

NLRA Violators Must Compensate Aggrieved Employees for All Direct or Foreseeable Financial Harm that Results from Violations

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For years, the National Labor Relations Board (NLRB) sought to make wronged employees whole for the consequences of a respondent's unfair labor practices. Last week, in a 3–2 decision, the Board clarified that its available make-whole remedies include compensating the employees for all “direct or foreseeable pecuniary harm” that results from the violations.

The Board demurred from trying to enumerate all pecuniary harms that may be considered direct or foreseeable. It made clear, however, the array is broad:

Where, as here, employees have been laid off in violation of the Act or been the targets of other unfair labor practices, they may be forced to incur significant financial costs, such as out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet. We cannot fairly say that employees have been made whole until they are fully compensated for these kinds of pecuniary harms if the harms were direct or foreseeable consequences of the respondent's unfair labor practice.

Still, because they were not implicated in the case, the Board declined to embrace, or opine on, the General Counsel's contention that the Board should award compensatory damages for pain, suffering, or emotional distress.

Regarding the procedure to be followed to resolve direct or foreseeable pecuniary harm claims, the Board explained that the General Counsel must establish the amount of the harm and that it was (1) either directly caused by the unfair labor practice or was foreseeable when the respondent violated the Act; and (2) incurred as a result of the unfair labor practice. The burden then shifts to the respondent to (1) negate the General Counsel's showing; or (2) establish that the employee failed to mitigate the alleged loss.

Going forward, the Board will apply its clarified standard in every case in which make-whole relief is warranted. The Board also will apply it retroactively to all pending cases.

The case is *Thryv Inc. and International Brotherhood of Electrical Workers, Local 1269*, Case Number 20-CA-250250 (NLRB 2022). Chairman McFerran and Members Wilcox and Prouty issued

the decision. Members Kaplan and Ring concurred in part and dissented in part.

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