LEGAL ISSUES ASSOCIATED WITH ECONOMIC CRISIS

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Introduction

As we continue to deal with an economic crisis in higher education, virtually all institutions are reevaluating their structure, functions, and ways of doing business to at least some extent with budgetary considerations in mind. *See, e.g.,* Appendix (providing sample list from Rutgers University of cost savings and efficiencies in light of recent budget constraints). Almost all colleges and universities have been affected by the recent economic downturn in significant ways, and the impacts will most likely be felt well into the future. This outline will provide a brief overview of some lessons learned and ideas to consider more generally in this economic environment. It will include a special section on legal and policy considerations related to faculty with regard to restructuring, and a brief list of useful resource materials.

The marketplace of higher education is changing, and even with economic recovery it will not be the same as it once was. Other pressures (including the globalization of higher education, changes in the demographics of the American population, changing business needs, the expanded notion of lifelong learning, etc.) are also having a long-term impact on the "business model" of higher education. *See, e.g.,* Andrew Delbanco, *The Universities in Trouble* (The New York Review of Books, May 14, 2009, at pp. 36 *et seq.*); Joseph Marr Cronin and Howard E. Horton, *Will Higher Education Be the Next Bubble to Burst?* (The Chronicle of Higher Education, May 22, 2009). Institutions of higher education must prepare for these challenges in the midst of much uncertainty, and look for future opportunities even at a time of severe fiscal constraints. *See, e.g.,* Goldie Blumenstyk, *NACUBO Meeting Attendees Say Economic Downturn Is Not All Bad News* (The Chronicle of Higher Education, June 30, 2009). Indeed, like other crises, economic crises can provide opportunities to think in new and creative ways about how we structure our institutions and conduct our affairs.

Some Lessons Learned and Ideas to Consider

(1) Communications and Human Resources Considerations

Budget Communications: The ways in which institutions communicate about their financial and budgetary challenges are extremely important. *See, e.g.,* Kathryn Masterson, *Harsh Economy Drives New Brand of Communication from the Top* (The Chronicle of Higher Education, Dec. 4, 2009). On the one hand, multiple constituencies (faculty, staff, students, parents, alumni, legislators, the general public, etc.) crave information about the nature and extent of the challenges. Among other things, such communications should be vetted with the impact on employee morale (and on prospective students or employees) in mind. There is a fine line between giving people the cold, hard facts and scaring them. In the midst of an economic crisis, we must be careful not to do long-term damage to our reputations by understating or overstating the extent of the problems we face.

Layoff communications: When individuals are laid off or otherwise let go, the communications with those individuals are critical in terms of the relationship going forward. Many litigation cases arise because of the way people are initially given bad news. The tone and timing of such communications are critical and should be carefully considered.

Outplacement: Providing help with outplacement for employees who are laid off or otherwise let go can be a way of demonstrating that an institution cares about its people.

Benefits: Rapidly rising costs for health care and other employee benefits have been a major factor in increased costs for higher education generally in recent years. While it is a difficult conversation to have, in this economic climate some institutions are taking a more serious look at the benefits provided and their priority vis-à-vis other institutional needs. *See, e.g.,* Karla Hignite, *Time to Regroup* (Business Officer, January 2010 at 17).

Budget process and shared governance: To the extent that various constituencies within an educational community can feel part of the decision-making process, they are more likely to take ownership of the decisions made and feel invested in them. Individual employees can also be encouraged to share creative budget strategies and ideas (e.g., about cost-cutting measures).

(2) Student Issues

Student services: In recent years, there has been increasing criticism of the amount spent my many colleges and universities of student services of various kinds. A recent study out of Cornell, however, suggests that greater expenditures on student support services correlate with increased graduation and retention rates. *See* Ben Eisen, *Cut Student Services? Think Again* (Insidehighered.com, July 29, 2009). The study indicated that expenditures on student services were especially helpful for retention and graduation rates at institutions where students have lower average test scores and higher numbers of Pell Grants. Of course, certain types of student services may be more critical than others for retention purposes (e.g., counseling centers may be more important than rock-climbing walls).

Student rights and expectations: Institutions considering academic program cuts must also consider the rights and expectations of students in those programs. Students may file suit or demand refunds if programs in which they are currently enrolled are eliminated before the students have a chance to complete their degree requirements. Student handbooks should contain appropriate disclaimers to provide the institution with latitude to make changes in the event of declining enrollments or other financial constraints.

Debt burdens: Many institutions are looking carefully at their financial aid policies to reduce student borrowing and to replace loans with grants when possible. *See* National Association of Independent Colleges and Universities (NAICU), *Private Colleges and the Economic Downturn*, http://www.naicu.edu/news_room/private-colleges-and-the-economic-downturn (lists many helpful examples of institutional policies and approaches on this issue). Institutions may also want to consider increasing the availability of financial and debt counseling for students (and perhaps their parents), particularly for students from family and socioeconomic backgrounds who are unaccustomed to borrowing large sums of money that need to be paid back over an extended period of time.

