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## The Use of Clawback Clauses in College Coaches' Contracts

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**Definition:** A clawback clause is a contractual covenant in an employment agreement that requires an employee who has received compensation or something of value to return that compensation upon the occurrence of a specifically stated condition subsequent.

### USES OF CLAWBACK PROVISIONS

Originally, clawback clauses were used in executive employee agreements in order to recapture compensation, stock options, or bonuses if the employee breached a non-compete, non-solicitation, or confidentiality covenant.<sup>1</sup> Clawback clauses have also been used in other ways, including:

1. Within state subsidy programs when the enabling law sets out minimum recapture requirements when a recipient of a state subsidy fails to meet any investment, wage, job creation, or retention commitment.<sup>2</sup>
2. Within bankruptcy law, which permits the trustee in bankruptcy to void or undo certain types of transactions wherein the trustee can clawback or regain assets, such as when there is a fraudulent or preferential transfer.<sup>3</sup>
3. Within the Sarbanes-Oxley Act of 2002, the first federal statute to require that certain bonuses previously paid to a company's CEO or CFO could be forfeited and repaid to the company.<sup>4</sup> The repayment obligation is triggered upon a restatement of the company's financial statements due to material non-compliance or misconduct.<sup>5</sup>
4. The Emergency Economic Stabilization Act of 2008, and the American Recovery and Reinvestment Act of 2009, require repayment of bonuses due to inaccuracies in financial statements applied to a broader group of executives.<sup>6</sup>
5. Finally, on July 10, 2009, the Department of the Treasury issued an interim final rule titled TARP Standards for Compensation and Corporate Governance, which implements the bail-out program's executive compensation provisions.<sup>7</sup> The rule provides that any bonus payment with respect to certain executives of bail-out recipients must be subject to a recovery or clawback provision that is triggered in certain circumstances relating to material inaccurate financial statements or performance metric criteria.<sup>8</sup>

1. Alexis Leondis & Margaret Collins, *Spending Bonus Cash Becomes Risky as Clawback Rules Increase*, BLOOMBERG BUSINESSWEEK, Jan. 8, 2010, <http://www.businessweek.com/news/2010-01-08/spending-bonus-cash-becomes-risky-as-clawback-rules-increase.html>.

2. *See for example*, 20 ILL. COMP. STAT. 715/25 (2010).

3. *See* BankruptcyLawFirms.com, *What is the Bankruptcy Clawback Provision?*, <http://www.bankruptcylawfirms.com/resources/bankruptcy/filing-for-bankruptcy/clawback-transfers.htm> (last visited May 22, 2010).

4. Leondis & Collins, *supra* note 1.

5. Gretchen Harders & Susan Gross Sholinsky, *Bonus Compensation and Clawbacks: What Employers need to Know*, EPSTEIN BECKER & GREEN, P.C., CLIENT ALERT, June 10, 2009.

6. *Id.*

7. *Id.*

8. *Id.*

Clawback clauses encourage executives to minimize behavior that would put a company at risk. Company executives need to understand the importance of ethical misconduct and financial misstatements. Adopting clawback clauses sends a message to shareholders and investors that the company is committed to sound executive compensation packages and effective corporate governance.<sup>9</sup>

In 2008, Equilar reported that more than 64% of the Fortune 100 companies and the largest U.S. firms based on revenues had clawback clauses in place in 2008, compared with approximately 17.6% in 2006,<sup>10</sup> and rising to 73% in 2009.<sup>11</sup> According to Equilar, the rise in clawback clauses is a relatively new phenomenon: 91.7% of the Fortune 100 companies that have clawback clauses adopted them within the last three years; 60% of the Fortune 100 companies have compensation recovery clauses in the event of financial restatement, while 72.4% of the companies allow for recovery in the event of ethical misconduct.<sup>12</sup>

### CLAWBACK CLAUSES IN COLLEGE COACHING CONTRACTS

The possibility of using clawback clauses in college coaches' contracts was raised in an article by George Dohrmann<sup>13</sup> who wrote:

It is a common storyline in the annals of NCAA scandals.

