

Facultyⁱⁿ Times of Financial Distress:

Examining Governance, Exigency,
Layoffs, and Alternatives



AMERICAN COUNCIL ON EDUCATION

Facultyⁱⁿ Times of Financial Distress:

Examining Governance, Exigency, Layoffs, and Alternatives

By Ann H. Franke, Esq.

This publication is provided as a public service, with the understanding that it does not render legal or other professional advice. For institutional or individual advice, or other professional assistance, seek the services of a competent professional.

For additional information, write to the American Council on Education, One Dupont Circle NW, Washington, DC 20036, or call (202) 939-9355.

© Ann H. Franke, 2009. Permission is granted for reproduction by educational institutions and nonprofit associations.

The author would like to thank the following individuals for their comments and assistance with this paper: Ada Meloy, American Council on Education; Daniel Kaufman and Dorothy Brackett, Michael Best & Friedrich LLP; Deborah Brown, Stetson University College of Law; Jordan Kurland and John Curtis, American Association of University Professors; and Ellen Babbitt, Babbitt, Land, Silverstein, and Warner LLP.



American Council on Education
One Dupont Circle NW
Washington, DC 20036

ACE and the American Council on Education are registered marks of the American Council on Education.

All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the publisher.

Table of Contents

Introduction	ii
Types of Faculty Appointments	1
Sources of Rights on Faculty Status and Layoffs	3
Institutional Contracts, Handbooks, Policies, and Faculty Union Agreements.....	3
Nondiscrimination Laws.....	5
Benefits and Notice Requirements	8
Immigration Law	9
Open Meetings and Records Acts	10
AAUP-Recommended Policies.....	11
Designing a Plan.....	14
Faculty Consultation in Times of Budget Crises	16
Conclusion	20
Appendix A: 90 Ideas for Increasing Income and Reducing Expenses, Plus 5 Ideas That Can Backfire.....	21
Appendix B: What Does Financial Exigency Look Like?.....	26
Selected Resources	29
About the Author.....	30

INTRODUCTION

The fortunes of colleges and universities cycle through prosperity and hardship. Individual institutions are sensitive to different combinations of economic factors. Their annual budgets reflect upward and downward pressures in, among other elements, investment returns, inflation, student enrollment, labor markets, and government support. American colleges and universities overall may suffer significant financial distress, typically because of major disruption in the national economy. In 2008–09, the United States found itself entering such a period, and the fortunes of many higher education institutions began deteriorating.

This paper discusses a last resort to alleviate severe financial difficulty for most institutions—the layoff of faculty members. It covers the role of faculty in institutional budget matters and the process of terminating faculty positions on grounds of financial need.

There is no single way to navigate financial storms. This paper attempts, rather, to present an array of ideas and alternatives helpful to institutions. Appendix A offers 90 ideas for relieving budget pressures. Faculty layoffs may become ultimately necessary to maintain institutional financial viability. Layoffs are, however, a poor substitute for regular judgments about programs and people. Retrenchment does not remedy a broken evaluation system. Layoffs should rest on neutral decisions about institutional needs rather than on decisions about individual strengths and weaknesses.

The terms *layoff*, *termination of appointment*, *retrenchment*, and *reduction in force* are used interchangeably. Readers should not take from the text any encouragement to terminate faculty appointments nor the endorsement of any one approach in proceeding down that path.

TYPES OF FACULTY APPOINTMENTS

Definitions of the main types of faculty appointments may be helpful to establish a common vocabulary; however, local parlance may attach different meanings to these terms.

Tenure. Tenure is a presumption that a faculty member is professionally competent. It is a contractual relationship between a faculty member and an institution entitling the faculty member to continue indefinitely in his or her position. Tenure is not, as sometimes stated, a lifetime appointment. A tenured faculty member's appointment may terminate under the following conditions:

- The individual resigns or retires.
- The individual becomes unfit to serve, leading to "dismissal for cause."
- The individual's program is eliminated.
- A severe financial emergency necessitates eliminating the individual's position.

Institutional policies generally elaborate on these conditions, particularly the latter three. Colleges and universities make their strongest employment commitments to their tenured faculty. Most tenured faculty hold the title *professor* or *associate professor*.

Tenure-track. In a tenure-track position, the individual has a contract lasting for a stated period of time, typically one to three years. Depending on the individual's performance and the institution's needs, the institution may offer to renew the contract. After a set time period, generally by the sixth year, the institution closely evaluates the individual for tenure. If the decision is negative, the individual receives a final one-year contract, after which he or she leaves the institution. Many tenure-track faculty hold the title *assistant professor*.

Non-tenure-track. In a non-tenure-track position, the faculty member receives one or more contracts lasting for a set period of time. A non-tenure-track position can be either a full- or part-time salaried post. The individual is never reviewed for tenure. At most institutions, non-tenure-track faculty members are ineligible to serve on the faculty senate or major campus committees, and they do not participate in evaluating other faculty members.

Part-time. A part-time faculty appointment generally involves teaching a course load lower than full-time faculty. Part-time appointments are usually non-tenure track, and part-time faculty usually play no role in governance or faculty evaluation. Some faculty members simultaneously hold part-time appointments at several institutions.

Adjunct. The term *adjunct* implies a short-term or casual relationship with the institution. Adjunct faculty are non-tenure track and typically are paid by the hour or course. They may receive few or no fringe benefits and no office space. An adjunct appointment may be full or part time.

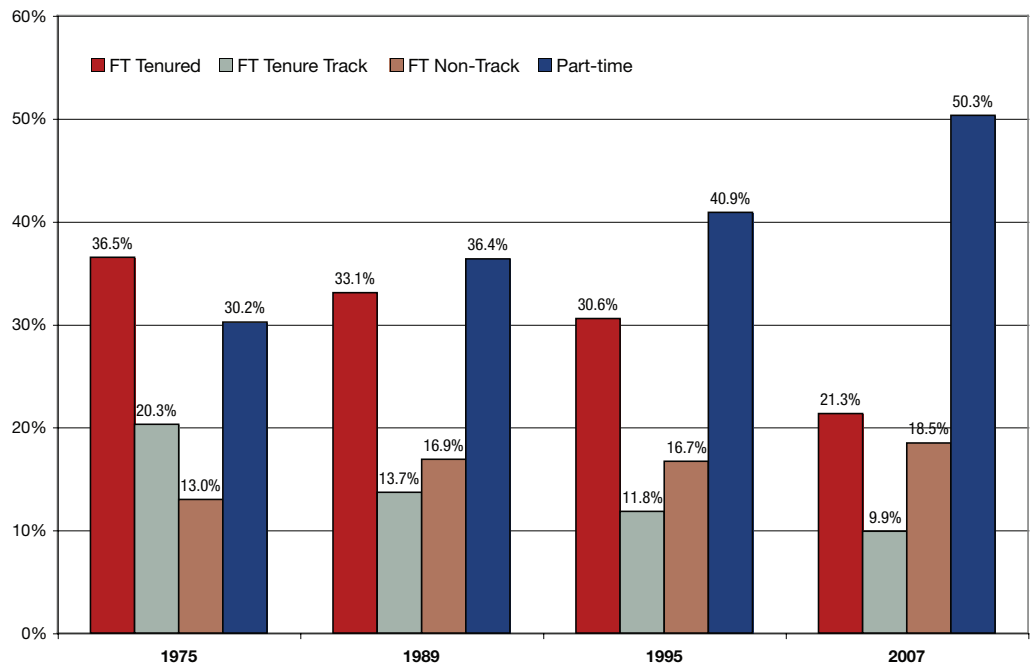
Contingent. This term, which appeared in the early 2000s, refers to all types of non-tenure-track faculty, whether full or part time.

Visiting. A visiting professor comes from another institution to teach and do research. The typical visit lasts one to two years. Salary and benefits during the visit may be paid by either the home or host institution or shared between them. A visiting professor has no long-term relationship with the host institution.

