

## QUICK REFERENCE UOC PROCEDURE AND LAW SUMMARY

### INITIAL CALL

California does not ban firearm possession, but regulates firearm possession ad hoc; as such it is important to document a number of factors. Dispatch will process the calls using current procedures. However upon receiving a phone call regarding people carrying firearms openly, they will obtain as much information as possible about the demeanor, behavior, and activities of the people carrying the firearms to help everyone determine if this is an “open carry” situation, including whether the firearm is in a holster, whether the suspect is in a prohibited area, and whether the suspect is engaged in, or about to be engaged in, any criminal activity. For instance, dispatch will confirm that there is no brandishing, assault, or other unlawful activity in progress. They will confirm whether or not the firearms are concealed and the location of the firearms. Typical information regarding the Reporting Person, descriptions, does the caller have any safety concerns, etc. will be gathered and relayed to the officers.

The intent is not to change the current practices/procedures of how we gather information or what information to gather, rather try to drill in further to determine if this is an “open carry” type call or a “man with a gun” type call. Obviously this information is critical to determine the appropriate tactics. A supervisor shall be assigned to all open carry or man with a gun calls.

Because much of the public is unaware of the legalities of “open carrying,” if the facts present themselves to be of the “open carry” type, dispatch will advise the caller that California does permit the open carrying of unloaded firearms with some exceptions.

### INITIAL CONTACT

When making the initial contact with a person carrying a handgun in a holster or otherwise carrying a firearm openly, officers should consider that the individual may be carrying a firearm lawfully, barring any other indicia of reasonable suspicion of a crime being or about to be committed. In assessing the situation, officers must consider the 4<sup>th</sup> amendment rights of the individuals carrying firearms openly as well as their own safety and the safety of the public.

#### Handguns v. Long Guns

**Handguns** Penal Code 12025 applies to firearms capable of being concealed upon the person, which is limited to “handguns” per Penal Code 12001. There is no requirement that all handguns must be registered to the owner in California. California only requires handguns *transferred* from 1991 to the present be registered to their owners, with some exceptions.

**Long Guns** Non-concealable firearms (rifles and shotguns) are not covered within the provisions of California Penal Code section 12025 and therefore are *not* required to be transported in a locked container. In general, they may be carried openly or concealed. As with any firearm, non-concealable firearms must generally be unloaded while they are being transported. However, a rifle or shotgun that is defined as an “assault weapon” (see below) pursuant to Penal Code 12276 or 12276.1 must be transported in accordance with Penal Code section 12026.1. Unless the firearm is an “assault weapon” or “.50 BMG Rifle,” there is no requirement that the firearm be registered or otherwise appear in the AFS.

## **Search & Seizure Cautions**

- 4<sup>th</sup> Amendment**            The Fourth Amendment, applied to the states through the Fourteenth Amendment, provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." (U.S. Const. amend. IV.)
- Michigan v. Chesternut***            A seizure under the Fourth Amendment occurs when "a reasonable person would have believed that he was not free to leave." (*Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States v. Mendenhall* 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)).) Advise the individual that they are free to leave immediately after performing an "(e) Check" and then, if desired, continue inquiries on a voluntary basis.
- Terry v. Ohio***                "There are well-defined limits on what police officers may do in discharging their duties, and police may be held liable for acting outside these limits. Perhaps the most fundamental of these is the requirement that the police not interfere with the freedom of private persons unless it be for specific, legitimate reasons. (See *Terry v. Ohio*, 392 U.S. 1, 21 (1968), 20 L. Ed. 2d 889, 88 S. Ct. 1868.)
- Duran v. Douglas***            "In the absence of a valid warrant, the police may generally not stop and detain an individual for investigation absent a reasonable belief that criminal or otherwise dangerous activity is afoot." (*Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377 (9th Cir. 1989).)
- U.S. v. Ubiles***                Plaintiff's lawful possession of an unloaded firearm could *not*, by itself, create a reasonable suspicion sufficient to justify an investigatory detention and seizure – or *arrest*. (See Lawrence Rosenthal, Second Amendment Plumbing after Heller: Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs (2009) 41 Urb. Law. 1, 37 ("When applicable law does not ban carrying a firearm, however, the Fourth Amendment does not permit a stop-and-frisk regardless of any indication that a suspect is armed or potentially dangerous because there is no indication that the suspect is violating the law.")) For example, in *United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000), the Third Circuit found that *an individual's lawful possession of a firearm in a crowded place did not justify a search or seizure*. Holding that the search violated Ubiles' Fourth Amendment rights, the court noted that the situation was no different than if the informant had told officers "that Ubiles possessed a wallet . . . and the authorities had stopped him for that reason." (*Id.*) Nor, the court continued, could the officers rely on the fact that Ubiles possessed the weapon while in a crowd. (*Id.* at 219.)
- Florida v. J.L.***                U.S. Supreme Court held that law enforcement cannot stop and frisk a citizen based solely on an anonymous tip describing only innocent behavior and which

