

CONSENT TO INTERVIEW -- BEST PRACTICES

Bret Bielema (Bielema) was hired as Barry Alvarez's (Alvarez) University of Wisconsin (UW) defensive coordinator before the 2004 season.¹ He served Alvarez in that position for two seasons.² Prior to the 2005 season, Alvarez announced that he would be retiring as head coach and that Bielema would take over the UW program in 2006.³ The Board of Regents of the University of Wisconsin System and Bielema entered into an Employment Agreement originally effective February 1, 2006.⁴ The subject Employment Agreement had been amended several times and extended Bielema's contract term to and including January 1, 2017.⁵

Bielema posted a 12-1 mark in his first season at UW, and the Badgers closed the season with a 17-14 victory over the University of Arkansas (Arkansas) in the Capital One Bowl.⁶ Bielema compiled an overall record of 68-24 in seven seasons and took the Badgers to the Rose Bowl three times.⁷ Bielema gained a third consecutive Rose Bowl berth with a stunning 70-31 victory over Nebraska on December 1, 2012 in Indianapolis.⁸ After the Nebraska victory, both Alvarez and Bielema attended the 55th Annual National Football Foundation Awards dinner in New York City where Alvarez was being inducted into the College Football Hall of Fame.⁹

Shortly after the Nebraska victory, Bielema announced to Alvarez that he was leaving for

¹ Jeff Potrykus, *Bielema Surprises Badgers, Leaves for Arkansas*, MILWAUKEE JOURNAL SENTINEL (Dec. 4, 2012), <http://www.jsonline.com/sports/badgers/bielema-leaving-uw-for-arkansas-ac7tik9-182124731.html>.

² *Id.*

³ *Id.*

⁴ Employment Agreement by & between University of Wisconsin-Madison & Bret Bielema (Feb. 1, 2006).

⁵ Fourth Amendment to Employment Agreement by & between University of Wisconsin-Madison & Bret Bielema (Feb. 1, 2010).

⁶ Potrykus, *supra* note 1.

⁷ Jesse Temple, *Alvarez on Bielema: 'We're Too Close'*, FOX SPORTS WISCONSIN (Dec. 22, 2012), http://www.foxsportswisconsin.com/12/22/12/Alvarez-on-Bielema-Were-too-close/landing_badgers.html?blockID=839055.

⁸ Potrykus, *supra* note 1.

⁹ Andy Baggot, *Badgers Football: Barry Alvarez Spurned, But Not Shaken, by Bret Bielema's Departure*, MADISON.COM (Dec. 07, 2012), http://host.madison.com/sports/college/football/badgers-football-barry-alvarez-spurned-but-not-shaken-by-bret/article_4c6da942-3ffa-11e2-8ae4-0019bb2963f4.html.

Arkansas. Alvarez was blindsided and admitted being "totally caught by surprise," when Bielema came to his New York City hotel room on December 3, 2012 and told him about an offer to move to the SEC and take over the struggling Arkansas Razorbacks.¹⁰ Alvarez said, "You're not telling me you're going to visit with Arkansas people. You've already taken the job." Alvarez recounted, "the answer was yes."¹¹

Alvarez noted matter-of-factly that "no one contacted me for permission" -- a breach of gentleman's protocol by Arkansas athletic director Jeff Long (Long) -- but insisted that he didn't feel betrayed by a lack of a heads-up from Bielema."¹² Alvarez stated, "I know the business."¹³

Bielema's final meeting with his team occurred on December 4, 2012 where he told his players that he was leaving for a better opportunity to win it all.¹⁴

When Bielema was introduced as the new head coach at the Arkansas in a press conference on December 5, 2012, he specifically insinuated that UW did not provide competitive salaries for its assistant coaches and that any national championship is more attainable with the Razorbacks than with the Badgers.¹⁵ He also announced that Alvarez would be coaching the Badgers in the Rose Bowl, effectively stealing Alvarez's thunder since it was to be announced to Wisconsin fans the next morning.¹⁶ In a gentlemanly fashion, Alvarez wished him well. "You know what, life goes on," Alvarez said. "I have no animosity towards Bret. Bret did a good job for us. Some things I disagree with in how they were handled, but everybody handles things their own way."¹⁷

Bielema indicated that he was very humbled and honored to become the head coach of

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Baggot, *supra* note 9.

