



What about my stock?

Valuing and recovering lost equity as part of lost compensation damages in wrongful-termination cases

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Some companies, particularly technology start-ups, provide employees with an ownership interest in the company to attract, retain, and compensate workers. This practice of providing some form of equity as part of an employee's compensation has become increasingly common across tech and other industries, including in more established companies. An employee's overall compensation package may include components such as base salary, bonus, and equity grants as well as other fringe benefits such as 401K matching.

Common forms of equity that employees may receive include stock, stock options, restricted stock, and restricted stock units. Often, equity is granted subject to vesting restrictions, based on time and/or performance metrics. Equity grants can make up a significant portion of the value of an employee's compensation package, particularly in companies where valuation rapidly increases. In a sense, employees working at companies that provide equity are investing in the companies in the hope that they will be valuable, paying for a share of ownership with their labor.

Claims seeking equity as damages can arise in a variety of situations. For example, an employment agreement may specify certain payment to the employee, including acceleration of equity vesting, should certain conditions occur, such as an acquisition of the company. The employee may seek the equity that should have vested pursuant to the acceleration clause as breach of contract damages. This article focuses on equity as a form of lost compensation in wrongful termination cases, where an employee has been terminated in violation of a statute or the common law.

Courts have recognized that stock is a component of compensation for decades.¹ In our experience litigating cases involving equity as a component of damages, most judges and arbitrators will allow evidence on lost equity, including testimony on the value of the equity from experts or other witnesses. However, the availability of equity damages as a matter of law is still frequently disputed and there is a dearth of authoritative case law on the topic. Additionally, defendants may challenge the valuation of equity as speculative, particularly where the company is privately held. Even with publicly traded companies where the stock price is a matter of public record, defendants may dispute what valuation should be applied to disputed shares.



Employment damages include future projected wage loss

In a wrongful termination action, such as a claim based on state or federal employment discrimination laws² or statutes prohibiting retaliation for engaging in protected activity,³ the plaintiff-employee can seek compensatory damages.⁴ Courts are directed to fashion effective remedies "so as to make the individual whole" and compensate for the harm – both economic and emotional – caused by the employer's unlawful actions.⁵

In many cases, calculating lost wages that the plaintiff-employee would have earned over time involves a degree of uncertainty because it requires determining the facts of an alternate reality: How long would the employee have remained employed absent the wrongful termination?

To determine the period that the plaintiff-employee's employment was reasonably certain to have continued, the trier of fact should consider "(1) the employee's future in the position



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from which she was terminated; (2) her work and life expectancy; (3) her obligation to mitigate her damages; (4) the availability of comparable employment opportunities and the time reasonably required to find substitute employment; (5) the discount tables to determine the present value of future damages; and (6) other factors that are pertinent in prospective damage awards.⁶

Despite the inherent uncertainty in projecting how long an employee would have continued in their role but for the wrongful conduct, courts have had considerable experience with damages for future wages⁷ and have affirmed awards of front pay for extended periods.⁸

Equity is an element of employee compensation, whether considered wages or “fringe benefits”

Compensatory economic damages for a wrongful termination claim include front and back pay, the loss of fringe benefits, and other out-of-pocket expenses.⁹ Stock option awards are a form of fringe benefits.¹⁰

The right to recover unvested stock options in a wrongful termination case has been recognized by courts for decades.¹¹ Courts have recognized that equity can constitute a component of a plaintiff-employee’s compensation package, along with items such as cash salary. Just like lost future salary, the value of the equity may constitute compensation that the employee would have received but for the termination. Accordingly, to make the plaintiff-employee whole, awarding the value of the equity is necessary to compensate the plaintiff and place them as close as possible to the economic situation they would have been in but for the defendant-employer’s unlawful conduct. These cases establish that a wrongfully terminated employee who was granted equity scheduled to vest during their employment is entitled to

compensation for the value of those lost equity rights.¹²

While an employer’s stock option plan may establish certain provisions regarding the vesting, exercise, and cancellation of stock options – in particular, conditioning vesting of stock options upon continued employment – the central issue is that compensatory damages for lost stock are necessary to return the employee to the financial position they would have been in had the wrongful termination not occurred. The same is true of lost wages or salary – generally, the prerequisite to obtaining salary is continued employment. However, where the defendant’s illegal termination has deprived the plaintiff of lost salary, courts routinely award the value of future lost salary. This same analysis should be applied to lost equity to make the plaintiff whole.

