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ESTIMATING DAMAGES IN EMPLOYMENT DISCRIMINATION/WRONGFUL TERMINATION MATTERS

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Although the stock market was up 7.5 percent from January to September 2009, it appears that continued business downsizing, layoffs, and a poor labor market will lead to another increase in employment discrimination/wrongful termination lawsuits in the coming year.

Employees who are terminated during good labor markets are less likely to sue for discrimination, while former employees who have extended periods of unemployment and suffer economically for a longer period of time may be more inclined to file wrongful termination claims. Seasonally adjusted initial unemployment claims in 2009 averaged over 606,000 per week from January to the end of August, an increase of 190,000 per week on average over 2008 numbers. Continuing weekly claims for unemployment benefits have topped 6 million since the first week in April 2009. The unemployment statistics and sheer number of jobs lost with little noticeable job growth make the labor market prime for wrongful termination lawsuits.

Given these statistics, it appears that wrongful termination suits will continue to rise, and the need for good economic advice from an expert will remain an important aspect of any attempt to seek redress for a perceived wrong.

Many wrongful termination claims involve allegations of discrimination. In recessionary times like those that we face today, an analysis and review of broader economic measures of firm health is necessary to distinguish between unavoidable terminations and those that are properly labeled discriminatory. By completing a thorough and objective analysis, the expert can examine the fact pattern and identify whether other factors were involved in the alleged discrimination. In this way, the expert can distinguish between real discrimination and recession-related downsizing. In addition, by reviewing industry statistics and trends, the local economy, and job market forces, the expert can help provide evidence supporting or refuting a discrimination claim. While plaintiffs and defendants will likely disagree about the true root cause of the plaintiff's termination, a thorough and well-reasoned analysis of the economic circumstances surrounding the dismissal is vital to either party's success in prosecuting or defending these types of lawsuits.

Good advice often hinges on the quality of the information available from the client. In order to estimate damages in a wrongful termination suit, the expert must gather specific case information to consider in his/her analysis--some of which comes

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from the plaintiff(s) and some of which comes from the defendant(s). Such information includes the basic facts like date of termination, length of service, date of birth, age at termination, sex, race, and level of educational attainment. Job-specific information also will be needed, such as earnings while employed, a list of benefits, and information on employer-paid contributions to retirement or 401(k) plans. Any information from the defendant(s) about positions at the company that are similar to the position held by the plaintiff(s), or information about the earnings/benefits of a replacement worker also can prove useful. These data, along with publicly available information relating to alternative job opportunities, unemployment, wage rate increases, and interest rates, can then be used by the expert in an analysis of estimated losses over the dismissed worker's expected work life. Typically, damages are computed

from termination to the date of trial and, where appropriate, from the date of trial to the end of the plaintiff's work-life expectancy. Should a plaintiff fully mitigate her harm from the termination, the damage period may end prior to expected retirement. Even if this should occur, if a terminated worker's retirement earnings are affected, an analysis of those losses is also conducted.

With consensus predictions showing that the unemployment rate in the United States will continue to rise through 2010, we can expect to see more wrongful termination claims in 2009 and 2010. When computed properly and objectively, the analysis and computation of wrongful termination damages is relatively straightforward. By analyzing relevant economic data, the expert can develop powerful conclusions regarding the charges of employment discrimination.

Mr. Nelson is a senior consultant in the Washington D.C. office of Econ One. He has experience computing and rebutting wrongful termination damages and has testified as an expert in wrongful termination matters.