A program is accused of violating the rules and the head coach is clearly culpable. Perhaps he gave money to a player or violated recruiting rules or was aware of academic fraud and did nothing to stop it. The coach either resigns or is fired, exiting in the heat of the scandal.

Months later, when the NCAA and/or the school decide on sanctions, the brunt of the punishment falls on the team and its new coach -- a ban from postseason play, scholarship reductions, recruiting restrictions -- whatever the case, they hinder players who had nothing to do with the wrongdoing and a coach who wasn't even on campus when the violations occurred.

It is a flaw in the system, one that frustrates athletes and fans.

But there is a relatively simple way to fix it.

In the wake of the economic collapse, "clawback" provisions have become more common in the contracts of Wall Street executives. These clauses enable companies to recover compensations such as bonuses for a variety of reasons, including the uncovering of a scandal or if certain performance goals are not reached. A recent editorial in The New York Times called for clear clawback provisions for board members of major banks as part of a financial reform package.<sup>14</sup>

9. Andrew Tuch, "Clawbacks" of Executive Compensation, <http://blogs.law.harvard.edu/corpgov/2008/07/30/clawbacks-of-executive-compensation/> (July 30, 2008, 12:04 EST).

10. Leondis & Collins, *supra* note 1.

11. *Id.*

12. Mary Pat McCarthy, *Clawback Provisions on the Rise*, DIRECTORSHIP BOARDROOM INTELLIGENCE, Dec. 1, 2008, <http://www.directorship.com/clawback-provisions-on-the-rise/>.

13. George Dohrmann, *Clawback Clauses in Contracts could Deter Coaches from Breaking Rules*, SPORTS ILLUSTRATED, Jan 20, 2010.

14. *Id.*

## CLAWBACK CLAUSE SURVEY

In February and March of 2010, a survey was sent by the author to universities within the Atlantic Coast Conference (ACC), Big Ten, Big 12, Big East, Pac-10 and Southeastern Conference (SEC). The survey asked each university's athletic director to answer the following question: Does the university currently use clawback clauses in its current coaches' contracts? Thirteen universities responded, including Duke, Florida State, Georgia Tech, Penn State, the University of Wisconsin-Madison, Baylor, the University of Kansas, Oklahoma State, Texas Tech, Marquette, the University of South Florida, Villanova and West Virginia. Each of the responding universities stated it does not use clawback clauses within its coaches' contracts.

Negotiating compensation packages, for cause termination, and buyout provisions, to name a few, are difficult legal challenges already; adding clawback clauses would further complicate the process.

It is not surprising that none of the responding universities included clawback clauses within their coaches' contracts. Negotiating compensation packages, for cause termination clauses, and buyout provisions, to name a few, are very difficult legal challenges already; adding clawback clauses would further complicate the process. In addition, adding clawback provisions might open the door to the university having to pay more money, especially if coaches demand bonuses in the event that they do not commit major NCAA violations.<sup>15</sup> Finally, drafting a mutually acceptable clawback clause would be very difficult as Xavier University Athletic Director Mike Bobinski observed, "[t]he legalese in drafting such a provision would be difficult."<sup>16</sup>

Recent reports demonstrated that University of Memphis football coach Larry Porter's contract contains a clause stipulating that bonuses for post-season victories will be taken back if the games are later vacated by the NCAA.<sup>17</sup> The clause states:

**Return of Bonuses:**

If there is a final NCAA decision that major violations have occurred in the Program which require the vacation of records and/or return of monies received by the University and/or other penalties, any and all bonuses pursuant to this Paragraph 6 and all of its subparagraphs shall be forfeited and if already paid returned to the University.<sup>18</sup>

According to Sheri Lipman, University of Memphis attorney, this clawback provision, which is used in both coaching and administrative contracts, is being revised and further refined.<sup>19</sup>

It will be interesting to see whether the university attempts to retrieve \$360,000 in performance bonuses that former coach John Calipari earned during the 2007-2008 basketball season, even though the school was forced to vacate all of its wins and money made from the NCAA tournament that year due to violations of NCAA rules in connection with former player Derrick Rose.<sup>20</sup>

15. *Id.* at ¶ 11.

