Are Mitigation Clauses Still Utilized in College Football Coaching Contracts?

By Martin J. Greenberg

A. Jimbo Fisher, Texas A&M University – no requirement to mitigate

Jimbo Fisher ("Fisher") commenced his coaching career at Florida State University in 2010.[1] He stayed at Florida State until 2017, compiling a record of 85 wins and 23 losses.[2] Fisher became the new head coach at Texas A&M University in 2018 and compiled a record over a six year period of 45 wins and 25 losses.[3] Fisher was terminated without cause in November of 2023.[4] Athletic Director Ross Bjork ("Bjork") had this to say about Fisher: "[T]he program was 'stuck in neutral [. . .] we are not reaching our full potential. We are not in the championship conversation and something was not quite right about our direction and the plan.'"[5] Bjork went on to say that "[t]here was something just not clicking to provide confidence for everyone in the program. You have to adapt, you have to evolve. I'm not going to say whether he did or didn't, but it didn't work."[6]

After signing Fisher to a 10-year, $75 million contract in 2017 to lure him away from Florida State, Texas A&M doubled down in 2021 by extending Fisher's contract through 2031 to the tune of nearly $95 million fully guaranteed.[7] Since the extension was signed, Texas A&M is 19/15 overall, 10/13 against SEC competition, and 12/14 against Power 5 opponents.[8]

Since Fisher was fired not for cause, there was approximately $77 million remaining on his contract.[9]

> Fisher's contract explains the buyout's payment schedule as follows: University shall pay twenty five percent (25%) of such amount in a lump sum within (60) days of the effective date of termination of the Agreement, and the remaining balance shall be paid to Coach in equal annual payments beginning one hundred twenty (120) days after the effective date of the termination of this Agreement and continuing through the original end date of this Agreement, December 31, 2031.[10]
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> Fisher's Contract, which runs through December 31, 2031:
> Total Buyout: $77,562,500
> Lump Sum (25%) owed (within 60 days): $19,390,625

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[1] *Jimbo Fisher Biography*, THE 12TH MAN, https://12thman.com/sports/football/roster/coaches/jimbo-fisher/1430 (last visited Mar. 18, 2024).
[2] *Id.*
[3] Dave Wilson, *Texas A&M AD fired Jimbo Fisher because program 'stuck in neutral,'* ABC NEWS (Nov. 12, 2023), https://abcnews.go.com/Sports/texas-ad-fired-jimbo-fisher-program-stuck-neutral/story?id=104836346.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Sam Khan, Jr., *How Texas A&M will pay Jimbo Fisher's $77.6 million buyout, the largest in college football history,* THE ATHLETIC (Nov. 12, 2023), https://theathletic.com/5056311/2023/11/12/buyout-jimbo-fisher-contract/.
[8] *Id.*
[9] *Id.*
[10] *Id.*

> Eight payments, starting no later than March 11, 2024 and continuing annually through 2031: $7,271,484[11]

"Fisher has no duty to mitigate his salary by finding another job, so if he is coaching somewhere in the near future, his new salary will not offset what Texas A&M owes him."[12]

> 'Texas A&M athletics and the 12th Man Foundation will be the sole sources of the necessary funds covering these transition costs,' Bjork said. The 12th Man Foundation is the primary fundraising arm for A&M athletics and is closely aligned with the school (its headquarters are just steps from Kyle Field) but is technically a separate 501(c)(3) entity. Bjork said the 12th Man Foundation will use unrestricted funds to cover the initial $19.3 million payment. The athletic department will pay the annual distributions to Fisher for the rest of the contract 'by growing our revenues and adjusting our annual operating budget accordingly.' Even the short-term money that Texas A&M owes outpaces the largest buyout known to be paid to a fired coach: $21.4 million to former Auburn coach Gus Malzahn. And that doesn't account for the money it would take the program to hire a new head coach and staff, which would be substantial.[13]

Fisher's contract was essentially guaranteed. He was fired not for cause, and the University was on the hook for the entire remaining balance as specified in the contract which permits Fisher to obtain other employment and not offset any earnings against the money owed to him by Texas A&M.

B. Mitigation

Mitigation of damages is a common law concept that essentially requires that a party that has suffered a loss has to take reasonable steps and actions to minimize the amount of loss suffered by taking some form of affirmatively action. In the coaching world, mitigation of damages means essentially that the coach has to make a good faith effort to seek comparable employment, and whatever is earned from comparable employment (as may be defined in the contract) is offset against the amount owed by the university that has terminated the coach without cause. However, I believe that parties to a contract can expressly or impliedly agree to contractually waive the duty to mitigate damages, and in the case of coaches would not have an obligation to obtain comparable employment to offset the earnings therefrom.

Where there is no obligation to mitigate damages there is often a strong statement of liquidated damages and what they constitute as a full and complete agreement of the damages suffered by the coach's early termination. Sometimes the concept of mitigation of damages is also called the doctrine of avoidable consequences where parties essentially cannot recover for losses that could

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[11] *Id.*
[12] *Id.*
[13] *Id.*

have been avoided, lowered, or reduced had the parties acted in a certain way to lessen those damages.

C. Mitigation Clauses

Is there a no mitigation provision trend among Power Coaches in college football? What follows is a listing of some of the top 25 highest compensated college football coaches in the 2022-2023 season and their contract provisions relative to mitigation requirements or no mitigation requirements.[14]

1. Mark Stoops, University of Kentucky, Head Football Coach Employment Agreement, November 26, 2012[15]

Paragraph 8. Events of Default and Termination

[No mitigation provision]

2. James J. Harbaugh, University of Michigan, Employment Agreement, December 28, 2014[16]

Paragraph 4.01 Termination Without Cause [. . .] (b) The Head Coach is required to mitigate the University's obligations under Section 4.01(a) by making reasonable efforts to obtain other employment as soon as reasonably practical following such termination. If the Head Coach obtains other employment or receives compensation for services (e.g., as a consultant) elsewhere after the University's termination of this Agreement pursuant to Section 4.01(a) (collectively, "Other Compensation"), then each of the University's monthly obligations to pay the Head Coach as set forth in Section 4.01(a) shall be reduced in the manner described in this section 4.01(b), by Head Coach's total compensation from all such sources relating to coaching or broadcasting (except not including: i) employee reimbursements; and ii) standard employee benefits under broad-based plans). If the Head Coach does obtain other employment or compensation, he shall immediately provide written notice to the University describing the position and his total compensation. The University shall have the right to reasonably request evidence of the efforts Head Coach has made to obtain other employment and the amount of compensation paid to or vested in favor of the Head Coach in the new position and Head Coach shall provide the evidence reasonably requested by the University from time to time. The Other Compensation shall be set off from the amounts due pursuant to Section 4.01(a) hereunder for the same period that it is earned by the Head Coach whether it is paid on an ongoing basis, as a sign-on or otherwise in advance or on a deferred basis. Any amounts subject to a vesting schedule shall be deemed earned when vested. If in any month the Other Compensation exceeds the University's obligations to the Head Coach as set forth in Section 4.01(a), such excess shall be carried forward and set off against the University's next future monthly obligations. The Head Coach shall provide the University on an ongoing basis with the

[14] Amanda Christovich & Doug Greenberg, *Who Is Highest-Paid Coach in College Football?* FRONT OFFICE SPORTS (Oct. 31, 2023), https://frontofficesports.com/who-are-highest-paid-college-football-coaches/.
[15] Head Football Coach Employment Agreement between the University of Kentucky and Mark Stoops, Nov. 26, 2012 (on file with author).
[16] Employment Agreement between the University of Michigan and James J. Harbaugh, Dec. 28, 2014 (on file with author).

information reasonably requested which is necessary to implement the foregoing and shall promptly respond to any reasonable inquiries of the University. The Head Coach shall promptly refund to the University any amounts that he receives that should have been setoff under the provisions of this section.

