

To Retire or Not?

Retirement Policy and Practice
in Higher Education

Edited by
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Chapter 3

Age-Based Retirement Incentives for Tenured Faculty Members: Satisfying the Legal Requirements

David L. Raish

Many colleges and universities have begun experiencing fewer retirements among their oldest tenured faculty members. Some of these institutions are exploring, or have instituted, age-based retirement incentive programs under which greater benefits are available on earlier retirement. These programs help institutions to achieve a more orderly turnover of faculty and, in many cases, substantial cost savings. At the same time, the programs offer individual faculty members the opportunity to retire more comfortably at an earlier age, if they choose to do so.

Until recently, the legality of these age-based retirement incentive programs was unclear. In addition, court challenges had become increasingly common under the Age Discrimination in Employment Act of 1967, as amended (ADEA). However, in October 1998, Congress enacted a “safe harbor” exception¹ to the ADEA covering certain age-based retirement incentive benefits offered by institutions of higher education to their tenured faculty members.

A variety of retirement incentives for tenured faculty, age-based or not, are now permitted under the ADEA. However, careful planning is required to satisfy the conditions of the ADEA as well as other federal and state laws.

Assessing the Need for Retirement Incentives

Not surprisingly, expiration at the end of 1993 of the ADEA’s special exception permitting mandatory retirement in higher education has led to fewer retirements by tenured faculty members, especially among those nearing, at, or over age 70.² Experience will, of course, inevitably vary from one institution to another, depending on a number of factors, including the climate

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of the institution (meteorological and otherwise), the teaching and other demands placed on senior faculty, the level of retirement income provided by the institution's retirement plans, the availability of postretirement health coverage, and the extent to which retirement or other benefit plans may provide disincentives to retire.³

Those institutions that experience fewer retirements among tenured professors of retirement age will generally face increased budget pressures, given the salary differential that typically exists between long-term and entry-level faculty members. This was recognized in the January 1998 report of the National Commission on the Cost of Higher Education. The report recommended legislation to permit age-based retirement incentives for tenured faculty members as one means of checking the skyrocketing costs of a college education (National Commission on the Cost of Higher Education 1998). Institutions also typically need to encourage more retirements in order to respond to changing academic needs, including necessary hires in new and existing fields (National Research Council 1991: 3).⁴

In 1986, Congress commissioned a study from the National Academy of Sciences on the impact on major research institutions of the expiration of the special ADEA exception permitting mandatory retirement of tenured faculty at age 70. The Committee on Mandatory Retirement in Higher Education, formed to conduct the study, concluded in its 1991 report that the mandatory age 70 retirement provision should be allowed to expire (National Research Council 1991: 5). However, it reached this conclusion on the assumption that age-based voluntary retirement incentive plans were available to institutions of higher education, in order to encourage retirements in the normal course (National Research Council 1991: 3). Contrary to this expectation, the Equal Employment Opportunity Commission (EEOC) and others have, in recent years, challenged the legality of some age-based faculty retirement incentives, and some of these challenges have met with success in the courts.⁵

The ADEA in General

With certain exceptions, the ADEA prohibits an employer from discriminating against any individual with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's age." More specifically, the ADEA also prohibits an employer from ceasing or reducing, because of age, contributions under a defined contribution retirement plan or benefit accruals under a defined benefit retirement plan.

The ADEA's definition of "employer" specifically includes "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." Further, the ADEA also incorporates by reference provisions of the Fair Labor Standards Act which allow for pri-

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vate causes of action against federal and state governments. However, the Supreme Court has recently held that the ADEA's purported abrogation of the states' sovereign immunity is unconstitutional, and, therefore, private claims cannot be brought in federal court against state employees, including state colleges and universities.⁶ The Court's decision, however, appears to leave open the possibility of enforcement action by EEOC.

Retirement Incentives Available Before the New Safe Harbor

Some retirement incentives were permissible under the ADEA prior to enactment of the safe harbor for tenured faculty in 1998. These incentives remain available. Indeed, Congress expressly provided that the 1998 safe harbor does not affect the application of the ADEA to plans or employers outside the safe harbor.⁷

Plans without benefits that decline with age. If a retirement incentive arrangement does not reduce or eliminate benefits on account of increased age, it does not run afoul of the ADEA prohibition against discrimination on the basis of age. Having a *minimum* age for a given benefit does not violate the ADEA, even if that minimum age is greater than 40. In other words, younger members of the class protected by the ADEA—those age 40 or older—may be denied a benefit that is available to older members of the protected class.⁸

For example, it would be permissible for an institution to offer lifetime medical coverage to faculty members or other employees retiring at or after a stated age, such as age 60. Similarly, it would be permissible for an institution to offer faculty members over a stated age, such as age 62, the ability to make a reduced time commitment for a stated period, give up tenure, and receive disproportionately greater compensation during that period. A phased retirement plan might, for example, permit a faculty member over age 62 to work half-time for up to three years for 75 percent of full-time pay, provided the faculty member gives up tenure at the beginning of the phased retirement period and agrees to retire altogether at the end of that period.

The most common type of retirement incentive arrangement with no reduction or cessation of benefits based on increased age is a "window" plan. Under such a plan, enhanced retirement benefits are offered only if an individual retires during a specified period of months. For example, an institution might establish a "window" plan under which faculty members over a stated age, such as 60 or 65, may elect, between September 1 and December 31 of a given year, to retire on June 30 of the following year and receive certain enhanced benefits. The enhanced benefits might include a lump sum cash payment, a larger pension under a defined benefit plan, postretirement health coverage (or, if that coverage is already available, a greater employer contribution toward that coverage), and perhaps other benefits or perquisites. Those who do not elect retirement during the 4-month win-

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dow receive no such enhancements on retirement. Because of the incentive provided by the closing of the window on December 31, faculty members are encouraged to retire now rather than later. No upper age limit or age-based reduction is needed to provide such an incentive.

Window plans do, however, have several drawbacks. First, they are often perceived by faculty members as unfair, since they require a decision within a limited period of time during which the faculty member may be unable or unwilling to think seriously about retirement. They also deny the benefit enhancements to those who may choose to retire a year or two later. While well suited for an immediate reduction in force (and, therefore, widely used by other employers for this purpose), window plans are inconsistent with the longer term, orderly turnover of faculty that most institutions and their faculty members prefer. If an institution were to reopen the window and offer enhanced benefits again, the incentive would quickly become diluted, as some faculty members would put off retirement and wait for the next opening of the window.

Incentives in defined benefit pension plans. The ADEA permits certain age-based early retirement subsidies in defined benefit pension plans.⁹ First, an employer may offer social security supplements that provide extra benefits only to those retiring before a specified age at which social security benefits are available (so-called “social security bridge benefits”). A defined benefit plan might provide, for example, that individuals retiring between ages 60 and 65 will receive an increase in their monthly retirement benefit equal to the social security benefit they can expect to receive at age 65, if they wait until age 65 to apply for their social security benefit. This eliminates one disincentive to retirement before age 65—that of having no social security income available between ages 60 and 62 and only a reduced Social Security income available for life if the benefit is started between ages 62 and 65.

