

Legislative Overview

SB 20-217:

Concerning Measures to Enhance Law Enforcement Integrity

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July 2020

Background & Timing

This bill became law very quickly.

- 6/3 – Intro'd in Senate (Prime sponsors: Sen. Fields, Sen. Garcia)
- 6/4 – Passed Sen. State, Vet. & Military Affairs Cmt. w/ amendments
- 6/6 – Passed Sen. Appropriations
- 6/8 – Passed Sen. 2nd Reading Special Order w/ amendments
- 6/9 – Passed Sen. 3rd Reading w/ amendments
- 6/9 – Intro'd in House (Prime sponsors: Rep. Gonzales-Gutierrez, Rep. Herod)
- 6/10 – Passed House Finance Cmt. w/ amendments
- 6/11 – Passed House 2nd Reading Special Order w/ amendments
- 6/11 – Passed House Appropriations
- 6/12 – Passed House 3rd Reading – No amendments
- 6/13 – Senate Concurred & Repassed w/ House amendments
- 6/19 – Signed by Governor

Major Provisions

1. Creates new civil cause of action against a peace officer for a violation of the CO Const., & new damages/indemnity obligations
2. Creates new definition for a law enforcement “contact” & related reporting requirements
3. Creates new statewide standards for use of force
4. Creates new duty to intervene under state law
5. Creates new statewide reporting requirements & databases
6. Creates new requirements re: wearing & activating body worn cameras, civil & criminal penalties re: failure to comply & records release standards
7. Creates new powers/duties for P.O.S.T. Board
8. Creates new authority for the CO A.G. to bring a pattern & practice investigation or civil lawsuit

Effective Now

The following went into effect on June 19th:

- Creation of state civil rights claim & indemnification obligations
- Provisions re: law enforcement “contacts”
- Internal data collection requirements about “contacts”
- Prohibition on chokeholds & carotid restraints
- Prohibitions re: response to protests/demonstrations
- Changes to justifications for use of deadly force
- Additional P.O.S.T. requirements to revoke certification after conviction for unlawful force or failure to intervene

***** There is no language or legislative intent that states an intent to make any of the provisions retroactive.***

Effective September 1, 2020

- **Use of force training deadline**
- **Increased criminal liability for peace officers re: use of force under Title 18**
 - Limitations & requirements re: use of physical force
 - Duty to intervene

Other Effective Dates

- **Statewide data reporting requirements:**
January 1, 2023
- **Statewide database publicly available:**
July 1, 2023
- **Body worn camera requirements:**
July 1, 2023

SB 217

New Civil Liability

New Civil Liability Under State Law

CRS §13-21-131 creates a new civil cause of action for violation of the Colorado Constitution that did not exist before

Requirements:

- 1) Peace officer
- 2) Under color of law
- 3) Subjects or causes to be subjected, including failure to intervene
- 4) A person
- 5) To a deprivation of any individual rights secured by Bill of Rights, Article II of the State Constitution

Expansive Liability

- Immunities under CGIA do not apply
- Statutory limits on damages in CGIA do not apply
- Qualified immunity is not a defense
- Prevailing plaintiff entitled to attorneys fees

Standard of Liability

The standard for a violation of the Colorado Constitution will likely be the same as a violation under the U.S. Constitution

- SB 217 is silent as to the standard
- However, historically Colorado courts have generally interpreted the Colorado Const. the same as the U.S. Const.
- So, for example, use of excessive force claims should be based on the familiar federal 4th Amendment standard of “objective reasonableness”

Indemnification Requirements

For a cause of action created under SB 217 the peace officer's employer must indemnify a peace officer for any liability & any judgment or settlement

- This is a broader indemnification obligation than exists under the CGIA or Peace Officers Act.

