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# **Faith's Law: Understanding its Employment History Review Requirements effective July 1, 2023**

**Webinar  
March 15, 2023**

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# Faith's Law: Understanding its Employment History Review Requirements effective July 1, 2023

Frank B. Garrett III and Susan E. Nicholas  
March 15, 2023

1

## Introduction to Today's Program



Provide a brief overview of  
Faith's Law's Current  
Requirements



Review the July 1, 2023,  
Employment History  
Review (EHR)  
Requirements in the Trailer  
Bill to Faith's Law



Address school district and  
contractor's obligations to  
conduct and respond to  
EHR requests



2

Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

## Employee Code of Professional Conduct Reminder

- Effective July 1, 2022, all school districts, charter schools and nonpublic schools must have an Employee Code of Professional Conduct addressing the following:
  - Incorporates the Code of Ethics for Illinois Educators
  - Incorporates the statutory definition of sexual misconduct contained in 5/22-85.5
- Sexual misconduct is defined as “any act, including but not limited to, any verbal, nonverbal, written, or electronic communication or physical activity, by an employee or agent of the school district, charter school, or nonpublic school with direct contact with a student that is directed toward or with a student to establish a romantic or sexual relationship with the student” including, but not limited to:



3

### Employee Code of Professional Conduct Reminder

- A sexual or romantic invitation;
  - Dating or soliciting a date;
  - Engaging in sexualized or romantic dialog;
  - Making sexually suggestive comments that are directed toward or with a student;
  - Self-disclosure or physical exposure of a sexual, romantic, or erotic nature;
  - A sexual, indecent, romantic, or erotic contact with a student.
- The above list is not all inclusive.



4

## Employee Code of Professional Conduct Reminder

- Additionally, your Employee Code of Professional Conduct must:
  - Identify expectations for employees and agents of the school district regarding how to maintain a professional relationship with students, including expectations for staff-student boundaries, recognizing the age and developmental level of students served, **AND** establishes guidelines for the following situations:
    - Transporting a student;
    - Taking or possessing a photo or a video of a student;
    - Meeting with a student or contacting a student outside of the employee's or agent's professional role.
  - The Code must reference ANCRA reporting and Title IX reporting requirements; and
  - Reference required employee training related to child abuse and educator ethics applicable under State and federal law.



5

## Employee Code of Professional Conduct Reminder

- Finally, the Employee Code of Conduct must be:
  - Posted on the school district website, if any;
  - Included in any staff, student, or parent handbook provided by the school district;
- A violation of the Employee Code of Professional Conduct and any failure to report a violation, may subject an employee to disciplinary action up to and including dismissal from employment.



6

# Employment History Review (EHR) Mandate

- All elementary and secondary schools and contractors holding contracts with any school must, beginning July 1, 2023, conduct an EHR for all permanent and temporary employees who will have “direct contact” with children or students. Covered employees may include, but are not limited to:
  - Licensed staff;
  - Educational Support Personnel;
  - Substitute teachers;
  - Contract employees;
  - Temporary employees
- The intent of this law is to better protect students and children from sexual misconduct by school district employees.



7

## Employment History Review (EHR)

- How is “direct contact” defined in the statute?
- Direct contact with children or students is defined as the possibility of:
  1. Care,
  2. Supervision,
  3. Guidance or control, or
  4. Routine interaction with students or children.
- Each school district should assess if any of their employment positions involve direct contact as defined above.



8

## Employment History Review (EHR) Steps

- ISBE's EHR Templates/Forms
- Prior to hiring an applicant to work directly with children or students, a school district or contractor must ensure that the following criteria are met:
  - The school district or contractor has no knowledge or information pertaining to the applicant that would disqualify the applicant from employment.
- This requirement pertains to the hiring entity. Separate from the EHR request, the hiring school district must affirm that they have no knowledge or information requiring disqualification of the applicant.
- Applicant Form:
  - <https://www.isbe.net/Documents/Temp1-ISBE-Sexual-Misconduct-Disclosure-Form-Applicant.pdf>
- Authorization and Release and Current/Former Employee Form:
  - <https://www.isbe.net/Documents/Temp2-Auth-Release-Sexual-Misconduct-Related-Info.pdf>



