

Hiring Considerations for Startups: A Checklist

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For a startup to succeed and grow, it must develop a supportive workforce. The hiring process is challenging for all employers—including startups, which are preoccupied with just that, starting-up. They are focused on developing their technology and securing capital. Generally, startups lack resources to hire human resources professionals, and employment-related issues are a distant priority. Navigating the hiring waters is difficult, but sensitivity to a number of issues can ease the process: **Compensation.** Employee compensation is often challenging for startups. How can you possibly hire employees when you do not have consistent revenue streams? How can you get quality employees when you cannot afford to pay them top dollar? Fear not, other options are available. Exempt employees, such as the startup's executives, can be paid with a mix of salary and equity. Compensation terms should be memorialized in an employment agreement, and signed by both the startup and the employee. **Offering Equity to Executives.** Things to consider when issuing equity are: (1) should the shares be subject to forfeiture if the employee leaves in a couple of years; (2) should the company have the right to repurchase the shares from the employee; (3) how should the share be valued—zero or fair market value (zero valuation has the least tax implications for the employee); (4) should the shares be voting or non-voting; (5) should there be restrictions on transferability, rights of first refusal, drag-along obligations, and other similar provisions that are customary in an arrangement of this type.

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Classifying Workers. While qualifying executives and exempt employees may be paid with a mix of salary and equity, non-exempt employees must be paid at least minimum wage. Non-exempt employees are also entitled to overtime pay after working a certain number of hours. Startups should pay attention to the engagement of workers who call themselves “consultants” or

“contractors” because they could be employees for wage and hour purposes. A multi-factor test evaluates whether the worker is indeed an independent contractor. Incorrectly classifying a worker can result in liability for the payment of back wages and payroll taxes. Appropriately classifying workers will save the startup from headaches later. **Non-Disclosure Agreements.** Businesses succeed because of a novel idea, and protecting that idea is critical. Before sharing the startups’ “secrets” or intellectual property, and risking the public distribution of your good idea, employees should sign non-disclosure agreements (NDA). The NDA should specify the type of information that is confidential, and how the information can be used without running afoul of the agreement. The NDA should describe how employees should maintain the company’s confidential information, including prohibiting employees from storing confidential information on their personal computers and prohibiting them from sending confidential information to their personal email addresses. The NDA should also restrict employees from taking confidential information outside the office and require employees to return confidential information if they are terminated. If properly drafted, NDAs are good deterrents to intellectual property leaks.

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Non-Compete and Non-Solicit Provisions. To protect the company and employees, startups should include non-compete and non-solicit provisions in their employment agreements. The duration and scope of the non-compete, and the period for not soliciting employees and customers, must be reasonable in order to be enforceable. Most states have specific guidelines for what constitutes reasonable and these should be followed. **Assignment of Intellectual Property.** Startups should have policies and agreements in place with all of their employees regarding what happens to the intellectual property designed, devised, developed, perfected or made by its employees. Ideally, there should be an agreement in place assigning all intellectual property to the startup.

Telecommuting. Startups often have employees before they secure office space, making working remotely the only option. Telecommuting can raise several issues for employers, particularly if non-exempt employees are working remotely. Working hours for non-exempt employees should be tracked, and these employees may be entitled to meal and rest periods or paid sick time. **Job**

Descriptions. In addition to the job duties, job descriptions should detail the amount of education and experience required to perform the job duties. Job descriptions help the startup assess the skills required of a future employee, set performance expectations, support employee classification decisions, and help evaluate accommodations for disabilities.

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Interviewing Potential Employees. Be warned that bad interview questions exist. Questions about protected classes like age, religion, and disability should be avoided. Do not ask candidates about their retirement plans or when they plan to have children. Prepare a list of questions to ask. Questions should focus on job-related skills and qualifications. Ask every candidate those questions, and tailor the follow-up questions based on their responses. Take notes about the interviews.

Document your impressions of candidates immediately after the interviews. Documenting the reasons for your hiring decisions can help defend them if someone later accuses you of discriminatory hiring. **Offer Letters.** Offer letters memorialize the employee’s job title and compensation, and give employers an opportunity to document the “at-will” employment relationship. “At-will” employment means that employers can terminate the employee at any time for any reason, just as long as the reason is not discriminatory. Making employment decisions based on an individual’s protected class—race, age, religion, gender, etc.—is discrimination and should be avoided at all costs. **Company Policies.** An employee handbook probably is not at the top of a startup’s list when it has only a handful of employees. But having a sexual harassment and discrimination policy in place early on can protect the startup later. A sexual harassment policy with a complaint procedure is a defense to a sexual harassment claim. Before hiring any employees, it is also a good idea to have an equal employment opportunity policy. *This originally appeared as a [JD Supra Perspective](#) on August 11, 2015.*

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