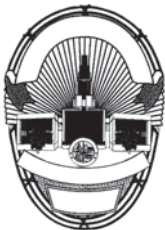


**PEACE OFFICERS' GUIDE  
TO  
INTERNAL AFFAIRS  
INVESTIGATIONS,  
WORKERS' COMPENSATION,  
DISABILITY AND PERSONAL  
INJURY CLAIMS**



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With additional office locations in  
Newport Beach Ca., Bakersfield Ca. and San Diego Ca.

*The purpose of this booklet is to inform the members of employee organizations represented by Adams, Ferrone & Ferrone of their rights in those areas which are of vital concern to them and their families.*

*Adams, Ferrone & Ferrone is an established law firm which devotes a significant portion of its practice to the representation of public safety employee organizations and their members throughout the State of California, particularly in Southern California. They concentrate their representation of associations in the areas of labor negotiations, criminal and disciplinary proceedings, workers' compensation, personal injury, retirement and officer involved shootings.*

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*They also have offices in  
Newport Beach Ca., Bakersfield Ca. and San Diego Ca.*

**WARNING: MAKING A FALSE OR FRAUDULENT WORKERS' COMPENSATION CLAIM IS PUNISHABLE BY UP TO 5 YEARS IN PRISON OR A FINE OF UP TO \$50,000.00 OR DOUBLE THE VALUE OF THE FRAUD, WHICHEVER IS GREATER, OR BOTH IMPRISONMENT AND A FINE.**

## INTERNAL AFFAIRS INVESTIGATIONS INTRODUCTION

This booklet is intended to provide the working peace officer a brief overview of the main elements of the Public Safety Officer's Procedural Bill of Rights Act, also known as "POBR" or "AB 301" which is codified in *California Government Code §3300-3311*.

All employees should be aware of their rights when confronted with a potential disciplinary situation. We recommend that you always contact your lawyer or labor representative for advice when any question arises. There are at least seven reasons why you should always contact your labor representative or lawyer:

1. Never under-estimate the degree of effort your department, the District Attorney, or other prosecuting agency will put into an investigation against you if they want to make a "project" out of you.
2. Most peace officers are in control and on the offensive as they do their job in the workplace. When you come under investigation, you are put in a position where you are on the defensive. This is a position with which most officers are very unfamiliar.
3. The fact that you have always given one hundred and ten percent to your department in the past may be completely overlooked when you are under investigation.

4. If you are the subject of a criminal investigation, the District Attorney or other prosecuting agency will go to great lengths to develop a case against you. Many prosecuting agencies will not prosecute misdemeanors and low grade felonies when the defendant is your typical unemployed, repeat offender. However, if the potential defendant is a police officer, the prosecuting agency will examine the case very closely.

5. Many situations that arise in the workplace not only give rise to disciplinary action but also criminal and civil liability. If you are injured in an incident, your workers' compensation, personal injury and disability rights may also be at stake.

6. Your years of experience as a peace officer do not adequately prepare you for a situation in which you are the subject of the investigation.

7. There is never any direct charge to you for an initial consultation with Adams, Ferrone & Ferrone. Their offices have 24 hour emergency service.

## **PEACE OFFICER'S BILL OF RIGHTS**

During any workday you may make numerous inmate or citizen contacts, accomplish arrests, lodge material into the evidence locker, prepare reports and converse with your supervisors.

Accordingly, opportunities have arisen for inmate, citizen and internally generated complaints from fellow officers, co-workers, supervisors, etc., to be lodged against you, for a claim that you employed excessive force upon an inmate, for you to be charged with failing to lodge contraband in the evidence locker or for your supervisors to claim that you were insubordinate. Each of the above situations may ultimately lead to your being interrogated regarding the incident in which you have allegedly been involved.

With this in mind, the legislature enacted California Government Code Section 3300 through 3311, properly known as the Public Safety Officer's Procedural Bill of Rights Act, and commonly known as AB 301, or POBR. In this booklet, we refer to AB 301 as "POBR".

POBR will not be discussed in detail in this booklet. This booklet is designed to provide a rapid reference for the working peace officer and to answer the most common questions which will arise during the workday. Your Association attorney or labor representative should be contacted as soon as possible before an interrogation in

order to provide you more detailed guidance.

## **TO WHOM DOES THE ACT APPLY?**

Section 3301 of the Government Code states that POBR applies to all local peace officers, described in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33 (except subdivision (e)), 830.34, 830.35(except subdivision(c)), 830.36, 830.37, 830.38, 830.4, and 830.5, of the Penal Code, whether they be employed by a general law or charter city or county.

## **WHEN DO MY RIGHTS UNDER POBR APPLY?**

One of the most difficult questions you could face is when do your rights under POBR apply? We take the position that virtually any investigation could lead to punitive action against you. If an investigator wants to talk to you, the first questions you should ask are whether you are under investigation and whether the investigation could lead to any form of discipline, punitive, or adverse action against you. Unless you are purely a witness to an incident, (which means you are not under investigation yourself), an investigation always has some chance of leading to adverse action against you. You may initially be considered a witness but knowledge you have could possibly implicate you in a manner not known to your Agency. You should consult with your Labor representative or attorney before any interrogation even if you are told you are just a witness.

One case interpreting POBR (*White v. County of Sacramento* (1982) 31 Cal.3d. 676) states when an investigation or interrogation concerns a matter that could lead to punitive action, POBR applies. *White v. County of Sacramento* defines punitive action very broadly.

## **WHAT ARE MY OBLIGATIONS AND RIGHTS WHEN I HAVE BEEN ORDERED TO SUBMIT TO AN INTERROGATION?**

Under California law, a law enforcement officer is subject to discipline for insubordination if he fails to cooperate in an investigation after being ordered to do so. This obligation requires that you respond to such inquiries by appropriate investigating authorities. Thus, irrespective of your constitutional right to protect yourself against self-incrimination, you can be disciplined for failing to comply with such orders to cooperate. We advise that you always follow an order from your Department at the time the order is given. We can later attack the order and possibly the entire proceedings if the order was illegal. However, by not following the order your Department will probably take severe disciplinary action against you for insubordination and it may be many months or years later before we gain your reinstatement.

