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WASHINGTON, DC

STARTUP & ACCELERATE SERIES

**Building a Better Team:
Employee Onboarding and Benefit Options**

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EMPLOYEE ONBOARDING



Employee Onboarding Agenda



Recruiting and Hiring Hazards

Interview questions, pay equity/salary history, criminal history, financial status, immigration, restrictive covenants



Diversity and Inclusion

Building a diverse and inclusive workplace through recruiting and employee retention



Documenting Terms and Conditions of Employment

At-will status, offer letter v. employment contract, employee handbooks, policies



Misclassification and Wage & Hour Considerations

Non-exempt employees, hours worked and pay, independent contractors (and the gig economy), interns

Federal and state discrimination laws

- Title VII of the Civil Rights Act of 1964
 - 15 or more employees
 - Protected categories include race, color, national origin, sex/pregnancy, religion
- Age Discrimination in Employment Act of 1967
 - 20 or more employees
 - Age (over 40)
- Americans with Disabilities Act of 1990
 - 15 or more employees
- State laws vary

Recruiting Hazards



Interview Questions

Do not ask questions about an applicant's protected characteristics or background and be sensitive to not inadvertently ask questions that may create legal risk



Salary history (pay equity laws)

Many states prohibit employers from screening applicants based on prior wages, salaries or benefits, or using that info to determine compensation



Criminal History

Be aware of rules that limit consideration of convictions



Financial Status

Comply with notice requirements of Fair Credit Reporting Act



Immigration Considerations

Permissible pre-hire inquiries:
Are you legally authorized to work in the US? Do you now, or will you in the future, require immigration sponsorship for work authorization (for example, H-1B status)?

Employment Eligibility:
Verification form (I-9) within three days of hiring

Agreements to Watch for and Consider

Non-Competition Agreements

Contain restrictions on employee's ability to accept certain employment (geographic and temporal)

Non-Solicitation Agreements

Prevent soliciting a company's clients or employees

Consider new restrictive covenants for key employees

Reasonable agreements for senior management

Focus on enforceability of restrictive covenants

Varies by state

Confidentiality/Inventions Assignment

Restrict someone from disclosing or using a company's proprietary information

Arbitration Agreements

With some exceptions, require employees to resolve disputes related to employment in arbitration rather than bringing a lawsuit in court

Document Terms and Conditions of Employment

- At-will vs. contractual employment for a term
 - Be sensitive to statements concerning future earnings and length of employment
- Offer letter vs. employment agreement
 - Include contingencies (e.g., availability of funding, execution of non-disclosure/noncompete agreement, execution of arbitration agreement)
 - Right to stock or stock options
 - Compensation, commissions, and bonus arrangements
 - Tailor to particular employees or job classes

Employee Handbooks and Policies

- Employee handbooks and policies set forth expectations and conduct rules
 - EEO, anti-discrimination, anti-harassment policies
 - Meal and rest break rules
 - Timekeeping and payroll rules
 - Vacation accrual and payout
 - Leaves of absence
 - Workplace safety

Employer Obligations with Respect to Harassment

- Adopt a strong anti-harassment policy
- Periodically train each employee on its contents
- Vigorously follow and enforce it
- The policy should include:
 - Explanation of prohibited conduct, including examples
 - Assurance that employees who make complaints or provide information related to complaints will be protected against retaliation
 - Complaint process that provides multiple, accessible avenues of complaint
 - Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible
 - A complaint process that provides a prompt, thorough, and impartial investigation
 - Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred

Diversity and Inclusion



- Develop strategic plans and policies for recruiting, hiring, retention and promotion
- Protected characteristics should not be taken into account in employment decisions
- Ensure diverse candidate pools
- Counter implicit bias
- Ensure consistent and objective standards
- Monitor progress

Performance Management Strategies



Communicate expectations;
Provide feedback



Document performance or disciplinary issues



Ensure adverse employment actions are made for legitimate, business reasons, and document those reasons



Ensure others who behaved similarly are treated similarly

Misclassification: Overtime Exemptions

- Are employees properly classified as exempt or nonexempt for overtime purposes (FLSA/state law)?
 - Potential red flag = none or very few nonexempt employees
- Potential repercussions for misclassification:
 - Liability for all unpaid overtime (may run back as far as three years in cases of willful violations)
 - Liability for withholding wages
 - Fines and penalties
 - Attorney fees exposure
 - Recordkeeping liability (e.g., where employer has failed to properly record employees' hours worked)

