College Coaching Contracts: Market Rate Review Provisions

By Martin J. Greenberg

I. Introduction

When a college coach's contract is negotiated and completed, and the contract constitutes one of the highest compensation packages at that time for the coach in his conference and the NCAA, what happens when one or more coaches' packages subsequently surpass the one negotiated? In my early articles, I suggested that some form of built-in automatic contract escalator was appropriate to make certain that the coach's compensation package was always within the highest of the conference or NCAA paid coaches. I called this a "reopener" provision or most favored nation clause.

It is impossible for a contract representative to predict with accuracy the future compensation packages of other coaches who negotiate their contract compensation packages subsequent thereto. The object is simply that your client is always one of the highest paid NCAA or conference coaches at all times regardless of the date that any new contracts come into play. This is most recently referred to as Market Rate Review Provisions. What follows are some examples:

A. Jim Harbaugh, University of Michigan

Jim Harbaugh ("Harbaugh") executed a long-term contract with the University of Michigan ("U-M") in December of 2014.[1] That contract had a term ending in 2021.[2] Harbaugh has signed a contract extension with U-M each of the last two years.[3] The first extension was in 2021 followed by another.[4] His contract is set to expire after the 2026 season.[5]

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[1] Employment Agreement for James J. Harbaugh, Head Coach, with the University of Michigan dated December 28, 2014, on file with the author.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

In Paragraph 3.02(d) of Harbaugh's 2014 Contract, Compensation, has a market review clause that states as follows:

> After Contract Year Three, the Base Salary and Additional Compensation each will be increased by 10%. After Contract Year Five, the Base Salary and Additional Compensation each will be increased by an additional 10% above the then current rate of Base Salary and Additional Compensation. At the end of Contract Year Five, there will be an evaluation by the University of the Head Coach's overall performance and review of his overall compensation, as measured by his then current fair market value, as compared to his peers. The parties will negotiate reasonably and in good faith whether Head Coach is compensated less than his fair market value, and if he is, will also negotiate reasonably and in good faith, an upward adjustment to bring the Head Coach's compensation to fair market value. If such an adjustment is made, then it will be in lieu of the 10% increase at the end of Contract Year Five, as provided above, if the adjustment is greater than the 10% increase.[6]

Harbaugh's 2014 Contract simply indicates that:

1. At the end of Contract Year 5 there will be an evaluation by the University as to the Head Coach's overall performance and a further review of his overall compensation as measured by his current fair market value, as compared to his peers.
2. The contract further requires that the parties will negotiate in good faith, and in the event that the Head Coach is compensated less than his fair market value, he will also reasonably negotiate in good faith to bring an upward adjustment in the coach's compensation to fair market value.
3. If an adjustment is to be determined and is greater than the 10% increase as called for in the contract, the adjustment will apply.

[6] *Id.*

B. Nick Saban, University of Alabama

Nick Saban ("Saban") entered into a Head Coach Employment Contract with the University of Alabama ("Alabama") effective January 4, 2007.[7] That specific contract did not have a Market Rate Review Clause as contained therein. Amendment #2 to Head Coaching Employment Agreement which extended the prior term to January 1, 2018 provided for a market rate review in Paragraph 3 which stated as follows:

> Market Rate Review. Commencing February 1, 2015 (and each February thereafter through the end of the contract, as amended), the parties will meet for so long as necessary to determine the marketplace trends regarding head football coach compensation at Southeastern Conference (SEC) and National Collegiate Athletic Association, Division 1, bowl subdivision (NCAA) institutions. Should the Employee's "total guaranteed annual compensation" be less than that of the average of the "total guaranteed annual compensation" of the three highest paid SEC head football coaches; or less than that of the average of the "total guaranteed annual compensation" of the five highest paid NCAA head football coaches; then the University agrees to increase Employee's "total guaranteed annual compensation" to the higher of the two averages, at said times. No more than one adjustment shall occur annually. For purposes of this paragraph, "total guaranteed annual compensation" shall be defined as that terminology is generally understood and defined within the industry and may include base salary and talent fee and similar such payments as received by Employee and included in the calculation of Employee's "total guaranteed annual compensation," but shall not include bonuses or incentives earned, expense allowances, deferred compensation, longevity bonus payouts, in-kind compensation, or other compensation of any nature not generally understood to be a part of a head collegiate football coach's "total guaranteed annual compensation." It is the intent of the parties, for purposes of this paragraph, to compare Employee's "total guaranteed annual compensation" to similar amounts received by head football coaches at SEC and NCAA institutions. Therefore, the parties agree that, should any comparator's "total guaranteed annual compensation" include amounts, known by whatever name, that are similar in nature to amounts received by Employee, said amounts shall be included in the comparator's "total guaranteed annual compensation" for purposes of determining the averages, and Employee's "total guaranteed annual compensation" for purposes of this comparison. Likewise, when amounts are to be excluded from Employee's "total guaranteed annual compensation" for purposes of said comparison, similar amounts shall be excluded from any comparator's "total guaranteed annual compensation," regardless of the name by which said compensation is known. Both parties agree to confer and negotiate in good faith at said times towards an adjustment in the Base

[7] Employment Contract for Nick L. Saban, Head Coach, with The University of Alabama dated June 15, 2007, on file with the author.