9

## Requirements of the Applicant for Employment

- The applicant for employment, using the ISBE template, must:
  - Swear or affirm that the applicant is not disqualified from employment. He/She must affirm that they were:
    - Not found to have engaged in sexual misconduct as defined in statute, resigned or been discharged, or not had his/her contract renewed due to a finding or sexual misconduct or while the allegation was pending or under investigation and has not had a license or certificate suspended or revoked due to a finding of sexual misconduct
- Provides a list, including the name, address, telephone number, and other relevant contact information of:
  - The applicant's current employer;
  - All former employers that were schools or school contractors, as well as all former employers at which the applicant had direct contact with children or students;
- A written authorization that consents to and authorizes disclosure by the applicant's current and former employers of the information requested and which releases those employers from any liability that may arise from such disclosure.



10

## Hiring School District or Contractor EHR Obligations

The school district or contractor **shall initiate** a review of the employment history of the applicant by contacting those employers listed by the applicant, and request the following information:

- The dates of employment of the applicant;
- A statement as to whether the applicant:
  - Was the subject of a sexual misconduct allegations, unless a subsequent investigation resulted in a finding that the allegation was false, unfounded, or unsubstantiated;
  - Was discharged from, been asked to resign from, resigned from, or otherwise been separated from any employment, has ever been disciplined by an employer, or has ever had an employment contract not renewed due to an adjudication or finding of sexual misconduct or while an allegation of sexual misconduct was pending or under investigation, unless the investigation resulted in a finding that the allegation was false, unfounded or unsubstantiated;
  - Had a license suspended, surrendered, or revoked or had an application for licensure, approval, or endorsement denied due to an adjudication or finding of sexual misconduct or while an allegation of sexual misconduct was pending or under investigation, unless the investigation resulted in a finding that the allegation was false, unfounded, or unsubstantiated.
- The applicant's former employers shall respond to the above questions, within 20 calendar days, by marking Yes, No or No Knowledge or Information that would disqualify the applicant on the provided form.
- A digital signature of the former employer is sufficient.



11

## Hiring School District or Contractor Obligations

- There is no set deadline by which a school district or contractor must initiate the applicant's EHR after the applicant completes the form.
- The statute only requires that the school district or contractor initiate the EHR prior to allowing the applicant to start work. Like a criminal background check, applicant can begin working while awaiting the EHR results.
- A school district should exercise caution and discretion.
- If a responding former employer's response is not received within the 20 days, a school district has met its statutory obligation, but additional action and due diligence is recommended.



12

## Hiring School District and Contractor Obligations

- For applicants licensed by ISBE, the school district shall also verify the applicant's reported previous employers with previous employers in the ISBE educator licensure database.
- An applicant who provides false information or willfully fails to disclose information required shall be subject to discipline, up to and including not being hired and dismissal, if hired.
- A school district shall complete the template for its employee at the time of separation from employment, or at the request of the employee, and maintain it as part of the employee's personnel file.
  - If the school district completes an investigation after an employee's separation from employment, the school district shall update the information accordingly.



13

## Prior Employers' Duty to Respond to the EHR Request

- No later than 20 calendar days after receiving a history review request, an employer who has or had an employment relationship shall disclose the information requested on the hiring school district's request form.
- If the prior employer has an office of Human Resources or Central Office, information shall be provided by that office.
- The prior employer shall disclose the information on the template/form provided.
- A prior employer's affirmative responses to questions about an applicant's sexual misconduct history requires the employer to provide additional information about the matters disclosed and all related records.
  - Note: The statute states that this information shall not be deemed a public record.
- There are no consequences under the statute for a former employer's failure or refusal to respond to the EHR request.