Issues Relating to Work Hours and Pay



Establish expected work hours, particularly for nonexempt employees



Establish mechanisms to ensure that employees are actively working (including regular responsive communications with team members)

But be sensitive to morale and PR issues related to these mechanisms



Comply with state wage payment laws (e.g., timing of payment)

Compensation Issues for Nonexempt Employees

- Accurately record *all* hours worked
 - Consider timekeeping systems and whether modifications are needed for remote setting
 - Consider attestations/acknowledgments regarding the complete and accurate recording of all time worked, and compliance with meal/rest period expectations
 - Beware of “on-call” treatment, if employees are expected to stand by for assignments
 - Remote meetings and training are generally compensable, unless *completely voluntary; not directly related to employee’s job*; and no “productive work” performed
 - Meal and rest breaks
- Overtime pay for hours worked over 40 hours per week

Misclassification: Independent Contractors

Service Providers

- Properly classified as a contractor, consultant, or advisor, rather than as employees?
 - How much control over the worker does the company have?

Potential repercussions for contractor misclassification

- Misclassified contractors could be entitled to retroactive participation in employee benefits
- Payment of federal and state employment taxes and amounts that should have been withheld, including interest and penalties
- Penalties for failure to contribute to state unemployment funds
- Unpaid overtime or other wage-based claims (if the employee should have been classified as non-exempt)
- State law major risk driver

The Gig Economy and Independent Contractors

- Companies are increasingly interested in entering the gig economy, but the legal uncertainties pose some discouraging risks
- A gig economy is a market model in which workers, typically through an on-line platform, contract with organizations for temporary, short-term engagements. Typically, a worker has the ability to pick and choose when he or she will work and how often.
- Types:
 - Personal Services
 - Examples: Uber, Lyft, GrubHub, Handy, Instacart, TaskRabbit, etc. – intermediary connects consumer with service
 - Goods and impersonal services
 - Examples: AirBnB, Etsy, etc. – intermediary connects buyers and sellers
 - Crowdsourcing
 - Personal shoppers/Secret shoppers
 - Brand ambassadors/social media monitors/moderators

Mitigating Operational Measures

- Hire workers as employees
 - They can be short-term or temporary employees
 - Work with reputable third-party staffing company to hire independent contractors as the staffing company's employees
 - Include indemnification provision in services agreement
 - Include arbitration agreement with class action waiver in services agreement with employee
- If you MUST keep them as independent contractors:
 - Avoid having independent contractors perform tasks that also are performed by employees
 - Limit independent contractors to performing tasks that are outside the company's usual course of business
 - Avoid having independent contractors who work exclusively for the company
 - Limit the amount of control exercised over the manner and means a gig worker performs his or her tasks

Interns

Fair Labor Standards Act

- requires “for-profit” employers to pay employees for their work. Interns and students, however, may not be “employees” under the FLSA—in which case the FLSA does not require compensation (minimum wage and overtime) for their work

“Primary Beneficiary Test”

- determine whether an intern or student is, in fact, an employee under the FLSA
 - In short, this test allows courts to examine the “economic reality” of the intern-employer relationship to determine which party is the “primary beneficiary” of the relationship
 - Don’t forgot state and local laws may be more stringent

