

You Get Hired to Get Fired

Martin J. Greenberg

Steven D. Gruber

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Martin J. Greenberg and Steven D. Gruber, *You Get Hired to Get Fired*, 24 Marq. Sports L. Rev. 141 (2013)

Available at: <http://scholarship.law.marquette.edu/sportslaw/vol24/iss1/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

YOU GET HIRED TO GET FIRED

MARTIN J. GREENBERG*

STEVEN D. GRUBER**

I. INTRODUCTION

In the college-coaching world, the current job environment can be summed up by the often-quoted adage “you get hired to get fired.” This notion has never been more accurate. Job security is essentially a misnomer, as coaches are routinely fired or forced to resign or retire. As such, it is of great importance for all parties involved in a college coaching contract to truly understand the pertinent agreement and its potential repercussions. Specifically, meticulous and calculated “back end” contractual protection is imperative for the university and the coach alike. This “back end” protection refers to the concept that procedural and monetary implications of termination at the “back end” of the contract are just as important as the upfront dollars and cents.

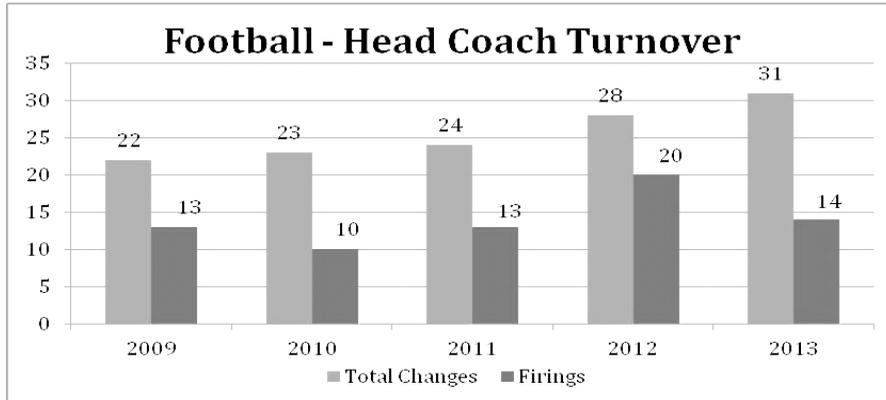
II. JOB ENVIRONMENT

A. *Job Movement*

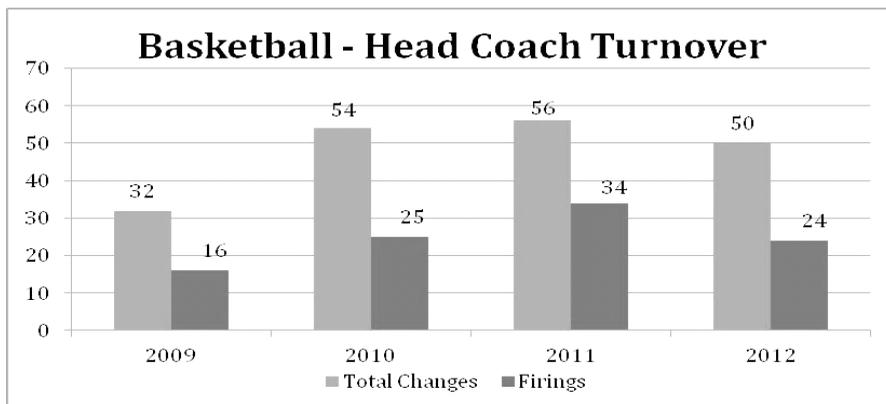
The business of college coaching is a big business, and contracts are as easily broken as created. The statistics with respect to turnover are quite telling and undoubtedly represent an endemic problem. It is important to note that many “resignations” are actually forced resignations in which a financial buyout agreement is reached between the university and the coach in exchange for a voluntary resignation.

* Martin J. Greenberg is the managing member of the Law Office of Martin J. Greenberg, LLC, member of the National Sports Law Institute Board of Advisors, adjunct professor of law at Marquette University Law School, and author of *The Stadium Game*, *Sports Law Practice*, and *SportBiz*.

** Steven Gruber is an attorney at Gruber Law Offices, LLC in Milwaukee, Wisconsin. Originally from Milwaukee, Gruber was recruited to play basketball in the Ivy League at Brown University. After four years as a distinguished student-athlete at Brown, he attended Marquette University Law School where he graduated *magna cum laude*, while focusing studies on litigation and sports-oriented courses. Presently, Gruber practices personal injury law and is actively involved in numerous sports-oriented and charitable endeavors.



1



2

1. See *24 Teams Begin 2011 Season Under New Stewardship*, C. FOOTBALL POLL.COM, http://www.collegefootballpoll.com/coaching_changes_2011.html (last updated Jan. 9, 2012); *31 Teams Have New Head Coaches for 2013*, C. FOOTBALL POLL.COM (Feb. 1, 2013), http://www.collegefootballpoll.com/coaching_changes_2013.html; *2009 Coaching Changes*, C. FOOTBALL POLL.COM, http://www.collegefootballpoll.com/coaching_changes_2009.html (last updated Mar. 14, 2009); *2009-10 College Football Coaching Changes*, CBSSPORTS.COM (Nov. 9, 2009), <http://www.cbsports.com/collegefootball/story/12492808>; *2010 Head Coaching Changes and How They Fared*, C. FOOTBALL POLL.COM, http://www.collegefootballpoll.com/coaching_changes_2010.html (last updated Aug. 2, 2010); *2010-11 FBS Head Coaching Changes*, ESPN (Jan. 14, 2011), <http://sports.espn.go.com/ncf/news/story?id=57507471>; *2011-12 FBS Head Coaching Changes*, ESPN (Dec. 18, 2011), http://espn.go.com/college-football/story/_id/7019959/football-bowl-subdivision-head-coaching-changes; *2012-13 FBS Head Coaching Changes*, ESPN (Jan. 7, 2013), http://espn.go.com/college-football/story/_id/8536583/football-bowl-subdivision-head-coaching-changes; *Arkansas Hires John L. Smith*, C. FOOTBALL POLL.COM, http://www.collegefootballpoll.com/coaching_changes_2012.html (last updated Apr. 23, 2012).

2. See *NCAA Division I Coaching Changes*, ESPN, <http://sports.espn.go.com/ncb/news/story?id=>

Of the approximately 125 universities that comprise the Football Bowl Subdivision (FBS) in college football, approximately one in four will enter the upcoming season with a new head football coach.³ In college basketball, head coach turnover is also quite prevalent. Specifically, in 2012 alone, approximately 15% of teams began the upcoming season with a new head basketball coach.⁴

Simply put, contracts have little or no meaning to both universities and coaches. Universities quickly fire coaches for numerous reasons. Similarly, coaches quickly leave for numerous reasons, namely when a better opportunity arises. University of California at Los Angeles men's basketball coach Steve Alford is a prime example. Alford signed a ten-year contract extension with the University of New Mexico on March 20, 2013.⁵ Only ten days later, Alford left New Mexico for UCLA.⁶

With regard to college football, the movement is similarly astonishing. Grant Teaff, executive director of the American Football Coaches Association, explained, ““We have a strong code of ethics. But there's nothing in the code

4030914 (last updated Oct. 7, 2009); *NCAA Division I Coaching Changes*, ESPN, http://espn.go.com/mens-college-basketball/story/_/id/7647785/ncaa-division-coaching-changes-2011-12-season (last updated Oct. 16, 2012); *NCAA Division I Coaching Changes*, ESPN, http://espn.go.com/mens-college-basketball/story/_/id/7647785/ncaa-division-coaching-changes-2012-13-season (last updated Oct. 16, 2012) [hereinafter *2012–13 NCAA Division I Coaching Changes*]; *NCAA Division I Coaching Changes*, ESPN, http://espn.go.com/mens-college-basketball/story/_/id/7647785/ncaa-division-coaching-changes-2010-11-season (last updated Oct. 16, 2012); Leroy Jenkins, Comment to *2010 College Basketball Coaching Changes and Potential Replacements*, NBADRAFT.NET (Apr. 2, 2010, 5:08 AM), <http://www.nbadraft.net/node/20042>; Jeff Goodman, *Analysis of the 2012 Coaching Changes*, CBSSPORTS.COM (Mar. 9, 2012), <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/17693834/analysis-of-the-2012-coaching-changes>; Matt Peloquin, *2011 College Basketball Coaching Changes & Potential Candidates*, COLLEGESPORTSINFO.COM (Feb. 8, 2011), <http://collegesportsinfo.com/2011/02/08/2011-college-basketball-coaching-changes-potential-candidates/>; Matt Peloquin, *2012 College Basketball Coaching Changes*, COLLEGESPORTSINFO.COM (Mar. 6, 2012), <http://collegesportsinfo.com/2012/03/06/2012-college-basketball-coach-changes/>; Matt Peloquin, *Grading the 2011 College Basketball Hires*, COLLEGESPORTSINFO.COM (Apr. 18, 2011), <http://collegesportsinfo.com/2011/04/18/grading-the-2011-college-basketball-coaching-hires/>.

3. *2012–13 FBS Head Coaching Changes*, ESPN (Jan. 7, 2013), http://espn.go.com/college-football/story/_/id/8536583/football-bowl-subdivision-head-coaching-changes; see also John E. Hoover, *John E. Hoover: Impact of College Football Coaching Changes Felt by Many*, TULSA WORLD, http://www.tulsaworld.com/sportsextra/john-e-hoover-impact-of-college-football-coaching-changes-felt/article_5b68a622-a8ad-57b2-a37f-1cdb6f8515f6.htm (last updated Sept. 30, 2013).

4. See *2012–13 NCAA Division I Coaching Changes*, *supra* note 2.

5. See Damon Scott, *Alford Signs 10-Year Contract with UNM*, ALBUQUERQUE BUS. FIRST (Mar. 20, 2013), <http://www.bizjournals.com/albuquerque/news/2013/03/20/alford-signs-10-year-contract-with-unm.html>.

6. See Chris Dufresne, *Here's Hoping Steve Alford's Word to UCLA Lasts More Than 10 Days*, L.A. TIMES (Mar. 30, 2013), <http://articles.latimes.com/2013/mar/30/sports/la-sp-sn-steve-alford-ucla-20130330>.

of ethics that says you can't change jobs.”⁷

Approximately half of all college football and basketball coaches are in their first, second, or third year at the university.⁸ A few examples of longevity, or lack thereof, are telling. West Virginia head football coach Dana Holgorsen, named head coach during the summer of 2011, has a longer tenure than fifty-four other head football coaches.⁹ Kentucky head football coach Mark Stoops was hired on November 27, 2012 and has yet to coach a game for Kentucky.¹⁰ Stoops has been on the job longer than 23% of coaches.¹¹ Further, the median hire date of a current FBS head coach is December 25, 2010.¹²

A similar trend with regard to longevity is found in college basketball. Texas Tech University, for example, has had five different head basketball coaches since the 2007–2008 season.¹³ University of Wyoming has had four different head coaches since the 2007–2008 season.¹⁴ Pepperdine University has had five different basketball coaches since the 2005–2006 season.¹⁵

B. Economic Implications

The economic implications of firing a coach without cause are daunting for universities. On November 25, 2012, Auburn University made history when it terminated Gene Chizik as head football coach.¹⁶ In 2010, Chizik led

7. Hoover, *supra* note 3.

8. See Patrick Stevens, *A Look at Current Division I Basketball Coaching Tenures, from 1 to 351*, D1SCOURSE.COM (June 12, 2013), <http://d1score.typepad.com/blog/2013/06/a-look-at-current-division-i-basketball-coaching-tenures-from-1-to-351.html>; Patrick Stevens, *A Look at the Length of Current FBS Coaching Tenures, from 1 to 125*, D1SCOURSE.COM (Jan. 10, 2013), <http://d1score.typepad.com/blog/2013/01/a-look-at-the-length-of-current-fbs-coaching-tenures-from-1-to-125.html> [hereinafter Stevens, *A Look at Current FBS Coaching Tenures, from 1 to 125*].

9. Stevens, *A Look at Current FBS Coaching Tenures, from 1 to 125*, *supra* note 8.

10. See Jerry Hinnen, *Mark Stoops Hired as Kentucky Head Coach*, CBSSPORTS.COM (Nov. 27, 2012), <http://www.cbssports.com/collegefootball/eye-on-college-football/21161968>.

11. Stevens, *A Look at Current FBS Coaching Tenures, from 1 to 125*, *supra* note 8.

12. *Id.*

13. Evin Demirel, *College Basketball Programs with More Coaching Turnover than Arkansas*, SPORTS SEER, (Mar. 8, 2013), <http://thesportsseer.com/2013/03/08/college-basketball-programs-with-more-coaching-turnover-than-arkansas/>. See generally *Men's Basketball*, TEX. TECH RED RAIDER OFFICIAL ATHLETIC SITE, <http://www.texastech.com/sports/m-baskbl/text-m-baskbl-body.html> (last visited Dec. 28, 2013).

14. Demirel, *supra* note 13. See generally *Men's Basketball*, U. WYO. OFFICIAL ATHLETIC SITE, <http://www.gowyo.com/sports/m-baskbl/wyo-m-baskbl-body.html> (last visited Dec. 28, 2013).

15. Demirel, *supra* note 13. See generally *Pepperdine Men's Basketball*, PEPP. U. OFFICIAL ATHLETIC SITE, <http://www.pepperdinesports.com/sports/m-baskbl/sched/pepp-m-baskbl-sched.html> (last visited Dec. 20, 2013).

16. See Jon Solomon, *Gene Chizik's Firing Is Fastest for a National-Championship Coach in*

Auburn to its first national championship in fifty-three years, while helping develop Cam Newton into a Heisman Trophy winner the same year.¹⁷ Less than two years later, Chizik was fired and became the first coach ever fired within two years of a national championship.¹⁸ During the press conference, Auburn Athletic Director explained, “In this fierce environment that we’re in with this league and being highly competitive, you have to win in order to be able to compete at this level and stay here and be a coach.”¹⁹ An Auburn beat writer facetiously stated the initials SEC, which stands for the Southeastern Conference, truly stood for “security evades coaches.”²⁰ Pursuant to his contract, Auburn owes Chizik almost \$7.5 million over the next three years.²¹ Chizik’s football staff is owed approximately an additional \$3.59 million.²²

While Chizik’s individual payout is the largest to date, other former coaches are not far behind. As of December 2012, in the SEC alone, Mississippi currently owed Houston Nutt \$6 million, while Tennessee currently owed Derek Dooley \$5 million and his assistants approximately \$4 million additional.²³

For the 2013 college football season, 25 of the 124 FBS universities will have a new head coach.²⁴ Further, thirteen of those schools created the pertinent opening by firing a coach prior to the conclusion of the contractual term. Those payouts totaled a conservative minimum of \$30.4 million. Assistant coaches will additionally be owed a conservative minimum of \$15 million. The previous year head coaches’ payouts totaled greater than \$27 million. While some of these payouts are contractually subject to mitigation offsets from future similar employment income, the numbers are nevertheless staggering.

Modern History, AL.COM (Nov. 25, 2012), http://www.al.com/sports/index.ssf/2012/11/gene_chiziks_firing_is_fastest.html.

17. *Id.*

18. *Id.*

19. Ryan Wood, *Fall from Grace: Chizik Becomes First Fired Within Two Years of National Title*, DOTHAN EAGLE, http://www.dothaneagle.com/news/article_0301b8ce-3781-11e2-b8cf-001a4bcf6878.html (last updated Nov. 25, 2012).

20. *Id.*

21. First Amendment to Emp’t Agreement between Auburn Univ. & Gene Chizik §§ 4(b), 18(b) (June 9, 2011) (on file with author); see Andy Staples, *Auburn Family Gets Rid of Chizik, Joins Coaching-Search Circus*, SI.COM, http://sportsillustrated.cnn.com/2012/writers/andy_staples/11/25/auburn-fires-gene-chizik/index.html (last updated Nov. 26, 2012).

22. See Staples, *supra* note 21.

23. Steve Berkowitz & Jodi Upton, *NCAA Football Coach Firing, Hiring Buyouts May Top \$50M*, USATODAY.COM (Dec. 11, 2012), <http://www.usatoday.com/story/sports/ncaaf/2012/12/10/college-football-coaching-buyout-payments/1759507/>.

24. *Id.*

University athletic department financial statements and cash flow now rival that of large corporations. The University of Texas at Austin athletic department, for example, generated greater than \$163 million in revenue in 2012.²⁵ Also in 2012, the University of Texas at Austin had operating expenses of greater than \$138 million. Further, in 2012, ten Universities' athletic departments produced revenues greater than \$106 million.

Given the current circumstances, this trend will likely continue to increase. Dr. Thomas H. Regan, an associate professor in the University of South Carolina's Department of Sport and Entertainment Management, points out, "'Even with payouts schools incur with firings, they're willing to do that because the money they generate with football is so significant.'"²⁶

C. CEO's in Headphones

Today's major college coaches are CEOs in headphones. In addition to significant financial pressures, a modern-day college coach has a multitude of wide-ranging, yet stressful duties. Generally, understood as purely an athletic instructor or trainer, the modern-day college coach is much more. Coaches are not only required to be an instructor but also spend significant time as a recruiter, academic advisor, psychological advisor, public figure, fundraiser, spokesperson for the university, budget director, glad-hander, and television, radio, and internet personality. Coaches' roles are generally defined broadly by contract and dictated by the athletic director and university president.

A high-profile as well as a high risk position, every move and movement is surrounded by stress. Every decision, whether on or off the field, is subject to second-guessing and scrutiny and often the subject of vigorous public debate.

Job security is as fleeting as the last seconds of an overtime victory. Job security is no longer reliant on being a role model for players and a sport-specific instructor. Rather, job security is often dependent on winning and increasing a university's bottom line. Coaches must entertain fans, sell expensive seating, increase alumni contributions, win NCAA tournament games or qualify for bowl games, and attract financially lucrative television and radio contracts.

25. Reuters, *Texas Athletic Department Reports \$163 Million in Revenue*, CHI. TRIB. (Feb. 9, 2013), http://articles.chicagotribune.com/2013-02-09/news/sns-rt-fbc-texas-newssx8598fa1-20130209_1_athletics-programs-revenue-public-schools.

