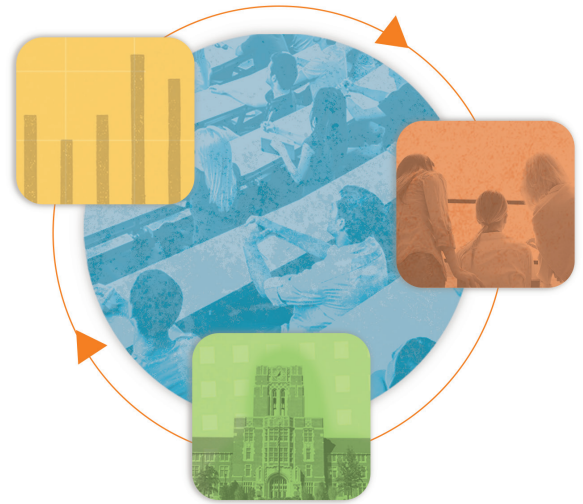


# University of California, Davis: Stop “Passing the Harasser” Policy

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Harassment in Higher Education<sup>1</sup>



## About Products of the Action Collaborative on Preventing Sexual Harassment in Higher Education

*This description of an innovative practice is a product of the National Academies’ Action Collaborative on Preventing Sexual Harassment in Higher Education. It is part of a series of papers designed to provide information on novel policies or practices, including what they aim to address, how they were developed, how they are operationalized, and how other organizations could adapt and apply them. The views expressed in this paper are those of the authors and not necessarily of their organizations or the Action Collaborative on Preventing Sexual Harassment in Higher Education. They do not represent formal consensus positions of the National Academies of Sciences, Engineering, and Medicine. Copyright by the National Academy of Sciences. All rights reserved.*

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<sup>1</sup> Information about the authors can be found at the end of the paper.

*The description of practice below summarizes the development and implementation of a policy by the University of California, Davis (UC Davis), to prevent “passing the harasser,” a term that denotes a known harasser transitioning from one institution to another without (1) the new employer’s knowledge of previous violations of sexual harassment policy or ongoing investigations of such violations, and/or (2) facing disciplinary action. The description of practice provided here details how the policy works and what processes were used to develop and implement it, with the aim of enabling other organizations to adapt and apply it to their own environment. Specifically, the paper includes the following information about the UC Davis policy: description and case examples, historical background on the development of the policy, processes used to develop it, initial feedback on the policy and how concerns were handled, preliminary ideas for evaluating the practice introduced by the policy, and suggestions for other organizations considering implementing similar practices.*

The Response Working Group of the Action Collaborative would like to acknowledge the UC Davis representatives who contributed to the development of this description of practice, including:

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- Binnie Singh, EdD, Assistant Vice Provost, Academic Affairs, UC Davis
- Wendi Delmendo, JD, Chief Compliance Officer, UC Davis

## INTRODUCTION

A systemic problem across institutions of higher education known as “passing the harasser” enables faculty members found responsible for sexual harassment to transition to another institution without notifying their new employer or facing disciplinary action from their previous employer (Flaherty, 2016;

Gluckman, 2017; Kingkade, 2017; Leatherman, 1996; Mervis, 2019). This problem is often facilitated by institutional confidentiality and nondisclosure agreements that prevent institutions from sharing information on faculty perpetrators of sexual harassment (Brown and Mangan, 2019; Fields, 2019a). The Response Working Group collected comprehensive information on the development and implementation of the initial policies designed to prevent the “passing the harasser” problem in higher education. These initial policies from the University of Wisconsin (UW) System and UC Davis provided two distinct models for addressing this problem that are now being adapted by other higher education institutions. This paper describes the UC Davis practice in detail; a companion paper from the Action Collaborative describes the UW System practice.<sup>2</sup>

