TERMINATING COLLEGE HEAD COACHES' EMPLOYMENT WITH CAUSE FOR NCAA RULES INFRACTIONS

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ABSTRACT

College athletics and its finances are in flux due to several recent incidents. Many athletics departments claimed to lose millions of dollars due to the COVID-19 pandemic. The *NCAA v. Alston* Supreme Court decision will result in universities and athletics departments providing their student-athletes with additional education-related benefits. Due to the NCAA's rule change permitting student-athletes to monetize their names, images, and likenesses, companies will likely divert sponsorship resources from athletics departments and toward student-athletes directly.

Thus, it is increasingly important for athletics departments to be prudent with resources. One area where university athletics departments have historically wasted millions of dollars is head coach severance payments. Some have paid head coaches millions of dollars in severance upon terminating their employment. More specifically, universities, through their employment contracts with head coaches, put themselves in a no-win situation when they must make an employment decision regarding a head coach if the NCAA accuses that coach of committing a significant NCAA rules violation. Under the current standard head coach contract, universities often have two options. A university may terminate the coach's employment without cause and pay the coach a large severance payment. Alternatively, if the university wants to terminate the coach's employment with cause and avoid the severance payment, it must continue to employ and pay the coach while awaiting adjudication of the violation allegation, which can take years and result in litigation.

This Article examines this no-win scenario for universities by first exploring a head coach's job responsibilities and the relevant employment contract provisions under which they perform them. Next, the Article analyzes instances where prominent head coaches violated NCAA rules and how their employment contracts shaped their universities' handling of the resulting employment decisions. Finally, the Article proposes contract language that would provide universities flexibility and potential cost

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savings when faced with an employment decision for a rule-breaking head coach.

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INTRODUCTION

IN 2017, the National Collegiate Athletic Association's (NCAA) Committee on Infractions (COI) concluded that then-University of Louisville (Louisville) head men's basketball coach Rick Pitino committed an NCAA violation by failing to properly supervise a staff member.[1] In violation of NCAA rules (and common sense and morals), the Louisville staff member arranged for strippers and prostitutes for prospective or current student-athletes, some of whom were minors.[2] As a result, the COI placed Louisville on probation for four years, fined it thousands of dollars, and suspended Pitino from coaching in five conference games.[3] This was not Pitino's first scandal. In 2003, he had an affair with and impregnated a woman who extorted money from Pitino for her abortion.[4]

Louisville retained the legendary Pitino despite the fact that his actions, or lack of, with respect to the strippers and prostitutes scandal likely violated his employment contract with the University.[5] Not only did Louisville continue to employ Pitino, but it also did so at a salary that was the highest in college basketball.[6] It was not until Pitino's association with a third very public scandal that Louisville initiated employment termination proceedings with Pitino.[7] It took this third strike, where federal authorities tied Pitino's program to a 2017 scheme in which prospective student-athletes received compensation to attend and play for certain universities,

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1. *See* NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF LOUISVILLE PUBLIC INFRACTIONS DECISION 2 (June 15, 2017), https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102682 [https://perma.cc/LHF3-6N6L] [hereinafter LOUISVILLE PUBLIC INFRACTIONS DECISION].

2. *See id.* at 1 ("The COI has not previously encountered a case like this.").

3. *See id.* at 22–24. Louisville also had to vacate 123 men's basketball victories and return its portion of conference revenue sharing; *see also* Michael McCann, *Rick Pitino's Contract Dispute and its Potential Impact on Larger NCAA Scandal*, SPORTS ILLUSTRATED (Oct. 14, 2017), http://si.com/college/2017/10/14/rick-pitino-louisville-contract-dispute-ncaa-scandal-fbi-investigation [https://perma.cc/R7BY-L2AP] (describing Pitino's dispute with Louisville regarding the amount the University owed him after it terminated his employment).

4. *See* Cari Grieb, *Louisville's Response to Rick Pitino's Sex-Related Controversies Warned of Troubled Moral System*, SPORTING NEWS (Nov. 10, 2017), http://sportingnews.com/us/ncaa-basketball/news/louisville-basketball-rick-pitino-controversies-sex-scandal-fbi-investigation-flawed-system/e9w7cpgpbg981ahzx96nibwel [https://perma.cc/L3DT-NRHT] (arguing that Louisville could have terminated Pitino's employment after either of the first two scandals and thus avoided involvement with the third).

5. *See id.* (pointing out that Louisville could have invoked a morals clause in Pitino's employment contract to terminate his employment).

6. *See* Sam Belden, *Rick Pitino Will Reportedly Lose Out on Up to $55 Million*, BUS. INSIDER (Sept. 27, 2017), http://businessinsider.com/rick-pitino-effectively-fired-salary-contract-louisville-2017-9 [https://perma.cc/XGK4-XSQC] (noting Pitino made nearly $8 million in the 2017-18 season and Louisville owed him $38 million through 2026 under his employment contract, with another $17 million "set to come from bonuses and other earnings").

7. *See* Grieb, *supra* note 4.

for Louisville to terminate Pitino's employment "for cause."[8] Terminating Pitino's contract for cause relieved the University of the $44 million it contractually owed him.[9] Pitino, however, quickly rebounded; within a year he was the head men's basketball coach at Iona University.[10]

The 2017 federal investigation into bribes and corruption in men's college basketball implicated Pitino's program along with numerous other programs. It led to the arrests of ten men. Of the ten arrested, seven pled guilty and three were convicted.[11] Prosecutors accused six assistant men's college basketball coaches of accepting bribes, and all either resigned or had their employment terminated.[12] Of the head coaches of the numerous men's basketball programs that federal authorities implicated in the scandal, most were able to "continue[ ] to work and earn millions of dollars in compensation."[13] The following serve as examples of embroiled head coaches who kept their jobs, at least for a time, despite involvement in the scandal:

- Chief among them is then-Louisiana State University (LSU) head men's basketball coach, Will Wade. According to NCAA allegations, Wade violated NCAA rules by paying eleven prospective student-athletes to attend LSU.[14] HBO aired an audio recording in 2020 of Wade infamously disclosing that he made a "strong ass" offer to procure a high-profile prospective student-athlete.[15] After media reports about the contents of that call, LSU suspended Wade in 2019.[16] The suspension

8. *See* McCann, *supra* note 3 ("From a plain reading of Pitino's contract, it appears that the University is well within its authority to fire him for just cause.").

9. Tyler Conway, *Rick Pitino's Louisville Contract Officially Terminated with 'Just Cause,'* BLEACHER REP. (Oct. 16, 2017), http://bleacherreport.com/articles/2739014-rick-pitinos-louisville-contract-officially-terminated-with-just-cause [https://perma.cc/8RST-T5VU].

10. *See* Mark Schlabach, *Your Guide to College Basketball's Ongoing NCAA Investigations*, ESPN (Nov. 6, 2020), http://espn.com/mens-college-basketball/story/_/id/30262819/your-guide-college-basketball-ongoing-ncaa-investigations [https://perma.cc/2Z5C-QE33].

11. *See id.* Federal authorities did not arrest Pitino.

12. *See id.* (noting that federal authorities accused the six assistant coaches of "accepting bribes to steer [student-athletes] to certain financial advisors and managers").

13. *Id.* (querying why the NCAA infractions process is moving so slowly).

14. *See id.* (explaining the NCAA enforcement staff said it received information that Wade "arranged for, offered and/or provided impermissible payments, including cash payments, to at least 11 men's basketball prospective student-athletes, their family members, individuals associated with the prospects and/or non-scholastic coaches in exchange for the prospects' enrollment at LSU" (internal quotation marks omitted)).

15. *Id.* (internal quotation marks omitted) (noting the HBO documentary included audio of a call between Wade and agent Christian Dawkins in which Wade discussed the offer to sign coveted prospective student-athlete Javonte Smart).

16. *See id.* (quoting Dawkins from the documentary as stating, "I think the only way you can interpret someone in a head-coaching position saying that they

was short-lived, however. Wade missed just one game, and LSU and Wade continued to enjoy on-court success despite working under a "cloud of suspicion" as the NCAA enforcement process runs its course.[17] When LSU finally received the formal notice charging Wade with NCAA rules violations in 2022, the University terminated his employment with cause.[18]

- Sean Miller remained the head men's basketball coach at the University of Arizona (Arizona) for the 2019–20 and 2020–21 seasons even after prosecutors played a damning wiretap recording during a federal criminal trial.[19] In the wiretap, former Arizona assistant coach Book Richardson told agent Christian Dawkins that Miller paid "then-Wildcats star Deandre Ayton $10,000 per month."[20] There was also evidence of academic fraud and provision of other benefits to student-athletes that would violate NCAA rules.[21] Regardless, Arizona officials publicly supported Miller while he coached for two more seasons until terminating his employment five weeks after the 2021 season concluded.[22] Despite the allegations against Miller and his program, and the fact that his team had not won an NCAA tournament game since 2017, Arizona owed Miller $1.4 million under his employment contract

made a strong-ass offer, they ain't talking about a scholarship offer, bro . . . . One hundred percent talking about money").

17. Scott Rabalais, *Change is Coming for LSU Basketball. How Much Change is the Key Question*, ADVOCATE (Mar. 23, 2021, 7:19 PM), http://theadvocate.com/baton_rouge/sports/lsu/article_18e80798-8c2c-11eb-bb49-a727ce164c09.html [https://perma.cc/JUM2-V6H6] (noting Wade has led LSU to three postseason appearances in his four seasons).

18. *See* Amie Just & Wilson Alexander, *LSU Has Fired Will Wade for Cause After Allegations of Major NCAA Violations. Here's Why,* ADVOCATE (Mar. 12, 2022), http://theadvocate.com/baton_rouge/sports/lsu/article_c8a96cb0-8e01-11e9-ad1e-47d4f9c2baf6.html [https://perma.cc/FR2Z-28QV].

19. Miller won over 300 games during his tenure at Arizona, which includes seven NCAA tournament and two Elite Eight appearances. *See* Adam Zagoria, *NCAA Coaching Carousel: Sean Miller is Out at Arizona. Where Will the Wildcats Go Next?*, FORBES (Apr. 7, 2021, 2:06 PM), https://www.forbes.com/sites/adamzagoria/2021/04/07/ncaa-coaching-carousel-sean-miller-is-out-at-arizona-where-will-they-go-next/ [https://perma.cc/TVQ4-85R6].

20. *See* Schlabach, *supra* note 10 (noting Miller denied paying Ayton, who was the first overall selection in the 2018 NBA draft).

21. *See id.* (describing issues relating to transcripts of then-prospective student-athletes).

22. *See* Gary Parrish, *Arizona Fires Sean Miller, but It Would Have Made More Sense For Everybody if This Had Been Done Much Sooner*, CBS SPORTS (Apr. 7, 2021), http://cbssports.com/college-basketball/news/arizona-fires-sean-miller-but-it-would-have-made-more-sense-for-everybody-if-this-had-been-done-much-sooner/ [https://perma.cc/5H44-MVUA] (noting that influential boosters continued to support Miller despite his troubles, making it difficult for administrators to terminate his employment).

upon terminating his employment.[23] The University stated at the time of Miller's employment termination that it would honor Miller's contract and pay him accordingly.[24]

- In the aftermath of the federal investigation of men's college basketball, the NCAA leveled five Level I violation allegations (the most severe categorization) against the University of Kansas (Kansas) men's basketball program, including one against longtime head coach Bill Self.[25] The NCAA's case centered on a former Adidas employee paying prospective student-athletes to attend Kansas.[26] The case placed both Kansas and Self at risk of severe sanctions, potentially including multiple years of postseason bans and a yearlong suspension of Self from coaching.[27] Despite the allegations and potential penalties, Kansas stood by Self.[28] In fact, during the midst of the NCAA infractions process, Kansas effectively awarded Self a

23. *See* Zagoria, *supra* note 19 (describing Miller's Arizona tenure as "long and winding").

24. *See* Anne Ryman & Jeremy Cluff, *Arizona Basketball Fires Coach Sean Miller After 12 Seasons: 'We Need to Move Forward'*, ARIZ. REPUBLIC (Apr. 7, 2021), http://azcentral.com/story/sports/college/ua/2021/04/07/arizona-basketball-fires-coach-sean-miller-according-report/7124947002/ [https://perma.cc/AP4C-NBQJ].

25. *See* Pat Forde, *Bill Self's Lifetime Contract Makes Clear Where Kansas's Priorities Lie*, SPORTS ILLUSTRATED (Apr. 2, 2021), http://si.com/college/2021/04/02/bill-self-lifetime-contract-kansas-ncaa-investigation [https://perma.cc/Q9WJ-MAQ3] (describing the NCAA's lack of institutional control and head coach responsibilities allegations against Kansas and Self, respectively). At the time of this publication, Self's resume includes coaching Kansas "to a national championship, 15 Big 12 Conference titles, and 17 NCAA tournament appearances." *Id.* (internal quotation marks omitted). Kansas and Self vehemently dispute the allegations, and Self is contemplating legal action against the NCAA. *See* Mark Schlabach, *Kansas Basketball Coach Bill Self Considering Legal Action vs. NCAA, Attorney Says*, ESPN (Jun. 18, 2020), https://www.espn.com/mens-college-basketball/story/_/id/29329604/kansas-basketball-coach-bill-self-considering-legal-action-vs-ncaa-attorney-says [https://perma.cc/W3RR-5Z75] (quoting Self's attorney's letter to the NCAA as threatening "negligence, breach of contract, defamation, fraud, tortious interference with contract and tortious interference with prospective contract" claims (internal quotation marks omitted)). In fact, Kansas has paid two law firms over $1 million to defend itself. *See* Sam Zeff & Greg Echlin, *KU Has Paid Huge Legal Bills Defending Alleged Violations in Men's Basketball Program*, KCUR (Nov. 25, 2020), http://kcur.org/sports/2020-11-24/ku-has-paid-huge-legal-bills-defending-alleged-violations-in-mens-basketball-program [https://perma.cc/3B5U-S27V].

26. *See* Forde, *supra* note 25 (characterizing Kansas's defenses to the NCAA's allegations as "laughable").

27. *See id.* (describing range of penalties that the NCAA's penalties matrix contemplates).

28. *See* Jesse Newell, *NCAA Goes Hard at Bill Self. But His Lawyers Say It's 'Only Reinforced (His) Resolve*,' KAN. CITY STAR (May 7, 2020), https://www.kansascity.com/sports/college/big-12/university-of-kansas/article242585046.html [permalink unavailable] (quoting Self's attorneys as stating that Kansas's chancellor and athletics director at the time supported Self's quest to defeat the "meritless and irresponsible allegations").

> lifetime employment contract paying him over $5 million annually.[29] So not only did Kansas retain Self in the face of severe NCAA allegations, it "rewarded" him "with extended job security."[30]

The situations involving these head coaches are examples of a scenario that universities and athletics departments frequently face—having to make employment decisions regarding head coaches who face allegations that they violated NCAA rules. Those unfamiliar with college athletics and coach contracts may be surprised (and perhaps disappointed) to learn that the decisions are often complicated. Because of their employment contracts with head coaches, universities and athletics departments increasingly spend significant amounts of money on severance payments to head coaches. For example, just fifteen years ago, two-thirds of "Power 5" conference member universities did not encounter severance payments to a football coach.[31] In the 2020 fiscal year, however, nearly two-thirds of those same universities provided severance payments to a former head football coach.[32] It is not just the number of universities and athletics departments that pay severance that is staggering; the amounts are also astounding. Public universities in Power 5 conferences paid a combined $66 million in severance payments in the 2020 fiscal year, for an average of $1.2 million per university.[33] During Harvey Perlman's tenure as the University of Nebraska's chancellor from 2001 to 2016, the University terminated four head football coaches' employment.[34] The resulting severances

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29. *See* Forde, *supra* note 25 (describing the contract as "impressively brazen").

30. *Id.* (stating "it's good to be Bill Self").

31. Andy Wittry, *Power 5 Spending on Coaches, Support Staff Increased by Average of $1.7M Per School in the 2020 Fiscal Year*, OUT OF BOUNDS WITH ANDY WITTRY (Jun. 10, 2021), http://andywittry.substack.com/p/power-5-spending-on-coaches-support [https://perma.cc/Q5HE-5RE8] (analyzing data from NCAA Membership Financial Reporting System). College athletics constituents describe the Big Ten, Big 12, Atlantic Coast, Pacific 12, and Southeastern conferences as the Power 5 conferences. These five conferences are college athletics' biggest and wealthiest and thus the NCAA permits them to enact legislation that only applies to them. *See* John Wolohan, *What Does Autonomy for the "Power 5" Mean for the NCAA?* LAW IN SPORT (Feb. 11, 2015), http://lawinsport.com/topics/item/what-does-autonomy-for-the-power-5-mean-for-the-ncaa [https://perma.cc/GZX7-D7XF] (citing Syracuse University and Duke University as examples of Power 5 universities).

32. *See* Wolohan, *supra* note 31 (noting that the number of universities that provided severance payments to head men's basketball coaches decreased in 2020, likely due to the COVID-19 pandemic ending the season early).

33. *See id.* (noting the amount decreased from the 2019 fiscal year, likely due to the COVID-19 pandemic).

34. *See* Paula Lavigne & Mark Schlabach, *FBS Schools Spent Over $533.6 Million in Dead Money Over 10+ Years*, ESPN (Nov. 5, 2021), http://espn.com/college-football/story/_/id/32552130/schools-spent-5336-million-dead-money [https://perma.cc/4A3J-4TYN] (listing the terminated football coaches as Frank Solich, Bill Callhan, Bo Pelini, and Mike Riley).

payouts were "just the cost of doing business."[35] Because of their employment contracts with head coaches, some universities have paid a substantial amount of severance to a head coach implicated in a significant NCAA rules violation. For example, as this Article analyzes in Section II.B.1., Arizona paid Miller $1.5 million in severance despite allegations of numerous significant NCAA rules violations in his men's basketball program.[36]

This Article examines the scenario in which universities face employment decisions regarding head coaches who violate NCAA rules. A university's most realistic options often are to: (1) continue to employ the coach because of the coach's success or because it is cost prohibitive to terminate the coach's employment without cause; or (2) attempt to terminate the coach with cause and likely encounter litigation. Part I of the Article examines the college head coaching profession, with a focus on how and why universities get themselves into the precarious position in the first place. More specifically, Part I explores typical head coach employment contract provisions, including clauses that require head coaches to follow NCAA rules and make their failure to do so justification for employment termination for cause. Part II details examples of these situations and takeaways from them. It also suggests contract language that would provide universities flexibility and help them save millions of dollars when they face employment decisions regarding coaches implicated in NCAA rules violations. The Article ends with a brief conclusion.

I. THE COLLEGE HEAD COACH PROFESSION AND EMPLOYMENT CONTRACTS

Over the past few decades, "college [athletics] transitioned from a time-honored tradition . . . to an economic commodity."[37] Generating billions of dollars annually for its constituents, college athletics has become big business in the United States.[38] For example, in 2005, The Ohio

35. *See id.*

36. *See* Erick Smith, *Arizona Parts Ways with Sean Miller After 12 Seasons as Men's Basketball Coach*, USA TODAY (Apr. 7, 2021, 5:11 PM), http://usatoday.com/story/sports/ncaab/pac12/2021/04/07/sean-miller-out-after-12-seasons-arizonas-mens-basketball-coach/7124927002/ [https://perma.cc/DMF3-FESJ] (noting Miller's employment contract with Arizona did not place responsibility on him to offset the $1.5 million payment through future employment).

37. Heidi Roche, *Loyalty v. Laissez Faire: The Coaching Contract Conundrum and Antitrust Implications of a No-Tampering Policy in College Sports*, 24 MARQ. SPORTS L. REV. 219, 221 (2013) (describing college athletics as previously "respected for its rivalries and cherished for its pure, inspiring nature").

38. *See* Martin J. Greenberg & Jay S. Smith, *A Study of Division I Assistant Football and Mens' Basketball Coaches' Contracts*, 18 MARQ. SPORTS L. REV. 25, 25 (2007); *see also* Kevin Stangel, *Protecting Universities' Economic Interests: Holding Student-Athletes and Coaches Accountable for Willful Violations of NCAA Rules*, 11 MARQ. SPORTS L. REV. 137, 137 (2000) ("The role of intercollegiate athletics at major colleges and universities has undergone a dramatic change since the inception of the National Collegiate Athletic Association ("NCAA") in 1906.").

State University (OSU) reported $89.7 million in athletics revenue.[39] In 2020, that amount nearly tripled to $233 million.[40]

Further, college athletics programs are important in higher education, as many view a university's athletics department as its metaphorical "front door."[41] Good coaches are the heart of a successful athletics program, and universities obsess with hiring the best.[42] A head coach can generate not only wins, but also revenue for a university.[43] This Part describes a college head coach's job duties and the typical employment contract under which the coach performs them.

A. *The College Head Coaching Profession*

Serving as a college head coach can be a "24-7" job.[44] In modern college athletics, college head coaches' roles and importance are akin to CEOs' in other industries.[45] The standard employment contract between a head coach and their university bears this out by "broadly" describing the head coach's duties.[46] These responsibilities extend beyond conducting practices and coaching in games.[47] Today's head coaches' duties include recruiting prospective student-athletes, fundraising, coordinating their student-athletes' academics, serving as public figures and media per-

39. *See* Andy Wittry, *College Athletics Spending and the Movement Towards Revenue Sharing*, ATHLETIC DIR. U., https://www.athleticdirectoru.com/articles/student-athlete-revenue-sharing/ [https://perma.cc/6U3Q-TB35] (last visited Feb. 8, 2022) (examining NCAA Membership Financial Reporting System annual reports).

40. *See id.*

41. Richard T. Karcher, *Redress for a No-Win Situation: Using Liquidated Damages in Comparable Coaches' Contracts to Assess a School's Economic Damage from the Loss of a Successful Coach*, 64 S.C. L. REV. 429, 433 (2012).

42. *See* Greenberg & Smith, *supra* note 38, at 26 (describing coaches as "vital to the success of the athletics program"). One legal scholar points to head coaches' impact on recruiting and signing talented prospective student-athletes as the key to winning. *See* Karcher, *supra* note 41, at 431 (explaining that "universities view head coaches as the principal ingredient to . . . a successful athletic program").

43. *See* Stephen F. Ross & Lindsay A. Berkstresser, *Using Contract Law to Tackle the Coaching Carousel*, 47 U.S.F. L. REV. 709, 728 (2013) (describing successful head coaches as "valuable commodities").

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

45. Martin J. Greenberg & Steven D. Gruber, *You Get Hired to Get Fired*, 24 MARQ. SPORTS L. REV. 141, 146 (2013) (explaining that the modern college head coach is much more than purely an athletics instructor); *see also* Brendan L. Smith, *Benched Coaches Shooting Back*, A.B.A. J. MAG. (Oct. 1, 2010), https://www.abajournal.com/magazine/article/benched_coaches_shooting_back [https://perma.cc/JL4U-JJXW]. (quoting sports law attorney Robert Lattinville).

46. Greenberg & Gruber, *supra* note 45, at 146 (noting that a university's president or athletics director may also dictate a head coach's duties).

