National Association of College and University Attorneys

Presents:

Difficult Employment Decisions in Times of Crisis

Webinar

May 28, 2020

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Henry Morris, Jr.
Partner, Arent Fox

Shelley Carthen Watson
Senior Associate General Counsel, University of Minnesota

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NACUA WEBINAR SERIES

Friday, May 28, 2020

DIFFICULT DECISIONS IN TIMES OF CRISIS

SPEAKER BIOGRAPHIES

Henry Morris is Partner at Arent Fox in Washington DC. Mr. Morris focuses his practice on counseling and litigating employment, labor, and education law cases. He has advised clients regarding and handled cases involving equal employment opportunity, employee discipline and discharge, employment torts, breach of contract, trade secrets, non-compete agreements, fair labor standards, plant closings, reductions-in-force, successor employer responsibilities, workers' compensation, and unemployment compensation. Mr. Morris is a member of Arent Fox's Diversity Committee and Employment Committee. Mr. Morris represents clients in a wide range of industries. These industries include retail, education, healthcare, construction, property management, broadcast, communications, entertainment, building service contracting, and hospitality. He also has represented several governmental entities. Mr. Morris is a member of the National Association of College and University Attorneys. And he is the firm's contact with the Employment Law Alliance, an international consortium of some of the world's leading management-side employment lawyers. Mr. Morris is a frequent lecturer and has written articles on a wide range of labor and employment issues. He is a member of the District of Columbia Bar and Virginia Bar. He received his JD from Columbia University School of Law in1983, and his AB from Columbia College, Columbia University, in 1978.

Shelley Carthen Watson, Senior Associate General Counsel in the Office of the General Counsel at the University of Minnesota. Her practice is primarily devoted to providing advice, counsel, and training in labor relations and employment issues, as well as defense of the University in collective bargaining and internal grievance arbitrations, and administrative matters before the EEOC, Minnesota Department of Human Rights and Department of Labor. Prior to coming to the University, Ms. Carthen Watson was a partner with the law firm of Robins, Kaplan, Miller & Ciresi, where her practice focused on business litigation and employment counseling and litigation. The former Deputy Commissioner of the Minnesota Department of Human Rights, she also served as Executive Director of the Hennepin County Bar Association and Hennepin County Bar Foundation. An honors graduate of Macalester College, she received her law degree from Northwestern University School of Law in 1985. Ms. Carthen Watson recently served as a member of the Board of Directors of NACUA, and is the recent recipient of their First Decade Award that recognizes university attorneys who have been NACUA members for 10 or fewer years and have made "a significantly innovative contribution, or provided outstanding service, to the association and to the practice." In 2018 she was named a Top Assistant General Counsel by First Chair, an annual selection of in-house counsel who have, through their hard work and innovation, made significant contributions to the legal community, and recently received the 2019 Minnesota Lawyer In-House Counsel Award for attorneys. “who among other things, navigate complicated contract negotiations, defend their companies in high stakes litigation and defend some of an organization’s most important assets.”

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Monday, May 28, 2020

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DIFFICULT EMPLOYMENT DECISIONS IN TIMES OF CRISIS

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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*

NACUA National Association of College and University Attorneys

Presenters

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University of Minnesota Office of General Counsel

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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

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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

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THRESHOLD ISSUES

Contractual Considerations

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

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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

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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 FURLOUGHS

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

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

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

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MEASURES SHORT OF LAYOFFS AND FURLOUGHS

Potential Minefields

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

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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

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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

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

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

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FURLOUGHS

Advantages of Furloughs

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

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FURLOUGHS

Disadvantages of Furloughs

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

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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 no duty to bargain the decision to furlough, may still have a duty to bargain the implementation or effects of the furlough

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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

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

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

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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:

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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

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

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

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QUESTIONS

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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 Reprensentatives
- Legal Counsel

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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

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INVOLUNTARY REDUCTIONS IN FORCE: PLANNING

Selection Criteria

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

INVOLUNTARY REDUCTIONS IN FORCE: PLANNING

Training

INVOLUNTARY REDUCTIONS IN FORCE: IMPLEMENTATION

Follow Established RIF Procedure and Selection Criteria

Be Consistent

Document, Document, Document

Conduct Adverse Impact Analysis

Identify Risky Cases

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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

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INVOLUNTARY REDUCTIONS IN FORCE: LEGAL EXPOSURE

Union Settings

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

Public Colleges and Universities: Due Process

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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

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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

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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

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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

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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

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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

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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

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QUESTIONS

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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

June 23-26, 2019

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Vice President and General Counsel
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Jim Hundrieser
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of Universities and Colleges

Jose A. Olivieri
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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.

Economic Prosperity Does Not Result from Cutting Costs

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

[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 HEls 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

[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.

Utilizing Outside Expertise to Address Business Model Challenges

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

[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

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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, HEls 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
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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.

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

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

Jim Hundrieser, Associate Managing Principal, Association of Governing Boards of Universities and Colleges

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Current Enrollment

- Demographic shift
- Discount pricing
- Cost-sticker price
- Debt concern
- Increased costs to do business
- Questioning value of higher education
- Unbundling of the college degree
- Foreign student enrollment

Fiscal Sustainability

- Many institutions facing financial threats
- Looking to cut costs
- Looking to enhance net revenue

Never Been More Important to Build a Sustainable Business Model

- Net revenue growth and understanding of Return on Investment ("ROI") have not been part of higher education's typical response to budget challenges
- Growing and diversifying revenue is more difficult than cutting expenses, and requires an element of operational execution that may challenge the capabilities of the institution

Prosperity Gap

An Institution with a $75 million budget identified an $11 million prosperity gap:

– Financial	$3 million
– Operational	$6 million
– Reserve	$2 Million
Total	$11 Million

Why You Might Be Thinking About Growing Revenue?

- Align with your institution's strategic plan
- Identify resources to build new programs
- Shift your institution from thinking "growth" to "add and subtraction to grow margin and minimize losses"
- Invest in programs that align with market trends
- Better understand ROI
- Rebuild reserves or infrastructure based on programs that produce larger ROI

Focus on Prosperity

- Situational assessment for your own institution
  - Which includes the financial quantification
  - Collaboration and consensus on the diagnostic assessment
- Link to macro trends shaping higher education
  - Alignment of mission and strengths
  - Creativity and innovation will be required, along with institutional resolve
  - Developing growth building blocks
- Develop tactical execution plans
  - Key assumptions, internal obstacles, leadership accountability, required measurement metrics, financial modeling, risks, investments, milestones, and timelines

Building Blocks of Financial Plans

- Transfer Student Enhancement
- Returning Student degree completion
- Online Programming
- Collaborations on Public, Private, and Community Partnerships
- Enrollment Management Integration
- Retention Programs
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- Targeted Academic Programs
- Endowment funds available for operations

Mergers/Affiliations/ Consolidations

- Not a clear market – matching entities
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Expense Reduction and Legal Issues

- Early voluntary separation incentives/early retirement programs
  - Older Worker Benefit Protection Act ("OWBPA")
  - Getting to the right incentive/Getting to the right costs
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  - Staff
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- Unfair labor practices
- Violence in the workplace

Financial Exigency

- American Association of University Professors ("AAUP")
- Policies/Manuals
- Case law

Communications

- Guide to managers
- Connection between managers, HR, communications staff, General Counsel
- Manager/HR script
- Logistics of layoff
- Media/social media

Reduction in Force Plan

- Manager Guide from Columbia College Chicago
- Sample comprehensive plan, decision making guide, documentation, communications, logistics

DOING MORE WITH LESS

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Many institutions of higher education are reacting to these trying economic times by determining a variety of ways to reduce personnel costs. These include reorganizing administrative departments, reassessing academic programs, and reducing the cost and of their faculty and staff. This outline reviews the practices institutions have used effectively and the creative alternatives they have implemented to manage during a time of personnel and cost cutting moves. The outline also addresses preparation and planning steps designed to reduce legal exposure.

I. Mandatory Pay Cuts, Furloughs and Reducing Working Hours

Colleges and universities are faced with increasing pressure to reduce personnel costs. While many schools are considering layoffs, there are alternatives that can achieve similar cost-cutting goals while saving jobs and allowing schools to retain their investment in current staff. These approaches can avoid the expensive severance payments, burdensome notice obligations under federal and state law, negative publicity and potential legal liability that often accompany layoffs, while leaving schools in a better position to respond to an upturn in the economy without needing to recruit, hire and train new employees at great expense. Layoff alternatives include pay cuts, reducing employees' hours and implementing mandatory furloughs.

A. Pay Cuts:

A school is generally free to change prospectively the terms and conditions of employment of at-will employees, including reducing the rate of pay. Before compensating an employee at a reduced rate of pay, the employer must ensure that advance notice is given to the affected employees before they start working at the new salary/pay rate. For non-exempt (often hourly) employees, their hourly rate would be reduced. For exempt (typically salaried) employees, their annualized salary would be reduced. The wage cut can take the form of an across-the-board reduction for all employees—10% for example—or be made on an individual basis. There are several legal issues that schools must look out for when making wage cuts.

1. First, schools must identify any relevant employment contracts and offer letters to determine whether there is a contractual compensation guarantee to the affected employees. The risk associated with poorly drafted, or ambiguously worded, offer

letters must be assessed carefully. Employees with offer letters that set forth their annual salary (or hourly rate) should be notified in writing of their new salary or hourly rate of pay to avoid potential breach of contract disputes down the road. Of course, any new communication should reiterate the "at will" nature of their employment.

2. Second, employees must be informed of the rate at which they will be working before they actually perform any work during that day or pay period. While not all states explicitly outline how much advance notice is required, some require varying lengths of advance notice. Some states also require the notice to be in writing. Where possible, at least 30 days advance written notice of any changes to an employee's rate of pay should be provided. The notice should be provided in advance of the next pay period—not just the next pay check. This is particularly important for schools that operate payrolls on a lag basis. However, state law should be reviewed for specific requirements.
3. Third, schools must make sure that non-exempt employees hourly rates do not fall below the applicable federal or state minimum wage.
4. Fourth, exempt employees must continue to earn a weekly salary of at least $455 per week (or higher, depending on state law) so that they continue to remain exempt from state and federal overtime requirements.
5. Fifth, schools cannot reduce the wages of unionized employees operating under the terms of a collective bargaining agreement without first bargaining with the union.
6. Finally, where wage cuts are not made equally on a company-wide or department-wide basis, schools must take care that employees protected by Title VII, the ADEA, the ADA, the FMLA and similar federal and state anti-discrimination laws are not disparately treated or impacted by the reductions, and that the cuts are made for legitimate business reasons that can be justified on non-discriminatory grounds.

B. Reduction in hours:

While reducing pay will certainly save a school money, it can also create morale issues for employees who continue to work just as hard for less money. In addition, cutting pay does not address one of the most common downsides of slow economic times—the fact that there simply isn't as much work to go around. Therefore, two similar alternatives are to reduce employees' hours and their pay by a proportionate amount, institute mandatory furloughs (unpaid leave) or shut down operations for certain days or weeks of the year.

1. Many of the same legal principles and issues discussed above with respect to pay cuts also apply to furloughing employees or reducing hours and pay simultaneously. Advance notice must be provided, and a 30-day period is recommended where possible. For unionized employees and those with employment contracts, the contract typically will govern and likely will prevent the reductions absent bargaining and/or renegotiation.
2. *Non-exempt employees*:
    a. For non-exempt employees, there are few potential legal issues in reducing employee work hours so long as they continue to earn at least the minimum hourly wage. Generally, employers are free to schedule the work day or week of non-exempt employees at their discretion, because hourly employees are simply paid for each hour worked. Therefore, if they are scheduled to work fewer hours going

forward, they will simply be paid for fewer hours. If they are instructed not to work on a particular day (or week), they simply are not paid for that day (or week). Keep in mind, however, that if non-exempt employees perform any work during a day, even if they are not scheduled to work at that time, they must be paid at their regular hourly (or overtime) rate for the time worked. In addition, employers should be aware that some states have minimum hours of pay requirements for employees who are "called in" to work but do not work a full shift.

b. One potential side-benefit of reducing work hours for non-exempt employees is that it also will necessarily reduce the number of overtime hours (paid at time-and-a-half) that are worked each week. While state law and individual employer policies may differ, federal law does not require premium pay (time and a half) until forty hours are worked. Managing, and reducing, overtime is an important first step towards controlling costs that should be taken before an employee's full-time schedule is reduced.

3. *Exempt employees*: Exempt employees, on the other hand, present unique issues under the Fair Labor Standards Act and similar state wage/hour laws that must be analyzed carefully before implementing a reduction in hours or furlough plan. To qualify as an exempt executive, administrative, or professional employee under the FLSA, 29 U.S.C. *et seq.,* and many state laws, an employee must, among other things, be paid on a "salary basis." In other words, an employee generally must receive the same amount of compensation in each week (while meeting federal and state minimum thresholds) without regard to how many hours worked, and with only limited exceptions. However, if certain guidelines are followed, an employer can reduce exempt employees' work hours or furlough them for certain days or weeks consistent with rulings by the U.S. Department of Labor ("DOL"), as well as two recent decisions by federal Courts of Appeals. These rulings and decisions make clear that an employer legally can reduce the salary of exempt employees in advance-designated reduced workweeks, where the reduction is due to economic conditions and is not an attempt to evade the salary basis test. However, employers must plan carefully, as multiple changes in an employee's schedule and salary throughout the year may lead to an across-the-board denial of the exemption.

C. Furloughs:

1. *Weekly Furloughs/Shutdowns*: Where exempt employees are furloughed for an entire week, or where a school shuts down certain operations (or closes a department) for an entire week, there is no legal obligation to pay employees for that week—assuming, of course, that employees perform no work. For exempt employees, particular care should be taken to avoid the use of Blackberries, cell phones, laptops, e-mail and voice mail, as the performance of work during a furlough or shutdown could require them to be paid their full weekly salary even if the employees perform only a minimal amount of work.

2. *Reducing Hours and Pay/Daily Furloughs or Shutdowns*: Sometimes, it is not feasible for a school to shut down operations or furlough groups of employees for week-long periods of time. However, if planned carefully, there are also ways to reduce hours and pay or structure furloughs/company shut-downs for periods of less than one week at a time. To comply with the FLSA, the change in work hours or

schedule must be made prospectively, and should be made either indefinitely or on a long-term basis for a fixed period of time (e.g., for the remainder of the year, for a three-month period, etc.). Schools should not change an exempt employee's work schedule more than 2-4 times in any twelve-month period. In addition, a written policy and schedule should be established and disseminated well in advance. Finally, the change in hours or work schedule should be made, where possible, on a school-wide, division-wide or department-wide basis, rather than individually. While individual reductions in schedule can be structured so as to comply with the DOL's interpretation of the FLSA, there is some increased risk that a court will find the practice to violate the salary basis test. It should be noted that even if the reduced workweek does result in a change from exempt to non-exempt status for any reason, the change to non-exempt status would be prospective and likely would revert back to exempt upon resumption of full-time work. As noted, such changes should be planned, pre-announced and done on a very episodic basis.

3. *State Laws*: Unfortunately, not all states have interpreted their own wage/hour laws in the same manner as the DOL, and schools should consult with legal counsel ahead of time to ensure proper analysis and review of applicable state laws.

4. *Additional Vacation Days in Lieu of Reduced Hours*: One possible alternative to reducing hours is to provide employees with an additional number of vacation days to be used throughout the year, but to reduce employees' overall salary by a corresponding percentage—so that the end result is that those extra vacation days essentially are unpaid. By way of example, an employer could provide employees with 10 additional vacation days (two weeks), but reduce their overall salary by 2/52 (3.8%). Employees would receive the same salary in every week going forward (albeit lower than what they had received previously), but would receive an additional 10 days off that year. Employers that choose to provide these extra "unpaid" vacation days, however, should make sure they have a clear written policy that the extra vacation days are for the calendar year only, do not carry over to the next year if unused, and, except in California, are not paid out if unused by the end of the year. California employers who would implement such a program should make sure that their employees use up all of the vacation days to avoid having to pay out the balance at the end of the year.

D. Work Share Programs:

In many states, rather than laying off a percentage of the work force to cut costs, employers can submit a plan to their state Department of Labor (or unemployment insurance division) to reduce the hours and wages of all or a particular group of employees, who will then "share" the remaining work. Those employees will then be eligible to receive partial unemployment benefits to supplement their lost wages—typically a percentage of unemployment benefits equal to the same percentage that wages were reduced for that week. Keep in mind, however, that employers may have to pay higher unemployment benefit premiums—so the ultimate cost of such a program must be considered in the context of achieving cost-saving goals.[1]

[1] U.S. Department of Labor, The Shared Work Program, http://www.labor.ny.gov/ui/dande/sharedwork1.shtm. (last visited Feb. 7, 2012)

E. Unemployment Benefits:

Employers should keep in mind that employees whose hours are reduced or who are furloughed for extended periods of time may qualify for unemployment or partial unemployment benefits from their state, depending on state law, the employee's past earnings, and the extent to which wages or hours are reduced. As with work-sharing programs, this in turn could increase the cost of the employer's unemployment benefit tax burden and should be factored carefully into any decision to reduce hours or implement a furlough plan.

F. Additional alternatives:

In addition to the steps discussed above, there are many other cost-saving measures that could be considered. These include: (i) freezing wages; (ii) establishing a hiring freeze so that no new employees are hired, and no new positions are filled when employees leave through natural attrition or termination; (iii) implementing alternative compensation arrangements such as deferred compensation, or increased incentive pay or productivity bonuses in conjunction with salary reductions or freezes; (iv) initiating better control over employees' work hours to ensure that employees are working full days and/or are not working unnecessary overtime; (v) setting caps or implementing "use it or lose it" policies for vacation pay or paid time off (except in California); (vi) offering a voluntary retirement or separation program to encourage employees to leave without having to resort to an involuntary reduction in force; and (vii) offering a voluntary sabbatical program or unpaid time off. Because many of these measures could raise unique state law issues, special care must be taken to consult with legal counsel to ensure compliance in each state in which a company operates.

II. Reductions in Benefits

Reducing benefits can be a useful tool when implementing cost-cutting strategies at the institutional level. While there are various strategies that can be used to cut costs with respect to benefits, schools should be aware of the legal considerations that will arise when employee benefits are reduced. In addition, plan administrators should take note that possible strategies may differ depending on whether a pension or welfare plan is involved and whether the institution is a public or private university and whether its plans are subject to ERISA (for example, governmental plans are not subject to ERISA but may be subject to state law regulations).

A. Pension Plans:

1. *Merging Plans*: Maintaining numerous separate plans can be complicated and costly. Merging similar types of pension plans can make management easier, more cost-efficient and less time-consuming. Paying for the administration of one fund, as opposed to many, can significantly reduce administrative costs, including service provider fees (e.g. recordkeeper fees, investment management fees, legal fees and auditors expenses). However, defined benefit plans and defined contribution plans should be considered separately because the two types of plans cannot be merged. When merging either defined benefit plans or defined contribution plans, plan sponsors should be cognizant of each plan's eligibility requirements, benefit

options/structures, benefit accrual formulas (in the case of defined benefit plans), and should ascertain what features of each plan are protected benefits that must be maintained for existing participants under the merged plan.

2. *Reduce Employer Contributions to Defined Contribution Plans:* Defined contribution plans can be designed to facilitate employee contributions, employer contributions or some combination of both. In defined contribution plans requiring either employer non-elective contributions (e.g. an employer contribution equal to a certain percentage of the employee's salary) or employer matching contributions (e.g. an employer contribution equal in some percentage to the employee's contributions to the plan), plan sponsors can consider either reducing or eliminating the amount of the employer's non-elective contribution or matching contribution to lower the cost of the defined contribution plan to the employer. Additionally, where an employer's defined contribution plan does not include an employee contribution feature, employers should consider adding a salary deferral component to encourage employees to save for their own future retirement.

3. *Plan Design Changes in Defined Benefit Plans:* There are various plan design changes that can be made to defined benefit plans that will lower the cost of the benefits provided by the plan. Such plan design changes can generally only be made prospectively and plan sponsors should be mindful of any plan design features that are protected under IRC § 411(d)(6), which generally prohibits the retroactive reduction or elimination of certain benefits prior to amendment of the plan. However, certain defined benefit plans subject to the funding requirements Pension Protection Act of 2006 may be permitted to eliminate certain benefits retroactively. Additionally, most plan design changes which reduce or eliminate benefits will require notice to plan participants and schools should be mindful of applicable notice requirements. See ERISA § 204(h). Plan design changes that will lower the cost of defined benefit plans include the following:

    a. Reduce the rate of future benefit accruals.

    b. Reduce or eliminate early retirement benefits or early retirement subsidies.

    c. Reduce or eliminate guaranteed payment benefit options, e.g. a five-year or ten-year guaranteed payment feature on a single-life annuity.

    d. Reduce or eliminate subsidized disability benefits prior to normal retirement age.

    e. Reduce or eliminate lump sum death benefits or any lump sum payment options provided by the plan.

4. *Implement a vesting schedule:* Employers can implement a vesting schedule for employer contributions for plans that do not already have any vesting requirements. Depending on the type of plan, employers can require employees to complete up to 7 years of service before their plans are fully vested. An employee is immediately 100% vested in his or her own employee contributions that are made to a defined contribution plan.

B. Welfare Plans:

1. *Self-Funded versus Insured Plans:* Schools should consider whether sponsoring a self-funded plan or an insured plan will be more economically efficient for the

employer. Certain schools may derive financial benefits by switching from an insured plan to a self-funded plan and vice versa. For example, schools with significant levels of cash reserves can reduce costs by self-funding their own health plans and having greater control over plan design while not being subject to state insurance laws. On the other hand, certain schools may find it preferable to insure against the costs of health coverage by utilizing an insured arrangement that caps the amount of the premiums that a school will pay for employee health coverage.

2. *Funding Arrangements for Insured Plans:* Plans with insured arrangements should consider whether negotiating an alternative funding arrangement with the insurer would be more beneficial than the plan's current funding arrangement, e.g. a minimum premium funding arrangement that would allow the plan to hold a reserve portion of the required premium payment.

3. *Conduct RFPs for Third Party Administrators, Insurance Carriers and/or to Bundle Benefits*: Engaging in periodic requests for proposals (RFPs) for third party administrators (for self-funded plans) or insurance carriers (for insured plans) can result in cost savings either from a new provider or from the plan's current provider. Additionally, where an insured plan contracts with different providers for medical, dental, vision and/or life insurance benefits, cost savings can often be achieved by bundling these benefits and obtaining comprehensive bids for all benefits included in the employer's health plan from a nationwide insurance provider that can offer a network for all benefits covered under the plan.

4. *Implement or Increase Employee Contribution Requirements*: Schools can require employees to pay a greater portion of the premium on welfare benefits. Generally, employers will share the cost of benefits with employees by deducting the employees' "share" of the cost from their paychecks. This can reduce costs to a school by increasing the cost to the employees while continuing to offer the same benefits to employees.

5. *Change or Increase the Co-Insurance Structure under the Plan of Benefits:* Schools can also consider plan design changes, such as increases in co-payments or co-insurance percentages for both in-network and out-of-network benefits that will reduce the school's costs. Additionally, out-of-network benefits tend to be one of the largest contributors to overall plan expenses; thus, implementing a co-insurance structure that encourages the use of in-network providers (e.g. with significantly higher co-insurance or co-payments for out-of-network providers) will generally reduce a school's costs for health care benefits.

6. *Reduce or eliminate retiree health benefits*: Funding retiree health benefits can be a significant expense for an employer's health plan; therefore, the reduction or elimination of retiree health benefits can drastically reduce an employer's expenses. However, employers providing retiree health benefits should carefully review any plan documentation to ensure such documents include "reservation of rights" language, which provides the employer with the right to terminate or amend the plan at any time, including the provision of any retiree health benefits. If the employer did not formally reserve the right to reduce employee benefits, then the employee may become "vested" in retiree health benefits and the employer may then be precluded from reducing those benefits under the plan in the future. *See, e.g., Sprague v. General Motors*, 133 F.3d

388 (6th Cir. 1998)(*en banc*)(ruling that GM had properly reserved the right to change or terminate health benefits promised to retirees despite the fact that the plan documents elsewhere contained a promise of lifetime benefits); *Devlin v. Transportation Communications Int'l Union*, 173 F.3d 94 (2d Cir. 1999)(upholding district court's conclusion that because terms of benefit plan explicitly provided for its amendment, the plan was correctly amended in compliance with its own procedures).

7. *Grandfathered Status under the Affordable Care Act***:** To the extent that a school's health plan has retained and wishes to retained its "grandfathered" status under the Affordable Care Act, then schools should be mindful of any changes to its current plan of benefits that may result in the loss of that grandfathered status.

8. *Implement a Wellness Program:* Implementing a wellness program designed to target major health risk factors and chronic diseases among employees can lead to substantial cost savings for employers. A Harvard study found that a properly designed and well managed wellness program can result in $6 of health care savings for every dollar spent (comprised of a $3.27 reduction in medical costs and $2.37 reduction in absenteeism costs for every dollar spent). See Health Affairs, February 2010.

C. Additional considerations under ERISA:

1. *Notice requirements*: Schools whose pension and welfare plans are subject to ERISA are required to comply with ERISA §§ 104 and 204(h). ERISA § 104 requires employers and plan sponsors of both pension and welfare plans to provide to participants and beneficiaries summaries of any material modifications (or reductions) to the plan of benefits within certain prescribed time limits. Further, ERISA § 204(h) requires that written notice be given to plan participants and employers when a plan will be amended so as to provide for a significant reduction in benefits. Notice must be written in a way that will be reasonably understood by the average plan participant, and should provide enough information to allow participants to understand the effect of the plan amendment. See 29 U.S.C. § 1054. The Supreme Court recently addressed this issue in *CIGNA Corp. v. Amara*, 2011 U.S. LEXIS 3540 (U.S., May 16, 2011), where a communication about reduction in employee benefits was found to be confusing and untruthful when it downplayed material changes to a benefit plan. Schools should ensure that their communications to plan participants are clear and straightforward.

    a. *Fiduciary obligations*: ERISA imposes duties, such as acting with a prudent standard of care, on fiduciaries of both welfare and pension plans. The broad fiduciary responsibilities that are imposed by ERISA require plan administrators to provide timely notification to employees before benefits are terminated. *See Lockheed v. Spink*, 517 U.S. 882 (1996).

III. Voluntary and Involuntary Reductions in Force

Courts use the terms "layoffs" and "reductions in force" interchangeably to mean work force reductions caused by economic or financial considerations in which employees are terminated, typically due to no fault of their own, and not replaced by newly-hired employees who perform substantially the same work. Staff layoffs at colleges and universities, both

campus-wide and department- specific, usually involve employees entitled to a broad array of substantive and procedural rights.

Under the EEOC guidelines, both voluntary and involuntary reductions in the force, layoffs and/ or head count reduction efforts, which are collectively referred to as RIFs (discussed further in this section) are grouped under the heading, "exit incentive or other employment termination program," and receive similar treatment. Both voluntary and involuntary RIF's involve the signing of a voluntary release or waiver by the resigning employee, further minimizing risk for the employer. Whether an employer chooses to implement a voluntary or involuntary RIF, developing a plan and timeline is essential to administering it in a legal, efficient and cost- effective manner. This section will detail the various incentive programs and their functions.

A. Negotiated retirements/ voluntary severance- offers to employees for a specified period a package of benefits.

1. Issues with negotiated retirement:

    a. Age discrimination Employment Act-

    b. Older Workers Benefit Protection Act (OWBPA)- bars employers from offering older workers severance packages that are LESS generous than terms offered to the workforce

    c. While employees cannot be asked to waive their rights to file discrimination lawsuits when being laid off, waivers of the right to file lawsuits and recover monetary relief can be used and is generally effective.

B. Voluntary Retirement Incentive Programs (RIF's)

1. Designing a Severance Plan:

    a. Severance Incentive Plans- Invariably, a RIF will require a close look at a company's severance benefit policies. It is common for employers to offer enhanced severance benefits to reduce the workforce through voluntary resignations. If the company has an existing policy of providing severance pay upon termination, it will be obligated to make those payments to employees discharged in a RIF, unless it first amends the plan prior to conducting the RIF. If it does not have a policy, it may want to consider providing one for the particular RIF it is planning. Either way, the employer's severance pay policies need to be evaluated before implementing a workforce reduction.

    b. Unless they are deemed to have no ongoing administrative scheme, written and unwritten pay policies are covered by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001-1461, even if the employer has never formally recognized the policy as a *severance plan* under ERISA. *See*, *e.g.*, *Smith v. Hartford Ins. Group*, 6 F.3d 131, 136 (3d Cir. 1993) (noting that a plan need not be written to be covered by ERISA); *Bennett v. Gill & Duffus Chems., Inc.*, 699 F. Supp. 454 (S.D.N.Y. 1988) (holding former employees of the company, after a sale of assets, were entitled to severance benefits under plan that was never written, but had been applied consistently). Because severance plans are usually viewed as employee benefit plans under

ERISA, the employer or other administrator will be required to adhere to the fiduciary standards required by law in its administration of the plan.

c. An employer's decision as to whether individual employees are or are not entitled to severance is subject to *de novo* review by a court, unless the plan document expressly grants the employer/fiduciary the discretion to interpret the policy, in which case courts generally will apply an *arbitrary and capricious* standard to review the determination. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

2. Early Retirement Incentive Plans- Early retirement incentives can take a variety of forms including periodic or lump-sum payments; additional health or life insurance benefits to retirees and their families; and additional age and/or service credits under an existing pension plan. Alternatively an employer with a defined benefit plan can design an ERIP that provides early retirees with a Social Security Supplement.

   a. The most common, and least legally risky, form of early retirement incentive plan offers the same benefits to all employees with the requisite minimum age (*e.g.*, 55) and years of service (*e.g.*, 15). The plan may also contain a severance award, pension component and/or benefits package.

   b. These plans are lawful, provided that they are *voluntary*, and are offered pursuant to an early retirement or special incentive program. *See* 29 U.S.C. § 623(f)(2)(B)(ii). *See also Connors v. Chrysler Fin. Corp*., 160 F.3d 971 (3d Cir. 1998) (dismissing age discrimination claim where plaintiff was offered same general choice between employment with new company or early retirement plan during corporate takeover as all other employees); *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 190-04 (5th Cir.) (holding that voluntary ERIP offered to entire group employees is evidence against claim of constructive discharge), *cert. denied*, 488 U.S. 908 (1988).

   c. To determine whether an employee's acceptance of an early retirement incentive was voluntary, courts typically consider whether the eligible employees had sufficient time to decide whether to elect early retirement. *See Bodnar*, 843 F.2d at 190-04 (stating that 15-day period was lawful although not generous); *but see Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 895 (9th Cir. 1990) (holding that less than one working day notice not sufficient; NOTE: The Older Worker Benefits Protection Act requires employers to give employees 45 days to decide whether to elect early retirement if offered in exchange for a release).

   d. Courts have stressed that a choice *cannot* be voluntary if it was induced by misconduct, misrepresentation, or undue pressure. *See Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1113 (1st Cir. 1989) (*prima facie* case of discrimination was established where employee was faced with "an impermissible take-it-or-leave-it choice between retirement or discharge"). Eligible employees must be given clear and accurate information about the consequences of their choices, and the employer must accurately respond to questions about the company's future plans. *See Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988) (ruling employer not entitled to summary judgment where evidence showed that, during the first separation program, employees were told that there were no plans for a second program even though management was discussing the possibility of a second separation program); *see also Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d

Cir. 1997) (holding that employer may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would). For example, if the employer plans to terminate employees involuntarily in the event numerical goals are not met, it should say so – without indicating or intending that those who do not elect the ERIP will be the first to go, or even that such a decision not to accept the ERIP will be considered in deciding whom to terminate.

e. Employers may condition the receipt of early retirement incentive benefits upon the employee's waiver of employment claims. *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (ERISA does not prevent an employer from conditioning the receipt of early retirement benefits upon plan participants' waiver of employment claims). "Prohibited transactions" under Section 406(a) of ERISA generally involve uses of plan assets that are potentially harmful to the plan. The payment of benefits conditioned on the waiver of claims by plan participants cannot be said to have that characteristic.

C. Differentiated Early Retirement Incentive Plans: The Federal Age Discrimination in Employment Act's ("ADEA") broad prohibition of age discrimination in the design or application of employee benefit plans implies that ERIPs cannot provide different benefits to participants on the basis of age – except in certain expressly authorized ways, such as providing for a minimum age for early retirement eligibility. There is, however, some ambiguity with respect to so- called differentiated or window plans that provide early retirement benefits to employees only within a certain age band – for example, employees between age 55 and 60.

1. The ADEA expressly authorizes two types of ERIPs that favor younger employees. The statute provides that an employer may offer a defined benefit plan: (i) that provides for "payments that constitute the subsidized portion of an early retirement benefit" (*i.e.*, eliminates the actuarial reduction for those who retire before normal retirement age); or (ii) that provides for "social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under Title II of the Social Security Act (42 U.S.C. § 401, *et seq.*) and that do not exceed such old-age insurance benefits." 29 U.S.C. § 623(l)(1)(A)(ii).

2. Eligibility for a voluntary RIF incentive program can be limited to employees who have attained a certain age and seniority level, *Bodnar*, 843 F.2d at 192, who work at a designated facility, *Trenton v. Scott Paper Co.*, 832 F.2d 806, 808 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988), or who work in a specific job classification. *Cf. Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989).

3 A RIF program, however, that targets a limited class or category of employees may be subject to challenge if the targeted group contains a disproportionately high number of employees who are members of a statutorily-protected class. *See*, *e.g.*, *Bodnar*, 843 F.2d at 193; *Trenton*, 832 F.2d at 811. In such circumstances, an employer must be able to show a legitimate (non-pretextual) business reason for limiting the program to the targeted group. *See Bodnar*, 843 F.2d at 193 ("[a]n

employer may implement an early retirement plan that does not extend to all potentially eligible employees if objective factors explain the exclusions").

D. Early Retirement Incentive Provided Through Window Programs:

1. Many early retirement incentive programs are provided through time *windows* under which eligible employees can elect to retire with enhanced benefits under the employer's pension plan within a certain period of time.

2. The following should be considered in the design of an early retirement window:

   a. Plan Ahead

      It often takes several months to plan a window. Therefore, it is important to allow sufficient lead time.

   b. Identify Employees Who Will Be Eligible for the Window

      It is important to use care in defining the group of employees who will be eligible for the window. The Internal Revenue Code provides that windows offered in tax qualified pension plans cannot discriminate in availability and amount in favor of *highly compensated employees.* The term *highly compensated employee* is defined in detail in the Code and the Treasury Regulations.

   c. Determine the Enhancement to Be Offered by the Window

      Employers will need to determine what enhancement to offer. Often the employer will need to have the plan's actuary determine the costs of the window.

   d. Prepare Management Staff

      When window programs are offered, it is common for employees to seek advice and information (formally and informally) from supervisors, human resources personnel and others about the consequences of their various options. Employers should instruct their supervisors to answer such inquiries in a truthful and non-coercive fashion. Counsel should be consulted to discuss how the information is to be communicated.

E. Involuntary RIF Severance Benefits:

1. The key aspect of any separation benefit package is severance pay. In general, employers have fairly wide latitude in setting levels of severance pay, although most severance plans set severance pay based on the formula of weeks of base pay per year of service, and cap severance at 52 or fewer weeks (some more general plans might cap severance benefits anywhere between 53 and 104 weeks). Severance can be paid in a lump sum or in installments, although when it is paid in installments, there may be certain tax implications that need to be considered in the drafting of the severance plan, specifically compliance with Rule 409A of the Tax Code. Additionally, certain "key employees" as defined in the Code may be required to wait six months before receiving benefits.

2. Continued Health Coverage

   Congress enacted the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. §§ 1161-1168, as a set of technical amendments to ERISA.

COBRA requires plan sponsors of group health plans to offer continuation coverage to employees and their dependents who become eligible for such coverage at the time a "qualifying event" occurs. This means an employer with at least twenty employees must provide "qualified beneficiaries" (*i.e.*, the covered employee, his or her spouse, and their dependants) the opportunity to continue medical coverage under its group health plan. The company may charge the qualified beneficiaries for their COBRA coverage, as well as charge them an additional two percent, to cover some of the administrative expenses.

Companies with more than twenty employees should have a COBRA compliance plan in place, especially if a reduction in hours or other qualifying event occurs. While many of these companies may have COBRA procedures in place already, events such as a RIF warrant review of practices to ensure compliance.

3. Other Welfare Benefits

   Most severance benefit packages do not provide any additional welfare benefits other than continued medical benefits to severed employees. This means that employees' participation and accruals under other benefit plans cease upon their separation from employment.

4. Outplacement Benefits: Many companies offer outplacement assistance as a severance benefit.

5. Retention Bonus

   Many employers build in to their severance plans the ability to make additional discretionary payments to employees, such as retention payments, a prorated portion of the employee's annual bonus, or other special bonuses, so that they can award these benefits on a case-by-case basis to individual employees impacted by a RIF and towards legitimate business objectives. These benefits may not be awarded on a discriminatory basis.

6. Unemployment Benefits

   a. Involuntary RIFs.

      Employees who are involuntarily terminated in connection with a plant closing or mass layoff will be eligible for unemployment insurance benefits in accordance with state law.

   b. Voluntary Programs

      i. It is quite common for employees who are laid off through voluntary RIFs to file claims for unemployment benefits. However, employees who *voluntarily* resign from their employment generally are not entitled to receive unemployment compensation benefits. N.Y. LAB. LAW. § 593(1); FLA. STAT. § 443.101(1)(a). A *voluntary* resignation means a separation through no fault of the employer.

      ii. An employee who voluntarily leaves his/her employment to take advantage of an early retirement incentive, while continuing work is available to that employee, is disqualified from receiving unemployment

benefits. *See*, *e.g.*, *In re Claim of Erigo*, 249 A.D.2d 667, 671 N.Y.S.2d 188 (3d Dep't 1998); *In re Claims of Guarnera*, 243 A.D.2d 858, 662 N.Y.S.2d 944 (3d Dep't 1997), *appeal denied*, 91 N.Y.2d 810, 671 N.Y.S.2d 714 (1998); *Calle v. Unemployment Appeals Comm'n*, 692 So. 2d 961 (4th Dist. 1997); *In re Astrom*, 362 So. 2d 312 (3d Dist. 1978).

IV. Tenure Issues - NOTE- We thank Richards Kibbe & Orbe LLP for their work in helping put together this section

A. As per 1940 Statement of Principles on Academic Freedom and Tenure: "Teachers are entitled to full freedom in research in the publication of the results, subject to the adequate performance of their other academic duties;"

B. "College and University teachers are citizens, members of a learned profession and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others and should make every effort to indicate that they are not speaking for the institution".

1. "After expiration of a probationary period, teachers… should have permanent or continuous tenure."

C. Definition of Tenure according to the American Association of University Professors and is based on that institutions of higher education are conducted for the common good, and the common good depends upon free search for truth and its free exposure. The point of tenure is:

1. Tenure is intended to promote the common good by allowing for "freedom of teaching and research of extramural activities" as well as "a sufficient degree of economic security to make profession attractive to men and women of ability".

2. In order to promote the common good, the AAUP 1940 Statement provides that after the expiration of a probationary period, teachers should have permanent or continuous tenure such that "their service should be terminated only for adequate cause… or under extraordinary circumstances because of financial exigencies."

D. Courts view tenure as a contractual right. When no contract, courts look to academic norms and practices and the policies of the American Association of University Professors (AAUP)- EX- case of Browzin v. Catholic University of America, where courts ruled the AAUP represent widely shared norms within the academic community. Statement from case read that jointly issued statements of the AAUP and other higher education organizations represent 'widely shared norms within the academic community' and may be used to interpret academic contracts.

1. Three most cited AAUP statements regarding tenure:

a. 1940 Statement of Principles on Academic Freedom and Tenure

b. 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings (AAUP 1958 Statement)

c. Recommended Institutional Regulations on Academic Freedom & Tenure (RIR)

i. The RIR was drafted in form of a proposed policy and was created in order to give institutions the ability to easily redraft or revise their tenure policies

ii. It is clear that the starting point to academic norms at universities such as Stanford, Michigan, George Washington University, University of Maryland, Fordham and Rutgers that the AAUP recommended policies are based on the AAUP's recommended policies. In all, there have been over 180 educational institutions to endorse the statement since 1940.

- See attached file for list of these educational institutions (saved in worlddox)

2. To what extent will courts use AAUP academic norms to interpret contractual agreements?

a. Kirschenbaum v. Northwestern University- the courts upheld a verdict that a contractual agreement stipulated that the professor would not be paid despite the AAUP 1940 Statement stating that tenure should provide for economic security on basis of contract/ no reference in university handbook to the 1940 statement

b. Gertler v. Goodgold- court denied professor's claim of breach of contract for "lack of research space" because while tenure is elastic, doesn't mean everything can be given if it is not stated in the contract.

E. RIR- "adequate cause" is what is deemed sufficient to terminate tenured faculty.

1. As per the AAUP RIR Memo (Section: Review, Note 5a) Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Termination for cause by the institution is subject to procedures mentioned in school's personal policy

2. What is regarded as adequate cause?

a. Immoral behavior (EX: Yu v. Peterson, case on professor plagiarizing) neglect, incompetence (must include testimony of qualified peers), ethical misconduct (EX: Yao v. Board of regents of the University of Wisconsin, where they found intentional tampering with a colleagues laboratory materials) etc.

3. Also can be terminated in event of discontinuation of program

a. Must be based on educational decisions and effort must be made to reallocate the affected tenured professors

4. Financial exigency

a. AAUP RIR memo- Section Financial Exigency, Note c.(1)- "termination of an appointment with continuous tenure… may occur under extraordinary circumstances because of a demonstrably bona fide financial exigency… as a first step, there should be a faculty body that participates in the decision that a condition of financial exigency exists or is imminent, and that all feasible alternatives to termination of appointments have been pursued… the

responsibility for identifying individuals whose appointments are to be terminated should be committed to a person or group designated or approved by the faculty. The allocations of this responsibility may vary according to the size…extent of terminations to be made or other considerations…"

b. Note c.(2)- "if administration issues notice to a particular faculty member of an intention to terminate the appointment because of financial exigency, the faculty member will have the right to a full hearing… the hearing need not conform in all respects with a termination proceeding… the issues in this hearing may include: the existence and extent of financial exigency, validity of educational judgments and criteria for identification of termination and if criteria is properly applied to this case…"

c. Institution at time of termination because of financial exigency, cannot make new appointments EXCEPT in circumstance where a distortion of academic program would otherwise result.

d. Before terminating an appointment because of financial exigency, must make every effort to place the faculty member in another suitable position (reassignment) within the institution.

e. To what extent is financial exigency a legitimate claim? If "an imminent financial crisis threatens the very survival of the institution". Scheuer v. Creighton University is an EXCEPTION to this rule

f. Krotkoff v Goucher College (4th Cir. 1978) and College Professors v. Bloomfield College (N.J. 1975) are two of several cases that are favorable to a university declaring financial exigency as the describe certain assets may be excluded from the financial exigency analysis;

F. Proof of physical/ mental disability- medical proof: "based on clear and convincing medical evidence that the faculty member… is no longer able to perform the essential duties of the position". Faculty member must be informed and given opportunity to present his position and provide evidence.

