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# Police Reform: Legal Challenges and Solutions

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## POSITION PAPER ON POLICE REFORM

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### INTRODUCTION

Public interest in law enforcement reform has grown in recent years, bringing new calls for revisions to use-of-force policies, performance evaluation and discipline procedures, additional officer training, civilian oversight agencies, shifts in responsibilities assigned to police departments, and even the demand to “defund” police departments. Accordingly, police reform is a priority in many localities. Indeed, there are good reasons for all stakeholders to endorse police reform—in the interest of the public, local government, and officers themselves.

But police reform faces numerous legal and policy hurdles. The primary legal constraints on local agencies reforming their police departments are as follows: the statutory protections afforded to peace officers by laws such as the Public Safety Officers Procedural Bill of Rights Act (“POBOR”), Penal Code 832 *et seq.* (“*Pitchess*”), and labor rights conferred to peace officer unions by the Meyers-Milias-Brown Act (“MMBA”). These legal constraints can obstruct or delay police reform. Some, such as the MMBA, prevent an agency from implementing certain policy changes over the police union’s objections absent lengthy negotiations and exhaustion of impasse procedures. Others, such as POBOR, can prohibit certain reforms. Additionally, laws such as *Pitchess* and POBOR can operate as structural impediments to certain reforms—for example, by preventing public hearings on disciplinary matters. The extent to which these laws constrain legal reform is continuously developing as police reform efforts are litigated.

The Legislature has also been active in reforming policing in recent years. 2021 alone saw eight new laws on the subject. Although these laws will impact policing in California and have important implications for local agencies, they do not on the whole materially change fundamental protections afforded to police officers under state law.

Below, we explain some of the key legal obstacles to police reform in California. We illustrate these obstacles by considering three core areas of police reform which are often debated among stakeholders:

1. *Use-of-Force Policies*: Changes to the standards governing when and how officers can apply force in the course of their duties.

2. *Performance Evaluation and Discipline*: Changes to how officer performance is evaluated and the consequences and procedures for disciplining deviation from those standards and other misconduct.
3. *Oversight*: Altering the processes that provide for police department transparency and provide for civilian participation in their operation.

## LEGAL CONSTRAINTS

As set forth above, the three primary state laws that a local agency must consider before embarking in police reform are POBOR, *Pitchess*, and the MMBA. This list is not exhaustive of the legal protections afforded to police officers in the performance of their duties. Police officers—like other public sector employees—are afforded certain constitutional rights in the workplace, including the right to due process (i.e., the right to a *Skelly* hearing) and the right to privacy under the state and federal constitutions. (See Cal. Const. art. I, § 1; U.S. Const. amend. IV.) While these baseline protections can become relevant in the face of certain proposed reforms, this paper focuses on the specific impact of POBOR, *Pitchess*, and the MMBA in this context.

### I. POBOR

POBOR “provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them.” (*California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 304.) The law is codified at Government Code sections 3300–3313.

Government Code section 3303 grants officers a variety of rights in the context of investigations or interrogations that could lead to “punitive action.” The term “punitive action” is construed broadly and “means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.” (Gov. Code § 3303.)

The protections of Government Code section 3303 include the following:

- The right to have an interrogation occur at a reasonable hour when an officer is on duty, unless the seriousness of the investigation requires otherwise. (Gov. Code § 3303(a).)
- The right to not be interrogated by more than two individuals at one time. (Gov. Code § 3303(b).)
- The right to be informed of the nature of the investigation prior to being interrogated. (Gov. Code § 3303(c).)

- The right to obtain any materials (e.g., written reports or recordings) from an initial interrogation prior to any subsequent interrogations. (Gov. Code § 3303(g).)
- The right to have an officer’s personnel file remain free of notes or reports that are deemed confidential. (Gov. Code § 3303(g).)
- The right to have a representative present at all times during an interrogation where the interrogation is likely to result in punitive action. (Gov. Code § 3303(i).)