Other early retirement subsidies are also permitted by the ADEA. For example, a participant who has accrued an annual lifetime benefit under a defined benefit pension plan, starting at age 65, equal to \$30,000, might receive only about \$15,000 per year if the participant retires and starts the benefit at age 55. This results from the normal actuarial reduction based on the fact that payments will be made for a longer period of time. The plan may enhance that early retirement benefit, so that the participant receives the same annual amount upon retirement at age 55 (or age 60) as he or she would have received if the benefits had started at age 65.

Voluntary early retirement incentive plans consistent with the purposes of the ADEA. The ADEA also permits voluntary early retirement incentive plans (VERIPs) consistent with the relevant purpose or purposes of the ADEA.¹⁰ The relevant purposes of the ADEA are to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.¹¹

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The scope of the ADEA exception for VERIPs is unclear. It has no meaning if it does not permit at least some retirement incentive plans under which benefits are reduced or cease as a result of increased age. As discussed above, minimum age requirements are permissible under the ADEA, and a plan that involves no reduction or cessation of benefits based on increased age is already consistent with the ADEA.

The Statement of Managers on the Older Workers Benefit Protection Act of 1990 (OWBPA), which added the VERIP exception to the ADEA, cryptically explains:

Early retirement incentive plans that withhold benefits to older workers above a specific age while continuing to make them available to younger workers *may* conflict with the purpose of prohibiting arbitrary age discrimination in employment.¹² (emphasis added)

This language suggests that *some* age-based retirement incentive arrangements are permitted by the VERIP exception. However, it also suggests that some are not, and it is unclear where the line should be drawn.

In a 1992 request for comments on certain issues to be addressed in future regulations, the EEOC asked:

Does OWBPA allow the reduction or elimination of an early retirement benefit in correlation with increasing age or increasing years of service? If so, under what circumstances?¹³

Not long thereafter, in a different administration, the EEOC answered its own question, taking the position that the VERIP exception permits no voluntary early retirement incentive plan that involves a reduction or cessation of benefits based on increased age.¹⁴ In a 1997 decision of a federal magistrate judge, that position met with success.¹⁵ However, in a 1998 decision of a U.S. Court of Appeals, the VERIP exception was held to apply to a plan that provided special benefits upon retirement only in the first year in which the teacher had both attained age 55 and completed twenty years of service.¹⁶

The Safe Harbor for Certain Age-Based Faculty Retirement Incentives

The uncertain scope of the VERIP exception, together with the limited usefulness of the retirement incentives otherwise available under the ADEA, prompted the higher education community to seek legislative clarification that voluntary retirement incentive plans, under which benefits end or decline in value based on increased age, could be offered to tenured faculty members. The result was the enactment of a safe harbor for certain age-based plans as part of the Higher Education Amendments of 1998.¹⁷

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Overview of the safe harbor. The safe harbor permits supplemental benefits that are reduced or eliminated based upon age, subject to six conditions:¹⁸

First, the employer must be an institution of higher education.

Second, the benefits must be offered to employees with unlimited tenure.

Third, the benefits must be payable upon *voluntary* retirement.

Fourth, the institution must not implement any age-based reduction or cessation of benefits other than these supplemental benefits (except as otherwise permitted by the ADEA).

Fifth, the supplemental benefits must be in addition to any retirement or severance benefits that have been available to tenured faculty members generally, independent of any early retirement or exit-incentive plan, within the preceding 365 days.

Sixth, any tenured faculty member who attains the minimum age and satisfies all non-age-based conditions for receiving such a supplemental benefit must have an opportunity for at least 180 days to elect to retire and receive the maximum supplemental benefit that could then be elected by a younger but otherwise similarly situated employee. The faculty member must also have the ability to delay retirement for at least 180 days after making that election.

Institutions of higher education. The safe harbor is limited to plans offered by institutions of higher education as defined in Section 101 of the Higher Education Act of 1965, as amended. That definition generally includes any educational institution that:

- admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- is legally authorized to provide a program of education beyond secondary education;
- provides an educational program for which the institution awards a bachelor's degree or provides not less than a two-year program that is acceptable for full credit toward such a degree;
- is a public or other nonprofit institution; and
- is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the secretary for the granting of preaccreditation status, and the secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

This definition is essentially the same as the definition of "institution of higher education" in the ADEA provision which, prior to January 1, 1994, permitted mandatory retirement of tenured faculty members at age 70.

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Employees with unlimited tenure. The safe harbor is limited to benefits offered to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure). This language is identical to the corresponding language of the ADEA provision which, prior to January 1, 1994, permitted mandatory retirement of tenured faculty at age 70. The Conference Committee Report on the Higher Education Amendments of 1998 (the Conference Report)¹⁹ confirms that the language is intended to have the same meaning as it did in that context.²⁰

The Conference Report makes clear that a faculty member need not be tenured at the time benefits are actually provided, so long as he or she was tenured at the time the benefits were offered. Take, for example, a phased retirement program under which faculty members give up tenure, reduce their workload to one-half for a specified period, and receive more than one-half of their full-time salary for that period. The institution may also provide additional benefits on full retirement at the end of that period. Neither the benefits paid during the period of phased retirement nor the benefits provided at full retirement will fail to qualify for the safe harbor because of the fact that the faculty member is no longer tenured when those benefits are provided.

Voluntary retirement. The safe harbor is available only for supplemental benefits payable on *voluntary* retirement. The statute does not elaborate on the term “voluntary,” nor does the Conference Report. Presumably, the body of law addressing the meaning of “voluntary” for other purposes of the ADEA will apply in this area as well.²¹ Thus, for example, a generous retirement incentive plan cannot be challenged as forcing involuntary retirement merely because its attractiveness induces employees to retire. Also, the employee bears the burden of proof that his or her retirement under a retirement incentive plan was involuntary. Among the relevant factors on voluntariness are whether:

- the employee had sufficient time to consider his or her options;
- accurate and complete information was provided about the benefits available under the early retirement incentive plan; and
- there have been threats, intimidation and/or coercion.

Given the protections of the unlimited tenure relationship, it is unlikely that a tenured faculty member could successfully challenge the voluntariness of his or her retirement, absent unusual circumstances.

No age-based reduction or cessation of other benefits. The safe harbor applies to voluntary retirement incentive benefits offered by an institution only if the institution does not, at the same time, implement any age-based reduction or cessation of other, existing benefits (except as otherwise permitted by the ADEA). In other words, a safe harbor plan cannot reward those who choose to retire and punish those who do not choose to retire. For example, a fac-

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ulty retirement incentive plan could not both provide additional benefits for retirement before age 70 and, for those choosing to remain employed after age 70, take away health coverage, a parking space, or some other benefit or perquisite that is generally available to tenured faculty members.

