



# EMPLOYMENT LAW BASICS FOR STARTUP COMPANIES

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# TODAY'S AGENDA



## PRACTICAL TIPS FOR:

- Recruiting and hiring
- Classifying and compensating your employees
- Managing employee separations
- Running a compliant workplace
- Laws that apply as you grow

## CASE STUDIES

- Taking it global

# TOP 10 MISTAKES WE SEE STARTUPS MAKE



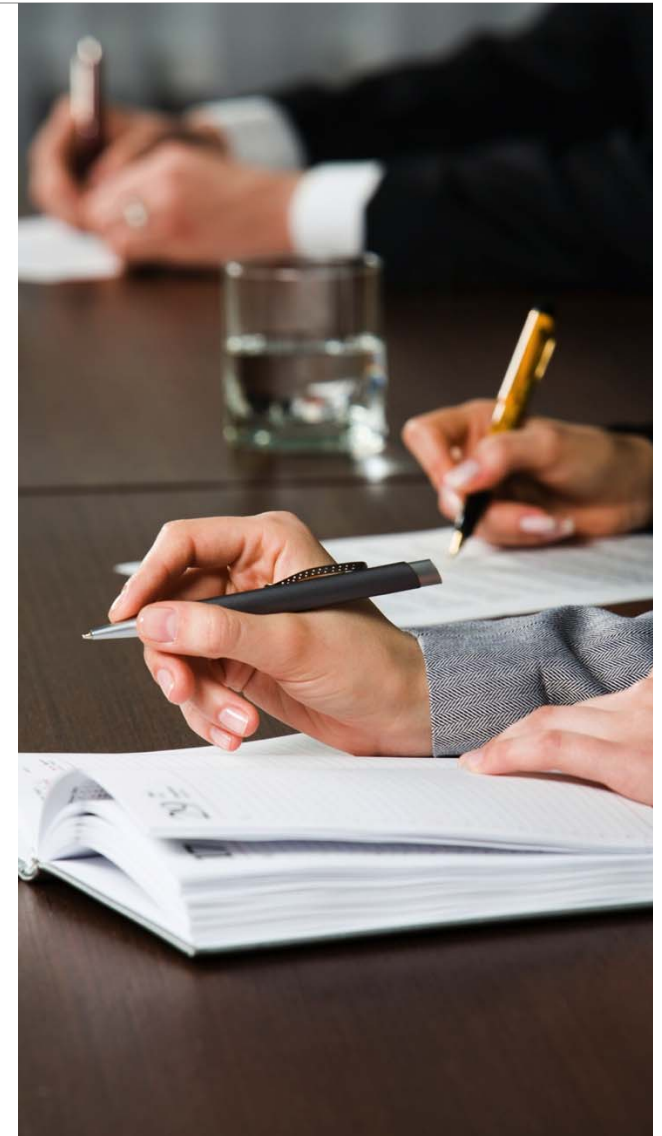
- Not paying employees
- Delaying written offer letter or PIIA until months after start date
- Classifying everyone as a consultant
- Classifying everyone as an exempt employee
- Misclassifying inside salespeople and administrative assistants as exempt from overtime
- Failing to prevent new employees from bringing over prior employer's electronic data
- Non-compliant commission plans
- Not reimbursing for cell phone and travel
- Not talking to a lawyer before firing someone
- Not paying all wages due upon termination



# EMPLOYMENT LAW BASICS – RECRUITING



- Ensure compliance with new hire's obligations to old employer
  - Comply with employee non-solicitation agreements
  - Out-of-state, non-compete agreements are often enforceable
- Ensure prospective hire does not take any information from prior employer (thumb drives, cloud-based, emails to self)
- Be aware of background check and discrimination laws and affirmative action obligations
- Make sure your pre-hire questions are job related
- If you use a recruiter, document rights and obligations



- Just calling someone an “independent contractor” does not make her one
- Need payroll set-up, including workers’ compensation insurance, before you hire employee
- Employee should sign offer letter and PIIA before starting
- Employers have obligation to provide reasonable accommodations to persons with disabilities
- Ensure I-9 compliance
- If employee is relocating, be aware of potential liability if employment is quickly terminated

# EMPLOYMENT LAW BASICS – COMPENSATION



- All employees must be paid (generally twice a month)
  - Paying in equity does not comply with Labor Code § 212
- Know whether employee is exempt or hourly
  - Employee cannot voluntarily waive non-exempt status
  - Main exemptions for start up employees: outside sales, executive, administrative, computer and creative professionals
  - If the employee does not meet an exemption, he is “hourly” and must be provided two 10-minute paid rest periods and one 30-minute unpaid lunch break, as well as overtime for all hours in excess of eight
    - Labor Code § 2810.5 notice for hourly employees
- Need (and want) written commission agreements
- Bonuses are a “wage” due to an employee once “earned”
- Vacation is not legally required, but if granted is a wage and increases payout on termination (or sale)



