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Taking the Risk out of RIFS and Budget Cuts: A Disciplined and Equitable Approach to Making Hard Choices

TAKING THE RISK OUT OF RIFS AND BUDGET CUTS: A DISCIPLINED AND EQUITABLE APPROACH TO MAKING HARD CHOICES

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Patricia T. Bergeson
Vice President and General Counsel
Columbia College Chicago

Jim Hundrieser
Associate Managing Principle
Association of Governing Boards
of Universities and Colleges

Jose A. Olivieri
Michael Best & Friedrich LLP

Introduction

Many higher education institutions ("HEI") are confronting difficult choices as the landscape of higher education evolves. Higher education, like many other industries, is undergoing a period of significant transformation. Market contraction is leading some HEis to close and others to merge. Ten institutions announced closing; 20 announced some form of merging in the first four months of 2019. Declining enrollment (34% of schools failed to meet their Fall 2017 enrollment targets) are causing fundamental changes to the business model. Most institutions have relied heavily on increasing enrollments and/or increasing tuition annually_to meet increasing costs and have not created a sustainable business model without the ability to generally do both (increase enrollment and cost of attendance). Without the ability to grow revenues, HEI's will have to carefully consider how and when to deploy reductions in force to maintain stable operations.

A variety of sources are combining to create the current turmoil HEis are experiencing. For example, rather than pursuing bachelors' degrees, consumer behavior is shifting toward pursuing alternatives such as certificate programs or entering the workforce. In addition, student demographics are changing. The number of high school graduates has been and is expected to continue to decline due to stagnant and lower birthrates. While college going rates are slightly increasing, new data suggests a second demographic decline in 2026/27 that will produce another decrease in high school graduates in some states currently experiencing growth. State and federal funding to public HEis has declined, requiring public HEis to find additional funding from private sources. Foreign student enrollment has been down during the past two years.

Add to these trends the rise of cheaper and more flexible online education alternatives, unbundling of the degree, and a greater realization among students and parents of the impact of student loan debt-and HEis begin to see why some experts are speaking and writing with increasing alarm about the higher education crisis.

Every HEI has unique problems and should determine its course of action on an individualized basis. When considering its options, HEis must also consider the legal implications of their potential actions-which if left unchecked-may only exacerbate a crisis.

<u>Economic Prosperity Does Not Result from Cutting Costs</u>

Institutions struggling to address financial challenges often overlook the fact that cutting costs almost never creates economic prosperity. Rather, cost cutting is a temporary fix to larger problems and it is not sustainable long-term. It may appear to be the easiest or fastest solution (and maybe it is short-term), but HEis may actually negatively impact top-line revenue by cutting costs-particularly when "across the board" cuts are made versus making strategic reductions.

Certainly, it is important to manage costs and improve efficiency. However, HEis can achieve cost containment and realignment of expenses more sustainably through high-level strategic thinking, planning, and action. For example, increasing productivity on the academic and administrative side, revising operating procedures, adopting new technologies, assessing course enrollments and program demand, and continuous assessment and financial modeling can produce short- and long-term cost savings while also strengthening an HEI's financial position overall. Innovation and new initiatives are far more likely than any other cost cutting options to improve an HEI' s financial health and lower costs.

One recent example is the University of Wisconsin - Stevens Point. Stevens Point announced that it planned on discontinuing or "retooling" thirteen majors primarily in the liberal arts area due to "a growing deficit and declining enrollment."[1] However, the University changed course after 14 faculty resignations and retirements. While their departures were important, Stevens Point is also adapting rather than discontinuing these majors. For instance, Stevens Point is restructuring its history major to include a teaching partnership with its School of Education.[2] History students will also have the opportunity to take courses that will assist them in using their history degree in the public policy, non-profit management, business, and healthcare fields.[3] Stevens Point is adding new offerings such as a doctorate in physical therapy and a new School of Design.[4] To address declining enrollment concerns, Stevens Point is focusing on reaching students outside of high school graduates, recognizing that it needs to reach a wider variety of students because many people are choosing work over school.[5] While this example shows an

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[1] Devi Shastri & Alan Hovorka, UW-Stevens Point Retreats on Cutbacks, Milwaukee Journal Sentinel, April 11, 2019, http://milwaukeejournalsentinel.wi.newsmemory.com/publink.php?shareid= 14ec7dbfc.

[2] Devi Shastri & Alan Hovorka, UW-Stevens Point Retreats on Cutbacks, Milwaukee Journal Sentinel, April 11, 2019, http://milwaukeejournalsentinel.wi.newsmemory.com/publink.php?shareid= 14ec7dbfc.

[3] Devi Shastri & Alan Hovorka, UW-Stevens Point Retreats on Cutbacks, Milwaukee Journal Sentinel, April 11, 2019, http://milwaukeejournalsentinel.wi.newsmemory.com/publ ink.php?shareid= I 4ec7 dbfc.

[4] Devi Shastri & Alan Hovorka, UW-Stevens Point Retreats on Cutbacks, Milwaukee Journal Sentinel, April 11, 2019, http://milwaukeejournalsentinel.wi.newsmemory.com/publink.php?shareid= I 4ec7dbfc.

[5] Devi Shastri & Alan Hovorka, UW-Stevens Point Retreats on Cutbacks, Milwaukee Journal Sentinel, April 11, 2019, http://milwaukeejournalsentinel.wi.newsmemory.com/publink.php?shareid= I 4ec7dbfc.

institution forced to better align offerings with program interest, it also showed significant push back may lead to leaders reversing decisions because of political responses rather than sound business practices. This is just one example of a recent effort to use growth strategies to deal with the challenges HEis are facing.

Although it may not generate economic prosperity for an HEI, some cost cutting measures may be simple and effective to implement while HEis undertake more long-term strategic thinking. For example, using energy saving features on university computers can save an HEI money on an energy bill.[6] Although the cost per computer may seem low, consider the totality of the impact of implementing this on all the computers on campus.

Another "simple" but likely divisive cost cutting measure is to freeze salaries or stop providing merit increases to high level administrators. HEls should review those administrators' contracts to ensure the administrators are not entitled to salary raises before implementing this policy. If no contract exists, administrators may still have a promissory estoppel claim-that they relied on some promise and are now injured as a result of the HEI breaking that promise. Under these circumstances, the HEI may be "legally estopped" from making good on its previous promise. Therefore, HEis should think carefully about the promises they make and the promises they have made to reduce their litigation risk.

If a contract or promise entitles administrators to a raise, that is not necessarily the end of the discussion. HEis may consider re-negotiating the terms of the contract when it expires or re-negotiate the terms of the current contract/promise to amend it in consideration for a different benefit. HEis need the support of their high level administrators to implement their high level strategic thinking, planning, and actions. Thus, the consideration provided, even if non-monetary, should be desirable. Notably, high level administrators across the U.S. have voluntarily forgone merit increases and end of the year bonuses to help the bottom line of their institutions. Getting these individuals on board may be easier than expected.

Fiscal Sustainability

These "simple" cost cutting measures are not sustainable over the long-term. They are simply not enough to counteract consumer behavior and demographic changes. Strategic growth and diversification of revenues are more difficult than cutting expenses and require an operational execution that may challenge the capabilities of an HEI.

HEls need to look to reorganize for innovation to effectively create new offerings, services, and solutions. The traditional tools of business planning are valuable only when the problem is standard and the future is reasonably predictable. These traditional approaches were founded on the assumption of relative certainty and for a different purpose (capturing value), but they work poorly for uncertainty and creating value.

Now, more than ever, HEis need to conduct detailed analyses, utilizing new methods and tools to manage complexity, diversify, and grow revenues. To accomplish this, clear guidance is

[6] Jenna A. Robinson & Stephanie Keaveney, *Cutting Costs is Possible. These Schools did It*, JAMES G. MARTIN CENTER, Feb. 5, 2016, https://www.jamesgmartin.center/2016/02/cutting-costs-is-possible-these-schools-did-it/.

needed to make the many trade-off decisions that must occur: whether and when to invest in the process; formulating, planning, and creating infrastructure; when to go it alone and when to partner; when to respond to feedback and to stick with a vision; and how and when to invest in scaling the institution. Most of all, these methods must allow leadership to make testable predictions.

