

ESHB 2327 - S COMM AMD
By Committee on Ways & Means

ADOPTED 03/06/2020

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature recognizes that
4 Washington's postsecondary educational institutions are some of the
5 best schools in the nation, offering high quality education and life
6 experiences for thousands of students. Washington institutions strive
7 to create learning environments where all students can reach their
8 full potential. The legislature also recognizes that in instances in
9 which an employee of an institution engages in sexual misconduct
10 against a student, institutions do not consistently disclose that
11 information. The legislature declares that disclosure of such
12 information is a matter of public safety for all Washington students
13 as well as for students on campuses across the nation. The
14 legislature finds that sexual misconduct, which may include
15 harassment or assault, has serious public health and safety effects
16 on students in Washington. These effects may deprive students of
17 their opportunities to obtain an education which would otherwise
18 improve their lives and health, and that of their own children. Other
19 effects include an employee in a position of power and authority over
20 students causing irreversible harm to the physical and mental health
21 of students from sexual misconduct. The legislature finds that
22 students of any postsecondary educational institution in Washington
23 should be protected from their institution hiring an employee who has
24 been found to have committed sexual misconduct at another
25 postsecondary educational institution. The legislature, therefore,
26 also finds that postsecondary educational institutions in Washington
27 need to know if a prospective employee has been found to have
28 committed sexual misconduct while employed at another institution.
29 Therefore, the legislature intends to require postsecondary
30 educational institutions to inquire about and conduct reference
31 checks on any applicant the institution intends to extend an offer of
32 employment to, regarding whether the applicant has ever been found to

1 have committed, or is being investigated for, sexual misconduct. The
2 legislature finds that nondisclosure agreements which prevent an
3 institution from disclosing that an employee has committed sexual
4 misconduct create a high potential for students in jeopardy of being
5 victimized. Therefore, the legislature finds such nondisclosure
6 agreements between an employee and institution, pursuant to which the
7 institution agrees not to disclose findings of sexual misconduct
8 supported by a preponderance of evidence or not to complete an
9 investigation, are against public policy and should not be entered
10 into by any Washington postsecondary educational institution and
11 should not be enforced by Washington courts. Therefore, the
12 legislature intends to provide clarity and direction to postsecondary
13 educational institutions for disclosing substantiated findings of
14 sexual misconduct committed by its employees against students.

15 NEW SECTION. **Sec. 2.** A new section is added to chapter 28B.112
16 RCW to read as follows:

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

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

34 (2) "Employee" means a person who is receiving or has received
35 wages as an employee from the postsecondary educational institutions
36 and includes current and former workers, whether the person is
37 classified as an employee, independent contractor, or consultant, and
38 is in, or had, a position with direct ongoing contact with students
39 in a supervisory role or position of authority. "Employee" does not

1 include a person who was employed by the institution in temporary
2 student employment while the person was an enrolled student unless
3 the student, at the time of employment, is or was a graduate student
4 in a position in which the graduate student has or had a supervisory
5 role or authority over other students. "Employee" does not include a
6 person employed as medical staff or with an affiliated organization,
7 entity, or extension of a postsecondary educational institution,
8 unless the employee has or had a supervisory role or position of
9 authority over students. A person who would be considered an
10 "employee" under this subsection, remains an "employee" even if the
11 person enrolls in classes under an institution's employee tuition
12 waiver program or similar program that allows faculty, staff, or
13 other employees to take classes.

14 (3) "Employer" includes postsecondary educational institutions in
15 this or any other state.

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

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

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

32 NEW SECTION. **Sec. 3.** (1) By December 1, 2023, the public four-
33 year institutions of higher education shall report the following to
34 the governor and the appropriate committees of the legislature:

35 (a) Summaries of any campus climate assessments conducted since
36 the effective date of this section that are designed to gauge the
37 prevalence of sexual misconduct on college and university campuses;

38 (b) Efforts to reach out to and capture information from students
39 who have traditionally been marginalized or experience

1 disproportionate impacts of systemic oppression based on, for
2 example, race, ethnicity, nationality, sexual orientation, gender
3 identity, gender expression, and disability;

4 (c) How information obtained in the assessments was used to
5 design and improve policies, programs, and resources for the campus
6 community; and

7 (d) The impacts of this act on institutional hiring practices,
8 campus safety, and other relevant considerations.

9 (2) This section expires June 1, 2024.

10 NEW SECTION. **Sec. 4.** A new section is added to chapter 28B.112
11 RCW to read as follows:

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

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

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

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

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

32 NEW SECTION. **Sec. 5.** A new section is added to chapter 28B.112
33 RCW to read as follows:

34 (1) Unless the victim of the alleged sexual misconduct requests
35 otherwise, when a postsecondary educational institution investigates
36 a complaint or allegation of sexual misconduct committed by an
37 employee against a student of the institution, the institution shall
38 complete the investigation whether or not the employee voluntarily or

1 involuntarily leaves employment with the institution. When the
2 institution completes its investigation, the institution shall make
3 written findings of whether the complaint or allegation is
4 substantiated.

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

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

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

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

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

23 NEW SECTION. **Sec. 6.** A new section is added to chapter 28B.112
24 RCW to read as follows:

25 (1) Beginning October 1, 2020, prior to an official offer of
26 employment to an applicant, a postsecondary educational institution
27 shall request the applicant to sign a statement:

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

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

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

4 (2) Beginning July 1, 2021, prior to an official offer of
5 employment to an applicant, a postsecondary educational institution
6 shall:

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

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

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

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

34 (c) If, by the effective date of this section, a postsecondary
35 educational institution does not have existing procedures for
36 disclosing information requested under this subsection, the
37 institution must establish procedures to begin implementing the
38 disclosure requirements of this subsection no later than July 1,
39 2021.

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

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

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

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

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

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

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

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

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

36 NEW SECTION. **Sec. 7.** A new section is added to chapter 42.56
37 RCW to read as follows:

38 (1) For the purposes of sections 2 through 6 of this act
39 regarding postsecondary educational institutions, personal

1 identifying information in an employee personnel file, student file,
2 investigation file, settlement agreement, or other files held by a
3 postsecondary educational institution that reveals the identity of
4 witnesses to or victims of sexual misconduct committed at the
5 postsecondary educational institution by an employee of the
6 institution are exempt from public disclosure and copying. If the
7 victim or witness indicates a desire for disclosure of the victim's
8 or witness' personal identifying information, such desire shall
9 govern.

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

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12 On page 1, line 2 of the title, after "institutions;" strike the
13 remainder of the title and insert "adding new sections to chapter
14 28B.112 RCW; adding a new section to chapter 42.56 RCW; creating new
15 sections; and providing an expiration date."

EFFECT: (1) Removes requirement for each postsecondary
educational institution to administer a climate assessment on the
prevalence of sexual misconduct on their campuses;

(2) Requires the public four-year institutions of higher
education, by December 1, 2023, to report to the appropriate
committees of the legislature and the governor on the following:

(a) Summaries on the prevalence of sexual misconduct on college
and university campuses, if a climate assessment was conducted;

(b) Efforts to understand traditionally marginalized students'
experiences;

(c) How information obtained by an assessment was used to improve
the campus community; and

(d) Impacts on hiring practices;

(3) Changes the requirement of an applicant to sign the
statement, pertaining to substantiated findings of sexual misconduct
or current investigation of sexual misconduct, from "before hiring"
to "prior to an official offer of employment";

(4) Changes the requirement of a postsecondary educational
institution to request certain information from past employers and
applicants from "before hiring" to "prior to an official offer of
employment"; and

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

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