# EMPLOYMENT LAW BASICS – SEPARATIONS



- Although employment is “at will,” you should have a legitimate non-discriminatory reason for firing someone
- Consult counsel
- In event of termination, final pay is due on employee’s last day
- Separation agreements with a release are frequently advisable but require consideration (generally additional money or vesting) for the release to be enforceable
- Unique rules apply to releases signed by employees who are 40+
- Policy not to provide any references limits risk associated with providing negative reference



# SCENARIO 1 – HIRING FIRST NON-FOUNDER



Co-founder identifies two new hires:

- Hire #1: A great programmer
  - Full-time consultant, one year “evergreen” contract
  - No salary until seed round closes, then \$75,000/year plus true-up for deferred salary prior to funding round
  - Paid in equity until funding (5% of company’s equity vesting monthly with 1 year cliff (strike price \$0.01/share))
  - She pays for own cell phone, Internet, computer (will use for work)
- Hire #2: A salesperson
  - Salary of \$225,000, commission TBD (no formal plan), OTE at \$400,000
  - Company needs his trade knowledge so we hope he brings with him whatever he can on a thumb drive
  - He’ll travel 25% of time
  - He is moving to California from Florida and has a Florida non-compete

**DO YOU SEE ANY PROBLEMS?**



- Person should be classified as an employee, not a consultant
- Salary deferrals are not permitted under the Labor Code
- Payment with equity alone is a Labor Code violation
- The post-funding salary is insufficient to render her exempt from overtime (\$84,130 for computer professional)
- Labor Code requires company to reimburse for reasonable expenses necessarily incurred

# HIRE #1: WHAT SHOULD YOU DO INSTEAD?



- Does the person meet the “administrative” or “executive” exemptions from overtime? Can you change job duties such that they do? If so, a salary of \$37,740 is sufficient
  - If cash payment is totally infeasible, speak with counsel about structuring a part-time/short-term engagement that satisfies independent contractor test, perhaps through an intermediate consulting entity, that is paid per-task with restricted stock
- Pay a “bonus” upon close of seed round, not a true-up on deferred salary
- Build release into employment offer letter to be executed post-financing
- Draft offer letter that states \$200/month of salary is allocated to Labor Code § 2802 expenses (cell phone, Internet, etc.)



# ISSUES WITH HIRE #2



- He is an “inside salesperson” and is not exempt from overtime because commissions are less than 50% of total compensation
- Labor Code requires written commission plan
- Good idea regardless because disagreements over commissions are very common
- Do not encourage him to bring competitor information (offer letter should direct him not to)
- Out-of-state non-compete likely is enforceable in this context and may require significant attorney time to have it declared unenforceable in California



# HIRE #2: WHAT SHOULD YOU DO INSTEAD?



- Be sure that commissions exceed salary when measured on a quarterly basis or that 50%+ of time is spent outside of office
- Draft a commission plan that clearly defines performance metrics, timing of payouts, clawbacks, caps, floors, “bluebird” or other limitation on payment for sales not due to employee’s efforts
- Have him sign the commission plan on first day of employment and outline basic terms in offer letter
- Include representation in offer letter that he will not bring competitor information (consider separate acknowledgment)
- Consult counsel regarding non-compete. Depending on current employer’s history with other employees going to competitors, consider pre-hiring disclosure to current employer (e.g., no solicitation of certain customers for a period of time).
  - If he moves here and then you have to fire him due to non-compete enforcement, you may be liable for significant damages under Labor Code § 970

# SCENARIO 2: EMPLOYEE TERMINATION



- Your 45-year-old CMO hasn't been performing. She was not paid initially and made \$2,500/mo after financing. She has 10 days of accrued vacation. In January, your co-founder tells you to terminate her as follows:
  - Will receive her paycheck and accrued vacation within two weeks of the date she signs a release of claims.
  - Contingent on signing the release, will be paid bonus that she was scheduled to receive based on work from the prior year.
  - She must sign the agreement immediately; no revocation period.

DO YOU SEE ANY PROBLEMS?



