INTRODUCTION:
These are trying economic times for the American economy in general and higher education in particular. Many colleges and universities facing the prospect of financial uncertainty are considering cost-cutting measures. Because staff salaries and benefits are the largest line item in most institutions’ budgets, these measures inevitably entail pressure to reduce staff payroll. Already institutions are ordering personnel freezes, eliminating vacant positions, and preparing for layoffs. [1]

Layoffs pose substantial legal risks. They implicate employees’ contractual employment rights and can give rise to actions for breach of contract. They may disproportionately impact members of statutorily protected classes of workers and can generate discrimination complaints. Layoffs are subject to various statutory and regulatory limitations. And invariably they take place against a backdrop of heightened anxiety and suspicion. While there is no way to eliminate the legal risks associated with layoffs, effective planning can keep exposure within anticipated and manageable limits.

DISCUSSION:
As a preliminary note, the authors wish to reiterate that this NACUANOTE is not legal advice. Proposed layoffs present a host of issues specific to and variable among institutions. Counsel for each institution should take into account unique circumstances, considerations, and legal risks that no summary treatment such as this can adequately address.

I. Preparing for Layoffs

Universities planning layoffs should begin by assuming that as large not-for-profit employers they are subject to a higher standard of transparency, fairness and accountability than profit-making enterprises. Layoffs generate emotion. They are contentious and likely to generate media coverage. Journalists, community leaders, politicians, and even judges demand more of colleges and universities than of other corporate employers.

In view of these realities, well-managed institutions should take three steps in advance of any public discussion of layoffs.
A. Careful Attention to Institutional Layoff Policies

The institution’s lawyers should perform a careful assessment of existing personnel policies to ensure they are workable, up-to-date, and consistent with the latest case law and legal standards. Policies adopted in the past should be reexamined to determine whether they are consistent with current employment practices, expectations and norms. Those policies should be reviewed with managers and supervisors to ensure that every supervisor knows what process to follow, what standards to apply, and what grievance rights to extend to those who lose their jobs.

B. Assembling a Planning Group

The institution should identify a group of senior administrators to plan for and manage the layoff process. The planning group ordinarily consists of human resource professionals, risk managers, lawyers, and public affairs specialists. The group should meet regularly to handle layoff communications issues (internal and external), assess institutional risk, and ensure that the process reflects transparency, integrity, and respect for the viewpoints of all affected constituencies at every stage.

C. Developing the Case for Layoffs

The institution—prompted by its specially constituted planning group and acting ultimately through appropriate presidential and governing board action—should prepare a strong, persuasive, defensible case for layoffs.

The institution must be prepared to show that layoffs were undertaken only after alternatives were implemented or considered and rejected. A record must be made that each alternative was carefully considered and proved to be impractical or unachievable taking into account the institution’s mission and ability to operate successfully after the downsizing. Among the alternatives (and associated legal risks) that should be analyzed are the following.


Hiring freezes and elimination of positions through attrition. Critics are likely to contend that the institution should not be permitted to lay off employees if the salary line can be sufficiently reduced by not replacing employees who leave.

Negotiated retirements. Voluntary severance and early retirement plans, increasingly common, have been successfully implemented at many colleges and universities. [4] Under a typical incentive plan, the institution offers a package of benefits to all or selected employees for a specified period. Employees who elect to retire are not replaced. The package of retirement-inducing benefits can be offered university-wide. Alternatively, if doing so does not increase the risk of discrimination claims or pension law violations, benefits can be limited to employees in particular departments or those at a specified seniority level. Under the Age Discrimination in Employment Act, care must be taken to avoid eligibility criteria related to age or arguable age-surrogates such as years of institutional service. [5]

The Older Workers Benefit Protection Act (OWBPA), enacted to protect older employees against coercive early-retirement plans, generally bars employers from offering older workers severance terms materially less generous than terms offered the workforce as a whole under an early retirement incentive program. [6] OWBPA also limits the employer’s ability to obtain from older workers releases of age discrimination claims in exchange for sweetened early retirement benefits. Releases must adhere to exacting statutory requirements: The release must be in writing and its terms must be expressed clearly; the employee must be advised in writing to consult an attorney before executing the release; the employee must be given at least 21 days (or 45 days in the case of a group termination program) to consider it; and the employee must be
given at least seven days after signing it to revoke it unilaterally. Releases in group termination programs also require disclosures concerning job titles and ages of persons in the layoff unit. Employees generally cannot be asked to waive the right to file a discrimination charge with the Equal Employment Opportunity Commission, although a waiver of the right to file a lawsuit and recover monetary or other personal relief can be effective. [7]

II. Developing a Layoff Plan

The planning group’s initial priority should be to determine whether the institution’s layoff policy contains four critical elements:

- Adequate notice to affected employees.
- Workable, neutral, demonstrably fair criteria for determining layoff sequence and selecting individual employees for layoff;
- Timely opportunity for counsel and other responsible offices, including the risk management, personnel, and affirmative action offices, to review layoff plans before implementation; and
- An equitable but efficient process for extending to affected staff members the right to administrative appeal.