> Salary and Talent Fee, if then deemed warranted based on the marketplace analysis, and to share information and appropriate documentation with the other party to substantiate its evidence of marketplace valuation. Valuations that are used for purpose of this Market Rate Review must be verifiable by public record or other documentation mutually acceptable to the parties and relied on in the industry. The good-faith failure or refusal of either party to agree to an adjustment or average proposed by the other party shall not constitute a breach of this contract.[8]

Saban executed a Second Amended and Restated Head Coach Employment Contract which extended his employment eight years commencing March 1, 2018 and ending February 28, 2026.[9] That contract in Article IV, Compensation, contains the same market rate review provision as contained in the prior Amendment which states as follows:

> Commencing February 1, 2019, (and each February 1 thereafter through the end of the contract as amended), the parties will meet for so long as necessary to determine the marketplace trends regarding head football coach compensation at Southeastern Conference (SEC) and National Collegiate Athletic Association, Division 1, bowl subdivision (NCAA) institutions. Should the Employee's "total guaranteed annual compensation" be less than that of the average of the "total guaranteed annual compensation" of the three highest paid SEC head football coaches; or less than that of the average of the "total guaranteed annual compensation" of the five highest paid NCAA head football coaches; then the University agrees to increase Employee's "total guaranteed annual compensation" to the higher of the two averages, at said times. No more than one adjustment shall occur annually. For purposes of this paragraph, "total guaranteed annual compensation" shall be defined as that terminology is generally understood and defined within the industry and may include base salary and talent fee and similar such payments as received by Employee and included in the calculation of Employee's "total guaranteed annual compensation," but shall not include bonuses or incentives earned, expense allowances, deferred compensation, longevity bonus payouts, in-kind compensation, or other compensation of any nature not generally understood to be a part of a head collegiate football coach's "total guaranteed annual compensation." It is the intent of the parties, for purposes of this paragraph, to compare Employee's "total guaranteed annual compensation" to similar amounts received by head football coaches at SEC and NCAA institutions. Therefore, the parties agree that, should any comparator's "total guaranteed annual compensation" include amounts, known by whatever name, that are similar in nature to amounts received by Employee, said amounts shall be included in the comparator's "total guaranteed annual compensation" for purposes of determining the averages, and Employee's

[8] Amendment #2 to Head Coach Employment Contract for Nick L. Saban with the University of Alabama dated September 9, 2009, on file with the author.
[9] Second Amended Head Coach Employment Contract for Nick L. Saban with the University of Alabama commencing March 1, 2018, on file with the author.

> "total guaranteed annual compensation" for purposes of this comparison. Likewise, when amounts are to be excluded from Employee's "total guaranteed annual compensation" for purposes of said comparison, similar amounts shall be excluded from any comparator's "total guaranteed annual compensation," regardless of the name by which said compensation is known. Both parties agree to confer and negotiate in good faith at said times towards an adjustment in the Base Salary and Talent Fee, if then deemed warranted based on the marketplace analysis, and to share information and appropriate documentation with the other party to substantiate its evidence of marketplace valuation. Valuations that are used for purpose of this Market Rate Review must be verifiable by public record or other documentation mutually acceptable to the parties and relied on in the industry. The good-faith failure or refusal of either party to agree to an adjustment or average proposed by the other party shall not constitute a breach of this contract.[10]

With respect to Saban's Contract:

1. February 1st of each year during the term of the Contract is the date where parties will meet so long as necessary to determine marketplace trends and compensation regarding SEC and NCAA Division 1, Bowl Subdivision institutions.
2. The meeting will address whether an upward adjustment of the total guaranteed annual compensation is necessary.
3. If Saban is not one of the three highest paid SEC head football coaches or one of the five highest paid football coaches, in that event, Alabama agrees to increase Saban's total guaranteed annual compensation to the higher of the two averages at said time.
4. No more than one adjustment shall occur annually.
5. The Contract defines Total Guaranteed Annual Compensation.
6. The Contract makes some exceptions to Total Guaranteed Annual Compensation including bonuses or incentives earned, expense allowances, deferred compensation, longevity bonus, payouts, in-kind compensation, or other compensation of any nature not generally understood to be a part of the collegiate head football coach's compensation.

[10] *Id.*

7. With respect to the determination of the Total Guaranteed Annual Compensation, the parties agree to confer and negotiate in good faith.
8. The parties are required to do a marketplace valuation and must be verifiable by public record.
9. Finally, good faith failure or refusal of either party to agree to an adjustment or the average proposed by the other party shall not constitute a breach of contract.