A tenured professor has the greatest security of employment. All other faculty appointments involve contracts for stated periods, which may be as short as a semester or as long as 10 years or more. Contracts for a stated period, also called “term contracts,” generally run successively. Before the contract expires, the parties decide whether to enter into a new agreement for another term. Under a rolling contract—an important variation—the agreement renews automatically unless stated conditions occur. The conditions might include a lack of need for the individual or a demonstration that the individual’s performance has become unsatisfactory.

Over the past 25 years, the proportion of tenured and tenure-track appointments has declined, with corresponding growth in more transitory relationships between institutions and faculty. Now the majority of all faculty members serve in non-tenured and non-tenure-track positions.

Figure 1. Trends in Faculty Status: 1975–2007
All degree-granting institutions, national totals



Source: American Association of University Professors, compiled from the U.S. Department of Education IPEDS fall staff survey. Used with permission.

The shift to non-tenure-eligible positions, which have risen to roughly 70 percent of all faculty positions, has major implications for planning and implementing faculty layoffs. If tenured faculty are last in line for retrenchment, many others now stand ahead of them.

SOURCES OF RIGHTS ON FACULTY STATUS AND LAYOFFS

A complex web of law undergirds the relationship between institutions and faculty members. Some legal rights stem from the private contracts the parties have reached, embodied in handbooks, policies, appointment letters, and sometimes collective bargaining agreements. Other rights flow from federal and state statutes, which address, among other topics, nondiscrimination and pre-layoff obligations. Academic custom also may serve as a source of guidance.

Every source of employment law establishes rights for both parties. It identifies the employer's rights and the employee's responsibilities, and vice versa. A brief tour through the legal terrain of faculty status, notably layoffs, can cover only a few major features. It is no substitute for the advice of legal counsel about the particular rights and responsibilities of a given institution and its faculty.

Institutional Contracts, Handbooks, Policies, and Faculty Union Agreements

The legal analysis of faculty status begins inside the institution, where leaders must gather and closely examine all internal documents that give legal shape to the institution-faculty relationship. In an ideal situation, the documents are mutually consistent; if they are not, legal counsel should provide advice about reconciling the discrepancies.

Individual Letters or Contracts. An institution typically issues some type of legally significant document to each professor, which may be an annual appointment letter, a contract for a semester or longer, a letter conferring tenure, or another form of written, individual documentation. This document may set an individual's annual salary, be signed by one or both parties, explain circumstances under which the institution may terminate the faculty member's appointment, and explicitly incorporate the faculty handbook.¹

Handbooks and Policies. Faculty handbooks are another critical internal source that shape mutual legal rights and responsibilities. Most handbooks include detailed provisions on faculty evaluation, nonrenewal, and dismissal for cause. They also may address, either cursorily or in depth, other issues relevant to faculty status, including appointments, teaching loads, retirement incentives, furloughs, and the termination of appointments in situations of program discontinuance or financial exigency.

The legal effect of a faculty handbook varies by state. The most common pattern is that, under the relevant state law, handbook provisions on the terms and conditions

¹ In a 1982 decision, a state appeals court ruled that Michigan State University breached its contract with an assistant professor by placing him on a short, unpaid furlough. The professor successfully argued that his term appointment called for payment of a fixed salary, which the university could not reduce unilaterally. The decision has not had significant impact on courts elsewhere. *Karr v. Michigan State University Board of Trustees*, 119 Mich. App. 1, 325 N.W. 2d 605 (Michigan Ct. Apps., 1982).

of faculty appointments become part of the legal contract between the institution and the individual. But the legal effect of a faculty handbook under state law may be more complicated than merely a “yes” or “no” analysis. Even if a handbook otherwise constitutes an enforceable contract, it may include provisions designed to limit its binding effect; for example, it may contain a disclaimer stating that it does not create legal rights. Another variation is a provision reserving to the institution the right to alter the handbook at any time, for any reason, without advance notice to the faculty. Whether a judge, notwithstanding such handbook provisions, will enforce the handbook’s *other* terms varies by state.

Several handbook provisions can assume special importance in faculty retrenchment.

- *Locus of Tenure.* An institution may specify that tenure resides in the institution as a whole or, less commonly, only within a smaller unit, such as a school or department. The distinction becomes significant during periods of contraction. If a tenured professor’s position is slated for termination because of program discontinuance or financial emergency, may the individual transfer to another department or school? A mathematics professor in the college of arts and sciences facing layoff, for example, may seek to move to an open position in the college of education to prepare future high school math teachers. If he or she is qualified for the new position and has tenure in the institution, the appointment would continue with tenure.
- *Sequence of Layoffs.* Handbooks and policies may establish a sequence for the institution to use in selecting faculty for layoffs. A typical sequence would place non-tenure-eligible faculty first, followed by faculty on the tenure track, and finally tenured faculty. Policies may provide for exceptions to the order in unusual, defined situations. Use of strict seniority, or total time at the institution, as a sequence for faculty layoffs is rare.
- *Pre-termination Rights.* Institutional documents may guarantee certain rights to a faculty member whose position is slated for termination. These may include a set period of notice or equivalent severance salary, the opportunity to transfer into another available position, retraining, and a right to appeal.
- *Post-termination Rights.* After layoff, the institution may guarantee that a faculty member has the right to be rehired within a certain period—roughly two to four years—if the institution has an opening for which the individual is qualified.
- *Standard of Financial Distress.* Handbooks generally contain a definition of *financial exigency* or other level of financial distress that can justify the termination of faculty appointments. The definition is discussed further below.
- *Standard for Program Discontinuance.* Handbooks also discuss the standards for terminating an academic program and the appointments of faculty in the program.

Other Internal Documents. Other documents, such as the affirmative action plan, governing board resolutions, and uncodified policies, may bear on faculty retrenchment. It is also helpful to gather information on steps taken and procedures used during any prior financial emergencies.

Collective Bargaining Agreements. National and local unions represent approximately 250,000 faculty members in the United States, most of whom are at public colleges and universities, including the California State University System and the State University of New York. On unionized campuses, collective bargaining agreements contribute another source of law to faculty status. A bargaining agreement may spell out procedures on furloughing faculty or terminating their appointments on grounds of financial distress. It may reserve to the administration the right to terminate faculty appointments in the event of financial difficulty or program closure. A contract may describe an operative standard of financial difficulty.

An institution may not target individuals for layoff because of their participation in union organizing or other protected activity.² The question may arise as to whether a college or university must bargain with its faculty union over layoffs. State labor laws and, for private-sector unionized campuses, the National Labor Relations Act can provide guidance. Typically the institution need not bargain over the decision *whether* to implement layoffs, but it must bargain over the *effect* of layoffs.

Nondiscrimination Laws

Any institution responding to budgetary pressures must tread carefully lest it commit discrimination against faculty or staff. Federal and state laws protect employees from discrimination based on factors including age, gender, race, disability, religion, and ethnic origin. Court cases make crystal clear that institutions need to train their managers and supervisors on the basic elements of nondiscrimination law. This becomes especially important in periods of contraction, given that deans, department chairs, and other managers likely will be coping with emotion-laden involuntary termination of colleagues.

Not all cost-saving measures pose equal risk of discrimination. An across-the-board salary cut for all employees draws no distinctions based on personal characteristics; thus, no protected class suffers a special disadvantage. More targeted programs may create direct or indirect discrimination. If all individuals identified for layoff share a common characteristic, such as being older than age 40, the institution has handed them an open invitation to an age discrimination lawsuit. A salary cut applicable only to tenured professors or only to engineering school faculty also could lead to discrimination claims. Tenured faculty may claim age discrimination while engineering faculty may claim gender discrimination, assuming most engineers were male. The greatest risk of discrimination arises if an institution selects particular individuals for adverse action without reference to neutral criteria.

Age Discrimination. In most employment settings, professionals with the longest service tend to earn the highest salaries. As budget cuts become necessary, they may become special targets. The most senior faculty are generally also the oldest. If a layoff is not well planned and executed, it may create problems under the federal Age Discrimination in Employment Act (ADEA). The ADEA protects employees aged 40 and older from adverse employment actions, including discharge, on the basis of age. Some states apply their own age discrimination laws to younger people.

