



## Difficult Employment Decisions in Times of Crisis

*Presented by:*  
*National Association of College and University Attorneys*

*in Cooperation with:*



College and University Professional  
Association for Human Resources

---

**Henry Morris, Jr., Partner, Arent Fox LLP**  
**Shelley Carthen Watson, Senior Associate General Counsel, University of Minnesota**

---

*NACUA Webinar*

*May 28, 2020*



National Association of College and University Attorneys



## Presenters




**Henry Morris, Jr.**  
*Partner  
Arent Fox LLP*



**Shelley Carthen Watson**  
*Sr. Associate General Counsel  
University of Minnesota  
Office of General Counsel*




National Association of College and University Attorneys



## AGENDA

1. Introduction
2. Threshold Issues
3. Measures Short of Layoffs and Furloughs
4. Furloughs
5. Involuntary Reductions in Force
6. Returning to Campus
7. Conclusion



NACUA  
National Association of College and University Attorneys



## THRESHOLD ISSUES

National Labor Relations Act Considerations

- Union Settings
- Non-Union Settings

Fair Labor Standards Act Considerations

- Non-Exempt Employees
- Exempt Employees

Wage Theft Statutes



NACUA  
National Association of College and University Attorneys




## THRESHOLD ISSUES

### Contractual Considerations

- Individual Employment Contracts
- Offer Letters
- Personnel Manuals and Policy Statements
- *Force Majeure*



NACUA  
National Association of College and University Attorneys




## THRESHOLD ISSUES

### Financial Exigency and Financial Stringency

- Sources
  - AAUP
  - Internal Policies

### Prerequisites to Declare

- Sources
- Exists or is Imminent
- Faculty Consultation
- Formal Declaration by President and/or Board



NACUA  
National Association of College and University Attorneys



## THRESHOLD ISSUES

### Advantages

- Allows Termination or Reassignment of Tenured Faculty


### Disadvantages

- Awfully High Bar to Meet
- Takes Considerable Time
- Bad Publicity
- Negative Scrutiny from Financial Institutions
- Loss of Confidence in the Institution
- May No Longer Even be Necessary



## MEASURES SHORT OF LAYOFFS AND FURLONGHS

- |  |  |
|--|--|
| – Increase Faculty Teaching Loads                          | – Decline to Renew Term Contracts                            |
| – Postpone Faculty Sabbatical Leaves at Full Salary        | – Freeze or Reduce Number of Visiting Scholars and Lecturers |
| – Move More Individuals from 12-month to 9-month Positions | – Reduce Number of Graduate Assistantships                   |



## MEASURES SHORT OF LAYOFFS AND FURLOUGHS

- Freeze or Reduce Staff Overtime
- Invite Staff and Faculty to Move From Full- to Part-Time Status
- Offer Voluntary Sabbatical Program
- “Work Share” Programs
- Encourage Voluntary Leaves of Absence
- Delay Filling all or Some Staff and Faculty Positions
- Allow High-Priority Positions that Become Vacant to be Filled Only by Internal Transfer



NACUA  
National Association of College and University Attorneys



## MEASURES SHORT OF LAYOFFS AND FURLOUGHS

### Hiring Freezes

- Restricts Filling of Open Positions or Posting of New Ones
- Important to Have Exceptions for Critical Positions
  - Campus and Personal Health and Safety
  - Compliance with Federal, State, and Local Laws and Regulations
  - Delivery of Essential University Services
  - Courses Necessary for Timely Graduation
  - Essential to Instruction, Research, and/or Clinical Operations
  - Roles Essential to Program or Clinical Activity Related to the COVID Pandemic
- Create and Require an Approval Process



NACUA  
National Association of College and University Attorneys



## MEASURES SHORT OF LAYOFFS AND FURLOUGHS

### Salary Freeze

- Advantages
  - No COL Increases
  - Maintain Cash Output
  - Flexibility
- Not Affected
  - Salary Changes upon Promotion
  - Bonuses (Unless Specifically Stated)
  - Adjustments that Have Already Been Awarded
  - Unionized Employees




## MEASURES SHORT OF LAYOFFS AND FURLOUGHS

### Voluntary Separation Programs

- Gather Relevant Data
- Determine the Desired Number of Participants
- Determine Eligibility Criteria
- Determine Inducements
- Ensure Voluntary is Really Voluntary






## MEASURES SHORT OF LAYOFFS AND FURLOUGHS

### Potential Minefields

- ADEA
- OWBPA
- Releases
- How much can you actually save?