Creating a sustainable business model-characterized by diversification and strategic, long-term revenue growth-should be one of the top goals of any university or college. However, successfully accomplishing this goal requires institutional willingness and resolve, as well as creativity and innovation.

All universities and colleges should determine where they currently reside within the culture of innovation as a precursor to developing their action plan to revamp their business model. Is the HEI at a moment of reinvention, where it needs to rapidly improve its competitive position while retaining the strengths of its existing business model? Or, is it at a place of trying to turn things around in a major way because of its weak competitive and financial position? If an HEI is at the turnaround-or worse-crisis point, in its existence, it is even more imperative that it develop and foster a culture of creativity and innovation among its board, executive leadership, and executive leadership team. Incremental growth will likely take more time than an institution has if it is at a point of crisis. It is crucial HEis consider and answer these questions carefully and create 3 and 5 year budget models to understand fiscal realities, because the answers will frame the potential solutions.

Cost Cutting Is Not The Only Answer

Strategic approaches to cost containment and realignment are vital pieces of an overall plan to ensure fiscal sustainability at HEis. It should be noted, however, that cost cutting is only a temporary fix. In contrast, achieving sustainable revenue growth is a natural way to lower costs over the sho1i- and long-term. Sustainable revenue growth involves making decisions on the margins by, for example, eliminating low enrolled classes or adjusting course rotations. Again, this is another opportunity to look at demographics and technological changes. Who are the future students and why are they pursuing higher education?

During the last enrollment crisis in the '70s and '80s women were credited for saving enrollment numbers.[7] Experts predict that Hispanics, returning students, and first-generation college students are the next groups that may curb declining enrollment.[8] The strategic approach here is to determine what will drive these potential students to enroll at an institution? What do these potential students need and want from their higher education experience?

Given the reduction in new foreign students one school has chosen to mitigate risk with an insurance policy. The University of Illinois evaluated its sustainability and noticed more than

[7] Elissa Nadworny, *Why is Undergraudate College Enrollment Declining?,* NPR, May 25, 2018, https://www.npr.org/2018/05/25/614315950/why-is-undergraduate-college-enrollment-declining.

[8] Elissa Nadworny, *Why is Undergraudate College Enrollment Declining?,* NPR, May 25, 2018, https://www.npr.org/2018/05/25/614315950/why-is-undergraduate-college-enrollment-declining.

half of its international students came from China. Chinese students make up one-fifth of the graduate students in the College of Business.[9] The College of Business and College of Engineering jointly agreed to a $60 million insurance policy that protects against "a sudden disappearance in Chinese tuition dollars." The Colleges are paying an annual premium over a three year period of $424,000.[10] The University of Illinois determined that if such a large percentage of students came from one source it needed to protect itself if that source was ever cut off. For example, the Chinese government recently decided to stop funding graduate student scholarships.[11]

The changing student demographic is coupled with technological advances impacting the job market. Automation continues to replace human labor. Soon technology advances will negatively impact skilled positions. Advances in artificial intelligence are beginning to mimic human decision making.[12] While artificial intelligence will sta1i to replace some jobs, it also creates a need for new ones most needing advanced credentials -- for example, software developers who can advance and maintain this new technology.

HEis need to determine whether their course offerings cater to both changes in student demographic and technological advances. This may involve bringing in new professors with expe1iise in these areas. It also may involve cutting certain programs and the professors who come with them. More information on terminating tenured professors is provided later in this paper. These decisions are all part of the strategic thinking that HEis must undertake to secure their survival in the future.

Cutting costs for an unconventional group, students-may also help create long-term growth. Many HEis take the stance that students' associate higher tuition with "better" education. Many of the most prestigious institutions have the financial backing to make this model work. For example, a large number of students who enroll at these prestigious HEis are able to pay full price. Those who cannot get help from the large endowments, scholarships, and other philanthropy provided by wealthy alumni.

However, for the majority of students, the difference between the advertised cost of attendance and the actual price students pay is vastly different, and HEis are typically burdened with making up for much of the difference. This is known as the "high cost, high discount"

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[9] Lynne Marek, *Why U of I is Insuring Itself-literally-Against a Drop in Chinese Students*, CRAIN'S CHICAGO BUSINESS, Jan. I I, 2019, https://www.chicagobusiness.com/education/why-u-i-insuring-itself-literally-against-drop-chinese-students.

[10] Lynne Marek, *Why U of I is Insuring Itself-literally-Against a Drop in Chinese Students*, CRAIN'S CHICAGO BUSINESS, Jan. 11, 2019, https://www.chicagobusiness.com/education/why-u-i-insuring-itself-literally-against-drop-
chinese-students. Peer HEIs have evaluated but declined to purchase the insurance coverage.

[11] Lynne Marek, *Why U of I is Insuring !tself-literally-Aguinsl a Drop in Chinese Students*, CRAIN'S CHICAGO BUSINESS, Jan. 11, 2019, https://www.chicagobusiness.com/education/why-u-i-insuring-itself-literally-against-drop-ch inese-students.

[12] Trevir Nath, *Automation Technology and its Impact on Jobs*, NASDAQ, Oct. 5, 2015, https :/ /www.nasdaq.com/artic le/automation-technology-and-its-i mpact-on-j obs-cm52693 7.

model. The discounts are getting so steep that the revenue generated from the students paying full price is barely, or not even, covering the discounted prices for other students.

To counteract their decreasing ability to afford to pay steep tuition discounts, a small number of HEis have moved to a "low cost, low discount" model. The lower cost of attendance is a more accurate reflection of what it will actually cost a student to attend the school, which factors in university provided discounts and other tuition assistance. These HEis hope to increase enrollment by first attracting more applicants.

A president of one university that has had tremendous success cutting tuition costs found that these high sticker prices negatively affected first-generation college students because they did not know about the many ways colleges can actually reduce the advertised cost of attendance for their students.[13] These students never believed that they would ever be able to afford to attend these high tuition schools, and therefore, they never applied. By never applying, these students never learn of the financial support they could be eligible for.

HEis should perform a cost-benefit analysis before moving to this new low cost, low discount model. They should ensure that cost of attendance is set high enough to be sustainable but they need to cut costs enough to be noticeable and attract the attention of new applicants.[14]

Of course, it would also be easier for HEls to cut cost of attendance if they knew what their competitor schools were going to do. At least that's what a few HEis are arguing.[15] For almost all HEls this plan would violate federal antitrust laws. However, a small number of private colleges have thought of a solution for this; they have toyed with the idea of asking for an exemption from federal antitrust laws.[16]

The Sherman Antitrust Act prohibits, among other things, "every contract, combination…, or conspiracy, in restraint of trade or commerce among the several Sates, or with foreign nations."[17] If competitors could get together and all agree to fix their prices they are likely going to drive up the cost of a consumer good. Thus, the Sherman Antitrust Act was

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[13] Nick Anderson, *Attention, College Shoppers, These Schools are Slashing their Prices*, THE WASHINGTON POST, Jan. 21, 2019, https://www.washingtonpost.com/local/education/attention-college-shoppers-these-schools-are-
slashing-their-prices/2019/0 I /21/e384eca0- l 2bc- I I e9-90a8- I 36fa44b80ba _story.html?utm _term=.cb05 I b8251 ed.

[14] Nick Anderson, *Attention, College Shoppers, These Schools are Slashing their Prices*, THE WASHINGTON POST,
Jan. 21, 2019, https://www.washingtonpost.com/local/education/attention-college-shoppers-these-schools-are-slashing-their-prices/2019/01 /21 /e384eca0- I 2bc- l I e9-90a8- I 36fa44b80ba _story.html?utm _ term=.cb05 I b8251 ed.

[15] Jon Marcus, *Colleges Say they could Lower Tuition - If Only they could Talk to Each Other About it*, THE WASHINGTON POST, Aug. I, 2017.

[16] Jon Marcus, *Colleges Say they could Lower Tuition - If Only they could Talk to Each Other About it*, THE WASHINGTON POST, Aug. I, 2017.

