

For the team: the risk of mass lateral hires

An unhappy team in another firm may look like a tempting prize, but there's no such thing as a free transfer, says **John Gould**



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They are successful, profitable, famous – and disaffected. They are a jewel among acorns. Yours is the natural home for such talent. The prospects are exciting but will you hear the still small voice asking “What can their existing firm do about it?”

In fact the recruitment of teams of lawyers from their existing firms is by no means legally straightforward and is hedged about with risk for both them and a would-be recruiter. The law used to seem easy. In the words of Cumming Bruce LJ in *Searle & Co Ltd v Celltech Ltd* [1982] FSR 92 (CA), there was “nothing in the general law to prevent a number of employees in concert deciding to leave their employer and set themselves up in competition”. Now there are many traps and routes to litigation for the unwary.

Fiduciary duties

Partners, directors and senior employees owe fiduciary duties to act in the best interests of their firms. This may mean promptly disclosing any approaches to each other. It would certainly exclude propositioning others to leave. It may be impermissible to provide a recruiter with even non-confidential information to assist its efforts. These duties may be reinforced by contractual obligations which may contain enforceable restrictions including gardening leave.

The risks of litigation extend to the recruiter. Unless the team is reformed by a series of unconnected individual recruitments without any team member's facilitation, the recruiter is at risk. Inducing breaches of contract or duty and conspiracies may easily form the basis for litigation. Injunction or damages claims may not provide the public relations triumph that the recruiter had envisaged. Periods of enforced gardening leave may lead to a lengthy fallow period once a team does actually transfer.

Secret discussions

Attempts to overcome these difficulties may be more obvious, predictable and provable than a recruiter expects. Sheltering behind headhunters may not survive investigation. Secret discussions may not stay secret. ‘Losing’ mobile phones with text

records or other documents would be a very risky strategy for a lawyer. Recruiting a single person to attract the rest might be an advantage if the person is prepared to risk not being followed. The greater the assurance of followers, the less effective the ploy.

In the end the losing firm may decide that the costs of action and reputational risk are not worth the benefit of simply postponing the inevitable. If the team is clear that they want to go, they may well be able to clear the way by negotiation. Divorce and re-marriage may be much safer than seduction but, to mix a metaphor, the team may simply be an unhappy mollusc unwilling to leave its rock.

Whatever the competitive pressures, encouraging individuals to take chances with their obligations is risky and not only for them. Risk reduces once a team has decided to leave its present firm and has told them so. Teams may be reluctant to do this until they have a new home.

The nearer the arrangements are to individual recruitments the lower the risk. Secrecy and concealment is not a solid foundation for a plan. However painful and initially costly, a negotiated and certain outcome is most likely to be best for everyone involved, least of all clients. **SJ**



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