26. Gene Sapakoff, *'Shameful' College Football Coach Salaries Likely Will Keep Rising*, POST & COURIER (Jan. 13, 2013), <http://www.postandcourier.com/article/20130113/PC20/130119682>.

D. More Money, More Problems

Not surprisingly, college coaches are routinely fired at a drastically increased frequency, as the financial stakes are at an all-time high. Universities assess their athletic personnel and bottom line similar to any profit-driven corporation. Further, Universities view their athletic department not only as a potential source of direct revenue, but also a source of vast indirect revenue through increased name recognition and application rates.

From 1985 to 2010, college coaching salaries increased more than 750%.²⁷ During the same period, pay for university professors increased 32% and pay for college presidents increased 90%.²⁸

Approximately seven years ago, in 2006, forty-two college football coaches made at least \$1 million annually.²⁹ In 2012, at least forty-two college football coaches make at least \$2 million annually. More telling, however, is the average salary of an FBS head coach. Despite a recessionary economy, universities placing staff on furloughs, and overall job loss, the average annual salary for FBS head coaches since 2006 rose greater than 70%. FBS head coaches' compensation "has even outpaced the pay of corporate executives, who have drawn the ire of Congress and the public because of their staggering compensation packages."³⁰

Universities often owe coaches little to nothing financially if a firing is done for cause, as defined by the pertinent contract. Therefore, as the potential financial ramifications of firings continue to increase, universities and coaches will continue to fight bitterly over what constitutes termination for cause. Coaches' contracts often contain vague, indefinable contractual terms. Further coupled with the lack of due process contractually afforded, the situation is ripe for potential abuse by universities. This simple notion makes the analysis this article undertakes more important than ever.

III. THREE CIRCUMSTANCES UNDER WHICH COACHES MAY GET FIRED

Coaches are primarily relieved of their duties under three circumstances: death or disability, termination not for cause, and termination for cause. Coaches may also voluntarily resign from their position, often simply another

27. Fred Barnes, *Calculating the Score*, BIG-TIME SPORTS AM. U. (Apr. 23, 2011), <http://sites.duke.edu/bigtimesports/2011/04/fred-barnes-the-wall-street-journal/>.

28. *Id.*

29. Erik Brady et al., *College Football Coaches Continue to See Salary Explosion*, USATODAY.COM (Nov. 20, 2012), <http://www.usatoday.com/story/sports/ncaaf/2012/11/19/college-football-coaches-contracts-analysis-pay-increase/1715435/>.

30. *Id.*

form of forced termination through mutual agreement with financial compensation provided.

A. Death or Disability

A coach may be relieved of his or her duties upon death or disability. When death occurs, the contractual agreement generally terminates immediately. However, some contracts include life insurance policies purchased by the university. Further, some contracts contain provisions requiring the university to fund other investment vehicles to protect the coach's family and beneficiaries in case of death or disability. Additionally, contracts often provide the University must pay the coach's beneficiary or beneficiaries a specified sum, usually a percentage of the coach's base salary or an amount equal to a certain number of years of the coach's base salary upon death.

If the coach is unable to perform his duties under the contract due to mental or physical disability, the pertinent agreement generally terminates immediately. Upon termination, however, the University may owe the coach a specified monetary sum pursuant to the contractual terms. With regard to specific disability provisions, college coaches' contracts vary drastically. A few contracts, for example, do not contain a mental or physical disability provision, while the vast majority of contracts contain some semblance of protection in case of disability. For example, certain contracts specifically delineate the general type and severity of the mental or physical illness necessary for the coach to no longer be able to perform his or her duties. Further, many contracts dictate a requisite time period for the illness to be present before the provision is triggered. Other contracts, meanwhile, specifically articulate an individual or institution as an independent medical examiner to serve as the fact-finder in the case of a dispute whether a disability actually exists that renders the coach unable to perform his or her duties. A sample death or disability provision, from Brady Hoke's contract with the University of Michigan, is provided below.

Disability, Death, or Inability. This agreement will terminate automatically upon the Head Coach's death or disability (which for purposes of this section shall mean the Head Coach is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which continues for at least six (6) consecutive months and can be expected to result in death or can be expected to last for a continuous period of not less than 12 months). If the University or the Head Coach terminates this

Agreement due to disability or for any other reason beyond his control (e.g. severe family or personal issues that make it impossible for the Head Coach to continue his employment), Head Coach shall have no liability whatsoever to the University as a result of such termination. All obligations of the University to make further payments and/or to provide other consideration, under this Agreement or otherwise, except to the extent already vested, shall cease immediately in the event such death or disability occurs. To the extent applicable, the Coach (or his beneficiaries) shall also be eligible to receive disability and/or life insurance benefits, but only to the extent that such benefits are available to him or his beneficiaries, as the case may be, under the rules established by the University and the University's insurance carrier.³¹

B. Termination Without Cause

In every college coach's contract, the university has the authority to terminate the contractual agreement "without cause." This same notion is also referred to as termination absent "just cause" or "not for cause." Specifically, termination without cause means the university has the explicit authority to terminate the contract prior to end of the term date for any reason. Under the pertinent contractual agreement, when a termination without cause occurs, the university generally owes the coach "liquidated damages" subject to the terms of the agreement. The liquidated damages or buyout payments under the termination without cause provision are paid pursuant to the contractual terms.

Termination without cause often occurs when the coach is failing to put a winning team on the court or field, failing to garner adequate fan support, failing to garner adequate financial support from alumni and boosters, failing to compete with conference opponents and noted rival universities, failing to bring in student-athletes representative of the university's missions, or any other potential cause not listed in the pertinent contractual provisions. Termination without cause, additionally, often occurs when a new athletic director, chancellor, or university president is appointed and wants to put his "mark" on the program by bringing in a new coach.

Notably, the liquidated damages or buyout owed pursuant to a termination without cause are often much greater than the sum owed under a termination for cause. Therefore, universities prefer to terminate a coach's contract under

31. Emp't Agreement between Univ. of Mich. & Brady Hoke § 4.05 (Mar. 28, 2011) (on file with author).

the guise of a “for cause” termination. A sample termination without cause provision, from Robert Huggins’s contract with West Virginia University is provided below.

Termination Without Cause by University. In addition to the provisions set forth above, there also is reserved to University the right to terminate this Agreement without cause at any time. In the event that University terminates Coach without cause, University will pay Coach (1) all base salary, guaranteed supplemental compensation and incentive compensation earned as of the date of termination; and (2) all base salary and guaranteed supplemental compensation remaining to the end of the term of the Agreement as liquidated damages payable as follows: \$500,000.00 within sixty (60) days of termination and one-half of the balance of such liquidated damages shall be due and payable to Coach within six (6) months after the initial payment is made pursuant to the provisions of this paragraph and the balance due and payable to Coach within eighteen (18) months after the initial payment is made.

Such sums shall be deemed to be liquidated damages and extinguish all rights of Coach to any further payments from University. All benefits and entitlements of Coach hereunder will terminate as of the date of termination by University without cause. Coach shall have no duty to mitigate, nor shall University have any right of offset.³²

C. Termination “For Cause”

Most pertinent for the purpose of this Article, the university has the explicit right to terminate the employment contract prior to its natural expiration “for cause” if the coach violates a specific provision in his or her contract. This same notion is also referred to as termination “with cause,” with or for “just cause,” and “for cause termination.” Specific contracts and the definition of what constitutes “cause” dramatically differs based on the contractual language. Some contracts contain an extremely concise paragraph as to what constitutes just cause, while other contracts contain numerous pages of potential circumstances and actions that constitute just cause. Determining what exactly constitutes “cause” is an imperative, and often difficult,

32. Emp’t Agreement between Robert E. Huggins & W. Va. Univ. art. V(C) (May 1, 2008) (on file with author).

distinction because of the financial repercussions from a termination with cause to a termination without cause.

The following is a thorough sample from numerous college coaches' contracts outlining circumstances in which a university may terminate the coach for cause:

1. Neglect or inattention or refusal or inability to perform duties
2. Breach of contract terms
3. Violation of University rules, or laws of the state or United States
4. Fraud or dishonesty in performance of duties and responsibilities
5. Fraud or dishonesty in preparing, falsifying, submitting, or altering documents
6. Failure to respond accurately and fully to any inquiry
7. Coach's instruction to any coach, student, or other person to respond inaccurately to an inquiry
8. Failure by coach to manage team
9. Soliciting, placing, or accepting a bet—illegal betting or gambling
10. Use or consumption of drugs or alcoholic beverages
11. Sale, use, or possession of narcotics, drugs, or controlled substances
12. Failure to promptly report violations that the head coach knows or should have known about
13. Failure to obtain prior approval for outside income activities
14. Engaging in activities that bring University into public disrepute, scandal, ridicule, or violate University mission
15. Win-Loss record
16. Repetitive or a pattern of conduct which constitutes violations of University or NCAA Rules
17. Violation of criminal statutes, whether prosecuted or not
18. Prolonged absences
19. A cause not previously enumerated that is adequate to sustain the termination of any other employee of the University
20. Failure to maintain an environment of NCAA Rules compliance
21. Breach of Coach's representations and warranties as an inducement to the contract
22. Failure to cooperate fully with Athletic Director, compliance officer, or University officials
23. Engaging in moral turpitude

The newest catch-all and expansion of bases for termination for cause is a violation that the coach knows or "should have known," which holds the coach accountable for the activities of the entire staff, student-athletes, and, of

course, financial donors.

IV. UNCERTAINTY IN USE OF LANGUAGE

A. *The Dictionary Definition*

Unfortunately, a common theme is prevalent in a multitude of termination for cause contractual provisions. The provisions are often indefinable, vague, and extremely subjective. An individual cannot reasonably analyze *Black's Law Dictionary*, *Merriam-Webster's Dictionary*, or any case law to discern what many terms and phrases truly mean. For example, "moral turpitude" may mean one hundred things to one hundred different individuals. The definition and interpretation of moral turpitude may vary based on ideals, geographic location, upbringing, traditions, ethnicity, and political and social beliefs, just to mention a few.

Further, these contractual provisions are often manipulated and defined in manners advantageous to the university. If a university is unhappy with one of their coaches and adequate contractual safeguards do not exist, the university may have the opportunity to terminate the coach under the guise of a for cause termination when, in actuality, there does not exist any valid contractual basis for a termination with cause.

B. *The Real Deal*

The subjectivity and lack of due process in college coaching contracts is not a theoretical discussion; rather, it is endemic with real and problematic repercussions. The problems are present in the contractual agreements across the board, from Division III coaches to the traditional BCS titans. To highlight the uncertainty of the contractual language, a few examples are discussed below.

In November 2011, Urban Meyer was named the head football coach at The Ohio State University (Ohio State).³³ Coach Meyer signed a six-year contract worth approximately \$4.4 million annually.³⁴ Prior to Ohio State, Coach Meyer was extremely successful at the University of Utah, University of Florida, and as an analyst for ESPN. Coach Meyer was widely considered the top available college football coach. Ohio State, meanwhile, is a traditional football power that has recently struggled.

Despite extremely favorable bargaining power, the language in Coach

33. Emp't Agreement between Urban F. Meyer & The Ohio State Univ. § 2.1 (June 8, 2012) [hereinafter Meyer Contract] (on file with author).

34. *Id.*

Meyer's contract exemplifies why it is necessary to abandon the subjective and disingenuous distinction between termination for cause and termination without cause. Further, the subjectivity and potential manipulation of terminology is a primary reason why a coach would be more adequately protected by a third-party dispute resolution process.

In pertinent part, under the termination for cause, in sub-section 5.1 (o), Coach Meyer's contract sets forth the following as actions that amount to "just cause":

Commission of or participation in by Coach of any act, situation, or occurrence which, in Ohio State's judgment, brings Coach and/or Ohio State into public disrepute, embarrassment, contempt, scandal or ridicule or failure by Coach to conform Coach's personal conduct to conventional and contemporary standards of good citizenship, with such conduct offending prevailing social mores and values and/or reflecting unfavorably upon Ohio State's reputation and overall primary mission and objectives, including but not limited to, acts of dishonesty, misrepresentation, fraud or violence that may or may not warrant criminal prosecution by the relevant authorizes.

It is recognized that this sub-section (5.1 a-o) encompasses findings or determinations of violations during employment of Coach at Ohio State or any other institution of higher learning.³⁵

Indicative of the need for change, paramount problems exist in Coach Meyer's contract under the for cause termination section. First, the pertinent provision (sub-section 5.1(o)) is permeated with words and phrases not readily defined by common usage and not defined in the contract itself. One thousand individuals may have one thousand different and reasonable interpretations of the words and phrases used but not defined in Coach Meyer's contract, such as "public disrepute, embarrassment, contempt, scandal or ridicule."³⁶ Further, Coach Meyer may be terminated with cause under the contract if he fails to conform his conduct to "conventional . . . conduct offending prevailing social mores and values and/or reflecting unfavorably upon Ohio State's reputation and overall primary mission."³⁷ Similar to the terms "public disrepute" or "embarrassment," "prevailing social mores" and "values" are equally

35. *Id.* at § 5.1(o).

36. *Id.*

37. *Id.*

subjective, vague, and ambiguous. To say these terms are simply “in the eyes of the beholder” is a drastic understatement.

A devout Mormon and lifelong Utah resident, based on inherent philosophical or religious beliefs, considers drinking a beer to amount to “embarrassment” or conduct that offends “prevailing social mores or values.” The lack of defined terms illuminates the strong and realistic opportunity for the university to manipulate words and phrases to terminate the coach with cause. A free-spirited Californian, meanwhile, may have drastically different interpretations of these ambiguous terms and phrases. Further, for a free-spirited Californian, possessing marijuana in a public forum may not constitute embarrassment or may not offend prevailing social mores or values. Although these examples are seemingly extreme, the notion remains the same: a contract filled with subjective words and phrases can be interpreted in a multitude of ways depending on the circumstances. Unfortunately, with the high stakes in the college coaching context, these terms are often, and will continue to be, manipulated by universities to terminate a coach for cause, despite often tenuous evidence of the actions that allegedly amounted to just cause.

In addition, Coach Meyer’s contract contains an additional “catch-all” clause drastically expanding the aforementioned terms. Specifically, the provision states, “It is recognized that this sub-section (5.1 a-o) encompasses findings or determinations of violations during employment of Coach at Ohio State or any other institution of higher learning.”³⁸ Pursuant to the terms of Coach Meyer’s contract, he could theoretically be dismissed with cause for an event that occurred twenty-five years ago when he was a first-year assistant coach at the University of Cincinnati.

Coach Meyer is certainly not the only coach whose contract is marred with subjective, vague, and ambiguous contractual language. A few examples of other big-name coaches with similarly problematic provisions, describing actions that amount to “just cause” in their contracts, are provided below.

KELLY—University of Oregon:³⁹

Conduct by Kelly that is seriously prejudicial to the best interests of University or its athletic program or which seriously endangers the health and well-being of a student-athlete or which violates university’s mission.⁴⁰

38. *Id.*

39. After the 2012–2013 season, Charles “Chip” Kelly left the University of Oregon (Oregon) to coach the Philadelphia Eagles in the National Football League (NFL), despite being contracted to coach at Oregon until June 2016. The following provision is from that previous contract with Oregon.

40. Emp’t Agreement between Univ. of Or. & Charles “Chip” Kelly § 7.02(a)(4) (Sept. 27, 2010)

SABAN—University of Alabama:

Actively engaging in any conduct or committing any act that brings Employee and/or the University into public disrepute, contempt, embarrassment, scandal, or ridicule and that negatively impacts the reputation or the high moral or ethical standards of the University of Alabama.⁴¹

FERENTZ—University of Iowa:

A major violation of any of the following: a policy of the Regents or University involving dishonesty, moral turpitude, or conflict of interest; conviction of any law involving dishonesty, moral turpitude, or conflict of interest; any other personal conduct that impairs Coach's ability to fulfill assigned duties or reflects adversely on the Coach's fitness to serve as head coach.⁴²

CREAN—Indiana University:

Any conduct, including acts or omissions, of the Employee in violation of any criminal felony statute, whether prosecuted or not, or any act of moral turpitude.⁴³

PITINO—University of Louisville:

Disparaging media publicity of a material nature that damages the good name and reputation of Employer or the University, if such publicity is caused by Employee's willful misconduct that could objectively be anticipated to bring Employee into public disrepute or scandal, or which tends to greatly offend the public, or any class thereof on the basis of invidious distinction.⁴⁴

. . .

Employee's (a) dishonesty with Employer or University, [or]
(b) acts of moral depravity . . .⁴⁵

(on file with author).

41. Head Coach Emp't Contract between Univ. of Ala. & Nick L. Saban § 5.01(b)(6) (June 15, 2007) [hereinafter Saban Contract] (on file with author).

42. Head Coach Contract between Univ. of Iowa & Kirk J. Ferentz § 10(e) (Sept. 2, 2010) (on file with author).

43. Amendment (First) to Emp't Agreement between Thomas Crean & Ind. Univ. § 5(B)(2) (Nov. 23, 2011) (on file with author).

44. Emp't Contract between Univ. of Louisville & Richard A. Pitino § 6.1.2 (July 1, 2010) [hereinafter Pitino Contract] (on file with author).

45. *Id.* § 6.1.4.

CALIPARI—University of Kentucky:

Coach's acts of significant misconduct including, but not limited to, conviction of any criminal violation (excluding minor traffic offenses or non-criminal offenses).⁴⁶

The aforementioned examples are just that, examples. There are countless coaches with similarly difficult-to-apply contractual phrases. Even with significant legal experience and research, many of the terms are difficult to adequately comprehend and apply. "Moral turpitude," for example, is defined in *Black's Law Dictionary* as "[c]onduct that is contrary to justice, honesty, or morality."⁴⁷ Whereas *Merriam-Webster Dictionary* defines the term as "an act or behavior that gravely violates the moral sentiment or accepted moral standards of the community."⁴⁸

Another prevalent term in a multitude of contracts is "good faith," which *Black's Law Dictionary* defines as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."⁴⁹ Whereas *Merriam-Webster Dictionary* vaguely defines the term as "honesty or lawfulness of purpose."⁵⁰

The term "immoral" additionally is often used in coaches' contracts, but it is not defined in *Black's Law Dictionary*.⁵¹ Furthermore, *Merriam-Webster Dictionary* merely defines immoral as "not moral" or "conflicting with generally or traditionally held moral principles."⁵²

Many other terms such as affects adversely, gross negligence, conduct detrimental, just to name a few, are also marred with the same subjective and vague qualities as the aforementioned terms and phrases.