16. *Id.* at ¶ 10.

17. Dan Wolken, *University of Memphis Fine-Tuning Coaching Contracts*, MEMPHIS COMMERCIAL APPEAL, Apr. 9, 2010.

18. E-mail from Attorney Sheri Lipman, University Counsel, University of Memphis, to Martin J. Greenberg, Law Offices of Martin J. Greenberg, LLC (Apr. 21, 2010, 16:29 CST) (on file with author).

19. *Id.*

20. Wolken, *supra* note 17.

## NCAA VIOLATIONS

The principles, enforcement policies, procedures and penalties for NCAA rules' violations are defined in Bylaw Article 19, Enforcement, which states that “[i]t shall be the mission of the NCAA Enforcement Program to eliminate violations of NCAA Rules and impose appropriate penalties should violations occur.”<sup>21</sup> Violations of NCAA rules are defined as secondary, i.e. "a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit,"<sup>22</sup> or major, defined as “[a]ll violations other than secondary violations, including those that provide an extensive recruiting or competitive advantage.”<sup>23</sup> Multiple secondary violations by a member institution may collectively be considered as a major violation.<sup>24</sup>

While the term “major” violation is broadly defined, it includes the following:

- Providing extra benefits to student athletes or recruits;
- Falsification of recruiting records;
- Unethical conduct including academic fraud;
- Impermissible recruiting inducements;
- Lack of institutional control and failure to monitor its athletics programs;
- Provision of false and misleading information;
- Hiring irregularities;
- Fraudulent entrance examinations;
- Impermissible contact - observation of pre-season activities;
- Impermissible try-outs;
- Impermissible telephone contacts.<sup>25</sup>

Beyond the conduct that is forbidden, the NCAA also mandates specific penalties. For example, penalties for secondary violations may include:

- A two-year probationary period;
- A reduction of the number of expense-paid recruiting visits;
- A requirement that all coaching staff members be prohibited from engaging in any off-campus recruiting activities for up to one recruiting year;
- A requirement that institutional staff members determined knowingly to have engaged in or condoned a major violation be subject to termination, suspension or reassignment;
- A reduction in the number of financial aid awards;
- Sanctions precluding postseason competition in the sport;
- Institutional recertification.<sup>26</sup>

Additional disciplinary measures that may be imposed in response to major violations include:

- Public reprimand and censure;
- Probation for a least one year;

21. NCAA Division I Manual 2009-2010, § 19.01.

22. *Id.* § 19.02.2.1.

23. *Id.* § 19.02.2.2.

24. *Id.* § 19.02.2.1.

25. *Id.* § 19.02.2.2.

26. *Id.* § 19.5.1.

- Individual or team records and performance vacated or stricken;
- A financial penalty;
- Ineligibility for any television programs involving coverage of the institution's intercollegiate athletics in which the violations occurred;
- Ineligibility for invitational and postseason meets and tournaments and NCAA championship events;
- Show cause orders.<sup>27</sup>

The seriousness of major violations under NCAA rules is best portrayed in the recent case involving former University of Southern California (USC) basketball coach Tim Floyd and student athlete O.J. Mayo, now a member of the Memphis Grizzlies.<sup>28</sup> USC implemented self-imposed sanctions on its men's basketball program for NCAA rules violations related to O.J. Mayo.<sup>29</sup> Sanctions were imposed "because of Mayo's involvement with Rodney Guillory, who under NCAA Rules became a USC booster because of his role in Mayo's recruitment[.]"<sup>30</sup> It was alleged that Guillory supplied Mayo with money and gifts on behalf of a sports agent and further alleged that former USC Coach Tim Floyd provided the money to Guillory.<sup>31</sup> Floyd resigned as the head coach on June 9, 2009.<sup>32</sup> After investigating the matter and finding several violations, the university imposed the following sanctions:

a one-year ban on postseason competition following the 2009-2010 regular season, including the Pac-10 Conference [B]asketball [T]ournament, a reduction of one scholarship for the 2009-2010 and 2010-2011 academic years, a reduction by one of the number of coaches permitted to engage in off-campus recruiting activities during the summer of 2010, and a reduction in the total number of recruiting days by [twenty days] (from 130 to 110) for the 2010-2011 academic year. In addition, because of Mayo's involvement with Rodney Guillory, whom under NCAA rules became a USC booster due to his role in Mayo's recruitment, USC will vacate all wins during the 2007-2008 regular season (twenty-one), which was when [the ineligible] Mayo competed. USC will also return to the NCAA the money [\$206,200.00] it received through the Pac-10 Conference for its participation in the 2008 NCAA Division I Men's Basketball Championship Tournament.<sup>33</sup>

The self-imposed penalties, which were accepted by the NCAA, illustrate not only the economic but public exposure a university may face when a major violation occurs.

Although the NCAA accepted the self-imposed penalties related to the basketball team, it penalized the football team for "a lack of institutional control," including extra benefits given to players and unethical

27. *Id.* § 19.5.2.

28. University of Southern California News, *USC Announces Sanctions on Men's Basketball Team*, Jan. 3, 2010, [http://uscnews.usc.edu/university/usc\\_announces\\_self-imposed\\_sanctions\\_on\\_mens\\_basketball\\_team.html](http://uscnews.usc.edu/university/usc_announces_self-imposed_sanctions_on_mens_basketball_team.html) (last visited May 23, 2010).

29. *Id.*

30. *Id.*

31. Posting of Mike Heiserman to the Los Angeles Time Fabulous Forum, [http://latimesblogs.latimes.com/sports\\_blog/2010/01/usc-basketball-imposes-major-sanctions.html](http://latimesblogs.latimes.com/sports_blog/2010/01/usc-basketball-imposes-major-sanctions.html) (Jan. 3, 2010, 11:17 PST).

32. Chris Foster, *Tim Floyd resigns as USC's basketball coach*, *Los Angeles Times*, (June 10, 2009), available at <http://articles.latimes.com/2009/jun/10/sports/sp-tim-floyd-usc10> (last visited May 23, 2010).

33. University of Southern California News, *supra* note 32.

conduct by an assistant football coach.<sup>34</sup> The NCAA's investigation focused on improper benefits received by Heisman Trophy winner Reggie Bush and his family after they became partners in New Era Sports and Entertainment while Bush was still in college. In the end, additional sanctions imposed on the football program included a ban from appearing in a bowl game for two seasons, the loss of ten scholarships for three seasons, and its final two victories from the 2004 season and all 12 wins from the 2005 season.<sup>35</sup> USC plans to appeal on the grounds that the NCAA Committee on Infractions made incorrect findings and that the penalties are too severe.<sup>36</sup>

### CONTRACTUAL COMPLIANCE

NCAA Bylaw 11.2.1 requires that “[c]ontractual agreements or appointments between a coach and an institution shall include the stipulation that a coach who is found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, including suspension without pay or termination of employment for significant or repetitive violations.”<sup>37</sup> Strict compliance with NCAA rules is often an integral element of a coach's contract. In most coaches' contracts, under the heading “Duties” there will be a list of obligations in an effort to insure that the coach complies with NCAA rules. These obligations include:

1. Coach agrees to abide by and comply with NCAA rules.
2. Coach agrees to work cooperatively with the university's Faculty Athletics Representative and compliance personnel on compliance matters and NCAA rules education.
3. If the coach becomes aware, or has reasonable cause to believe, that any violations of NCAA legislation have been committed by him, a member of his coaching staff, a representative of the University's athletic interests, or any other person under his direct or indirect supervision, direction or control, he shall report the violation immediately to the Athletic Director and the Director of Compliance.
4. Coach shall supervise assistant coaches, student athletes and other individuals under his supervision so as to maintain strict compliance with the rules and regulations of the NCAA.
5. Coach shall cooperate fully in any review or investigation of possible violations of any of the NCAA rules conducted or authorized by the University.
6. Coach shall be knowledgeable of all applicable NCAA rules and regulations.

