



High Crimes and Misdemeanors

How to Handle Criminal Records in Hiring and Retention in California's K-12 Public Schools

Presented by:

Michelle L. Cannon

Erin M. Hamor

PASSCo

November 20, 2020

Michelle L. Cannon

Partner



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Overview

Michelle L. Cannon is a Partner in Lozano Smith's Sacramento office and co-chairs the firm's Labor and Employment Practice Group. Ms. Cannon works closely with school districts, county offices of education and community colleges in all areas of education law. She is an active member in the Labor & Employment, Students, Community Colleges, Charter Schools and Litigation Practice Groups. Ms. Cannon represents clients in all areas of education law, and has extensive experience in board governance, labor and personnel-related matters, student discipline, and charter school facilities. She was named to the Northern California Super Lawyers list each year from 2013 to 2018, and a Top Lawyer in Schools & Education by Sacramento Magazine from 2016 to 2020.

Ms. Cannon's practice focuses on representing public entity clients in the following areas:

- General governance
- Brown Act issues
- Conflicts of interest
- Public Records Act
- Labor and personnel-related matters
- Employee discipline and dismissal
- Collective bargaining
- First Amendment issues
- Investigation of discrimination and harassment complaints
- Certificated and classified employee issues
- Student issues
- Student discipline
- First Amendment issues
- Search and seizure related to students
- Charter school issues
- Review of charter petitions
- Revocation of charters
- Charter school facilities
- Litigation
- Sexual discrimination
- Sexual harassment
- Wrongful termination
- First Amendment issues
- 42 U.S.C. section 1983 claims
- Contract disputes
- Writs and appeals in both state and federal courts

Practices

Labor & Employment
Student
Litigation
Community Colleges
Charter Schools
Title IX

Education

J.D., University of the Pacific, McGeorge School
of Law
B.A., St. Mary's College of California

Admissions

California

Additional Experience

Michelle has worked extensively in the collective bargaining arena in various roles. These roles include, but are not limited to, working as a facilitator in Interest Based Bargaining, acting as lead negotiator in the creation of new contracts, and advising clients through impasse proceedings.

Ms. Cannon has also prosecuted numerous successful permanent certificated and classified termination proceedings. Ms. Cannon was recently published in the *Daily Journal* as a co-author of an article entitled "The Right to Education in California: It's for the Legislature to Decide Education Policy."

Presenter Experience

Ms. Cannon is a frequent speaker at workshops and CSBA and ACSA conferences. She regularly presents on topics such as sexual harassment prevention training, board issues, including the Brown Act and conflicts of interest, collective bargaining, discrimination, employee discipline and dismissals, student discipline, certificated employee lay off procedures, First Amendment issues, and charter schools.

Professional Affiliations

- Board Member, Roseville Chamber of Commerce
- Board Member, Roseville City School District Foundation
- Member, California School Boards Association
- Member, California Council of School Attorneys
- Member, Placer County Bar Association
- Member, Sacramento County Bar Association
- Member, California State Bar Association
- Member, Animal Legal Defense Fund

Education

Ms. Cannon received her law degree from the University of the Pacific, McGeorge School of Law. She earned a B.A. from St. Mary's College of California. Ms. Cannon has received certification through ATIXA as a participant in Level 1 and Level 3 ATIXA Civil Rights Investigator Trainings.

Erin M. Hamor

Senior Counsel



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Overview

Erin M. Hamor is Senior Counsel in Lozano Smith's Sacramento office, and co-chair of the firm's Charter Schools Practice Group. Ms. Hamor represents clients in all aspects of public education and public agency law. Her areas of expertise include labor and employment, charter schools, board governance, and litigation.

Ms. Hamor regularly advises clients on a variety of matters including certificated and classified discipline and terminations, grievance processing, contract interpretation, and employee leaves. She is experienced at navigating complex personnel matters and guiding clients through labor law compliance issues. Ms. Hamor defends school districts against unfair practice charges brought before the Public Employment Relations Board, and responds to claims of discrimination filed with the DFEH and EEOC.