Government Code section 3304 sets forth certain due process rights for peace officers who are subject to discipline or denied promotion. Such rights include the right to administratively appeal punitive actions and the application of a one-year statute of limitations period for the agency to investigate disciplinary matters, absent an applicable statutory exception. (See Gov. Code § 3304(b) & (d)(1).)<sup>1</sup>

POBOR’s protections thereby limit a police department’s ability to discipline and evaluate its officers and the scope of police reform measures, especially those concerning oversight, performance evaluation, and discipline.

### **A. Discipline**

POBOR imposes limitations on reforming procedures for disciplining officers. Some of these limitations are relatively straightforward. For example, POBOR may constrain a civilian review board from holding a hearing with a target officer, or an auditor from joining and asking questions of an officer during an investigatory interview, because Government Code section 3303 limits the number of interrogators that can be present. (See *Berkeley Police Assn. v. City of Berkeley* (2007) 167 Cal.App.4th 385, 410).

Other limitations are more complex. For instance, a document like a civilian review board’s disciplinary recommendation may trigger POBOR administrative appeal rights where there is evidence that the document may be used for disciplinary purposes or making other personnel decisions. (See *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1223; *Hopson v. City of Los Angeles*, 139 Cal.App.3d 347 (1983).) In *Caloca v. County of San Diego*, the court held that a civilian oversight committee’s recommendation for discipline, even if purely advisory, constituted punitive action under POBOR because there was evidence that it could lead to adverse employment consequences. (*Caloca, supra*, 72 Cal.App.4th at p. 1222–23.) The

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<sup>1</sup> These provisions provide the following: “no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer . . . without providing the public safety officer with an opportunity for administrative appeal” (Gov. Code § 3304(b)); and “no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency’s discovery by a person authorized to initiate an investigation of the allegation” (Gov. Code § 3304(d)(1)).

officer was therefore entitled to an administrative appeal.<sup>2</sup> (*Id.* at 1222.) However, where a document issued by a civilian review board will *not* lead to discipline or inform other personnel decisions, POBOR rights likely are not implicated. (See *Conger v. County of Los Angeles* (2019) 36 Cal.App.5th 262, 265; *Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136, 146.)

In addition to POBOR, almost every locality has a separate disciplinary process set forth in the memorandum of understanding (MOU) between the locality and the police union—a contract negotiated in accordance with the MMBA. As such, disciplinary procedure reform must account not only for POBOR’s due process requirements, but also the contractual commitments that a locality has made to the police union via the parties’ MOU. The terms of the MOU, of course, can be revisited when the contract is open for negotiation, but changes are subject to good faith meet-and-confer and impasse procedures under the MMBA.

## **B. Performance**

POBOR also impacts performance evaluations. Government Code section 3305 provides that “[n]o public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment[.]” Similarly, Government section 3306 grants peace officers 30 days to respond to the adverse comments in their personnel files, and section 3306.5 states that “[e]very employer shall, . . . upon the request of a public safety officer . . . permit that officer to inspect personnel files that are used or have been used to determine that officer’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.” The purpose of all three provisions “is to facilitate the officer’s ability to respond to adverse comments potentially affecting the officer’s employment status.” (*McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 1332, citing *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 799.)

“Adverse comments” can include comments that fall short of discipline. (See *id.* at p. 925 “[t]he events that will trigger an officer’s rights under those statutes are not limited to formal disciplinary actions, such as the issuance of letters of reproof or admonishment or specific findings of misconduct. Rather, an officer’s rights are triggered by the entry of any adverse comment in a personnel file or any other file used for a personnel purpose”]; see also *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 249 [“As relevant here, Webster defines comment as ‘an observation or remark expressing an opinion or attitude[.]’ ‘Adverse’ is defined as ‘in opposition to one’s interest: DETRIMENTAL, UNFAVORABLE.’ ” [citations omitted].) Local agencies must therefore use caution in revising their performance evaluation processes to ensure that police officers have the right to review and respond to comments that may be adverse.

