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Gainful Employment Redux – Not Just for For-Profits Anymore

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With a potential government shutdown bringing into question the ability to meet the master calendar requirement, the Department of Education (ED) released the final and official Gainful Employment (GE) rule on October 10, 2023. The final rule is substantially similar to the proposed rule released in May 2023, with a few exceptions outlined below. Unless a court intervenes (a lawsuit is inevitable), the rule will be effective as of July 1, 2024. Notably, the final rule is only focused on GE and financial value transparency and does not include final rules relating to financial responsibility, administrative capability, or ability-to-benefit or certification procedures that were previously part of a bundle of new requirements proposed earlier in the year. These topics from the notice of proposed rulemaking (NPRM) were published separately (and unofficially) on October 24, 2023. For more information on the proposed rules and the other topics, see this client alert from June 2023. GE clearly was the priority, and despite an abbreviated period to review the thousands of comments on the proposal, ED pushed forward with the new requirements, which will have wide-ranging impacts on all institutions of higher education – beyond just for-profit colleges.

For those unfamiliar with GE, the Higher Education Act (HEA) specifies that certain programs are eligible for Title IV federal student aid program funds only if they prepare students for "gainful employment in a recognized occupation." This basis for Title IV participation must be met by all programs at proprietary institutions, as well as nondegree programs offered by nonprofit and public institutions. But the HEA does not define or further explain the concept of "gainful employment." Thus, ED has – over the course of now three versions of regulations – attempted to create a definition of what it means to be gainfully employed. While many would assume that having any paying job would qualify as being "gainfully employed," ED has previously taken the position that the measure of gainful employment is whether graduates can pay their student loan debt based on their earnings. ED's new GE rule continues to push this definition but adds a number of new twists. Although not entirely clear, it appears that GE programs could begin to lose eligibility in 2026.

What is familiar?

ED has implemented two prior versions of a GE rule at various points over the last 15 years. The latest proposal borrows largely from the 2014 version, which was rescinded by the prior administration in 2019. The new GE rule once again attempts to define whether a program is effective in using external characteristics and data sources – yet to be identified – related to post-graduation performance.

Under the latest proposal, a GE program is defined by the institution's Office of Postsecondary Education Identifier (OPEID) and the program's six-digit Classification of Instructional Programs (CIP) code and degree level. This is a welcome change from the proposal discussed in negotiated rulemaking, where there was talk of moving to a four-digit code, thereby adversely impacting categories of programs rather than specific curricula and credential levels. As of July 1, 2024, if an institution has multiple locations under the same OPEID that offer the same program at the same degree level, those programs will be combined and measured as one program pursuant to the six-digit CIP code standard.

The debt-to-earnings (DE) ratio remains largely unchanged. It requires that a GE program's graduates have median – not mean – annual wages that ensure the median loan debt is not more than 8% of those earnings – or, in the alternative, that the median loan debt is not more than 20% of discretionary earnings as calculated by ED. These pass/fail thresholds are consistent with the 2014 version of the rule, and two failures in three consecutive years will result in a Title IV loss for the failing program.

Also similar to the prior rule, once a program has lost eligibility, or an institution voluntarily discontinues a failing program, the institution cannot add that program, or a "substantially similar" program (meaning one that shares a four-digit CIP code root with the failing program), to the Eligibility and Certification Approval Report (ECAR) for a three-year period of ineligibility. After the three-year period is over, institutions may seek to reestablish eligibility for the program.

What's new?

'Financial value transparency' construct

In a move to expand the reach of ED's stated goal to determine and share the effectiveness of education programs that

are eligible to receive Title IV funds, ED also has added a new "financial value transparency" framework that will measure the earnings outcomes, borrowing, costs and debt of **all** postsecondary programs, not just the GE programs. All programs at all institutions (yes, including nonprofits and public colleges and universities) must report this information, which will be publicly available on an ED website. While all eligible institutions will have to report additional information to ED and disclose program information to students, non-GE programs will not be subject to Title IV eligibility loss based on their scores, but will be identified publicly (see below) as underperforming in terms of earnings outcomes.

Removal of due process protections and appeal options

Under the 2014 iteration of the GE rule, institutions were given multiple opportunities to review and test data before ED made a final determination, as well as an opportunity to challenge the earnings figures used by ED in its calculation through a recent graduate earnings survey. The 2014 rule also included a "zone" metric, where programs with an annual DE between 8 – 12%, or a discretionary DE of 20 – 30%, would be provided an additional year to improve and pass the GE ratios. With the exception of a limited review period to ensure the correct students are included in the evaluation, and despite the fact that ED expressed concerns about the accuracy of the sample data it produced during discussion of the proposals, all of these processes to protect institutions from the impacts of data errors are absent from the new rule. In fact, ED has yet to clearly identify the source(s) of the data that will serve as the driver for the GE rule – nor has ED explained how it will avoid the prior data shortcomings plaguing the information the agency provided during negotiated rulemaking. Further, an institution now may only appeal **after** loss of eligibility and solely on the basis of a miscalculated DE rate or earnings premium. The appeal will be conducted under Subpart G of the regulations.