NACUA  
National Association of College and University Attorneys




## MEASURES SHORT OF LAYOFFS AND FURLOUGHS

### Reduced Work Schedules and/or Corresponding Salary Deduction

- Proportional Reduction in Wages for Non-Exempt Employees
- Exempt Employees only if Due to a “Bona Fide Reduction” in the Amount of Work
  - Must be Prospective
  - Must not be Recurrent
  - Must be Related to Long-Term Business Needs or Economic Slowdown
  - Reductions do Not Go Below the Minimum Salary Amount for Exempt Status




NACUA  
National Association of College and University Attorneys




## MEASURES SHORT OF LAYOFFS AND FURLOUGHS

Salary Reduction

- Reduction in Hours can also Trigger Other Consequences
  - Ineligibility for Benefits
  - Eligibility for Unemployment
- Duty to Bargain




NACUA  
National Association of College and University Attorneys



## MEASURES SHORT OF LAYOFFS AND FURLOUGHS


Suspend or Reduce Retirement Contributions

- May Reduce or Suspend any Discretionary Matching or Non-Elective Contributions at any Time
- May Reduce or Suspend Fixed Matching and/or Fixed Non-Elective Contributions with a Prospective Plan Amendment
- Provide Employees with Advance Notice of any Changes
- Likely Subject to Bargaining



NACUA  
National Association of College and University Attorneys






## FURLOUGHS

Furloughs vs. Layoffs


Types of Furloughs

Legal Authority for Furloughs

- Executive Orders, State Personnel System Authorizations; Board's Resolutions
- Applicable Policies, Procedures, or Contractual Documents that Authorize the Use of Furloughs




NACUA  
National Association of College and University Attorneys



## FURLOUGHS

Advantages of Furloughs

- Avoids Layoffs
- Reduces Rehiring Needs
- Reduces Cash Output
- Employees Retain Benefits
- Employee Morale
- Eligible for Unemployment




NACUA  
National Association of College and University Attorneys




## FURLOUGHS

### Disadvantages of Furloughs

- Lose Top Performers
- Reopening Takes Time
- Work Interrupted
- Lower Employee Morale
- Still have to Pay Benefits
- Managing Furlough Days for Exempt/Faculty




NACUA  
National Association of College and University Attorneys



## FURLOUGHS

### Union Collective Bargaining Agreements

- Temporary decrease in hours of work and/or amount of pay is a unilateral change to terms and conditions of employment
- If expressly reserved in the contract, no duty to bargain, but if silent, just the reverse.
- Even if not duty to bargain the decision to furlough, may still have a duty to bargain the implementation or effects of the furlough



NACUA  
National Association of College and University Attorneys



## FURLOUGHS

### Administrative Staff and Non-Unionized Faculty


- Have employment contracts or appointments that specify a particular salary for a defined academic or fiscal year
- Institutional policies might not allow for financial constraints short of financial exigency or stringency
- Or may have language providing for flexibility in the event of financial exigency or other severe budgetary challenges



## FURLOUGHS

### FLSA Minefields: Nonexempt


- Nonexempt employees only need to be paid for hours that are actually worked
- Unless limited or restricted by state law or employee agreements, an employer generally may require to take unpaid days off
- Several state laws and ordinances require show-up pay predictive scheduling, or contain notice requirements
- Paid sick leave and other paid leave laws may be implicated if a qualified leave begins before an employee is furloughed




## FURLOUGHS

FLSA Minefields: Exempt

- Must be paid their full salary for any week in which they perform *any* work
- To effectively furlough, must instruct them to perform **no work at all**
- If a furlough begins in the middle of a work week, must pay all exempt employees for the entire week
- Exception for public employees




NACUA  
National Association of College and University Attorneys



## FURLOUGHS

Selection of Employees Minefield

- Gather Data and Keep it Confidential
- Identify the Selection Criteria and Consistently Apply it
- Perform a Disparate Impact Analysis
- Identify any Immigration Issues



NACUA  
National Association of College and University Attorneys




## FURLOUGHS

### WARN Act Minefield

- Requires at least 60 calendar days advance written notice of a worksite closing or a mass layoff
- A layoff or furlough lasting less than six months does not constitute an “employment loss,” thereby triggering any WARN notice obligation




NACUA  
National Association of College and University Attorneys




## FURLOUGHS

### WARN Act Minefield

- Employers who do not issue WARN notices because they do not intend layoffs or furloughs to last longer than six months may be subject to WARN liability if the layoff or furlough is extended beyond six months, unless:




NACUA  
National Association of College and University Attorneys




## FURLOUGHS

- (1) the extension beyond six months is caused by business circumstances not foreseeable at the time of the initial layoff; and
- (2) notice is given at the time it becomes reasonably foreseeable that a layoff beyond six months will be required.

- Beware state Mini WARN Acts with their own notice requirements




NACUA  
National Association of College and University Attorneys



## FURLOUGHS

Those Exempt from Furloughs Typically Include:

- H-1B Visa Holders
- Those whose Employment is Funded at 90% or Greater by Externally Sponsored Funds
- Employees whose Salary is \$40,000 or Less per Year
- Graduate Assistants, Pre- and Post-Doctoral Fellows
- Undergraduate Student Workers
- Employees Working Less than Half-Time
- Those Excluded for Programmatic Health or Safety Reasons



NACUA  
National Association of College and University Attorneys





## FURLOUGHS

### Benefits Issues

- Consider suspending usage of PTO during a furlough preserve unemployment eligibility
- Consider suspending accrual of additional PTO (on a going-forward basis) during a furlough
- Beware state law final compensation laws