## The UC Davis Policy

To prevent the “passing the harasser” problem, UC Davis developed a groundbreaking approach in 2018 designed to prevent the hiring of faculty with tenure/security of employment<sup>3</sup> (i.e., a career-long guarantee of employment) who have a history of misconduct. The UC Davis policy requires all individuals applying for a tenured (or equivalent) faculty position to include with their application materials a signed release stating that if they are the top candidate, UC Davis may contact all their prior university employers and conduct a reference check. Specifically, the UC Davis policy involves asking previous employers whether a candidate has any history of substantiated academic misconduct<sup>4</sup> found following a formal investigation, including a finding

<sup>2</sup> The Action Collaborative’s paper on the UW System practice can be accessed here: <https://www.nationalacademies.org/news/2022/04/innovative-practice-university-of-wisconsin-system-stop-passing-the-harasser-policy> (accessed April 18, 2022).

<sup>3</sup> A Lecturer or Senior Lecturer within the Security of Employment (LSOE) series holds a continuous appointment that may not be terminated except for good cause after having the opportunity for a hearing before the properly constituted advisory committee of the Academic Senate (UC Davis, 2014).

<sup>4</sup> Substantiated misconduct is further defined in UC Davis’s legal release form, available here: <https://aadocs.ucdavis.edu/your-resources/forms-and-checklists/forms/ARF.pdf>.

of sexual harassment/sexual violence, in the course of the applicant's research/scholarship, teaching/mentoring, or university/public service. In addition, since the reference check policy is limited to substantiated misconduct found following a formal investigation, UC Davis issues tentative offer letters to final candidates asking them to attest that they have not been disciplined in the last 5 years and are not currently the subject of an investigation.

The UC Davis policy is innovative in that it is not limited to sexual harassment and sexual violence; rather, it introduces a coordinated process for conducting reference checks that also encompasses any form (or combination) of harassment or discrimination that impacts the applicant's capacity to perform research, teaching, or service duties. In this way, the policy reflects how people with multiple marginalized identities often experience sexual harassment in combination with other forms of harassment and/or discrimination.

### Relationship to Findings and Recommendations of the 2018 *Sexual Harassment of Women Report*

UC Davis's practice is consistent with several aspects of the recommendations put forth in the report *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (NASEM, 2018). In line with the 2018 report's recommendation 3—to move beyond legal compliance to address culture and climate—the UC Davis policy requires more than basic legal compliance; it addresses the UC Davis culture and climate by sending an immediate message to applicants and UC Davis community members with respect to expectations around behavior. By requiring applicants to sign a release that allows UC Davis to contact their previous university employers about substantiated findings of sexual harassment/sexual violence, the policy is designed to send an unequivocal message that the university

does not tolerate such behavior. In addition, this policy connects to the 2018 report's recommendation 4 on improving accountability, as it holds faculty accountable for academic misconduct and makes clear that sexual harassment is just as important as research misconduct. Individuals who have been found responsible for infractions involving sexual harassment/sexual violence are likely to be identified through the reference check process, and if the infractions are judged to be sufficiently serious, those individuals will not be offered a faculty position.

### DESCRIPTION OF THE PRACTICE

"Passing the harasser" is a common issue across institutions of higher education whereby faculty members found responsible for sexual harassment can quietly resign and seek employment at another institution without notifying their new employer of their past misconduct, thereby escaping any disciplinary action. An additional problem is that the new employer is unaware of a harasser's previous misconduct, which can embolden serial harassers to continue their harmful behavior or prevent new employers from ensuring that their community is protected from repeat behavior. This problem is fueled by the hesitation of many institutions to share with other institutions information on their employees' disciplinary history out of a desire to avoid legal risks (e.g., defamation lawsuits), negative publicity, or privacy violations (Brown and Mangan, 2019; Fields, 2019b; Flaherty, 2018). Indeed, institutions will often sign confidentiality or nondisclosure agreements with employee perpetrators of sexual harassment, enabling them to transition from one institution to another without anyone knowing of their previous misconduct (Cantalupo and Kidder, 2019). In the absence of federal regulations or guidance on requesting and sharing information on sexual misconduct among higher education institutions and prospective employers, the development and implementation of policies to stop "passing the harasser" is currently left to individual universities, university systems, or states (Brown and Mangan, 2019; Fields, 2019c).

