BARGAINING DURING DIFFICULT AND CHANGING TIMES

James C. Hanks
Ahlers & Cooney P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
(515) 243-7611
jhanks@ahlerslaw.com

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ATTACHMENT A

EARLY RETIREMENT PLANS

1. Statement of Purpose

Early retirement plans do not constitute a per se violation of the Age Discrimination in Employment Act. The Courts have routinely held that "an employer's adoption of an early retirement plan does not create a prima facie case of age discrimination under the ADEA". Bodnar v. Synpol, Inc., 843 F.2d 190, 46 FEP Cases 1086, 1087 (5th Cir. 1988). However, an early retirement plan can form the basis for an employee's claim of constructive discharge. In Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 62 FEP Cases 1198 (1st Cir. 1993), the Court stated:

> To transform an offer of early retirement into a constructive discharge, a plaintiff must show that the offer was nothing more than a charade, that is, a subterfuge disguising the employer's desire to purge the plaintiff from the ranks because of his age. . . . Under this dichotomy, offers which furnish employees a choice in name only are impermissible because, in the final analysis, they effectively vitiate the employees' power to choose work over retirement.

62 FEP Cases at 1201. In Vega the employee claimed that the only choice that he was given was between early retirement with benefits or a termination of employment without benefits.

These cases indicate that it is preferable to clearly state the purpose of the early retirement plan in the plan itself and to do so in a manner which is non-discriminatory. In their statement of the purpose of the plan, school districts should consider referring to the financial benefits that will inure to both the employees and the district as a result of early retirement.

2. Eligibility

Early retirement plan benefits can be offered to selected groups of employees, as opposed to all employees, without violating the ADEA. See Bodnar, 46 FEP Cases at 1088. Accordingly, districts can lawfully choose to limit early retirement benefits to administrators, or teachers, or highly-compensated individuals as long as "objective factors explain the exclusions".

Most school district early retirement plans exclude an employee whose contract is recommended to be terminated for a cause which is personal to the employee. Districts should also consider whether to exclude employees who are on an extended leave of absence. A more difficult question is whether to exclude employees who are either applying for or are currently receiving long term disability insurance benefits. The exclusion of these employees may be justified on the basis that they are applying for other benefits or on the basis that, absent an offer of early retirement benefits, they do not have an intention to remain an employee of the district. However, the exclusion of disabled or potentially disabled employees naturally raises issues under some state civil rights laws, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973.

Definitions of eligibility frequently refer to years of service. If it is used, the term "years of service" should be carefully defined. Consider the following questions:

1. Are years of service limited to years of employment in the school district or does it include all years of service in education?

2. Does an extended leave of absence count as a year of service?

3. Does a year of absence due to layoff count as a year of service?

4. Must the years of service be consecutive or is the calculation based on the employee's total years of service?

5. If an employee taught in a position which was a 12 month position rather than a 9 month position, does that entitle the employee to more than 1 year of service?

A second element of eligibility is age. There is no restriction on the minimum age that an employer may set for eligibility to receive benefits. However, if an early retirement plan contains a maximum age, the Eighth Circuit Court of Appeals has held that such a plan is a violation of the Age Discrimination in Employment Act. Jankovitz v. Des Moines Independent Community School District, 421 F.3d 649 (8th Cir. 2005).

3. Conditions or Limitations

Early retirement plans can be targeted to meet the specific needs of the school district. For example, a plan can be established which provides benefits only when the district needs to reduce staff. And if benefits are payable only when staff reduction is necessary, then the benefits can be further restricted to employees who are working in those areas in which reduction needs to take place.

The plan can also limit the total number of employees who will be granted benefits in a year or limit the total amount of dollars that will be paid out in benefits. These limits should be spelled out in the plan or the plan should reserve to the board the right to announce the limits on an annual basis. It is also prudent to reserve to the board the right to determine that no benefits will be provided in a given year and that the plan may be rescinded at the board's discretion at any time.

Because there may be more applicants for benefits than there are benefits to be paid, the plan should specify the method for determining how successful applicants will be chosen. Objective criteria, such as first come-first served, are preferable to subjective criteria, such as the discretion of the board.

The district should also consider including a provision which requires a recipient of early retirement benefits to agree not to apply for reemployment with the district in the future or which makes the recipient ineligible for future employment.

4. The Application Process

The application process should be tightly defined and should include a specific window of time within which an application must be submitted. The application should include a form which is a conditional resignation with an assurance of continued employment if the application is not accepted by the board.

Early retirement plan benefit recipients should also execute a release or waiver of liability which specifically releases the district from any claims under the ADEA. In order to comply with the Older Workers Benefit Protection Act, an ADEA waiver must meet the seven requirements that are set out in the OWBPA.