does not sufficiently predict the future actions of a suspect. (*Florida v. J.L.*, 529 U.S. 266 (2000).)

***U.S. v. King***

The Tenth Circuit has also dealt with this question. In *United States v. King* (10th Cir. 1993) 990 F.2d 1552, the Tenth Circuit found that *a firearm alone did not create a reasonable suspicion of criminal activity*—permitting such detentions would render the Fourth Amendment functionally meaningless.

**Contact Advisory**

**Contact**

Officers are expected to appropriately assess each situation and respond in a safe manner that respects the citizens' rights. These types of contacts are difficult in the sense that you will be using different contact tactics that you may otherwise use in a situation involving a person with a gun that has other extenuating circumstances. Officers are required to respect the rights of others and impartially enforce the law. Demonstrate the utmost professionalism in your conduct. Assess the situation and monitor the subjects prior to making contact. Use "contact and cover" while interacting with citizens. Clear verbal commands regarding the weapon inspections should be given *with the Officer retrieving the weapon from the holster*. Keep in mind that criminals rarely advertise the fact that they are armed, and that a firearm carried openly in a holster is usually a sign that the individual is attempting to carry a firearm within the letter of the law.

**Supervisor**

If possible, a supervisor should be present when contact is made with the individuals or groups.

**Identification of Individual Not Required**

**PC§148**

Unloaded Open Carry enthusiasts most likely will not produce identification, even if requested. It is their stance that they are complying with all laws and are not compelled to identify themselves. In short, there is no authority that requires them to identify themselves. Do not enforce the PC §148 solely under this circumstance. Absent any other reasonable suspicions of articulable facts, officers cannot arrest for failure to provide Identification. Other law enforcement agencies improperly cite *Hiibel v. Sixth Judicial District* (2004) 542 U.S. 177, which allowed for a demand for I.D., this case was in Nevada which has a "Stop and I.D." statute. California has no similar requirement for I.D. Thus, it is not a PC § 148 violation to refuse to identify oneself during an investigative stop. (*In re Gregory S.*, 112 Cal.App.3d 764 (1980).)

**INSPECTION OF FIREARM**

**Limited Authority to Inspect**

**PC§12031(e)**

In order to determine whether or not a firearm is loaded for the purpose of enforcing PC§12031, peace officers are authorized to examine any firearm

carried by anyone on his or her person or in a vehicle while in any public place, or on any public street, or in any prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section is, in itself, probable cause for arrest for violation of 12031.

It is important to note that the authority granted by this provision does not permit any search or seizure beyond mere inspection of the firearm to determine whether the firearm is loaded. It does not, without additional factors, give you the right to prolong the contact beyond inspection to run computer checks or complete an FI. **To do this you must have consent or additional factors that justify a reasonable suspicion detention.** Reasonable suspicion is less than probable cause but more than no evidence at all. Reasonable suspicion is defined as: information sufficient to cause a reasonable law enforcement officer, taking into account his or her training, to reasonably believe that the person to be detained is, was or is about to be, involved in criminal activity. (The Fourth Amendment and Search and Seizure, 9<sup>th</sup> Edition, Phillips.)

**PC§833.5** In addition to any other detention permitted by law, if a peace officer has *reasonable cause to believe that a person has a firearm or other deadly weapon with him or her in violation of any provision of law relating to firearms or deadly weapons* the peace officer may detain that person to determine whether a crime relating to firearms or deadly weapons has been committed. For purposes of this section "reasonable cause to detain" requires that the circumstances known or apparent to the officer must *include specific and articulable facts causing him or her to suspect that some offense relating to firearms or deadly weapons has taken place* or is occurring or is about to occur and that the person he or she intends to detain is involved in that offense. The circumstances must be such as would cause any reasonable peace officer in like position, drawing when appropriate on his or her training and experience, to suspect the same offense and the same involvement by the person in question.

