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 system under the Higher Education Act (HEA) of 1965. The 1972 HEA reauthorization extended federal financial aid eligibility to these institutions. As a tradeoff, 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[1] 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. It applies to all for-profit educational programs including certificate, associate degree, bachelor's degree, and graduate education programs, and covers non-degree programs (i.e. certificates) offered by public and private nonprofit institutions (primarily community colleges), at both the undergraduate and graduate levels.

2010 Regulations

In 2009, the Education Department (ED) announced its intent to regulate on a variety of program integrity issues including the definition of gainful employment. Up until that time, the term "gainful employment in a recognized occupation" remained largely undefined. ED had clarified that recognized occupations referred to jobs listed in the Department of Labor's *Dictionary of Occupational Titles*, or its successor the *Occupational Information Network (O*Net)*. However, it never set a standard for "gainful employment." ED held three rounds of negotiations between November 2009 and January 2010 and published a proposed regulation in July 2010.[2]

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

[1] 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.

[2] ED uses a specialized process to develop regulations call "negotiated rulemaking." The agency selects representatives from a variety of stakeholders with an interest in a regulation including higher education institutions, consumer advocates, state attorneys general and several others depending on the issue being discussed. The goal is to come to a consensus on the eventual negotiations, though in the absence of consensus ED can independently publish final regulations after the process concludes.

- 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. 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 required gainful employment programs to meet at least one of the following two tests:

- Have a repayment rate of at least 35% for former students in the program; or
- Have a debt-to-earnings ratio of no more than 30% of discretionary income or 12% of annual earnings. Discretionary income was defined as the difference between annual earnings and 150% of the federal poverty level.

Programs that failed to meet one of the tests for three out of four years would lose eligibility for federal financial aid under Title IV of HEA. 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 gainful employment test once 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,
- Schools had to prominently display warnings 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. ED also capped the total number of programs that could lose eligibility in the first year of the rule's implementation at 5% of all programs (weighted by enrollment).

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." Although the court upheld the Department's authority to issue the rule, as well as the debt-to-earnings test, it still struck down the entire rule, reasoning that the repayment rate was integral to the regulation's design.

Still, some data on programmatic outcomes were released through the effort. A 2021 research study found that poor performance on the gainful employment 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 regulations in October 2014. The new rule removed the repayment rate metric, and instead required programs to pass a slightly stricter debt-to-earnings ratio test. A program's typical graduate's debt repayments would need to be either less than 20% of their discretionary earnings or less than 8% of their annual earnings. Programs with debt-to-earnings ratios between 20% and 30% of discretionary income or between 8% and 12% of annual earnings would be placed in a "warning zone" while those with ratios above the warning zone would fail. Programs would lose eligibility for Title IV financial aid if they failed the test twice in three years or spent four consecutive years in the warning zone. The rules also continued to include a reporting and disclosure requirements to provide 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[3].

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

[3] 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.

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 the warning zone. 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 recission 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), but the court allowed the case to continue on procedural issues. In that case, the plaintiffs are seeking the reinstatement of the 2014 Gainful Employment rule. The Department claims that legally they cannot reinstate a rescinded rule and that they do not have the personnel or resources to reimplement it. Another was filed by the California attorney general, and the third was filed by a group of state attorneys general. The group of state attorneys general dropped the case upon the Biden Administration taking office, but the other two cases are pending, and the 2019 rescission remains in effect in the meantime.

Latest Developments

In October 2021, in an affidavit submitted as part of the AFT lawsuit, Undersecretary James Kvaal signaled the Department's intent to convene a negotiated rulemaking committee on gainful employment to rewrite the regulation rather than reimplement a rescinded rule. Negotiations took place between January and March of 2022. Based on the feedback of most negotiators, ED used the prior 2014 rule as the basis for its framework. The latest draft presented to negotiators during the final session proposed a new earnings metric and a stricter debt-to-earnings test than the 2014 rule. Failing either test in two out of three years would cause a program would lose eligibility for Title IV financial aid. The tests would require:

- A program's typical graduate to achieve a debt-to-earnings ratio lower than 20% of discretionary income or 8% of annual income; and
- The median annual earnings of its graduates to exceed those of the median high school graduate in the institution's state.

The negotiated rulemaking committee failed to achieve consensus with representatives from every institutional sector and financial aid administrators objecting to the latest draft. Dissenters raised a number of concerns including that the rule would not take into account impacts of the COVID-19 pandemic, that they had limited data, and that the new minimum earnings metric was new to them. ED is currently developing the final proposed rule and expects to release it in early 2023. The memo will be updated after the release of the final rule.

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