

Employment Issues for Start Ups

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The background features a series of concentric circles in light gray, some solid and some dashed, radiating from the center. Overlaid on this is a large orange callout box with a pointed bottom edge. Inside this box, the text "Not Legal Advice" is written in a large, white, sans-serif font, and "Limited Questions" is written below it in a smaller, white, sans-serif font.

Not Legal Advice

Limited Questions

Protecting
Intellectual
Property and
Goodwill

**At the start of
employment**

Consider requiring employees to sign agreements governing:

- Confidentiality of trade secrets and protection of proprietary rights.
- Non-solicitation of employees.
- Non-solicitation of customers.
- Non-competition by employees.

Confidentiality and Proprietary Rights Agreements

- To protect **intellectual property** (IP) assets, including **trade secrets**, from disclosure or misuse by an employee
- To codify that the employee assigns any inventions created while employed by the employer, and that all works created are **works made for hire** that belong to the employer

Non-Compete Agreements

- An agreement between an employer and an employee that restricts a former employee from working for the employer's competitors after his employment ends.
- Reasonably necessary to protect a legitimate business interest

Non-Solicitation Agreements

- Prohibits an employee approaching the employer's employees and clients
- Less restrictive and more likely to be enforced than a non-compete.

Mandatory Arbitration

- **Saves money and time**
- **Include confidentiality**

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Compliance/Legal Liability

Minimum
Number of
Employees

**It's Fewer Than You
Think and**

**You May Have More
Employees Than You
Realize**

one or more
employees

- the **FLSA**, if other requirements are met
- the **Equal Pay Act**, if the employer is otherwise covered by the FLSA
- all requirements under the **Immigration Reform and Control Act (IRCA)**, including Form I-9 requirements, but not the anti-discrimination provisions
- the **Occupational Health and Safety Act (OSHA)**
- the **National Labor Relations Act (NLRA)**
- the **Uniformed Services Employment and Reemployment Rights Act (USERRA)**
- the **Fair Credit Reporting Act (FCRA)**
- **Section 1981 of the Civil Rights Act of 1866**

four or more
employees

- must comply with the anti-discrimination provisions under **IRCA**

15 or more
employees

- **Title VII**
- **the Americans with Disabilities Act (ADA)**
- **Genetic Information Nondiscrimination Act (GINA)**

20 or more
employees

- the **Age Discrimination in Employment Act (ADEA)**
- the **Consolidated Omnibus Budget Reconciliation Act (COBRA)**, if the business maintains an employer-sponsored group benefit plan

50 or more
employees

- must comply with the **Family and Medical Leave Act (FMLA)**

100 or more
employees

- May be required to comply with the **Worker Adjustment and Retraining Notification Act** (WARN Act)

Employee v.
Independent
Contractor

**You May Have More
Employees Than You
Realize**

Using Independent Contractor Status

- Many potential benefits of using **properly classified** independent contractors
- Must weigh against the likelihood of liability for misclassification
- Complex legal question

**Use Independent
Contractor Status
with Caution**

- **Assume that all workers are employees**
- **If you can justify IC status – draft a contract**
- **Recognize the potential consequences**

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To Begin Hiring

First Steps

- **Comply with Federal and State Tax, Reporting, and Notice Requirements**
 - EIN
 - W-4
 - State and Local Tax forms
 - State new hire or registration requirements
 - State Wage Theft Prevention Acts

First Steps

- **Comply with Federal and State Tax, Reporting, and Notice Requirements**
- **Complete and Maintain Form I-9s for All Employees**

First Steps

- **Comply with Federal and State Tax, Reporting, and Notice Requirements**
- **Complete and Maintain Form I-9s for All Employees**
- **Obtain Necessary Insurance**

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Hiring Process

Carefully
conduct
interviews

- ensure interview questions do not seek information about **protected class** status
- focus on objective criteria and the essential functions of the job
- Use caution regarding seeking information about an applicant's prior salary

Other Hiring Pitfalls/Best Practices

- Job postings, ads, and algorithms
- Due diligence about candidates' current employers
- Ensure **background checks**, if used, comply with applicable law
- Comply with immigration laws

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Employment Relationship

Wage and Hour: FLSA

- **Properly Classify All Employees as Exempt or Nonexempt**
 - Assume FLSA minimum wage and overtime apply
 - “Salaried” does not automatically mean exempt
 - Do not rely on unpaid interns or trainees to do work that otherwise would be done by employees

Founder Matters at Formation

- **The founders' employment status with the startup**

Workplace Posting and Notice Requirements

- Posting requirements vary depending on the size of the company and the laws applicable to companies of similar size
- Determine an appropriate place, such as a coffee room, break area, lunch room, or lounge, for workplace posters.
- Devise a procedure to communicate workplace notices to employees working remotely,

Workplace Policies and Procedures to Minimize Liability

- **Formalize certain policies in writing**
- **Consider workplace training**

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Termination of Employment



Risks

- Employers face litigation risks for termination:
 - Due to discrimination, retaliation, or harassment
 - Because an employee seeks or takes protected leave,
 - In response to protected whistleblowing activities
- Termination can include voluntary resignation under extreme circumstances

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Develop and Consistently Apply Policies

- **Obtain Employee Acknowledgment**
- **Apply Policies Consistently**

Document Reasons for Termination

- **Failure to Create Documents**
- **Failure to Exercise Objectivity**
- **Failure to Give Honest Criticism**
- **Failure to Maintain Documents**
- **Failure to Be Timely**
- **Failure to Train Reviewers**

Waiver and Release Agreements

- An explicit waiver and release of legal claims in exchange for adequate consideration.
- Not all claims can be released and some claims require specific written terms

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Unemployment Insurance

Standard for Eligibility

- **An employer-employee relationship**
- **Wages paid for the services**
- **Sufficient earnings during a specific period of time**

Employee Lack of Fault and Other Requirements

- Separation resulted through no fault of her own (determined under state law)
- other eligibility requirements of state law (varies)
 - ready, willing and able to work
 - met the waiting period (typically one week in most states)