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<sup>2</sup> “[T]he procedural details” of this appeal can be “formulated by [a] local agency.” (*Crupi v. City of Los Angeles* (1990) 219 Cal.App.3d 1111, 1120.) At a minimum, though, they must allow an evidentiary hearing before a neutral factfinder. (*Morgado v. City and County of San Francisco* (2017) 13 Cal.App.5th 1, 7.)

## II. *Pitchess* Protections

Codifying the protections articulated in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, Penal Code section 832.7(a) makes two categories of public safety officer records confidential—“personnel records” and “records maintained by any state or local agency pursuant to Section 832.5.” The latter references records pertaining to the investigation of complaints made by members of the public against peace officers. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1283 [quoting Penal Code §§ 832.7(a) & 832.5].) Courts have held that the privilege imbued by Penal Code section 832.7(a) “is held both by the individual officer involved and by the police department.” (*Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401.)

Under Penal Code section 832.5, agencies and departments employing police officers must investigate complaints made by members of the public against those officers and must retain the records of those complaints for five years. (*Copley Press, Inc., supra*, 39 Cal.4th at p. 1288 [citing Penal Code § 832.5(a) & (b)].) The statute also “provides that complaints ‘determined by the peace . . . officer’s employing agency to be frivolous . . . or unfounded or exonerated . . . shall not be maintained in that officer’s general personnel file’ and ‘shall be removed from’ that file ‘prior to any official determination regarding promotion, transfer, or disciplinary action.’” (*Ibid.* [quoting Penal Code § 832.5(b) & (c)].)

A “personnel record” protected from disclosure under section 832.7(a) is defined as any file maintained under the employee’s name by the employer containing records relating to any of the following: (1) personal data, including marital status, family members, educational and employment history, home addresses, or similar information; (2) medical history; (3) election of employee benefits; (4) employee advancement, appraisal, or discipline; (5) complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties; and (6) any other information the disclosure of which would constitute an unwarranted invasion of personal privacy. (Penal Code § 832.8(a).)

The Court in *Pasadena Police Officers Assn.* explained the operation of these *Pitchess* statutes:

[D]isciplinary records of peace officers are protected by privilege under the [*Pitchess*] statutes no matter where those records are generated . . . Information which is not itself a personnel record is nevertheless protected if it was obtained from a peace officer’s personnel record. . . Only records generated in connection with an administrative appraisal or discipline qualify as [*Pitchess*] protected personnel records; records generated as part of an internal or administrative investigation of the officer generally are confidential, but other records about an incident are not.

(*Pasadena Police Officers Assn., supra*, 240 Cal.App.4th at p. 288 [quotations and citations omitted].)

The Legislature has twice amended Penal Code section 832.7 in the past few years to allow for greater disclosure of personnel records. In 2018, SB 1421 amended the law to remove protection for reports, investigations, or findings related to incidents involving the discharge of a firearm, use of force causing serious bodily injury, sexual misconduct, and untruthfulness by a peace officer. (Penal Code § 832.7(b)(1).)<sup>3</sup>

In 2021, SB 16 amended section 832.7 to allow disclosure of records related to sustained findings of: an officer’s use of unreasonable or excessive force; an officer’s failure to intervene against another officer using clearly unreasonable or excessive force; unlawful arrests and unlawful searches; and conduct involving prejudice or discrimination. (Pen. Code § 832.7(b)(1)(A), (C)–(E).) Note that, aside from incidents relating to the discharge of a firearm or use of force causing great bodily injury, these exceptions only apply where there is a sustained finding against the officer. (See *id.* at § 832.7(b)(1)(A)(i)–(ii).)

The confidentiality conferred by the *Pitchess* statutes pose a serious obstacle to public participation in police discipline. For example, the court in *Berkeley Police Assn.* held that the hearing of a civilian oversight agency regarding individual officer disciplinary matters was confidential under the *Pitchess* statutes, and thus could not be held in public, because the hearing would discuss the content of records confidential under *Pitchess*. (*Berkeley Police Assn.*, *supra*, 167 Cal.App.4th at 404–405.) As such, *Pitchess* can erect substantial barriers to the public’s participation in police disciplinary matters.

