Avoid ‘Inducement’ Risks When Recruiting Employees from Other Companies

Safety orientation training for new and young workers is either a legal requirement or best practice.

Sometimes the best person for a job works at another company. Wooing these people is part of capitalism. But it also carries legal risks, especially if things don’t work out and you end up firing the recruit. The risk stems from a legal rule called inducement and here’s what you can do to manage it.

The Law of Inducement

If you have just cause to fire the employee you recruited from another company, you can stop reading. Inducement is a concern only when termination is **without** cause, in which case courts may extend the termination notice period. **Result:** Higher damages.

Making employers pay extra notice for firing employees they induced from secure jobs became official law in the famous *Wallace* case of 1997, where a Manitoba grain company fired a salesman with a stellar record right after assuring him that his position was secure. The Supreme Court of Canada found the termination not only wrongful but carried out in “bad faith.” So, it extended the salesman’s notice to 24 months. “There’s a need to safeguard the employee’s reliance and expectation interests in inducement situations,” the Court explained [*Wallace v. United Grain Growers,* [1997] 3 S.C.R. 701].

But in the very next line, the Court cautioned that “not all inducements carry equal weight.” Courts would have to decide about extra notice for inducement case by case, it instructed.

7 Inducement Pitfalls to Avoid

And so they have. Inducement gets raised just about any time an employee recruited from another organization gets fired shortly into his tenure with the new employer. If you recruit employees working at other organizations, you need to understand how these cases get decided to stay out of trouble. Although no single one is determinative, there are 7 basic patterns of inducement courts look for:

1. Initiating the Recruitment Process

Inducement is akin to seduction. The purest picture would be of an employer locating the employee working happily at the other organization, initiating the recruitment process and making a full court press to persuade them to leave.

Example: A headhunter cold calls an employee to pitch a "wonderful" opportunity at a rival software firm. The employee has a secure job and is lukewarm, but after 13 months of wining and dining and "the sky's the limit" urgings, she takes the offer. Six months later, she's laid off. The court finds inducement and awards $320,000 in damages [*Antidormi v. Blue Pumpkin Software Inc.*, [2004] O.J. No. 3888].

Example: A production director is impressed by another company that's also located closer to his home. He submits a resume, does 2 interviews and takes a pay cut to go there. He gets laid off 6 months later. No inducement, says the court [*Laszczewski v. Aluminart Products Ltd.,* [2007] O.J. No. 4991].

2. Targeting an Employee with a Secure Job

The more secure recruits are in their current position, the greater the inducement risks in wooing them. Thus, for example, a casino committed inducement by firing a games manager 18 months after luring him away from a secure position of 16 years [*Dias v. Paragon Gaming EC Co.*, [2010] A.J. No. 1450]. By contrast, there was no inducement of a product packaging employee who had been looking to get out after his firm lost a big customer and eagerly responded to overtures by negotiating a salary increase. The employee was a "willing seduce," the court ruled [*McCulloch v. IPlatform Inc.*, [2004] O.J. No. 5237].

3. Offering Assurances of Long Term Employment/Security

Assurances of long-term employment are probably the most potent evidence of inducement. Witness the *Wallace* case itself where the grain salesman was fired right after being assured that his position was secure. The company's use of words like "secure" and "committed" to describe the opportunity also helped the software developer prove inducement in *Blue Pumpkin* above.

4. Promising Other Benefits

Dangling other incentives, including promises of significant pay raises, bumps in seniority and/or fast-track promotions, can also set you up for inducement claims.

Example: A 21% salary increase, as compared to the cumulative 7.69% in raises received in all 6 years with his previous firm, was evidence of inducement [*Butcher v. Protagon Display Inc.*, [2011] O.J. No. 3391].

5. Misrepresenting the Company or Its Finances

Putting the best face on your organization is an expected part of recruiting. But there's a difference between puffery and misrepresentation. The latter would include portraying your company as stable and prosperous when it's in financial distress. But employees are also expected to make inquiries about the company before accepting a job. For example, one reason the production director lost in the *Laszczewski* case above is that he jumped at the offer without doing "due diligence." Had he bothered to look at the company's financial statements , he might have recognized that layoff was a possibility.

