New Challenges in Employment Law: Heightened Responsibilities for Employers in an Era of Accountability and Transparency

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Introduction

The first segment of this two-part presentation on employment law examines the existing framework of employment laws as they play out across campus during a down economy. Today's environment requires employers to focus on preventive practices, good decision-making, and the need to insure that long term success is not compromised by short term choices. Part I of these materials briefly addresses the legal and practical risks associated with layoffs, including general planning and implementation considerations, waivers and releases, and the new COBRA subsidy legislation.

Part II encompasses some of the unintended or unanticipated consequences that might occur in a down economy, namely, legal mistakes in the use of furloughs, unintended consequences of technology, and the potential for union organizing and what that might look like under the Employee Free Choice Act.

I. Layoffs, RIFs, and Related Issues

The current economic conditions have forced colleges and universities to closely examine their complement of programs and staffing levels as part of broader cost-cutting efforts. Even during the best of times, change can be hard. In this climate, the uncertainty in the employment market for those whose positions may be eliminated and the challenges faced by administrators in trying to fairly effectuate the changes needed to maintain financial stability while retaining key talent are particularly challenging. In this section, we will examine some of the issues and risks associated with these important decisions.

A. Making Choices

Who to let go and who to keep? How do you decide? How do you keep your best people? How do you avoid so devastating the morale that productivity all but disappears? All hard questions… and ones for which no single clear answer emerges. The economic downturn has yielded some interesting patterns of action. The mainstream approach in higher education has largely been to develop a structured process for determining staff layoffs, and addressing the myriad of associated issues like eligibility for rehire, benefits continuation, "bumping", and other such issues. This model is discussed more below.

Interestingly, though, it can be said that some consider the economic climate an opportunity as well. For example, one recent study by Veritude, Inc., a staffing company, described an interesting perspective on layoffs. The study, titled *The New Normal: Recession*

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Response and Workforce Planning,[2] was unsurprising in its reporting that 62% of companies surveyed indicated that they had laid off employees as a direct response to the current economic climate. Other reported practices included lowered wages (22%) or reduced benefits (18%), the next two most common responses. What was interesting (and somewhat surprising) was the study's conclusion that the plethora of qualified applicants and the relative ease with which companies can obtain qualified applicants "is enabling companies to re-engineer their workforce at the micro level." According to the study, 63% of companies "report that they are actively replacing low-performing employees with high-performing new hires in preparation for economic recovery." At least one commentator has already weighed in with the risks of such an approach.[3]

So what does one do? Employment litigation has become so prevalent that the likelihood of emerging from a layoff without at least some level of claims or grievances seems somewhat remote. What colleges and universities can do is put in some time and effort up front to understand their rights, the risks, and then plan for change in a way that minimizes them insofar as is reasonably feasible.

B. The Right to Layoff

At the initial stage when it seems that a reduction in staffing may be necessary, one good starting place is to understand what are and are not the institutional rights in this regard. Such a seemingly straightforward question is not always so simplistic. Consider first you may already have published policies and procedures, or even collective bargaining agreements that detail this issue and describe both when layoffs will occur and even how they will be implemented. Depending on status as a public or private employer, the status of particular employees as tenured faculty or "at will" staff or staff with civil-service type protections, whether you are in a union or non-union setting, and even the state you are in[4], the answer may not be the same. Only after you have reviewed this issue fully and determined your starting point can you begin to plan. This process will also help to determine where gaps may exist in policies or where important issues have been left unaddressed and will require new or revised policies.

As one examines this issue, it is worth noting some special considerations related to faculty and tenure. Whether binding or not, it is at least important to understand the American Association of University Professors' perspective when dealing with financial crises. The AAUP has established a web page devoted to this issue, with numerous links to helpful information in this regard.[5] One important element to note is that the AAUP definition of a "financial exigency" may not match your own institutional definition.[6] From a litigation

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[2] Available at https://www1.vtrenz.net/imarkownerfiles/ownerassets/1010/ReportRd11.pdf (last accessed 1/27/10).

[3] *See, e.g.*, Cappelli, Peter, *Commitment Takes Another Hit*, Human Resource Executive Online (7/20/09), available at http://www.hreonline.com/HRE/story.jsp?storyId=233187998 (last accessed 1/27/10).

[4] *See, e.g., Pachla v. Saunders System, Inc.*, 899 F. 2d 496 (6th Cir. 1990)(Implied contract claim over layoff under state law can go to jury when factual questions exist on economic necessity); *King v. Michigan Consol. Gas Co.*, 442 N.W. 2d 714 (Mich.App.1989)(employee can challenge layoff where employer failed to follow own procedures) *But see, Dabrowski v. Warner-Lambert Co.*, 815 F. 2d 1076 (6th Cir. 1987)(where employer retained broad discretion in deciding who to retain, no breach of contract)

[5] *See* Financial Crisis FAQs, available at http://www.aaup.org/aaup/financial/mainpage.htm (last accessed 1/27/10).

[6] *See, e.g.*, Olswang, Steven G., et al, *Retrenchment*, 30 J.C.& U.L. 47 (2003); Dixon, Thomas M., et al, *Case Comment: Pace v. Hymas: Termination of Tenured University Faculty: Financial Exigency and the Burden of Proof in a Substantive Due Process Claim*, 13 J.C. & U.L. 417 (Spring 1987); Burke, Janell Seitz, *Financial Emergency as*

standpoint, a university declaration of a financial exigency is often examined on a case-by-case basis. Factors to consider can include everything from enrollment declines to elimination of nonessential programs, and other reductions in non-salary expenses.[7] Moreover, some courts have granted deference to academic institutions on financial exigency even in the absence of specific enabling policies.[8] The American Council on Education has published a comprehensive monograph titled *Faculty in Times of Distress —Examining Governance, Exigency, Layoffs, and Alternatives* and authored by Ann Franke that discusses the faculty aspects of this issue in great detail.[9]

Apart from examining the legal right to lay off and any restrictions on that right, it almost goes without saying that all those involved in the assessment and planning for layoffs must be familiar both with specific legal obligations that may attach and with the legal framework governing the actual selection of employees to be affected.

On the first issue, specific legal obligations that may attach, one example is that if the layoff is of sufficient magnitude, the provisions of the Worker Adjustment and Retraining Notification Act (WARN) may apply.[10] This law is complex, with various definitions of key terms like "plant closings[11]" and mass layoffs[12]", what constitutes an "employment loss[13]" and what exceptions to notice exist.[14]

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a Grounds For Dismissal of Tenured Faculty in the Washington Community College System, 19 Gonz.L.Rev. 105 (1983/1984).

[7] *See*, *e.g.*, K*lein v. Board of Higher Education of City of New York*, 434 F. Supp. 1113 (S.D.N.Y.1977)(detailed plan developed, including reduction in personal services, staff reduction, supplies, equipment, telephone and facilities); *Board of Community College Trustees v. Adams*, 701 A.2d 1113 (Md.App.1996)(allowing tenure to be terminated for reasons not personal to faculty based on necessary or preferred discontinuance of program, declining enrollment, or financial problems necessitating termination of programs, positions or courses).

[8] *See, e.g., Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978); *Jimenez v. Almodovar*, 650 F.2d 363 (1st Cir. 1981).

[9] Available at http://www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=32783 (last accessed 1/27/10. *See also*, Hustoles, Tom, *Workforce Reductions Practical Suggestions for Making Them in a Legally Defensible Way*, Vol. 53 CUPA-HR Journal No. 1 (Spring/Summer 2002).

[10] *See* 29 U.S.C. §2101, *et seq*.; 20 C.F.R Part 39. Note also that a number of states have enacted their own WARN-type statutes. For some helpful resources, see *The Worker Adjustment and Retraining Notification Act — A Guide to Advance Notice of Closings and Layoffs*, U.S. Department of Labor Employment and Training Administration Fact Sheet, available at http://www.doleta.gov/programs/factsht/warn.htm (last accessed 1/27/10). *See also*, Friedman, Steven J., et al, *And You Thought the Bailout Was Bad: Employment Law Risks in the Current Financial Crisis*, Littler Mendelson (October 2008), available at http://www.littler.com/PressPublications/Documents/2008_10_Insight_BailoutBad_EmploymentLawRisk_CurrentFinancialCrisis.pdf (last accessed 1/27/10) and *THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT —Employer's Guide to Advance Notice of Closings and Layoffs*, Employment and Training Administration, U.S. Department of Labor (July 2003), available at http://www.doleta.gov/layoff/pdf/EmployerWARN09_2003.pdf (last accessed 1/27/10).

[11] *See* 29 USC 2101(a)(2).

[12] *See* 29 USC 2101(a)(3).

[13] *See* 29 USC 2101(a)(6) and 2101(b).

[14] For example, WARN contains both an "unforeseen business circumstances" exception in 29 U.S.C. §2102(b)(2)(A) and a "faltering company" exception (applicable only to plant closings) at 29 U.S.C. §2102(b)(1). Even then, the employer must provide written notice as soon as practicable with an explanation as to the basis for the reduced notification period. *See* 29 U.S.C. §2101(b)(3).

