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Key employment law considerations for an early-stage tech company

For many start-ups and early-stage technology companies, dealing with employment and human resources issues can often be a minefield or, at the very least, something which sits relatively low on their list of priorities.

However, in order to protect their business, there are a number of key employment points that companies should be aware of when taking on employees.

This article considers those key points and also highlights some common pitfalls that, if not addressed, could inadvertently lead to future risk and/or liabilities.

- Implement written contracts (that give suitable protection) – It is a legal requirement that, on or before their start date, all employees are given a written statement which sets out basic terms of their employment (for example, information such as start date, working hours, place of work, salary, notice period, etc.).

  However, irrespective of this legal obligation, it is highly recommended that all employees, in particular those who are key and/or senior, are issued with a contract of employment which provides suitable protection to the company during and after the employment relationship. Indeed, any potential investors will likely insist that all key employees are signed up to robust written employment contracts.
  The following contractual terms will be of particular importance:
  - Notice Period – it will be important to ensure that the contract for any key employee sets down a notice period that gives the company sufficient time to mitigate the impact of that employee ever leaving the company.
  - For example, if a critical employee is only required to give one month's notice then it is likely that the departure of that employee on such short notice could significantly disrupt the company's operations. It is common therefore that the employment contract for key/senior employees will provide for a notice period of 3 or 6 months.
  - Post-termination restrictions – on a similar note, it will be important to ensure that the contracts for any key employees contain suitable post-termination restrictions which seek to prevent them from competing with the business or soliciting customers for a period of time after their employment with the company comes to an end. If the contract does not contain such terms then there will be very little that can be done to prevent a former employee from immediately setting up in direct competition or from attempting to poach the company' customers, suppliers or employees.
  - Courts are notoriously wary of restrictive covenants and will only enforce such restrictions that go no further than reasonably necessary to protect the business' legitimate interests. As a result, it will be vital to consider what sort of protection is actually needed for your business and to tailor the restrictions for individual employees.
  - Intellectual Property – it perhaps goes without saying that any early-stage tech company should take all steps to protect its intellectual property rights. In the employment sense, this will include ensuring that the employment contracts contain full and detailed IP terms – especially in relation to the senior and/or technical members of the workforce.
  - Confidential Information – it will also be important that the employment contract contains a comprehensive confidentiality clause in order to protect all of the information and know-how that employees acquire during their employment. In particular, this should make expressly clear that the employee will remain bound by their confidentiality obligations after the termination of their employment (without any expiry). If an employee is not bound by such an express confidentiality obligation then the law will impose only very limited protection for companies once the employment relationship has come to an end.
  - Clarity of commercial terms – in addition to the above, implementing suitable employment contracts will also have the considerable benefit of ensuring that both parties are completely clear on the terms of the employment relationship. For instance, the contract will detail the employee's remuneration package, including any bonuses or benefits that have been agreed.
- Pay your employees from the beginning (including Founder employees) – It is not uncommon for Founder employees, or employees who are otherwise onboarded at an early-stage, to work for a company without pay for an initial period, e.g. until a certain level of investment is secured. Whilst this may be entirely understandable from a commercial perspective, such an arrangement would very likely amount to a breach of National Minimum Wage (NMW) legislation, which requires employers to pay workers at least a minimum hourly rate.

  Employers that fall foul of this legislation risk enforcement action by HMRC or the employees themselves (albeit the latter might be unlikely if the arrangement is agreed in good faith) – and can result in the company being ordered to pay any arrears of the NMW as well as interest and penalties. It is recommended therefore (and any potential investors may want to see) that all early-stage employees have been paid an employment wage at least in line with the NMW.

  On a related note – early-stage companies should also ensure that, from the start of the employment, employees are provided with all other employment benefits which are imposed by law. For example, the law sets down minimum entitlements in respect of pension contributions (subject to the eligibility) and paid holiday.

- Beware of employment risks – One of the most common employment law issues that can arise in start-up companies is engaging an individual to work on a consultancy or contractor basis when, in reality, the way in which that individual works amounts to an employment relationship.

  Broadly speaking, there are three types of employment status – employee, worker (essentially an 'employee-lite' status) and the genuinely self-employed. The distinction is important as it determines the legal protections that the individual is entitled to. As you would expect, the law affords employees the greatest range of rights and protections (such as the right not to be unfairly dismissed and the right to a statutory redundancy payment); workers get some, but not all, of the same rights; and self-employed consultants/contractors have no 'employment-type' protection under the law. Employees and the self-employed are, obviously, also subject to very different tax treatment.

  If companies incorrectly categorise the staff who are working for them (e.g. engaging a consultant who is, to all intents and purposes, working as an employee) then potential liabilities can arise at a later date. For example, HMRC may demand the unpaid employment taxes and national insurance contributions (as well as interest and penalties). In addition, the individual themselves may seek to bring some form of employment-related claim against the company, for example for unpaid holiday and/or unfair dismissal.
- Implement HR policies / Employee Handbook – Finally, as a company grows it is well advised to implement a set of robust non-contractual staff policies (for example by way of an Employee Handbook). Typical policies would include equal opportunities, anti-harassment and bullying, family leave, IT security, disciplinary & grievances, etc.

  Not only are such handbooks an effective tool for promoting a company's ethos and culture, they can also be valuable in helping an employer prevent and/or resist future disputes and claims with employees.