



Supporting the Culminating Stages of Faculty Careers: Legal Issues

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Executive Summary	4
Introduction	4
Brief History of Mandatory Faculty Retirement	5
The Nature of Age Discrimination	7
Voluntary Retirement	9
Retaliation	10
Contract Issues in Phased Retirement	12
Benefits and Age Discrimination	14
Retirement Incentives and the Safe Harbor	14
Tax and Other Twists and Turns	16
An Operational Lesson in Retirement Incentives	19
Conclusion	20
Suggested Resources	21
Appendix	22
Endnotes	23

Executive Summary

Congress eliminated mandatory retirement for tenured faculty in 1994. Since that time, professors with tenured appointments have had the freedom to retire at a time of their choice. Colleges and universities can enhance the transition to retirement with various amenities and inducements. This report focuses on the major legal issues in the areas of civil rights, contract, and tax law associated with faculty retirement incentives.

From the perspective of civil rights, retirement must be a voluntary decision, made without institutional coercion. Colleges and universities must avoid negative stereotypes suggesting that older faculty are incompetent or unproductive. All faculty must be judged on their individual performance. General rules prohibiting, for example, the re-hire of retired faculty into adjunct positions may violate the Age Discrimination in Employment Act. It is important not to use terms such as “doddering” or “fuddy duddy,” lest they be taken as evidence of bias. Institutions must also avoid retaliating against faculty who assert their right to be free from age discrimination. Colleges and universities can address performance issues with all tenured faculty, whether young or old, through professional development, discipline, and dismissal. The passive strategy of waiting for mandatory retirement is no longer an option.

Clear language in retirement incentive plans, benefit programs, and one-off severance agreements with individual faculty eliminate many legal issues. For example, institutions must address the point at which a tenured professor participating in a phased retirement program relinquishes his or her tenure. Is it at the end of the full-time position, the end of the transition period, or some interim point? Clear language is also important in explaining how the schedule for a part-time teaching load will be set. One institution, for example, stated that

the part-time schedule would be set by “mutual agreement” with the retiring faculty member. The institution found itself on the losing end of a lawsuit after the faculty member objected to a half-time load in both the fall and spring semesters, preferring instead a full-time load in the spring.

Retirement incentives raise a host of complex questions under the tax code as well as federal laws protecting employee benefits. An institution can impose an upper age limit on an ongoing retirement incentive by designing the incentive to satisfy a statutory safe harbor. Detailed laws and regulations constrain many of the options in designing faculty retirement incentives, including ongoing programs and window plans. Qualified tax counsel is an important partner in designing retirement incentives.

Before considering the adoption of retirement incentives, the institution must clarify its goals for the program. Those goals, along with the legal framework, drive the creation of important benefits that support faculty in the culminating stages of their careers.

Introduction

Institutions offer faculty retirement plans to provide economic security to professors when they reach the end of their full-time academic careers. A generous retirement plan can help in recruiting faculty to the institution by providing assurance of their future economic comfort. Basic retirement plans come in two types: defined contribution and defined benefit plans. In a defined contribution plan, a set amount is regularly deposited in a tax-deferred retirement account for the individual. The amount is often a percentage of salary. The plan may require or permit contributions from the employer, the faculty member, or both. The funds grow over time, with the growth dependent on the types of investments chosen and their performance. When the faculty member retires, the account

is used for retirement income. The amount of income depends upon the sum accumulated over the faculty member's period of professional service.

A defined benefit plan, in contrast, sets a formula for the size of payments that an individual faculty member will receive in retirement. The formula often uses the individual's average salary in the final few years before retirement. The faculty member will, upon retirement, receive this defined benefit. Defined benefit plans are more common at public colleges and universities than private institutions. An institution may offer both types of plans.

Before 1994, most colleges and universities could require faculty members to retire. As of January 1, 1994, however, federal law forbade mandatory faculty retirement. Faculty members gained the right to select their own retirement date. At some institutions, the elimination of mandatory retirement has had little impact on the ages at which faculty members retire. At other institutions, the elimination of mandatory retirement resulted in some faculty members choosing to retire later. Poor conditions in financial markets can influence the timing of faculty retirement. If the stock market is low, for example, a professor who has chosen stocks for defined contribution pension plan investments may delay retirement until market conditions improve. Many factors influence the timing of faculty retirements.

Colleges and universities may explore ways to encourage their faculty members to retire. Retirements can ease budget pressures, as long-serving faculty often—but not always—command high salaries. Retirements can allow an institution to recruit new faculty, perhaps with new areas of specialization that the institution seeks to promote. A retirement incentive program is a common method used by institutions for encouraging faculty to retire. Another method, directed to the retirement of a single

individual, is a voluntary, individually-negotiated severance agreement. Incentives may include cash payments and fringe benefits such as health insurance or life insurance.

Regular retirement plans and retirement incentives must operate within a complex structure of legal requirements. Federal laws speak to important issues such as the equity in plan design and soundness in plan operation. Tax laws stake out narrow territory for the deferral of income taxes until after retirement. Federal and state laws prohibit age discrimination. These laws constrain the circumstances under which an institution can impose an upper age limit on faculty eligibility to receive certain retirement incentives.

Legal missteps can lead to severe consequences for the institution and the individual, including taxes, interest, and penalties. An institution found liable for age discrimination may bear costs for elements such as back pay, front pay, damages, and the plaintiff's attorneys fees.

Directed to a readership of university administrators, this report provides an overview of the key legal issues in encouraging faculty members to retire. It is not a step-by-step guide to designing retirement plans or incentives, nor is it a substitute for competent legal advice. The hope is, rather, that the reader will gain a richer understanding of the key legal issues that arise in supporting faculty members in the culminating stages of their academic careers.

Brief History of Mandatory Faculty Retirement

The passage in 1967 of the federal Age Discrimination in Employment Act (ADEA) hailed a new era in workplace equity. Championed by Congressman Claude Pepper from Florida, the ADEA sought to shatter myths and stereotypes about older people. Section 2 of the ADEA declares that

...the purpose of this chapter [is] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Age differs from other personal characteristics such as race, religion, disability, and gender, which our civil rights laws protect. Because age is a continuum, the ADEA touches everyone's employment from age 40 onward.

As a general matter, the ADEA requires neutrality with respect to age. The law protects both employees and job applicants starting at age 40. It prohibits employers from discriminating against them in terms and conditions of employment. These include: hiring, training, compensation, advancement, layoff, and dismissal. The ADEA also prohibits employers from retaliating against someone who seeks to exercise rights under the statute.

