SECTION 7.
LIABILITY OF CITY OFFICIALS FOR INTENTIONAL TORTS AND CIVIL RIGHTS VIOLATIONS

This section introduces the concept of public official civil rights liability. It discusses the potential civil rights liability of officials and entities for the acts of local officials and the operations of local governmental entities. It is not intended, nor should it be used, as a complete treatment on the subject. The emphasis of this discussion is potential liability under federal civil rights theories, and the principal immunities available to local officials from federal civil rights liability.

Virtually every sphere of municipal operations can be the backdrop for a decision or action raising issues of potential civil rights liability. We hope that this brief discussion assists you, as an elected official, to understand when decisions you are entertaining and legislation and policy you are considering, may raise issues touching upon federal civil rights laws. Being so informed, you are in a better position to know when you should consult your human resources, labor relations, and legal staffs to address these issues and minimize the risk of potential civil rights liability for the City and for you.

A. GIST OF A CIVIL RIGHTS VIOLATION

Essentially, a civil rights violation may arise when a municipality, its officials or employees, deprive a person of any constitutional right or federally protected right, by any statute, ordinance, regulation, custom or usage under color of law.[32] Acting under "color of law" means acting by State or local authority, rather than as a private person.[33] A person need not specifically intend to deprive another of a federal or constitutional right to be liable - he or she need only have intended to do the improper act.[34]

B. POTENTIAL PERSONAL LIABILITY OF THE MAYOR, COUNCILMEMBERS, DEPARTMENT DIRECTORS AND OTHER CITY OFFICIALS FOR CIVIL RIGHTS VIOLATIONS

Ordinarily, Councilmembers and other local legislators acting within the traditional legislative capacity and city prosecutors acting as advocates in the criminal process are absolutely immune from liability for damages under Section 1983. Legislators act

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[32] 42 U.S.C. § 1983 (sometimes cited as "§ 1983" or "section 1983"). See generally, CALIFORNIA CONTINUING EDUCATION OF THE BAR (CEB), CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE (4th Ed.) Chapter 13.

[33] *Lugar v. Edmonson Oil*, 457 U.S. 922, 102 S. Ct. 2744 (1982).

[34] *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961)(overruled on other grounds 436 U.S. 658 (1978)); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F. 3d 470 (9th Cir. 1998).

within the traditional legislative capacity when they formulate rules and policies to be applied in all future cases (e.g., adopt ordinances, rezone property, adopt budgets for their municipality, levy taxes, adopt broad policies, adopt general plans, etc.), according to the framework established for taking such action.[35]

Most California cities operate under a City Manager form of government, where the Council selects one of its own members to act as Mayor. Such a Mayor continues to sit on the Council, usually presiding over its meetings, breaking tie votes, and executing instruments and legislation on behalf of the Council. Under such a scheme, the Mayor enjoys the same legislative immunity as other Councilmembers when the Mayor is acting within "the sphere of legitimate legislative authority."[36]

In contrast, the City of Fresno has a Mayor-Council form of government in which the Mayor does not sit on the Council. Instead, the Mayor possesses some legislative power (e.g., veto legislation, prepare and submit a budget), but primarily exercises a large measure of the executive and administrative power formerly exercised by the Council under the previous Council-Manager form of government, such as exclusive appointment and supervision of the City Manager and appointment of members to commissions and boards.[37] Consequently, Fresno's Mayor enjoys legislative immunity when exercising the Mayor's legislative power,[38] but the Mayor is not entitled to absolute legislative immunity for conduct not performed as part of the legislative function.[39]

However, a suit may still be maintained against legislators and prosecutors for declaratory or injunctive relief. Government officials performing discretionary functions generally have a qualified immunity for civil damages to the extent their conduct did not violate clearly-established statutory or constitutional rights which a reasonable person would have known.[40] A discretionary act is one as to which the actor is free to

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[35] *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 520 P. 2d 29 (1974); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171 (1979); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976).

[36] *Supreme Court of Va. v. Consumers Union,* 446 US 719, 732, 100 S. Ct. 1967 (1980) (relating to legislative immunities generally).

[37] See generally, Fresno City Attorney, Mayor-Council Form of Government Summary and Transition Recommendations (June 7, 1996).

[38] *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998) (mayor entitled to absolute legislative immunity for preparing and introducing budget in which plaintiff's department eliminated; councilmembers voting on budget likewise entitled to absolute legislative immunity).

[39] *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S. Ct. 2675 (1979) (issuing press release not part of legislative function); *Trevino v. Gates*, 23 F. 3d 1480 (9th Cir.) (city councilmembers' indemnification of police officers which a jury found had used unconstitutional excessive force is not legislative in character).

