

Evolving needs for Emerging and High Growth Companies: Series A stage

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If your company is at the Series A stage in your fundraising, there are some important steps to consider as you progress in your development.

Partners Gary Marshall, Emerging and High Growth Companies Group, Kelly O'Ferrall, Employment and Labour Group, and Simon Hodgett, Technology Group, unpack key Series A-stage considerations, including record-keeping hygiene, disciplined option grants, minimizing negotiation friction, developing sophisticated sales channel arrangements and IP strategies, implementing legally-required and recommended workplace policies, and pay and overtime considerations.

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Transcript

Gary Marshall: Hi everybody. Today we'll be discussing the commercial and compliance and some other corporate items that would typically arise for companies at the Series A stage of fundraising and growth. I'm Gary Marshall. I'm a partner in Osler's Emerging and High Growth Companies Practice Group, and I'm joined by my colleagues Kelly O'Ferrall, a partner in our Employment and Labour group, and Simon Hodgett, a partner in our Technology group. Good to have you both here. Before we dive into the commercial and employment-related matters, I thought it would be helpful to touch on a few just high level corporate things that are good to keep in mind once your company gets to the Series A stage. And really a couple of the main things revolve around the overarching concept of professionalizing your company and making it ready to scale beyond Series A, and really become a large efficiently-run organization.

One of those things would be record-keeping hygiene. At this stage you're going to have a lot more external stakeholders, including investors, employees and former employees, or perhaps banks and debt providers. Each of those parties are going to expect you to have good records and to be running your business in a professional manner. Up until this point, you may have been able to go back and correct things that weren't done properly before, or you may have been able to gloss over some of the more day-to-day admin items that bigger companies may need to take care of but, at this point, you need to start really getting in the habit of making sure everything is clean and properly documented upfront, and that you're getting proper approvals for things as you go along, because fixing them later becomes

more and more difficult as well.

Another thing that you should start thinking about and doing proactively, which relates to record keeping, involves option grants for employees. At this point in your life cycle, similarly, you may have been used to in the past, kind of going back and papering things that you intended to do previously, but maybe forgot or you just didn't tell your lawyer about. One of those things is option grants, and because of the tax nature and tax issues surrounding option grants and the fact that they relate to your employees and their expectations for their job, it becomes important to stay on top of properly documenting your option grants and getting regular 409A valuations, and keeping your lawyers in the loop when it comes to those things. So those are just a couple of many different corporate things you should keep in mind at this stage. I'm happy to have a conversation with anyone offline about other concerns or other things you should be aware of. But now I think it makes sense to jump into the commercial conversation and, fortunately, we have Simon here who's one of the leading practitioners of tech and technology company commercial work in Canada. Simon, I think with that kind of framing in mind for companies at the Series A stage, I thought it would be helpful just to get your thoughts on some things that you think are important to keep in mind when it comes to companies at this level negotiating commercial agreements and thinking about their overall IP strategy.

Simon Hodgett: With respect to commercial contracting, at this stage in the development of the company, there should be some fairly good experience with respect to how the commercial agreements are working. Hopefully some relatively good agreements were put in place at the outset of the business, but now's the time to look at the agreements again and see if there are friction points, if there are gaps, if there are matters which have developed in the business that are no longer reflected in the agreements, and to ensure that everything is working to the highest efficiency and providing the most protection for the business. In addition to that, some customers will be providing you with their form of agreement, and that really depends on the business. For some companies that's a huge feature of their business and sometimes it's less or so or non-existent, but if you're dealing with customer agreements, it's a good time to learn from those experiences, see where you're having to give up things that perhaps you wouldn't give up in your general customer agreements, and how to approach those and how to deal with the requests from the customers that may be recurring.

In addition, at this stage we often see third party agreements to expand the ability to distribute the products. For example, reseller agreements and referral agreements are entered into to expand the ability to access revenue. These agreements, some of them have some wrinkles to them that you have to be quite careful about, for example, when there's requests for exclusivity, with respect to reseller or referral agreements, and it's important to take those into account and treat them seriously because they have an expansive impact in a negative way if they're improperly done, as well as potentially having a very positive impact. One of the last things I would mention is that now's the time also to revisit the IP situation of the company. Probably now you understand the value of the IP, whether it's got a company that's going to rely on patents, whether it's going to rely on copyrights principally, and to ensure that those factors are being kept in mind as the company develops, that there's a plan around them, and that when you're contracting, you're appropriately allocating IP in your contracts to fit with that strategy.

Gary Marshall: That's helpful and great advice, Simon. Thanks for that. And I think that's probably a good segue into similar things that one, as a founder or someone running a Series A company should keep in mind when it comes to the employment side of the business in terms of what you should be focused on in developing HR policies, or just overall employment processes that will keep your business out of trouble and running smoothly. Kelly, do you want to touch on a few of those items?

