

# Restrictive Covenants in College Coaches' Contracts



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# Table of Contents



- 1. Greenberg's Coaching Corner, Attorney Martin Greenberg CV
- 2. Environment of College Coaching
- 3. USA Today's November 2013 Football Coaches Database
- 4. Financial Engineering—CEO in Headphones
- 5. Protectable University Interests
- 6. Means to Restrict Movement in College Coaching Contracts
- 7. Surveys and Conclusions
- 8. Bret Bielema: Consent to Interview—Best Practices
- 9. Martin J. Greenberg, *Behind the Bielema Jump*, JS ONLINE (Dec. 19, 2012)
- 10. Peter Callaghan, *College Football Has its Own Version of Contracts Law*, THE NEWS TRIBUNE (Dec. 5, 2013)

# Table of Contents Continued



- **11. Bielema—A New Contract Direction**
- **12. Commentary on Bielema’s Arkansas Contract**
- **13. Other Examples of Covenants Not to Compete in College Coaches Contracts**
- **14. Legal Enforceability of Restrictive Covenants**
- **15. Beating Restrictive Covenants**
- **16. Liquidated Damages for a Breaching Coach are Enforceable**
- **17. Examples of Amounts of Liquidated Damages in Coaches’ Contracts for Early Termination**
- **18. Gary Anderson’s Contract—University of Wisconsin**
- **19. Conclusion: Is a Bielema-Style Covenant Not to Compete Enforceable in Wisconsin?**

# 1. Greenberg's Coaching Corner

## Attorney Martin J. Greenberg



**Attorney Martin J. Greenberg**

**CV**



- Milwaukee sports and real estate lawyer
- Adjunct Professor of Law at Marquette University Law School
- Founder of the National Sports Law Institute at Marquette University Law School
- Served on Athletic Board of Marquette University
- Represented Conference USA in the negotiation of its Commissioner's Agreement, Formation Agreement and Conference Bylaws

# 1. Greenberg's Coaching Corner

## Attorney Martin J. Greenberg



- Teaches a course at Marquette University Law School entitled Representing Athletes and Coaches in Contract Negotiations
- Greenberg's years of writing on college coaching contracts and college athletics can be seen on Greenberg's Coaching Corner:  
<http://www.law.marquette.edu/national-sports-law-institute/greenbergs-coaching-corner>
- Has been a featured speaker on college athletics at American Football Coaches Association (AFCA), the National Association of Collegiate Directors of Athletics (NACDA), the American Bar Association, and the NCAA Men's Coaches Academy.
- Has written books—Sport\$Biz, Sports Law Practice, and The Stadium Game.,
- Has hosted his own television show about the business of sports entitled Sport\$Biz.
- Has represented college coaches for years, and had the largest deal before Nick Saban's University of Alabama deal.
- Has acted as an expert witness in coaching and collegiate athletic issues.
- Noted in Best Lawyers in America—Sports Law.

## 2. Environment of College Coaching



- Coaching carousel
- Virtual free agency
- Annual right of passage—coaching hiring frenzy
- At-will contracts
- Jumping—movement
- Long-term deals cut short by payment of liquidated damages
- Highest paid state employee
- CEO in Headphones
- Highly valuable and protectable asset to the university

### 3. USA TODAY NOVEMBER 2013 FOOTBALL COACHES DATABASE

| RANK | SCHOOL              | CONF    | HEAD COACH       | SCHOOL PAY  | OTHER PAY | TOTAL PAY   | MAX BONUS   | STAFF PAY TOTAL |
|------|---------------------|---------|------------------|-------------|-----------|-------------|-------------|-----------------|
| 1    | Alabama             | SEC     | Nick Saban       | \$5,395,852 | \$150,000 | \$5,545,852 | \$700,000   | \$4,462,700     |
| 2    | Texas               | Big 12  | Mack Brown       | \$5,392,500 | \$61,250  | \$5,453,750 | \$850,000   | \$4,111,000     |
| 3    | Arkansas            | SEC     | Bret Bielema     | \$5,158,863 | --        | \$5,158,863 | \$700,000   | \$3,233,000     |
| 4    | Tennessee           | SEC     | Butch Jones      | \$4,860,000 | \$0       | \$4,860,000 | \$1,000,000 | \$3,170,000     |
| 5    | Oklahoma            | Big 12  | Bob Stoops       | \$4,741,667 | \$31,500  | \$4,773,167 | \$819,500   | \$3,436,200     |
| 6    | Ohio State          | Big Ten | Urban Meyer      | \$4,608,000 | \$0       | \$4,608,000 | \$550,000   | \$3,474,504     |
| 7    | LSU                 | SEC     | Les Miles        | \$4,300,000 | \$159,363 | \$4,459,363 | \$700,000   | \$4,565,803     |
| 8    | Michigan            | Big Ten | Brady Hoke       | \$4,154,000 | \$0       | \$4,154,000 | \$550,000   | \$3,072,000     |
| 9    | Iowa                | Big Ten | Kirk Ferentz     | \$3,985,000 | \$0       | \$3,985,000 | \$1,750,000 | \$2,367,500     |
| 10   | Louisville          | AAC     | Charlie Strong   | \$3,700,000 | \$38,500  | \$3,738,500 | \$808,333   | \$2,703,900     |
| 11   | Oklahoma State      | Big 12  | Mike Gundy       | \$3,450,000 | --        | \$3,450,000 | \$550,000   | \$2,884,000     |
| 12   | South Carolina      | SEC     | Steve Spurrier   | \$3,300,000 | \$22,500  | \$3,322,500 | \$1,550,000 | \$2,744,600     |
| 13   | Georgia             | SEC     | Mark Richt       | \$3,200,000 | \$114,000 | \$3,314,000 | \$1,000,000 | \$3,294,000     |
| 14   | Penn State          | Big Ten | Bill O'Brien     | \$3,282,779 | --        | \$3,282,779 | \$200,000   | --              |
| 15   | Cincinnati          | AAC     | Tommy Tuberville | \$3,143,000 | \$0       | \$3,143,000 | \$465,000   | \$1,920,000     |
| 16   | Texas Christian     | Big 12  | Gary Patterson   | \$3,120,760 | --        | \$3,120,760 | --          | --              |
| 17   | Texas A&M           | SEC     | Kevin Sumlin     | \$3,100,000 | \$300     | \$3,100,300 | \$750,000   | \$3,392,250     |
| 18   | Nebraska            | Big Ten | Bo Pelini        | \$2,975,000 | --        | \$2,975,000 | \$1,000,000 | \$2,648,500     |
| 19   | Kansas State        | Big 12  | Bill Snyder      | \$2,800,000 | \$3,000   | \$2,803,000 | \$580,000   | \$2,594,750     |
| 20   | Missouri            | SEC     | Gary Pinkel      | \$2,800,000 | \$200     | \$2,800,200 | \$850,000   | \$2,642,500     |
| 21   | Florida State       | ACC     | Jimbo Fisher     | \$2,750,000 | \$0       | \$2,750,000 | \$675,000   | \$2,874,450     |
| 22   | Florida             | SEC     | Will Muschamp    | \$2,724,500 | \$10,000  | \$2,734,500 | \$454,000   | \$3,211,400     |
| 23   | Mississippi State   | SEC     | Dan Mullen       | \$2,700,000 | \$0       | \$2,700,000 | \$650,000   | \$2,167,775     |
| 24   | West Virginia       | Big 12  | Dana Holgorsen   | \$2,630,000 | \$0       | \$2,630,000 | \$600,000   | \$2,733,000     |
| 25   | Southern California | PAC-12  | Lane Kiffin      | \$2,594,091 | --        | \$2,594,091 | --          | --              |
| 26   | Washington          | PAC-12  | Steve Sarkisian  | \$2,575,000 | \$0       | \$2,575,000 | \$1,525,000 | \$2,805,024     |

