

Ever Negotiated A Head Coach's Contract? | Part II

Written by William R. Poplin, Jr.

With almost 300 college coaches being paid more than \$1,000,000 in annual compensation, it's no wonder that when a divorce from their employer occurs, it makes the headlines. In Part I of this series, we discussed the situation in which a school has terminated (or sought to terminate) a coach for cause and the typical contract language that governs such circumstances and their outcome. In Part II, we examine the more typical break-up scenario where either the coach decides to depart for what they expect to be greener pastures or the school decides to pay the coach to go away. In either instance, the termination without cause (or termination "for convenience") scheme in the coach's contract comes into play with potentially significant economic and other consequences.

The concept of termination without cause of a contract originated from an implied right belonging to the federal government that long has been recognized even in the absence of an express provision in the contract. *United States v Corliss Steam Engine Co.*, 91 U.S. 321 (1875). While this implied right of the federal government to terminate a contract without cause remains today, a party to a private contract may exercise such a right only if there is an express provision providing it in the contract. When such a termination right is exercised, the terminating party is obligated to make the terminated party whole. In simple terms, this is the general concept of the bilateral termination without cause and "buy-out" scheme that exists in modern coaching contracts. The details, however, warrant a closer look.

Termination By The Coach Without Cause/Resignation. In virtually all of the cases in which a coach resigns and thus terminates their contract without cause, they are leaving to accept employment they consider to be an improvement over their current one. Historically, schools accepted this risk as one inherent in the industry, that balances itself out with coaches coming and going in both directions. Therefore, it was rare that a departing coach was responsible for any "damages" or "buyout" connected with their departure.

However, the frequency with which coaches now resign and terminate has engineered meteoric change in the termination without cause rights retained by schools and the corresponding obligations imposed on coaches. Inasmuch as these provisions are designed to deter other schools from poaching a coach mid-contract, it is not surprising that the first questions is a hiring

school usually asks a currently employed coach is, “what is the amount of the buyout of your existing contract?” The answer to that question depends upon the nature of the buyout clause—fixed sum, percentage of remaining/unearned compensation or sliding scale--and the status of the performance of the contract

In a fixed sum arrangement, the coach is required to pay a predetermined lump sum amount regardless of the remaining term and contract balance. In a percentage of remaining compensation formula, the coach is obliged to pay a percentage (often 25-75% but in some contracts as high as 100%) of the salary (and sometimes bonuses/benefits) that remains under their contract. Both of these methods reflect the approach taken in older agreements as well as the methodology occasionally employed by smaller schools with lower budgets. Most modern contracts utilize the sliding scale approach, in which the buyout amount decreases each year, as a means of incentivizing tenure and reducing risk as the contract matures. This approach is illustrated as follows:

<u><i>Date Coach Resigns</i></u>	<u><i>Amount Owed to School</i></u>
<i>Start Date through December 31, 2026</i>	<i>\$8,000,000</i>
<i>January 1, 2027 through December 31, 2027</i>	<i>\$6,000,000</i>
<i>January 1, 2028 through December 31, 2028</i>	<i>\$4,000,000</i>
<i>January 1, 2029 through December 31, 2029</i>	<i>\$2,000,000</i>
<i>January 1, 2030 through December 31, 2030</i>	<i>\$1,000,000</i>

Because the hiring school typically pays the buyout obligation owed by its new coach to their former school, there have been few instances in which a coach has resigned and terminated without cause to pursue another opportunity yet challenged the buyout provision(s) on legal grounds. As a result, these buyout clauses traditionally have been “stand-alone” provisions within the contract.

However, anticipating that such a challenge will occur in the future, schools have begun to incorporate provisions and language in their contracts that aim to support and minimize the legal vulnerability of buyout provisions in a manner similar to traditional liquidated damages provisions. Specifically, language such as the following now commonly accompanies the buyout provisions required of college coaches:

(i)Coach recognizes that Coach’s promise to work for the school until the completion date of this Agreement is an essential consideration of and a material inducement for the school’s decision to employ them as a coach;

(ii)Coach recognizes that the school is making a highly valuable investment in their continued employment by entering into this Agreement and its investment would be lost or diminished were Coach to resign or otherwise terminate their employment as a coach prior to the completion date of this Agreement;

(iii) If Coach resigns prior to the completion of this Agreement to accept similar employment with another employer, the school will incur damages that will be uncertain and not susceptible to exact computation such that Coach shall pay the school the relevant amount listed in the buy-out provision as liquidated damages as a reasonable forecast or approximation of the damages the school will incur from Coach's resignation;

(i) The buyout payment is to reimburse the school for expenses including but not limited to, the following: (a) searching for, recruiting and hiring a new coach and staff; (b) relocating a new coach and staff; and, (c) buying out the contract, if necessary, of a new coach. Coach agrees that such amount is a reasonable approximation of the harm that the school will incur in the event of such resignation or termination for convenience by Coach; and,

(ii) The Parties have bargained for and agreed to this liquidated damages provision giving consideration to the special personal talents that Coach brings to the school that cannot be easily replaced, the critical importance of stability to the success of the school, the substantial disruption to the school that will result from Coach's resignation, the significant costs incurred by the school in conducting a search for another coach and the substantial expenditure of administrative resources in effectuating a change of coaching staff, all of which will result in damages the amount, nature and extent of which are difficult to determine and cannot be estimated with certainty.