**MAY STATEMENTS MADE BY ME IN RESPONSE  
TO AN ORDER FROM MY SUPERIOR BE USED  
AGAINST ME IN SUBSEQUENT CRIMINAL OR  
CIVIL LEGAL PROCEEDINGS?**

The United States Supreme Court has held that any statement made by you in response to an order from your superior(s) to cooperate in an investigation is coerced and, therefore, may not be used against you in any subsequent criminal proceeding. (*Garrity v. State of New Jersey* (1967) 385 U.S. 495, 87 S. Ct. 616.) It also appears that the “fruit of the poison tree” doctrine should apply so that no evidence gained as a result of your statement could be used against you either. It is very important that you only give an ordered statement to prevent its use in a criminal proceeding against you.

Moreover, in 1994 POBR was amended to include *Government Code § 3303(f)* which essentially states that a coerced statement is not admissible in any civil proceeding subject to certain exceptions. Those exceptions are (1) when the Department is seeking civil sanctions against the officer; (2) when an officer brings an action against the Department arising out of a disciplinary action; (3) for use to impeach the testimony of that officer after a judge specifically reviews the statement to determine whether and what parts may be used for impeachment; (4) if that officer is deceased. This is a significant amendment to AB 301 and is another clear reason why you should never give a voluntary statement.

## **SHOULD I VOLUNTEER INFORMATION TO THE INVESTIGATORS?**

Absolutely not. From a legal point of view, there is absolutely no reason for you to make any voluntary statements. As noted above, any statement you make should only be in response to an order from your superior so that its future use can be restricted. The fact that your statement is a reply to such order should be verified and documented as clearly as possible, preferably by tape recording it.

Many officers have significantly compromised their cases by giving voluntary statements. Many people have essentially convicted themselves by the voluntary statements they made. In addition, because voluntary statements are accessible in civil proceedings, giving one could damage you in a civil lawsuit and expose either you, your agency or both to a civil judgment. It is our strongest advice that you not give voluntary statements because it will only work to your disadvantage.

## **AM I EVER ENTITLED TO BE INFORMED OF MY CONSTITUTIONAL RIGHTS?**

Yes, but don't panic. If prior to or during the interrogation it is deemed that you may be charged with a criminal offense, you shall be immediately Mirandized or informed of your constitutional rights.

As a rule, you should never waive your Miranda or constitutional rights. This concept is closely related to our advice that you never give a voluntary statement. In most cases, when a Department Mirandizes an officer, and the officer refuses to waive his or her rights, the Department will then order the officer to answer questions. Remember, any statement made in response to an order is deemed coerced and may not be used against you in a criminal proceeding and most parts of a civil proceeding.

## **HOW MUST MY INTERROGATION BE CONDUCTED?**

Once POBR applies, Section 3303 provides that:

1. The interrogation shall be conducted at a reasonable hour, preferably at a time when you are on duty or during your normal waking hours unless the seriousness of the investigation requires otherwise. If your interrogation is during off duty hours, you are entitled to appropriate overtime compensation.

2. Prior to the interrogation, you are entitled to know the rank, name and command of the officer in charge of the investigation, as well as the identity of any other individuals present during the interrogation. No more than two interrogators may ask questions at any one time.

3. You must be informed of the nature of the investigation prior to commencing the interrogation.

4. The interrogating session shall not extend beyond a reasonable time, considering the gravity of the issue being investigated. You shall be allowed to attend to your own personal physical necessities.

5. You cannot be subjected to offensive language, threats or promises of reward, nor shall your home address or photograph be given to the press or media without your consent. However, as noted earlier, if you refuse to respond to the interrogation, you may be informed that your failure to answer questions directly related to the interrogation may result in punitive action.

6. Both you and the Department representative may record the interrogation.

7. You cannot be loaned or temporarily reassigned to a location or duty assignment if a sworn member of your Department would not normally be sent to that assignment under similar circumstances.

8. Significantly, if you have given a prior statement or interview you are entitled to review that statement prior to your next interview. You may also be entitled to any reports or complaints made by investigators or other persons prior to a subsequent interview (except those deemed confidential).

NOTE: Always be on the lookout for your prior statements. For example, if you write a police report, ask

for the report before the interview. Also, if any supervisor asks you to briefly explain what happened in an incident, he may document that conversation in a memorandum to his superiors or record the conversation in some fashion. If you have any prior conversation with a supervisor about the matter for which you are being investigated, always ask for any reports, tapes, notes, documents, etc., the supervisor created from that conversation before giving a subsequent interview.

## **WHEN AM I ENTITLED TO A REPRESENTATIVE?**

Upon filing a formal statement of charges or during any interrogation that could result in punitive action, **and at your request**, you have the right to be represented by a representative of your choice (including an attorney) who may be present at all times during the interrogation.

If your representative is a fellow officer or non-attorney, he cannot be required to disclose the nature of the conversation you and he/she have had, nor can they be disciplined for refusing to disclose the conversation, unless the interrogation focuses upon criminal matters. You should keep in mind that statements made to your attorney are protected from disclosure by the attorney-client privilege regardless of the nature of the investigation.

The importance of having representation during an interrogation by a commanding officer or other supervisor was concisely stated in *National Labor Relations Board v.*

*J. Weingarten, Inc.* (1975) 450 U.S. 251, 260-263, 95 S.Ct. 959, 967, where it was said:

“A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated or too ignorant to raise extenuating factors. A knowledgeable... representative could assist the employee by eliciting favorable facts and save the employer production time by getting to the bottom of the incident occasioning the interview....”