3. Kirby Smart, University of Georgia, Agreement, January 1, 2016[17]

Paragraph 13, 14, or 15.

[No mitigation provision]

4. Kirk J. Ferentz, State University of Iowa, Head Coach Contract, February 1, 2016

Paragraph 11. Termination by University Without Cause; Liquidated Damages

[No mitigation provision]

5. Lane Monte Kiffin, Florida Atlantic University - Head Coaching Agreement (Men's Football Program), December 13, 2016

Paragraph B. Termination Obligations. 1. Termination by University Without Cause.

[No mitigation provision]

6. Michael R. Gundy, Oklahoma State University, Employment Contract, January 1, 2017[18]

Paragraph 3. Mitigation of Damages. Nothwithstanding the provisions of Sections 5.03(a)10 and 5.03(c), Employee agrees to mitigate University's obligation to pay the liquidated damages set forth in Section 5.03(c) for a termination under Section 5.03(a) 10 and to make reasonable and diligent efforts to obtain comparable employment (i.e., in the football industry), including, but not limited to, a coaching position at a university or professional team or other similar employment involving athletics, as soon as reasonably possible after termination of this Contract by University under Section 5.03(a)10. After Employee obtains such new employment, University's financial obligations under this Contract, including this Section 5.03(c) for a termination under Section 5.03(a)10, shall be reduced proportionally by any compensation received from such new employment during the term of this Contract.

7. John J. Fisher, Jr. Texas A&M University, Coach's Employment Agreement, December 4, 2017[19]

Paragraph 5.3 Damages Upon Termination by University Without Cause. [. . .] Coach will not have a duty to mitigate University's damages if this Agreement is terminated by University without

[17] Agreement between University of Georgia Athletic Association, Inc. and Kirby Smart, Jan. 1, 2016 (on file with author).
[18] Employment Contract between Oklahoma State University and Michael R. Gundy, Jan. 1, 2017 (on file with author).
[19] Coach's Employment Agreement between Texas A&M University and John J. Fisher, Jr., Dec. 4, 2017 (on file with author).

Cause. Furthermore, University will not be entitled to any offset whatsoever in the event that Coach secures any subsequent employment.

8. Nick L. Saban, University of Alabama, Amended and Restated Head Coach Employment Contract, February 1, 2013 and Second Amended and Restated Head Coach Employment Contract, March 1, 2018[20]

Page 28, Paragraph (h) Offset Against Liquidated Damages. It is agreed that the Liquidated Damages paid by the University pursuant to Section 5.01(e) hereof shall be offset and reduced on a monthly basis by the gross compensation earned by Employee personally or through business entities owned or controlled by Employee from employment as a head or assistant coach or as an administrator either at a college or university or with a professional sports organization (collectively referred to hereafter as a "Coaching Position.")For purposes of this subsection, "gross compensation" shall mean, without limitation, gross income from base salary or wages, talent fees, or other types of compensation paid to Employee by an employer, including by a business entity owned or controlled by Employee, consulting fees, honoraria, fees received by Employee as an independent contractor, or other income of any kind whatsoever from a Coaching Position. While the University's obligation to pay Liquidated Damages remain in effect, within fourteen (14) days after accepting any employment in a Coaching Position and within fourteen (14) days after the end of each month thereafter, Employee shall furnish to the University an accounting or report of all gross compensation received by Employee during the immediately preceding month from the Coaching Position. The University shall reduce the amount of the monthly Liquidated Damages payments due and payable to Employee based upon the gross compensation for the immediate previous month as reflected in the Coaching Position gross compensation report. If Employee fails or refuses either to notify the University of Employee's employment in a Coaching Position or to furnish the monthly Coaching Position gross compensation reports after receiving a formal, written request to do so from the University, then, after giving Employee fourteen (14) days' written notice, the University's obligation to continue paying Liquidated Damages to Employee shall cease.

9. Kyle Whittingham, University of Utah, Employment Agreement, January 1, 2019[21]

Paragraph 8. Termination by University without Cause. D. Notwithstanding the foregoing damages provisions, Coach Whittingham agrees to make reasonable, good faith, and diligent efforts to obtain comparable employment, such as a coaching position (not necessarily as a head coach) at a university that competes on the NCAA Division 1 FBS or FCS level or with a professional team, as soon as reasonably possible after the termination of this Agreement. After Coach Whittingham obtains new employment, University's financial obligations under this Agreement, including damages, shall cease to be limited to the difference between Coach Whittingham's compensation under this Agreement and compensation at his new employment.

[20] Second Amended and Restated Head Coach Employment Contract between The University of Alabama and Nick L. Saban, Mar. 1, 2018 (on file with author).
[21] Employment Agreement between the University of Utah and Kyle Whittingham, Jan. 1, 2019 (on file with author).

10. Ryan P. Day, Ohio State University, Head Coach Employment Agreement, January 2, 2019[22]

Paragraph 5.2 Termination by Ohio State Other Than For Cause. [. . .]

5.2.3 Notwithstanding the foregoing, the Post-Termination Payments shall be subject to the following:

(a) Coach acknowledges and expressly agrees that he shall be required to mitigate any payments to him under Section 5.2.1;

(b) Coach acknowledges and expressly agrees that he shall be required to make every reasonable and diligent effort as soon as practicable following his termination to seek and secure a Comparable Position. For purposes of this Agreement, a "Comparable Position" shall include other employment at the market rate for Division I collegiate football coaching positions or professional football coaching positions. Coach shall report monthly to the director or the Director's designee on employment applications and progress in actively seeking other employment. Coach shall notify Ohio State immediately if Coach has obtained other employment or has been engaged to provide service, either as an employee or an independent contractor. Coach's lack of diligence in seeking a Comparable Position or Coach's refusal of a reasonable offer of a Comparable Position shall void Ohio State's responsibility to pay the Post-Termination Payments;

