



## ***Considerations in Selecting an Expert for Wrongful Termination Matters***

*by Chris Hamilton, CPA, CFE, CVA, DABFA*

As with other matters in which financial experts are important contributors to a successful legal team, wrongful termination cases can often hinge on the presentation of a qualified expert. Choosing a forensic accounting professional who can tip the scales in your favor is not always so easy. To aid legal counsel in the selection process, it is useful to look at many factors, including when to hire the expert, components in determining compensation, key areas of contention, and options in experts available.

### **Hire Early in the Case**

The starting point in any wrongful termination dispute is whether there was a damaging event. Forensic accountants rarely, if ever, contribute to establishing this part of the case. However, that does not negate the importance of involving an expert early in the case, in particular:

- A financial expert can estimate the damages to assist the plaintiff and/or their legal counsel in valuing the case.
- Most law firms want the calculations done early in the case to prepare for the possibility of negotiating a settlement without a trial.

Establishing the economic loss sustained by the plaintiff as a result of wrongful or discriminatory action is based on the loss of income and fringe benefits both before and after trial. The calculation involves determining historic (pre-trial) losses as well as projecting future losses. The losses are mitigated by actual income earned in the historical period and in the projected period. In addition to loss of income the damage calculations will include other costs such as medical.

### **More Than Salary**

Compensation is more than simply salary or wages. There are several additional potential benefits associated with employment that must be included in the calculation, if applicable. These include:

- Employer payroll taxes paid for the benefit of the employee such as social security, unemployment insurance, workers compensation insurance, and other state employment taxes
- Insurance (medical, life, disability, etc.) offered by the employer on either a matching or full-pay basis
- Payments for holidays, sick days, vacation, paid time off, family and medical leave pay, etc.
- Retirement benefits including matching 401k contributions, defined benefit plans, stock bonuses/ESOP's, cash balance plans
- Any other expenses of the employer for the benefit of employees

Obviously, the financial expert must have knowledge of, and experience with, understanding the existing compensation elements and structure of the employer at the time of injury. A miscalculation of any of the above elements can have a material effect on total damages.

### **Software Limitations**

There are several software packages available that provide the framework for preparing damage calculations. These are useful in guiding users through the mathematics. However, most of the software comes with built-in assumptions on growth rates, discount rates, and standard cost factors for non-salary benefits. This is where the financial expert comes in. Canned software solutions are dangerous particularly if the case moves on from discovery and settlement conferences to a trial.

### **Common Technical Disagreements**

It is useful for attorneys to be aware of issues that are common areas of disagreement and error in wrongful termination matters. These include:



- The discount rate used to calculate the present value of future benefits is highly subjective, as is the growth rate used to project future earnings.
- “Work life expectancies” are a key concept in wrongful termination cases and are potentially controversial. They are drawn from published sources that are based on sophisticated statistical calculations from a complex set of data.
- Expected inflation, in both the growth rate and the discount rate, is based on economic theory and is open to challenge.
- Valuation of salary and fringe benefits are the most objective estimates. Despite this objectivity, the opposing parties may have different opinions on such compensation.

In all of these issues, the expert must be able to explain the source and methodology in a way that can be grasped by the group or person that must make a decision regarding damages.

### **Which Type of Expert?**

Often, the damage phase of a wrongful termination trial becomes a battle of the experts. CPAs with forensic accounting expertise in such matters are often selected by experienced legal counsel. These experts provide real-world experience that is compelling. Other attorneys like to hire a highly credentialed university economist. The thought behind the latter approach is to hire what is perceived as an impressively smart expert.

However, as a word of caution, “smart” doesn’t always carry the day. An ivory tower, theoretical approach to subjective or objective issues is often not nearly compelling to a jury as the facts presented by an experienced forensic accountant who can explain how the damages actually apply in the real world. Further, the expert needs to present difficult and complex concepts in an understandable way to the jury, such as terms like “present value” and “discount rates.” Since forensic accountants work with business owners who need to know the economic and financial realities and facts of issues, it is typically easier for these CPAs to clearly communicate to a jury.

### **Choose Your Expert Carefully**

Financial experts are key to resolving a wrongful termination case. They should be involved from the beginning and they should be retained with an eye on the end. Will they make a compelling and understandable presentation to the trier of fact should the case go to trial? To win your case, be careful in selecting the right expert.

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