1.2.2015

BUYOUTS – COACHING FREE AGENCY

By Martin J. Greenberg and Bryan M. Ward

I. INTRODUCTION

On July 11, 2014, I participated in a CLE seminar sponsored by the National Sports Law Institute and Sports Law Alumni Association of the Marquette University Law School and presented on the topic of restrictive covenants in college coaches' contracts. The study and presentation was motivated by the current environment of college coaching which can best be described as a coaching carousel, virtual free agency, annual rite of passage, and at-will contracts.

A university has a vested interest to see that coaches' contracts are contractually fulfilled, to prevent movement of a coach to a same or similar position during the term of the contract, especially within the same Conference, to prevent use of trade secrets or confidential information obtained during the coaching tenure, to prevent solicitation of enrolled student-athletes or recruits, and to minimize the outrageous costs of replacement.

As a result, I studied the contracts of some of the highest paid coaches at major public universities in the United States and looked at their contracts to determine what contractual means are utilized to restrict movement in college coaching, including covenants not to compete, prohibition against disclosure of trade secrets and confidential information, consent to interview, non-solicitation prohibition, and the payment of liquidated damages upon early departure.

The results of the survey concluded:

1. Covenants not to compete are rarely used in college coaching contracts;

2. Coaches' contracts do contain prohibitions against the disclosure of trade secrets and confidential information;
3. Coaches' contracts often require consent to interview for another job during the term of the contract;
4. Most coaching contracts today require the coach to pay liquidated damages upon early departure and in breach of the contract; and
5. The trend in college coaches' contracts is not to make the coach stay, but to make him pay to go.

It is apparent from my survey and review of numerous coaches' contracts that the methodology most often used today to make coaches stay is a deterrent in the form of liquidated damages or a buyout if the coach decides to terminate his contract early.

Buyouts are a fact of life in the business of college coaching.

"The lost concept of contract in college coaching, especially in high-profile Division I sports, has been bemoaned by many a sports commentator. It seems that each year a prominent coach signs a lucrative multi-year contract and pledges eternal allegiance to that school. A year to two later, that same coach leaves for an even higher paying job. While a student-athlete must gain the consent of his coach and school to transfer elsewhere, a coach is seemingly a free agent every year" said Attorney Dan Fitzgerald.[1]

"The whole landscape of college athletics has changed from an educational model to a business model," Minnesota athletic director Joel Maturi said. "I struggle with that. You can't

[1] Dan Fitzgerald, *Coaching Contracts and Buyout Clauses*, CONNECTICUT SPORTS LAW (Apr. 17, 2008), http://ctsportslaw.com/2008/04/17/coaching-contracts-and-buyout-clauses/.

survive in this business unless you're chasing the competition. There's an arms race in this business when it comes to facilities and coaching contracts. It's reality." [2]

"It's just the way the marketplace has gone," Agent Jimmy Sexton said. "Stadiums are full. Radio and TV rights are at an all-time high. [A buyout clause for a coach] is one of the trickle-down effects of college sports, especially in the Southeast."[3]

The purpose of this paper is to review liquidated damage or buyout provisions when the coach terminates early, how the coach undertakes to pay the enormous amounts that are being sought to terminate early, what are the different ways of structuring buyouts, and ultimately what are the tax effects if the buyout is paid for by a third party.

II. SAMPLE LIQUIDATED DAMAGE OR BUYOUT CLAUSES WHEN COACH TERMINATES CONTRACT EARLY

What follows are some examples of buyout or liquidated damage provisions in college coaching contracts when the coach terminates early.

Flood, Kyle – Rutgers, effective January 21, 2012.

> F. Termination by Mr. Flood/Liquidated Damages
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> Rutgers and Mr. Flood acknowledge that Mr. Flood's services to Rutgers are unique and of a personal nature and further if Mr. Flood was to terminate his employment with the University prior to its conclusion, it would be difficult to assess the damages suffered by Rutgers. Accordingly, if Mr. Flood terminates his contract prior to February 28, 2017, Rutgers shall be entitled to receive from Mr. Flood the following amounts as liquidated damages.

Termination between January 30, 2012 and February 1, 2013	$1,000,000
Termination between February 2, 2013 and February 1, 2014	$ 850,000
Termination between February 2, 2014 and February 1, 2015	$ 700,000
Termination between February 2, 2015 and February 28, 2016	$ 500,000
Termination between February 2, 2016 and February 28, 2017	$ 0

[2] Gene Frenette, *Buyout Business*, THE FLA. TIMES-UNION, (June 24, 2007), http://jacksonville.com/tu-online/stories/062407/col_179690188.shtml.
[3] *Id.*

The liquidated damage shall be paid to Rutgers by Mr. Flood within thirty (30) days of his termination.[4]

Doeren, Dave – North Carolina State University, effective December 1, 2012.

XIV. Termination by Coach

A. Coach agrees that the promise to work for NC State for the entire term of the Agreement is essential to NC State. The parties agree that the Coach has special, exceptional, and unique knowledge, skill and ability as a men's basketball coach which, in addition to the continuing acquisition of coaching experience at NC State, as well as NC State's special need for continuity in its men's basketball program, render the Coach's services unique. Coach therefore agrees, and hereby specifically promises, not to accept men's basketball related employment prior to the natural expiration of the term of this Agreement, under any circumstances, without first providing written notice to the Director of Athletics and the Chancellor, of such employment including, but not limited to a men's basketball coach at any institution of higher education which is a member of the NCAA or for any professional 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 this Agreement or any extension thereof. NC State agrees that Coach may terminate this Agreement at any time, for any reason, upon written notice to NC State and payment of liquidated damages in Section XIV.B below.

B. Coach acknowledges that accepting employment from any other person or entity prior to the natural expiration of the term of this Agreement constitutes a breach of this Agreement. In the event of such breach, Coach shall be limited to solely paying NC State liquidated damages in lieu of any and all other legal remedies or equitable relief in the amount of Coach's current Annual Salary multiplied by the number of full and partial contract years remaining in the term of this Agreement. Payment of the total amount of liquidated damages shall occur over the remaining term of the Agreement as follows: 1) within fifteen (15) days of the effective date of termination without cause, payment shall be made of Annual Salary amounts due with respect to the remainder of that contract year, as well as, if applicable, any bonuses earned as of the effective date of termination during the contact year; and 2) remaining payments due hereunder with respect to each subsequent year shall be made monthly or as otherwise agreed upon by Coach and NC State, until all amounts due under this section XIV have been paid in full. This is an Agreement for personal services. The parties recognize and agree

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[4] Employment Contract between Kyle Flood and Rutgers, XVII – Compliance Provision, §F (Jan. 30, 2012) (on file with author) [hereinafter Flood Contract].

that a termination of this Agreement by Coach prior to its natural expiration could cause NC State to lose its valuable investment in Coach's continued employment at NC State and could cause NC State additional damages beyond its lost investment, including but not limited to a possible adverse effect on recruiting. The parties further agree that it is difficult or impossible to determine with certainty the damages that may result from such termination by Coach and that the liquidated damages provisions of this paragraph are not to be construed as a penalty, but as an attempt by Coach and NC State to establish adequate and reasonable compensation to the University in the event Coach terminates this Agreement. NC State agrees that, in the event that Coach breaches this Agreement by accepting employment as herein described prior to the natural expiration of this Agreement, Coach's sole obligation to NC State shall be governed by section XIV(B) of this Agreement, and any prior agreements or promises in regard to any other payments to NC State are null and void.[5]

Sumlin, Kevin – Texas A&M University, effective January 1, 2013.

5.4 Termination by Sumlin. Sumlin recognizes that his promise to work for the University for the entire term of this Agreement is of the essence of this Agreement to the University. Sumlin also recognizes that the University is making a valuable investment in his continued employment by entering into this employment Agreement and that its investment would be lost were Sumlin to resign or otherwise terminate his employment, other than "for cause" (as defined in Section 5.4(b) below), with the University prior to the expiration of the Term of this Agreement. While recognizing these agreements and this entire Agreement, the parties agree that Sumlin may nevertheless terminate this employment Agreement prior to its normal expiration but only upon the following terms and conditions:

(a) Written notice by Sumlin. Sumlin may terminate this employment Agreement during its term by giving the University advance written notice of the termination of his employment with the University.

(b) Payment upon Termination by Sumlin. This Agreement may be terminated by Sumlin at any time "for cause." The term "for cause" in this section shall include, but not be limited to, a material violation by the University of any terms or conditions of this Agreement not remedied within 15 business days after receipt of written notice thereof by the University. Should Sumlin terminate this Employment Agreement without due cause prior to the end of the Term as provided in Section 1.1, Sumlin shall pay to the University as liquidated damages the sum of $2,000,000.00 if such termination occurs prior to March 31, 2014, with the amount of liquidated damages being reduced by $400,000.00 annually effective March 31 of each year of the Term. For example, if Sumlin

[5] Employment Agreement between Dave Doeren and N.C. State Univ., XIV. Termination by Coach ¶(A)(B) (Dec. 1, 2012) (on file with author) [hereinafter Doeren Contract].

terminates this Agreement without due cause after March 31, 2015, but before March 31, 2016, Sumlin would owe University a one-time payment of $1,200,000.00. Such liquidated damages shall be due and payable within sixty (60) days after the effective date of termination of this Agreement. Failure to pay such liquidated damages shall constitute a breach of this Agreement. The parties have bargained for and agreed to the foregoing liquidated damages provision, giving consideration to the fact termination by Sumlin will cause the University administrative, recruiting, and resettlement costs in obtaining a replacement for Sumlin, in addition to potentially increased compensation costs and loss of ticket revenues.

Upon termination of this employment Agreement by Sumlin, the University's obligation to pay to Sumlin the consideration described herein shall terminate and cease as of the effective date of the termination.[6]

Holgorsen, Dana – West Virginia University, Agreement dated August 7, 2012.

D.2. Holgorsen and University agree that the damages incurred by the University would be uncertain and not susceptible to exact computation, in the event Holgorsen terminates this agreement without cause. As such, the University shall be paid Two Million Dollars ($2,000,000.00), as specified liquidated damages. The parties agree that said sum is not a penalty and shall be payable within thirty (30) consecutive days after termination. These liquidated damages will constitute full settlement of any and all adverse claims that university might otherwise assert against Holgorsen.[7]

Meyer, Urban – Ohio State University, Employment Agreement dated June 8, 2012.