The decision on whether a layoff will be covered by WARN's requirements is not always clear. It is important to remember, though that even if a layoff is initially not covered by WARN, WARN contains an aggregating feature where reductions over time may be consolidated for purposes of determining the employer's WARN obligation. Employment losses occurring in two or more groups that, by themselves, do not meet the minimum threshold could potentially be aggregated if those losses occur within a ninety-day period. The regulations set forth both 30-day and 90-day "look ahead and look back" provisions for employers to determine if aggregation will apply.[15] The employer should be able to avoid aggregation if it demonstrates that the losses are "separate and distinct" and are not an attempt to avoid WARN.[16] This means that WARN may apply retroactively to layoffs that, when made, did not require sixty days' notice, but that trigger the notice requirements when added to subsequent layoffs. Under 20 C.F.R. § 639.5(a), an employee's last day of employment is considered the date of that employee's layoff. Further, any cause of action under WARN does not accrue until enough employees are terminated to constitute an aggregated mass layoff, a significant point if an employee has signed a release because the release may not bar a subsequently accruing WARN claim.[17]

Note also that bills are pending in both the House and Senate to expand WARN. In June 2009, members of the House and Senate reintroduced the Federal Oversight, Reform, and Enforcement of the WARN (FOREWARN) Act (H.R. 3042, S. 1374). This legislation would amend the Worker Adjustment and Retraining Notification (WARN) Act by requiring more and smaller employers to notify workers of mass firings or plant closings and increasing employer penalties and enforcement mechanisms.

On the second issue, that of the legal framework governing the selection of employees, a myriad of state and federal laws preclude decision-making based on factors or characteristics the law has chosen to protect, such as race, sex, color, religion, age, etc… Such claims can often be pursued under either a disparate impact or disparate treatment analysis, so these are key concepts to understand.

In general, a disparate impact claim is established by the showing that the action in question (in this case, a layoff) had a statistically significant impact on a protected group.[18] This is typically a numbers game, with statistical analysis needed to insure this does not occur, or that if it does, that the decision can nonetheless be defended as consistent with business necessity. The EEOC's recently updated fact sheet on the use of employment tests and selection procedures, even though focused on hiring and promotion, is helpful in explaining this general concept.[19] Disparate treatment claims typically involve the individual selectee, who claims that he or she in particular was selected for a reason not permitted by law. Depending on whether the

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[15] *See* 20 C.F.R. § 639.5(a)(1)(i) and 20 C.F.R. § 639.5 (a)(1)(ii).

[16] *See, e.g., Hollowell v. Orleans Regional Hospital, LLC.*, 217 F.3d 379 (5th Cir. 2000) (holding layoffs occurring from a continuing economic demise did not result from separate and distinct causes).

[17] *See, e.g., Allen v. Sybase, Inc.*, 468 F.3d 642 (10th Cir. 2006).

[18] Disparate impact as a viable theory of discrimination even in the absence of specific intent had long been held cognizable under Title VII, and was recognized under the ADEA in 2005. *See, e.g., Griggs v. Duke Power Co*., 401 U.S. 424 (1971) and *Smith v. City of Jackson*, 544 U.S. 228 (2005).

[19] *See Employment Tests and Selection*, EEOC (June 23, 2008), available at http://www.eeoc.gov/policy/docs/factemployment_procedures.html (last accessed 1/31/10).

individual claims the employer used criteria protected under Title VII or the Age Discrimination in Employment Act (ADEA), the analysis can vary somewhat.[20]

To summarize briefly then, a few key questions at this initial rights assessment phrase to consider:

- From what source(s) does the right to declare a financial exigency arise (i.e.,, inherent, by contract, under state law, …);
- Is the institution bound by any specific definition or process to invoke such a declaration;
- Once so determined, do these sources require or recommend a particular order to things in terms of identifying and accomplishing cost reductions and defining the obligations attendant to those efforts;
- What state, federal, or local law obligations may be implicated as the process progresses.

C. Planning and Assessment

Once you understand the framework of institutional rights and obligations, the actual planning process begins. In this regard, the employer is left to the detail work of determining why a layoff is needed, and typically whether alternative measures, such as hiring freezes, elimination of travel, etc…, might accomplish the same goals.[21] Such planning efforts, if done well and documented, can be useful in defending subsequent claims.[22] The planning process might include elements as basic as eliminating unneeded functions,[23] making changes for efficiency or other legitimate reasons,[24] or might more broadly encompass possible program reduction or program elimination.[25] It is preferred that these decisions are made in a reasonable way, and where possible, without a focus or reference on the incumbents to be affected. At this point, it is the institution's goals and needs that are the focus of the inquiry.

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[20] Under Title VII, an unlawful employment practice is established when he plaintiff demonstrates race, color, religion, sex or national origin was a motivating factor in the decision, even though other factors may also have motivated the practice. *See* 42 U.S.C. §2000e-2(m). On discriminatory intent based on age under the ADEA, the plaintiff must prove age was the "but-for" cause of the challenged adverse employment action. *See Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009). A shifting burden of proof/burden of production analysis is typically used to determine the ultimate issue of discrimination. *See generally, Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[21] *See, e.g.*, Franke, Ann H., *Faculty in Times of Distress — Examining Governance, Exigency, Layoffs and Alternatives*, American Council on Education (2009) at Appendix A; *see also, e.g., Pace v. Hymas*, 726 P. 2d 693 (Idaho 1986).

[22] *See, e.g., Tice v. Lambert Yards, Inc.*, 761 F. 2d 1210 (7th Cir. 1985).

[23] *See, e.g., Holley v. Sanyo Mfg., Inc*., 771 F. 2d 1161 (8th Cir. 1985)(consolidation of two positions); *Parcinski v. Outlet Co*., 673 F. 2d 34 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983)(elimination of buyer position a business decision made on rational basis); *Mizrany v. Texas Rehabilitation Commission*, 522 F. Supp. 611 (S.D.Tex. 1981), a*ffd. mem.*, 685 F. 2d 1384 (5th Cir. 1982)(employer established position properly selected for elimination based on determination it could be eliminated without client impact).

[24] *See, e.g., Jorgensen v. Modern Woodmen of America*, 761 F. 2d 502 (8th Cir. 1985)(reducing size of larger territories based on business judgment).

[25] For a detailed discussion of program reduction and program elimination in the context of faculty rights, see Olswang, Steven G., et al, *Retrenchment*, 30 J.C.&U.L. 47 (2003.

One method is using the "institution today/institution tomorrow" framework to examine all existing programs and services. These can be categorized as "must have", "should have" and "nice to have", depending on the institution's larger mission and the academic program elements deemed essential to its long term success. Rarely are across-the-board percentage reductions effective from a strategic standpoint. Such an approach is a hatchet rather than a scalpel and does not consider the proper allocation of resources based on institutional priorities. Rather, at this stage, defining what the institution does today and what it will no longer do tomorrow allows for an objective strategic assessment without the detail of the "people part" of the equation. That step comes later, after the larger assessment is done, and is more often the subject of controversy as individuals dispute their selection for layoff.

D. Criteria and Appeals

As part of the initial rights assessment, the employer may have determined that the criteria for layoff have already been defined. For example, a not uncommon feature in collective bargaining environments is a provision dictating that layoffs will occur by seniority. Seniority under both Title VII and the ADEA is generally not considered problematic.[26] Assuming the definition of seniority (i.e., service as a whole, service in specific position, or service in any position covered by the agreement) is clear, this may be the easiest part of the process. Often though, such matters are either not defined, or are defined but with exceptions based on the need to retain particular skills. At the planning and assessment stage, one presumably has determined the basic framework of change to be considered, and this stage now requires a further level of detail on how to get there. Cuts that do not involved job loss are institutionally painful but do not typically generate the level of angst that accompanies job loss.

In deciding on the criteria for selection, it is important to understand the distinction between objective and subjective criteria. Objective criteria are typically those items not easily subject to dispute, such as tenure, seniority, length of employment, specific productivity measurements, or possessing certain measurable or identifiable skills or qualities. Subjective criteria, on the other hand, are those factors not easily quantifiable. One example of a definition of subjective criteria is criteria that are "not fixed, not measurable, and not objective regarding employment qualifications, selection standards or processes that require judgment in application, such that different persons applying such criteria/procedures would not necessarily reach the same conclusion. A criterion is subjective if it is not fixed or measurable."[27] While not unlawful *per se*, subjective criteria are often examined more closely because of the potential that can mask discrimination.[28] Even when using subjective criteria, avoiding generalized terms like "attitude",

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[26] The ADEA exempts from is coverage actions taken by an employer under a bona fide seniority system not intended to evade the purposes of the law. *See* 29 U.S.C. § 623(f)(2)(A). Likewise, Title VII contains a disparate impact exemption for bona fide seniority systems and certain other bona fide systems. *See* 42 U.S.C. § 2000e-2(h).

