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ChangeAbility
The Newsletter of Redpoint Business Coaching
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Welcome!

You are reading ChangeAbility, a newsletter from Redpoint Business Coaching run by Urs Koenig PhD, MBA.

ChangeAbility is a bimonthly newsletter bringing you hands-on tips and cool resources for starting or building your business.

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I. Top Three Legal Issues for Small Business Hiring

Ever wondered:

- + if you should hire a contractor or make someone an employee in order to handle all the new work which is just about to come in?
- + how to protect your intellectual property once someone leaves your company?
- +how to avoid claims from terminated employees?

Read on as Seattle based business lawyer Patricia Raskin, from Raskin Snodgrass PLLC, shares her wisdom with you. Patricia has nine years of experience counseling small businesses and has recently launched her own firm.

+++Top Three Legal Issues For Small Business Hiring+++
By Patricia Raskin, Raskin Snodgrass PLLC
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As your business grows, you may see the opportunity to take on additional work. Successful small businesses, however, are often running so lean that they lack the additional work force needed to process new work, and must either hire additional bodies to handle the increased business or lose the opportunity. Small businesses that come to me for counsel at this stage in their business development are typically facing three very significant issues:

1. Can we handle our new business opportunities by hiring independent contractors, as opposed to bringing on additional employees?
2. What can we do to ensure that our contractors and employees do not, in the future, use our intellectual property or solicit our clients for their own personal gain?
3. If we do not sign an employment agreement, can we let an employee go whenever we want?

++ Employee vs. Independent Contractor ++

Should a new hire be considered an independent contractor or an employee? The ease of dealing with an independent contractor, who takes care of his/her own withholding, insurance and other benefits, makes the independent contractor route especially attractive to many small businesses. However, you must be aware that just because you call someone an independent contractor doesn't mean that they are an independent contractor under law. And if you misclassify a contractor who is later deemed an employee, your company may unwittingly find itself subject to liability for things like worker's compensation coverage, unpaid taxes, acts performed by the contractor, and significant penalties.

The most significant factor courts consider in determining whether the contractor is actually an employee is the extent to which a company exercises control over the means and manner of work performance. The

more control a company has, the more likely that a court analyzing the issue would deem an independent contractor to be an employee, and require the company to pay penalties associated with its failure to comply with worker's compensation, tax and other applicable laws.

Whether or not the work involved is part of the employer's regular business and whether the party employed is engaged in a distinct occupation or business are important in measuring the degree of an employer's control. For example, Company A, a retail store, hires an individual to do communications work in connection with the store's Christmas promotions. Company A wants to treat that individual as an independent contractor. The individual hired has her own business, and works on other projects with other companies on a regular basis. Thus, she is engaged in a distinct business, apart from the work she's doing for Company A, and the project the contractor is working on is not part of Company A's regular business. In this scenario, analyzing the issue of whether the hired individual is actually an employee or a contractor, a court is likely to find her to be a contractor.

In addition to degree of control, whether or not you have a signed written agreement with a contractor that establishes the nature of your relationship is significant. While the fact of a contract will not control the issue, it can be very useful in preventing a reclassification of your contractor as an employee. Moreover, your contract should specifically delineate the lack of your control over the contractor in a description of the contractor's work activities. For example, the contract should acknowledge that the contractor will be working on her own time and reference the type of separate expertise that the contractor will apply to the project.

++ Protecting Your Intellectual Property ++

What can you do to protect your trade secrets from improper use or disclosure by your contractors or employees? Number one on your list should be to require every employee and contractor to sign an "Intellectual Property Assignment and Nondisclosure Agreement". This agreement should clearly specify that everything the employee/contractor does while employed by the company is the property of the company. It should also define that information which the company deems confidential and specify what the employee or contractor must do to keep the information from being improperly disclosed.

