YOU’RE HIRED!
LEGAL ISSUES FOR THE SCHOOL BOARD IN HIRING
SCHOOL DISTRICT EMPLOYEES

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Presented By

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These materials are designed to accompany a presentation and do not constitute legal advice.
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LEGAL ISSUES FOR THE SCHOOL BOARD IN HIRING SCHOOL DISTRICT EMPLOYEES

I. The School Board’s General Statutory Authority.
   A. Minnesota Statutes, §123B.09, subd. 1 provides:
      1. The School Board is charged with the care, management and control of the affairs of the school district.
      2. The School Board has the general charge of the business of the district, the schoolhouse, and of the interest of the schools thereof. The Board’s authority to conduct the business of the district includes implied powers in addition to any specific powers granted by the legislature.

   B. Minnesota Statutes, §123B.09, subds. 7 and 8.
      The Board must superintend and manage the schools of the district; adopt rules for their organization, government, and instructions; keep registers; and prescribe textbooks and courses of study.

II. The School Board’s Functions Related to Hiring the Superintendent.
   A. Selecting and Hiring the Superintendent of Schools.
      1. Minnesota Statutes, §123B.143 provides school boards the exclusive authority for “selection and employment of a superintendent.”

   B. Legal Issues During the Hiring Process For Superintendent.
      1. The Open Meeting Law.
         a. General Rule: The Open Meeting Law (Minn. Stat. §13D.01) applies to a gathering of a quorum or the members of a school board or committee of a school board.
         b. Search Committees and Selection Committees.
            • General Rule: Committees with less than a quorum of school board members and without any decision-making authority to act on behalf of the School Board are not subject to the Open Meeting Law.
            • There is not a “bright line” rule in determining when decision-making is sufficient to trigger the Open Meeting Law. The greater the degree and
finality of decision-making by a committee, the more likely the Open Meeting Law applies. The continuum of decision-making authority must be analyzed on a case-by-case basis. For example:

- It is unlikely that the Open Meeting Law is triggered by a committee that only screens and recommends rejection or inclusion of applications based on objective qualifications/criteria established by the school board.

- A committee authorized by the school board to exercise discretion to eliminate applicants and determine which applicants are candidates for further consideration by the school board would likely be subject to the Open Meeting Law.

**NOTE**: If the committee sends all applicants to the school board for consideration with ranking and/or recommendations, it is less likely that the committee is governed by the Open Meeting Law.

- If a committee is appointed by the school board with the authority to determine which applicants should be interviewed by the board (and thus considered “finalists”), the committee meetings are likely governed by the Open Meeting Law.

- The Open Meeting Law will apply to a committee that has been delegated authority by the school board to select who should be hired for the superintendent position.

*Best Practice*: Apply the Open Meeting Law to committees with authority to do anything more than make recommendations to the school board. Committees with the power to exercise discretion that eliminates applicants from the applicant pool may be deemed to have taken action on behalf of the school board.

c. “Serial” Meetings or Interviews with Applicants May Violate the Open Meeting Law.

- The test is whether serial interviews were held to avoid the Open Meeting Law.

- Electronic communication regarding School District business (serial or otherwise) that includes a quorum or more of School Board members is subject to the Open Meeting Law.

2. The Minnesota Government Data Practices Act

a. Minnesota Statutes, §13.43, subd. 3 governs the classification of data on applicants. The following information is public data:
Veteran status relevant to test scores
Rank on eligible list
Job history
Education and training
Work availability

b. The names of applicants are private data during the entire hiring process and thereafter, unless the applicant is or was a finalist. “Finalist” is defined as an applicant who was selected to be interviewed by the School Board.

NOTE: Applicants who are interviewed by entities other than the School Board (i.e. consulting firm, human resources director) are not “finalists” until they are selected for a Board interview.

Best Practices: Applicants should be informed that their name will be public data if they are selected to be interviewed by the School Board, even if they decline the interview. Applicants should also be informed of the approximate date by which interviewees will be selected.


a. During school board meetings, applicants should be referred to by an assigned number or letter until they are “finalists”.

