



Claims Brief

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Electronic Control Weapons: Can Your Policy Withstand Scrutiny?

Introduction

After decades of use, the important role that electronic control weapons (“ECWs”) can play in law enforcement is virtually undisputed. The weapons’ ability to defuse dangerous situations can obviate the need for more severe or even deadly force and thus can help protect police officers, bystanders, and suspects alike. Due to the weapons’ effectiveness, the number of police departments that have issued ECWs to their officers has proliferated, especially over the past ten years. Attendant to this proliferation is the increase in police misconduct lawsuits based upon the use of ECWs. Many such lawsuits challenge not only the specific use of an ECW, but also the training received by the officer that used the weapon and the departmental policies that guided the officer’s conduct.

In December 2009, the United States Court of Appeals for the Ninth Circuit, the federal court with appellate jurisdiction over federal district courts in the western United States, held that ECWs constitute an intermediate, significant level of force that must be justified by a “strong governmental interest that compels the employment of such force.” *Bryan v. McPherson*, 590 F.3d 767, 775 (9th Cir. 2009). This holding will certainly be echoed in many cases to come. Also in December, the Report of the Maryland Attorney General’s Task Force on Electronic Weapons was issued. This detailed report, which the Attorney General stated was offered for the consideration of the General Assembly and State and local law enforcement, includes numerous recommendations to elected officials and law enforcement policy makers, including specific recommendations concerning use-of-force policies for ECWs.

It is not the purpose of this publication to advocate for or against police use of ECWs or the adoption of any or all of the recommendations contained in the Attorney General’s Task Force Report; instead, it is our purpose to urge those law enforcement agencies that have issued these weapons, specifically Tasers, to ensure that their ECW policies are current and comprehensive. Written policies are the primary means by which law enforcement agencies communicate their standards and expectations to their officers. Accordingly, policies must not only be comprehensive and up-to-date, they must be consistent with relevant legal standards and contemporary law enforcement practices. Strong departmental guidance concerning ECWs is needed not only to protect officers and the public, but also to limit exposure to civil liability.

ECW Policy Considerations

Drawing from resources available from the U.S. Department of Justice, as well the Attorney General’s Task Force’s Report, there are myriad considerations that must be addressed in any ECW policy. Many of the essential considerations are discussed below.

1. Training and Certification Requirements

Only those officers who are appropriately trained and certified in the use of the ECW should be allowed to carry and use it.

2. The ECW and the Use of Force Continuum or Use of Force Matrix

If your department utilizes a use of force continuum or use of force matrix, ensure that the ECW is included. As an incapacitating technique, the ECW should be included just below deadly force.

3. The ECW's Classification

Most agencies classify ECWs as "less-lethal" devices. While ECWs are not intended to be lethal, they are not non-lethal weapons and so should be appropriately identified as "less-lethal" rather than "less-than-lethal." The "less-lethal" classification emphasizes that the ECW is a serious use of force.

4. When an ECW Should be Used

The most commonly applied standard is to permit ECW use against an individual who either poses a physical threat to an officer or others, or who is actively resisting an officer. Most policies define "actively resisting" to include actions that fall short of causing an imminent threat of harm, such as "bracing" or "tensing" one's arms to avoid being placed in handcuffs—even if the person is otherwise unthreatening. However, the Attorney General's Task Force recommends that ECWs not be used "solely as a device to coerce compliance with the officer's orders." This, again, is only a recommendation and one that essentially restricts the use of ECWs against subjects who pose an imminent threat of physical harm to an officer or others. "Physical harm" would mean "any impairment of physical condition, excluding minor injuries." Regardless of the language used, your departmental policy must provide officers with a clearly articulated standard as to when ECW use is warranted.

5. When an ECW Shouldn't be Used

Clearly, there are circumstances where an ECW should not be used. For example, an ECW should never be used against a passive subject. The Department of Justice and the Attorney General's Task Force recommend that an ECW not be used against a restrained subject unless that subject poses an imminent threat of physical harm. A number of agencies prohibit ECW use against persons in handcuffs. Taser International, whose ECWs are used by thousands of police departments worldwide, warns against use of its ECW against a person who:

- Could fall and suffer impact injury to the head or other sensitive area;
- Is on an elevated or unstable surface;
- Is less able to catch or protect self in a fall;

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- Could fall on a sharp object;
 - Is running, in motion, or moving under momentum;
 - Is operating or riding in or on any mode of transportation; or
 - Is located in water, mud, or marsh environment if the ability to move is restricted; Is in an environment where there are combustible vapors or liquids or other flammable substances, including OC sprays that use alcohol.

Many of these warnings are also recommended as prohibitions against ECW use by the Department of Justice and the Attorney General's Task Force.

6. Avoiding ECW Use Against Persons at Heightened Risk of Injury

Taser International warns against using its ECW against the “physically infirm, elderly, or pregnant.” According to the Attorney General's Task Force, other groups that should be considered to be at heightened risk of injury include children (or adults of small stature), persons with known heart conditions, persons under the influence of drugs or alcohol, and persons in mental/medical crisis (including excited delirium).

There will be many situations in which heightened risk of injury will not be readily apparent to the officer. Thus, at a minimum, the Attorney General's Task Force recommends that: (1) law enforcement agencies inform officers of the uncertainties and potential dangers of ECW use against heightened risk populations; (2) educate officers in identifying heightened risk individuals, and; (3) emphasize alternatives to ECW use for heightened risk populations. Ultimately, the decision to use an ECW to restrain an individual when non-force options have failed or are not feasible must be left to the officer in the field. To ensure that officers' decisions are as informed as possible, it is critical that agencies have clear and thorough policies and training related to interactions with persons in medical need or mental health crises. In this regard, *see* [Risk Management Bulletin No. 118](#) available at the LGIT website.

7. Where the ECW Should be Targeted

Recently, Taser International modified its usage recommendations for its ECW to discourage discharge on a subject's upper chest. Taser International now recommends that officers should avoid chest shots when possible. When aiming at the front of a suspect, the best target for officers is the major muscles of the pelvic area or thigh region. According to Taser International, back shots remain the preferred area when practical. Most agencies prohibit use of an ECW against sensitive areas of the body, including the head, eyes, mouth, neck, chest and genitalia.

8. Other Policy Considerations

In addition to the subjects discussed above, ECW policies should encompass other areas including, but not limited to:

- The need for verbal warnings prior to ECW deployment;
- restricting or prohibiting prolonged or multiple ECW discharges;
- Identifying the circumstances in which the ECW can be used in drive-stun (pain compliance) mode;
- The potential need for medical care after ECW deployment;
- Reporting requirements;
- Supervisor and departmental review of ECW incidents; and
- Downloading data following ECW deployment.

Conclusion

In an area evolving as rapidly as the police use of ECWs, it is incumbent upon every law enforcement agency utilizing these weapons to provide clear guidance to its officers. This can most effectively be done through policies that address *all* areas of concern, including:

- Training; pre-deployment assessments and actions;
- Deployment in the field; and
- Post-deployment measures.

Since the law is evolving rapidly, please review your current policy, and review it annually. The policy should be updated when needed, regardless of the date of the last review. Through such vigilance, law enforcement agencies will communicate their high standards to officers, the public, and reviewing courts.

If you have questions concerning this issue, please contact John F. Breads, Jr., Director of Legal Services, jbreads@lgit.org or telephone 1-800-673-8231.

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