OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 25-08 **July 24, 2025**

TO: Regional Directors, Officers-in-Charge, and Resident Officers

FROM: William B. Cowen, Acting General Counsel

SUBJECT: Guidance for Investigating Salting Cases

I recently instructed Regions to submit all salting cases[1] for review and consideration. Based on my review of several pending cases, I am providing updated guidance for investigating salting cases.[2]

Below you will find a brief summary of *Toering Electric Company* 351 NLRB 225 (2007) followed by updated case processing guidance that I expect all Regional offices to follow when investigating refusal to hire/refusal to consider for hire cases that arise in the salting context.

The Toering Case

In *Toering*, the Board significantly modified the legal standard established in *FES (A Division of Thermo Power)*[3] for determining whether an applicant for employment in a salting case is entitled to protection as a Section 2(3) employee under the National Labor Relations Act (Act).

As a general rule, job applicants are employees under Section 2(3) and are protected from discrimination under the Act.[4] In *Toering*, however, the Board determined that those protections were being abused in salting cases where salts "…have engaged in conduct clearly intended to provoke a decision *not* to hire them, or have engaged in antagonistic behavior toward the employer that is wholly at odds with an intent to be hired." (emphasis in original)[5] The Board addressed this problem by placing the burden on the General

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[1] Salting has been defined as "the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees." *Toering Electric Co.*, 351 NLRB 225, fn 3 (2007) (quoting *Tualatin Electric*, *Inc*. 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996)). "[H]owever, a salting campaign's immediate objective may not always be organizational, and the role of an individual "salt" who applies for work may not always be to obtain employment." Id.

[2] This memorandum supersedes the previously issued guidance found in GC 08-04 (Revised) (Guideline Memorandum Concerning *Toering Electric Company*), which is hereby rescinded.

[3] 331 NLRB 9, 12-13 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

[4] See, e.g., *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 551-553 (D.C. Cir. 2006), enfg. 344 NLRB 426 (2005).

[5] Those tactics included submitting applications by individuals who either lacked an interest in obtaining employment or were unaware of the submission; engaging in conduct inconsistent with an intent to obtain employment; and weaponizing Board processes by filing unfair labor practice charges to inflict substantial

Counsel in salting cases to "prove by a preponderance of the evidence that the individual in question was genuinely interested in seeking to establish an employment relationship with the employer."[6]

The Board emphasized that the change effected by *Toering* was not intended to constrain legitimate organizing activity or salting campaigns, but was necessary to "allay reasonable concerns that the Board's processes can be too easily used for the private, partisan purpose of inflicting substantial economic injury on targeted nonunion employers rather than for the public, statutory purpose of preventing unfair labor practices that disrupt the flow of commerce."[7]

The Legal Standard in Salting Cases

In salting cases, the General Counsel must satisfy the burdens imposed under both *FES* and *Toering* to establish a violation of the Act.

Under *FES*, the General Counsel must demonstrate that: (1) the employer was hiring or had concrete plans to hire; (2) the applicant had experience or training relevant to the announced or generally known requirements or, in the alternative, the employer has not adhered uniformly to such requirements, or the requirements were themselves pretextual; and (3) antiunion animus contributed to the decision not to hire the applicant for employment.[8]

Toering added an additional, required element to the General Counsel's prima facie case under *FES* – the need to demonstrate that the applicant is genuinely interested in seeking to establish an employment relationship with the employer. The Board stated:

> This requirement embraces two components: (1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did so on their behalf. In the latter instance, agency must be shown.
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> As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's

litigation costs on the targeted employer or to drive the non-union element out of business. 351 NLRB at 229 – 231.

[6] *Id*. at 233.

[7] *Id.* at 228.

[8] 331 NLRB at 12-13. The Board also explained that to establish a discriminatory refusal to consider, the General Counsel bears the burden of showing that: (1) the respondent excluded applicants from a hiring process; and (2) antiunion animus contributed to the decision not to consider that applicant for employment. The burden then shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. *Id.* at 10.

