



Criminal History Reviews of Contractor Employees

In 2007, the Texas Legislature passed Senate Bill 9 (SB 9), which requires review of the criminal histories of school district employees and other persons who have contact with students at school. SB 9 includes a requirement that contractors review the criminal histories of employees who have direct student contact. Contractor employees with certain convictions are prohibited from working at a school district. In this document, we address frequently asked questions about SB 9 and contractor employees.

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TYPES OF CRIMINAL HISTORY RECORDS

The term *criminal history* means different things in different contexts. No comprehensive database exists for all of the arrests, charges, indictments, convictions, and other adjudications in the United States. Instead, the nation's criminal record system is a conglomeration of federal, state, and local databases.

The criminal history reviews required by SB 9 involve either state criminal histories or national criminal histories:

- **State criminal history records** (*criminal history record information* or **CHRI**): information collected by Texas Department of Public Safety (DPS), a law enforcement or criminal justice agency, or a private entity, that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.¹ With the possible exception of reports from private agencies, these records include only data from Texas.

¹ Tex. Gov't Code § 411.082(2); 19 Tex. Admin. Code § 153.1101(4).

- National criminal history records (*national criminal history record information* or NCHRI): criminal history records from DPS and the FBI retrieved through fingerprint identification information. The FBI's records include data from Texas and other states.²

In other words, CHRI are state-wide, name-based or fingerprint-based criminal histories and NCHRI are national, fingerprint-based criminal histories. National criminal histories are conducted through DPS and require fingerprints, state-issued photo identification, and other identifying information.

CONTRACTOR RESPONSIBILITIES

Q. Which contractors does SB 9 apply to?

- A. SB 9 does not apply to every contractor: It applies only to an entity that contracts with a district to provide *services*. Tex. Educ. Code § 22.0834(a). In other words, it does not apply to a contract for the purchase of goods or real estate. As discussed below, SB 9 also applies to subcontractors of service contractors.

TEA interprets the terms *contract to provide services* and *contractor* broadly. A *service contractor* is an entity that “contracts or agrees with a [district], by written agreement or verbal understanding, to provide services through individuals who receive compensation.” Law enforcement agencies and the Department of Family and Protective Services are excepted from the definition when conducting an investigation or intervention regarding an alleged crime or act of child abuse on a school campus. 19 Tex. Admin. Code § 153.1101(10).

Q. What responsibilities does a contractor have?

- A. A contractor has five general responsibilities:
- For covered employees, obtain state or national criminal history records, as required by statute;
 - For employees who are not covered, maintain any conditions or precautions that prevent the employees from being covered;
 - Upon request, provide identifying information on covered employees to the district;
 - Prohibit contractor and subcontractor employees with disqualifying convictions from serving at a district;
 - Certify compliance—for itself and any subcontractors—to the district.

19 Tex. Admin. Code § 153.1117(c).

Each of these responsibilities is addressed below. The definition of “covered employees” is addressed in a separate section of these FAQs.

² Tex. Educ. Code § 22.081(2); 19 Tex. Admin. Code § 153.1101(8).

Q. Where does a contractor obtain criminal histories on covered employees?

- A. The source of criminal history information depends on the covered employee's date of employment:
- Employed before January 1, 2008: contractors must obtain state criminal histories (CHRI). Tex. Educ. Code § 22.0834(g).
 - Offered employment on or after January 1, 2008: contractors must obtain national criminal histories (NCHRI). Tex. Educ. Code § 22.0834(a), (b).

If a national criminal history is required, the contractor must create an account with DPS to access the criminal history through the Fingerprint-based Applicant Clearinghouse of Texas (FACT).

Q. What is the deadline for a contractor to obtain the criminal history record information on a covered employee?

- A. It depends on when the covered employee was hired.
- Before January 1, 2008: "As soon as practicable." Act of May 28, 2007, 80th Leg., R.S., S.B. 9, § 30.
 - On or after January 1, 2008: "Before or immediately after employing or securing the services" of the covered employee. Tex. Educ. Code § 22.0834(c).

