



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

The Hiring Process – Green Light, Yellow Light, Red Light

Making Good Decisions!

MASA/MOSPRA
2019 Spring Conference

Presented by:
Celynda L. Brasher
Aigner S. Carr

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DIFFERENT
BY DESIGN

TODAY'S AGENDA

- What are the issues?
- What are the legal requirements?
- What are the practical implications?

BACKGROUND INFORMATION

PRE-EMPLOYMENT ISSUES

- **What legal problems may arise when individuals apply to the district?**
 - **Discrimination and retaliation claims**
 - **Issues regarding truthfulness of applications**
 - **Issues related to results of background checks**

SOURCES OF LEGAL OBLIGATIONS

- Federal law
- State law
- Ordinances
- Case law
- Board policies and regulations

APPLICATIONS, RESUMES, AND REFERENCES

- **Is the document complete?**
- **Does the document have indicia of authenticity?**
- **Are there unexplained gaps in employment, attendance at school, or other sequential events?**
- **Has the applicant signed the application waiver form permitting you to inquire beyond listed references?**

APPLICATIONS, RESUMES, AND REFERENCES

- **Who do you know and could contact at prior employers?**
- **Are high-level supervisors listed, or just co-workers?**
- **Has the applicant engaged in frequent job-hopping?**
- **Do the reasons for changing jobs ring true?**

APPLICATIONS, RESUMES, AND REFERENCES

- **Be aware of missing information**
- **Sometimes what is not listed or not said speaks loudly**
- **Listen to cautious references**
- **Ask if the applicant would be rehired**
- **If the reference is negative – pay attention and act accordingly**

AVOIDING LEGAL CLAIMS

- **Treat similarly situated applicants in the same manner**
- **Be aware of comparisons based on race, gender, religion, disability, and other protected characteristics and activity**
- **Compare to current and recent hires and rejections**
- **Be aware of patterns (and “exceptions”)- background checks, qualifications, experience, etc.**

AN APPLICANT WITH A PAST: RAP BACK AND EMPLOYEE FINGERPRINTING

Frequently Asked Questions Regarding Missouri's Required Background Checks- Applicants

- **What questions can you ask regarding criminal history on an application?**
- **In what stage of the application process can you conduct a background check?**
- **Can a school district employee start working before the background check is completed?**
- **What can/should you do if you receive information about an arrest/charge/conviction after an offer of employment is made?**

Frequently Asked Questions Regarding Missouri's Required Background Checks- Hired Employees

- **Can you terminate an employee for false information regarding criminal charges/convictions/arrests on application?**
- **What must a school district report to DESE if it receives information regarding a certificated employee?**
- **How does a school district decide what criminal infractions should lead to termination? Is there a set list?**

Missouri's Background Check Requirements- Section 168.133 RSMo

For all school district employees who will have contact with students:

- ✓ **Fingerprint Check through the Missouri Highway Patrol's System**
- ✓ **Fingerprint Check through the FBI Database**
 - **Typically run by the Missouri Highway Patrol**
- ✓ **MO Case.net Search: "A search of any information publicly available in an electronic format through a public index or single case display."**

Missouri's Background Check Requirements- Section 168.133 RSMo

- **Family Care Safety Registry?**
 - **DHSS does not interpret 168.133 to require FCSR check for School District employees**
 - **However, if an employee has undergone this check and a criminal background check as part of their certification within one year of employment, requirements of 168.133 are considered to be met.**
 - **Still a VERY GOOD idea to run an FCSR check on all employees who will have contact with students**
 - **DHSS interpretation isn't necessarily controlling**
 - **Only way for District to check for substantiated findings of child abuse that did not lead to a conviction**

Missouri's Background Check Requirements- Section 168.133 RSMo

- **DESE Background Check?**
 - Under the statute, DESE is required to facilitate an annual check of certificated employees.
 - DESE Check currently includes:
 - Missouri Highway Patrol Criminal Registry (Fingerprint Check)
 - Federal Criminal Registry (FBI Check)
 - Sexual Offender Registry
 - DESE Check does not include substantiated findings of child abuse that do not lead to criminal convictions.

The Rap Back System

What is Rap Back?

- **“RAP” = Record of Arrests and Prosecutions**
- **“BACK” = Background Checks**
- **Optional service**
- **Operated through the Missouri Automated Criminal History System (MACHS) through State Highway Patrol**

The Rap Back System

What is Rap Back?

- **Rap Back will notify school district through MACHS if a subscribed employee is arrested and/or fingerprinted.**
- **Initial alert does not contain PII concerning the employee**
- **Designated employee must log in to MACHS to request updated criminal history record.**

The Rap Back System

House Bill 1350

- **Passed during 2018 Legislative Session; effective August 28, 2018**
- **In part, updates statutes to include specific information about Rap Back program**
- **Codified at Section 43.540 of the Missouri Revised Statutes**

The Rap Back System

What's New?