### FOR CAUSE TERMINATION

In addition to contractual duty provisions, coaches' contracts also contain “for cause termination” provisions that may result in the termination of the coach in the event the coach is found to have violated NCAA rules. The following are examples of for cause termination provisions involving non-compliance with NCAA rules:

1. Conduct by the coach that constitutes a major violation, or a pattern of conduct which may constitute or lead to a major violation, of any NCAA or other Governing Athletic

34. Gary Klein Davis Wharton, *NCAA Hits USC with Severe Penalties*, LOS ANGELES TIMES (June 10, 2010), available at <http://www.latimes.com/sports/la-sp-0611-USC-ncaa-sanctions-20100611.0.48749666.story> (last visited June 14, 2010).

35. David Wharton, *Trojans Had Their 'Heads in the Sand'*, LOS ANGELES TIMES, (June 11, 2010), available at <http://www.latimes.com/sports/la-sp-0612-usc-big-names-20100612.0.6558054.story> (last visited June 13, 2010).

36. Gary Klein, *Q&A for USC sanctions*, LOS ANGELES TIMES, (June 10, 2010), available at <http://www.latimes.com/sports/la-sp-0611-usc-qa-20100611.0.7746681.story> (last visited June 15, 2010).

37. NCAA Division I Manual, 2009-2010, § 11.2.1.

Rule which may, in the reasonable and good faith judgment of the University, negatively and significantly impact and reflect adversely upon the University, or its athletics program, including any violation which results or could result in the University being placed on probation by the NCAA; or conduct by members of coach's coaching staff or others under his supervision or subject to his control or authority, constituting a major violation, or a pattern of conduct which may constitute or lead to a major violation of any NCAA or other Governing Athletic Rule, of which coach had knowledge and failed to act reasonably to prevent, limit or mitigate, which may, in the reasonable and good faith judgment of the University, negatively and significantly impact and reflect adversely upon the University or its athletics program, including any violation which results or could result in the University being placed on probation by the NCAA.

2. Coach's failure to report immediately to the Director of Athletics and Director for Compliance any violations of NCAA or other Governing Athletic Rules or University Rules by coach or by members of coach's coaching staff, student-athletes, or other persons under coach's control or authority that become known to coach.
3. Coach's refusal or failure to furnish information relevant to an investigation of a possible program violation of an NCAA rule or regulation;
4. Coach's refusal to cooperate with the NCAA or the University staff in the investigation of possible program violations of NCAA rules or regulations;
5. Coach's knowing involvement in arranging for academic fraud by or for prospective or enrolled student-athletes;
6. Coach's knowing involvement in offering or providing prospective or enrolled student athletes improper inducement or extra benefits;
7. Coach knowingly furnishing the NCAA or the University false or misleading information concerning the coach or any staff member's or athletics' involvement in or knowledge of a violation of an NCAA rule or regulation.

### CONTRACT DRAFTING CONSIDERATIONS

If the coach's contractual duty requires strict compliance with NCAA rules and regulations and if the coach can be terminated for cause for non-compliance with NCAA rules and regulations, it would appear that the next logical step is some financial penalty for non-observance of NCAA rules in the form of a clawback provision. As one reporter explained, "[c]ollegiate athletic programs should . . . [i]nset clawback provisions into the contracts for coaches, clauses clearly written that would force a coach to pay back part of his salary should he or his program violate NCAA Rules."<sup>38</sup> Mike Bobinski, Xavier University Athletic Director, replied, "[i]t is an interesting idea. If that were to happen it would surely cause some more thought for a coach whether to go down the road [of breaking NCAA rules]. It would be another layer of deterrent for that kind of behavior."<sup>39</sup>

Bill Carr, former Athletic Director at the University of Florida and CEO of Carr Sports Associates, Inc., states,

[w]ithout question, it is appropriate for universities to begin the use of 'Clawback Clauses' in their employment contracts with highly compensated coaches and administrators. If a coach or administrator receives financial benefits from his team's

<sup>38</sup>. Dohrmann, *supra* note 13.