[17] Sherman Act section I. 15 U.S.C. § I.

created to prevent this type of cooperation. Antitrust laws were created to maximize competition and lower prices for consumers. Importantly, even one HEI talking to another HEI about possibly having a discussion that may violate antitrust laws may prompt an antitrust investigation. Therefore, the number of supporters of this exemption remains small.

Proponents of this exemption argue that competition for students has only increased prices for those students. The proponents allege that to compete they have to offer deeper discounts to students to get them to enroll at their school. With the external factors already pressuring their bottom line, these HEis state that they can no longer afford to offer these discounts.

Opposition to this exemption points to twenty-three private HEis that are already exempt from antitrust laws.[18] These HEis qualify for an exemption because they follow need-blind admissions procedures and agree to:

- award aid only on the basis of demonstrated financial need;
- use common principles of analysis for determining the need of students for that aid; and
- use a common application form for institutional aid.[19]

The Department of Justice studied cost changes among these schools during a five-year period and found that cost of attendance at these schools has gone up, not down. Not only did it go up, it went up twice as fast as other non-exempt HEis. Admittedly, financial aid also increased, but it increased at a slower rate than cost of attendance.[20]

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[18] These schools belong to the 568 Group which was created after Congress passed the Improving America's Schools Act. This exemption is a result of United States v. Brown University. No. 9 I-CV-3274 (E.D. Pa. May 22, 1991); 5 F.3d 658 (3d Cir. 1993). The case involved all Ivy League schools and MIT. Scott, Suryanarayan, & Zimbroff, Antitrust Issues Affecting Colleges and Universities, 13 NACUANOTES 3, Feb. 11, 2015. The U.S. Department of Justice alleged Section 1 antitrust violations for "engaging in a conspiracy to fix prices via conspiring on financial aid policies in an effort to reduce aid and raise revenues." Id. The Ivy League schools entered into a consent decree in which they agreed to stop cooperating with each other and acknowledged that the antitrust laws applied to HEls. Id. However, MIT refused to agree to the deal and went to trial. The district court held that MIT violated the Sherman Act, but the decision as overturned by the Third Circuit Court of Appeals, which held that the activity was not per se unlawful. Thus, the case was re-tried to determine the outcome under a rule of reason analysis. The government and MIT settled the case. Now, HEls may cooperate only if they admit applicants "on a need-blind basis and provide financial aid to meet the full need of all such students to agree on methods of determining the need." Id.

[19] 568 Presidents Group, https://www.568group.org/home/?q=node/I2 (last visited April 5, 2019); 15 U.S.C. I Note. The law prohibits these institutions from sharing information about the terms of any prospective individual aid award. Note, this is not referring to federal financial aid.

[20] GA0-06-963 Higher Education (p.4). https://www.568group.org/home/sites/default/files/gao.pdf. See also Nick Anderson, Attention, College Shoppers, These Schools are Slashing their Prices, THE WASHINGTON POST, Jan. 21,
20 19, https :/ /www.washingtonpost.com/local/ed ucation/attention-co I lege-shoppers-these-schoo ls-are-slashing-their-prices/2019/01/21 /e384eca0-12bc-1 I e9-90a8-136fa44b80ba_story.html?utm_term=.cb05 l b825 led.

Mergers, Affiliations, Consolidations, And Investments

When cost cutting is not the right avenue, or not enough to create and sustain value, HEis may consider new types of collaborative ideas. Higher education is not immune to the events that have historically impacted other industries, including new entrants, new technologies, labor agreements, and innovative services that collectively alter industry dynamics. The goal of considering any mergers, affiliations and/or consolidations efforts is to survive the changes and challenges buffeting higher education and help HEis determine the best path forward that creates efficiencies, growth opportunities, and overall cost savings.

HEis in relatively stable economic positions should make plans to ensure their stability in the future. One option these stable HEis should consider is to build new programs or niche services to meet expected skilled credentials. Building is an internally focused option that seeks to align institutional needs with future goals. Student housing, research centers, athletic facilities, dining, and mixed-use facilities (including partnerships with non-HEis) are just a few options whose construction could address current and future needs while adding sho1i- and long-term value to the campus and its holdings.

Importantly, the choice to build should be informed by best estimates of future needs and trends-it may not make sense to build a parking garage if in 20 years self-driving vehicles and social ride sharing services continue to increase in use. Again, determining whether to build provides another opportunity for HEis to consider the needs of its future students. Anticipating the need to create the infrastructure to develop new technologies, make healthcare advances, and make other innovative discoveries will give HEis an advantage over others who are trying to play catch up.

A second option is to buy. The goal of buying is to obtain access to resources that can further strengthen the short- and long-term economic positions of the institution. There will be more sellers than buyers and the buying process will be slow, but the result could (and should) address significant needs and add substantial value to the institution's existing real-estate, plant, and academic po1ifolio.

Lastly, a third and more dramatic option, both in a legal and logistical sense, is affiliation. HEis already know how to affiliate since they currently work with others through a variety of contractual relationships. An affiliation is essentially the same type of arrangement.

Mergers

Mergers occupy the far end of the affiliation continuum. This option may be the last resort for institutions struggling to stay in business in the challenging higher education environment, and therefore, the permanency of a merger should be given full consideration.

Mergers do not just benefit the struggling HEis looking to survive in some form. They may also benefit prospering HEis that may want to acquire important real estate-especially land and buildings in urban areas-or add specialty programs that align with growing market demand. No matter the characteristics of the parties merging, there are numerous legal implications.

HEis should analyze the tax considerations in advance of the merger. For example, if the merger is of two tax-exempt entities, Internal Revenue Service ("IRS") guidance should be observed to ensure the preservation of tax-exempt status. In some instances, a new application for tax-exempt status may be required. If the applicable employer identification number changes as a result of a merger, there may be an impact on state and employment tax registrations.[21]

Mergers in the higher education industry raise practical concerns for each HEI's governing body and legal team. Two key considerations that must be prioritized are the purchase price adjustments and the timeline to successfully complete the merger ("Closing"). For the purchase price, each HEI should agree upon a specialized accounting firm with experience in calculating higher education institutions cash equivalents and indebtedness to make any final adjustments to the purchase price. A substantial adjustment on the purchase price may disrupt the timeline or success of a merger.

Closing is often shaped by the various state, federal, accreditation, and local regulatory consents. For example, if the U.S. Depaiiment of Education is involved in a transaction, Closing should be planned within the first ten (I 0) days of any month because same-day audited balance sheets are due to the Department of Education by the end of the month following the month in which Closing occurred.

Another consideration is that many public universities are established under a state statute, which also comes with other legal responsibilities that cannot be given up. Attempting to merge in compliance with state laws may require legislative approval and even legislative changes.

In addition, I---IEis must take into account their legal obligations around endowments. Many donors give money with specific intent, which should be honored. Disrupting a donor's intent may spark litigation. In some instances, a simple meeting with donors to explain the new vision is enough to mitigate any litigation risk. Merging HEis have obligations toward their students as well. HEis must ensure they comply with the requirements of accrediting agencies so that students will receive degrees from accredited institutions.

A less involved option than a merger may be to combine resources. For example, the University of North Carolina system consolidated its process for determining in-state and out-of-state students. Prior to consolidation, all 16 schools maintained their own process for

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[21] The IRS recently relaxed its guidance regarding when the restructuring of tax exempt organizations requires a new application for tax-exempt status. Previously in Revenue Rulings 67-390 and 73-469, the IRS required an organization previously recognized as exempt from US federal income tax under section 50 I (a) of the Internal Revenue Code of 1986, as amended (the "Code"), to file a new application for tax exempt status if any of the following structural changes occurred: (I) incorporation of a trust; (2) incorporation of an association; (3) reincorporation by an Act of Congress; (4) reincorporation under the laws of another state; and (5) in some instances, the incorporation of an unincorporated association. In February 2018, the IRS released Revenue Procedure 2018-15 that allows, subject to I imitations, domestic business entities classi fted as corporations and recognized as exempt under Code section 50 I (a) to undertake certain reorganizations, previously listed in Revenue Ruling 67-390 and 73-469, without filing a new application for tax-exempt status. The application of Revenue Procedure 2018-15 is fact specific, and varies for different transactions.

determining whether students qualified for in-state tuition. In 2013, this process was centralized among all of the schools which resulted in a more cost-efficient process.[22]

The merger, affiliation, and or consolidation process requires a serious self-assessment on the part of the institution, in order to identify goals, needs, and desires. A thorough cost-benefit analysis, determination of timing, and being able to answer the questions "what do you hope to achieve" and "what are you willing to give up" are also impo1iant components to consider.

