BARGAINING AND LABOR RELATIONS ISSUES IN 2010-2011

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I. THINGS THE DISTRICT CAN CONTROL

A. EARLY RETIREMENT

1. Non-Mandatory Subject of Bargaining

2. Requirements for Payment of Benefits under Iowa Code Section 279.46

   a. Minimum age of 55
   b. Notification of intent to retire **prior** to April 1
   c. Retirement effective not later than the start of the "next following school calendar"

3. Jankovitz v. Des Moines Indep. Cmty. Sch. Dist., 421 F.3d 649 (8th Cir. 2005) – maximum age limitation is a violation of the ADEA

4. Optional Provisions

   a. Targeted groups (only teachers, only administrators, etc.) or targeted subgroups (only elementary teachers, only 7-12 Language Arts teachers)

   b. Years of service requirement

   c. Cash only, insurance only, or any combination – tax consequences if employees have an option to chose a taxable or non-taxable benefit

   d. Minimum or maximum number of early retirees – need objective system for determining recipients

   e. Release of all claims against district – special ADEA requirements for release of ADEA claims

   f. Agreement not seek re-employment with the district – may exclude substitute teaching and coaching or district may retain option to offer employment

5. See Attachment A for legal update

B. REDUCTION IN FORCE

1. Number of Staff to be Reduced – Non-Mandatory Subject of Bargaining

2. Areas Where Reduction will be Implemented - Non-Mandatory Subject of Bargaining

3. Timing of Reduction in Force - Non-Mandatory Subject of Bargaining – But Statutory Timelines for Teaches and Administrators

4. Sub-Contracting - Non-Mandatory Subject of Bargaining - Sioux City Community School District, 80 PERB 1600 and Iowa City Community School District, 82 PERB 2049

5. See Attachment B – The Right Way to Implement a Reduction in Force

6. **Strategy: No Layoff Guarantee in Exchange for Contract**

C. TEACHER SALARY SUPPLEMENT PAYMENTS

1. Department of Education Ruling

a. TSS funds are subject to the 10% across-the-board budget reduction

b. Whether school districts are obligated to pay to teachers their calculated TSS amount, which is 10% higher than the amount the school districts received in TSS monies, is dependent upon locally bargained agreements

c. Decision has been appealed to District Court by ISEA

2. School Districts Can Rely Upon and Implement Ruling

3. Strategy: Pay Full Amount of TSS in Exchange for Contract

4. Strategy: Combine No Layoff Guarantee with Payment of Full Amount of TSS in Exchange for Contract

II. THINGS THE DISTRICT CAN INFLUENCE

A. BARGAINING

1. Relationship with the Association/Union is the Key

2. Communication Regarding Budget Reductions

3. Steady and Consistent Flow of Financial Information

4. Internal Settlement Trend – Non-Contract Employees Lead the Way

5. Single Salary Schedule – ISEA Opinion Letter: Single and Exclusive Salary Schedule

6. Reopener Clause - Mandatory Subject of Bargaining – More Downside Than Upside

B. FURLOUGHS

1. State of Iowa – Mandatory Unpaid Days

   a. AFSCME
   b. SPOC
   c. No furlough permitted by contract
   d. No obligation to reopen contract
   e. 5 Mandatory Unpaid Days – No layoff through 6/30/10

2. WIT

   a. UE
   b. No furlough permitted by contract
   c. No obligation to reopen contract
   d. 4 days – No layoff through 6/30/10
   e. WITEA has agreed to economic concessions equivalent to 4 days

3. School District Agreements

   a. Council Bluffs CSD – Agreement with SEIU
   b. No furlough permitted by contract
   c. No obligation to reopen contract
   d. 4 days – No layoff through 6/30/10

