

Robbins Schwartz

Rightsizing the Workforce

Presented By: Joseph J. Perkoski

THE MECHANICS OF RIF

- » First Step: Consider limitations and restrictions set forth in the Illinois Public Community College Act (“IPCCA”) and any relevant collective bargaining agreements.
- » Second Step: Develop a plan and rationale to support the need for the RIF
- » Third Step: Address your bargaining obligations

Authority to Conduct RIFs

- » Section 3-42 of the IPCCA: Allows a community college “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.

Authority to Conduct RIFs

- » Section 3B-5 of the IPCCCA: While a college has authority to engage in RIFs of all personnel, the IPCCCA carves out special protections for faculty. Specifically, Section 3B-5 of the Act outlines the process by which a board may reduce the number of faculty members.
 - › These protections apply to both tenured and non-tenured faculty members.
 - › These protections do not extend to part-time employees or to employees who do not “regularly engage in teaching or academic support services.”

Timeline for Faculty RIFs

- » The IPCCCA sets forth a strict timeline for reductions in faculty members, requiring that the Board give notice of any RIFs no later than 60 days prior to the end of the school year.
- » If not, he or she will be deemed reemployed for the following school year.
- » If a CBA provides for a notice date that conflicts with the IPCCCA, the earlier of the two will control.

Notice for Faculty RIFs

- » Under the IPCCCA, notice of a reduction in force must include:
 - › A statement of honorable dismissal; and
 - › The reason for that honorable dismissal.
- » All notices must be:
 - › In writing; and
 - › Delivered in person; or
 - › Sent via certified or registered mail, postage prepaid, addressed to the faculty member's last known address.
- » If a CBA requires that additional information be included in the notice, the college must also follow those requirements.

Bumping Rights Afforded to Full-Time Tenured Faculty

- » Section 3B-5: 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.
- » Under the IPCCCA, prior to terminating a tenured faculty member, the Board must first terminate:
 - › Probationary faculty members; and
 - › Any other employees with less seniority who are qualified to render services for which the tenured employee is also competent to render.

Right to Reappointment and Reinstatement

- » Under the IPCCA, all dismissed faculty members have a preferred right to reappointment for 24 months following the beginning of the school year for which he or she was dismissed.
 - › Supersedes the appointment of any new faculty member for any position involving services for which the dismissed faculty member is competent to render.
 - › No non-tenured faculty member or other employee with less seniority is employed to render a service which a tenured faculty member is competent to render.

Mechanics of Bargaining a Reduction in Force

- » 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.
- » Non-Economic Reason for RIF: 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.

Bargaining in the Midst of Financial Crisis

- » The 60-day notice requirement can be challenging because it comes at a time when a college may not be fully aware of the following year's budget and enrollment numbers.
- » This means that decisional bargaining is nearly impossible to complete before a board of trustees must approve a RIF in order to meet the 60-day deadline.

Bargaining in the Midst of Financial Crisis

- » For decisions in which there is a statutory deadline such as the 60-day rule for tenured and non-tenured faculty set forth in the IPCCCA, the college may implement its decision so long as it:
 - › Provides notice of its recommendation to the Union before the action; and
 - › Invites bargaining prior to the Board's action.
- » If there is no statutory or contractual deadline the college should seek to complete decisional bargaining before the RIF is implemented.

Bargaining in the Midst of Financial Crisis

- » Upon confirming its intent to implement the RIF, the College should immediately notify the Union and indicate its good faith intent to bargain by requesting that bargaining begin as soon as possible.
 - › The notice should include the college's rationale for implementing the RIF, as well as any data and/or economic proposals to lend support.
 - › Provide the union with all of the data relied upon in making the RIF decision. If possible, create a white paper in advance of the bargaining designed to be shared with the union so that they are fully aware of the basis of the RIF and the information relied upon in making the decision.

Bargaining in Good Faith

- » If decisional bargaining, be prepared to explain the basis for the targeted employees and to show the cost savings. Then the burden is on the union to either challenge that basis or to make a proposal for a different approach.
- » With respect to impact bargaining, the college can address the application of the bumping process and other mechanics of the RIF and possible call back. The college can also consider offering severance or out placement for impacted employees.