Since 1967, Congress has made three major amendments to the ADEA. In 1978, it raised the mandatory retirement age to 70. In 1986, it eliminated mandatory retirement entirely, except for limited categories including highly-paid executives and public safety personnel. With both the 1978 and 1986 amendments, the American Council on Education and other higher education groups successfully lobbied for a brief delay in the effective dates with respect to tenured faculty. They argued that a fixed endpoint had long been a central feature of the tenure system. Colleges and universities sought to attract more women and minorities to the professoriate, and the elimination of mandatory retirement, they argued, could complicate those efforts. A 1977 news report on the legislative proposal to raise the retirement age to 70 explained these concerns:

Employers claim they will be hurt by having to keep highly paid employees, who

otherwise would retire and be replaced by younger people at lower salaries. "This is going to have a serious impact on virtually every university in the country," said Sheldon Steinbach, counsel for the American Council on Education. Steinbach said the average senior faculty member with a full professorship in a major university earns between \$25,000 and \$35,000 a year, compared with \$14,000 to \$15,000 a year for a young beginner. "We don't know yet how much of a strain this will be, because we don't know how many will stay after 65, but there will be an impact.... This would have an especially dramatic impact on minorities and women," Steinbach said, "primarily because they are the ones entering at this point in time at greater numbers than they did in the past."¹

Mandatory retirement for tenured faculty finally ended on January 1, 1994.² The elimination of mandatory retirement is sometimes called "uncapping," referring to removal of the age limit or cap.

Tenured Faculty Retirement Age

- 1967** Congress prohibits mandatory retirement before age 65; little impact on higher education, which already follows that pattern
- 1978** Congress raises mandatory retirement age to 70, delaying implementation for tenured faculty
- 1982** Tenured faculty mandatory retirement age becomes 70 on July 1
- 1986** Congress eliminates mandatory retirement, again delaying implementation for tenured faculty
- 1994** Mandatory retirement ends for tenured faculty as of January 1

The third major amendment to the ADEA occurred in 1990 with the passage of the Older Workers Benefit Protection Act. OWBPA

(sometimes pronounced “OB-pah”) addressed two main areas. First, it prohibited discrimination in fringe benefits. Second, it set minimum technical requirements for releases of legal claims. Older workers who sign releases of their ADEA claims must receive, among other elements, at least 21 days to consider the release (extended to 45 days in some situations), advice about seeking legal guidance, and seven days in which they might revoke their acceptance of a release. The requirements help ensure that a release of legal claims is both knowing and voluntary. Important in resolving individual lawsuits over age discrimination, the requirements also apply, with significant additions, to campus retirement incentive programs. See Appendix, Checklist for Compliance with the Older Workers Benefit Protection Act.

Even before 1994, individual institutions were free to eliminate mandatory retirement on a voluntary basis. Some institutions, both public and private, were compelled to do so under state law. While federal civil rights laws, such as the ADEA, take precedence over state laws, states remain free to enact supplemental protections. Of the states that uncapped mandatory retirement for tenured faculty before 1994, many eliminated mandatory retirement in their *public* higher education institutions.³ Other states took a broader approach, uncapping in both public and private institutions.⁴

The Nature of Age Discrimination

As a society, we have become responsive to avoiding discrimination based on factors such as gender, race, and disability. Age stereotypes, however, seem more deeply ingrained. A 50-year-old who has just received a PhD is more likely to encounter difficulty in securing an academic appointment than a 30-year-old. Evaluators may assume the older candidate is less flexible, less current in the field, and less likely to make a lasting contribution to the

institution. Age stereotypes can also influence the culminating stages of faculty careers. Many people wrongly assume that older faculty are less productive in research, less innovative in teaching, and uninterested in advancing their institutions. Another common assumption is that mental performance necessarily declines in older people.

One dean of faculty, for example, encouraged the college’s governing board swiftly to adopt a retirement incentive program with this rationale:

It is no secret that faculty effectiveness decreases with age, and turnover would be healthy. Older faculty members become distanced from the modern roots of their fields. There are the yellowed lecture notes, the less-traveled path to conferences and seminars, the less than enthusiastic welcome for students.⁵

Such remarks devalue older professors and cast a pall over the culminating stages of faculty careers.

Stray remarks may be offered as evidence in lawsuits over age discrimination. A department may seek, for example, “young, fresh blood” or older faculty may be referred to as “legacies,” a term also used for outdated computer systems.⁶ In one case, an administrator explained a layoff with the observation that “in a forest you have to cut down the old, big trees so the little trees underneath can grow.” He admitted that “little trees” referred to younger university staff. AARP has offered guidance on language that may demean older people. AARP suggests avoiding terms such as:

behind the times	fragile	out dated
dear	fuddy duddy	over the hill
doddering	gray	senile
feeble	little	sweet
foolish	old fool	withered
	old maid	wrinkled

Some would also add the term “overqualified” to the list, as it may on occasion serve as a proxy for age.

Aging is a highly individual process. While a group of 6-year-olds may share, in general terms, common levels of cognitive and physical development, a group of 86-year-olds is much more heterogeneous. At many institutions, older faculty are living legends. In 2005, the Georgetown University Law Center believed that its 99-year-old adjunct professor of international law was the country’s oldest active law professor. The professor, who taught for 44 years, died a few days after the end of the fall semester that year.

Colleges and universities must make employment decisions without regard to age. It is illegal, for example, to assume that older faculty members are inept with computers, unenthusiastic, or lacking in new ideas. They are individuals with unique capabilities. Faculty evaluations, including post-tenure evaluations, should always discuss individual performance rather than myths or stereotypes about aging. Institutional standards and procedures must apply fairly to the appointment, evaluation, and dismissal of all professors, whether they are 30 or 80 years old. The award of tenure to a humanities professor in New York at the age of 68 was sufficiently unusual to merit press coverage.⁷ Perhaps someday this will be commonplace rather than newsworthy.

An institution may treat its retired faculty in an unlawful discriminatory manner, as the situation of Van McGraw at the University of Louisiana at Monroe (ULM) illustrates. The U.S. Equal Employment Opportunity Commission (EEOC) pursued an age discrimination lawsuit on behalf of the retired former professor and dean. Upon retiring from the university, McGraw immediately returned as a professor. In 1996 the Board of Supervisors adopted a new policy prohibiting the re-hire of retirees. Under the new policy McGraw’s contract

was not renewed. He made repeated, unsuccessful attempts to return to teaching. In 2005, the EEOC sued the university for age discrimination and retaliation. The prohibition on rehiring retirees disqualified a group of older faculty on a basis that would be difficult for an institution to justify. After five years of litigation, the parties settled the case for \$450,000, repeal of the policy, and a promise that the university would conduct annual training on discrimination and harassment for all managerial and supervisory personnel, including the president, provost, and deans. “I loved ULM for all 37 years I was there, and still do,” said McGraw. “I feel that some measure of justice has been achieved, especially concerning the positive changes the university and the board are going to make, which will benefit others in the future and prevent further discrimination.”