(c) If Coach obtains any other employment or is engaged to provide service (regardless of whether the employment or engagement constitutes a Comparable Position), then the Post-Termination Payments shall be reduced by Coach's total compensation attributable to the period covered by the scheduled term hereof from all sources directly related to such position(s) (including, without limitation, salary, deferred compensation, signing bonuses or other cash compensation income, except not including the employee benefits costs associated with such position(s)) (the "Mitigation Compensation"). Each monthly Post-Termination Payment that would otherwise be payable under Section 5.2.1(a) or Section 5.2.1(b) that is payable during the time that Coach has such position(s) shall be reduced by the gross amount of the monthly Mitigation Compensation;

(d) Coach agrees that as a condition of receiving the Post-Termination Payments, Coach must execute a comprehensive release within sixty (60) days of the date of Coach's termination in the form determined from time to time by Ohio State in its reasonable discretion. Generally, the release will require Coach and Coach's personal or legal representatives, executors, administrators, successors, heirs, distributes, devisees, legatees and assigns to release and forever discharge Ohio State, its past, present and future trustees, officers, employees, directors, agents, attorneys, successors and assigns from any and all claims, suits and/or causes of action that grow out of or are in any way related to Coach's employment with Ohio State, other than any claim that Ohio State has breached the terms of the release agreement. This release will include, but not be limited to, any claim under or out of the Equal Pay Act; the Civil Rights Acts of 1964; the United States Constitution; the Age Discrimination in Employment Act; the Older Worker's Benefit Protection

[22] Head Coach Employment Agreement between The Ohio State University and Ryan P. Day, Jan. 2, 2019 (on file with author).

act; the Americans with Disabilities Act; the Family and Medical Leave Act; any state, federal law or local ordinance prohibiting discrimination, harassment or retaliation in employment; any claim for wrongful discharge, including in violation of public policy; claims of promissory estoppel or detrimental reliance; defamation, intentional infliction of emotional distress; or the public policy of any state; Chapter 4112 of the Ohio revised Code and any other provision of the Ohio Revised Code; and any other federal sate or local law concerning employment, or in any other manner regulating or otherwise concerning wages, hours or any other terms or conditions of employment. Upon Coach's termination of employment with Ohio State (other than *for cause*), Coach will be presented with a release and if Coach fails to timely execute the release, Coach agrees to forego any Post-Termination Payments. Coach acknowledges that Coach is an experienced person knowledgeable about the claims that might arise in the course of employment with Ohio State and knowingly agrees that the Post-Termination Payments provided for in this Agreement are satisfactory consideration for the release of all possible claims described in the release;

(e) Coach agrees that as a condition of receiving the Post-Termination Payments, Coach shall, subject to a reasonable mutually-agreed confidentiality agreement, provide a copy of his employment or service agreement as well as his Form W-2s and Form 1099s related to Coach's position to Ohio State's HR Director for Athletics for each calendar year during which all or a portion of the Post-Termination Payment Period occurs;

(f) Coach agrees that his failure or refusal to provide the notice and documentation set forth in this Section 5.2 shall relieve Ohio State of its financial obligations under this Agreement to pay the Post-Termination Payments; and

(g) Coach recognizes that his mitigation obligations are an essential term of this Agreement and Coach agrees that, to the extent permitted by applicable law, Ohio State reserves the right to reduce the Post-Termination Payments due and owing under this Section 5.2 if Coach's Mitigation Compensation appears contrived to rely upon payments to Coach by Ohio State (examples include, but are not limited to, if Coach's new position apportions compensation so that it increases by more than twenty percent (20%) per year or balloons after Ohio State's payments to Coach cease) or if Coach's new position pays below market rate during the years of Ohio State's financial obligations under this Agreement.

5.2.4 For purposes of this Section 5.2, any reference to Coach's "termination of employment" by Ohio State (or any form of the phrase "termination of employment") shall mean Coach's "separation from service" within the meaning of Section 409A of the Internal Revenue Code and Treasury regulation Section 1.409A-1(h).

11. Michael K. Norvell, Florida State University, Employment Agreement, December 7, 2019[23]

Section V. Termination of Employment Agreement. Paragraph E. Termination Without Cause.

[. . .]

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

12. Sam Pittman, University of Arkansas, Offer of Employment, December 8, 2019[24]

Termination for Convenience by UA. [. . .]

The UA's payments of these amounts will be subject to the following conditions: (a) payment in equal monthly installments over the remaining Term as if you had not been terminated; (b) the affirmative duty to mitigate your damages if terminated for convenience, by reasonably and diligently seeking in good faith and accepting other comparable full-time, paid employment (head coach of an NCAA Division I, intercollegiate head football coach at a high-level institution or head coach or assistant coach of a professional team in the National Football League) at a rate of compensation not less than market value and consistent with compensation rates for similar positions in the industry, if terminated for convenience by the UA after January 1, 2022; (c) the affirmative duty to report and provide evidence of all efforts to obtain comparable employment and maximize your earnings as a collegiate or professional football coach throughout the entire period in which the UA's obligation to pay the release payment is in effect, if terminated for convenience by the UA after January 1, 2022; (d) the UA's right of offset of any earnings you

[23] Employment Agreement between Florida State University and Michael K. Norvell, Dec. 7, 2019 (on file with author).
[24] Offer of Employment between the University of Arkansas and Sam Pittman, Dec. 8, 2019 (on file with author).

receive, whether from athletic or non-athletic related sources, and your duty to disclose all such earnings if terminated for convenience by the UA after January 1, 2022; (e) the UA's right of offset will include the right to impute the fair market value of the comparable position if terminated for convenience by the UA after January 1, 2022 and the compensation appears to be less than market value base don relevant market data at the time and the right to offset the total economic value of any compensation package, employment agreement, or other compensation formula utilized with any new employer, and your agreement not to structure or allow your compensation or any compensation package with any new employer to be structured in any manner that reduces, avoids, diminishes, or denies the UA's right of offset; and (f) your reciprocal obligation to pay the UA the liquidated damage amounts outlined below in the event you terminate your employment for convenience.

13. Lane Monte Kiffin, University of Mississippi – Employment Contract (Head Football Coach), December 9, 2019[25]

Page 7. Termination Without Cause.

[No mitigation provision]

14. Bret A. Bielema, University of Illinois, Employment Agreement, December 19, 2020[26]

Paragraph 5.1.c Regardless of the date of termination, any payments to the Head Coach under Section 5.1 shall be reduced by the gross amount of earnings or other payments the Head Coach may subsequently receive, or earn and defer receipt of, from any Offset Position. The Head Coach agrees to make reasonable ongoing efforts in seeking employment in an Offset Position commensurate with his experience, in good faith, and to immediately notify the University of such employment and the compensation such employment provides. The Head Coach shall not structure the timing of income in order to avoid his obligations or to avoid the reduction of liquidated damages owed by the University under Section 5.1. The Head Coach agrees to return to University any payments already made that would be subject to mitigation. The University acknowledges and agrees that the Head Coach may retire without being obligated to mitigate damages, and the Head Coach shall not be required to accept an employment or consulting offer that the Head Coach reasonably regards as unacceptable. Should the Head Coach choose to retire but later return to work in any other capacity as described herein at any time during the Contract Term, mitigation of payment obligations will remain in effect, including the Head Coach's obligation to return payments already made.