[40] *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982).

exercise judgment in determining the manner in which a duty is to be performed. When little or nothing is left to the individual's judgment as to the manner in which to perform the duty, the duty is said to be ministerial. Qualified immunity is available to officials, but not their governmental entities, in the case of a challenged custom, policy or usage.

Although legislators are entitled to absolute common-law immunity for legislative acts, this immunity does not apply when acting in their administrative or executive capacities. In other words, legislators have absolute immunity against civil suits only when acting within their legislative capacities.[41]

C. ACTS WHICH MIGHT RESULT IN A CIVIL RIGHTS VIOLATION

A city is created by virtue of state law and therefore anyone acting "under color" of a city's authority acts under "color of state law" for purposes of 42 U.S.C. Section 1983.[42] Action under color of state law may encompass implementation or enforcement of a municipal law, regulation, policy or custom.[43]

The following is a non-exhaustive list of situations where local governments may act or fail to act, resulting in civil rights liability:

1. Employment Discrimination.

Discrimination in hiring, firing, promotion, retention, use of certain classifications of persons or which have a disproportionate impact that operates to exclude protected classes of persons at a higher rate than others. Tests must be job related or justified by business necessity (i.e., a valid measure of job performance).[44] Tests may obviously not be scored on the basis of race, religion, national origin or color.[45]

Title VII of the Civil Rights Act of 1964 is specifically made applicable to local governments[46] and prohibits discrimination on the basis of race, color, religion,

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[41] See note 3, *supra; San Pedro, supra,* 159 F. 3d at 482.

[42] *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937, 102 S. Ct. 2744 (1982).

[43] See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra*, at §§ 13.20 and 13.21.

[44] *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849 (1971) (overruled on other grounds, as recognized in 914 F. Supp. 1257 (1996)).

[45] 42 U.S.C. § 2000e-2(1).

[46] 42 U.S.C. § 2000e-2, 2000e-3.

national origin, sex, as well as certain retaliatory acts. It also applies to job applicants as well as employees.[47]

California Constitution, Article 1, Section 8, prohibits employers from disqualifying any person from entering or pursuing a business, profession, vocation or employment because of sex, race, creed, color, national origin or ethnic origin. Proposition 209 added Section 31(a) to Article 1 of the California Constitution. Section 31(a) provides that the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[48]

The California Fair Employment and Housing Act ("FEHA") applies to all municipalities and prohibits discrimination on the basis of race, color, national origin, ancestry, sex, pregnancy, childbirth, or related medical condition, marital status, religious creed, physical and mental disability, medical condition (cancer-related or genetic characteristics), age 40 and over, and sexual orientation. Unlawful discrimination also includes the perception that an individual has any of these characteristics or that an individual is associated with a person who has, or is perceived to have, any of these characteristics.[49]

2. Pregnancy, Childbirth, and Related Medical Conditions.

The Pregnancy Act of 1978 is part of Title VII and prohibits local governments, among others, from discrimination on the basis of pregnancy, childbirth, pregnancy disability and related medical conditions.[50]

3. Sexual Harassment.

Unwelcome sexual advances or requests for sexual favors, or verbal or physical conduct of a sexual nature which interferes with a person's work performance or creates an intimidating or hostile work environment is a form of discrimination under both California and federal law.[51]

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[47] 42 U.S.C. § 2000e-2(a).

[48] Adopted by initiative November 6, 1996.

[49] Gov. Code §§ 12920 - 12927, 12940 - 12948. The FEHA applies to public employers pursuant to Government Code section 12926(d). Implementing regulations have been adopted by the Fair Employment and Housing Commission. See 2 Cal. Code of Regs. §§ 7285 et seq.

[50] 42 U.S.C. § 2000e-(k).

[51] 29 U.S.C. § 2000e-(a)(1); Gov. Code §§ 12940(h) and (i), and 12950.

4. Age Discrimination.

The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age for persons age 40 and over.[52]

5. Handicap Discrimination.

The Rehabilitation Act of 1973 applies to local governments receiving certain kinds of federal financial assistance and prohibits discrimination against the handicapped in programs or activities receiving federal financial assistance.[53]

6. Disability Discrimination.

The Americans with Disabilities Act ("ADA") prohibits discrimination on the basis of disability against a qualified individual with a disability in regard to virtually every aspect of the employment relationship.[54] A qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.[55]

Title I generally prohibits discrimination against a qualified individual with a disability because of such disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[56] The City is covered by the ADA's employment provisions.

7. National Origin and Citizenship.

The Immigration Reform and Control Act of 1986 prohibits discrimination based upon national origin and citizenship by employers with more than three employees.[57]

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[52] 29 U.S.C. §§ 621, *et seq.*

[53] 29 U.S.C. §§ 701-7961.

