

## **EMPLOYER/AGENCY INFORMATION**

### **FINGERPRINT MANDATES FOR SCHOOL EMPLOYERS**

#### **BACKGROUND**

In response to the murder in Sacramento of a high school student by a temporary custodian, the legislature enacted AB 1610 (Ortiz) and 1612 (Melby) on an urgency basis, effective September 30, 1997. In 1998, additional laws seeking to further reduce the possibility for persons who have been convicted of "serious" or "violent" felonies will be in contact with pupils was approved and enacted by the legislature.

Specifically, **current law requires the fingerprinting of applicants for credentials and temporary teaching certificates, new classified employees and employees of entities that provide services to school districts. It prohibits the retention of current employees (certificated and classified) who have not yet obtained permanent status, and prohibits the employment of new certificated employees, if any of these has been convicted of a serious or violent felony.** These prohibitions are best enforced if the affected employees are fingerprinted. The law does not include fingerprint requirements or prohibitions to "volunteers".

The summary and recommendations below are based on conservative advice from attorney firms serving school districts throughout California that is focused on the goal of protecting pupils and eliminating district exposure to liability. In areas where the law is silent or allows for discretion, it is most often recommend that fingerprints be obtained even when the duty to do so is unclear. School districts/employers that require fingerprinting beyond the statutory requirements need to be aware that the associated costs may not be reimbursed by the state. However, issues of safety, liability and political concerns also need to be taken into consideration.

#### **NEWLY HIRED CLASSIFIED EMPLOYEES**

- (1) **New classified employees hired on or after October 1, 1997 must first be fingerprinted and the district must receive a report from DOJ before they are employed.** Follow the procedures on the DOJ website page "Public Schools--Classified Employees."
- (2) There is **no exemption for classified employees hired in temporary and substitute positions for less than a year.** The only exemption is for pupils (less than 18 years of age) employed at the school they attend, in part-time, temporary jobs.
- (3) DOJ is required to process these cards within 15 working days of receipt of the cards from the district (including mailing time from the district to the DOJ, this will be approximately one month).
- (4) If DOJ cannot meet its 15 working day deadline, it will call the school district/employer.
- (5) If DOJ determines that the applicant has a serious/violent conviction, it will telephone the district. The DOJ will mail the criminal history sheet as a follow-up.
- (6) **Do not hire any classified applicant with a serious or violent felony conviction.**
- (7) Once a criminal history sheet has been received (it will be sent even for those not convicted of serious/violent felonies), each district must determine its employment standards. Specifically, if the district is willing to employ an applicant who has a criminal history involving lesser crimes.

NOTE: *Education Code section 45123 provides that no person convicted of a sex offense may be employed, and no person convicted of a drug offense may be employed unless the governing board determines that the individual has been rehabilitated for at least five years following conviction.*

- (8) **School districts/employers should file a "Contract for Subsequent Arrest Notification Service" with the DOJ. This form enables the DOJ to inform school districts/employers of all subsequent convictions and pending criminal proceedings.** This contract will only apply to persons whose cards are filed after the Contract form has been received by the DOJ, so current employees who are not re-fingerprinted will not be covered by this notification service.
- (9) **There is no exemption from the law for new hires that do not or may not be required to come into contact with pupils.** This exemption applies only for employees of contractors providing services to districts.
- (10) Annually by September 30 school districts/employers must submit to DOJ a list of their prior year employees, indicating whether they were checked for criminal histories (presumably meaning whether they were fingerprinted).

#### **CURRENT NON-PERMANENT CLASSIFIED EMPLOYEES (hired prior to October 1, 1997)**

- (1) **California law prohibits the retention of current temporary, substitute and probationary employees with serious/violent felony convictions.** Although it does not expressly require that these individuals/employees be fingerprinted, it is recommended **that all nonpermanent classified employees (hired prior to October 1, 1997) be fingerprinted (in the same manner as new hires) unless the school district/employer is certain that these employees are conviction-free.** School districts/employers can only be certain of this fact if the employee was printed when hired, has been employed for not more than a year, and the school district/employer filed a contract for subsequent arrest notification before hiring. **Do not rely on the employee's own assurance for this purpose.**
- (2) If DOJ calls to report a conviction for serious or violent felony, place the employee immediately on unpaid leave. The employee may contact DOJ to dispute the information. This is and should not be the responsibility of the district/employer.
- (3) When DOJ provides the school district/employer with the criminal history sheet indicating the conviction, immediately terminate the employee without regard to any other procedures. Terminated employees may contact DOJ directly for additional assistance or clarification.
- (4) If DOJ subsequently advises the district/employer in writing that its earlier criminal history report was erroneous and that in fact the employee has no record of conviction for serious or violent felony, reinstate the employee.

