

Employment Law Overview

The Employment Law Start-up Kit will help start-up companies organize their work force optimally. This kit contains two core sections. The first section is an employment law checklist that provides a quick overview of the main issues employers need to address when taking on employees. The second section is a template employee agreement form.

The Employment Law Best Practices Guide provides an overview to start-ups and emerging businesses on many of the important legal issues they may encounter. The guide is layered and contains hyperlinks (highlighted in blue) on pages 1-3 to more detailed annotations. For further information on each topic, click the blue headings. The guide is current as of November 2015. See the glossary attached to end of document for definitions.

Employers can use The Employment Agreement as a template for memorializing employee-employer relationships. The sample Agreement contains detailed annotations. This guide simply provides a background—employers should conduct additional research and consult an attorney for further clarification and information.

Disclaimer

These documents were created and vetted by students and supervising attorneys at the University of Pennsylvania Law School's Entrepreneurship Legal Clinic applying Pennsylvania law. They are intended to educate and inform the early stage start-up. As such, they are designed to be simple and accessible and may omit terms or language relevant to your specific circumstances. Please carefully read through the documents and any instructions and annotations included therein.

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Employment Law Best Practices for Startups, Entrepreneurs, and Growing Businesses

Quick Tips

- Do not discriminate in the hiring process.
 - Carefully consider whether workers should be classified as employees or independent contractors.
 - Be sure to comply with minimum wage and overtime pay laws.
 - Protect the company's intellectual property and confidential information through agreements.
 - Consider various compensation and incentive plans for workers.
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Contents

1 Risks in the Hiring and Interview Process

Discrimination in the Hiring Process. Do not discriminate based on: race, color, religion, national origin, sex, age, disability, veteran status, genetic info, or citizenship (these are “protected classes”).

Social Media Issues in Hiring. The law is constantly developing in this area, but employers can minimize potential legal liability by either:

- not performing social media searches at all (the least risky approach); or
- having someone other than the interviewer (i.e., a human resources professional) perform social media searches, while ensuring that only information learned lawfully during the process gets passed on to the interviewer.

2 Wage and Hour Issues

Administering Payroll. Before hiring any employees, the employer should determine:

- who will be responsible for payroll (e.g., a chief financial officer, human resources professional, professional employer organization (PEO), or payroll company);

- how frequently to pay the company's employees; and
- what amount and how the company will pay its employees (e.g., salary, hourly, or commission basis).

Complying with Minimum Wage and Overtime Laws. Employers must pay all nonexempt employees at least the minimum wage per hour and overtime payments for hours worked in excess of 40 hours per week. (See below for exemptions). Employers must keep records of all hours worked by nonexempt employees.

Classifying Workers as Exempt or Nonexempt. The most common exemptions include those for:

- administrative employees;
- executive employees;
- professional employees;
- computer professional employees;
- outside sales employees; and
- highly compensated employees.

Can Startup Founders Agree to Work for Free? Many founders may qualify as exempt executive employees under the business owners' exemption (29 CFR § 541.101) if they both:

- own at least 20% equity interest in the business (whether corporation, partnership or other entity); and
- are actively engaged in the management of the business.

Independent Contractors and the Risks of Misclassification. Click heading; also see the [Independent Contractor Kit](#).

3 Employee Benefits and Incentive Compensation

Common types of incentive compensation and benefits that startup companies may provide their workers include equity-based awards, such as:

- restricted stock;
- restricted stock units;
- stock options;
- stock appreciation rights;
- phantom stock; and
- performance share units (PSUs).

Other types of compensation include:

- incentive bonus plans (including short-term and long-term, as well as discretionary and non-discretionary plans); and
- severance benefits (as part of either an individual employment contract or a company-wide plan).

4 Protecting Intellectual Property and Goodwill

Ideally, these agreements should be signed by workers at the beginning of their employment. Generally, courts have held that an offer of new employment is adequate consideration to support an agreement. Protections should be in place before employees have access to confidential information and intellectual property.

Confidentiality and Proprietary Rights Agreements. These agreements help protect valuable confidential information and intellectual property (IP) assets, including trade secrets, from disclosure or misuse by an employee. (Please refer to the Employment Agreement below).

Non-compete Agreements. These agreements between employers and employees restrict former employees from working for the employer's competitors for a specified period of time after the employment ends.

Non-solicitation Agreements. These agreements bar employees (either during or after employment, or both) from contacting the employer's key contacts in an attempt to hire, retain or create contractual relationships with them.

Risks in the Hiring and Interview Process

Discrimination in the Hiring Process. To reduce the risk of a discrimination claim, employers should:

- research the relevant federal, state and local laws and the protected classes they cover;
- inform recruiting staff of potentially discriminatory practices;
- clearly describe the necessary qualifications and functions of each job position; and
- primarily consider objective criteria in the hiring process.