47. Greenberg, *supra* note 44, at 127 (citing "exponential growth in . . . responsibilities beyond conducting practices" and coaching in games).

sonalities, and performing administrative tasks such as budgeting.[48] Head coaches' jobs can be stressful and constituents may analyze and debate their every move and choice.[49] Ever-increasing media coverage of college football has intensified this scrutiny.[50]

Head coaches are among the highest profile employees at their universities.[51] Relatively high pay accompanies this profile; and head coaches' pay often exceeds that of their universities' chancellors or presidents, as well as the most esteemed professors.[52] As of March 2021, thirty-one head men's basketball coaches earned more than $3 million annually.[53] This has increased from twenty-nine in 2020, twenty-one in 2019, and fourteen in 2018.[54]

However, head coaches' workplace environment lends itself to job insecurity.[55] For head coaches, job security once depended on serving as both a sport instructor and role model for athletes.[56] Currently, however, university administrators judge head coaches on their win-loss records.[57]

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48. *See id.* at 130–31 (noting that some head coaches experience health problems due to the position's demands).

49. *See id.* at 127. Head coaches receive most of the credit and criticism for the success and lack of success, respectively, for their athletics programs. *See* Greenberg & Smith, *supra* note 38, at 26.

50. *See* Randall S. Thomas & R. Lawrence Van Horn, *College Football Coaches' Pay and Contracts: Are They Overpaid and Unfairly Treated?*, 91 IND. L.J. 189, 230–31 (2016).

51. *See id.*

52. *See* Greenberg, *supra* note 44, at 127 (noting that head coaches' athletics accomplishments receive more notoriety than their universities' science departments' most celebrated lab discoveries). Head coaches can earn as much as seventeen times the average salary of a full-time university professor. *See id.* at 137. For a discussion on the appropriateness of college football head coaches' pay, see Randall S. Thomas & Lawrence R. Van Horn, *Are College Presidents Like Football Coaches? Evidence from Their Employment Contracts*, 58 ARIZ. L. REV. 901, 956 (2016) (pointing out that head football coaches are highly skilled and owe "great responsibility for their programs and universities" and arguing that, "given competitive labor markets . . . their level of compensation is efficient").

53. *See* NCAA Salaries, USA TODAY (Mar. 9, 2021), http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach/ [permalink unavailable].

54. *See* Brent Schrotenboer, Steve Berkowitz & Matt Wynn, *Cheating Allegations, Corruption Scandal Don't Slow Men's Basketball Coaches' Pay*, USA TODAY (Mar. 11, 2020, 3:27 PM), http://usatoday.com/story/sports/ncaab/2020/03/11/college-basketball-coaches-salaries-schools-pay-more-after-fbi-probe/5012939002/ [https://perma.cc/VMM5-W3ZE]. In 1997, there were only two college coaches who earned at least $1 million annually. *See* Greenberg, *supra* note 44, at 137.

55. *See* Thomas & Van Horn, *supra* note 50, at 230–31.

56. Greenberg & Gruber, *supra* note 45, at 146 (describing a head coach's job security "as fleeting as the last seconds of an overtime victory").

57. *See* Thomas & Van Horn, *supra* note 52, at 941 (explaining that head football "coaches cannot rely solely on [their] close connections to boosters[ ] or trustees" to maintain employment if their teams fail to meet high expectations). Thus, because winning and revenue often go together, universities assess their athletics personnel and bottom line similarly to any profit-driven corporation. *See* Greenberg & Gruber, *supra* note 45, at 147 (explaining why universities routinely fire head coaches "at a drastically increased frequency").

Winning increases attendance and donations, helps increase the likelihood of lucrative media rights contracts, and influences prospective student-athletes to attend a university.[58] Thus, universities often view their athletics departments not only as a potential revenue source, but as a way to increase name recognition and application rates.[59] Head coaches establish a "brand" for the university.[60] Consequently, successful head coaches can "provide unparalleled value to their . . . universities[.]"[61]

Men's basketball and football are often a university's most visible sports programs, so their head coaches often create the most value.[62] Universities can receive significant revenue when they play in a bowl game or in the NCAA men's basketball tournament.[63] On many campuses, football revenue alone funds most, if not all, of the universities' other athletics programs.[64] Success on the football field has also benefited many universities' reputations and provided them national prominence.[65] Likewise, men's basketball postseason success provides universities free advertising and results in increased interest among prospective students.[66]

The potential to garner enormous revenue through athletic success can present universities and head coaches with a "win at any cost" atti-

58. Greenberg, *supra* note 44, at 127 (describing a head coach's job security as conditioned on winning because wins are the equivalent of the bottom line). Winning helps athletic programs sustain success because prospective student-athletes seek to join successful sport programs and maintain that success. *See* Karcher, *supra* note 41, at 431.

59. *See* Greenberg & Gruber, *supra* note 45, at 147 (explaining that college athletics' "financial stakes are at an all-time high").

60. *See* Ross & Berkstresser, *supra* note 43, at 721. This is likely because head coaches are the face of their athletics programs. *See* Greenberg & Smith, *supra* note 38, at 26.

61. Ross & Berkstresser, *supra* note 43, at 721. The athletics departments that produce the most revenue "continuously . . . push the envelope on football and [men's] basketball coaches' compensation for the prospect of having successful programs[.]" Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Consideration*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 6 (2009) (citing the University of Alabama, the University of Florida, the University of Kansas, Louisiana State University, and the University of Notre Dame as examples).

62. *See* Greenberg, *supra* note 44, at 131 (noting that football and basketball revenue often underwrites women's sports programs and less visible sports).

63. *See id.* at 142–44 ("There is no better way to illustrate the high financial stakes associated with winning than by looking at the dollars paid out for bowl game participation.").

64. Thomas & Van Horn, *supra* note 50, at 199 (describing the indirect benefits to universities from having successful football programs).

65. *See id.* (citing the University of Alabama, the University of Notre Dame, and the University of Florida as examples of universities who enjoy "instant name recognition at least in part because of their tradition of football traditions").

66. *See* Eamonn Brennan, *Study: Hoops Success Helps Enrollment*, ESPN (Aug. 27, 2012), http://espn.com/blog/collegebasketballnation/post/_/id/63340/study-hoops-success-begets-more-students [https://perma.cc/5G42-LPY8] (citing George Mason University and Butler University as examples of universities whose success in the men's basketball championship led to benefits off the court).

tude.[67] While a successful coach can readily improve a university's image, an unsuccessful program can be a detriment.[68] Because success is "directly attributable" to a head coach, whose achievements have a substantial financial impact on a university, a coach's job tenure should mirror their capacity to create value.[69] It is pricey for a university to retain a head coach whose program performs poorly.[70] If a coach's program fails to generate enough revenue or the coach falls out of favor with constituents, the university may terminate the coach's employment for financial reasons.[71] Thus, even established head coaches whose programs suffers an unexceptional season or two may lose their job.[72]

Similarly, many fans' commitment and loyalty rests with the head coach, rendering it problematic for the university to recreate its brand and preserve loyalty when the coach departs.[73] A decline in the fan base can result in lower game attendance and decreased merchandise sales.[74] Because athletics programs can serve as revenue generators for many universities, a successful head coach is an priceless resource.[75] The next Section explores how head coach employment contracts reflect this value.

B. *College Head Coach Employment Contracts*

While they enjoy large salaries and prestige, college head coaches are just employees, and employment law governs their employment relation-

67. Greenberg, *supra* note 44, at 146 (explaining that revenue potential from "television, gate receipts, sponsorship relationships, alumni donations and [postseason] tournament participation has put the bottom line or balance sheet psychology on an equal basis with 'wins and losses'").

68. *See* Thomas & Van Horn, *supra* note 52, at 904 (explaining that head coaches significantly impact their programs' win-loss records, and winning can lead to increased revenue).

69. *Id.* at 904 (comparing head football coaches and university presidents' roles).

70. *Id.*

71. Greenberg, *supra* note 44, at 141–42 (quoting a former Jacksonville University head men's basketball coach as stating, "[W]inning is the bottom line. Schools are looking for coaches who run clean programs, graduate their players and win big. If you stumble in any area, you're in trouble. But winning big is the big factor. And that translates into money." (internal quotation marks omitted)); *see also* Thomas & Van Horn, *supra* note 50, at 193 (stating that universities terminate head coaches "promptly" when they perform poorly).

72. Thomas & Van Horn, *supra* note 52, at 941.

73. Ross & Berkstresser, *supra* note 43, at 721 (examining appropriateness of damages when head coaches breach employment contracts).

74. *See id.* Former Big 12 Conference commissioner Dan Beebe has explained that university presidents and chancellors walk "a difficult line" in that they "depend on the revenue of certain sports," which in turn depends largely on having successful head coaches. Karcher, *supra* note 61, at 11 (internal quotation marks omitted). If a successful head coach leaves a university, its revenue may decrease, or it may signal a lack of commitment to the program, which could cause a decrease in "donations, ticket sales[,] and television appearances[.]" *Id.* (internal quotation marks omitted) (noting this affects "other [sports] programs").

75. Ross & Berkstresser, *supra* note 43, at 721.

ship with their universities.[76] At common law, employment is at-will, such that the employer or employee may terminate the employment relationship at any time for any purpose.[77] Most United States workers are at-will employees and thus do not enter employment contracts with their employers.[78]

However, an employer and employee may enter a contract modifying their at-will relationship.[79] When an employee is under an employment contract, the employer typically forfeits the ability to terminate the employee's employment for any reason at any time without consequence.[80] College athletics is a business, and the relationship between the university and head coach is business-like.[81] With many universities and athletics departments emphasizing on-field success, college coaching is a volatile industry where, according to some, universities hire coaches to fire them.[82] Given this volatility and the relatively rapid turnover, head coaches negotiate employment contracts with their universities that include protection mechanisms like multi-year fixed terms and substantial severance payments in the event of employment termination.[83] Universi-

76. *See* Martin J. Greenberg & Djenane Paul, *Coaches' Contracts: Terminating a Coach Without Cause and the Obligation to Mitigate Damages*, 23 MARQ. SPORTS L. REV. 339, 363 (2013) (examining application of damages mitigation principles to injury or breach of contract situations involving college head coaches); *see also* Michael S. Selvaggi, *The College v. The Coach*, 3 SETON HALL J. SPORT L. 221, 225 (1993).

77. *See* Ross & Berkstresser, *supra* note 43, at 717.

78. *See At-Will Employment*, NCSL (Apr. 8, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/G2UX-SPWU].

79. Ross & Berkstresser, *supra* note 43, at 717 (explaining that the parties may include "additional protections" against discharging an at will employee, "such as requiring just cause for firing"). Only those in "important" positions usually enter employment contracts. *See At-Will Employment*, *supra* note 78.

80. *See* Karen Gwinn Clay, *Jury Slam-Dunks JSU for Coach's Termination*, 20 No. 10 MISS. EMP. L. LETTER 7 (Jan. 2014) (describing Jackson State University's termination of now-former head women's basketball coach Denise Taylor and subsequent legal proceedings).

81. *See* Greenberg, *supra* note 44, at 258 (advocating that head coaches and universities treat their relationship "in the strictest contractual and legal sense").

82. *See* Christian Dennie, *There Are No Handshake Deals in College Coaching Contracts*, 20 NO. 1 ANDREWS ENT. INDUS. LITIG. REP. 2 (2008) (pointing out that head coaches' job security depends on the success of eighteen-to-twenty-two-year-old student-athletes carrying out complex strategy and game planning, which would be a clear path to failure in most professions); *see also* Greenberg & Gruber, *supra* note 45, at 141 (explaining that in the college coaching world, job security is a misnomer and describing turnover in college coaching as "an endemic problem"). Due to the rise of college athletics as big business, college coaching is a high stakes game "where money talks." *See* Greenberg, *supra* note 44, at 134.

83. *See* Thomas & Van Horn, *supra* note 52, at 940–41 (describing likelihood of a university terminating a head coach at some point in the coach's career as "likely"); *see also* Thomas & Van Horn, *supra* note 50, at 195. Coaches' useful work lives are often short for their universities. *See* Martin J. Greenberg, *Termination of College Coaching Contracts: When Does Adequate Cause to Terminate Exist and Who Determines its Existence?*, 17 MARQ. SPORTS L. REV. 197, 254 (2006) (summarizing high turnover in the coaching profession).

ties likewise value continuity in their coaching positions and stability in their athletics programs, and are thus willingly employ their head coaches for several years.[84] In fact, most college head coach employment contracts contemplate an employment period of at least five years.[85] Most head coaches are not at-will employees, instead contracting to perform duties exclusively for their universities for several years in consideration of a steep guaranteed salary.[86] Thus, head coaches' employment is unique compared to most employees in the workforce in that they are not fungible and thus not easily replaceable.[87] Each individual head coach possesses a unique coaching style, personality, and reputations.[88]

Universities justify their large financial commitments to head coaches as investments that should pay off through increased ticket sales, marketing and sponsorship revenue, donations, and admissions applications.[89] For example, when the University of Alabama ("Alabama") hired Nick Saban as its head football coach, then-Alabama President Robert Witt described Saban's employment contract to the board of trustees as "a sound

84. *See* Karcher, *supra* note 41, at 432 (examining reasons why head coaches are unique employees).

85. *See* Thomas & Van Horn, *supra* note 50, at 940–41 (describing the contract length as necessary because head coaches attempt to sway high school-aged prospective student-athletes to attend their universities, and these prospects and their families appreciate a strong likelihood that the head coach will be at the university throughout the prospects' athletic career at the university). "[D]ue to the nature of the [college athletics] recruiting process . . . it is neither practical nor feasible" for head coaches to serve as at-will employees. Karcher, *supra* note 41, at 432.

86. Karcher, *supra* note 61, at 3. Head coach salaries continue to rise due largely to increases in universities' revenue from bowl game appearances and television contracts, agents successfully representing coaches, and increased competition for successful head coaches. *See id.* at 6. One legal scholar identifies supply and demand as the "real impetus for the rise in coaching salaries," as universities' "desire to win and . . . perception among college administrators that only a small handful of coaches in the marketplace" are winners results in "limited supply and high demand[.]" *Id.* at 38.

87. Karcher, *supra* note 41, at 431 (explaining that head coaches are unique because of their high profile status and daily local and national media coverage of them); *see also* Robin Mistretta-Bradley, *The Buyout Clause: What's the Point?*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 127, 141 (2009).

88. *See* Mistretta-Bradley, *supra* note 87, at 141 (explaining universities want to hire and preserve these unique reputations and styles by retaining head coaches).

89. Karcher, *supra* note 61, at 27 (providing as an example a quote from former University of Florida president Bernie Machen describing then-head football coach Urban Meyer's multimillion dollar salary as an investment). Then-University of California athletics director Sandy Barbour once explained, "[I]f we let [a coach] go because we're not willing to pay market, we'll pay a huge price." Roche, *supra* note 37, at 220 (second alteration in original) (quoting Steve Wieberg, Jodi Upton, A.J. Perez & Steve Berkowitz, *Pay Booms in Hard Times*, USA TODAY, http://usatoday30.usatoday.com/printedition/news/20091110/1acoachpay10_cv.art.htm [https://perma.cc/JTT4-JKHD] (last visited Nov. 4, 2013)) (describing the "conundrum" that universities face of "pay[ing] the ever-increasing market price" to hire and retain head coaches, or "lose the chance of obtaining the notoriety, five-star recruits, and accomplishments that a high-profile coach yields").

business decision."[90] Likewise, when the University of Kentucky ("Kentucky") announced its eight-year, $31.65 million contract with head men's basketball coach John Calipari, athletics director Mitch Barnhart explained, "If done correctly, the investment in a coach will pay for itself and yield returns for the overall program in general."[91]

1. *Head Coach Employment Contract Negotiations*

Due largely to the fact that successful head coaches enjoy "tremendous leverage," the head coach negotiation and hiring process is fraught with peril for universities.[92] Universities and athletics directors "scramble" to fill vacancies during the short period of time in which they clamor to hire the few desirable head coaches on the market during hiring season in each sport.[93] Once a university identifies a desirable prospective head coach who has mutual interest, the two parties often enter a memorandum of understanding (MOU).[94] The MOU identifies essential items like the head coach's salary, length of the employment term, termination benefits, and the buyout clause.[95]

Once the coach agrees to the job offer, their agent completes employment contract negotiations with the university.[96] Once simple and straightforward, college head coach employment contracts have become intricate and complex.[97] Their primary purposes include specifying the nature and duration of employment, as well as compensation.[98] However, as universities' expectations of head coaches increase, both parties may

90. Karcher, *supra* note 61, at 28 (internal quotation marks omitted) (quoting Adam Jones & Cecil Hurt, *Saban's Contract a Done Deal*, TUSCALOOSA NEWS (June 15, 2007), http://www.tuscaloosanews.com/article/20070615/NEWS/706150345/1007/APS [https://perma.cc/W5D8-M929]).

91. *Id.* at 29 (quoting Steve Wieberg, *Brand: 'Hard Questions' Need to Be Asked About Rising Salaries*, USA TODAY (Apr. 3, 2009), http://www.usatoday.com/sports/college/mensbasketball/ 2009-04-02-brand-salaries_N.htm [https://perma.cc/S9SP-C3NQ]).

92. *Id.* at 39.

93. *Id.*

94. *See id.* at 40–41.

95. *See* Thomas & Van Horn, *supra* note 50, at 207.

96. *See id.* at 209 (describing the agent's role as protecting the head coach from unfair termination and overly demanding expectations).

97. *See* Gina A. Pauline & John T. Wolohan, *An Examination of the Non-Recruit Clause in Intercollegiate Coaching Contracts*, 21 J. LEGAL ASPECTS SPORT 219, 219, 221 (2012); *see also* Greenberg, *supra* note 44, at 127 (referring to college coach employment contracts as "sophisticated endeavors" and noting that no standard forms exist and coaches lack a union that protects their interests). In fact, one author explains that college coaching contracts evolved from handshake agreements to the modern-day Magna Carta of contracts. *See* Dennie, *supra* note 82 (explaining the length and complexity is due to provisions regarding compensation, termination, duration and renewal, and supplemental income).

98. *See* Selvaggi, *supra* note 76, at 225 (exploring similarities and differences between head coach employment contracts and other workers' employment contracts).

intensify efforts to protect themselves in the event of litigation.[99] Contract negotiations may last as long as six months.[100]

Despite the prolonged long-form contract negotiations, the initial "panic" to hire a top choice with mutual interest can cause a university to overpay and engage in subpar negotiations, leaving it exposed.[101] Because universities are aware of the potential benefits of athletics success, head coaches enjoy substantial negotiating power.[102] The resulting employment contracts "garner public attention and scrutiny."[103]

Due to the nature of the coaching business, regardless of how well the employment contract is drafted, it is likely that either the university or head coach will breach the contract one day.[104] In fact, some legal scholars believe that employment contracts have minimal meaning to universities and their coaches.[105] Some coaches feel the same. For example, former Marquette University head men's basketball coach Kevin O'Neill

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99. *See* Pauline & Wolohan, *supra* note 97, at 219.

100. *See* Thomas & Van Horn, *supra* note 50, at 209 (noting that the length of negotiations depends on the "urgency of the issues and the parties' positions"). A college head coach's employment contract may be as lengthy as eighty pages. *See* Greenberg, *supra* note 44, at 149.

101. Karcher, *supra* note 61, at 40 (quoting Raymond D. Cotton, an attorney who specializes in university presidents' compensation, and who described the process as both "ludicrous" and "not appropriate for higher education" (internal quotation marks omitted)); *see also* Greenberg, *supra* note 44, at 150–51 (explaining that universities often negotiate head coach employment contracts in a "frenzy" to lock in big-name head coaches (internal quotation marks omitted) (quoting Edward Stoner II & Arlie Nogay, *The Model University Coaching Contract ("MCC"): A Better Starting Point for Your Next Negotiation*, 16 J. COLL. & UNIV. L. 43, 44 (1989))). Note that, conversely, first-time head coaches may be so elated to get their first head coaching position that they fail to hire counsel to review their employment contracts, leaving them exposed. *See id.* at 150.

102. *See* Thomas & Van Horn, *supra* note 50, at 211 (explaining likelihood of other universities inviting successful coaches to apply for openings at their universities). Further, universities generally seek to do what they can to ensure their head coaches enjoy success at the beginning of their tenures. *See id.* at 209. Head coaches coming off a successful season enjoy even more negotiating leverage. *See* Karcher, *supra* note 61, at 12–13; *see also* Ross & Berkstresser, *supra* note 43, at 728 (referring to "successful . . . coaches" as "valuable commodities" who possess "great bargaining power over universities").

103. Thomas & Van Horn, *supra* note 50, at 189 (comparing scrutiny to that of corporate CEOs' employment contracts).

104. *See* Pauline & Wolohan, *supra* note 97, at 221; *see also* Greenberg, *supra* note 44, at 128 (stating that in the college coaching industry, contracts are "not. . . contract[s]," "job security" is "fleeting," and that the parties breach employment contracts easily).

105. Greenberg & Gruber, *supra* note 45, at 143 (explaining that "universities quickly fire coaches for numerous reasons" and, similarly, "coaches quickly leave for numerous reasons"); *see also* Roche, *supra* note 37, at 221 (describing coaches and universities' lack of loyalty and citing coaches' willingness to breach their employment contracts to attain higher-salaried positions).

once said, "I won't wipe my nose on the [employment] contract. It's not worth the price of the paper."[106]

However, that does not prevent the parties from bargaining over certain protections. Coaches try to guard their financial interests through means including negotiating lengthy, fixed-term contracts.[107] However, a long-term employment contract does not ensure employment for the contract's full term.[108] "[R]isk follows . . . reward[,]" and, "[i]n big-time intercollegiate athletics, the risk to a school making a significant investment in a [head] coach is that the investment does not result in a successful [athletics] program."[109] Even if an employee under contract performs well, the employer may breach the contract and terminate the employee.[110] Likewise, head coaches are aware that consistent losing on the playing field likely results in employment termination.[111] In either event, the issue becomes what or how much the employer owes the former employee.[112] Thus, a head coach's employment contract "may be the most important armor that the coach has in protecting his entry and exit in the job."[113] Coaches should plan for their eventual departure, and the terms of the employment contract between the coach and the university that address the back-end of employment may be more important than the terms addressing the commencement of the coach's employment.[114] The next Section explores how coaches and universities attempt to protect themselves contractually in situations where the university desires to terminate the coach's employment.

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106. Roche, *supra* note 37, at 230 (internal quotation marks omitted) (quoting Martin J. Greenberg, *Representation of College Coaches in Contract Negotiations*, 3 MARQ. SPORTS. L. REV. 101, 109 (1995)).

107. *See* Thomas & Van Horn, *supra* note 52, at 942.

108. *Id.*

109. Karcher, *supra* note 61, at 33.

110. *See* Thomas & Van Horn, *supra* note 52, at 942 (comparing scenario whereby a university president performs well but the board of trustees terminates the president's employment).

111. *See* Thomas & Van Horn, *supra* note 50, at 195 (describing reasons why head coaches focus on what happens to the parties when coaches leave voluntarily or involuntarily). "[R]ecent studies . . . show[ ] . . . a tenuous connection between coaches' salaries and winning." Karcher, *supra* note 61, at 33.

112. *See* Thomas & Van Horn, *supra* note 50, at 230 (explaining that the answer depends on the contract and its termination provisions).

113. Greenberg, *supra* note 44, at 127 (stating that head coaches' long-term employment contracts mean nothing as provisions providing for buyouts for termination without cause are rampant); *see also* Dennie, *supra* note 82 (explaining that the parties negotiate and argue the breadth of termination provisions at length).

