TO: NYSAC

FROM: RWGM Labor Team

RE: Newly Enacted or Passed Laws

DATE: June 16, 2020

In the wake of the recent death of George Floyd, the New York Legislature passed several bills with the intent of reforming policing, which the Governor is signing into law. Given the significant changes to procedures and mandated allowable behavior, RWGM wanted to inform all of these changes.

*Eric Garner Anti Chokehold Act - A06144/S6670B (Signed into law by the Governor)*

This act amends the penal law by adding a section called aggravated strangulation. This law specifically applies to a police officer (as defined in section 1.20 of the *Criminal Procedure Law*) or peace officer (as defined in section 2.10 of the *Criminal Procedure Law*) who obstructs the breathing or blood circulation (as defined in section 121.11 of the *Penal Law*), or who uses a chokehold or similar restraint, thereby causing serious injury or death to another person. Any individual who violates this act will be guilty of a Class C felony.

This law took effect immediately.

*Required Reporting In the Event of Discharging of a Weapon - A00927/S2575B (Signed into law by the Governor and takes effect June 15, 2020)*

These bills added a new section to the *Executive Law* that requires any law enforcement officer or peace officer to make a verbal report to their supervisor and a formal written report within six (6) and forty-eight (48) hours, respectively, when the officer discharges their weapon on or off-duty when a person could have been struck by a bullet from the weapon, including when the officer discharges their weapon in the direction of another person. These bills explicitly allow an officer to invoke their fifth amendment right against self-incrimination.
The “STAT” Act - A10609/S1830C (Signed into law by the Governor and takes effect 180 days from signature or December 12, 2020)

These bills amend Executive Law and Judiciary Law to require various data be collected and published. The entities responsible for the collection and dissemination of the data are Law Enforcement Departments and the Chief Administrator of the Courts.

In regard to Law Enforcement Departments, the Chief of every Police Department and every Sheriff must “promptly report” certain information to the Division of Criminal Justice Services. The information required to be reported involves any arrest-related death. An arrest-related death is considered any death that occurs while in custody or during an attempt to establish custody. The information required in every report is as follows:

- the number of arrest-related deaths;
- the race, ethnicity, age, and sex of the individual;
- the zip code or location where the death occurred; and
- a brief description of the circumstances surrounding the arrest-related death.

This act requires the first report described above to be submitted within six (6) months of the law being enacted (December 15, 2020) and contain the information for that time period, and annually thereafter and no later than February 1. These reports will thereafter be published for public dissemination.

Private Cause of Action for the Misuse of 911 Caused by Bias - A01531/S8492 (Signed into law by the Governor on June 12, 2020)

This act amended section 79-n of the Civil Rights Law to provide for a civil cause of action to anyone in a protected group against an individual who summons the police or a peace officer without reason “suspect a violation of the penal law, any other criminal conduct, or an imminent threat to a person or property.” A person is considered to lack reason for suspicion where a reasonable person would not suspect such violation, conduct, or threat.

This act took effect immediately.

Codification of the Right of Individual’s to Record Police Activity - A01360/S3253A (Signed into law by the Governor and takes effect 30 days from signature or July 14, 2020)

This act codifies the right of individuals not under arrest or in custody to record (on essentially any device) law enforcement activities. The individual also has the right to maintain possession of the device the recording was made on. Furthermore, individuals under arrest or in custody do not forfeit the right to have such recordings, property and equipment maintained and return to him or her. Under this act, no individual may physically interfere with law enforcement activity or obstruct governmental administration (as defined in the Penal Law). Under this act, law enforcement officers (peace officers, police officers, security officers, security guard, or similar official engaged in law enforcement activity) may not do any of the following to an
individual attempting to exercise the right to record law enforcement activity and interfere with
the right listed above:

- intentionally preventing or attempting to prevent that person from recording law
  enforcement activity;
- threatening that person for recording a law enforcement activity;
- commanding that the person cease recording law enforcement activity when the person
  was nevertheless authorized under law to record;
- stopping, seizing, searching, ticketing or arresting that person because that person
  recorded a law enforcement activity; or
- unlawfully seizing property or instruments used by that person to record a law
  enforcement activity, unlawfully destroying, or seizing a recorded image or recorded
  images of a law enforcement activity, or copying such a recording of a law enforcement
  activity without consent of the person who recorded it or approval from an appropriate
court.

The act provides an affirmative defense that the officer had probable cause to arrest the
person recording such law enforcement activities.

This act provides civil remedies for an individual whose rights provided for under the act
are violated. The remedies would be provided for in addition to those causes of actions defined
under 42 USC §1983. This cause of action provides for attorney’s fees to be provided. As such,
policies and training must be amended to inform employees who fit the definition above of these
rights.