<u>Utilizing Outside Expertise to Address Business Model Challenges</u>

Colleges and universities have for a long time and are increasingly turning to the expertise of outside providers for help. Both public and private HEis take advantage of the expertise outside providers have and use these providers to move away from emotional decision making to data informed decision making. These outside providers take many forms and have the capabilities to provide endless services. For example, outside providers may partner with HEis to build dormitories, provide dining services, or monitor information technology. Moreover, these partnerships can convene and benefit all stakeholders. The outside providers benefit from the unique resources and networking capabilities of institutions, while the outside providers provide expertise needed to facilitate the use of those resources. The HEis benefit by placing most of the risk in the partnership to the outside provider, and can also focus their resources on their academic missions rather than areas outside their expertise.

HEis have increasingly turned to the outside providers to fund, design, build, and/or manage their infrastructures. To address today's challenges, institutions are embracing these partnerships in new and innovative ways, such as:

- Focusing college investments on modernization of academic and research facilities.
- Generating annual ground rents.
- Shifting construction and operating risk to a developer with the property belonging to the institution at the end of the lease.
- Adding campus housing and amenities.
- Adding high-quality housing, dining, and "third spaces" today's students expect and desire, at no cost to the institution.
- Fostering economic development.
- Developing underutilized sites.
- Adding dynamic new streel-level retail along major corridors.

A development pursuant to a partnership with an outside provider can take years to complete from the initial planning to final opening of the facility.[23] However, projects under commission

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[22] Jenna A. Robinson & Stephanie Keaveney, *Cutting Costs is Possible. These Schools did It*, JAMES G. MARTIN CENTER, Feb. 5, 2016, htLps://www.jamesgmartin.center/2016/02/culting-costs-is-possible-these-schools-did-it/.

[23] Partnerships with outside providers are not limited to physical buildings. For example, Ohio State University entered into an agreement with an outside provider that provided $438 million to its endowment earmarked for scholarships, staff grants, and tenure-track faculty by entering into an agreement with Queensland Investment

of a partnership generally have the benefit of quicker completion because the outside provider is solely devoted to the completion of the project. In contrast, if an HEJ was responsible for the entire project it can be spread thin with obligations of overseeing the new project and obligations to its other institutional responsibilities.

HEis are competing to attract a decreasing number of students. Competition can occur due to academic offerings and non-academic offerings, such as internship or employment skill training, Greek life, and athletic programs. Some of these non-academic offerings, including housing and dining, ·can be revenue generating to help provide additional general revenue support. These non-academic offerings can also distinguish HEis and focus on building or renovating their current infrastructure to attract incoming students.

There are several key concepts HEis should understand, as the concepts will inform the nature and scope of an HEI's development:

Build-Own-Operate ("BOO"): under the BOO strategy the outside provider carries the responsibility for designing, funding, constructing, operating, and maintaining the new facility during a pre-negotiated concession period. Under this strategy there is no special provision for transferring the facility to the institution under the concession period; following the concession period, a new or renegotiated agreement will be required, or the institutions might purchase the facility outright from the provider.

Build-Own-Operate-Transfer ("BOOT"): like the above, except that the provider or concession company may not own the facility.

Design-Build-Finance: a strategy where funding for the new project comes from a private sector source, but the private sector does not operate or provide services at or to the facility.

Design-Build-Finance-Operate: an outside provider will be responsible for financing and operating the facility (in whole or in part), in addition to carrying the weight of the design and construction phases.

Design-Build-Operate: financing is obtained from the public sector, but the institution or developer remains responsible for design, construction, and operation.

Corporation. Ohio State leased 36,000 of its on-campus parking spaces for a 50 year period. Kristen Mitchell*, The 50-Year Agreement: OSU's $483M Parking Deal Stands Alone Among Other Schools After Year I*, THE LANTERN, Dec. 19, 2013, http://thelantern.com/2013/l 2/50-year-agreement-osus-483m-parking-deal-stands-alone-among-schools-year- I/.

Partnering with outside providers to provide on campus student dining is another common outside provider partnership endeavor. See, e.g., Sarah Geegan, Unprecedented Public-Private Partnership to Support and Promote Vibrant, Innovate Food Economy in Kentucky, UK NOW, Sept. 2, 2014, https://uknow.uky.edu/campus-news/unprecedented-public-private-partnership-support-and-promote-vibrant-innovative-food (The University of Kentucky partnered with Aramark for a 15 year, $235 million deal for dining services. As part of the deal, Aramark agreed to use locally sourced and sustainable processes. Student saw an immediate decrease in the cost of their meal plans.)

HEis that embark upon outside provider partnerships should identify their goals upfront, know their potential partners, and be sure that those paiiners are a good match for what they want to accomplish. While not a panacea for the fiscal woes confronting many colleges and universities, such partnerships can be viable options to help increase resources and improve educational offerings.

Legal Risks In Employee Terminations

HEis conducting long-term planning will notice the amount that they are spending on non-academic staff and academic faculty. Although many avenues of cutting human capital expenses are lawful, almost all separations have legal risk, and therefore, HEis must carefully consider their human capital cost cutting measures. For example, a separated worker may initiate a discrimination or retaliation claim alleging they were terminated because they belong to a particular protected class or engaged in protected activity. Just a few examples of a protected class are those protected by Title VII,[24] the individual's use of leave under the Family Medical Leave Act, or the individual's status as an individual with a disability under the Americans with Disabilities Act.

Some staff and faculty also may fall under whistle blower protection status, which means that they are protected from retaliation when they report their employer's illegal activities to a specified individual, organization, commission, or agency, depending on the law governing the illegal activity.

If an employment contract governs the relationship between an HEI, then the employee (typically a non-tenured faculty member) and the HEI must follow the procedures laid out in the agreement when conducting terminations. These contract clauses will describe the rights that the faculty may have and any procedures the HEI must follow to properly terminate the faculty member (e.g., the amount of advance notice that a non-tenured faculty member must receive before their contract is not renewed). HEis should keep in mind that not all contracts will contain the same provisions, and therefore, they should closely examine any affected individual's contract to ensure proper compliance.

HEis should be especially wary of age discrimination claims that separated employees may assert. Congress has recognized that in some cases employers need to cut costs by reducing their workforces. The Older Workers Benefit Protection Act ("OWBPA") governs voluntary exit incentive programs and involuntary terminations for employees age 40 and older.

Although the OWBPA permits some relief for HEis it creates burdens on HEis who ask their depatting employees to waive their rights to file an age discrimination claim in connection with a severance (or similar) agreement.[25] First and foremost, the waiver must be supported by

[24] Race, color, national origin, sex, religion. This also includes retaliation for opposing discrimination in the workplace.

[25] HEls should evaluate the risk when it comes to disparate treatment and disparate impact claims. The OWBPA

consideration the employee was not already entitled to. HEis should ensure the consideration is based on existing practices or policies (if they exist). Any differences in severance pay, especially among similar employees, should be attributed to a legitimate reason.[26] Further, departing employees are entitled to twenty-one (21) days to consider the waiver. The agreement must advise the employee to consult with an attorney. Once departing employees sign the waiver they have seven (7) days to revoke their acceptance.

The OWBPA burdens multiply when waivers are offered to a group of employees in connection with an exit incentive program or other involuntary termination program. Two or more employees subject to one of these programs amounts to a "group." Under these circumstances, departing employees are entitled to forty-five (45) days to review the agreement and the same seven (7) day revocation period applies.

Moreover, 1-IEls must "show their work." When seeking a waiver of an age claim, the HEI must also provide, in writing and in a manner calculated to be understood by the average individual eligible to participate in the program, "any class, unit, or group of individuals covered by such program. Essentially, the employer must attach to the waiver an exhibit that includes a list of all participants eligible for the program, their titles, and their ages as well as the ages of the individuals in the same job classification or decisional unit[27] who are not eligible or were not selected for the exit incentive program. The HEI must also disclose the eligibility criteria it used for selecting employees eligible for the program. HEis should ensure their eligibility factors are based on objective criteria to protect against discrimination claims.