We always recommend that you use your labor representative or attorney during an interrogation. At the very least, and only if no other option is available, you should have your Association representative or shop steward sit in with you during the interrogation. It has been our experience that another member of your Department will be a less effective representative, especially in a contentious or controversial interrogation. In any serious matter, especially an investigation with criminal implications, your lawyer should be present. We offer twenty-four hour emergency service. There is never a time when you will not be able to have a representative.

## **TIPS TO KEEP IN MIND WHEN BEING QUESTIONED**

- Just because the department isn't calling your interview an official Internal Affairs (IA) investigation doesn't mean it isn't one. The right to representation is not triggered by the department's description of the interview but rather the circumstances and your state of mind. **If you have a reasonable basis to believe that the interview involves allegations that "could" result in disciplinary action if true (whether the allegations actually are true or not), you have the right to representation.** When in doubt, seek advice from an experienced labor representative or attorney.
  
- Ask for a copy of the complaint if there is one. Remember that there does not have to be a complaint, written or otherwise, for your Department to review a job-related matter that comes to its attention. Under the current law, you are not entitled to review any documents, including complaints, prior to an initial interview although many investigators will provide you with such information if you ask.
  
- Always ask for any materials documenting prior statements made by you regarding the matter under investigation including your police report, if applicable.

- Insist that the investigator inform you of the specific charges or allegations. At the very least, the investigator is required to inform you of the general nature of the investigation prior to the interview commencing.
- Keep your demeanor as pleasant as possible. Remember, other parties, such as a department head, hearing officer, judge or jury may ultimately hear the tape recording of your interview.
- Tape record your interrogation. Make it a habit to have immediate access to a tape recorder.
- Keep a proper perspective on what is happening. Keep in mind that the purpose of the investigation is to gather facts. Your role as the person being interviewed is to provide those facts, in response to questions. The interrogation may not be the appropriate forum to mount a proactive defense of your actions. You provide the facts during the interrogation. Then, if management believes that you acted inappropriately, they will notify you, and at that point you will be able to work on a defense (if you have one), or at least raise mitigating circumstances. You will also then have greater access to the other facts gathered in the investigation (the complaint, witness statements, etc.)

## **TELL THE TRUTH OR FACE TERMINATION FOR DISHONESTY**

- Do not speak unless a question is pending.
- Do not volunteer unnecessary information during the interview. At the end of the interview, ask for a break during which you can determine (especially with the assistance of your attorney or representative) if there is information that would be to your benefit to provide; for example, a witness that the Department may not be aware of. It is also important, however, to make a complete and forthright statement so that additional interviews are not necessary. The more statements that you make about the same incident, the greater chance that you will not be consistent, raising a question as to your credibility. Remember that you have already made one statement if you completed a police report about an incident.
- Only answer one question at a time. If a question requires multiple answers, have the question restated to focus on one issue at a time.
- If the question deals with a matter that you have already responded to in writing, for example in a police report, refer to the report prior to your response. If possible, direct the interrogator to the report for the answer to the question so that you are not restating verbally what you already stated in writing.

- If you started the interrogation without a representative but then become uncomfortable during the interview and decide that you need or simply want one, invoke your right to representation: “I will, of course, answer all of your questions, but at this point in time I request to have a representative assist me prior to answering any more questions, as I am entitled to under Government Code §3303.”
- Ask for a break if you need one, whether to attend to personal necessities, clear your mind or talk to your representative.
- Don’t make statements to other officers, employees or persons about the investigation as they may be interviewed about your statements. This is especially true if you are ordered not to communicate with others. Any conversation after such an order could lead to a charge of insubordination and your subsequent termination.
- Don’t be intimidated by procedural admonishments that management may give you prior to questioning, such as reading you the Public Safety Officers’ Procedural Bill of Rights, Miranda, or giving you a “Lybarger Admonishment” (which should be something like this: “Because you are being administratively ordered to answer questions, nothing you say may be used in a subsequent criminal proceeding”). Statutory and case law requires this type of formality.
- Remember, how you act during the stress of an internal

affairs investigation is as much an opportunity for the Department to gain a positive impression of you (honesty, integrity, etc.) as it is for it to get a negative impression.

## **WHEN DO THE GUIDELINES FOR CONDUCTING AN INTERROGATION NOT APPLY?**

The guidelines set forth in Section 3303 do not apply when your contact with the supervisor results from the normal course of duty, counseling and instruction, or informal verbal admonishment or other routine or unplanned contact with your supervisor or other officer.

However, nearly every interrogation is the result of planned contact, and is not the result of normal or informal contact with you. If a commanding officer or supervisor has particular questions to ask of you, then it can hardly be said that the contact with you is routine or unplanned. You should assess your rights under POBR in every interrogation, including written inquiries.

## **IS THERE A DEADLINE FOR THE DEPARTMENT TO COMPLETE THE INVESTIGATION?**

POBR provides that the department must conclude the investigation and commence discipline within one year of the date an individual in the department who has the authority to order an investigation is made aware of the actions serving as the basis for discipline. The exceptions

available to the department, however, almost negate the rule.

The exceptions are:(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period; (2) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver; (3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies; (4) If the investigation involves more than one employee and requires a reasonable extension; (5) If the investigation involves an employee who is incapacitated or otherwise unavailable; (6) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending; (7) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution; and, (8) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer. Where a pre-disciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by section 3304.

Notwithstanding the one-year time period, an

investigation may be reopened against a public safety officer if both of the following circumstances exist: (1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation; (2) One of the following conditions exist: (A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency; (B) The evidence resulted from the public safety officer's pre-disciplinary response or procedure.

The department must notify an employee of its intent to discipline the officer within 30 days of the decision to discipline. For those peace officers sworn under subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice.

## **WHAT IF THE DEPARTMENT IMPOSES DISCIPLINE?**

You are entitled to appeal any disciplinary action taken against you. If the discipline is serious, the department must provide you with pre-disciplinary safeguards. They must give you notice of the proposed action, copies of all materials upon which the action is based and an opportunity to meet with the individual initially proposing the discipline prior to imposing the discipline. This is not an evidentiary hearing. It is an informal opportunity

for you and/or your representative to respond to the charges.