How much notice is adequate? The Worker Adjustment and Retraining Notification Act (“WARN”), a federal law, requires covered employers to give at least 60 days’ written notice of “mass layoffs” and “plant closures” to affected employees or their collective bargaining representative, and to state and local monitoring agencies. For purposes of the statute, virtually all colleges and universities are large enough to come within the definition of a covered employer (any employer with 100 or more full-time employees). [8]

A growing number of states have enacted their own versions of WARN, often with broader coverage and more restrictive notice provisions than the federal statute. For example, California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, South Carolina and Tennessee are among the states with worker notification laws that could be triggered by large-scale institutional layoffs.

Quantitative or qualitative layoff criteria? In determining the sequence of layoffs, should the policy rely on quantitative (and perforce objective) criteria, such as seniority or years in rank? Or should it use qualitative (and necessarily subjective) criteria, such as job performance or whether the position is essential to the institution’s mission? The question can be difficult and contentious. From a legal perspective, use of objective, measurable criteria such as seniority tends to be safest. [9] Most colleges and universities, however, want to keep their best employees and prefer layoff sequences that are based in part on supervisors’ perceptions of relative performance or job qualifications. While such sequences may be desirable operationally, reliance on subjective criteria tends to be more hazardous legally. [10] The legal analysis is complicated by the fact that many institutions not only lay off employees but also reorganize operations so that remaining employees perform new jobs.

Other limitations can come into play in determining whether individual employees can or should be terminated as part of a layoff. Federal law bars employers from terminating employees because courts have garnished their wages to pay debts or because they have taken leave under the federal Family and Medical Leave Act. [11] A number of federal and state laws contain additional protections, including laws that forbid taking adverse action against an employee who qualifies as a “whistle-blower.” In addition, collective bargaining agreements and state public-sector labor laws often limit employers’ rights to determine layoff sequences. In recent years, with job security foremost in union negotiators’ minds, extensive restrictions to prevent employers from contracting out services performed by bargaining unit members have been added to many collective bargaining agreements. Such provisions often reduce savings that can be achieved by layoffs, notably in maintenance and technical areas.

Experienced human resource professionals can be valuable guides in the application of layoff criteria. Care should be taken to ensure that confidentiality of communications between human resources staff and the institution’s legal counsel is protected by attorney-client privilege and related legal doctrines.
Pre-implementation review. Layoff policies at many institutions incorporate a requirement for internal review prior to the formal implementation of staff layoffs. The following is a typical example: The layoff plan must be submitted to Human Resources and the Office of Affirmative Action Programs in sufficient time to allow those offices to conduct an internal review. In the case of a planned layoff of 10 employees or more within any 90-day period from a single Vice Presidential area, the layoff plan must also be submitted to the University Counsel. Human Resources will be responsible for coordinating the review process. The pertinent reviewing offices will review the layoff plan to ensure that the plan (a) is consistent with Equal Employment Opportunity policies, (b) provides adequate and appropriately documented programmatic justification for the identification of layoff units, and (c) provides appropriate documented justification for the selection of particular employees for layoff within a classification and grade level. A layoff plan cannot be implemented until it has received the approval of the appropriate reviewing offices. Provisions like this require that layoff plans be implemented in two stages. First, data are analyzed to ensure that layoffs will not disproportionately affect employees in statutorily protected classes. At this initial qualitative or statistical stage, the operating unit in which layoffs will be implemented provides lists showing, for each employee to be laid off, the employee’s gender, race, and age. Attorneys and human resource professionals review the lists to determine whether the percentage of “protected” employees on the layoff list is larger to a statistically significant degree than the representation of such employees in the unit as a whole. If it is, then the layoff plan can be disapproved by the office conducting the pre-implementation review—typically the affirmative action office.

