



Chicago

35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600
Fax: (312) 558-5700

Geneva

43, rue du Rhône
1204 Geneva, Switzerland
41 22 317-75-75
Fax: 41 22 317-75-00

London

99 Gresham Street
London EC2V 7NG
44 (0)20 7105 0000
Fax: 44 (0)20 7105 0100

Los Angeles

333 South Grand Avenue
Los Angeles, CA 90071-1543
(213) 615-1700
Fax: (213) 615-1750

Moscow

4 Stasovoy Ulitsa
119071 Moscow
Russian Federation
7495-975-0623
Fax: 7495-975-0624

New York

200 Park Avenue
New York, NY 10166-4193
(212) 294-6700
Fax: (212) 294-4700

Paris

25, avenue Marceau
75116 Paris, France
33 1-53-64-82-82
Fax: 33 1-53-64-82-20

San Francisco

101 California Street
San Francisco, CA 94111-5802
(415) 591-1000
Fax: (415) 591-1400

Washington, D.C.

1700 K Street, N.W.
Washington, D.C. 20006-3817
(202) 282-5000
Fax: (202) 282-5100

Oil Capital Sheet Metal Update

In a 3-2 decision, the NLRB recently changed its standard for determining backpay in “salting” cases. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007). The NLRB held that it will no longer apply to a union-organizer “salt” the presumption that he or she would have worked indefinitely, and is entitled to backpay from the date of discrimination until the employer makes an unconditional offer to hire the “salt.”. The NLRB further stated in “salting” cases it is the General Counsel’s burden to establish that the claimed backpay period is reasonable.

Oil Capitol refused to hire Michael Couch, who was found to be a “salt.” The NLRB has defined “salting” as “the act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees.” *Tualatin Electric*, 312 NLRB 129, 130 n. 3 (1993). The traditional remedy for refusal to hire in non-salting cases includes backpay. Prior to *Oil Capitol*, a rebuttable presumption was applied that backpay period was due from the moment of discrimination until a valid offer of instatement or reinstatement. Employers had the burden of rebutting this presumption to reduce a back pay award. *Oil Capitol* changes the standard by holding that the rebuttable presumption does not apply to “salts.” Though employment in typical refusal-to-hire cases was presumed to be indefinite, courts will not presume that a “salt” would have transferred work sites after completing a project. Now, the General Counsel must prove a “salt” would have worked at multiple job sites or for an indefinite period. The General Counsel must also prove that a “salt” would still be employed by the employer if not for the discrimination in order to gain an instatement or reinstatement order.

The majority reasoned that in customary refusal-to-hire cases, the employer is in the best position to know the duration of employment because employees generally plan on working indefinitely at the employer’s discretion. “Salts,” however, generally only seek employment for the time necessary to achieve the union’s objectives. Therefore the NLRB held that the union, rather than the employer, is particularly suited to know the duration of a “salt’s” employment because it is based on the union’s goals.

The dissent criticized the reading as going beyond the briefs and empirical evidence submitted by the parties. The dissent challenged the majority’s conclusion that “salts” typically would not seek indefinite employment, stating a union cannot predict how long a “salt’s” employment will last when employment is cut short by the employer. The dissent also criticized the majority for “reaching beyond the issue of backpay” to the subject of instatement or reinstatement, and suggesting that in some cases that instatement or reinstatement would not be a proper remedy.

The majority countered by stating that by eliminating the rebuttable presumption in “salting” cases, damages would be less punitive and more tailored to the actual consequences of discrimination.

If you have questions regarding this Briefing, please contact one of the Labor & Employment Relations Practice Group partners listed below.

Chicago

(312) 558-5600

Derek G. Barella
Susan M. Benton
John M. Dickman
C. R. Gangemi, Jr.
Gregory J. Malovance
William G. Miozzi
Michael L. Mulhern
Gerald C. Peterson
Michael P. Roche
Rex L. Sessions
Cardelle B. Spangler
Cheryl Tama Oblander
Joseph J. Torres

Los Angeles

(213) 615-1700

Paul J. Coady
Jessie A. Kohler
Anna Segobia Masters
Evan R. Moses
Lee T. Paterson
Laura R. Petroff
S. Shane Sagheb
Amanda C. Sommerfeld

New York

(212) 294-6700

Jeffrey S. Bosley
Stephen L. Sheinfeld

Paris

(33) 1-53-64-82-82

Sébastien Ducamp

San Francisco

(415) 591-1000

Charles S. Birenbaum
Jon Cohen
Robert Spagat
Joan B. Tucker Fife

Washington, D.C.

(202) 282-5000

Connie N. Bertram
M. Carter DeLorme
William G. Miozzi