¹⁶ *Id.*

¹⁷ Temple, *supra* note 7.

Arkansas. "During my conversations with Long, he described the characteristics for the perfect fit to lead this program. It was evident we shared the same mission, principles and goals. The infrastructure in place at Arkansas shows the commitment from the administration to accomplish our goals together and am I excited to begin to lead this group of student-athletes."¹⁸

Bielema agreed to a six-year contract with Arkansas worth upward of 3.2 million dollars per year. He replaced interim coach John L. Smith who went 4-8 with the Razorbacks last season.¹⁹ Smith replaced Bobby Petrino who was fired in April 2012 for misconduct.²⁰

According to Forbes magazine, the Arkansas football program was the eighth most profitable program in the nation with a value of more than \$89 million.²¹

An 80,000-square football operations center is under construction and scheduled to be completed in 2013.²² There are plans to expand Razorback Stadium, which seats 72,000, which could cost as much as \$100 million.²³ And finally, athletic director Long signed a contract extension through 2017.²⁴

While there was a massive departure of assistant coaches after Bielema's announcement, most of the assistant coaches remained at UW through the Rose Bowl game.²⁵

This is the same Bielema that told Sporting News that "we at the Big Ten don't want to be like the SEC in any way, shape or form."²⁶

Alvarez, who had not coached for seven years, turned 66 two days before the Badgers (8-

¹⁸ Potrykus, *supra* note 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Potrykus, *supra* note 1.

²⁵ Temple, *supra* note 7.

²⁶ Paul Meyerberg, *Coaching Job Evaluation: Wisconsin*, USA TODAY (Dec. 4, 2012), <http://www.usatoday.com/story/gameon/2012/12/04/job-evaluation-wisconsin-bret-bielema-paul-chryst/1746237/>.

5) faced PAC 12 conference titlist Stanford (11-2) in Pasadena, California.²⁷ This will be a "one and done" exercise for Alvarez.²⁸

In the January - March 2009 *For the Record*, I wrote an article entitled "Interview -- You May be Fired" which discussed the firing of Jeff Jagodzinski by Boston College for interviewing without consent with the New York Jets of the NFL. In that article I concluded that college coach's contract handle the issue of whether or not a coach can have discussions with other universities or teams during the term of the contract in several different ways, including:

1. Silence. The contract is silent and does not contain a non-compete, notice, or university prior approval provision relative to discussions or negotiations with other universities during the term of the contract.
2. Prior Approval Clause. The contract contains a prior approval clause; that is, the coach must first obtain the consent or approval of the athletic director before having discussions with other universities.
3. Prior Approval Clause Subject to Time Limitations. The contract contains a prior approval clause, i.e. the coach must first obtain the consent or approval of the athletic director, but also limits the time in which discussions or negotiations may take place.
4. Notice. The contract requires the coach to notify the athletic director of his desire to engage in discussions or negotiations with another institution during the contract term.
5. Notice – Athletic director Contact. The contract requires the coach to not only provide notice to the athletic director, but also to direct the potential employer to contact the athletic director prior to any further discussions.
6. Restrictive Covenant. If the contract contains a restrictive covenant, that may prohibit discussions or negotiation with other universities prior to the end of the contract term.
7. Termination. The contract contains an obligation to notify the University of another coaching opportunity and a covenant that failure to notify the athletic director constitutes an event for termination for cause.²⁹

Bielema's original contract and the amendments thereto did not contain a prohibition against interviewing with other universities during the term of his contract. But evidently UW felt it was important enough to include such clause in any subsequent contract.

In UW's new contract with Gary Anderson dated as of January 2, 2013, paragraph VI is

²⁷ Baggot, *supra* note 9.