Social Media Issues in Hiring. Employers can learn information about an applicant through social media; however, employers should take precautions to ensure that they do not use certain information in the hiring process. For example, an employer may learn information about an applicant that may be covered by a protected class, including:

- religious affiliations or beliefs;
- genetic conditions;
- sexual orientation;
- national origin; and
- age.

Employers may reduce legal risks by either:

- not performing social media searches at all (the least risky approach); or
- having someone other than the interviewer (e.g., a human resources professional) perform social media searches, while ensuring that only information learned lawfully during the process gets passed on to the interviewer.

Employers should train their workers who are involved in the hiring process to comply with:

- anti-discrimination laws;
- the Fair Credit Reporting Act;
- password protection laws, which may prohibit employers from seeking login information or accessing the password protected portions of a prospective or current employee's personal social media accounts with certain exceptions; and
- lawful interview procedures.

Wage and Hour Issues

Start-up entrepreneurs should pay close attention to lawful wage and hour practices to minimize liability. They should keep in mind that they must follow minimum wage and overtime rules, especially since employees at startups often work long hours in undefined roles. These issues amplify as a company's workforce expands.

Important considerations include:

- deciding how to administer payroll;
- classifying workers correctly as exempt or nonexempt;
- adhering to minimum wage and overtime laws; and
- classifying workers correctly as employees, independent contractors, or interns.

Administering Payroll

Before hiring any workers, the employer should decide:

- who will be responsible for payroll (e.g., a chief financial officer, human resources professional, professional employer organization (PEO), or payroll company);
- how frequently to pay the company's employees; and
- what amount and how the company will pay its employees (e.g., salary, hourly, or commission basis).

Additionally, employers should document their pay policies in order to avoid disputes, even if they are hiring friends or former colleagues.

Complying with Minimum Wage and Overtime Laws

Employers must comply with both state and federal minimum wage and overtime pay laws, unless the employer can show that the employee qualifies for an exemption under the FLSA (Fair-Labor Standards Act).

Employers must maintain records of all hours worked by non-exempt employees.

The FLSA applies to all private employers and employees who in any workweek are either:

- engaged in interstate commerce or in the production of goods for commerce (individual coverage)—this includes trade, commerce, transportation, transmission or communication among states or between any state and any place outside of that state; or

- employed by an enterprise engaged in commerce or the production of goods for commerce with gross annual sales or business of at least \$500,000 (enterprise coverage).

(29 U.S.C. §§ 203(r), (s); 206(a); and 207(a).)

The above tests are interpreted broadly. Most employers are covered because the interstate commerce prong covers typical business activities such as using the phone or e-mails for interstate communication. If they satisfy the test, startups are no exception.

Employers must also adhere to state wage and hour laws for nonexempt employees. State laws often impose:

- higher minimum wages;
- stricter overtime payment requirements; and
- mandatory meal and rest break periods.

Classifying Workers as Exempt or Nonexempt

Under the FLSA, employers must pay covered employees at least the minimum wage. Additionally, employers must comply with overtime pay laws for hours worked in excess of 40 hours per week, unless the employees satisfy one of the statutory exemptions. Common exemptions include those for:

- administrative employees;
- executive employees;
- professional employees, including learned professionals and creative professionals;
- computer professionals;
- outside sales employees; and
- highly compensated employees.

([29 C.F.R. §§ 541.0](#)–541.710.)

To satisfy the requirements of an administrative, executive, professional, highly compensated or computer professional employee under federal law, employees must meet both:

- The relevant exempt duties test, which requires that the employee spend enough time performing duties that qualify as exempt from the FLSA's overtime provisions. Each exemption classification requires specific types of exempt duties.

- The salary requirement, unless the employee is performing his or her role as:
 - a business owner (see [Can Startup Founders Agree to Work for Free?](#));
 - a teacher;
 - practicing law or medicine; or
 - a computer professional earning at least \$27.63 per hour for every hour worked.

The test for determining exempt status may differ under state laws.

Paying an employee on a salary basis is not enough to qualify for an exemption. A common misunderstanding is that a salaried employee does not get overtime pay and as such should be classified as exempt. However, classification demands a factual analysis of the job obligations actually performed by the employee, not simply those listed on a job description.

Can Startup Founders Agree to Work for Free?

A lot of emerging startups do not have the resources to pay the high salaries formerly earned by their founders and executives. These workers are often compensated with equity instead of a higher salary. Some even work for free or take an annual salary of \$1 while logging hours well in excess of 40 hours a week. However, entrepreneurs should think carefully about these practices to stay in compliance with the FLSA.