V. ENFORCEMENT PROCEEDINGS

Enforcement proceedings come in all shapes and sizes. Almost every

46. Emp't Agreement between Univ. of Ky. & John Vincent Calipari ¶ 7(b)(xi) (Mar. 31, 2009) [hereinafter Calipari Contract] (on file with author).

47. BLACK'S LAW DICTIONARY 1101 (9th ed. 2009).

48. *Moral Turpitude*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/moral%20turpitude> (last visited Nov. 29, 2013).

49. BLACK'S LAW DICTIONARY, *supra* note 47, at 762.

50. *Good Faith*, MERRIAM WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/good%20faith> (last visited Nov. 29, 2013).

51. See BLACK'S LAW DICTIONARY, *supra* note 47, at 817.

52. *Immoral*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/immoral?show=0&t=1385760213> (last visited Nov. 29, 2013).

college coaches' contract will have verbiage relating to making a determination, adjudicating, and processing a termination *for cause*. In order to determine the state of the industry, numerous college coaches' contracts—from the largest schools and conferences to the smaller schools and conferences—were reviewed to determine the variety of procedures utilized by colleges in terminating their coaches. While the list is not exhaustive, it is fairly representative of what can be found relative to the procedures utilized by colleges in once again determining, adjudicating, and processing terminations *for cause*.

A. Examples

1. Little or No Mention of Due Process Procedure

MEYER—The Ohio State University:

If Ohio State is considering terminating this agreement *for cause* under this Section 5.1 or Section 4.2, it shall give Coach an opportunity to explain the circumstances from his point of view before termination, unless the circumstances are so heinous that, in Ohio State's reasonable judgment, it would be impossible for Coach to justify his actions.

If Ohio State terminates this agreement *for cause* under this Section 5.1 or Section 4.2, it shall give written notice to Coach of its intention to so terminate this agreement.⁵³

In both contracts between the University of Kentucky and its men's basketball head coach, John Calipari, and its football head coach, Mark Stoops, there is no mention of a meeting, due process, or appeals procedure or reference to University procedures in their contracts.⁵⁴

2. Notice with Informal Opportunity to Be Heard by Athletic Director

ANDERSEN—University of Wisconsin-Madison:

Prior to termination for cause, University shall provide Coach with written notice of the factual basis for the proposed action and the intended effective date of termination. Coach shall have an information opportunity to be heard by the Director of Athletics to discuss and rebut the alleged factual basis for the termination. The University has the sole authority to

53. Meyer Contract, *supra* note 33, § 5.1.1.

54. See Calipari Contract, *supra* note 46; Head Football Coach Emp't Agreement between Univ. of Ky. & Mark Thomas Stoops (Nov. 26, 2012) (on file with author).

determine whether Coach's actions or inactions merit dismissal.⁵⁵

3. Notice with Right to Respond

PETERSEN—Boise State University:⁵⁶

Suspension or termination for good or adequate cause shall be effectuated by the University as follows: before the effective date of the suspension, reassignment, or termination, the Director or his designee shall provide Coach with notice, which notice shall be accomplished in the manner provided for in this Agreement and shall include the reason(s) for the contemplated action. Coach shall then have an opportunity to respond. After Coach responds or fails to respond, University shall notify Coach whether, and if so when, the action will be effective.⁵⁷

4. Pre-Termination or Post-Termination Meeting with President or Chancellor of University Wherein the Decision of the President or Chancellor Relative to Termination is final

SPURRIER—University of South Carolina:

Any termination for cause must be preceded by a pre-termination meeting held for such purpose by the President of the University after not less than five (5) days prior written notice to Coach, which notice shall include a statement of the charges against Coach. The meeting shall consist of an explanation of the University's cause for termination and an opportunity for Coach to present his side of the story. Present at the meeting shall be the President, Athletics Director, University General Counsel and/or other persons deemed appropriate by the President. Coach shall be permitted to have an attorney present to represent him if he so desires. The decision of the President following the meeting shall be the

55. Emp't Agreement between Univ. of Wis.-Madison Div. & Gary L. Andersen art. V, § A(1)(b) (Jan. 25, 2013) [hereinafter Andersen Contract] (on file with author).

56. After eight seasons with Boise State University, Chris Petersen left to coach at the University of Washington. The following provision is from Petersen's previous contract with the University of Washington.

57. Emp't Agreement between Boise State Univ. & Chris Petersen § 5.1.2 (Feb. 1, 2007) (on file with author).

final University decision.⁵⁸

SABAN—University of Alabama:

Except in those extraordinary circumstances in which a pre-termination hearing would result in damage to the University, be detrimental to the University's interests or would result in injury to Employee, to another employee or student of the University, or to the general public, "for cause" sufficient to satisfy the provisions of Section 5.01(b) hereof shall be determined by the President or the President's designee at the pre-termination hearing held for such purpose after fourteen (14) days' prior written notice to Employee, which notice shall include a statement of the charges against Employee. The hearing shall consist of an explanation of the University's evidence and an opportunity for Employee to present Employee's side of the story and shall include the right to have an attorney present to advise Employee, but not to actively participate in the proceedings. The decision of the President or the President's designee at such hearing shall be final.⁵⁹

HOWLAND—University of California Los Angeles:⁶⁰

In the event of a Termination for Cause, Coach and his counsel shall be entitled to an opportunity to appear before and/or to submit written materials to the Chancellor or his/her designate in order to test whether Coach was removed from his position in a manner consistent with the terms of this 2008 HC Agreement. Such an appearance may take place either before Coach is removed from his position or after he is so removed. Coach's request to exercise this right must be made in writing to the Chancellor. Coach understands and agrees that the exigencies of operating an NCAA Division I men's basketball program require that matters involving the termination of Coach for cause be handled expeditiously to

58. Emp't Agreement between Univ. of S.C. & Stephen O. Spurrier § 12.01(b) (Nov. 23, 2004) (on file with author).

59. Saban Contract, *supra* note 41, § 5.01(c).

60. The University of California Los Angeles (UCLA) terminated its contract with its men's basketball head coach, Ben Howland, shortly after a disappointing performance in the 2013 NCAA Tournament, despite having a contract with Howland that did not expire until April 2017. *See generally* Amendment No 3. to 2008 Head Coach Agreement between UCLA & Ben Howland (Sept. 21, 2010) (on file with author). The following provision is from that previous contract with Howland.

avoid the perception of confusion within and damage to the program. Coach agrees, therefore, that he shall have 10 (ten) calendar days from the date on which he receives notice that he is to be terminated for cause or from the date on which he is terminated, whichever occurs first, in which to request an appearance before and/or to submit written materials to the Chancellor or his/her designate. Such an appearance shall occur within 5 (five) calendar days after Coach's request to so appear is timely received. The Chancellor or his/her designate shall review the matter and respond to Coach in writing within 3 (three) calendar days. The parties understand and agree that this process represents an administrative remedy.⁶¹

FISHER—Florida State University:

Coach shall have the right, upon written request, for an opportunity for review and hearing before the President of the University or his designee relative to any termination of this Agreement for Cause. This right shall be Coach's exclusive opportunity for review and hearing relative to any termination of this Agreement for Cause and Coach hereby waives his right to any other hearing provided in the Florida Administrative Procedures Act, Chapter 120, Florida Statutes, as amended, or in any rules, policies or regulations of the Florida Board of Governors and the University. The determination of the President in such case shall constitute final agency action.⁶²

BENFORD—University of North Texas:

[University of North Texas] shall have the right to terminate this Agreement for cause. Cause shall be determined by the President or the President's designee at a meeting held for such purpose after fourteen (14) days prior written notice to Coach Benford, which notice shall include the reasons for the proposed termination. The meeting shall include an opportunity for Coach Benford to respond. The decision of the President or the President's designee following the meeting shall be final. This Section and the definition of cause is intended to give [University of North Texas] the

61. 2008 Head Coach Agreement between UCLA & Ben Howland ¶ 10(d) (June 1, 2008) (on file with author).

62. 2010 Emp't Agreement between Fla. State Univ. & John J. Fisher, Jr. art. V, § C(iii) (Dec. 18, 2009) (on file with author).

widest discretion permitted by applicable law. In the event this Agreement is terminated for cause, all obligations of [University of North Texas] to make further payment and/or provide any other consideration hereunder shall cease as of the date of termination.⁶³

5. Meeting with Athletic Director with Right to Appeal Athletic Director's Determination to President or Chancellor

RHOADS—Iowa State University:

Once the Director of Intercollegiate Athletics has determined termination is warranted, the Director shall have the administrative authority to order suspension of Rhoads from his duties and salary pending termination of this Agreement, provided that notice of any such suspension pending termination shall be delivered to Rhoads in writing, at least three days prior to the effective date of the suspension, detailing the reasons for such suspension and setting forth a reasonable time within which Rhoads may respond. In no case may suspension without pay pending termination exceed 30 days. Within the three-day period, Rhoads shall have the right to an informal meeting with the Director of Intercollegiate Athletics, or the Director's designee, to discuss the basis for suspension and termination. Rhoads shall have the procedural right to make a written request for a review and hearing relating to any such suspension and termination order by the Director. The request must be made to the President. The request shall state the grounds for seeking review. Review and hearing will be before the President or the President's designee. If a designee conducts the review and hearing, the designee shall make a recommendation to the President, who shall make the final decision, subject to any review required by law or rule. If Rhoads fails to request such review and hearing within five working days after the effective date of the suspension pending termination, this Agreement shall be terminated for the causes cited in such notice.⁶⁴

63. Univ. of N. Tex. Men's Basketball Head Coach Emp't Agreement between Univ. of N. Tex. & Tony Benford art. V, § 5.04(b) (Aug. 14, 2012) (on file with author).

64. Emp't Agreement between Iowa State Univ. & Paul Rhoads ¶ V(2)(b) (June 15, 2009) (on

TURGEON—University of Maryland:

The Athletic Director may suspend (with or without pay) the Coach pending an investigation or decision or relating to the existence of Cause for termination; provided however, the Coach will first receive written notice and be accorded an opportunity to be heard in a meeting with the Athletic Director. A suspension without pay under this Paragraph 8.3.(b) shall not extend beyond thirty (30) work days. The Coach may appeal any action taken by the Athletic Director under this paragraph 8.3.b to the President of the University. The President shall process the appeal in the same manner as are grievances of Exempt Employees of the University (a “Grievance”). The decision of the President shall be the final decision of the University. Coach shall be entitled to receive payments which were withheld pursuant to a suspension under this Paragraph 8.3.b. in the event that: (i) A Grievance (in connection thereto) is decided in Coach’s favor; and/or (ii) with respect to any suspensions in connection with Paragraph 8.3.a.(v), a final determination is made by the NCAA that the Coach did not violate the NCAA Constitution or the NCAA Operating Bylaws.⁶⁵

CREAN—Indiana University:

If at any time the University has any reason to believe that Cause may exist to terminate the employment of the Employee pursuant to Section 6.02.B of this Agreement, the University shall have the right to conduct a review or investigation, either on its own initiative or in conjunction with the NCAA, the Big Ten or otherwise, with or without notice to the Employee. Upon request, the Employee shall cooperate with the University and its professional advisors in the conduct of the review or investigation to the full extent requested by the University, including but not limited to providing oral or written statement(s) under oath and providing originals or copies of any or all information, records or documents requested by the University.

If at any time the University has any reason to believe that Cause may exist to terminate the employment of the

file with author).

65. Univ. of Md. Head Coach Agreement between Univ. of Md. & Mark Turgeon ¶ 8.3(b) (June 27, 2011) (on file with author).

Employee pursuant to Section 6.02.B of this Agreement, the University shall have the right, upon written notice to the Employee, to suspend the Employee with pay until such time that the review or investigation is complete and the Employee is notified in writing that the Employee may resume his duties and responsibilities under this Agreement. Unless any exception is specifically set forth in writing as a part of the suspension notice to the Employee, the suspension shall be deemed to be a prohibition upon the Employee from engaging in any activities otherwise allowed by this Agreement, including but not limited to recruiting, media activities, endorsements, or any interaction with any student-athletes or other members of the men's basketball staff.

“Cause” sufficient to terminate the employment of the Employee pursuant to Section 6.02.B of this Agreement shall initially be determined by the Director of Athletics in his sole discretion. The Director of Athletics may make this determination without conducting any prior review or investigation as contemplated above. If an initial determination is made by the Director of Athletics that Cause exists to terminate the employment of the Employee pursuant to Section 6.02.B of this Agreement, the University shall have the right to suspend the Employee from all of his duties with or without pay, as determined by the Director of Athletics in his sole discretion, pending termination of the employment of the Employee pursuant to Section 6.02.B of this Agreement. The University shall provide to the Employee a written notice of suspension pending termination of employment (“Notice Pending Termination”). The Notice Pending Termination shall provide (i) the reasons for such suspension and for the initial determination of Cause by the Director of Athletics, (ii) the effective date of the termination for Cause in the absence of a review of the initial determination of the Director of Athletics, and (iii) the procedure by which the Employee may seek a review of the initial determination of the Director of Athletics. Any suspension of the Employee with or without pay pursuant to this provision shall be deemed effective immediately upon delivery of the Notice Pending Termination to the Employee.

The Employee shall have the procedural right, upon written request, to a review of his suspension and pending

termination as previously determined by the Director of Athletics. Such review may be initiated by the Employee by submitting a written request to the President of the University. Any request for a review shall (a) be sent within ten (10) days of the delivery of the Notice Pending Termination, and (b) shall set forth responses for each of the reasons that the Employee contends that the initial determination of Cause by the Director of Athletics is not appropriate. Any request for a review that does not follow the foregoing procedure in all respects shall be deemed waived by the Employee and the initial determination of Cause shall automatically become final and binding. Upon receipt of a proper request for a review, the President of the University shall consider the review and may, in his sole discretion, appoint one or more delegates to consider the review request. The President or his delegate(s) shall provide an opportunity for the Employee to be heard as to the specific reasons set forth as the basis for the suspension and the determination of Cause to terminate the employment of the Employee pursuant to Section 6.02.B of this Agreement. If after such opportunity to be heard, the President or his delegate(s) determines that the initial determination of the Director of Athletics is proper, the Employee shall be notified in writing of the decision by the President or his delegate(s) and the termination for Cause shall take effect on the date specified in the President's or delegate(s) notification. If the President or his delegate(s) determines that the initial determination of the Director of Athletics was not proper, then the President may order reinstatement of the Employee to his position on such additional terms and conditions as the President or his delegate(s), in his or their sole discretion, deems necessary to fulfill the purpose and intent of this Agreement. The decision of the President or his delegate(s) shall be final and binding on the Employee for all purposes.

The Employee acknowledges and agrees that the foregoing procedure is the exclusive procedure that will apply to any determination (or review or appeal of any determination) of Cause sufficient to terminate the employment of the Employee pursuant to Section 6.02.B of this Agreement. The Employee waives his right to use or pursue any and all other procedures, including the grievance

procedures, afforded to other employees of the University in connection with a termination of their employment by the University.

In the event that Michael McRobbie resigns or is terminated from his position as president of the University, the *Procedures for Termination for Cause* as described in this Section may be renegotiated with both parties making a sincere effort to formulate a post-termination procedure that includes impartial members of the University community. Employee has fourteen (14) calendar days after President McRobbie's notice of resignation or termination to invoke his right to renegotiate. If employee fails to invoke this right within the time period, then the *Procedures for Termination for Cause* remain as currently written.⁶⁶

HEATH—University of South Florida:

Procedures for Termination for Cause by the University. In the event the University takes action to terminate this Agreement for cause, the following provisions shall apply:

i. Pre-termination Meeting. Except in extraordinary or exigent circumstances, Coach will be provided written notice, in accordance with the terms of this Agreement, at least ten (10) working days prior to the intended termination date. Such notice must be signed by the Athletic Director, or his designee, and will include a statement setting forth the reason(s) for the termination action and a date, time and place for a Pre-termination Meeting. The Pre-termination Meeting is Coach's opportunity to present any information, evidence or argument in support of his belief that termination is inappropriate and will occur prior to the effective date of the termination action. Coach may provide written notice of his intent not to participate in the Pre-termination Meeting at any time prior to the scheduled meeting. Failure of Coach to appear for such a meeting will be deemed a waiver of his right to receive a Post-termination Meeting under this Section. In the event termination results from extraordinary or exigent circumstances and a Pre-termination Meeting is not scheduled, the Athletic Director, or his designee, will provide

66. Ind. Univ. Emp't Agreement between Ind. Univ. & Thomas Crean art. VI § 6.02(C) (Aug. 11, 2008) (on file with author).

to Coach, within forty-eight (48) hours, a written statement detailing the reasons for the termination in accordance with the provisions of this subparagraph.

ii. Post-termination Meeting. If the Coach is terminated for Cause under the provisions of Article 8, upon written request of the Coach within forty-eight (48) hours of the effective date of the termination, Coach has the right to a Post-termination Meeting. The University will make every effort to convene such meeting within Ten (10) working days of the University's receipt of the written request. Such meeting shall be conducted by the President or her designee. Within Five (5) working days of the Post-Termination Meeting, the President, or her designee, shall notify Coach of her decision. The decision of the President is final and binding on all parties to this Agreement, and shall constitute final agency action for purposes of Section 120.569, Florida Statutes (2007).

iii. Applicability. The procedures outlined in this section will also apply to disciplinary suspensions without pay, but not to termination without cause as provided for in Section 11.a, to suspension with pay pending investigation as provided for in Section 12, or to reassignment as provided for in Section 13.⁶⁷

RODRIGUEZ—University of Arizona:

Process for Suspension with Pay or Termination.

1. Notice. Within 30 days after the Director decides to impose a suspension with pay or terminate Coach's Contract for cause pursuant to Section XIV(A) above, the Director or his designated representative shall hand-deliver or mail to Coach using first class U.S. mail directed to Coach's last known address of record, a written notice of the proposed action and providing a reasonable opportunity to defend. The notice of proposed action shall state the specific grounds and particular facts upon which the proposed action is based and may include written reports or documents supporting the proposed action. Coach shall be responsible for keeping the University apprised of any address changes in writing.

