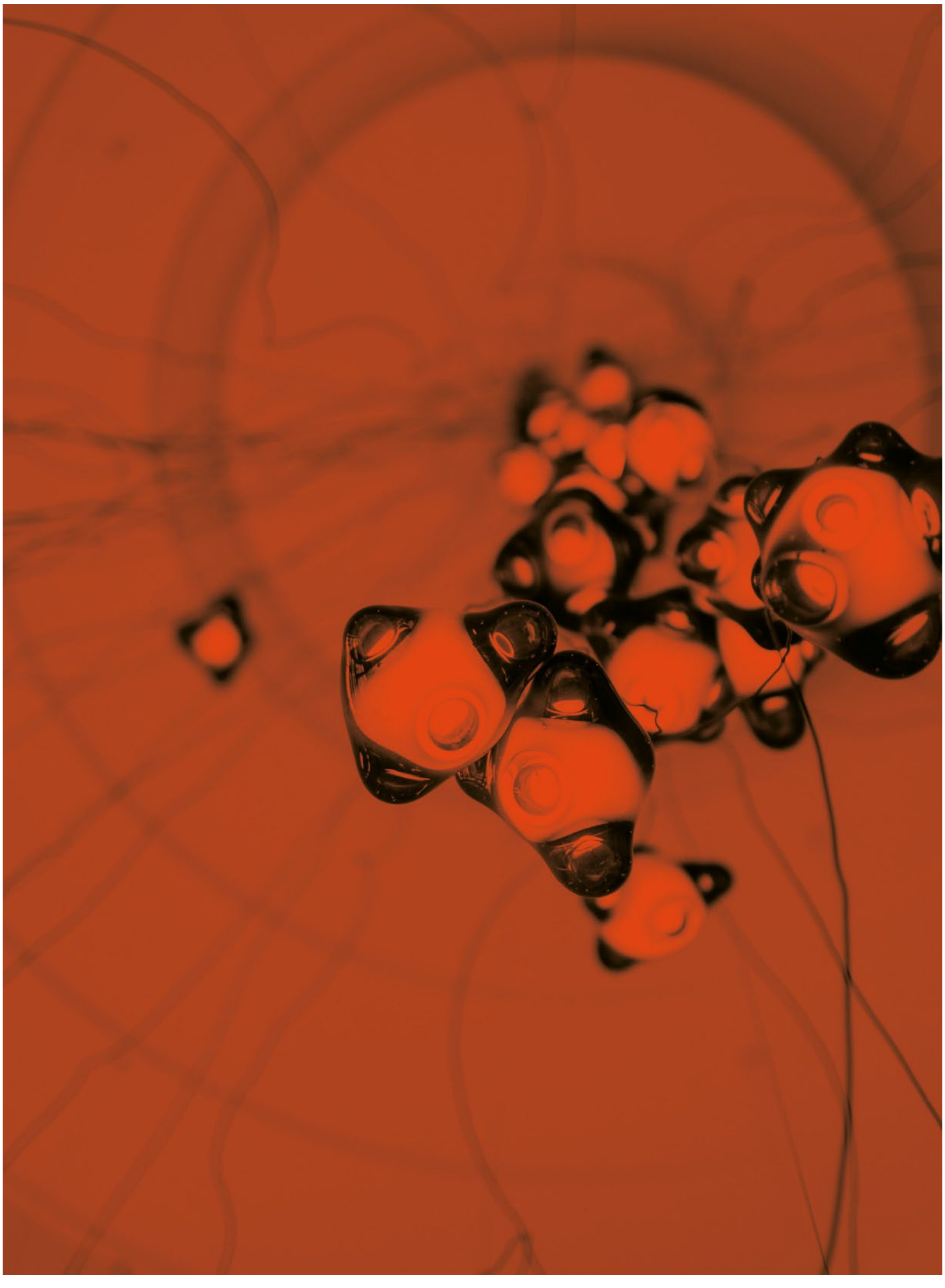
Founders' Handbook



It's business. But it's personal.

Introduction

Starting a business is a journey that will involve many decisions, challenges and, we sincerely hope, satisfaction and success.

This handbook aims to make that journey easier. As well as helping you get started, it will be a useful reference point along the way. It explains your choices at each key stage, unravels the legal and business complexity and helps ensure you structure your business for success.

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Step 1: Setting up Your Company

You've made the decision to start your company. So, what's next? First, you'll need to choose the vehicle you'll use to build your empire. Your options include being a sole trader or starting a partnership, LLP or limited company.

SOLE TRADER – an enterprise owned and run by one person where there is no legal distinction between the individual owner and business entity.

PARTNERSHIP – at least two parties agree to do business together for a given mutual purpose. Profits and assets are shared between the partners but so are losses and responsibilities for debt (despite who incurs them). A partnership is not a formal incorporated legal entity. Partners can be people, entities, or a mixture of both.

LLP – limited liability partnership is a partnership where the partners have limited their liabilities. Responsibility for one partner's misconduct or negligence does not fall at the feet of the other partners. The LLP is a separate legal entity.

LIMITED COMPANY – read the rest of this handbook to find out.

1. What is a company?

A company is a separate legal entity responsible for its own income, assets, debts, and liabilities. Ownership of the company is split into shares with the owners of those shares being called "Members" or "Shareholders".