² See sections 8(a)(3) and (4) of the National Labor Relations Act. 29 U.S.C. § 158.

What constitutes age discrimination? As just noted, a layoff that specifically targeted older people would be discriminatory. Discrimination also may be inferred from a layoff with a substantial and differential effect on people aged 40 and older, or by replacing older faculty members with younger ones.

Beyond patterns that suggest ageism, ill-considered remarks also can become proof of discrimination. Academic discrimination lawsuits often include evidence of so-called stray remarks, which are generally casual comments that may be interpreted as showing bias. Examples of stray remarks offered in court to suggest age discrimination include:

- Referring to senior professors as “legacies.”
- Citing a desire for “young blood” or “fresh blood” in a department.
- Stressing a need for “agility.”
- Referring to an individual as an “old white guy.”

Age Discrimination in Layoffs

An interim director of the University of Wisconsin Press decided in 1999 that he needed to lay off staff to address a serious budget shortfall. Working with the associate director, he compiled a list of four individuals—aged 54, 50, 47, and 46—for layoff. Other than the director and the associate director, these four were the oldest people on the staff. Their duties were turned over to existing or new staff members who were, in each instance, at least 10 years younger.

The interim director and the associate director both testified that they were seeking a “new vision” for the press, hoping to make it “more agile.” The interim director testified that he sought to reshape the press, provided he could jump through the “legal hurdle” of the ADEA. Trial testimony also showed that he explained the layoffs to the staff using a metaphor of cutting down “old trees” to allow new younger trees to flourish.

The jury concluded that the university willfully discriminated on the basis of age against the four former employees, a finding that allowed enhanced penalties. The federal court of appeals upheld the lower court decision, stressing that the university failed to train its supervisors in basic provisions of nondiscrimination law.

Source: EEOC v. Board of Regents of the University of Wisconsin System, 288 F.3d 296 (7th Cir. 2002)

It is important to develop a well-thought-out plan before beginning a layoff. Department chairs and deans need to be able to respond in nondiscriminatory ways to faculty who ask, “Why me?” They should focus on the layoff plan and institutional need rather than the individual’s age, performance, or financial ability to retire. Also, they should not assume that older faculty would not be interested in transferring to another department or retraining in a new field. To reduce the risk of discrimination claims in reductions in force, institutions should prepare a preliminary list of individuals slated for layoff and have an experienced human resources professional or attorney review the list for potential discriminatory patterns before the individuals are notified.

Older Workers Benefit Protection Act. Any retirement incentives and any releases for faculty and staff aged 40 and older must comply with the Older Workers Benefit Protection Act (OWBPA), which requires equity in offering retirement incentives to older workers. It also includes specific provisions for releases of claims, including timetables for reconsideration and a restriction

on forgoing the opportunity to complain to the federal Equal Employment Opportunity Commission (EEOC). Legal advice can help institutions avoid problems under the OWBPA.

Diversity Issues. The effect of layoffs on faculty diversity can be a major concern. In recent years, many institutions have devoted enormous energy to diversity in their faculty recruitment. In planning a layoff, a university might seek to preserve its existing level of faculty diversity or to maintain as much diversity as reasonably possible. In a legal framework, the issue is whether affirmative action is permissible in a reduction in force.

A white professor whose appointment is terminated might challenge the retention of a minority colleague under an affirmative action plan. The core legal concern is whether preference programs “unnecessarily trammel the interests” of nonminority faculty. Using affirmative action in faculty recruitment can be easier to defend than using it in retrenchment, as not being hired is less individually disruptive than being laid off under an affirmative action program. The legal analysis of affirmative action in layoffs differs for public and private institutions, as constitutional requirements apply only to public institutions. State law may also vary. Some states, including California and Nebraska, bar the use of affirmative action in their public institutions.

Racial Preference and Layoffs

In 1997, a case reached the U.S. Supreme Court on the use of racial preference in a layoff.³ The board of education in Piscataway, New Jersey, implemented a reduction in force for teachers. Layoffs were made according to a strict seniority system. At the time, the teaching staff was more diverse than the available workforce. The board's affirmative action plan covered all aspects of employment, including layoffs. The facts of the case were unusual: Two high school teachers in the same department—one African American and one white—had been hired on exactly the same day nine years earlier. Both were deemed to be equally qualified in light of their classroom performance, evaluations, volunteerism, and certifications. In past layoffs involving equal seniority, the board had broken ties through a random process, but none of the past ties had involved teachers of different races. Given the affirmative action plan and the fact that the department had no other minority teacher, the superintendent recommended retaining the African-American teacher. The white teacher filed suit under Title VII (the main federal employment discrimination statute) and prevailed in the federal court of appeals. The appellate court analyzed Supreme Court affirmative action precedents under Title VII and constitutional standards. The appeals court concluded:

[W]e are convinced that the harm imposed upon a nonminority employee by the loss of his or her job is so substantial and the cost so severe that the board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion. This is especially true where, as here, the nonminority employee is tenured.

The board of education successfully petitioned the Supreme Court to review the case; however, the parties reached a settlement before a decision was handed down. (Media reports suggested that civil rights groups, concerned about the possibility of an adverse Supreme Court ruling, encouraged a settlement and provided monetary contributions.) In the past decade, the court has not granted review in a similar case to clarify the role of affirmative action in layoffs.

³ *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), cert. granted, 521 U.S. 1117, cert. dismissed, 522 U.S. 1010 (1997).

Legal experts on affirmative action continue to debate its use in university employment, particularly in light of recent Supreme Court decisions on student admissions.⁴ Before a faculty layoff, it is vital to read the institution's affirmative action plan. If it applies preferences in layoffs, the institution should consult with a lawyer who is experienced in affirmative action and reverse employment discrimination litigation.

Retaliation. State and federal laws prohibit employers, including academic institutions, from retaliating against employees who raise complaints. If a professor complains, for example, that an athletic coach is harassing students, the administration cannot target the professor for layoff because of the complaint. The layoff would be an adverse action motivated by the professor's legally protected complaint. It might be tempting to use a layoff to solve the problem of an outspoken professor who has long been a thorn in the administration's side, yet retrenchment is not an occasion to address problems with individuals; decisions should be motivated instead by neutral institutional needs. Use neutral criteria in selecting faculty for retrenchment and check the preliminary list for possible retaliation problems (and discrimination problems) before making final decisions.

Benefits and Notice Requirements

Family and Medical Leave. Faculty members, like other employees, have rights under the Family and Medical Leave Act (FMLA). If a faculty member is on FMLA leave at the time of layoffs, the institution must not take into consideration this fact in deciding whether to eliminate the individual's position. A faculty member on FMLA leave is entitled to return to the same position or an equivalent one unless he or she would have been laid off anyway during the leave. A faculty member on FMLA leave is entitled to health insurance continuation for up to 12 weeks, and this remains true regardless of the possible elimination of the individual's position.

COBRA. The Comprehensive Omnibus Budget Reconciliation Act (COBRA), passed in 1985, allows most employees whose positions are terminated the opportunity to extend their group health coverage at their own expense. As part of the American Recovery and Reinvestment Act of 2009, Congress provided a partial subsidy to employees involuntarily terminated from their positions between September 1, 2008, and December 31, 2009. Employers must revise their COBRA notices to reflect the changes, and the U.S. Department of Labor has prepared models for this purpose.⁵

⁴ Alger, J.R. *As the workplace turns: Affirmative action in employment.* National Association of College and University Attorneys Annual Conference, June 29, 2005. Dreier, A.E. *Update on affirmative action/diversity litigation.* National Association of College and University Attorneys Annual Conference, June 26–29, 2002. Both available to NACUA members at www.nacua.org/lrs/outline/outlineguide.asp.

⁵ For model notices, see www.dol.gov/ebsa/COBRAModelNotice.html.

