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**Meeting the Challenge of Economic Exigency: Managing Legal
and Policy Issues in a Tight Economy**

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I. INTRODUCTION

As a supplement to the manuscript entitled “Retrenchment,” we thought it useful to address some frequently asked questions concerning personnel actions associated with academic retrenchment.

**II. LEGAL AND RELATED ISSUES IN CLOSING A MAJOR UNIT: WHAT
ISSUES ARE ENCOUNTERED?**

The closing of college and university units create several categories of legal issues and mixed issues of law and policy. Briefly, the categories are:

- A. Decision-making Process:** A decision to close a department, division or school is one of the most significant decisions a university can make. The decision should not be hasty and the process should be credible. And to be credible, significant faculty involvement should occur. While trustees should be kept informed of the process, and understand and support the process, the numerous on-campus meetings necessary to develop a recommendation for the administration would make trustee participation difficult.
- B. Notification:** While it is advantageous to make, in addition to the campus community, the local and alumni constituencies aware of the possible downsizing,

it is essential to promptly notify all constituencies when the decision is made. More than mere notification is necessary: cogent reasons must be delineated. Public officials and regulatory bodies should be informed whenever appropriate.

C. Personnel:

1. **Non-academic:** So long as decisions are made in a nondiscriminatory manner, the termination or transfer of nonacademic staff should not have significant legal consequences.

Notice of termination should be given in accordance with university policies and procedures. The greater the period of notice the better. Transfers, and even possibly demotions, should be explored for existing staff. Terminations, or reduction to part-time status, can trigger unemployment compensation benefits.

Consider the staffing requirements for program termination. In order to have sufficient staff available to conclude the particular operation, it may be necessary to provide bonuses for those remaining until the end.

2. **Tenure Track Faculty:** Financial exigency need not be demonstrated to terminate such individuals. Normally, one-year's advance notice will be required. Again, consider transfer and alternative placement opportunities.
3. **Tenured Faculty:** See the "Retrenchment" article for a discussion of legal standards applicable to the termination of tenured faculty. Every reasonable alternative to termination should be considered. This includes, for senior faculty, the possibility for early retirement incentives or individualized retirement plans. If early retirement plans are created, consider the applicability of ERISA.
4. **Students:** Courts generally hold that a student has no right to the continuation of a particular program. Early notice of the decision, and assistance in finding other schools or programs will minimize risk. For example, when Washington University announced the closure of its School of Dental Medicine in May, 1989, it developed an arrangement with Loyola University of Chicago to have Loyola accept and enroll the

students admitted to Washington University School of Dental Medicine for the fall of 1989.

5. **Contracts and Grants:** Contracts and grants may be in effect with outside business and governmental entities. These agreements need to be identified and reviewed to determine whether they can be terminated or completed elsewhere in the university. If they can't be completed, try to negotiate the best possible termination of your responsibilities. It is possible that litigation asserting a breach of contract could occur. Agreements should be drafted to minimize the risk of litigation by addressing termination of the agreement in the event of retrenchment.
6. **Gifts and Endowments:** The documents creating gifts and endowments should be examined to determine whether the funds can be transferred to other university purposes without judicial intervention. If donors are alive, consent might be sought for such a transfer. In some cases, it will probably be necessary to obtain a court order to transfer funds to another part of the university. It is unlikely that the funds will be transferred to another institution, or returned to the donor. In states in which the Uniform Management of Institutional Funds Act (e.g., 760 Illinois Compiled Statutes 50/9) is in effect, the procedure for changing an endowment's purpose can usually be accomplished, at modest cost, by filing a lawsuit in which the Attorney General of the state is the responding party. Finally, the terms of known expected gifts should be reviewed and changed, if necessary. Endowment agreements should be drafted to provide for changed circumstances such as those resulting from retrenchment (e.g., If changed circumstances should at some future time cause the continuation of this Professorship to be inappropriate or impractical, the Board of Trustees may redesignate the purpose of the endowment constituting this Professorship, and the income therefrom.)
7. **Fiscal Note:** An assessment should be made of potential litigation that might arise and a reserve fund created for that purpose. Insurance coverage should be maintained in order to provide protection from claims

that accrued before the closure of the department, division or school period. Assessment of future risk, and provision of resources to address it, becomes even more critical if the program being closed provided healthcare or dealt with vulnerable populations. It may also be prudent to establish a reserve fund for the costs of any claims that may arise from the closure.

Closure also will impose additional burdens on human relations and legal personnel. Since the most likely reason for closure will be economic, it is quite unlikely that additional personnel will be added for the many post-closure activities. To address the issues surrounding closure, and to provide the necessary assistance and counseling to persons affected by the decision, resources will have to be allocated and, in all likelihood, attention to other functions will necessarily diminish.

III. RETRENCHMENT PROCESS QUESTIONS AND ANSWERS

A. Must the American Association of University Professors' (AAUP) Policies be followed?

No, unless you have explicitly incorporated those policies into your faculty contract. However, the AAUP "Redbook" (Policy Documents and Reports – 9th Ed. 2001) should be reviewed prior to the termination of faculty and, as a litigation avoidance strategy, congruence with those policies should be considered.