However, age-based changes in benefits that are permitted by other provisions of the ADEA would not prevent the safe harbor from applying. For example, age-based reductions in benefits are permitted when justified by increased employer cost. In addition, postretirement health coverage can be (and typically is) eliminated or scaled back substantially upon the retiree's eligibility for Medicare. Because these reductions are permissible under the ADEA, they do not defeat the safe harbor. Also, employers frequently change postretirement benefits from time to time, often reducing or eliminating post-retirement health coverage, for example. This, too, would not prevent the safe harbor from applying, where the change applied to all faculty members or to a non-age-based class of faculty members.

Benefits in addition to preexisting retirement or severance benefits. The supplemental benefits described in the safe harbor must be in addition to any retirement or severance benefits that have been offered generally to tenured faculty, independent of any early retirement or exit-incentive plan, within the preceding 365 days. This provision is designed to prevent an institution that currently offers postretirement (or postseverance) lifetime health coverage, or other benefits, to tenured faculty members from instituting a safe harbor retirement incentive plan and offering the lifetime health coverage or other benefits only to faculty members retiring under that safe harbor plan. In other words, the safe harbor does not permit an employer to take existing postretirement (or postseverance) benefits that are available generally to tenured faculty, without any reduction or cessation based on increased age, and transform them into age-based benefits under a retirement incentive plan described in the safe harbor.

However, in recognition of the fact that employers frequently change, replace, or terminate employee benefits, this restriction is limited to preexisting benefits that were in effect during the preceding 365 days. Thus, for example, an employer that ceased providing postretirement health coverage to those retiring on or after January 1, 2000, could, on or after January 1, 2001, institute a safe harbor retirement incentive plan that includes postretirement health coverage as a benefit only for those who choose to retire under the safe harbor plan. For purposes of this 365-day rule, while the language is not entirely clear, it appears that benefits that continue to be provided to those who are already retired are not taken into account. A benefit would presumably cease to "have been offered generally" to tenured faculty when those who retire cease to be eligible for it, and not when the benefit ceases to be available to those already retired. For instance, if the institution in the preceding example stopped offering postretirement health coverage

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Table 1. Hypothetical Safe-Harbor Incentive Retirement Program

<i>Retirement at age</i>	<i>Lump sum benefit as percent of final annual salary</i>
65	200
66	160
67	120
68	80
69	40
70 or older	0

Source: Author's calculations.

on January 1, 2000, the fact that those who retired before that date continue to receive postretirement health coverage for many years to come should not prevent the institution from offering retiree health coverage under a safe harbor retirement incentive plan, beginning January 1, 2001.

In addition, a safe harbor plan can provide a benefit previously offered under a prior early retirement or exit-incentive plan, even if offered within the preceding 365 days. This would, for example, permit an institution to replace an existing early retirement incentive plan with a new plan described in the safe harbor, without waiting 365 days. Similarly, an institution that has been negotiating retirement or exit incentives with faculty members on a case-by-case basis could adopt a safe harbor plan within 365 days thereafter and include the same benefits under that plan.

"One bite at the apple" without regard to increased age. The final condition of the safe harbor is often referred to as the one-bite-at-the-apple or the one-bite rule. It is designed to ensure that an otherwise eligible employee is not precluded (by having attained too high an age) from having at least one reasonable opportunity to retire and receive the maximum benefit offered by the safe harbor plan. That opportunity must include at least 180 days to make the election to retire, and at least 180 days after the election to plan for retirement. Since institutions need time to fill positions, change teaching assignments for other faculty members, or change curricula, the second 180-day requirement should generally be in the interest of both the professor and the institution.

The one-bite-at-the-apple condition will generally apply in two circumstances. First, when a safe harbor retirement incentive plan is established, those who are otherwise eligible for the plan, but are too old to receive its maximum benefit, must be given at least 180 days in which they may elect to retire under the plan and receive that maximum benefit. Assume, for example, a safe harbor incentive plan that provides a lump-sum cash benefit determined under Table 1.

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A tenured faculty member who was age 71 when the plan was established must be offered a 180-day opportunity to elect to retire and receive a lump sum benefit equal to 200 percent of final annual salary. (A faculty member who does not elect to retire during that time period would not have any future right to any benefit under the plan.) The faculty member must also be given a period of at least 180 days after the election to plan for retirement.

Similarly, a faculty member who was age 67 when the above plan was established would also be entitled to a 180-day period during which he or she could elect to retire and receive the maximum 200 percent benefit (followed by another 180 days to plan for retirement). If the 67-year-old faculty member did not elect during the applicable 180-day period to retire, he or she would be entitled only to those lower benefits available thereafter (for example, a 40 percent benefit if the faculty member ultimately retired at age 69).

The second circumstance in which the one-bite rule will apply is where a faculty member is not yet eligible for the plan, for a reason other than age, at the time the plan is established, and subsequently becomes eligible at an age when the maximum benefit is not normally available. That faculty member, too, must be given the 180-day opportunity to elect to retire and receive the maximum benefit (and another 180 days to plan for retirement, after that election). For example, if a safe harbor retirement incentive plan, providing benefits under the table above, requires fifteen years of continuous service before a faculty member becomes eligible for the plan, a faculty member whose continuous service began at age 56, and who completed the fifteen-year service requirement at age 71, would be entitled to elect at that time to retire and receive 200 percent of pay as a lump sum benefit. The same would be true if the faculty member completed the fifteen years of continuous service at age 66, 67, 68, or 69.

The maximum benefit available under the one-bite rule. The one-bite opportunity must apply to “the maximum benefit that could then be elected by a younger but otherwise similarly situated employee.” This means, for example, that if, on completion of the fifteen-year service requirement in the preceding example, the safe harbor plan was no longer in effect (such that no benefit could then be elected by a younger employee), the faculty member completing the fifteen-year service requirement would also be entitled to no benefit. Similarly, if the plan had been modified between the time it was established and the time the faculty member completed fifteen years of continuous service, whether to reduce or increase benefits, the faculty member would be entitled to the maximum benefit available at that time as reduced or increased.

The maximum benefit that must be made available is the benefit that is available to a “younger but otherwise similarly situated employee.” This means that, while the older faculty member benefiting from the one-bite condition is assumed to be of the age at which the maximum benefit is avail-

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able, all other relevant facts are those actually in existence with respect to the faculty member. For example, if the benefit is a percentage of final pay, the final pay is the faculty member's actual final pay, not the final pay that he or she would have had at a younger age, or that some other, younger faculty member may have. If the schedule of benefits differs among the schools or faculties at the university, the maximum benefit would be determined under the schedule that applies to the faculty member's own school or faculty.

According to the statute and the Conference Report, it does not appear relevant that a maximum benefit could grow to a larger amount if the faculty member were permitted to elect to retire after the initial 180-day election period, due to an increase in salary, years of service, or some other factor that may, under a given safe harbor plan, affect the amount of the benefits provided. It appears that the benefits provided under the one-bite condition need not take any such possible increases into account, and that no second bite needs to be made available. For example, if a plan is established offering the benefits described in the table above, and a 71-year-old professor is given six months to elect to retire and receive a benefit equal to 200 percent of final annual salary, it appears that the benefit need only take into account his or her final salary at the time of the election. If the professor declines to retire at that time and earns a higher salary the following year, it does not appear that another election needs to be offered with the increased benefit.