[27] *See* Glossary of EEO Terms, Office of Equity and Diversity, Montgomery College, available at http://www.montgomerycollege.edu/Departments/oed/glossarycontent.htm#s (last accessed 1/30/10).

[28] As once court explained, "[i]t is true that an employer's use of subjective criteria may leave it more vulnerable to a finding of discrimination, when a plaintiff can point to some objective evidence indicating that the subjective evaluation is a mask for discrimination". *See Sattar v. Motorola, Inc*., 138 F.3d 1164, 1170 (7th Cir. 1998). Nonetheless, in the absence of discrimination, the general rule is that a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions. *Id*. When an employer relies on subjective criteria, the employer should be able to articulate "a clear and reasonably specific factual basis upon which to base its subjective opinion." *See Chapman v. A-1 Transport*, 229 F. 3rd 1012, 1033 (11th Cir. 2000(en banc).

"teamwork" and "flexibility" unless a level of specific factual detail can be determined is generally recommended. It is more defensible to base decisions on an accurate assessment of an employee's skills, and also the ability of the employee to perform the work that will remain after the layoff.[29]

Having and following well-defined criteria are critical elements in defending subsequent litigation.[30] For example, the use of performance evaluations as a criterion is easier when supported by specific factual detail and where safeguards in the process allowing employees to review and comment were present.[31] It is also important at this stage to conduct any necessary disparate impact assessment to insure the criteria selected do not have unintended consequences for which the institution may be liable.

Finally, having an appeal process whereby employees can challenge their selection for layoff is important. For public institutions and staff from a due process standpoint[32] and as a routine practice by policy for private institutions, having the means by which to independently review challenged decisions and verify that the established criteria were applied properly can provide an important check against error and may reduce the potential for litigation.

E. Softening the Blow

As part of the layoff plan development, measures the employer would take to cushion employees from the impact should also be a point of discussion. While it is not uncommon to have policies that address the criteria to be used, an often-neglected area is considering what can (or should be done) for both those let go and those who remain. For those being let go, employers options abound. To name just a few that might be worthy of considering:

- *Leave Usage Prior to Separation Date*: Consider whether, if an employee will have a leave balance to be paid in a lump sum at separation, the leave can instead be used to extend employment, thus allowing the employee to take advantage of any employer cost-sharing elements of employee benefits.

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[29] *See, e.g., Baines v. GenCorp Inc.*, 896 F. 2d 1457 (6th Cir. 1990), cert. denied, 498 U.S. 878 (1990)(mere retention of employee under 40 in RIF, by itself, not sufficient for prima facie case). *But see, Haroldsen v. Omni Enterprises*, 901 P. 2d 426 (AK 1995)(rejecting *Barnes* formulation of prima facie case and requiring employer to articulate reasoning for decision).

[30] *See, e.g., Duke v. Uniroyal Inc.*, 928 F. 2d 1413 (4th Cir. 1991)(employer failed to follow its own EEO policy in recognizing seniority in RIF).

[31] *See, e.g., Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299 (E.D. Mich 1976)(defendant undertook a concerted and genuine effort to evaluate the employees in the evaluated group and evaluations were conducted impartially, conscientiously and without any intention to do anyone an injustice); *Stoller v. Marsh*, 682 F. 2d 971 (D.C. Cir. 1982), *cert denied*, 460 U.S. 1037 (1983)(proper safeguards in evaluative process enhance ability of employer to later rely upon them).

[32] This is often a state law issue, with the applicable state statute dictating the process to be followed, and also appeal rights. *See, e.g.*, Ga. Code Ann. §45-20-19 (specifying 30 days notice required with certain essential elements to be specified in notice); N.J.S.A. 11A:8-4 (appeal permitted for layoff); KRS §151B.087(describing appeal process for layoffs); *Koo v. Commonwealth of Kentucky Department for Adult and Technical Education*, 919 S.W. 2d 531 (Ky.App. 1995)(unlike discipline, in challenging validity of layoff, employee bears burden of showing non-compliance with statute). Good faith by the decision-maker is often a litigated element in the public sector. *See, e.g.*, Pearson, James O., *Determination as to good faith in abolition of public office or employment subject to civil service or merit system*, 87 A.L.R. 1165 (2009).

- *Severance Pay*: Paying a period of wages, either as a lump sum payment or over time, may assist employees in transitioning to other work. Note that the treatment of these payments may or may not offset unemployment benefit payments depending on their characterization as severance or "wages in lieu of notice".
- *Outplacement Support*: Providing job search assistance can be highly beneficial to employees who may have been on the job market. Job search techniques, resume review, and the like can help these employees land other jobs.
- *Recall Rights*: A common feature in unionized environments, this would guarantee an option to return if conditions change and the employee's former position becomes available. Consider having a caveat that such a right may be extinguished if an intervening factor (such as a felony conviction) renders an employee unsuitable for reemployment.
- *Rehire Consideration*: Granting some level of enhanced or preferential consideration for a period of time after layoff can provide a measure of assistance.
- *Unemployment Assistance*: A laid-off employee will typically qualify for unemployment benefits but some find the process daunting. Offering guidance on how to seek this benefit can be helpful.
- *Counseling Services*: Often access to an employer's EAP program ends with employment. Can the benefit be extended for a period of time to assist employees with the stress associated with job loss?
- *References*: Many employers follow the standard "neutral reference" practice, releasing only the most minimal of information to prospective employers. Consider whether this should be changed. In so doing, remember that it is always best to be honest if references are granted. If you write a glowing reference on an employee selected for layoff based on poor performance, the letter will likely be used as evidence of pretext if the employee later claims an impermissible motive was sued in his or her selection for layoff.

Those that remain present a different challenge. Layoffs can drastically affect morale and engagement. A clear communication strategy for those that remain should be developed to try and lessen the morale impact caused by the layoff.[33]

F. Waivers and Releases

No discussion of layoffs or staff reductions would be complete without some discussion on the issue of waivers and releases. Listed above are a variety of things an employer might do for a laid off employee. To the extent any of those that the employer decides to do is not something to which the employee may already be entitled, such additional measures may be sufficient "consideration" for which the employer may seek a release of claims to reduce its

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[33] *See, e.g.*, Bienati, Lawrence M., *Coping with Job Transition* (2003), available at http://adman.ucdavis.edu/conference08/Coping%20wiith%20Job%20Transition.pdf (last accessed 1/30/10); Carey, W.P., *Survival of the Smartest: After the Layoffs, Manage for Long-Term Stability*, Knowledge @W.P. Cary, available at http://knowledge.wpcarey.asu.edu/article.cfm?articleid=1766 (last accessed 1/30/10); Rogoski, Richard R., *Humane layoffs take clear planning, communication*, Triangle Business journal (10/3/03), available at http://triangle.bizjournals.com/triangle/stories/2003/10/06/focus2.html (last accessed 1/30/10).Walters, James, *Layoff, Morale and Right-Communication*, Inc. Newsletter (5/8/01), available at http://www.inc.com/articles/2001/05/22608.html (last accessed 1/30/10).

litigation risk. Often required when severance benefits are paid, a release can help insulate the employer from later litigation over an employee's separation.

Certain legal principles must be taken into consideration in the drafting of these releases. As a starting point, and given that claims of employment discrimination are among the most likely to occur, let's examine first the EEOC's position on this issue. In response to the current climate, the EEOC issues a new policy guidance document on July 15, 2009, titled *Understanding Waivers of Discrimination Claims in Employee Severance Agreements* (hereafter "*Waiver Guidance*").[34]

Within the *Waiver Guidance*, the EEOC first begins a basic framework, explaining that some distinctions do exist between releases for claims under the ADEA by virtue of the specific release requirements in the Older Workers Benefit Protection Act (OWBPA) and those that arise under other employment statutes like Title VII. The EEOC then summarizes its view of the general standard for release validity stating:

> A waiver in a severance agreement generally is valid when an employee **knowingly and voluntarily** consents to the waiver. The rules regarding whether a waiver is knowing and voluntary depend on the statute under which suit has been, or may be, brought. The rules for waivers under the Age Discrimination in Employment Act are defined by statute – the Older Workers Benefit Protection Act (OWBPA).[35] Under other laws, such as Title VII, the rules are derived from case law. In addition to being knowingly and voluntarily signed, a valid agreement also must: (1) offer some sort of consideration, such as additional compensation, in exchange for the employee's waiver of the right to sue; (2) not require the employee to waive future rights; and (3) comply with applicable state and federal laws.[36]

Waiver Guidance at Section III (bold and footnotes in original).

Addressing first the issue of waivers under Title VII, the ADA and EPA, the EEOC explains what constitutes a "knowing and voluntary" waiver, listing the common factors court will consider under a totality of circumstances test to determine if a release is valid. As explained by the EEOC:

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[34] Available at http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html (last accessed 1/27/10).

