



TOPIC: USM Policies Regarding Terminal Leave For Faculty and Separation for Exempt Staff and Retirement Planning and Incentives Plan

COMMITTEE: Organization & Compensation

DATE OF COMMITTEE MEETING: June 4, 2014

SUMMARY: Amendments to the USM Policy on Terminal Leave for Faculty (No. II-2.10) and Policy on Separation for Regular Exempt Employees (No VII-1.22) are required to address legal advice provided by the Office of the Attorney General and the USM's outside tax and benefits counsel, the firm of Ice Miller. Counsel have advised that the application of certain provisions in the two policies are at odds with Internal Revenue Service requirements regarding deferred compensation. The potentially problematic provisions in the policies involve: 1) the provision of employee benefits to an individual who is no longer providing services to the employer; and 2) the timing of tax liability for payment for an extended period of leave.

The attached proposed amendments were developed by a USM Retirement Planning and Incentives Workgroup that included institution academic and administration and finance administrators, institution and OAG counsel, and representatives of the Council of University System Faculty and University System Staff. The proposals seek to remedy the above tax law concerns as follows:

- **Policy on Terminal Leave for Faculty:** The current policy authorizes paid terminal leave with full benefits for up to two years, during which time the faculty member is on leave from the institution. The amendments would establish that terminal leave is available as follows: 1) If the faculty member fulfills duties at 25% or more full-time employment, he/she may be considered an active employee with appropriate salary and benefits for the terminal leave period; and 2) If the faculty member is not fulfilling duties at the 25% threshold, he/she may not be deemed an active employee with benefits, but still may receive compensation commensurate with that expected during terminal leave under the current policy. The amendments also limit terminal leave without the provision of services to the institution to 2.5 months after the calendar year in which the parties agree to the leave arrangement.

The proposed policy makes no change in the circumstances in which terminal leave is appropriate: as a discretionary arrangement that is in the best interest of the institutions and voluntarily sought by the faculty member.

- **Policy on Separation for Exempt Staff:** The current policy provides that exempt employees, who serve at will, may be separated from employment after a period of notice of one to twelve months, depending upon the employee's length of service. It also provides that the employee may be placed on administrative leave during the notice period. The amendments would clarify that, if an employee is placed on administrative leave during that period, he/she may not be considered an active employee with benefits, but still may receive compensation commensurate with that expected during the notice period.

The proposed amendments do not change the circumstances in which notice termination is appropriate or other aspects of the policy unrelated to notice termination.

In recognition that the USM's compliance with tax law requirements will necessitate new approaches to terminal leave and notice termination practices, the USM Workgroup also has developed a USM Retirement Planning and Incentives Plan. The Plan is intended to provide additional options which may assist institutions in meeting institutional goals while providing certain advantages to affected employees. Options described in detail in the attached Plan include:

- **Post-Severance Contributions:** This option allows tax-deferred contributions to an employee's retirement account for a period of years, generally up to \$52,000/year. These contributions provide significant tax advantages to the employee and the institution.

Currently, an institution may make a post-severance contribution only with the Board's approval.

Under the proposed Plan, authority to approve a post-severance contribution agreement would be delegated to the institution's President, with all such agreements reported annually to the Chancellor and the Board. A formal delegation document is attached to the Plan.

- "Window" Programs: "Window" Programs allow for voluntary severance payments to a defined group of employees for a specified period of time. Any employee within the group is eligible to participate, and may be paid up to two times the lesser of the employee's annual salary or \$260,000 up to two years on a tax-deferred basis. Under the proposed plan, an institution's Window Program will require approval of the Chancellor and the Board.
- Phased Retirement: The Phased Retirement option allows an employee to reduce duties over time, under a binding agreement that specifies: 1) the duties, length, and other terms of the transition period, and 2) the commitment of the employee to retire at the end of the period. The proposed Plan provisions would provide structure and guidance for informal variations on the phased retirement arrangements that currently take place at some USM institutions.
- Hybrid Retirement Agreements: An institution and an employee may agree to an arrangement that combines more than one of these Plan options, or combines one of these options with a transitional terminal leave agreement or notice termination, under appropriate circumstances.