5.3 Termination by Coach Without Cause. If Coach terminates this agreement without cause:

a) Coach shall provide Ohio State with written notice of his termination of this agreement; and

b) Coach shall pay to Ohio State in substantially equal monthly installments commencing within one (1) year of the date of such termination if Coach terminates this agreement without cause before December 1, 2012, the Two Hundred Fifty Thousand Dollars ($250,000) transition payment set forth in Section 3.1.b and the pro-rata portion of the additional Two Hundred Fifty Thousand Dollars ($250,000) transition payment set forth in Section 3.1.a.i. Such pro-rata portion shall be equal to Two Hundred Fifty Thousand Dollars ($250,000) multiplied by a fraction, the numerator of which is the number of days

[6] Coach's Employment Agreement between Kevin Sumlin and Tex. A&M Univ., Termination and Suspension ¶5.4(a)(b) (Jan. 1, 2013) (on file with author) [hereinafter Sumlin Contract].

[7] Employment Agreement between Dana Holgorsen and W. Va. Univ., V. Termination, ¶D.2. (Aug. 7, 2012) (on file with author) [hereinafter Holgorsen Contract].

between the date of termination and December 1, 2012 and the denominator of which is three hundred sixty-five (365).

c) Coach shall not for a period of one (1) year after such termination by Coach contact or otherwise seek to recruit any high school athlete previously contacted or recruited by Ohio State, unless such athlete had been recruited or contacted by any new institution employing Coach prior to the notice of termination by Coach to Ohio State; and

d) Unless Ohio State agrees otherwise, if Coach accepts employment or performs services in a coaching position for another NCAA Division 1 school or for a professional football team or as a media commentator with a national broadcast or cable company at any time up to twelve (12) months after Coach resigns from Ohio State, Coach shall pay Ohio State as liquidated damages and not as a penalty Two Million Dollars ($2,000,000) to reimburse Ohio State for expenses including, but not limited to i) searching for, recruiting and hiring a new head football coach and coaching staff, and ii) relocating a new head football coach and coaching staff, and iii) buying out the contract, if necessary, of the new head coach. Coach shall use his best efforts to pay Ohio State as soon as possible, but shall pay One Million Dollars ($1,000,000) to Ohio State no later than ninety (90) days after the date of Coach's timely acceptance of such new employment in a coaching position or as a media commentator as set forth above and shall pay the remaining One Million Dollars ($1,000,000) to Ohio State no later than twelve (12) months after the date of Coach's timely acceptance of such new employment in a coaching position or as a media commentator as set forth above; and

e) If Coach terminates this agreement without cause, Coach shall not be entitled to receive any further unearned compensation or benefits under this agreement (Coach is not deemed to have earned bonuses and supplemental compensation which Coach must repay to Ohio State in accordance with Section 5.7 hereof).[8]

Turgeon, Mark – University of Maryland, Agreement dated June 27, 2011.

10.2 No other Employment. Coach nevertheless may terminate this 2011 Agreement prior to its normal expiration upon written notice of termination to the University. Further, if Coach terminates this Agreement in order to accept employment or consulting with the men's basketball program or athletic program at another college or university or to accept employment or consulting with any basketball team participating in any professional league or conference, Coach will pay to the University Five Hundred Thousand Dollars ($500,000) if the termination occurs in years one through three (2012, 2013, 2014) of this 2011 Agreement; Three Hundred and Fifty Thousand Dollars ($350,000) if the termination occurs in years four through six (2015, 2016, 2017) of this 2011

[8] Employment Agreement between Urban Myer and Ohio State Univ., Termination ¶5.3(a)-(e) (June 8, 2012) (on file with author) [hereinafter Meyer Contract].

Agreement; or Two Hundred and Fifty Thousand Dollars ($250,000) if the termination occurs in years seven through eight (2018, 2019) of this 2011 Agreement. The Coach shall pay this amount within one year of the date that the Coach ends his employment. It is understood this payment does not constitute a penalty, but rather, a reasonable formula for estimating the resultant costs to the University, including: expenses associated with a search for a new head coach; expenses associated with paying two staffs of assistant coaches; moving and relocation expenses of the new head coach and assistant coaches; loss of revenue in ticket sales; disruption to the men's basketball program and its participating student-athletes; and, disruption of fund raising activities and loss of business revenue, gifts, and donations. The Coach therefore agrees, and hereby specifically promises, not to accept employment, under any circumstances, as a basketball coach at any institution of higher education which is a member of the NCAA, or for any basketball team participating in any professional league or conference prior to the expiration date of the term of this 2011 Agreement, or any extension thereof, without first providing written notice to the Athletic Director prior to accepting said employment. For the purposes of this paragraph, Coach shall be deemed to have terminated his employment at the University in order to accept employment or consulting with the men's basketball program or athletic program at another college or university or to accept employment or consulting with any basketball team participating in any professional league or conference if the acceptance occurs within one (1) year after termination of his employment at the University (provided said acceptance also takes place during what would have been the Term of this Agreement, had it naturally expired). Failure to perform the requirements set out in this Paragraph 10.2 shall constitute a material breach of this 2011 Agreement.[9]

Bowden, Terry – University of Akron, Employment Contract effective December 22, 2011.

G. Termination by the Coach. Coach recognizes that his promise to work for University for the entire term of this Contract is an essential consideration in University's decision to enter into this Contract and employ him as Head Coach. This Contract would be diminished were he to resign or otherwise terminate his employment as Head Coach prior to the expiration of the Contract. The Coach understands and agrees that he may, nevertheless, resign or otherwise terminate his employment under this Contract prior to the expiration of this Contract, but only upon the following terms and conditions:

1. In addition to any other notices required in this Contract, the Coach shall provide University with written notice of termination of this Contract; and

[9] Head Men's Basketball Coach Agreement between Mark Turgeon and Univ. of Md. ¶10.2 (June 27, 2011) (on file with author) [hereinafter Turgeon Contract].

2. The Coach shall not be entitled to receive any further compensation or benefits under this Contract, including but not limited to any bonuses pursuant to Exhibit A of this Contract; and

3. Coach will pay University as liquidated damages, and not as a penalty, an amount that is dependent upon the contract year in which the contract is terminated and that shall be paid pursuant to the following schedule:

a. After December 22, 2011, but prior to February 28, 2013:	$400,000.
b. After March 1, 2013, but prior to February 28, 2014:	$300,000.
c. After March 1, 2014, but prior to February 28, 2015:	$200,000.
d. After March 1, 2015, but prior to February 28, 2016:	$100,000.

In the event that Coach gives notice of termination after March 1st of a given year, but Coach or his representatives engaged in discussions with representatives of his new employer prior to that March 1st date, Coach shall be obligated to pay the liquidated damages amount owing for the year in which those discussions first occurred. Coach shall pay all such amounts to University within thirty (30) days after the date of the Coach's termination.[10]

Gundy, Michael – Oklahoma State University, Employment Contract effective January 1, 2009.

8(g). Coach recognizes that the promise to work for University for the entire term of this Contract is of the essence of this Contract. Coach also recognizes that University is making a highly valuable investment in Coach's employment by entering into this Contract and that University's investment would be lost if Coach were to resign or otherwise terminate employment with University before the end of the Contract term. Nonetheless, subject to the payment of liquidated damages to the University as provided herein, it is agreed that at any time after commencement of this Contract, Coach may terminate this Contract without cause by giving written notice to University, such termination to become effective no earlier than thirty (30) days after receipt of such written notice. University shall not be liable for the loss of any collateral business opportunities or any other benefits, perquisites, or income from any sources that might ensue as a result of Coach's termination of this Contract.

8(h) In the event Coach terminates this Agreement without cause, Coach shall pay to University, as liquidated damages, the sum of Three Million Dollars ($3,000,000). Said total sum shall be paid within thirty (30) days after the effective date of termination. Coach shall be entitled to continue health insurance at Coach's expense as required by applicable law, but shall not be entitled to any other employee benefits.

[10] Employment Contract between Terry Bowden and Univ. of Akron, V. Termination ¶G(1)-(3) (Dec. 22, 2011) (on file with author) [hereinafter Bowden Contract].

The parties have bargained for and agreed to the foregoing liquidated damages provision, giving consideration to the fact that University will incur administrative, recruiting, resettlement, and other costs in obtaining a replacement for Coach, in addition to potentially increased compensation costs if Coach terminates this Agreement prior to its expiration, which damages are extremely difficult or impracticable to determine with certainty. The parties further agree that the payment of such liquidated damages by Coach and acceptance thereof by University shall constitute adequate and reasonable compensation to University for the damages and injury suffered by it because of such termination by Coach. The foregoing shall not be nor be construed to be, a penalty.[11]

Helfrich, Mark – University of Oregon, Employment Agreement dated January 20, 2013.

6.3 Termination by Coach

a. Coach recognizes that his promise to work for the University for the entire Term of this Agreement is of the essence of this Agreement. Coach also recognizes that University is making a highly valuable investment in his continued employment by entering into this Agreement and that its investment would be lost were he to resign or otherwise terminate his employment with the University prior to the expiration of the Term of this Agreement. In recognition of these facts, the parties agree that Coach's decision to terminate this Agreement prior to its expiration will be subject to the following terms and conditions.

b. If Coach wishes to pursue other employment opportunities, Coach is required to provide Athletic Director with written or verbal notice prior to meeting with representatives from another entity to discuss such employment opportunities. If Coach terminates this Agreement during its Term he must notice Athletic Director in writing. While Coach is assigned to the position of head football coach, such termination by Coach must occur at a time other than during the football season, unless the parties mutually agree otherwise. However, so long as the termination occurs other than during the football season, nothing limits Coach's ability to provide notice at any time. If Coach gives notice prior to the completion of all play, University may require Coach to continue performing his coaching and other responsibilities, or University may reassign Coach until completion of all play. Simultaneous with such notice, Coach shall inform University in writing of his employment plans following the termination of his employment with University.

c. Termination by Coach shall require Coach to pay University as follows:

On or before the end of Contract Year One:	$3,000,000
After Contract Year One but on or before the end of Contract Year Two:	$2,500,000
After Contract Year Two but through the end of Contract Year Five:	$1,750,000

[11] Employment Contract between Michael Gundy and Okla. State Univ. ¶8(g)(h) (Jan. 1, 2009) (on file with author) [hereinafter Gundy Contract].