B. Is a college obligated to retrain a tenured faculty member it intends to terminate?

No, see *Goucher College* decision, 585 F.2d 675 (4th Cir. 1978).

C. Must a college deplete its endowment before it declares financial exigency?

No. See *Bloomfield College* decision, 322 A.2d 846 (N.J. Supr. Ct. Ch. Div. 1974), aff'd 346 A.2d 615 (App. Div. 1975).

D. Is a college obligated to provide alternative placement for a tenured faculty member displaced during retrenchment?

No. See *Black Hawk College* decision, 647 N.E. 2d 1079 (Ill. App. Ct. 1995).

E. Should faculty be involved in downsizing decisions?

Absolutely. Any process involving a declaration of financial exigency or program discontinuance should include faculty representatives (and others affected by the process). If a faculty group can identify programs to be eliminated, or suggest criteria to the administration, the ultimate results will be more acceptable to the campus community, and the possibility of litigation diminished. Faculty participation in the process should be meaningful and occur in a timely manner. Efforts should be made to avoid the appearance that faculty involvement was an afterthought and implemented after a retrenchment decision has already been made.

F. Who should make the termination decisions?

A senior administrator, such as a provost or dean. While the president and board of trustees must approve the process, they should not designate individual faculty members for termination.

G. Can faculty terminations occur for reasons other than financial exigency or program discontinuance?

Other non-causal reasons for termination, such as the material change of a program or shift in institutional priorities, could be expressed in a faculty appointment or handbook.

H. Can cost saving measures short of program closure and termination be successful retrenchment alternatives?

Absolutely. Examples of effective cost saving measures include temporary furloughs, increased course loads, reduction in pay, non-renewal of appointments, and hiring freezes.

I. Can awards of tenure occur in other programs or departments while downsizing is occurring elsewhere?

Yes, unless prohibited by college policy. In most cases, the downsizing is taking place in order to insure the college's survival. Vibrant and popular programs can't be allowed to atrophy.

J. Can a college establish new programs at the same time it is reducing or eliminating programs?

Yes, except this should be pursued more cautiously when retrenchment is the result of a declaration of financial exigency. Determine whether faculty or staff being laid off have a right to be considered for the new program.

K. When must the notice of termination be provided to faculty?

Normally, one year's notice must be given to tenured and tenure track faculty. The payment obligation exists even if there are no responsibilities for the faculty during that year. Appointment letters for term faculty normally contain an ending date so, normally, no additional notice of termination is legally required. But it is a good practice to let term faculty know their status for the upcoming year.

L. Can administrative responsibilities be removed from tenured faculty?

As a general rule, no concept of "administrative tenure" exists. The extent of notice, if any, to be provided will be governed by your policy. Minimal due process protections exist at public colleges. See, e.g. *Janos v. Univ. of Washington*, 851 P.2d 683 (Wash. App. 1993). Policies should clearly articulate the at-will nature of administrative appointments (e.g., No administrative position is tenured and the President reserves the right to appoint, continue, or terminate any administrator.)

Unless absolutely essential, the involuntary end of one's administrative responsibilities should coincide with the end of an academic year or semester. Mid-semester terminations inevitably cause observers to impute some serious malfeasance, misfeasance or nonfeasance to the person affected. And this impression will foment litigation as well as impeding outplacement.

M. Should there be an appeal process?

Yes, but it should be created for this situation. It should be simple and expeditious. The appeal should be lodged with the person to whom the initial decision maker reports, most likely the president.

N. What is the board’s role?

The board should be aware of the circumstances that make downsizing necessary, examine the decision-making process, explicitly support that process, and declare financial exigency should that be necessary. They should not decide which faculty members should be terminated, but rather confirm that appropriate criteria have been fairly and consistently applied. If they become the decision-makers in individual cases, they *will be*, for sure, defendants in any litigation arising from the terminations.

III. STAFF REDUCTIONS

A. What is the source of the principles governing a staff reduction?

Usually it is the employment contract between the employee and the college. The terms of this contract are often found in employee handbooks, employment contracts (which can include appointment letters), employer policies and, when unions are present, collective bargaining agreements. Anti-discrimination and other laws impact the downsizing process as well.

B. What anti-discrimination laws impact downsizing?

All may but the two most commonly involved in challenges to transfers, reduction in hours and terminations are the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA).

C. What are the requisite elements of an ADEA claim?

The elements of a prima facie case of age discrimination for one dismissed pursuant to a RIF are: (1) plaintiff was at least 40 years of age at the time of the termination; (2) he or she satisfied the applicable job qualifications; (3) he or she was discharged; and (4) [the factor unique to RIF cases] he or she must also “provide some additional showing that [discrimination] was a factor in the termination. *Nitschke v. McDonnell Douglas Corp.*, 68 F.3d 249, 251 (8th Cir. 1995). The fourth element can be established by direct evidence, statistical evidence, or circumstantial evidence.