Indemnification Exceptions

Exception: if the peace officer's "employer" determines "the officer did not act upon a good faith and reasonable belief that the action was lawful" →

= the officer is personally liable and shall not be indemnified for 5% of the judgment or settlement or \$25,000, whichever is less

- The public entity will be on the hook for the remainder of the judgment/settlement

Exception: a public entity does not have to indemnify if an officer is convicted of a criminal violation from which the claim arises

Liability Impacts

It is difficult to fully anticipate the impacts of this new form of liability, however, the following impacts are generally anticipated:

1. Litigation will likely move from predominantly in federal court to predominantly in state court;
2. Litigation costs for the County will likely increase; and
3. Liability costs for the County will likely go up overall

Risk-Sharing & City of Centennial

The existing Agreement for Law Enforcement Services states:

- **To the extent authorized by law, the County is required to defend & indemnify the City from all costs, claims, judgments, or damages, whether in settlement or by court order, alleged or resulting from acts or omissions of the County, including claims arising out or in any way related to the provision of services under the Agreement**
 - This will include claims brought under the new cause of action created by SB 217 involving or relating to the services provided by ACSO to the City

Risk-Sharing & City of Centennial

Existing Agreement for Law Enforcement Services:

- **The City pays, as part of total fees, an annual amount for “Risk Sharing Costs” which includes:**
 - % of County insurance costs;
 - % of “Minor Claims” (i.e. under \$60K) averaged over prior 3 years
 - Average of 3 years total “Major Claims” (i.e. over \$60K) incurred by the County, only to make the County whole on out of pocket costs.
 - % of staff time to process minor claims
- **2020 Annual Risk Sharing Cap = \$1,071,323**
 - Risk Sharing cap increases annually based on percentage increase
 - Parties must meet in good faith to negotiate how to handle any circumstance where (a) County incurs a judgment on any major claim that exceeds the amounts covered under the County’s liability insurance policies, or (b) it is anticipated County will, as a result of the combined 3-year Major Claim Risk Sharing Costs Allocation & Risk Sharing Cap, not recoup all of its out of pocket expenditures for 3 consecutive years.

SB 217

**New Provisions re:
Law Enforcement Contacts**

Law Enforcement “Contacts”

CRS §24-31-901 creates a new definition & standard for what constitutes a law enforcement “contact”

= An interaction with an individual (whether or not in a motor veh.), initiated by peace officer, whether consensual or nonconsensual, for the purpose of enforcing the law or investigating possible violations of law.

Standard for Contacts

CRS §24-31-309 requires peace officers have a “legal basis” for making a contact, whether consensual or nonconsensual

- The statute does not define “legal basis”

Note: this provision falls under statutory provisions related to P.O.S.T. training & profiling and not under the criminal code, and the statute does not address what, if any, consequences flow from a violation of these provisions.

Reporting Requirements for Contacts

CRS §24-31-309 requires peace officers report the following information to the employing agency for each “contact”:

- Perceived demographic information (race, ethnicity, sex & approx. age)
- Whether contact was a traffic stop
- Time, date, and location of contact
- Duration of contact
- Reason for contact
- Suspected crime
- Result of contact (warning/citation, property seizure or arrest & add'l info)
- Actions taken by officer during contact, including: whether they (i) asked for consent to search and if provided, (ii) searched any person or property & basis for search, contraband/evid. discovered, (iii) seizure of any property and type/basis, (iv) unholstered a weapon, and (v) discharged firearm.

ACSO Response

1. ACSO created new contact cards to capture required data in a format that can be mined & reported to comply with future reporting requirements (generally this information was previously captured in narrative portions of reports);
2. ACSO clarified policy to define “investigative contacts” to mean any time deputies contact a subject/suspect for the purpose of investigating a possible crime, even if consensual, & by policy, such contacts require a legal basis to initiate the contact; and
3. ACSO trained sworn staff re: standard for contacts & changes to response to calls for service

SB 217

New Use of Force Standards

New Use of Force Standards

The following use of force changes became effective on June 19, 2020:

1. Prohibitions on certain enforcement actions in response to protests/demonstrations
2. Prohibition on use of chokeholds
3. Changes to deadly force provision regarding fleeing felons