[35] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

[36] State law typically governs questions regarding the proper construction of a severance agreement and the validity of waivers. For example, under the Minnesota Age Discrimination Act, a release must give the employee fifteen days after signing the agreement to change his mind and revoke his signature. Under California law, a waiver cannot release unknown claims unless the waiver agreement contains certain language specifically providing for such a waiver. Other states may impose additional requirements to obtain an effective waiver of certain state law claims. To determine whether a severance agreement is enforceable in the state in which you work, contact your state labor law department or consult with an attorney for legal advice.

In addition to waiver issues, workforce reductions or other substantial business changes often trigger additional legal obligations arising, for example, under the Worker Adjustment and Retraining Notification Act (WARN), the National Labor Relations Act (NLRA), the Employee Retirement Income Security Act (ERISA), relevant benefit plans, and labor contracts.

> To determine whether an employee knowingly and voluntarily waived his discrimination claims, some courts rely on traditional contract principles and focus primarily on whether the language in the waiver is clear.[37] Most courts, however, look beyond the contract language and consider all relevant factors – or the totality of the circumstances -- to determine whether the employee knowingly and voluntarily waived the right to sue.[38] These courts consider the following circumstances and conditions under which the waiver was signed:
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> - whether it was written in a manner that was clear and specific enough for the employee to understand based on his education and business experience;
> - whether it was induced by fraud, duress, undue influence, or other improper conduct by the employer;
> - whether the employee had enough time to read and think about the advantages and disadvantages of the agreement before signing it;
> - whether the employee consulted with an attorney or was encouraged or discouraged by the employer from doing so;[39]
> - whether the employee had any input in negotiating the terms of the agreement; and
> - whether the employer offered the employee consideration (e.g., severance pay, additional benefits) that exceeded what the employee already was entitled to by law or contract and the employee accepted the offered consideration.

Waiver Guidance at Section III (footnotes in original).

The *Waiver Guidance* then provides some examples from case law, one where the waiver was determined valid and one on which it was not.[40] The non-ADEA portion of the discussion

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[37] *See e.g., Morrison v. Circuit City Stores*, 317 F.3d 646 (6th Cir. 2003)("[i]n reviewing whether a waiver of prospective claims was valid, we apply ordinary contract principles"); *Warnebold v. Union Pac. R.R.*, 963 F.2d 222 (8th Cir. 1992)(court applied "ordinary contract principles" in determining whether there was a knowing and voluntary waiver of claims).

[38] *See e.g., Wastak v. Lehigh Health Network*, 342 F.3d 281 (3rd Cir. 2003)(courts must inquire into the totality of circumstances "to determine whether the execution of a waiver was 'knowing and voluntary'"); *Smith v. Amedisys*, Inc., 298 F.3d 434 (5th Cir. 2002)("[i]n determining whether a release was knowingly and voluntarily executed, this court has adopted a 'totality of the circumstances' approach"). Even courts that apply ordinary contract principles generally consider the circumstances surrounding the execution of the release, the clarity of the release, and whether the employee was represented by or discouraged from consulting an attorney. *See e.g., Whitmire v. WAY FM Group, Inc.*, 2008 WL 5158186 (M.D. Tenn. Dec. 8, 2008)(in holding that a waiver was knowing and voluntary, a court noted that the employee was given at least 21 days to consider the agreement, asked questions that resulted in a revised agreement, sought advice from an attorney but disregarded it and decided to sign the agreement, had seven days after she signed the agreement to revoke it and chose not to do so, and admitted she understood what she was signing).

[39] *See e.g., Pilon v. University of Minn.*, 710 F.2d 466 (8th Cir. 1983)(where the employee was represented by counsel, the release language was clear, and there was no claim of fraud or duress, the release was upheld). Waivers that are executed by employees who were not advised to seek legal advice are more closely scrutinized than agreements entered into by employees after consultation with an attorney.

[40] *See Waiver Guidance* at Examples 3 and 4 citing to *Hampton v. Ford Motor Company*, 561 F.3d 709 (7th Cir. 2009)(waiver upheld) and *Torrez v. Public Service Company of New Mexico, Inc.*, 908 F.2d 687 (10th Cir. 1990)(waiver invalid) but noting *Cirillo v. Arco Chem. Co.*, 862 F.2d 448 (3rd Cir. 1988)(employee's waiver was

also addresses the EEOC position on an employer's inability to interfere with the filing of a charge as a part of a release[41] and the possible obligation to "tender back" severance pay for a non-ADEA claim if a claim is brought. On the charge issue, the EEOC is clear in its view that although a severance agreement may use broad language to describe the claims that the employee is releasing, the employee can still file a charge with the EEOC if the employee believes that he or she was discriminated against during employment or wrongfully terminated. The EEOC states that no agreement between an employee and the employer can limit the employee's right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA, and that any provision in a waiver that attempts to waive these rights is invalid and unenforceable.[42]

On the "tender-back" issue, the EEOC explained that "[u]nder the ADEA, an employee is not required to return severance pay -- or other consideration received for signing the waiver -- before bringing an age discrimination claim."[43] Under Title VII, the ADA, or the EPA, however, the EEOC views the law as less clear, noting that some courts have concluded "that the validity of the waiver cannot be challenged unless the employee returns the consideration, while other courts apply the ADEA's "no tender back" rule to claims brought under Title VII and other discrimination statutes and allow employees to proceed with their claims without first returning the consideration."[44] The EEOC also notes that courts may reduce monetary awards in subsequent litigation based on consideration already received.[45]

The EEOC next reviewed the minimum statutory elements required for a valid release of claims under the ADEA. Unlike other discrimination claims where the validity of such releases has largely been determined by courts, ADEA claims by statute have very specific requirements for a release of ADEA claims to be valid. Under 29 U.S.C. Section 626(f), it is provided:

(f) Waiver

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

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knowing and voluntary where he was advised of equal employment laws, encouraged to consult employee relations representative, and release specifically mentioned Title VII).

[41] *See Waiver Guidance* at Section III, Question 3 citing its *Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes* (April 1997)(available at http://www.eeoc.gov/policy/docs/waiver.html) and 29 C.F.R. § 1625.22(i)(2).

[42] *Id*.

[43] *See Waiver Guidance* at Section III, Question 5 citing *Questions and Answers: Final Regulation on "Tender Back" and Related Issues Concerning ADEA Waivers*, available at www.eeoc.gov/policy/regs/tenderback-qanda.html and also *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) (holding that because the release failed to comply with OWBPA, it could not bar the employee's ADEA claim even if the employee retained the monies she received in exchange for the release).

[44] *See Waiver Guidance* at Section III, Question 5 citing *Blackwell v. Cole Taylor Bank*, 152 F. 3rd 666 (7th Cir. 1998) (noting that employees bringing non-age claims might still have to "tender back" their consideration) and *Hampton v. Ford Motor Co.*., 561 F.3d 709 (7th Cir. 2009)(noting that because no exception to the "tender back" rule exists in this Title VII case, employee must return – or least offer to return—the consideration she received before challenging the validity of the waiver); *but see Rangel v. El Paso Natural Gas Co.*, (holding that because the primary purpose of the ADEA and Title VII is to make it easier for an employee to challenge discrimination, employees bringing claims under Title VII should not have to return their severance pay before filing suit).

[45] *See Waiver Guidance* at Section III, Question 5.

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;[46]

(B) the waiver specifically refers to rights or claims arising under this chapter[47];

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;[48]

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;[49]

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

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[46] On this point, the *Waiver Guidance* at footnote 17 cites to *Thormforde v. International Business Machines Corp.*, 406 F.3d 500 (8th Cir. 1999) as an example of a release not upheld on this point and also *Syverson v. IBM*, 472 F. 3rd 1072 (9th Cir. 2007) (court adopted the reasoning in *Thormforde* when finding the same waiver used under different circumstances invalid).

[47] EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name. *See* 29 C.F.R. §1625.22(a)(6).

[48] On this point, the *Waiver Guidance* at footnote 18 cites to *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111 (1st Cir. 1998) (to *"advise"* employees to consult an attorney means affirmatively to *"caution," "warn,"* or *"recommend").*

[49] The *Waiver Guidance* notes that the EEOC "regulations clarify that the 21-day consideration period runs from the date of the employer's final offer", and also that if "material changes to the final offer are made, the 21-day period starts over." *See Waiver Guidance* at Section IV, Question 6 and footnote 19. Moreover, the EEOC, citing 29 C.F.R. §1625.22 (e)(6), states that "[a]n agreement can be signed prior to the 21- (or 45-) day time period as long as employee's decision is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21- or 45-day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. *Id*. Courts have not always taken so stringent an approach. *See, e.g., Gomez v. AlliedSignal, Inc.*, 172 F.3d 62 (10th Cir. 1999), *appeal after remand*, 229 F.3d 1163, 2000 WL 1227761 (10th Cir. 2000) (employee not entitled to OWBPA's 21-day evaluation period when he agrees to settle federal age discrimination claims during pretrial conference supervised by judge).

