one of the provisions of this law. A technical violation of the Act or a state or local law could expose the officer or retiree to the full criminal liability existing in a given state regarding the carrying of a concealed weapon. A conviction under those local state statutes will establish the basis for further disciplinary action by the employer. This action could include termination and loss of state license if the conviction is for a felony. Some states require mandatory sentencing for firearms offenses.

Because of all the unanswered questions, LEAF advises that officers or retirees do not carry firearms outside of State of Michigan until it can be determined how the individual states are going to react to the provisions of the Act.

### The LEAF Manual for Law Enforcement Risk Control at [mml-leaf.org](http://mml-leaf.org)

In 1992, the MML Liability and Property Pool brought together a group of Michigan police chiefs to address risk control issues in law enforcement. The group called itself the Law Enforcement Action Forum (LEAF). It is comprised of two groups of police professionals, the Northern and Southern Committees. Each Committee meets regularly in its respective region. The group's mission is to develop law enforcement policies and related support materials designed to provide guidance to law enforcement executives.

A few years after LEAF'S inception, the MML Workers' Compensation Fund became a co-sponsor of LEAF with the Liability and Property Pool. Co-sponsorship recognizes the correlation between safe work practices and decreased liability exposures, as well as providing an additional source of stable revenue to fund LEAF's activities. The basic philosophy then became that by establishing safe work practices the organization might reduce or at least mitigate its risk exposure and, in turn, this would reduce the potential for litigation.

Primary supporters of LEAF and its mission have been administrators of the MML insurance programs, members of the MML Risk Management Services staff, Loss Control, and James DeGrazia of O'Connor, DeGrazia, Tamm and O'Connor, P.C., the committee's legal advisor who specializes in the area of police liability and legal defense. Collectively, these individuals assisted the members of LEAF in researching and responding to various police issues and frame policy language. The Committees meet jointly at least twice a year to review existing sample policies, discuss current law enforcement risk control issues, and to provide insight and guidance to the MML Risk Management and Loss Control staffs.

Since its inception, LEAF has significantly contributed to the steady and sustained reduction in both the frequency and severity of law enforcement claims. These proven

results have helped to garner credibility for LEAF and the respect of Michigan law enforcement professionals. Many consider the policies and the information in the MML, LEAF

Manual for Law Enforcement Risk Control to be the standard for law enforcement in the State of Michigan.

The National League of Cities uses LEAF as an example of success in the field of law enforcement risk control. Risk management and loss control regularly receive requests from out-of-state departments or experts for the materials. LEAF policies and training initiatives are receiving increased attention at the national level.

You can find [The MML LEAF Manual for Law Enforcement Risk Control](http://mml-leaf.org) on the web at [mml-leaf.org](http://mml-leaf.org). If you have not been on the site, then you should contact the MML LEAF Coordinator, Gene King at [gking@meadowbrook.com](mailto:gking@meadowbrook.com) to obtain your password. Once in, all the up to date policies, Memorandums of Law, Forms, Training Materials, Newsletter and other related resource materials are available for your use.

At the end of September, the Northern and Southern LEAF Committees met to review and update many chapters of the Manual. These new and updated policy materials will appear in the Manual after the first of the year. Always check in the "What's New" folder to see if LEAF has added any new materials.

LEAF works hard to provide relevant, current and up to date information for use by Law Enforcement Executives who are members of the Pool and Fund. Take time to look at the resources; doing so, can save a lot of time in research and policy development. Again, the address is [mml-leaf.org](http://mml-leaf.org).

***While compliance with the loss prevention techniques suggested herein might 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.***

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the MML Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

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