

THIS TRAINING BULLETIN PROVIDES INFORMATION BY THE DEPARTMENT OF JUSTICE

## UPCOMING LEGISLATION REGARDING USE OF DEADLY FORCE

This bulletin serves as a reminder of the training and policy mandates, effective January 1, 2021, imposed by SB 230 related to an officer's use of force, and the changes codified by AB 392, effective January 1, 2020. Law enforcement should also be aware that in April 2020, the California Judicial Council issued Jury Instructions for Use of Force under these legislative changes. (See CALCRIM 507 (Justifiable Homicide: By Peace Officer), rev. Apr. 2020).

Law enforcement agencies should already be aware of Assembly Bill (AB) 392 (AB No. 392 (2019-2020 Reg. Sess.)), and Senate Bill (SB) 230 (SB No. 230 (2019-2020 Reg. Sess.)).

AB 392 amends California law by redefining the circumstances under which homicide by a peace officer is deemed justifiable and by affirmatively prescribing the circumstances under which a peace officer is authorized to use deadly force to effect an arrest, prevent escape, or overcome resistance. (Pen. Code, §§ 196, 835a). SB 230 requires law enforcement agencies to implement certain training and policy mandates regarding use of force by January 1, 2021.

### OVERVIEW OF AB 392

#### 1. **Deadly Force Can Only Be Used When an Officer Reasonably Believes that Such Force Is Necessary, and Only Under Certain Circumstances**

- a. Under AB 392, an officer's use of deadly force is justified only when the officer reasonably believes, based on the totality of the circumstances, that deadly force is "necessary" to:
  - b. "Defend against an imminent threat of death or serious bodily injury to the officer or to another person"; or
  - c. "Apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended." Where feasible, officers must, prior to the use of force, make reasonable efforts to identify themselves as such and warn that deadly force may be used.
- (Pen. Code, § 835a, subd. (c)(1)(A) and (B).) AB 392 defines "deadly force" as any force that "creates a substantial risk of causing death or serious bodily injury." (Pen. Code, § 835a, subd. (e)(1).)

#### 2. **"Imminent" Threats Are Ones that "Must Be Instantly Confronted And Addressed."**

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Under AB 392, an “imminent” threat is one where a reasonable officer, based on the totality of the circumstances, would believe “that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person.” (Pen. Code, § 835a, subd. (e)(2).) “An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.” (*Ibid.*).

### **3. The Evaluation of Whether an Officer “Reasonably Believes” That Deadly Force Is “Necessary” is Based on the “Totality of the Circumstances”**

Under AB 392, an officer’s decision to use force is evaluated “from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.” (Pen. Code, § 835a, subd. (a)(4).)

In considering the totality of the circumstances, AB 392 provides that the conduct of the officer *and* the subject leading up to the use of deadly force is relevant. The statute states that the “totality of the circumstances” includes “all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.” (Pen. Code, § 835a, subd. (e)(3).)

The Legislature further amended Penal Code 835a to state that uses of force are to be “evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers.” (Pen. Code, § 835a, subd. (a)(3).)

### **4. Officers May Not Use Deadly Force Against Persons Who Pose a Danger Only to Themselves**

AB 392 prohibits the use of deadly force against persons based only on the danger they pose to themselves. (Pen. Code, § 835a, subd. (c)(2).)

### **5. AB 392 Recognizes a Peace Officer’s Right to Self-Defense if Using Objectively Reasonable Force**

AB 392 recognizes that an officer may need to use objectively reasonable force to “effect the arrest or to prevent escape or to overcome resistance” from a person being arrested. (Pen. Code, § 835a, subd. (d).) In these circumstances, AB 392 does not require officers to “retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested.” (*Ibid.*)

However, the statute still encourages the use of “tactical repositioning” or other de-escalation tactics in responding to resistance. (*Ibid.*; *see also* Pen. Code, § 835a, subd.

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(a)(2).)