Ms. Hamor also advises clients regarding all aspects of the Charter Schools Act, including charter oversight, location, petition review and revocation. She supports administrators and boards with general governance matters including conflicts of interest, the Brown Act and the Public Records Act.

Experience

Prior to joining Lozano Smith, Ms. Hamor worked for a county counsel's office, where she advised county agencies on matters including labor and employment, litigation, county governance, and public health and safety. She regularly collaborated with key stakeholders to draft ordinances, policy, and legal advice guiding county operations and governance.

Ms. Hamor served as a Judicial Extern to the Supreme Court of California and its Committee on Judicial Ethics Opinions, and previously worked as a law clerk for the San Francisco Office of the City Attorney. Serving on the Complex and Affirmative Litigation Team, Ms. Hamor assisted the City Attorney in bringing affirmative public interest litigation to remedy unlawful, fraudulent and unfair business practices throughout the state.

Court Admissions

Ms. Hamor is admitted to the U.S. District Court for the Northern, Eastern and Central Districts of California.

Education

Ms. Hamor earned her J.D. from the University of San Francisco School of Law. She earned her B.A. in Psychology with double minors in Political Science and Criminal Justice from Gonzaga University, where she was named a University Regents' Scholar. Ms. Hamor has received certification through ATIXA as a participant in Level 1 and Level 3 ATIXA Civil Rights Investigator Trainings.

Practices
Labor & Employment
Student
Charter Schools
Litigation
Investigative Services

Education
J.D., University of San Francisco School of Law
B.A., Gonzaga University

Admissions
California

WHO WE ARE & WHAT WE DO

Lozano Smith is a full-service education and public agency law firm serving hundreds of California's K-12 and community college districts, and numerous cities, counties, and special districts. Established in 1988, the firm prides itself on fostering longstanding relationships with our clients, while advising and counseling on complex and ever-changing laws. Ultimately, this allows clients to stay focused on what matters most – the success of their district, students and communities they serve. Lozano Smith has offices in eight California locations: Sacramento, Walnut Creek, Fresno, Monterey, Bakersfield, San Luis Obispo, Los Angeles, and San Diego.

AREAS OF EXPERTISE

- Administrative Hearings
- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology & Innovation
- Title IX

COST CONTROL is important for public agencies and an area we have mastered. We recognize and understand your financial restraints and work tirelessly to provide the best legal representation with those limitations in mind. One of the best ways we keep legal costs to a minimum is through strategic, preventive legal services. These include Client News Briefs to keep you updated on changing laws affecting education. In addition, we offer extensive workshops and legal seminars providing the tools needed to minimize liability, reducing the need for legal assistance down the road.

CLIENT SERVICE is our top priority and we take it very seriously. With premier service as the benchmark, we have established protocols and specific standards of practice. Client calls are systematically returned within 24 hours and often sooner when required.

DIVERSITY IS KEY and we consciously practice it in all that we do. It is one of our core beliefs that there is a measurable level of strength and sensitivity fostered by bringing together individuals from a wide variety of different backgrounds, cultures and life experiences. Both the firm and the clients benefit from this practice, with a higher level of creative thinking, deeper understanding of issues, more compassion, and the powerful solutions that emerge as a result.

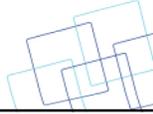
POWERPOINT



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What We Will Cover

- Background Checks & Fingerprinting
- Reading a Live Scan Report
- Arrests & Charges
- Criminal Convictions
- Hypothetical Scenarios



Background Checks & Fingerprinting

Background Checks

It is extremely important to conduct thorough background check of all employee applicants.

A **complete** background check should include review by **trained staff** of:

- Complete employment application
- Employer References
- Credential Verification
- Education Degree Verification
- Fingerprinting (Criminal History)



Background Checks

Failure to conduct thorough background checks can result in harm to students and/or staff and create liability for the District.

Negligent Hiring

- School district employees have a duty to protect students from foreseeable harm.
- It is a breach of the school district's duty of care to fail to prevent foreseeable harm through inadequate or negligent hiring, supervision, and retention.
- Failure to conduct adequate complete background screening that include fingerprinting and reference checks before hiring staff can result in harm to students and liability on the part of the District.