FLSA Exemption for Business Owners. If the business is covered by the FLSA, then working for free (or for \$1) violates the minimum wage and overtime requirements (unless the employee falls within an exemption). Many startup founders may qualify as exempt executive employees under the business owners' exemption (29 CFR § 541.101) if they both:

- own at least 20% equity interest in the business (whether it's a corporation, partnership or other entity); and
- are actively engaged in the management of the business.

Both factors must be satisfied. Accordingly, an individual with a 20% or more interest in a business who is required to work long hours but makes no management decisions, supervises no one, and has no authority over personnel, does not satisfy the business owners' exemption.

Moreover, startup business owners should check the applicable state and local laws, as they may not align perfectly with the FLSA requirements. In such a case, a startup may have to pay minimum wage to a business owner even though he meets both of the federal exemption factors described above.

Independent Contractors and the Risks of Misclassification

Many startups classify their workers as independent contractors in order to avoid minimum wage and overtime requirements and to save money by paying fewer benefits and lower taxes. However, merely classifying a worker as an independent contractor or simply hiring them part-time (or seasonally) does not necessarily protect an employer from legal challenges based on misclassification.

There are several tests used to determine whether independent contractors are appropriately classified. No single factor determines the issue. An IRS test considers several factors grouped into three general categories:

Behavioral control (the right to control the manner in which work is performed), including factors such as:

- The type and degree of instructions given. Independent contractors generally control how, when and where they perform the work, while employees generally must follow their employers' instructions.
- Requiring the use of company equipment, such as computer and e-mails. Independent contractors generally use their own equipment.
- The evaluation system used. Independent contractors are typically evaluated only by the end result of the work, while employees may be evaluated on how the work is actually performed.
- The application of employee policies and procedures. Independent contractors are not covered by these.
- Training. Independent contractors generally do not receive training from the client company.

Financial control (the right to control economic aspects of a worker's activities), including factors such as:

- The contractor's degree of investment. Independent contractors often make a significant investment in the tools and equipment they use to perform the work.
- Reimbursement of business expenses. Independent contractors are typically responsible for their own expenses and overhead.
- The contractor's opportunity for profit or loss. Independent contractors run a greater risk of incurring a loss in connection with a particular engagement.
- The contractor's ability to service multiple clients at the same time. Independent contractors generally do not have exclusivity obligations.
- Method of payment. Independent contractors are often paid a flat fee for an engagement, while employees generally are guaranteed regular wages for the period of time the employment relationship continues.

The **relationship between the parties**, including factors such as:

- Written contracts. While written contracts are not sufficient to determine a worker's status, they can help indicate the parties' intent.
- Employee benefits. Independent contractors typically are not entitled to receive retirement, health insurance and other similar benefits an employer provides to its employees.
- Permanency of the relationship. Employees are typically engaged for indefinite periods and can be discharged for any or no reason without notice, while independent contractors are typically engaged for specified periods or projects and cannot be discharged except under the terms of their contract.
- Whether the services are provided through a corporate entity or through an individual service provider. Employees are hired in their individual capacities, while independent contractors who provide services to the general market typically form a business entity such as a limited liability company (LLC) or corporation.
- Whether services provided are key aspects of the business. Where the individual's services are key aspects, it is more likely that the worker is actually an employee of the company.

Although the tests may be described differently than the IRS test, many states consider similar factors. Employers should research state and local laws to ensure compliance.

Consequences of Improper Classification

The risks and costs associated with improperly classifying a worker may be significant. Misclassification suits are expensive and disruptive for businesses. Additionally, settlement payments are often in the millions of dollars.

If a company has improperly classified a worker as an independent contractor, the IRS generally requires the employer to reclassify the worker as an employee. This makes the company responsible for any liabilities related to that employee, including:

- back wages and overtime pay;
- tax and insurance obligations;
- employment law compliance; and
- employee benefits.

Misclassification Liability May Persist After Business Closure

Some startup business owners mistakenly think that if their business fails and lacks resources to pay employees or service providers, they can shut

down the business and be free from any obligations to their employees. However, founders and equity shareholders may incur liability post-closure as:

- an individual who exercised enough control over the terms and conditions of employment to qualify as an “employer” under the FLSA; or
- the owner of a new business, formed after the closure of the first, with the same owners and operating essentially for the same purpose, under the Uniform Voidable Transfer Act (UVTA), if the new business was formed to avoid a debt.

Thus, even when resources are depleted, startup owners should ensure they:

- properly classify employees as exempt from minimum wage and overtime requirements (only when applicable);
- pay all employees their wages, including overtime, if applicable, in a timely manner; and
- properly classify independent contractors (only when applicable).