With the end of mandatory retirement in 1994, colleges and universities lost a passive strategy for addressing poor faculty performance—waiting for the date on which the professor would be obliged to depart. Today active strategies remain viable for addressing performance: professional development, faculty discipline, and dismissal. Some institutions are enhancing their policies for progressive faculty discipline. Others have initiated their first-ever proceedings to dismiss a tenured professor. By legislative mandate or choice, some institutions have expanded the active options to include post-tenure evaluation. The key to all these tools is a focus on performance. An employment decision based on actual performance does not constitute age discrimination.

In the absence of a fixed retirement age, what happens to the concept of *early* retirement? In one sense, it is moot. Some institutions avoid using the term “early” in describing retirement incentive programs. Several institutions, for example, have developed a Faculty Retirement Incentive Plan, or FRIP (e.g., Missouri State University, Stanford University,

and University of Chicago). Other institutions still refer to their plans as early retirement. The benchmark, however, is not a mandatory retirement age. It may be the age at which the professor or other employee would receive full Social Security retirement benefits (e.g., University of Utah). The benchmark may also be the normal retirement age under a defined benefit plan.

Another factor hidden in the elimination of mandatory retirement is new complexity in calculating front pay. If a court declines to order an institution to reinstate a faculty member whom it dismissed illegally, front pay is an alternate remedy. Over what period of time should front pay be calculated? We can no longer assume that a professor would relinquish his or her post at age 70. Establishing a year in which the professor would have resigned or retired becomes an evidentiary matter. Evidence might include average retirement ages at the institution; a normal retirement age, as discussed above; or prior statements the professor may have offered about retirement.⁸

Voluntary Retirement

Faculty retirement must be an individual, voluntary decision. An institution must avoid the appearance of pressuring a faculty member to retire, lest the individual claim coercion and discrimination. Even offering unsolicited advice about retirement or retirement benefits to an individual may be evidence of age discrimination. A pending case involving the University of California System, for example, involves allegations that a supervisor made unsolicited statements such as “You really ought to retire.” A jury could infer that the statements were evidence of age bias, rather than comments about how the individual might advance his best interests.⁹ A single inquiry into a faculty member’s retirement plans, standing alone, may not prove age bias.¹⁰ Particular facts and

circumstances would weigh heavily in the determination, which is usually made by a jury. To reduce the legal risks, pose the inquiry in writing, explain the reason for asking, and indicate that a reply is voluntary rather than mandatory. Also explain that the individual will not be obliged to retire on any date indicated.

Consider the situation of William Newman, a tenured professor who taught management information systems at Texas A&M International University. In July 2006, he consulted with the human resources office about possible retirement and completed some forms. He allegedly was told that he would also need to submit a letter of resignation to his department chair or dean, which he never did. He informed the human resources office that he was considering two possible retirement dates the following month, August 10 or August 15, and that he did not intend to inform anyone about his plans. The human resources office consulted with the dean, who concluded that Newman had resigned. The dean wrote to Professor Newman to that effect on July 21.

Newman promptly objected by telephone and certified letter, asserting that he had neither resigned nor retired and that he intended to continue teaching. The administration held fast to the position that he had resigned and denied Newman’s request for an internal hearing on the matter. Newman sued the university for, among other claims, due process violation in not providing a hearing. An appellate state court ruled in 2008 that he was entitled to a trial. The court observed that the university “persisted in maintaining that Newman had ‘retired’ despite his prompt and unequivocal denial of retirement. At a minimum, this raises a fact issue as to whether the ‘deemed’ resignation was a pre-text for wrongfully terminating him.”

One Wag's Concern over Unsolicited Retirement Advice

Dear vice chancellor (Geoffrey):

I do apologize for taking up your time during the vacation, but there is a small matter which has recently been causing me and indeed my wife (Dorothy) and seven children some minor concern.

I refer to the various circulars which emanate from your office on the subject of early retirement. These, as you will recall, are usually straightforward documents. The financial advantages of the various available schemes are listed and some detailed examples are provided of the actual benefits which might accrue for academics in varying age and status brackets. . . [describes circulars distributed to entire faculty]. But subsequent editions appear to have had a more restricted circulation list. Indeed during the early months of last term I received no fewer than 18 letters from your office—all containing cyclostyled material and with envelopes bearing such injunctions as “CASH BONANZA—specially for you,” and “STACKS OF LOOT—yours for a signature.”

Matters began to come to a head—and you appreciate that I intend this as constructive criticism—when I was forced to restrain a porter from pasting a letter headed *Early retirement: get out while the going's good* on the rear windows of my Dormobile Campavan.

No doubt it is important that the facts about early retirement are fully brought home to those who might wish to avail themselves of existing opportunities. But there must surely be a line between education and what one might call propaganda.

Certainly this was the view taken by my wife and myself and several of our children when we awoke this morning to find that the university had taken advantage of the empty billboard facing our residence to give additional publicity to the bursar's present, somewhat insensitive slogan: “PUSH OFF SUCKER—YOUR NUMBER'S UP.”

...I think it safe to say that at the moment I do not intend to consider my present position until after my 40th birthday early next year.

Yours sincerely

G. Lapping (Prof)

From the Times Higher Education Supplement

Fundamentally, incentives provide a stimulus to faculty in making voluntary decisions about retirement. Incentives can take many forms, including cash payments, enhanced benefits, sabbatical programs, and other elements. Financial counseling, a common feature, merits special comment. From a legal standpoint, institutions are well-advised to retain an experienced outside firm to provide counseling rather than conducting it themselves. By using an outside firm, an institution avoids the risk of creating a fiduciary relationship with a faculty member. Involving an outside firm also reduces the risk that the faculty member will claim that the institution coerced his or her retirement.

Retaliation

The ADEA prohibits not only age discrimination but also retaliation against employees who assert rights under the statute. The most recent data available from the EEOC show that approximately 20 percent of all discrimination charges which the Commission receives involve age discrimination. More than a third of all charges involve a claim of retaliation under the ADEA and the other statutes the EEOC enforces. Retaliation has become at least as significant a problem as discrimination in American workplaces.

