

Date of Hearing: January 9, 2024

ASSEMBLY COMMITTEE ON HIGHER EDUCATION

Mike Fong, Chair

AB 810 (Friedman) – As Amended January 3, 2024

SUBJECT: Postsecondary education: hiring practices: academic, athletic, and administrative appointments

SUMMARY: Requires the California Community Colleges (CCC), the California State University (CSU), and requests both the University of California (UC) and private postsecondary education institutions, to implement a policy of requiring potential employees for academic, athletic, and administrative positions to disclose whether they have been the subject of a finding of sexual harassment and to permit the institution to contact past employers to inquire whether the applicant had any substantiated allegations of misconduct. Specifically, **this bill**:

- 1) Requests the governing board of an independent college or university in California that receives state financial aid and the UC to do the following when hiring for an academic, athletic or administrative position:
 - a) Require an applicant to disclose if the applicant had any final administrative decision or final judicial decision of sexual harassment issued in the last seven years from previous employers. The applicant is permitted to disclose if they are in the process of appealing the decision with either their previous employer or the United States Department of Education (DOE). The information as disclosed by the applicant is not to be required until the applicant is in the final stages of the application process for the position of potential employment.
 - b) Require an applicant to sign a release form authorizing the potential employer (the independent university or the UC) to inquire whether the applicant had any substantiated allegations of misconduct from the applicant's previous employers. The potential employer will ask for and utilize the information provided by the applicant in the final stages of the application process after the potential employer has determined whether the applicant is qualified for the position of potential employment.
- 2) Requires the governing board of a CCC and the CSU to do the following when hiring for an academic, athletic or administrative position:
 - a) Require an applicant to disclose if the applicant had any final administrative decision or final judicial decision of sexual harassment issued in the last seven years from previous employers. The applicant is permitted to disclose if they are in the process of appealing the decision with either their previous employer or the DOE. The information as disclosed by the applicant is not to be required until the applicant is in the final stages of the application process for the position of potential employment.
 - b) Require an applicant to sign a release form authorizing the potential employer (the independent university or the UC) to inquire whether the applicant had any substantiated allegations of misconduct from the applicant's previous employers. The potential employer will ask for and utilize the information provided by the applicant in the final

stages of the application process after the potential employer has determined whether the applicant is qualified for the position of potential employment.

- 3) Requires a postsecondary education institution to contact the current or former employers of a potential athletic volunteer to determine whether the potential volunteer has any employment violations.
- 4) Defines the following:
 - a) “Postsecondary education institutions” means any campus of the UC, the CSU, the CCC, an independent institution of higher education, as defined in Education Code Section 66010, and a private postsecondary education institution as defined in Education Code Section 94858.
 - b) “Final administrative decision” means the written determination as to whether or not sexual harassment occurred as determined by the decisionmaker following the final investigative report and the subsequent hearing.
 - c) “Final judicial decision” means the final determination of a matter submitted to a court that is recorded in a judgment or by order of the court.
 - d) “Sexual harassment” has the same meaning as described in subdivision (a) of Section 66262.5 or if applicable as defined in Section 106.30 of Title 34 of the Code of Federal Regulations.
 - e) “Misconduct” means any violation of employment policies governing employee conduct as issued by the applicant’s previous employer including, but not limited to policies prohibiting sexual harassment, sexual assault, or other forms of harassment or discrimination as defined by the employer.
 - f) “Substantiated allegations” means an allegation that has been sustained based upon a burden of proof that meets the threshold of preponderance of evidence or fifty percent plus a feather.
- 5) Declares it is the intent of the Legislature for postsecondary education institutions to do the following:
 - a) Provide clear messages to applicants regarding the expectations around behavior that contribute to an equitable inclusive campus culture;
 - b) Conduct background checks to be completed by the U.S. Department of Justice and the Federal Bureau of Investigation during the final stages of the application process for an athletic department employee or volunteer.
- 6) Declares it is the intent of the Legislature to enact policies that will prevent a common issue across institutions of high education known as passing the harasser.

EXISTING LAW:

Federal law.

- 1) Stipulates that no person in the United States will, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance except for specified circumstances including membership of fraternities and sororities (United States Code Title 20, Chapter 38, Section 1681).
- 2) Outlines the required response pursuant to Title IX, of a postsecondary higher education institution when the institution is made aware of an alleged sexual harassment incident on campus. The regulations include a requirement for a formal complaint, a grievance procedure for an investigation into whether the incident based on a standard of evidence occurred, and a method of appealing the outcome of the grievance process (Federal Code of Regulations Title 34, Subtitle B, Chapter 1, Subpart D, Section 106.45).
- 3) Defines sexual harassment as conduct on the basis of sex that satisfies at least one of the following:
 - a) An employee of the postsecondary education institution conditions aid, benefit, or services to a recipient on the individual's participation in unwelcome sexual conduct;
 - b) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; an
 - c) Sexual assault, dating violence, domestic violence, and stalking, as defined in the United States Code (Federal Code of Regulations, Title 34, Subpart D, Section 106.30).

State law.