14



# Non-Disclosure/Confidentiality Agreements

Beginning July 1, 2023, a school district or contractor may not enter a CBA, employment contract, agreement for resignation or termination, severance agreement, or any other contract or agreement, or take an action that:

- Has the effect of suppressing information concerning a pending investigation or a completed investigation in which an allegation was substantiated related to a report of suspected sexual misconduct by a current or former employee;
- Affects the ability of the school district or contractor to report suspected sexual misconduct to the appropriate authorities; or
- Requires the school district or contractor to expunge information about allegations or findings of suspected sexual misconduct from any documents maintained by a school district or contractor, unless after investigation, an allegation is found to be false, unfounded, or unsubstantiated.

Such a contract entered into after July 1, 2023, is void and unenforceable.

Unless the laws of another state prevent the release of the information or records requested, or disclosure is restricted by the terms of contract entered into prior to July 1, 2023, all relevant information, records, and documentation shall be disclosed that may otherwise be confidential.



15

## Information Obtained Through the EHR Request

- A school district or contractor who receives information from a EHR response may:
  - use the information for the purpose of evaluating an applicant's fitness to be hired or for continued employment; and
  - report the information to ISBE, a State licensing agency, a law enforcement agency, a child protective services agency, another school district or contractor, or a prospective employer.



16

## Immunity Protections

- An employer, school district, school district administrator, or contractor who provides information or records about a current or former employee or applicant is immune from criminal and civil liability for the disclosure of the information or records, unless the information or records provided were knowingly false.
- The immunity afforded is in addition to and is not a limitation on other immunities under the law.
- Immunity extends to any circumstances when the employer, school district, school district administrator, or contractor in good faith shares findings of sexual misconduct with another employer.



17

## Substitute Teachers

- The EHR check is required only prior to the initial hiring of a substitute or placement on a school district's approved substitute list and shall remain valid as long as the substitute continued to be employed by the same school district or remains on the school district's approved substitute list.
  - May use single EHR for schools within a single school district.
- A substitute employee seeking to be added to *another* school district's substitute list shall undergo an additional EHR.
  - Appearance of a sub on one school district's substitute list does not relieve another school from compliance with this Section .
- An EHR conducted upon initial hiring of a substitute employee by a contractor or any other entity that furnishes substitute staffing services to schools shall satisfy the requirements for all schools using the services of that contractor or other entity.
- A contractor or any other entity furnishing substitute staffing services to schools must comply with the provisions related to contractors.



18

## Internal Staff Reassignments After Hire

Employee transfers of an applicant who has already undergone an EHR within the school district or to another school established and supervised by the same organization does not require an additional EHR check.

If the transferring employee has not undergone an EHR within the school district, and the transfer or reassignment results in direct contact with students or children, then an EHR must be initiated.

## Additional Contractor EHR Obligations

- The EHR performed by the contractor remains valid as long as the employee remains employed by the same contractor, even if assigned to perform work for other school districts.
- Contractors shall maintain records documenting the EHR for all employees as required and, upon request, provide access to the records copy pertaining to that employee to a school district to whom the employee has been assigned to work.

# Contractor Reporting Obligations

Prior to assignment to perform work for a school district in a position involving direct contact with children or students, the contractor shall inform the school district of any instance known to the contractor in which the employee has:

- Been the subject of a sexual misconduct allegations, unless a subsequent investigation resulted in a finding that the allegation was false, unfounded, or unsubstantiated;
- Been discharged from, been asked to resign from, resigned from, or otherwise been separated from any employment, has ever been disciplined by an employer, or has ever had an employment contract not renewed due to an adjudication or finding of sexual misconduct or while an allegation of sexual misconduct was pending or under investigation, unless the investigation resulted in a finding that the allegation was false, unfounded or unsubstantiated;
- Ever had a license suspended, surrendered, or revoked or had an application for licensure, approval, or endorsement denied due to an adjudication or finding of sexual misconduct or while an allegation of sexual misconduct was pending or under investigation, unless the investigation resulted in a finding that the allegation was false, unfounded, or unsubstantiated.



21



## Student Teachers, Volunteers and Coaches

- EHRs are required of all employees of the school district in positions involving direct contact with students.
- Volunteers are not employees and therefore not covered by this statute.
- Student teachers or interns, if paid, must complete an EHR
- Paid coaches are covered by the statute and its EHR requirements.



