

The Domestic Violence Act

Applying this law retroactively may cost some officers their jobs

BY CYNTHIA SCANLON

Last September, Congress passed a federal law that may have tremendous impact on the federal, state, and local law enforcement personnel now employed throughout the country. The new law is very clear and simple: it is now illegal for anyone convicted of domestic abuse to own, carry or transport a firearm.

That includes law enforcement officers and military personnel. There are no exceptions.

The law was initially drawn up to protect women and children from the growing rise of domestic abuse. But Congress also wanted to take away guns from felons by making the law include misdemeanors, since most domestic abuse cases are prosecuted as such. So Congressional leaders expanded the law to encompass everyone convicted of domestic abuse, whether it be two months or 20 years ago.

Causing the most concern in the law is the word "retroactive," which was dropped into the legislation at the last minute. This clause, which surprised many in the law enforcement community, calls into question the Constitution's prohibition against ex post facto laws by increasing the punishment of a crime — sometimes years after it was committed.

"We don't understand [the law]," said Ed Spencer, spokesman for the Dallas Police Department. "To pass a law that makes it illegal for you to have done something that wasn't illegal when you did it, we wonder about. We think there's some constitutional issues about whether such a law is legal."

When police chiefs throughout the U.S. held their annual meeting in Phoenix last year, the new federal law was introduced as pending legislation. While chiefs were generally in favor of the law when it was presented to them at the conference, they were not told of the retroactivity clause, according to Robert K. Olson, chief of the Minnesota Police Department.

"An exemption for police was brought up, and it was the consensus of the chiefs that we didn't want exemptions for cops if they're beating up their spouse or significant other," Olson said. "We didn't want them on the job, either. Then we found out in November that the retroactivity clause

had been slipped in, which was unrestrained, and it caused us a lot of concern."

The National Association of Police Organizations (NAPO), an association that represents thousands of police officers, is not happy with the law at all. They warn it is ambiguous, unenforceable, and possibly unconstitutional. They further point out that most individuals that are affected by this law won't lose their jobs — but cops will, which they contend is discriminatory.

"This has consumed more of our time than anything else, and we are very unhappy," said Beth Weaver, Director of Communications for NAPO. "(The law) is confusing. They are not telling agencies what to do, nor are they mandating what you should do about it."

While Weaver said she understands the spirit of the law and what it is intended to achieve, she cautions that law enforcement is bearing the brunt of the law by sacrificing their jobs.

"We aren't saying cops should be above the law," she said. "We are saying that unfortunately they are the only people that are going to lose their jobs as a result of this and how can we rectify the situation?"

This has turned out to be a difficult question that no one, at this point, has been able to answer. Alcohol, Tobacco, and Firearms (ATF), the organization charged with enforcing the federal laws pertaining to weapons, doesn't have many answers at the moment either.



PHOTO BY MARK C. IDE

In March, Brian Burns, liaison and public information agent for ATF, said, "Right now, because this law is so new, parameters are still being worked out. Our agency is working in conjunction with different departments discussing ways to deal with this. I don't think any one set way has been etched in stone on a national policy."

The Department of Justice as well as local, state, and other federal law enforcement communities are trying to work together to answer the questions this new law poses, according to Burns,

but, to date, no answers have been forthcoming.

"We interpret the law like everyone else," Burns said. "ATF is working through the many complex issues, as are law enforcement agencies, and we are trying to develop a fair, equitable, and realistic enforcement policy." He said, the Justice Department is creating guidelines that would make enforcement and punishment much clearer, but just when those guidelines will be available is unknown, which

does not help police officers being affected by the law now.

In order to comply with the law, some law enforcement agencies are combing their records in search of offenders. The Minnesota Police Department is checking all 900-plus of its sworn officers and civilians who work on its force. "We ran record checks of all of them, and we checked the county in which they live to make sure we didn't miss anything in the state system, which is not that good," Olson said.

"Our internal controls division is looking through our officers' files to determine how many officers have been convicted of domestic abuse to ascertain how it might affect the department," said Inspector Ella Bully of the Detroit Police Department. "We haven't completed the search."

ATF also is running checks of its own personnel. "We're all going through the same thing," Burns said. "We're in the process of an extensive background review on all law enforcement and affected personnel, which includes people in our labs. That process is still ongoing."

