

## New York Enacts Sweeping Policing and Criminal Justice Systems Reform

During the week of June 8, 2020, New York State (“NYS”) made extensive changes to the law to reform policing. The following is a summary of the changes and new requirements.

### A. Executive Order No. 203: New York State Police Reform and Reinvention Collaborative

#### Stated Purpose

On June 12, 2020, Governor Cuomo issued an Executive Order with the stated purpose to create significant law enforcement changes in response to police-involved deaths and concerns about racially biased law enforcement and to create accountability for law enforcement agencies. This Executive Order is intended to require local governments to re-invent and reform their law enforcement agencies.

#### Overall Requirement

Local government entities will need to immediately begin planning for legislative action, and the development and submission of comprehensive police reform plans which are due to NYS no later than April 1, 2021. Failure to submit proof of compliance with the Executive Order may result in the local government entity losing funding for the police agency/police officers.

There are five steps (outlined below) that government entities employing police officers must take to avoid loss of funding. Ultimately, the goal is to create a plan that is created at the direction of the chief executive officer, working with the local police leader and community stakeholders, for submission to the local legislative body for enactment and implementation to eliminate racial inequities in policing, modify and modernize policing strategies, policies, procedures, and practices, and develop practices to better address the particular needs of communities of color to promote public safety, improve community engagement, and foster community trust in police. Once complete, the local government must transmit a certification to the Director of the Division of the Budget of New York State to affirm that the planning and implementation process has been complied with and that corresponding local law(s) or resolution(s) have been adopted. The Director of the Division of the Budget shall be authorized to condition receipt of future appropriated state or federal funds that the local government would be eligible to receive upon filing of such certification. The Division of the Budget will review local government plans and determine the appropriate use of funds with respect to agencies that do not comply with the order.

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## Upcoming Action from New York State

The Division of the Budget will work with the Division of Criminal Justice Services (DCJS) to promulgate more detailed guidance in connection with the Executive Order.

## Local Government Entities Covered by the Executive Order

For purposes of the Executive Order, covered governmental entities are governmental entities who employ police officers as that word is defined in Section 1.20 of the NYS Criminal Procedure Law. This definition of police officer includes, for example, a sworn member of the division of state police; sheriffs, undersheriffs, and deputy sheriffs of counties; sworn officers of authorized police departments or police forces in cities, towns, villages or police districts; investigators employed in the office of a district attorney; sworn officers of the division of law enforcement in the department of environmental conservation; and university police officers appointed by the state university.

## Actions Required by Covered Government Entities

The Executive Order states that guidance from DCJS and the Division of the Budget will provide additional information. Based on the Executive Order itself, there appears to be five steps that a covered local government must take to comply and avoid funding loss.

**Step 1:** Each local government entity must perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices for the purpose of developing 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 promoting community engagement to foster trust, fairness, and legitimacy; and to address any racial bias and disproportionate policing of communities of color.

**Step 2:** Each chief executive of the local government entity must convene with the head of the local police agency and community stakeholders to develop the plan to improve such deployments, strategies, policies, procedures, and practices. The plan must consider the following:

- Evidence-based policing strategies, including but not limited to use of force policies and 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 and hot spots policing;



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- 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.

**Step 3:** The local government entity, in coordination with its police agency, must consult with stakeholders, including but not limited to membership and leadership of the local police force; members of the community, with emphasis in areas with high numbers of police and community interactions; interested non-profit and faith-based community groups; the local office of the district attorney; the local public defender; and local elected officials, and create a plan to adopt and implement the recommendations resulting from its review and consultation, including any modifications, modernizations, and innovations to its policing deployments, strategies, policies, procedures, and practices which are 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.

**Step 4:** The plan must be offered for public comment to all citizens in the locality, and after consideration of such comments, shall be presented to the local legislative body in such political subdivision, which shall ratify or adopt such plan by local law or resolution, as appropriate, no later than April 1, 2021.

**Step 5:** The local government entity must transmit a certification to the Director of the Division of the Budget to affirm that such process has been complied with and such local law or resolution has been adopted.

## **Enforcement and Accountability**

The Director of the Division of the Budget shall be authorized to condition receipt of future appropriated state or federal funds, which such local government would otherwise be eligible for, upon filing of such certification. Further, the Director of the Division of the Budget is authorized to seek the support and assistance of any state agency to effectuate the Executive Order.