**Arizona v. Hicks** Only if the serial number of the weapon comes into *plain view* during inspection, may it be noted and run against data bases. (*Arizona v. Hicks*, 480 U.S. 321, 324 (1987).)

**People v. De Long** You cannot search for the serial number. (*People v. DeLong*, 11 Cal.App.3d. 786 (1970).)

**PC§12090** Makes it unlawful to alter, remove, change, or obliterate a firearms serial number; it does *not*, however, criminalize covering of serial numbers.

**PC§8571.5** Officers may not seize or confiscate any firearm or ammunition from an individual who is lawfully carrying or possessing the firearm or ammunition. Officers may temporarily disarm an individual, however, if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual. An officer who disarms an individual is to return the firearm before discharging the individual unless the officer arrests the individual or seizes the firearm as evidence of the commission of a crime.

**Loaded v. Unloaded**

**PC§12031(g),  
PC§626.9(j)**

A firearm is loaded when “a firearm shall be deemed to be loaded when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or *attached* in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof *attached* to the firearm. A muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.”

***People v. Clark***

Interpreting PC§12031's “attached” language, the courts have found that a firearm is loaded when a shell or cartridge has been placed into a position from which it can be fired. A firearm is not loaded if the shell or cartridge is stored elsewhere and not yet placed into a firing position. (*People v. Clark*, 45 Cal.App.4<sup>th</sup> 1147, 1153 (1996).) **Conversely, a firearm is not loaded if ammunition is not placed into a firing position.**

**PC § 171e,  
PC § 12001**

A firearm shall be deemed loaded whenever both the firearm and unexpended ammunition capable of being discharged from such firearm are in the immediate possession of the same person. **CAUTION:** This definition is *limited* to persons carrying a firearm with the *intent* to commit a *felony* or possession of a firearm on the grounds of the Governor’s Mansion, or any other residence of the Governor, the residence of any other constitutional officer, or the residence of any Member of the Legislature, in the State Capitol, any legislative office, any hearing room in which any committee of the Senate or Assembly is conducting a hearing, the Legislative Office Building at 1020 N Street in the City of Sacramento, or upon the grounds of the State Capitol.

**Restricted Locations**

**PC§171b**

**Public Buildings:** This section prohibits any person from possessing a firearm within public buildings.

**PC§171.5**

**Sterile Areas:** This section prohibits any person from possessing a firearm in a “sterile area” of an airport or passenger vessel terminal.

**PC§626.9**

**School Grounds:** This section prohibits any person from possessing a handgun in a place that the person knows, or reasonably should know, is a school zone, unless it is with the written permission of the school district superintendent, designee, or equivalent school authority.

**School Zone:**

Defined as an area in, or on the grounds of, a public or private school providing instruction in K-12, inclusive, or within a distance of 1,000 feet from the grounds of the public or private school. (PC§626.9(e)(1).)

**PC§626.95**

**Playground/Youth Center:** Pursuant to this section, violation of PC§12025, 12031, 417(a)(2), or 417(b) while on the grounds of a playground, or youth center during hours when it is open for business, classes, or school-related

programs, or at a time when minors are using the facility, when the person knows that he or she is on or within the grounds, are felony wobblers.

**Playground:** Defined as any park or recreational area specifically designed to be used by children that has play equipment installed, including public grounds designed for athletic activities such as baseball, football, soccer, or basketball, or any similar facility located on public or private school grounds, or on city or county parks. (PC§626.95(c)(1).)

**Youth Center:** Defined as any public facility that is used to host recreational or social activities for minors while minors are present. ( PC§626.95(c)(2).)

## UNLOADED FIREARM LAWS

### Carrying Concealed Firearms on the Person

**PC§12025(a)** This section prohibits carrying a concealed handgun upon the person without a license to carry such a firearm. It does not apply to rifles or shotguns. (Penal Code §12001)

**Knowledge:** The person must know that he was carrying a firearm.

**Unlocked-** An otherwise unsecured handgun concealed in an unlocked suitcase carried by a

**Suitcase:** person is sufficiently “upon his person” to constitute a violation. (*People v. Dunn*, 61 Cal.App.3d Supp. 12 (1976).)