²⁸ *Id.*

²⁹ Martin J. Greenberg, *Interview – You May Be Fired*, MARQUETTE UNIVERSITY LAW SCHOOL (July 2009), <https://law.marquette.edu/assets/sports-law/pdf/for-the-record/greenberg-v20no1.pdf>.

entitled "Notification Required Prior to Discussion With Other Employers," and states as follows:

The parties agree that should another employment opportunity be presented to Coach or should Coach be interested in other employment during the term of this Agreement, Coach shall notify the Director of Athletics or designee of such opportunity or interest before any discussions can be held by Coach with potential employer. This provision is essential to this Employment Agreement and violation thereof may be considered just cause for termination pursuant to Article V, Section A.1.³⁰

It is apparent that these types of clauses have become standard fare in college coaches' contracts and are contained in some of the most recent contract signings:

Mark Thomas Stoops -- University of Kentucky (Nov. 26, 2012): Employment Opportunities. During the term of this Agreement, Coach shall notify the Director of Athletics of any offers of employment, employment opportunities or requests for meetings or discussions with respect to possible employment opportunities before engaging in substantive discussions regarding such employment or employment opportunities.³¹

Mike Macintyre -- University of Colorado (Jan. 7, 2013): Notification of Intent to Seek or Accept Another Coaching Position. The parties agree that should another coaching opportunity be presented to Macintyre or should Macintyre elect to pursue another coaching position requiring the performance of duties prior to the expiration of the term of this Agreement, Macintyre must notify the Athletic director before any discussions can be held between Macintyre and any prospective employer. Macintyre further agrees, and hereby specifically promises, not to negotiate for or accept employment, under any circumstances, as a coach requiring performance of duties prior to the expiration of the term of this Agreement without first giving seven (7) days written notice to the Athletic director.³²

Dave Doeren -- North Carolina State University (MOU offer dated December 1, 2012): "A provision that you agree not to seek or apply for other positions without prior notice to the Athletic director."³³

Robert P. "Bobby" Petrino -- Western Kentucky University (Dec. 10, 2012): University Approval Required Prior to Negotiation with Other Schools or Employers.

³⁰ Employment Agreement by & between University of Wisconsin-Madison & Gary L. Andersen, ¶ 6 (Jan. 2, 2013).

³¹ Employment Agreement by & between University of Kentucky & Mark Thomas Stoops, ¶ 4 (Nov. 26, 2012).

³² Employment Agreement by & between University of Colorado & Mike Macintyre, ¶ 13 (d) (Jan. 7, 2013).

³³ Memorandum of Understanding by & between North Carolina State University & Dave Doeren (Dec. 1, 2012).

The parties agree that should another coaching or sports related employment opportunity be presented to Coach or should Coach be interested in another coaching position during the term of his Employment Agreement, Coach must notify the University's Athletics Director of such opportunity or interest, and obtain permission from the Athletics Director before any discussions can be held by Coach with anticipated coaching position principals, which permission shall not be unreasonably withheld.³⁴

Bret Bielema -- University of Arkansas (Dec. 4, 2012): The employment agreement shall include a covenant not to compete that shall cover all SEC institutions. You covenant and agree not to accept employment in any coaching capacity with any other SEC institution, including any Eastern or Western Division institution, prior to the expiration date of the Term and any mutually agreed upon extensions of the Term. This non-compete provision shall also apply to any new institutions in the event the SEC expands its membership during the course of the Term of the employment agreement. In the event the University terminates your employment for its convenience, the covenant not to compete shall not apply.³⁵