114. *See* Greenberg, *supra* note 44, at 128 ("The first day of the job often must be spent planning for the last day of the job . . . ."); *see also* Thomas & Van Horn, *supra* note 50, at 195. Universities often negotiate protection in the event the head coach departs the university voluntarily for a more desirable position by implementing a contract buyout that the coach or hiring university will pay. *See id.*

2. *College Head Coach Employment Contract Termination Provisions*

Terminating the employer-employee relationship is difficult on both an employer and employee.[115] A split between a university and a head coach can also be expensive.[116] College head coach contracts usually contain separate "termination for cause" and "termination without cause" provisions.[117] Depending on the provision under which the university terminates a head coach's employment, the university may still owe the coach millions of dollars.[118]

Employment contracts may also refer to termination "without cause" as termination absent "just cause," or "not for cause."[119] A termination without cause provision provides the university authority to terminate the contract prior to its end of term date for any reason.[120] Common reasons why universities terminate head coaches without cause include consistent losses, inadequate fan support, inadequate financial support from donors, failing to compete with fellow conference members or rivals, and other reasons that the pertinent contract provisions do not list.[121] Further, it is not uncommon for a new president, chancellor, or athletics director to seek to make their "mark" on a sport program by bringing in a new coach and terminating the current coach's employment without cause.[122]

When a university terminates a head coach's employment without cause, it will likely incur fiscal obligations that can be enormous.[123] A

115. *See* Amy S. Ybarra, *Breaking Up Is Hard to Do*, 24 NO. 11 TEX. EMP. L. LETTER 7 (2013) (recommending that employers refrain from making headlines with a termination and citing example of the University of Southern California terminating Lane Kiffin's employment as its head football coach).

116. *See* Greenberg & Paul, *supra* note 76, at 339. In fact, terminating a head coach can cause daunting economic implications for universities. *See* Greenberg & Gruber, *supra* note 45, at 144 (citing example of Auburn University terminating head football coach Gene Chizik's employment two years after he led Auburn to a national championship and despite still having to pay Chizik $7.5 million and his staff $3.59 million).

117. *See* Greenberg, *supra* note 83, at 205 (describing The Ohio State University's termination of head men's basketball coach Jim O'Brien); *see also* Ross & Berkstresser, *supra* note 43, at 720.

118. *See* Thomas & Van Horn, *supra* note 52 (contrasting ramifications of terminations for cause and terminations without cause).

119. *See* Greenberg & Gruber, *supra* note 45, at 149. In other words, a coach cannot force a university to permit the coach to continue to work if the university decides to terminate the coach's employment or replace the coach with another individual. *See* Greenberg, *supra* note 44, at 245. This Article uses the terms "without cause," "absent just cause," and "not for cause" interchangeably.

120. *See* Greenberg & Gruber, *supra* note 45, at 149; *see also* Greenberg & Paul, *supra* note 76, at 341 (explaining that mitigation of damages found its way into coaches' employment contracts through provisions permitting termination without cause and for the university's own convenience).

121. *See* Greenberg & Gruber, *supra* note 45, at 149.

122. *Id.*

123. *See* Greenberg & Paul, *supra* note 76, at 339 (explaining that the employment contract may require the university to pay for the head coach's remaining contract years).

head coach's employment contract frequently requires their university to pay the head coach severance payments or common law damages for breach upon an employment termination without cause.[124] Contract provisions that specify the damages amount for breach present several advantages, including predictability.[125] The severance amount the university owes the head coach often equals the full amount of all of the compensation to which the head coach would have been entitled if the parties fully performed the contract.[126] Alternatively, some head coach employment contracts provide for a minimum of three or five years of base salary in the event the university terminates a head coach without cause.[127] Thus, the amount a university owes and pays a head coach that it terminated without cause is, in essence, payment to someone to *not* perform work for the university.[128]

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124. Thomas & Van Horn, *supra* note 52, at 942 (comparing amounts that universities owe depending on whether termination was with or without cause); *see also* Karcher, *supra* note 61, at 23. Authors, fans, and media members commonly refer to the severance payments accompanying terminations without cause as "buyouts." *See* Karcher, *supra* note 61, at 23–24. For example, see Greenberg, *supra* note 44, at 127 (describing buyouts for terminations without cause as "rampant" in college athletics). Others refer to these severance payments as liquidated damages, which should put the parties on notice of what will occur economically post-termination. For example, see Dennie, *supra* note 82 (explaining that liquidated damages clauses in coach contracts are becoming the norm and call for a predetermined settlement amount). Regardless of nomenclature, the industry trend is for universities and head coaches to contract around the default consequential damages by quantifying, or liquidating, their damages during contract negotiations. *See* Karcher, *supra* note 41, at 435 (explaining that a buyout is nothing more than a triggered liquidated damages clause). Absent predetermined severance payments, a university terminating a coach without cause must anticipate having to negotiate a settlement accounting for uninterrupted pay or the net present value of all sums remaining under the contract's term. *Id.*

125. *See* Greenberg & Paul, *supra* note 76, at 345 (describing parties' ability to negotiate damages amount instead of imposition by a court or arbitrators as advantageous).

126. Thomas & Van Horn, *supra* note 52, at 942; *see also* Karcher, *supra* note 61, at 24. Given coaches' relatively short tenures, it is unsurprising that they bargain for greater protection in the event of termination without cause. *See* Thomas & Van Horn, *supra* note 52, at 906 (comparing college head football coach and university president employment contracts). Losing is costly to a head coach; not only does it markedly increase the chance of termination, it also reduces their likelihood of future employment as a head coach. *See id.* at 913 (explaining why coaches compensate for this risk by negotiating significant severance payment provisions).

127. *See* Thomas & Van Horn, *supra* note 52, at 953–55 (comparing termination without cause provisions in college head coach and university president employment contracts and concluding that the severance provisions for head coaches cover more years of base salary, perhaps because head coaches enjoy less job security and negotiate accordingly).

128. *See* Karcher, *supra* note 61, at 24 (referring to buyouts as "an additional cost to schools for keeping coaches on contract that are no longer working for them"). In fact, two legal scholars describe the money that university officials willingly pay to buy out faltering head coaches' contracts as the latest symbol of the college "football arms race." Greenberg & Paul, *supra* note 76, at 340.

For example, Texas A&M University (Texas A&M) terminated head football coach Kevin Sumlin's employment without cause in 2017 with two years remaining on his contract.[129] Under the "Damages Upon Termination by University Without Cause" provision in Sumlin's contract, Texas A&M had to pay Sumlin the full amount remaining under his contract—$10.4 million.[130] More recently, LSU terminated the employment of former head football coach Ed Orgeron without cause less than two seasons after he guided the team to a national championship, thus owing him $17 million in severance.[131]

With coaching salaries (and severance payments) rising, universities are increasingly likely to negotiate cumbersome termination provisions to try and protect their interests.[132] As media coverage of college athletics has amplified, head coaches face an increased risk of employment termination due to their personal conduct that does not relate to on-field performance.[133] Thus, universities negotiate termination for cause provisions to protect their images in the event of employee misconduct.[134] These contract provisions also go by termination "with cause," termination with

129. *See* Alex Kirshner, *Why Kevin Sumlin's $10.4 Million Texas A&M Buyout Is Even Better (for Him) Than It Sounds*, SB NATION (Nov. 26, 2017, 4:49 PM), http://sbnation.com/college-football/2017/11/26/16694462/kevin-sumlin-fired-buyout-texas-a-m-contract [https://perma.cc/J6CU-99UA].

130. *See id.* Interestingly, Sumlin's contract did not contain an "offset provision" present in many coach contracts that would offset the amount Sumlin earned from future employment against the amount Texas A&M owed him. *See id.* Thus, when the University of Arizona hired Sumlin seven weeks after Texas A&M fired him, Sumlin was able to keep the full $10.4 million in severance from A&M while earning nearly $3 million annually to coach at Arizona. *See* Alex Kirshner, *Kevin Sumlin's at Arizona Now, After Collecting a Huge Buyout From Texas A&M*, SB NATION (Aug. 30, 2018, 6:30 PM), http://sbnation.com/college-football/2018/8/30/17625318/kevin-sumlin-arizona-texas-a-m-coach [https://perma.cc/2EEX-LXBA].

131. *See* Chip Patterson, *LSU, Coach Ed Orgeron Agree to Part Ways at Conclusion of 2021 College Football Season*, CBS SPORTS (Oct. 17, 2021), http://cbssports.com/college-football/news/lsu-coach-ed-orgeron-agree-to-part-ways-at-conclusion-of-2021-college-football-season/ [https://perma.cc/93JE-FQYL] (quoting LSU athletics director Scott Woodward as explaining that the football program was not competing for "SEC and national championships").

132. *See* Dennie, *supra* note 82 (describing universities as "tightening the reins").

133. *See* Thomas & Van Horn, *supra* note 52, at 230–31 (explaining inclusion of termination with cause option in head coach employment contracts).

134. *See* Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS SPORT 5, 17 (2011) (explaining that the right to end a working relationship is a natural consideration for contract drafters and parties); *see also* Thomas & Van Horn, *supra* note 52, at 943 (describing termination for cause provisions as "an important protection" for a university from the damage to its reputation and image that could arise if a coach engages in serious misconduct). In fact, negotiations regarding the circumstances that can justify termination for cause can become contentious. *See* Thomas & Van Horn, *supra* note 50, at 230; *see also* Greenberg & Gruber, *supra* note 45, at 147 (stating that "universities and coaches . . . fight bitterly over what constitutes termination for cause").

or for "just cause," or "for cause termination."[135] They provide the circumstances under which a university may terminate a coach for the coach's bad act or harmful omission and relieve the university of its duty to further compensate the coach.[136] If a head coach commits an act that, per the employment contract, justifies termination for cause, the university may terminate the contract prior to the end of its term.[137] A coach who breaches an employment contract and whose university terminates the coach's employment with cause typically is not entitled to severance compensation.[138]

The circumstances justifying termination for cause vary depending on head coach contracts. Such circumstances are often a main focus of head coach contract negotiations.[139] Universities may prefer vague, indefinable terms.[140] Universities often add, or seek to add, language like "shall in-

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135. *See* Greenberg & Gruber, *supra* note 45, at 150. This Article uses the terms interchangeably termination "with cause," termination "for just cause" and "for cause termination" interchangably.

136. *See* Greenberg, *supra* note 83, at 205 (contrasting termination for cause and termination without cause employment contract provisions generally); *see also* Thomas & Van Horn, *supra* note 50, at 942.

137. Greenberg & Gruber, *supra* note 45, at 150.

138. Thomas & Van Horn, *supra* note 52, at 942 (explaining that, as a result, universities carefully draft definitions for what constitutes cause); *see also* Greenberg, *supra* note 44, at 210 (explaining that most college head coach employment contracts include a clause exonerating the university from any further liability for compensation following termination with cause). Thus, an employee likely would prefer a termination without cause from a financial standpoint. *See* Thomas & Van Horn, *supra* note 52, at 942 (noting that counsel for employees will vociferously resist including strong definitions of cause in their clients' employment contracts). Conversely, "universities prefer to terminate a coach's contract" with cause because of the hefty severance payments that often accompany termination without cause. Greenberg & Gruber, *supra* note 45, at 149–50. However, note that termination for cause proceedings can hang out a university's dirty laundry in the public, or involve protracted and expensive litigation that may offend fans and alumni. *See* Greenberg, *supra* note 83, at 230 (explaining that compromise is the current modus operandi when a university seeks to terminate a head coach's employment with cause). Thus, a university may prefer to settle its differences with a head coach it just terminated to control the head coach's public narrative and prevent an airing of dirty laundry. *See* Greenberg, *supra* note 44, at 219 (citing examples including legendary head football coach Barry Switzer settling with the University of Oklahoma for $225,000 after the two parted ways in the wake of Switzer's NCAA violations). Even if a valid termination for cause circumstance exists, a university with adequate resources may consider terminating a head coach without cause because it is the cleanest basis to separate from employment. *See* Thomas & Van Horn, *supra* note 52, at 952.

139. *See* Thomas & Van Horn, *supra* note 50, at 209 (explaining that the parties may look to previous contracts between the university and other coaches as well as other universities' coach employment contracts).

140. *See* Greenberg & Gruber, *supra* note 45, at 147 (describing the situation as "ripe for potential abuse by universities"). In fact, two legal scholars believe that termination for cause provisions are often "indefinable, vague, and extremely subjective" in the university's favor. *See id.* at 152 (citing "moral turpitude" as an example). Another notes that defining the word "cause" can present problems. *See* Epstein, *supra* note 134, at 17. Universities can use these vague terms like weapons

clude" or "includes but is not limited to" when listing circumstances that justify termination with cause in order to protect themselves and provide flexibility.[141] Head coaches and their representatives particularly seek to avoid provisions permitting universities to unjustifiably or subjectively terminate head coaches' employment with cause.[142] A recent example of a for cause termination is Washington State University (Washington State) terminating head football coach Nick Rolovich's employment after he refused to abide by a state COVID-19 vaccine mandate.[143] Because Washington State terminated Rolovich's employment with cause, Rolovich did not receive his $2 million annual salary.[144]

More relevant to this Article, head coach employment contracts typically permit termination with cause for material contract breaches, violating NCAA or conference rules that result in certain sanctions, and "conduct that constitutes moral turpitude or reflects adversely on the university."[145] Universities hope that, by carefully enumerating offenses that would trigger termination for cause, they will deter or punish offenders for their actions.[146] A complete loss of severance pay should serve as a

to terminate coaches with cause. Greenberg, *supra* note 833, at 226. To mitigate the likelihood that their university may terminate their employment with cause, coaches seek contract terms that are not subjective. *See* Thomas & Van Horn, *supra* note 50, at 230. Thus, coaches likely prefer contract language that more strictly defines acts constituting just cause. *See* Greenberg, *supra* note 44, at 215.

141. Dennie, *supra* note 82.

142. *See* Thomas & Van Horn, *supra* note 50, at 230.

143. *See* Edward Sutelan, *Why Did Washington State Fire Nick Rolovich? Coach's Vaccine Refusal at Center of Cougars' Decision*, SPORTING NEWS (Oct. 18, 2021), http://sportingnews.com/us/ncaa-football/news/washington-state-fire-nick-rolovich-coach-vaccine-refusal/13zvz7ypuvm7t15s72ys8a6dbh [https://perma.cc/7RQT-U3BE] (describing state mandate prohibiting state agencies from permitting workers not fully vaccinated against COVID-19 to work for them).

144. *See id.* (quoting "clear lines in Rolovich's contract that allowed him to be fired").

145. Greenberg, *supra* note 83, at 206, 221 (noting OSU's head men's basketball Jim O'Brien's employment contract included these terms). Additionally, circumstances that can constitute adequate reasoning for termination with cause often include "perpetuation of willful fraud, conduct seriously prejudicial to the best interests of the university, immoral acts, habitual intoxication, dishonesty, and gross negligence." Thomas & Van Horn, *supra* note 50, at 230–31. Head coach contracts also often contain provisions defining neglect of duties as grounds for termination for cause, which suggests that universities could use poor on-field results to terminate a head coach's employment for-cause. *See id.* at 233. However, this has not been the case. *See id.*; *see also* Karcher, *supra* note 61, at 23 (stating that it is unfortunate for universities that lack of winning is not a valid reason to terminate a head coach for cause).

146. *See* Thomas & Van Horn, *supra* note 52, at 943. However, given the near certainty coaches terminated with cause will sue their universities for breach of contract, universities are selective about their use of the just cause distinction. Michael McCann, *Breaking Down Kevin Ollie's Case Against UConn and the University's Likely Defenses*, SPORTS ILLUSTRATED (Jun. 29, 2018), http://si.com/college/2018/06/29/uconn-huskies-kevin-ollie-fired-arbitration-lawsuit [https://perma.cc/2J4K-5S4F] (citing Louisivlle's termination of Pitino with cause as an example after retaining him through multiple scandals).

significant deterrent.[147] Further, a coach terminated with cause likely suffers severe reputational harm.[148]

3. *NCAA Rules and College Head Coach Employment Contracts*

Coaches operate in an "environment controlled by NCAA rules . . . ."[149] Thus, in addition to winning games, head coach are concerned with their student-athletes' academic eligibility and amateur status, extra benefits, boosters' activities, expense reporting, and recruiting.[150] This Section details the means and processes through which the NCAA enforces its rules and universities' incorporation of NCAA rules compliance into head coach employment contracts.

a. The NCAA and Its Rules Enforcement Process

The NCAA describes itself as "a member-led organization" that consists of over 1,000 colleges and universities.[151] Through the NCAA's legislative process, its member universities propose and adopt rules regarding college athletics and implement them on campus.[152] NCAA member universities and their student-athletes agree to the rules in order to have the opportunity to compete in NCAA-sponsored competitions.[153] The NCAA notoriously does not lack for rules.[154] For example, one NCAA Division I bylaw defines the term "business day[,]" while others regulate when and how often coaches may call or write prospective student-athletes, or even answer incoming calls from them.[155]

Universities and staff members that abide by NCAA legislation should not be disadvantaged by doing so.[156] Thus, NCAA member universities

147. *See* Thomas & Van Horn, *supra* note 52, at 943.

148. *See id.* (noting that coaches aggressively negotiate limitations to what constitutes cause in their employment contracts); *see also* Greenberg & Gruber, *supra* note 45, at 213 (explaining that a termination with cause provision can interfere with a coach's future, both financially and professionally).

149. Greenberg, *supra* note 44, at 146 (describing NCAA rules as a "voluminous, complicated and very often broken set of guidelines").

150. *See id.* at 147.

151. *What Is the NCAA?*, NCAA, http://ncaa.org/about/resources/media-center/ncaa-101/what-ncaa [https://perma.cc/8R5F-ZGTC] (last visited Feb. 28, 2022) (providing basic information regarding the NCAA).

152. *See id.* (noting these rules include "everything from recruiting and compliance to academics and championships").

153. See Brandon Leibsohn, *Road to Recovery: The NCAA's New Enforcement Process Creates More Legal Headaches*, 21 SPORTS LAW J. 123, 126 (2014).

154. NCAA bylaws and policies cover myriad substantive areas, competition rules, and scheduling. *See* Jo R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws that Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 262 (2010).

155. NCAA, 2020-21 DIVISION I MANUAL § 13.02.1, 13.1.3, 13.4.1 (2020), *http://ncaapublications.com/productdownloads/D121.pdf* [https://perma.cc/PE5T-GCYU] [hereinafter 2020-21 MANUAL].

156. *See* Elizabeth Lombard, Note, *Changes Are Not Enough: Problems Persist with NCAA's Adjudicative Policy,* 95 NOTRE DAME L. REV. 925, 928 (2019) (describing

created an infractions process to help ensure fair play and integrity among members.[157] One group of NCAA employees in particular bears this responsibility: the NCAA's Enforcement Staff.[158] The Enforcement Staff consists of a few dozen individuals, including former coaches, athletics administrators, compliance staff members, student-athletes, and attorneys.[159]

The Enforcement Staff is akin to the NCAA's prosecutor.[160] It is the NCAA entity responsible for reviewing information about potential violations.[161] The Enforcement Staff receives information regarding potential rule violations from many sources, including self-reports and sources.[162] If a situation warrants further investigation, the Enforcement Staff issues a Notice of Inquiry to, and works with, the involved member university to discover the facts.[163] By sending a Notice of Inquiry to the university, the Enforcement Staff indicates the commencement of a formal, joint investi-

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NCAA's infractions process's purpose). Conversely, without rules, enforcement, and an infractions system to find and punish rules violators, unscrupulous coaches and staff members would have a field day. *See* Potuto, *supra* note 154, at 262.

157. *See* NCAA, *Division I Infractions Process*, NCAA, http://ncaa.org/enforcement/division-i-infractions-process [https://perma.cc/TLQ3-QK3A] (last visited Feb. 28, 2022) [hereinafter *Division I Infractions Process*].

158. *See* NCAA DIV. I COMM. ON INFRACTIONS, NCAA DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT 9 (June 2020), http://ncaaorg.s3.amazonaws.com/infractions/d1/2019D1Inf_AnnualReport.pdf [https://perma.cc/Z29K-PT6J] [hereinafter DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT] (describing Enforcement Staff's role in the infractions process). Under NCAA rules, member universities are responsible for enforcing compliance, but if a university is unaware of, or contributing to, NCAA rules violations, the NCAA may act on its own. *See* Leibsohn, *supra* note 153, at 126.

159. *Evaluations Show Infractions Process Improvements*, NCAA (Aug. 1, 2016), http://ncaa.org/about/resources/media-center/news/evaluations-show-infractions-process-improvements [https://perma.cc/AUP8-T7HX] (describing efforts to improve infractions process and noting the Enforcement Staff consisted of fifty-seven individuals in 2016); *see also Inside the Division I Infractions Process: Who's Who in the Infractions Process*, NCAA, http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionWhoisWho.pdf [https://perma.cc/Z3QF-JTKG] (last visited June 10, 2021) (describing individuals and their roles in the infractions process).

160. *See* Timothy Davis & Christopher T. Hairston, *Majoring in Infractions: The Evolution of the National Collegiate Athletic Association's Enforcement Structure*, 92 OR. L. REV. 979, 988 (2014) (describing the Enforcement Staff's actions to include presenting information to support allegations of rules infractions to the COI); *see also* Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major Infractions Cases*, 37 SETON HALL L. REV. 749, 753–54 (2007) (noting that Enforcement Staff members are full-time NCAA employees).

161. *See Division I Infractions Process*, *supra* note 157.

162. *See Inside the Infractions Process: Paths for Handling Potential Violations*, NCAA (Jan. 2020) http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_ResolutionPathsforViolations.pdf [https://perma.cc/FEB9-KBXF] (illustrating various resolution paths for potential violations). The Enforcement Staff may receive tips on potential violations from university self-reports, rival coaches, media stories, anonymous tips, and disgruntled staff members or student-athletes. *See* Potuto, *supra* 154, at 289–90.

163. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 7.

gation of, and with, the university.[164] Its investigators must review information regarding potential violations in a "fair, accurate, collaborative, and timely manner."[165]

If the Enforcement Staff believes information may substantiate violations, it alleges potential Level I or Level II violations, with the former being the more significant of the two.[166] The Enforcement Staff states its allegations in a formal document directed to the university and involved individuals called a Notice of Allegations (NOA).[167] The Enforcement Staff bears the burden of proving these violations.[168]

There are four means by which an infractions case involving a Division I member university resolves, and three of them conclude with a COI decision.[169] The COI is an independent administrative body that includes volunteers from NCAA member universities, athletics conferences, former coaches, and individuals from the general public who possess legal training.[170] More specifically, panelists' professional profiles include current and former university presidents, chancellors, and athletics directors, conference commissioners, former coaches, attorneys, and professors.[171]

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164. *See* Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215, 226 (2012) (explaining that the investigation goes "wherever else the evidence leads"). The Notice of Inquiry is not an allegation; rather, it informs the university of a formal investigation. *See* Rogers & Ryan, *supra* note 160, at 765.

165. DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 9 (characterizing trust and collaboration between the Enforcement Staff, universities, and conferences as "vital" to the process).

166. *See id.* at 7 (providing overview of infractions process). There are three violation levels. *See id.* at 9. The COI adjudicates cases involving alleged levels I and II violations, whereas, for the most part, the Enforcement Staff and universities handle Level III violations. *See id.* For context, the Enforcement Staff alleged an average of ninety-one Level I or II violations per year between 2017 and 2019. *See id.* at 11 (providing data regarding Enforcement Staff allegations). For further context, the COI hosted six hearings over disputed allegations in 2019. *See id.* at 12.

