



# Legal tips for start-up companies



# Starting a business? This is what to consider...

**We have extensive experience in advising businesses and have seen many start-ups become successful companies and long-standing clients. We have put together a guide to the points to consider when starting out. Although the matters we have covered are not an exhaustive list of all the issues which could emerge, it serves as a useful reminder of the key points.**

We understand that when a business starts out its budget is often limited, but putting in place a good set of professional advisers (eg accountants, tax advisers and lawyers) should help you navigate the business through its early years and increase its chance of success.

## Business structures

One of the first steps to consider on setting up a business is which structure would best suit your business. [Refer to 'Ways to structure a business.'](#)

## Managing a company

If you choose to adopt a corporate structure the two most important documents concerning the governance of a company are its articles of association and a shareholders' agreement.

The articles are a contract between the shareholders of the company and is a document which is filed at Companies House. The purpose of the articles is to regulate the management of the company and clarify how control and power is determined between the directors and the shareholders. Newly formed companies often adopt the 'model articles', a copy of which is available at Companies House.

If the company is to have more than one shareholder, it is sensible to have a shareholders' agreement which governs the running of the company and deals with topics such as the issue and transfer of shares, decisions which may require the unanimous consent of the shareholders and the appointment directors. It is a private and confidential document that records the commercial terms of the arrangements between the founding parties and often contains key details relating to terms of the investment.

If you are creating a company with other people, it may be prudent for the shareholders to discuss the future of the company eg what happens if one of the founders wants to leave after a couple of years. It is helpful if, from the outset, all the shareholders understand their respective rights in the company.

Once it has been formed, there is a duty to ensure that the statutory books of the company are kept up-to-date. [Refer to 'What books must a company keep?'](#)

## Intellectual property

Depending on the nature of your business (eg technology companies) the protection of IP may be crucial. If so, you should make sure when entering into any agreement with a third party that

the contract addresses the way that the company's IP is to be used and that it also deals with the ownership of the IP, which may be created by both parties.

You should consider who specifically owns any IP which will be used by the company. It may be a good idea at the outset to ensure that the IP is owned by the company itself and not by the company's founding directors or shareholders. This will be particularly important for any future investments in the company as an investor would want certainty that any valuable IP is vested in the company.

The simplest way of achieving this is to ensure that contracts are put in place establishing who owns the IP and where necessary drafting any assignments and/or licences which may be needed. [Refer to 'A guide to IP rights' and 'Managing your IP'.](#)

## Non-disclosure / confidentiality agreement

From the beginning, it is important that a company ensures that its company information and IP remain confidential. Certain confidential information may need to be disclosed to third parties as part of their due diligence if they are considering making an investment, or entering into a commercial transaction, with the company. Before you share any confidential information of the company, you should ensure that you have put a non-disclosure or confidentiality agreement (NDA) in place, wherever possible.

The content of the NDA will depend on the nature of the information which you propose to disclose, the relationship between the parties and the purpose for which you are giving the information to the third party. It is important that the NDA is suitable for the specific circumstances in which you are to disclose the information. Therefore you should take legal advice when preparing NDAs to ensure that the agreement covers your specific situation. [Refer to the 'NDAs/confidentiality agreements' guide.](#)

## Standard terms and conditions

Many businesses experience difficulties with their customers and/or suppliers because they have failed to create clear contractual terms to govern their relationship. If there is no contract, often lawyers have to look at the relevant terms implied by law and the course of dealings between the parties to establish what terms may apply.

Companies often put in place standard terms and conditions of business which regulate their relationship with customers and suppliers. Having certain written terms in place avoids any uncertainty in the event of a dispute. These terms and conditions are often standard and can be fairly simple depending on the nature of the business. In some circumstances, it may be more prudent to have a tailored comprehensive agreement between you and a third party.