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title *[section 4 or 15]* may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

So what happens if you do not meet the OWBPA requirements? The *Waiver Guidance* takes the position that the release is invalid and unenforceable, but goes on to explain further that several courts have held that violation of OWBPA does not itself create a separate cause of action.[50] The *Waiver Guidance* also points out other reasons a release may be invalid, such as

[50] *See Waiver Guidance* at Section IV, Question 6 and footnote 21 citing "*EEOC v. Sara Lee Corp*., 883 F. Supp. 211 (N.D. Ill. 1995); *Williams v. General Motors Corp*., 901 F. Supp. 252 (E.D. Mich. 1995); *but see Commonwealth of Massachusetts v. Bull HN Information Sys. Inc.*, 16 F. Supp. 2d 90 (D. Mass. 1998)(holding that an invalid waiver can be an independent cause of action under the ADEA); in a subsequent proceeding, *Commonwealth of Massachusetts v. Bull HN Information Sys. Inc.*, 143 F. Supp. 2d 134 (D. Mass. 2001), the court clarified that although employees can bring a suit challenging a violation of OWBPA requirements, they cannot recover damages absent proof of age discrimination."

fraud, duress, or mutual mistake.[51] The *Waiver Guidance* concludes with both a checklist for employees, titled *What to Do When Your Employer Offers You a Severance Agreement* and a sample waiver form.[52]

So what's missing from this discussion? As helpful as this *Waiver Guidance* may seem, readers should remember that it is limited in scope, covering only those laws the EEOC is charged with enforcing (Title VII, ADEA, ADA, EPA, etc…). A key point to remember is that a myriad of other employment laws exist (both federal and state), and the requirements can differ.

One such example is claims under the Fair Labor Standards Act. Unlike the case law on Title VII, FLSA claims are not always deemed to be capable of waiver without DOL or court supervision.[53] The Family and Medical Leave Act case law on releases was initially mixed[54], but the 2009 regulatory amendments to the FMLA, effective on January 16, 2009, clarified this issue and specifically allows for the release of retrospective FMLA claims.[55] For those employers subject to ERISA, ERISA claims can be waived, but care must be taken to do so correctly. At least one court has held that ERISA preempts state law on the issue of release validity.[56] Employers must also be cautious not to inadvertently create an ERISA plan when structuring a severance program unless one is desired.[57] Finally, some state laws may have their own

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[51] *See Waiver Guidance* at Section IV, Question 7.

[52] *See Waiver Guidance* at Appendices A and B.

[53] Historically, disputes over FLSA coverage may not be compromised without Department of Labor involvement. *See, e.g., D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945). *Cf., Allen v. SunTrust Banks, Inc.*, 549 F. Supp. 2d 1379 (N.D. Ga. 2008) (temporary restraining order prohibiting employer from requiring employees to waive FLSA claims as condition of receiving severance benefits package offered in connection with RIF); *but see Martinez v. Bohls Bearing Equip. Co.*, 361 F.Supp.2d 608 (W.D.Tex.2005) (reviewed text and legislative history of the FLSA, as well as various precedents regarding settlements of FLSA claims, and concluded that private release signed by an employee waiving his rights under the FLSA was valid and enforceable). Bona fide disputes over hours may be compromised. *See, e.g., Strand v. Garden Valley Tel. Co.*, 51 F. Supp. 898 (D. Minn. 1943). *See also, Coventry v. U.S. Steel Corp*., 856 F.2d 514, 521-22 (3rd Cir. 1988) (discussing FLSA exception to general recognition of waivers and comparing it with employee's ability to waive rights under ADEA). Also, this principle on waivers has been called into question in recent years. *See, e.g., Bonetti v. Embarq Management Company*, 2009 WL 2371407 (M.D.Fla. 2009).

[54] *Compare Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005) (concluding that waiver of FMLA claims was prohibited without DOL or court approval.) with *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003) (concluding that retroactive waivers of FMLA waivers were enforceable without court or DOL approval).

[55] *See* 29 C.F.R. §825.220.

[56] *See, e.g., Tobin v. Ravenswood Aluminum Corp.*, 838 F. Supp. 262 (S.D. W. Va. 1993)(ERISA preempts state contract law with respect to a release obtained in exchange for severance benefits); b*ut see*, *Lynn v. CSX Transp., Inc.*, 84 F.3rd 970 (7th Cir. 1996) (ERISA's non-alienation provisions allowed employee to bring statutory claim that his pension was improperly calculated under terms of employer's retirement plan despite his having signed form release at termination pledging not to sue employer).

[57] *Compare Kolkowski v. Goodrich Corp.*, 448 F.3d 843 (6th Cir. 2006) (severance plan can be subject to ERISA if the employer has discretion over the distribution of benefits, and there are ongoing demands on an employer's assets) and *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72 (2d Cir. 1996)(arrangement that required managerial discretion and separate analysis of certain criteria to determine whether an employee was involuntarily terminated, and thus qualified for the severance benefits, constituted an ERISA plan) with *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (severance arrangement that only requires a "one-time lump sum payment triggered by a single event" (such as RIF) does not create an ongoing administrative scheme) and *James v. Fleet/Norstar Financial* Group, Inc., 992 F.2d 463 (2d Cir. 1993) (employer's decision to give employees sixty days additional pay following their last day of work if such employees stayed on the job until an internal restructuring was completed was not an ERISA plan). *See also*, Signorille, Mary Ellen, *Responding to Economic Crises: Plant Closings, RIFs, Layoffs And Bankruptcy*, ABA Section of Labor and Employment Law 2nd Annual CLE Conference (9/12/08), available at http://www.abanet.org/labor/lel-annualcle/08/materials/start.htm (last accessed 1/30/10).

restrictions.[58]

G. COBRA Subsidy

Mention must at least be made of the COBRA subsidy enacted last year and extended through February as questions will undoubtedly arise in any layoff. The American Recovery and Reinvestment Act of 2009 (ARRA),[59] as amended by the Department of Defense Appropriations Act for 2010[60] provides for premium reductions for health benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Under these laws, eligible individuals pay only 35 percent of their COBRA premiums and the remaining 65 percent is reimbursed to the coverage provider through a tax credit. To qualify, individuals must experience a COBRA qualifying event that is due to the involuntary termination of a covered employee's employment. The involuntary termination must occur during the period that began September 1, 2008 and will end on February 28, 2010. The premium reduction applies to periods of health coverage that began on or after February 17, 2009 and lasts for up to 15 months.

Both the IRS and the Department of Labor have been active in publishing notices and materials related to the subsidy, among them an IRS Notice on the details,[61] IRS Q&A on the subsidy,[62] DOL Model Notices,[63] and various fact sheets on the subsidy.[64] Institutions should be familiar with the new subsidy.

II. Unintended Fall-out during Difficult Times

Even at the best of times, the Fair Labor Standards Act (FLSA) is tedious and difficult. In the context of an uncertain economy, an employer's desire to control costs, and an employee's inevitable wish to remain employed, an interesting dynamic can develop. The employer is doing more with less, additional responsibilities fall to those who remain, and in the midst of all of this, technology has enabled the 24/7 workplace. In this section, we will address the FLSA implications to college and university furlough plans and the litigation trend over non-compensated work after hours using technology like cell phones and PDAs. We will close with a discussion of the Employee Free Choice Act because fears over job security can often lead to an organizing effort.

A. Furloughs and the FLSA

On the issue of furloughs, the Department of Labor (DOL) has issued a set of FAQs designed to assist employers in properly applying its regulations.[65] Furloughs for non-exempt workers and in the absence of state law or collective bargaining restrictions are generally not problematic from a FLSA standpoint. Employers simply must understand the distinctions

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[58] *See, e.g.*, Section 443.041(1), Florida Statutes (waiver of unemployment rights void).
[59] Pub.L. 111-5 (2/17/09).
[60] Pub.L. 111-118 (12/19/09).
[61] *See* IRS Notice 2009-27, available at http://www.irs.gov/pub/irs-drop/n-09-27.pdf (last accessed 2/1/10).
[62] *See* COBRA: Questions and Answers for Employers, available at http://www.irs.gov/newsroom/article/0,,id=204708,00.html (last accessed 2/1/10).
[63] Available at http://www.dol.gov/ebsa/COBRAmodelnotice.html (last accessed 2/1/10).
[64] *See, generally*, http://www.dol.gov/ebsa/cobra.html (last accessed 2/1/10).
[65] *See Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues* (July 2009), available at http://www.dol.gov/WHD/flsa/FurloughFAQ.pdf (last accessed 1/30/10).

between "engaged to wait" and "waiting to be engaged" and not overly restrict the furlough time of these employees so as to convert non-work time into compensable time.[66]

It is slightly more difficult in the area of exempt of exempt employees paid on a "salaried basis". DOL regulations preclude a variety of deductions from an employee's predetermined pay.[67] Within that basic rubric, and again assuming no state law or collective bargaining restrictions, the specific rules relating to furlough differ depending on the employer's status as public or private. Moreover, different rules apply to the classes of lawyers, doctors and teachers, which are not subject to the salary basis test.

