LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, AUGUST 21, 2026

Nuanced issues impacting the settlement of employment law cases: Economic damages in FEHA cases, Part 1

In FEHA mediations, nuanced questions involving back pay, mitigation and non-wage losses can significantly affect the value of economic damages–and ultimately shape whether and how a case settles.

By Angela Reddock-Wright

This art was created with the assistance of Shutterstock AI tools

Every FEHA-based employment case has at least three components: the underlying factual allegations, the related legal issues and questions, and alleged damages. In mediation, while the factual and legal issues tend to be the biggest drivers of the conversation during the day, the question of alleged damages is equally important, if not the lynchpin, of whether a case can settle.

We know that every discrimination, harassment or retaliation case brought under California's Fair Employment and Housing Act (FEHA) includes at least two components of damages — economic and emotional distress — often accompanied by an argument for alleged punitive damages. And, of course, any award of damages in FEHA matters comes with the ability for plaintiff and plaintiff's counsel to seek recovery for attorneys' fees and costs. While the law on FEHA-based employment damages is relatively established, nuanced issues can impact how a case might be settled and, if so, for how much.

This article provides a deeper look into some of the nuanced issues that sometimes arise in FEHA cases and how such issues can change settlement dynamics.

FEHA damages

FEHA offers a rich menu of potential damages, but there are no caps on any damages category. Legal and equitable remedies under Government Code Section 12965 are intended to make injured workers whole while deterring future employer misconduct.

Injured employees can recover economic damages, emotional distress and other noncompensatory damages, attorneys' fees and costs, and punitive damages, but to do so, they must navigate a multi-level game board, understanding and finessing the rules of the game.

We'll begin by examining economic damages, working within the context of mediation. Future columns will focus on other types of damages that also may be recoverable in FEHA cases. The ultimate goal in mediation is to arrive at a settlement that appropriately compensates the plaintiff for the alleged employment harm, while balancing the interests of the defendant employer and recognizing the risks to all parties in continuing the litigation.

Hypothetical

Consider an hourly worker who was terminated from her job based in Los Angeles, allegedly for discriminatory reasons in violation of the FEHA. A recent college graduate, she was paid $25 per hour, approximately $48,000 annually, including premier health, retirement and other benefits. Her work was related to her field of study, but it didn't require specialized skills or advanced training. After her termination, she did not find new employment. She also claims that because of her termination, she had to move back home with her parents in another state where the cost of living is less than in California.

The plaintiff claims that she has looked for new jobs but, due to a downturn in the job market, she has not been able to find a job of a similar nature or rate of pay. She has been without a job for two years. She also claims that she has had significant medical issues in the time she has been off work and has had to pay out of pocket for her medical care, along with treatment for her alleged emotional distress.

Her lawsuit claims that she was singled out because she was the only female employee in the department and, unlike her male coworkers, was expected to be perfect. When they made mistakes, the company provided them with leniency and took no action; when she made her first mistake, she was fired. The defendant employer argues that the plaintiff was terminated based on a documented history of significant and repeated performance issues, including attendance issues which involved several missed days of unexcused absences.

The plaintiff comes into mediation asking for $500,000, an amount she believes reflects her alleged backpay, out of pocket costs (moving and medical expenses), and emotional distress as a result of her employer's alleged discriminatory actions, along with compensation for future loss while she attempts to find a new job and heal from the alleged emotional impact of the termination.

The defendant employer, in contrast, arrives at the mediation prepared to pay no more than nuisance value for the case — at most $25,000 — and stating that they will never pay six figures for the case. The defense argues that it had legitimate business reasons to terminate plaintiff, that plaintiff failed to mitigate her damages, and it has evidence of other contributors to plaintiff's alleged emotional distress. Defendant also denies responsibility for plaintiff's alleged out-of-pocket moving and medical expenses. Defendant argues that plaintiff's decision to move back home with her parents limited her efforts to mitigate her damages, as there were equivalent, and even better, job opportunities here in California.

Why the great divide, and how will the parties arrive at a fair and reasonable settlement?

Is this plaintiff entitled to back pay?

Every FEHA discrimination case involves an adverse employment action such as a termination, demotion or failure to hire or promote. Back pay is the wages, salary and other compensation that would have been earned but for the alleged discriminatory adverse action. For hourly workers such as the plaintiff, compensation will likely be the plaintiff's alleged lost wages from the time of her termination through the resolution of her FEHA claim.

And now for the nuance: Can this plaintiff recover full lost wages when she, arguably, has failed to mitigate by finding new employment? Is the defendant employer responsible for out-of-pocket costs associated with her moving out of state and back home with her parents? Is defendant responsible for the plaintiff's out-of pocket medical and therapy costs?

Can this plaintiff actually recover the full amount of claimed back pay? According to her former employer, she failed to take any steps to mitigate her damages. The implication is that if she had done so, the amount of back pay owed her — assuming she had a valid FEHA discrimination claim — would have been offset by amounts she earned with a new employer, including any benefits she would have with a new employer.