G. Court will focus more on whether school followed their own procedure as opposed to the act

H. Universities are allowed to revise tenure policies as long as policy changes are "reasonable and uniformly applicable".

1. What are some examples of "reasonable and uniformly applicable"?

a. Rehor v. Case Western Reserve University (Ohio 1975) - court permitted University to change mandatory faculty retirement age from 70 to 68. (Key Point- mandatory retirement age policies are no longer legally permissible)

b. Brady v. DiBaggio: court rejected a tenured professor's claim that the university's failure to re- appoint her to an administrative position constituted constructive discharge because it essentially forced her to take the university's offer of an early retirement package.

i. The court's statement: "a constructive discharge exists if 'working conditions would have been so difficult or unpleasant that a reasonable

person in the employee's shoes would have felt compelled to resign.' … a reasonable person in [the professor's] shoes would not have felt compelled to resign upon being informed that she would have to resume her regular duties as a member of the faculty of a State university medical school"

c. Baylor University v. Coley- Reassigning due to poor work performance or the like. Case where a professor sued claiming constructive discharge and breach of contract after the professor was demoted and had several of her substantive responsibilities reassigned to poor work performance. The Texas Supreme Court affirmed the jury's denial of both the professor's claims and approved the use of a jury's instruction which stated that an employee is considered to be constructively discharged "when an employer makes conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign".

d. The University of Maryland has formalized as part of its policies the fact that changes to any post- tenure termination policies will only be applied to subsequent appointments (unless the appointee agrees otherwise)

2. 1994- Congress amends Age Discrimination in Employment Act of 1967 that removes exemption that had allowed universities to utilize mandatory retirement age.

   a. What are creative ways institutions have given incentive to tenured professors to retire as their productivity decreased?

      i. Early Retirement Incentive Programs- ERIP

         - What risks are associated with the ERIP?

            1. If professor has a higher salary

            2. Productivity- higher production can take the incentive package and move on, leaving you stuck with those with lower production levels

      ii. Post- tenure review - done as an effort to manage productivity

         - According to a 1996 study, 61% of 680 institutions and by the year 2000, 37 states had established a post- tenure review policy

         - Post tenure review can be incorporated in collective bargaining agreements or faculty handbooks (the contractual approach) or created by state statute or administrative regulation

         - In an effort to manage the productivity of tenured professors, several schools have implemented a system of post- tenure review. This provides opportunities to faculty for faculty renewal. Others use variable pay systems to reward certain types of performances, such as excellent teaching or scholarship. Additional strategies include policies on faculty conflict of commitment and variable workload policies.

         - AAUP finds this controversial; as such, provides list of suggested minimum standards

            1. Reasons for finding this include that faculty find post- tenure review a thinly disguised attempt to discharge tenured faculty

members and replace them with non- tenure track or junior faculty. Others fear that it is a method from which legislators or state coordinating boards monitor/ increase faculty workloads and performance. Lastly, some believe post- tenure review is costly and offers little in regards to worthwhile outcomes.

a. According to sources such as "The Fallout from Post- Tenure Review", the Chronicle of Higher Education. The number of faculty that have received unsatisfactory evaluations is very small and further research shows that negative evaluations don't necessarily have negative consequences.

2. AAUP- in the AAUP's "Post Tenure Review: An AAUP Response", the AAUP sets minimum standards for good practice if a formal system of post tenure review is established. They stress that no procedure for evaluation of faculty should be used to weaken or undermine the principles of academic freedom and cautioned against allowing any general system of evaluation to be used as ground for dismissal or other disciplinary action. In the 1999 version of the "Post Tenure Review: An AAUP Response", they declared that "post- tenure review ought to be aimed not at accountability, but at faculty development" and concluded by saying the standards of tenure dismissal should still be adequate cause.

I. Does faculty compensation in regards to tenure differ depending on the school (i.e. medical school vs. law school)?

1. Medical school because of cost of health care and their salary comes from grants, clinical revenue etc usually have lower compensation as opposed to other schools.

J. What are the differences in tenure rights between private and public universities?

1. Private = a contractual right

a. EX: case of Murphy v. Duquesne- ruled that breach of contract review was appropriate for a case involving a contract between a professor and a university

b. EX: McConnell v. Harvard Univ.- "It is well established that, under District of Columbia law, an employee handbook such as the Harvard University Faculty handbook defines the rights and obligations of the employee and the employer and is contractually enforceable by the courts."

c. When contract is ambiguous, courts will then go to custom at the specific university and outside schools as well

K. How should a termination for cause be accomplished?

1. AAUP 1940 Statement and 1958 Statement detail this:

a. Statement describing the charges in reasonable order against the tenured professor:

b. As per the AAUP RIR memo: (Section Review, Note 5b) Dismissal of a faculty member with continuous tenure, or with special or probationary appointment before the end of the specified term, will be preceded by: (1) discussions between

the faculty member and appropriate administrative officers looking toward a mutual settlement; (2) informal inquiry by the duly elected faculty committee [insert name of committee] which may, if it fails to effect an adjustment, determine whether in its opinion dismissal proceedings should be undertaken, without its opinion being binding upon the president; (3) a statement of charges, framed with reasonable particularity by the president or the president's delegate.

c. Note 5c3- "service of notice of hearing with specific charges in writing will be made at least twenty days prior to the hearing"

d. Then describe him his rights, which include:

   i. Opportunity for a hearing before faculty body

      - As per AAUP RIR memo: Review, Note 5c: A dismissal… the individual concerned will have the right to be heard initially by the elected faculty hearing committee…
      - Note 5c2: the hearing committee may, with the consent of the parties concerned, hold joint prehearing meetings with the parties in order to (i) simplify issues (ii) effect stipulations of facts, (iii) provide for exchange of documentary or other information (iv) achieve such other appropriate prehearing objectives as will make the hearing fair...

   ii. Right of counsel if desired must be mentioned

      - Note 5c6- "At the request of either party or the hearing committee, a representative of a responsible educational association will be permitted to attend proceedings as an observer"

   iii. Right to present evidence/ cross- examination

      - Note 5c9- "… grant adjournments to enable either party to investigate evidence"
      - Note 5c10: "the faculty member will be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. The administration will cooperate…"

   iv. Right to record the hearing

      - Note 5c7- "A verbatim recording of the hearing will be taken and a typewritten copy will be made available…"

   v. Have the opportunity to present himself to governing board of the institution

V. Legal Considerations

To what legal risks does an institution expose itself when it lays off staff or takes other adverse cost- cutting action? How can the risks be anticipated and minimized?

A generation ago, under the traditional "employment at will" doctrine, most state laws gave employers broad latitude to terminate staff members for any reason or even no reason. With rare exceptions, neither federal nor state law impeded the day-to-day termination of employees

or blocked mass layoffs. More recently, however, Congress, state legislatures, and federal and state courts have increasingly restricted employment at will and extended to employees expanded legal rights. Today, employees can challenge layoffs by asserting claims for breach of contract, unlawful discrimination, tortious conduct, violation of employment statutes, and, for employees who belong to labor unions, violation of labor laws and collective bargaining agreements. Below is a further detailed analysis of a few of these claims:

A. Breach of Contract:

1. Asserted employment rights of college and university staff members are set forth in many documents, including appointment letters, employee handbooks, personnel manuals, and written policies. All of these can be claimed, with merit or not, to be part of the employment "contract." Courts and other adjudicators, such as arbitrators, hold institutions liable for denying rights to which employees are entitled as a matter of employment contract law.
2. Thoughtful human resource management involves ongoing attention to the documentary and other underpinnings of employees' potential breach of contract claims. Many institutions present human resource policies in an indexed personnel manual or easy-to-access Web site. Human resource professionals and university counsel should review the entire manual every year or two to ensure that policies are clear, carefully worded, consistent with changes in law and institutional practice, and contain appropriate disclaimers as to their contractual effect.
    a. Ordinarily, it is wise to include in the manual a policy on layoffs. Under the policy, the institution should reserve the right to terminate staff positions for financial or programmatic reasons, and should prescribe standards and procedures for effecting large-scale and department-specific layoffs that become appropriate, while retaining flexibility to address particular circumstances.
3. Often times, employees who face layoffs assert that their supervisors made oral promises of job security. To counteract that, many personnel manuals disclaim oral employment agreements. Below is an illustration from a public university's employee handbook:

    "No one at the University now has or in the past has had the authority to make any binding oral promises, assurances, or representations regarding employment status or security. Any such representations made prior to the effective date of this policy are hereby rescinded and superseded by this policy…"
4. Several steps can help minimize exposure to claims for breach of employment contract.
    a. Personnel policies should be disseminated to all staff members to whom the policies apply. This can be done by including instructions on these policies in the new-employee orientation process and sending periodic reminders to all staff that human resource policies are available on an institutional Web site or through the human resources department.
    b. Managers should be trained on how to apply pertinent personnel policies, and where to turn for interpretive help. At institutions that require managers to evaluate subordinates in writing, managers should take the obligation seriously and see to it that evaluations adequately document performance deficiencies that may bear on termination decisions down the road.

B. Discrimination Claims:

1. It is unlawful to take an employment action against an employee if the action is motivated by consideration of the employee's race, national origin, religion, gender, age, disability or membership in another legally protected category. Although many states and some cities have extensive antidiscrimination laws, discrimination claims are most often grounded in federal law or state law similar to it. For example:
   a. Claims of race, gender, pregnancy, national-origin or religion-related employment discrimination can be brought under Title VII of the 1964 Civil Rights Act or 42 U.S.C. § 1983.
   b. Discrimination on the basis of a disability is actionable under the Americans with Disabilities Act or the Rehabilitation Act of 1973.
   c. The Age Discrimination in Employment Act ("ADEA") protects workers age 40 and over from discrimination on the basis of age.
2. Discrimination claims asserted under state or local law often involve equal protection provisions in the state constitution or claims under a state human rights statute or local ordinance. Most federal, state, and local antidiscrimination statutes also forbid retaliation for making a claim of discrimination. Caution is needed if a candidate for layoff has previously asserted a discrimination claim; evidence is needed to establish that the decision is not retaliatory. Institutions ordinarily want as well to observe their own non-discrimination statements, which in some cases confer protections beyond those required by government.
3. Discrimination is alleged in many contexts.
   a. Layoff plans that incorporate early-retirement or specially negotiated severance arrangements can entail age discrimination issues under the ADEA and the Older Workers Benefit Protection Act ("OWBPA").
   b. The ADEA forbids "involuntary retirement" of persons age 40 and over on the basis of their age (discussed further under "Tenure Issues").
4. If the institution is found to have effected a discriminatory layoff, liability can include back pay, compensatory damages, punitive damages, attorney fees, and equitable relief such as reinstatement.
   a. Some university counsel believe that discrimination claims are the most threatening hazard associated with large-scale layoffs, due to the exposure the claims entail to large judgments and attorney fees.
   b. If a laid-off employee persuades a court that the institution acted based on the employee's age, race, religion or other protected characteristic, the institution would be exposed not only to fees for the services of its own lawyers, but also fees of the employee's lawyers. The amounts an institution may owe in employees' attorney fees can exceed other liabilities associated with employment litigation, and in some observers' view represent the real deterrent to civil rights violations. Even where cases are merely threatened or litigation stops short of a court judgment, the institution in employment claims often must absorb some element of the employee's attorney fees when the claim is settled.

C. Tort Claims:

1. A tort, in general, is commission of a willful or negligent wrong, other than a breach of contract, that causes its victim measurable injury.

    a. In recent years, employment-related tort theories have expanded. In addition to venerable claims such as wrongful discharge and fraudulent discharge, employees in many states now regularly sue for tortious interference with contractual relations, intentional infliction of emotional distress, defamation, breach of the implied covenant of fair dealing, and other claims grounded in tort law. Employers can be liable for compensatory and punitive damages, but usually are not exposed to plaintiff attorney fee liability in such cases.

D. Worker Adjustment and Retraining Notification Act "WARN":

1. A federal law that requires covered employers to give at least 60 days' written notice of "mass layoffs" and "plant closures" to affected employees or their collective bargaining representative, and to state and local monitoring agencies. Virtually all universities and colleges are large enough to come within the definition of a covered employer (which is an institution that has 100 or more employees)

VI. Practical Considerations

Some of the aforementioned considerations may generate organized resistance and adverse public relations. They will likely provoke agitation in the workforce. Layoffs and other cost-cutting measures can result in legal actions for breach of contract, discrimination, and wrongful discharge. They can be challenged on other grounds, too—for example as violations of labor laws, breaches of collective bargaining agreements, or infringements of rights guaranteed by statutes governing reductions in force. Institutions can manage legal risks through intelligent planning, well-designed procedures, and adherence to legally defensible operating standards.

Few questions have so concerned college and university lawyers and risk assessment professionals as how best to manage cost- cutting and layoffs. Employment-related administrative proceedings and lawsuits make up well over half of liability claims asserted against most colleges and universities. Claims related to layoffs and other terminations are proliferating. While there is no way to prevent all such claims, many institutions have learned that effective planning by their managers and counsel can keep exposure within anticipated and manageable limits.

Well-managed colleges and universities exhibit three key characteristics in planning and implementing staff layoffs:

1. Managers use a team approach to decision-making. The team, which includes human resource professionals, lawyers, risk managers, and public affairs specialists, treats honesty and integrity as paramount values, and is sensitive to legal requirements and the institution's interest in stable, fair-minded employee relations.
2. Well-crafted personnel policies are in place before the cost- cutting and layoff process begins. Policies are reviewed in advance for compliance with legal requirements, and are applied with thoughtful regard for consequences and consistency.

3. Managers are attentive to current and potential problem cases where legal risks are foreseeably high. Managers address problem cases early and energetically.

A. Layoffs affect employees entitled to an unusually broad array of substantive and procedural rights; may be contested in the glare of public scrutiny; and will provoke anxiety, suspicion, and other strong emotions in the workforce, because employees accustomed to job security will feel betrayed.

B. Claims data show that a disproportionate percentage of legal claims come from high- risk cases. Defense of these claims tends to be more difficult the longer the problem has festered. Positions harden and the parties become fixed on vindication rather than on reaching sensible resolutions.

1. Experienced administrators identify high-risk cases early in the process and, assisted by the institution's lawyers, take steps to prevent these situations from ripening into major trouble.

C. A layoff plan is unlikely to be an effective strategy if its purpose is to remedy a pattern of deficient or untimely management of weak performance by employees.

1. Generally, layoffs are more defensible as a legal matter if based on programmatic or functional change or economic retrenchment.

D. Below are a few methods which to think about when preparing how to handle reductions in the force and layoffs:

1. Downsizing Do's"

a. Adopt a set of guiding principles that all decisions are assessed by

b. Involving key constituents in the process creates trust

c. Collaborate to show unity among senior officials and communicate, including employees from start

d. Debrief for institutional learning and self assurance

e. Stay prepared

2. Transforming the role of each department

a. Human Resources- from tactical/ transactional work to strategic partner in decisions involving workforce

b. General Counsel/ Legal Department- from strictly a legal advisory system to a more encompassing program where all assets of the university are connected and well informed

THE DOWNTURN'S LESSONS LEARNED

TOUGH ISSUES IN IMPLEMENTING COST-SAVING STRATEGIES:
RIFS, FURLOUGHS, VOLUNTARY SEPARATION PROGRAMS, AND OTHER APPROACHES

June 27-30, 2010

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Some economic barometers suggest that the American economy has commenced a recovery, but unemployment remains high, federal and many state budgets remain deeply in the red, and American universities and colleges – both private and public – continue to face enormous difficulties as a result of what many are now calling the Great Recession. With many endowments at all time lows and state deficits at all time highs, institutions of higher education have faced a gauntlet of unparalleled financial and operational constraints, with an equally profound impact on faculty, other professional and administrative staff, compensation levels and benefits.

Are there lessons to be learned from events of the last 18 months? The economic downturn has created an array of legal and practical risks, problems, and challenges, including: (1) risks of *legal liability* that may be lurking in the array of decisions most institutions have had to make in a hurry, where poorly planned or executed changes can result in significant legal claims and liability, which may defeat the business goals underlying workforce reductions, wage or benefit changes, or other initiatives; (2) challenges of *limited resources* as the troubled economy has sapped many educational institutions of significant assets and funding; and (3) problems of *focus* as university administrators have found themselves expending energy on reducing programs and eliminating positions, at the expense of supporting faculty and staff with ongoing responsibility for addressing forward-looking needs, including the important work of building their institutions and adapting them to the 21st century.

This paper[1] adds to the substantial body of NACUA resource material devoted to restructuring and downsizing,[2] and focuses on cost-saving strategies, relevant legal principles, and lessons learned by many colleges and universities during the most recent downturn.

A. Voluntary Separation Programs and Severance Benefits

When colleges and universities confront a need to reduce the workforce, voluntary separation programs (VSPs) for several reasons can be advantageous either as a stand-alone program or as part of a process that may eventually include involuntary separations.[3] Institutional needs and objectives should drive the structure and design of any restructuring or VSP. Especially when augmented by other alternatives to an involuntary reduction-in-force (RIF), voluntary separation programs can achieve substantial long-term cost savings. Also, the voluntary nature of a VSP can substantially reduce the liability and litigation risks that are typically associated with an involuntary RIF.

Although a VSP requires careful planning, a VSP can be easier to administer, with a more limited impact on the institution and a more modest investment of time and resources than an involuntary RIF. Many employers also find that VSPs involve significantly less turmoil and morale damage than involuntary separation programs. Finally, the great variety of different types of VSPs often translates into significant flexibility in tailoring a particular program to the available time and resources, and the challenges responsible for the need to reduce headcount, while also focusing on the retention of employees who are important to the organization's post-VSP objectives.

In every case, one must clearly understand the goals to be accomplished by a VSP and, more importantly, to determine what employees and what resources are needed to accomplish the

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[1] The authors acknowledge the assistance of Stephanie Christiansen-LaRocco and Gwendolyn B. Morales, both associates in the labor and employment practice of Morgan Lewis & Bockius, who provided significant research assistance and made other important contributions to parts of this paper.

[2] The following are among the significant number of extremely helpful NACUA papers in recent years that have touched on restructuring and downsizing issues: NACUA Notes, *Furloughs: The New "Normal"?* (March 23, 2010) (http://www nacua.org/nacualert/docs/furloughs.asp); Carey A. Dewitt and Kathleen A. Rinehart, *"I Feel Your Pain" – Reductions in Force and Furloughs: Effective Planning and Implementation* (June 24-27, 2009) (http://www nacua.org/fileStreamer/default.asp?file=/outline/docs/xiii_financial_aspects_of_instl_mangmnt/xiii-09-06-1.doc); NACUA Notes, *Staff Layoffs and Reductions in Force: Organizing the Process and Managing the Legal Risk* (February 3, 2009) (http://www.nacua.org/nacualert/docs/ StaffLayoffs.asp); Randolf M. Goodman, Designing and Implementing Effective Faculty Early Retirement Programs (March 3-5, 2004) (http://www.nacua.org/ fileStreamer/default.asp?file=/outline/docs/xi_faculty/xi-04-03-9.doc); Thomas P. Hustoles and Ellen M. Babbitt, *Planning and Implementing Institutional Reductions in Force and Other Personnel Cost-Saving Measures Involving Administrators and Staff* (March 3-5, 2004) (http://www nacua.org/fileStreamer/default.asp?file=/outline/ docs/xxii_personnel/xxii-04-03-4.doc); Ellen M. Babbitt, *RIFs, Downsizing and Restructuring: Recent Developments With Respect To Waivers, WARN, and Written Layoff Policies* (March 3-5, 2004) (http://www. nacua.org/fileStreamer/default.asp?file=/outline/docs/xix_labor_law/xix-01-06-1.doc); Ellen V. Benson and David L. Raish, *Faculty Retirement Incentives* (March 21-23, 2002) (http://www.nacua. org/fileStreamer/default. asp?file=/outline/docs/xi_faculty/xi_02_03_14.doc).

[3] Portions of this section's discussion of Voluntary Separation Programs and other sections below, including the sample RIF Procedure set forth in Figure 1, are derived from papers and other resource materials created by Morgan Lewis Workforce Change, which is devoted to the management of employment, labor and benefits issues involving workforce reductions, mergers, acquisitions, startups, and other types of business restructuring.

college or university's prospective institutional needs. This requires a concrete assessment of the existing employee population, required cost reductions, what post-RIF structure best serves the institution's prospective educational objectives, what employee skills and functions are needed, and how the VSP may augment or detract from other changes or strategic initiatives that are under consideration at the same time.

In particular, evaluating whether or how to implement a VSP should involve the careful consideration of several important tradeoffs, challenges and options:

Time and Administration. For institutions confronted with an urgent need to immediately reduce headcount, perhaps the biggest downside of a VSP is the time associated with creating the program, making the program available to employees, and giving employees sufficient time to make a voluntary decision about whether to participate in the program. Most VSPs involve separation benefits conditioned on the employee's execution of a release, which generally means employees must be given at least 45 calendar days in which to consider whether they are willing to sign a waiver and release agreement, with an additional 7-day post-execution revocation period. (These periods are required relative to the waiver of federal age discrimination claims in most "group" settings under the Older Workers Benefit Protection Act, also called "OWBPA." *See* Part E below.) More time is needed to create the program, ensure it is consistent with institutional needs, adequately communicate details to managers, supervisors and employee-participants, and administer relevant benefits.

People You Can't Afford to Lose. A frequent concern when evaluating a potential VSP is the risk that too many employees will decide to participate in the plan, or that the people who elect voluntary separation will include highest-performing employees who are most critical to the organization. An array of plan design options can heavily influence the extent to which a VSP appropriately balances the need to reduce headcount against the need to safeguard against the loss of those individuals whose retention is deemed important. These options include: (i) the fundamental judgment concerning what benefits and how much money will be offered as an inducement to promote participation by a sufficient number of employees; (ii) possible design of the VSP with explicit eligibility criteria limiting participation to particular levels, positions, departments and/or locations (or excluding from participation certain levels, positions, departments and/or locations); (iii) retention benefits or inducements offered to certain individuals deemed most critical to the institution; and/or (iv) devising a two-stage VSP where interested employees apply for participation in the program (*i.e.*, seeking voluntary separation in exchange for severance pay and other benefit enhancements) but where actual participation is subject to management review and approval. Such a two-stage process, though affording protection against undesirable departures, adds a level of complexity to the program along with legal and practical tradeoffs that warrant careful consideration in advance. For example, too much management involvement in accepting or rejecting employees for participation may prompt employees to challenge the "voluntariness" of the program. Employee-applicants excluded from participation may initiate claims alleging, for example, that they were unlawfully excluded for discriminatory reasons. Also, a number of practical management challenges can result from continued employment of substantial numbers of people who have expressed their desire to leave the organization, based on a potential separation package that was ultimately denied to them. NOTE: If an existing tax-qualified retirement benefits plan provides early retirement or exit incentive benefits as part of the plan, then the Employee Retirement Income

Security Act (ERISA) and the Internal Revenue Code (IRC) may impose new or different restrictions that would prevent eligible employees from participating in the plan.

What Type of VSP? There is enormous variation among different voluntary separation programs. In many cases, VSPs are structured as an "early retirement" benefit that can be incorporated into an existing retirement benefit plan, which is most common when dealing with a defined benefit retirement plan (*i.e.*, where participating employees can elect "early" retirement while avoiding certain benefit reductions otherwise provided in the plan). VSPs can also be structured where the retirement "incentive" – for example, with eligibility depending on a combination of age and service – involves a variety of benefits not part of a formal retirement plan. *See, e.g., Gutchen v. Bd. of Governors of the Univ. of R.I.*, 148 F. Supp. 2d 151, 153 (D.R.I. 2001) (University offered a voluntary retirement incentive plan including a health benefit stipend which retirees would not otherwise receive). And many VSPs have no relation to retirement but, rather, consist of a benefits package designed to provide sufficient inducement for an adequate number of employees to elect voluntary separation. These benefits can include severance pay, employer-paid medical insurance (provided for a specified period after separation), stock options, outplacement assistance, and innumerable other types of benefit enhancements or supplements.

Criteria – Who Is Offered the Program? As noted above, there is a wide variety of different types of VSPs, which in part may dictate the particular employees who will be deemed eligible for the program. If a VSP takes the form of an early retirement option built into a tax-qualified retirement benefits plan, then all eligible participants in the plan would have a right of participation, subject to whatever more narrow requirements may be specified in the plan. However, employers otherwise have significant discretion to tailor a voluntary separation program to the college or university's particular needs. As noted above, the eligibility criteria can involve a combination of years or service and/or age. *See, e.g., Gutchen*, 148 F. Supp. 2d at 153 (voluntary retirement incentive plan offered to faculty and staff who: (1) were employed for a minimum of twenty hours per week; (2) were fifty-eight years of age or older; and (3) completed at least ten years of service at the University). However, care must be exercised, with advice from legal counsel, to ensure that any age-based criteria do not violate federal and state prohibitions against age discrimination. *See, e.g., Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 833 (9th Cir. 2000) (plaintiffs alleged employer violated the ADEA by offering an early retirement incentive program to members of one retirement plan, whose average age was 55, and not to members of another, whose average age was 60). Other criteria, if adopted for legitimate reasons, can limit VSP participation to particular levels, positions, departments and/or locations or can exclude from participation certain levels, positions, departments and/or locations.

Preserving "Voluntary" Participation. A long line of legal decisions highlights the need to ensure that any voluntary separation program remains "voluntary," which is important for the VSP to reduce the legal and litigation risks that are frequently associated with involuntary RIFs. It is important to give employees clear and effective communications concerning the program, and for employees to have a reasonable time period in which to decide whether to elect voluntary separation. (*See* the discussion of OWBPA requirements in Part E below.) If employees are offered a "voluntary" separation window which may be followed by involuntary separations (for example, which may take place if too few employees volunteer for participation), it is also important to avoid having supervisors and managers give individual employees "hints" about whether or not particular people may be later selected (or protected) as part of an involuntary RIF.

Predicting the Future? Voluntary separation programs can involve several potential problems involving future developments. First, many institutions have found themselves inadvertently creating a conveyor belt of successive, increasingly lucrative separation "incentives" which, over time, will substantially decrease the likelihood of meaningful employee participation in any program (based on an expectation there will be an even better exit incentive package offered in the future). Second, other employers have encountered problems and litigation concerning representations that there would NOT be any "better" future exit incentives, which can lead to legal claims if the college or university at some future point makes available some type of benefits enhancement not previously offered. Finally, a threshold communications question is the extent to which the employer when announcing a VSP should express any position concerning whether future involuntary separations may or will occur following the VSP's implementation. At a minimum, care must be taken to avoid making any statements that may be misleading or inaccurate concerning involuntary separations or other events that may or may not take place in the future.

Cost – How Much is Enough? The most difficult judgment to make, when creating any VSP, is determining how much cost should be associated with the program and what types of benefits or enhancements should be offered. Relevant factors here can include the structure of the College or university's existing benefits programs; what employee groups and how many employees would be potentially eligible for certain benefit enhancements; what other employment options are available to employees at particular locations where any VSP might be adopted; what voluntary separation programs have been offered in the past and/or elsewhere within the college or university and with what levels of participation; what separation programs have been offered by other employers in the same industry or at particular locations; and what cost represents an appropriate balance between the need to reduce headcount and the financial challenges driving the need for a headcount reduction in the first place.

Severance Benefits. In spite of the prevalence of circumstances that trigger severance benefits, employers often overlook important compliance and administrative issues when contemplating workforce reductions and other major corporate transactions. Important issues to remember include:

- *ERISA Welfare Plan Compliance*. Many formal and informal severance programs can constitute "employee welfare benefit plans" subject to ERISA (the Employee Retirement Income and Security Act of 1974), excluding public colleges and universities that are not covered by ERISA.[4] Private employers should consider the extent to which any severance program is subject to ERISA and, if so, how to comply with its requirements. Being subject to ERISA in many respects can be desirable. If litigation arises in connection with severance benefits provided through an ERISA plan, state law claims may be pre-empted and (assuming claims and appeals procedures are followed) a decision to deny severance benefits may receive a deferential standard of review by a reviewing court. *See Morlino v. Staten Island Univ. Hosp.*, No. 95 CV

[4] Under ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1), Title I of ERISA does not apply to a "governmental plan" which is defined in relevant part as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." ERISA § 3(32), 29 U.S.C. § 1002(32).

3891, 1998 WL 160937, *8-9 (E.D.N.Y. Apr. 1, 1998) (finding plaintiff's state law claim for breach of separation agreement pre-empted by ERISA).

- *Amending/Terminating Severance Benefits*. The case law generally is favorable concerning an employer's right to amend or terminate a severance plan before (and even shortly before) the event that would otherwise cause employees to be eligible for severance benefits. *See Kulesza v. N.Y. Univ. Med. Ctr.*, 129 F. Supp. 2d 267, 271-72 (S.D.N.Y. 2001) (holding that defendant was free to amend its severance plan to exclude employees separated due to the termination of an affiliation contract from receiving severance benefits, where defendant amended the plan six weeks before the termination of such contract).

- *Potential Offset/Coordination with WARN*. Although employers generally do NOT receive credit under WARN for severance pay that is required under a preexisting benefits plan (see "Top Four WARN Mistakes"), a severance plan can be created or amended so the amount of required severance pay is reduced or offset by the advance written notice that is required to be received by the employee in advance of a layoff or termination. Such careful drafting can help ensure that the employer both satisfies its WARN obligations and is not unintentionally or overly generous in providing severance pay at a time when it can least afford to do so.

- *Compliance with 409A*. Employers should be careful to ensure that severance arrangements (severance plans, employment agreements that provide severance pay, etc.) comply with the deferred compensation rules set forth in 409A of the Internal Revenue Code. In some instances, severance pay and benefits may constitute "deferred compensation" for purposes of 409A and need to satisfy 409A's technical payment timing rules and other requirements (including the requirement that payments to key employees of a public company be delayed for six months following a separation from service). In other instances, it may be possible to structure a severance arrangement to fit within one of 409A's exceptions and avoid the need to comply with 409A. There are potentially serious tax consequences for failing to comply with 409A (immediate inclusion of severance pay in income and the employee being subject to a 20% excise tax on the severance pay) so it is important to ensure that a severance arrangement either complies with 409A or fits within one of the exceptions.

Public University Early Retirement Incentives. Public colleges and universities, though having greater latitude in some areas (see note 4 above), may lack the flexibility enjoyed by private institutions to engage in voluntary separation plans or other early retirement programs. This is particularly the case where public higher education institutions must rely directly on the State treasury for any funds for that purpose. In California, the Legislature established by statute a mechanism by which the California State University could extend a golden handshake to employees in the form of an additional two years of service credit in return for early retirement. The triggering mechanism includes a determination by the Governor that the best interests of the state would be served by encouraging early retirement of designated employees and that sufficient economies could be realized to offset the cost to the employing state institution resulting from the award of the credits. The employing agency, in this case CSU, had to fund the golden handshake. The Governor invoked the statute and made the necessary findings in May

2004. CSU's faculty union has expressed a desire to negotiate a golden handshake in the current fiscal crisis as an alternative to layoffs.

B. Involuntary Reductions-in-Force

In the current economy, many educational institutions have been required to implement various types of involuntary reductions-in-force affecting different populations ranging from full-time and part-time faculty, research personnel, administration, and maintenance employees, among others.

In every case, one must clearly understand the goals to be accomplished by a RIF and, more importantly, to determine what employees and what resources are needed to accomplish the employer's forward-looking institutional needs. This requires a concrete assessment of the existing employee population, required cost reductions (if any), what post-RIF structure best serves the employer's prospective organizational objectives, what employee skills and functions are needed, and how the RIF complements other changes or strategic initiatives that may also be under consideration at the same time.

There is enormous variation among types of RIFs and their underlying causes and objectives. Sometimes, a RIF involves a single facility shutdown or plant closing. Other RIFs may entail the elimination of unnecessary personnel without any structural or organizational changes. More broad-based RIFs may take the form of a complete restructuring, with a combination of department eliminations, shifts in resources, course or program consolidations, and the creation of other new departments or programs. Varied talent management demands often result in RIFs and reductions in some areas while other areas, within the same institution, are hiring and expanding.

An effective RIF requires more than sound strategy; it also requires effective implementation – and with careful coordination between college or university leaders, human resources and benefits professionals, communications and media relations officials, potential outplacement services, and experienced in house and outside legal counsel, among others. After deciding that a RIF is necessary, the institution should establish a RIF management team that will have overall responsibility for planning and implementing the RIF and related organizational changes. The RIF management team should include key individuals from affected departments, human resources and benefits representatives, legal counsel, communications and media relations professionals. This committee will be responsible for the planning and implementation of the RIF from beginning to end, ensuring that the RIF is conducted in a fair and consistent manner to minimize associate risks and achieve organizational goals, and coordinating the RIF with other ongoing and planned workforce change initiatives.

Among the most scrutinized aspects of any workforce reduction are the reasons for implementing the RIF, the criteria applied when selecting employees for layoff or employment termination, and the process followed when RIF selection decisions are made, reviewed and implemented. All of these areas are fraught with perils and pitfalls that can undermine objectives and/or result in significant liability even for the most well-intentioned employers:

Constitutional Due Process Requirements – Public Colleges and Universities. Most employees of public college and universities likely have property rights in their employment. As such, they likely are entitled to some due process protections if subject to a layoff or RIF.

Public employees' federal constitutional rights to due process depend upon their having had a property right in continued employment. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). If they have a property right, the State may not deprive them of this property without due process of law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985). "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .'" *Loudermill*, 470 U.S. at 538, *citing Roth*, 408 U.S. at 577. However, a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. *Castle Rock v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796 (2005), *citing Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904 (1989).

The Court has held that an essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950). The Supreme Court has described "the root requirement" of the due process clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971). The requirement of a pretermination hearing arises from a balancing of interests: the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. The pretermination hearing need not be elaborate and the Court has endorsed something less than a full evidentiary hearing.

However, *Loudermill*, the seminal case in this area, involved a dismissal for cause and that fact played a role in the Court's conclusion that due process required both a pretermination as well as an post-termination evidentiary hearing mandated by state law. The U.S. Supreme Court has not expressly addressed the due process rights of a public employee who is separated from employment in a layoff or reduction in force. A number of federal circuit and district courts have addressed this situation, albeit with somewhat varying holdings.

For many years, a number of federal and state courts have recognized what is often called the "reorganization exception" to due process hearings. The rationale behind this exception was well stated in *Mayfield v. Kelly*, 801 F. Supp. 795 (D.C. Cir. 1992). It reviewed the clashing interests that the *Loudermill* decision sought to balance and concluded:

> These interests weigh differently in a RIF than they do in a removal for cause. The employee's interest in a for-cause dismissal involves more than the position at stake because of the stigma that results from a for-cause dismissal and the problems such dismissal might create for future employment opportunities. Although a RIF results in significant hardship for the terminated employees, it does not pose these additional problems. The governmental interests in removing employees during a RIF are also quite

different from the usual for-cause dismissal. A RIF involves a large number of employees – in these cases, over one hundred – for whom it is impossible to have pre-termination hearings.

However, in *Dwyer v. Regan* 777 F.2d 825 (2d Cir. 1985), Dwyer, an employee who had been employed by the retirement system for almost 20 years, claimed he performed capably but that a plan was hatched by the head of the system to remove him without cause and without a hearing and that claims by Regan that the elimination of Dwyer's position was based on a fiscal crisis were subterfuge. The Court of Appeals, while acknowledging the "reorganization exception," upheld Dwyer's claim that he had been denied due process by not providing him a pre-termination hearing, reasoning:

> We recognize, of course, that a state may well, from time to time, decide to make its operations more efficient by abolishing or consolidating positions or by implementing a considered substantial reduction in its work force. We are not persuaded that the state must routinely provide hearings for employees whose positions are targeted for elimination whenever the state adopts such efficiency measures. Where, however, as here, there is no indication that the state has undertaken substantial measures such as these but rather is alleged to have targeted a single employee for termination, we hold that if the state has a due process obligation to provide a hearing prior to removing that employee from his ongoing position, and if the employee protests the notice of elimination of his position and contends that it is but a sham and pretext for the deprivation of his property right, the state must be prepared to grant the employee some kind of hearing prior to the termination of his employment.

In *Washington Teachers' Union Local #6 v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the court sustained the denial of pre-termination hearings to teachers who were part of a RIF affecting 400 teachers. The court weighed the factors identified in *Loudermill* and in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976), and concluded that pre-termination hearings were not required. It relied in large part upon the principle that "post-deprivation hearings suffice in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'"

A somewhat different tack was taken in *Allen v. City of Beverly Hills*, 911 F.2d 367 (9th Cir. 1990). There, the court looked at whether the employee had a property right in continued employment in the face of a layoff. Given the broad discretion enjoyed by the City in making layoff decisions, the court reasoned there was no entitlement to continued employment in such circumstances and, hence, no property right or entitlement to a hearing. Most courts have not taken this approach. Rather, they have concluded that the laid off employees had a property right but that due process did not require a pre-termination hearing. *See American Federation of State Etc. Employees v. County of Los Angeles*, 146 Cal. App. 3d 879, 194 Cal. Rptr. 540 (1983): "Given the text of rule 19, . . . it is clear that no county employee has a legitimate claim of entitlement to be free from layoff or reduction in position when reasons of economy or lack of work eliminate a need for the position. Due process does not demand a pre-removal hearing in the absence of a protected interest or when the circumstances precipitating removal are general to the employing entity."

But in a recent Ninth Circuit decision, *Levine v. City of Alameda*, 525 F.3d 903 (9th Cir. 2008), the court took a very straightforward approach to due process, concluding that the laid off employee had a property right in continuing employment under the due process clause and that this entitled him to a pre-termination hearing, which he had not been given. Levine had claimed his layoff was a pretext and that the real reason for his layoff as a property manager was that his supervisor didn't like him. As well, this appeared to be a one person layoff. Arguably, then, this holding can be distinguished from those relying on the "reorganization exception." But the court did not distinguish this case on its facts. Rather, it simply concluded that the deprivation of a property right required a pretermination hearing.

It behooves university counsel to carefully examine the case law in his or her jurisdiction to ascertain the tenor of both federal and state decisions on due process rights of public employees separated from employment in layoffs and RIFs. Where the layoff is large-scale and there are no claims of pretext, most courts have concluded that pre-termination hearings are not required, particularly when post-termination hearings, whether in the form of arbitrations or statutory hearings, are available. Where the layoff focuses on one or a few individuals with claims of pretext, the prevailing case law tends to support the right to a pretermination hearing, assuming one was requested. In instances of broad layoffs where a one or a few individuals claim pretext, court decisions are less uniform. Some find no need for any pretermination hearings. *Franks v. Magnolia Hospital*, 888 F. Supp. 1310 (N.D. Miss.1995), *affirmed without opinion*, 77 F.3d 478 (5th Cir. 1996). But particularly where post-termination proceedings appear inadequate, denial of a pre-termination hearing may prove fatal. *Lalvani v. Cook County*, 396 F.3d 911 (7th Cir. 2005).

Discrimination Claims. Employees who are laid off or terminated may assert claims of unlawful discrimination (based on age, sex, race, color, national origin, religion or other protected characteristics) or retaliation. Discrimination claims may be based upon claims of disparate treatment, which requires a showing of intentional discrimination, or disparate impact, by arguing that selection criteria and/or the RIF process were not logically connected to the stated objectives. *See, e.g., Anderson v. Okla. State Univ. Bd. of Regents*, 342 F. Appx. 365, 366-67 (10th Cir. 2009) (plaintiff terminated in a RIF alleged that the RIF was a pretext for terminating him in retaliation for reporting an affair between his supervisor and another employee); *Herrero v. St. Louis Univ. Hosp.*, 109 F.3d 481, 483-84 (8th Cir. 1997) (plaintiff terminated in a RIF alleged that her termination was due to discrimination by, inter alia, arguing that the employer lacked adequate criteria for determining those employees to be terminated). In a disparate impact case under Title VII, if the employee establishes a disparate impact, the university must show that the practice was job-related and consistent with business necessity. The employee may still prevail if he or she can establish that an alternative employment practice with less impact was available but not adopted by the university. In ADEA cases, if the employee establishes a disparate impact, the university may nonetheless prevail if it is able to show that the practice in question was based upon a reasonable factor other than age.

RIF Procedure – Getting it Right. The workforce reduction procedure warrants special attention (see Figure 1 – Sample RIF Process, next page) and the reasons supporting a RIF, selection criteria to be applied, the RIF process, and the explanation underlying every individual's selection should be documented in writing.

Implementation – Getting it Wrong. Legal claims in many cases stem from RIF-related deviations from the employer's own RIF criteria and/or procedure, which can arise from missed steps in the process, application of the wrong criteria, the continued employment of individuals whose retention cannot be reconciled with the RIF selection criteria, and/or disagreement among decision-makers concerning who should be selected and/or why particular selections were made.

What Happened? In some cases employers have difficulty even ascertaining, after-the-fact, what criteria were applied, what procedure was followed, and/or who made particular selection decisions.