## Employment

It is important that a business has in place employment contracts with its key employees. This contract can deal with an employee's

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salary, restrictive covenants (to try to ensure key employees cannot set up in competition) and termination provisions. It can also contain provisions to ensure that any employee creating IP during his employment vests this in the company.

If the company is also going to employ consultants, then it would be useful to put a consultancy agreement in place for such individuals. This could include for example the number of days he would be working, his rates of pay, etc. *Refer to the employment guide.*

### Commercial property and leases

Entering into a lease for commercial premises can be a nerve racking and confusing process for any start-up business. There are many aspects to consider when drafting the key terms of a new lease and numerous traps for the unwary. *Refer to 'What to look out for in a commercial lease'.*

### Buying a business

As the business expands, or as part of your initial start-up, you may consider buying the shares or assets of another company. This can be an extremely complex matter, depending on the value, nature of the company or assets to be purchased.

We recommend that you take legal advice about any proposed purchase of shares or assets. You would not want to inadvertently take on more liability than you were expecting. *Refer to 'a guide to buying a business'.*

### Our expertise

Willans is a leading law firm noted for giving expert, practical and personal service. We act for local, national and overseas clients.

Our astute commercial team advises listed companies, partnerships, LLPs, entrepreneurs and privately-owned firms operating in industries that range from aerospace, engineering, IT, telecoms and satellite-based technology to design and manufacture, property development, healthcare, education and charities.

Our commercial lawyers, most of whom have City law firm backgrounds, combine technical expertise and business acumen with the ability to get things done. We offer everything you would expect from an experienced, high-calibre team, plus an exceptional degree of continuity and personal attention.

We also have private client lawyers who can advise you on personal matters ranging from estate planning and wills to residential property and matrimonial law.

We are ranked in the independent legal directories *Legal 500* and *Chambers UK*. We have also been awarded Lexcel accreditation by the Law Society which is effectively a stamp of quality assuring that we are a well-run firm that provides a high quality service.

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*Disclaimer: This is a guide only and does not constitute legal advice. Specific advice should be sought for each case; we cannot be held responsible for any action (or decision not to take action) made in reliance upon the content of this publication.*

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# Ways to structure a business

**When setting up a business the structure that you adopt will define the legal liabilities which you may face in running one. It depends on the circumstances as to which business structure is the most beneficial since there are wide differences between them. This guide only touches on some of them.**

Usually the overriding aim will be to achieve limited liability, which will mean that the incorporation of a company is the main option (although this can also be achieved by setting up a limited liability partnership). If limited liability is not important, then tax factors will be the driving force. It is important that you get both accounting and legal advice as to the best structure for your business.

The main types of business structures are:

- a sole trader
- a limited company
- a partnership
- a limited liability partnership
- an unincorporated association.

## Sole trader

As a sole trader, you are running the business as an individual. There is no separate entity which runs it. You keep all your business profits and you pay tax on them. As a sole trader you are responsible for the liabilities of the business. You are therefore personally responsible for any losses that it makes.

## Limited company

If you set up a company this will be a separate legal entity in its own right and it will have its own benefits and liabilities. The finances of the company are separate to your personal finances.

Any profit made in the business will be owned by the company (subject to tax). The company can then distribute its profits to the shareholders by way of dividend, and when the company is wound up its capital (after deducting all liabilities to third parties) will be divided amongst the shareholders in proportion to their shareholdings.

A company is made up of:

- **Members** - are the people who own the shares in the company and are also known as 'shareholders'
- **Directors** - are responsible for running the company. Sometimes shareholders are also directors but they do not have to be. There are many legal responsibilities which are placed upon a director in running a limited company.

Most companies are 'limited by shares'. This means that the shareholders will only be liable for the company's debts limited to the value of the shares that they own but have not paid for.

As shares are usually paid for on incorporation, a shareholder will therefore have no liability for the company's debts in normal circumstances. The directors will not be responsible for the debts of the business (unless they have breached their director's duties or broken the law in some other respect eg by fraudulent or wrongful trading).

