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Your Venture Employee Suddenly Quits – 10 Steps to Take ASAP

By Robert Cocchia, Esq. and Dror Futter, Esq.

As the employment tsunami of the "Great Resignation" sweeps the US economy, not even the hottest startups are immune. Even for separations that at first seem amicable, it is not uncommon to subsequently learn "there is more to the story." Whether the split is amicable or otherwise, to preserve your proprietary information and corporate assets, here are 9 steps you should take immediately - before you even start thinking about replacing the employee.

10 STEPS TO TAKE IMMEDIATELY

1. Review All Agreements

- Review the terms of all employment-related agreements and identify provisions triggered by the departure. Typically this will include an offer letter, confidentiality/IP/non-solicitation/non-compete agreement and possibly documentation related to an equity grant.
- If the employee is required to give notice of termination, consider if you will waive it. Unless there is specific work that the employee is uniquely positioned to complete, it is generally best to waive the period.
- Determine the existence and extent of any restrictive covenants agreed to by the employee (non-compete/non-solicit) and highlight ongoing enforceability. Prepare a letter reminding the departing employee of all post-employment obligations.

2. Notify and Coordinate with Your PEO

- If your employee is employed through a Professional Employment Organization (PEO), notify the PEO and coordinate with their process for employee resignations. PEO's usually set up a co-employment situation and a result, the PEO is likely to have legal concerns and its own well developed process.

3. Protect Proprietary Information and Company Assets

- Secure access to confidential information, limit/remove employee's access to information and the corporate network, and review network activity for unusual downloads or email traffic. Provide the employee with information about how company assets should be returned (laptops, monitors, phones, etc.).

4. Restrict Physical Access

- For in-person employees, revoke access badges or otherwise prevent unescorted access to your facility.

5. Evaluate Equity Repurchase Rights

- If the employee was granted company stock or options, review the terms of the grant. Focus on any notice or exercise requirements and their time frames – and exercise any repurchase rights in a timely fashion and in accordance with the process detailed in the equity agreement.

6. Identify Transition Issues

- Plan for the transfer of tasks, projects and third-party relationships to remaining employees.

7. Determine Final Pay Requirements

- Ensure compliance with applicable law regarding timing and content of final paycheck to employee. This will include unpaid wages and in some cases, accrued but unused vacation time, unpaid bonuses and unpaid commissions.

8. Plan for Communication to Third Parties

- To control the narrative, develop a plan to proactively notify other employees and, if needed, customers, suppliers, investors or others.

9. Consider a Separation Agreement

- Evaluate the benefit of offering the employee a “severance” in exchange for a release of claims and non-disparagement obligations, and even more so, confidentiality obligations if no NDA was previously in place.

10. Conduct Exit Interview

- If employee is willing to sit down, find out why they are leaving to identify areas that the company can improve. Employees on the way out are often the most honest in their assessment of the company. The Exit Interview is also a good opportunity to reiterate the employee’s post-employment obligations.

1. **Is the employee entitled to payout of unused vacation time?**
   This depends on the law of the state where the employees resides and, in some states, on the policy of the employer as set forth in the employee handbook, or other written agreement with the employee.

2. **Is the employee entitled to payment of a pro-rata bonus?**
   This depends on the language of the bonus plan, and whether it specifically states that the employee must be employee on the date the bonus is paid to be eligible.

3. **Should you offer a severance package?**
   A severance package may be a good idea if there are concerns regarding the exiting employee and the company would like to secure a release of all possible claims. Consideration, above that which the employee is already entitled, is required to make a release agreement enforceable. Severance can be money, accelerated equity vesting, payments to cover COBRA, or anything of value which the employee is not otherwise entitled to.

4. **Can you ask what the employee will be doing next?**
   Certainly. Although the employee is not required to tell you unless there is an existing confidentiality agreement which specifically allows the company to advise any new employer of the existence of restrictive covenants or confidentiality obligations.

5. **Can you always contact the new employer if there are non-compete or confidentiality concerns?**
   Yes, but the company should be careful if there is no existing agreement in writing with the employee that permits this communication with a new employer. While the company can take reasonable steps to protect its legitimate interests, overreach by the company could lead to an "interference" claim by the employee if the new employer withdraws the job offer as a result.

6. **Do you take a different approach with respect to the departure of an independent contractor?**
   Not necessarily, however the approach would focus more on the terms of the contract with the contractor instead of employment laws. Given the significant problems of misclassification of independent contractors, however, it might be prudent to consider a release agreement.

7. **Do any employee benefits continue after termination of the employment relationship?**
   Other than continuing group health plan benefits under COBRA (paid for by the employee),

generally benefits end with the termination of employment unless they have a written employment agreement providing otherwise.

8. **What can the company say about the reasons for the employee's departure or the employee's performance?**
   Saying nothing is the best practice is for the company. If it is necessary to discuss the reasons for the departure with investors, board members, or employees, the company and employee should agree on the message. If the employee does not cooperate, messaging should be limited – e.g., "He/she left for another opportunity." Anything negative about the employee should be avoided.

9. **What do you do if the employee refuses to participate in an exit interview or agree to a separation and release agreement?**
   There is no requirement that the employee participate in an exit interview or agree to anything on the way out the door. However, such a refusal should be a red flag that the employee might file a lawsuit. The company should consult with counsel regarding next steps.