International students: Many institutions are now looking for international students who can pay full tuition while adding to the diversity of the student body. Institutions must keep in mind, however, that international diversity is not the same as domestic diversity (a point that sometimes gets lost when the statistics for the two are intermingled in reports). Both are important, but they are not the same.

Time to degree: A fundamental conversation about time-to-degree requirements (and the possibility of three-year bachelor's degrees) has become more pronounced recently. There is probably not a one-size-fits-all answer that makes sense for every institution in light of the varieties of institutional missions and requirements, but changes in technology and modes of course content delivery have made it possible to consider such questions. *See, e.g.*, Lamar Alexander, *The Three-Year Solution* (Newsweek, Oct. 26, 2009).

(3) Educational Mission-Related Issues and Priorities

Programs that reflect long-term mission: Certain types of programs are inherently expensive, and may be loss-leaders for the institution (e.g., research-intensive graduate education, or specialized academic programs with relatively low enrollments). When doing the cost-benefit analysis of programs overall, the long-term educational mission and identities and roles of our institutions within society must be kept in mind. Some programs may be worth keeping because institutions of higher education are guardians of our cultural heritage as well as developers of innovations and ideas in areas that can have a long-term (if not immediately obvious or economically viable) impact.

Travel restrictions: Travel restrictions that limit the ability of faculty and staff to travel for legitimate mission-related reasons can harm productivity as well as the competitiveness of institutions. The travel needs at a college or university (for research, off-campus educational programs, training, continuing education, etc.) are inherently quite different from the needs of other types of entities (e.g., state agencies). When public institutions are faced with tight state travel restrictions, therefore, it is worth trying to make the case that higher education is a unique context with particular needs. Travel should of course always be examined carefully to make sure that is relevant and related to the educational mission, but often it is essential to institutions that strive to be involved in the world beyond their physical campuses.

Academic centers: Academic centers are often formed to draw or retain specific faculty members. They can exist beyond traditional departments or schools, and may be founded on the premise that they would be supported by external funding. Once established, however, such centers can take on a life of their own. As they do with so many other issues now, institutions might consider requiring that such centers undergo some sort of periodic review (or build in "sunset clauses" so that centers that are no longer necessary or economically viable due to changed circumstances can be eliminated without undue hardship).

Sustainability: Sustainability and environmental sensitivity is another priority that can involve competing interests in short-term costs or investments and long-term benefits. When possible, it helps to be able to think about these sorts of issues in a much more expansive time frame than the traditional one-year budget cycle. Most institutions of higher education will presumably be around for many decades to come, and we must do our part to ensure whenever possible that they are built to reflect that long-term perspective and the interests associated with it.

Diversity and other priorities: Other key institutional priorities can end up getting short shrift if they are not discussed explicitly as budget cuts are on the table. For example, efforts to diversify the faculty, staff or student body may be harmed when programs directed at outreach, financial aid, or recruitment are scaled back. Such priorities should be explicitly mentioned so that they are not lost in the midst of financial discussions.

Athletics: At a time when academic programs are facing severe budget cuts at many institutions, athletic programs continue to require substantial (and often increasing) subsidies from colleges and universities. The issue is most pronounced at schools that compete in Division I athletics. A recent USA Today article reported that more than $800 million in student fees and university subsidies are supporting athletic programs at schools competing at this level, and that these subsidies grew about 20% in four years (from $685 million in 2005 to $826 million in 2008). Jack Gillum, Jodi Upton and Steve Berkowitz, *College Athletics Soaking Up Subsidies, Fees* (USA Today, Jan. 14, 2010). While athletic programs can serve an important function as part of the educational mission, the question in tight budget times is one of institutional priorities. Some institutions have made headlines recently by dropping football or other varsity teams in an effort to save money, or by scaling back athletic programs to a lower (and less expensive) competitive level. *See, e.g.,* Libby Sander, *Beset by Financial Woes, U. of New Orleans Considers Leaving Division I* (The Chronicle of Higher Education, Nov. 11. 2009) (describing proposed move from

Division I to Division III). As noted below, cuts in varsity teams frequently lead to a public backlash from alumni and others that must be anticipated.

Accreditation: When making budget cuts, the impact on accreditation standards must be kept in mind. Budget managers may or may not be experts in accreditation standards related to issues such as faculty and library resources, adequacy of facilities, etc.

(4) Strategic Budgeting Approaches

Across-the-board cuts v. other approaches: Across-the-board freezes or cuts are often the easiest to impose and administer, but they are also blunt instruments that fail to take into account hard strategic choices about the relative long-term value of different programs and functions within an institution. For example, during times of fiscal austerity, it may be more important than ever to invest in revenue-producing programs—or in programs that are so highly ranked that an institution should do everything possible to maintain its competitive advantage in those areas. Alternatively, programs that are relatively modestly funded, and/or that are not strongly competitive (even if they once were), should perhaps be reexamined. These conversations are difficult to have internally, but sometimes they are vital.

