



CIRSA LAW ENFORCEMENT LIABILITY ALERT

Published by the CIRSA General Counsel's Office

SAFER TOGETHER

The Enhance Law Enforcement Integrity Act – Sweeping and Dramatic Changes Coming to Colorado Law Enforcement

This article was written by Eric M. Ziporin of the law firm of SGR, LLC. The firm is a member of CIRSA's defense counsel panel and provides legal services to CIRSA and its members in a wide variety of claims including law enforcement liability claims. Mr. Ziporin welcomes any questions regarding this article and will be happy to provide additional information upon request. He can be reached at 303.320.0509.

Editor's Note: If your entity participates in CIRSA's liability coverage program and you receive a notice, demand or suit asserting a claim under the Enhance Law Enforcement Integrity Act ("ELEI"), then as with all liability claims, be sure to promptly submit the matter to the CIRSA Claims Department so that the matter can be reviewed with respect to potential coverage and claims handling under your CIRSA law enforcement liability coverage.

Among its immediate effects, the ELEI states that each law enforcement agency in the state shall train its peace officers on the new use of force standards and certain other provisions of the bill, prior to their becoming effective September 1, 2020. In conjunction with this training your agency may determine it needs to update its use of force policy or other policies in its police policy and procedures manual.

If your city or town is a CIRSA member, CIRSA will, as a service to its members, make available the assistance of one of its defense panel attorneys to review and comment on draft updates to your policies and provide related consultation. CIRSA will provide up to five hours of attorney time to your entity for this assistance, at no member expense. This service is not a substitute for legal and other advice from your entity's city or town attorney, police legal advisor, and law enforcement professionals. If your entity would like to obtain this CIRSA assistance, please call or e-mail Sam Light, CIRSA General Counsel, at 720-605-8002 or saml@cirsa.org.

Police reform is coming to Colorado this summer to a city near you. More precisely, sweeping and unprecedented police reform is coming to your city or town, and with it comes increased liability exposure for not only peace officers in Colorado, but also for the cities and towns who employ them. Earlier in the 2020 legislative session, proponents of police reform in the Colorado legislature attempted to pass a police reform bill without success. The tragic and indefensible killing of George Floyd at the hands of police officers in Minnesota and the protests that followed provided these proponents with the momentum needed over the last several weeks to quickly pass [Senate Bill 20-217](#), the Enhance Law Enforcement Integrity Act ("ELEI") – just prior to the expiration of the legislative session. That bill now waits for the signature of Governor Polis, which is expected to happen in the next week or so.

(page 1 of 3)

The ELEI will mandate changes in many areas, to include: (1) requiring all peace officers in Colorado to be equipped with body worn cameras by July of 2023; (2) limitations on the force that can be used during protests; (3) an expansion of criminal liability for peace officers and associated limitations on the use of force and deadly force; (4) mandatory revocation of an officer's Peace Officer Standards and Training ("POST") certification if found criminally or civilly liable for certain conduct; (5) mandatory employment disciplinary sanctions for officers; (6) mandatory comprehensive reporting requirements for peace officers and police departments; and (7) a new civil cause of action under Article II of the Colorado Constitution for claims alleging excessive use of force or violation of other rights secured by Article II. This article will focus on the new excessive force claim under the Colorado Constitution and its impact on peace officers and municipalities, both from a liability and financial perspective.

To fully appreciate the changes that the new Colorado Constitution claim will bring to the civil liability landscape, it is important to understand how these claims have looked until now. Historically, there have been two ways that an alleged victim of excessive force could pursue their claim in court: (1) a tort claim under Colorado law alleging negligence, assault, battery, etc.; and (2) a federal civil rights claim pursuant to 42 U.S.C. § 1983 alleging excessive force in violation of the Fourth Amendment. The vast majority of excessive force claims have been brought pursuant to § 1983 and have been filed in federal court, handled by judges who deal with these claims on a frequent basis and are familiar with the defenses asserted on behalf of peace officers and municipalities.

