

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

JUNE 22, 2023

The New York State Law Enforcement Misconduct Investigative Office: What Law Enforcement Agencies Need to Know

In June 2020, the New York Legislature enacted Article 5, Section 75 of the New York Executive Laws, which established the Law Enforcement Misconduct Investigative Office (LEMIO). In response to the nationwide protests following the killing of George Floyd, LEMIO was created to prevent and remedy misconduct committed by officers of New York law enforcement agencies, adding a layer of accountability outside the agencies themselves. The office's mission is to identify and investigate officer misconduct and assist agencies in improving their policies and practices. It is important to note that LEMIO is meant to supplement, not replace, existing accountability procedures where they are lacking. These changes are intended to increase transparency and accountability surrounding officer misconduct, thereby increasing public safety and trust in law enforcement as a whole.

Article 5, Section 75 provides LEMIO with jurisdiction over all covered New York agencies, excluding those under the jurisdiction of the Metropolitan Transportation Authority Inspector General, the Port Authority Inspector General, and the State Inspector General. Covered agencies include "any agency of any political subdivision within the state maintaining a police force or police forces of individuals defined as police officers in § 1.20 of the criminal procedure law..." Broadly speaking, all local police departments within New York are subject to the regulatory powers of LEMIO regardless of the size of the force. This includes all village, town, city, and county police agencies. According to LEMIO's [2022 annual report](#), its jurisdiction covers over 500 agencies in New York, employing over 80,000 personnel.

Duties of LEMIO

LEMIO is an entity within the Office of the Attorney General (OAG) headed by an appointed Deputy Attorney General (AG). Section 75 tasks the Deputy AG with numerous duties regarding investigating complaints, reviewing the agencies' policies for addressing misconduct, and providing the public with adequate reports of investigations.

LEMIO receives and investigates public and internal complaints against law enforcement agencies, specifically regarding allegations of corruption, fraud, excessive force, crime, conflicts of interest, and abuse. Additionally, LEMIO may unilaterally initiate an investigation of an officer, even in the absence of a public complaint. LEMIO must contact both the Division of Criminal Justice Services (DCJS) and the head of each agency against which an allegation has been filed, informing them of the allegation and the progress of the investigation. Thus, so long as special circumstances do not require confidentiality, a covered agency will be informed of any ongoing investigation. LEMIO may also share submissions with other local, state, or federal agencies when deemed necessary for the investigation or disciplinary action.

Pursuant to the investigative duties of LEMIO, Section 75 provides LEMIO with a broad range of powers that have the potential to substantially affect covered agencies. When investigating an allegation, LEMIO has the power to subpoena and enforce the attendance of any witness to the incident, including officers and other agency personnel. LEMIO may also administer oaths and examine witnesses under oath, require the production of and analyze any materials relevant to the investigation, and monitor whether an agency has implemented recommendations previously offered by LEMIO. Most notably, LEMIO has the power to require any officer or employee of a covered agency to answer questions regarding any matter that is related to the performance of their official duties with the agency. The law includes Garrity protection for officers, codifying that statements or evidence obtained during LEMIO's questioning may not be used against the officer in subsequent criminal prosecution other than for perjury or contempt, but that failure to answer questions is cause for removal from the agency. The authority to decide whether to remove an officer appears to remain with the agency, but the possibility of charges of contempt or perjury for non-cooperation provides a significant motivation for employees to cooperate.

At the close of an investigation, LEMIO will make a conclusion as to whether disciplinary action, civil or criminal prosecution or further governmental investigation is warranted, although LEMIO does not have authority to directly administer discipline against local officials. LEMIO's statutory duty to determine if criminal prosecution is warranted appears somewhat at odds with the Garrity protection offered during the investigatory phase.

LEMIO is statutorily required to provide a public report of its investigation. These reports shall detail the procedure and resolution of the investigation, as well as include any recommendations from LEMIO as to how a covered agency might improve its internal policies and procedures for reporting and addressing misconduct. Covered agencies must take prompt action to implement any recommendations provided in the report, as the head of the agency must advise the governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate, the minority leader of the assembly and DCJS of such action within 90 days of the issuance of the report.