- Release for unpaid wages during first three months and failure to pay overtime in subsequent period is not enforceable, since there is no good faith dispute as to whether wages were due
- Under Labor Code § 203, all wages must be paid on termination date / last day of employment, including accrued vacation
- She has already earned the bonus; to require her to sign a release in order to receive it violates Labor Code § 206.5
- Requiring immediate signature is procedurally unconscionable
- Failing to include 7-day revocation period leaves you open to claim for age discrimination under federal law

# WHAT SHOULD YOU DO INSTEAD?



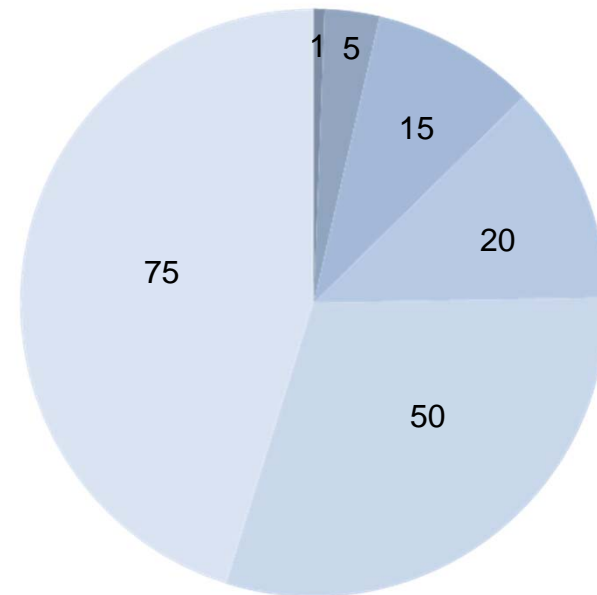
- Provide final paycheck on last day of employment (accrued vacation and salary)
- Ensure she gets COBRA notice
- Provide 21 days to consider separation agreement and 7 days to revoke after signing
- Offer some consideration for release beyond what she is already due (mutual non-disparagement, nominal cash payment, an additional month of vesting, payment of bonus at earlier date)
- Consult counsel to see if there is any argument that the bonus is not due at all and/or is not due until February





- More and more laws apply as you grow. Having a employee handbook and involving an HR representative or employment-law counsel can help you navigate them
- 1 employee – immigration, workers' comp, independent contractors, overtime, meal and rest periods, paid family leave, unemployment insurance
- 5 employees – discrimination (state), pregnancy discrimination
- 15 – disability (ADA), discrimination (federal)
- 20 – age (federal)
- 50 – family and medical leave (state and federal), sexual harassment training
- 75 – EEOC reporting
- Government contract of \$50,000 or more – OFCCP (federal)

## EMPLOYEES



- Considerations as you go global
- Engagement options
- Employment documentation
- Global myths



# CONSIDERATIONS AS YOU GO GLOBAL



# ENGAGEMENT OPTIONS



Employees	Independent Contractors	Agency Workers	PEO Employees
<ul style="list-style-type: none"> <li>Local corporate presence required?</li> </ul>	<ul style="list-style-type: none"> <li>What quacks like a duck is a duck</li> </ul>	<ul style="list-style-type: none"> <li>Permissible?</li> </ul>	<ul style="list-style-type: none"> <li>Are joint employees and need to comply with all applicable employment laws</li> </ul>
<ul style="list-style-type: none"> <li>Payroll registrations?</li> </ul>	<ul style="list-style-type: none"> <li>Withholding obligations (VAT, GST)?</li> </ul>	<ul style="list-style-type: none"> <li>Employee leasing laws?</li> </ul>	<ul style="list-style-type: none"> <li>Employee leasing laws?</li> </ul>
<ul style="list-style-type: none"> <li>Benefits?</li> </ul>	<ul style="list-style-type: none"> <li>Registration obligations?</li> </ul>	<ul style="list-style-type: none"> <li>Limitations on time or type?</li> </ul>	<ul style="list-style-type: none"> <li>Limitations on time or type?</li> </ul>
<ul style="list-style-type: none"> <li>Fixed term?</li> </ul>	<ul style="list-style-type: none"> <li>Sales agent rules?</li> </ul>	<ul style="list-style-type: none"> <li>Equal pay obligations?</li> </ul>	<ul style="list-style-type: none"> <li>Joint liability</li> </ul>
<ul style="list-style-type: none"> <li>Equity compensation?</li> </ul>	<ul style="list-style-type: none"> <li>Equity compensation?</li> </ul>	<ul style="list-style-type: none"> <li>Equity compensation?</li> </ul>	<ul style="list-style-type: none"> <li>Equity compensation?</li> </ul>

