

## Employment Law Lessons From the Gridiron

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[Steven A. Palazzolo](#)

I love it when something happens in the news and I get to use it as a centerpiece for this newsletter. Today, it happens to be football. I'm not talking about the game on the field being some sort of allegory for how to manage your staff. I'm talking about the game behind the game. Yes, a real-live lawsuit involving the NFL and a PAC 10 school.

In case you have not heard, the Tennessee Titans have sued Lane Kiffin and the University of Southern California. Been a bad year for USC, wouldn't you say? First they loose their head coach to the NFL. Then, as reported by the *New York Times*, the NCAA smacks them with sanctions that include no post-season bowl play in 2010 and 2011 and forces them to vacate every victory in which Heisman Trophy winner Reggie Bush (or is that former Heisman Trophy winner?) played, including the 2005 national championship game. Finally, according to the *Times*, they loose 10 scholarships in each of the next three seasons.

Then USC hires Mr. Kiffin, the former head coach of the Oakland Raiders. He was fired from Oakland. Then he was head coach for the University of Tennessee, a job he quit. Now he is at USC. So what did Mr. Kiffin do that has the Tennessee Titans all riled up (and has at least some connection with employment law)? He hired an offensive coordinator to join his coaching staff.

How is that a problem? Well, seems this particular gentleman, Kennedy Pola, had a contract with the Tennessee Titans. And the Titans allege in their complaint against Mr. Kiffin and USC that the contract said Mr. Pola would not take another job without getting the "express prior written consent" of the Titans. The Titans also say that Mr. Pola was obligated to not "entertain employment with another person or entity" during the term of the contract unless he had prior written permission from the Titans or the Commissioner of the NFL.

Mr. Pola, according to the complaint, did not have permission to talk to Mr. Kiffin. So what? How does that have anything to do with Mr. Kiffin or USC? Why aren't the Titans suing Mr. Pola for breach of contract? Well, they might (although they had not as of publication time).

See, the Titans are suing Mr. Kiffin and USC for "tortuous interference with a contract." (They are also suing under a Tennessee statute that basically provides the same protection and gives them a shot at triple damages). What, you ask, is tortuous interference with a contract? It's a tort. A tort, for those of you who don't know, is basically a civil wrong – as opposed to a criminal wrong – that does not arise from a contract and that causes someone else damage. The Titans are claiming that Mr. Kiffin and, through him,

USC knew about the contract with Mr. Pola ignored the contract and convinced Mr. Pola to breach it. They want damages.

So here is what I don't get. The Titans don't allege that the contract prohibits Mr. Pola from talking to anyone about another job. They say he simply has to have permission before he does so. So why not get permission? I don't know what kind of relationship Mr. Kiffin and the head coach of the Titan's have. Maybe they don't like each other (now that I think about it, I'll bet Mr. Kiffin does not have a lot of friends in Tennessee after the way he left his last job). But I do know that Jeff Fischer, the head coach of the Titans, is a USC alum. Maybe, just maybe, if Mr. Kiffin and USC had asked, the Titans would have said something like "OK, talk to him. We don't want to hold back our employees." After all, USC isn't exactly in direct competition with the Titans.

Maybe they would have said no, but that doesn't seem smart on the Titans' part, does it? They then would have had an employee who probably didn't want to be with them anymore. They would have looked like the bad guys.

So here is the moral of our little story. When you are hiring talent, especially highly-skilled talent, ask if there is any sort of agreement with the current employer. It may be a covenant not to compete, a confidentiality agreement or a no-solicitation agreement. If there is one, honor it. It will save you a bunch of trouble in the long run. If not, hire away. (That's a pun, by the way).