Amendment of Civil Rights Law by Adding a New Section to Civil Rights Law Affirming the Right
of an Individual in Custody to Receive Mental Health and Medical Attention - A08226B/S6601B
(Signed into law by the Governor and takes effect immediately on June 15, 2020)

This act amends the Civil Rights Law to provide that individuals under arrest or in custody
of a police officer, peace officer, or other law enforcement representative are entitled to medical
or mental health attention when needed. This act accomplishes this by creating a duty of the officer
to provide attention to the medical and mental health needs of such person and obtain reasonable
treatment for such needs. The standard of review under this act is whether the care requested is
reasonable and provided in good faith under the circumstances. Failure to provide reasonable
and good faith attention creates a cause of action to an individual who, as a result of said failure, suffers
serious physical injury, significant exacerbation of an injury or condition.

Repeal of Civil Rights Law §50-a and Amendment of Public Officers Law - A10611/S8496 (Signed
into law by the Governor on June 12, 2020)

This act began by repealing section 50-a of the Civil Rights Law (“Section 50-a), which
created an exemption of disclosure of personnel records associated with police officers,
firefighters, corrections officers, parole officers, and other peace officers under the Freedom of
Information Law (“FOIL”). In addition to the repeal of Section 50-a, the act amended FOIL
(Public Officers Law §§86, et seq.). In regard to the specific amendments, although discipline
records of the types of employees listed above may now be disclosed under FOIL, it allows for certain redactions.

First, certain redactions are allowed to law enforcement disciplinary records. These records include the following items created in furtherance of a law enforcement disciplinary proceeding (defined as the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency):

- the complaints, allegations, and charges against an employee;
- the name of the employee complained of or charged;
- the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
- the disposition of any disciplinary proceeding; and
- the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

The redactions allowed to law enforcement disciplinary records, as defined above, are the following:

- items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;
- the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;
- any social security numbers; or
- disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

In addition to the above, technical infractions (defined as “a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative
departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities”) may also be redacted from law enforcement disciplinary records.

This act was effective immediately upon signature from the governor on June 12, 2020.

**Body Cameras for New York State Police - A08674A/S8493 (Passed both houses)**

This act requires the New York State Police to wear body cameras during certain interactions with the public. It does not, however, apply to local police departments.

**Creation of a Special Investigation Office Within the Office of the State Attorney General - A01601C/S2574C (Signed into law by the Governor on June 12, 2020 and takes effect April 1, 2020)**

This act, first, created within the Office of the State Attorney General the Office of Special Investigations. The purpose of this office is to investigate and, if warranted, prosecute police officers or peace officers who are involved in the death of an individual, whether or not they are in the officer’s custody. This provision applies to deaths that occur while the officer is on or off-duty. To bring charges against the officer, the act requires the Attorney General determine whether an act or omission did, in fact, cause the death of the deceased.

Pursuant to this act, the Attorney General of New York (“the Attorney General”) is vested with investigative authority and criminal jurisdiction upon the death of a person referenced above. All jurisdiction over the prosecution of such incidents is vested with the Attorney General and supersedes the jurisdiction of the District Attorney of the county in which the incident occurred. The Attorney General then retains jurisdiction over the matter until such time as the Attorney General determines the matter does not meet the requirements listed within the description of the act. Should the Attorney General make such a determination, it will provide written notice of said determination to the district attorney for the county in which the incident occurred.

Various responsibilities are placed upon the Attorney General in regard to investigations held under the act. Primarily, the Attorney General is required to conduct a full, reasoned, and independent investigation of the matter. This investigation must (1) gather and analyze evidence; (2) conduct witness interviews; (3) commission and review any required scientific reports; and (4) review audio and video recordings. This act also confers subpoena and fact-finding power to the Attorney General while conducting this investigation.

In regard to any incident arising under this act, the Office of Special Investigations is empowered to issue a public report on its website regarding the investigation if the office declines to present evidence to a grand jury or the grand jury declines to return an indictment on any charge. These reports must include the result of the investigation, an explanation as to its decision, and any recommendations for reforms arising from the investigation. Aside from incident specific reports, the Office of Special Investigation must make an annual public report regarding the matters it investigated and handled, as well as any recommendations for any reforms.
The Act was signed into law on June 12, 2020 and will become effective on April 1, 2021.

Amendment to Executive Law to Create the Law Enforcement Misconduct Investigation Office - A10002/S3595B (Passed both houses and has not yet been signed into law as of the date of this memorandum)

This act begins by conferring jurisdiction over all law enforcement agencies (including any political subdivision) to the Law Enforcement Misconduct Investigation Office (“the Office”), which was created under this Act within the Department of Law. The purpose of the Office is to review, study, audit, and make recommendations relating to the operations, policies, programs, and practices of state and local law enforcement agencies. The Office functions to do the following in relation to covered law enforcement agencies:

- Receive and investigate allegations of corruption, fraud, use of excessive force, criminal activity, conflicts of interest, or abuse;
- Inform the heads of covered law enforcement agencies of such investigations and their progress, unless confidentiality is required;
- Determine whether disciplinary action, civil or criminal prosecution, or further investigation by federal, state or local agencies is required, and to assist in such further actions;
- Prepare and release to the public written reports, with redactions of information exempt pursuant to the Freedom of Information Law;
- Review and examine periodically the policies and procedures of covered law enforcement agencies with regard to the prevention and detection of corruption, fraud, use of excessive force, criminal activity, conflicts of interest, and abuse in those agencies;
- Recommend remedial actions to prevent or eliminate the issues discussed above;
- Investigate patterns, practices, systemic issues, or trends identified within the investigations above; and
- Submit annual reports that recommend specific changes to state law to further the mission of the law enforcement misconduct investigative office.