## A global strategy for documenting the relationship is key

### Sources

- Statute
- Collective bargaining agreements
- Case law

### Strategy

- Global, local or hybrid approach

### Documentation

- Offer letter
- Employment agreement
- Handbooks and policies
- Proprietary information and inventions assignment agreement (PIIA)
- Non-competes and non-solicits
- Commission and bonus plans
- Data privacy notice
- Stock option documentation



# CLOSING THOUGHTS: GLOBAL EMPLOYMENT MYTHS



## Myth 1

You always (never) need a local entity to hire

## Myth 2

If you can't figure out the employee thing, just hire as an independent

## Myth 3

... or send an expat

## Myth 4

Just use your U.S. offer letter

## Myth 5

... and global policies





# CLOSING THOUGHTS: GLOBAL EMPLOYMENT MYTHS



## Myth 6

Everyone wants equity

## Myth 7

... and our U.S. Ts&Cs are great

## Myth 8

Good thing we don't have a union!

## Myth 9

And if it doesn't work out, just fire them!

## Myth 10

... or sell the business





# QUESTIONS?



# MARGARET KEANE, EMPLOYMENT PARTNER



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**Margaret Keane** has defended employers in all aspects of workplace disputes – including internal investigations, contentious termination negotiations, dispositive motions, trials, arbitrations and mediations.

Recent matters include successful defense of wage and hour claims, resolution of commission disputes, pay equity issues, restrictive covenants and unfair competition disputes, and harassment and discrimination claims.

On the counselling side, she frequently advises on wage and hour and worker classification compliance, commission plans, unfair competition issues and the challenges of the digital workplace, including compliant use of social media, Bring Your Own Device (BYOD) policies and workplace privacy.

Margaret has extensive experience in the employment aspects of corporate transactions, including due diligence, Worker Adjustment and Retraining Notification Act (WARN) compliance; and negotiating and drafting employment, consulting, post-sale restrictive covenants and severance agreements.

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**Ute Krudewagen** focuses on providing multinational companies with solutions to the challenges presented in managing a global workforce. In addition, she counsels companies on employment issues triggered by cross-border transactions.

Ute advises international and cross-border clients on a broad range of complex employment matters, including background checks, employment agreements, discrimination and harassment claims, social media issues, global policies and procedures, non-compete and proprietary information agreements, works council and union issues, codes of social responsibility, workplace privacy, employee assignments and global mobility programs, global reductions in force, and severance and retention plans.

Ute also counsels global employers on the issues associated with transactions, including cross-border mergers and acquisitions, outsourcing, post-acquisition integrations and tax restructurings. She has successfully addressed employment issues in transactions with workforces in more than 60 jurisdictions in one transaction, with deal values ranging from US\$2 million to US\$8 billion, including negotiation and drafting of the deal agreement, employee transfers, consultations with unions and works councils, benefits harmonization, interim operating models and acquisition-related downsizings.

# SEBASTIAN MILLER, EMPLOYMENT ASSOCIATE



**Sebastian Miller** advises and advocates for both businesses and individuals, primarily with respect to employment law.

Sebastian represents a variety of start ups and early stage companies in general employment matters. He frequently answers questions about employee classification, leaves of absence, and instituting policies and procedures that comply with applicable federal, state and local employment laws and regulations. Sebastian also represents both employers and employees in employment transitions, usually negotiating and drafting employment agreements and severance packages on their behalf. Another component of his practice involves advising buyers and sellers in corporate change of control transactions, often performing diligence on potential liabilities and then negotiating definitive purchase agreements as well as non-compete and retention agreements.

In addition to his counseling practice, Sebastian represents clients in the courtroom and before arbitrators and administrative bodies (most frequently before the California Labor Commissioner). His recent successes include securing summary judgment of a discrimination case in favor of an employer and summary adjudication in favor of an individual who sought declaratory relief with respect to agreements that were ostensibly enforceable under Business & Professions Code §§ 16602 and 16602.5. He has also defended wage and hour class actions, various single plaintiff employment cases, and represented both plaintiffs and defendants in a variety of commercial matters that touch on employment issues.

In pro bono matters, Sebastian has secured settlements on behalf of victims of § 1983 civil rights violations, recovered thousands of dollars on behalf of defrauded investors, and won VA benefits for a veteran who improperly received a dishonorable discharge.

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# AMIE ALDANA, EMPLOYMENT ASSOCIATE



**Amie Aldana** focuses her practice on employment counseling.

She counsels employers on various domestic and international employment issues, including employment policies and procedures, employee leaves, hiring and termination, and OFCCP compliance. In addition, she prepares agreements and advises companies on employment law issues in the context of mergers and acquisitions.

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Amie also assists clients with labor relations issues, conducts factual investigations, and defends employers against wage and hour claims.