PREPARING TO IMPLEMENT CRIMINAL JUSTICE REFORM LEGISLATION IN TOWNS AND CITIES

October 2021

Gov. Roy Cooper on September 2, 2021 signed into law a wide-ranging piece of legislation that creates new databases, requires additional background checks and decriminalizes certain local government ordinances. This document is designed to highlight a few provisions in Senate Bill 300 (S.L. 2021-138) Criminal Justice Reform that deserve particular attention from local government attorneys, law enforcement agencies and administrators. Some of the changes may require town councils to adopt or amend ordinances; some provisions may require local governments to create new databases; and other provisions may require that new practices and processes be established. This guidance document highlights the main changes in the legislation. However, this is not legal advice and towns and cities are encouraged to read the entire bill and consult their staff attorneys or contract attorneys to determine the changes they need to implement.

A. DECRIMINALIZATION OF CERTAIN ORDINANCES (PART XIII):

PART XIII of S.L. 2021-138, titled Decriminalization of Certain Ordinances, removes the current presumption that all local ordinances may be enforced criminally (G.S.160A-175) and states that ordinances may be enforced criminally as provided in G.S. 14-4 "only if the city specifies such in the ordinance." It further states: "Notwithstanding G.S. 160A-75, no ordinance specifying a criminal penalty may be enacted at the meeting in which it is first introduced." It also includes a list of statutory sections in which cities cannot adopt ordinances with criminal enforcement. That list of topic areas are as follows: planning and regulation of development; stream clearing programs; regulating businesses and trades; outdoor advertising; solar collectors; cisterns and rain barrels; taxis; setback lines; curb cut regulations and ordinances regulating trees. The legislation specifies that these changes *go into effect Dec. 1, 2021*, so towns and cities have a limited time frame in which to respond to these changes.

To prepare for the change in the law, towns and cities should consider taking the following steps:

i. Determine if you have ordinances which impose potential criminal penalties.
ii. Make a list of ordinances for which you wish to retain criminal enforcement authority.
iii. Check to make sure the list does not include ordinances that fall under the topic areas disallowed by the legislation.
iv. Check to make sure the ordinance language includes clear criminal authority.
v. If these ordinances do not have clear criminal authority, have town council adopt a new ordinance or a statement that comprises specific language in the ordinances that state they can be criminally enforced.
vi. For ordinances that will not be enforced criminally, establish administrative capabilities to issue and collect civil citations or fines for violations and provide for an appeals process. PRACTITIONER'S TIP: For arrestable offenses, judicial officials have the authority to obtain personal identification information for an alleged violator. In civil matters, where only a citation or fine can be issued, obtaining the identity of the alleged violator may be difficult or practically impossible.
vii. If town councils need to, adopt any new ordinances or changes to ordinances by Dec. 1, 2021, the date Part XIII of S.L. 2021-138 goes into effect. PRACTITIONER's TIP: Since the legislation requires the criminal authority to be specified in "the ordinance," towns and cities should carefully specify criminal enforcement in each applicable ordinance.
viii. Note that ordinances with criminal enforcement authority cannot be adopted in the first meeting that it is introduced.

B. CREATING POLICIES, DATABASES AND FOLLOW UP PLANS

Certain provisions require the creation of processes whereby law enforcement agencies must track specific types of incidents and report those to a statewide database. Practitioners say it is important that once this information is collected, it be properly retained so that confidentiality requirements are maintained, and that law enforcement officers (LEOs) be given the opportunity to challenge their inclusion if required by law. Once the data has been collected, practitioners also recommend that supervisors keep track of these

incidents, perhaps through an automated alert system, and supervisors create Action Plans to help individual officers avoid repeated occurrences. Setting up the database and tracking the data may be required by the new law but acting on the information may be a best practice to avoid being seen as having failed to follow through on early warning signs.

