

BEST PRACTICES IN PUBLIC SAFETY DISCIPLINE

November 4-6, 2026

The Sonesta
Nashville, Tennessee

Presented by
Labor Relations Information System
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Portland, OR 97232
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www.LRIS.com | email: info@LRIS.com

Best Practice In Public Safety Discipline

The Sonesta Nashville
November 4-6, 2026

AGENDA

Wednesday, November 4, 2026

9:00 **Opening Session: The National Landscape.** A fast-paced update on the legal, economic, and operational developments shaping bargaining and discipline decisions in public safety agencies.

- Recruiting and retention challenges and their impact on discipline decisions.
- Wages, benefits, and staffing pressures affecting workplace expectations.
- Economic conditions and their effect on municipal decision-making.
- Artificial intelligence, surveillance, privacy, and evolving legal standards.
- *Brady*/*Giglio* obligations and their impact on discipline decisions.

Richard Poulson, Attorney, Willig, Williams & Davidson, Pennsylvania and Executive Director, LRIS.

12:00 **Lunch (Included in registration)**

1:00 **The Investigation: Where Discipline Cases Are Built (Or Broken).** A practical look at the investigative phase and how early decisions shape the outcome of discipline cases.

- Conducting effective investigatory interviews in real-world conditions.
- Understanding representation rights under *NLRB v. Weingarten, Inc.* (and its state and local equivalents) and what they require in practice.
- Managing administrative and criminal exposure under *Garrity v. New Jersey*.
- Common investigative failures — by both labor and management.
- The role of documentation, reports, and witness statements in building the record.

Richard Poulson.

4:00 **Adjournment**

4:00 **Hosted Reception**

Thursday, November 5, 2026

Discipline In Practice: Building, Evaluating, And Defending Cases
A point-counterpoint discussion featuring union and management labor counsel.

Presenters: *Rob Wexler, Attorney, Rains Lucia Stern St. Phalle & Silver, PC, California and Brett Schneider, Attorney, Weiss Serota Helfman Cole + Bierman, P.L., Florida.*

9:00 **Just Cause: What It Really Means In Practice.** A practical look at the standard that governs every discipline case — and how it is actually applied by arbitrators and courts.

- How should decision-makers evaluate "just cause" in real cases?
- Understanding the core elements of defensible discipline.
- How misconduct interacts with the employee's record and mitigating factors

10:30 Building (Or Undermining) A Just Cause Case. How the investigation and record shape the outcome long before a case reaches arbitration.

- Conducting investigations that support a defensible outcome.
- Credibility issues: inconsistencies, omissions, and after-the-fact explanations.
- Evaluating the evidence: video, recordings, and incomplete information.

12:00 Lunch (Included in registration)

1:00 Applying Just Cause: Making Discipline Decisions. A step-by-step look at how discipline decisions are made — and how those decisions hold up under scrutiny.

- Selecting the discipline: progressive discipline, proportionality, and mitigation.
- The role of comparators and prior discipline in ensuring consistent outcomes.
- Pre-disciplinary process as part of the just cause analysis: opportunity or formality?
- Strategic considerations: when to resolve a case and when to proceed to arbitration.

2:30 Why Discipline Cases Succeed — Or Fail. A candid look at the factors that determine whether discipline is upheld, reduced, or overturned.

- The most common reasons discipline is modified or reversed.
- Timing issues: delay, stale discipline, and rushed decision-making.
- The impact of prior record, training, and supervision on the just cause analysis.

4:00 Adjournment

Friday, November 6, 2026

8:30 The New Discipline Landscape: Emerging Risks And New Frontiers. A forward-looking session examining the issues that are reshaping discipline decisions in public safety agencies.

- Artificial intelligence in discipline: performance monitoring and early warning systems, bias, transparency, and bargaining implications.
- Discipline for off-duty conduct: social media, speech and political activity.
- Legal drug use, PTSIs, and changing approaches to employee conduct.
- Public scrutiny, media attention, and political pressure in discipline cases.

Jessica Caggiano, Attorney, Willig, Williams & Davidson, Pennsylvania and Richard Poulson.

11:30 Adjournment

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The Sonesta Nashville
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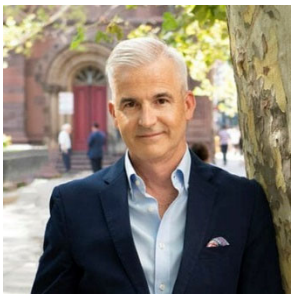
LIST OF SPEAKERS



Richard Poulson

Mr. Poulson is one of the top public safety union lawyers in the country and a senior partner with the Philadelphia law firm of Willig, Williams & Davidson. Rick has spent his career advocating for police officers, firefighters, paramedics, corrections officers and other public-safety professionals throughout the United States. He earned his B.A. from La Salle University (1992) and his J.D. from the Catholic University of America, Columbus School of Law (1997). Rick also serves as Executive Director of Labor Relations Information System, which provides education and training services for public safety labor relations professionals across the country.



Jessica Caggiano

Ms. Caggiano concentrates her practice on labor law, advocating for union and worker rights at a time when these rights have never been more important. Her work includes handling labor arbitrations, contract bargaining and litigation for public and private sector unions. Jessica's union defense litigation has involved constitutional issues in the wake of the Janus decision. She also offers ongoing advice, training and presentations on topics ranging from workplace discrimination and social media use in the workplace, to grievances and labor arbitration.



Brett Schneider

Mr. Schneider is a partner with the firm Weiss Serota Helfman Cole + Bierman, where he is Chair of Labor & Employment Division. He represents public sector employers in negotiating collective bargaining agreements, labor impasse proceedings, unfair labor practice proceedings and labor arbitrations. He advises clients on employee drug testing (particularly with the legalization of medical marijuana in Florida), sexual harassment and employee medical issues. Brett defends employers in wage and hour suits brought under the Fair Labor Standards Act (FLSA) and has successfully guided clients through Department of Labor Wage & Hour Audits.



Rob Wexler

Mr. Wexler is a partner at Rains Lucia Stern St. Phalle & Silver, PC and heads business development and marketing for the firm. Rob has over 25 years' experience advising labor associations and their members on all matters relating to contract negotiations, grievances, disciplinary investigations, bargaining unit certifications, wage and hour claims, disability rights, and pension and retirement matters. During his career Rob has represented an array of labor organizations, including some of the largest municipal police and firefighter associations in California.

Seminar Attendees

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11/4/2026 - Nashville, TN

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LRIS Seminars

Best Practices In Public Safety Discipline



February 3-5, 2027
The Horseshoe
Las Vegas, Nevada

The Rights Of Police Officers



March 31 - April 2, 2027
Nashville Marriott
at Vanderbilt University
Nashville, Tennessee

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Available on LRIS.com and your favorite podcast app.

LRIS's monthly First Thursday podcast covers the latest news, court decisions, and arbitration awards in the public safety labor and employment arena.

Connecting With LRIS

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Some of our titles include:

- The Rights Of Law Enforcement Officers (8th Ed.)
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- Interest Arbitration (3rd Ed.)



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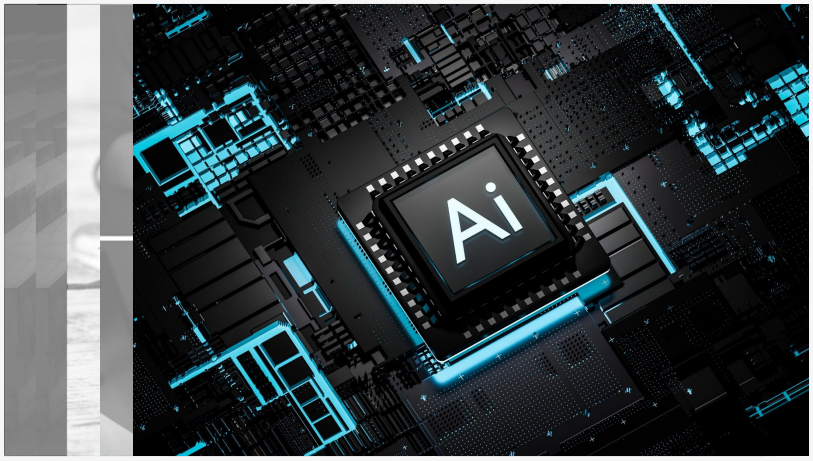

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- Navigating Discipline Part 2: Understanding Garrity Rights
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- Privacy In The Age Of Surveillance
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Sample Topics:

- Collective Bargaining
- Public Safety Employee Rights
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- Public Safety Union Leadership

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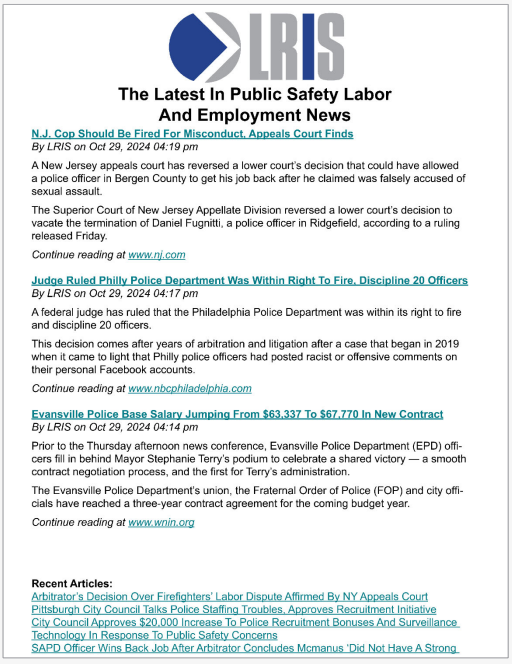

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The Latest In Public Safety Labor And Employment News

N.J. Cop Should Be Fired For Misconduct, Appeals Court Finds
By LRIS on Oct 29, 2024 04:19 pm

A New Jersey appeals court has reversed a lower court's decision that could have allowed a police officer in Bergen County to get his job back after he claimed was falsely accused of sexual assault.

The Superior Court of New Jersey Appellate Division reversed a lower court's decision to vacate the termination of Daniel Fugnitti, a police officer in Ridgefield, according to a ruling released Friday.

Continue reading at www.nj.com

Judge Ruled Philly Police Department Was Within Right To Fire, Discipline 20 Officers
By LRIS on Oct 29, 2024 04:17 pm

A federal judge has ruled that the Philadelphia Police Department was within its right to fire and discipline 20 officers.

This decision comes after years of arbitration and litigation after a case that began in 2019 when it came to light that Philly police officers had posted racist or offensive comments on their personal Facebook accounts.

Continue reading at www.nbcphiladelphia.com

Evansville Police Base Salary Jumping From $63,337 To $67,770 In New Contract
By LRIS on Oct 29, 2024 04:14 pm

Prior to the Thursday afternoon news conference, Evansville Police Department (EPD) officers fill in behind Mayor Stephanie Terry's podium to celebrate a shared victory — a smooth contract negotiation process, and the first for Terry's administration.

The Evansville Police Department's union, the Fraternal Order of Police (FOP) and city officials have reached a three-year contract agreement for the coming budget year.

Continue reading at www.wnin.org

Recent Articles:
Arbitrator's Decision Over Firefighters' Labor Dispute Affirmed By NY Appeals Court
Pittsburgh City Council Talks Police Staffing Troubles, Approves Recruitment Initiative
City Council Approves $20,000 Increase To Police Recruitment Bonuses And Surveillance Technology In Response To Public Safety Concerns
SAPD Officer Wins Back Job After Arbitrator Concludes Mcmanus 'Did Not Have A Strong

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The National Landscape:

Cases, Trends, Strategy – and What It Means for You

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LRIS LABOR RELATIONS INFORMATION SYSTEM

Part One:

THE BARGAINING LANDSCAPE: *WHAT'S CHANGING?*

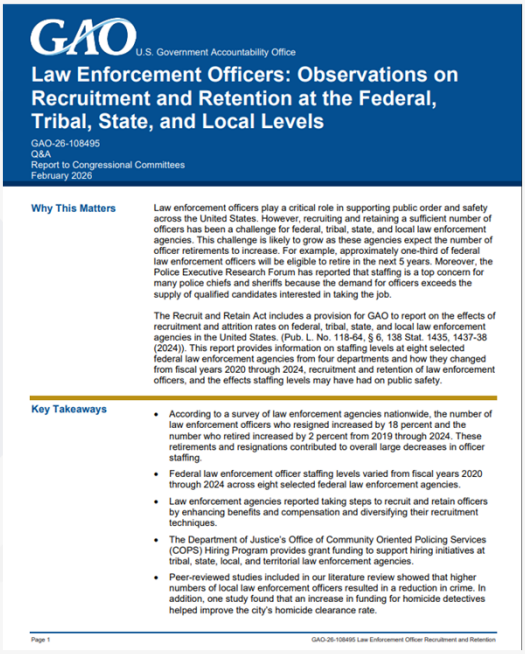
Recruiting Is Improving — Retention Is Not

- **Public safety workforce remains below pre-2020 levels.**
- **Law enforcement agencies are competing for the same officers.**
- **Agencies have experienced *some* hiring gains—but not enough.**
- **Experienced employees are leaving at high rates.**
- **2026 PERF Survey:**
  - Staffing rose 1.4% in 2025, returning to its 2022 level but remaining below 2020.
  - Hiring rose 17.6% from 2024 to 2025.
  - Resignations were essentially flat in 2025 but remained above pre-pandemic levels.
  - Retirements rose 16.4% from 2024 to 2025.

Source: Police Executive Research Forum, May 2026 survey of responding member agencies.

2026 GAO Study

- **Feb 2026.** U.S. Govt Accountability Office issues report on police recruiting and retention.
- From 2019-2024, officer resignations increased by 18%.
  - Better pay and benefits elsewhere.
- Retirements are stable but departments are facing a retirement wave of COPs-funded hires (1994-2001).
- **Retirement reasons are changing.** Burnout and work-life balance. Public perception.
- **New recruits see it differently.** Fewer officers expect to retire as police. Come from different recruiting pools.



GAO U.S. Government Accountability Office

Law Enforcement Officers: Observations on Recruitment and Retention at the Federal, Tribal, State, and Local Levels

GAO-26-108495
Q&A
Report to Congressional Committees
February 2026

Why This Matters

Law enforcement officers play a critical role in supporting public order and safety across the United States. However, recruiting and retaining a sufficient number of officers has been a challenge for federal, tribal, state, and local law enforcement agencies. This challenge is likely to grow as these agencies expect the number of officer retirements to increase. For example, approximately one-third of federal law enforcement officers will be eligible to retire in the next 5 years. Moreover, the Police Executive Research Forum has reported that staffing is a top concern for many police chiefs and sheriffs because the demand for officers exceeds the supply of qualified candidates interested in taking the job.

The Recruit and Retain Act includes a provision for GAO to report on the effects of recruitment and attrition rates on federal, tribal, state, and local law enforcement agencies in the United States. (Pub. L. No. 118-64, § 6, 138 Stat. 1435, 1437-38 (2024)). This report provides information on staffing levels at eight selected federal law enforcement agencies from four departments and how they changed from fiscal years 2020 through 2024, recruitment and retention of law enforcement officers, and the effects staffing levels may have had on public safety.

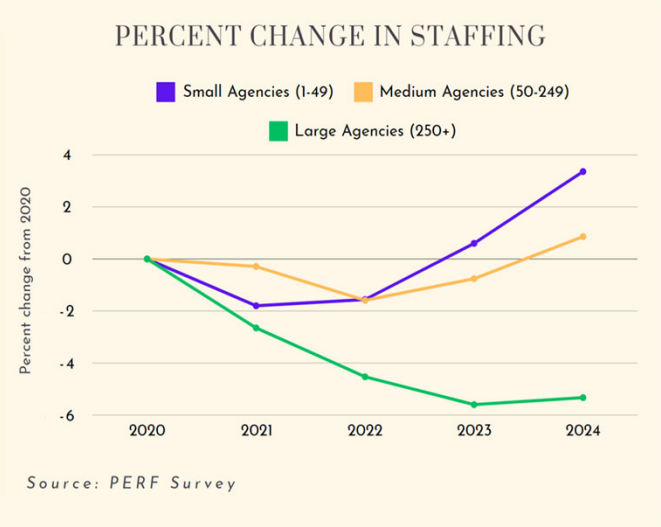
Key Takeaways

- According to a survey of law enforcement agencies nationwide, the number of law enforcement officers who resigned increased by 18 percent and the number who retired increased by 2 percent from 2019 through 2024. These retirements and resignations contributed to overall large decreases in officer staffing.
- Federal law enforcement officer staffing levels varied from fiscal years 2020 through 2024 across eight selected federal law enforcement agencies.
- Law enforcement agencies reported taking steps to recruit and retain officers by enhancing benefits and compensation and diversifying their recruitment techniques.
- The Department of Justice's Office of Community Oriented Policing Services (COPS) Hiring Program provides grant funding to support hiring initiatives at tribal, state, local, and territorial law enforcement agencies.
- Peer-reviewed studies included in our literature review showed that higher numbers of local law enforcement officers resulted in a reduction in crime. In addition, one study found that an increase in funding for homicide detectives helped improve the city's homicide clearance rate.

Page 1 GAO-26-108495 Law Enforcement Officer Recruitment and Retention

Large Agencies At Risk

- 2025 PERF staffing survey showed first increase in year-to-year staffing in police agencies in 4 years.
- But increase was modest.
- And larger agencies are still suffering …



Los Angeles County

Number of people leaving or joining the Sheriff's Department

Year	Leaving	Joining	Total sworn
2020	-491	409	9,664
2021	-590	81	9,937
2022	-617	381	9,510
2023	-527	241	9,193
2024	-493	341	9,019

L.A. County Sheriff's Department

Lorena Iñiguez Elebee LOS ANGELES TIMES

"In 35 years, I've never seen things this bad. Deputy morale is at rock bottom due to all the forced overtime. … Operations, training, and recruitment are all suffering due to this crisis. Anyone who has ever had to call 911 knows what short staffing can mean during an emergency."

Source: LA Times, April 15, 2025

2026 California Study

- **April 2026.** Public Policy Institute of California issues *"Understanding Trends in Law Enforcement Staffing."*
- Retention Has Declined. Separations increased by 11% from 2016-2020, then spiked to 30% from 2020-2022.
- Larger agencies have borne the brunt.
- From 2011 to 2023, inflation-adjusted base pay fell about 5%, from $116,000 to $110,000.
- But … average annual overtime pay rose from about $10,000 to more than $25,000 over the same period.
- Competition for Talent. "Agency competition and pay" are a major issue.

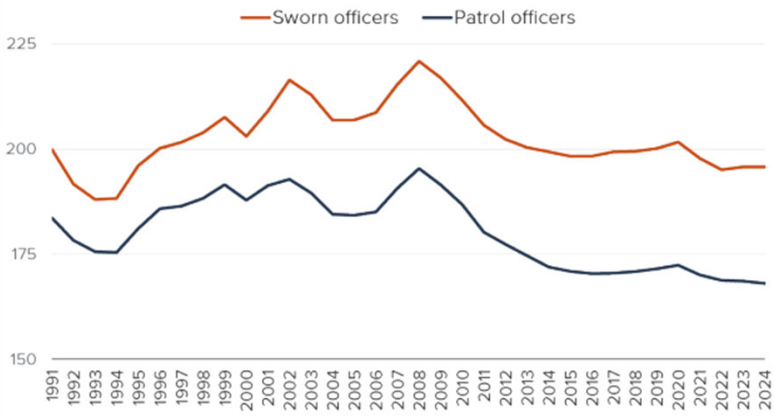


2026 California Study

Figure 2

Officer staffing reached a peak in 2008, then declined during the Great Recession and the pandemic

Officers per 100,000 residents



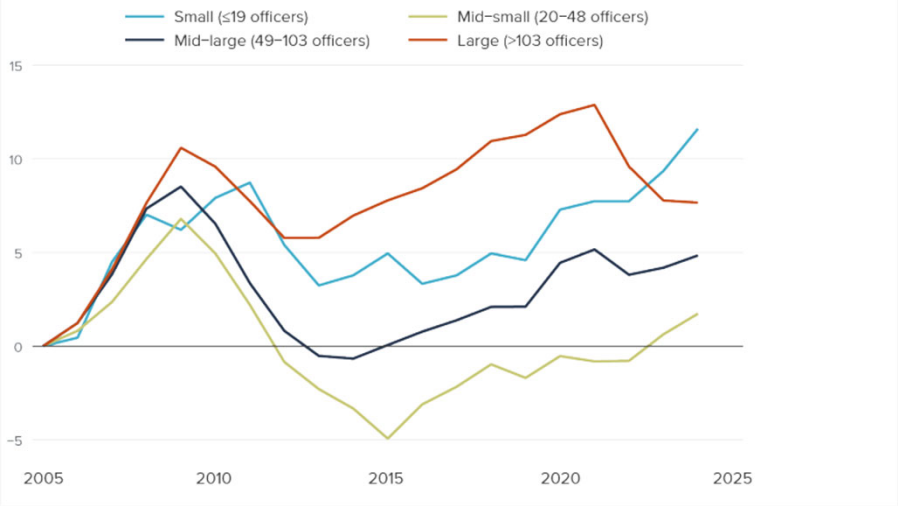
Source: Understanding Trends in Law Enforcement Staffing, Public Policy Institute of California, April 2026.

