

A Financial Divorce – When a Coach is Terminated Without Cause



National Sports Law Institute
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Marquette University Law School, Milwaukee, Wisconsin
By Martin J. Greenberg

I. Environment of College Coaching

A. College coaching is a field of movement, you get hired to be fired. The turnover ratio is extensive and protections must be incorporated into the contract to protect a coach who may be fired for cause or without cause.

There have been 24 Football Bowl Subdivision (FBS) coaching changes in the FBS, continuing the trend of at least 20 or more changes in each of the last four seasons. That included 27 in 2018, 20 in 2017, 23 in 2016, and 28 in 2015.

Once again the coaching carousel has started its annual spin. There have been 73 coaching changes involving 70 universities in college football in the last three seasons continuing the trend. Here is an example of changes that were made for 2019-2020:





<u>University</u>	<u>Former Coach</u>	<u>New Coach</u>
Rutgers	Chris Ash	Greg Schiano
Florida State	Willie Taggart	Mike Norvell
Arkansas	Chad Morris	Sam Pittman
New Mexico	Bob Davie	Danny Gonzales
UNLV	Tony Sanchez	Marcus Arroyo
Missouri	Barry Odom	Eli Drinkwitz
UTSA	Frank Wilson	Jeff Traylor
USF	Charlie Strong	Jeff Scott
Boston College	Steve Addazio	Jeff Hafley
Ole Miss	Matt Luke	Lane Kiffin
Old Dominion	Bobby Wilder	Ricky Rahne
Washington	Chris Petersen	Jimmy Lake
Colorado State	Mike Bobo	Steve Addazio
Fresno State	Jeff Tedford	Kalen DeBoer
FAU	Lane Kiffin	Willie Taggart
Memphis	Mike Norvell	Ryan Silverfield
Appalachian State	Eli Drinkwitz	Shawn Clark
Mississippi State	Joe Moorehead	Mike Leach
Baylor	Matt Rhule	Dave Aranda
San Diego State	Rocky Long	Brady Hoke
Washington State	Mike Leach	Nick Rolovich
Hawaii	Nick Rolovich	Todd Graham
Michigan State	Mark Dantonio	Mel Tucker
Colorado	Mel Tucker	Karl Dorrell

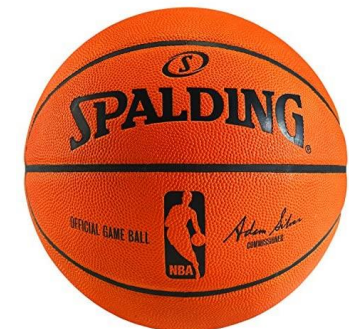


B. The most important contract provisions in a coach's contract is the back end or exit clauses, not the financial package.

C. Coaches are big money employees.

2020 NCAA BASKETBALL COACHES' PAY BY USA TODAY

School	Conference	Coach	Pay
Kentucky	SEC	John Calipari	\$8,158,000
Duke	ACC	Mike Krzyzewski	\$7,256,924
UCLA	PAC-12	Mick Cronin	\$5,500,000
Tennessee	SEC	Rick Barnes	\$4,700,000
Texas Tech	BIG 12	Chris Beard	\$4,443,000
Villanova	Big East	Jay Wright	\$4,410,304
Michigan St.	Big Ten	Tom Izzo	\$4,191,070
North Carolina	ACC	Roy Williams	\$4,102,409
Louisville	ACC	Chris Mack	\$4,067,494
Kansas	BIG 12	Bill Self	\$3,985,857



2020 NCAA FOOTBALL BALL COACHES' PAY BY USA TODAY

School	Conference	Coach	Pay
Clemson	ACC	Dabo Swinney	\$9,315,600
Alabama	SEC	Nick Saban	\$8,857,000
Michigan	Big Ten	Jim Harbaugh	\$7,504,000
Texas A&M	SEC	Jimbo Fisher	\$7,500,000
Georgia	SEC	Kirby Smart	\$6,871,600
Auburn	SEC	Gus Malzahn	\$6,827,589
Texas	BIG 12	Tom Herman	\$6,750,000
Purdue	Big Ten	Jeff Brohm	\$6,600,000
Oklahoma	BIG 12	Lincoln Riley	\$6,384,462
Florida	SEC	Dan Mullen	\$6,070,000



The average FBS coach receives \$2.67M per year in compensation.

D. College athletics, especially basketball and football, are big businesses that generate huge revenues for a university.

2017/2018 NCAA TOP SCHOOL REVENUES FOR
ATHLETIC DEPARTMENTS
By USA Today

Rank	SCHOOL	CONFERENCE	TOTAL REVENUE
1	Texas	Big 12	\$219,402,579
2	Texas A&M	SEC	\$212,399,426
3	Ohio State	Big Ten	\$205,556,663
4	Michigan	Big Ten	\$195,414,032
5	Alabama	SEC	\$177,481,937
6	Georgia	SEC	\$176,699,893
7	Oklahoma	Big 12	\$175,325,500
8	Florida State	ACC	\$168,177,850
9	Penn State	Big Ten	\$165,373,214
10	Florida	SEC	\$161,183,765
11	Wisconsin	Big Ten	\$151,966,795



At the FBS level, college football provides 80% of the revenues for the average athletic department.

Total Revenue defined as including all sources of operating revenue for athletic departments.

Methodology: <https://sports.usatoday.com/2019/08/12/methodology-for-2018-ncaa-athletic-department-revenue-database/>

Revenue categories

- Ticket sales: Sales of admissions to athletics events. Include ticket sales to the public, faculty and students, and money received for shipping and handling of tickets. Does not include amounts in excess of face value (such as for preferential seating).
- Contributions: Includes amounts received directly from individuals, corporations, associations, foundations, clubs or other organizations for the operations of the athletics program. Amounts paid in excess of a ticket's value. Contributions include cash, marketable securities and in-kind contributions such as dealer-provided cars for staff use. Also includes revenue from preferential seating.
- Rights/Licensing: Includes revenue for athletics from radio and television broadcasts, Internet and e-commerce rights received from institution-negotiated contracts, the NCAA and conference revenue-sharing arrangements; and revenue from corporate sponsorships, licensing, sales of advertisements, trademarks and royalties. Includes the value of in-kind products and services provided as part of a corporate sponsorship (e.g., equipment, apparel, soft drinks, water and isotonic products). Also includes revenue from food, concessions and parking.
- Student fees: Fees assessed to support athletics.
- School funds: Includes both direct and indirect support from the university, including state funds, tuition, tuition waivers etc., as well as federal Work Study amounts for student workers employed by athletics department. It also includes the value of university-provided support such as administrative services, facilities and grounds maintenance, security, risk management, utilities, depreciation and debt service that is not charged to the athletics department.
- Other: Amount that the athletics department transferred back to the school and — under a 2015 change in the NCAA's reporting system — is recorded as a revenue loss. All other sources of revenue, including game guarantees, school-specific revenue from bowl games, support from third-parties guaranteed by the school such as TV income, housing allowances, etc.; revenue from sports camps; income from athletics restricted endowments and investments that are used for operations in the reporting year.

Expense categories

- Coaching/staff: All salaries, bonuses (except for bowl-game bonuses) and benefits reported on the university's tax forms for coaches and staff, as well as amounts to coaches and staff from third parties that are guaranteed by the institution. Beginning with 2018, also includes bonuses paid to football coaches related to participation in a bowl game.
- Scholarships: Athletically related student aid, including summer school and tuition discounts and waivers (including aid given to student-athletes who have exhausted their eligibility or who are inactive due to medical reasons), and aid for non-athletes such as student managers.
- Facilities/overhead: Debt service payments, including internal loan programs; other facilities costs charged to the athletics program, including maintenance, utilities and rental fees; overhead/administrative fees charged by the school to athletics.
- Other: Includes guarantees paid to other schools; school-specific expenses for bowl games other than bonuses paid to football coaches related to participation in a bowl game, severance payments to past coaches and staff; recruiting; team travel; equipment and uniforms; game day and camp expenses; fundraising and marketing costs; spirit group support; medical expense/insurance; conference dues; the value of university-provided support such as administrative services, facilities and grounds maintenance, security, risk management, utilities, depreciation and debt service that is not charged to the athletics department. Beginning with 2016, also includes meals and snacks provided for athletes beyond those provided under regular board plans and during team travel.

E. The demand for high power coaches has dramatically increased and universities are willing to take the extra mile as far as contractual perquisites and benefits in order to obtain and retain coaches for the future.