At the second or case-by-case stage, the reviewing office examines the personnel file of each person to be laid off and, for comparison purposes, the files of similarly-situated personnel, to ensure that employees selected for layoff are selected strictly in accordance with layoff criteria, not irrelevant, undocumented, or illegal factors. This labor-intensive review process requires supervisors to justify their selection of employees to be laid off. A careful two-stage review process goes a long way toward insulating layoffs from legal challenge based on arbitrariness or discriminatory impact.

An acceptable appeals process. To satisfy the dictates of fairness (at private institutions) and due process (at public institutions), institutions should give affected employees reasons for the layoff decision and an opportunity to contest it through an internal review process. Opportunity to contest does not entitle the employee to elaborate process. Generally, it is acceptable both to limit the grounds for appeal and to use a streamlined appellate process distinct from existing processes afforded for matters other than layoffs. Counsel should review the appeal process carefully to be sure it is workable and (for public institutions) reflects the requirements of applicable law.

III. Implementing the Layoff Plan

A. Communications

Once the layoff plan is finalized, it should be communicated to the institution’s various constituencies. The message should focus on why layoffs are necessary. Briefing sessions should be conducted for trustees and, at least in the case of public institutions, key legislators and government officials. Campus meetings and discussion forums are often useful settings in which to explain to employees the financial conditions that have created the need for a layoff. Special communications with alumni, faculty, and students can take various forms, such as a president’s letter and articles in the alumni magazine and student newspaper.

Newspapers (including campus newspapers), television and radio stations, and other community media merit close attention. In even the largest cities, significant layoffs will attract the interest of the media. In small towns, where institutions of higher education often exert a dominant influence in local politics and culture, the layoff of even a few employees can have community-wide reverberations. At the very least, press releases should be prepared and distributed – after careful review by the planning group – to the local media. In smaller communities, it may be particularly advisable to schedule a press conference to announce the layoffs.
B. Notifying Affected Employees

Sensible advice on notification of employees is contained in Risk Management of Reductions in Force, a 1992 publication prepared by United Educators for the National Association of College and University Business Officers:
While experiences vary, many institutions have the line manager or department administrator communicate a layoff individually to each affected employee. Supervisors should be given extensive orientation on the notification process. They should be encouraged to be sympathetic and supportive, but to avoid giving false hopes. The human resource staff may work closely with these “notification managers” to rehearse remarks and determine if it is necessary to substitute another individual to convey the message. Central coordination of the notification schedule and the use of written materials outlining policies, procedures, and benefits [are] important. [14]
There is no universally correct way to terminate employees. Institutions have different cultures. They are governed by idiosyncratic state and local laws and adopt varying policies. Nevertheless, legal risks can be reduced by observing several commonsense rules:

First and most important, institutions and the officials who represent them during the layoff process should treat employees with dignity and respect in all aspects of the process. This is a sound risk-minimization principle as well as a matter of plain decency and compassion.

Second, documentation is key. Officials responsible for carrying out layoffs should carefully document the reasons for each decision in personnel files. If the layoff sequence depends on subjective evaluation of job performance and qualifications, documentation in the employee’s personnel file should contain persuasive support for distinctions made.

Third, terminations must be conducted professionally. It is best to provide notice individually, rather than in a group setting, and (if resources permit) to have a human resources staff member present at the meeting in addition to the employee’s supervisor. Employees’ questions should be answered truthfully. Most questions can be anticipated as part of the pre-implementation planning phase. Employees should have immediate access to information on severance benefits, outplacement assistance, and unemployment-compensation applications. Do not expect affected employees to return to work immediately; give them time to absorb the news. [15]

Fourth, to the extent appropriate and reasonable, officials should keep confidential, both within and outside the institution, the identities of terminated employees and the reasons for termination. Employees’ privacy should be respected. Supervisors and others involved in the process should be instructed not to make gratuitous negative statements about any person laid off. Even though it is inevitable that the identities of laid-off employees will become known, that information should not come in the first instance from supervisors.

Fifth, unless the institution knows for certain that no additional layoffs will follow, its spokespersons and managers should avoid statements that may lead remaining employees to believe that their jobs are safe. At many institutions layoffs come in waves. More harm can be done by lulling staff members into a false sense of security than by being truthful about continuing uncertainty.

C. Ongoing Consideration of the Employee

Managers experienced with layoffs know that supportive outreach steps to assist affected employees are nearly always in the institution’s interest. Some of the outreach steps often taken by colleges and universities include the following.