5. Benefits

Early retirement benefits may be provided on a sliding scale but benefits must not decrease as the age of the employee increases. Although a sliding and decreasing scale of benefits was the norm for many years prior to the passage of the Older Workers Benefit Protection Act, it is clear now that such a decreasing scale of benefits is violative of the ADEA unless the decrease in the amount of the benefit provided is directly related to cost of providing that benefit. With the exception of life insurance, it is difficult to establish a cost justification for a benefit which decreases as age increases.

Benefits can be provided on a dollar basis or a percentage basis, and the basis may either be fixed (for example, $10,000 for all employees or 30% of salary for all employees) or it may be floating (for example, $500 or 5% of salary for each year of service). If the benefit basis is floating, it may be capped at any level which the district thinks is appropriate (for example, 20 years of service).

Most plans address the question of the eligibility of employees for group health insurance benefits. In drafting the insurance provision of the early retirement plan, it is important to determine whether employees who retire early will be entitled to participate in the district's group health plan until they reach age 65. See, for example, Iowa Code Section 509A.13.

A number of employers have adopted early retirement plans that provide insurance until Medicare eligibility. Sometimes this is the only benefit provided under the plan. Every month, each retiree gets the same benefit - a month of health insurance. However, because a younger employee has more months until reaching age 65, it can be argued that more "benefit" is received by younger retirees.

In 2007, the Equal Employment Opportunity Commission ("EEOC") adopted a rule that allows employers to offer early retirement benefit plans that reduce or eliminate health benefits when a participant in the plan becomes eligible for Medicare, clarifying confusion of whether this constituted age discrimination. 29 C.F.R. § 1625.32(b). Thus, employers may offer health insurance that is reduced or eliminated when retirees reach Medicare age (currently 65 years), but should word the policy to have the health insurance benefit end "with Medicare eligibility" rather than "at age 65," to avoid potential claims of age discrimination. Districts that offer this

benefit may need to purchase a Medicare supplement policy when retirees reach Medicare eligibility, to ensure that the same level of health benefits are being provided to retirees over age 65 as those provided to younger retirees.

Regardless of whether employees are simply eligible to participate in the district's health insurance plan or are provided health insurance benefits as part of the plan, it is critical to reserve to the board the right to modify the plan benefits, the right to change the insurance carrier, and the right to change the benefit administrator. If you fail to do so, you may be required to continue to provide health insurance benefits at the same level as the level that was in effect at the time that the employee began receiving early retirement benefits.

Early retirement plans can offer employees options with regard to the benefits that they receive. Employees may be given the option of receiving cash, insurance premium payments, some combination of cash and insurance premium payments, or other economic benefits. If insurance premium payments are provided as a benefit, the district must consider the effect of time on the amount of the premium which the district obligates itself to pay. In most instances, it will be preferable to provide the insurance benefit in terms of a specified dollar amount.

Employees can also be given an option with regard to the timing of their receipt of benefits. Benefits can be provided in a lump sum or in periodic payments. In establishing the plan, the timing of periodic payments is at the discretion of the school district. Once an employee has elected to receive periodic payments, that election should be irrevocable. The district should refrain from any financial counseling. Instead, employees should be counseled to obtain personal tax advice when making their selection of benefits.

The plan may provide that no benefits are payable unless the employee is alive on the date that the first payment is to be made. Regardless of whether payments are contingent upon the employee being alive, the plan should make some provision for payment in the event of the death of the retiree.

ATTACHMENT B

MEMORANDUM OF AGREEMENT
BETWEEN
SERVICE EMPLOYEES INTERNATIONAL UNION
AND THE
COUNCIL BLUFFS COMMUNITY SCHOOL BOARD

The representatives of the Service Employees International Union and the Council Bluffs Community School Board mutually agree to waive negotiations for the 2010-2011 contract year. By waiving negotiations, the parties agree that the employees represented by the Service Employees International Union will receive wages and benefits consistent with and as outlined in the current 2009-2010 contract.

In consideration for waiving an increase in the wages and benefits for employees represented by the Service Employees International Union, the District will forego the reduction of employees in positions represented by the Service Employees International Union except for those occurring through attrition by resignation, retirement or closing or combining of facilities for the 2010-2011 contract year. The parties further agree that if all other employee groups are awarded a pay and benefit increase for the 2010-2011 school year, they agree to re-open this memorandum for reconsideration of wages and benefits.

If the District, due to continued financial shortfalls, deems it necessary to implement work year or work day reductions, the Service Employees International Union will agree to such reductions up to a maximum of 5 days reduction in exchange for no layoffs or reduction in workforce except those created by attrition by retirement, resignation or closing or combining of facilities. The determination of need for work year or work day reductions will be at the sole discretion of the District.

This agreement is applicable to all full time and part time employees covered by the collective bargaining unit beginning July 1, 2010 and ending June 30, 2011.