After Contract Year Five: $1,000,000

d. Coach may prorate this amount over the remaining contract months without interest or may pre-pay in one or more lump sums. The parties recognize and agree that projection or measurement of University's damages in such a case would be extremely difficult and that this provision is a sufficient and reasonable estimate of the potential injury to University and that it shall be enforceable as liquidated damages and not as a penalty. Provided, however, that if University's membership in the PAC-12 Conference ends and University does not join, without a competition-season interruption, a conference of comparable stature and NCAA classification level, this subsection shall not apply and Coach shall not be obligated to pay any liquidated damages.

e. Coach and University have bargained for and agreed to the foregoing liquidated damages provisions, giving consideration to the fact that termination of this Agreement by Coach under this Section 6.3 may precipitate or lead to University's loss of revenue or other economic advantages or income related to University's athletics program, which damages are extremely difficult to determine fairly, adequately, or with certainty. The parties further agree that the payment of such liquidated damages by Coach shall constitute sufficient, adequate and reasonable compensation to University for any loss, damages or injury that University suffers because of such termination by Coach. The foregoing shall not be, nor be construed to be, a penalty.[12]

Rodriguez, Richard – The University of Arizona, Second Amended Multiple-Year Employment Contact for Head Football Coach dated June 30, 2014.

XVI. Termination by Coach

Termination by Coach shall obligate Coach to pay to the University, in lieu of all other legal remedies, damages as follows:

Termination prior to January 15, 2015:	$1,000,000 or $2,000,000 in the event Coach accepts employment with West Virginia University
Termination on or after January 16, 2015, up through and including January 16, 2016:	$500,000 or $1,000,000 in the event Coach accepts employment with West Virginia University

Coach shall make any payment owed to University under this Section in a lump sum within sixty (60) days after his employment with University ends.[13]

[12] Employment Agreement between Mark Helfrich and Univ. of Or. ¶6.3(a)-(e) (Jan. 20, 2013) (on file with author) [hereinafter Helfrich Contract].

[13] Second Amended Multiple-Year Employment Contract for Head Football Coach between Richard Rodriguez and Ariz. Bd. of Regents ¶XVI (June 30, 2014) (on file with author) [hereinafter Rodriguez Contract].

Dykes, Daniel – University of California-Berkeley, Head Coach of Football Employment Contract effective December 7, 2012.

13. Termination by Coach. Coach recognizes that Coach's promise to work for the University for the entire Term of this Contract is of the essence of this contract to the University. Coach also recognizes that the University is making a highly valuable investment in Coach's continued employment by entering into this Contract and its investment would be lost were Coach to resign or otherwise terminate Coach's employment with the University prior to the expiration of the Term, the loss of which University cannot be reasonably or adequately compensated in damages in an action at law. Moreover, Coach recognizes that during Coach's employment, Coach shall gain confidential information concerning University's athletic program and that use of this confidential information by another athletic program and at a PAC-12 athletic program in particular would place University at a serious competitive disadvantage. Additionally, Coach acknowledges that University would incur significant and substantial administrative, recruiting, and resettlement costs and loss of ticket revenue were Coach to leave University employment before the expiration of the Term and that such costs and losses are difficult to ascertain with certainty.

In the event Coach terminates on or prior to December 31, 2013, Coach pays University $3,000,000. The parties agree that Coach's payment of the liquidated damages for this time frame is a fair measure of University's costs and losses and not a penalty.

In the event Coach terminates Coach's employment after December 31, 2013 and on or prior to December 31, 2014, Coach shall repay to the University previously earned salary in the amount of $2,500,000. In the event Coach terminates Coach's employment after December 31, 2014 and on or prior to December 31, 2015, Coach shall repay to the University previously earned salary in the amount of $2,000,000. In the event Coach terminates Coach's employment after December 31, 2015 and on or prior to December 3, 2016, Coach shall repay to the University previously earned salary in the amount of $1,000,000. In the event Coach terminates Coach's employment after December 31, 2016 and on or prior to the conclusion of the 2016-2017 football season (including any bowl game in which the University is to participate), Coach shall repay to the University previously earned salary in the amount of $750,000.

Payment pursuant to this Paragraph 13 shall be made within sixty (60) calendar days following the termination of said employment.

Coach understands that this Paragraph 13 is a material term of this Contract and that any breach of this paragraph will substantially harm University. Coach therefore agrees that, in the event Coach fails to pay the liquidated damages or to repay the previously earned salary specified herein, University shall be entitled to seek and enforce its full rights and remedies hereunder, including an action for full payment and damages.

The parties agree that Coach's payment of the liquidated damages set forth in this Paragraph 13 is fair measure of University's costs and losses and not a penalty. University's right of payment under this Paragraph 13 is subject to University's execution of a release of claims at the time of employment termination, in the form attached as Appendix C and incorporated herein by reference.

Except as may be otherwise agreed to between the parties, in the event the right to terminate pursuant to this Paragraph 13 is exercised, all future obligations between the parties not set forth in Paragraph 13 cease effective the date of termination.[14]

Alford, Steve – University of California-Los Angeles, Full Time Coach, Talent Fee & Camp Agreement – Men's Basketball, effective as of March 30, 2013.

5.2 Termination by the Employee.

There is reserved to Coach the right to terminate this Agreement at any time by providing written notice to the Director. Such termination by Coach must occur, however, at a time outside the Men's Basketball playing season or the Men's Basketball recruiting season as defined by the NCAA, with the exception of the thirty (30) days immediately following the last regularly scheduled game of the Men's Basketball season in the calendar year in which Coach so terminates this Agreement, so as to minimize the impact of such termination upon UCLA's Men's Basketball program. Exceptions to this provision can be approved only with the prior, express written agreement of the Director. Upon termination by Coach, all future rights and obligations between the parties under this Agreement shall cease, with the exception that, in the event Coach terminates prior to April 30, 2020, Coach termination or "buyout" amount shall be:

I. $10,400,000 if prior to April 30, 2016;
II. $7,800,000 if prior to April 30, 2017;
III. $5,200,000 if prior to April 30, 2018; and
IV. $2,600,000 if prior to April 30, 2019.[15]

McElwain, Jim – Colorado State University, Employment Agreement dated December 13, 2011 (Terminated).

6(d) Termination by McElwain. At all times during the Term, McElwain shall have the right to terminate this Agreement, without cause, at any time upon prior

[14] Employment Contract between Daniel Dykes and Univ. of California-Berkeley ¶13 (Dec. 7, 2012) (on file with author) [hereinafter Dykes Contract].
[15] Full Time Coach, Talent Fee & Camp Agreement – Men's Basketball between Steve Alford and Univ. of California-Los Angeles ¶5.2 (Mar. 30, 2013) (on file with author) [hereinafter Alford Contract].

written notice to the University, except that McElwain shall not, without good cause (such as would be cause for termination for breach by the University), give his notice of termination that is to take effect between July 1 and the last regular season game of the then-current CSU football season. If such notice is given during the foregoing time frame, the termination effective date shall be determined at the sole discretion of the Director, but in no event later than the final game (to include any post-season bowl game) of that season.

(i) $5,000,000 if such termination occurs before December 31, 2012
(ii) $4,000,000 if such termination occurs before December 31, 2013
(iii) $3,000,000 if such termination occurs before December 31, 2014
(iv) $2,000,000 if such termination occurs before December 31, 2015
(v) $1,000,000 if such termination occurs before the final regular season game in the 2016 football season; or
(vi) $0 if such termination occurs after the final regular season game in the 2016 football season.

These amounts shall be payable in full on a lump-sum basis within 30 days of the effective date of McElwain's termination.[16]

Ollie, Kevin J. – University of Connecticut, Head Men's Basketball Coach Agreement dated October 4, 2013.

11.2 In the event that the Coach accepts a position during the term of this Agreement as a Head or Assistant Basketball Coach at any NCAA Division 1 institution, or as a Head or Assistant Coach in any professional league, the following fee will be paid to the University from the Coach within sixty (60) days of the effective date of the Coach's separation from the University:

Period	Payment
1/1/2013 – 12/31/2013	$3,750,000
1/1/2014 – 12/31/2014	$2,550,000
1/1/2015 – 12/31/2015	$1,300,000
1/1/2016 – 12/31/2016	$ 800,000
1/1/2017 – 12/31/2017	$ 800,000
1/1/2018 – 4/15/2018	$ 0

For example, if the Coach notifies the University in writing of an effective date of separation of March 1, 2015, the Coach shall be obligated to pay or cause to be paid to the University the sum of $1,300,000. This payment shall be made within 60 days of the date of separation.[17]

[16] Employment Agreement between Jim McElwain and Colo. State Univ. ¶6(d) (Dec. 13, 2011) (on file with author) [hereinafter McElwain Contract].
[17] Head Men's Basketball Coach Agreement between Kevin J. Ollie and Univ. of Conn. ¶11.2 (Oct. 4, 2013) (on file with author) [hereinafter Ollie Contract].

O'Brien, William – The Pennsylvania State University, Employment Contract, dated January 6, 2012 (Terminated, currently Coach of NFL Houston Texans)

8. Termination by Coach

A. Resignation

(1) Coach may terminate this Contract for any reason upon written notice to University. (Coach will be deemed to have terminated this Contract in the event Coach dies or Coach becomes disabled or incapacitated and is continuously unable to perform any or all of his obligations under this contract for a period of at least six (6) months). If such termination (other than by reason of death, disability, or incapacity) occurs during the term of this contract or any extension hereof, Coach will pay University as liquidated damages an amount equal to the product of (i) Coach's Base Salary and Additional Compensation at the time of termination, multiplied by (ii) the number of years remaining under this Contract at the time of termination. In the case of partial years, the amount will be pro-rated by the number of months left in the partial year. This amount will be in lieu of any and all other legal remedies available to University pursuant to this paragraph.

(2) Any payment due under this Paragraph will be made within thirty (30) days of the effective date of Coach's termination of the Contract. The parties acknowledge that the University will incur administrative, recruiting, resettlement and other costs in obtaining a replacement coach in addition to potentially increased compensation costs and loss of ticket, broadcast or other revenues, which damages are impossible to determine with certainty and accordingly agree to this liquidated damages provision. The parties further agree that the liquidated damages provided for herein are reasonable in amount and not a penalty.

(3) In calculating the amount of liquidated damages under this Paragraph, it will be assumed that Coach's per annum Base Salary and Additional Compensation on the date of termination would remain in effect for the remaining stated term of this Contract.

(4) In the event of termination by Coach under this Paragraph, University will be obligated to pay to Coach the Annual Performance Incentives provided for in Paragraph 7 earned to the date of such termination but will not be obligated to reimburse Coach for any expenses incurred by Coach prior to termination toward presentation of any summer camp.[18]

Pitino, Richard – University of Minnesota, Employment Agreement dated April 5, 2013.

3.3 Coach's Right to Terminate Without Just Cause. In the event Coach terminates this Agreement during the Term of Employment without just cause,

[18] Employment Contract between William O'Brien and Pa. State Univ. ¶8(a)(1)-(4) (Jan. 6, 2012) (on file with author) [hereinafter O'Brien Contract].