167. Parkinson, *supra* note 164, at 226 (noting that the Enforcement Staff directs the notice to the university's president or chancellor).

168. *See id.* at 224 (noting that the COI has concluded that the Enforcement Staff has not met its burden "plenty" of times).

169. *See Division I Infractions Process*, *supra* note 157 (illustrating the four means by which a case resolves and showing that three end with a COI adjudication). "The jurisdictional responsibility of the COI is to hear and resolve cases of institutional culpability." Potuto, *supra* note 154, at 295.

170. *Division I Committee on Infractions*, NCAA, http://ncaa.org/governance/committees/division-i-committee-infractions [https://perma.cc/2YPM-4BAE] (last visited Feb. 28, 2022).

171. *See Inside the Division I Infractions Process: Division I Committee on Infractions Composition*, NCAA (Jan. 2019), http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_COIComposition-FactSheet.pdf [https://perma.cc/PU5K-TTTL] [hereinafter *Inside the Division I Infractions Process: Composition*] (explaining that a panel's size for each individual case is between three and seven COI members).

Thus, the COI touts the infractions process as "peer-review[ed]."[172] There are up to twenty-four COI members at any given time, a smaller panel of which considers each case on the COI's behalf.[173]

NCAA Division I legislation places extra responsibility and accountability on head coaches.[174] More specifically, Division I legislation presumes that head coaches are responsible for the actions of those who report to them.[175] Under NCAA Bylaw 11.1.1.1, whether the head coach knew of a staff member's actions is irrelevant.[176] Even when a head coach is unaware—or claims lack of awareness—of a staff member's actions, the COI presumes the head coach should have been aware.[177] In addition to imposing a presumption of responsibility on the head coach for violations in the sport program, Bylaw 11.1.1.1 requires head coaches to "promote an atmosphere of compliance," and "monitor the activities of all institutional staff members . . . who report, directly or indirectly, to the coach."[178]

The current version of Bylaw 11.1.1.1 has been effective since August 1, 2013.[179] Since its implementation, and relative to other NCAA rules for which it could allege violations, the Enforcement Staff uses it often and

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172. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 5 (describing infractions process's framework). For discussion regarding the benefits of judgment by peers, see Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process,* 26 CARDOZO ARTS & ENT. L.J. 695, 709 (2009) (recommending, among other things, more independent members on the COI). For discussion regarding whether the process is actually peer reviewed for coaches, see Josh Lens, *The NCAA Infractiosn Process and Peer Review*, OHIO STATE L.J. ONLINE (forthcoming 2022).

173. *See Inside the Division I Infractions Process: Composition*, *supra* note 171.

174. For a more in-depth analysis of NCAA head coach responsibilities legislation, see Josh Lens, *The Propriety of Incorporating Enforcement Staff Declination Statements Into the NCAA Infractions Process Following Bylaw 11.1.1.1 Head Coach Responsibilities Investigations*, 100 NEB. L. REV. 483 (2021).

175. 2020-21 MANUAL, *supra* note 155, § 11.1.1.1.

176. *See id.*; *see also* Nicole Auerbach, *Coaches Recognize NCAA Demand to Be More Accountable*, USA TODAY (July 11, 2013), https://www.usatoday.com/story/sports/ncaab/2013/07/11/college-basketball-coaches-rule-monitoring/2510215/ [https://perma.cc/RM89-MZH7] (describing "new world of NCAA enforcement and greater responsibility" for head coaches).

177. *See* Dennis Dodd, *Inside College Football: Hugh Freeze Faces an NCAA Issue Calipari, Carroll Avoided,* CBS SPORTS (Mar. 3, 2017), https://www.cbssports.com/college-football/news/inside-college-football-hugh-freeze-faces-an-issue-calipari-carroll-avoided/ [https://perma.cc/96YD-ZMYK] (explaining how NCAA legislation holds head coaches accountable for what happens within their programs in the context of Hugh Freeze's actions related to the Ole Miss football program between 2012 and 2016).

178. 2020-21 MANUAL, *supra* note 155, § 11.1.1.1.

179. *See id.* Under the previous version of the legislation, head coaches were presumed only *knowledgeable of*—as opposed to *responsible for*—actions of staff members who report to them. *See Meaningful Penalties Align with Significance of Wrongdoing*, NCAA (Aug. 1, 2013), http://ncaa.org/about/resources/media-center/news/meaningful-penalties-align-significance-wrongdoing [https://perma.cc/V3HD-NFLQ].

aggressively. Since 2014, the Enforcement Staff has alleged more Level I or II violations of Bylaw 11.1.1.1 than any other of the hundreds of bylaws in the NCAA manual.[180] Further, between 2014 and 2018, head coaches committed twenty-seven percent of Level I and Level II violations, the most of any position in college athletics.[181] In 2019, head coaches committed a whopping fifty-two percent of all violations. For context, assistant coaches were the next highest group at fifteen percent.[182]

A head coach's NCAA rule violation can be extremely costly, not only for the head coach, but also for the university. It can cost a university millions of dollars to investigate NCAA violations and traverse the NCAA's infractions process.[183] In 2015, for example, the University of North Carolina, Chapel Hill reported that it spent over $10 million for legal and public relations assistance with its academic fraud scandal.[184] In addition to financial costs, universities suffer reputational harm due to involvement in NCAA enforcement scandals.[185]

b. College Head Coach Employment Contracts' Incorporation of NCAA Rules

Some head coaches with "win-at-all-costs attitude[s]" willingly place their careers above their universities' futures by taking chances with actions that violate NCAA rules.[186] When caught, penalties for rule break-

180. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 11 (showing that the Enforcement Staff alleged eighteen Level I and II Head Coach Responsibilities violations in 2019, which was the most of any bylaw).

181. NCAA DIV. 1 COMM. ON INFRACTIONS, NCAA DIVISION I INFRACTIONS 2018-19 ANNUAL REPORT 17, http://ncaa.org/sites/default/files/2018-infractions-annual-report_0.pdf [permalink unavailable].

182. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 12.

183. *See* Stangel, *supra* note 38, at 139 (describing the $1.9 million cost to the University of Minnesota to investigate academic fraud in its men's basketball program and noting that the University also had to pay then-head coach Clem Haskins a $1.5 million buyout and NCAA financial penalties).

184. *See UNC-CH's Total Price Tag For Academic Scandal Tops $10M*, WRAL (Oct. 26, 2015, 5:45 PM), http://wral.com/unc-ch-paid-7-6m-for-legal-pr-help-in-academic-scandal/15022416/ [https://perma.cc/TN3F-8XT9]. The UNC case featured academic courses that the enforcement staff felt were less-than-rigorous and unfairly benefited student-athletes. *See* Pat Forde, *Baylor's Slap on the Wrist Doesn't Feel Right, But There's Not Much NCAA Rules Could Do*, SPORTS ILLUSTRATED (Aug. 11, 2021), http://si.com/college/2021/08/11/baylor-football-ncaa-sanctions-investigation [https://perma.cc/W5U9-XZZ9] (describing the UNC case as one of the "most significant scandals of the past decade"). However, because the classes were available to non-athlete students, in addition to student-athletes, the COI concluded that the classes did not violate NCAA legislation. *See id.*

185. *See* Stangel, *supra* note 38, at 139 (citing University of Minnesota example and quoting then-Chairwoman of the Higher Education Finance Committee in Minnesota as stating "significant harm" to the University's reputation resulted from its academic fraud scandal in its men's basketball program).

186. *See id.* at 152–53 (describing knowingly violating NCAA rules as "inexcusable").

ing greatly impact universities' options for terminating their coaches' employment.[187] Virtually every head coach employment contract states that it is a head coach's duty to abide by, and comply with, the NCAA's constitution, bylaws, and interpretations as well as all rules of the conference to which the university belongs.[188] Universities double down on the importance of head coaches following NCAA rules by including failure to follow NCAA rules as grounds for termination for cause.[189] More specifically, common contract language states that "a deliberate or serious violation, material in nature, of any law, regulation, constitutional provision or bylaw of . . . the NCAA" that reflects adversely on the university or its athletics program, or that results in the NCAA placing the university on probation, constitutes a basis for termination with cause.[190] A violation finding by the COI, as opposed to the university, is usually a prerequisite for just cause.[191]

Because of Bylaw 11.1.1.1, a head coach's employment contract also likely includes language providing the university cause for terminating the head coach's employment if a staff member engages in serious violations that the head coach failed to reasonably supervise.[192] For example, consider University of Michigan (Michigan) head football coach Jim Harbaugh's employment contract. Michigan can terminate Harbaugh's employment with cause upon "a material violation of a material provision" of NCAA rules within the football program that occurs as a result of Harbaugh's "failure to appropriately supervise the Program in a reasonable and customary manner."[193]

Thus, head coaches who violate NCAA rules, or oversee staff members who do so, not only face potential NCAA penalties but also may breach their employment contracts.[194] When a university's head coach commits a

187. Greenberg & Gruber, *supra* note 45, at 194.

188. *See id.* (providing example contract language from coaches' contracts including now-former Texas Tech University head football coach Kliff Kingsbury). The inclusion of university, conference, and NCAA rules is an "important aspect" of coaches' contracts. Stangel, *supra* note 38, at 153.

189. *See* Greenberg & Gruber, *supra* note 45, at 194 (providing examples, including language from Kingsbury's contract). Because of Bylaw 11.1.1.1, universities may contractually require coaches to take all reasonable steps to ensure staff members comply with NCAA rules. *See* Greenberg, *supra* note 44, at 147, 209.

190. *See* Greenberg, *supra* note 44, at 147 (noting that the contract also likely references conference or university rules, which are less relevant to this Article).

191. Stangel, *supra* note 38, at 154.

192. *See* Greenberg, *supra* note 44, at 147, 210; *see also* Greenberg & Gruber, *supra* note 45, at 151–52 (referring to such a clause as "[t]he newest catch-all"); *see also* Stangel, *supra* note 38, at 154 (explaining that just cause usually requires a major violation by the head coach or a staff member of which the head coach was aware).

193. EMPLOYMENT AGREEMENT BETWEEN THE UNIVERSITY OF MICHIGAN AND JAMES J. HARBAUGH § 4.02(d) (Dec. 28, 2014).

194. *See* Stangel, *supra* note 38, at 153; *see also* Greenberg, *supra* note 44, at 147 (explaining that NCAA rule violations can have a dramatic effect on a coach's career, including a university terminating an employment contract for the coach's

significant NCAA violation, the university must determine whether to retain the coach, and at what cost.[195] For example, under his contract in place at the time federal authorities implicated Self and Kansas, Kansas would have owed $5.4 million to Self even if it fired him for committing major NCAA rules violations.[196] The following Section further explores the situation whereby universities must make an employment decision regarding a rule breaking head coach.

II. UNIVERSITIES' EMPLOYMENT DECISIONS REGARDING HEAD COACHES INVOLVED IN NCAA RULES VIOLATIONS

The instances in which a university terminated a head coach's employment for NCAA rules violations are numerous. Notable examples include the University of Nevada, Las Vegas firing head men's basketball coach Jerry Tarkanian, the University of Washington firing head football coach Rick Neuheisel, and both the University of Oklahoma (Oklahoma) and Indiana University (Indiana) firing head men's basketball coach Kelvin Sampson.[197] More recently, the University of Tennessee (Tennessee) terminated head football coach Jeremy Pruitt's employment due to alleged violations of NCAA recruiting rules.[198]

The instances in which a university terminated a head coach for cause for involvement in NCAA violations without having to pay the coach severance is fewer, however. This Part examines select instances where the NCAA implicated a head coach in NCAA rules violations, forcing their universities to make a decision regarding the coach's employment. As these examples illustrate, universities sometimes choose to continue to employ their head coaches, possibly due to the coach's success or because the employment contract renders the alternative cost prohibitive. Other

breach). One legal scholar opines that the fiscal consequences for a head coach who breaches an employment contract by violating NCAA rules are worse than any consequences emanating from NCAA sanctions. *See* Selvaggi, *supra* note 76, at 227.

195. *See* Schrotenboer et al., *supra* note 54 (explaining that a university must perform its own risk calculation).

196. *See id.* (describing Self's contract provision as "leverage" and noting that it differs "starkly with other coaches' contracts").

197. *See* Courtney Bru, *Hoosier Legal Adviser Sampson? The Dangers of Terminating Without 'Just Cause'*, 16 NO. 5 OKLA. EMP. L. LETTER 5 (2008) (advising employers to proceed carefully and comply with any procedural requirements before and when terminating for cause). By terminating Sampson for cause, Indiana avoided having to pay Sampson $2.5 million in severance under his contract. *See id.* Washington terminated Neuheisel for cause for violating NCAA rules by participating in an NCAA basketball pool, and UNLV terminated Tarkanian for cause for NCAA violations. *Id.* As of March 2022, Kelvin Sampson serves as the University of Houston's head men's basketball coach.

198. *See* Rachel Treisman, *University of Tennessee Fires Head Football Coach Over Alleged Recruitment Violations,* NPR (Jan. 18, 2021), http://npr.org/2021/01/18/958132859/university-of-tennessee-fires-head-football-coach-over-alleged-recruitment-viola [https://perma.cc/3QFJ-4J9T] (quoting chancellor Donde Plowman as explaining that Pruitt "did not meet the university's expectations for promoting an atmosphere of compliance" and monitoring his staff).

times, universities separate from their head coaches, sometimes with no further obligation to provide compensation and other times continuing to compensate the coaches. University administrators could potentially save their universities millions by heeding these examples.

A. *Instances Where a University Made an Employment Decision Regarding a Head Coach Involved with NCAA Rules Violations and Ramifications of the Employment Decision*

Prominent coaches who were both successful on the court and involved in NCAA violations include head men's basketball coaches Clem Haskins, Jim O'Brien, Kelvin Sampson, and Bruce Pearl.[199] Because their situations shaped how universities draft modern head coach employment contracts, this Section begins with a brief analysis of them before moving on to more recent instances from which universities can continue to learn.[200]

1. *Clem Haskins*

In 1999, former University of Minnesota (Minnesota) tutor Jan Gangelhoff disclosed to local media that she had written about 400 research papers and completed exams for twenty men's basketball student-athletes during the tenure of then-head coach Clem Haskins.[201] Haskins denied any wrongdoing but resigned a few months later.[202]

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199. Other scholars have covered these scenarios from varying angles. *See, e.g.*, Epstein, *supra* note 134, at 18 (referring to the O'Brien, Sampson, and Pearl scenarios as a "triumvirate"); *see also* Greenberg, *supra* note 83. Scholars have also written about Neuheisel's employment termination and subsequent lawsuit against the University of Washington and the NCAA. However, Neuheisel's scenario is less relevant to this Article as, while Washington terminated his employment for violating NCAA rules regarding gambling and cooperating during the ensuing investigation, his lawsuit centered on whether he received appropriate and sufficient process during and following his employment termination. For further discussion, see Greenberg, *supra* note 83, at 231–35.

200. *See, e.g.*, Epstein, *supra* note 134, at 18–19 (explaining that "O'Brien's case set an example for university counsel, athletics directors and contract drafters to tighten college coaching contracts"); *see also* Greenberg, *supra* note 83 (describing adjustments Ohio State made in O'Brien's successor's contract).

201. *See* Associated Press, *Minnesota to Sue Haskins*, CBS NEWS (Sept. 11, 2000, 6:35 PM), http://cbsnews.com/news/minnesota-to-sue-haskins/ [https://perma.cc/NNQ6-ZKD7]. "The subjects of these papers ranged from acid rain to Native American relations to premenstrual syndrome." Frank J. Ferraro, *When Athletics Engulfs Academics: Violations Committed by University of Minnesota Basketball*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 13, 14 (2003).

202. *See* Associated Press, *supra* note 201 (noting Haskins resigned three months after Gangelhoff disclosed the impermissible academic assistance). Amid rumors regarding the academic misconduct in the men's basketball program, the University and its regents wanted Haskins to "disappear" but were constrained by Haskins's employment agreement. Sara A. Elliott, Richard M. Southall, Mark S. Nagel, Paul J. Batista & James T. Reese, *The Board of Regents of the University of Minnesota v. Haskins: The University of Minnesota Men's Basketball Academic Fraud Scandal—A Case Study*, 13 J. LEGAL ASPECTS SPORT 121, 125 (2003).

Upon his resignation, Minnesota paid Haskins $1.5 million to buy out the years remaining on his contract.[203] The parties formed their buyout agreement under the "unjust cause" provisions in Haskins's employment contract.[204] The agreement required Haskins to "cooperate with the university's investigation" and, if Haskins did not, provided the University "the right to require specific performance through legal action."[205] At the time the parties reached the buyout agreement, Minnesota's president stated there was "no proof" that Haskins engaged in wrongdoing.[206] Haskins continued to deny Gangelhoff's allegations during the University's nine-month, $2.2 million investigation.[207]

In 2000, Minnesota learned that Haskins acknowledged to NCAA investigators he paid Gangelhoff $3,000 for committing academic fraud.[208] Because he lied during the investigation in violation of the buyout agreement, Minnesota sued Haskins to recover the $1.5 million.[209] The lawsuit included fraud, deceit, and breach of contract claims.[210] The parties

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203. *See* Stangel, *supra* note 38, at 139 (noting the University's investigation implicated Haskins). Haskins and Minnesota agreed to a ten-year extension of his original contract in 1992. *See* Greenberg, *supra* note 44, at 221.

204. *See* Greenberg, *supra* note 44, at 223.

205. *Id.*

206. FCCNN Administrator, *University Sues Haskins for Return of Buyout*, BRAINERD DISPATCH (Sept. 12, 2000), http://brainerddispatch.com/sports/university-sues-haskin-return-buyout [https://perma.cc/GX2Q-BPV5] (noting the University's president had to "defend[ ]" the buyout at the time). Minnesota likely recognized it lacked legally sufficient evidence to support a just cause termination under Haskins's employment contract, and its president publicly thanked Haskins for his "thirteen years of service . . . and . . . [wished] him a future of success and good health." Elliott et al., *supra* note 202, at 122, 129.

207. *See* Greenberg, *supra* note 44, at 223 (describing Haskins's denials); *see also* Associated Press, *supra* note 201 (describing investigation and fallout including two University administrators departing and self-imposed penalties like recruiting restrictions and a postseason ban). Other individuals who worked with the men's basketball program reported, among other things, that Haskins "asked [them] to do course work" for student-athletes, that Haskins intimidated them after reporting suspicions that student-athletes cheated, and that "faculty members felt pressured to keep players eligible." *Cheating Scandal Timeline*, MINN. PUB. RADIO, http://news.minnesota.publicradio.org/features/199903/11_newsroom_cheating/timeline.shtml [https://perma.cc/YS82-WTB2] (last visited Feb. 28, 2022).

208. Greenberg, *supra* note 44, at 223.

209. *See* FCCNN Administrator, *supra* note 206 (quoting University attorney Lorie Gildea as stating, "The university got ripped off, and we want our money back").

210. *See id.* (noting that a federal grand jury also pursued the matter because some of the involved individuals submitted fraudulent coursework through the mail). For more specific information regarding the University's lawsuit, see Elliott et al., *supra* note 202, at 132–34. Haskins's attorneys asked the court to dismiss the University's lawsuit, arguing that the University violated a clause in the buyout agreement by not trying to resolve the dispute before going to court. *See Haskins in Salary Flap With School*, ASSOCIATED PRESS (Nov. 10, 2000), http://apnews.com/article/a9cd23cd1237cae49cbdb2d307bd92566 [permalink unavailable] The University contended this argument was flawed because Haskins committed fraud,

agreed to permit an arbitrator resolve the dispute, and the arbitrator ordered Haskins to return $815,000 of the $1.5 million.[211]

Haskins's employment contract had permitted Minnesota to terminate him with just cause in the event of a major NCAA violation involving Haskins.[212] The contract specifically stated, "Determination of violation of a rule of [the NCAA] shall require a finding by the [NCAA]."[213] In 2000, the COI released its sixty-page public report adjudicating numerous alleged NCAA violations in connection with the matter and concluding Haskins "was knowledgeable about and complicit in the academic fraud . . . ."[214] The COI described the violations in the men's basketball program as "among the most serious academic fraud violations to come before it in the past 20 years."[215] The COI cited Haskins for, among other violations, failing to act ethically.[216] The COI imposed penalties including placing Minnesota on probation for four years, reducing the number of athletics scholarships in its men's basketball program, and recruiting restrictions.[217] The COI also placed a seven-year show-cause order on Has-

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rendering the agreement, including the dispute resolution clause, unenforceable. *Id.*

211. *See* Associated Press, *Judge Rules Haskins Must Return $815,000*, J. TIMES (May 14, 2002), https://journaltimes.com/news/state-and-regional/judge-rules-haskins-must-return-815-000/article_1dc4e049-85f1-5161-bf26-576f56063941.html [permalink unavailable] (explaining that since $425,000 of the buyout was deferred compensation, the award meant the University would receive $1.075 million of the buyout). Perhaps the University was motivated to arbitrate after a federal judge dismissed a felony fraud charge against Gangelhoff for misappropriating federal Pell Grant funds for a men's basketball student-athlete and rejected a plea agreement that required her to testify against Haskins. *See* Todd Milbourn, *Judge Dismisses Charge, Gangelhoff Goes Free*, MINN. DAILY (Sept. 26, 2000), http://mndaily.com/217560/uncategorized/judge-dismisses-charge-gangelhoff-goes-free [https://perma.cc/KSY4-CV9Y] (quoting Hamline University law professor as explaining Gangelhoff would have been the "star witness" against Haskins). The arbitration followed an unsuccessful mediation attempt and denial of Haskins's summary judgment motion. *See* Elliott et al., *supra* note 202, at 135–36.

212. *See* Greenberg, *supra* note 44, at 221 (quoting Haskins's employment contract and pointing out that Minnesota would still owe Haskins deferred compensation if it terminated him with just cause).

213. *Id.* at 222.

214. Press Release, Jack H. Friedenthal, Chair, NCAA Division I Committee on Infractions, University of Minnesota, Twin Cities Public Infraction Report 3 (Oct. 24, 2000), http://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102169 [https://perma.cc/J7MD-XXVL].

215. *Id.* (describing violations as "significant, widespread and intentional" and undermining "the bedrock foundation of a university and the operation of its intercollegiate athletics program").

216. *See id.* at 17 (describing, among other ways he acted unethically, Haskins's attempts at influencing student-athletes' testimony during NCAA interviews).

217. *See id.* at 28–30.

kins.[218] Given the COI's findings, Minnesota would have had just cause to terminate Haskins's employment had he not resigned.

2. *Jim O'Brien*[219]

Jim O'Brien and OSU's men's basketball program enjoyed immense success during his head coaching tenure from 1997 to 2004.[220] Despite his achievements, OSU terminated O'Brien's employment in June 2004.[221] O'Brien's dismissal stemmed from his dealings with, and recruitment of, highly-regarded prospective student-athlete Aleksandar Radojevic.[222] While recruiting Radojevic, O'Brien funneled $6,000 through an assistant coach to Radojevic's relative or guardian, purportedly to assist Radojevic's family in a war-torn region of Yugoslavia.[223] Further, O'Brien did not report his awareness of the fact that Radojevic had signed with a professional team in Yugoslavia and received compensation for playing for the team. Signing with a professional team made Radojevic a professional, rendering him ineligible to play college basketball.[224] In fact, O'Brien signed a standard NCAA form attesting that he had reported any NCAA rules violations of which he was aware.[225] Radojevic signed a National Letter of Intent to play for OSU but neither enrolled nor played there after the NCAA learned of Radojevic's professional contract in February 1999.[226]

O'Brien disclosed the payment to Radojevic to OSU's athletics director in 2004.[227] OSU reacted by notifying O'Brien of its intent to terminate

218. *See id.* at 29. For additional information on NCAA show-cause penalties, see Josh Lens, *Voiding the NCAA Show-Cause Penalty: Analysis and Ramifications of a California Court Decision, and Where College Athletics and Show-Cause Penalties Go From Here*, 19 U.N.H. L. REV. 21 (2020).

