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RE: Forensic Vocational Economic Developments in Adverse Employment

Increasingly, damages experts are being consulted on adverse employment litigation matters. Traditionally, "adverse employment" matters were simply referred to as "wrongful termination" cases. This may be because, historically, the majority of individual employment litigation resulted from the firing of a specific employee. However, we have seen more of these matters contested over issues such as "constructive discharge" or alleged "involuntary resignations." For this reason, these matters cannot simply be referred to as "wrongful termination" any longer and should be more appropriately identified as "adverse employment" cases. There is, of course, also a distinction between "employment litigation" and "labor" cases as "labor" disagreements involve organized employment, i.e. unions, etc., whereas our forensic consulting practice has focused on individual claims of adverse employment litigation.

Regardless of nomenclature, there have been recent developments and research concerning the calculation of economic damages associated with this form of litigation. In April 2013, research was published in the *Journal of Forensic Economics* 24(1) by Charles Baum which recommends "adjusting losses from employment terminations for the annual probability a worker would have remained employed" with the terminating employer. Using National Longitudinal Survey of Youth (NLSY) data, which tracks the employment experiences of a nationally-representative cohort of individuals over three decades between 1980 and 2010, Baum was able to calculate the expected length of time that an individual might expect to be employed with the terminating employer. Not surprisingly, Baum found that there was a high correlation between accumulated job tenure and the probability of remaining with an employer "for one additional year."

In December 2015, a comment upon the Baum research was published in the *Journal of Forensic Economics* 26(1) by Nicholas Coleman. In his commentary, Coleman suggests that the statistical analysis introduced by Baum should not only be applied to the job held with the terminating employer, but should also be applied to any post-termination employment held by the plaintiff.

It is generally accepted that plaintiffs involved in adverse employment litigation execute diligence in their post-termination job search. Earnings acquired through post-termination employment will then mitigate the claimed damages resulting from the subject termination. Some jurisdictions, such as our home state of West Virginia, have previously held that plaintiffs may be excused from mitigation efforts in special circumstances. For example, the West Virginia Supreme Court of Appeals expanded an exemption to the mitigation of future damages (front-pay) in the *Seymour v. Pendleton Community Care* (2001) decision in instances where the plaintiff prevails that the subject termination was "malicious." However, it should be noted that the West Virginia Legislature altered this mandate in June 2015 with the enactment of Senate Bill 344, which now requires plaintiffs pursuing damages from employment litigation to exercise "affirmative duty" in mitigating damages, regardless of any allegations that the subject termination may have been "malicious."

Given that mitigation can greatly impact the overall value/cost of damages attributable to adverse employment claims, there was immediate reaction to the comments made by Coleman in the December 2015 *Journal of Forensic Economics*. Essentially, Coleman has suggested that the short duration of tenure, in the post-termination job, results in an overall reduced expectation of employment. Coleman's approach is to utilize the probabilities acquired from Baum's 2013 research for application to all successive years of post-termination employment. This approach greatly reduces the overall value of any anticipated mitigating earnings by compounding the post-termination earnings reductions through successive years of the analysis. However, a fundamental problem exists with Coleman's critique and this was addressed in Baum's reply to Coleman, which was also published in the *Journal of Forensic Economics* 26(1).

In his response to Coleman's criticism, Baum reminds practitioners that the adjustment probability for "pre-termination" earnings calculated from NLSY data addressed the likelihood that individuals would leave the pre-termination employer for any number of reasons, many of which would be considered voluntary (take a better job elsewhere, exit the labor force to care for an ill family member, geographic relocation, retirement, etc.). Therefore, use of these data to reduce mitigation responsibilities could actually reward the plaintiff for voluntary decisions resulting in lower earnings. For this reason, the so-called "ripple effect" which Coleman suggests that a termination causes across the plaintiff's future employment is not validated by the methodology and data proposed by Baum for adjustment of the pre-termination employment earnings. Simply stated, Baum reminds practitioners that separations from alternative comparable post-termination employment are unlikely to be linked to the initial separation from the terminating employer.

Unlike damages attributable to personal injury, earnings losses resulting from "wrongful termination" are taxable. It may seem appropriate to simply assume that the income taxes the plaintiff would have paid on an annual basis from gross wages earned will approximate the income taxes owed on a lump-sum award/settlement. However, such assumption would be mistaken. The error in such assumption is the result of the incremental structure of income taxation. Simply, the taxes paid on an annual salary are assessed at a lower percentage than the taxes on a lump-sum representing the cumulative future earnings of the plaintiff. Forensic economists have long recognized this income tax differential and the appropriateness of increasing the damages estimate to accommodate for the increased income tax liability. However, it has also been known that just a single "gross-up" of the damages only results in an additional income tax liability. This is because the tax liability increases with every increase in the damages award or settlement, thus establishing a potentially never-ending cycle of damages enhancement. Recent research presented at the 91st annual conference of the Western Economic Association introduces a methodology intended to consolidate these adjustment iterations. We will be watching as this research continues to be reviewed by our peers.

Our continued interest and resulting pursuit of current research keeps both of us on the cutting edge of developments related to the proper methodologies and data required for valid and reliable economic damages calculations. We will continue this drive for knowledge as we move forward with this practice. If you believe that we may be helpful in enhancing your understanding of forensic vocational rehabilitation and/or economics, then we encourage you to contact our office. We are both available for informal in-house presentations and discussions with members of your firm or formal CLE presentations at large conferences. In the meantime, we hope that you have a great summer.

Sincerely,

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