

# *LEGAL UPDATE*

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WSSSC WINTER MEETING

FEBRUARY 3, 2023

AAG H. BRUCE MARVIN

# What we will cover

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- Barlow v. State of Washington*
- Student Conduct Academy
- Overtime Qualified Employees – the
- Gramm-Leach-Bliley Act
- Other issues
- Questions

# *Barlow v. State of Washington*

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- While enrolled at WSU Vancouver Campus, perpetrator was disciplined for two separate instances of inappropriate sexual misconduct
- Suspended for 9 days and required to write essay on consent
- Staff who reviewed essay concluded that perpetrator still did not understand concept of consent
- Perpetrator returns to WSU and transfers to Pullman campus
- Perpetrator rapes another student in off-campus apartment

# *Barlow v. State of Washington*

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- Barlow sues on following theories
  - Title IX
  - WLAD & RCW 28B.110
  - Common law negligence
- Trial court dismisses Title IX and WLAD/RCW 28B.110 finding WSU was not deliberately indifferent
- Court finds Washington does not recognize “special relationship” between the parties that would give rise to common law duty to protect students from misconduct by other student

# *Barlow v. State of Washington*

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- Barlow appeals to Ninth Circuit, which refers following issues to Washington State Supreme Court:

**(1) Does Washington law recognize a special relationship between a university and its students giving rise to a duty to use reasonable care to protect students from foreseeable injury at the hands of other students?**

**(2) If the answer to question 1 is yes, what is the measure and scope of that duty?**

# *Barlow v. State of Washington*

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- *Amicus* brief by SBCTC, Council of Presidents (public 4-years), and Private 4-years
  - Relationship between IHE and student is grounded in contract
  - Emphasizes differences in size, structure, and mission of Washington State IHEs
  - Unintended consequences could include:
    - Heightened scrutiny of criminal histories for applicants and enrolled students at 4-years
      - Formerly incarcerated students
      - Undermine DEI initiatives
    - Increased liability for open enrollment CTCs
    - Expansion of tort liability beyond college property and college-sponsored activities
  - Potentially precedential case – ruling likely this summer

# Student Conduct Academy

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- Gauging interest within CTCs for student conduct training
- One day training by AAGs focusing on basic hearing preparation and presentation skills
- Sessions on both sides of the mountains
- SBCTC/WSSC sponsorship?
- Creation of subcommittee?
- Time frame?
- Materials available

# Overtime Qualified Employees

## *The Coaching Conundrum*

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Threshold salary for overtime exempt status under Washington Minimum Wage Act –  
\$1,259.20 per week

### HYPOTHETICAL:

Classified employee working 40 hours a week and earning \$900 per week

Classified employee applies for coaching position, which is exempt from minimum wage law

Coaches are paid \$3,500 stipend over course of 15 week season - \$233 per week

Coaches typically works 15 hours per week

The Coach's combined wages during the 15 week season totals \$1,133 per week

**Is the Coach entitled to receive overtime during the coaching season?**



# *The Coaching Conundrum*

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Coach is entitled to receive overtime pay for any time worked over 40 hours per week

When employee works both an over-time qualified and an over-time exempt position, employer must determine which position represents the employee's "primary duty"

"Primary duty" means "principal, main, major or most important duty that the employee performs."

In our hypothetical classified work would constitute employee's primary duty

Weighted average of both hourly wages is used to determine overtime pay

Classified hourly wage - \$900 per week / 40 hours

Coach hourly wage -\$233 per week / 15 hours

Weighted average hourly wage -  $\$1133 / 55 \text{ hours} = \$20.6 \times 1.5 = \mathbf{\$30.9 \text{ per overtime hour}}$

# The Coaching Conundrum

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- So... our employee's combined salary (classified and coaching) (\$1,133) is below the overtime exempt threshold (\$1,259.20) and their primary duties relate to an overtime qualified position
- What is the overtime rate for our employee?

The overtime rate is calculated by taking a weighted average of both hourly wages

Classified hourly wage - \$900 per week / 40 hours

Coach hourly wage - \$233 per week / 15 hours

Weighted average hourly wage - \$1133 / 55 hours = **\$20.60**

Times **1.5 overtime multiplier** =

**\$30.90 per overtime hour**

# *The Coaching Conundrum*

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## Variations on a theme

- What if classified and coaching wages exceed the overtime exempt threshold (\$1,259.20)?
- What if employee is an instructor and their combined wages are below exempt threshold?
- What if the employee is not represented by a union and salary is below threshold?
- What if coaching is volunteer position and stipend only reimburses reasonable expenses?
- What if coaching positions are covered by the faculty CBA?

**IF YOU ENCOUNTER THESE ISSUES, CONSULT WITH HR AND YOUR AAG!**

# The Gramm-Leach-Bliley Act (GLBA)

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- Federal law administered by the Federal Trade Commission
- Governs privacy and security of student financial aid records
- Two components
  - Consumer Privacy –IHE must comply with FERPA- 16 C.F.R. 313.1(b)
  - Information Security – new rule, effective June 9, 2023

# GBLA Financial Information Security

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Institutions of Higher Education required to:

- Designate a qualified individual to oversee security of student financial information
- Design and implement an information security program that is based on a risk assessment
- Implement security controls that are based on the risk assessment
- Encrypt customer information both in transit and storage
- Regularly conduct testing and monitoring of security controls
- Train personnel on information security
- Periodically assess security systems belonging to service providers who have access to data
- Develop and implement a written incident response plan
- Annually prepare and a written status report on information security to the Board of Trustees

*See 16 C.F.R. 314.4*

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# QUESTIONS?