A company can also be 'limited by guarantee'. This means each member undertakes to pay a specific amount if the company is wound up whilst he is a member, or within a year after he ceases to be a member. Most companies limited by guarantee are charities or other non-trading companies.

A company can also be a 'public limited company'. The aggregate nominal value of all shares in issue must be at least £50,000, with at least £12,500 worth of shares having been paid for by the shareholders.

Public companies are more regulated than private companies. Probably, the principal reason to choose a public company structure is that they can issue shares to the public.

## Partnerships

If you decide to set up a partnership you and your partners will be personally responsible for the business. Unlike a limited company, a partnership is not a separate legal entity in its own right. This means that all the profits of the business are shared between the partners.

However, you will also be personally responsible for the share of any losses that the business makes and also for all debts incurred on behalf of the business.

## Limited liability partnerships

If you set up a limited liability partnership (LLP) the members of an LLP are not personally liable for the debts of the business. If the LLP cannot pay, their liability is limited to the amount which they have invested in the business.

The LLP is like a company in some ways, as it is a legal entity in its own right, but like a partnership in other ways. For example it does not have shareholders or directors and members are taxed on the LLP's profits as if they were partners.

The LLP is governed by what is known as an LLP agreement. This document normally sets out the member's shares of the LLP's profits and liabilities. It governs the running of the LLP. There are also designated members in an LLP who have extra responsibilities under the LLP agreement.

## Ways to structure a business

### **Unincorporated association**

Although unusual, an unincorporated association is an organisation set up by agreement between a group of people who come together for a reason other than to make profits, such as a sporting club.

Individual members will be personally responsible for any debts or contractual obligations of an unincorporated association.

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# What books must a company keep?

**All companies are required under the Companies Act 2006 to keep their company books up-to-date. This note helps employers check that they are including everything to keep their books in good working order.**

Typical information included in the books are registers of:

- members
- applications and allotments of shares
- transfers of shares
- directors and their addresses
- secretaries
- debentures
- mortgages and charges
- sealings and executions
- people with significant control
- residential addresses of people with significant control

and copies of any board minutes and documents lodged with Companies House.

The following provisions of the Companies Act 2006 (CA 2006) apply:

## Register of members

Section 113 of the CA 2006 says companies should keep a register of its members and record:

- their names and addresses
- the date when each person was registered as a member and the date they ceased to be one
- a statement of shares held by each member distinguishing each share by its number (if the shares are numbered) by its class (if the company has more than one class of issued shares), and the amount paid or agreed to be considered as paid on the shares.

Section 114 of the CA 2006 states that a company's register of members should be made available for inspection and the company must give notice to the registrar of the place where this register is kept available for inspection and any change to that place.

Section 112 of the CA 2006 defines a member of the company (ie a shareholder) by reference to the register of members. Failure to maintain a register of members means that the identity of the company's shareholders is uncertain.

## Register of directors

Section 162 of the CA 2006 states that every company must keep a register of its directors and their residential addresses (section 165).

Section 163 requires a company's register of directors to contain the following particulars in the case of an individual:

- name and any former names
- a service address
- country or state of residence
- nationality
- business occupation
- date of birth.

Where a director is a body corporate or a firm that is a legal person, section 164 requires a company's register of directors to contain:

- the corporate or firm name
- its registered or principal office
- the legal form of the company or firm and the law by which it is governed.

## Register of secretaries

Section 275 of the CA 2006 requires a company to also keep a register of its secretaries. The register must be available for inspection and the company must notify the registrar of the place where the register is kept.

## Records of resolutions and meetings

Section 355 of the CA 2006 states that every company must keep records comprising:

- copies of all resolutions of members passed otherwise than at general meetings; and
- minutes of all proceedings of general meetings.

The records must be kept for a period of ten years.

