EMPLOYMENT ACTIONS AND RIFS IN THE MIDST OF THE STATE BUDGET CRISIS

I. COMMUNITY COLLEGE EMPLOYMENT CONTRACTS AND SEVERANCE AGREEMENTS

A. On September 22, 2015, Governor Rauner signed House Bill 3593 into law as Public Act 99-0482. The Act added a new section to the Public Community College Act (110 ILCS 805/3-65), which establishes significant limitations on community college employment contracts. In addition to limiting the term of an employment contract and imposing strict notice requirements, the Act places a limit on the amount of severance that can be paid.

B. 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).

1. Employment contracts entered into prior to September 22, 2015, are effectively grandfathered. However, any extensions or amendments of a grandfathered contract would be subject to the law.

2. Collective bargaining agreements are expressly excluded from the Act.

C. The Limitations on Employment Contracts

Public Act 99-0482 mandates the following limitations on community college employment contracts, which make these terms non-negotiable between the community college and the (prospective or existing) employee:

1. Severance payable under the contract may not exceed one (1) year's worth of salary and applicable benefits;

2. A contract with a determinative start and end date may not exceed four (4) years; and

3. Employment contracts may no longer contain automatic rollover clauses. A grandfathered contract with a rollover clause would not be extended by operation of the rollover clause.

D. New Notice Requirements

1. Approval of an employment contract, contract renewals, or contract extensions must be made during an open meeting of a board of trustees.

2. 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. A complete description of the action to be taken; and

b. The contract itself, including all addendums or any other documents that change an employee's initial contract.

3. The ICCB has yet to release any guidance on what the notice is to look like.

E. Relationship to OMA

The new notice requirements clearly expand the requirements of the Illinois Open Meetings Act (OMA) as to the posted agenda and intended action items.

1. Consider the agenda wording to comply with the notice requirements.

   a. The Act does not address the content of the meeting. However, guidance is provided in the recent Fourth District Appellate Court case, *Board of Education of Springfield School District No. 186 v. The Attorney General of Illinois, et al.* While that case rejected the Attorney General's expansive interpretation of the OMA, the Appellate Court did affirm the need for a public body to "advise the public about the general nature of the final action to be taken." The following example is compliant:

      > "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."

   b. Attach the proposed contract or the contract amendment document to the agenda or have a link to the document.

2. Consider the wording of the motion for the meeting.

   a. Example: "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."

   b. The contract or the written amendment should be incorporated into the minutes.

   c. Use of consent agendas.

   d. Consider closed session issues.

F. 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. The ability of a college to engage in an employment contract for a period which exceeds the current board of trustees' term has come under fire as of late.

1. Unlike the Illinois School Code, the Illinois Public Community College Act IIPCCA) previously had no specific provision on multi-year contracts. For example, the Illinois School Code, §10-23.8 (105 ILCS 5/10-23.8), provides for superintendent contracts for a period of up to five years. This provision has been cited as an exception to the common law principle that a governmental board whose members serve limited terms may not enter into contract for a term beyond that for which the Board sits.

2. Prior to Public Act 99-0482, there were no similar provisions for community colleges. 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.

G. Challenges as a Result of the Act

1. How do you address the annual mass approval of numerous employment contracts?

2. Can a severance agreement provide a non-salary payment to address an employment grievance?

II. BUDGET CRISIS, NAVIGATING REDUCTIONS IN FORCE (RIFS)

A. Authority to Conduct RIFs

1. Section 3-42 of the IPCCA sets forth that the power and duties of a community college includes the ability "to employ such personnel as may be needed, to establish policies governing their employment and dismissal, and to fix the amount of their compensation." (105 ILCS 805-3-42).

2. While a college has authority to engage in RIFs of all personnel, the IPCCA 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.

    a. 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:

i. notice shall be given to the affected faculty member not later than 60 days before the end of the preceding school year;

ii. together with a statement of honorable dismissal and the reason therefor.

b. If notice of the RIF is not provided at least 60 days before the end of the school year, then the potentially affected individual is deemed reemployed for the following school year.

c. Note: Section 3B-5 provides these protections only to "Faculty Members", which the Act defines as "a full time employee of the District regularly engaged in teaching or academic support services, but excluding supervisors, administrators, and clerical employees."

d. Accordingly, these protections apply to both tenured and non-tenured faculty members. However, these protections do not extend to part-time employees or to employees who do not "regularly engage in teaching or academic support services."

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

1. 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.

2. Bumping Rights

a. 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.

b. However, 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.

3. Recall Rights

a. 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.

b. 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.

C. Bargaining Requirements

1. A RIF occurs whenever a college decides to decrease the number of employees employed by the board or to discontinue a particular type of program or service.