Limits on Force Used in Protests/Demonstrations

**CRS §24-31-905 states in response to a protest/
demonstration, a LEA & any person acting on
behalf of a LEA is prohibited from:**

1. Discharging any non- or less lethal projectiles, including impact projectiles, in a manner that targets head, pelvis or back; or
2. Discharging impact projectiles indiscriminately into a crowd; or
3. Using any chemical agents or irritants, including pepper spray and tear gas, prior to:
 - (i) issuing an order to disperse in a sufficient manner to ensure the order is heard and repeated if necessary, and
 - (ii) followed by sufficient time and space to allow compliance with the order

Prohibition on Chokeholds

CRS §18-1-707(2.5) now prohibits officers from using a “chokehold” upon another person

“Chokehold” is defined to include carotid restraints: a method by which a person applies sufficient pressure to a person to make breathing difficult or impossible and includes but is not limited to any pressure to the neck, throat, or windpipe that may prevent or hinder breathing or reduce intake of air. It also means applying pressure to a person’s neck on either side of the windpipe, but not the windpipe itself, to stop the flow of blood to the brain via the carotid arteries.

Exception Where Deadly Force Justified

CRS §18-1-707(4.5) states:

Notwithstanding any other provision, a peace officer is justified in using deadly force if the peace officer has an objectively reasonable belief that a lesser degree of force is inadequate & the peace officer has objectively reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving serious bodily injury.

- ACSO understands this to mean chokeholds cannot be used as a control mechanism, but if a deputy is fighting for his/her life and is otherwise justified in using deadly force under this standard, it is not prohibited.

Changes re: Deadly Force

SB 217 eliminated the “fleeing felon” rule and CRS §18-1-703(3) now states:

A peace officer is justified in using deadly physical force to make an arrest “only when all other means of apprehension are unreasonable” given the circumstances, and:

- (a) The arrest is for a felony involving conduct including the use or threatened use of deadly physical force;
- (b) The suspect poses an immediate threat to the peace officer or another person;
- (c) The force employed does not create a substantial risk of injury to other persons.

ACSO Response

1. ACSO's use of force policy (ADM 502) already prohibited chokeholds & carotid holds, except in circumstances where deadly force is justified, however, the policy was updated to mirror the exact language in the new statute.
2. ACSO already trains on the use of less lethal projectiles & crowd control tactics in a manner consistent with the statutory changes, however, ACSO explicitly added these provisions to revisions to its use of force policy, which will be published in August to comply with other changes mandated to take effect on September 1st.
3. ACSO already trains deputies to meet a standard for deadly force that does not have a per se fleeing felon rule, but rather, requires that deadly force be based on a reasonable belief there is an imminent threat of serious bodily injury or death to a deputy/others
4. ACSO pushed out info & training on these standards to deputies

Additional Use of Force Changes Mandated Under SB 217

The following use of force standards take effect on September 1, 2020:

1. Limitations on use of any physical force;
2. Requirement of warnings prior to using firearms or deadly physical force, unless undue risk;
3. Duty to intervene; and
4. Changes to standards for force in the jail

Limits on Physical Force

CRS §18-1-707(1) will state:

A peace officer shall apply “nonviolent means,” when possible, before resorting to the use of “physical force,” and an officer may use physical force only if nonviolent means would be ineffective in effecting an arrest, preventing escape, or preventing an imminent threat of serious bodily injury or death to the officer or another.

- “Physical force” is defined very broadly to mean the application of physical techniques or tactics, chemical agents, or weapons to another person.
- “Nonviolent means” is not defined.

Limitations on Physical Force

CRS §18-1-707(2) will state:

When physical force is used, a peace officer shall:

- (a) Not use deadly physical force to apprehend a person who is suspected of only a minor or nonviolent offense;
- (b) Only use a degree of force consistent with the minimization of injury to others;
- (c) Ensure that assistance and medical aid are rendered to any injured or affected person as soon as practicable; and
- (d) Ensure that any identified relatives or next of kin of persons who have sustained serious bodily injury or death are notified as soon as practicable.

