ARIZONA
EMPLOYMENT LAW LETTER
Part of your Arizona Employment Law Service

April 2018

Preparing to avoid employment agreement blunders, part 1

by Jodi R. Bohr
Gallagher and Kennedy, P.A.

By now, you've heard of Sean Miller, right? He's the University of Arizona basketball coach who was allegedly caught on wiretaps discussing payment of $100,000 to Deandre Ayton to play for the Arizona Wildcats. Less than 24 hours after Miller found himself in the hot seat, media began to speculate whether he would be fired and what his payout would be, uncovering a potential contractual blunder.

Cue the grammarian's favorite grousing topic—poor grammar

Could a typo cost the university millions? Possibly. You see, under Miller's employment agreement, the university can terminate his employment *without cause*, so long as it pays him 50% of his base salary that would have been owed through the remaining period of his agreement. At $2.6 million per year with a contract through the end of the 2022 season, a termination without cause would cost the university $5.2 million.

But shouldn't he be terminated for cause? Based on what appears to be an improperly placed closed parenthesis, a termination *for cause* could yield Miller $10.3 million in contract payments. See for yourself. The agreement provides that if he's terminated for cause, "the University's sole obligation to Coach shall be the payment of his Base Salary as provided in Section III (and where applicable, any accrued Additional Compensation earned under Section IV prior to the date of such termination)." Did you catch that? Now, move the closed parenthesis to just after "Section IV" and read it again.

Avoiding costly mistakes

Most employment contracts won't have the same potential for a multimillion-dollar mistake. But grammatical and other errors in contracts happen more often than you'd think. A recent federal court of appeals decision rested on the lack of an Oxford comma when it ruled that a group of drivers deserved overtime for certain tasks. These examples demonstrate the importance of properly determining the necessity of drafting and/or negotiating employment agreements.

Implementing a standard agreement for all employees. An employment agreement should specifically set out the obligations and rights conferred onto each party in the employment relationship. Those obligations and rights will vary by employee, so the agreement should as well. The position, seniority, duties, and contact with customers will generally determine the type and scope of the provisions in the agreement. Arizona courts determine the validity of contract provisions on a case-by-case basis, so a valid provision for one employee may not be found to be valid for another by virtue of her position.

Confusing contracts with policies. Policies are flexible and generally can be changed at the will of the employer, within the confines of federal and Arizona law. Employment agreements, on the other hand, are inflexible in that they require both parties to agree to make any changes to their terms. Therefore, you should include only those provisions that you want to be bound by. You can impose other rules or requirements without giving them the permanence and legal enforceability of a contract by drafting noncontractual policies and procedures in a handbook.

Tune in next month

Because employment agreements can vary wildly depending on the position of the employee, this topic must be divided into two columns to explore it fully. Stay tuned for my next column, which will explore the inclusion and scope of provisions within an employment agreement. In the meantime, remember that the first step is determining whether a written agreement is necessary or whether a verbal agreement—along with the company's written policies—will suffice.

We may never know how a court would interpret Miller's contract. He returned to his coaching duties with

the backing of the university. Who knows, though? Maybe with this most recent grammatical blunder, my grammar tips will make me the highlight of the party. Wishful thinking? Most certainly.

Jodi R. Bohr is an attorney with Gallagher & Kennedy, P.A. and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at jodi.bohr@gknet.com or 602-530-8035.