Coach shall pay the University a termination fee in accordance with the following schedule.

a. If Coach leaves the University on or before April 30, 2016, Coach will pay the University One Million, Five Hundred Thousand and No/100 Dollars ($1,500,000.00).

b. If Coach leaves the University on or between May 1, 2016 and April 30, 2019, Coach will pay the university Five Hundred Thousand and No/100 Dollars ($500,000.00).

Coach shall repay this amount to the University, in addition to any other payments required under this Agreement.[19]

Petrino, Robert P. "Bobby" – University of Louisville Athletic Association, Inc., Employment Contract dated January 9, 2014.

8. Termination Without Just Cause

8.3 Employee may terminate the Employment Contract by giving ten (10) days written notice to Employer and shall pay to the Employer liquidated damages as follows:

(i) if the Employee terminates the Employment Contract on or before June 30, 2017, Employee will pay $10,000,000.00.
(ii) if the Employee terminates the Employment Contract during the period of July 1, 2017 through June 30, 2018, Employee will pay $8,500,000.00.
(iii) if the Employee terminates the Employment Contract during the period of July 1, 2018 through June 30, 2019, Employee will pay $7,000,000.00.
(iv) if the Employee terminates the Employment Contract during the period of July 1, 2019 through June 30, 2020, Employee will pay $5,500,000.00.

Said amount shall be paid within twenty-one (21) days of Employee's final day of employment. Each of the amounts set forth above (8.3((i)-(iv) shall be reduced by 50% if at the time payment is due, Tom Jurich is not the Athletic Director of the University.[20]

[19] Employment Agreement between Richard Pitino and Univ. of Minn. ¶3.3(a)(b) (Apr. 5, 2013) (on file with author) [hereinafter Pitino Contract].
[20] Employment Contract between Robert P. "Bobby" Petrino and Univ. of Louisville Athletic Ass'n, Inc. ¶8(8.3)(i)-(iv) (Jan. 9, 2014) (on file with author) [hereinafter Petrino Contract].

Strong, Charlie R., University of Texas at Austin, Restated Head Football Coach Employment Agreement dated February 14, 2014.

> **C. <u>Termination of Employment by Coach.</u>** The Parties agree that Coach has special, exceptional, and unique knowledge, skill, and ability as a football coach which, in addition to the continuing acquisition of coaching experience at the University, as well as the University's special need for continuity in its football program, render Coach's services unique. Coach further recognizes that his promise to work for the University for the entire Term of this Agreement is an essential consideration in the University's decision to employ him as Head Coach of the Program. Coach also recognizes that the University is making a highly valuable investment in his continued employment by entering into this Agreement and its investment would be lost or diminished were he to resign or otherwise terminate his employment as Head Coach with the University prior to the expiration of this Agreement and coach at another intercollegiate football program. Accordingly, Coach agrees that in the event he resigns or otherwise terminates his employment under this Agreement prior to the expiration of the initial Term of this Agreement and accepts a coaching position at another intercollegiate football program or a coaching position with a professional football program, he shall pay to the University as liquidated damages, and not as a penalty, the following:
>
> The dollar amount equal to the total compensation that the University will be obligated to pay any football assistant coaches, on Coach's staff at the time that he terminates this Agreement but not retained on the new head coach's football staff, who remain employed by the University sixty (60) days after the Coach terminates this Agreement.
>
> Payment of said liquidated damages will be in a single lump sum amount with payment to be made within seventy-five (75) days of Coach ceasing to be the Head Coach. If Coach terminates his employment under this Agreement prior to its expiration in accordance with <u>Section 7.C</u>, his compensation and benefits, to the extent not already vested, shall cease upon the termination date.[21]

Petersen, Christopher S., University of Washington, Employment Agreement dated December 6, 2013.

> 12. *<u>Termination by Employee for Convenience.</u>* This Agreement may be terminated by Employee at any time prior to the expiration of the Term upon written notice to the University, in which case the University shall have no further obligation to Employee under this Agreement other than funding the Supplemental Contributions accrued through the effective date of termination as provided in Section 5(c)(1)-(3) and paying (i) any compensation earned pursuant to Sections 5(a) and (b) on a pro-rata basis to the date of termination, (ii) all

[21] Restated Head Football Coach Employment Agreement between Charlie R. Strong and Univ. of Tex. Austin ¶7.C (Feb. 14, 2014) (on file with author) [hereinafter Strong Contract].

compensation earned and accrued pursuant to Sections 5(d) and (e) as of the date of termination, (iii) any amount accrued pursuant to Section 6 as of the date of termination, (iv) any other allowance or expense reimbursement to which Employee is otherwise entitled as of the date of termination. In the event Employee owes the University liquidated damages under this Section 12 as provided below, University shall have the right to withhold payment of any amount University owes Employee under the preceding sentence as an offset against the liquidated damages owed by Employee.

Employee recognizes he has been hired to use his unique talents for a specialized position, and his promise to work for the duration of the Agreement is essential to the purpose of this Agreement. Both parties acknowledge University is making a very substantial investment in Employee's continued employment by entering into this long-term contract, and the value of this multi-year contract is significantly higher than University would have offered for a one-year contract. Both parties also recognize stability is an integral component of developing a long-term successful athletic program, and the relationships Employee forms and the value of Employee's personal services will be irreplaceable by University. Both parties are familiar with the operations of Division I athletic programs and University's program, in particular, and they understand the economic and non-economic losses University would incur if Employee were not to fulfill the term of this Agreement. Such damages are difficult to quantify, and the true damages caused by Employee's departure may not be fully known for years to come. In light of these considerations, the Parties agree that in the event Employee terminates this Agreement prior to the expiration of the Term (as the same may have been extended from time to time, and Employee accepts other employment as a head coach at another NCAA member institution or at any level of professional football ("Other Coaching Employment"), he will pay, or cause to be paid, as a repayment of compensation, perquisites and benefits paid to or accrued by Employee in anticipation that Employee would fulfill the Term of the Agreement, a fixed sum to University according to the following schedule:

a. If Employee terminates the Agreement and accepts Other Coaching Employment during the first (1st) Contract Year, Employee shall pay the University $3,000,000.00;
b. If Employee terminates the Agreement and accepts Other Coaching Employment during the second (2nd) Contract year, Employee shall pay the University $2,500,000.00;
c. If Employee terminates the Agreement and accepts Other Coaching Employment during the third (3rd) Contract Year, Employee shall pay the University $2,500,000.00; or
d. If Employee terminates the Agreement and accepts Other Coaching Employment during the fourth (4th) Contract Year, Employee shall pay the University $1,500,000.00.

> The Parties agree the payment described above is their reasonable attempt to quantify the economic and non-economic losses to University, and it is not a penalty. The payment shall be made within sixty (6) days of the end of Employee's employment. University agrees to accept the payment as its sole and exclusive remedy in the event Employee leaves his position before the expiration of the Agreement's Term to obtain Other Coaching Employment, and to forego all other remedies, including actual damages and injunctive relief.[22]

III. A WELL-DRAFTED LIQUIDATED DAMAGES CLAUSE

After a review of many liquidated damages or buyout clauses in coaches' contracts, the following elements should be included when a coach terminates his contract early:

1. The promise to complete the contractual term by the coach is essential to the contract and one of the reasons for paying the coach the contractual consideration.
2. Conclusion of the term by the coach will permit continuity in the program.
3. If the coach decides voluntarily to terminate the contract, the coach must give written notification of such termination and such termination may only occur during specified periods during the contract season.
4. To terminate early the coach must pay compensation to the university in the form of "liquidated damages."
5. The amount of liquidated damages may de-escalate during the term of the contract.
6. The contract will establish the payment date for liquidated damages after termination and the liquidated damages will either be payable in lump sum or on an installment method and interest may accrue on the unpaid installments.
7. Liquidated damage may be assessed at a higher rate if coach accepts appointment from a named university.

[22] Employment Agreement between Christopher Petersen and Univ. of Wash. ¶12 (Dec. 6, 2013) (on file with author) [hereinafter Petersen Contract].

8. The failure to pay the agreed upon liquidated damages, will result in the accrual of interest, a judgment taken by the university and the right for reimbursement of any and all legal fees and costs incurred.
9. The services of coach are unique and the coach has exceptional knowledge and skills that are difficult to replace.
10. The contract is one for personal services for which the university cannot force performance.
11. Damages are not susceptible to calculation, are uncertain and would be difficult to fairly and adequately assess.
12. The agreed upon liquidated damages are in lieu of all other legal and equitable remedies.
13. The amount of liquidated damages is mutually agreed upon to be a fair assessment of damages as between the university, coach and coach's counsel.
14. Liquidated damages represent a reimbursement to the university of potentially the following damages:
    a. searching for a new head coach and/or coaching staff;
    b. pay a new coach or pay any buyout or liquidated damages under his previous contract;
    c. relocation and moving expenses that a new coach may incur;
    d. pay off assistant coaches for not for cause termination;
    e. loss of revenue in ticket sales;
    f. disruption to the program;
    g. interception of fundraising activities;

h. loss of business revenues, gifts, and donations;

i. increase compensation to newly hired coach; and

j. loss of recruits or student-athletes by virtue of early termination of coach.

15. The amount established as liquidated damages is adequate and reasonable compensation, is not a penalty, and has been fully provided for as part of the agreement.
16. The coach and university will execute a release of all claims.
17. Coach, as of the date of termination, shall not be entitled to receive any further compensation, loss of collateral business opportunities, benefits or perquisites.
18. The recipient university upon hiring of a new coach shall execute an agreement that it is jointly and severally liable for the liquidated damages - buyout fee as required to be paid by the terminating coach.