In addition to responding to complaints, LEMIO is also responsible for reviewing an agency's current procedures for identifying, investigating and addressing misconduct. LEMIO will examine the policies and procedures of covered agencies to ensure that there are sufficient modes of both preventing and detecting misconduct. Regarding detection, LEMIO considers whether the agency has a sufficient system for receiving reports—both for the public and internal parties—and whether the agency has a satisfactory plan to investigate and rectify any alleged misconduct.

Responsibilities of Covered Agencies

As previously mentioned, covered agencies must act to implement recommendations from LEMIO following an investigation of that agency. However, Section 75 also adds other notable responsibilities of law enforcement agencies, its individual officers and other employed personnel.

The law requires that every officer or employee of an agency report to LEMIO any information relating to instances of corruption, fraud, excessive force, criminal activity, conflict of interest or abuse committed by another officer or employee in his or her employment capacity. Importantly, heads of covered agencies should note that they too have a reporting duty in certain circumstances, namely, that in the event that an officer or employee in their agency is the subject of five complaints from five or more individuals related to at least five separate incidents, all within a span of two years, the head

of the agency must report the complaints to LEMIO. A knowing failure to report in either of these situations will lead to penalties such as removal from office or employment. Conversely, those that file good faith reports will not be subject to discipline.

LEMIO Previous Activities

As of January 2021, LEMIO had reviewed more than 1,300 complaints, interviewed relevant witnesses to those incidents and conducted a public hearing for one investigation. These investigations focused on potential discriminatory policing and the use of excessive force by police officers. As of December 2022, OAG created an [online portal](#) for the public and agency employees to report misconduct, making it easier for LEMIO to collect and analyze data across all covered agencies.

In 2022, LEMIO reported that a portion of its investigations were related to individual instances of alleged misconduct as opposed to patterns of ongoing misconduct within an agency. These investigations occurred specifically when the internal investigation and disciplinary processes of covered agencies did not sufficiently address the issue. Thus, it is important for covered agencies to acknowledge the close and constant eye that LEMIO keeps on an agency's policies and procedures, and each agency should ensure they have processes in place to work to prevent and address officer misconduct.

Focuses for 2023

In 2023, LEMIO intends to continue its focus on identifying and addressing policing practices that are discriminatory against protected classes of individuals, such as discrimination on the basis of race or gender. The origin of LEMIO is deeply rooted in biased policing and excessive force, and it will remain an ongoing topic of concern of ensuring the safety and trust of New York citizens.

Similarly, LEMIO intends to increase its outreach and communication with covered agencies, community groups and the general public. In its 2022 annual report, LEMIO urged the New York legislature to consider mandating a standardized system to track and report data detailing interactions between law enforcement and the public. A centralized state agency, such as DCJS, would support the data collection and ensure that agencies are able to meet the legislative requirements. Additionally, LEMIO suggested that covered agencies should make their policies publicly available online, furthering the transparency of law enforcement.

LEMIO also intends to focus on police retaliation against individuals engaged in First Amendment-protected activity, instances of false testimony and dishonesty in reports, and weaknesses in agency reporting and investigative procedures. Both LEMIO and the New York Legislature emphasize that LEMIO is a supplement to, rather than a substitute for, other accountability measures. Thus, it is a priority for LEMIO to work with covered agencies to strengthen any internal provisions that currently exist to identify and address officer misconduct. This includes monitoring methods of reporting, increasing transparency between LEMIO, the public, and the covered agencies, and ensuring fair and proper consequences following investigations.

Conclusion

The enactment of Section 75 places new responsibilities on law enforcement agencies across New York State, and it is important that each agency is aware of its duties. To remain in compliance with

the law, covered agencies should ensure they have a well-functioning internal system for receiving and addressing complaints of officer misconduct. Agencies must be aware of any recommendations from LEMIO on improving such procedures and policies, as well as the proper procedure for reporting claims of misconduct to LEMIO.

For more information on the information presented in this memo, please contact [Kristen Smith](#), any attorney in Bond's [labor and employment practice](#) or the Bond attorney with whom you are regularly in contact.

Special thanks to Summer Law Clerk Alexis Takashima for her assistance in the preparation of this memo.

