

Steve Alford - Coaching Free Agency is Just a Matter of Money

by

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Steve Alford (Alford) became the head basketball coach at the University of New Mexico (UNM) on March 23, 2007, replacing the fired Ritchie McKay. During his stay at the UNM he amassed 155 wins and 52 losses.¹

Alford executed his first contract with UMN on June 26, 2007. Paragraph 7 of that contract, entitled, Termination by Request of Coach Alford, stated:

Coach Alford may terminate this Agreement at any time upon thirty days notice to the VPIA. In the event that Coach Alford voluntarily terminates this agreement, the University shall have no further liability except for base salary and benefits accrued to the date of termination, a pro rata share of the Other Compensation described in paragraph 3.b.5, above, but there shall not be any liability as to the Deferred Compensation except, and only, as provided in paragraph 3d, above.²

Paragraph 7 was amended by the Second Amendment to Addendum to Employment Agreement of Head Coach Steve Alford dated July 12, 2010. The amendment stated as follows:

Paragraph 7 of the Addendum is amended to read: Coach Alford may terminate this Agreement at any time upon thirty days notice to the VPIA. In the event that Coach Alford voluntarily terminates this Agreement, the University shall have no further liability except for base salary and benefits accrued to the date of termination, a pro rata share of the Other Compensation described in paragraph 3.b.5, above, but there shall not be any liability as to the Deferred Compensation except, and only, as provided in paragraph 3d, above. Coach Alford understands and agrees that his termination of this Agreement pursuant to this paragraph prior to the expiration of the term of this Agreement will cause irreparable harm to the reputation and athletic programs of the University in an amount not

¹ Bryan Kilpatrick, *Steve Alford, New Mexico Reach Buyout Agreement*, SBNATION.COM (May 18, 2013), <http://www.sbnation.com/college-basketball/2013/5/18/4343626/steve-alford-buyout-new-mexico-basketball-ucla>.

² University of New Mexico, Addendum to Employment Agreement of Head Coach Steve Alford, Page 5, ¶ 7, (June 27, 2007)

capable of precise calculation and quantification. Therefore, Coach Alford agrees to pay to the University, as liquidated damages and not as penalty, a sum of \$400,000.00 in the event that he terminates this agreement at any time prior to March 31, 2011, the sum of \$300,000.00 in the event he terminates this Agreement on or after April 1, 2011, but prior to March 31, 2012, the sum of \$200,000.00 in the event he terminates this Agreement on or after April 1, 2012 but prior to March 31, 2013, and the sum of \$150,000.00 in the event he terminates this Agreement on or after April 1, 2013 but prior to the expiration of the term of this Agreement.³

Alford signed a Term Sheet dated March 18, 2013, in which a new ten-year contract was to commence on April 1, 2013. The Term Sheet, which follows, was specifically contingent upon "our reaching agreement on a final written employment agreement."⁴

1. Term of the contract: Ten years, commencing April 1, 2013. Contract will run April 1 through March 30. Length on the contract will not drop below 6 years. There are no additional years earned on the contract based on incentives earned.

2. Coach Alford will receive a \$240,000 increase to his compensation for next year beyond any incentives earned this year that role into his base for next year.

3. Coach Alford agrees to not to open salary discussion for a year period.

4. Unless specified in this, agreement or changes are needed due to language that is outdated or no are longer accurate, remaining terms of existing contract remain intact.

5. University will commit to an additional salary pool of \$65,000 for the basketball coaches and staff. Any raises must conform to University HR policy and must be approved by the Vice President for Athletics.

6. Should Coach Alford leave the employment of UNM he will be required the following amount:

Prior to April 1, 2015	\$1,000,000
After April 1, 2015 but prior to April 1, 2017	\$500,000

³ University of New Mexico, *Second Amendment to Addendum to Employment Agreement of Head Coach Steve Alford*, pg.3 ¶ 11 (July 12, 2010).

⁴ Rick Wright, *UNM: Alford Owes Us \$1 million*, ABQJOURNAL.COM (Apr. 3, 2013), <http://www.abqjournal.com/sports/37408/college/unm-alford-owes-us-1-million.html>.

