

QUICKLAUNCH UNIVERSITY WEBINAR

Employment Law 101 for Startups—From Hiring to Firing

DECEMBER 11, 2018

Speakers: Laura Schneider and Andrew Stauber



Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A feature
- Questions will be answered as time permits
- Offering 1.0 CLE credit in California and New York*

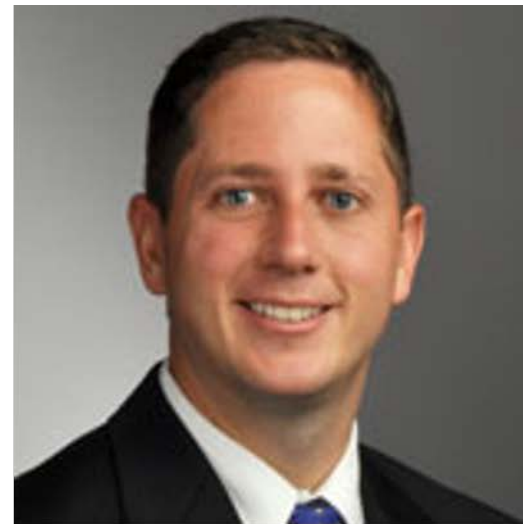
WilmerHale has been accredited by the New York State and California State Continuing Legal Education Boards as a provider of continuing legal education. This program is being planned with the intention to offer CLE credit in California and non-transitional CLE credit in New York. This program, therefore, is being planned with the intention to offer CLE credit for experienced New York attorneys only. Attendees of this program may be able to claim England & Wales CPD for this program. WilmerHale is not an accredited provider of Virginia CLE, but we will apply for Virginia CLE credit if requested. The type and amount of credit awarded will be determined solely by the Virginia CLE Board. Attendees requesting CLE credit must attend the entire program.

WEBINAR

Speakers



Laura Schneider
Partner
WilmerHale



Andrew Stauber
Counsel
WilmerHale



Why Think About Employee Issues in Advance?

- Potential management costs
 - Time and effort of management
 - Lack of productivity
 - Bad morale
 - Loss of competitive advantage
 - Investor concerns
- Potential legal costs
 - Legal fees
 - Corporate liability
 - Individual liability
 - Damages → back/front pay, emotional distress, punitive damages



Getting It Right From The Start

- Interview
- Background Checks
- Immigration Issues
- Employment Classification
- Offer Letter
- Restrictive Covenants
- Compensation



The Interview

- Reasonable accommodation obligations
 - Disability and religion
- No questions re: protected class status
 - Age, race, religion, pregnancy, etc.
- No questions re: pay history
 - CA, CT, DE, HI, MA, OR, VT, Chicago, NYC
- Stick to job-related questions
- Pay attention to “red flags”



Background Checks

Under Fair Credit Reporting Act (FCRA), must:

- Give notice in writing that a consumer report may be obtained
- Obtain written authorization from applicant
- Distribute summary of applicant's rights under FCRA
- If employer intends to take adverse action based on report,
 - Must provide applicant with copy of report
 - Must describe in writing the rights of the applicant under FCRA

Need to abide by state/local law analogs (e.g., CA, MA, NY/NYC):

- Credit checks often not permissible
- Additional information required in giving notice
- Must describe in writing employer's rationale for decision (NYC)

Determination must not be discriminatory



Immigration and Work Authorization

- Only U.S. citizens and permanent residents (“green card” holders) may work in the U.S. without specific work authorization from USCIS
 - All employers must complete I-9 forms for all employees
 - *Generally*, work authorization (“work visa”) requires employer sponsorship (e.g., H-1B (specialty worker), L-1 (intracompany transferee), O-1 (extraordinary ability))
 - Other common visas: B (business/pleasure visitors – **not** work authorized), F (students – work authorized only with OPT/CPT)
 - Certain individuals may obtain work authorization on their own (e.g., students (limited post-degree work permit, with possible extension)); EADs based on special status, including asylum, family relationship to U.S. citizen/resident)



Classifications: Know Before You Hire

- Employee vs. Independent Contractor
 - Employee
 - Wage/Hour, Benefits, Unemployment Insurance, Workers' Compensation, Taxes
 - Independent Contractor
 - Federal Law → IRS Test
 - Control: behavioral, financial, type of relationship
 - State Law Can be Stricter (e.g., MA and CA)
 - Free from direction and control
 - Service performed is outside employer's usual course of business
 - Contractor customarily engaged in independent business or profession of same nature as service being performed