Tony Benford -- University of North Texas (April 21, 2012): 4.03. Restrictive Covenant. The parties agree that Coach Benford has special, exceptional, and unique knowledge, skill, and ability as a coach of intercollegiate basketball which, in addition to the continuing acquisition of coaching experience at UNT, as well as UNT's special need for continuity in the Team and Athletics Program, renders Coach Benford's services unique. Coach Benford recognizes that the loss of his services to UNT, with UNT's approval and release, prior to the expiration of the Term of this Agreement or any renewal thereof, would cause an inherent loss to UNT which cannot be estimated with certainty or fairly or adequately compensated by money damages. Coach Benford therefore must notify UNT's Athletic director of any sport-related employment opportunity presented to Coach Benford by a third party and must be given prior written permission before any discussion can be held by Coach Benford with representatives of such third party, which consent shall not unreasonably be withheld. Coach Benford further agrees and hereby specifically promises not to actively seek, negotiate, or accept employment, under any circumstances, as a coach at any institution of higher education which is a member of the NCAA or for any team participating in any professional league or conference in the United States or elsewhere requiring performance of duties prior to the expiration of this Agreement or any extension thereof, without first obtaining a release of this Agreement or a negotiated settlement thereof in writing accepted by Coach Benford and Athletic director and President. This restrictive covenant shall not apply if Coach Benford is re-assigned to duties at UNT other than Head Coach. This restrictive covenant shall not apply to nor be construed to interfere with Coach Benford's duty to mitigate upon termination of this Agreement by UNT without cause.³⁶

³⁴ Employment Agreement by & between Western Kentucky University & Robert P. "Bobby" Petrino, § 5.07 (Dec. 10, 2012).

³⁵ Employment Offer Letter by & between University of Arkansas & Bret Bielema, (Dec. 4, 2012).

³⁶ Employment Agreement by & between University of North Texas & Tony Benford, § 4.03 (Apr. 21, 2012).

Terry Bowden -- The University of Akron (Aug. 7, 2012): Interference with Coaches, Athletic Staff or Athletes. In the event of termination, the Coach agrees that he will not interfere with University's coaches, athletic staff or student-athletes or otherwise obstruct University's ability to transact business.

Notification Requirement. The parties agree that should another coaching opportunity be presented to the Coach, his representatives or agents, or should the Coach be interested in another coaching position during the term of this Contract, the Coach must notify the Director of such opportunity or interest and permission must be given to the Coach by the Director before any discussions can be held by the Coach with the principals, agents or representatives of, or consultants to, the institution or entity with the anticipated coaching position, which permission shall not be unreasonably withheld.³⁷

Tim Miles -- University of Nebraska-Lincoln (May 4, 2012): Section 10. Discussion of Other Prospective Employment; Resignation.

(a) Unless notice of termination of employment has been given to Coach in accordance with Sections 13 or 14 of this Contract, Coach shall not engage in discussions or negotiate, directly or indirectly, with an intent to seek or explore prospective employment by any other employer, without first notifying the Director of Intercollegiate Athletics of such discussions or negotiations.³⁸

Daniel Hurley -- University of Rhode Island (March 29, 2012): The Coach agrees not to personally or through any agent, actively seek, negotiate for, or accept other full-time or part-time employment as an NCAA men's Division I basketball coach so long as twelve months remain on the terms of this agreement without first providing written notice to the Director of Athletics.³⁹

Phillip John Fleck -- Western Michigan University (Dec. 31, 2012): Notification of Other Opportunities. If another coaching opportunity is presented to Coach, or should Coach be interested in another coaching or other position during the term of this Agreement, Coach must be personally and promptly notify Athletic director of such opportunity or interest. Permission to pursue such opportunity shall not be unreasonably withheld.⁴⁰

Michael Leach -- Washington State University (Oct. 17, 2012): The employee agrees and specifically promises that he will neither directly nor indirectly through an agent accept employment, under any circumstances, as a coach or in any other capacity related to intercollegiate athletics with any member institution of the NCAA or with any Football team participating in any professional league or conference in the United States or elsewhere requiring performance of duties prior to the expiration date of the term of

³⁷ Employment Agreement by & between University of Akron & Terry Bowden, §§ V(L); VII (Aug. 7, 2012).

³⁸ Contract of Employment by & between University of Nebraska-Lincoln & Tim Miles, § 10(a) (May 4, 2012).

³⁹ Employment Agreement by & between University of Rhode Island & Daniel Hurley, § 7.1 (Mar. 29, 2012).