22

## Faith's Law Trailer Bill Does NOT:

- Prohibit additional investigations of prospective employees or from requiring applicants to provide additional background information or authorization beyond what is required under this Act, nor prevent a current or former employer from disclosing more information than what is required under this Act.
- Relieve a school district, school employee, contractor of the school, or agent of the school from any legal responsibility to report sexual misconduct in accordance with State and federal law;
- Prohibit the right of the exclusive bargaining representative under a CBA to grieve and arbitrate the validity of an employee's termination or discipline for just cause.



23

## ISBE Resource Guide on or before July 1, 2023

ISBE, in consultation with relevant stakeholders shall develop and maintain a resource guide that shall be made available on the ISBE website.

- Provide guidance for pupils, parents or guardians, and teachers about sexual abuse response and prevention resources available in their community, including:

At the start of the school year, each school district shall notify the parents or guardians of enrolled students of the availability of the resource guide, shall furnish the resource guide to a student's parent or guardian at the request of the parent or guardian, and may make the resource guide available on its website.



24

## Frequently Asked Questions

- Can we start someone pending the outcome of the check, like we do with fingerprint background checks?
- What if the current or prior employer does not respond?
- How should this operate as a practical matter?
- Can we rely on a prior school district's investigation, if it has been done after the EHR requirements went into effect?
- Do we have to do this with temporary employees?
- What duties does this trigger for the unsupported and likely just vicious "that person is probably a child molester" type of statement/allegation?
- Can we outsource this to another company? Or can't ISBE take care of this?
- Does a finding of responsibility under a Title IX investigation trigger a report? Or do we have to do a separate finding to satisfy this law?
- How far back does the EHR investigation go?
- What about the FOIA?
- Do we have to do this for any employer honorably dismissed and then recalled?
- Do we have to update the EHR for employees who take on summer employment?
- Should we conduct the EHR for positions that currently have no "direct" contact but might at a later time?





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Contributing Author, "Employment Discrimination" *School Law: Personnel and Student Issues*, IICLE (1996, 1999, Supp. 2001, 2005, 2010, 2012, 2015, and 2021)

"Extended Medical Leave Under ADA Soundly Rejected by 7th Circuit," *Chicago Daily Law Bulletin* (2017)

"First Amendment Protections Get Broader for Government Employees," *Chicago Daily Law Bulletin* (2016)

"Big-box Employee's Attempt to 'Scam' Company Undercuts FMLA Claims," *Chicago Daily Law Bulletin* (2015)

Employers Must Rethink Employee 'Look' Policies After High Court Decision," *Chicago Daily Law Bulletin* (2015)

"Using Social Network Screening as Part of the Hiring Process: Employers Should Proceed with Caution," *Inquiry & Analysis*, National School Boards Association's Council of School Attorneys (2013)

**RECENT PRESENTATIONS**

*School District Diversity, Equity and Inclusion Guidance*, Northwest Personnel Administrators Group Meeting (September 2022)



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Central District of Illinois

U.S. District Court for the  
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Supreme Court of Illinois



*Safeguarding School District's Diversity, Equity and Inclusion Initiatives from Unlawful Discrimination Challenges*, American Association of School Personnel Administrators (April 2022)

*A Review of Important New Laws Impacting Illinois School Districts*, Illinois Association of School Boards (January 2022)

*Sexual Violence and Harassment on Campus*, Illinois Community College Trustee Association (June 2021)

*Responding to COVID-19 Related Employee Accommodations and Leave Requests*, American Association of School Personnel Administrators (October 2020)

*Workplace Liability in the Post Pandemic Era*, Illinois Large Unit District Association (June 2020)

*Debunking Some Common Employee FMLA Leave Myths*, Illinois Association of School Personnel Administrators Annual Conference (January 2020)

*Legal Updates for Illinois Community College Chief Student Services Officers' Meeting*, Illinois Community College Student Services Officers (June 2019)

*Legislative Update: A Review of New Laws Affecting Illinois Community Colleges*, Illinois Council of Community College Presidents Retreat (September 2019)

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