Federal stimulus money: The federal stimulus money has been used in some states and institutions to plug gaps that may continue to exist after the stimulus money runs out. Institutions must be very careful in dealing with stimulus funding that is temporary by its very nature; it can mask underlying budget holes that will recur in the future. If these gaps are not recognized, they could create worse problems in future years when the stimulus funding runs out. *See, e.g.,* Josh Keller, *In California Budget Deal, Bad News for Colleges in 2010* (The Chronicle of Higher Education, July 21, 2009).

Choosing your battles and managing cuts: In analyzing the impact of program cuts, the costs in time and human resources in managing such cuts (and the aftermath) must be weighed and balanced. Cuts to varsity athletic teams, for example, can lead to strong and sustained alumni and public reaction. At Brandeis University, a plan to close the museum and auction off the 7,000-work art collection was quickly abandoned after a backlash from the art world and many students and alumni. Even after the institution announced that the museum would not close and that only a limited number of pieces (if any) might be sold, the university was sued by three overseers of the museum. *See* John Hechinger, *Brandeis Faces Suit Seeking to Stop Plans to Sell Art* (The Wall Street Journal, July 27, 2009).

Short-term benefits v. long-term costs: Institutions must be able to recognize when short-term economic benefits will be overshadowed by longer-term costs. For example, delays in construction projects can add significant costs (in labor, materials, etc.). Such costs can be especially high if a project is interrupted in midstream due to the special costs associated with shutting down and then restarting projects.

(5) New (or Not-So-New?) Ways of Doing Business

Sharing of services: Many institutions are now looking at innovative ways to share different types of services with other institutions (which could be other colleges or universities, or other types of organizations or institutions altogether). Collaborations with regard to particular types of services (e.g., library acquisitions, bulk purchasing, etc.) should be strategic, as centralization in and of itself does not necessarily always produce savings or efficiency. *See* Doug Lederman, *Consortiums, Collaboration, Centralization … Conflict?* (Insidehighered.com, July 1, 2009). Institutions worry about their identities when the topic turns to joint or shared programming on the academic side, but even there opportunities exist for institutions willing to think in new and innovative ways.

Structural changes and institutional combinations: Some states are beginning to have serious conversations about combining institutions with similar missions and functions or consolidating academic programs; others are looking at systems and system offices to see if administrative layers can be cut or combined. Plans to shift students from four-year colleges to community and technical colleges have been discussed in some states and have sparked considerable debate. *See, e.g.,* Eric Kelderman, *To Save Money, Louisiana Seeks to Balance 2 and 4-Year Colleges* (The Chronicle of Higher Education, Jan. 15, 2010).

In-sourcing v. out-sourcing: When examining the costs of various services, it is always worth asking the question as to whether in-sourcing or out-sourcing is more cost-effective. The answer to that question might vary over time for different types of functions, especially as they become more specialized.

Developing in-house talent: Colleges and universities have long sought administrative, faculty and staff talent through national searches in which individuals are brought in from other institutions. While this cross-pollination is important in bringing new ideas and perspectives to institutions, colleges and universities may at times undervalue the potential of their own existing human resources. Some corporations do far more than typical colleges and universities to provide career development opportunities for their own talent. Internal training and development programs can provide real long-term benefits and savings to an institution.

Institutions may also want to reexamine and modify position descriptions to recognize the changing realities of jobs in higher education. At a time when many institutions are doing more with less, all sorts of employees are being asked to take on new responsibilities. While these changes can create opportunities for career growth (even if individuals' salaries or titles do not immediately change), the expectations of employees must be managed with clear communications to preserve morale and guard against charges of exploitation, discrimination, etc.

Use of consultants: Some institutions have used management consultants to examine business functions and identify possible ways of becoming more efficient. Major institutions that have used such consultants have tended to ask them to focus on administrative operations (e.g., procurement, information technology) rather than core academic issues like courseloads and tenure. *See* Tamar Lewin, *Universities Turn to Consultants to Trim Budgets* (The New York Times, Nov. 15, 2009). Even though individuals within the institutions may be able to identify the same issues, it can sometimes be helpful to engage outside experts who do not have vested interests in existing structures and ways of doing business.

Making the case for investment in higher education: Institutions of higher education must be prepared to make their best case for multiple external audiences as to why they are good investments for the future of the country. While some of the benefits provided by institutions of higher education cannot be easily quantified, we can and must be willing to attempt to articulate our economic impact on our respective regions. The greater the extent to which institutions of higher education can be seen as instruments of economic recovery and growth, the greater the chances that funding for higher education from both public and private sources will be made available. The recent announcement by California Governor Arnold Schwarzenegger, proposing a requirement that the state invest more in a system of higher education that creates opportunities for individuals to become productive members of society than on a penal system that seeks to incarcerate and punish individuals, is a promising conversation-starter. *See* Josh Keller, *Calif. Governor Proposes Amending Constitution to Bolster Higher Education* (The Chronicle of Higher Education, Jan. 6, 2010).