*WARN Act.*⁶ The federal Worker Adjustment Retraining and Notification (WARN) Act requires an employer to provide 60 days' advance notice of plans to close or to lay off 50 employees or more. Passed in 1988, the WARN Act generally applies to employers with at least 100 employees. It covers private colleges and universities and other private and non-profit organizations. Its application to public academic institutions is less clear. Public institutions need to examine closely the facts and circumstances of their activities, particularly their business and competitive activities, to determine whether the act applies to them.

Under the WARN Act, a covered employer must provide advance notice to the affected employees or the union representing them, as well as to state and local governments so they can prepare for the newly unemployed workers. Employees may bring individual and class action lawsuits in federal court to enforce their rights under the act. Penalties for failure to give notice include back pay, fines, and attorneys' fees. Approximately 16 states have adopted their own "baby" WARN Acts, some of which broaden the definition of employer and establish, among other elements, a longer notice period or stiffer penalties.

ERISA. The Employee Retirement Income Security Act (ERISA) of 1974 forbids employers from laying off employees for the purpose of denying them benefits. It also forbids layoffs designed to reduce the cost of ERISA-protected benefits. Severance arrangements for individuals also may have implications under ERISA and tax laws.⁷

Unemployment Compensation. Unemployment compensation provides a safety net for those whose employment ends. If an institution lays off tenured faculty or prematurely terminates the contracts of other faculty, those individuals will be eligible for unemployment compensation. In some states, faculty who are laid off temporarily via a furlough also may be eligible, as may those whose contracts are not renewed.⁸ In planning a layoff, the institution can sort out in advance which faculty members will have a right to unemployment compensation and help guide them through the process.

Immigration Law

For the many academics at U.S. colleges and universities who are citizens of other countries, immigration may affect their treatment during budget crises. Furloughing a faculty member or other employee who is working under an H-1B visa may constitute an impermissible salary reduction unless the federal government has given advance approval.⁹

6 29 U.S.C. sec. 2101–2109. On the status of public colleges and universities under the federal WARN Act, see 20 C.F.R. sec. 639.3(a). The federal regulations define *employer* to include public and quasi-public entities that engage in business, are separately organized from the regular government, have their own governing bodies, and possess the authority to manage their own assets and personnel, e.g., *Castro v. Chicago Housing Authority*, 360 F.3d 721, 729 (7th Cir. 2004) (Chicago Housing Authority is a quasi-public agency covered by the WARN Act). States with "baby WARN Acts" include: California, Connecticut, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Hampshire, Oregon, Rhode Island, South Carolina, Tennessee, and Wisconsin. Other state laws may also be relevant. Massachusetts has, for example, a law on layoffs covering entities that receive financing issued, insured, or subsidized by a Massachusetts quasi-public agency.

7 See, e.g., ERISA section 510 and IRS Code section 409A.

8 See generally Manicone, M.N. (2008, October 3). Case in point: Who should receive unemployment benefits? *The Chronicle of Higher Education*, p. A37 (unemployment compensation for faculty whose term contracts are not renewed).

9 See 20 CFR § 655.731.

Laying off a foreign national professor, like the dismissal of a non-U.S. student, may place the individual out of status and require him or her to leave the country. The institution may have a legal obligation to defray the travel expenses, so administrators should be prepared to work through these issues carefully with the assistance of an immigration expert.

Open Meetings and Records Acts

Every state has a law requiring governmental bodies to hold open meetings and make their records available to the public. The scope of these laws, often called “sunshine laws,” varies by state. In most states, the sunshine laws apply to public colleges and universities. A public governing board may find it awkward to discuss in an open setting subjects such as faculty furloughs and layoffs. Nonetheless, as it copes with hard times, the board should understand and fulfill its responsibilities under the state sunshine laws.

AAUP-RECOMMENDED POLICIES

Another source of guidance for faculty layoffs comes from the American Association of University Professors (AAUP). Founded in 1915, AAUP formulates policies on important subjects including academic freedom, tenure, faculty dismissal, ethics, and discrimination. AAUP policies, some of which are developed in conjunction with other higher education groups, guide institutions as they write their own faculty handbooks and policies. The 1940 Statement of Principles on Academic Freedom and Tenure and the 1966 Statement on Professional Ethics are probably the AAUP policies most often incorporated verbatim into faculty handbooks around the country. If a handbook or collective bargaining agreement plainly diverges from AAUP policy, a court would be most unlikely to enforce AAUP policy over the contrary explicit institutional provision. If, though, a handbook or bargaining agreement was unclear because of ambiguity or silence, a court might look to AAUP policy as an interpretive guide. AAUP policies may be viewed as expressions of academic custom or aspiration.

AAUP's Recommended Institutional Regulations on Academic Freedom & Tenure (RIR) covers the termination of faculty appointments for cause, as well as for institutional reasons of financial exigency or program discontinuation.¹⁰ Under the RIR, an institution may dismiss a tenured faculty member or a faculty member with a term appointment during the contract term "...under extraordinary circumstances because of a demonstrably bona fide financial exigency, i.e., an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means." (RIR 4(c)(1))

AAUP further recommends that the faculty participate in determining whether a condition of financial exigency exists or is imminent and whether the institution has pursued alternatives short of terminating faculty appointments. Faculty consultation is discussed below.

Before terminating appointments, the institution should endeavor to place affected faculty members in other suitable positions. It should terminate non-tenured appointments before tenured ones "except in extraordinary circumstances where a serious distortion of the academic program would otherwise result." (RIR 4(c)(3)) The same standard applies to the appointment of new faculty members during a period of faculty retrenchment.

The RIR addresses individual rights as well. A faculty member whose appointment is slated for termination should have the option to request a hearing. The institution bears the burden of proving the "existence and extent" of the financial exigency. Other issues for consideration at the hearing include the criteria for selecting positions for termination and whether the criteria were applied properly to the individual. A faculty member whose position is terminated should receive advance notice or severance salary; the RIR requires at least one year's notice or severance salary for someone with tenure.

¹⁰ The Recommendations Institutional Regulations are available on the AAUP website at www.aaup.org/AAUP/pubsres/policydocs/contents/RIR.htm#b6.

Under AAUP policy, program discontinuance may lead to the termination of tenured faculty appointments or the early termination of faculty appointments for a stated term. AAUP condones program discontinuance if the decision is based on long-range educational needs: “The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof. Note: ‘Educational considerations’ do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.” (RIR 4(d))

Affected faculty members should have an option to transfer to other suitable open positions and an option to receive retraining at the institution’s expense. As in situations of financial exigency, faculty members displaced by program discontinuance have the right to a hearing and suitable advance notice or severance salary.

Adaptation of AAUP Financial Exigency Standard to Faculty Handbook

The University of Kansas Medical Center is one of the quality institutions of higher learning in the nation. Only as a last resort, after all possible alternatives calculated to preserve the survival of the University of Kansas Medical Center as a quality institution of higher learning have been examined in good faith, and utilized or rejected, should the University of Kansas Medical Center consider the release of any tenured member of the faculty on the basis of financial exigency.

Financial exigency would be a condition descriptive only of the University of Kansas Medical Center as a whole, a unique and compelling financial crisis that would jeopardize the ability of the University of Kansas Medical Center to maintain its status as a quality institution unless faculty positions are reduced by the release of one or more tenured faculty members other than “for cause,” as defined in the *Handbook for Faculty and Other Unclassified Staff* (University of Kansas Medical Center).

The need for such reductions means that, considering its total resources, the University of Kansas Medical Center has demonstrated that it has no other reasonable alternative, including appropriate reductions in administrators and administrative support staff, and that such reductions will substantially alleviate its fiscal situation and give it the best opportunity to regain its status.

Source: University of Kansas Medical Center. *Handbook for faculty and other unclassified staff*, section X.B., at p. 220. Available at www2.kumc.edu/aa/fa/pdf/handbook.pdf.