> actual interest in going to work for the employer. In other words, while we will no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence, that an application for employment is anything other than what it purports to be.
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> Consequently, once the General Counsel has shown that the alleged discriminatee applied for employment, the employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual **refused similar employment** with the respondent employer in the recent past; incorporated **belligerent or offensive comments** on his or her application; engaged in **disruptive, insulting, or antagonistic behavior** during the application process; or engaged in **other conduct inconsistent with a genuine interest** in employment.
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> Similarly, evidence that the **application is stale or incomplete** may, depending upon the circumstances, indicate that the applicant does not genuinely seek to establish an employment relationship with the employer.
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> Assuming the employer puts forward such evidence, the General Counsel, to satisfy the genuine applicant element of a prima facie case of hiring discrimination, **must then rebut that evidence and prove by a preponderance of the evidence that the individual in question was genuinely interested in seeking to establish an employment relationship** with the employer.
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> Thus, **the ultimate burden of proof as to the Section 2(3) status of the alleged discriminatee-applicant rests with the General Counsel.**

351 NLRB at 233 (citations omitted; emphasis added; formatted for clarity).

Case Processing Guidance

Toering governs all salting cases, and Regions are required to determine whether the *Toering* standard has been met as part of its initial investigation. Before soliciting charged party evidence in these cases, Regions should focus their initial investigative efforts and resources on obtaining evidence from the charging party. Regions should ensure that the evidence gathered bears on the two legal issues in *Toering*: whether the alleged discriminatee applied for employment and possessed a genuine interest in being hired.

Investigating the Employment Application Component

When investigating an application component, Regions should obtain copies of all application materials in the possession of the charging party or its witnesses. Regions should ask each alleged discriminatee whether they applied for employment or authorized someone to submit the application on their behalf. If the hiring process included personal interviews, Regions should explore the circumstances of the interview.

Mass or Batch Applications – In salting campaigns, unions sometimes utilize the practice of submitting mass or batch applications to an employer. The fact that applications may have been submitted en masse does not, standing alone, preclude a finding that an applicant is genuinely interested in employment if the submitter of the applications obtained authorization to do so from the applicants.[9] Thus, in mass application cases, Regions should determine whether the applicants actually authorized the submitter to submit applications on their behalf. The most effective way to prove that the applicant authorized the submitter to apply on the applicant's behalf is both through the applicant's own testimony and the testimony of the submitter of the applications in question. Evidence that the union regularly confirmed applicants' continuing interest in employment (such as by routinely updating applicant lists or by contacting individuals prior to submitting their applications) would support a finding of agency.

Investigating the Genuine Interest Issue

As a general matter, this phase of the investigation examines the overall manner in which the applicant presents themselves for consideration as an employee. Does the applicant have the requisite experience for the job? Did the applicant engage in any conduct that is incompatible with someone who is genuinely applying for work? Does their resume or other application materials, appear designed to provoke a dispute? Is their behavior during the interview consistent with someone who is genuinely seeking employment? Are there any similar indications that demonstrate their purpose is something other than genuinely seeking employment?[10] Although in litigation this evidence is not relevant until the employer places the applicant's genuineness into question, this evidence should be obtained as part of the initial investigation.[11]

Regions should explore with each alleged discriminatee the sincerity of their interest in employment with the employer. Because the General Counsel bears the ultimate burden of proving an applicant's genuine interest, it is imperative that Regions conduct a thorough and robust investigation of this issue. Testimony that the applicant would have accepted the position with the employer if an offer had been extended does not, by itself, show a genuine interest within the meaning of *Toering*. Nor is a mere

[9] 351 NLRB at 233, fn. 51.

[10] Truthfully reporting one's employment history is not, by itself, evidence of a lack of genuine interest. Thus, the fact that a person's resume accurately reflects that they previously worked for a unionized employer or held a position with a union is not disqualifying. However, as discussed herein, such evidence, in conjunction with other relevant factors, may raise questions of the applicant's sincerity.

