

California Signs Police Reform Legislation Into Law

On September 30, 2021, Governor Gavin Newsom approved and signed SB 2 and SB 16.¹ SB 2 created a decertification procedure for peace officers and removal/denial of qualified immunity for claims or actions brought under Tom Bane Civil Rights Act (Civil Code section 52.1). SB 16 impacts retention of peace officer employment records and access to employment records.

The following are general summaries of the notable changes in the law that may impact law enforcement agencies and peace officers.

SB 2

Overview

SB 2 was intended to establish an “independent civilian” nine-person commission to oversee officers who commit misconduct and to change the qualified immunity typically afforded to officers and agencies.

Civil Code section 52.1

SB 2 added Civil Code section 52.1(n). Subsection (n) holds that immunity provisions in Government Code sections 821.6 (personal liability for malicious acts), 844.6 (injuries to prisoners and indemnity), and 845.6 (prisoner’s medical care) are **not applicable** to actions (brought under Tom Bane Civil Rights Act) for claims against individual officers and/or their agency.

Additionally, subsection (o) holds that the indemnity provisions under Government Code section 825 (tendering indemnity), Government Code section 825.2 (payment on claims), Government Code section 825.4 (indemnification of public entity), and Government Code section 825.6 (recovery for indemnification) shall apply to causes of action brought under this section or the Tom Bane Civil Rights Act.

Government Code section 1029

Government Code section 1029 was expanded to include additional persons who are disqualified from becoming a peace



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officer. These new changes included discharge from the military with adjudication for felony offense; misdemeanor conviction reduced from a felony; conviction of certain offenses (forgery, theft, mutilating, falsifying records, bribery and corruption, perjury and subornation of perjury, falsifying evidence, influencing, intimidating, or threatening witnesses, refusing to receive or arrest criminally charged persons); and being listed on the National Decertification Index of the International Association of Directors of Law Enforcement Standards and Training or similar database.

Penal Code section 832.7

SB 2 granted the Commission on Peace Officer Standards and Training with authority to access an officer's confidential personnel records.

Penal Code section 13503

Previously, the Commission did not have authority to adopt rules to cancel certificates. SB 2 granted the Commission authority to adopt decertification rules.

Penal Code section 13509.5

Within the Commission on Peace Officer Standards and Training, SB 2 created a Peace Officer Standards Accountability Division. The Division's responsibilities are to review investigation, conduct investigation, present findings and recommendations, and initiate proceedings to suspend or revoke a certification under the direction of the Commission.

Penal Code section 13509.6

SB 2 authorized the Governor to establish the Peace Officer Standards Accountability Advisory Board, which will make recommendations on decertification. The Board consists of nine members: a peace officer; two from nonprofit or academia in police accountability; two from community-based organizations in police accountability; two who have experienced wrongful use of force or surviving family members; and one attorney with experience with oversight of peace officers. The Speaker of the Assembly and the Governor select the Board members for a term of three years.

Penal Code section 13510

Previously, section 13510 authorized the Commission to establish rules on minimum standards and competency for peace officers. The amendment now authorizes the Commission to uphold the rules. It is likely the Commission may have the authority to enforce its rules.

Penal Code section 13510.1

Previously, the Commission established a certification program for the California Highway Patrol; SB 2 removed references to the California High Patrol.

SB 2 expanded the definition of a peace officer, for whom the Commission can regulate, to include peace officers employed by various entities, including Department of Consumer Affairs, Dental Board of California, Director of Forestry and Fire Protection, Department of Motor Vehicles, California Horse Racing Board, State Fire Marshal, Food Inspectors, Division of Labor Standards Enforcement, State Departments of Health Care Services, Public Health, Social Services, Department of Toxic Substances Control, Office of

Statewide Health Planning and Development, Public Employees' Retirement System, Department of Insurance, Department of Housing and Community Development, Office of the Controller, Department of Business Oversight, Contractors' State License Board, Office of Emergency Services, Secretary of State, California State Lottery, Employment Development Department, California Science Center, Franchise Tax Board, Department of Managed Health Care, State Department of Developmental Services, State Department of State Hospitals, California Health and Human Services Agency, California Community College, school districts, San Francisco Bay Area Rapid Transit District, harbor or port police, transit police officers, airport law enforcement officer, and railroad police officer.