NOTE: Even confirmation of an applicant’s name violates the Minnesota Government Data Practices Act if the applicant is not a finalist.

b. The release of public data regarding an applicant (i.e. job history) must be limited to avoid disclosure of the identity of the applicant until he/she is a “finalist”. For example, “job history” should not include positions the applicant held in particular school districts. However, upon request, sufficient information should be provided to satisfy public policy; such as, the applicant’s years of experience and positions held in unnamed school districts.

c. Under the Minnesota Government Data Practices Act, applicants have the right to obtain data from the School District about themselves, including interview notes, e-mails between Board members and/or administrators, and documentation of recommendations and ranking.

4. Contract Negotiation

The School Board may designate a school board member, administrator and/or legal counsel as the contact person(s) to negotiate the terms of a candidate’s employment contract. The terms of the contract and executed contract must be approved at a School Board meeting.
C. Pre-Hire Screening.

1. Reference checks on applicants.
   a. Do thorough checks with all prior employers;
   b. Be alert for nebulous responses;
   c. Questions to ask in reference checks are:
      - Was the employee discharged?
      - Was the employee proposed for discharge:
        (i) What was the result?
      - Did the employee resign in any of the following circumstances:
        (i) Following investigation?
        (ii) Pending discharge?
        (iii) Upon request?
        (iv) Pursuant to a separation/settlement agreement?

NOTE: Under Minnesota Statutes, §123B.143, subd. 2(b) and (c):

Before a person may enter into a superintendent’s contract with a board, the candidate shall disclose in writing the existence and terms of any previous buyout agreement, including amounts and the purpose for the payments, relating to the superintendent’s contract with another board. The disclosure made under this paragraph is public data. The contract of a person who fails to make a timely disclosure is void.

2. Request copies of all public personnel data;

   Certain personnel data is public and must be released pursuant to a request, including:

   a. The existence and status of any complaints or charges against the employee (regardless of whether the complaints resulted in disciplinary action);

   b. The final disposition of any disciplinary action, together with the specific reasons for the action and data documenting the basis of the action, except data that would identify confidential sources or employees of the school district;

   c. The terms of any agreement settling any dispute arising out of the employment relationship, including a buyout agreement;
d. For certain employees (business managers, human resource directors, athletic directors (who spend at least 50% of time in administration, personnel and supervision) superintendents, principals, directors and chief financial officer data relating to a complaint or charge against the employee, if disciplinary action is taken or the employee resigns while the complaint is pending or there is a settlement agreement regarding potential claims arising out of the employee’s conduct; and

e. Private personnel data on a current or former employee related to acts of violence toward or sexual contact with a student, if an investigation conducted by or on behalf of the school district or law enforcement affirm the allegations in writing and the investigation results in the resignation of the subject of the data.

3. If the school district wants to seek private data from a previous employer, obtain a signed authorization for release of information from the applicant, which should include the following:

- release of all written observations, evaluations, reprimands, notices of deficiency, or other private data gathered and maintained while employed with Independent School District No. ___.
- the information will be used for purposes related to possible employment.
- one year duration.
- waiver of any and all claims for liability arising out of release of the information (specify) by Independent School District No. ___.

NOTE: State law provides significant immunity to employers regarding employment references. Minn. Stat. § 181.967.

4. Obtain Copies of Required Licenses, Certifications, Transcripts, etc.

a. Confirm licensure through the Minnesota Department of Education.

b. For teachers and other licensed employees (i.e., superintendents and other administrators) contact the Minnesota Board of Teaching or the Minnesota Board of Administrators for any public data regarding the action on an applicant’s license.

D. Interviewing.

1. It is important to remember that illegal inquiries can occur in interviews, as well as application forms. Make sure inquiries do not unlawfully involve protected status which may give rise to discrimination claims.
2. Focus on the applicant’s qualifications for the position.

