



Special Issues for Academic Institutions

January 2019



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- **BCGi Memberships (free)**

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2019 Summit



Striving For Diversity: Sure It's Required, But It's The Right Thing To Do!

- **When:** April 4-5, 2019
- **Where:** San Francisco, CA
- **Benefits of Attending:**
 - Earn HRCI & SHRM Credits
 - Learn the basics of Affirmative Action Planning (for New Practitioners)
 - Acquire new ideas from other companies/contractors in effectively addressing the requirements of the EO 11246, VEVRAA, Section 503
 - Learn and Acquire Better Understanding of Diversity
 - Value of Diversity in the Workforce
 - Ways and Metrics to Evaluate Diversity
 - Best Practices
 - Meet and Network with other HR and AA professionals
 - Have the opportunity to directly ask and get answers from the experts about your company-specific questions and concerns

- **Bonus #1: SPACE IS LIMITED.** Schedule a 30-minute one-on-one session with experts in Affirmative Action Planning, Compensation Analysis, Testing & Validation, or Diversity Strategies. Meetings will be the day prior to the conference (April 4, 2018).
- **Bonus #2:** Free registration for the pre-conference *Foundations of AAP Development* webinar to be held the week prior.

REGISTER NOW

Learn more: <https://www.bcginstitute.org/page/summit>



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Upcoming Webinars & Events

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**Reminder: HRCI & SHRM
Credits will be emailed within a
week of the webinar ending!**

- February 21-22 – [AAP Boot Camp](#)
- February 28 – [Revisiting the 2018 and New 2019 Directives](#)
- March 27 – [Foundations of AAP Development](#)
- April 4-5 – [BCGi Summit: Striving For Diversity: Sure It's Required, But It's The Right Thing To Do!](#)
- April 17 – [Compensation Analysis 101 – Structuring Data for Analyses](#)
- April 24 – [Foundations of AAP Compensation – Interpreting Statistical Results](#)
- May 15 – [Requirements for Developing Functional Affirmative Action Plans](#)

Disclaimer



The materials contained in this presentation were prepared by the law firm of Schuyler Affirmative Action Practice for the participants' reference in connection with education seminars. Attendees should consult with counsel before taking any actions and should not consider these materials or discussions about these materials to be legal or other advice.



Agenda

- Background on Academic Issues Group
 - Workforce
 - Transactions
 - Compensation
 - Issues of Inclusion
 - Recruitment
 - Q&A
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Higher Education Group Discussions

- **July 2010** – Academic Institutions meet at NILG Conference
- **September 2010** – Director Shiu suggested involving AAAA
- **March 2011** – Survey of academic institutions
- **June 2011** – AAAA representatives discussed results of survey with Director Shiu
- **September 2011** – Schuyler AAP hosts Academic Listening Session at OFCCP
- **October 2011 – May 2012** – Next steps & requested recommendations presented to Director Shiu
- **June – July 2012** – Acad Issues were presented at AAAA and NILG Conferences
- **May 2013** – Clarification email was sent from Debra Carr
- **September 2014** – AAAED Board met with OFCCP officials
- **January 2015** – AAAED representatives met with OFCCP to clarify issues
- **March 2015** – AAAED representatives met with OFCCP to discuss compensation
- **January 2016** – AAAED Board met with OFCCP to discuss academic issues
- **June 2018** – AAAED Members met with Craig Leen to discuss academic issues
- **September 2018** – AAAED Listening Session with OFCCP and academic community



Workforce



Faculty

- **Faculty Appointments** – Teaching and research, administrative, term, adjunct, visiting and affiliate, emeriti, eminent scholar, endowed, clinical, attending, Target of Opportunity, dual appointments
- **Ranks and Titles** – Tenured, tenure-track, non-tenure track and clinical; not linear, feeder pool idea not relevant, each person on their own merit, tenured jobs may be lifetime
- **Salary** – Institutional, supplements, administrative, clinical salary, grants, contracts, consultations and awards, off cycle increases and bonuses, summer compensation
- **Work Schedules/Salary** – 9 months, summer, per course, research supplements, awards and grants
- Pay determinants not always available for modeling



