Higher Education Employment Issues: During and After the Pandemic
Speakers

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Agenda

• Vaccines and Other COVID Employment Issues
• Q&A #1
• Layoffs and Cost-Saving Measures
• Anticipating the Road Ahead
• Q&A #2
Vaccines and Other COVID Employment Issues
Can You Require Employees to be Vaccinated?

• Potential complication: “EUA” status of current vaccines
  • Patients informed they have option to refuse
  • Pending full FDA approval or further guidance, some risk inherent in requiring employee vaccination
• EEOC guidance (Dec. 2020) assumes employers can require vaccination, subject to providing accommodations for:
  • Disabilities
  • Religious beliefs
• Also – check your state law
• Consult legal counsel
Encouraging Vaccination

• Offering incentives?
  • May be legal, but not necessarily effective
  • Potential discrimination issues
  • If offered under voluntary wellness program, are incentives more than *de minimis*?
• Best “incentive” may be making getting vaccinated easy
Other COVID Questions

- Can you:
  - Ask about current or past COVID positivity status?
  - Require a negative COVID test?
    - Viral vs. antibody tests
  - Discipline employees for refusing to return to work?
    - Technically permissible, but may not be wise
    - Evaluate each case individually
  - Potential equity problem: requiring only some employees to return to the workplace
    - “Staff vs. Faculty” dilemma
As Campus Re-Opens

• Expect increased employee requests for accommodation
  • Especially for continued remote work
• Need a process for addressing these requests
  • Determine which ones you are (and aren’t) legally obligated to accommodate
  • Always must conduct individualized assessment
  • You don’t automatically have to provide the specific accommodation requested, including telework
UE Resources

Responding to the Pandemic

- Collected at https://www.edurisksolutions.org/coronavirus/
  - Waivers and releases
  - Remote operations
  - FAQs, including employment practices
  - Prior webinar recordings
  - Online learning program, Your Campus and COVID-19: The Road Back
Q&A #1
Layoffs and Cost-Saving Measures
Cost-Saving Options

• Consult legal counsel early
• Furloughs
  • Decision-making process should be similar to RIF: business justification, objective selection criteria
  • Watch for FLSA issues when furloughing exempt employees
  • Remember state law and CBA issues
• Voluntary Severance Programs (VSPs)
  • Must offer program to all employees in defined eligibility group
  • May have employees you’d prefer to keep elect to leave
Cost-Saving Options (cont.)

- Layoffs/Reductions in Force (RIFs)
  - Have you exhausted alternatives?
  - Document the business justification
  - Try to use objective employee selection criteria
  - Ensure no disparate adverse impact on protected groups
  - Consider other laws (e.g., WARN Act)
  - Review CBAs, handbooks, contracts
  - Waiver/release considerations
Faculty Layoffs

- Layoffs of tenured faculty particularly complicated
- Governance documents often detail the required process
- Likely require institution to show financial need, and may mandate demonstrating “financial exigency”
  - Does your institution use AAUP definition?
- Will require comprehensive financial analysis and collaboration among senior leadership
- Critical to:
  - Always follow your own procedures
  - Work with legal counsel
UE Resources

Institutional Financial Distress

• Guide to Manage Risks Associated With Program Change
• Four accompanying checklists:
  • General Planning for All Program Changes
  • Program Reduction or Discontinuance
  • Change of Institutional Control
  • Institutional Closure
• Checklist: Employee Layoffs Driven by Financial Pressure
Anticipating the Path Ahead
Other Faculty Issues

• Return to campus, increased anxiety
• Academic Freedom, First Amendment questions
• Tenure and Performance Problems
Social Justice/DEI

• Avoid “off the shelf” solutions
• Proceed thoughtfully and have right people at the table
• Be prepared for intense employee reactions . . . and perhaps more complaints
Key Take-Aways
Q&A #2