|    |                      |          |                  |             |           |             |             |             |
|----|----------------------|----------|------------------|-------------|-----------|-------------|-------------|-------------|
| 27 | North Carolina State | ACC      | Dave Doeren      | \$2,550,000 | \$5,000   | \$2,555,000 | \$1,000,000 | \$2,635,800 |
| 28 | Clemson              | ACC      | Dabo Swinney     | \$2,540,024 | \$10,000  | \$2,550,024 | \$775,000   | \$4,212,150 |
| 29 | Virginia Tech        | ACC      | Frank Beamer     | \$2,491,616 | \$50,000  | \$2,541,616 | \$382,500   | \$2,219,820 |
| 30 | Georgia Tech         | ACC      | Paul Johnson     | \$2,513,000 | \$2,500   | \$2,515,500 | \$1,025,000 | \$2,189,250 |
| 31 | Kansas               | Big 12   | Charlie Weis     | \$2,500,000 | \$3,727   | \$2,503,727 | \$615,000   | \$2,126,000 |
| 32 | Auburn               | SEC      | Gus Malzahn      | \$2,440,000 | --        | \$2,440,000 | \$1,250,000 | \$3,495,000 |
| 33 | Utah                 | PAC-12   | Kyle Whittingham | \$2,427,100 | --        | \$2,427,100 | \$740,000   | \$2,160,000 |
| 34 | Baylor               | Big 12   | Art Briles       | \$2,426,360 | --        | \$2,426,360 | --          | \$483,994   |
| 35 | Colorado             | PAC-12   | Mike MacIntyre   | \$2,403,500 | --        | \$2,403,500 | \$1,500,000 | \$2,552,500 |
| 36 | California           | PAC-12   | Sonny Dykes      | \$2,394,000 | --        | \$2,394,000 | \$304,000   | \$2,400,000 |
| 37 | Arizona State        | PAC-12   | Todd Graham      | \$2,300,000 | \$3,020   | \$2,303,020 | \$3,159,000 | \$2,315,980 |
| 38 | UCLA                 | PAC-12   | Jim Mora         | \$2,300,000 | \$0       | \$2,300,000 | \$750,000   | \$2,779,000 |
| 39 | Wake Forest          | ACC      | Jim Grobe        | \$2,251,635 | --        | \$2,251,635 | --          | --          |
| 40 | Washington State     | PAC-12   | Mike Leach       | \$2,250,000 | \$0       | \$2,250,000 | \$625,000   | \$1,845,500 |
| 41 | Northwestern         | Big Ten  | Pat Fitzgerald   | \$2,221,153 | --        | \$2,221,153 | --          | --          |
| 42 | Virginia             | ACC      | Mike London      | \$2,173,200 | \$16,503  | \$2,189,703 | \$715,000   | \$2,771,800 |
| 43 | Purdue               | Big Ten  | Darrell Hazell   | \$2,160,833 | --        | \$2,160,833 | \$1,095,000 | \$2,010,000 |
| 44 | Boise State          | Mt. West | Chris Petersen   | \$2,148,000 | \$3,500   | \$2,151,500 | \$290,000   | \$2,436,390 |
| 45 | Arizona              | PAC-12   | Rich Rodriguez   | \$1,850,000 | \$300,000 | \$2,150,000 | \$610,000   | \$2,249,300 |
| 46 | Miami                | ACC      | Al Golden        | \$2,148,107 | --        | \$2,148,107 | --          | --          |
| 47 | Wisconsin            | Big Ten  | Gary Andersen    | \$2,035,823 | \$85,000  | \$2,120,823 | \$440,000   | \$2,495,000 |
| 48 | Maryland             | ACC      | Randy Edsall     | \$2,021,440 | \$4,000   | \$2,025,440 | \$950,000   | \$2,307,514 |
| 49 | Mississippi          | SEC      | Hugh Freeze      | \$2,000,000 | \$5,500   | \$2,005,500 | \$1,575,000 | \$2,429,092 |
| 50 | Kentucky             | SEC      | Mark Stoops      | \$2,001,250 | --        | \$2,001,250 | \$1,475,000 | \$2,425,000 |

## 4. Financial Engineering—CEO In Headphones



- 1. Signing bonuses
- 2. Retention, continuation, longevity bonuses
- 3. Up-step life insurance provisions
- 4. Deferred compensation
- 5. Buyout of previous employer
- 6. Post-coaching employment

# Financial Engineering Continued



- 7. Interest-free or forgivable loans
- 8. Retirement plans
- 9. Annuity
- 10. Expense account
- 11. Relocation payment
- 12. Disability payment
- 13. Entrepreneurial sharing



# 5. Protectable University Interests



- **Contractual fulfillment**
- **Prevent movement to same or similar position during term of contract, especially within same Conference**
- **Prevent use of trade secrets or confidential information obtained during coaching tenure**
- **Prevent solicitation of enrolled student-athletes or recruits**
- **Replacement cost**

## 6. Means to Restrict Movement in College Coaching Contracts



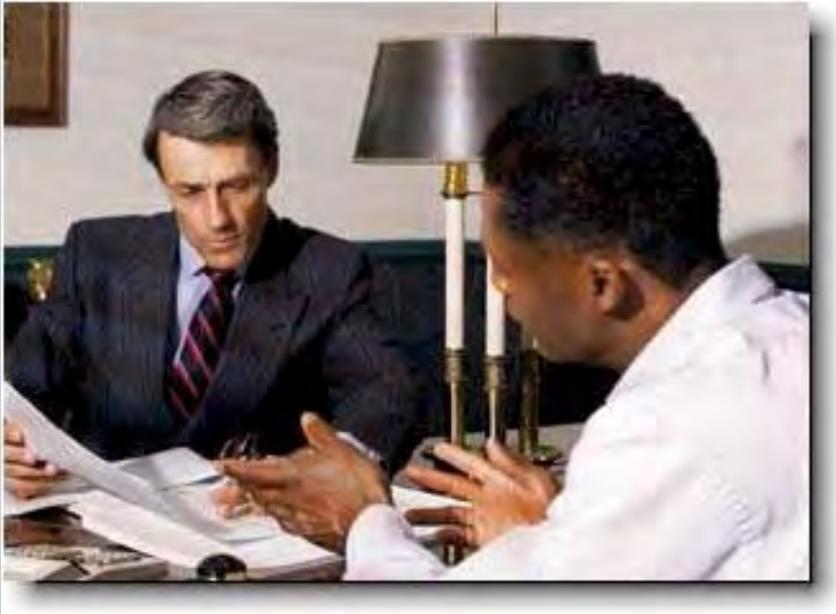
- **1. Covenant Not to Compete**: a contractual covenant that prohibits an employee from competing in the same or similar business, or holding the same or similar title either during a contractual period, or post completion of a contractual period, for a limited time within a reasonable geographic scope.

# Means to Restrict Movement in College Coaching Contracts Continued



- **2. Prohibition Against Disclosure of Trade Secrets or Confidential Information:** a prohibition and covenant not to disclose non-public information that provides a competitive advantage which has an independent economic value to a university's competitors; to retain such information on a confidential basis; and not to misappropriate, use, share, or disclose such information to competitors.

# Means to Restrict Movement in College Coaching Contracts Continued



- **3. Consent to Interview:** a covenant not to communicate, whether directly or through an agent, with any prospective employer regarding any coaching position without first receiving the written permission from the athletic director. Such permission shall not be unreasonably withheld, and the violation of which shall constitute a breach of the employment agreement and a basis for termination for cause.