Until now, significant protections and limitations existed in defending these claims. Any state tort claim has been governed by the Colorado Governmental Immunity Act ("CGIA"). The CGIA has provided governmental immunity to peace officers in the sense that any claimant must prove that the conduct of the officer was "willful and wanton." Municipalities have had complete sovereign immunity for state tort claims under the CGIA as there has been no applicable waiver of immunity for claims alleging excessive force. In the event that a plaintiff prevailed at trial, the CGIA provided a statutory cap limiting the amount of damages that could be recovered. While these same protections and limitations do not exist for federal claims brought under § 1983, cases against peace officers are often defended on the basis of qualified immunity, in addition to other defenses. For these federal claims, qualified immunity requires the plaintiff to prove that the officer's conduct violated clearly established law.

The ELEI changes everything. Upon being signed by the Governor, a claimant can now bring a claim alleging that his or her rights were violated under the Colorado Bill of Rights, that being Article II of the Colorado Constitution. The Colorado Constitution essentially mimics the Fourth Amendment which prohibits unreasonable search and seizure, to include prohibiting the use of excessive force by peace officers. The new claim provides liability for peace officers who not only use excessive force, but who fail to intervene to prevent a fellow officer from using excessive force.

Most significantly, the ELEI expressly states the CGIA will not apply to this new claim, thereby eliminating CGIA governmental and sovereign immunity to state tort claims previously afforded to officers and municipalities. The statute also expressly provides that qualified immunity is not a defense to this claim. In association with the mandatory body camera requirement, an inference of officer misconduct and liability is created in the event that the officer fails to activate or tampers with the camera. An entirely new claim is created against municipalities, as the ELEI authorizes the Colorado Attorney General to bring a civil action against a public entity in the event it determines (based on the aforementioned reporting requirements) that the municipality has a pattern and practice of constitutional violations.

The potential financial impact of the ELEI is significant. The statute eliminates any limitations on a plaintiff's ability to recover damages and attorney fees. Cities and towns will be required to indemnify a peace officer for any settlement or judgment, unless the peace officer was criminally convicted for the conduct giving rise to the claim, or unless the employer determines that the officer did not "act upon good faith and reasonable belief that the action was lawful." Under the latter scenario, the peace officer will be responsible to pay a portion of the settlement or judgment out of his or her own pocket, but if the officer is unable to do so, the city or town will be required to pay the full amount.

The elimination of immunities and limitations associated with the new Colorado Constitution claim all but ensures that it will be a primary remedy pursued by claimant's attorneys moving forward, thereby eliminating or significantly reducing the prosecution of state tort and § 1983 claims alleging excessive force. These claims will be filed in state courts throughout Colorado – courts which are already more burdened with heavier case loads than the federal court and handled by judges much less familiar with these types of claims.

The ELEI is silent as to the standard of review that will be applied by the court evaluating the claim. It is well settled law that claims alleging excessive force are to be assessed under the "objective reasonableness" standard and the factors set out by the United States Supreme Court in *Graham v. Connor*. Given the similarities between Article II of the Colorado Constitution and the Fourth Amendment, it is anticipated that the courts will apply this same standard of review, but no one will know for sure until the courts start to interpret the new law. It is also unknown at this point whether a claimant will be able to bring this new claim against the municipality, and if so, what he or she needs to prove to establish municipal liability.

The defense of civil claims involving police liability will never be the same. The elimination of immunities and limitations creates new and increased risks for all involved, not the least of which is the risk to peace officers in Colorado who may lose their livelihood if they do not prevail at trial. The ELEI will undoubtedly alter how cases are defended, not only in terms of the settlement of claims but the decision to take a case to trial. It is inevitable that there will be legal challenges to the ELEI, but it could be years before those challenges are resolved, and they may not resolve in favor of law enforcement. For now, the political and social climates in this county and state are demanding police reform, and it is imperative that peace officers adapt, accept, and receive training on these changes to their profession.