New NLRB Decision Means Employers Will Have to Pay Up for Labor Violations

Insights
12.14.22

A decision yesterday from the NLRB means employers may now be called upon to compensate suspended and discharged workers beyond backpay and other traditional forms of make-whole relief when found to have committed labor violations. The 3-2 decision in *Thryv, Inc.* saw the Democratic majority rule that employers are now on the hook for "all direct or foreseeable" damages flowing from any violation of the National Labor Relations Act, such as out-of-pocket medical expenses, restitution for lost credit rating, and missed mortgage and rental payments. This groundbreaking decision extending the Board's remedial arsenal in all agency proceedings to include consequential damages will probably soon come under judicial review, but for the time being employers should prepare for the new normal after this latest setback from the current Labor Board.

Aggressive New Labor Board Makes Push to Expand Damages

In September 2021, newly appointed NLRB General Counsel Jennifer Abruzzo issued a memo supporting and reaffirming the rights of Regional Office to consider "the full panoply of remedies available" in addressing employer unfair labor practices. She also expressed an intent to revisit certain remedies and issue periodic remedy updates.

A Democratic Board majority had previously expressed a willingness to explore consequential damages for economic losses as part of this new remedial framework. The memorandum made direct reference to this remedy as a prime example of the Board's direction moving forward.

General Counsel Abruzzo's push for expansion of Board remedies first materialized in June 2022 when NLRB prosecutors advocated for reversal of its 1970 *Ex-Cell-O Corp.* decision. For over half a century leading up to that point, the Board was reluctant to engage in speculative calculations to award monetary compensation or seek make-whole relief awards. But the June proposal signaled a significant shift that was further revealed when Abruzzo proposed that future remedial orders include monetary relief "for the lost opportunity to make gains through the collective bargaining process."

It was clear that this push for remedial expansion would not be limited to refusal-to-bargain cases. Employers had legitimate concerns about whether make-whole remedies would be made available in discharge and other cases – concerns that came to fruition with the Board's most recent decision.

Fears Confirmed: Expansive New Remedies Are Here

In the *Thryv* case, the NLRB upheld an administrative law judge's finding that a marketing agency violated labor law by laying off a group of employees before bargaining with the incumbent union. In so doing, the Board added consequential damages to a panoply of traditional make-whole remedies that had already included back pay and reinstatement.

The Board's ruling made clear that employers that commit unfair labor practices can now be liable for even the indirect consequences of their unlawful conduct – so long as those damages were otherwise "foreseeable."

Prior to this decision, NLRB prosecutors were already incorporating monetary awards into settlement agreements to address the economic ramifications of unfair labor practices. The terms of those agreements shed light on the types of "consequential damages" employers could face, as they have gone so far as to cover interest payments on loans taken out by workers to cover living expenses.

Under *Thryv, Inc.,* however, the Board can now take things a big step further. Employers could also now be responsible for out-of-pocket medical expenses, late credit card fees and rent payments, or even the loss of a home or a car – so long as the Board deems them to be a "foreseeable" consequence of any unlawful termination.

Consequently, monetary awards will now be available to remedy virtually all forms of economic harm – however remote or attenuated – even in the absence of egregious or extraordinary circumstances. Employers will then be relegated to challenging the amount awarded, the foreseeability of damage, and the consequential relationship between the violation and resulting harm. It is unclear whether and to what extent any of these arguments will ultimately prove successful.

Republican Response Falls on Deaf Ears

In a vigorous dissent, the Board's Republican members argued that this decision represents an unprecedented (and potentially unconstitutional) expansion of agency authority beyond quantifiable relief to include a host of speculative elements – thereby injecting a substantial amount of uncertainty for employers and other stakeholders. The dissent points out that this broad standard could extend recovery to indirect and virtually indeterminate losses that unreasonably stretch the chain of causation, thereby complicating damage calculations.

As the dissent points out, tracing these protracted damage threads will delay and lengthen compliance proceedings. It could lead to intrusive financial inquiries for the individuals involved. While the majority of the Board acknowledged these possibilities, it explained that an employer's make-whole obligations take priority over the simplicity of administration.

Looking Ahead: What Should You Do?

It remains to be seen whether the decision will withstand judicial scrutiny at the appellate level. We would not be surprised to see the employer in this case appeal the decision or some other impacted employer take this new standard to court.

In the meantime, however, employers need to redouble their efforts to ensure that they have fully analyzed the circumstances surrounding discipline that could lead to suspension or discharge of employees engaged in protected, concerted activities (or other activities protected by Section 7 of the NLRA). You could now incur substantial new penalties as a result of any such violation. It may be time for you to conduct managerial trainings to ensure you are best positioned for compliance – the beginning of the new year is a perfect time for such a refresher.

You also should coordinate with your labor counsel about any ongoing Board proceedings or those you anticipate in the near future. You will need to factor this new standard into your calculations as you determine the best course of action for your organization.

Fisher Phillips will continue to monitor this and other labor-related issues and provide updates where necessary, so make sure you are subscribed to Fisher Phillips' Insight System to receive the most up-to-date information directly in your inbox. If you have any questions, we encourage you to consult with your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Group.

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