# Getting your business off to the right start

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Starting up a new enterprise can be a daunting task. Most entrepreneurs’ energies will be devoted to perfecting their product or service and generating demand. Protecting the business itself can seem less important; however, at this early stage businesses are both more exposed to risk and best placed to prevent it.

These are our top three employment law tips for new

businesses:

**1. Protecting confidential information** – If a business has no contractual arrangements to protect confidential information when a member of staff leaves, they will have very little legal protection. Without a contract, the law will protect only the most key trade secrets (like the secret recipe for Coca Cola). That may help a start up which has developed cutting edge technology, but the reality is that many very successful start ups do not rely on trade secrets: they have a good product or service that they deliver well. Without contractual protection, this can leave them very exposed to a sharp elbowed or disgruntled former member of staff.

A well drafted contract employment contract will change that and can protect confidential information that does not form part of an employee's skills and general knowledge.

**2. Protecting your clients** – Even though clients and staff are the most valuable asset of many businesses, there is no base layer of protection to stop ordinary employees from leaving and using their contacts to help them set up in competition (although that can sometimes be different with very senior employees).

Most small business owners know this and think that they have appropriate provisions in their employment contracts to prevent former employees from taking clients and sometimes even from competing full stop.

A little bit of knowledge can be a dangerous thing and that is certainly true with post-termination restrictions. Courts in the UK take a very restrictive attitude to post-termination restrictions in employment contracts and will only enforce those that they consider protect the legitimate interests of the business. If a covenant goes further than that, unless it can delete the offending section, a Court will not enforce it. Drafting enforceable covenants is a bespoke exercise: what a

business' legitimate interests are will depend on the sector, business and the employee's role in question. So while many businesses think that they are covered by a standard agreement that they downloaded from the internet, often those agreements are not worth the paper that they are written on. It is only after an employee has left and breached them that a restriction will be tested. If they don't work, by then it will be too late to protect the business.

If an employee has access to valuable information or clients, it is worth making sure the business is protected with bespoke, enforceable post-termination restrictions. Another approach that smaller businesses could explore is whether to offer their staff a small equity stake in their business. Courts can be more generous in their approach to post-termination restrictions contained in shareholders agreements, for example.

**3. Interns** – Many new businesses will rely on the input and assistance of unpaid interns. The concept of an intern is relatively new to UK law. As a result, it fits in quite badly with what is already a messy area of law. There are three categories of staff:

1. employees, who benefit from all employment law protections, including the right after two years' service, not to be unfairly dismissed;
2. workers, who benefit from the right not to be discriminated against, holiday pay and the national minimum wage; and
3. everyone else, who do not have much in the way of employment law protections as they are traditionally viewed as being in business on their own account.

It is not always easy, even for employment lawyers, to determine where staff fall between these categories. Interns are no exception. If interns fall into this latter category, they will not qualify for the national minimum wage. However,

the legal ambiguity means that it is open to interns to argue that they are in fact workers, or even employees, which could leave the business exposed to a claim for unpaid wages or holiday pay.

To be a worker, an intern must work under a contract to provide services. This means that there needs to be a legal agreement in place (which can be written or oral) and that the intern must receive 'consideration' for their work. Interns' working arrangements are more likely to fall into the latter category if employers do the following:

- **Softening the language** – Softening the wording of an internship arrangement can be helpful to suggest that there is no contract in place. For example, 'we would be grateful if you could start around 9 am' or 'if you do not want to carry on with this internship, try and let us know a week or two in advance'.
- **Being careful about payments/benefits offered** – 'consideration' can be any form of payment or benefit in kind for work. Refunding genuinely incurred expenses should fall outside of this but offering interns flat expense fees or the opportunity of a job at the end of an internship could qualify as consideration and mean that they qualify as workers.

Employment law should not be the focus of start ups but it can be an expensive and unnecessary distraction at a time when a business can least afford it. The right employment law protections from the start will help insure against future disputes with current and former staff.

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact info@bdbf.co.uk, or your usual BDBF contact.**

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