The importance of best employment practice to protect your startup

When starting a business, you make a huge number of decisions, on everything from office location to company branding. With so many things to think about, founders and business leaders might overlook some of the fundamental steps around employment.

Temps de lecture : minute

23 November 2021

Ensuring good employment practices and having the necessary documentation in place is not only important to protect your startup, but also to ensure that it is an appealing proposition for investors as it looks to grow down the line.

There are a number of practical steps and processes that companies must go through at the outset in order to be able to start hiring employees. These range from registering as an employer with HMRC to ensuring the company has appropriate employers' liability insurance in place. The *UK government website* provides information on these initial steps and procedures.

These practical steps are necessary, but as the company develops and grows, it will face a number of different employment challenges depending on the stage it is at: from the very outset as you start building a team around your founders and leaders, to further down the line as you approach acquisition or IPO.

It's vital that business leaders anticipate these challenges and act to

address them early to minimise the risk of them causing significant problems that are much harder to resolve later on. One of the most effective ways of protecting the business from the outset is putting in place well-drafted employment contracts.

Protecting your ideas – the employment contract

When founders create a new company based on a brilliant idea with an enthusiastic, close-knit team, it is easy to believe there is no need to protect the business and its assets – particularly around confidential business ideas and Intellectual Property (IP) – from those very people who established the startup.

However, in addition to registering that IP and defending the product or service from outside forces, companies need to protect its business ideas from those on the inside as well. Unfortunately, it is a fact of life and business that disagreements happen, and when they do – particularly among cofounders and senior team members – they might lead to someone leaving the company and trying to use the same idea elsewhere or stealing your hard-earned clients, customers and employees.

To prevent a company's ideas from being taken elsewhere, properly drafted and water-tight employment contracts must be introduced at the earliest stage, especially for the founding team. While the law prevents employees from misappropriating confidential information belonging to their employer during the *employment relationship* (this is automatically implied into every employment contract), there is no such implied duty after employment has terminated. So, protecting this confidential information after termination of employment can only be achieved through appropriately drafted confidentiality and IP provisions in the employment contract.

In addition to well-drafted and robust confidentiality and IP provisions, employers might also want to include a garden leave clause in their employment contracts as these can be an effective way of protecting the business; on garden leave, employees remain employed but are not carrying out active duties, contacting clients or accessing company information or systems during their notice period.

Companies should also consider whether it would be appropriate to introduce post-termination ‘restrictive covenants’ into the employment contracts of founders and other senior employees. Restrictive covenants, such as non-compete and non-solicitation clauses, can be an effective way of further protecting your business if and when senior employees leave. However, the law around the enforceability of such restrictions is complex and so you should seek legal advice if and when these restrictions are being introduced.

New beginnings

Any fast-growing business will have a changing structure over time. A growing number of businesses are acquired by or merged into a bigger entity every year. According to *Forbes,* data shows that a record-high of $1.77T in M&A transactions were announced in the first quarter of 2021, 124% higher than the same period of 2020.

It is worth noting that any such investment or acquisition can and will have an impact on the employees, although the immediate impact will depend largely on the structure of the transaction.

In a share sale, only the ownership structure of the company will be affected and so in many cases, the company’s daily operations and working structure are unlikely to change significantly and so this will rarely have a significant impact on the employees.

However, in a business sale, the employees will generally transfer to a buyer by operation of law, giving rise to certain employee protections and employer obligations, including a duty to inform and consult with employee representatives in advance about the proposed transfer and its impact on employees. Again, it will be important to ensure that legal advice is taken at an early stage to anticipate the employment implications of a proposed investment or acquisition.

Important considerations

Employment is a big factor for any company and rights, obligations and protections should be established right at the start of the business journey. Doing so should save the organisation time, money, and many stresses from the natural changes of a workforce.

Good employment practices are not just beneficial when relationships with employees break down, though, they are also a factor as the business secures investment or gets acquired. Buyers take on huge responsibilities when acquiring a business and so a key part of their due diligence will involve ensuring that the company or business that they are acquiring has complied with its obligations as an employer and, moreover, that it has taken steps to protect itself – and its ideas – if and when key employees move elsewhere.

Oliver Spratt is counsel at *Morrison & Foerster.*

Article by Oliver Spratt