Q. How is a covered employee's "date of employment" determined?

- A. Determining the date of employment is very important. The date of employment dictates the type of criminal history—national or state—and the deadline for obtaining the criminal history. The determination of "date of employment" depends on whether the employer is a contractor or subcontractor, or if the person is an independent contractor:
- Contractor: if the covered employee is employed by the contractor, the date of employment is the date the employee began providing services to the contractor for compensation;
 - Subcontractor: if the covered employee is employed by a subcontractor, the date of employment is the later of: (1) the date the contractor secured the services of the subcontractor; and (2) the date the subcontractor secured the services of the employee.
 - Independent contractor: if the covered employee is an independent contractor, the date of employment is the date of the contract or agreement with the district;

19 Tex. Admin. Code § 153.1101(5).

The *date of securing services* is the date the employee or subcontractor accepts an offer from the service contractor for a specific job position or for the performance of a specific project that is to begin on a date that is certain or reasonable ascertainable. 19 Tex. Admin. Code § 153.1101(6).

Examples:

- **Employed by contractor:** School Janitors, Inc. hired Joe Smith on April 1, 2007. On January 15, 2008, School Janitors, Inc. signed a contract with Texas Star ISD to provide janitorial services. School Janitors, Inc. has assigned Joe to work at Texas Star High School. Joe's "date of employment" for SB 9 purposes is the date he began working for School Janitors, Inc. Because this date is before January 1, 2008, School Janitors, Inc. must obtain Joe's criminal history from a law enforcement or criminal justice agency, or a private entity, as soon as practicable.
- **Employed by subcontractor:** On August 15, 2008, School Janitors, Inc. subcontracts with Jones Janitorial Partners to assist with janitorial services at Texas Star ISD sporting events for the 2008-2009 school year. Jones Janitorial Partners has two employees: Mary and Bob Jones, who have owned and operated the company for five years. Mary and Bob's date of employment for SB 9 purposes is the date of the contract between School Janitors, Inc. and Jones Janitorial Partners—August 15, 2008—because that is later than 2003, when Mary and Bob began the company. Because the date of the contract is after January 1, 2008, Mary and Bob must submit to a fingerprint-based, national criminal history review.
- **Independent contractor:** On December 15, 2007, Texas Star ISD contracted with Lucy Brown to provide educational diagnostician services for the spring semester of the 2007-08 school year. Lucy's date of employment for SB 9 purposes is December 15, 2007, even though she will not begin work under the contract until after January 1, 2008. Therefore, Lucy must submit to a state or local criminal history review as soon as practicable.

Q. Are contractors required to obtain criminal histories on covered employees who are certified by the State Board for Educator Certification?

- A. Yes. Certified, covered employees fall under the statutory provisions for covered employees who are not subject to a national criminal history review: A state-level CHRI check is required. Tex. Educ. Code § 22.0834(g). Therefore, a contractor must obtain the criminal history of a certified employee from any law enforcement or criminal justice agency or from a private entity, regardless of the date of employment. 19 Tex. Admin. Code § 153.1117(c)(1).

Q. How does a contractor certify compliance with the criminal history review requirements?

- A. A contractor must certify to the district that it has received the criminal history record information for all covered contract employees providing the contracted services. Tex. Educ. Code § 22.0834(d); 19 Tex. Admin. Code § 153.1117(c)(5). The certification encompasses both employees of the contractor and of any subcontractors. 19 Tex. Admin. Code § 153.1101(3).

There is no official form for these certifications. However, TASB Legal Services has developed sample forms for contractors and independent contractors. The sample forms are attached to these FAQs.

Q. Are employees of subcontractors considered to be covered employees?

- A. Yes. TEA's rules define *covered contract employee* to include an individual who is employed or offered employment by a subcontractor of a service contractor. 19 Tex. Admin. Code § 153.1101(3). In the comments to its rules, TEA asserted that any other interpretation would render the statute ineffective in protecting schoolchildren and would favor private interest over public interest. 33 Tex. Reg. 9235 (Nov. 14, 2008).

DISTRICT RESPONSIBILITIES

Q. What are a district's responsibilities regarding contractors and their employees?

- A. Districts have three responsibilities:

- Obtain certification of compliance from each contractor;
- Prohibit contractor and subcontractor employees with disqualifying convictions from serving at a district;
- Report to SBEC any certified contractor employees with a reported criminal history.