The UC Davis policy includes a reference check inquiry that applies to applicants for faculty positions in every college or school at UC Davis that would provide tenure or security of employment to new hires. Once faculty members have tenure, they can be removed from their position only for incompetent performance or serious misconduct through a protracted and legally complex process. The UC Davis policy was developed to avoid these difficult removal processes by identifying individuals with a history of substantiated findings of sexual harassment/sexual violence before they are hired. This policy applies to all ladder-rank<sup>5</sup> associate and full professors (tenured) and lecturers and senior lecturers with security of employment.

Under the UC Davis policy, reference checks can be conducted with all prior university employers of such candidates in the last 10 years; the checks are carried out by the central campus's Office of Academic Affairs. The policy thereby ensures that uniform practices are applied for applicants to all academic units across the university and that reference check procedures are tracked in a consistent manner. It is important to note that this policy does not apply directly to faculty candidates pursuing high-level administrative positions (e.g., vice chancellor), as their hiring process involves a more exhaustive background check that goes beyond the standard criminal background check. This background check, conducted by search firms for high-level administrative recruitments, is expected to capture the information gathered in UC Davis's reference check policy, as it specifically requests information from both the candidates and their references regarding prior misconduct, harassment, discrimination, or Title IX violations.

The reference check program investigates faculty candidates only with respect to their faculty responsibilities, which are outlined in the University of

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<sup>5</sup> Ladder-rank faculty are those appointed in the Professor series (i.e., faculty who are appointed as Assistant, Associate, or Full Professors). Appointees in the Professor series are accorded tenure or are tenure-track (at the Assistant Professor rank) (UC Davis, 2014).

California *Academic Personnel Manual*. The inquiries are restricted to (1) substantiated findings of misconduct; and (2) associated discipline related to teaching, research, service, and (if applicable) clinical care resulting from both ongoing and completed investigations. If and when a prior institution discloses such findings of substantiated sexual harassment (or other forms of academic misconduct), the candidate is informed and given the opportunity to provide additional information in response. The Director of Academic Employment and Labor Relations then consults with the Vice Provost for Academic Affairs, Assistant Vice Provost for Academic Affairs, campus counsel, Title IX officer (if appropriate), hiring dean, and hiring department chair to discuss the nature of and conditions surrounding the substantiated incident (how serious it was, how long ago it occurred, whether there was any recurrence, whether the individual accepted personal responsibility or engaged in victim blaming, and whether the person was deemed to have been rehabilitated). The consultation also takes into consideration any response from the candidate and evidence of appropriate sanction/remedy.

As noted above, the UC Davis policy takes into account the compounding effects of sexual and other forms of harassment. Multiple forms of harassment and/or discrimination would elevate the seriousness of each such offense, virtually eliminating any chance of the individual being hired by UC Davis.

If the consultation results in consensus that a candidate could represent a risk to the university community, that individual will not be offered a faculty position. To maintain privacy and confidentiality, the misconduct disclosures discussed during the consultation are not shared with the respective department faculty or the faculty recruitment committee; if the findings regarding misconduct result in not extending an offer, the dean involved in the faculty hiring process will share only that the finalist's hire was not approved without providing any additional details.

## Case Example for the Reference Check Process

*A faculty recruitment committee recommends faculty candidates to an academic department. The academic department evaluates these individuals and selects a final candidate who would be hired with tenure or security of employment. The department then notifies the appropriate dean regarding the recommendation to hire this final candidate. If the dean concurs with the recommendation, the dean's office sends the recommendation to the Office of Academic Affairs. Subsequently, the Director of Academic Employment and Labor Relations (who typically holds a law degree) within the Office of Academic Affairs begins the reference check process by contacting the final candidate's academic employers from the last 10 years. Typically, the Office of Academic Affairs staff member conducting the check begins by contacting their counterpart at the final candidate's previous academic institutions (e.g., Vice Provost of Academic Affairs). In some cases following this initial contact, the Office of Academic Affairs staff member may be directed to contact other personnel at the prior institution to address the reference check inquiries. The Office of Academic Affairs staff member inquires strictly about substantiated findings from both ongoing and completed investigations regarding misconduct and associated discipline related to teaching, research, and service. If formal findings of misconduct are disclosed, a selected group of UC Davis senior staff members is convened to discuss the disclosed information and whether the process of hiring the candidate should proceed.*