The tricky part is determining which employees make up the decisional unit. For example, HEis with underperforming departments with feeble futures may involuntarily terminate or create an exit incentive program for the individuals within that department. The decisional unit in that case is likely the entire department. But HEls may have to provide information on employees outside the department if other departments were evaluated for eligibility. HEis should carefully analyze what they took into consideration when creating the exit incentive program to determine the appropriate decisional unit.

A group layoff may also trigger the Worker Adjustment and Retraining Notification ("WARN") Act,[28] and/or its state and local counterparts. The purpose of the WARN act is to give affected workers advance notice (60 days) of any closings or mass layoffs so these workers can obtain other employment or retraining services. In addition, employers must provide

disclosure requirements for group layoffs allows separated employees to see who else was affected by the group layoff and the ages of those affected.

[26] This recommendation applies to severance pay not associated with an age waiver as well.

[27] "Decisional unit" is defined as "that portion of the employer's organizational structure l'rorn which the employer chose the persons who would be offered consideration for the signing ofa waiver and those who would not be offered consideration for the signing ofa waiver." 29 C.F.R. § 1625.22(t)(3)(B). Courts will invalidate a release when the decisional unit is too narrow, too broad, or misidentifies employees. See, e.g., *Kruchowski v. Weyerhaeuser Co.,* 446 F.3d I 090 (I 0th Cir. 2006).

[28] 29 U.S.C. § 2101.

notice to the local chief elected official of the local government where the closing or mass layoff occurs, to the employees' representative, and to the state dislocated worker unit.[29]

The WARN notice requirement applies to any business with 100 or more full-time workers that lays off 50 or more workers at a single site.[30] The notice requirement is triggered when (1) an employer closes a facility or discontinues an operating unit that affects at least 50 employees at a single site of employment; (2) an employer lays off at least 50 employees at a single site of employment during a 30 day period; (3) an employer lays off 500 or more workers at a single site during a 30 day period; (4) or lays off 50-499 workers, and these workers constitute at least 33% of the employer's total workforce at a single site of employment.[31]

The substance of a notice depends on to whom the notice is given. Generally, workers must receive a notice that contains a statement about whether the employer expects the action to be permanent or temporary; the expected start date and schedule of the closing or mass layoff (including an expected date of when the individual employee will be affected); an indication of whether bumping rights exist; and the name and telephone number of a company official for additional information.[32]

Although it is important to follow the procedural requirements of laws such as the OWBPA and WARN, HEis also must consider how their staff and faculty will react to terminations and mass layoffs. Adverse reactions, such as violence, are becoming more prevalent during termination discussions. HEis should not consider themselves immune from these violent reactions and should have policies in place to maintain a safe area during a termination discussion as well as maintain a safe campus for any possible delayed retaliatory violence.

Finally, HEis with a unionized workforce will likely have less flexibility to cut human costs, because of the provisions outlined in the collective bargaining agreement. HEis who fail to follow the provisions of the collective bargaining unit will face unfair labor practice charges. HEls should conduct a detailed review of the collective bargaining agreements they are party to before cutting workers within those bargaining units.

Financial Exigency: A Possible Exception to Tenure Protection

After reviewing their options and their finances, some HEis may find themselves at a point of no return. HEis distribute their limited funds to a vast number of areas, one of those

[29] 20 C.F.R. §§ 639.6(a)-(d). Failure to provide advance notice to workers results in a monetary penalty that equals any back pay and benefits during the 60 day period. A $500 per day penalty for a notice violation to the local government.

[30] Or employs I 00 or more workers who work at least a combined 4,000 hours per week and the employer is a private for-profit, private non-profit, or quasi-public entity separately organized form the government. 20 C.F.R. § 639 .3(a)(I)(ii)-(ii).

[31] 20 C.F.R. §§ 639.3(b)-(c).

[32] *See, e.g.,* 20 C.F.R. § 639.7.

areas being salaries for tenured faculty.[33] Under certain circumstances, financial challenges are so dire that they are forcing some HEis to consider the possibility of declaring a financial exigency. An HEI in the most serious financial circumstances must decide whether it can retain all of its tenured faculty members, and still continue to effectively operate. Often an HEI's policies will provide that tenured faculty may not be dismissed for reasons other than misconduct unless there is a "financial exigency."

When a financial exigency occurs, HEis may be relieved of their obligations to honor tenured faculty contracts. Exceptions to tenure are most commonly found in an HEI's handbook, contracts, and/or bylaws. In addition, a public HEI is subject to any tenure rights provided in state statutes. Typically, an HEI's policies must explicitly state the financial exigency exception in order for the HEI to have it apply to its situation; however, there are instances where a court has read in this exception even when it is not included in the HEI's policies.[34]

While policies may provide exceptions to tenure, these policies also likely provide some rights and protections for faculty. Tenured faculty at private HEis receive the rights described in their HEI's policies. Tenured faculty at public HEis receive the rights provided in their institution's policies and, in some cases, state statutes. In addition, they have some Fourteenth Amendment's Due Process rights.

Often before an HEI can consider eliminating a tenured faculty member, it must declare a bona fide financial exigency. The American Association of University Professors ("AAUP") publishes recommended regulations on academic freedom and tenure that are widely recognized in the higher education industry. The AAUP defines financial exigency as, "a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that caimot be alleviated by less drastic means. "[35]

Courts have also interpreted the meaning of bona fide financial exigency. Most commonly, a court will find a declaration of financial exigency bona fide when an institution can show that it was operating at a deficit for a number of years, was subject to significant decrease in government funding, and/or endured other types of budget cuts.[36] Some courts have

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[33] As a general rule, when interpreting the word "tenure," judges and courts do defer to the wording of a particular professor's contract or the bylaws of the university in question. See, e.g., *Krotkojf v. Goucher Coll.*, 585 F.2d 675, 678 (4th Cir. 1978); *Pace v. Hymas*, 726 P.2d 693, 695 (Idaho 1986); *Am. Ass 'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll.*, 322 A.2d 846, 847-48 (N.J. Super. Ct. Ch. Div. 1974).

[34] *Krotkojf v. Goucher Coll.*, 585 F.2d 675, 678-79. Multiple courts have interpreted contracts without an explicit financial exigency exception to firing to have an implicit exception for it. See, e.g., *Johnson v. Board of Regents*, 377 F. Supp. 227, 234-35 (W.D. Wis. 1974); *Levitt v. Board of Trustees*, 376 F. Supp. 945 (D. Neb. 1974).

[35] *Recommended Institutional Regulation on Academic Freedom and Tenure 4.c.(I).*

[36] Courts have also placed the burden of proving a financial exigency exists on the HE!. See e.g., *Krotkojf*, 585 F.2d at 679; Pace, 726 P.2d at 697*; Am. Ass 'n of Univ. Professors v. Broomfield Coll.*, 322 A.2d 846, 856 (N .J. Super. Ct. Ch. Div. 1974).

determined that a court will look only at the HEI's operating funds to determine if a financial exigency exists, and not consider the capital assets of the institution.[37]

Notably, the AAUP definition contemplates financial exigency across the entire HEI rather than a financial exigency within a certain department or program. Those HEis whose policies contemplate financial exigency within a department or program will have an easier legal hurdle making cuts to departments or programs. Those HEis considering discontinuing a program with tenured professors should consider whether that program is in a state of financial exigency. Unfortunately, there is little case law addressing this issue, but some courts have previously looked favorably at program financial exigency.[38]

Simply having a budget deficiency is not enough to declare a bona fide financial exigency. An institution must attempt to remedy its financial crisis through alternative measures before it may declare a financial exigency and remove tenured faculty. Common mitigation efforts include the high level strategic thinking, planning, and actions described in this paper as well as the more common methods of freezing or delaying salary raises, increasing tuition, reducing operating expenses, cutting administrative costs, offering early retirement, and/or removing non-tenured faculty.