For those subject to the "salaried basis" test, the general rule is that the employee is required to pay the employee the full predetermined salary for any week in which the employee performs any work without regard to the number of days or hours. This makes furloughs particularly difficult to manage give the ability of exempt employees to continue working remotely through computer access and PDAs.[68] The employer is not obligated to pay for work weeks when no work is performed. This general rule is also different if the employer is a public employer. In that case, a special regulation under 29 C.F.R. §541.710 allows for pay deductions due to a budget-required furlough, but it disqualifies the employee from the overtime exemption for that week. The employer in theory can also reduce pay. For hourly staff, and in the absence of state or federal minimum wage law as or other restrictions, this is typically not legally problematic. For salaried employees, DOL takes a more restrictive view, permitting such changes when not based on quantity or quality of work but only where bona fide and not used a device to evade the FLSA.[69]

Teachers, lawyers and doctors fall into a slightly different class in that these occupations do not have a "salary basis" requirement. To qualify as a teacher who is exempt from receiving overtime pay, DOL simply requires simply that an employee have "teaching" as a primary job duty and that the employee be employed by an educational establishment.[70] Deductions from salary will not disqualify these classes from the exemption. For those considering furlough plans as a cost-cutting measure, familiarity with these limitations is crucial for compliance.

B. Technology and the FLSA

Of greater concern than furloughs are the dynamics created by institutions implementing layoffs and the stress and fear this can create in employees. Not surprisingly, those that remain may wish to "prove their worth", hoping to avoid being selected for reduction. This diligence can lead to the "curse of the overly-dedicated", a dynamic already present at many institutions

[66] *Id.* at Question 8.
[67] *See DOL Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA)* (July 2008), available at http://www.dol.gov/whd/regs/compliance/fairpay/fs17g_salary.pdf (last accessed 1/30/10).
[68] *See, e.g.*, Swanton, Mary, *Time Out: How should in-house attorneys handle the proliferation of furlough programs*, Inside Counsel (August 2009), available at http://www.insidecounsel.com/Issues/2009/August-2009/Pages/Time-Out.aspx (last accessed 2/1/10).
[69] *See Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues* (July 2009) at Question 7, available at http://www.dol.gov/WHD/flsa/FurloughFAQ.pdf (last accessed 1/30/10).
[70] *See* 29 C.F.R. § 541.303. It is not always a given that an individual with an instructor title will qualify. *See, e.g.*, *Astor v. U.S.*, 79 Fed. Cl. 303 (2007)(firearms instructors not entitled to exemption both because not employed by educational establishment and because "teaching" not considered primary duty).

simply by virtue of the industry and type of people who gravitate toward education. Risks come with this phenomenon.

A 2008 study by the Pew Research Center's Internet and American Life Project, *Networked Workers*[71], shares some interesting statistics on the use of technology by employees. According to the Pew Report, individuals considered to be "Networked Workers" (i.e., those that use the internet or email at work):

- 93% own a cell phone (compared with 78% of all American adults)
- 85% own a desktop computer (compared with 65% of all adults)
- 61% own a laptop (compared with 39% of all adults)
- 27% own an PDA (compared with 13% of all adults)

From this, the Pew Report also states that 45% of employed respondents in the survey sample reported at least some work from home. While the number that work at home daily or almost every day was only 18%, the percentage of employed Americans working from home as often as a few times per month was 37%. Not surprisingly, for "Networked Workers" had a much higher rate of reported work, with 56% reporting some at-home work and 20% working from home daily or almost every day.

The Pew Report also examined result from those the study labeled as "Wired and Ready Workers", with the term referring to the "96% of employed adults who are in some way making use of new technologies—either by going online, using email, or owning a cell phone."[72] In some respects, these results are positive, with 80% saying these technologies have improved their ability to do their job, 73% stating these technologies have improved their ability to share ideas with co-workers, and 58% saying these tools have allowed them more flexibility in the hours they work.[73] It was not all good news though. The Wired and Ready Workers also reported these technologies increase demands that they work more hours (46%), increase the level of stress (49%), and make it harder to disconnect from their work at home and on the week-ends (49%).[74] Indeed, one in five email users and half of the PDA owners say they are required to read and respond to work-related emails when not at work.[75]

So what does this have to with employment law? No one will really dispute that technology is a marvel that can greatly improve efficiency and productivity. It is not without challenges, however, and exposure to various forms of liability associated with the use of technology continues to surface. With cellular phones, for example, one might have thought that the only issues facing colleges and universities were the risks associated with cell phone taxation[76] and the possible liability associated when employees text or talk on the phone and

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[71] Available at http://www.pewinternet.org/Reports/2008/Networked-Workers.aspx (last accessed 1/30/10).
[72] *Id*. at p.iii.
[73] *Id*.
[74] *Id*.
[75] *Id*. at p.v.
[76] By way of example, see the Baylor University web page (http://www.baylor.edu/tax/index.php?id=38399) detailing tax consequences of cell phone usage and its approach to compliance. As of this writing, NACUBO reported on January 15, 2010, that the IRS has dropped its plan, announced in June 2009 in IRS Notice 2009-46 (available at http://www.irs.gov/irb/2009-23_IRB/ar07.html), to issue simplifying regulations for cell phone accounting in anticipation of possible passage of H.R. 690/S. 144, titled the "Modernize Our Bookkeeping in the Law for Employees (MOBILE) Cell Phone Act of 2009". The bill is available at http://thomas.loc.gov/cgi-

drive.[77] The most recent iteration of possible liability, wage and hour consequences of off-duty work performed on employer-issued electronic devices, is now the latest round. While reports are just beginning to surface, the issue is significant and one employers need to take seriously.

Recent media reports have chronicled the filing of several lawsuits by employees seeking compensation for time spent away from work performing work-related functions on employer-provided equipment.[78] Indeed, the legal community was abuzz when the suit against T-Mobile was filed last year.[79] The suit, styled *Agui, et al v. T-Mobile, et al*[80], alleges that non-exempt retail sales associates and supervisors were issued T-Mobile smartphones and were required to review and respond to numerous T-Mobile-related e-mails and text messages both day and night, whether or not they were logged into T-Mobile's computer-based timekeeping system.[81] In another suit filed in March 2009, a former CB Richard Ellis Group Inc. maintenance worker seeks pay for time spent after hours receiving and responding to messages on a work-issued cell phone.[82]

It can't really be said that this issue should be a complete surprise. The issue surfaced in 2007 in an article published in the New York Law Journal.[83] In 2008, articles in the New York Times Media Talk and USA Today at least hinted at the issue when reporting on a dispute between ABC and several of its news writers over Blackberries and time spent after normal

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bin/query/z?c111:H.R.690.IH (last accessed 1/30/10): For additional detail on this issue, see NACUBO's comments in response to the IRS Notice, available at http://www.nacubo.org/Documents/BusinessPolicyAreas/NACUBOCommentletter2009-46.pdf (last accessed 1/30/10).

[77] *See, e.g.* Bekish, Ashlee and Nolan, Dayle,, *Employer Liability for Employee Cell Phone Use*, available at http://www.martindale.com/personal-injury-law/article_Larkin-Hoffman-Daly-Lindgren-Ltd_892478.htm (last accessed 1/30/10) and Corporate Cell Phone Policies, posted online by *CellPhoneSafety.org*, a site created by the National Consumer Advocacy Commission and available at http://www.cellphonesafety.org/regulation/corporate.htm (last accessed 1/30/10),.

[78] *See, e.g.*, Sanserino, Michael, *Lawsuits Question After-Hours Demands of Email and Cellphones*, Wall Street Journal (8/10/09), available at http://online.wsj.com/article/SB124986371466018299.html (last accessed 1/30/10); *Lawsuit: Overtime pay for after-hours cell calls, emails*, Oregon Business Report (8/13/09), available at http://oregonbusinessreport.com/2009/08/lawsuit-overtime-pay-for-after-hours-cell-calls-emails/ (last accessed 1/30/10).

[79] *See* Baldas, Tresa *T-Mobile Suit Puts Legal Price on Wireless*, The National Law Journal (7/20/09), available at http://www.law.com/jsp/article.jsp?id=1202432364897&rss=newswire last accessed 1/30/10); Bernstein, Steven, *PDA After Hours*, Fisher & Phillips Labor Letter (December 2009), available at http://www.martindale.com/labor-employment-law/article_Fisher-Phillips-LLP_862478.htm (last accessed 1/30/10); *Hidden Costs: Non-Exempt Employees' Class Action Complaints for Time Spent on Work-Related Messages*, Jackson Lewis (10/20/09), available at http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1884 (last accessed 1/30/10).

