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Robert McClintock  
Director of Fire & EMS Operations  
Technical Assistance and Information Resources  
International Association of Fire Fighters  
1750 New York Avenue, NW  
Washington, DC 20006

## **Re: Use of EMS Body Cameras - Legal Considerations**

Director McClintock,

This memo responds to your request for a legal opinion on the use of body cameras during EMS calls. This request was prompted by President Sellers of the Shreveport Firefighters Association reaching out after receiving a report on EMS body camera usage from the Louisiana Department of Health.

This memo lays out a general description of various legal considerations arising from requests or demands that IAFF members wear body cameras on EMS calls or in other situations. With respect to policy, IAFF leadership will need to determine whether it wants to issue an IAFF position with respect to the growing number of EMS organizations requiring the wearing of body cameras.

## Legal Considerations

### The Right to Negotiate Over Wearing Body Cameras

The demand that IAFF members wear body cameras creates collective bargaining issues in both the public and private sector.

#### Public Sector

In most states where IAFF members enjoy public sector bargaining rights, public sector employers with unionized work forces are required by law to collectively bargain with union representatives over "mandatory subjects of bargaining." Mandatory subjects of bargaining typically consist of wages, hours, and terms and conditions of the bargaining unit's employment. The wearing of body cameras is likely to be deemed a mandatory subject of bargaining meaning that a department or municipality must bargain over the decision to wear body cameras and the effects of wearing body cameras (policy, procedures, protections, discipline, etc.) prior to

implementation. Even in states that do not have collective bargaining rights, there may be a legal obligation for the department or municipality to meet and confer with the union or fire fighters about the implementation of a body camera policy by statute or ordinance or the department or municipality may be willing to do so.

Departments or municipalities may insist they possess a management right to unilaterally require their employees wear body cameras. This will depend on the wording of the management rights clause or in the statute, if a public sector employer's management rights are established by statute such as in Ohio<sup>1</sup> and Florida.<sup>2</sup> There may be arguments that wearing body cameras were not contemplated when the management rights clause was agreed to and therefore should not fall under the management rights clause. On the other hand, if the collective agreement has a strong zipper clause or complete agreement clause, the union may be able to argue that the department or municipality cannot impose a mid-term modification to the collective agreement by implementing the wearing of body cameras.

When unions have demanded bargaining over wearing body cameras in a public sector law enforcement context, the results—so far—have been a mixed bag. Some jurisdictions have held wearing body cameras fall into a management prerogative and are not bargainable.<sup>3</sup> On the other hand, several jurisdictions have held that while public sector employers possess the managerial right to implement the wearing of body cameras, they must negotiate over the impact of wearing those body cameras with unions who timely request it.<sup>4</sup> Impact bargaining requires a public sector employer to bargain with the union over the effects of wearing body cameras on the unit members. Such effects include disciplinary schemes, privacy concerns, and safety issues resulting from wearing body cameras.

Upon learning that a department or municipality will require IAFF members to wear body cameras, IAFF locals should consult with legal counsel to see if they should demand or request the right to bargain over the implementation and impact of wearing body cameras or if they can inform management that such implementation would violate the collective agreement's zipper clause or complete agreement clause.

## Private Sector

While the National Labor Relations Board (NLRB) does not appear to have issued any decision involving private sector employees wearing body cameras, given that there are private sector EMS operators in the IAFF, the issue may arise. When the NLRB considers such an issue, it may find the issue analogous to workplace surveillance camera or other uniform issues. The NLRB has repeatedly decided that employers commit unfair labor practices in violation of

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<sup>1</sup> Ohio Rev. Code § 4117.08.

<sup>2</sup> Fla. Stat. §447.209.

<sup>3</sup> Pennsylvania Labor Relations Board, *Fraternal Order of Police, Delaware County Lodge 27 v. Yeadon Borough*, Decision No. PF-C-18-100-E, 2019 BL 346958; Michigan Employment Relations Commission, *Berrien County and Berrien County Sheriff -and- Police Officers Labor Council*, Decision No. C17 L-122, 2018 BL 529662.

<sup>4</sup> See, e.g., Florida Public Employees Relations Commission, *Jacksonville Consolidated Lodge #5-30, Fraternal Order of Police vs. City of Jacksonville*, Final Order, Case No. CA-2017-012; Illinois Labor Relations Board, *Decision, Fraternal Order of Police, Lodge #7 and City of Chicago (Department of Police)*, Case Nos. L-CA-17-037, L-CA-20-024.

