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## Calculating damages in employee raiding or lift-out disputes

Employee raiding or lift-out disputes have become prevalent in many industries, including insurance, mortgage brokerage and/or lending, and financial services, among others.

These are the key points addressed in the article:

- **Damages in employee raiding cases may extend beyond lost profits.** Courts often consider multiple categories of harm, each requiring a distinct analytical approach and careful factual support.
- **Lost profits analysis hinges on building and validating a credible “but-for” scenario.** Experts must reconstruct what would have happened if the alleged misconduct did not occur while excluding losses that would have occurred in the ordinary course of business.
- **The damages period and theory of recovery can significantly influence outcomes.** The scope of recoverable damages depends on additional unique factors, underscoring the importance of early expert involvement to shape damages strategy and evidence.

These disputes typically involve **four broad categories of damages**: lost profits, destruction or diminution of business value, additional costs resulting from departures, and unjust enrichment. A financial expert plays a critical role in quantifying them. Damages calculations are not just about numbers - they help tell a story about how defendants’ alleged improper conduct (related to breach of restrictive covenants, breach of fiduciary duty, and/or<sup>1</sup>, among others) adversely impacted the company or enriched defendants and their new business ventures or employers.

### Plaintiff’s actual losses (lost profits)

The first category is **lost profits**. This category focuses on profits not realized by the plaintiff due to the defendant’s alleged improper conduct. Instances of improper conduct include violating a non-

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<sup>1</sup> While trade secret misappropriation claims are often included in employee raiding or lift-out disputes, these claims require a different set of considerations. For example, what are the specific trade secrets that the defendant allegedly misappropriated? What is the benefit that these trade secrets had conferred to the plaintiff or will confer to the defendant? Did the defendant (or employees of the defendant) use the trade secrets to gain a competitive advantage over the plaintiff?

compete or a non-solicitation clause. This improper conduct may have resulted in, for example, a loss of customers and/or sales and corresponding profits to the plaintiff.

To estimate lost profits, an expert would construct a **counterfactual** scenario (a “but-for” world) where the improper conduct did not occur and the plaintiff retained some or all of the customers and/or sales in question. This analysis requires projecting both revenues and costs under that hypothetical scenario, and validating the projections through multiple steps.

1. **Establish a baseline projection.** Begin with the plaintiff’s historical financials to set benchmarks for revenues, costs, and profits. On the revenue side, examine the historical performance of the departed employees compared to those who stayed. Consider metrics such as productivity, tenure, and industry experience, as well as performance trends.
2. **Assess attrition.** Review historical patterns of customer and employee attrition at the plaintiff and identify trends likely to persist in the “but-for” world. If possible, compare the plaintiff’s historical attrition patterns to (i) other business units of the plaintiff; (ii) specific competitors of the plaintiff; or (iii) the industry or broader market at large. From a damages perspective, it is imperative to exclude the impact of any departures that would have likely occurred in the plaintiff’s ordinary course of business.
3. **Validate against internal projections.** Compare the expert’s projections with the company’s own forecasts made prior to the employee departures. This helps assess reasonableness and makes it easier to identify any gaps between internal expectations and the expert’s analysis.
4. **Adjust for external factors.** Adjust projections for market conditions or other external influences unrelated to the departures. One common approach is benchmarking against competitor financials to estimate how the plaintiff might have performed in a “but-for” scenario.
5. **Evaluate cost structure.** Determine the additional costs that the plaintiff would have incurred had the plaintiff retained certain customers or made additional sales. Consider which costs would have remained constant even if the departures had not occurred. For example, would expenses such as office space, overhead, or administrative support have stayed the same?
6. **Bolster with the record evidence.** Information obtained from the record (i.e., legal filings, documents produced by the parties, and depositions) can support or enhance the reasonableness of an expert’s calculation. For example, are there any emails that explicitly discuss why customers departed from the plaintiff or why the plaintiff experienced a decrease in sales? It may also be helpful to conduct public records research to better understand the background and reputation of the companies or employees at issue, including involvement in other litigation, tax liens or other financial difficulties, or adverse references to them in the media. In addition, social media analytics research can identify whether individuals from the plaintiff are connected on a social media platform to individuals from the defendant, as well as identify publicly disclosed posts by relevant individuals that may be pertinent to the litigation.<sup>2</sup>

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<sup>2</sup> Social media analytics involves the algorithmic review of publicly facing social media content across a variety of platforms such as Facebook, X (formerly Twitter), and Instagram and an analysis of the visible social media content. This analysis may include both network and relationship analysis (such as the analysis of social media connections or social media “friendships”) and content analysis or monitoring (such as the review, aggregation or automated monitoring of new relevant posts or Tweets on various platforms).