The parties agree that this memorandum is not precedent setting and may not be used as evidence in any future grievance or bargaining procedures.

_____
Bobby Berg, Chief Negotiator Date
Service Employees International Union

_____
Janet Reiners, Chief Negotiator Date
Council Bluffs Community School District

_____
Lyle Cain, President Date
Service Employees International Union

_____

ATTACHMENT C

FURLOUGHS: FAIR LABOR STANDARDS ACT IMPLICATIONS

The FLSA exempts certain employees employed in a bona fide executive, administrative, or professional capacity from minimum wage and overtime pay requirements. 29 U.S.C. § 213. An employee qualifies for exemption if the duties and salary tests are met. *See* Wage and Hour Opinion Letter FLSA2009-14 (U.S. Dept. of Labor Jan. 15, 2009). For purposes of this discussion, it is assumed that the employees in question meet the duties test and receive at least $455 per week in accordance with FLSA regulations.

The issue for school districts considering a furlough is whether the exempt employees who are affected by a furlough are paid on a "salary basis." The regulations provide:

> (a) General rule. An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, *an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available*.

29 C.F.R. § 541.602 (emphasis added). It is clear from this provision that furloughs or reductions in hours/pay which last an entire week do not affect the exempt status of employees. However, it is less apparent whether the above provision permits furloughs or reductions in hours/pay which are less than a week.

The normal rule regarding furloughs is reflected in this opinion issued by the Wage and Hour Division:

> It is our opinion that salary deductions due to a reduction of hours worked for short-term business needs do not comply with § 541.602(a) because they result from "the operating requirements of the business." 29 C.F.R. § 541.602(a). Thus, "[i]f the employee is ready, willing and able to work, deductions may not be made for time when work is not available." *Id*. Deductions from the fixed salary based on short-term business needs are different from a reduction in salary corresponding to a reduction in hours in the normal scheduled work week, which is permissible if it is a bona fide reduction not designed to circumvent the salary basis requirement, and does not bring the salary below the applicable minimum salary. *See* Field Operations Handbook § 22b00; Wage and Hour Opinion Letter FLSA2004-5 (June 25, 2004) ("[R]ecurrent

> changes in the normal scheduled workweek . . . more likely would appear to be designed to circumvent the salary basis requirement."). Unlike a salary reduction that reflects a reduction in the normal scheduled work week and is not designed to circumvent the salary basis requirement, deductions from salary due to day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary basis requirement is intended to preclude.

See Wage and Hour Opinion Letter FLSA2009-14 (U.S. Dept. of Labor Jan. 15, 2009) (footnotes omitted) (finding salary deductions due to mandatory time off lasting less than a workweek violate the salary basis requirement and may cause the loss of exempt status, but explaining that the employer is not required to pay the salary for mandatory time off of a full workweek).

However, the Department has acknowledged the special status of public agencies and has issued a rule applicable exclusively to such agencies. 29 C.F.R. section 541.710(b) provides:

> Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Consistent with this regulation, the Wage and Hour Division has stated in an opinion letter that a proposal to reduce the workweek of certain exempt employees from forty hours to thirty-two hours with a commensurate reduction in pay, prompted because of a reduction in spending by the state on programs administered by the employer, does not affect the exempt status of such employees. *See* Wage and Hour Opinion Letter FLSA1997-__ (U.S. Dept. of Labor Mar. 4, 1997). That opinion states, "[The regulation] does not preclude a bona fide reduction in an employee's salary which is not designed to circumvent the salary basis requirement

See also Michigan Supervisors' Union v. State of Michigan, 826 F. Supp. 1084 (W.D. Mich. 1993) (finding salaried employees of a state agency were entitled to compensation for wages lost due to a four-day furlough in 1991 because the above regulation, finalized in 1992, did not apply retroactively). Although there is no definition of the term "furlough" as used in this rule in either the federal regulations or case law, it is arguable that such term would encompass a reduction in hours/pay.

ATTACHMENT D

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE STATE OF IOWA
AND
AFSCME/IOWA COUNCIL 61

CONDITIONS AND UNDERSTANDINGS

The State of Iowa ("the State") and AFSCME / Iowa Council 61 ("the Union") agree that proposals made by either party in the course of the discussions regarding this Memorandum of Understanding do not establish any precedence for the negotiations between the parties and that they constitute no part of the bargaining history between the parties.

The State and the Union further agree that this Memorandum of Understanding does not establish any precedence for the negotiations between the parties and that it constitutes no part of the bargaining history between the parties.