19 Tex. Admin. Code § 153.1117(b).

Q. What if a district has an urgent need for services and there is not enough time to obtain the criminal history of a contractor employee?

- A. In an emergency, a district may allow a contractor employee or employees who have not submitted to a criminal history review to enter district property if the employee or employees are accompanied by a district employee. Tex. Educ. Code § 22.0834(f); 19 Tex. Admin. Code § 153.1117(b)(2). The statute does not define the term *emergency*, but it does provide that the district may adopt rules regarding this exception. Accordingly, it is the district's responsibility to determine whether an emergency exists for purposes of this exception.

Q. Can a district obtain criminal histories on covered employees for the contractor?

- A. No. The Texas Education Code requires the *contractor* to obtain the criminal histories of covered employees. In the case of covered persons employed after January 1, 2008, the contractor, not the district, must contact DPS directly to set up an account to obtain national criminal histories. Tex. Educ. Code § 22.0834(c), (g).

Q. Can a contractor show a covered employee's criminal history record to the district?

A. No. According to DPS, an individual's criminal history is confidential and the contractor may not show it to the district. *See* Tex. Gov't Code § 411.084. It is a criminal offense for a person to knowingly or intentionally obtain criminal history record information in an unauthorized manner, use the information for an unauthorized purpose, or disclose the information to a person who is not entitled to the information. Tex. Gov't Code § 411.085.

Q. Can a district ask a contractor for a list of contractor and subcontractor employees?

A. Yes. A contractor must provide to a district, upon request, the information necessary for the district to obtain criminal history information for the covered employees of the contractor or subcontractor. 19 Tex. Admin. Code § 153.1117(c)(4).

Q. Can a district obtain criminal histories of contractor employees after the contractor has obtained them?

A. Yes. A district may obtain the national criminal histories of contractor employees from DPS's clearinghouse. Tex. Educ. Code § 22.0834(e). If a contractor employee was not subject to a national criminal history review, the district may obtain a state criminal history. Tex. Educ. Code § 22.0834(h). In either case, the district must pay the cost of obtaining the histories, unless the district and the contractor have agreed otherwise. By subscribing to the clearinghouse for contractor employees, the district has the benefit of obtaining electronic updates should a contractor employee be arrested or otherwise have a change in criminal history.

Q. How often may a district obtain criminal history records on contractor employees?

A. A district may obtain the criminal histories of contractor employees as often as the district wishes. In the past, a district could obtain the criminal history of a person only two times each year. SB 9 removed this limit. Tex. Gov't Code § 411.097(b). If a district subscribes to the DPS's clearinghouse for a specific contractor employee, however, the district will receive electronic updates should the contractor employee's status change.

For practical purposes, districts may be more concerned with obtaining updated employee lists from contractors than with obtaining updated criminal history records. Particularly on construction projects, the ebb and flow of workers may necessitate careful tracking of staff to ensure that the district knows who is working on the project. A district may want to build into its agreement a requirement that the contractor provide regular updates.

COVERED EMPLOYEES

Q. Which employees of a contractor are “covered”?

A. A covered employee is an employee who will have continuing duties relating to the contracted services and direct contact with students. Tex. Educ. Code § 22.0834(a), (g); *see also* 19 Tex. Admin. Code § 153.1101(3). The same rule applies to independent contractors. The test for a whether a person is covered has three prongs: The person must:

- 1) work on a contract for services;
- 2) have continuing duties related to the contract; *and*
- 3) have direct contact with students.³

This is an “all or nothing” test.⁴ If all three prongs are met, a criminal history review is *mandatory*. If all three prongs are not met, SB 9 does not authorize the contractor or the district to obtain the employee’s criminal history through DPS’s clearinghouse. The contractor or the district may nonetheless obtain the employee’s criminal history from DPS (although not through the clearinghouse) if the employee provides written consent.

Q. What are “continuing duties” related to the contracted services?

A. *Continuing duties* are those work duties that are performed pursuant to a contract on a regular, repeated basis rather than infrequently or one-time only. 19 Tex. Admin. Code § 153.1101(2).