- **Now includes National Rap Back program**
 - **Can receive alerts if employee is arrested in a state other than Missouri**
- **Now requires employees to be fingerprinted every six years to be an effective tool**

The Rap Back System

What's New?

- **Section 43.540.6 provides that an employer can request an updated criminal history record only if:**
 - **The employer has abided by all procedures and rules promulgated by the MSHP and FBI regarding the Rap Back programs;**
 - **“The individual upon whom the Rap Back notification is being made has previously had a Missouri and national criminal record review completed for the qualified entity under this section within the previous six years; and”**
 - **The employee is still “actively under the purview of the qualified entity.”**

The Rap Back System

What's New?

- **Requires employers to notify employees that:**
 - **Fingerprints will be retained by the state central repository and the FBI and shall be searched against other fingerprints on file; and**
 - **(if enrolled in National Rap Back program) Fingerprints may continue to be compared to other fingerprints submitted or retained by FBI**

The Rap Back System

What's New?

- **Requires employers to notify employees that:**
 - **Employees have the right to obtain a copy of any criminal record review, including the criminal history records, if any, contained in the report, and**
 - **Employees have the right to challenge the accuracy/completeness of information in such report**

Responsibilities?

- **Each school district is responsible for ensuring that their Rap Back subscriptions are up to date.**
- **Districts are responsible for conducting triennial validations of subscriptions.**
- **Additionally, if a Rap Back update is available, Districts must confirm that the individual is still of interest prior to requesting a new criminal history response.**
- **Districts are encouraged by Highway Patrol to actively keep their subscriptions up to date by unsubscribing once an individual's employment is terminated.**

Triennial Validation

- **Subscriptions stay active for three years.**
- **After the three years have passed, Districts need to validate individuals in order for the Rap Back subscription to be extended.**
- **If subscriptions are not validated, it will result in the permanent removal of these individuals from the Program.**
 - **Re-entry would require additional fingerprinting.**

Frequently Asked Questions Regarding the Rap Back System

- **Previously, employees fingerprinted after July 1, 2015, were automatically enrolled. Is that still the same?**
- **Should school districts enroll all employees?**
- **Should school districts notify employees/applicants of enrollment in Rap Back? Sign off on application?**
- **Is there a risk in having arrest information vs. charges / convictions? Is there a way to receive this information and minimize the risk?**
- **Who should know about the arrests?**
- **Should employees be required to report arrests to the school district? What if they don't report an arrest, and the school district receives a Rap Back Alert?**

What does Rap Back NOT do?

- **Provide the following:**
 - **Notifications for arrests concerning non-serious offenses such as traffic citations**
 - **Notifications for arrests in which the arresting agency fails to follow regulations and does not forward a set of criminal fingerprints to the repository**
 - **Notifications regarding subsequent actions following arrest**
 - **Once notified of arrest, the District is required to do any follow up deemed necessary by Administration**

Potential Liability?

- **Requesting updated criminal history on an individual that is no longer employed by the District or “under the purview of your school district” is not allowed.**
- **Possibly leading to –**
 - **Civil liability**
 - **Criminal liability**

Best Practices Regarding Background Checks

- **If you receive a negative background check (or other criminal information) regarding an applicant, what should you do?**
 - **Applicant cannot start work until the background check process is complete.**
 - **Allow the applicant to explain the results of the check.**
 - **If the applicant was dishonest on his/her application, can be grounds for not hiring.**
 - **Depends on language in application/policies**
 - **Still should be allowed an opportunity to explain- mistakes can be made**
 - **Document the entire process.**
 - **Respond consistently and in line with District policies.**

Best Practices Regarding Background Checks

- **If you receive a negative background check (or other criminal information) regarding a current employee, what should you do?**
 - **Allow the employee to explain the situation.**
 - **Document the entire process.**
 - **Respond consistently and in line with District policies.**
 - **Consider administrative leave.**
 - **Review EEOC guidance.**
 - **Arrest v. Conviction**
 - **Disparate impact**
 - **Job-related and consistent with business necessity**

Best Practices for Facilitating Background Checks and the Rap Back

- **Best to have the person who receives the results be separate and uninvolved in hiring/employment decision.**
- **All results should remain confidential**
 - **Only employees with a “need to know”**
 - **Should be stored in a private area without open access**
 - **Crime to share this information inappropriately**
 - **However, employee is entitled to copy**

CONCLUSION

- **Document, Document, Document**
- **Be consistent in your use of background checks.**
- **Be fair to the employee/applicants**
- **Keep information confidential**
- **Be aware of relevant laws and policies-
AND FOLLOW THEM**
- **Due process considerations**

Questions?

Celynda L. Brasher
Aigner S. Carr

Tueth Keeney Cooper Mohan &
Jackstadt, P.C.

Telephone: 314.880.3615

Email: cbrasher@tuethkeeney.com
acarr@tuethkeeney.com