EEOC Charge Statistics Fiscal Years 2000 to 2010 (Excerpt) ¹¹											
	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Total Charges Under All Laws	79,896	80,840	84,442	81,293	79,432	75,428	75,768	82,792	95,402	93,277	99,922
Age Charges	16,008	17,405	19,921	19,124	17,837	16,585	16,548	19,103	24,582	22,778	23,264
	21.5%	23.6%	23.5%	22.5%	22.0%	21.8%	23.2%	25.8%	24.4%	23.3%	21.5%
Retaliation Charges Under All Laws	21,613	22,257	22,768	22,690	22,740	22,278	22,555	26,663	32,690	33,613	36,258
	27.1%	27.5%	27.0%	27.9%	28.6%	29.5%	29.8%	32.3%	34.3%	36.0%	36.3%

Under the ADEA an institution may not take an adverse action against a faculty member or other employee because the individual:

- Opposed age discrimination, whether informally or formally. Informal opposition might consist of commenting upon unfairness due to age. Formal opposition includes steps such as filing an age discrimination charge.
- Assisted someone else who is opposing age discrimination.
- Participated in an investigation, hearing, or other proceeding involving age discrimination.

A faculty member or other employee who proves the institution retaliated in violation of the ADEA is entitled to unlimited compensatory and punitive damages.

A federal district court allowed Professor Michael Shub to proceed to trial on his lawsuit against Westchester Community College involving, among other claims, one for retaliation under the ADEA.¹² Shub was a retired associate professor of mathematics. He sought an appointment as an adjunct professor and, after his first unsuccessful attempt, filed an

age discrimination charge against the college. He continued to apply for adjunct positions. The department chair testified that he “just didn’t know how to proceed” with Shub’s applications after he had filed the discrimination charge. The judge ruled that a jury could conceivably conclude that the discrimination charge influenced the college’s decision not to hire Shub. Such a finding would constitute retaliation under the ADEA.

The case illustrates a classic piece of advice for avoiding retaliation claims—train managers and supervisors. The ADEA protects an individual’s good faith claim of age discrimination. Even if the claim ultimately fails, the employer cannot penalize an applicant or employee in any way for opposing age discrimination. The college would have been wise to advise all of its department chairs about these basic facts and to remind them again after a faculty member filed a charge. One also hopes that institutions routinely encourage department chairs to seek advice as legal problems emerge.

Contract Issues in Phased Retirement

A phased retirement agreement is a contract requiring careful drafting and close review by both parties. Disputes can arise over issues such as the new teaching schedule or the duration of the program. Three examples serve to illustrate common problems.

Pianist Jerome Rose, a tenured professor at Bowling Green State University, agreed to retire and, for the next three years, to teach a limited class schedule under an annual contract. In the retirement agreement, the university reserved its right to set the schedule:

5.The University will have the sole discretion to assign the hours and responsibilities of the Faculty Member. If the Faculty Member fails to perform services at acceptable levels, this agreement will terminate with no further responsibility of the University to offer the Faculty Member any further service opportunities.

6. The Faculty Member will sign an annual contract in each of the fiscal years covered by this agreement. Failure to sign an initial contract will indicate that the Faculty Member does not wish to keep the supplemental retirement option in force. If for any reason the Faculty Member fails to sign subsequent contracts, this agreement will terminate with no further responsibility of the University to offer the Faculty Member any further service opportunities.

In the first year, the university accommodated Rose's request for summer teaching. For the second year the university assigned him to the spring term. Rose objected because teaching in Ohio during the fall and spring semesters would conflict with obligations he had in New York. Various correspondence and meetings ensued, and Rose ultimately did not sign the annual contract. After the spring semester had begun, he requested a leave of absence. He also continued to state his opposition

to any teaching assignments except in the summer. The university terminated Rose's employment. The clear language of the agreement led the court readily to conclude that Rose had violated the agreement and the university owed him no further obligation.¹³

A dispute between Professor Thomas Guss and Fort Hays State University over his phased teaching schedule came to the opposite result. In June 2003, Guss and the university signed a "Notice of Continuing Tenured Faculty Appointment." The agreement provided Guss with a half-time appointment for the 2003–04 year. The agreement referred to a phased retirement agreement for further details. The phased retirement agreement, signed two days later, provided Guss with a five-year period of half-time teaching, ending in 2008. The phased retirement agreement stated that "[t]he exact schedule by which this reduction is achieved may be adjusted annually by mutual agreement between the Employee and the University."

In the first year of his reduced schedule, Guss taught full-time in the spring semester only. For the following year, the university offered him a schedule of 6 credit hours in the fall and 6 credit hours in the spring. Guss objected, indicating that he would again teach full-time in the spring. In reply the university ordered Guss to report by August 23, 2004. The university continued: "if you fail to be present and commence your teaching duties, we will consider you to have abandoned your position and will initiate appropriate proceedings to terminate your contract...." The university promptly ended the agreement. Guss filed an internal grievance, which the university rejected. He then filed a lawsuit.

The court examined three relevant paragraphs of the phased retirement agreement:

1. Effective August 17, 2003, Employee shall be appointed to the position of Professor of Educational Administration and Counseling on a half-time (.5 FTE) nine-months

appointment, at an annual salary of \$26,004. The exact schedule by which this reduction is achieved may be adjusted annually by mutual agreement between the Employee and the University.

7. While this Agreement is otherwise irrevocable, the Employee and the University may, by mutual agreement, modify the terms hereof at any time prior to Employee's retirement, to reduce further the Employee's fractional time appointment or to provide for an earlier full retirement date for Employee. Any such modification of this Agreement must be in writing.

8. This Agreement [1] is intended to terminate any previous agreement, contract, or understanding concerning this employment relationship; [2] will remain in effect even if the University subsequently establishes different policies or enters into agreements containing different terms and conditions of employment of any unclassified employee; [3] is subject to all provisions of the laws of Kansas, the regulations, policies, minutes, and resolutions of the Board of Regents and the rules, regulations, and policies of University; and [4] is subject to such additional terms as set forth in Employee's annual Letter of Appointment.

The court concluded that, by a plain reading of paragraph 1, the university negotiated away its inherent right to set faculty schedules.¹⁴ It awarded Guss his unpaid salary and reinstatement for remainder of his contract.

A key issue in the phased retirement of tenured professors is the point at which their tenure ends. Does the professor relinquish tenure upon the conclusion of his or her full-time employment? The end of the phased period is the other obvious option, although a mid-point could also be used. The choice can make a difference. Say, for example, enrollment drops precipitously or the individual's

performance declines to an unacceptable level. Under such conditions, the institution might seek the flexibility to terminate the phased arrangement at the end of a year. From the faculty member's perspective, the institution's firm commitment to the full phase-out period may be an important factor in agreeing to a phased retirement. Fort Hays State University titled its agreement "Notice of Continuing Tenured Faculty Appointment," which implies that tenure remained through the period of part-time work. The correct approach is an agreement that clearly specifies the point at which the professor no longer has tenure.