4. Furlough Issues

   a. Coverage
   b. Savings
   c. Mandatory v. Voluntary
   d. Furlough generally not permitted by contract
   e. No obligation to reopen contract
   f. FLSA issue
   g. Individual contract issue

h. ISEA Opinion Letter

C. CONTRACT DAYS

1. Number of Contract Days - Non-Mandatory Subject of Bargaining

2. Payment of Wages for Contract Days - Mandatory Subject of Bargaining

3. Individual Contract Issues

4. ISEA Opinion Letter

III. THINGS THE DISTRIC CANNOT CONTROL OR INFLUENCE

A. EXTERNAL SETTLEMENT TREND

1. IASB Report: 1990-91 through 2008-09 - Average was 4.56%

2. IASB Report: 1990-91 through 2008-09 - Lowest was 3.70% (1993-94)

3. IASB Report: 2009-10 - Average was 3.26%

4. IASB Report: 2009-10 - Average dropped from 3.56% after 10 weeks to 3.19% after 13 weeks

B. INTERNAL AND EXTERENAL PRESSURE ON ISEA OR UNION

1. What Do You Get For Your Money

2. Titan Tire: Employee Lawsuit Against Company and Union

C. STATE REVENUES

1. Allowable Growth – 2% for 2010-2011 Not Guaranteed

2. March REC Report

D. LEGISLATIVE ACTION

1. Fair Share

2. Prevailing Wage

E. PUBLIC/TAXPAYER REACTION

ATTACHMENT A
EARLY RETIREMENT PLANS – LEGAL UPDATE

1. Negotiatibility

In Ft. Dodge Community School District v. P.E.R.B., 319 N.W.2d 181 (Iowa 1982), the Iowa Supreme Court held that an early retirement plan proposal was a non-mandatory subject of bargaining. The Court stated that the early retirement plan was neither mandatory as a proposal relating to "wages" or "supplemental pay". The plan was not a wage proposal because "wages" means "pay, given for labor" and does not include "payment for services not rendered or labor not performed". 319 N.W.2d at 183-184. And the plan was not a supplemental pay proposal because:

> We believe that the term supplemental pay refers to pay for services rendered, and that the "service" rendered by early retirement is not the type of service envisioned by the legislature. . . . [T]he term supplemental pay means pay for rendering a service; it does not appear to be intended as payment for not working. . . . It is not intended to be tied solely to a person's age, as the cash incentive plan is here.

319 N.W.2d at 184. The Court did not address the question of whether the proposal was an excluded or illegal subject of bargaining.

The Court considered a similar issue in City of Mason City v. P.E.R.B., 316 N.W.2d 851 (Iowa 1982). In the Mason City case, the proposal in dispute was one which required the employer to pay health insurance premiums for retired employees until they became Medicare eligible. The Court held that his proposal "directly pertains to 'retirement systems' and is a legally excluded subject of bargaining". 316 N.W.2d at 856.

Unable to bargain directly with regard to early retirement plans, employee organizations have attempted to require bargaining concerning post-retirement benefits by proposing that employees be compensated for unused sick leave when they retire or terminate their employment. In Western Hills Area Education Agency 12, 83 PERB 2337, the Public Employment Relations Board ruled that a proposal to provide reimbursement to employees for accumulated but unused sick leave upon termination of employment was a non-mandatory subject of bargaining. This decision was affirmed by the Court of Appeals in Professional Staff Ass'n of Area Education Agency 12 v. PERB, 373 N.W.2d 516 (Iowa App. 1985). See also City of Iowa City, 85 PERB 2904, and City of Newton, 94 PERB 5077, 5079. And in Woodbury County, Iowa, 83 PERB 2343, PERB ruled that a severance pay proposal which provided compensation to employees for accumulated but unused sick leave upon retirement was a non-mandatory subject of bargaining.