67. Head Coaching Agreement between Stan Heath & Univ. of S. Fla. § 11(e) (May 24, 2007) (on file with author).

2. Pre-suspension or termination meeting. Within ten (10) days following the date of hand-delivery or mailing of the notice in Section XIV(B)(1), Coach will have an opportunity to request a meeting with the Director by delivering a written request for such a meeting to the Director. Upon receipt of Coach's request, the Director shall schedule the meeting to be held prior to the effective date of the proposed action. At the meeting, Coach will be given the opportunity to present information to refute the existence of cause, as defined above, for the proposed action. Coach may provide a written response including supporting or refuting information, if any.

3. Decision by Director or his Designated Representative. The Director or his designated representative will review all information received from Coach, and decide whether there is sufficient basis for suspension with pay or termination. After the review, the Director, or his designated representative, shall render a written decision. If the decision is that Coach will be suspended with pay or terminated, the decision shall include: (1) the reason(s) for suspension with pay or termination, (2) the facts found and conclusions drawn from the meeting and the evidence reviewed, and (3) the effective date of the suspension with pay or termination. The written decision shall be hand-delivered or mailed to Coach in the same manner as set forth in Section XIV(B)(1).

4. Appeal. Coach may appeal a written decision for suspension with pay or termination by filing a written appeal with the Vice President for Human Resources within ten (10) days following the date of hand-delivery or mailing of the written decision. The appeal must state the issue(s) in dispute, the facts in support of Coach's position, and the remedy requested. The Vice President for Human Resources will appoint an independent third-party Review Officer to review the facts and circumstances of the matter and the application of University and Board personnel policies. The Review Officer shall submit a written report to the President (a copy of which shall be provided to the Vice-President for Human Resources to be retained in an appeal file). The report shall include, but is not limited to, a brief summary of the dispute, the Review Officer's Findings, Conclusions, and Recommendation for corrective action, if any. The Vice

President for Human Resources may serve as a technical advisor to the Review Officer.

5. Review by the President. The President shall consider the Review Officer's written report and will render a final decision ("Decision") in writing as soon as reasonably possible following receipt of the written report. Copies of the Decision shall be sent to Coach, the Director, the Review Officer, and the Vice President for Human Resources. The President may endorse, modify or reject the findings, conclusions and/or recommendation of the Review Officer. The President may instruct the Review Officer to conduct further investigation on certain facts or issues before rendering a decision. The Decision shall also serve as a directive for any action necessary to effectuate compliance therewith. The Decision of the President is final and concludes the appeal process and is not subject to further administrative review.⁶⁸

LEACH—Washington State University:

Determination of Cause and Hearing Provision. "Just cause" sufficient to satisfy the provisions of Section 4.1 hereof shall initially be determined in good faith by the Athletic Director of the University. The Athletic Director shall give the Employee written notice of the provisions of the Agreement alleged to have been violated, together with a statement of the factual basis for those allegations. The Employee will have ten (10) calendar days within which to cure the alleged violations, if curable, and/or respond to the Athletic Director, in writing, with reasons he should not be terminated. If the Employee is unable or unwilling to cure the violation or the violation is not curable, the Athletic Director, after considering any response provided by the Employee, will issue a decision regarding termination for cause. If a summary suspension has been issued in accordance with Section 4.4, the Athletic Director must issue a decision regarding termination within five (5) calendar days of receipt of the Employee's response. If a summary suspension has not been ordered, the Athletic Director shall issue a decision regarding termination within ten (10) calendar days of receipt

68. Multiple-Year Emp't Contract for Head Football Coach between Univ. of Ariz. & Richard Rodriguez § XIV(B) (Dec. 1, 2011) (on file with author).

of the Employee's response.

Appeal of Termination for Just Cause. The Employee may appeal the Athletic Director's decision to terminate for cause to the University President. Such appeal must be made in writing within ten (10) calendar days' notice of the Athletic Director's determination, and must contain a statement of the reasons that the Employee requests the President to set aside the decision to terminate for just cause. The Employee must provide a copy of the appeal to the Athletic Director at the time it is delivered to the Office of the President. The Athletic Director may, within seven (7) calendar days of receipt of the notice of appeal, provide an additional written statement supporting his decision to the President, and shall provide the President with 1) the written notice of termination sent to the Employee; 2) the Employee's written response, if any, and 3) the written decision of termination. The President may allow oral statements in the President's discretion. The President shall render a final decision within thirty (30) calendar days of receiving the materials provided by the Athletic Director, which shall be the final decision of the University.

The Employee shall not be entitled to receive any compensation under this Agreement pending the appeal. Should Employee be reinstated by the President, Employee shall be entitled to back pay for compensation not paid during the pendency of the appeal.⁶⁹

PETRINO—University of Idaho:

Suspension, reassignment, or termination for good or adequate cause shall be effectuated by the University as follows: before the effective date of the suspension, reassignment, or termination, the Director or his designee shall provide Coach with notice, which notice shall be accomplished in the manner provided for in this Agreement and shall include the reason(s) for the contemplated action. Coach shall then have an opportunity to respond. After coach responds or fails to respond, University shall notify Coach whether, and if so when, the action will be effective. Coach may, within fifteen (15) calendar days of receiving such notice, request review of

69. Emp't Agreement between Wash. State Univ. & Michael C. Leach §§ 4.2–4.3 (Oct. 17, 2012) [hereinafter Leach Contract] (on file with author).

the decision in writing directed to the University President. However, such request for review shall not stay the effectiveness of the action, and review by the President is at the President's sole discretion.⁷⁰

6. Athletic Director's Decision is Final

MACINTYRE—Colorado University:

Prior to suspension without pay or termination for cause, Macintyre shall be given written notice of the alleged grounds for suspension or termination and shall have five (5) calendar days from the date of the notice to provide the Athletic Director with written notice of a request for a meeting. If no written notice of a request for a meeting is received as provided herein, the suspension or termination shall become final five (5) calendar days after the notice to Macintyre. If requested, the meeting shall take place within a reasonable time between Macintyre and the Athletic Director or designee and shall consist of an explanation of the University's position and an opportunity for Macintyre to present his response. Macintyre may have an advisor present, but the advisor may not participate actively in the meeting. If Macintyre chooses to have an advisor present, the University may also have an advisor present although the advisor may not participate actively in the meeting. The Athletic Director or designee shall state his decision in writing, set forth the reasons for suspension or termination and deliver the decision in accordance with the procedures for giving notice in paragraph 25. The Athletic Director or designee's decision is final. If Macintyre's employment is terminated for cause, the University shall have no further obligation to make further payments and/or to provide any other consideration or benefits under this Agreement as of the effective date of the termination, except for compensation or benefits earned by Macintyre before the effective date of termination.⁷¹

70. Emp't Agreement between Univ. of Idaho & Paul Petrino art. 5, § 5.1.2 (Dec. 4, 2012) (on file with author).

71. Emp't Agreement between George Michael Macintyre & Univ. of Colo. ¶ 15 (Jan. 7, 2013) (on file with author).

7. Decision of Athletic Director or President Is Final—Waiver of Rights

ROBINSON—Oregon State University:

Termination for Cause. This appointment may be terminated prior to the end of the fixed-term period for any of the causes set out in the Oregon State Board of Higher Education's Administration Rules OAR 580-021-0325. One of the causes, as defined by the State Board Rules, is failure to perform the responsibilities of an academic staff member. For the purposes of this Agreement, such failure shall include, but not be limited to:

- a. engaging in, supporting, or knowingly tolerating any significant or repetitive violation of any governing constitution, bylaw, rule or regulation of the NCAA or the PAC-10 Conference, during the period of this Agreement or at any time during the two years previous to the execution of this Agreement, whether at this or another institution,
- b. failure to comply with the attached Code of Ethics of the Oregon State Board of Higher Education, which is incorporated herein by reference, and
- c. failure to carry out faithfully and diligently all duties and responsibilities as described in this Agreement.

COACH waives any rights he may have to receive written notice of non-renewal or to receive written charges or to have a hearing under OAR 580-021-0318 through -0470. COACH shall, however, be notified of the grounds for termination being considered by University and shall have an opportunity to present a statement of denial, explanation and/or extenuation before such termination is finalized.

The decision whether to terminate this Agreement for cause shall be made by the Athletic Director or the University President. In reaching a decision whether to terminate, or impose a lesser discipline under Section 17, the Athletic Director or President will take into consideration the severity of the action(s) or omission(s) that constitute the cause for termination.

In the event University terminates this Agreement for cause prior to the end of this Agreement, all obligations of University to make further payments and/or to provide other consideration under this Agreement shall cease as of the end

of the month in which such termination occurs, provided that COACH will be entitled to earned but unpaid bonuses and reimbursement for previously incurred and approved expenses. University shall not be liable to COACH for any loss of collateral business opportunities or any other benefits, perquisites or income.⁷²

8. Termination Decision of the Board of Directors of the University or Its Designee

PITINO—University of Louisville:

Termination of this Employment Contract by Employer may occur only by decision of the Board of Directors of Employer or a duly authorized and constituted subcommittee of the Board after ten (10) days' prior written notice of the charges against Employee and an opportunity for Employee to present evidence. Employee may obtain the assistance of an attorney at Employee's sole expense to aid in the proceeding.⁷³

9. Pre-Termination Procedure Before President of the University and Right to Appeal Pursuant to the University Dispute Resolution Procedure

MILLER—University of Arizona:

Prior to termination for cause, University shall provide timely notice of the charges asserted against Coach and a reasonable opportunity to defend against the charges. The notice of proposed action shall state specific grounds and particular facts upon which the proposed action is based, including any written reports or documents supporting the proposed action. A reasonable opportunity to defend shall mean that Coach shall have a right to meet with the President, or his designated representative, to respond to the proposed action. At the meeting, Coach shall be given the opportunity to present information to refute the existence of legitimate reasons for the proposed action. To invoke the meeting process, Coach shall deliver a written request for a meeting to the Director no later than seven (7) [days] following receipt of the notice of proposed action. Upon receipt of Coach's request, the

72. Emp't Agreement & Notice of Appointment for Head Coach between Or. State Univ. & Craig Robinson § 18 (July 10, 2008) (on file with author).

73. Pitino Contract, *supra* note 44, § 6.3.

Director shall schedule the meeting to be held prior to the effective date of the proposed action. Following the meeting, the proposed action, supporting information, and the Coach's response and refuting information, if any, shall be carefully reviewed by the President, or his designed representative, to decide whether there is a sufficient basis for suspension without pay or termination for cause. After the review, the President, or his designated representative, shall render a written decision. If the decision is that Coach is to be suspended without pay or terminated for cause, the decision shall include: (i) the reason(s) for suspension without pay or termination for cause, (ii) the facts found and conclusions drawn from the meeting, and (iii) the effective date of the suspension without pay or termination for cause. Coach may appeal a written decision for suspension without pay or termination for cause by filing a written appeal with the Assistant Vice President for Human Resources within ten (10) working days from the date of receipt of the written decision. The rules and procedures set forth in the Classified Staff Dispute Resolution Procedure, Policy #406.0 shall govern the appeal process, except that there shall be no Staff Dispute Resolution Committee and, in addition to other enumerated powers, the Hearing Officer shall assume the duties of the Staff Dispute Resolution Committee and shall make all necessary findings and recommendations. For the purposes of this Contract, the rules and procedures applicable to the appeal process are merely borrowed from the Classified Staff Human Resources Policy Manual. Nothing herein shall be construed as classifying Coach, or making Coach a Classified Staff employee, or conveying to Coach any rights or benefits that are provided to Classified Staff employees as a result of classification. In the event a termination for cause is ultimately overturned by a court of competent jurisdiction, then the liquidated damages provision in section 19 shall apply and in addition Coach shall be entitled to receive from University the reasonable costs and expenses (including, without limitation, reasonable court-awarded attorneys' fees and disbursements) in connection with the pursuit of the matter.⁷⁴

74. Multiple Year Contract for Head Men's Basketball Coach between Univ. of Ariz. & Sean E.

10. Determination by Athletic Director with Right to Appeal, Utilizing University Non-Bargained for Dispute Resolution Procedures

MURPHY—Eastern Michigan University:

The Athletic Director shall have administrative authority to immediately suspend Employee on a pre-hearing basis from performance of some or all duties with salary payments, temporarily for a period of up to one month without termination of this Agreement for causes set forth in this Section 6.0 et. seq.

Employee shall have the procedural right, upon written request, for a review and hearing relative to any such suspension ordered by the Athletic Director. Any such hearing shall be governed by the normal University's Non-Bargained for Dispute Resolution procedures provided for non-academic administrative employees, as now or hereafter amended, unless other procedures are agreed upon by the parties in lieu thereof.⁷⁵

11. University Dispute Resolution Procedures

PASQUALONI—University of Connecticut:⁷⁶

Termination and/or Discipline. . . this Agreement shall terminate upon the occurrence of any of the following events . . .

(d) In the event the Coach is removed from the position or otherwise disciplined for just cause, as defined in the Collective Bargaining Agreement between the University and the AAUP ("Collective Bargaining Agreement"), as it pertains to members of the unit not in a tenure track. The phrase "just cause" shall include, in addition to the definition contained in

Miller § 17(g) (June 22, 2009) (on file with author). See generally *Staff Dispute Resolution Procedure*, U. ARIZ. HUM. RESOURCES, <http://www.hr.arizona.edu/policy/406> (last updated June 2007).

75. Athletic Coach Emp't Agreement between E. Mich. Univ. & Robert L. Murphy § 6.2 (Apr. 25, 2011) (on file with author). See generally E. MICH. UNIV. HUMAN RES., NON-BARGAINED-FOR EMPLOYEE DISPUTE RESOLUTION PROCEDURE, (2011), available at http://www.emich.edu/hr/employeerelations/documents/nonbargained_for_dispute_resolution_procedure.

76. Despite having a contract expiring in December 2015, the University of Connecticut terminated its contract with its football head coach, Paul Pasqualoni, in September 2013 after the team started the 2013 season 0-4. The following provision is from that previous contract with Pasqualoni.

the Collective Bargaining Agreement, a violation by the Coach of any law, rule, regulation, policy, constitutional provision, bylaw, or official interpretation of the University, the Conference or the NCAA; or a violation by a member of the Football coaching staff, or any other person under the Coach's supervision and direction, including student-athletes in the Football program, that the Coach knew, or in the exercise of due diligence should have known, as a violation, and takes no steps to address, correct and report the violation within a reasonable period of time which under no circumstances shall be longer than ten (10) business days.

(e) In the event the Coach is disciplined or removed for just cause, the procedures currently contained in Article 13 of the Collective Bargaining Agreement, which is incorporated herein, shall control. In the event that there is a new Collective Bargaining Agreement, any provisions pertaining to discipline or termination of bargaining unit members not in a tenure track shall apply to this Agreement.⁷⁷

LONDON—University of Virginia:

Prior to termination, the Coach shall be provided written notice of the justifying cause and reasonable opportunity to discuss the concern with the Director or his designee. In the event of an NCAA finding, Coach will be suspended with pay of base salary (Paragraph 4.1.1) only pending a final determination by the NCAA. In the event of termination for cause as provided in this Paragraph 7.1, all rights and benefits hereunder, including all forms of compensation, shall terminate on the designated termination date. The Coach may appeal and challenge any disciplinary termination pursuant to the University's applicable grievance procedures, and as permitted by applicable law, pursue his available legal remedies in accordance with Paragraph 11. As an alternative to termination, the University may institute lesser disciplinary action for cause after providing the Coach written notice of

77. Univ. of Conn. Head Football Coach Agreement between Univ. of Conn. & Paul Pasqualoni, art. 10.1(d)–(e) (Jan. 14, 2011) [hereinafter Pasqualoni Contract] (on file with author). *See generally* COLLECTIVE BARGAINING AGREEMENT BETWEEN UNIVERSITY OF CONNECTICUT BOARD OF TRUSTEES AND UNIVERSITY OF CONNECTICUT CHAPTER OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (2007), available at [http://osd.uconn.edu/Content/Tuition%20Pages/AAUP Contract.pdf](http://osd.uconn.edu/Content/Tuition%20Pages/AAUP%20Contract.pdf).

the underlying cause and reasonable opportunity for him to review it with the Director or his designee.⁷⁸

PELINI—University of Nebraska:

Coach's employment may be suspended or terminated for cause in accordance with the policy and procedures of the Department of Intercollegiate Athletics approved by the Chancellor pursuant to Section 4.7.1 of the *Bylaws*. A copy of said departmental policy and procedures is attached as Appendix "C" to this Contract, incorporated herein by this reference.⁷⁹

MONTGOMERY—University of California, Berkeley:

4. Waiver of Procedural Rights. Coach understands and agrees that if this Employment Contract is terminated under Paragraphs 3, 10, 11, 12, or if, under Paragraph 9, Coach is disciplined by any action other than termination, Coach is waiving Coach's rights to any internal University-based or Constitutionally based internal process Coach might otherwise be due, such as a Skelly hearing, a post-deprivation hearing and/or a liberty interest hearing. Coach attests that Coach is voluntarily waiving Coach's rights to such processes in exchange for the bargained for consideration in Paragraph 5 of this Employment Contract and the Contract Addendum. However, should Coach be terminated pursuant to Paragraph 9, Coach will be entitled to the process outlined in Paragraph 6 of this Employment Contract in addition to the right to pursue any claims Coach may have against the University through any judicial or regulatory means. The University acknowledges that Coach shall not be required to initiate or exhaust any internal claim or appeals process prior to pursuing his available judicial or regulatory remedies.

...

6. Application of Personnel Policies for Staff Members and Other Policies of General Application to University Employees. Personnel Policies for Staff Members (PPSM)

78. Head Football Emp't Agreement between Univ. of Va. & Mike London ¶ 7.1 (Dec. 8, 2009) (on file with author). See generally *Grievance Procedure*, VA.GOV, <http://www.dhrm.virginia.gov/EDR/grievance.htm> (last visited Nov. 30, 2013).

79. Contract of Emp't between Univ. of Neb. & Mark "Bo" Pelini § 13(a) (Mar. 9, 2009) (on file with author). See generally BYLAWS OF THE BOARD OF REGENTS OF UNIVERSITY OF NEBRASKA (2013), available at <http://www.nebraska.edu/docs/board/bylaws.pdf>.

listed below and annexed hereto are incorporated into this Employment Contract:

...

