Structuring Voluntary Resignation Incentive Options For Tenured Faculty Members

Many universities and colleges across the country have been struggling with the issue of how best to incentivize certain tenured faculty members to resign and relinquish their tenure. If a university or college decides to offer a voluntary resignation incentive option to some or all of its tenured faculty members, steps it should take when deciding how to structure and implement that option include the following:

- design decisions will need to be made in order to select the voluntary resignation incentive option that will best meet the needs of the university or college;
- the voluntary resignation incentive option that will be offered should be structured in a manner that will satisfy the applicable legal requirements, including employee benefit, tax, and employment law requirements; and
- several administrative steps should be taken in order to properly implement the voluntary resignation incentive option.

What Are Some of the More Important Design Decisions That Should Be Made When Deciding What Voluntary Resignation Incentive Option To Offer?

Voluntary resignation incentive options for tenured faculty members can be designed in a variety of ways. The options used by universities and colleges that we work with include group programs that are generally available to all eligible tenured faculty members throughout the applicable university or college, more limited programs that are only offered to certain groups of tenured faculty members (e.g., eligible tenured faculty members in a particular department), and "ad hoc" individual agreements with certain tenured faculty members that are negotiated separately and vary depending upon the unique facts and circumstances of each faculty member.

Among the more important design decisions that should be considered when deciding what voluntary resignation incentive option(s) to offer to tenured faculty members are the following:

- **Determining the Goals To Be Accomplished** – Before offering a voluntary resignation incentive option to tenured faculty members, a university or college should clearly identify the goals it is trying to accomplish through such an offer. Examples of such goals include: (1) saving money; (2) reducing the number of tenured faculty members in a particular school or department (e.g., because the school or department no longer has sufficient enrollment to justify the current staffing levels); (3) providing an incentive for tenured faculty members who no longer have the necessary skills to leave (e.g., a tenured faculty member who no longer has the technological skills needed for his or her position); and (4) reallocating faculty resources to better meet the current needs of the university or college. A university or college also will need to decide whether to make retirement incentives available through a group program, individual "ad hoc" agreements, or both, and that decision will vary depending upon, among other things, how strongly the university or college feels that (a) the same benefits package should be offered to all eligible tenured faculty members, or (b) flexible benefits packages will be needed in order to achieve the desired number of faculty retirements.
- **Deciding Which Tenured Faculty Members Should Be Eligible** – Once the goals to be accomplished by offering a voluntary resignation incentive option have been identified, a university or college should identify which tenured faculty members should be eligible for the option selected in order to best achieve those goals. A university or college generally will have flexibility when deciding which tenured faculty members should be eligible for the option (e.g., deciding whether the option should be offered on an institution-wide basis, to selected schools or departments, or to selected tenured faculty members), as long as the selection does not discriminate on the basis of one of the "protected" employment law classifications (e.g., age, race, sex, color, disability, religion, national origin, marital status, etc.).

- **Determining What Benefits Should Be Provided** – A determination will need to be made as to what benefits are most likely to provide the necessary incentive to encourage the eligible tenured faculty members to retire. Most voluntary resignation incentive options provide cash in one form or another, and many also provide health coverage. Some universities and colleges also provide certain other benefits in addition to cash and health coverage.

- **Deciding the Amount of Funds That Will Be Available** – A decision will need to be made about the amount of funds that will be available for a voluntary resignation incentive option, as that amount could affect the size of payments and types of benefits that can be provided. A decision also will need to be made regarding what source of university or college funds will be used to pay for the voluntary retirement incentive option.

- **Determining How Much Coordination There Should Be With Any Existing Retirement Incentives** – If a university or college already has an existing retirement incentive (e.g., a phased retirement program), it should consider to what extent (if any) the new voluntary resignation incentive option will be coordinated with the existing program.

- **Considering How To Handle Employee Relations Issues** – Providing retirement incentive payments to certain tenured faculty members could create expectations among other tenured faculty members that they also will receive such payments when they retire. Consideration should be given on how to handle such expectations.

What Are Some of the More Important Legal Requirements That Should Be Considered When Designing a Voluntary Resignation Incentive Option?

Among the more important legal requirements that should be considered when designing a voluntary resignation incentive option are the following:

- **Employee Benefit Requirements** – Private universities and colleges that are subject to the employee benefit requirements of the Employee Retirement Income Security Act ("ERISA") will want to consider any applicable ERISA requirements early in the design process, as those requirements often play a major role in how a voluntary resignation incentive option will need to be structured. Such universities and colleges will need to determine, with respect to each payment or benefit under the voluntary resignation incentive option, whether such payment or benefit will have to comply with some or all of ERISA's benefit requirements or whether it can be structured to be exempt from ERISA.

