Hiring & the Law:
Tips for Getting the Right People "On" The Bus

A. GETTING THE RIGHT PEOPLE "ON" THE BUS

As every Chief Executive Officer (CEO), Human Resources Manager, senior executive, or entrepreneur knows, having the right people on your team is arguably more critical to your business than having the right corporate or business strategy. As reported in our companion Grey Book in this series ***"Management Guide for Defining the Employment Relationship"***, according to management guru Jim Collins, authour of the best selling book *Good to Great*,"The executives who ignited the transformations from good to great did not first figure out where to drive the bus and then get people to take it there. No, they *first* got the right people *on* the bus (and the wrong people *off* the bus), and *then* figured out where to drive it."

The purpose of this Grey Book Primer is to discuss how employers can get the right people *on* the bus (safely), without exposing themselves to unnecessary legal risks. Lawyers refer to this as the "pre-employment obligations" of the employer. We examine how to get the wrong people *off* the bus in our companion Grey Book in this Series, ***"Dismissal & the Law: Strategies for Getting the Wrong People off the Bus".***

B. PRE-EMPLOYMENT OBLIGATIONS & MANAGING RISK

This may sound odd since employers tend to worry more about termination or dismissal and hardly give a moment's thought to their pre-employment obligations, yet the legal risks in the pre-employment phase are many for the unwary employer. These include potential liability for discrimination in hiring; negligent misrepresentation; breach of pre-existing restrictive covenants; and inducing breach of contract, among others. Awareness is half the battle; acting on this awareness is the other half.

Discrimination in Hiring

Both federal and provincial human rights codes prohibit discrimination in employment advertising, applications and interviews. For example, under section 23 of the *Ontario Human Rights Code*, and subject to specified exceptions, no employer can ask any question of an applicant at any point in the recruitment process relating to, or allow their hiring decision to be influenced by, any of the prohibited grounds of discrimination including race, ancestry, place of origin, colour, ethnic origin, sex, sexual orientation, age, record of offences, marital status, family status, or disability (mental or physical), unless the characteristic qualifies as a *bona fide occupational requirement* or *qualification*. These expressions have highly technical meanings in law. And this is true even if no intent to discriminate is present. Keep these restrictions in mind throughout all phases of the recruitment and hiring process.

Negligent Misrepresentation

One of the greatest areas of potential liability for employers in the context of their pre-employment obligations is the tort of *negligent misrepresentation*. Simply stated, every person in a special relationship of proximity to another owes that other person a duty of care not to cause harm to that person. The modern articulation of this duty of care finds its genesis in the famous House of Lords case in *Hedley Berne* (1963), and includes a duty of care in providing information or advice to another person with the intention of inducing him or her to enter into a contract. The duty owed is one of reasonable care to ensure the advice or information is accurate, not misleading, and can be relied on. The courts have determined that the contractual relationship between an employer and prospective employee is such a relationship.

Accordingly, information regarding the nature and requirements of the job, the employer's true financial picture or competitive position in the market place, availability of an equity position in the company, and any other information within or reasonably within the knowledge of the employer about the company or the position, communicated to the prospective employee, must be accurate and reliable, if it is reasonable to expect that the prospective employee might rely on it in making his or her decision to accept the employment offer. The leading case in this area is that of the Supreme Court of Canada in *Queen v. Cognos Inc*. (1993), 99 D.L.R. (4th) 626. This duty is breached even if the person making the inaccurate statement believed it to be true. The duty extends, however, to the representation of *existing facts* only; not to speculations about possible future events that may or may not happen. Liability may be limited by a carefully worded and exact limitation of liability clause. The best general advice we can offer is to limit pre-employment representations to immediately verifiable facts and resist the temptation to "over-sell" the company or the

job. Then add a limitation clause to your employment contract for good measure.

Post-Employment Obligations & Restrictive Covenants

The other side of the *pre-employment obligations* of the employer are the *post-employment obligations* of the departing employee, i.e. the individual you are considering for employment. Most employees come to a new employment situation with a past. That past, particularly for executives and other high-level personnel, often includes *post-employment obligations* and *fiduciary duties* owed by them to a previous employer. These obligations do not necessarily cease with termination of the prior employment. Hiring managers and executives ought therefore to be particularly mindful of identifying these obligations early, and taking steps to mitigate any risks associated with them.

One way to get on top of this risk quickly is to ask the new or prospective employee whether he or she has a signed employment agreement with his or her previous employer and, if so, to review that agreement together to identify any risks and put controls in place to guard against them. But many of these obligations exist at common law quite apart from a written employment contract, and particularly where the individual occupied a senior or otherwise "key" position with the previous employer that created fiduciary obligations for the employee. Awareness is key.

For example, most employees, and particularly senior managers and other high-level personnel, owe a "duty of confidentiality" to their former employer that follows them wherever they go. This means that the new employee cannot *disclose* or even *use* any confidential information of that previous employer in his or her new position. The most hotly debated issue in this area is distinguishing between confidential information of the previous employer and the general knowledge and skills of the employee. The employee is typically free to use his or her own knowledge and skills for their benefit and that of their new employer. What they cannot use or disclose, however, are things like their previous employer's trade secrets, customer or supplier names, business intelligence, pricing or competitive strategies.

The other area to watch for is "Non-Competition" and "Non-Solicitation" clauses. These too can create risks for the new employer. Assuming the clauses are carefully drafted and enforceable (which is not always the case), "poaching" a key performer from your immediate competitor may be a hollow victory. Soliciting business from that individual's previous customers can also be perilous. Great care ought to be taken to reduce those risks. If the clauses in the pre-existing employment agreement appear unreasonable, they just might be. Seek legal advice before ignoring or slavishly complying with them.

Inducing Breach of Contract

Inducing breach of contract is another area of potential liability for the unwary employer. Sure you want to get the right people *on* the bus, but be wary how you get them *off* the bus they are currently on.

The leading case in this area is that of the British Columbia Court of Appeal in *Ernst and Young v. Stuart* (1993), 79 B.C.L.R. (2d) 70. In that case, a senior member of an accounting firm (Ernst and Young) left the firm to join a competing firm (Arthur Andersen).The competitor was aware that the accountant was under a restrictive covenant and that he owed his partners 12 months' notice, but offered him a position anyway with a promise of indemnity should his former employer sue him for breach of the partnership agreement. Although the accountant decided on his own to leave, there was no doubt the assurances offered by Arthur Andersen induced him to breach his contract with his prior firm. The new employer (Arthur Andersen) was found liable for inducing breach of contract. Even though the covenant itself was ultimately found to be unenforceable, the 12 months' notice clause was reasonable.

To succeed in an action for inducing breach of contract, the plaintiff must prove the existence of an enforceable contract, an act of persuasion intended to induce breach of contract, a lack of legal justification, and damages suffered by the plaintiff. By all means, get the right people *on* the bus; just be careful *how* you do it.

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