Another recent suggestion that is getting increased attention, modeled in part on the 1862 Morrill Land Grant Act (which provided revenue from the sale of federal lands that allowed states to build public universities to provide broader access to higher education and to conduct basic and applied research), is a call for federal investment in public research universities in light of declining state support and the pressing need to maintain competitiveness in an era of globalization. *See, e.g.,* Paul Courant, James J. Duderstadt, and Edie N. Goldenberg, *Needed: A National Strategy to Preserve Public Research Universities* (The Chronicle of Higher Education, Jan. 3, 2010).

Identifying and addressing burdensome regulatory requirements: One of the major drivers of increased costs in higher education in recent decades has been the steady growth of increased regulatory requirements at the federal, state and local levels applicable to higher education. Colleges and universities are subject to rules and regulations from many different government sources. Once a regulatory or reporting requirement has been created, it is rarely removed even if it has proven to be archaic or not to be useful. The Obama administration has indicated a willingness to take a fresh look at federal regulations that impede efficiency and effectiveness and that may not serve the public interest. Similarly, the incoming governor of New Jersey has asked public colleges and universities to identify burdensome state regulations or reporting requirements that could be modified or eliminated. While these exercises often fail to produce results, the current economic crisis may provide a fresh opportunity to identify and address burdensome requirements that do little if anything to strengthen educational access and outcomes. Institutions may want to look for opportunities to make the case for regulatory relief collectively at the federal, state and local levels.

Increasing revenues and cutting expenses: Many institutions are now looking at both sides of the ledger in trying to find ways to increase revenue (including, for example, the creation or expansion of executive education or other academic programs for non-traditional students) and reduce expenses. For a comprehensive list of "90 Ideas for Increasing Income and Reducing Expenses, Plus 5 Ideas that Can Backfire," *see* Franke, Ann: *Faculty in Times of Financial Distress: Examining Governance, Exigency, Layoffs, and Alternatives* at pp. 21-25 (American Council on Education, 2009).

Special Considerations Related to Faculty

Institutional restructuring, retrenchment, or reduction in force plans must take into account the special nature of faculty and their role in the higher education context. At some institutions, relationships with faculty are governed by collective bargaining agreements that set forth standards and procedures related to terms and conditions of employment; at others, faculty handbooks or other institutional policies may create specific obligations that come into play. The American Association of University Professors (AAUP) has a section on its website devoted to the financial crisis in which it answers questions regarding AAUP policies and best practices as well as legal considerations. *See* American Association of University Professors, *Financial Crisis FAQs*, http://www.aaup.org/aaup/financial/mainpage.htm. Of course, the degree to which institutions have adopted AAUP policies as their own varies widely. Regardless of where your institution is on that spectrum, it can be very helpful to become familiar with the AAUP's statements on financial issues as a guide to the types of concerns and expectations that faculty members may have.

(1) Importance of Process and Shared Governance

One of the AAUP's chief criticisms is that administrations are invoking the broader financial crisis to justify measures that adversely affect the working conditions of faculty members and other academic professionals without sufficient consultation with faculty. As the introduction to the AAUP's *Financial Crisis FAQs* says:

> [I]t is precisely in these times that faculty should be a central part of the decision making processes in colleges and universities. It is precisely in these times that faculty should have access to the sort of financial information that makes such shared governance meaningful. And it is precisely in these hard financial times that faculty must take the lead in helping to define the academy's future.

In addition to timely consultation with faculty, the AAUP has often focused on transparency of decision-making and the sharing of information (see, for example, the discussion of financial exigency and institutions affected by Hurricane Katrina, below). For a thorough discussion of the importance of faculty consultation in times of budget crises, *see* Franke, Ann: *Faculty in Times of Financial Distress: Examining Governance, Exigency, Layoffs, and Alternatives* at pp. 16-19 (American Council on Education, 2009).

(2) Tenure and Contracts

Under most institutional policies, faculty members with tenure or term contracts are entitled to a notice period prior to being separated from the institution. Tenured faculty members in particular may have rights to alternative placement within the institution, depending on the reason for the tenure termination. At public institutions, tenured faculty members may also have a cognizable property interest in continued employment that triggers certain due process rights. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972); *see also* American Association of University Professors, *Financial Crisis FAQs*, http://www.aaup.org/aaup/financial/mainpage.htm.

Some institutions have discussed postponing or denying tenure on financial grounds. Before doing so, institutions must be aware of their own policies and procedures with regard to tenure consideration. Institutional policies might not allow for financial constraints (short of financial exigency) to be a rationale for deferring or postponing tenure or promotion decisions. If no prior notice has been given of this possibility, individuals' expectations will be reasonably based upon institutional policy and past practice. Institutions must also think about the long-term effects of taking a drastic step with regard to tenure consideration—e.g., the impact on recruiting and retention of faculty over the long haul.

