

## 5 Steps Independent Schools Should Take to Manage Legal Risk in 2019

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### The 5 steps

- 1 Make sure your school is conducting criminal background checks in compliance with legal standards.
- 2 Implement procedures for checking and providing references to make the best hires and reduce legal risk.
- 3 Evaluate the classification of all independent contractors under the new *Dynamex* standard.
- 4 Update contracts with contractors to include provisions protecting the school and its students.
- 5 Ensure that parent contracts and handbooks include key provisions to protect your school.

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### Criminal Background Checks

- What laws apply to school background checks?
- Who should be livescanned?
- Procedures
- Acting on a criminal history report

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### What laws apply to criminal background checks (K-12)?

- Education Code 44237
- California Fair Chance Act
- San Francisco's "Ban the Box" law
- State and Federal Discrimination Laws

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### Who should be Livescanned?

MANDATORY	PERMISSIVE
<p>All school employees who may have contact with minor pupils</p> <p>Employees of certain contractors</p>	<p>Volunteers who have significant or unsupervised contact with students</p> <p>Any individual contractors or employees of contractors who may have contact with students</p> <p>Individuals retained by parents who work on campus—e.g., tutors, specialists</p>

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### Timing for Employee Criminal Background Checks—K-12

- School must receive and evaluate Livescan results before employee starts work on campus.
- Notify candidates of background check requirement early in hiring process, but don't inquire on application or during preliminary interview.
- If background check is performed post-offer, include in offer that employment is conditioned on Livescan results with a deadline for completion.

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**What do you do with a report that shows criminal history?**

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graph LR; A[For convictions on "the list"] --> B[Deny employment]; C[For other convictions] --> D[Conduct an individualized assessment]
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**Individualized Assessment**

- Consider
  - Nature and Gravity of Offense
  - Time passed since conviction
  - Relationship to Job

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**Process for Individualized Assessment**

- Written notice of preliminary decision
- Consideration of additional information from applicant
- Final written notice

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## Risks of Poor Reference Checks

- Time and money spent on a bad hire
- Risk to students and other employees
- Negligent hiring claims

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## Establish procedures for checking candidate references

- Get written authorization from candidate
- Have trained employees check references for each candidate
- Contact all relevant references, making "blind" reference checks
- Maintain records of reference checks, separate from personnel file

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## How to conduct the reference check

- Call the right person
- Use a standard outline for each position
- Get the facts
- Ask the hard questions
  - Performance, Counseling, Termination
  - Treatment of Co-Workers
  - Conduct toward students
  - Complaints about the employee

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## Asking Good Questions

<p>Instead of "Was she a good teacher?"</p>	<ul style="list-style-type: none"> <li>• How did her classroom management skills compare to the skills of other teachers?</li> <li>• Has this candidate ever had any performance concerns for which corrective action was given, either verbally or in writing?</li> <li>• What have you observed about her instructional skills?</li> <li>• Did the school initiate her termination/ask her to leave?</li> </ul>
<p>Instead of "Did he get along with children?"</p>	<ul style="list-style-type: none"> <li>• Has he ever been the subject of a substantiated report of child abuse or sexual misconduct?</li> <li>• Were there any concerns by anyone about his interactions with students?</li> <li>• Did he demonstrate an understanding of appropriate boundaries with students?</li> <li>• Did the school receive any complaints about the candidate's behavior?</li> </ul>

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## Risks in Providing References

IF YOU <i>DO</i> DISCLOSE PROBLEMS	IF YOU <i>DON'T</i> DISCLOSE PROBLEMS
<p>Claims for defamation— <i>The former employee asserts the reference was not true.</i></p> <p>Claims for breach of privacy— <i>The former employee claims the school shared private information without authorization.</i></p>	<p>Claims by the new employer for fraud or misrepresentation</p> <p>Reputational harm for "kicking the can"</p> <p>Children may be harmed</p>

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## How to reduce risk in providing references

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- Have a good policy that designates who will provide references (HOS or Business Manager or HR) and how much they will share.
- Make sure the person providing a reference knows the school's guidelines and has all the information on the employee.
- Get a written release to provide a reference.
- Stick to the facts and follow the policy!

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## Independent Contractors Before Dynamex v. Superior Court

- Multi-factor tests
- Totality of Circumstances
- Control most important factor



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## Dynamex's New "ABC" Test

- Just 3 Factors
- Employer must prove each one
- No "Totality of Circumstances" consideration



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## The Dynamex ABCs

**A**

Worker is free from hiring entity's control and direction over the work; AND

**B**

Work is outside the usual course of hiring entity's business; AND

**C**

Worker is actually and customarily engaged in an independent business of the same nature.