[25] Employment Contract between the University of Mississippi and Lane Kiffin, Dec. 9, 2019 (on file with author).
[26] Employment Agreement between the University of Illinois and Bret A. Bielema, Dec. 19, 2020 (on file with author).

15. <u>Joshua K. Heupel, University of Tennessee, Employment Agreement – Head Football Coach, January 27, 2021</u>[27]

Section 3.1.2. University Separation Payment. [. . .] As a condition of being eligible to receive the University Separation Payment, Coach shall be required to: (i) execute a waiver and release of claims substantially in the form attached as Appendix A (which may be modified to conform to subsequent changes in the law or by mutual agreement of the parties) and incorporated herein by reference, and (ii) use his reasonable efforts to mitigate the University's obligation to pay the University Separation Payment by making reasonable and diligent efforts as soon as practicable following termination to obtain another comparable employment or paid services position. The following are considered comparable employment: (a) head coach with a Power Five or Group of Five school, or with an NFL team or (b) an offensive coordinator with a Power Five or NFL team (any job mentioned above is herein referred to as a "Required Job"). Coach's failure to satisfy either condition will nullify the University's obligation to make the University Separation Payment. During the period of time in which the University is obligated to make the University Separation Payment, Coach shall promptly report to the University on a quarterly basis all non-passive income earned from any of the Required Jobs or any other employment (whether as an employee or independent contractor). For each month from the termination date through the end of the Term, the University shall have the right to deduct or offset any and all such non-passive income of Coach from any of the Required Jobs or any other employment (whether an employee or independent contractor) from the monthly University Separation Payment installment.

16. <u>Mel Tucker, Michigan State University, Employment Agreement February 12, 2020 and Amended Employment Agreement dated November 24, 2021</u>[28] <u>(Fired for Cause on September 27, 2023)</u>

Section III. Term of employment: Termination, B. Early Termination; Damages

2. [. . .] Upon notice to the Coach by the University of this election to terminate pursuant to this Section III.B.2, the Coach shall mitigate the University's payment obligations under this Section III.B.2 by making reasonable efforts to obtain other comparable employment (which may include, but is not limited to, employment coaching a professional football team or an intercollegiate football team) as soon as reasonably practical following such termination. This obligation includes a duty to seek compensation for such comparable employment at the market-rate, which is more than nominal compensation. If subsequent to termination under this Section III.B.2 the Coach obtains other comparable employment, then each of the University's monthly obligations to pay the Coach as set forth about in this Section III.B.2 will be reduced by the Coach's total compensation relating to such comparable employment, excluding employee reimbursements and standard employee benefits under broad-based plans (the "Other Compensation"). If the Coach obtains other comparable employment, he shall immediately provide written notice to the University describing the position and his total compensation. The University may request

[27] Employment Agreement between the University of Tennessee and Joshua K. Heupel, Jan. 27, 2021 (on file with author).
[28] Amended Employment Agreement between Michigan State University and Mel Tucker, Nov. 24, 2021 (on file with author).

reasonable evidence of the amount of compensation paid to or vested in favor of the Coach in the new position; in such case, the Coach shall provide such evidence in a timely manner. The Other Compensation shall be set off from the amounts due pursuant to this Section III.B.2 for the same period that it is earned by the Coach, whether it is paid on an ongoing basis, as a sign-on or otherwise in advance or on a deferred basis. Any amounts subject to a vesting schedule will be deemed earned when vested. If in any month the Other Compensation exceeds the University's obligations to the Coach as set forth in this Section III.B.2, such excess will be carried forward and set off against the University's next future monthly obligations. The Coach shall provide the University on an ongoing basis with the information reasonably requested which is necessary to implement the foregoing and shall promptly respond to the reasonable inquiries of the University. The Coach shall promptly refund to the University any amounts that he receives that should have been set off under the provisions of this Section.

17. Brent Venables, University of Oklahoma, Contract of Employment, December 5, 2021[29]

Section V.(b) While the University's obligation to pay liquidated damages of Section V.A(l)(a) remains in effect, Coach agrees to mitigate the University's obligation to pay liquidated damages as soon as possible after termination of this Agreement by immediately beginning to make reasonable, continued, and diligent efforts to obtain employment in the field of amateur, collegiate, or professional sports including coaching, administration, management, broadcasting, or other athletics-related businesses or activities (hereinafter referred to as a "New Position"). The liquidated damages paid by the University shall be offset or reduced on a dollar-for-dollar monthly basis by the compensation paid to or controlled by Coach as a result of Coach's employment in each New Position held by Coach while the University's obligation to pay liquidated damages remains in effect. For purposes of the preceding sentence, compensation shall mean, without limitation, from Coach's New Position employer, or a related or affiliated corporation, company or other entity that supports the New Position employer: (i) base salary, wages, incentive payments, bonuses, supplemental pay, or other compensation of any kind whatsoever, but specifically excluding any fringe benefits typically provided to individuals in the coaching profession (i.e., health insurance, courtesy use of automobile, courtesy tickets, country club privileges, etc.); (ii) honoraria; (iii) all income and fees received by Coach as an independent contractor, consultant, or self-employed person; (iv) all income and fees received by Coach from Coach's participation in or performance of activities similar to those listed in Section III above; (v) other income arising out of, relating to, or associated with Coach's employment in a New Position; and (vi) Deferred Compensation. Deferred Compensation shall mean any and all salary, incentive payments, bonuses, supplemental pay, annuities, insurance premiums, or other compensation of any kind whatsoever that prior to the end of the Term of the Contract, or any extensions thereto. Coach's then employer, or a related or affiliated corporation, company, or other entity that supports the employer's athletic program, becomes contractually obligated to pay, agrees to pay then or in the future, or does pay to Coach, or an associated entity, for services provided by Coach during the remaining Term of this Agreement had this Agreement not been terminated. The amount of

[29] Contract of Employment between the University of Oklahoma and Brent Venables, Dec. 5, 2021 (on file with author).

Deferred Compensation that shall be credited monthly against the monthly liquidated damages payment shall equal the total of Deferred Compensation divided by the months in the period between the last day of the month in which the termination date occurs and the date the Term would have ended as specified above, or pursuant to any amendment. Coach shall use his good faith best efforts to structure any compensation for work, services provided, or any other type of labor related to New Position in a manner that seeks to mitigate University's obligation under Section V.A.(l)(a) of this Agreement and to not structure payment of compensation to a time after the period in which the University's obligation to pay liquidated damages noted in Section V.A.(l)(a) ceases. Coach agrees to notify the University within fourteen (14) days of the date Coach accepts a New Position, and the complete details of the employment including all compensation associated therewith. Should Coach fail to provide such information in a timely manner following the University's written request, the University's obligation to pay liquidated damages shall cease. For purposes of this subsection, employment means working as an employee, independent contractor, consultant, or self-employed person.

