

## Local Government Insurance Trust

# RISK MANAGEMENT BULLETIN

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### **SECONDARY EMPLOYMENT OF LAW ENFORCEMENT OFFICERS AND LOCAL GOVERNMENT LIABILITY: ISSUES, QUESTIONS, AND ANSWERS**

In December 2001, the Court of Appeals of Maryland decided the seminal case of *Lovelace v. Anderson*, a case which changed the landscape of local government liability for tortious acts or omissions committed by law enforcement officers working secondary employment in a capacity that contemplates the use of police powers. *Lovelace* arose from an occurrence during which an off-duty Baltimore City Police Officer, who was working in a secondary capacity as a security guard at a hotel in Baltimore County, became involved in a shoot-out with would be armed robbers. During the shoot-out, a guest at the hotel was wounded. The guest later sued multiple defendants, including the police officer, the hotel chain, and the Baltimore City Police Department. The trial court granted summary judgment in favor of all defendants. On appeal, the Court of Special Appeals of Maryland affirmed the decision of the trial court. Critically, the Court of Special Appeals held that although the police officer was off-duty and outside of his jurisdiction, he was still authorized and required to uphold the laws of the State of Maryland. Thus, when the officer was confronted with two armed robbers at the hotel, he “reverted” to his police officer status. And, since the officer had not acted with gross negligence, he was immune from liability.

The Court of Appeals of Maryland rejected the conclusion and rationale of the Court of Special Appeals. First, the court ruled that while acting as a private security guard for the hotel, the police officer was *not* entitled to any form of public official immunity. Second, through the application of common law agency principles, the court concluded that, at the time of the armed robbery, the officer could be deemed to have been working for two employers, namely the hotel and the police department. Specifically, the court stated that “the same basic principles of Maryland agency law, for determining whether actions of employees generally are within the scope of particular employment relationships, are equally applicable to police officers.”

The decision in *Lovelace v. Anderson* dramatically reduces, if not eliminates, public official immunity as a defense for law enforcement officers working secondary employment in a capacity which contemplates the use of police powers. Further, the decision no longer allows secondary employers who engage off-duty law enforcement officers as their agents to immunize themselves from liability for the officer’s tortious conduct.

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Now, six years after the *Lovelace* decision, many questions still remain concerning the liability of local governments for the actions or omissions of law enforcement officers working secondary employment in the field of private security, both inside and outside of their sworn jurisdictions. Many of the most common questions, along with the answering opinions of LGIT in-house counsel, are set forth below.

*When a law enforcement officer is off-duty, what are his or her official duties?*

A law enforcement officer is not under a general duty to enforce the law while off-duty, but, while acting within the officer's sworn jurisdiction, he or she may assume his or her regular duties to enforce the law and remedy breaches of the peace.

*Is a law enforcement officer working in a secondary employment capacity for a private employer entitled to any form of immunity normally available to law enforcement officers?*

No. When working secondary employment for a private employer, a law enforcement officer is not entitled to public official immunity.

*When an off-duty law enforcement officer is working for a private employer in a security capacity, is he or she still a law enforcement officer or simply an employee of the private employer?*

While working off-duty, a law enforcement officer is primarily considered an employee of the private employer. However, he or she still has full police power if acting within the officer's sworn jurisdiction. Therefore, the determination of whether he or she was also a law enforcement officer will depend on the circumstances surrounding his or her secondary employment and the officer's actions during the incident in question.

*When will the local government be liable along with the private employer for the actions of an off-duty law enforcement officer working secondary employment?*

For liability to be imposed on the local government, the law enforcement officer must have exercised a traditional police power; the local government must have had knowledge, either actual (through police report or other direct police communication) or constructive (through knowledge that the off-duty officer was expected by his secondary employer to engage in the exercise of traditional police powers) of the officer's action; the action taken by the officer must simultaneously have served the interests of the private employer and the local government; and the interests of the private employer and the local government that were served by the officer's actions were not inconsistent with each other.

*What factors will courts look to in determining if the off-duty officer was employed by the private employer only or by the private employer and local government, jointly?*

Courts will consider the following factors: the power to select and hire the employee; the payment of wages; the power to discharge; the power to control the employee's conduct; and whether the work is part of the regular business of the employer.

*If a law enforcement officer, working for a private employer in a security capacity during off-duty hours, uses local government-issued or local government-purchased equipment, can the local government be held liable for the officer's acts while working off-duty?*

Yes. The local government may be liable along with the private employer for the acts of an off-duty law enforcement officer. This is because the permissive use of governmentally issued equipment is not only indicative that the local government had knowledge that such equipment would be used by the off-duty officer in his or her secondary employment, but also because, in a broad sense, it can be seen, as authorization and/or ratification of the conduct engaged in by the off-duty officer.

*If an off-duty law enforcement officer working for a private employer in a security capacity is covered by the private employer's liability insurance, who is responsible for the officer's actions?*

Responsibility is not predicated upon a private employer's having liability insurance. Depending on the circumstances, the private employer and the local government may both be liable for the officer's acts. However, an indemnity agreement through which the secondary employer accepts liability for the tortious acts or omissions of the off-duty officer would likely shift the ultimate financial responsibility to the private employer. Consequently, even though such agreements may be hard to obtain, a local government may want to consider making them a requirement prior to allowing secondary employment in which traditional police powers may be utilized.

*If the private employer for whom the off-duty law enforcement officer is working pays the local government/police department that regularly employs the officer directly, and the local government /police department then pays the officer, who is responsible for the officer's acts?*

Both the private employer and the local government may be liable for the acts of the off-duty officer. This type of payment arrangement increases the chances of local government liability.

In sum, the decision in *Lovelace v. Anderson* prevents private employers who employ off-duty law enforcement officers from simply shifting liability arising from the officer's acts back to the local government. Instead, through application of agency principles, courts will determine on a case-by-case basis which employer in fact employed the officer at the time of the events in question and impose liability accordingly. It may very well be that both the private employer and

the local government will both be responsible for the officer's acts. For this reason alone, it is imperative that all local law enforcement agencies have detailed secondary employment policies and procedures in place. These policies should address all pertinent issues, including, but not limited to:

- the use of equipment, including weapons and uniforms, issued by the department;
- whether secondary employment is permitted beyond the officer's sworn jurisdiction;
- restrictions upon the types of secondary employment that can be pursued by officers;
- the requirement that the secondary employer have adequate liability insurance that includes the officer as a named or additional insured;
- a requirement that the private employer execute an indemnity agreement by which it assumes any and all financial responsibility arising from the off-duty officer's allegedly tortious acts or omissions;
- the specific duties that the officer may be called upon to perform by his or her secondary employer;
- the requirement that the secondary employer have adequate liability insurance that includes the officer as a named or additional insured;
- the ability to recall the officer to duty from his secondary employment in the event of a manpower shortage; and
- the manner in which secondary employment is monitored by each local police agency.

Having these policies in place before a claim is made or a lawsuit is filed will go a long way towards determining upon whose shoulders, if any, liability and ultimate financial responsibility rest in this complex legal arena.

For more information on this subject, please contact Vance J. Petrella, Manager, Loss Control Services, at 1-800-673-8231.

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