

Faculty and Staff Reductions in Force and Obligation to Bargain Complimentary Webinar for Higher Education Personnel

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Faculty & Staff Reductions in Force and Obligation to Bargain

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Reduction In Force & Bargaining

- Financial Challenges Amidst COVID-19 Pandemic
- Evaluate Options to Reduce Costs
 - Options include workforce reductions
- Workforce reductions trigger bargaining obligations



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

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Overview

- Navigating the RIF Process
 - Faculty
 - 110 ILCS 805/3B-5
 - Non-faculty staff
- Check CBA or employment contracts for process to RIF non-faculty personnel
- Review College Policy Manual for other applicable rules

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Assess Finances and Staffing Needs

- Analyze college finances and faculty/staff needs for 2021-2022 school year.
 - Review college budget and financial projections.
 - Review projected student enrollment.
 - Confirm status of any grant-funded services.
 - Consider the impact of staff changes (*e.g.*, resignations, retirements, transfers, reassignments, leaves of absence, dismissal of non-tenured faculty for non-RIF reason).
 - 110 ILCS 805/3B-3: Dismissal of non-tenured faculty (non-RIF):
 - Notice by Board no later than 60 days before end of school year.
 - Specific reasons are confidential but shall be issued to faculty member upon request.
 - *Note:* Probationary period is three consecutive school years, with optional one-year extension.

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Reasons for Faculty RIF

- A Faculty RIF occurs when a college decides:
 - To decrease the number of faculty members employed by the Board; or
 - To discontinue a particular type of teaching service or program.
- Applies to non-tenured (probationary) and tenured faculty.



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Notice Obligations for Faculty RIF

- Timeline for Faculty RIFs
 - No later than 60 days before the end of the school year (the end of the Spring semester)
- Board action required
 - May need to call a special meeting to meet timeline
- Faculty RIF Notices
 - Statement of honorable dismissal;
 - Reason for the honorable dismissal; and
 - Must be in writing and meet delivery requirements.
 - Failure to meet timeline results in the faculty member's reemployment for the ensuing school year.

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Faculty RIF: Bumping and Recall Rights

- Bumping and Recall Rights
 - **By February 1st:** College must provide faculty seniority list to the Union
 - College must first terminate probationary faculty and employees with less seniority prior to terminating tenured faculty member
 - **Recall Period:** 24 months from beginning of school year for which the faculty member was dismissed
 - Preferred right to reemployment over new hires
 - College cannot employ probationary faculty or employees with less seniority to render a service a tenured faculty member is competent to render

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Case Study

- *Barrall v. Board of Trustees of John A. Logan College*, 2020 IL 125535 (Dec. 17, 2020)
 - Changes decades of precedent under *Biggiam v. Board of Trustees*, that “other employees with less seniority” does not include part-time (adjunct) instructors.
 - Significantly limits a college’s ability to RIF tenured faculty members in the first place and to hire/employ adjunct instructors during statutory RIF recall period.



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Case Study: Relevant Facts

➤ *Barrall v. Board of Trustees of John A. Logan College*

- Board voted to reduce the number of full-time faculty it would employ for the 2016-2017 academic year.
 - 27 full-time faculty received layoff notices.
 - Bargained to agreement with union on all matters related to RIF.
 - 7 recalled to position for the 2016-2017 academic year; 20 were not recalled.
- During the 2016-2017 academic year, the Board employed adjuncts to teach courses previously taught by RIF'ed faculty members.
- Enough work existed to employ the RIF'ed faculty members, had the Board not employed adjuncts to teach courses they were qualified to teach.

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Case Study: Relevant Statutory Provision

➤ *Barrall v. Board of Trustees of John A. Logan College*

- If a dismissal of a faculty member for the ensuing school year results from the decision by the Board to decrease the number of faculty members employed by the Board or to discontinue some particular type of teaching service or program, notice shall be given to the affected faculty member ... provided that the employment of no tenured faculty member may be terminated under the provisions of this Section while any probationary faculty member, or **any other employee with less seniority**, is retained to **render a service** which the tenured employee is competent to render...
- For the period of 24 months from the beginning of the school year for which the faculty member was dismissed, any faculty member shall have the preferred right to reappointment to a position entailing services he is competent to render prior to the appointment of any new faculty member; provided that no non-tenured faculty member or **other employee with less seniority** shall be employed to **render a service** which a tenured faculty member is competent to render.

