

# Navigating The Hiring Process Successfully



Many employers are experiencing challenges with recruiting new employees. This is particularly so following the COVID-19 pandemic, with individuals increasingly willing to change employers. Because of this increased employee mobility, employers are engaging in the hiring process more often than in prior years.

There are a number of common legal issues that may arise during the hiring process. Employers should be aware of these legal issues so that they may take steps to prevent the issues from arising or manage risk and liability proactively.

## **Inducement**

Employers looking to hire often approach individuals and convince them to leave their current jobs. While there is nothing wrong with inducing someone to leave their current employment, there may be consequences if the relationship with the new employee breaks down. For example, an employer who induces a prospective employee to leave their current job may face increased liability if that employee's employment is terminated at a later point. Whether inducement increases liability can depend on a variety of factors, including the language in the offer of employment or the employment agreement.

## **Restrictive covenants and fiduciary duties**

Whether a prospective employee is subject to a restrictive covenant or a fiduciary duty with their current employer is also an important consideration during the recruitment process. Restrictive covenants and fiduciary duties can impose restrictions on what the prospective employee can do for their new employer. This can result in liability for the new employer if the employee breaches those restrictions.

Non-competition clauses preclude a departing employee from doing competitive business with their former employer. Non-solicitation clauses prohibit a departing employee from soliciting former clients or employees from their former employer.

Fiduciary duties can also impose restrictions on former employees. Not all employees are fiduciaries – employees only become fiduciaries where they have the ability to unilaterally exercise a discretion or power in a manner that affects their employer's legal interests. However, employees who are fiduciaries will owe fiduciary duties to their former employers for a period of time after leaving their employment. For example, former employees who owe fiduciary duties to their former employers are generally prohibited from directly soliciting their former employer's customers or

clients and from using confidential information to their own advantage.

Employers that are hiring should be cautious when they have a prospective employee who is subject to a restrictive covenant or a fiduciary duty. In either case, the former employer may commence a lawsuit or obtain an injunction against both the prospective employee and the new employer if it appears that the employee is breaching those obligations in their new job. When an employer is hiring an individual with these obligations, that employer should be taking steps to limit exposure in the event of a potential claim by the former employer.

## **Human rights**

In Canada, employers have a duty not to discriminate against job applicants during the hiring process.

Where an employer asks questions about a protected human rights ground, or asks questions that are intended to get a response about a protected characteristic, that employer may face a human rights complaint risk. Accordingly, it is very important for employers to carefully review and consider what questions they are asking applicants during the hiring process.

Where an applicant discloses that they have a protected ground that may require accommodation if they are hired, the employer will need to determine how that prospective employee could be accommodated to the point of undue hardship. The fact that the prospective employee would require accommodation if hired should not be a factor in any decision not to hire that applicant.

To learn more about the legal issues that arise during recruitment and considerations for retaining employees, please join us for the 2024 Saskatchewan Labour Update in [Regina](#) on May 8, 2024, or in [Saskatoon](#) and [virtually](#) on May 14, 2024.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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