2. Why are limited companies a popular option?

A limited company is a distinct entity from its owners. Once the owners have paid for their shares, they have no further liability to the company meaning they cannot be pursued for the company's liabilities. Their personal assets are protected. For most entrepreneurs, the limited liability nature of a company makes it more attractive than acting as a sole trader or partnership.

3. How do I create a company?

A company is established by filing the necessary paperwork at Companies House. This paperwork is where you choose the name of the business, its registered office location, its articles of association, and its shareholders and directors. The distinction between directors and shareholders is important.

4. Directors vs Shareholders

Although in some new companies the directors and shareholders are the same people, they are two distinct positions.

Shareholders are the ultimate owners of the company, having paid for each share in their ownership (initially just one shareholder may own all the shares). A shareholder generally owes no duties or obligations to the company. This means when making decisions as a shareholder they can, in most cases, act in their own interest.

Directors are responsible for the management of the company. Executive directors run the day-to-day business of the company, whereas non-executive directors have a more strategic function. Executive directors tend to be employees. The top level of executive directors is often referred to as the C-Suite: Chief Executive Officer, Chief Finance Officer, Chief Scientific Officer for instance. Some non-executive directors may represent stakeholders in the company, for example an investor, others may be engaged as they bring a certain skill set which can help the board, for example, industry experience. Non-executive directors are usually not employees and do not work in the company but may be engaged to supply specified services and have a restricted time commitment.

All directors are bound by a series of duties to the company.

5. Directors' duties

Directors' duties are owed to the company and, although their roles may be different, there is no distinction between the duties owed by executive or non-executive directors. The primary source for directors' duties is the Companies Act 2006.

Directors must:

— Act within powers bestowed on them by law and other relevant sources, such as the company's articles of association, unless modified by the company's articles of association

— Promote the success of the company for the benefit of its members as a whole

— Exercise independent judgment

— Exercise reasonable care, skill and diligence

— Avoid conflicts of interest

— Not accept benefits from third parties

— Declare interests in proposed or existing transactions or arrangements with the company.

The Companies Act lists six factors that directors must consider when reaching decisions to promote the company's success. These include consideration of employee interests, the long-term consequences of their proposed actions and fostering relationships with suppliers and customers. This is where board minutes are important. Board minutes provide a corporate history of the company. They demonstrate why directors decided to follow a particular course of action and can be a useful defence against any allegations that directors' duties were not appropriately discharged.

Where a company is a social venture, the obligation of the directors to promote the success of the business is modified in the articles to benefit the social objectives of the company alongside the members.

Duties are also imposed on directors from other legislative sources, for example, the Insolvency Act 1986, and the Health and Safety at Work Act 1974. Where a company's solvency is in question, the directors must consider the interests of the company's creditors whose interests may become paramount.

6. Potential penalties

If you breach any of these statutory duties as a director, you could face civil action and, if you breach certain statutory offences, criminal sanction. Where the company has suffered a loss because of your actions, you may have to compensate the company in relation to any personal profits you have enjoyed. As duties are owed to the company, and not to shareholders, the company is the only vehicle able to enforce a breach. In some circumstances, shareholders can apply to court to be put into the place of the company to enforce a breach. This is expensive and rare.

There are however some circumstances where third parties might be able to bring a direct action against the directors, for example, when somebody suffers injury or death because of a breach of health & safety legislation. You could be removed from office by an appropriate number of shareholders passing a resolution. You could also find yourself disqualified from acting as a director and prevented from being involved directly or indirectly with setting up and promoting a company.

Directors & officers' insurance can provide some protection to the personal assets of directors in the event they are personally sued by reason of their position as a director. However, there are necessary limits in the case of wrongful acts.

Step 2: Sourcing Funds

Once your company is up and running, it will need one thing to survive: money. The aim is to use profits from the on-going business to fund growth, investment into research and development, and/or to ensure the company is an equal amongst its competitors. However, in the early years a company will often need to raise external funding, or capital, to accelerate its journey.

Common sources of funding available to a company are:

— Grants **(G)**

— Equity **(E)**

— Debt **(D)**

Each source of funding could be subject to its own handbook, so we have set out a brief overview below:

Funding Source Options

1. Assistance from a public body (G)

To ask for funding you need to understand what is available to you.

Central or local government, and other organisations controlled by a public body may be able to offer forms of assistance to your company such as grants, loans and guarantees.

Your company can use the grant to move the business forward, without having to worry about how you'll repay the money in the future. Grants are an ideal form of funding because they do not need to be repaid. In addition, grantors do not require you to give up any ownership of your company (this means they are non-dilutive). Grantors normally require a degree of audit and reporting to ensure the monies are being used for the purpose the grant has been made.

There are several different types of grants for small businesses and start-ups. Grants may require a lengthy application process and are usually meant to support a specific project or business milestone. Some may require you to secure matched funding from another source.

2. Loans and convertible loan notes (D)

Another way to raise money for the company is through a loan. The loan instrument will set out how long the company can borrow the loan for, how much interest will accrue on the debt, whether the loan is to be secured against the company's property and under which circumstances it is repayable.

Some investors will advance monies via an instrument called a convertible loan note.