Q. What is “direct contact with students”?

A. *Direct contact with students* is contact that results from activities that provide substantial opportunity for verbal or physical interaction with students that is not supervised by a certified educator or other professional district employee. Examples include unsupervised coaching, tutoring, or other services to students.

On the other hand, contact with students that results from services that do not provide substantial opportunity for unsupervised interaction with a student or students is not, by itself, direct contact with students. Examples include addressing an assembly, officiating a sports contest, or judging an extracurricular event. 19 Tex. Admin. Code § 153.1101(7).

³ TEA’s rules identify an exception: A student enrolled in the district where the services are performed is not a *covered employee*. 19 Tex. Admin. Code § 153.1101(3)(D).

⁴ Districts should note that this test applies to contractor employees, not to district employees. District employees are subject to criminal history background checks even if they have no student contact.

Even casual contact may meet this definition. One commenter asked TEA to limit the rules to one-on-one interaction and to provide that *direct contact* does not include “passing by a student in a public location.” TEA rejected both requests, stating that no basis existed in the legislative history for limiting *direct contact* to one-on-one interaction or for concluding that passing a student in a public location, such as a school hallway, does not provide *substantial opportunity* for direct contact. 33 Tex. Reg. 9234-5 (Nov. 14, 2008).

Q. When is a covered employee prohibited from working at a district?

- A. A district may not allow a contractor employee to serve at the district if the district obtains information that: (a) the person has been convicted of a Title 5 felony against a minor or student; (b) the person is required to register as a sex offender because of an offense against a minor or student; or (c) the person has been convicted of a similar offense under federal law or the laws of another state. Tex. Educ. Code § 22.085(c). Title 5 felonies are those listed in Title 5 of the Texas Penal Code and include murder, attempted murder, assault, sexual assault, and similar offenses.

These are minimum standards. A district may adopt stricter standards for eligibility to work on district contracts. See 19 Tex. Admin. Code § 153.1117(b)(3).

Q. Can a contractor avoid SB 9 by taking steps to prevent employees from having direct contact with students?

- A. Yes, but the contractor must make reasonable efforts to ensure that any such conditions or precautions are maintained throughout the project. 19 Tex. Admin. Code § 153.1117(c)(1), (5). For example, on a construction project at a campus where students are present, the contractor might erect a fence or other barrier around the project, provide sanitary facilities on the construction site, and prohibit its employees from having contact with students or going into school buildings. The contractor then has a responsibility to make reasonable efforts to ensure that the barrier and sanitation facilities are maintained and that employees comply with its policies regarding contact with students and entry into school buildings.

MISCELLANEOUS

Q. Is UIL required to review the criminal history of sports officials?

- A. No Texas law requires the University Interscholastic League (UIL) to review the criminal history of sports officials. In fact, sports officials are not employed by UIL or the Texas Association of Sports Officials. Most sports officials in Texas are retained by individual school districts on a game-by-game basis.

Criminal history reviews are not required for sports officials whose activities on campus are limited to officiating sports contests. Officiating a game typically does not provide substantial opportunity for unsupervised interaction with students. Sports officials may, however, be subject to district rules regarding campus visitors.

Q. Who will pay the cost of obtaining criminal history record information on covered employees?

- A. The statute does not specify who will pay the cost of obtaining criminal history record information for covered employees. Accordingly, the district and the contractor should determine this responsibility before performance under the contract begins.

A district that is beginning the contracting process may wish to determine in advance whether contractor employees are likely to be “covered employees.” If so, it may be prudent to include a reference to the SB 9 requirements in the request for proposal or bid specifications, and to factor in the additional contractor and administrative costs.

Q. Where can I find more information about SB 9?

- A. Contractors should contact DPS for assistance with creating accounts and obtaining criminal histories. For legal questions, contractors should consult their own attorneys or associations. TASB Legal Services cannot advise contractors because of the potential conflict of interest.

School district representatives can contact TASB Legal Services at 800-580-5345 or legal@tasb.org for guidance. For in-depth issues, districts should contact their local attorneys. For information about SB 9 and school district employees and volunteers, see the Personnel FAQs at www.tasb.org/services/legal/faqs/personnel.aspx.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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