

Diary of a Start-up

Second part in a 12-week series

Week Two Question: Should I require dot-com experience of any members of my executive team?

Know how to fire ‘em before you hire ‘em

The lawyer's lament

Len Ferber says that when advising clients about hiring employees, he is reminded of George Bailey's maid in "It's a Wonderful Life."

By Len Ferber

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So, Tim, you have your idea, some initial funding, and you've been introduced to several people you want to hire to help you begin to "build the dream." It is now time to make sure you get off on the right foot in building your workforce.

Managing your human resources is one of the most important parts of running a successful organization. Start-up companies, however, constantly make missteps in the process of hiring and managing employees — missteps that can drain them of time and money.

When advising clients about hiring employees, I am reminded of George Bailey's maid in "It's a Wonderful Life." In the climactic scene, when the whole town of Bedford Falls is contributing to the Building and Loan's shortfall, the maid makes her contribution saying "I was saving this money for a divorce if ever I got married." Call me a pessimist, but you need to adopt the same attitude about new hires. In other words, start thinking about terminating employees before you hire them.

When hiring, you should avoid "employment agreements," and, instead, use "employment letters." The difference is crucial. An "employment agreement" is a contractual commitment to employ a person for a certain period of time (usually measured in years). While the company usually retains the right to fire the employee, if the termination is not "for cause," the company must continue to pay the employee under the contract. In most negotiated contracts, "cause" is not "doing a bad job." As a result, the overwhelming number of terminations are not for cause, requiring continued payout under the agreement or other monetary settlement. Remember one thing: Employment agreements protect the employee, not the employer.

Employment letters merely summarize the terms of the employment — position, salary, benefits and start date. I don't care what's in an employment letter as long as it contains the three magical words that make a lawyer's heart go a-flutter: "employment at will." This means that either the employee or the employer can terminate the employment at any time with or (and here's the important part) without cause. One other thing about employment letters: Try to avoid agreeing up front to pay a severance in the event of termination. The reason: if you have already agreed to provide severance, you cannot use it as a "bargaining chip" to obtain a release of claims from a terminated employee.

New employees should also sign a Confidentiality and Non-Disclosure Agreement, agreeing not to disclose or use any non-public information about the company, except in fulfilling their employment responsibilities. Such a document is crucial, especially for a technology company, for several reasons:

- It acts as a deterrent to former employees who might otherwise wish to use/disclose confidential information, and, in any event, provides the company with an agreement it can enforce.
- Funding sources will expect to see such an agreement and will require you to get them signed.
- The agreement will typically contain an explicit assignment to the company of all work product and inventions conceived of during employment, which is required for the company to claim ownership of patentable inventions. Your assignment clause, however, should reflect the Illinois Patent Act, which prohibits such assignments in certain situations.

Consider whether the agreement should contain a post-termination agreement not to compete. This is a delicate and complex subject. Suffice it to say that if the restriction is limited to what is necessary to protect the company's legitimate business interests, both as to the length and scope of the restriction, it should be enforceable. In Illinois, a restriction of six months to a year may be enforceable; 1-2 years get a little more suspect especially for "rank-and-file" employees. More than two years may be problematic.

And thinking about terminations, instituting a formal review process can be either your best friend or worst enemy. Reviews are extremely important for two reasons:

- Employees do, in fact, like to know how they are doing and want to know if there are problems so that they can correct them.
- It is the best method of establishing a record of poor performance should you wish to terminate an employee because of performance issues.

In evaluating employees, I suggest what is, unfortunately for many businesses, a novel approach: be honest. I can't tell you how many clients I've had who have wanted to get rid of an employee for poor performance only to find that the employee's record contained nothing but good reviews.

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