



The art of war: keeping and attracting talent in a disrupted labor market

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A labor market ripe for team moves

During the course of the last eighteen months, we have seen a significant increase in merger and acquisition activity within Bermuda, particularly in the (re)insurance sector. The uncertainties which can be created by a merger or acquisition often act as a catalyst for team moves as both employers and employees may seek to exploit the situation.

As a consequence, employers involved in mergers and acquisitions need to be ever more vigilant and proactive in how they seek to retain top performers and their teams, particularly in the months leading up to and in the immediate aftermath of the deal. On the flip side, this kind of activity can result in opportunities for employers to acquire top performers and their teams who may have become disillusioned or feel uncertain as to their own futures.

Importance of keeping the team together

For any business to thrive it must protect its interests from competitors. The impact of losing a top performer and their team to a competitor can be extremely damaging. The effect is not normally limited to the individual performer or team but can also result in the loss of clients, prospects, other staff and valuable confidential information. Such business interests will inevitably have been hard earned over a considerable period of time and are unlikely to be easily replaced in the short term.

Therefore it is fundamental to any successful business that it puts in place at the commencement of the employment relationship and maintains throughout effective protections. Likewise, for those employers who wish to turn poacher they need to proceed with caution and plan the raid carefully to try and minimize the risk of being embroiled in costly and time consuming litigation.

This article focuses on the measures which employers can take to try and limit the risks and detrimental effects of a potential team move and the steps necessary to plan and execute a successful poaching exercise.

Take pre-emptive measures: be proactive

There are a number of steps that employers can take to mitigate the risks that its employees will leave to join a competitor. Many employers already offer employees incentive based remuneration packages which aim to align the employees and employers longer term interests. Whilst such long term incentive plans together with a clear communication strategy can certainly assist with employee retention there are also some additional measures which employers should actively consider, such as:

- Including bespoke post termination restrictions in employees' contracts preventing both joining a competing business as well as soliciting former colleagues to join a competing business. Some employers also include covenants preventing groups of ex-employees from working together for a competitor.

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- Including other express terms which require employees to disclose any information which may adversely affect the employer's interests (e.g. plans to compete, approaches from competitors) and to provide any prospective employers with a copy of the employee's contract of employment and to disclose the identity of a potential new employer once an offer has been received.
- Identifying which employees or teams are most likely to be tempted to remove confidential information or attempt to take customers/clients. In general, those roles with most contact with clients and access to confidential information such as sales roles or roles which have been involved in creating intellectual property such as IT or software developer roles, are likely to pose the greatest risk.
- Ensuring that the employer does not inadvertently breach an employee's contract of employment as this will render the post termination restrictions and contractual confidentiality obligations unenforceable. For example, employers should ensure that they have the contractual right to suspend or place an employee on "garden leave" before doing so and should continue to provide employees with all contractual benefits even if it is suspected that the employee may be contemplating a team move.
- Taking preventative steps to ensure that if employees leave they cannot use any confidential information to assist a competitors business. This means ensuring that any confidential information is subjected to appropriate security measures (for example, password protecting and limiting accessibility). Also putting in place reliable IT systems for tracking how and when data has been accessed. This can enable the investigation of concerns at an early stage when action can still be taken.

Take charge: act quickly and decisively

In a "team move" scenario where one or more employees who work in the same business decide to leave and either set up in competition with their existing employer on their own account, or join one of their existing competitors, time is of the essence and the existing employer must act quickly and decisively to protect its own business interests.

Once an employer has established that the departing employees have acted in an unlawful manner (either breaching express terms or implied terms of their contract) there are several protective steps that it can take to try and prevent or mitigate the damage. These include:

- Investigating potential unlawful conduct, including interviewing the relevant employees and other employees who owe fiduciary duties (i.e. to act in the best interests of the company, to not make secret profits or to avoid any

conflicts of interests etc) to the employer (so should provide truthful and accurate responses) and conducting a forensic IT analysis (being careful not to breach any applicable privacy laws – this will include PIPA when it comes into force).

- Sending letters before action to the departing employees, the new employer, and sometimes other employees who may be vulnerable to being poached by the new employer.
- Applying for interim injunctive relief to enforce express or implied contractual rights, consider a "springboard injunction" to prevent the team or the new employer from taking advantage of an unlawful springboard as a result of past unlawful conduct (typically a breach of confidentiality but has been expanded to cover over unlawful acts such as breaches of good faith or fiduciary duties).
- Applying for orders for delivery up of documents and other material belonging to the existing employer to prevent its misuse, and to further investigate suspected wrongdoing.
- Seeking to negotiate a commercial settlement, typically involving the departing employees offering undertakings to the existing employer, or to the court, to desist from further unlawful activities.
- Continuing with legal proceedings to obtain final remedies against team members and/or the new employer for final injunctive relief, or financial remedies including compensatory damages or an account of profits.

In practice, an important tactical decision is whether or not to take action against the departing employees or against the new employer as well for the tort of inducing a breach of contract. This is another reason why ensuring that the contract contains express obligations on the employee to draw the post termination restrictions and confidentiality obligations to the attention of any prospective employer and/or inform the employer if an offer of employment has been accepted, can be useful. This may support an assertion that the prospective employer was on notice of the post termination restrictions.

Plan carefully and take precautions

As will be clear from the issues already raised in this article, care should be taken by prospective employers when recruiting senior individuals and teams from their competitors. The primary concerns, as noted, are that the individual may face enforcement action aimed at preventing them from working for their new employer for a period of time or seriously limiting their effectiveness in the new role and the new employer may itself face a claim that it has induced the employee to breach his or her contract.

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However there are several important steps that prospective employers can undertake to try and minimize the risk of enforcement action and disruption to their recruitment processes. These include:

- Taking time to understand the legal obligations (both express and implied) to which the prospective employees are subject, including, what type(s) of information is possessed by the prospective employees and whether this is covered by any implied or express confidentiality obligations.
- Considering seeking a legally privileged advice as to the potential enforceability of any express post termination restrictions at an early stage in the recruitment process.
- Engaging an external third party recruitment business to handle the recruitment process to demonstrate that the process was at arm's length and also to remind prospective employees to comply with their legal obligations.
- Avoiding creating any potentially damaging documentation evidence of potential unlawful conduct try to limit written communications.
- If the matter appears likely to lead to litigation considering who will act for the parties (to avoid any potential conflicts) and determining whether there is an acceptable compromise which could be offered to the former employer to avoid the cost and risk of litigation and enable the recruitment to go ahead.

Conclusions

Whilst there are clearly a number of potential risks which employers can face at the hands of former employees provided that these risks are carefully considered at the outset of the employment relationship and properly addressed in the applicable contracts which govern the relationship and the preventative steps outlined above are taken the risks can be significantly mitigated.

Likewise, for poachers, whilst the stakes are inevitably high provided that the poaching exercise is carefully planned and executed it is possible to significantly reduce the risk of litigation and achieve the desired outcome.



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