

Employment Law 101 for Start-Ups

Allison Di Cesare & Summer Danakas

April 4, 2019

OSLER

EMPLOYMENT ISSUES FOR START-UPS:

1. Employees vs. Independent Contractors
2. Hiring “Interns”
3. Importance of Employment Agreements
4. Key Employment Compliance Issues
5. Termination of Employment

Employees vs. Independent Contractors

EMPLOYEE	INDEPENDENT CONTRACTOR
Employment-specific statutes	Fewer statutes apply
Administrative obligations	Fewer administrative obligations
Reasonable notice for indefinite hires unless there are clear terms regarding termination of employment (except Quebec)	Termination-related obligations are generally set out in the contract
“Contract <u>of</u> service”	“Contract <u>for services</u> ”
Part of the business of the Company	In business for themselves

Employees vs. Independent Contractors (cont'd)

The true nature of the relationship depends on the “total relationship of the parties”

- Exclusive service
- Control by the principal over the service to be provided, and when, where and how it is to be performed
- Provision of tools necessary to provide the services
- Expectation of profit or chance of loss
- Integration of activities to the principal’s business organization

McKee v. Reid's Heritage Homes Ltd. (2009, ONCA)

Independent Contractors...what's the catch?

- “If it quacks like a duck...”
- Adjudicators will generally err on the side of finding workers to be employees, even if they’ve agreed in writing to call themselves contractors
- Unexpected reasonable notice obligations, missed opportunity to limit obligations with an employment agreement, tax withholding penalties
- Balance business needs vs. legal risks

“Interns”

- “Intern” is not a recognized class of worker
- Very limited carve-outs and exceptions under employment standards legislation
- Individuals engaged to provide services/work are likely either employees or independent contractors
- Practically, the nature of the type of work that interns provide means they will almost always be considered employees

Importance of Employment Agreements

- Not “mere paperwork” – key component of risk management for all start-ups
- Clear and mutual understanding of the expectations and obligations during the relationship
- In the absence of a prior agreement, common law reasonable notice or pay in lieu for employees hired on indefinite basis
- They protect your Company
- They will save you \$\$\$

Common Issues re: Employment Agreements

- Sign **before** individual commences employment... or else unenforceable! (Also avoid signing on start date.)
- Do not “freelance” or make-up employment documents
- Not following terms; agreements altered “on the fly”
- Options – agreement should not specify a percentage of the Company; need a separate option agreement and Board approval
- Problems can usually be “fixed” – provided relationship hasn’t already broken down
- Keep it simple!
- “Hold the line” on standard terms

Key Employment Compliance Issues

A) Employment Standards

- Record keeping, hours of work, minimum wage, overtime pay/time off, vacation time off and pay
 - Minimum wage: it applies to *all employees* – \$14 per hour
 - Overtime: true managers and developers are exempt – scientists, analysts, coordinators, officer manager, admin all entitled to OT notwithstanding that they may be paid a salary

B) Human Rights

- Employee's right to freedom from discrimination or harassment in the workplace based on protected grounds – “performance issues”
- Illnesses typically must be accommodated to the point of undue hardship
 - Mental illness and other non-visible disabilities can be very challenging, but there is no “get out of jail free” card for start-ups

C) Occupational Health and Safety

- Requirement to have workplace violence and harassment policy and procedure; health and safety representative or joint health and safety committee

Termination of Employment: Basics

- For cause vs. without cause
 - Cause = very high threshold; “industrial capital punishment”
 - Without cause will often be far more cost effective, although sometimes important to take a stand
 - Properly drafted and enforceable employment agreements help manage risk
- Be cognizant of bonus, incentives, commission and options vesting terms.
- Obtaining a release is key – investors don’t like uncertainty re: employee litigation.

Firing: “DOs and DON’Ts”

- DOs:
 - Ensure no one is made aware in advance except on the most restricted “need to know” basis
 - Select the right people to deliver the message (ideally 2 employer reps)
 - Select a time and place that optimizes privacy
 - Have the termination letter ready to hand to the employee and be ready to explain it
 - Provide a brief explanation for termination that is accurate, but does not open up a debate
 - Keep the discussion short, focused and calm
 - Explain how the employee is to return company property
 - Obtain all of the employee’s passwords (*e.g.*, for voicemail, computer log-in)
 - Allow the employee to obtain his/her personal belongings at a convenient time
 - Take notes after the meeting
 - See the employee off/ensure that the employee gets home safely
- DON’Ts:
 - Be too soft or too hard
 - Dither – get to the point without small talk
 - Go into detail regarding the reason for the termination
 - Argue
 - Force the employee to pack up their personal belongings immediately following the termination
 - Avoid the “security march to the door”

Termination Meeting Objectives

“DOING IT RIGHT” AVOIDS:

- Employee suffering pain, stress and embarrassment
- Hurting remaining employee morale
- Hurting the Company’s reputation
- Having to pay the employee more money (e.g. aggravated/punitive damages)

Questions?

Call or email anytime

Allison Di Cesare

Associate

416.862.6725

adicesare@osler.com

Summer Danakas

Associate

416.862.6513

sdanakas@osler.com