BENEFIT OPTIONS



Benefit Options Agenda



Overview Of Benefit Options



Tips to Mitigate Risk



Compliance Hurdles

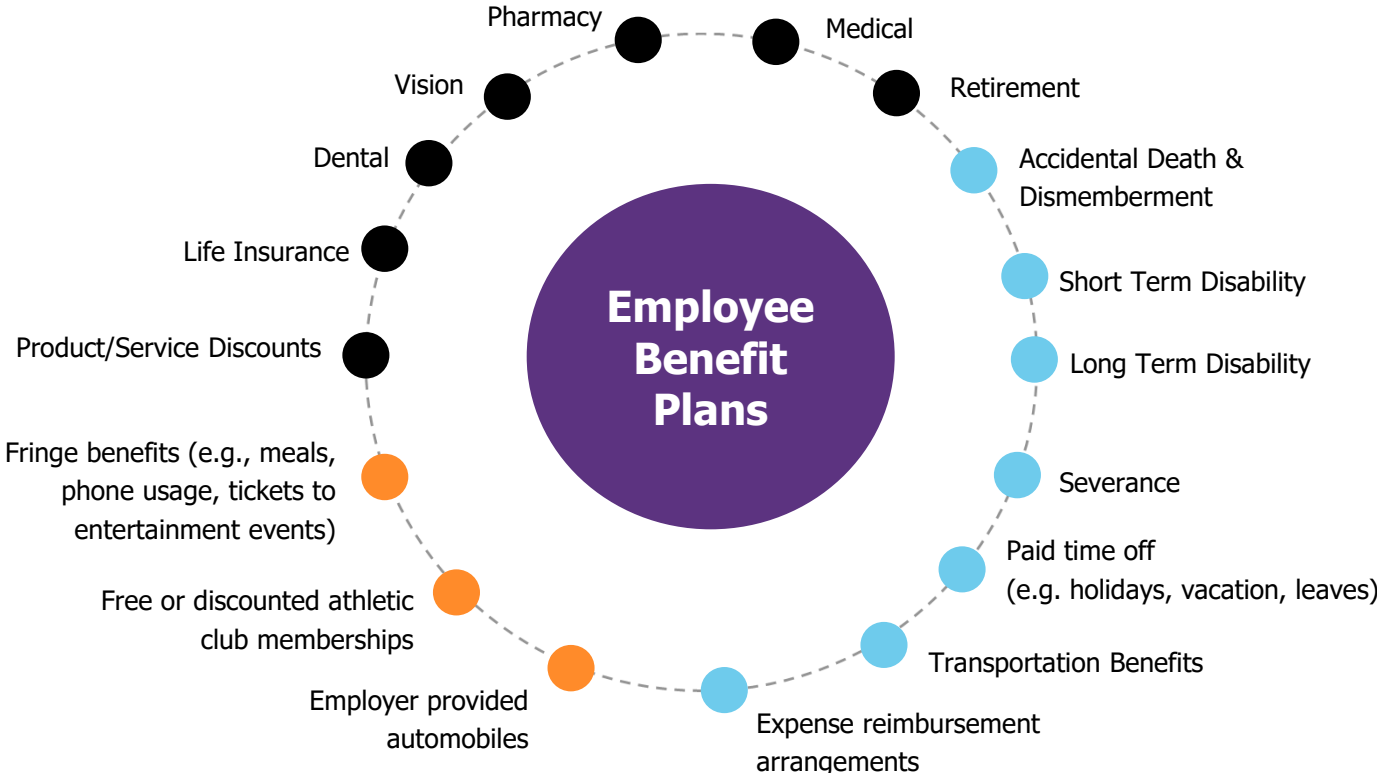


Ideas for Startups and Smaller Employers

Why Employee Benefits Matters?

- Competition for talent is fierce
- What you offer beyond salary can go a long way towards setting your company apart from the competition
- Offering a competitive benefits package can:
 - Help you attract talent
 - Help you retain talent
 - Increase employee engagement
 - Create loyalty among your employees

Types of Employee Benefit Plans



Governing Laws

- Laws and rules governing the design, operation and administration of employee benefit plans are complex.
- Some of the key federal statutes that govern this area include:
 - ERISA: The Employee Retirement Income Security Act of 1974, as amended
 - The Code: Internal Revenue Code of 1986, as amended
 - ACA: Patient Protection and Affordable Care Act of 2010, as amended
 - HIPAA: Health Insurance Portability and Accountability Act of 1996, as amended
 - COBRA: Consolidated Omnibus Budget Reconciliation Act of 1985, as amended

BENEFITS CAN BE RISKY BUSINESS – WHY YOU WANT TO GET IT RIGHT



Benefits Can Be Risky Business

- Because of the complex legal landscape, offering employee benefits can present risk and potential exposure for “plan sponsors” and “fiduciaries”
- Power to enforce laws, interpret laws and investigate compliance rests with multiple governmental agencies:
 - DOL: U.S. Department of Labor (Employee Benefits Security Administration)
 - IRS: Internal Revenue Service of the Department of the Treasury
 - PBGC: Pension Benefit Guaranty Corporation
- Individuals (current, former and would-be participants and beneficiaries) can sue in federal court...resulting in a very active plaintiffs’ bar!
 - Class-action litigation is active; targets plan sponsors, fiduciaries and service providers

Your Responsibilities as a Plan Fiduciary

Four Basic Fiduciary Duties Under ERISA

- Duty of loyalty
- Duty of prudence
- Duty to diversify
- Duty to follow plan terms

Prohibited Transaction Rules under the Internal Revenue Code

- A fiduciary cannot, among other things:
 - Receive money from the plan's assets.
 - Deal with plan assets in his or her own interest.
 - Note that there are exceptions for necessary expenses, reasonable expenses properly and actually incurred.