**Severance Benefits.** Severance packages conventionally include four elements: a notice period before the effective date of the layoff, severance pay, continued eligibility for selected fringe benefits, and preference in applying for other internal positions.
A perennial problem is whether laid-off employees should be entitled to work through the notice period or whether the institution should substitute paid leave and require employees not to come to work. The institution’s layoff policy should be flexible enough to allow the result that most effectively serves the work units involved. In some circumstances, the functioning of essential institutional programs depends on a smooth transfer of duties from laid-off staff to those who will succeed them, and those laid off should be encouraged to remain on the job during the notice period. In other circumstances, demoralization of staff members who lose their jobs may necessitate their removal from the workplace as soon as possible.

Some institutions conventionally require employees to execute a release in return for severance pay. Other institutions do not. Counsel should be consulted on the issue, particularly because releases are regulated under the Older Workers Benefit Protection Act.

**Counseling and outplacement.** Counseling services for laid-off personnel are often cost-efficient to the institution, valuable to the employee, and likely to reduce claims. Outplacement services, including retention of a qualified outside firm, can be valuable benefits, as can preretirement counseling for personnel who take early retirement. Experience shows that when laid-off employees feel they have a meaningful prospect of future employment or a secure retirement they are less likely to assert unwarranted claims against the institution.

**Health and fringe benefits.** The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires that employer-provided health benefits be made available for up to 18 months following termination. At some institutions, laid-off employees qualify for additional post-separation benefits, such as tuition benefits for dependents who currently receive them. As part of the planning process, the planning group should consult with benefits specialists on COBRA coverage issues in order to ensure that accurate, easy-to-understand written summaries describing COBRA benefits are prepared for affected employees.

**Hiring preference.** Laid-off employees ordinarily receive various re-employment preferences, such as recall rights for a certain period, notice of job vacancies, preference over external candidates, restoration of seniority benefits upon rehire, and the presumption of no break in service if the employee is recalled within a specified period.

**References.** Employees’ requests for letters of reference can present thorny issues. Requests for reference can put the employer in a bind. On the one hand, employers are unlikely to want to prevent a discharged employee from obtaining other employment. On the other hand, employers are expected to state truthfully the reason for an employee’s termination, and can incur liability if they misrepresent the reason. To reduce exposure to defamation claims, some institutions adopt the general policy of providing in response to reference requests only basic factual information, such as dates of employment and last position held. Administering and monitoring compliance with institutional policy on references is a challenge at colleges and universities, where many individuals may be contacted by prospective employers.

Care should also be taken to comply with pertinent requirements under ERISA, including preparing any necessary formal benefits-plan documents and summary plan descriptions.

**CONCLUSION:**

Universities contemplating layoffs during a financial downturn can manage the costly attendant legal risks through careful planning. This means developing a thoughtfully designed plan that is consistent with the university’s institutional layoff policies, fully vetted for its substantive and procedural completeness, adequately communicated to the institution’s various constituencies, and implemented in a manner that respects the dignity of employees.
AUTHORS:

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RESOURCES:

NACUA Resources:

NACUA Resource Pages

- NACUA, Weathering Financial Uncertainty
  Mounted just a few weeks ago, this NACUA resource page contains links to pertinent statutes and regulations, conference outlines, articles from the JOURNAL OF COLLEGE AND UNIVERSITY LAW, and media reports.
- Employment Separation Resources and Links

NACUA Conference Outlines

- Current Issues in Age Discrimination, 2006 Annual Conference.
- Do Your Employment Policies Pass the Test? March 2006 CLE.
- Designing and Implementing Effective Faculty Early Retirement Programs, March 2004 CLE.
- Planning and Implementing Institutional Reductions in Force and Other Personnel Cost-Saving Measures Involving Administrators and Staff Financial Aspects, March 2004 CLE.
- Planning and Implementing Institutional Reductions in Force and Other Personnel Cost-Saving Measures Involving Administrators and Staff Personnel, March 2004 CLE.
- Some of the Ten Things Every Higher Education Lawyer Should Know About Employment Law (Other than Discrimination Law), 2003 Annual Conference.
- Designing and Implementing Effective Faculty Early Retirement Programs, March 2002 CLE.
- RIFs, Downsizing, and Restructuring: Recent Developments with Respect to Waivers, WARN, and Written Layoff Policies, 2001 Annual Conference.
- Primer on Retirement Benefits, 2000 Annual Conference.

NACUA Publications

- Should I Stay or Should I Go? Early Retirement Incentive Programs, 2006.