Ascertaining the maximum benefit. In a plan that offers only a lump sum benefit, in the form of a dollar amount or percentage of pay, as in the examples above, it is easy to determine the maximum benefit available to a younger but similarly situated faculty member. However, some retirement incentive plans provide several benefits, and may pay or provide them over a period of years. For example, a bridge benefit might be paid monthly from the time of retirement until age 65 (or until age 70), allowing a faculty member to postpone starting his or her regular retirement benefits until that time, so that they can grow to a higher amount. The safe harbor plan might also offer health coverage from retirement until age 65, or for the faculty member's lifetime. Other benefits might include on-campus parking, office, laboratory or library space, secretarial assistance, and other opportunities to participate in campus life in various ways. The Conference Report provides:

If more than one benefit is offered, or noncash benefits are provided, or benefits are provided over a period of time, the employee will be assumed to retire at the age which, under the applicable formula or formulas, results in benefits with the largest combined present value.

In most cases, the age at which this present value is the greatest will be readily apparent. For example, if a safe harbor retirement plan provides the benefits described above to individuals retiring between ages 65 and 70, the monthly bridge benefit is 50 percent of final monthly pay, that benefit is payable until age 70, and the retiree health coverage is available for the faculty

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member's lifetime, it is clear that the maximum benefits would be available to someone electing to retire at age 65. Those maximum benefits would be five years of monthly bridge benefits plus lifetime medical coverage and perquisites. A 66-year-old or 68-year-old retiree would receive fewer monthly bridge benefits and other lifetime benefits over a shorter lifetime. Accordingly, a 71-year-old faculty member to whom the one-bite condition applies would be entitled to five years of monthly bridge benefits, at 50 percent of his or her actual final monthly rate of pay, together with lifetime retiree medical coverage and other perquisites. While the Conference Report states that the faculty member will be assumed to retire *at the age* that results in benefits with the largest combined present value, the Conference Report does not suggest that the benefits actually received by the faculty member must have a present value at least equal to that amount. For example, the 71-year-old faculty member exercising his or her right under the one-bite condition will have a shorter life expectancy, so the lifetime medical coverage and other perquisites provided will have a smaller present value. Presumably, no additional benefit must be paid to make up for this difference in present value, although the statute and legislative history are not entirely clear on this point.

The 180-day requirements. Given the two 180-day periods required, as a minimum, to satisfy the one-bite condition, the offer of voluntary retirement incentives would need to be made at least 360 days prior to the intended retirement date. This would allow a tenured faculty member to wait until the last day of the 180-day election period before making his or her election, and still have another 180 days after the election to plan for retirement. For example, if retirements generally occur on June 30, a safe harbor plan could provide for an election to be made between July 1 and December 31 of one year to retire on June 30 of the next year. On the other hand, the Conference Report does make clear that a faculty member may waive the second 180-day period. For example, if a faculty member elected on July 1 to retire on September 1 of the same year, and if the institution were agreeable to that timetable, the safe harbor plan would still satisfy the one-bite condition.

In the case of a phased retirement plan under which a faculty member elects a reduced workload, but does not fully retire for a stated period of years, it does not seem necessary to allow 180 days between the time of the faculty member's election and the time the reduced workload begins, as long as there are at least 180 days between that election and the date of full retirement. However, the Conference Report does not specifically address this point, and the statute is not entirely clear.

Examples of safe harbor plans. The Conference Report offers some examples of faculty retirement incentive benefits that would fall within the safe harbor. The first involves a monthly bridge benefit available to tenured faculty members who voluntarily retire between ages 65 and 70. In the example, the bridge benefit equals 50 percent of the faculty member's final monthly

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salary, and is paid from retirement until age 70. The Conference Report goes on to explain that the benefit could be made available between other ages, such as 60 and 65, or 62 and 69, could involve a percentage of salary different from 50 percent, and could even include a varying percentage of salary based, for example, on service, rank, the school or department in which the faculty member teaches, or other factors. The Conference Report clarifies that the benefit could also be subject to other conditions, such as a minimum service requirement for eligibility, or limitation of the plan to one or more schools, departments, or other classifications of tenured faculty.

There is, of course, no requirement that the benefit be based on the retiree's actual salary. It could instead be based on an average salary for professors of a given rank, or in a specific discipline, or institutionwide, or at a group of institutions. Alternatively, the benefit could be a fixed dollar amount instead of a percentage of salary, or it could be based on a formula altogether unrelated to salary.

Another example provided by the Conference Report involves a plan that provides lump sum retirement incentive payments that are reduced based on age at retirement, and eliminated at a specified upper age, such as age 65 or 70. As in the case of a monthly bridge benefit, an institution has considerable leeway in structuring its plan. Variables include the age or ages at which the lump sum benefit is available, the amount of the benefit, the extent to which it is reduced based on age, the age at which it ceases to be available, and the eligibility conditions that apply, including a minimum service requirement or limitation of the plan to one or more schools, departments or other classifications of tenured faculty. Institutions that prefer a monthly bridge benefit for a period of years may, in effect, be forced to offer a single lump sum benefit instead, because the monthly bridge benefit may result in up-front taxation on the full present value of the payments to be made, as discussed below.

The Conference Report also discusses a "voluntary phased, planned or similar retirement program" that offers subsidized pay or benefits for part-time work or decreased duties. Even if the amount of the subsidy or the duration of the part-time work or decreased duties, or both, is reduced or eliminated based on age, these programs, when properly structured, also fall within the safe harbor. For example, a phased retirement program might allow a tenured faculty member to teach a one-half course load for a period of one, two, or three years, as elected by the faculty member, with subsidized pay determined on the basis of Table 2, provided the faculty member gives up tenure at the start of the phased retirement period and agrees to retire altogether at the end of the period.

Presumably, the phased retirement opportunity could be eliminated at a stated age, such as age 70 in the above example, despite the fact that the example in the Conference Report does not include that plan feature.

The Conference Report does not give examples specifically addressing

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Table 2. Hypothetical Safe-Harbor Phased Retirement Program.

<i>Age when phased retirement commences</i>	<i>Percent of full-time salary paid throughout phased retirement period</i>
62	90
63	85
64	80
65	75
66	70
67	65
68	60
69	55
70 or older	50

Source: Author's calculations.

the provision of various noncash benefits that are common to faculty retirement incentive plans, such as health or life insurance coverage, and various perquisites that allow a faculty member to remain part of the campus community, such as a parking space, laboratory or office space, secretarial assistance, committee memberships, access to sports, eating or other facilities, and the like. However, the statute is drafted broadly enough to include these and other benefits, and there is no suggestion in the Conference Report of any limitation on the nature of the benefits offered. Of course, any safe harbor plan, regardless of the amount or nature of the benefits provided, must satisfy all the conditions of the safe harbor that are discussed above.

