



Employers Gain Additional Defenses In Union Salting And Deferral Cases Thanks to New Guidance from NLRB Official

Insights

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The National Labor Relations Board's Acting General Counsel recently issued two policy memos reshaping how you can handle union-related risks in salting and deferral cases. The **salting** guidance provides a roadmap for employers targeted by unions for not hiring union-supported candidates. The other revamps how the NLRB will treat **deferral** procedures, streamlining the unfair labor practice process when a grievance-arbitration clause covers a workplace dispute. Together, these moves give employers fresh defenses. What can you do to capitalize on these changes?

What is Salting?

Salting occurs when a union sends a member to a non-unionized jobsite to get hired and then try to convince the existing employees to organize into a union. Although it sounds deceptive, salting is a legitimate organizing activity, and "salts" – the union employees who apply for employment with the targeted employer – are protected from discrimination and retaliation under federal labor law.

Unions have deployed salting tactics historically to organize construction, manufacturing, and transportation employees. However, they have recently adopted the practice to organize employees in technology, e-commerce, retail, and other industries.

What has Changed?

The Board's case law requires three elements to establish that an employer unlawfully failed to consider or hire a union employee:

- the employer was hiring or had concrete plans to hire;
- the applicant had experience or training relevant to the announced or generally known requirements of the position; and
- union animus contributed to the decision not to hire the applicant for employment.

Under the AGC's July 24 guidance, employees (or unions) filing charges must present evidence that the salt is "genuinely interested" in working for the employer. While the Board will independently evaluate this element, it will analyze evidence from the employer of the circumstances surrounding:

- the contents and completeness of the salt's application;
- the applicant's behavior and conduct during interviews; and
- the applicant's previous refusal of similar employment.

What Should You Do Going Forward?

Here are several steps for you to consider in response to the AGC's salting guidance:

1. Review Recruitment Practices. Assess whether your recruitment strategy is based on targeted recruiting, where applications are accepted only when an open position is posted, or general/continuous recruiting, where applications are accepted at any time. By targeting and limiting recruiting to an as-needed basis, you may avoid any inference that you did not consider or interview a salt candidate because of their union affiliation when, in reality, you did not have concrete plans to hire when the "salt" candidate applied. It may also allow you to demonstrate why you hired a specific applicant and not the union employee.

2. Develop Clear Job Postings Detailing Qualifications for the Position. Ensure job descriptions clearly detail the desired experience/credentials and essential duties for the position. This will help you identify discrete qualifications/duties that the hired applicant possessed and why the salt candidate was less qualified and not hired.

3. Require Applicants to Submit Complete Applications and Verify Personal Email Address During the Application Process. During salting campaigns, unions have been known to apply for positions on behalf of an employee without their knowledge. Requiring employees to verify their personal email addresses can help to confirm that all applicants, including any union employee applicants, have a genuine interest in working for the company. And requiring applicants to submit a complete application may help screen applicants who are less serious about working for the employer.

4. Retain Applications from All Applicants for at Least a Year. The National Labor Relations Act (NLRA) requires individuals to file an unfair labor practice charge within six months of a violation. By maintaining a repository for all applications for at least one year, you can rest confidently that you will be able to demonstrate the reasons for your hiring decisions in the event a ULP charge is filed in the last of that six-month period. You should also comply with recordkeeping obligations under other statutes, such as Title VII, the ADA, and various state laws, which may be even longer.

5. Utilize Standard Interview Forms that Allow Management Employees to Memorialize Any Inappropriate Comments or Behavior. The AGC noted that specific comments made during interviews may demonstrate a lack of genuineness on behalf of union employees or other applicants. Documenting an applicant's behavior during an interview may enable you to subsequently establish that the salt applicant did not possess a genuine desire to work for your company.

6. Train Managers and Human Resources Representatives on Salting. It is crucial that employees involved in the hiring process understand union salts still enjoy the same protections as other applicants. Your hiring team must judge all applicants under the same criteria and evaluate to determine who is best positioned to perform the essential tasks of the role, without consideration of any union affiliation or preference.

7. Engage Experienced Labor Counsel Early. With unions using sophisticated techniques like salting, it is important to engage experienced labor counsel at the first sign of suspected salting activity. They can help you review and update your policies and practices, prepare for potential investigations or litigation, and develop a proactive positive employee relations strategy.

What are the NLRB's Recent Changes to the Deferral Procedure?

The AGC also updated the Board's investigation procedures for ULP charges that may be subject to the parties' collectively bargained grievance and arbitration process, which the Board refers to as "deferral." In essence, deferral permits the Board to pause investigations of ULP charges while the parties resolve the issue through the grievance and arbitration process. The Board can then adopt the result of that process or continue its investigation at that time.

Under [the August 7 guidance](#), the Board will defer all cases where:

- the charge allegations are facially proper and timely; and
- the initial evidence demonstrates that there is a reasonable chance that the parties can resolve their dispute using their contractual grievance-arbitration procedure.

Even if these factors are not met, the Board may exercise executive restraint to defer a ULP investigation where a contractual grievance-arbitration procedure exists. The NLRB will also limit parties' reporting obligations for deferred cases from quarterly to biannually.

These changes reflect the AGC's belief that the National Labor Relation Act's statutory scheme is upheld when parties use their contractual grievance-arbitration procedures and not the Board's increasingly-strained resources.

What Should You Do Going Forward?

Here are proactive steps to consider going forward given the updated deferral framework:

1. Review CBA Grievance-Arbitration Procedures. If you are subject to collective bargaining agreements, you should assess whether contractual language covers disputes that may separately qualify as ULP charges. If so, you should notify the Board of the grievance-arbitration language immediately upon receiving a ULP charge to avoid having to potentially litigate a dispute on multiple fronts in separate venues.

2. Assess Whether To Negotiate New Grievance-Arbitration Language. If you are subject to narrow grievance-arbitration procedures covering limited disputes, you may want to consider negotiating broader procedures that cover alleged violations of the NLRA. Be mindful, however, that remedies provided in arbitration may be broader than those under the NLRA.

Conclusion

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