Perquisites – Benefits

1. Guaranty payments
2. Bonuses
3. Incentive payments
4. Sports camps
5. Retention payments
6. Payments to previous employer
7. Up-step life and disability insurance
8. Retirement benefits
9. Tuition reimbursement
10. Tickets, club memberships, autos
11. Moving expenses – temporary or permanent housing
12. Outside income – consulting – endorsements – speaking engagements
13. Future employment
14. Family travel



F. Coach's contract is a much more sophisticated instrument than a player's contract that can consist of 30 or more pages with lots of legalese and tax implications

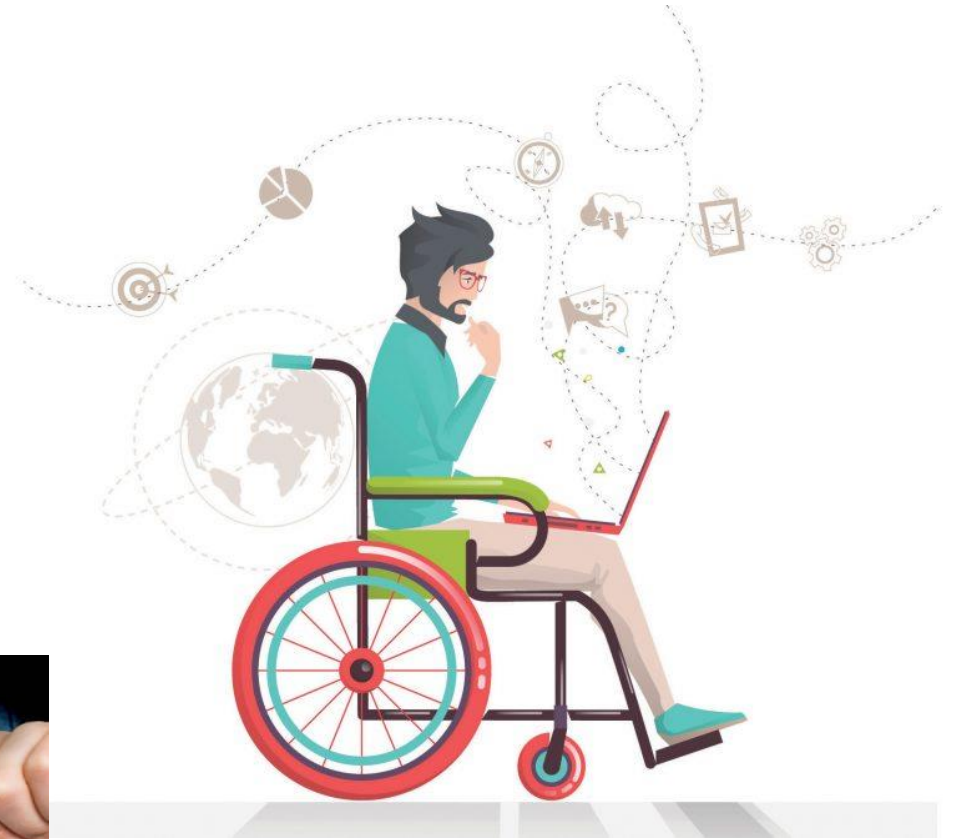


G. Essentially a coach's contract is a contract at will where both the university and the coach can cut the contract's term short, the early termination provisions.

II. Termination

A. Termination: A coach's job and relationship with the university may be terminated:

1. For Cause
2. Not For Cause
3. Resignation
4. Disability
5. Death
6. Mutual Agreement



B. The contract usually contains a list of actions that constitute for cause termination:



Dismissal for Cause. Coach agrees that UAF has the right to dismiss Coach and terminate this Employment Agreement for cause under this section at any time prior to the expiration of the Employment Agreement. For purposes of this section, “for cause” shall include, but not be limited to, any one or more of the following as determined in the reasonable and good faith judgment of UAF:

1. Material and adverse neglect or inattention by Coach of the standards, duties or responsibilities expected of University employees, including, but not limited to, all duties set forth in this Employment Agreement and assigned from time-to-time by the Athletic Director, after written notice of any such neglect or inattention has been given to Coach, and Coach fails to cure the identified deficiencies within seven (7) calendar days after receiving the written notice.
2. Any material or intentional or reckless breach by Coach of the terms and conditions of this Employment Agreement, including, but not limited to, failure to comply with all NCAA and SEC rules and regulations if Coach fails to cure the identified deficiencies within seven (7) calendar days after receiving the written notice from UAF; provided, however, that such notice and opportunity to cure shall be provided to the extent that any such material or intentional or reckless breach by Coach of the terms and conditions of this Employment Agreement are not capable of being cured.
3. Knowing participation in significant or repetitive violation of the NCAA or SEC constitution, by-laws, rules, regulations, or interpretations thereof by the NCAA or SEC.
4. Failing to comply with NCAA Bylaw 11.1.2.1 as the same may be amended from time to time.
5. Conduct or omission(s) by Coach which constitute a Level I or Level II violation under the NCAA’s enforcement structure effective August 1, 2013 (or major violation under the NCAA’s pre-August 1, 2013 enforcement structure), or may lead to an NCAA finding of a Level I or Level II violation (or major violation), of one or more of the Governing Athletic Rules or the University’s interpretation thereof, including, but not limited to, multiple Level III or Level IV violations of the Governing Athletic Rules considered collectively to be a Level I or Level II violation (or multiple secondary violations of the Governing Athletic Rules under the NCAA’s pre-August 1, 2013 enforcement structure considered collectively to be a major violation), whether the conduct occurred during Coach’s employment with the University or another NCAA-member institution.
6. Failure of Coach to report promptly to the Athletic Director or Athletic Department Compliance Office any actual knowledge of or reasonable cause to believe that violations of the Governing Athletic Rules or University policies have been committed or are being committed by himself or others.
7. Conviction of a crime under federal or state law, excluding minor traffic offenses not involving the alleged use of alcohol or drugs.
8. Prolonged absence from duty without the consent of the Athletic Director or his designee.

Continued...

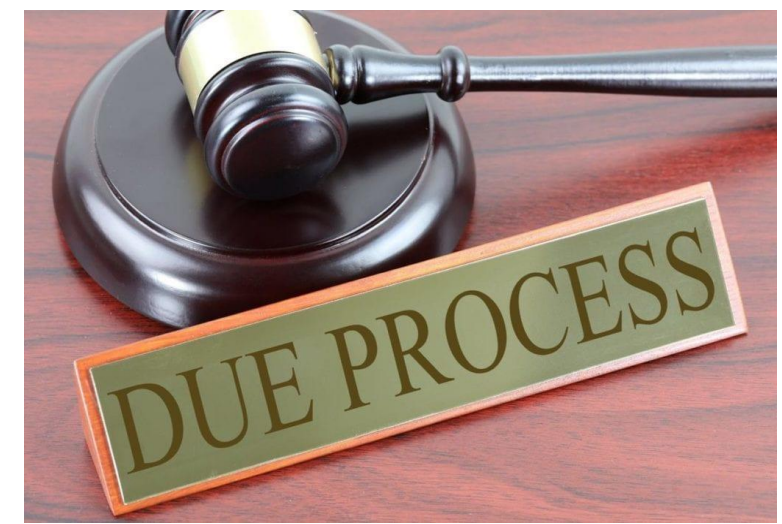


9. Engaging in unreasonable conduct in willful disregard or deliberate indifference for the welfare and safety of the University's football student-athletes, including failure to adhere to the NCAA principle of student-athlete well-being.
10. Committing one or more acts of fraud in the performance of Coach's duties and responsibilities under this Employment Agreement, including, but not limited to, the preparation of, falsification of, or alteration of documents or records of the University, NCAA, or SEC, or documents or records required to be prepared, kept, or maintained by University policy, the Governing Athletic Rules, law or other documents or records pertaining to any prospective student-athlete, student-athlete, including, for example and without limitation, expense reports, transcripts, eligibility forms, or compliance reports or permitting, encouraging, or knowingly disregarding any fraudulent or dishonest acts by other coaches, student-athletes, or any individuals, if any, under Coach's control or authority.
11. Soliciting, placing or accepting by Coach of any bet or wager on any intercollegiate or professional athletic contest whether through a bookmaker, a pool or any other individual or means.
12. Providing any information or data regarding the football program, any other athletic program at the University or any information concerning or relating to any University student-athletes to any person or entity known to Coach or that should have reasonably been known to Coach to be a gambler, bettor, bookmaker or any agent or runner for such individuals or entities or associating with such individuals and/or entities.
13. Selling, using or possessing by Coach of any illegal substances, including, but not limited to, narcotics, drugs, controlled substances, steroids or the sale, use or possession of any such substances that violate University's policies or the Governing Athletic Rules.
14. Encouraging, condoning or instructing, whether directly or indirectly, any assistant football coach, football staff member, prospective student-athlete, student-athlete, or any individual or entity not to cooperate, be forthcoming, or truthful in any inquiries or information gathering activities concerning any matters that are relevant to the University's athletic programs or another institution's athletic programs that are conducted by any governmental entities, law enforcement agencies or any other governing bodies or officials, including, but not limited to, the University, the NCAA, the SEC or other officials or governing organizations with authority over the University's athletic programs or that may be required by law, University policies, or the Governing Athletic Rules.
15. Engaging in any act that constitutes a prohibited conflict of interest by Coach under the policies of the Board of Trustees and UAF or under applicable law, including, for example and without limitation, failing to obtain prior approval to engage in outside employment or endorsing a product, good or service for a company in direct competition with a sponsor of the Athletic Department.
16. Providing false, misleading, or incomplete information relevant to the conduct of UAF's business, including, but not limited to, information provided by Coach to UAF during the interviewing and hiring process, if Coach knew or should have known the information was false, misleading, or incomplete.
17. Otherwise engaging in conduct, as solely determined by the University, which is clearly materially and adversely contrary to the character and responsibilities of a person occupying Coach's position or which materially and adversely affects the reputation of the University or UAF's athletics programs in any way.

Continued... Due Process in the Termination Procedure

Due process: finding of facts and determination whether or not there are actions that would constitute termination for cause:

1. By the Athletic Director;
2. By the President;
3. By Independent Third-party, like the chief judge of the circuit court of county where the university is located;
4. By Mediation;
5. By Arbitration; or
6. By Litigation.



