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CLIENT BULLETIN

PROBATION PEACE OFFICERS & OFF-DUTY WEAPONS

**By Christopher W. Miller, General Counsel
State Coalition of Probation Organizations**

This bulletin provides an overview of current legal authority governing the off duty carrying of concealed firearms by probation peace officers. This bulletin does not constitute legal advice. Probation peace officers should be familiar with the regulations of their own agency and consult their labor association or agency representative before deciding to carry a concealed firearm off duty.

Can a Probation Department prohibit a peace officer employee from carrying a concealed firearm off-duty?

No. Penal Code section 25400, which replaced former sections 12025 and 12031 effective January 1, 2012, prohibits the carrying of a concealed weapon on the person or in a vehicle. As "duly appointed peace officers," however, probation peace officers – deputy probation officers and sworn juvenile institution staff – have the right to carry a concealed firearm off-duty without violating those sections. (Pen. Code § 25454(b).)

A probation department may regulate the authority of deputy probation officers to carry and use firearms only while those employees are on duty and exercising peace officer powers in one of the five areas of responsibility defined in Penal Code section 830.5: conditions of probation or post release community supervision; escape by any inmate or ward; transportation of persons on probation or post release supervision; law violations; and mutual aid.

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In an opinion issued August 31, 1989, the California attorney general concluded a deputy county probation officer does not need to obtain a CCW permit to carry a concealed firearm off duty. (72 Ops. Cal.Atty.Gen. 167, 172 [89-505].) The Attorney General specifically stated a "county chief probation officer's authority, limited as it is to employment[-]related conduct, cannot prohibit an off-duty deputy probation officer from carrying a concealed firearm."

The opinion is predicated on the officer's status as a "duly appointed peace officer" pursuant to section 830.5(a), not on the classification of probation officer. The Attorney General concluded deputy probation officers do not need to obtain a license to carry a concealed firearm off duty because section 830.5 grants them full time peace officer *status* even though it limits their *authority* to act as a peace officer to those duties authorized by a chief probation officer.

In *Orange County Employees Association, Inc. v. County of Orange* (1993) 14 Cal.App.4th 575, the Fourth District Court of Appeal recognized the attorney general's opinion regarding off duty carry by probation peace officers was entitled to "great weight". The court held that, as a matter of policy, off-duty peace officers should not be deprived of their ability to carry a firearm because "peace officers have general obligations that go beyond their duties to a particular agency." (*Id.* at p. 580.) The *Orange County* court found deputy probation officers, and other categories of peace officer not listed in former section 12027 (now Penal Code section 25450(b)), are "duly appointed peace officers" exempt from the prohibition against carrying a concealed firearm off duty without a license.

Do probation peace officers have statutory authority to carry off duty?

There is no affirmative statutory authority for probation peace officers to carry firearms off duty. Other categories of peace officers – parole agents, state correctional officers – are authorized by statute to carry a firearm while not on duty. (Pen. Code § 830.5(c).) But there is no similar statutory authority for probation peace officers to carry off duty. While a chief probation officer may authorize a peace officer employee to carry a department-issued weapon off duty, the *authorized* carrying of a concealed firearm off-duty and the right to carry off duty *without authorization* are two different concepts.

Are peace officers required to qualify with their off-duty weapon?

No -- but it's a good idea. There are no requirements for maintaining competence in the use of an off-duty weapon unless the probation peace officer is authorized to carry off duty by his or her department. However, officers who wish to carry a

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firearm off-duty should qualify with that weapon at the range. Deputy probation officers who are armed as part of their normal duties *must* qualify quarterly.

Should I report any off-duty use of a concealed weapon?

Yes. You should report to your supervisor or other department representative any off-duty incident involving potential liability to the department, including the use of a concealed weapon. When the off-duty use of a concealed weapon results in injury or death to another person, both the Probation Department and the local police or sheriff department will investigate the incident.

Can I be disciplined for off-duty use of my concealed firearm?

Yes. Although your department cannot impair your right to carry an off-duty firearm while you are actively employed and not retired, you can be reprimanded, suspended, demoted, or even terminated for improper off-duty use of the weapon. Brandishing a firearm, assault with a deadly weapon, and grossly negligent discharge of a firearm all are offenses which can cause you to be disciplined as well as prosecuted. Conviction of a felony involving off-duty use of a firearm will terminate your employment and could cost the loss of retirement benefits.

What should I do if I get arrested for possessing a concealed weapon?

You should contact legal counsel and your union immediately if you are cited or arrested for an offense involving off-duty use of a firearm. Despite an Attorney General opinion and a published court decision upholding the right of probation peace officers to carry concealed weapons off duty without a license, police agencies and prosecutors may arrest and charge deputy probation officers and juvenile institution staff with violating Penal Code section 25400.

You cannot be disciplined until there has been an internal investigation into alleged violations of department policy relating to the off-duty incident. Whether you are arrested or ordered to submit to a department interrogation about the off-duty firearm incident, you should not make any statements without consulting with counsel or union representative.

Who is liable for an injury or death caused by my off-duty use of a firearm?

Both you and your county may be liable for injuries caused by your off-duty use of a firearm. Your department is not obligated to provide for the civil or criminal defense of any probation department employee who causes injury or death to another person through the off-duty use of a firearm. Most agencies have policies

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stating the department assumes no responsibility for the unauthorized off-duty carrying and use of a concealed weapon by a deputy probation officer.

However, the off-duty use of a firearm may be deemed "course and scope" -- requiring the County to provide for your defense -- where the use involved the exercise of the peace officer powers enumerated in Penal Code section 830.5. A peace officer has peace officer status 24/7, even when off duty, and the off-duty use of a weapon may turn out to be within the scope of the officer's duties.

Can I carry a concealed firearm across state lines?

On July 22, 2004, President George Bush signed into law the Law Enforcement Officers Safety Act ("LEOSA") (H.R. 218). The legislation was intended to give off-duty and retired peace officers the ability to carry a concealed weapon anywhere in the United States without regard to local laws or regulations.

The law provides that any individual who is a qualified law enforcement officer, and who is carrying a proper identification card, may carry a concealed firearm across state lines regardless of local regulations to the contrary. A "qualified law enforcement officer" is a person who:

- (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
- (2) is authorized by the agency to carry a firearm;
- (3) is not the subject of any disciplinary action by the agency;
- (4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
- (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
- (6) is not prohibited by Federal law from receiving a firearm.

Probation officers in California must be authorized by their department to carry a firearm before the exemptions in HR 218 will apply. The law appears at this time to apply only to field officers or other persons authorized to carry a firearm.

The serious responsibility and potential liability involved in carrying a firearm off-duty requires probation officers to be educated about the applicable laws, regulations, and department policies. I encourage you to contact your union, local counsel, or agency before you make the decision to carry off-duty.

CHECKLIST FOR OFF-DUTY CARRY

- Am I a probation peace officer?
 - Deputy Probation Officer (Pen. Code § 830.5(a)); or
 - Probation employee working in juvenile institution or transportation (Pen. Code § 830.5(b))
- Have I qualified with my off-duty weapon?
- Quarterly qualification *recommended* but not *required* for personal off-duty firearm
- Have I discharged my weapon off duty?
 - Contact a supervisor immediately
 - Contact your union immediately
 - Do not speak to investigators except to provide public safety statement, until advised by counsel
- Am I under investigation or getting sued for an off-duty incident involving a concealed firearm?
 - Contact your union immediately
 - Do not speak to investigators or attorneys until advised by legal counsel