After April 1, 2017 \$300,000

7. New Incentives that read as follows:

Conference Championship	\$50,000
Conference Tournament Championship	\$50,000
NCAA Sweet 16	\$60,000
NCAA Elite 8	\$75,000
NCAA Final Four	\$125,000
Beat a top 25 team*	\$15,000

*ranking at the time of the game, capped at a maximum award of 3

** amounts that roll into base do not change

***Eliminate the following incentives:

Strength of Schedule
RPI
20 win season⁵

The Term Sheet was signed both by Alford and by UNM, i.e. Paul Krebs, vice president.

Alford announced he was resigning to take the head coaching job at UCLA on March 30, 2013, just two days before his new contract was to begin on April 1, 2013.⁶ Because Alford's previous contract stipulates that he will give thirty days' notice before terminating, UNM maintains that his final day of work was thirty days (April 30, 2013) after his resignation, bringing the one million dollar buyout into play as contained in the Term Sheet.⁷

Shortly after Alford's resignation, Lee Peifer, UNM Counsel, wrote the following letter to Alford's agent:

Dear Mr. Barnett:

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

I write to you with the understanding that you are Coach Steve Alford's representative with regard to his contractual relationship with the University of New Mexico. We understand that Coach Alford announced, on March 30, 2013, that he is leaving the University of New Mexico to accept a coaching position at UCLA. However, Coach Alford's contract provides that he may terminate it at any time *upon thirty days notice to the VPIA*. Therefore, the University of New Mexico accepts Coach Alford's March 30 announcement as termination effective upon the close of business on April 29, 2013. All contractual terms set forth in the March 18, 2013, Term Sheet executed by Coach Alford and Vice President Krebs remain in full force and effect.

The written employment agreement integrating the terms of the March 18, 2013, Term Sheet is ready for Coach Alford's signature.

Thank you for your kind attention to this matter. In the event that Coach Alford is represented by legal counsel presently unknown to the University, please feel free to have counsel contact me.

K. Lee Peifer
Interim University Counsel
University of New Mexico⁸

Peifer followed with a letter to Alford on April 3, 2013:

Dear Mr. Alford,

On March 30, 2013, you informed Vice President for Intercollegiate Athletics (VPIA), Paul Krebs, of your decision to take the head basketball coach position offered to you by the University of California - Los Angeles (UCLA). Under both the original Addendum ("Addendum") to your employment contract, which you signed on June 26, 2007, and the Second Amendment to Addendum of Employment contract, signed July 12, 2010, termination of your employment contract requires thirty days' notice to the VPIA. Your communication to the VPIA constituted notice of your intent to terminate the contract; your last day of employment with the University of New Mexico (UNM) will be April 29, 2013.

On March 18, 2013, you reached an agreement with UNM on certain material terms of an extended employment contract, which was memorialized by your signature and the signature of the VPIA ("Term Sheet"). You affirmed that Agreement publicly in statements to the press. The terms contained in the Term Sheet were incorporated in a new comprehensive employment contract that was completed and ready for

⁸ *Id.*

your signature on April 1, 2013. In addition to increased compensation and incentives, you agreed that if you left your employment with UNM prior to April 1, 2015, you would pay one million dollars (\$1,000,000.00).

Pursuant to your employment agreement, including the Term Sheet, UNM hereby demands payment of \$1,000,000.00, to be paid by the close of business on April 29, 2013. Failure to pay this amount in full by April 29, 2013 will constitute a breach of your employment agreement with UNM, including but not limited to the Term Sheet, and will invoke paragraph 12 of the Addendum.

Please contact me, or have your attorney contact me, to arrange for payment.

Sincerely,

K. Lee Peifer
Interim University Counsel⁹

Alford subsequently responded with the following email to Kimberly Bell, UNM

Associate Counsel:

Dear Ms. Bell:

I understand that UNM is taking the position that my resignation was not effective on March 30 and that I will continue as a University employee until April 29 or 30.

