Cooley

After Nearly a Decade of Uncertainty, Gainful Employment Rule Is Gone

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On July 1, the US Department of Education released a final rule that rescinds the entirety of the Obama-era Gainful Employment (GE) Rule. While the technical effective date of the rescission of the GE rule is July 1, 2020, Secretary Betsy DeVos, in announcing on June 28 the pending issuance of the demise of the GE rule, also issued a notice that affected institutions could elect to implement the new rule immediately.

First proposed early in the Obama administration and applicable to all programs at proprietary institutions and non-degree programs at all other Title IV-eligible institutions, the GE rule became effective on July 1, 2015, implementing a program outcome evaluation methodology based on the median debt of program graduates as compared to their annual and discretionary earnings. Since then, impacted institutions have been required to report enrollment and student debt data annually to ED. While this data was intended to be the basis for the GE debt-to-earnings measures, which would in turn determine Title IV eligibility for covered programs, ED only issued one set of rates, in January 2017, days before the Obama administration ended.

The demise of the GE rule was not completely unexpected. Early in the Trump administration, ED began coordinating a negotiated rulemaking process to rewrite the GE rule and issued numerous delays to the implementation of various pieces of the GE rule, including the earnings appeal process (some appeals were literally granted in the week prior to ED's announcement) and the disclosure requirements, which were set to become effective on July 1, 2019.

Institutions electing to adopt the new rule early, and thus "opt out" of continued compliance with the 2015 GE rule, will simply need to document their decision through a memo to file. By adopting early implementation, institutions will not be required to comply with the current requirements to include the disclosure template in their GE program promotional materials or directly distribute the disclosure template to prospective students, which was set to be required starting on July 1, 2019; post the GE Disclosure Template on the institution's website; comply with the certification requirements for GE programs under 34 CFR 668.414; or report GE data for the 2018-2019 award year to NSLDS by October 1, 2019. Institutions that choose to early adopt also may remove the template and any other GE disclosures that are required under the rule from their web pages.

While ED did not issue specific guidance regarding what must be included in the early implementation documentation, a simple notice, signed by an appropriate institutional official indicating the intent to immediately adopt the new GE rule "pursuant to the final regulations published on July 1, 2019 (84 Fed. Reg. 31,392) and the subregulatory guidance published on June 28, 2019 (Electronic Announcement #122)" should be sufficient. The notice need not be sent to ED but must be maintained in the institution's files.

If you would like additional assistance on crafting an appropriate early implementation notice, please let us know.

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