A more informal situation apparently existed at a state university in Mississippi, which decided to discontinue its phased retirement program entirely. According to press accounts, the university faced new financial pressures requiring \$1.2 million in budget cuts to academic programs. The institution decided not to renew the appointments of faculty in phased retirement; they were teaching half time at half salary. That decision protected current tenured and tenure-track faculty, while upsetting the plans and expectations of recently-retired faculty who had continued to teach.

Several factors complicated the Mississippi situation. The dean who encouraged the faculty to consider informal phased retirement left. His successor discontinued the program. In addition, any re-hire of a retired professor required approval from the governing board, and a professor was obliged to retire before the board could consider the matter. One professor explained that the former dean had said that the \$50,000 annual savings from the professor's retirement and re-hire would be invested in the program he headed. As he had intended to teach half time for three more years, the professor was surprised and disappointed when his contract was not renewed. The situation resulted in negative publicity for the university.¹⁵

Benefits and Age Discrimination

In passing OWBPA in 1990, Congress acknowledged that the cost of providing certain benefits to older employees may exceed the cost of providing the same benefit to younger employees. Life insurance is an example of a benefit bearing a cost that can vary with the employee's age. Congress allowed employers, in limited situations, to reduce benefits for older staff. The *cost* to the employer, however, must remain equal. For example, an institution could spend \$500 per employee to purchase life insurance. Younger employees would receive more insurance coverage than their older colleagues. This differential would not, however, constitute age discrimination because the employer is paying the same amount for the premiums.

Voluntary retirement incentives may offer fringe benefits that would not otherwise be available to the individual. The University of Rhode Island, for example, offered participants a special health benefit stipend not normally available to retirees.¹⁶

The EEOC and AARP battled for years over whether an employer may offer a retirement incentive providing medical benefits only up to the point that the individual becomes eligible for Medicare. The EEOC took the position that discontinuing medical benefits at age 65 does not constitute age discrimination, since the trigger is Medicare eligibility. AARP maintained that such a coordination of benefits does discriminate based on age. After several rounds of litigation, in which ACE supported the EEOC's position, a federal appeals court ruled in 2007 that a retirement incentive can, indeed, discontinue medical benefits at the point of Medicare eligibility without violating the ADEA.¹⁷

Once again, clear language is critical. The University of Northern Iowa sponsored a group health care plan that provided supplemental coverage to retirees eligible for Medicare. A retired professor who did not enroll in

Medicare Part B at the earliest opportunity sued unsuccessfully for continued full benefits under the university's group plan. The university handbook explained that the transition occurred when the employee was "entitled to claim benefits" from Medicare. The Iowa Supreme Court ruled that this language absolved the university of any duty to pay the retiree's medical expenses that would have been covered by Medicare Part B, had he enrolled in a timely manner.¹⁸

Medical benefits are a special concern to retiring faculty members, and institutions have an array of options to structure benefits for retirees.¹⁹ In designing retiree medical benefits, institutions will need to consider the impact of the recent federal healthcare reform law, the Patient Protection and Affordable Health Care Act. The law has a limited exception for retiree-only medical benefits, requiring close analysis and legal advice.

Retirement Incentives and the Safe Harbor

We now reach the central topic of retirement incentives. Should a college offer a retirement incentive to faculty? Before answering this question, the institution can usefully examine the age and salary structure of its faculty. It may also wish to examine and promote the existing retirement benefits. One expert has suggested these steps:²⁰

- Review the adequacy of normal retirement benefits and revise as appropriate.
- Reduce any incentives under current plans to postpone retirement.
- Communicate to faculty clearly and positively:
 - » Current pension benefits.
 - » Any post-retirement medical benefits for retiree, spouse, or dependents.
 - » Information on Medicare coverage.
 - » Other post-retirement benefits such as long-term care, dental coverage, life

insurance, financial planning, or discount programs.

- » Campus amenities available to retired faculty such as: office space, secretarial support, library or gym access, parking, tuition remission, department mailings, invitations to events, sports tickets, and possible rehire for part-time teaching.
- Consider enhancing existing retirement benefits for certain faculty (complying with Internal Revenue Code sec. 457(b)).

An institution deciding to offer faculty retirement incentives has many choices. The two major structures for retirement incentives are temporary plans and ongoing plans. Under a temporary plan, sometimes called a window plan, the institution offers a retirement incentive only for a relatively short period of time, typically 6 to 18 months. Faculty who agree within the window to retire receive extra compensation, often a lump sum payment. To participate in a window plan, a faculty member must generally satisfy requirements of a minimum age and a minimum number of years of service. Significantly, a window plan need not impose an upper age limit on eligibility to stimulate retirements. To impose an upper age

limit would effectively result in age discrimination, violating OWBPA.

A window plan has advantages and disadvantages. It can meet an institution's immediate need to reduce its workforce, decreasing costs. From a legal standpoint, an institution can design a window plan to avoid problems with ERISA and OWBPA, discussed further below. However a window plan often stimulates turnover in a somewhat disorganized way. Some institutions take steps to preserve their essential people and programs. An institution might, for example, reserve its right to disapprove individual participation or the right to limit the number of faculty who can participate. Another potential drawback is that a window plan loses its effectiveness if faculty believe the institution may subsequently offer a more generous window plan.

An ongoing retirement incentive plan is, as the name implies, one that the institution makes available for an extended period of time. In limited circumstances, as discussed below, an ongoing plan may impose an upper age limit on tenured faculty for participation. For any ongoing plan, the institution should reserve the right to modify or discontinue the

Individual Arrangements and Group Plans

A South Carolina case illustrates the potential interplay between an individual employment agreement and an incentive program, in this instance a retention incentive. Professor Phillipe Arnaud served in the Department of Immunology at the Medical University of South Carolina. In July 1998, he signed a five-year agreement to resign as of June 2002, in exchange for a 10 percent increase in his base salary in the intervening years. In the fall of 2002, he opted to participate in a retention incentive program. The program guidelines plainly indicated that participation did not alter an individual's employment status:

- (1) Participants in the . . . program retain the same status and employment rights they held upon entering the program;
- (2) While program participants retain the same rights to their positions they held prior to entering the program, participation in the . . . program does not guarantee employment for the specified program period; and
- (3) Employees who enter the . . . program gain no new employment rights and are subject to the employment policies and procedures associated with whatever position(s) they occupy during the program period.

University administrators had reinforced to Arnaud that his agreement to resign was irrevocable and remained in effect. Still, Arnaud argued that the retention incentive program superseded the 1998 agreement. The South Carolina Supreme Court had little difficulty rejecting Arnaud's position.²²

plan. Otherwise changes in an ongoing plan might give rise to legal claims such as breach of contract or promissory estoppel.²¹

The ADEA explicitly allows defined benefit plans to offer certain age-based incentives to retirement. These include subsidies to individuals retiring before the plan's normal retirement age. An employee retiring at a younger age receives a more valuable subsidy. An institution may also offer subsidies that increase based on the number of years until the individual becomes eligible for full Social Security benefits.

