

What To Know Before You Hire From A Competitor?



In many industries right now, businesses are fighting not just for clients, customers, and market share but to attract and retain good talent.

If you've managed to recruit an employee from a competitor – congrats!

But before you put together the onboarding package and schedule the welcome lunch, here are a few steps to take to avoid any potential legal headaches:

Identify Potential Risks

Before hiring a candidate from a competitor, there are a few potential risks to look out for, which may impact your strategy in the hiring process or make you decide to go with a different candidate altogether. Employees owe their current (and soon-to-be former) employers a number of duties, that can be outlined in their contracts, based on the common law, or the fiduciary nature of their position. If any of these duties are breached, it could result in expensive litigation, a damage award, and paying the other side's legal fees- for the employee, the hiring employer, or both. Further, if any of the below duties are even *perceived* to be breached, you could still end up defending expensive litigation. Therefore, not only should *actual* breaches be avoided, but also anything that could *appear* to be a breach from the outside.

- **Contractual Duties**

Is the candidate subject to an enforceable restrictive covenant in their contract with their current employer? This could take the form of a non-solicitation clause, which limits the employee's ability to solicit clients/employees of their current employer for a certain period after they leave. If you are hiring a particular candidate because of their business connections, current clients, or strong relationships with other high-value employees, you should find out if they are currently subject to a non-solicitation clause. In that case, the candidate's ability to bring clients or employees with them when they leave, and for a specific amount of time after they leave, would be severely limited. Further, if any employees or clients of the current employer do switch over to your business shortly, this could have the appearance of breaching the non-solicitation obligation, and could result in receiving a cease and desist letter, or ultimately, a Statement of Claim.

A candidate's contract could also contain a non-compete clause, which limits their ability to compete with the employer or work in a competitive business, for a specified amount of time and in a specified geographic location. If a candidate's

contract contains an enforceable non-compete clause, working with your company at all could constitute a breach of contract. Note that in Ontario, non-compete clauses are now prohibited under the *Employment Standards Act, 2000*, except for executive employees or in the case of a sale of a business, see our blog post on that topic [here](#).

Finally, employees may be subject to confidentiality or non-disclosure agreements, which could limit their ability to disclose certain information gained while working for their former employer.

- **Common Law Duties**

Regardless of any specific clauses contained in the employment contract, all departing employees have a duty not to disclose their former employer's trade secrets or confidential information.

Another important consideration is whether the employee is a "fiduciary" of their current employer, which means they owe their employer certain elevated obligations beyond those of a normal employee. Fiduciary employees can include directors, officers, senior managers, and other key employees. Even without specific contractual provisions, fiduciary employees owe their employers duties of good faith and loyalty, confidence, non-solicitation, and non-competition during and after their employment.

- **Notice of Resignation**

Whether there is a specific timeframe specified in their contract or not, employees have a duty to provide notice of resignation to their employer. In some provinces, this length of time is determined by statute, or it can be outlined in the employment contract. If the resignation notice period is not set out in the legislation or the contract, employees must still provide "reasonable" resignation notice. Depending on the employee's role and level of responsibility, the required resignation notice could be quite lengthy, so this is something to ask the candidate about and to keep in mind, particularly if you require the candidate to start at a certain time.

Practical Ways to Prevent Problems and Mitigate Risks

- Ask candidates whether they are subject to any restrictive covenants or other post-employment restrictions with their current employer.
- A candidate who has worked for a competitor will likely have valuable information regarding the competitor's business, strategies, customers, etc. While it may be tempting to try to get the inside scoop from the candidate, hiring employers should refrain from asking about or accepting information from the candidate about their current employer.
- When making an offer of employment, ask the candidate to confirm that they have not taken any of their former employer's confidential information or trade secrets, and will not use any confidential information from former employers in the course of their employment.
- Once a candidate has accepted the offer of employment, encourage them to provide written notice of their resignation to their employer as soon as possible, and to cooperate in the transition process.
- If the candidate is bringing clients or co-workers with them, ensure that the clients were not solicited (or appear to be solicited) in breach of any restrictive covenants.
- Discourage the candidate from soliciting their co-workers, and avoid active solicitation of other employees of the same company. If another employee of the same competitor applies for a job, ensure to document in detail how that candidate came to apply to the job posting.

- Use general best practices as you would in any potentially contentious workplace situation: keep everything as transparent and above board as possible, and document all steps taken and communications with relevant parties written with the eyes of an adjudicator in mind.

To ensure a smooth transition when hiring from competitors, follow these proactive steps to mitigate legal risks and maintain ethical practices.

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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