



## Gainful Employment Memo

**Primary Statute:** HEA sections 101(b)(1), 102(b)(1)(A)(i), and 102(c)(1)(A)

### Background

Prior to 1972, proprietary (for-profit) institutions of higher education were prohibited from participating in the federal financial aid under the Higher Education Act (HEA) of 1965. The 1972 reauthorization of the Higher Education Act extended federal financial aid eligibility to these institutions. As a trade off, Congress limited eligibility to apply to programs that “prepare students for gainful employment in a recognized occupation.” Non-degree programs at public and private, non-profit institutions were subject to the same limitation. A House report discussing the expansion of what would later come to be known as Pell Grants<sup>1</sup> noted that lawmakers were concerned about opening up eligibility to proprietary schools as “most of the institutions have no experience administering public student grant programs.”

“Gainful employment” language remains in statute today. Specifically, section 101(b)(1) of the most recent iteration of the HEA extends eligibility for federal financial aid programs to public and private nonprofit non-degree institutions that prepare students for gainful employment; section 102(b)(1)(A)(i) defines an eligible proprietary institution of higher education as one that provides programs to prepare students for gainful employment; and section 102(c)(1)(A) defines eligible postsecondary vocational institutions as public or private nonprofit colleges that provide programs to prepare students for gainful employment. (All institutions must also meet certain other requirements, such as being accredited by a recognized accrediting agency and obtaining state authorization to operate.)

The statute, therefore, applies the gainful employment standard to for-profit educational programs (including certificate, associate degree, bachelor’s degree, and graduate education programs) and to other non-degree programs (i.e., certificate) offered by public and private nonprofit institutions (primarily community colleges), at both the undergraduate and graduate levels.

### 2010 Regulations

In 2009, the Education Department announced its intent to regulate on a variety of program integrity issue.

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<sup>1</sup> Introduced in the 1972 Higher Education Act reauthorization, Pell grants were originally named Basic Educational Opportunity Grants, or BEOGs. In 1980, BEOGs were renamed Pell grants.

Among the regulatory provisions ED announced the intent to address was the definition of gainful employment. Up until that time, the term “gainful employment in a recognized occupation” had been largely undefined. Recognized occupations were defined as those included in the Department of Labor’s *Dictionary of Occupational Titles*, or its successor the *Occupational Information Network (O\*Net)*. The “gainful employment” portion of the phrase was undefined. During its regulatory process, ED held three rounds of negotiations between November 2009 and January 2010 and published a proposed regulation in July 2010.

The [proposed rules](#) included several provisions, including a two-piece test of whether GE-eligible programs (all programs at for-profit institutions and non-degree programs at any institution) were successfully preparing students for gainful employment that measured:

- The debt-to-earnings (DTE) ratio of graduates from the program; and
- The repayment rate of all former students in the program (graduates and non-graduates).

Programs that failed both metrics would either lose all eligibility for federal financial aid programs or would face additional limitations on their enrollment. Failing programs were also required to make disclosures to students.

The proposed rules were extraordinarily contentious, and the Education Department received more than 90,000 comments on the rules. The rules were also controversial in Congress. At the urging of the [Association of Private Sector Colleges and Universities](#) (APSCU, now Career Education Colleges and Universities, or CECU), lawmakers sought several times to attach riders to annual appropriations bills prohibiting the Department from using federal funds to finalize or implement the gainful employment rules. Those efforts were never successful.

The [final rule](#) was not published until June 2011. It finalized the performance metrics as requiring GE programs to have:

- A repayment rate of at least 35% for former students in the program; and
- A debt-to-earnings ratio of either 30% of discretionary income or 12% of annual earnings

The final rule also included a set of reporting and public disclosure requirements: Gainful employment programs had to share their repayment rates and debt-to-earnings ratios publicly; Programs that failed the GE test were required to provide plain-language warnings to students; Programs that failed the test twice also had to include a warning about the risks of enrolling in the program, given that it could lose eligibility for federal financial aid; and, warnings had to be prominently displayed on colleges’ websites and in their promotional materials.

The rule also required that institutions seek Department approval prior to establishing new gainful employment programs. Largely in response to public comments, the Department expanded appeal opportunities during the transition period for programs before they would lose eligibility and capped the total number of programs that could lose enrollment in the first year of the rule's implementation so that it would not exceed 5% of program completers. The final rule also required loss of Title IV eligibility only after programs had failed the GE test three times.

To implement the rule, the Department would rely on both administrative and reported data: its own debt information on federal student loans, reported information from institutions about private education loans, and earnings data obtained through a data-matching agreement between the Education Department and the Social Security Administration.