Following a 2-year pilot phase 1 implementation focused only on the hiring of tenured faculty, UC Davis initiated pilot phase 2 in July 2021. This phase encompasses individuals applying to tenure-track assistant professor (or equivalent) positions who have previously been employed at other academic institutions.

### **HISTORICAL BACKGROUND, PROCESSES USED TO DEVELOP THE PRACTICE, AND INITIAL CONCERNS**

Before instituting this policy, UC Davis had no mechanism in place to avoid hiring faculty with tenure (or the equivalent security of employment) who had committed substantiated academic misconduct at their prior institution(s). The university realized, however, that such hires actually occurred, with the information about prior misconduct coming to light only when tenured faculty committed sexual harassment after being hired at UC Davis. This realization prompted the university to consider how it could better protect its academic community by preventing

such hires in the future. UC Davis representatives converged on the reference check policy as the optimal approach, while recognizing that the agreement of candidates' prior institutions was needed to make the policy work. And because of the policy's legal ramifications, UC Davis representatives conferred with counsel both within the university and at the UC Office of the President in developing the framework for phase 1 of the policy, focused on faculty hires with tenure or security of employment.

Following these consultations with counsel, multiple additional concerns had to be addressed before the phase 1 pilot could be initiated. One of the primary concerns was whether substantiated findings of misconduct would automatically disqualify candidates. To address this concern, UC Davis representatives developed the above-described approach of consulting with a group of senior staff members to evaluate the nature of the misconduct, including how serious it was, how long ago it occurred, whether there was any recurrence, whether the individual accepted personal responsibility



or engaged in victim blaming, and whether the person was deemed to have been rehabilitated. Another significant concern was the potential reluctance of other universities to cooperate in sharing information on employee misconduct if they had signed a nondisclosure agreement with a candidate. To address this issue, UC Davis representatives decided to require applicants to sign a legal release form<sup>6</sup> (UC Davis, 2021) giving UC Davis permission to obtain any disciplinary records from their previous academic employers. The application of any applicant who does not sign this release form is considered incomplete and ineligible for review.

After addressing the above concerns, UC Davis representatives presented the reference check policy to the leadership of the UC Davis Academic Senate, with the understanding that they would request formal consultation with the Academic Senate, as well as academic leadership (10 deans), toward the end of the phase 1 pilot. The policy was also presented to the vice provosts of academic affairs/academic personnel at each of the 10 UC campuses. Once UC Davis representatives notified the UC Davis Academic Senate, felt confident in the legal footing of the reference check policy, and received approval of UC Davis campus counsel for use of the signed release forms, the 2-year phase 1 pilot was initiated.

## FEEDBACK ON THE POLICY AND HOW CONCERNS WERE ADDRESSED

UC Davis representatives did not receive a substantial amount of feedback from the Academic Senate, and found that there was universal support for the program. Neither the Faculty Executive Committees of the College of Letters and Science (the largest college within UC Davis, with about 630 faculty) nor

the School of Medicine, for example, returned any comments or expressed any concerns. Individual UC Davis Executive Committees did request some minor changes before the program was institutionalized, changes the UC Davis representatives are in the process of addressing. In particular, the Committee on Academic Personnel (the committee that evaluates faculty for merit, promotion, and tenure) requested the terminology used in the policy be made consistent throughout (e.g., “final candidate” and “finalist” were used interchangeably). This committee also asked that the policy provide greater transparency to applicants as to if and when the reference check process would be initiated; UC Davis representatives are developing a method for addressing this request through the web-based UC Davis application system, UC Recruit. In addition, to supplement the reference check program, the Academic Senate Committee on Faculty Welfare requested that the deans’ tentative offer letters include language asking finalists to attest that they have not been disciplined in the last 5 years and are not currently the subject of a misconduct investigation. Although the tentative offer letter from the Dean is not a part of the reference check program itself, this change was requested since the reference check policy requests only information on substantiated misconduct found following a formal investigation.

