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Not Just for Counties
Jail Litigation

How PREA Impacts Jails

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"PREA INCIDENT"
You may have heard within your agencies' correctional facilities that any type of sexual assault on an incarcerated inmate or detained person is commonly being referred to as a "PREA incident."

WHAT IS PREA?
In 2003, the Prison Rape Elimination Act (PREA) was unanimously passed in both houses of Congress, was signed on September 4, 2003, by President George W. Bush, and became the first federal legislation addressing the issue of sexual assault in correctional settings. 42 U.S.C.A. §15601.

WHY ARE WE STILL DISCUSSING PREA HERE AT IMLA 12 YEARS LATER ?
There has been an increase in civil litigation suits involving claims against a correctional or detention facility for failing to comply with PREA regulations. This is because it is only within the past year or two that our local jails and community confinement facilities have been required to comply with PREA standards.

The 2003 Act charged the U.S. Department of Justice (DOJ) with gathering data on the incidence of prison rape and created the National Prison Rape Elimination Commission (NPREC) to study the problem of rape on confined persons and to recommend to the DOJ national standards for implementing PREA. It took 9 years until the DOJ promulgated a comprehensive set of regulations implementing PREA on May 17, 2012. These regulations were published in the Federal Register and became effective on August 20, 2012. *See* 28 CFR 115 et. seq.

The rule was immediately binding on the Federal Bureau of Prisons; however, there was a 1-year implementation period, or until August 20, 2013, for state and local corrections agencies and private contractors.

PREA requires agencies to implement many policies, protocols, and technology to improve the prevention and detection of sexual victimization in correctional facilities. This includes a requirement for annual PREA-compliance audits. The standard governing these audits specified that the agency (municipality in our case) must have at least one-third of their facilities audited by August 20, 2014. The second third had to be completed by this past August 20, 2015. It is likely that most of your facilities have been audited within the past year or two, or will be by 2016.

DOES PREA APPLY TO YOUR MUNICIPALITY?
PREA is applicable to most municipalities. The PREA regulations apply to all custodial corrections settings, including prisons, jails, police lock-ups, juvenile detention facilities and community residential settings. They apply to the federal

government, states, and local governments – cities and counties, and also to private prisons that are contracted by government agencies. Moreover, PREA applies to all types of sexual misconduct against an inmate, including assault, abuse, and sexual harassment by fellow inmates and staff.

IS RAPE IN YOUR FACILITIES A REAL PROBLEM?

PREA requires the Bureau of Justice Statistics (BJS) to carry out a comprehensive statistical review of the incidence and effects of prison rape for each calendar year. According to its most recent report, prison rape allegations increased 39% since 2005, and out of the substantiated incidents of sexual victimization, 52% involved only inmates and 48% were staff involved with inmates. *See* www.bjs.gov

WHAT CORRECTION FACILITIES NEED TO KNOW ABOUT PREA

There are separate standards for adult prisons and jails, juvenile facilities, temporary lockups and community confinement facilities. This article focuses on adult prisons and jails, for which there are 49 separate PREA standards.

Key Provisions For Your Agency To Be In Compliance:

Develop a Prevention Plan that encompasses the following:

- Make sure a PREA coordinator is appointed for your facility.
- Develop a written policy mandating Zero Tolerance of sexual abuse and harassment.
- Educate both staff and inmates. PREA requires inmates to be educated within 30 days of intake on their rights and the agency's policies for responding to alleged incidents of sexual victimization.
- Respond to and investigate every allegation of sexual assault or harassment. PREA requires every agency to ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment. The agency shall impose no higher than a preponderance of the evidence standard in determining whether allegations of sexual abuse or sexual harassment are substantiated.
- Screen inmates for risk of sexual victimization, identifying both victims and aggressors.
- Discipline staff and inmates for violations of policy. Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse of a confined person.
- Collect data and receive a PREA-compliance audit during the 3-year period of August 20, 2013 – August 20, 2016, and during each 3-year reporting period thereafter.
- Restrict cross-gender, pat-down searches. For facilities with 50 or more inmates, beginning August 20, 2015, PREA restricts such searches of female inmates in prisons, jails and community confinement facilities. For those with 50 or less inmates, the standards go into effect on August 20, 2017. Notably, there are no proposed standards for cross-gender pat-down searches of males.