In some instances, individual employees may have specific contracts that cover their salaries, benefits, bonuses, or other aspects of their compensation. Institutions must be aware of the existence of such individual agreements when making sweeping changes in compensation in response to a budgetary crisis, as these sorts of agreements could very well constitute binding contracts under state law. Going forward, institutions may need to build language into such agreements that protects the institutions' ability to exercise flexibility with regard to salary or benefits in light of economic necessity.

(3) Unions and Collective Bargaining Agreements

If an institution's faculty members are unionized, the provisions of the collective bargaining agreement govern terms and conditions of employment. Some public institutions may have "adequate funding" language in their contracts that protects the institution in the event that the state fails to provide sufficient funding to cover the basic responsibilities under the contract. The definition of what constitutes "adequate funding" will vary from state to state. In other instances, institutions may have language providing for flexibility in the event of financial exigency or other severe budgetary challenges (see section below on financial exigency). If this sort of language is not in the contract(s), unionized institutions may have a more difficult time making unilateral changes with regard to salaries, benefits, or other aspects of employment.

(4) Other Specific Budgetary Considerations

Described below briefly are some of the budgetary issues involving faculty that have aroused significant discussion over the past year or so. In considering any of these options, institutions must be aware of the constraints of their own policies as well as appointment letters that may have created enforceable contractual obligations.

Salary Reductions and Furloughs: Not surprisingly, the AAUP has come out strongly against non-progressive furlough or salary reduction plans. *See, e.g.*, Letter of AAUP to Weber State University (March 20, 2009), http:www.aaup.org/NR/rdonlyres/E97E9C68-BF2D-4CD6-A37F-DBA8127F8F86/0/letterregardingparttimesalarycuts.doc (discussing reductions in part-time salaries); Letter of LSU AAUP Chapter to Louisiana State University (March 16, 2009), http://www.aaup.lsu.edu (discussing proposed salary reduction and furlough initiatives).

It is tricky to determine how the concept of furloughs can or should apply to faculty, who do not work traditional 9-5 hours. Furloughs can also be problematic for research faculty whose work is supported by grants (that in turn require a certain amount of “effort” as measured by time spent on the grant). California and other states are now embracing this tool (even for faculty).

Hiring Freezes: Hiring freezes are often one of the easier tools to use legally, because no one is guaranteed that a new position will be available to them at a given time at a particular institution. Of course, they can have other negative effects (e.g., on diversity efforts).

Program Reduction or Elimination: Changes or reductions in the structure of particular programs (e.g., combining departments or schools) might be grounds for termination of faculty, although the AAUP does not recognize “program reduction” as a separate ground for terminating tenure. Program elimination entails the complete closure of a program of instruction, department or unit. At some institutions, program elimination can be grounds for termination of tenured faculty (depending on applicable institutional policies, collective bargaining agreements, etc.). *See generally* Olswang, Steven G., Babbitt, Ellen M., Cameron, Cheryl A., and Kamai, Edmund K., *Retrenchment*, 30 J.C.& U.L. 47 (2003).

One key question in making such decisions is the locus of tenure. If faculty members have tenure within the institution as a whole (rather than a particular department), then it is more likely that they will retain rights to employment even in the face of program elimination.

The AAUP Recommended Institutional Regulations on Academic Freedom and Tenure ("RIR") require a prior declaration of financial exigency (see below) if the reason for program elimination is financial rather than educational. *See* Recommended Institutional Regulations on Academic Freedom and Tenure, AAUP Policy Documents & Reports (10th ed. 2006). In the event of a bona fide formal discontinuance of a program or department of instruction for educational reasons, the RIR also require institutions to make "every effort to place the faculty member concerned in another suitable position" before issuing notice to the faculty member of the institution's intention to terminate the appointment. *Id.* at 4.d. The RIR also require institutions proposing to eliminate a program or department to "bear the costs of relocating, training, or otherwise compensating faculty members adversely affected." *Id.*

Financial Exigency: AAUP policy does permit termination of individual faculty members for financial reasons if such terminations are preceded by a Board "declaration of financial exigency" and are based on specific faculty participation in the educational decisions regarding the programs and individual faculty members involved. *See* RIR 4.c. The RIR define a bona fide financial exigency as "an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means." *Id.* This is a formal decision made by the governing board.

While AAUP policy requires a one-year notice to terminate individuals' employment contracts (including tenured faculty) on the basis of a financial exigency, institutional policies will vary on this subject. Most institutions do in fact have policies on this subject, some of which may prove to be extremely unworkable in practice. Courts have recognized an inherent right of institutions to terminate tenured contracts in order to save the institution. *See Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978). If and when politically possible, it might be a good idea to review institutional policies on this subject (perhaps in conjunction with a broader look at the institutions' policies on a variety of subjects)—with appropriate faculty involvement through normal governance channels.