Staff Groups

- **Typical hierarchy** – EEO Categories, job groups, pay grade/levels, distinction based on sub-organizational characteristics (Medical School vs. Arts and Sciences)
- **Immense variability** in job types, roles and responsibilities, no high volume jobs, similar titles with varied responsibilities and compensation patterns
 - Exempt and non-exempt; collective bargaining; with and without benefits
- **Work schedules** – variations in hours and weeks worked
- **Temporary assignments; market variability; hot jobs** - consultants & contractors
- **Compensation** – base pay, overtime, shift premium, merit and cost of living adjustments, out of cycle increases, remediation adjustments
- **Pay systems** - broadband and wide salary range distribution with designated point intervals

Students and Trainees



- **Students:** Enrolled graduate and undergraduate and Other students, typically less than 20 hours, non-exempt positions, and work study programs
 - Only for student positions, non-competitive selections, discipline specific; short-term
- **Trainees:** Many positions are a part of education and experiential training – medical residents, post-doctoral students, teaching and research assistants
 - Limited to very narrow range of education and experience, term bound, guided by educational and professional organizations, parameters and employment terms clearly defined, candidate qualification vs. employer selection



Transactions

“Promotions” for Faculty



Based on:

- Terminal degree (appropriate for responsibilities)
- Experience (not always years)
- Teaching (proper command of the material)
- Research
- Scholarly activity (i.e., publications)
- Service and college governance
- Evaluations (students as well as outside experts in the field)



Faculty position types can effect termination rates

- Adjuncts (sometimes on as needed basis)
- Non-tenure eligible faculty
- Specific term positions
 - Postdocs/Fellows (1-2 years)
 - Visiting Professors
 - Lecturers

Staff position types can effect termination rates

- Grant-funded positions/soft money
- Development Officers
- Athletics (coaches)
- RIF



Staff Hires reflect Supply and Service Contractor Hires

Academic selections

- Some positions require that one be enrolled as a student
- Faculty recruitment is different for tenured vs. non-tenured track
- Some faculty come with a grant
- Spouses are offered positions
- Last-minute hires due to enrollment by students



Compensation



- About half of the academic institutions analyze part-time and full-time employees separately
- Most analyze temporary and non-temporary faculty separately
- Most academic institutions do NOT combine tenured, tenure track, and non-tenure track faculty in job groups, but use several methods for grouping faculty
- Secondary wages are NOT typically included in total compensation for purposes of analysis – only base pay



Factors Impacting Faculty Compensation

- Other salaries paid within the university
 - Market data
 - Department
 - Education
 - Professional training or certifications
 - Number of years relevant functional and/or industry experience
 - Number of staff previously supervised
 - Special abilities or national recognition
 - Publications
 - Research Specialty
 - Tenure/Non-Tenure Track
 - Teaching/research ratio (more research = more salary)
-

Factors for Establishing Pay Analysis Groups



- Pay levels, salary grades and broad-bands
- Tenured, tenure track, non-tenure track
- Other dispositions (i.e. adjunct, visiting)
- Part-time, full-time
- Department
- Academic field



Challenges in Analyzing Faculty Compensation

- **Annualizing pay:** Most positions are for 9 months a year; Non-standard workweek; hours worked are not tracked
- **Comparators:** Some faculty have no “comparators” – i.e. the Nobel Laureate
- **Dual appointments within university:** Primary and secondary role
- **Control over compensation:** Post-Doc “compensation” typically is set by grant; other funding from outside sources
- **Technological advances:** Allow newer faculty to command higher compensation
- **Prestige as compensation:** Some faculty work for zero or minimal compensation
- **Athletic staff:** Comp based on team’s success; endorsements and other outside funding
- **Department Chair:** Commands additional compensation
- **Faculty promotion/tenure system:** Different tracks result in different compensation
- **Multiple add-ons:** Base pay, bonus, supplements, W2 pay, merit pay, housing allowance



Issues of Inclusion

Our “Employees” are Different



- Postdoctoral fellows
- Graduate teaching assistants
- Research assistants
- Student residential assistants
- Other student workers
- Temporary workers

Who is/is Not Considered an Employee?



