

When Employees Are Bad Actors: Risks and New Solutions



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Agenda

1. Legal Risks Related to Employment of Bad Actors
2. Novel Approaches to Risk Mitigation From Across the Country
3. Reintegrating Bad Actors
4. Retaliation Risks



Legal Risks Related to Employment of Bad Actors

- Background Checks and Hiring Process
- Paid vs. Unpaid Leave Pending Investigations
- Defamation Claims against Complainants
- Separation Agreements
- Transparency to the University Community



Background Checks and Hiring

- Focused on uncovering prior job-related misconduct.
- Texas law (TLC 103.004) provides immunity based on job references, unless knowingly false information.
 - Laws vary, some require consent (e.g., IL, NM).
- Consider employee certification and reference release as part of hiring process.
- Criminal background checks subject to federal, state (none in TX), and local laws. Check beforehand.



Paid vs. Unpaid Leave For Exempt Employees – DOL Rules

- Unpaid suspensions allowed for violation of workplace conduct rules *if* pursuant to *written policy* applicable to *all employees*.
- Unpaid disciplinary suspension allowed for infractions of safety rules “of major significance” that relate to prevention of serious danger in the workplace or to other employees.
- FLSA risk low for faculty and physicians, but higher for other exempt employees.
- Limited enforcement options for state employees, but DOL could bring enforcement action.
- See 29 C.F.R. §541.602(b)(4)&(5).



Paid vs. Unpaid Leave – Texas Law, Regents Rules, Other Risks

- Texas law contemplates unpaid disciplinary suspensions. Tex. Gov't Code § 661.909(c).
- Regents Rule 30601: classified employees may be subject to disciplinary suspension without pay.
 - Regents Rules do not address unpaid disciplinary suspensions for faculty or admin staff.
- Risks that Leave Becomes Compensable:
 - Requiring employee to be “on call”.
 - Mandating employee not engage in other work.
 - Consider 24-hour notice period to mitigate.



SB 212 – A Year Later

- Employees are being terminated.
- At least one criminal arrest (former police officer at public university).
- Highlights need for continued training and consideration of departmental policies.
- Institutions across the state examining potential violations and remedial actions.
- Open question: Under what policy is an alleged SB 212 investigated and/or adjudicated?



Local police chief arrested over failure to report student's allegations

Defamation Claims Against Complainants / Witnesses

- Reports from United Educators that ~70% of respondent Title-IX cases include defamation claims against complainant.
- Multiple claims involving UT institutions in past 4 years.
- Students lack immunities enjoyed by employees.
- Claims often surviving initial dispositive motion.



Separation Agreements

- Separation agreements historically included waiver of rights (e.g., due process, defamation) in exchange for payment.
- Also included mutual confidentiality provisions that would preclude disclosure absent waiver from bad-actor.
- Confidentiality provisions:
 - Likely unenforceable for Texas state entities.
 - May be unenforceable under various state laws following me-too changes (e.g., CA, NV, OR).
- Is PR risk worth it?
- E.g., Johns Hopkins letter



Transparency to University Community and Others

- Recent campus unrest for lack of disclosure.
 - Some have adopted new policies requiring termination and/or disclosure of sexual misconduct by bad actors.
- Texas has mandated transparency in various forms:
 - K-12 school teachers (TEC 21.006)
 - Students: disclosure to institutions and on transcripts (TEC 51.287, 51.9364)
 - Mandatory reporting of Title IX matters (SB 212)
- However, Texas law has not addressed mandatory disclosure of adverse findings for higher ed employees.

Novel Approaches Around the Country



UC San Diego



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University of Wisconsin had multiple incidents:

- Asst. DOS and Title IX coordinator committed harassment, moved to similar job in Illinois, and then hired at another UWS campus. Neither institution knew.
- UW Madison faculty member found to have created toxic environment in his lab. After investigation but before sanction, faculty accepted a rotator position with NSF. Then UWS determined he would be suspended without pay for 2 years, but didn't tell NSF. NSF not happy and terminated.
- Quinn Williams, GC of UWS: *“Institutions of higher education aren't designed to change quickly. But it's no longer acceptable to mitigate risk by quietly letting someone leave.”*

Sweeping changes to personnel and reference check policies:

1. Personnel files must include minimum information on investigations, findings, and settlements, and must be shared with other UWS and Wisconsin state entities;
2. Final candidates asked about sexual misconduct findings, pending investigations, or if left under pending allegations;
3. Mandatory reference checks re sexual misconduct with prior employer and all prior WI state employers, but no *per se* bar;
4. Mandatory disclosures in response to reference check inquiries regarding potential employee misconduct, including any sexual misconduct.

UWS Policy, Sept. 25, 2018

Reference check pilot project requiring:

1. Faculty applicants must sign an “Authorization to Release Information” for information “concerning any misconduct related to teaching, research and service (and clinical care if applicable).”
2. Reference check completed on final candidate and limited to questions re “to substantiated findings of misconduct and associated discipline.”
3. If adverse information provided, applicant can respond.
4. Prior findings not a *per se* bar.

UC Davis, July 20, 2018

- UC Davis Vice Provost Philip Kass: *“Potential applicants for faculty positions who have been disciplined, upon reading UC Davis’s requirement for a signed authorization in order for their application to be considered, will be dissuaded from applying.”*
- No complaints from applicants or institutions about the policy during the first year.
- UC San Diego adopted on November 1, 2019.



System-wide policy that requires:

- All final candidates to allow for release of any findings of sexual misconduct or harassment from current or previous employer(s); and
- Prohibits inclusion of confidentiality or non-disclosure provisions in separation / settlement agreements that would limit the release of findings of sexual misconduct.

UIS Board of Trustees, November 14, 2019

Potential Strategies

- ✓ Formalize documentation of findings of misconduct in employees' personnel files.
- ✓ Formalize documentation of negotiated resolutions or settlement agreements in personnel files.
- ✓ Mandatory disclosure of final misconduct findings and pending investigations by applicants.
- ✓ Execution of authorization by applicants.
- ✓ Mandatory reference checks of prior employers (including UT and Texas employers).
- ✓ Adopt a rule that prior findings not a *per se* bar and opportunity to respond.

Potential Strategies -- Continued

- ✓ Conditional offers subject to completion of reference checks.
- ✓ Mandatory disclosures in response to reference checks from other institutions.
 - May require authorization to mitigate potential defamation claims.
- ✓ Presumptive termination based on finding of sexual misconduct.
- ✓ Disclosure of adverse findings to university community.
- ✓ Prohibition on confidentiality or non-disclosure provisions in separation, resignation, and/or settlement agreements.

Legal Barriers to These Strategies

- Unaware of any Texas law or UT System Regents Rule that would preclude consideration of these policies.
- Defamation?
 - UWS considered legal risks “oversold.”
 - Consider requiring authorization for reference checks from third parties.
 - Would need to protect identity of others involved.
- Non-disclosure provisions in separate agreements unenforceable as a matter of law.

Reintegrating Bad Actors

- Responding to transparency demands
- Have a communication strategy
- Defense of respondents by colleagues and others outside organization
- Retaliation risks, including non-actionable retaliation

Retaliation Risks

Risk factors:

- Strong power dynamics and positions of authority, e.g.:
 - Faculty supervising graduate students and post-docs
 - Deans, Dept. Chairs, etc.
 - Physicians and Residents
- Autocratic managerial styles.
- Lack of cultural sensitivity and failure to follow social norms.

Mitigation Strategies:

- Consider decreasing or modifying power structures.
- Active monitoring and written remediation plan.
- Empower those at risk with training and ongoing support / access.

Questions?