C. The most problems in the area of termination are with respect to termination without cause or not for cause.



In other words, a divorce between the coach and the university which in essence becomes a financial buyout.



D. A termination without cause provision usually contains the following:



- No stated cause for termination essentially a financial divorce pursuant to the terms of the contract.
- Amounts so paid are denominated as liquidated or agreed to damages.
- Release – the parties to the contract execute a mutual release and acknowledge that the payments are not a penalty.
- Amount of liquidated damages equates to some portion of the financial package.
- The methodology of payment is either in lump sum, monthly installment pursuant to amount payable, lump sum installments, or a declining amount based on firing date.
- Often the coach is required to mitigate damages by making a good faith effort to find comparable employment.
- Offset Clause – The amount to be paid to coach by the university shall be offset reduced on a monthly basis by the gross compensation earned by coach personally or through business entities owned or controlled by coach or employment as a head or assistant coach or administrator at either the college or university level or with a professional sports organization.



Payouts are a regular occurrence and expensive.



Rutgers payments to fired coaches and administrators tops \$22 million

- Football Coach Chris Ash, potential payout \$8.47 million
- Basketball Coach Eddie Jordan, payout \$2.1 million
- Athletic Director Julie Hermann, payout \$1.66 million
- Football Coach Kyle Flood, payout \$1.4 million
- Athletic Director Tim Perneti, payout \$1.25 million
- Football Offensive Coordinator Jon McNulty, potential payout \$900,000
- Basketball Coach Fred Hill, Jr., payout \$825,000
- Swimming and Diving Coach Petra Martin, payout \$725,000
- Rutgers New Brunswick Chancellor Debasish Dutta, payout \$480,000
- Basketball Coach Mike Rice, payout \$475,000
- University General Counsel John Wolf, payout \$420,000
- Lacrosse Coach James Stagnitta, payout \$102,199



Buyouts Involve Big Dollars

Largest Buyouts in College Football Coaching

Buyouts include the money that universities owe to coaches if they elect to fire them before their respective contract terms have concluded.

Here are the examples of buyouts as of 12/1/2019 in college football, according to USA Today:

1.	Jimbo Fisher (Texas A&M)	\$60,625,000
2.	Dabo Swinney (Clemson)	\$50,000,000
3.	Nick Saban (Alabama)	\$34,100,000
4.	Jeff Brohm (Purdue)	\$27,650,000
5.	Gus Malzahn (Auburn)	\$27,050,000
6.	Kirby Smart (Georgia)	\$24,239,584
7.	Kirk Ferentz (Iowa)	\$21,571,250
8.	Lincoln Riley (Oklahoma)	\$21,013,333
9.	Scott Frost (Nebraska)	\$20,416,667
10.	Geoff Collins (Georgia Tech)	\$20,350,000
11.	Will Muschamp (S. Carolina)	\$19,437,500
12.	Ryan Day (Ohio State)	\$18,750,000
13.	Mike Gundy (Ok. State)	\$16,623,813
14.	Jim Harbaugh (Michigan)	\$11,687,500



Obviously some of these coaches have stipulations in their contracts to mitigate or offset damages by procuring other comparable employment.

Bacon: Coaching Buyouts Reveal an Insane Side of College Sports

By John U. Bacon, Special to The Detroit News, Nov. 16, 2018

<https://www.detroitnews.com/story/sports/college/2018/11/16/bacon-coaching-buyouts-reveal-insane-side-college-sports/2024277002/>



**The
Detroit
News**

Plenty of pundits have raged about the soaring salaries of college coaches, and rightly so.

Over the past three decades, the average football coach's salary increased tenfold to \$2.5 million. That's about 25 times more than the average college professor earns, whose salary has merely kept pace with inflation. Today the highest-paid public employee in 39 states is either a basketball coach or a football coach.

That's nutty enough, but I can make a rational argument that many coaches bring in far more than they take, and add value to their universities. I can also fall back on the marketplace argument. If a school wants to pay its coach several million dollars a year, I can't begrudge the coach for taking it. That's how the marketplace works.

But what I cannot rationalize is why these schools continue to pay millions to coaches many years after they were fired. Schools created this upside-down market, which handsomely rewards abject failure, when they started including buyout clauses in their coaches' contracts. These force schools to pay exorbitant sums just to get rid of losing coaches.

Those bizarre buyouts are supposed to come with a catch: If a winning coach leaves for another school before his contract runs out, he has to pay the school he's leaving a big buyout. But it turns out the coach usually doesn't pay anything, because the school he's going to invariably pays his buyout for him.

This results in an even sillier scenario, where schools end up not only paying millions to their former coach, and millions to their new coach, they have to pay millions more to their new coach's previous school, so he can leave to come to their school.

As one athletic director said, "I'm paying the old coach, I'm paying the school that's not my school, and I'm paying the new coach. Wow, that's an expensive change."

Paying a great coach big money to win games is one thing. Paying a horrible coach even more money to go away is quite another.

If an NFL team wants to pay three head coaches at once, go right ahead. But when universities are wasting millions just to get incompetent coaches to leave, while their students are mortgaging their futures to pay tuition, that's a criminal lack of responsibility.

This insanity has got to stop. And the schools can stop it whenever they like.

Yes, massive buyouts are a problem in college football. But they're ADs problem, not coaches.

By Zach Barnett, FootballScoop.com, Nov. 14, 2019

<https://footballscoop.com/news/yes-massive-buyouts-are-a-problem-in-college-football-but-theyre-ads-problem-not-coaches/>



Look, [Arkansas AD Hunter] Yurachek is absolutely right that 8-figure buyouts are ridiculous and unnecessary. In a time where public opinion has turned against the NCAA business model and politicians of all stripes across the country are storming the castle, it's an extremely bad look to pay a coach \$10 million not to coach a game played by unpaid college students.

Well, the buyout situation throughout college athletics I don't think is great," Yurachek said earlier this week, via [Whole Hog Sports](#). "I mean, there's huge buyouts in all these contracts, and I did say I thought that — and I said it in my opening press conference — that losing football games should be condition for terms of your employment to be nullified, and that's tough to be a pioneer in that because that hurts your candidate pool moving forward.

Big-money buyouts are so routine at this point that they're now baked into the DNA of college football: A coach gets fired, USA Today editor Steve Berkowitz tweets out his buyout figure, and scores of people quote-tweet his tweet with the same joke about how there's no money to pay the players. It's a bad look. So bad, in fact, that Bill Simmons — the most influential sports writer of his time, and a writer who never writes (or, wrote) about college football — did a segment on his old TV show about dead money paid to college football coaches.

So, yes, it's a problem for college sports, and it's a problem entirely made by athletics directors and no one else.

This is where ADs jump in the argument and say, "The market..."

Examples of Comparable Employment and Mitigation Provisions in Coaching Contracts

1. Mike Novell, Florida State



E. Termination without cause.

Upon notice to the Employee by University of its election to terminate pursuant to this subsection V.E., **the Employee shall be obligated to mitigate the University's financial obligation by immediately utilizing his best efforts to obtain full-time subsequent employment in a comparable position, which is not limited to a head coaching position at a Power Five Conference. This obligation includes a duty to seek a market-rate salary, which is more than nominal compensation, for the subsequent employment.** If Employee obtains such other employment, or any other employment, during the Termination Period, Employee shall promptly provide written notice to the University describing the position and the annual gross cash salary and all other benefits and conditions of employment. Employee shall provide the University on an ongoing basis with the information reasonably requested which is necessary to implement the University's obligations under this subsection V.E. and shall promptly respond to any reasonable inquiries from the University. Upon request, Employee shall provide information related to all efforts to obtain subsequent employment and all offers of employment that have not been accepted by him. The University's obligation shall be subject to a mitigation offset in the event Employee secures subsequent employment prior to University's full satisfaction of the remaining Termination Amount. In the event that the Employee secures such employment, the amount due to the Employee under the terms of this subsection V.E. shall be reduced on a dollar-for-dollar basis by the amount earned by the Employee in such new employment during the remaining Termination Period.

If Employee is terminated without cause, the University agrees to engage in a good faith discussion and review regarding the applicability of Internal Revenue Code §409A and §457(f) to such guarantee payment structure, and pending such review, agrees to make any necessary accommodations (not to include any increase or decrease in the applicable amount) in such payment structure to comply therewith. §§§

17. Termination of Coach's Employment.

(d) Termination Without Necessity of Demonstrating Cause.

(iv) For purposes of this Section 17(d), (i) the term "Other Employment" shall mean the provision of services by Coach including, without limitation, working as an employee for another employer, as a consultant, as a self-employed person, or as an independent contractor, whether personally or through one or more business entities owned or controlled by Coach; and (ii) the term "Compensation" shall mean any and all gross income derived from Other Employment, whether as wages paid by an employer, as a dividend or other distribution from a business entity owned or controlled by Coach, or otherwise (but not including the value of customary and standard benefits that are typically part of an employment relationship). For purposes of determining the Compensation payable to Coach during the Mitigation Period under circumstances in which Coach's Other Employment is evidenced by one or more contractual agreements having a term greater than one year (without limiting inclusion of other types of Compensation) in which the annual increase from any one year to a succeeding year is equal to or greater than twenty percent (20%), any periodically-rated salary, additional or supplemental compensation, or other compensation expressed as a periodic rate payable to Coach in any given year shall be deemed to be the average Compensation of such nature payable under said contractual agreement(s), determined by dividing the total such Compensation payable thereunder for all periods (including periods occurring after the end of the Mitigation Period) by the total number of years occurring during the term thereof. In the event the term of such contractual agreement(s) includes one or more partial years, such Compensation payable in such partial year(s) shall be included in the aforementioned calculation, and each such partial year shall be considered part of the term as a fractional year based on the number of days in such partial year divided by 365, rounded to the nearest hundredth of a year. For example, a contractual agreement beginning on April 1, 2023 and ending on June 30, 2028 would be considered to have a term of 5.25 years.