- 1) Establishes the UC as a public trust to be administered by the Regents and grants the Regents full powers of organization and governance subject only to legislative control as necessary to ensure the security of funds, compliance with terms of its endowments, and the statutory requirements around competitive bidding and contracts, sales of property, and the purchase of materials, goods, and services (Article IX, Section (9) (a) of the California Constitution).
- 2) Defines "Sexual Harassment" as unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting under the following conditions: quid pro quo, as defined, and hostile workplace, as defined. Further defines "Sexual Harassment" as sexual violence, sexual battery, and sexual exploitation, as defined (Education Code (EDC) Section 66262.5 and 212.5).
- 3) Requires the governing board of the CCC to adopt a standard of practice, when hiring for an academic or administrative position that requires an applicant to disclose whether they have been the subject of any final administrative or judicial decision with regards to sexual harassment in the last seven years. Permits the applicant to also disclose whether they are appealing the decision to either their previous employer or the United States Department of Education. Authorize the community college to ask for the disclosure in the final stages of the employment process (EDC Section 87604.5).

- 4) Requires the CSU to adopt a standard of practice, when hiring for an academic or administrative position that requires an applicant to disclose whether they have been the subject of any final administrative or judicial decision with regards to sexual harassment in the last seven years. Permits the applicant to also disclose whether they are appealing the decision to either their previous employer or the United States Department of Education. Authorize the CSU to ask for the disclosure in the final stages of the employment process (EDC Section 89521).
- 5) Requests the UC and independent colleges and universities, which receive state financial aid, to adopt a standard of practice, when hiring for an academic or administrative position that requires an applicant to disclose whether they have been the subject of any final administrative or judicial decision with regards to sexual harassment in the last seven years. Permits the applicant to also disclose whether they are appealing the decision to either their previous employer or the United States Department of Education. Authorize the UC to ask for the disclosure in the final stages of the employment process (EDC Section 92612.1).

FISCAL EFFECT: Unknown.

COMMENTS: *Confronting misconduct.* Based on the investigative work by *EdSource* and the *Los Angeles Times*, several incidents were found of professors who despite having engaged in sexual harassment and misconduct, were able to resign and retain employment at a subsequent postsecondary education institution in California. This practice of “passing a harasser” is a common practice and is utilized by institutions to avoid defamation lawsuits and to help incentivize settlement agreements with accused employee. A college is not liable for not investigating a complaint of harassment against a professor, if the professor elects to move on prior to the completion of the investigation. Furthermore, the previous employer is not compelled to disclose the complaint of harassment to the police nor prospective future employers of the accused individual, if the individual leaves prior to the conclusion of the investigation. The practice is so common that Joshua A. Engle, a lawyer who represents faculty members and has consulted with the federal government on Title IX revisions, advises in an article by *The Chronicle of Higher Education*, for accused employees of academic institutions to immediately begin looking for other places of employment because human resource officials will withhold information from future employers out of fear of a defamation lawsuit.

In 2023, California sought to rectify this issue by enacting SB 791 (McGuire) Chapter 415, Statutes of 2023. Senator McGuire stated “SB 791 is all about shining the light on dark and dangerous behavior, holding perpetrators accountable and ensuring the cycle of harassment and abuse on California’s college campuses is stopped in its tracks. This bill will require applicants for administrative or academic positions to disclose any final administrative or judicial decision determining they committed sexual harassment. That information would then be turned over to the hiring committee at the college campus to put an end to the cycle of abuse.”

In the analysis for SB 791 (McGuire), Assembly Higher Education Committee Staff noted the measure “does not require the institution to verify the information disclosed by the applicant, nor does the measure require the institution to act upon the information received.” SB 791 (McGuire) was an excellent first step to addressing the common problem of perpetually hiring academics who have a history of harassing students, faculty, and staff. However, more must be done to eliminate the employment loopholes that allow institutions to place the fear of defamations lawsuits above their duty to offer educational programs free from discrimination and harassment.

Purpose of the measure. As expressed by the author, “AB 810 is a measure that will add an extra guardrail in the employment processes for academic, athletic, and administrative positions at postsecondary education institutions in California. AB 810 builds upon the work of SB 791 (McGuire) by expanding the disclosure requirements to athletic positions and provides an additional reference check requirement of postsecondary education institutions to ensure applicants do not have a history of disciplinary violations at their previous places of employment. The intent of this bill is to give higher education institutions another tool to keep college campuses equally accessible and safe for all. This measure seeks to adds a layer of transparency to ensure that high education institutions are conducting due diligence when it comes to hiring potential employees or agreeing to volunteers.”

Background checks for postsecondary education institutions. Each of the CCC, CSU, and the UC conduct background checks for potential applicants for academic and administrative positions. Based on the Fair Chance Act of 2018, postsecondary education institutions do not conduct the background check until after a condition of employment is provided and the check is limited to crime committed in the last seven years that are related to the duties of the intended job. For example, the CCC conducts a U.S. Department of Justice background check for academic instructional staff as CCC districts are not permitted to hire someone with convicted sex offenses or controlled substance offenses according to Education Code Section 87405 subdivision (a). The background check is provided to the applicant who is then given the opportunity to explain the findings to the hiring board.