18. Billy Napier, University of Florida, Head Coaching Agreement, December 5, 2021[30]

16. Termination Consequences. D. Termination by Association Without Cause.

(1) If this Agreement is terminated by Association without cause pursuant to subparagraph 15A, in addition to the portion of annual base salary under paragraph 4, expense compensation under paragraph 10, equipment compensation under paragraph 13, services compensation under paragraph 4A of the Activities Agreement, and activities compensation under paragraph 5 of the Activities Agreement (collectively defined as "Annual Compensation") that has been theretofore earned through the date of termination (applying the proration process specified in paragraph 4 to determine the amount of compensation earned for the Partial Year), and Basic Benefits under paragraph 7 which shall be paid up to the effective date of termination, Coach shall be entitled to receive 85% of the total remaining Annual Compensation due Coach through the end of the otherwise unexpired Term of the Agreement as if he had not been terminated ("Association Without Cause Payment"). Such is to be paid by Association in five (5) installments, calculated in accordance with subparagraph 16H, the first payment being due within thirty (30) days of the effective date of termination and the second through fourth payments paid in installments on the first July 15th following the date of termination and on each successive July 15th thereafter until fully paid. Coach shall not be subject to any mitigation obligations and the Association Without Cause Payment shall not be subject to any offset right attributed to the Association.

19. Dan Lanning, University of Oregon, Employment Agreement, December 12, 2021[31]

Paragraph 6.2 Termination by University (not for cause) e. If University terminates this Agreement under this Section 6.2, Coach agrees to mitigate University's obligations to pay liquidated damages under Section 6.2.b by making reasonable, good faith, and diligent efforts to obtain Comparable Employment, such as a coaching position (not necessarily as a head coach) or a senior athletic

[30] Head Coaching Agreement between The University Athletic Association, Inc. and Billy Napier, Dec. 5, 2021 (on file with author).
[31] Employment Agreement between the University of Oregon and Dan Lanning, Dec. 12, 2021 (on file with author).

administrative position (such as athletic director or associate athletic director position) at a college or university or with a professional team as soon as reasonably possible after termination of this Agreement. Should Coach obtain any employment, including, but not limited to, Comparable Employment, ("New Employment") University's financial obligations under this Agreement, including Section 6.2.b shall cease if Coach's Monthly Compensation (defined as $1/12^{th}$ of Coach's annual compensation, inclusive of all bonuses and any form of monetary compensation, including any payments into special programs, including special insurance vehicles or corporations or trusts, but excluding usual and customary non-monetary fringe benefits such as health and life insurance, club memberships and use of vehicles), is equal to or greater than University's obligation to pay liquidated damages under Section 6.2.b, prorated on a monthly basis. If Coach's Monthly Compensation, from New Employment is less than University's monthly obligation to pay liquidated damages under Section 6.2.b, the amount of University's obligation to pay liquidated damages shall be reduced on a monthly basis by the greater of: a) the amount of Coach's Monthly Compensation from such New Employment or, in the event University reasonably determines that the amount of such Monthly Compensation is not within an acceptable range for compensation amounts pursuant to the anticipated results of an arms-length negotiation between Coach and a new employer when then-existing and relevant marketplace factors are applied, then b) the median Monthly Compensation, as determined from publicly available sources, of incumbents in equivalent coaching or senior athletic administrative positions in, as relevant, the NCAA Division, collegiate athletics' conference, or professional sports league in which Coach has obtained Comparable Employment or any other employment. In no event with the University's then-current obligation to pay Coach liquidated damages increase if Coach resigns from New Employment or is otherwise terminated from New Employment. In the event Coach is separated from New Employment and the University still has obligations under Section 6.2, Coach continue to have the mitigation obligations set forth above. Coach shall promptly inform University of changes in his employment status (including monthly salary and type and value of fringe benefits that are included in the calculation of Coach's compensation) for purposes of the implementation of this Section 6.2.e. Coach agrees to provide University with a copy of any employment agreement relevant to Coach's obligations stated above, as well as other information necessary to establish compliance with this mitigation obligation including, upon request, information relating to income Coach has received in a manner that did not generate a form W-2 or 1099. Should Coach fail to produce evidence of engaging in good faith efforts to obtain employment within a reasonable time (not to exceed thirty days) following University's request for such documentation or should such documents indicate that Coach is not fulfilling Coach's mitigation obligations outlined in this Section, University's obligations to pay liquidated damages under Section 6.2.b shall cease.

20. William “Dabo” Swinney, Clemson University, Amended and Restated Employment Agreement, January 1, 2022[32]

Paragraph 18. Termination of Coach’s Employment. (d) Termination Without Necessity of Demonstrating Cause.

(i) The University may, by providing five (5) days written notice, terminate Coach’s employment without necessity of demonstrating Cause at any time. [. . .]

Coach shall not be required to seek other employment in order to receive the Severance Benefit contemplated by this Section 18(d), and the University shall pay the Severance Benefit regardless of whether Coach seeks or obtains other employment after the termination of this employment with the University. If Coach obtains other employment, the University expressly waives and acknowledges that it is not entitled to any mitigation of the Severance Benefit owed to Coach.

21. Brian Kelly, Louisiana State University, Employment and IP License Agreement, April 8, 2022[33]

Paragraph B. Termination by LSU Without Cause.

[No mitigation provision]

22. Hugh Freeze, Auburn University, Employment Agreement, November 28, 2022[34]

Paragraph 22. Termination Other Than For Cause. [. . .] For purposes of clarity, there shall be no mitigation requirement by Coach nor shall the University have any right to offset any such payments under this Paragraph 22. The parties’ obligations under this Paragraph will survive termination of the Agreement.

23. Luke Fickell, University of Wisconsin, Employment Agreement, November 30, 2022[35]

Section V. Termination and Liquidated Damages. A. By University. 3. Liquidated Damages upon termination by University without cause, with notice.

(a) The University shall have the right to terminate this Agreement prior to the expiration date without cause pursuant to Article V, Section A.2. In such event, occurring prior to the last regular season game of the 2029 season the University shall pay, or cause to be paid, to Coach or to Coach’s estate or designated beneficiary should Coach die after termination but during the payment period, as his exclusive remedy in lieu of any and all other legal remedies, damages of any type, or equitable relief available to Coach, subject to Coach’s duty to mitigate a set forth hereinafter, liquidated damages and not compensation in an amount equal to the great of 80% of the total compensation remaining under the initial

[32] Amended and Restated Employment Agreement between Clemson University and William Swinney, Jan. 1, 2022 (on file with author).
[33] Employment and IP License Agreement between the Louisiana State University and Agricultural and Mechanical College and Brian Kelly, Apr. 8, 2022 (on file with author).
[34] Employment Agreement between Auburn University and Hugh Freeze, Nov. 28, 2022 (on file with author).
[35] Employment Agreement between the University of Wisconsin-Madison and Luke Fickell, Nov. 20, 2022 (on file with author).