#### **NEWLY HIRED CERTIFICATED EMPLOYEES**

- (1) **California law** does not expressly require that new certificated applicants be fingerprinted. However, it **prohibits the employment of any such applicant who has a serious/violent felony conviction.** Therefore, it is prudent to require such applicants to be printed, and for

districts/employers to refrain from employing certificated applicants until the fingerprints have been processed.

- (2) **New certificated employees should only begin work only after fingerprints** are obtained, processed and the **DOJ provides a criminal history to the district/employer indicating no record of serious or violent felony convictions.**
- (3) School districts/employers should file a Subsequent Arrest Notification Service for all employees.

### **COMMON SUBSTITUTE LISTS FOR CERTIFICATED AND CLASSIFIED EMPLOYEES**

- (1) DOJ emphasizes that the recipient of criminal history information (including a report of "no record") cannot share this information with anyone else. Thus, if a county office or consortium of districts wants to receive substitute teacher clearances on behalf districts, it cannot inform (or provide a copy to) those districts of the information it receives.
- (2) Common substitute lists may be maintained for both certificated and classified positions if the agency that receives the records clearance certifies to the agency maintaining the list that the applicant "meets all eligibility requirements for employment including those imposed by AB 1610 and AB 1612."

NOTE: The Santa Clara County Office of Education (SCCOE) maintains substitute lists for certificated positions only. Substitute classified lists are maintained individually by each school district).

### **APPLICANTS FOR TEMPORARY TEACHING CERTIFICATES**

- (1) A person who meets the requirements for and does not possess a teaching credential may, pending approval of the application, seek a temporary certificate in order to teach until the credential is officially issued by the California Commission on Teacher Credentialing (CCTC). County offices of education are responsible for issuing temporary teaching certificates.
- (2) **California law prohibits county offices from issuing temporary certificates to applicants until fingerprints are obtained, processed, and the DOJ provides a criminal history report to the county office of education indicating no record of serious/violent felony conviction.**
- (3) DOJ accepts fingerprints for this purpose from either a county office or a school district authorized by the CCTC to perform this task on its own. A county office of education may accept a school district's affidavit indicating the completion of a fingerprint check and the confirmation by the DOJ that the applicant has no record of conviction for serious or violent felony. Under such an agreement, the county office of education may issue the temporary certificate based on this affidavit.

### **CONTRACTORS**

- (1) **California State law requires any employer who provides certain services under contract to school districts to certify that no employee who renders those services and who may come in contact with pupils has been convicted of a serious or violent felony.** A school

district/employer receiving the service is not required or authorized to check the records of these employees.

- (2) Services described in the statute include janitorial, administrative, landscaping, transportation, food services or "similar services."
- (3) A school district that contracts with another district to provide the listed services is an employer and is required to make the certification with regard to employees assigned to the contract. For example, a school district that provides transportation services to a neighboring district will have to certify that its bus drivers who are assigned to the contract are free of the prohibited convictions.
- (4) **An exception is provided to entities providing services in emergency or exception situations, such as when pupil health or safety is endangered or repairs are needed to make schools safe and habitable. These exceptions should not be invoked without first consulting with legal counsel.**
- (5) **Contractors are not required to provide a certification if the school district/employer receiving the services determines the contractor's employees will have only limited contact with pupils.** This determination should be based on such factors as the length of time the contractor's employees are on school grounds, whether pupils will be in their proximity, and whether the contractor's employees will be working alone or with others (i.e., other of the contractor's employees, or district employees). If a district/employer makes this determination, appropriate steps must be taken to protect the safety of any pupils who may come into contact with the contractor's employees. This includes requiring a school district/employer employee to be present and/or prohibit the access of contractor employees to areas where pupils are present (including classrooms, rest rooms, storage rooms, etc). In all cases, **the burden of selecting the proper safety measures rests with the school district/employer receiving the services and not with the contractor.**
- (6) In many cases, it will not be reasonable to determine that contractor employees will not come into contact with pupils. For example, a private transportation provider's bus drivers (or the drivers assigned by a district that contracts to supply bus service for another district) will have to be fingerprinted and the contractor will have to give the appropriate certification. The same approach should be applied to regular contractors providing gardening and custodial services.
- (7) In other cases, such as occasional contractors (e.g., repair work), employees working for suppliers, subcontractors on a construction job, and delivery drivers for office supplies, etc., certification is not practicable. Instead, school district/employers need to take steps to ensure these contractor employees are away from pupils and, if necessary, to accompany them as they perform their work.
- (8) **It is recommended that general contractors on construction jobs located on school sites be required to certify that their own employees working on site are free of serious/violent convictions.** There should be time between the acceptance of their bid and the award of the contract for the contractor to obtain the fingerprint clearances necessary. For construction jobs on new sites, where no pupils will be present, certification is not necessary.
- (9) If a contractor certification is necessary because its employees may come into contact with pupils, **it is the responsibility of the contractor, not the school district (unless a district is**

**providing services as a contractor) to have employees fingerprinted.** The district/employer receiving services should make a copy of that information available to the contractor.

