



Diversity and the Law: 2021

Amplification of Underutilization in Employment¹

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This document provides an example of how “underutilization” is calculated for the purposes of determining whether a failure to provide adequate employment equal opportunity exists, requiring an institution as a federal contractor to use “good faith” efforts to remedy this condition in compliance with federal OFCCP requirements.

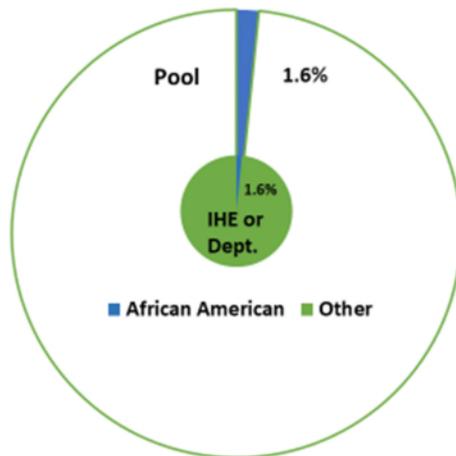
Underutilization, as defined by the Office of Federal Contract Compliance Programs’ <80% test for federal contractors, is when the percentage representation of a racial, ethnic or sex group in the relevant workforce at an institution of higher education (IHE) is <80% of that group’s percentage representation in the available qualified labor pool from which the IHE could recruit for the position.

The **relevant workforce** is the cluster of positions at the IHE—of a type, seniority level and discipline(s)/expertise that share a relevant recruitment market, considering the IHE’s size, organization and hiring structure.

The **available qualified labor pool** are the people in the qualified recruitment market from which the IHE could reasonably recruit for the position (local, regional, national, or international), based on the position and the institution’s character, context, and reach.

Calculation Example:

- First, determine what the percentage representation of a race or gender is in the available qualified labor pool from which the IHE could reasonably recruit for a position, e.g., Full Professor of Engineering. Determine 80% of that representation. Let’s say that pool is 2% African American. Calculate 80% of 2%, which is 1.6%. (IHEs have flexibility in defining the qualified labor pool, as explained in more detail below.)
- Second, determine what the percentage representation of African Americans is in the relevant workforce at the IHE—e.g., in Full Professors of Engineering at the IHE.
 - Let’s say that African Americans hold <1.6% of such positions. If so, there is an underutilization (as any representation of African Americans that is <1.6% in the relevant workforce at the IHE is <80% of their representation in the available, qualified labor pool from which the IHE could recruit— by percentage).
 - Alternatively, let’s say that their representation is $\geq 1.6\%$. If so, there is no underutilization, as any such representation of $\geq 1.6\%$ equals or exceeds 80% of their representation in the available, qualified labor pool. There is no underutilization, even if the number of African American full Professors of Engineering at the IHE is small.



Affirmative Action Plan Role:

An IHE’s Human Resources Office or Equal Employment Opportunity Office will annually update the IHE’s Affirmative Action Plan (AAP) and that will provide the governing definitions and calculations of relevant workforce and available and qualified labor pool, and ultimately determine underutilization.

However, whether there is an underutilization in particular positions could be different, under different definitions of the relevant workforce and available qualified labor pool. The IHE has some flexibility on how it defines these terms. Depending on the IHE’s organization structure, size and hiring criteria, the IHE may define the relevant workforce as all tenured professors (or the IHE may separately consider all full or associate or assistant professors)—within a single department (as in the example) or across all STEM departments, or across each school or college within the IHE, or across the entire IHE.

IHEs also have flexibility on how they define the available qualified labor pool, provided that they have a logical rationale for the definition that is consistent with the IHE’s hiring practices, character and context—i.e., consistent with the IHE’s local, regional, national or international reach and hiring for the type of position.

When academic leaders consult with the Human Resources Office or Equal Employment Opportunity Office, as it structures academic units’ sections of the Affirmative Action Plan, the most supportable and useful conclusions on underutilization may result.