- PPSM Policy 65 Termination of Career Employees
Section B. Notice and Decision only
- PPSM Policy 70 Complaint Resolution only for complaints alleging discrimination and for termination under Paragraph 9 of this Employment Contract; Sections D–H and only to the extent that Sections D–H are applicable to Managers and Senior Professional employees, except that Step III fact-finding for medical separation shall not be available to Coach.

...

9. Discipline and Termination. Material violation by Coach of the provisions hereinabove stated, material violation of NCAA regulations, or material misconduct, shall constitute a breach of this Employment Contract and upon such breach the University may, at its discretion, administer disciplinary or corrective action or terminate this Employment Contract.

Discipline under this Paragraph 9 may subject Coach to penalties including, but not limited to, public or private reprimand, monetary fines, adjustments in compensation, suspension with or without pay, or termination, as determined by the Director of Intercollegiate Athletics. In the event Coach is to be terminated pursuant to this Paragraph 9, of this Employment Contract, Coach is entitled to notice and complaint resolution rights as delineated in Paragraph 6 above.⁸⁰

COOPER—Miami University:

Notice. If Miami terminates this Agreement for cause under this Section 5.1, it shall give written notice to Coach of its intention to terminate this Agreement specifying the provision upon which Miami relies therefore and the intended effective date of termination.

80. Emp't Contract between Univ. of Cal. & Michael Montgomery ¶¶ 4, 6, 9 (Feb. 27, 2009) (on file with author). See generally UNIV. OF CAL: HUMAN RES., COMPLAINT RESOLUTION: PPSM 70 (July 1, 2012), available at http://atyourservice.ucop.edu/employees/policies_employee_labor_relations/personnel_policies/spp-70-policy_complaint-resolution-faqs-072012.pdf.

Hearing Rights. In the event Miami terminates this Agreement *for cause*, Coach shall have such rights to a hearing, as are generally afforded and given to Miami's unclassified administrative staff under Section 13.2 of the Miami University Policy and Information Manual.⁸¹

There are significant issues when analyzing the due process rights of coaches who are terminated. If, for instance, there is a university due process procedure, what then is the relationship between the coach's contract and such procedure? Which procedure, i.e. the procedure as agreed to in the coach's contract or the university's due process procedure, has priority?⁸²

Sometimes the coach's contract will answer the issue. For instance, in the case of Lorenzo Romar, his contract with the University of Washington indicates, "This right to a hearing by the Special Assistant to the President shall be in lieu of any right to review that may be provided for in the Personnel Program."⁸³

In some coaches contracts this may become a non-issue by virtue of the fact that the coach is given the same procedural rights as other university employees. Former University of Connecticut head football coach Paul Pasqualoni's contract had provided him with due process procedures "currently contained in Article 13 of the Collective Bargaining Agreement."⁸⁴

When the coach's contract has a stated procedure and the university also has a regular due process procedure, there is certainly a potential for a conflict. While a conflict of procedures needs to be avoided, there is not a clear consensus as to what happens in the event a conflict actually occurs.⁸⁵

One general counsel office at a major Division I university stated, "'We would do our best to comply with both procedures in the termination.'"⁸⁶ Another general counsel office from the same conference had a slightly different opinion.⁸⁷ He believes that the terms and process of the coach's contract would likely be the ones used, since "[t]he parties bargained for a

81. Amended Emp't Agreement between Miami Univ. & John Cooper §§ 5.1.1-5.1.2 (May 31, 2012) (on file with author). See generally MIAMI UNIV., MIAMI UNIVERSITY POLICY AND INFORMATION MANUAL (2012), available at <http://www.miami.muohio.edu/documents/secretary/MUPIM.pdf>.

82. Martin J. Greenberg, *Termination of Coaching Contracts: When Does Adequate Cause to Terminate Exist and Who Determines its Existence?*, 17 MARQ. SPORTS L. REV. 197, 251 (2006).

83. Coaching Contract between Lorenzo Romar & Univ. of Wash. ¶ 8(e) (Apr. 1. 2002) (on file with author); see also Greenberg, *supra* note 82, at 251.

84. Pasqualoni Contract, *supra* note 77, art. 10.1(e).

85. Greenberg, *supra* note 82, at 251.

86. *Id.* (quoting a email response from an anonymous general counsel to the author).

87. *Id.* at 251-52.

specific process even though a more general one existed. It would not be logical to bargain for a process and then go outside the contract to use a different process.”⁸⁸ While opinions differ as to conflicts, there is no specific authority as to what procedures should be followed, and it is unclear how the courts might ultimately resolve a conflict if the issue would arise.⁸⁹

Another issue that arises is whether a college coach is entitled to the constitutional right of due process when the coach is actually terminated.⁹⁰ If the coach has such an entitlement, are the rights he receives constitutionally adequate?⁹¹

Generally, college coaches at public universities are public employees, and as such have a right to pre-removal due process.⁹² In the case of *Board of Regents v. Roth*, the United States Supreme Court established that public employees are entitled to pre-removal due process.⁹³ The Court in its opinion stated, “[S]taff members dismissed during the terms of their contracts have interests in continued employment that are safeguarded by due process.”⁹⁴ The basic requirements of due process are “notice and an opportunity to respond.”⁹⁵ In another case, the Supreme Court in *Cleveland Board of Education v. Loudermill* opined that a “public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.”⁹⁶ It is fairly typical for coaches’ contracts to provide them with these basic due process rights.⁹⁷ Many of the due process provisions quoted in this Article provide for these basic due process rights.

The issue of constitutionally, required due process, seems to be of limited importance in college coaches’ contracts because it appears that most coaches are afforded some form of due process.⁹⁸ Coaches at public universities are entitled to constitutional due process protections; however, the due process rights their contracts provide are normally adequate.⁹⁹

88. *Id.* at 252 (quoting a email response from an anonymous general counsel to the author).

89. *Id.* at 252.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* See generally *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

94. *Roth*, 408 U.S. at 577.

95. Greenberg, *supra* note 82, at 252 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)).

96. *Loudermill*, 470 U.S. at 546.

97. Greenberg, *supra* note 82, at 252.

98. *Id.* at 252–53.

99. *Id.* at 253.

On the other hand, private universities are generally not required to satisfy constitutional due process requirements when terminating a coach or any other employee.¹⁰⁰ In most cases, private universities are not government actors, and consequently, they do not need to follow constitutional requirements.¹⁰¹ When, private universities do receive some level of public funding, aggrieved parties have attempted to argue in court that public funding qualifies private universities as government actors.¹⁰² In limited circumstances, this argument has been successful, but traditionally courts have been reluctant to accept this position.¹⁰³ For example, in *Madon v. Long Island University C.W. Post Center*, the court held that a tenured professor at a private university, which received state funding, was not entitled to constitutional procedural due process when he was terminated.¹⁰⁴ The court stated that the “mere allegations of State financial or other support, without more, are insufficient to convert an otherwise independent entity into a ‘joint venture’ with the State.”¹⁰⁵ Based on this finding, coaches at private universities are probably not constitutionally entitled to procedural due process.¹⁰⁶ However, coaches at private universities have negotiated due process rights in their contracts that go beyond what is constitutionally required.¹⁰⁷

12. Arbitration

McCAFFERY—University of Iowa:

Coach may challenge University’s termination of Coach for Cause before a panel of arbitrators. The arbitration panel shall consist of three members, one person selected by the University, one by Coach, and a third person agreed upon by the nominees of the parties. In the event the parties are unable to agree upon a third arbitrator within 14 days, the parties shall request a list of 10 arbitrators from the American Arbitration Association selected for their experience in resolving similar disputes. The parties will select an arbitrator from the list by the “strikedown” method, with Coach having the first and last strike. The parties will share equally the

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. 518 F. Supp. 216 (1981).

105. *Id.* at 249.

106. Greenberg, *supra* note 82, at 253.

107. *Id.*

costs of the arbitration, but shall bear individually the costs of their own counsel and representation.

University shall bear the burden of proving by a preponderance of the evidence its right to terminate this Agreement for Cause. In all other respects, unless the parties otherwise agree, the arbitration will be conducted in accordance with the rules of the American Arbitration Association. The decision of the panel shall be final and binding upon the parties.¹⁰⁸

JOHNSON—Georgia Tech:

The Athletic Director shall have the right, for good cause, to terminate COACH'S services as the ASSOCIATION'S Head Football Coach, subject to the approval of the President of the ASSOCIATION or his designate, if, in the ASSOCIATION'S opinion, "good cause" (as defined herein) exists. Should COACH disagree with "good cause" termination, COACH may, within ten (10) days of such termination, give written notice of his objection to such termination. Should this occur, the Rules of the American Arbitration Association will be used as a guideline for the following: The ASSOCIATION shall, within a reasonable time, not to exceed twenty (20) days, request a list of seven arbitrators from the American Arbitration Association who are available for employment as herein provided.

Selection of an arbitrator shall be made by each party ranking each of such arbitrators on the list with a number from one (1) to seven (7): one for the favorite, two for the second, and so on. The two rankings will be added and the arbitrator with the lowest cumulative number shall be the arbitrator to hear the case. In the event this method of selection results in a tie, each party will alternately remove one arbitrator from the fill list until only one arbitrator remains on the list. The arbitrator whose name remains on the list shall be the arbitrator who hears the case. COACH will have the first turn to remove an arbitrator from the list.

After the selection of an arbitrator, the issue of "good cause" termination shall be submitted to arbitration for a non-

108. Head Coach Contract between Univ. of Iowa & Francis John McCaffrey ¶ 9 (Aug. 17, 2010) (on file with author).

binding decision which shall be rendered within twenty (20) working days following the close of the proceedings conducted by the arbitrator. The proceedings conducted by the arbitrator shall be under such terms and conditions as the arbitrator determines, consistent with the procedures of the American Arbitration Association, and the arbitrator's decision shall be submitted to both parties within twenty (20) days of the close of evidence and briefs which, within the discretion of the arbitrator, are allowed.

Costs of the arbitration procedure shall be borne by the non-prevailing party. The non-prevailing party shall be liable for the prevailing party's reasonable attorney's fees and necessary costs incurred in connection with said arbitration.¹⁰⁹

O'BRIEN—Pennsylvania State University:¹¹⁰

Any claim or dispute arising out of or related to this Contract, Coach's employment or the discipline or termination of Coach pursuant hereto shall be resolved exclusively via confidential, binding arbitration at the Employer's place of business, or at another site in Pennsylvania that is mutually agreeable to the parties. Arbitration shall be conducted by a panel of three (3) arbitrators selected pursuant to the rules of the American Arbitration Association ("AAA"). The arbitration panel's award shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. To initiate arbitration, a demand for arbitration must be filed in writing with the other party to this Contract and with the AAA within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall demand for arbitration be made after the date when the institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.¹¹¹

109. Emp't Contract between Ga. Tech & Paul Johnson art. VIII (Dec. 10, 2007) (on file with author).

110. After the 2013–2014 season, Bill O'Brien announced he would be leaving Pennsylvania State University (Penn State) to coach the Houston Texans in the NFL, despite having a contract to coach at Penn State until January 2017. The following provision is from that previous contract with Penn State.

111. Emp't Contract between Pa. State Univ. & William O'Brien ¶ 15 (Jan. 6, 2012) (on file with author).

ALFORD—University of New Mexico:¹¹²

To the fullest extent permitted by law, any dispute or controversy arising out of or relating to this Agreement or the breach thereof, including the rights, duties, obligations and liabilities of the parties hereunder, shall be determined by binding arbitration. The duty to arbitrate shall survive and include the cancellation or termination of this Agreement and shall include all disputes or questions regarding interpretation and enforceability of this Agreement. Arbitration shall be conducted, upon request of either party, before a single arbitrator chosen by the parties by alternately striking names from a list of seven names submitted by the American Arbitration Association of individuals who shall be attorneys knowledgeable in the field of employment contracts and, to the greatest extent possible, collegiate athletics, and who shall make his/her award in conformity with the rules of said Association and in accordance with the laws of the State of New Mexico as applied to the facts found by him/her. The expense of arbitration proceedings conducted hereunder shall be borne equally by both parties hereto, and all arbitration proceedings hereunder shall be conducted in Albuquerque, New Mexico. If the arbitrator determines that the University did not have adequate cause for any termination under Paragraph 5, damages shall be calculated based upon sums that the University would be required to pay under the compensation provisions of this Agreement. No other compensatory, consequential or exemplary damages may be awarded to Coach Neal.¹¹³

GRAHAM—Arizona State University:

Notice and Hearing. Prior to the effective date of a termination for cause, the University will conduct a pre-termination hearing within ten (10) days after receipt by Coach of a written notice of termination hearing.

i. Statement of Reasons. The notice will include a statement of the reasons for the termination hearing.

112. Steve Alford coached at the University of New Mexico for six seasons (2007–2013) before leaving to coach at UCLA. The following provision is from Alford's previous contract with University of New Mexico.

113. Addendum to Emp't Agreement between Univ. of N.M. & Steve Alford, ¶ 12 (June 26, 2007) (on file with author).

ii. Hearing. Except as provided in this Section 15(f), the hearing will be conducted in the same manner as hearings provided for under University Staff Policies and Procedures Manual Section 1011 (SPP 1011), as it may be amended or modified from time to time.

iii. University Designee. The designated hearing officer or other designee will conduct the hearing with the President (or the President's designee) and the Coach.

iv. Coach Counsel. The Coach may have counsel present as an advisor, but counsel for the Coach may not actively participate in the hearing.

v. Written Notice by University. If the determination of the pre-termination hearing is that cause for termination exists and if the University elects to terminate this Contract for cause, the University shall give written notice of termination to Coach including a statement of the reasons for termination.

vi. Coach Request for Due Process Hearing. Within fifteen (15) days after receipt of the notice of termination, the Coach may submit to the President a written request for a post-termination due process hearing, which will be conducted by the American Arbitration Association (AAA) in accordance with its Employment Arbitration Rules. A request for arbitration shall not change the effective date of termination unless the arbitrator or a court of competent jurisdiction subsequently determines that there was not just cause for termination. In that event, the termination of Coach by the University will be deemed to be a termination by the University without cause and the liquidated damages provision in Section 16 will apply.¹¹⁴

MUSCHAMP—University of Florida:

Termination Notice and Pre-termination Hearing. In order to effect a termination of this Agreement for cause, the Association shall follow this procedure. The Association shall give the Coach written notice of termination of this Agreement, and this notice shall state the effective date of the termination. The notice of termination shall be given at least

114. Multiple-Year Football Head Coach Contract between Ariz. State Univ. & Michael Todd Graham § 15(f) (Mar. 5, 2012) (on file with author). *See generally* ARIZ. STATE UNIV., STAFF PERSONNEL MANUAL: SSP 1011 INVOLUNTARY TERMINATION (2013), available at <http://www.asu.edu/aad/manuals/spp/spp1011.html#>.

five (5) days before the effective date of the termination, shall be signed by the Athletic Director or the Athletic Director's or Chairman's authorized designee, and shall comply with clause (a) of Appendix A to this Agreement. This notice shall include a reference to the provision of this Agreement under which the termination is authorized and a short explanation of evidence that supports the termination decision. (Evidence in support of the termination shall be included in good faith by the Association in its notice; however, any failure of the Association to set forth all evidence shall not preclude or otherwise affect the effectiveness of the termination notice or the Association's ability to use the omitted evidence to support its termination decision.)

Notwithstanding the foregoing, in those extraordinary situations in which a five-day notice period could result in damage to property, would be detrimental to the reputation, mission and/or other interests of the Association and/or the University, and/or could result in injury to the Coach, any other individual and/or the public, the termination of this Agreement and the Coach's employment by the Association shall be effective upon the Association's giving its termination notice, and the provisions of subparagraph 17F shall apply. The Association, may, in any event and notwithstanding any other provision upon giving notice of termination with cause, without giving further notice or any additional process, suspend Coach or re-assign him to work at home or elsewhere off the University and Association campus and facilities during the termination notice period or otherwise prior to the termination becoming effective.

The Coach shall have the right, prior to the effective date of the termination, to present a statement, either oral or written, to the Athletic Director or his or her authorized designee, setting forth the reasons why the Coach believes the Association should rescind its notice of termination of the Agreement prior to the termination becoming effective. To exercise this right, the Coach shall either provide his written statement or request the opportunity to make an oral statement in a notice complying with clause (a) of Appendix A. (The Athletic Director or his or her (or the Chairman's) designee shall notify the Coach of the date, time, method (e.g. in person or by phone) and place for giving an oral statement if

requested by the Coach.) In those extraordinary situations where a pre-termination notice is not given, the Coach may make a written statement in a notice complying with clause (a) of Appendix A to the Athletic Director or his or her (or the Chairman's) authorized designee within two (2) days after the Association's termination notice is given, concerning the reasons why the Association should rescind the termination.

The Athletic Director or authorized designee shall consider the Coach's statement, if any, but shall make an independent decision in the Athletic Director's or authorized designee's sole discretion, which, except as provided in subparagraph 16F, shall be binding on the parties. The termination shall take effect on the date set forth in the termination notice or shall remain in effect as provided in the Association's termination notice, unless the termination notice is rescinded by written notice of the Association given before the effective date of the termination or unless the termination itself is rescinded by written notice of the Association. Rescission, whether of the notice of termination or of the termination itself, shall only be effective if it is in a written notice signed by the Athletic Director or his or her (or the Chairman's) authorized designee, complies with clause (a) of Appendix A, and, for rescission of the termination, is given to the Coach on or before thirty (30) days after the effective date of the termination.

