

Evolving needs for Emerging and High Growth Companies: Series C and later stage



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Authors: [Mark Longo](#), [Kelly O'Ferrall](#), [Simon Hodgett](#)

If your company is at the Series C stage or beyond, your commercial, compliance and other strategic needs will continue to evolve.

Mark Longo, partner and Co-Chair of the Emerging and High Growth Companies Group and partners Kelly O'Ferrall, Employment and Labour Group, and Simon Hodgett, Technology Group, cover what to consider at Series C and beyond, including board composition, committees and charters, exit-readiness, sophisticated and risk-calibrated policies and procedures with respect to commercial contracting, scaling and leveraging in-house legal and contract management teams and tools, key-employee retention strategies, and investor-ready compliance records.

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Transcript

Mark Longo: Hello to our viewers. Today we will be discussing commercial employment and compliance items that typically arise for a technology company at the Series C stage and beyond. My name is Mark Longo. I'm co-chair in Osler's Emerging and High Growth Companies Group, and I'm joined by Kelly O'Ferrall, a partner in our Employment and Labor Group, and Simon Hodgett, a partner in our Technology Group.

Simon Hodgett: Thanks, Mark.

Kelly O'Ferrall: Thanks for having us, Mark.

Mark Longo: Absolutely. Before we dive into the commercial and employment considerations, I wanted to touch on a few corporate and governance matters that are important to keep in mind for a company at this stage. First, in terms of board of director composition and committees, companies should consider whether it is appropriate to add additional independent directors to their board, and whether to form board of director committees, principally an audit committee and a compensation committee. Secondly, a board should consider drafting a board charter that is applicable for a private growth-stage company and a company with aspirations to exit via either an IPO, or acquisition via private equity or strategic acquirer. Thirdly, and as Kelly will touch on a little bit, executive compensation becomes very important at this level. It's important to review and seek advice from external advisors on executive compensation strategies. Next, in terms of corporate development, often companies at this stage get into buy-side acquisitions and investments,

and it's important to build out the internal corporate development function of a company at this stage.

And then the final point is related to exit readiness. Companies at the Series C stage and beyond should be prepared for secondary sales of shares, liquidity events, in terms of outright acquisition, by maintaining a very current virtual data room, continuing to optimize the company's capital structure and obtaining tax and corporate advice early, in terms of optimizing both the tax and the corporate result in any form of liquidity event, both from a corporate point of view, but also in terms of individual shareholders and stock option holders. With that, Simon, let's turn into the commercial area. What are your recommendations related to establishing or scaling a company's internal legal team and capabilities when a company is at the Series C stage and beyond?

Simon Hodgett: Thanks, Mark. I think that the main thing is at this stage, there's an expectation that there'll be a fairly sophisticated set of policies and procedures put in place with respect to commercial contracting and customer contracting, and a lot comes with that. At the C level, there's an expectation that the company has scaled to the point where we'll have a relatively high volume of contracts. Those contracts will have gone through a number of revisions and cycles to make sure that the friction is taken out of them to the extent you can, and it has in place systems in order to ensure that the contracts are properly stored. There's a record of when they were signed, and there's management overall. And that really implies that now there probably should be a legal team that deals with the commercial contracts that is aware of where the gives and gets are in the company's agreements, which are consistent with its business plan.

And overall, it's just exhibiting a much more sophisticated approach to commercial contracting. It knows when it's getting agreements from customers that are misaligned. It has a proper structure that its internal legal counsel understands in order to get senior leadership approval for significant deviations, when that happens, when there are changes in customer agreements and so on that are set up so that non-lawyers can deal with them and when they have to be brought to the legal team. So all of that should start to exist. And in addition to that, there should be a series of systems to manage risk in those contracts, to document the contracts, ones that have specific and extraordinary risk so that it can be escalated within the organization properly so that there's an appreciation of risk across all the contracts.

Mark Longo: That's great. Turning to you, Kelly, what should companies keep in mind when it comes to their employees leading up to either an acquisition, IPO or another form of exit?

Kelly O'Ferrall: For sure. So one thing that's really important to keep in mind, as I'm sure most people know, is that key employee retention can be absolutely crucial in the lead up to an exit. Keeping the right people around who have the historic knowledge of the company and its processes is very, very important. So to do so, often appropriate compensation arrangements would need to be considered and implemented if needed, not only to retain talent, but potentially to attract new talent as well. That'll look differently depending on the objectives of the company and the potential exit being contemplated, but some examples include retention arrangements on an individual basis or broader change of control or management carve out plans or simply inserting change of control provisions into existing employment or other contractual relationships.

Mark Longo: Excellent. What else is important from an employment law perspective?

Kelly O'Ferrall: For sure. Well, any acquirer or investor will be interested in checking to see that there has been compliance with applicable employment laws in this case. As such, it'll be important as always to ensure that all employees and contractors have entered into

enforceable agreements based on the latest templates that are available, ensuring that all mandatory workplace policies have been implemented, i.e. drafted and rolled out, not just drafted and stuck on a shelf, ensuring that employees who've left the company who can create wrongful dismissal risks for the company have signed appropriate separation agreements and releases if appropriate, and then just a general compliance check to ensure that there's no lingering doubt about the company's compliance with, for instance, overtime legislation, pay equity legislation is a big one. Health and safety to name a few. These should all be addressed.

Mark Longo: Now, Simon, turning back to you for a moment, how should late-stage technology companies both implement as well as scale legal project management strategies where you've got a high volume of customer contracts but also high value customers to take into account?

Simon Hodgett: Well, I think it's a mixture of people, process, and sometimes technology, depending on the scale of the business, having a project or an agreement tracking tool can be very helpful. Having staff who are tasked with making sure that the contracts are appropriately stored, and that seems like such a simple thing. However, it happens all the time where a critical contract can't be found at a time when it's absolutely needed, but just to make sure that those systems are in place so it's an orderly process to store and to understand when those agreements are coming to the end of their terms and need to be renegotiated, feeding that back into the process in order to put in people's calendars to start renegotiating critical contracts. So I think it's all about systematizing it now. These larger companies, since we're now in a larger company, it can't be done to one individual, it has to be a system, it has to be a process. So there has to be some tools in place in order to track the critical contracts.

Mark Longo: That's great. Well, thank you both Simon and Kelly for joining us today on this Series C video series.

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