The options outlined in the proposed Plan are primarily intended to assist institutions and employees in terminal leave and notice termination situations. However, they would be available to institutions in other circumstances, provided that: 1) the retirement or other separation of an employee is beneficial to the institution's business and academic goals, and 2) the employee voluntarily chooses to participate in the option.

ALTERNATIVES: The committee could decline to approve, or require modifications to, the proposed Plan and policy revisions.

FISCAL IMPACT: Potential additional annual costs are dependent upon the individualized circumstances of each terminal leave, notice termination or other retirement or separation arrangement.

CHANCELLOR'S RECOMMENDATION: The Chancellor recommends approval of the proposed policy revisions and the Plan.

COMMITTEE ACTION: Approval of policy amendments and plan recommended

DATE: June 4, 2014

BOARD ACTION:

DATE:

SUBMITTED BY: Joseph Vivona

28.0 II-2.10-POLICY ON TRANSITIONAL TERMINAL LEAVE FOR FACULTY
(Approved by the Board of Regents, November 30, 1989, Amended, , 2014)

5/27/14 DRAFT

I. PURPOSE

This policy is intended to establish and define the terms of a transitional terminal leave. ~~Terminal leave is defined as a leave of absence with pay extending over a period which terminates on the effective date of a faculty member's separation from employment with the institution. Transitional terminal leaves are appropriate when beneficial to the institution and its programs, since they may provide a means to reallocate positions and other resources from low demand to high demand programs.~~

II. TERMS

- ~~A.~~ The President may grant a transitional terminal leave, upon application by the faculty member, ~~in accordance with the following provisions:~~ at the discretion of the institution and with the consent of the faculty member.
- ~~B.~~ Only full-time tenured faculty members at the institution shall be eligible for transitional terminal leave. ~~if awarded, such a leave shall be with full pay for a period not to exceed twelve months, or with half pay for a period not to exceed twenty-four months.~~ For the purposes of this policy, the term "tenured faculty" or "faculty member" shall include permanent status librarians.
- ~~C.~~ Unless otherwise provided in Section III.B, a faculty member, while on transitional terminal leave, shall:
1. Remain an employee of his or her institution, and be subject to all policies of the Board of Regents and the institution;
 2. Receive the a salary up to that which would have been accorded had he or she remained at the institution, consistent with Section III.A 1 or 2; and
 3. Retain eligibility for all benefits normally associated with full-time (or, where applicable, half-time) employment, with the exception of annual leave, ~~and~~
 4. ~~Not be required to perform duties of any kind during the period of leave unless otherwise stipulated.~~
- ~~D.~~ As a condition to the grant of transitional terminal leave, the faculty member shall agree, in writing, to the conditions of the leave, waiving all claims arising out of her or his employment, other than those specified in ~~II-C~~ this policy, and also waiving all claims to subsequent employment at the institution subsequent to the period of transitional terminal leave.

III. DUTIES AND DURATION

Depending upon the duties to be performed during transitional terminal leave, the transitional terminal leave period shall be of the following duration:

- A. Continued Performance of Duties During Transitional Terminal Leave: If the faculty member performs duties, as agreed upon and documented between the institution and the faculty member, at a level of at least 25% of the faculty member's full-time commitment over the prior 36 month (or as otherwise deemed by the Internal Revenue Service to constitute full-time employment) evenly throughout the entire terminal leave period, then transitional terminal leave may be granted: ~~with full pay for a period:~~
1. For twelve month faculty, with up to full pay for a period not to exceed twelve months, or with up to half pay for a period not to exceed twenty four months; or
 2. For nine- and ten-month faculty, with up to full pay for a full academic year, or with up to half pay for two full academic years.
 3. For faculty members employed on a part-time basis during the academic year preceding the transitional terminal leave, "full pay" means the full rate of pay earned for such part-time service, and half pay means half of the rate of pay earned for such service.
- B. Duties not Performed During Transitional Terminal Leave: Consistent with applicable IRS requirements, if a faculty member does not meet the service requirement of Section III.A:
1. The duration of the faculty member's fully-paid transitional terminal leave will be limited to a period of time within 2.5 month of the end of the calendar year in which the faculty member and the institution entered into the transitional terminal leave agreement, using normal applicable payroll schedules.
 2. The level of compensation shall be set as set forth in Section III.A.
 3. The faculty member's active employment will cease effective on the beginning date of the transitional terminal leave period, as will eligibility for all benefits normally associated with employment.