The standard of institutional survival has proven to be the most controversial aspect of AAUP’s financial exigency policy. Critics urge that an “annihilation threat” of institutional survival sets the bar too high for prudent governance and administration. A single department may be hemorrhaging funds to the detriment of the institution, presenting the question as to whether the administration should close that department and possibly displace its faculty. On a related point, AAUP also requires the institution to pursue alternative means to alleviate financial stress. As critics point out, this standard is imprecise. “Pursuit” of options lies in a gray zone between considering options and exhausting them. In any case, once an institution has seriously explored all other options, the time needed to affect a cure may be long past. Note, too, that public insti-

tutions rarely face the risk of closing their doors; public funding may decline severely, but rarely does it disappear. Appendix B offers four short case studies that explore budget stress and financial exigency.

Alternative Policy on Financial Exigency

The university defines *financial exigency* as a serious financial condition that threatens the fiscal soundness of the university or of one of its academic units. Financial exigency permitting termination of tenured or multiyear appointments need not threaten the viability of the institution as a whole but may apply only to a specific college, school, or division. . . . [Board evaluates and finds financial exigency.] In the event the board finds financial exigency and the president is directed to develop a plan for remedying the condition, the protection of viable academic programs and of tenured and multiyear contract faculty appointments shall be a strong priority. When, in the discretion of the president, alternative means of addressing the exigency have been exhausted or are not practicable, the university may terminate the appointments of tenured and term contract faculty [under stated procedures].

Source: Ellen Babbitt, Esq., with Babbitt, Land, Silverstein, and Warner LLP, Chicago IL.

Even more important than agreeing or disagreeing with AAUP is understanding the policies your institution has adopted, clarifying them as needed, and faithfully following them.

DESIGNING A PLAN

Despite great creativity and sacrifice, the reduction of faculty positions may eventually become necessary. Before implementing a faculty retrenchment plan, an institution should clearly state the plan's goals and reconcile them to its institutional mission. It should articulate the magnitude of cost savings it hopes to achieve and the time period for achieving them. It should explain how the retrenchment plan advances the overall institutional mission. Putting the goals in writing will help guide planning and implementation.

*Across-the-Board Versus Selective Cuts.*¹¹ Once the need for faculty layoffs has been established, a key issue in developing the plan is determining whether all departments should bear reductions equally or whether cuts will be made selectively. Will every department be asked to cut one position or will the pattern be more complex? A similar question arises for less drastic measures such as hiring freezes and salary cuts: Is it better to spread modest pain everywhere or to inflict greater pain in certain areas?

Proponents of an across-the-board approach argue that this approach is most equitable. One prime advantage is that it leaves structures and people in place so operations can be restored easily when finances improve. An across-the-board approach does not conflate educational policy considerations with financial pressures. Advocates say, in effect, “We won’t use a tight budget as an excuse to make snap decisions about whether the English department or the physics department is weaker.” An across-the-board approach also supports collegiality and spares administrators from harsh criticism about injustice.

A selective approach recalibrates the internal allocation of institutional resources. It permits an institution to mitigate the effects of decisions that were driven by forces that are no longer relevant. A selective approach also allows newer priorities to flower, such as a new emphasis on global programs. Selective cuts help an institution move from the past into the future. They reshape the institution by reducing functions that are no longer central.

Effect on Tenured Faculty. Tenured faculty have met the institution’s closest scrutiny of merit. A sound approach that preserves the full meaning of tenure is to save tenured faculty appointments unless the institution can articulate a clear and compelling reason to depart from this preference. With the proliferation of non-tenure-eligible positions, significant savings can be achieved by declining to renew faculty contracts or, if necessary, interrupting contracts during their terms.

¹¹ For more detailed comparisons of across-the-board and selective approaches, see Bowen, H.R. (1983, January–February). The art of retrenchment. *Academe*, pp. 21–24 (favoring an across-the-board tactic), and Butterfield, B., & Wolfe, S. (2d ed., 2008). *You can get there from here: The road to downsizing in higher education*. Knoxville, TN: College and University Professional Association for Human Resources (favoring a selective approach).

Releases. Another issue in planning for faculty retrenchment is whether faculty should be required to sign a release of claims to receive termination benefits. Some institutions only require releases for “sweeteners” beyond the benefits, such as severance salary, specified in faculty contracts and institutional policies. Releases need to be prepared carefully, particularly for employees aged 40 and older who have rights under the ADEA. A release should be conscious and voluntary, it should not waive future claims, and it should state in detail what claims it releases. Some compensation for which the employee would not otherwise be eligible should accompany the release as *consideration*, which is a legal term referring to the mutual exchange of value under a contract. Reasons *against* seeking a release include the following:

- Employees may receive an erroneous impression that the institution has done something wrong.
- Under the ADEA, proper releases advise the individual to consult with an attorney, which may stimulate litigation. Other ADEA requirements include time delays, such as 45 days for consideration of the agreement and seven days after signing for rescission.
- Requiring a release might lower morale.

Consult with legal counsel about using, or foregoing, releases in faculty layoffs.

Departure. In some settings, employees who are laid off are escorted to gather their personal belongings and then hustled off the premises. Using this approach with faculty would not be prudent, except in the rare situation in which an individual poses a direct threat of violence. Faculty may hold strong loyalty to their research work. One faculty member, dismissed from a university physics lab that lost its funding, continued to work for a year beyond the date on which his salary ended.

FACULTY CONSULTATION IN TIMES OF BUDGET CRISES

The governing board, which bears ultimate authority in colleges and universities, typically delegates responsibility in certain areas to the administration. At the heart of every academic institution is its academic program. Faculty members possess special expertise with and insight into the academic program. Accordingly, trustees and administrators generally solicit and respect faculty judgments on academic matters.

Faculty opinion, even on academic matters, is not dispositive; however, it is entitled to serious consideration and deference. It would be a perversion of academic governance for a governing board to reach a decision about a budget issue, solicit the input of multiple stakeholder groups, listen patiently, and then proceed to implement the decision already made. Shared governance is more than listening; it requires evaluation, discussion, and weighing. With respect to academic matters, the faculty voice deserves greater weight than those of other campus constituencies.

This model of shared governance is ideal, covering both programmatic and budgetary issues. When times are hard, internal consultation assumes no less importance. A history of robust consultation during times of relative prosperity will sustain institutional governance during periods of financial distress. In good economic times, people develop and maintain mutual trust that helps them maintain shared decision making during more challenging periods.

The typical forum for internal consultation on financial issues is a budget committee composed entirely or predominantly of faculty members. The budget committee needs members with solid backgrounds in budget matters. The committee may operate as an arm of the faculty senate or, less often, report directly to senior administrators. The list below, drawn from actual examples, shows possible components of a faculty budget committee's mission:

- Consider budget policies, priorities, procedures, and practices, with emphasis on the academic budget.
- Consult regularly with the provost/president/cabinet and other groups involved in academic planning.
- Advise the provost/president/cabinet on budget-related matters.
- Gather information about budget issues.
- Provide regular reports, at least once each term, to the faculty senate.
- Offer counsel to the senate leadership in the formulation of policy recommendations and resolutions concerning budgetary matters.
- Provide input on budget decisions.
- Participate in campus long-range planning.
- Consider large scale expenditures.
- Consider faculty salary increases and fringe benefits (e.g., group insurance, retirement, tuition benefits).

- Conduct studies of budget-related matters.
- Propose both long- and short-term strategies for budget issues.
- Monitor institutional budget decisions.
- Recommend policies for schools and departments to use in implementing campus-wide budget decisions.
- Serve as main conduit of budget information for the faculty.
 - Provide ongoing education for the entire faculty about campus budget cycles, priorities, and processes using methods such as town hall meetings and publications.
 - Educate faculty about particular budget proposals.

The chair or other members of the faculty budget committee also may serve as ex officio members of other relevant staff, faculty, and administrative bodies.