Other Resources:

- National Association of College and University Business Officers, Facing the Financial Downturn: Toolkit and Resources for Colleges and Universities
NACUBO has assembled on one Web site a useful compendium of research papers, analytic tools, and links to other cites. The materials are indispensable aids in the preparation of justifications for layoff plans.

- National Association of College and University Business Officers, **NACUBO Advisory Report 92-1: Risk Management of Reductions in Force**
  Prepared for NACUBO by United Educators Risk Retention Group, Inc., this 14-page monograph outlines a well-organized six-point strategy for designing and implementing a college or university retrenchment plan. The monograph includes a useful “Check-List for Internal Planning,” and describes the experience of two institutions, one public and one private, in implementing large-scale layoffs.

**Footnotes:**

**FN1.** Courts use the terms “layoffs” and “reductions in force” interchangeably to mean work force reductions caused by economic or financial considerations in which employees are terminated due to no fault of their own and not replaced by newly-hired employees performing substantially the same work. Courts distinguish between economy-based or budget-based layoffs, on the one hand, and terminations for cause, on the other. *E.g.*, *Smith v. Thomas Jefferson Univ.*, 2006 U.S. Dist. LEXIS 45079, at *9* (E.D. Pa.); *Wright v. Central State Univ.*, 1999 U.S. Dist. LEXIS 21711, at *17* (S.D. Ohio). In this paper the term “layoff” is used as courts have used it to refer to no-fault termination of staff members due to economic or financial circumstances beyond their control.

**FN2.** The collective bargaining agreement between one Michigan public university and its unionized staff employees contains this provision: “[T]emporary adjustments in the workforce can be made without application of the Layoff [..] Procedures. Such temporary layoffs will not exceed a total of seven (7) days per contract year or two (2) days per pay period, and the Union will be notified before such layoffs are implemented.” Thomas P. Hustoles and Ellen M. Babbitt, *Planning and Implementing Institutional Reductions in Force and Other Personnel Cost-Saving Measures Involving Administrators and Staff*, a paper presented at a continuing legal education seminar of the National Association of College and University Attorneys, March 2004.

**FN3.** *See, e.g.* *Karr v. Michigan State University Board of Trustees*, 325 N.W. 2d 605 (Mich. App. 1982), holding that a public university could not unilaterally furlough a tenure-track faculty member whose one-year appointment letter specified the salary to which he was entitled. Cf. *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999); *Massachusetts Community College Council v. Commonwealth of Massachusetts*, 649 N.E.2d 708 (Mass. 1995).


FN8. Application of the WARN Act to colleges and universities is not simple, and the implementing Department of Labor regulations (20 C.F.R. Part 639) should be consulted. While this paper is not intended to suggest that sixty days’ notice of layoffs in the higher education context is a statutory prerequisite, it is in our judgment a best practice in all but the most extreme cases to provide at least that period of notice.

FN9. Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act provide that an employer acts legally if it follows a “bona fide seniority system,” and courts have interpreted the law to allow layoffs in reverse order of seniority, provided that seniority is determined fairly. *Zambetti v. Cuyahoga Community College*, 314 F.3d 249 (6th Cir. 2002); *Tramble v. Columbia University*, 1999 U.S. Dist. LEXIS 1274 (S.D.N.Y.).


FN13. To what extent, if any, should the institution’s president figure in public communications about a large-scale layoff? Whether the president should be a visible spokesperson may depend on the layoff locus. If the layoff is confined to one or a few operating areas (for example, buildings and grounds, the teaching hospital, or central administration offices under the supervision of one vice president), wise strategy may call for delegation of communications responsibility down the chain of command to the appropriate division or unit head. It may be prudent to reserve the president for possible major public controversy. Naturally, the president’s aptitude for effectively handling such situations should be taken into account.


FN15. The excellent 1992 NACUBO report contains a series of suggestions on how to prepare for and conduct these inevitably painful and difficult meetings: “Supervisors should be given extensive orientation on the notification process. They should be encouraged to be sympathetic and supportive, but to avoid giving false hopes. The human resources staff may work closely with these ‘notification managers’ to rehearse remarks and determine if it is necessary to substitute another individual to convey the message. Central coordination of the notification schedule and the use of written materials outlining policies, procedures, and benefits is important." *NACUBO Advisory Report 92-1*, page 6.

FN16. COBRA was enacted in 1986 to preserve the group health insurance benefits of terminated employees. Under COBRA, former employees are entitled to retain their benefit eligibility for a maximum of 18 months. But COBRA coverage is very expensive; employees must pay 102 percent of the combined employer-employee premium.
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