Employment Agreement and Additional Compensation Agreement or Six Million Four Hundred Eighty Thousand Dollars ($6,480,000), less applicable withholdings. In such an event occurring after the last regular season game of the 2029 season, the amount of liquidated damages shall be Six Million Four Hundred Eighty Thousand Dollars ($6,480,000). Coach may be required to use accumulated unused vacation and personal leave for the period from the effective date of the termination to the end of the term per the unclassified staff benefits regulations. University's obligation shall be paid on a monthly basis, prorated over the balance of the term of this Agreement, including any effective extensions thereof.

(b) In the event the University terminates this Agreement without cause, Coach agrees to make reasonable and diligent efforts to obtain other comparable employment as soon as reasonably possible, and to mitigate the amount of liquidated damages to which he is entitled under this Agreement, as follows: If Coach accepts any coaching position in the National Football League, or at any NCAA Division 1 program the total amount of liquidated damages the University is obligated to pay, and Coach is entitled to receive, as specified herein, shall be reduced on a monthly basis by an amount equal to Coach's annual gross base salary paid for such month under Coach's new employment agreement, until the expiration date of any payment period hereunder. Coach agrees to notify the University as soon as reasonably possible after accepting such new employment. For avoidance of doubt, Coach shall not be required to accept any position if accepting such position is not in the best interests of his coaching career.

[. . .]

D. New Contracts (2023-2024)

College coaching positions are like a merry-go-round. They change often. Pursuant to the Freedom of Information Act/Public Records Laws, I have requested the employment agreements for some of the Power 5 coaching changes in college football to determine if there is a continuation of some form of trend.

After the regular football season, there is often a whirlwind of changes among college coaches. To determine whether or not there is a trend, I also looked at some of the most highly paid coaches who changed positions. What follows are excerpts from those coaches' contracts regarding mitigation or no mitigation.

Texas A&M made a total turnaround with respect to its liquidated damages - mitigation clause in comparison to the Fisher contract. Mike Elko's contract falls more in line with the standard in the industry wherein a coach fired not for cause is entitled to get paid but does have a good faith affirmative obligation to obtain comparable employment and to minimize the damages by offsetting the amount owed by the terminating university with income from other employment.

24. <u>Trent Bray, Oregon State University, Employment Agreement, March 1, 2023</u>[36]

4.2 Termination by University Without Cause.

(d) Notwithstanding the severance and deferred compensation payment provisions, Coach agrees to mitigate University's severance and deferred compensation payment obligation by making reasonable and diligent efforts to obtain industry related employment consistent with Coach's skills and experience as an NCAA Division I head football coach. If at any time during the period that University is obligated to make severance or deferred compensation payments to Coach ("Post-Termination Payment Period"), Coach becomes entitled to receive from a third party compensation or remuneration for any work, services or other activity whether reportable on IRS From W-2, 1099, or K-1 (in the case of K-1 in connection with a trade or business in which Coach materially participates) (collectively, "Compensable Services"), Coach shall notify University in writing within 15 days of becoming so entitled and shall include the identity of the payor, the nature of the Compensable Services and the compensation or remuneration Coach will be entitled to receive at any time for Compensable Services to be performed by Coach during the Post-Termination Payment Period. University's obligation to make severance or deferred compensation payments under this Section 4.2(d) shall cease immediately upon Coach engaging in Compensable Services unless the compensation or remuneration Coach will be entitled to receive at any time from the third party for Compensable Services to be performed during the Post-Termination Payment Period is less, when prorated on a monthly basis over the remainder of the Post-Termination Payment Period ("Prorated Monthly Third-Party Payment"), than University's monthly severance or deferred compensation payment obligation. In the event that such Prorated Monthly Third-Party Payment is less than University's monthly severance or deferred compensation payment obligation, University's monthly severance and deferred compensation payment obligation shall be reduced beginning with the month following Coach's commencement of performance of Compensable Services by an amount equal to the Prorated Monthly Third-Party Payment. If, however, Coach does not notify University of the Compensable Services within the 15 day period University shall not be liable for any further payments under this Section 4.2.

(1) In addition to the written notice Coach is required to provide University upon Coach's commencement of Compensable Services, during the Post-Termination Payment Period Coach shall provide annual written certifications to University regarding compliance with Coach's obligations to University under Section 4.2(d). During the Post-Termination Payment Period, within 30 days after Coach has filed Coach's annual individual income tax return (IRS Form 1040), but not later than November 15 each year, Coach shall provide University Coach's dated and signed statement certifying that as of the date of such certification Coach is in full compliance with the provisions of Section 4.2(d) of this Agreement and has provided University on a timely, complete and accurate basis all information regarding Compensable Services required by Section 4.2(d). Additionally, within 30 days after University has requested in writing from Coach during the Post-Termination Payment Period copies of relevant tax records confirming Coach's compliance with Section 4.2(d) (which may include a copy of Coach's IRS Form 1040 for any years during the Post-Termination Payment Period and any Forms W-2, 1099 and K-1 reporting amounts includable on such IRS Form(s) 1040), Coach shall provide such documents to

[36] Employment Agreement and Notice of Appointment for Head Coach between Oregon State University and Trent Bray, Mar. 1, 2023 (on file with author).

University. University may not request copies of such tax records more than once each calendar year, and Coach shall not be required to provide University the same records for a particular calendar year more than once.

(2) If during the Post-Termination Payment Period University's severance payment obligation has been eliminated or reduced due to Coach's providing Compensable Services, and a change in circumstances occurs such that the information regarding Compensable Services that Coach previously reported to University is no longer accurate or complete, within 15 days after such change in circumstances Coach shall notify University in writing and provide details of such change in circumstances (including update of information previously reported to University regarding Compensable Services). Beginning with the month following such updated written notice from Coach, University's monthly severance or deferred compensation payment to Coach (as applicable) shall be increased or reduced as necessary to reflect any new amount of Prorated Monthly Third-Party Payment.

25. Jonathan Smith, Michigan State University, Terms Sheet, November 25, 2023[37]

3. Guarantee (University Terminates Without Cause)

- 85% of total remaining Annual Compensation due through the otherwise unexpired Term.
- Subject to offset for NFL or Division I coaching position, although Coach is not required to accept any position if such position is not in the best interest of his coaching career upon Coach's reasonable determination.
- Full amount shall be payable to Coach in equal monthly installments over the otherwise unexpired Term of the agreement. Notwithstanding the forgoing, the University agrees to modify the timing of the initial payment and/or the monthly installments to comply with Section 457(f) of the Internal Revenue Code and any applicable exceptions (namely, the severance exception and/or the short-term deferral requirement.)
- The University shall continue providing at the University's expense Coach's then-existing health insurance benefits during the entirety of the first three (3) full months following any such termination.