# Means to Restrict Movement in College Coaching Contracts Continued



- **4. Non-Solicitation Prohibition**: a covenant by a coach that he will not communicate with, or otherwise attempt to recruit, any enrolled student-athletes or any high school athletes with whom he had previously communicated or recruited while employed at the university post job termination.

# Means to Restrict Movement in College Coaching Contracts Continued



- **5. Liquidated Damage Provisions**: a provision that permits the coach to terminate his employment agreement early without cause. Coach then shall not be entitled to receive any further compensation or benefits following the effective date of termination, and shall be liable to the university for an amount specified in the contract which shall be denominated and agreed to as liquidated damages. The subject provision is a deterrent for the coach to leaving early and oftentimes the liquidated damages are paid for by the recipient university.

# 7. Survey and Conclusions

To determine whether college coaches contracts have:

- (1) covenants not to compete;
- (2) prohibitions against disclosure of trade secrets and confidential information;
- (3) requiring the obtaining of prior consent to interview for another job during the term of the contract;
- (4) a prohibition against solicitation of student-athletes or recruits; and
- (5) a liquidated damage provision in the event the coach terminates early.





# Methodology

1. Review USA Today 2013 database— highest paid NCAA college coaches.
2. Review selected contracts of the highest paid coaches in NCAA to determine whether the covenants hereinbefore enumerated are contained in those contracts.



# Survey Conclusions



| School          | Coach            | CNC<br>Yes/No | Trade<br>Secrets - C.I. | Recruitment | Consent to<br>Interview | Liquidated<br>Damages |
|-----------------|------------------|---------------|-------------------------|-------------|-------------------------|-----------------------|
| Alabama         | Nick Saban       | NO            | YES                     | NO          | YES                     | YES                   |
| Arizona         | Rich Rodriguez   | NO            | YES                     | NO          | NO                      | YES                   |
| Arizona State   | Todd Graham      | YES           | YES                     | NO          | NO                      | YES                   |
| Arkansas        | Bret Bielema     | YES           | NO                      | NO          | NO                      | YES                   |
| Auburn          | Gus Malzahn      | NO            | YES                     | NO          | YES                     | YES                   |
| Boise State     | Bryan Harsin     | NO            | YES                     | NO          | YES                     | YES                   |
| California      | Sonny Dykes      | NO            | YES                     | NO          | NO                      | YES                   |
| Central Florida | George O'Leary   | NO            | NO                      | NO          | NO                      | YES                   |
| Cincinnati      | Tommy Tuberville | NO            | NO                      | NO          | NO                      | YES                   |
| Clemson         | Dabo Swinney     | NO            | NO                      | NO          | YES                     | NO                    |
| Colorado        | Mike MacIntyre   | NO            | NO                      | NO          | YES                     | YES                   |
| Connecticut     | Paul Pasqualoni  | NO            | NO                      | NO          | NO                      | YES                   |
| Florida         | Will Muschamp    | NO            | YES                     | YES         | NO                      | YES                   |
| Florida State   | Jimbo Fisher     | NO            | YES                     | NO          | NO                      | YES                   |
| Georgia         | Mark Richt       | NO            | NO                      | NO          | YES                     | YES                   |
| Georgia Tech    | Paul Johnson     | NO            | NO                      | NO          | NO                      | NO                    |
| Iowa            | Kirk Ferentz     | NO            | YES                     | NO          | NO                      | NO                    |
| Kansas          | Charlie Weis     | NO            | NO                      | NO          | NO                      | YES                   |
| Kansas State    | Bill Snyder      | NO            | YES                     | NO          | YES                     | NO                    |
| Kentucky        | Mark Stoops      | NO            | NO                      | NO          | YES                     | YES                   |
| Louisville      | Charlie Strong   | NO            | NO                      | NO          | YES                     | YES                   |
| LSU             | Les Miles        | NO            | YES                     | NO          | NO                      | YES                   |
| Maryland        | Randy Edsall     | NO            | NO                      | NO          | YES                     | NO                    |
| Michigan        | Brady Hoke       | NO            | NO                      | NO          | YES                     | YES                   |
| Minnesota       | Richard Pitino   | NO            | NO                      | NO          | YES                     | YES                   |

# Survey Conclusions Continued



| School               | Coach            | CNC<br>Yes/No | Trade<br>Secrets - C.I. | Recruitment | Consent to<br>Interview | Liquidated<br>Damages |
|----------------------|------------------|---------------|-------------------------|-------------|-------------------------|-----------------------|
| Mississippi          | Hugh Freeze      | NO            | NO                      | NO          | NO                      | NO                    |
| Mississippi State    | Dan Mullen       | NO            | NO                      | NO          | NO                      | NO                    |
| Missouri             | Gary Pinkel      | NO            | NO                      | NO          | YES                     | YES                   |
| Nebraska             | Bo Pelini        | NO            | YES                     | NO          | YES                     | YES                   |
| North Carolina State | Larry Fedora     | NO            | YES                     | NO          | NO                      | YES                   |
| Ohio State           | Urban Meyer      | NO            | YES                     | YES         | YES                     | YES                   |
| Oklahoma             | Bob Stoops       | NO            | NO                      | NO          | YES                     | YES                   |
| Oklahoma State       | Mike Gundy       | NO            | NO                      | NO          | NO                      | YES                   |
| Purdue               | Darrell Hazell   | NO            | YES                     | NO          | NO                      | YES                   |
| South Carolina       | Steve Spurrier   | NO            | YES                     | NO          | NO                      | YES                   |
| Texas                | Mack Brown       | NO            | NO                      | NO          | NO                      | NO                    |
| Texas A&M            | Kevin Sumlin     | NO            | NO                      | NO          | NO                      | YES                   |
| Texas Tech           | Kliff Kingsbury  | NO            | NO                      | NO          | NO                      | YES                   |
| UCLA                 | Jim Mora         | NO            | YES                     | NO          | NO                      | YES                   |
| Utah                 | Kyle Whittingham | NO            | NO                      | NO          | NO                      | YES                   |
| Virginia             | Mike London      | NO            | NO                      | NO          | YES                     | YES                   |
| Virginia Tech        | Frank Beamer     | NO            | NO                      | NO          | NO                      | NO                    |
| Washington State     | Mike Leach       | NO            | NO                      | NO          | YES                     | YES                   |
| West Virginia        | Dana Holgorsen   | NO            | YES                     | NO          | NO                      | YES                   |
| Wisconsin            | Gary Andersen    | NO            | YES                     | NO          | YES                     | YES                   |

# Survey Conclusions Continued



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

# Articles on College Coaches Contracts



- 1. Bret Bielema—Consent to Interview—Best Practices
- 2. *Behind The Bielema Jump*—Martin J. Greenberg
- 3. *College Football Has its Own Version of Contract Law*—Peter Callaghan



## 8. Bret Bielema – Consent to Interview—Best Practices



Bret Bielema (Bielema) was hired as Barry Alvarez's (Alvarez) University of Wisconsin (UW) defensive coordinator before the 2004 season. He served Alvarez in that position for two seasons. Prior to the 2005 season, Alvarez announced that he would be retiring as head coach and that Bielema would take over the UW program in 2006. The Board of Regents of the University of Wisconsin System and Bielema entered into an Employment Agreement originally effective February 1, 2006. The subject Employment Agreement had been amended several times and extended Bielema's contract term to and including January 1, 2017.

Bielema posted a 12-1 mark in his first season at UW, and the Badgers closed the season with a 17-14 victory over the University of Arkansas (Arkansas) in the Capital One Bowl. Bielema compiled an overall record of 68-24 in seven seasons and took the Badgers to the Rose Bowl three times. Bielema gained a third consecutive Rose Bowl berth with a stunning 70-31 victory over Nebraska on December 1, 2012 in Indianapolis. After the Nebraska victory, both Alvarez and Bielema attended the 55<sup>th</sup> Annual National Football Foundation Awards dinner in New York City where Alvarez was being inducted into the College Football Hall of Fame.