3. Ed Orgeron, Louisiana State University



(4) In the event of termination by LSU without cause, the amount of liquidated damages owed by LSU under this Section 12.B shall be reduced and extinguished by and to the extent of any compensation EMPLOYEE earns, receives, or is entitled to receive from the termination date until LSU's obligation pursuant to this Section 12.B to EMPLOYEE terminates or ceases to exist. EMPLOYEE shall exercise due diligence and good faith in seeking other athletically-related employment as soon as practicable at a prevailing market salary resulting from arm's length negotiations. In the event EMPLOYEE obtains other employment, EMPLOYEE will notify LSU and provide any and all documentation requested by LSU to determine the amount of compensation received by EMPLOYEE and the amount of offset due to LSU.

4. Nick L. Saban, University of Alabama



Article V - Termination

5.01(h) Offset Against Liquidated Damages. It is agreed that the Liquidated Damages paid by the University pursuant to Section 5.01(e) hereof shall be offset and reduced on a monthly basis by the gross compensation earned by Employee personally or through business entities owned or controlled by Employee from employment as a head or assistant coach or as an administrator either at a college or university or with a professional sports organization (collectively referred to hereafter as a "Coaching Position.") For purposes of this subsection, "gross compensation" shall mean, without limitation, gross income from base salary or wages, talent fees, or other types of compensation paid to Employee by an employer, including by a business entity owned or controlled by Employee, consulting fees, honoraria, fees received by Employee as an independent contractor, or other income of any kind whatsoever from a Coaching Position. While the University's obligation to pay Liquidated Damages remains in effect, within fourteen (14) days after accepting any employment in a Coaching Position and within fourteen (14) days after the end of each month thereafter, Employee shall furnish to the University an accounting or report of all gross compensation received by Employee during the immediately preceding month from the Coaching Position. The University shall reduce the amount of the monthly Liquidated Damages payments due and payable to Employee based upon the gross compensation for the immediate previous month as reflected in the Coaching Position gross compensation report. If Employee fails or refuses either to notify the University of Employee's employment in a Coaching Position or to furnish the monthly Coaching Position gross compensation reports after receiving a formal, written request to do so from the University, then, after giving Employee fourteen (14) days' written notice, the University's obligation to continue paying Liquidated Damages to Employee shall cease.

5. Tom Allen, Indiana University



H. Mitigation of University's Obligations: The Employee is required to mitigate University's obligations under Section 6.02.G by making reasonable and diligent efforts (under the circumstances and opportunities then prevailing) to obtain a comparable employment position (as defined below) as soon as practicable following such termination. If the Employee is employed elsewhere post-termination in a comparable position (as defined below), then University's obligation to pay Employee as set forth in Section 6.02.G shall be reduced by Employee's total compensation from all sources directly related to such a comparable position (except not including the employee benefits costs associated with such a comparable position). University shall pay such amount (which shall not include employee benefits for the period that Employee is employed in such a comparable position) in equal monthly installments after the date of termination for the period defined in Section 6.02.G.

For purposes of this section, "comparable employment position" shall include, but not be limited to, positions as: (1) a media commentator with a national or regional network, broadcast station or cable company or (2) a head or assistant coach in the professional or collegiate ranks.

6. Mike Gundy, Oklahoma State University



(d) Mitigation of Damages. Notwithstanding the provisions of this Section 5.04, Employee agrees to mitigate University's obligation to pay liquidated damages under this Section 5.04 and to make reasonable and diligent efforts to obtain comparable employment (i.e., in the football industry), including, but not limited to, a coaching position at a university or professional team or other similar employment involving athletics, as soon as reasonably possible after termination of this Contract by University without just cause. After Employee obtains such new employment, University's financial obligations under this Contract, including this Section 5.04 shall be reduced proportionally by any compensation received from such new employment during the term of this Contract.

7. Thomas J. Herman, University of Texas



7. SUSPENSION AND TERMINATION

B. Termination by the University without Cause. The University shall have the right to terminate Coach’s Employment and this Agreement (and the related Professional Services and License Agreement) without any reason and without cause prior to the expiration of the Term as stated in Section 3 above. In the event this Agreement is terminated without cause: (1) all obligations of the University to Coach pursuant to this Agreement shall cease as of the date of termination, (2) Coach shall be eligible for any post-termination benefits applicable to regular employees of the University (i.e. COBRA insurance eligibility, etc.), and (3) the University will pay to Coach, in lieu of any and all other legal remedies or equitable relief available to Coach or LLC, liquidated damages equal to \$5,000,000 for each remaining contract year (pro-rated for partial month/months) of the unexpired Term of this Agreement as stated in Section 3 above. Such liquidated damages shall be paid in monthly installments beginning on the date of termination through December 31, 2021, the term over which any such liquidated damages will be paid shall be referred to as the “Payout Period.”

Coach acknowledges that he will minimize the payments due to him under this Section 7.B and agrees to make reasonable efforts to obtain other employment as long as the University has the obligation to make such payments. If Coach obtains new football-related employment during the Payout Period, the University shall offset against the liquidated damages paid to Coach the amount of any post-termination football-related income that Coach receives, earns, or is owed for such employment through the Payout Period. Coach shall immediately, but no later than twenty (20) days, upon/after acceptance of other employment, notify the Men’s Athletics Director in writing of such employment and the total compensation to be paid to Coach for the employment. In addition, Coach agrees to either provide the University with, or allow the University to audit, a copy of his W-2 form(s), relevant 1099’s, and other tax documents related to earnings for each calendar year corresponding to the years, if any, that the University has the obligation to make payments under Section 7.B.

If the University ends this Agreement without cause prior to the expiration of the Term as stated in Section 3 above, in accordance with the provisions of this Section 7.B hereof, the University in no case shall be liable for Coach’s or LLC’s loss of any collateral business opportunities or any other benefits, perquisites, or income resulting from activities such as, but not limited to, camps, clinics, media appearances, personal appearances, radio, television, internet, marketing and promotional services, apparel or shoe agreements, equipment agreements, consulting relationships, or from any other sources that may result from the University’s termination of this Agreement without cause.

For purposes of this Section 7.B, (1) “employment” shall mean working as an employee of another employer, as a consultant, as a self-employed person, or as an independent contractor; (2) “football-related” shall mean performing services as a coach, an athletics administrator, an officer or staff member in an organization that may regulate or oversee football competition (such as the National Football League, the NCAA, or an athletics conference), or performing services as a broadcaster or otherwise involved in the production of football-related events; (3) “amounts earned by Coach in the new employment” shall mean any and all compensation received, earned, or due through Coach’s employment during the Payout Period, including, base salary, consulting fees, bonuses, deferred compensation, and any other compensation received by Coach during the Payout Period. Coach shall use his good faith best efforts not to structure and or defer any compensation due for services performed during the Payout Period to a time beyond the Payout Period.

POWER FIVE CONFERENCES



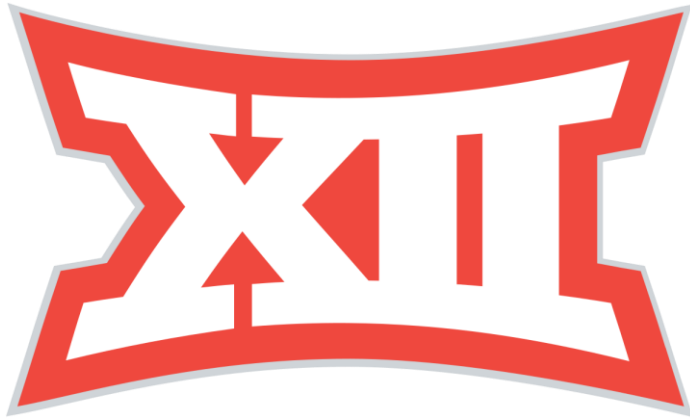
ACC

University	Coach	Date	Mitigation Y/N
Boston College	Hafley		
Clemson	Swinney	5.1.2019	N
Duke	Cutcliffe		
Florida State	Norvell	12.11.2019	Y
Louisville	Satterfield	12.4.2018	Y
Miami	Diaz		
North Carolina	Brown	11.28.2018	Y
NC State	Doeren	1.1.2018	Y
Pittsburgh	Narduzzi		
Syracuse	Babers		
Virginia	Medenhall	Denied	
Virginia Tech	Fuente	Denied	
Wake Forest	Clawson		
Notre Dame	Kelly		

BIG 10

University	Coach	Date	Mitigation Y/N
Illinois	Smith	3.7.2016	Y
Indiana	Allen	1.8.2017	Y
Iowa	Ferentz	7.1.2017	N
Maryland	Locksley	12.5.2018	N
Michigan	Harbaugh	12.28.2014	Y
Michigan State	Dantonio	1.15.2017	N
Minnesota	Fleck	2.2.2017	Y
Nebraska	Frost	12.3.2017	Y
Northwestern	Fitzgerald		
Ohio State	Day	1.2.2019	Y
Penn State	Franklin	1.11.2014 TS	N/A
Purdue	Brohm	1.10.2014	Y
Rutgers	Schiano		
Wisconsin	Chryst	1.27.2017	Y