Section §8(a)(1) and §8(a)(5) when failing to provide unions notice of and refusing to bargain over installation of surveillance cameras in the workplace prior to installation.<sup>5</sup> It is likely that a similar analysis would apply to an employer affixing video and audio recording devices directly onto its employees' uniform.

Employers have a duty to bargain in good faith with union representatives about mandatory subjects of bargaining, which generally include uniform requirements and workplace attire.<sup>6</sup> To be unlawful, however, there must be evidence that the unilateral change was a "material, substantial, and significant" change to employees' terms and conditions of employment.<sup>7</sup> Whether a change rises to that level is determined "by the extent to which it departs from the existing terms and conditions affecting employees."<sup>8</sup>

As with the public sector, if under a collective bargaining agreement, language of a management rights clause and zipper clause will impact whether an employer has an obligation to negotiate over the decision and effects or impact of implementing a policy on the wearing of body cameras.

### Federal HIPAA Concerns

The Federal Health Insurance Portability and Accountability Act (HIPAA) requires EMS agencies to safeguard protected health information (PHI).<sup>9</sup> Yet the recording of a patient encounter is not expressly prohibited under HIPAA. Body camera recordings may be used for treatment, healthcare operations, and other purposes permitted by HIPAA's Privacy Rule.<sup>10</sup> EMS agencies—as employers—may also use body camera footage for healthcare operations activities identified in HIPAA such as quality assurance, evaluation of employees, and developing clinical protocols. While HIPAA may permit these activities without patient authorization, safeguarding body camera footage may present disciplinary pitfalls for IAFF members.

Body camera footage containing PHI must be safeguarded under the HIPAA security rule to prevent a "breach."<sup>11</sup> Any event qualifying as a "breach" of body camera footage requires reporting by an EMS agency. As recorded footage may contain PHI, the safeguarding of body cameras and any data created therefrom may result in additional procedures EMS employees may have to follow and resultant discipline from failing to follow those protocols. Without clear guidelines and policies by EMS agencies and adequate training provided to EMS employees, IAFF

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<sup>5</sup> *Colgate-Palmolive Company and Local 15, International Chemical Workers Union, AFL-CIO*, 323 NLRB 515 (1997) (The employer's installation and use of hidden surveillance cameras in the workplace is a "mandatory" subject of bargaining, and the union has a statutory right to bargain over the installation and continued use of the surveillance cameras); see also *Anheuser-Busch, Inc. and Brewers and Maltsters, Local Union No. 6, I.B.T.*, 342 NLRB 560 (2004), citing *National Steel Corp. v. NLRB*, 324 F.3d 928 (7th Cir. 2003), enforcing 335 NLRB 747 (2001) (employer's installation of hidden surveillance cameras in work and break areas is a "mandatory" subject of bargaining).

<sup>6</sup> *Salem Hospital Corporation a/k/a The Memorial Hospital of Salem County*, 360 NLRB 768 (2014).

<sup>7</sup> *Carey Salt Co.*, 360 NLRB No. 38, slip op. at 12 (2014); *Peerless Food Products*, 236 NLRB 161, 161 (1978).

<sup>8</sup> *Southern California Edison Co.*, 284 NLRB 1205, 1205 fn. 1 (1987), enf'd. 852 F.2d 572 (9th Cir. 1988).

<sup>9</sup> 45 CFR § 160.103 defines protected health information as any individually identifiable health information that is transmitted or maintained in any form or medium by a covered entity.

<sup>10</sup> 45 CFR § 164.506.

<sup>11</sup> "Breach" possesses a specific definition under HIPAA (45 CFR § 164.402).

members may find themselves subject to arbitrary and unwarranted discipline.

As it stands now, EMS body camera footage containing PHI is largely unregulated. The lack of regulation, and the lack of clarity in regulations that do exist, creates a series of potential problems for IAFF members. Locals should ensure that the wearing, usage, and storage of body cameras is set forth in clear and comprehensive procedures and that employees are afforded ample training on those procedures.