Application of the safe harbor to plans that predated it. A number of colleges and universities implemented age-based faculty retirement incentive plans prior to the enactment of the Higher Education Amendments of 1998. These institutions have relied principally on the VERIP exception discussed above, which provides that voluntary early retirement incentive plans do not violate the ADEA if those plans are otherwise consistent with the relevant purpose or purposes of the ADEA.

These institutions will now need to examine their existing plans to see if they satisfy all of the conditions of the safe harbor. If an existing plan fails to comply in some respect with the safe harbor, it does not necessarily mean that the plan violates the ADEA. The Higher Education Amendments of 1998 provide that the enactment of the safe harbor does not affect the application of the ADEA with respect to any plan that is not described in the safe harbor.²² An institution may still have compelling arguments that the VERIP exception applies to such a plan, notwithstanding any age-based reduction or cessation of benefits. However, the institution may be well advised to replace that existing plan with one that satisfies the conditions of the safe harbor, in order to achieve greater protection against ADEA claims.

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If a preexisting plan satisfies all of the conditions of the safe harbor, it is not protected by the safe harbor as to any cause of action that may have arisen under the ADEA prior to the date of enactment (October 7, 1998).²³ Enactment of the safe harbor does not affect the application of the ADEA to any plan described in the safe harbor, for any period prior to enactment.²⁴ However, strong arguments can be made that such a plan falls within the VERIP exemption and, therefore, did not violate the ADEA. Going forward, it appears that the plan may continue unchanged and benefit from the protection of the safe harbor.

It might be possible to construct an argument that the safe harbor requires the “one-bite” condition to be satisfied after enactment of the safe harbor provisions. For that reason, an institution may, out of caution, want to reintroduce its faculty retirement incentive plan and offer a new 180-day period to elect the maximum benefit. While this may result in additional costs, it also has the advantage of providing a new impetus for retirement by those older faculty who earlier declined to retire. In any event, it is unlikely that any plan in existence before the 1998 legislation met *all* of the detailed conditions of the safe harbor.

ERISA Issues to Consider

For many colleges and universities, the Employee Retirement Income Security Act of 1974, as amended (ERISA), may significantly limit the nature of the benefits that can be provided under a faculty retirement incentive plan, or the faculty members who may be made eligible for those benefits, or both.

Exemption for state institutions and church-affiliated colleges or universities. ERISA does not apply to benefit plans of state or local governments or their agencies or instrumentalities.²⁵ Therefore, state colleges and universities, as well as community colleges, are not subject to ERISA. Religiously affiliated colleges or universities are also generally exempt from ERISA, provided that they are controlled by a church (or by a convention or association of churches) or share common religious bonds and convictions with that church (or convention or association).²⁶ Accordingly, these colleges and universities need not be concerned with the ERISA constraints discussed below. However, these institutions do need to be mindful of state statutes prohibiting age discrimination, since they cannot rely on the defense that ERISA preempts such a statute with respect to a retirement incentive plan subject to ERISA.²⁷

Plans that are subject to ERISA. Unless they fall within ERISA’s exemptions for governmental and church-affiliated institutions, discussed above, colleges and universities are subject to ERISA with respect to their pension and welfare benefit plans. Faculty retirement incentive plans will presumably fall within the ERISA definition of a “welfare benefit plan”²⁸ to the extent they provide such benefits as health coverage, disability benefits, or death

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benefits. Since ERISA contains few content requirements for welfare benefit plans, it is unlikely to affect the design of a faculty retirement incentive plan with respect to welfare benefits.

Of much greater concern are the ERISA rules applicable to “pension plans.” ERISA defines a pension plan to include:

any plan, fund, or program established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

- (i) provides retirement income to employees, or
 - (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
- regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.²⁹

Faculty retirement incentive plans that offer cash benefits after termination of employment, such as bridge benefits or lump sum payments on retirement, as described in examples above, would generally fall within ERISA’s definition of a pension plan. These plans, if age based, would generally fail to satisfy at least five of ERISA’s requirements for pension plans. First, the minimum age for participation is normally 60, 62, or 65, well in excess of ERISA’s age 21 or 26 limit.³⁰ Second, benefits do not accrue and vest as generally required.³¹ Instead, they get smaller the later one retires. Third, ERISA specifically prohibits the reduction of contributions or benefit accruals based on increased age.³² Fourth, retirement incentives are not typically offered in a joint and survivor annuity form providing lifetime income to the surviving spouse.³³ Fifth, the plans typically are not funded through a trust or other vehicle that protects the assets from creditors of the employers.³⁴ Instead, benefits typically are paid from the institution’s general assets.

Exception for top hat plans. ERISA does exempt from these and other pension plan requirements a “top hat” plan—that is, a plan “which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.”³⁵ There are no regulations providing guidance on the meaning of “select group,” “management,” or “highly compensated employees.” In a nonbinding advisory opinion, the Department of Labor has stated that the top hat provisions should be interpreted in light of Congress’s intent to limit the provisions to individuals who, by virtue of their position or compensation level, have the ability to affect or substantially influence the design and operation of the plan.³⁶

It is doubtful that all faculty members at any college or university constitute a select group of management or highly compensated employees. However, if the retirement incentive plan is limited to a narrowly defined eligible group, such as tenured, full-time professors over age 60 with at least fif-

teen years of service, the salary levels may be high enough at a given institution, and the number of eligible individuals low enough, that the group will qualify for the top hat exemption. The argument that tenured faculty members constitute management, if not highly compensated, employees would be enhanced if the eligible tenured faculty members had some voting power or other influence as a group over the design of the retirement incentive program and other benefits. As a practical matter, however, to satisfy the top hat exception some institutions may need to limit their faculty retirement incentive plans to more select groups of higher paid faculty members, such as faculty members at the business, law or medical school, or those whose annual pay exceeds a stated amount.

Phased retirement programs. If a phased retirement program provides benefits only while the individual continues to work, and not after termination of employment, it is unlikely to be a pension plan under ERISA.³⁷ Thus, the troublesome ERISA requirements for pension plans would not apply. However, a phased retirement program that falls outside of ERISA's definition of a pension plan would need to be designed with any applicable state age discrimination laws in mind, since the ERISA preemption argument would not be available unless the program constituted a welfare benefit plan under ERISA Section 3(1).³⁸

Window plans. Window plans discussed above may also be exempt from ERISA, at least if they provide only for a single lump sum cash payment and no welfare benefits described in ERISA Section 3(1), because such an arrangement may not constitute a plan under ERISA.

In *Fort Halifax Packing Co. v. Coyne*, in the context of severance payments, the Supreme Court held that no ERISA plan existed, stating that "the theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits."³⁹ Subsequently, lower courts have examined potential ERISA plans to determine if they require an ongoing administrative scheme.⁴⁰ Factors considered in the determination of whether an ongoing administrative scheme is implicated include the type of payment (one-time lump sum or continuous, periodic payments), the duration of the employer's obligation, the trigger for payments (a one-time event or termination in general), and the necessity of case-by-case eligibility determinations.⁴¹

If a window plan does not constitute either a pension or welfare benefit plan under ERISA, the ERISA preemption argument would again be unavailable with respect to any applicable state age discrimination laws. Thus, it is generally inadvisable for a window plan to have an upper age limit or to reduce benefits based on increased age. Fortunately, such age-based features are not necessary to provide the incentive to retire; the incentive comes from the closing of the window at the allotted time.