## Registration of allotment

Section 554 of the CA 2006 states that a company must register an allotment of shares as soon as practicable, and in any event, within two months after the date of the allotment.

## Register of debenture holders

Section 743 of the CA 2006 states that any register of debenture holders that a company keeps should be available for inspection at a place notified to the registrar by the company.

## What books must a company keep?

### Registration of a transfer

Section 770 of the CA 2006 refers to the transfer of shares. It provides that a company may not register a transfer of shares or debentures of the company unless a proper instrument of transfer has been delivered to it, or the transfer is an exempt transfer within the Stock Transfer Act 1982.

### Register of interests

Section 808 of the CA 2006 refers to a company's register of interests. A company is required to keep a register of information received by it about interests in its shares. A company which receives any such information must, within three days of receipt, enter it in its register against the name of the present holder of the shares in question or, if there is no present holder, against the name of the person holding the interest.

### Register of charges

Section 876 of the CA 2006 requires every company to keep a register of charges available for inspection.

Section 877 requires charge documentation and the register of charges to be available for inspection at the place notified to the registrar.

### Register of people with significant control

Part 21A and Schedules 1A and 1B to the CA 2006 require every UK company (including dormant companies) and limited liability partnership (LLP) to create and maintain a register of people with significant control (a PSC register). The legislation requires particulars of individuals who hold significant control over a company (PSCs) as well as relevant legal entities (RLEs) that would hold significant control if they were individuals.

PSCs are defined as persons/legal entities who fall into at least one of the categories below:

- holds, directly or indirectly, more than 25% of the shares of the company;
- holds, directly or indirectly, more than 25% of the voting rights of the company/LLP;

- holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the company;
- has the right to exercise, or actually exercises, significant influence or control over the company/LLP; or
- has the right to exercise, or actually exercises, significant influence or control over any trust or firm (not a legal entity) that has significant control (under one of the other four categories) over the company/LLP.

Various information in respect of each PSC should be contained within the register, including: the PSC's name, service address, nationality and date of birth (if an individual), date upon which they obtained control and the nature of their control.

### Register of people with significant control - residential addresses

As with director's residential addresses a separate register of the PSC's residential address will be required to be maintained at the registered address if a separate service address has been given.

### Further information

Sections 1134-1138 of the CA 2006 set out further requirements in respect of company records.

For example, section 1135 states that company records may be kept in hard copy or electronic form and can be arranged in such manner as the directors see fit. However, if the records are kept electronically, they must be able to produce a hard copy version.

### Sanctions

Failure to comply with any of these provisions amount to an offence committed by the company and every officer who is in default. A person who is found guilty is liable to a fine on summary conviction.

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# A basic guide to intellectual property rights

**This guide relates to the protection of intellectual property rights in the UK. Where required, we can advise on options that will allow wider protection in the EU and/or further afield.**

## Patents

Patents protect 'inventions'. The invention must be new, involve an inventive step and be capable of industrial application. You need to apply to the UK Intellectual Property Office (IPO) to gain protection in the UK. If granted, the patent will last for 20 years. Certain ideas cannot be patented.

It is vital that patent applications are made as soon as possible. If they are in the public domain before the application is filed – even by a day – the inventor will be unable to gain patent protection.

## Design rights

The term 'design' relates to a product's appearance: its shape, texture, colour, materials used, contours and ornamentation. To qualify as a new design, the overall impression should be different from any existing design. There are three types of protection for designs, explained below.

### Unregistered design rights

This is an automatic right, which protects aspects of shape and configuration of a three-dimensional article. The right exists from the point the design is recorded in a design document or an article is made to the design. The right generally lasts for 15 years. Actions for breach of these rights are often difficult to establish as you have to prove that you hold the right and that deliberate copying has taken place.

### Registered design rights

This provides further protection for the appearance of all or part of a product in terms of features such as lines, contours, colours, shape, texture and materials. It covers two- and three-dimensional items and lasts up to 25 years if registered with the IPO (subject to periodic renewal).

