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Employment Actions and RIFs in the
Midst of the State Budget Crisis

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Community College Employment Contracts and Severance Agreements

» Applicability:

- › The law applies to employment contracts and severance agreements which are entered into, amended, renewed, or extended after September 22, 2015 (the effective date of the law).

» The Limitations on Employment Contracts

- › Severance payable under the contract may not exceed one (1) year's worth of salary and applicable benefits;
- › A contract with a determinative start and end date may not exceed four (4) years; and
- › Employment contracts may no longer contain automatic rollover clauses.

Community College Employment Contracts and Severance Agreements

» New Notice Requirements

- › Approval of an employment contract, contract renewals, or contract extensions must be made during an open meeting of a board of trustees.
- › Public notice must be given of an employment contract entered into, amended, renewed, or extended after September 22, 2015. The form of the public notice is to be determined by the Illinois Community College Board (ICCB), but must at least include:
 - A complete description of the action to be taken; and
 - The contract itself, including all addendums or any other documents that change an employee's initial contract.
- › The ICCB has yet to release any guidance on what the notice is to look like.

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» Relationship to OMA

- › Consider the agenda wording to comply with the notice requirements.
 - “Approval of extension of Provost Mike Smith’s employment contract for a one year period from July 1, 2016, through June 30, 2017, with a 2% increase in salary providing for an annual salary of \$102,000 by amendment.”
 - Attach the proposed contract or the contract amendment document to the agenda or have a link to the document.
- › Consider the wording of the motion for the meeting.
 - “Motion to approve the contract extension of Provost Mike Smith for one additional year from July 1, 2016, through June 30, 2017, with a salary increase of 2%, providing for an annual salary of \$102,000 by amendment, a copy of which shall be made a part of these motions.”
 - The contract or the written amendment should be incorporated into the minutes.
 - Use of consent agendas.
 - Consider closed session issues.

Community College Employment Contracts and Severance Agreements

- » Impact on Multi-Year Contracts
- » The Act may have inadvertently affirmed the long practice of a college engaging in multi-year employment contracts beyond the term of a current sitting board of trustees.
 - › Unlike the Illinois School Code, the Illinois Public Community College Act (IPCCA) previously had no specific provision on multi-year contracts.
 - › The ability of community colleges to enter into multi-year contracts beyond the term of a current board was based on the broad authority given to a community college board of trustees to establish employment terms for faculty and administrators.

Community College Employment Contracts and Severance Agreements

- » Challenges as a Result of the Act
 - › Annual Mass Contract Approvals
 - › Severance Agreement Limitations

Budget Crisis, Navigating Reductions in Force (RIFs)

» Authority to Conduct RIFs

- › The IPCCCA carves out special protection for faculty. Specifically, section 3B-5 of the Act outlines the process by which a board may reduce the number of faculty members.
- › If a dismissal of a faculty member for the ensuing school year results from the decision by the Board to decrease the number of faculty members employed by the Board or to discontinue some particular type of teaching service or program:
 - notice shall be given to the affected faculty member not later than 60 days before the end of the preceding school year;
 - together with a statement of honorable dismissal and the reason therefor.
- › Note: Section 3B-5 provides these protections only to “Faculty Members”.
- › Accordingly, these protections apply to both tenured and non-tenured faculty members.

Bumping and Recall Rights Afforded to Full-Time Tenured Faculty Members

- » Section 3B-5 of the Act requires that, unless otherwise provided in a collective bargaining agreement, by February 1 of each year, a board must distribute to its faculty union a list, categorized by positions, showing the seniority of each faculty member for each position that a faculty member is qualified to render.
- » Bumping Rights
 - › No tenured faculty member may be terminated under a RIF if a probationary faculty member or other employee with less seniority is retained in a position to provide services that the tenured employee is competent to render.
 - › A tenured full-time faculty member may be terminated under a RIF while a college continues to employ part-time faculty to teach courses that the tenured full-time faculty member is also qualified to teach unless otherwise limited in a collective bargaining agreement.

Bumping and Recall Rights Afforded to Full-Time Tenured Faculty Members

» Recall Rights

- › For 24 months from the start of the school year for which the faculty member was dismissed pursuant to a RIF, any faculty member has the preferred right to be recalled to a vacant position that he/she is qualified to render prior to the appointment of any new faculty member.
- › However, no non-tenured faculty member or other employee with less seniority may be hired to render a service which a tenured faculty member is qualified to provide.

Bargaining Requirements

- » Economic Reason for RIF
 - › Decisional Bargaining
- » Non-Economic Reason for RIF
 - › If the decision to conduct the RIF is for economic reasons (i.e., financial cost savings), then the RIF is a mandatory subject of bargaining and the college is obligated to bargain the decision to conduct the RIF and the impact of the decision.
- » Extent of Duty to Bargain
 - › A college may implement a RIF decision to comply with the 60 days before the end of the school year deadline even if the parties have not yet reached an agreement or reached impasse.
 - › A college must only bargain in good faith to impasse or agreement and is not required to make concessions.