Federal Income Tax Issues to Consider

Under the Internal Revenue Code, an individual who has a right to deferred compensation from a tax-exempt or governmental employer is taxed on the value of that right at the time the right ceases to be subject to a “substantial risk of forfeiture,” even if the individual does not (or could not) receive the deferred compensation at that time.⁴² Unlike ERISA, this Code provision applies to deferred compensation payments by both state and private colleges and universities, including most religiously affiliated institutions.⁴³

The first question under the Code is whether a faculty retirement incentive plan is providing deferred compensation. In general, it seems likely that the Internal Revenue Service would take the position that benefit payments promised under a faculty retirement incentive plan, whether a lump sum at retirement, periodic bridge payments for a specified period, or lifetime payments would constitute deferred compensation.⁴⁴ On the other hand, if retirement before a stated age is required in order to receive the retirement incentive benefits, a strong argument can be made that the faculty member faces a substantial risk of forfeiting those benefits until the day that he or she retires (before reaching the stated age) and becomes entitled to the benefits.⁴⁵ Similarly, with respect to subsidized payments made during part-time employment as part of a phased retirement plan, since those payments would normally be conditioned on continued part-time employment, they would be subject to a substantial risk of forfeiture until actually paid.

Once a faculty member is fully retired, any remaining payments to which he or she is thereafter entitled will not normally be subject to a substantial risk of forfeiture, unless the faculty member is obligated to provide some continuing, substantial services in exchange for those payments—e.g., as a consultant.⁴⁶ Thus, the faculty member is subject to tax on the full present value of those payments at the time of retirement. For this reason, most colleges and universities have designed their faculty retirement incentive plans to provide benefit payments in a single lump sum. However, this is not compelled by the Code. An institution could make periodic payments over a fixed period, or over the faculty member’s lifetime. As a practical matter, the first payment should be large enough to cover the taxes on the present value of all payments, or the institution should be prepared to make a loan to the faculty member to cover those taxes and to obtain repayment of that loan through monthly deductions from the subsequent periodic benefit payments. In either instance, the tax treatment of the actual benefit payments is quite complicated. A portion of each periodic payment is treated as a tax-free recovery of the present value already taxed, while the balance of the payment is subject to ordinary income tax. To avoid these tax (and associated reporting) complexities, institutions have normally opted for lump sum retirement incentive payments.

Legislation was proposed and almost enacted in 1992 exempting certain

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faculty retirement incentive plans from the adverse tax treatment of deferred compensation. Perhaps the higher education community will again seek such legislation.

In the case of a window plan, under which all employees over a minimum age may elect to retire within a specified period of months and receive additional benefits, those benefits would similarly be subject to a substantial risk of forfeiture in the normal case. The risk of forfeiture arises because the benefits would normally be conditioned on retirement on the date specified in the window election (and on continued employment until that date). If the payments were to be made over a period of time, or over the faculty member's lifetime, an argument can be made that they do not in this context constitute deferred compensation. In its regulations defining deferred compensation under a similarly drafted statute relating to FICA taxes, the Internal Revenue Service takes the position that benefits paid under window plans, or certain similar arrangements, should be treated as severance payments instead of deferred compensation.⁴⁷ Arguably, the same approach should be taken for income tax purposes, with the result that periodic payments under a window plan would not be taxed until received.

A U.S. district court in 1999 held that one-time early retirement incentive payments to tenured faculty members in exchange for their release of tenure rights are not "wages" for purposes of FICA taxes.⁴⁸ The court concluded that the early retirement payments to tenured faculty members were for the purchase of their tenure rights, which constitute property interests. According to the court, the payments used to purchase the property interests were not "wages" or "remuneration for services" and so were not subject to FICA taxes. Arguably, the court's rationale also extends to early retirement payments made over a period of time in exchange for tenure rights. The same rationale would support the argument that such payments are not "deferred compensation" for federal income tax purposes. However, the court's opinion is flatly contrary to the position taken by the Internal Revenue Service,⁴⁹ and it is not clear whether other courts will agree.

State Age Discrimination Laws

The ADEA does not preempt state age discrimination laws, to the extent they offer broader protection than the ADEA.⁵⁰ Thus, the safe harbor for certain age-based faculty retirement incentive plans has no effect on the applicability of state age discrimination laws. With respect to faculty retirement incentive plans (including top hat plans) that constitute employee benefit plans as defined in ERISA, ERISA should preempt any state age discrimination law to the extent such state law prohibits conduct which is lawful under the ADEA.⁵¹ However, as discussed above, some faculty retirement incentive plans are not subject to ERISA and, therefore, do not benefit from the ERISA preemption of state law. Plans not covered by ERISA in-

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clude, as discussed above, plans of state colleges and universities and community colleges, plans of certain religiously affiliated colleges and universities, phased retirement programs of all institutions, where such programs provide no ERISA-covered benefits, and window plans providing only lump sum cash payments. Accordingly, institutions considering such plans will need to take into account any state age discrimination laws that apply to the institutions.

Summary of Available Options

The variety of possible faculty retirement incentive benefits can be divided into three categories: window plans, ongoing retirement incentive plans that provide benefits on full retirement, and phased retirement plans that offer benefits during a phase-down of the work load for a specified period, followed by full retirement.

A faculty retirement incentive plan may, of course, include elements of two or even all three of these categories—for example, an enhanced benefit at the outset, during a window period, followed by the option to take phased retirement or full retirement with differing benefits. Of course, institutions may offer retirement incentives to faculty members on an individually negotiated basis, without any formalized plan at all. Such arrangements, however, are outside the scope of this chapter.

Window plans. As discussed above, a window plan offers faculty members a set period of months in which they can elect to retire with enhanced retirement benefits. For example, a window plan might give faculty the opportunity to elect between September 1 and December 31 of a given year to retire the following June 30 and receive a lump sum payment or periodic payments with or without postretirement health coverage or other enhancements. While the opportunity is typically limited to faculty members over a minimum retirement age, such as 60 or 62, window plans do not normally have a maximum age. An age cap is generally not necessary to provide the incentive to retire, since the end of the window (December 31 in the above example) provides that incentive.

From a legal standpoint, window plans raise the fewest concerns under the statutes discussed above. With no upper age limit and no reduction of benefits based on increased age, and assuming retirement is voluntary, such a plan does not discriminate on the basis of age and, therefore, does not need to fall within the new safe harbor, or any other specific exemption, in order to comply with the ADEA. For these same reasons, state age discrimination laws should not be of concern. For institutions subject to ERISA, the retirement incentive benefits are unlikely to constitute a separate ERISA plan, at least where benefits are paid in a single lump sum payment, because the plan is temporary and requires no ongoing administration. Finally, the adverse tax treatment of deferred compensation is arguably avoided on the

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grounds that the payments are in the nature of severance pay and not deferred compensation.