More likely to act as a deterrent than unregistered design protection, the right also makes it easier for you to exploit the item eg by selling the rights or by licence. You do not have to prove copying in any infringement action.

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## Copyright

Copyright protects original literary, dramatic, musical or artistic works; sound recordings, films or broadcasts and the typographical arrangements of published editions. The right arises automatically on creation of the work and allows you to protect your material and stop others from reproducing it without your permission. The period of protection varies, depending on the nature of the work.

## Trade marks

Many businesses represent their name in a particular style eg with words, logos or a combination of both. This 'trade mark' or brand distinguishes the business from its competitors and it is wise to consider registering it as a trade mark at the IPO.

Registration gives you the exclusive right to use your mark for goods and services provided in the UK; it may dissuade competitors from using your mark, or a similar mark, without your permission and it allows you to sell or license the use of the mark. If your mark is not registered and a dispute arises, you would have to rely on a claim for passing off which tends to be more complex and costly.

## Passing off

This can offer protection when someone else is seeking to benefit from the goodwill of your business. Broadly, you would have to show that:

- you have goodwill in the reputation of your goods and services
- the other party has made a misrepresentation in the course of trade, which has led (or may lead) people to believe that the goods or services offered by the other party are yours
- your business has (or is likely to) suffered consequential damage.

## Our expertise

Our knowledgeable *Chambers*-rated team can help businesses manage and safeguard their IP. We handle all aspects of intellectual property law, ranging from drafting and negotiating contracts to protect intellectual property rights as well as advising in disputes involving infringement of trade marks, design rights, patents and copyright as well as passing off actions.

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# Managing your intellectual property

**Traditionally, a company has valued its tangible assets but paid little regard to its intangible assets such as intellectual property. Over the past decade, intellectual property has increased in importance and value and it is vital that a company is aware of this, not only to protect its own assets but also to avoid infringing the rights of any third party which could result in a costly action against it.**

## *Intellectual property audit*

Ideally you should carry out an intellectual property (IP) audit on a regular basis, not only checking your IP assets but those of your major competitors. This is especially important for a business involved in technology and R&D.

The principal steps in relation to an IP audit are:

- identify your registered IP
- identify your unregistered IP
- identify IP licensed from third parties (to include any registration requirements regarding the licence and whether the licence is transferable)
- identify IP licensed to third parties
- Investigate any potential infringements
- identify and check all agreements of the company which deal with IP rights (eg contracts for services, employment contracts, consultancy contracts, marketing agreements etc)
- Assess any opportunities for exploitation of your IP rights (eg assignment, licensing, joint ventures).

## *Protecting your IP rights*

For a breakdown of IP rights and the protection afforded to such IP rights, please see our guidance note – *'A basic guide to intellectual property rights'*.

## *Development of IP management policies*

After conducting an IP audit, policies should be put in place to ensure that a company is protecting its IP and meeting its objectives following the audit. These could include the following:

### **Renewal of registrations**

A system of reminders should be set up so that relevant employees are aware of the renewal dates for registered IP. Before the employee renews the registration, you should consider the commercial value of the registration and whether it should be renewed. However, you should take care not to allow registrations to lapse if the rights could be of value to a third party. If so, you

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could consider whether to license or assign the rights for value to the third party.

### **Confidentiality**

Any product which is developed should be kept confidential as any prior disclosure may make the invention part of the 'state of the art' and incapable of obtaining patent protection. All confidential documents should be marked 'confidential' or 'trade secret' to ensure that third parties are aware of their confidential nature.

The disclosure of confidential information should be protected with a confidentiality agreement or non-disclosure agreement. For additional practical tips on how to protect your confidential information please see our guidance note – *'Practical tips for confidentiality and non-disclosure agreements'*.

