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Two more US appeals courts rejected the US NLRB's *Thryv* framework this week, creating an uneven playing field and increasing the likelihood of US Supreme Court review.

Key takeaways

- US appeals courts are divided on whether the NLRB has the authority to award compensatory damages under its 2022 *Thryv* ruling.
- The recent rejections of broader remedies bring the issue closer to potential review by the US Supreme Court.
- Jurisdictional strategy and early case evaluation are important for employers in unfair labour practice litigation.



The US Courts of Appeals for the Fifth and Sixth Circuits independently rejected the US National Labor Relations Board's (NLRB) authority to award expanded make-whole remedies in opinions filed in the past week. The decisions have deepened a circuit split over the agency's controversial 2022 *Thryv* ruling.

The Fifth and Sixth Circuits join the Third Circuit on one side of the split. The Ninth Circuit stands alone on the other.

Before *Thryv*, the NLRB's make-whole remedies were limited to reinstatement and backpay.

However, in a 3-2 decision finding that the software company had violated the National Labor Relations Act 1935 (NLRA) by laying off six striking workers, the Board wrote that, to "best effectuate the purposes of the Act, our make-whole remedy shall expressly order [Thryv] to compensate affected employees for all direct or foreseeable pecuniary harms that these employees suffer as a result of [Thryv]'s unfair labor practice."

Fisher Phillips partner Joshua Nadreau said *Thryv* has "forced employers to reconsider the exposure of unfair labour practices beyond the remedies that had been historically contemplated." He said the ambiguities of the NLRB's decision have created uncertainty in the private sector.

NLRB "diverges" from traditional remedies

A unanimous three-judge panel for the Fifth Circuit vacated the NLRB's *Thryv* order in 2024. However, the appeals court did not rule on whether the NLRA grants the Board authority to order expanded remedies until its 31 October 2025 decision in *Hiran Management v NLRB*.

Eight non-unionised employees at Hiran Management, doing business as karaoke restaurant Hungry Like the Wolf, went on strike in 2022 due to an alleged lack of pay, among other things. The striking employees were terminated following an unsuccessful meeting with the restaurant's lawyer about their list of demands.

The employees took the matter to the NLRB, which filed a complaint alleging that Hiran violated the NLRA by discharging workers for engaging in protected concerted activity. An NLRB administrative law judge (ALJ) ruled in favour of the agency in February 2024.

The Board adopted the ALJ's position on appeal and ordered Hiran to reinstate and "make whole" the employees for any foreseeable pecuniary harms. The company appealed to the Fifth Circuit in November 2024, and the appeals court concluded that the NLRB exceeded its statutory authority by ordering Hiran to reimburse all foreseeable costs incurred by the discharged employees.

"While some forms of equitable relief attempt to restore the status quo, legal relief often has the same goal. If the Board were correct, then all instances of compensatory damages could qualify as an equitable remedy. In demonstrating no principled distinction between legal and equitable relief, the Board's result diverges sharply from the well-established principle that compensatory damages are a form of legal relief," the appeals court wrote.

The court condemningly continued: "The Board is not entitled to re-create established distinctions in the law, or in its governing statute, to serve parochial purposes."

The Fifth Circuit also found that the NLRB's ruling contradicted US Supreme Court precedent holding that the agency's "power to order affirmative relief" does not include a "general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct."

The decision "significantly narrows the potential financial exposure in unfair labour practice cases" for employers in the Fifth Circuit, Phelps Dunbar counsel John Duke said, as the NLRB "can no longer tack on extra compensatory damages for every ripple effect of an alleged violation."

The Sixth Circuit offered employers the same relief with its 5 November 2025 decision in *NLRB v Starbucks*. The case centred around a shift supervisor in Michigan who led union organising efforts at her store in 2022 and was terminated that year for allegedly violating Starbucks' two-employee safety policy. Starbucks Workers United pursued unfair labour practice charges on her behalf, and the NLRB filed a complaint alleging that the coffee giant violated the NLRA by discharging the employee in retaliation for her union activity.

An ALJ and the Board, on appeal, rejected Starbucks' claims that the employee was terminated for violating company policy. The NLRB ordered Starbucks to provide expanded make-whole relief, which the Sixth Circuit vacated on Wednesday.