[11] I recognize that some of the above-listed areas of inquiry target evidence that an employer may present under *Toering* to contest the genuineness of an applicant's interest after the General Counsel demonstrates that an application was submitted. Because our post-*Toering* experience in salting cases shows that employers almost invariably dispute the genuineness of an applicant's interest after employer evidence is solicited, it is of the utmost importance that these critical areas be explored with each applicant during the initial affidavit. This approach will conserve Agency resources since the presence of evidence reflecting an insincere interest in employment may warrant dismissing the allegation, thereby sparing Regions the time and expense associated with soliciting employer evidence and later obtaining rebuttal evidence.

representation of “genuine interest” sufficient. **Once placed in issue, genuine interest must be proved by the General Counsel by a preponderance of the evidence**.[12]

Regions should deeply probe the witness to test the legitimacy of that claim. This can be accomplished by asking whether the applicant recently refused similar employment with the employer; engaged in disruptive, insulting, or antagonistic behavior during the application process; followed the employer’s established procedures when applying; timely arrived for the interview(s); made follow-up inquiries regarding the application; had relevant work experience with other employers; or was actively seeking similar employment with other employers.

In addition to affidavit testimony, Regions should also request that the charging party produce relevant documentary evidence pertaining to the genuine interest issue, including applications, resumes, social media posts, emails and other written communications between the applicant and employer, and those between the applicant and the union, that discuss, refer to or mention the employer and the application process. These documents should be closely scrutinized for signs that would indicate a lack of a genuine interest in employment. For example, an application that is "stale" or incomplete may, depending on the circumstances, indicate that the applicant did not genuinely seek to establish an employment relationship with the employer. An application would likely be considered "stale" if a significant amount of time has elapsed since the individual authorized filing an application, or if it has been on file with the union for a long period of time without being submitted to an employer for consideration.

Regions should also vet the actual contents of applications and resumes for the existence of statements that evince a lack of genuine interest in working for an employer. For example, recent investigations have included application packages that identify “reading the National Labor Relations Act” as a hobby or list skills such as “applying pressure on employers to recognize our union,” “exposing employers who commit unfair labor practices” and “filing charges.” Comments such as these are definite signs that the alleged discriminatee is not a bona fide applicant. Other irregularities in an application package that may strongly indicate that an applicant lacks a genuine interest in being hired include: the failure to provide references or the names and contact information for previous employers; short employment stints with numerous employers; gaps in employment; fictitious employer names; suspicious email addresses; erroneous dates; overly vague or generalized descriptions of job duties; and the inclusion of hostile, threatening or offensive remarks on the application.

As a final matter, a *Toering* analysis is for the purpose of determining whether a particular applicant has a genuine interest in securing employment and therefore is entitled to protection as a Section 2(3) employee under the Act. It must be remembered that even where an individual’s interest in employment is genuine, many of the factors going into a *Toering* analysis also may be part of a lawful basis for declining to hire that individual – e.g. an applicant may engage in resume fraud by including false information

[12] 351 NLRB at 233.

or not including unfavorable information in a genuine effort to obtain employment. Nothing in *FES* or *Toering* requires an employer to accept or ignore such conduct.[13]

Deciding the Merits and Whether a Full Investigation is Necessary

After all relevant evidence has been gathered from the charging party – and prior to seeking charged party evidence – Regions should assess the evidence and determine whether, under *Toering*, the alleged discriminatee is entitled to protection as a statutory employee under the Act. If the Region concludes that an application was not submitted or authorized, or that the alleged discriminatee lacks a genuine interest in employment, the Region should dismiss the allegation, absent withdrawal, and refrain from conducting further investigation of the allegation or soliciting employer evidence regarding the matter.