For additional information, also see the [Independent Contractor Kit](#).

Employee Benefits and Incentive Compensation

Many startups lack the resources to pay the high salaries or fixed benefits that large corporations can provide. Accordingly, startups often use some form of incentive compensation and other benefits.

Some common types of incentive compensation and benefits that companies may offer their workers include equity-based awards, such as:

- restricted stock;
- restricted stock units (RSUs);
- stock options, including:
 - incentive stock options (ISOs), also known as statutory stock options, and Non-Qualified Stock-Options;
- stock appreciation rights (SARs); and
- phantom stock.

Other types of compensation include:

- incentive bonus plans;
- severance benefits; and
- various employee benefits and retirement plans.

Entrepreneurs should consult an attorney if they want to issue equity-based incentive awards or other types of deferred compensation, as there are a number of complicated tax, securities laws, and other laws that will apply. In addition, the type and design of equity award that companies offer varies based on the company's corporate form (e.g., LLC versus C Corporation), and the goals that the company seeks to achieve through the equity award (e.g., retention and incentives). Entrepreneurs should also be careful not to give away too much ownership in their company, especially in the early stages of growth.

Protecting Intellectual Property and Goodwill

Businesses should protect their assets to the fullest extent of the law by requiring employees to sign agreements governing:

- confidentiality of trade secrets and protection of proprietary rights;
- non-solicitation of employees;
- non-solicitation of customers; and
- non-competition by employees.

Ideally, workers should sign these agreements at the beginning of their employment. Courts have generally held that an offer of new employment is adequate consideration to support these agreements.

Confidentiality and Proprietary Rights Agreements. Employers often require their workers to sign a confidentiality and proprietary rights agreement to protect their sensitive confidential information and intellectual property (IP) assets.

Employers should require their workers to sign this at the start of employment:

- to protect against an employee learning confidential or proprietary information before the employee is subject to confidentiality restrictions;
- so that the new employment offer functions as consideration to consummate the contract (assuming applicable state law holds that at-will employment is adequate consideration); and
- to demonstrate that the employee agrees to assign any inventions he or she creates while employed by the employer, to the extent allowed by state law, and that all works created are works made for hire that belong to the employer.

Non-compete Agreements. A non-compete agreement is an agreement between an employer and an employee that restricts a former employee from working for the employer's competitors for a specified period of time after his employment ends.

Employers should review the applicable state law to determine any enforceability requirements.

Non-competes agreements help when an employee learns essential, confidential information or trade secrets. Employers should carefully identify employees who might have access to such critical information; typically, non-competes apply only to a small subset of employees, such as the founders and initial employees of a startup.

Non-solicitation Agreements. A non-solicitation agreement bars an employee (either during or after employment, or both) from contacting the employer's key contacts in an attempt to hire, retain, or create contractual relationships with them. Non-solicitation provisions generally:

- prohibit former employees from using confidential information and trade secrets to solicit others;
- preserve trade secrets by limiting a former employee's ability to exploit company resources; and
- are found either in a stand-alone contract or a non-compete agreement.

Additionally, non-solicitation agreements are governed by state law. For more information, please see the [Intellectual Property Kit](#).

Glossary

Consideration. Something of value to which a party is not already entitled that is given to the party in exchange for contractual promises. Consideration can take various forms, including a:

- monetary payment;
- promise to do something; or
- promise to refrain from doing something.

Consideration is one element critical to the formation of a contract and it must be adequate for the contract to be enforceable.

Fair Labor Standards Act (FLSA). A federal law governing wage and hour law, including the national minimum wage, overtime pay, child labor, and wage and hour record-keeping (29 U.S.C. §§ 201 to 219). The FLSA requires payment of a minimum hourly wage to covered nonexempt employees. State minimum wages vary and may be higher than the federal minimum wage (\$7.25 as of December 2015). Covered employers must pay covered nonexempt employees at least the greater of the federal or applicable state minimum wage.

The FLSA also requires payment of one and a half times the regular rate of pay to covered nonexempt employees for hours worked over 40 hours per workweek. It also requires record-keeping related to employees' wage, hour, and basic demographic information.

Incentive Stock Options (ISOs). A type of stock option that can be granted only to employees and can qualify as a statutory stock option under the Internal Revenue Code (IRC) to receive tax-favorable treatment. If qualified, ISOs are not subject to ordinary income taxes at grant or exercise. Instead, only the profit made on any sale of the underlying shares is taxed, at prevailing long-term capital-gains rates. Under certain circumstances, the holder of an ISO may also be subject to alternative minimum tax in the year the ISO is exercised.