The AAUP issued significant guidance on this subject in the wake of Hurricane Katrina, after several institutions in New Orleans took drastic steps due to the severe economic crises with which they were confronted. A Special Committee of the AAUP found that all five institutions under discussion had failed to conduct faculty terminations consistent with AAUP's recommended best practices—or in some cases with the institutions' own policies. *See* Report of an AAUP Special Committee: Hurricane Katrina and New Orleans Universities," http://www.aaup.org/AAUP/protect/academicfreedom/investrep/2007/katrina.htm. In particular, the AAUP asserted that some of the institutions involved had used a "force majeure" plan in order to make unilateral decisions about whom to furlough, or to ignore faculty appeal rights. In the case of Tulane University, the AAUP said that the University's decision to declare financial exigency did not allow terminated faculty members to consider how the evidence applied to their own particular situations (although the AAUP has subsequently lifted its censure of Tulane, which adopted policies that specify more explicit faculty roles in decision making in financial crises, and that stress the protections that should be offered to tenured faculty members).

The New Orleans report clarifies the AAUP's position that institutions may be in violation of "academic due process" if they make unilateral changes from their own written policies, deviate from fundamental AAUP recommendations, fail to involve the faculty in the process of evaluating financial exigency or the specific choices made for termination, or fail to afford individual faculty members due process (particularly with regard to appeals of specific termination decisions). The overall conclusions of the report were as follows:

1. **Pre-Katrina Policies:** Pre-Katrina faculty policies, though reflecting various degrees of commitment to academic freedom and due process, provided templates that, if scrupulously followed, would likely have averted many of the harmful results.

2. **Disaster Preparation:** Disaster preparation was also uneven, and might well have included keener anticipation of problems in communicating with faculty and obtaining information.

3. **Adherence to Policy:** Widespread failure to adhere to stated policy almost universally created serious, sometimes inexplicable, lapses in protecting academic freedom and due process.

4. **Rationale for Extraordinary Action:** The rationale for extraordinary action not only varied widely but also in several cases failed to invoke conditions that might have warranted draconian steps, albeit within procedures that were seldom actually observed.

5. **Quantity of Terminations:** The numbers of persons affected also varied widely, though at all institutions the number who were initially notified of adverse personnel action exceeded the inescapable or minimal needs of the institution, sometimes substantially.

6. **Faculty Consultation:** Faculty consultation in most cases not only fell far below minimal AAUP standards but also below the level of consultation that could have been achieved.

7. **Notice:** The notification and timing of personnel actions at most institutions also failed to meet AAUP standards and created needless, even at times unconscionable, uncertainty.

8. **Alternative Placement:** Alternative placement of affected faculty universally fell below AAUP standards but also fell short of the institutions' apparent capacity to mitigate the harshest effects of inevitable personnel reductions.

9. **Internal Review:** Opportunity for internal review of adverse judgments failed to meet most accepted standards of due process as well as the institutions' own established review procedures.

10. **Tenure:** Faculty tenure, previously recognized and generally respected by all the institutions, received far less deference than AAUP policy and prior practice of these institutions would have required.

11. **Prospects for Academic Freedom:** The condition of academic freedom in the investigated New Orleans universities remains alarmingly uncertain.

Id.

Of course, the AAUP is not a court or government entity. Therefore, the degree to which its standards would be applied to institutions depends in large part on the degree to which those institutions have adopted AAUP standards in their own institutional policies and procedures. Litigation is ongoing at several of the New Orleans institutions featured in the Special Committee report, which could ultimately provide a further clue as to how courts will deal with these issues. Courts have sometimes looked with skepticism at general institutional statements suggesting that measures are needed to improve an institution's financial fortunes. *See, e.g., AAUP, Bloomfield Chapter v. Bloomfield College,* 322 A.2d 846 (N.J. Super. Ct. 1974), *aff'd* 346 A.2d 615 (App. Div. 1975).

Workloads and Sabbaticals: Some institutions have discussed making changes in faculty workloads or tightening standards for faculty sabbaticals. As with many of the other issues discussed herein, institutions should first be aware of their own policies and procedures and the methods by which they can be modified.

Retirement Funds: In some instances, institutions (such as Brandeis University) have told employees that they will suspend institutional contributions to retirement funds for some period of time.