IV. LIQUIDATED DAMAGES

A liquidated damage clause in a coach's contract simply sets an agreed upon amount of damages in a contract in the event of a breach, or early termination by the coach.[23] In essence liquidated damages are a type of contract performance insurance.[24] However, damages in a contract are liquidated only if: (1) the damage is either uncertain or difficult to quantify; (2) the amount is reasonable and considers the actual or anticipated harm caused by the contract breach; (3) the loss is difficult to prove; (4) there isn't a better alternative remedy; (5) the damages are structured to function as damages, and not as a penalty.[25]

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[23] Aditi Mukherji, *What are Liquidated Damages?*, FINDLAW (May 23, 2013, 1:01 PM), http://blogs.findlaw.com/law_and_life/2013/05/what-are-luquidated-damages.html.
[24] *Id.*
[25] *Id.*

The *American Law Reports* annotation on liquidated damages states, "Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual harm caused by the breach. … A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty" (12 A.L.R. 4th 891, 899).[26]

The *Uniform Commercial Code*, Section 2-718 entitled "Liquidation or Limitation of Damages" provides:

> "(A) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."[27]

Likewise the *Restatement (Second) of Contracts*, Section 356(1) also provides:

> "(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."[28]

A penalty is an amount that is disproportionate to the actual harm caused. A penalty serves as a punishment or as a deterrent against the breach of a contract.[29] Penalties are granted when it is found that the covenants and stipulations of a contract have not been met.[30] Liquidated damages, on the other hand, are an amount estimated to equal the extent of damages that may

[26] THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/_/dict.aspx?rd=1&word=Liquidated+damages (last visited Nov. 5, 2014).
[27] UNIFORM COMMERCIAL CODE § 2-718 (2013).
[28] RESTATEMENT (SECOND) OF CONTRACTS § 356(1).
[29] THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/_/dict.aspx?rd=1&word=Liquidated+damages (last visited Nov. 5, 2014).
[30] *Id.*

occur if the contract is breached.[31] These damages are determined when a contract is entered into, and serve as protection for both parties that have entered the contract.[32]

> Liquidated damages clauses possess several contractual advantages. First, they establish some predictability involving costs, so that parties can balance the cost of anticipated performance against the cost of a breach. In this way liquidated damages serve as a source of limited insurance for both parties. Another contractual advantage of liquidated damages clauses is that the parties each have the opportunity to settle on a sum that is mutually agreeable, rather than leaving that decision up to the courts and adding the costs of time and legal fees.[33]

V. RECIPIENT UNIVERISTY INVOLVEMENT

Almost invariably when a coach jumps his contract, terminates early, or takes another job, the recipient university is involved in some fashion, especially with respect to the payment of some portion or all of the liquidated damages. Several examples are illustrative.

Tommy Tuberville became the head football coach of Texas Tech University pursuant to an Employment Contract dated February 27, 2010.[34] Article V, Termination, paragraph C, Early Termination or Resignation of Coach, provides as follows:

> In the event Coach terminates his employment at University to coach at another NCAA Division 1-A institution during the Term of this Agreement, Coach shall pay University a lump sum amount equal to the remaining Base Salary of the Agreement within one year of the date of resignation. All other liabilities of the parties shall cease effective the date of resignation provided, however, that Coach shall be entitled to any Supplemental Compensation set forth in paragraph III.C.4. above earned prior to Coach's resignation. For purposes of this paragraph, Coach shall be deemed to have terminated his employment at University in order to coach at another institution if Coach accepts a coaching position at another NCAA Division 1-A institution within one-year after terminating his employment at University.[35]

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Employment Contract between Tommy Tuberville and Tex. Tech Univ. (Feb. 27, 2010) (on file with author) [hereinafter Tuberville TTU Contract].
[35] *Id.* at ¶V.C.

Tuberville indeed terminated his contract early by becoming the head football coach of the University of Cincinnati and executing an Employment Agreement dated December 9, 2012.[36] Paragraph 8 of the University of Cincinnati Employment Agreement, entitled Texas Tech University Buy-Out, provides as follows:

> Coach incurred a binding contractual buy-out obligation to Texas Tech University ("TTU") by terminating his employment contract with TTU to accept employment as the University's Head Football Coach. In consideration therefore, the University shall reimburse Coach through an "accountable plan" (pursuant to the IRS Federal Tax Code section 62(c)) for the funds necessary to fulfill his buy-out obligation to TTU, which TTU has confirmed to be $943,000. Subject to Coach's compliance with the provisions of Treas. Reg. Section 1.62-2, the University shall not withhold payroll and other employment taxes from the amount reimbursed to Coach under this section.[37]

Randy Edsall became the head football coach of the University of Connecticut pursuant to an Employment Agreement executed on or about July 1, 2004.[38] Article 11 of the Agreement entitled Other Employment, provided as follows:

> The Coach agrees not to personally, or through any agent, actively seek, negotiate for, or accept other employment, of any nature, during the term of this Agreement without first having advised the Director of Athletics of the intention to do so.
>
> In the event that the Coach accepts a position during the term of this Agreement as a head football coach at a NCAA Division I institution, or as a head coach in any professional football league, and the conditions of Article 10.2 have not been met, the following will be due the University from the Coach:

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[36] Employment Agreement between Tommy Tuberville and Univ. Cincinnati (Dec. 9, 2012) (on file with author) [hereinafter Tuberville Univ. Cincinnati Contract]. It should be noted that in the Tuberville-Univ.Cincinnati Memorandum of Understanding, the provision for the Texas Tech buyout was different than that that ultimately became part of the contract. The MOU provision stated as follows: "The Employment Agreement shall contain a provision which states that upon receipt by the University of satisfactory evidence that Coach has incurred a binding contractual buy-out obligation payable to Texas Tech University by accepting employment as the University's Head Football Coach, and upon receipt of a copy of the invoice received by Coach from Texas Tech University for the same, the University shall issue a payment to Coach of the buy-out amount not to exceed $931,000. Coach understands and acknowledges that the $931,000 constitutes income to him under applicable State and Federal tax codes and will be subject to withholding."

[37] *Id.* at ¶8.

[38] Employment Agreement between Randy Edsall and Univ. of Conn. (July 1, 2004) (on file with author) [hereinafter Edsall Univ. of Conn. Contract].

Period	Amount Due University from Coach
7/1/2004 – 6/30/2005	$750,000
7/1/2005 – 6/30/2006	$750,000
7/1/2006 – 6/30/2007	$500,000
7/1/2007 – 6/30/2008	$475,000
7/1/2008 – 6/30/2009	$400,000
7/1/2009 – 6/30/2010	$ 0[39]

Edsall cut short his University of Connecticut contract and became the head football coach at the University of Maryland pursuant to a Head Football Coach Agreement dated June 24, 2011.[40] Paragraph 6.5 of the University of Maryland contract provides:

> The University has authorized as a reimbursable employee business expense of Coach the direct payment by the University of $400,000 to the University of Connecticut ("UConn") on or before December 31, 2011 (the "UConn Expense"). The University acknowledges that payment of this expense was necessary to obtain the services of Coach and, therefore, substantially benefits the University. Further, the University has determined that the requirements of its accountable plan, as outlined in Section 6.5 below, have been satisfied with respect to this expense.[41]

Gus Malzahn accepted the position of head football coach for Arkansas State University pursuant to a Letter of Understanding dated December 13, 2011.[42] Paragraph 13 of said Letter states as follows:

> Should you resign during the first year of your contract (January 1, 2012 to January 31, 2013), you will pay as liquidated damages the amount of $700,000; should you resign during the second year of your contract (February 1, 2013 to January 31, 2014), you will pay as liquidated damages the amount of $350,000; should you resign during the third year of your contract (February 1, 2014 to January 31, 2015), you will pay as liquidated damages the amount of $200,000; should you resign during the fourth year of your contract (February 1, 2015 to January 31, 2016), you will pay as liquidated damages the amount of $100,000; should you resign during the fifth year of your contract (February 1, 2016 to January 31, 2017), you will pay as liquidated damages the amount of $50,000 provided that if your resignation in your fifth year of this contract is after the

[39] *Id.* at ¶11.
[40] Head Football Coach Agreement between Randy Edsall and Univ. of Md. (June 24, 2011) (on file with author) [hereinafter Edsall Univ. of Md. Contract].
[41] *Id.* at ¶6.5.
[42] Letter of Understanding between Gus Malzahn and Ark. State Univ. (Dec. 13, 2011) (on file with author) [hereinafter Malzahn Ark. State Univ. Contract].

> completion of the final game of the 2016 season, no liquidated damages will be owed. All liquidated damages shall be paid to the Red Wolf Club, Inc.[43]

On or about June 1, 2013, Malzahn entered into an Employment Agreement becoming the head football coach at Auburn University.[44] Paragraph 26 of said Employment Agreement, Repayment of Buyout from Previous Employment, provides as follows:

> Coach acknowledges that Auburn loaned him Seven Hundred Thousand Dollars ($700,000.00) to satisfy the buyout provision of his contract with his previous employer. During the course of this contract, this debt will be forgiven in the amount of Dollars ($140,000.00) for each contract year completed under this Agreement such that the debt will be forgiven entirely. If Coach is terminated for cause prior to December 31, 2017, he will be responsible for paying to the University the balance remaining on this loan, with the amount owed for a partial year being determined on a pro rata basis (i.e., $11,667 per month). In such event, University has the discretion to require repayment of the outstanding loan balance as it sees fit and can require a lump sum payment or partial payments.[45]

On or about December 11, 2012, Bryan Harsin entered into a Letter of Intent to become the head football coach at Arkansas State University.[46] Paragraph 12 of said Letter provides as follows:

> Should you resign during the first year of your contract (January 1, 2013 to January 31, 2014), you will pay as liquidated damages the amount of one million seven hundred and fifty thousand dollars ($1,750,000.00); should you resign during the second year of your contract (February 1, 2014 to January 31, 2015), you will pay as liquidated damages the amount of one million dollars ($1,000,000.00); should you resign during the third year of your contract (February 1, 2015 to January 31, 2016), you will pay as liquidated damages the amount of five hundred thousand dollars ($500,000.00); should you resign during the fourth year of your contract (February 1, 2016 to January 31, 2017), you will pay as liquidated damages the amount of three hundred thousand dollars ($300,000.00); should you resign during the fifth year of your contract (February 1, 2017 to January 31, 2018), you will pay as liquidated damages the amount of one hundred thousand dollars ($100,000.00), provided that if your resignation in your fifth year of this contract is after the completion of the final regular season

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[43] *Id.* at ¶13.

[44] Employment Agreement between Gus Malzahn and Auburn Univ. (June 1, 2013) (on file with author) [hereinafter Malzahn Auburn Univ. Contract].

[45] *Id.* at ¶26.

[46] Letter of Intent between Bryan Harsin and Akr. State Univ. (Dec. 11, 2012) (on file with author) [hereinafter Harsin Letter of Intent].

