

Hiring, Firing and Compensation for Startups: Key Employment Law Issues

Presented by:

Laura E. Schneider, Esq., Partner

 **#WHQSU**

WILMERHALE® 

WILMER CUTLER PICKERING HALE AND DORR LLP®



Getting It Right From The Start

- Application
- Interview
- Reference Check
- Background Check
- Immigration Issues



First Impressions: The Interview

No questions re: protected class status
(age, race, religion, pregnancy, etc.)

Stick to job-related questions

Reasonable accommodation obligations
(disability and religion)

Pay attention to “red flags”



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 17 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
- Unemployment, Workers' Compensation, Taxes, Wage/Hour, Benefits
- 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
- Fed. 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
- No “Volunteer” Work
- No “Off the Clock” Work
- Substantial Penalties
 - multiple damages
 - personal liability



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
 - Include representation that employment won’t violate obligations to previous employer
 - State that proof of eligibility to work in U.S. is required
- Severance → Release



Compensation – Avoid Costly Mistakes

- Employees must be paid consistent with wage/hour laws
 - Non-exempt employees 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)



Protecting Your Assets: Condition of Employment

- Agreements
 - Noncompetition
 - Nonsolicitation
 - Proprietary Information / Trade Secrets
 - Assignment of Inventions
- Reasonable to Protect Legitimate Interests
 - Differs by state
- Consistent Enforcement



Start With an Eye to the Finish

- Employee Handbook/Policies
 - draft for flexibility in discipline and performance management
 - no contractual language or required process
- Performance/Discipline
 - importance of documentation
- Maintain work environment free from discrimination/discriminatory harassment
- Reasonable accommodation (disability/religion)
- Be consistent



Parting Ways: Look Before You Leap

- Understand your obligations and be prepared to comply
 - Employee handbook/policies
 - Offer letter/employment contract
- Review documentation
 - Performance/discipline/work product
- Past practice
 - Consistency of actions in similar circumstances
- No 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
 - Release of claims



Questions?

Laura E. Schneider, Esq.

Partner, Labor and Employment Practice Group

+1 617 526-6846

Laura.schneider@wilmerhale.com

 **#WHQSU**