110 ILCS 805/3B-5

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Case Study: Question Presented



➤ *Barrall v. Board of Trustees of John A. Logan College*

- Whether Section 3B-5 permits the board to layoff tenured faculty members and then, within the statutory recall period, hire adjunct instructors to teach courses that the laid off faculty members are competent to teach?
 - Does “other employee with less seniority” include adjuncts?
 - What does “to render a service” refer to?

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Case Study: The Court's Decision

➤ *Barrall v. Board of Trustees of John A. Logan College*

- Section 3B-5 does not permit the board to layoff tenured faculty members and then, within the statutory recall period, hire adjunct instructors to teach courses that the laid off faculty members are competent to teach.
 - Adjuncts are “employees with less seniority” because they have no seniority.
 - “To render a service” includes positions AND individual courses.
 - Court states that it was compelled to reach this conclusion based on language in statute and the overarching goal of creating tenure, which is to ensure a degree of security for teachers with experience and ability.
 - 1 dissenting justice.

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Case Study: Broader Impact

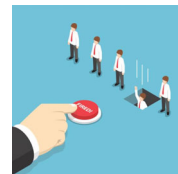
- *Barrall v. Board of Trustees of John A. Logan College*
 - While the decision is focused on the post-RIF recall language in the statute, the same terms (“other employees with less seniority” and “to render a service”) appear earlier in the statute addressing the *decision* to dismiss a tenured faculty member.
 - Given that the Court determined that adjuncts are “other employees with less seniority” and that “render a service” includes being hired to teach a course (vs. a position), a board could not RIF a tenured faculty member if it continued to employ adjunct instructors to teach courses that the tenured faculty member was competent to teach.
 - As dissenting Justice Burke notes, “the majority’s reading of the statute defeats the purpose of the layoff, making it effectively impossible for the college to manage its budget” through employment of adjuncts to teach courses.
 - This decision does not change a board’s discretion to terminate probationary full-time faculty members while still employing adjuncts to teach courses a probationary faculty member was competent to teach (absent a CBA provision to the contrary).

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RIF: Non- Faculty Staff

- No specific statute governs process for RIF of non-faculty staff (e.g., facilities employees, administrative/clerical staff, support services staff, etc.).
 - Identify programs, services and/or categories of position for anticipated RIF.
 - Review any relevant CBA, employment contract, and/or Board Policy Manual to determine applicable RIF timeline and/or procedures.
 - Verify applicable definition of seniority.
 - Determine RIF layoff order.



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RIF: Non-Faculty Staff

- No specific statute governs process for RIF of non-faculty staff (e.g., facilities employees, administrative/clerical staff, support services staff, etc.).
 - Identify any applicable employee bumping, RIF reassignment rights and recall rights.
 - Notify union as applicable and commence bargaining.
 - Evaluate whether Board action is necessary to effectuate RIF and comply with same.
 - Timely draft and deliver RIF notices.

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RIF Collective Bargaining Obligations

- Identify bargaining obligations in connection with a proposed RIF.
 - Economic (cost savings) v. Non-Economic Reasons
 - Under Illinois law, a college's decision to RIF for economic reasons (*i.e.*, cost savings) is a mandatory subject of bargaining, and the college is obligated to bargain the *decision* to RIF to agreement or impasse.
 - In contrast, if a college's decision to RIF is for non-economic reasons (*e.g.*, lack of student enrollment), the college is only obligated to bargain the *impact* of the decision.
 - Check CBA for greater bargaining obligations

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RIF Collective Bargaining Obligations



- Identify bargaining obligations in connection with a proposed RIF.
 - RIF bargaining obligations—Number of sessions—“Good Faith” obligation
 - *Remember:* The college is only required to initiate but not complete its bargaining obligations prior to complying with any statutory RIF notice requirements (e.g., faculty).
 - Ability to implement RIF if no agreement or impasse
 - IELRB and IPCCCA compliance obligations

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RIF Bargaining Tips

- Notify the union of the range—not fixed number—of faculty/employees subject to the proposed RIF.
 - **Example:** 2-5 custodians or 1-2 psychology faculty
- Provide college’s rationale and data to support the RIF for cost-saving reasons.
 - **Example:** Increased expenditures due to COVID-19 safety measures, reduced state revenues, declining student enrollment, etc.
- Plan on scheduling several RIF bargaining sessions to document record of good faith bargaining to avoid unfair labor practice claim.
 - Bargaining does not need to be completed prior to action by the Board
- Discuss and respond to any union counter-proposals and make any adjustments to initial proposed RIF plan.
 - **Reminder:** Colleges have no obligation to agree to any union counter-proposals under IELRA.

