

The effectiveness of early termination clauses in university coaching contracts: Will Coach Fran be as successful as Coach O'Brien?

Paul J. Batista, Texas A&M University

Frank A. Bouchet, Texas A&M University

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In the 2006-2007 football season, head football coaches at public Division I Football Bowl Subdivision (FBS) schools earned an average salary of \$950,000, not including benefits and perquisites. At least 42 of the 119 FBS coaches made over \$1 million a year in 2006-2007, up from only 5 coaches in 1999. Nine coaches are making over \$2 million, while Kirk Ferentz of Iowa has a guaranteed contract that will pay him \$4.6 million for the year ending July, 2007 (USA Today, 2006).

As college coaches' salaries have escalated to dizzying heights, a highly sought coach no longer accepts standard contract provisions tendered by the University's general counsel. Successful head coaches have followed the lead of high profile athletes by hiring agents or attorneys to represent them in seeking and securing employment. Among the most critical responsibilities of these representatives is to negotiate the terms of the employment contract, seeking to provide as much job security for the coach as possible.

Two recent high profile cases relating to early termination of coaches' contracts have garnered significant attention in the national media. One case has apparently been resolved through litigation, while the other is in its early stages. In both cases, the negotiated and agreed upon language of the contract relating to early termination "for cause" is the determining factor whether or not the coach has breached his employment contract.

In the first case, *O'Brien v. The Ohio State University*, (Slip Copy, 2007 WL 2729077, Ohio App. 10 Dist., 2007), an appellate court has determined that The Ohio State University did not have contractual grounds to fire basketball coach Jim O'Brien for cause. The court examined the terms of the early termination clause contained in O'Brien's contract, and found that the University prematurely fired O'Brien. The court affirmed a judgment in favor of O'Brien for almost \$2.5 million.

OSU athletic director Andy Geiger approached O'Brien after his first two years as head basketball coach, seeking to negotiate a new five year contract. Having just coached OSU's men's basketball team to more victories than any team in school history, O'Brien was in a position to negotiate favorable terms in his new contract. Using that leverage to his advantage, O'Brien negotiated an early termination clause listing specific conditions as the only circumstances under which the University could terminate O'Brien's contract prior to completion of the full five year term.

During the term of the contract, O'Brien notified OSU that he might have been involved in making a loan to a prospective recruit in violation of NCAA rules. The University terminated O'Brien, citing his apparent violation of NCAA rules. However, the clear and unambiguous language of the contract allowed termination only under certain enumerated circumstances, at least one of which had not been fulfilled at the time OSU terminated O'Brien's contract for cause under the early termination provision.

The second case recently in the news involves head football coach Dennis Franchione at Texas A & M University. Working with his personal assistant, Coach Fran created a secret e-mail newsletter called VIP Connections that was delivered to 23 recipients and provided inside information about the football team.

Among the information provided was information about named recruits, medical and educational information about current players, and negative comments about officials working A & M's games. This information apparently violated not only NCAA and Big 12 rules and regulations, but also the Federal Educational Rights and Privacy Act (FERPA, also known as the "Buckley Amendment") and the Health Insurance Portability and Accountability Act (HIPAA).

Subscribers to the VIP Connection paid \$1,200 per year, generating gross income of \$26,000 over a two year period. Franchione's contract with Texas A & M runs through 2012, and pays him in excess of \$2 million per year. Coach Fran's contract also contains an early termination clause, but the wording of the clause is not as favorable to Coach Fran as O'Brien's was to him.

As this abstract is being submitted, the final chapter in Coach Fran's saga has yet to be written. However, scrutinizing the early termination clause of his contract, and based on the reported allegations, it appears that Texas A & M has grounds to terminate

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Coach Fran for cause, without paying the remaining compensation contemplated in his contract. By the time of the conference, the University will have taken any action that it deems appropriate.

This presentation will review the facts of both cases, highlight and compare the specific language of the early termination clauses, and discuss the options available to both schools. The O'Brien case will be discussed in detail, and the negotiating environment existing in both contract negotiations will be reviewed.