Local Faculty Executive Committees of the Academic Senate representing individual UC Davis colleges and schools also provided feedback. One committee requested that applicants be invited to provide with their applications an explanation regarding any materials that might potentially be shared with UC Davis as part of the reference check. UC Davis representatives noted that the application system is already well suited to accommodating this request as applicants are always welcome to provide additional information in the cover letter that accompanies their application. In addition, the reference check program allows applicants to submit explanations/additional

<sup>6</sup> The Authorization to Release Information can be found at <https://aadocs.ucdavis.edu/your-resources/forms-and-checklists/forms/ARF.pdf>.

information if and when materials from prior institutions indicating substantiated misconduct are shared with UC Davis. Although this situation has not yet occurred, UC Davis representatives stressed that they would reach out to finalists to gather their perspective on any misconduct disclosures.

A Faculty Executive Committee also raised the question of whether information disclosed during the reference check would be treated as confidential, and asked that all such information be destroyed to prevent it from being shared at a later date in the merit and promotion processes. UC Davis representatives responded that recent policies prevent UC Davis offices from purging any materials related to substantiated sexual harassment and sexual violence, but assured the committee members that such information would never be included in applicants' future merit and promotion dossiers. Information related to sexual harassment or sexual violence could enter a faculty member's dossier for advancement only if (1) the behavior occurred at UC Davis, (2) the individual was disciplined, and (3) part of that discipline was a letter of censure signed by the chancellor specifically stating that the information would be included in the person's subsequent merit and promotion dossiers.

## PRELIMINARY EVALUATION OF THE PRACTICE

To begin evaluating this policy/practice, UC Davis representatives are monitoring the number of final candidates for tenured or security of employment faculty positions who have had substantiated findings of academic misconduct, including sexual harassment, and the resulting hiring outcomes each year. To date, UC Davis has conducted more than 50 reference checks under the new policy, and none of the proposed hires has had any substantiated misconduct documented at prior institutions. UC Davis believes that requiring individuals to sign a waiver for the release of such information from their previous institution(s) acts as a strong deterrent to anyone

with substantiated misconduct from completing an application. None of the individuals hired in the last 3 years who have undergone reference checks have been the subject of any allegations of misconduct at UC Davis.

## SUGGESTIONS TO OTHER ORGANIZATIONS CONSIDERING IMPLEMENTING SIMILAR PRACTICES

UC Davis representatives strongly encourage other institutions to engage and get buy-in from campus leaders (e.g., the Academic Senate) early in the process of piloting such a practice. They cited the example of one UC campus that initiated a similar policy pilot without consulting its Academic Senate and was met with strong resistance from its leadership. Because of this lack of support, the campus had to pull the program back for an extended period of time to allow for a consultative process, which ultimately delayed piloting and institutionalizing that reference check policy. UC Davis representatives also cautioned that Academic Senate leaders may want to have a greater role in the pilot program beyond engagement in an extensive consultation toward the pilot's end. UC Davis representatives addressed this issue by reminding Academic Senate leaders that faculty applicants do not become members of the Senate before being hired. Because faculty only become Senate members after they are hired, the Office of Academic Affairs stated that they have latitude to carry out this reference check program independently.

UC Davis representatives also stressed that piloting the program was crucial for gaining the support of the Academic Senate before the practice was institutionalized. Near the end of the 2-year phase 1 pilot, the Academic Senate was asked to provide feedback and recommendations concerning the practice's potential institutionalization. Even though proposed candidates for faculty positions are not yet members of the university's Academic Senate,

UC Davis representatives believed it was important to demonstrate that they could capably address any concerns of the current Academic Senate faculty, especially regarding the processes for handling disclosures of substantiated misconduct for prospective faculty hires. To this end, a process was formalized whereby the hiring dean and department chair (who is a member of the Academic Senate) are engaged in consultations to determine whether a final offer should be extended to a candidate for whom misconduct information is disclosed.