In recent years, education associations have presented proposals entitled "Voluntary Separation" or "Early Separation Pay". Under these proposals, the employer would be required to provide health insurance benefits to employees after they have separated from their employment. In Des Moines Police Bargaining Unit Association v. P.E.R.B., 423 N.W.2d 885 (Iowa App. 1988), the Iowa Court of Appeals held that a retirement insurance proposal which

would require the employer to contribute to a trust fund to be used for insurance premium payments to be made after retirement was an illegal subject of bargaining because it was a supplemental retirement system. Based on this case and the PERB cases that I have cited, I believe that the separation pay proposals that are presented by the association are most likely to be found to be non-mandatory subjects of bargaining.

2. Early Retirement Plan Provisions

A. 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.

B. 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 the Iowa Civil Rights Act, 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 Indep. Cmty. Sch. Dist.*, 421 F.3d 649 (8th Cir. 2005).

C. 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.

D. 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.

I recommend that early retirement plan benefit recipients also execute a release or waiver of liability which specifically releases the district from any claims under the ADEA. I have included a sample form in the materials.

E. 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, remember that school district employee who retire early are entitled to participate in the district's group health plan at group rates until they reach age 65. See Iowa Code Section 509A.13. This provision of Iowa law provides greater group health insurance continuation rights than either COBRA or Iowa Code Chapter 509B.

A number of Iowa school districts 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 Erie County Retirees Association v. County of Erie, 220 F.3d 193 (3rd Cir. 2000), a federal appeals court considered whether an employer could provide a different, lesser insurance benefit for retired employees over age 65 (and Medicare eligible), than it provided for retired employees under age 65. Rather than view the insurance benefit provided to retirees under age 65 as being a "bridge" to Medicare eligibility, the court used a straight "equal benefit or equal cost" analysis to the plan.

Under the "equal cost or equal benefit rule," the employee must provide an equal benefit to all, or the variation in benefit must be justified by the higher cost for older employees. An example of equal cost would be an employer that spends $50 a month to buy term life insurance for an employee, an amount which buys less insurance for someone age 65 than someone age 55. The Erie County court found that this safe harbor was not available to the employer, because the employer was spending more money on the insurance benefit for younger employees (and therefore the equal cost rule did not apply), and the younger employees were receiving the insurance benefit for a longer time period than the older employees (and therefore the equal benefit rule did not apply).

In its October 3, 2000 Compliance Manual, the Equal Employment Opportunity Commission supported the Erie County court's decision. Quoting the Erie County decision, the EEOC observed the "Medicare status is a direct proxy for age." The EEOC went on to state: "[I]f an employer eliminates health coverage for retirees who are eligible for Medicare – or if it refuses to continue to cover its older retirees for the benefits it provides that are not offered by Medicare – older retirees will get less coverage than younger retirees on the basis of their age. Unless the employer can meet the equal cost defense, the law does not permit this age discrimination."

Neither the Erie County case, nor the October 2000 EEOC guidance, considered the argument that continuing insurance until Medicare eligibility acts as an insurance "bridge" for retired employees. The legislative history of the ADEA specifically recognizes the validity of a plan that includes social security "bridge" payments. These are payments made to "bridge" a retired employee's income until the employee becomes eligible for social security payments. By analogy, an employer could argue that its health insurance plan is a similar type of "bridge"–that is, the plan provides a "bridge" of insurance until the employee is eligible for Medicare. Although this appears to be a compelling argument that favors providing insurance benefits to early retirees, it appears that the Erie County court would reject it.

The EEOC, however, recently has shown some willingness to consider this argument. On August 17, 2001, by unanimous vote the EEOC rescinded the section of the Compliance Manual that addresses retiree health benefits. The EEOC chair stated that the Commission had heard from a wide range of stakeholders, including employers and labor groups, who were expressing concerns about the impact of the rescinded policy. The EEOC stated that it will be focusing on the development of a new policy, consistent with the ADEA, that does not discourage employers from providing early retirement health benefits. In the same press release, the EEOC reaffirmed its commitment to "vigorously pursue other types of age discrimination claims involving retirees, such as cash-based early retirement incentives that are reduced or eliminated with advancing age."

