What To Know About NLRB's Expanded Labor Remedies

By **Manolis Boulukos** (January 4, 2023)

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Prior to the National Labor Relations Board's Dec. 13, 2022, decision in Thryv Inc., the board's traditional make-whole remedy for employee damages suffered as a result of an employer's unfair labor practice was generally limited to back wages or reinstatement of employment. Today, potential remedies in unfair labor practice cases are broader, and far more nebulous.

In Thryv, which involved an employer's alleged unfair labor practices relating to bargaining over a reduction in force, the board dramatically broadened its interpretation of the scope of employer liability under the National Labor Relations Act, holding that in addition to back wages and reinstatement, affected employees may also recover "for all direct or foreseeable pecuniary harms" resulting from employer violations of the act.

Needless to say, this decision significantly raises the stakes for employers facing potential liability under the act, and leaves the door open for the board to expand further the scope of unfair labor practice remedies.

On an immediate level, the most impactful aspect of this decision relates to the addition of allegedly foreseeable pecuniary losses suffered by employees. As the board detailed in Thryv, this category of damages would go beyond lost wages to include indirect consequences of a job loss — or other consequences of an employer's unfair labor practice — such as credit card debt, medical bills, child-care expenses, job search costs and potentially even housing-related costs, such as moving expenses or losses related to a mortgage foreclosure.

Although the board declined to include even more nebulous categories of damages, such as pain and suffering, within the scope of its new make-whole standard in the Thryv case, it did so on the basis of the particular facts of the case, declining explicitly to decide that issue one way or another.

Given the general counsel's concerted effort to give more teeth to board remedies, it seems likely that the board will have ample opportunity to revisit that issue in future cases.

The board's new standard, articulated in Thryv, will require proof that the alleged loss was, "either (a) directly caused by the unfair labor practice; or (b) was foreseeable at the time of the unfair labor practice and was incurred as a result of the unfair labor practice."

At that point, the burden will shift to the employer to establish facts that either negate or mitigate the alleged loss. Obviously, one of the most problematic areas for employers will be effectively determining its potential liability for what is foreseeable under this new standard.

Notably, this new remedial standard is not limited to cases brought against unionized employers; the act's provisions cover most private-sector employees, regardless of whether they are represented by a union.

So, while this decision is likely to be challenged in a federal court of appeal, and may

eventually be overturned, for the time being it is particularly important for all employers covered by the act to ensure that policies and practices comply with the act.

Specifically, employers and labor counsel are well advised to recalibrate risk assessments involved in making decisions related to significant employment issues, such as individual terminations where any alleged "protected and concerted activity" is involved, reductions in force, union organizing campaigns, and — in the case of unionized employers — implementing unilateral changes to terms and conditions of employment based on disputed contract language.

The following are key areas for consideration.

In reviewing any potential separation of employment where either a collective bargaining agreement or individual rights under the act are potentially implicated, an assessment of potential exposure should attempt to account for the enhanced remedies and enhanced exposure made available under Thryv — back wages and reinstatement are now only one element of the analysis.

In unionized workplaces, disputed employment actions that the union would typically challenge via the grievance process — such as for-cause terminations or application of seniority language in conducting layoffs — may now be the subject of unfair labor practice charges (in addition to or in the place of grievances), given the potential availability of more robust remedies.

Employers and counsel should be prepared to fight the same battle on multiple fronts.

Given that damages now available in board proceedings are not available under all employment discrimination statutes, employers and counsel should be prepared for the possibility that plaintiffs' employment counsel will more regularly encourage individual litigants to file unfair labor practice charges.

In order to be prepared for this possibility, nonunionized employers will want to ensure that their employment handbooks, policies and practices are compliant with current board policies relating to workplace conduct rules and disciplinary measures.

Manolis Boulukos is a partner at Ice Miller LLP.

Ice Miller partners Paul L. Bittner, Ryan McCabe Poor and Paul H. Sinclair contributed to this article.