

ARE RESERVE OFFICERS EMPLOYEES?

by Jim Lombardi & David Lombardero

From 1984 through 1990, one of our legislative goals has been to remove the words "full-time paid" from California laws relating to peace officers. We were largely successful at the end of this cumbersome process. Reserves are now recognized in the law as full-fledged peace officers if they have had the proper training.

However, some in law enforcement management have taken the position that certain protections afforded full-time officers could or should not be passed on to reserve officers because they were not "employees." In the past, I have pointed out that appointment as a reserve officer creates an employer/employee relationship. However, many members of management – and the attorneys advising them – continue to take the position that reserve officers cannot be employees because they are not paid. This is incorrect. Under California law, reserve officers are considered employees for nearly all purposes.

A person does not have to be paid in order to be an employee. Whether a person receives compensation is an important consideration, it is not indispensable to being an employee. *Webster's Third New International Dictionary* defines "employee" as "one employed by another usually in a position below the executive level and usually for wages." Receiving wages enters into the definition as a firm requirement only in the labor-relations definition of "employee." As we know, police administrators sometimes refer to reserve officers as "at-will employees."

California Law

1. Government Code Section 810.2 states that "Employee includes an officer, judicial officer . . . employee, or servant, whether or not compensated, but does not include an independent contractor." This definition applies to lawsuits against public entities and employees.

2. Government Code Section 1030 provides in relevant part: "A classifiable set of the fingerprints of every person who is now employed, or who hereafter becomes employed, as a peace officer of the state, or of a county, city, city and county or other political subdivision, whether with or without compensation, shall be furnished to the Department of Justice and to the Federal Bureau of Investigation by the sheriff, chief of police or other appropriate appointing authority of the agency by whom the person is employed." Government Code Section 1029 also refers specifically to requirements for "being employed as a peace officer of the state, county, city, city and county or other political subdivision, whether with or without compensation." These sections are in the division of the Government Code dealing with public officers

and employees, and acknowledge that compensation is unnecessary to make a peace officer an employee.

3. The last sentence of Penal Code Section 830.6 (which defines peace officer powers of reserve officers) states: "A reserve park ranger or a transit, harbor, or port district reserve officer may carry firearms only if authorized by and under those terms and conditions as are specified by his or her employing agency." Use of the term "employing agency" implies that these reserve officers are "employees." If these classes of reserve officers are employees, reserve officers who work for other agencies should also be employees.

4. POST Regulation 1004(a) provides: "Any department which employs peace officers and/or Level I Reserve peace officers shall have a POST-approved Field Training Program." POST Regulation 1002(a) specifies requirements that apply to "Every peace officer employed by a department," but a subsection exempts reserve officers from the written test. Thus, POST refers to reserve officers as employees.

5. Labor Code Section 2750 provides: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person." This section does not mention compensation, so it is not indispensable.

6. Labor Code Section 3352(i) excludes "[a]ny person performing voluntary service for a public agency or a private, nonprofit organization who receives no remuneration for the services other than meals, transportation, lodging, or reimbursement for incidental expenses" from the definition of "employee" for purposes of workers' compensation. Most reserve officers do not receive compensation for services, and so would be excluded from workers' compensation coverage were it not for Labor Code Section 3362.5. This section states: "Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city police officer, a deputy sheriff, or a reserve police officer of a regional park district or a transit district, and is assigned specific police functions by that authority, the person is an employee of the county, city, city and county, town, or district for the purposes of this division while performing duties as a peace officer if the person is not performing services as a disaster service worker for purposes of Chapter 10 (commencing with Section 4351)." Consequently, reserve officers are employees for purposes of workers' compensation benefits.

7. Title 2, Section 7286.5(b) of the California Administrative Code defines "employee" as: "Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written." Reserve officers are appointed. No requirement of

compensation is specified. Consequently, they are employees for purposes of the Fair Employment and Housing Act.¹

Federal Law

Federal law is different from California law, and there is more variation in the treatment of volunteers. Although there may be statutory authorization for some agencies of the federal government (such as the Forest Service) to use volunteers in law enforcement, there does not appear to be a program to do so. In general, it seems that the federal analog of a reserve officer would be considered an employee for purposes other than entitlement to salary.

1. For purposes of the Fair Labor Standards Act (FLSA), reserve officers must be classified as volunteers or employees. Reserve officers who receive only nominal compensation are treated as volunteers. This is the result of 29 U.S.C Section 203(e)(4), which exempts "any individual who volunteers to perform services for a public agency . . . if – (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and such services are not the same type of services which the individual is employed to perform for such public agency."

2. Under 16 U.S.C. Sections 18(i), 558(c), 670c(d), 742f(c), 4604(c), persons who volunteer to perform services for various federal agencies are considered employees for purposes of tort liability, workers' compensation and damage to their property, but not for other purposes.

3. Cases interpreting federal employment discrimination laws (Title VII) have held that some form of compensation, direct or indirect, is important and perhaps essential to the determination of whether there is an employer/employee relationship. However, that does not mean that a salary is an absolute requirement. In *Pietras v. Board of Fire Commissioners*, 180 F.3rd 468, 473 (1070) (2d Cir. 1999) the court held that "an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits." The court went on to hold that a volunteer firefighter could be found to be an employee if she received "indirect but significant remuneration through benefits such as a disability pension, survivors' benefits, group life insurance, and scholarships for dependents upon death. The court agreed with *Haavistola v. Community Fire Co.*, 6 F.3rd 211 (4th Cir. 1993), which reached the same conclusion. In

¹ *Mendoza v. Town of Ross*, 128 Cal. App. 4th 625 (2005), is not to the contrary. In that case, the volunteer was never properly appointed. Also, unlike reserve officers, he was not entitled to workers' compensation or other benefits, and there was no statute defining volunteer community service officers as employees.