Considering and pursuing alternatives to removal are essential steps of the financial exigency declaration process. Careful consideration of the options discussed in the first half of this paper is a crucial step before reaching financial exigency. Under most circumstances, HEIs must show that they actually pursued alternatives to financial exigency to lawfully terminate tenured faculty.[39] Failing to pursue alternatives is strong evidence that declaring a financial exigency was a pretext for abolishing tenure.[40]

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[37] *Krotkojf*, 585 F.2d at 681 ("[T]he existence of financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets.").

[38] In *Scheuer v. Creighton University*, the university's handbook stated that tenure may be revoked because of a "financial exigency on the part of the institution." 260 N. W. 2d 595, 597, 199 neb. 618 (1997). When the handbook contemplated review of tenure revocation, it stated, "[w]here termination of appointment is based upon financial exigency, which may be considered to include bona fide discontinuance of a program or department of instruction or the reduction in size thereof. .. " *Id*. Creighton conceded that its entire university was not in a financial exigency, but that its School of Pharmacy was. In construing the handbook language and considering other courts' interpretations of the AAUP guidelines, the court held that financial exigency can be confined to one program. The court commented that if it ignored the provision of the handbook that permitted a financial exigency to exist within in a department, it would require the school "to continue operating programs running up large deficits so long as the institution as a whole had financial resources available to it. The inevitable result of this type [of] operation would be to spread the financial exigency in one school or department to the entire University." *Id*. at 600.

A judge in the Idaho District Court held that program discontinuance was appropriate when the Dean of the plaintiff's college analyzed multiple criteria to determine which program to cut in a financial exigency. *Milbauer v. Keppler*, 644 F. Supp. 20 I, 205 (D. Idaho 1986).

[39] See, e.g., *Klein v. Bd. of Higher Educ*., 434 F. Supp. 1113, 1116-17 (S.D.N.Y. 1977) (finding that an effort to cut costs in administration and service areas before releasing professors was appropriate); *Johnston-Taylor v. Gannon*, No. 91-2398, 1992 U.S. App. LEXlS 22052, at * 5 (6th Cir. Sept. 2, 1992).

[40] *Am. Ass 'n of Univ. Professors*, 322 A.2d at 272 (noting that firing tenured teachers before implementing faculty salary reductions or reducing faculty was contributory evidence that the professors were fired in an attempt to

If the alternative measures are unable to alleviate the HEI's financial burdens, it must then consider which tenured faculty members to remove.[41] HEis should check their policies to verify that they have a methodology in place to determine which faculty members to remove first. HEis should use a methodology based on objective criteria, and apply the criteria in the same manner to every faculty member.[42] Following objective criteria reduces discrimination claims and promotes fairness. The objective criteria should also reflect the high level strategic planning HEis should be going through during their declared financial exigency. Examples of objective criteria used are seniority, emollment patterns in classes taught, performance reviews, and expertise. A court will generally defer to the institution's decision regarding what methodology it implemented, and ultimately, which faculty members are not retained.

A public institution has the additional burden of ensuring its financial exigency removal procedures afford its tenured faculty due process protections. Removal policies at private institutions may reflect some of these basic due process principles. Under financially exigent circumstances, providing tenured faculty with minimal due process is recommended. In general, due process requires notice and a right to be heard.[43] Essentially, the tenured faculty member must know the basis for why they are being terminated and they must have the opportunity to contest that basis.

The nature of the due process protections required is flexible, and dependent on the specific situation. Complying with due process and/or institutional policies is tricky, and where most institutions that have a bona fide financial exigency incur legal liability.

If an institution must remove tenured faculty, it should consider transferring faculty to open positions it can afford to keep.[44] For example, those HEis that move in a new direction in terms of course offerings, programs, and majors may consider offering re-training or additional

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abolish tenure, and not due to a financial exigency). The Supreme Court of Idaho found that there was not a financial exigency and tenured teachers had been inappropriately fired when the University of Idaho could have made other financial reductions first. *Pace*, 726 P.2d at 695-96, 702.

[41] At public HEis faculty typically do not have a right to participate in formulating the criteria used to determine which tenured faculty to cut, and they typically do not have a right to a hearing prior to the decision to terminate. *Bignall v. North Idaho Coll*., 538 F.2d 245-46; *Klein*, 434 F. Supp. At 1118; *Johnson*, 377 F. Supp. At 237-39. There is a "diminished private interest in challenging relatively remote administrative decisions." *Texas Faculty Ass'n v. Univ. a/Texas*, 846 F.3d 379, 185 (5th Cir. 1991).

[42] *Johnston-Tay/or*, 1992 U.S. LEXIS 22052, at *6-8 (the HEI made a list of fourteen criteria that it evaluated its tenured professors on to determine which professors it needed to cut. Criteria deemed the most important by the Department Dean included the history of program enrollment, the ratio of full-time and part-time faculty, and the professors' performance evaluations); *Klein*, 434 F. Supp. at 11 15 (non-tenured professors were the first cut followed by certified professors. After these cuts the HE! relied on seniority of the tenured professors to determine which ones to cut first).

[43] *See, e.g., Klein*, 434 F. Supp. at 1 I 15-16.

[44] *Browzin v. Catholic University of America*, 527 F.2d 843,847, 849-50 (D.C. Cir. 1975) (!f a program is discontinued, the university still has a requirement to make every effort to keep the professor employed within the University).

education to tenured faculty who would otherwise be cut. Alternatively, if an institution is able to work its way out of the financial exigency, especially if it does so within a few years, it could consider re-hiring any previously removed tenured faculty members.

Ultimately, whether a bona fide financial exigency exists is a fact specific inquiry that must be considered institution by institution. An institution should declare a bona fide financial exigency with caution, and only after careful consideration of the institution's potential legal liability and accreditation/financial expectations. Moreover, an institution should document its process for determining that a financial exigency existed; the alternatives it considered and/or took; and the rights it afforded to separated faculty members. The documentation process is important, because the institution has the burden to prove that a financial exigency existed if the issue is litigated.

Conclusion

HEls should think strategically about their futures no matter where they are on the spectrum of struggling to stay open to economically thriving. High level strategizing and decision making can help facilitate economic sustainability well into the future. Cutting costs is not the answer for long-term survival. If necessary, HE Is should closely scrutinize their plan to cut personnel as these plans trigger legal risks.

REDUCTION IN FORCE PLAN
MANAGER GUIDE

Columbia
COLLEGE CHICAGO | Human Resources

MANAGEMENT PLANNING & CONSIDERATIONS

Managers should consider the following when preparing a **Reduction in Force Plan (RIF - PLAN)**:

1. Conduct an analysis of the business necessity of position(s) in support of the department's goals and overall strategic plan priorities.
2. Conduct an analysis of the budget targets and/or cost savings goals. Incorporate the cost required in giving notice or severance for eliminated employees. Notice to union employees entails payment for 90-days, regardless of if they work through the notice period or not, benefits and an additional payment for two weeks. These payments are required in compliance with the USofCC agreement regardless of position funding (grant or CCC funded) and cannot be waived. Also include the cost of severance for non-union staff which involves one year of pay for each year of employment/service up to a maximum of twelve weeks and 90 days of benefit continuation if a separation agreement is signed.
3. Consider all appropriate options before determining the need to reduce staff, such as reviewing current vacancies that can be eliminated or whether affected employees can be transferred to avoid losing their jobs.
4. Identify what work is currently being completed by employees identified for elimination and what work will need to be completed, if any, after the RIF - PLAN is implemented.
5. Consider what tasks, initiatives, or duties can be eliminated with the least impact on the department and the institution.
6. Assess job performance. Do not use a reduction in force as a substitute for performance management or corrective action. If employees are not performing as expected it is the manager's responsibility to address the issue, coach the employee, and follow corrective action steps. If an employee is identified as having performance issues, supporting documentation must be presented with the RIF- PLAN demonstrating that corrective action has been taken to document the problem.