This act also confers significant fact-finding powers to the Office to investigate the subject matter listed above. These powers include the right to do the following:

- issue and enforce subpoenas;
- require production of documents deemed relevant to its investigations;
- examine, copy, or remove any document or record of the covered law enforcement agency;
- require any officer or employee employed by a covered law enforcement agency to answer questions related to their official duties, no such statement or document may be used in a subsequent criminal prosecution except for perjury or contempt purposes arising from such testimony. The refusal of any officer or employee to answer questions shall be cause for removal from office or employment or other appropriate penalty;
• monitor the implementation by covered law enforcement agencies of the recommendations made by the Office; and
• perform other necessary or appropriate actions to fulfill its duties.

In addition to the responsibilities of the Office, the act creates various duties required by covered law enforcement agencies and the officers and employees employed by that law enforcement agency. First, employees and officers must “promptly” report to the Office any information concerning the covered topics above, including any misconduct of another officer or employee. Failure of an officer or employee to make a report will be cause for removal or other appropriate penalties. Those officers or employees who make such a report can not be retaliated against for such report. Next, the head of any covered law enforcement agency must refer to the Office for investigation the complaints against an officer or employee when that individual has received at least five separate complaints from five or more individuals within the past two years. The Office will then investigate the complaints to determine whether the office or employee has engaged in a pattern or practice of misconduct. Finally, the head of any law enforcement agency shall advise the governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and assembly within 90 days of the issuance of a report by the Office as what remedial actions the law enforcement agency has taken in response to any recommendation for such actions contained in the report.

This act has not yet been signed by the Governor, but will take effect on the first day of April of the succeeding year of the date the act is signed.

Executive Order No. 203

In addition to the legislative package above, the Governor of New York also issued Executive Order No. 203 (“EO 203”). EO 203 provides for various requirements associated with local governments that operate a police agency, as defined in section 1.20 of the Criminal Procedure Law. Specifically, EO 203 requires such police agencies:

perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices, and develop a plan to improve such deployments, strategies, policies, procedures, and practices, for the purposes of addressing the particular needs of the communities served by such police agency and promote community engagement to foster trust, fairness, and legitimacy, and to address any racial bias and disproportionate policing of communities of color.

To accomplish this mandate, each chief executive of the local government must convene the head of the local police agency and any stakeholder in the community to develop a plan to satisfy the findings of the above review. This plan must consider evidence-based policing strategies that involve, amongst other things, the following:

• use of force policies;
• procedural justice;
• any studies addressing systemic racial bias or racial justice in policing; implicit bias awareness training;
• de-escalation training and practices;
• law enforcement assisted diversion programs; restorative justice practices;
• community-based outreach and conflict resolution;
• problem-oriented policing;
• hot spots policing;
• focused deterrence;
• crime prevention through environmental design;
• violence prevention and reduction interventions;
• model policies and guidelines promulgated by the New York State Municipal Police Training Council; and
• standards promulgated by the New York State Law Enforcement Accreditation Program.

In development of this plan, the local government and its police agency must consult with stakeholders, which includes, but is not limited to, members and leaders of the police force, the community (emphasizing those areas with high police interactions), interested non-profits and faith-based community groups, the local district attorney and public defender, and local elected officials. After consultation, the local government is to adopt a plan to implement the recommendations resulting from its review. This plan is to include any “modifications, modernizations, and innovations to its policing deployments, strategies, policies, procedures, and practices, tailored to the specific needs of the community and general promotion of improved police agency and community relationships based on trust, fairness, accountability, and transparency, and which seek to reduce any racial disparities in policing.”

After the plan is formulated, it must be offered for public comments. After the public comment period, the plan is to be presented to the local legislative body, which shall adopt or ratify the plan. This must occur no later than April 1, 2021. After the process has completed, the local government must transmit a certification to the Division of Budget to affirm the process has been complied with and that the local law or resolution was adopted. Failure to make such certification could result in the Division of Budget withholding future appropriated state or federal funds.

This initiative will be announced by the Division of Budget through guidance that will be sent to all local governments.

Please note as a disclaimer that this information is not intended to offer and should not be relied upon as legal advice or opinion. The attorneys at Roemer Wallens Gold & Mineaux LLP can assist you with questions arising from these new initiatives. Our attorneys have already worked with clients, some of which are NYSAC members, on these issues. Any inquiries can be directed to RWGM Partner Earl T. Redding, Esq., at 518.312.2458 (cell) or eredding@rwgmlaw.com.