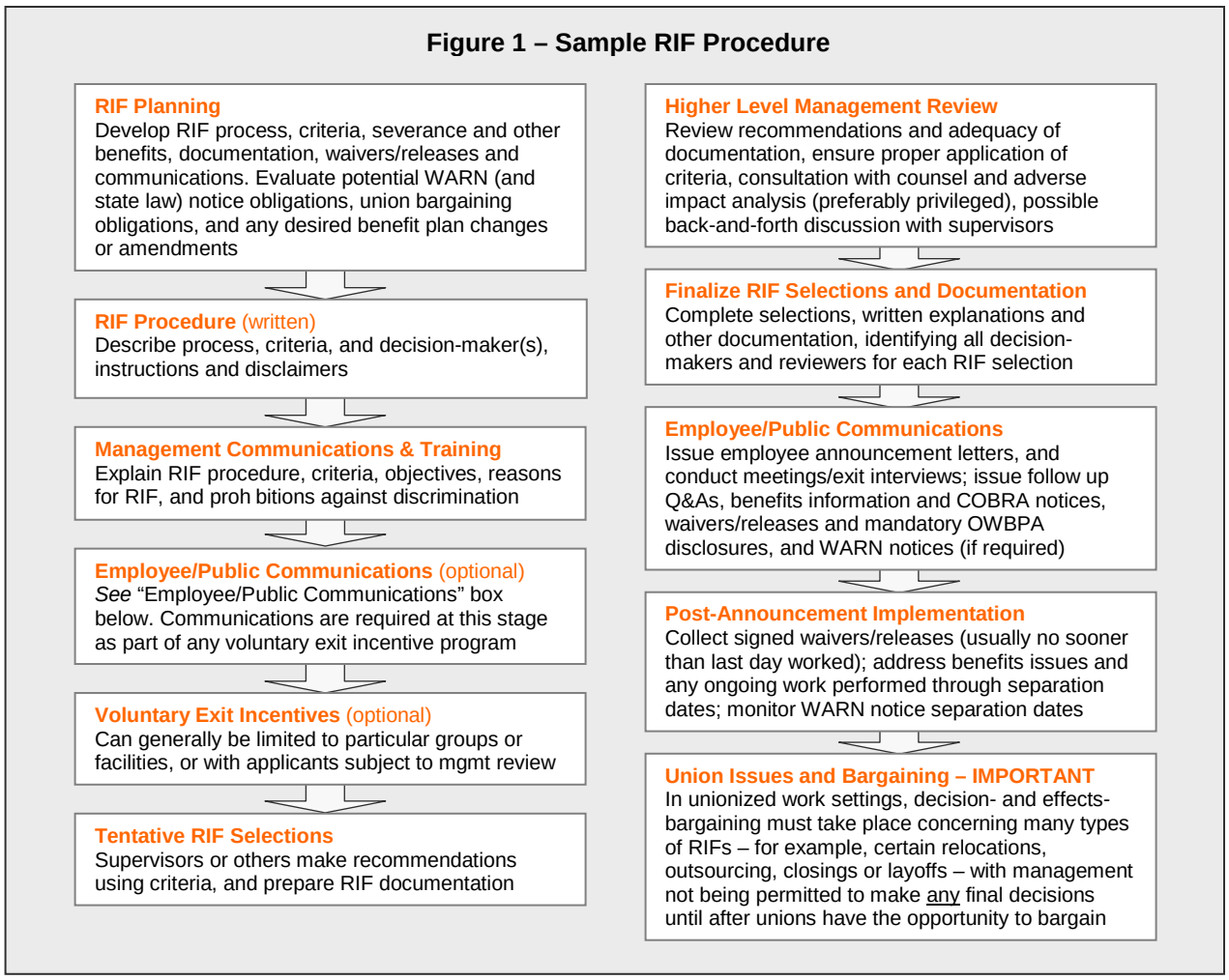
Performance Evaluations. Discrepancies between employee performance evaluations (assessing past performance) and any new or different RIF-related performance assessments emerge in countless legal challenges to RIF selection decisions.

Bad Documentation. Inadequate or incomplete documentation, or inaccurate statements in RIF-related documentation, can independently give rise to RIF liability, particularly since many RIF-related claims can be litigated years after-the-fact when decisionmakers are unavailable, or when they no longer recall what was done and why. However, thorough and precise documentation of the decision making process for each employment decision can be crucial in defending against challenges to RIF-related terminations. *See Naval v. Herbert H. Lehman Coll.*, No. 97 CV 6800, 2004 WL 3090578, *11 (E.D.N.Y. Sept. 15, 2004) (granting summary judgment to employer where in opposition to plaintiff's allegation that his national origin was the reason for his termination, defendants offered "overwhelming evidence that budgetary constraints, academic qualifications, and fiscal structure explain each contested personnel decision").

Statistics. An enormous number of RIF lawsuits center around statistics concerning ages and other protected characteristics of employees who were selected and not selected for inclusion in the RIF, making it essential to subject RIF recommendations to a statistical "adverse impact" analysis, preferably in the context of privileged attorney-client RIF consultation.

Training and Review. Many RIF problems stem from the failure to have effective training of managers, supervisors and other decision-makers concerning relevant criteria, the RIF process, how to prepare effective documentation, and the existence of legal prohibitions against discrimination. *See, e.g., Smith v. Thomas Jefferson Univ.*, No. 05-2834, 2006 WL 1887984, *6 (E.D. Pa. June 29, 2006) (plaintiff terminated in a RIF alleged that defendant failed to comply with its own internal policy governing RIFs and that there was thus an issue of material fact as to the true reason of her termination). Effective documentation is especially important to permit meaningful review of RIF selection recommendations by higher level management, which should be done in every workforce reduction.

Figure 1 – Sample RIF Procedure



Age-Related Remarks. A surprising amount of RIF litigation still arises from alleged "smoking gun" evidence of discrimination centering around inappropriate references to age, sex, race, color, national origin or other "protected" characteristics. *See, e.g., Smith*, 2006 WL 1887984 at *7 (plaintiff terminated in a RIF alleged that her supervisor had made discriminatory comments about ethnic minorities, indicating that the RIF decision was discriminatory and plaintiff's termination was a guise for racial animus).

C. Furloughs and Other RIF Alternatives: California State University – A Case Study

There are significant potential advantages to implementing alternatives to a reduction-in-force. Possible alternatives include hiring freezes, attrition, job sharing arrangements, hours reductions, salary reductions, temporary shutdowns, voluntary leaves of absence, expense reduction campaigns, a moratorium on compensation increases, voluntary separation programs, and early retirement incentives. Sometimes, these can be implemented in lieu of a RIF. In other cases, they can reduce the number subject to a RIF. In most cases, RIF alternatives may reduce or eliminate the legal risks associated with involuntary separations, and decrease morale problems.

During the last year and a half, many colleges and universities have chosen to institute furloughs, including California State University (CSU). The furlough program adopted at CSU is

described as a case study in this section, and additional materials pertaining to the CSU furlough program are contained in the Appendix.

Furloughs Defined. At CSU, furloughs are considered temporary, mandated periods of time off work without pay. They do not affect employment status, health benefit eligibility, or pay rates for retirement benefits.

Establishing the Legal Bases for Furloughs. While most colleges and universities have long had authority to impose RIFs and layoffs and programs to implement them, many found themselves without a program and often lacking clear authority to impose furloughs. In California, the Legislature long ago promulgated a statutory scheme governing layoffs at the California State University in the California Education Code. *See* Cal. Educ. Code §§ 89550, *et seq*. As well, CSU's collective bargaining agreements with its faculty and staff have long contained layoff provisions that supersede the statutory scheme and set forth in considerable detail the manner in which RIFs are to occur and the effects bargaining which must take place.

But neither the California Education Code, nor the collective bargaining agreements, nor even CSU's administrative regulations promulgated by its Board of Trustees addressed furloughs. When, in February 2009, the State Legislature reduced its tentative appropriation to CSU for the 2008/2009 fiscal year, already in progress, and the upcoming 2009/2010 fiscal year by more than $500 million, CSU determined that furloughs might be one of the mechanisms to be used to address this profound budgetary reduction.

CSU set about promulgating administrative regulations governing furloughs for its management and non-represented employees. *See* attached Title 5, California Code of Regulations § 43200. As well, CSU initiated negotiations with the various unions representing its employees since furloughs appeared to be mandatory subjects of bargaining. (It is worth noting that, under California labor law governing public employees, layoffs are not mandatory subjects of bargaining.)

With the fiscal year about to commence on July 1, 2009, time was of the essence in negotiating furlough agreements. Ultimately, not all bargaining units agreed to furloughs. Since CSU's layoff scheme is almost entirely built on seniority, it appears that in a number of instances bargaining unit employees with greater seniority successfully voted against furloughs, preferring to retain their salaries and accept layoffs of junior members. Nonetheless, most of the bargaining units, including the faculty unit, voted in favor of furloughs. Attached are the furlough agreements CSU reached with the California Faculty Association and the California State University Employees' Union, the exclusive representatives for, respectively, the faculty and staff bargaining units. These are available online as well: Furlough Agreement with CSUEU at .calstate.edu/LaborRel/Contracts_HTML/CSU-CSUEUFurlough.pdf; Furlough Agreement with CFA at .calstate.edu/LaborRel/Contracts_HTML/CFA-Furlough-Agreement.pdf.

Communicating: "Can You Hear Me Now?" Throughout this entire budget crisis, the CSU Chancellor and staff have maintained open lines of communication with CSU employees, spread throughout the length and breadth of California on 23 campuses. On some occasions, the Chancellor has sent emails to all CSU employees explaining the budget situation. In other instances, and on a more regular basis, employee updates have been posted on the systemwide

webpage at .calstate.edu and made available to the campuses for further distribution. All of these communications have been placed on the web for easy access, at ://www.calstate.edu/executive/communications/index.shtml. The attached July 8, 2009 Employee Update, for example, discussed the magnitude of the impending budget cut for the 09/10 fiscal year and the status of furlough negotiations.

As well, each of the 23 campuses has established its own communications network to address furlough issues and, with a state budget deficit that still looms large, layoffs of management and staff personnel with its employees and students. On April 23, 2010, the president of the Fresno campus announced layoffs of 46 employees because of the continuing crisis. *See* ://www.fresnostatenews.com/2010/04/budget-reductions/.

The University is not the only institution communicating with its employees about furloughs and layoffs. CSU employees are in thirteen bargaining units. These include bargaining units for faculty, clerical and administrative support, technical support, academic professionals, police, physicians and dentists, among others. Many of the unions maintain their own web pages and they have posted their own FAQs on furloughs, layoffs and the latest developments in the formulation of the State budget. See CSUEU's Layoffs FAQ 2010 at ://www.csueu.org/Home/BudgetCentral/tabid/902/ctl/Details/mid/1900/ItemId/553/Default.aspx. Obviously the messages reaching employees from these various sources are not always consistent.

Advantages and Disadvantages of Furloughs. The advantages of furloughs are evident when compared to the two most viable alternatives to significantly cutting costs: RIFs or layoffs and reductions in pay. Furloughs mean that employees retain their jobs or that fewer employees are laid off than otherwise would be the case. Universities hope that an improving economy will limit the need for RIFs and permit them to restore furloughed employees to full employment status. Furloughs avoid the necessity to let employees go with the obvious headaches associated with recruiting new employees as the economy recovers. A major advantage furloughs usually offer over a straight salary reduction is that furloughed employees often retain all or most of their benefits with no reduction, such as health coverage and retirement benefits. This has been the case at CSU.

But furloughs present challenges as well. Perhaps this can be shown graphically by looking at the furlough calendar for Fresno State, one of the CSU campuses. There are administrative/academic closure days, state shutdown furlough days, administrative furlough days, academic furlough days and more. ://www.csufresno.edu/facilitiesmanagement /documents/adminfurloughcalendar11.09.pdf

The biggest challenge is managing furlough days for faculty while maintaining classes on as normal a schedule as possible. According to the CSU/CFA furlough agreement, campus presidents may designate specific furlough days as campus closure days but for instructional faculty these campus closure days are limited to six of the 18 furlough days faculty agreed to take. The remaining furlough days are scheduled by mutual agreement between each faculty member and a campus administrator. While efforts have no doubt been made both by individual faculty and CSU campuses to limit the impact of faculty furloughs on class sessions, there has of course been an impact. Faculty are permitted to take furloughs on days when they would otherwise teach. The complexity of the process is reflected in a FAQ web page posted by CFA, the faculty union. *See* ://www.calfac.org/allpdf/Budget_09_10/FAQ_onfurlough_1005.pdf.

The student body organization at San Diego State University, another CSU campus, administered a survey of student attitudes toward furloughs in December 2009, as reported in the San Diego News Network. ://www.sdnn.com/sandiego/2009-12-09/politics-city-county-government/sdsu-student-survey-shows-furloughs-take-toll-on-education/print/.

It was reported that 6,671 students responded to the survey and 5,100 responded during the first 24 hours it was made available on line. The results included the following: 86.7% responded that faculty had scheduled furloughs on instructional days; 62.9% stated that course material was crammed into insufficient instruction time; 55.9% indicated there had been a lack of instruction on required course material; 44.1% reported that faculty were less available for office hours and email communications; and 63.4% stated that faculty did not offer alternative instruction on furlough days. Apparently, a common theme in the responses was that students felt they were paying more for less. At the same time CSU had instituted furloughs, it had raised student fees a significant amount to cover the budget deficit.

While no survey data is available, campus administrations have also been adversely affected by furloughs. They are in many respects a very inefficient way to manage affairs. At this point, with hope of an increase in State funding for the 2010/2011 fiscal year, CSU is not planning to continue its furlough program beyond June 2010.

Furloughs and FLSA. A significant legal issue that colleges and universities that have implemented furloughs have had to confront is the treatment of employees exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) . Furloughing exempt employees may endanger their status as exempt employees, thereby possibly exposing the university to overtime pay.

As a general rule, to be an exempt employee under FLSA, an employee must perform executive, professional or administrative duties, and must meet the "salary basis test." The salary basis test requires the employer to pay the employee not less than $55 per week, exclusive of board, lodging or other facilities, *see 29* CFR § 541.600, and the employee must receive a predetermined compensation for any week in which the employee works – without regard to the number of days or hours worked and not subject to reduction because of variations in the quality or quantity of the work performed. The regulations further provide as follows:

> An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

29 CFR § 541.602. In other words, if a university furloughs an exempt employee for part of a workweek, and deducts from the employee's salary a proportional amount, the university may jeopardize the employee's exempt status. That would entitle the employee to compensation for all hours worked, and overtime pay as well, if employee worked more than 40 hours in that week. Ultimately the university's decision could end up costing the university far more than it hoped to save.

There are exceptions to the general rule stated above. In the case of public agencies, including public universities, "[d]eductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced," 29 CFR § 541.710(b). This exception expressly permits a public university to furlough an exempt employee for less than an entire workweek and deduct remuneration from his predetermined compensation for the furlough days without jeopardizing the overall status of the employee as exempt. However, in order to utilize this exception, the university must treat the exempt employee as non-exempt during the furlough week. As such, the employee will be entitled to compensation for all hours actually worked and any overtime. In order to benefit from the furlough plan, the university must direct such an exempt employee not to work on any furlough days and not to work overtime.

The CSU furlough agreements with unions, and its procedures for management and non-represented employees, have followed this exception. Generally speaking, CSU exempt employees have been required to take two furlough days each month in separate weeks. They have been forbidden to work more than 32 hours in their furlough weeks which precludes overtime and gives the university the savings for the one furlough day.

There is another exception available to both the private and the public sectors. *Under FLSA, the salary basis test does not apply to teaching professionals, lawyers, doctors, or dentists*. Sections 541.303(d) and 541.304(d). In other words, these exempt employees (which of course include NACUA attorneys), may be furloughed for less than an entire workweek, with a concomitant deduction from their predetermined compensation for the furlough days, and yet they remain exempt meaning they are not entitled to overtime. They, like all other exempt and non-exempt employees, must be paid the minimum wage.

There is still another way by which universities, public and private, may be able to furlough exempt employees for less than a full week without jeopardizing their exempt status. Furloughs can run afoul of the salary basis test when an exempt employee who is being paid a predetermined salary for a given workweek is directed not to work on a number of days within a workweek and then is not paid for the days not worked. But in a series of opinion letters dating back to 1970, the U.S. Department of Labor has held that an employer operating on a shortened workweek, or operating with work shortages in a "defined work-unit," may alter an exempt employee's predetermined compensation at the same time it reduces the length of the workweek and thereby avoid violating the salary basis test.

In an opinion letter dated February 23, 1998 (1998 WL 852696), the Department of Labor stated:

> 29 CFR § 541.118(a) [now 29 CFR § 541.602] provides that employees are considered to be paid "on a salary basis" if they regularly receive each pay period a predetermined amount constituting all or a part of their compensation which is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed. However, we have consistently taken the position that a bona fide reduction in an employee's salary does not preclude salary basis payment as long as the reduction is not designed to circumvent the requirement that the employees be paid their

> full salary in any week in which they perform work. In addition, the amount paid to the employee in any workweek must not be less than the minimum salary required by the regulations. *E.g.*, Opinion Letter No. 1140 (WH-93) December 10, 1970. Consistent with this position, we have stated that a fixed reduction in salary effective during a period when a company operates a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment. Therefore, the exemption would remain in effect as long as the employee receives the minimum salary required by the regulations and meets all other requirements for the exemption.

In an opinion letter dated November 13, 1970 (1970 WL 26462), the Department of Labor concluded that an employer's change from 52 five-day workweeks to 47 five-day workweeks and five four-day workweeks, with a corresponding predetermined reduction in salary for exempt employees, also did not violate the salary basis test (then 29 CFR § 541.118, now section 541.602).

In a recent opinion letter dated August 19, 2009, issued by the California Division of Labor Standards Enforcement, the state agency that oversees California's wage and hour laws, the DLSE relied heavily on the Department of Labor opinion letters to conclude that an employer's plan to reduce the work schedule of its exempt employees coupled with a reduction in their salaries did not violate California wage and hour laws governing exempt status. In this instance, the employer proposed to reduce the number of its employees' scheduled work days from five days to four days per week, with a corresponding reduction in salary, as the result of significant economic difficulties due to the severe economic downturn. The employer also intended to restore both the full five-day work schedule and full salaries of its exempt employees as soon as the business conditions permitted. *See* ://www.dir.ca.gov/dlse/opinions/2009-08-19.pdf.

This outcome relies upon a distinction between, on the one hand, deductions from an exempt employee's predetermined compensation because of absences due to mandated furlough days, and, on the other hand, a prospective fixed reduction in the salary of an exempt employee to correspond with a reduction in the normal workweek. The former approach risks the loss of exempt employee status. The latter approach has been upheld as consistent with retaining exempt employee status. *See In re Wal-Mart Stores, Inc.*, 395 F.3d 1177 (10th Cir. 2005); *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226 (10th Cir. 2008).

Which approach is taken may impact other important considerations. While it isn't entirely clear, by opting for the latter approach and instituting a fixed reduction in salary, the university may adversely affect exempt employees' entitlements to certain benefits, such as retirement benefits or healthcare. These may be tied to the stated compensation level so while furloughs constitute deductions from the predetermined salary level but that predetermined level remains the standard for determining benefit entitlements, a formal reduction in that salary level may have negative consequences. CSU has retained the predetermined compensation scale in place.

Other Cost Saving Alternatives. CSU, as a public university system, likely does not have the same array of choices in the area of cost cutting as private universities have. As well, as a system with a highly organized labor force, CSU does not have the discretion that a university that is not unionized has to institute changes and promulgate new policies. CSU must meet and

confer and negotiate over many changes that affect wages, hours and other terms and conditions of employment.

The California Legislature has provided by statute, Government Code § 20901, that various public employees who are members of the two large public retirement programs in the state, which includes CSU and University of California employees, will be eligible for an additional two years of service credit if they elect to retire within certain prescribed dates, if the Governor makes a determination that certain conditions exist. These conditions are: (1) because of an impending curtailment of or change in the manner of performing services, the best interests of the state would be served by encouraging the retirement of designated employees; and, (2) sufficient economies could be realized to offset any cost to the employing public agency resulting from award of the service credit. Under the legislation, the affected public agency will have to fund the "golden handshake."

In 2004, Governor Schwarzenegger issued an Executive Order determining that the two conditions existed for CSU faculty only. It goes without saying that other CSU employees were not overjoyed by limited scope of the program. In any case, in the current budget crisis with enormous deficits that seem to reemerge each fiscal year, there appears to have been no meaningful consideration of any golden handshakes for faculty or anyone else.

CSU Case Study – Conclusion. These are difficult times for higher education. CSU, the largest public higher education system in the country, continues to confront a state budget crisis of enormous proportions. It has experienced a challenging year using furlough programs as one means to reduce costs. It has also sought to use other cost saving strategies, such as recruitment freezes, travel restrictions, purchasing limitations and the like. Unfortunately, however, none of these mechanisms has entirely removed the need for layoffs. There have been lessons learned but none offer instant solutions to the current difficulties. Hopefully an improving economy, more commonsense management of the State budget, and a greater appreciation by legislators and the public of the need to support public higher education will help ensure a return to brighter times.

D. WARN and State/Local Notice Requirements

The Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101 *et seq.*, provides that covered employers must give 60 days' written notice to unions, nonunion affected employees and certain government representatives before any "mass layoff" or "plant closing." This seemingly clear summary of the statute, however, belies its complex application. First, WARN may not apply to various public colleges and universities. Second, even when WARN does apply in a college or university setting, the terms "mass layoff" and "plant closing" are potentially misleading. Finally, WARN contains numerous complex exceptions, exemptions and exclusions, and detailed WARN regulations set forth additional details including specific content requirements that apply to written notices provided under WARN.

Is WARN Applicable to Public Colleges and Universities? WARN applies to an "employer" which the statute defines as any "business enterprise" which employs a requisite

number of employees.[5] After WARN was enacted, questions immediately emerged concerning whether – and to what extent – WARN applies to various public and quasi-public employers, and other entities and operations that may not be regarded as a "business enterprise." Obviously, this also raised questions about whether various colleges and universities – especially those that are public institutions or otherwise closely aligned with government entities – might be excluded from the coverage of WARN (and, potentially, certain WARN-type state or local laws).

These questions about WARN's applicability or non-applicability to different types of employers received significant attention in the Department of Labor's WARN regulations, which (i) indicates that WARN does apply to "non-profit" organizations; (ii) WARN does not apply to federal, state and local governments (as well as Indian tribal governments); and (iii) WARN may or may not apply to "public and quasi-public entities" depending on whether they are engaged in a "business" and depending on how they are organized. 54 Fed. Reg. 16,042, 16,065 (April 20, 1989). As to all of these issues, the WARN regulations state:

> The term "employer" *includes non-profit organizations* of the requisite size. *Regular Federal, State, local and federally recognized Indian tribal governments are not covered*. However, the term "employer" *includes public and quasi-public entities which engage in business* (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are *separately organized from the regular government*, which *have their own governing bodies* and which *have independent authority to manage their personnel and assets*.

54 Fed. Reg. at 16,065 (emphasis added).

Some further elaboration is contained in the explanatory preamble accompanying the WARN regulations. There, the Department of Labor stated:

> Because of the use of the term "business enterprise", DOL concludes that regular Federal, State, and local government public agencies and services are outside the purview of WARN. . . . The legislative history is not helpful on the specific question of coverage of public and quasi public business enterprises. DOL agrees that the underlying intent of WARN is worker protection. Given the nature and the language of the law, DOL concludes that the term "business enterprise" used in the statute includes public and quasi public entities which engage in business (i.e., take part in a commercial or industrial enterprise; supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments). Whether a particular public or quasi public entity is covered will be determined by the functional test described above and by an organizational test, i.e., whether the entity is managed by a separately organized governing body with independent authority to manage its personnel and assets. It should be noted that DOL has not defined covered public enterprises in terms of the traditional/non-traditional governmental functions distinction

[5] To be covered under WARN, the term "employer" encompasses business enterprises that employ "100 or more employees, excluding part-time employees" or "100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. § 2101(a)(1).

> that was rejected by the Supreme Court as unworkable in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984). The test that has been adopted is intended to be a relatively precise one that will include such entities as regional transportation authorities and independent municipal utilities, but will exclude such organizations as school boards.

54 Fed. Reg. at 16,044.

In *Castro v. Chicago Housing Auth.*, 360 F.3d 721, 728 (7th Cir. 2004), the Seventh Circuit held that WARN *did* apply to the Chicago Housing Authority, reasoning that the CHA rented, leased, purchased and sold property like any other real estate owner; had authority to enter into contracts and make investments; was separate from the City of Chicago; and otherwise performed all of the functions of traditional private businesses, despite the fact that the majority of its funding came from public funds. *Id.*

In a more recent case, however, the District Court for the Eastern District of Virginia held that WARN did *not* apply to the Virginia Commonwealth University, at least absent specific allegations that the university was engaged in standard business activities that brought it back within WARN's reach. *Spain v. Virginia Commonwealth Univ.*, 2009 WL 2461662, at *5, 2009 U.S. Dist. LEXIS 70524, at *8-13, 29 Indiv. Empl. Rts. Cas. (BNA) 1342 (E.D. Va. Aug. 11, 2009). Noting that WARN uses the term "business enterprise" in the definition of "employer," and "does not explicitly extend its application to public employers or their agencies," the court held it must defer to the Department of Labor's WARN regulations as long as they were "a permissible construction of the statute" and were not "contrary to clear congressional intent." *Id.* Thus, the court dismissed the plaintiff's WARN claim because it had not been alleged that VCU satisfied "the criteria articulated by the DOL for being deemed a 'business enterprise' under the [WARN] Act." *Id.*

It is possible that the WARN status of a particular public college or university may depend on an individualized application of the "organizational" and "functional" tests articulated in the WARN regulations. *Id.* Further guidance in this area also hopefully will be provided by future court cases addressing this aspect of WARN.

When Is WARN Notice Necessary? There is a three-part formula governing whether WARN notices are required: WARN notices are required if (1) there is an "employment loss" that (2) involves enough employees whose employment losses occur over (3) the relevant time period (30 or 90 days).

The first element, "employment loss," means: "(A) An employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) A layoff exceeding 6 months, or (C) A reduction in hours of work of more than 50 percent during each month of any 6 month period." WARN § 2(a)(6), 29 U.S.C. § 2101(a)(6).

The second element – the requisite number of employees experiencing employment losses – is found in WARN's definition of "plant closing" and "mass layoff."

A "plant closing" means a "permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment" resulting in employment losses at the single site "for 50 or more employees excluding any part

time employees" over a 30 day period. WARN § 2(a)(2), 29 U.S.C. § 2101(a)(2). Even if thousands of employees work at a large facility, a WARN-triggering "plant closing" can occur whenever 50 full time employees at a single employment site experience employment losses resulting from the shutdown of one or more "facilities" or "operating units."

A "mass layoff" means a reduction in force (not a plant closing) involving employment losses over a 30 day period for 33 percent or more of a single site's employees (excluding part time employees) so long as at least 50 employees (again excluding part timers) experience employment losses at the single site over a 30 day period. However, if 500 employees (excluding part timers) experience employment losses over a 30 day period, a WARN-triggering "mass layoff" will occur *regardless* of whether the affected employees comprise 33 percent of the site's full time employees. See WARN § 2(a)(3), 29 U.S.C.§ 2101(a)(3).

Significantly, "part time" employees are not counted in evaluating whether a plant closing or mass layoff has occurred for purposes of WARN. Also, WARN contains a special "part time" employee definition which excludes certain low-service employees from many WARN calculations, as well as certain low-hour employees. Under WARN, "part time" employees – who are not counted in many calculations – are defined as employees who have been "employed for an average of fewer than twenty hours per week" or "employed for fewer than 6 of the 12 months preceding the date on which notice is required." WARN § 2(a)(8), 29 U.S.C. § 2101(a)(8). However, "part time" employees must still be covered by WARN notices if the number of other employees experiencing an employment loss is sufficient to trigger WARN's notice obligations.

The third element – the relevant time period – involves the time period within which employment losses are counted when evaluating whether there is a WARN-triggering "plant closing" or "mass layoff." WARN's "plant closing" and "mass layoff" definitions generally provide that notice is required if the requisite number of employees experience an employment loss over a 30 day period. WARN §§ 2(a)(2), 2(a)(3), 29 U.S.C. §§ 2101(a)(2), 2101(a)(3). However, a 90-day period is frequently applicable – WARN Section 3(d) states that "employment losses for 2 or more groups at a single site of employment" occurring within any 90 day period may be considered "in the aggregate" at least where each group, standing alone, *would be insufficient* to constitute a plant closing or mass layoff. WARN § 3(d), 29 U.S.C. § 2101(d) (emphasis added). See also 54 Fed. Reg. at 16,053, 16,067 91989) (to be codified at 20 C.F.R. § 639.5(a)(1)(ii)). The successive employment losses occurring more than 30 days apart would *not* be aggregated in such situations if the employer "demonstrates" that the employment losses "are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of [the] Act." Id.

Exceptions, Exemptions and Exclusions. There are several exceptions, exemptions or exclusions under WARN. These terms also are misleading. For example, WARN "exceptions" do not eliminate the obligation to issue WARN notices but, rather, they can permit an employer to provide notice of less than 60 days. WARN's "exemptions" and "exclusions" can sometimes eliminate any obligation to issue WARN notices in a variety of situations. In all situations, employees should be careful when evaluating these WARN provisions. It is prudent to consult counsel and carefully evaluate the Department of Labor's WARN regulations when considering WARN's potential application in particular situations.

Here is an abbreviated summary of WARN's exceptions, exemptions and exclusions:

- *Sales*. WARN contains an exclusion allocating responsibility and sometimes eliminating the need to provide notice in situations involving the sale of part or all of an employer's business. WARN § 2(b)(1), 29 U.S.C. § 2101(b)(1).
- *Relocations/Consolidations*. WARN contains an exclusion for relocations or consolidations where employees receive certain transfers (or transfer offers) to a different facility before the "plant closing" or "mass layoff" takes place. WARN § 2(b)(2), 29 U.S.C. § 2101(b)(2).
- *Strikes/Lockouts*. WARN contains an exemption for certain strikes and lockouts, making notice unnecessary where a plant closing or mass layoff "constitutes" a strike or lockout. See WARN § 4(2), 29 U.S.C. § 2103(2). WARN notice also would not be required before an employer permanently replaces economic strikers. Id. A strike or a lockout will not fall within this exemption, however, if it is declared a subterfuge to evade WARN's notice requirements. Id.
- *Temporary Facilities/Projects*. WARN contains an exemption making notice unnecessary if a closing involves a temporary facility or if a closing or layoff "is the result of the completion of a particular project or undertaking" where the affected employees "were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking." WARN § 4(1), 29 U.S.C. § 2103(1).
- *Low-Hour or Low-Service Employees*. As noted above, certain part time employees (which can include some seasonal employees) are not counted in determining whether WARN notice is required, although these employees have to receive WARN notices if the number of other affected employees is sufficient to trigger WARN's notice requirements. "Part time" employees are defined as those who have been "employed for an average of fewer than twenty hours per week" or "employed for fewer than 6 of the 12 months preceding the date on which notice is required." WARN § 2(a)(8), 29 U.S.C. § 2101(a)(8).
- *WARN Notice-Reduction Provisions*. There are three situations where, under WARN, an employer can provide less than sixty days advance notice, although employers must still provide as much notice as possible and explain why reduced notice is being given. WARN § 3(b)(3), 29 U.S.C. § 2102(b)(3). These are frequently called "exceptions" but they do not eliminate WARN's notice obligations. If these "exceptions" apply, WARN notices must still be issued but notice of less than 60 days will be permitted. See WARN § 3(b)(3), 29 U.S.C. § 2102(b)(3): "An employer relying on [WARN's notice reduction provisions] shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period."
  - *Faltering Companies*. An employer may give less than sixty days notice prior to a closing if, at the time notice would have been required, the employer "was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown," provided that the employer "reasonably and in good faith believed that giving the notice required would have

precluded the employer from obtaining the needed capital or business." WARN § 3(b)(1), 29 U.S.C. § 2101(b)(1).

- *Unforeseeable Business Circumstances*. WARN's 60 day notice period may be reduced "if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." WARN § 3(b)(2)(A), 29 U.S.C. § 2102(b)(2)(A).
- *Natural Disasters*. Under WARN, notice of less than sixty days can be provided "if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or . . . drought. . . ." WARN § 3(b)(2)(B), 29 U.S.C. § 2101(b)(2)(B).

How Are WARN Notices Issued? WARN notices – if required – must be provided in writing (1) to *each representative of the affected employees* as of the time of the notice or, *if* there is no such representative at that time, to *each affected employee*; and (2) to *the State dislocated worker unit* (designated or created under Title III of the Job Training Partnership Act)[;] and (3) [to] *the chief elected official of the unit of local government* within which such closing or layoff is to occur." WARN § 3(a), 29 U.S.C. § 2101(a) (emphasis added). WARN provides that "[i]f there is more than one [local government] unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made." Id. However, many employers in such situations find it easier to issue WARN notices to the chief elected official of both (or all) units of local government.

The Department of Labor's WARN regulations set forth specific content requirements specifying what must be contained in different types of WARN notices. 54 Fed. Reg. 16,042, 16,059 60, 16,068 (to be codified at 20 C.F.R. §§ 639.1, 639.7) (1989). Service of notice in WARN cases can raise potential questions of fact, and employers should prepare and retain careful documentation showing in detail when, how, where, and to whom WARN notices were provided.

WARN Liability and "Severance" Pay. WARN's enforcement provisions make any violating employer liable for backpay and the cost of related benefits for every day that required notice is not provided (i.e., up to a maximum of sixty days). WARN § 5(a), 29 U.S.C. § 2104(a). Additionally, employers failing to provide adequate notice to local government officials incur an additional fine of up to $500 for each day of the violation (i.e., $30,000 over the 60 day notice period). WARN § 5(a)(3), 29 U.S.C. § 2104(a)(3). However, the $500 per day fine does not apply if, within three weeks following the date a shutdown or layoff is ordered, the violating employer pays all affected employees the full amount for which the employer is liable to them.

WARN also provides that an employer's liability will be reduced by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation. . . ." WARN § 5(a)(2)(B), 29 U.S.C. § 2104(a)(2)(B). Thus, any severance pay that is required under state or federal law (e.g., a private severance plan enforceable under ERISA), or pursuant to any contract or collective bargaining agreement, will not reduce an employer's liability to affected employees.

Alternatively, an employer can issue WARN notices, and thereafter continue every employee's employment on a "paid leave" basis (i.e., without having the employees actually report to work). See 54 Fed. Reg. at 16,047 48.

State and Local Notice Requirements. Increasingly, states and local governments have enacted their own specialized WARN-type notice requirements that in many cases differ from WARN. *See* WARN § 6, 29 U.S.C. § 2105 (noting that WARN's requirements are in addition to other contract or statutory rights, except that notice shall run concurrently with that required under any other contract or statute). California, Wisconsin, Illinois, New York, New Jersey and other states have WARN-type statutes that operate very differently from WARN. Other states require severance payments to employees who have their employment terminated within a certain period of time following a stock acquisition or in certain other situations. And some states impose certain requirements relating to health insurance or union obligations in situations involving various types of restructuring or transactions, although some of these statutes may be preempted by federal law.

E. Waiver/Release Agreements

If written waivers or releases are desired in connection with a workforce reduction or even individual employment terminations, the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433 (1990) – which amended the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. – sets forth important prerequisites to enforceability which must *all* be satisfied for the waivers or releases to eliminate potential age discrimination liability. Under OWBPA, a waiver of age discrimination claims will not be valid unless it is in writing and, even then, only if the following requirements are met:

(a) It is written to be understood by the employee or by the average employee eligible to participate;
(b) It specifically refers to rights or claims under the ADEA;
(c) There is no waiver of future claims arising after the date the waiver is executed;
(d) The waiver is exchanged for additional consideration or value other than that to which the employee already is entitled;
(e) The employee is advised in writing to consult with an attorney;
(f) The employee is given at least 21 days to consider the agreement; and
(g) The employee is given seven days to revoke the waiver agreement.

29 U.S.C. § 626(f). These same requirements apply with respect to releases that settle EEOC charges or court actions, except the 21-day consideration period and 7-day revocation window are replaced with a requirement that the employee be given a "reasonable period of time" to consider the settlement agreement.

The burden of showing that these requirements have been met rests with the party asserting the validity of the waiver, usually the employer. *See Manning v. N.Y. Univ.*, No. 98 CIV 3300, 2001 WL 963982, *5 (S.D.N.Y. Aug. 22, 2001) (citing 29 U.S.C. § 626(f)(3) for the proposition that NYU bore the burden to prove that plaintiff's waiver in settlement of lawsuit was knowing and voluntary). Moreover, no waiver agreement may affect the EEOC's

enforcement of the ADEA, nor may a waiver be used to interfere with an employee's right to file a charge or participate in an EEOC investigation or proceeding.

"Group" Requirements and Mandatory Disclosures. OWBPA sets forth *additional* requirements if an age discrimination waiver is requested "in connection with an *exit incentive or other employment termination program offered to a group or class of employees*" (emphasis added). In such situations, the waiver will be valid only if employees are given *45 days* to consider the waiver agreement. Moreover, for the waiver to be valid in such cases, there are mandatory disclosures under OWBPA – the employer also must inform the employees, in writing, of the following: (1) a description of the "class, unit, or group of individuals covered by [the] program," which the EEOC regulations refer to as the "decisional unit" (see 29 C.F.R. §§ 1625.22, 1625.23); (2) eligibility factors and time limits for participation in the exit incentive or other program, (3) job titles and ages of all employees who are eligible for the exit incentive or other program, and (4) ages of all employees in the same job classification or organizational unit who are *not* eligible for the exit incentive or other program. *See generally* 29 U.S.C. § 626(f).

Several concepts appear to be prominent when determining the scope and definition of the decisional unit:

- The definition of what constitutes a decisional unit appears to focus in large part on organizational structure (*i.e.*, the organization of the institution, before one even evaluates who is being eliminated and how the decisions are being made).
- The language in OWBPA sets forth the concept of decisional unit (without using that term) as the "class, unit, or group of individuals covered by" the termination/severance program. The term "covered by" suggests the overall target audience of the program could establish the relevant decisional unit.
- Examples in the regulations suggest strongly that the decisional unit may be the unit within which the employer has established a particular reduction target (*i.e.*, *regardless* of who makes the individual decisions or how they are made). For example, the regulations make reference to reductions where "Fifteen of the employees in the Computer Division will be terminated in December" (here the decisional unit is stated to be the "Computer Division") or "Ten percent of all accountants, wherever the employees are located, will be terminated next week" (here the decisional unit is stated to be "All Accountants").
- It also appears that the decision-making process – specifically, what units or facilities were considered for layoff even if not ultimately chosen – significantly influences what the decisional unit should be. The OWBPA regulations, when addressing one situation where the decisional unit was deemed to span multiple facilities, state: "Likewise, if the employer analyzes its operations at several facilities, *specifically considers and compares ages, seniority rosters, or similar factors at differing facilities*, and determines to focus its workforce reduction at a particular facility, then *by the nature of that employer's decisionmaking process the decisional unit would include all considered facilities and not just the facility selected for the reductions*" (29 CFR § 1655.22(f)(3)(ii) (E)) (emphasis added).

- Other aspects of the OWBPA regulations provide broad parameters guiding what constitutes the decisional unit, but are very difficult to apply, in large part because the regulations are self-contradictory. The regulations state that the decisional unit is "typically" no broader than the facility, but provide many examples – based on the scope of the units subject to particular targets – where the decisional unit should be broader. The regulations state that higher level management review will not necessarily expand the decisional unit, but then indicate that higher level management review will increase the size of the decisional unit if the upper-level management representatives alter the "scope" of the reduction.
- Sometimes a decisional unit may be a defined sub-group within a larger unit if the employer has focused exclusively on that sub-group for purposes of a layoff. The regulations state that "if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit."

The regulations are confusing and even, at times, self contradictory when it comes to defining and describing the "decisional unit." When viewed in the university context, decisional units are most likely the units which have been targeted for layoff and from which the laid off employees are drawn, be it a department, college, special program, or the campus. Then, too, the decisional unit may be a particular sub-group on the campus, such as faculty, skilled workers, administrative aides or the like, particularly where the employees are in separate bargaining units, and where a particular workforce reduction has only involved the consideration of position eliminations or other changes within a discrete, identifiable group. This determination requires careful evaluation in every situation, taking into account the OWBPA regulations and whatever additional guidance can be gleaned from the decided court cases (if any) that may involve similar circumstances.

Potential Sovereign Immunity – Public Colleges and Universities. In *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000), the U.S. Supreme Court held that the Eleventh Amendment provides immunity to states from suits for money damages by private individuals under the ADEA. As such, while state universities may be sued for money damages by the EEOC under ADEA and by private individuals under state statutes that bar age discrimination (such as California's Fair Employment and Housing Act), state universities under *Kimel* would be immune from ADEA lawsuits brought by older employees who believe that their separations are based upon age. That raises the question whether the potential availability of sovereign immunity may give more latitude to state colleges and universities when implementing RIFs or other involuntary separations, and whether they should seek OWBPA-compliant waivers of age discrimination claims.

It is important to understand that sovereign immunity from private damages does not extinguish the underlying legal requirements. States are obligated to follow the ADEA even if they are immune from money damages suits by individuals. Moreover, as noted above, states may still be sued by the EEOC for money damages for discriminating against individual employees; thus, sovereign immunity does not necessarily shield a public university from the reach of the ADEA.

In light of the application of sovereign immunity, some state colleges and universities may elect to forego seeking an OWBPA-compliant waiver of ADEA rights from separating employees. The risk of exposure may be far less than that faced by private universities. By foregoing such a waiver, public universities may avoid the need to comply with the ADEA standards imposed under OWBPA (*i.e.*, the universities may avoid the mandatory disclosure of positions/ages and may finalize settlement agreements without the OWBPA-required consideration/revocation periods), although it is prudent for public colleges and universities to consider protecting themselves against state age discrimination statutes using normal general releases. Conversely, even if not required, some public colleges and universities may elect to adhere to OWBPA requirements when seeking a comprehensive release to err on the side of ensuring that any waiver/release will be considered knowing and voluntary, regardless of the particular standards applied.

With or without the use of waivers and releases, state universities remain exposed to lawsuits for monetary damages from the EEOC and possibly from other representatives of the federal government, as well as to proceedings for injunctive relief by individuals and federal authorities. Therefore, state universities are still well-advised to engage in rigorous planning processes before instituting any layoffs that may raise age discrimination issues.

F. Unions, Bargaining, and Contract Issues

The implementation of workforce reductions and other changes associated with institutional restructuring becomes even more complex in unionized work settings. Although a detailed discussion of union-related issues exceeds the scope of this paper,[6] several union-related issues affecting private colleges and universities, under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. ("NLRA"), warrant particular attention.