⁴⁰ Employment Agreement by & between Western Michigan University & Philip John Fleck, § 12 (Dec. 31, 2012).

this Agreement or any extension thereof, without first notifying the Athletic director.⁴¹

John Cooper -- Miami University (May 31, 2012): Coach agrees that he shall not, under any circumstances, discuss or negotiate directly or indirectly his prospective employment with any other institution of higher learning or any professional athletic team without providing the Director with written notice at least twenty-four hours prior to engaging in any such discussions or negotiations. Coach shall not, under any circumstances, accept employment as a coach at any other institution of higher learning or with any professional athletic team, requiring performance of duties prior to the expiration of this Agreement, without the prior written approval of the Director.⁴²

Paul Petrino -- University of Idaho (12/4/2012): Other Coaching Opportunities. Coach shall not, under any circumstances, interview for, negotiate for, or accept employment as a coach at any other institution of higher education or with any professional sports team, requiring performance of duties prior to the expiration of this Agreement, without the prior approval of the Director. Such approval shall not unreasonably be withheld.⁴³

Tony Levine - University of Houston (12/22/11): Should another employment opportunity be presented to you or should you be interested in another coaching position during the term of your contract, you must notify the Director of Athletics of such opportunity or interest, and obtain permission from the Director of Athletics before you hold any discussions related to such other position.⁴⁴

Once again, a notification or prior consent to interview clause does not prevent a coach from jumping; rather the clause puts the athletic director on prior notice of a coach seeking employment elsewhere, which essentially prevents the athletic director from being blindsided as what happened in the Bielema situation.

In light of Jagodzinski's termination by Boston College, as well as the Bielema incident, what follows are best practices with respect to prohibiting or limiting interviews during the term of a coach's contract:

1. Notification in writing by the coach to the athletic director of another job

⁴¹ Employment Agreement by & between Washington State University & Michael C. Leach, § 5 (Oct. 17, 2012).

⁴² Amended Employment Agreement by & between Miami University & John Cooper, § 4.3 (May 31, 2012).

⁴³ Employment Agreement by & between University of Idaho & Paul Petrino, § 4.6 (Dec. 4, 2012).

⁴⁴ Memorandum of Understanding by & between University of Houston & Anthony M. Levine, at 2 (Dec. 22, 2011).

opportunity or desire to obtain an interview with another collegiate institution or coaching opportunity before the end of the contract term.

2. Obtaining express written permission from the athletic director prior to any discussions by coach, his agents or representatives pertaining to coaching opportunities of any NCAA member institution or any other coaching or non-coaching position that may result in termination of the coach's employment.
3. Such expressed permission shall not be unreasonably withheld in that in most college coaches' contracts today, if the coach terminates prior to the end term of the contract, the coach is responsible for the payment of some form of liquidated damages.
4. Such expressed written permission shall only be required during a specified period of time after the regular season or, in the alternative, after the conclusion of a tournament or Bowl Game if the team is invited to participate.
5. If the coach is contacted by a representative of a potential employer other than the university regarding job opportunities, the coach will require that representative or potential employer to contact the athletic director prior to any further discussions.
6. If it is the University's desire that the coach have no opportunity to interview during the contract term, a restrictive covenant clause needs to be included where the coach acknowledges his services are unique; the need in the University athletic program for continuity and competitiveness, and that violation of the covenant without employer's prior written consent would damage the University to an extent that cannot be estimated with certainty or fairly compensated by

money damages and is the basis for injunctive relief.

7. If failure to notify or seek express permission to interview is a basis for termination for cause, and the coach violates such covenant, the University is relieved of any further responsibility under the contract.
8. If the University terminates coach for failure to follow the afore-referenced procedures and coach is terminated for cause and then takes a job for which he interviewed, coach should still be liable for liquidated damages to the University for cutting short his contract term.
9. Finally, in the event of an interview and a premature termination, coach agrees that he will not interfere with University assistant coaches, athletic staff or student athletes who are on the team or who may have been recruited for the team, or otherwise obstructing the University's ability to transact business.

CONCLUSION:

Consent to interview clauses serve a useful contractual purpose. If interviewing is permitted, a carefully drafted procedure puts everyone on notice, without surprise, and helps to avoid the confusion of leaving for a coaching position before a tournament or Bowl Game and alleviates the damage done not only to the University but to its student-athletes.

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