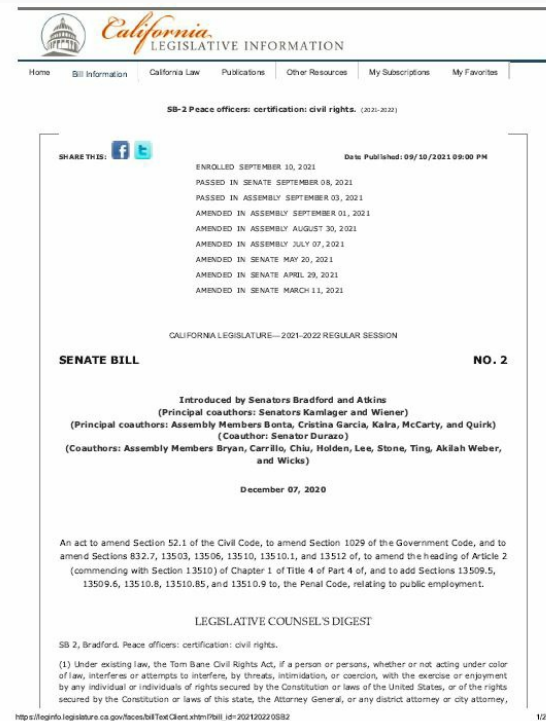


September 14, 2021

Qualified Immunity & Police Licensing: Understanding SB 2

As many of you are aware, the California Legislature has been debating Senate Bill 2, known as the Kenneth Ross Jr. Police Decertification Act of 2021. Although the bill has not been signed by Governor Newsom, we expect he will do so soon. For a variety of reasons, this law enforcement legislation has been one of the most closely followed and hotly debated of any in recent history.

Many law enforcement associations, including the Peace Officers Research Association of California (PORAC), lobbied successfully to eliminate or minimize the effects of some of the most draconian measures in the original incarnations of the bill. RLS Principal Tim Talbot worked closely with PORAC's legislative team on this matter.



The screenshot shows the official page for Senate Bill 2 on the California Legislative Information website. The page title is "SB-2 Peace officers: certification: civil rights. (2021-2022)". It lists the bill's history: ENROLLED SEPTEMBER 10, 2021; PASSED IN SENATE SEPTEMBER 08, 2021; PASSED IN ASSEMBLY SEPTEMBER 03, 2021; AMENDED IN ASSEMBLY SEPTEMBER 01, 2021; AMENDED IN ASSEMBLY AUGUST 30, 2021; AMENDED IN ASSEMBLY JULY 07, 2021; AMENDED IN SENATE MAY 20, 2021; AMENDED IN SENATE APRIL 28, 2021; AMENDED IN SENATE MARCH 11, 2021. The bill is identified as "SENATE BILL NO. 2" and was introduced by Senators Bradford and Atkins. It lists principal coauthors (Senators Kamlager and Wiener) and assembly members (Bonta, Garcia, Kaira, McCarty, and Quirk) as well as coauthors (Assembly Members Bryan, Carrillo, Chiu, Holden, Lee, Stone, Ting, Aklah Weber, and Wicks). The date is December 07, 2020. The bill's purpose is to amend various sections of the Civil Code, Government Code, and Penal Code. The page also includes a "LEGISLATIVE COUNSEL'S DIGEST" section with a footnote (1) regarding the Tom Bane Civil Rights Act.

[View the Legislation](#)

To assist our clients in understanding the effects of the bill, the following are its most significant provisions:

1. Qualified Immunity

SB 2 does nothing to alter qualified immunity in federal civil rights litigation. In state litigation matters, SB 2 makes largely superficial technical changes within Civil Code section 52.1. However, it leaves untouched Civil Code section 825, et seq., which is the statutory basis upon which peace officers frequently secure indemnity and defense by their employers against lawsuits for matters within the scope of their employment.

2. Peace Officer Certification

Existing laws prescribe certain minimum standards for a person to be appointed

as a peace officer, including moral character and physical and mental condition, and certain disqualifying factors for a person to be employed as a peace officer, including a felony conviction. SB 2 slightly expands upon the nature of “convictions” that render a candidate ineligible for certification as a peace officer. SB 2 requires that the Commission on Peace Officer Standards and Training (“POST”) establish a certification program to serve as a peace officer within the state. POST also has the duty and the power to investigate and determine the fitness of any person to serve as a peace officer in the state. POST would then issue or deny certification to be a peace officer in accordance with specified criteria. A law enforcement agency can only employ as peace officers individuals with a current, valid certification (or pending certification).

3. Public Law Enforcement Agency Responsibilities

SB 2 requires a local law enforcement agency employing peace officers to report to POST the employment or separation from employment of a peace officer, and any complaints, charges, allegations, or investigations into serious misconduct by a peace officer that could render the officer’s certification subject to suspension or revocation. The local agency is also responsible for reporting findings by civil oversight entities, and civil judgements that could affect the officer’s certification.