Shortly after the Nebraska victory, Bielema announced to Alvarez that he was leaving for Arkansas. Alvarez was blindsided and admitted being "totally caught by surprise," when Bielema came to his New York City hotel room on December 3, 2012 and told him about an offer to move to the SEC and take over the struggling Arkansas Razorbacks. Alvarez said, "You're not telling me you're going to visit with Arkansas people. You've already taken the job." Alvarez recounted, "the answer was yes."

Alvarez noted matter-of-factly that "no one contacted me for permission" -- a breach of gentleman's protocol by Arkansas athletic director Jeff Long (Long) -- but insisted that he didn't feel betrayed by a lack of a heads-up from Bielema." Alvarez stated, "I know the business."

Bielema's final meeting with his team occurred on December 4, 2012 where he told his players that he was leaving for a better opportunity to win it all.



# Bret Bielema – Consent to Interview—Best Practices Continued



When Bielema was introduced as the new head coach at the Arkansas in a press conference on December 5, 2012, he specifically insinuated that UW did not provide competitive salaries for its assistant coaches and that any national championship is more attainable with the Razorbacks than with the Badgers. He also announced that Alvarez would be coaching the Badgers in the Rose Bowl, effectively stealing Alvarez's thunder since it was to be announced to Wisconsin fans the next morning. In a gentlemanly fashion, Alvarez wished him well. "You know what, life goes on," Alvarez said. "I have no animosity towards Bret. Bret did a good job for us. Some things I disagree with in how they were handled, but everybody handles things their own way."

Bielema indicated that he was very humbled and honored to become the head coach of Arkansas. "During my conversations with Long, he described the characteristics for the perfect fit to lead this program. It was evident we shared the same mission, principles and goals. The infrastructure in place at Arkansas shows the commitment from the administration to accomplish our goals together and am I excited to begin to lead this group of student-athletes."

Bielema agreed to a six-year contract with Arkansas worth upward of 3.2 million dollars per year. He replaced interim coach John L. Smith who went 4-8 with the Razorbacks last season. Smith replaced Bobby Petrino who was fired in April 2012 for misconduct.

According to Forbes magazine, the Arkansas football program was the eighth most profitable program in the nation with a value of more than \$89 million.

An 80,000-square football operations center is under construction and scheduled to be completed in 2013. There are plans to expand Razorback Stadium, which seats 72,000, which could cost as much as \$100 million. And finally, athletic director Long signed a contract extension through 2017.

While there was a massive departure of assistant coaches after Bielema's announcement, most of the assistant coaches remained at UW through the Rose Bowl game.

This is the same Bielema that told Sporting News that "we at the Big Ten don't want to be like the SEC in any way, shape or form."

## 9. Martin J. Greenberg, *Behind the Bielema Jump*, JS ONLINE (Dec. 19, 2012)



Badger Nation, its administrators, players and fans, were shocked by the sudden resignation of Bret Bielema as head football coach of the University of Wisconsin.

Bielema was hand-picked by his predecessor Barry Alvarez and compiled a 68-24 record (.739) in seven seasons, including three Big Ten titles. Bielema guided the Badgers to a bowl game in every season during his coaching tenure, and the team will be playing in the Rose Bowl for the third consecutive year after a lopsided 70-31 victory over Nebraska in the Big Ten Championship game.

Speculation about why Bielema left Wisconsin for the University of Arkansas includes a more lucrative contract, a stronger conference, more money to hire assistants and a chance to win. As Al McGuire always would say, "Leave at the top of your game."

Bielema's decision is representative of a business where turnover is commonplace, where long-term loyalty is not required and where the term of the contract is meaningless.

Bielema's Wisconsin contract is a personal service contract. As such, if a coach wants to jump, he cannot be forced to work, and the remedy of specific performance is not available to the university. Damages are speculative and hard to calculate. The only legal tool that a university has to keep its coaches off the playing field is a negative injunction - a court order preventing the coach from coaching at another institution. As a result, and to circumvent all this legalese, early termination for both the coach and the university is a two-way street.

In the coaching business, the university at any time and for no reason can cut short the term of its coach by terminating the coach without cause. Termination by the university without cause usually involves a failure by the coach to win, lagging ticket sales, dwindling attendance, unhappiness among big money donors, loss of interest in the program, inability to compete in a conference or against a rivalry opponent or changes in administration.

# *Behind the Bielema Jump Continued*



Early termination by the university, of course, will require some payment in damages. The measure of damages is normally the contract package for the remaining term or an agreed upon or bargained lump sum. The University of Tennessee is now on the hook for its firing of Derek Dooley to the tune of \$5 million, and Auburn University's firing of Gene Chizik, even though he won a national championship two years ago, could cost as much as \$7.5 million.

If Arkansas would fire Bielema without cause in 2016, for instance, the school would owe him as much as \$9.6 million. Termination without cause by the university normally would require the coach to mitigate damages by obtaining comparable employment through a good-faith effort to find another job to offset losses.

On the other hand, the coach has the opportunity to cut short his contractual commitment to the university by providing written notice of termination and paying an exit fee. For instance, Michigan State head coach Mark Dantonio's exit fee is \$2.5 million, while Urban Meyer of Ohio State would have to pay \$2 million.

Bielema's exit fee for leaving Wisconsin early, pursuant to the letter agreement with Arkansas, will be paid by Arkansas. Bielema's exit fee is \$3 million, which decreases by \$500,000 for each subsequent contract year.

While movement in college coaching should not be shocking, the fact that Bielema reportedly did not inform Alvarez, the athletic director, until after the acceptance of the letter agreement is alarming. One would have thought that Bielema would have told his mentor that he was seeking employment with another university, even though he may not have been legally required to do so.

Most coaches' contracts have clauses that prohibit the coach from accepting or seeking employment as a coach for another NCAA Division 1 football team or professional team during the term of the agreement without first obtaining the university's prior consent. Some contracts even prohibit those discussions not only during the season, but until after the completion of bowl competition in order not to do injustice to the university and its players.

College coaching is a big business, and contracts are as easily broken as made. Long-term contracts in college coaching don't mean a thing. Jumping at the next best opportunity is the name of the game. And understanding that job environment is the key to understanding jumping contracts.

*Martin Greenberg is a Milwaukee attorney who has represented coaches in contract negotiations and has written extensively on the subject.*

## 10. Peter Callaghan, *College Football Has its Own Version of Contracts Law*, THE NEWS TRIBUNE (Dec. 5, 2013)



Read more here: <http://www.thenewstribune.com/2013/12/05/2930748/college-football-has-its-own-version.html#storylink=cpy>  
Say what you want about the departure this week of University of Washington Husky football coach Steve Sarkisian.

Say his return to the University of Southern California was inevitable, say jumping contracts is just the way things are in college sports, say athletics is the tail that wags the dog of American universities.

But please don't use the words market or marketplace, as UW athletic director Scott Woodward did in a recent Seattle Times article about lucrative coach contracts: "If we lived in a pure egalitarian society, heck no, it's not justified. But it's the market."

If this is a market, it's not like most other markets where contracts have meaning, where they are enforceable. As this week's Sarkisian story reminds us, contracts in college athletics protect the coaches more than the universities. Yet college officials who lose a coach don't have much room for complaint when they, in turn, go out and steal a coach from another college.

Coaches don't even have to leave to exploit this system. The fact that they can flee whenever they wish means that when a job opens up, he – or she – can wring higher pay and benefits from their current school to get them to stay. Ironically, coaches can demand that their contracts be renegotiated in order to keep them from violating their contracts.