Classified vs. Certificated Employees

Classified Employees

- Not required to have a teaching credential
- Includes clerical staff, instructional assistants, custodians, accounting personal, and similar classifications
- Ed Code, §§ 45122.1, 45123, 45124

Certificated Employees

- Required to have a credential from the California Commission on Teacher Credentialing
- Includes teachers, speech therapists, school psychologists, nurses, and similar classifications
- Limitations on issuance of credential based on criminal history
- Ed. Code, §§ 44830.1, 44836, 44837



Criminal Background Checks Required

- School districts required to perform criminal background checks for all employees
- Certificated Employees: Ed. Code, § 44830.1
- Classified Employees: Ed. Code, § 45125





Arrested but not Charged

New applicants:

- **Cannot ask about or consider** arrest when hiring!

Current employees:

- DOJ contacts school district (subsequent arrest notification)
- **Wait** for more information
- Possible grounds for dismissal (Ed Code, §§ 44932, 45113)
 - Immoral/unprofessional conduct
 - Dishonesty
 - Evident unfitness for service
 - Conviction of felony or crime of moral turpitude
 - Other grounds listed by Board Policies



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Arrested and Charged

New applicants:

- May consider charge

Current employees:

- Get more information!
- Consider mandatory leave of absence
- Consider optional leave of absence
- Possible grounds for dismissal



Mandatory Leaves of Absence

- Ed. Code, §§ 44940 and 45034 require districts to place an employee on a compulsory leave of absence if the employee is "charged with a mandatory leave of absence offense:"
 - Sex offenses
 - Murder or attempted murder
 - Aiding or abetting the unlawful sale, use, or exchange to minors of controlled substances
- Right to furnish a bond
- Unpaid
- School may extend leave of absence with notice



Reporting to Commission on Teacher Credentialing

For certificated employees:

- Must forward a copy of the criminal charges to CTC no later than 10 days after receipt
- Must report changes of status
 - Dismissed or non-re-elected
 - Suspended or placed on unpaid leave as a final adverse action for more than 10 days
 - Otherwise terminated
 - As a result of "an allegation of misconduct or while an allegation of misconduct is pending"
- Procedural changes
- Use CTC Reporting Form





REMINDER:
CANNOT consider arrests!
CAN consider charges!

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Criminal Convictions

Convictions

- Violent and Serious Felonies
- Sex Offenses
- Drug Offenses
- Other Offenses



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Convictions in Other States



Any offense committed or attempted in any other state which, if committed or attempted in California, would have been punished as a prohibited offense.



Violent & Serious Felonies Sex Offenses

No Contest Plea



Conviction



Violent and Serious Felonies

Violent Felonies

- Penal Code, § 667.5(c)
- Murder & Voluntary Manslaughter
- Rape
- Lewd acts on a child under 14
- Any felony committed with great bodily injury
- Home invasion robbery
- Arson
- Carjacking

Serious Felonies

- Penal Code, § 1192.7
- Overlap with violent felonies
- Grand theft with a firearm
- Assault with intent to rob or rape
- Robbery or bank robbery
- Felony involving a dangerous weapon
- Selling controlled substances to minors



Violent and Serious Felonies



Generally

- **Cannot** employ if convicted of violent or serious felony

Exceptions

- Rehabilitated, pardon, or acquitted

Applies to classified staff and certificated staff



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Sex Offenses

- Sex Offenses defined in Ed. Code, § 44010
- Includes over 2 dozen Penal Code sections
- Includes attempted sex offenses
- **Practice Tip:** Cross-check livescan report with Penal Code sections defined in Ed. Code, § 44010



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Sex Offenses



Generally

- Cannot employ if convicted of a sex offense.

Exception

- May employ if charges dismissed or acquitted.

However

- For certificated employees: If the victim was a minor, the District cannot employ the person, even if the conviction was judicially dismissed.