Bargaining in Good Faith

- » Good faith bargaining usually requires, at the very least, three sessions, as well as the understanding that bargaining may, in fact, cause the college to pull back the RIF.
- » Typically, if the parties cannot reach agreement after a good faith effort, the college can move forward with its decision over the impasse.

MECHANICS OF CONDUCTING AN EXIT PROGRAM RIF

- » Types of Exit Programs under the ADEA
 - › Age Discrimination in Employment Act (“ADEA”): Under the ADEA, employers are required to make written disclosures to employees under the following types of programs:
 - Exit Incentive Programs: Voluntary programs 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 programs).

MECHANICS OF CONDUCTING AN EXIT PROGRAM RIF

» Types of Exit Programs under the ADEA

- › Other Employment Termination Programs: 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.

MECHANICS OF CONDUCTING AN EXIT PROGRAM RIF

- » Types of Exit Programs under the ADEA
 - › If the College does not seek a waiver/release of rights and claims under the ADEA and does not offer consideration, then the College is not obligated to provide the affected employee with a written agreement or disclosure of information related to the RIF.
 - › If only one (1) employee is subject to the RIF, then the additional written disclosures are not required.

Waiver Requirements

- » Older Workers Benefit Protection Act (“OWBPA”): If an employer requests releases from two or more employees who are separating from employment as part of the same separation program, the OWBPA (an amendment to the ADEA) requires that the employer provide additional detailed information to those employees.

Waiver Requirements

- » Section 1625.22 of the ADEA: In situations involving programs that result in the termination of two or more employees, the ADEA requires that “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 . . . [must] inform the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to:
 - › 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
 - › 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 only be considered “knowing and voluntary” if the waiver agreement:
 - › Is in writing and drafted in language which the average employee eligible to participate in the RIF program can understand;
 - › Advises the employee to consult with an attorney prior to execution;
 - › Does not include a waiver of right or claims that may arise after the date of execution of the agreement;
 - › Provides for consideration to the employee in exchange for the waiver;

Waiver Requirements

- » A waiver in connection with a multiple-employee RIF will only be considered “knowing and voluntary” if the waiver agreement:
 - › Provides the employee with at least 45 days within which to consider the agreement – this 45 days runs from the date of the employer’s final offer, though an employee may voluntarily elect to sign the waiver sooner (note that if the college is only seeking a waiver from one employee, the waiting period is reduced to 21 days); and
 - › Provides an employee with a revocation period of at least 7 days following execution and states that the agreement is not valid and enforceable until this period has expired.

Conducting an Involuntary Exit Program RIF

- » The college must identify the scope of the class, unit, group, or job classification of the involuntary exit program by examining the “decisional unit” at issue:
 - › FACILITY-WIDE
 - › DIVISION-WIDE
 - › DEPARTMENT-WIDE
 - › REPORTING STRUCTURE
 - › JOB CATEGORY

Conducting an Involuntary Exit Program RIF

- » Notify the Union about the College's intent to implement the involuntary exit program . This notice should include potential dates to start bargaining, as well as the College's rationale for implementing the involuntary exit program and any economic proposals or data that can be used to lend support to its position.
- » Commence bargaining of the decision to implement the involuntary exit program . Bargaining should begin as soon as the College notifies the Union of its intent to implement the involuntary exit program but may not necessarily conclude prior to the Board's decision to implement the involuntary exit program .

Conducting an Involuntary Exit Program RIF

- » Draft written notices of the reduction in force for each affected faculty member. These notices should include a statement of honorable dismissal.
- » Deliver the notices in person or via certified or registered mail, postage prepaid, addressed to the faculty member's last known address at least 60 days prior to the end of the current school year, or by the date specific in the CBA, whichever is sooner.
- » Understand that each terminated faculty member's right to reappointment extends for 24 months from the date of his or her layoff.
- » Understand that if bargaining continues beyond the date of decision, it may drive the College to pull back the RIF.