[54] 42 U.S.C. §§ 12101 *et seq.* The ADA supplements the Rehabilitation Act of 1973 (29 U.S.C. §§ 791 *et seq*).

[55] 42 U.S.C. §§ 12131, *et seq.*

[56] 42 U.S.C. § 12112. The effective date for Title I of the ADA was July 26, 1992.

[57] 8 U.S.C. § 1324b, *et seq.*

8. Protected Speech.

There is some protection for employees (although not absolute constitutional protection) who speak out on matters affecting public concern.[58]

9. Land use decisions and actions affecting private land.

Municipal decisions and actions can result in liability if they overly regulate, take or damage land or an interest in land, and thereby diminish its fair market value, without due process of law; take land without just compensation (Fifth Amendment); regulate, take or damage land based on invidiously discriminatory grounds (civil rights); or regulate, take or damage land denying the affected landowner procedural due process and equal protection (Fourteenth Amendment). In reality, all such actions can be made out as civil rights violations, since they deny the landowner a constitutionally protected right.

10. City Actions impermissibly seeking to regulate conduct.

Ordinances, resolutions, executive orders, regulations, and other actions may be set aside on civil rights claims if they are too vague to enforce, or if they prohibit both protected as well as unprotected conduct (e.g., certain vagrancy, curfew, public assembly, and other ordinances).[59]

11. Enforcement of permissible ordinances in an impermissible manner.

Similarly, otherwise valid ordinances may not be enforced in an arbitrary manner against classes of people, particularly suspect classifications. Otherwise, discriminatory ordinances must bear a rational relationship to a legitimate state purpose or, in cases of ordinances discriminating against suspect classes, must promote a compelling state interest.[60]

12. Failure to (adequately) train.

The failure to train or adequately train which amounts to deliberate indifference to the rights of persons with whom the employee comes in contact may give

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[58] *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968); *Chico Police Officers Association v. City of Chico*, 232 Cal. App. 3d 635, 283 Cal. Rptr. 610 (1991).

[59] *Connally v. General Construction*, 269 U.S. 385, 46 S. Ct. 126 (1926); *Coates v. Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686 (1971).

[60] *Weber v. City Council of Thousand Oaks*, 9 Cal. 3d 950, 513 P. 2d 601 (1973).

rise to liability.[61] This situation most often arises in the case of police officers and custodial personnel.

13. Failure to (adequately) supervise.

The failure to supervise or adequately supervise which amounts to deliberate indifference to the rights of persons with whom the employee comes in contact may give rise to liability.[62] When a history of widespread abuse puts the responsible supervisor on notice of the need for improved training or supervision and the official fails to take corrective action, the supervisor may be liable if the failure causes "constitutional" injury to others.[63]

14. Failure to intervene or prevent an act (inaction).

A local governmental entity may be liable under 42 U.S.C. Section 1983 "if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights."[64]

To impose liability on a local governmental entity for failing to act to preserve constitutional rights, a Section 1983 plaintiff must establish that he or she possessed a constitutional right of which he or she was deprived, that the municipality had a policy that "amounts to deliberate indifference" to the plaintiff's constitutional right, and that the policy is the "moving force behind the constitutional violation."[65]

A person may be liable for a wrongful act by a person he or she supervises of which he or she was aware, but which he or she failed to prevent,[66] or for the wrongful act of another which he or she is capable of preventing, but fails to intervene to prevent.[67]

15. Federal Fair Housing Act.

The Federal Fair Housing Act ("FFHA") of 1968, as amended, contains broad language barring housing practices that discriminate on the basis of race,

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[61] *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989).

[62] *Davis v. City of Ellensburg*, 869 F. 2d 1230 (9th Cir. 1989).

[63] *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978); *Fundiller v. City of Cooper City*, 777 F. 2d 1436 (11th Cir. 1985).

[64] *Oviattt v. Pearce*, 954 F. 2d 1470, 1474 (9th Cir. 1992).

[65] *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197 (1989).

[66] *Taylor v. List*, 880 F. 2d 1040 (9th Cir. 1989).

[67] *Meehan v. County of Los Angeles*, 856 F. 2d 102 (9th Cir. 1988).

disability, handicap, and other factors. In addition, the FFHA requires housing providers, including entities like the City who make housing rehabilitation and CDBG loans and grants, to make reasonable accommodations when necessary to afford handicapped and other persons equal opportunity to housing programs. The FFHA further prohibits discrimination in the processing review or making denial of loans.[68]

See *San Pedro* case discussed in Section B above, in which the federal court held that a claim may stand against a councilmember under the Fair Housing Act for interference and retaliation. This court explained that although the councilmember was entitled to immunity for legislative acts, he was not entitled to immunity for alleged acts of retaliation.