You Cannot Delegate Your Risk Away Entirely

- While it is often advisable to engage service providers to help manage your fiduciary responsibilities, you must monitor the delegation
- Co-fiduciary liability under ERISA: a fiduciary is liable for a breach of fiduciary duty by another if the fiduciary
 - Participates in the breach or conceals the breach, knowing it to be a breach
 - Fails to comply with fiduciary duties
 - Facilitates a breach
 - Has knowledge of, but does not take reasonable actions to correct, a breach

Consequences of Breach of Fiduciary Duty are Serious

- Personal liability for fiduciary breach (limits on exculpation using plan assets)
- Obligation to restore loss (and income) to the plan
- Monetary penalties to DOL equal to 20% of the recovery amount or IRS excise taxes
- Reputational risk
- Possible removal from position
- Criminal penalties (fines and incarceration) for failure to make 401(k) contributions, willful violations of reporting and disclosure requirements, kickbacks, bribes, and embezzlement
 - E.g., soliciting gifts or things of value with the intent to be influenced regarding plan decisions
 - E.g., directly or indirectly offering or promising to do so

Preparing for the Deal

- If you want to sell your company, remember that prospective buyers and investors are looking to minimize liabilities and exposure
- Employee benefits compliance issues can be a major source of risk
- Deal structure can impact the amount of risk that a buyer will assume
- Diligence will focus on uncovering compliance issues and liabilities associated with employee benefit plans and arrangements
- Employee benefits exposure and liabilities can impact the deal
 - Representations and warranties
 - Indemnification provisions
 - Negotiation of purchase price adjustments
 - Impact escrow requirements

Possible Exposure Related to Benefit Plan Administration

A few examples of conduct that can result in benefit plan exposure:

Improperly excluding certain workers from participating in or receiving benefits (e.g., worker misclassification, not following plan terms)

Failure to timely and fairly respond to claims for benefits

Failure to provide required plan information

Failure to administer benefits in accordance with the terms and rules of the plan

Failure to file and furnish required reports

Failure to update and amend plan documents to reflect current law

Failure to timely respond to requests for information

Mishandling plan assets

Improperly disclosing Protected Health Information

Breaching fiduciary duties

Failure to timely provide a COBRA notice

IDEAS FOR STARTUPS TO OFFER BENEFITS AND AVOID COMPLIANCE RISK



Key to Vendor Engagement – Negotiate the Services Agreement

- Engage experienced service providers, consultants and advisors to help make decisions and manage your benefit plans
- When choosing a vendor, use a prudent selection and evaluation process
- Carefully negotiate and review service provider agreements
 - Do not just accept the provider's template agreement
 - Understand the scope of services and what your responsibilities are
 - Understand the fees
 - Carefully review the limitation of liability and indemnification provisions
 - Carefully review the term and termination provisions

Consider “Plans” for Smaller Employers to Help Employees Save for Retirement


These options are designed with smaller employers in mind. They enable employees to save for retirement on a tax-deferred basis and are less onerous for employers to administer than “traditional” qualified plans.



**SIMPLE IRA
Plans**



**SEP IRA
Plans**



**Payroll
Deduction
IRAs**

Retirement Plans That Are “Easier” to Administer

Simplified Employee Pension Plan (SEP)

- Any size employer
- Employer contributions only
- Higher level of contributions permitted
- IRS Model Form 5305/SEP

Savings Incentive Match Plan for Employees (SIMPLE)

- Employers with 100 or fewer employees
- Employee contributions with required employer match or non-elective contribution
- Higher level of contributions than traditional IRA, but not as much as SEP
- IRS Model Forms 5305/SIMPLE and 5304/SIMPLE

Other Retirement Savings Options

Payroll Deductible IRA

- Not really a “plan”
- Employee establishes an IRA with a financial institution
- Employee authorizes a payroll deduction for the IRA
- Employer transmits the employee’s deduction to the financial institution
- No reporting requirements if plan is voluntary, employer makes no contributions, employer does not “endorse” the plan and employer receives reasonable comp

State-Administered IRAs

- Some states require employers of a certain size to enroll their workers in the state savings program if they do not offer their own retirement savings plan
- Business are responsible for registering with the state program, sending required employee data to the program administrator, enabling auto-enrollment of new employees, and transmitting the payroll deductions