Sometimes during extreme budget crises, consultation with faculty members or faculty committees may seem unwise. Here are three potential concerns:

- *Delay.* Faculty deliberations may be unduly time consuming. The faculty senate or its committees may have proceeded in the past with exacting care, arriving at recommendations only after lengthy review and discussion. An administration may address this concern for pressing budget matters by providing the faculty budget committee with relevant information and then setting a deadline, reasonable in light of the circumstances, for formulation of its advice.
- *Sensitivity of Information.* A governing board or administration might be reluctant to share information about its straitened finances with faculty for fear that they may, whether intentionally or inadvertently, distribute it more widely. Were the information to fall into the hands of lenders, current or prospective students, or the media, the institution's situation could deteriorate further. This concern is best addressed through an explicit understanding of confidentiality with the faculty budget committee and others receiving sensitive information.
- *Desire to Avoid Controversy or Panic.* Soliciting faculty advice about a budget crisis might be viewed as an invitation to fractious dissension. An academic community should tolerate and even encourage the expression of faculty opinions. From heat, light can emerge, and widespread panic is most unlikely.¹²

Many institutions value transparency over secrecy as they face difficult situations. Management experts almost universally favor acknowledgement of problems and open problem-solving processes.

¹² It is a common misperception that crisis necessarily leads to panic. Author Amanda Ripley has written that in disasters, panic is relatively uncommon. "But the enduring expectation that regular people *will* panic leads to all kinds of distrust on the part of neighbors, politicians, and police officers. The idea of panic, like the Greek god for which it is named, grips the imagination. The fear of panic may be more dangerous than panic itself." *The Unthinkable: Who Survives When Disaster Strikes—And Why*, p. 143 (Crown Publishers, 2008).

The Wisdom of Sharing the Truth

A college president, paraphrasing Moliere, has explained the value of sharing information: *It's better to get the facts out rather than to allow trustees, faculty members, and others to speculate and be led by their own fears to think wishfully and act precipitously. A lack of confidence can make a bad economy even worse. There is a reason why most depressions before 1929 were called panics.*

Many first-rate ideas can be uncovered when people with experience at a college, even at lower levels, are given scary but reliable data and ask, "What do we do now?" Top administrators should not only be open with information but also should solicit feedback and advice.

Source: Chabotar, K.J. (2009, February). How to communicate in a difficult economy. *The Chronicle of Higher Education*, 55(23), 45.

Institutions facing faculty retrenchment confront difficult decisions about where to make cuts and whose appointments to terminate. One recommended approach is to set the central policy at a high administrative level and then place corollary decisions closer to or within operational units. The president might, for example, require the college of education to cut three faculty positions, the college of engineering to cut four, and the college of arts and sciences to cut six. The respective deans, who are most familiar with their colleges, then would make the final decisions about particular individuals whose appointments would be terminated.

Both with respect to the allocation of cuts and the identification of individuals, faculty views are important. AAUP's RIR notes that if an institution declares a state of financial exigency, consultation should occur on subsequent decisions:

"Judgments determining where within the overall academic program termination of appointments may occur involve considerations of educational policy, including affirmative action, as well as of faculty status, and should therefore be the primary responsibility of the faculty or of an appropriate faculty body. The faculty or an appropriate faculty body should also exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated. These criteria may appropriately include considerations of length of service.

"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 allocation of this responsibility may vary according to the size and character of the institution, the extent of the terminations to be made, or other considerations of fairness in judgment. [Footnote omitted.]" (RIR 4(c)(1))

Wide consultation can help sustain faculty support, and even student and public support, for the ultimate outcomes. It also may prove helpful in persuading a court that the institution acted in good faith.

Internal Appeals. Faculty handbooks generally accord a faculty member slated for retrenchment a right to appeal the decision internally. The appeal is most often to a faculty body, which then makes a recommendation to the administration.

Internal appeals of all types, not just in the realm of layoffs, can become cumbersome. Some institutions provide multiple levels of appeals, leading to interminable proceedings. A single appeal with defined criteria, an orderly process, and a designated final decision maker serves as an important safeguard against mistakes. In designing an appeal process for faculty retrenchment, consider these elements:

- Existence of a financial crisis as defined in institutional policy.
- Validity of criteria used to select faculty members for layoff.
- Selection of individual for layoff, which may cover, among other issues, possible discrimination or retaliation.
- General adherence to institutional policy.

Faculty involvement in appeals is essentially a more focused form of consultation.¹³

¹³ The Recommended Institutional Regulations of AAUP suggest an on-the-record adjudicative hearing covering: "(i) The existence and extent of the condition of financial exigency. The burden will rest on the administration to prove the existence and extent of the condition. The findings of a faculty committee in a previous proceeding involving the same issue may be introduced. (ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered presumptively valid. (iii) Whether the criteria are being properly applied in the individual case." RIR 4(c)(2).

CONCLUSION

An institution that functions well during times of prosperity will face the fewest challenges in times of economic distress. Many other steps to reduce budget difficulties should precede a decision to terminate faculty appointments. Planning, consultation, and neutrality are the keys to success, should an institution face such an ultimate ordeal. Tenured faculty already have satisfied the institution's closest scrutiny of merit. Their status should accord some protection, although not complete insulation, in situations of faculty retrenchment. Consultation with faculty before and during retrenchment can help guide institutional decisions and reduce the potential for costly mistakes. Some institutions closely follow AAUP's recommended policies on financial exigency while others elect to depart from them. In the last analysis, cycles of prosperity and stringency for American colleges, universities, and their faculties will inevitably continue.

APPENDIX A: 90 IDEAS FOR INCREASING INCOME AND REDUCING EXPENSES, PLUS 5 IDEAS THAT CAN BACKFIRE

Ideas to Increase Income¹⁴

1. Improve student recruitment and the admissions process.
2. Improve student facilities.
3. Strengthen efforts to retain students already enrolled. Set numerical goals and provide cash incentives to departments meeting them.
4. Consider a spring admissions program to offset attrition and better use facilities.
5. Adjust tuition levels with the dual goals of increasing income and maintaining enrollment.
6. Review student scholarship and loan opportunities and other policies and programs to encourage increased enrollment or to maintain enrollment.
7. Provide more information to prospective students and their families about financial aid programs.
8. Offer financial literacy training to students to help them manage their money and stay in school.
9. Follow up with every student who does not re-enroll. If the reason is financial, offer information and assistance. Strengthen ties between the financial aid office and the office for enrollment management.
10. For private institutions, guarantee students will graduate in four years, ready for employment or graduate school; reduce tuition to level of public institutions; discount tuition for alumni who have lost jobs.
11. Encourage veterans to enroll. For private institutions, match public institution tuition levels for veterans.
12. Improve public relations and develop a “good-place-to-enroll” image of the institution to increase enrollment and fund raising.
13. Increase the number of programs and courses geared toward the needs of business and government.
14. Increase enrollment or create new programs in continuing education courses and programs focused on nontraditional adult students.
15. Strengthen links with “feeder” institutions, such as high schools or community colleges, to facilitate student enrollment. Improve articulation and transfer of credit arrangements.

¹⁴ This list is drawn from several sources, notably the following: *You Can Get There From Here: The Road to Downsizing in Higher Education*, by Barbara Butterfield with Susan Wolfe (College and University Professional Association for Human Resources, 2nd edition 2008); *Financial Exigency, Governance, and Related Matters* (2004), American Association of University Professors; Special Report: Higher Ed and the Economy, by Alan Dessoff, *University Business* (March 2009); A Straight-Talk Survival Guide for Colleges, by Peter A. Facione, *The Chronicle of Higher Education*, v. 55, issue 28, p. A36, March 20, 2009. These are available, respectively, from www.cupahr.org/knowledgecenter/hehr_db/articles/toolkit/ed_resources/YouCanGetThereFromHere_Chapter1.pdf; www.aaup.org/AAUP/comm/rep/finexg.htm; <http://universitybusiness.com/viewarticle.aspx?articleid=1247&p=4#0>; and http://chronicle.com/weekly/v55/i28/28a03601.htm?utm_source=at&utm_medium=en.