Public Universities and State Labor Laws. The NLRB in 1970 asserted jurisdiction over most private colleges and universities. *See Cornell University*, 183 NLRB 329 (1970).[7] Union issues relating to public colleges and universities generally are *not* subject to the provisions of the NLRA. Although public colleges and universities are generally not covered by the NLRA, union issues in many cases remain subject to state public sector labor statutes. *See*, *e.g.*, *University of Vermont*, 297 N.L.R.B. 291 (1989) (based on petition of the Vermont Labor Relations Board, NLRB declines to exercise jurisdiction over the University of Vermont based on finding that it "was created by the State so as to constitute a department or administrative arm of the government"). While state public sector labor boards often follow federal labor law, there are many instances in which they do not and attention needs to be paid in each situation.

[6] For a detailed discussion of union-related restructuring issues, see Philip A. Miscimarra *et al*., THE NLRB AND MANAGERIAL DISCRETION: SUBCONTRACTING, RELOCATIONS, CLOSINGS, SALES, LAYOFFS, AND TECHNOLOGICAL CHANGE (2d ed. Olin Institute for Employment Practice & Policy 2010).

[7] The NLRB in *Cornell University* overruled the Board's prior decision in 1951 that it would *not* effectuate the purposes of the NLRA "to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with charitable and educational activities of the institution." *Trustees of Columbia University*, 97 NLRB 424 (1951).

Decision- and Effects-Bargaining. Whatever the bargaining unit,[8] an employer generally must give the union an opportunity to engage in decision bargaining before changing anything that deals with what the Board and the Courts have construed to be "mandatory" bargaining subjects – "wages, hours, and other terms and conditions of employment." *See, e.g., Salem Coll.*, 261 NLRB 327, 336 (1982). A long line of NLRB and court cases dealing with restructuring situations distinguishes between "decision" and "effects" (or "impact") bargaining. Even when decision bargaining is not required, an employer must always provide its union with an opportunity to bargain over the effects of a particular decision on unit employees (hence the name "effects bargaining").

In decision-bargaining, an employer must generally advise the union of a *tentative* decision, give the union an opportunity to *request* bargaining (during which the union can propose alternatives), bargain in good faith either to an agreement or impasse, then *implement* the decision. The employer may not present a union with a *fait accompli* (in other words, a decision that has already been finalized or implemented). *See*, *e.g.*, *National Family Opinion, Inc.*, 246 NLRB 521, 530 (1979). The union also has a right to request "relevant" information that is reasonably necessary to understand and intelligently discuss the matter at hand. *See*, *e.g.*, *NLRB v. Truitt Manufacturing Co*., 351 U.S. 149 (1956).

The employer is not obligated to reach agreement in bargaining and, if the parties reach an impasse, the employer may unilaterally implement its decision. But, if the employer fails to bargain in good faith, the NLRB's remedy is generally quite drastic – the *status quo ante* must usually be restored (*i.e.*, the operation that was subcontracted, relocated or sold would have to be reinstituted at the facility in question). Additionally, affected employees may have to be rehired with backpay to the date of their initial termination or layoff.

Even where decision-bargaining is not required, the union must generally be given an opportunity to bargain over the *effects* of a particular decision "in a meaningful manner and at a meaningful time." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981). Absent an emergency situation or extenuating circumstances, reasonable advance notice prior to a decision's implementation must normally be afforded to allow for "meaningful" effects bargaining. *See*, *e.g.*, *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir.), *cert. denied*, 464

[8] As regards faculty, the courts are divided on how much authority is enough to determine whether faculty are managerial employees and therefore ineligible to form a union. *See*, *e.g.*, *Loretto Heights College v. NLRB*, 742 F.2d 1245 (10th Cir. 1984) (faculty were not managerial employees and were an appropriate bargaining unit where faculty exercised little governing authority through sparsely populated and rarely convened committees that provided recommendations to the Board of Trustees); *NLRB v. Lewis Univ.*, 765 F.2d 616 (7th Cir. 1985) (faculty properly considered managerial where faculty exercised "effective control" over the educational policies of the university, which was the "business" of the university); *NLRB v. The Cooper Union for the Advancement of Science & Art*, 783 F.2d 29 (2d Cir. 1986) (faculty were non-managerial employees who exercised no authority beyond their own classrooms and whose recommendations were regularly vetoed by the Board of Trustees); *NLRB v. Florida Memorial College*, 820 F.2d 1182 (11th Cir. 1987) (faculty was appropriate bargaining unit where faculty did not play a significant role in the college's governance and policy-making procedures). From recent news it also appears more likely that the NLRB may reverse its decision in *Brown University*, 342 NLRB 483 (2004), and hold that graduate student assistants can unionize. *See*, *e.g.*, Daily Lab. Rep. (BNA) No. 84 (May 4, 2010), A-1 (noting the filing of a new NLRB petition involving New York University and an effort by the Graduate Students Organizing Committee/UAW Local 2110 to represent 1,800 graduate teaching and research assistants, in the hope that the newly constituted NLRB will overturn *Brown University*).

U.S. 892 (1983). Thus, although the union in effects-bargaining situations can be advised of a "final" decision, sufficient notice must generally be afforded to permit effects bargaining while employees are still actively at work. *See*, *e.g.*, *Otis Elevator Co. ("Otis III")*, 283 NLRB No. 40, slip op. at 7-10..

When an employer fails to fulfill its obligation to engage in effects-bargaining, the NLRB's remedy is generally to order effects-bargaining (as well as the reinstatement of affected employees with a limited backpay award), although a restoration of the *status quo ante* generally is not required.

Unfortunately, the law in many cases remains unclear when it comes to determining whether decision-bargaining is required in relation to many restructuring decisions. In particular, the legal standards governing this question appear to differ depending on the particular label that can be applied to the type of action under consideration:

- **Closings**. *First National Maintenance Corp. v. NLRB*, 452 U.S. at 666 (1981), the U.S. Supreme Court held that a complete or "partial" closing is not a mandatory subject of decision-bargaining under the NLRB, although employers even in cases involving a closing were required to engage in effects-bargaining "in a meaningful manner and at a meaningful time." *Id*. at 682.
- **Subcontracting**. In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that a decision to contract out maintenance work was a "mandatory" subject of bargaining thereby requiring decision bargaining. The NLRB in recent years has almost always required decision-bargaining in any case involving what the Board considers to be "subcontracting." *See*, *e.g.*, *Torrington Industries, Inc*., 307 N.L.R.B. 809 (1992), *supplemented*, 316 N.L.R.B. 500 (1995).
- **Relocations**. A different, complex burden-shifting standard – governing whether decision-bargaining is required in cases involving a "relocation" – was articulated in *Dubuque Packing Co*., 303 N.L.R.B. 386 (1991), *aff'd sub nom. UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 511 U.S. 1016 (1994), *cert. dismissed*, 511 U.S. 1138 (1994).
- **Layoffs**. The Board in several decisions has held that an economically based decision to implement layoffs is a mandatory subject of bargaining, although there is some confusion about whether decision-bargaining or effects-bargaining is required. *See*, *e.g.*, *Lapeer Foundry & Machine, Inc*., 289 N.L.R.B. 952, 954 (1988); *NLRB v. Litton Financial Printing Division*, 893 F.2d 1128 (9th Cir. 1990), *enforcing* 86 N.L.R.B. 817 (1987), *rev'd in part on other grounds*, 501 U.S. 190 (1991). Under California state public sector labor law, layoffs are not mandatory subjects of bargaining, but their effects are subject to bargaining.

Alleged Antiunion Discrimination and Collective Bargaining Agreements. In a unionized environment, layoffs and related business changes also can give rise to a claim of antiunion discrimination and alleged breaches of the applicable collective bargaining agreements. This is particularly true when employees are being laid off. In cases involving alleged antiunion discrimination, employers tend to have greater latitude when implementing shutdown or closing decisions, at least when they are unaccompanied by the outsourcing or

relocation of affected operations. *See*, *e.g.*, *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). Care must be taken to follow the contract and applicable labor law principles. *See*, *e.g.*, *Provena Hospitals*, 350 N.L.R.B. 808 (2007); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300 (D.C. Cir. 2003), *enforcing* 334 N.L.R.B. 304 (2001).

G. Concluding Remarks

The face of higher education has changed as a result of the economic recession of the last 18 months. Endowments have shrunk, fundraising has diminished, state funding has been severely cut. This has led to layoffs and furloughs of faculty and staff, major belt tightening, forced reductions in student enrollment, and shrinkage of available scholarship funds. Universities, and their counsel, have struggled to address these challenges.

Hopefully these changes will not become permanent features of university life. Much has been learned during this period of crisis. Careful and diligent planning wherever possible and the active involvement of college and university attorneys remain essential ingredients in helping the institutions navigate through these difficult tim

Cal. Admin. Code tit. 5, § 43200

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 5. EDUCATION
DIVISION 5. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITIES
CHAPTER 1. CALIFORNIA STATE UNIVERSITY
SUBCHAPTER 7. EMPLOYEES
ARTICLE 6.8. FURLOUGHS OF NON-REPRESENTED EMPLOYEES
This database is current through 4/16/10 Register 2010, No. 16.

§ 43200. Furloughs.

(a) The following terms are defined for this Article:

(1) "Furlough" means mandatory, temporary unpaid time off work. No earned accrued leave or any other compensated time may be used for any portion of a furlough.

(2) "Financial crisis" means an event(s), occurrence(s) or state of affairs creating an imminent and substantial deficiency in California State University financial resources that severely impacts the California State University's ability to sustain ongoing operations or to fulfill its mission.

(b) Upon a finding by the Chancellor of a natural disaster, epidemic or other major debilitating event that significantly impacts the operations of the California State University, or a financial crisis as defined in this Article, either systemwide or on one or more campuses, the Chancellor may implement furloughs for non-represented, Management Personnel Plan and Executive employees. The Chancellor may suspend any Title 5 regulation(s) and/or any California State University policy(ies) encompassing work hours and/or wages which he or she deems necessary to effectuate this provision. The Chancellor will determine the period of time furloughs will remain in effect.

Note: Authority cited: Sections 89030 and 89500, Education Code. Reference: Sections 89030 and 89500, Education Code.

Memorandum of Understanding
CSU/CSUEU Furlough Program - July 6, 2009

Gavin Lawler 7/21/09

1. Preamble

   a. CSUEU and CSU are entering into these negotiations because of the unprecedented reduction in state general fund support that the CSU is facing in both its 2008-2009 and 2009-2010 budget (an approximate $583,816,000 reduction from the Legislature's February 2009 special session budget revisions). The intent of this Agreement is to provide a framework for the implementation of furlough plans on campuses and to lessen the impact of those budget cuts on the CSU.

   b. The purpose of furloughs is to lessen the severity of layoffs by reducing compensation costs.

   c. The CSU's guiding principles with respect to this budget crisis are as follows:

      i. To serve as many students as possible without sacrificing quality; and

      ii. To preserve as many jobs as possible within the constraints under which the CSU is being required to operate.

2. Definitions

   a. The term "furlough day" as used in this Agreement refers to a day on which an employee is normally scheduled to work, or is in pay status, that is taken as an unpaid day off.

   b. The term "furlough period" as used in this Agreement refers to the week in which a furlough day occurs.

   c. The term "pay status" as used in this Agreement refers to the time in which an employee is working or is on paid leave.

3. Furlough Days

   a. In order to ensure that operational needs are met, the President, in consultation with the employee, shall designate the days on which an individual employee shall observe the furlough days required by this agreement. For the purposes of this provision, consultation shall mean that the employee will be given the opportunity to nominate days on which to observe the furlough on non-campus closure furlough days.

      This consultation shall take place as soon as practicable, but no later than the start of the monthly pay period in which a furlough day is to be observed. Although the President shall make the final determination based on operational needs of the campus, consideration shall be given to the employees' nominated observance day(s). In the event that operational needs require that not all employees can observe the furlough on the nominated days, the President shall prioritize requests on the basis of seniority.

   b. Twelve (12) month Employees shall be subject to no more than twenty-four (24) furlough days between ~~August~~ July 1, 2009 and June 30, 2010. Eleven (11) month

employees shall be subject to no more than twenty-two (22) furlough days between ~~August 1~~, 2009 and June 30, 2010. Ten (10) month Employees shall be subject to no more than twenty (20) furlough days between ~~August~~ 1, 2009 and June 30, 2010.

c. Campuses may be closed on furlough days at the discretion of the President.

d. It is the intent of the parties that furlough days should be distributed as equally as possible across the term of this agreement. However, the President or the employee may designate one five day furlough in an individual work-week once in a fifty-two (52) week period. With the exception of this one-time observance of five (5) furlough days, no employee shall observe more than three (3) furlough days in any pay period for a full-time CSUEU-represented employee from ~~August~~ 1, 2009 through June 30, 2010.

e. The President may designate as a furlough day any of the following holidays, only if they have been rescheduled for observance on another day by the President in order to make up for the one-month delay in the start of this program.

   i. Lincoln's Birthday

   ii. Washington's Birthday

   iii. Memorial Day

   iv. Admission Day

   v. Columbus Day

f. The President may also designate the day after Thanksgiving as a furlough day.

g. Employees shall receive at least twenty-one (21) days notice prior to the implementation of any furlough plan.

h. Furlough programs shall expire no later than June 30, 2010.

i. At the end of the negotiated furlough ~~period~~, the President shall ensure that all employees have taken the appropriate number of furlough days commensurate with the salary reductions that have been made. If, due to operational needs, the President cannot assign the requisite number of furlough days, then the employee shall be credited with the appropriate number of alternate days off equal to the salary deductions made.

4. Employee Salary Rates and Schedules

   a. Each employee's pay reduction necessitated by furloughs shall be spread evenly over the eleven (11) month period or over the pay periods within these eleven(11) months for which the employee is in pay status.

   b. Employees who in the last twelve (12) months volunteered to reduce their time-base (e.g. 10/12 or 11/12) shall be allowed to return to 12/12 status prior to the implementation of any furlough plan.

   c. Employees on 4/10 work schedules may be converted to 4/8 work schedules during furlough periods.

d. Part-time employees shall be subject to furloughs on a pro-rated basis. Pro-ration shall be determined consistent with the employee's time base.

e. The number of days in the pay period that per diem or intermittent employees are allowed to work shall be reduced by two days so that no per diem or intermittent employee shall be allowed to work more than nineteen (19) days in a month with twenty-one (21) days in that pay period or twenty (20) days in a month with twenty-two (22) days in that pay period.

f. Employees may not substitute vacation days, sick leave, CTO or holiday credits for furlough days.

g. It is the intent of the CSU to avoid overtime during any furlough periods. Overtime must be authorized in accordance with Article 19, Section 19.4.

h. Exempt employees lose their FLSA exemption during the week they take a furlough day and are treated as hourly employees.

i. It is the expressed intent of the CSU that exempt employees should not be required to work more than thirty-two (32) hours during a furlough week.

j. Where an exempt employee believes they have been assigned an excessive or unreasonable workload during a week in which he/she maintain his/her exempt status, the employee may file a complaint using a similar process contained in Article 8 of the Collective Bargaining Agreement. This process shall include a Chancellor's Office Level of Review. The parties shall execute a MOU fully outlining the process to be followed within twenty-one (21) days of the execution of this agreement.

k. Furlough days do not count as time worked for determining overtime in the workweek.

   i. In the event that any employee is authorized to work in excess of thirty-two (32) hours during any furlough week, he/she shall be compensated at the employee's straight time rate up to forty (40) hours.

   ii. All hours worked in excess of forty (40) hours in a workweek shall be compensated at a rate of one and one-half times his/her hourly straight time rate.

   iii. In the event an employee is scheduled to work outside of their normal five-day workweek as a result of observing a furlough day, such time shall be considered call-back pursuant to Article 19, sections 19.17 and 19.18.

5. Work Jurisdiction

During the period of the furlough, the number of student assistant hours and the number of administrators in a department shall not be increased for the purpose of performing bargaining unit work.

6. Impact of Furlough Programs on Benefits and Retirement

    a. Furlough Programs shall not adversely affect an employee's anniversary date or seniority credit or create a break-in-service. Furlough Programs shall not impact the accrual of vacation and sick leave or the payment of health, dental or vision benefits, or the Flex Cash Option.

    b. Furlough Programs shall not impact compensation for the purposes of retirement and death and disability benefits. These benefits shall be based on the unchanged salary rate that would have been credited had the employee not been furloughed.

7. Exemptions from Furloughs

    a. Designated employees who perform the work of public safety positions (such as dispatchers and community service employees), regardless of their job classification, shall be exempt from any Furlough Programs. A list of such exempted classifications and/or employees shall be prepared and appended to this agreement.

    b. The Furlough Program does not apply to employees who are on a leave of absence without pay or on military leave.

8. State-wide Labor Management Committees

    a. Pursuant to Article 27, the parties shall form a state-wide Labor-Management Committee (LMC) to monitor the effect of furloughs on workload during the period of this agreement. The parties recognize, however, that both the CSUEU and employees should make good-faith efforts to resolve workload issues arising out of the furlough with local campus management at the campus level before raising the issue to the state-wide committee's attention.

    b. Pursuant to Article 27, the parties shall form a state-wide Labor-Management Committee to explore cost-saving measures that lessen the effects of cuts to the CSU budget.

    c. These two labor management committees shall be formed within thirty (30) days of the execution of this Agreement. Within forty-five (45) days of the execution of this Agreement, the LMCs shall meet and schedule routine meetings thereafter.

9. Reduction of Maximum Number of Furlough Days

    a. If the 2008-2009/2009-2010 reductions in state general fund support are more than $58,000,000 less than those detailed in the Legislature's Conference Committee recommendations on the budget bill (approximately $583,816,000), or should the CSU negotiate and implement new salary increases with another employee group such as General Salary Increases or Service Salary Increases while any CSUEU-represented employees are subject to furloughs the CSUEU may elect to meet and confer over the maximum number of furlough days allowed under this proposal.

For the CSUEU:

Date

For the CSU:

Date

For the CSUEU:

Date

For the CSU:

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For the CSUEU:

Date

1. Preamble

   a. To preserve, in light of the reduction by approximately $583,816,000 from the Legislature's February 2009 special sessions budget revisions of the state general fund support in the CSU 2008-09 and 2009-10 budgets, as many faculty unit jobs as possible and at the same time to serve as many students as possible without unreasonably increasing workload, while acknowledging that cuts of this magnitude will naturally have consequences for the quality of education that we can provide, CFA and CSU hereby agree to the following Memorandum of Understanding.

   b. The purpose of furloughs is to lessen the severity of layoffs by reducing compensation costs.

2. Definitions

   a. The term "furlough day" as used in this Agreement refers to a day on which a faculty unit employee is normally scheduled to work, or is in pay status, that is taken as an unpaid day off.

   b. The term "pay status" as used in this Agreement refers to the time in which a faculty unit employee is working or is on paid leave.

3. Furlough Days

   a. The President may designate specific furlough days as campus closure days, or partial campus closure days (including reduced administrative services days). For instructional faculty unit employees, campus closures or partial closures above shall be limited to six (6) days. Scheduling of additional furlough days shall be by mutual agreement of the faculty employee and the appropriate administrator. Absent mutual agreement, the appropriate administrator shall designate the furlough days for the faculty employee based on compelling operational needs of the campus and shall explain those needs in writing to the faculty unit employee.

   b. Full-time Academic Year faculty unit employees shall be subject to eighteen (18) furlough days during the 2009/2010 academic year. The pattern of days shall include no more than nine (9) furlough days per semester and six (6) furlough days per quarter. At

CSU Stanislaus the pattern of days shall include no more than eight (8) days in the fall term, two (2) days in the winter term, and eight (8) days in the spring term.

c. Full-time 12 month Faculty Unit Employees shall be subject to twenty-four (24) furlough days between July 1, 2009 and June 30, 2010. 10 month employees shall be subject to no more than twenty (20) furlough days between July 1, 2009 and June 30, 2010.

d. Full-time Faculty unit employees on a cruise calendar at the California Maritime Academy shall be subject to twenty (20) furlough days during the dates of the cruise academic calendar for 2009/2010.

e. Salary Reduction – the salary reduction for Academic Year, Ten (10) Month and Twelve (12) Month Faculty Unit Employees shall be 9.23% of the annual salary.

f. Furlough Credit – for each month in which a salary deduction is taken a corresponding furlough credit shall be given to the Faculty Unit employee.

g. Furlough Observance - The Furlough Program shall allow a Faculty Unit employee to observe up to four (4) furlough days in a single calendar month. With the exception of this one-time observance no employee shall be subject to, or take, more than two (2) furlough days in any calendar month for a full-time faculty unit employee over the terms of this agreement. Due to the unique calendar at the California Maritime Academy, the parties agree that exceptions to the maximum observance days per week and per pay period may be made.

h. A Faculty employee shall not be permitted to observe more than one furlough day in any workweek, except during one week during the month of the four (4) day exception in 3(g) above.

i. Full-time Faculty Unit Employees who after June 30, 2008 voluntarily reduced their time-base shall be allowed to return to their prior time-base within thirty (30) days of the effective date of this MOU.

j. The President may designate the day after Thanksgiving as a furlough day.

k. For Academic Year Faculty unit employees, only those days that are workdays within the academic calendar may be used as furlough days.

l. All furlough days must be taken before June 30, 2010.

m. At the end of the negotiated Furlough Program, the President shall ensure that all Faculty unit employees have taken the appropriate number of furlough days commensurate with the salary reductions that have been made.

4. Employee Salary Rates and Schedules

a. Each employee's pay reduction necessitated by furloughs shall be spread evenly over the months in which deductions are made. With an effective implementation date of August, this would mean an eleven month period for 10 month and 12 month employees (which equates to a 10.07% monthly deduction) or, for academic year employees, the 9.23% shall be deducted over the pay periods associated with the 2009/2010 academic year. For academic calendars in which the first pay period is September 2009, salary reductions will continue through the August 2010 pay period.

b. Part-time employees shall be subject to furloughs on a pro-rated basis. Pro-ration shall be determined consistent with the employee's time base.

c. Employees may not substitute vacation days, sick leave, or personal holidays for furlough days.

5. Faculty Unit Employee Workload

a. The composition of professional duties and responsibilities of individual faculty members shall be determined as described in Article 20 of the CBA. The furloughs described herein shall not result in an unreasonable workload or schedule within the meaning of Article 20.3.

b. Prior to starting their assignment for any term, pursuant to this agreement, Faculty Unit employees shall certify in writing that:

i. They will not work on the assigned furlough day; and

ii. They will not work beyond the duties assigned for the furlough week

c. In order to effectuate the observance of the furlough for full-time librarian, counselor, or coaching employee(s), who are governed by the provisions in Articles 20.15 and 20.29, that week's assignment shall be reduced by (eight) hours per Furlough Day taken

during that week. This provision shall apply pro-rata to any less than full-time librarian, counselor, or coaching employees.

d. To address the impacts on probationary faculty caused by furloughs, the furloughs described herein shall have no adverse effect on the eligibility for, and award of, tenure pursuant to Article 13 and/or promotion pursuant to Article 14 for probationary and tenured faculty unit employees. At the request of a probationary faculty unit employee made to the appropriate administrator between July 1, 2009 and June 30, 2010, the probationary period of such employee will be increased, by one (1) year from the normal probationary period of six (6) years of full-time probationary service and credited service specified in Article 13.3 to a probationary period of seven (7) years of full-time service and credited service, provided that the request is received by the appropriate administrator before the first level of review has rendered its recommendation concerning an active application for tenure and/or promotion by the employee.

e. For the duration of the furlough program, no additional administrator or volunteer (who did not teach in Academic Year 2008/2009) may perform bargaining unit duties in a department in which faculty unit employees are subject to furlough.

6. Impact of Furlough Program on Salary Programs, Benefits and Retirement

a. The Furlough Program shall not affect an employee's anniversary date or seniority credit or create a break-in-service. The Furlough Program shall not impact the accrual of vacation and sick leave or the payment of health, dental or vision benefits, or the Flex Cash Option.

b. The Furlough Program shall not impact compensation levels for the purposes of CalPERS retirement under the current Regulations. These benefits shall be based on the unchanged salary rate that would have been credited had the employee not been furloughed.

c. These furloughs also shall have not affect the eligibility for, award of, and amount of, leaves of absence with pay pursuant to Article 23, sick leave pursuant to Article 24, sabbatical leaves pursuant to Article 27, difference in pay leaves pursuant to Article 28,

participation in the Faculty Early Retirement Program ("FERP") pursuant to Article 29, Pre-Retirement Reduction in Time-Base ("PRTB") pursuant to Article 30, and vacation pursuant to Article 34, except that a faculty unit employee may take a Furlough Day during such leave, participation in the FERP, PRTB, or vacation.

d. These furloughs shall not constitute a break in service for any faculty unit employee and shall also not change the seniority date of any tenured faculty unit employee.

e. The furloughs described herein shall not effect eligibility for, award of, and amount of any salary increases pursuant to Article 31, including, but not limited to, any salary increases accompanying a promotion pursuant to Article 31.5.

f. The furloughs described herein shall have no adverse effect on the eligibility for, award of, and amount of upward movement on the salary schedule pursuant to Article 12.10 or range elevations pursuant to Article 12.16 through 12.20.

g. Any FERP participant may request, and shall be granted, a leave of absence without pay for any academic term or terms beginning between July 1, 2009 and June 30, 2010. Such leave of absence without pay shall not adversely affect future participation in the FERP; specifically, any FERP participant taking such a leave of absence without pay shall be entitled actively to participate in the FERP for a total period of no more than five (5) academic or fiscal years.

h. Any faculty unit employee may request subject to the terms of Article 22, Leaves Without Pay, a leave of absence without pay for any academic term or terms beginning between July 1, 2009 and June 30, 2010.

i. Any tenured faculty employee who applies, and is otherwise eligible pursuant to Article 30, for a PRTB for any academic term or terms beginning between July 1, 2009 and June 30, 2010 shall be granted such a PRTB, and any tenured faculty unit employee currently holding a PRTB who applies for a further PRTB for any academic term or terms beginning between July 1, 2009 and June 30, 2010 shall be granted such further PRTB.

j. Any full-time, three-year temporary faculty unit employee who is laid-off between July 1, 2009 and June 30, 2010 will be placed on the reemployment list and will have all

rights of an individual on the reemployment list pursuant to Articles 12.7, 12.8, and 38.48.

k. Additional Employment: For the period between July 1, 2009 and June 30, 2010, Article 36.4 shall be revised to read as follows:

> "The '25%' overage as used in this Article shall be calculated as a percentage of the faculty unit employee's pre-furlough full-time workload or, when appropriate, full-time time base; or as a percentage of the faculty unit employee's pre-furlough full-time salary, whichever is greater. The total additional employment of the faculty unit employee shall not exceed the .25% overage."

7. Exemptions from Furloughs

   a. Faculty Unit employees whose salary is 100% funded from grants and contracts not funded from the state general fund, shall not be subject to this furlough agreement.

   b. Faculty Unit employees whose salary is partially funded from grants and contracts not funded from the state general fund, shall be subject to this furlough program pro-rata with the percentage of funds received from the state general fund used to fund that salary.

   c. Instructional Faculty Unit employees in 2322, Special Programs, and 2323, Extension for Credit, shall also not be subject to this furlough agreement.

   d. The Furlough Program does not apply to employees who are on a leave of absence without pay or on military leave. The Furlough program will not impact Family Medical Leave, Industrial Disability Leave and Non-Industrial Disability Insurance (NDI) Leave.

8. State-wide Labor Management Committees and Information Reporting

   a. The parties shall form a state-wide labor-management committee to monitor the effect of furloughs on workload during the period of this Furlough Program. Both the CSU and Faculty Unit employees shall make good-faith efforts to resolve workload issues arising out of the furlough with local campus management at the campus level before raising the issue to the attention of the state-wide committee.

b. This labor management committee shall be formed within thirty (30) days of the execution of this Agreement. Within forty-five (45) days of the execution of this Agreement, the LMCs shall meet and schedule routine meetings thereafter.

c. For each academic term between July 1, 2009 and June 30, 2010, CSU will report to CFA within thirty (30) days of the start of such academic term (a) the name and department of faculty employees by campus who taught during the same academic term in the previous year and who do not teach during that academic term in this year; and (b) the name and department of faculty employees by campus who received health benefits during the same academic term in the previous year and who do not receive health benefits during that academic term in this year.

9. Reduction of Maximum Number of Furlough Days

If the 2008-2009/2009-2010 reductions in state general fund support are less than those detailed in The Legislature's Conference Committee Recommendations on the Budget Bill (approximately $583,816,000), in an amount greater than $58,000,000, or should the CSU negotiate and implement new salary increases such as General Salary Increases or Service Salary Increases with any CSU represented bargaining unit while any CFA represented employees are subject to furloughs, CFA may elect to meet and confer over the maximum number of furlough days allowed under this proposal.

10. Enforcement

Any alleged violation of this MOU shall be grievable pursuant to the procedures of Article Ten (10) of the Collective Bargaining Agreement between the parties.

11. Duration

The furlough program will be effective from July 1, 2009 to June 30, 2010.

For the CFA: **For the CSU:**

Susan Meisenhelder by B.R. 7-29-09

Date 7/29/09 Date

Chancellor

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  - July 24, 2009
  - July 22, 2009
  - July 15, 2009
  - July 8, 2009
  - July 7, 2009

- July 6, 2009
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- Media Teleconference: CSU Leaders Discuss Budget and Systemwide Impaction

- Video: CSU Chancellor Charles B. Reed Honored as Visionary by McGraw Hill

- Q&A with Chancellor Reed about Student Fee Increases

- The State Budget Crisis:
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- **Chancellor's Email to Employees**
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  - January 31, 2007
  - July 25, 2006
  - May 24, 2006

- Communications Archive

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Last Updated: March 19, 2010

Chancellor

The California State University Employee Update
Wednesday, July 8, 2009

Trustees Discuss Plan to Manage Budget Crisis

Furloughs, enrollment reductions and a possible student fee increase were among the options the CSU Board of Trustees discussed Tuesday as ways to deal with a proposed $584 million budget cut, the largest in the system's history. The budget reduction is the result of the state's attempt to close a $26.3 billion budget gap.

"We have never before seen such a devastating cut in a single year," said CSU Chancellor Charles B. Reed. "I am concerned because the CSU system has a national reputation for access, quality and diversity."

Because employee salaries and benefits account for approximately 85 percent of the CSU's operating budget, large expenditure cuts will require significant reductions in labor costs, explained Robert Turnage, assistant vice chancellor for Budget. The magnitude of the CSU's problem, however, means that one single solution will not produce the needed savings. To illustrate, Turnage said the proposed $584 million cut is equivalent to the funding provided by the state for about 95,000 students, the approximate number the CSU graduates each year.

Part of the CSU's plan to reduce salary expenditures includes a furlough for all employees two days a month, which would reduce spending by roughly $275 million and preserve 22,000 course sections or 15 percent of all classes for students for the academic year. In addition, furloughs are temporary and do not affect employment status, health benefit eligibility or pay rate for retirement benefits. CSU executives, management and non-represented employees will begin furloughs August 1.

Labor agreements between the CSU and its employee unions do not include provisions for furloughs, therefore each union must agree to negotiate furloughs. If a union has not agreed to negotiate furloughs, the CSU will follow the options under the contract which may include layoffs and non-retention of temporary employees to reduce CSU's employment costs for that employee group.

The California State University Employees Union (CSUEU) representing 16,000 non-academic employees has reached a tentative agreement with the CSU and the Academic Professionals of California (APC) representing 2,400 student service employees has agreed to discuss furloughs. The CSU has met with the California Faculty Association (CFA) to discuss furloughs and the CFA has scheduled a vote of its membership beginning July 13. There are approximately 23,000 faculty personnel.

Employees in the public safety union will be exempt from furloughs and several other labor groups have either rejected furloughs or are still negotiating.

In addition to furloughs, trustees were briefed about student enrollment reductions for 2010-11. CSU will look to reduce its student enrollment by 32,000 students systemwide by using a combination of enrollment management tools such as increased grade point averages for out-of-area applicants.

There will also be a student fee increase considered at the July 21 Board of Trustees meeting that will go into effect this fall. While the exact increase has not been finalized, increases in financial aid included in the federal stimulus package will cover a fee increase for 187,000 of the CSU's 450,000 total students. The CSU also expects to receive an additional $81 million in federal Pell awards for its neediest students, and would also set aside one-third of any fee increase for financial aid. Tax credits, increased work study and student loan improvements will also offset the fee increases for many students.

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Last Updated: July 08, 2009

CALIFORNIA STATE UNIVERSITY, FRESNO

Campus Furlough Calendar

Faculty, APC, CSUEU, MPPs, Confidentials

2009-2010

JULY 2009

S	M	T	W	Th	F	S
			1	2	♥ 3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

AUGUST 2009

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23	| 24	25	26	27	28	29
30	31					

SEPTEMBER 2009

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20	21	22	23	24	☀ 25	26
27	28	29	30			

OCTOBER 2009

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18	19	20	21	22	☀ 23	24
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NOVEMBER 2009

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22	23	24	✚ 25	♥ 26	27	28
29	☀ 30	1				

DECEMBER 2009

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27	♥ 28	♥ 29	♥ 30	✚ 31		

JANUARY 2010

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31						

FEBRUARY 2010

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28	1					

MARCH 2010

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28	◆ 29	◆ 30	♥ 31			

APRIL 2010

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18	☀ 19	20	21	22	23	24
25	26	27	28	29	30	

MAY 2010

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16	17	18	19	20	21	22
23	24	25	26	27	✚ 28	29
30	♥ 31					

JUNE 2010

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6	7	8	9	10	11	12
13	14	15	16	17	☀ 18	19
20	21	22	23	24	25	26
27	28	29	30			

Holiday Closure Schedule

♥

Independence Day, 7/3/09
Labor Day, 9/7/09
Veterans Day, 11/11/09
Thanksgiving Day, 11/26/09
Christmas Day, 12/25/09
Lincoln's Birthday, 12/28/09
Admission Day, 12/29/09
Columbus Day, 12/30/09
New Year's Day 1/1/10
Martin Luther King Day, 1/18/10
President's Holiday, 2/15/10
Cesar Chavez Day, 3/31/10
Memorial Day, 5/31/10

Legend

♥ Holidays

| Instruction start and end date

Thanksgiving Break (campus closed)

✚ 7	Furlough Closure - Administrative / Academic (limited operations)	☀ 11	Furlough - Administrative (open for instruction)		Academic Year Work Day
◆ 4	Furlough Closure - State Shutdown (limited operations)	✥ 1	Furlough - Academic (open for business)	★ 2	Furlough - Administrative / Academic (alternative instruction - limited operations)

Frequently Asked Questions on Faculty Furloughs

Last updated October 5, 2009

After a vote of the CFA membership this summer, CFA and the CSU administration entered into a furlough agreement. Below, we answer frequently asked questions about the implementation of the furlough agreement. The agreement itself can be viewed at **http://calfac.org/allpdf/Budget_09_10/FurloughSideLetter.pdf**

PLEASE NOTE, UPDATED QUESTIONS AND ANSWERS ARE IN BLUE TYPE.

Faculty may submit questions not addressed here to **furloughsandbudgetcuts@calfac.org**.

A. GENERAL QUESTIONS

1. Are all faculty members subject to the furloughs?

All faculty members are subject to the furloughs, with the following exceptions:

- Faculty whose salaries are 100% funded from grants and contracts not funded from the state general fund
- Faculty who teach self-support classes
- Faculty who are on a leave of absence without pay or military leave.
- Faculty whose salary is funded in part from the state general fund and in part from grants and contracts, or who teach some state-support classes and some self-support classes, are subject to the furloughs with respect to that portion of their salary that is funded from the state general fund/state-support only.
- Part-time faculty are subject to the furloughs on a pro-rata basis, as described in #25 below.

2. How many furlough days will there be?

Between July 1, 2009, and June 30, 2010, full-time Academic Year (AY) faculty will have 18 days, 10-month full-time faculty will have 20 days, and 12-month full-time faculty will have 24 furlough days.

3. How much is pay reduced for faculty during the furlough period?

The annual salary for work performed between July 1, 2009 and June 30, 2010 is reduced by 9.23%. The reduction is spread evenly across the corresponding pay-periods.

4. When is the first pay period that will be reduced for the furlough? And the last?

For any AY faculty members, and assuming that AY 2009-10 starts on September 1, 2009: the first pay check to reflect a reduction will be the one issued at the end of September or beginning of October, 2009, which covers work performed in September 2009. The last pay check to reflect a reduction will be the one issued at the end of August or beginning of September of 2010, which also covers work performed in AY 2009-10.

5. Will health and retirement benefits be reduced as well?

No. The furlough has no effect on eligibility for, and amount of, health, dental, and vision benefits or the Flex Cash option. It also has no effect on retirement benefits, which will be based on the pre-furlough salary rate. Similarly, the furlough has no effect on eligibility for, and amount of, sick leave, vacation, sabbaticals, difference in pay leave, and leave of absence with pay. However, faculty on such leave, vacation, or sabbatical will have their pay reduced for the period in question as described above.

6. Can I work on a furlough day?

Technically no. Prior to starting your assignment for any term between July 1, 2009 and June 30, 2010, you will have to certify in writing that you will not work on furlough days and that you will not work beyond the duties assigned for weeks with one or more furlough days. Obviously, however, no one is able to monitor what an individual faculty member does on any particular day.

7. Can I go to campus on a furlough day to pick up my mail, see a friend, attend a CFA rally or go there for any other lawful reason?

Yes. The Furlough Agreement does not ban faculty members from campus on furlough days. It simply releases them from the obligation to work on those days.

8. Why are faculty asked to sign the non-work agreement?

It is our understanding that the CSU administration wants to guard against later claims for payment for work performed.

9. Can I refuse to certify that I will not be working on furlough days? I will have to work on furlough days and do not want to lie.

CFA does not recommend this. Refusal to do so could potentially subject you to discipline. Instead, you should reduce (rather than just reshuffle) your workload so that you do not have to work on furlough days.

10. What if I find the form offensive?

Under Article 11.2 of the CBA, "A faculty unit employee shall have the right to submit material to his/her Personnel Action File." Therefore, you can submit a separate statement together with the form, for inclusion in your Personnel Action File, in which you explain your opinion about the form or about having to sign it.

11. What happens if I have not taken all my furlough days by the deadline, June 30, 2010?

The campus President is supposed to ensure that you have taken the appropriate number of furlough days. Your annual salary will be reduced by 9.23% in any event.

12. Will I lose my "exempt" status under state and federal wage and hour law in those weeks in which I am subject to a furlough day and will I become entitled to overtime for hours worked in excess of 8 hours a day or 40 hours during those weeks?

No. In order to lose your "exempt" status under state and federal wage and hour law, your monthly salary would have to be reduced to less than two (2) times the state minimum wage for full-time employment. A 9.23% salary reduction does not do this.

13. Will all management employees also be subject to furlough?

Yes, according to the Chancellor's Office.

14. Will the furloughs continue after this year?

CFA would have to agree to any continuation of the furloughs beyond June 30, 2010. Absent such an agreement, the furloughs automatically expire on that date.

15. Are violations of the side letter grievable?

Yes.

B. SCHEDULING OF FURLOUGH DAYS

16. How will furlough days be scheduled?

The campus President may designate campus closure days. Instructional faculty can be subjected to no more than six (6) such campus closure days as furlough days. Non-instructional faculty (librarian, counselor, and coaching employees) can be subjected to any number of such campus closure days as furlough days, up to the maximum number of 18, 20, or 24 furlough days .

The campus President may also designate the day after Thanksgiving as one of his/her six furlough days, but only if that day is not already designated as a holiday on the campus official Academic Year Calendar for 2009-2010.

For both instructional and non-instructional faculty, any remaining furlough days up to the maximum number of 18, 20, or 24 furlough days are scheduled by mutual agreement between each faculty member and the appropriate administrator.

17. Can any day during the academic year 2009-2010 be designated as a furlough day?
No. The general rule is that only official workdays on a campus's academic year calendar can be designated as faculty furlough days. This rule applies both to the days chosen by the faculty member and to those chosen as faculty furlough days by the campus President. (Note that different rules apply to campus closure days for other CSU employees.)

To determine which days are workdays in the academic work year for your campus, see:
http://www.calstate.edu/HRAdm/Payroll/AcademicCalendars/AcademicCalendars.shtml

18. What happens when a faculty member and the appropriate administrator cannot reach mutual agreement regarding the scheduling of the remaining furlough days?
If no mutual agreement can be reached, the appropriate administrator shall designate the furlough days for the faculty member based on "compelling operational needs" and shall explain those needs to the employee in writing.

19. Are there any other limitations on the scheduling of furlough days?
Yes. No more than 2 furlough days can be scheduled in any given month, and no more than 1 furlough day can be scheduled in any given week. There is a one-time exception to these limitations whereby a faculty member can schedule up to 4 furlough days in one particular month, including up to 4 furlough days in one week of that month. For AY faculty, each furlough day must be one of the 180 workdays established by the campus academic calendar.

20. What if the President designates 4 days in one week as faculty furlough days as part of the 6 that s/he can designate? Does that prevent a faculty member from choosing another group of 4 days in one week?
No. The furlough agreement states: "The Furlough Program shall allow a Faculty Unit employee to observe up to four (4) furlough days in a single calendar month." This language makes clear that this is a right that **faculty** have under the furlough agreement, and this right cannot be abridged by unilateral action on the part of the President.

21. Can I substitute vacation, sick leave or personal holidays for furlough days?
No.

22. Can I take teaching days as furlough days?
Yes, subject only to the limitations below.

23. Can the administration impose a limitation on the number of teaching days that can be taken as furlough days?
No. The administration cannot impose an across-the-board limitation on the number of teaching days that can be taken as furlough days, let alone prohibit faculty from taking any teaching days other than campus closure days as furlough days. However, in individual cases, excessive scheduling of certain teaching days as furlough days may conflict with compelling operational needs. For example, if a faculty member teaches a class that meets only on Thursdays, and wants to schedule every other Thursday as a furlough day, the resulting reduction of class meetings by half might conflict with compelling operational needs if the class cannot be taught effectively in half the meetings.

24. So who determines what are "compelling operational needs"?
In the first instance, "the appropriate administrators." However, if it is clear that the administrator is using "compelling operational needs" as an excuse to unreasonably deny a desired furlough day to any faculty member – for example by claiming that "compelling operational needs" militate against the faculty member taking any teaching days as furlough days – then the faculty member can file a grievance and let an arbitrator decide what constitutes "compelling operational needs."

25. How are the furloughs supposed to work for faculty on cruise calendar at the Maritime Academy?

Faculty on cruise calendar at the Maritime Academy will be subject to 20 furlough days. Because such faculty cannot take furlough days while on a cruise, exceptions to the limit of one furlough days per week and two furlough days per month may be made for them.