Consider Pooled Employer Plans to Offer Retirement Savings Opportunities

- Relatively new option (created by the SECURE Act, which was enacted in 2019)
- Pooled employer plan (PEP) is a centrally administered defined contribution plan that can be joined by multiple unrelated employers
- Advantages of PEPs:
 - Remove significant administrative burdens to maintaining a retirement plan
 - Allow for significant economies of scale and scope
 - Can help avoid state-mandated savings schemes (through preemption)
 - Impose relatively limited administrative responsibilities on adopting employers
 - May limit (but do not eliminate) fiduciary responsibilities for adopting employers
- Registered Pooled Plan Providers have begun to offer PEPs

Health and Welfare Benefits

- Options for smaller employers to provide health benefits:
 - Small Business Health Options Program (SHOP)
 - Individual Coverage Health Reimbursement Arrangements (ICHRAs)
 - Qualified Small Employer Health Reimbursement Arrangement (QSEHRA)
 - Private “Level-funded” Plans
- If participants will pay a portion of cost on a pre-tax basis, then must also establish a “cafeteria plan” under Code section 125
 - Code section 125 restricts ability to make elections for coverage on a pre-tax basis
 - Note that non-employees (e.g., members of an LLC structured as a partnership, partners, or pass-through entity owners) cannot participate on a pre-tax basis

Other Ways to Offer Benefits

- Professional Employer Organizations (PEOs) - provide broad range of human resource management and employee benefits services to your employees
 - Use a co-employment model
- Outsourced Benefits Providers – focus on employee benefits services only
- Beware of offering benefits to non-employees (e.g., contractors or employees of staffing firms) because of multiple employer welfare arrangement (MEWA) and multiple employer plan risks

Things to Remember



Keep Track of Your Employee Headcount

Certain legal requirements and obligations that you may be exempt from now because you have little or no employees will kick in as you grow.

- E.g., Under ACA, businesses with at least 50 full-time equivalent (FTE) employees must offer health insurance to their full-time employees that meets the ACA minimum coverage requirements. Failure to offer such coverage will result in a tax penalty.
- E.g., SIMPLE IRA Plans are only for employers with 100 or fewer employees. There is a 2-year grace period to account for growth or acquisition.
- E.g., in DC, businesses with at least 20 employees must offer transit benefits.



Monitor Vendors

Periodically review service provider delegations, performance and fees – do not act on auto-pilot



Worker Classification Matters

If you rely on contactors to help you with your business, you want to make sure that you minimize your exposure under your benefit plans and arrangements for potential worker misclassification.

- Make sure your plans and contracts include “Microsoft language” (so that benefit plan eligibility will not extend retroactively to individuals who are hired as independent contractors and later reclassified as employees)



Mitigate Risk

Use indemnifications and fiduciary liability insurance to minimize exposure for breach of fiduciary duty



Keep Your Benefit Documents and Agreements Together

If your goal is to attract a buyer, the buyer will want to review your benefit plans and arrangements

QUESTIONS?



Save The Date



WASHINGTON, DC

STARTUP & ACCELERATE SERIES

TMT in the DMV:

Key Considerations for Your Telecom Business

Thursday, September 9 @ 12:30pm

Presenter



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Jonathan Zimmerman helps clients design and maintain all types of employee benefit plans and programs. His practice focuses on Internal Revenue Code and Employee Retirement Income Security Act (ERISA) compliance for retirement, health and welfare, and executive compensation plans. He has particular experience with Code Sections 409A, 162(m), and 280G, and with taxes and fees arising under the Affordable Care Act (ACA). Jonathan also devotes a large part of his practice to payroll, withholding, and fringe benefits matters. He works with clients of all sizes and routinely handles matters ranging from large transactions to day-to-day administrative questions.

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Carly E. Grey counsels employers on employee benefit and executive compensation matters. She advises on qualified and nonqualified retirement plans, health and welfare plans, and executive compensation arrangements. She also counsels clients on the legal issues arising under ERISA, the Internal Revenue Code, the Affordable Care Act, HIPAA, COBRA, and securities laws. In addition to helping employers resolve day-to-day compliance issues, Carly advises on complex employee benefits and executive compensation matters.

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Jocelyn R. Cuttino advises clients on labor and employment matters including statutory compliance, antidiscrimination practices, employment policies, HR procedures, and best practices for avoiding litigation and developing positive employee relations. Jocelyn conducts internal investigations related to alleged sexual harassment, performs workplace culture assessments, advises on responses and remediation measures in connection with alleged misconduct, and defends companies in employment litigation and other workplace crises. She defends clients at trial and in all phases of complex employment and class litigation, and represents clients before US federal and state fair employment agencies.

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