A convertible loan note is a type of loan that provides when certain triggers have been met, the entity or person who has lent the money to the company can have the money converted into shares in the company (often for a discount to the price paid per share by future investors). Triggers will often include future financing at a given valuation (a "qualifying financing") or an exit event. If the triggers aren't met, the noteholder will have an option to convert to equity otherwise the loan will be repayable, (sometimes with a redemption penalty). Convertible loan notes are typically used as alternatives to equity fundraising by growth companies as a bridge to get them to their next equity round or valuation inflexion point.

3. Advanced subscription agreements (E)

An investor can agree to make an advance payment of subscription monies for shares in a company. These shares will be issued at some point in the future, on a "qualifying financing", sale or liquidation, as with convertible loan notes, or on a long-stop date. An advanced subscription agreement is not a debt; it does not generate interest, and it can never become repayable in cash.

4. EIS/SEIS considerations

The choice between a convertible loan note or an advanced subscription agreement is often dictated by tax considerations such as the Seed Enterprise Investment Scheme (SEIS) or the Enterprise Investment Scheme (EIS). Put (extremely) briefly, these are government schemes that provide a range of tax reliefs (like income and capital gains tax) for investors who subscribe for qualifying shares in qualifying companies. Loan notes do not qualify for these reliefs whereas advanced subscription agreements do in certain circumstances. For example, to qualify for SEIS or EIS, shares to be issued on a "qualifying financing" should be issued under the advanced subscription agreement within 6 months of entering into it.

5. SAFEs (E)

Simple agreements for future equity (SAFEs) are a relatively recent addition to the seed financing toolkit.

SAFEs have the same conversion features but lack the debt hallmarks of convertible loan notes (there is no maturity date and no interest). They are more akin to an advanced subscription agreement. The holders of SAFEs can convert their SAFEs into equity at a lower price than the investors in the subsequent financing round (based either on the discount or valuation cap in their SAFEs, or both).

6. Equity (E)

The most popular option for raising capital is through investment for equity. An investor will give money to a company in exchange for new shares. By accepting the investment amount, the existing shareholders of the company have their ownership percentages diluted. The principal terms of an investment will be captured in a term sheet. Depending on the size of the investment, an investor may be afforded certain rights including information rights, representation on the board and participation (or indeed veto) on certain decisions or actions proposed by the company.

National Security and Investment Act considerations

Where an investment is made into any UK company, both the investor and the company will need to consider whether the National Security and Investment Act regime applies. There are mandatory and voluntary notification regimes. A mandatory notification is required in relation to investments that involve acquisitions of control over qualifying entities operating in 17 high risk sectors of the economy.

For an overview of the regime, see our website briefing "The National Security and Investment Act: protecting UK assets and infrastructure." Our NSI Act checker also lets you answer a series of simple questions to help you understand whether notification under the regime is likely to be required.

The Future of Fundraising

With the advancement of blockchain technology and tokenisation, there is a possibility that the tokenisation of securities such as shares may be used in the future for fundraisings.

The company would issue security tokens containing certain rights such as the rights that are afforded to a shareholder when they hold a share in your company. Depending on the nature of the security token being issued, it may or may not fall within the current framework for being regulated or un-regulated. At their core, tokens are digital securities on a blockchain infrastructure, however, at this current point in time it is yet to be seen if the uptake on this form of fundraising in the UK is going to be taken up on a mass scale.

Step 3: Building a Team

When starting a company, it can be tempting to push HR down the priority list, especially during the early growth stages when your time and resources are in short supply.

However, you should not underestimate the importance of putting the right processes and policies in place from the outset. Dealing with employment issues proactively can save you significant time and money further down the line should a problem occur.

Here we outline the top 10 points to look out for when starting your employment journey:

1. Hiring

It is not unusual for businesses to recruit employees on an ad-hoc, needs-driven, basis but without a plan to support the hiring process, it is likely that process will be inconsistent and ineffective. Not only could this waste your time and money, it risks discrimination claims.

You need to think carefully about what skills are required and be able to justify why you have selected a particular person for a job over and above other candidates. This can be achieved by creating a tailored checklist for each role, which is discussed during the interview process and used every time you recruit to ensure consistency.

A decision to hire should not be based solely on what you find on social media profiles. It is easy to make assumptions about a person based on photos but there could be underlying reasons why they are acting in a certain way. For example, a candidate may have a disability.

2. Employee structure

An individual may be an employee, a worker, or self-employed. The distinction is important, as it determines an individual's statutory employment rights, and how they are taxed. Assessing an individual's status is not just determined by how the parties label the relationship. It is a question of law and fact.

An employee is an individual who has entered into, or works under, a contract of employment. An employment contract may be in writing, but can also exist by virtue of how matters operate in practice.

To determine whether an individual is an employee, an employment tribunal will assess, among other things, their integration into the workforce. Employees are entitled to the full range of statutory employment rights. This includes rights during employment, such as the right to certain statutory minimum payments in the event of illness and some forms of family-related leave. It also includes rights on termination, including a statutory minimum notice period, and some protections against dismissal. Some of these rights only apply after the employee has attained a minimum period of service.

The category of worker is wider. It includes employees but will also include an individual who enters into a contract personally to perform any work or services for another party, as long as that other party is not the client or customer of any business carried on by the individual.