You should also consider whether to include a non-solicitation clause in the agreement, prohibiting the employee or contractor from soliciting any business from the company's clients, as well as a non-competition clause, prohibiting the employee or contractor from competing within the company during and after he/she leaves your employment. To be enforceable, these provisions must be narrowly tailored as necessary to provide reasonable protection to the company. If they're overbroad, they may be stricken from the agreement, leaving you without their protection altogether.

Be careful not to overlook the fact that founders and executives are employees too, and absolutely should be subject to these agreements.

++ "At-Will" Employment ++

Unless an employment agreement specifies otherwise, employment in Washington State is "at-will", and may be terminated at any time by the employee or the employer. This rule insulates employers from claims challenging its decision to terminate an employee or the motivation for that decision. Be aware, however, that termination of an employee for reasons that are otherwise unlawful (for example, termination based on discrimination for age, race or sex) can be challenged, even if the employee is an at-will employee.

However, even if you have not executed a formal employment agreement with an employee, that agreement can be implied from any promises made to an employee, such as verbal promises of continued employment, continued benefits, or termination only for just cause. Terms of employee handbooks, policy statements and other company documents can also constitute an "employment agreement" that modifies the right to discharge an employee at-will.

Consequently, to retain your right to discharge an employee, you must be careful to train all managers and others with authority to refrain from making unnecessary promises to employees. I also suggest including a disclaimer in all employment handbooks and policy documents that reserve to the company the right to modify or withdraw all or any part of the handbook or policy.

Make contact with Patricia Raskin at Raskin Snodgrass PLLC, patricia@raskinsnodgrass.com, (206) 447-9400.

II The Athlete's Corner: Narrow Win in the Big Hurt

Wanna know what true suffering looks like? Check it out at:

> <http://www.photorelect.com/scripts/prsm.dll?eventorder?photo=06PX000D000019>

After last years comfortable winning margin of more than two minutes, I had to fight much more this year. After almost five hours on the mountain bike, in the kayak, on the road bike and in my running shoes, it came down to a sprint to the finish which I won by less than half a second.

III Upcoming Workshops and Speeches

"TRAIN SMARTER NOT HARDER: ACHIEVE YOUR SKIING GOALS NEXT WINTER" WASHINGTON SKI TOURING CLUB MONTHLY MEETING

- December 2nd 6pm at REI

In this 45 minute presentation, I will share my (skiing) training philosophy. You will learn the importance of skiing specific training during the off-season, choosing the right training intensity (using heart rate zones) and periodization (both overload AND rest are part of smart training). No registration is necessary and the meeting is free, simply show up.

BUSINESS START-UP WORKSHOP -- "THINKING OF BECOMING YOUR OWN BOSS?"

If you are thinking of, or are in the process of, starting your own business, or if you want to learn how to run your business better, please join me for this 3 hour workshop at Centerpoint, Seattle's leading center for life and career renewal, based close to the UW campus. For more information, please send me an email or check out: www.centerpointonline.org

The workshop will be offered on:

- October 26th 6pm to 9pm at Centerpoint
- December 7th 6pm to 9pm at Centerpoint

The fee is \$54 for non-members and \$45 for Centerpoint Associate Members.

BUSINESS PLAN WORKSHOP AT THE U.S. SMALL BUSINESS ADMINISTRATION (SBA) BUILDING?

- November 10th (all day)
- December 8th (all day)

I will be teaching the Marketing Plan and Operation Plan section of the Small Business Administration workshop 'Building a Business Plan' in downtown Seattle. To register and for more info on this and other small business workshops, see the SBA and the Service Corps of Retired Executives (SCORE) website: <http://www.sba.gov/wa/seattle/>, <http://www.seattlescore.org/index.htm>, or call the SBA at 206-553-7310.

+++++LET ME KNOW WHAT YOU THINK+++++
Simply reply to this newsletter. I welcome your feedback!

ChangeAbility is a publication of Redpoint Business Coaching, which is run by Urs Koenig MBA, PhD.

Visit Redpoint's website: www.redpointcoaching.com or contact Urs at urs@redpointcoaching.com

or call: ++ 1 206 322 1335

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