C. FURLOUGHS AND SPECIAL SITUATIONS

26. How do the furloughs work for part-time faculty?

Part-time faculty members are subject to the furloughs on a pro-rated basis that is proportional with their time base. Part-faculty members can take “working teaching days” and/or “working non-teaching days” as furlough days.

Academic year part-time Lecturers will have 18 furlough days in an academic year (9 furlough days in a semester term or six in a quarter term), which is the same number of days as academic year full-time faculty. Each of the furlough days for a part-time Lecturer is pro-rated consistent with their time base.

For example, an AY part-time Lecturer with a 50% time base appointment for 7.5 units in a term would have each of his or her 18 furlough days pro-rated to 50% of full-time. No CSU work, whether teaching or non-teaching work, would be done on these furlough days.

The salary reduction for a part-time Lecturer also is pro-rated consistent with their time base. Using the same example, an AY part-time Lecturer with a 50% time base appointment for 7.5 units in a term and pre-furlough salary of $2,000 per month would have a furloughed salary of $1,815.40 per month:
[$2,000 – ($2,000 x .0923 = $184.60) = $1815.40]

27. I buy out some or all of my teaching time with, or receive assigned time from, funds from grants and contracts not funded from the state general fund. Will I be furloughed on the bought-out teaching time or assigned time?

No. Only the portion of your salary funded from the general state fund, if any, is subject to the furloughs.

28. My Dean decides how much of my bought-out teaching time or assigned time is charged to my external grant. What if the dean reduces that amount?

If your salary remains unchanged, this would theoretically increase the portion of your salary that is subject to the furloughs. However, unless the Dean has compelling reasons unrelated to the furloughs to do so, such an action would be grievable. In addition, your grant or contract may contain language that would prevent the Dean from doing so.

29. If I teach during this Summer or next, will my pay for this work be reduced?

The Chancellor's Office is not planning to ask for furloughs for anyone teaching in the summer of 2009. Because those sessions are well under way, they have not developed a mechanism to capture the savings, and they also have not developed a mechanism whereby faculty could easily reduce their work schedules, given the very short time line. Accordingly, faculty working on summer 2009 appointments will receive their full pay and will not have to take additional furlough days. However, the Chancellor's Office "reserve[s] the right to apply furlough to summer 2010 employment in the month of June," as they can under the furlough agreement.

30. If I perform chair duties during this Summer or the next for extra pay, will my pay for this work be reduced?

If the work is performed between July 1, 2009 and June, 2010 as part of a 12-month appointment, pay for that work will be reduced by 9.23%.

31. I am a full-time chair with one half-time AY appointment and one half-time 12-month appointment. How do the furloughs work for me?

You should be subject to 24 full furlough days—18 "combined" AY/12-month furlough days during the academic year and 6 straight 12-month furlough days outside the academic year falling between August 1, 2009 and June 30, 2010. You should also be subject to a 9.23% salary reduction for each of your appointments.

32. Will faculty who are on sabbatical or difference-of-pay leave be subject to the furloughs?

Yes. Both sabbatical and difference-of-pay leaves are "for purposes that provide a benefit to the CSU, such as research, scholarly and creative activity, instructional improvement or faculty retraining." As such, faculty are expected to work during these leaves, and they are therefore subject to the furloughs.

33. I am FERPing. Can I avoid being furloughed in AY 2009-10 and still preserve my FERP rights?

Yes. Any FERP participant can take a leave of absence without pay for any or all academic terms beginning between July 1, 2009 and June 30, 2010. Such a FERP participant preserves his or her FERP rights, specifically, the right actively to participate in the FERP for a total period of no more than 5 academic or fiscal years. In other words, a FERP participant who takes a leave of absence without pay between July 1, 2009 and June 30, 2010 does not lose the period when he or she was on leave but can FERP for an equal period later on, in addition to any otherwise remaining FERP time.

34. I voluntarily reduced my time base after June 30, 2008. Can I increase it now?

Any full-time faculty member who voluntarily reduced his or her time base after June 30, 2008 will be allowed to return to his or her prior time base if he or she so requests by August 27, 2009.

35. I am a full-time faculty member with additional employment compensated by CSU. Will I be able to continue this additional employment?

Yes. In fact, the furlough agreement increases your eligibility for additional employment. Whereas under the Collective Bargaining Agreement, such additional employment is capped at 25% of the employee's "full-time workload or, when appropriate, full-time time base," under the furlough agreement, it is capped at 25% of the employee's "pre-furlough full-time workload or, when appropriate, full-time time base" or the employee's "pre-furlough full-time salary, whichever is greater."

Moreover, if the additional employment occurs on the same campus as the main employment, it is not subject to the furlough, *i.e.*, the salary for the additional employment will not be furloughed and the employee will not have to take additional furlough days for it. If the additional employment occurs on a different campus from the main employment, it is subject to the furlough, *i.e.*, the salary for the additional employment will be furloughed and the employee will have to take additional furlough days for it.

36. I am a non-citizen with a work visa. Will the furloughs affect my status?

Some visas have a minimum salary requirement. Please contact faculty affairs and ask whether the furloughs will affect your status. If the answer is "yes," you may have to consult an immigration attorney. Your local bar association may have a referral service that can assist you in finding such an attorney. You may also want to consult the website of the U.S. Citizenship and Immigration Services: http://www.uscis.gov/portal/site/uscis

D. FURLOUGHS AND WORKLOAD

37. How can instructional faculty make sure that they receive a workload reduction that is commensurate to the pay reduction?

The furlough agreement explicitly states that "[t]he furloughs...shall not result in an unreasonable workload or schedule within the meaning of Article 20.3." For instructional faculty, this means that to receive a workload reduction that is commensurate to the pay reduction, they must schedule some furlough days on teaching days.

The Chancellor's Office has stated in a Press Release that "[u]nder the...furlough agreement, faculty members will work with individual campus administrators so that class schedules for students are

minimally disrupted" and that "if a furlough day is taken on a day of instruction, alternative out-of-classroom assignments could be given to students." It should be noted that these statements are NOT part of the side letter. As a result, if a campus administrator attempts to ensure that "class schedules for students are minimally disrupted" by limiting the number of teaching days that can be taken as furlough days, or if that administrator does allow a faculty member to take teaching days as furlough days but orders him or her to give "alternative out-of-classroom assignments" to students, this may create an unreasonable workload or schedule that can be grieved.

38. What about workload reduction for non-instructional faculty, such as librarian, counselor, or coaching employees?

Under the Collective Bargaining Agreement, the assignment of librarian, counselor, or coaching employees "shall be an average of forty (40) hours in a seven (7) day period." Under the furlough agreement, that assignment "shall be reduced by eight hours per Furlough Day taken during that week." This ensures that non-instructional faculty receive a workload reduction that is commensurate to the pay reduction.

39. How will CFA make sure that faculty receive a workload reduction that is commensurate to the pay reduction?

CFA and the administration will form a state-wide labor-management committee to monitor the effect of the furloughs on faculty workload between July 1, 2009 and June 30, 2010. CFA will help faculty resolve workload issues on campus before they are discussed at the state-wide labor-management committee. If an issue cannot be resolved on campus or at the state-wide labor-management committee, CFA will help faculty pursue grievances in appropriate cases.

40. I am a probationary (tenure-track) employee. Can I afford to take a workload reduction without hurting my chances of getting tenure?

The furloughs are not supposed to have an adverse effect on the eligibility for, and award of, tenure. To ensure that probationary employees can take a workload reduction without hurting their chances of getting tenure, the furlough agreement provides that, upon request, the probationary period of any probationary employee will be extended by one year from six to seven years. The probationary employee must make this request between July 1, 2009 and June 30, 2010; and if the employee has an active application for tenure, he or she must make the request before the first level of review has rendered a recommendation concerning that application. Note that this provision does not absolve the probationary employee from the obligation to submit performance review materials in a timely fashion.

E. FURLOUGHS AND PROMOTION AND RANGE ELEVATION INCREASES

41. I am a tenure-track or tenured faculty member who is up for a promotion. Will the furlough reduce the salary increase that comes with a promotion?

No. With a promotion, you will get the regular 7.5% (minimum) increase based on your pre-furlough full-time salary. After the promotion has become effective but before the furloughs have expired, your paycheck will reflect both the 7.5% increase and the 9.23% reduction. Once the furloughs have expired, your paycheck will reflect only the 7.5% increase.

42. I am a lecturer who is up for a salary increase pursuant to Article 12.10 or a range elevation pursuant to Articles 12.16 through 12.20 of the Collective Bargaining Agreement. Do the furloughs hurt my chances to get such a salary increase or range elevation?

No. The furloughs shall have no adverse effect on the eligibility for, award of, and amount of salary increases pursuant to Article 12.10 or range elevations pursuant to Articles 12.16 through 12.20. Similarly, the furloughs shall have no adverse effect on the eligibility for, award of, and amount of any salary increases pursuant to Article 31. Note, however, that some salary increases pursuant to Article 31, such as the General Salary Increases and the Service Salary Increases, are in jeopardy independently of the furloughs because CSU has not received an amount in the state budget for 2009-10 that would be consistent with the "Compact." And because the Service Salary Increases are in jeopardy, so are salary increases pursuant to Article 12.10. Again, this is unrelated to the furloughs. The furloughs do not make it any less likely that faculty will get these increases.

F. FURLOUGHS AND FACULTY JOBS

43. The furloughs are supposed to save jobs. How will CFA know that the administration does not take other measures, such as increased reliance on management employees or volunteers for teaching, that destroy faculty jobs?

For the duration of the furlough program, no additional management employee or volunteer may teach or perform other bargaining unit work who did not already do so in AY 2008-09.

44. How will CFA know if the furloughs indeed do save any jobs?

Under the furlough agreement, the administration must supply CFA with the names and departments of faculty members who lost employment or benefits. This information must be provided each academic term and for every campus. Recall that benefits are not lost as a result of the furloughs, but only as the result of a time base reduction. In addition, CFA receives data that show how much money is spent on faculty salaries each month.

45. I am a full-time three-year lecturer. What if the furloughs don't save my job and I get laid off?

You will be placed on a reemployment list and will have preference for available temporary work over non-three-year lecturers for three years. Please see Articles 12.12 and 38.48 of the Collective Bargaining Agreement for details.

46. I am a part-time lecturer with a three-year appointment. What if the furloughs don't save my time base and I lose all work?

Part-time Lecturers with three-year appointments who lose all work will maintain their preference for available temporary work rights with either a zero-time-base appointment or will go on the reemployment list, depending on when the three-year appointment expires. Please refer to Articles 12.12 and 38.48 for details.

47. I am a tenured faculty member. Will the furloughs change my anniversary date or seniority credit in case of lay-offs?

No. The furloughs will not affect a tenured employee's anniversary date or seniority credit. They also do not create a break-in-service for any employee.

- San Diego News Network - http://www.sdnn.com -

SDSU student survey shows furloughs take toll on education

Posted By joseph.pena On December 9, 2009 @ 4:06 pm In Education, Local News, Politics & Government | No Comments

A survey of more than 6,600 San Diego State University students shows faculty furloughs have taken a toll on classroom instruction.

The survey — administered by the Associated Students and presented last week to the University Senate — is evidence furloughs are not an effective way to combat cuts to the California State University (CSU) system's budget, said Natalie Colli, Associated Students vice president of university affairs.

Colli said 6,671 students responded to the survey, and more than 5,100 responded during the first 24 hours the survey was made available online. Among the results:

[1]

SDSU students target budget cuts at a rally Nov. 16. Among the students concerns is faculty furloughs, which, according to a new survey by the Associated Students, have taken their toll on higher education. (Photo by Steven Bartholow)

– 86.7 percent of respondents said professors scheduled furloughs on instructional days;

– 62.9 percent of respondents said course material was crammed into insufficient instruction time;

– 55.9 percent of respondents reported a lack of instruction on required course material;

– 44.1 percent of respondents reported less availability of office hours and e-mail communication;

– 63.4 percent of respondents said professors did not offer alternative instruction (i.e. podcast lectures, online quizzes) on furlough days; and

– 36.7 percent of respondents said they would prefer the same required coursework, and instructional days to remain intact.

An overarching theme among the responses is “students feel they’re paying more for less,” Colli said, and the “resounding message is: no more furloughs.”

A statewide furlough agreement was signed in July, and requires faculty and staff to take roughly two furloughed days each month, which translates to a 10 percent cut in pay. The furlough agreement expires in June 2010, and there is no knowing whether furloughs will continue in the 2010-11 academic year, said Bonnie Zimmerman, associated vice president for faculty affairs at SDSU.

“I don’t bet on the stock market, I don’t bet in Vegas, and I don’t bet on furlough agreements,” said Zimmerman, a former 25-year faculty member at SDSU and past chair of the University Senate.

Zimmerman said she is not surprised by the survey’s results.

“Of course there was (an impact on education),” she said. “What would you expect?”

Faculty members had less than one month to schedule their fall furlough days with department chairs. The furlough agreement has few guidelines and allows negotiations for faculty members and department chairs. It does not require faculty members to do added work or compensate for lost instruction time, Zimmerman said, but it does require faculty to show how learning goals are met.

“Something the agreement says is faculty cannot be asked to make up work,” said Zimmerman, who is also furloughed. “We are all being asked to reduce our work and our salaries accordingly. The state doesn’t have enough money to keep us operating, and given that, something’s got to give. It isn’t fair to ask workers to take a reduction in pay and a reduction in hours and do the same amount of work.

“In some cases, though, there may be ways in which faculty provides alternative instruction without increasing their workloads, and I think faculty will see more ways to do that and do it smoothly next semester.”

Colli said she was heartened by some of the students’ responses. In some cases, respondents reported professors took time to design alternative coursework to mitigate the impact of lost classroom instruction. And, the majority — 60.2 percent said all, and 36 percent said some — reported professors indicated furloughed days in their syllabi.

“Some faculty showed an inspiring amount of dedication,” Colli said. “They had no regard for the furloughs and still wanted to teach everything they could, using a number of different avenues.”

The survey results break from the stereotype of apathetic students, said Colli and Ben Cartwright, the government executive assistant to the Associated Students.

“We didn’t have an agenda with the survey; we’d heard rumblings on campus that students were unhappy, but in fact, we thought students would be happy to have more days off during the semester,” said Cartwright, who designed the survey. “When it came down to it, though, they were unhappy that they were expected to learn the same amount of material with less time.”

SDSU’s Associated Students plans to submit the survey to the California State Student Association for statewide distribution. Colli said she hopes the survey shows how students on CSU campuses throughout the state are impacted by furloughs.

Students have responded to cuts at the CSU, University of California (UC) and the California Community Colleges (CCC) levels with demonstrations. SDSU students have organized three this semester. Last month, students rallied [2] after CSU Chancellor Charles B. Reed announced the system will reduce its enrollment by 40,000 students next year in response to a $564 million budget cut in state funds.

Zimmerman said she understands the student body’s concerns, and she’s sympathetic toward her colleagues. With regard to student frustration, it should be directed at California’s

Legislature, Zimmerman said. “It’s up to California to decide whether it is going to support higher education or not.”

“Members of the administration know they’re going to be lightning rods, but ultimately we’re all in this together. Administration, employees, faculty, staff and students — more often than not — all stand together. And we’re going to have to. We’ve got to save the CSU. We’ve got to save San Diego State.”

FIFTY YEARS OF NACUA
2010 ANNUAL CONFERENCE

The Downturn's Lessons Learned

Tough Issues in Implementing Cost-Saving Strategies

RIFs, Furloughs, Voluntary Separation Programs, and Other Approaches

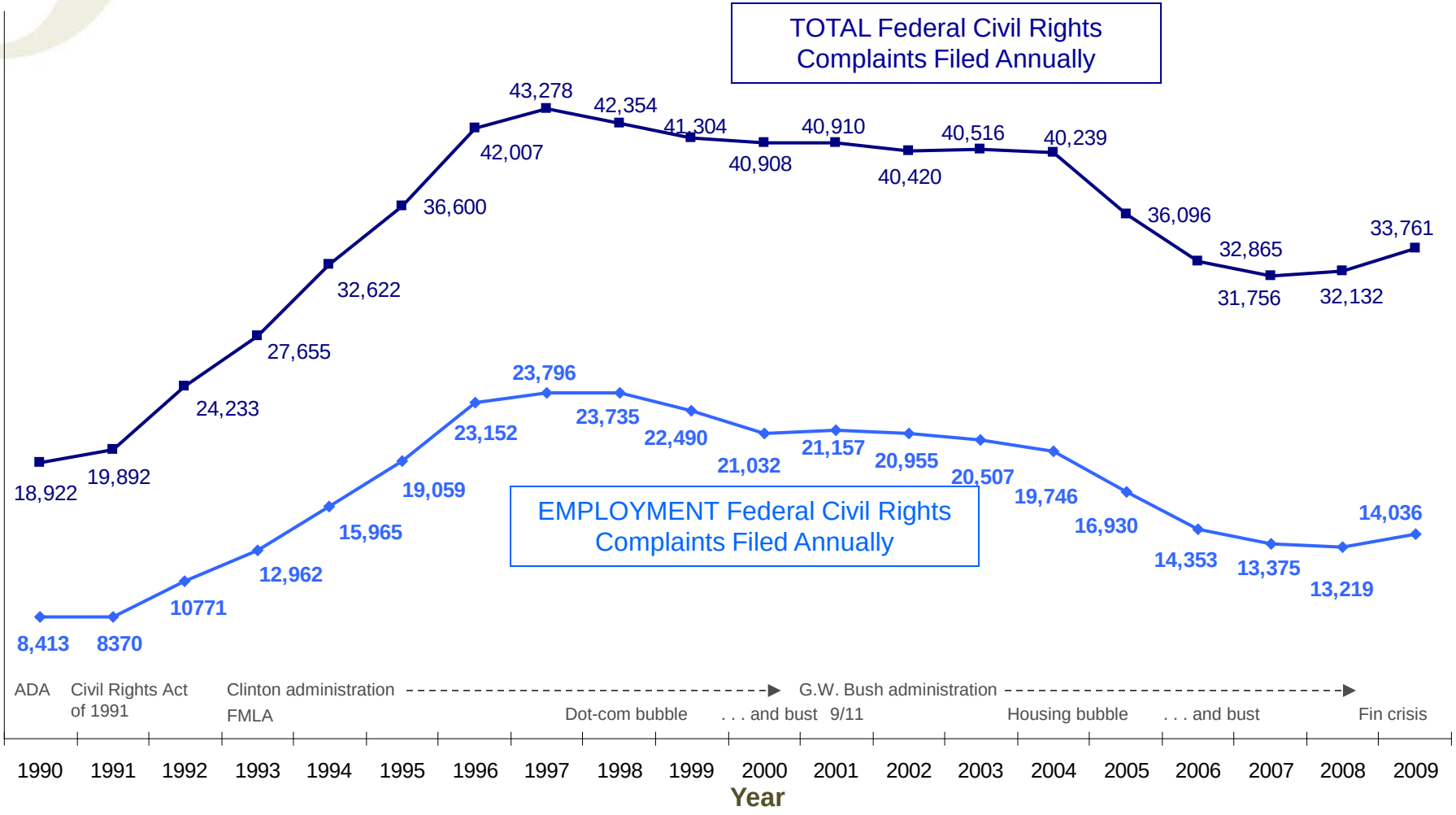
Donald A. Newman
Philip A. Miscimarra
Sean V. Burke

Framework

1. **The downturn and employment claims – in perspective**
2. **RIFs and discrimination claims – working backwards**
3. **Up-front legal defenses . . .**
   - Waiver/release agreements
   - Voluntary separation programs
   - Sovereign immunity
4. **Furloughs: the California State University program**
5. **Top ten mistakes . . .**
   - RIFs
   - Waivers/releases
   - WARN

1. The Downturn in Perspective

Federal Dist. Ct. Civil Rights Cases Filed, Total and Employment (1990-2009)



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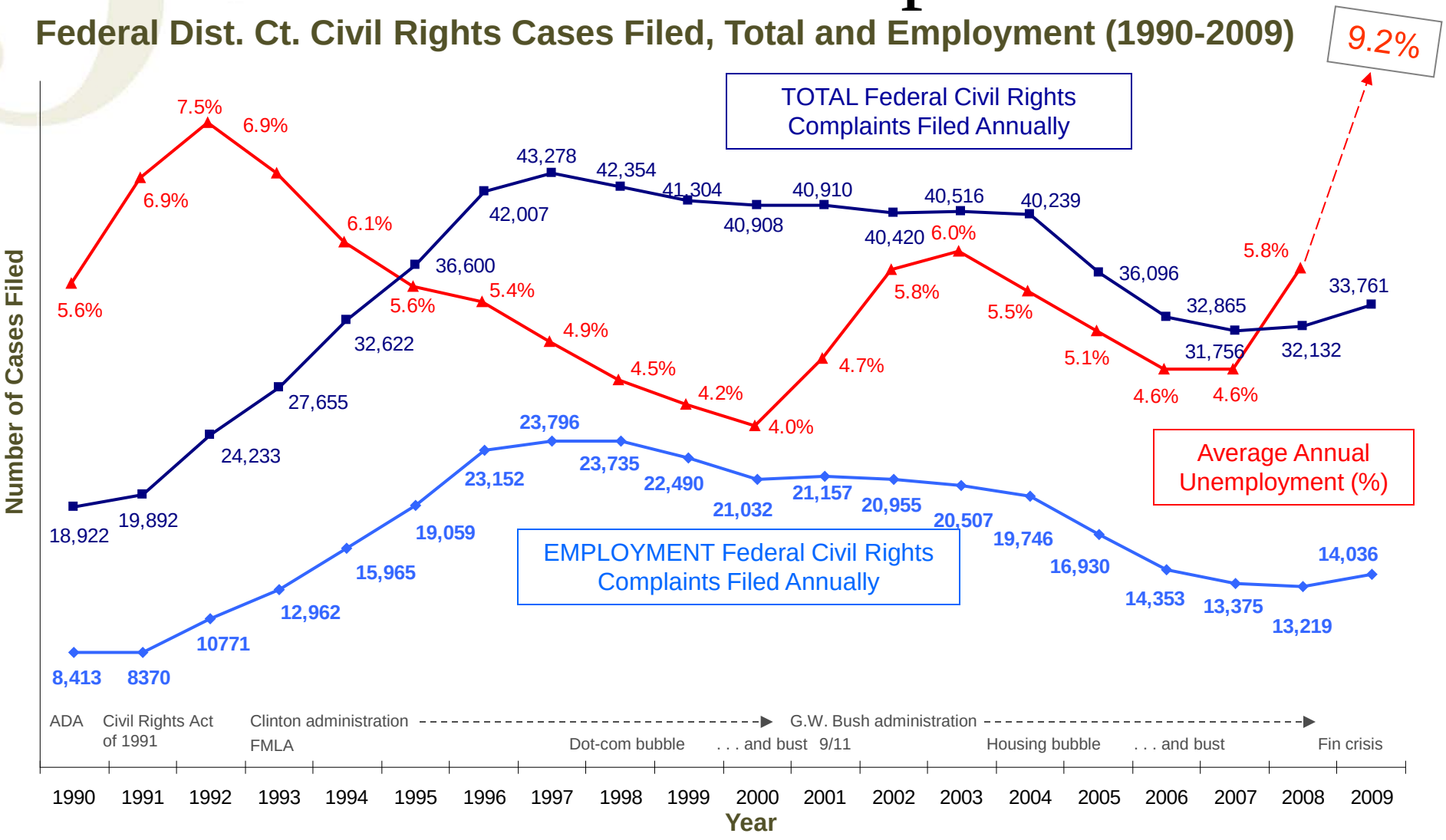
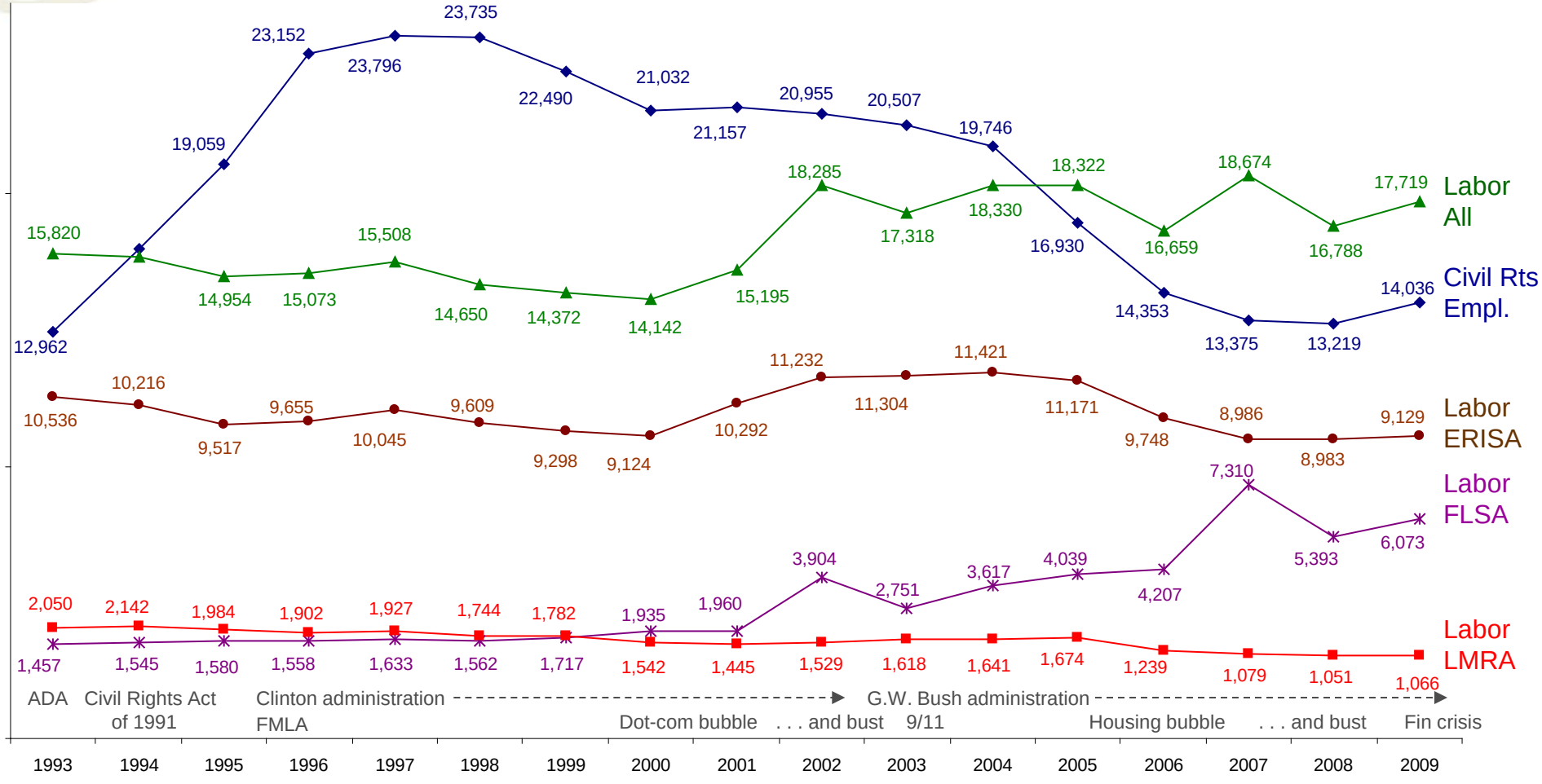


1. The Downturn in Perspective

Civil Cases Filed Federal District Courts, Selected Types (fiscal 1993-2009)



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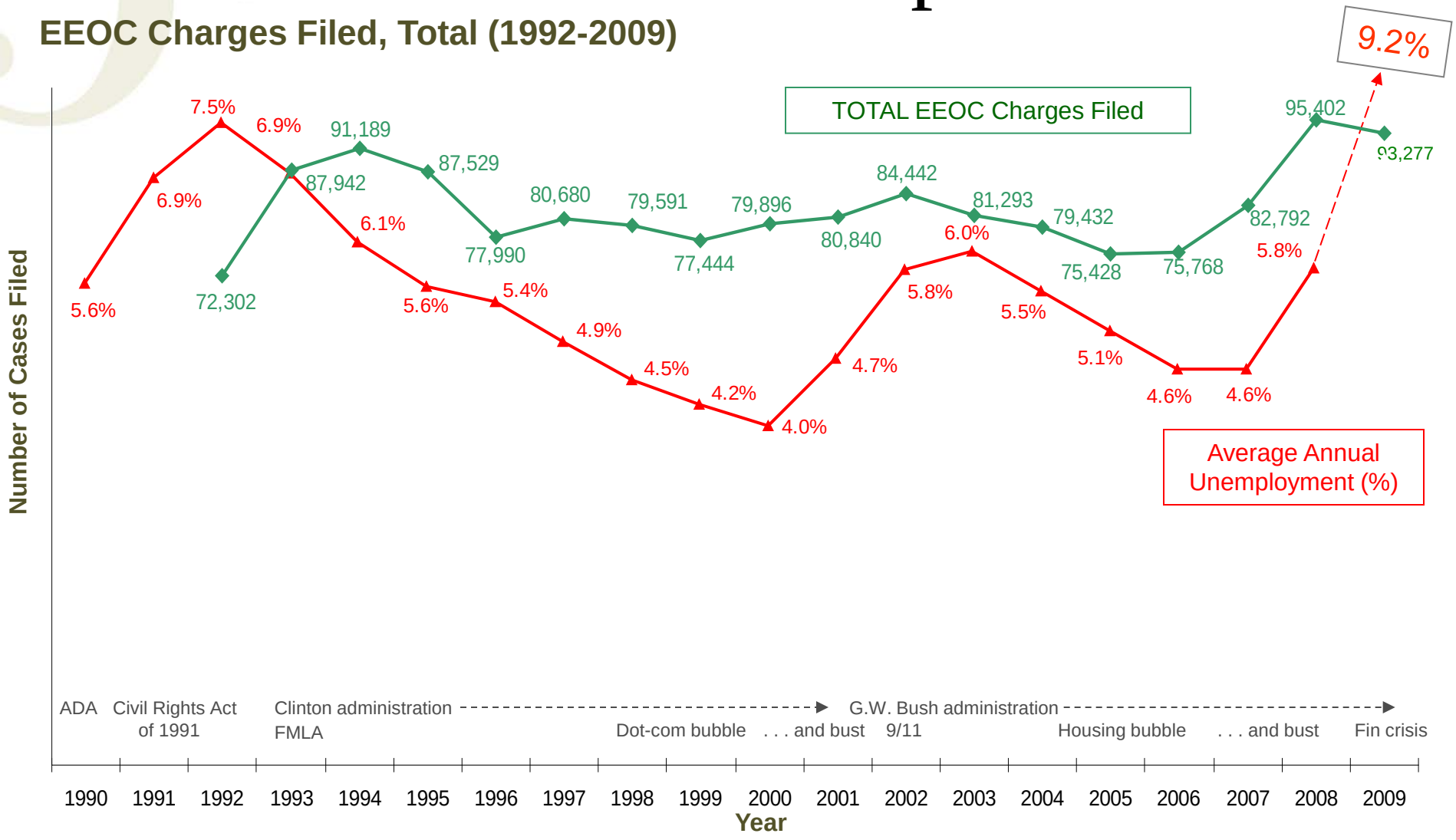
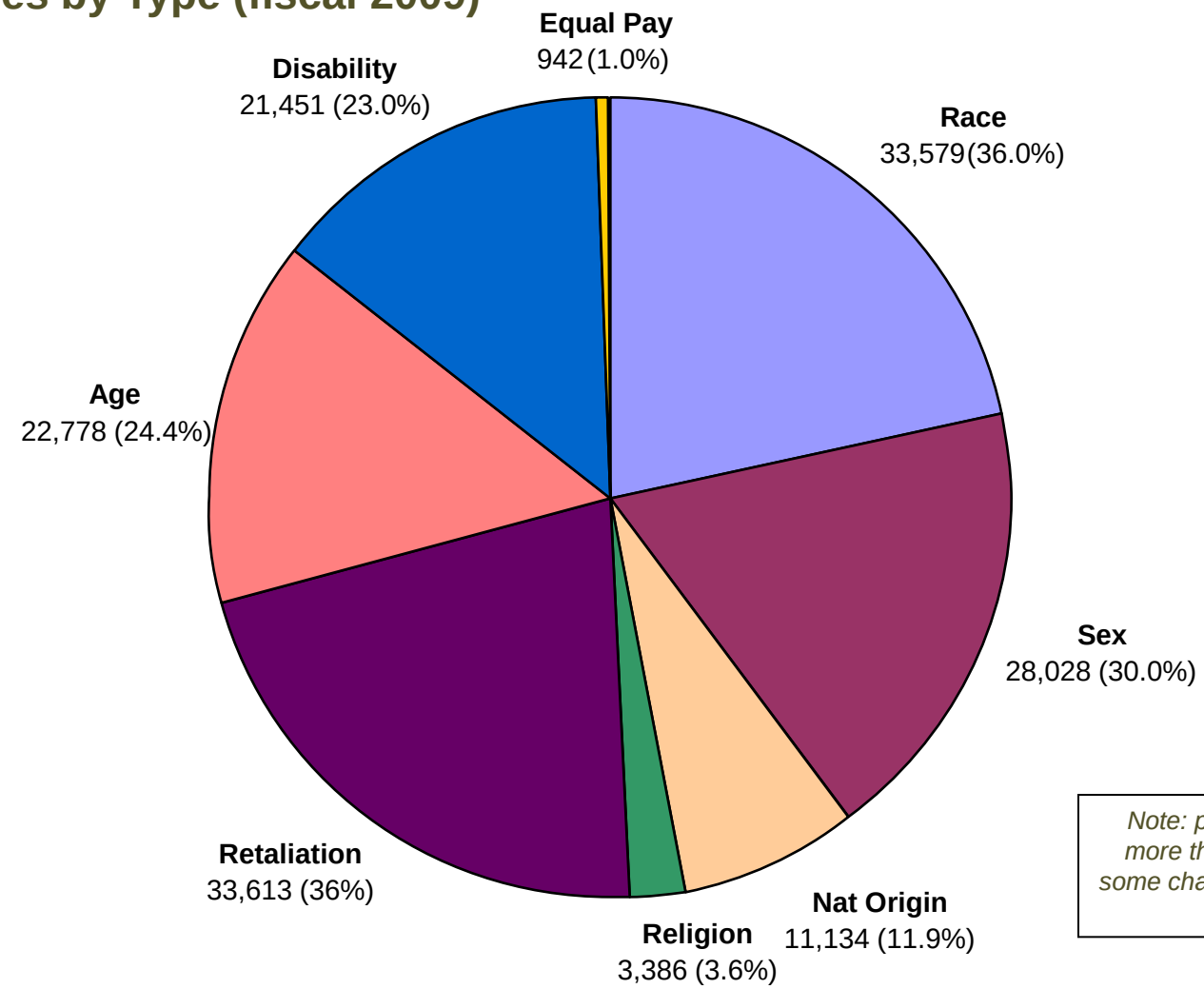
EEOC Charges Filed, Total (1992-2009)



1. The Downturn in Perspective

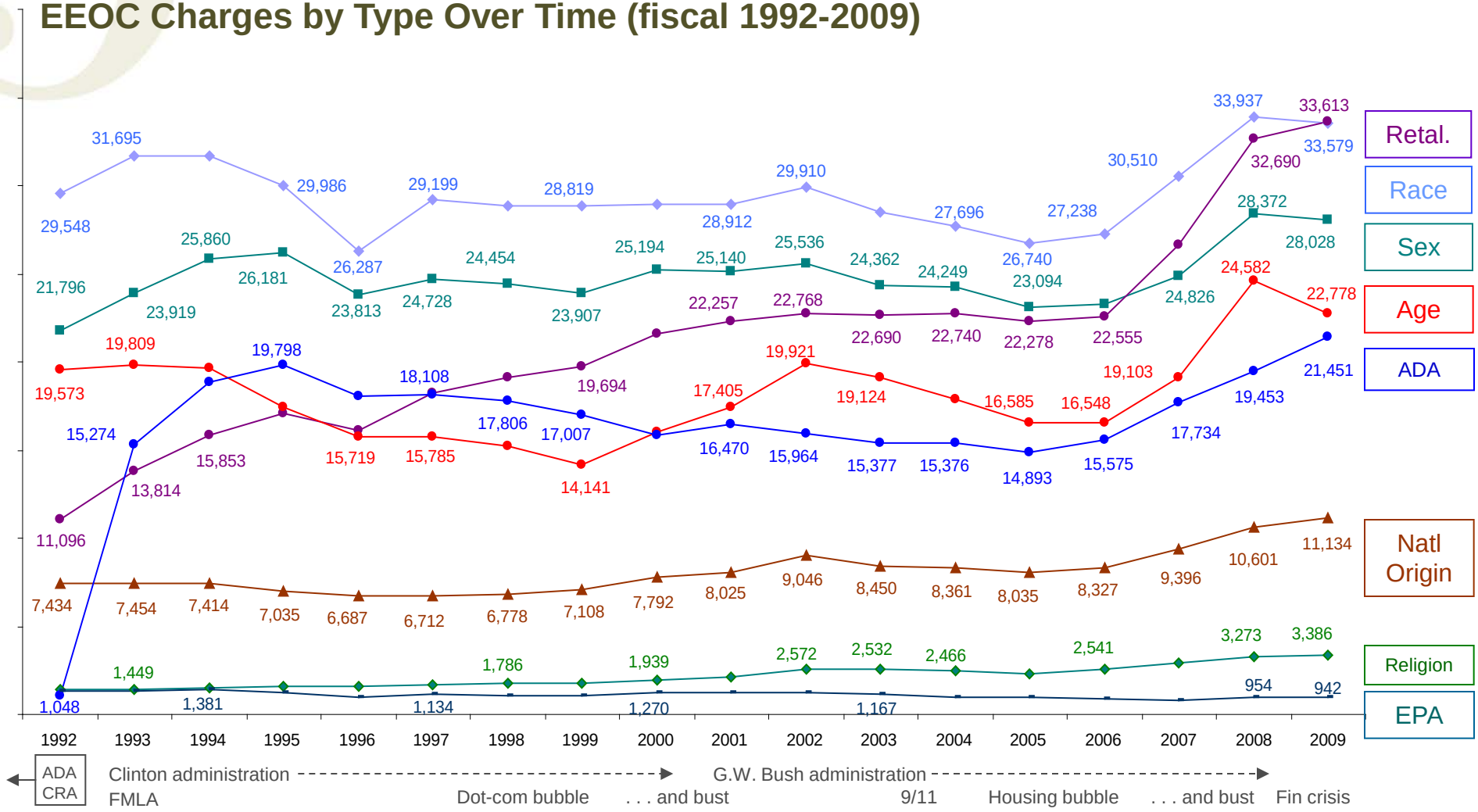
EEOC Charges by Type (fiscal 2009)



Note: percentages add to more than 100% because some charges include multiple claims

1. The Downturn in Perspective

EEOC Charges by Type Over Time (fiscal 1992-2009)



2. RIFs and Discrimination Claims

Involuntary termination occurs . . .
(1) Employee is told of termination
(2) Other employees stay (partial reduction)

Voluntary departure (not involuntary)
Sued for not letting some people "volunteer"

Charge/lawsuit filed

Disparate Treatment case
(1) prima facie case of discrimination
(2) employer legitimate non-discriminatory reason
(3) employee tries to prove "pretext"

Disparate Impact case
(1) policy or practice causes disparate impact
(2) challenged practice or policy based on . . .
    (i) reasonable factor other than age (ADEA) or
    (ii) business necessity (Title VII)

Damages
ADEA cases: "willful" violation (knowing or reckless disregard of ADEA violation)
Title VII/ADA claims: compensatory/punitive damages up to $300,000
Section 1981 and many state law claims: punitive damages (uncapped)

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Process not followed
No explanation or bad explanation . . .
- no witnesses left (everyone gone or fired too),
- nobody remembers criteria/reasons,
- nobody remembers claimant,
- different reasons given at different times
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Decision-maker: "not my decision"
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- claimant's performance evaluations good,
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Performance evaluations support reasons
New evaluation system created just for RIF
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Terrible statistics – overall or particular groups (older employees gone, younger employees kept, average age decrease, over/under 40 analysis, etc.)

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- retained employees' evaluations bad,
- no performance evaluations at all.

Performance evaluations support reasons
New evaluation system created just for RIF
Objective criteria used (e.g., seniority)
Smoking gun (direct evidence) problems . . .
- "too old to do the job,"
- "retirement home image,"
- "age is a stigma we all carry around."

