

# QuickLaunch University Webinar: Hiring Your First Employees and Advisors and Letting Them Go When Necessary

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## Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A box on the bottom right panel
- Questions will be answered as time permits
- WebEx customer support: +1 888 447 1119, press 2

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## 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

- No questions re: protected class status (age, race, religion, pregnancy, etc.)
- No questions re: pay history
  - (NYC – October 2017)
  - (MA – July 2018)
- Stick to job-related questions
- Reasonable accommodation obligations (disability and religion)
- 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 investigative consumer report
- 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 also abide by state law analogs (e.g., NY, CA)

## 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), TN (Canadians/Mexicans in specific occupations), 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 (1-year post-degree work permit, with 24-month extension for STEM degree if E-Verify is used); 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 – MA (differs by state)

- 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

### Federal Law → IRS Test

- Control: behavioral, financial, type of relationship

*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 (yet...)
  - 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 (in addition to wage notices – e.g., NY, CA)
  - At-will statement
  - Avoid “cause” or “notice” requirements
  - Avoid annual salary statement
  - Avoid “loose” descriptions of equity grants
  - Include representation that employment won’t violate obligations to previous employer
  - State that proof of eligibility to work in U.S. is required
  - Severance → Get Release
  - Condition employment on restrictive covenants



# Restrictive Covenants

- Agreements
  - Non-Competition
  - Non-Solicitation
  - Proprietary Information / Trade Secrets
  - Assignment of Inventions
- Reasonable to Protect Legitimate Interests
  - Differs by state (e.g., CA)
  - Factors: (a) interests of the employer/employee, (b) scope
- Consistent Enforcement



## Compensation – Avoid Costly Mistakes

- Employees must be paid consistent with wage/hour laws
  - E.g., frequency → non-exempt employees at least bi-weekly (MA)
  - 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)



## Equity Issuances Generally

- Allocation of Equity
  - Founders vs. Non-Founders
- Dilution
  - Planning for New Hires
- Authorized, Issued and Reserved Shares
  - Founder Issuances and Option Pool Reservation
- Vesting
  - Typical Schedule and Acceleration of Vesting
- Securities Laws Compliance



# Forms of Equity Incentives: Restricted Stock and Stock Options

- Restricted Stock
  - What is restricted stock?
  - Taxation of restricted stock: Section 83(b) elections
  - When do you use restricted stock?
- Stock Options
  - What is a stock option?
  - Benefits of stock options
  - Incentive Stock Option (“ISO”) or Nonstatutory Stock Option (“NSO”)
  - When do you use options?



# Stock Options

## Incentive Stock Options (“ISOs”)

- Must comply with tax rules
  - Granted under shareholder-approved plan
  - Option holder must be an employee
  - \$100,000 limitation
- Generally more favorable tax benefits to employees compared to NSOs

## Nonstatutory Stock Options (“NSOs”)

- No specific tax rules
  - Does not have to be a plan in place
  - Can be issued to any service provider (employees or directors, consultants and advisors)
- Generally less favorable tax treatment for employees compared to ISOs





## Start With an Eye to the Finish

- Employee Handbook/Policies
  - Draft for flexibility in discipline and performance management
  - No contractual language or required process
  - Retain explicit right to change policies at any time
- Performance/Discipline
  - Document and be consistent
- Maintain work environment free from discrimination/discriminatory harassment
- Provide reasonable accommodation (disability/religion)



## Parting Ways: Look Before You Leap

- Understand your obligations and be prepared to comply
  - Offer letter/employment contract
  - Employee handbook/policies
- Review documentation
  - Performance/discipline/work product
- Consider past practice
  - Consistency of actions in similar circumstances
- Avoid retaliation
  - Review history of complaints (e.g., harassment, discrimination, “whistle-blowing”)



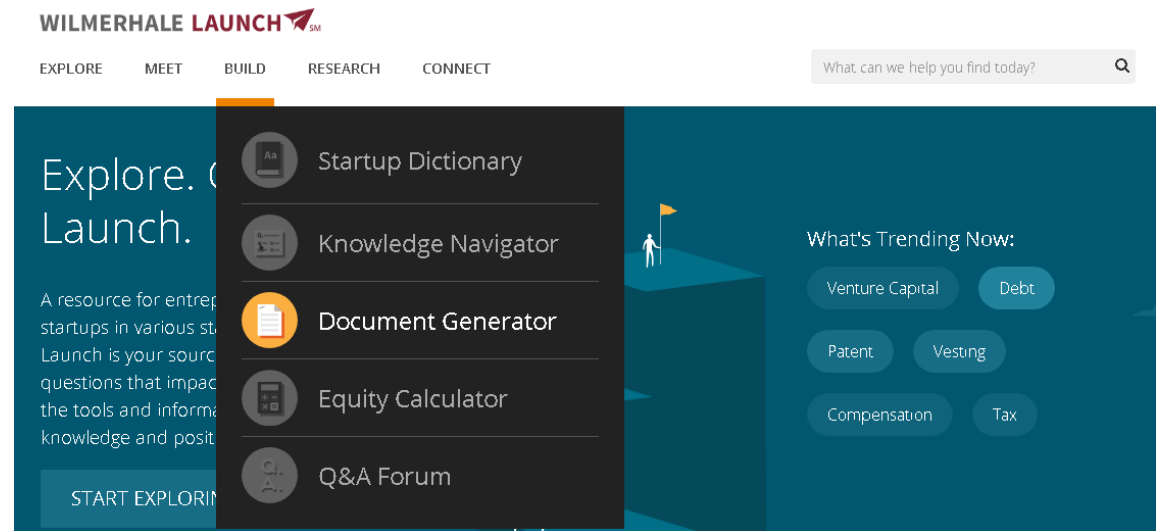
## Parting Ways: Managing the Details

- 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
  - Get release of claims

## Additional Resources

For more information visit [WilmerHaleLaunch.com](https://www.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**





## Questions?

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