## QUESTIONS





## INVOLUNTARY REDUCTIONS IN FORCE: PLANNING

Establish RIF Management Team

- Departmental Decision-Makers
- Human Resources Representatives
- Employee Benefits Representatives
- Internal Communications Professionals
- Media Relations Representatives
- Finance Department Representatives
- Legal Counsel




NACUA  
National Association of College and University Attorneys




## INVOLUNTARY REDUCTIONS IN FORCE: PLANNING

Establish Institution's Objectives

- Legitimate Business Reasons for the RIF
- Locations, Departments, Divisions, or Job Types Targeted
- RIF Date(s)
- Severance Package




NACUA  
National Association of College and University Attorneys




## INVOLUNTARY REDUCTIONS IN FORCE: PLANNING

Selection Criteria

- How will positions/individuals be selected for reduction?
- Selection Factors
  - Seniority
  - Job Classification
  - Skills
  - Attendance
  - Job Performance




NACUA  
National Association of College and University Attorneys




## INVOLUNTARY REDUCTIONS IN FORCE: PLANNING

Training



NACUA  
National Association of College and University Attorneys



## INVOLUNTARY REDUCTIONS IN FORCE: IMPLEMENTATION


Follow Established RIF Procedure and Selection Criteria

Be Consistent


Document, Document, Document

Conduct Adverse Impact Analysis

Identify Risky Cases




NACUA  
National Association of College and University Attorneys



## INVOLUNTARY REDUCTIONS IN FORCE: LEGAL EXPOSURE

Laws that Provide Reinstatement Rights

- The Family and Medical Leave Act
- The Uniformed Services Employment and Reemployment Rights Act
- The Americans with Disabilities Act



NACUA  
National Association of College and University Attorneys



## INVOLUNTARY REDUCTIONS IN FORCE: LEGAL EXPOSURE


### Union Settings

- Collective Bargaining Agreements
- Duty to Bargain
  - Decision Bargaining
  - Effects Bargaining

### Public Colleges and Universities: Due Process



NACUA  
National Association of College and University Attorneys



## INVOLUNTARY REDUCTIONS IN FORCE: LEGAL EXPOSURE


### Discrimination Claims

- Disparate Treatment
- Disparate Impact


### The Worker Adjustment Retraining Notification Act

- The Duty: Generally
- Exemptions

### Paycheck Protection Program Loan Forgiveness




NACUA  
National Association of College and University Attorneys




## RESUMING ON-CAMPUS OPERATIONS: DUTY TO PROVIDE A SAFE WORKPLACE

### OSHA

- Core Principles
  - Prevent Workplace Injury and Illness from Occurring
  - No One-Size-Fits-All Solutions




NACUA  
National Association of College and University Attorneys



## RESUMING ON-CAMPUS OPERATIONS: DUTY TO PROVIDE A SAFE WORKPLACE


### Approach

- Identify Sources of Potential Exposure
- Identify Measures that will Effectively Minimize or Eliminate the Exposure Risk



NACUA  
National Association of College and University Attorneys







## RESUMING ON-CAMPUS OPERATIONS: DUTY TO PROVIDE A SAFE WORKPLACE

### Hierarchy of Controls Methodology

- Engineering Controls
- Administrative Controls
- Safe Work Practices – Good Hygiene
- Personal Protective Equipment




NACUA  
National Association of College and University Attorneys




## RESUMING ON-CAMPUS OPERATIONS: EMPLOYEE HEALTH SCREENING

### Health-Related Questions and Medical Examinations

- Medical Questioning
- Measuring Employee Temperature
- COVID-19 Testing
- Keep Employee Health Information Confidential




NACUA  
National Association of College and University Attorneys




## RESUMING ON-CAMPUS OPERATIONS: EMPLOYEES WHO REFUSE TO RETURN

Employee Statutory Rights

- The Occupational Safety and Health Act
- The National Labor Relations Act
- The Americans with Disabilities Act
  - Employees with Generalized Fear of Returning
  - Employees whose Impairment Prevents them from Performing their Job's Essential Functions
  - Employees at Increased Risk of becoming Seriously Ill from COVID-19
- The Families First Coronavirus Response Act



NACUA  
National Association of College and University Attorneys



## RESUMING ON-CAMPUS OPERATIONS: FLSA ISSUES

Payment Issues


- Paying for Time Spent Testing
- Paying for the Tests

Maintaining FLSA Exemptions

- Executive
- Administrative
- Professional

Volunteers

Workers' Compensation



NACUA  
National Association of College and University Attorneys



NACUA materials and PowerPoint slides available as part of this program are offered as educational materials for higher education lawyers and administrators. They are prepared by presenters and are not reviewed for legal content by NACUA. They express the legal opinions and interpretations of the authors.

Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides, and comments of the presenters should not be used as legal advice. Legal questions should be directed to institutional legal counsel.

Those wishing to re-use the materials, PowerPoint slides or recordings should contact NACUA ([nacua@nacua.org](mailto:nacua@nacua.org)) prior to any re-use.

**NACUA**  
National Association of College and University Attorneys

46