IV. IMPLEMENTATION

Each institution shall develop procedures for implementation of this policy. These procedures shall be filed with the Chancellor.

Replacement for: BOT VII-G.6

VII- 1.22 – POLICY ON SEPARATION FOR REGULAR EXEMPT EMPLOYEES

Approved by the Board of Regents on December 3, 1999, EFFECTIVE January 2 and January 12, 2000

I. PURPOSE AND APPLICABILITY

- A. The purpose of this policy is to establish separation procedures for regular Exempt USM employees.
- B. EXCEPTION: Regular USM employees in the following Exempt positions are excluded specifically from sections III and IV of this policy:
 - 1. Officers: Vice Chancellors, Vice Presidents, Provosts and Academic Deans.
 - 2. Associate and Assistant Vice Chancellors, Associate and Assistant Vice Presidents, Associate and Assistant Provost, Associate and Assistant Academic Deans.
 - 3. Subject to approval of the Chancellor, the Chief Executive Officer (CEO) may designate other key executive positions for this exemption. Appointees to such positions shall be notified of such designation at the time of appointment. (*Refer to implementation policy of the Exempt Pay Program for treatment of current incumbents.)

II. GENERAL

Employment for regular USM employees in exempt positions is on an at-will basis. This means that, subject to applicable laws and policies, the employment relationship may be terminated at any time by either the employee or the University, consistent with Section III of this policy.

III. TERMINATION BY PERIOD OF NOTICE

A. DETERMINATION OF PERIOD OF NOTICE

An employee may be involuntarily separated and shall be provided with a defined period of notice.

- 1. Service for determining length of notice period is based on institutional service rather than USM service, and shall include prior institutional service provided there were no breaks in service longer than three years.

2. An Exempt employee at one USM institution who is offered an Exempt position at another USM institution may, at the discretion of the offering institution, be credited with prior USM service for purposes of calculating the required period of notice upon separation. Any such decision to credit prior service at another USM institution shall be noted in the employee's personnel file at the time of appointment and becoming effective after satisfactory completion of the probation period.

B. LENGTH OF NOTICE PERIOD

The period of notice shall be as follows:

Years of Institutional Service	Period of Notice
Less than one year	One month
One Year but less than four years	Three months
Four Years but less than seven years	Six months
Seven Years but less than ten years	Nine months
Ten years or more	Twelve months

C. EMPLOYEE STATUS DURING NOTICE PERIOD

1. ~~The institutional Chief Executive Officer (CEO)~~ **President** or designee may:
 - a. Assign alternate duties and responsibilities to an employee who has been notified of a period of notice separation for any part or all of the period of notice **or at a level of part-time service of at least 25%; or**
 - b. **Continue the employee in his or her regular position during the period of notice separation.**

2. At the option of the ~~institution Chief Executive Officer~~ **President** or designee, an employee who has been notified of a period of notice separation, may be placed in an administrative leave with pay status for any part or all of the period of notice.
 - a. ~~In this case, the employee shall not earn other paid leave (annual, sick, holiday personal) during the period of administrative leave. Alternatively, the institution CEO or designee may assign alternate duties and responsibilities to an employee who has been notified of a period of notice separation for any part or all of the period of notice.~~ **consistent with federal tax law requirements, the employee can no longer be deemed an employee of the institution, effective as of the beginning of the administrative leave period, and shall not be eligible**

for employee benefits (such as health and retirement benefits) or earn other paid leave (annual, sick, holiday, personal) during the period of administrative leave.