On the other hand, window plans are unattractive to many institutions, given the perceived unfairness of offering substantial benefits only to those few faculty members who are eligible—and prepared—to retire during a limited period of time. Window plans also have little effectiveness if offered more than once, or if other circumstances exist that may cause faculty members to believe they can simply wait for the next window to retire.

Other plans providing benefits on full retirement. Plans in this category are normally more ongoing in nature although subject, of course, to the institution's ability to modify or terminate them. These plans typically offer retirement incentive payments, as a single lump sum or periodic payments, with or without postretirement health coverage or other enhancements, on full retirement from the institution. In order to provide some incentive to faculty members to retire, and to limit the additional retirement benefits to earlier retirement when the faculty member most needs them, these ongoing plans have not only a minimum retirement age for eligibility but also a maximum age. They also typically include a reduction in benefit based on increasing age. Thus, institutions need to structure these plans to avoid age discrimination claims by older faculty. Unless institutions are prepared to take the risk of relying on the uncertain scope of the ADEA's VERIP exception, these plans should be designed to satisfy the conditions of the 1998 safe harbor. This means assuring that:

- The institution falls within the definition of “institution of higher education” in the Higher Education Act of 1965, as amended.
- The plan is limited to faculty members (or other employees) who are under a contract of unlimited tenure, or a similar arrangement providing for unlimited tenure.
- The benefits provided are “supplemental” to other benefits existing at the time the plan is implemented.
- With respect to tenured faculty members who do not choose to retire, the institution does not take away other, existing benefits, or reduce existing benefits, as a result of increased age.
- The plan does not make available, solely to those retiring under the plan, benefits that were generally available to tenured faculty members retiring within the preceding 365 days (except for benefits under another early retirement or exit incentive plan).
- When the plan is established, every faculty member who would be eligible for the maximum benefit except for attainment of too high an age is given a 180-day opportunity to elect retirement and receive that maximum benefit, and another 180 days to plan for retirement.
- Any faculty member who, at the time the plan was established, did not meet all eligibility criteria other than age (such as a required number of

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years of service) and later satisfies those criteria will have a 180-day opportunity to receive the maximum benefit then available to a younger, but otherwise similarly situated, employee.

Ongoing retirement incentive plans of this nature should be structured with consideration of the employee's tax consequences. Unless they pay the cash incentive benefit (if any) in a single lump sum payment, the institution will probably want to frontload the payments sufficiently to cover the upfront tax liability on the present value of all periodic payments, or loan a similar amount to the employee to pay that tax liability, with repayment to be made through payroll deduction from the remaining payments.

Institutions subject to ERISA—that is, colleges and universities other than state institutions and certain religiously affiliated institutions—must limit this second category of plans to a select group of management or highly compensated employees within the meaning of ERISA's top hat exemption. This top hat exemption presently is unclear in scope, given the absence of guidance from the Department of Labor.

In the case of a state college or university, community college, or religiously affiliated college or university that is exempt from ERISA, the institution will need to consider any applicable state age discrimination laws. This is unlikely to be true of an institution subject to ERISA, assuming the retirement incentive plan constitutes an ERISA pension plan, because of ERISA's preemption of state law affecting such benefit plans. Nevertheless, this does not appear to have been tested yet in the courts in the context of early retirement incentive plans.

Phased retirement plans. This third category of plans provides enhanced salary or benefits, or both, prior to full retirement during a period of years (usually three years or less) during which a faculty member's workload gradually decreases. Typically, the faculty member gives up tenure at the beginning of the phase-down period, and agrees to retire fully at the end of the period, although these elements are not always required. The phase-down may be in stages, such as 75 percent, 50 percent, and 25 percent workloads over a three-year period, or it may involve a simple cutback to a 50 percent (or other percentage) workload throughout the phased retirement period. Phased retirement plans might have an upper age limit, or they might reduce the enhanced salary or benefits based on increased age, or both. However, some institutions offer the phased retirement option with the same enhanced salary or benefits to all tenured faculty over a minimum age, such as 55 or 60.

If the phased retirement plan has an upper age limit on eligibility, or reduces benefits based on age in some respect, an institution is generally well-advised to design the plan to fall within the safe harbor discussed above. This means, as a practical matter, that the following must be true:

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- The institution falls within the definition of institution of higher education in the Higher Education Act of 1965, as amended.
- The plan is limited to faculty members (or other employees) who are under a contract of unlimited tenure, or a similar arrangement providing for unlimited tenure.
- The salary subsidy paid (and any other extra benefits provided by the plan) during the phase-down period are in addition to salary amounts (and benefits) generally available to part-time faculty with the same workload.
- The phased retirement plan does not involve any age-based reduction or cessation of benefits other than the salary subsidy (and any other extra benefits provided by the plan), except as otherwise permitted by the ADEA.
- The salary subsidy (and any other extra benefits provided by the plan) generally have not been available to part-time tenured faculty members, with similar workloads, during the preceding 365 days, except under another early retirement or exit-incentive plan.
- Any faculty member who is otherwise eligible at the time the plan is established, but is over the highest age at which the maximum phased retirement plan benefits are available, has at least a 180-day opportunity to elect phased retirement and receive the maximum benefits available to a similarly situated younger faculty member and another 180 days to plan for retirement.
- Any faculty member who, at the time the plan was established, did not meet all eligibility criteria other than age (such as a required number of years of service) and later satisfies those criteria, but is then older than the highest age at which the maximum benefits are generally available, has a 180-day opportunity to elect phased retirement and receive the maximum benefits.

If the benefits under a phased retirement plan are provided solely while the individual continues to work, and not after termination of employment, such a plan will not generally fall within the meaning of a pension plan under ERISA. Therefore, such a plan need not be limited to a select group of management or highly compensated employees in order to avoid ERISA's onerous requirements for pension plans.

On the other hand, the absence of ERISA pension plan status deprives the institution of the argument that state age discrimination laws are preempted by ERISA, unless the plan's age-based benefits are health coverage, disability benefits, death benefits, or other benefits that fall within the ERISA definition of a welfare benefit plan. The institution will, therefore, have to consider the effect of any such law that may apply.

The adverse tax rules for deferred compensation should not be of con-

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cern in a phased retirement plan, so long as the enhanced salary or benefits are conditioned upon continued provision of services during the phase-down period.

Conclusion

Many institutions of higher education—and their faculties—value ongoing retirement incentive plans. The institutions benefit from more orderly faculty turnover and, in many cases, substantial cost savings. The individual faculty members have the opportunity to retire more comfortably at an earlier age, if they are inclined to do so.

For an ongoing retirement incentive plan to accomplish these objectives, it is important that the benefits decrease at higher ages and end at a specified age. Otherwise, there would be no incentive to retire, and older retirees may reap a windfall given the growth in their retirement accounts, older retirees are less likely to need an extra benefit to produce a comfortable level of retirement income.

