Labor & Employment @lert

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NLRB Adopts Pecuniary Harms Remedy

Since being appointed by President Biden, National Labor Relations Board (NLRB or Board) General Counsel Jennifer Abruzzo has sought to expand the remedies available for unfair labor practice violations under the National Labor Relations Act (NLRA) and pushed regional attorneys to request the "full panoply of remedies available."[1]

For more than 80 years, the NLRB has held that remedies available to employees who are victims of an unfair labor practice are limited to lost pay and benefits.[2] On December 13, in a 3-2 decision it expanded the scope of available remedies. Employees may now recover all damages that were a **direct or foreseeable** result of an employer's NLRA violation, stating:

> The remedy we clarify today will make affected employees whole for direct or foreseeable pecuniary harms that result from a respondent's unfair labor practice in every case in which our standard remedy would include make-whole relief, regardless of the egregiousness of the violation or the respondent's past conduct.

The Board did not provide a clear standard for when a harm is "foreseeable," stating, "We will 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." However, it did provide examples of foreseeable pecuniary harms:

- Out-of-pocket expenses incurred by the employee including increases in premiums, copays, coinsurance, deductibles, other out-of-pocket expenses, and unpaid medical bill expenses
- Credit card debt
- Late fees, penalties, eviction/moving expenses or other expenses caused by the inability to pay bills
- Other costs incurred to make ends meet, which can presumably include fees paid to check cashing enterprises, short-term loan fees, interest on loans, etc.

Two Board members disagreed with the majority's decision, claiming:

> On its face, this standard would permit recovery for any losses indirectly caused by an unfair labor practice, regardless of how long the chain of causation may stretch from unfair labor practice to loss, whenever the loss is found to be foreseeable. In our view, this standard opens the door to awards of speculative damages that go beyond the Board's remedial authority.

Further litigation is required to understand the scope of what is foreseeable, but without some limitations, the threshold for foreseeable damages remains open to interpretation.

Notably, the new remedial standard applies retroactively to all pending cases, creating massive uncertainty for employers on the scope of their liability for NLRA violations.

FOR MORE INFORMATION

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[1] https://apps.nlrb.gov/link/document.aspx/09031d458353f6b9 (Seeking Full Remedies).
[2] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).