

# Back Pay *Plus*: NLRB Permits Employees To Recover “Foreseeable” Damages From Employers for Labor Law Violations

By **Morris L. Hawk**

Yesterday, the National Labor Relations Board significantly expanded the damages available to employees in unfair labor practice proceedings. Damages for employees wrongfully discharged in violation of federal labor law have traditionally been limited to back pay and reinstatement. Now, the Board, in a 3-2 decision, has ruled that such employees are entitled to all direct or foreseeable financial harms arising from the employer’s violation.

The Board majority defines “direct harms” as those resulting directly from the employer’s unlawful conduct and “foreseeable harms” as those which the employer knew or should have known would be likely to result from the employer’s violation of the Act.

Including “foreseeable harms” is an unprecedented expansion of the Board’s traditional remedy. The Board does not specify what types of pecuniary harms are “foreseeable.” However, in describing what could constitute a “foreseeable harm,” the Board mentions out-of-pocket medical costs, credit card interest and late fees due to missed payments, tax penalties arising from early 401(k) withdrawals, and even the loss of a home because of the inability to make mortgage payments.

To prove damages under the new standard, the General Counsel will have the initial burden of producing evidence of the amount of the harm and whether it was either: a) directly caused by the employers’ unfair labor practice; or b) foreseeable at the time of the unfair labor practice. The employer will then have the opportunity challenge the amount owed, present evidence that the harm would have occurred even absent the unfair labor practice, and/or establish that the harm was not foreseeable. However, the Board adds that “uncertainties” or “ambiguities” as to damages will be resolved against employers.

The new standard applies immediately to all existing cases. Employers currently facing unfair labor practice charges will need to evaluate them based on the additional damages that may result from an unfavorable decision. Employers will also no doubt see additional “foreseeable” damages included in settlement demands made by the NLRB’s General Counsel.

Please reach out to your Roetzel attorney with any questions regarding the Board’s new standard for damages or any other labor law related issue.

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