Such a system without rules, as much as supply and demand, explains the steep rise in college coaching salaries into the \$2 million to \$5 million range.

Martin Greenberg is a Milwaukee attorney who has negotiated contracts for both players and coaches. He writes extensively on the topic and teaches it at Marquette University Law School where he founded the National Sports Law Institute.

Greenberg calls the "market" for college coaches, "like nothing I've ever seen." An employer can't force someone to work, Greenberg said. That went out with indentured servitude. But in normal situations, if employees under personal services contracts don't want to work, the employer can stop paying them and even seek an injunction to block them from working for a rival.

# *College Football Has its Own Version of Contracts Law Continued*



That, Greenberg said, is unlikely to work in college sports. Instead, he advocates that schools and coaches anticipate that a “divorce” will occur and agree ahead of time what compensation will be paid. Sarkisian has such language in his contract and will pay the UW \$1.5 million. But those payments are usually paid not by the coach but by the new college – or its rich boosters. While the UW will get cash from USC, it will likely turn around and pay a comparable amount to whichever college it steals Sarkisian’s replacement from.

So these payments do little to deter coaches from ditching contracts or schools from enticing them away.

“The money from winning, the importance of athletics to universities, outweighs the costs,” Greenberg said. Instead the payments give the jilted university president a way to “hold his head up and say ‘at least we got something.’”

“Professional sports leagues have rules against tampering with coaches under contract. The NFL, for example, does not allow a coach to walk away for more pay from a rival team. So why doesn’t the NCAA impose similar rules? It already punishes college athletes who jump from one school to another. The cynic in me wonders if this isn’t done because the NCAA is, technically at least, governed by college presidents — the other class of employees who consider contracts to be meaningless if a better and higher-paying job comes along.

Greenberg said there are ways to gain some control over the annual coaching carousel. In addition to buy-outs, he said he is starting to see clauses that limit which schools a coach can flee to. The University of Arkansas, he said, prevents the football coach from going to another university in the Southeastern Conference.

“With jumping becoming a way of doing business, I’m surprised we haven’t seen more anti-competition clauses,” Greenberg said. Such clauses say “you can jump, but you’re not going to go to a school we play football games against,” Greenberg said.

Like, for example, the University of Southern California.



# 11. Bielema – A New Contract Direction



# Bielema – A New Contract Direction Continued



WHEREAS, the Head Football Coach is an important leader, educator, and professional of the Razorback Football Program who pays a critical role in fulfilling the mission of the Athletic Department in assisting student-athletes achieve their full human potential academically and athletically and in becoming productive adults who make positive lifelong contributions to their communities and society.

19. COVENANT NOT TO COMPETE. The parties covenant and agree that the University is a member of the SEC and competes against other SEC member institutions for students, faculty, and staff. Additionally, the parties covenant and agree that the University's football program competes against other SEC member institutions for prospective student-athletes, financial support, and prestige. The parties further covenant and agree that the competitiveness and success of the University's football program affects the overall financial health and welfare of the Athletic Department and that the University maintains a vested interest in sustaining and protecting the well-being of its football program, including, but not limited to, the recruitment of prospective student-athletes to the institution and the financial integrity of its athletics programs. To avoid harming the University's interests, Coach covenants and agrees that this covenant not to compete shall be in full force and effect during the period of time beginning on December 4, 2012, and ending on December 31, 2018, and shall survive Coach's termination of the Agreement prior to the expiration of the Term or any mutually agreed upon extensions of the Term for any reason whatsoever. Coach and/or any individual or entity acting on Coach's behalf, shall not seek or accept employment in any coaching capacity with any other member institution of the SEC. For purposes of this covenant not to compete, the University and Coach agree that it shall apply only to the 14 member institutions of the SEC existing as of December 4, 2012. This covenant not to compete, however, shall not apply if the University exercises its right to terminate this Agreement for convenience or if Coach terminates this Agreement for caused based upon the University's material breach of this Agreement.

Nothing contained in this Agreement shall be deemed, construed or operate as a waiver of any immunities to suit available to the University or the members of the Board of Trustees or any University officials, representatives or employees. In the event of a breach or threatened breach of this provision, the University shall be entitled to injunctive relief as well as any other applicable remedies at law or in equity. Coach understands and agrees that without such protection, the University's interests would be irreparably harmed, and that the remedy of monetary damages alone would be inadequate. This covenant not to compete shall be independent of any other provision of this Agreement, and the existence of any claim or cause of action by Coach against the University, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement of this provision by the University.

# Bielema – A New Contract Direction Continued



20. COVENANT NOT TO DISCLOSE TRADE SECRETS. By virtue of his position, Coach covenants and agrees that non-public information, which provides a competitive advantage to the Razorback Football Program, will be created, developed and entrusted to him during the course of his paid employment with the University. Coach covenants and agrees that such information includes, but is not limited to, the following: The Razorback Football Program's methods; processes; operations; recruiting programs; computer and video programs; future plans; prospective student-athlete contact lists; coaching contact lists; current student-athlete contact lists; playbooks; signals; recruiting techniques; player development programs (including, but not limited to, nutrition programs, strength-building, and position coaching); coaching and leadership philosophies and practices; practice drills; training techniques; offensive and defense schemes; game plans and game plan techniques; prospect and player evaluation systems; and pre-game, in-game, and post-game coaching practices and strategies; training sequences and methodologies; (collectively, "Trade Secrets"). Individually and collectively, Coach acknowledges and agrees that all such information constitutes Trade Secrets under Arkansas law and has an independent economic value to the University's competitors through the SEC. Coach agrees that he may create and learn of information constituting Trade Secrets while employed and paid as the Head Football Coach of the Razorback Football Program.

Coach further covenants and agrees that such information and Trade Secrets give the University's Razorback Football Program a competitive advantage over its competitors, and Coach, therefore, covenants and agrees to treat such information confidentially under this Agreement and to protect the University. Coach covenants and agrees not to misappropriate, use, share or disclose any such information and/or Trade Secrets to any other member institutions comprising the SEC or any of their respective personnel, including, but not limited to, any coaches, for the period of time comprising the Term (including any extensions) of this Employment Agreement (regardless of whether Coach remains employed for the length of the Term). Coach further agrees that, because Coach's services under this Agreement are of a special, unique, unusual, extraordinary and intellectual character which gives those services special value, the loss to the University of which cannot be reasonably or adequately compensated in damages in an action at law, and because disclosing any such confidential information or Trade Secrets would place the University at significant competitive disadvantage, the University shall have the right to obtain from any court such equitable, injunctive, or other relief as may be appropriate, including a decree enjoining Coach from sharing or disclosing any Trade Secrets with any Division I Football Bowl Subdivision college or university.



# Bielema – A New Contract Direction Continued



21. **PRIOR NOTIFICATION TO ATHLETIC DIRECTOR.** Without limiting any of the foregoing provision of the Employment Agreement, during the Term of this Employment Agreement, Coach and/or any individual or entity acting on Coach's behalf shall not communicate, whether directly or indirectly, with any prospective employee (or any person or entity acting, whether directly or indirectly, on behalf of any prospective employer (or any person or entity acting, whether directly or indirectly, on behalf of any prospective employer) regarding any coaching position without first receiving permission from the Athletic Director. Moreover, once Coach and/or any individual or entity acting on Coach's behalf receives permission to communicate, whether directly or indirectly, with any prospective employer (or any person or entity acting, whether directly or indirectly, with any prospective employer (or any person or entity acting, whether directly or indirectly, on behalf of any prospective employer) regarding any coaching position, the Coach (or anyone or any entity acting on his behalf, whether directly or indirectly) must wait at least 24 hours from the time he receives permission until the time of any such communications may begin. The failure to comply with this provision shall be a material breach of this Employment Agreement entitling the University to terminate Coach for cause.