POWER FIVE CONFERENCES



BIG 12

University	Coach	Date	Mitigation Y/N
Baylor	Rhule		
Iowa State	Campbell	11.30.2015	N
Kansas	Miles	11.16.2018	Y
Kansas State	Klieman	1.1.2019	Y
Oklahoma	Riley	11.16.18 TS	Y
Oklahoma State	Gundy	1.1.2017	Y
TCU	Patterson		
Texas	Herman	5.12.2017	Y
Texas Tech	Wells	12.7.2018	Y
West Virginia	Brown	6.21.2019	Y



PAC-12

University	Coach	Date	Mitigation Y/N
Arizona	Sumlin	1.16.2018	Y
Arizona State	Edwards	1.1.2018	N
California	Wilcox	6.16.2017	Y
UCLA	Kelly	11.25.2017	N
Colorado	Tucker	12-12-18	Y
Oregon	Cristobal	12.8.2017	Y
Oregon State	Smith	3.1.2020	N
USC	Helton		
Stanford	Shaw		
Utah	Whittingham	1.1.2019	Y
Washington	Petersen	12.6.2013	N
Washington State	Leach	1.25.2014	Y

POWER FIVE CONFERENCES



SEC

University	Coach	Date	Mitigation Y/N
Alabama	Saban	2.1.2013	Y
Arkansas	Pittman	12.8.2019 TS	Y
Auburn	Malzahn	12.3.2017	N
Florida	Mullen	11.26.2017	N
Georgia	Smart	1.1.2018	Y (if SEC)
Kentucky	Stoops	1.1.2019	N
LSU	Orgeron	2.25.2016	Y
Ole Miss	Kiffin	Requested	
Mississippi State	Moorhead	1.1.2019	Y
Missouri	Drinkwitz	12.8.2019 TS	Y
South Carolina	Muschamp	12.5.2019	N
Tennessee	Pruitt	12.7.2017	N
Vanderbilt	Mason		

Index: Problems with Termination Without Cause Provisions

1. Bret Bielema, University of Arkansas
2. Jim McElwain, University of Florida
3. Kevin Stallings, University of Pittsburgh
4. Willie Taggart, Florida State University
5. Dave Beatty, University of Kansas
6. Al Golden, University of Miami
7. Todd Graham, Arizona State University
8. Mark Gottfried, North Carolina State University



Bret Bielema, University of Arkansas



Bret Bielema and the University of Arkansas executed an Employment Agreement on August 20, 2013. Paragraph 15 of the Employment Agreement provided for Termination for Convenience by the University. The Agreement provided that notwithstanding any other term or condition of this Agreement, Coach shall have an affirmative duty of mitigation to additionally seek and accept other employment in the event this Employment Agreement is terminated for convenience, as well as the obligation to comply with any mitigation and other conditions set forth in the Guarantee Agreement.

Simultaneously with entering into the Employment Agreement, Bielema entered into a Personal Services and Guarantee Agreement dated February 6, 2015 to be effective December 4, 2012 with the Razorback Foundation, Inc. That Agreement indicated in Paragraph 8 that if Bielema is terminated for the convenience of the University of Arkansas, the Foundation shall pay to Bielema the amounts specified below:

January 1, 2017 to December 31, 2017	\$15,400,000
January 1, 2018 to December 31, 2018	\$11,700,000
January 1, 2019 to December 31, 2019	\$7,900,000
January 1, 2020 to December 31, 2020	\$4,000,000

Paragraph 11 of the Agreement further indicates that if Bielema is terminated by the University of Arkansas for its convenience and the Foundation is obligated to pay the amounts specified in Paragraph 8, Bielema agrees that those payments shall be subject to the following mitigation provisions:

Bielema shall have the duty to mitigate his damages by making reasonable efforts to gain employment. The parties understand and agree that if Bielema is successful in gaining such re-employment or alternative employment of any kind, the Foundation's Guarantee Payment Obligation shall be reduced by the amount of compensation Coach earns from such employment. The Foundation's right to reduce its obligation shall not include allowances Coach may earn from passive investments or interest not associated with new employment.

Bielema was fired in November of 2017 after having compiled an overall record of 29 wins and 34 losses and 11 wins and 29 losses in the SEC. In his last year, 2017 he went 4 wins and 8 losses. The Razorback Foundation was obligated to pay Bielema for being fired without cause thirty-seven payments totaling \$11,935,000. As of December 31, 2018, \$320,833.33 was paid.

To meet his mitigation obligation, Bielema served as a volunteer coach with the New England Patriots, and then became the New England Patriots Defensive Line Coach in 2019 at a salary of \$250,000 (significantly under what Defensive Line Coaches might be paid). In January of 2020, Bielema accepted a position with the New York Giants as outside linebacker/senior assistant with a salary of \$400,000.

Bielema was notified by the University lawyers that he had breached his Agreement in which he was required to:

- Diligently seek and obtain other employment of the same or similar nature;
- Provide a written summary to the Razorback Foundation of his efforts to find other employment twice a year;
- Notify the Foundation in writing of other employment obtained and income received; and
- Use his best efforts to maximize earning potential with any new employer.

During the year he was a volunteer there were 10 Power Five Coaching openings for which he did not seek employment. By virtue of his breach of Agreement, the Foundation has asked for recoupment of the money already paid Bielema.

Conclusion:

Bielema has commenced a lawsuit in the United States District Court, Western District of Arkansas, Fayetteville Division with a caption of *Bret A. Bielema vs. The Razorback Foundation, Inc.*, Case Number 5:20-CV-05104-PKH as filed on June 12, 2020. He is seeking damages for breach of contract, i.e. – non-payment of the buyout amount, and putting Bielema in a false light invasion of privacy.

Bielema maintains that “[t]he most careful, microscopic review of the agreement would not reveal a single word, phrase, or sentence that imposed an obligation on Coach Bielema to seek the highest-paying position he could obtain – much less to seek a position that paid an annual salary of more than \$150,000.”

Bielema also claims that he had to seek a competitive salary for a job but there is no mention of him having to seek a DI head coaching position or any other position.

The University claims that Bielema in good faith failed to mitigate damages by not attempting to seek comparable employment.



Jim McElwain, University of Florida



McElwain originally entered into a contract with University of Florida (Florida) dated as of December 5, 2014 as head football coach. McElwain was fired in 2017 after two and half seasons. His record was 10 wins and 4 losses in 2015, 9 wins and 4 losses in 2016, and 3 wins and 4 losses in 2017. At the time of McElwain's firing he was owed approximately a \$13 million buyout pursuant to his termination without cause provision.

McElwain claimed he was receiving threats towards him and his family. Florida took the position that either McElwain made the University potentially liable by not disclosing death threats made against himself, his family, and other coaches or players, or he lied about the death threats.

As a result, Florida changed his firing to "with cause" for purposes of allowing Florida to decrease the buyout amount. Florida accused McElwain of violating the Standard Clause in his contract in Paragraph 9 which reads:

During the term the Coach shall perform the coach's duties and personally comport himself at all times in a manner that is consistent with good sportsmanship and with the Association's and University's highest standards of professionalism, competence, academic mission, demonstrated commitment of head athletic coaches, and personal and professional conduct, ethics, integrity, and morals as such highest standards are determined by the President or Chairman in consultation with the Athletic Director.

Jim McElwain, University of Florida



There is a question as to whether or not McElwain's representatives fought for his full buyout. This was complicated because his agent, Jimmy Sexton, who represents a number of potential hires for the University of Florida and many coaches in the SEC, including Dan Mullen who eventually got the Florida job. Because of Sexton's potential conflict of interest, Sexton likely would not have wanted to be in a dispute with the University of Florida for one of his clients while negotiating for the job on behalf of another client.

Conclusion:

Universities will attempt to find anything that might constitute termination for cause so as to either alleviate its necessity to pay liquidated damages, or in the alternative, to utilize the claim for cause termination circumstance to decrease the amount of the buyout.



Kevin Stallings, University of Pittsburgh



Stallings essentially was hired in 2016 by the University of Pittsburgh (Pitt) and was fired in 2018 with four years remaining on his contract and was owed in excess of \$9 million for being fired not for cause.

Stallings' lawyer claimed that he was entitled to his entire remaining salary pursuant to his contract. Pitt reportedly offered under \$7.5 million, but Stallings' lawyer disputed those reports and claimed that the real number offered was far less. Pitt then began to look for reasons to fire Stallings with cause rather than not for cause.

In a game at the University of Louisville in January of 2018, after a Pitt loss, Stallings shouted "at least we don't pay our players \$100,000 to a heckler." This was in response to the Adidas scandal that got Louisville Coach Rick Pitino fired from Louisville as head coach after it was alleged he recruited Brian Bowen by paying him \$100,000 to attend Louisville.

Stallings' record at Pitt was 16 wins and 17 losses in the 2016/2017 season, and 8 wins and 24 losses in the 2017/2018 season.

Stallings and Pitt eventually came to an agreement as to his buyout but the number and terms therefore were not disclosed. This is an excellent example of where universities are using for cause for any set of circumstances in order to try to negotiate and reduce the amount of buyout under the not for cause termination.



Willie Taggart, Florida State University



Willie Taggart was hired by the Florida State University (FSU) pursuant to a Letter Agreement (Memorandum of Understanding (MOU)) dated December 5, 2017. What follows are some of the key provisions for this discussion as contained in said Letter Agreement:

We agree to work together to finalize these terms in a formal employment contract which will set forth the entirety of our agreement and will be executed by you and the University as soon as practicable.