If, after this pre-disciplinary process, the department imposes the discipline and you wish to contest it, then you are entitled to an administrative appeal hearing in accordance with rules adopted by the agency. The hearing is conducted like a miniature trial. The rules of evidence are not strictly enforced. The hearing takes place before a State Personnel Board Administrative Law Judge. He makes a recommendation to the State Personnel Judge who usually, but not always, adopts the judge's recommendation.

No chief of police may be removed by a public agency, or appointing authority, without providing the chief of police with written notice and the reason or reasons therefor and an opportunity for administrative appeal.

At the hearing, the burden is on the department to prove by a preponderance of evidence that the facts underlying the discipline are true and that the conduct violated a specific policy or policies. As such, the department must go first at the hearing. You are entitled to due process which means at a minimum you must be given the opportunity to cross examine the witnesses against you, present witnesses on your behalf and present evidence in your defense.

Hearsay evidence (statements made outside of the

hearing by individuals not called to testify) is admissible, however, it alone cannot be used to support a finding of misconduct. It must supplement or explain other direct evidence in order to sustain discipline. This means that the department has to call witnesses to testify against you to prove its case. They cannot simply call the internal affairs investigator and have them testify as to what people told them.

After the hearing, the decision is typically subject to review by the superior court. Either the department or you can seek judicial review of the decision. The type of review depends on who is seeking it. You must consult with an attorney if you wish to avail yourself of this opportunity.

**WARNING: THERE ARE TIME DEADLINES WHICH MUST BE MET IN ORDER TO SEEK JUDICIAL REVIEW OF THE DECISION. FAILURE TO MEET THESE DEADLINES WILL RESULT IN YOUR FOREVER BEING PRECLUDED FROM SEEKING JUDICIAL REVIEW. YOU SHOULD CONSULT WITH AN ATTORNEY IMMEDIATELY UPON LEARNING THE RESULTS AFTER THE ADMINISTRATIVE HEARING.**

### **DOES POBR APPLY TO PROBATIONARY EMPLOYEES OR THE EMPLOYEES SERVING AT THE PLEASURE OF THE EMPLOYER?**

Yes. POBR speaks with reference to all public safety officers, regardless of tenure. Additionally, the cases of

*Barnes v. El Cajon* (1978) 87 Cal.App.3d 502, 151 Cal.Rptr. 94 and *Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 172 Cal.Rptr. 84 indicated that peace officers who are on probation or are department heads serving at the pleasure of the agency are covered by POBR.

The law also provides that a probationary employee is entitled to an opportunity for an administrative appeal if disciplinary action is taken. However, in the case of a probationary termination, the Department is under no obligation to reinstate the officer or consider the cause of that termination. It is also unclear as to what type of hearing you are entitled to as a probationary employee. Section 3304.5, however, provides that any administrative appeal filed by a public safety officer shall be conducted in accordance with rules adopted by the public agency. If you are a probationary employee you should thoroughly consult with your labor representative or lawyer if you become the subject of a disciplinary investigation.

**MAY ADVERSE MATERIAL BE ENTERED  
IN MY FILE AND, IF SO, WHAT CAN  
BE DONE ABOUT THIS?**

Pursuant to Section 3305, adverse material may be placed in your file, but you must first be given the opportunity to read and sign the document indicating that you are aware it is being placed in your file. Pursuant to Section 3306, you have thirty days (presumably from the date that you have been made aware of the existence of the

adverse material) to file a written response, which shall be attached to the adverse material and placed in the file. This rule applies to all files your Department maintains on you, not just your formal personnel file.

You should frequently check your personnel file(s) to remain aware of its contents. Section 3306.5 requires departments to allow officers to inspect their file(s) at reasonable intervals and without loss in compensation.

If the officer finds materials in his/her file(s) which they believe are mistakenly/illegally placed there, he/she may request in writing that the items be removed or corrected. The request must describe the material to be removed/corrected and the reasons for the removal/ correction.

The department must respond to the request within 30 days either denying the request in whole or in part or granting the request. If the department denies all or part of the request, it must explain the reasons for the denial in writing. Both the officer's request and the department's response will become part of the personnel file.

### **MUST I AND SHOULD I TAKE A LIE DETECTOR TEST?**

No, and usually not. Pursuant to Section 3307 of POBR, you cannot be compelled to submit to a lie detector test against your will. Likewise, you cannot be disciplined or otherwise punished because of your failure to submit to

an examination. Nor may evidence of your refusal be utilized at a subsequent hearing, trial or other proceeding, whether it be judicial or administrative.

A lie detector test is defined as: (1) a polygraph; (2) a deceptograph; (3) a voice stress analyzer; or, (4) any other device, whether mechanical or electrical, which is used for the purpose of rendering an opinion regarding honesty/dishonesty of an individual.

You may elect under certain rare circumstances to waive your rights and submit to a lie detector test for tactical reasons. Before making such a decision, your attorney should be contacted, inasmuch as submitting to an exam is the rare exception, not the rule.

Practical Note: Our experience is that if you fail a Departmentally administered examination it will confirm your Department's earlier belief that you are a liar. If you pass that same examination, the Department will usually disregard the results because these examinations are inherently unreliable.

**IS THE DEPARTMENT ENTITLED TO INQUIRE ABOUT THE STATUS OF MY PROPERTY, INCOME, ASSETS, SOURCES OF INCOME, DEBTS OR PERSONAL EXPENDITURES?**

Yes, under some circumstances. Pursuant to Section 3308 of POBR, the department is not entitled to inquire

regarding the above, unless such information is obtained or required under a state law or proper legal procedure, tends to indicate a conflict of interest with respect to your performance of official duties, or is necessary to ascertain the desirability of assigning you to a specialized unit in which there is a strong possibility that bribes or other improper inducements may be offered.