# Bielema – A New Contract Direction Continued



## 16. LIQUIDATED DAMAGES

16(a). **TERMINATION BY COACH / TERMINATION WITHOUT CAUSE BY COACH - SALARY REPAYMENT.** Subject to the terms and conditions of this provision, Coach may terminate this Employment Agreement without cause by providing written notice to the Athletic Director one (1) day prior to the effective date of the termination. In its sole discretion, the University may waive or consent to shorter notice periods. In the event Coach terminates this Employment Agreement without cause, then Coach shall not be entitled to receive any compensation or benefits of any nature whatsoever under this Employment Agreement following the effective date of the termination, and Coach shall be obligated to repay the amounts herein set forth. Due to disruption and harm that would be caused to the football student-athletes, the Razorback Football Program, the Athletic Department and the University, Coach covenants and agrees that the right to terminate this Employment without cause shall not apply during the Razorback football team's regular season. For purposes of this provision, the term "regular season" shall mean the period of time beginning one month prior to the first game of the season and ending at the conclusion of the final regular season game each year during the life of this Employment Agreement. For clarity, any post-season competition, including, but not limited to, any bowl games, shall not be included within the meaning of the "regular season."

In the event Coach terminates this Agreement to accept a coaching or administrative position with a college, university or professional sports organization at any time prior to the final day of the Term of this Agreement on December 31, 208, other than due to Coach's death, disability or illness that prevents him from fulfilling his duties as Head Football Coach, then Coach: (i) shall not be entitled to receive any compensation or benefits of any nature whatsoever under this Employment Agreement following the effective date of the termination; and (ii) shall be liable to the University for the re-payment of the amounts specified in the following schedule:

| <b>YEAR</b>                              | <b>AMOUNT</b>         |
|--|-----------------------|
| First Contract Year (12/04/12-12/31/13)  | <b>\$3,000,000.00</b> |
| Second Contract Year (01/01/04-12/31/14) | <b>\$2,500,000.00</b> |
| Third Contract Year (01/01/15-12/31/15)  | <b>\$2,000,000.00</b> |
| Fourth Contract Year (01/01/16-12/31/16) | <b>\$1,500,000.00</b> |
| Fifth Contract Year (01/01/17-12/31/17)  | <b>\$1,000,000.00</b> |
| Sixth Contract Year (01/01/18-12/31/18)  | <b>\$500,000.00</b>   |



# Bielema – A New Contract Direction Continued



The foregoing amounts shall be paid on a non-cumulative basis beginning with the effective date of Coach's termination of this Agreement (the "Coach's Payment") and any partial years shall be prorated. The Coach's Payment amount shall be payable in full to the University within 90 days following the effective date of Coach's termination of this Agreement.

Coach covenants and agrees that the University will commit substantial financial resources to the success of the Razorback Football Program (including, but not limited to, hiring and paying offensive and defensive coordinators and other assistant football coaches) and that if Coach terminates this Employment Agreement, to accept other employment as set forth hereinabove, the University will suffer damages the amount, nature and extent of which is difficult to determine and which may include, but not be limited to, additional expenses to search for and employ another Head Football Coach, salary or other compensation to hire another Head football Coach, tangible and intangible detriment to the Razorback Football Program and the support of its fans and donors. Accordingly, the parties covenant and agree that the amount of salary repayment to the University hereunder is fair and reasonable. In consideration of payment of the foregoing amounts, the University will release Coach from any further obligations under this Agreement and will also release Coach's new employer, from any claims or actions that the University might have against such employer. Likewise, Coach will release the University, its employees, officers, trustees and any third-party guarantor from any obligations hereunder or under any guaranty agreement.



# Bielema – A New Contract Direction Continued

37. RETURN OF UNIVERSITY PROPERTY. All property, materials, and information (whether in hard copy or electronic format), including, but not limited to, all personnel records, recruiting records, team information, films, videos, statistics, or any other items or data, provided to Coach by the University (including, but not limited to, the Razorback Football Program), for use as part of the Razorback Football Program or otherwise provided to Coach in connection with or relating to his University employment under this Agreement are at all times and shall remain the sole and confidential property of the University. Upon the expiration or earlier termination of this Agreement for any reason whatsoever, Coach shall return, within seven (7) calendar days, any such University-owned property described in this provision as well as all other University-owned equipment, including, but not limited to, keys, credit cards, cellular telephones, pagers, computers, computer tablets, pagers and any other property in Coach's possession, custody or control. Coach shall further be responsible to return any funds advanced to Coach for business travel. If Coach fails to comply with this provision, then the University shall have the right to offset the total value of any such property from any final payment owed to Coach or other sums held by the University.

It should be noted that the University of Arkansas Letter of Agreement between prior football coaches and the University also contained Covenants Not to Compete:

## **Bobby Petrino, December 11, 2007**

"Your employment agreement will contain a covenant not to compete against the University of Arkansas. Accordingly, this provision will include your promise and covenant not to accept employment in any coaching capacity with another SEC Western Division school prior to the expiration date of the initial term and any extensions of the term of your employment agreement with the University. In the event the University terminates you for its convenience, the covenant not to compete shall not apply."



## **John L. Smith, April, 2012**

"Your employment agreement will contain a covenant not to compete against the University of Arkansas. Accordingly, this provision will include your promise and covenant not to accept employment with any other SEC member institution. In the event the University terminates you for its convenience, the covenant not to compete shall not apply."

# 12. Commentary on Bielema Contract



This inclusion of a non-compete clause in Bielema's contract is noteworthy for a number of reasons. Initially it highlights how non-compete clauses can be broadly utilized, in an array of industries, in an effort to protect an employer's business interests. While enforceability is a completely separate issue, Arkansas, similar to many other institutions, is attempting to protect the substantial investment it has made in an employee, here the coach of its football team. Moreover, if Bielema ever violated the non-compete clause by going to another school in the SEC, it would likely result in a expensive and highly publicized legal battle between universities. It is an open question if a court in Arkansas or another jurisdiction would ultimately enforce the clause and enjoin a football coach of Bielema's stature from working at another school in the SEC. At a minimum, however, the non-compete clause provides Arkansas with substantial leverage over any other university in the SEC that attempts to hire Bielema to coach its football team before the expiration of the clause on December 31, 2018. The simple takeaway from the non-compete clause appears to be that Arkansas has no interest in losing its multi-million dollar football coach to a rival school in the SEC.

Mondaq: United States: When Coaches Can't Compete -- Non-Competes in Sports; October 2, 2013, by Gregory D. Hanscom,, <http://www.mondaq.com/unitedstates/x/266562/Antitrust+Competition/When+Coaches+Cant+Compete+NonCompetes+In+Sports>

The inclusion of a covenant not to compete illustrates the further broadening of non-compete contracts into a variety of industries. The University of Alabama, like many other institutions, is trying to protect the substantial investment it has made in its football coach. This non-compete agreement provides the University of Alabama with preventive measures from Bielema abandoning them to coach a competing football team, as well as substantial leverage against any other university in the SEC that might want to lure Bielema away from Alabama.

Chicago Business Litigation Lawyer Blog; Covenants Not to Compete Used to Tie College Football Coaches to a School; by Peter S. Lubin and Vincent L. DiTommaso, October 26, 2013. [http://www.chicagobusinesslitigationlawyerblog.com/2013/10/as\\_of\\_late\\_employers\\_have.html](http://www.chicagobusinesslitigationlawyerblog.com/2013/10/as_of_late_employers_have.html)



# 13. Other Examples of Covenants Not to Compete in Coaches Contracts



## **Sean E. Miller - Univ. of Arizona: June 2009 Multiple Year Contract for Head Men's Basketball Coach.**

20. Covenant Not to Compete. In the event of a termination under section 19, Coach agrees that he will not obtain employment as a head coach with any Conference school for the time period remaining under this Contract. The parties agree that money damages alone would be inadequate to remedy a breach of this covenant; therefore, the Board shall have the right to obtain from any court such equitable, injunctive, or other relief as may be appropriate, including a decree enjoining Coach from violating this Section. Coach agrees this covenant is reasonably limited in duration and geographic scope, and is necessary to protect legitimate interests of the University. This provision shall not prejudice any right the University may have under Section 19.