7. **Consider any offsets to the plaintiff's actual results.** Depending on the specifics of the legal claims, the plaintiff may have a duty to reasonably mitigate (i.e., take steps to lessen) its economic damages. The plaintiff may or may not have taken any such steps. A plaintiff's duty to mitigate may differ between contract claims and trade secret misappropriation claims.

## Destruction or diminution of business value

In some cases, the unexpected employee departures or lift-outs may have broader implications beyond a loss of customers or sales; the defendants' allegedly improper acts may have led to a **decrease in or complete destruction of the plaintiff's business value**. For this second category of harm, while it is necessary for an expert to perform many of the same steps as listed above, it is also necessary for an expert to connect any employee or customer departures to issues experienced by the business overall, whether in the form of a loss of funding, an inability to sell the business at an expected price, or a complete shutdown of the business.

## Additional costs resulting from departures

Beyond lost profits, companies often face a third category of harm, **additional costs** triggered by unexpected employee exits. These can include:

- **Retention incentives:** Payments made to keep remaining employees from leaving.
- **Recruitment expenses:** Fees for recruiters, advertising, and onboarding new hires.
- **Turnover-related costs:** Higher-than-normal attrition can lead to training gaps, productivity losses, and administrative overhead.

In addition, while certain employee-related costs, such as salaries and benefits typically decline with fewer employees, fixed costs, such as office space and long-term leases, remain unchanged, at least in an intermediate timeframe. This means the fixed cost per employee rises when departures occur in large clusters.

## Unjust enrichment

In the last category, if a plaintiff brings forth claims such as breach of fiduciary duty or misappropriation of trade secrets,<sup>3</sup> the plaintiff may be entitled to recover the gains enjoyed by the defendant resulting from the alleged improper conduct (assuming that these gains are not duplicative with any claims for lost profits). These gains are generally measured in two ways:

- **Defendant's profits:** Profits that the defendant was able to generate due to its improper conduct. For example, the defendant may have used a plaintiff's trade secrets to obtain business from specific customers. The plaintiff may seek to recover the defendant's profits associated with those customers.
- **Defendant's "headstart":** In certain instances, a defendant may have been able to launch its business or bring a product to market earlier as a result of improper conduct. In those instances, a plaintiff may be entitled to the profits that the defendant received during this "headstart" period.

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<sup>3</sup> See, for example, Defend Trade Secret Act, 18 U.S.C. § 1836.

These categories of damages can vary significantly given the specific defendants named in a particular action. For example, if a plaintiff sues a company *and* various individuals in an employee raiding matter, the plaintiff may be able to recover a portion of the company's profits. However, if a plaintiff only sues the related individuals, the plaintiff may be able to seek only the additional compensation (salaries, benefits, bonuses, etc.) received by those individuals.

## Consideration of damages period

In any employee raiding matter, the damages period is a key consideration. For breaches of restrictive covenants, one must first consider the length of the non-competition or non-solicitation clauses. How long is a particular employee contractually prohibited from competing with the plaintiff or soliciting its employees and customers? Does the agreement in question have a tolling period?

Another consideration is the tenure of specific customers. Does the plaintiff typically retain a customer for long periods of time, or is revenue more sporadic? What is the sales cycle of the plaintiff? If a customer is lost by the plaintiff during a particular period, is that customer likely lost for good? These issues may allow a plaintiff to expand the damages period beyond any contractual time limitations.

For cases involving trade secret misappropriation claims, the damages period may be even less straightforward. How long would it have taken the defendants to recreate the misappropriated information? What is the harm to the plaintiff now that the information in question is no longer a trade secret? How long is the defendant's head-start period?

## Conclusion

There are many factors that impact an expert's damages calculation in an employee raiding matter. As a result, it can be helpful to involve an expert early in the case, as they can provide guidance on damages theories, the information needed to support these theories, and any damages-related issues that arise.

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