Retirement Plans: The drop in the stock market over the past year has had a huge effect on the retirement savings of many faculty members. Individuals who thought they were on the verge of retirement suddenly found that their portfolios had diminished by 30% or more. Without mandatory retirement, the normal patterns of retirement were suddenly changed as few individuals felt that they could afford to live on the money they had accumulated. There are many legally sustainable retirement incentive programs that can be considered, but they must comply with the provisions of the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and Older Workers Benefit Protection Act (OWBPA), 104 Stat. 981 (which amended the ADEA in 1990). The ADEA protects employees aged 40 and older from adverse employment actions, including discharge, on the basis of age. The OWBPA requires equity in offering retirement incentives to older workers and includes particular provisions relating to releases of claims, including timetables for reconsideration and protections for the filing of complaints with the federal Equal Employment Opportunity Commission. 1998 amendments specific to institutions of higher education allow colleges and universities to offer retirement incentive packages to tenured faculty that include supplementary benefits that are reduced or eliminated on the basis of age, provided that certain provisions are followed:

> The language in 29 U.S.C. § 623(m) provides a 'safe harbor' for colleges that offer tenured faculty members supplemental retirement incentives that either diminish or become unavailable as the faculty member's age increases. The law also provides that tenured faculty who would otherwise be too old for the incentive program at the time it is implemented must be allowed to participate.

Kaplin, William A., and Lee, Barbara A., *The Law of Higher Education* at p. 402 (4th ed. John Wiley & Sons, 2006).

Resources

Here is a brief list of some helpful resources on the financial crisis and its impact on higher education. Some of these resources are being continuously updated with new information and examples.

AAUP Policy Documents & Reports (American Association of University Professors, 10th ed. 2006).

American Association of University Professors, *Financial Crisis FAQs*, http://www.aaup.org/aaup/financial/mainpage.htm.

Franke, Ann: *Faculty in Times of Financial Distress: Examining Governance, Exigency, Layoffs, and Alternatives* (American Council on Education, 2009).

National Association of College and University Attorneys (NACUA), NACUA Resources Page, "Weathering Financial Uncertainty," http://www.nacua.org/lrs/NACUA_Resources_Page/FinancialCrisis.asp.

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RUTGERS
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APPENDIX

Cost Savings and Efficiencies Update – Spring 2009

Rutgers, the State University of New Jersey, like other public colleges and universities in the state, has been challenged by declining levels of state financial support dating back two decades. From nearly 70% in FY 1989, the state's share of a student's educational costs at Rutgers has fallen to just over 41% in FY 2009. This downward trend is unlikely to be reversed in the near future, as the direct state appropriation for Rutgers in the Governor's FY 2010 budget (not including state-paid fringe benefits) is no more than the amount provided to the university in FY 1998, *without adjusting for inflation.*

In keeping with the university's long-standing efforts to function in the most efficient and effective manner possible, numerous cost-saving and efficiency initiatives have been implemented on Rutgers' Camden, Newark, and New Brunswick/Piscataway campuses. The following are just a few of the many ways in which the university community has responded to recent state budget cuts.

Energy Savings – These energy initiatives are generating significant short- and long-term savings:

- Solar Farm – A new solar farm on the Livingston Campus in Piscataway will generate approximately ten percent of the electrical demand on that campus while reducing carbon dioxide emissions by 1,200 tons per year.
- High Temperature Water System – Improvements in high temperature hot water underground lines will generate an estimated annual fuel savings of $2.52M by FY10.
- Energy Management Procurement Team (EMPT) - Procures futures and commodities for electric (estimated annual savings of $3.6m) and natural gas (estimated annual savings of $2.8m).
- Motors and Transformers – Improvements will result in annual savings in electrical costs of $432,000.
- New Brunswick Cogeneration Electrical Savings - Achieved by the production of electricity and heat at the university's cogeneration facility instead of buying from the market (monthly savings of $100,000 to $150,000).
- Retrofits of Lighting Across All Three Campuses – Retrofitting of lighting with energy efficient products in buildings on Camden, Newark and New Brunswick/Piscataway campuses will reduce energy consumption, CO2 admissions, and costs.
- Energy Efficient Laundry Service – New and improved washers and dryers for student residence halls will reduce water and energy consumption while saving approximately $135,000 per year.

Health Services – Efforts in this area reduce costs to both the university, generally, and students, directly.

- Student Insurance – Rebid policy saves approximately $500k per year.
- Outsourced Health Services Lab and Implemented Electronic Pharmacies – Savings of approximately $100k per year.

Housing and Dining – Efficiencies in this area save millions in auxiliary costs per year.

- Phone Service – Removal of land lines from residence halls in New Brunswick/Piscataway - which are no longer needed due to student cell phone use - saves over $1 million.
- Housing and Residence Life Operations in New Brunswick – Consolidation of these units results in staffing and administrative savings of $450k per year, while reconfiguration of dorm units generates over $1 million in new revenues.
- Camden and New Brunswick Dining Operations – Consolidation of these separate dining service operations results in savings of $200k per year.
- Dining Facilities and Management – Consolidation of operations results in savings of $1m per year.
- New Web-based Housing Application Process – saves $91k per year.

Information Technology – Rutgers is saving money and protecting the environment through enhanced conservation efforts in the area of information technology.