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**"A"**  
Worker Free  
from Control  
and  
Direction

- Compares level of control between "typical" employees and contractors
- Scheduling flexibility or location of work is not enough

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**"B"**  
Not Hiring  
Entity's  
Usual  
Business

- Outside plumbers or electricians for retail store = contractors
- Art instructor teaching at art museum = employee

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**"C"**  
Worker  
actually and  
customarily  
engaged in  
independent  
business

- Performs same type of work
- Takes steps to establish and promote business
- Works for other clients

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## Post-Dynamex Steps

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    graph LR
      A[Review all IC relationships] --> B[Conduct due diligence on ABC factors]
      A --> C[Review written agreements]
  
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## Contracts with Contractors

- Background Checks
- Compliance with Laws
- Policies and Trainings
- Tuberculosis Assessment
- Confidential Information
- Insurance

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## Background Checks

Which contractors **MUST** get them?

- School and classroom janitorial
- Schoolsite administrative
- Schoolsite grounds and landscape maintenance
- Pupil transportation
- Schoolsite food-related

Which contractors **SHOULD** get them?

- Any contractor whose employees will have contact with students on a non-emergency basis

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## Background Checks

Construction Contractor's employees  
DO NOT need background checks if:

- Physical barrier limits contact with students;
- Contractor's employees continually supervised by employee of contractor who has cleared background check; **OR**
- Contractor's employees supervised by school personnel.

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Contractor (not school) has employees submit fingerprints

Contractor reviews results to determine whether employee can work at school

For each employee to be assigned to the school, contractor certifies the employee has not been convicted of offense barring such assignment

Contractor's employee can begin assignment at school **ONLY AFTER** background check complete and certification received

Contractor notifies school of subsequent criminal proceedings or convictions that would bar assignment

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## What other legal compliance should be required by the contract?

- I-9 verification
- Business registration, licensing
- Employment laws
- Tax laws
- San Francisco Ordinances

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## Policies and Trainings

What school policies should contractors' employees be required to follow?

Harassment & Discrimination  
Adult/Student Boundaries

What training should contractors provide their employees?

Harassment  
Mandated Reporting

Schools may want to create a packet of modified school policies applicable to contractors

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Recommended  
Additional  
Contract Terms

### Tuberculosis Assessment

- Contractor to certify that employees submit proof of negative risk assessment or test

### Confidential Information

- Modified version of the school's policy for employee handling of confidential and proprietary information

### Insurance

- Legally required insurance (e.g., workers' compensation, unemployment) and general liability insurance

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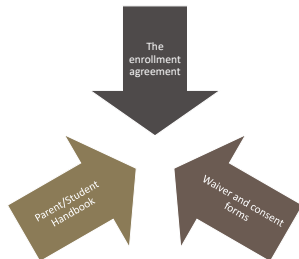
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## The Agreement with Parents



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## The Enrollment Agreement

KEY PROVISIONS TO INCLUDE	WHAT YOU SHOULD NOT INCLUDE
<ul style="list-style-type: none"> <li>Date tuition obligation becomes unconditional</li> <li>School's right to terminate</li> <li>Reenrollment at school's discretion</li> <li>Compliance with school policies</li> <li>Expectations for parents</li> </ul>	<ul style="list-style-type: none"> <li>Disability-related questions</li> </ul>

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## Other Provisions to Consider

- Media consent
- Liability waiver/release
- Arbitration
- Who should sign? Both parents/guardians

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## Student/Parent Handbooks—Legally Required Policies

- Nondiscrimination
- Harassment policy—Education Code 231.5
  - Key provisions of policy
    - Scope of conduct covered—any impact on learning environment or other students, whether on or off campus or via electronic communications/social media
    - Include clear reporting procedures for students, parents and employees to follow
    - Consider including bullying
  - Adult-student boundaries policy

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## Recommended Policies

- Accommodation of Disabilities**
  - Both parent and student disabilities
  - Clear procedures for requesting
  - Describe limits on accommodations
- Student Discipline**
  - Conduct guidelines (on and off campus)
  - Academic standards
  - Procedures
  - Key: Discretion and flexibility for the school
- Expectations for Parents**
  - Enrollment conditioned on parent conduct
  - Respectful communications
  - Boundaries
  - Divorced Parents

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*The above outline includes general information and is not intended to provide legal advice as to any specific factual situation. If you have questions about the application of these laws to a particular situation, you should consult with legal counsel.*

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