> game of the 2017 season, no liquidated damages will be owed. All liquidated damages shall be paid to the Red Wolf Club, Inc.[47]

Unfortunately, Harsin's stay as Arkansas State University was short term as he entered into an Employment Agreement to become head football coach at Boise State University on or about February 27, 2014.[48] In Harsin's Boise State University term sheet dated December 11, 2013, Boise State University, under Previous Employment, agreed as follows:

> The University shall provide Harsin either directly or indirectly, with funds necessary to satisfy a $1.75M obligation to his previous employer within ten (10) days following the execution of this Material Term Sheet.[49]

Charlie R. Strong ("Strong") entered into a Term Sheet for Presentation to and Discussion with UT System Board of Regents dated January 13, 2014 to become the head football coach at the University of Texas at Austin.[50] The term sheet indicates under the heading of "Assumption of Contract from University of Louisville" that:

> UT will accept assignment of Coach's current employment agreement from Louisville and pay Louisville an assignment fee of $4,375,000 to acquire the opportunity to hire Coach at UT. (UT and Coach will amend and restate employment agreement in accordance with UT Terms.)[51]

Strong entered into an Assignment and Assumption of Second Restated Employment by and between the University of Louisville, University of Texas at Austin and Strong dated January 2014.[52] Paragraph 9 of said Assignment and Assumption Agreement indicates as follows:

> [T]he University of Texas at Austin agrees to pay the University of Louisville Athletic Association, Inc. the sum of $4,375,000.00 (the "Consideration") as a condition to Assignor's assigning and transferring the Transferred Interest to

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[47] *Id.* ¶12.
[48] Term Sheet between Bryan Harsin and Boise State Univ. (Feb. 27, 2014) (on file with author) [hereinafter Harsin Time Sheet].
[49] *Id.* ¶7.
[50] Term Sheet between Charlie R. Strong and Univ. Tex. Bd. of Regents (Jan. 13, 2014) (on file with author) [hereinafter Strong Term Sheet].
[51] *Id.*
[52] Assignment and Assumption of Second Restated Employment between Charlie R. Strong, Univ. of Louisville, and Univ. of Tex. Austin (Jan. 2014) (on file with author).

Assignee. The Consideration will be paid by wire transfer to Assignor on the business day next following the Effective Date pursuant to wire instructions provided in writing by Assignor to Assignee.[53]

VI. EXAMPLES OF BUYOUT PROVISIONS WHERE RECIPIENT UNIVERSITIES PARTICIPATE IN PAYMENT TO PREVIOUS EMPLOYER:

Malzahn, Gus -- Auburn University, December 4, 2012.

26. Repayment of Buyout from Previous Employment: Coach acknowledges that Auburn loaned him Seven Hundred Thousand Dollars ($700,000.00) to satisfy the buyout provision of his contract with his previous employer. During the course of this contract, this debt will be forgiven in the amount of Dollars ($140,000.00) for each contract year completed under this Agreement such that the debt will be forgiven entirely. If Coach is terminated for caused prior to December 31, 2017, he will be responsible for paying to the University the balance remaining on this loan, with the amount owed for a partial year being determined on a pro rata basis (i.e., $11,667 per month). In such event, University has the discretion to require repayment of the outstanding loan balance as it sees fit and can require a lump sum payment or partial payments.[54]

MacIntyre, George Michael -- University of Colorado, January 7, 2013.

3. San Jose State University Liquidated Damages. The parties acknowledge that Macintyre's agreement with San Jose State University contains certain liquidated damages provisions. The University hereby agrees to assume responsibility to pay to San Jose State University up to the amount of Four Hundred Thousand Dollars ($400,000.00) to retire Macintyre's liquidated damages obligations. In the event that the amount of liquidated damages exceeds Four Hundred Thousand Dollars ($400,000.00), Macintyre agrees that he is solely responsible for payment of the excess amount. If the payment to San Jose State University results in Macintyre owing additional federal and state income taxes directly related to the payment, after all allowable deductions are taken, then the University will pay additional compensation to Macintyre in such amount as will be sufficient, after all requisite withholding, to cover the amount of the additional taxes. Such additional payment to Macintyre shall be made within thirty (30) days of the date that Macintyre provides sufficient proof, in the University's discretion, to the University of the amount of additional taxes.[55]

Edsall, Randy Douglas -- University of Maryland, June 24, 2011.

6.5 Payment or Reimbursement of Contract Termination Expense. The University has authorized as a reimbursable employee business expense of Coach

[53] *Id.* at ¶9.
[54] Malzahn Auburn Univ. Contract at ¶26.
[55] Coaching Contract between George Michael MacIntyre and Univ. of Col. ¶3 (Jan. 7, 2013) (on file with author).

> the direct payment by the University of $400,000 to the University of Connecticut ("UConn") on or before December 31, 2011 (the "UConn Expense"). The University acknowledges that payment of this expense was necessary to obtain the services of Coach and, therefore, substantially benefits the University. Further, the University has determined that the requirements of its accountable plan, as outlined in Section 6.6 below, have been satisfied with respect to this expense.[56]

Some universities do this without mention of a previous buyout, but in the form of a "Signing Bonus."

Alford, Steve -- University of California-Los Angeles, March 30, 2013.

> 3.4 Signing Bonus. Coach shall be paid, within 60 days of the execution of this agreement, a one-time signing bonus in the amount of $845,615.00 (eight hundred forty-five thousand six hundred fifteen dollars and no cents). This sum shall, among other things, compensate Coach fully for lost income, liquidated damages owed, and the tax consequences thereon, relating to his departure from his prior position at another institution.[57]

Dykes, Daniel -- University of California-Berkeley, December 7, 2012.

> G. Signing Bonus. Coach shall receive a one-time signing bonus of $594,000 on or before February 15, 2013.[58]

Doeren, Dave -- North Carolina State University, MOU, December 1, 2012.

> Buyout of financial obligation at former institution: $750,000. Coach will have the sole financial obligation for taxes related to this payment.[59]

Harsin, Bryan -- Boise State University, MOU, December 11, 2013.

> Previous Employment: The University shall provide Harsin, either directly or indirectly, with funds necessary to satisfy a $1.75M obligation to his previous employer within ten (10) days following the execution of this Material Term Sheet.[60]

Pitino, Richard -- University of Minnesota, April 4, 2013.

> 2.10 Contract Buyout Payment. The University recognizes your financial contract buyout obligation to your previous institution and will pay you an amount for this

[56] Edsall Univ. of Md. Contract at ¶6.5.
[57] Alford Contract at ¶3.4.
[58] Dykes Contract at ¶G.
[59] Doeren Contract.¶4.
[60] Harsin Term Sheet.

obligation including the associated tax consequences. If Coach terminates this Agreement without cause at any time prior to April 20, 2018, then Coach shall repay this amount to the University, in addition to any other payments required under this agreement.[61]

Hazell, Darrell -- Purdue University, January 7, 2013.

III.F. Annual Loan Forgiveness. Purdue will provide Coach with an interest-free loan of $725,000. At the end of each year of the contract that Coach remains as Head Football Coach, $120,833 of the loan will be "forgiven". If Purdue terminates coach's employment for cause, the outstanding balance will be forgiven and will be amortized over the remaining years of the original contract term.[62]

Chizik, Gene -- Auburn University, December 15, 2008 (Terminated).

26. Repayment of Buyout from Previous Employment. Coach acknowledges that Auburn loaned him Seven Hundred Fifty Thousand Dollars ($750,000.00) to satisfy the buyout provision of his contract with his previous employer. During the course of this contract, this debt will be forgiven in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) for each contract year completed under this Agreement such that the debt will be forgiven entirely. If Auburn terminates Coach for cause prior to December 31, 2013, or if Coach terminates his employment with the University for any reason other than his disability or death prior to December 31, 2013, Coach will be responsible for paying University the balance remaining on this loan, with the amount owed for a partial year being determined on a pro rata basis (i.e. $12,500 per month). The remaining balance will be paid as follows: 50% within thirty (30) days of termination for cause by Auburn or termination by Coach; and 50% within one (1) year of termination for cause by Auburn or termination by Coach. Coach acknowledges that University also has the discretion to reduce the payments owed to Coach in Paragraph 18 in whole or in part as part of the repayment of this loan. If Auburn terminates Coach without cause prior to December 31, 2013, the balance remaining on the loan will be forgiven by Auburn.[63]

Dooley, Derek -- University of Tennessee, September 2, 2010 (Terminated).

Article II, Section C. The University also agrees to pay (i) a total of $500,000, in two equal payments of $250,000 each, to Louisiana Tech University on Coach Dooley's behalf no later than June 1, 2010 and June 1, 2011; and (ii) a total of $286,782 to be paid to the Internal Revenue Service on Coach Dooley's behalf as withheld taxes, $143,391 to be submitted to the Internal Revenue Service within thirty (30) days of the date on which each payment is submitted to Louisiana Tech University. The University will report total taxable value of the commitment in the

[61] Pitino Contract at ¶2.10.
[62] Coaching Contract between Darrell Hazell and Purdue Univ. ¶III.F (Jan. 7, 2013) (on file with author).
[63] Coaching Contract between Gene Chizik and Auburn Univ. ¶26 (Dec. 15, 2008) (on file with author).

Article II.C in the amount of $786,782. The sum set forth in this Article II.C represents the total payment the University will make on behalf of Coach Dooley regardless of the amount of taxes actually due.[64]

Hoke, Brady -- University of Michigan, March 23, 2011 (Terminated).

Section 3.02(h). Buyout Payment. The Head Coach acknowledges that the University has agreed to pay on behalf of the Head Coach the sum of $1,000,000 to San Diego State University ("SDSU") in order to satisfy the buyout terms of the Head Coach's employment contract with SDSU. The University considers this payment as taxable wages for tax withholding and reporting purposes. Consistent with that determination, the University has made timely deposits with appropriate taxing authorities of all amounts required to be withheld as taxes with respect to the Head Coach as a result of making the SDSU settlement payment. The University has agreed to neutralize to zero (0) dollars the actual tax impact of the buy-out payment in order that the Head Coach not be unduly burdened or distracted in connection with the performance of his duties hereunder. It is the express intention of the parties that neither party benefit financially to the extent there is a difference between (i) the amount of withheld taxes and (ii) the amount of tax liability incurred by the Head Coach. With respect to this liability which is attributable to the University having made the buyout payment, the Head Coach must claim all deductions allowable under applicable tax laws, including this buyout payment. Therefore, as soon as practicable in 2012, the parties will review the Head Coach's pertinent tax information, including his signed federal and state income tax returns for 2011, and either the Head Coach or the University will pay the other party, as the case may be, such amount as is necessary to effectuate this mutually desired benefit. The Head Coach represents and warrants to the University that he is not bound by or subject to any contractual or other obligation to SDSU or any other party that would be violated by his execution or performance of this Agreement.[65]

Robinson, Craig -- Oregon State University, April 6, 2008 (Terminated).

Section 12. Payment Toward Satisfaction of Coach's Current Contract. University will pay Brown University or its designee the sum of $145,000 toward satisfaction of Coach's obligations under his current contract with Brown University.[66]

Crean, Thomas -- Indiana University, August 11, 2008.