219. O'Brien's legal dispute with OSU is a "prominent" and "contemporary" contract and employment case. Adam Epstein, *Ohio and Sports Law*, 25 MARQ. SPORTS L. REV. 363, 368 (2015).

220. *See* Greenberg, *supra* note 83, at 197–98 (noting O'Brien's successes included leading Ohio State to the 1999 men's Final Four, multiple Big Ten Conference championships, and multiple NCAA men's basketball tournament appearances and receiving numerous coaching awards).

221. *See id.* at 198.

222. *See id.* at 198–99 (describing Radojevic's recruitment).

223. *See id.* at 199–200 (noting that O'Brien described the payment as a loan that he believed was permissible under NCAA rules).

224. *See id.* at 199.

225. *Id.* at 200 (describing O'Brien signing the NCAA Certificate of Compliance).

226. *See id.* at 199–200 (noting that OSU had to declare Radojevic ineligible for athletics participation and apply for reinstatement of his eligibility, which the NCAA denied). "In the summer of 1999, Radojevic entered the National Basketball Association (NBA) draft and was selected twelfth overall by the Toronto Raptors." *Id.* at 200.

227. *See id.* at 201 (explaining O'Brien worried the payment could become public through a lawsuit).

his employment.[228] More specifically, OSU offered O'Brien the choice of resigning or having his employment terminated for cause because he breached his contract by failing to comply with NCAA rules and report violations he had "reasonable cause" to believe occurred.[229] The notification informed O'Brien that under either choice, OSU had no obligation to further compensate him.[230] O'Brien had three years remaining on his employment contract at the time.[231]

OSU terminated O'Brien's employment later that day.[232] In the ensuing NCAA infractions case, the COI determined violations occurred and required OSU to pay back $800,000 in NCAA tournament revenue and imposed penalties including probation and forfeiture of records and wins between 1999 and 2002, stripping OSU of its 1999 Final Four and conference titles.[233] Further, O'Brien received a five-year show-cause penalty largely due to the same conduct that resulted in OSU terminating his employment.[234]

O'Brien's subsequent lawsuit against OSU argued it lacked "cause" under the contract's definition.[235] Under O'Brien's contract, OSU could terminate him for cause if, in relevant part: (1) O'Brien materially breached it; or (2) O'Brien knew or should have known of an NCAA violation that led to an NCAA investigation and resulted in sanctions including probation.[236] OSU asserted it possessed cause because O'Brien materially breached his contract.[237] More specifically, OSU alleged O'Brien not only violated NCAA rules when he made the payment to Radojevic's family and made matters worse when he failed to report the violation.[238] However, O'Brien argued that the contract's language required the NCAA to issue sanctions against OSU for OSU to possess cause.[239] Thus, per O'Brien, there could be no breach until the NCAA issued sanctions.[240] O'Brien pointed out that the NCAA had not penalized OSU at the time it termi-

228. *Id.* at 202–04 (quoting letter).

229. *See id.* at 203 (quoting notification).

230. *See id.*

231. *See* Epstein, *supra* note 134, at 18. After a successful 1998-99 season, OSU rewarded O'Brien by extending his contract term by eight years and significantly increasing his compensation. Greenberg, *supra* note 83, at 200–01.

232. *See* Greenberg, *supra* note 83, at 204 (noting that O'Brien requested additional time in which to reach a decision, but OSU refused).

233. *See id.* (explaining that erasing these records means that OSU technically did not win any games between 1999 and 2002).

234. WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW: COACHING CONTRACTS § 16:8 (2011).

235. *See* Greenberg, *supra* note 83, at 205, 208.

236. *See id.* at 201, 205–06 (describing contract's language as "favorable to O'Brien").

237. *See id.* at 208.

238. *Id.*

239. *See id.* at 208–09.

240. *See id.*

nated his employment, and thus, OSU lacked cause at the time.[241] As a result, O'Brien contended that OSU owed him liquidated and compensatory damages under the contract.[242]

The Ohio Court of Claims held that O'Brien breached his contract when he had reasonable cause to believe he violated NCAA rules by making the payment to Radojevic's family and failed to disclose the potential NCAA violation.[243] Despite this determination, the court concluded that OSU lacked cause to terminate O'Brien's employment under the contract.[244] More specifically, "the court determined that O'Brien's breach was not material, and therefore, under the language of the contract, OSU did not have cause" to fire O'Brien.[245] The court emphasized that the impermissible payment for Radojevic's family was isolated and "not so egregious as to frustrate the essential purpose of that contract and thus render future performance by [OSU] impossible."[246] After OSU appealed the Court of Claims ruling, the Court of Appeals of Ohio noted, "OSU was the drafting party. OSU is not lacking in sophistication, and has only been prejudiced as a result of being held to its own bargain."[247] Thus, OSU had to pay O'Brien in accordance with the contract's termination without cause provision, and a jury awarded O'Brien $2.25 million in liquidated damages.[248] The Ohio Supreme Court upheld the award on appeal.[249] "O'Brien's victory over OSU was significant because," to that point, "coaches have rarely been successful [in lawsuits] challenging their terminations."[250] In fact, one practitioner accurately predicted that O'Brien's

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241. *See id.*

242. *See id.* (noting that O'Brien's lawsuit sought $6 million in damages).

243. *See id.* at 221–22 (explaining that the court determined that O'Brien's actions following the loan signaled he had reasonable cause to believe he had committed a violation).

244. *Id.* at 222.

245. *Id.* (noting that the court looked at the common law meaning of material breach as well as the Restatement of Contracts); *see also* Dennie, *supra* note 82. The trial judge read O'Brien's employment contract to mean that OSU "anticipated retaining O'Brien . . . even if he committed a major violation bearing on prospective eligibility and then failed to disclose," his violation even "at the very time [OSU] pursued a reinstatement request for the prospect." Potuto, *supra* note 154, at 269. Within college athletics, the judge's interpretation of the contract was inconceivable for a university concerned with institutional control and its standing among fellow NCAA member universities. *Id.* at 268–69.

246. Greenberg, *supra* note 83, at 224 (quoting O'Brien v. Ohio State Univ., No. 2004-10230, 2006 Ohio Misc. LEXIS 52, *P169 (2006)); *see also* Dennie, *supra* note 82.

247. Epstein, *supra* note 134, at 19 (quoting O'Brien v. Ohio State Univ., 2007-Ohio-4833, 2007 Ohio App. LEXIS 4316, *P95 (Ct. App. 2007)).

248. *See* Greenberg, *supra* note 83, at 224 (explaining the court's rationale).

249. Bru, *supra* note 197, at 2 (citing the O'Brien scenario as an example of a university paying millions of dollars to a coach the university believed it had cause to terminate).

250. Greenberg, *supra* note 83, at 235.

case outcome would embolden terminated coaches to pursue litigation against their former employers.[251]

After its dispute with O'Brien, OSU made significant changes to his successor's employment contract. The contract between OSU and O'Brien's successor, Thad Matta, included a wide-ranging list of incidences that would give OSU cause to terminate his employment.[252] One legal scholar described OSU's contract with Matta as OSU's attempt to do "everything possible to avoid another problem like the O'Brien situation."[253]

3. *Kelvin Sampson*

While the head men's basketball coach at Oklahoma, Kelvin Sampson committed NCAA violations by making hundreds of impermissible recruiting phone calls to prospective student-athletes.[254] In its written report adjudicating the violations, the COI stated:

> This case is a result of [Sampson's] complete disregard for Bylaw 13 telephone contact limitations during the four-year timeframe (2000-04). [Sampson] created and encouraged an atmosphere among his staff of deliberate noncompliance, rationalizing the violations as being the result of "prioritizing' rules." Though he acknowledged that he knowingly violated NCAA recruiting legislation, he did not take the phone contact violations seriously.[255]

As a result, both Oklahoma and the COI imposed significant penalties on Sampson and the University. Oklahoma's sanctions included two years of probation, reduction in men's basketball athletics scholarships, and

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251. Smith, *supra* note 45 (citing interview with Lattinville).

252. *See* Greenberg, *supra* note 83 at 221 (providing examples of occurrences in Matta's contract that were not in O'Brien's contract to include falsification of records, gambling, and alcohol and drug use and explaining OSU likely included them in response to situations involving other coaches like Neuheisel and current West Virginia University head men's basketball coach Bob Huggins); *see also* Dennie, *supra* note 82 (describing Matta's employment contract as much more stringent, lengthy, and thorough).

253. Greenberg, *supra* note 83, at 221.

254. *See* Epstein, *supra* note 134, at 19–20; *see also* Press Release, Thomas E. Yeager, Acting Chair, NCAA Division I Committee on Infractions, University of Oklahoma Public Infractions Report 1 (May 25, 2006), http://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102281 [https://perma.cc/A657-SB3L] [hereinafter Oklahoma Public Infractions Report] (describing the University of Oklahoma's men's basketball staff's 577 impermissible telephone calls, 233 of which Sampson placed).

255. Oklahoma Public Infractions Report, *supra* note 254, at 2.

recruiting restrictions.[256] Sampson's penalties included loss of bonus compensation and restrictions on recruiting.[257]

Despite his transgressions and penalties, Indiana hired Sampson as head coach of its most prized possession—its men's basketball program.[258] To that point, Indiana's sport programs had not committed any significant NCAA violations in forty-five years, and many considered its head men's basketball coaching position as one of the five best coaching jobs in the country.[259]

Based on Sampson's transgressions at Oklahoma, when Indiana hired him, it negotiated significant protections in the employment contract.[260] Sampson's employment contract listed fourteen circumstances upon which Indiana could terminate Sampson's employment for cause.[261] These included:

> 4. A significant, intentional, or repetitive violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Ten Conference or the NCAA, which violation may, in the sole judgment of the University, reflect adversely upon the University or its athletics program, including but not limited to any significant, intentional, or repetitive violation which may result in the University being placed on probation by the Big Ten Conference or the NCAA and including any violation which may have occurred during any prior employment

256. *See id.* at 16–21.

257. *See id.* at 18–19 (noting recruiting restrictions included loss of the ability to make recruiting phone calls for one year and restrictions on engaging in off-campus recruiting).

258. *See* Stephen Kriger, *Indiana's Kelvin Sampson: "Fool Me Once, Shame on You; Fool Me Twice . . ."* BLEACHER REP. (Feb. 17, 2008), http://bleacherreport.com/articles/9873-indianas-kelvin-sampson-fool-me-once-shame-on-you-fool-me-twice (analogizing violating NCAA rules regarding recruiting phone calls to exceeding the speed limit by five miles per hour yet emphasizing that coaches should follow the rules). Indiana later admitted that its hiring of Sampson was "risky." *See* Press Release, Josephine R. Potuto, Former Chair, NCAA Diviaion I Committee on Infractions, Indiana University, Bloomington Public Infractions Report 2 (Nov. 25, 2008), http://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102283 [https://perma.cc/FES2-8D6R] [hereinafter Indiana Public Infractions Report]. For discussion on the propriety and irony of the fact that Sampson gifted Oklahoma an NCAA investigation and sanctions when he left for a position with a storied program and a pay raise, see Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where it Belongs*, 52 B.C. L. REV. 551, 569-70 (2011).

259. *See* Kriger, *supra* note 258 (describing Indiana's athletics programs at the time of Sampson's hire as "clean"). Prior to Sampson's Indiana tenure, the COI had never cited Indiana's men's hoops program for a significant NCAA violation. *See* T.J. Clifton, *Does the Crime Justify the Punishment? An In-Depth Look at the Indiana University Phone Call Scandal*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 73, 74 (2009).

260. *See* Greenberg, *supra* note 83, at 214–15 (noting that O'Brien's scenario also likely influenced Indiana's negotiations with Sampson).

261. *See id.* at 214 (comparing Sampson's employment contract with that of his predecessor, Mike Davis); *see also* Epstein, *supra* note 134, at 19–20.

> of the Employee at another NCAA member institution and for which the NCAA could hold the Coach responsible;
>
> . . .
>
> 10. Fraud or dishonesty of Employee in the performance of his duties or responsibilities under this Agreement;
>
> 11. Failure to maintain an environment in which the coaching staff complies with the NCAA, Big Ten and University rules and regulations;
>
> . . .
>
> 14. Findings of the NCAA infractions committee referenced in Section 4.08 that demonstrate serious, intentional, or repetitive violations and that result in additional significant penalties or sanctions against the Employee beyond the University of Oklahoma's self-imposed sanctions taken against the Employee, including any action of the NCAA that would materially impair the Employee's ability to perform under this Agreement.[262]

Sampson vowed to put his troubles behind him, and Indiana and its athletics director elected to believe Sampson would win while following the rules as had been Indiana's custom.[263]

According to one media member, however, "Sampson failed miserably."[264] Indiana discovered, and disclosed to the NCAA, that Sampson made at least 100 impermissible recruiting calls as Indiana's coach (while on probation for the recruiting violations at Oklahoma).[265] The Enforcement Staff investigated and issued an NOA describing violations in Indiana's men's basketball program.[266]

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262. Greenberg, *supra* note 83, at 213–14 (quoting EMPLOYMENT CONTRACT BETWEEN INDIANA UNIVERSITY AND KELVIN SAMPSON § 6.02(B) (Apr. 20, 2006)).

263. Kriger, *supra* note 258. At Sampson's introductory press conference, he explained that coaches are human and make mistakes but that he had corrected them and moved forward. Clifton, *supra* note 259, at 75. Indiana's president explained that Sampson's Oklahoma violations were the university's number one concern but the University was confident Sampson could run a clean program. *See id.*

264. *See* Kriger, *supra* note 258 (describing Sampson's continued NCAA violations as damaging Sampson and Indiana's reputations).

265. *See* Andy Katz, *Indiana Gets List of Alleged Violations Related to Phone Calls*, ESPN (Feb. 12, 2008), http://espn.com/mens-college-basketball/news/story?id=3243325 [https://perma.cc/TKA2-S8PH] (describing Sampson's use of three-way calls initiated by assistant coaches to attempt to get around telephone call prohibitions).

266. *NCAA Notifies Indiana of Allegations Regarding Men's Basketball*, IND. UNIV. (Feb. 13, 2008), http://iuhoosiers.com/news/2008/2/13/NCAA_Notifies_Indiana_Of_Allegations_Regarding_Men_s_Basketball [https://perma.cc/ML48-GBNH] (quoting now-former Indiana athletics director Rick Greenspan as stating he was "extremely disappointed" in the allegations regarding Sampson (internal quotation marks omitted)).

When the Enforcement Staff issued the NOA, Sampson resigned, further decimating Indiana's men's basketball program.[267] Despite Sampson's transgressions and their violation of the protections it negotiated in its employment contract with him, Indiana paid Sampson $750,000 upon his departure in exchange for Sampson's agreement to not file a wrongful termination lawsuit.[268]

Thus, for the second time, Sampson left a university both prior to the conclusion of his employment contract term and facing an NCAA investigation and significant sanctions.[269] The COI eventually concluded that Sampson and Indiana's men's basketball staff violated both NCAA recruiting rules and recruiting restrictions remaining from the Oklahoma case by making at least 100 impermissible recruiting calls to prospective student-athletes.[270] In fact, the COI described Sampson's conduct as "unprecedented" in that he "intentionally flouted telephone penalties imposed in the Oklahoma case."[271] Further, Sampson violated NCAA legislation mandating ethical conduct when he made false and misleading statements during the investigation, resulting in the COI finding that he failed to maintain head coach responsibilities.[272] The COI imposed significant penalties on Indiana and Sampson.[273] Indiana's penalties included three years of probation, a reduction in men's basketball athletics scholarships,

267. *See* Indiana Public Infractions Report, *supra* note 258, at 6 (noting that Indiana only had two men's basketball student-athletes returning to the program at the time).

268. *See* Epstein, *supra* note 134, at 19–20 (stating "IU was willing to pay the price, if necessary, by hiring a coach who left a program under investigation by the NCAA. In the end, IU did."). An anonymous donor funded $550,000 of the buyout and the remaining $200,000 came from athletics department funds. David Wheeler, *Indiana U. Men's Basketball Coach Resigns in Wake of NCAA Charges*, CHRON. OF HIGHER EDUC. (Feb. 23, 2008), http://chronicle.com/article/indiana-u-mens-basketball-coach-resigns-in-wake-of-ncaa-charges [permalink unavailable]. If Indiana had terminated Sampson's employment without cause or not reached the $750,000 buyout agreement with him, Indiana would have owed him $2.5 million under his contract. *See* Bru, *supra* note 198.

269. These two occasions did not deter the University of Houston from hiring Sampson following the expiration of his show-cause order resulting from the Indiana violations, and Houston has reaped significant on-court benefits since hiring Sampson. *See* Matt Norlander, *How Kelvin Sampson Repaired His Career at Houston and Resurrected the Cougars, Who Are Back in the Final Four*, CBS SPORTS (Mar. 30, 2021), http://cbssports.com/college-basketball/news/how-kelvin-sampson-repaired-his-career-at-houston-and-resurrected-the-cougars-who-are-back-in-the-final-four/ [https://perma.cc/KE8W-FTLU].

270. *See* Indiana Public Infractions Report, *supra* note 258, at 1, 7.

271. *Id.* at 6 (describing Sampson's conduct as "undermin[ing] [the] enforcement and infractions processes that depends on the cooperation, and rules compliance, of coaches.").

272. *See id.*

273. The case also resulted in the COI concluding that Indiana failed to monitor its men's basketball program. *See* Indiana Public Infractions Report, *supra* note 258, at 6 (explaining that the COI, not the Enforcement Staff, made the failure to monitor allegation). Indiana was shocked at the COI's conclusion, and then-Big Ten commissioner Jim Delany described the COI's finding as imposing a

and numerous recruiting restrictions.[274] The COI imposed a five-year show-cause order on Sampson.[275]

4. *Bruce Pearl*

Tennessee hired Bruce Pearl as its head men's basketball coach in 2005.[276] Pearl and his program enjoyed immediate success, as Pearl guided the Volunteers to twenty-one wins in his first season, which tied the record for number of victories in a head coach's first year at Tennessee.[277] Tennessee rewarded Pearl by extending his contract by two years and increasing his average annual compensation to $1.3 million.[278] Tennessee, pleased with Pearl's ongoing success, extended his contract and increased his compensation again in both 2008 and 2009.[279]

However, Pearl and his staff violated NCAA recruiting rules a couple years later when, among other incidents, Pearl hosted prospective student-athletes at his home when they were on campus for unofficial visits.[280] Pearl compounded the matter by instructing the prospects and their family members to not disclose the gathering because it violated NCAA rules.[281] Pearl did not report the violation to Tennessee, denied knowledge of it when Tennessee officials asked him about it, encouraged others to provide false information regarding the matter, and originally lied to

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strict liability standard on universities who hire coaches with checkered backgrounds. *See* Clifton, *supra* note 259, at 78.

274. *See* Indiana Public Infractions Report, *supra* note 258, at 40–43.

275. *See id.* at 46. Many believe that a show-cause order serves as a scarlet letter for college head coaches, or at least blacklists them from other college athletics employment. Lens, *supra* note 218, at 21. Sampson did not coach college hoops again until his five-year show-cause order expired. *See id.* at 35.

276. *See* Epstein, *supra* note 134, at 21 (describing Pearl as "[n]o stranger to controversy").

277. *See* UT Sports Information, *Vols Ink Pearl to New Contract*, VOLQUEST (Mar. 8, 2006), http://tennessee.rivals.com/news/vols-ink-pearl-to-new-contract [https://perma.cc/5C8W-WJ56] (describing Pearl's contract extension based on his success on the court).

278. *See id.* (noting that athletics department resources, not state revenues, funds Tennessee's coaches' salaries).

279. SECLiveNews.com, *Bruce Pearl Signs New Contract with Tennessee*, BLEACHER REP. (Apr. 6, 2009), http://bleacherreport.com/articles/151863-bruce-pearl-signs-new-contract-with-tennessee?source=rss_teams_Tennessee_Volunteers [https://perma.cc/2FE6-2VJW] (describing raises that increased Pearl's annual salary to over $2.3 million).

280. *See* NCAA, UNIVERSITY OF TENNESSEE, KNOXVILLE PUBLIC INFRACTIONS REPORT 1 (Aug. 24, 2011), http://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102351 [https://perma.cc/3VSG-8Z6F] [hereinafter TENNESSEE PUBLIC INFRACTIONS REPORT]. The interactions during these prospect-funded campus visits between Tennessee coaches and the prospective student-athletes at Pearl's home constituted impermissible off-campus contact under NCAA recruiting legislation. *See id.* at 3.

281. *See id.* at 4. In April 2009, the Enforcement Staff received an anonymous letter containing a photograph of Pearl and one of the prospective student-athletes standing together at Pearl's home. *See id.* at 1.

the Enforcement Staff during interviews.[282] In a subsequent interview, Pearl provided truthful information to the Enforcement Staff.[283]

Upon receiving the Enforcement Staff's Notice of Inquiry in September 2010, Tennessee self-imposed sanctions including reducing Pearl's salary by $1.5 million over five years and prohibiting him from off-campus recruiting for one year.[284] However, Tennessee not only chose to retain Pearl, it also publicly and enthusiastically gave him a vote of confidence. Then-athletics director Mike Hamilton proclaimed, "Bruce made one mistake in this incident and he came forward to correct it. I'm glad he's our basketball coach."[285]

After conducting additional interviews, the Enforcement Staff sent Tennessee an NOA in February 2011.[286] Tennessee took the interesting step of terminating Pearl's contract yet presenting him with a new one at the reduced salary as punishment for his involvement in the NCAA violations.[287] Hamilton admitted:

> A lot of this is legal procedure . . . . Basically the information that came to light in the course of the investigation warranted the termination of his previous contract as it was written. There will be some changes in terminology of the contract. The main thing is the compensation will be changed.[288]

However, Pearl continued to work while not under contract.[289] Yet some have pointed to Pearl's employment contract as the reason Tennes-

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282. *See id.* at 1.

283. *See id.* at 7.

284. Andy Katz, *Bruce Pearl Protected by Contract*, ESPN (Sept. 17, 2010), http://espn.com/mens-college-basketball/news/story?id=5582439 [https://perma.cc/5BV3-6QLV].

285. *Id.*

286. *See* TENNESSEE PUBLIC INFRACTIONS REPORT, *supra* note 280, at 19–20.

287. *Vols' Bruce Pearl Working Without Deal*, ESPN (Oct. 21, 2020), https://www.espn.com/mens-college-basketball/news/story?id=5712243 [https://perma.cc/3GZ6-Z4MG].