**Inoperable-** It is not a defense to PC§12025 that the firearm is inoperable. (*People v.*

**Firearm:** Marroquin, 210 Cal.App.3d 77, 82.)

**PC§12025(f)** **Firearms carried openly in belt holsters are not concealed.**

### Firearms Concealed in a Vehicle by Driver

**PC§12025(a)(1)** This section prohibits carrying concealed handguns within a vehicle by the person controlling or directing the vehicle.

**Knowledge:** The person must know the gun was in the car. (*People v. Jurado*, 25 Cal.App. 3d 1027, 1030-31 (1972); *People v. Rubalcava*, 23 Cal. 4<sup>th</sup> 322, 331-32 (2000).)

**Possession:** The statute does not require that the person have exclusive possession and

**& Control** control of the firearm; it is enough that the person owned and controlled the car, and knew the gun was below the seat, even though the gun was

placed there by someone else and belonged to someone else. (*People v. Davis*, 157 Cal.App. 2d 33, 36 (1958).)

**Unlocked** If a firearm is transported in a vehicle in a manner that it is invisible unless its  
**Carrying** carrying case is opened, it's concealed. (*People v. Hodges*, 70 Cal.App.4<sup>th</sup> 348,  
**Case:** 1355 (1999).)

**PC§12026.1(a)(1)** This section provides additional methods for transporting a firearm in a vehicle.

**Trunk:** It is lawful to transport an unloaded firearm in a vehicle's trunk.

**Locked-** It is lawful to transport an unloaded firearm in a vehicle if it is in a locked container.

**Container:** A "locked container" is a secure container which is fully enclosed and locked by a padlocked, key lock, combination lock, or similar locking device. (PC§12026.1(c).)

### **Firearm Concealed in Vehicle by Occupant**

**PC§12025(a)(3)** This section prohibits any person to cause to be carried concealed a handgun within any vehicle in which he or she is an occupant.

**Knowledge:** The person must know that he caused the firearm to be concealed in the car (concealing a gun between the seats), even if he did not intentionally bring the gun into the car. (*People v. Padilla*, 98 Cal.App.4<sup>th</sup> 127, 134 (2002).)

## **LOADED FIREARM LAWS**

### **Loaded Firearm on Person or in Vehicle**

**PC§12031(a)** This section prohibits carrying a loaded firearm in public in a vehicle or on one's person. This section applies to any public place, on any public street, or in any place where it is unlawful to discharge a firearm.

**Knowledge:** The person must know that he was carrying a firearm. But knowledge that the firearm is loaded is not an element of the offense of carrying a loaded firearm in a public place. (*People v. Dillard*, 154 Cal.App.3d 261 (1984).)

**Inoperable** A firearm does not need to be in working order if it was designed to shoot and

**Firearm:** appears capable of shooting. (*People v. Taylor*, 151 Cal.App. 3d 43f2, 437 (1984).)

## ON LOCATION RETURN OF A FIREARM

If a firearm is determined to be lawfully carried at the time of a Penal Code 12031(e) inspection, the firearm must be immediately returned to the individual. If the firearm was removed from an individual's holster, the officer shall return the firearm to the holstered position for the individual so as to not place the individual in a position of brandishing a firearm in a public place.

## LAW ENFORCEMENT OFFICER SAFETY ACT

On July 22, 2004, the Law Enforcement Officers Safety Act (LEOSA) of 2004, also commonly called "HR 218," became law. (18 U.S.C. §§, 926B, 926C.) This federal law allows "a qualified law enforcement officer" or "a qualified retired law enforcement officer" with identification that meets specified criteria to carry a concealed firearm anywhere in the nation, regardless of most other state and local laws which restrict the possession of concealed weapons.

### Qualified Law Enforcement Officers

In order to be "a qualified law enforcement officer" under the LEOSA, a person must meet the following requirements:

- (1) Is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
- (2) Is authorized by the agency to carry a firearm;
- (3) Is not the subject of any disciplinary action by the agency which could result in suspension or loss of police powers;
- (4) Meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
- (5) Is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance;

AND

- (6) Is not prohibited by Federal law from receiving a firearm.

The identification required LEOSA is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer. The photographic evidence does *not* have to state that the individual is authorized to carry firearms or any other express language in order to be valid under LEOSA.

There is *no* requirement that the law enforcement officer be on duty in order to carry a firearm under LEOSA. Further, the only documentation that a law enforcement officer must carry for LEOSA to apply is photographic identification issued by the government agency identifying the individual as a law enforcement officer or the proper credential carried by the retired law enforcement officer.