REDUCTION IN FORCE PROCESS

1. Managers must complete a **Reduction in Force Plan (RIF- PLAN)** and prepare updated organizational charts and job descriptions that reflect the department's structure *after* the RIF.
2. Managers must work with their respective Department Head to obtain approval of the RIF- PLAN, including the selection of the employees to be eliminated prior to finalizing the plan.
3. Once the Department Head approves the RIF- PLAN, it must be submitted to the Office of Human Resources for review. Employees should not be informed about the pending RIF- PLAN.
4. The RIF- PLAN should be kept strictly confidential and should not be discussed with anyone who does not have a business necessity to know until the Office of Human Resources has completed its review.
5. The Office of Human Resources (OHR) and General Counsel's Office (GC) will review the plan to analyze the impact on the institution's diversity and affirmative action objectives. Managers will be scheduled for a meeting to discuss the details of the RIF- PLAN. Keep in mind that adjustments may be necessary to obtain approval of the RIF- PLAN in order to reduce the risk of litigation for the institution and foster equity.
6. Employees should not be informed about the pending RIF-PLAN until the review by OHR and GC is complete and managers are approved to initiate implementation.
7. RIF notices for staff employees will be provided by OHR.
8. Once a RIF- PLAN is approved, the implementation steps will be final. Managers should not change the agreed-upon plan after it has been communicated to those employees who will be eliminated.
9. Employee notifications are to be conducted in person by the manager and/or department head.
10. OHR will inform the USofCC the day of the elimination meeting which employees are being eliminated.

11. OHR staff will be available to provide information regarding last day on benefits, payroll, unemployment, and outplacement assistance. Managers should not address these issues without prior approval from OHR. In the event that a member of OHR is not able to attend the notification meeting, managers will be provided with an Exit Packet and should refer employees to OHR for questions.

REQUIRED DOCUMENTS

Managers must submit the following as part of the RIF-PLAN:

1. **Reduction in Force Plan** – provides details regarding the type of reduction, scope, timing, and transition requirements
2. **RIF Employee Analysis Form** – provides names and position details of the affected employees
3. **RIF Transfer of Duties Form** – provides names and position details of remaining employees that will absorb all, or a portion, of the eliminated position duties
4. **Organizational Chart** – current structure and revised to reflect the RIF
5. **Job Descriptions** – for each employee that will be eliminated and for any employee whose position will be restructured to absorb some, or all the eliminated duties, if applicable

COMMUNICATION PLAN

Preparation is essential for a reduction in force meeting with affected employees. Managers should consider the following:

1. Become familiar with the manager script for the meeting with affected employees.
2. Anticipate potential questions and work with OHR to agree upon appropriate responses.
3. When scheduling a meeting with the department to inform them of the RIF-PLAN and affected employees, let them know that the meeting is _**not**_ to announce more eliminations to reduce the stress of those employees.
4. Consider when you inform affected employees if there is a member of your management staff who can speak to the non-affected employees so that everyone hears the news at the same time.
5. Determine if individual or group meetings will best serve the needs of your employees.
6. Demonstrate compassion and empathy but be brief and to the point. Stick to the talking points and do not feel you have to answer questions beyond reiterating the message.
7. Be sensitive to the affected employee's preference regarding how much information to provide to remaining employees.
8. Do not make any promises or assurances regarding current or future employment or agree to make any changes to the vetted and approved RIF-PLAN.
9. The RIF meeting with employees may not be the best time to discuss a transition plan; instead, schedule a follow-up meeting to discuss important details with affected employees.
10. Be prepared to offer support for the eliminated employees through the notice period, if applicable. If they express difficulty coping with the news refer them to the employee assistance program or to OHR.

MANAGER'S CHECKLIST

1. Complete an online **Employee Separation Notice** for each employee who will be eliminated
    a. Submit the form *after* the employee has been notified of the elimination
    b. Indicate if email should be forwarded temporarily to another employee
2. For staff employees, review and approve hours by the Payroll deadline to ensure timely last payment
    a. Employee working through 90-day notice should enter their time worked
    b. Employees not working through the notice period do not need to enter time
3. Collect the following CCC property:
    a. Office keys
    b. P-card
    c. Computers, laptops, iPads etc.
    d. College I.D. card
    e. Any additional college property that may be in employee's possession
4. Obtain important information prior to the employee's last day of employment such as:
    a. Passwords to software, email, voicemail
    b. Instructions on how to use software or systems that only the eliminated employee had access to
5. Complete a 360 to get a back-up of the employee's hard drive, email, disable voicemail after listening to any unheard messages

REDUCTION IN FORCE MEETING LOGISTICS

Careful planning prior to the reduction in force (RIF) notification meetings helps to ensure that they are conducted professionally, respectfully and go as smoothly as possible. It is important that the position eliminations is communicated clearly and directly.

The following should be decided at least a week in advance:

- **Who will conduct the *notification meeting* (for impacted employees):** It is recommended that two people conduct the notification meeting to inform impacted employees. Typically this should be the immediate supervisor and department head. For example, the department head (Chair) and representative from the Dean's Office or the supervisor and department head. Human Resources is available to help you prepare for the notification meeting. Per the USofCC CBA, HR will endeavor to have an HR representative at each notification meeting for impacted union employees.

- **Who will conduct the *notification meeting* (for remaining employees):** It is recommended that while the notification meeting with impacted employees is in progress, a second meeting is scheduled to inform the remaining employees of the position elimination(s). Typically this meeting is conducted by a member of the department's management team, such as an associate chair or director. This will help the employees prepare for when their colleague(s) return from the notification meeting and be respectful of their colleague(s). It also gives the department's management team the opportunity to provide a consistent message regarding the RIF and why it was necessary.

- **When to schedule the meeting:** Work with Human Resources to finalize the notification meeting schedules. Typically when a RIF is necessary, departments and Human Resources coordinate the notification date so that there is one day in which all impacted employees are notified. This helps to reduce the anxiety of remaining employees.

- **Where to hold the meetings:** Ideally the notification meeting will take place in near proximity to the impacted employee's work area in a private space where there will be no interruptions. It is recommended that impacted employee(s) are not scheduled to attend the notification meeting in another building. Keeping the employees(s) near their work area makes it easier to return to their workspace to collect their personal belongings and return keys, ID and other college property to department heads. The notification meeting with remaining employees could be scheduled in a separate location. By the time the meeting is concluded it is likely that the impacted employees will be back at their desks collecting their personal belongings.

- **Exit Packets:** Human Resources will provide exit packets for the impacted employees for you to distribute during the notification meeting. Human Resources will also notify USofCC, Information Technology (to disable system logins and email), and Safety & Security.

- **Meeting Agenda:**
  - The ***notification meeting with impacted employees*** is generally brief, no more than 20 - 30 minutes. The individual conducting the meeting will deliver the message that a RIF was necessary and provide the reason why, restructuring or budget cuts, announce the last day of employment, provide the Exit Packet, refer the employee(s) to Human Resources for questions regarding benefits and payroll, and instruct employee(s) to go back to their workspace to gather their belongings, turn in keys, IDs, and college property, and say farewell to colleagues. A few minutes should be set aside for some questions but it should be made clear that the decision is final.

  - The ***notification meeting with remaining staff*** is also brief. The purpose of this meeting is to inform employees that a RIF was necessary due to restructuring or budget cuts. Employees are informed that impacted employees are being notified and will return to their workspace to gather their personal belongings and say goodbye to colleagues. Advise employees to be respectful of their colleagues and to understand that they may, or may not want to interact once they have been informed that their jobs have been eliminated. Inform remaining employees that as a result of the RIF, there will be some restructuring needed to reassign duties of eliminated positions. Let them know that a separate meeting will be scheduled to communicate the details and provide updated job descriptions for those impacted. Close the meeting by letting employees know that for now, no further eliminations are scheduled so they do not stress about follow-up meetings or feel uncertain if more will be coming.

NOTIFICATION MEETING CONTENT

Notifying employees that their employment is being terminated is difficult. The following is a recommended outline of the notification meeting to help you prepare for the meeting with the impacted employee(s).

Step 1: Opening Statement – State the facts of the situation, be brief and to the point.

Example: I have important news that impacts you. Our department has had substantial budget cuts/lost grant funding/is undergoing restructuring and this has resulted in the need to eliminate your position(s).

Step 2: Deliver the Message - Tell the employee clearly that he or she is impacted and his/her employment will end on the effective date.