288. *Id.* (internal quotation marks omitted). In a document it filed with the NCAA, Tennessee claimed it did not terminate Pearl's employment because doing so may deter others from reporting misconduct. Lubbock Avalanche-Journal, *Tennessee Officials Defend How Pearl Was Fired*, LUBBOCK ONLINE (Mar. 22, 2011), http://lubbockonline.com/article/20110726/SPORTS/307269899 [https://perma.cc/335Q-92MY]. However, perhaps Pearl's immense on-court success—Pearl had led Tennessee to its first Elite Eight appearance in the men's basketball tournament in March 2010—was Tennessee's impetus for retaining Pearl when it first learned of the impermissible gathering at his home. *See* Katz, *supra* note 284 (describing Pearl's success). Hamilton publicly stated that Tennessee was prepared to stand behind Pearl even if the NCAA suspended him for a season. *See Tennessee Fires Bruce Pearl*, ESPN (Mar. 21, 2011), http://espn.com/mens-college-basketball/news/story?id=6243862 [https://perma.cc/UJW6-ZEVF]

289. *See Tennessee Fires Bruce Pearl*, supra note 288 (stating Pearl worked without a contract after Tennessee terminated his employment contract).

see did not terminate his employment.[290] Pearl's contract precluded Tennessee from terminating him for cause absent a COI "finding" that determined Pearl knowingly engaged in or condoned conduct that constituted a "significant" NCAA violation.[291] The attorney who represented O'Brien in his lawsuit against OSU described Pearl's employment contract with Tennessee:

> It's hard to imagine a contract that affords a coach more protection than . . . Jim O'Brien's contract with Ohio State . . . . Bruce Pearl doesn't have to imagine though, because he's got just such a contract.[292]

Tennessee likely would have had a strong argument that the circumstances justified termination with cause under Pearl's employment contract once the NCAA infractions process ran its course. However, Pearl never gave Tennessee that chance, making Tennessee pay—literally—for continuing to employ him following the Notice of Inquiry and the NOA and was no longer a Tennessee employee when the infractions process concluded.

As stated earlier, when Tennessee self-imposed recruiting restrictions following receipt of the Notice of Inquiry, it self-imposed recruiting restrictions, including prohibiting Pearl from recruiting off-campus for a year.[293] However, for whatever reason, Tennessee delayed the effective date of the off-campus recruiting prohibition for two weeks.[294] During that two-week period, and just four days after Tennessee's press conference revealing the NCAA investigation into its men's basketball program, Pearl committed another NCAA violation.[295] When recruiting in Virginia, Pearl engaged in an impermissible "bump" with a prospective student-athlete.[296] Again, Pearl failed to self-report the violation to Tennessee admin-

290. *See* Katz, *supra* note 284 (citing interview of Columbus-based attorney Joseph Murray, who represented O'Brien in his lawsuit against OSU).

291. *Id.* (quoting relevant portion of Pearl's contract); *see also* Epstein, *supra* note 134, at 21.

292. Katz, *supra* note 284 (quoting Columbus-based attorney Joseph Murray).

293. *See id.*

294. *See* Will Shelton, *Bruce Pearl Fired at Tennessee*, SB NATION (Mar. 21, 2011, 2:30 PM), http://rockytoptalk.com/2011/3/21/2063725/bruce-pearl-fired-at-tennessee [https://perma.cc/6GN3-LKBD] (referring to Tennessee's decision to delay the effective date of the off-campus recruiting ban as "ill-advised"); *see also* Mike Rutherford, *Why Some People Hate Bruce Pearl: A Timeline*, SB NATION (Apr. 4, 2019), http://sbnation.com/college-basketball/2019/4/4/18295241/bruce-pearl-final-four-timeline-infractions-auburn-iowa-deon-thomas-wire-milwaukee-violations [https://perma.cc/Z27K-XAB4] (describing Tennessee's decision to not make the punishments effective immediately as "a crucial error in judgment").

295. *See* Shelton, *supra* note 294.

296. *See id.* During certain times of the year, NCAA rules permit coaches to evaluate prospective student-athletes but not have contact with them. *See* Jeremy Crabtree, *Inside Spring Guidelines*, ESPN (Mar. 1, 2015), http://espn.com/college-sports/recruiting/football/story/_id/12404435/the-recruiting-rules-rule-spring [https://perma.cc/RG8X-3BWE] (explaining NCAA evaluation periods). During

istration.[297] After learning of the impermissible bump, then-Southeastern Conference commissioner Mike Slive suspended Pearl for Tennessee's next eight SEC conference games.[298] Tennessee terminated Pearl's employment in March 2011.[299] The parties agreed to a so-called buyout for just under $950,000.[300]

Had Pearl remained a Tennessee employee through the course of COI proceedings regarding the gathering at his home, Tennessee would have had a strong argument to terminate his employment with cause. The COI's findings relevant to the determination of whether cause would have existed under Pearl's contract included:

- Pearl knowingly engaged in an NCAA violation as he admitted to the Enforcement Staff that he advised parents of one of the prospective student-athletes that it would be an NCAA violation to attend a gathering at Pearl's home.[301]
- Pearl lied to both Tennessee administrators and the Enforcement Staff when, among other things, he professed to be un-

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these periods of time in which the NCAA permits evaluations, but not contact, coaches may not engage in lengthy dialogue with a prospective student-athlete when they "bump" into them. *Id.* (stating sarcastically that "it's amazing how recruiters manage to bump into the one player they're looking for at a high school with hundreds of students and teachers").

297. *See id.* (describing the impermissible bump as a likely secondary violation).

298. *Id.*

299. *See id.* (noting that Tennessee's chancellor overruled its athletics director's desire to retain Pearl). The impermissible bump likely "tipped the scales against Pearl." *Tennessee Fires Bruce Pearl*, supra note 288.

300. *See Bruce Pearl Out as Tennessee Coach*, FOX SPORTS (Mar. 21, 2011), http://foxsports.com/stories/college-basketball/bruce-pearl-out-as-tennessee-coach [https://perma.cc/MSP9-UYKX] (noting Hamilton described both Pearl's impermissible gathering at his home and impermissible bump as factors in the decision to part ways with Pearl); *see also* Jason Kirk, *Bruce Pearl's Non-Contract Buyout Amount Revealed In Tennessee AD Mike Hamilton's Statement*, SB NATION (Mar. 22, 2011), http://atlanta.sbnation.com/georgia-bulldogs/2011/3/22/2064866/bruce-pearl-fired-contract-buyout-tennessee-basketball [https://perma.cc/6WFN-PJEL]. Because Pearl was working without a contract, it is debatable whether Tennessee legally owed him any amount or whether it was a payment in exchange for Pearl agreeing to not fight the NCAA allegations. *See id*; *see also Tennessee Fires Bruce Pearl*, supra note 288. Pearl's buyout amount was just a small fraction of the amount Tennessee paid in buyouts to coaches and administrators in the ten-year period from 2008 to 2018. During that time period, Tennessee saw the "termination or resignation of two athletics directors, four football or basketball coaches and two chancellors." *UT Buyouts Over Past 10 Years Top $24 Million*, WBIR (May 2, 2018), http://wbir.com/article/news/local/ut-buyouts-over-past-10-years-top-24-million/51-548254549 [https://perma.cc/KYJ3-VRKU] Their buyouts totaled more than $24 million. *Id.* (describing departures of individuals including Hamilton and Jimmy Cheeks, Tennessee's chancellor at the time Tennessee separated from Pearl).

301. TENNESSEE PUBLIC INFRACTIONS REPORT, *supra* note 280, at 4.

familiar with the location depicted in the photo, despite that it was his own kitchen.[302]

- Though he denied it, Pearl attempted to influence other individuals' accounts for their Enforcement Staff interviews.[303]
- Pearl twice signed forms attesting that he had reported any NCAA violations of which he was aware to Tennessee's compliance staff.[304]

Thus, it appears Pearl knowingly committed NCAA violations. His extensive efforts to conceal them show that he believed the incident was not insignificant. Of note is that the definition of a "major violation" at the time Pearl engaged in the impermissible activities incorporates the term "significant." Per the 2008-2009 NCAA manual:

> A secondary violation is a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit. Multiple secondary violations by a member institution may collectively be considered as a major violation.[305]

The month following Pearl's departure from Tennessee, the COI issued a written report concluding that Pearl engaged in multiple *major* violations, including impermissible phone calls, impermissible recruiting contact, unethical conduct, and failure to monitor and promote a compliant atmosphere.[306] At the time, the NCAA defined major violations as "[a]ll violations other than secondary violations are major violations, specifically including those that provide an extensive recruiting or competitive advantage."[307] Thus, by NCAA definition, Pearl's violations were "significant." Applying the language of Pearl's employment contract, the Enforcement Staff and COI's conclusions that Pearl knowingly committed "significant" and "major" NCAA violations likely would have constituted a circumstance justifying terminating Pearl's employment with cause had Tennessee still employed him under his contract. This could have saved Tennessee the nearly $1 million it paid Pearl under the so-called buyout.

In sum, despite Tennessee officials supporting Pearl when Tennessee publicly disclosed the violations stemming from the gathering at Pearl's home, the University parted ways with Pearl a couple weeks later after

302. *Id.* at 6 (noting Pearl also lied about whether he knew the identity of another individual, an assistant coach's wife, in the photo).

303. *See id.* at 6–7 (describing Pearl's conversations with a prospective student-athlete's father).

304. *See id.* at 5 (describing annual Certification of Compliance form).

305. NCAA, 2008-09 DIVISION I MANUAL § 19.02.2.1 (2008), http://ncaapublications.com/productdownloads/D109.pdf [https://perma.cc/X7SN-QMN7] [hereinafter 2008-09 MANUAL].

306. *See* TENNESSEE PUBLIC INFRACTIONS REPORT, *supra* note 280, at 3–10, 14.

307. 2008-09 MANUAL, *supra* note 306, § 19.02.2.2.

learning he committed the "bump" violation that, per NCAA definition, was insignificant.[308] Pearl left Tennessee with both a severance payment of nearly $1 million and NCAA sanctions.[309]

5. *Rick Pitino*

The aforementioned Pitino's program presented the COI with a case unlike any it had encountered.[310] In 2017, the COI concluded, among other things, that a Louisville "men's basketball staff member arranged on-campus striptease dances and acts of prostitution for enrolled student-athletes and prospective student-athletes . . . some of whom were minors, on their campus visits" over a three-and one-half-year period.[311] The COI characterized the staff member's planning and facilitation of the actions as Level I NCAA violations.[312] The COI also concluded Pitino committed a Level I violation of head coach responsibilities legislation by failing to monitor the staff member.[313] Thus, under Bylaw 11.1.1.1, Pitino was vicariously responsible for the staff member's actions and violation.[314] The COI imposed penalties including placing Louisville on four years of probation, banning Louisville's men's basketball program from the postseason, reducing available athletics scholarships in the men's basketball program, recruiting restrictions, suspending Pitino from coaching in five conference games in the 2017-18 season, and vacating wins and records during the relevant time period.[315] Louisville appealed some of the penalties, but the Infractions Appeals Committee upheld them.[316] As a result, Louisville holds the dubious distinction as the first Division I men's basketball program forced to vacate a national championship—it won the title in

308. *See* Shelton, *supra* note 294 (describing impermissible "bump" violation).

309. Sanctions included two years of probation and numerous recruiting restrictions. *See* TENNESSEE PUBLIC INFRACTIONS REPORT, *supra* note 280, at 13–18. Auburn University hired Pearl in 2014, where his tenure has included on-court success like leading Auburn to the 2019 Final Four, and off-court troubles including Auburn's involvement in the federal investigation into corruption in men's college basketball. *See* Rutherford, *supra* note 294.

310. LOUISVILLE PUBLIC INFRACTIONS DECISION, *supra* note 1, at 1.

311. *Id.* at 1, 4 (noting most of the illicit activity occurred in the Minardi Hall dormitory, which Pitino raised money to build and name in honor of his brother-in-law, who died in the terrorist attacks of September 11, 2011).

312. *See id.* at 2 (finding the acts constituted recruiting and ethical conduct violations).

313. *See id.* (noting the COI did not conclude Pitino knew of the violations but determined he failed to exercise sufficient oversight of the staff member's operations).

314. *See id.* at 1, 18 (explaining that Pitino failed to rebut the presumption of responsibility).

315. *See id.* at 22–26.

316. *See* NCAA DIV. I COMM. ON INFRACTIONS, DECISION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION DIVISION I INFRACTIONS APPEALS COMMITTEE, UNIVERSITY OF LOUISVILLE 7 (Feb. 20, 2018), http://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102666 [https://perma.cc/ARJ4-S3US].

2013.[317] Then-interim Louisville president Greg Postel disagreed with the Appeals Committee's decision regarding the staff member's "offensive and inexcusable" actions.[318]

Louisville elected to retain Pitino notwithstanding the COI's findings and punishments.[319] Louisville did so despite having the ability to terminate Pitino's employment under two separate clauses in Pitino's contract.[320] More specifically, Louisville could have argued that, by permitting the men's basketball program to use prostitutes and strippers to entice prospective student-athletes, Pitino engaged in "willful misconduct that could objectively be anticipated to bring him into public disrepute or scandal."[321] And "to the extent [he] knew about the misconduct and lied about [it]," Pitino engaged in acts of "moral depravity."[322]

However, it was not the "shameless sexual escapades" that were the subject of the COI case and penalties that served as the impetus for Louisville to oust Pitino.[323] Rather, it was an FBI allegation only a couple months later that Louisville agreed to pay a prospective student-athlete $100,000 through Adidas to secure his enrollment that led to Pitino's termination.[324] One day after federal prosecutors released a series of criminal complaints involving corruption and bribery in men's college basketball that included the allegation involving Louisville, the University

317. *See* Gary B. Graves, *Louisville Must Vacate Basketball Title, NCAA Denies Appeal*, ASSOCIATED PRESS (Feb. 20, 2018), http://apnews.com/article/ap-top-news-in-state-wire-basketball-college-sports-sports-c2c67d13ef72450894095dc3369ee185 [permalink unavailable] (describing Louisville's sex scandal as "embarrassing"). For a discussion on whether the technical vacation of the 2013 national championship is actually impactful, see Andy Staples, *Louisville Has Bigger Problems Than a Meaningless Banner Removal*, SPORTS ILLUSTRATED (Feb. 20, 2018), http://si.com/college/2018/02/20/louisville-loses-2013-ncaa-national-championship-penalty [https://perma.cc/HYH7-C552].

318. Graves, *supra* note 317 (quoting Postel, who explained that Louisville apologized immediately for the staff member's actions and fully cooperated with the NCAA during its investigation).

319. *See* Lindsay Schnell, *Scandal Finally, Correctly, Finishes Rick Pitino at Louisville, But His Legacy Is Set,* USA TODAY (Sept. 27, 2017), http://usatoday.com/story/sports/ncaab/columnist/2017/09/27/rick-pitino-louisville-legacy-great-coach-too-many-scandals/709384001/ [https://perma.cc/73F2-ZWB4] (explaining that the escort scandal was the second sex scandal Pitino survived at Louisville).

320. Grieb, *supra* note 5 (characterizing Louisville twice retaining Pitino after separate sex scandals as placing "winning and revenue ahead of its decency").

321. *Id.* (quoting contract language).

322. *Id.* (pointing out that the self-proclaimed madame who published a book regarding the arrangement between escorts and the staff member claimed "Pitino knew everything regarding the prostitution visits"). One media member found it "comical" that Pitino repeatedly claimed he had no idea what happened in his own program. Schnell, *supra* note 319.

323. *See* Grieb, *supra* note 5 (questioning Louisville's decision-making process and reasoning).

324. *See id.* (identifying the prospective student-athlete as Brian Bowen, whose verbal commitment to attend Louisville was a shock when he announced it publicly).

placed Pitino on unpaid administrative leave.[325] Pitino countered that, by doing so, the board was "in material breach of the terms" of his contract.[326] Louisville's Athletic Association's Board voted to begin the employment termination process for Pitino.[327] In correspondence to Pitino, Postel cited the escort scandal and Pitino's failure to notify proper authorities when an agent who was a criminal defendant in the federal bribery case was on campus among the reasons for terminating Pitino's employment.[328] Pitino's attorney tried to convince the Board that it should not terminate Pitino's employment for cause.[329] The Board was not swayed, however, voting unanimously to terminate Pitino for "just cause" under his contract.[330] At the time, Pitino had several years remaining on his contract, during which time Louisville was to pay him $44 million.[331] Legal expert Michael McCann has stated:

> From a plain reading of Pitino's contract, it appears that the university is well within its authority to fire him for just cause. Even when viewing Pitino in the most favorable light, he seemingly failed to prevent various kinds of corruption that have damaged the university's name and brand. More critical interpretations of Pitino's behavior suggest he knew about the corruption or perhaps even directed some of it.
>
> If any of those interpretations proves correct, Pitino would have violated his contract in a way that likely empowers the university to fire him for cause.[332]

Pitino sued Louisville in federal court for just under $39 million, claiming it violated his employment contract by: (1) "plac[ing] him on administrative leave without the required notice[;]" and (2) "fir[ing] him without cause."[333] Pitino's complaint stated Louisville provided eight reasons for terminating his contract, including "disparaging media publicity," "a major [university], [conference], or NCAA rule violation," and "failing

325. *See* McCann, *supra* note 3.

326. *Louisville Fires Rick Pitino Amid Federal Investigation*, CBS BALT. (Oct. 16, 2017), https://baltimore.cbslocal.com/2017/10/16/louisville-pitino-fired/ [https://perma.cc/CU8F-DS7V].

327. *Id.*

328. *See* McCann, *supra* note 3, for a full list.

329. Pitino's contract required Louisville to provide him notice and an opportunity to exonerate himself. *See* McCann, *supra* note 3.

330. *See Louisville Fires Rick Pitino Amid Federal Investigation*, *supra* note 326.

331. *See id.*

332. McCann, *supra* note 3.

333. Kevin Koeninger, *Rick Pitino Sues University of Louisville Over Firing*, COURTHOUSE NEWS SERV. (Dec. 1, 2017), http://courthousenews.com/rick-pitino-sues-university-of-louisville-over-firing [https://perma.cc/8MP6-TZBK] (detailing Pitino's complaint against the University of Louisville Athletic Association). Pitino contended he was entitled to annual payments of $4.3 million through 2026 per the liquidated damages provision in his contract. *See id.*

to promote an atmosphere of compliance, academic integrity, and ethical conduct."[334] Pitino argued that the media publicity did not constitute cause for his termination because coverage did not result from his "willful misconduct."[335] He also argued that he promoted a compliant atmosphere and that his contract does not hold him "strictly liable for his assistant coaches' alleged misdeeds."[336] The Hall of Fame coach's complaint denied his involvement in the Adidas scheme, contended that Louisville failed to conduct an independent investigation, and claimed that Louisville locked him out of his office, restricted his e-mail account, and effectually fired him by placing him on administrative leave.[337]

Pitino and Louisville filed cross motions for summary judgment largely addressing Louisville's ability to rely on the escort scandal in its decision to terminate Pitino with cause. Louisville's motion argued that the University encountered three of the most "notorious scandals in college sports history during Pitino's tenure," referencing Pitino's marital affair, the escort scandal, and the federal investigation.[338] More specifically, Louisville described Pitino's failings as "devastating" for the University, and contended that the NCAA violations resulting from the escort scandal provided just cause under Pitino's employment contract.[339] Pitino's motion contended "that the escort scandal [was] irrelevant" to the just cause determination "because the conduct occurred prior to the parties execution of" Pitino's most recent and applicable employment contract.[340] In oral arguments, Pitino's attorneys pointed out that Louisville initially defended Pitino regarding the escort scandal but later, after the federal in-

334. *Id.* (internal quotation marks omitted).

335. *Id.* (internal quotation marks omitted).

336. *Id.* (internal quotation marks omitted).

337. *Id.* (quoting Pitino's complaint as stating he "had no part—active, passive, or through willful ignorance—in the conspiracy described in the complaint").

338. *See* Gentry Estes, *University of Louisville: Damage Caused by Rick Pitino 'Catastrophic*,' COURIER J. (May 16, 2018), http://courier-journal.com/story/sports/college/louisville/2018/05/15/ulaa-rick-pitino-catastrophic-damage-university-louisville/610378002/ [https://perma.cc/GMD7-FT8G] (quoting Louiville's motion). Pitino's marital affair does not directly implicate NCAA rules and, though salacious, is relatively irrelevant to this Article. However, the affair and fallout from it likely constituted a just cause circumstance for terminating Pitino under his contract had Louisville chosen to exercise it. *See* Adam Epstein, *Kentucky and Sports Law*, 30 MARQ. SPORTS L. REV. 117, 131–32 (2019).

339. *See* Estes, *supra* note 338.

340. Augustus Flottman, *Rick Pitino's Lawsuit Against Louisville Could Set New Precedent on Contract Law,* FARUKI (May 22, 2019), http://ficlaw.com/blog/business-litigation/archives/rick-pitinos-lawsuit-against-louisville-could-set-new-precedent-on-contract-law [https://perma.cc/862Y-3LCP] (describing Pitino's argument that conduct that occurred during the operation of a prior contract cannot support a breach of contract claim after the parties supersede or substitute their prior agreement with a new contract as "a nuanced question of contract law").

vestigation implicated Louisville, attempted to use both scandals to justify terminating his employment with cause.[341]

Ultimately, Pitino and Louisville settled Pitino's lawsuit. As part of the settlement agreement, Louisville described Pitino's departure as a resignation but he did not receive any money.[342] Iona University would later hire Pitino as its head men's basketball coach, while Louisville received an NOA from the Enforcement Staff related to its involvement in the Adidas scandal.[343]

6. *Kevin Ollie*

Kevin Ollie's basketball career enjoyed "a meteoric rise", beginning as a student-athlete in the University of Connecticut (UConn) men's basketball program from 1991 to 1995 and continuing throughout a thirteen-year NBA career, during which "[h]e became a respected clubhouse mentor to young superstars like LeBron James and Kevin Durant."[344] His success continued when he became UConn's head coach in 2012 and led the team to a national championship in 2014.[345] Ollie's fall from one of the hottest coaching commodities in basketball "was just as swift and stunning."[346]

After finishing the 2017-2018 season with a 14-18 record and losing in the first round of its conference tournament, UConn terminated Ollie's

341. *See* Danielle Lerner, *Lawyers for U of L and Pitino Clash in Court Over Contract Payout and Escort Scandal*, COURIER J. (Apr. 25, 2019, 7:10 PM), http://courier-journal.com/story/sports/college/louisville/2019/04/25/rick-pitino-louisville-lawyers-fight-over-contract-escort-scandal/3572573002/ [https://perma.cc/TKY9-MJGE] (quoting Pitino's attorney arguing, "Why are we talking about Katina Powell when for three years they said he did nothing wrong? . . . . It was always about this Adidas thing and it didn't materialize like they thought it would" (internal quotation marks omitted)).

342. *See* Danielle Lerner, *Rick Pitino Reaches Settlement With University of Louisville Athletic Association*, COURIER J. (Sept. 18, 2019, 8:53 AM), http://courier-journal.com/story/sports/college/louisville/2019/09/18/rick-pitino-university-louisville-athletics-association-reach-settlement/2354450001/ [https://perma.cc/9RPC-Q3QZ] ("Pitino said he agreed to the settlement against his attorney's advice.").

343. *See* Paul Zeise, *Why Does the NCAA Always Punish Schools But Rarely Coaches?*, PITTSBURGH POST-GAZETTE (May 6, 2020), http://pressherald.com/2020/05/06/why-does-the-ncaa-always-punish-schools-but-rarely-coaches/ [https://perma.cc/669T-48HV] (describing Pitino's history of "funny interpretation of the rules" and lack of attention in following them, including providing prospective student-athletes with coupons for free McDonald's food while an assistant coach at the University of Hawaii).

