

## ADVISORY OPINION

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### Outside Compensation/Collegiate Athletic Coaches

#### QUESTION

How does RCW 42.52 restrict outside compensation paid to a university<sup>1</sup> coach?

#### ANSWER

The state's ethics law does not prohibit the receipt of outside compensation. However, the ethics law does restrict the receipt of compensation when compensation is related to the performance of official duties, unless specifically authorized under RCW 42.52.110. RCW 42.52.120(1) establishes specific conditions that apply to the receipt of outside compensation under contracts and grants. These conditions prohibit the payment of outside compensation to a university coach when: a contract is not bona fide and actually performed; the services for which the coach is paid are simultaneously performed as part of official duties; the services rendered under the contract are prohibited by agency policy; the contract includes the participation of the coach in his or her official capacity; and, the coach's official position is used to secure the contract. A university coach is also prohibited from using university resources for the performance of a contract outside of his or her official duties under RCW 42.52.160 and WAC 292-110-010.

#### ANALYSIS

It is common for universities to offer compensation packages to collegiate coaches comprised of a base salary and certain perquisites including, but not limited to, cars, country club fees, annuities, travel allowances for family members, and mortgages. In addition to direct compensation from a university, coaches may also be provided opportunities to receive additional compensation from outside sources. Additional income often derives from commercial endorsements, special appearances or consulting services.

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<sup>1</sup> The term "university" is interchangeable with "college."

Chapter 42.52 RCW does not prohibit the receipt of outside compensation for state employees. However, certain provisions of this chapter may limit what state employees may receive depending on who makes payment and the services performed for such payment.

**RCW 42.52.110, Compensation for official duties or nonperformance.**

RCW 42.52.110 limits the receipt of outside compensation for the performance or nonperformance of official duties, but contains specific exemptions for state employees of institutions of higher education:

No state officer or state employee may, directly or indirectly, ask for or give or receive or agree to receive any compensation, gift, reward, or gratuity from a source for performing or deferring the performance of any official duty unless otherwise authorized by law except: (1) the state of Washington; or (2) in the case of officers or employees of institutions of higher education or of the \*Spokane intercollegiate research and technology institute<sup>2</sup>, a governmental agency, an agency or instrumentality of a governmental entity, or a non-profit corporation organized for the support and benefit of the state employee's agency or other state agencies pursuant to an agreement with the state employee's agency. [Emphasis added]

As used in the statute, “official duty” means “those duties within the specific scope of employment of the state employee as defined by the employee’s agency or by statute or the state Constitution.” RCW 42.52.010(12). Examples of official duties common to coaches include, but are not limited to, making appearances on televised programs, radio shows, or other events as required under contract with a university; wearing sports apparel and shoes from a specific vendor pursuant to a contract between the institution and the vendor; and, taking teams to post-season games, or winning games and titles.

Under RCW 42.52.110, a coach performing these official duties is limited to receiving compensation from the state of Washington, a governmental entity, an agency or instrumentality of a governmental entity, or a non-profit corporation, provided the non-profit was organized for the support and benefit of the institution pursuant to an agreement with that institution.

**RCW 42.52.120, Compensation for outside activities.**

While RCW 42.52.110 addresses who may compensate a state employee for the performance of an official duty, RCW 42.52.120(1) provides specific conditions under which compensation may be received for the performance of contracts or grants outside of official duties. This provision provides in pertinent part:

- (1) No state officer or state employee may receive any thing of economic value under any contract or grant outside of his or her official duties. The prohibition in this subsection does not apply where the state officer or state employee has

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<sup>2</sup> Spokane intercollegiate research and technology institute was abolished by 2011 1st sp.s. c 14 § 17.

complied with RCW 42.52.030(2)<sup>3</sup> or each of the following conditions are met:

- (a) The contract or grant is bona fide and actually performed;
- (b) The performance or administration of the contract or grant is not within the course of the officer's or employee's official duties, or is not under the officer's or employee's official supervision;
- (c) The performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee;
- (d) The contract or grant is neither performed for nor compensated by any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift;
- (e) The contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity;...<sup>4</sup>

Under RCW 42.52.120(1), a university coach may receive outside compensation from a private company for services performed outside his or her official duties only if each of these conditions is met. The requirement of each condition as it relates to the acceptance of outside compensation by collegiate coaches is discussed below.

**RCW 42.52.120(1)(a), Contracts must be bona fide and actually performed.**

RCW 42.52.120(1)(a) states that one condition under which a state employee may receive something of value outside his or her official duties is when a contract or grant is “bona fide and actually performed.” This provision prohibits state employees from obtaining payments under outside contracts solely by virtue of their state position in which an obligation of the employee is illusory.