Significant consequences for getting it wrong



Classifications: Know Before You Hire

Exempt vs. Non-Exempt Employees

- Exempt → Salary Basis Test and Duties Test
- Non-Exempt → Overtime
 - No “comp” time
 - No “volunteer” work
 - No “off the clock” work

Substantial Penalties

- Multiple damages
- Personal liability
- Fines
- Criminal penalties



An Ounce Of Prevention: The Offer

- Term Contract vs. Employment At-Will
- Offer Letter
 - At-will statement
 - Avoid “cause” or “notice” requirements
 - Avoid annual salary statement
 - Avoid “loose” descriptions of equity grants
 - Condition employment on restrictive covenants (where lawful)
 - Include representation that employment won’t violate obligations to previous employer
 - State that proof of eligibility to work in U.S. is required
 - Indicate if employment is conditioned on satisfactory background/reference checks or other contingencies



Protecting Your Assets: Condition of Employment

- Agreements
 - Non-competition
 - Non-solicitation
 - Proprietary Information / Trade Secrets
 - Assignment of Inventions
- Reasonable to Protect Legitimate Interests
 - Differs by state
 - California
 - Recent Massachusetts law
- Consistent Enforcement
- *Note: during interview process, ask new-hires about any non-competition/non-solicitation obligations they may have to a prior employer*



Compensation – Avoid Costly Mistakes

- Employees must be paid consistent with wage/hour laws
 - *E.g.*, in MA, non-exempt employees must be paid no less frequently than bi-weekly
 - Unpaid interns → tread **very** carefully
 - No deferral of minimum wage/salary amounts
- Commissions
 - Written plan
- Bonuses
 - Discretionary
 - Specify will receive only if actively employed at time of payout
- Equity
 - Not a substitute for minimum wages/salaries
 - Precision and consistency (terms of plan, written agreements)



Best Practices For Managing The Employment Relationship

- Employee Handbook/Policies
 - Draft for flexibility in discipline and performance management
 - No contractual language or required process
- Comply with federal and state laws
 - Maintain work environment free from discrimination/discriminatory harassment (including, but not limited to, sexual harassment)
 - *Current area of emphasis for state legislators and others → #MeToo*
 - Sick leave; leaves of absence
 - Accommodations (disability; religion)
 - No retaliation
- Performance/Discipline
 - Importance of documentation (formal or informal)
 - Evaluations/Reviews, Warnings, Performance Improvement Plans
- Be consistent

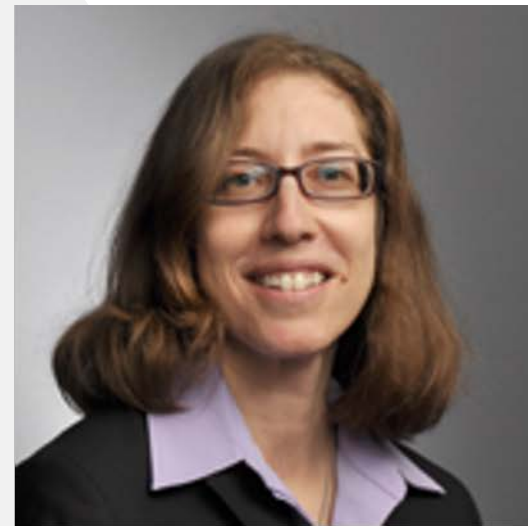


Parting Ways: Managing the Details

- Planning
 - Transition requirements?
 - Final pay - MA (differs by state)
 - Last day (involuntary) vs. next regular pay date (voluntary)
 - Must include accrued, unused vacation, “earned” compensation
 - Unemployment information
 - Company property / securing premises, information and systems
- References
 - Confirm position, dates of employment, compensation
- Severance
 - Release of claims



Questions?



Laura Schneider
Partner
WilmerHale
Laura.Schneider@wilmerhale.com
+1 617 526 6846



Andrew Stauber
Counsel
WilmerHale
Andrew.Stauber@wilmerhale.com
+1 617 526 6815



Additional Resources

For more information, visit WilmerHaleLaunch.com

- A website full of vital information, tools and connections needed to position entrepreneurs and startups for success
- Draws on expertise of WilmerHale's extensive team of lawyers practicing in areas critical to emerging companies in various stages of growth
- Features a growing library of video insights from lawyers, investors and other experts
- Allows entrepreneurs and investors to build knowledge, research topics with everyday impact and connect with dedicated lawyers
- Contains Document Generator