344. Dom Amore, *Kevin Ollie Fired After UConn Claims 'Just Cause'; Coach Says He Will Fight*, HARTFORD COURANT (Mar. 10, 2018), https://www.courant.com/sports/uconn-mens-basketball/hc-sp-uconn-ollie-fired-20180310-story.html [permalink unavailable].

345. *See id.* (noting Ollie's success led to rumors that NBA organizations perennially considered him for head coaching positions).

346. *Id.* (noting Ollie's UConn record was 97-44 through four seasons, followed by 30-35 over the next two seasons).

employment with cause, meaning it would not have to pay him $10 million for the multiple years remaining on his contract.[347] The "just cause" stemmed from a then-pending NCAA inquiry into the program's impermissible offseason activities that included individuals from outside the program.[348] The NCAA's then-ongoing investigation also examined whether UConn's men's basketball program committed NCAA recruiting violations.[349] Ollie immediately released a statement that he intended to contest that UConn possessed just cause to terminate his employment.[350]

Ollie's employment contract language regarding the circumstances constituting "just cause" was broad.[351] The contract effectively stated that if UConn or the NCAA concluded Ollie violated NCAA rules, Ollie would be subject to suspension without pay.[352] Further, Ollie would be subject to termination with cause in the event of significant or repetitive violations.[353] Thus, notably, Ollie's contract did not require a complete NCAA investigation, let alone finding, before UConn could act.[354] Moreover, UConn could terminate Ollie's employment with cause if the NCAA cited one of Ollie's assistant coaches for NCAA violations.[355]

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347. *See id.*

348. *See id.* (describing the NCAA's restrictions on summer workouts at the time as "strict").

349. McCann, *supra* note 146 (providing example of UConn alum and NBA legend Ray Allen making a phone call to a prospective student-athlete in violation of NCAA rules).

350. *See* Amore, *supra* note 344 (quoting Ollie's statement, in which Ollie states he "always diligently promoted an atmosphere of compliance"). UConn thought it was done with Ollie, but Ollie was "by no means done with the University of Connecticut." Michael McCann, *How Kevin Ollie Could Contest UCONN's 'Just Cause' Firing*, SPORTS ILLUSTRATED (Mar. 19, 2018), http://si.com/college/2018/03/19/uconn-mens-basketball-coach-kevin-ollie-fired-just-cause-legal-analysis [https://perma.cc/4KST-8W6P]. Ollie went through UConn's appeals process, and UConn's president upheld the just cause termination, concluding Ollie partook in multiple transgressions that violated his contract. *UConn President Alleges Ollie Broke NCAA Rules*, TIMES UNION (June 25, 2018), http://timesunion.com/sports/article/UConn-president-alleges-Ollie-broke-NCAA-rules-13025629.php [https://perma.cc/6HGT-8227] (quoting the president explaining that "a series of 'isolated' or '*de minimis*' violations can become a pattern of noncompliance" (emphasis added)).

351. *See* Amore, *supra* note 345 (citing interview with Pepperdine University sports law professor Alicia Jessop).

352. See McCann, *supra* note 350.

353. *See id.* (describing implications of UConn having the ability to terminate Ollie's employment with cause as he was the highest paid state employee at the time and to continue to have to pay him would invite valid criticism regarding spending priorities and use of taxpayer money).

354. *See* Amore, *supra* note 344 (quoting Jessop as explaining, "[UConn] can arguably get out of the contract well before the NCAA ever concludes its investigation").

355. *See id.* (citing interview with Jessop).

The ensuing dispute between Ollie and UConn reads like a law student's nightmare civil procedure exam fact pattern:[356]

- In Connecticut, public university employees may unionize, and UConn's teaching and research staff unionized and negotiated a collective bargaining agreement (CBA).[357] Ollie's employment contract stated that he was entitled to the same personnel benefits that union members receive.[358] Ollie won a battle when an arbitrator ruled that the CBA between Ollie, UConn's chapter of the American Association of University Professors, and UConn took precedence over Ollie's employment agreement.[359] That CBA contained language requiring a higher standard for just cause termination.[360] The COVID-19 pandemic delayed the arbitration, as did the arbitrator's death.[361]
- Along the way, Ollie threatened to sue UConn for defamation and false light after UConn released 1,355 pages of documents related to its decision to terminate Ollie's employment with cause.[362] Ollie and his attorneys contended that UConn designed the release of the documents to disparage Ollie's character and inhibit his ability to obtain future employment.[363]
- Ollie filed a federal lawsuit against UConn alleging it illegally attempted to stop him from filing a "racial discrimination

356. Ollie's dispute with UConn "has been a complicated web of lawsuits and charges and has often been nasty, despite Ollie's long association with UConn, as a student-athlete, assistant coach and head coach, a role in which he led UConn to the national championship in 2014." Dom Amore, *Resolution in Kevin Ollie's Contract Dispute with UConn Will Be Further Delayed by Death of Arbitrator Marcia Greenbaum*, HARTFORD COURANT (Jan. 25, 2021), https://www.courant.com/sports/uconn-mens-basketball/hc-sp-uconn-men-kevin-ollie-ncaa-arbitration-marcia-greenbaum-20210126-20210125-6budcrf5ifepbpbunrjioxdxku-story.html [https://perma.cc/H7GQ-DWK7].

357. *See* McCann, *supra* note 350 (explaining that Ollie, though not a professor, falls within the bargaining unit because his employment contract so dictates).

358. *See id.* (quoting Ollie's employment contract).

359. David Borges, *Kevin Ollie Wins Ruling on Union Protection in Fight Over Firing*, CT POST (Aug. 13, 2019), http://ctpost.com/uconn/article/Kevin-Ollie-wins-ruling-on-union-protection-in-14301861.php [https://perma.cc/3XQ5-GKTD].

360. *Id.* (explaining that UConn believed the employment agreement governed the dispute).

361. *See* Jackson Lewis, *The University of Connecticut Loses Termination Arbitration with Former Coach*, JD SUPRA (Jan. 24, 2020), https://www.jdsupra.com/legalnews/university-of-connecticut-loses-3268960/ [https://perma.cc/CU8F-DS7V].

362. *See* McCann, *supra* note 146.

363. *Id.* (noting documents included a transcript of an interview of one of Ollie's former assistant coaches that indicated Ollie paid a prospective student-athlete $30,000 to attend UConn in violation of NCAA rules).

claim stemming from his employment termination."[364] Ollie claimed UConn subjected him to "disparate treatment," noting the NCAA violations for which UConn terminated his employment were less significant than violations that occurred under his predecessor Jim Calhoun's watch.[365] Ollie's suit sought emergency injunctive relief that would have permitted him to proceed with his discrimination claim while continuing the arbitration process with UConn.[366] The court dismissed Ollie's claim, concluding it was not ripe.[367] Ollie's attorney insisted that Ollie was "playing a long game" and would pursue the race discrimination claim following arbitration with UConn.[368]

- Ollie filed a lawsuit against Glenn Miller, once Ollie's top assistant coach, alleging that Miller slandered Ollie in remarks during an NCAA Enforcement interview about Ollie paying a prospective student-athlete's mother to induce the prospective student-athlete to attend UConn.[369] Miller's attorney described the lawsuit as an effort to intimidate Miller.[370]
- Ollie's legal team subpoenaed Ollie's successor, Dan Hurley, to testify in Ollie's arbitration hearing.[371]

In July 2019, the COI released its written decision regarding NCAA violations in UConn's men's basketball program. The COI concluded that

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364. Joel Anderson, *Kevin Ollie Cites Jim Calhoun and Racial Discrimination as Part of Suit Against UConn*, ESPN (Dec. 18, 2018), http://espn.com/mens-college-basketball/story/_/id/25567958/former-coach-kevin-ollie-files-suit-uconn-huskies [https://perma.cc/CBS4-T6BD] (describing suit filed in U.S. District Court in Hartford, Connecticut).

365. *See id.* (noting Calhoun won three national championships at UConn).

366. *See id.* (noting Ollie had a deadline by which to pursue a complaint with the Connecticut Commission on Human Rights and Opportunities).

367. *See* David Borges, *Kevin Ollie Dealt a Loss by Federal Judge in Racial Discrimination Claim*, NEW HAVEN REGISTER (Feb. 5, 2019, 9:04 PM), http://nhregister.com/uconn/article/Kevin-Ollie-dealt-a-loss-by-federal-judge-in-13590843.php [https://perma.cc/UGR6-NTMH] (stating it was a loss for Ollie, even though he was not coaching at the time).

368. *Id.*

369. Associated Press, *Ex-UConn Basketball Coach Kevin Ollie Sues Former Assistant*, USA TODAY (Apr. 30, 2019, 2:01 PM), http://usatoday.com/story/sports/ncaab/2019/04/30/former-uconn-coach-kevin-ollie-sues-former-assistant/39423293/ [https://perma.cc/FJ59-H37N] (noting the NCAA did not allege any violations against Ollie or UConn over the alleged payment).

370. *Id.* (internal wuotation marks omitted) (quoting Miller's lawyer Drzislav Coric).

371. *See* Michael Shapiro, *Dan Hurley Subpoenad by Kevin Ollie in UConn Arbitration Hearing*, SPORTS ILLUSTRATED (Feb. 23, 2020), https://www.si.com/college/2020/02/23/dan-hurley-subpoenaed-kevin-ollie-uconn-arbitration-case [https://perma.cc/HY99-9CWL] (describing Ollie's basis for the subpoena as "[t]he timing of [Hurley's] hiring is obviously relevant to when the decision was made to fire Kevin Ollie" (internal quotation marks omitted) (second alteration in original)).

violations in the areas of "benefits, practice, coaching personnel, and recruiting" occurred.[372] Further, Ollie "violated ethical conduct and head coach responsibility legislation and failed to cooperate" with the investigation.[373] In fact, the COI pointedly stated that Ollie's failure to maintain control both increased the severity of his violations and allowed them to occur within the program for most of his tenure.[374] The COI issued penalties including placing UConn on probation for two years, fining UConn, reducing the number of available athletics scholarships in UConn's men's basketball program, and numerous recruiting restrictions.[375] The COI also placed a three-year show-cause order on Ollie.[376] As part of the show-cause penalty, Ollie would serve a suspension of thirty percent of the first season of employment should any NCAA member university employ him between July 2, 2019 and July 1, 2022.[377] Ollie appealed several of the findings and the show-cause penalty to the Infractions Appeals Committee.[378] The Appeals Committee affirmed the COI's findings and penalty.[379] Regardless, an arbitrator ruled in January 2022 that UConn improperly terminated Ollie's employment and ordered the University to pay him over $11 million.[380] UConn disagreed with the arbitrator's ruling that the University should have waited until the infractions process concluded before determining it possessed cause to terminate Ollie's employment.[381]

372. NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF CONNECTICUT PUBLIC INFRACTIONS DECISION 1 (July 2, 2019), http://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102778 [https://perma.cc/SK4R-LTAG].

373. *Id.*

374. *See id.* (stating that "[t]he case illustrate[d] the importance of full candor and cooperation in the infractions process, as well as head coach control. The head coach faltered in both respects, increasing the severity of his violations and allowing violations within the program to occur for most of his tenure").

375. *See id.* at 28.

376. *See id.* at 28–29 (explaining that the show-cause order was due to Ollie knowingly providing false or misleading information during the investigation, failure to cooperate with the investigation, and declining to participate in a second interview with the Enforcement Staff after UConn terminated his employment).

377. *See id.* at 29. Ollie recently accepted a coaching and player development position with "Overtime Elite, a new professional basketball league for top prospects between 16 and 18 years old." Adrian Wojnarowski, *Ex-UConn Coach Kevin Ollie to Coach New Elite Basketball Prospect Venture*, ESPN (Apr. 12, 2021), http://espn.com/espn/story/_/id/31242042/sources-ex-uconn-coach-kevin-ollie-coach-new-elite-prospect-venture [https://perma.cc/VMN6-W97Z].

378. *See* NCAA DIV. I COMM. ON INFRACTIONS, DECISION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION DIVISION I INFRACTIONS APPEALS COMMITTEE, UNIVERSITY OF CONNECTICUT 1 (May 6, 2020), http://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102853 [https://perma.cc/M4GS-ZNGB].

379. *See id.*

380. *See* Associated Press, *Former UConn Men's Basketball Coach Kevin Ollie Wins Arbitration Case*, SPORTS ILLUSTRATED (Jan. 20, 2022), http://si.com/college/2022/01/20/arbitrator-makes-ruling-on-uconns-dismissal-of-kevin-ollie [https://perma.cc/BX5E-UZVK].

381. *See id.* (describing the University's response to the arbitrator's ruling).

B. *Takeaways and Recommendations Stemming from Recent Instances Where Universities Made Employment Decisions Regarding Head Coaches Involved with NCAA Rules Violations*

University administrators can learn lessons from each other's coach employment contract drafting mistakes. Among them is that they should not shy away from over inclusiveness and specificity when identifying circumstances that justify termination with cause. For example, OSU learned its lesson after its situation involving O'Brien, increasing the number of circumstances justifying termination with cause from three in O'Brien's employment contract to fifteen in successor Thad Matta's employment contract.[382] Indiana benefited from having the foresight of including more specific termination for cause language addressing Sampson's prior conduct at Oklahoma when he repeated that conduct, providing Indiana justification to terminate his employment with cause.[383]

While the foregoing paragraph encourages universities to specify circumstances justifying termination with cause, inclusion of vague and subjective language that provides universities flexibility can be beneficial. For example, including subjective language like "moral turpitude" in addition to the more specific list of circumstances can be advantageous for universities seeking to part ways with a coach.[384] Further, universities should be careful that their head coach employment contracts do not limit them to the specific instances enumerated as justification for termination with cause. Thus, when listing the circumstances, universities should include language prior to the list indicating that the list is not all-inclusive (e.g., "such as" and "including").[385]

Despite these learning opportunities that situations like O'Brien's provide, many universities continue to have to pay rule-breaking coaches millions of dollars to *not* work for them. Universities usually attempt to mitigate the likelihood of having to do so contractually. Again, virtually every college head coach employment contract requires the coach to abide by and comply with NCAA rules.[386] Further, most head coach employment contracts include language that a deliberate or serious violation of an NCAA bylaw that reflects adversely on the university or an athletics

382. *See* Greenberg, *supra* note 83, at 218–21 (quoting Matta's employment contract, comparing it to O'Brien's, and concluding "OSU clearly was doing everything possible to avoid another problem like the O'Brien situation").

383. *See id.* at 214–15 (explaining that Sampson's situation at Oklahoma led Indiana to attempt to protect itself from repercussions of Sampson's violations at Oklahoma).

384. *See* Greenberg & Gruber, *supra* note 45, at 152.

385. For example, see the relevant language in paragraph 4 of Sampson's employment contract with Indiana on page 45.

386. *See* Greenberg & Gruber, *supra* note 45, at 194–95 (providing example contract language from coaches' contracts including former Texas Tech University head football coach Kliff Kingsbury). The inclusion of university, conference, and NCAA rules is an "important aspect" of coaches' contracts. Stangel, *supra* note 38, at 153.

program, or that results in the NCAA placing the university on probation, constitutes a just cause basis for termination.[387] Importantly, a violation finding by the COI, as opposed to the university, is usually a prerequisite for just cause.[388] For example, California State University, Northridge head men's basketball coach Mark Gottfried's employment contract permitted the University to terminate him with cause upon an NCAA finding of Gottfried's involvement in the men's basketball scandal.[389]

However, due to its nature, the NCAA's infractions process can complicate or interfere with universities' ability to render their desired employment decisions when their employment contracts obligate them to wait on the process concluding with a violation finding to justify termination for cause. Perhaps the biggest complication for universities is how long it takes a case to traverse the infractions process. The NCAA and COI have received so much criticism about the infractions process's sluggishness that the NCAA's enforcement website includes an entire page entitled, "Why can infractions cases take a long time to investigate?"[390] Data from the NCAA's 2019-20 Division I Infractions Annual Report indicates that the average infractions case starts with the Enforcement Staff investigating between twelve and twenty months.[391] If the Enforcement Staff's investigation substantiates allegations, it alleges potential Level I or Level II violations in an NOA.[392] In a contested case, the university (and other involved individuals) have ninety days to file a written response addressing the allegations.[393] The Enforcement Staff has the opportunity to file a written reply to the university's written response.[394] The COI hearing will occur no sooner than thirty days after the Enforcement Staff's written reply.[395] A case spends an average of seven days to four months with the COI.[396] A university or involved individual can appeal a COI finding or

387. *See* Greenberg, *supra* note 44, at 147 (noting that the contract also likely references conference or university rules, which are less relevant to this Article)

388. Stangel, *supra* note 38, at 153–54.

389. *See* Schrotenboer et al., *supra* note 54 (describing the contract provision as protection for the university).

390. *Why Can Infractions Cases Take a Long Time to Investigate?*, NCAA, http://ncaa.org/enforcement/why-can-infractions-cases-take-long-time-investigate [https://perma.cc/XVN8-JW3T] (last visited Feb. 28, 2022).

391. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 6–7 (explaining that the Enforcement Staff's investigation duration depends on the case type).

392. *See id.* at 9.

393. *See* 2020-21 MANUAL, *supra* note 155, § 19.7.2.

394. *See id.* § 19.7.3.

395. *See* BRYNNA BARNHART, AYAZ HAFEEZ, RUSSELL REGISTER & TODD SHUMAKER, NCAA REGIONAL RULES PRESENTATION: WHAT THE ENF? AN INTERACTIVE JOURNEY THROUGH THE FOUR STAGES OF A LEVEL I/II INFRACTIONS CASE 33, http://ncaaorg.s3.amazonaws.com/compliance/rrs/2021/presentations/aw/Association-Wide_Enforcement—What_The_ENF.pdf [https://perma.cc/KD4H-5US2] (last visited Jul. 7, 2021) [hereinafter REGIONAL RULES PRESENTATION].

396. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 6–7 (explaining that the length of time depends on the case type).

penalty.[397] An appealing university or individual has fifteen days after the COI releases its decision to notify the Infractions Appeals Committee of its intent to appeal.[398] The university or individual then has thirty days in which to file an initial written submission supporting the appeal.[399] The appeals committee advocate then has thirty days to file a written response.[400] The university or individual may file a written rebuttal with the appeals committee.[401] And, finally, the Enforcement Staff has ten days thereafter to provide a written statement to the appeals committee.[402] After the written submissions and oral argument, the infractions appeals committee spends an average of four months deciding a case.[403] "Any appealed penalty is stayed and does not apply through the appeal process."[404] Thus, it is conceivable, if not likely, an NCAA violations case can take over a year from the time the Enforcement Staff begins its investigation to the time the COI releases its decision. In 2020, for example, the COI decided a case that took two and a half years to resolve.[405] An appeal would extend the timeline even further.

Given the length of time it takes the COI to process cases, universities can put themselves in a no-win situation when their head coach employment contracts require COI adjudication prior to being able to terminate employment with cause. In this scenario, when a university has reason to believe its head coach was involved in NCAA violations and wants to terminate the coach's employment, its two choices are to do so without cause or for cause. In the former situation, the university likely will have to pay a large percentage of the amount remaining on the coach's contract or negotiate a buyout. If the university wishes to save money by terminating the coach's employment with cause, it may have to retain the coach for several months or even years while the infractions process plays out if COI adjudication of the violation is a termination with cause prerequisite. This can result in an unhappy, awkward partnership and affect recruiting and team morale.

1. *An Illustration: The University of Arizona and Sean Miller*

Consider what happened with Miller and Arizona. Perhaps no university was more embroiled in the men's basketball corruption scandal since federal authorities announced their bombshell investigation in September

397. *See id.* at 7 (illustrating infractions process).
398. *See* 2020-21 MANUAL, *supra* note 155, § 19.10.2.
399. *See id.* § 19.10.3.
400. *See id.* § 19.10.3.2.
401. *See id.* § 19.10.3.3.
402. *See id.* § 19.10.3.4.
403. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 7.
404. *Id.*
405. *See* REGIONAL RULES PRESENTATION, *supra* note 396, at 35.

2017.[406] At that time, federal authorities arrested one of Miller's now-former assistant coaches, Book Richardson, on federal fraud and bribery charges.[407] In February 2018, ESPN reported Miller paid $100,000 to secure a prospective student-athlete's enrollment.[408] As a result, Miller did not coach in one game and did not work for four more days while Arizona officials asked him "directed and pointed questions" about the allegations.[409] Arizona apparently heard what it needed—or wanted—to hear, because it announced in March 2018 that Miller would remain as head coach.[410]

Miller's employment contract permitted Arizona to terminate his employment with cause for circumstances including "demonstrated dishonesty" and "a material or repetitive violations" of NCAA rules.[411] One legal expert explained at the time that proof or a COI finding that Miller paid the prospective student-athlete would have provided Arizona a defensible rationale for terminating Miller's employment with cause.[412] However, the infractions process is still ongoing as of this writing. Thus, if Arizona had wanted to separate from Miller amid the negative publicity, it would have had to terminate his employment without cause. In that scenario, Arizona would have owed Miller more than $10 million under his contract.[413]

Instead of terminating Miller, Arizona and Miller amended their employment agreement in April 2018 to reflect what would happen if the COI determined Miller committed a Level I violation.[414] In that event, Miller would lose $1 million of his $4.1 million longevity bonus if Arizona

406. *See* Matthew Bain, *Why Sean Miller and Arizona Basketball Will Survive the Recruiting Fallout from NCAA*, AZ CENT. (Jul. 22, 2019), http://azcentral.com/story/sports/college/ua/2019/07/22/sean-miller-arizona-basketball-college-basketball-recruiting-fbi-ncaa-drew-askew-nimari-burnett/1795780001/ [https://perma.cc/TP7P-V2MJ] (noting the irony that few other men's basketball programs had enjoyed as much recruiting success in the timeframe since the scandal).

407. *See* Bruce Pascoe, *Sean Miller's Revised Contract Terms Include Threat of a Fine, New Title IX Obligations,* TUCSON.COM (Apr. 15, 2018), http://tucson.com/sports/arizonawildcats/basketball/sean-millers-revised-contract-terms-include-threat-of-a-fine-new-title-ix-obligations/article_2dee0bde-5b01-57bc-ad94-dcf3d5a761a0.html [https://perma.cc/DR52-2YWZ].

408. *See id.*

409. *Id.* (internal quotation marks omitted).

410. *See id.* (noting Miller coached the final six games of the 2017-18 season).

411. Michael McCann, *What's Next for Sean Miller and Arizona? Why His Contract Language Could Play a Pivotal Role*, SPORTS ILLUSTRATED (Feb. 24, 2018), http://si.com/college/2018/02/25/arizona-sean-miller-contract-ncaa-scandal [https://perma.cc/Z8LF-TXNQ] (describing Miller's termination for cause provision as "customary").

412. *See id.* (analyzing Miller's employment contract's for cause termination provision).

413. *See* Steve Berkowitz, *If Arizona Fires Sean Miller For Cause, It Would Set Up Potential Legal Fight Over Contract*, USA TODAY (Feb. 24, 2018), http://usatoday.com/story/sports/ncaab/pac12/2018/02/24/arizona-fires-sean-miller-cause-legal-fight-possible/370554002/ [https://perma.cc/X6RP-3QP8].