3. Use an interview outline that includes standardized, job-related questions and document the responses.

4. Involve more than one interviewer, if possible.

5. Develop a more complete understanding of the applicant’s strengths, weaknesses and qualifications for the position.

6. Notice gaps in work history or frequent job movement and ask for explanations.

7. Ask for explanations for any missing or ambiguous information on the application.

8. Do not make promises of permanent or long-term employment.

9. Examples of lawful questions during interviews.
   a. Technical qualifications;
   b. What does the applicant perceive the job to be?
   c. Educational and other background relevant to the position;
   d. How does applicant feel about present job?
   e. Why would you like to work here?
   f. Where else have you worked?
   g. What jobs did you hold?
   h. What will your supervisor at [previous employer] tell me about your performance?
   i. Why did you leave previous employers?
   j. What do you think you did particularly well when you were at [previous employers]?
   k. Was there room for improvement in your performance? Where?
   l. Have you ever been discharged or asked to resign from any job?
m. For teachers or other employees governed by continuing contract law: was your employment contract non-renewed during a probationary period? If yes, in what year (1st, 2nd or 3rd)?

**NOTE:** The answer to this question is important in determining whether a teacher has a one year or a three year probationary period.

n. Describe your relationships with your co-employees [at previous employers]?

o. What positive things do you think you will bring to this position?

p. Behavioral and situational questions:
   - How did you handle [specific situation] in the past?
   - How would you handle [specific situation] in this position?

q. Have you ever been disciplined or otherwise notified of deficiencies in your conduct or performance?

r. Has an employer made reports regarding you to the Board of Teaching, Board of Administrators, Department of Education, law enforcement, etc.?

s. Have you ever been the subject of an investigation by an employer, Board of Teaching, Department of Education, etc.?

t. For licensed employees: have any conditions ever been placed on your license or has it been suspended or revoked?

E. **Post-offer Screening.**

1. Criminal background checks.

   a. School districts must obtain a state criminal background check from the Minnesota Bureau of Criminal Apprehension (BCA) on all individuals who are offered employment and all individuals (except enrolled student volunteers) who are offered (paid or unpaid) positions for athletic coaching or extra-curricular academic coaching services. Minn. Stat. §123B.03, subd. 1.

   b. School District’s may to do criminal background checks on other volunteers, independent contractors and student employees.

   c. Limited exceptions:
• Not required if the applicant holds an initial entrance license issued from the Board of Teaching or Department of Education within the twelve months preceding an offer of employment.

• May use the result of a criminal background check conducted by another school district if:

1. accessible;
2. done within previous twelve months;
3. the applicant gives consent to access the background check; and
4. there is no reason to believe the applicant has committed an act subsequent to the check that would disqualify him/her for employment.

d. For all non-state residents who are offered employment with the school district, the school district must request a criminal history background check on such applicants from the BCA and from the government agency performing the same function in the resident state; or, if no government agency performs the same function in the resident state, from the Federal Bureau of Investigation.

e. Applicants must sign an informed consent form and pay the fee for the state criminal background check.

f. School districts may conduct a federal criminal background check through the BCA in accordance with the Child Protection Background Check Act. For federal criminal background checks, the school district must submit a consent form signed by the applicant, a set of fingerprints on an FBI applicant card, and the fee (school district must pay).

g. Criminal background checks through the BCA are not “foolproof.” Deeper background checks are advisable.

2. Background checks with the Board of Teaching are required in regard to disciplinary action against a teacher. Minn. Stat. §123B.03, subd. 1(a).

3. Applicants who are denied employment based on the outcome of either a criminal background check or Board of Teaching check must be so informed. Minn. Stat. §123B.03, subd. 1(b).