### **IS MY LOCKER OR STORAGE SPACE SACRED GROUND?**

Although Government Code Section 3309 seems to provide that your locker or other storage space that has been assigned to you may not be searched, the exceptions almost negate the rule. Thus, the locker or storage space may be searched if you are present when it is done, if you have consented, if there is a warrant, or if you have been told in advance of the search that a search will be conducted.

The same rule applies to your briefcase, locked desk, or other equipment or storage facilities in the workplace. Do not automatically consent to the Department's request to search your locker or briefcase. At the very least, try to get the Department to order you to allow them to search your locker.

### **CAN MY PHOTOGRAPH BE PUT ON THE INTERNET BY THE DEPARTMENT?**

Not if you reasonably believe that doing so will result in a threat, harassment, intimidation or harm to you or your

family. Gov. Code §3307.5. The officer, a District Attorney, or a U.S. Attorney may seek an injunction preventing this use if the department refuses a request in writing by the officer, District Attorney or U.S. Attorney demanding the use cease and desist. A court hearing the injunction may impose a fine up to five hundred dollars (\$500.00) a day commencing two days after the department receives the request and continuing for each day thereafter that the unauthorized use continues.

### **WHAT IF THE DEPARTMENT VIOLATES MY RIGHTS?**

From time to time over-zealous or ignorant investigators or Department Administrators will violate your rights. What should you do? First, don't panic. The Department may be destroying its entire case if you handle the situation correctly. The most difficult cases arise where the Department will not allow you time to contact your labor representative or attorney. In those cases, try to document the fact that the Department is violating your rights. If possible, document these events on a tape recorder. Remember, you have the right to tape record any interview that could lead to punitive action. (NOTE: Never secretly tape record confidential communication between an investigator or other Department representative. It may be a crime.) If the investigator or Department will not order you to give a statement, document this and then walk away. You are never required to give a voluntary statement.

Effective January 1, 1980, Section 3309.5 was added to POBR, providing that it shall be unlawful for a local public

safety department to deny or refuse to provide the rights and protections guaranteed under POBR. Furthermore, the Superior Court has been given initial jurisdiction over proceedings regarding violations of POBR. The court has clear authority to order injunctive or other extraordinary relief to remedy the violations and to prevent future violations. This amendment authorizes the granting of relief which would prohibit the imposition of punitive action, in appropriate cases, where your rights have been violated.

The result of all this means you can go to court to block any future violations of POBR. We may also be able to suppress unlawfully obtained evidence or information even in an administrative proceeding or disciplinary hearing following a violation of POBR.

The various methods of relief support the proposition that you are better off obeying the orders of your supervisors even if they contravene your rights under POBR. By obeying the orders, you will avoid charges of insubordination and the potentially fatal results. Remember, you have a remedy to address the infringement upon your rights.

Significantly, section 3309.5 has been amended to provide that sanctions and attorneys' fees may be awarded against any party filing a bad faith or frivolous action under that section. Most importantly, the section has been amended to provide that monetary damages may be recovered against a public safety department, its employees, agents, or assigns, for maliciously violating any of the rights afforded by POBR with the intent to injure the officer.

Moreover, the public safety department shall, for each and every violation, be liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) to be awarded to the public safety officer whose right or protection was denied and for reasonable attorney's fees as may be determined by the court. If the court so finds, and there is sufficient evidence to establish actual damages suffered by the officer whose right or protection was denied, the public safety department shall also be liable for the amount of the actual damages.

## **PROTECTIONS FOR WEARING THE AMERICAN FLAG**

After September 11, 2001, it became common for officers to wear pins of or containing the American Flag. Some departments sought to take action precluding the act. The legislature quickly enacted section 3312 to give some protection against the department action. The section provides that the employer of a public safety officer may not take any punitive action against an officer for wearing a pin or displaying any other item containing the American flag, unless the employer gives the officer written notice that includes all of the following: (a) A statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag. (b) A citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates. (c) A statement that the officer may file an appeal against the employer

challenging the alleged violation pursuant to applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

## **DO NOT EVER RESIGN!**

There are few if any exceptions to this rule. In serious investigations, it is not uncommon for a Department to propose that you resign. This offer is usually made when you are most vulnerable. Do not do it! Your resignation usually only works to the benefit of your Department and directly to your detriment. You should thoroughly consult with counsel regarding all options before you submit a letter of resignation. Once you submit a letter of resignation it is difficult if not impossible to rescind it. In other words, even if you change your mind, the resignation cannot be undone once it is accepted by your Department. If you resign from your job, it may also interfere with your Legal Defense benefits through your association. Resignation could also have disastrous consequences for your workers compensation or disability pension benefits. Extreme care must be used when considering resigning from your job. Carefully discuss this option with your representative or attorney before you do anything.

## **CAN THE DEPARTMENT CHANGE MY RIGHTS UNDER POBR?**

Only if the agency adopts rules which provide greater protection than those afforded by POBR. The rights under

POBR are the minimum protections given to officers. The agency cannot reduce the protections of POBR.

### **CAUTION!**

Inasmuch as this area of law is constantly in flux, legal counsel should be contacted when there is any question as to your rights under POBR.

Because of the nature of your employment, public safety officers are constantly exposed to injury, often resulting from the intentional or negligent acts of third parties. As a result of this exposure, the remedies available to the injured officers may fall within one, or more, of the following categories:

- (1) Workers' Compensation;
- (2) Public Employees' Retirement System or County Retirement Systems;
- (3) Third party personal injury claims;
- (4) Uninsured/underinsured motorist claims;
- (5) Americans with Disabilities Act (ADA);
- (6) Insurance coverage.

Since the law governing on-the-job injuries and retirement is subject to frequent change, this booklet will set forth only general guidelines covering the rights of injured public safety officers employed by a police, sheriffs or fire department.