TERMS OF UNDERSTANDING

1. All bargaining unit employees shall be required to take five (5) mandatory days of leave without pay in Fiscal year 2010 ending on June 24, 2010. The State agrees that, for purposes of calculating overtime, a mandatory unpaid day will be considered to be time worked. The State also agrees that, if an employee takes a mandatory unpaid day of leave on the day before a holiday, the use of this mandatory unpaid day of leave will satisfy the requirement that an employee be in pay status on the day before a holiday, and that, if an employee takes a mandatory unpaid day of leave on the day after a holiday, the use of this mandatory unpaid day of leave will satisfy the requirement that an employee be in pay status on the day after a holiday.

   The State agrees that, through the end of Fiscal Year 2010, there will be no layoff of any bargaining unit employees pursuant to a layoff plan submitted to the Iowa Department of Administrative Services on or after October 27, 2009.

2. Effective with the beginning of the fourteenth pay period of Fiscal Year 2010, the State's matching contribution for deferred compensation contributions made by employees provided for in Article IX, Section 2 of the current collective bargaining agreement shall be suspended through the end of Fiscal Year 2010. The State understands and agrees that the employees' contributions will continue through the end of Fiscal Year 2010 as provided in Article IX, Section 2 of the current collective bargaining agreement. The State agrees that the State's matching contribution for deferred compensation contributions made by employees provided for in Article IX, Section 2 of the current collective bargaining agreement will be reinstated effective at the beginning of Fiscal Year 2011, unless otherwise agreed by the parties.

The State further agrees that the Governor will seek and obtain the Executive Council's approval to suspend the State's matching contribution for deferred compensation contributions made by employees who are in non-contract positions in the Departments in which AFSCME bargaining unit members are employed through the end of Fiscal Year 2010.

3. For the duration of the current collective bargaining agreement (until June 30, 2011), the provision contained in the first sentence of Article V, Section 1, Part A shall be suspended and shall not be in effect for purposes of the implementation of any layoff governed by Article VI and the State further agrees that employees who are not in bargaining unit positions covered by the current collective bargaining agreement between the State and AFSCME/Iowa Council 61 shall not be permitted to bump or displace employees who are in bargaining unit positions covered by the current collective bargaining agreement between the State and AFSCME/Iowa Council 61. The Union understands and agrees that the provision contained in the first sentence of Article V, Section 1, Part A of the current collective bargaining agreement will be reinstated effective July 1, 2011, unless otherwise agreed by the parties.

4. This Memorandum of Understanding will be interpreted and implemented in accordance with the Frequently Asked Questions (FAQ) document issued by the Iowa Department of Administrative Services on December 7, 2009 (Version 2) and the FAQ document issued by the Iowa Board of Regents and agreed to by AFSCME/Iowa Council 61. Any changes to a FAQ document issued to implement this Memorandum of Understanding must be agreed to by the State and by AFSCME/Iowa Council 61.

THE STATE OF IOWA	AFSCME/IOWA COUNCIL 61
By: _____	By:_____
Chester J. Culver	Danny Homan
Governor	President and Chief Negotiator
Date:_____	Date: _____
By: _____	
James C. Hanks	
Chief Negotiator	
Date:_____	

ATTACHMENT E

MEMORANDUM OF AGREEMENT
BETWEEN
COMMUNICATION WORKERS OF AMERICA LOCAL 7103
AND THE
COUNCIL BLUFFS COMMUNITY SCHOOL BOARD

The representatives of the Communication Workers of America, Local 7103 and the Council Bluffs Community School Board mutually agree, that in consideration of the District's current financial needs, employees will be allowed the opportunity to volunteer to take unpaid leave. Approval of such leave will be at the sole discretion of the District. Approval of requests for unpaid leave will take into consideration any potential disruption of services to students.

Voluntary unpaid leaves may not be taken in less than one and half hour (1.5) hour increments by employees working less than a twelve (12) month work year.

Only employees who work in ten and a half (10.5) or twelve (12) month positions will be eligible to take unpaid leaves of more than one continuous day. Employees who request and are approved for leaves of more than one continuous day may be required to take such leave at a time when school is not in session.

Employees who work in ten and a half (10.5) or twelve (12) month positions and who request and are approved for a reduction in the workweek for the remainder of the work year must take such leave on a regularly scheduled basis each week. Employees who volunteer for a reduction extending through the end of the 2009-2010 contract year will have their annual salary recalculated to reflect the reduction.

Unpaid leave must be documented on the employee timesheet each pay period.

This agreement is applicable to regular full time and part time employees. Employee benefits will not be modified or reduced as part of the work hour or work year reduction.

It is further agreed that either party may request that the memorandum be re-opened for modification.

The parties agree that this memorandum is not precedent setting and may not be used as evidence in any future grievance or bargaining proceeding.

This agreement is in effect up to and including June 30, 2010.

_____	_____
Kathleen Jurgens, Co-President, Communication Workers of America	Janet Reiners, Chief Negotiator Council Bluffs Community School District
Date_____	Date _____