## **Michael Carey - West Virginia Univ. - Employment Agreement 2/29/12.**



F. Covenant Not to Compete. Coach acknowledges that during the term of employment by University, he will gain confidential information concerning University's athletic program and that the use of this confidential information by an opponent in the same conference as University would place University's athletic program at a serious competitive disadvantage. Accordingly, Coach expressly promises and agrees not to engage in employment with another Big 12 Conference school, or any other conference in which University is a member, in any capacity relating to a basketball program for a period eighteen (18) months after termination under this Agreement. Coach further agrees that, because his services under this Agreement are of a special, unique, unusual, extraordinary and intellectual character which gives those services peculiar value, the loss to University of which cannot be reasonably or adequately compensated in damages in an action of law, and because said breach would place University at significant competitive disadvantage, University shall have the right to obtain from any court such equitable, injunctive, or other relief as may be appropriate, including a decree, enjoining Coach from engaging in any employment relating to a basketball program for any school in a Conference in which University is a member. Provided, however, the injunctive relief contemplated herein shall be for no more than eighteen (18) months.

# Other Examples of Covenants Not to Compete in Coaches Contracts Continued



## **Kyle Flood - Rutgers University - Employment Contract 1/30/12.**

XIX. Covenant Not to Compete. The parties covenant and agree that the competitiveness and success of the University's football program affects the overall financial health and welfare of the Athletics Department, and that the University maintains a vested interest in sustaining and protecting the well-being of its football program, including but not limited to the recruitment of prospective student-athletes to the institution, retention of coaching and other staff members, and the integrity of its athletic programs. To avoid harming the University's interests, Mr. Flood agrees that this covenant not to compete shall be in full force and effect during the period of time of this contract and any future amendments, and shall survive termination of the contract for any reason.

Neither Mr. Flood, nor any individual or entity acting on Mr. Flood's behalf, shall seek or accept employment in any head or assistant coaching capacity with any other member institution of the Big East (or any other conference of which Rutgers is a member) for the duration of this contract or while Rutgers is making any payments to Mr. Flood hereunder, without first obtaining written permission from the Director. In addition, neither Mr. Flood, nor any individual or entity acting on Mr. Flood's behalf, shall seek to hire or offer employment to any current or former assistant coaching or non-coaching staff employed by the University while such staff is covered by an existing contract with the University, without first obtaining written permission from the Director.

In the event of a breach or threatened breach of this provision, the University shall be entitled to injunctive relief as well as any other applicable remedies at law or in equity. Mr. Flood understands and agrees that without such protection, the University's interests would be irreparably harmed, and that the remedy of monetary damages alone would be inadequate. This covenant not to compete shall be independent of any other provision of this contract, and the existence of any claim or cause of action by Mr. Flood against the University, whether predicated on this contract or otherwise, shall not constitute a defense to the enforcement of this provision by the University.



# 14. Legal Enforceability of Restrictive Covenants



## **Wisconsin Statute §103.465:**

Restrictive covenants in employment contracts. A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

### ***Lakeside Oil v. Slutsky***

Soon after the enactment of Wisconsin Statute Section 103.465, the Wisconsin Supreme Court, in *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 98 N.W.2d 415 (1959) set forth a five-part test for the enforceability of a covenant not to compete in the employment context.

- 1) Is it necessary for the employer's protection?
- 2) Does it provide for a reasonable time period?
- 3) Does it cover a reasonable territory?
- 4) Is it unreasonable as to the employee?
- 5) Is it unreasonable as to the general public?

<http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=79&Issue=5&ArticleID=1153>

### ***Star Direct v. Dal Pra***

The Wisconsin Supreme Court also dealt with Wisconsin Statute Section 103.465 more recently in *Star Direct v. Dal Pra*, 319 Wis. 2d 274 (Wis. 2009). The Court set forth a five-part test for the enforceability of a covenant not to compete in the employment context. A restrictive covenant must:

- 1) Be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee;
- 2) Provide a reasonable territorial limit;
- 3) Not be contrary to public policy
- 4) Not be harsh or oppressive as to the employee; and
- 5) Provide a reasonable time limit

Along with this five-part test, it must be taken into consideration that a covenant should be questioned in terms unbiased to the employee. Restrictive covenants in employment contracts are to be construed in favor of the employee.

The enforceability of restrictive covenants in employment contracts is a matter of local law.

# 15. Beating Restrictive Covenants



**WHAT YOU CAN DO:** Consider whether one or more of these ten most common (a) factual, (b) contractual, and (c) legal defenses to a non-compete may be available to you. If so, your proactive presentation of them to your employer will likely be an effective way to defeat your non-compete, preferably without even getting to a Court battle:

1. Your intended new job may not, in fact, violate the precise terms of your non-compete agreement.
2. The non-compete restriction may be too vague to be enforceable.
3. “Unclean Hands” is a common and effective defense.
4. An employer must have a “legitimate business interest” to enforce a non-compete.
5. Unreasonable breadth as to (a) Time, (b) Geography or (c) Activities.
6. Void as against “Sound Public Policy.”
7. Prior employer breach.
8. Fraudulent inducement.
9. Sometimes, if terminated without cause, especially if there is evidence of employer bad faith.
10. Other contractual and factual defenses.

Alan L. Sklover, *How to Defeat a Non-Compete: Ten Effective Defenses*, SKLOVERWORKINGWISDOM (Jan. 7, 2012), <http://skloverworkingwisdom.com/blog/index.php/how-to-defeat-a-non-compete-ten-effective-defenses/>

# 16. Liquidated Damages for a Breaching Coach are Enforceable



***Kent State University v. Ford***, 2011CV00511 (OH. Apr. 26, 2011)

Kent State also sought summary judgment against Ford for liquidated damages amounting to \$1.2 million less retirement deductions. The court also found that:

It is virtually the unanimous rule of all jurisdictions that whether a stipulation is for liquidated damages or a penalty is a question of law for the court." *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380 (1993), citing *Ruckelshaus v. Broward Cty. School Bd.* 494 F.2d 1164, 1165 (C.A. 5, 1974).

In determining whether stipulated damages are punitive or liquidated, it is necessary to look to the whole instrument, its subject-matter, the ease or difficulty of measuring the breach in damages, and the amount of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach, and also to the intent of the parties ascertained from the instrument itself in the light of the particular facts surrounding the making and execution of the contract. *Lake Ridge Academy, supra*. 16 381-382, citing *Jones v. Stevens*, 112 Ohio St. 43 (1925), paragraph one of the syllabus.

Where the parties have agreed on the amount of damages ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 28 (1984), citing *Jones v. Stevens, supra*, paragraph two of the syllabus.

The court went on to determine that the liquidated damage provision was proper by virtue of the uncertainty of the amount and difficulty of proof of damages. The Court determined that the amount of loss was unknowable.



# Liquidated Damages for a Breaching Coach are Enforceable Continued



The court then looked at the issue of unreasonableness or unconscionability of the liquidated damages and determined that:

The second issue is whether the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties.

Coach Ford had experience in employment contracts during his coaching career. He was highly educated and fully understood the terms, content, and ramifications presented by the 2010 contract. He also retained a knowledgeable sports agent. Two or three years were left in the 2008 contract, so there was no compulsion to sign the 2010 contract. The contract was not unconscionable.