- b. Under such circumstances, the institution will provide appropriate alternative compensation to the employee to compensate for the loss of salary or benefits that the employee would otherwise have been eligible during the notice termination period. The institution will develop an appropriate compensation arrangement for the employee to be terminated that meets the goals of this Section and relevant federal tax law requirements, in consultation with the employee and the Office of the Attorney General.

D. Failure to provide notice as set forth in this section may be grieved.

IV. TERMINATION FOR CAUSE

With the approval of the ~~institution-CEO~~ **President** or designee, the period of notice defined in III.B. above is not required if the employee is to be terminated for any of the following reasons: moral turpitude, incompetency, willful neglect of duty, illegal actions, gross misconduct, severe safety violations, failure to accept reassignment, or medical condition causing inability to perform essential job duties with reasonable accommodations required by law.

V. PROBATION AND REJECTION ON PROBATION

- A. Each USM employee who voluntarily applies for and accepts an Exempt position is in a probationary status during the first year of appointment to that exempt position. A new hire into an Exempt position shall serve a one year probationary period. Employees shall earn and be able to use sick, annual, personal and holiday leave during the probation period.
- B. If an incumbent has completed a probationary period for a Nonexempt position and the position is changed to Exempt, the incumbent will be considered to have completed the probationary period for the Exempt staff position.
- C. If an incumbent is serving a probationary period for a Nonexempt position and the position is changed to Exempt, the incumbent will be required to serve the balance of a probationary period to equal one year.
- D. If an incumbent has completed at least one year in a faculty position and the position is changed to the Exempt category, the incumbent will be considered to have completed the probationary period for the Exempt position. If an incumbent has completed less than one year in a faculty position and the position is changed to the Exempt category, the incumbent will be required to serve the balance of a probationary period to equal one year.
- E. During the probationary period, the responsible administrator may, at his/her discretion, reject an employee. The employee to be rejected shall be given at least a 30 calendar days written notice of the rejection or, at the discretion of the responsible administrator, shall be placed on

administrative leave as described in section III.C. The notice is to be provided to the employee no later than 30 calendar days prior to the expiration of the probation period. The notification period required does not apply if the rejection is the result of a breach of discipline or of such gross incompetence as to jeopardize essential services. An employee may grieve the rejection on probation for the purpose of showing that the rejection is procedurally deficient or in violation of law.

IMPLEMENTATION PROCEDURES:

Each Chief Executive Officer or designee shall develop procedures as necessary to implement this policy and shall forward a copy of such procedures to the Chancellor.

All actions taken under this policy and institutional procedures shall be review by the institution's Director of Human Resources/Personnel in advance of the action being taken.

REPLACEMENT FOR:

UM Personnel Policies and Rules for Associate Staff, G. Probation, Reassignment, Requirements of Notice, and Layoff, 1. Probation and Rejections on Probation, p. 12 and 13, Requirements of Notice, p. 13, June 1989.

Laws Relating to and Governing Policies and Procedures of the Board of Trustees of the State Universities and Colleges of Maryland, Jan. 1977, Section VI. Administrative Officers, C. Appointment, Page VI-1.

USM Policy on Librarians, VII-2.15, Permanent Status, October 6, 1995 Additionally, this policy supersedes, in whole or in part, any policy(ies) and/or procedure(s) established by the Regents, Trustees, Presidents, or their designees, of the former institutions of the University of Maryland, and of the former State Universities and Colleges, and of the Regents of the University System of Maryland that are in conflict with this policy's purpose, applicability, or intent, that may have been overlooked and not included as a specific citation under "Replacement For.

Proposed USM Retirement Planning and Incentives Plan (June 4, 2014)

With restrictions to the USM's Terminal Leave policy and policy on Separation for Exempt Employees now necessary, this document provides a series of alternatives to traditional terminal leave for faculty and notice termination for staff that will provide retirement planning options and incentives under narrow circumstances. Specifically, these options may be used when: 1) the retirement or other separation of an employee is beneficial to the business and/or academic objectives of the institution, and 2) the employee voluntarily chooses to participate in the alternative. The options set out in the Plan are intended to be consistent with IRS Code, regulations and guidance regarding retirement and deferred compensation plans.