Additional Considerations

- » Employment Contract Limitations (110 ILCS 805/3-65): Applies to all employment contracts entered into, amended, reviewed, or extended after September 22, 2015, excluding collective bargaining agreement.
 - › Establishes significant limitations on community college employment contracts; and
 - › Places a limit on the amount of severance that can be paid to an amount that does not exceed salary and applicable benefits.
- » Payments Issued Pursuant to Agreements: The IRS treats severance pay 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.
 - › 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).

OTHER WAYS TO RIGHT SIZE THE WORKFORCE

» Retirement Incentive Programs

- › SURS Cap on End of Career Earnings: In no event can a college increase an eligible faculty member's annual earnings through a retirement incentive program by more than 6% of the faculty member's previous fiscal year salary.
 - Earnings: Earnings are defined as any earnings used to calculate the Final Rate of Earnings ("FRE") as defined by SURS.
 - Post-Retirement Bonus: To avoid this cap, faculty members could be paid a post-retirement service bonus after the issuance of the final payroll check.

OTHER WAYS TO RIGHT SIZE THE WORKFORCE

» Employee Furloughs

- › Section 541.710 of the Fair Labor Standards Act:
 - Expressly allows for public sector employers to furlough exempt employees without those employees losing their “exempt” status.
 - 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.

OTHER WAYS TO RIGHT SIZE THE WORKFORCE

» Employee Furloughs

- › 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.

OTHER WAYS TO RIGHT SIZE THE WORKFORCE

» Employee Furloughs

› 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.

OTHER WAYS TO RIGHT SIZE THE WORKFORCE

» Employee Furloughs

› 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.

OTHER WAYS TO RIGHT SIZE THE WORKFORCE

» Strategic Planning

- › Reorganization: Reorganization could include reorganization of the administrative structure, combining duties, or program restructuring.
- › Attrition: Upon losing faculty or staff to retirement or reorganization, a college may consider choosing not to replace those employees.

OPEN MEETINGS ACT CONSIDERATIONS

» Public Act 99-0482

- › Public Act 99-0482 (110 ILCS 805/3-65): Mandates the following limitations on community college employment contracts:
 - 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. A grandfathered contract with a rollover clause would not be extended based on a rollover clause.

OPEN MEETINGS ACT CONSIDERATIONS

» Public Act 99-0482

› Notice Requirements:

- Under Public Act 99-0482, 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.

OPEN MEETINGS ACT CONSIDERATIONS

» Posted Agendas and Intended Action Items

- › The new notice requirements set forth in Public Act 99-0482 clearly expand the requirements of the OMA as to the posted agenda and intended action items.
- › *Board of Education of Springfield School District No. 186 v. The Attorney General of Illinois*, 2017 IL 120343 (Jan. 20, 2017)
 - Addresses the extent of Section 2(e)'s requirement that a public body's final action be "preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

» Posted Agendas and Intended Action Items

- › *Board of Education of Springfield School District No. 186 v. The Attorney General of Illinois*, 2017 IL 120343 (Jan. 20, 2017)
 - Emphasized that while a public body may voluntarily choose to provide information regarding the key terms of the proposed action, such an understanding would often be time consuming and impractical and therefore not required.
 - If using a resolution, the resolution should include the employee names and should be made available to the public at the meeting. If another form of board action is used, the list of names should be made available at the meeting.

OPEN MEETINGS ACT CONSIDERATIONS

» Posted Agendas and Intended Action Items

› *Board of Education of Springfield School District No. 186 v. The Attorney General of Illinois*, 2017 IL 120343 (Jan. 20, 2017)

- The agenda should identify the employee group that is the subject of the RIF but need not identify the employees.
 - For example: “Approve Recommendation to Honorably Dismiss Non-Tenured and Tenured Faculty.”
- A board must have a public recital of the nature of the action about to be taken.
 - We recommend that a board provide a verbal summary of the action before making the motion.

QUESTIONS?