C. Dabo Swinney, Clemson University

Dabo Swinney, the Head Football Coach for Clemson University, executed a new contract with a term commencing May 1, 2019 and ending December 31, 2028.[11] The Term Sheet for Swinney's new contract contains a Market Rate Review clause to adjust compensation during the term of the Contract:

> 6. <u>Good Faith Market Review</u> – Swinney's contract will contain a good faith market review to adjust compensation during the term of the contract.
>
> The following provision for a Good Faith Market Review shall be added:
>
> Beginning with the 2022 collegiate football season, the Parties agree to complete a good faith review and negotiation of Head Coach compensation within 120 days after the football team appears in the CFP (or surviving system) Semi-Final Game. After said review and negotiation, if the Parties fail to reach an agreement for a market adjustment of Head Coach's compensation and the University did not offer terms that would make Head Coach's annual compensation no less than third (3^{rd}) amongst active head coaches at institutions which are eligible to compete for the CFP (or surviving system), the University agrees to waive for the remaining Term of this Agreement any liquidated damages which would be due from Head Coach to University should he subsequently terminate his employment at University (employee Buyout). For purposes of this provision, the average compensation per year (APY) over the remaining term shall be used as the primary market comparison. The Parties agree to jointly engage, if needed, an independent valuation expert to assist with determining market valuations (the valuation expert's opinion shall be non-binding). No such review and negotiation will be required (but is not prohibited) if the Parties entered into an agreement for a market based adjustment in the immediately preceding year. Furthermore, this provision

[11] Term Sheet of Dabo Swinney, Head Football Coach, with Clemson University dated May 1, 2019, on file with the author.

> shall not prevent the Parties from mutually agreeing to amend the terms of the Head Coach's employment agreement at any other point during the Term of this Agreement.[12]

With respect to Swinney's Contract clause:

1. Beginning in 2022, Clemson and Swinney agree to a good faith review and negotiation of Swinney's compensation within 120 days after Clemson appears in a CFP semi-final game.
2. If the parties fail to reach an agreement for a market adjustment and Clemson does not offer terms that would make Swinney's annual compensation not less than third among active head coaches at institutions which are eligible to compete for the CFP, then Clemson agrees to waive for the remaining term of the Contract any liquidated damages that Swinney would pay to Clemson should he terminate the contract (Buyout).
3. For purposes of this provision, the average compensation per year (APY) over the remaining term shall be used as the primary market comparison.
4. The Parties agree to jointly engage, if needed, an independent valuation expert to assist with determining market valuations (the valuation expert's opinion shall be non-binding).
5. No such review and negotiation will be required (but is not prohibited) if the Parties entered into an agreement for a market-based adjustment in the immediately preceding year. However, this shall not prevent the Parties from mutually agreeing to amend the terms of Swinney's Contract at any other point during the Term of this Contract.

[12] *Id.*

D. Interesting to Note

Brian Kelly ("Kelly"), who left Notre Dame and became the head coach of Louisiana State University ("LSU"), entered into an Employment and IP License Agreement in April of 2022.[13] However, Kelly's contract does not have a Market Rate Review clause even though his compensation is one of the highest among SEC coaches and coaches in the Power 5 conferences.

II. Conclusion

1. There is no standard form of Market Rate Review clauses in college coaching contracts and such clause is rarely used. Market Rate Review Provisions are only found in the highest paid Power 5 college coaching contracts. However, it is not a bad idea for all Power 5 or Mid-Major coaches to consider an annual review of compensation to keep pace with the marketplace.
2. Market Rate Review clauses may deter a coach from jumping to what he feels to be a better opportunity because the financial package is greater. The clause keeps the contracting university in the game.
3. Market Rate Review clauses also provide some basis for increasing the liquidated damages in the event the coach terminates his contract early.
4. Market Rate Review clauses may create an absolutely no move Provision in the contract to make certain that the coach is coaching at the university for a given contractual term.
5. Market Rate Review clauses need to be clearly defined as to who is to undertake the valuation, an independent third-party or the coach and university in unison.

[13] Employment and IP License Agreement for Brian Kelly, Head Coach, with Louisiana State University dated April 6, 2022, on file with the author.

6. There must be a clear definition of what the component and elements are of a financial package for purposes of comparing the financial packages of other coaches.
7. The Market Rate Review clauses must identify and define the comparative class, i.e. is it Power 5 coaches, conference coaches, or all coaches all together.
8. The timing of the evaluation is important as the timing may prevent the coach from jumping to another university.

Thank you to Margaret Williams for assisting in footnoting and finalizing the article. Margaret is a second-year law student at Marquette University, and a 2025 Sports Law Certificate Candidate.