The basic Terms of our agreement are:

I. Term

The term of the agreement will be six (6) years from the date of your hiring.

II. Compensation

For your duties and responsibilities as Head Intercollegiate Football Coach you will be paid as follows:

Contract Year 1 (Date of hire through January 31, 2019)	\$5,000,000.00
(equivalent to \$416,666.67 per month, paid pro-rata for any partial months)	
Contract Year 2 (February 1, 2019 through January 31, 2020)	\$5,000,000.00
Contract Year 3 (February 1, 2020 through January 31, 2021)	\$5,000,000.00
Contract Year 4 (February 1, 2021 through January 31, 2022)	\$5,000,000.00
Contract Year 5 (February 1, 2022 through January 31, 2023)	\$5,000,000.00
Contract Year 6 (February 1, 2023 through January 31, 2024)	\$5,000,000.00

Your annual compensation listed above shall consist of a base salary of two hundred and fifteen thousand dollars (\$215,000.00) and the balance as supplemental compensation for your endorsement and participation in television and radio programs as reasonably required by University, as well as, participation and endorsement of University contracts and contracts with the University's athletics support foundations, including but not limited to, apparel, multimedia, and beverage contracts; personal appearances; speaking engagements and public relations; the use of your name, image and likeness; license of any trademarks and similar Intellectual Property held by Coach or a legal entity owned by Coach; and fundraising.



[. . .]

IV. Termination and Buyout

Termination by University Without Cause

The University reserves the right to terminate your employment without cause for its own convenience at any time. In the event you are terminated without cause, University will pay you liquidated damages in an amount equal to eighty-five (85%) the total remaining compensation due to you through the end of the otherwise unexpired Term, less required deductions and applicable withholdings for federal, state and local taxes. The payments will be made on a monthly basis over the remaining term of the contract. However, the University will engage in a good faith discussion and review regarding the applicability of Internal Revenue Code §409A to such guarantee payment structure, and pending such review, agrees to make any necessary accommodations in such payment structure to comply with §409A. The University's obligation shall be subject to a mitigation offset in the event you secure subsequent employment prior to University's full satisfaction of such payments.

[. . .]

I anticipate working together in a timely and cooperative manner to agree upon the remaining terms set forth in the contract to be executed. This binding Letter of Agreement and the subsequent employment agreement are governed by the laws of the State of Florida. This offer is contingent upon the satisfactory completion of a mandatory background check.

Welcome to the Seminole Family. I look forward to the continued success of our football program under your leadership.

While the Letter of Agreement was signed by both the University and accepted by Taggart, a more formal contract was never executed between the parties. FSU terminated Taggart on November 3, 2019, 21 games into his six year, \$30 million contract.

Since Taggart never signed an employment contract, FSU claimed he was an employee at will. MOU are formal contracts, but they are not binding on either party and usually have a condition subsequent, that is the execution of an employment contract mutually acceptable to the parties. However, MOUs may also have certain binding provisions and may become enforceable as a contract. Otherwise MOUs will be construed as an agreement to agree, which is unenforceable.

Kentucky experienced the same situation with Billy Gillespie who was fired in 2009 after two seasons as head basketball coach. Gillespie ultimately sued. The University of Kentucky settled and agreed to pay \$3 million settlement, half of what Gillespie thought he was owed under his employment contract. While Taggart and his claimed buyout is over six times what was owed to Gillespie (approximately \$18 million), Taggart also had a subsequent employment offset clause in his MOU that runs until 2024 that was similar to Bielema's at Arkansas.

The question becomes is whether an MOU is the equivalent of a contract and enforceable as such. Please see For The Record: Leaping without Looking, MOUs create risk when Universities do not know their legal significance by Martin J. Greenberg and Kaitlyn Wild, <https://law.marquette.edu/assets/sports-law/pdf/for-the-record/greenberg-v21no1.pdf>.





Florida State University will end up paying a number of buyouts in order to get rid of Taggart. Before joining Florida State in 2018, Taggart had spent one year as the coach of the Oregon Ducks following a successful run at South Florida. When Florida State hired Taggart away from Oregon they agreed to pay his \$3 million buyout with Oregon. Florida State also agreed to payout an additional \$1.3 million that Oregon owed to South Florida when they hired him away from South Florida in 2016. So when all is said and done Florida State could be on the hook for as much as \$20 million to part ways with Willie Taggart.

In December of 2019, Willie Taggart was officially introduced as the new Florida Atlantic University head coach. It was announced that Taggart will make \$750,000 per year for five years.

Conclusion:

A settlement as of the date of this presentation has not been publicly reported.



David Beatty, University of Kansas



1. Beatty was hired in 2015 by the University of Kansas and fired in November of 2018, but was allowed to finish the season. He finished his career at Kansas with a record of 6 wins and 42 losses. Originally fired not for cause, meaning Beatty was entitled to his full \$3 million buyout.
 2. After hiring Les Miles, Kansas reached out to see if they could stretch Beatty's buyout into two year intervals, Beatty declined.
 3. Kansas immediately started an "ongoing internal investigation." Allegations revolved around a former video coordinator, Jeff Love, providing on-field, and inter meeting room instruction to Kansas quarterbacks before he was an official coach who was allowed on the field or in the training room in violation of NCAA Rules.
 4. Beatty's contract said that he may be terminated "for cause" for "significant, or repetitive or intentional violations" of NCAA Rules.
 5. Kansas may have had some underlying reasons to void the buyout including the fact that the Kansas athletic department was losing money, they were paying Miles \$3 million per year, they said the need to find a "dead hooker...in [Beatty's] closet," they are currently involved in a basketball scandal involving Bill Self, and they claimed they merely found the violations when conducting standard exit interviews.
 6. Beatty sued (Beatty and DB Sports, LLC vs. Kansas Athletics, Inc.) in the United States District Court for the District of Kansas.
 7. Former Kansas Football coach David Beatty and KU Athletics have reached a settlement for \$2.55 million that effectively ends Beatty's lawsuit against the athletic department, KU announced on June 5, 2020.
- The agreement comes 15 months after Beatty first filed his lawsuit, where he alleged that KU Athletics sought to concoct a reason to fire him for cause to avoid a \$3 million payout.

Meanwhile, Beaty's lawyer, Michael Lyons, stated this was a "tremendous victory for David and his family."

"It brings to closure what has been a tremendous struggle for David personally and professionally," Lyons said. "What Kansas did in promising to pay him and ultimately renegeing and then trying to destroy him professionally has taken years off of David's life and hurt him very deeply personally. So this is redemption for he and Raynee, his wife, and his family."

"This is a victory for college coaches like David everywhere," Lyons said of the settlement. "This trend, that is starting to matriculate in college athletics where, 'We'll make a promise to pay you if we fire you, and then we trump up something, and come up with something to try to get out of a contract,' which is what Kansas has done here ... I think this case is a great example of why that's a bad idea.

"They ultimately damaged their reputation, subjected themselves to more exposure in their athletic department and before the NCAA, and spent more money than they ultimately would have had to had they simply just paid him and honored their commitment."

<https://www.kansascity.com/sports/college/big-12/university-of-kansas/article243321701.html>



So you want to fire your coach without paying his buyout ...

Here's how it might be possible for colleges to exploit the NCAA's enormous rulebook in order to get out of deals they don't like any more.

By [Steven Godfrey](#) Dec 5, 2019, 4:38pm EST

<https://www.bannersociety.com/2019/12/5/20997328/college-football-coach-buyouts-kansas-david-beaty>

But there's new hope for angry-but-broke institutions hankering to cut ties with little or nothing due at severance: the NCAA.

Sure, you know the NCAA as a purposefully overcomplicated governing body employed as a straw man by a billion dollar industry seeking to muddy up its business model. But if your athletic director suddenly needs to avoid paying a heap of heretofore legally required money to that now-former coach, Indianapolis can help!

Most coaches have standard language in their contracts mentioning that NCAA violations on their watch could cancel their current and future paychecks, potentially nullifying a high-dollar buyout. The interpretation of each coach's contract is different, but it turns out that the right lawyers are willing to argue even the tiniest violations can trigger a voided buyout.





Al Golden, University of Miami



A case involving the interpretation of a termination without cause provision in Golden's Employment Agreement with the University of Miami (Miami) was filed in the United States District Court of Florida, Case No.: 1:18-CV-24414 on October 24, 2018 entitled Alfred J. Golden, Jr., Plaintiff vs. University of Miami, et al., Defendants.

1. Original Contract, April 27, 2011
7. Termination of Employee by the University. The University may terminate Mr. Golden's employment at any time. If the University terminates Mr. Golden prior to expiration of the Term, he will nevertheless be paid by the University a sum equal to the following formula:
[\$250,000 * (Number of years left in the Term)] (hereinafter, the "Termination Payment").

If Mr. Golden is terminated in the middle of a contract year, the amount due for that particular year will be prorated to reflect the months left for such a particular contract year. The parties agree, represent and acknowledge that the Termination Payment is, and fairly and adequately represents agreed-to liquidated damages and shall not be deemed or construed by either party as a penalty. Aside from any payments earned pursuant to paragraph 6, any outstanding payments due pursuant to paragraph 3(d) of the Guarantee Agreement, and the payment provided by this paragraph 7, all other terms, conditions and obligations of the parties to this Agreement and the Guarantee Agreement shall terminate and cease as of the date of Mr. Golden's termination.