In the event the Region concludes the alleged discriminatee was a bona fide applicant based on its evaluation of the charging party's evidence or is unable to decide the issues without a complete investigation, the Region should proceed to solicit the charged party's evidence, complete its investigation and make a final determination. Thus, a full investigation of a salting case is only warranted when the charging party's evidence demonstrates that the *Toering* factors have been satisfied or obtaining employer evidence is otherwise appropriate.

Determining Backpay in Meritorious Cases

If a determination is made that a refusal to hire and/or refusal to consider for hire salting case has merit, the Region should follow standard case processing protocol by notifying the parties of the decision and attempting to settle the matter before issuing a complaint. However, prior to preparing and presenting the proposed settlement agreement to the parties, the Region must examine the salting discriminatee's entitlement to backpay and instatement in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

In *Oil Capitol*, the Board held that the presumption of indefinite employment – that a discriminatee's backpay period should run from the date of discrimination until a valid offer of reinstatement is made – is inapplicable when the discriminatee is a union organizer or salt.[14] Instead, the General Counsel is required to present affirmative evidence that the discriminatee, if hired, would have worked for the employer for the backpay period claimed in the compliance specification. If the General Counsel fails to prove that the discriminatee would have stayed at a job indefinitely, the discriminatee is not entitled to instatement.[15] The Board deemed the following non-exhaustive list of factors as relevant to proving the length of the discriminatee's backpay period: (1) the discriminatee's personal circumstances during the backpay period; (2) union policies and

[13] Of course, such improper conduct must actually form the basis of the employer's action and not simply be seized on as a pretext for otherwise unlawful action.

[14] 349 NLRB at 1349. The Board also found inapplicable the traditional presumption in the construction industry that, if hired, a discriminatee would have been transferred by the employer to other jobsites after the completion of the project for which they originally were hired.
[15] Id. at 1354.

practices with respect to other organizing campaigns; (3) specific union plans for the targeted employer; (4) instructions or agreements between the discriminatees and the union concerning the anticipated duration of the assignment; and (5) historical data regarding the duration of employment of the discriminatees and other discriminatees in similar organizing campaigns.[16]

Under *Oil Capitol*, Regions should conduct a pre-complaint backpay investigation and allow the enunciated factors to guide their evidence-gathering efforts and determination regarding the appropriate backpay period. Given our ever-present duty to ensure that proposed backpay figures reflect the actual amount of monetary losses sustained on account of an unfair labor practice, Regions should resist the temptation to base their calculations on the discriminatee's unsubstantiated claims about the duration of the backpay period. This is especially true in cases where a discriminatee claims they would have worked for the employer for an indefinite period of time because, as the Board rightly recognized, "union salts unlike other applicants, do not typically seek employment for an indefinite duration."[17]

Lastly, in addition to seeking evidence from the discriminatee regarding the factors set forth in *Oil Capitol*, Regions should afford the charged party an opportunity to submit evidence that would reduce or negate its liability before making a final determination regarding the backpay period and any backpay owed. Engaging in this exercise will ensure that the ultimate backpay period and figure are founded on a full complement of pertinent evidence presented by both parties.

Submitting Cases to the Division of Advice

Regions should submit their *Toering* refusal to hire and refusal to consider for hire cases to the Division of Advice when, after the completion of a full investigation, the evidence obtained fails to clearly resolve the issue of: (1) agency raised by an authorization to submit an application on someone else's behalf; or (2) whether an applicant was "genuinely interested" in employment. Additionally, cases should be submitted to Advice where the Region finds that an applicant had a genuine interest in seeking employment notwithstanding the presence of *Toering* factors as well, as cases raising questions under *Toering* and *Oil Capitol* not resolved by this Memorandum.

Regions should take appropriate action in light of the guidance contained in this memorandum, including reviewing all complaint cases that were removed from the trial calendar to determine whether proceeding to trial is still warranted or the case should be dismissed. Please direct any questions regarding this memorandum to your AGC/Deputy.

/s/
W.B.C.

[16] Id. at 1349.

[17] Id. at 1351.