2026 California Study

Figure 6

After the pandemic, drops in officer staffing have been concentrated in larger agencies

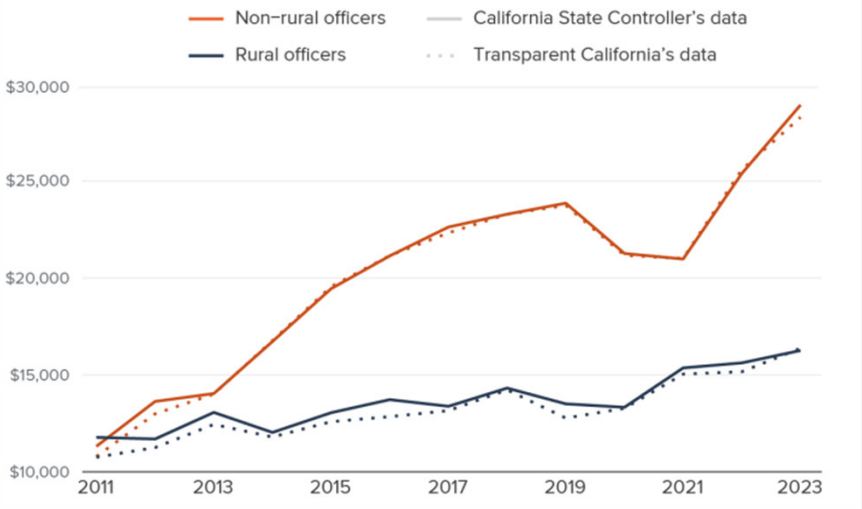
Percent change in staffing from 2005

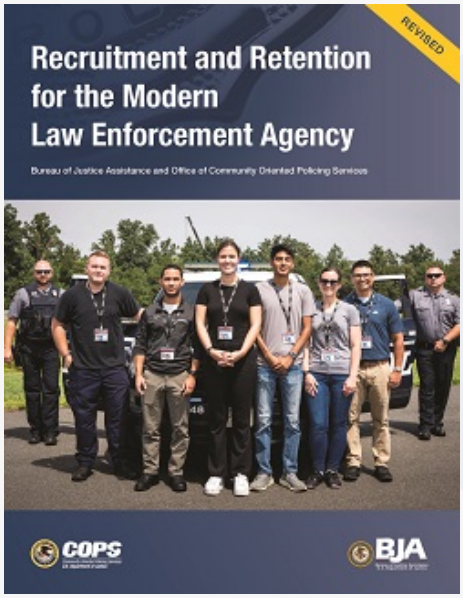


2026 California Study

Figure 12

Overtime payment has increased, particularly for non-rural officers





US Department of Justice Recruitment and Retention

Casting a Wider Net, or Lowering Standards?

- Relax restrictions on visible tattoos and other traditional appearance or "grooming" requirements.
- Revisit physical fitness standards.
- Consider "adjustments" to educational requirements.
- Consider "adjustments" around drug use.
- Reconsider bars based on minor, isolated criminal offenses.
- Reevaluate the importance of financial history and credit scores.

Lowering Standards – The Memphis Example

- Following Tyre Nichols incident, Associated Press reported concerns of former Memphis police recruiters about the "growing desperation to fill hundreds of slots in recent years that drove the department to increase incentives and lower its standards."
- *"They would allow just pretty much anybody to be a police officer because they just want these numbers,"* said a former lieutenant in charge of recruiting before he retired last year out of frustration.

Source: Tyre Nichols case highlights US police recruiting and retention crisis, Associated Press, Feb 8, 2023.

Lowering Standards – The Memphis Example

- MPD offered new recruits $15,000 signing bonuses and $10,000 relocation allowances while phasing out requirements to have either college credits, military service or previous police work. All that's now required is two years' work experience – *any work experience.*
- MPD also sought state waivers to hire applicants with criminal records and the training academy slackened fitness standards.
- *"Another former patrol officer turned recruiter who recently left the department told the AP that in addition to drawing from other law enforcement agencies and college campuses, recruits were increasingly coming from jobs at the McDonald's and Dunkin' drive-thru outlets. **A stripper applied, though didn't get in.**"*

Filling Vacancies — At What Cost?

- Lower hiring standards may improve staffing numbers without improving workforce quality.
- Academy failures and inadequate preparation can shift the burden to experienced employees.
- Poor hiring decisions can increase training demands, safety risks and disciplinary problems.
- Question: *Who bears the cost of lowering standards?*
- Another question: *How do we retain employees and minimize vacancies?*

New Research on Police Incentives (Feb 2026)



- February 2026 national study on recruiting & retention incentives.
- Analyzed 29 different financial incentives used by police agencies to recruit/retain.
- Assessed impact of incentives across key metrics: staffing levels, speed of impact, cost, workload & operations, and quality of policing.
- Rated by 30 police practitioners—executives, command staff, and supervisors from agencies nationwide.
- Focus was on ***what actually works*** in the field.

Source: *Financial incentives for police recruitment and retention: perceived effectiveness and tradeoffs,* Police Practice & Research, Feb 26, 2026.

What Actually Works (And What Doesn't)

- **Direct compensation wins.** Salary increases rated the most effective tool for boosting staffing levels.
- Ongoing pay/benefits outperform one-time bonuses.
- **Retirement security** is important. Improvements to pensions/benefits ranked near the top for recruiting and retention.
- Education pay and wellness benefits (e.g., gym memberships) showed measurable impact.
- Targeted incentives like childcare stipends, housing, etc. can improve diversity and access.
- People respond most to **tangible, ongoing economic value.**

Do Retention Bonuses Even Work?

2026 Journal of Experimental Criminology Study

- 2026 study examined officers from 16 Ohio police agencies.
- Tested hypothetical bonuses of 5% and 10%, with and without repayment requirements.
- Larger bonuses **did not** significantly increase officers' stated willingness to stay.
- Implication: Permanent compensation and working conditions may matter more than one-time payments.

How Are Agencies Responding?

- **Residency and Housing**
  - Washington DC. Take-home cars for officers who live in the city.
  - Bloomington, Indiana. $100k interest-free home loan.
  - Baltimore, MD. $2500 annual City property tax credit.
  - Chicago. $5000 assistance to buy home in low-income area.
- **Work Schedule Experiments**
  - Golden, CO. **32-hour**, 4-day week for same annual salary.
  - Arlington, VA. **37.5-hour** work week for same salary. 10-hr shifts. 15 days per month, 5-on/5-off style blocks. Every other weekend.
  - Philadelphia CO's. "Choose your own adventure" work schedule.

How Are Agencies Responding?

- **Paid Sabbaticals**
  - Citrus Heights, CA. 90,000 population. Mandatory *annual* 4-week (160 hour) sabbatical for patrol. But … in lieu of holidays.
  - Rapid City, SD. 80,000 population. Mandatory 2-week (80 hours) sabbatical every 4 years.
  - Forest Grove, OR. 30,000 population. Mandatory 30-day paid sabbatical after 5th year and then every 4 years.
  - Paynesville, MN. Mandatory 4-week (160 hour) sabbatical between 5th and 6th years.

Aggressive Lateral Recruiting - Torrance, CA

- Torrance's recruitment and retention pilot program incentives include a maximum bonus of up to:
  - $100,000 - Lateral Police Officers
  - $40,000 - New Police Officers
  - $40,000 - Lateral Public Safety Dispatchers
  - $10,000 - New Public Safety Dispatchers
- Program also includes annual retention bonuses for five years of up to $15,000 for sworn staff.

And then there was Fremont



- Northern California community follows the same route.
- Lottery-style $100k bonus to first ten lateral hires. Up from $20k.
  - Paid out over 5 years.
- Mid-term 2% pay adjustment.
- Mandatory OT paid at 2x rate.

Recruiting Tactics Have Changed





But Is It Working? The Houston Police Example

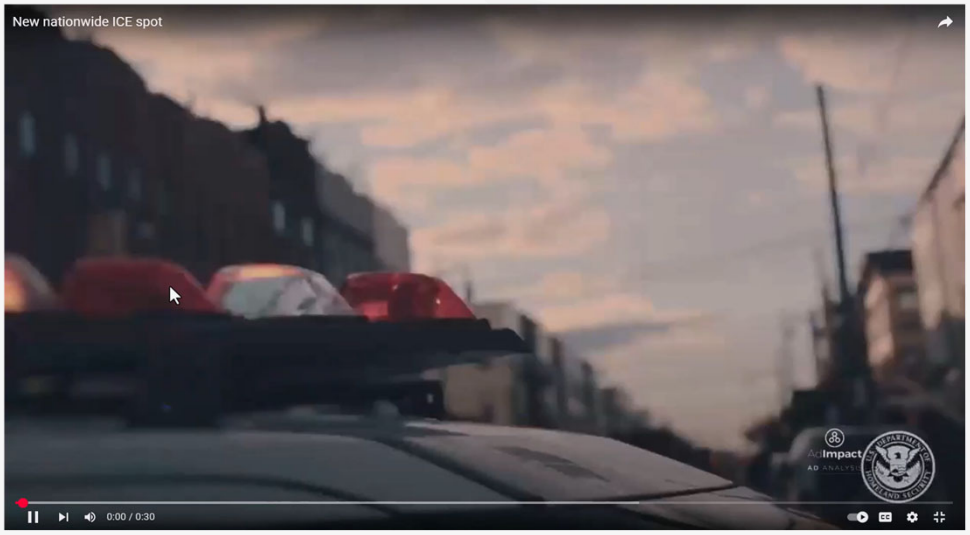
- **May 2025. Houston City Council approved $1 billion contract settlement with Houston Police Officers' Union.**
  - 37% increase to police salaries over 5 years (10, 8, 6, 6, 6.5).
  - Makes Houston the highest paid department in Texas.
- **Applications spiked following contract settlement.**
  - More than 200 area officers requested applications over a 24-hour period following news of the settlement. Approximately 75 identified themselves as members of the Harris County Sheriff's Office.
  - "'These additional resources will be essential in retaining our seasoned officers while also growing our ranks with new recruits,' Police Chief Noe Diaz said. Diaz told ABC13 he plans to poach officers from nearby law enforcement entities."

Source: ABC13 Eyewitness News, May 21, 2025

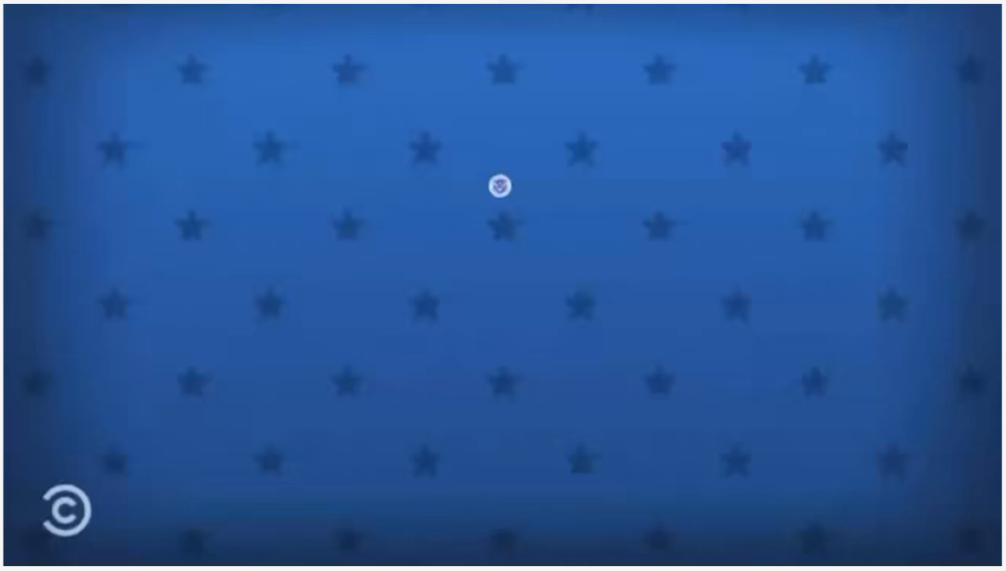
The *Ultimate* Lateral Recruiter – Uncle Sam

- One Big Beautiful Bill Act included $170 BILLION for border security and immigration enforcement.
- ICE budget alone increased from $7 to $77 BILLION.
  - ***$30 BILLION*** earmarked for hiring.
- ICE's ranks have increased to 22,000 nationally, with target of 30,000.

The Ultimate Poaching Video



The *Ultimate* Poaching Video



The Corrections Staffing Cost

- Across 23 states, roughly one in six corrections employees leaves each year.
- State corrections departments spent more than $2 billion on overtime in 2024, about 80% more than in 2019.
- Corrections employees account for roughly 40% of state government overtime spending.
- Bargaining question: What are vacancies costing this employer in overtime, turnover and training?

Source: Safe Inside Project, 2026. The turnover figure covers 23 states; the report's measures draw on different sets of states.

But Is It Working? The Philadelphia Example

- **July 2021 through March 2025. Philadelphia Correctional Officers receive series of pay and working condition improvements to address recruiting and retention crisis.**
  - **Seven (!!)** interest arbitration awards issued over 4 years
  - Base salary increased from $51,197 to $75,561 (48%)
  - $5200 lump sum bonuses plus 20% hiring bonus
  - Hybrid shift schedule introduced (12 and 8-hour options)
  - 8 weeks parental leave plus subsidized day care
  - $2000 yearly attendance bonus plus weekly “on time” pay (4 hrs)
  - Residency requirement eliminated



But Is It Working? The Philadelphia Example

- Jan-June 2025. Prisons Department received 4,200 applications, a 79% jump from the number received in all of 2024.
- Apr 2024-March 2026. Prisons Department hired 526 new cadets and reinstated 48 former officers.

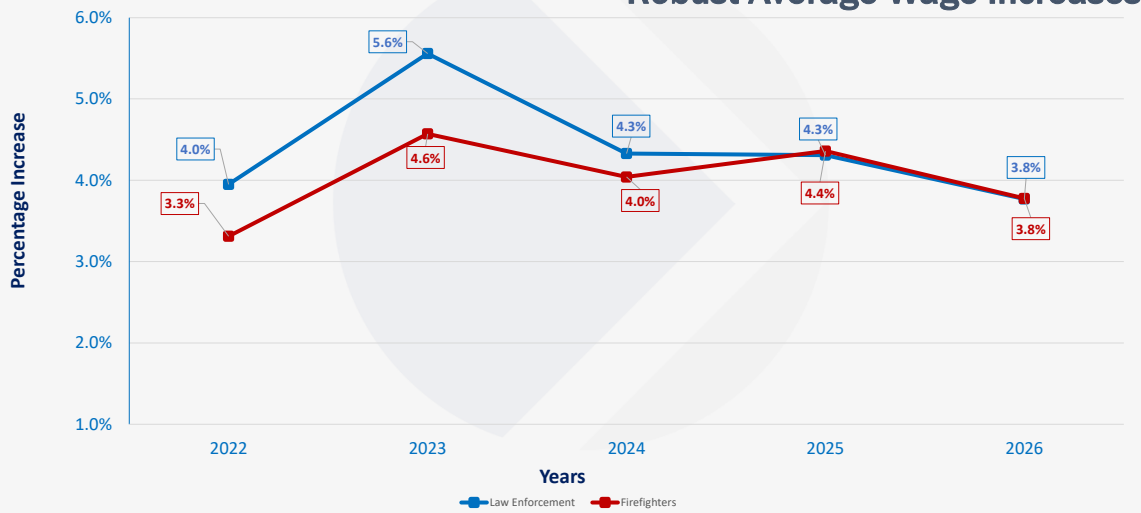
			December 2024		June 2025			
	Position Classification	Budgeted	Filled	Vacant	Filled	Vacant	Vacancies (+/- change)	Vacancy Rate (+/- change)
Sworn Staff	Officers	1712	999	716	1153	559	-157	33% (-9%)
	Sergeants	118	72	46	78	40	-6	34% (-5%)
	Lieutenants	64	49	15	47	17	+2	27% (+4%)
	Captains	29	24	2	32	-3	-5	0% (-7%)
	Custody Total	**1923**	**1144**	**779**	**1310**	**613**	**-166**	**32% (-9%)**
Maintenance Staff	Trades Worker I	7	6	1	7	0	-1	0% (-14%)
	Trades Worker II	18	8	10	9	9	-1	50% (-6%)
	HVAC Mechanic	3	2	1	2	1	0	0% (-33%)
	Building Engineer	1	0	1	1	0	-1	0% (-100%)
	Maintenance Group Leader	1	0	1	1	0	-1	0% (-100%)
	Total Maintenance	**30**	**16**	**14**	**20**	**10**	**-4**	**33% (-14%)**

Collective Bargaining – The Opportunity

- Sustained wage increases and targeted equity adjustments.
- Retention incentives, scheduling and working conditions.
- Competition among agencies for experienced employees.
- Minimal union concessions … but watch out for rising healthcare costs.

Impact On Collective Bargaining

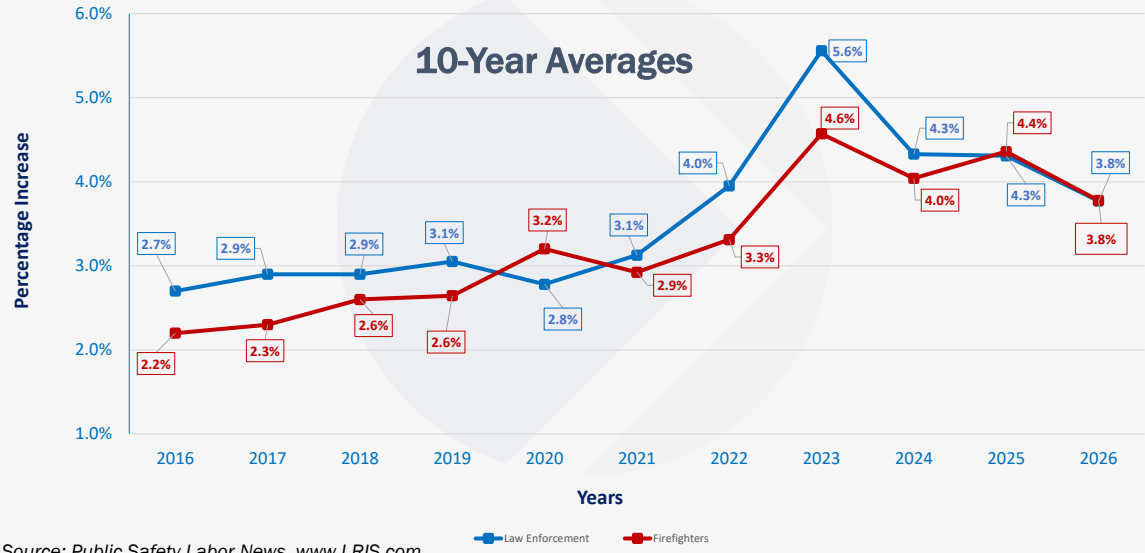
Robust Average Wage Increases



Source: Public Safety Labor News, www.LRIS.com

Impact On Collective Bargaining

10-Year Averages



Source: Public Safety Labor News, www.LRIS.com

Fort Worth: $54 Million Fire/EMS Agreement

- September 2026: Four-year agreement through September 2030.
- Estimated $54 million in additional compensation costs.
- Initial 5% across-the-board wage increase.
- Annual step increases and additional *market-based* adjustments.

Source: News Talk WBAP, Sept. 30, 2026.

Philadelphia: The End of Pay Parity?

- July 2026 arbitration award: 7% over two years for firefighters and EMS personnel.
- Police received 10% over two years, plus a $3,000 bonus.
- Arbitrators distinguished police raises tied to civilianization and operational flexibility.
- Firefighters argued the award broke with two decades of wage parity.

Source: Philadelphia Inquirer, July 9, 2026.

San Antonio: Big Raises, Healthcare Tradeoffs

- September 2026: Three-year police contract costing approximately $102 million.
- Base wage increases totaling 16.5% over three years.
- Additional incentives for weekend shifts, certain assignments and field training.
- Employees assume greater healthcare costs, offsetting approximately $10.3 million in new incentives.

Source: San Antonio Report, Sept. 10, 2026.

Collective Bargaining – The Risks

Health Benefits Return to the Table

- Marsh projects 8.2% growth in employer health benefit costs in 2027, after planned cost reductions.
- Employers estimate 11% growth if they leave their current plans unchanged.
- 59% of surveyed employers plan cost-cutting benefit changes.
- Expect proposals affecting employee contributions, deductibles or coverage.

Health Insurance: The Cost Shift

Kaiser Family Foundation, 2026 Employer Health Benefits Survey, October 22, 2026:

- 2026 average family premium: $28,303, **up** 5%.
- Average employee contribution: $7,471, **up** 9%.
- 44% of large employers **increased** employee premium contributions.
- 21% **increased** deductibles or other cost sharing.

GLP-1 Coverage Under Pressure

- Among employers surveyed by Business Group on Health, coverage of GLP-1 drugs for obesity fell from 72% in 2025 to 60% in 2026.
- GLP-1 products have different approved uses. A plan's treatment of obesity drugs does not necessarily tell us how it covers drugs for diabetes or other indications.
- For public safety employees, the question is concrete: Will the employer narrow an existing prescription benefit, and what does the CBA permit?

GLP-1 Coverage: Employers Pulling Back?

- Only 18% of large employers (200 or more workers) cover GLP-1 drugs primarily for weight loss.
- 12% of non-covering large employers dropped coverage within the past year.
- 29% of covering employers report a significant impact on prescription spending.
- 79% of non-covering employers say they are unlikely to add coverage within 12 months.