Until the EEOC develops new guidance on this matter, employers should view with caution early retirement plans that reduce or eliminate insurance benefits upon Medicare eligibility. The Erie County case has not been overruled, and still is good authority that such plans are not consistent with the ADEA. However, the EEOC's further study on this issue may lead to a conclusion that plans which reduce or end insurance at Medicaid eligibility are acceptable under the ADEA. Insurance is an important benefit in many early retirement plans, and therefore it is important that the EEOC develop a policy where these benefits can be provided, in a manner consistent with the ADEA.

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

THE RIGHT WAY TO IMPLEMENT A REDUCTION IN FORCE

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I. IDENTIFY ANY REQUIREMENTS FOR OR LIMITATIONS ON THE EMPLOYER'S RIGHT TO REDUCE OR REALIGN ITS WORKFORCE.

A. Section 7 of the Public Employment Relations Act provides that public employers shall have, in addition to all powers, duties, and rights established by constitutional provision, statute, ordinance, charter, or special act, the exclusive power, duty, and the right to:

1. Direct the work of its public employees,

2. Hire, promote, demote, transfer, assign and retain public employees in positions within the public agency,

3. Suspend or discharge public employees for proper cause,

4. Maintain the efficiency of governmental operations,

5. Relieve public employees from duties because of lack of work or for other legitimate reasons,

6. Determine and implement methods, means, assignments and personnel by which the public employer's operations are to be conducted,

7. Take such actions as may be necessary to carry out the mission of the public employer,

8. Initiate, prepare, certify and administer its budget, and

9. Exercise all powers and duties granted to the public employer by law.

B. The decision whether to reduce the workforce and to what extent is a non-mandatory subject of bargaining.

Bettendorf and Dubuque Community School Districts, 76 PERB 598 & 602
North Scott Community School District, 77 PERB 931

LeMars Community School District, 83 PERB 2410

C. The employer's right to reduce its workforce is subject to statutory limitations.

1. Teachers: the termination of a teacher's contract for purposes of a reduction in force is subject to the just cause requirements of Iowa Code Section 279.15. **Olds v. Board of Education of Nashua Community School District, 334 N.W.2d 769 (Iowa App. 1983).**

2. Administrators: the termination of an administrator's contract for purposes of a reduction in force is subject to the just cause requirements of Iowa Code Section 279.24. **Martinek v. Belmond-Klemme Community School District, 760 N.W2d 454 (Iowa 2009).**

3. Veterans: employees who are entitled to a preference under Iowa Code Chapter 35C are not entitled to a hearing under Iowa Code Section 35C.6. **Holmes v. Reese, 265 N.W. 384 (Iowa 1936); Lyon V. Civil Service Commission of City of Des Moines, 212 N.W. 579 (Iowa 1927).**

D. The employer's right to reduce or realign the workforce may be limited by collective bargaining agreements, board polices, or individual contracts.

1. Review staff reduction procedures for conditions or limitations.

2. Review collective bargaining agreement for provisions concerning subcontracting, privatizing or use of temporary employees

3. Review board policies for conditions or limitations pertaining to reductions in force, especially for non-bargaining unit employees.

4. Review individual contracts for limitations, especially limitations in administrator contracts arising out of multiple-year agreements.

II. ESTABLISH THE EMPLOYER'S REASONS FOR REDUCTION OR REALIGNMENT OF WORKFORCE.

A. The Iowa Supreme Court has stated that "just cause" includes legitimate consideration relating to the school district's personnel and budget needs. **Briggs v. Hinton Community School District, 282 N.W.2d 740 (Iowa 1979).**

B. Budgetary considerations may include the following:

1. General decline in employer's financial condition

2. Sudden or episodic change in financial condition

a. Sudden or unexpected loss of student enrollment:
b. Loss or end of special funding (ISL, grant, etc.)
c. Property or casualty loss
d. Employee defalcation or error
e. Change in expenses: for example utilities or fuel
f. Lawsuit resulting in loss not covered by insurance policies

