

Preparing Your Damages Case

Checklists of issues and evidence in employment and personal-injury matters

Economic damages – actual monetary loss caused by a tort or breach – occur in many forms and can involve a variety of issues. Whether you are retained by the plaintiff or the defense, a good understanding of the basic elements of damages and the issues that might be involved is essential to effective representation. Here, we present a

guide to the basic elements of damages in both personal-injury and employment-discrimination matters, and some of the issues that often arise. We also include a list of documents useful in assessing the extent of loss. A forensic economist, retained early in the case-preparation process, can identify all major elements of loss, assist with discovery and gather pertinent evidence.

EMPLOYMENT

■ **Basic elements of damages can include:**

- Wages /salary
- Bonuses
- Commissions
- Health benefits
- Stock options
- Retirement benefits
- Search-for-work expenses
- Expenses of new employment

■ **Major issues:**

Damages are determined by what the plaintiff earned with the defendant employer, what the plaintiff earns currently, and whether or when subsequent earnings will achieve parity with earnings from the defendant.

Issues may include:

- **Tenure with defendant employer.** Would the plaintiff have terminated employment with the defendant voluntarily, absent the alleged tort or breach? Would the position at issue have been terminated due to economic forces? What is the likelihood of the defendant's downsizing or plaintiff's demotion?
- **Post termination employment.** What are the chances plaintiff will secure subsequent employment?
- **Earnings parity.** At what point will plaintiff's earnings from subsequent employment achieve parity with earnings from defendant

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PERSONAL INJURY

■ **Basic elements of damages can include:**

- Lost Earnings
- Lost Fringe Benefits
- Lost Household Services
- Medical Costs

In wrongful-death matters in many jurisdictions, the decedent's likely personal-consumption expenditures (the decedent's personal living expenses, exclusive of what he or she would have saved or spent on family support) are deducted from damages.

Rules on deductions of collateral sources vary from jurisdiction to jurisdiction. For example, in New Jersey, Social Security payments are subtracted from damages, while in Pennsylvania, Social Security payments do not offset damages.

■ **Major issues:**

Damages are determined by how long the injury will limit earnings, to what degree the injury will limit earnings, and what, if anything, will offset the loss (e.g., subsequent earnings).

Issues may include:

- **Earning capacity.** Expected income taking into consideration age, education, personal attributes, health, labor-market conditions and the plaintiff's actual earnings.
- **Worklife.** How long plaintiff can expect to work, taking into consideration expected retirement age and absences from the

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Employment Discrimination

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employer?

• **Plaintiff's mitigation efforts.** Did plaintiff actively seek alternative employment? How diligently?

■ **Probable tenure with defendant employer:**

How long would the plaintiff have worked for the defendant? Would the plaintiff have worked through retirement age, or would plant closings or other career contingencies cut short tenure with the defendant?

Evidence on this issue includes:

- Work history with defendant employer
- The plaintiff's economic assets
- Available retirement benefits
- Health of the plaintiff
- Health and job status of the plaintiff's spouse
- Likely layoffs or plant closings
- Average retirement age within company
- Economics of the industry

■ **Duration of unemployment / earnings parity:**

The Bureau of Labor Statistics Displaced Worker Survey reports on employment and earnings data, plus average (mean) duration of unemployment by age, sex, race, marital status and other characteristics, which is often helpful in estimating the length of time it will take a terminated worker to find alternative employment and achieve earnings parity (wages equivalent to those with defendant employer).

■ **Mitigation (post-termination employment):**

The plaintiff has a duty to mitigate damages by seeking employment comparable to the job he had with the defendant. *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)

The defendant has the burden of proving failure to mitigate. *Robinson v. SEPTA, Red Arrow*, 982 F. 2d. 892, 897 (3d Cir. 1993). The defendant must show that substantially equivalent work was available and that the plaintiff did not exercise reasonable diligence in seeking alternative employment.

Economists can proffer testimony on job markets, rates of unemployment and other data relevant to the job search.

■ **Benefits:**

Health Insurance. Damages are normally calculated by finding the cost of replacing whatever coverage the employer provided less the employee's cost of contribution.

Pension. The value of a discontinued defined-contribution pension fund is the total contributions that might be expected to be made during the back- and front-pay period.

Under defined-benefit plans where the front-pay period does not continue through retirement age, benefits are typically a function of years of service and amount of salary toward the end of the employee's career.

