SB 212 (Employee Mandatory Reporting)

Relating to a reporting requirement for certain incidents of sexual harassment, sexual assault, dating violence, or stalking at certain public and private institutions of higher education; creating a criminal offense; authorizing administrative penalties.

Summary of Legislation

SB 212 requires employees to “promptly report” certain incidents (described below) “to the institution’s Title IX coordinator or deputy Title IX coordinator.”

Failure to do so can lead to administrative penalties, termination, and potential criminal sanctions.

Effective Date

SB 212 generally goes into effect on September 1, 2019. Significantly, though, the criminal sanctions do not go into effect until January 1, 2020. Further, the Coordinating Board is directed to submit an initial report of institutions not in compliance with the law by January 1, 2021.

Employee Reporting Requirement

SB 212’s employee reporting obligation is triggered when an “employee of a postsecondary educational institution” “witnesses or receives information” regarding an incident that “the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking, which was allegedly committed by or against “a student enrolled at or an employee of the institution at the time of the incident.” By its terms, this duty to report would be triggered when both the alleged perpetrator and alleged victim are affiliated with an institution. However, it is worth pointing out that the requirement also applies in instances when individuals with no

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2 SB 212 defines “Sexual harassment” as “unwelcome, sex-based verbal or physical conduct that: (A) in the employment context, unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment; or (B) in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student’s ability to participate in or benefit from educational programs or activities at a postsecondary educational institution.” Tex. Edu. Code § 51.251(5).


affiliation with an institution are either allegedly victimized by a school employee or student or are accused of committing offenses against school employees or students. The employee reporting obligation only exists, though, when the employee witnesses or receives information regarding sexual harassment, sexual assault, dating violence, or stalking “in the course and scope of [the employee’s] employment.” There is nothing in the law suggesting that an employee is relieved of their individual obligation to report because they know another employee has already reported the same misconduct.

If a school determines that an employee failed to satisfy their mandatory requirement, the school would be required to terminate that employee “in accordance with the institution’s disciplinary procedure.”

Exceptions

While no definition of “employee” is provided, the law notes that an “[e]mployee of a postsecondary educational institution” does not include “a student enrolled at the institution.” Although not entirely clear, it appears that this student exception is intended to apply to traditional student-workers (i.e., full-time students with part-time positions in the university) and not full-time employees who happen to be taking courses at the institution. The statute’s definition of employee also notably does not include language suggesting that the reporting requirement applies to volunteers, agents, or other non-employees.

Employees who are “victims of sexual harassment, sexual assault, dating violence, or stalking” are not required to report incidents involving themselves. Additionally, employees who learn about reportable incidents “at a sexual harassment, sexual assault, dating violence, or stalking public awareness event sponsored by a postsecondary educational institution or by a student organization affiliated with the institution” are not required to report those incidents. This latter exception would cover “information” generated by events such as “Take Back the Night” so long as the event is sponsored by the school or a student organization affiliated with the school.

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5 Id. Notably, the statute fails to define “course and scope of employment.” We expect the Coordinating Board will provide additional guidance on this. In the meantime, we believe it is reasonable to borrow from traditional employment law principles in construing the reach of the obligation, i.e., an employee has a duty to report when he or she witnesses or receives reportable information while performing duties in the furtherance of the university’s business and for the accomplishment of tasks for which the employee was hired. See Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002) (citing Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 357 (Tex.1971)).

6 Tex. Edu. Code § 51.255(c). In addition, SB 212 makes it a Class B misdemeanor (punishable by a maximum of 180 days in jail and/or a maximum fine of $2,000) for a person who “is required to make a report under Section 51.252 and knowingly fails to make the report” or “with the intent to harm or deceive, knowingly makes a report under Section 51.252 that is false.” Id. § 51.255(a). The offense is escalated to a Class A misdemeanor (punishable by up to one year in jail and/or a maximum fine of $4,000) “if it is shown on the trial of the offense that the actor intended to conceal the incident that the actor was required to report under Section 51.252.” Id.