Negotiating the terms of the coach's voluntary departure (most likely to take another job) at the outset of their relationship with the school can present an awkward situation in which limited leverage exists. Some coaches have been able to offset an onerous buyout provision with a longer contract term and/or higher compensation. However, because any buyout that ever comes into play likely will be paid by the new school, often the coach simply accepts the initial buyout structure that is proposed. Regardless, because the buyout amount will be meaningful to any prospective future employer (and the creation of future opportunities), prudence dictates that the coach endeavor to negotiate the buyout amount as aggressively as possible and make certain that the notice requirements, calculation formula and timing of any payments, as well as the method of any dispute resolution, are crystal clear and understood.

Termination By The School Without Cause. [1] The intense pressure to win that schools face has resulted in a massive increase in the amount of compensation they are willing to pay to hire coaches they believe will deliver them to the promised land. When the results do not match the expectations (and the compensation), schools often decide to start over and repeat the process with the next coach. When they do, schools resort to the termination without cause provision

[1] For a brief discussion of the risk associated with prospective attempts to convert terminations without cause (wherein the coach gets paid) to terminations for cause (wherein the coach does not get paid), please see Part I of this series.

in the contract and the corresponding “buyout” scheme that specifies the amount of compensation owed to the coach, the manner in which it will be paid and any mitigation or other duties required of the coach.

The typical termination without cause of a coach provision is simple and straightforward:

The School may terminate the Coach’s employment without cause by so notifying the Coach either verbally or in writing of its intent to terminate the employment relationship within a period not to exceed 15 calendar days from the date of the notice unless otherwise mutually agreed; or,

The parties agree that the School may terminate this Agreement prior to its expiration date without cause. Termination “without cause” shall mean termination on a basis other than those set forth herein as constituting a basis or bases for termination with cause.

Once the school has exercised its right to terminate the coach’s employment without cause, its buyout obligations come into play. Similar to the structures identified above with regard to coaches who resign, school buyouts likewise are structured as a lump sum, a percentage of the remaining contract value, a sliding scale or some combination such as an opening discount rate (Coach shall be entitled to receive 90% of the base salary for the remaining term of the contract) followed by a sliding scale for the actual payments. While these buyout structures provide financial security to the coach, their central purpose is to enable the school to manage its risk and financial exposure over an extended period of time rather than suffering an immediate strain.

Unlike buyouts of coaches’ obligations to their schools, school buyouts of their payment obligations to coaches customarily include mitigation and offset provisions. [2][3] These contract terms require the coach to make reasonable efforts to secure “comparable employment” post-termination and enable the school to offset any compensation the coach earns from new employment from their buyout obligations. An example of such a provision follows:

The Coach shall have a duty to use reasonable efforts to mitigate any damages that the Coach may sustain or incur based upon the termination of the Coach’s employment, including without limitation any post-termination payments, by using Coach’s reasonable efforts to actively seek comparable employment within a reasonable time following termination. The Coach shall provide the School on an ongoing basis with information relating to the efforts undertaken by the Coach to secure other comparable employment.

[2] The author never has seen a contract wherein a school has assumed the reciprocal duty to mitigate its damages flowing from a coach’s resignation but finds the possibility intriguing.

[3] In many older contracts, the school was allowed to “re-assign” the coach to another position at the school. Because the head coach position is so unique, such provisions have become archaic and outdated. However, it is an equally provocative proposition to consider a school reassigning a coach to whom it owes \$millions to a position in the development office or the physical education department.

When negotiating these provisions, best practice dictates that “comparable employment” should be defined in a manner similar to the following:

For purposes of this provision, “comparable employment” shall mean employment as (i) a head or assistant coach in the same sport in the professional or collegiate ranks; or (ii) a media commentator in the same sport with a national or regional network, broadcast station or cable company.

While there are many more terms and conditions contained in the contracts of collegiate head coaches, the termination without cause and associated provisions are, without question, among the more important ones. Negotiating and drafting these provisions requires diligence, transparency and a clear understanding of the parties’ respective leverage and short- and long-term interests. The stakes in these negotiations and contracts are high—not just financially, but operationally and reputationally for both the coach and the institution. Hopefully, this discussion of the prevailing practices, principles and strategies will enable schools, coaches and their representatives to better protect their interests.