### III. The Meyers-Milias-Brown Act

#### A. Legal Standard

The MMBA “gives local government employees the right to organize collectively and to be represented by employee organizations and obligates employers to bargain with employee representatives about matters that fall within the ‘scope of representation[.]’” (*Building Material & Construction Teamsters’ Union v. Farrell* (1986) 41 Cal.3d 651, 660 (“*Building Material*”) [citations omitted].) Whether the MMBA poses a significant obstacle to police reform depends on the subject matter of the reform; some areas of reform are bargainable while others are not. Certain subjects, such as revision to use-of-force policies, are management decisions that can be

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<sup>3</sup> The Penal Code section 832.7(b)(1) exceptions are as follows: (1) any record relating to the report, investigation, or findings of: (a) “An incident involving the discharge of a firearm at a person by a peace officer or custodial officer”; or (b) “An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury”; (2) “Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public”; and (3) “Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.”

adopted over a police union’s objection, whereas other issues, such as discipline, must be negotiated with a police union beforehand.

Under Government Code section 3505, “the public employer and recognized employee organization have a ‘mutual obligation personally to meet and confer promptly upon request by either party . . . and to endeavor to reach agreement on matters within the scope of representation[.]’” (*Claremont, supra*, 39 Cal.4th at p. 631.) Government Code section 3504 defines which matters fall within the scope of representation:

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

(Gov. Code § 3504.)

The California Supreme Court has resolved some of the ambiguities in Government Code section 3504. Regarding the first phrase, “to require an employer to bargain, [the] action or policy must have ‘a *significant and adverse* effect on the wages, hours, or working conditions of the bargaining-unit employees.’” (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 631, quoting *Building Material*, 41 Cal.3d at pp. 659–60.) The second phrase, an exception to the first, forestalls “any expansion of the language of wages, hours and working conditions” from applying to an agency’s management decisions. (*Claremont, supra*, 39 Cal.4th at p. 631, quoting *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616 [internal quotations omitted].)

Management decisions are those that “‘lie at the core of entrepreneurial control’ or are ‘fundamental to the basic direction of a corporate enterprise.’”<sup>4</sup> (*Building Material, supra*, 41 Cal.3d p. 655, quoting *Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203, 223.) Even when a management decision falls within the scope of representation, it is subject to meet and confer obligations only if “the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.” (*Int’l Assn. of Fire Fighters, supra*, 51 Cal.4th at p. 273, quoting *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 679, 668.)

In *Claremont*, the California Supreme Court established a three-part inquiry to determine whether an employer’s decision is subject to meet and confer under the MMBA:

First, does the action have “a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.” If not, there is no duty



to meet and confer. Second, does the “significant and adverse effect arise from the implementation of a fundamental managerial or policy decision.” If not, there is a duty to meet-and-confer. Third, if both factors are present, the court applies a balancing test. The action “is within the scope of representation only if the employer’s need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.” In balancing the interests, a court may also consider whether the “transactional cost of the bargaining process outweighs its value.”

(*Claremont, supra*, 39 Cal.4th at p. 638 [citations omitted].)

While the MMBA does not require an employer to meet and confer over a management decision that passes the *Claremont* test, courts have held that the employer must negotiate over the “effects” of such a decision. (See *Int’l Assn. of Fire Fighters, supra*, 51 Cal.4th at p. 273.) For example, “although ‘an employer has the right unilaterally to decide that a layoff is necessary, [it] must bargain about such matters as the timing of the layoffs and the number and identity of employees affected.’” (*Claremont*, 39 Cal.4th at pp. 633–34 [quoting *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 64].) As one court has explained, “[t]he public employer’s duty to bargain arises under two circumstances: (1) when the decision itself is subject to bargaining, and (2) when the effects of the decision are subject to bargaining, even if the decision, itself, is nonnegotiable.” (*El Dorado County Deputy Sheriff’s Assn. v. County of El Dorado* (2016) 244 Cal.App.4th 950, 956.)