Identifying an individual's employment status is not always straightforward, and categorisation of individuals as workers has proven particularly contentious over recent years. Workers are entitled to a more limited range of statutory employment rights. Like employees, they are entitled not to be discriminated against on the basis of statutorily protected characteristics, to the national minimum wage and a written statement of terms of employment and, among other things, to a minimum amount of statutory holiday. However, they do not enjoy the same level of protection against dismissal as employees.

An individual is self-employed if they provide services to another party in the course of running a business or profession in their own right. Self-employed individuals have few statutory employment rights, but are still entitled to certain minimum rights, such as a safe working environment when working at a client's premises, and in most cases are also entitled not to be discriminated against on the basis of a statutorily protected characteristic.

This can be a complex area of law, so entrepreneurs need to tread carefully when classifying individuals in the workplace.

Businesses should not be tempted to class an employee as a contractor purely for tax reasons. If you artificially push someone into a different box because you feel that would be most beneficial for the company, this could lead to potential liabilities and future tribunal claims.

If you do recruit contractors or consultants, ensure you have a robust written and tailored contract in place with each of them to avoid any ambiguity. Some intellectual property (IP) rights (notably copyright and rights in designs) arising as a result of services provided under a consultancy agreement will normally belong to the consultant. As a business will usually want to take ownership of these rights, it may be important to include specific assignment provisions in a well-constructed consultancy agreement.

The same principles should apply when recruiting non-executive directors.

3. Company interest protection

Failing to protect your company's interests including customer connections, staff and intellectual property (IP), could be hugely damaging.

Growth companies usually have small teams with lots of knowledge so even if just one individual joins a competitor, this could cause major issues.

To help manage these risks should they arise, robust contracts should be put in place from the outset. Think about how crucial an individual could be to your business and what you would need to protect should they leave. Then put the necessary clauses in their contract.

This can include having tailored post-termination restrictive covenants. Tailoring these clauses gives them the maximum chance of enforceability. A garden leave provision is another option, which entitles the employer, after notice has been given by either party, to require the employee to stay at home during the notice period and not work or contact colleagues, clients and suppliers.

4. Employment policies

Less is more when it comes to employment policies. You don't need an employment handbook filled with off-the-shelf policies as chances are, most of them won't fit with your business so could restrict the way it operates.

Focus on what you need as a minimum and on non-contractual policies. In other words, focus on those policies that can be changed and are of most value to your company.

A disciplinary/grievance policy is essential for all businesses. It is also advisable to have bribery, whistleblowing and anti-bullying and harassment policies in place, as well as a data protection policy in line with the UK GDPR.

5. Employee rights

You don't need to know everything about employee rights, but you do need a basic level of knowledge. If you don't, you risk breaching the law and having an unhappy workforce.

For example, an increasing number of people want to work flexibly, and they have the right to make a formal request to do so. An understanding of the law will ensure you respond to those requests in the right way.

There is a lot of useful information and advice available online (particularly on Government websites) to help you understand what employees are entitled to, so take advantage of those resources.

6. Workplace conflict

If there is a potential workplace issue bubbling away in the background, tackle it head on. If you don't address it at the earliest opportunity, it could escalate into a full-blown dispute.

Make sure you follow your disciplinary/grievance policies and encourage those involved in the issue to also read and follow these policies.

Don't be afraid to put a formal (and documented) plan in place if needed, especially for poor performance, as this could save you time. and costs further down the line.

7. Evidence

Take a proactive approach to record keeping and documentation. Keep your employee records up to date, especially if there have been issues in the workplace.

If someone has formally raised concerns about something at work, these should be logged so that you have a paper trail if things escalate (even if just by way of a brief follow up email on the issue).

8. Procedural knowledge

If you don't know how to carry out a disciplinary or grievance procedure or don't understand the policy, take advice. There is plenty of guidance available and legal support if necessary to help you follow the rules.

Bear in mind the risks of getting it wrong. For example, if you dismiss an employee without following the correct procedure and the dismissal is found by an employment tribunal to be unfair, the employee's compensation could be increased by up to 25 percent.

9. Sickness & absence

If someone has to take sick leave, this can be really disruptive for a start-up. However, you need to make sure you manage this issue carefully as it is an area that can give rise to discrimination and other employment claims.

If someone has been off work sick for several weeks, take the time to understand the reasons why and try to find out whether their absence is linked to a broader, underlying issue. This can include asking them to attend an appointment with occupational health or another medical specialist as appropriate. You may discover that they have a disability in which case you will need to consider putting in place reasonable adjustments in the workplace and carefully manage any future capability process.

10. Employee engagement

As your start-up grows, don’t forget about engaging your employees and keeping them motivated. Losing talent can be detrimental to your business, so make sure you communicate with employees regularly. If someone’s performance dips unexpectedly, talk to them to find out why.

Think about what incentives you could offer. These can range from offering working arrangements such as working from home, to Enterprise Management Incentive (EMI) share options which enable you to grant your employees share options up to the value of £250,000 at any one time with tax relief if certain criteria are met.

Involving staff in social impact initiatives is another effective means of engaging staff and creating a feel-good factor.