16. Shift the institution's investment portfolio from a focus on long-term growth to an emphasis on current income.
17. Increase payout rate from endowment as a short-term emergency step. Check legal restrictions, including whether state law requires maintaining endowment at "historic market level."
18. Encourage faculty to seek grants and other financial support for research and teaching.
19. Review overhead charges to grants and contracts to determine if rates can be revised upward.
20. Review institution-owned assets, such as land and fine art, for possible lease or sale.
21. Consider renting facilities to outside groups. Lease street-level space to commercial groups. Provide meeting space for a fee for special events and conferences. Check insurance arrangements and, if buildings were financed by bonds, any bond restrictions.
22. Impose or increase fees for services such as parking, laboratory course materials, and recreational facilities.
23. Establish or improve services for alumni.
24. Encourage alumni to make financial support of the institution a top priority.
25. Increase unrestricted gifts in fund-raising drives.
26. Work to convert pledges and bequests into current gifts. Consider offering a discount for accelerated payment.
27. Seek reimbursement from advisers whose poor advice led to declines in investment returns.
28. Borrow money by drawing on an existing line of credit or taking out a loan.

Ideas to Reduce Expenses

29. Identify potential energy cost savings throughout the institution. Examples include heating and cooling of buildings, use of elevators, vehicle use, and equipment that is left running.
30. Identify cost savings in the use of supplies and paper and in services for telephone, mail, computers, duplicating, and printing.
31. Reduce advertising costs.
32. Close individual buildings at specific times to save utility and maintenance costs.
33. Consider changing schedules of some units to a four-day, 40-hour workweek to save operating costs.
34. Defer repair and maintenance, but not to the point of compromising safety or health.
35. Postpone major construction, potentially including projects under construction.
36. Review use of campus space. Adjusting class schedules, for example, might eliminate the need for new construction.
37. For public institutions, reduce enrollment.
38. Freeze the institutional budget for student aid.
39. Provide students with on-campus positions in facilities, custodial, and support services in exchange for tuition credits.
40. Consolidate functions and programs.

41. Cut the size of all committees in half and reduce the number of times they meet. Maintain committees on curricular effectiveness, student retention, and other areas of special emphasis.
42. Consolidate support staff functions so that one group provides service to several departments.
43. Streamline cumbersome procedures.
44. Negotiate with the local government for free services or reduced costs for current services.
45. Renegotiate payments-in-lieu-of-taxes to the local government.
46. Renegotiate long-term debt retirement to spread over a longer time period, reducing current debt service payments.
47. Review auxiliary services to reduce costs.
48. Eliminate undergraduate minor programs and reduce number of undergraduate major programs by 25 percent.
49. Close special emphasis centers and programs.
50. Suspend or close graduate programs that are not highly regarded and are peripheral to the institution's mission.
51. Reduce cost of athletic programs and student activities, weighing general value and participation levels.
52. Examine insurance coverage for savings through higher deductibles, lower limits, or different carriers.
53. Reduce or eliminate external consultants.
54. Improve year-round use of facilities, provided changes would be cost effective.
55. Develop relationships with nearby institutions to share resources and develop group purchasing programs. Possible areas for collaboration include library resources, language courses, computing services, financial services, risk management, and campus security. Group purchasing might cover supplies, utilities, equipment, insurance, and outside legal or accounting services.
56. Reduce travel, entertainment, and conference expenditures.
57. Reduce library and academic department subscriptions to newspapers, magazines, and journals. Convert needed print subscriptions to electronic if savings result.
58. Reduce number of institution-paid professional memberships and fees.
59. Reduce or eliminate expenditures for nonacademic functions, services, and activities that are not essential to the institution's academic mission.
60. Forego parties and other entertainment, including the purchase of alcohol.
61. Stop buying bottled drinking water.
62. Reduce expenses for recruitment of staff and faculty.
63. Increase class sizes.
64. Increase faculty teaching loads. Do not count small classes—for example, under 15 students—as part of a faculty member's load.
65. Encourage faculty to focus on student retention by basing class size on final grades submitted.
66. For tenured faculty teaching only a partial load, assign mid-level administrative responsibilities for which they are qualified.
67. Move more instruction to online learning.

68. Postpone faculty sabbatical leaves offered at full salary. Consider increasing sabbaticals offered at partial salary.
69. Draw on qualified administrators and staff to undertake teaching, advising, or other duties.
70. Move more individuals from 12-month to nine-month positions.
71. Decline to renew term contracts, including appointments for tenure-track and contingent faculty, provided standards for advance notice are met.
72. Reduce expenses for leases and contracts with outside vendors.
73. Reduce the number of credits covered by the flat tuition rate.
74. Reduce the number of visiting scholars and lecturers.
75. Reduce the number of graduate assistantships.
76. Reduce staff overtime.
77. Offer retirement incentives to faculty and staff.
78. Reduce tuition remission programs for faculty and staff.
79. Invite professional employees voluntarily to forego a small percent of salary (1–2 percent) donated to a pool to save jobs of lower-wage staff.
80. Invite staff and faculty to move from full- to part-time status.
81. Encourage leave without pay.
82. Require furloughs. Before adopting furloughs, check with counsel for issues under the Fair Labor Standards Act and immigration requirements.
83. Delay filling all or some staff and faculty positions.
84. As part of a hiring freeze, allow high-priority positions that become vacant to be filled only by internal transfer.
85. Provide support for staff and faculty who are interested in changing careers, with the goal of either leaving the institution or moving internally into a more critical function.
86. Reduce or close academic programs or departments and, as needed, transfer faculty appointments to other academic units.
87. Review benefit plans and coverage. Seek voluntary reductions or change plans to implement reductions.
88. Delay salary increases for six months to a year.
89. Reduce salaries by a small percentage.
90. Merge with another institution.

Ideas That Can Backfire

1. **Decline to renew the contracts of all untenured faculty and then decide later whom to retain.** Declining to renew all expiring faculty contracts generates enormous disruption and ill will. The strongest faculty will be most likely to find positions elsewhere. Those who are “fired then rehired” may well experience both relief and resentment. Instead, institutions should project future needs as well as possible and make individual decisions about nonrenewal. Faculty members deserve no less. Blanket notice of nonrenewal arguably provides no notice at all.
2. **Eliminate disability accommodations for students, faculty, and staff.** If an institution is considering scaling back existing accommodations that it now believes are overly generous, it should proceed with great care. Provide ample

advance notice to all individuals who may be affected; in explaining the institution's reasoning, engage the individuals in a new interactive process, and work to ease any transition.

3. **Stop paying the employer's contribution into employee retirement accounts.** Delaying or discontinuing the employer's contributions into employee retirement accounts would likely breach employees' rights. If needed, consider modifying the terms of the retirement plan. Consult first with affected groups and provide lead time for the transition rather than just delaying or stopping the sending of checks to the retirement plan provider.
4. **Reclassify all contingent faculty as independent contractors.** Federal labor law distinguishes between independent contractors, who provide services with relative independence, and employees. Independent contractors receive fewer benefits than employees, notably Social Security contributions. The determination of whether an individual is an independent contractor or an employee requires analysis of all the facts and circumstances of the person's relationship to the institution. Most contingent faculty are treated as employees. A wholesale reclassification may trigger scrutiny from the U.S. Department of Labor, which can impose fines and repayment obligations.
5. **Eliminate tenure.** Removing all tenured faculty or stripping tenure from current faculty members may lead to breach of contract litigation, difficulty in future faculty recruiting, declines in student and alumni loyalty, and possible accreditation problems.¹⁵

¹⁵ For the AAUP perspective, read *Incentives to Forego Tenure* (2000), available at www.aaup.org/AAUP/issues/tenure/forgoincentives.htm.

APPENDIX B: WHAT DOES FINANCIAL EXIGENCY LOOK LIKE?