- Computer Recycling – Each year, roughly 400 computers from computing laboratories are recycled to other university units, where they represent improved performance and/or significant cost-savings (savings to units of $120k).
- Printgreen – The university's Printgreen project, designed to reduce the waste of printer paper in student computing facilities, saves over 40 million sheets of paper and over $250k annually.
- Online Billing and Related Activities – Throughout the university, paper term bills and other documents are being replaced by electronic versions which save printing and mailing costs.

Instructional Efficiencies – On all three campuses, course offerings have been eliminated and class sizes expanded where appropriate and not deemed detrimental to the quality of instruction. The following examples from the College of Arts and Sciences in Newark are illustrative:

- Concentrating Enrollment in Fewer Classes – Combining and eliminating class sections has improved classroom utilization efficiency and saved money on part-time lecturers.
- Increasing Class Size – Efforts to increase class size limits where appropriate resulted in growth in both the mean and median class size last fall.
- Reducing Frequency of Low-Enrollment Classes – Courses that are required by majors but serve few students generally are being offered less frequently to increase class size and efficiency.

Procurement Improvements – Rutgers has revised its purchasing policy and procedures to better leverage the university's buying power and take advantage of the benefits of competition.

- Preferred Supplier Partnerships for Scientific and Research Products - Working under an agreement covering more than 1,000,000 products from 1500 suppliers, this initiative establishes an automated cost effective system for the purchase and distribution of scientific/research products (savings of $100k for FY 2008).
- Rutgers Cooperative Purchasing Partners Program –Gives higher education institutions, townships, and municipalities the opportunity to participate in Rutgers-initiated contracts on technology purchases and services. Rutgers and its partners save dollars as a result of leveraging the cooperative purchasing power of the various organizational bodies.
- Credit Card Discount - The University secured a lower discount rate for Credit Card processing (estimated savings of $500k).
- Recycled Paper– Rutgers-Newark recently selected a minority-owned business to supply recycled copy paper to departments at a savings of almost $4 per carton.
- Networking – The university is currently leveraging a partnership with NJEdge and renegotiating several communications contracts for an estimated savings of over $600k per year.

Public Safety – Rutgers has saved millions in this area to date through reorganization, centralization of services, and the use of new technologies and revised contracting. Annual savings will continue.

- Campus Security Enhancements - Over one thousand cameras and other technological enhancements have been installed throughout the New Brunswick campus as a part of an on-going strategy to further improve security conditions while reducing costs (annual savings of $2M).
- Municipal Court Attorneys – Use of municipal prosecutors by RUPD instead of private attorneys in local jurisdictions, with no decrease in conviction rates (annual savings of $150k).
- Community Service Officers – The use of student Community Service Officers provides a cost-effective means of supplementing the full-time police and security personnel on Rutgers' campuses.
- Segways – The use of Segways by Rutgers-Newark police and security patrols allow for quick responses and higher visibility, while reducing the need for more-expensive vehicles.
- Greater Camden Partnership – Rutgers-Camden belongs to a consortium of Camden businesses that support a "clean and safe district" through the use of "ambassadors" that circulate through the downtown and waterfront area, cleaning street debris and providing a visible presence.
- Inspection Services - Created new operational unit to perform (fire code requirement) NFPA-25 sprinkler inspections for Housing and Facilities - as opposed to hiring outside vendors at 200%+ rates (savings of $2M to-date and $700k yearly).

- Reduced Operational Costs - Reorganized, centralized and eliminated administrative employees (savings of over $200k yearly).
- Hiring - Hire trained police candidates when possible as opposed to untrained recruits that require at least one year of field training (training cost savings of $300k to-date and $100k yearly).
- Renewed Campus Bus Contract - Redefinition of "missed trip" saves the university $70,000 while improving on-time efficiency and eliminating "bus bunching" problem.
- Sharing of Public Safety Vehicles – Created a pool of shared public safety vehicles to reduce the number of vehicles required. Police, Emergency Services, Security, Transportation and Administration now share generic "Public Safety" vehicles (annual savings of approximately $100k).
- Inspection Software - Initiated a handheld inspection software tool that will enable inspectors to timely and accurately report on their inspections (annual savings of approximately $50k.)

Other Savings and Efficiencies

- Shared Services – Rutgers' three main campuses in Camden, Newark, and New Brunswick/Piscataway share numerous programs and services with neighboring higher education institutions including: Camden County College, Essex County College, NJIT, Rowan and UMDNJ. In Camden, for example, the university's bookstore, library, campus and recreation centers, and health services are all shared with Camden CC and Rowan. The university also works cooperatively with other New Jersey colleges at various off-campus locations in the state.
- Facilities Renovations – Use of in-house staff for smaller renovations on the Newark campus maintains quality while saving money over use of outside contractors.
- Mail Services – Efforts to encourage electronic communication on the New Brunswick/Piscataway campuses, along with the closing of two low-volume campus post offices there, has resulted in annual savings of more than $400k.
- Admissions – New self-reported academic transcripts have resulted in savings for both the university and local school districts, while conserving paper and speeding decision time by over two weeks.

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