26. Jonathan Smith, Michigan State University, Employment Agreement, November 25, 2023[38]

6.2 Termination Without Cause. Mitigation of Damages. The Coach shall have a duty to mitigate any damages that they may sustain or incur based upon the termination of their employment, including without limitation, any liquidated damages, by using their best efforts to actively seek and obtain comparable employment as an NFL or Division I coach, within a reasonable period of time following termination. The Coach is not required to accept any position if such position is not in the best interest of their coaching career upon Coach's reasonable determination. The Coach shall not structure nor time compensation in any new employment in a manner to avoid mitigation.

[37] Head Football Coach Terms Sheet between Michigan State University and Jonathan Smith, Nov. 25, 2023 (on file with the author).
[38] Employment Agreement between Michigan State University and Jonathan Smith, Nov. 25, 2023 (on file with the author).

The Coach shall provide the University on an ongoing basis with information relating to the efforts undertaken to secure other employment and respond to any inquiries that the University may make relating to those efforts. If the Coach secures other employment in an NFL or Division I coaching position during the Remaining Term, the Coach shall immediately share with the University documentation (appointment paperwork, fully executed contract) of the new position, start date, and the total compensation that will be paid to them in that position. Total compensation includes base salary and supplement payments (deferred compensation, bonuses, and other compensation earned, expect compensation for employment benefits such as moving or employee housing). Not providing official documentation or notifying the University of alternative employment may result in the suspension of monthly installment payments until such time that Coach provides such documents, upon which installment payments shall resume. If the compensation earned in the new position is less than what the Coach would have earned from the University during the Remaining Term, the University shall choose to pay the Coach the difference through either reduced monthly payments or through a lump sum payment, that is paid either by the University or a third-party.

If the compensation that the Coach actually receives in the new employment exceed that which the Coach would have earned from the University during the Remaining Term, the University shall be relieved of any further obligations to compensate the Coach under this section of the Agreement. The Coach shall provide the University with any information reasonably requested to implement the above, and the Coach agrees to promptly respond to any reasonable inquiries of the University.

The Coach shall be obligated to repay the University for any payment made pursuant to Section 6.2 if, within one (1) year of Coach's termination, the University learns that the Coach engaged in behavior during their employment that would have constituted "Cause" for termination if the University had learned of it during the Coach's period of employment with the University. This provision will survive termination of this Agreement.

27. Mike Elko, Texas A&M University, Key Contract Terms, November 27, 2023[39]

Damages for University's termination of contract without Cause: University will be obligated to pay liquidated damages to Coach in an amount equal to 75% of the annual base salary for the remaining term of the Agreement, if University terminates the Agreement without cause and there are three or more years remaining on the term of the Agreement. The percentage increases to 80% if University terminates the Agreement without cause and there are less than three years remaining on the term of the Agreement. Coach will have the duty to mitigate by making a good faith effort to obtain employment in a similar position at a market rate.

28. Mike Elko, Texas A&M University, Coach's Employment Agreement, November 27, 2023

5.3.2 While the University's obligation to pay liquidated damages remains in effect, Coach agrees to mitigate the University's obligation to pay liquidated damages under this section 5.3 hereof and to use his best efforts to obtain employment in another coaching or similar football related professional position. For purposes of this subsection, "best efforts" means acting promptly and in good faith, taking all necessary and reasonable steps to obtain employment in another

[39] Key Contract Terms between Texas A&M University and Mike Elko, Nov. 27, 2023 (on file with author).

coaching or professional position at market value at the earliest possible date, and continuing such efforts without interruption. The University shall have the right to request evidence of the efforts made by Coach to obtain such other employment, and Coach must provide such evidence in a prompt and timely manner. It is agreed that the liquidated damages paid by the University hereof shall be offset and reduced on a monthly basis by the gross compensation earned by Coach personally or through business entities owned or controlled by Coach. For purposes of this subsection, "gross compensation" shall mean without limitation, gross income from base salary or wages, talent fees, or other types of compensation paid to Coach by an employer for a, including a business entity owned or controlled by Coach, consulting fees, honoraria, fees received by Coach as an independent contractor, or other employment-related compensation of any kind whatsoever.

5.3.3 While the University's obligation to pay liquidated damages remains in effect, within seven (7) calendar days after accepting an employment position as described above, Coach shall provide the University with complete details of his new compensation package. If in the University's reasonable, but sole determination, Coach appears to be underpaid compared to the market value for the same or similar position(s), or if Coach's new compensation package increases or balloons after the University's payments under this section to Coach cease, or the subsequent employment arrangement otherwise attempts to avoid the intended net effect of this provision, Coach expressly agrees that the University may assign a reasonable market value compensation based upon an evaluation to be shared with Coach that is reasonable in light of the then current market conditions, including, but not limited to, the compensation typically received by employees with similar attributes (e.g., coaching tenure, career experience, position, conference, etc.) and that such market value level of compensation shall be used by the University to calculate its liquidated damages payments, if any, due to Coach. Should Coach fail or refuse to notify the University of any subsequent employment and/or provide the details of his compensation with subsequent employer or fail to provide evidence of his best efforts to obtain subsequent employment as required in Section 5.3.2 above, the University's obligation to continue paying liquidated damages to Coach shall cease.

29. Curt Cignetti, Indiana University, Memorandum of Understanding, November 30, 2023[40]

If your employment is terminated by the University without Cause the University will pay you as follows:

Between December 1, 2023 – Novembre 30, 2024	$20,000,000
Between December 1, 2024 – November 30, 2025	$17,000,000
Between December 1, 2025 – November 30, 2026	$14,000,000
Between December 1, 2026 – November 30, 2027	$9,000,000
Between December 1, 2027 – November 30, 2028	$6,000,000
Between December 1, 2028 – November 30, 2029	$3,000,000

[40] Memorandum of Understanding Offer between the Indiana University and Curt Cignetti, Nov. 30, 2023 (on file with author).

Such payments would be made in equal monthly installments with appropriate withholding and deductions for taxes from the date of termination through the Normal Expiration Date. You will have the responsibility to mitigate and offset the University's payment.

30. Bronco Mendenhall, University of New Mexico, Memorandum of Understanding, December 5, 2023[41]

- If you terminate the contract, or if the contract is terminated for cause, the University shall not be liable for any payments or benefits after the date of termination.
- The standard University provision for termination for cause.
- A termination without cause provision that will require payment of the following, depending on the year termination occurs:
    - Contract Years One or Two: 100% of your salary for the remainder of the term of the contract.
    - Contract Year Three: 80% of your salary for the remainder of the term of the contract.
    - Contract Year Four: 65% of your salary for the remainder of the term of the contract.
    - Contract Years Five: 50% of your salary for the remainder of the term of the contract.
- A provision that you will agree not to seek or apply for other positions without prior notice. If you accept another position, you are responsible to pay the University of New Mexico the following sums based on the year the termination occurs:
    - Contract Year One: $3,000,000
    - Contract Year Two: $2,000,000
    - Contract Year Three: $750,000
    - Contract Year Four: $500,000
    - Contract Year Five: $300,000
- As an employee of the University, you will be subject to all policies and provisions of the University of New Mexico employee policy manual.