2. Economic Reason for RIF

   a. 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.

   b. Most RIF/layoff decisions are based in part on economic or financial reasons.

3. Non-Economic Reason for RIF

   a. If the decision to conduct the RIF is for non-economic reasons (i.e., the college decides to discontinue a particular program or service), then the college is obligated to bargain only the impact of the decision to conduct the RIF.

   b. An employer's decision to conduct a RIF/layoff in order to reorganize or restructure its delivery of programs or services is a matter of inherent management authority and generally not a mandatory subject of bargaining.

4. Extent of Duty to Bargain

   a. 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.

   b. A college must only bargain in good faith to impasse or agreement and is not required to make concessions.

D. The Mechanics of Conducting a RIF

The college must first identify the scope of the class, unit, group, or job classification of the RIF by examining the "decisional unit" at issue.

1. 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.

2. When identifying the composition of the decisional unit, the college should act on a case-by-case basis. Therefore, the determination of the appropriate class, unit, group, or job classification must also be made on a case-by-case basis.

3. Examples of Decisional Units

   a. 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.

   b. Division-Wide. 15 of the employees in the employer’s Finance division will be terminated in December. The decisional unit is the Finance division.

   c. 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.

   d. 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.

   e. Job Category. 10% of all accountants, wherever the employees are located, will be terminated next week. The decisional unit is all accountants.

4. Note: If a college determines that the RIF impacts several established grade levels and/or other established subcategories within a job category or title, then the information provided to the employees who are asked to sign a waiver and release (explained further below) must be broken down by grade level or other subcategory. Also note that if the impacted employees are selected by the college from a subset of a decisional unit, the college must still disclose information for the entire population of the decisional unit to the RIF-affected employees.

E. Use of Agreements and Waivers

1. A valid and enforceable waiver includes a written agreement between the employer and the employee and additional written disclosures provided to employees subject to the RIF decision who are asked to sign a waiver.

2. 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.”

    a. 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).

    b. 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). The 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.

        i. Consideration may be anything of value in addition to that which the employee is already entitled to in the absence of a waiver.

        ii. 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.

3. If consideration is not offered and a release/waiver of rights and claims under the ADEA is not sought by the college, then no written agreement or disclosure of information related to the RIF is required to be provided to the affected employees.

4. If only one (1) employee is subjected to the RIF, then the additional written disclosures are not required.

F. Waiver Requirements

1. The Older Workers Benefit Protection Act (“OWBPA”), which is a part of and an amendment to the ADEA, requires that additional, detailed information be provided when an employer is requesting releases from two or more employees who are separating from employment as part of the same separation program.

2. Therefore, 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.

3. Section 1625.22 of the ADEA specifically 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.”

4. Therefore, a waiver in connection with a multiple employee RIF will be considered “knowing and voluntary” and thereby enforceable only if the following conditions are satisfied:

    a. Generally, the waiver agreement:

        i. must be in writing and drafted in language which the average employee eligible to participate in the RIF program can understand;

        ii. must advise the employee to consult with an attorney prior to execution;

        iii. cannot include a waiver of right or claims that may arise after the date of execution of the agreement;

        iv. must provide for consideration to the employee in exchange for the waiver;

        v. 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

        vi. 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.

G. Payments Issued Pursuant to Agreements

1. The IRS treats severance pay (which includes payments issued pursuant to the terms of a RIF or voluntary early retirement agreement) as supplemental wages because it is not payment for services in the current payroll period but is instead a payment made upon or after termination of employment.

2. 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).

    a. The Court noted that Section 3121(a) of the IRS Code defines wages as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash" and that Section 3121(b) provide that employment includes "any service, of whatever nature, performed by an employee for the person employing him."

    b. Accordingly, because severance payments are considered wages, such payments must be paid to employees using Form W-2 and not Form 1099.

H. Approval of Signed Agreements and Waivers

1. The terms of a RIF or voluntary early retirement incentive program will be approved by the board prior to the employees being presented with the agreements and waivers.

2. 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.

III. EMPLOYEE FURLOUGHS AS COST-SAVINGS MEASURES

A. 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.

B. 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.

C. Under the FLSA, the following rules generally apply to exempt employees:

1. 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

2. Employers may take deductions from an exempt employee's pay where the employee performs no work at all in a given work week.

D. 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.

E. Employment Contract Considerations

1. Carefully review the content of any employment contracts prior to proceeding with a furlough of an exempt employee.

2. 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.

F. Furlough Alternatives

1. Substituting an exempt employee's accrued leave for time an employee is made to be absent from work.

2. Making a fixed and permanent decision to reduce the hours and corresponding pay for some exempt employees.