Courts have differed over when “effects bargaining” is required. Some opinions suggest that if an action is a management decision, and the employer’s prerogative outweighs the benefit to labor relations, then the implementation of that decision is not subject to effects bargaining. (*Claremont, supra*, 39 Cal.4th at pp. 637–38; *San Francisco Police Officers’ Assn. v. San Francisco Police Com.* (2018) 27 Cal.App.5th 676, 690.) Other decisions, specifically in the context of layoffs, suggest the opposite—that implementation of the management decision can be restrained by bargaining over effects. (See *Int’l Assn. of Fire Fighters, supra*, 51 Cal.4th at p. 277.) In contrast, PERB has taken a strong position in insisting that effects bargaining must be completed before decisions are implemented and requiring that impasse procedures (including factfinding) be completed even in the context of effects bargaining. (See, e.g., *Santa Clara County Correctional Peace Officers’ Assn v. County of Santa Clara* (2013) PERB No. 2321-M.)<sup>5</sup>

## **B. The MMBA and Use-of-Force Policies**

It is now firmly established that a local agency does *not* have a duty to meet and confer over revisions to these policies. In *San Francisco Police Officers’ Assn. v. San Francisco Police Commission* (2018) 27 Cal.App.5th 676, San Francisco formed a commission to, among other things, revise the SFPD’s use-of-force policy. (*Id.* at pp. 680–81.) San Francisco negotiated with

the SPOA regarding the reforms proposed by the Police Commission (the two sides met nine times in five months), but the City consistently asserted that the reforms were managerial and thus outside the scope of representation. (*Ibid.*) After several months of negotiations that failed to achieve agreement on several policies—particularly the use of the carotid (choke) restraint and a prohibition on police officers shooting at moving vehicles—San Francisco declared an impasse, and the SFPOA filed a grievance under the MOU to bring it back to the bargaining table. (*Id.* at pp. 681–82.) Thereafter, the City changed course and asserted its managerial rights, voting to approve the use-of-force reforms and prompting the SPOA to file a petition to compel the City to arbitration. (*Id.* at p. 682.) In the interim, the two parties reached an agreement regarding training and discipline. (*Id.* at p. 681.)

In considering the action, the Court of Appeal squarely held that use-of-force policies are not subject to mandatory bargaining. (*Id.* at p. 688.) It rejected the SFPOA’s assertion that the City was required to negotiate the effects of the policy changes. The court determined that, under step three of the *Claremont* test, the use-of-force policy changes were not within the scope of representation because the employer’s need for unencumbered decision making in managing its operations vis-à-vis a use-of-force policy outweighed the benefit to employer-employee relations of bargaining over the decision. (*Id.* at pp. 687–88.) Further, the court explained that requiring an employer to negotiate the effects of a use-of-force policy could bog down the implementation of the policy itself, effectively subjecting it to meet and confer obligations. (*Id.* at p. 690) Finally, the court acknowledged that the two parties had already reached an agreement regarding training and discipline, and thus “there were no outstanding pre-implementation issues related to the effects of the use-of-force policy on working conditions regarding which the City had refused to meet and confer.” (*Ibid.*)

### **C. The MMBA and Oversight Boards**

The law regarding the MMBA’s application to civilian police oversight boards and their procedures is still developing, not least because PERB only recently began exercising its jurisdiction over claims brought by police unions under the MMBA. PERB’s decision in *County of Sonoma* (2021) PERB Decision No. 2772-M is instructive on the current state of the law.