- **Tax Requirements** – The voluntary resignation incentive option will need to be structured to either comply with the deferred compensation requirements in Sections 457(f) and 409A of the Internal Revenue Code ("Code"), or to be exempt from those requirements. In addition, certain types of benefits are subject to nondiscrimination requirements under the Code (e.g., self-insured health benefits under Section 105(h) of the Code, dependent tuition benefits under Section 117(d)(3) of the Code, and tax-sheltered annuity benefits under Section 403(b)(12) of the Code), and if any such benefits are offered as part of a voluntary resignation incentive option those nondiscrimination requirements should be reviewed to ensure they are satisfied. In certain circumstances, it may also be necessary to comply with the "reasonable compensation" requirements of Section 4958 of the Code.

- **Employment Law Requirements** – The employment law requirements and issues that should be considered when designing a voluntary resignation incentive option include the following: (1) verifying that the voluntary resignation incentive option is not being provided in a way that will discriminate against a tenured faculty member on the basis of one of the "protected" employment law classifications (this is especially important if individual "ad hoc" agreements are used); (2) deciding whether to require an eligible tenured faculty member to sign a release in order to participate in the voluntary resignation incentive option (most universities and colleges will require a release to be signed), and verifying that the applicable requirements for an effective release have been satisfied; and (3) taking steps to help ensure that each eligible tenured faculty member's decision on whether or not to accept the voluntary resignation incentive option is truly a voluntary decision.

What Are Some of the More Frequent Voluntary Resignation Incentive Options Used By Universities and Colleges For Tenured Faculty Members?

The universities and colleges we work with have used a variety of options to incentivize tenured faculty members to resign, including the following:

- **"Fort Halifax" Programs** – "Fort Halifax" programs are separation incentive programs that generally are available for a limited period of time, generally provide for a lump sum payment upon termination of employment (in addition to a lump sum payment, some courts have held that a "Fort Halifax" program can provide for payments over a relatively short period of time), do not create a need for an ongoing administrative program for processing claims and paying benefits, and generally do not require the exercise of managerial discretion. These programs are based on a 1987 United States Supreme Court decision, *Fort Halifax Packing Co. v. Coyne*, and have been held to be completely exempt from the employee benefit requirements of ERISA. There have been numerous court decisions since 1987 that have applied this exemption, but the cases have not always been consistent or clear. In light of the case law uncertainty regarding the applicable "Fort Halifax" standards, it is best to be careful when designing a voluntary resignation incentive option to be a "Fort Halifax" program. The consequences of not qualifying for the Fort Halifax exemption could be expensive, as there are numerous ERISA requirements that would have to be satisfied by a private university or college. However, when a voluntary resignation incentive option has been properly structured to satisfy the "Fort Halifax" exemption, a private university or college can avoid the need to comply with the extra administrative steps to comply with ERISA's employee benefit requirements.

- **"Ad Hoc" Individual Resignation Incentive Arrangements** – "Ad hoc" individual resignation incentive arrangements are individual resignation incentive arrangements negotiated with each applicable tenured faculty member based on the facts and circumstances that are unique to that faculty member ("Ad Hoc Arrangements"). Ad Hoc Arrangements generally will vary from tenured faculty member to tenured faculty member, as different compensation and other resignation terms may be needed in order to get each tenured faculty member to agree to resign. Although Ad Hoc Arrangements can be more flexible than other types of voluntary resignation incentive options with respect to meeting the needs of an individual tenured faculty member, they need to be closely monitored to ensure that (1) the variation in eligibility, compensation, and/or benefit terms among tenured faculty members does not discriminate on the basis of one of the "protected" employment law classifications (e.g., it should not discriminate on the basis of age, sex, race, color, religion, national origin, disability, marital status, sexual orientation, etc.), and (2) the applicable employee benefit requirements, tax requirements and other applicable employment law requirements are satisfied with respect to each Ad Hoc Arrangement.

