

EMPLOYER LAW BLOG

Employer Alert: NLRB Opens Door to Additional Remedies in Unfair Labor Practice Proceedings

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On December 13, 2022, the National Labor Relations Board (NLRB) appears to have radically expanded the remedies available to employees in unfair labor practice proceedings. This expansion will have significant ramifications for employers, heightening the stakes and costs of such proceedings.

Traditionally, the NLRB has been limited to awarding “make-whole” relief in the form of backpay and other injunctive relief when it finds a labor law violation. This means that the NLRB has not been able to award other types of monetary relief beyond backpay, such as reimbursement of expenses incurred by an employee following a violation.

However, in its recent 3-2 Decision and Order in *Thryv, Inc. v. International Brotherhood of Electrical Workers, Local 1269*, the NLRB re-examined “the proper scope of the Board’s make-whole relief.” In doing so, the NLRB found “it necessary to ensure that affected employees are made fully whole for the costs they incur as a result of the respondent’s unlawful actions.”

According to the NLRB, “to best effectuate the purposes of the [National Labor Relations Act], our make whole-whole remedy shall expressly order respondents to compensate affected employees for all direct or foreseeable pecuniary harms that these employees suffer as a result of the respondent’s unfair labor practice.”

The NLRB made clear it viewed this new standard for remedies available—that is, remedies for “all direct or foreseeable pecuniary harms”—as applying to “all cases in which our standard remedy would include an order for make-whole relief.” In other words, it views these additional types of remedies as the norm, not the exception. The NLRB repeatedly declined to characterize the remedies available as “consequential damages,” under the view that such phrase is “a term of art used to refer to a specific type of legal damages awarded in other areas of the law and fails to accurately describe the make-whole remedial policy we espouse here.”

But this raises the question: if not “consequential damages,” what additional types of remedies is the NLRB authorizing by its decision? The NLRB’s decision does not provide much, if any, clarity. The NLRB explicitly stated it would “not attempt today to enumerate all the pecuniary harms that may be considered direct or foreseeable in the myriad of unfair labor practice cases that come before us.”

The NLRB also noted that its decision did not express any opinion on the availability of remedies for non-pecuniary harms, such as emotional distress damages. And the NLRB refused to address whether remedies such as front pay and compensation for legal fees were now on the table under this new standard.

So, what’s the takeaway from this case? In short, this is an unwelcome and frustrating development for employers. It appears the NLRB opened a huge door on available remedies yet did little to meaningfully define the limits of such expanded authority.

Only time will tell, but employers can expect to see employees filing more unfair labor practice charges and claiming more types and sources of damages. As a result, such proceedings will almost certainly become more complicated and drawn out. Stay tuned for more developments.