C. Personnel reasons may include the following:

1. General decline in enrollment

2. Decline in specific grade level or course – even if overall student population or other grades or courses are increasing

3. Elimination of program or course

4. Change in program

5. Building closure

6. Grade realignment

7. Elimination of positions

8. Realignment of positions

D. Test the employer's action for legitimacy

1. A reduction in force is subject to challenge if it is a pretext for otherwise impermissible action.

2. Personality differences should never influence decision-making regarding a reduction in force.

E. Test the employer's action for sufficiency

1. The courts do not require a mathematical or scientific basis for the reduction in force. **Mackey v. Newell-Providence Community School District, 483 N.W.2d 5 (Iowa App. 1992).**

2. Evidence of the need for a reduction in force must meet the preponderance test. A 4% decline in student population did not justify the termination of one 33.3% of the nursing staff. **Leu v. Newton Community School District, 441 N.W.2d 408 (Iowa App. 1989)**.

III. REVIEW THE EMPLOYER'S ACTION FOR POTENTIAL CLAIMS OF IMPROPER MOTIVATION.

A. Employees may not be terminated solely because they are in a protected class.

1. The test that is typically applied in disparate treatment cases requires the employee to prove:

(a) that the employee is a member of a protected class;

(b) that the employee suffered an adverse employment action;

(c) that, at the time that the employer took the adverse action, the employee was performing at a level that met the employer's legitimate expectations, and

(d) the employee's position was filled by someone outside of the protected class (although this requirement need not always be met in reduction in force cases or in age discrimination cases). If the employee satisfies this test (referred to as establishing a prima facie case of discrimination), the employer is then required to introduce evidence showing that its action was taken for a legitimate, nondiscriminatory reason. If the employer does so, the employee must then prove the reason given by the employer was false or pretextual.

2. The test that is applied in <u>disparate impact</u> case requires the employee to prove that a policy or practice of the employer, although neutral on its face, has a significant, adverse impact on members of the protected class. If the employee proves that there is an adverse impact on the protected class (usually through statistical evidence), then the employer must prove that its actions were based on business necessity or, in the case of age discrimination claims, on reasonable factors other than age.

3. Consider all protected classes: age, race, religion, creed, color, sex, sexual orientation, gender identity, national origin, disability, and veteran status.

4. Search for evidence of violation of employee's rights:

a. Direct evidence
b. Indirect/circumstantial evidence
c. Statistical evidence

B. Employees may not be terminated solely because they have engaged in protected activity.

1. The test applied in protected activity cases is generally referred to as a "but for" test, i.e. that but for the employee's protected action, the employer would not have taken adverse employment action. Normally, the employer asserts that the action, like a layoff, was taken for some legitimate reason – such as economic necessity. Thus, there are usually what are called "dual motives" for the action. Under the dual motive test, the employee must first establish a prima facie case that the employee's protected conduct (e.g., union activity) was a "substantial or motivating factor in the discharge," The burden then shifts to the employer to demonstrate by a preponderance of the evidence that the discharge would have taken place even in the absence of protected conduct. **Cerro Gordo County v. P.E.R.B.,** 395 N.W.2d 672, 676 (Iowa App. 1986).

