Confronting the "Gypsy Cops" Problem:

Understanding State Statutes that Give Legal Protections to Those Who Speak Out

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The national problem of "gypsy cops" is not a new one. Toxic officers engage in misconduct in one agency after another over the course of a career and, in the meantime, inflict damage to agency reputation and morale along the way. These officers leave one agency where they are widely known to be a serious problem only to find a new home with another agency where the behavior continues until it is time to move again.

One of the most significant factors aiding gypsy cops in finding employment in a new agency is the unwillingness of past agency representatives to divulge facts that would disqualify the officer in the eyes of any reasonable background investigator or agency leader. Serious problems—in the form of frequent citizen complaints, disciplinary write-ups and suspensions—are often documented but not shared with new agencies considering hiring these officers.

So, why are agencies failing to cooperate with other departments engaged in background investigations on these officers? One of the most common refrains is that sworn personnel refuse to cooperate based on the advice of Human Resources or attorneys. There is an overwhelming, though often vague, fear that any cooperation whatsoever will result in costly lawsuits filed by the toxic officer in question.

However, in the majority of states, employer immunity statutes protect agencies from being held liable for communicating past performance issues to a potential employer *so long as* those statements are truthful and made in good faith.

The simple purpose of this legal article is to bring to the attention of agency leaders—and those who advise them—these employer immunity statues. This article will explain what these statutes mean for law enforcement leaders who would like to speak up and put an end to the perpetuation of gypsy cops, helping them overcome their often-misplaced concerns regarding legal liability.

State-Specific Employer Immunity Statutes—A Legal Right to Speak Up

Employer immunity statutes at the state level vary dramatically. In some states, like Ohio, the immunity is fairly straightforward in that truthful statements given in good faith are legally protected. In states like Michigan, the employer immunity protections have caveats, including the requirement that the employee in question be notified of disclosures and the requirement to purge personnel files of disciplinary actions dating back more than 4 years. In states like Florida, there is not only employer immunity for truthful good faith disclosures, but *an affirmative requirement that employers cooperate* with law enforcement agencies conducting background investigations.

Here are some specific statutory examples. Under Ohio law:

(B) ***An employer who is requested by an employee or a prospective employer*** *of an employee to disclose to a prospective employer of that employee information pertaining to the job performance of that employee for the employer and who discloses the requested information to the prospective employer is* ***not liable*** *in damages in a civil action to that employee, the prospective employer, or any other person for any harm sustained as a proximate result of making the disclosure or of any information disclosed,* ***unless*** *the plaintiff in a civil action establishes, either or both of the following:*

(1) By a preponderance of the evidence that ***the employer disclosed particular information with the knowledge that it was false, with the deliberate intent to mislead the prospective employer or another person, in bad faith, or with malicious purpose****;*

(2) By a preponderance of the evidence that the disclosure of particular information by the employer constitutes an unlawful discriminatory practice described in section 4112.02, 4112.021, or 4112.022 of the Revised Code.[1]

In other words, only potentially negative disclosures that are given untruthfully or in bad faith (such as giving incriminating information from an internal investigation while withholding exculpatory information), or otherwise violate state law regarding unlawful discrimination can trigger liability under Ohio state law.

[1] ORC § 4113.71(B) (emphasis added)

Under Michigan law:

An employer may disclose to an employee or that individual's prospective employer information relating to the individual's job performance that is documented in the individual's personnel file upon the request of the individual or his or her prospective employer. ***An employer who discloses information under this section in good faith is immune from civil liability for the disclosure. An employer is presumed to be acting in good faith at the time of a disclosure under this section unless a preponderance of the evidence establishes 1 or more of the following****:*

(a) That the ***employer knew the information disclosed was false or misleading****.*

(b) That the ***employer disclosed the information with a reckless disregard for the truth****.*

(c) That the ***disclosure was specifically prohibited by a state or federal statute****.*[2]

However, Michigan law also recognizes an "employee right to know," and requires employers to notify the individual in question of certain disclosure, and that this notification be mailed on or before the day in which the information is communicated to a potential employer.[3]

Furthermore, Michigan law requires employers to review personnel files before releasing information and to "delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old."[4]

Under Florida law:

An employer who discloses information about a former or current employee to a prospective employer of the former or current employee upon request of the prospective employer or of the former or current employee ***is immune from civil liability*** *for such disclosure or its consequences* ***unless*** *it is shown by* ***clear and convincing evidence*** *that the information disclosed by the former or current employer was* ***knowingly false or violated any civil right*** *of the former or current employee protected under chapter 760.*[5]

Florida's statute goes beyond simply providing immunity for truthful disclosures, Florida law actually *requires* employers to disclose information when contacted by law enforcement agencies:

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[2] Mich. Comp. Laws § 423.452 (emphasis added)
[3] Mich. Comp. Laws § 423.506
[4] Mich. Comp. Laws § 423.507
[5] Fla. Stat. § 768.095 (emphasis added)

When a law enforcement officer, correctional officer, or correctional probation officer, or an agent thereof, is conducting a background investigation of an applicant *for temporary or permanent employment or appointment as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer with an employing agency,* ***the applicant's current or former employer****, or the employer's agent,* ***shall provide*** *to the officer or his or her agent conducting the background investigation* ***employment information concerning the applicant.***[6]

Becoming Familiar with Your State Laws in Addressing the Problem of Gypsy Cops

Agency leaders, city and county attorneys, HR professionals and background investigators should become familiar with their specific state's employer immunity statutes, where applicable. Background investigators should consider informing representatives from other agencies about these statutes when inquiries regarding past employment only result in "he worked here from 2009 until 2016, and that's all I can tell you". Furthermore, agency leaders should keep these statutes in mind when making the crucial decisions as to whether or not to divulge to a fellow agency facts illustrating that the officer they are considering hiring is not fit to serve.

Law enforcement is a high liability profession. Any thoughts of eliminating all liability are misguided. Managing reasonable liability should be the goal rather than eliminating all liability in light of the fact that liability can never be eliminated—especially if law enforcement professionals are actively engaged in activities which simultaneously serve to improve the safety of the community while increasing the risks that lawsuits (founded or unfounded) may result.

As agency leaders consider their options *and their ethical obligations* when contacted by other departments that are considering hiring toxic officers, they should take time to consider what their state law actually says when it comes to honest, fact-based disclosures of past misconduct. Refusing to cooperate in these background investigations may mean less work and, in some instances, less risk of a baseless lawsuit filed by a toxic officer that once worked for the department. But it may also mean that a bad apple who has no business serving as a law enforcement officer finds a new home, a new badge and a new opportunity to disgrace the profession.

[6] Fla Stat. § 943.134(2)(a) (emphasis added)