- **Phased Retirement Programs** – Many universities and colleges have established phased retirement programs for eligible tenured faculty members. These programs often will include enhanced compensation rights and reduced work schedules over a period of time in return for an irrevocable commitment to retire by a certain date. The enhanced compensation must be properly structured to either be exempt from the Code's deferred compensation requirements, or to comply with those requirements. If any enhanced benefit rights are provided pursuant to a phased retirement program, it is important to verify that (1) the enhanced benefits do not violate any of the Code's benefit nondiscrimination requirements (those requirements generally preclude certain benefits being provided in a way that discriminates in favor of highly compensated employees or highly compensated individuals), and (2) the enhanced benefits are allowed to be provided under the terms of the applicable benefit plan.

- **Severance Plans** – If a voluntary resignation incentive option will include people who are not yet eligible to retire, it may be possible to structure that option to be a severance plan. The severance plan will need to be carefully structured so that it is either exempt from the deferred compensation requirements, or it complies with those requirements. In addition, private universities and colleges will need to make sure the severance plan satisfies ERISA's severance pay plan requirements. The severance plan option often will not be used by private universities and colleges when designing a voluntary resignation incentive option for tenured faculty members, because many universities and colleges want to limit that option to tenured faculty members who are eligible for retirement.

- **Early Retirement "Window" Programs Offered Pursuant to a Qualified Defined Benefit Pension Plan** – If a university or college has a qualified defined benefit pension plan, it could offer an early retirement "window" program that would be offered as part of the qualified defined benefit pension plan and could be paid for with assets of that pension plan ("Qualified Plan Window Program"). An example of a Qualified Plan Window Program would be to allow pension plan participants who are age 60 and who have ten years of service to elect to retire within a year in return for enhanced pension plan benefits. Many universities and colleges do not have qualified defined benefit pension plans, and thus are unable to take advantage of this option. A Qualified Plan Window Program must also satisfy numerous requirements under the Code, including nondiscrimination requirements that preclude offering a Qualified Plan Window Program in a manner that discriminates in favor of highly compensated employees.

What Are Some of the Other Administrative Steps That Will Need To Be Taken In Order To Properly Implement a Voluntary Resignation Incentive Option?

Among the other administrative steps that will need to be taken in order to properly implement a voluntary resignation incentive option for tenured faculty members are the following:

- **Review Any Agreements, Plans, or Other Documents That Could Affect the Voluntary Resignation Incentive Option** – Before a voluntary resignation incentive option is implemented, a review should be made of any documents that could have an impact on the voluntary resignation incentive option (e.g., existing agreements with eligible tenured faculty members, faculty manuals or handbooks, and severance plans).
- **Review a List of the Current or Recently Retired Tenured Faculty Members Who Are Not Eligible For the Voluntary Resignation Incentive Option** – Before implementing a voluntary resignation incentive option, a university or college should review a list of its current or recently retired tenured faculty members, and assess whether any of them are likely to complain about being excluded from eligibility for the voluntary resignation incentive option. That list should include tenured faculty members who are on sabbatical, are currently disabled, are on a leave of absence, or who retired on or after the date the university or college first seriously considered offering the voluntary resignation incentive option. After reviewing that list, the university or college should then decide whether any adjustment of the eligibility requirements for the voluntary resignation incentive option would be appropriate.
- **Prepare a Properly Drafted Agreement To Participate in the Voluntary Resignation Incentive Option** – If an eligible tenured faculty member decides to participate in a voluntary resignation incentive option, he or she should be required to sign a properly drafted agreement that accurately reflects the terms of such participation. Such agreements usually will provide that such decision to participate is irrevocable, and will include any applicable release requirements. If a release is required, it generally should be structured in a way that will satisfy the requirements for a valid release of age discrimination claims under the Age Discrimination in Employment Act.
- **Check Whether Any Eligibility Provisions In Applicable Benefit Plans Need To Be Revised** – To the extent employee benefits will be provided during a "retirement incentive," the eligibility provisions of each applicable benefit plan should be reviewed to determine if any changes will be needed to help ensure that a retiring tenured faculty member will be eligible for that benefit.
- **Establish a Timetable for the Voluntary Resignation Incentive Option** – A timetable for the Voluntary Resignation Incentive Option should be established that will include, among other things, the date when it will be first announced, the date when participation agreements will have to be submitted, the deadlines for returning and revoking any applicable release, and the period during which retirement must occur.

If you have any questions about this memorandum, please contact Ted Lewkowicz, any other member of our Higher Education Practice Group or Employee Benefits and Executive Compensation Practice Group, or the attorney in our firm with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS

Commitment · Service · Value · Our Bond