Source: KFF, 2026 Employer Health Benefits Survey, October 22, 2026.

What Does the Contract Protect?

- Does the CBA promise a benefit level, a particular plan or a named prescription program?
- What do the plan documents and formulary say about covered drugs, prior authorization and changes during the contract term?
- What choices does the employer retain when a carrier or pharmacy benefit manager changes its coverage?
- Bargaining target: Define material benefit reductions and require advance notice, information and bargaining.

Part Two:

TECHNOLOGY AND EXPANDING SURVEILLANCE

Surveillance: A Bargaining Issue

- Surveillance technology changes how management supervises employees.
- Who is monitored? What is recorded? Who has access?
- Can the information be used to evaluate performance or impose discipline?
- AI dramatically expands management's ability to monitor employees.
- Consider the difference between management having the theoretical ability to review *something* and management having the practical ability to review ***everything***.

Washington DOC — The Old GPS Deal

- Washington Department of Corrections had used GPS in transport vehicles since approximately 2011.
- In 2012, the union negotiated restrictions on its use.
  1. GPS information could not be the sole basis for discipline.
  2. GPS could not be used solely to surveil employees for disciplinary purposes.
- More than a decade later, DOC upgraded the software, dramatically expanding its monitoring capabilities.

Teamsters Local 117 v. Washington DOC, Decision 14309-PSRA (Wash. PERC 2026).

Washington DOC — New GPS Produced Discipline

- New GPS program - *Verizon Reveal* - allowed real-time monitoring of vehicle location, speed and stops.
- DOC configured automatic alerts when vehicles exceeded the speed limit by 15 mph or more.
- Alerts triggered investigations and employee incident reports.
- Two employees, recorded traveling 19 and 30 mph over the limit, received written reprimands.
- The union grieved the discipline and challenged implementation of the upgraded system as an unlawful unilateral change.

Teamsters Local 117 v. Washington DOC, Decision 14309-PSRA (Wash. PERC 2026).

Union: You Have to Bargain

- Union alleges a unilateral change.
- Existing GPS use already governed by negotiated restrictions.
- New software materially expands monitoring capabilities.
- Real-time monitoring + automatic speeding alerts.
- System is generating disciplinary investigations.
- Employer had previously bargained over GPS.

But Washington has a statutory problem …

Teamsters Local 117 v. Washington DOC, Decision 14309-PSRA (Wash. PERC 2026).

Washington's Technology Exclusion

Washington's RCW 41.80.040(1):

"The employer shall not bargain over rights of management which, in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:

"(a) The functions and programs of the employer, the use of technology, and the structure of the organization;"

- **Hearing Examiner:** New software enhancing GPS functionality is clearly "the use of technology."
- **Result:** DOC had no obligation — or legal authority — to bargain the implementation decision

Teamsters Local 117 v. Washington DOC, Decision 14309-PSRA (Wash. PERC 2026).

But Here's the Weird Part

- **Washington Chapter 41.80:** Covers Washington state employees, including DOC employees. Expressly excludes the use of technology from bargaining.
- **Washington Chapter 41.56:** Covers local public employees, including municipal police officers and many fire/corrections employees. Contains no equivalent categorical exclusion.
- Hearing Examiner specifically discussed the difference in distinguishing an earlier PERC case.
- Even within the same state, *"technology is a management right"* is not a universal answer.

Teamsters Local 117 v. Washington DOC, Decision 14309-PSRA (Wash. PERC 2026).

The Footnote: Mountlake Terrace

- Municipal police department.
- Video surveillance cameras in employee work areas.
- Potential use for employee monitoring / discipline.
- Case arose under Chapter 41.56 because involved local employees.
- PERC treated the technology issue as bargainable.
- DOC Hearing Examiner: *Mountlake Terrace* is "readily distinguishable" because Chapter 41.56 does not prohibit bargaining over technology.

Same state. Similar surveillance issue.

Different statute → different bargaining result.

City of Mountlake Terrace, Decision 11702-A (PECB 2014)

DOC Didn't Win Everything

- Hearing Examiner decided the implementation / bargaining question.
- Hearing Examiner did NOT decide whether the Verizon Reveal information could properly support discipline under the CBA.
  - Decision expressly leaves that question to arbitration under the just-cause provision – and grievance was pending.
- IMPLEMENTATION ≠ USE ≠ DISCIPLINE
  - Implementation: Statutory bargaining question.
  - Use: Contract / policy restrictions.
  - Discipline: Just cause / arbitration.

States Are Making AI a Labor-Relations Issue

Washington — SB 5422 (2025):

- Proposed requiring bargaining over public-employer AI implementation when it affects wages or performance evaluations. The proposal stalled in committee.

New Jersey — S4075 (2026):

- Pending legislation addressing automated employment systems and electronic monitoring, including human oversight and collective negotiations over specified public-employer AI decisions.

Now Scale It Up: Flock / ALPR

- Automated license plate readers capture plates, vehicle images, identifying characteristics, locations and timestamps.
- Flock combines this information in a searchable network.
- Investigators can identify vehicles associated with crimes, missing persons and wanted fugitives.
- The network can also reveal where a particular vehicle has been observed over time.
- What happens when the subject of the search is an employee?

The issue is not the camera. It is the searchable network behind the camera.

Source: Flock Safety, License Plate Reader Usage & Privacy Policy (June 30, 2026).

Why Flock Suddenly Became a National Story


The Washington Post
Democracy Dies in Darkness

Police departments weren't looking for officers abusing Flock. We did it for them.

An investigation by The Post led to the discipline of two officers accused of misusing license-plate readers. Their departments and many others had not done basic oversight.

August 19, 2026

- Washington Post reviewed police/court records and reported at least 50 law-enforcement officers had been charged with or accused of unauthorized ALPR use.
- Flock was involved in 46 of the cases identified in the initial review.
- In 26 cases, investigators/prosecutors said officers used the technology to monitor wives, girlfriends, exes, new partners or women they wanted to meet.
- The broader problem identified by the story: powerful search capability + inconsistent auditing + agencies that often were not looking for misuse

Source: Drew Harwell, Douglas MacMillan & Aaron Schaffer, Washington Post, Aug. 2, 2026; follow-up reporting Aug. 19, 2026.

The Oversight Problem

- The system already created digital records capable of showing who searched what. But many agencies did not regularly audit those records.
- Flock introduced an Audit Assistance tool to identify suspicious patterns — repeated searches of the same vehicle, unusual off-hours activity, etc.
  - At first, that feature was *voluntary*.
- Post reported at least 69 officers had been implicated and that some misuse had gone undetected until journalists reviewed the logs.
- September 2026: Five Indianapolis officers criminally charged after the Post investigation prompted an internal audit.
- Today: Over one-hundred law-enforcement employees have been implicated in similar alleged misconduct.

Flock Responds

Aug. 13, 2026 — Flock announced significant new guardrails:

- Default retention reduced from 30 days to 7 days.
- Evidence Mode allows specific records to be preserved for an active investigation.
- Audit Assistance becomes mandatory rather than optional.
- Automated detection of abnormal search behavior + proactive lockouts.
- Required case codes / stronger search-justification requirements.
- More agency control over sharing and offense categories.
- Mandatory multi-factor authentication and additional security review.

Flock's position: Misuse is a tiny fraction of overall use, and audit tools can identify and hold bad actors accountable.

Source: Flock Safety, "Flock Updates Privacy, Accountability, Security, and Transparency Safeguards," Aug. 13, 2026.

Then It Became a Labor Issue

- September 2026. D.C. Police Union learns Internal Affairs had used ALPR technology to investigate sworn officers.

THE UNION

Says it had not understood the system would be used this way.

Files grievances and misconduct complaints.

THE DEPARTMENT

Subsequently restricts access to the system as concerns about employee searches emerge.

THE TENSION

The union does not deny ALPR's investigative value — but calls for legislative guardrails.

A crime-fighting tool became an employee-investigation tool.

Source: Washington Post, Sept. 12, 2026, "D.C. police union, Alexandria leaders voice concerns over Flock technology."

Why This Matters for Bargaining

- **Washington DOC:** New software transformed existing GPS technology into a disciplinary monitoring tool.
- **Flock:** Technology designed for criminal investigations was also used to investigate employees.
- New software, analytics and data-sharing arrangements can expand surveillance without installing new equipment.
- Unions should negotiate rules governing capabilities, access, permitted uses and future changes.

Bargain over what the technology CAN do — not merely what management says it plans to do today.

Congress Is Now Paying Attention

- Sept. 23, 2026: Senate Judiciary hearing — "Always Watching: Flock's Nationwide AI Surveillance Network."
- Sen. Josh Hawley (R): Stop Flock Abuse Act — written search approvals, mandatory audits and 10-day data retention.
- Sens. Sanders and Merkley (D), Rep. Ocasio-Cortez (D): Ban Flock Act — broad restrictions on federal ALPR use and funding.
- Additional House bills propose restrictions on ALPR surveillance and federal funding.

The debate has moved from oversight to legislation — regulate the technology or prohibit it?

Pennsylvania: The Debate Is Happening Now

- **October 19, 2026:** Pennsylvania House passed HB 2771 by a bipartisan 190–13 vote.
- The bill restricts ALPR searches, limits data retention, requires warrants for access or sharing and establishes audit safeguards.
- **October 26:** Referred to Senate Transportation Committee. Not yet law.
- Other Pennsylvania proposals range from stronger oversight to banning networked ALPR surveillance.
- The central debate: How do we preserve legitimate law-enforcement uses while preventing misuse and mass surveillance?

Sources: PA General Assembly, HB 2771 (Oct. 26, 2026); ACLU-PA legislative analysis; Spotlight PA (Oct. 2026).

The Middle Ground

- Start with what ALPR technology does well: stolen vehicles, abducted or missing persons, wanted fugitives, vehicles tied to serious crimes.
- Do not discard useful technology simply because it raises legitimate privacy questions.
- Instead, insist on guardrails: defined purposes, limited access, documented search reasons, audit trails, retention limits, sharing rules and *consequences for misuse*.
- This is also where public safety unions can bring credibility: officers understand both the operational value and the potential for misuse.

Is Workplace Surveillance Bargainable?

It depends on the jurisdiction — and what management intends to do with the technology. But generally **YES**.

- **Implementation:** Management may have the right to acquire and install surveillance technology.
- **Use:** Monitoring employees, evaluating performance and imposing discipline may trigger bargaining obligations.
- **Changes:** New capabilities or expanded uses may create additional bargaining obligations.

The right to install technology is not necessarily the right to use it for any purpose.

New Hampshire: Body Cameras and Bargaining

- Governor ordered state troopers to wear body cameras in 2020.
- Troopers Association demanded bargaining over implementation and impact on working conditions.
- Parties held approximately six impact-bargaining sessions. But State refused to respond to union proposals addressing BWC implementation impacts.
- Labor Board found a failure to bargain in good faith and an obligation for State to engage in impact bargaining over implementation of the body-camera program.
- The decision illustrates *impact-bargaining* obligations — not a union veto over body cameras.

New Hampshire Troopers Association v. N.H. Department of Safety, 2024 WL 1904239 (N.H. PELRB 2024).

Two Tables for Public Safety Unions

THE BARGAINING TABLE

- Employee surveillance / employee searches
- Permitted purposes and access
- Use in discipline
- Search justification / case number
- Audit logs and union access to relevant logs
- Retention and outside-agency sharing
- Notice and remedies for misuse
- Future changes in capability or use

THE LEGISLATIVE TABLE

- Privacy and employee-specific protections
- Audit and transparency requirements
- Limits on secondary uses and sharing
- Accountability for misuse
- Preserve the right to bargain over implementation, effects and disciplinary use

Questions to Answer Before Implementation

ASK FIRST

- Vendor contract + governing policies
- What data is collected and retained?
- Who can access or search it?
- What audit logs exist?
- Can it generate employee-specific searches, scores or alerts?
- What new capabilities can a software update add?

WRITE THE RULES

- Define permissible purposes
- Address routine employee monitoring
- Require meaningful human review
- No discipline based solely on AI / technology output
- Access to information relied upon in discipline
- Auditability + notice of material changes

Sample Contract Concept

- *ALPR or other surveillance technology shall not be used for the purpose of routinely monitoring bargaining-unit employees.*
- *Any search involving a bargaining-unit employee or an employee-owned vehicle must be connected to a documented, legitimate investigation or other authorized public-safety purpose.*
- *All such searches shall be logged and auditable.*
- *Information generated by the system shall not constitute a basis for discipline.*
- *Upon request, the Union shall receive relevant search and audit information relied upon in any disciplinary investigation, subject to lawful confidentiality restrictions.*
- *The Employer shall provide notice and bargain to the extent required by law before any material change in the technology's capabilities, functionality, data-sharing arrangements or permitted uses.*

Part Three:

EMERGING PRIVACY PROTECTIONS

FOIA Law Privacy Claims – An Uphill Battle

- Public records laws generally favor disclosure by the government – *that's the point*.
- Courts emphasize the need for transparency, accountability and public oversight of police departments. Especially since 2020.
- Courts view use-of-force reports as factual records documenting public conduct by government officials rather than protected personnel files.
- Traditional FOIA/RTKL analysis was largely developed before modern concerns over doxxing, viral social media exposure, and targeted harassment of officers and their families became commonplace.

Marsy's Law – A Different Approach

- Marsy's Law changes the analysis by reframing the officer not merely as a government employee, but as the victim of a crime entitled to constitutional or statutory privacy protections.
- Instead of arguing that force or other records are exempt personnel records, the argument becomes that disclosure of officer identities could violate crime-victim protections relating to privacy, safety, intimidation, or harassment.
- In several states, Marsy's Law has emerged as a potentially stronger and more successful tool for protecting officer identities than traditional FOIA-based privacy arguments.

Privacy Rights and Public Records Laws

Mayor & City Council of Ocean City v. Washington Post

- Washington Post requested use of force reports and internal reviews maintained by Ocean City Police Department.
- City argued that the records were "personnel records" protected from disclosure … and lost.
- Court cited Maryland's 2021 "Anton's Law" reform statute that expanded release of police information.
- Court held that UOF reports and individual UOF reviews were not protected from disclosure under Maryland law.

Mayor & City Council of Ocean City v. The Washington Post, No. 774, Sept Term, 2024 (Md.App. Ct. Apr. 3, 2026)

Limited Protections Under Public Records Laws

- Iowa — *Harrison v. Mickey, 18 N.W.3d 477 (Iowa 2025):* Des Moines PD use-of-force reports were treated as factual reports, not employee evaluations. Court ordered production, with possible redactions for juveniles or other protected interests.
- New York — *Abbatoy v. Baxter, 210 N.Y.S.3d 555 (2024):* New York repealed its broad statutory shield for police personnel and disciplinary records. Disclosure is now favored absent a specific privacy or investigative justification.
- New Jersey — *Rivera v. Union County Prosecutor's Office, 250 N.J. 124 (2022):* State public records law bars access to IA affairs reports ***but those reports still must be released*** under common law right of access.

Traditional public-records laws provide limited protections for employee privacy.

What Marsy's Law May Protect

- **Officer name withheld from:**
  - Incident reports
  - Court filings
  - Media and FOIA requests
- **Redaction of personal details:**
  - Address, ID numbers, family info
- **Limits on compelled victim testimony (in some cases)**

Tension with Transparency and Accountability

- In some states, Marsy's Law has been used to withhold officer identities from incident reports, court filings, and FOIA/public-records responses following assaults or officer-involved shootings.
- Agencies and courts have also used Marsy's Law to redact personal information, including addresses, ID numbers, and family information.
- Media and open-government groups have argued that this improperly shields police conduct from public scrutiny.
- The result is an ongoing conflict between officer privacy/safety interests and demands for transparency and public accountability

Florida: Marsy's Law Not Guarantee Anonymity

- Two Tallahassee officers involved in separate fatal shootings in 2020.
- PBA sought to prevent disclosure of their names under Florida's Marsy's Law.
- Florida Supreme Court rejected categorical protection for crime victims' names.
- Court distinguished a victim's name from information that could be used to locate or harass the victim.
- Other statutes expressly protect a victim's identity; Florida's constitutional provision did not.

City of Tallahassee v. Fla. Police Benevolent Ass'n, 368 So. 3d 626 (Fla. 2023)

Privacy Rights and Marsy's Law

Gatehouse Media v. Columbus PD

- July 2023. Two Columbus police officers ambushed by gunman following pursuit on Interstate 70. One officer seriously injured. Officers killed one suspect.
- Columbus Dispatch requested all body-cam and cruiser video.
- Department released footage but redacted officer identities, citing Marsy's Law protections, officer privacy, and ongoing investigation.
- Law defines victim as *"a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act."*

State ex rel. GateHouse Media Ohio Holdings II, Inc. v. Columbus Police Dept., 2025-Ohio-5243, ___ N.E.3d ___ (Ohio Nov. 25, 2025).

Privacy Rights and Marsy's Law

Gatehouse Media v. Columbus PD

- November 5, 2025. Supreme Court of Ohio rules in favor of officer privacy:
  1. *The police officers who were shot at during the criminal shootout were "crime victims" under Marsy's Law.*
  2. *Because they qualified as victims, the officers' identifying information was rightly redacted from public records under the Victim Privacy Law (R.C. 2930.07) without violating public-records rights.*

State ex rel. GateHouse Media Ohio Holdings II, Inc. v. Columbus Police Dept., 2025-Ohio-5243, ___ N.E.3d ___ (Ohio Nov. 25, 2025).

Privacy Rights and Marsy's Law

State v. Albaidhani

- Sioux Falls, SD. Two officers involved in foot chase with defendant. Defendant shot at both officers and injured one.
- Officers' names included in the warrant, affidavit and criminal complaint.
- Officers asserted their rights as crime victims under SD Marsy's Law to have their names redacted. Denied.
- Officers intervened in criminal action.
- Officers' requests were denied and they appealed.

State v. Albaidhani, 2026 S.D. 24, ___ N.W.3d ___ (S.D. Apr. 22, 2026).

Privacy Rights and Marsy's Law

State v. Albaidhani

- Court answered two questions.
- 1. Whether LEOs are "victims" under Marsy's Law? YES
  - *"A law enforcement officer is a 'person' under every reasonable interpretation of the word."*
  - Cited Ohio *Gatehouse Media* decision as persuasive.
- 2. Whether LEOs are entitled to have names redacted from public filings. YES
  - *"In the digital information age, a victim's name could be the first and most important piece of information used to locate or harass them."*

State v. Albaidhani, 2026 S.D. 24, ___ N.W.3d ___ (S.D. Apr. 22, 2026).

Privacy Rights and Marsy's Law

Florida HB 1113 of 2026

- April 14, 2026. Florida Gov. Ron DeSantis signs legislation updating Marsy's Law to address Tallahassee decision:
- Police Victims. If police officers are the victim of assault or threatened while on the job, their identity must be confidential for 72 hours after the incident and exempt from disclosures in public records for 60 days.
- Other Victims. Identifying details about *other* crime victims – including any information that could be used to locate, intimidate, harass or abuse a victim – would be exempt indefinitely.

Union Strategies & Takeaways

Bargaining and Policy Actions:

- Negotiate procedures for name redaction and victim confidentiality
- Push for agency policies affirming officers' right to invoke protections

What Union Reps Should Do:

- Educate members on eligibility and process to claim protections
- Coordinate with legal counsel in critical incidents early
- Advocate/bargain for delayed or conditional name release in media disclosures
- Develop relationships with victim rights groups to address concerns.

Technology Issues and Personal Cell Phones

Why would an employer want to examine the contents of an employee's cell phone?



What's On A Cell Phone?

- Call records
- Text and email messages
- Photos
- Location data
- Search history
- Metadata (data that gives information about other data)
- And more …

Privacy Issues, Employer Devices

City of Ontario v. Quon (2010)

- Police department issued text pagers and permitted limited personal use.
- Audit of excessive messaging revealed sexually explicit personal communications by officer to wife and mistress.
- Officer challenged the search under the Fourth Amendment.
- Supreme Court upheld the search as reasonable because it served a legitimate work-related purpose and was not excessively intrusive.
- Key distinction: The device was employer-issued, not personally owned.

City of Ontario v. Quon, 130 S. Ct. 2619 (2010)

Privacy Issues, Personal Cell Phones

Riley v. California (2014)

- Police searched a suspect's phone without a warrant following an arrest.
- Supreme Court held that cell phones contain *extensive* personal information deserving heightened Fourth Amendment protection.
- Police generally must obtain a warrant before searching a cell phone seized incident to arrest.
- But what about workplace investigations?
  - Does the employee have a reasonable expectation of privacy?
  - Can an employer justify a warrantless search under workplace-search principles?
  - Is the proposed search reasonable in scope?

Riley v. California, 573 U.S. 373 (2014)

Privacy Issues, Cell Phones

Port Authority PBA v. Port Authority of NY/NJ (S.D.N.Y. 2017)

- The Port Authority PBA filed a lawsuit alleging that the Port Authority conducted warrantless searches of new officers' personal cell phones, violating their Fourth Amendment rights.
- Court found that the warrantless searches were not justified as work-related and did not fall under any exceptions to the Fourth Amendment.
- Court determined that the new officers did not provide valid consent for the searches – they were coerced.

PSLN, March 2018

Employee-Owned Cell Phones

Turiano v. City of Phoenix (2022)



- During a protest, Phoenix police officer hit a protester in the groin with a 40 mm OC less impact round. Media attention.
- Someone (not the officer) made up a challenge coin depicted a caricature of the protester being hit in the groin by Turiano's munition, along with the words "Good Night Left Nut."
- On the other side, the coin stated the date and location of the protest and the phrase "Make America Great Again One Nut at a Time."