### State “Invasion of Privacy” Laws

Most states have enacted laws against an “invasion of privacy” granting affected individuals the right to sue another for gross intrusion into their personal affairs. Many states also recognize “intrusion upon seclusion” as a tort granting individuals a legal recourse if their privacy has been invaded. The expectation of privacy is highest in an individual’s home and much lower in a public location.

States also have varying wiretap/eavesdropping laws requiring a person recording a conversation to provide notice and obtain consent before recording. A few states require the consent of all parties being recorded prior to recording, while most states require the consent of only one party to a recording. IAFF members required to wear body cameras must learn whether their state is a “one-party” consent state. If so, an IAFF member responding can generally use a body camera without obtaining the consent of the individuals on the scene (patients or bystanders). In states requiring the consent of everybody involved before recording, IAFF members will need to ensure that all parties to the recording have given their consent.

It is for important IAFF locals and members to ensure that they know and understand the applicable privacy and consent laws in their applicable jurisdictions prior to agreeing to use and operate body cameras while working.

### Body Camera Footage and State Laws

All states maintain some form of an open records law.<sup>12</sup> Typically, these laws require public agencies to make certain records available for public inspection or to provide records to public parties upon request.<sup>13</sup> While such laws *may* exempt records relating to medical treatment and would not apply to employees employed by private-sector employers, these laws are often ambiguous and largely untested in the EMS body camera context. Two examples, discussed below, illustrate potential concerns.

New Mexico’s Public Records Act provides that “[e]very person has a right to inspect public records of this state except...records pertaining to physical or mental examinations and medical treatment of persons confined to an institution.”<sup>14</sup> Based on this language, it is unclear whether records of medical treatment outside of “an institution”—such as body camera footage at

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<sup>12</sup> Such laws may be referred to as “sunshine laws” or “freedom of information acts.”

<sup>13</sup> Illustrative overview available at *Police Body-Worn Cameras Legislation Tracker*, URBAN, <https://www.rcfp.org/resources/bodycams/>

<sup>14</sup> N.M. Stat. Ann. § 14-2-1(A)(1)

the scene of a car accident—are exempt from disclosure. New Mexico’s compliance guide does not provide clarification either.<sup>15</sup> It is therefore unclear if an EMS professional’s recording of treatment provided to an individual at the site of a car crash would be subject to release through a public records request or subject to the exemption. West Virginia’s public records law exempts from disclosure “[i]nformation of a personal nature such as that kept in a...medical...file.”<sup>16</sup> It also states that this exemption does not apply if disclosure is in the public interest.<sup>17</sup> Therefore, West Virginia courts are statutorily empowered to release medical records, but only under vague, unspecified circumstances. This sort of ambiguity as to when footage recorded by a body camera is subject to public release is present across a number of states.

Some states have enacted legislation to guarantee patient privacy. Connecticut, for example, prohibits body camera recording when a person is undergoing medical evaluation or treatment.<sup>18</sup> Florida prevents public disclosure of footage taken in medical facilities.<sup>19</sup> Michigan’s Freedom of Information Act exempts from disclosure “information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.”<sup>20</sup>

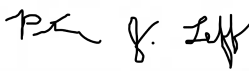
As the requirement that public safety officials wear body cameras increases, we expect more development of this area of disclosure law to occur in the state houses and courts.

## Conclusion

The wearing of body cameras presents a number of legal and policy issues. Because they are not yet widespread, especially in the EMS field, the law in this area is relatively sparse and still developing. We encourage any local union confronted with this issue to reach out to IAFF General Counsel or their local legal counsel

Sincerely,

MOONEY, GREEN, SAINDON,  
MURPHY & WELCH, P.C.

By: 

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Daniel J. Sweat

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<sup>15</sup> 2 THE OFFICE OF THE N.M. ATTORNEY GEN., INSPECTION OF PUBLIC RECORDS ACT: COMPLIANCE GUIDE 8 ED. (2015), <https://www.nmag.gov/wp-content/uploads/2021/11/Inspection-of-Public-Records-Compliance-Guide-2015.pdf> (last visited on 10/2/2022).

<sup>16</sup> W. Va. Code § 29B-1-4(a)(2).

<sup>17</sup> *Id.*

<sup>18</sup> Conn Gen. Stat. § 29-5d(g)(1).

<sup>19</sup> Fla. Stat. § 119.071(2)(1)2(b).

<sup>20</sup> Mich. Comp. Laws Serv. § 15.243(1)(a).

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