- OFCCP: Darden Factors
- What about students?
- NLRB (Columbia case)
- DOL Wage and Hour Division



- About 5 years ago, OFCCP discussed with us the use of ***Darden*** Factors to determine inclusion in the AAP
- We responded that this would not resolve most of the inclusion issues about which academic institutions were most concerned
- OFCCP subsequently issued the ***Darden*** Factor analysis FAQ



Darden Factors

- The contractor's right to control when, where, and how the individual performs the job
- The skill required for the job
- The source of the instrumentalities and tools
- The location of work
- The duration of the relationship between the parties
- Whether the contractor has the right to assign additional projects to the individual
- The extent of the individual's discretion over when and how long to work
- The method of payment
- The contractor's role in hiring and paying assistants
- Whether the individual's work is part of the regular business of the contractor
- Whether the contractor is in business
- The provision of employee benefits to the individual



The application of the *Darden* factors is a fact-specific, case-by-case assessment, not a simple, bright-line test. If a contractor believes that a worker may not be an employee, the contractor must assess and weigh each of the *Darden* factors with respect to its relationship with that individual.

While no one factor will necessarily be decisive, the factors that indicate the extent to which the contractor controls the manner and means of the individual's performance of his or her work will typically be most important in the *Darden* analysis.

See Equal Employment Opportunity Commission (EEOC) Compliance Manual, Section 2, Threshold Issues, Part 2-III, Covered Parties, available at <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1> (May 12, 2000).

OFCCP FAQ Applying Darden to Adjunct



Example 1: Corazon Sanchez is an adjunct professor of mathematics at Federal Contractor College (FCC), which has a million-dollar contract to provide research services to a federal agency. Ms. Sanchez, who also works full-time for a non-contractor company, was hired to teach various math courses for FCC's continuing education evening program, and FCC determines which courses Ms. Sanchez will teach and the schedule for each course. Ms. Sanchez does not teach at FCC every semester as her classes are contingent on sufficient enrollment. FCC provides Ms. Sanchez with a list of topics that must be covered for each course, but permits her to construct a syllabus based on the topics it provides. FCC requires Ms. Sanchez to hold office hours once a week, but Ms. Sanchez may determine when those office hours will be. The courses are held on FCC's campus, and FCC provides Ms. Sanchez with office space equipped with a computer, printer, and copier for her use.

FCC pays Ms. Sanchez a fixed amount for each course that she teaches and withholds federal and state taxes from her payments. FCC does not provide Ms. Sanchez with other benefits such as health or life insurance, which it provides to full-time faculty members, and does not permit Ms. Sanchez to hire her own assistants.



Darden analysis: An employment relationship exists between Ms. Sanchez and FCC, and she should be included as an employee in FCC's AAP. FCC determines the course, course topics, and schedule that Ms. Sanchez adheres to, and requires her to hold regular office hours. Although Ms. Sanchez has some discretion as to how she covers the required topics in her syllabus and when she will hold office hours, FCC directs the content of her work and when that work is to be performed (*Factors 1 and 7*). While Ms. Sanchez is hired for her specialized expertise in mathematics (*Factor 2*), she is performing the work of teaching, which is part of FCC's routine business (*Factor 10*). FCC requires Ms. Sanchez to teach at FCC's campus and provides her with office space and equipment for her use. (*Factors 3 and 4*). Moreover, FCC treats Ms. Sanchez as an employee for tax purposes by withholding federal and state taxes from her payment (*Factor 13*) and does not allow her to hire her own assistants (*Factor 9*).



It should be noted that some characteristics of the relationship between Ms. Sanchez and FCC are consistent with a non–employment relationship. Specifically, Ms. Sanchez works for FCC on a contingent basis based on demand and enrollment, can choose to accept or decline to teach the courses that FCC wishes to offer each semester, (*Factors 5 and 6*), is paid a flat, per course fee with no insurance benefits (*Factors 8 and 12*), and retains full–time employment with another company (*Factor 11*). However, these characteristics do not outweigh the significant indicia of an employment relationship in FCC’s ability to direct and control how, where, and when Ms. Sanchez performs her duties, and FCC’s treatment of her as an employee for tax purposes.