If the prima facie case has been established, the college or university has the burden of producing evidence that it terminated the plaintiff “for a legitimate, nondiscriminatory reason,” and the burden then shifts to the plaintiff to prove that

the reason provided by the employer was a pretext for discrimination. *Nitschke*, 68 F.3d at 251.

It is likely that plaintiffs will challenge the rationale for the downsizing decisions. Frequently they ignore not only the traditional deference courts give to academic matters, but language designed to avoid “second guessing” like the following: “the employment discrimination laws have not vested in the federal courts the authority to sit as super personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.” *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995); *See also Krenik v. County of Le Sueur*, 47 F.3d 953, 960 (8th Cir. 1995). Careful planning should prevent challenges to downsizing reaching trial.

D. Why would there be ADA claims?

A criterion applied to many downsizing decisions is productivity. Often, after a layoff is announced, persons affected will claim that a disability (usually a psychological one) limited their productivity. But often the alleged disability has not been disclosed, or not disclosed to decision makers. In such situations, management’s ignorance provides a defense.

E. Didn’t the Supreme Court say that ADEA and ADA don’t apply to state entities, including colleges and universities?

Yes, BUT most states have equivalent anti-discrimination laws that continue to be applicable. And, following the Supreme Court’s decision, several states enacted legislation waiving the immunity conferred by the Supreme Court. E.g., 745 ILCS 5, 1.5 (effective 1/1/04).

F. How can I minimize the risk of discrimination claims?

Document the legitimate reasons for retrenchment decisions including budget constraints, academic priorities, and personnel qualifications. Anticipate disparate treatment and impact claims when considering retrenchment alternatives.

G. What effect of a termination creates an incentive to litigate today?

Loss of health benefits. Sure, the COBRA option exists but it is costly. Explore, as a risk avoidance measure, extending health coverage to RIFed employees.

H. Does the use of appointment letters limit our options?

An appointment letter can create an obligation to pay an employee for an extended time period. If you must use such letters, avoid making a commitment for a fixed term. A statement of duration of employment will create an obligation for that period. Instead include limited or exculpatory language. Compare *Luethans v. Washington Univ.*, 894 S.W. 2d 169 (Mo. Banc 1995) with *Clark v. Washington Univ.*, 906 S.W. 2d 789 (Mo. App. 1994), in which the employee's current appointment letter was held to have created an at-will status, although prior contracts were purportedly of one year's duration.

I. Are transfers easy to challenge?

No. To maintain an action for discrimination one must demonstrate initially that the personnel action was "materially adverse." Mere transfer to another location or related job is insufficient to satisfy this requirement.

J. Who should make the RIF decisions?

Not the immediate supervisor. Criteria should be developed by HR and, as appropriate, recommendations obtained from supervisors. The decisions should be made at a higher level and be devoid of impermissible considerations. Bypassing the immediate supervisor limits and nullifies the inevitable allegations of some form of misconduct asserted against supervisors in downsizing situations. For example, see *Herrero v. St. Louis University*, 109 F.3d 481 (8th Cir. 1997). Age, race and ethnic origin discrimination claims brought by a 60-year-old former employee of the University's Medical School were denied. Although there may have been some remarks by an immediate supervisor indicating bias, the final termination decisions were made by upper level administrators without any alleged taint of discrimination.

IV. COLLECTIVE BARGAINING

A. What is collective bargaining?

Collective bargaining is a process by which representatives of the employer and representatives of groups or units of employees negotiate a formal legal agreement covering wages, hours, and other terms and conditions of employment.

B. Can a union member negotiate his or her downsizing “deal”?

No. If a collective bargaining agreement exists, only the exclusive bargaining agent (union) may negotiate the terms covered in the contract. In other words, a “one size fits all” approach occurs when unions are present.

C. Are union members immune from downsizing?

No, unless so specified in their contract. In my experience, union members generally are laid off first before faculty and staff. However, collective bargaining agreement reduction-in-force procedures must be followed.

D. In the unionized workplace, who decides whether layoffs shall occur?

Management should retain this right to decide this issue. The management rights clause of the collective bargaining agreement should reserve to management the right to “establish, consolidate, merge or eliminate programs” and the employees of those programs, as well as the general right to control personnel.

The decision to layoff should be solely management’s. But, in a unionized work force, the impact of the decision must be bargained.

E. Can subcontracting occur in a unionized setting?

Yes, unless prohibited by the contract, which would be unique. Unions are generally concerned with the protection of their current dues paying members, not the incoherent future. The following sample provision on subcontracting exemplifies this:

The Employer reserves the right to contract out any work it deems necessary in the interests of efficiency, economy, improved work product or emergency. However, no employee covered by this Agreement shall be laid off due to subcontracting.

F. What are the key elements for a RIF or program discontinuance in a unionized setting?

1. Preserve the administration’s right to make the initial and final determinations.
2. Bargain the impact with the affected unions.
3. Be open to creative proposals.
4. Have the impact distributed proportionally to all college employees.