The parties agree that the Coach is not entitled to any hearing if this Agreement is terminated without cause as provided in subparagraph 16A. The procedure described in this subparagraph 16E shall also be applicable in the event of a suspension of the Coach under subparagraph 16C or 16D and, in that event, all references to termination or its effective date shall be deemed to be references to suspension and its effective date.¹¹⁵

Dispute Resolution and Arbitration. Any disputes between the parties in connection with or arising out of this Agreement and/or the Activities Agreement shall first be discussed and resolved by the parties, which shall mean by the Athletic Director or the Chairman of the Board of the Association or

115. Head Coaching Agreement between Univ. Athletic Ass'n & William L. Muschamp ¶ 16(E) (Dec. 13, 2010) (on file with author).

his or her designee and the Coach. If such discussions fail to resolve the matter within ninety (90) days of a party requesting of the other party that they initiate discussions, the matter shall be resolved by arbitration to be conducted in Gainesville, Florida in accordance with the Arbitration Rules of the American Arbitration Association, as then in effect, which rules are deemed to be incorporated in this clause by this reference. There shall be three arbitrators, one appointed by each party and the third appointed by the other two arbitrators. All of the arbitrators shall have at least 10 years of experience arbitrating or adjudicating the relevant type of dispute and claim in a college athletics context and at least 15 years of total experience as an arbitrator, judge and/or lawyer. Provided that each arbitrator satisfies such experience, the arbitrators need not be resident or professionally credentialed in Florida. The determination made by the arbitrators shall be made by majority vote, and shall be final and binding on the parties to this Agreement and the Activities Agreement. Each party shall pay the costs of the arbitrator it appoints and shall share equally the costs of the third arbitrator and all other arbitration costs (except that each party shall be responsible for its or his own attorneys' and advisors' fees and costs). The decision of the arbitrators may be enforced in any court of competent jurisdiction and the parties agree and consent to venue and sole jurisdiction in the federal or state courts in Gainesville, Florida (or for Federal Court of Appeals in Atlanta, Georgia or wherever the U.S. Court of Appeals for the Eleventh Circuit may have its primary seat) for this purpose.¹¹⁶

13. Appointment of a Hearing Board the Findings of Which Go Back to the Chancellor for Final Determination

SELF—University of Kansas:

Procedures for Suspension and Termination.

a. Employment may be suspended for a period of time, without pay, or terminated, with immediate cessation of salary payments and fringe benefits, for cause. Cause for suspension or termination shall be those causes specified in Section 12C

116. *Id.* at app. (i).

of this contract, including, but not limited to, a significant or repetitive violation by Self, or a significant or repetitive violation by an employee under Self's supervision of which Self was aware or which was of such a character or extent that Self should have been aware, of any of the rules, regulations or policies of the Big 12 Conference or the National Collegiate Athletic Association, as modified from time to time. A "significant or repetitive violation" under this Section shall be defined in accordance with the principles stated in Section 11.2.1.2 of the 2007-2008 NCAA manual, or the then-existing successor section and NCAA manual.

b. Prior to suspension or termination, Self (i) shall be provided with written notice of contemplated suspension or termination and a statement of the reasons and facts in support thereof and (ii) shall have five calendar days from receipt of such notice to deliver a written request for a hearing on the contemplated action. Written requests shall be delivered to the Office of the Chancellor. If no written request is received by the Chancellor as provided herein, a contemplated suspension or termination shall become final five calendar days following Self's receipt of such notice.

c. Upon receipt of a written request for a hearing, the Chancellor shall appoint a three-person hearing board, composed of two individuals from the Board of Directors of Kansas Athletics, Inc. ("Athletics") and one other University or Kansas Athletics employee, to consider the matter and hear reasons for and against the contemplated action. Self shall have the right to appear before the hearing board, with a representative if he desires, to comment on the reasons given for the contemplated action and to present reasons against it. The hearing board shall not be bound by formal or technical rules of evidence. The hearing board shall send written findings of fact and recommendations on the matter to the Chancellor or the Chancellor's designee. The Chancellor or designee may seek counsel from the Athletics' Board of Directors. The Chancellor shall consider and decide the matter and shall notify, in writing, Self, the Director of Intercollegiate Athletics, and the hearing board of the Chancellor's decision, which shall be final.

d. In the event employment is terminated pursuant to the terms and conditions set forth in these Additional Terms, Self

shall be entitled to all rights which have accrued under contract as of the termination date.

e. In the event of a conflict between these Additional Terms and Athletics' and the University's general terms, conditions, policies and procedures governing employment (as they may be modified from time to time), these Additional Terms shall govern.

f. If Self is found in violation of NCAA regulations, he shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures.¹¹⁷

14. Determination of President Shall Be Final Subject to Right to Pursue Mediation or Legal Remedies

PAINTER—Purdue University:

5.3 Termination By Purdue With Cause.

5.3.1 Effect of Termination With Cause. Purdue may terminate this Agreement and the Coach's employment at any time if Cause is found under Section 5.3.2 below, upon providing the due process procedures set forth in Sections 5.3.2 and 7.9 below. If Purdue terminates this Agreement for Cause, Purdue will pay or provide any Base Salary, Retirement Contributions, Benefits, Supplemental Stipend and Bonus which have accrued and/or been earned through the end of the month in which such termination takes effect, and, subject to Section 5.3.3 below when applicable, shall have no further obligation to make any payments or to provide any Benefits or other consideration under this Agreement or otherwise.

5.3.2 Due Process Procedures for Termination With Cause. Purdue shall provide written notice to the Coach if Purdue intends to terminate this Agreement for Cause. Such notice shall be provided at least ten days in advance of the date on which termination is to take effect, and shall include a statement of the charges against the Coach. In that event, the President or the President's designee shall schedule a hearing to determine if Cause exists as soon as reasonably possible. The hearing shall consist of an explanation of Purdue's

117. Emp't Agreement between Univ. of Kan. & Bill Self, attachment A, § I (Apr. 1, 2008) (on file with author).

evidence and an opportunity for the Coach to present his side of the story. The Coach may have an advisor present who may consult with the Coach but who may not actively participate in the proceeding. The decision of the President or the President's designee at such hearing shall be Purdue's final decision. The procedures contained in this subsection shall provide the exclusive framework within Purdue for addressing the existence of Cause and for imposing any discipline, including termination, if Cause is found. This subsection applies in lieu of all other Purdue procedures which might otherwise be applicable. The Coach shall thereafter retain all of his rights to pursue further relief under Section 7.9 below.

5.3.3 Payments in Connection with Certain Terminations for Cause. The Parties recognize that Purdue is required to disclose violations of NCAA Regulations in connection with the Program to the NCAA, and that it may be appropriate for Purdue to terminate this Agreement for Cause based on a Preliminary Determination. The Parties further recognize that if Purdue terminates this Agreement for Cause based solely on a Preliminary Determination, and if the NCAA proceedings, when complete, do not support Purdue's Preliminary Determination that the Coach committed a significant violation or repetitive violations of NCAA Regulations, Purdue should compensate the Coach by making the Termination Right Purchase Payment which Purdue would have owed to the Coach had this Agreement been terminated without Cause. Therefore, the parties agree as follows:

5.3.3.1 NCAA Violations Under Section 4.3.2.1 and 4.3.2.2. If (i) Purdue makes a Preliminary Determination that the Coach has committed a significant violation or repetitive violations of NCAA Regulations under Section 4.3.2.1 and/or Section 4.3.2.2 above and discloses those violations to the NCAA, (ii) Purdue elects to terminate this Agreement for Cause based on those violations before the NCAA has concluded its proceedings regarding the violations, and (iii) upon completion of such proceedings, the NCAA does not support Purdue's Preliminary Determination that the Coach committed a significant violation or repetitive violations of NCAA Regulations, then Purdue will make a payment to the

Coach equal to the amount of the Termination Right Purchase Payment which Purdue would have owed to the Coach if Purdue had elected to terminate this Agreement without Cause under Section 5.2.1 above, together with interest from the date of termination at Indiana's statutory prejudgment interest rate. The Coach acknowledges and agrees that upon making the payments called for in Sections 5.3.1 above and this Section 5.3.3.1, Purdue shall have satisfied all of its remaining obligations to the Coach under this Agreement, that such payments shall constitute full, fair and reasonable compensation to the Coach under this Agreement, and that Purdue shall have no further obligation to make any payments or to provide any Benefits or other consideration to the Coach under this Agreement or otherwise.

5.3.3.2 NCAA Violations Under Section 4.3.2.3.

(i) The Parties recognize that there may be more uncertainty and less control from the Coach's perspective in connection with violations of NCAA Regulations under Section 4.3.2.3 above than would be the case regarding violations under Sections 4.3.2.1 and 4.3.2.2.

(ii) Therefore, if Purdue makes a Preliminary Determination that the Coach has committed a significant violation or repetitive violations of NCAA Regulations under Section 4.3.2.3 above (and not also under Section 4.3.2.1 and/or Section 4.3.2.2) and discloses those violations to the NCAA, Purdue may only elect to terminate this Agreement for Cause before the NCAA has concluded its proceedings regarding such disclosed violations if Purdue first makes a non-refundable payment to the Coach in accordance with the following subsection.

(iii) If Purdue makes such an election before July 1, 2015, the amount of such non-refundable payment shall be \$1,500,000.00. If Purdue makes such an election on or after July 1, 2015, the amount of such non-refundable payment shall be \$1,000,000.00.

(iv) If Purdue makes such an election and such a payment, and if upon completion of such proceedings the NCAA does not support Purdue's Preliminary

Determination that the Coach committed a significant violation or repetitive violations of NCAA Regulations, Purdue will make a payment to the Coach equal to the difference between (a) the amount of the Termination Right Purchase Payment which Purdue would have owed to the Coach if Purdue had elected to terminate this Agreement without Cause under Section 5.2.1 above, and (b) the payment made by Purdue to the Coach under this Section 5.3.3.2, together with interest on the difference from the date of termination at Indiana's statutory prejudgment interest rate.

(v) The Coach acknowledges and agrees that upon making the payments called for in Sections 5.3.1 above and this Section 5.3.3.2, Purdue shall have satisfied all of its remaining obligations to the Coach under this Agreement, that such payments shall constitute full, fair and reasonable compensation to the Coach under this Agreement, and that Purdue shall have no further obligation to make any payments or to provide any Benefits or other consideration to the Coach under this Agreement or otherwise.

5.3.3.3 Other Terminations for Cause. If Purdue terminates this Agreement for Cause based on acts or omissions by the Coach (i) other than a significant violation or repetitive violations of NCAA Regulations, or (ii) which included both a significant violation or repetitive violations of NCAA Regulations and other acts or omissions constituting Cause, this Section 5.3.3 shall not apply. The Coach shall in that event retain the due process protections provided under Sections 5.3.2 and 7.9 with respect to such termination.

...

7.9 Disputes.

7.9.1 Mediation. Before either Party files a lawsuit under Section 7.9.2 below, the Parties agree to use best efforts in good faith to settle the dispute by participating in non-binding mediation to be conducted by a mutually agreeable mediator to be selected jointly by the Parties at the time of the dispute. If either Party determines after three days of mediation that the dispute is not likely to be settled in a mutually acceptable manner, such Party may then commence

litigation. Mediation hearings shall be held in West Lafayette, Indiana, unless the Parties agree otherwise, and shall be governed by the Indiana Rules for Alternative Dispute Resolution.

7.9.2 Courts. Courts in Tippecanoe County, Indiana with subject matter jurisdiction shall have sole and exclusive jurisdiction and venue over all disputes arising under or in connection with this Agreement or its breach which have not been resolved by mediation pursuant to Section 7.9.1 above. The Parties hereby (i) submit to the exclusive jurisdiction and venue of said courts with respect to any such dispute, and (ii) waive any defense or claim that said courts do not represent the preferred venue, lack personal jurisdiction over either Party, or are inconvenient for the Parties or witnesses.

7.9.3 Liquidated Damages in Certain Circumstances. The Parties agree that if Purdue has terminated this Agreement alleging Cause as the basis for the termination, and if a court subsequently rules in a lawsuit under Section 7.9.2 above that Purdue breached this Agreement in connection with such termination, and if Purdue does not appeal such ruling or such ruling is upheld after Purdue has exhausted all appeal rights, the damages which the Coach may have incurred as a result of such termination would be extremely difficult to determine with certainty or fairly or adequately. Therefore, the Parties agree that in such event, Purdue will pay to the Coach, as liquidated damages and not as a penalty, the full amount that Purdue would have been required to pay as a Termination Right Purchase Payment under Section 5.2.1 above if Purdue had elected to terminate this Agreement without Cause instead of for Cause. This amount shall be payable in a lump sum within forty-five (45) days after the date on which all of Purdue's rights of appeal of the court's ruling have been exhausted, or after the time for all appeals has expired, whichever first occurs. The Coach acknowledges and agrees that the payment of said amount as liquidated damages by Purdue shall constitute full, fair and reasonable compensation for all damages and injuries of any type that the Coach may have incurred because of such termination.¹¹⁸

118. Emp't Agreement between Matt Painter & Purdue Univ. §§ 5.3, 7.9 (July 1, 2009) (on file

VI. NCAA IMPACT

The NCAA enforcement rules and imposition of defined penalties profoundly impact the termination process for college coaches. NCAA rules are addressed in coaches contracts in one of three formats: (1) as a duty of the coach, (2) as a basis for termination, and (3) a stipulation that if the coach is found in violation of NCAA regulations, the coach shall be subject to disciplinary or corrective action.

A. Duty of a Coach

First, compliance with NCAA rules is enumerated in almost every coach's contract as a duty of the coach. The following provisions from several recently executed coaches' contracts are good examples:

KINGSBURY—Texas Tech University:

Performance. . . . Coach will follow all applicable University policies and procedures. Coach shall not, either directly or indirectly, breach, or countenance the breach, by any player or coach subject to his control or supervision, of any of the rules and standards of the Big 12 Conference, the National Collegiate Athletic Association (NCAA), as well as other associations or agencies to which the Texas Tech University adheres. Coach understands that he is presumed to be responsible for the actions of all assistant coaches and other administrators who report, directly or indirectly to him. Coach shall promote an atmosphere of compliance within the Football program and shall monitor the activities of all assistant coaches and other administrators involved with the program who report, directly or indirectly to him.¹¹⁹

ANDERSEN—University of Wisconsin-Madison:

Scope of Services/Duties. To fulfill the purpose of Coach's employment . . . in a satisfactory and proper manner, [Coach] shall:

. . .

Coach agrees to abide by and comply with the constitution, bylaws, rules, regulations and interpretations (collectively "Legislation") of the National Collegiate Athletic

with author) [hereinafter Painter Contract].

119. Emp't Contract between Texas Tech Univ. and Kliff Kingsbury § IV (Feb. 18, 2013) [hereinafter Kingsbury Contract] (on file with author).

Association (NCAA), Big Ten Conference and any applicable conferences with which the University may be affiliated (Conference), and University rules and regulations relating to the conduct and administration of the athletic program, including recruiting and eligibility rules, as now constituted or as any of the same may be amended during the term hereof. Coach shall also take all reasonable steps to ensure that all assistant coaches, student-athletes, and other individuals under his supervision comply with the aforementioned NCAA, Conference or University Legislation. In the event Coach becomes aware or has reasonable cause to believe that violations of NCAA, Conference or University Legislation may have taken place, he shall report the same promptly to the Director of Athletics or designee or the Division's Compliance Coordinator.¹²⁰

HURLEY—University of Rhode Island:

Coach's Duties. . . . To recognize and comply with the laws, policies, rules, and regulations of and governing the University and its employees, and the rules of the National Collegiate Athletic Association "NCAA", and the Conference, as now constituted or as they may be amended during the term hereof. The Coach shall also endeavor to ensure that all assistant coaches, basketball student-athletes, and any other employees or any representatives of the University's athletic interests for whom the Coach is administratively responsible, comply with the University, NCAA and Conference aforesaid policies, rules, and regulations as well.¹²¹

B. Basis for Termination

A second area where the violation of NCAA rules is addressed in a coach's contract is in the provisions for termination for cause. For example:

KINGSBURY—Texas Tech University:

For Cause. The University specifically reserves the right to terminate this Employment Contract for Cause. Such Cause shall include but is not limited to the following: material and serious violation(s) of Section IV above; failure or refusal to

120. Andersen Contract, *supra* note 55, art. II, § D.

121. Men's Basketball Coach Emp't Agreement between Univ. of R.I. & Daniel Hurley § 4.1.3 (Mar. 21, 2012) [hereinafter Hurley Contract] (on file with author).

perform assigned duties; serious or major violation or violations of the governing policies, rules, regulations and procedures of the University, any athletic conference of which the University is a member, or a Level 1 or Level 2 violation or excessive and multiple Level 3 or Level 4 violations of NCAA rules or countenance of such violations by a member of University's Department of Intercollegiate Athletics' staff who Coach directly supervises, or failure to report such violations as set forth in Section IV above; Coach's serious violation of local, state, or federal laws; Coach's commission of an act of moral turpitude, or Coach's engaging in Objectionable Behavior. In the event this Agreement is terminated by University for Cause, the University's sole obligation to Coach shall be to pay his Base Salary until the effective date of termination in addition to any Rights Fees and Supplemental Compensation that has been earned as of the date of termination. In no event shall the University be liable to Coach for the loss of any collateral business opportunities or any form of consequential damages resulting from or associated with Coach's employment.¹²²

ANDERSEN—University of Wisconsin-Madison:

Termination by University for Just Cause. . . . 'just cause' shall include . . . the following:

. . .

A violation or failure to report a violation of any law, rule, regulation, constitutional provision or bylaw of University, the applicable conference, or the NCAA, which violation may, in the sole judgment of University, reflect adversely upon University or its athletic program, including any violation which may result in University being sanctioned or placed on probation by a conference or the NCAA.¹²³

HURLEY—University of Rhode Island:

Termination. The University reserves the right and option to terminate this Agreement upon written notice to Coach for "Cause." For the purposes of this Agreement, "Cause" shall be defined as the following: (1) Coach's material failure to perform any of the material duties referred to in this

122. Kingsbury Contract, *supra* note 119, § V(A).

123. Andersen Contract, *supra* note 55, art. V, § A(1)(a)(4).

Agreement, or refusal or unwillingness to perform such duties (subject to force majeure); provide Coach is first given a reasonable opportunity to cure (e.g., at least ten [10] days); (2) Coach engages in any conduct which results in a finding of a Major Violation by the NCAA as defined by the NCAA regulations or set forth in Article 19 of the NCAA Manual (subject to Section 6.2), or conduct by an assistant coach, men's basketball student athletes or employees or representative of the University's athletic interests for which Coach is directly administratively responsible, which is known or should have been known by Coach and not promptly reported to the University, and which results in a finding of a Major Violation by the NCAA as defined by the NCAA regulations or set forth in Article 19 of the NCAA Manual (subject to Section 6.2); (3) Coach's prolonged absence from duty without the written authorization of the Athletic Director; (4) Coach's conviction of, or plea of nolo contendere to, charges of a felony; and/or (5) commission of an act of moral turpitude by Coach (provided said act would constitute a felony). The University shall provide Coach with notice of his deficiencies and, where practicable, shall allow the Coach a reasonable time to correct such deficiencies which time shall not exceed ten (10) days from the date of notice (it being understood that Section 6.1(1) shall always entitle Coach to not less than ten [10] days to cure).¹²⁴

C. *Violations of the Rules*

Finally, in many coaches' contracts the dictates of NCAA Bylaw 11.2.1 are included as part of the contract. NCAA Bylaw 11.2.1 (Stipulation that NCAA Enforcement Provisions Apply) provides,

Contractual agreements or appointments between a coach and an institution shall include the stipulation that a coach who is found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, including suspension without pay or termination of employment for significant or repetitive violations.¹²⁵

124. Hurley Contract, *supra* note 121, § 6.1.

125. 2012–2013 NCAA DIVISION I MANUAL art. 11.2.1 (2012) [hereinafter NCAA MANUAL].