7 Id. § 51.251(3).

8 Id. § 51.252(d)(1).

9 Id. § 51.252(d)(2).
What Must Be Included in Employee Mandatory Report?

The mandated report to the Title IX coordinator or deputy Title IX coordinator must include “**all information** concerning the incident known to the reporting person that is relevant to the investigation.” The statute does not identify specific details or requirements for the report. The report must also note, “if applicable, redress of the incident, including whether an alleged victim has expressed a desire for confidentiality in reporting the incident.”

The statute provides a significant caveat to this reporting requirement for an employee who (1) has been “designated by the institution as a person with whom students may speak confidentially concerning sexual harassment, sexual assault, dating violence, or stalking” or (2) “receives information regarding such an incident under circumstances that render the employee’s communications confidential or privileged under other law.” Critically, though, these individuals are not immune from the reporting requirement. Rather, this provision requires employees in either of these two categories to provide “only the type of incident reported,” which cannot “include any information that would violate a student's expectation of privacy.”

This confidential-employee designation appears to only apply to incidents involving students, but the statute does not otherwise restrict the types of employees institutions can designate as confidential employees.

Confidentiality Requirements

Once a report is made, the “identity of an alleged victim” who is the subject of the mandatory report must remain “confidential” and may only be disclosed to:

- “persons employed by or under contract with the postsecondary educational institution to which the report is made who are necessary to conduct an investigation of the report or any related hearings”;

- “a law enforcement officer as necessary to conduct a criminal investigation of the report”;

- “the person or persons alleged to have perpetrated the incident, to the extent required by other law;” or

- “potential witnesses to the incident as necessary to conduct an investigation of the report.”

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10 Id. § 51.252(b).
11 Id.
12 Id. § 51.252(c).
13 Id.
14 Id. § 51.256.
The identity of an alleged victim may also be disclosed if confidentiality is “waived in writing by the alleged victim.”\textsuperscript{15}

This is a potentially significant restriction which will likely create a host of unanticipated practical challenges. Just by way of example, it is not uncommon for information about dating violence or stalking cases to be shared with institutional behavioral intervention teams and it is not clear if this new law would impact that practice. Similarly, schools may also share internal incident reporting regarding these matters. For example, if campus police, student housing, or student affairs personnel issue a daily incident log to a group of senior administrators and that log has identifiable information then the practice of including names (or even potential identifiers such as room numbers) may need to be revisited.

**Title IX Coordinator Report Requirement**

The statute further requires the Title IX coordinator to submit a “written report” on all of the reports of sexual harassment, sexual assault, dating violence, or stalking received pursuant to the mandatory-reporting requirement to the “institution’s chief executive officer” “[n]ot less than once every three months.”\textsuperscript{16} The Title IX coordinator report must include information regarding:

- “the investigation of those reports”;
- “the disposition, if any, of any disciplinary processes arising from those reports”; and
- “the reports for which the institution determined not to initiate a disciplinary process, if any.”\textsuperscript{17}

The law does not further specify what “information regarding the investigation” is required, but presumably it would include sufficient facts to meaningfully advise the president about how an investigation is proceeding. There is no requirement that the report include the identity of participants, and such disclosure may violate SB 212’s confidentiality provisions to the extent the president plays no role in an institution’s investigation or hearing process.