COST OF COMPLIANCE

PREA is an admittedly unfunded Congressional mandate with which municipalities must comply. After the NPREC issued its final PREA implementation report, the DOJ hired consulting firm Booz Allen to conduct a cost-impact analysis of implementing PREA standards. While costs vary due to a number of factors, the fact is that PREA compliance will cost municipalities money. The DOJ estimated "that the costs of these standards to all covered facilities, assuming full, nationwide compliance, would be approximately $6.9 billion over the period 2012-2026, or $468.5 million per year. The average compliance cost per facility was estimated at $55,000 for prisons, $50,000 for jails, $24,000 for community confinement facilities, $54,000 for juvenile facilities and $16,000 for police lock-ups. http://ojp.gov/programs/preacostimpact.htm

Further, as discussed later, PREA has the potential to cause cost increases from suits and resulting litigation. However, the cost for implementing the standards may be minimal for your agency when compared to a successful, large monetary award for a civil lawsuit brought by an alleged victim of sexual victimization in a confinement facility.

PREA-BASED LITIGATION

Will you start seeing an increase in litigation based on municipalities' failure to comply with PREA? The technical answer is: "No." However, the practical the answer likely is: "Yes." How can this be?

PREA Does Not Contain a Cause of Action

Although allegations of sexual assault while incarcerated are often referred to as "PREA incidents," it is important to note that PREA itself does not create a private right of action to sue for violations of the PREA or its accompanying regulations. *See Alexander v. Sandoval*, 532 U.S. 275, 291 (2003) (holding that, in the absence of explicit authorization by Congress, no private right of action is created simply by statute.)

Several district courts have also specifically found that PREA "does not create a right of action that is privately enforceable by an individual civil litigant." *See generally LeMasters v. Fabian*, Civil No. 09–702 DSD/AJB, 2009 WL 1405176, at *2 (D.Minn. May 18, 2009); *Rindahl v. Weber*, No. CIV. 08–4041–RHB, 2008 WL 5448232, at *1 (D.S.D. Dec.31, 2008); *Bell v. County of Los Angeles*, No. CV 07–8187–GW(E), 2008 WL 4375768, at *6 (C.D.Cal. Aug.25, 2008); *Pirtle v. Hickman*, No. CV05–146–S–MHW, 2005 WL 3359731, at *1 (D.Idaho Dec.9, 2005).

PREA is intended to address the problem of rape in prison, and to that effect, it authorizes grant money and creates a commission to study the issue. The statute does not grant prisoners any specific rights. In the absence of "an 'unambiguous' intent to confer individual rights," such as a right to sue, courts will not imply

such a right in a federal funding provision. *Chinnici v. Edwards*, No. 1:07–cv–229, 2008 WL 3851294, at *3 (D.Vt. Aug.12, 2008) (quoting *Gonzaga University v. Doe*, 536 U.S. 273, 280, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002)); *Jones v. Schofield*, No. 1:08–CV–7 (WLS), 2009 WL 902154, at *2 (M.D.Ga. Mar.30, 2009) "A reading of the Prison Rape Elimination Act makes clear that its goal is to lessen the occurrence of rapes in prisons across this Country. Its focus concentrates on statistics, standards, developing information, and regulating federal funding in an effort to lessen prison rapes." *Moorman v. Herrington*, No. CIV A 4:08CV-P127-M, 2009 WL 2020669, at *2 (W.D. Ky. July 9, 2009)

Then Why Is It Practical to Assume More PREA-Related Litigation?
PREA standards require raising awareness of PREA. For instance, PREA requires postings and inmate education on PREA and of a person's rights and processes under PREA. The result is that inmates and other confined individuals will better understand the recourses available when allegedly victimized. A municipality has to prepare that more law suits – substantiated or frivolous – will be filed. In addition, because of PREA, municipalities should assume higher expectations from both judges and juries on how detainment and correctional facilities handle claims and investigations of sexual victimization.
PREA will affect a municipality's ability to defend frivolous suits when compliance with PREA is low. Plaintiffs will attempt to argue due process violations given that a municipality did not take necessary actions required by PREA to detect, prevent, and ultimately eliminate the incidence of sexual victimization. This argument creates at least an appearance of negligence. Though PREA does not contain a private right of action for plaintiffs to sue for violations of PREA or its regulations, there may be room for plaintiffs to argue that correctional facilities are negligent in not complying with a law intended to eliminate rape in prisons and other confinement facilities. Further, as discussed below, failure to comply could be used as evidence to demonstrate that prison officials are acting deliberately indifferent to an objectively serious risk of harm.