Under this provision a university coach must “actually perform” the outside contract. A coach may not receive money under a contract by agreeing to perform one or more obligations, and then fail to perform each obligation. For example, if a coach agrees to accept payment for making three television appearances for a company, and then makes only one appearance, his or her acceptance of compensation under the contract violates RCW 42.52.120(1).

Moreover, a contract must be “bona fide”. Though not defined by statute, bona fide generally means “in good faith.” Webster’s 3d International Dictionary. If a coach enters into an outside

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<sup>3</sup> RCW 42.52.030 was amended by 2005 c 106 § 2, deleting subsection (2).

<sup>4</sup> RCW 42.52.120(1)(f) also prohibits an outside contract or grant that might require the disclosure of confidential information. Because this prohibition would not appear to apply to outside contracts for collegiate coaches, it is not further discussed in this Advisory Opinion.

contract with a company under which payment to the coach clearly exceeds the value of his or her performance, acceptance of payment under the contract may violate RCW 42.52.120(1)(a) because the contract is not bona fide. For example, a shoe company offers to pay a coach an exceedingly large sum of money simply to wear its shoes outside of official duties. In this case, such a contract may not be bona fide.

**RCW 42.52.120(1)(b), Performance of outside contract may not be within the course of official duties.**

RCW 42.52.120(1)(b) states that one condition under which a state employee may receive something of value outside his or her official duties is when the performance of a contract or grant is not within the course of official duties. An employee acts “in the course of employment” when “engaged at the time in the furtherance of the employer’s interest.” Elder v. Cisco Construction Co., 52 Wn.2d 241, 245, 324 P.2d 1082 (1958). Thus, RCW 42.52.120(1)(b) prohibits a state employee from receiving pay from a third party for simultaneously performing a act that is performed as a state duty. This provision would prevent a coach from accepting compensation from a company for wearing its products while coaching, or for requiring players to wear a company’s products or use its equipment.

**RCW 42.52.120(1)(c), Outside contract is not prohibited by applicable laws or rules governing outside employment.**

RCW 42.52.120(1)(c)<sup>5</sup> states that one condition under which a state employee may receive something of value outside his or her official duties is when the performance of a contract or grant is not prohibited by “applicable laws and rules” governing outside employment.<sup>6</sup> For example, if a university has a policy that prohibits its employees from making commercial endorsements, a coach would violate RCW 42.52.120(1)(c) if he or she received compensation under an outside contract for making commercial endorsements. A violation would occur even if the institution’s officials ignored such a policy and approved the receipt of compensation by a coach for the commercial endorsements.

**RCW 42.52.120(1)(d), Contract may not be performed for nor compensated by any person from whom an employee is prohibited under RCW 42.52.150(4) from receiving a gift.**

RCW 42.52.120(1)(d) states that one condition under which a state employee may receive something of value outside his or her official duties is when a contract is not performed for nor

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<sup>5</sup> RCW 42.52.120(1)(c) also states that a contract may not be prohibited by RCW 42.52.040. That section of the statute restricts a state employee from assisting another person in a transaction involving the state. Because this provision has no apparent application to the receipt of outside compensation by collegiate coaches, it is not further discussed in this Advisory Opinion.

<sup>6</sup> The term “applicable laws” would include statutes enacted by the legislature in the Revised Code of Washington (RCW), as well as rules adopted by agencies in the Washington Administrative Code (WAC). Because RCW 42.52.120(1)(c) differentiates between “laws” and “rules”, the term “rules” as used in the statute includes an agency’s policies and procedures not adopted in the WAC.

compensation by a person from whom the employee would be prohibited from accepting a gift under RCW 42.52.150(4). RCW 42.52.150(4), however, does not strictly prohibit the acceptance of gifts by a state employee. Rather, this section limits the acceptance of certain items for:

...a state officer or employee of a regulatory agency or of an agency that seeks to acquire goods and services who participates in regulatory or contractual matters may receive, accept, take, or seek, directly or indirectly **only the following items** from a person regulated by the agency or from a person who seeks to provide goods and services to the agency...[Emphasis added.]

The statute goes on to list those items which the state employee may receive. Under RCW 42.52.120(1)(d) and 42.52.150(4), for example, if a university contracts to purchase equipment or sports apparel from a company, and a coach participates either in the contract, or in decisions relating to the acquisition of equipment from the company, that coach is prohibited from accepting outside compensation from the company unless the form of compensation is specifically permitted under RCW 42.52.150(4).