4. Investigations of Serious Misconduct

By January 1, 2023, POST must adopt a regulation that defines “serious misconduct” that will serve as a basis for revoking or suspending a peace officer’s certification. Among the acts that SB 2 prescribes as serious misconduct are work-related dishonesty, abuse of power, falsely arresting someone, excessive force, sexual assault, biased policing, participation in law enforcement gangs, failure to cooperate in investigations of police misconduct and the failure by a peace officer to intercede when they witness excessive force. There are limited circumstances where acts occurring prior to January 2022 may prompt an inquiry and those should be reviewed with your association’s legal counsel.

Although local agencies remain responsible for conducting investigations of alleged serious misconduct, SB 2 creates the Peace Officer Standards Accountability Division (“Division”) within POST to review investigations conducted by law enforcement agencies and to conduct additional investigations into serious misconduct that may provide grounds for suspension or revocation of a peace officer’s certification. These investigations must generally be completed within 3 years of receipt of the completed investigation by the local agency (tolled during the administrative or judicial disciplinary appeal process or during the criminal prosecution of the peace officer), but there is no time limit if the alleged misconduct was not reported to POST.

5. Revocation or Suspension of Certification

The bill would require the Division to investigate potential grounds for decertification and make findings as to whether grounds for action against an officer’s certification exist. The bill would require the Division to notify the officer subject to decertification of their findings and allow the officer to request review.

6. Advisory Board

SB 2 also creates a 9-member Peace Officer Standards Accountability Advisory Board (“Board”). The Board is comprised of the following: two members

appointed by the Governor who are current or former peace officers, two members of the public with experience at academic or non-profit institutions dealing with police accountability (one appointed by the Governor, one by the Speaker of the Assembly), two members of the public with experience working at community-based organizations on issues related to police accountability (one appointed by the Governor, one by the Speaker of the Assembly), two members of the public appointed by the Governor with strong consideration to victims of wrongful police uses of force or family members of a person killed by police, and one attorney with professional experience in police oversight, appointed by the Governor.

The Board must hold public meetings to review the findings after an investigation made by the Division and to make a recommendation on what action should be taken on the peace officer's certification. The Board may only recommend revocation if the factual basis for revocation is established by clear and convincing evidence. The Board may also recommend a suspension of the peace officer's certification.

SB 2 requires the Board to report annually on its activities, and those of the Division, and Commission relating to the certification program, including the number of applications for certification, the events reported, the number of investigations conducted, and the number of certificates surrendered or revoked.

7. Threshold for Revoking Certification

Prior to a peace officer's certification being revoked, the Commission must determine by a two-thirds majority vote that the record, in its entirety, supports a finding that serious misconduct has been established by clear and convincing evidence. Should action be taken against a peace officer's certification, the Division will commence formal proceedings consistent with the Administrative Procedure Act (California Government Code section 11340, et seq.) and the peace officer will have the right to an evidentiary hearing. The bill also makes all records related to the revocation of a peace officer's certification public and would require that records of an investigation be retained for 30 years.

Recommendations

Meet and Confer Obligation.

SB 2 is a state mandate much like the recent use of force legislation (AB 392), use of force training mandates (SB 230) and exceptions to peace officer personnel files (SB 1421). Therefore, while the substantive provisions may not be negotiable, the local law enforcement agency may have an obligation to negotiate the impacts of any actions taken to implement the legislation. While there may not be significant steps for the local law enforcement agency to take to comply with SB 2, it is incumbent on local law enforcement associations to carefully monitor attempts by the agency to react and conform to SB 2.

Understand the Legislation.

Obviously the stakes are high when a peace officer's livelihood is at issue so it's incumbent that individuals and association leaders gain a basic understanding of the substantive and procedural elements of the bill. Your association is advised to contact legal counsel for a more comprehensive analysis and to determine what

negotiable effects, if any, are triggered by this new legislation.

PROUDLY ANNOUNCING
Our Sept. Newsletter

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THE ULTIMATE BACKUP
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DOUBLE FEATURE

FEATURED STORY
RLS Secures Major Victory in PERB Affirming the Right to Bargain Law Enforcement Oversight

Q&A:
How to Preserve Your Rights to an On-Duty Third Party Injury Claim

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Summary of Peace Officer Rights
(CA GovT Code §§ 3300-3313)

WHEN DOES THE ACT APPLY?
 The POBRA applies when a peace officer is:

- Under investigation about a matter that could lead to punitive action, AND
- Subjected to interrogation.

WHEN MAY THE ACT NOT APPLY?

- Counseling, instruction, or informal verbal admonishment.
- Routine or unplanned contact.
- Investigations of purely criminal matters.

"PUNITIVE ACTION" INCLUDES:

- Written Reprimand
- Reduction in Salary, including loss of specialty position pay
- Transfer for Purposes of Punishment
- Demotion
- Suspension
- Dismissal

TO CONTACT A REPRESENTATIVE CALL:
 RLS NORCAL (866) 964-4513
 RLS SOCIAL (310) 993-1486
 PORAC LDF (800) 255-5610

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