Before the passage of OWBPA in 1990, some colleges and universities often offered faculty retirement incentive plans that reduced or eliminated benefits based on the individual's age. Enactment of OWBPA cast serious doubt on the legality of such age-based retirement incentives in defined contribution plans. After lobbying by the higher education community, including the American Council on Education and the American Association of University Professors, in 1998 Congress amended the ADEA. The amendment created a "safe harbor" allowing colleges and universities to offer retirement incentives with an upper age limit to tenured faculty. Under the safe harbor, an age-based faculty retirement incentive program must:

- Be available only to faculty with tenure or tenure-like employment arrangements.
- Supplement, rather than replace, regular benefits available to tenured faculty within the preceding year.
- Be available for at least 180 days, at the maximum benefit level, to all tenured faculty who meet the criteria for participation, such as the minimum age and requisite period of service.
- Allow a period of not less than 180 days between the faculty member's decision to participate and his or her retirement date.²³

Here is the crux of the safe harbor protecting an ongoing faculty retirement incentive program that sets an upper age limit. An institution must design the program so that no tenured professor is too old to have at least one opportunity to receive the maximum benefit, provided she meets the other eligibility criteria. If older faculty have at least one chance to take the incentive, the program can continue with an upper age limit.

Tax and Other Twists and Turns

This section discusses legal requirements for retirement programs under federal laws covering pensions and income taxes. Covering the Employee Retirement Income Security Act (ERISA) and federal tax requirements, it is designed to be comprehensible to the non-expert rather than comprehensive. The section ends with a checklist of questions to discuss with tax counsel.

ERISA Issues

Congress adopted the Employee Retirement Income Security Act of 1974 to address serious abuses in pensions and other employee benefits. Before ERISA, employees were at the mercy of private employers who might fail to set aside sufficient funds to pay promised benefits. A company might invest the funds poorly, leading to unacceptable losses. Even if funds were available, an employer might deny retirement benefits to long-serving employees under unfair plan loopholes. ERISA establishes minimum standards for non-governmental pension plans and regulates the federal income tax effects of transactions associated with employee benefit plans. The law protects the interests of employee benefit plan participants and their beneficiaries by: requiring that they receive financial and other information about the plan; establishing standards of conduct for plan fiduciaries; and providing meaningful remedies and access to the federal courts.

ERISA promotes consistency and fairness on a national basis in employee retirement and other benefits. President Gerald Ford signed the bill on Labor Day 1974.

ERISA applies to some colleges and universities and not to others. Looking first at the exclusions, ERISA does not apply to retirement programs for government employees. State colleges and universities, as well as community colleges, are exempt from ERISA. ERISA also excludes most church plans, so colleges and universities tied to religious groups may be exempt. What's left? ERISA covers private, non-religious colleges and universities.

A full discussion of this complex law is best left to experts. Here are some basic issues, though, that tax counsel and administrators often discuss at private, non-religious colleges and universities.

The institution can usually decide whether to design a retirement incentive to meet ERISA standards. In choosing the technical features of a retirement incentive, the institution can decide whether it wants the plan to meet the standards of ERISA or to fall outside them. Each choice has its virtues and drawbacks. The key virtue is favorable tax treatment. A cautionary note, discussed below, is that through a single severance agreement or a series of such agreements, an institution might unwittingly create an ERISA plan.

ERISA covers pension plans and welfare plans. A pension plan under ERISA is an institutional program offering retirement income or income deferred until the end of employment or beyond. Retirement incentive programs at private, non-religious institutions may be classified as pension plans under ERISA.

A welfare plan, in contrast, focuses more on fringe benefits including medical care, disability benefits, and death benefits. Certain severance arrangements may also be classified as ERISA-covered welfare plans.

The distinction between pension plans and welfare plans bears practical consequences. ERISA imposes stricter requirements on pension plans than on welfare plans. Pension plans must meet requirements in areas including vesting, funding, and distributions. Tax counsel may seek to structure retirement incentives as welfare plans under ERISA, to fall within the more flexible regulations.

ERISA trumps state age discrimination laws. A faculty retirement incentive that meets ERISA's requirements is exempt from compliance with state age discrimination laws. Private, non-religious colleges and universities may seek to structure their retirement incentives to satisfy ERISA, to eliminate legal risks under state age discrimination laws.

What are the risks under state laws against age discrimination? Many states have such laws, comparable to the federal ADEA, that prohibit private and public employers from discriminating on the basis of age. State laws can expand upon, but not limit, federal civil rights. A retirement incentive plan that satisfies the ADEA may nonetheless remain vulnerable under a broader state law against age discrimination. A retirement incentive that satisfies both the ADEA and ERISA fully meets its obligations not to discriminate on the basis of age.

A retirement incentive that satisfies ERISA may increase the faculty member's risk of income tax liability. No good deed goes unpunished. The funding requirements for ERISA plans may increase the risk that faculty members will face income tax on payments they receive as retirement incentives.

ERISA covers plans, but a plan may cover only one person. Another complexity with significant practical implications for institutions is the scope of a retirement incentive. Consider two examples—a large university offering a retirement incentive program to 300 faculty members and a small college offering an

individually-negotiated buy-out to one professor who wishes to retire. In both examples the institutions are private and not religiously-affiliated.

In a landmark case from the early 1990s, a private company that had no pension plan offered one long-serving employee an inducement to retire. The inducement included a monthly payment of \$500, life insurance, health insurance, an automobile, automobile expenses, and country club dues. The employee accepted the package. Four years later the company was sold and the benefits ended. The employee filed suit, and a federal appeals court ruled that, under ERISA, the monthly payments constituted a pension plan and the life and health insurance constituted a welfare plan. The court reasoned that ERISA did not set a lower limit on the number of participating employees; one was enough. Since various technical aspects of the agreement fit ERISA's definitions, the benefits could only be terminated in compliance with the statute.²⁴ Litigation is common over the application of ERISA to individual severance agreements, and institutions must design a retirement incentive for even a single faculty member with awareness of ERISA's technical requirements.