## **WORKERS' COMPENSATION APPEALS BOARD**

The Workers' Compensation Appeals Board is a quasi-judicial administrative hearing agency established by the Legislature to adjudicate questions involving injuries and disabilities which have arisen out of and occurred in the course of employment. The Worker's Compensation Appeals Board is separate and distinct from the Public Employees' Retirement System, local retirement systems or boards and the Superior and Municipal Courts.

### **INJURY**

“Injury” means any injury, illness or disease arising out of or aggravated by employment. Industrial injury includes not only the obvious result of a direct trauma, but also many illnesses and disease processes, resulting from exposure at work. The “injury” may include, but is not necessarily limited to, heart trouble, ulcers, strokes, cancer, psychoneurosis or hernia, as well as the usual traumatic injuries.

### **PRESUMPTIONS**

The California Legislature has enacted certain presumptions within the Labor Code which assist public safety officers in proving that heart trouble, cancer, tuberculosis, hernias, pneumonia, back, hepatitis C, and meningitis are job related.

The term “heart trouble” has been broadly construed

by the appellate courts to mean any affliction which puts the heart in a troubled condition. This presumption also applies to heart trouble which has its onset after retirement, the Legislature having extended it one year for every four years worked, up to a maximum of five years after your actual last day of work.

These presumptions are rebuttable, which simply means that if your employer produced evidence that your condition was caused by something other than your employment, the presumptions may not be helpful. Therefore, it is advisable not to rely totally on the presumption to establish the conditions as an on-the-job injury or to establish the extent of disability resulting from such a condition.

## **MEDICAL BENEFITS**

An injured employee is entitled to all reasonably necessary medical treatment required to cure or relieve him or her from the effects of an industrial injury, for as long as it is needed. However, your employer must first be placed on notice and given the opportunity to furnish medical treatment before you can go to your own doctor and expect to get reimbursement for the expense.

Medical treatment includes necessary services and supplies including medication, nursing care, crutches, and artificial limbs. Furthermore, reasonable transportation expenses incidental to such treatment are also included, presently payable at the rate of \$ .36 per mile.

During the first 30 days following an industrial injury, the employer has the control over what doctor you see, except where you have properly pre-selected the doctor before your injury. Under those circumstances, the pre-selected physician may treat you from the onset of the industrial injury or illness. The presumption that your pre-selected treating physician is correct in matters pertaining to treatment and disability has been eliminated as of April 2004.

After 30 days you are entitled to a change of physician which your employer must authorize within five working days of your request. If treatment is denied or unreasonably delayed after demand, you are authorized to solicit treatment from your private physician and will normally not be responsible for payment. However, physicians treating industrial injuries must agree to accept payment at the rates established by the Division of Workers' Compensation and may not seek any additional balance from the injured worker.

In April 2004, sweeping changes were enacted to the medical benefits in workers compensation. Medical treatment recommendations are now submitted by the employer's carrier to a Utilization Review Assessment Board (UR). The determination made by UR is presumptively correct. The utilization review process may restrict and/or delay an injured worker's ability to receive medical treatment. Disputes can be resolved with an agreed medical examiner or through litigation at the WCAB.

In addition, medical treatment must comply with the American College of Occupational and Environmental

Medicine "ACOEM" guidelines which require the medical treatment at issue will "cure or relieve" the effects of the industrial injury. If the treatment recommended by the treating physician does not "cure or relieve" the effects of the injury, the treatment could be delayed or denied.

On January 1, 2005, the employer will have the exclusive right to select the injured worker's treating physicians. The employers have established medical networks of approved treating physicians. It has not been surprising the majority of the network treating physicians came from the employer side. If a network has not been established, the injured worker may still pre-designate a treating physician. Once the network of doctors has been established, the injured worker must seek medical treatment for an industrial injury from one of physicians on the panel. The panel physician's treatment recommendations are also subject for review by UR. In the event that the injured worker is dissatisfied by that panel physician, then the injured worker may select another physician in the network.

The WCAB has yet to rule on the issue of when the employer can 'pull' an injured worker from his/her treating physician who is not part of the network.

**A Worker's Compensation Appeals Board Award is necessary in order to guarantee treatment for more than five years following the date of your injury. In that manner, you can protect yourself with a "lifetime" medical award.**

## **“4850 TIME” AND TEMPORARY DISABILITY INDEMNITY**

“Temporary disability” payments are intended to help you meet your usual expense while you are recovering from an injury and unable to work, or until your condition has reached a point where further improvement is not expected.

Section 4850 of the Labor Code provides that law enforcement officers and fire fighters who are injured in the line of duty shall be entitled to their full salary in lieu of temporary disability payments for a period up to one year. Entitlement to “4850 time” terminates when your physician releases you to return to work or the Workers’ Compensation Appeals Board finds you able to do so. If you are retired on an industrial disability retirement you may be entitled to draw one full year of “4850 time” before retirement, depending on the duration of your temporary total disability and your participation in vocational rehabilitation.

The sweeping changes in SB 899 have now added a two-year limitation on the payment of temporary disability. If the employer has commenced benefits more than 104 weeks after the injury, the employer will likely deny benefits. Currently, we have successfully defeated an attack on the two-year limitation applying to 4850 benefits. It remains to be seen how the appellate courts will resolve the issue.

## **PERMANENT DISABILITY BENEFITS**

In many cases an industrial injury leaves the injured worker with residual “permanent disability.” If so, compensation is payable regardless of whether the injured employee has returned to work or retired. This is therefore in the nature of a settlement.

The “permanent disability rating” is computed by the use of a schedule adopted by the Division of Workers’ Compensation and is based upon medical evidence and the testimony of the injured worker presented to the Board. In this process, the selection of medical experts is critical and requires knowledge of their skill, bias and credibility before the Board.

