

Locke Lord QuickStudy: NLRB Greatly Expands Scope of Unfair Labor Practice Remedies

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In a 3-2 [ruling](#) in the matter of *Thryv, Inc. v. IBEW Local 1269*, issued on Tuesday, December 13, 2022, the National Labor Relations Board (“NLRB” or the “Board”) formally changed the landscape of unfair labor practice litigation by expanding the scope of make-whole remedies available for the Board to award against employers for violations of the National Labor Relations Act (“NLRA”). Specifically, through this expansion, make-whole remedies now include “compensating [charging parties] for direct or foreseeable pecuniary harms resulting from [a] respondent’s unfair labor practice.”

Because the NLRB has historically limited itself to awarding remedies expressly provided by the NLRA (e.g., reinstatement and backpay), the Board took pains to distinguish these new remedies from consequential damages—which the Board acknowledges are “more suited for the common law of torts and contracts.” Nevertheless, the expanded remedy appears eerily similar to consequential damages. Examples of the newly-expanded Board remedies cited in the decision include reimbursement of “out-of-pocket medical expenses, credit card debt, or other costs [individuals may be forced to incur] simply in order to make ends meet,” when individuals have been terminated in violation of the NLRA or have been the target of other kinds of unfair labor practices.

To further delineate this expansion of make-whole remedies, the Board defined “direct harms” and “foreseeable harms” that give rise to such remedies. Specifically, “direct harms” are defined as, “those in which an employee’s ‘loss was the direct result of the Respondent’s illegal conduct.’” By way of example, the Board cited an instance where an employer was required to reimburse an employee for ruined clothes caused by a discriminatory job assignment given in retaliation for pro-union conduct. It defined “foreseeable harms” as, “those which the respondent knew or should have known would be likely to result from its violation of the [National Labor Relations Act], regardless of its intentions.” By way of example, the NLRB referenced an instance where an employer terminated employees’ health insurance without notifying the union or employees, and continued deducting healthcare premiums. In that case, the Board determined it was foreseeable that the affected employees would incur out-of-pocket medical expenses and, therefore, required the employer to reimburse employees for those costs.

Notably, the Board stressed that the expanded make-whole remedy is not extraordinary. Instead, it stated that the expanded remedy should be applied “in every case in which our standard remedy would include make-whole relief.” In short, the Board intends to impose and seek to recover this new category of damages in every unfair

labor practice proceeding in which it finds the employer violated the NLRA.

The expansion of make-whole remedies dramatically increases employers' potential liability when faced with unfair labor practice charges. Accordingly, employers should factor this added liability into their consideration of any action that may result in an unfair labor practice charge.

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