I. Post-Severance Contributions

This option will allow the institution to make tax-deferred contributions to an employee's USM Supplemental 403(b) plan account with considerable flexibility. It is available only at the institution's discretion and generally used on a case-by-case basis, but can be extended to groups of employees should that option be in the institution's business and/or academic interest.

Elements:

- Contributions are available in the year of retirement, and up to five years thereafter. The institution may structure the contributions to be made in any or all of the six years.
- The employee may receive, each year, up to the lesser of \$52,000/year or the employee's annual salary.
 - The amount may be less in the year of separation, depending upon employer and employee contributions into retirement accounts that year.
 - As a matter of institution policy or on a case-by-case basis, an institution may provide lower amounts for shorter durations than the IRS limits.
- Post-severance contributions provide significant tax advantages to the employee and the institution.
 - The employee is not taxed on the contribution until the money is withdrawn from the employee's 403(b) account.
 - FICA is not paid on post-severance contributions, with potential savings of up to 7.65% to the employee and a 7.65% savings to the institution.
- Contributions are "retirement" benefits, not employment compensation.

- The contributions are made directly into a supplemental 403(b) account; if the employee does not have such an account, it can be created for any faculty or staff member.
- In any year when an employee receives a post-severance contribution, the individual is no longer an employee and cannot:
 - Receive employee health and retirement benefits.
 - Be a paid employee, even part-time, at a State institution or agency.
- Post-severance contribution recommendations must be approved by the institution's President and reviewed by legal counsel. Each post severance contribution must be documented in an agreement signed by President or designee and the employee.
- Institutions will report annually to the Chancellor and the Board regarding all post-severance contributions agreed during the year, including contribution amounts, duration, funding sources, and any other necessary information requested by the USM.
- A post-severance contribution may be agreed to as a substitute for transitional terminal leave or notice termination. (For example, a contribution may be paid in lieu of a period of administration leave to an employee who receives a notice termination and may be especially useful when continued employment benefits and/or salary payments across multiple calendar years are at odds with IRS requirements.)

II. "Window" Programs

A "Window" Program allows for tax-favored voluntary severance payments that are made available to a defined group of employees for a specified period of time. Window Programs may be valuable tools in situations where it is necessary to downsize a department, school, unit or program.

Elements:

- The Program must be offered to a defined class of employees, and any employee within the class is eligible to participate.
- Any employee who fits the group's eligibility criteria and agrees to participate within the limited "window" of time can be paid on a tax-deferred basis two times the lesser of the employee's annual salary or \$260,000, over a period of two years.
 - Classes can be defined in a targeted manner to discrete groups of faculty and staff, e.g.,
 - By types of employment (e.g., tenured faculty, regular exempt staff).

- By age/years of service, or a combination of both.
 - By school, programs or departments or units, based on standards of business or academic necessity.
 - By a maximum number of employees who may be accepted into the Program in total, and also within particular departments, job classifications, etc.;
 - By a combination of the above criteria.
- A Window Program is offered for a defined, limited period of time, after which the window “closes.”
 - The financial incentive can vary during the window period (i.e., more paid to those who retire immediately; less to those who retire later).
 - It may be important not only to specify the duration of the “window,” but also to clarify that such a program will not be offered again for a specified number of years.
- Window Programs provide some tax advantages to the employee.
 - Unlike current terminal leave and notice termination, which must be taxed in full when agreed to (unless paid out in full within 2.5 months of the same calendar year), tax on Window Programs is taken out when the payments are made and may be spread out over two years.
- Window Program payments are direct, severance compensation.
 - Once receiving this benefit, the individual is not longer an employee and cannot receive active employee health benefits and retirement contributions.
- An institution that intends to establish a Window Program shall submit a proposal to the Chancellor and obtain approval of the Board of Regents prior to the program’s implementation.
 - The institution should also consult with counsel when establishing a Window Program to ensure that all requirements regarding notices and waivers are met.