Section 4.04. Upon receipt of a copy of the terms of the Employee's present contract with Marquette University that requires the Employee to pay Marquette University liquidated damages upon the termination of the Employee's contract, the University will pay the Employee the stated amount of liquidated damages;

[64] Coaching Contract between Derek Dooley and Univ. of Tenn. ¶II(C) (Sept. 2, 2010) (on file with author).
[65] Coaching Contract between Brady Hoke and Univ. of Mich. ¶3.02(h) (Mar. 23, 2011) (on file with author).
[66] Coaching Contract between Craig Robinson and Or. State Univ. ¶12 (Apr. 6, 2008) (on file with author).

however, such amount shall not exceed six hundred fifty thousand dollars ($650,000). In the even this amount is deemed to be income, the Employee will be responsible for any associated tax consequences.[67]

Bielema, Bret -- University of Arkansas, December 4, 2012.

Pages 10-11. The University will pay (using legally permissible funds) Coach's former employer a sum not to exceed a total of One Million and No/100 Dollars ($1,000,000) if required under the terms of Coach's employment contract with his previous employer. The University considers this payment to be taxable wages for tax withholding and reporting purposes. Consistent with that determination, the University will make timely deposits with appropriate taxing authorities of all amounts required to be withheld as taxes with respect to Coach as a result of making any such payment. The University will neutralize to zero (0) dollars the actual tax impact of such payment to enable you to avoid any undue burdens or distractions in connection with the performance of your duties as Head Football Coach at the University. With regard to the University's commitment to undertake this obligation, we expressly agree and intend that the University or you will not benefit financially to the extent there is a difference between (a) the amount of withheld taxes and (b) the amount of tax liability incurred by you. With respect to this liability which is attributable to the University making any such payment, you agree to claim all deductions allowable under applicable tax laws, including the applicable deductions relating to the amount paid by the University to satisfy any portion of your employment agreement with your previous employer. Depending on the timing of any such payment by the University, you and/or your advisors agree to review your pertinent tax information, including any signed federal and state income tax returns necessary, and either the University or you will pay the other party, as the case may be, such amount as is necessary to effectuate this mutually desired benefit. Coach represents and warrants to the University that his acceptance of the position of Head Football Coach and his performance of the duties of this position will not violate any other contract or obligation to any other party.[68]

Petersen, Christopher S. -- University of Washington, December 6, 2013.

5.m. *Reimbursement of Boise State University Contract Termination Expense.* The University acknowledges that a necessary element of inducing Employee to accept employment with University as its Head Football Coach is the University's commitment to pay the $750,000 Boise State University contract termination expense that Employee would incur upon accepting employment with the University. The University has authorized the reimbursement of Employee for this expense under its accountable plan (as described in section 1.62-2 of the Treasury regulations) and will pay said sum directly to Boise State University.[69]

[67] Coaching Contract between Thomas Crean and Ind. Univ. ¶4.04 (Aug. 11, 2008) (on file with author).
[68] Coaching Contract between Bret Bielema and Univ. of Ark. 10-11 (Dec. 4, 2013) (on file with author).
[69] Petersen Contract at ¶5.m.

In addition to giving new coach James Franklin one of college football's most lucrative employment contracts, Penn State also agreed to pay $1.5 million that Franklin owed Vanderbilt University for early termination of his contract. The buyout payment which Penn State provided in response to an inquiry was not listed among the financial terms the University distributed on January 11, 2014 when it announced Franklin's hiring. It was unclear as to whether Penn State also would be paying the income taxes likely to be associated with the payment of the buyout on Franklin's behalf.

Professional teams also play the buyout game when a coach jumps from a college team to a professional team in breach of his contract.[70] Chip Kelly's University of Oregon Employment Agreement dated September 27, 2010 provided as follows:

> **6.03** Termination by Kelly.
>
> Kelly recognized that his promise to work for the University for the entire term of this Agreement is of the essence of this Agreement to the University. Kelly also recognized that University is making a highly valuable investment in his continued employment by entering into this Agreement and that its investment would be lost were he to resign or otherwise terminate his employment with the University prior to the expiration of the term of this Agreement. In recognition of these facts, the parties agree that Kelly's decision to terminate his employment prior to the then in force expiration date of this Agreement will be subject to the following terms and conditions.
>
> a. Written Notice. If Kelly terminates this Employment Agreement during its term, he must give University fifteen (15) days advance written notice of the termination of his employment with the University. While Kelly is assigned to the position of Head Coach of the University's football team, such termination by Kelly must occur at a time outside the football regular playing season and post-season play, if any. Simultaneous with such notice, Kelly shall inform University in writing of his employment plans following the termination of employment with University.
>
> b. Liquidated damages. If Kelly terminates this Agreement or any extensions thereof without cause and takes a college or professional football coaching job, he shall pay to University, as liquidated damages, the following:
>
> On or before the end of Contract Year One: $4,000,000

[70] Coaching Contract between Chip Kelly and Univ. of Or. ¶6.03 (Sept. 27, 2010) (on file with author).

After Contract Year One but on or before the end of Contract Year Two:	$3,750,000
After Contract Year Two but on or before the end of Contract Year Three:	$3,500,000
After Contract Year Three but on or before the end of Contract Year Four:	$2,500,000
After Contract Year Four but on or before the end of Contract Year Five:	$2,250,000
After the Fifth Contract Year and each Contract Year thereafter:	$2,000,000

c. Kelly may prorate this amount over the remaining contract months without interest or may prepay in one or more lump sums. The parties recognize and agree that projection or measurement of University's damages in such a case would be extremely difficult and that this provision is a sufficient and reasonable estimate of the potential injury to University and that it shall be enforceable as liquidated damages and not as a penalty. Provided, however, that if University's membership in the PAC-10 Conference ends and University does not join, without a competition-season interruption, a conference of comparable stature and NCAA classification level, this subsection shall not apply.[71]

In August of 2013, Kelly became the head football coach of the Philadelphia Eagles, and was contractually obligated to pay a $3.5 million buyout to the University of Oregon. Kelly is paying $85,365.85 every month until the summer of 2016 without interest.

Bill O'Brien signed an Amended and Restated Employment contract with the Penn State University in June of 2013 that mandated a separate NFL buyout price.[72] What follows is the revised liquidated damage clause:

7. TERMINATION BY COACH

a. Voluntary Resignation.

(i) Coach may terminate this Contract for any reason upon sixty (60) days written notice to the University. (Coach will be deemed to have terminated this Contract in the event Coach died or Coach becomes disabled or incapacitated and is continuously unable to perform any or all of his obligations under this contract for a period of at least six (6) months.) If such termination (other than

[71] *Id.*
[72] O'Brien Contract at ¶7(a)(i)-(iv).

by reason of death, disability or incapacity or if Coach is not, within one year of the effective date of his resignation, employed by any third party as a football coach or in any other capacity relating to a professional or intercollegiate football program) occurs during the term of this Contract or any extension thereof, Coach will pay to the University as liquidated damages an amount equal to the product of (i) the amount payable to Coach pursuant to Sections 4(a), (d) and (e) hereof for the then current Contract Year multiplied by (ii) the number of years remaining under this Contract, including any extensions hereof, at the time of termination; provided, however, that if Coach terminates this Contract in order to take a head coaching position with any National Football league team, the amount payable by Coach pursuant to this Section shall be equal to the product of (i) the amount payable to Coach pursuant to Section 4(a) hereof for the then current Contract Year multiplied by (ii) the number of years remaining under this Contract, including any extensions hereof, at the time of termination. In the case of partial years, the amount will be pro-rated by the number of months left in the partial year. This amount will be in lieu of any and all other legal remedies available to the University pursuant to this Section.

(ii) Any payment due under this Section will be made within sixty (60) days of the later to occur of (A) the effective date of Coach's termination of the Contract and (B) the date on which Coach becomes employed by a third party as a football coach or in any other capacity relating to a professional or intercollegiate football program. The parties acknowledge that the University will incur administrative, recruiting, resettlement and other costs in obtaining a replacement coach in addition to potentially increased compensation costs and loss of ticket, broadcast or other revenues, which damages are impossible to determine with certainty and accordingly agree to this liquidated damages provision. The parties further agree that the liquidated damages provided for herein are reasonable in amount and not a penalty.

(iii) In calculating the amount of liquidated damages under this Section, it will be assumed that Coach's per annum Base Salary and additional compensation on the date of termination would remain in effect for the remaining stated term of this Contract.

(iv) In the event of termination by Coach under this Section, the University will be obligated to pay to Coach the annual performance incentives provided for in Section 6(a) earned to the date of such termination but will not be obligated to reimburse Coach for any expenses incurred by Coach prior to termination toward presentation of any summer camp.[73]

The restated contract indicates that O'Brien changed the formula for his buyout and reduced the price of an NFL buyout from $19.33 million in 2012 to $6.4 million for 2013, per the contract. On the other hand, another university would have to pay Penn State $11.08 million for O'Brien. O'Brien was hired to become the coach of the Houston Texans on January 2, 2014.

VII. METHODS FOR FINANCIALLY HANDLING DEPARTING COACH WHO TERMINATES CONTRACT EARLY

1. <u>Interest Free Loan</u>: The recipient university pays the other university the amount of the buyout. The recipient university enters into an interest-free loan with the new coach which is amortized and forgiven over the term of the new employment contract. However, there is a "Clawback" provision wherein the coach would have to be pay back the recipient university the amount of the buyout in the event the coach terminates early, is terminated for cause, or there is a death or disability.
2. <u>Signing Bonus:</u> Coach is paid, as a front-end payment, a signing bonus to cover the costs and tax consequences relating to coach's early departure from his prior position at another institution.
3. <u>Recipient University Assumes Full Responsibility for Payment of Liquidated Damages.</u> The recipient university assumes full responsibility for the payment, and in the event the liquidated damages results in the coach owing additional federal and state income taxes

[73] *Id.*

related to the payment, the University will pay additional compensation to coach in such amounts as to cover the additional taxes.

