



THE WINTHROP CLINIC: Best Practices in Contract Design and Structure

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The Winthrop Clinic is a special AD-only series of publications to help administrators utilize *Win AD*'s continually expanding data and updated features. Each edition provides ADs with turn-key, actionable content on employing innovative ideas and strategies in order to increase revenue and save time by harnessing the power of *Win AD*.

In this edition of *The Winthrop Clinic*, we offer a look at best practices for Coach and AD contracts. We summarize important considerations for termination provisions, both institution-initiated (for cause and without cause) and coach-initiated. We also cover vital factors when weighing the inclusion of compensation clawback language—what compensation is typically subject to clawback and how long the clawback should be in effect. This information, from the *Win AD* Coaches database, is presented in the hopes of providing ADs with valuable data for structuring future contracts.

➤ WHAT TO KNOW ABOUT TERMINATION PROVISIONS

One of the primary purposes of an employment agreement is to define how the parties' relationship will end and what their obligations will be at that time.

CONSIDERATIONS—SCHOOL-INITIATED TERMINATION:

- Define when it can end the relationship. A school should always be able to terminate the contract for any reason, after a reasonable period of notice.
- Define the circumstances under which the school will be required to pay severance to the terminated coach.

"FOR CAUSE" TERMINATION coach typically not entitled to future compensation, forfeits compensation not yet been earned (e.g. deferred comp)

Must Have "For Cause" Termination Triggers:

- Violations by the coach of NCAA, conference, or school rules, or breach of the terms of the employment agreement.
- Failure by the coach to immediately report to the school violations under his/her control, after becoming aware of such violations.
- Failure to promptly and accurately respond to reasonable requests or inquiries from the school, NCAA, or conference officials.
- Admission or conviction of a crime.
- Fraud or dishonesty in performing duties.
- Wagering by the coach on college, or professional sports, permitting those under his/her control to do so, or providing information about college athletics to those involved in gambling.

Good to Have "For Cause" Termination Triggers:

- Coach engaging in activity that could bring the school scandal, embarrassment, or ridicule.
- Coach engaging in a pattern of conduct that, in the reasonable and good faith judgment of the school, may constitute or lead to violation of NCAA or conference rules.
- Consumption of alcohol or use of legal drugs by the coach in a manner that materially impairs the performance of his/her duties.
- Coach engaging in commercial activities not specifically provided for under the employment agreement.

"WITHOUT CAUSE" TERMINATION coach entitled to some level of severance (e.g. payment of base salary until end of the agreement).

"Without Cause" Termination—Examples Limiting Severance Pay Exposure

REASSIGNMENT CLAUSE:

Coach agrees that Athletic Director may, at any time and with reasonable evidence of misconduct without cause or the necessity of any hearing, reassign Coach to other positions with different duties than those as Coach of University's program, without reduction in Coach's wages and benefits. . . . Prior to any reassignment, there shall be a meeting between the Coach and the President of the University to discuss the matter. After such meeting the President and Athletics Director shall confer and determine whether a reassignment shall occur. In the event the decision is made to reassign Coach, then the Coach shall have the right to accept such reassignment or terminate this Agreement. Should Coach decide to terminate this Agreement, he shall be entitled to receive payment of fifty percent (50%) of the value of his salary for the remaining term of the Agreement.

MITIGATION AND OFFSET PROVISIONS

(requires coach to seek similar employment that offsets school's severance payments):

[T]he Coach agrees to mitigate the University's obligation to pay liquidated damages under this Agreement and to make reasonable and diligent efforts to obtain employment, such as a head or assistant coaching position or administrative position at an NCAA Division I college or university or with a professional sports team, as soon as possible after termination of this Agreement by the University. Upon Coach's acceptance of any new employment, the University's obligation to pay the full amount of liquidated damages provided herein shall be reduced by the amount of the minimum guaranteed annual salary of the Coach's new position or the reasonable market value of the position, whichever is greater. Coach agrees to notify the University within fourteen (14) days of the date Coach accepts new employment of the minimum annual salary of the new employment.