I also understand that UNM intends to deposit money into my account representing salary from March 30 through April 29 or 30. My resignation as Head Coach was effective March 30. I performed no services after that date and am not entitled to any salary for services rendered after March 30. I will not accept any such payment.

The Term Sheet of March 18 never became effective because UNM and I never reached agreement on a final written employment contract including those terms. My obligations and those of UNM are governed by the agreement in place before the Term Sheet.

I am not entitled to any additional deferred compensation payments from UNM. Although I performed the conditions that would have entitled me to receive additional incentive salary, my contract with UNM provides that I am not entitled to receive such incentive salary because of my contract

⁹ *Id.*

termination. I will not accept any unpaid deferred compensation or incentive salary.

My contract with UNM provides that if I terminated the contract before March 31, 2013, I would agree to pay the sum of \$200,000. I hereby offer that amount to UNM.¹⁰

In the press conference announcing the hiring of Alford, UCLA Athletic Director Dan Guerrero (Guerrero) indicated that Alford will receive a seven-year, \$18.2 million contract from UCLA.¹¹ Guerrero also said that Alford would receive \$2.6 million annually, a \$200,000 signing bonus, and that while Alford would have to pay a buyout to UNM, UCLA would work with him.¹² The \$200,000 signing bonus that Alford received from UCLA is the amount that Alford claims he owes the UNM by virtue of his early termination.¹³

Disputes arising under the Alford UNM contract are subject to arbitration.

Paragraph 12 of the June 26, 2007 contract indicates as follows:

To the fullest extent permitted by law, any dispute or controversy arising out of or relating to this Agreement or the breach thereof, including the rights, duties, obligations and liabilities of the parties hereunder, shall be determined by binding arbitration. The duty to arbitrate shall survive and include the cancellation or termination of this Agreement and shall include all disputes or questions regarding interpretation and enforceability of this Agreement. Arbitration shall be conducted, upon request of either party, before a single arbitrator chosen by the parties by alternately striking names from a list of seven names submitted by the American Arbitration Association of individuals who shall be attorneys knowledgeable in the field of employment contracts and, to the greatest extent possible, collegiate athletics, and who shall make his/her award in conformity with the rules of said Association and in accordance with the laws of the State of New Mexico as applied to the facts founded by him/her. The expense

¹⁰ Steve Mieczkowski, *Email from Steve Alford to UNM Obtained*, KOB.COM (Apr. 30, 2013), <http://www.kob.com/article/stories/s3017152.shtml>.

¹¹ Andy Katz, *UCLA Hires Steve Alford*, ESPN.COM (Mar. 30, 2013), http://espn.go.com/los-angeles/mens-college-basketball/story/_/id/9114861/ucla-bruins-hire-new-mexico-lobos-coach-steve-alford.

¹² *Id.*

¹³ *Noteworthy in the World of Sports: College Basketball*, MILWAUKEE J. SENTINEL, May 1, 2013, at 9C.

of arbitration proceedings conducted hereunder shall be borne equally by both parties hereto, and all arbitration proceedings hereunder shall be conducted in Albuquerque, New Mexico. If the arbitrator determines that the University did not have adequate cause for any termination under Paragraph 5, damages shall be calculated based upon sums that the University would be required to pay under the compensation provisions of this Agreement. No other compensatory, consequential or exemplary damages may be awarded to Coach Alford.¹⁴

Craig Neal, who acted as Associate Head Coach for the past six years under Alford, was hired as the 20th head coach of UNM on April 2, 2013. Neal's contract, which is dated April 8, 2013, has a Termination by Request of Coach clause which requires one million dollars in liquidated damages in the event of an early termination:

Coach Neal may terminate this Agreement at any time upon fifteen (15) days' notice to the VPIA. In the event that Coach Neal voluntarily terminates this Agreement, the University shall have no further liability except for prorated base salary, as described in paragraph 3.a. above, and benefits accrued to the date of termination, and a pro rata share of the Other Compensation described in paragraph 3.b.5, above. Coach Neal understands and agrees that his termination of this Agreement pursuant to this paragraph prior to the expiration of the term of this Agreement will cause irreparable harm to the reputation and athletic programs of the University in an amount not capable of precise calculation or quantification. Therefore, Coach Neal agrees to pay to the University, as liquidated damages and not as penalty, a sum of One Million Dollars (\$1,000,000.00) in the event that he terminates this Agreement pursuant to this paragraph at any time prior to the expiration of the term of this Agreement.