Terrible statistics – overall or particular groups (older employees gone, younger employees kept, average age decrease, over/under 40 analysis, etc.)
Pre-RIF training or lack of pre-RIF training
Meaningful higher-level management review

2. RIFs and Discrimination Claims

Involuntary termination occurs . . .
(1) Employee is told of termination
(2) Other employees stay (partial reduction)

Charge/lawsuit filed

Disparate Treatment case
(1) prima facie case of discrimination
(2) employer legitimate non-discriminatory reason
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Disparate Impact case
(1) policy or practice causes disparate impact
(2) challenged practice or policy based on . . .
  (i) reasonable factor other than age (ADEA) or
  (ii) business necessity (Title VII)

Damages
ADEA cases: "willful" violation (knowing or reckless disregard of ADEA violation)
Title VII/ADA claims: compensatory/punitive damages up to $300,000
Section 1981 and many state law claims: punitive damages (uncapped)

Voluntary departure (not involuntary)
Sued for not letting some people "volunteer"
Comparison employees treated better
Process not followed
No explanation or bad explanation . . .
- no witnesses left (everyone gone or fired too),
- nobody remembers criteria/reasons,
- nobody remembers claimant,
- different reasons given at different times
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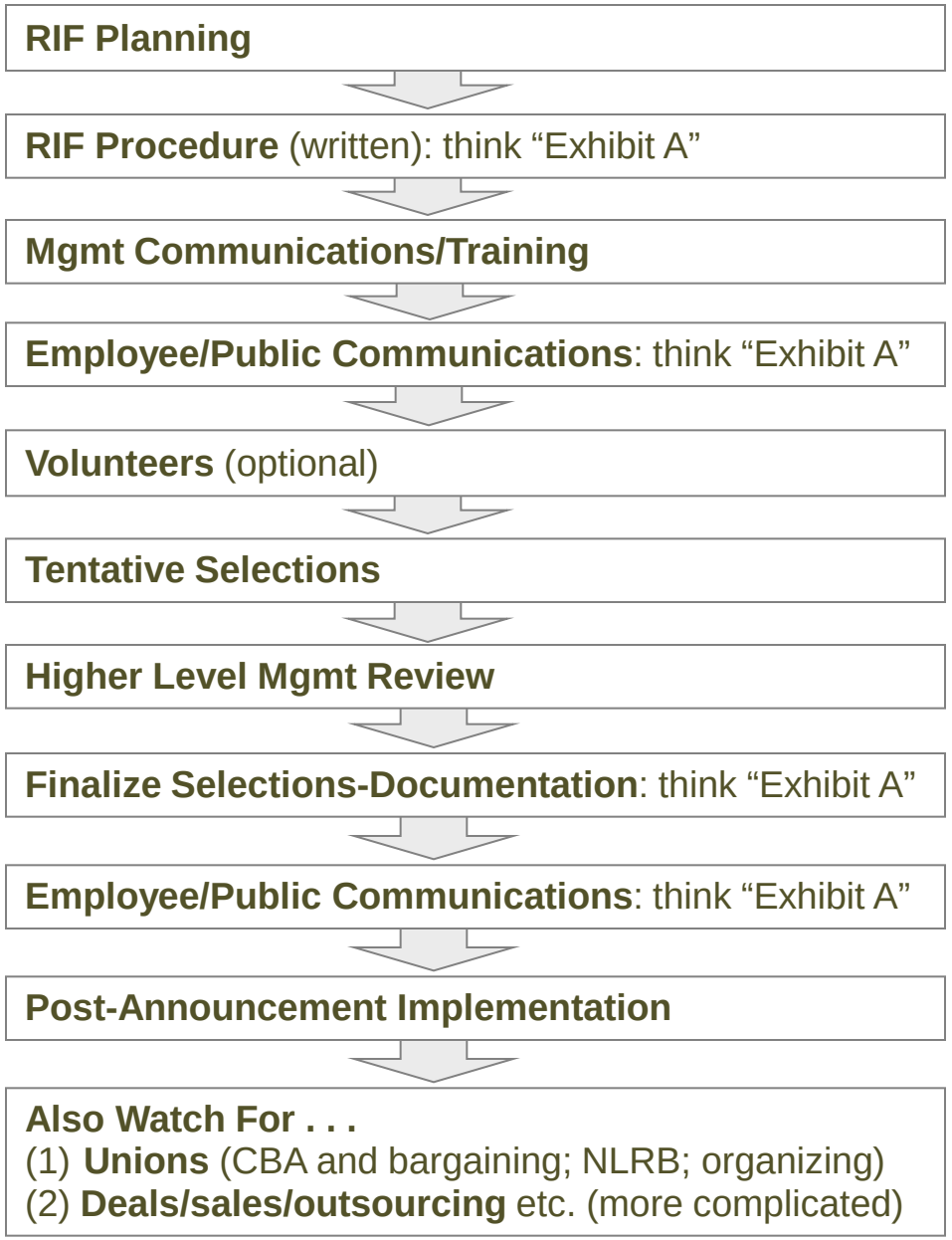


2. RIF Process Lessons Learned

Higher level review

- Great variation, especially with limited time and resources
- Most important purpose:
  - ensure good business decisions are being made
- Adverse impact analysis
  - great variation
  - affected by resource limits
  - privileged or not?
  - how to handle statistical disparities
- Legal "must haves" . . .
  - basic documentation – to permit meaningful management review
  - basic documentation – indicating (later) who did what and why
  - $$$ and releases (defense, credit re existing employees and litigation)

Higher Level Mgmt Review

(1) Review narratives/explanations for concrete reasons; "evaluation" issues; differentiation from comparison employees; smoking gun/code words
(2) Ensure fidelity to process and criteria
(3) Sanity check re "criteria applied in practice"
(4) Sanity check re number of reductions
(5) Legal consultation; adverse impact analysis
(6) Possible back-and-forth with lower mgmt re:
– completeness/adequacy of documentation
– individual selections
– potential changes based on numerical disparities
(7) WATCH: reverse discrim, "reason" for changed selections, and "supervisor backlash" testimony

3. Defenses – Release Agreements

Ubiquitous . . .

yoo-BIK-kwi-tes; Adjective

Being or seeming to be everywhere at the same time. Omnipresent. Constantly encountered.

– *The American Heritage Dictionary of the English Language (4th ed. 2000)*
Miriam-Webster Online Dictionary (2006)

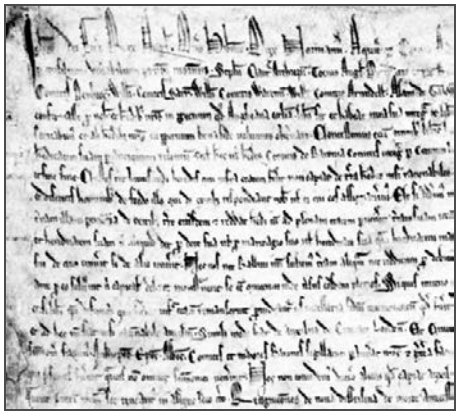
- Lawsuit and settlements
- Performance-related separations (especially the "messy" ones)
- Severance pay and related employee benefit plans
- Reductions-in-force, plant closings and restructuring

Real money and easy class actions

Organizational lethargy – hidden problems . .

- **Question**: Where did most releases come from?

  Answer: Magna Carta (and some releases have never changed since then!)



3. Defenses – Release Agreements

General OWBPA Requirements - ***see ADEA, 29 U.S.C. § 626(f)***

- Individuals cannot waive ADEA rights unless waiver is "knowing and voluntary"
- Requirements for ADEA waivers to be knowing and voluntary . . .

1. **Understandability** – waiver agreement must be "written in a manner calculated to be understood by [the] individual, or by the average individual eligible to participate"
2. **Mention ADEA** – waiver "refers to rights or claims arising under [the ADEA]"
3. **No Future Waiver** – no waiver of rights/claims "that may arise after the date the waiver is executed"
4. **Real Consideration** – waiver is "only in exchange for consideration in addition to anything of value to which the individual already is entitled"
5. **Go Consult a Lawyer** – individual "is advised in writing to consult with an attorney prior to executing the agreement" (we favor a separate "writing")
6. **Review Period** – individual "is given a period of at least 21 days within which to consider the agreement" *(see special rule for exit incentive/group waivers)*
7. **Revocation Period and When Effective** – agreement provides for revocation period of at least "7 days following . . . execution" AND provides "the agreement shall not become effective or enforceable until the revocation period has expired"

3. Defenses – Release Agreements

Group obligations under OWBPA

required If a waiver is requested "in connection with an exit incentive or other employment termination program offered to a group or class of employees"

Consequences of "group" program under OWBPA . . .

1. Consideration period expanded: 45 days rather than 21 days
2. Mandatory disclosures are required:
   - Must be in writing and "calculated to be understood" by average person
   - What needs to be disclosed:
     - class, unit, or group of individuals covered by such program ("decisional unit")
     - eligibility factors for such program,
     - time limits applicable to such program,
     - job titles and ages of all individuals eligible or selected for the program, and
     - ages of all individuals in the same job classification or organizational unit who are **not** eligible or selected for the program

3. Defenses – Release Agreements

Example of OWBPA Mandatory Disclosure (from regulations)

(A) The **decisional unit** is the Construction Division.

(B) All persons in the Construction Division are **eligible** for the program. All persons who are being terminated in our November RIF are **selected** for the program.

(C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office within **45 days** after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has **7 days** to revoke the waiver agreement.

(D) The following is a listing of the **ages** and **job titles** of persons in the Construction Division who **were** and **were not selected** for termination and the offer of consideration for signing a waiver:

Job Title	Age	No. Selected	No. Not Selected
(1) Mechanical Engineers, I	**25**	**21**	**48**
	26	**11**	**73**
	63	**4**	**18**
	64	**3**	**11**
(2) Mechanical Engineers, II	**28**	**3**	**10**
	29	**11**	**17**
	Etc., for all ages		
(3) Structural Engineers, I	**21**	**5**	**8**
	Etc., for all ages		

3. Defenses – Release Agreements

1. **Should you have different releases for older and younger employees? (employees age 40+ versus under 40)**
2. **When group disclosures are being given, on what date should ages be calculated?**
   - when decisions were made?
   - when first wave of separations are implemented?
   - when each person's employment terminates (disclosure sheet contains ages calculated on different dates)?
3. **What is "decisional unit" when, in a broad-based university-wide reduction at multiple campus locations …**
   - selections are made first by particular function (e.g., clerical and administrative staff are made by university-wide operations group) and
   - each department (e.g., Law School, School of Medicine, and College of Arts & Sciences) puts together their own list of individuals to be terminated?
   - the human resources group reconciles the different lists

3. Defenses: Voluntary Exit Incentives

Involuntary termination occurs . . .
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Terrible statistics – overall or particular groups (older employees gone, younger employees kept, average age decrease, over/under 40 analysis, etc.)

3. Defenses: Voluntary Exit Incentives

Factors <u>favoring</u> voluntary separation programs . . .

- close to a "bullet-proof" defense to later legal claims
- morale-friendly and union-friendly
- substantial long-term cost savings possible

Factors <u>against</u> voluntary separation programs . . .

- cost time and money (when both probably are in short supply)
- possible brain drain – departures of people you don't want to lose
- successive VSPs and "holdout syndrome"

Options . . .

- limitations by position, department, etc.
- possible two-stage process (volunteers "apply")
- disclaimers:
  - participation subject to mgmt discretion
  - no stmts re other or different future packages
  - participation is voluntary
  - involuntary RIFs possible among non-volunteers

3. Defenses – Sovereign Immunity

Potentially available to public colleges and universities

- *Kimel v. Florida Board of Regents* (U.S. Sup. Ct. 2000)

Sovereign immunity not protection against . . .

- money damages sought by EEOC under ADEA
- individual causes of action brought under state discrimination laws
- non-monetary statutory requirements (i.e., injunctive relief or other remedies directed against certain policies, selection criteria, etc.)

Judgment call . . .

- whether to consider use of non-OWBPA-compliant releases based on lower risk of monetary liability risk towards individuals
- whether to err on the side of OWBPA waiver/release compliance even though sovereign immunity defense may be available

4. Furloughs: California State Program

- **Furloughs Defined**
- **Establishing the Legal Bases for Furloughs**
- **Communicating: “Can You Hear Me Now?”**
- **Advantages and Disadvantages of Furloughs**
- **Furloughs and FLSA**
- **Other Cost Saving Alternatives**
- **CSU Case Study – Conclusion**

5. Top Ten RIF Mistakes

1. **Too fast – improper pre-RIF planning**
2. **Too slow – multiple rounds of reductions, business paralysis, and "the retained employees are leaving" problem)**
3. **No process, no criteria, no control, no documentation, and (later) no witnesses who can remember anything or anybody**
4. **Performance evaluation problems and failure to address them**
5. **Deficient "higher level management review" of RIF selections**
6. **Deficient (or no) statistical analysis of RIF selections**
7. **Failure to address severance pay plans and policies ("I thought you read the benefit plan" problem)**
8. **Failure to adequately address union/contract claims**
9. **Deficient waivers/releases (the "I thought you read our release form" problem and "people actually sue under OWBPA" surprise)**
10. **Inadequate and ineffective (or worse) communications, and WARN/state law notices (if required)**

5. Top Ten Waiver/Release Mistakes

1. **Release is not "understandable"**
2. **21-day, not 45-day, consideration period used in "group" setting**
3. **Failure to describe "time limits" and "eligibility factors" in writing**
4. **Improperly shortening 7-day "revocation" period**
5. **Defining the "decisional unit" incorrectly**
6. **Including a "covenant-not-to-sue" prohibited under OWBPA regs**
7. **Including "tender back" requirement prohibited under OWBPA regs**
8. **Birthdates and not ages (or wrong ages) placed on disclosure form**
9. **Unintended "future" waiver problem**
   - waiver covers entire period of employment, but person signs release before last day
   - waiver releases all claims arising on or before date release is "effective"
10. **Using separate release forms (under 40, 40+) and wrong people get the wrong release form**

5. Top Ten WARN Mistakes

1. **"Mass layoff" defined incorrectly**
2. **"Plant closing" defined incorrectly**
3. **"We won't have a 'plant closing' because we do not have any 'plants'"**
4. **"We won't have 'plant closing' because hundreds of our employees will still work at the same campus location"**
5. **"We won't have a 'mass layoff' – we terminate people, we don't lay them off"**
6. **WARN counting is done incorrectly (30 days? 90 days? 6 months?)**
7. **"We don't need WARN notices – everyone got three months' severance pay"**
8. **"This was all unforeseeable, so WARN notices are not required"**
9. **"We complied with WARN. We don't have to worry about state/local laws"**
10. **Forgetting that WARN may not apply if a public college or university fails to constitute a "business enterprise"**

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FIFTY YEARS OF NACUA
2010 ANNUAL CONFERENCE

The Downturn's Lessons Learned

Tough Issues in Implementing Cost-Saving Strategies

RIFs, Furloughs, Voluntary Separation Programs, and Other Approaches

Donald A. Newman
Philip A. Miscimarra
Sean V. Burke

THE GRAYING OF THE WORKFORCE: IMPLICATIONS FOR REDUCTIONS IN FORCE

March 17 – 19, 2010

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The economic downturn that began in 2008 is not over, and our campuses continue to implement reductions in force, hiring freezes, and other measures necessary to address budget difficulties. At the same time, campuses – like all facets of American society – are experiencing a "graying of the workforce," which has legal as well as policy implications.

In this session, we discuss the legal implications of the "graying of the workforce" as it plays out on campus. This outline tracks the subjects that we will discuss, addressing (1) demographics of today's higher education workforce, as illustrated by statistics from California State University; (2) recent developments and best practices in the law of age discrimination and OWBPA releases; and (3) one institution's approach to offering early retirement alternatives.

I. DEMOGRAPHICS OF TODAY'S HIGHER EDUCATION WORKFORCE: CSU

While not representative of all universities throughout this diverse country, the California State University is comprised of 23 campuses spread across the entire breadth of the State of California, and has approximately 433,000 students and 44,000 staff and faculty. As such, selected demographic information from CSU may help us understand the current composition of the higher education workforce and the profound patterns of change that have affected that workforce over the last two decades.

Attached as Group Appendix A are charts and spreadsheets, dated March, 2009, comparing age distribution patterns over the past decade for full-time faculty, part-time faculty, and other full-time employees at CSU.

II. RECENT DEVELOPMENTS IN ADEA LAW

The federal Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"), prohibits age discrimination in the workplace. Along with the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f) (1990), and parallel state statutes, ADEA protects workers 40 and above from discrimination in all aspects of employment (such as hiring, promotion, benefits, and compensation) and from retaliation for activities protected under the Act. (For an excellent summary of the basic provisions and requirements of ADEA and OWBPA through June of 2006, *see* J. Rosenberg & G. Skoning, "Current Issues In Age Discrimination" (NACUA Annual Conference Outline, June 26, 2006).

Prior to 2005, ADEA was presumed to track the provisions of Title VII with respect to the burdens of proof and persuasion applied to employees and employers involved in litigation. During the past five years, however, the U.S. Supreme Court has issued a trio of significant decisions that, read together, make ADEA litigation substantially more difficult for employees. Below, we review the provisions of ADEA, summarize the new Supreme Court decisions and their significance, and discuss the implications of those decisions for higher education.

A. A Short History of ADEA Jurisprudence Prior to 2005

Understanding the Supreme Court's recent ADEA decisions requires some review of the statutory language and the development of civil rights jurisprudence over the last few decades. This history is complicated because the various civil rights laws are ambiguous, their differences have become significant, and their amendment histories are essential to understand in any attempt to evaluate the Supreme Court's recent ADEA decisions.

The primary anti-discrimination provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 *et seq.* ("ADEA"), provides in relevant part:

> *It shall be unlawful for an employer –*
>
> *(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . .*

ADEA also includes defined exceptions for *bona fide* occupational qualifications and "reasonable factors other than age" ("RFOA"):

> *It shall not be unlawful for an employer, employment agency, or labor organization –*
>
> *(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . (Id.)*

As with other civil rights legislation, ADEA's statutory language (and accompanying regulations) did not address important questions of the burdens of proof and persuasion applicable during litigation. Nor did ADEA or any other civil rights legislation originally define the necessary level of "causation" -- for a simple "disparate treatment" case or for the more complicated, "mixed motive" case, in which an employer has allegedly considered an employee's protected status but claims to have made the decision based upon other, permissible motives.

Recognizing that discrimination will necessarily be difficult for plaintiffs to prove, courts and commentators struggled for decades with the proper allocation of burdens, as between plaintiffs and defendants, in discrimination cases. The Supreme Court first issued landmark decisions, articulating a framework for production of evidence by employees and employers. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In 1989, issuing a heavily split decision with no clear majority, the Supreme Court in *Price Waterhouse* then grappled with the proper causation standard in a "mixed motive" case. Justice O'Connor, in a concurring decision, supported use of a "but for" causation standard; at the same time, however, she advocated shifting the burden to the employer to show that it would have taken the same action notwithstanding the impermissible consideration (once the plaintiff has shown by direct evidence that the employer substantially relied upon the impermissible consideration). *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Price Waterhouse so roiled civil rights jurisprudence that Congress stepped in and amended Title VII through the Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m)). The 1991 Act borrowed heavily from the approach taken by the plurality of the justices in *Price Waterhouse* in articulating a causation standard for proof of discrimination. It provided in relevant part that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." At the same time, under the 1991 Act employers could significantly limit the remedies available to a plaintiff in a so-called "mixed motive" case, if the employer could prove that it "would have taken the same action in the absence of the impermissible motivating factor." Civil Rights Act of 1991, § 107(b)(3), 42 U.S.C. § 2000e-5(g)(2)(B).

The 1991 Act also purported to reverse another Supreme Court decision (*Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)), which had limited plaintiffs' ability to pursue "disparate impact" theories under Title VII. The 1991 Act provided that a Title VII plaintiff only has the initial burden of establishing that a statistic disparity exists – whereupon the employer must assume the substantial burden of showing that it had a business necessity for the challenged practice. *Id.*

Significantly, ADEA was not brought within the scope of the 1991 Act (nor was any other comparable civil rights law, such as the Americans with Disabilities Act). Thus, the provisions of Title VII and ADEA differ: ADEA was not amended in 1991 to incorporate the "motivating factor" standard, the *Price Waterhouse*-inspired "employer defense" to mixed

motive cases, or the relaxed "disparate impact" proof standards.[1] Nonetheless, in ADEA cases and other civil rights cases decided between 1991 and 2005, courts tended to interpret Title VII and ADEA as coextensive with respect to the burdens of proof and persuasion applicable to disparate treatment (and, specifically, to "mixed motive") cases. The EEOC agreed and incorporated these provisions into its regulations governing ADEA claims. *See, e.g.*, 29 C.F.R. § 1625.7(d)(requiring that employer prove "business necessity" when seeking to defend against claim that practice has adverse impact on the basis of age).

Against this backdrop, the Supreme Court issued a series of ADEA decisions that departed from this approach, including the controversial *Gross* decision. Those decisions and their implications are discussed in Sections II-B through E below.

B. Limiting "Disparate Impact" Claims: *City of Jackson*

Before 2005, courts and agencies split as to whether ADEA encompassed "disparate impact" claims and as to the permissible burdens of proof and defenses in an ADEA "disparate impact" case. *E.g.*, *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999). In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the United States Supreme Court confirmed the availability of "disparate impact" theories under ADEA; at the same time, however, it imposed significant limitations that now make it extremely difficult, if not impossible, for ADEA plaintiffs to maintain these actions.

- **Determination that "Disparate Impact" Theory Allowed.** The *City of Jackson* plaintiffs were senior police and public safety officers who claimed that the City's compensation system had a disparate impact on older workers because it afforded lower step-pay increases to senior (defined in terms of years of seniority) than to junior officers. The City claimed this disparity was necessary to meet competition for similar jobs in the area. The United States Supreme Court held that ADEA permits "disparate impact" claims because it shares "common substantive features" and a "common purpose" with Title VII, which is recognized to allow "disparate impact" claims. 544 U.S. at 232-40.

- **Significant Limitations upon ADEA Cases.** While ostensibly recognizing a "disparate impact" theory of ADEA liability, however, the Supreme Court declined to adopt the same burden-of-proof requirements imposed upon plaintiffs in Title VII "disparate impact" cases – and, instead, articulated burden-of-proof requirements that strongly favored employers.

- **Only a RFOA Defense, No Business Necessity Required.** First, the Court declined to adopt, for ADEA "disparate impact" cases, the "business necessity" defense applicable in Title VII cases. The Court noted that, while the language of

[1] ADEA includes the RFOA exception, quoted above (and codified at 29 U.S.C. § 623). By contrast, Title VII includes the more limited "business necessity" defense, permitting the employer to defend on the grounds that a challenged distinction on the basis of prohibited status is "job related," justified by "business necessity," and constitutes the "least discriminatory" alternative available to satisfy that business necessity. 42 U.S.C. § 2000e-2(k)1)(A) (further discussed in Section II-B of this Outline, in the specific context of the *City of Jackson* case).

Title VII includes a specific "business necessity" defense (42 U.S.C. § 2000e-2(k)1)(A)), ADEA includes no such provision but, instead, only includes the "reasonable factors other than age" (RFOA) defense. The *City of Jackson* Court concluded that, in ADEA "disparate impact" cases, the employer's non-age-related justification for a challenged employment practice need only be "reasonable" and the employer also need not show it used the "least discriminatory alternative." 544 U.S. at 231-33.

- **Burden of Persuasion with Plaintiff.** The Court also held that the burden of persuasion always rests with the plaintiff in an ADEA "disparate impact" case (unlike in a Title VII disparate impact case, in which the various burdens quickly shift to the employer as specified in the 1991 Civil Rights Act). The *City of Jackson* Court reasoned that, while Title VII had been amended in 1991, ADEA had not. Therefore, the more restrictive form of "disparate impact" case, articulated in the Supreme Court's *Wards Cove Packing Co.* decision but set aside for Title VII claims by the 1991 Act, would still apply in any ADEA "disparate impact" case. 544 U.S. at 240-41.

- By simultaneously eliminating any need for defendants to prove "business necessity" or "least restrictive alternatives," while also requiring plaintiffs to meet a burden of proof rejected by Congress as too restrictive for Title VII litigation, the *City of Jackson* decision made ADEA "disparate impact" claims extremely difficult for plaintiffs to pursue. *See* S. Benjes, Note, *Smith v. City of Jackson: A Pretext of Victory for Employees*, 83 DEN. U.L. REV. 231, 253 & n. 233 (2005); *see also* J. Rosenberg & G. Skoning, "Current Issues in Age Discrimination" (NACUA Annual Conference Outline, 2006), at 7-9 (discussing ADEA "disparate impact" claims eliminated on 12(b)(6) or summary judgment motions since *City of Jackson* decision in 2005).

C. Limiting ADEA Challenges to Facially Neutral Pension Plans: *KRS*

In *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*, __ U.S. __, 128 S. Ct. 2361 (2008), the Supreme Court issued another significant ADEA decision, this time regarding an ADEA challenge to age-related provisions in a state's retirement plan. In this close (5-4) decision, the Court upheld a state retirement plan that expressly took a beneficiary's age into account in setting disability pension benefit payments.

- **Underlying Facts.** Under Kentucky's retirement plan for hazardous-occupation employees, employees who became disabled before standard retirement age (which was 55) could receive credit for "imputed" years not actually worked, while employees who worked past standard retirement age and then became disabled received no such credit. Thus, an individual becoming disabled before normal retirement age could earn more in disability benefits than one becoming disabled and retiring after normal retirement age. Plaintiff in *KRS* continued working after becoming eligible for retirement at age 55; became disabled and retired at age 61; and sued, challenging the Plan's calculation of his benefits as a

violation of ADEA. (*See* Supreme Court's *KRS* decision for other facts relating to specific operation of the State's Plan).

- Although the State's plan was facially discriminatory because it denied certain employees enhanced benefits based upon their age, the Supreme Court cited six factors in concluding that the Plan did not violate ADEA:

    - "Age and pension status remain 'analytically distinct' concepts . . . one can easily conceive of decisions that are actually made 'because of' pension status and not age, even where pension status is itself based on age." 128 S. Ct. at 2367.

    - The case involved not an individual employment decision, but a set of complex, system-wide rules. "These systemic rules involve not wages but pensions – a benefit that the ADEA treats somewhat more flexibly and leniently in respect to age." *Id.*

    - "[T]here is a clear non-age-related rationale for the disparity . . . the whole purpose of the disability rules is . . . to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits." *Id.* at 2368. "The disparity turns upon pension eligibility and nothing more." *Id.* at 2369.

    - "Although Kentucky's Plan placed an older worker at a disadvantage in this case, in other cases, it can work to the *advantage* of older workers." *Id.* (emphasis in original).

    - "Kentucky's system does not rely on any of the sorts of stereotypical assumptions that the ADEA sought to eradicate. It does not rest on any stereotype about the work capacity of 'older' workers relative to 'younger' workers." *Id.*

    - "The difficulty of finding a remedy that can both correct the disparity and achieve the Plan's legitimate objective . . ." *Id.*

- **Vigorous dissent.** Justice Kennedy, in a strongly-worded dissent, stated that this decision "create[d] a virtual safe harbor for policies that discriminate on the basis of pension status, even when pension status is tied directly to age and then linked to another type of benefit program." *Id.* at 2375.

    - **Post-*KRS* Decisions**. Subsequent lower-court decisions have tended, on the authority of *KRS*, to reject discrimination challenges to pension plans drawing distinctions based upon an employee's number of years until retirement eligibility. *E.g.*, *EEOC v. Baltimore County*, 593 F. Supp. 2d 797 (D. Md. 2009); *Schultz v. Windstream Communications,*

Inc., 2009 WL 1028175 (April 16, 2009, D. Neb.); *Walker v. Monsanto Co. Pension Plan*, 636 F. Supp. 2d 774 (S.D. IL 2009).

- The common thread in these decisions is that the employers did not make Plan revisions based upon "stereotypical" assumptions about older workers (which would still, in the view of the *KRS* Court and the lower courts, have constituted age discrimination). Rather, these employers, like KRS, were found to be engaged in legitimate attempts to encourage retirement, maximize disability benefits to workers in dangerous professions, or implement other policies that did not necessarily disadvantage elderly workers.

- Although the *KRS* decision signals the Supreme Court's willingness to permit certain age-related modifications to pension plans, it should not be interpreted as a license to implement plans that fail to comply with the Internal Revenue Code, ERISA, or other statutes setting forth strict requirements and limitations for early retirement and defined benefit plans. Employers must remain careful and deliberate in adopting or refining any pension plans or early retirement initiatives, despite the decision in *KRS*.

D. Resurrecting "But For" Causation in "Mixed Motive" Claims: *Gross*

Finally, and most significantly, the Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*, __ U.S. __, 129 S. Ct. 2343 (2009), reinstates the "but for" causation requirements that, since the 1991 Civil Rights Act, had been disregarded by lower courts adjudicating ADEA and other civil rights cases. The Supreme Court granted certiorari in Gross for the stated purpose of determining whether, in an ADEA "mixed motive" case, there is any legitimate distinction between "direct" and "circumstantial" evidence (and, thus, whether a standard jury instruction based upon language from the *Price Waterhouse* case was appropriately delivered during the *Gross* trial). [2]

In a startling decision, however, the Court in *Gross* decided the preliminary question whether the language of ADEA even permits a "mixed motive" case. The Supreme Court held that it does not. The *Gros*s decision instead held that, unlike plaintiffs proceeding under Title VII, ADEA plaintiffs must demonstrate that age is the "but for" cause of the challenged decision; and, therefore, no "mixed motive" claim can be brought under ADEA.

- **Lower court decision on review.** Gross was a long-time employee of FBL. In 2003, his new supervisor changed his job title and responsibilities, transferring many of his responsibilities to a younger employee he had previously supervised.

[2] In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989), the Supreme Court had held by a plurality that, once a Title VII plaintiff demonstrates that discrimination is a "motivating factor" for the challenged employment decision, the burden shifts to the employer to demonstrate that it would have taken the same action notwithstanding the impermissible consideration. Once the 1991 Act adopted this aspect of the *Price Waterhouse* plurality decision, a jury instruction based upon this language came to be used frequently in federal civil rights cases.

Gross sued, introducing evidence showing that his 2003 reassignment was based, at least in part, on his age. The trial judge instructed the jury that it should return a verdict in favor of Gross if it found that age was a "motivating factor" in Gross's reassignment (pursuant to the standard, *Price Waterhouse* jury instruction, the jury was also directed that the verdict should be for the employer if the employer then demonstrated it would have demoted Gross regardless of his age). The jury found in favor of Gross; the Eighth Circuit reversed, finding that the court employed faulty "mixed motive" jury instructions based upon the evidence adduced at trial.

- **Supreme Court decision.** In its decision in *Gross*, however, the Supreme Court declined to address the jury instruction or evidentiary issues that were central to the litigation below (or that were, ostensibly, the reason the Supreme Court granted certiorari). The Supreme Court in *Gross* concluded that a mixed-motive instruction is *never* appropriate in an ADEA case because a mixed motive case cannot be pursued under ADEA. The Court noted that, after its own decision in *Price Waterhouse*, Congress amended Title VII explicitly to authorize discrimination claims in which plaintiff's membership in a protected class was a "motivating" (but not necessarily the "but for") cause of the challenged employment decision. But Congress did not similarly amend ADEA to permit such claims. This indicated to the Supreme Court that its own precedents involving Title VII mixed-motive claims should not apply to ADEA cases.

- **"But For" Causation.** The Court then moved to the "ordinary meaning" of the relevant language in ADEA, which prohibits discrimination "because of" an employee's age. To the majority, this meant that an ADEA plaintiff must prove his or her age was the "but for" cause of the employer's decision. And, it follows, the final aspect of the "mixed motive" analysis, which is the shift of the burden to the employer to show the action would have been taken even absent the impermissible factor, will never occur in ADEA cases.

- **Substantial Departure from Precedent.** By resurrecting the "but for" causation standard, the Court decided not to follow Congress's 1991 amendment to Title VII (which was, as the Court noted, never extended to ADEA) or its own decision in *Price Waterhouse* (which articulated a burden-shifting mechanism that had been adopted, in part, by Congress in 1991 and utilized consistently by lower courts to balance the proof burdens involved in civil rights litigation). The Supreme Court also interpreted the fundamental anti-discrimination prohibition set forth in ADEA differently from identical language found in Title VII. The result is that ADEA plaintiffs are now subject to a highly restrictive proof standard not applied to Title VII plaintiffs.

- **Lower court decisions interpreting *Gross*.** Before *Gross* was issued in June of 2009, courts and agencies assumed ADEA causation requirements were co-extensive with those of Title VII As such, the implications of *Gross* are just beginning to play out in the lower courts:

- Some courts have interpreted *Gross* to prohibit plaintiffs from bringing discrimination cases premised upon age as well as other prohibited categories. *See Culver v. Birmingham Bd. of Ed.*, 2009 WL 2568325 at *1 (N.D. Ala. Aug. 17, 2009) (plaintiff was required to drop either age or race claims because an adverse action could not be the "but for" result of age discrimination if there was any other motive for alleged discrimination); *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890 at **4, 7 (E.D. Pa. Aug. 11, 2009) (plaintiff cannot prevail on claim of age discrimination if pursuing multiple bases for her discrimination claim, including gender, race, or disability).

- The better approach was probably followed in *Love v. TVA Board of Directors*, 2009 WL 2254922 at ** 9, 12 (M.D. Tenn. July 28, 2009) (in promotion case, where plaintiff alleged both age and race discrimination, court allowed both to proceed to bench trial but applied different standards to defenses applicable to Title VII and ADEA claims; court thus found in favor of plaintiff on the race claim, awarding back pay and retirement benefits, but in favor of the employer on the age claim, citing *Gross*).

- Lower court decisions since *Gross* have acknowledged the change in the standard for interpreting ADEA defense and shifting the employer's burden-of-proof. *Martino v. MCI Comm. Services, Inc.*, 574 F.3d 447, 455 (7th Cir. 2009) (*Gross* requires that age must be not merely a motivating factor but the *only* motivating factor for the adverse decision); *see also Sebring v. AutoZone, Inc.*, 2009 WL 2424204 at *2 (D. Utah, Aug. 6, 2009) (*Gross* eliminates "determining factor" standard and requires that ADEA plaintiff prove age was "but for" cause of adverse action). Lower courts have, however, exhibited some confusion as to whether any aspect of the *McDonnell-Douglas* burden-shifting analysis can now be used in an ADEA case. *See, e.g.*, *Bell v. Raytheon Co.*, 2009 WL 2365454 at *5 (N.D. Tex. July 31, 2009) (court would not "shift the burden to the defendant to articulate a legitimate nondiscriminatory reason unless the plaintiffs show that age was the but-for cause of any adverse employment actions"); *but see Woehl v. Hy-Vee, Inc.*, 637 F. Supp. 2d 645 (S.D. Iowa 2009) (*McDonnell-Douglas* framework applies but burden of persuasion does not shift to employer simply upon showing that age was "one" motivating factor).

E. Implications and Practice Tips

The Supreme Court decisions discussed above have changed ADEA litigation in a manner that has to be interpreted as highly favorable to employers. The combined effects of the *City of Jackson* and *Gross* decisions are, certainly, to place upon ADEA plaintiffs proof burdens

that are not applicable to Title VII plaintiffs (and that may, as in some cases noted above, result in plaintiffs abandoning age-related challenges in favor of other discrimination challenges that can be advanced using Title VII).

The *Gross* decision has been criticized for departing from the likely intentions of Congress, and it may not remain the law. *See, e.g.*, M. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010). For this and the following other reasons, the decisions discussed above should not be used as a basis for any reevaluation of an institution's strong commitment to eradicating age discrimination:

- *Gross* may be reversed by Congress, much as Congress reversed aspects of the *Price Waterhouse* and *Wards Cove* decisions by passing the 1991 Act. In October of 2009, members of both houses of Congress introduced legislation to overturn *Gross*. *See* S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009); H.R. 3721, S. 1756 (entitled the "Protecting Older Workers Against Discrimination Act"). This legislation seeks to restore the "motivating factor" causation standard to ADEA jurisprudence. *See* M. Harper, *The Causation Standard in Federal Employment Law*, 58 BUFF. L. REV. at 139 n. 271. It would cover all claims (EEOC or case filings) initiated since the *Gross* decision was decided (June 18, 2009), and it would apply the "motivating factor" analysis to retaliation as well as discrimination claims.

- ADEA is not the only age-discrimination law applicable to most employers. Nearly every state has enacted civil rights laws prohibiting age discrimination; courts or agencies applying those state statutes are not bound to follow federal precedent and, in some cases, are unlikely to respect the restrictive decision in *Gross*. For instance, in *Schott v. Care Initiatives*, 2009 WL 3297290 (N.D. Iowa), decided shortly after *Gros*s, the district court held that the Iowa Civil Rights Act (ICRA), as previously interpreted by the Iowa Supreme Court, does not permit imposition of a "but for" causation standard with respect to claims brought under the ICRA (even with respect to ICRA language similar to the language of the federal RFOA defense). The district court thus concluded that two different causation standards ("motivating factor" and "but for") would be applicable to that plaintiff's ICRA and ADEA claims, respectively. *Id.* at * 4.

- In addition, while decisions such as *Gross* and *City of Jackson* affect claims and defenses raised during litigation, they do *not* suggest that employers are being excused from the primary anti-discrimination requirements of ADEA.[3] The fact that defenses are now easier to assert and lawsuits are more difficult to pursue

[3] Other Supreme Court cases decided during the past five years could be viewed as "pro-plaintiff," in that they expand or affirm the anti-discrimination provisions of ADEA. *See., e.g, Gomez-Perez v. Potter*, __ U.S. ___, 128 S. Ct. 1931 (2008) (implying, from the general anti-discrimination provisions of ADEA, a prohibition against retaliation in favor of federal employees); *Meachum v. Knolls Atomic Power Laboratory*, __ U.S. __, 128 S. Ct. 2395 (2008) (affirming EEOC's position that employer bears the twin burdens of production *and* persuasion when raising the RFOA defense).

affects litigation strategy, the valuation of claims for settlement purposes, and the costs of litigation; this development may, in turn, affect how much our clients are willing to pay to secure OWBPA releases. But employers are still legally required to guard against age discrimination and address claims internally through appropriate grievance processes. Moreover, in fashioning layoffs and seeking effective ADEA releases, employers are still obligated to follow any applicable standards set forth in the OWBPA (which was not limited by any of the decisions summarized above).

- Higher education clients, in particular, have continuing and powerful policy incentives to enforce the anti-discrimination laws. Educational institutions have a strong cultural commitment to promoting fairness, equity, diversity, and respect for different groups within the campus community. On our campuses, individuals 40 or over are well-represented not only in the workforce but in the student population. In the new millennium, as the realities of an aging population collide with the realities of an economic downturn, our clients will need to ensure that layoff and downsizing decisions are made for neutral, appropriate reasons that are not only defensible in federal court but equally defensible in the "court of campus opinion."

The Supreme Court decisions summarized above are too recent to lend themselves to many decisive "practice tips," except that campus counsel will want to monitor very closely further legislative and case law developments regarding ADEA. On the one hand, Congress or the courts may act to limit the reach of *Gross*; on the other, courts may extend the reasoning of *Gross* to other types of "mixed motive" litigation. *See, e.g., Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (a January 15, 2010 decision by the Seventh Circuit extending rationale of *Gross* to prohibit mixed-motive litigation brought under the Americans with Disabilities Act).

In the meantime, however, one recommended "tip" is to review institutional policies against age discrimination. Some institutional policies purport to quote cases or statutory language at length; some even make reference to the *McDonnell-Douglas* framework. They should no longer do so, unless the institution has made the deliberate decision to subject itself to a higher standard of proof than federal law would actually require. Indeed, even where state Human Rights Acts still mandate use of a "motivating factor" standard in age discrimination cases, the institution will want to consider not articulating *any* specific "causation standard" in its internal policies (for fear of limiting its ability to defend against either a federal or state claim). In any event, an institution's decision to impose upon itself a heavier defensive standard than federal law presently requires should be deliberate, not a "default" position resulting from obsolete policy language; therefore, institutional policies should be reviewed.

III. OWBPA DEVELOPMENTS

A. 2009 EEOC Policy Document

The Older Workers Benefit Protection Act ("OWBPA") amended ADEA and applies, in particular, to waivers of claims by older employees. 29 U.S.C. § 626(f) *et seq.* It was intended to establish minimum, mandatory standards for employers seeking waivers of ADEA claims.

Unless an employer meets these standards, a waiver cannot be considered "knowing and voluntary." The stakes are high for the employer; rather than serving as an effective release, an inadequate waiver will, under well-established case law, be found invalid (and the employee will not be required to "tender back" the payment that he or she was afforded in exchange for the now-invalid release). *See, e.g., Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998); *see also* 29 C.F.R. § 1625.23(a) & (b) (EEOC regulations prohibiting "tender back provisions" in ADEA releases).

OWBPA sets forth separate, and in some respects complicated, informational requirements when a waiver is being sought in the context of an "exit incentive or other employment termination program." 29 U.S.C. § 626 (f)(1)(F)(ii).[4] This includes informing the terminated employee in writing of the "decisional unit" from which the employee chose certain employees for termination while ruling out others, and of "any eligibility factors for such program [or termination decision]. . . " 29 C.F.R. § 1625.22(f)(3)(ii)(A); 29 U.S.C. § 626(f)(1)(H); 29 C.F.R. § 1625.22 (EEOC regulations). As well, the employer must inform affected employees in writing of the job titles and ages of all individuals eligible or selected for the exit incentive or other employment termination program, as well as the ages of all individuals in the same classification or unit who are not eligible or selected. These requirements necessitate careful and comprehensive review of the proposed layoff plan and the information to be shared with terminated employees. Strict compliance with the terms of the statute is required, and the employer has the burden of proving compliance with the requirements of ADEA and OWBPA when seeking to rely on a waiver. 29 C.F.R. § 1625.22(h).

Given the aging of the academic workforce, employers' general interest in reducing risk by obtaining waivers, and the continuing economic downturn and concomitant need for layoffs in both public and private institutions, OWBPA has become an increasingly significant factor in campus decision making. The general requirements of the OWBPA (regarding, among other things, the timing and revocation requirements) are beyond the scope of this Outline; several recent NACUA outlines, however, offer excellent basic discussions and checklists regarding compliance with the OWBPA, "best practices" when drafting releases and negotiating layoffs, and recommended approaches to communicating RIF and furlough plans to the campus community. All are available on the NACUA website and should be consulted as counsel plan and review potential RIF plans.[5]

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[4] The statute does not define this term, but case law indicates that "exit incentive or other employment termination program" should be interpreted to include voluntary or involuntary terminations of more than one person at a time (in other words, virtually any layoff). *E.g., Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994) (layoff of 60 employees was group termination under OWBPA); *see also EEOC v. Sara Lee Corp*., 923 F. Supp. 994 (W.D. Mich. 1995)(four-person layoff was an "employment termination program" under OWBPA).

[5] For a comprehensive summary of the requirements of ADEA, OWBPA, and case law through 2006, *see* J. Rosenberg & G. Skoning, "Current Issues in Age Discrimination" (NACUA Annual Conference Outline, 2006). For an outstanding 2009 discussion of communication and implementation of RIFs and furloughs on campus, *see* C. DeWitt & K. Rinehart, "I Feel Your Pain . . . Reductions in Force and Furloughs: Effective Planning and

The most significant recent development in OWBPA practice is probably the EEOC's issuance of a policy document, dated August 4, 2009, entitled "Understanding Waivers of Discrimination Claims in Employee Severance Agreements." This policy document is posted at *www.eeoc.gov/poliyc/docs/qanda_severance-agreements.html).* It ranks as "required reading" for any employment lawyer drafting OWBPA releases and is attached as Appendix B. Highlights include a discussion of the legal requirements applicable when an employer engages in a mass layoff, a checklist of "what to do when your employer offers you a severance agreement," and a sample waiver for an exit incentive or other termination program.

The EEOC's policy document is written to communicate directly with employees who are being asked to review and sign an ADEA waiver. It is probably the first resource that a terminated employee would consult upon being offered an ADEA waiver, and it is likely to be reviewed as well by any attorney consulted by that employee. The EEOC policy document may also be used as a court or agency's first point of reference when assessing the validity of a release.