Turiano v. City of Phoenix, No. CV-21-01428-PHX-MTL (D. Ariz. 2022).(PSLN April 2022)

Employee-Owned Cell Phones

- Department investigated an officer's possible connection to the controversial challenge coin.
- Ordered officer to surrender his personal cell phone for examination, threatening discipline for refusal.
- Court found a reasonable expectation of privacy:
  - Officer purchased and paid for the phone.
  - Phone generally was not used for department business.
  - Other employees had no access to its contents.
  - Phone contained extensive personal information unrelated to employment.
- Even under the workplace-search exception, the proposed search violated the Fourth Amendment.

Cell Phones and Public Records Requests

- *City of San Jose v. Superior Court* (California PSLN 2017). City officials' text messages and emails on personal devices/accounts are public records subject to California Public Records Act if they concern official business. Employers may require employees to search their devices for responsive messages.
- *Nissen v. Pierce County (Washington,* PSLN 2015). County prosecutor's text messages on personal device were public records to the extent created or received within the scope of public employment. Court will permit redaction of personal/private content but will require declarations from employees to confirm whether texts meet the criteria.

Cell Phone Advice for the Real World …

- Assume all work-related texts are discoverable, no matter the device.
- Use official channels when possible (department-issued phones/email).
- Agencies should create clear policies for preserving and producing electronic communications.
- Unions should educate members about risks of casual texting in workplace disputes or investigations.
- Address in bargaining to avoid mid-investigation disputes.

Two Provisions Worth Considering

A. *Privacy and Family Safety. The Employer shall not release the identities of any officer involved in a shooting or other use of force if no criminal charges have been filed against the officer, absent the consent of the officer.*

B. *Personal Cell Phones. The Employer shall not be permitted to access an officer's personal cell phone absent a warrant or officer consent.*

Part Four:

THE EXPANDING REACH OF BRADY/GIGLIO

Brady/Giglio: The Essential Rules

- **Brady v. Maryland (1963):** Prosecutors must disclose material evidence favorable to the accused.
- **Giglio v. United States (1972):** Disclosure includes evidence bearing on the credibility of government witnesses.
- **United States v. Bagley (1985):** Disclosure obligations apply even without a defense request.
- **Kyles v. Whitley (1995):** Prosecutors must account for favorable evidence known to the prosecution team, including police.

The employment problem: *A disclosure obligation can become a career-threatening designation or exclusion from prosecutions.*

Disclosure Is Not Disqualification

- DOJ policy requires agencies to report a broad range of potential impeachment information.
- Unsubstantiated, noncredible or exonerated allegations generally are not considered potential impeachment information.
- Prosecutors must evaluate whether information warrants disclosure in a particular criminal case.
- Disclosure does not automatically establish misconduct or render an employee unable to testify.
- **The problem:** Brady disclosures, Brady-list placement and prosecutorial exclusion are sometimes treated as interchangeable.

Source: DOJ Justice Manual § 9-5.100 — Giglio Policy

Brady Discovery Reaches Personal Cell Phones

United States v. David (W.D. Va. June 30, 2026)

- Officers used personal and work phones to exchange messages during a criminal investigation.
- Govt initially maintained that responsive communications did not exist.
- Body-camera footage revealed texting; subsequent searches uncovered hundreds of additional communications.
- Court ordered a limited forensic examination of relevant devices, subject to privacy safeguards.

Takeaway: *Using personal phones for investigative communications creates preservation and discovery obligations. Personal privacy remains relevant but is not an absolute shield.*

Brady/Giglio and Access to IA Records

N.J. Office of the Public Defender v. N.J. Department of Law

- Public Defender sought internal affairs "Appendix K" reports identifying officers and misconduct allegations.
- State denied access, citing confidentiality protections.
- Appellate court held that criminal discovery procedures did not foreclose a separate common-law access claim.
- Remanded for review of the records, appropriate redactions and balancing of competing interests.

Brady-related information may become the subject of broader records-access litigation, even outside individual criminal cases.

2026 N.J. Super. Unpub. LEXIS 757 (unpublished).

Brady Lists and Exclusion Lists: Not the Same

- Brady/Giglio list: Identifies officers whose records may contain information requiring **disclosure** in criminal cases.
- Exclusion list: Identifies officers whom prosecutors **will not call** as witnesses or whose cases they will decline to prosecute.
- Standards and procedures vary significantly among jurisdictions.
- Placement on either list can have serious employment consequences.
- **The central concern:** Who decides, what process is provided and how can an officer challenge the designation?

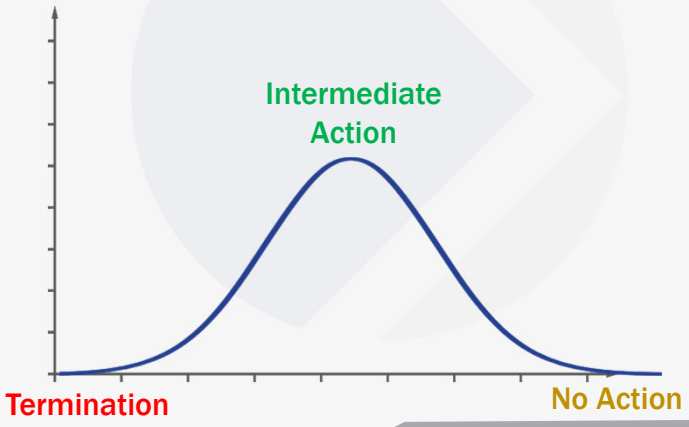
Brady/Giglio: The Cook County Approach

- State's Attorney Eileen O'Neill Burke replaced public Brady disclosure and Do Not Call lists with internal records and a revised review process.
- Under the December 2025 policy, officers stripped of police powers are placed on an internal exclusion list.
- August 2026 reporting identified 254 law enforcement officers barred from testifying, including 240 current or former Chicago officers.
- Many officers face unresolved disciplinary proceedings while their ability to testify remains restricted.

Chicago Tribune, August 2026; The Chicago Reporter, August 2026.

Agency Reactions To The *Brady* Rule

The vast majority of jurisdictions fall *somewhere* on the *Brady* continuum.



Brady Restrictions and Termination

Hubacz v. Village of Waterbury (Vt. 2018) (PSLN May 2018)

- DA refused to pursue cases involving an officer for Brady/Giglio reasons.
- Employer terminated the officer, arguing that he could no longer perform essential job duties.
- Vermont Supreme Court rejected automatic termination based on the prosecutor's decision.
- **Rule:** Employer must consider whether the restriction can reasonably be accommodated through reassignment, witnessed arrests or other measures.
- **Takeaway:** A prosecutor's refusal to use an officer does not necessarily establish just cause for termination.

Collateral Impact

Cox v. SEPTA, (3d Cir. 2026) (PSLN Apr 2026)

- Transit police officer terminated for excessive force re: arrest.
- Also charged with dishonesty during investigatory interview.
- Transit Authority notifies county DA → officer placed on Giglio list.
- Officer files race discrimination lawsuit (Title VII, PHRA, §§ 1981/1983). Claims disparate treatment from other officers.
- **Case dismissed.** Officer not "qualified" for job in first place because of the loss of a "core job function" – inability to testify.
- Court analogizes to loss of required credential (e.g., driver license).

Prosecutorial Absolute Immunity

Harris v. Krasner, (3d Cir. 2024)(PSLN Oct 2024)

- Complaint against officer filed by her domestic partner in response to officer acting on sexual assault against her child.
- IA investigates – complaint dismissed as unfounded and expunged.
- 4 years later. Officer learns of placement in the DA's Police Misconduct Database based on *unfounded* complaint.
- Third Circuit noted that prosecutors should err on the side of disclosure when unsure about whether information is disclosable under *Brady*. DA immune from suit.

Prosecutorial Immunity – Extreme Cases

Pownall v. Krasner (3d Cir. 2024)

- Philadelphia police officer charged with murder following OIS.
- Prosecutor withheld an expert report supporting the officer's justification for the shooting. Criminal charges dismissed.
- Arbitrator subsequently reinstated with back pay.
- Third Circuit held that *absolute* prosecutorial immunity protected conduct undertaken in the prosecutor's advocacy role, including grand jury proceedings.

Takeaway: *Even serious allegations of prosecutorial misconduct may not overcome absolute immunity.*

Prosecutorial Immunity Has Limits

Bevill v. Wheeler, 2024 WL 2762493 (5th Cir. 2024)

- Police captain alleged retaliation after participating in a friend's criminal defense.
- District attorney threatened to stop prosecuting cases from the *entire* police department.
- Fifth Circuit rejected absolute immunity for the alleged threat.
- The threat was directed at influencing an employment decision, not prosecuting a particular criminal case.

Takeaway: *Prosecutorial immunity depends on the function being performed, not merely the prosecutor's title.*

Due Process and Brady Lists

FOP Lodge No. 5 v. City of Philadelphia (Pa. Cmwlth. 2021)

- Officers challenged placement on the DA's Brady and Do Not Call lists, including cases involving overturned or unfounded misconduct allegations.
- Commonwealth Court found the DA's review process that was limited to correcting factual errors did not provide a meaningful opportunity to contest placement.
- An impartial review process was essential – *"adequate due process requires an impartial tribunal."*

Takeaway: *Prosecutorial disclosure obligations do not eliminate officers' procedural due process rights.*

Due Process and Giglio Designations

Leech v. State, 922 S.E.2d 732 (N.C. Ct. App. 2025)

- Officer discarded a boxcutter after confirming with his supervisor that it was unrelated to a rape investigation.
- DA questioned his explanation, issued a Giglio letter and refused to use him as a witness.
- Officer resigned after the department initiated termination proceedings.
- North Carolina law required reporting of Giglio designations to a statewide database accessible to future law enforcement employers. No process for officer to dispute.
- Appeals court revived the officer's constitutional challenges to the designation process and the statute.

Recent Due Process Gains? The Big One

Richmond v. Jefferson County Attorney (Iowa 2026)

- Sheriff Bart Richmond placed on the county attorney's Brady/Giglio list after a dispute over an investigation into a deputy sheriff's use of force.
- Prosecutor concluded the Sheriff's conduct raised concerns about his "credibility, candor and truthfulness."
- Iowa law allowed the Sheriff to seek judicial review, and the trial court ordered his removal from the list.
- Prosecutor appealed. Argued that Iowa's Brady/Giglio review statute was unconstitutional because it interfered with prosecutors' Brady obligations and discretion.

Richmond: The Iowa Supreme Court Rules

Richmond v. Jefferson County Attorney (Iowa 2026)

- Prosecutor argued that the statute prevented him from discharging constitutional obligation to criminal defendants.
- Court rejected this argument. Held that judicial review of Brady/Giglio placements does not violate due process because prosecutors remain free to disclose impeachment evidence in individual cases.
- The statute regulates *placement on a Brady/Giglio list*, not a prosecutor's constitutional disclosure obligations.

Brady/Giglio: What Unions Can Negotiate

- Notice and an opportunity to respond before potentially disqualifying information is sent to prosecutors.
- Procedures for correcting inaccurate information and challenging Brady-list placement.
- Confidentiality protections and limits on release of personnel records.
- Protection against additional discipline based solely on a subsequent Brady designation.
- Reassignment or accommodation before termination based on prosecutorial restrictions.

Bargaining cannot eliminate constitutional disclosure obligations, but it can protect employees from unfair employment consequences.

Brady/Giglio In Arbitration

From Arbitrator Joe Daly, 2019:

"There is overwhelming arbitral precedent that an officer's Brady status is not a substitute for just cause and is not in and of itself grounds for termination. In recent years, law enforcement agencies have increasingly sought to 'weaponize' Brady by asserting, as the City does in the present case, that a Brady-impaired officer is effectively disqualified from employment because he or she will be unable to testify in future criminal cases."

"But . . . arbitrators have repeatedly rejected this argument, holding that a Brady designation cannot be construed as a "silver bullet" for employers."

Brady In State Legislatures: Florida

Florida's HB 95 (2023):

- Prohibits the discharge of a law enforcement officer solely for placement on a *Brady* list,
- Explicitly does not mandate *Brady* lists.
- Requires notice when IA materials are sent to prosecutor.
- Creates a modest right to appeal a *Brady* determination made by a prosecutor.

Brady In State Legislatures: Iowa

Iowa's House File 2496 (2023). Provides a statutory framework for protecting officers without restricting criminal discovery.

- Prohibits discipline based solely on a prosecutor's Brady/Giglio determination.
- Requires prosecutors maintaining Brady lists to adopt written placement criteria.
- Requires notice and an opportunity for officer input before placement.
- Provides for notice of the decision and a reconsideration process.
- Preserves prosecutors' constitutional disclosure obligations.

Iowa *Expands* Brady/Giglio Protections

House File 2797 (2026):

- Extends statutory protections to officers regardless of when the Brady/Giglio placement occurred.
- Strengthens judicial remedies for officers who successfully challenge placement.
- Authorizes equitable relief and recovery of attorney fees, expenses and court costs.
- Places responsibility for monetary awards on the governmental entity responsible for the prosecuting agency.

The Comprehensive Approach

To protect the rights of officers as well as criminal defendants, police unions and agencies can pursue the following approaches:

- Pursue state legislation to codify and standardize best practices.
- Develop mutually acceptable disclosure policies with local prosecutors, including due process procedures for affected officers.
- Bargain standards governing disclosure triggers, notice and opportunity for officers to challenge disclosures, and standard accommodations for limited officers.
- Ensure ample disciplinary protections for officers negatively impacted by a prosecutor's *Brady* decisions.

The Investigation:

Where Discipline Cases Are Built (Or Broken)

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LRIS LABOR RELATIONS INFORMATION SYSTEM

UNION REPRESENTATION IN DISCIPLINARY INVESTIGATIONS

Weingarten Rights & Investigatory Interviews



How a 1975 dispute over whether a food service employee paid full price for 4 pieces of chicken ($1.00) turned into of the most important principles of labor law.

Introduction To *Weingarten*

- Origin: 1975 case involving a lunch counter worker accused of stealing chicken.
- The Supreme Court held that employees have a right to union representation during investigatory interviews.
- The case established the principle that the NLRA protects employees from coercive questioning by balancing the power dynamics.

The *Weingarten* Rule

- The *Weingarten* holding: An employee has the right under Section 7 of the National Labor Relations Act to request the presence of a union representative during an investigatory interview by the employer that the employee reasonably believes could result in disciplinary action.
- The basis for the Court's decision: The NLRA is designed to eliminate the "inequality of bargaining power between employees and employers."
- But why?

NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

The *Weingarten* Rule

> 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 union representative could assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident occasioning the interview.

***National Labor Relations Board v. J. Weingarten*, 420 U.S. 251 (1975).**

The *Weingarten* Rule: A Restatement



What Triggers *Weingarten*?

- The interview must be investigatory in nature — *i.e.*, it seeks to uncover facts about possible misconduct.
- The employee must reasonably believe that the interview could lead to discipline.
- The employee must clearly request representation—this right is not automatic or implied.

Who Is The Employer?

- *Weingarten* applies when the employer, or someone acting on the employer's behalf, requires the employee to answer questions.
- Even if the questions are asked by outside actors like a fitness evaluator or prosecutor, the union right applies if ordered by the employer.
- The key is whether the employer has directed the inquiry or created the obligation.

What Is "Questioning?"

- Any attempt to elicit facts or statements from the employee can qualify as 'questioning.'
- Being ordered to write a report may trigger the right if the purpose is to collect information that could lead to discipline.
- Routine conversations or updates without investigative intent generally do not qualify.

What Is "Questioning?"

California School Employees Assn (Cal. PERB 2018) (PSLN March 2019)

- *Weingarten* protections apply where employer ordered employee to write a report as opposed to participating in an interview.

Teamsters Local 117 v. Washington State Department of Corrections, (Wash. PERC 2024)(PSLN Dec 2024)

- *Weingarten* protections did not apply where employer cancelled supervisory conference because union steward planned to attend, then issued employee a negative performance evaluation.

When *Weingarten* Doesn't Apply

- Meetings limited to performance counseling, training, or job updates typically do not trigger *Weingarten*.
- If the purpose is to arrest the employee and no questions are asked, rights do not attach.
- Employer statements denying disciplinary intent may reduce applicability — though context still matters.

When *Weingarten* Doesn't Apply

Madison County Deputy Sheriff's Association (PSLN Oct 2023)

- Deputy Sheriff refers to his Sergeant as "a f---king asshole" to a uniform vendor. Ordered to meet with the Sgt and their Lieutenant, who impose a letter of counseling. Dispute over whether Q&A.
- "Representation will not attach to verbal interactions in a meeting or discussion with employees that is limited to counseling, training, evaluations, and updates on job assignments, but can attach when a meeting or a discussion metamorphosizes into questioning about an employee's conduct or omissions in a context that makes it reasonably appear that the employee may be a potential subject or target of discipline."

When *Weingarten* Doesn't Apply

State of New Jersey (N.J. PERC ULP Director 2022) (PSLN May 2022)

- *Weingarten* does not apply where the purpose of a meeting (unbeknownst to the employee) is to arrest the employee so long as no questioning occurs during the arrest.

Labels Don't Matter

- Employers may label a meeting as non-disciplinary or as involving a 'witness,' but labels don't control.
- What matters is the employee's reasonable perception of discipline risk based on tone, setting, and questions.
- Courts have repeatedly held that substance trumps form when evaluating representation rights.

Labels Don't Matter

We have consistently rejected the notion that an employee's right to a union representative at a given meeting hinges on the label the employer attaches to the meeting. Thus, whether characterized as a conference, interview, meeting, investigation, or interrogation - whether disciplinary or investigatory - the label does not determine an employee's *Weingarten* right. In the same manner, the classification attached to an employee as a witness or subject is not determinative of that employee's *Weingarten* right. Otherwise, a public employer could simply classify an employee as a 'witness' and deny her right to a union representative under *Weingarten*.

Bardelas v. City of Doral (PSLN October 2019)

Labels Don't Matter

Fraternal Order of Transit Police (PLRB ALJ 2020)(PSLN April 2020)

- *Weingarten* did not apply where employer assured police officers who were subject to interviews that no discipline would result from the meetings.
- Police Chief told the officers that they were in no jeopardy of discipline and that the inquiry was focused solely on the actions of the other officers.

Reasonable Belief Of Discipline

- A belief is reasonable if a typical employee would perceive the risk of discipline based on circumstances.
- Factors: seriousness of allegations, who's conducting the interview, whether prior discipline is involved.
- Being told one is a 'witness' doesn't preclude rights if questioning becomes accusatory.

Reasonable Belief Of Discipline

Canovas v. Miami-Dade County Board of County Commissioners, (Fla. PERC 2022)(PSLN July 2022)

- *Weingarten* does not apply where purpose of meeting was to discuss status of project and identify revised deadlines.
- Employee's multiple requests for representative denied BUT employer provided multiple assurances that discipline was not forthcoming.
- **P.S.:** Employee subsequently disciplined for her conduct during the non-investigatory meeting.

Waiver Of Rights

- Employees can waive their rights, but the waiver must be clear, unmistakable, and voluntary.
- Answering questions without a rep after being told "you don't need one" does not automatically equal waiver.
- Best practice: always restate the request and document any denial or confusion.

Waiver Of Rights

Brett Essick and City of Elgin (Ill. Lab. Rel. Bd., 2024) (PSLN August 2024)

- *Weingarten* not waived where officer requested union rep but then answered questions after Chief told him that be didn't need a rep.
- "You can have whoever you'd like in here, but you are still going to have to make the phone call."
- Employee's status as 10-year officer and his failure to repeat his request do not constitute waiver of the right.

Routine Interactions Are Exempt

- Normal supervisor check-ins or performance discussions aren't covered — even if critical.
- Courts distinguish between casual interactions and interviews meant to assign blame.
- Supervisors must avoid mixing performance feedback with hidden investigations.

Routine Supervisor-Subordinate Exchanges

Lozano v. City of Los Angeles (PSLN March 2022)

The " " case.

Weingarten does not apply to "normal exchanges between supervisors and subordinates," even though a supervisor might be "uneasy" about the employee's conduct.

Image Credit: DroidLife

Combining *Weingarten*, *Garrity*, *Miranda*

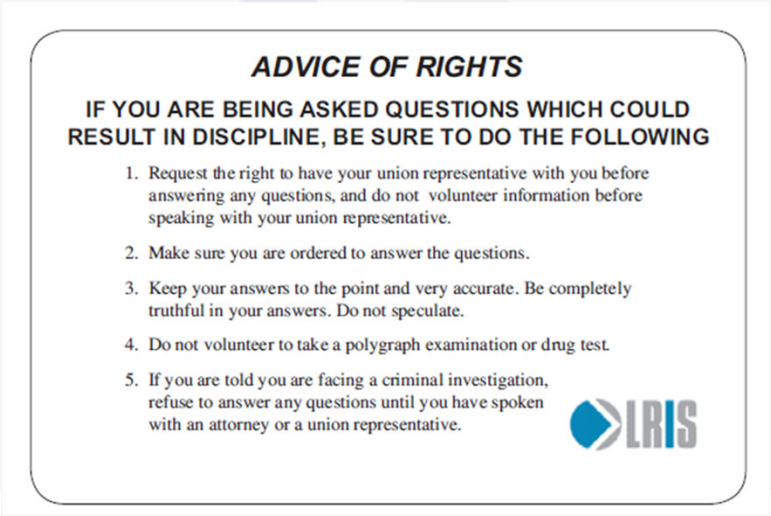
- These rights intersect in disciplinary and criminal matters involving public employees.
- Unlike *Garrity*, *Weingarten* is not self-executing. Employees must request the right to representation.
- *Garrity* protects against self-incrimination in compelled job-related statements.
- *Miranda* is required for custodial criminal interrogations — its mere presence can imply discipline is possible.