"The policymaking rationale for such remedies reflects the very crux of their unlawfulness: The Board is measuring monetary relief from the standpoint of the employee's loss, indicating its compensatory nature, rather than the employer's gain, which invokes equitable considerations," the Sixth Circuit wrote. "In so doing, the Board has impermissibly shifted from equity to law."

Circuit split

The Fifth and Sixth Circuits have joined the US Court of Appeals for the Third Circuit in rejecting the remedies established under *Thryv*. In its 27 December 2024 opinion in *NLRB v Starbucks*, the Third Circuit ruled that the NLRB unlawfully ordered Starbucks to provide compensatory damages to two terminated employees.

The Third Circuit agreed with the NLRB that Starbucks engaged in unfair labour practices by terminating the employees for their involvement in union organising. However, it found that the NLRB "exceeded its authority under the NLRA" by ordering relief that "exceed[ed] what the employer unlawfully withheld."

"[W]hile it is true that 'the Board for many years has ordered that employees be made whole for a variety of monetary losses suffered as a result of an unfair labor practice,' it has done so— at least until *Thryv*— on a case-by-case basis, with awards that provided workers with the benefits of their employment contracts in a way that likely fell under the umbrella of a backpay award. . . . That changed with the Board's decision in *Thryv*," the Third Circuit wrote.

Phelps' Duke noted that there's "no practical difference" among the appeals courts' positions, but said the Fifth Circuit "tends to be much more conservative" than others. The Third Circuit, he continued, may be more "NLRB-friendly" in its interpretation of the NLRA when considering certain remedies, such as awarding attorneys' fees for bad faith bargaining.

The US Court of Appeals for the Ninth Circuit has taken a different approach. In a 20 October 2025 decision, the Ninth Circuit upheld an NLRB decision ordering Macy's to provide expanded make-whole relief for unlawfully locking out building engineers and craftsmen without clearly informing them of the conditions for reinstatement.

Notably, the Ninth Circuit rejected the department store's argument that the NLRB exceeded its statutory authority by ordering compensatory damages, concluding that "the Board's invocation of *Thryv*'s make-whole relief framework in this case vindicates a public right."



"We agree that the NLRB is not authorized to award 'consequential damages.' . . . The broad 'grant of remedial power' under the [NLRA] also 'does not authorize punitive measures, but making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces,'" the Ninth Circuit wrote. "But the NLRB has not awarded such damages here."

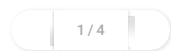
Sixth Circuit



"We do not doubt the Board's authority to tailor monetary payments so that they serve solely 'to restore the status quo,' rendering them equitable. But awards under *Thryv* reach much farther than just that narrow category. In effect, they broaden the realm of [NLRA] relief to harms bearing, at best, a tangential relation to the respective unfair labor practice."

NLRB v Starbucks, 5 November 2025
Rejected *Thryv*

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The future of *Thryv*

The current circuit split regarding *Thryv* remedies makes the issue "a very likely candidate for US Supreme Court review," Duke said.

Duke added that he thinks the US Supreme Court "would cap NLRB remedies" as the Third, Fifth and Sixth Circuits have done. For now, he said, "remedial exposure depends heavily on where a case happens to be filed."

"Liabilities are capped at traditional make-whole relief in the Third and Fifth Circuits, while they can extend a lot further in the Ninth Circuit. This makes jurisdictional strategy and early case assessment really important," Duke said.

Employers in the Third, Fifth and Sixth Circuits may choose to appeal adverse district court decisions in those jurisdictions. However, Duke said employers in the Ninth Circuit "would be well advised to appeal" instead to the US Court of Appeals for the District of Columbia Circuit, which can hear all Board decision appeals and has yet to weigh in on the issue.

There's also potential for the NLRB to revisit the Biden-era *Thryv* ruling once it returns to a quorum and is under Republican control. However, Duke said the agency may leave the matter up to the US Supreme Court "so that a future Democratic Board would not be able to reverse" what would likely be an employer-friendly decision.

Fisher Phillips' Nadreau acknowledged the NLRB's doctrine of non-acquiescence, noting that it "takes the position that its cases are valid unless and until the US Supreme Court says otherwise." He said this creates a practical problem for employers in the short term, but that an end is in sight.

"Right now, *Thryv* is the law of the land from the NLRB, and ALJs are bound to follow it," Nadreau said. "But between the US Supreme Court or the NLRB reversing the decision itself, the likelihood of *Thryv* lasting much longer is pretty remote."

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