California, reserve officers receive workers' compensation (including disability benefits) if they are injured or killed while on duty. They and their dependents receive substantial benefits under the federal Public Safety Officers' Benefits Program if they are killed or totally disabled in the line of duty. These include a death benefit of nearly \$300,000 and educational benefits of over \$800 per month for children and spouse. They also receive free training, some of which qualifies for college credit and, in the case of Level I officers, may keep them eligible for full-time employment without further training. Thus reserve officers in California could be found to be employees for purposes of Title VII.²

Law Enforcement Officers Safety Act

One of the issues of interest to many reserve officers is whether the federal Law Enforcement Officers Safety Act ("H.R. 218") confers a right to carry concealed weapons. This turns on what that law means when it uses the term "employee," which it does not define. Because the Act depends upon state law to determine whether someone is a law-enforcement officer with powers of arrest and authorized to carry a firearm on duty, it may also have intended to look to state law to determine whether a reserve officer is an employee of a governmental agency. Furthermore, the purposes of the Act, and the language of the statute itself favor a broad interpretation that would include active reserve officers, at least in California.

H.R. 218 has two components: 18 U.S.C. Section 926B, which applies to active law enforcement officers, and 18 U.S.C. Section 926C, which applies to certain retired law enforcement officers. Few retired reserve officers would qualify, because of the requirements that the officers have been "regularly employed" and have a vested right to a pension. On the other hand, active reserve officers qualify under Section 926B, which does not require "regular employment" but only that the officer be a law enforcement "employee" of a government agency. This contrast makes it clear that "regular employment" is unnecessary for active officers.

For purposes of Section 926B, the most important questions are whether the reserve is authorized by his or her employing agency to carry firearms, and whether he or she has powers of arrest. In California, all reserve officers have powers of arrest but, some agencies do not allow Level III reserves to carry firearms. Level III reserve officers with those agencies would not qualify under 18 U.S.C. Section 926B even if active.

² Language in a more recent decision, *United States v. City of New York*, 359 F3rd 83, 92-93 (2d Cir. 2004) suggests that reserve officers *would* be considered employees under Title VII because they receive workers' compensation and other benefits, and nearly all of the other indicia of an employer-employee relationship are present.

HR 218 defines "law enforcement officer" in sweeping terms, and the legislative history suggests that Congress intended the Act to be interpreted broadly. Both the House and the Senate reports state that the purposes of the Act include enabling "equipped, trained and certified law enforcement officers to continually serve and protect our communities regardless of jurisdiction or duty status at no cost to taxpayers," enabling law enforcement officers nationwide to be prepared to answer a call to duty no matter where, when or in what form it comes," and to help officers "to protect citizens in the wake of a terrorist attack." In other words, Congress believes that having law enforcement officers armed off duty will help protect the public. Also, the "Act is designed to protect officers and their families from vindictive criminals, and to allow thousands of equipped, trained and certified law enforcement officers, whether on duty, off duty or retired, to carry concealed firearms in situations where they can respond immediately to a crime across state and other jurisdictional lines." So long as the officer is trained, these goals are furthered regardless of whether he or she is paid. California reserve officers receive more training than many other classes of law enforcement officers in California.

The House and Senate reports are not concerned with whether the officer is paid, so long as he or she "works" for a public law enforcement agency and has the authority to use a firearm. They explain: "In order to qualify for the bill's exemptions to permit a qualified off-duty law enforcement officer to carry a concealed firearm, notwithstanding the law of the state or political subdivision of the state, he or she must have authority to use a firearm by the law enforcement agency where he or she works; not be subject to any disciplinary action; satisfy every standard of the agency to regularly use a firearm; not be prohibited by Federal law from receiving a firearm; and carry a photo identification issued by the agency." The sponsor of the bill also stated that one of the purposes of the bill was to override local laws that do not allow off-duty officers to carry weapons.

Beyond these considerations, the Act is dependent upon state law in determining whether someone is a law enforcement officer with powers of arrest and authorized to carry a firearm. Consequently, state law may be entitled to some deference in determining whether there is an "employment" relationship.

We believe that the argument for coverage of active reserve officers is stronger than the argument against it, which turns entirely on the argument that someone who is not paid is not an employee - an argument that has many holes. While California and Arizona appear to have concluded that active, volunteer reserve officers who carry firearms on duty are covered by 18 U.S.C. Section 926B, California has not issued a formal opinion on the subject. Some law enforcement agencies take the position that the Act does not apply to reserve officers, most likely out of liability concerns, and the agencies are unwilling to consider alternative advice unless it comes from above. Some agencies simply do not want to address the issue while it remains controversial.

Regardless of what your agency concludes, you have to consider how the law enforcement agencies where you will be traveling may react. Even in California, your agency's interpretation, like the analysis here, is not binding on out-of-state agencies. Also, remember that 18 U.S.C. Section 926B provides no protection if you are intoxicated or are subject to disciplinary action. Be discrete.

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