6. Using Misleading Recruitment Tactics

Talking up a firm or opportunity is expected when it comes from HR directors and headhunters; but using the recruit's friends or colleagues to do your bidding can be problematic, especially if you offer them a referral bonus or other financial stake in the hire.

Example: Ex-colleagues encourage a Bell Canada employee with 20 years of service to apply for a job at Alcatel where they now work. Alcatel faces "tremendous opportunities" and offers "security" to its employees, they urge. What the employee doesn't know is that the ex-colleagues stand to earn $8,000 in referral fees from Alcatel. She takes the job and is fired without cause after 20 months. This kind of recruiting goes far beyond the kind of salesmanship inherent in the normal recruiting process, reasons the court in finding inducement and extending notice to 9 months [*Egan v. Alacatel Canada Inc,* [2006] O.J. No. 34].

7. Terminating New Employees Early into Their Tenure

Inducement has a limited shelf life. The risks are greatest when employees are fired soon after starting the new job. Thus, for example, a highly recruited sales rep fired 3 weeks into his tenure was awarded 7.5 months' notice [*McIntosh v. CTF Supply Ltd.*, [2001] O.J. No. 5062]. With each passing month, the gap in expectation between anticipated and actual tenure diminishes. Witness the salesman who lost his inducement claim when he was laid off after 13.5 *years* of service. He had a long run, said the court, and "any inducement consideration he had expired long ago" [*Smith v. Centra Windows Ltd.*, 2009 BCSC 606 (CanLII)].

6 Ways to Protect Yourself

There are at least 6 things you can do to minimize your liability risks for inducement:

1. Don't Make Promises You Can't Keep

You don't need a lawyer to tell you that you should avoid making false promises and be upfront with the people you recruit—at least if your goal is to establish positive and long-lasting employment relationships with them.

Practical Strategy: Although any false promise is problematic, it's especially important to avoid false assurances of job security.

2. Keep Your Recruiting Agents from Making False Promises

Ensure the people you rely on to perform recruiting functions, including both internal HR staff and headhunters, are upfront. Most professional recruiters do their job responsibly; but a few don't, especially if they only get paid when they produce a hire. And even responsible recruiters have been known to oversell opportunities on occasion.

Practical Strategy: Establish a policy banning recruitment staff from offering enticements or making representations about the organization or opportunity without running it past you first. If you hire headhunters, include an equivalent provision in the contract.

MODEL LANGUAGE

> Recruiter has no authority to make any representation, enticement or offer to a job candidate on the Company's behalf that's intended to induce the candidate to accept employment with the Company, unless such representation, enticement or offer has been submitted to and specifically approved in advance by the Company through its agent [*list the name of the HR director or other designated agent*].

3. Disclose Referral Fee Arrangements

Employee referral programs, i.e., paying bonuses to employees for recruiting friends or former colleagues, can be a good way to lure talent and build morale. But, as the *Egan* case above illustrates, they can also get you into trouble, especially when job candidates doesn't realize that their wooers stand to make a bonus. So, if you use these programs, be upfront with candidates and let them know about the arrangement.

4. Put All Promises in Writing

Putting the right provisions in the employment contract goes a long way in preventing the employee from getting an inducement bump if things don't work out. **Caveat:** You need to negotiate and get the agreement signed **before** the employee begins the job.

Practical Strategy: Make sure you list **all** of the terms of your agreement in the employment contract. Then, add a clause spelling out that the contract contains the entire agreement and that no side deals or verbal promises or representations have been made.

> **MODEL LANGUAGE**
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> Employee acknowledges and agrees that this Contract incorporates the entire agreement between the Employee and Company, and that the Employee is relying on no other representations, promises or inducements by the Company or its representatives in entering into this Contract.

5. Limit Employee to Statutory Notice

The second technique is to have the contract specifically address what the employee's rights will be in the event of termination without cause.

Practical Strategy: Limit employees to only the notice they're entitled to receive under the employment standards law of your jurisdiction. This will prevent employees from claiming more generous form of notice known as "common law notice" if they're terminated without cause.

6. Make Employment Probationary

Avoid making assurances of long-term employment and disclose any risk of early termination to recruits **before** they take the position to guard against false expectations.

Practical Strategy: Consider making the employment probationary. Of course, this could end up making it harder to lure the recruit. But if you really do desire a probationary arrangement, making the recruit think the position is permanent is exactly the kind of assurance that can lead to an inducement claim.