In November 2020, Sonoma County voters overwhelmingly adopted a ballot measure that expanded the powers of its sheriff oversight agency. (*Id.* at p. 14.) The initiative allowed the County’s oversight agency, the Independent Office of Law Enforcement Review and Outreach (“IOLERO”), to investigate sheriff employees and make recommendations for their discipline, to access sources of evidence obtained as part of internal affairs investigations, to receive and review confidential peace officer personnel files, and to post body-worn camera video footage online. (See *id.* at pp. 14–19.) The peace officer associations challenged the measure before PERB. (*Id.* at p. 23.) PERB granted the unions’ motion to expedite their unfair practice charges, bypassing a decision by an administrative law judge and assigning the case to the Public Employment Relations Board itself. (*Ibid.*)

PERB then issued a lengthy decision in which it concluded that the County violated the MMBA by failing to meet and confer over certain aspects of the ballot measure before

submitting it to the voters. Specifically, PERB concluded that many of the ballot measure’s amendments relating to procedures for investigating and recommending discipline of employees were subject to decision bargaining and that other amendments were subject to effects bargaining. (*Id.* at p. 3)

PERB held that several policy changes in the ballot measure concerning investigation and discipline were subject to meet and confer: those granting IOLERO authority to conduct independent investigations of Sheriff’s Office employees and recommending discipline of those employees; those allowing IOLERO to subpoena records or testimony in investigations and review an officer’s discipline record, including all prior complaints; and those allowing the IOLERO Director to personally sit in and observe investigative interviews. (*Id.* at pp. 39–40.) PERB ruled that, while these changes were management decisions for the County, the benefit to labor-management relations under the *Claremont* inquiry outweighed the County’s interests and thus the decisions themselves were subject to bargaining. (*Id.* at pp. 38–39 [“for those Measure P amendments aimed in material part at investigation and discipline of employees, the benefits of collective bargaining outweigh the County’s interest. Indeed, because such issues lie at the core of traditional labor relations, they are particularly amenable to collective bargaining.”].)

PERB’s analysis of whether these changes were subject to meet and confer is difficult to follow. It stated that the associations had a right to meet and confer before the “County subjects employees they represent to such a parallel investigatory process for the first time, especially since IOLERO’s procedures may deviate from the investigations conducted by the Sheriff’s Office. These amendments thus directly affect employment by changing—or at least creating ambiguity about—disciplinary procedures and standards.” (*Id.* at p. 40.) At some parts of the decision, PERB suggested that changes merely affecting an investigation or disciplinary process are subject to meet and confer. (*Id.* at p. 41 [“Measure P further impacts disciplinary procedures by expanding the types of evidence the County could use as a basis for discipline”]; see also *id.* at p. 42 [“Given the potential impact an investigative interview may have on an officer’s career, procedures at such an interview are an important subject of collective bargaining requiring negotiation before making a change”].) In others, PERB stated that the ambiguity created by the amendments regarding these issues was what was objectionable. (*Id.* at p. 41 [“It thus is possible that an officer could still be under investigation by IOLERO more than one year after the officer’s misconduct was discovered.”].)

As to the remaining challenged provisions, PERB found that they were not subject to decision bargaining. According to PERB, the County’s managerial interest outweighed the benefits to labor-management relations because the provisions were “not part and parcel of Measure P’s attempt to create a parallel investigatory track.” (*Id.* at p. 44.) These amendments included the following: a provision authorizing IOLERO to publicly post body worn camera video footage; a provision authorizing IOLERO to directly contact and interview complainants and witnesses; and a provision granting IOLERO access to investigative evidence and Sheriff’s Office databases.

PERB nevertheless found that some of these provisions were subject to meet and confer for bargainable effects. The provision regarding IOLERO’s ability to post footage from body

work cameras was subject to effects bargaining because it was not clear whether the decision to post such footage would be done “on a case-by-case basis to the extent allowed by law, in consideration of victim privacy rights and active investigations.” (*Id.* at p. 45.) Similarly, the provision allowing IOLERO to contact witnesses was subject to effects bargaining because the provision did not specify whether officers or supervisors accused of wrongdoing were included as witnesses who were subject to interviews and whether they would be paid for the time spent during the interview. (*Id.* at p. 46.) By contrast, PERB ruled that the provision granting IOLERO “unfettered access to investigative evidence and Sheriff’s Office databases” did not create any effects within the scope of representation because the existing operational agreement provided access to the Sheriff’s Office AIM database. (*Id.* at p. 47.)

