Hiring & Recruiting: Improper Inducements Can Result in Liability to Organization AND Officers



Recruiting

Two companies are bidding for a lucrative government contract. The bid specs say that the winning company must have at least 25 qualified senior technicians. Company A has 45 such technicians; Company B has none. Senior officials of Company B interview representatives of Company A's technical staff and persuade them to come work for Company B. As a result, Company B gets the contract. Company A sues the officials of Company B for deliberately inducing the technicians to violate their fiduciary duty to Company A. The officials ask the court to dismiss the suit but the Ontario Court of Appeal refuses. Result: Company B officials must stand trial to determine if they're personally liable for stealing away Company A's technical staff [*ADGA Systems International Ltd. v. Valcom Ltd.*].

Officers Usually Insulated from Personal Liability

The decision of the court to find the officials personally liable is noteworthy because Company B is a limited liability corporation. Normally, a corporation's directors, officers and other shareholders (which, for simplicity sake, we'll refer to collectively as "officers") aren't *personally* liable if they commit violations while trying to advance the corporation's interest. But the normal liability protections didn't apply to the officials in *Valcom*. Why not?

Piercing the Corporate Veil

Corporations are legal entities separate and distinct from their officers. They're responsible for their own debts, legal violations and other liabilities. This layer of protection for corporate officers, known as the "corporate veil," goes back to a venerable 1897 case from the House of Lords called *Salomon v. Salomon*.

But courts have the discretion to disregard the corporate form and hold officers personally responsible for violations. This is called "piercing the corporate veil." Piercing the corporate veil is most often used when the court thinks that the officers used the corporate form to covertly advance their own personal interests.

But that's not what happened in *Valcom*. Recruiting away the senior technicians who

were under contract to Company A was a clear transgression. But the Valcom officials did it not to benefit themselves but to serve the business interests of their corporation. Their motivation was to help the company get the contract.

Directors and Officers Face Risk of Personal Liability

Before *Valcom*, Canadian courts had been historically very reluctant to pierce the corporate veil. Many predicted that the *Valcom* case, which happened in 1999, would usher in a new era in which corporate officers would be held accountable for all transgressions committed by their company. Specifically, it was feared that officers would be sued any time their company violated a contract. These fears haven't been realized.

In fact, piercing the veil is highly unlikely if the company has a contract with the injured party. After all, the latter is expected to know about the company and factor in the fact that officers can't be held personally liable before doing business with the company to begin with.

What upset the *Valcom* court so much was that Company A, the victim, didn't have any contractual relations with Valcom. It was just a competitor. All it expected was for Valcom to play fair in the competition for contracts. This Valcom failed to do in the court's opinion.

Managing Liability Risks

At the end of the day, *Valcom* shows that company officials that improperly recruit away key employees from competitors are running the risk of personal liability. That's not to say that you can't aggressively compete for talent. But when the prospects you target are under contract and can't take a position with your company without violating their fiduciary duties to their current employer, you're asking for trouble. The lesson of *Valcom* is that conduct like this can justify piercing the veil, even if the officers held liable did it to help the corporation rather than for personal gain.