Until enactment of the ADEA safe harbor in 1998, the legality of age-based retirement incentive plans was uncertain. The safe harbor now affords them protection. However, the safe harbor includes a number of conditions that need to be satisfied. In addition, other federal and state laws need to be taken into account. Thus, careful planning is required in designing and implementing age-based retirement incentive plans for tenured faculty.

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Notes

1. Higher Education Amendments of 1998, Pub. L. No. 105-244, §941, 112 Stat. 1581, 1834–35, adding section 4(m) to the ADEA.

2. See Clark, Kreps, and Ghent (this volume) and the discussion of the research by Ashenfelter and Card (1998) Clark and Hammond (this volume) for an assessment of the change in retirement ages since the ending of mandatory retirement.

3. See Keefe (this volume) for discussions of retirement incentive programs and intangible factors in retirement decisions.

4. See Ehrenberg et al. (this volume) for an examination of the implications of delayed retirement on Cornell University.

5. *Solon v. Gary Community School Corp.*, 180 F. 3d 844 (7th Cir. 1999); *Equal Employment Opportunity Commission v. Crown Point Community School Corp.*, 1997 WL 54747 (N.D. Ind. 1997). Challenges have been rejected by *Auerbach v. Board of Education of the Harborfields Central School District of Greenlawn, New York*, 136 F. 3d 104 (2nd Cir.

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1998), although with dicta suggesting gradual age-based reductions would violate the ADEA, and by *Lyon v. Ohio Education Association*, 53 F.3d 135 (6th Cir. 1995).

6. *Kimel v. Florida Board of Regents*, M U.S. M, 2000 WL 14165,* 16 (January 11, 2000).

7. Higher Education Amendments of 1998, §941(c)(2)–(3).

8. ADEA §4(l)(1)(A), 29 U.S.C. §623(l)(1)(A); see *Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995) (holding that ADEA section 4(l)(1)(A) precludes the ADEA claim of a 52-year-old individual asserting that he was denied pension benefits in violation of the ADEA because he was under age 55).

9. ADEA §4(l)(1)(B), 29 U.S.C. §623(l)(1)(B).

10. ADEA §4(f)(2)(B)(ii), 29 U.S.C. §623(f)(2)(B)(ii).

11. ADEA §2(b), 29 U.S.C. §621(b).

12. 136 Cong. Rec. S13594-01, S13596 (September 24, 1990) (S. 1511 Final Substitute: Statement of Managers) (hereafter “OWBPA Statement of Managers”).

13. Equal Employment Opportunity Commission, Request for Comments, Age Discrimination in Employment Act, 57 Fed. Reg. 10626, 10628 (March 27, 1992).

14. See, e.g., Brief for Plaintiff at 21–22, *Equal Employment Opportunity Commission v. Crown Point Community School Corp.*, No. 2893 CV237, 1997 WL 54747 (N.D. Ind. 1997); Brief for Appellants at 12–14, *Lyon v. Ohio Education Association*, 53 F.3d 135 (6th Cir. 1995).

15. *Equal Employment Opportunity Commission v. Crown Point Community School Corp.*

16. *Auerbach v. Board of Education*. In dicta, the court suggested that the VERIP exception would not apply if the benefits were gradually reduced as higher ages were attained. However, it is unclear why this distinction would be warranted.

17. Higher Education Amendments of 1998.

18. ADEA §4(m), 29 U.S.C. §623(m).

19. H.R. Rep. No. 105-750, pp. 403–7 (1998).

20. See C.F.R. §1625.11(e)(1) (1998) (amplifying the meaning of “unlimited tenure” to some extent).

21. See, e.g., OWBPA Statement of Managers, at S13596; *Auerbach v. Board of Education*.

22. Higher Education Amendments of 1998.

23. *Ibid.*

24. *Ibid.*

25. Employee Retirement Income Security Act of 1974 (ERISA) §§3(32) and 4(b)(1), 29 U.S.C. §§1002(32) and 1003(b)(1).

26. ERISA §§3(33) and 4(b)(2), 29 U.S.C. §§1002(33) and 1003(b)(2).

27. ERISA §514(a), 29 U.S.C. §1144(a) (providing that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)”).

28. ERISA §3(1), 29 U.S.C. §1002(1).

29. ERISA §3(2)(A), 29 U.S.C. §1002(2)(A).

30. ERISA §202(a)(1), 29 U.S.C. §1052(a)(1).

31. ERISA §203, 29 U.S.C. §1053.

32. ERISA §204(b), 29 U.S.C. §1054(b).

33. ERISA §205(a), 29 U.S.C. §1055(a).

34. ERISA §302, 29 U.S.C. §1082.

35. ERISA §§201(2) and 301(a)(3), 29 U.S.C. §§1051(2) and 1081(a)(3).

36. Department of Labor Advisory Opinion No. 90-14A.

37. *But see* Department of Labor Advisory Opinion No. 81-27A.

38. ERISA §514(a), 29 U.S.C. §1144(a).

39. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987).

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40. See, e.g., *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1409 (6th Cir. 1996); *Delaye v. Agripac, Inc.*, 39 F.3d 235, 237 (9th Cir. 1994); *Champagne v. Revco D.S. Inc.*, 997 F.Supp. 220, 221–22 (D.R.I. 1998).

41. *Champagne v. Revco D.S. Inc.*, 997 F. Supp. at 222, quoting *Gilmore v. Silgan Plastics Corp.*, 917 f. Supp. 685, 688 (E.O. No. 1996).

42. Internal Revenue Code of 1986, as amended, §457(f).

43. A religiously affiliated institution is exempt from Section 457(f) if it is church or a “qualified church-controlled organization” within the meaning of Section 3121(w)(3)(B) of the Code. I.R.C. §457(e)(13). However, a religiously affiliated college or university falls within that exemption only if it is not open to the general public or no more than 25 percent of its revenues normally consist of tuition or other payments from the public or of government-source funds. I.R.C. §3121(w)(3)(B).

44. See Treas. Reg. §31.3121(v)(2)-1(b)(3)(i), (defining “deferral of compensation” for purposes of a special timing rule for FICA tax payments in Section 3121(v)(2) of the Code, which is worded very similarly to Section 457(f)).

45. See Treas. Reg. §1.83-3(c).

46. *Ibid.*

47. Treas. Reg. §31.3121(v)(2)-1(b)(4)(v).

48. *North Dakota State Univ. v. United States*, No. A3-98-50, Slip. op. at 18–20 (D.N.D. Nov. 22, 1999).

49. See IRS Technical Advice Memorandum 9711001.

50. 29 CFR §1625.10(g); *Moody v. Pepsi-Cola Metropolitan Bottling Co.*, 915 F.2d 201, 209–10 (6th Cir. 1990), *Bailey v. Container Corp. of America*, 594 F. Supp. 629, 632–33 (S.D. Ohio 1984).

51. See *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103–4 (1983); *Devlin v. Transportation Communications International Union*, 173 F. 3d 9y (2nd Cir. 1999).

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