Kelly O'Ferrall: Absolutely, thanks Gary. Now is definitely a good time to ensure that you've developed and implemented both the legally required workplace policies, as well as those recommended policies, as these policies will be a very important tool for reducing your workplace-related legal risks. The required policies vary by jurisdiction depending on where the employee is actually located, as in where the employee is actually working, and they vary from jurisdiction to jurisdiction. For example, workplace harassment policies are required in several jurisdictions, but not every jurisdiction. In addition to these legally mandated policies, there's other policies that we highly recommend implementing to reduce workplace-related legal risks. Examples of these types of policies would be something like a vacation policy or a technology use policy, maybe not required by law, but you'll certainly be happy to have them should a dispute with an employee arise. In addition to ensuring that you have these solid workplace policies, you'll also want to develop processes for ensuring that employees are aware of them and that they receive all required and appropriate workplace training.

Again, keeping in mind not only the legal requirements, but also best practices to reduce workplace-related legal risks as much as possible. Another thing that often comes up is undocumented pay arrangements. If you're paying your employees in anything other than base pay compensation, or a base salary without anything in writing, for instance, a discretionary bonus program, now would be a good time to document those terms, either through a commission plan, a bonus plan, or updating your employment agreements to include these provisions to ensure that the terms and conditions on which the compensation is payable are cleared both to you and to the employee. This will save you money in the long run as it'll reduce the costs and risk of disputes overpayment, which largely arise when employees are exiting. Finally, if you haven't recently updated your template employment and independent contractor agreements, this is the number one thing you can do to reduce your workplace-related legal risks. Case law does evolve over time, so it's important to ensure that even if you had templates provided to you with the assistance of legal counsel, you're updating those templates from time to time to ensure that they are enforceable.

Gary Marshall: Thanks Kelly, that was very helpful. Another topic that we think would be really timely and helpful for Series A founders and leaders would be related to information governance and other compliance issues related to that, including privacy and other topics, and with the growth of AI, this has been a really hot button issue for a lot of our clients. Simon would be a great person to talk to about this topic, and I'll let him cover a few of the high-level thoughts that you should have as you think about this area.

Simon Hodgett: Thanks, Gary. Hopefully, right from the very beginning, the company's been thinking about compliance issues from its very earliest stages, but the reality is the compliance is expensive, difficult and resource heavy. Many of our clients will do an initial view of privacy, how the information is being used and other compliance issues. I should say that there are compliance issues depending on what your business is. If you're in healthcare, for example, or providing services to the financial services industry, then there's going to be compliance issues there too, of a specialized nature, which you should be thinking about with respect to privacy. Now is the time, given the stage that the company's at, to have another look at the practices of the company, how it's collecting information, the policies it has up, the statements it has up, which may have been made at a very early stage of the company, but may no longer align with practices.

It's also a good time to dig into a little bit more the program internally to ensure that compliance is given the right level of priority. That may mean designated some employees, or it may mean simply digging into the issue a little bit more about how the information is being used. This is particularly common now with respect to our artificial intelligence clients. The degree to which information is used, whether it's personal information or information generally is used within the businesses, is something that it's very, very important to understand and to have in place a proper compliance program thinking ahead as the company develops in order to meet any questions with respect to due diligence in the future,

or even from customers who'll be asking about information practices and privacy, and ownership of data as the business develops and it sells to particular customers.

Gary Marshall: Thanks Simon. And finally, we thought it would be helpful to touch on elements of employment and labor-related business risk and strategy that Series A can think about in terms of scaling their business to the next level and as they grow their teams, which often happens significantly right around the time the company raises its Series A. Kelly, would you like to talk about a few of those topics?

Kelly O'Ferrall: For sure. One thing that comes to mind immediately is overtime compliance. It is not uncommon in the early stages for employers to overlook overtime pay requirements or to pay overtime, pay incorrectly, or not at all. Although it's common, non-compliance with overtime rules at any stage can have material financial consequences on the employer, mainly in the form of overtime claims. As such, now might be a good time to conduct an assessment of overtime-related risks and deal with them accordingly should they exist. Future investors will undoubtedly ask about this if they haven't done so already. A second issue that doesn't come up quite as often, but is frequently overlooked, is compliance with health and safety requirements, both the Occupational Health and Safety Act, which contains requirements that require employers to implement health and safety policies, designated health and safety representative, or constitute a joint health and safety committee, depending on the size of the employer. Even non-safety sensitive workplaces are required to comply with many of these requirements. So that's something to keep in mind and look into if you haven't already. I should also mention that businesses should confirm whether they're required to register with and pay premiums to the Provincial Workers' Compensation Board. It's mandatory if you're caught by the legislation. There are quite a few exemptions, but it's definitely something to confirm as early as possible as it can create financial liability later on if it's not properly complied with.

Gary Marshall: Thanks, Kelly. Well, we appreciate Kelly's and Simon's input. This just covers a few of the very many legal related items that you should be thinking about at this stage of your business. And as always, the Osler -team is here and happy to speak with you at any time about the things we talked about in this video or anything else that comes to mind or is facing your business right now, or anything else that you'd like to talk about in terms of growing and scaling your business. Thank you for joining us.

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