### **Documentation**

Product development should be documented and kept safe. Even if it seems trivial it is worth keeping, as this paperwork could help refute a claim for infringement in the future. All documents should be dated to record when the product was developed.

### **Personnel**

All relevant personnel who have access to IP should have confidentiality clauses in their contracts.

- **Employees** - although generally speaking, IP created by an employee is owned by the employer, if the IP is created by the employee outside the normal course of his employment, the employer may not have rights to it. Therefore, employment contracts should make it clear that all IP created by an employee (whether inside or outside his normal duties) will vest in his employer. Even where such a clause is included, there are still grey areas of the law, for example where inventions are created outside working hours. Employment contracts should also contain a waiver of an employee's moral rights.

In some cases, even where an employee develops an invention which belongs to his employer, the employee has a statutory right to compensation if it is of 'outstanding benefit' to the employer. The employer cannot contract out of this provision but it is rare for a court to award a payment on this basis.

- **Consultants** - using external consultants should be considered carefully. Generally, a consultant will own the IP rights in the works which it creates for a business – this is irrespective of whether you have paid them to do it. An express provision governing ownership and use of those rights to be created should be agreed with the consultant at the outset.

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# Practical tips for confidentiality and non-disclosure agreements

## Many transactions which a company enters into with another business may require a confidentiality or non-disclosure agreement before negotiations start.

It is always advisable to get a signed confidentiality agreement in place before any confidential information is disclosed. However, there are a number of practical ways in which a party disclosing information can ensure that the recipient protects confidential information and complies with their obligations under the non-disclosure agreement (NDA) and/or the Data Protection Act 1998.

### Identify the recipient of the information

Each person responsible for disclosing confidential information should be made aware of who is and isn't authorised to receive it.

A company should not assume that just because an individual is copied into an email he is necessarily authorised to receive this confidential information. Also, before allowing anyone to be an authorised recipient under any NDA, the disclosing party should be satisfied that he is willing to receive the confidential information and that he will comply with its obligations.

### Keep records

A disclosing party should always keep a record of what confidential information it has passed on to the recipient. If necessary, this will allow it to keep track of what information or documents to ask the recipient to return or destroy under the terms of the NDA, and to identify the source of any leaks of information which may occur in the future.

### Hard copies only

For extremely sensitive information, it may be appropriate for a disclosing party to distribute just hard copies of the document (rather than electronic ones) and only to specifically named recipients.

### Labelling

Any documents containing confidential information, or emails of confidential information, should be clearly marked as 'confidential'.

### Passwords/encryption

If a disclosing party labels a document 'confidential' this may not be enough to deter individuals within an organisation from accessing such information. There are ways to protect it which will minimise the potential for any accidental disclosure, either by creating a file with a password or encrypting the files themselves.

### Give advice

It is important at the outset to instruct all parties receiving the information as to the methods to be used for keeping it confidential in accordance with the terms of any NDA.

### Corporate transactions and data rooms

During a corporate transaction, where a vast amount of company information will be disclosed to a recipient, it is common to have a 'data room'.

An electronic data room is an effective way of protecting the confidential information as access to the data room will be password protected. This is a good way of restricting access and to monitor who has logged on to view the documentation.

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# Employment law considerations for start-ups

**When starting a business, a range of legal requirements must be met. Although the laws covering employment are extensive, the main issues for small and start-up businesses can be straightforward if the correct approach is taken from the outset. By sticking to a few rules, you can avoid most of the pitfalls and prevent problems arising.**

## Contracts of employment

Employers are obliged by law to provide employees, whose employment is to continue for more than one month, with a written statement containing certain required particulars of employment, not later than two months after their employment begins.

This statement must detail job title, place of work, main duties/responsibilities, pay (plus any bonuses, pensions, etc), working hours, holiday entitlement and notice period. You must also include details of your discipline and grievance procedures.

You can reserve the right to amend the job description and place of work. However you cannot change the terms of the contract without the employee's agreement.