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Sexually Violent Predators

- Designation is not a conviction but a psychiatric determination rendered by a court.
- Often preceded by a conviction for a sex offense.
- School districts prohibited from employing persons designated as sexually violent predators.
- If court reverses its determination, former designation is no longer a bar to employment.



Drugs and Controlled Substances



Classified Employees - Ed. Code, § 45123
Certificated Employees - Ed. Code, § 44836



Offenses defined in Ed. Code, § 44011:

- Possession without a prescription
- Possession with intent to sell
- Unlawfully furnishing to a minor
- Offenses on public school grounds



Controlled Substance Offenses

Generally

- Cannot employ if convicted of a controlled substance offense

Exception

- May employ if conviction reversed or acquitted

Difference between certificated and classified employees:

- **Certificated:** May employ a person convicted of a controlled substance offense if that person holds an appropriate credential for the position.
- **Classified:** May employ a person convicted of a controlled substance offense if the board determines that the person has been rehabilitated for at least 5 years.



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Marijuana Offenses

Non-felony conviction for possession of marijuana that is two or more years old may NOT be considered.

2 C.C.R., § 11017.1



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Juvenile Offenses



- AB 1843, effective July 1, 2017
- Any record concerning or related to an arrest or conviction while a person was subject to the jurisdiction of juvenile court may not be considered as a factor in hiring.



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All Other Offenses

- May generally consider the conviction before hiring if not otherwise prohibited
- May be prohibited from using conviction to deny employment if adverse impact would result on the basis of a protected characteristic
 - e.g., race, color, national origin, etc.
- Refusal to hire applicant must be justified by “business necessity”



Hypotheticals... Who Can You Hire?

Exercise 1

You just received this Live Scan report for an applicant, Cameron Crowell.

CAN YOU HIRE CAMERON?

- 20091210 CASCWALNUT CREEK TOC: M
466 PC-POSSESS/ETC BURGLARY TOOLS
DISPO: CONVICTED-PROB/JAIL
CONV STATUS: MISDEMEANOR TOS:4



Exercise 2

You just received this Live Scan report for an applicant, Taylor Townsend.

CAN YOU HIRE TAYLOR?

- 20080810 CASCMCSACRAMENTO
001: 97M14539
647(B) PC-DISORDERLY CONDUCT: PROSTITUTION TOC:M
DISPO: CONVICTED- PROB/JAIL
CONV STATUS: MISDEMEANOR TOS:4



Exercise 3

You just received this Live Scan report for an applicant, Avery Adams.

CAN YOU HIRE AVERY?

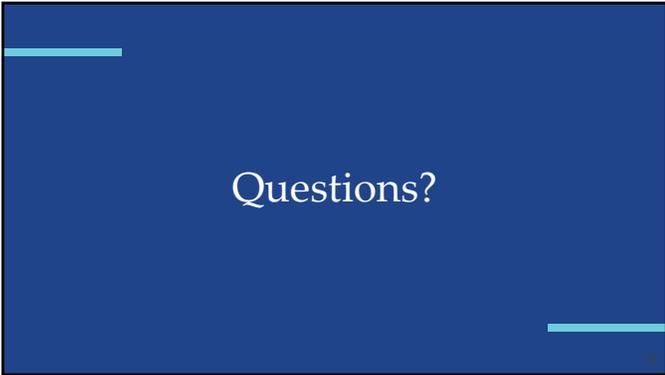
- 20070104 CAMCSTOCKTON
001: 4109991
484(A) PC-PETTY THEFT TOC: M
DISPO: CONVICTED - PROBATION
CONV STATUS: MISDEMEANOR
20150810 DISPO: CONV SET ASIDE & DISM
1203.4/1203.4A PC
COM: COURT CASE NUMBER 4109991



Fingerprinting & Criminal Record Take-Aways

- Violent and serious felonies, sex offenses, and controlled substance offenses generally bar employment, but there are some legal exceptions
- **May generally consider** the conviction before hiring if not otherwise prohibited.
 - Cannot consider arrests
 - May consider charges
- Always look for post-conviction actions—for example, expungement
- Call legal counsel for complicated scenarios







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For more information, questions and comments about the presentation, please feel free to contact:

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