What makes this law so difficult for many agencies is the lack of computerized employment and criminal records. To make matters worse, misdemeanors do not always appear on rap sheets, or may have been committed in another jurisdiction from where the officer now works or lives, making it even more difficult to track.

"We're sitting in Dallas. It's difficult to ascertain whether any member of our organization had a misdemeanor conviction for (domestic abuse) in a remote part of the state or another state," Spencer said.

In addition to record checks, many departments are issuing department-wide memos explaining the new law and who falls within its parameters. Officers who feel they fall under the law's guidelines must voluntarily come forward. Failure to do so will mean charges by Internal Affairs, a move that has assisted administrators in complying with the law, but has caught officers between a rock and a hard place. This combination of records checks along with mandates to voluntarily come forward are becoming

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common-place procedure among many agencies.

"We sent the order out," Olson said. "There's a possibility that someone will blow the whistle on an officer that didn't obey the order, but we'll catch up to them sooner or later."

The danger in this is, Weaver pointed out, is trying to determine who falls under the law and what punishment should be given without having clear guidelines as to how to proceed. At stake are the Constitutional rights of the affected officers.

"Everybody is trying to figure it out on their own," Weaver said. "And everyone is doing something a little bit different. People have been placed on administrative leave or desk duty or paid leave at home or civilian jobs."

Weaver also questions the myriad ways that departments are approaching the law's requirements of asking officers to voluntarily come forward. "Some of the larger agencies ... haven't said 'boo' about what they are going to do, and some agencies are looking into the past five years of records," said Weaver. "That's nice, but that's not really the law."

The law has already adversely affected officers in Arizona, Colorado, Michigan, and Minnesota. As record checks become more complete, the number of states involved will surely grow.

The Dallas Police Department, which has 2,800 officers on its force, has found only one officer that they know falls under the new law. "We've asked him to surrender his city-issue gun," said Ed Spencer, spokesman for the Dallas Police Department. But because the punishment under the law remains nebulous, Dallas has requested assistance from the Dallas City Attorney in interpreting the law and clarifying punishment.

Minneapolis currently has two affected officers. "We have put them in civilian jobs until I have them checked," Olson said. "They must show the department that they have the lawful right to possess firearms and ammunition. If they cannot do that, they will be terminated."

NAPO is concerned about the welfare of officers who were convicted of domestic abuse — sometimes more

than a decade ago — now being punished years later by this new law. "This is the horror story," Weaver said. "Somebody had a problem years ago and maybe hasn't had a thing happen since. We're going to take away their job because of this one mistake, one time, years ago."

Police chiefs like Olson agree that the law may go too far in its retroactivity clause. "Someone may have had a problem 20 years ago, handled it, and has been a wonderful employee since. In many cases, they are still tied

up with the person they were involved with [during the domestic abuse dispute]," he said.

"We think it is a bit much to suddenly say, 20 years later, 'Well, gee, your job is gone now.' Some of these folks have clearly reconciled over the years and are happily married. All of the sudden we are going to take away their livelihood."

Some officers are doing whatever is legally necessary to keep their jobs. Olson cited one officer on his force, a 28-year veteran who was convicted of

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domestic abuse six years ago. After the conviction, he went into treatment and has had no problems with the law since.

"Six years later this law was passed and he fell under it," Olson said. "I had to relieve him of duty. He immediately got his ex-wife and they went to court. He was paying \$1,700 a month in child support, which would have stopped had he lost his job. They convinced the court to let him vacate his previous guilty plea. In taking back the guilty plea the court set it for dismissal. He therefore has no conviction on his record by judicial order."

While this may seem extreme, Olson asked, "What does a 51-year-old, 28-year police veteran do for a living if he can't carry a firearm? That's all he knows. He can't even be a security guard."

Olson added, "The law says if you get [the conviction] expunged or otherwise dismissed, it doesn't count. I'm assuming this is going on all over the country."

Because of the murkiness of the law's ramifications, agency adminis-

trators have been looking to ATF for some kind of guidance, but ATF can only comply with the law itself.

"We don't make the laws; we enforce the laws and statutes that are given to us through Congress," Burns said. "We're under the same requirements of the law, and we too have to do extensive background reviews on our employees. We take the law as it stands and do the best job we can with it. This is a very precarious statute, no question about it."

