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# Reducing the risks of inducement

*As the economy recovers, employers will be looking to land top talent — but if the worker is already working somewhere else, there are legal pitfalls to avoid*

**BY ANNELI LEGAULT**

As Canadian companies emerge from hiring freezes and staff reductions, the hunt will be on for top talent. When actively recruiting, employers need to be aware of certain liability issues that can arise if an employment relationship does not work out.

First, when recruiting employees away from their current employment, employers should bear in mind the risks of causing them to breach their terms of employment. Employees should provide any notice of resignation to which they are contractually bound. Employers shouldn't let them bring any property or information belonging to their former employer to the new job.

A prudent step would be to include a clause in an offer letter or employment agreement stating the employer does not want the worker to bring any materials belonging to a prior employer. In addition, to flush out any issues that may arise from pre-existing non-solicitation or non-competition agreements, it's worth considering a statement that confirms a new employee is not bound by any prior restrictions that will limit his ability to accept employment or fulfill his new job responsibilities.

Second, there are potentially severe financial penalties for dismissing an employee who was actively recruited away from prior employment. In a typical case, an employee with long-term, secure employment is approached by a new employer. The new employer embarks on a campaign of inducement, perhaps including social events, an offer of a signing bonus or better pay. Eventually, the employee accepts. Within a short time of starting the new job, the employee is dismissed.

While the courts do not articulate this baldly, it looks like they are adding the two periods of employment together when calculating the amount of termination pay to award. Essentially, the courts treat this kind of situation as if the second employer caused the employee to lose both periods of employment.

While this approach may make some sense — although in my personal view, it treats employees as innocent, unthinking pawns, unable to govern their own lives — the case law on "inducement" has morphed from its original form into an unrecognizable creature. The case law no longer requires aggressive or even particularly active recruitment activities by the second employer. The original "inducement" or "enticement" is largely missing in many cases.

The principle has been applied even if a prior employment was not particularly secure or long-standing. The Supreme Court of Canada has confirmed the principle applies even if the new employment is lengthy, although then the inducement factor is given less weight when determining the appropriate termination pay.

Employers also need to be aware hiring through a third-party recruiter does not absolve an employer of liability. A recruiter is viewed as an agent of the employer and its actions are seen as those of the employer. Some recruiters will say they prefer to only hire people already actively employed in the target industry. Accordingly, the risk of increased severance liability is very real.

### Reducing liability

Given the courts' willingness to treat many run-of-the-mill recruitments as inducement, how does an employer limit severance liability when hiring already employed individuals?

The best strategy is to use an employment agreement that stipulates the severance terms, though this may be a change of course for many employers. Many employers avoid discussing severance at the time of hiring, either because it sends a negative message at what is supposed to be a positive moment or out of fear haggling about severance terms will derail the recruitment process.

However, this is the only effective way to avoid a large inducement claim if things don't work out. More senior employees will not be fazed by seeing a severance clause in an employment letter or employment agreement. Many have seen these before and the agreement also protects them and spares them the need to fight for their severance payment. A signed agreement is the only effective way to avoid claims based on inducement.

### Wrongful hiring

When competing for top talent, it is critical to remain aware overly optimistic pitches to job candidates will cross the line if a statement is made that is known to be untrue or misleading or a material fact is omitted.

In one prominent case, an interviewer neglected to tell a job applicant the board of directors had not yet committed any funds to the enterprise in question. As it happened, after the individual started work, the funding wasn't approved.

An employee who leaves employment because of misrepresentations can allege wrongful hiring and sue for damages. Employers need to ensure those involved in interviewing are aware of the importance of accuracy and completeness, particularly if it is reasonable to believe a job candidate will be relying on particular statements to make his decision.

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*Anneli LeGault is a partner practising employment, labour and privacy law at Fraser Milner Casgrain in Toronto. She can be reached at (416) 863-4450 or anneli.legault@fmc-law.com.*