It is important to put all important terms in writing. Without a written agreement, you will not have the following advantages:

- *flexibility* - for example the ability to move an employee to a different role
- *certainty* - if anything is unclear, this could lead to disputes.

It is also vital that contracts include provisions covering confidentiality. Whilst they are employed, an employee has an implied duty to keep any business information or trade secret confidential. However, there is only a limited implied right following termination of employment, so it is recommended that you put an express obligation to this effect in the contract of employment.

The General Data Protection Regulation (GDPR) also requires businesses to have certain safeguards in place to control the way in which it processes any personal data which it may hold. See our GDPR factsheet for further information.

All start-ups should consider the inclusion of provisions covering the ownership of intellectual property (IP). By law any IP created by any employee during their employment will remain the sole property of the company. However, it is recommended that, where an employee's role is likely to involve the creation of substantial IP rights, a detailed IP clause is included in their contract of employment.

Employers should also consider what post-termination restrictive covenants should be included in order to best protect the business's interest, staff and client base. Restrictive covenants are only enforceable if they are no wider than necessary to protect the legitimate business interest of the employer. It is important that you obtain specialist legal advice on the preparation of any covenant, so that it is tailored specifically to your business and industry.

For senior employees or directors, employers should aim to provide a more comprehensive document known as a service agreement, which is considered to be a heavy duty type of employment contract.

We can guide you through the process of determining the types of employment contracts that suit your business and accurately reflect the arrangements you have with your employees (at all levels).

## Key employment policies

Having set procedures for recruiting and managing staff does not just make the processes easier for you and your company – many are required by law. You must be aware of the rules and regulations about your employees' rights and other key elements of employment law.

Detailed below are two of the key policies that should form the basis of your staff handbook:

### Disciplinary & grievance

All employers (irrespective of size) are required to follow the ACAS Code of Practice on disciplinary and grievance procedures. Businesses are required by law to provide details of the procedures they have in place and must make them easily accessible to employees.

It is a good idea to have written procedures in place that comply with the ACAS code while still giving you a degree of flexibility. Any policy should state that the procedures are non-contractual.

The policy should cover the following areas:

- confidentiality
- investigation process
- suspension (in the case of disciplinary procedure)
- conduct of hearings
- the right to be accompanied at hearings
- penalties and effect of warnings (in the case of disciplinary procedure)
- the conduct of and right to an appeal.

This list is not exhaustive and you should obtain specific legal advice on the preparation of disciplinary and grievance procedures, tailored to your business and industry.

Having such policies can also reduce the risk of unfair dismissal claims.

### Equal opportunities

Employers must not discriminate at any stage of the recruitment process or during employment. All employees should be treated equally and in accordance with their legal rights.

## Employment law considerations for start-ups

Businesses are also legally responsible for acts of discrimination by their employees.

An equal opportunities policy can help to set minimum standards of behaviour and reduce the risk of legal action. An effective policy should discourage discriminatory attitudes and behaviours, and make job applicants and employees feel confident about equality of opportunity.

It is crucial that the policy is implemented with proper training and that appropriate action is taken in the event of breach. Taking such action can help you avoid liability for any discrimination or harassment committed by an employee.

Employers need to ensure that any policy is suitable and relevant to their activities. The principal aim of the policy should be to provide a positive message to employees and others that you value equality and diversity, and take a proactive stance against discrimination.

### Our expertise

We can prepare bespoke policies tailored to your business ensuring that they comply with the relevant employment legislation, and ensuring that your position is protected. We can also provide equal opportunities training to your staff.

### Contact

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# What to look out for in a commercial lease

**Taking on a lease of a commercial premises can be a nerve racking and confusing process for any start-up business. There are many aspects to consider when drafting the key terms of a new lease and numerous traps for the unwary.**

Our commercial property team has put together this guide to highlight some of the key issues:

## Heads of terms

Clear heads of terms are always to be welcomed. They should set out the key points agreed between the parties for the proposed letting eg extent of property to be let, rent, rent reviews etc. We recommend that you always speak with your solicitor before agreeing heads of terms so that he can give guidance on any particular issues of importance to you, eg service charges, car parking rights, rights of access in case of emergency, etc.