Strong staff engagement and impact initiatives will also add to the business' impact story, if measured and reported effectively. A strong impact story can also help customer engagement and help attract funding as you grow. Even if you do not set out to engage in impact reporting at this early stage, it is recommended to establish a strong culture from the outset.

Step 4: Understanding the Legal Jargon

So you've started up a company and everyone is suddenly speaking a different language. We've put together this jargon buster to help you identify your articles from your shareholders' agreement and your drag from your tag.

Shareholders' Agreement – a shareholders' agreement is a private contract between the company and some, or all, of its shareholders. The agreement will describe how the company will be managed, what the directors of the company can and cannot do without shareholder consent and sets out the shareholders' rights and obligations. Some important sections of a shareholders' agreement include Non-competes, Information rights, Consents and Warranties.

Non-Competes – to ensure that the investors who become shareholders keep the value of the business and the full benefit of the goodwill of the business, the founders, and, in later stages, key management of the company will usually be subject to certain restrictions for an agreed period after they leave the company.

CAP Tables – a cap table (sometimes in the form of a spreadsheet) lists all the company's securities such as ordinary shares, preferred shares, warrants, who owns them, and the prices paid by the investors for these securities. It also indicates each shareholder's percentage of ownership in the company.

Information Rights – within a shareholders' agreement there will be certain information rights that shareholders are entitled to which go beyond the limited rights afforded by statute. These could cover areas such as financial and commercial updates as well as any specific information an investor might require for its own governance.

Warranties – a warranty is a type of contractual promise by one party (for example, the company or the founders) that a particular statement of fact is true and may be relied upon by the other party (for example an investor). If the statement proves untrue, a warranty claim can be made against the company, founders or other warrantors to compensate the investor for damage they have suffered as a result.

Articles – the company's articles of association are its corporate governance and constitutional document. In short, they set out the rules company officers must follow when running a company. The articles are a public document filed at Companies House and can be seen on the company's online register. There are standard default model articles which can be used or a company may choose to have bespoke articles.

Consents – there are certain matters in the everyday running of the company that will not be affected or permitted without either (i) board consent; or (ii) shareholder consent. "Board consent" will be defined in the shareholders' agreement for example as "the approval of more than 50% of the directors at the meeting" and "shareholder consent" may be the "prior written consent of the holders of a certain majority of a class of shares". Either of these consent rights could go further and stipulate that certain directors (in the case of board consent), or certain shareholders, or a combination of shareholders (in the case of shareholder consent) must agree with the proper course of action.

Classes of Share – a class of share is an individual category of share capital in a company. Each category may have different voting rights, dividends and returns on capital. The different classes tend to be ordinary shares (including alphabet shares), non-voting shares, preference shares or redeemable shares. Subject to shareholder consent, a company can create many different classes of shares.

Leavers – there are often good leaver/bad leaver provisions which describe the circumstances in which a person ceases to be an employee of a company. Good leaver will usually mean leaving employment on grounds of death or disability whereas a bad leaver will usually mean leaving in circumstances justifying their summary dismissal. Whether or not the employee is deemed a good or bad leaver may commonly affect the treatment of shares held by that employee in the company. For example, the price at which a leaver's shares can be acquired by the company or offered to other shareholders.	**Anti-Dilution** – dilution refers to a shareholder’s ownership decreasing because of new shares being issued. Therefore, anti-dilution provisions give a shareholder the right to maintain their percentage ownership of a company by buying a proportionate number of shares if new shares are issued.
Waterfalls – this refers to a pre-determined flow of funds and priority of distributions or allocations between or among shareholders. Payment waterfalls are agreed contractually between parties to override any order of payments which may apply automatically by operation of law.	**Drag/Tag** – a drag provision is when a minority shareholder is compelled to sell their shareholding in the event a majority shareholder wishes to sell their shares to a buyer who is only interested in buying the whole company. The minority shareholder must sell their shares on the same terms and effectively as part of the same deal. A tag along provision is the ‘sister’ provision which allows minority shareholders to compel a buyer of a majority ownership of the shares to buy their shares too.

Step 5: Choosing Commercial Contracts

Types of Contracts

The types and range of contracts you encounter will largely depend on the nature of your business. When thinking about contracts, it is easy to imagine contracts relating to employment or property. There is a whole range of commercial contracts that are needed as part of the day to day running of a business – whether it be buying in much needed goods or services or "the bread and butter" of selling your own goods or services. These contracts can follow the full life cycle of your business – from non-disclosure/confidentiality agreements that cover initial discussions through to letters of intent or memorandums of understanding that end in the formal contract.

A formal contract can take many forms:

— **T&Cs for the supply (or procurement) of goods or services** – these are often short form contractual terms. They can be standalone contracts or contractual terms referenced or included as part of purchase orders or invoices.

— **Distribution or agency agreements** – these are used where a supplier of goods or services would like to expand its product/service channels by using an independent third party (either as an agent or a distributor). These arrangements can be particularly useful when expanding into new territories.

— **Collaboration agreements** – both parties agree to work towards a joint project or end-goal. Each party's marketing and promotion activities are usually carefully defined and complex intellectual property provisions will be needed if new intellectual property may be created during the collaboration.

— **Licensing agreements** – this is an agreement that allows one party to exploit the property of the other, subject to carefully defined restrictions. For example, licensing agreements that relate to software.