31. Lane Kiffin, University of Mississippi, Term Sheet, January 1, 2024[42]

Silent as to termination provisions.

32. Anthony Sanchez, New Mexico State University, Head-Coach Employment Agreement, January 2, 2024[43]

5.5 Termination by NMSU Without Cause. NMSU may elect to terminate Coach's employment under this Agreement without cause, by written notice, at any time during its term, and in such event, NMSU will be liable to Coach only for damages in an amount equal to the base salary provided in this Agreement for the remainder of the period from termination to the stated

[41] Memorandum of Understanding Offer between the University of New Mexico and Bronco Mendenhall, Dec. 5, 2023 (on file with author).
[42] Contract Terms Sheet and Incentive Bonuses between University of Mississippi and Lane Kiffin, Jan. 1, 2024 (on file with author).
[43] Head Coach Employment Agreement between New Mexico State University and Anthony Sanchez, Jan. 2, 2024 (on file with author).

expiration date, but offset by an compensation earned by Coach from another employer in mitigation of those damages. Such damages will be paid in bi-monthly payments subject to federal and state tax withholdings. No retirement withholdings or contributions by NMSU will be due with respect to the post-termination damage payments, and Coach will not be entitled to any other employment benefit of any kind. The parties agree that upon a NMSU Termination Without Cause, Coach has a duty to mitigate his damages by making a reasonable good faith and diligent effort to obtain and keep other comparable employment. Coach agrees to promptly notify NMSU upon accepting other comparable employment, and to provide NMSU with documentary evidence of his earnings from such other comparable employment. The damages due from NMSU under this section will be reduced by an amount equal to the salary earned by Coach from other comparable employment during the period from the termination to the stated expiration date. As a condition precedent to delivery of the damage payments contemplated by this section, Coach agrees to sign a liability release and waiver of claims indicating that the payments to be made by NMSU are in full settlement of any and all legal claims of any type that Coach might otherwise assert against NMSU.

33. Sherrone Moore, University of Michigan, Memorandum of Understanding, January 27, 2024[44]

University buyout of contract upon termination without cause: 75% of Base Salary and Additional Compensation for the remainder of Term, provided that Head Coach shall be obligated to seek alternative employment and any amounts earned by Head Coach in new employment or other engagement shall be offset against amounts owed by University under this provision.

E. Mitigation Chart[45]

Coach	University	Date	Mitigation
Mark Stoops	University of Kentucky	11/26/2012	No
James Harbaugh	University of Michigan	12/29/2014	Yes
Kiby Smart	University of Georgia	1/1/2016	No
Kirk Ferentz	University of Iowa	2/1/2016	No
Lane Kiffin	Florida Atlantic University	12/12/2016	No
Michael Gundy	Oklahoma State University	1/1/2017	Yes
John Fisher, Jr.	Texas A&M University	12/4/2017	No
Nick Saban	University of Alabama	3/1/2018	Yes
Kyle Whittingham	University of Utah	1/1/2019	Yes
Ryan Day	Ohio State University	1/2/2019	Yes
Michael Norvell	Florida State University	12/7/2019	Yes
Sam Pittman	University of Arkansas	12/8/2019	Yes

[44] Memorandum of Understanding between the University of Michigan and Sherrone Moore, Jan. 26, 2024 (on file with author).
[45] All contracts on file with author.

Lane Kiffin	University of Mississippi	12/9/2019	No
Bret Bielema	University of Illinois	12/19/2020	Yes
Joshua Heupel	University of Tennessee	1/27/2021	Yes
Mel Tucker	Michigan State University	11/24/21	Yes
Brent Venables	University of Oklahoma	12/5/2021	Yes
Billy Napier	University of Florida	12/5/2021	No
Dan Lanning	University of Oregon	12/12/2021	Yes
William Swinney	Clemson University	1/1/2022	No
Brian Kelly	Louisiana State University	4/8/2022	No
Hugh Freeze	Auburn University	11/28/2022	No

F. Conclusion

For over 30 years I have been involved in teaching, negotiating, and studying college coaching contracts in the United States. At one time these contracts were very simple in nature, but they have morphed into multi-paged documents stuffed with legalese. One of the areas I have followed is what happens when a coach is no longer wanted by the university but has time left on their contract. What normally results is a Termination Without Cause that triggers some form of a Buyout Provision which may include all or some of the monies that are owed for the remainder of the term of the contract.

Until recently, most contracts had standard form provisions that required the common law duty to mitigate damages by taking affirmative action to find comparable employment as defined by the contract. The coach is to make good faith efforts and the ultimate hiring by another defined source as being an offset to the damages that were accruing by virtue of the termination without cause, i.e. an offset. This has pretty much been the standard in the industry for years.

I have testified as an expert witness for the Golden State Warriors in an arbitration proceeding regarding a case involving whether or not Coach Mike Montgomery met the terms and provision of the mitigation clause in his contract. I once again revisited this subject matter when I had the opportunity to opine as to whether or not Coach Bret Bielema met his obligation to mitigate damages in his contract dispute with the University of Arkansas. As a result of my involvement in those two expert witness cases and teaching Representing Professional Athletes and Coaches at Marquette University Law School for many, many years, I have followed the standards of the industry for decades.

When it was announced that Fisher was fired without cause from Texas A&M and was owed the remaining millions of dollars left on his contract without an affirmative duty to mitigate, I began to wonder if this was a changing trend in college football contracts. I can certainly understand why a contract agent who has a power coach, i.e. a CEO in headphones client, would want to negotiate a contract without mitigation. That means the coach would receive a guaranteed contract wherein he receives the remaining monies left on the contract if he gets fired without cause and would even be able to obtain new employment of his choice without having to offset the monies received from his prior employer.

I began my review of this matter by studying 23 contracts of the so-called highest paid college football coaches in the 2022-2023 season to determine whether or not there was the existence of a mitigation or no mitigation provision. Interestingly enough, I found that ten of those contracts contained no obligation to mitigate damages and fifteen included a mitigation provision. While I'm not certain that this is a trend, it certainly is a complement to contract agents in their sophistication as to how to negotiate a guaranteed contract for their client. If a university made a mistake for whatever reason, the university is on the hook for the remainder of the contract, pure and simple.

With respect to the newest generation of contracts during the 2023-2024 hiring cycles, there doesn't seem to be a discernible trend as most of those contracts contain mitigation provisions.

One, of course, has to ask the question as to whether or not this money could be better spent on educational or athletic department purposes other than paying the remainder of the contract term of a coach who can then earn twice the salary. This may be an indication of the leverage that power coaches have to negotiate their contracts and the money that can be made in college football by universities.

Thank you to Danelle Anderson Welzig for assistance in researching and editing this article. She has been a paralegal with The Law Office of Martin J. Greenberg, LLC since 2013.