Hidden Requirements for Calculating Graduate Employment

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The current trend in higher education is towards greater transparency regarding student outcomes. Through initiatives like the U.S. Department of Education's (ED) College Scorecard, politicians and regulators have purportedly sought to increase student's awareness of their job prospects after graduation and the relative economic value of their degree. But while many politicians have advocated for greater disclosure of students' employment results, there is currently no uniform methodology for how schools calculate their graduate employment rate (*i.e.*, the percentage of the school's graduates who are employed within a certain period of time after graduation).

In the absence of any uniform rules for calculating graduate employment rates, many state and federal prosecutors have adopted their own views about which students schools – especially propriety (or "for-profit") schools – can count as "employed." These prosecutors are not education, labor, or employment experts. They have not considered all the "pros" and "cons" for different employment rate methodologies. Nevertheless, the prosecutors bring or threaten claims against proprietary schools, including computer coding bootcamps, based on how the prosecutor thinks the school should have counted graduate employment. These prosecutors often apply their standards inconsistently, with many bringing or threatening claims against proprietary schools for using the exact same methodology permitted by the courts and/or used by other public and private "not-for-profit" schools.

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Because of the cost and risk of defending this litigation, most proprietary schools ultimately settle these claims. As part of this settlement, prosecutors require the school to enter a consent order or assurance of discontinuance ("AOD"). These consent orders and AODs mandate that, in the future, the school

must follow the prosecutor's preferred methodology for calculating their graduate employment rate. Other schools, however, may not know about the prosecutors' requirements unless the school reviews these consent orders and AODs.

This article summarizes some of the graduate employment rate methodologies required by prosecutors through these consent orders and AODs. It shows where these standards differ from established case law applied to other schools, including other public and private "not-for-profit" schools. It also compares the different requirements that prosecutors have applied to different proprietary schools, even within the same state. Other proprietary schools, including computer coding bootcamps, should be aware of the requirements imposed by these consent orders and AODs, so that they can attempt to avoid similar claims by prosecutors.

This article summarizes some of the graduate employment rate methodologies required by prosecutors through these consent orders and AODs.

A. No national standard for methodology

Before examining the standards required by prosecutors, it is important to remember that there is currently no national standard regarding how schools calculate their graduate employment rates. ED has twice considered whether to impose a specific methodology to calculate a school's graduate employment rate. Both times, ED failed to approve a proposed methodology and declined to institute any national standard.

In 2010, ED proposed a rule requiring a specific methodology for calculating graduate employment rates but withdrew it after receiving a number of objections. (*See* Program Integrity Issues, 75 Fed. Reg. 34,806, 34873, 66,832, 66836-37; 34 C.F.R. § 668.6(b)(1)(iv) and (g) (Mar. 24, 2014)). Instead, ED asked the National Center for Education Statistics (NCES) to develop a placement rate methodology. However, after considering the issue, NCES's Technical Review Panel (TRP) affirmatively declined to institute any uniform policy. Rather, the TRP recommended that schools continue to use their own methodologies, so long as the school is transparent regarding how their rates were

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calculated.

In 2014, ED instituted the "Gainful Employment" Regulations and again explicitly rejected imposing any required methodology for calculating the graduate employment rate, provided that schools comply with accreditor and state agency reporting requirements and provide basic disclosures as to the manner in which they calculate their graduate employment rates. (*See* Program Integrity Issues, 79 Fed. Reg. 16,477, 64,979-80 (Oct. 31, 2014)).

B. Prosecutors institute their own methodology

In the absence of a national methodology, state and federal prosecutors have enforced their own opinions on how schools should calculate their graduate employment rates. These standards are often inconsistent, with prosecutors bringing or threatening claims against proprietary schools for the exact same methodologies used by public and private "not-for-profit" schools. Some prosecutors even enforce different requirements for similarly situated proprietary schools in the same state. This erratic enforcement makes it virtually impossible for proprietary schools to know whether their methodology will be deemed acceptable and gives the impression that the proprietary schools are in a "no-win" situation. No matter what methodology they choose – even if they follow exactly what all the other "not-for-profit" schools are doing – they may find themselves on the wrong side of the prosecutor's opinion. These inconsistent standards also ***create confusion*** for consumers by making it impossible for prospective students to make an "apples-to-apples" comparison of different colleges and universities. Further, because these methodologies are mandated by prosecutors, and not by the legislature or courts, other proprietary schools may not know about the requirements unless they review the relevant consent orders and AODs.