TYPES OF CASES MUNICIPALITIES CAN EXPECT TO DEFEND

8th Amendment – The Eighth Amendment guarantees that the government cannot subject any person to cruel and unusual punishment. The United States Supreme Court recognized in *Farmer v. Brennan* that a prison official may be held liable for cruel and unusual punishment if the official displayed deliberate indifference towards the sexual abuse of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

One must also consider as a defense whether or not Plaintiff's claims are objectively, sufficiently serious to state a claim under the Eighth Amendment. See *Boddie v. Schnieder*, 105 F.3d 857 (2d Cir. 1997). In *Boddie*, the Second Circuit analyzed an inmate's claims of a series of incidents and found that the allegations (1) failed to state a claim as no single incident was severe enough to be objectively, sufficiently serious, and (2) the incidents were not cumulatively

egregious in the harm they inflicted. The court further held that the isolated episodes of harassment and touching alleged by the plaintiff are despicable, and, if true, they may potentially be the basis of state tort actions. However, they do not involve a harm of federal constitutional proportions as defined by the Supreme Court.

4th Amendment – The Fourth Amendment guarantees protection against unreasonable searches and seizures. Although numerous cases have held that a pat-down search while incarcerated is a routine and necessary part of prison life[1], the Fourth Amendment imposes a standard of reasonableness upon the exercise of discretion by government officials, in order to protect the "privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse,* 440 U.S. 648, 653-54 (1979) (citations omitted).

However, there are a few cases that have allowed plaintiffs to go forward on whether or not a sexually suggestive pat-down search while incarcerated violates the Fourth Amendment. *See Seltzer-Bey v. Delo*, 66 F.3d 961, 962-63 (8th Cir.1995) (allegations that prison guard conducted daily strip searches, made sexual comments about prisoner's penis and buttocks, and rubbed prisoner's buttocks with nightstick were sufficient to withstand motion for summary judgment on plaintiff's Fourth Amendment claims); *Watson v. Jones,* 980 F.2d 1165, 1165-66 (8th Cir.1992) (allegations that prison guard conducted daily routine pat-down searches for two months that consisted of tickling and "a deliberate examination of the genital, anus, lower stomach and thigh areas" were sufficient to withstand summary judgment motion in inmates' suit claiming that sexually harassing and physically intrusive pat-down searches violated Fourth Amendment rights).

14th Amendment – Pretrial detainees are entitled to the same protection under the Fourteenth Amendment as imprisoned convicts receive under the Eighth Amendment. *Sandin v. Conner*, 515 U.S. 472, 493 (1995) The Fourteenth Amendment says that a State shall not "deprive any person of life, liberty, or property, without due process of law." To establish that prison officials failed to prevent harm, a pre-trial detainee must first prove they were "incarcerated under conditions posing a substantial risk of serious harm." *Farmer,* 511 U.S. at 834. This is an objective requirement to ensure the deprivation is a violation of a constitutional right. *See Jensen v. Clarke,* 94 F.3d 1191, 1197 (8th Cir.1996). Second, a pretrial detainee must establish the prison officials were deliberately indifferent to inmate health or safety. *Farmer*, 511 at 834. This is a subjective requirement, mandating the prisoner prove the official both knew of and disregarded "an excessive risk to inmate health or safety." *Id.* at 837.

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[1] *See e.g. Sherwood v. Schofield*, 2013 WL 3943542, at *5 (E.D. Tenn. July 30, 2013) (collecting cases.)

State Law Claims of Assault, Battery, Intentional or Negligent Infliction of Emotional Distress, Negligent Hiring, Training and Supervision
Remember to consider whether governmental immunity applies for Negligent Hiring Training and Supervision, and whether Respondeat Superior applies for claims of Assault and Battery that occurred outside the scope of employment, which will be discussed below.

POTENTIAL DEFENSES
Prison Litigation Reform Act
The Prison Litigation Reform Act ("PLRA") requires incarcerated people to "exhaust administrative remedies" by filing detailed written complaints (known as grievances) with prison officials, often within very short time limits that usually range from 15 to 30 days of an incident. If a person does not fully complete the grievance process within the period, they are generally barred from later bringing a lawsuit in federal court. PREA does extend the timeframe to file grievances related to sexual abuse; however, failure of an inmate to comply could bar them from bringing a § 1983 case. Remember that failure to comply is an affirmative defense that needs to be plead by the defendant facility.

No Physical Injury
42 U.S.C. § 1997e(e) states that no federal civil action may be brought by prisoner for an emotional injury without a showing of physical injury. However, see *Williams v. Prudden*, 67 F. App'x 976, 978 (8th Cir. 2003), citing *Berryhill v. Schriro*, 137 F.3d 1073, 1076 (8th Cir.1998) (holding that sexual assaults are not part of prisoner's punishment, and substantial physical and emotional harm suffered by victim of such abuse are compensable injuries); *see also Liner v. Goord*, 196 F.3d 132, 135 (2d Cir.1999) (holding sexual assaults qualify as physical injuries as matter of common sense, and sexual assaults certainly constitute more than de minimis injury).