To qualify, an ISO must satisfy the requirements of Section 422 of the IRC, including a requirement that the ISO be issued pursuant to a qualifying, stockholder-approved plan. In addition, to be entitled to tax-favorable treatment, the holder of an ISO must hold the underlying shares until the later of one year from the date of exercise or two years from the date of grant of the option.

Intellectual Property. Intangible products of human intellect that are subject to ownership and other legal rights. The categories of IP that are

protected under US law are: certain inventions, plants and product designs (protected by utility, plant and design patents); trade secrets; certain works of authorship (protected by copyrights); mask works; and trademarks.

Minimum Wage. A minimum hourly amount that employees must be paid under the Fair Labor Standards Act of 1938 (FLSA) or applicable state law. The FLSA requires payment of a minimum wage to nonexempt employees.

Overtime Pay. Under the Fair Labor Standards Act of 1938 (FLSA), the amount nonexempt employees must be paid for work in excess of 40 hours per workweek. Employers covered by the FLSA generally must pay nonexempt employees overtime pay at a rate of at least one and half times an employee's regular rate of pay.

Phantom Stock. Phantom stock is the grant of a right to the appreciation in the corporation's stock, with a fixed exercise date and method of calculation. Since phantom stock does not dilute shareholder equity, it is a popular form of executive compensation for outside executives in closely held and private corporations.

Often defined as deferred compensation unit plans, phantom plans grant chosen employees the financial advantages of stock ownership without granting them an equity interest in the company. Employees are given fictional shares—usually for each year of employment. At the end of an agreed upon future date (or upon a specified event, such as the sale of the company), the employee can receive the value of those vested shares.

Protected Class. Federal Protected Classes include:

- race;
- color;
- religion or creed;
- national origin or ancestry;
- sex;
- age;
- physical or mental disability;
- veteran status;
- genetic information; and
- citizenship.

Restricted Stock. The compensatory award of company stock granted to a service provider that is subject to certain restrictions until it vests.

On the grant date, the service provider becomes the record owner of the restricted stock and has voting, dividend and other stockholder rights. However, the shares are non-transferable and subject to forfeiture until the

restricted stock vests (meaning, until the restrictions lapse). The period during which restricted stock is unvested and subject to restrictions is often referred to as the restricted period.

The shares are fully issued at the time of the grant and provide immediate value to the grantee. There is no exercise feature and therefore the awards have no risk of going underwater. Unlike stock options, restricted stock continues to have value even if the stock price declines.

Restricted Stock Unit. A compensatory award granted by a company to an employee or other individual performing services for the company. A RSU represents a promise by the company to transfer a share of the company's stock or a cash payment equal to the value of a share of the company's stock at a specific time in the future.

The holder of a RSU is not the beneficial owner of the shares underlying the RSU award and therefore is not entitled to voting, dividend, or other stockholder rights unless and until shares are delivered in settlement of the award.

Stock Appreciation Rights. A compensatory award granted to an employee or other service provider of a company. On exercise of a SAR, the recipient is entitled to receive an amount equal to the appreciation in the value of the underlying company shares from the date the SAR is granted until the SAR is exercised.

SARs may be settled in cash or shares; however, it is more common for SARs to be settled in cash.

A SAR is similar to a stock option except that the recipient is not required to pay an exercise price to exercise the SAR. Rather, the recipient receives the excess of the fair market value of the SAR at the time of exercise over the exercise price (usually the fair market value of the underlying shares on the grant date).

As is the case with stock options, a recipient's ability to exercise a SAR is typically subject to the satisfaction of vesting requirements.

Stock Options. A compensatory award granted by a company to an employee or other individual performing services for the company. A stock option provides the employee or other service provider with the right (but not the obligation) to purchase employer stock at a specified price at the end of a specified vesting period. The exercise price is typically the fair market value of the stock at the time the option is granted. The vesting is commonly time-based (or, less often, performance-based).

Once vested, a stock option is exercisable for a specified period of time (the exercise period). If the stock option is not exercised during the exercise period, it is forfeited. If a stock option is granted with an exercise price that is less than the fair market value of the underlying shares on the grant date, this can cause adverse tax consequences for the option holder under Section 409A of the Internal Revenue Code.

Trade Secret. A type of intellectual property, information (for example, formulas, drawings, patterns, compilations, programs, devices, methods, techniques, or processes) that:

- provides an economic or competitive advantage to its owner because the information is not generally known by or available to third parties; and
- is subject to reasonable efforts by its owner to maintain its secrecy.

Work Made for Hire. Under Section 101 of the Copyright Act, “Work Made for Hire” is a work that is either:

- created by an employee in the scope of his employment; or
- specially commissioned, if the creator of the work and the commissioning party agree in writing that the work is a work made for hire and the work is commissioned for use as:
 - a contribution to a collective work;
 - part of a motion picture or other audiovisual work;
 - a translation;
 - a supplementary work;
 - a compilation;
 - an instructional text;
 - a test;
 - answer material for a test; or
 - an atlas.