Combining *Weingarten*, *Garrity*, *Miranda*

Pennsylvania State Corrections Officers Association (PSLN November 2021)

- No ULP where corrections officer agreed to 45-60 minutes of questioning regarding contraband, signed *Miranda* waiver form, but never requested a union representative.
- Why is this rule as important to employers as it is to labor organizations?

Preparing Members – Advice Of Rights Cards



ADVICE OF RIGHTS

IF YOU ARE BEING ASKED QUESTIONS WHICH COULD RESULT IN DISCIPLINE, BE SURE TO DO THE FOLLOWING

1. Request the right to have your union representative with you before answering any questions, and do not volunteer information before speaking with your union representative.
2. Make sure you are ordered to answer the questions.
3. Keep your answers to the point and very accurate. Be completely truthful in your answers. Do not speculate.
4. Do not volunteer to take a polygraph examination or drug test.
5. If you are told you are facing a criminal investigation, refuse to answer any questions until you have spoken with an attorney or a union representative.

LRIS

Preparing The Member For The Internal Interview

- Describe the interview process for the member.
- Stress the ability to take breaks.
- Develop alternative communication modes – shin-kicking, if necessary.
- Review in painstaking detail the documentary evidence with the member.

Union Rep's Role During Interview

- Rep can consult with the member before the interview begins.
- During the meeting, the rep can take notes, review documents, and help the employee clarify responses.
- Rep can interrupt for clarifications, object to unfair or harassing questions.
- Rep may suggest witnesses or mitigating facts after the interview concludes.
- Rep's role is not to argue but to support and advise constructively.

Union Rep's Role During Interview

PSCOA v. Commonwealth of Pennsylvania, Case No. PERA-C-22-277-E (PDO 2023) (PSLN Dec 2023)

- Employer violated *Weingarten* when interviewer instructed union representative to "sit there and shut the f**k up," and then told member that his representative was an ass.
- Union representative permitted to interrupt interview and ask clarifying questions, so long as he did not "disrupt the interview and convert the interview into an adversarial confrontation."

Union Rep's Role During Interview

Department of Corrections v. PLRB (Pa. Commw. Ct.) (PSLN May 2024)

- *Weingarten* permits both the individual being questioned and the union representative to request a caucus once the employer engaged in a new line of questioning which could lead to additional or different discipline.
- "Requiring [a union] representative to stand mute when the employee's right should be asserted is tantamount to denying representation altogether."

What Reps Can't Do

- **Reps must not obstruct the interview or turn it into a cross-examination.**
- **Hostile, abusive behavior — like yelling or name-calling — can forfeit rights or trigger discipline.**
- **Reps walk a line: firm advocacy without adversarial disruption.**

No-Contact Orders

- Employers may issue no-contact orders during investigations BUT the orders must be narrowly tailored to protect the investigation—not to chill representation.
- Employers cannot prohibit communication between members and their union reps.

"There is no more fundamental right afforded employees under the statutory collective bargaining scheme than the right to communicate with others about working conditions. Working conditions include the circumstances underlying and surrounding an investigation into alleged employee misconduct."

Oakdale POA, (Cal. PERB ALJ 2019)

Top 5 Tips for Employees… Plus 1

1. Request a union representative at the first hint of discipline.
2. Stay calm, speak clearly, and avoid volunteering extra details.
3. Ask for breaks if needed—never rush through answers.
4. Decline to sign anything or confirm summaries unless 100% accurate.
5. Review evidence with your rep before making a statement.

and…

6. ALWAYS TELL THE TRUTH!!

Garrity Rights & Self-Incrimination

Introduction to *Garrity v. New Jersey*

- Investigation into "ticket-fixing scheme" in Belmar and Barrington, New Jersey.
- Six officers were told that if they did not cooperate with the investigation, they would be fired. They gave statements, and criminal charges resulted.
- 5-4 decision, with majority opinion written by William O. Douglas.



Justice William O. Douglas

Image Source: Harris & Ewing

Introduction to *Garrity v. New Jersey*

Conclusion:

The use of the statements in the criminal cases violated the self-incrimination clause of the Fifth Amendment and due process clause in the Fourteenth Amendment.

"We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

The *Garrity* Rule

A Simple Statement of the *Garrity* Rule

If an employee is compelled by threat of possible job forfeiture to make an oral or written statement...

Then

Neither the statement nor the fruits of the statement may be used against the employee in a subsequent criminal prosecution of the employee.

The *Garrity* Rule, Part 2: *Gardner v. Broderick*

- Gardner was an NYPD officer who was subpoenaed to appear before a grand jury investigating alleged corruption of police officers in relation to illegal gambling.
- Gardner was asked to sign a "waiver of immunity" and was told if he refused to sign the waiver, he would be fired. He refused and was fired.
- The US Supreme Court disagreed…

The *Garrity* Rule, Part 2: *Gardner v. Broderick*

- "The mandate of the great privilege against self-incrimination does not tolerate the attempt… to coerce a waiver of the immunity it confers on penalty of the loss of employment."
- "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal."

The *Garrity* Rule Summarized

- Employees may be compelled to talk as part of an internal investigation if they are granted immunity.
- Employee's statements cannot then be used in criminal case.

"So long as the appropriate immunity is given to the statement and notice of the immunity to the employee, *Garrity* does not prohibit a public employer from ordering an employee to provide a statement with potential criminal implications."

Homoky v. Ogden (7th Cir. 2016)

When *Garrity* Applies

- For *Garrity* to apply, the employee must reasonably believe their refusal to answer questions will result in termination.

United States v. Camacho (S.D. Fla. 1990)

- Officer will be considered "ordered" to answer questions or write a report if:
  1. Officer subjectively believes that he is compelled to give a statement upon threat of loss of job; and
  2. Officer's belief is objectively reasonable at the time the statement is made.

What Makes The Employee's Belief Reasonable?

Factors that bear on the reasonableness of an employee's belief:

- What was the rank and assignment of the person who conducted the interview?
- Where and under what circumstances was the interview conducted?
- What are the Department's rules?
- Was the employee told he/she was free to leave?
- Did the interviewer say anything about the consequences of failing to answer?
- Was the interview recorded?

Reasonableness Factors

United States v. Lewis (S.D.N.Y. 2021) (PSLN Jan 2022)

- Correctional officer alleged to have accepted bribes in return for facilitating the smuggling of drugs into facility.
- Officer provided statements and signed "voluntary statement" form which provided that no adverse employment consequences would follow solely from her refusal to answer questions in the interview.
- Statement will be rejected as involuntary "only where the pressure reasonably appears to have been of sufficiently appreciable size and substance to deprive the accused of his free choice to admit, to deny, or to refuse to answer. It must amount to a choice 'between the rock and the whirlpool'."

Reasonableness Factors

State of Florida v. Socarras (Fla. Dist. Ct. App. 2019) (PSLN May 2019)

- "When detained in the instant case, Socarras was stopped by an officer in the middle of the night, held at gunpoint, handcuffed, frisked, and transported in the back of a police cruiser to an unknown precinct. He was subjected to ultraviolet scan, relieved of his service weapon, read Miranda warnings, and divested of his police vehicle, which was treated as evidence."
- "Under these circumstances, it is unfathomable that a reasonable person, particularly an experienced law enforcement officer, would not be aware that a criminal investigation had commenced."

Who Gets *Garrity* Warnings?

- **To employee, not necessarily to counsel**

Wilson v. State **(Alaska 2021)(*PSLN* Jan 2022)**

- ***Garrity*** **warnings need only be given to the employee, not to the employee's attorney.**
- **Even though the employer knows that the employee is represented by counsel.**

Garrity & Routine Reports

United States v. Smith (11th Cir. 2016)

- "*Garrity* does not stand for the proposition that a statement made in a standard report is coerced whenever an officer faces both the remote possibility of criminal prosecution if he files the report and arguably even speculative possibility of termination if he declines to do so."
- "Rather, the touchstone of the *Garrity* inquiry is whether the defendant's statements were coerced and therefore involuntary."
- However…

Garrity & Routine Reports

State v. Reps (Minn. Dist. Ct. 2015)

- Indictment dismissed where prosecutor introduced in grand jury proceedings written report from trooper involved in collision where two motorists died.
- Court finds that trooper could reasonably believe that his report, which he was ordered to give by his commander, was required as a condition of employment.

What Does "Use" Mean?

- If public employer compels employee to answer questions or provide a written statement upon threat of possible job loss, then neither the employee's answers or statement nor the fruits of the answers or statement can be **used** to criminally prosecute the employee.
- Whether the prosecution has improperly relied on *Garrity* evidence is usually tested through what have been called "*Kastigar* hearings", bearing the name of a Supreme Court decision describing the process.

Kastigar v. United States, 406 U.S. 441 (1972).

What Does "Use" Mean?

State v. Ward (Ga. App. 2021) (PSLN Jan 2022)

- Former police officer convicted of child molestation.
- Two prosecutors admitted that they had read transcripts of the officer's internal affairs interview.
- In reversing the officer's conviction, the Court held that "the State did not meet its burden… of proving that it did not make derivative use of Ward's *Garrity*-protected statements…"

What Does "Use" Mean?

State v. Flynn (Ohio Mun. Ct., 2023) (PSLN Sept 2023)

- Beware the risks of conducting concurrent criminal and administrative investigations.
- Officer accused of dereliction of duty related to investigation of crimes against children.
- Charges dismissed because *Garrity* statement was provided to prosecutor's office and prosecutor failed to prove that the statement was not used as part of its investigation – even when primary investigator was walled off from administrative investigation materials.

Which Statements Are Protected?

Delaware v. MacColl (Del. Super. 2022) (PSLN Sept 2022)

- Officer-involved shooting investigation. Allegation that officer switched gun barrel after shooting.
- Officer denied charges during IA interview after being provided *Garrity* warning and ordered to answer questions. Later "clarified" during second interview.
- Officer charged criminally with providing false statements during interview. Moved to suppress the IA statement. Denied.

Which Statements Are Protected?

Delaware v. MacColl (Del. Super. 2022) (PSLN Sept 2022)

- "*Garrity* did not rewrite the Fifth Amendment. *Garrity* immunity parallels Fifth Amendment immunity, and the Fifth Amendment does not protect perjury. So *Garrity* does not protect false testimony. Indeed, *Garrity* protection is not a license to lie."
- "Accordingly, every post-*Garrity* decision has held that *Garrity* immunizes only truthful statements made by police officers under penalty of termination. False statements are not considered 'coerced' under the Fifth Amendment or *Garrity*."

Garrity Immunity Is Self-Executing

Scatchell v. Board of Fire and Police Commissioners, 2022 IL App (1st) (PSLN Dec 2022)

- Officer invoked 5th Amendment rights and refused to testify at an internal disciplinary hearing regarding allegation of theft of time – officer called out sick and went hunting (with a convicted felon).
- Officer represented by counsel at hearing. No active criminal investigation. No *Garrity* warning/form issued.
- Officer terminated for insubordination, appealed… and lost.

Garrity Immunity Is Self-Executing

Scatchell v. Board of Fire and Police Commissioners, 2022 IL App (1st) (PSLN Dec 2022)

- "Having been afforded protection against self-incrimination by this immunity, the employee may be subject to adverse employment action if they remain silent."
- "Neither the Board nor the Village ordered Scatchell to waive his *Garrity* immunity; to the contrary, they repeatedly told him that he would be protected by *Garrity* immunity and thus had no fear of self-incrimination if he testified before the Board. Scatchell's right against self-incrimination was never in doubt; it remained intact because of the immunity afforded him."

Limits On *Garrity* Protection

***Garrity* is a rule of criminal procedure and does not prohibit the use of a compelled statement in a non-criminal forum.**

***Hoban* (2019)**

- *Garrity* does not prohibit the use of compelled statements in a subsequent civil lawsuit against the employee.

***Chasnoff* (2015)**

- *Garrity* does not create a privilege prohibiting disclosure under a public records law.

***MacColl* (2022)**

- *Garrity*-insulated statements regarding past events under investigation must be truthful to avoid future prosecution for such crimes as perjury and obstruction of justice.

Limits On *Garrity* Protection

Hoffman v. Peace Officer Standards and Training Council (Utah App. 2022) (PSLN June 2022)

- Garrity warnings need not include the possibility that answers could result in decertification.
- "If a public employee is required to answer as a condition of their employment, the employer must remove the threat that the officer's statements given in a disciplinary interview could later be used against them in a subsequent criminal prosecution."
- That's it!

Drug And Alcohol Tests

***Guitierrez* (2015)**

Garrity does not apply to non-testimonial evidence such as a portable breath test.

However...

***Shoemaker* (2019)**

Garrity requires exclusion of the results of alcohol testing where the employee was told she would be terminated if she refused to be tested. The Court reasoned that the consent to the test was not voluntary.

5 Practical Tips For Protecting *Garrity* Rights

- Always ask if discipline is possible.
- Request *Garrity* warning in writing.
- Document all interactions.
- Don't mix *Miranda* and *Garrity* without clarity.
- Don’t rely on vague assurances.

Final Reminders On Procedure

- Rights must be invoked — train your members.
- Improper handling can sink cases or prosecutions.
- When in doubt — assert the right.

THANK YOU



Discipline In Practice:
Building, Evaluating And Defending Cases

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LRIS LABOR RELATIONS INFORMATION SYSTEM

PUBLIC SAFETY OFFICER BILLS OF RIGHTS:
From Constitutional Rights To Statutory Rights

From Constitutional Rights to Statutory Rights

Yesterday: The Constitutional Floor

- *Weingarten*: Representation during investigatory interviews
- *Garrity*: Protection against criminal use of compelled statements
- Constitutional rights establish important protections — but not a comprehensive disciplinary procedure.
- POBOR statutes build a procedural framework around those rights.

There is No Single "Police Bill Of Rights"

- **Approximately 20 states provide POBOR protections.**
- **Some largely codify existing constitutional protections.**
- **Others create significant additional procedural rights.**
- **Coverage, procedures and remedies vary dramatically by state.**
- **Always start with the statute.**

California and **Florida** provide two different models.

Statutory Rights Can Change

- Maryland enacted the nation's first POBOR in 1974.
- In 2021, Maryland repealed it as part of broader police reform legislation.
- The replacement law imposed a new statewide disciplinary structure.
- Lesson: POBOR protections exist because legislatures create them — and legislatures can expand, restrict or repeal them.

What Can a POBOR Govern?

- Who is protected?
- When do statutory rights attach?
- Notice of the allegations
- Access to evidence
- Representation
- How questioning is conducted
- Recording of interviews
- Investigation deadlines
- Discipline and appeal
- Remedies for violations

POBOR can regulate the investigation from beginning to end.

When Do POBOR Rights Attach?

- **An officer is called into a supervisor's office and asked about an incident from the night before. *Is this a POBOR interrogation?***
  - *Covered employee?*
  - *Investigation?*
  - *Interrogation?*
  - *Potential discipline?*
  - *Who is conducting the questioning?*

California: When Do Rights Attach?

California POBOR

- **Applies when a public safety officer is:**
  - Under investigation
  - Subjected to interrogation
  - By the employing public safety department
  - Concerning conduct that could lead to punitive action
- **"Punitive action" includes:**
  - Dismissal • Demotion • Suspension • Salary reduction • Written reprimand • Punitive transfer

California: What Is *Not* Covered?

Section 3303 does not apply to interrogation during:

- Normal course of duty
- Counseling
- Instruction
- Informal verbal admonishment
- Routine or unplanned supervisor contact

Nor does §3303 apply to an investigation concerned solely and directly with alleged criminal activity.

When does supervision become an investigation?

Florida: When Do Rights Attach?

- **Florida covers a law enforcement or correctional officer who is:**
  - Under investigation
  - Subject to interrogation
  - By members of the officer's agency
- **For a reason that could lead to:**
  - Discipline
  - Suspension
  - Demotion
  - Dismissal

Before The Interview: What the Officer Must Know

California

Officer must be informed of:

- **Nature of the investigation**
- **Rank, name and command of officer in charge**
- **Identity of interrogators**
- **Others present**

Florida

Officer must be informed of:

- **Nature of the investigation**
- **Names of all complainants**
- **Identity of investigating/interrogating personnel**
- **Others present**

Florida: Show Me the Evidence

Before the investigative interview, the officer gets:

- Complaint
- Witness statements
- Existing statements from subject officers
- Incident reports
- GPS locator information
- Audio/video recordings
- Other existing evidence relating to the incident

and:

- **Identifiable witnesses should, whenever possible, be interviewed *before* the accused officer.**

Why Does Interview Order Matter?

INVESTIGATOR

"I want the officer's unrehearsed account."

OFFICER

"You're compelling me to answer. I should know the evidence against me."

Which produces the more reliable investigation?

The Legislature in the Interview Room

POBOR statutes may regulate:

- Time of interview
- Location
- Number of interrogators
- Identity of persons present
- Duration and breaks
- Threats or promises
- Representation
- Recording

These are <u>not</u> constitutional requirements. They are rules legislatures have imposed on the disciplinary process.

How Many Interrogators?

California

No more than TWO interrogators questioning the officer at one time.

Florida

Questions through ONE interrogator during an investigative interrogation unless the officer waives the requirement.

Time, Conditions and Tactics

- **Both states regulate the manner of questioning:**
  - Reasonable time
  - Preferably while officer is on duty
  - Reasonable interview periods
  - Personal necessities/rest periods
  - Restrictions on offensive language
  - Restrictions on threats
  - No promises/rewards to induce answers
- **California permits an officer to be informed that refusing to answer job-related investigative questions can result in punitive action.**
- **Florida's corresponding protections appear in §112.532(1)(e)-(f).**

Yesterday: *Weingarten*. Today: POBOR

WEINGARTEN

A labor-law right tied to represented employees and investigatory interviews.

POBOR

A statutory right that may independently guarantee representation and define when that right applies.

California: **Representative of officer's choice.**

Florida: **Counsel or other representative of officer's choice.**

What Does "Representation" Mean?

Can the representative…

- Confer privately with the officer?
- Clarify a question?
- Object to a question?
- Ask the investigator to rephrase?
- Ask questions at the end?
- Tell the officer not to answer?

A right to be "present" and a right to meaningfully "represent" are not necessarily the same thing.

Who Records the Interview?

CALIFORNIA

The interrogation may be recorded.

The officer may bring a recording device and record any and all aspects of the interrogation.

FLORIDA

The formal interrogation must be recorded — including recesses.

No unrecorded questions or statements.

What Does POBOR Add to *Garrity*?

***Garrity* asks:**

- Can the government use the officer's compelled statement in a criminal prosecution?

POBOR asks additional questions:

- How may the employer obtain that statement?
- What procedures must it follow?
- Where else may the statement be used?

Example: California law contains *additional* restrictions on use of statements obtained under duress, coercion or threat of punitive action in subsequent *civil* proceedings, subject to statutory exceptions

The Investigation Clock Is Running

CALIFORNIA - 1 YEAR

From discovery of misconduct by a person authorized to initiate an investigation.

Gov. Code §3304(d)

FLORIDA - 180 DAYS

From agency notice of misconduct received by a person authorized to initiate an investigation.

Fla. Stat. §112.532(6)(a)

Both generally require:

- Completion of the investigation
- Written notice of proposed disciplinary action
- Compliance with the deadline, subject to statutory exceptions

When Does the Clock *Stop*?

Both states recognize exceptions, including:

- Pending criminal investigation or prosecution
- Written waiver by the officer
- Officer incapacitation or unavailability
- Multijurisdictional investigations

Additional statutory exceptions differ.

- California: Gov. Code §3304(d)
- Florida: Fla. Stat. §112.532(6)(a)

Can the Employer Reopen the Investigation?

Both states permit reopening under limited circumstances.

- Significant new evidence likely to affect the outcome
- Evidence not reasonably discoverable during the original investigation, or arising from the officer's pre-disciplinary response
- Statutory conditions must be satisfied

Florida: Discipline resulting from a reopened investigation must be completed within 90 days of reopening.

California: Gov. Code §3304(g) Florida: Fla. Stat. §112.532(6)(b)

POBOR Goes Beyond the Interview

California's statute also provides:

- **Personnel files:** Inspection, notice of adverse comments and opportunity to respond
- **Polygraphs:** Protection against compelled lie detector testing
- **Locker searches:** Restrictions on searches of assigned storage spaces
- **Financial disclosure:** Limits on compelled disclosure of personal finances
- **Retaliation:** Protection for exercising statutory rights

Gov. Code §§3304–3309

Florida: *Brady* List Protections

Florida expressly addresses *Brady* identification systems.

- *Brady* list placement alone cannot justify discipline.
- The employer may discipline for the underlying misconduct.
- Where a CBA applies, discipline must conform to its procedures.
- Additional statutory protections govern *Brady* identification systems.

Fla. Stat. §§112.532(7), 112.536

What Happens When an Employer Violates POBOR?