In addition to this quarterly written report, the “Title IX coordinator or deputy Title IX coordinator” is required to “immediately report to the institution’s chief executive officer” an incident of sexual harassment, sexual assault, dating violence, or stalking reported by an employee if the coordinator has “cause to believe that the safety of any person is in imminent danger as a result of the incident.”\textsuperscript{18} The law provides no guidance on how coordinators are to make this assessment and Title IX personnel are certainly not precluded from relying on the institution’s standard threat assessment practices in making this determination.

\begin{footnotes}
\footnote{Id.}
\footnote{Id. § 51.253(a).}
\footnote{Id.}
\footnote{Id. § 51.253(b).}
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Chief Executive Report to Governing Body

Subject to an exception for smaller institutions mentioned below, “at least once during each fall or spring semester,” the chief executive officer is required to “submit to the institution’s governing body” and “post on the institution’s Internet website a report” concerning the employee mandatory reports.\(^{19}\)

That report cannot “identify any person” and must include:

- the number of mandatory reports received;
- the number of investigations conducted as a result of those reports;
- the disposition, if any, of any disciplinary processes arising from those reports;
- the number of those reports for which the institution determined not to initiate a disciplinary process, if any; and
- any disciplinary actions taken against an employee for failing to make a mandatory report.\(^{20}\)

For institutions with fewer than 1,500 “enrolled students” in a given semester, the report to the governing body and website post need only be made if five mandatory reports were made during the applicable semester.\(^{21}\)

Finally, on an annual basis, the chief executive officer must “certify in writing to the Coordinating Board that the institution is in substantial compliance with” SB 212.\(^{22}\) The Coordinating Board is authorized to mete out administrative penalties up to $2 million if it determines that the institution is not in “substantial compliance.”\(^{23}\)

Immunities and Anti-Retaliation

SB 212 creates a unique “immunities” provision which extends beyond institutional employees and applies to any person “acting in good faith who reports or assists in the investigation of” a mandatory report or “who testifies or otherwise participates in a disciplinary process or judicial proceeding arising from” a mandatory report.\(^{24}\) Those individuals are “immune from civil liability, and from criminal liability for offenses punishable by fine only” that “might otherwise be incurred or imposed as a result of those actions.”\(^{25}\) They may also “not be subjected to any

\(^{19}\) Id. § 51.253(b).
\(^{20}\) Id. § 51.253(c).
\(^{21}\) Id. § 51.253(d).
\(^{22}\) Id. § 51.258(a).

\(^{23}\) The statute fails to define the meaning of “substantial compliance,” and there is no definition provided in the Education Code. We expect The Coordinating Board to define this term in its rulemaking. Generally speaking, though, “substantial compliance with a statute means compliance with its essential requirements.” BankDirect Capital Fin., LLC v. Plasma Fab, LLC, 519 S.W.3d 76, 82 (Tex. 2017).

\(^{25}\) Id.
disciplinary action” by the school “at which the person is enrolled or employed for any violation by the person of the institution’s code of conduct reasonably related to the incident for which suspension or expulsion from the institution is not a possible punishment.”  

The law also bars institutions from “disciplin[ing] or otherwise discriminat[ing] against” “an employee who in good faith” makes a mandatory report or “cooperates with an investigation, a disciplinary process, or a judicial proceeding relating to” a mandatory report.  

Recommended Action Items

As alluded to throughout this guidance, ICUT anticipates that the Coordinating Board will clarify several ambiguous areas of this new legislation in the negotiated rulemaking process.  

The Coordinating Board will engage Texas’ public and private institutions of higher education in developing these rules through the negotiated rulemaking process in accordance with Texas Government Code, Section 2008 (Negotiated Rulemaking Act). The Coordinating Board is in the process of selecting individuals for the Negotiated Rulemaking Committee, and ICUT expects to have robust representation in the rulemaking process.  

ICUT will continue to provide updates and revised implementation guidance to member institutions as additional information and guidance becomes available. In the meantime, the following is a list of recommended action items to guide institutional compliance with SB 212:

Policy Steps

- Institutional policies should be crafted and/or revised to include the SB 212 mandatory reporting requirement for employees. Given the potential consequences of non-compliance for both employees and institutions, it is recommended that schools develop a protocol to ensure that all current employees are aware of the reporting requirements at the beginning of the upcoming academic year and at regular intervals.