For copyright purposes, the employer or commissioning party is both:

- the author of a work made for hire; and
- the initial owner of the copyright in the work, unless that party and the creator of the work agree differently in writing.

Employment Agreement

Employment Agreement
[Company Name]
[Date]

[Employee Name]
[Employee Address 1]
[Employee Address 2]

Dear _____:

[Company Name], a [Entity Type]ⁱ(the “Company”), is pleased to offer you employment with the Company on the terms described below. If you wish to accept this offer, please sign and date the enclosed duplicate original of this letter and return it to me. As required, by law, your employment with the Company is also contingent upon your providing legal proof of your identity and authorization to work in the United States. This offer, if not accepted, will expire at the close of business on [Date].

1 Consideration

In consideration of your employment by the Company, which, by signing this letter, you acknowledge to be good and valuable consideration for your obligations hereunder, you and the Company hereby agree to the terms described herein.

2 Position

You will start in a [full-time/part-time] position as [Employee’s Title] and you will initially report to the Company’s [Supervisor’s Title]. Your primary duties will be

[_____]. By signing this letter, you confirm with the Company that you are under no contractual or other legal obligations that would prohibit you from performing your duties with the Company.ⁱⁱ

3 Compensation and Employee Benefits

3.1 You will be paid a starting [wage/salary] at the rate of \$_____ per [hour/month/year], payable on the Company’s regular payroll dates.ⁱⁱⁱ

Employment Agreement

3.2 You will be eligible to participate in the following Company-sponsored benefits: [_____].

4 Confidential Information Agreement^{iv}

4.1 **Confidential Information.** You agree that during the course of employment by the Company, you will have access to and learn about confidential, secret and proprietary documents, materials, data and other information, in tangible and intangible form, of and relating to the Company and its businesses (“Confidential Information”) and that this Confidential Information and the Company’s ability to reserve it for its own exclusive knowledge and use is of great competitive importance and commercial value to the Company, and that improper use or disclosure of the Confidential Information by you will cause irreparable harm to the Company, for which remedies at law will not be adequate.

4.2 **Disclosure and Use Restrictions.** You agree and covenant:

- (A) To treat all Confidential Information as strictly confidential^v;
- (B) Not to directly or indirectly disclose, publish, communicate or make available Confidential Information, or allow it to be disclosed, published, communicated or made available, in whole or part, to any entity or person whatsoever not having a need to know and authority to know and use the Confidential Information in connection with the business of the Company and, in any event, not to anyone outside of the direct employ of the Company except as required in the performance of the Employee's authorized employment duties to the Company; and
- (C) Not to access or use any Confidential Information, and not to copy any documents, records, files, media or other resources containing any Confidential Information, or remove any such documents, records, files, media or other resources from the premises or control of the Company, except as required in the performance of your authorized employment duties to the Company or with the prior consent of an authorized officer acting on behalf of the Company in each instance (and then, such disclosure will be made only within the limits and to the extent of such duties or consent). Nothing herein will be construed to prevent disclosure of Confidential Information as may be required by applicable law or regulation, or pursuant to the valid order of a court of competent jurisdiction or an authorized government agency, provided that the disclosure does not exceed the extent of disclosure required by such law,

Employment Agreement

regulation or order. In addition, this Section does not, in any way, restrict or impede you from discussing your employment with co-workers or union representatives or exercising your rights under Section 7 of the National Labor Relations Act, or otherwise disclosing information as permitted by law^{vi}.

4.3 Duration of Confidentiality Obligations. Obligations under this Agreement with regard to any particular Confidential Information will commence immediately upon you first having access to such Confidential Information, whether before or after you begin employment by the Company, and will continue during and after your employment by the Company until such time as such Confidential Information has become public knowledge other than as a result of the your breach of this Agreement or breach by those acting in concert with you or on your behalf.^{vii}

5 Proprietary Rights Agreement^{viii}

5.1 Work Product. You acknowledge and agree that all writings, works of authorship, technology, inventions, discoveries, ideas and other work product of any nature whatsoever, that you create, prepare, produce, author, edit, amend, conceive or reduce to practice individually or jointly with others during the period of your employment by the Company and relating in any way to the business or contemplated business, research or development of the Company (regardless of when or where the Work Product is prepared or whose equipment or other resources is used in preparing the same) and all printed, physical and electronic copies, all improvements, rights and claims related to the foregoing, and other tangible embodiments thereof (collectively, "Work Product"), as well as any and all rights in and to copyrights, trade secrets, trademarks and related goodwill, patents and other intellectual property rights therein arising in any jurisdiction throughout the world and all related rights of priority under international conventions with respect thereto, including all pending and future applications and registrations therefor, and continuations, divisions, continuations-in-part, reissues, extensions and renewals thereof (collectively, "Intellectual Property Rights"), will be the sole and exclusive property of the Company.