Under this legislation at least three sets of data must be collected:

1. Critical Incident Database – A new statewide database of critical incidents is established by this legislation. Critical incident is defined as "an incident involving any use of force by a law enforcement officer that results in death or serious bodilyinjury to a person." The information collected in this database stays confidential. While the legislation requires law enforcement agencies to report "critical incidents," involving police officers, it also provides the officer a right, prior tobeing placed in the database, to request a hearing in Superior Court for a determination of "whether the officer's involvement was properly placed in the database." Agencies may want to create a process whereby an officer is informed prior to their names being submitted to this database, and the officer be informedof an opportunity to exercise a right to request a hearing in Superior Court. PRACTITIONER's TIP: It should be noted that the right to a hearing is limited to whether the officer's involvement was properly placed in the database, not theappropriateness of the officer's actions during the incident. Also, if the incident results in disciplinary action there may also be a need for a name clearing hearingso these two processes may overlap and possibly conflict. PRACTITIONER's TIP: When advising an officer regarding a hearing, consider the risks of the process in the event of future litigation.

2. Early warning system - Every agency that employs law enforcement is required to develop a confidential early warning system for law enforcement including at minimum instances of use of force, discharge of firearm, vehicle collisions and citizen complaints (Part VIII). The system's essential purpose is to identify possible problem officers, not to collect data. Many small agencies could implement an early warning system manually. But for some agencies, this could be a time-

consuming effort, requiring the creation of a computerized system that collects the information, creates an alert at a particular threshold of reports and ultimately triggers a supervisor to place the officer on a remedial plan. Some system to monitor the data collected and alert a supervisor to repeated offences may be needed to avoid future claims that the agency failed to properly supervise such officers. The "use of force" information to be collected can be individualized to each agency, possibly including instances where handcuffs were placed on an individual and the number of minor vehicle accidents. The data collected under this database stays confidential. This section is effective Dec. 1, 2021 and applies to actions and behaviors on or after that date.

3. Duty to intervene and report excessive use of force
   Part XVI of the legislation creates a duty for LEOs to intervene and report an excessive use of force by a LEO. This may require agencies that do not have such a policy to adopt one. In addition, agencies should also create a reporting system likeones for critical incidents and the early warnings system. Agencies that do not evaluate their officers' use of force open themselves up for negligent retention and supervision claims. Agencies should evaluate the performance of their officers who consistently trigger alerts to determine what measures should be taken to correct any noted deficiencies in the officer's performance, including but not limited to, education, additional training, and disciplinary action.

C. RETAINING AND USING THE DATA

Even while they collect additional data required by this legislation, personnel departments should remember that G.S. 160A-168 requires personnel data to be kept confidential unless it is exempt under a specific exemption. In particular, consider: "section (c4). Even if considered part of an employee's personnel file, the following information regarding any sworn law enforcement officer shall not be disclosed: (3) Any identifying information as defined in G.S. 14-113.20."

D. OTHER PROVISIONS OF INTEREST THAT MAY REQUIRE AGENCIES TO PREPARE PROCESSES INCLUDE THE FOLLOWING:

- Decertification - Part I of the bill creates a public database of LEO certification suspensions and revocations to be established by the N.C. Criminal Justice Educationand Training Standards Commission.
- Applicants for law enforcement positions and current law enforcement will be required to provide fingerprints, and agencies will have to submit those to the SBI fora federal and state background check by June 23, 2023. (Part II)
- Applicants for law enforcement positions will have to undergo psychological screening and local governments will have to foot the bill for the screening. (Part VI).
  PRACTITIONER'S TIP: Consider the costs of such screenings and include those costs when preparing budget estimates.
- Law enforcement will need to report Giglio notifications in writing to the statewide Criminal Justice Standards Division. Those required to report these letters include theindividual LEO, the agency head and a judge that issues the notification. (Part IV)
- Changes to the body cam recording viewing statute (Part XXI): No later than three business days from receipt of the notarized form - provided by the law enforcementagency - requesting immediate disclosure of footage in a case involving death or serious bodily injury, a law enforcement agency shall file a petition in the Superior Court in any county where any portion of the recording was made for issuance of a court order regarding disclosure of the recording. Any person who willfully records any recording disclosed pursuant to this subsection shall be guilty of a Class 1 misdemeanor. Any person who knowingly disseminates a recording disclosed pursuant to this subsection shall be guilty of a Class I felony. PRACTITIONER'S TIP: Check to ensure the law enforcement agency has a supply of high-capacity thumb drives where hours of footage can be downloaded for quick transmittal to the Superior Court judge.
- Part X of the legislation now adds the Governor to the list of individuals who may askthe SBI to investigate deaths due to use of force by a law enforcement officer.

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