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Insurance Trust**

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RISK MANAGEMENT INFORMATION
LAW ENFORCEMENT OFFICERS SAFETY ACT OF 2004

The Law Enforcement Officers Safety Act of 2004 became law this past summer. The main force of the Act is to preempt state restrictions so “qualified” active and retired police officers can carry handguns nationwide. One frequently asked question is whether cities are legally obligated to help employees and retirees achieve “qualified” status. LMCIT believes the Act imposes no such obligation. This conclusion is based on the statutory language, and is supported by broader constitutional principles of federalism described by the U.S. Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997) (striking down requirements that local police help conduct federal firearms background checks).

Whether or not to aid active and retired officers achieve “qualified” status to carry nationwide is a discretionary call for each city. This memo outlines risk issues that should be considered in making that decision.

No new obligations

The Act essentially treats agency-issued photographic identification cards as proof that an individual is qualified to carry a handgun throughout the United States. The key questions facing cities are (1) whether they are *required* by federal law to issue photo credentials so officers can prove they are qualified (no); (2) whether they are required to provide training to retired officers (no); and (3) whether federal law prevents cities from exercising control over the use of agency-issued credentials (no).

The language of the Act does not command local law enforcement agencies to issue identification cards to officers. The Act *assumes* these credentials will be routinely issued as a matter of course. But under *Printz*, Congress cannot issue any kind of federal command, or insist through an unstated assumption, that local government agencies issue identification cards to their employees. Likewise, neither the language of the Act nor any kind of assumed congressional intent requires local governments to provide training courses for retired law enforcement officers. Finally, there is no enforceable federal requirement that cities allow officers to keep agency-issued credentials in their possession. Identification cards belong to the issuing governmental body, not the individual officer.

Liability concerns

The prospect of off-duty active and retired officers carrying handguns in other states gives rise to a number of potential liability scenarios.

- Individual liability – Personal injury and wrongful death. An officer visiting another state is the legal equivalent of a gun-carrying citizen. Police immunities against civil and criminal liability for using deadly force will probably not be available. Standards for civilian use of deadly force are generally more restrictive, will vary from state to state, and would be very difficult to incorporate into typical police training.
- Municipal liability – Failure to train. A plaintiff in another state may assert that Minnesota agencies should have trained their police officers to the “armed citizen” standard for use of deadly force. A defense would be that the home agency has provided the training specified by federal law. There is no good way to predict how courts will rule on those issues.
- Municipal liability – Failure to supervise. An officer who is unfit to carry a firearm (due to a mental or physical disability) could use her credentials to carry a handgun anyway in another state. A plaintiff would likely assert that the agency should have revoked the credentials once it was on notice that the officer was unfit.
- Individual and Municipal – More imposing laws. Unlike Minnesota, not all states have liability caps for public officials, and other states may not offer immunities to protect police in discretionary situations. Even if there are, they may not apply to visiting officers from other states.

Comparing the risks

Concern for the safety of off-duty and retired officers might be a good reason to help them obtain “qualified” status to carry handguns in other states. But the financial and legal risks of helping them do so are much greater than the risks of saying “no.”

- The *Printz* case substantially undermines any legal claim that local agencies are obligated to provide credentials and training so officers can carry nationwide. Comparatively, the outcome of personal injury or wrongful death claims based on handgun use in other states is far less predictable. The outcome will depend on the facts of the case and the laws in force where the incident occurred. Issues may also arise concerning the officer’s fitness and training.
- The cost of defending against a lawsuit by an aggrieved employee or retiree who wants to carry a gun will likely be several orders of magnitude *less* than the damages recoverable in a suit alleging personal injury or wrongful death.

Insurance coverage concerns

The city’s LMCIT liability coverage protects officers for liability claims that arise in the course and scope of their duties. The availability of coverage depends on whether the employee was doing something the employer asked for or tacitly approved, and not necessarily on whether the employee had legal status as a police officer during the incident. If the message sent to officers is “stop the felony wherever it happens,” then an off-duty officer who does so in another state

would be acting in the course and scope of employment. LMCIT's liability coverage would be available to the officer.

The city's LMCIT liability coverage would apply to a claim against the city whether or not the officer was acting in the course and scope of employment. Most cities carry a reasonable amount of coverage, but this coverage amount may not be adequate to protect against the risks of higher defense costs and uncapped damage awards in other states. Expenses like travel and lodging for court appearances are not covered by liability insurance.

Policy recommendations

LMCIT recommends that members carefully consider the extent to which they become involved in enabling active and retired officers to carry handguns in foreign jurisdictions.

Currently employed officers:

- There should be a written policy defining the course and scope of duties for city police officers. All officers should receive documented training on the policy.
- There should be a written policy about ID cards. It should clearly spell out that the cards belong to the issuing agency, not the individual employee, and must be immediately surrendered to the agency upon demand.
- If circumstances arise that warrant disarming an officer, the agency should also demand the immediate surrender of identification cards.

Retired officers: Cities should think even more carefully about whether to help retired officers achieve qualified status. The risks are more difficult to manage. Retired officers are not subject to the same daily monitoring that goes on with current employees. Impairments or disabilities that would warrant disarming a retiree will develop largely outside of the agency's knowledge, and there will be no opportunity to respond. As with active officers, standard police training does not necessarily prepare them to make legally defensible "citizen" shooting decisions either in Minnesota or elsewhere. A bottom-line consideration for policy makers is whether there is a sufficient public benefit from arming retired officers to offset these risks to your city.

If cities decide to take on these risks, there may be a *minor* risk management benefit in requiring retirees to obtain a state permit to carry before issuing credentials. The permitting process will help identify any legal restrictions against firearms possession. This step will not, however, address the broader spectrum of risks discussed above. If identification cards are issued to retirees, the cards should disclaim that the retiree has any official status with the agency. Cities should consider language such as: "This card identifies the individual as a retired police officer of the City of _____. The bearer is not an officer or agent of the city, and this identification card does not give the bearer any authority to act on the city's behalf or to exercise law enforcement authority."

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Consult your attorney for advice concerning specific situations.