5.2 Work Made for Hire; Assignment.^{ix} You acknowledges that, by reason of being employed by the Company at the relevant times, to the extent permitted by law, all of the Work Product consisting of copyrightable subject matter is "work made for hire" as defined in the Copyright Act of 1976 (17 U.S.C. § 101), and such copyrights are therefore owned by the Company. To the extent that the foregoing

Employment Agreement

does not apply, you hereby irrevocably assign to the Company, your entire right, title and interest in and to all Work Product and Intellectual Property Rights therein, including the right to sue, counterclaim and recover for all past, present and future infringement, misappropriation or dilution thereof, and all rights corresponding thereto throughout the world. Nothing contained in this Agreement will be construed to reduce or limit the Company's rights, title or interest in any Work Product or Intellectual Property Rights so as to be less in any respect than that which the Company would have had in the absence of this Agreement.

5.3 Further Assurances; Power of Attorney.^x During and after your employment, you agree to reasonably cooperate with the Company [at the Company's expense]^{xi} to:

- (A) Work Product and Intellectual Property Rights in the Work Product in any jurisdiction in the world; and
- (B) Maintain, protect and enforce the same, including, without limitation, executing and delivering to the Company any and all applications, oaths, declarations, affidavits, waivers, assignments and other documents and instruments as will be requested by the Company. You hereby irrevocably grant the Company power of attorney to execute and deliver any such documents on your behalf in your name and to do all other lawfully permitted acts to transfer the Work Product to the Company and further the transfer, issuance, prosecution and maintenance of all Intellectual Property Rights therein, to the full extent permitted by law, if you do not promptly cooperate with the Company's request (without limiting the rights that you will have in such circumstances by operation of law). The power of attorney is coupled with an interest and will not be affected by your subsequent incapacity.

5.4 No License. You understand that this Agreement does not, and will not be construed to, grant you any license or right of any nature with respect to any Work Product or Intellectual Property Rights or any Confidential Information, materials, software or other tools made available to you by the Company.

6 Employment Relationship

Your employment with the Company is for no specific period of time. Your employment with the Company will be "at will," meaning that either you or the Company may terminate your employment at any time and for any reason, with or without cause. Any contrary representations that may

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have been made to you are superseded by this offer. This is the full and complete agreement between you and the Company on this term. Although your job duties, title, compensation and benefits, as well as the Company's personnel policies and procedures, may change from time to time, the "at will" nature of your employment may only be changed in an express written agreement signed by you and the Company's Chief Executive Officer.

7 Outside Activities

While you render services to the Company, you agree that you will not engage in any other employment, consulting or other business activity without the written consent of the **Company**.^{xii}

8 Taxes, Withholding and Required Deductions

All forms of compensation referred to in this letter are subject to all applicable taxes, withholding and any other deductions required by applicable law.

9 Miscellaneous

9.1 Governing Law. The validity, interpretation, construction and performance of this letter, and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto will be governed, construed and interpreted in accordance with the laws of state of _____, ^{xiii} without giving effect to principles of conflicts of law.

9.2 Entire Agreement. This letter sets forth the entire agreement and understanding of the parties relating to the subject matter herein and supersedes all prior or contemporaneous discussions, understandings and agreements, whether oral or written, between them relating to the subject matter hereof.

9.3 Counterparts. This letter may be executed in any number of counterparts, each of which when so executed and delivered will be deemed an original, and all of which together will constitute one and the same agreement. Execution of a facsimile copy will have the same force and effect as execution of an original, and a facsimile signature will be deemed an original and valid signature.

9.4 Electronic Delivery. The Company may, in its sole discretion, decide to deliver any documents or notices related to this Agreement, securities of the Company or any of its affiliates or any other matter, including documents and/or notices required to be delivered to you

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by applicable securities law or any other law or the Company's Certificate of Incorporation or Bylaws by email or any other electronic means. You hereby consent to (i) conduct business electronically, (ii) receive such documents and notices by such electronic delivery, and (iii) sign documents electronically and agree to participate through an on-line or electronic system established and maintained by the Company or a third party designated by the Company.

We look forward to having you join us no later than [Date].

Very truly yours,

[Company Name]

By: _____
[Signature]

Name: _____

Title: _____

Accepted and Agreed:

[Print Employee Name]

[Signature]

[Date]

Anticipated Start Date: _____

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ⁱ This should include both the state in which the entity was formed and the legal entity used in formation (e.g., Pennsylvania Limited Liability Company).