Over the term of the contract Coach Ford was assured to receive no less than \$1.5 million of compensation. The damage provision annually reduced the damages over the five year term of the contract. It applied equally to each party. Both had the same responsibility to each other. If the contract was breached, the non-breaching party would be properly compensated. Thus, the contract was not unreasonable.

Finally, the damages provided in the employment contract were not disproportionate. Early loss of an outstanding coach could potentially cause substantial damage to KSU's program. Effective coaches in college sports programs are liberally compensated. Coach Ford received a \$100,000 raise in the 2010 contract, which would tally \$1.5 million over the contract term. Replacement of an equivalently talented coach would certainly be costly. Bradley U believed that Coach Ford was so valuable to a basketball program, that he was offered \$700,000 a year for five years. The parties' damage clause was not disproportionate.



# Liquidated Damages for a Breaching Coach are Enforceable Continued



***Vanderbilt University v. Dinardo***, 174 F.3d 751 (6th Cir. 1999)

The court in upholding the liquidated damage clause stated that:

We review the district court's summary judgment de novo, using the same standard as used by the district court. See *Birgel v. Bd. of Comm'rs.*, 125 F.3d 948, 950 (6th Cir.1997), cert. denied, 522 U.S. 1109, 118 S.Ct. 1038, 140 L.Ed.2d 104 (1998). We view the evidence in the light most favorable to the non-moving party to determine whether there is a genuine issue as to any material fact. See *id.* Summary judgment is proper if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Contracting parties may agree to the payment of liquidated damages in the event of a breach. See *Beasley v. Horrell*, 864 S.W.2d 45, 48.(Tenn.Ct.App.1993). The term "liquidated damages" refers to an amount determined by the parties to be just compensation for damages should a breach occur. Courts will not enforce such a provision, however, if the stipulated amount constitutes a penalty. See *id.* A penalty is designed to coerce performance by punishing default. See *id.* In Tennessee, a provision will be considered one for liquidated damages, rather than a penalty, if it is reasonable in relation to the anticipated damages for breach, measured prospectively at the time the contract was entered into, and not grossly disproportionate to the actual damages. See *id.* See *Beasley*, 864 S.W.2d at 48; *Kimbrough & Co. v. Schmitt*, 939 S.W.2d 105, 108 (Tenn.Ct.App.1996). When these conditions are met, particularly the first, the parties probably intended the provision to be for liquidated damages. However, any doubt as to the character of the contract provision will be resolved in favor of finding it a penalty. See *Beasley*, 864 S.W.2d at 48.

The district court held that the use of a formula based on DiNardo's salary to calculate liquidated damages was reasonable "given the nature of the unquantifiable damages in the case." 974 F.Supp. at 642. The court held that parties to a contract may include consequential damages and even damages not usually awarded by law in a liquidated damage provision provided that they were contemplated by the parties. *Id.* at 643. The court explained:

The potential damage to [Vanderbilt] extends far beyond the cost of merely hiring a new head football coach. It is this uncertain potentiality that the parties sought to address by providing for a sum certain to apply towards anticipated expenses and losses. It is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc. As such, to require a precise formula for calculating damages resulting from the breach of contract by a college head football coach would be tantamount to barring the parties from stipulating to liquidated damages evidence in advance. *Id.* at 642.

# 17. Examples of Amounts of Liquidated Damages in Coaches' Contracts For Early Termination



| SCHOOL               | COACH          | AMOUNT         |
|----------------------|----------------|----------------|
| Florida              | Will Muschamp  | \$500,000.00   |
| UCLA                 | Jim Mora       | \$3,000,000.00 |
| Oklahoma             | Bob Stoops     | \$3,000,000.00 |
| West Virginia        | Dana Halgorsen | \$2,000,000.00 |
| Texas A&M            | Kevin Sumlin   | \$2,000,000.00 |
| Missouri             | Gary Pinkel    | \$1,000,000.00 |
| California, Berkeley | Daniel Dykes   | \$3,000,000.00 |
| Oklahoma State       | Mike Gundy     | \$3,000,000.00 |
| Colorado             | Mike Macintyre | \$2,300,000.00 |
| Minnesota            | Richard Pitino | \$1,500,000.00 |



# 18. Gary Anderson's Contract—University of Wisconsin



# Gary Anderson's Contract Continued



## B. By Coach.

Coach recognizes that his promise to work for University for the entire term of this Agreement is of the essence of this Agreement to University. Coach also recognizes that University is making a highly valuable investment in his continued employment by entering into this Agreement and that its investment would be lost if he were to resign otherwise terminate his employment with University prior to the expiration of the term of this Agreement.

While recognizing these agreements and this entire Agreement, the parties agree that Coach may, nevertheless, terminate this Agreement prior to its normal expiration, but only upon the following terms and conditions.

### 1. Termination by Coach.

This Agreement may be terminated by Coach by giving University written notice of the termination of his employment with University. In such event, if Coach accepts another coaching position at any time during the remaining term of this Agreement, Coach may be required to pay to the University, at University's sole discretion, in lieu of any and all other legal remedies, damages of any type or equitable relief available to the University, and without regard to actions by the University to mitigate its damages, liquidated damages in an amount of three million dollars (\$3,000,000.00) if separation occurs within first two years of Employment Agreement (February 1 - January 31) as amended; two million dollars (\$2,000,000.00) if separation occurs during years three or four of Employment Agreement as amended; or one million dollars (\$1,000,000.00) if separation occurs during year five of the Employment Agreement as amended.

Such liquidated damages shall be due and payable within one hundred twenty (120) days after notice of termination of this Agreement or after acceptance of employment in a college, university or professional program as stated above, whichever occurs first. Coach will be entitled to continue his health insurance plan at his own expense through a private source or COBRA. As permitted by Wisconsin law, Coach may secure a conversion policy for his UW group term life insurance. Any other employee benefits that Coach was receiving at the time of termination will be terminated, including contributions to University retirement plans. In no case shall University be liable for the loss of any collateral business opportunities or any other benefits, perquisites, or income from any sources that may ensue as a result of Coach's termination of this Agreement.

However, this provision for liquidated damages by Coach shall not apply when said termination by Coach is for a bona fide retirement that does not involve any further activities by Coach, in a college, University or professional program to the end of the term of this Agreement.

The parties have bargained for and agreed to the foregoing liquidated damages provision, giving consideration to the fact that University will incur administrative, recruiting, and resettlement costs in obtaining a replacement for Coach in addition to potentially increased compensation costs if Coach terminates this Agreement while serving as Head Football Coach, which damages are extremely difficult to determine fairly or with certainty. The parties further agree that the payment of such liquidated damages by Coach and acceptance thereof by University shall constitute adequate and reasonable compensation to University for the damages and injury suffered by Coach because of such termination by University. The parties acknowledge that the foregoing is not, nor should it be constructed to be, a penalty, and shall be binding upon the parties.

# Gary Anderson's Contract Continued



## VI. Notification Required Prior to Discussion with Other Employers.

The parties agree that should another employment opportunity be presented to Coach or should Coach be interested in other employment during the term of this Agreement, Coach shall notify the Director of Athletics or designee of such opportunity or interest before any discussions can be held by Coach with potential employer. This provision is essential to this Employment Agreement and violation thereof may be considered just cause for termination pursuant to Article V, Section A.1.

No covenant not to compete

No covenant against disclosure of confidential information or trade secrets

No covenants against soliciting or recruiting student-athletes or recruits



## 19. Conclusion



**Is a Bielema-Style Covenant Not to Compete  
Enforceable in Wisconsin?**



# Special Thank You



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