16. Access to facilities and services.

The Americans with Disabilities Act ("ADA") discussed under point 6, above, has broad implications for potential local government liability if its requirements are not observed. For example, the ADA generally requires, among other things, that: programs and services be provided in an integrated setting, unless separate or different measures are needed to ensure equal opportunity; reasonable modifications in policies, practices, and procedures that deny equal access to disabled individuals, unless fundamental alteration in the program would result; auxiliary aids and services when needed to ensure effective communication, unless an undue burden or fundamental alteration would result; and operation of city programs so that, when viewed in their entirety, they are readily accessible to and usable by individuals with disabilities.[69] Under Title II of the ADA, public entities may not discriminate against or deny access or services to any "qualified individual with a disability" when providing services, including public transportation.[70] Title II of the ADA establishes detailed requirements for accessibility and usability of public transportation vehicles, trains, or commuter rail cars and for transportation facilities or stations.[71]

Title II of the ADA also prohibits local governmental agencies from excluding qualified individuals from participating in or receiving the benefits of the entity's services, programs or activities on the basis of a disability.[72] The regulations prohibit discrimination on the basis of disability in employment under any

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[68] 42 U.S.C. § 3600, *et seq.*

[69] See generally, U.S. Department of Justice, Civil Rights Division, Title II Highlights, http://www.usdoj.gov/crt/ada/t2hlt95.htm.

[70] 42 U.S.C. §§ 12131 *et seq.*

[71] 42 U.S.C. §§ 12131 *et seq.*; see also 28 C.F.R. §§ 35.101 - 35.190.

[72] 42 U.S.C. § 12132.

service, program or activity conducted by a public entity.[73] This section arguably protects disabled individuals applying for or participating in volunteer activities with cities, such as volunteer fire and police programs.

Both general law and charter cities are prohibited from purchasing rapid transit equipment which is not accessible to individuals with disabilities.[74] If state law prescribes higher accessibility standards than federal law, state legislation has expressly provided that state law requirements must be followed.[75]

The First Amendment precludes a local government from taking sides in elections by making public facilities available to only one side. Once a public forum has been established, free speech and equal protection principles prohibit discrimination based solely on content or subject matter.[76]

D. THE CONSEQUENCES TO AN OFFICIAL OR A CITY OF BEING FOUND LIABLE FOR A CIVIL RIGHTS VIOLATION

If the City loses a civil rights lawsuit, it may be liable to the successful plaintiff for compensatory damages. Where the harm is continuing or will take place in the future, the court may issue an injunction and/or a declaration that the local governmental action, policy or decision violates the civil rights law. Punitive damages may also be awarded, in addition to compensatory, declaratory and injunctive relief.[77] Finally, plaintiffs are typically awarded attorneys fees, often in significant amounts.[78]

A public official or employee who is found liable for a civil rights violation is entitled to indemnification for compensatory damages.[79] To receive indemnification, the official or employee must request indemnification in writing before trial, obtain the City's defense of the claim and reasonably cooperate in good faith in the defense of the action.[80] Even where a conflict between the City and the official may arise, the City

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[73] 28 C.F.R. § 35.140.

[74] Gov. Code § 4500(a).

[75] Gov. Code § 4500(b).

[76] *Lehman v. City of Shaker Heights*, 418 U.S. 298, 315-316, 94 S. Ct. 2714 (1974).

[77] *Martinez v. Procunier*, 354 F. Supp. 1092 (1973), aff'd 416 U.S. 396 (1974) (overruled on other grounds, as recognized in 802 F. Supp. 606 (1992)).

[78] 42 U.S.C. § 1988.

[79] Gov. Code §§ 825 *et seq.*; *Williams v. Horvath*, 16 Cal. 3d 834, 843, 548 P. 2d 1125 (1976) (distinguished on other grounds 105 Cal. App. 3d 876 (1980)).

[80] Gov. Code § 825(a). Public entities must defend employees and former employees in civil actions if the employee's act or omission was within the scope of his employment, the employee did not act with actual fraud, corruption or actual malice and the defense of the action would not create a

may be required to indemnify the employee or official subject to a written reservation of rights. However, where defense of the official would create "an actual and specific conflict of interest," then the City may refuse to provide a defense.[81] The City may even indemnify the official or employee for punitive damages, if the Council makes findings that it is in the best interests of the City to do so.[82] The findings may only be made after a judgment has been rendered in the case.

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specific conflict of interest between the entity and the employee. (Gov. Code §§ 995 and 995.2.) Special rules regarding indemnification of elected officials who tortiously interfere in a judicial proceeding, commit an intentional tort not directly related to the official's performance of official duties or violate specified Government Code and Penal Code sections relating to official misconduct are found in Government Code §§ 815.3, 825(f) and 825.6.

[81] Gov. Code § 995.2.

[82] Gov. Code § 825.