Example: Your position is one of the jobs affected and effective today, your position is being eliminated. While today is your last physical day of employment you will remain on payroll and benefits for the next 90-days and will receive payment for two weeks. (USofCC staff only)

Step 3: Provide Additional Information - Give the employee the Exit Packet and refer them to HR for questions regarding last day on payroll and benefits.

Example: Human Resources has prepared an Exit Packet outlining important details regarding your last day on payroll, benefits, and outplacement services available to you. Please contact Human Resources with any questions or to set up an exit interview. Tell the employee whether you will give a reference or not. If you will not give a reference, tell the employee the College will not release information to outside employers other than verification of employment in the department, dates, and the job title.

Step 4: Listen and Respond to Any Questions - Wait for a reaction from the employee. Listen to what he or she has to say. Respond to questions, however, do not attempt to justify the decision by providing more information.

Step 5: Discuss the Next Steps - Clearly outline the employee's next steps.

If exiting upon notification:

- You are not expected to work through the day, as soon as we finish here you are free to go home
- Retrieve your personal belongings. If you have too many personal items to take with you today, we can schedule a date and time for you to return to pick them up. You must contact me to set up that appointment. If you need any boxes today, let me know.
- Return College property to me before you leave today (keys, ID, laptop, Pcard, etc.)
- Take the Exit Packet home, review it carefully and contact Human Resources Professional for questions regarding last day on payroll, benefits, and outplacement services available to you.
- Take some time to say goodbye to colleagues before leaving

If working through the notice period:

- You are expected to work through your notice period
- We will meet to establish a transition plan that will outline the deliverables to be completed between now and your departure
- You will be scheduled for an exit interview with Human Resources to go over your benefits and pay questions prior to your last day of work
- Per the USofCC CBA, union employees may take up to twelve paid days to attend job interviews. Employees must provide three business days' notice prior to the absence

Step 6: Close the Meeting - Treat the employee(s) with respect, say thank you.

Example: I want to thank you for your service to our department and the College. You are welcome to apply for any open positions at the College. If there is anything that I can do to assist you with finding another position, let me know.

RECOMMENDATIONS FOR TALKING WITH EMPLOYEES

DO:

Be prepared. Maintain confidentiality. Take ownership of the decision to eliminate positions. Speak to the employee in a private place. Get right to the point. Recognize the employee's contribution to the department and the College. Briefly and truthfully explain the reason for the layoff. Listen to the employee. Allow him or her to respond. Restate the information if necessary. Refer the employee to Human Resource Services for payroll and benefits information. Give the employee the Exit Packet. Remove yourself from the conversation and contact Security, ONLY if you feel at risk during the conversation.

DON'T:

Engage in personal small talk. Allow the meeting to be interrupted. Use humor. Defend, justify or argue about the decision. Identify others who are being eliminated (if conducting individual notification meetings). Make comparisons between employees. Try to minimize the situation. Personalize the employee's response. Say that you disagree with the decision or that you had no choice in the decision. Get into the role of counselor for the employee. Promise anything or change the last day of employment. Read your script. Advise in areas such as benefits, COBRA, etc.

RESPONDING TO EMPLOYEE QUESTIONS

Employee reactions are going to be unique and specific to each employee. The following are examples of frequently asked questions designed to help you to respond appropriately. While you should make an effort to address some questions or concerns, keep in mind that indulging too many will not be productive. Keep conversations brief and follow the meeting agenda to avoid uncomfortable situations.

Question: Are you telling me I am fired?
Response: No, you are not being fired. Your position is being eliminated which is different. Your positions has been eliminated as part of a reduction in force, not because of anything that you did or did not do.

Question: Why me?
Response: Our department has been required to make difficult decisions in order to meet budget targets. Your position was identified based on the needs of the department and budget targets.

Question: How many others are being eliminated?
Response1: I know this is difficult for you, but we're here to discuss your situation. I cannot discuss others in the department due to privacy reasons. (If conducting individual vs. group notification meetings)

Response2: I know this is difficult for you. In our department you and NAMES OF OTHERS IN THE MEETING are being eliminated. (If conducting group notification meetings)

Question: Can I transfer to another department or can you delay elimination until the end of the year?
Response: Before deciding on your position, we looked at all possible alternatives. At this time, there are no options for transfer or possibility to delay the timing based on departmental budget targets. You are welcome to apply for any other open positions at the College that you are interested in.

Statement: I don't accept this. I am going to the President/Union/News.
Response: You can do what you feel you need to do but it does not change the fact that your position has been

eliminated today.

Question: I think you are discriminating against me because of my age/sex/race.
Response: That's not the case. Your position is being eliminated due to reduction in force to meet budget targets.

Question: I'm going to sue you.
Response: You can do what you feel you need to do but it does not change the fact that your position has been eliminated.

Question: You're going to regret this (or other threatening statements)
Response: It is time for you to gather your belongings and leave now. I do not want to call Security but if you make threatening statements I will have to ask them to escort you out.
** If you feel that your safety is at risk, end the conversation, remove yourself from the situation and contact Security if you are concerned about what an employee might do to you or your staff.*

Question: I have so many projects. Can I work one more month or till the end of the academic year?
Response: No, arrangements will be made to cover any initiatives that you were working on. Today is your last day of employment and you are not expected to work through the remainder of the day.

Question: What about my pay/benefits?
Response: There is information about your pay/benefits included in the Notification Packet. For questions, contact the Office of Human Resources, Benefits team.

Question: Can I apply for open positions at the College?
Response: Yes, you are welcome to check the College's career site on a regular basis.

Question: Would you be willing to provide a letter of recommendation?
Response: Yes, I would be happy to assist you with your job search by providing a letter of recommendation.

Question: Will I qualify for unemployment?
Response: That is question is addressed in your Notification Packet and you can contact the Office of Human Resources.

(For employees exiting immediately after notification only)
Question: I have personal items on my computer, can I access it before leaving?
Response: No. It is standard practice to disable system access upon being eliminated. However, you will have access to your Columbia email and IRIS page for three business days. To obtain items on your computer, let me know what you would like a copy of and I will work with IT to see what we can do.

MANAGER CHECKLIST

After the notification meetings have occurred:

- Complete an ***Employee Separation Notice (ESN)*** for each employee affected by the Reduction in Force
- While the employee's email access was disabled you can decide if you want the employee's email to remain disabled or redirected to you or another member of your staff for a period of time and indicate that on the ESN
- Communicate to departments that interacted with the eliminated positions who their new contact is moving forward
- Review and approve timesheet hours by the Payroll deadline to ensure timely and accurate last payment
    - Employees working through the 90-day notice period should continue to enter time each pay period
    - Employees not working through the 90-day notice period will not be required to enter time
- Contact Information Technology to have computers backed up to preserve information. If an eliminated employee asked for copies of personal information on their work computers work with IT to obtain copies. Make sure to determine that the information is personal and not College property.
- Contact Information Technology to disable voicemail for the extensions of eliminated employees
- If employees did not return keys and you are concerned about the security of data or documents contact Facilities & Operations to inquire about the possibility of changing the lock to a particular office or suite
- Return employee IDs to the Office of Human Resources
- Return P-cards to the Purchasing Department

COMMUNICATING WITH THE REMAINING STAFF

It can be a difficult time for the employees who remain employed after a reduction in force in their department. They will have questions and concerns about job security, or about changes to their positions as a result of the eliminations. Keeping the lines of communication open with your remaining staff is important to help reduce anxiety.

To ensure that staff remains engaged and at ease:

- Acknowledge their questions and concerns. Be honest about situations that are still in transition. Make sure to follow up as soon as possible.
- Schedule regular meetings to discuss the department's plan and goals for the future.
- Communicate the transition plan. Have clear objectives and goals for your employees to focus on. Make sure that they have the necessary tools and resources to accomplish the work.
- Meet individually with the employees who will be taking on additional job responsibilities. Acknowledge their feelings and concerns. If possible, keep them involved in the decision making process when making new assignments. Provide employees with updated job descriptions.

- Refer employees to the Employee Assistance Program (EAP) if they inform you that they need assistance dealing with the reduction in force in the department. Contact the Office of Human Resources if you think it would be beneficial to have an EAP representative on campus to meet with your staff.

- Check-in with employees regularly to see how they are coping.