Four brief case studies on faculty layoffs illustrate the scope of financial difficulty that justifies, under even the most stringent standard, the termination of tenured faculty appointments or term appointments before their conclusions. Fortunately, each of the institutions described below recovered from the difficulties described.¹⁶

City University of New York. In 1974, the City University of New York (CUNY) comprised 18 colleges and enrolled 200,000 students who paid no tuition and only modest fees. Beginning in late 1974, New York City spun into a near-total financial collapse because of a recession and the city's heavy debt. The crisis deeply affected city services, including CUNY. In 1975–76, CUNY's budget was cut by 4 percent. The following academic year, the budget was cut twice for a total of 13 percent. The cuts, occurring during a period of inflation, created a combined reduction close to 30 percent in actual purchasing power. Universities are labor-intensive entities, and 80 percent of the university's budget was devoted to personnel. Of that, about two-thirds represented the faculty budget.

Among the responses to its drastic change in fortunes, the university increased class sizes, increased faculty teaching loads, and decreased staffing levels in both faculty and non-faculty areas. It reduced the full-time instructional staff by 24 percent and part-time instructors by 91 percent. None of the reductions affected professors who had statutory tenure.

Instructional Changes from 1974–75 to 1976–77	
Senior college average class size	rose from 25 to 30
Community college average class size	rose from 20 to 33
Classes taught per full-time faculty	rose 15 percent

Staffing Changes From June 1975 to September 1976	
Full-time instructional staff	24 percent
Other full-time staff	24 percent
Part-time instructional staff	91 percent
Other part-time staff	68 percent

Describing the abrogation of 1,000 faculty contracts shortly before the fall semester began in 1976, Chancellor Robert Kibbee told *The New York Times*, “That is the kind of thing that is unacceptable in academic circles.”

¹⁶ These accounts were drawn from reports published by the American Association of University Professors, Washington, DC. (1977). *The City University of New York: Mass dismissals under financial exigency*. AAUP Bulletin, 60-81. (1984). *Westminster College of Salt Lake City*. AAUP Bulletin, 1a-10a. (1995, July–August). *St. Bonaventure University (New York)*. Academe: Bulletin of the AAUP, 65-73. (1998, May–June). *University of the District of Columbia: Massive terminations of faculty appointments*. Washington, DC. Academe: Bulletin of the AAUP, 46-55.

Westminster College (Utah). With a 1983 operating budget of just under \$5 million, the college's unrestricted fund balance had shown a deficit in each of the eight prior years. In May 1983, the accumulated deficit totaled \$2.1 million. In mid-June, the college's external auditor questioned whether the college would be able to continue its existence, and the regional accrediting agency indicated that the college's accreditation was in serious jeopardy because of financial instability. In the spring of 1983, six faculty members, two of whom were tenured, received notices that they would not be retained. Faculty were notified that effective June 30, the college would cease to exist and would be replaced by a successor institution with no tenure system and a slightly different name. Faculty were invited to apply for positions at the new institution and all but two, one with tenure, were accepted. By the fall, the college's finances improved rapidly, and a "show cause" order that had been issued by the college's regional accrediting agency on the basis of financial instability had been lifted.

St. Bonaventure University (New York). St. Bonaventure University experienced a significant decline in student enrollment in the period from 1990–94, when the student body decreased from 2,370 to 1,805. By early 1994, the university had a cumulative operating deficit of \$9.5 million. A bank line of credit was nearly exhausted, and an accessible portion of the endowment, known as a quasi-endowment, had been significantly depleted. In 1993 and 1994, the university eliminated a total of 46 non-faculty positions. Early in 1994, the governing board declared the existence of a state of financial exigency. Twenty-one full-time faculty members voluntarily resigned or changed duties. Fourteen departed, three transferred to administrative positions and seven took part-time instructional positions. Determining that the savings were still insufficient, the university terminated the appointments of 22 faculty members, 18 of whom were tenured. They were entitled to a year's salary as severance payment. The university also reduced the pay of continuing faculty and administrators by 6.5 percent for one year and decreased its retirement contributions for those same groups from 10 to 5 percent. The university began to regain financial strength in the fall of 1994 as student enrollment grew significantly and the trustees pledged to increase their gifts to the university.

University of the District of Columbia. In the early 1990s, the District of Columbia supported its university, which charged very low tuition, with annual appropriations and generous supplemental funds when needed. In 1991, city funding for the university totaled \$76.9 million. The city began to experience severe financial difficulties. Congress then established a five-member group, termed the "control board," to manage municipal affairs. In 1995, the control board assumed oversight of the university, and the following year the university received less than \$38 million in city funds. The control board also ordered the institution to develop a plan to repay an accumulated deficit of \$6.75 million. With approval from the trustees, the administration took steps to place faculty and non-instructional staff on furloughs for six weeks, delay the fall opening of classes by six weeks, and nearly double student tuition.

As a result of the delayed opening and tuition increase, student enrollment plummeted. Between fall 1996 and fall 1997, enrollment dropped from roughly 7,500 students to 4,800. The university's accrediting agency placed the university on a warning status, observing that "classroom instruction is perilously close to falling below the minimum quality level."

The city council declared the university to be in a state of financial emergency, and the control board authorized the administration to abrogate the faculty collective bargaining agreement in implementing faculty reductions in force.¹⁷ In mid-February 1997, the administration notified 125 faculty members that they would be placed immediately on administrative leave and their appointments would terminate on April 1. The group represented one-third of the total faculty. Their salary over the six-week leave period constituted their severance payment. Staff reductions also were implemented. The savings from these actions led the accrediting agency, late in 1997, to remove the university from warning status.

¹⁷ A federal court later invalidated the suspension of the collective bargaining agreement's RIF requirements. *Univ. of the D.C. Faculty Ass'n v. D.C. Fin. Responsibility and Mgmt. Assistance Auth.*, 163 F.3d 616 (D.C. Cir. 1998).

SELECTED RESOURCES

American Association of University Professors. (1983). Hard times: An AAUP task force responds to economic realities in higher education. *Academe*.

American Association of University Professors. (2006). *Recommended institutional regulations on academic freedom and tenure*. Available at www.aaup.org/AAUP/pubsres/policydocs/contents/RIR.htm.

Beightol, S., & Palmer, C. (2009). *Reduction in force handbook*. Michael Best & Friedrich. Available for purchase from www.michaelbest.com/pubs/pubDetailMB.aspx?xpST=PubDetail&pub=2200.

Butterfield, B., & and Wolfe, S. (2d ed., 2008). *You can get there from here: The road to downsizing in higher education*. Knoxville, TN: College and University Professional Association for Human Resources.

DeMeza, W.B. (2009). *RIF checklist: Key issues in managing a reduction-in-force*. Holland & Knight LLP. Available at <http://www.hklaw.com/id24660/PublicationId2582/ReturnId31/contentid53971/>.

Facing the financial downturn: Toolkit and resources for colleges and universities. National Association of College and University Business Officers. Online resources available at www.nacubo.org/x10934.xml.

Lipsig, E., Dollarhide, M., & Seifer, B. (2007). *Reductions in force in employment law*. BNA Books.

Michaelson, M., & White, L. (2008). *Staff layoffs and reductions in force: Managing the risks*. Washington, DC: American Council on Education. Available at www.acenet.edu/AM/Template.cfm?Section=Legal_Issues_and_Policy_Briefs2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=30489.

Olswang, S., Babbitt, E., Cameron, C., & Kamai, E. (2003). Retrenchment. *Journal of College and University Law*. 30-47.

Weathering financial uncertainty. National Association of College and University Attorneys. Resource page available to NACUA members at www.nacua.org/lrs/NACUA_Resources_Page/FinancialCrisis.asp.

ABOUT THE AUTHOR

Ann H. Franke is president of Wise Results, LLC, based in Washington, DC. She consults nationally with colleges and universities on legal, risk, and policy issues. She has authored two national reports for the American Council on Education and other groups: *Good Practice in Tenure Evaluation* (2000) and *Safety in Student Transportation: A Resource Guide for Colleges and Universities* (2006). She has held senior positions with United Educators Insurance and the American Association of University Professors.