Following publication of the rules, the Association of Private Sector Colleges and Universities (now Career Education Colleges and Universities) [sued](#) to have the rules overturned. In 2012, the judge in the case [struck down](#) the repayment rate provision because insufficient evidence to support the repayment rate threshold of 35% meant it was "arbitrary and capricious." However, the judge upheld the Department's authority to issue the rule, as well as the thresholds and definitions for the debt-to-earnings ratios. Still, those changes effectively struck down the rule, since the repayment rate was integral to the test for gainful employment.

Still, some [data](#) on programmatic outcomes were released through the effort. A 2021 research [study](#) found that poor performance on the GE metrics was associated with a greater likelihood of program or college closure, suggesting that for-profit colleges were responsive to the regulations.

## **2014 Regulations**

In 2013, the Department started a new rulemaking process for gainful employment; and after publishing a proposed rule in May 2014 and sifting through around 95,000 comments from the public, finalized [new gainful employment rate regulations](#) in October 2014. The new rules ousted the repayment rate requirement, and instead simply required programs to pass the debt-to-earnings ratio based on either discretionary earnings (where the threshold was 20%) or average annual earnings (8%) of their graduates. Programs would lose eligibility for Title IV financial aid if they failed that test twice in three years. The rules also continued to include a reporting and disclosure requirement to provide consumer information to prospective and enrolled students.

In response to a separate 2012 court ruling from the judge in the APSCU case, the Department limited the new regulations to the debt and earnings of federal financial aid recipients, because a ban in the HEA on student unit record data prohibits the collection of information from non-federal aid recipients<sup>2</sup>.

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<sup>2</sup> Institutions still had to report on the *private* loans of federal aid recipients, and those data were included in the total debt amounts of graduates from the program.

Following publication of the 2014 rule, APSCU again [filed](#) a lawsuit, but the same judge who heard the 2012 lawsuit [upheld](#) the rule because the repayment rate provision had been removed. The Association of Proprietary Colleges, on behalf of some for-profit colleges in New York, also sued on the basis of procedural violations and violations of institutions' due process rights; the court upheld the rule. A third lawsuit, filed by the American Association of Cosmetology Schools, argued that administrative earnings data understated the earnings of their graduates because many of their graduates did not report tipped income on their taxes. The court upheld the rule but required the Department to loosen the requirements for appeals of the programmatic earnings data for the affected institutions. Finally, a lawsuit filed by acupuncture schools in 2017 again argued that the earnings data were understated, but the suit was ultimately dropped as the Trump Administration began to repeal the rule.

The first year of data were finally published in January 2017, in the final month of the Obama Administration. According to the data, more than 700 programs [failed](#) the metric in the first year, and more than 1,200 were in a warning "zone" with debt-to-earnings ratios between 20 and 30% for discretionary income or 8 to 12% for annual earnings. Ninety-eight percent of the failing programs were offered by for-profit institutions, although some were not. However, failure in a single year did not mean any program would lose eligibility for federal financial aid.

### **2019 Regulations**

The Trump Administration took office in January 2017, and quickly began to pull back on the gainful employment rules. The Department [allowed](#) institutions to delay implementation of the disclosure rules and failed to release subsequent years of data. Its failure to implement the rule was challenged in court; a collection of state attorneys general, for instance, [sued](#) in 2017, though the case was [dismissed](#) for lack of standing.

In 2017, the Education Department announced its intent to regulate again on gainful employment, this time to repeal the 2014 regulations. The final regulations, which rescinded the 2014 rules in full, were [published](#) in July 2019, and institutions were permitted to immediately cease implementing the 2014 requirements.

Separately, a court [ruled](#) in 2018 that the Department misused data obtained from the Social Security Administration under its data-sharing agreement for gainful employment to use the data for an unrelated purpose. The SSA terminated the data-sharing agreement as a result, leaving no mechanism to enforce the 2014 regulations in the meantime.

Three lawsuits have been filed against the Department's rule, arguing that the Department violated procedural requirements in its rulemaking. One [filed](#) by the American Federation of Teachers (AFT) was [dismissed in part](#) (including a challenge to the rescission of the debt-to-earnings ratios, on the basis that the SSA data-sharing agreement was no longer in place anyway), but the court allowed the case to continue on procedural issues. Another was [filed](#) by the California attorney general, and the third was [filed](#) by a group of state attorneys general. All three cases are pending, and the 2019 rescission remains in effect in the meantime.

### **What's Next?**

The Biden Administration took office in January 2021, and in May, the Department [announced](#) their intention to initiate a new rulemaking on a variety of higher education topics, including gainful employment. Public hearings were held in June 2021, with the negotiated rulemaking committee first convening in October.

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