

The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 19, No. 11

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November 2011

Damages In Labor And Employment Disputes: Designing The Economic Damages Model And The Role Of The Expert

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Labor and employment disputes may result from allegations of employment discrimination, and from work-related injury, wrongful death incidents or medical malpractice. In many cases, such disputes lead to claims of lost earnings and other compensation and may also include a claim of damages to family members. Differences in the nature of the claim, the basis of “but-for” and post-incident compensation, potential inclusion of damages to family members and jurisdiction-specific rules are just some of the factors that render the estimation of damages in these matters complex. The general economic environment makes the task more complicated still. A fitting economic model, one that accounts for relevant factors and is structured as allowed by the specific jurisdiction, is at the heart of the proper estimation of damages. The economic expert, serving as part of the litigation team, can and should play a central role in developing it.

The basis for a damages claim in labor and employment disputes is that a particular incident or event may have hindered, limited or completely halted an individual’s ability to earn income and receive benefits over the course of their working years. But what would that income have been? What would have been the value of those benefits? How much has, in fact, been lost?

The objective of the economic damages model in these cases is to calculate the difference between net compensation but-for the event, and the plaintiff’s actual net compensation given the disruptive event. The role of the economic expert is to construct an

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economic model of damages based on a reasonable evaluation of factors affecting the individual’s potential and actual compensation.

The first question to be addressed in the construction of the model is whether the alleged wrongful incident hindered the individual’s ability to earn income over the individual’s full remaining working life or only for a limited number of years. Closely related is the question of whether the individual would be able to replace the lost earnings opportunities, partially or fully, at some point in the future.

Answering these questions is not a straightforward matter. Consider, for example, the impact of the current economic downturn on wages and employment prospects. The economic expert should consider whether an estimate of lost compensation projection is realistic given the diminished likelihood of secured employment under the current economic circumstances.

Among other factors central to the model design are the following:

- What were the base earnings and history of compensation increases prior to the disruptive incident? The individual’s industry of employment and occupation may be a key factor in answering this question.

- What was the individual’s potential for other compensation such as health benefits, bonuses, stock options and the like? What would have been the timing of conversion to the actual monetary value of such benefits?

- What risks might the individual have faced in terms of being able to maintain employment? What can be said about the employment outlook in the industry of employment or the individual’s occupation?

- Could the individual obtain replacement employment with similar earnings



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and/or compensation? If so, what is the reasonable length of time for the individual to be able to obtain replacement employment? What are the compensation risks associated with the replacement employment?

In addition to economic elements, jurisdiction needs to be considered when designing a damages model. Jurisdictions differ in what they allow as categories of damages, deductions to the damages estimate, assumptions on potential inflation, assumptions regarding the present value of future damages and even the structure of an expert report and the documentation accompanying it. The following are some examples of differences across jurisdictions:

- Courts in New York State do not allow for the calculation of the present value of future damages in personal injury or wrongful death matters, or for any considerations regarding taxation.

- Pennsylvania is unique in its requirement to apply the “total offset method,” according to which damages awards are not discounted to present value. The assumption here is that the effect of future inflation would be offset by the interest rate, and no inflationary increases or discounting of future damages to present value are allowed.

- New Jersey poses requirements on the reports put forth by experts that are very similar to the requirements in federal court under Rule 26 – meaning that it is important to plan for the impact discovery rules.

- Federal courts and certain state courts allow for the deduction of taxes in certain labor and employment disputes. Federal courts also pose very stringent rules regarding the documentation and information that is to be contained in, or accompany, an expert report.

While these are legal issues, the economic expert plays a role in structuring the analysis and the expert report itself so that jurisdiction rules are properly addressed and the analysis is properly structured. In these legal matters as well as in the core economic analysis, the economic expert is an essential element of a successful claim or defense.

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