

Brief Your CEO: Personal Liability of Officers for Recruiting Violations



BOTTOM LINE ON TOP

Here's a case HR directors can use to deliver a powerful message to their C-Suite: HR management and oversight of recruitment activities is vital to managing liability risks to not only your organization but your officers and directors personally

THE VALCOM CASE

ADGA and Valcom are bidding for a lucrative government contract. The bid specs require the winning company to have at least 25 qualified senior technicians. ADGA has 45; Valcom has none. But Valcom gets the contract thanks to efforts of senior officials who personally interview ADGA technical staffers and persuade them to join Valcom and bring their colleagues with them. ADGA sues the Valcom officials personally for deliberately inducing the technicians to violate their fiduciary duty to ADGA. The Ontario Court of Appeal refuses to toss the case, saying the officials can be personally liable for stealing away ADGA's technical staff [*ADGA Systems International Ltd. v. Valcom Ltd.*, 1999 CanLII 1527 (ON CA)].

WHAT KEEPS YOUR OFFICERS UP AT NIGHT

The threat of being held personally liable for the organization's transgressions is the bugaboo of every corporate officer and director (collectively, "officers"). The principle means of managing this risk is by organizing the company as a separate legal entity responsible for its own debts and liabilities, like a corporation or limited liability company (LLC). But Valcom was an LLC and its corporate officials were still found personally liable. Obviously, then, the corporate and LLC form isn't an impenetrable shield.

PIERCING THE CORPORATE VEIL

The notion of disregarding the corporate form and holding officers personally liable, aka, "piercing the corporate veil," dates back to a venerable 1897 UK case called *Salomon v. Salomon*. But courts only resort to the strategy in rare

cases when they think officers are disguising themselves behind the corporate form to advance their own personal interests. So, to the extent officers act in good faith and in the primary interests of the corporation over their own, they're generally safe.

WHY VALCOM IS SO SCARY

What makes the *Valcom* case so scary from an officer's perspective is that it *wasn't* a piercing of the corporate veil. Although the officers' recruitment tactics were found to cross the line, they did it not to benefit themselves but to serve the business interests of their corporation and help it secure a big contract.

In holding them liable, the court extended corporate officer personal liability laws to protect not just a business associate or contract partner but an actual business rival. ADGA had no contractual relations with Valcom. It was just a competitor. All it expected was for Valcom to play fair in the competition for contracts. Valcom's failure to live up to this modest expectation was what got the court so upset.

MORAL & SIGNIFICANCE

When the *Valcom* case first came down nearly 20 years ago, some predicted it would usher in a new era of corporate officer accountability for every transgressions and contract violation their company commits. Such fears haven't come to pass. Even so, *Valcom* shows that company officials can be liable when they act in the company's rather than their own personal interests.

Improper recruitment is one area which can result in personal liability. That's not to say that you can't aggressively compete for talent. But the officers in *Valcom* committed 3 fatal mistakes:

1. They disdained the company's normal recruiting protocol and personally intervened in the process;
2. They targeted recruits in fiduciary positions who were currently under contract to another firm; and
3. They induced those recruits to violate their contract and fiduciary duties to their current employer.

In guarding against these recruiting abuses, HR protects the organization and its officers. Making officers aware of that fact might do you and your HR program some good.