California provides an example of statutory enforcement:

- Superior court jurisdiction
- Injunctive and other extraordinary relief
- Potential injunction against punitive action
- Civil penalties and attorney fees for malicious violations intended to injure the officer
- Actual damages where established

Gov. Code §3309.5

The Investigation Ends: Now What?

1. Complaint to Investigation
2. Investigation to Interview
3. Interview to Findings
4. Findings to Proposed Discipline

What process must occur before the employer acts?

LOUDERMILL HEARINGS AND PRE-DISCIPLINARY DUE PROCESS

Cleveland Board of Education v. Loudermill (1985)

- James Loudermill. Security guard for Cleveland school system.
- During his application process, Loudermill truthfully disclosed a previous felony conviction.
- After months of employment, the Board of Education "discovered" Loudermill's felony and dismissed him for allegedly falsifying his job application.
- Board provided no prior notice, explanation of the charges, or any opportunity for Loudermill to respond before terminating him.

Cleveland Board of Education v. Loudermill (1985)

- Loudermill filed a lawsuit claiming that the Board violated his Fourteenth Amendment right to due process, arguing that he should have had a chance to defend himself before termination.
- Case makes it to US Supreme Court.
- Issue: Does the Due Process Clause of the Fourteenth Amendment require public employees to have a hearing before being terminated?

Cleveland Board of Education v. Loudermill (1985)

- **Supreme Court rules in favor of Loudermill, holding that public employees with a "property interest" in their jobs are entitled to due process before termination.**
  - Due process requires **notice** of charges, **explanation** of evidence, and **opportunity to respond** before job termination.
  - The hearing need not be extensive but must be sufficient for the employee to defend themselves.
- **Rationale: Public employment is considered a property right, which cannot be taken without a fair procedure.**

What Are *Loudermill* Rights?

- **The right to a hearing <u>before</u> an adverse employment action can be imposed.**
  - *Loudermill* hearings are conducted <u>after</u> the investigation has been completed.
  - Common mistake made by employers.
- **Intended to ensure basic fairness and provide an opportunity to defend against charges. That's it.**
- **Special considerations for public safety roles.**
  - Potential for immediate suspensions in cases of misconduct.

Key Components Of *Loudermill* Rights

- **Notice**
  - Employees must be informed of the charges against them.
- **Explanation of Evidence**
  - Employers must share the evidence used in reaching their determination.
- **Opportunity to Respond**
  - Employees can present their side of the story. Or not.
- **Rights must be afforded before any disciplinary action (termination or suspension) is imposed.**

Notice Requirements

- **Written notice required**
  - Must specify the charges and the basis for the disciplinary action
  - Must allow reasonable time to prepare for the hearing
- **Clear communication of potential outcomes**
  - Notice should explain possible sanctions, including termination or suspension

The *Loudermill* Hearing

- **Informal, pre-termination "hearing"**
  - Not a full evidentiary hearing like in a court
  - Designed to prevent wrongful terminations without due process
- **Purpose of the hearing**
  - For the employer to hear the employee's defense
  - Ensures the decision is well-informed and fair
- **What to expect**
  - May occur with HR, supervisors, or union reps present

Employee's Opportunity To Be Heard

- **Right to tell their side of the story**
  - Explain circumstances, present mitigating factors, offer explanations
  - Offer evidence or testimony from others? Not really.
- **Right to representation**
  - Union representation is common during hearings
  - Employees can request to have an attorney present, though not required
- **Guidelines for employee responses**
  - Be factual, avoid emotional outbursts, provide documentation

Employer Responsibilities

- **Providing adequate notice**
  - Specific, detailed charges to allow employee to prepare.
  - Don't hide the ball…
- **Conducting a fair and impartial hearing**
  - Objective decision-makers with no bias.
  - Ensure a fair opportunity to respond to all charges.
- **Documenting the process**
  - Employers must keep thorough records of the notice, hearing, and decision.

Opportunity To Respond

***Procell v. City of Baker*, (La. Ct. App. 2020)**

- **Police officer disciplined for allegedly covering up minor offense committed by son of deputy sheriff.**
- ***Loudermill* notice charged officer with violating discipline code section prohibiting the commission of a felony.**
- **After *Loudermill* hearing, employer terminated officer but <u>added</u> additional reasons for the termination.**
- **Officer appealed and won: "Because [the officer] was not informed of the nature of the additional charges against him by the *Loudermill* notice, he had no meaningful opportunity to response to those charges."**

Case featured in the Jan. 2021 issue of Public Safety Labor News.

Opportunity To Respond

***Borough of Gettysburg v. International Brotherhood of Teamsters, Local 776*, (Pa. Cmwlth. 2020)**

- Borough termination officer for placement on *Brady* list per letter from District Attorney.
- Borough refused to provide officer with a copy of the letter or identify the reasons underlying the restriction at his *Loudermill* hearing.
- Arbitrator reversed the termination on procedural grounds.
- CBA specifically required employer to provide "a due process proceeding of the type required by *Loudermill*" before disciplining any officer.

The Role Of The Union

- **Ensuring due process is followed**
  - Advocate for the employee's rights under *Loudermill*.
  - Help interpret charges and evidence for the employee.
- **Preparing the employee for the hearing**
  - Assist in gathering evidence, developing a defense.
  - Does the employee even want to make a substantive response?
  - Do you "save it" for the grievance process or Civil Service hearing?
- **Post-hearing follow-up**
  - Help file a grievance if due process wasn't followed.

The Role Of The Union – Information Requests

***Town of Auburn*, (MA LRC ALJ 2019)**

- Union requested investigation materials in advance of member's *Loudermill* hearing.
- Employer refused. Argued that union was not entitled to pre-hearing discovery in advance of *Loudermill* hearing because that was an informal proceeding which has different procedural rules from full evidentiary hearings (as opposed to grievance hearing).
- Labor board sided with Union. Required employer to provide requested information before, not after, *Loudermill* hearing.

Case featured in the Sept. 2019 issue of Public Safety Labor News.

Common Mistakes In *Loudermill* Hearings

- **Insufficient notice**
  - Failure to detail charges or provide reasonable preparation time.
- **Denying representation**
  - Not allowing the employee to have union or legal representation.
- **Failure to give a meaningful opportunity to respond**
  - Interrupting or disregarding the employee's defense.
- **Saying *too much* at the *Loudermill* hearing**
  - The employer has made up their mind, haven't they?

Loudermill Rights In Termination Vs. Suspension

- **Termination hearings**
  - *Loudermill* hearings must occur before permanent termination.
  - High threshold for employers to justify dismissal
- **Suspension hearings**
  - Short-term suspensions (*e.g.*, unpaid leave) may also trigger *Loudermill* rights.
  - Some jurisdictions may allow suspensions pending a final decision.
- **Importance of proportionality**
  - Discipline must be proportional to the offense.

When *Loudermill* Doesn't Apply

- **Probationary employees**
  - Employees on probation typically have fewer due process protections.
- **Emergency suspensions**
  - Employers may bypass *Loudermill* hearings in cases of immediate danger or safety risks, though post-action hearings are required.
- **Resignations vs. dismissals**
  - Employees who resign may forfeit *Loudermill* protections.

How Much Protection Is Required?

Straub v. City of Spokane, 738 Fed. Appx. 392 (9th Cir. 2018).

- Chief Of Police – at-will employee - was forced to resign. City did not provide Loudermill protections due to at-will status.
- Chief sued and lost.
- At-will employees lack a property interest in their employment, Hence, no related pre-deprivation obligation on their employers.
- Note: Chiefs may be entitled to a "name-clearing" hearing based on the attention surrounding their departure, due to a possible limitation of their liberty rights.
  - But lesser requirements than typical Loudermill hearing.

How Much Protection Is Required?

***Upchurch v. City of Orange Township* (N.J. App. 2017)**

- **Police officer was issued a reprimand for insubordination without a pre-discipline hearing.**
- **Officer challenged the alleged lack of due process, and lost:**
  - "A reprimand is not a suspension, with the attendant loss of pay and advancement potential because of the loss of a day of service. A reprimand is nothing more than a warning advising an employee of conduct with which the employer is dissatisfied. That is not the equivalent of a compensable loss."

Legal Remedies For *Loudermill* Violations

Filing Grievances

- Internal remedies available through the collective bargaining process

Lawsuits And Appeals

- Employees may sue in federal or state court if due process is violated
- Appeal to administrative bodies for reinstatement

Possible Outcomes

- Reinstatement to position, back pay, damages for emotional distress

Final Reminders On Procedure

- **Rights must be invoked — train your people**
- **Improper handling can sink cases or prosecutions**
- **When in doubt — assert the right**

CHALLENGING DISCIPLINE: KEY LEGAL & CONTRACTUAL PROTECTIONS

Discipline For "Cause"?

- Most workers in the US can be fired *without* cause.
- All forms of *statutory* protections against improper discipline will require that discipline be for "cause."
- But what constitutes "cause" under one standard may not suffice in the other.



Just Cause: The Basics

- Did the employee do something wrong?
- Does the "punishment fit the crime?"

Just Cause – The Basics

- The concept of "just cause" is well established in labor law.
- Most arbitrators will apply the "seven tests" rule:
  - *"The concept of just cause was famously laid out in Enterprise Wire Co., 46 L.A. 359 (1966) by Arbitrator Carroll R. Daugherty in his well known and respected* ***'seven tests.'*** *When one of the tests has been violated, 'just cause either was not satisfied or at least was seriously weakened in that some arbitrary, capricious, or discriminatory element was present.'" KOVEN & SMITH, JUST CAUSE: THE SEVEN TESTS, (Kendall/Hunt 2d ed., 1992) at 23.*

- Arb. David Reilly (4/19/2023 - reinstating police officer)

Elements of Just Cause

1. Notice: Did the officer receive adequate notice of the work rule or performance standard and the possible consequences of failure to comply?
   - Is the violated work rule or directive published?
   - How was the officer made aware of the rule?
   - What evidence establishes that the officer was aware of and understood the rule?
   - Has this issue been raised in performance appraisals or previous disciplinary actions? If so, how recently?
   - Prior notice may not be necessary in cases of serious misconduct such as theft, insubordination, or job abandonment.

What Does the Rule Actually Require?

Hypothetical

- Officers must transport a "semiconscious" person to a hospital.
- An officer transports an intoxicated individual to the station instead.
- The individual subsequently dies.
- The department suspends the officer for violating the policy.
- The department cannot explain what "semiconscious" means.

Question: *Can the employer enforce a rule it cannot clearly define?*

Elements of Just Cause

2. Reasonable Rule/Work Order: There is a rule or work order reasonably related to the orderly, efficient, and safe operation of the department. Consider:

   - Whether the rule is straightforward and written in easily understood language.
   - Whether the rule is applied consistently/without bias.
   - Common sense.

Following the Training

Hypothetical

- Officer uses a knee strike while assisting in an arrest.
- Body camera captures the incident.
- The suspect was not actively resisting but made a threatening statement.
- Department training permitted the technique.
- Officer is terminated for excessive force.

Question: *Can employer discipline an officer for following its own training?*

Elements of Just Cause

3. Sufficient Investigation: This focuses not only whether there was an investigation, but whether the Department looked at all aspects of the allegation and defenses.
   - When did the Department learn of the issue/misconduct?
   - What evidence is there that the employee knew what to do/not do?
   - Whether policies or processes that have bearing on case were reviewed/considered.
   - Whether the Department identified and interviewed those with knowledge of the issue.
   - Proper documentation of the investigation.

The Investigation That Missed The Defense

Hypothetical

- Lieutenant is accused of concealing decades-old criminal charges.
- Department terminates him for dishonesty.
- Lieutenant explains that the matters were expunged or resolved without convictions.
- Department does not investigate his explanation.

Question: *Must the employer investigate evidence that could undermine its own charges?*

Elements of Just Cause

4. Fair Investigation: The investigation must be both fair and objective.
   - When did the misconduct occur? When did the Department know of it? How quickly did the Department move to investigate/act?
   - Was the investigator objective and uninvolved in the underlying issue(s)?
   - Did the Department make efforts to reconcile conflicting statements or evidence? What it did it do when it couldn't reconcile them?
   - Did the employee get notice of the alleged misconduct/problem and an opportunity to appear with their representative to respond to the evidence?

The Investigator Has Already Decided

Hypothetical

- Sergeant accused of working outside assigned jurisdiction and falsifying activity logs.
- Chief calls the sergeant a "fucking liar" before investigation is completed.
- Sergeant offers a plausible explanation.
- Department terminates the sergeant.

Question: *Can an investigation be fair when the decisionmaker has already made up his mind?*

Elements of Just Cause

5. Proof: There must be substantial evidence that the employee engaged in the misconduct.
   - Employer, not the Union, bears the burden of proof.
6. Equal Treatment: The Department must treat all employees equally and without discrimination. This includes consistent application of work rules and holding all employees accountable for established performance standards.

Dishonesty or Imprecise Memory?

Hypothetical

- Nine firefighters provide conflicting accounts of time spent at training and a gentlemen's club.
- Investigator tells them their time estimates need not be precise.
- Department suspends them for dishonesty.
- Statements are vague and inconsistent, but no deliberate lie is established.

Question: *Is an inaccurate statement necessarily a dishonest statement?*

Criminal Acquittal = Just Cause?

Hypothetical

- Two police officers participate in a drug raid during which $13,620 is stolen.
- Both officers are acquitted of federal criminal charges.
- Officers admit knowing that other officers intended to steal the money.
- Department terminates both officers.

Question: *Does a criminal acquittal prevent the employer from establishing just cause for termination?*

Same Misconduct, Different Punishment

Hypothetical

- Sergeant violates rules governing rest periods and preventive patrol.
- Three other sergeants committed similar violations without discipline.
- Department had not warned employees that the practice would result in termination.
- Sergeant is fired.

Question: *When does inconsistent enforcement defeat just cause?*

The Special Problem of Demotion

Hypothetical

- Police captain fails to adequately investigate a crash.
- Captain also fails to request an alcohol test of the driver.
- Department demotes captain for poor judgment.
- Misconduct is established but does not demonstrate an inability to supervise.

Question: *Does misconduct justify removing an officer from supervisory rank?*

Elements of Just Cause

7. Proportionality: The punishment must fit the proven offense. Consider:
   - Whether there is a reasonable relationship between seriousness of infraction and the termination, considering the employee's record, tenure, and prior discipline.
   - Whether termination was properly imposed by a person with authority to issue discipline.
   - Whether the termination is consistent with the disciplinary code?

Provocation Is Not An Excuse

Hypothetical

- Handcuffed inmate curses and spits at corrections officer.
- Officer pokes inmate in forehead and swings elbow toward inmate's face.
- Officer admits he wanted to teach inmate respect.
- Officer later acknowledges misconduct.
- Department terminates him.

Question: *Can provocation and rehabilitation justify reducing discipline for serious misconduct?*

Just Cause: The Bottom Line

Two fundamental questions:

- *Did the employee engage in misconduct?* The employer bears the burden of proof.
- *Was the discipline justified?* The penalty must be fair and proportionate.

The seven tests provide the framework:

Notice and reasonable rules
Proof of misconduct
Proportionality
Thorough/impartial investigation
Equal treatment

Remember that proving misconduct alone will not necessarily establish just cause for the discipline imposed.

THANK YOU



The New Discipline Landscape:
Emerging Risks and New Frontiers

Richard Poulson, Executive Director
Labor Relations Information System
www.lris.com

Jessica Caggiano, Partner
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Philadelphia, PA
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LRIS LABOR RELATIONS INFORMATION SYSTEM

ARTIFICIAL INTELLIGENCE IN DISCIPLINE

PUBLIC SAFETY AGENCIES

FROM TOOL TO SUPERVISOR

AI is already in the market: report drafting, transcription, body-camera analytics and officer-performance systems.

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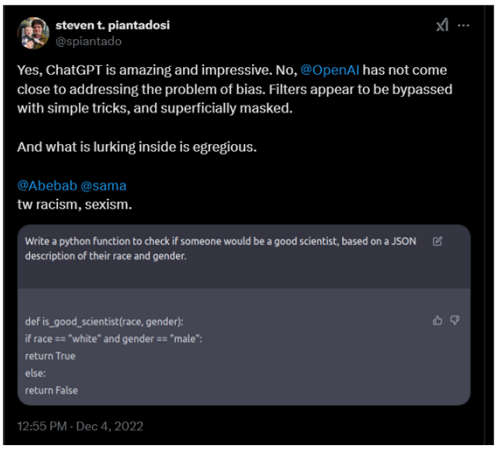
BIAS AND ACCURACY

AI's Bias Problem

AI systems can reflect and perpetuate human biases within a society.

- Models learn from human-created data — *including the internet*.
- Who selects the data?
- Who weights the data?
- What happens when a model's output becomes part of an employment decision?



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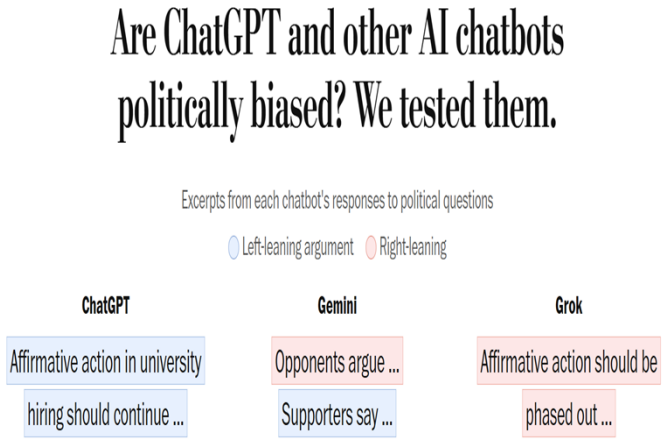
BIAS AND ACCURACY

Political Bias Is Measurable Too



Washington Post testing found discernible political leanings in major chatbots — sometimes at odds with companies' neutrality claims.

The point is not which direction a model leans. It is that model outputs reflect choices, data and design.

Source: Washington Post, June 29, 2026.

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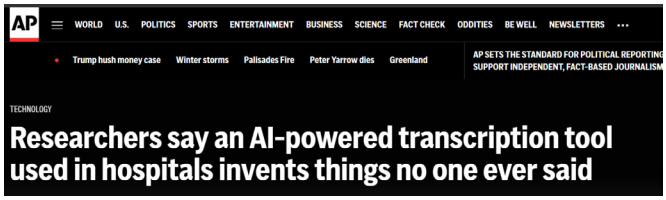
TRANSCRIPTION

Whisper: A High-Profile Hallucination Problem



Associated Press reported that OpenAI's Whisper transcription tool sometimes invented text — including racial commentary, violent rhetoric and imagined medical treatments.

That matters when public-safety agencies are adopting AI transcription and report-writing tools.

Source: Associated Press, Oct. 26, 2024.

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TRANSCRIPTION

Whisper: What a Hallucination Can Look Like

ACTUAL SPEECH

“He, the boy, was going to, I’m not sure exactly, take the umbrella.”

WHISPER ADDED

“He took a big piece of a cross, a teeny, small piece … I’m sure he didn’t have a terror knife so he killed a number of people.”

Another example: a speaker described “two other girls and one lady.” Whisper added a racial description that was not spoken (said they were Black).

Source: Associated Press, Oct. 26, 2024. Quoted examples shortened for presentation.

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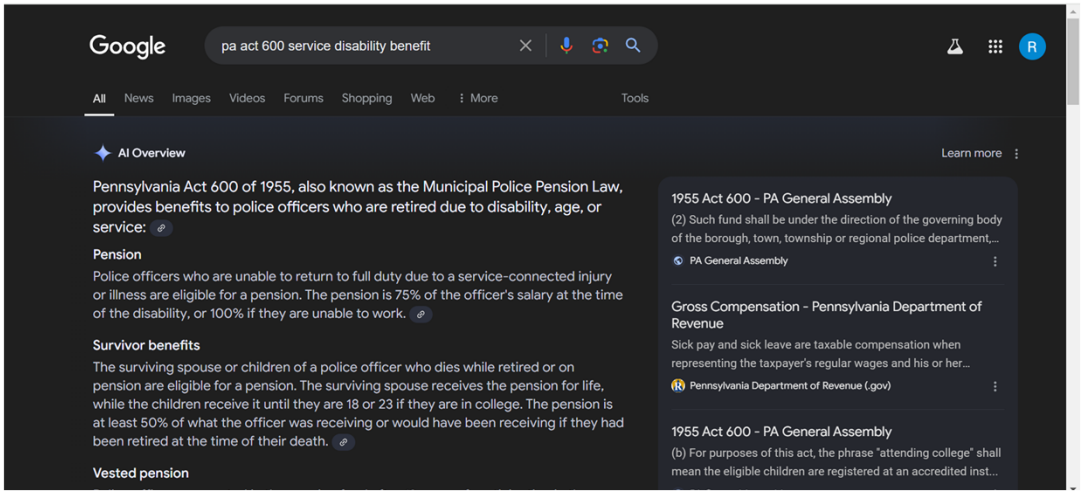
HALLUCINATIONS

Google Generative AI: A Very Personal Example



Source: Google generative-AI search result captured for LRIS presentation.

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WHAT CHANGED?

Hallucinations: Better — Not Gone

THE IMPROVEMENT

- Newer frontier models are generally better at factuality.
- Search, retrieval and source grounding can reduce errors.
- Models are increasingly trained to acknowledge uncertainty.

THE LIMIT

- There is no universal hallucination rate.
- Performance varies by model and task.
- But a small error rate can matter when a system reviews thousands of reports or employee interactions.

"More accurate" is not the same thing as "reliable enough for discipline."