4. Recipient University Pays Buyout to University. Recipient university will be responsible for payment to the other university the amount of the liquidated damages, but coach is responsible for any and all tax consequences associated with the buyout payment.
5. Recipient University Pays Buyout to Coach. Recipient university will pay coach the amount of the buyout payment which coach acknowledges as income and agrees to pay any and all applicable federal and state income taxes.
6. Recipient University Reimburses Coach. Coach pays the buyout payment and the recipient university reimburses the coach the amount of the buyout.
7. Assignment of Rights. Recipient university enters into an assignment and assumption agreement with the former university. No buyout actually occurs by coach because technically there was no termination. There is a payment for the assignment that is equal to the buyout and the recipient university enters into a new restated contract with the coach. This methodology has been utilized by the University of Texas, the University of Louisville, and the University of Alabama at Birmingham.[74]
8. Share Responsibility – Creativity. To obtain the Colorado State Head Football Coach, Jim McElwain, the University of Florida Gators will pay the largest buyout ever given to another university in college football history. The University of Florida will pay Colorado State University a total of $5,000,000.00 -- $3,000,000.00 in cash over six years and another $2,000,000.00 to play a football game in Gainesville sometime in the

[74] Steve Berkowitz, *Schools buying Coach's Contracts instead of Buying Out*, USA TODAY Sports (Nov. 19, 2014) http://www.usatoday.com/story/sports/ncaaf/2014/11/19/college-football-coaches-compensation-buyouts-texas-louisville-alabama/19271987/

near future.[75] McElwain will also pay $2,000,000.00 personally, which would then equal a total buyout of Seven Million Dollars ($7,000,000.00).[76] The buyout to Colorado State now eclipses the buyout that the University of Texas paid Louisville in 2013 for Charlie Strong in the amount of $4,375,000.00.[77] McElwain's payment of $2,000,000.00 is also the largest amount that a coach has ever paid to buy himself out of a contract, exceeding what Rich Rodriguez paid, i.e. $1,500,000.00, to West Virginia to get out of his contract to jump to Michigan.[78] The total seven million dollar buyout is seven and a half times the average buyout paid by a university to another university over the past three years of the twenty-one buyouts that were public over that time period; the average buyout was $935,786.00.[79]

VIII. POTENTIAL TAX ISSUES FOR THE TRANSITIONING COACH

And finally, whenever money changes hands, tax laws and the IRS are sure to be involved. Even when the new university pays the entire buyout amount owed to the former school, the coach is not necessarily completely off the hook. As with every other thing of value that a coach receives, the IRS must be considered.

Typically, all payments that a university makes to a coach, or on behalf of a coach, are considered taxable income to the coach. Loan forgiveness is also generally considered taxable income. And of course, if a coach is terminated without cause and receives a buyout payment under his employment contract, the buyout payment from university to coach is income subject

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[75] Kelly Lyell, *CSU loses coach to Florida for record $7M buyout*, THE COLORADOAN (Dec. 4, 2014), http://www.coloradoan.com/story/sports/csu/football/2014/12/04/report-florida-will-announce-mcelwain-new-coach-today/19885141/.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Darren Rovell, *Gators pay record $5M for coach,* ESPN.COM (Dec. 4, 2014), http://espn.go.com/college-football/story/_/id/11979092/florida-gators-pay-record-5-million-buyout-colorado-state-jim-mcelwain.

to taxes, just as it would be if the coach was still coaching. However, when the new school pays the buyout to the former university, or reimburses the coach for that payment, the tax result is not so clear.

Whether a buyout paid by one school to another school is taxable income for the coach, and if so, whether it results in a net tax liability, is not a settled question. But it certainly could be an expensive question. For a one million dollar buyout payment, at the current Alternative Minimum Tax rate of 28%, the tax liability for the coach could be $280,000.00. At the regular 39.6% rate, the tax liability for the coach could be $396,000.00.

Tax Law Professors Douglas Kahn and Jeffrey Kahn (the "Professors") have studied the issue, and conclude that buyout payments by the coach's new school to the coach's former university should not result in any tax liability for the coach.[80] They present two separate legal theories to support their position.[81]

First, the Professors argue that a buyout payment should be considered a nonitemized deduction, meaning that the full amount is deductible as a business expense.[82]

Second, the Professors argue in the alternative that the new school's buyout payment should be considered a noncompensatory payment (or reimbursement) for a business purpose of the new school, and therefore should not be considered income to the coach at all.[83]

The Professors analyze in their article tax concepts relating to the issue including:

1. Tax treatment when the recipient university pays the buyout;

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[80] Kahn, Douglas A. "Tax Consequences When a New Employer Bears the Cost of the Employee's Terminating a Prior Employment Relationship." J.H. Kahn, co-author. Fla, Tax Rev. 8, no 5 (2007): 539–54 (hereinafter "Kahn & Kahn"). The Professors Kahn are clear that the result is the same whether the new school pays the old school directly, or reimburses the coach for the coach's liability to the old school. *Id.* at 542. For a (slightly) less technically dense treatment of this topic by the Professors Kahn, see their article "Will the Tax Man Cometh to Coach Rodriguez?" Tax Notes, Vol. 120(5) pp. 474–78 (2008).
[81] Kahn & Kahn, at 545.
[82] *Id.* at 545–49.
[83] *Id.* at 545–53.

2. Tax treatment when the recipient university reimburses the coach for the buyout;

3. Whether an employer's payment of an employee's personal obligation constitutes gross income;

4. Whether a non-reimbursable buyout payment by the employee is deductible as a business expense under IRC § 167;

5. The Washout Effect;

6. Miscellaneous itemized deductions and the 2% rule as well as the Alternative Minimum Tax (AMT); and

7. Non-itemized deductions.[84]

These issues are beyond the scope of this article and the Professors' article should be consulted for a better understanding of the inter-relationship of the tax laws to these issues.

Despite their conclusions, however, the Professors are careful to point out that the IRS has not taken a position on the tax implications of buyout payments for the coach, under either of their theories.[85]

"Institutions are skating on thin ice, with no precedent upon which to rely and unproven rationale, to take any position other than any payment of the coach's buyout obligation made by the new institution ... would be anything but taxable income to the coach," Indiana State general counsel Melony A. Sacopulos, who has an extensive background in business and tax law, said via e-mail.[86] Jeffrey Kahn acknowledged "it could be that (a legal finding would be) this is really disguised compensation." The IRS "would want to fight this, because they don't want to get into

[84] *Id.* at 542-48.
[85] *Id.* at 554.
[86] Steve Berkowitz, *Tax-free buyouts? Coaches take a chance with the IRS*, USAToday Sports (Nov. 6, 2013), http://www.usatoday.com/story/sports/ncaaf/2013/11/06/college-football-coach-pay-buyouts-taxes-irs/3449639/.

an issue about (case-by-case determinations) when it's disguised compensation and when it isn't," he said."[87]

Whatever the preferred tax treatment, these potential tax issues should be addressed at the time a coach's new contract is negotiated, drafted and signed. Coaches' contracts should be structured to address tax issues regarding a buyout payment, and a review of the excerpted contracts included in this article shows that some contracts already attempt to do this.

For example, Texas Tech's contract with Tommy Tuberville structures the buyout payment as part of as "accountable plan"—a type of employee expense reimbursement plan that comports with the second theory offered by the Professors.[88] Maryland's contract with Randy Edsall also considers the buyout payment to be a reimbursable employee business expense.[89]

Auburn's contract with Gus Malzahn pays the buyout, but considers the payment to be a loan that is forgiven over the course of five years, provided that Malzahn remains at Auburn.[90] Because of this loan forgiveness over time, Malzahn will almost certainly have tax liability for Auburn's payment of his buyout.[91] Arkansas' contract with Bret Bielema considers its buyout payment to be taxable wages to Bielema, and calls for Arkansas to withhold taxes from its buyout payment.[92]

The tax treatment of a buyout payment within the contract can establish tax liability, or set the stage for a more favorable tax position to be taken on the coach's tax return. The Auburn and Arkansas contracts all but ensure that a buyout payment is taxable income, while the Texas

[87] *Id.*
[88] Tubervile Cincinnati Contract, excerpted *supra*, at pp. 24, subsequently revised by university to treat payment as personal income to Tuberville.
[89] Edsall–Maryland Contract, excerpted *supra*, at p. 25.
[90] Malzahn–Auburn Contract, excerpted *supra*, at pp. 26.
[91] See, e.g., Kahn & Kahn, *supra* note 80, at 552, noting the difference in IRS tax rulings when the employee is required to perform under the new contract for a set time before reimbursement would occur.
[92] Bielema–Arkansas Contract, excerpted *supra*, at pp. 32.

Tech and Maryland contracts set the stage for each coach to submit a tax return that claims no taxes owed on the buyout payment, as advocated by the Professors.

The theories offered by the Professors are well-reasoned and even compelling, but they do not have the force of law. What ultimately matters to the individual coach is what the IRS thinks, and, if necessary, what judges decide. Although the Professors may turn out to be right, the IRS has not yet weighed in, and no coach wants to be a test case for the courts to decide that question. Time spent by the coach in the courtroom or in the tax lawyer's office is time spent away from the team and program. Even if the coach wins in court, the coach still loses the money, the time, and the sanity that are the costs of a lawsuit against the IRS.

The most interesting treatment of the tax issue is found in the documents accompanying Strong's move to the University of Texas ("Texas"), in which Strong's Louisville contract is assigned to Texas, with Texas paying an "assignment fee" as consideration for the assignment.[93] By Texas' assumption of the Louisville contract, the buyout clause is never triggered (or at least never invoked), and the payment by Texas to Louisville is clearly a Texas business expense that does not flow through Strong. Accordingly, there should be no tax liability for Strong because technically no buyout payment was ever made—at least not one that Strong was obligated to pay under his Louisville contract. By removing the applicability of the buyout clause altogether, Texas and Strong appear to have arranged the strongest position for claiming no tax liability for Strong.

So long as college coaches operate essentially as free agents, with only buyout clauses as restrictions on their movement, the tax obligations associated with buyout payments will almost certainly continue to be a concern, especially from the perspective of the coach. Accordingly, for the coach, it is extremely important to consider tax issues when the initial contract with the

[93] Strong–Texas—Louisville Assignment and Assumption Agreement, excerpted *supra*, at p. 27.

new school is negotiated and drafted. These issues include how a buyout payment is treated by the university, the timing of reimbursement, potential liability for payment of taxes, possible tax penalties, and legal costs to defend tax treatment based on contractual assumptions as to tax liability. Once the new contract is signed, the opportunity to structure a deal to avoid tax liability may have already been lost.

IX. CONCLUSION

It is common knowledge that coaches are hired to get fired, and as such, the back end of a coach's contract is as important as the overall compensation figure. College coaches, in particular, must navigate a coaching carousel in which it is commonplace for a contract to end before its term expires. The result is a unique environment that is essentially free agency, with the only restrictions being buyout and/or liquidated damages clauses that make a coach pay to leave instead of requiring him to stay. Therefore, it is imperative that the buyout and/or liquidated damages clauses are examined, negotiated, and well drafted. Issues such as reasonableness, third-party payment, and tax liability must be considered before the contract is signed. Careful drafting is necessary to ensure that all parties are protected and prepared because early termination – whether by the university or by the coach – has become increasingly certain. For the foreseeable future, the coaching carousel will continue to spin, and it shows no signs of slowing.

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