

Details about OFCCP's Technical Assistance Guide for Educational Institutions

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The [Technical Assistance Guide for Educational Institutions](#) (the "Guide") OFCCP [released recently](#) is largely a review of existing standards and regulations, but it also includes suggested best practices and concrete guidance specific to educational institutions.

The complete document is available with other guidance on [OFCCP's Technical Assistance website](#). A summary follows.

Since releasing the Guide, Director Craig Leen and other Agency officials have spoken about it publicly, most recently at its Academic Institutions Town Hall in Washington D.C., and a listening session with the American Association for Access, Equity, and Diversity. In those sessions, they said colleges and universities can expect compliance reviews to be more efficient than in the past, and to start seeing institutions scheduled for review beginning in Spring 2020.

Overview of Laws

The Guide includes an overview of laws enforced by OFCCP, and reminds contractors of "two general rules" —

- **Do not discriminate** against applicants or employees based on protected categories; and
- **Take affirmative action** to a) ensure equal employment opportunity without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin; and b) to employ and advance qualified individuals with disabilities and protected veterans.

Affirmative Action Programs and Standards

The Guide includes an overview of what contractors must include in their Affirmative Action Programs: Organizational Profile ("Workforce Analysis"), Job Group Analysis, Availability, Placement Goals, the VEVRAA Hiring Benchmark, Section 503 Utilization for Individuals with Disabilities,

Outreach, and Compensation, to name a few.

These are regulatory requirements and not new to contractors. However, the Guide does provide some education-specific insights. For example —

1. **Single or Multiple AAPs?** The Guide provides that, where a campus includes a collection of buildings, either a single AAP or multiple establishment AAPs might be appropriate. Specifically, where a campus has *various schools, colleges or departments that:*
 - Operate distinctly, have limited employee interaction, and have different human resources departments, separate AAPs are likely appropriate.
 - Share instructional staff, and the operations of the units are more interconnected, a single establishment AAP is likely appropriate.

2. **Is a Worker an “Employee”?** The Guide discusses whether educational institutions should count as employees, and therefore include in their AAPs, medical residents and student workers, for example.
 - OFCCP will consider whether the individual’s primary relationship with the institution is work-related. The Guide reminds educational institutions that OFCCP will not issue violations for excluding student workers from AAPs or personnel activity data, pointing to OFCCP’s [Directive 2019-05](#), issued in September.
 - The Guide, like the 2019 Directive, also pointed institutions to the [Darden test](#) from the U.S. Supreme Court to determine whether an individual with a relationship to the institution qualifies as an employee.

3. **What are Appropriate Pay Analysis Groups?** Consistent with OFCCP’s trend to make larger pay groupings then account for differences in duties by introducing variables, the Guide provides:
 - “Because tenure-track instructors have similar job functions and duties,” they can be included in the same pay analysis group, then variables introduced to a regression analysis to control for differences (contractors may not agree with this approach).
 - Variables such as the quality of teaching, publications, research, and community service should be included in the regression “only when they can be objectively and neutrally measured.”

Compensation in a Compliance Review

In the Guide, OFCCP discusses issues unique to tenure or tenure-track instructors, in contrast with issues involving non-tenure track instructors. The Guide also provides example questions it may ask

during a compliance review. For example:

- How does the institution conduct its own compensation analysis?
- What and who determines the pay of professors, professional lecturers, instructors, and other teaching positions?
- What are the sources of funding for grants and how do they influence base salaries?
- What criteria are used to issue awards or honors that impact compensation?
- How do 9-month and 12-month contracts differ, and what determines their availability?
- How are tenure promotions reviewed for neutrality and by whom?

Religious Exemption

The Guide clarifies that religious colleges and universities are permitted to make employment decisions based on religious if the institution is, in whole or substantial part:

- Owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or
- If the curriculum of such educational institution is directed toward the propagation of a particular religion.

The guidance cites to, and is consistent with, OFCCP's [Directive 2018-03](#). We provided further context for the Directive in [this](#) August 2018 post.

“Specialty Areas” Unique to Educational Institutions

The Guide addresses three “specialty areas” that may surface in compliance reviews of educational institutions: Athletics, Medical, and Online Institutions, and offers insights as to how the contractor – and OFCCP – might approach them.

1. Athletics

The Guide states that “many specialized factors” (the market, revenue from conference sources, etc.) affect compensation and promotional opportunities for coaches and athletic directors. The Guide says should address such factors in their AAP. (Addressing these in the written AAP is not required by OFCCP regulations.) For example:

- The existence of written contracts designating job responsibilities and salaries;
- The level at which performance reviews and merit increases are determined (decisions made by head coaches? Athletic directors?);

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- Whether the physical size of the program plays a role in compensation; and
 - Whether revenue from the program or reputation of the program affects compensation of coaches and directors.

2. Medical

The Guide recognizes that compensation of medical personnel can be dependent on specific discipline, and encourages contractors to track in their data “major work areas, such as teaching, clinical, or research duties.”

3. Online Institutions

The Guide acknowledges that, increasingly, institutions function partially or entirely as online schools. These schools may have a majority of instructors who are not full-time employees. It lists practices OFCCP says “the institutions should ensure that its AAP addresses . . .” They include:

- Define terms such as “faculty, core faculty, and contributing faculty”;
- Detail recruitment and selection procedures for all staff, especially instructional positions;
- Detail relevant compensation factors, especially for instructional positions; and
- Annotate in the Workforce Analysis and Job Group Analysis the actual locations of remote and telework employees.

Again, these are issues that may be relevant in a compliance review, but there is no regulatory obligation to include them in the written AAP.

We will continue to provide updates on OFCCP enforcement trends related to educational institutions.

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