— **Website terms and conditions** – these appear on a website and will govern the way in which an individual can use the website and the content within it.

1. Why are contracts so important?

Contracts are a record of the legal responsibilities that you have agreed to in respect of a particular arrangement and the legal rights that you receive in return. They document your commercial understanding with a third party and should set the scene for your on-going relationship with that party. If problems occur, a clearly drafted contract will help you, either in being able to assert your rights or defend your position. Contract creation and contract negotiations should form a critical part of your business' legal and commercial risk analysis activities.

2. Finding the right contract for you

Any business arrangement represents a balancing act between risk and reward. The risks you are willing to accept for a high value or business critical arrangement will not be the same as a low value/low priority arrangement. Getting the contract to fit with your risk/reward analysis can involve some fine tuning and careful consideration. There are also a whole range of contract types that you may encounter, each having a slightly different emphasis.

It is important to choose the right contract type so you can be confident that the key risks are properly addressed. For these reasons, ‘off the shelf’ contracts (from online providers, for example) should always be treated with caution and carefully considered before using. Utilising terms from a competitor or similar business can also be a risky option. They will not be tailored to your business or your individual risk profile, which may be very different to a competitor (especially one that is at a different stage of maturity). Using others' terms as a base for your own could also lead to a breach of copyright claim.

3. Domestic and international contracting

If you contract internationally then additional factors will need to be considered. A critical consideration will be which countries’ laws will govern the interpretation of the contract and whether you will be able to enforce your contractual rights in the English courts. More practical issues include export requirements, currency of payments and which language to contract in/translation.

Step 6: Understanding Data Compliance

Data protection: early compliance

Our advice with data protection legislation? Start as you mean to go on. Systems, processes and procedures you put in place now should help your future growth and compliance.

This approach will keep you legally compliant. From a commercial point of view it is particularly important to take this approach as it:

- will form a key part of any investment/sale due diligence process with investors/purchasers keen to understand what steps you have taken to ensure compliance and how you utilise the personal data you hold;
- helps to instil confidence within your customers by highlighting that you respect their personal data and singling you out as a trusted service provider; and
- will help you to avoid being subject to large sanctions. An example of this was a fine of £18.4 million issued by the UK's regulator for failure to keep millions of customers' personal data secure following on from poor due diligence during the investment process.

Privacy by design & default

The General Data Protection Regulation ("EU GDPR") came into effect on 25 May 2018. Following Brexit, the UK created its own version of the EU GDPR, called the UK GDPR, which is very closely aligned with the EU GDPR. EU and/or UK GDPR apply to every business that collects, processes or stores personal data.

Data protection by design is ultimately an approach that ensures you consider privacy and data protection issues at the design phase of any system, service, product or process and then throughout the lifecycle.

Data protection by default requires you to ensure that you only process the data that is necessary to achieve your specific purpose. In essence this means you have to 'bake in' data protection into your processing activities and business practices.

This can be achieved in a number of ways with the UK's regulator providing the following examples:

- Adopting a 'privacy-first' approach with any default settings of systems and applications;
- Not processing personal data that you do not necessarily require to provide your service unless the individual decides you can;
- Providing individuals with sufficient controls and options to exercise their rights; and
- Developing organisational policies, processes, procedures and practices that have privacy implications.

Next steps

The key to data protection compliance is understanding how and why personal data flows through your business. The simplest way to tackle this is a who, what, when, why, how and where approach:

1. Whose personal data do you collect?

It is necessary to think both internal as well as external. So in addition to your customers consider your employees, suppliers and business partners.

2. What personal data do you collect?

Personal data has a broad definition and relates to anything that can identify an individual both directly and indirectly – this can range from the name of an individual to their dietary requirements.

3. When do you collect personal data?

This will likely be dependent on your answer to ‘whose personal data do you collect’ – is it during the recruitment process, for example, or externally at trade shows etc.?

4. How do you collect personal data?

Do individuals provide you with their personal data or do you also collect it through online 'contact us' forms and on-premise signing in sheets?

5. Why do you collect personal data?

Establishing why you collect personal data allows you to establish which lawful basis you are relying upon as well as highlighting areas where in fact you are collecting too much personal data.

6. Where do you collect and store personal data?

What is the geographical location – for example, where are the company servers located? If the company uses third party servers, for example AWS – do you know what ‘region’ data is stored in?

Common mistakes

"A privacy policy fixes all."

The production of a privacy policy helps to satisfy one of the principles under the UK GDPR – transparency – it isn't however a fix all. A privacy policy is just one document that you will need to produce when acting as a controller (the party that decides what to do with the personal data) over personal data and it will need to adequately reflect what you do with personal data.

If you act predominantly as a data processor (processing personal data only in accordance with instructions from a data controller) for your core business, your focus should, in fact, be on ensuring you have an effective data processing addendum, and well documented and comprehensive organisational and technical security measures.

"Let's send marketing information to every email address we hold."

There will inevitably be a desire to spread the word about your new company and the products and services you offer. However, organisations may need an individual's consent before they can send marketing texts, emails or faxes, make calls to a number registered with the Telephone Preference Services (TPS), or make any automated marketing calls. The standard of consent for digital marketing is a high standard – it must be freely given, specific, informed and unambiguous and must be made by a clear affirmative action (this can't be via pre-ticked boxes). This would be difficult to meet with any bought-in marketing lists.