B. Recurring Issues in Crafting Releases

Neither the OWBPA nor the EEOC (in its regulations or policy documents) deal directly with some of the subtle problems involved in meeting the informational requirements of what the OWBPA terms "exit incentives or other employment termination programs" (but which will hereinafter be referred to as "mass layoffs"). The statute and accompanying regulations require that, at the beginning of the 45-day consideration period, the employer inform the employee in writing of (i) any class, unit, or group of individuals covered by the employment termination program, any eligibility factors for the program, and any time limits applicable to it; and (ii) the job titles and ages of all individuals eligible or selected for the program, as well as the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. *See* 29 U.S.C. § 626(f)(1)(H)(i) & (ii); 29 C.F.R. § 1625.22(f)(3)(i)(B).

The statutory language and regulations do not, however, address certain difficult issues that counsel and administrators face, on a recurring basis, when trying to define the appropriate "decisional unit," eligible and non-eligible employees, and rationale for a RIF on campus. These types of problems make it essential, among other things, that institutions (i) develop a careful and appropriate plan for considering the RIF as a policy decision, (ii) select employees for any RIF using that Plan, (iii) engage in an adverse impact analysis of the proposed selections, and (iv) document every step of the process (hopefully, while (v) working closely with counsel). Below, we address several issues that tend to recur in campus OWBPA practice.

1. Defining "Decisional Unit" and Identifying Ages of Employees

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Implementation" (NACUA Annual Conference Outline, 2009). Other useful NACUA resources include M. Michaelson & L. White, "Staff Layoffs and Reductions in Force: Organizing the Process and Managing the Legal Risk" (NACUANOTE, Feb. 2009; adapted from 2008 Monograph produced for the American Council on Education, NACUBO, and United Educators); B. Jones, M. Mootchnick & K. Rinehart, "Tried and True Approaches to Settlement and Severance Agreements" (NACUA Annual Conference Outline, 2008).

Size of Decisional Unit. Employment attorneys are frequently asked to opine (often *after* administrators have made initial decisions as to who will be terminated) about the appropriate definition of a "decisional unit" that must be identified for purposes of complying with the OWBPA information requirements. This can be difficult. The EEOC's regulations provide that the "decisional unit" is that portion of the employer's organizational structure from which the employer actually chooses certain employees for the program (and declines to choose others). 29 C.F.R. § 1625.22(f)(3)(i)(B). But this varies from case to case, and layoff to layoff. Depending upon the reason for the layoff and the manner in which the particular organization is structured, the "decisional unit" could include virtually every employee in the organization. *See* 29 C.F.R. § 1625.22(f)(3)(v)(A) (EEOC offers example of small facilities with interrelated functions and employees that may comprise a single decisional unit).

Complicating matters, an employer can be penalized for over-inclusiveness as well as under-inclusiveness. In *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10th Cir. 2006)(revising earlier opinion reported at 423 F.3d 1139), the Court found a block of release agreements unenforceable because the group termination notice identified the "decisional unit" as *all* salaried employees at a large mill (although the employer had actually considered for termination only a small group of employees reporting to one, particular mill manager). 446 F.3d at 1094-95. In this instance, giving the employees "too much" information constituted non-compliance with the statute. It follows that an employer must actually identify the employees considered, who considered them, and which eligibility factors were used *before* any reasonable determination can be made as to what must be disclosed to terminated employees with respect to the appropriate "decisional unit."

Campus decisionmakers sometimes struggle with whether to include in a "decisional unit" individuals from different campuses or geographic locations. While the EEOC regulations indicate that a decisional unit usually is limited to the workforce of a single facility (29 C.F.R. § 1625.22(f)(3)(ii)(B)), this may depend upon whether different facilities or locations are managed as interrelated units or are served by the same personnel (29 C.F.R. § 1625.22(f)(3)(v)(A) & (B)). Large educational institutions can face significant difficulties determining which functional units constitute "decisional units" for purposes of describing a RIF, particularly where multiple units are the subject of RIFs. *See, e.g., Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1246-47 (11th Cir. 2006)(releases upheld on appeal, after being voided in district court, because terminations were considered only on regional level; thus, statistics regarding employers national restructuring efforts were not required under OWBPA). In some circumstances, individuals working in identical jobs, but on different campuses, would probably constitute part of the "decisional unit," given the realities of how colleges and universities usually evaluate job functions. Again, the key will be how the individual institution functions on a daily basis and how its administration actually evaluates the particular job classifications and categories in determining whether to implement a RIF and whom to select.

Providing Age Information. Another requirement related to identification of the "decisional unit" is the requirement that the ages of those selected for termination and considered for termination be identified as part of the information necessarily provided to those being offered waivers. 29 C.F.R. § 1625.22(f)(4) (ii), (iii), and (v). The EEOC's regulations regarding the OWBPA set forth categorization requirements regarding the ages of persons eligible or

selected for termination, grade levels and subcategories, and distinctions between voluntary and involuntary terminations. *Id.* These regulations should be carefully consulted and scrupulously followed when preparing information to accompany any agreements and waivers.

The purpose of these regulations is to permit employees to review the ages of employees within relevant job classifications; they are intended to prevent manipulation by the employer of age-related data to minimize any inference of decisionmaking based upon age. This presents difficult issues where the age information being provided suggests that individuals selected for termination are, in fact, among the older employees within a unit. Indeed, giving the aging of the workforce and the particular decisional units at issue, age-related information may appear so skewed that employers sometimes opt *not* to seek waivers and provide age-related information. This might prove a particularly attractive option for state institutions enjoying sovereign immunity; even for private institutions, however, the effect of providing age-related information is a significant factor to consider in determining whether to seek ADEA releases and how to define decisional units.

Practice Tips:

Information given to terminated employees regarding the "decisional unit" must reflect the reality of the evaluation process. The critical issues for purposes of determining which employees' demographic information must be disclosed are (i) who within the institution made the decisions; (ii) what information they considered; and (iii) whom they actually evaluated in the course of deciding upon terminations. This depends, in turn, upon the objectives of the downsizing effort. If the objective is to save money in a particular department or division, then that unit may probably be the sole focus of consideration and, usually, only the employees in that unit will properly be identified as the "decisional unit." If the institution is facing overall financial exigency, however, or if the Board or senior administration become involved in actual selection of individuals for termination, the "decisional unit" may suddenly blossom into a huge group of employees. Institutions must also meet statutory and regulatory requirements for providing age-related information (and, depending upon how this plays out in a particular layoff, this may suggest that the institution does not wish to seek ADEA waivers).

2. Using Performance As An Eligibility Factor

As part of the information required to be disclosed under OWBPA, employers are required to inform affected employees about "any eligibility factors for such program." 29 U.S.C. § 626(f)(1). Generally, this is thought to be one of the less challenging aspects of OWBPA compliance; an EEOC example of appropriate "eligibility factors" is generic, describing the "eligible" group as everyone within the decisional unit and the "selected" group as everyone from within the eligible group who is being terminated. *See, e.g.*, 29 C.F.R. § 1625.22(f)(4)(vii); *see also* 2009 EEOC Policy Document, at App. B ¶ 11. Recently, however, some courts have suggested that the term "eligibility factors" requires more specificity and, in particular, at least a general description of the termination selection criteria. *See., e.g., Pagliolo v. Guidant Corp*., 483 F. Supp. 2d 847 (D. Minn. 2007) (release violated OWBPA by, among other things, failing to identify general criteria for selection of employees for termination). And, in *Guidant*, the factors used to select employees for termination were admittedly both "job

performance" and "criticality"; the court held that these should have been disclosed as part of the information tendered with the OWBPA releases. While other cases have interpreted the "eligibility" requirement less rigorously, *Guidant* serves as a reminder that the contours of the OWBPA are far from clear -- and that any ambiguities will be interpreted against the employer.

Whether or not the university must identify the criteria it is using in making its layoff decisions as part of the OWBPA process, it should approach the task of identifying the criteria with great care. The criteria used will not only impact the character of the workforce that departs and remains but will also affect those who are separated in deciding whether to waive their legal claims and whether to sue.

Many universities, particularly those in which the workforce is unionized, rely heavily upon seniority (meaning, years of service) in determining which faculty and staff are to be laid off once the layoff decision has been made and the affected organizational units selected. But many other universities, whether unionized or not, do not base layoff decisions exclusively on seniority. And, together with job skills and unique work specialties, job performance is typically a significant factor to be considered in making reduction in force decisions.

Using performance to rank employees for possible termination does, however, raise the level of risk associated with RIFs. Performance evaluation is inherently subjective, even where the employer seeks to rely on criteria that appear quantifiable or otherwise measurable. Moreover, subjective reasons for termination are always easier for employees to attack before agencies or courts.

Practice Tips:

Develop Written Criteria Before Making Any Decisions. An obvious point (but one that is sometimes lost in the process) is that any layoff should be based upon written criteria developed before specific termination decisions are made. Assuming that criteria are not already set forth -- in the form of state statutes or regulations, collective bargaining agreement provisions, or existing university policies -- universities must develop criteria to (1) determine when a layoff is justified or called for; (2) decide which units in the university are to be affected by the layoff (and to what extent); and (3) determine which employees are to be subject to layoff. The criteria must also be subjected to rigorous evaluation while they are being implemented (for example, by compiling impact data with respect to age and other characteristics of the affected and unaffected workforce). Objective criteria typically create less risk than subjectively applied criteria, although the criteria must be germane in either case.

Define and Document Performance-Related Criteria. The university must be very careful to use performance considerations that are written and well-defined. The evaluation process should be thorough, well-documented, and based upon the written, job-related criteria. Job performance must be considered for *everyone* being evaluated for layoff (using the same, identified criteria). The fundamental caveat is that similarly situated persons should be treated similarly.

Document Selections Using Past Evaluation Materials. If the university intends to consider past performance in the determination of layoff eligibility, the documents used to evaluate performance should be pre-existing performance reviews that were prepared using objective or carefully applied subjective criteria. It is best to avoid reliance upon *ad hoc* performance evaluations prepared in the context of the particular layoff process.

Pay Particular Attention To The Age Impact Data. As noted, if the university wishes to obtain waivers of rights under ADEA pursuant to a RIF, it must provide data of the ages of all those employees who are included and not included in the layoff, and do so by job title. This data should be gathered and subjected to careful review and analysis *before* any final employment decisions are made -- to determine whether the impact is such as to suggest possible discrimination or vulnerability to such a claim (or even that the affected employees are likely to refuse to sign waivers and elect to consult their own legal counsel). The data may even cause the university to rethink its criteria, including the affected decisional units, or reevaluate its layoff decisions. As noted below, this data may also bear upon a state university's decision whether to pursue ADEA waivers, given its 11th Amendment immunity.

What To Do With An Employee Who Should Be Dismissed For Cause. Quite frequently, employers evaluating employees for a layoff or RIF where performance is one factor being used come across an employee whose performance merits dismissal for cause. If the layoff criteria are based on factors such as years of service, it is possible that the problem employee is not subject to layoff. In such an instance, the employer should consider whether dismissal or some lesser discipline is warranted and act separately from the RIF process to address the performance issues. Particularly if the poor performance has not been sufficiently documented or does not clearly warrant dismissal, progressive discipline should be imposed. (If, however, the employee is eligible for layoff, then the employee may be included in the separation group notwithstanding the fact he or she might otherwise have been subject to dismissal for cause).

Generally, H.R. "best practices" discourage use of a layoff as a means to separate under-performing individuals. Therefore, if performance is not otherwise being used as a criterion for layoff, or if the poor performer still does not "qualify" for layoff, the university should not depart from its stated or actual criteria by including the poor performing employee in the RIF. This could jeopardize not only the university's ability to defend against discrimination claims by that employee but also the strength of the institution's defenses against other claims. It may even, in a "worst case" scenario, place in jeopardy the validity of any waivers the university secures from other employees in connection with the layoff.

Involvement of University Counsel:

As an obvious, final practice tip, all of these difficult situations (which, in turn, require the making of difficult and sometimes risky judgments) underscore the need for early involvement of counsel. Counsel should be involved in (i) developing a plan for RIF that includes articulation of objectives and eligibility factors, (ii) undertaking a comprehensive adverse impact analysis before the RIF is announced, and (iii) coordinating presentation of waivers and separation packages to employees, consistent with a refined and prepared message. Where the university is using subjective layoff factors such as performance, it is all the more

important that counsel be involved in ensuring that the eligibility factors are well-defined and properly applied. It is also critical that the campus administration be fully advised by counsel of any pitfalls revealed by review of policies, performance and evaluation documents, and other materials relevant to adverse impact analyses. The NACUA materials cited in footnote 5 above offer excellent, practical suggestions to campus counsel for planning, executing, and communicating legal and effective campus RIFs.

C. 11th Amendment Immunity

In *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000), the U.S. Supreme Court held that the Eleventh Amendment provides immunity to States from suits for money damages by private individuals under the ADEA. As such, while state universities may be sued for money damages by the EEOC under ADEA and by private individuals under state statutes that bar age discrimination (such as California's Fair Employment and Housing Act), state universities are immune from such suits brought by older employees who believe that their separations are based upon age.

That raises the question whether sovereign immunity from suit should alter the behavior of state universities in implementing RIFs or other involuntary separations -- and, in particular, whether and to what extent state universities should seek waivers of age discrimination claims.

First, it is important to understand that immunity from suit does not mean immunity from federal law. States are obligated to follow the ADEA even if they are immune from money damages suits by individuals. Second, as noted above, States may still be sued by the EEOC for money damages for discriminating against individual employees; thus, sovereign immunity does not necessarily shield a public university from the reach of the ADEA.

But, in light of the application of sovereign immunity, state universities may decide to forego seeking a waiver of ADEA rights from separating employees. The risk of exposure is far less than that faced by private universities. By foregoing the waiver, public universities do not have to provide notice with age statistics and may finalize settlement agreements without being subject to the 7-day right of revocation. Public universities may still protect themselves against state age discrimination statutes through their normal general releases.

Nonetheless, with or without the waiver, state universities remain exposed to lawsuits for monetary damages from the EEOC and possibly from other arms of the federal government, as well as to proceedings for injunctive relief by individuals and federal authorities. Therefore, state universities are still well-advised to engage in the rigorous planning processes outlined in Section III-B above before instituting any layoffs that may raise age discrimination issues.

IV. EARLY RETIREMENT INCENTIVES

In lieu of (or in addition to) instituting layoffs, many institutions are offering early retirement incentives to address budgetary issues. Many such incentives affect (indeed, most are specifically directed toward) the "graying workforce" itself. The experiences of CSU, which employs a significant number of employees 40 or over, are again useful in discussing and evaluating the kinds of early retirement incentives presently being offered on campus. (*See* those

NACUA materials listed in footnote 5 above, as well as NACUA materials set forth on other NACUA resource pages, for good examples of permissible early retirement initiatives that have been offered by colleges and universities).

Early retirement incentives may be extended on an individual basis to selected employees or on a gro**u**p basis. Two group approaches recently used by CSU are discussed below

A. Early Retirement Coupled With Continued Employment

One kind of program encourages retirement by offering those who retire the opportunity to continue to work at the institution on a reduced schedule.

The California State University has long had in effect a program called the "Faculty Early Retirement Program" (or "FERP"), which is now a part of the collective bargaining agreement between CSU and its faculty union. A copy of the FERP provision is attached as Appendix C.

Tenured faculty members who have reached the age of 55 are eligible to participate. *All participants must have been granted a service retirement*. FERP participants retain the same rank and salary step level that they had in the year immediately prior to retirement. Eligible faculty may participate for up to five consecutive years. Typically in each of these eligible years, the faculty member is permitted to teach no more than one semester of a two-semester academic year. The employment is to be proportional to the time base of the participant in the academic year immediately prior to retirement. FERP participants are required to perform normal responsibilities and their share of normal duties and activities.

B. Early Retirement Encouraged Through A Golden Handshake

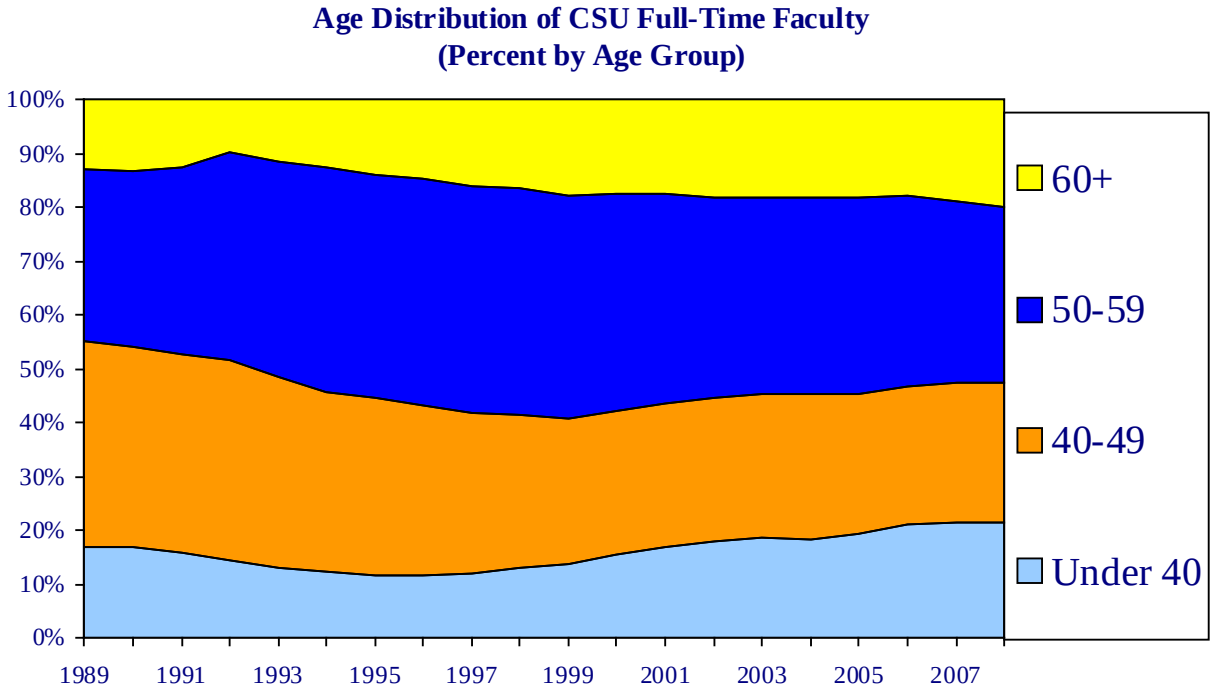
Another kind of program involves a "golden handshake," under which the institution encourages employees to retire by offering them greater retirement benefits to do so.

In California, the State Legislature has provided by statute that, upon a determination by the Governor that certain conditions exist, various public employees who are members of the two large public retirement programs, including faculty at California State University and the University of California, would be eligible for an additional two years of service credit if they retire within certain prescribed dates. The Governor had to determine that (1) because of an impending curtailment of or change in the manner of performing services, the best interests of the state would be served by encouraging the retirement of designated employees; and (2) sufficient economies could be realized to offset any cost to the employing public agency resulting from award of such credit. Under the statute, the affected public agency had to fund the golden handshake.

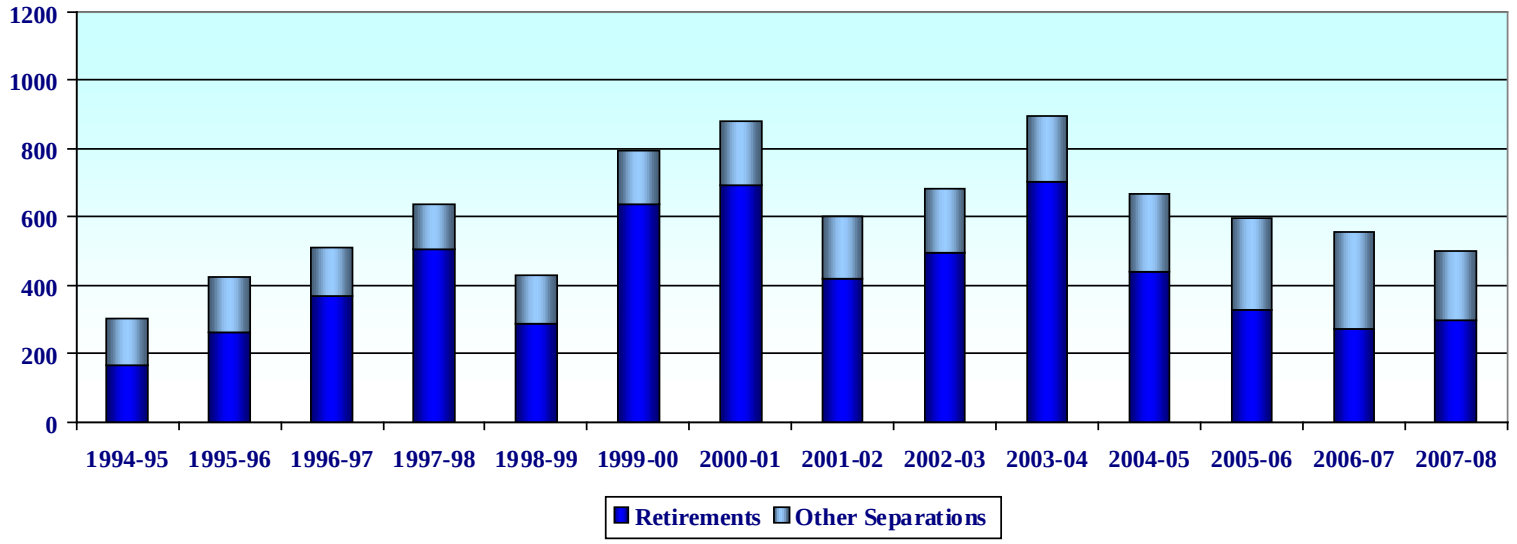
In May 2004, the Governor issued an Executive Order finding that the required conditions existed for CSU faculty. As such, eligible CSU faculty members were offered an inducement to retire. Attached is the letter eligible faculty received from CalPERS, one of the public retirement agencies involved, as well as the applicable Executive Order (attached as Appendix D).

Age Distribution of CSU Full Time Faculty (Head Count)

Fall	Under 30	30-39	40-49	50-59	60-69	70+	Total	Average
2008	149	2,428	3,142	3,915	2,209	176	12019	50.1
2007	176	2,422	3,105	4,086	2,112	162	12,063	50.0
2006	143	2,287	3,008	4,103	1,949	132	11,622	50.0
2005	106	2,084	2,932	4,102	1,900	152	11,276	50.3
2004	101	1,942	2,985	4,039	1,865	137	11,069	50.3
2003	128	2,060	3,109	4,241	1,987	149	11,674	50.3
2002	162	1,969	3,125	4,379	2,028	119	11,782	50.4
2001	147	1,769	3,054	4,426	1,871	112	11,379	50.6
2000	132	1,571	2,976	4,458	1,849	103	11,089	51
1999	95	1,411	2,961	4,521	1,842	106	10,936	51.3
1998	91	1,287	3,028	4,493	1,657	85	10,641	51.1
1997	89	1,185	3,135	4,469	1,627	76	10,581	51.2
1996	94	1,153	3,334	4,461	1,514	69	10,625	51
1995	72	1,155	3,447	4,366	1,403	60	10,503	50.7
1994	61	1,226	3,499	4,356	1,263	54	10,459	50.4
1993	60	1,331	3,808	4,315	1,199	46	10,759	49.9
1992	67	1,493	4,059	4,156	1,041	42	10,858	49.3
1991	101	1,763	4,347	4,133	1,419	57	11,820	49.4
1990	123	1,972	4,633	4,078	1,585	65	12,456	49.2
1989	130	1,951	4,644	3,898	1,551	56	12,230	49.1
1988	120	2,004	4,558	3,741	1,417	68	11,908	48.8



Separations among CSU Tenure Track Faculty

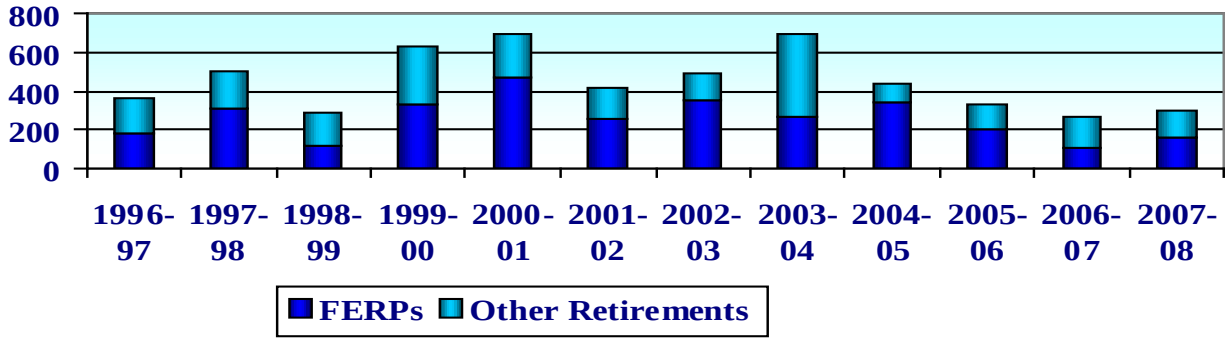


	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
Retirements	166	263	369	504	286	637	695	417	495	702	437	328	271	300
Other Separations	137	162	144	135	143	158	188	183	190	196	231	270	284	201
Total Separations	303	425	513	639	429	795	883	600	685	898	668	598	555	501
Retirements as a % of Separations	55%	62%	72%	79%	67%	80%	79%	70%	72%	78%	65%	55%	49%	60%

	Retirements	Other Separations	Total Separations
14-year Total	5,870	2,622	8,492
14-year Average	419	187	607

Note: Faculty retirements have fluctuated widely related to the impact of "Golden Handshakes" boosting retirements one year and reducing their numbers in subsequent years. In 1998-99, retirements may have been fewer as passage of SB 400 provided improved benefits to those retiring after the academic year ended.

CSU Tenure Track Faculty Retirement and FERP Head Counts since 1996-97



	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
FERPs	182	311	119	332	470	261	357	270	340	201	110	156
Other Retirements	187	193	167	305	225	156	138	432	97	127	161	144
Total Retirements	369	504	286	637	695	417	495	702	437	328	271	300
FERPs as % of Total Retirements	49%	62%	42%	52%	68%	63%	72%	38%	78%	61%	41%	52%

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Age Distribution of Full-Time Employee Headcount by Faculty Status

Fall 2008

Age	Staff*		Faculty		Total	
	Headcount	Percent	Headcount	Percent	Headcount	Percent
60+	2,215	10.2	2,385	19.8	4,600	13.6
50-59	6,841	31.4	3,915	32.6	10,756	31.8
40-49	5,487	25.2	3,142	26.1	8,629	25.5
30-39	4,597	21.1	2,428	20.2	7,025	20.8
Under 30	2,637	12.1	149	1.2	2,786	8.2
TOTAL	**21,777**	**100**	**12,019**	**100**	**33,796**	**100**
AVERAGE AGE	**45.7**		**50.1**		**47.2**	

*Staff includes all personnel not counted among the instructional faculty.

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Age Distribution of Full-Time Employee Headcount by Gender and Minority Status

Fall 2008

Age	Male		Female		Minorities		Total	
	Head-count	%	Head-count	%	Head-count	%	Head-count	%
60+	2,563	16.2	2,037	11.3	1,209	9.4	4,600	13.6
50-59	4,868	30.7	5,888	32.8	3,421	26.5	10,756	31.8
40-49	4,139	26.1	4,490	25.0	3,537	27.4	8,629	25.5
30-39	3,287	20.8	3,738	20.8	3,301	25.6	7,025	20.8
Under 30	979	6.2	1,807	10.1	1,451	11.2	2,786	8.2
TOTAL	**15,836**	**100**	**17,960**	**100**	**12,919**	**100**	**33,796**	**100**
AVERAGE AGE	**48.1**		**46.5**		**44.8**		**47.2**	

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Minority Employees as Percent of Full-Time Employees by Age Group and Job Category (Headcount)

Fall 2008

Age	Support*	Professional & Managerial	Faculty	All Full-Time Employees
60+	38.7	26.2	21.0	26.3
50-59	41.1	30.1	25.1	31.8
40-49	49.9	43.5	31.2	41.0
30-39	59.4	50.5	33.5	47.0
Under 30	56.9	48.7	30.2	52.1
ALL AGES	**48.6%**	**39.9%**	**27.7%**	**38.2%**

E.g., in the "60 and above" age group of Full-Time Support employees, 38.7% are minorities.

*Support includes persons in the following employee categories: clerical and secretarial, technical and paraprofessional, skilled crafts, and service and maintenance.

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Female Employees as Percent of Full-Time Employees by Age Group and Job Category (Headcount)

Fall 2008

Age	Support*	Professional & Managerial	Faculty	All Full-Time Employees
60+	57.1	54.0	33.9	44.3
50-59	58.7	61.3	45.6	54.7
40-49	56.9	54.1	46.1	52.0
30-39	59.7	52.3	49.3	53.2
Under 30	70.8	57.4	63.1	64.9
ALL AGES	**60.0%**	**56.2%**	**44.4%**	**53.1%**

E.g., in the "60 and above" age group of Full-Time Support employees, 57.1% are female.

*Support includes persons in the following employee categories: clerical and secretarial, technical and paraprofessional, skilled crafts, and service and maintenance.

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UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS IN EMPLOYEE SEVERANCE AGREEMENTS

Table of Contents

I. INTRODUCTION

Employee reductions and terminations have been an unfortunate result of the current economic downturn. Even in good economic times, however, businesses of every size carefully assess their operational structures and may sometimes decide to reduce their workforce. Often, employers terminate older employees who are eligible for retirement, or nearly so, because they generally have been with the company the longest and are paid the highest salaries. Other employers evaluate individual employees on criteria such as performance or experience, or decide to lay off all employees in a particular position, division, or department.[1] An employer's decision to terminate or lay off certain employees, while retaining others, may lead discharged workers to believe that they were discriminated against based on their age, race, sex, national origin, religion, or disability.

To minimize the risk of potential litigation, many employers offer departing employees money or benefits in exchange for a release (or "waiver") of liability for all claims connected with the employment relationship, including discrimination claims under the civil rights laws enforced by the Equal Employment Opportunity Commission (EEOC) -- the Age Discrimination in

Appendix B

Employment Act (ADEA), Title VII, the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA).[2] While it is common for senior-level executives to negotiate severance provisions when initially hired, other employees typically are offered severance agreements and asked to sign a waiver at the time of termination. When presented with a severance agreement, many employees wonder: Is this legal? Should I sign it?

This document answers questions that you may have if you are offered a severance agreement in exchange for a waiver of your actual or potential discrimination claims. Part II provides basic information about severance agreements; Part III explains when a waiver is valid; and Part IV specifically addresses waivers of age discrimination claims that must comply with provisions of the Older Workers Benefit Protection Act (OWBPA). Finally, this document includes a checklist with tips on what you should do before signing a waiver in a severance agreement and a sample of an agreement offered to a group of employees giving them the opportunity to resign in exchange for severance benefits.

II. SEVERANCE AGREEMENTS AND RELEASE OF CLAIMS

A severance agreement is a contract, or legal agreement, between an employer and an employee that specifies the terms of an employment termination, such as a layoff. Sometimes this agreement is called a "separation" or "termination" agreement or "separation agreement general release and covenant not to sue."[3] Like any contract, a severance agreement must be supported by "**consideration**." Consideration is something of value to which a person is not already entitled that is given in exchange for an agreement to do, or refrain from doing, something.

The consideration offered for the waiver of the right to sue cannot simply be a pension benefit or payment for earned vacation or sick leave to which the employee is already entitled but, rather, must be something of value *in addition* to any of the employee's existing entitlements. An example of consideration would be a lump sum payment of a percentage of the employee's annual salary or periodic payments of the employee's salary for a specified period of time after termination. The employee's signature and retention of the consideration generally indicates acceptance of the terms of the agreement.

1. What does a severance agreement look like?

A severance agreement often is written like a contract or letter and generally includes a list of numbered paragraphs setting forth specific terms regarding the date of termination, severance payments, benefits, references, return of company property, and release of claims against the employer. If your employer decides to terminate you, it may give you a severance agreement similar to the one that follows:

> **Example 1:** This letter sets forth our agreement with respect to all matters that pertain to your employment and separation from employment by [your organization] ("the Company").
>
> 1. *Termination of Employment.* You will cease to be employed by the Company on X date.
> 2. *Severance Payments.* The Company agrees to pay you X weeks of severance pay. The severance pay will be in addition to the

payment of unused accrued vacation pay to which you are entitled. You may elect to receive this severance pay in the form of a lump sum payment, or spread it over a number of weeks, less applicable deductions for taxes.

***

7. *General Release*. You agree that the consideration set forth above, which is in addition to anything of value to which you are or might otherwise be entitled, shall constitute a complete and final settlement of any and all causes of actions or claims you have had, now have or may have up to the date of this agreement including, without limitation, those arising out of or in connection with your employment and/or termination by the Company pursuant to any federal, state, or local employment laws, statutes, public policies, orders or regulations, including without limitation, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, and [certain state] laws.

Agreements that specifically cover the release of age claims will also include additional information intended to comply with OWBPA requirements. *See* Part IV.A, Question and Answer 6.

Example 2: This agreement is intended to comply with the Older Workers Benefit Protection Act. You acknowledge and agree that you specifically are waiving rights and claims under the Age Discrimination in Employment Act.

. VALIDITY OF WAIVERS – IN GENERAL

Most employees who sign waivers in severance agreements never attempt to challenge them. Some discharged employees, however, may feel that they have no choice but to sign the waiver, even though they suspect discrimination, or they may learn something after signing the waiver that leads them to believe they were discriminated against during employment or wrongfully terminated.

If an employee who signed a waiver later files a lawsuit alleging discrimination, the employer will argue that the court should dismiss the case because the employee waived the right to sue, and the employee will respond that the waiver should not bind her because it is legally invalid. Before looking at the employee's discrimination claim, a court first will decide whether the waiver is valid. If a court concludes that the waiver is *invalid*, it will decide the employee's discrimination claim, but it will dismiss the claim if it finds that the waiver is valid.

A waiver in a severance agreement generally is valid when an employee **knowingly and voluntarily** consents to the waiver. The rules regarding whether a waiver is knowing and voluntary depend on the statute under which suit has been, or may be, brought. The rules for waivers under the Age Discrimination in Employment Act are defined by statute – the Older Workers Benefit Protection Act (OWBPA).[4] Under other laws, such as Title VII, the rules are derived from case law. In addition to being knowingly and voluntarily signed, a valid agreement also must: (1) offer some sort of consideration, such as additional compensation, in exchange for the employee's waiver of the right to sue; (2) not require the employee to waive future rights; and (3) comply with applicable state and

federal laws.[5]

2. What determines whether a waiver of rights under Title VII, the ADA, or the EPA was "knowing and voluntary"?

To determine whether an employee knowingly and voluntarily waived his discrimination claims, some courts rely on traditional contract principles and focus primarily on whether the language in the waiver is clear.[6] Most courts, however, look beyond the contract language and consider all relevant factors – or the totality of the circumstances -- to determine whether the employee knowingly and voluntarily waived the right to sue. [7] These courts consider the following circumstances and conditions under which the waiver was signed:

- whether it was written in a manner that was clear and specific enough for the employee to understand based on his education and business experience;
- whether it was induced by fraud, duress, undue influence, or other improper conduct by the employer;
- whether the employee had enough time to read and think about the advantages and disadvantages of the agreement before signing it;
- whether the employee consulted with an attorney or was encouraged or discouraged by the employer from doing so;[8]
- whether the employee had any input in negotiating the terms of the agreement; and
- whether the employer offered the employee consideration (e.g., severance pay, additional benefits) that exceeded what the employee already was entitled to by law or contract and the employee accepted the offered consideration.

> **Example 3:** An employee who was laid off from her position at an automobile assembly plant agreed to release her employer from all claims in exchange for a $100,000 severance payment. After signing the waiver and cashing the check, she filed a lawsuit alleging that she was harassed and discriminated against by her coworkers during her employment. A court found that the employee's waiver was knowing and voluntary by looking at the totality of circumstances surrounding its execution: the employee graduated from college and completed paralegal classes that included a course in contracts; she had no difficulty reading; the agreement was clear and unambiguous; she had ample time to consider whether to sign it; she was represented by counsel; the cash payment provided by the employer was fair consideration; and she did not offer to return the payment she received for signing the waiver.[9]

> **Example 4:** An employee was informed that his company was downsizing and that he had 30 days to elect voluntary or involuntary separation. The employee chose voluntary separation in exchange for severance pay and additional retirement benefits and signed a waiver, which stated: "I . . . hereby release and discharge [my employer] from any and all claims which I have or might have, arising out of or related to my employment or resignation or termination." The employee later filed suit alleging that he was terminated based on his race and national origin.

In finding that the employee's waiver was *not* knowing and voluntary, a court noted that although the language of the agreement was "clear and unambiguous," it failed to specifically mention the release of employment discrimination claims. Because the employee was only high school educated and unfamiliar with the law, his argument that he believed he only was releasing claims arising from his voluntary termination and the benefits package he accepted was "not an unreasonable conclusion."[10]

3. May I still file a charge with the EEOC if I believe that I have been discriminated against based on my age, race, sex, or disability, even if I signed a waiver releasing my employer from all claims?

Yes. Although your severance agreement may use broad language to describe the claims that you are releasing (*see* Example 1), you can still file a charge with the EEOC if you believe you were discriminated against during employment or wrongfully terminated.[11] In addition, no agreement between you and your employer can limit your right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. Any provision in a waiver that attempts to waive these rights is invalid and unenforceable.[12]

4. If I file a charge with the EEOC after signing a waiver, will I have to return my severance pay?

No. Because provisions in severance agreements that attempt to prevent employees from filing a charge with the EEOC or participating in an EEOC investigation, hearing, or proceeding are unenforceable (*see* Question and Answer 3 above), you cannot be required to return your severance pay --or other consideration --before filing a charge.[13]

5. Will I have to return my severance pay if I file a discrimination suit in court after signing a waiver?

Under the ADEA, an employee is not required to return severance pay -- or other consideration received for signing the waiver -- before bringing an age discrimination claim.[14] Under Title VII, the ADA, or the EPA, however, the law is less clear. Some courts conclude that the validity of the waiver cannot be challenged unless the employee returns the consideration, while other courts apply the ADEA's "no tender back" rule to claims brought under Title VII and other discrimination statutes and allow employees to proceed with their claims without first returning the consideration.[15]

Even if a court does not require you to return the consideration before proceeding with your lawsuit, it may reduce the amount of any money you are awarded if your suit is successful by the amount of consideration you received for signing the waiver. *See* Part IV.A. Question and Answer 9.

. WAIVERS OF ADEA CLAIMS

A. General Requirements for Employees Age 40 and Over

In 1990, Congress amended the ADEA by adding the Older Workers Benefit Protection Act (OWBPA) to clarify the prohibitions against discrimination on the basis of age. OWBPA establishes specific requirements for a "knowing and voluntary" release of ADEA claims to guarantee that an employee has every opportunity to make an informed choice whether or not to sign the waiver. There are additional disclosure requirements under the statute when waivers are requested from a group or class of employees. *See* "Additional Requirements for Group Layoffs of Employees Age 40 and Over" at IV. B.

6. What makes a waiver of age claims knowing and voluntary?

OWBPA lists seven factors that must be satisfied for a waiver of age discrimination claims to be considered "knowing and voluntary."[16] At **a minimum**:

- **A waiver must be written in a manner that can be clearly understood.** EEOC regulations emphasize that waivers must be drafted in plain language geared to the level of comprehension and education of the average individual(s) eligible to participate. Usually this requires the elimination of *technical jargon* and *long, complex sentences.* In addition, the waiver must not have the effect of *misleading, misinforming*, or *failing to inform* participants and must present any advantages or disadvantages without either *exaggerating the benefits* or *minimizing the limitations*.

  > **Example 5:** An employee, who had worked for his company for 28 years, was selected for an involuntary RIF and asked to sign a "General Release and Covenant Not to Sue" (severance agreement) in exchange for money. The severance agreement provided, among other things, that the employee "released" his employer "from all claims . . . of whatever kind," including claims under the ADEA and any other federal, state, or local law dealing with discrimination in employment. The severance agreement also referenced "covenants not to sue" and stated that "[t]his covenant not to sue does not apply to actions based solely under the [ADEA]." After reading the severance agreement, the employee asked his supervisor if the exception for ADEA claims contained in the covenant not to sue meant he could sue the employer if his suit was limited to claims under the ADEA. His supervisor contacted the employer's legal department and then sent the employee an e-mail stating, "Regarding your question on the General Release and Covenant Not to Sue, the wording is as intended. . . . . The site attorney was not comfortable providing an interpretation for you and suggested you consult with your own attorney."
  >
  > The employee signed the agreement, collected severance benefits, and then sued his employer for age discrimination under the ADEA. A court held that the severance agreement was not enforceable because it was not written in a manner calculated to be understood. [17]

- **A waiver must specifically refer to rights or claims arising under the ADEA.** EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.

- **A waiver must advise the employee in writing to consult an attorney before accepting the agreement.**

  > **Example 6:** A release stating: "I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims," did not comply with OWBPA's requirement that an individual be *advised* to consult with an attorney. Although the voluntary early retirement agreement advised employees to consult financial and tax advisors, to seek advice from local personnel representatives, and to attend retirement seminars, it said nothing about seeking independent legal advice prior to making the election to retire and accepting the agreement.[18]

- **A waiver must provide the employee with at least 21 days to consider the offer.** The regulations clarify that the 21-day consideration period runs from the date of the employer's final offer. If material changes to the final offer are made, the 21-day period starts over.[19]

- **A waiver must give an employee seven days to revoke his or her signature.** The seven-day revocation period cannot be changed or waived by either party for any reason.

- **A waiver must not include rights and claims that may arise after the date on which the waiver is executed.** This provision bars waiving rights regarding new acts of discrimination that occur *after* the date of signing, such as a claim that an employer retaliated against a former employee who filed a charge with the EEOC by giving an unfavorable reference to a prospective employer.