[80] Case No. 1:2009 cv 02955 (E.D.N.Y. July 10, 2009), available at http://www.wcsr.com/resources/pdfs/flsa072109.pdf (last accessed 1/30/10).

[81] Among the allegations in the Agui Complaint are claims that these non-exempt employees were required to perform work in advance of "clocking in" to the time keeping system, working after their shift after logging out, given company Blackberries or other smart devices and required to respond to T-Mobile related emails and text messages at all time, whether clocked in or not, take and place calls, and participate in business conference calls outside their normal 40-hour week without pay. Agui Complaint at ¶ ¶ 29-30. None of this extra work when not clocked into the T-Mobile time system was paid, and the complaint alleges that when the plaintiffs complained to store managers, they were told nothing could be done and they would just have to accept working the extra hours as part of T-Mobile's standard business practices. Agui Complaint at ¶ 31.

[82] *See John Rulli v. CB Richard Ellis Group*, Case No. 2:2009 cv 00289 (E.D. Wis., Mar. 13, 2009).

[83] *See* Schlossberg, Jeffrey M. and Malerba, Kimberly B., *Tech-Tock—Are employees who check devices off hours entitled to overtime pay?*, New York Law Journal (5/2107), available at http://online.wsj.com/public/resources/documents/TechTock.pdf?mod=WSJBlog (last accessed 1/30/10).

hours working. According to the reports, three writers refused to sign waivers indicating they would not be paid for after-hours work checking their Blackberries.[84] Media reports also suggested Verizon was sued on this same issue.[85]

So what happens from here? First, to the extent litigation is brought where the employer claims that the employee is exempt from overtime requirements, it stops there if the employer is correct.[86] Not always an easy task since the burden of proving exempt status falls to the employer and misclassification of workers as exempt can easily happen.[87]

If the employees are not exempt, employers must realize the standard for determine what is compensable time is broad. The determination of what is compensable time is under the liberal standard of “suffer or permit to work,” with the DOL regulations cautioning that "[w]ork not requested but suffered or permitted is work time."[88] As a general rule, the employer must know or have reason to believe that an individual is performing work on its behalf, or the work performed is not within the purview of an employer/employee relationship.[89] The employer does carry a duty of reasonable inquiry, though, given the conditions prevailing in its business, to determine if work is performed on its behalf.[90]

The two most likely defenses employer will raise will be an assertion that the work was *de minimis*, or alternatively, that “rounding” practices provide a defense. The *de minimis* defense developed under *Anderson v. Mt. Clemens Pottery Co.*[91], and basically provides that *de minimis* time worked beyond an employee’s regular schedule can be disregarded for purposes of pay obligations to the employee. If only it were so simple. Litigation over what constitutes *de minimis* time is contentious and courts have not always agreed.[92] “In recording working time under the Act, insubstantial or insignificant time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be

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[84] *See* Stelter, Brian, *ABC and Writers Skirmish Over After-Hours E-Mail*, The New York Time (6/23/08), available at http://www.nytimes.com/2008/06/23/business/media/23abc.html (last accessed 1/30/10); Wulfhorst, Ellen, *BlackBerries, blogs create overtime work disputes*, USA Today (6/25/08), available at http://www.usatoday.com/tech/products/2008-06-25-blackberry-blogs-overtime-pay_N.htm (last accessed 1/30/10).
[85] *See, e.g.*, Buckley & Klein, *BlackBerry Overtime* (2/11/09), available at http://www.overtimelawyerblog.com/2009/02/blackberry_overtime.html (last accessed 1/30/10); Goodman, Michelle, *Overtime Pay for E-mails? Debate Grows*, ABC News Column (8/20/09), available at http://abcnews.go.com/Business/overtime-pay-mails-lawsuits-continue/story?id=8366893&page=3 (last accessed 1/30/10).
[86] Exempt status is important because the FLSA’s rules for minimum wage and overtime do not apply to “any employee employed in a bona fide executive, administrative, or professional capacity.” *See* 29 U.S.C. § 213(a)(1). Each of these exemptions is dependent on an analysis of that employee’s actual role in the organization, not the title assigned to an employee. *See* 29 C.F.R. § 541.2.
[87] *See, e.g.*, Susan E. McPherson and Matthew D. Fridy, *Fair Pay Exemptions for You and Your Client*, 66 Ala. Law. 269 (2005).
[88] *See* 29 U.S.C. §203(g); 29 C.F.R. §785.11.
[89] *See, e.g.*, *Burry v. Nat'l Trailer Convoy, Inc.*, 338 F.2d 422 (6th Cir. 1964)(wife of employee permitted to work in terminal of company transporting house trailers and mobile homes when husband was absent from terminal office and trained by company was employee where company, with knowledge, permitted wife to work in terminal).
[90] *See, e.g.*, *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (5th Cir. 1969)(using standard of knew or had opportunity through reasonable diligence to acquire knowledge in determining employer liable for illegally employing minors).
[91] 328 U.S. 680 (1946).
[92] *Compare Carlsen v. United States*, 521 F. 3rd 1371 (Fed.Cir.2008)(suggesting 10 minutes a *de minimis* cutoff) with *Rutti v. LoJack Corp.*, 578 F.3d 1084 (9th Cir. 2009)(using three-part test to determine *de minimis*).

disregarded."[93] Note that the rule applies only when uncertain and indefinite periods of time of a few seconds or minutes duration are involved, and where the failure to count such time is due to considerations justified by industry realities.[94] An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time, or any practically ascertainable period of time the employee is regularly required to spend on duties he or she is assigned.[95]

Rounding may also be a defense. The practice of rounding, codified in DOL regulations, permits employers to compute work time by recording the employee's starting and ending time to the nearest quarter hour, so long as over time the practice will not fail to properly compensate the employee.[96] What this means is that it all must more or less average out; a rounding practice that only rounds in favor of the employer is not permitted.

In light of this development, managers and supervisors should, in the first instance, think hard about who are given company phones and PDAs. If it is a non-exempt employee, ask yourself why you are giving the device other than to have the employee work when away from the work site. If you conclude that legitimate reasons exist to issue the device, review your policies. Most employers have a policy prohibiting employees from working extra without proper authorization, but are you enforcing it? Receiving emails throughout the week-end from a non-exempt employee is a sign the employee is working and could be sufficient to put the employer on notice. Consider also whether you have an adequate and effectively communicated method for employees to report additional work after hours. This is sometimes problematic for employees who use an electronic time recording systems that an employee can access only while physically at work.

By the way, a word about such time-recording systems: to the extent they use an "auto-deduct" feature to deduct meal periods, that is now another new wave of FLSA litigation beginning to make the rounds.[97] Also of concern is recent litigation working its way through the court over the status of certain undergraduate students as "employees" subject to the FLSA while employed as Conference Assistants at Illinois State University.[98]

C. Employee Free Choice Act of 2009

The Employee Free Choice Act ("EFCA") H.R. 1409, S. 560[99] was first introduced in 2007.[100] It was not passed at that time, but was re-introduced in 2009, and remains a top priority for organized labor. In summary, the bill would amend the National Labor Relations Act (the "Act") as follows:

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[93] *See* 29 C.F.R. § 785.47.
[94] *Id*
[95] *Id*.
[96] *See* 29 C.F.R. §§ 785.48.
[97] Smith, Allen, *Automatic Meal Break Deductions Targeted in Spate of Lawsuits*, Society of Human Resource Management (1/19/10), available at http://www.shrm.org/LegalIssues/FederalResources/Pages/Autodeducts.aspx (last accessed 1/31/10).
[98] *See North v. Board of Trustees of Illinois State University*, 2009 WL 3769907 (C.D.IL 2009)(denying motion to dismiss and allowing notice to possible class members).
[99] Available on THOMAS, the Library of Congress portal for legislative information, at http://thomas.loc.gov/
[100] The Employee Free Choice Act of 2007, H.R. 800, S. 1041(110th Congress). The 2007 version failed to pass when senators who oppose the bill voted against "cloture," preventing a vote on the bill.

- Section 2 would require the Board to certify a bargaining representative without directing an election if a majority of the bargaining unit employees have authorized designation of the representative (card-check) and no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit[101];

- Section 3 would establish special procedural requirements for reaching an initial collective bargaining agreement following certification or recognition, including the time period during which bargaining must commence[102] and optional mediation[103] and mandatory arbitration of initial contract disputes[104];

- Section 4 would revise enforcement requirements with respect to unfair labor practices during union organizing drives, particularly a preliminary investigation of an alleged unfair labor practice which may lead to proceedings for injunctive relief; and require that priority be given to a preliminary investigation of any charge that, while employees were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative until the first collective bargaining contract is entered into, an employer: (1) discharged or otherwise discriminated against an employee to encourage or discourage membership in the labor organization; (2) threatened to discharge or to otherwise discriminate against an employee in order to interfere with, restrain, or coerce employees in the exercise of guaranteed self-organization or collective bargaining rights; or (3) engaged in any other related unfair labor practice that significantly interferes with, restrains, or coerces employees in the exercise of such guaranteed rights; and

[101] Section 2 of H.R. 1409 would amend Section 9(c) of the NLRA to accomplish this, and also require that the Board develop guidelines and procedures for the designation by employees of a bargaining representative, including model collective bargaining authorization language that may be used for purposes of making the designations, and procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.