- This has not been adopted by OFCCP
- Our Goal
 - Reach for the low-hanging fruit
 - Provide a bright-line rule as a starting point
 - Apply the guideline already in place: Darden factors
- Our Question: Should students be included in an academic institution's Affirmative Action Plan (AAP)?
 - No. Students are not considered employees, and therefore should not be included in the AAP.

Applying Darden Factors to Student Employees



- a. Eligibility:** Positions filled by full-time students are restricted to student applicants.
- b. Duration:** Student work assignments are short term, flexible and contingent upon the student's enrollment in the academic institution. The duration of the relationship is limited and based on student's time at the university and other educational constraints.
- c. Compensation:** Students typically do not benefit from the same compensation, fringe benefits, rights and responsibilities as employees at the academic institution.
- d. Purpose:** Positions are typically created for students to further their education and/or as part of a financial aid package. The primary focus of the students' employment is to provide experiential learning opportunities to advance their classroom learning. Opportunities benefit the student and not as much to further the institutional business.
- e. Work schedule:** Students typically have great flexibility with regard to when, where, and how the tasks are performed.



- Defines “employees” to include graduate and undergraduate teaching assistants, graduate research associates, instructional officers, graduate fellows assistants, and work study students for the purposes of collective bargaining
- Does this mean we need to include these titles in the AAP?
 - OFCCP has not yet provided an answer



What the DOL Wage Hour Division Says

On May 18, 2016, the Department of Labor's Wage and Hour Division issued "Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act," which provided clarification on some positions at academic institutions:

- ***Postdoctoral fellows*** are considered employees.
- ***Graduate teaching assistants*** are considered employees.
- ***Research assistants*** are not considered employees.
- ***Student residential assistants*** enrolled in bona fide educational programs who receive reduced room or board charges or tuition credits from the university are not generally considered employees.
- ***Other student workers*** are generally considered employees when their duties are not part of an overall education program and who receive some compensation.



Recruitment

Recruitment Overview



- While staff recruitment processes may be generally aligned with typical expectations, recruitment processes for faculty have some unique elements
 - Visiting appointments and other term-limited appointments
 - Target of Opportunity appointments
 - Collaboration across disciplines, institutions, and nations (i.e. National Matching)
 - Training appointments
 - Dual career appointments
- These unique elements impact an institution's:
 - Applicant flow
 - Recordkeeping
 - Ability to numerically demonstrate competitive process



- List with the State Employment Delivery System (ESDS) all suitable job openings.
 - Must submit job postings with state agencies in specific formats that may vary by agency,
 - Must document activities and annual written assessment of the effectiveness of each activity; If activities not effective, must identify and implement alternative efforts, and
 - Must retain records for 3 years

Mandatory Job Listing Requirement Exceptions



1. Executive and top management positions [faculty are not considered to be included in this];
2. Positions that will be filled from within the contractor's organization; and
3. Positions lasting three days or less.



- WRP is recognized by the Office of Personnel Management (OPM) as a model strategy in its guidance to federal agencies regarding the recruitment and hiring of people with disabilities in response to Executive Order 13548, Increasing Federal Employment of Individuals with Disabilities. Since the program's expansion in 1995, over 6,000 students and recent graduates have received temporary and permanent employment opportunities through the WRP.
- *WRP is managed by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP) and the U.S. Department of Defense's Office of Diversity Management & Equal Opportunity (ODMEO).*
<http://askearn.org/#refdesk/Recruitment/WRP>.
- Private-sector employers can now use <http://wrp.jobs>, a no-cost online job board, to find pre-screened college students and recent graduates with disabilities looking for internships and permanent positions.

What's Next?



OFCCP is in the last stage of finalizing it's Technical Assistance Guide (TAG) for academic institutions. Stay tuned!



Resources



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