Burns added, "I don't see any change on the horizon unless Congress takes this up."

If NAPO has its way, that is exactly what will happen this legislative session. "We have introduced a bill into Congress that would return the new federal law to its original form," Weaver said. "Law enforcement and the military had an official use exception, which meant they could still carry their service weapon to do their job."

The goal is to get the official use exception reinstated, which would mean military and law enforcement would be exempt from the law. Bar-

ring that, the organization wants to see the retroactive clause stricken.

"We may have to live with the retroactive part, which would be better than nothing," Weaver said. "But we would like to see the whole thing go away with regards to law enforcement."

While some feel that way, Michele Hallett, executive director of the Arizona Coalition Against Domestic Violence (a coalition involved in public policy and community education for the advocacy of laws relating to domestic violence), said law enforcement officers should be held to the same or higher standards as those they may be arresting.

"I would not want to see an amendment that exempts police and the military," Hallett said. "People with [law enforcement] responsibilities ought not to be violating those laws. We have a reasonable expectation that police know what the law is and what the sanctions are for violating the law. If someone chooses to be violent in their own home toward their intimates, that is very problematic."

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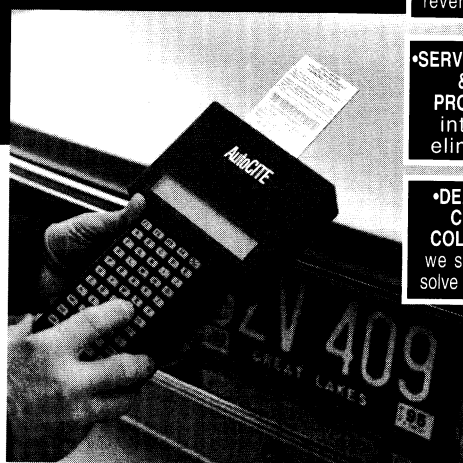
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What makes this problematic, according to Hallett, is that domestic violence is the single most frequent call for police. "A patrol officer is going to run into multiple domestic violence calls and cases," said Hallett. "We ought to expect as a society that those officers are not guilty of committing those same offenses. We ought to question the judgment of someone who is committing violence in their own home, and I think it is reasonable to question whether that same person can answer appropriately on a similar call."

Hallett pointed out that misdemeanor domestic abuse cases can escalate into homicides. "The intent of this law is important," she said. "When people get called in for a misdemeanor domestic violence offense, they are the ones most likely to turn into escalated violence some where down the road. Making sure that those people don't have access to lethal weapons is an important piece of the rationale of the law."

Still, like many police administrators, Hallett questions the unrestrained

retroactivity clause within the bill as possibly being too encompassing and unfair. She has no problem with an evaluation being conducted on an individual who has had a clean record after a set amount of time has gone by.

"I have not seen such a proposal, but that is something that ought to be considered," she said. "People ought to have the opportunity to change their behavior and show that the violent behavior has stopped. That seems to have been an oversight of the people who drafted the legislation."

Critics of the bill point out the possibility of abuse victims failing to call for assistance, especially if their abuser is a police officer, for fear that the abuser will automatically lose his job. Hallett said she has found no grounds for these assertions.

"I have not had any calls from victims who said, 'I'm concerned, and I normally would have called and had this violence interrupted, but I'm not going to because of this new law,'" Hallett said. "No evidence has come across my desk to support that."

As a final argument, some are ques-

tioning whether or not it would be feasible for law enforcement administrators to water down their requirements and give exemplary officers desk or civilian jobs in order to stay on the force. Olson may speak for many administrators when he said he is adamantly opposed to creating such special positions for officers falling under this new law, no matter how good their employment record might be.

"That would be creating a limited duty," he said. "It would open the door for ADA (Americans With Disabilities Act) issues, and I don't want that door open. It would be foolish for us to do that."

He added, "Carrying a weapon is a bona fide occupational qualification to be a police officer in Minnesota. Our position is, if you can't carry a gun, you can't be a cop."

That position will hold true for law enforcement personnel across the nation who have been convicted of domestic abuse — until Congress decides otherwise. L&O

Cynthia Scanlon is a free lance writer in Arizona.

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