[102] Under Section 3 of H.R. 1409, Section 8 of the National Labor Relations Act would be amended by adding language requiring that whenever bargaining is for the purpose of establishing an initial agreement following certification or recognition, bargaining must start not later than 10 days (or within such further period as the parties agree upon) after receiving a written request for bargaining from the newly organized or certified representative. The parties must "meet and commence to bargain collectively" and "make every reasonable effort to conclude and sign a collective bargaining agreement."

[103] Section 8 of the National Labor Relations Act would be amended to provide that "[i]f after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement."

[104] Also under Section 3, if after the expiration of the 30-day period beginning when mediation is requested, or such additional period as the parties may agree upon, FMCS is not able to bring the parties to agreement by conciliation, FMCS will refer the dispute to an arbitration board (detailed to be determined by regulations). The arbitration panel shall render a decision settling the dispute, and such decision will be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties."

- Section 4 would also add to remedies for such violations including back pay plus liquidated damages; and additional civil penalties for certain willful repeat violations.[105]

By its terms, it seems simple, but the implications are significant. To say labor and management were polarized on this issue when the EFCA was first proposed is to put it mildly. At that time and still today, the AFL-CIO characterizes the EFCA as enabling "working people to bargain for better wages, benefits and working conditions by restoring workers' freedom to choose for themselves whether to join a union."[106] The passage of time between the initial effort to pass the EFCA in 2007 and its re-introduction in 2009 has only strengthened the resolve of the unions and garnered even stronger opposition from employers.

According to one recent report, AFL-CIO President Richard Trumka optimistically expects the EFCA to pass within the first few months of 2010.[107] Others are not so sure.[108] In 2009, reports emerged that a possible compromise was in the offing that would drop the card-check feature from the bill, leaving the other provisions.[109] Whether true or not, these statements likely prompted the U.S. Chamber, as part of its *Employee Free Choice Act Toolkit*[110], to publish *Beware of False Compromises on Card Check*[111] criticizing the purported compromises.

The more recent debate has focused not on possible compromise, but rather on the possibility that if the National Labor Relations Board becomes sufficiently pro-union (and especially if Craig Becker, an associate general counsel to both the Service Employees International Union (SEIU) and the AFL-CIO, is confirmed), some aspects of the EFCA may

[105] *See* Section 4 of H.R. 1409, available on THOMAS, the Library of Congress portal for legislative information, at http://thomas.loc.gov/ (last accessed 1/26/20).
[106] *See* http://www.aflcio.org/joinaunion/voiceatwork/efca/whatis.cfm (last accessed 1/26/10). For a more detailed look at the perceived failings of the current process and why the EFCA would effectuate the NLRA, see *The Facts—Union Representation and the NLRA* (December 2008), available at http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/efcareport_1208.pdf (last accessed 1/26/10). The opposing view is detailed in a new U.S. Chamber briefing book, *The Employee Free Choice Act—Piercing the Rhetoric* (2009), available at http://www.uschamber.com/publications/reports/0906efca.htm (last accessed 1/26/10).
[107] *See* Mooney, Kevin, *AFL-CIO's Trumka Says Employee Free Choice Act Will Pass This Year*, The American Spectator, AmSpecBlog (posted 1/13/10), available at http://spectator.org/blog/2010/01/13/afl-cios-trumka-says-employee/print (last accessed 1/26/10).
[108] *See, e.g.*, Schuman, Ilyse, *Union Leader Predicts EFCA Passage in First Quarter of 2010*, Washington DC Employment Law Update (Littler Mendelson, 1/12/10), available at http://www.dcemploymentlawupdate.com/2010/01/articles/efca-1/union-leader-predicts-efca-passage-in-first-quarter-of-2010/ (last accessed 1/26/10); *EFCA Update: Compromise, Delay and Uncertainty*, EFCA Newswire, Baker Hostetler (9/23/09), available at http://www.efcanewswire.com/component/content/article/21-efca-update-compromise-delay-and-uncertainty (last accessed 1/26/10);
[109] *See, e.g.*, HR Hero Alerts , *Specter Reveals Possible EFCA Compromise*, The Employment Law Post (9/16/09), available at http://employmentlawpost.com/hrnews/2009/09/16/specter-reveals-possible-efca-compromise/ (last accessed 1/26/10); Greenhouse, Steve, *Democrats Drop Key Part of Bill to Assist Unions*, New York Times (7/16/09), http://www.nytimes.com/2009/07/17/business/17union.html?_r=2 (last accessed 1/26/10); Wolgemuth, Liz, *Employee Free Choice Without Card Check: "Card Check Lite?"*, U.S. News & World report (*The Inside Job* column) (7/17/09), available at http://www.usnews.com/money/blogs/the-inside-job/2009/07/17/employee-free-choice-without-card-check-card-check-lite-.html (last accessed 1/26/10).
[110] Available at http://www.uschamber.com/chambers/efca_gr_toolkit.htm (last accessed 1/26/10).
[111] Available at http://www.uschamber.com/wfi/beware.htm (last accessed 1/26/10).

occur regardless of the bill's passage.[112] Specifically, and likely in part as a result of comments by William Gould, a former chair of the Board[113], the latest commentators are focusing on the possibility that the Board, through rule-making and its administrative authority, could administratively to shorten the time period for processing representation elections, broaden the application of *Gissel* orders[114], try to impose additional penalties upon employers for unfair labor practices, and try to expedite bargaining through its interpretation of the duty to bargain in good faith.[115]

That may not be all. Labor and management alike are also watching for the outcome of a new law in Oregon that would allow employees to opt out of certain mandatory meetings, including ones about unions.[116] The new *Worker Freedom Act* has already been challenged in court.[117] No doubt more will come in the months ahead on this important issue.

Conclusion

A down economy can cause institutions to re-think and re-focus priorities in the face of shrinking resources. These efforts can implicate the existing framework of laws institutions must navigate through to the end. Caution and diligence in both current compliance and in adapting to new and emerging liability theories is essential to success.

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[112] *See, e.g.*, Bogardus , Kevin, *Nominee to Labor board heats up card-check fight*, The Hill (1/25/10)available at http://thehill.com/business-a-lobbying/77909-labor-board-nominee-heats-up-card-check-fight , last accessed 1/26/10).

[113] *See, e.g.*, Schoeff, Jr., Mark, *NLRB Decisions Could Make Card Check a Reality*, Workforce Management Online (July 2009), available at http://www.workforce.com/section/03/feature/26/52/97/265299.html (last accessed 1/26/10).

[114] Under *NLRB v. Gissel Packing Co.* 395 U.S. 575 (1969), the Board can impose a duty to bargain on an employer despite a union loss in a Board certified election. The Board created this remedy to address situations where the union has received a majority of valid authorization cards, and the employer's unfair labor practices are so pervasive that there is little or no possibility of holding a fair election at any point in the immediate future.

[115] *See, e.g.*, Spencer, Glenn, *Two Tracks for EFCA in 2010*, The Metropolitan Corporate Counsel (Hot Issues Alert, December 2009), available at http://www.metrocorpcounsel.com/pdf/2009/December/13.pdf (last accessed 1/26/10); *EFCA Update: Compromise, Delay and Uncertainty*, EFCA Newswire, Baker Hostetler (9/23/09), available at http://www.efcanewswire.com/component/content/article/21-efca-update-compromise-delay-and-uncertainty (last accessed 1/26/10); U.S. Chamber Letter to the House and Senate Committees on Health, Education, Labor and Pensions (7/24/09, in opposition to Becker, available at http://www.uschamber.com/NR/rdonlyres/ettxevxhnekd3wkr3cqekv7c6frknxbzziu52m3jmw74itsnlttljywtuk4qflagvhz2ij4l2mh3fsozgka3xz44dzc/090724_becker.pdf (last accessed 1/26/10); Miklave, Matthew T., *Employee Free Choice Act: Reexamining Duty to Bargain*, EpsteinBeckerGreen (5/8/09), available at http://www.ebglaw.com/showArticle.aspx?Show=10885 (last accessed 1/26/10).

[116] *See, e.g.*, O'Brien, Michael, *Gagging Employers*, Human Resource Executive Online (1/21/01), available at http://www.hreonline.com/HRE/story.jsp?storyId=325172322&topic=Main (last accessed 1/26/10)

[117] *See, e.g.*, *U.S. Chamber Challenges Pro-Union Oregon Law Limiting Employers' Free Speech Rights* (12/22/09), available at http://www.uschamber.com/nclc/091222_pr.htm (last accessed 1/22/10).