If during the term of this Agreement Coach Neal (or any of his representatives) wishes to enter into discussions with another school about employment opportunities, Coach Neal shall first notify the VPIA of such discussions. Failure to make such notification will be deemed a material violation of Coach Neal's obligations under this Agreement and may subject Coach Neal to termination by the University for cause under paragraph 5 of this Agreement.¹⁵

¹⁴ Coaching Contract between University of New Mexico and Steve Alford, ¶ 12, (June 27, 2007

¹⁵ University of New Mexico, *Addendum to Employment Agreement of Head Coach Craig Neal*, ¶ 5 (May 1 2013).

The Alford case is deserving of a settlement between the parties. If not, it is certainly headed for binding arbitration. The facts, circumstances, and documents reflecting the parties' expression of their agreements makes for an excellent law school exam. It will be interesting, if made public, to review the results of an arbitrator's analysis of this factual situation.

I did an analysis of what are commonly referred to as MOUs, letters of intent, term sheets, or discussion sheets in an article in *For the Record*, Vol. 21, No. 1, January-March 2010, entitled "Leaping Without Looking: MOUs Create Risks When Universities Do Not Know Their Legal Significance."¹⁶ In that article I stated that MOUs are conventionally used in the quick-hire, quick-fire intercollegiate athletics coaching environment.

Hirings are often officially announced before a long-term employment contract can be fully negotiated. "In such situations, MOUs, sometimes referred to as Letters of Intent, Term Sheets or Discussions Sheets, are often used to state the terms of the contract under which the coach will work."¹⁷ Subject to the coach and university executing a formal contract, they generally state the broad terms of a relationship to be entered into between the coach and university.

In most instances, an MOU is also subject to a condition subsequent, i.e. the drafting and execution of a formalized contract that contains the complete agreement of the parties. On the other hand, if an MOU constitutes a formal contract, it may be deemed to be binding on the parties. However, if the

¹⁶ Martin Greenberg & Kaitlyn Wild, *Leaping Without Looking: MOUs Create Risks When Universities Do Not Know their Legal Significance*, 21 *For the Record* 1 (National Sports Law Institute, Milwaukee, W.I.), Jan.-Mar. 2010.

¹⁷ *Id.*

document requires that essential elements are to be decided or determined at some time in the future, most courts will construe the MOU as an agreement to agree, often viewed as nonbinding and non-enforceable. In most cases, courts have refused to enforce individual provisions of agreements to agree as free-standing contractual promises when other substantial and necessary terms of the agreement have been left open for future negotiation.¹⁸

Normally for an MOU to be enforceable and valid, a contract to enter into a future covenant must specify all material and essential terms and leave nothing to be agreed upon as a result of future negotiations. If the agreement does not include all material terms, it is viewed as an agreement to negotiate in good faith.

If this matter would have gone to arbitration short of settlement, the arbitrator would probably be asking several of the following questions:

1. Whether the Term Sheet was intended and is a binding legal contract
2. Whether the Term Sheet contains all of the basic terms needed for an employment agreement and can and was intended to serve itself as an employment contract for Alford, to commence April 1, 2013.
3. The Term Sheet does indicate that, "We have agreed on the enumerated principal terms, which will be incorporated into a definitive, written agreement; however, those terms are contingent upon our reaching agreement on a final written employment agreement." Does this language indicate that the Term Sheet was subject to a condition subsequent, and that is, reaching a final written employment agreement?

¹⁸ *Id.*

4. While Paragraph 4 of the Term Sheet indicates that the remaining terms of the existing contract remain intact, there is an indication that in a final, written employment agreement, additional changes may be needed relative to outdated language or contractual provisions that are no longer accurate. Does this language make the Term Sheet an agreement to agree?