AB 810 (Friedman) mirrors the requirements of a background check in that it requires the potential employer to ask past employers of the applicant whether the applicant violated any of the employer’s policies. Just as background checks do not occur until the final stages of the application process, the “reference check” as required by AB 810 (Friedman) would only occur with the applicant’s permission and in the last stages of the application process.

Policies to prevent the “passing of harassers”. According to Edsource, “California has no mechanism for its three public higher-education systems – the CSU, the UC, and the CCC to share information about employees with sexual misconduct-allegation records”. This loophole in state policy is how a Fresno City College professor was able to retain employment and receive tenure despite having a substantiated claim of sexual violence at the neighboring California State University, Fresno.

The concept of enabling faculty, who are found responsible for sexual harassment, to transition to another institution was such a concern for the University of California, Davis campus, that in 2018, the campus began a pilot program to conduct reference checks to determine whether applicants have a documented history of disciplinary violations from their previous employers. The pilot program was such a success, that the University adopted the policy for all tenured faculty positions.

The policy as referenced requires tenured faculty applicants to sign a release permitting UC Davis to ask their previous employers about any substantiated academic misconduct including a finding of sexual harassment or sexual violence. Additionally, UC Davis asks the applicant to attest that they have not been disciplined in the last five years and are not currently the subject of an investigation.

The UC Davis policy was highlighted as a best practice for addressing the “passing of harassers” in a report presented to the Action Collaborative on Preventing Sexual Harassment in Higher Education (Action Collaborative). The Action Collaborative brings together academic and research institutions from across the nation to develop research-based resources related to sexual harassment prevention that will benefit the higher education community.

One of the main issues preventing colleges and universities from inquiring on the past employment history of applicants is the issue of liability. Institutions often fear employee litigation over the sharing of information or litigation should the disclosure request process fail to catch repeat harassers. However, in an April 22, 2022 article by the *Chronicle of Higher Education*, UC Davis officials acknowledged the policy is a deterrent as it has screened out applicants who may in fact be perpetual harassers from seeking tenure or permanent positions due to the reference check requirement. Furthermore, the article indicated that as of its publication on April 22, 2022, UC Davis had not experienced any major legal recourse for enforcing the policy.

AB 810 (Friedman) seeks to codify the UC Davis policy and expand the policy to apply to all public postsecondary education and potentially all private postsecondary education institutions in California. AB 810 (Friedman) shields the institution from liability as it requires the applicant to sign a disclosure agreement permitting the institution to contact past employers of the applicant.

Will this measure be impacted by the Assembly Higher Education Committee and the Senate Education Committee’s work on Title IX and sexual harassment reform? In March 2022, the staff of the Assembly Higher Education Committee were given a directive to examine how the State could best assist postsecondary education institutions in California to adhere to state and federal law pertaining to the prevention of sex discrimination on campus. Over the last two years, Assembly Higher Education Committee in collaboration with the Senate Education Committee spent over 400 hours participating in trainings, researching, reading reports and dissertations, and listening to experts, students, staff, and faculty from the CCC, the CSU, the UC, and the Association of Independent Colleges and Universities (AICCU). At the time of the publication of this analysis, the report as drafted by the two committees has not yet been made public; however, the report will contain recommendations on how the State can best address sexual harassment and sexual violence on college and university campuses.

The author has agreed to amend the bill to align with the recommendations of the report, should the report address employee background checks in a manner different than AB 810 (Friedman).

Arguments in support. The California Faculty Association, which represents over 29,000 faculty at the CSU, supports AB 810 (Friedman), as the measure “aligns with our commitment to transparency and responsible hiring practices. It is crucial to thoroughly evaluate potential hires and volunteers not only based on their skills and qualifications but also on their past conduct in similar roles. This not only promotes a safer environment for our students but also fosters a more ethical and responsible culture within our athletic departments.”

Previous legislation. SB 791 (McGuire) Chapter 415, Statutes of 2023, required the CCC and the CSU, and the UC to require potential employees to disclose whether they have been found to have committed sexual harassment in the seven years prior to their application of employment.

AB 1844 (Medina) of 2022, held in the Assembly Committee on Appropriations, would have provided a mechanism by which public postsecondary institutions are required to inquire

whether an applicant for employment, as defined, is the subject of a sexual misconduct investigation and to disclose to future employers whether an employee was the subject of a sexual misconduct investigation while they were employed. Requires campuses to establish positions on campus to provide survivor and respondent support, as defined

SB 1439 (Block), of 2016, provides that the UC, the CSU, and the CCC shall require applicants for employment, as specified, to disclose information regarding final administrative findings of sexual harassment. This bill had bipartisan support and was vetoed by Governor Brown who in his veto message stated: “while I understand the desire to mitigate risk, governing boards—who are the fiduciaries of these institutions—should be responsible for setting hiring standards, including the disclosure of prior bad conduct.”

REGISTERED SUPPORT / OPPOSITION:**Support**

California Faculty Association
Consumer Attorneys of California

Opposition

None on file.

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