

ESHB 2327 - S COMM AMD

By Committee on Higher Education & Workforce Development

OUT OF ORDER 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 institution in Washington should be
23 protected from their institution hiring an employee who has been
24 found to have committed sexual misconduct at another postsecondary
25 institution. The legislature, therefore, also finds that
26 postsecondary institutions in Washington need to know if a
27 prospective employee has been found to have committed sexual
28 misconduct while employed at another institution. The legislature
29 finds that nondisclosure agreements which prevent an institution from
30 disclosing that an employee has committed sexual misconduct create a
31 high potential for students in jeopardy of being victimized.

1 Therefore, the legislature finds such nondisclosure agreements
2 between an employee and institution, pursuant to which the
3 institution agrees not to disclose findings of misconduct supported
4 by a preponderance of evidence or not to complete an investigation,
5 are against public policy and should not be entered into by any
6 Washington postsecondary institution and should not be enforced by
7 Washington courts. Therefore, the legislature intends to provide
8 clarity and direction to postsecondary educational institutions for
9 disclosing substantiated findings of sexual misconduct committed by
10 its employees against students.

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

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

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

30 (2) "Employee" means a person who is receiving or has received
31 wages as an employee from the postsecondary educational institutions
32 and includes current and former workers, whether the person is
33 classified as an employee, independent contractor, or consultant, and
34 is in, or had, a position with direct ongoing contact with students
35 in a supervisory role or position of authority. "Employee" does not
36 include a person who was employed by the institution in temporary
37 student employment while the person was an enrolled student unless
38 the student, at the time of employment, is or was a graduate student
39 in a position in which the graduate student has or had a supervisory

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

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

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

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

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

29 NEW SECTION. **Sec. 3.** A new section is added to chapter 28B.112
30 RCW to read as follows:

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

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

38 (c) The student achievement council shall develop a standardized
39 statewide campus climate assessment to be administered by the

1 postsecondary educational institutions and the state board for
2 community and technical colleges. The assessment must be designed to
3 capture information on the prevalence and effects of sexual
4 misconduct on students who have traditionally been marginalized or
5 experience disproportionate impacts of systemic oppression based on,
6 for example, race, ethnicity, nationality, sexual orientation, gender
7 identity, gender expression, and disability.

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

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

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

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

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

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

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

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

34 (3) The postsecondary educational institutions and the state
35 board for community and technical colleges may make policy changes in
36 response to assessment results that indicate either a prevalence of
37 sexual misconduct, or negative perceptions and attitudes by the
38 campus community pertaining to sexual misconduct reporting, or both.
39 The postsecondary educational institutions may provide confirmation
40 of those policy changes to the student achievement council. The

1 student achievement council may include those policy changes in the
2 report submitted under subsection (4) of this section to the governor
3 and the appropriate committees of the legislature.

4 (4) (a) The postsecondary educational institutions and state board
5 for community and technical colleges shall submit assessment results
6 to the student achievement council every five years, beginning July
7 1, 2023. The student achievement council shall submit reports
8 summarizing the findings of the assessments to the governor and the
9 appropriate committees of the legislature by December 31st of each
10 year assessment results are due.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35 (a) Declaring whether the applicant is the subject of any
36 substantiated findings of sexual misconduct in any current or former
37 employment or is currently being investigated for, or has left a
38 position during an investigation into, a violation of any sexual

1 misconduct policy at the applicant's current and past employers, and,
2 if so, an explanation of the situation;

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

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

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

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

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

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

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

1 (c) If, by the effective date of this section, a postsecondary
2 educational institution does not have existing procedures for
3 disclosing information requested under this subsection, the
4 institution must establish procedures to begin implementing the
5 disclosure requirements of this subsection no later than July 1,
6 2021.

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

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

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

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

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

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

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

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

37 (9) Public institutions of higher education shall share best
38 practices with all faculty and staff who are likely to receive
39 reference check requests about how to inform and advise requesters to

1 contact the institution's appropriate official office for personnel
2 records.

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

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

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

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OUT OF ORDER 03/06/2020

18 On page 1, line 2 of the title, after "institutions;" strike the
19 remainder of the title and insert "adding new sections to chapter
20 28B.112 RCW; adding a new section to chapter 42.56 RCW; and creating
21 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.

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