The following are some examples of different requirements for calculating graduate employment statistics imposed by prosecutors through constant orders and AODs.

1. Duration

One objection raised by prosecutors relates to the time duration that the graduate's job is expected to last. Prosecutors often allege that schools improperly count graduates as employed, even though the graduate's position was only temporary.

Courts have consistently held that it is ***not deceptive*** for a school to include temporary positions in its graduate employment rate. *See MacDonald v. Thomas M. Cooley Law School*, 724 F.3d 654, 662-63 (6th Cir. 2013); *Gomez-Jimenez v. New York Law School*, 943 N.Y.S.2d 834 (Sup. Ct. 2012); *Casey v. Florida Costal School of Law*, 2015 WL 10096084, *14-15 (M.D. Fla., Aug. 11, 2015); *Austin v. Albany Law School of Union Univ.*, 957 N.Y.S.2d 833, 842 (Sup. Ct., 2013); *Bevelacqua v. Brooklyn Law School*, 975 N.Y.S.2d 365, 2013 WL 1761504, at *6-7 (Sup. Ct., 2013). These courts hold that consumers cannot assume that the employment calculation includes only permanent or lengthy positions when the schools did not make any representations regarding the expected duration of the positions in its published graduate employment rate.

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Notwithstanding these decisions, many prosecutors have brought or threatened claims based on how schools count graduates in temporary

positions. These prosecutors have insisted that schools only count positions that are expected to last for an indefinite or extended duration. For example:

- New York required that Career Education Corporation ("CEC") could only count graduates as employed if the position was ***permanent*** (*i.e.*, there is no planned end date). (*See* CEC NY Consent Order, Section II.B.4.a.ii (August 19, 2013).)
- Later, New York mandated that a computer coding bootcamp, Flatiron School, Inc. ("Flatiron"), could only count a graduate as employed if the position was anticipated to employ the graduate for a period of no less than ***three months***. (*See* Flatiron NY AOD, ¶ 45(ii) (October 11, 2017).)
- Massachusetts required that Premier Education Group, L.P. and Salter College ("Salter") could not count students serving in ***externships*** or ***temporary jobs***. (*See* Salter MA Consent Order, Section IV.C (December 11, 2014).)
- Thirty-nine (39) states (including New York) and the District of Columbia mandated that Education Management Corporation ("EDMC") could not count graduates in a position that was expected to last less than one hundred and eighty (180) days (*i.e.*, ***approximately six months***). (*See* EMDC Consent Order, ¶ 69(a)(2) (November 2016).)

2. Full-time versus part-time

Like duration of employment, courts have consistently held that it is ***not deceptive*** for schools to include part-time positions in their graduate employment rates. *See Philips v. DePaul University*, 19 N.E.3d 1019, 1028-29 (Ill. App. 2014); *MacDonald*, 724 F.3d at 662-63; *Gomez-Jimenez*, 943 N.Y.S.2d at 843-44; *Casey*, 2015 WL 10096084, *14-15; *Austin*, 957 N.Y.S.2d at 842; *Bevelacqua*, 2013 WL 1761504, at *6.

Despite these cases, New York has consistently required that proprietary schools cannot count a graduate as employed unless the graduate's position requires at least ***twenty (20) work hours per week***. (*See* CEC NY Consent Order, Section II.B.4.a.iv; Flatiron NY AOD, ¶ 45(iii).) This twenty (20) hour per week requirement also was included in the EDMC Consent Order entered with prosecutors in thirty-nine (39) states (including New York) and the District of Columbia. (EMDC Consent Order, ¶ 69(a)(4).)