ⁱⁱ This sentence is intended to ensure that the employee is not subject to a non-compete from a prior employer that he would violate by accepting this employment offer.

ⁱⁱⁱ Companies should ensure that this satisfies minimum wage requirements. While this clause assumes monetary compensation at set increments, startups often also use some form of incentive compensation and other variable or deferred benefits to motivate their employees and compete for top talent. An additional sub-clause should be added after sub-clause (a) to describe any incentive compensation being given to the employee. The types of incentive compensation and benefits that companies may offer their employees will vary depending on the goals and corporate form of the company, and may include equity-based awards, such as:

- restricted stock;
- restricted stock units;
- stock options;
- stock appreciation rights;
- phantom stock; or
- performance share units

Please consult an attorney for further guidance if you decide to issue employees equity, because there are a number of tax, securities law, and other laws that you must consider when designing an equity compensation plan. Entrepreneurs should also be cautious about giving away too much ownership of their company.

^{iv} This Section is specifically necessary for early-state startups where it is common for sensitive product development and design information to be shared on a company-wide basis. Employers should require all their employees to sign a confidentiality and proprietary rights agreement at the start of the employment relationship

^v The effectiveness of the restrictions in the clause depends on:

- what information the employee can use or disclose in the ordinary course of performing his job duties, without obtaining additional authorization;
- whether the employee must get additional authorization before disclosing or using certain information to co-workers and/or third parties, even if the disclosure or use is in the course of the employee's performance of his regular job duties; and
- how the employee must get any required additional authorization, such as whether the authorization (this may be oral or if it must be in writing; and may be from a supervisor or if it must be from a senior executive, such as the employer's general counsel).

It is common for such clauses to include an additional layer of protection that requires third parties (for example, customers, consultants, suppliers and other business associates) execute separate confidentiality agreements (also referred to as non-disclosure agreements or NDAs) before the employee discloses any valuable confidential information to them.

^{vi} Employers need to determine whether or not they have a legitimate business need for limiting the employee's disclosure about his terms and conditions of employment. If there is no such need, Employers risk violating the NLRA by limiting the employee's ability to

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disclose those terms and conditions to co-workers or union representatives.

^{vii} As a general matter, a time limit on the duration of the confidentiality agreement is not required for enforceability. You may exclude the time limitation in this clause without jeopardizing your ability to enforce the clause.

^{viii} The clauses in Section 5 work to protect the employer's IP rights. These clauses should be included in employment agreements for all junior or senior employee who have the possibility of creating IP rights during their employment. The possibility of creating IP rights may apply even if the employee is not filling a creative role in the company. Note that, if the employee's position makes it likely that the employee will create valuable IP rights such as inventions or has developed pre-existing IP that may be used in the employer's business, additional provisions may be necessary to appropriately protect the employer's IP rights.

As a general matter, an employee's assignment may be found unenforceable under state law if it is overbroad and therefore unfair to the employee. For this reason, these clauses limit the scope of assignment to IP created during the course of employment and related to the employer's business.

^{ix} Under US copyright law, a copyright-protected work prepared by an employee within the scope of his employment constitutes a work made for hire. The result is that the employer, and not the employee, is deemed the author of the work and owns the copyright therein, unless the parties have agreed otherwise.

We included a catchall provision that applies to all other work product and IP rights therein to ensure that the employer owns the IP. This is to guarantee that any work product that does not fall under the work-made-for-hire doctrine (discussed above) will be covered by the assignment provision.

^x This provision ensures that the employee will assist the employer, to the extent necessary, to give effect to the assignment provision and to apply for, enforce, and protect the employer's interest in the work product and IP rights therein. This provision is necessary because there may be a need, either during the employee's employment or after, for the employee to sign documents related to the IP rights of the work product. This provision also provides that the employee grants the employer a power of attorney for the purpose of executing any documentation and undertaking appropriate actions, if, for example, the employee is unavailable or uncooperative.

^{xi} This bracketed language is optional. It provides that the employer is responsible for the employee's expenses when complying with this provision. The employer may choose not to include this language such that the employee is responsible for its own expenses. If the employer does not cover these expenses, the employer should consider the quality of the efforts that the employee will provide beyond merely signing documents.

^{xii} This provision aims to ensure that the employee win provide the company with his full professional attention. However, whether or not you include such a provision will depends on multiple factors (the nature of a startup, the position, and the compensation provided). The bargaining power between the employee and employer may be such that the employees may not be willing to agree to such a provision.

^{xiii} In most cases this should be the state where the employee is located.