- Institutional discrimination, employee, and student policies should be revised to reflect that written reports go to the president and board. These policies also should outline the

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26 Id.
27 Id. §51.257(a).
28 Id. §§ 51.254(b) (stating that the immunity provision does not apply to “a person who perpetrates or assists in the perpetration of the incident reported”), 51.257(b) (stating the anti-retaliation provision does not apply to “(1) reports an incident described by Section 51.252(a) perpetrated by the employee; or (2) cooperates with an investigation, a disciplinary process, or a judicial proceeding relating to an allegation that the employee perpetrated an incident described by Section 51.252(a)”).
29 See id. § 51.9364(e) (directing the Texas Higher Education Coordinating Board to “adopt rules as necessary to implement this section”).
30 Further complicating matters is the fact that institutional compliance efforts will also need to be informed by the final Title IX regulations which are expected to be issued in September 2019.
role of the president and board in reviewing those reports and, if applicable, potentially intervening in particular cases.

- Institutional discrimination and employee policies should be revised to include SB 212’s anti-retaliation provision and specify that it is a violation of institutional policy to discipline or otherwise discriminate against an employee who in good faith makes a mandatory report or cooperates with an investigation, disciplinary process, or judicial proceeding relating to a mandatory report.

- Institutional disciplinary policies in faculty and staff handbooks should be revised to include a specific reference to the mandatory-reporting requirement and specify that the only appropriate sanction for a violation of an employee’s mandatory reporting requirement will be termination. This statutory requirement presumably applies to tenured faculty members.

- Institutional amnesty provisions for students and employees should be drafted and/or revised in a manner consistent with SB 212’s immunities provision.

**Recommended Training**

- Employees should receive training on the new reporting requirements in advance of the upcoming academic year and in regularly-scheduled intervals.

- New employee orientation/on-boarding process should include information/training on the mandatory-reporting requirement.

- Employees and students should be notified about employee reporting requirements so that alleged victims of misconduct can make informed decisions about who to discuss instances of sex harassment, sex assault, dating violence, or stalking with.

- Training should be provided to all relevant staff on SB 212’s confidentiality requirements.

- Presidents and board members should receive training on SB 212. Regular training on statutory and regulatory requirements under Title IX and related laws is recommended as well.

**Other Compliance Recommendations**

- To avoid any confusion about whether a mandatory report was made or not, schools should consider creating online portals for making mandatory reports and requiring reports to be made through the online portal. The portal should include information about the location of the alleged incident so that institutions can satisfy any Clery obligations associated with a mandatory report.
The confidentiality restrictions described above do not permit sharing information with those who need to know to implement accommodations/interim measures. Institutions should consider preparing a release/waiver of confidentiality as necessary to address accommodations or necessary information sharing that is not permissible under the new statute. Along those same lines, institutions should consider how information about sex misconduct and similar misconduct reports are currently shared and assess whether practices need to be modified so as not to run afoul of the new confidentiality provisions.

Institutions should prepare a template Chief Executive Report consistent with the obligations of SB 212 and consider a protocol for presidential response to these reports.

A website page dedicated to SB 212 should be created which, among other things, satisfies the Chief Executive Report Requirement.

Institutions should develop guidelines for when Title IX coordinators and deputy coordinators have cause to believe that the safety of any person is in imminent danger and an immediate report to the president is warranted, and consider a protocol for presidential response.

Institutions should revisit confidential reporting designations to assess who should be a potential confidential recipient of student complaints. SB 212 does not restrict an institution’s designation of an employee “as a person with whom students may speak confidentially concerning sexual harassment, sexual assault, dating violence, or stalking.”

Title IX coordinators should calendar their quarterly reports to institutional presidents. Institution’s compliance personnel should also calendar the president’s annual certification letter and ensure that it is submitted on a timely basis.

Questions regarding this guidance or requests for proposals to aid in compliance can be directed to Husch Blackwell:

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