

Effective and legally sustainable faculty and staff (employment) Employment Equal Opportunity (EEO) policies that also advance Diversity, Equity, and Inclusion (DEI) must be viewed through a dual—aims/means lens—and in multiple layers. These policies should be grounded in data in a well-developed and deployed annual Affirmative Action Plan (AAP). This top-line guidance is to inform good policy design that may involve individual race and gender- consciousness.

<p>INSTITUTIONAL FACULTY/STAFF DEI AIMS</p>	<p>MEANS TO ACHIEVE AIMS</p>
<p>Must have significant enough aims to justify an exception to federal laws’ prohibition against discrimination on the basis of Race/Ethnicity, Sex/Gender (RES)... if <u>individuals’</u> RES identities are considered when conferring employment benefits or opportunities, terms, or conditions:</p>	<p>Must pursue RES-neutral means/design...unless considering <u>individuals’</u> RES in conferring benefits/opportunities is legally justified (necessary), to avoid unduly burdening others:</p>
<ul style="list-style-type: none"> • Remedying a legally-recognized persistent “underutilization” of – or presumed or actual discrimination against – a particular RES in an IHE’s relevant workforce. • Underutilization/presumed discrimination don’t exist if a RES is poorly represented both in the available qualified labor pool for a field <i>and</i> at the IHE. 	<ul style="list-style-type: none"> • Necessity of RES-conscious affirmative action may be shown only if neutral policies <ul style="list-style-type: none"> ○ Barrier removal/targeted outreach/neutral criteria—are seriously reviewed and used, but prove inadequate to remedy persistent underutilization or presumed discrimination, and RES is considered incrementally; ○ Any consideration of RES of individuals is temporary – until it is no longer necessary as a strategy, or a remedy is achieved.
<p>Aims to remedy a legally-recognized disparity in representation at an IHE, showing inadequate EEO:</p>	<p>AAP/System documents and evaluates “necessity” data:</p>
<ul style="list-style-type: none"> • Remedial affirmative action may be justified, if the AAP shows the existence of, and aim to remedy: <ul style="list-style-type: none"> ○ Underutilization: representation of a RES in the IHE’s relevant workforce (i.e., in a job category (type)/in market-related disciplines/at a level of position) is <80% of that RES’ representation in the available, qualified labor pool from which the IHE could recruit for the position—on a percentage basis (not in absolute numbers); or, ○ Presumed Discrimination: there is a ≥ 2 standard deviation disparity between representation of an RES in the IHE’s relevant workforce and that RES’ representation in the available qualified labor pool from which the IHE could recruit for the position. 	<ul style="list-style-type: none"> • Utilization data in the AAP are key to justifying conclusions/action. • Focus on identifying and using neutral policies – evidence of their adequacy alone (or not). • Focus on lesser considerations of RES, combined with use of neutral policies, evidence of their adequacy together. • Evidence of effectiveness of RES-conscious affirmative action used (without overburdening others – others can still compete for opportunities; RES is not considered in layoff decisions).

- Mirroring at the IHE or in a Dept. the representation of a RES in the general population or remedying general societal inequity is not the aim.

But, with or without underutilization or presumed discrimination, professional development and other programming to prepare faculty to serve the needs of a diverse and equitable student body and society—and seeking faculty/staff who bring DEI scholarship/expertise/knowledge, effective pedagogy for a diverse student body, and/or commitment to serve the needs of a diverse, equitable student body, community, and society—are legally permitted, likely to be characterized as neutral while advancing EEO and DEI interests, and should not be subject to exacting federal nondiscrimination law standards (although the Supreme Court has not specifically ruled on the knowledge/commitment criteria).

These qualities can be important to advance the IHE's mission.

Faculty roles in advancing educational benefits of diversity for all students may be a supplementary aim—but is inadequate alone under current law to justify RES-conscious affirmative action. A remedial aim relating to underutilization or presumed discrimination is always required.

Stereotyped interest, capability, role is not considered an important aim. When such stereotyping is absent, the law does recognize biological/ physiological differences in the sexes that in limited circumstances may be considered as relevant to an individual's qualifications.

- Focus on considering changed circumstances affecting remedial justification and/or means and on making adjustments.

A “STAIRCASE APPROACH” – Employment

Policies attentive to legal standards that require evidence of need to consider race/ethnicity, sex/gender

Conditions for Race/Ethnicity, Sex/Gender (RES)-Conscious Employment Affirmative Action –Requires a Remedial EEO Aim

- Remedying presumed or actual **discrimination** or
- Remedying **persistent underutilization** or
- **Remedying artificially limited labor pool** (may justify considering RES in capacity building) – if the IHE excluded RES from “training opportunities” (RAs, Post-Docs, Visiting) to compete for higher-skilled roles (Tenure Track), IHE may be able to consider RES in selecting participants for such temporary training/mentoring (but not RES-exclusive)
- **RES-conscious affirmative action is temporary** until remedy is achieved – grounded in AAP data—not used in layoffs
- **Stairs 1-3 are used for a sustained period to avoid undue burdens** on others – but data show they’re inadequate
- **Remedy IHE-related**, not society-related, inequity