Earnings threshold

In addition to the DE measurement, median program earnings will now be measured against the average earnings of a high school graduate. Thus, even a program that yields no debt, or a program that is offered at no charge, could fail the GE test if the graduates do not earn at least as much as the average high school graduate aged 25 – 34 in their state actively seeking or engaged in the employment marketplace (or nationally, if the program is primarily offered online across many states). Notably, unlike institutional outcomes, students who are surveyed and self-identify as not actively seeking employment are excluded from the calculation of average high school earnings. A GE program must pass both the DE ratio and the high school earnings threshold to "pass" the GE measure. If a program fails the same metric for two of three consecutive years, it will lose eligibility for Title IV funding. This means that a GE program will become ineligible for Title IV if it fails the DE ratio **or** the high school earnings measure for two out of three consecutive years. A program does not lose eligibility if it fails different metrics for two of three consecutive years.

New ED website

The 2014 GE rule included disclosure requirements that mandated institutions have GE information included in numerous locations on their website. Under the new rule, ED will develop its own website, where it will post the information on each program at each school, and the institutions must post prominent links to the ED site on all webpages where program, cost and aid information is published.

New calculation of debt measure

One positive change from the 2014 GE rule is ED's new median debt determination. To establish the median debt for a program, ED will use the lesser of the total loan debt or the "total amount for tuition and fees and books, equipment, and supplies for each student, **less the amount of institutional grant or scholarship funds provided to that student**" (emphasis added). This bolded clause is a positive development for institutions. In the prior iteration of the rule, the costs were capped, but ED did not consider reductions to tuition, such as grants and scholarships, provided to students in that measure. Now, for institutions that provide grants, loans and tuition discounts, those reductions will be deducted from the student's overall costs, which may reduce the median student debt.

On a less positive front, the prior version of the rule required ED to measure both the mean and the median debt – and to use the lesser of the two. In the new version, ED will only use the median debt. This may negatively impact institutions where the average debt is lower than the median of the cohort.

Student warnings

Under the new rule, all eligible institutions (yes, again, nonprofits and publics included) will be required to notify enrolled and prospective students when a program is not passing the DE rates. For non-GE programs, this will include an acknowledgement that prospective and enrolled students must submit through ED's new website. (Note that graduate

programs will be required to confirm students receive disclosures for underperforming graduate programs, but ED backed off on requiring non-GE undergraduate programs to do the same.)

For a failing GE program, institutions must notify enrolled and prospective students that the program is at risk of losing Title IV eligibility after just one year of failing either metric. For a GE program failure, notice must be sent within 30 days from the date ED issues a notice of determination that a GE program has failed one of the metrics, as one failure could result in loss of Title IV in the following year. For non-GE programs, the notice and acknowledgement requirement becomes effective on July 1, 2026. What is not entirely clear from the regulations is how the 30-day notice requirement for failing GE programs will align with the language of 34 CFR § 668.605, which indicates warnings will be required for failing programs "eginning on July 1, 2026."

'Qualified graduate programs'

Under the 2014 version of the GE rule, medical and dental programs were provided a longer window between the graduate cohort and the year in which earnings were measured to account for the residency and internship requirements that delay substantive earnings growth. In the new iteration, ED has created a new category of programs that will receive this extended measurement period, which it now calls "qualified graduate programs." Under this new definition, ED will provide this extended period "for the first three award years that the Secretary calculates debt-to-earnings rates and the earnings premium measure" for programs "hose students must complete required postgraduation training programs to obtain licensure in one of the following fields: medicine, osteopathy, dentistry, clinical psychology, marriage and family counseling, clinical social work, and clinical counseling." ED indicates that after the initial three-year period, it will reassess the programs included in the definition and reevaluate regularly after that.

Transitional reporting period

While there was a transition period calculation in the 2014 version of the GE rule, the new rule takes a different approach. Rather than automatically running a transitional rate based on what schools report, ED has changed what is actually reported. For the first six years for which rates are calculated, institutions may opt to report the required information in one of two ways. The first option is standard reporting, which will initially report, for programs other than qualifying graduate programs, for the second through seventh award years prior to July 1, 2024, and for qualifying graduate programs, for the second through eighth award years prior to July 1, 2024. The second option is to use the "transitional reporting period," which only includes information on the two most recently completed award years. If an institution opts to go with transitional reporting, ED will calculate transitional rates using the median debt for the period reported and the earnings for six years.

What are the key dates and deadlines?

- **July 1, 2024**: The rule takes effect, but schools should begin preparing now.
- **July 31, 2024**: The first institutional reporting is due. ED indicated that it will provide additional guidance and training on the new reporting requirements prior to this date.
- **October 1, 2024 (and every October 1 thereafter)**: Subsequent and ongoing annual reporting.
- **Early to mid-2025**: We anticipate ED will be able to issue the first GE and financial value transparency scores, but it is not entirely clear, because the deadline for ED's website and institutional disclosure requirements is not until July 1, 2026.
- **July 1, 2026**:
  - ED will establish its program information website.
  - Institutions with programs subject to the financial value transparency framework must issue student acknowledgments for programs with failing DE rates.
  - Institutions subject to the GE framework will be required to issue student warnings for any program that has failed one of the GE metrics and could become ineligible in the subsequent year.

ED published a fact sheet, and there is additional information available on ED's website. We encourage institutions to carefully review all available information, and Cooley is happy to answer any questions.

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34 CFR 668.81 et. seq.

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