### 6. AB 392 Applies to All Peace Officers

AB 392 applies to all “peace officers,” a very broad category that essentially includes all officers in any state or local public safety agency whose primary duty is to enforce the law. (Pen. Code, § 830 et seq.) This means that AB 392’s requirements are applicable to the officers in each of the county sheriff’s departments; city, transit agency, and school and university police departments; and all state and local law enforcement and correctional officers, among others defined in the Penal Code. (*Ibid.*)

### 7. Other Amendments to the Penal Code by AB 392

AB 392 further amended Section 835a of the Penal Code to include:

- a. The Legislature’s declaration that law enforcement’s use of force is a “serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life.” (Pen. Code, § 835a, subd. (a)(1).)
- b. The Legislature’s intent that peace officers use “deadly force only when necessary in defense of human life,” and accordingly, that officers use “other available resources and techniques,” such as tactical repositioning or de-escalation, if it is “reasonably safe and feasible to an objectively reasonable officer.” (Pen. Code, § 835a, subd. (a)(2).)
- c. The Legislature’s finding that people with physical, mental health, developmental, or intellectual disabilities “are significantly more likely to experience greater levels of physical force during police interactions, as their disability may affect their ability to understand or comply with commands from peace officers.” (Pen. Code, § 835a, subd. (a)(5).)

## OVERVIEW OF SB 230 – Effective January 1, 2021

### 1. SB 230 Requires Each Agency to Adopt and/or Maintain a Standard Use of Force Policy That Includes Required Elements and is Accessible to the Public

SB 230, which was passed shortly after AB 392, requires law enforcement agencies to adopt a use of force policy containing 20 specified elements by January 1, 2021, and to make this policy accessible to the public. (Gov. Code, § 7286, subs. (b), (c).) The 20 specified elements are:

- a. A requirement that officers utilize deescalation techniques, crisis intervention tactics, and other alternatives to force when feasible.
- b. A requirement that an officer may only use a level of force that they reasonably believe is proportional to the seriousness of the suspected offense or the

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reasonably perceived level of actual or threatened resistance.

- c. A requirement that officers report potential excessive force to a superior officer when present and observing another officer using force that the officer believes to be beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances based upon the totality of information actually known to the officer.
- d. Clear and specific guidelines regarding situations in which officers may or may not draw a firearm or point a firearm at a person.
- e. A requirement that officers consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.
- f. Procedures for disclosing public records in accordance with [Penal Code] Section 832.7.
- g. Procedures for the filing, investigation, and reporting of citizen complaints regarding use of force incidents.
- h. A requirement that an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject.
- i. Comprehensive and specific guidelines regarding approved methods and devices available for the application of force.
- j. An explicitly stated requirement that officers carry out duties, including use of force, in a manner that is fair and unbiased.
- k. Comprehensive and specific guidelines for the application of deadly force.
- l. Comprehensive and detailed requirements for prompt internal reporting and notification regarding a use of force incident, including reporting use of force incidents to the Department of Justice in compliance with [Government Code] Section 12525.2.
- m. The role of supervisors in the review of use of force applications.
- n. A requirement that officers promptly provide, if properly trained, or otherwise promptly procure medical assistance for persons injured in a use of force incident, when reasonable and safe to do so.
- o. Training standards and requirements relating to demonstrated knowledge and understanding of the law enforcement agency's use of force policy by officers,

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investigators, and supervisors.

- p. Training and guidelines regarding vulnerable populations, including, but not limited to, children, elderly persons, people who are pregnant, and people with physical, mental, and developmental disabilities.
- q. Comprehensive and specific guidelines under which the discharge of a firearm at or from a moving vehicle may or may not be permitted.
- r. Factors for evaluating and reviewing all use of force incidents.
- s. Minimum training and course titles required to meet the objectives in the use of force policy.
- t. A requirement for the regular review and updating of the policy to reflect developing practices and procedures.

*(Ibid.)* SB 230 also requires the [Commission on Peace Officer Standards and Training](#) (POST) to establish uniform, minimum guidelines for these new use of force policies, and to develop and provide training for law enforcement officers based on the new use of force requirements. (Pen. Code, § 13519.10.) POST trainings, including its training on AB 392, are available on the POST website at: <https://post.ca.gov/>.