**Qualified “Retired” Law Enforcement Officers**

In order to be “a qualified retired law enforcement officer” under the LEOSA, a person must meet the following criteria:

- (1) Be separated from service in good standing from service with a public agency as a law enforcement officer;
- (2) Before such separation, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest;
- (3) (A) Before such separation, served as a law enforcement officer for an aggregate of 10 years or more;  
  
OR  
  
(B) Be separated from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;
- (4) during the most recent 12-month period, has met, at the expense of the individual, the standards for qualification in firearms training for active law enforcement officers, as determined by the former agency of the individual, the State in which the individual resides or, if the State has not established such standards, either a law enforcement agency within the State in which the individual resides or the standards used by a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State;
- (5) (A) has not been officially found by a qualified medical professional employed by the agency to be unqualified for reasons relating to mental health and as a result of this finding will not be issued the photographic identification;  
  
OR  
  
(B) has not entered into an agreement with the agency from which the individual is separating from service in which that individual acknowledges he or she is not qualified under this section for reasons relating to mental health and for those reasons will not receive or accept the photographic identification;
- (6) Is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance;  
  
AND
- (7) Is not prohibited by Federal law from receiving a firearm.

In order to qualify as “identification” under the LEOSA, a credential that is carried by a retired law enforcement officer must meet one of the following criteria:

- (1) A photographic identification issued by the agency from which the individual separated from service as a law enforcement officer that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the active duty standards for qualification in firearms training as established by the agency to carry a firearm of the same type as the concealed firearm;

OR

- (2) (A) A photographic identification issued by the agency from which the individual separated from service as a law enforcement officer;

AND

- (B) A certification issued by the State in which the individual resides or by a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State that indicates that the individual has, not less than 1 year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State or a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State to have met—

- (I) The active duty standards for qualification in firearms training, as established by the State, to carry a firearm of the same type as the concealed firearm; or
- (II) If the State has not established such standards, standards set by any law enforcement agency within that State to carry a firearm of the same type as the concealed firearm.

### **Limits of LEOSA**

LEOSA is broad and the term “firearm” includes ammunition not expressly prohibited by *Federal* law or subject to the provisions of the National Firearms Act.

A law enforcement officer of the Amtrak Police Department, a law enforcement officer of the Federal Reserve, or a law enforcement or police officer of the executive branch of the Federal Government qualifies as an employee of a governmental agency who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest. (18 U.S.C. §926B(f).)

Regarding the requirement that the individual have the statutory power of arrest to be a “qualified law enforcement officer,” California law allows “a peace officer” to make an arrest. (Pen. Code, § 834.) Penal Code sections 830.1 through 832.6 specify the persons who are peace officers and when and where they may use their authority. No one else is considered a peace officer under California law. (Pen. Code, § 830.) Certain federal officers, however, have been deemed to have LEOSA application. For example, LEOSA applies to members of the Coast Guard. *See People v. Booth*, 20 Misc. 3d 549, 552-53, 862 N.Y.S.2d 767, 770 (N.Y. Co. Ct. 2008) (member of Coast Guard covered by section 926B held to be exempt from prosecution for Criminal Possession of Weapon in the Second Degree; see also *Alcoast 549/10*); (See also *LaFontaine v. City of New York* (2009) 2009 U.S. Dist. LEXIS 105838. As

such, LEOSA is likely to also apply to Navy Shore Patrol, Air Force Law Enforcement, and Military Police.

The LEOSA has limits and exceptions. It does not apply to all firearms and weapons. For example, it does not authorize either qualified law enforcement officers, or qualified retired law enforcement officers, to carry any of the following: machineguns, silencers, or destructive devices. Likewise, the LEOSA does not supersede all state laws regarding the possession of concealed firearms. The LEOSA states that it “shall not be construed to supersede or limit the laws of any State that (1) allow *private* persons . . . to prohibit or restrict the possession of concealed firearms on *their property*; or (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base or park.”

### **BOTTOM LINE FOR CARRYING ISSUES**

Law abiding citizens are carrying firearms in compliance with California laws with increased frequency. Police may stop a person who is openly carrying a firearm in a belt holster and may inspect the firearm to see if it is loaded; however, the person may not be arrested for violating PC§12031 if ammunition is not in such a position from which it can be fired, even though the person may have immediate access to matching ammunition. Upon a determination that the firearm is unloaded, the firearm should be returned and the person in possession advised that he or she is free to leave. Further questioning may be done on a voluntary basis.