



Diversity and the Law: 2021

**Graduate Students and Post Docs DEI Guidance:
What Federal Nondiscrimination Law Applies? ¹**

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This document addresses the question of whether graduate student research and teaching assistants, as well as post-doctoral associates, should be classified as students or employees when evaluating relevant policies and practices under federal non-discrimination law.

When evaluating compliance with federal non-discrimination laws in education and employment, a complex question is whether graduate student research and teaching assistants, as well as post-doctoral associates, should be classified as students or employees. The answer to that question, which is typically fact-specific, is the necessary foundation for determining whether Title VI and Title IX education or Title VII and Title IX employment standards are operative.

Although not an exhaustive list, factors in favor of considering such an individual as a student for determining the relevant governing legal regime are:

1. The purpose of the program is clearly expressed to be educational and that is its predominant focus;
2. Monetary payments are referred to as a scholarship, or as a stipend, and not as “salary” or “wages;”
3. The post-doc program or assistantship is awarded at the time a postdoc or graduate student is admitted to the overall educational program and is characterized as a component of or support for pursuit of that program;
4. No services are required in exchange for the monetary component(s) of the post-doc program or assistantship; rather, the monetary components are awarded to support participation in the program as a whole and any research or teaching requirements are educational prerequisites to earning a post-doc program certificate or graduate degree;
5. Post-docs and graduate students are enrolled/registered as students with the school’s registrar; any research or teaching obligations are expressed as program certification or degree requirements;
6. Compensation paid to the post-doc or assistant is not treated as an allowable “cost” under the OMB Circular A-21 provision that characterizes as allowable costs “tuition remission and other forms of compensation paid as, or in lieu of, wages to students performing necessary work” pursuant to a “bona fide employer-employee relationship between the student and the institution for the work performed;”
7. Post-docs and assistants are given a status other than “employee” in the institution’s record-keeping systems;
8. Payments are made by way of an “accounts payable” account or other non-wage account, instead of a “payroll” account;
9. Post-docs and assistants are not subject to employee tax withholdings and do not receive a W-2;
10. Post-docs and assistants are not unionized;
11. Institutional IP policies do not characterize or treat post-docs or assistants as employees;
12. Post-docs receive certificates of completion at the end of the program, reinforcing the educational nature and benefits of the program; assistants receive academic credit toward a degree for their assistantships;
13. Institutional manuals and policies clearly identify post-docs and assistants as students;

14. Award letters, letters of appointment, etc. state that post-docs are not employees of the institution (or of any external funding agency) and that their program is educational, leading to a degree or academic certificate.

An individual may be both a student and an employee in their relationship with an institution, depending on the activity and aspect of the relationship at issue. When an aspect of a program is challenged (*e.g.*, level of payment), both the predominant nature of the program and of the particular aspect challenged are likely to be considered.²

When an individual's race, ethnicity and gender are *not* considered in diversity and equity policies, generally, federal non-discrimination laws' exacting requirements should not apply;³ as a result, the student-employee distinction is less likely to be important with respect to non-discrimination laws. At the same time, however, that distinction remains important for purposes of other laws, such as those relating to tax, payroll, direct costs of research, and more.

²An agency or court also might look to, *e.g.*, the IRS' tax treatment of post-doc awards (*see, e.g.*, I.R.C. § 117 and IRS Publication 520, "Scholarships and Fellowships"); and Dept. of Labor/FLSA treatment of graduate students, externs, and health professional residents. *See, e.g.*, DOL Field Operations Handbook at paragraphs 10b18-b20 and 10b24 (1993). This list is excerpted from the American Association for the Advancement of Science, *Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education*, R. Burgoyne, et al. (2010).

³ Federal non-discrimination laws would apply to claims of race, ethnicity or gender-based disparate impact, where race, ethnicity and gender are not considered explicitly or in practice, but there is an adverse impact on identity. Note that there is no private right of action for disparate impact claims under Titles VI and IX that govern student claims of discrimination in education; by contrast, Title VII, which governs employment discrimination claims, permits a private right of action. *See Alexander vs. Sandoval*, 532 U.S. 275 (2001); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The U.S. Department of Justice may initiate litigation under all of these statutory regimes.