  > **Example 7:** An employee who received enhanced severance benefits in exchange for waiving her right to challenge her layoff later filed suit. In finding the waiver valid, the court noted that because the waiver clearly stated that she was releasing any claims that she "may now have or have had," it did not require her to waive future claims hat may arise after the waiver was signed.[20]

- **A waiver must be supported by consideration in addition to that to which the employee already is entitled.**

If a waiver of age claims fails to meet any of these seven requirements, it is invalid and unenforceable.[21] In addition, an employer cannot attempt to "cure" a defective waiver by issuing a subsequent letter containing OWBPA-required information that was omitted from the original agreement.[22]

7. Are there other factors that may make a waiver of age claims invalid?

Yes. Even when a waiver complies with OWBPA's requirements (*see* Question and Answer 6 above), a waiver of age claims, like waivers of Title VII and other discrimination claims, will be invalid and unenforceable if an employer used fraud, undue influence, or other improper conduct to coerce the employee to sign it, or if it contains a material mistake, omission, or misstatement.

Example 8: An employee who was told that his termination resulted from "reorganization" signed a waiver in exchange for severance pay. After a younger person was hired to do his former job, he filed a lawsuit alleging age discrimination. The company then changed its position and claimed that the real reason for the employee's discharge was his poor performance. The employee argued that his waiver was invalid due to fraud and that if he had known that he was being terminated because of alleged poor performance, he would have suspected age discrimination and would not have signed the waiver. The court held that fraud was a sufficient reason for finding the waiver invalid.[23]

Example 9: An employee was terminated and given ten weeks of severance pay in exchange for signing an agreement waiving all of her potential discrimination claims. She later filed a lawsuit alleging that she was continuously passed over for promotion based on her age and sex throughout her employment. In response to the employer's attempt to dismiss her suit, she alleged that the waiver was an ultimatum which effectively gave her no choice since she was her grandchildren's guardian and her family's source of income. The court held that the employee's financial problems and prospective loss of her job did not constitute "duress" for the purpose of invalidating a waiver.[24]

8. If I am 40 years old or older, am I entitled to more severance pay or benefits than a younger employee?

No. Although severance packages often are structured differently for different employees depending on position and tenure, an employer is not required to give you a greater amount of consideration than is given to a person under the age of 40 solely because you are protected by the ADEA.[25]

9. Are there any circumstances where I may have to pay my employer back the money it gave me for the waiver of my age claims?

Yes. Your employer may offset money it paid you in exchange for waiving your rights if you successfully challenge the waiver, prove age discrimination, and obtain a monetary award. However, your employer's recovery may not exceed the amount it paid for the waiver or the amount of your award if it is less.[26]

Example 10: Your employer paid you $15,000 in exchange for a waiver of your age discrimination claim. You sue and convince a court that your waiver was not "knowing and voluntary" under OWBPA and that you are entitled to $10,000 in back pay and liquidated damages based on age discrimination. A court could reduce your award to zero because $10,000 is less than the $15,000 the employer already paid you for the waiver.

Example 11: Same as Example 10, except that you are awarded $30,000 based on age discrimination. A court could not reduce your award by more than $15,000, the amount you received in exchange for the waiver. This means that you would still get $30,000 - the $15,000 your employer paid you for your waiver and an additional $15,000 awarded by the court.

10. If I challenge an age discrimination waiver in court, may my employer renege on promises it made in the agreement?

No. EEOC regulations state that an employer cannot "abrogate," or avoid, its duties under an ADEA waiver even if you challenge it. Because you have a right under OWBPA to have a court determine a waiver's validity, it is unlawful for your employer to stop making promised severance payments or to withhold any other benefits it agreed to provide.[27]

> **Example 12:** A company eliminated almost all of its direct sales positions and offered terminated employees six months of severance benefits in exchange for signing a waiver. In response to the employees' suit alleging age discrimination, the company indicated that it was suspending any further severance payments and was discontinuing other benefits provided under the waiver agreement. A court held that the company could not cut off severance payments or demand repayment of benefits because the employees filed suit challenging the validity of the waiver.[28]

B. Additional Requirements for Group Layoffs of Employees Age 40 and Over

When employers decide to reduce their workforce by laying off or terminating a group of employees, they usually do so pursuant to two types of programs: *"exit incentive programs"* and *"other employment termination programs."* When a waiver is offered to employees in connection with one of these types of programs, an employer must provide enough information about the factors it used in making selections to allow employees who were laid off to determine whether older employees were terminated while younger ones were retained.

11. What is an "exit incentive" or "other termination" program?

Typically, an "exit incentive program" is a **voluntary program** where an employer offers two or more employees, such as older employees or those in specific organizational units or job functions, additional consideration to persuade them to voluntarily resign and sign a waiver. An "other employment termination program" generally refers to a program where two or more employees are **involuntarily terminated** and are offered additional consideration in return for their decision to sign a waiver.[29]

> **Example 13:** A bank must eliminate 20% of its 200 teller positions in a particular geographic location and decides to retain only those employees who most recently received the highest performance ratings. The bank sends a letter to 50 tellers who were rated "needs improvement" offering them six months pay if they voluntarily agree to resign and sign a waiver. This is an "exit incentive program."

> **Example 14:** Same facts as in Example 13, but only 30 tellers voluntarily resign. The bank involuntarily lays off 10 tellers with severance pay in exchange for their waiver of age claims. This is an "other termination program."

Whether a "program" exists depends on the facts and circumstances of each case; however, the general rule is that a "program" exists if an employer offers additional consideration – or, an

incentive to leave – in exchange for signing a waiver to more than one employee.[30] By contrast, if a large employer terminated five employees in different units for cause (e.g., poor performance) over the course of several days or months, it is unlikely that a "program" exists. In both exit incentive and other termination programs, the employer determines the terms of the severance agreement, which typically are non-negotiable. [31]

12. If I am in a group of employees who are being laid off and asked to sign a waiver, what information does my employer have to give to me?

Your waiver must meet the minimum OWBPA "knowing and voluntary" requirements (see Question and Answer 6 above). In addition, your employer must give you - and all other employees who are being laid off with you - written notice of your layoff and at least 45 days to consider the waiver before signing it. Specifically, the employer must inform you in writing of:

- the **"decisional unit"** -- the class , unit, or group of employees from which the employer chose the employees who were and who were not selected for the program

> **Example 15:** If an employer decides it must eliminate 10 percent of its workforce at a particular facility, then the entire facility is the decisional unit, and the employer has to disclose the titles and ages of all employees at the facility who were and who were not selected for the layoff. If, however, the employer must eliminate 15 jobs and only considers employees in its accounting department (and not bookkeeping or sales) , then the accounting department is the decisional unit, and the employer has to disclose the title and ages of all employees in the accounting department whose positions were and were not selected for elimination.

The particular circumstances of each termination program determine whether the decisional unit is the entire company, a division, a department, employees reporting to a particular manager, or workers in a specific job classification.

- **eligibility factors** for the program;[32]
- the **time limits** applicable to the program;
- the **job titles and ages of all individuals who are eligible** or who were selected for the program (the use of age bands broader than one year, such as "age 40-50" does not satisfy this requirement) and the **ages of all individuals in the same job classifications or organizational unit who are not eligible** or who were not selected.

See Appendix B for an example of an agreement issued to employees being laid off or terminated pursuant to a group exit incentive program.

. CONCLUSION

If your employer decides to terminate your job, you may be given a severance agreement that requires you to waive your right to sue for wrongful termination based on age, race, sex, disability, and other

types of discrimination. Although most signed waivers are enforceable if they meet certain contract principles and statutory requirements, an employer **cannot lawfully** limit your right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC or prevent you from filing a charge of discrimination with the agency. An employer also cannot lawfully require you to return the money or benefits it gave you in exchange for waving your rights if you do file a charge. While this document is not intended to cover all of the issues that arise when your employer informs you that you are being terminated or laid off, the following checklist may help you decide whether or not to sign a waiver.

APPENDIX A

Employee Checklist: What to Do When Your Employer Offers You a Severance Agreement:

- **Make sure that you understand the agreement**
  - Read the agreement to see if it is clear and specific, or if it is confusing because it contains terms you do not understand.
  - If you are 40 or older, inform your employer that the law requires your agreement to be written in a manner that makes it easy to understand. Usually this means that your agreement should not contain technical jargon or long, complex sentences.
- **Check for deadlines and act promptly**
  - The moment you are given a severance agreement, check to see if your employer gave you a deadline for accepting, or declining, the agreement. If you are 40 years old or older, federal law requires the employer to give you at least 21 days to review the agreement and make up your mind.
  - If your employer has not given you a reasonable amount of time, or rushes your decision, this is a red flag. An employer who is fair will understand that you cannot review or make decisions about an important document on a moment's notice.
  - If you are being rushed, ask for more time. Put your request in writing. If you are 40 or older and your employer is asking you for a decision in fewer than 21 days, remind the employer that the law requires you to be provided at least 21 days. (If you and at least one other person are being laid off in a reduction in force (RIF) at the same time, you must be given 45 days to consider the agreement.)
- **Consider having an attorney review the severance agreement**
  - Even if you are parting amicably with your employer, you may want to ask for advice about whether you should sign it, whether the terms are reasonable, and whether you should ask your employer to change any of the terms.
  - If you decide that you want an attorney to review the agreement, promptly make an appointment. Do not wait until the last day before the deadline to review the severance agreement.
  - If you are at least 40 years old, the agreement must advise you to consult with an attorney.
- **Make sure you understand what you are giving up in exchange for severance pay or**

benefits

- The main benefit to signing an agreement is that you will receive a cash payment or benefits in exchange for signing away your right to bring certain legal claims against your employer.
- Make sure that the agreement offers you something of value to which you are not already entitled.
- If you think you have been wrongfully terminated because of age, race, sex, religion, or some other discriminatory reason, you may want to think twice about signing. The benefits of signing a severance agreement should be carefully weighed against claims you might have against your employer, the likelihood of winning a court case or settlement, and the probable costs.

- **Review the agreement to ensure that it does not ask you to release nonwaivable rights**
  - Confirm that your employer is not asking you to waive your right to file a charge, testify, assist, or cooperate with the EEOC.
  - Make certain that the agreement is not asking you to waive rights or claims that may arise after the date you sign the waiver.
  - Make sure that your employer is not asking you to release your claims for unemployment compensation benefits, workers compensation benefits, claims under the Fair Labor Standards Act, health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA), or claims with regard to vested benefits under a retirement plan governed by the Employee Retirement Income Security Act (ERISA).

APPENDIX B

Sample Waiver: Exit Incentive or Other Termination Programs

> The following example illustrates one way in which the required OWBPA information could be presented to employees and is not intended to suggest that employers must follow this format. Rather, each waiver agreement should be individualized based on an employer's particular organizational structure and the average comprehension and education of the employees in the decisional unit subject to termination. For another example of how the required information might be presented, see 29 C.F.R. § 1625.22(f)(vii).

Dear [Employee]:

This letter, upon your signature, will constitute the agreement between you and [your employer]("the Company") on the terms of your separation from the Company (hereinafter the "Agreement"):

1. Your employment will terminate on X date. or

or

You have agreed to resign on X date. Your last day of work will be X date.

2. You have been paid your earned salary and accrued vacation pay through the effective date of your termination.

***

5. Although you are not otherwise entitled to it, in consideration of your acceptance of this Agreement, the Company will pay you an extra ___ [week's][month's] salary at your current rate of $____ per [week][month], less customary payroll deductions to be paid upon the effective date of this Agreement as defined in paragraph 11 below. You understand and agree that this payment includes extra payments given to you in exchange for your signature and release.

6. You waive and release any and all claims you have or might have against the Company. . . . These claims include, but are not limited to claims for discrimination arising under federal, state, and local statutory or common law, such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and [state law].

***

11. The following information is required by OWBPA:

The class, unit, or group of individuals covered by the program includes all employees in the _____ [plant, location, area, etc.] whose employment was terminated in the reduction in force during the following period :_____). All employees in ___[plant, location, area, etc.] are eligible for the program.

The time limits applicable to such program are the employees in the ___ [plant, location, area, etc.] who are being offered consideration under a waiver agreement and asked to waive claims under the ADEA and were given an opportunity to agree from ___to ___. They must sign the agreement and return it to the COMPANY within 45 days after receiving the waiver agreement. Once the signed waiver agreement is returned to the COMPANY, the employee has seven days to revoke the waiver agreement.

The following is a listing of the ages and job titles of employees who were and were not selected for layoff [or termination] and offered consideration for signing the waiver. Except for those employees selected for layoff [or termination], no other employee is eligible or offered consideration in exchange for signing the waiver:

Job Title	Age	# Selected	# Not Selected
(1)	25	2	4
	28	1	7
	45	6	2
	63	1	
(2)	24	3	5
	29	1	7

ENDNOTES

[1] When employers conduct a reduction in force (RIF), they often do so pursuant to "exit incentive programs." For example, an employer may offer a one-time "buyout" to certain employees (e.g., "all hourly employees") or an "early retirement" program to all employees who are already eligible for immediate retirement benefits to persuade them to voluntarily resign; or, it may carry out an involuntary RIF, where it lays off all employees in a particular position or division. See discussion in Part IV.B.

[2] The ADEA prohibits employment discrimination against persons 40 years of age or older; Title VII prohibits employment discrimination based on race, color, religion, sex (including pregnancy), and national origin; Title I of the ADA prohibits employment discrimination against an individual on the basis of disability; and the EPA prohibits sex-based wage discrimination between men and women in the same establishment who are performing under similar working conditions. See http://www.eeoc.gov/abouteeo/overview_laws.html.

[3] This document uses the term "severance agreement" to describe any termination agreement between an employer and an employee, whether voluntary or involuntary, that requires the employee to waive the right to sue for discrimination.

[4] Waivers of age claims are governed by OWBPA which provides a minimum set of conditions that have to be met in order for the agreement to be considered knowing and voluntary. A waiver of an ADEA claim, therefore, is not valid unless it satisfies OWBPA's specific requirements and was not induced by the employer's improper conduct. *See* Part IV.A, Questions and Answers 6 and 7.

[5] State law typically governs questions regarding the proper construction of a severance agreement and the validity of waivers. For example, under the Minnesota Age Discrimination Act, a release must give the employee fifteen days after signing the agreement to change his mind and revoke his signature. Under California law, a waiver cannot release unknown claims unless the waiver agreement contains certain language specifically providing for such a waiver. Other states may impose additional requirements to obtain an effective waiver of certain state law claims. To determine whether a severance agreement is enforceable in the state in which you work, contact your state labor law department or consult with an attorney for legal advice.

In addition to waiver issues, workforce reductions or other substantial business changes often trigger additional legal obligations arising, for example, under the Worker Adjustment and Retraining Notification Act (WARN), the National Labor Relations Act (NLRA), the Employee Retirement Income Security Act (ERISA), relevant benefit plans, and labor contracts.

[6] *See e.g.,* Morrison v. Circuit City Stores, 317 F.3d 646 (6th Cir. 2003)("[i]n reviewing whether a waiver of prospective claims was valid, we apply ordinary contract principles"); Warnebold v. Union Pac. R.R., 963 F.2d 222 (8th Cir. 1992)(court applied "ordinary contract principles" in determining whether there was a knowing and voluntary waiver of claims).

[7] *See e.g.,* Wastak v. Lehigh Health Network, 342 F.3d 281 (3d Cir. 2003)(courts must inquire into

the totality of circumstances "to determine whether the execution of a waiver was 'knowing and voluntary'"); Smith v. Amedisys, Inc., 298 F.3d 434 (5th Cir. 2002)("[i]n determining whether a release was knowingly and voluntarily executed, this court has adopted a 'totality of the circumstances' approach"). Even courts that apply ordinary contract principles generally consider the circumstances surrounding the execution of the release, the clarity of the release, and whether the employee was represented by or discouraged from consulting an attorney. *See e.g.,* Whitmire v. WAY FM Group, Inc., 2008 WL 5158186 (M.D. Tenn. Dec. 8, 2008)(in holding that a waiver was knowing and voluntary, a court noted that the employee was given at least 21 days to consider the agreement, asked questions that resulted in a revised agreement, sought advice from an attorney but disregarded it and decided to sign the agreement, had seven days after she signed the agreement to revoke it and chose not to do so, and admitted she understood what she was signing).

[8] *See e.g.,* Pilon v. University of Minn., 710 F.2d 466 (8th Cir. 1983)(where the employee was represented by counsel, the release language was clear, and there was no claim of fraud or duress, the release was upheld). Waivers that are executed by employees who were not advised to seek legal advice are more closely scrutinized than agreements entered into by employees after consultation with an attorney.

[9] *See* Hampton v. Ford Motor Company, 561 F.3d 709 (7th Cir. 2009).

[10] See Torrez v. Public Service Company of New Mexico, Inc., 908 F.2d 687 (10th Cir. 1990); *but see* Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988)(employee's waiver was knowing and voluntary where he was advised of equal employment laws, encouraged to consult employee relations representative, and release specifically mentioned Title VII).

[11] *See* EEOC's website for information on "How to File a Charge of Discrimination" at http://www.eeoc.gov/charge/overview_charge_filing.html.

[12] Agreements that prevent employees from cooperating with the EEOC interfere with enforcement activities because they deprive the Commission of important testimony and evidence needed to determine whether discrimination has occurred. EEOC guidance also states that obtaining a promise from an employee not to file a charge or assist in Commission investigations constitutes unlawful retaliation in violation of federal employment rights statutes. *See* EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes (April 1997); *see also* 29 C.F.R. § 1625.22(i)(2).

[13] Although your right to file a charge with the EEOC is protected, you can waive the right to recover from your employer either in your own lawsuit, or in any suit brought on your behalf by the Commission. *See* EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes.

[14] *See* Questions and Answers: Final Regulation on "Tender Back" and Related Issues Concerning ADEA Waivers, available at www.eeoc.gov/policy/regs/tenderback-qanda.html. Recognizing that older workers often need their severance payments to live on and may, in fact, already have spent the payments on living expenses, EEOC regulations clarify that the contract principles of "tender back" (returning the consideration received for the waiver before challenging it in court) and "ratification" (approving or ratifying the waiver by retaining the consideration) do not apply to ADEA waivers. *See also* Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998) (holding that because the release failed to comply with OWBPA, it could not bar the employee's ADEA claim even if the employee retained the monies she received in exchange for the release).

Employers also may not avoid the "no tender back rule" by using other means to limit an employee's right to challenge a waiver agreement or by penalizing an employee for challenging a waiver agreement. For example, an employer may not require an employee to agree to pay damages to the employer or pay the employer's attorney's fees simply for filing an age suit. Employers, however, are not precluded from recovering attorneys' fees or costs specifically authorized under federal law. 29 C.F. R. § 1625.23(b).

[15] *See, e.g.,* Blackwell v. Cole Taylor Bank, 152 F. 3d 666 (7th Cir. 1998) (noting that employees bringing non-age claims might still have to "tender back" their consideration) and Hampton v. Ford Motor Co.., 561 F.3d 709 (7th Cir. 2009)(noting that because no exception to the "tender back" rule exists in this Title VII case, employee must return – or least offer to return—the consideration she received before challenging the validity of the waiver); *but see* Rangel v. El Paso Natural Gas Co., (holding that because the primary purpose of the ADEA and Title VII is to make it easier for an employee to challenge discrimination, employees bringing claims under Title VII should not have to return their severance pay before filing suit).

[16] *See* EEOC regulations Waiver of Rights and Claims Under the Age Discrimination in Employment Act (ADEA). 29 C.F.R. Part 1625.

[17] *See* Thormforde v. International Business Machines Corp., 406 F.3d 500 (8th Cir. 1999); *see also* Syverson v. IBM, 472 F. 3d 1072 (9th Cir. 2007) (court adopted the reasoning in Thormforde when finding the same waiver used under different circumstances invalid).

[18] *See* American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998) (to *"advise"* employees to consult an attorney means affirmatively to *"caution," "warn,"* or *"recommend").*

[19] An agreement can be signed prior to the 21- (or 45-) day time period as long as employee's decision is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21- or 45-day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. 29 C.F.R. 1625.22 (e) (6).

[20] *See* Budro v. BAE Sys. Info. And Elec. Sys. Integration, Inc., 2008 WL 1774961 (D.N.H. April 16, 2008).

[21] Although a waiver that fails to meet OWBPA's requirements is unenforceable, a number of courts have refused to permit a suit based solely on an employer's alleged violation of OWBPA requirements, holding that a failure to meet those requirements cannot create a separate cause of action under OWBPA and is not a violation of the ADEA. *See e.g.,* EEOC v. Sara Lee Corp., 883 F. Supp. 211 (N.D. Ill. 1995); Williams v. General Motors Corp., 901 F. Supp. 252 (E.D. Mich. 1995); *but see* Commonwealth of Massachusetts v. Bull HN Information Sys. Inc., 16 F. Supp. 2d 90 (D. Mass. 1998) (holding that an invalid waiver can be an independent cause of action under the ADEA); in a subsequent proceeding, Commonwealth of Massachusetts v. Bull HN Information Sys. Inc., 143 F. Supp. 2d 134 (D. Mass. 2001), the court clarified that although employees can bring a suit challenging a violation of OWBPA requirements, they cannot recover damages absent proof of age discrimination.

[22] *See* Butcher v. Gerber Products Co., 8 F. Supp. 2d 307 (S.D.N.Y. 1998)(as a matter of law and public policy, an employer is allowed only one chance to conform to the requirements of OWBPA and

cannot "cure" a defective release by issuing a letter to employees containing OWBPA-required information that was omitted from their separation agreements and request that they either "reaffirm" their acceptance or "revoke" the release).

[23] *See* Lauderdale v. Johnston Indus., Inc., 31 Fed. Appx. 940 (11th Cir. 2002).

[24] *See* Cassiday v. Greenhorne & Omara, Inc., 220 F.Supp. 2d 488 (D. Maryland 2002) (noting that the employee did not allege that her "employer threatened or otherwise misled or duped her into signing; at all times, she remained free to reject the offer and pursue her legal remedies").

[25] See 29 C.F.R § 1625.22 (d) (4). *See also* DiBiase v. SmithKline Beecham Corp., 48 F. 3d 719 (3d Cir. 1995)(an employer may offer enhanced benefits to all terminated employees who agree to waive all claims against the company, without providing extra consideration to employees protected by the ADEA).

[26] *See* Questions and Answers: Final Regulation on "Tender Back" and Related Issues Concerning ADEA Waivers, available at www.eeoc.gov/policy/regs/tenderback-qanda.html; 29 C.F.R. § 1625.23(c).

[27] *See* Questions and Answers: Final Regulation on "Tender Back" and Related Issues Concerning ADEA Waivers, available at www.eeoc.gov/policy/regs/tenderback-qanda.html; 29 C.F. R. § 1625.23 (d).

[28] *See* Butcher v. Gerber Products Co., 8 F. Supp. 2d 307 (S.D.N.Y. 1998).

[29] 29 C.F.R. § 1625.22(f) (1) (iii) (A) (2005).

[30] *Id.*

[31] *Id.* at § 1625.22(f) (1) (iii) (B).

[32] An example in the regulations describes eligibility as: "All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program." 29 C.F.F. § 1625.22(f)(4)(vii)(B). Some courts, however, interpret the term "eligibility factors" to mean the criteria, such as job performance, experience, or seniority, an employer relied on in deciding who to terminate. *See* Pagilio v. Guidant Corp., 483F. Supp. 2d 847 (D. Minn. 2007)(the court held that a release violated OWBPA by, among other things, failing to identify the general criteria by which employees were selected for termination); *but see* Kruchowski v. Weyerhaeuser Co., 423 F.3d 1139, *amended by*, 446 F.3d 1090 (10th Cir. 2006)(the court invalidated a release of claims because it failed to identify selection criteria as "eligibility factors;" however, in a later, revised, opinion, the court omitted eligibility factors as one of the grounds for invalidating the release and held only that the employer violated OWBPA by failing to identify the decisional unit).

This page was last modified on July 15, 2009.

ARTICLE 29

FACULTY EARLY RETIREMENT PROGRAM

29.1

Eligible tenured faculty employees as defined in provision 2.13(d) and tenured librarians who have reached the age of fifty-five (55) may, subject to the conditions below, participate in a Faculty Early Retirement Program (FERP). This program is not available to Counselor Faculty Unit Employees.

29.2

An eligible tenured faculty employee or tenured librarian shall notify the President in writing at least six (6) months prior to the beginning of the campus academic year that s/he opts to participate in the FERP. The President may waive the required notice period.

29.3

The potential participant shall be provided with a FERP appointment letter from the President. The FERP appointment letter shall indicate the required period of employment as determined by the President. The employee shall provide to the President a written statement of acceptance of such a FERP appointment. If the President determines it is necessary, due to program needs, to alter the period of employment, the President and the participant shall attempt to reach mutual agreement on an alternative. If mutual agreement is not reached, the President may alter the period of employment, provided that the participant receives a one hundred and twenty (120) day notice.

29.4

Participants in FERP shall have been granted a service retirement. Such service retirement shall be in accordance with the requirements of PERS and/or STRS.

29.5

Participation in FERP shall commence at the beginning of the campus academic year. Service retirement shall begin concurrently with or prior to the beginning of the campus academic year.

29.6

FERP employment shall be at the same rank, and salary (step) level of the participant in the academic or fiscal year immediately prior to retirement. Such employment shall be proportional to the time base of the participant in the academic or fiscal year immediately

prior to retirement.

29.7

a. An employee who opts to participate in FERP pursuant to 29.2 on or after July 1, 2007, and whose participation commences with the beginning of the 2007/08 academic year or thereafter, shall be entitled to the yearly period of employment for no more than five (5) consecutive academic or fiscal years.

b. An employee who opts to participate in FERP pursuant to 29.2 during the final year of this Agreement shall be entitled to the yearly period of employment for no more than five (5) consecutive academic or fiscal years.

29.8

The permissible "period of employment" shall refer to one (1) academic term not to exceed a total of ninety (90) workdays or fifty (50) percent of the employee's regular time base in the year preceding retirement. Calculations of such periods of employment shall include days worked in summer session/special session or CSU extension that do not coincide with the period of employment.

29.9

The permissible “period of employment” for Librarian Faculty Unit Employees shall refer to full-time employment for a duration not to exceed fifty percent (50%) of the Librarian Faculty Unit Employee’s work year in the year immediately preceding retirement, or fifty percent (50%) of the Librarian Faculty Unit Employee’s regular time base in the year immediately preceding retirement. In either case, the period of FERP employment shall not exceed 960 hours. Any change in the work schedule of Librarian Faculty Unit Employee in the year preceding entry into FERP shall require the approval of the President. Calculations of such periods of employment shall include days worked in summer session/special session or CSU extension that do not coincide with the period of employment.

29.10

A participant in FERP at California State University, Stanislaus or a quarter system campus may request of the President employment in addition to the one (1) academic term period of employment, provided that such additional employment does not result in a total period of employment which exceeds the ninety (90) day limit pursuant to provision 29.8.

29.11

The right to continued employment in the FERP pursuant to provision 29.6 of this Article shall terminate in the event of dismissal for cause, layoff, or failure to meet the employment commitment.

29.12

A participant may request that the time base of the FERP appointment be reduced. The President shall determine if such a request shall be granted. Such a reduction in time base shall continue for the duration of the FERP appointment.

29.13

Participants may be appointed in CSU extension during the period of employment in FERP.

29.14

Notwithstanding provisions 29.8, 29.9, 29.10 and 29.13, participants shall not be eligible for other CSU appointments while in the FERP.

29.15

Effective July 1, 1996, when the DMD salary schedule is eliminated, tenured faculty unit employees formerly receiving Designated Market Condition Salaries in disciplines designated hard-to-hire shall be eligible to opt to participate in FERP pursuant to 29.2. An employee receiving a Designated Market Condition salary who, pursuant to 29.2, opts to participate in FERP prior to July 1, 1987, shall continue to participate in FERP under the provisions of this Article.

29.16

A participant shall be granted one (1) leave of absence without pay for personal illness for all or part of the period of employment. Such leaves shall not affect future participation in FERP.

29.17

At the time of the service retirement and appointment in FERP, a participant may elect to carry over up to forty-eight (48) hours of sick leave into the FERP appointment if the participant elects to reduce his/her accumulated sick leave by that amount for service retirement credit. In addition to the sick leave carry over, if any, full-time FERP participants shall continue to accrue eight (8) hours sick leave per qualifying academic pay period or qualifying pay period during the period of employment. Such accrual shall be pro rata for less than full-time participants. A maximum of one hundred and sixty (160) hours of sick leave may be accrued during FERP.

29.18

A participant shall be required to perform normal responsibilities and his/her share of normal duties and activities.

29.19

A participant shall, for the period of active employment, be deemed a tenured faculty employee. Such a participant shall be eligible to serve on governance committees whose assignments are normally completed during the period of FERP employment.

29.20

Employees deemed tenured pursuant to 29.19 shall not be counted against any percentage limitation on total tenured faculty employment at the department, school/college, campus, or statewide level.

29.21

During the period of an employee's participation in FERP, the CSU shall provide a CSU dental plan on the same basis as such a plan is provided to faculty unit employees. The provision of such a dental plan shall require that the participant was enrolled in a CSU dental plan immediately prior to service retirement.

29.22

The following provisions of this Agreement shall not apply to participants in FERP:

Article 14, Promotion
Article 22, Leaves of Absence Without Pay
Article 24, Sick Leave, 24.1, 24.3, 24.4
Article 27, Sabbatical Leaves
Article 28, Difference in Pay Leave
Article 32, Benefits, 32.1

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Last updated: June 12, 2007

Executive Order

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EXECUTIVE ORDER
EXECUTIVE ORDER S-8-04

by the
Governor of the State of California

WHEREAS, Government Code section 20901 and Education Code section 22715 permit California State University employees who are members of the Public Employees' Retirement System and State Teachers' Retirement System to receive an additional two (2) years of service credit whenever the Governor determines by executive order that: 1) Because of an impending curtailment of or change in the manner of performing services, the best interests of the state would be served by encouraging the retirement of California State University employees; and 2) Sufficient economies could be realized to offset any cost to the California State University resulting from award of such credit; and WHEREAS, the impact of changes in funding levels and methods of providing services to achieve program efficiencies may result in curtailment of employees in the California State University; and WHEREAS, the best interests of the state would therefore be served by encouraging the retirement of California State University employees through an additional two years of service credit; and WHEREAS, sufficient economies could be realized to offset any cost to California State University resulting from the award of such credit. NOW, THEREFORE, I, ARNOLD SCHWARZENEGGER, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to be implemented according to the following criteria: A. The California State University is authorized to participate in the Early Retirement Program in accordance with Government Code section 20901 and Education Code section 22715. B. The California State University shall submit a Program Participation Plan to the Department of Finance for fiscal review and approval. C. The Program Participation Plan shall include documentation of personnel reductions, associated costs of participating in the Program, anticipated savings and other relevant information supporting the Participation Plan. D. The Early Retirement Program is available to California State University employees in the California Faculty Association with whom an agreement to participate has been negotiated. E. For employees retiring pursuant to Government Code section 20901 and Education Code section 22715, payment of Public Employees' Retirement System and State Teachers' Retirement System costs will be made in a manner and time acceptable to the California State University, the Public Employees Retirement System and the State Teachers' Retirement system and the Department of Finance. F. The eligibility period established by the California State University for Faculty will not exceed 120 days -- March 31, 2004 through July 28, 2004. G. Employee participation is voluntary. H. An approved Participation Plan is subject to the provisions of Government Code section 20901. IN WITNESS WHEREOF I have here unto set my hand and caused the Great Seal of the State of California to be affixed this the sixth day of May 2004. /s/ Arnold Schwarzenegger Governor of California

C

Member Services Division
P.O. Box 942710
Sacramento, CA 94229-2710
Telecommunications Device for the Deaf - (916) 326-3240
(888) 225-7377; FAX - (916) 231-7917

May 11, 2004

Dear Member:

Government Code Section 20901 and Executive Order S-8-04 permit California State University (CSU) employees who are represented by the California Faculty Association (CFA) and who are State members of the California Public Employees' Retirement System to receive two years of additional service credit if they meet the eligibility requirements outlined below.

You are receiving this information because your employer has identified you as eligible for and considering retiring within the provisions of the Executive Order.

NOTE: CalPERS has been informed by the University that approval to participate in the program has been received from the Department of Finance. CalPERS does not approve participation.

The following information will assist you in determining your eligibility and the effect of the "Golden Handshake" on your retirement plans. Additional information may be obtained from your Campus Benefits Officer or by contacting CalPERS.

Unless otherwise indicated, all CalPERS forms, booklets, and brochures described in this letter are available:

- on our website at www.calpers.ca.gov
- you may obtain a copy from your Benefit's Coordinator
- you may contact CalPERS directly to have a copy mailed to you

Eligibility

Current California State University Unit 3 faculty employees (part-time, full-time, and intermittent) will be eligible to receive the additional service credit if all of the following conditions are met:

1. The member must be employed by an agency or university that has been approved to participate in the program by the Department of Finance and must be in a department, organizational unit or job classification designated by the employer.

   Note: you should contact your employer, not CalPERS, if you have questions pertaining to your eligibility for the Golden Handshake.

2. The member must retire in accordance with Government Code section 20901. This period is from May 6th, 2004 through July 28, 2004 with a separation date of no earlier than May 5, 2004. For a retirement to become effective on the final date of the specified period, the member must be separated from employment status no later than July 27, 2004.

3. The member must be eligible to retire without the additional service provided by the Golden Handshake. The member must be credited with at least five (5) years of service credit prior to the effective retirement date. The additional service credit provided by Section 20901 **may not** be used to meet the above requirements.

4. The minimum age for a *service* retirement is age 50. In other words, a member who applies for a *service* retirement must be at least age 50 on or before the effective date of retirement.

5. University employees who had acquired State Second Tier service credit (1¼% @ 65) from previous employment with the State of California (outside of the CSU system) may want to consider converting their Second Tier service credit to the First Tier. A member must have at least ten (10) years of service credit and be at least 55 years of age (for service retirement) to receive a benefit for any Second Tier service (no age requirement for disability retirement). Please examine your Annual Member Statement to determine if you have this service credit type. For information on converting past State Second Tier service, please contact CalPERS at 1-888-CalPERS (1-888-225-7377).

Effect on Retirement Allowance

Informational booklets, which explain the formula to use when calculating your unmodified retirement allowance, are available from your Campus Benefits Officer. The years of service credit is the only factor improved in the calculation of retirement benefits under this Executive Order. The benefit factor, which is based upon your age at retirement, and final compensation, which is based upon your highest average full time pay rate, are not affected by this Executive Order and are not increased when estimating the effect of additional service on the retirement allowance.

The attached chart shows the increase in the unmodified allowance for the two additional years of service credit. Locate the age at which you plan to retire and your final compensation. Follow down the age column and across the final compensation column until the columns meet. This figure is the approximate amount of the monthly increase to your unmodified allowance that would be provided by the two years of additional service credit.

Disability Retirement

Members who apply for and are approved for a disability retirement and whose effective date of separation from employment and whose effective date of retirement falls within the prescribed period are also entitled to the additional service credit provided by the Executive Order.

In some cases, this additional credit will not affect the allowance. Applications for Disability Retirement may **not** be canceled once CalPERS has determined that a member is disabled. However, the member will have 30 days from the date of the approval to change to a service retirement (if at least age 50).

Members applying for a disability retirement must be credited with at least five years of service prior to the effective retirement date. Employees considering applying for a disability retirement are advised to contact CalPERS for specific details on the retirement benefit and application process.

Retirement Process

There are many resources available to assist you in gathering relevant retirement information, analyzing your specific situation, and reaching your retirement decisions.

- Utilize the Golden Handshake information available on the CalPERS website
- Thoroughly review this letter and its attachments
- Utilize your Campus Benefits Officer and CalPERS resources to obtain answers to your retirement questions.
- Attend a Retirement Planning Workshop to learn about the retirement process and how to maximize your retirement benefits.

Obtain an Estimate of Retirement Benefits

To determine your retirement benefit for the various options available at retirement, you'll need an estimate of your retirement benefits. You may utilize our on-line *Retirement Planning Calculator*. The calculator can provide you with a quick estimate of the retirement income you can expect. Although the *Retirement Planning Calculator* can quickly provide you with an estimate of the retirement benefit (which may enable you to decide whether or not to retire), it may not provide you enough detail to choose which option is right for you, since it does not provide estimates for all the options.

If you choose to retire, you may want to obtain a formal estimate. To obtain a formal estimate, you may utilize the *CalPERS Retirement Allowance Estimate Request form*. We will provide estimates of the benefit if you note "Include Golden Handshake" at the top of the form. The form is contained within the retirement application packages listed on page 4 or you may download it from our web-site. You will also find descriptions of the options in the retirement application package - please review the entire section carefully so you understand all of the options. Your option election is irrevocable.

Obtain Employer Certification
A completed *Certification of Eligibility for Two Years Additional Service Credit Form* must be obtained from your Campus Benefits Officer. The form **must** be completed by an authorized employer representative.

If you have not submitted your retirement application, the completed certificate of eligibility **must** be attached to your retirement application when you submit it to CalPERS to receive the Golden Handshake benefit in your first check.

If you have already submitted your retirement application, do not submit the form. Forms not attached to the application when submitted will be returned. Your employer will notify CalPERS of your eligibility after the window period, and CalPERS will adjust your benefit retroactively after that.

Submit Application
If you decide to retire, you must file a retirement election application. The application and instructions for completing the application as well as other information is provided in the following publications:

Service retirement – *Stepping Into Retirement* (Pub 43)
Disability retirement – *A Guide To... Completing Your CalPERS Disability Retirement Election Application* (Pub 35)

In order to ensure timely payment of your benefits you must submit the application at least 30 days prior to retirement.

You will elect your retirement option and designate beneficiary information on forms contained in the application package. A CalPERS authorized employee (Regional Office counter staff) (or a notary) must witness (or notarize) your signature. If you are married, your spouse's signature must also be witnessed (or notarized).

The Golden Handshake Benefit

CalPERS must receive the *Two Years Additional Service Credit Employer Certification Form* completed by the authorized employer representative before the additional service can be included in your retirement check. If the completed certification form is enclosed with your retirement application, your first retirement check will include the benefit derived from the two additional years of service credit.

If the form is not enclosed with your retirement application, then your retirement benefit will not include the benefit of the 2 years of additional service credit. After the window period and after

your eligibility has been confirmed, you will receive an adjustment retroactive to the date of retirement.

To insure appropriate crediting of the additional two years of service credit, upon closure of the Golden Handshake window period, your employer will notify CalPERS of any members who received the Golden Handshake but are **not** actually eligible, and they will notify CalPERS of any members who are eligible to receive the Golden Handshake but didn't. Based upon this information, CalPERS will correct the retirement benefits of these members retroactively. This confirmation and adjustment process may take several months.

Other Service Credit Which May Be Available

If you are considering purchasing other CalPERS service credit, such as redeposit of withdrawn contributions, service prior to membership, additional retirement service credit (a.k.a., "air time" or "non-qualified service credit"), etc., submit your request for service credit cost information to CalPERS as soon as possible. The request to purchase service credit is required to be made prior to the effective date of retirement.

For information and forms to complete a service credit purchase request, please review the information and Frequently Asked Questions (FAQ's) on our website about purchasing Additional Retirement Service Credit and the *Guide to your CalPERS' Service Credit Purchase Options* publication for information about the other service credit purchase types.

Group Health Insurance

If you separate from a CSU position providing eligibility for CalPERS health benefits and you retire within 120 days of separation from that position, you will be eligible for the full state's share towards the health program plan premium. The health plan premium rates may be examined on our web site. Any portion of the premium which exceeds the employer's share will be deducted from your retirement check.

Deductions from Your Retirement Check

Deductions for your share of the health insurance premiums are automatically continued if you go directly from paid status into retirement. If you have the coverage now but wish to **discontinue** coverage into retirement, you must notify us of this in writing and submit the notification along with your application for retirement.

Premium payments for your dental insurance (Basic plan) are paid by the CSU and will be automatically continued if you go directly from pay status into retirement. If you have the coverage now but wish to **discontinue** coverage into retirement, please notify the Campus Benefits Officer.

If there will be a delay in receiving your first retirement check, you may wish to make direct payments to the carrier to continue coverage. The carrier will reimburse the direct payment premiums (the employer's share) to you when CalPERS begins payment.

Questions regarding your health and dental insurance should be directed to your Campus Benefits Officer.

If you are considering a disability retirement, you should contact your Campus Benefits Officer regarding the procedures for the continuation of health and dental insurance into retirement.

Employer provided vision care insurance does not continue into retirement. Federal regulations provide for continuing the coverage for up to eighteen months, but the retiree must pay the full cost of the insurance premium plus a 2% administrative fee. The employer will not pay for any portion of this benefit. If you are interested in maintaining the vision care insurance, contact your Campus Benefits Officer.

To make arrangements for continuing any other deductions, contact the organization receiving the payment to determine if the deduction can continue.

Loss of Additional Service Credit

The additional service credit provided under the Executive Order is forfeited by the member upon reinstatement from retirement (returning to active CalPERS membership), and the additional service is **not** creditable upon the member's subsequent retirement. Violation of any eligibility restrictions contained in the Executive Order itself including any limits on employment in retirement will also result in the loss of the additional service credit.

A member is not eligible for this additional service credit if he/she receives unemployment insurance arising out of employment with the employer granting the additional service credit during a one-year period following the date of the issuance of the Executive Order.

Questions

Additional questions regarding the Golden Handshake may be directed to your Campus Benefits Officer or may be directed to CalPERS.

KATHIE VAUGHN, CHIEF
MEMBER SERVICES DIVISION

Attachments

NACUA WEBINAR SERIES

Thursday, May 28, 2020

DIFFICULT EMPLOYMENT DECISIONS IN TIMES OF CRISIS

HELPFUL RESOURCES

U.S. Equal Employment Opportunity Commission, What You Should Know About "COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws"

Occupational Safety and Health Administration, U.S. Department of Labor, "Guidance on Preparing Workplace for COVID-19"

Patricia T. Bergeson, Jim Hundrieser and Jose A. Olivieri, "Taking the Risk Out of RIFs and Budget Cuts: A Disciplined and Equitable Approach to Making Hard Choices," (NACUA Annual Conference 2019)

Edward Brill, Mark Cheskin and Andrew J. Lauer, "Doing More with Less," (NACUA March 2012 CLE Workshop)

Donald A. Newman, Philip A. Miscimarra and Sean V. Burke, "The Downturn's Lessons Learned: Tough Issues in Implementing Cost-Saving Strategies: RIFs, Furloughs, Voluntary Separation Programs, and Other Approaches," (NACUA Annual Conference 2010)

Ellen M. Babbitt and Donald Newman, "The Graying of the Workforce: Implications for Reductions in Force," (NACUA March 2010 CLE Workshop)