UC Davis representatives also highlighted logistical issues that other institutions should consider when first developing similar policies. First, the practice requires an investment of time to identify who at a candidate's prior institution has the authority to provide this information, as well as to make what may need to be multiple attempts to contact such individuals. This represents an even greater challenge when prior institutions are in other countries. Occasionally, it has been necessary to ask candidates to contact their institutions directly to request that they provide UC Davis with the misconduct information. Nevertheless, UC Davis has had close to full cooperation from other institutions, especially once they have been provided with a candidate's signed release.

Second, given the time investment required, which may vary depending on the responsiveness of previous employers, UC Davis representatives advised that institutions consider their staffing resources before determining the scope of a similar reference check program. The resource needs for the UC Davis program are manageable only because it applies to a small number of hires for faculty positions with tenure or security of employment (i.e., about 20 hires per year). Even the expansion of the program to experienced tenure-track faculty members with previous employment at other academic institutions did not increase the workload significantly. On the

other hand, extending the program to every faculty hire might involve 50–100 more candidates a year, and UC Davis representatives emphasized that conducting the program with such a large number of candidates would be difficult to manage centrally.

Another issue to consider is how the time required to carry out the reference checks might impact an institution's recruitment competitiveness. UC Davis representatives stated that, to avoid delaying the hiring process, contact with prior institutions begins as soon as they are notified about final candidates. A top faculty candidate at UC Davis likely will also be a top candidate at other institutions, and a delayed hiring process could impact offer acceptance. To their knowledge, UC Davis representatives have not lost a final candidate because of this reference check process; however, they noted that the job market for the final candidates subject to this policy (i.e., associate or full professors) is relatively small. They added that if the reference check policy were to delay the hiring process, they would have to reconsider the practice and the timing of its implementation. They suggested further that it is helpful to be transparent with final candidates about the time required (a month or longer) to complete the steps necessary to reach a hiring decision.

## CONCLUSION

This paper has described UC Davis's innovative practice of developing and institutionalizing a reference check policy to prevent passing the harasser at the university. This practice is innovative in that it is designed to gather and consider information on all forms of misconduct (not just sexual) in faculty hiring decisions, and it was piloted for 2 years to gain support for its institutionalization among campus faculty and leadership. As most institutions lack a systematic mechanism for inquiring about academic misconduct beyond sexual harassment to inform their hiring decisions, UC Davis has provided a leading example for other institutions aiming to address the



“passing the harasser” problem through comprehensive reference checks (Flaherty, 2019). Given the success of the phase 1 pilot focused on faculty hires with tenure or security of employment, the phase 2 pilot is extending the practice to applicants for faculty positions in tenure-track or security of employment series who were previously employed as professors or lecturers at other academic institutions. Although the policy is relatively new and is still undergoing evaluation, UC Davis representatives said they have no reservations about encouraging other institutions to adapt this policy, and indeed have participated in discussions with representatives of other Association of American Universities institutions to encourage wider participation and cooperation.

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### **ABOUT THE ACTION COLLABORATIVE**

The Action Collaborative on Preventing Sexual Harassment in Higher Education brings together academic and research institutions and key stakeholders to work toward targeted, collective action on addressing and preventing sexual harassment across all disciplines and among all people in higher education. The members actively collaborate to identify, research, develop, and implement efforts that move beyond basic legal compliance to evidence-based policies and practices for addressing and preventing all forms of sexual harassment and promoting a campus climate of civility and respect. The Action Collaborative includes four Working Groups (Prevention, Response, Remediation, and Evaluation) that compile and gather information, and publish resources for the higher education

community. The Prevention Working Group focuses on developing, implementing, evaluating, and compiling approaches for creating environments and organizational climates that prevent sexual harassment from occurring.

### **CONFLICT-OF-INTEREST DISCLOSURES**

None disclosed.

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