4. Background checks conducted by third party firms are allowed; however, state law requires that a school district which contracts for criminal background checks must, among other requirements, “provide the state compact officer with the name of the proposed third party contractor and a copy of the proposed contract.” Minn. Stat. §123B.03, subd. 4. Also, there are procedural requirements under the Fair Credit Reporting Act (FCRA) and Minnesota Access to Consumer Reports Act (MACRA).
NOTE: Whether the “Ban the Box” legislation applies to school districts remains an open question. The Minnesota School Boards Association and the Kennedy & Graven law firm have requested an opinion from the Minnesota Department of Human Rights regarding whether the statute – which prohibits inquiries regarding an applicant’s criminal record/history prior to an interview or before a conditional offer of employment – applies to school districts.

F. Medical Examinations.

1. Pre-offer medical examinations are prohibited.

2. Post-offer medical examinations are lawful if:
   • The examination tests are only job-related requirements.

3. If an employer requires an applicant to submit to a physical examination, the employer must bear the full cost of that examination. Minn. Stat. §181.61.

4. Health history questionnaires are prohibited under Minnesota law.

5. Under Minnesota law, if any health care records or medical information adversely affects any hiring decision, the employer must notify the affected party of that fact within ten (10) days of the employer’s final decision.

6. Under state and federal law, all medical information on applicants (and employees) must be kept confidential.

7. Medical information must be kept in a separate file from employees’ personnel files.

G. Search Engine and Social Network Checks.

1. Google searches or checking social networking websites presents a high risk of inadvertently obtaining information which will taint the legality of the selection process, i.e., photographs, race, religion, sexual orientation, marital status, disability and military status.

2. Inconsistent decision-making as to when searches are done will increase potential discrimination liability.

3. Information is unreliable.

4. There have been a total of seven bills (four House, three Senate) in the Minnesota Legislature in the last two years which would have prohibited employers from requiring that an applicant or employee provide his/her password to a social networking site. No action was taken on the bills; however, it is likely that another bill will be introduced in the 2015 Session. Six states have passed similar legislation, and twenty-eight states have bills pending.
5. Several members of Congress have asked the EEOC and the Department of Justice to investigate the practice of requesting passwords from applicants/employees, and Facebook has suggested that it might take legal action against employers who gain access to their employees’ Facebook accounts.

III. Teachers and Other Employees.

A. Statutory Authority.

1. Minnesota Statutes §123B.143, subd. 1(2) provides that the superintendent shall “recommend to the Board employment and dismissal of teachers.”

2. Minnesota Statutes §122A.40, subd. 3 states that “school board must hire or dismiss teachers at duly called meetings.”

3. Employees are hired by school board action.

NOTE: Where a husband and wife, brother and sister, or two brothers or two sisters, constitute a quorum, no contract employing a teacher may be made or authorized except upon the unanimous vote of the full school board. Also, the school board may not employ any teacher related by blood or marriage (within the 4th degree) to a school board member except by an unanimous vote of the school board.

B. Policy Authority.

It within the authority and responsibility of the school board to develop and adopt policies related to hiring employees. Such policies typically include the delegation of authority to the superintendent or other administrators to select personnel, a description of the school district’s hiring process and practices, and the level and timing of any school board involvement/approval.

C. School Board Access to Information Regarding Applicants.

1. The Minnesota Government Data Practices Act, Minn. Stat. §13.43 defines public data on applicants as: veteran data; relevant test scores, rank on eligible list; job history; education and training; and work availability. The names of applicants are private data unless they are “finalists”—which means selected to be interviewed by the school board.

2. Access to private data on applicants (and other employees).

   a. Under Minnesota Rules Part 1205.0400, subp. 2, private data regarding applicants may be disclosed to individuals within a government entity (i.e. school board members) whose “work assignment reasonably requires access” to the data. Also, subpart 3 requires that “the responsibility authority shall
establish written procedures to assure that access is gained only by those parties identified in subp. 2.”


- City council members could access public data.

- If the “responsible authority” for the City determines that city council members’ work assignments reasonably require access to personnel data, the council members may gain access to private data. Such access must be pursuant to written procedures adopted by the City.