**2327-S.E AMS HEWD S7012.1 - NOT FOR FLOOR USE**

**ESHB 2327** - S COMM AMD

By Committee on Higher Education & Workforce Development

**OUT OF ORDER 03/06/2020**

Strike everything after the enacting clause and insert the following:

"NEW SECTION. **Sec.**  The legislature recognizes that Washington's postsecondary educational institutions are some of the best schools in the nation, offering high quality education and life experiences for thousands of students. Washington institutions strive to create learning environments where all students can reach their full potential. The legislature also recognizes that in instances in which an employee of an institution engages in sexual misconduct against a student, institutions do not consistently disclose that information. The legislature declares that disclosure of such information is a matter of public safety for all Washington students as well as for students on campuses across the nation. The legislature finds that sexual misconduct, which may include harassment or assault, has serious public health and safety effects on students in Washington. These effects may deprive students of their opportunities to obtain an education which would otherwise improve their lives and health, and that of their own children. Other effects include an employee in a position of power and authority over students causing irreversible harm to the physical and mental health of students from sexual misconduct. The legislature finds that students of any postsecondary institution in Washington should be protected from their institution hiring an employee who has been found to have committed sexual misconduct at another postsecondary institution. The legislature, therefore, also finds that postsecondary institutions in Washington need to know if a prospective employee has been found to have committed sexual misconduct while employed at another institution. The legislature finds that nondisclosure agreements which prevent an institution from disclosing that an employee has committed sexual misconduct create a high potential for students in jeopardy of being victimized. Therefore, the legislature finds such nondisclosure agreements between an employee and institution, pursuant to which the institution agrees not to disclose findings of misconduct supported by a preponderance of evidence or not to complete an investigation, are against public policy and should not be entered into by any Washington postsecondary institution and should not be enforced by Washington courts. Therefore, the legislature intends to provide clarity and direction to postsecondary educational institutions for disclosing substantiated findings of sexual misconduct committed by its employees against students.

NEW SECTION. **Sec.**  A new section is added to chapter 28B.112 RCW to read as follows:

The definitions in this section apply throughout this section and sections 3 through 6 of this act unless the context clearly requires otherwise.

(1) "Applicant" means a person applying for employment as faculty, instructor, staff, advisor, counselor, coach, athletic department staff, and any position in which the applicant will likely have direct ongoing contact with students in a supervisory role or position of authority. "Applicant" does not include enrolled students who are applying for temporary student employment with the postsecondary educational institutions, unless the student is a graduate student applying for a position in which the graduate student will have a supervisory role or position of authority over other students. "Applicant" does not include a person applying for employment as medical staff or for employment with an affiliated organization, entity, or extension of a postsecondary educational institution, unless the applicant will have a supervisory role or position of authority over students.

(2) "Employee" means a person who is receiving or has received wages as an employee from the postsecondary educational institutions and includes current and former workers, whether the person is classified as an employee, independent contractor, or consultant, and is in, or had, a position with direct ongoing contact with students in a supervisory role or position of authority. "Employee" does not include a person who was employed by the institution in temporary student employment while the person was an enrolled student unless the student, at the time of employment, is or was a graduate student in a position in which the graduate student has or had a supervisory role or authority over other students. "Employee" does not include a person employed as medical staff or with an affiliated organization, entity, or extension of a postsecondary educational institution, unless the employee has or had a supervisory role or position of authority over students. A person who would be considered an "employee" under this subsection, remains an "employee" even if the person enrolls in classes under an institution's employee tuition waiver program or similar program that allows faculty, staff, or other employees to take classes.

(3) "Employer" includes postsecondary educational institutions or school employers in this or any other state, and any other employer in this state or any other state.

(4) "Postsecondary educational institution" means an institution of higher education as defined in RCW 28B.10.016, a degree-granting institution as defined in RCW 28B.85.010, a private vocational school as defined in RCW 28C.10.020, or school as defined in RCW 18.16.020, that participates in the state student financial aid program.

(5) "Sexual misconduct" includes, but is not limited to, unwelcome sexual contact, unwelcome sexual advances, requests for sexual favors, other unwelcome verbal, nonverbal, electronic, or physical conduct of a sexual nature, sexual harassment, and any misconduct of a sexual nature that is in violation of the postsecondary educational institution's policies or has been determined to constitute sex discrimination pursuant to state or federal law.

(6) "Student" means a person enrolled at a postsecondary educational institution and for whom educational records are maintained.

NEW SECTION. **Sec.**  A new section is added to chapter 28B.112 RCW to read as follows:

(1)(a) Postsecondary educational institutions shall administer campus climate assessments to gauge the prevalence of sexual misconduct on their campuses.

(b) The state board for community and technical colleges shall administer campus climate assessments of community and technical colleges to gauge the prevalence of sexual misconduct on community and technical college campuses.