Contrast this with *Sherwood v. Schofield*, No. 2:12-CV-50, 2013 WL 3943542, at *3 (E.D. Tenn. July 30, 2013) which held that a prisoner in a correctional facility who files a federal civil action cannot recover on the basis of mental or emotional injury suffered while in custody absent a showing of physical injury.

Scope of Employment –
Will your agency be liable for a sexual assault by a correctional officer under a theory of respondeat superior? Check your jurisdiction, however, many jurisdictions hold that a county cannot be held liable for its employee's sexual assault of a jail inmate, under doctrine of respondeat superior, since sexual assault is never within the scope of one's employment. *See Johnson v. Cook Cnty.*, 526 F. App'x 692, 697 (7th Cir. 2013) (holding that sexual assault *by its very nature* precludes a conclusion that it occurred within the employee's scope of employment under the doctrine of *respondeat superior); Longen v. Fed. Express Corp.*, 113 F. Supp. 2d 1367, 1373 (D. Minn. 2000) (holding that a sexual assault was not within the scope of employment as the employee was not acting in

furtherance of his employer's interests); and *Motelewski v. Maui Police Dep't*, No. CV 11-00778 BMK, 2012 WL 3780188, at *5 (D. Haw. Aug. 30, 2012) *on reconsideration in part*, No. CV 11-00778 BMK, 2013 WL 361762 (D. Haw. Jan. 28, 2013) (holding that sexual assault by an officer occurred outside of the scope of employment as it is not foreseeable that an officer would disobey a policy and commit sexual assault.)

Contrast this. however, with the case of *Mary M. v. City of Los Angeles*, which held that when a police officer on duty misused his official authority by raping a woman whom he had detained, the public entity that employs him could be held vicariously liable, and it was a question of fact for the jury to decide if the rape arose from official misuse of duty. *Id.* 54 Cal. 3d 202, 221, 814 P.2d 1341, 1352 (1991); *See also Doe v. Sipper*, 821 F. Supp. 2d. 384 (D.D.C. 2011)

WHAT OTHER CONSEQUENCES ARE THERE FOR A FAILURE TO COMPLY WITH PREA?

As stated above, PREA does not require full nationwide compliance, nor does it enact a mechanism for the DOJ to direct or enforce such compliance. Instead, PREA provides a financial penalty – "For each fiscal year, any amount that a State would otherwise receive for prison purposes for that fiscal year under a [federal] grant program covered by this subsection, shall be reduced by 5 percent, unless the chief executive of the State submits to the Attorney General (A) a certification that the State has adopted, and is in full compliance with the national PREA standards…or (B) an ASSURANCE that not less than 5 percent of such amount shall be used only for the purpose of enabling the State to adopt, and achieve full compliance with, those national standards…" 42 U.S.C. § 15607(c). It is interesting to note that the above provision *does not* provide financial incentives for local corrections agencies, Federal Bureau of Prisons, or privately operated facilities to implement them.

As another incentive to comply, PREA provides that each year the "Attorney General shall publish a report listing each grantee that is not in compliance with the national standards…" There are 56 jurisdictions that are subject to PREA – 50 states, 5 territories and the District of Columbia.

In case you are curious how your state is doing, go to www.bja.gov, which provides links to the 2014 and 2015 state compliance reports.

In 2014, only 2 states submitted PREA certifications (asserting full compliance with PREA): New Hampshire and New Jersey. In 2015, 11 states submitted certifications: Iowa, Maine, Mississippi, Missouri, New Hampshire, New Jersey, North Dakota, Oregon, Tennessee, and Washington. In addition, 40 jurisdictions submitted assurances (promises that they were working towards compliance). Therefore, only 5 jurisdictions are currently subject to a 5 percent reduction of federal funds.

FUTURE PREA-RELATED LITIGATION

Lots of literature, particularly from civil rights groups, suggests there will be a push to pass successive legislation to amend PREA to include a private cause of action for failure to comply or have other penalties for failure to comply. Also, as PREA becomes more widely known to judges and juries, it could definitely set a standard for which failure to comply will be construed as deliberate indifference.

PREA standards are available online.

To assist states and localities with implementation, BJA has funded the National PREA Resource Center to provide training and technical assistance for those in the field who are working to come into compliance with the standards. These resources are available at www.prearesourcecenter.org.

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