ERISA has special rules for incentives available only to a select group of highly-compensated or managerial employees. A plan may be exempt from ERISA if it does not draw on specially segregated funds and is available only to a limited group of employees. This exemption goes by the colorful name “top hat plan.” The plan must be “unfunded” and the employees must be a limited group at the management level or highly compensated.²⁵

Tax Issues

Beyond the ADEA and ERISA, a third major area of federal law applicable to retirement plans and incentives is the Internal Revenue Code. As a conceptual matter, the government

wants taxes paid promptly. Yet to encourage saving for retirement, the law establishes some narrow circumstances under which taxpayers may defer paying income taxes on certain types of retirement funds. In a defined contribution plan, for example, the employer and employee may invest money on which taxes are deferred until the money is withdrawn. The investments earn interest and dividends—at least that's the hope—and taxes payable on the earnings are also deferred. Technical rules govern details of the plan, such as the period of deferral. Once the taxpayer reaches a stated age limit, he or she must begin drawing from the funds and paying taxes. The balance between postponing taxes and paying them runs throughout the financial side of retirement.

The tax treatment of a retirement incentive can hinge on when the professor is entitled to receive payment. Consider two tenured faculty members who accept slightly different retirement incentives. Professor A agrees to retire today and to return in each of the next five years to present a symposium, for a fee of \$10,000 per symposium. Professor B agrees to retire today in exchange for five annual payments of \$10,000 each, with no further obligation to perform services.

When would each professor be responsible for paying income tax on the \$50,000? The answer for Professor A is straightforward. She would pay tax year-by-year on each \$10,000 payment. One might assume the same answer would hold for Professor B—upon receipt of each payment, he would pay income tax on that payment. Enter now section 457 of the tax code. It introduces the concept of a “substantial risk of forfeiture.” Professor B is entitled to the full \$50,000 without any strings attached, so he faces no significant risk of receiving less than \$50,000. Because Professor B has no substantial risk of forfeiture, the IRS considers

the full \$50,000 to be taxable at the outset, even though the payments will be spread over a five-year period. From the government's standpoint, this controls the possibility that an employer and employee might collude to stretch out payments in order to limit the employee's tax liability. Professor A does face a substantial risk of forfeiture. She will receive payment only if she presents the annual symposium. Hence she can pay the tax as each payment arrives.

This simplified case provides an example of the issues that arise under section 457. In more technical terms, the section accelerates taxation for deferred compensation to the first year in which the faculty member (or other employee) becomes entitled to the full amount of the deferred compensation, without a substantial risk of forfeiture. The tax code and regulations provide voluminous detail on deferred compensation, tests for a substantial risk of forfeiture, and exceptions. Broader than ERISA, this issue affects most public, private, and religiously-affiliated institutions.

The law is unclear as to whether an institution must withhold tax on faculty retirement incentive payments. The Federal Insurance Contributions Act (FICA) requires institutions to withhold a portion of wages to fund Social Security and Medicare. Two federal appellate courts have reached opposite conclusions on whether a university must withhold FICA tax from a tenured professor's retirement incentive payments. The underlying question is whether the payments constitute wages or are instead an exchange for the individual's relinquishment of tenure.

The Third Circuit Court of Appeals ruled that the University of Pittsburgh was required to withhold FICA taxes, since the payments were wages in exchange for services. In contrast, the Eighth Circuit Court of Appeals ruled that North Dakota State University was not

so required. The IRS has taken the position that the Third Circuit ruling is correct. The IRS currently expects institutions to withhold FICA taxes from faculty retirement incentives everywhere *except* in the states covered by the Eighth Circuit. Those states are: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. The situation will remain murky until either the United States Supreme Court or Congress resolves it.²⁶

Some Issues to Discuss with Tax Counsel

- Does ERISA apply to your institution?
- What state laws against age discrimination, if any, apply to your institution?
- Looking at recent buy-out agreements with individual faculty, has your institution already established a plan under ERISA? If so, which kind—a pension plan or a welfare plan?
- What are the advantages and disadvantages of structuring a retirement incentive program to satisfy ERISA's requirements for welfare plans? For pension plans?
- Given the specific goals you would like to achieve, how can you best proceed?

An Operational Lesson in Retirement Incentives

The University of Missouri System implemented a retirement incentive program in 1999 for faculty and staff. The Missouri State Auditor, Claire McCaskill (now a U.S. senator), audited the program and published a report on it in June 2001.²⁷ The report concluded that the program essentially achieved its objectives. About 42 percent of eligible employees participated. The more detailed observations of the report, some of which are included below, suggest areas in implementing retirement incentives that may merit special attention.

Some participants in the early retirement program received inconsistent treatment and compensation. Individual campuses did not

follow identical rules on offering the incentives and providing compensation.

The university was unable to determine the amount of savings the program achieved. The initial calculation of projected savings was made, figuratively if not literally, on the back of an envelope. At the time of the audit, the university was as yet unable to quantify the savings achieved through the program.

Rehire provisions applied differently at various campuses. The plan strictly forbade the rehire of administrators who agreed to retire. Some campuses, however, ignored this prohibition.

Nine faculty members who had already agreed to retire were nonetheless allowed to participate in the retirement incentive program. The University paid these nine individuals approximately \$648,000 in buyout incentives, supplementing the estimated \$624,000 they would receive in pension benefits. The payment of dual incentives created a windfall for these individuals.

Conclusion

Tenured faculty are free to choose the timing of their own retirements, without institutional coercion. Before adopting or modifying retirement incentives for tenured faculty, a college or university must assess its current faculty demographic profile and its academic goals. What is the program designed to accomplish? How can one evaluate whether it achieves its purposes?

Institutions can design successful retirement incentives by honoring three principles. First, avoid discriminating against older faculty on the basis of age. Second, use clear and comprehensive language in explaining the exact terms of incentives, benefits eligibility, tenure relinquishment, and even teaching schedules, as these elements hold places of central importance to retiring faculty. Third, structure incentives with ERISA, OWBPA, and the Internal Revenue Code in mind, lest the institution or individual face unpleasant liabilities or penalties.

Retirement incentives provide an opportunity for creative problem solving. Devote the time and resources to design and implement them legally and effectively.

Suggested Resources

- National Research Council. (1991). *Ending Mandatory Retirement for Tenured Faculty: The Consequences for Higher Education*. Washington DC: National Academy Press.
- Benson, E. and Raish, D. (2002). *Faculty Retirement Incentives*. National Association of College and University Attorneys.
- Goodman, R. M. (2002). *Designing and Implementing Effective Faculty Early Retirement Programs*. Washington DC: National Association of College and University Attorneys.
- McCaskill, C. (2001). *University of Missouri System Voluntary Early Retirement Incentive Program - 2000*. www.auditor.state.mo.us: Missouri State Auditor Report No. 2001-49.
- Sciscoe, T. S. (2006). *Should I Stay or Should I Go? Early Retirement Incentive Programs in Higher Education*. Washington DC: National Association of College and University Attorneys.