NCAA Bylaw 11.1.2 (Responsibility for Violations of NCAA Regulations) further provides that “[i]nstitutional staff members found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, whether such violations occurred at the certifying institution or during the individual’s previous employment at another member institution.”¹²⁶

For instance, Gary Andersen’s contract, with the University of Wisconsin-Madison, is basically a restatement of NCAA Bylaw 11.2.1:

Disciplinary/Corrective Action. Pursuant to NCAA Bylaw 11.2.1, Coach understands and agrees that if Coach is found in violation of any NCAA or Conference Legislation or fails to report a violation, he shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, including suspension without pay or termination of employment for significant or repetitive violations. It is understood and agreed that any such disciplinary or corrective actions shall be in addition to and in no way limit or restrict any actions the University may take pursuant to Article V herein.¹²⁷

Michael Leach’s new contract with Washington State University provides:

Employee Subject to Discipline for Violations of NCAA Rules and Regulations. If the Employee is found to be in violation of NCAA rules and regulations, including but not limited to the ethical conduct expectations as stated in NCAA Bylaws 10.1, 11.1.1, 11.1.2, 11.1.2.1 and 19.01.2, whether while employed by the University or during prior employment at another NCAA member institution, the Employee shall be subject to disciplinary or corrective action as set forth through the NCAA enforcement procedures. Further, the University may suspend the Employee for a period of time, without pay, or may terminate employment as provided in Section 4.1 hereof if the Employee is found by the NCAA or PAC-12 to have been involved in or condoned major violations or a pattern of uncorrected secondary violations of NCAA, PAC-12, or University rules and regulations.¹²⁸

In October of 2012, NCAA Bylaw 11.1.2 was amended by adding

126. *Id.* art. 11.1.2.

127. Andersen Contract, *supra* note 55, art. VII.

128. Leach Contract, *supra* note 69, § 1.3.

11.1.2.1, which reads as follows:

Responsibility of Head Coach. It shall be the responsibility of an institution's head coach to promote an atmosphere for compliance within the program supervised by the coach and to monitor the activities regarding compliance of all assistant coaches and other administrators involved with the program who report directly or indirectly to the coach.¹²⁹

The purpose of the NCAA enforcement program is “to eliminate violations of NCAA rules and impose appropriate penalties should violations occur.”¹³⁰ Penalties for violation of NCAA rules are now found in Bylaw Article 19 (Enforcement).

In addition to the amendment to NCAA Bylaw 11.1.2, the NCAA implemented significant changes to the NCAA Division I enforcement structure in October 2012.¹³¹ The changes resulted from the perceived need to: (1) stiffen penalties; (2) make penalties more predictable; (3) create a more transparent and expedited process; and (4) uphold the values and integrity of the NCAA.¹³²

The most significant change was replacing the two-tiered “major/secondary” classification structure with a four-tier penalty structure.¹³³ Rather than classifying a violation as only either “major” or “secondary,” violations are now categorized by severity into four levels, from Level I (most severe) to Level IV (least severe).¹³⁴

Level I violations are severe breaches of conduct that “seriously undermine or threaten the integrity of the NCAA collegiate model as set forth in the [NCAA] Constitution and bylaws, including any violation that provides or is intended to provide a substantial or extensive recruiting, competitive or other advantage, or a substantial or extensive impermissible benefit.”¹³⁵ Examples of Level I conduct might include:

- Lack of institutional control;
- Academic fraud;
- Failure to cooperate in a NCAA enforcement

129. NCAA MANUAL, *supra* note 125, art. 11.1.2.1.

130. *Id.* art. 19.01.1.

131. Casey Kannenberg, The New NCAA Enforcement Model, Am. Bar Ass'n http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_new_ncaa_enforcement_model.html (last visited Dec. 28, 2013).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

investigation;

- Individual unethical or dishonest conduct, regardless of whether the underlying institutional violations are considered Level I;
- Bylaw 11.1.2.1 violation by a head coach resulting from an underlying Level I violation by an individual within the sport program;
- Cash payment or other benefits intended to secure, or which resulted in, enrollment of a prospective student-athlete;
- Intentional violations or reckless indifference to the NCAA Constitution or bylaws; or
- Collective Level II and/or Level III violations.¹³⁶

Level II violations are significant recruiting, competition, or other breaches of conduct involving “more than a minimal but less than a substantial or extensive [advantage or] impermissible benefit.”¹³⁷ Examples of Level II violations might include:

- Violations of NCAA bylaws that do not rise to a Level I violation and are more serious than a Level II violation;
- Failure to monitor (these violations will be presumed Level II but may be deemed to be of a Level I nature if the failure is substantial or egregious);
- Systemic violations that do not amount to a lack of institutional control;
- Multiple recruiting, financial aid or eligibility violations that do not amount to a lack of institutional control;
- Bylaw 11.1.2.1 violation by a head coach resulting from an underlying Level I violation by an individual within the sport program; or
- Collective Level III violations.¹³⁸

Level III violations are breaches of conduct that are “isolated or limited in nature, providing no more than a minimal recruiting, competitive or other advantage; and do not include more than a minimal impermissible

136. NCAA WORKING GROUP ON COLLEGIATE MODEL—ENFORCEMENT, FINAL REPORT 8 (Aug. 2012) [hereinafter FINAL REPORT] (on file with author).

137. Kannenberg, *supra* note 131.

138. FINAL REPORT, *supra* note 136, at 8–9.

benefit.”¹³⁹ Examples of Level III violations might include:

- Inadvertent violations of NCAA bylaws that are isolated or limited in nature.
- Extra-benefit, financial aid, academic eligibility and recruiting violations, provided they do not create more than minimal advantages.¹⁴⁰

Lastly, Level IV violations are incidental infractions that are “minor and ‘are inadvertent and isolated, technical in nature and result in a negligible, if any, competitive advantage.’”¹⁴¹ Examples of Level IV violations might include:

- Camp brochures.
- Recruiting correspondence related to size, paper limitations.
- Institutional promotional activities.
- No IRL activation prior to official visit.
- Other minor, paperwork and technical violations.¹⁴²

The new enforcement structure increases the scope and severity of penalties relative to Level I and II violations.

There are seven different categories of “core penalties,” which are as follows:

- (i) competition penalties, which limit an institution’s post-season participation
- (ii) financial penalties, which include fines and disgorgement of post-season revenue
- (iii) scholarship reductions
- (iv) show-cause orders, which restrict some or all athletics related duties of institutional personnel
- (v) head coach restrictions, which include suspensions from coaching activities if a head coach fails to adequately promote rules compliance

139. Kannenberg, *supra* note 131 (quoting *Board Adopts Tougher, More Efficient Enforcement Program*, NCAA, <https://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/october/board+adopts+tougher+more+efficient+enforcement+program> (last visited Jan. 31, 2013)).

140. FINAL REPORT, *supra* note 136, at 9.

141. Kannenberg, *supra* note 131 (quoting *Board Adopts Tougher, More Efficient Enforcement Program*, NCAA, <https://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/october/board+adopts+tougher+more+efficient+enforcement+program> (last visited Jan. 31, 2013)).

142. FINAL REPORT, *supra* note 136, at 9.

- (vi) recruiting restrictions, which include limits on official and unofficial visits as well as limits on off-campus activities and recruiting communication; and
- (vii) probation.

In terms of severity, the penalty ranges within each category allow for far greater penalties than traditionally imposed in prior major infractions cases. For example, the following table indicates the penalty range for a “Level 1 standard” violation:

Competition	Financial	Scholarship	Show-Cause	Head Coach	Recruiting	Probation
1 to 2 year post-season ban	3% of program budget or post-season money disgorgement	12.5% to 25% reduction	2 to 5 years	suspended for 30% to 50% of the season	12.5% to 25% reduction in visits, off-campus activity, and communication	2 to 6 years

The following table indicates the even more severe penalty range for a “Level 1 aggravated” violation.¹⁴³

Competition	Financial	Scholarship	Show-Cause	Head Coach	Recruiting	Probation
2 to 4 year post-season ban	5% of program budget or post-season money disgorgement	25% to 50% reduction	5 to 10 years	suspended for 50% to 100% of the season	25% to 50% reduction in visits, off-campus activity, and communication	6 to 10 years

The range of penalties may be further refined based on aggravating and mitigating factors in each case:

Aggravating factors [for Level I and II] are set forth in newly adopted Bylaw 19.9.3. There are 14 aggravating factors, including the catch-all “other facts warranting a higher penalty range.” Generally, aggravating factors involve multiple violations or a pattern of violations, intentional misconduct, unethical conduct, or a lack of institutional control. Mitigating factors are set forth in newly adopted Bylaw 19.9.4. There are eight mitigating factors, which focus on prompt institutional detection and correction of problems as well as “exemplary cooperation” by an institution during an

143. Stuart L. Brown et al., *New NCAA Division I Enforcement Model*, ICE MILLER, LLP (Dec. 20, 2012), http://www.icemiller.com/publication_detail/id/1987/index.aspx.

enforcement staff investigation.¹⁴⁴

As a result of NCAA Bylaw 11.1.2.1, an institution's head coach is presumed to be responsible for the actions of all assistant coaches and administrators who report directly and indirectly to the head coach.¹⁴⁵ Under the new Bylaw, a head coach is required to cultivate "an atmosphere [of] compliance within [his] program. . .and to monitor the activities regarding compliance of all assistant coaches and other administrators involved with the program who report directly or indirectly to the [head] coach."¹⁴⁶ The new legislation holds head coaches directly accountable for NCAA violations by members of their coaching staff.¹⁴⁷

NCAA Bylaw 11.1.2.1 incorporates the doctrine of vicarious liability.¹⁴⁸ "In laymen's terms, vicarious liability means that an employer is responsible for the actions of employees, when such actions were performed within the course of employment. This rule is also called the 'Master/Servant Rule' and is recognized in both common law and civil law jurisdictions."¹⁴⁹

The NCAA's new rule presumes that a head coach will be responsible for Level I and Level II violations occurring within his or her program *unless* the coach can show that he or she promoted an "atmosphere of compliance" and monitored his or her staff.¹⁵⁰

For Level III violations, a head coach will also face great personal accountability.¹⁵¹ Beginning August 1, 2013, a head coach may be suspended if an assistant coach commits a Level III violation without the head coach's knowledge.¹⁵² Further, Level III violations are announced publically, and any member institution may obtain a five-year history of a head coach's Level III violations.¹⁵³

For Division I Men's Basketball coaches, the list of identified Level III violations might include but are not limited to the following:

- In-person, off-campus contacts during a dead period

144. *Id.*

145. NCAA MANUAL, *supra* note 125, art. 11.1.2.1.

146. *Id.*

147. *See id.*

148. Benjamin Haynes, *New NCAA Rule Incorporates Doctrine of Vicarious Liability to Head Coaches*, SPORT-IN-LAW (Oct. 26, 2012) <http://sportinlaw.com/2012/10/26/new-ncaa-rule-incorporates-doctrine-of-vicarious-liability-to-head-coaches/>.

149. *Id.*

150. Brown et al., *supra* note 143.

151. *Id.*

152. *Id.*

153. *Id.*

[particularly during the National Letter of Intent (NLI) signing dead period].

- Exceeding the permissible number of opportunities with a prospective student-athlete.
- Intentional or significant game-day simulations and/or impermissible recruiting aids.
- Providing team gear or other inducements to prospective student-athletes
- Violations that occur as a result of engaging nonscholastic third parties in the recruiting process.
- Collective recruiting violations and/or other intentional recruiting violations (e.g., multiple impermissible early phone calls, multiple impermissible contacts, providing inducements).
- Impermissible benefits to student-athletes or inducements to prospective student-athletes by third parties that the coaching staff knows about or is involved with.¹⁵⁴

The same applies to Division I football coaches. A list of identified Level III violations might include, but is not limited to the following:

- In-person, off-campus contacts during a dead period (particularly during the NLI signing dead period).
- Exceeding the permissible number of contacts with a prospective student-athlete.
- Intentional or significant game-day simulations and/or impermissible recruiting aids.
- Providing team gear or other inducements to prospective student-athletes.
- Violations that occur as a result of engaging nonscholastic third parties in the recruiting process (e.g., prescheduled unofficial visits that are impermissibly funded, etc.).
- Collective recruiting violations and/or other intentional recruiting violations (e.g., multiple impermissible early phone calls, multiple impermissible contacts, providing inducements).
- Holding 7-on-7 events on an institution's campus and/or otherwise attending or being involved in nonscholastic

154. USA TODAY, HEAD COACH RESPONSIBILITIES REGARDING COMPLIANCE WITH AND VIOLATIONS OF NCAA RULES 1–2 (Oct. 25, 2012), *available at* http://usatoday30.usatoday.com/sports/investigations%20and%20enterprise%20docs/ncaa_enforcement_proposal.pdf.

events.

- Impermissible benefits to student-athletes or inducements to prospective student-athletes by third parties that the coaching staff knows about or is involved with.
- Providing a written offer of athletically related financial aid to a prospective student-athlete prior to August 1 of the prospect's senior year in high school.¹⁵⁵

The use of the words “promoting an atmosphere of compliance” and “monitoring a coach’s staff” is once again extremely vague and subject to interpretation. However, guidelines are provided by the new rule in which the NCAA will examine to determine if a coach has promoted an atmosphere of compliance and has monitored his staff.¹⁵⁶ The NCAA has labeled this the “Action Plan.”¹⁵⁷ There are three main bullet points that the NCAA highlights in the Action Plan. They are: 1) communication; 2) monitoring; and 3) documentation.¹⁵⁸

A sample Action Plan, which is contained in University of Oregon football coach Mark Helfrich’s contract, is as follows:

Communication

The president of the University will meet with the Coach annually to discuss the president’s expectations for NCAA rules compliance.

The athletics director will meet with the Coach annually to discuss the athletics director’s expectations for NCAA rules compliance. The meeting will address the following:

- Athletics director’s philosophy and expectations on rules compliance.
- Compliance resources for the football program.
- The football program’s shared responsibility with compliance staff.
- Continued dialogue with athletics director to discuss the institution and football program’s compliance environment and expectations.

The compliance director will meet with the Coach at least annually to discuss his/her expectations for NCAA rules compliance. The meeting will address the following:

155. *Id.* at 2.

156. *Id.* at 3.

157. *Id.*

158. *Id.* at 3–5.

- Compliance director's philosophy and expectations on rules compliance.
- Compliance resources for the football program.
- A discussion of the compliance staff's and football program's expectations for submitting rules interpretations and waiver requests and how to best resolve any disagreements over the submission of such requests.
- Football program's shared responsibility with compliance staff.
- Expectations for reporting actual and suspected NCAA rules issues (e.g., immediate action; reporting lines).
- Establishment of a plan for continued dialogue with compliance director to discuss the institution and program's compliance environment and expectations.
- Establishment of a plan for ongoing dialogue between coaching staff and compliance staff to discuss key issues facing the sport and program (e.g., agents; initial eligibility; pre-enrollment amateurism, etc.).

The president, athletics director, compliance director and Coach will meet annually to discuss the institution and program's compliance environment and expectations.

Monitoring

The Coach will actively look for red flags of potential violations.

In consultation with the compliance director, the Coach will create written procedures to ensure that the football staff, including assistant coaches, is monitoring the football program's rules compliance.

In consultation with the compliance director, the Coach will:

- Assign a football staff liaison to the University's compliance staff.
- Assign football staff members to monitor specific areas of compliance (e.g., recruiting contacts, initial eligibility, amateurism, telephone contacts).
- Regularly evaluate football staff members to ensure their areas of compliance are monitored and that all responsibilities are executed in a timely manner.

- Ensure that the football program has adequate and ongoing compliance training and that there is a plan in place for discussion of important information.
- Determine reporting lines for resolving actual and potential NCAA rules issues.
- Determine reporting lines to alert compliance staff of issues involving prospective student-athletes and current student-athletes (e.g., agents, initial eligibility, pre-enrollment amateurism, etc.).
- Regularly solicit feedback from the football staff concerning their areas of compliance and the program's overall compliance environment in order to ensure that the monitoring systems are functioning properly.
- Ensure that football staff immediately notifies the compliance staff when concerns or red flags occur related to potential NCAA rules violations.¹⁵⁹

Bylaw 19.9.7(b) grants the Committee on Infractions (COI) authority to prohibit a head coach from participating, directly or indirectly, in any coaching activities throughout the coach is suspended.¹⁶⁰ Further, NCAA representatives have indicated that “all-inclusive suspensions are anticipated (e.g., a three-game suspension from games on Monday, Thursday and Sunday will essentially be a full-week suspension from all coaching activity).”¹⁶¹

NCAA Administrative Bylaw 32 delineates the enforcement policies and procedures utilized to review, hear, and appeal cases before the committee on infractions.¹⁶² Bylaw 32 essentially creates the COI, Appeals Committees and the due process afforded universities and university personnel with respect to violations of NCAA rules.¹⁶³

Not only did the penalty structure change, there were also some additional procedural changes, including the following:

1. The size of the COI increased to twenty-four members, almost tripling its previous size.¹⁶⁴ COI panels will be drawn from the overall COI

159. Emp't Agreement between Univ. of Or. & Mark Helfrich, exhibit A (Jan. 20, 2013) (on file with author).

160. Brown et al., *supra* note 143.

161. *Id.*

162. *See generally* NCAA MANUAL, *supra* note 125, art. 32.