(c) The student achievement council shall develop a standardized statewide campus climate assessment to be administered by the postsecondary educational institutions and the state board for community and technical colleges. The assessment must be designed to capture information on the prevalence and effects of sexual misconduct on students who have traditionally been marginalized or experience disproportionate impacts of systemic oppression based on, for example, race, ethnicity, nationality, sexual orientation, gender identity, gender expression, and disability.

(d) The assessment must include, but is not limited to, the following:

(i) The prevalence of sexual misconduct on and off campus;

(ii) Options for reporting sexual misconduct presented to survivors and witnesses and how those options were presented;

(iii) Whether survivors or witnesses reported to the institutions, campus police, or any other local law enforcement agency, and reasons why they did or did not report, including any barriers or discouragement they experienced in reporting or not reporting;

(iv) Whether survivors or witnesses experienced retaliation for reporting, filing complaints, or working with investigators; whether there were perceptions that such actions might result in retaliation affecting students' or staff members' education or careers; and whether there were perceived pressures not to report to law enforcement or not to file complaints with outside agencies;

(v) An evaluation of student and employee attitudes and awareness of campus sexual misconduct issues and consent; and

(vi) Best practices for responding to, and preventing, sexual misconduct on campus.

(2) The postsecondary educational institutions and the state board for community and technical colleges shall work with the student achievement council to develop definitions of terms, survey questions, scope of the assessment, or any other assessment features the student achievement council finds necessary for the purposes of consistency.

(3) The postsecondary educational institutions and the state board for community and technical colleges may make policy changes in response to assessment results that indicate either a prevalence of sexual misconduct, or negative perceptions and attitudes by the campus community pertaining to sexual misconduct reporting, or both. The postsecondary educational institutions may provide confirmation of those policy changes to the student achievement council. The student achievement council may include those policy changes in the report submitted under subsection (4) of this section to the governor and the appropriate committees of the legislature.

(4)(a) The postsecondary educational institutions and state board for community and technical colleges shall submit assessment results to the student achievement council every five years, beginning July 1, 2023. The student achievement council shall submit reports summarizing the findings of the assessments to the governor and the appropriate committees of the legislature by December 31st of each year assessment results are due.

(b) Each postsecondary educational institution shall make the portion of the student achievement council's report relating to the institution widely available to its campus community, including by posting on the institution's web site and by email informing students, faculty, and staff of the report's availability.

NEW SECTION. **Sec.**  A new section is added to chapter 28B.112 RCW to read as follows:

(1) Except as provided in subsection (2) of this section, any provision of a settlement agreement executed subsequent to the effective date of this act between a postsecondary educational institution and an employee is against public policy and void and unenforceable if the provision prohibits the employee, the institution, a survivor, or any other person from disclosing that the employee has either:

(a) Been the subject of substantiated findings of sexual misconduct; or

(b) Is the subject of an investigation into sexual misconduct that is not yet complete.

(2) A settlement agreement may contain provisions requiring nondisclosure of personal identifying information of persons filing complaints or making allegations and of any witnesses asked to participate in an investigation of the allegations.

(3) Personal identifying information in a settlement agreement that reveals the identity of persons filing complaints or making allegations and of any witnesses asked to participate in an investigation of the allegations is exempt from public disclosure pursuant to section 7 of this act.

NEW SECTION. **Sec.**  A new section is added to chapter 28B.112 RCW to read as follows:

(1) Unless the victim of the alleged sexual misconduct requests otherwise, when a postsecondary educational institution investigates a complaint or allegation of sexual misconduct committed by an employee against a student of the institution, the institution shall complete the investigation whether or not the employee voluntarily or involuntarily leaves employment with the institution. When the institution completes its investigation, the institution shall make written findings of whether the complaint or allegation is substantiated.

(2)(a) A postsecondary educational institution shall include in the employee's personnel file or employment records any substantiated findings of sexual misconduct committed by the employee while the employee was employed with the postsecondary educational institution.

(b) When disclosing records included in an employee's personnel file or employment records under this section, the institution shall keep personal identifying information of the complainant and any witnesses confidential, unless disclosure of identifying information is agreed to by the complainant or witnesses or required under law.

(c) Personal identifying information in an employee's file or employment records that reveals the identity of the complainant and any witnesses is exempt from public disclosure pursuant to section 7 of this act.

(3) For purposes of this section, postsecondary educational institutions shall use a preponderance of the evidence standard when determining whether findings are substantiated.

(4) For purposes of this section and section 6 of this act, "substantiated" means the employee has committed sexual misconduct.