■ **Useful documents:**

- Tax documents (e.g. 1099s, W-2s, 1040s)
- Lifetime earnings information from the Social Security Administration.
- Plaintiff's personnel files (pre- and post-incident)
- Fringe-benefit documents (pre- and post-incident pension plan descriptions, health plan, employer-paid insurance policies, employee handbook, bonus and raise schedules)
- Plaintiff's resume
- Employment application to defendant
- Post-incident employment applications
- Past and present collective-bargaining documents
- Pay stubs
- A record of plaintiff's job-search efforts, including copies of correspondence to prospective employers

For detailed checklists and assistance in producing comprehensive damages arguments in employment, personal-injury and wrongful-death matters, contact

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Personal Injury / Wrongful Death

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work force for illness, child rearing, education or other reasons.

• **Employment patterns.** How plaintiff performs in the workplace, taking into consideration such issues as hours and overtime and other issues.

• **Earnings growth.** How will earnings grow over time due to inflation and increases in personal productivity?

■ Pre-injury earning-capacity evidence:

- The plaintiff's actual earnings history
- Statistical earnings of the plaintiff's cohorts. Sources can include employment and union records, government and academic studies, trade associations and employment agencies.
- The plaintiff's physical, mental and medical status. Were there any preexisting medical conditions that would have limited earning capacity regardless of the tort? What was the plaintiff's aptitude? Were there any planned or actual career or educational advancements?

■ Post-injury earning-capacity evidence:

- An assessment by a vocational specialist on the plaintiff's abilities and reduced expectations.
- The plaintiff's actual post-tort earnings.
- A medical specialist's opinion regarding total disability.

■ Fringe benefits:

Fringe-benefit items that generally count toward damages include company-paid health insurance, company-paid life insurance and pension benefit. Losses are not the cost to the employer but the loss to the claimant, measured by replacement cost.

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■ Household Services:

Household services are the value of services provided by plaintiff or decedent for the benefit of other family members. Sources for the amount of household services rendered and their value include testimony of family members, government and academic studies and the cost of services from commercial providers.

■ Personal consumption (wrongful death):

Personal consumption is the amount decedent would have spent on personal living expenses and would not be available to wrongful-death claimants. Personal-consumption items are not deducted if the decedent's family incurs such costs (e.g., housing, utilities).

Personal-consumption items often include:

- Housing (single decedents)
- Clothing
- Transportation
- Health care

■ Future medical expenses:

Future medical expenses are calculated by medical-cost specialists who provide reports referred to as life-care plans, showing what the plaintiff will need for medical care. The cost of this element of damages is affected by life expectancy in instances where the injury is permanent.

■ Useful documents:

- Tax documents (e.g., 1099s, W-2s, 1040s, Schedule Cs)
- Lifetime earnings information from the Social Security Administration
- Fringe-benefit documents (pension plan, health plan, employer-paid insurance policies, employee handbook)
- Plaintiff or decedent's resume
- Past and present collective-bargaining documents
- Pay stubs
- Bank-account records (checking and savings)
- Employment records
- Medical records

Web resources for gathering and assessing evidence on economic loss

- Center for Forensic Economic Studies web site
www.cfes.com/publications/articles.htm

Includes numerous articles and practice tips on economic damages, including:

- Beyond 1040: Six Sources of Evidence on Lost Earnings
- Lost Earning Capacity of Undocumented Workers
- The Basics of Pension Damages
- A Tax Break for Plaintiffs Raises Interesting Issues
- Determining the Earning Capacity of Business Owners
- Flawed Vocational Reports Skew Damages Claims
- Basic Damages Issues in Employment Litigation
- Employee Stock Option Claims

- Best's Insurance Law Digests
www.ambest.com/legal/statelawdigest.html

A.M. Best, publisher of insurance directories, provides online Insurance Law Digests summarizing insurance laws for each state and the Canadian Provinces. Compiled by a leading law firm in each state or province, the Digests include valuable guidance on laws regarding damages.

- Request for Social Security earnings Information
www.socialsecurity.gov/online/ssa-7050.pdf

Information includes annual earnings, periods of employment or self-employment and the names and addresses of employers.

- Bureau of Labor Statistics workforce characteristics
<http://www.bls.gov/cps/lfcharacteristics.htm>

Earnings and demographics of employed and unemployed persons and persons not in the labor force.

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Stephen Rosen

Has provided actuarial and pension-plan consulting since 1971 and has written and testified extensively on pension issues. Wrote The Accountant's Guide to Employee Benefit Plans (Warren Gorham & Lamont) and The Tax Reform Act of 1984 (Farnsworth). Retained by law firms, insurance companies and actuarial firms to testify in numerous matters.

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