Note that if you are not represented by an attorney you may be invited to select a qualified medical examiner from a list of three physicians. He or she would then evaluate your disability. However, if you are unhappy with the results of that evaluation, it is extremely difficult to thereafter obtain medical evidence on your own behalf or to present it to a Workers’ Compensation Judge. This in turn will render it difficult to even obtain legal representation as an attorney would be unable to effectively rebut the qualified medical examiner’s opinion. We believe that individuals with significant injuries are almost always better off being represented than merely obtaining a qualified medical examination. Therefore, we urge you to consult an attorney before selecting a qualified medical examiner. For injuries after January 1, 2004, the rate of indemnity is \$728 per week. For injuries after January 1, 2005, the rate of indemnity is \$840 per week. For injuries after January 1, 2006, the rate of indemnity is greater of \$840

or the State Average Weekly Wage (SAWW).

Impairments of normal body motions or functions, a work restriction, a competitive handicap in the open labor market, and complaints of pain are “rated” in terms of a percent of permanent disability. Each percentage carries a fixed dollar value in the California Labor Code. The Labor Code provides an escalating table of dollar values so that the higher percentage rating you received, the more each percentage point is worth.

Effective January 1, 2005 a new rating system for permanent disability will be used based upon the American Medical Association (AMA) guidelines. Currently, there is broad uncertainty over how the new rating system will operate. The new rating system has significantly reduced benefits for orthopedic injuries, especially the back and knee. In some cases, the monetary benefits are so low, attorneys in the field have closed shop. This was a goal in the sweeping legislation of SB 899. The differences from the old rating system to the new have been devastating. For example, an injury to the knee or back under the old system that is 70% or over \$100,000 could now rate under 25% or \$30,000. The new rating system reduced the benefits by over \$70,000!!! The effects have been devastating to the injured workers and their attorneys.

Payment of permanent partial disability benefits is currently made bi-weekly at rates which vary with the entire permanent disability indemnity award is paid. The maximum weekly rate will be \$230 per week for disabilities over 70% for injuries occurring on or after July 1, 1996.

It is possible to “commute” sufficient weekly payments to produce a lump sum settlement in cases where a strong showing of a specific and genuine need can be made.

If a person is permanently, totally disabled from the open labor market as a result of an on-the-job injury or disease, he or she will receive the temporary disability benefit payment on the date of injury for the rest of his or her life. Those benefits are set forth by statute and depend on the date of your injury. The maximum rate will be \$490 for injuries occurring on or after July 1, 1996. For injuries occurring after January 1, 2003, the rate of indemnity is \$602.00 per week.

If an injured person has received a permanent disability award, he or she has five years from the date of injury to reopen the claim should the condition worsen, resulting in additional disability. A formal Petition to Reopen must be filed with the WCAB before the fifth anniversary of the injury in order to preserve the right to pursue additional disability.

## **VOCATIONAL REHABILITATION**

This benefit is available where the job injury leaves one with a disability that prevents his or her return to duty. In cases where vocational rehabilitation is involved, it is very important to coordinate this benefit with the workers’ compensation claim and the disability retirement claim.

For injuries before January 1, 2004, VR benefits & services are available. There is still a \$16,000 dollar cap on all costs of and benefits for rehabilitation.

For injuries after January 1, 2004, a "voucher system" will be used to provide monetary benefits in lieu of vocational retraining.

## **SCHOLARSHIPS FOR DEPENDENTS OF PUBLIC SAFETY OFFICERS**

Dependents of public safety officers who are killed or totally disabled as a result of an accident or an injury caused by external violence of physical force incurred in the performance of their duty are entitled to a scholarship at any one of the accredited institutions of collegiate grade located in California, if such institution offers a two-year junior college course or four-year college course.

Such scholarships include a payment of tuition and fees, monthly allowance, books and supplies to a maximum of \$6,000 over a period not to exceed six years, but a maximum of \$1,500 per year. Dependents must demonstrate financial need of such scholarship assistance and the term "dependent" means children, natural or adopted, surviving the injured officer.

## **STATUTE OF LIMITATIONS**

An "Employee's Claim for Workers' Compensation Benefits" must be filed by the employee immediately upon the occurrence of any event which results in need for medical treatment, loss of time from work or residual disability.

In the event of a dispute, the time limit to file at the Workers' Compensation Appeals Board, referred to as the

Statute of Limitations, is as follows:

(1) If you are injured and no benefits (injury leave, 4850 time, or other workers' compensation benefits such as medical treatment) are provided, then the claim must be filed with the Workers' Compensation Appeals Board within one year of the date of injury.

(2) Where treatment or other benefits are provided for the injury by the employer, the claim must be filed within five years of the date of injury.

(3) Where over five years have run from the date of injury but medical treatment has been provided by your employer, then the claim must be filed within one year from the last furnishing of medical treatment.

There are specific ways to avoid the application of the Statute of Limitations in certain cases, and if your claim does not fall clearly within one of the above rules, legal advice should be sought regarding your particular case as soon as possible.

## **MENTAL STRESS CLAIMS**

In 1993 sweeping legislative changes were enacted which severely restricted the scope of mental stress claims. These provisions apply to mental stress claims:

a) In mental stress cases there must be a diagnosis pursuant to DSM IV or another nationally recognized psychiatric diagnostic manual.

- b) A preponderance of the evidence must establish that actual events of employment were predominant as to all causes combined of the psychiatric injury. (More than 50%.)
- c) In the case of employees whose injuries resulted from being a victim of a violent act, or from direct exposure to a significant violent act, the employee must demonstrate that actual events of employment were a “substantial cause” of the injury (35 - 40% of the causation from all sources combined).
- d) If you have been employed for less than six months, no compensation will be paid for psychiatric injury, unless it was caused by a “sudden and extraordinary employment condition”.
- e) Mental stress claims filed after notice of termination or layoff are subject to substantial restrictions.
- f) No compensation is payable for alleged mental stress injury resulting from “lawful, non-discriminatory, good faith personnel actions.”