The California Supreme Court recognized that stock awards are wages under California law.¹³ In that case, the Court held that equity shares, granted to an employee but subject to a vesting schedule, are “wages” as defined by the California Labor Code, reasoning that wages include “other benefits to which [an employee] is entitled to as part of his compensation.”¹⁴

Establishing the value of lost equity

Courts regularly calculate the value of stock.¹⁵ Courts have developed methods for ascribing value to stock in contexts such as employment cases as well as business disputes.¹⁶ Valuation methods include using the stock’s highest market value within a reasonable period or valuing the stock on the date of the breach of the obligation or wrongful termination.¹⁷ Some courts take a blended approach, basing the value of the equity as the market price of the shares on the date the employee tried to exercise their shares.¹⁸

In contrast, some courts have denied plaintiffs the value of lost equity because

it is too speculative.¹⁹ As discussed above, one method courts apply to avoid an unduly speculative valuation is by fixing the value of the stock on a concrete date in the past, like the date of termination, rather than speculating about when the employee would have sold their stock or what the future value of the stock will be.²⁰

We recommend retaining an expert economist or business valuation expert to value the equity, taking into account reduction of the future award to present value and removing any costs associated with the equity grant, such as the exercise price of stock options and administrative costs.²¹

Where the equity grant was provided in the form of a time-based vesting schedule, the amount of equity that would have vested can be calculated on a periodic basis (e.g., monthly, bi-annually, or annually as the case may be) along with base salary, bonus, and other benefits such as 401K matching.

In discovery, it is important to seek information regarding the valuation of the company, including any 409A valuations conducted by the company, valuation of the company provided for investors, or other relevant information. This can be accomplished through written discovery and document requests as well as depositions of corporate officers or the person most knowledgeable under Federal Rule of Civil Procedure 30(b)(6) or equivalent state law procedure.

Specific performance as an alternative

If the court or arbitrator finds that the value of stock is not ascertainable, the law provides the alternative remedy of specific performance.²² This is particularly appropriate where the company’s stock is not publicly traded.²³ The finder of fact may award warrants for the stock the plaintiff would have received during the period they would have remained employed but for the wrongful termination.



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Endnotes:

¹ *LabelGraphics, Inc. v. Comm'r*, 221 F.3d 1091, 1097 fn 6 (9th Cir. 2000) (“We recognize the role that options have come to play in executive compensation, especially in the high technology sector.”) (citing *Kennedy v. Commissioner*, (6th Cir. 1982) 671 F.2d 167, 175.)

² For example, see the federal Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), Americans with Disabilities Act (42 U.S.C. 12101 et seq.), Age Discrimination in Employment Act (29 U.S.C. §621), and Equal Pay Act (29 U.S.C. § 206(d)) and state law equivalents, including California’s Fair Employment and Housing Act (Government Code § 12900 et seq.), New York’s Human Rights Law (NY Exec L § 296 et seq.), and the Illinois Human Rights Act (775 ILCS 5/1-101, et seq.), to name a few.

³ Examples include the federal Fair Labor Standards Act, Family and Medical Leave Act, and Dodd-Frank Wall Street Reform and Consumer Protection Act, and state law protections such as California’s Labor Code (see, e.g., Lab. Code, § 1102.5).

⁴ In addition to compensatory damages, successful plaintiffs may also be able to recover their attorney’s fees and litigation costs. Against a private employer, a plaintiff may be able to recover punitive damages if they meet the required showing of malice, oppression, or fraud perpetrated by a managing agent of the employer.

⁵ *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 906; see also *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 418-19 (directing that in Title VII cases, “[t]he injured party is to be

placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.”); *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F.2d 1338, 1346 (noting that front pay is necessary “to make a victim of discrimination whole.”).

⁶ *Suggs v. ServiceMaster Educ. Food Mgmt.* (6th Cir. 1996) 72 F.3d 1228, 1234 (citations and quotation marks omitted); see *Gothardt*, 191 F.3d at 1157; *Anastasio v. Schering Corp.*, 838 F.2d 701, 709 (3d Cir. 1988).

⁷ *Munoz v. Oceanside Resorts, Inc.* (11th Cir. 2000) 223 F.3d 1340, 1349; *Koyen*, 560 F.Supp. at 1168–69. (“It is not difficult to determine the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employee’s work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards.”)

⁸ *Gothardt v. Nat’l R.R. Passenger Corp.* (9th Cir. 1999) 191 F.3d 1148, 1157 (affirming a front pay award covering approximately eleven years); *Padilla v. Metro-N. Commuter R.R.* (2d Cir. 1996) 92 F.3d 117, 126 (affirming a front pay award covering more than twenty years); *Warren v. Cty. Comm’n of Lawrence Cty.* (N.D. Ala. 2011) 826 F. Supp. 2d 1299, 1319 (affirming a front pay award covering 32 years).

⁹ Hon. Ming W. Chin, et al., California Practice Guide: Employment Litigation ¶17:290-17:294.8 (The Rutter Group 2020).

¹⁰ *Passantino v. Johnson & Johnson Consumer Prod., Inc.* (9th Cir. 2000) 212 F.3d 493, 511 (considering stock bonuses and stock options as an element of compensation); *Kennedy*, 671 F.2d at 175; *Doe v. City of Chula Vista* (S.D. Cal. 1999) 196 F.R.D. 562, 568.