Duty to mitigate

With an annual salary of approximately $48,000 and having been out of work for two years, the plaintiff's alleged back pay claim amounts to close to $100,000. What, in fact, was plaintiff's duty with respect to mitigating this claim?

Plaintiff has not lined up any new jobs over the course of two years. She asserts that no work utilizing her education and skills was available in that timeframe, noting that many recent college graduates have had a hard time finding work in their chosen fields. Is this enough to support her claim for back wages?

Every FEHA plaintiff is subject to a duty to mitigate harm, which can include making a reasonable effort to find comparable employment. All wages earned in comparable work will offset the former employer's liability. When the work is highly specialized — think of a brain surgeon or a rocket scientist — it may be challenging to find comparable work right away. There could be a significant time gap until a new position is found, and the pay differential could be significant. But for a worker making $25 per hour, the defense will argue, the job search should be far less difficult.

On the other hand, the burden is on the defendant employer to demonstrate that comparable work was available and that the plaintiff unreasonably failed to pursue it. (See CACI No. 3963) Here, defendant will argue that the terminated position was neither specialized nor unique while pointing to online job postings of a plethora of jobs paying $25 per hour. Using this reasoning, with its $25,000 maximum settlement position defendant posits that, at minimum, in short order, plaintiff should have been able to find another job making at least $25 per hour, especially in the Los Angeles job market. Hence, defendant is willing to consider a 10-week pay gap ($25k) as a reasonable settlement.

A FEHA claimant is never obligated to accept inferior employment, relocate, or take positions substantially below his or her qualifications, but what makes inferior employment? A longer commute? No cafeteria? A stricter boss? At the same pay (or better), any non-specialized work assignment would likely be considered comparable.

Actual earnings from substitute employment, even if inferior, will be offset from recovery (*Martinez v. Rite Aid Corporation* (2021) 63 Cal.App.5th 958). It seems counterintuitive, but if the plaintiff accepts a job that pays less or offers fewer benefits than the prior job, those wages will be offset against her recovery. If, however, she holds out and can show that no comparable work was available at the same rate of pay, she may be entitled to full recovery. Given the hourly and not highly skilled nature of her earlier work, this is unlikely.

Mitigation interrupted

Let's assume the plaintiff found a new job but then lost it. What happens to her claim against the first employer if she failed to keep the new job? The defense will likely argue that plaintiff did not mitigate damages, so her lost wages should not resume after the second job ended.

If the second job was terminated because of plaintiff's actions (she couldn't do the work, she was always late), the defense's argument will probably hold water. But if the new job was terminated other than for cause and the plaintiff continued to look for comparable work, some courts have held that a claim for continued lost wages can be maintained. (See *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503.)

The plaintiff might also contend that she was incapable of retaining a job as a direct result of the defendant's actions. She could argue that lost wages should resume because she suffered emotional distress from the alleged discrimination, and this impeded her ability to remain employed. Plaintiff's economic damages claim is a separate claim from her emotional distress claims. We will look at nuanced issues in assessing emotional distress claims in a future article.

Non-wage losses

Back pay typically includes more than wages and salary; it can also include health insurance, retirement contributions, bonuses, commissions, stock options and other benefits that would have been part of an employee's pay package. Compensation considerations such as bonuses, commissions and stock options generally arise with exempt, high-wage earners as opposed to hourly workers. We will consider these specialized benefits in a future article.

Here, plaintiff will want to be made whole for the costs incurred when she relocated to her parents' house, as well as out-of-pocket costs for medical care and therapy, which she links directly to her termination.

In order to recover such costs, however, she must be able to prove that the move was directly caused by the defendant's illegal actions, must present original invoices and receipts supporting her claim, and must minimize costs. Out-of-pocket costs tied directly to employment changes will always be closely evaluated alongside FEHA statutory violations. (See *Schultz v. Spraylat Corp.*, 866 F. Supp. 1535 (C.D. Cal. 1994).)

The defense will say that moving out of state was a personal choice and that the medical costs were purely elective. The plaintiff will counter that these were all direct and foreseeable consequences of her improper termination. Ultimately, the parties may end up splitting the non-wage baby down the middle.

Conclusion

It's in the nuances where the mediation process becomes important. It allows the parties to work though economic and other damages, along with additional factual and legal issues, in a neutral and confidential setting. The parties are able, with the mediator's help and guidance, to flush out all relevant factors with the goal of finding their way to an amicable resolution.

The goal is to balance the parties' interests based on the evidence and data available at the time. A good mediation process will capture and help the parties to delve into these nuances, while also allowing them to focus on the key issues likely to drive settlement. When both sides can candidly explore their assumptions and expectations, the process should enable them to work through the inherent complexities and arrive at a just and equitable settlement.

Angela Reddock-Wright *is a neutral with Signature Resolution specializing in employment, Title IX, civil rights and police abuse cases, along with mass tort, class action and Multidistrict litigation cases involving sexual assault and abuse, among other claims. Reddock-Wright is also available to serve as a special master, court-appointed neutral, settlement allocator, and as an independent and consent decree monitor in these and similar cases.*