Recruiting An Employee From A Franchisee? Pitfalls To Avoid

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In today's economic climate, recruiting and retaining qualified and capable employees is an ongoing challenge for many businesses. To address this challenge, a franchisor may wish to recruit a rising star from within one of its franchises. However, this approach is not without risk—both during the new employment relationship and at its end.

During the employment relationship, hiring a franchisee's employee increases the risk the franchisor and franchisee may be considered a "joint employer." This is because adjudicators look for indicators of overlapping direction and control in their assessment of a "joint employer" and moving a franchisee's leader or star employee to a franchisor may be seen as such an indicator. As many franchisors know, a joint-employer declaration can lead to a franchisor being jointly and severally liable for many of the franchisee's employment-related liabilities and, in the case of a unionized franchisee, being bound to the same collective agreement obligations.

At the end of the employment relationship, courts may find the recruited employee is entitled to enhanced reasonable notice, either because of their prior service with the franchisee or because they may have been "induced" to leave it. This is particularly so if a franchisor hires internally from a franchisee and then later decides to end the employment relationship early in its tenure.

This article elaborates on both risks.

Risk of a joint-employer declaration

The dreaded joint-employer declaration (referred to in Ontario as a "common" or "related" employer declaration) is a significant legal risk facing parties to the franchise relationship. The Ontario Labour Relations Board (OLRB) can make a common employer declaration under the *Employment Standards Act, 2000* (ESA) with respect to employment standards, and a related employer declaration under the *Labour Relations Act, 1995* (LRA) with respect to unionization and labour relations.

A common employer declaration between a franchisor and franchisee under the ESA will make a franchisor jointly and severally liable for employment standard minimums of the franchisee's employees. This includes liability for termination pay, severance pay, vacation pay, and other unpaid wages.

A related employer declaration under the LRA can have long-term implications for the unionization status of a franchisor. If the franchisee is bound to a collective agreement with a trade union, a related employer declaration binds the franchisor to the same collective agreement and makes the franchisor liable for the franchisee's existing obligations. This includes making the franchisor and franchisee both responsible for negotiating a collective agreement, making union remittances, and for contributions and other obligations under the collective agreement, such as appropriate wage rates.

Whether under the ESA or LRA, the OLRB considers the presence of common control and direction between the parties, including whether the two entities have moved, transferred, or interchangeably utilized employees.[1]

In a recent decision, *UFCW Local 1006A v Ryding*, the OLRB decided four separate entities were common employers. Ryding Regency Meat Packers Ltd., a meat manufacturing facility, declared bankruptcy. Its employees were represented by UFCW Local 1006A. Following the declaration of bankruptcy, the union applied to the OLRB for a declaration that Ryding was a common employer under the ESA with three other entities.

The union argued Ryding interchangeably shared employees, management, directors, and financial control with these other entities. More specifically, the parties shared and hired key non-union personnel, engaged or employed workers interchangeably to staff each other's warehouses, paid recently laid-off workers to serve as operators, and shared the same management staff.

The OLRB agreed with the union and issued a common employer declaration under the ESA. As a result of this declaration, all four entities were jointly and severally liable for any termination pay and severance pay owing to the Ryding employees. In reaching its decision, the OLRB identified the factors it considers when determining if parties are common employers under the ESA:[2]

- Common management or directing mind
- Common financial control
- Common premises
- Common ownership
- Existence of common trade name or logo
- **Movement of employees between two or more entities**
- Use of the same assets by two or more entities, or transfer of assets between them
- Common market or customers served by two or more entities

While the OLRB confirmed no single factor is determinative (including the movement of employees), this case reminds us of the risk of sharing employees among different entities. This is particularly relevant to the franchise industry in which players may already meet some of the other criteria for a common or related employer declaration, including a common trade name or logo, and a common market or customers.

Enhanced reasonable notice

To entice the best talent, employers often make lucrative employment offers—especially when the talent is already employed elsewhere. However, if the employer lures an employee away from secure employment, there is a risk this recruitment strategy will be considered "inducement." This is particularly risky if the employer makes an attractive offer and then terminates the employee's employment shortly after they come on board. Canadian courts have made it clear that an employee who is "induced" to leave secure employment will be entitled to enhanced reasonable notice at common law.

This risk can be mitigated by avoiding recruitment strategies which cross the line into "inducement" and by implementing an enforceable employment agreement which limits the employee's entitlements upon termination.

In *Younesi v Kaz Minerals*,[3] the British Columbia Supreme Court awarded the plaintiff an "inducement increase" in reasonable notice damages at common law. Shahram Younesi had been employed as a project manager for National Grid USA for more than a year and a half when he was headhunted through LinkedIn by a recruiter on behalf of Kaz Minerals. At the time, Younesi and his family lived in Vancouver, and Younesi worked both part-time in the USA and remotely from his home in Vancouver. Younesi did not want to leave Vancouver.

Younesi went through several interviews with Kaz Minerals and was ultimately offered the job. The offer letter he signed promised he would be assigned to a Vancouver-based project for at least 22 months. The offer letter also included a clause permitting either party to terminate employment on one month's written notice.

The offer contained several hallmarks of inducement including:

- a detail comparison of compensation between the old and new job,
- a guarantee Kaz Minerals would keep Younesi in Vancouver for at least 22 months, and
- a substantial increase in salary.

Younesi accepted the offer and resigned from his then employment. Roughly one month after he began work, Younesi was given one month of working notice of termination. He sued for wrongful dismissal.

The court awarded Younesi six months notice—four months' reasonable notice and a further two-month "inducement increase." The court found there was "no doubt" Kaz Minerals induced Younesi to leave his previous employment. Kaz Minerals had requested particulars of his former compensation package for the sole purpose of preparing a comparison between the old and new job and emphasized the 22-month assignment based in Vancouver. According to the court, the package was designed to be an "irresistible offer" having regard to Younesi's personal circumstances. "By any measure" it amounted to inducement far beyond the standard "wooing" of a prospective employer.

Takeaways

While competition for top talent is fierce, it need not expose a franchisor to additional liability. If you are a franchisor looking to hire an employee working for a franchisee, it is important to move carefully and consider the potential impact on long-term operational growth as well as obligations upon termination. Remember:

1. The recruitment and sharing of employees between franchisor and franchisee could increase the risk of a joint-employer declaration. However, this is only one factor in the joint-employer analysis and, as such, it is important to balance this with practical operational requirements and strategy.
2. Avoid making promises of job security that go beyond the "typical courtship." Further, once the franchisor has done its due diligence and decides to close the deal, a clear and enforceable termination clause remains the best way to mitigate risk in the employment relationship, should employment be short-lived.

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[1] *UFCW Local 1006A v Ryding Regency Meat Packers Ltd.*, 2024 CanLII 2047 (ON LRB).
[2] *Ryding, supra* note 1 at para 87 citing *USW v Aluminart*, 2022 CanLII 70236 at para 20.
[3] *Younesi v Kaz Minerals Project B.V*, 2021 BCSC 614 (CanLII).