- (10) **Before a contractor can apply to have its employees fingerprinted, it must first apply to the DOJ for approval to submit fingerprints.** To do so, it must have already been awarded a contract by the school district/employer and must furnish a copy of the contract to DOJ. School districts/employers should include fingerprint information in any and all materials provided to potential bidders and prospective contractors on construction contracts. School district/employers should also ensure continuing contractors for the services listed in item (2), above, and personal services contracts where the contractor will have contact with pupils (e.g., psychologists, speech therapists, walk-on coaches who will work one-on-one with students without a staff member present) adhere to these requirements.

## **VOLUNTEERS**

- (1) **There is no legal requirement that volunteers be fingerprinted and there is no statutory prohibition against allowing a person with a conviction for a serious or violent felony to volunteer.**
- (2) Since school districts/employers will not knowingly want to allow such persons to have access to pupils except in rare circumstances (e.g., a person speaking to students from experience about life in prison), a criminal background check may be requested from DOJ under Penal Code section 11105.3, using fingerprints.
- (3) Request a CLETS computer check from local law enforcement agencies. This is authorized by Education Code section 35021.1, optional with the law enforcement agency and may require a fee charged by that agency. NOTE: CLETS checks do not provide as much information as a criminal background check under (2), above.
- (4) Review the Megan's law CD-ROM listing of sex offenders, available at local law enforcement agencies. This check relates only to serious and high risk sex offenders.

## **SECURITY OF LAW ENFORCEMENT INFORMATION**

- (1) The only written information provided by the DOJ is a **criminal history** or a copy of a fingerprint card, marked "no record." This information is known as the Criminal Offender Records Information (CORI) and is **available only to a properly designated custodian of records**. This person should be at a reasonable high level, such as the director of personnel, and not a staff person such as a human resources technician, department secretary, or receptionist.
- (2) The **CORI must be kept in a secure (i.e., locked) file, not in personnel files, and it is not a public record.**
- (3) The **CORI must be destroyed (e.g., shredded, not merely discarded) once an employee has been hired.** If an applicant has not been hired, or an employee has been dismissed, because of this information, it may be kept until the processes to challenge the personnel action have been completed.

- (4) **The employee/applicant does not have the right to see CORI information. If the employee/applicant wishes to challenge the record, he/she should be directed to contact the Alleged Inaccuracy Person at the DOJ.** School districts/employers should not make themselves responsible for this contact.

### **PROVING COMPLIANCE WITH THE LAW**

- (1) **School districts cannot maintain criminal history information, even to prove that an employee has not been convicted of the prohibited offenses.**
- (2) **School districts/employers may maintain a log--either in an employee's file or separately for all employees--with the following entries:**
  - (a) **Date fingerprints were taken or submitted to the DOJ** at a live scan station.
  - (b) Date fingerprints were sent to Sacramento (same date as (a) above if live scan is used). School districts/employers may retain a copy of the fingerprint card, but not in the personnel file. The card itself is not CORI information.
  - (c) **Date school district/employer received the criminal history report of "no record".** Do not retain a copy of the report.
  - (d) **Date DOJ informed the school district/employer to report that an applicant/current employee had been convicted of a serious or violent felony.** This should be the same date a current nonpermanent employee is placed on mandatory unpaid leave, a fact that may be recorded in the personnel file--but not the crime. Record the name and title of the DOJ staff person providing the report.
  - (e) **Date school district/employer received the official "criminal history" and reviewer's name.** This should be the same date a current nonpermanent employee is notified of termination, a fact that may be recorded in the personnel file, along with the reason--but not the crime.
  - (f) **Date school district/employer destroyed the criminal history** (shredded or burned, not discarded). Criminal history should not be retained if the applicant is hired. If the applicant is not hired, retain criminal history for a reasonable period (at least six months) in the event the employee/applicant to challenges his/her non-hiring. Be certain that the record is in a locked, secure place.
  - (g) **Date school district/employer eventually destroyed the criminal history if retained to protect against an applicant's challenge.**
  - (h) In all cases, **the school district/employer staff person making the entry should sign his or her name or add initials to the form.**
- (3) DOJ may be able to provide evidence, if necessary, that it gave the required information to the school district/employer.