163. *Id.* at 32.1.1.

164. Brown et al., *supra* note 143; *see also* NCAA MANUAL, *supra* note 125, art. 19.3.

membership and will now adjudicate cases.¹⁶⁵ This will permit hearings to proceed more efficiently and also allow an increased frequency of COI hearings.¹⁶⁶

2. Before the enforcement staff conducts an inquiry on an institution's campus, the institution's president or chancellor must be notified of the inquiry, either orally or in writing.¹⁶⁷

3. The enforcement staff is required to provide a more detailed notice of allegations.¹⁶⁸ A Notice of Allegations must include "(i) the alleged violations, (ii) details of the allegations, (iii) the possible level of each violation, and (iv) 'the factual information and aggravating and/or mitigating factors on which the enforcement staff may rely in presenting the case.'"¹⁶⁹

4. The enforcement staff must "prepare two documents after receiving the involved parties' responses to the Notice of Allegations: (i) a written reply, due within 60 days of receipt of the involved parties' responses, and (ii) a 'statement of the case,' submitted after the conclusion any pre-hearing conferences."¹⁷⁰

5. COI hearings no longer need to be always held in person.¹⁷¹ Level II cases "will be conducted by telephone or video conference unless an in-person hearing is requested."¹⁷² Additionally, in Level I cases with few or uncomplicated contested issues, "the institution and/or the involved individual may make a written request to appear before the panel by video conference or other mode of distance communication."¹⁷³

The contract of Matt Painter, Purdue University's men's basketball head coach, deals with NCAA violations in three capacities—i.e. violations by the coach, violations by others that the coach knows about or fails to report, and violations by others that the coach should reasonably have known about.

4.3.2 Violations.

4.3.2.1 Violations by the Coach. Subject to the due process procedures referenced Sections 5.3.2, 5.3.3, 7.1, and 7.9 below, the Coach shall be subject to disciplinary action under this Agreement, in addition to any discipline to which

165. *Id.*

166. *Id.*

167. Brown et al., *supra* note 143; *see also* NCAA MANUAL, *supra* note 125, art. 19.5.3.

168. Brown et al., *supra* note 143; *see also* NCAA MANUAL, *supra* note 125, art. 19.7.1.

169. *Id.*

170. Brown et al., *supra* note 143; *see also* NCAA MANUAL, *supra* note 125, art. 19.7.3.

171. Brown et al., *supra* note 143; *see also* NCAA MANUAL, *supra* note 125, art. 19.7.7.

172. NCAA MANUAL, *supra* note 125, art. 19.7.7.

173. *Id.*

the Coach may be subject under Purdue, Big Ten, or NCAA Regulations, if (i) Purdue determines that the Coach has violated Purdue Regulations, (ii) Purdue or the Big Ten determines that the Coach has violated Big Ten Regulations, or (iii) Purdue or the NCAA determines that the Coach has violated NCAA Regulations, including but not limited to any NCAA violation which may have occurred during any prior employment of the Coach at another NCAA member institution and for which the NCAA could hold the Coach responsible.

4.3.2.2 Violations by Others Which the Coach Knows About and Fails to Report. Subject to the due process procedures referenced Sections 5.3.2, 5.3.3, 7.1, and 7.9 below, the Coach shall be subject to disciplinary action under this Agreement in addition to any discipline which the Coach may be subject under Purdue, Big Ten, or NCAA Regulations, if (i) Purdue determines that any person under the Coach's supervision or any student athlete in the Program has violated Purdue Regulations, (ii) Purdue or the Big Ten determines that any person under the Coach's supervision or any student athlete in the Program has violated Big Ten Regulations, or (iii) Purdue or the NCAA determines that any person under the Coach's supervision or any student athlete in the Program has violated NCAA Regulations, and if the Coach has actual knowledge of such violation of Purdue, Big Ten, or NCAA Regulations and does not promptly report the same in accordance with Section 4.3.1 above.

4.3.2.3 Violations by Others Which the Coach Should Reasonably Have Known About. Subject to the due process procedures referenced Sections 5.3.2, 5.3.3, 7.1, and 7.9 below, the Coach shall be subject to disciplinary action under this Agreement in addition to any discipline which the Coach may be subject under Purdue, Big Ten, or NCAA Regulations, if (i) Purdue determines that any person under the Coach's supervision or any student athlete in the Program has violated Purdue Regulations, (ii) Purdue or the Big Ten determines that any person under the coach's supervision or any student athlete in the Program has violated Big Ten Regulations, or (iii) Purdue or the NCAA determines that any person under the coach's supervision or any student athlete in the Program has violated NCAA Regulations, and if the

Coach in the exercise of due care in the performance of his duties as head coach of the Program reasonably should have known of such violation of Purdue, Big Ten, or NCAA Regulations and does not promptly report the same in accordance with Section 4.3.1 above.¹⁷⁴

Painter's contract also addresses what happens with respect to NCAA violations under the contract:

5.3.3.1 NCAA Violations Under Sections 4.3.2.1 and 4.3.2.2.

If (i) Purdue makes a Preliminary Determination that the Coach has committed a significant violation or repetitive violations of NCAA Regulations under Section 4.3.2.1 and/or Section 4.3.2.2 above and discloses those violations to the NCAA, (ii) Purdue elects to terminate this Agreement for Cause based on those violations before the NCAA has concluded its proceedings regarding the violations, and (iii) upon completion of such proceedings, the NCAA does not support Purdue's Preliminary Determination that the Coach committed a significant violation or repetitive violations of NCAA Regulations, then Purdue will make a payment to the Coach equal to the amount of the Termination Right Purchase Payment which Purdue would have owed to the Coach if Purdue had elected to terminate this Agreement without Cause under Section 5.2.1 above, together with interest from the date of termination at Indiana's statutory prejudgment interest rate. The Coach acknowledges and agrees that upon making the payments called for in Sections 5.3.1 above and this Section 5.3.3.1, Purdue shall have satisfied all of its remaining obligations to the Coach under this Agreement, that such payments shall constitute full, fair and reasonable compensation to the Coach under this Agreement, and that Purdue shall have no further obligation to make any payments or to provide any Benefits or other consideration to the Coach under this Agreement or otherwise.

5.3.3.2 NCAA Violations Under Section 4.3.2.3.

(i) The Parties recognize that there may be more uncertainty and less control from the Coach's perspective in connection with violations of NCAA Regulations under Section 4.3.2.3 above than would be the case regarding

174. See Painter Contract, *supra* note 118, § 4.3.2.

violations under Sections 4.3.2.1 and 4.3.2.2.

(ii) Therefore, if Purdue makes a Preliminary Determination that the Coach has committed a significant violation or repetitive violations of NCAA Regulations under Section 4.3.2.3 above (and not also under Section 4.3.2.1 and/or Section 4.3.2.2) and discloses those violations to the NCAA, Purdue may only elect to terminate this Agreement for Cause before the NCAA has concluded its proceedings regarding such disclosed violations if Purdue first makes a non-refundable payment to the Coach in accordance with the following subsection.

(iii) If Purdue makes such an election before July 1, 2015, the amount of such non-refundable payment shall be \$1,500,000.00. If Purdue makes such an election on or after July 1, 2015, the amount of each non-refundable payment shall be \$1,000,000.00.

(iv) If Purdue makes such an election and such a payment, and if upon completion of such proceedings the NCAA does not support Purdue's Preliminary Determination that the Coach committed a significant violation or repetitive violations of NCAA Regulations, Purdue will make a payment to the Coach equal to the difference between (a) the amount of the Termination Right Purchase Payment which Purdue would have owed to the Coach if Purdue had elected to terminate this Agreement without Cause under Section 5.2.1 above, and (b) the payment made by Purdue to the Coach under this Section 5.3.3.2, together with interest on the difference from the date of termination at Indiana's statutory prejudgment interest rate.

(v) The Coach acknowledges and agrees that upon making the payments called for in Sections 5.3.1 above and this Section 5.3.3.2, Purdue shall have satisfied all of its remaining obligations to the Coach under this Agreement, that such payments shall constitute full, fair and reasonable compensation to the Coach under this Agreement, and that Purdue shall have no further obligation to make any payments or to provide any Benefits or other consideration to the Coach under this Agreement or otherwise.¹⁷⁵

Head basketball coach of the University of Rhode Island, Daniel Hurley,

175. *Id.* §§ 5.3.3.1–5.3.3.2.

can be terminated for cause if he

engages in any conduct which results in a finding of a Major Violation by the NCAA as defined by the NCAA regulations or set forth in Article 19 of the NCAA Manual (subject to Section 6.2), or conduct by an assistant coach, men's basketball student athletes or employees or representative of the University's athletic interests for which Coach is directly administratively responsible, which is known or should have been known by Coach and not promptly reported to the University, and which results in a finding of a Major Violation by the NCAA as defined by the NCAA regulations or set forth in Article 19 of the NCAA Manual (subject to Section 6.2).¹⁷⁶

Additionally, Paragraph 6.2 of Hurley's contract provides,

[If] the University terminates this Agreement for Cause, pursuant to Section 6.2(2), above, and the NCAA subsequently determines that (1) no Major Violation occurred; or (2) to the extent a Major Violation occurred, (a) it did not result from Coach's conduct; or (b) it resulted from the conduct of an assistant coach, men's basketball student-athletes, or employees for which Coach is directly administratively responsible but said conduct was neither known nor reasonably should have been known by Coach; then in such an instance, the University's termination of this Agreement for Cause shall be deemed as a termination without Cause (pursuant to Section 6.7 and Coach will be entitled to immediate payment of the Termination Payment [as defined below] retroactive to the original date of termination).¹⁷⁷

Both Painter's and Hurley's contracts indicate the interplay between NCAA findings and the respective university termination process. Whatever procedures the NCAA puts in place, there will always be criticism and suggestions for further due process improvements. In a recent article dealing with the NCAA's judicial process, several professors suggested that the process should further be changed.

1. NCAA infractions cases should be referred to one or more neutral third-party arbitrators with knowledge of sports

176. Hurley Contract, *supra* note 121, § 6.1.

177. *Id.* at § 6.2.

industry arbitration.

Such a change, which would be modeled on Major League Baseball's salary-arbitration model, would entitle coaches, athletes, and institutions to a fairer hearing than they receive under the NCAA's current system, the authors argue, without the cloud of the NCAA wearing multiple hats in the enforcement process (i.e., investigator, prosecutor, judge, and executioner).

2. Appeals from the neutral third-party arbitration decisions should be heard by an independent appellate body of arbitrators.

Such a procedure would provide an extra layer of protection for coaches, administrators, and others, and create an open environment for appeals based on established procedures, Mr. Dennie and Mr. Gurney write.

3. If expedited authority is required to address matters for the good of intercollegiate athletics or the specific sport, then the legislation to authorize the NCAA president to levy sanctions should be proposed and voted upon by NCAA member institutions. Appeals of executive action should be afforded through neutral third-party arbitration.¹⁷⁸

VII. CONCLUSION

A. *The Times Are a Changin'*

The current system is rife with problems. College coaches have short, unpredictable careers. The old adage that college coaches are "hired to be fired" has never been more accurate, as the financial stakes for university and coach alike are unprecedented. Job movement and job turnover is the norm, not the exception.

Contracts must therefore provide adequate protections because of the potential for abuse. Furthermore, with the prevalence of around-the-clock sports news stations, social media, and vast internet access, a for cause termination could, and likely will, interfere with the affected coach's future, financially and professionally.

178. Email from William Car, Carr Sports Assocs., Inc. to Professor Martin Greenberg, Professor at Marquette Univ. Law School (May 10, 2013, 5:05 PM) (on file with author).

B. The Future

The issue of lack of due process in college coaches' contracts can move forward in three primary ways.

1. No Changes

The first option is to continue on the same path. As you have likely garnered at this point in the analysis, the current path is problematic. This option has been abused and will continue to be abused. Subjective and vague terms will continue to be manipulated.

Those who argue the current system is not broke allude to the notion that these vague terms, manipulated in favor of the university, are simply the quid-pro-quo for exorbitant salaries. However, as with essentially any other industry, supply and demand dictate compensation.

Furthermore, many college coaches are contractually part of a university due process procedure in place for all university employees. Since many college coaches are state employees, a constitutional right to due process should nevertheless be adequately provided. Therefore, many will claim that a combination of contractual provisions, university due process, and constitutional rights are adequate and no change is needed.

2. Eliminate Distinction

Another option is to eliminate the arbitrary, and often disingenuous, distinction between termination with cause and without cause. Simply, this means combining the separate contractual provisions into a general termination provision. This change will significantly alter the current system of termination.

Eliminating the distinction would concretely provide a specified payment of liquidated damages, regardless of the nature of the termination. This would avoid abuse and provide contractual and economic certainty for both parties. Further, eliminating the distinction between termination with cause and without cause will help prevent the airing of "dirty laundry" by both parties. The difficulty will stem from what is the appropriate amount of liquidated damages because the reason for termination could vary so drastically. Specifically, this option begs the question whether Coach X should receive the same liquidated damages for being terminated because of a sexual assault allegation, a poor win-loss record, or NCAA violations.

3. Provide Protections

The most appropriate option is likely to provide adequate contractual safeguards to prevent abuse. The protections must provide an expedited procedure to ensure fairness and judicial efficiency.

The current mainstay process seems to be a decision by the athletic director with a right to appeal to the chancellor/university president, whose decision is final. The bottom-line is the university is often the judge, jury, executioner, and appeals court. The university personnel, such as athletic director and university president, are on the “same team.”

The idea of due process in termination proceedings for coaches is not new. Randy J. Walker was the head football coach at Northwestern University from 1999 to 2005. During that period, Martin J. Greenberg and Thom Park renegotiated his contract.

The economic terms of renegotiation took little or no time to agree upon. What Walker objected to was the way in which a termination for cause was determined. His words were simple: “The University is the accuser, judge, and jury, and there is no fairness in the process.” It took almost a year to come up with an agreed upon negotiated procedure with respect to a contemplated termination or suspension. What follows is the final clause that appeared in Randy Walker’s contract:

Prior to any contemplated suspension or termination of Employee, University shall be required to provide Employee with written Notice of contemplated suspension or termination of employment and a statement of the reasons and factual basis and support therefor. Employee, from the date of receipt of said written Notice, shall have five (5) calendar days from receipt thereof to deliver a written Request for a hearing on the contemplated action. Written Request shall be delivered to the office of the Chancellor or President of the University. If no written request is received by the Chancellor or President as provided herein, a contemplated suspension termination shall become final five (5) calendar days following the Employee’s receipt of said Notice. Upon receipt of a written Request for hearing, the Chancellor or President shall appoint a three (3) person Hearing Panel composed of the Chief Judge of the County in which the main office of the University is located, the President of the local Bar Association who in turn shall select a third arbitrator to consider the matter and hear reasons for and against the contemplated suspension or termination. The Employee shall

have the right to appear before the Hearing Panel with a representative, if he desires, including legal representation, to comment on the reasons given for the contemplated action and to present evidence. The Hearing Panel shall not be bound by formal or technical rules of evidence but shall be governed by the arbitration rules of the American Arbitration Association. The decision of the Hearing Panel shall be final and conclusive as to the employment status of the Employee. Employee shall be afforded any and all necessary due process including the right to hire counsel, call witnesses, conduct discovery, examine documentation and cross examine witnesses so that Employee is given a fair and unbiased hearing as to his employment status. The cost of arbitration shall be borne by the University.¹⁷⁹

Some universities have built in appropriately implemented procedures to help provide protection. Further, because this involves an individual's career and right to earn a living, the following are potential provisions and guarantees that should be provided in contracts, as they provide a semblance of due process safeguards.

1. Guarantee of fairness
2. Notice
3. Opportunity to be heard
4. Decision supported by substantial evidence
5. Right to be represented by counsel
6. Right to review evidence to opponents
7. Hearing before an impartial person
8. Right to call witnesses
9. Right to cross-examine witnesses
10. Transcript of proceedings
11. Written decision
12. Right to appeal
13. Impartiality in the process
14. Right to undertake discovery

In the vast majority of college coaches' contract, the language is in favor of the university. Further, in many instances the language is unclear, subjective, and ripe for abuse. The use of indefinable words and phrases makes it even more important that the termination process provide a

179. Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127, 218–219 (2001).

semblance of due process protections and fairness.

Regardless of what due process protections are provided, the procedure in all instances must be expedited. Having a suspended coach, being without a coach who is in the process of termination, or letting the issue of termination linger is neither in the best interest of the coach or the university.

The back-end of the contract, primarily its exit features, in many ways is more important than the front end financial package often sensationalized in media headlines. The system needs to be revised. Society should not adhere to a system where the university, which has its inherent interests, is both the finder of fact, judge and prosecutor, ultimate determiner of fact, and appeals court. This process evades fairness. Objectivity and due process protections need to be appropriately infused.

The United States' common law legal system, and society as whole, has an interest in drastically reforming the manner in which college coaches' contracts are manipulated for the benefit of universities. The NCAA and university contractual legal approach is not exportable, meaning society should not allow a system of this nature to exist and potentially expand into other realms. Further, "[i]f the law is about enforcing justice and fairness, the NCAA and the member institutions themselves have avoided the law for far too long."¹⁸⁰ The NCAA, universities, and student-athletes should strive for a common goal, addressing the staggering power imbalance and provide adequate protections and a fair legal system for the student-athletes and coaches.

The fact that society has allowed contractual abuse to proceed in this manner is quite disconcerting. The NCAA and universities must restore confidence in student-athletes, coaches, and the general public in the system. In college coaches contracts there contains little to no language addressing what most lawyers and most non-lawyers would consider due process.

As a society, we must understand this abuse in the larger societal context. Basic notions of due process and fairness should be considered in this quasi-private legal system. Society should be embarrassed, and our moral compass greatly offended. The progressive nature of our legal system has, and always will, be a vital part of the United States' culture. The time-honored notion of "liberty and justice for all" should no longer evade collegiate coaches.

180. Mary Grace Miller, Comment, *The NCAA and the Student-Athlete: Reform Is on the Horizon*, 46 U. Rich. L. Rev. 1141, 1172 (2012).