Appendix

Checklist for Compliance with the Older Workers Benefit Protection Act

A release or waiver of employment rights for an individual age 40 or above should meet the following criteria:

- Be in writing, in language comprehensible to the employee.
- Refer to rights or claims that the ADEA protects.
- Address only rights or claims which arose on or before the date the agreement was signed, because future claims cannot be released.
- Be exchanged for something of value to which the employee would not otherwise be entitled.
- Advise the employee to consult and discuss the waiver with a lawyer before signing the agreement.
- Give the employee at least 7 days after signing to revoke the agreement.
- Give the employee at least 21 days to review and consider the agreement.
- Give the employee at least 45 days to review and consider the agreement, if it involves an incentive for voluntary departure or a group layoff.

In situations involving an incentive for voluntary departure or group layoff, the institution must also provide information about:

- The group of employees offered the program.
- Eligibility factors for participation.
- Time limits for participation.
- Job titles and ages of employees selected or eligible for the program.
- Ages of all employees in his or her organizational unit or job classification who are ineligible for the program.

29 U.S.C. § 626(f). See U.S. Equal Employment Opportunity Commission, “Understanding Waivers of Discrimination Claims in Employee Severance Agreements,” available at www.eeoc.gov/policy/docs/qanda_severance-agreements.html

Endnotes

¹ Associated Press, 1977.

² 29 U.S.C. §639(d).

³ States eliminating mandatory retirement at public colleges and universities before 1994: Alaska, Alabama, Arizona, Connecticut, Florida, Idaho, Louisiana, New Hampshire, New York, Texas, Virginia, and Wyoming. (National Research Council, 1991, p. 27).

⁴ States eliminating mandatory retirement at all colleges and universities, both public and private, before 1994 were: Hawaii, Maine, Montana, Nevada, Utah, Wisconsin, and Puerto Rico. *Ibid.*

⁵ Dana Milbank, How a Small College Struggles to Usher Out Members of the Old Guard, Wall Street Journal, November 24, 1997, p. A1.

⁶ Doug Lederman, Ohio Court Unravels Professor's Victory in Age Discrimination Case, Inside Higher Education, April 11, 2008.

⁷ Elizabeth Redden, Newly Tenured at Age 68, Inside Higher Education, March 4, 2008.

⁸ See *Cox v. Shelby State Community College*, 194 Fed.Appx. 267 (6th Cir. 2006)(After tenured professor proved his dismissal was motivated by race discrimination and retaliation, trial court properly awarded front pay in lieu of reinstatement).

⁹ Sarahni Pecson, Age Discrimination Case Against UC Goes Forward, The California Aggie, May 31, 2011.

¹⁰ See, e.g., *Clark v. Matthews Intl. Corp.*, 628 F.3d 462 (8th Cir. Dec. 27, 2010), *aff'd* in part en banc, No. 10-1037, May 2, 2011; *Bucana v. Exxon Mobile Co.*, 2006 U.S. Dist. LEXIS 11101 (S.D. Tex. Mar. 1, 2006).

¹¹ Excerpted from EEOC Charge Statistics FY 1997 Through FY 2010, available at www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

¹² *Shub v. Westchester Community College*, 556 F.Supp.2d 227 (S.D.N.Y.,2008).

¹³ *Rose v. Bowling Green State Univ.*, 122 Ohio Misc.2d 3, 784 N.E.2d 213, 2003-Ohio-636 (Ohio Ct.Cl. Jan 31, 2003) (NO. 2001-04077); adopted by 2003 WL 1244410, 2003-Ohio-1283 (Ohio Ct.Cl. Mar 17, 2003) (NO. 2001-04077).

¹⁴ *Guss v. Fort Hays State University*, 38 Kan.App.2d 912, 173 P.3d 1159 (Kan.App., 2008).

¹⁵ "Center Loses Its Director," by Ed Kemp. *Hattiesburg American*, July 6, 2010; University of Southern Mississippi, Faculty Senate Minutes for the Meeting of November 13, 2009.

¹⁶ *Gutchen v. Bd. of Governors of the Univ. of R.I.*, 148 F. Supp. 2d 151, 153 (D.R.I. 2001)

¹⁷ *AARP v. Equal Employment Opportunity Commission*, 489 F.3d 558 (3d Cir. 2007), cert. denied, 552 U.S. 1279 (2008)

¹⁸ *Harrington v. University of Northern Iowa*, 726 N.W.2d 363 (Iowa S.Ct. 2007).

¹⁹ Funding and Design Options for Retiree Health Care, Melissa Proffitt Reese, T.Sciscocoe, W. McClain III, E. Dawes, June 2008, NACUA, Washington, DC.

²⁰ (Benson, 2002) pp. 1–2.

²¹ *Furrer v. Southwestern Oregon Community College*, 196 Or.App. 374, 103 P.3d 118 (Or.App.,2004)(Allowing class action suit to proceed against college that had amended its ongoing retirement incentive program, allegedly to the detriment of employees).

²² *Medical University of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (SC 2004).

²³ The 1998 Amendment provides:

(m) Notwithstanding subsection (f)(2)(B), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 101 of the Higher Education Act of 1965) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

-such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this Act;

-such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

-any employee who attains the minimum age and satisfies all non- age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

²⁴ *Williams v. Wright*, 924 F.2d 1540 (11th Cir. 1991). See *Alexander v. Provident Life and Accident Insurance Co.*, No. 1:09-CV-27 (E.D. Tenn. Oct. 16, 2009) (Individual disability insurance contracts for employed physicians, in which employer paid part of premium).

²⁵ It does not appear that the definition under ERISA of managerial level for faculty follows the United States Supreme Court's reasoning in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), which held under a different statute that the faculty were managers.

²⁶ *North Dakota State University v. United States*, 255 F.3d 599 (8th Cir. 2001); *University of Pittsburgh v. United States*, 507 F.3 165 (3rd Cir. 2007). The Sixth Circuit has held that retirement incentive payments made by a public school district to a tenured teacher were subject to FICA. *Appoloni v. United States*, 450 F.3d 185 (6th Cir. 2006). For discussions of the issue see: Comment, Carson Maricle, Early Retirement Payments Under Tenure and FICA Taxes: Transfer of a Property Right or Just Another Payday?, 34 Southern Illinois U. L. Journal 727 (2010); Robert J. Tepper & Craig G. White, Do Tenure Buyouts Warrant Unique Employment Tax Treatment?, 35 Oklahoma City U. L. Review 169 (2010).

²⁷ Claire McCaskill, State Auditor. University of Missouri System Voluntary Early Retirement Incentive Program, 2000. Report No. 2001-49, June 28, 2001, www.auditor.state.mo.us.