5. Did Alford fail in his good faith obligation to take the steps necessary to execute a final, written employment agreement? Rather than undertaking that obligation, Alford entered into a contract short of the April 1, 2013 date with another institution. While the Term Sheet gives no time limit in which the final employment contract is to be executed, the term of the new contract commenced April 1, 2013.

6. Was the Term Sheet subject to a condition subsequent, i.e. the parties reaching an agreement on a final, written employment agreement, for which none was ever reached because of Alford's early termination.

7. While the Term Sheet was subject to the execution of a written employment agreement, the Term Sheet did not contain language indicating that it was not a contract, such as:

1. The memorandum is only an expression of the party's intent concerning some of the material elements of the proposed University/Coach contract.
2. It is understood and agreed that all material terms of the proposed contract are not yet agreed upon between the parties and mutually satisfactory language therefore must still be agreed upon.
3. It is further understood that no contractual liabilities and obligations whatsoever are intended to be created by the parties.
4. The memorandum is not intended to constitute a legally binding contract to consummate the transaction.
5. No party may claim any legal rights against the other based on the memorandum and no party may take any action in reliance thereon.

6. Each party is required in good faith to complete a contract reflecting the terms of the memorandum within _____ days, time being deemed of the essence.

8. Did Alford breach his obligation by not giving the required 30-day written notice, although written notice of termination in coaches' employment agreements are not often used?

This case makes for an interesting legal analysis by an arbitrator and would have shed some further light on the use of memorandums of understanding. My guess, the case will be resolved economically, and so it was.

On May 17, 2013, it was announced that NMU had agreed to accept \$300,000 of their original \$1 million demand. NMU announced that the settlement resulted in a net benefit of approximately \$625,000 to NMU. The \$325,000 in compensation that was not paid constituted bonuses, incentives and deferred compensation.

In prepared statements, UNM Board of Regents President Jack Fortner and University President Robert Frank expressed pleasure with the deal:

On behalf of the UNM Board of Regents, we are pleased that President Frank and our Office of University Counsel evaluated the costs and benefits to UNM under Coach Alford's previous contract and the April 1 contract," Fortner said. "This resulted in an agreement that is fair to all parties and avoids costly, lengthy arbitration. Through this process, UNM has acted in good faith and never lost sight of its responsibility to the UNM community."

Said Frank: "We worked diligently to find the best possible outcome under the circumstances. The result is within \$50,000 of the net amount UNM would have received had Coach Alford paid the \$1 million buyout. The outcome is favorable for UNM and allows us to move forward with the assurance that we have been good stewards of university resources.

Most importantly, we have the great fortune of having Coach Neal to lead the UNM Men's Basketball team to its next outstanding season."¹⁹

Kimberly Bell, UNM associate counsel said there was "'comfort' in reaching an agreement before pushing the matter to arbitration -- when the final outcome would have been out of the university's hands. She said there is comfort in resolving what was a high-profile dispute for Lobo basketball, enabling the program to move on without further distraction."²⁰

"In the end, the best thing to do was to solve the dispute without going to court, as it allows both sides to move forward. With an agreement in principle in place, Alford can continue to build his program at UCLA and New Mexico can proceed on with the Craig Neal era."²¹

Thanks to Ryan Session, a 3rd year Marquette University Law student for editing and footnoting this article.

¹⁹ Geoff Gramer, *UNM, Steve Alford Come to Buyout Agreement*, ABQJOURNAL.COM (May 17, 2013), <http://www.abqjournal.com/sports/39832/college/breaking-unm-steve-alford-come-to-buyout-agreement.html>.

²⁰ *Id.*

²¹ Rapielle Johnson, *New Mexico, Former Coach Steve Alford Settle Buyout Dispute*, NBCSPORTS.COM (May 17, 2013), <http://collegebasketballtalk.nbcsports.com/2013/05/17/new-mexico-former-coach-steve-alford-settle-buyout-dispute/>.