It is hard to glean much from the *County of Sonoma* other than that a local agency, with the exception of use-of-force policies, must exercise caution in attempting to implement police reforms over a police union’s objection, especially with matters relating to discipline. While the decision focused on reforms related to discipline and investigation, a similar analysis could apply to reforms concerning issues such as shifts in services (i.e., transferring duties out of police departments) or training.

### LEGISLATIVE CHANGES

On September 30, 2021, Governor Newsom signed eight new police reform bills into law. These were:

- **SB 2 (Bradford):** The primary focus of SB 2 is the certification and eligibility of peace officers throughout the state. It prohibits persons from serving as peace officers if they have been convicted of specified felonies or have engaged in certain misconduct. It has a similar prohibition on service if officers have had their certification denied or revoked by the Commission on Peace Officer Standards and Training (“POST”) or had their name listed on other decertification indexes due to misconduct. SB 2 also mandates that the Department of Justice provide the POST Commission with the power to investigate and determine the fitness of any person to serve as a peace officer in the state. Finally, it eliminates certain immunities for peace officers under the Bane Act.
- **SB 16 (Skinner):** SB 16 expands public access to law enforcement records, including records concerning sustained findings of an officer’s use of unreasonable or excessive force, an officer’s failure to intervene against another officer using clearly unreasonable or excessive force, unlawful arrests and unlawful searches, and conduct involving prejudice or discrimination. These records were previously confidential under the Penal Code. SB 16 also requires an agency hiring a peace officer to review a file containing records relating to any misconduct the officer has engaged in prior to hiring that peace officer.
- **AB 26 (Holden):** AB 26 bolsters the legal duty of peace officers to report instances of excessive uses of force by their colleagues and requires that officers

who fail to intercede during their colleagues' use of excessive force be disciplined in the same manner as the officer who engaged in the excessive force.

- **AB 48 (Gonzalez):** AB 48 limits and provides standards for law enforcement agencies' use of certain projectiles or chemical agents in responding to public gatherings.
- **AB 89 (Jones Sawyer):** AB 89 requires the Chancellor of California Community Colleges to develop a program for a modern policing degree, along with recommendations for creating financial assistance for students of historically underserved and disadvantaged communities. It also raises the minimum age of eligibility to serve as a police officer to twenty-one years old.
- **AB 481 (Chiu):** AB 481 provides that law enforcement agencies must obtain approval from the agency's governing body prior to taking certain actions relating to the funding, acquisition, or use of military equipment.
- **AB 490 (Gipson):** AB 490 prohibits law enforcement agencies from using restraints or transportation techniques that could result in positional asphyxia.
- **AB 958 (Gipson):** AB 958 targets law enforcement "gangs" among peace officers. Among other things, it requires law enforcement agencies to maintain a policy that prohibits participation in a law enforcement gang and that makes violation of that policy grounds for termination. Such termination must be disclosed to another law enforcement agency conducting a preemployment background investigation of that former peace officer.

While this new legislation will have a large effect on reforming policing in California, it will have a lesser impact on the obstacles facing local agencies described above. The only bill that specifically addresses any of the laws that form the focus of this paper is SB 16, which expands the categories of records subject to disclosure under *Pitchess*. However, as described above, most of the new exceptions require a sustained finding that the officer engaged in misconduct as a prerequisite to disclosure. (See Pen. Code § 832.7(b)(1)(A)(iii-iv), (b)(1)(C)-(E).) Thus, while the statute will allow for greater transparency post-hoc, it does not generate much additional flexibility for local governments seeking to boost participation or oversight in the disciplinary process.

The new bills will also generate challenges for local agencies. As with any new laws, agencies will have to grapple with statutory language absent guidance from the courts. Moreover, many of the laws require policy changes which local agencies will have to negotiate with their peace officer unions pursuant to the MMBA.

## **CONCLUSION**

Many communities remain committed to police reform efforts. Municipal governments in these jurisdictions will continue to serve as the bridge between community stakeholders and police unions in these discussions. It is the role and the challenge of public agencies to facilitate the development of effective reforms and navigate their implementation in compliance with state law, including the legal hurdles discussed here.