## **DISABILITY RETIREMENT**

If an industrial injury causes a local peace officer or fire fighter to be permanently and substantially incapacitated for the performance of his or her duties, he or she will be eligible for a service-connected or industrial disability retirement. In most cases this allowance will be at least 50% of the injured employee’s final compensation. In most circumstances the disability retirement allowance is exempt from state and federal income taxation.

The laws governing disability retirement are complex. They vary depending upon the retirement system to which you belong. Members of the Public Employees Retirement System of the State of California are subject to different laws and procedures than members of County Employees Retirement Systems. Whether an employer makes appropriate permanent light duty available to an injured employee affects one's retirement rights. We strongly recommend that anyone contemplating the possibility of disability retirement as a result of a job-related injury obtain specialized legal representation as soon as possible.

### **THIRD PARTY LAWSUITS**

If you are injured because of the negligent or intentional act of someone other than your employer or co-worker, or by virtue of a defective product, you may be entitled to pursue both a workers' compensation and a personal injury case. A personal injury case is a lawsuit against the person or company whose negligence, intentional acts, or omissions caused your physical and/or emotional injuries. Examples of such cases include vehicle accidents, slip-and-fall accidents, professional negligence ("malpractice"), and products liability actions.

Personal injury cases are filed in a State or Federal Court. You are entitled to recover your past and future wage loss, medical expenses, and damages for your pain and suffering and loss of enjoyment of life. To the extent that your employer or a retirement system has provided medical expense or wage loss, they may be entitled to a portion of

your recovery. Proper co-ordination of your third party, workers' compensation and retirement matters is essential in order to maximize your own recovery.

A personal injury or products liability action against someone other than your employer who is responsible for your injury must be filed within one year of the injury. Shorter claims periods apply in certain cases, particularly when a public entity is at fault, so legal counsel should be sought promptly if your injuries result from "third party" acts or omissions.

### **UNINSURED MOTORIST CLAIMS**

If one is injured by the negligence of a third party driving an uninsured motor vehicle, he or she may seek a recovery from the insurance company insuring his or her own personal automobile under the uninsured motorist clause of his or her policy. This is usually done through formal contested claims and arbitration proceedings.

Though one's own insurance company may seek reduction of the amount of the uninsured motorist recovery by the amount of benefits expended by an employer for medical, salary and compensation benefits, your employer or retirement system is not entitled to any portion of your uninsured motorist recovery.

### **AMERICANS WITH DISABILITIES ACT**

On July 26, 1990, the federal Americans with Disabilities Act ("ADA") was signed into law. This law protects all Americans with disabilities, regardless of whether the disability was job-related. It protects not only those who have more traditionally conceived physical

disabilities such as blindness, deafness, paraplegia or quadriplegia, but also people with mental disabilities, people recovering from drug abuse or alcoholism, people with AIDS, and people with less profound disabilities.

The Americans with Disabilities Act specifically applies to persons with disabilities in all segments of society, including state and local governments, the Congress, and the private sector.

The ADA requires that a “qualified individual with a handicap” be provided with “reasonable accommodation” by his or her employer, unless such accommodation would impose “undue hardship” on the employer. “Reasonable accommodation is not easily defined but can include such things as changing the work location, changing the work environment, offering a job reassignment, removing barriers to performance and the like.

The effect of ADA on law enforcement agencies is not fully developed yet. We are unaware of any reported appellate decision addressing the question of whether a public safety employer must offer reasonable accommodation to a disabled officer who cannot continue to perform full enforcement duties. Many local law enforcement agencies currently offer, or in fact require, partially disabled officers or deputies to perform permanent light duty rather than granting disability retirements. Others take exactly the opposite position, retiring any officer who cannot perform full duty.

The relatively small number of appellate decisions to date interpreting ADA should not discourage anyone who

truly believes himself or herself to have been discriminated against on the basis of disability from pursuing litigation. The law grants the courts broad power to reverse discriminatory acts and to award appropriate damages.

### **ATTORNEYS' FEES**

Attorneys' fees in workers' compensation cases are set by the Workers' Compensation Appeals Board, and are payable out of the award made to you. No fee is paid in advance. If there is no dollar recovery for you, there is usually no attorneys' fee. Attorneys' fees average 12%-15% of the value of benefits obtained in workers' compensation cases, whether those benefits are the restoration of sick leave, payment of out-of-pocket medical expense, "4850 time" in contested cases, permanent disability indemnity or rehabilitation benefits. There are additional fees, set by the WCAB on an hourly basis, for legal services with respect to vocational rehabilitation issues.

In third party suits and uninsured motorist claims, legal representation is generally on a contingent fee basis with the attorney advancing all necessary costs for the prosecution of the matter.

In disability retirement proceedings attorneys fees are usually paid on an hourly basis, with the client also advancing any additional costs of the hearing, such as fees charged by expert medical witnesses. In the majority of cases a formal hearing is unnecessary, with the result that fees and costs are not great.

Even in relatively clear cases of disability, however, it

is advisable to consult with an attorney to insure that you receive all of the benefits to which you are entitled.

## **PROCEDURE IN EVENT OF INJURY OR JOB-RELATED ILLNESSES**

1. Report all injuries or job-related illnesses to your supervisor as soon as possible. Be sure to complete the Employee's Claim form and give it to your supervisor.
2. If you are asked by a claims adjuster or private investigator to give a statement, we suggest that you contact competent legal counsel or your association before doing so. If you do give a statement, obtain a copy of it. You are not obligated to give your employer a medical release for all of your past medical records. They are only entitled to obtain the records of your treatment for the claimed injury or illness and records of past treatment of a similar condition, or a condition involving the same part of the body, in the past. Names of physicians or therapists treating for an unrelated condition are often not legally discoverable and should not be disclosed.
3. Record your periods of disability, medical expenses (save receipts and canceled checks) and mileage traveled to and from treatment.
4. In the event of a significant injury or illness, we recommend that you contact an attorney specializing in workers' compensation and personal injury matters as soon as possible to obtain proper advice about whether you need representation and how to proceed.