Limitations re: Deadly Force

CRS §18-1-707(4) will state:

A peace officer must identify him/herself as a peace officer & give a clear verbal warning of his/her intent to use firearms or other deadly physical force

- With sufficient time for the warning to be observed
- Unless, to do so would unduly place peace officers at risk of injury, would create a risk of death or injury to other persons.

Duty to Intervene

CRS §18-1-802 will enact a state-level duty to intervene requiring:

Peace officers intervene to prevent or stop another peace officer from using physical force that exceeds the degree of force permitted, if any, by CRS §18-1-707

- Applies when carrying out an arrest, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control, without regard for chain of command.
- Additional civil, admin. & criminal penalties for failure to intervene

Penalties for Unlawful Force

In addition to civil or criminal liability, SB 217 requires mandatory POST revocation related to unlawful force:

- If a peace officer is convicted of or pleads guilty or nolo contendere to a crime involving unlawful use or threatened use of physical force, a crime involving failure to intervene in the use of unlawful force, or is found civilly liable for the use of unlawful force or the failure to intervene in the use of unlawful force.
 - No reinstatement allowed unless exonerated in court

ACSO Response

1. ACSO policy & training already required a duty to intervene.
2. ACSO policy & training already required deputies to de-escalate if possible & to use only that amount of force reas. & necessary under the circumstances including any resistance presented, however, ACSO will publish revisions to its use of force policy in August & will train deputies on the specific requirements re: nonviolent means & physical force standards
3. ACSO policy & training already required deputies to identify selves & provide a warning, if feasible, prior to deadly force
4. ACSO scheduled in-service training for all deputies in Aug. to include classroom & practical scenario-based training
5. ACSO's 2021 training schedule is being created with new statutory standards and training in mind

SB 217

Data Reporting Requirements

Additional Data Requirements

Beginning Jan. 1, 2023, all local LEAs must report to the state division of criminal justice:

- 1. All uses of force by its peace officers that results in death or serious bodily injury, including:**
 - Date, time, location;
 - Perceived demographic information
 - Names of all peace officers on scene, identified by whether involved in the use of force or not
 - Type of force used
 - Severity & nature of injury for suspect & officer
 - Whether officer was on duty at the time
 - Whether the use of force resulted in a law enforcement investigation & result
 - Whether the use of force resulted in a citizen complaint & resolution of complaint
 - All instances when a peace officer resigned while under investigation for violating department policy
- 2. All data relating to “contacts” conducted by its peace officers**
(discussed in slide above)
- 3. Data related to any “unannounced entry” into a residence with or without a warrant.**

Statewide Database Required

Beginning July 1, 2023, state DCJ must create an annual report including all info reported, aggregated & broken down by LEA, along with the underlying data.

- The state must maintain a statewide database with the data collected in a searchable format and publish the database on its website
- Any agency that fails to meet the reporting requirements “is subject to the suspension of its funding by its appropriating authority.”

ACSO Response

1. ACSO developed & implemented a new contact card in its RMS system that allows data to be mined and reported in the future (previously the required data was largely captured in the narrative reports)
2. ACSO is reviewing the additional reporting requirements in order to ensure compliance by the future implementation date for statewide reporting.

SB 217

P.O.S.T. Data

Public Reporting of Officer Misconduct/Termination

Beginning July 1, 2022, P.O.S.T. is required to create and maintain a database containing:

1. Information re: peace officer's untruthfulness;
2. Information re: peace officer's failure to follow P.O.S.T. training requirements;
3. Information re: peace officer decertification by P.O.S.T.; and
4. Information re: peace officer terminations for cause.

ACSO Response

ACSO already gathers this info during the hiring processes & ACSO also employs additional existing statutory tools & authority such as:

1. Existing law requires P.O.S.T. to decertify a peace officer who is found to have been untruthful under certain circumstances, and in such instances the person would not be eligible to apply for employment at ACSO.
2. ACSO requires all applicants to sign a release & waiver authorizing ACSO to review all personnel & IA records from prior employers, including prior complaints, misconduct and/or discipline;
3. ACSO requests & reviews such information as part of its robust background investigations prior to hiring;
4. All deputy applicants are put through a polygraph where they are also asked about employment history prior to being hired; and
5. All deputy applicants also receive a suitability review & psychological evaluation prior to being hired.