A certificate or proof of eligibility is deemed the "property" of the Commission, which it can suspend, revoke, or cancel.

Penal Code section 13510.8

Penal Code section 13510.8 lists the grounds for decertification. In addition to the ineligibilities under Government Code section 1029, a peace officer may be decertified for: termination for cause and "serious misconduct" (dishonesty by the officer or reporting of another officer; abuse of power; physical abuse [unreasonable or excessive force]; sexual assault; demonstrated bias; egregious or repeated violation of the law; participation in law enforcement gangs; failure to cooperate in an investigation; and failure to intercede).

Law enforcement agencies are responsible for completing an investigation for serious misconduct, whether the officer is employed or no longer employed by the agency. The Peace Officer Standards Accountability Division will review the law enforcement agency's investigation and may conduct its own investigation.

Penal Code section 13510.85

SB 2 grants an officer due process rights, including notice, right of review, and other procedural rights, including a right to an administrative hearing before an administrative law judge.

Penal Code section 13510.9

Section 13510.9 contains the reporting requirements for law enforcement agencies. These reporting requirements include employment (hiring and separation), complaints, findings of a civilian oversight entity, disposition of an investigation, civil judgment, and court finding. The Commission may inspect and copy an agency's investigation, including any evidence.

Agencies will be required to execute and maintain an "affidavit-of-separation" signed under penalty of perjury. The affidavit will include the reason for the separation, whether as part of a resolution or settlement. An officer may respond to the affidavit of separation.

Law enforcement agencies will be notified of any investigation by the Division (unless it would interfere with the investigation), the finding by the Division, determination by the Commission, and adjudication from a hearing.

SB 16

Overview

SB 16 amended or added the following sections:

Evidence Code section 1045 (in-camera review and 5-year limitation)

Penal Code section 832.5 (retention of complaints for 5 years)

Penal Code section 832.7 (public records act)

Penal Code section 832.12 (written permission for employment file); and

Penal Code section 832.13 (immediate reporting of use of force).

SB 16 outlines how law enforcement agencies should handle, store, organize, and retain peace officer personnel records. The following are some of the notable amendments of the new legislation.

Evidence Code section 1045

Previously, courts, during an in-camera review, considered only conduct occurring five years from the complained-of conduct at issue. This 5-year provision has been removed (likely to conform to the longer 15-year period of disclosure permitted under Penal Code section 832.5(b), below). Custodians of records will likely have to retain and provide additional records to court as a result.

Penal Code section 832.5(b)

Previously, law enforcement agencies were required to retain complaints for a minimum of 5 years. The legislation now makes a distinction between not-sustained and sustained records. Not-sustained records must be retained for a minimum of 5 years.

Sustained records must be retained for a minimum of 15 years. During the pendency of any request, the records cannot be destroyed; a litigation “hold” may be advisable.

Penal Code section 832.7

SB 16 expanded and included additional types of records subject to a public records act request:

- Sustained findings involving unreasonable or excessive force
- Sustained finding of an officer’s failure to intervene during another officer’s use of excessive or unreasonable force
- Sustained finding an officer engaged in conduct (verbal, writing, online posts, recording, or gestures) involving prejudice or discrimination
- Sustained finding of unlawful arrest or unlawful search
- Factual information provided to an agency’s attorney
- Factual information discovered by an agency’s attorney during an investigation
- The billing records of the agency’s attorney, with some limitation

Penal Code section 832.12(b)

SB 16 now requires a hiring agency to request and the hiring department to review an officer’s prior employment record.

(New) Penal Code section 832.12(b)

Peace officers must “immediately” report “all” use of force to their department or agency.

These new laws will change an agency's duty and responsibility to respond to the public's requests for information related to peace officers and disciplinary records. Should you have any questions, your legal advisors at Hanson Bridgett are available to assist your agency.

¹ Governor Newsom also signed other legislation impacting law enforcement agencies and officers, including AB 26, AB 48, AB 89, AB 481, AB 490, and AB 958.

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