2. Consider all types of protected activity

    a. Freedom of speech – written speech, oral speech, symbolic speech
    b. Union activity
    c. Freedom of religion
    d. Freedom of association/political activity

3. Search for evidence of violation of employee's rights

    a. Direct evidence
    b. Indirect/circumstantial evidence
    c. Statistical evidence

C. Personnel action other than complete or permanent layoffs

1. Furloughs

    a. Definition
    b. Employer's right to furlough and contractual limitations
    c. FLSA issues

2. Permanent and Partial Reductions of Hours or Days

3. Statutory Limitations – Chapter 279

4. Collective bargaining agreement limitations

D. Unemployment Issues

IV. COLLECT THE EVIDENCE NEEDED TO SUPPORT THE EMPLOYER'S ACTION.

A. Identify the standard of proof

1. Teachers

2. Administrators

3. Other employees

B. Collect the evidence

1. Budgetary or financial evidence

2. Evidence regarding personnel reasons

3. Evidence to refute improper motive

V. REVIEW POLICIES FOR EMPLOYEES NOT COVERED BY COLLECTIVE BARGAINING AGREEMENTS.

A. Identify the reason or basis in the broadest possible terms

B. Classify all employees

1. Narrower is generally better
2. Every employee must be in at least one class
3. Establish rules for employees who are in multiple classes
4. Establish rules for employees on extended leaves, military leave, FMLA, LTD

C. Establish the criteria for layoff

1. Objective criteria

a. Seniority or length of service
b. Licenses and certifications
c. Degree or credit hours of education
d. Additional training specific to the position

2. Subjective criteria

a. Define every term
b. Determine how each criterion will be measured
c. Determine how each criterion will weighed
d. Determine how the decision will be made
e. Establish procedure for breaking ties or giving preference

D. Apply the criteria correctly

1. Identify the proper pool of employees

2. Apply all criteria to all employees in the pool

E. Establish and carefully implement the order of layoff

VI. CAREFULLY REVIEW AND IMPLEMENT ALL ELEMENTS OF ANY COLLECTIVELY NEGOTIATED STAFF REDUCTION PROCEDURE.

A. Classify all employees

1. Insure that every employee is in at least one class

2. Determine the proper classification of all employees who are in multiple classes – communicate with the employee organization if there is any doubt regarding the classification of an employee. If there is no agreement, place the employee in all appropriate classifications.

3. Determine the proper status of all employees who are on extended leaves, military leave, FMLA, LTD - communicate with the employee organization if there is any doubt regarding the status of an employee. If there is no agreement, treat the employee as subject to reduction in force.

B. Review and define all criteria for layoff

1. Objective criteria

a. Seniority or length of service
b. Licenses and certifications
c. Degree or credit hours of education
d. Additional training specific to the position

2. Subjective criteria

a. Define every term
b. Determine how each criterion will be measured
c. Determine how each criterion will weighed
d. Determine how the decision will be made
e. Establish procedure for breaking ties or giving preference

C. Apply the criteria correctly

1. Identify the proper pool of employees
2. Apply all criteria to all employees in the pool
3. Review and implement any bumping or displacement provisions

D. Make sure that all contractual notification provisions are satisfied

VII. CONSIDER IN ADVANCE ANY POSSIBLE CHALLENGES TO THE EMPLOYER'S PLANNED REDUCTION OR REALIGNMENT.

A. Consider the possibility that a grievance which might be filed

1. Grievances relating to the termination of a teacher's contract take precedence over the statutory termination proceedings, if the decision being challenged is arbitrable. **Atlantic Education Association v. Atlantic Community School District, 469 N.W.2d 689 (Iowa 1991).**

2. Statutory proceedings relating to the termination of a teacher's contract take precedence over the grievance arbitration, if the decision being challenged is not arbitrable. **Atlantic Education Association v. Atlantic Community School District, 469 N.W.2d 689 (Iowa 1991).**

3. If the termination for reduction in force is one which may be contested by arbitration, then the statutory proceedings will be stayed at the request of the teacher. **Shenandoah Education Association v. Shenandoah Community School District, 337 N.W.2d 477 (Iowa 1983).**

4. Grievances are ultimately controlled by the employee organization. So, the employer should communicate with the organization prior to starting the termination process if there is some possibility that the grievable issue may be resolved or at least to establish the different positions of the parties.

B. Consider any prohibited practice complaint that might be filed

1. Review all activity of any affected individual.

2. Review all activity of the employee organization