3. Continuing employment

Another area where prosecutors have differed from courts is how schools should count students who continue working for the same employer after graduate. In considering a graduate placement rule promulgated by the FTC in the 1970s, the Second Circuit held that it would be affirmatively misleading for the FTC to require schools to count students who did not seek new employment the same as students who sought but were unable to find employment. *See Katharine Gibbs Sch. v. FTC*, 612 F.2d 658, 664-65 (2d Cir. 1979).

Still, prosecutors have mandated a variety of different ways for schools to count graduates who continue with their same employer – even if the graduate does not actively seek a new position. For example:

- EDMC could only count "continuing employment" graduates as "placed" if the program enabled the graduate to maintain his/her position or earn a promotion or pay increase, even if the graduate did not seek new employment. (*See* EMDC Consent

Order, ¶ 69(a)(4).)

- The FTC and Massachusetts required that DeVry Education Group and DeVry University ("DeVry") could not count graduates as employed if they obtained their employment more than six months prior to graduating, even if the graduate did not seek new employment. (*See* DeVry FTC Stipulated Order, ¶ I.D.1 (December 19, 2016); DeVry MA AOD, ¶15 (June 30, 2017).)
- CEC could only count "continuing employment" graduates as employed if the graduate verified in writing that the training received enabled the graduate to maintain or advance in the graduate's position. CEC had to count a graduate the same as someone who was unable to find employment unless the graduate verified in writing that he/she was not seeking new employment or a promotion. (*See* CEC Consent Order, Section II.B.4.i and II.B.8.h.)

4. In-field employment

Finally, courts have held that an employment rate is not misleading simply because it includes jobs that do not use the graduate's education. *See, e.g., Austin*, 957 N.Y.S.2d at 842. Nevertheless, prosecutors have mandated that schools can only count jobs that utilize the graduate's education and cannot include some specific positions and industries. For example:

- Massachusetts required that Lincoln Technical Institute, Inc. and Lincoln Educational Services Corp. ("Lincoln") could not count as "placed" any student whose position was "outside the student's field of study." Among the positions Lincoln was forbidden from including were: (i) waitresses or waiters, (ii) restaurant hosts or hostesses, (iii) childcare providers, (iv) home health aides, (v) custodians, or (vi) any positions in: (a) retail, (b) housekeeping, (c) food service, or (d) transportation. (*See* Lincoln MA Consent Order, ¶¶ IV.A and IV.C (July 13, 2015).)
- CEC could only count graduates if the position was included on CEC's list of job titles for the program, or the position requires the use of the skills learned in the program as a predominant component of the job. CEC was not allowed to include retail sales positions (for graduates of criminal justice programs), and receptionists or childcare positions (for graduates of medical assistant programs.) (*See* CEC NY Consent Order, Section II.B.4.i and fn.1.)
- Salter could not include: (i) home health aides, (ii) nurse's assistants, (iii) certified nurse's assistants, (iv) personal care assistants, (v) companions, (vi) homemakers, (vii) daycare providers, (viii) receptionists, (ix) customer service representatives, or (x) firefighters. (*See* Salter MA Consent Order, Section IV.C.)
- EDMC could only include graduates with positions in their field of study or a related field of study. To be considered in the graduate's field of study or a related field of study, the position must (i) be included on the list of job titles for the program and included in the most recent Classification of Instructional Programs (CIP) to Standard Occupational Classification (SOC) Crosswalk for the applicable CIP code; or (ii) require the graduate to use the program's published core skills a majority of time while at work, ***and*** (a) the position's written job description must have stated that a college education

was required or preferred, (b) the positon must be as a supervisor or manager, or (c) the graduate or employer must certify in writing that the education provided a benefit or advantage to the graduate in obtaining the position. (*See* EMDC Consent Order, ¶ 69(a)(1)(i)-(ii).)

Conclusion

Through consent orders and AODs, state and federal prosecutors have imposed a variety of different methodologies for proprietary schools to calculate their graduate employment rates. These standards are often not found in any statute or regulation and may be contrary to the requirements applied by the courts or applied to other schools in the same jurisdiction. Propriety schools must be aware of the requirements imposed by prosecutors in their jurisdictions and cannot just rely on following the regulations and case law. Otherwise, schools my find themselves subject to an investigation or litigation for using a graduate employment methodology that they otherwise thought was allowed.

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