



Client Alert -

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To All Members:

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POSSESSION OF AN ASSAULT RIFLE BY AN OFFICER AFTER RETIREMENT IS NOT PERMITTED

On December 31, 2010, the California Attorney General issued a long awaited official, published, opinion (No. 09-901) answering the question of whether a retired peace officer can keep an assault rifle he or she lawfully purchased and registered while serving as an active law enforcement officer?

The conclusion reached by the Attorney General is that "a peace officer who purchases and registers an assault weapon in order to use the weapon for law enforcement purposes is *not* permitted to continue to possess the assault weapon after retirement." (Emphasis added.)

In an in-depth and extensive legal opinion, the Attorney General addresses all issues contained in the underlying question. The question was originally posed by, now retired, San Diego Sheriff Bill Kolender and was re-submitted by current Sheriff William D. Gore.

[Pursuant to a request from the Office of the Attorney General (AG) for input from the California State Sheriffs' Association (CSSA), this firm, as general counsel to CSSA, submitted a legal analysis in December of 2009 to the AG, reaching the same conclusion now set forth in AG Opinion No. 09-901. Our conclusion was that "the Assault Weapons Control Act (AWCA) provides for a general prohibition on assault weapons within the state of California which become applicable – subsequent to retirement – to a peace officer who lawfully purchased and registered an assault weapon while an active sworn member of a law enforcement agency."]

Assault Weapons Control Act (AWCA)

The Attorney General points out that the general purpose of the AWCA [Penal Code sections 12275-12290], as set forth when the act was amended in 1999, was to "ban all assault weapons, regardless of their name, model number, or manufacture. It is the purpose of this act to effectively achieve the Legislature's intent to prohibit all assault weapons."

The Opinion sets forth the various exceptions to what, otherwise, appears to be a virtual

total ban on such weapons. Among those exceptions is one for peace officers using such weapons for law enforcement purposes. PC 12280(f)(1) allows officers from designated law enforcement agencies to possess and use the agency's assault weapons for law enforcement purposes.

The Attorney General also notes a second exception, PC 12280(f)(2), which permits an officer employed by one of the designated agencies to purchase an assault weapon if "the employer authorizes the officer to possess the weapon and the officer registers the weapon within a specified time period."

Silveira v. Lockyer

In 2002, the Ninth Circuit U.S. Court of Appeals issued a ruling in the case of *Silveira v. Lockyer*, 312 F.3d 1052, wherein the Court "struck down a provision that was similar to what is now section 12280(f)(1)...." The AG notes that "the *Silveira* court reasoned that, because retired peace officers no longer served in any law enforcement capacity, their possession of assault weapons did not advance a legitimate state interest."

Subsequent to that decision, the state Legislature amended the AWCA and deleted the retired officer's exception. The AG Opinion cites to the amending legislation which stated that, "it is the intent of the Legislature in amending Section 12280 of the Penal Code to delete the exemption allowing retired peace officers to obtain an assault weapon from their employing agency upon retirement."

As such, states the AG, "since the retired officer exemption has been removed from the statute, it is evident that a peace officer to whom an employer-owned assault weapon is assigned pursuant to (f)(1) must return the weapon to the employing agency upon retirement. This conclusion comports with the language of the statute, and is compelled by *Silveira*."

Financial Expense Incurred by Officer

An issue of "fairness" has been raised in the past regarding the fact that an officer has spent his or her own funds to purchase the weapon and the compelled return of it would be unfair. The AG's Opinion addresses this issue as well.

"[W]e do not believe that the fact that a peace officer may have spent his or her own money to buy an assault weapon under subdivision (f)(2) makes this situation materially different from the issue decided in *Silveira*. The *Silveira* case stands squarely for the proposition that the continued possession of assault weapons by retired peace officers does not serve law enforcement purposes and is therefore inconsistent with the legislative purpose of the Act, which is to eliminate the availability of assault weapons generally. The source of funds for the purchase of a weapon is not relevant to the issue of whether its possession may be justified on law enforcement grounds."

The AG also points out that a retired officer who lawfully owned the weapon prior to the Act, and had timely registered it, would be "grandfathered" in, as would any other private citizen who met those requirements.

Post *Silveira* Cases

The Attorney General also addresses the fact that two recent decisions from the United States Supreme Court have been issued regarding the Second Amendment and an individual's right to bear arms.

In the case of *District of Columbia v. Heller*, (2008) 554 U.S. 570, the Supreme Court held that the Second Amendment allows the possession of guns in one's home for personal protection and struck down the District of Columbia's laws which banned such possession.

In the case of *McDonald v. City of Chicago*, (2010) 130 S.Ct. 3020, the Supreme Court ruled that the Second Amendment applied to the states and, therefore, complete bans on possessing weapons was unconstitutional.

However, in both the *Heller* case and the *McDonald* case, the Supreme Court stated that the right to keep and bear arms was not unlimited. States still have the right to reasonably regulate the carrying of dangerous and unusual weapons. In *McDonald*, the Court stated that the right "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

HOW THIS AFFECTS YOUR AGENCY

As stated in the AG's Opinion, "our examination of the language of the Act, the legislative history of the Act, and the *Silveira* case all persuade us that a peace officer who has purchased and registered an assault weapon as an active duty officer no longer comes within any of the Act's exceptions upon his or her retirement"

If an agency has allowed officers to retain such weapons after retirement, this Opinion, along with the statute and case law, appears to conclude that such action is unlawful. Official opinions of the Attorney General do not constitute the "law," however, in California, official opinions of the Attorney General are given great weight by appellate courts when addressing issues contained in those opinions.

As in all matters involving the law, it is important that you receive advice and guidance from your agency's designated legal counsel. In this situation, in particular, such advice and guidance is imperative.

As always, if you wish to discuss this matter in greater detail, please feel free to contact me at (714) 446 – 1400 or via e-mail at mjm@jones-mayer.com

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