**RCW 42.52.120(1)(e), Contract not expressly created or authorized by the employee in his or her official capacity.**

RCW 42.52.120(1)(e) states one condition under which a state employee may receive something of value under a contract or grant outside his or her official duties is when the contract or grant is neither expressly created nor authorized by the employee in his or her official capacity. RCW 42.52.120(1)(e) may be violated if a coach actually identifies himself or herself as a university coach or employee in signing the outside contract.

This condition is also violated when the contract requires the coach to perform services or acts that he or she could only perform as a coach, including but not limited to, requiring a team to use certain products; wearing certain clothes while coaching; identifying oneself as a coach in commercials; using university or college trademarks in commercials; and, appearing on a coaches' show affiliated with the university.

RCW 42.52.120(1)(e) is not violated, for example, if a coach makes commercials in which he or she is not identified as the coach; makes appearances for a sporting goods company in a personal capacity; or consults with a sporting goods company in a personal capacity.

**RCW 42.52.130, Honoraria.**

Another provision in the state's ethics law that may affect university coaches is the receipt of honoraria. RCW 42.52.130 states in pertinent part:

- (1) No state officer or state employee may receive honoraria unless specifically authorized by the agency where they serve as state officer or state employee.
- (2) An agency may not permit honoraria under the following circumstances:

(a) The person offering the honorarium is seeking or is reasonably expected to seek contractual relations with or a grant from the employer of the state officer or state employee, and the officer or employee is in a position to participate in the terms or the award of the contract or grant;...<sup>7</sup>

“Honorarium” means “money or thing of value offered to a state officer or state employee for a speech, appearance, article, or similar activity in connection with the state officer’s or state employee’s official role.” RCW 42.52.010(11). An honorarium does not include travel, lodging, or subsistence expenses, which are gifts. RCW 42.52.150(1).

For the purposes of our analysis, a distinction must be made between an “honorarium” and the “receipt of compensation under contracts or grants” which is subject to the more restrictive provisions of RCW 42.52.120(1). As defined, an honorarium would apply to the receipt of compensation for a single article, appearance, or similar activity, without the state officer or state employee incurring additional obligations.<sup>8</sup> All other compensation is subject to the limitations under RCW 42.52.110 and RCW 42.52.120.<sup>9</sup>

A state employee may not receive an honorarium for performing an official duty, because such receipt of such a payment may violate RCW 42.52.110. However, under RCW 42.52.130 a state employee may receive an honorarium for “an activity in connection with his or her state position.” RCW 42.52.010(11). For example, a university coach could receive an honorarium for giving a speech or writing an article on his or her coaching philosophy, or for making an appearance at a sports clinic. These activities, while not part of a coach’s official duties, are activities “in connection with” a coach’s official duties.

RCW 42.52.130(1) provides that an honorarium must be approved by the employing agency. An agency cannot approve an honorarium, however, if the entity offering the honorarium is reasonably expected to contract with the agency, and the employee may be in a position to participate in the terms of the contract. RCW 42.52.130(2). Under this condition, a university or college could not approve a coach’s honorarium from a sporting goods company when the coach participated in the university’s decision to contract for the purchase of goods from the company.

**RCW 42.52.160, Use of persons, money, or property for private gain.**

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<sup>7</sup> RCW 42.52.130(2)(b) and (c) list further restrictions on the receipt of honoraria; however, these restrictions have no apparent application to collegiate coaches and are not further discussed in this Advisory Opinion.

<sup>8</sup> In the Board’s review of the University of Washington’s ethics policies, the Board iterated this distinction when it advised the University that receipt of compensation by faculty and staff for service on boards, commissions, and committees did not constitute honoraria, but rather compensation and was therefore subject to the provisions of RCW 42.52.110 and 42.52.120. See Board’s letter to the University of Washington, November 13, 1998.

<sup>9</sup> In this context, appearing on a series of coach’s shows to discuss the university team or conducting a sports camp would involve multiple obligations, and thus would fall under the provisions of RCW 42.52.120, rather than the honorarium provision under RCW 42.52.130.

The final applicable provision of the state's ethics law, RCW 42.52.160, places limits on the use of state resources by university coaches when performing services under outside contracts:

- (1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or official custody, for the private benefit or gain of the officer, employee, or another.
- (2) This section does not prohibit the use of public resources to benefit others as part of the state officer's or state employee's official duties.
- (3) The appropriate ethics board may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activities does not result in interference with the proper performance of public duties.

Pursuant to RCW 42.52.160(3), the Board has adopted WAC 292-110-010, which allows state employees to make certain occasional and limited uses of state resources.. Under RCW 42.52.160 and WAC 292-110-010, a university coach would be prohibited from: entering into a private agreement with a sporting goods company to ensure that players wear the company's products; from appearing in commercials using university facilities or trademarks; and, conducting private sports clinics at university facilities without paying fair market value for the use of the facilities.