414. *See* Pascoe, *supra* note 407.

retained him despite the COI finding.[415] Alternatively, Miller would lose his longevity fund shares if the University terminated his employment with cause.[416]

Miller and Arizona continued to receive negative publicity for the scandal when a March 2020 HBO documentary entitled The Scheme aired.[417] In the documentary, individuals accused Miller of paying prospective student-athletes to enroll at Arizona in violation of NCAA rules.[418]

In October 2020, Arizona received the Enforcement Staff's NOA that alleged nine violations, including numerous Level I allegations against men's basketball staff members.[419] Among them was a Level I charge against Miller for violating NCAA head coach responsibilities legislation.[420] Arizona's infractions case will go through the Independent Accountability Resolution Process (IARP).[421] The IARP was created in 2018 in order for a panel of individuals completely independent of the NCAA and its members to adjudicate complex cases involving alleged violations of core NCAA values.[422] The case should resolve in 2022.[423]

Despite the serious allegations, Arizona permitted Miller to continue to coach, and Arizona won seventeen out of twenty-six games in the 2020-21 season.[424] Due to Arizona's proactive self-imposition of a postseason

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415. *See id.* (explaining that "Miller became fully vested in 175,000 shares of Western Refining Logistics stock on May 31, 2017").

416. *See id.*

417. *See* Adam Zagoria, *New HBO Film Reveals Unheard Audio Between Former Runner Christian Dawkins and Sean Miller, Will Wade*, FORBES (Mar. 18, 2020), https://www.forbes.com/sites/adamzagoria/2020/03/18/new-hbo-film-reveals-never-before-heard-audio-recordings-between-former-runner-christian-dawkins-and-coaches-sean-miller-will-wade/?sh=547831e44746 [https://perma.cc/AQ7L-RFPQ].

418. *See id.* (quoting Dawkins and his attorney).

419. *See* Bruce Pascoe, *Still Awaiting Word From IARP, Arizona President Robert Robbins Says 'Sean Miller Is Our Coach'*, ARIZ. DAILY (Jun. 22, 2021), http://tucson.com/sports/arizonawildcats/still-awaiting-word-from-iarp-arizona-president-robert-robbins-says-sean-miller-is-our-coach/article_435e6f9c-8035-11eb-9707-f35bf59fa1c7.html [https://perma.cc/5X8F-M75F] (describing other violation allegations against men's basketball staff members including that they falsified academic records for prospective student-athletes, accepted $20,000 in bribes, and loaned $500 to a student-athlete and attempted to cover it up).

420. *See id.*

421. *See id.* (noting there were already four cases on the IARP docket ahead of the Arizona case at the time).

422. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 5, 34, 37.

423. *See* Bruce Pascoe, *NCAA Says IARP Cases Involving Arizona, Five Other Schools to Be Finished Within a Year*, ARIZ. DAILY (Apr. 28, 2021), http://tucson.com/sports/arizonawildcats/basketball/pascoe/ncaa-says-iarp-cases-involving-arizona-five-other-schools-to-be-finished-within-a-year/article_a71367b6-a84b-11eb-8bc4-773f71e99ddb.html [https://perma.cc/5ASK-AQP2].

424. *See* Dan Wolken, *Opinion: Time for Arizona to Make a Decision on Sean Miller's Future*, USA TODAY (Mar. 10, 2021), http://usatoday.com/story/sports/col-

ban when media reports implicated Arizona and Miller in the scandal, its men's basketball season concluded at the end of the regular season.[425] Following the scandal, a lack of postseason success became the norm under Miller for Arizona's storied program. After the scandal became public in 2017, Arizona did not win another NCAA men's basketball tournament game until 2022, and overall, only won around half of its games between 2017 and 2021.[426]

The Arizona-Miller relationship became increasingly awkward after the 2021 season. Shortly after the 2021 season, amid questions about Miller's future with Arizona, its president Robert Robbins stated at a press conference that Miller "is our coach."[427] Robbins explained that Arizona would wait for an adjudication from the IARP before making a determination on Miller's future.[428] However, at the time, there was no timetable for the IARP to adjudicate the matter.[429]

While Arizona officials publicly supported Miller, they had not evidenced their support tangibly by extending his contract. Miller was under contract through June 30, 2022.[430] Because of the impact it could have on recruiting, it is almost inconceivable for a university to permit its employment contract with a head coach to reach its final year.[431] Miller had been at Arizona for twelve years and received contract extensions in 2012, 2013, 2014, 2015, and 2017.[432] With Miller's contract only having a year left on it, making him a "lame duck" coach, one national writer described Arizona as "paralyzed by dysfunction and indecision" and explained that Miller's tenure at Arizona reached "a boiling point."[433] Perhaps Arizona

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lege/columnist/dan-wolken/2021/03/10/ncaa-investigation-sean-millers-future-arizona-crossroads/6937349002/ [https://perma.cc/EP7M-KPRR] (describing Miller's work as "an impressive coaching job").

425. *See id.*

426. *See* Jeremy Cluff, *Sean Miller Contract Status Looms Over Arizona Wildcats Basketball Program*, ARIZ. REPUBLIC (Feb. 24, 2021), http://azcentral.com/story/sports/college/ua/2021/02/24/arizona-basketball-sean-miller-contract-status-looms-over-wildcats/6804903002/ [https://perma.cc/GZH9-77K5] (quoting *San Jose Mercury News* commentator Jon Wilner as describing Arizona as not very good).

427. *See* Pascoe, *supra* note 407.

428. *See id.* (quoting Robbins as stating, "They could have new findings. We just have to wait and find out what the final word is going to be.").

429. *See id.*

430. *See* Brian J. Pedersen, *Arizona Head Coach Sean Miller Not Thinking About Contract Extension Yet*, SB NATION (Feb. 23, 2021), http://azdesertswarm.com/basketball/2021/2/23/22288993/sean-miller-contract-extension-arizona-wildcats-final-year-future-ncaa-investigation-postseason-ban [https://perma.cc/2DS6-3FX5] (noting that Miller's employment contract stated Arizona would pay him $2.9 million for the 2021-22 term).

431. *See id.* (explaining that, at the time, Arizona lacked any verbal commitments from class of 2022 prospective student-athletes, likely because there was no assurance Miller would still be on the job).

432. *See id.*

433. Wolken, *supra* note 424 (explaining that the IARP was "moving at a glacial pace" and it could take another year for it to resolve the case).

had grown cold on Miller because of his recent relative lack of on-court success and the shine had worn off the amazing success in the early part of his tenure.[434]

A month after Robbins publicly supported Miller, Arizona terminated Miller's employment.[435] Arizona fired Miller without cause, and thus owed him roughly $1.5 million under his contract.[436] Arizona had already paid Miller over ten million dollars in salary and retention bonuses since the federal investigation into men's college basketball became public.[437] Arizona's handling of Miller's employment status and how much it paid him both to coach and go away since the scandal became public is especially noteworthy given the recent financial struggles of its athletics department. Just a few months before terminating Miller and paying him $1.5 million to go away, Arizona's athletics department eliminated twenty-one full-time positions and elected to not fill fifteen vacant positions.[438] However, Arizona may have felt it lacked cause to terminate Miller under his contract since the IARP had not adjudicated the NCAA violations allegations.

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434. *See id.* (noting that Miller had been to three Elite Eights and two Sweet Sixteens in his first eight seasons).

435. *See* Ryman & Cluff, *supra* note 24 (quoting athletics director Dave Heeke as stating it was time for a "fresh start").

436. *See id.* (explaining that Miller's contract permitted "him to receive 50% of his remaining guaranteed pay"). One national sports commentator criticized Arizona's handling of the situation, stating that Arizona terminated Miller's employment due to his recent lack of on-court success but had been willing to look past the NCAA violations allegations, thus evidencing where its "ethical compass" lies. *See* Pete Thamel, *Sean Miller's Firing Proves the Only Unacceptable Thing in College Basketball is Losing*, YAHOO! SPORTS (Apr. 7, 2021), http://sports.yahoo.com/sean-miller-firing-college-basketball-losing-ncaa-case-235343119.html [https://perma.cc/XG5N-458D].

437. *See* Thamel, *supra* note 436 (wondering why Arizona did not terminate Miller's employment with cause). Xavier University (Xavier) hired Miller as its head coach in March 2022. *See* Dennis Dodd, *With NCAA Enforcement on Its Last Legs, Congress Seeks to Place Limits on Investigations*, CBS SPORTS (Mar. 29, 2022, 4:55 PM), https://www.cbssports.com/college-basketball/news/with-ncaa-enforcement-on-its-last-legs-congress-seeks-to-place-limits-on-investigations/ [https://perma.cc/8UVJ-8QBC]. Perhaps ironically, Greg Christopher serves as Xavier's athletics director and hired Miller. *Id.* Christopher served on the COI from 2012 to 2020. *Id.* In fact, Christopher chaired the COI when the enforcement staff accused Miler of NCAA violations at Arizona. *Id.*

438. *See University of Arizona Athletic Department Cutting 21 Jobs in Wake of Financial Crisis*, ARIZ. DAILY STAR (Nov. 2, 2020), http://azcentral.com/story/sports/college/ua/2020/11/02/arizona-athletic-department-cutting-jobs-due-financial-crisis/6133011002/ [https://perma.cc/YQT6-GMFN] (noting that the athletics department expected to lose $45 million or more due to the COVID-19 pandemic).

2. *A Potential Solution: Employment Contract Language That Requires an NOA—Instead of COI or IARP Adjudication—of NCAA Violations Allegations for Cause to Exist*

This Article suggests that, when drafting the list of circumstances that provide it with the ability to terminate a coach's employment with cause in the employment contract, universities should specify that an NOA alleging a Level I or II violation against a head coach—as opposed to the industry standard of a COI or IARP finding—is sufficient to constitute cause.[439] Doing so would protect universities and increase their flexibility when faced with a situation where the Enforcement Staff alleges violations against a coach.[440] It can—and does—often take a year or more for the IARP, COI, or infractions appeals committee to adjudicate an Enforcement Staff's allegations. When employment contracts require such an adjudication, this often leaves universities employing, paying millions of dollars to, and enduring an awkward relationship with, rule breaking coaches.

While at first glance this may seem undesirable for coaches, the reality is that the COI is extremely likely to affirm any Enforcement Staff allegation.[441] Per NCAA data it released in 2019, the COI affirms ninety-three

439. Universities would likely prefer employment contract language akin to that in Sampson's contract with Indiana or Ollie's contract with UConn. A university would perhaps attain maximum protection and flexibility when its head coach employment contract provides that termination for cause exists upon the university unilaterally determining that the head coach committed a Level I or II violation that would reflect adversely on the university. Such language perhaps could have given Arizona cause to terminate Miller's employment as early as 2017 after federal authorities implicated Arizona and Miller in the college men's basketball scandal, for example. Note, however, that the allegations and innuendo surrounding Miller and potential illicit activities ultimately was not part of the Enforcement Staff's NOA. *See* Wolken, *supra* note 424 (citing rumored payments to former Arizona men's basketball student-athlete Deandre Ayton as an example). However, given former assistant coach Book Richardson's involvement in, and arrest stemming from, the scandal, combined with allegations regarding academic fraud, it is likely that Arizona could have determined that Miller committed a Level I or II violation of NCAA head coach responsibilities legislation. Note, however, that because the NCAA was investigating Sampson for rules violations at Oklahoma when Indiana hired him, the circumstances of his hiring were unique. UConn and Ollie are engaged in multiple disputes regarding his termination. Further, coaches would not want their universities to have that much autonomy in determining whether a situation constituted a Level I or II violation and thus determining their fate. Therefore, coaches and their agents would likely be loath to agree to such one-sided language.

440. The employment contract should also specify that the university's receipt of an NOA alleging a Level I or II violation against the head coach constitutes a material breach of the contract. This would proactively counter O'Brien's successful argument in his dispute with OSU that one incident of wrongdoing did not amount to a material breach given his history as a coach.

441. Universities' head coach employment contracts should also specify that cause exists when the Enforcement Staff alleges a Level I or II head coach responsibilities violation against the head coach for a staff member's violation. Recall that under NCAA Bylaw 11.1.1.1, head coaches are presumed responsible for the

percent of the Enforcement Staff's allegations.[442] Thus, head coaches would not assume much more, if any, risk by agreeing to this language. If a head coach balked at this proposed language during employment contract negotiations, the university could counter by offering some small amount of severance if the university terminated the coach's employment with cause under the provision. Even if a university had to pay some severance, it would still enable it to exit the relationship in a less expensive manner than through termination without cause.

If done correctly, the suggested language would increase clarity of what constitutes cause under the contract, thus mitigating the likelihood the parties end up in litigation regarding whether cause existed.[443] This is increasingly important. While universities and head coaches typically "settle [their splits] in the backroom rather than the courtroom," the O'Brien and Neuheisel cases emboldened coaches like Ollie to pursue disputes with universities.[444] Aggrieved coaches, who believe their universities lacked cause when terminating them, are increasingly likely to air dirty laundry in a courtroom and use the public forum as leverage against their former employers.[445] For example, within days of Washington State terminating Rolovich's employment for cause, his attorney announced plans for legal action, describing the termination as "unjust and unlawful" and describing the athletics director's behavior as "discriminatory and vindictive."[446]

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actions of their staff members. 2020-21 MANUAL, *supra* note 155, § 11.1.1.1. It may seem harsh to permit termination a head coach for cause for a staff member's violation. However, the COI has only ruled against an Enforcement Staff Bylaw 11.1.1.1 allegation twice in the dozens of times the Enforcement Staff has brought it as of this writing. *See* Lens, *supra* note 174. In other words, a head coach has successfully rebutted the presumption of responsibility for a staff member's actions only twice. Thus, universities should feel empowered to pursue and insist on the inclusion of the ability to terminate a head coach's employment with cause for allegations that a staff member committed a Level I or II violation.

442. JON DUNCAN, ENFORCEMENT SELF-STUDY OPERATIONS AND COMPLIANCE 7, http://ncaaorg.s3.amazonaws.com/infractions/guides/2019ENF_SelfStudyOperComp.pdf [https://perma.cc/AG9J-RELB] (last visited July 9, 2021) (contending that this data shows that the Enforcement Staff makes well-supported charges).

443. One legal scholar describes termination clauses as the most difficult to negotiate in the employment contract. *See* Greenberg, *supra* note 44, at 209. However, it has become increasingly important to draft and negotiate employment agreements with specific provisions that detail the circumstances that qualify as termination for cause. *See* Dennie, *supra* note 82.

444. Greenberg, *supra* note 83, at 230.

445. *Id.* (citing the Neuheisel case as a good example). University presidents/chancellors and administrators likely recognize the short attention span of their athletics programs' fans and try to make the negative attention disappear by buying out coaches' employment contracts. *See* Elliott et al., *supra* note 202 (citing example of Iowa State University's handling of the departure of head men's basketball coach Larry Eustachy)

446. Pete Thamel, *Former Washington State Football Coach Nick Rolovich's Attorney Plans to Take Legal Action Against School*, YAHOO! SPORTS (Oct. 20, 2021), http://sports.yahoo.com/former-washington-state-football-coach-nick-rolovichs-attorney-

If Arizona's employment contract with Miller had included the suggested language, it could have terminated him with cause in October 2020. Instead, he and Arizona played out the 2020-21 season with Miller as a "lame duck" coach during which time prospective student-athletes would not commit to attending the university because of Miller's contract status.[447] The Arizona-Miller example illustrates a primary benefit of the suggested language—it could provide universities flexibility when faced with an employment decision regarding coaches formally accused of NCAA rules violations. After all, the COI or IARP is extremely likely to formally deem them NCAA rules violators after passage of (significant) time.

It appears that LSU may have recently *attempted* to include similar language in its contract with Wade. LSU indefinitely suspended Wade in March 2019 after he refused to answer its questions about the leaked FBI wiretaps that included Wade telling Dawkins he made a "strong-ass offer" to a third party close to a prospective student-athlete to influence the prospect to attend LSU.[448] Wade based his refusal to meet with LSU and NCAA officials on his criminal attorney's advice.[449] However, after Wade hired the attorney who also represented Miller and Pearl, Wade reversed course and agreed to meet with LSU and the NCAA.[450]

Because Wade breached his contract by initially declining to cooperate with LSU's investigation, LSU and Wade amended their employment agreement.[451] The amendments included adding two circumstances that would justify termination for cause:

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plans-to-take-legal-action-against-school-141857174.html [https://perma.cc/QS7J-R68L] (describing Rolovich's stance as based on his Catholic faith).

447. Note that Arizona had the opportunity to include this language when it amended Miller's contract in 2018 but instead required an adjudication of the violations.

448. *See* Bryn Stole, *LSU Coach Will Wade Gave Up Bonuses, Made Contract Concessions Amid Reinstatement*, ADVOCATE (Apr. 24, 2019), http://theadvocate.com/baton_rouge/sports/lsu/article_204cdb80-66d6-11e9-b8df-ebea6e1c30b8.html [https://perma.cc/PV9D-S9RB] (explaining that Wade gave up compensation bonuses that the team earned for him during his suspension).

449. *See* Glenn Guilbeau, *Maybe LSU's Wade is Not Done—Suspended Coach Hires New Lawyer With Experience vs. NCAA*, DAILY ADVERTISER (Apr. 5, 2019), http://theadvertiser.com/story/sports/college/lsu/2019/04/04/lsus-wade-makes-move-hires-attorney-ncaa-background/3368806002/ [https://perma.cc/WJ9J-V9QL] (quoting Wade's criminal attorney as explaining that Wade would meet with LSU and NCAA officials following the then-pending criminal investigation).

450. *See id.* Thompson likely advised Wade that refusal to meet with LSU and NCAA officials permitted LSU to terminate Wade's contract with cause, in which case Wade would forfeit $10 million in salary remaining on his contract. *See* Glenn Guilbeau, *Wow! Why the Sudden Change of Heart for LSU Coach Will Wade? Could it Be the $10 Million?*, DAILY ADVERTISER (Apr. 15, 2019), http://theadvertiser.com/story/sports/college/lsu/2019/04/15/lsu-coach-wade-had-10-million-reasons-sit-lsu-and-ncaa/3479853002/ [https://perma.cc/MM9M-GN2Q].

451. Steve Berkowitz, *LSU Basketball Coach Will Wade Loses More Than $400,000 in Bonuses, Pay After Investigation*, USA TODAY (Apr. 24, 2019), http://usatoday.com/story/sports/ncaab/sec/2019/04/24/lsu-basketball-coach-will-

> xviii. If the NCAA Committee on Infractions, subject to any and all appeals before the NCAA Infractions Appeals Committee, ultimately finds COACH to have committed any Level 1 or Level 2 violation, as defined by NCAA regulations, before April ___, 2019, LSU shall have cause to terminate COACH's employment, whether such claims are pursuant to the Employment Agreement or otherwise. In that event, COACH hereby agrees to waive any and all claims that LSU wrongfully terminated him or terminated him without cause, whether such claim is based on the Employment Agreement or otherwise.
>
> xix. If the NCAA Committee on Infractions issues a formal notice of allegations of a Level 1 or Level 2 violation to LSU involving COACH, LSU shall have cause to terminate COACH'S employment, whether such claims are pursuant to the Agreement or otherwise. In that event, COACH hereby agrees to waive any and all claims that LSU wrongfully terminated him or terminated him without cause, whether such claim is based on the Employment Agreement or otherwise.[452]

It is unclear whether section xviii required a COI adjudication before April 2019 or whether it was an attempt to refer to the NCAA's definition of Level I and II violations on that date. Either interpretation of the contract language is reasonable. However, the latter possibility is likelier because the amendments were discussed and implemented in April 2019 and the Enforcement Staff had not even issued an NOA at that point so clearly there could be no COI adjudication by April 2019. However, speaking of NOAs, section xix permits termination for cause upon the COI issuing an NOA that included a Level I or II violation involving Wade. However, the *Enforcement Staff*, not the *COI*, issues NOAs.[453] The COI does have the ability to conclude that a coach committed a violation even when the Enforcement Staff did not allege it, however.[454] Further, LSU's case is in the IARP and therefore the *NCAA's Complex Case Unit* issued the notice of alle-

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wade-loses-over-400-k-bonuses-pay/3567368002/ [https://perma.cc/M3MB-QG8P] (noting Wade forfeited as much as $250,000 in bonus compensation as part of the amendment). NCAA rules require employment agreements to include a stipulation that athletics department staff members owe an "affirmative obligation to cooperate fully in the infractions process, including the investigation and adjudication of the case." 2020-21 MANUAL, *supra* note 155, § 11.2.1.

452. FIRST AMENDMENT TO EMPLOYMENT AGREEMENT 2 (April 14, 2019), http://bloximages.newyork1.vip.townnews.com/theadvocate.com/content/tncms/assets/v3/editorial/9/08/908aa4c8-66da-11e9-8ced-53355c45b939/5cc0d9a8621a2.pdf.pdf [https://perma.cc/D3SU-BYUV].

453. *See* DIVISION I INFRACTIONS 2019-20 ANNUAL REPORT, *supra* note 158, at 9.

454. *See* NCAA DIV. I COMMITTEE ON INFRACTIONS, INTERNAL OPERATING PROCEDURES 5–12 (July 21, 2021) http://ncaaorg.s3.amazonaws.com/committees/d1/infraction/D1COI_IOPs.pdf [https://perma.cc/AAS8-K7UM].

gations instead of either the Enforcement Staff or COI.[455] While it is likely that LSU intended its contract amendment to give it cause to terminate Wade's employment upon the Enforcement Staff or Complex Case Unit issuing an NOA involving Wade, it is unclear from the amendment as the parties drafted it. Thus, it is unclear as of this writing whether LSU actually possessed cause under the contract amendment to terminate Wade's employment when it did so.

CONCLUSION

The NCAA infractions case pipeline is "clogged[,]" the process of investigating infractions can be "painstaking" for universities, and the wheels of NCAA justice sometimes turn as if "mired in mud."[456] Southeastern Conference commissioner Greg Sankey, likely referencing cases involving universities implicated in the men's basketball scandal, recently publicly criticized the "unacceptable" timeline for "numerous high-profile infractions matters . . . ."[457] Delayed justice in NCAA infractions matters has likely enabled several potentially guilty parties to remain in their positions, posing an image problem for the embattled NCAA that Sankey worries could result in a "crisis of confidence."[458]

Because of the way universities and their head coaches have drafted their employment contracts, universities often must choose between two undesirable choices when a coach commits a significant NCAA violation. Under the typical contract, the university must choose whether to terminate the coach's employment without cause and pay the coach a sizable severance amount or terminate the coach without cause *after* the lengthy infractions process concludes. A simple drafting change permitting universities to terminate head coaches with cause upon NCAA allegations of significant rules violations would permit universities to part ways with their head coaches sooner. For universities and athletics departments, the additional flexibility, potential cost savings, and ability to move on from a rule-breaking coach and avoid awkward, prolonged tenures is increasingly important in ever-evolving college athletics.

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455. *See* Just & Alexander, *supra* note 18.

456. Tim Sullivan, *Justice Delayed Is Justice NCAA-Style: Wheels Turning Slowly in Solving DI Infractions*, LOUISVILLE COURIER J. (Dec. 15, 2020, 5:46 PM), http://www.courier-journal.com/story/sports/college/louisville/2020/12/15/ncaa-infractions-cases-slow-way-organization-operates/6542680002/ [https://perma.cc/79CX-J5GE] (noting "the reckoning remains irritatingly incomplete" despite that over three years passed since federal officials confirmed extensive corruption in men's college basketball).

457. *Id.* (internal quotation marks omitted) (quoting Sankey correspondence to NCAA leadership).

458. *Id.* (internal quotation marks omitted) (citing Wade, Miller, and Self as examples).