SB 217

**Body Worn Cameras
&
Recording Requirements**

Body Worn Camera Requirements

By July 1, 2023 all LEAs must issue body worn cameras (BWCs) to each peace officer who “interacts with members of the public”

- Agencies may seek funding pursuant to CRS §24-33.5-519
 - However, the testimony was that the fund does not have sufficient funds
- Unfunded mandate: no additional appropriations were made for BWCs so this cost will fall upon local agencies

Recording Requirements

Beginning July 1, 2023, peace officers are required to wear & activate a BWC* when:

- (1) Responding to “a call for service”; or
- (2) During “any interaction with the public initiated by the peace officer, whether consensual or nonconsensual, for the purpose of enforcing the law or investigating possible violations of the law”

Note: This will substantially increase the # of ACSO deputies required to wear & activate a camera, the circumstances that are recorded, the amount of data to manage, and the resources required to deal with such increases.

** The statute also applies to dash cameras, however, ACSO vehicles are not equipped with dash cameras and the legislation does not require ACSO to outfit vehicles with dash cameras.*

Recording Exceptions

The statute includes the following exceptions:

1. No need to wear or activate a BWC when working undercover.
2. Allowed to turn off BWC to: (i) avoid recording personal info that is not case related; (ii) when working on an unrelated assignment; (iii) when there is a long break in the incident or contact that is not related to the initial incident; and (iv) in administrative, tactical & management discussions.
3. Provisions do not apply to jail peace officers/staff if the jail has video cameras, except it does apply to jail officers when performing a task that requires an anticipated use of force, including cell extractions and restraint chairs.
4. Provisions do not apply to civilian or administrative staff or peace officers “working in a courtroom”

Recording Penalties

If peace officer fails to activate a BWC as required or tampers with footage/operation, the following penalties arise:

1. In any investigation or civil proceeding there will be a “permissive inference” that the missing footage would have reflected misconduct by the peace officer.
2. In a prosecution, any statement sought to be introduced through the officer related to the incident that were not recorded due to the failure to activate or reactivate the BWC, or if the statement was not “recorded by other means” creates a “rebuttable presumption” of inadmissibility.
 - The statute does not state this is limited to statements made solely by a criminal defendant, and could be construed to apply to any witness statements as well.
3. Other administrative & criminal penalties for the officer.

Exception for BWC Malfunctions

The civil/criminal penalties do not apply if:

- (1) The BWC was not activated due to a malfunction of the BWC; and
- (2) The peace officer was not aware of the malfunction, or was unable to rectify it, prior to the incident.
 - Provided that the agency's documentation shows the peace officer checked the functionality of the BWC at the beginning of his/her shift

Retention of Recorded Data

Beginning July 1, 2023, LEAs are required to follow a retention schedule for BWC recordings in compliance with State Archives rules & direction.

No rules have been published to date, however, the following will likely be required, at a minimum:

- Maintain all BWC footage relevant to criminal cases for the required statute of limitations or state mandated evidentiary periods;
- Maintain all other footage for at least 2 years in order to ensure it still exists within the statute of limitations for a civil lawsuit

Note: This will be significant increase over existing retention schedules and the amount of data currently maintained and managed by the ACSO .

Records & Release Provisions

Beginning July 1, 2023, Mandatory Release of BWC Video Is Required Under Certain Circumstances:

- For all incidents in which there is a complaint of officer misconduct through notice to the LEA, it must release all unedited video and audio recordings of the incident to the public within 21 days after receiving the complaint.
- All video & audio depicting a death must be provided upon request to the victim's spouse, et al. and such person shall be notified of the right to receive & review such recordings at least 72 hours prior to public release.