"Cookies provide great analytics and that's essential."

We appreciate that it is crucial as a business to understand how your customers operate and interact with you. However, in order to comply with the cookies requirements: you must tell users that cookies are being used; explain to users what the cookies do and why they are doing what they are doing; and get the user's consent in order to store a non-essential cookie (a cookie that is helpful or convenient, but not essential) on their device. The definition of essential cookies has a narrow application.

We have a specialist team at Mishcon de Reya who can help you from the initial data mapping stage through to the production of compliance documents as well as assisting with ongoing training and data protection updates.

Step 7: Protecting Your Intellectual Property (IP)

From the moment you start developing your business you will start creating valuable IP. Whether that is in technology you are developing, your new brand or in a novel methodology, it is important to identify what IP you have, and take the necessary steps to protect it. Knowing how to deal with your IP early on will allow you to create a robust basis for future investment and avoid common pitfalls that can render your IP open to challenge and your business vulnerable to litigation.

Types of IP

IP rights fall into five distinct categories.

Patents

Patents protect inventions for a product or process in any field. They give the owner an exclusive right to prevent others from working the patented invention and profit from the invention for up to 20 years, or 21 where the optimal strategy is used. They must be registered on a territory-by-territory basis and can be enforced against anyone who works the patented invention.

Top Tip

Crucially, the invention that is the subject of the patent must not have been disclosed prior to the filing of the patent application. It is therefore of utmost importance that all inventions, and any know how relating to them, are kept confidential and not disclosed to anyone other than under a non-disclosure agreement.

Designs

Designs protect the appearance and configuration of a product. In the UK and Europe, there are two types of protection for designs – registered and unregistered. Unregistered designs arise automatically and at no cost to the designer. They can be enforced against unauthorised copying of the design and also prevent unauthorised dealing (e.g. sale, importation, hire, offering to sell or hire, possession) of the infringing articles. However, they only protect against direct copying of the design. By contrast, registered design rights provide stronger protection both in terms of the length of protection and the scope of enforceability, and can be enforced against similar designs irrespective of whether or not they were copied.

Top Tip

A design must be novel in order to be registered and must not have been disclosed prior to application (subject to any available grace periods). It is therefore important to ensure that any new designs and design drawings are kept confidential, and that records are kept as to the date of their creation and disclosure, including when the design first goes on sale.

Trade Marks

Trade marks operate to identify the origin of goods and services. They can comprise names, logos and even colours and sounds. Registration provides the strongest protection and is on a territory-by-territory basis. They last for as long as they continue to be used and renewed.

Top Tip

In some cases, trade mark registrations can be enforced against the use of the same or similar marks in relation to the same or similar goods and services as those covered by the registration (and potentially even dissimilar goods and services, where the trade mark has a reputation). It is therefore important to instruct a full availability search in key territories before adopting a new name in order to mitigate against the risk of infringing third parties' rights, and not simply rely on a basic search for identical marks.

Copyright

Copyright protects the expression of ideas – for example, works of art through to books, website text and computer source code. It arises automatically upon creation of a “work” without the need for registration, and generally lasts for the life of the author plus 70 years. It is a right to prevent the copying of the whole or a substantial portion of the work in question.

Top Tip

In order to enforce copyright is it necessary to evidence both ownership and subsistence of copyright in the relevant work. It is therefore important to keep detailed records of how and when copyright works were created, and who created them, and ensure that you obtain necessary rights (a transfer or a licence) in any copyright in works that you commission to be created.

Confidential Information / Trade Secrets

Although not strictly an IP right, rights in confidential information and trade secrets protect valuable proprietary information and allow the owner to prevent the unauthorised use and disclosure of that information. These rights can arise both automatically and through the use of contractual documents governing their use and disclosure.

Top Tip

Successfully preventing misuse of your valuable know how requires you to implement an effective know how management system and to ensure your employees are trained as to the proper use and disclosure of the information. Implementing this from day one will help ensure your confidential information remains protected.

Identifying Your IP

It can be useful to conduct an IP audit to identify what IP you own and what you need to do to protect it. This can also be useful to show to potential investors, to demonstrate the value of your IP. IP audits should be carried out by a specialist IP lawyer, and there is funding available to support this, such as the Innovate UK IP Audit Scheme. We can help connect you to this scheme if required. Further information can be found on our IP Audit and Strategy site.

Developing an IP Strategy

It is also important to put in place an IP strategy to set out how you intend to protect, enforce and commercialise your IP. This is again important not only for your internal business processes, but to demonstrate value to investors. Funding is available from Innovate UK for businesses that have received a funded IP audit to develop an IP strategy and put in place recommended protections. We can support with developing an IP strategy, and also with applying for funding.

Step 8: Finding a Workspace

As an entrepreneur, you need to do your homework before signing a letting agreement. Whether you want a space in a serviced office or looking to lease your own space, taking the time to research where you want to work (for example, on a business park or science park), what type of workspace best meets your property requirements and to agree the most appropriate terms for the letting will ensure that the agreement best meets your needs now and in the future.