For avoidance of confusion, for purposes of this Agreement, Year 1 shall correspond to the period of time between December 13, 2010 through January 31, 2012; Year 2 shall correspond to the period of time between February 1 2012 through January 31, 2013; Year 3 shall correspond to the period of time between February 1, 2013 through January 31, 2014; Year 4 shall correspond to the period of time between February 1, 2014 through January 31, 2015; and, Year 5 shall correspond to the period of time between February 1, 2015 and January 31, 2016.

Any payment due pursuant to this paragraph 7 shall be paid by the University to Mr. Golden in equal monthly installments for the remaining months left in the Terms, and shall be subject to any and all applicable payroll tax deductions. In the event that Mr. Golden secures other employment during the remaining portion of the term of this Agreement, he is obligated to notify the University in writing of the terms of that employment, including salary and any additional compensation. The University has the right to reduce any continuing payment obligations to Mr. Golden under this termination provision by 50% to the extent that he earns salary or wages or is otherwise compensated by any third party.

Al Golden, University of Miami

2. First Amendment, February 20, 2012, Extended term of contract to January 31, 2020 and Changed the amount of payout to \$500,000 from \$250,000 relative to termination without cause.
3. Second Amendment, July 23, 2012, Made no substantive changes to termination without cause provisions.
4. Third Amendment, March 28, 2013

Paragraph 7 of the Employment Agreement. Paragraph 7 of the Employment Agreement shall be replaced with the following paragraphs:

The University may terminate Mr. Golden's employment at any time. If the University terminates Mr. Golden prior to the expiration of the Term, he will nevertheless be paid by the University a sum (the "Termination Payment") equal to the following formula:

Year 3	\$2,000,000.00
Year 4	\$2,000,000.00
Year 5	\$2,000,000.00
Year 6	\$1,000,000.00
Year 7	\$1,000,000.00
Year 8	\$1,000,000.00
Year 9	\$1,000,000.00

The parties agree, represent and acknowledge that the Termination Payment is, and fairly and adequately represents, agreed-to liquidated damages and shall not be deemed or construed by either party as a penalty. Aside from any payment earned pursuant to paragraph 6(A)-6(E), any outstanding payments due pursuant to paragraph 3(d) of the Guarantee Agreement, and the payment provided by this paragraph 7, all other terms, conditions and obligations of the parties to this Agreement and the Guarantee Agreement shall terminate and cease as of the date of Mr. Golden's termination.

For avoidance of confusion, for purposes of this Agreement, Year 1 shall correspond to the period of time between December 13, 2010 through January 31, 2012; Year 2 shall correspond to the period of time between February 1, 2012 through January 31, 2013; Year 3 shall correspond to the period of time between February 1, 2013 through January 31, 2014; Year 4 shall correspond to the period of time between February 1, 2014 through January 31, 2015; Year 5 shall correspond to the period of time between February 1, 2015 and January 31, 2016; Year 6 shall correspond to the period of time between February 1, 2016 and January 31, 2017; Year 7 shall correspond to the period of time between February 1, 2017 and January 31, 2018; Year 8 shall correspond to the period of time between February 1, 2018 and January 31, 2019; and Year 9 shall correspond of time between February 1, 2019 and January 31, 2020.

Any payments due pursuant to this paragraph 7 shall be paid by the University to Mr. Golden in equal monthly installments for the remaining months left in the Term, and shall be subject to any and all applicable payroll tax deductions.

The University's obligation to pay liquidated damages is subject to Mr. Golden's duty to mitigate, as follows: In the event the University terminates the Employment Agreement pursuant to this paragraph 7, Mr. Golden agrees to mitigate the amount of liquidated damages to which he is entitled to receive pursuant to this paragraph 7 and to make reasonable and diligent efforts to obtain other employment as a college or professional football coach, or as a football studio show talent, or game broadcaster, as soon as reasonably possible after termination of this Employment Agreement. Mr. Golden agrees to immediately notify the University upon accepting such other employment. After Mr. Golden accepts any such new employment, the total amount of liquidated damages the University is obligated to pay and Mr. Golden is entitled to receive as specified herein shall be reduced on a monthly basis by an amount equal to Mr. Golden's annual gross base salary paid for such month under Mr. Golden's new employment agreement until the expiration of the Term as defined in Paragraph 1(a) of the Employment Agreement.

5. The lawsuit aforereferenced alleged that the University of Miami did not pay Golden the full amount of the separation payment under Paragraph 7 of the Employment Agreement and was in breach of contract. The Golden case involves an interpretation of the latest termination without cause provision in his contract. The University takes the position that Golden is entitled to \$2 Million only. Golden takes a position that the payments are cumulative in nature and that he should receive the buyout not only in the year in which he was terminated, but for the remainder of his contract through Year 9. The University of Miami contends that the contract is unambiguous and entitles defendant to judgment. Contract interpretation is question of law to be determined by the courts through reading the words of the contract and the contents of the entire contract in construing the contract to effectuate the parties' intent.





Todd Graham, Arizona State University



A. Todd Graham was hired as head football coach for the Arizona State University (ASU) pursuant to an original contract dated March 5, 2012. Graham was terminated without cause on December 29, 2017 and compiled 46 wins and 32 losses while at ASU.

B. Graham's original contract had an obligation to mitigate damages clause if he was fired without cause:

c. **Duty to Mitigate Damages.** Notwithstanding the requirements of this Section 16. Coach shall have a duty to mitigate the University's obligation to pay liquidated damages by making reasonable and diligent efforts to obtain other employment as soon as reasonably possible after termination of this Contract by the University pursuant to this Section 16. As of the date Coach begins any other employment, the definition of "Computed Amount" set forth in Section 16(a)(iv) shall be modified and shall mean an amount equal to fifty percent (50%) of Base Salary and Additional Salary due to Coach under the remaining term of this Contract. This Section 16 shall survive the expiration or earlier termination of this Contract.

C. In his Amended and Restated Contract the obligation to mitigate damages was eliminated.

D. Paragraph 16 stated as follows:

16. Termination by University without Cause; Liquidated Damages. This Contract may be terminated by the President of the University or the President's designee at any time without cause upon written notice to Coach.

A. Liquidated Damages. In such event, the University will pay Coach liquidated damages, in lieu of any and all other legal remedies or equitable relief. The liquidated damages shall be paid by payment of the Computed Amount (defined below) as follows:

i. Thirty-five (35%) of the Computed Amount in a lump sum payable on the next regularly scheduled payday unless that date falls within three (3) days of the termination date;

ii. Sixty-five (65%) of the Computed Amount in equal bi-weekly payments on the University's normal paydays for employees after the termination date until the then Expiration Date of this Contract;

iii. The payments by the University under this Section 16 will be subject to such withholdings as may be required by applicable state and federal laws as determined by the University. Coach understands that the lump sum present value of the Computed Amount (calculated as required by the Treasury Regulations issued under Section 457(f) of the Internal Revenue Code of 1986, as amended) shall be subject to federal and state income tax withholding and employment taxes (Social Security and Medicare taxes) on the date of termination, even though sixty-five percent (65%) of the Computed Amount is paid to Coach in installments. As a result of such immediate taxation on the lump sum present value of the Computed Amount, Coach acknowledges that all or a substantial portion of the initial thirty-five (35%) payment will be withheld to pay federal and state income tax withholding and employment taxes on the lump sum value of the Computed Amount.

iv. "Computed Amount" means an amount equal to one hundred percent (100%) of Base Salary and Additional Salary due to Coach under the remaining term of this Contract. In calculating the Computed Amount, it will be assumed that Coach's per annum Additional Salary would increase as provided in Exhibit A for the remaining term of this Contract.

E. Termination Letter

This letter confirms your discussion with Ray Anderson, VP University Athletics, and confirmation that the Arizona Board of Regents through Arizona State University (ASU) has exercised its right to terminate your Amended and Restated Multiple-year Football Head Coach Contract, dated July 1, 2013 and amended on July 1, 2014, July 1, 2015, and July 1, 2016 (as amended, the "Employment Contract"), and your employment as ASU's Head Football Coach effective 11:59pm on December 29, 2017 ("Contract Termination Date"). You and ASU Agree that we are terminating the Employment Contract without cause pursuant to Section 16. ASU's rights as well as your obligations under Section 13 of the Employment Contract (concerning ASU records and intellectual property) will continue in effect after termination of the Employment Agreement.

Section 16 of the Employment Contract sets forth the liquidated damages payable to you as a result of your termination. As discussed and agreed, ASU will pay you the Computed Amount of \$12,000,000 as follows: 35% of the Computed Amount, \$4,200,000, in a lump sum payable on December 29, 2017 and 65%, \$7,800,000, of the Computed Amount in equal bi-weekly payments of \$85,714 on the University's normal paydays for employees after the termination date until June 30, 2021, the Expiration Date of your contract. ON the January 5, 2018 paycheck you will receive a payout of \$270,769 for your accrued and unused vacation hours as permitted under SPP 702-01 (up to 176 hours) and a bonus of \$266,667 for ASU's appearance in the Sun Bowl. Enclosed is the following:

(1) a calculation of the gross liquidated damages payment setting forth the amount of federal and state tax that ASU is required to withhold with respect to your: (a) final paycheck, (b) bonus, and (c) vacation hour payout;

The December 29, 2017 check will be a hard check and enclosed with this letter. The January 5, 2018 payment will be made via direct deposit into your account unless you request differently. Please contact Frank Ferrara, Senior Associate Athletic Director, should you have any questions regarding the calculations.