Records & Release Provisions

BWC recordings will also still be considered “criminal justice records” potentially subject to release under the CO Criminal Justice Records Act (CCJRA) & ACSO will be obligated to discover all recordings relevant to criminal cases under existing law

- Given the volume of recordings that exist, this creates additional staffing and resource needs for the Sheriff's Office to manage the various equipment, review and release requirements.

Records Release Obligations

Notwithstanding other BWC provisions, ACSO will have significant new review/redaction obligations under SB 217:

- Any video that raises “substantial privacy concerns for criminal defendants, victims, witnesses, juveniles, or informants, including video depicting nudity; a sexual assault; a medical emergency; private medical information; a mental health crisis; a victim interview; a minor, including any images or information that might undermine the requirement to keep certain juvenile records confidential; any personal information other than the name of the person not arrested, cited, charged, or issued a written warning, including a government-issued identification number, date of birth, address, or financial information; significantly explicit and gruesome bodily injury, unless the injury was caused by a peace officer; or the interior of a home or treatment facility shall be redacted or blurred... while still allowing public release.”

Records Release Obligations

ACSO will also be prohibited from releasing unredacted footage containing privacy concerns without written authorization.

- If redaction or blurring is insufficient to protect the privacy interests, ACSO shall, upon request, release the video to the victim, or if deceased other specified representatives, within 21 days after receipt of the complaint of misconduct.
- If video is not released to the public due to privacy concerns, ACSO is required to notify the person whose privacy interest is implicated, if contact information is known, within 21 days after receipt of a complaint of misconduct and inform them of the right to waive the privacy interest.

Records Release Obligations

Exception to release requirements where video would substantially interfere with or jeopardize an active or ongoing investigation

- May be withheld from the public, except it shall be released no later than 45 days from date of allegation of misconduct; and
- Prosecution must prepare a written explanation of the interference or jeopardy that justifies the delay
- Also, if criminal charges have been filed against any party to an incident, they may file constitutional objections to release in the criminal case before the 21-day period expires
 - Hearing required within 7 days after filed
 - Ruling no later than 3 days after the hearing

ACSO Response

1. ACSO has evaluated the additional staff that will be required to wear & activate a BWC under this new standard
2. ACSO has reviewed & evaluated its current BWC policy, BWC use, storage & related workloads to estimate future needs to comply with new recording requirements/ penalties.
3. ACSO is in the process of preparing budget packages for the County and City to meet those significant staffing & resource needs in advance of July 2023
4. ACSO will make future changes to its BWC policy to comply with the new statutory requirements
5. ACSO will push out new information & training to staff in advance of July 2023 related to all new recording requirements

SB 217

**New State Pattern & Practice
Civil Action**

Pattern & Practice Cause of Action

SB 217 also makes it unlawful for “any governmental authority” or agent, et al., to engage in a pattern or practice of conduct by peace officers, or by officials/employees of any governmental agency, that deprives persons of rights, privileges, or immunities secured or protected by the constitution or law of the U.S. or Colorado

- Empowers the Attorney General when there is reasonable cause to believe a violation of this section has occurred to bring a civil action in the name of the State of Colorado for all appropriate relief to eliminate the pattern or practice
- Before filing suit, must notify governmental entity and give 60 days to change or eliminate pattern or practice

ACSO Response

1. ACSO's rigorous training requirements, which exceed min. P.O.S.T. standards, ensure deputies understand & train annually on policies & constitutional policing standards
2. ACSO's Internal Affairs processes investigate & alert Sheriff/agency to complaints of any unconstitutional conduct so appropriate corrective action can be taken
3. ACSO's CALEA accreditation, along with several other nationally-recognized accreditations ensure ACSO's policies are progressive & meet or exceed constitutional standards
4. County assigns a full-time legal advisor to ACSO, who also serves as a member of the Sheriff's Executive Command Staff & routinely reviews policies, trainings, complaints & provides ongoing legal guidance re: constitutional standards

Questions?

Thank you!