III. Phased Retirement

Phased Retirement is an option that allows an employee to reduce duties over time, under a binding agreement that specifies: 1) the duties, length, level of commitment and compensation during the transition period; and 2) the commitment of the employee to retire at the end of the period. Phased Retirement is intended specifically as a means for long-time faculty members to ease the transition toward retirement.

- The employee reduces workload over period of 1-3 years from full-time to part-time in return for a binding agreement to retire at a fixed date.
 - Salary will be pro-rated, unless extraordinary circumstances exist such that the institution president authorizes the negotiation of a different salary.
 - Part-time commitment must be at least 25%. ~~to avoid tax vulnerabilities.~~
- Phased retirement allows the employee ease out of work life, without losing benefits.
 - By staying above 50%, health benefits eligibility continues.
 - Retirement benefit accrual continues:
 - ORP contributions continue based upon the salary paid, and service toward retiree and spouse health benefits continue to be credited, pro-rated by percentage of employment.
 - For State Retirement Plan participants, service toward retirement and health benefits eligibility is pro-rated based on percentage of part-time employment.
 - Eligibility for USM benefits, including leave and tuition remission will continue on an appropriate pro-rata basis.
- Phased retirement plans allow for re-employment at the retiree's former institution or other USM institution, subject to timing and salary level restrictions required by State retirement law.

IV. Hybrid Retirement Agreements

An institution and an employee may agree to a retirement agreement that combines more than one of these Plan options under appropriate circumstances, or combines one of these options with a transitional terminal leave agreement or notice termination.

- For example, an institution and employee may agree to combine:
 - Two years of reduced duties in a phased retirement plan, followed by a post severance contribution at the end of the phased retirement period.
 - One year of terminal leave at 25% of the employee's prior duties, followed by a post severance contribution at the end of the phased retirement period.
- A hybrid or alternative retirement agreement must specify the terms of each of the option agreed to, and each element is subject to the individual option's approval and reporting requirements.

V. General

- As a condition of participation in any of the options set forth in this Plan, the institution will require a written agreement with the employee that includes:
 - The specific terms of the option(s) that will be provided to the employee, including compensation amounts, any continuing service commitment and benefits, and the duration of the agreement; and
 - A release of the employee's employment rights, other than those specified in the written agreement.

**UNIVERSITY SYSTEM OF MARYLAND BOARD OF REGENTS
403(b) SUPPLEMENTAL PLAN DELEGATION RESOLUTION
DISCRETIONARY EMPLOYER CONTRIBUTIONS**

WHEREAS, the University System of Maryland (or its predecessor institutions) has maintained a voluntary supplemental retirement plan described in Section 403(b) of the Internal Revenue Code since the 1960's and continues to maintain such a plan; and

WHEREAS, the University System of Maryland has adopted a single written plan document for its supplemental 403(b) plan, most recently amended as the University System of Maryland Supplemental 403(b) Retirement Plan (Amended and Restated Effective June 17, 2011) (the "Plan"), and

WHEREAS, the Board is the fiduciary for the Plan, to the extent mandated by law; and

WHEREAS, the Board desires to provide for more efficient Plan administration by authorizing a delegation of certain powers relating to Discretionary Employer Contributions from the Board to the Chancellor and to the Presidents of each of the USM institutions and centers.

IT IS THEREFORE RESOLVED:

Pursuant to Section 2.31 of the Plan, the Board delegates (a) to the Chancellor, for University of Maryland System administration employees, and (b) to the President of each constituent institution or center, for employees of such institution or center, the authority to establish discretionary employer contributions to the Plan in connection with such employee's Severance from Employment, as such term is defined in Section 2.26 of the Plan. This delegation includes the authority to establish the amount and timing of discretionary employer contributions, subject to restrictions and limits imposed by the Internal Revenue Code, and regulations and interpretations thereunder.

June 27, 2014