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### B. FOIL of Law Enforcement Personnel Records/Repeal of 50-a

For many years, Public Officers Law (“POL”) §87(2)(a) allowed covered entities to exempt disclosure of records if the records were “specifically exempted from disclosure by state or federal statute.” Civil Rights Law §50-a has required that law enforcement personnel records be treated as confidential and not released to the public except as mandated by a lawful court order or the consent of the police officer who is the subject of the records.

On June 11, 2020, the Governor signed legislation repealing New York Civil Rights Law §50-a, in turn, allowing the public to have access to the disciplinary records of law enforcement personnel. Accordingly, law enforcement personnel records are no longer automatically exempt from disclosure.

The legislation specifies that a “law enforcement agency” is any police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers (as detailed above and as set forth in Section 1.20 of the NYS Criminal Procedure Law), a sheriff’s department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or paramedics.

“Law enforcement disciplinary records” are any records created in furtherance of a law enforcement disciplinary proceeding (which is defined as the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency), including but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) 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 records may be redacted in specific ways prior to disclosure. Specifically, with a few exceptions, a law enforcement agency shall redact any portion of a record containing personal medical information (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 use of an employee assistance program, mental health service, or substance abuse services (unless such use is mandated by a law enforcement disciplinary proceeding); social security numbers; home addresses, or personal emails or telephone numbers. This type of information may also be redacted about any complainant or family member of the police officer. Additionally, a law enforcement agency may redact records pertaining to “technical infractions.” “Technical infraction” means “a minor rule violation by a person employed by a law enforcement agency...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.”

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### C. NYS Criminal Justice Legislative Package Commonly Referred to as the “Say Their Name Agenda”

In addition to Executive Order 203 and the repeal of Civil Rights Law 50-a, last week the NYS legislature and the governor passed nine additional laws that are intended to substantially modify policing in New York.

The following bills were passed by both the NYS Assembly and the Senate and signed by the Governor:

1. (A.1360–A; S032530-A): A person not under arrest or in custody has a right to record police activity and to maintain custody and control of that recording and any property or instruments used to record police activities.
2. (A.1531–B; S08492): Establishes a right of action under the Civil Rights Law when a person without sound reason calls 911 or otherwise summons police alleging criminal activity, and such call or request for assistance is motivated by bias based on the race, color, national origin, ancestry, gender, religion, religious practice, disability or sexual orientation of the person reported.
3. (A.6144–B; S06670-B): Prohibits the use of chokeholds by law enforcement and establishes the crime of aggravated strangulation, a Class C felony when police use chokeholds. (Called the Eric Garner law).
4. (A.10608; S02575-B): Requires state and local police and peace officers, whether on or off duty, to report to a supervisor within six hours of the discharge of a service revolver under circumstances where a person could have been struck.
5. (A.10609; S01830-C): The Police Statistics and Transparency (STAT) Act, which would require courts to compile and publish aggregate racial and other demographic information concerning arrests and court processing of lower-level offenses, including misdemeanors and violations. The bill also requires police departments to submit annual reports on arrest-related deaths to the Division of Criminal Justice Services, the governor, and the legislature.
6. (A.8674A; S08493): New York State Police Body-Worn Cameras Program, which would direct the Division of State Police to provide all state police officers with body-worn cameras that are to be used any time an officer is on patrol. The law identifies specific situations when the camera is to be turned on and recording.
7. (A.8226B; S06601-B): Amends the Civil Rights Law to affirm the right of persons in custody to prompt and reasonable medical and mental health assistance.
8. (A.1601–B; S02574-C): Creates an Office of Special Investigation within the Office of the New York State Attorney General, which will independently investigate, and if warranted, prosecute incidents involving the death of a person caused by an act or omission of a police or peace officer.



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9. (A.10002–B; S03595-C): Establishes the Law Enforcement Misconduct Investigative Office within the Department of Law which would investigate complaints from any source, or upon the office's initiative, concerning allegations of corruption, fraud, use of excessive force, criminal activity, conflicts of interest, or abuse in certain law enforcement agencies.

The following bill has been passed by the NYS Assembly but has not yet passed the Senate:

1. (A.4615; S01137-A): Prohibits law enforcement officers and agencies from profiling based on race or ethnicity, establishes a statewide public database containing data on motor vehicle and pedestrian stops by police, and allows any victim of racial or ethnic profiling, or the attorney general, to bring an action for damages or injunctive relief to stop improper profiling.