1. Ensure your letting agreement is flexible

Flexibility is so important for a fast-growth company when agreeing a letting agreement. Ensure the agreement is granted for the length of time you anticipate you will need from the outset. Depending on the success of your business, you may also need to safeguard against the property becoming either too small or too big.

In a lease, flexibility can be achieved through negotiating appropriate ‘alienation’ provisions, which enable you to transfer the lease (assign), sub-let the lease or share occupation of the property with another business. On the other hand, in a serviced office agreement ‘alienation’ provisions are not common but the agreements are often for shorter time periods.

Subletting or sharing your space can potentially provide your business with a new revenue stream, so take the time to choose your property and consider how you could use it to your advantage as your business grows or if your circumstances change.

It is also possible to include break rights in the letting agreement, which give you the option to end the letting agreement at appropriate intervals.

2. Use an agent

Don’t underestimate the value of an agent, even if you are planning to let a small space. An agent’s local market knowledge will ensure you pay the right level of rent for the property. They will also advise on possible incentives such as rent-free periods and what security (i.e. rent deposit) you should expect to have to provide the landlord.

3. Plan your fit-out

If you want to fit-out your new space, put a plan in place at the earliest opportunity as you will probably need the landlord's consent.

Get your designs completed in the early stages of agreeing your letting agreement so that they can be approved in good time. This will make sure your fit-out company can begin work as soon as you take occupation.

4. Check your repair and reinstatement obligations

All tenants will have repair and reinstatement obligations as part of their letting agreement, but it is important to clarify what you are signing up to and what you will be required to do at the end of the term.

In some cases, and particularly if you are letting space which is in a good state of repair, you will have to put the property back in the same condition you took it in. This could include removing any items or alterations. You will also be required to keep the property in a state of good condition and repair throughout your tenancy.

If you're letting an older property or depending on the condition of the property, you should get advice on potentially limiting or modifying your repairing obligations. A common way to limit your repairing obligations is by reference to a photographic 'schedule of condition' which provides evidence of the condition of the property at the time you took the agreement. This is then used to determine the extent of the repair works you must carry out during and at the end of the term.

The cost and liability for repairs throughout the letting agreement and at the end of the letting agreement (dilapidations) can be expensive so steps should be taken to mitigate these costs.

5. Get your timings right

Allow enough time to agree your letting agreement, especially if you are an international business seeking to set up a new UK base.

If you are looking to take a lease as opposed to a serviced office agreement, the due diligence process and documentation involved in the UK property market can take time, so ideally allow at least six to eight weeks to negotiate terms of a lease and get the necessary paperwork signed.

Step 9: Planning for Your Future

Planning to protect your assets for your loved ones can seem complicated and is all too easy to put off. There are a few simple steps to ensure your affairs are in order and your business is protected.

1. Your will

Putting a will in place ensures you control exactly what happens to your assets, including the shares in your business, on your death. If you do not have a will, your assets will pass in accordance with the intestacy rules in place at the time of your death and can lead to an unwanted outcome. It is vital that any will you put in place is correctly drafted and executed, or it will not be valid.

2. Ensure personal and business planning are aligned

When making your will, it is essential to make sure that the terms of your will and the terms of any corporate governance documents (such as articles of association, partnership agreement or shareholders' agreement) are compatible with each other. If not, it may cause problems for both your executors and your business after your death.

You should also consider the impact of future personal events when reviewing your corporate governance documents. This includes the death or loss of capacity of a shareholder but also the impact of a divorce or marital separation. Considering these things in advance can save a huge amount of stress and uncertainty down the line. Tax advice will be crucial to ensure all available reliefs can be taken advantage of where appropriate.

3. What about divorce?

The divorce of a founder can impact upon the business either directly (for example, where the opposing spouse makes a claim against the shares) or indirectly (for example, by dint of the time commitment spent engaging with professional advisors and dealing with divorce proceedings). The good news is that you can help to mitigate the potential impact with some advance planning from the outset or on review of corporate governance documents.

4. Who should inherit your business assets?

Assuming it is allowed under the terms of your corporate governance documents, who would you want to inherit the shares in your business? It may be better for the business if your shares pass to existing shareholders rather than to your family. If so, appropriate insurance should be put in place to ensure that the other shareholders will have sufficient funds to purchase the shares from your estate on your death.

5. Pensions and life cover

Your pension and life cover provision should not be underestimated when organising your personal affairs. Nomination forms for each pension and life policy should be regularly reviewed.

6. What happens if you lose mental capacity?

Without a lasting power of attorney in place, no one can make decisions on your behalf in your capacity as a shareholder in the event you lose mental capacity. This can easily leave your business in a tricky situation. Business owners often choose different people to make decisions in relation to their business interests to the people chosen to make personal financial decisions for them. Lasting powers of attorney are like an insurance policy – you hope to never need to rely on them but far better to have them in place if required.

Conclusion

Setting up and growing a business can be both exciting and challenging.

This Handbook may not provide all the answers to the many questions you will have or deal with every scenario you will encounter, but you are not alone.

We are always ready at Mishcon de Reya to support you with practical, insightful advice that works for you on both legal and business levels. We can also introduce you to other professionals you may need along the way, and successful founders who can enlighten and inspire you. Wherever you are on your journey, just get in touch.

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