¹¹ *Scully v. US WATS, Inc.* (3d Cir. 2001) 238 F.3d 497, 506 (upholding damages award to include the plaintiff’s stock options in wrongful termination case); *Haft v. Dart Grp. Corp.* (D. Del. 1995) 877 F. Supp. 896, 903 (“Wrongful termination of an employee under a fixed term contract precludes an employer from denying an employee stock option rights.”); *Moua v. Int’l Bus. Machines Corp.* (N.D. Cal. Feb. 25, 2019) No. 10-CV-01070, 2019 WL 917422, at *1 (in pregnancy discrimination and wrongful termination case, allowing for discovery on the plaintiff’s damages claim for lost stock options and life insurance premium contributions); *Greene v. Safeway* (10th Cir. 2000) 210 F.3d 1237, 1243-44 (in ADEA case, affirming award of value of unvested stock options); *Hardy v. Saliva Diagnostic Sys., Inc.* (D. Conn. 1999) 52 F. Supp. 2d 333, 338 (in wrongful termination case, affirming award of future lost stock options under Washington law, which provides “right to recover reasonable damages in the form of lost compensation”); *Cloud*, 76 Cal.App.4th at 901 (noting award for value of lost stock options in gender discrimination case under California law).

¹² See also California Practice Guide: Employment Litigation ¶17:153.

¹³ *Schachter v. Citigroup* (2009) 47 Cal. 4th 610, 619.

¹⁴ In *Schachter*, the court considered whether an employer failed to pay all wages due to an employee who resigned, where the employee forfeited unvested stock at the end of his employment. The court found that the employer’s stock plan did not violate the Labor Code because the employer could condition the receipt of the stock upon continued employment – exactly as with any other fringe benefit or agreement to pay base salary. (Id. at 618.)

¹⁵ *Scully*, 238 F. 3d at 504 (approving a trial court’s calculation of damages of value of stock); *Maughan v. Correia* (2012) 210 Cal.App.4th 507, 518–524 (calculating the value of lost stock where the plaintiff was prevented from exercising her stock); *Knox v. Microsoft Corp.* (1998) 92 Wash. App. 204, 211 (remanding a wrongful termination case for the trial court to calculate the value of vested and unvested stock); *Hardenbrook v. United Parcel Serv., Inc.* (9th Cir. 2012) 490 F. App’x 45, 47 (unpublished) (remanding a case because the trial court had not discounted the restricted stock to present value).

¹⁶ See California Practice Guide: Employment Litigation ¶17:155 (describing the variety of approaches courts take); *Bedrosian v. Tenet Healthcare Corp.* (Cal. Ct.App., Oct. 28, 2003) No. B166742, 2003 WL 22435654, at *7 (unpublished); *Scully v. US WATS, Inc.* (3d Cir. 2001) 238 F.3d 497, 510; *Schultz v. Commodity Futures Trading Comm’n*, (2d Cir. 1983) 716 F.2d 136, 141; *Clements*, 41 F.2d at 42; *Miga v. Jensen* (Tex. 2002) 96 S.W.3d 207, 216 (where an employer prevented an employee from exercising a vested option, the court calculated the value of the stock at the time of the breach of contract, but noted that “time-of-breach damages may be inadequate when an employer anticipatorily repudiates an option agreement”).

¹⁷ *Ibid.*

¹⁸ *Scully*, 238 F.3d at 510 (discussing calculating value of restricted options as the difference between the options’ exercise price and the open market price on date of employee’s attempted exercise, not on the date of termination or the end of the restricted period).

¹⁹ *Jaros v. LodgeNet Entm’t Corp.* (D.S.D. 2001) 171 F.Supp. 2d 992, 1005, aff’d, 294 F.3d 960 (8th Cir. 2002) (denying an award of back pay based on stock “[b]ecause a value [could not] be placed on the stock option without speculating as to whether and when [the plaintiff-employee] would have purchased and sold . . . stock”).

²⁰ See *Scully*, 238 F.3d at 510; *Miga*, 96 S.W.3d at 216.

²¹ See *Miga*, 96 S.W.3d at 215–16 (“Calculating the value of an unexercised option can be a complicated enterprise, requiring the application of finance models to determine the present value of the right to purchase stock at a fixed price at some future time.”).

²² *Capaldi v. Levy* (Cal. Ct.App. 1969) 1 Cal.App. 3d 274, 281; *Kramer v. Puracyp, Inc.* (Cal. Ct. App. Mar. 17, 2017) No. D070407, 2017 WL 1034474, at *3-4 (unpublished) (citing “150 years of California appellate court decisions” that “have consistently upheld the granting of specific performance in cases involving the stock of closely held corporations”); *Medcom Holding Co. v. Baxter Travenol Labs., Inc.* (7th Cir. 1993) 984 F.2d 223, 227.

²³ *Medcom Holding Co.*, 984 F.2d at 227 (“A contract for the sale of corporate stock not publicly traded can be specifically enforced on the ground that valuation is imprecise without an active market for the stock.”); *Lucente v. Int’l Bus. Machines Corp.* (2d Cir. 2002) 310 F.3d 243, 262 (declining to order specific performance for a publicly traded company because an adequate remedy was available at law and remanding the case to the trial court to recalculate damages).