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Alternatives to RIF

- Pause on filling vacancies
- Incentivized retirement program
- Reduction in employee benefit offerings
- Increased employee contribution to health insurance



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Alternatives to RIF

- Salary freeze
- Furlough
- Making a fixed and permanent decision to reduce the hours and corresponding pay for some employees.

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Questions?



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Todd Hayden practices in the areas of school and municipal law. He provides governmental employers with guidance and counseling regarding labor and employment, including employee discipline and termination, board governance, collective bargaining, contract, public finance and transactional matters.

Todd has represented employers in various employer-employee disputes including federal and state litigation, EEOC/Department of Human Rights charges, State Labor Board Proceedings and grievance and arbitration proceedings. Todd has extensive experience in collective bargaining, including unit formation proceedings, negotiations, mediation and interest arbitration. He has performed construction contract reviews, served as local bond counsel and worked on school boundary changes.

Todd is approved by the Illinois State Board of Education to provide school board member training.

AWARDS

Illinois Leading Lawyer, Employment Law: Management, Labor Law: Management, School Law and Governmental, Municipal, Lobbying & Administrative Law, 2015

RECENT PUBLICATIONS

Contributing author, "Civil Rights Litigation," *Illinois School Law*, IICLE (2017)

RECENT PRESENTATIONS

Collective Bargaining for School Board Members and Administrators, IASB/IASA/Illinois ASBO Joint Annual Conference (November 2018)

Employee Free Speech and the Public Employer, HR Source Employment Law Conference at Northern Illinois University (September 2018)

Practical Advice for Maintaining a Harassment Free Workplace, IASA (February 2018)



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Commercial Transactions
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AWARDS

Illinois "Rising Star," Employment & Labor Law (2015-2018)

RECENT PUBLICATIONS

"Recent Department of Labor Opinion Letters: Pay for Training and Travel," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Sexual Harassment Prevention Training Compliance Required Before New Year," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Will 'Scabby the Rat' Live To Fight Another Day?" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Superintendent's Police Report is Protected Speech" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Changing the Landscape: Abusive Conduct Not Protected Under NLRA" *Employment and Labor Law Flashpoints*, IICLE (2020)

"COVID-19 Changes to Claims for Unemployment Benefits in Illinois" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Seventh Circuit: Jury, Not Judges, Must Decide Coach's Sex Discrimination Claim" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Examining DOL Rule on New Employee Leave Rights" *Employment and Labor Law Flashpoints*, IICLE (2020)



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Central District of Illinois

U.S. District Court for the
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Supreme Court of Illinois

"Better Safe Than Sued – Issuing Timely FMLA Notices" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Unions Strike Back Through Amendments to Illinois Public Labor Acts" *Employment and Labor Law Flashpoints*, IICLE (2020)

"First Amendment Protections Get Broader for Government Employees," *Chicago Daily Law Bulletin* (2016)

"Regulatory Changes to the Illinois Wage Payment and Collection Act," *Justinian Society Newsletter* (2015)

"New FOIA Amendments to Ease Burden on Public Bodies," *Justinian Society Newsletter* (2015)

"Illinois Supreme Court Determines Arbitration Award Ordering Reinstatement of a Paraprofessional was Binding Because the Award 'Drew Its Essence' from the CBA," *Justinian Society Newsletter* (2014)

"When the Music Stops, Why Not Require Certain Title VII Plaintiffs to Find a Chair on Which to Rest Their Complaint," *The John Marshall Law Review*, (2009)

RECENT PRESENTATIONS

Is PERA Dead?? Implementation of a Local Appeals Process for Unsatisfactory Ratings, IASPA Annual Conference (January 2020)

A Workshop on Compliance with the Open Meetings Act and Illinois Freedom of Information Act, LUDA Annual Conference (October 2019)

Community College Trustees Training Session, ICCTA (June 2019)

ORGANIZATIONS

Chicago Bar Association

Illinois Council of School Attorneys

Illinois State Bar Association

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RECENT PRESENTATIONS

Free Speech on Campus, Illinois Community College Chief Student Service Officers (March 2020)

Navigating Payroll Laws, Illinois ASBO Bookkeepers Conference (March 2020)

Administrators Legal Update, Concordia University (December 2019)

Navigating Background Checks in Today's Environment, Illinois ASBO (May 2019)

Employee Misconduct Issues: Effective Management Strategies for Defensible Discipline/Discharge, Concordia University (April 2019)



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J.D., *cum laude*, Michigan State University College of Law

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Supreme Court of Michigan

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