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## Presenting Compensation Estimates To A Jury

**Josefina V. Tranfa-Abboud**

**MARKS PANETH LLP**

In all cases, presenting a damages estimate to a jury is an art that must be backed up by understandable science. The art is in the combination of effective questions by counsel (whether retaining or opposing) and a presentation by the expert that gets the jury's attention. The presentation should convey a strong sense of relevance and applicability of the data used and consequently, the reliability of the results.

Employment disputes often lead to the presentation of estimates of lost compensation usually spanning several years, which involve a reasonable expectation of compensation growth. Compensation packages often include a salary or wages and potentially cash and non-cash fringe benefits. To further complicate matters, estimates of alleged lost compensation over a period of time include the determination of the growth factor applicable to each of the components of compensation.

Effective presentation by the economist is possible when the economist can substantiate his or her opinions through factual and/or researched data and a straightforward methodology. The economist must be able to effectively convey the message that the historical trend in the plaintiff's earnings and the plaintiff's occupation pre- and post-incident cannot be ignored, and that earnings growth as well as the value of fringe benefits potentially varies across occupation, industries and location. While it may not be necessary to present every

detail of the analysis, it is important for the economist to highlight that because of occupational and other differences, the more specific the data source is, the more reliable the analysis is. The more specific the data is to the plaintiff's occupation, the more effective the economist's presentation can be.



**Josefina V.  
Tranfa-Abboud**

Collective Bargaining Agreements (CBAs) typically provide contractual compensation package data for workers such as police officers, municipality employees and construction trade workers, to name a few. CBAs provide information regarding contractual wages and increases, and descriptions that allow the economist to identify cash and non-cash fringe benefits.

However, not all occupations are covered by CBAs, and it is the economist's job to identify the applicable source of data. The Occupational Employment Statistics (OES) reports annual mean earnings by occupation and by metropolitan area. Such information may be useful for the determination of the expected increase in earnings and may provide a point of comparison between the plaintiff's historical earnings trend and the trends reported for the relevant occupation in the relevant location. When occupation and location are known, OES data may be the most applicable point of reference. The Economic Report of the President provides historical data pertaining to the rate of increase in wages in the economy as a whole, but does not provide a breakdown by occupation or geographic region and can be subject to difficult cross-examination if more specific data is readily available.

Even more challenging is informing the jury regarding fringe benefits. Fringe benefits such as a 401(k) plan have a cash value

that can be estimated. Fringe benefits such as a Welfare Fund typically do not provide cash income. Life insurance does not provide a benefit during working years, while a FICA reimbursement plan does. While the value of a 401(k) may be estimated as a portion of earnings, the monetary value of alleged lost dental coverage has no relation to wages. For the economist's presentation to be credible and reliable, specific and direct information from documented plans is the most reliable source, when available. The less factual or documented support is available, the more speculative the estimate of value of the fringe benefit is, and the more vulnerable the expert may be to cross-examination.

Even more complex is pinning down an applicable rate of increase to the monetary value of fringe benefits. The Employment Cost Index (ECI) reports the historical rate of inflation in the costs faced by the employers but does not provide insight on the rate of inflation applicable to the monetary value to the employee. As such, this data source can also be subject to successful cross-examination, and it is generally not applicable. Consumer Price Index (CPI) data pertaining to fringe benefits, albeit limited, may be the only possible source available to the economist.

Effective presentation of such information to a jury in a limited amount of time challenges the economist to strike a balance between the potential complexity of defining compensation components, the methodology in selecting the growth rate, recognizing the differences in compensation across industries, occupations and geographic region, and providing a succinct presentation to the jury on methodology, data and ultimate opinion and results. The economist must be able to offer a solid and acceptable reason for the validity of the data source selected and the segment of the data ultimately used in order to minimize the vulnerability of the expert under cross-examination.

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*Josefina V. Tranfa-Abboud, PhD, is a Principal in the Litigation and Corporate Financial Advisory Services Group at Marks Paneth LLP. Dr. Tranfa-Abboud has extensive experience in economic analysis related to labor and employment disputes and also serves as an expert witness for both plaintiffs and defendants.*

*Please email the author at [jabboud@markspaneth.com](mailto:jabboud@markspaneth.com) with questions about this article.*