CONSIDERATIONS—COACH-INITIATED TERMINATION:

- Timing and required period of advance notice of the termination.
- Coach should be required to pay "liquidated damages" to school for the loss of his/her services for remainder of the contract term. Often uses a sliding scale where the dollar amount is reduced over the term of the contract. However, these penalties are typically paid by the coach's new employer.

Coach-Initiated Terminations—Examples of Creative Clauses

"SCHEDULING CLAUSE"

(used in lieu or as part of any buyout or liquidated damages provision):

- An increasingly utilized stipulation, the "Scheduling" Clause, first appeared in Western Kentucky's contract with Dennis Felton and included specific language for early departure. This contract clause is a creative way to contain a buyout yet reward and compensate the "departing school"—an asset pay multiple dividends over a number of years. The clause can be seen in contracts at WKU, Southern Illinois University, and VCU. In the buyout, the contract required "any major conference school that hired Felton to pay Western Kentucky \$200,000 and to agree to a four-year, home-and-home series with [Western Kentucky]."

➤ WHAT TO KNOW ABOUT COMPENSATION CLAWBACKS

Clawbacks are now beginning to be used in coaching contracts, the idea being that a coach should not be compensated for misconduct or for failing to properly perform job responsibilities and that the threat of recouping previously paid bonuses or other compensation will discourage improper activity.

The primary trigger is sanctions imposed by the NCAA or the conference as result of a rule violation (including sanctions self-imposed by the school) that the coach or staff knew or should have known of. Other triggers include later-discovered violations of school policies by the coach or staff that the coach was or should have been aware of.

CONSIDERATIONS:

What compensation will be subject to clawback?

- Performance-based compensation (e.g. bonuses or other incentives) are the typical types of pay subject to clawback because they are linked to job performance and because base pay may be protected from clawback under state laws restriction wage withholding.
- Compensation earned but not yet paid (e.g. supplemental retirement benefits) could be a candidate for clawback because that pay can be forfeited, as opposed to having to be repaid by the coach to the school.

What is the period over which the clawback will remain in effect?

- Clawbacks can apply both during employment and for a period following termination of employment. While there is still relatively little case law on the enforcement of clawback provisions, the general view is a clawback is most likely to be found enforceable if the contract limits how long the restriction is to remain in effect following termination of employment. Many consider a period of one or possibly two years to be most likely enforceable.

EXAMPLE CLAWBACK CLAUSE:

Coach will forfeit and repay any Supplemental Compensation or performance bonus paid to Coach when the achievements that were the basis for such payments are vacated, diminished or in any way affected by any sanctions, whether self-imposed by ASU or imposed by the Pac-12 or the NCAA, resulting from violations of NCAA or Pac-12 Conference rules by Coach or by an assistant coach or other program member and either Coach knew or should have known that the violation had occurred or was occurring or Coach failed to establish and maintain reasonable policies and procedures for the program to prevent such violations. This clause applies regardless of whether such violations result in termination of the contract and regardless of whether Coach is still employed by ASU.

- Contact Kevin Barefoot (800-218-2280 or Kevin@WinthropIntelligence.com) to schedule a demo and discover how Win AD is helping Division-I programs of all sizes and budgets increase revenue and save money with the best data available anywhere.

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Information for *The Winthrop Clinic* is sourced from the Win AD Coaches Database:

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- If Coach terminates the contract early position or a professional coaching position determined by the ASU President, from
- If Coach terminates the contract, Coach with any Pac-12 Conference school for without the prior consent of the ASU P

Year	Sport	Base Salary	Personal Service	Deferred Comp.	Total Comp.	Contingent Bonus
2017-2018	Football	\$700,000	\$1.90	\$1.20	\$5.21	\$700,000
2016-2017	Football	\$700,000	\$1.90	\$4.01	\$700,000	\$700,000
2015-2016	Football	\$700,000	\$1.90	\$7.50	\$11.51	\$700,000
2014-2015	Football	\$700,000	\$1.90	\$4.01	\$700,000	\$700,000