<sup>39</sup>. *Id.*

competitive success that is later vacated or the institution is sanctioned by the conference or NCAA for rules violations by the coach during that same period, there should be repayment of those dollars by the coach or administrator. It cannot be any other way.<sup>40</sup>

With respect to clawback provisions, Sheri Lipman, University of Memphis attorney, explained:

From the University lawyer's perspective, clawback provisions in coach contracts, specifically related to bonuses for participation in the NCAA tournament, make sense. If the NCAA money must be returned following an infractions matter, such provisions protect the institution which must re-pay the money, and eliminate uncertainty which has the possibility of leading to litigation. However, from the Athletic Department's perspective, the issue is more complicated. The Athletic Department must consider whether such provisions will prevent the institution from hiring the coach it wants, particularly when other institutions are not currently using these provisions. Moreover, when there is no finding against the coach and the coach remains at the institution, there may be a worry of a strained relationship because of the need to return the money. Finally, because infractions matters are often decided a number of years after the events at issue, the requirement to repay a large sum of money many years later creates practical questions for individuals who have not taken the repayment into account in their family budgets.<sup>41</sup>

Here are some other issues to consider in drafting a clawback provision involving NCAA violations:

1. What triggers the clawback provision, i.e. self-imposed penalties for major violations of NCAA rules, or a finding of major violations of NCAA rules by the Committee on Infractions or the Infractions Appeals Committee for which the coach knew or participated in?;
2. How far back the clawback provision reaches? This will be important in regard to the appropriate statute of limitations and in determining when the triggering event occurred;
3. What types of compensation the clawback provisions apply to (e.g. salary, outside income, perquisites, the total package, bonuses, etc.)?;
4. What the university can retrieve when it triggers the clawback provision (i.e. a stipulated amount or a percentage of coach's package to be agreed upon between the university and coach, or is it limited to bonuses paid that should not have been paid but for NCAA rules violations)?;
5. What kind of penalties for major violations of NCAA rules would trigger the clawback provision (e.g. fines, probation, reductions, financial relinquishments)?;
6. Does the clawback provision apply prospectively even if the coach is terminated or has taken another job?;
7. Is the clawback payment payable in a lump sum or on an installment basis? What are the potential tax consequences of each arrangement?;<sup>42</sup>
8. Does the clawback clause contain an offset provision (any amounts that could be clawed back by the university that can be offset by amounts the university owes the coach pursuant to the contract)?;

40. E-mail from William Carr, Carr Sports Associates, to Martin J. Greenberg, Law Offices of Martin J. Greenberg, LLC (Apr. 15, 2010, 19:39 CST) (on file with author).

41. E-mail from Lipman, *supra* note 18.

42. Allison Grace, *Compensation Clawbacks*, EVANCARMICHAEL.COM, <http://www.evancarmichael.com/Human-Resources/3395/Compensation-Clawbacks.html> (last visited May 23, 2010).



9. Should the coach be responsible for some of the costs involved in NCAA or self-evaluation enforcement proceedings, including attorney's fees?;
10. Should the coach be responsible for the acts of others who are under his supervisory control, or only for acts that he had direct knowledge of or participated in?;
11. Should any release of claims involving clawback provisions be prospective in nature after the repayment obligation has occurred?; and
12. Is the previously paid amount considered "wages?" This is important as clawback amounts may not be forfeited under some applicable state wage and hour laws.<sup>43</sup>

### CONCLUSION

In the next five years, as college coaches' contracts likely become even more lucrative and complex, it will not be surprising if clawback clauses become an important component of the negotiation process between a coach and university. Because coaches unfortunately continue to violate NCAA rules and may expose universities to serious punishments, it is important that athletic departments and college presidents seriously consider the use of these clauses to recoup money they have paid the offending coach. It will be interesting to review the breadth and scope of the next generation of clawback clauses in coaches' contracts.

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43. *Id.*