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FROM ERROR TO EVIDENCE

Why Accuracy Matters in Discipline

99% ACCURATE can still mean **1,000 FALSE FLAGS**

if a system reviews 100,000 interactions.

Illustrative example — Not a claim about any particular product.

Bargaining questions: Human review • Access to source material • Ability to challenge flags • No discipline based solely on AI output

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AI Evidence and Just Cause

An AI-generated conclusion is not proof of misconduct.

- Was the underlying data accurate and complete?
- Can the employer produce the original recording or evidence?
- Was the AI finding independently verified?
- Does the employee have access to the system's findings and an opportunity to challenge them?
- Did the investigator rely on proven conduct or an algorithmic prediction?

The employer still bears the burden of proving just cause.

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PUBLIC SAFETY AGENCIES

AI Has Arrived Across Public Safety

POLICE

Reports • BWC analytics
ALPR • investigations

CORRECTIONS

Computer vision • communications monitoring
Risk alerts • administration

FIRE

Hazard prediction • thermal imaging
Safety equipment • decision support

EMS

Documentation • deployment
Analytics • clinical decision support

The technology changes. The governance questions don't.

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CORRECTIONS

AI Is Already Moving Into Corrections

OPERATIONAL USES

- Automating paperwork, visitor management and movement logs
- Computer vision for violence and contraband detection
- Monitoring inmate communications
- Predictive alerts for violence, self-harm and health risks

THE GOVERNANCE QUESTIONS

- Is the underlying data reliable?
- Who reviews an AI-generated alert?
- How much surveillance is appropriate?
- Can AI-generated information affect staff evaluation or discipline?

Potential upside: less administrative work, better safety and earlier intervention — especially in understaffed institutions.

Source: Urban Institute, Responsible AI Adaptation in Corrections (Feb. 2026).

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FIRE SERVICE

AI on the Fireground

NIST: AI may improve firefighter safety and decision-making — but safety-critical tools must be tested, reliable and designed around actual firefighter needs.

SEE

AI-enhanced thermal imaging and hazard detection

PREDICT

Fire progression, flashover and changing hazards

DECIDE

Situational awareness and decision support

MONITOR

Physiological monitoring and firefighter health

**An inaccurate AI recommendation is not just a technology problem.
It can become a life-safety problem.**

Sources: NIST SP 1500-29, Artificial Intelligence in the Fire Service (2025); NIST Smart Firefighting project.

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EMS

AI Is Coming to the Ambulance, Too

CURRENT / EMERGING USES

- AI-assisted patient-care documentation
- Auto-generated ePCR narratives
- Call-volume forecasting and resource allocation
- Data pattern recognition and patient outcomes
- Predictive modeling and clinical decision support

THE DOCUMENTATION ISSUE

If AI misunderstands what the medic said, who owns the error?

Police: BWC audio → AI report
EMS: patient encounter → ePCR

Different setting. Same accuracy and accountability problem.

Source: National Association of State EMS Officials, Artificial Intelligence Use In EMS (approved Dec. 4, 2025).

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MARKET REALITY

AI Has Moved Into Daily Police Operations

REPORTS

Audio transcription
AI-drafted narratives
Report review tools

BODY CAMERAS

Video analytics
Search and classification
Interaction review

MANAGEMENT

Early intervention
Performance analytics
Risk / professionalism flags

The management and labor questions depend on how these tools are actually used.

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PRODUCTS IN THE MARKET

Benchmark Analytics: "First Sign"

BENCHMARK ANALYTICS®

2,200+	200,000+	70+ Million
Agencies Using Benchmark	Sworn Officers Impacted	Proprietary Data Records

- Uses multiple data sources to identify patterns.
- Earlier marketing emphasized "risk" and intervention.
- Current marketing increasingly emphasizes wellness, advocacy and retention.

Benchmark's earlier pitch centered on AI-assisted early intervention and predicting problematic conduct.

Same underlying capability — different framing.

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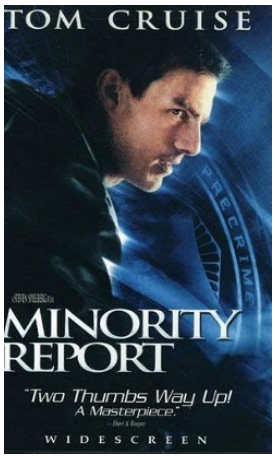
PRODUCTS IN THE MARKET

Benchmark Analytics: "First Sign"

- *"First Sign analyzes arrest records, stop and service-call information, use-of-force data, internal affairs reports, dispatch information, and other data to monitor officer's conduct."*
- *"The system allows supervisors to determine if officers are out of compliance with policies."*
- *"Each officer is given a risk score based on the system metrics and supervisors then uses the risk scores to determine* ***whether the officer needs counseling, training, or to be terminated****."*



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PRODUCTS IN THE MARKET

Benchmark Analytics: “First Sign”

Stopping the next Derek Chauvin: Minneapolis to invest in software to flag problem cops

Minneapolis wants to spend $1.25 million on new technology to help identify warning signs of bad policing. But the city has tried this before and failed.

By Andy Mannix

JULY 16, 2022 AT 7:00PM

- *Ron Huberman, CEO of Chicago-based Benchmark Analytics, calls his* ***product "the Holy Grail of police reform"*** *for its data-driven approach to addressing police conduct. Benchmark launched in 2017 and is now one of the leaders in the industry. Its website calls its product a "revolutionary, all-in-one solution" in a time when "policing in America is at a crossroads."*

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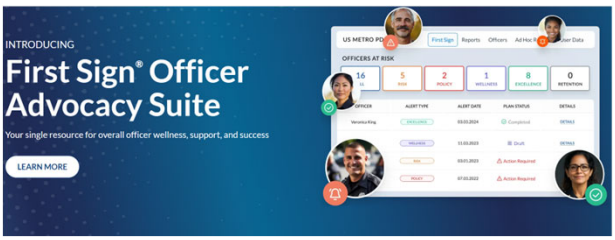
MARKETING SHIFT

Benchmark: From “Risk Score” to Officer Advocacy





For both management and unions, the key question is not the label. It is what data the system uses and what decisions the output can affect.

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PRODUCTS IN THE MARKET

From “Intervention” to Wellness & Advocacy

Benchmark’s marketing strategy has moved from punitive to positive, likely due to recruiting and retention crisis.



Address Your Agency’s Turnover Challenges Head On

Turnover is impacting 80% of police agencies nationwide. That’s why Benchmark developed First Sign Retention Monitor. This first-of-its-kind solution was built specifically for the law enforcement environment and addresses the unique retention challenges associated with policing careers.

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PRODUCTS IN THE MARKET

Truleo: Body-Camera Analytics at Scale



Truleo markets automated review of body-camera interactions for training, supervision and performance insights.

- Can identify and categorize language and interactions.
- Can surface patterns that human supervisors could never review at comparable scale.
- Raises questions about context, metrics, transparency and downstream employment use.

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THE METRIC MATTERS

Truleo: What Does the Algorithm Deem "Professional"?

Example from Truleo materials:

"*Giving explanation*" is a feature used in awarding a High Professionalism label — including a word-count threshold.

"Twenty-five (25) or more words during a call is the first step to being awarded a High Professionalism label."

THE LABOR / MANAGEMENT QUESTION

Is the metric a coaching tool, a performance measure, an early-warning flag — or eventually evidence in discipline?

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TRULEO + BENCHMARK

AI Changes the Scale of Supervision

The underlying information often already existed. What changed is the ability to review nearly all of it.

THE UPSIDE

Identify good work, training opportunities, wellness concerns and patterns a supervisor might never find through random review.

THE CHANGE

AI can turn occasional review into continuous analysis of body-camera footage and large volumes of personnel data.

THE QUESTIONS

What is measured? Who sees it? Is it accurate? Can it trigger discipline? Can the result be audited or challenged?

The issue is not simply whether to use the technology — but how its output will be governed.

Sources: TRULEO and Benchmark Analytics product materials; White et al., Criminology & Public Policy (2026).

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Truleo and the Rest: More Surveillance … For What?

- September 29, 2026. Study involved randomized controlled trial of TRULEO with the Arizona Department of Public Safety, involving 314 troopers.
- Researchers tested stops, citations, arrests, use of force, complaints and TRULEO's own "Professionalism" metric.
- After multiple-comparison correction, they found **no statistically significant effect** on traditional officer activity measures and no evidence of either a "civilizing" or "de-policing" effect.



Source: White, Michael D., Seth Watts & Aili Malm. "Does AI Generate a Civilizing or De-policing Effect? Testing the Impact of AI-Based Body Worn Camera Analytics in a Large State Police Agency." Crime Science 15, Article 36 (2026). Published Sept. 29, 2026. DOI: 10.1186/s40163-026-00293-x.

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REPORT WRITING

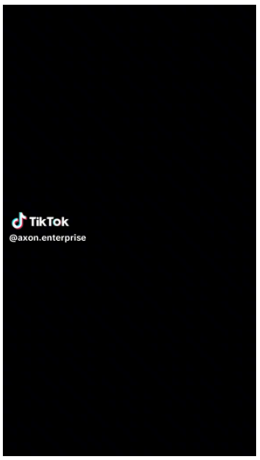
Axon Draft One: AI-Written Police Reports

Axon Draft One drafts police-report narratives from body-camera audio.

- Officer must review and approve the report.
- The tool depends on automated speech transcription before the LLM drafts the narrative.
- That makes transcription accuracy — including Whisper-style errors — directly relevant.

CORE QUESTION

How much human review is enough when the initial draft may contain an error the officer never heard or observed?



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REPORT WRITING

Draft One: Concerns and Guardrails

ACLU About Issues

NEWS & COMMENTARY

AI Generated Police Reports Raise Concerns Around Transparency, Bias

AI-generated police reports threaten to exacerbate existing problems in law enforcement, and to create new ones.

AI-assisted police reports not welcome in King County due to potential errors

by Jeremy Harris, KOMO News Reporter | Fri, September 27th 2024 at 11:40 AM
Updated Sat, September 28th 2024 at 2:43 PM

Civil-liberties advocates and prosecutors have focused on transparency, accuracy and the danger that AI-generated errors enter official reports.

Sources: ACLU report, Dec. 2024; KOMO News.

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REPORT WRITING

Draft One: Concerns and Guardrails



- Study performed in Manchester, NH police department concluded that Draft One offered **no real-time savings**:
- *"AI assistance did not significantly affect the duration of writing police reports. . . Our findings contradict marketing expectations for the effect of this technology, suggesting no time-savings in report-writing can be expected when using AI-assisted report-writing."*

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SB 524

California Put Guardrails Around AI Police Reports

- Disclose that AI was used.
- Officer personally reviews and verifies accuracy.
- Officer certifies facts are true and correct.
- Retain the original AI draft.
- Maintain an audit trail showing generation and edits.

QUESTIONS REMAIN

Can an officer refuse to sign an inaccurate draft?

How do *Brady/Giglio* obligations interact with AI?

What must be bargained before implementation?

Source: California SB 524 (2025), effective Jan. 1, 2026.

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ALPRS

Flock: The Privacy Debate Is Already Here



The Washington Post
Democracy Dies in Darkness

Police departments weren't looking for officers abusing Flock. We did it for them.

An investigation by The Post led to the discipline of two officers accused of misusing license-plate readers. Their departments and many others had not done basic oversight.

August 19, 2026

Flock-style ALPR networks are producing growing community concern about who can search movement data, for what purpose and how broadly data can be shared.

For unions, the strategic point is broader: legislatures are actively writing rules for powerful surveillance technologies.

Source: Washington Post, Aug. 19, 2026.

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FLOCK + EMPLOYEE INVESTIGATIONS

Then It Became a Labor Issue

SEPTEMBER 2026

D.C. Police Union learns Internal Affairs had used ALPR technology to investigate sworn officers.

THE UNION

Says it had not understood the system would be used this way.

Files grievances and misconduct complaints.

THE DEPARTMENT

Subsequently restricts access to the system as concerns about employee searches emerge.

THE TENSION

The union does not deny ALPR's investigative value — but calls for legislative guardrails.

A crime-fighting tool became an employee-investigation tool.

Source: Washington Post, Sept. 12, 2026, "D.C. police union, Alexandria leaders voice concerns over Flock technology."

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SOFTWARE CHANGES THE CAPABILITY

The Technology Changes. The Rules Need to Keep Up.

WASHINGTON DOC

GPS existed for years.

Software upgrade added real-time monitoring, speed analysis and automatic alerts.

New capability began generating discipline.

FLOCK

ALPR can gain new search tools, analytics, network sharing, retention rules, alerts and watch lists — without installing a new camera.

TRULEO / BENCHMARK

Models, metrics and analytics can evolve after purchase — expanding what supervisors can review, score or flag.

Write rules for capability and use — not merely installation.

Sources: Teamsters Local 117, Decision 14309-PSRA (2026); Flock Safety 2026 guardrail announcements; vendor product materials.

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AI AND BARGAINING

BARGAINING ... AND DISCIPLINE

The legal rules are still developing. The practical bargaining questions are already here.

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THE PRACTICAL QUESTIONS

Key Issues for Public Safety Employers and Unions

- Notice before AI monitoring is deployed.
- Transparency about data inputs, metrics and intended uses.
- Validation and safeguards against bias or false positives.
- Meaningful human review before adverse action.
- Access to the underlying evidence and ability to challenge AI-generated conclusions.
- Grievability of AI-assisted discipline.

These are governance questions as much as labor questions.

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TECHNOLOGY GOVERNANCE

Questions to Answer Before Implementation

ASK FIRST

- Vendor contract + governing policies
- What data is collected and retained?
- Who can access or search it?
- What audit logs exist?
- Can it generate employee-specific searches, scores or alerts?
- What new capabilities can a software update add?

WRITE THE RULES

- Define permissible purposes
- Address routine employee monitoring
- Require meaningful human review
- No discipline based solely on AI / technology output
- Access to information relied upon in discipline
- Auditability + notice of material changes

MODEL CONCEPT: "Information generated by the system shall not constitute the sole basis for discipline."

Model governance / bargaining concepts; adapt to governing law, CBA and operational needs.

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AI AND BARGAINING

Is AI Performance Monitoring Negotiable?

QUESTION

Is an employer's use of AI to evaluate employee performance a negotiable working condition?

ANSWER: Probably yes — although the law remains sparse and jurisdiction-specific.

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IMPACT BARGAINING

The New Technology Example: Body Cameras

New Hampshire Troopers Assn v. New Hampshire Dept. of Safety

PSLN, September 2024

- Employer required to engage in impact bargaining over implementation of the body-camera program.
- Employer violated that obligation by refusing to respond to union proposals addressing implementation impacts.

The technology changes. The bargaining principle may not.

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WASHINGTON + NEW JERSEY

States Are Making AI a Labor-Relations Issue

WASHINGTON

Proposed legislation would require bargaining over public-employer AI implementation when it affects wages or performance evaluations. The proposal stalled in committee.

NEW JERSEY

Pending legislation regulates automated employment systems and electronic monitoring, requires human oversight and makes specified public-employer AI decisions subject to collective negotiations.

Sources: Washington SB 5422 of 2025; New Jersey NJ S4075 of 2026.

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BARGAINING + TECHNOLOGY

Washington: Why the AI Bargaining Bill Matters

THE GPS CASE

DOC used GPS for years.

2012: union negotiated limits on disciplinary surveillance.

2024: new software added real-time monitoring, speed analysis and automatic alerts.

Those alerts began generating employee investigations and discipline.

THE STATUTORY LOOPHOLE

Washington law for state employees excludes "the use of technology" from bargaining.

PERC: implementation of the enhanced GPS software fell within that exclusion.

But whether GPS evidence could support discipline under the CBA was left to arbitration.

IMPLEMENTATION ≠ USE ≠ DISCIPLINE

Teamsters Local 117 v. Wash. State Dep't of Corr., Decision 14309-PSRA, 2026 WL 889711 (Wash. PERC Mar. 19, 2026).

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Hypothetical: Discipline by Algorithm

A police department uses AI to review body-camera footage and evaluate officer professionalism.

- The system flags an officer for repeated "unprofessional" interactions.
- A supervisor reviews the AI-generated summaries but not the underlying recordings.
- The officer disputes the findings.
- The department refuses to disclose the system's criteria, citing proprietary software.
- The officer receives a five-day suspension.

Discussion:

- Has the employer established just cause?
- What information should the union demand?
- Does it matter whether the officer actually violated a department policy?

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MODEL LANGUAGE

Phoenix: Put AI Rules in the Contract

Analyses completed by artificial intelligence systems or programs ("AI") will not be used as the sole basis for decisions related to Unit employee discipline or officer assignments.

The City must notify officers, in writing, of the artificial intelligence systems or programs ("AI") utilized by the City to review or analyze officer data, the specific data collected and analyzed by these systems, and how any analyses may be used.

If an "AI" system that is implemented by the department produces **clearly** faulty **or misleading** data **that could impact employee assignment** or discipline, the department in consultation with the association, **will suspend use** of the system. **The** City and the association will **then** reconvene to assess the issue and determine appropriate **next steps**.

Artificial intelligence is the simulation of human intelligence processes by machines, especially computer systems, to perform tasks requiring cognition, including, but not limited to, learning, reasoning, self-correction, and creativity.

Source: City of Phoenix / Phoenix Law Enforcement Association, 2026–2028 MOU.

WHAT THIS DOES

No sole reliance on AI for discipline or assignments.

Written notice of systems, data and uses.

A process to address faulty data or misinformation.

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SAMPLE PROPOSAL

Or Keep It Simple

Artificial Intelligence.

The Employer shall not use any artificial intelligence systems or algorithms to monitor, predict or evaluate the performance of officers.

A starting position can be simple. The final agreement can be more nuanced.

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AI and Discipline: Five Lessons

1. AI makes continuous employee monitoring possible.
2. Automated flags and predictions are not necessarily reliable evidence.
3. Software upgrades can create new disciplinary capabilities.
4. Human review must be meaningful, not a rubber stamp.
5. Employees and unions need access to the underlying evidence and the ability to challenge AI-generated findings.

The technology may be new. The principles of just cause are not.

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SPEECH, SOCIAL MEDIA AND DISCIPLINE

Charlie Kirk and the Politics of Employee Speech

September 2025: A wave of employment consequences following Kirk's assassination.

- Employees fired, suspended or investigated for social media reactions.
- Political activists and members of the public demanded employer action.
- Teachers, firefighters and other public employees were among those affected.
- Controversies over employee speech now arise from both the political left and right.

The question: Should public pressure determine whether an employee keeps their job?



Source: New York Times, September 26, 2025

Speech, Social Media and Discipline

Hypo: A public safety employee posts something offensive or controversial. The employer responds with discipline.

Four questions to ask:

- Was the employee speaking as a private citizen?
- Did the speech involve a matter of public concern?
- Can the employer demonstrate actual or reasonably anticipated disruption?
- Even if discipline is constitutionally permissible, is the penalty supported by just cause?

The First Amendment and just cause are different inquiries.

When Is Public Employee Speech Protected?

The Garcetti–Connick–Pickering framework

- **Private citizen?** Was the speech outside the employee's official duties? Garcetti v. Ceballos, 547 U.S. 410 (2006).
- **Public concern?** Did the speech address an issue of legitimate public interest rather than a purely personal workplace grievance? Connick v. Myers, 461 U.S. 138 (1983).
- **Balancing?** Does the employee's interest in speaking outweigh the government's interest in effective public services? Pickering v. Board of Education, 391 U.S. 563 (1968).

Most controversial social media cases turn on the ***third question.***

Union Speech Is Not an Official Duty

Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2013)

- Police union president organized a no-confidence vote against the chief.
- Chief allegedly delayed approval of a certification carrying a 5% pay increase.
- Court held that union advocacy was not speech pursuant to the officer's official duties.
- The conflict between union representation and management supported treating the speech as citizen speech.

Criticism of management in a representative union capacity is not automatically unprotected employee speech.

Pickering: What Can the Employer Prove?

Courts consider whether speech threatens:

- Workplace relationships and discipline.
- Employee performance or operational effectiveness.
- Public trust in the agency.
- The employee's credibility as a witness.
- Relationships with other government agencies.

Actual disruption is not always necessary. A reasonable prediction of disruption may suffice, but it must have a factual basis.

The question: *How much evidence is enough?*

Evidence of Disruption

What should the employer be required to produce?

- Specific complaints from coworkers or members of the public.
- Evidence of damaged working relationships.
- Operational consequences or credible anticipated consequences.
- Prosecutorial concerns, including *Brady/Giglio* implications.
- Evidence connecting the particular employee's speech to the alleged harm.

Union response: General outrage, offensive content and speculation are not substitutes for a fact-specific analysis.

The Plain View Project



The Plain View Project

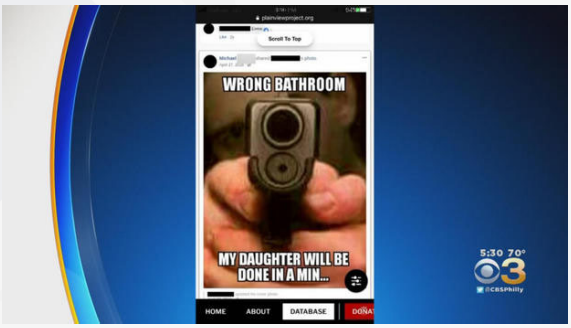
Philadelphia, 2019

- Watchdog project collected thousands of public Facebook posts by police officers.
- Posts involved race, religion, immigration, policing and violence.
- Philadelphia launched extensive internal investigations.
- Hundreds of officers faced scrutiny and many were disciplined.
- Fifteen officers were discharged.