Your January 5, 2018 paycheck will include your salary for the pay period of December 18, 2017 through the Contract Termination Date, which covers the pay period ending December 31, 2017. As provided in Section 16 of the Employment Contract, all employee-related benefits and all fringe benefits furnished by ASU will terminate as of the Contract Termination Date and the liquidated damages payable to you are in lieu of any and all other legal remedies or equitable relief otherwise available to you.



F. The amount of the income taxes owed to the IRS was greater than the amount Graham received in his first installment from ASU and required Graham to obtain a \$1.9 million loan to cover his tax liability.

IRC Section 457(f) applies to employees of tax-exempt entities (such as ASU) and contains provisions that cause severance payments to be immediately taxable even if such payments are paid at a later date. However, IRS Section 457(f) (and the Treasury Regulations under IRC 457(f)) provide for two exceptions to the immediate taxation of severance that has not yet been paid. However, for these exceptions to apply, the contract or agreement needs to be drafted properly and must include specific language.

The first exception is known as the severance exception. This exception applies to severance payments upon an involuntary termination that does not exceed two times the employee's annualized compensation provided that the severance is made pursuant to a written contract that requires the severance to be paid no later than two years following the termination of employment. To take advantage of this exception, contracts providing for payments in connection with a termination of employment should be drafted so that the payments are split into two separate payments. In Coach's contract, one payment could have been called "severance" that would have provided him with two years of continued pay. The remainder of the payments due to Coach would have remained payable as liquidated damages. If Coach's contract had contained the necessary language, the severance payments paid to him during 2018 and 2019 would have been taxable when paid instead of December 2017.

The second exception is known as the short-term deferral exception. Under this exception, any payments that are required to be paid within 2-½ months following the later of the year in which the contract is terminated and the last day of employer's fiscal year would have been taxable when received instead of on the date the contract is terminated. However, in order for this exception to apply, specific "boilerplate" language should be inserted. Had this been done, Coach's 35% lump sum payment would have been taxable in 2018 instead of 2017.



G. Graham's agent sued Graham for commissions due and Graham counterclaimed against the agent claiming malpractice and negligence in his representation in the following respects:

- Failing to understand the provisions inserted into the contract and to become educated in what the provisions meant and to explain the consequences of accelerated taxation to Coach and discuss potential revisions to the contract;
- Failing to identify the potential tax consequences of 457(f) on Coach's tax liability in the event he was terminated;
- Failing to inform or warn Coach that the amount of taxes he could owe by virtue of Section 457(f)'s impact could, and likely would, exceed the amount he would receive as a 35% lump sum under Paragraph 16;
- Failing to identify possible changes or improvements to Paragraph 16's language that would defer taxation of significant portions of the payments due by use of the techniques described in greater detail above;
- Failing to propose that Paragraph 16 of the ASU agreement be modified to require ASU to pay all withholding when due by operation of Section 457(f) in a manner similar to the Washington State contract identified above;
- Failing to have a fundamental knowledge of the two-year exception or the two and a half month deferral mentioned above when agent was negotiating the ASU contract;
- Failing to disclose or identify, in writing, any supposed limitations on the scope, quality or nature of the services agent or firm would provide in connection with the contract advice it promised to provide in exchange for the fee charged to Coach; and
- Failing to provide competent contract advice concerning the tax consequences of Paragraph 16 of the contract and proposing alternative language that better served Coach's interests.





Mark Gottfried, North Carolina State University



- NC State hired Gottfried as Head Men's Basketball Coach in 2011.
- His employment agreement was twice amended, last by a 21 page Third Employment Agreement dated April 12, 2020 which continued his employment through April 4, 2020.
- In February of 2017, NC State terminated Gottfried's employment.
- As part of his termination NC State and Gottfried entered into a separate Termination Agreement.
- Gottfried was terminated without cause and for more than a year NC State made monthly payments to Gottfried in accordance with the terms of the Termination Agreement.
- Approximately fourteen months after the execution of the Termination Agreement, NC State sent Gottfried a "Notice of Intent to Discharge for Cause."
- In a September 28, 2018 letter NC State also stated that "no additional payments are owed."
- On 8/31/2020, Gottfried filed a lawsuit in the US District Court for the Eastern District of North Carolina, Western Division, Civil Action No. 20-CV-467 entitled Mark Gottfried vs. North Carolina State University.
- Since Gottfried's ouster he has been ensnared in the ongoing corruption scandal in college basketball after a former assistant of his, Orlando Early, alleged that his former boss was in on payments made to the family of former blue chip recruit Dennis Smith Jr., who later signed with NC State.
- The NCAA has sent a Notice of Allegations dated July 9, 2019 to NC State alleging that multiple violations occurred surrounding Smith, Jr.'s recruitment.
- Gottfried's case is another example where a university has agreed to pay liquidated damages pursuant to termination without cause, but later changed its mind based upon subsequent facts and terminated the coach for cause because of "NCAA violations."

CONCLUSION

1. Jobs in college coaching are a fleeting moment. You get hired to get fired.
2. The back end of contracts, i.e.-termination clauses, are as important, if not more important, than the package number.
3. Termination without cause provisions need to be carefully drafted with full and clear explanations of what constitutes good faith efforts to obtain comparable employment and what types of employment are included in comparable employment.
4. Record Keeping – universities are looking to alleviate the need to pay. One of the defenses is a failure to mitigate. Proof of mitigation must be documented.
5. There is a trend where universities are using for cause termination as leverage to offset liquidated damages.
6. A release of liability is appropriate.
7. Understand the tax ramifications of your structured buyout.

CONCLUSION

8. The contract should clearly state that the coach has an affirmative obligation to mitigate damages; that the right to receive liquidated damages, as specified in the termination without cause clause, is specifically conditioned on meeting and fulfilling that obligation; and that liquidated damages are not guaranteed payments.

9. The obligation to mitigate damages requires a reasonable, diligent, and good faith effort. These words are not easily definable, are words of art, and should have a more substantive definition as to their meaning. For instance, when does the obligation to mitigate commence? Is it immediate or does the coach get some “rest period” after termination? Is the coach, in order to meet the mitigation obligation, required to have some form of marketing plan? Is the coach required to maintain a “book” or time log with respect to prospective job inquiries? Is the coach required to have a list of targets based on job availability? Are written follow-ups required to initial inquiries? A best practice clause will require specificity and definition as to what constitutes reasonable, diligent, and good faith efforts to mitigate damages.

10. The obligation to mitigate requires a good faith effort to obtain comparable employment. Comparable employment is another term that needs to be specifically defined. Does comparable employment mean identical or similar job status, responsibilities, and compensation? Does comparable employment mean that a head coach who was terminated without cause from an SEC job paying four million dollars a year must take employment as a head coach in the Atlantic Coast Conference at two million dollars a year if available? Does comparable employment mean another coaching job at the same division level or any coaching job at any level in the NCAA? Does comparable employment mean a similar job in a professional status as either a head coach or assistant head coach? Does comparable employment mean an administrative job such as a general manager, athletic director, or front office staff? Does comparable employment mean income from media outlet employment or other sports-related employment, or does comparable employment mean income from any source regardless of the job description? The obligation is to make the coach whole for the liquidated damage amount, and the responsibility to pay any difference is always with the university. Maybe comparable employment ought to define an accepted minimum compensation package that offsets the university’s obligation rather than attempting a definition of comparable job status, responsibilities, and compensation.

11. Because the college coaching market is national in nature, a good faith and reasonable effort to obtain comparable employment includes available coaching jobs on a national basis. That would appear to be the most reasonable and understood meaning within the industry. However, coaches oftentimes are not interested in moving, want to stay within the same or similar conference, want comparable employment to include designated schools, and want to put some form of geographic limitation on movement. All of this must be written into the contract to further define what comparable employment is.

12. While the intent of mitigation of damages clauses is to make the coach whole during the mitigation period, what offsets liquidated damages also needs to be specifically defined. Does it include salary, benefits, deferred compensation, personal service and talent fees, income from outside sources, perquisites, bonuses, and other forms of compensation that may constitute the package? Or should the offset be defined as anything that has economic value that is paid by the subsequent employer?

13. Most mitigation of damages clauses have some form of reporting function, which is a certification of the amounts that the coach has received at the new employment to offset the university’s responsibility. The reporting function and how one certifies actually what is received to offset liquidated damages must be more specific in detail.

14. Finally, if employment is obtained in contemplation of the obligation to mitigate in a reasonable, diligent, and good faith manner, is the offsetting compensation received by virtue of new employment prospective or retroactive in nature and application?

The better approach to an early terminated coach is simply a negotiated amount as liquidated damages, which is paid either in lump sum or tax structured pursuant to an agreement between the coach and the university without any obligation whatsoever to mitigate or find offsetting employment. The liquidated damages amount should be a number that is negotiated and defined by the present value of those damages that the coach and the university agree are to be paid for early termination. Unless a master draftsman contemplates the many issues that arise with respect to what this obligation means, a simple no obligation to mitigate whatsoever is the simplest solution to keep these matters out of the world of arbitration and the courts.

See Martin J. Greenberg and Djenane Paul, *Coaches’ Contracts: Terminating A Coach Without Cause and the Obligation to Mitigate Damages*, 23 MARQ. SPORTS L. REV. 339 (2013).