The Mechanics of Conducting a RIF

- » A “decisional unit” is that portion of the college’s organizational structure from which the college selects the employees that will be offered consideration for signing a waiver and those who will not. The term decisional unit was developed to reflect the process by which an employer chooses certain employees for a RIF program and rules out others.

Examples of Decisional Units

- » Facility-Wide. 10% of employees in the employer's Springfield facility will be terminated within the next 10 days. The decisional unit is the Springfield facility.
- » Division-Wide. 15 of the employees in the employer's Finance division will be terminated in December. The decisional unit is the Finance division.
- » Department-Wide. Half of the workers in the employer's Auditing department of the Finance division will be terminated in December. The decisional unit is the Auditing department.
- » Reporting Structure. 10% of the employees who report to the employer's Vice President of Finance, wherever the employees are located, will be terminated immediately. The decisional unit is all employees reporting to the Vice President of Finance.
- » Job Category. 10% of all accountants, wherever the employees are located, will be terminated next week. The decisional unit is all accountants.

Use of Agreements and Waivers

- » The Age Discrimination in Employment Act (ADEA) identifies two (2) types of programs under which employers seeking releases and waivers must make written disclosures to employees: 1) “exit incentive programs”; and 2) “other employment termination programs.”
 - › The first type of program is a voluntary program for a group or class of employees who are offered consideration in exchange for their decision to resign voluntarily and sign a waiver (i.e., a voluntary early retirement program).

Use of Agreements and Waivers

- › The second type of program refers to a group or class of employees who will be involuntarily terminated and who are offered consideration in return for signing a waiver (i.e., a RIF program).
 - Consideration offered is a standardized formula or benefits package determined by the employer that is available to two or more employees and is not generally subject to negotiation between the parties.
 - Consideration may be anything of value in addition to that which the employee is already entitled to in the absence of a waiver.
 - Typically, this comprised of a lump sum payment based on an employee's length of service. However, sufficient consideration may also include such benefits as outplacement services, continuation of health insurance benefits paid for by the college, or tuition waivers for a certain number of credit hours.

Waiver Requirements

- » In order to secure a valid and enforceable waiver and release, a college must provide additional ADEA-related information to all of the employees who are in the decision unit affected by the RIF or early retirement program.
- » Section 1625.22 of the ADEA states that in situations involving programs that result in the termination of two or more employees, “at a minimum. . . 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 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.”

Waiver Requirements

- » A waiver in connection with a multiple employee RIF will be considered “knowing and voluntary” if the following conditions are satisfied:
 - must be in writing and drafted in language which the average employee eligible to participate in the RIF program can understand;
 - must advise the employee to consult with an attorney prior to execution;
 - cannot include a waiver of right or claims that may arise after the date of execution of the agreement;
 - must provide the employee with at least 45 days within which to consider the agreement, which runs from the date of the employer’s final offer, though an employee may voluntarily elect to sign the waiver sooner (if the college is seeking a waiver from only one employee, then the waiting period is reduced to 21 days); and
 - must provide an employee with a revocation period of at least 7 days following execution and state that the agreement is not valid and enforceable until this period has expired.

Payments Issued Pursuant to Agreements

- » The Supreme Court has held that severance payments to terminated employees are subject to FICA withholdings. *United States v. Quality Stores, Inc.*, 134 S.Ct. 1395 (2014).
 - › Accordingly, because severance payments are considered wages, such payments must be paid to employees using Form W-2 and not Form 1099.

Approval of Signed Agreements and Waivers

- » Once the college receives signed agreements from the employees, the board should also sign and approve the individual agreements. Doing so will prevent individuals from later alleging that their termination and the terms of their release and waiver are invalid and unenforceable if not approved by the board.

Employee Furloughs as Cost-Saving Measures

- » In some situations, furloughs may be preferable to RIF or voluntary early retirement programs since they may be used to temporarily control costs without having to expend considerable time and capital to hire new employees once staffing needs change.
- » Section 541.710(b) of the Fair Labor Standards Act (FLSA) expressly allows for public sector employers to furlough exempt employees without those employees losing their “exempt” status.

Employee Furloughs as Cost-Saving Measures

- » Under the FLSA, the following rules generally apply to exempt employees:
 - › Salary deductions may not be taken from an exempt employee's pay for absences of less than a work week that are due to the fault of the employer or the operating requirements of the employer; and
 - › Employers may take deductions from an exempt employee's pay where the employee performs no work at all in a given work week.
- » Section 541.710 expressly allows a college, as a public sector employer, to furlough exempt employees for partial or full work weeks, and deduct their salaries accordingly, without having them lose their exempt status.

Employment Contract Considerations

- » Carefully review the content of any employment contracts prior to proceeding with a furlough of an exempt employee.
- » While the terms of a specific contract will control, it is possible that the terms of an administrator's employment contract would prevent any reduction in the contractually agreed upon salary.

Furlough Alternatives

- » Substituting an exempt employee's accrued leave for time an employee is made to be absent from work.
- » Making a fixed and permanent decision to reduce the hours and corresponding pay for some exempt employees.

QUESTIONS?