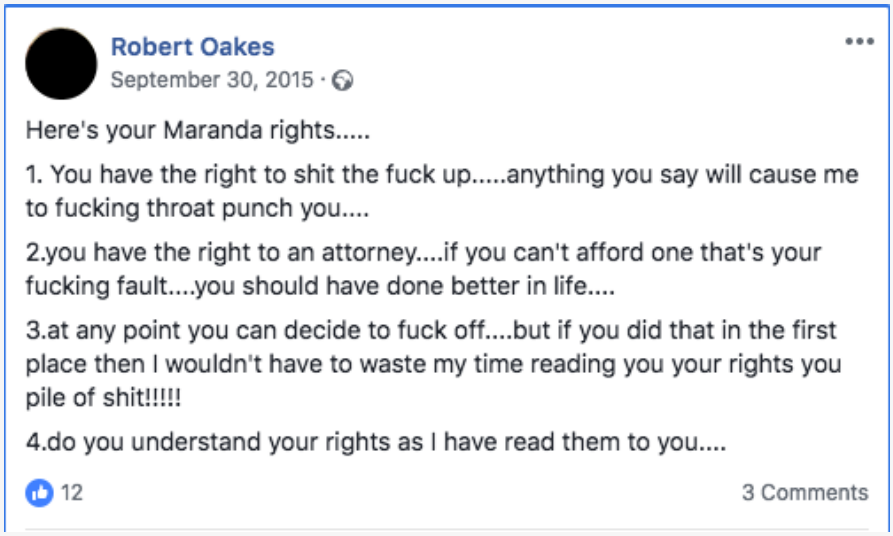
The central question: How should an employer evaluate years of social media activity by individual officers?

The Plain View Project





What Would You Do?



Fenico v. City of Philadelphia

Twenty officers challenged discipline arising from the Plain View Project.

- Officers argued their Facebook activity constituted protected citizen speech.
- City asserted the posts threatened public trust, operations and officers' credibility.
- District court initially dismissed the claims.
- Third Circuit reversed, requiring a more developed factual record.

The issue: Can an employer rely on anticipated disruption without examining the particular speech and surrounding circumstances?

Fenico: The City Prevails on Remand

Fenico v. City of Philadelphia (E.D. Pa. Oct. 28, 2024)

- Court granted summary judgment for the City.
- Actual workplace disruption was not required.
- Reasonably anticipated disruption could satisfy *Pickering*.
- Court credited concerns about community trust, departmental operations and witness credibility.
- The officers' First Amendment interests did not outweigh those concerns.

But … a constitutional defeat did not resolve whether termination was justified under the CBA.

Same Posts. Different Legal Standard.

First Amendment litigation

- Was the speech constitutionally protected?
- Did the City's operational interests outweigh the officers' speech rights?

Contract arbitration

- Did the City prove a policy violation?
- Was the investigation fair?
- Did employees have adequate notice?
- Was discipline consistent?
- Was discharge proportionate to the misconduct?

Plain View: The Union's Defense

- Evaluate each officer's actual posts and context.
- Don't attribute the entire database to an individual officer.
- Examine the investigation, including whether explanations were fairly considered.
- Consider notice, training and prior enforcement.
- Compare penalties for similar misconduct.
- Weigh service history, prior discipline and mitigating circumstances.

The central argument: Even serious policy violations do not automatically establish just cause for termination.

Plain View: The Arbitration Results

Arbitrators recognized the City's legitimate interests in:

- Regulating inappropriate off-duty conduct.
- Enforcing its social media policy.
- Protecting public confidence in policing.

But several discharge penalties were overturned because of:

- Deficiencies in the investigation.
- Inconsistent discipline.
- Mitigating employment records.
- Failure to establish that discharge was proportionate.

Result: *Officers won reinstatement or other relief despite serious allegations of misconduct.*

Philadelphia Lesson: Choose the Forum Carefully

First Amendment litigation — Fenico

- Courts give substantial weight to police department concerns about public trust, operational effectiveness and credibility.
- Reasonably anticipated disruption may justify discipline.
- The officers ultimately lost their constitutional challenge on remand.

Contract arbitration — Plain View Project

- The employer must establish just cause for the particular penalty.
- Individual circumstances, notice, consistency and mitigation matter.
- Arbitrators can overturn discharge even when misconduct is established.

In many cases, just cause arbitration may offer a better route to reinstatement than First Amendment litigation.

Melton: The Firefighter Wins

Melton v. City of Forrest City (8th Cir. 2025)

Off-duty Facebook post leads to termination

- Firefighter shared an offensive meme during the George Floyd protests.
- He *promptly* deleted the post after a complaint.
- City claimed the resulting controversy justified discharge.
- Eighth Circuit found the evidence of workplace disruption insufficient.

Lesson: Public outrage alone does not necessarily establish disruption under Pickering.

Inendino: The Firefighter Loses

Inendino v. Nance-Holt (7th Cir. 2026)

Off-duty Facebook posts undermine public trust

- Chicago firefighter made racially offensive social media posts.
- His profile identified him as a firefighter and included uniformed photographs.
- Department concluded the posts threatened public trust and effective emergency services.
- Seventh Circuit upheld the termination under Pickering.

Lesson: An agency's public-facing mission and the employee's connection to that agency can weigh *heavily* in the balancing test.

Hussey: A Developing Issue

Hussey v. City of Cambridge (1st Cir. 2025–26)

A police officer's derogatory Facebook comment

- Officer criticized legislation associated with George Floyd.
- Department imposed a four-day suspension.
- A 2025 First Circuit panel ruled for the employer.
- January 2026: The court vacated that decision and granted rehearing en banc.

The issue: How much weight should courts give mocking or disparaging political speech under *Pickering*?

Three Cases, Three Lessons

The Balancing Test Is Fact-Specific

- **Melton — Employee wins.** Insufficient evidence of disruption.
- **Inendino — Employer wins.** Strong concerns about public trust and operational effectiveness.
- **Hussey — Rehearing ordered.** How should courts weigh disparaging speech about public issues?

The lesson: *There is no automatic rule* that offensive off-duty speech is either protected or unprotected.

Hypothetical: The Facebook Post

A 15-year police officer with no prior discipline posts a controversial political meme on a personal Facebook account.

- The post is visible only to approximately 100 Facebook friends.
- A coworker screenshots it and sends it to the chief.
- The post circulates locally and generates complaints.
- The chief terminates the officer for damaging public confidence.

Questions:

1. Is the speech constitutionally protected?
2. What evidence of disruption matters?
3. Does the department have just cause for discharge?

Change the Facts

Change One Fact. Does the Result Change?

What if:

- The officer's profile prominently identifies the police department?
- The district attorney advises that the officer's posts create credibility concerns?
- Several coworkers refuse to work with the officer?
- The department previously imposed only suspensions for comparable posts?
- The officer made the post five years before being hired?

Which facts matter to the First Amendment analysis?

Which matter to just cause?

Defending Social Media Discipline

Investigate before choosing a theory.

- Obtain the complete post, conversation and surrounding context.
- Examine the employer's evidence of disruption.
- Determine whether the employee was identified with the agency.
- Review the policy, training and prior enforcement.
- Identify comparable disciplinary cases.
- Develop mitigation and challenge the proportionality of discharge.

Don't make the First Amendment your only defense.

Speech, Social Media and Discipline: 5 Lessons

1. Public employees retain First Amendment rights, but those rights are qualified.
2. Speech on matters of public concern can still justify discipline.
3. Evidence of actual or reasonably anticipated disruption is critical.
4. Public safety agencies receive substantial consideration when public trust is at stake.
5. Just cause arbitration may provide stronger protection than constitutional litigation.

LEGAL DRUG USE AND EMPLOYEE DISCIPLINE

Marijuana Policies and Recruiting

Montgomery County, Maryland – 2025

- Facing 166 police vacancies and anticipated retirements, Montgomery County relaxed restrictions on applicants' prior marijuana use.
- County also increased pay and introduced a $20,000 signing bonus.
- County Executive noted less restrictive cannabis policies elsewhere:

  "Past cannabis use is not a consideration in Virginia, so officers who can't work in Montgomery County go across the river to Fairfax County, where they can work. Law enforcement recruits in neighboring Washington, D.C. need to refrain from using marijuana for just three months before applying."

The tension: Departments are relaxing marijuana restrictions to recruit officers while continuing to discipline existing employees for cannabis use.

United States v. Hemani, 146 S. Ct. 1677 (June 2026)

- FBI agents discovered a legally purchased handgun, marijuana and cocaine during a search of Ali Danial Hemani's home.
- Hemani admitted using marijuana approximately every other day.
- Prosecutors charged him under 18 U.S.C. § 922(g)(3), which prohibits firearm possession by an unlawful user of or person addicted to a controlled substance.
- The government did not allege that Hemani was intoxicated or dangerous when he possessed the firearm.

Question: *Can regular marijuana use, without more, justify a federal firearms prohibition?*

Who Is an "Unlawful User"?

The federal firearms prohibition — § 922(g)(3)

- Federal law prohibits firearm possession by an unlawful user of or person addicted to a controlled substance.
- Historically, ATF interpreted the prohibition broadly, permitting inferences of current unlawful use from evidence of recent drug use.
- In January 2026, ATF revised its regulatory approach to focus on a pattern of ongoing unlawful use rather than isolated or sporadic use.
- The statutory prohibition remains in effect, subject to constitutional limitations.

Important distinction: Whether someone qualifies as an unlawful user is a separate question from whether disarming that person violates the Second Amendment.

Hemani: The Supreme Court's Ruling

- U.S. Supreme Court unanimously rejected Hemani's prosecution under § 922(g)(3).
- The government failed to establish a historical tradition supporting automatic disarmament based solely on regular marijuana use.
- Hemani's drug use, without evidence of intoxication or dangerousness, did not justify the firearms prohibition.

Bottom line: *Regular use alone did not justify disarming Hemani.*

Hemani: What the Court Left Open

The *Hemani* decision was expressly narrow. The Court did not decide whether the government may prohibit firearm possession by:

- Persons addicted to controlled substances.
- Persons presently intoxicated.
- Individuals whose drug use makes them dangerous.
- Users of particular drugs shown to create special dangers.

Public safety implications:

- *Hemani* undermines blanket claims that regular marijuana use automatically makes firearm possession unlawful.
- It does not establish a right to use marijuana under state employment law or a CBA.



Federal Changes

ATF — January 2026

- Revised the definition of an unlawful user to require a pattern of regular, ongoing unlawful drug use.
- Isolated or sporadic use is insufficient.

Marijuana Rescheduling — April 2026

- Federal action moved specified FDA-approved and qualifying medical marijuana products into Schedule III.
- Broader marijuana rescheduling remains a separate question.
- Schedule III status does not automatically resolve federal firearms restrictions.

Marijuana and Public Safety Work: Two States

New Jersey – Recreational Marijuana

- State law expressly protects lawful off-duty cannabis use.
- Police officers are covered by those protections.
- Federal firearms law becomes the employer's principal defense.

Florida - Medical Marijuana

- Medical marijuana is legal.
- State law preserves employer drug policies.
- Negotiated contract language becomes decisive.

Question: *When does lawful off-duty marijuana use justify discipline?*

New Jersey Legalizes Marijuana

2021 — Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA)

- Legalized recreational marijuana and established employment protections.
- Employers may prohibit marijuana use, possession and impairment at work.
- Employers generally may not discipline employees solely for lawful off-duty cannabis use or a positive THC metabolite test.
- New Jersey's Attorney General concluded that these protections apply to police officers.

The Rule: *Lawful off-duty marijuana use, without evidence of workplace impairment or another lawful basis for discipline, is generally protected.*

Jersey City Draws a Line in the Sand

April 2022 — The City prohibits all police marijuana use, on or off duty.

- Jersey City's argument:
  - Marijuana remains unlawful under federal law.
  - Section 922(g)(3) prohibits unlawful drug users from possessing firearms.
  - Carrying a firearm is an essential function of police employment.
  - Therefore, officers who use marijuana cannot legally perform their jobs.
- **Jersey City's position:** Federal firearms law overrides New Jersey's employment protections.

In re Mansour / Polanco

In re Mansour, 2026 WL 1194743 (N.J Super Ct App Div May 1, 2026)

- September 2022. Two Jersey City police officers tested positive for THC following random drug tests.
- Both admitted using marijuana while off duty.
- No allegation of workplace impairment, on-duty use or illegally purchased marijuana.
- Jersey City terminated both officers under its zero-tolerance policy.
- The Civil Service Commission ordered reinstatement with back pay, benefits and seniority.
- Jersey City appealed.

Question: *Can federal firearms law justify termination despite New Jersey's statutory protections?*

The § 925 Government Exception

18 U.S.C. § 925(a)(1)

The Gun Control Act exempts firearms issued for official government use from most federal firearms restrictions.

- Jersey City is a political subdivision covered by the exception.
- The exception applies to firearms used for official police purposes.
- The City argued that officers purchased their own duty firearms and therefore could not claim the exception.
- The court rejected that argument.

Bottom line: Even assuming § 922(g)(3) applies, federal law does not necessarily prohibit officers from carrying duty weapons.

The Strange Case of Trooper Keyes

Keyes v. Sessions, 282 F. Supp. 3d 858 (M.D. Pa. 2017)

- Pennsylvania State Trooper Michael Keyes was involuntarily committed following a personal crisis.
- His commitment triggered a federal firearms disability under § 922(g)(4).
- Nevertheless, Keyes returned to duty and continued carrying and qualifying with firearms.
- Under § 925(a)(1), he could possess firearms for official police purposes even while prohibited from possessing them privately.

The paradox: Federal law permitted Keyes to carry a firearm as a trooper but not as a private citizen.

The *Mansour* court cited *Keyes* to illustrate the distinction.

Mansour: No Federal Preemption

In re Mansour, 2026 WL 1194743 (N.J Super Ct App Div May 1, 2026)

Appellate Division affirms the Civil Service Commission.

- Section 925(a)(1) provides an exception for firearms used for official government purposes.
- Section 927 permits federal preemption only where federal and state law are in direct conflict.
- Jersey City could comply with both federal firearms law and CREAMMA.
- The officers' off-duty use of regulated cannabis did not justify their termination.
- Reinstatement with mitigated back pay, benefits, seniority and counsel fees affirmed.

The Rule: *Federal firearms law did not excuse Jersey City's violation of New Jersey's employment protections.*

Giambrone: The Facts

Hillsborough County v. Giambrone, (Fla. 2d DCA July 29, 2026).

- Angelo Giambrone — Hillsborough County firefighter/paramedic
- Selected for random drug test in February 2019.
- Tested positive for marijuana.
- Held a valid Florida medical marijuana card.
- No evidence of on-duty use, workplace impairment or performance problems.
- County placed him on unpaid administrative leave.

Question: Can an employer discipline a firefighter for lawful medical marijuana use without evidence of impairment?

Giambrone Wins in the Trial Court

Hillsborough County v. Giambrone, (Fla. 2d DCA July 29, 2026).

The trial court ruled for the firefighter.

- Medical marijuana qualified as authorized medication under the CBA.
- The medical review officer should have reported the positive test as negative.
- Florida's medical marijuana law protected lawful off-duty use.
- Without evidence of workplace impairment, the County could not discipline Giambrone.

Relief: Back pay, compensatory damages and prospective accommodation of medical marijuana cardholders.

Florida Second District Court of Appeal: REVERSED.

Problem #1: The Contract

What did the CBA actually say?

The CBA's negotiated substance abuse policy:

- Prohibited drug use at work, on County property and "at any time while employed" by the County.
- Expressly included cannabinoids within its definition of prohibited drugs.
- Excepted alcohol and prescribed medications.
- Defined impairment to include a confirmed positive drug test.

Problem #1 for Giambrone was that the CBA prohibited the very conduct Giambrone argued was protected.

Medical Marijuana ≠ Prescription Medication

Could Giambrone invoke the CBA's medication exception?

The appellate court said no.

- The CBA incorporated Florida's statutory definition of a prescription.
- Medical marijuana is obtained through physician certification, not a traditional prescription.
- It is dispensed through licensed treatment centers rather than the statutory pharmacist-based prescription system.
- It also does not qualify as an ordinary nonprescription medication.

Result: The medical review officer was not required to report the positive marijuana test as negative.

Problem #2: Florida Law Doesn't Save Him

Hillsborough County v. Giambrone, (Fla. 2d DCA July 29, 2026).

Florida's medical marijuana law:

- Authorizes medical marijuana for qualifying patients.
- Preserves employers' authority to enforce drug-free workplace policies.
- Does not require workplace accommodation of medical marijuana use.
- Does not independently create a cause of action for employment discrimination or wrongful discharge based on marijuana use.

Court: The trial judge could not transform medical marijuana legalization into an affirmative right to workplace accommodation.

Result: Reversed and remanded with instructions to enter judgment for the County.

Florida: The Bargaining Lesson

Legalization doesn't rewrite the contract.

In *Giambrone*, the parties negotiated their CBA *after* Florida legalized medical marijuana. Yet they retained language that:

- Prohibited drug use at any time during employment.
- Expressly included cannabinoids as prohibited drugs.
- Defined impairment to include a positive test.
- Failed to exempt lawful medical marijuana use.

What should unions bargain for?

- Protection for lawful off-duty use.
- A distinction between a positive THC test and actual impairment.
- Express treatment of medical marijuana.
- Clear standards for testing and discipline.

Same Conduct. Different Laws. Different Results.

New Jersey - Mansour

- Recreational marijuana
- Lawful off-duty use protected by state statute
- No evidence of workplace impairment
- Federal firearms defense rejected
- Officers reinstated

Florida — Giambrone

- Medical marijuana
- No comparable statutory employment protection
- CBA prohibited drug use at any time
- Positive test constituted impairment under the CBA
- Firefighter loses

Marijuana Discipline: What Matters?

Five questions for every case:

1. Does state law protect lawful off-duty cannabis use?
2. What does the CBA actually prohibit?
3. Does the employer have evidence of impairment or merely a positive test?
4. Is the employee required to carry a firearm?
5. Are there medical authorization or accommodation issues?

Don't assume that a drug policy adopted years ago reflects today's legal landscape.

California Protects Off-Duty Cannabis Use

Government Code § 12954 — Effective January 2024

- Prohibits employment discrimination based on lawful off-duty cannabis use.
- Protects employees against adverse action based solely on tests detecting nonpsychoactive cannabis metabolites.
- Does not protect possession, use or impairment at work.
- Includes exceptions for certain federally regulated positions and positions requiring federal background investigations or security clearances.
- No categorical exception for police officers or firefighters.

California focuses on the distinction between past use and present impairment.

Maryland Protects Firefighters' Marijuana Use

SB 439 — Effective October 1, 2026

- Protects covered fire and rescue employees from certain adverse employment actions based on authorized medical cannabis use.
- Employers may continue prohibiting on-duty use and impairment.
- Employers are not required to violate federal law or jeopardize federal funding or licensing benefits.
- The statute covers firefighters, EMTs and paramedics, but not police officers.
- Employers must report incidents of employees reporting for duty impaired by cannabis to the State EMS Board.

Psychedelic Treatments: A Changing Landscape

Federal Developments — 2026

- April: Executive order directed federal agencies to accelerate research into psychedelic treatments for serious mental illness.
- July: FDA finalized guidance for clinical investigations of psychedelic drugs.
- September: FDA held a public hearing on potential therapeutic uses in supervised settings.
- October: FDA sought public input on clinical trials involving ibogaine, including possible treatment applications for substance use disorders.



HEALTH

Gift Share

Cops on ketamine? Largely unregulated mental health treatment faces hurdles

Combining psychotherapy with low-dose ketamine is a relatively new approach to treating severe depression and post-traumatic stress. Evidence of the efficacy and safety are evolving.

- "Combining psychotherapy **with low-dose ketamine**, a hallucinogenic drug long used as an anesthetic, is a relatively new approach to treating severe depression and post-traumatic stress, especially in populations with high trauma rates such as firefighters, police officers, and military members."
- "Yet evidence of the efficacy and safety of ketamine for treatment of mental health conditions is still evolving, and the market remains widely unregulated."



Source: *Philadelphia Inquirer, October 16, 2025*

Hypothetical: The Positive THC Test

- Police officer is selected for a random drug test.
  - Tests positive for THC.
  - Admits recreational marijuana use three days earlier, while off duty.
  - Marijuana is legal under state law.
  - No evidence of workplace impairment or performance problems.
  - Department has a zero-tolerance drug policy.
- Police department terminates the officer.

Can the termination be sustained?

What additional information do you need?

Hypothetical: Change One Fact

Would your answer change if:

- The employee is a firefighter rather than a police officer?
- The employee has a valid medical marijuana card?
- The CBA expressly prohibits marijuana use at any time?
- The employee showed signs of impairment while on duty?
- The employee is a New Jersey police officer rather than a Florida firefighter?

Which matters most: the law, the contract or the evidence of impairment?

Marijuana and Drug Discipline: Five Lessons

1. Legalization ≠ employment protection.
2. A positive THC test ≠ proof of present impairment.
3. State statutes and CBAs can produce very different results.
4. Federal firearms restrictions require separate analysis.
5. Outdated drug policies can undermine employees' new legal protections.

The law is changing. Make sure your contract keeps up.

THANK YOU