NEW SECTION. **Sec.**  A new section is added to chapter 28B.112 RCW to read as follows:

(1) Beginning October 1, 2020, before hiring an applicant, a postsecondary educational institution shall request the applicant to sign a statement:

(a) Declaring whether the applicant is the subject of any substantiated findings of sexual misconduct in any current or former employment or is currently being investigated for, or has left a position during an investigation into, a violation of any sexual misconduct policy at the applicant's current and past employers, and, if so, an explanation of the situation;

(b) Authorizing the applicant's current and past employers to disclose to the hiring institution any sexual misconduct committed by the applicant and making available to the hiring institution copies of all documents in the previous employer's personnel, investigative, or other files relating to sexual misconduct, including sexual harassment, by the applicant; and

(c) Releasing the applicant's current and past employers, and employees acting on behalf of that employer, from any liability for providing information described in (b) of this subsection.

(2) Beginning July 1, 2021, before hiring an applicant, a postsecondary educational institution shall:

(a) Request in writing, electronic or otherwise, that the applicant's current and past employers provide the information, if any, described in subsection (1)(b) of this section. The request must include a copy of the declaration and statement signed by the applicant under subsection (1) of this section; and

(b) Ask the applicant if the applicant is the subject of any substantiated findings of sexual misconduct, or is currently being investigated for, or has left a position during an investigation into, a violation of any sexual misconduct policy at the applicant's current and past employers, and, if so, an explanation of the situation.

(3)(a) Pursuant to (c) of this subsection, after receiving a request under subsection (2)(a) of this section, a postsecondary educational institution shall provide the information requested and make available to the requesting institution copies of documents in the applicant's personnel record relating to substantiated findings of sexual misconduct.

(b) Pursuant to (c) of this subsection, if a postsecondary educational institution has information about substantiated findings of a current or former employee's sexual misconduct in the employee's personnel file or employment records, unless otherwise prohibited by law, the institution shall disclose that information to any employer conducting reference or background checks on the current or former employee for the purposes of potential employment, even if the employer conducting the reference or background check does not specifically ask for such information.

(c) If, by the effective date of this section, a postsecondary educational institution does not have existing procedures for disclosing information requested under this subsection, the institution must establish procedures to begin implementing the disclosure requirements of this subsection no later than July 1, 2021.

(4)(a) The postsecondary educational institution or an employee acting on behalf of the institution, who discloses information under this section is presumed to be acting in good faith and is immune from civil and criminal liability for the disclosure.

(b) A postsecondary educational institution is not liable for any cause of action arising from nondisclosure of information by an employee without access to official personnel records who is asked to respond to a reference check.

(c) The duty to disclose information under this section is the responsibility of the postsecondary educational institution to respond to a formal request for personnel records relating to a current or prior employee when requested by another employer.

(5)(a) When disclosing information under this section, the postsecondary educational institution shall keep personal identifying information of the complainant and any witnesses confidential, unless the complainant or witnesses agree to disclosure of their identifying information.

(b) Personal identifying information that reveals the identity of the complainant and any witnesses is exempt from public disclosure pursuant to section 7 of this act.

(6) Beginning October 1, 2020, a postsecondary educational institution may not hire an applicant who does not sign the statement described in subsection (1) of this section.

(7) Information received under this section may be used by a postsecondary educational institution only for the purpose of evaluating an applicant's qualifications for employment in the position for which the person has applied.

(8) This section does not restrict expungement from a personnel file or employment records of information about alleged sexual misconduct that has not been substantiated.

(9) Public institutions of higher education shall share best practices with all faculty and staff who are likely to receive reference check requests about how to inform and advise requesters to contact the institution's appropriate official office for personnel records.

NEW SECTION. **Sec.**  A new section is added to chapter 42.56 RCW to read as follows:

(1) For the purposes of sections 2 through 6 of this act regarding postsecondary educational institutions, personal identifying information in an employee personnel file, student file, investigation file, settlement agreement, or other files held by a postsecondary educational institution that reveals the identity of witnesses to or victims of sexual misconduct committed at the postsecondary educational institution by an employee of the institution are exempt from public disclosure and copying. If the victim or witness indicates a desire for disclosure of the victim's or witness' personal identifying information, such desire shall govern.

(2) For purposes of this section, "witness" does not mean an employee under investigation for allegations of sexual misconduct."

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By Committee on Higher Education & Workforce Development

**OUT OF ORDER 03/06/2020**

On page 1, line 2 of the title, after "institutions;" strike the remainder of the title and insert "adding new sections to chapter 28B.112 RCW; adding a new section to chapter 42.56 RCW; and creating a new section."

EFFECT: (1) Requires the assessment, administered by the postsecondary institutions, to review and consider best practices for responding to, and preventing, sexual misconduct on campus.

(2) Establishes that postsecondary institutions may make policy changes in response to certain assessment results and that WSAC report on those changes to the governor and legislature.

(3) Removes an employee under investigation for allegations of sexual misconduct from being considered a witness.