## Registration

Any lease of more than 7 years must be registered, as must a transfer of an unregistered lease where the unexpired term exceeds 7 years. It is important to ensure that the lease plan is Land Registry compliant so that the lease can be correctly registered at the Land Registry as soon as possible following completion.

## Stamp duty land tax

Depending upon the level of rent stamp duty land tax may need to be paid and you will want to know how much this is before you take on the lease.

## Points to consider in the lease

- Are the rights to be granted to you sufficient for your purpose?
- Are the rights reserved in favour of the landlord potentially too disruptive for your proposed use of the property?
- Have you agreed the frequency of rent reviews? Often this is at the end of every fifth year of the term although some landlords may ask for rent reviews every three or four years.
- Do you need a break clause allowing you to bring the lease term to an early end? If so, and if this is agreed by the landlord, then you should ensure that only the bare minimum of conditions are attached to the break right. Ideally 6 months' notice in writing to the landlord should suffice. However he will often require pre-conditions such as payment of rent and giving up the property

with vacant possession on the break date. What you should always resist is any proposal by the landlord that the break can only be exercised if you have complied with the covenants in the lease – this is almost impossible to achieve!

- Will you have the right to assign the lease and/or sublet the property?
- Will there be a service charge? If so, try to ensure that this is capped at an agreed level in every year.
- Is the business use allowed under the lease also an authorised planning use? You do not want to face enforcement by the local authority.
- Will you have sufficient rights to erect signage so that you can announce your presence in the building?
- Is the property in less than perfect condition? Then you should aim to agree that your repairing and decorating obligations will be judged against a schedule of condition and that you are not obliged to put the property in any better state of repair or condition than that described in the schedule.

These are just a few of the areas that should be very carefully considered before taking a lease. We are able to offer advice and assistance, from the heads of terms stage through to negotiating the lease and dealing with any associated licences that may be required, eg permitting tenant's fit out works.

Do not make the mistake of thinking that an easy way to save money is to avoid talking to a solicitor about the lease. Many tenants who have followed this route have lived to rue the day; perhaps either because the lease was drawn in draconian terms and as a result they have found it impossible to assign or underlet, or because it contained conditions attaching to the break right which made it impossible for the tenant to actually break the lease.

## Our expertise

Our *Chambers*-rated commercial property team acts for both commercial property landlords and tenants on a range of transactions from small office or shop lettings up to multi-million pound sales and purchases of high value rental leasehold properties. We also manage commercial clients' rental property portfolios throughout England and Wales.

## Contact

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# A guide to buying a business

**We have prepared a basic guide of matters to be considered when buying a business or company. This guide may be particularly useful if you are considering an acquisition for the first time.**

A buyer can buy either the shares of the company that owns the target business or simply buy the assets which make up that business:

- **Share purchase** - the buyer buys the whole company (including liabilities that he may not know about).
- **Asset (or business) purchase** - the buyer chooses the assets that he wants to buy. This will provide more flexibility, but it can be complicated to identify and transfer specific assets.

## Dealbreakers

The following issues may arise during the course of a transaction:

### Due diligence

The purpose of due diligence is to investigate the assets and liabilities of the target business. A buyer must take legal advice to ensure it gets the legal protection that it requires. If the buyer becomes aware of any significant problems in the due diligence process, it can:

- abort the deal
- negotiate a price reduction
- seek specific protection in the acquisition agreement, such as an indemnity (see below).

### Employees

If a buyer buys a business as a going concern (even via an asset purchase), it must take on its employees on their existing contract terms. Consultation with employees is usually required for an asset purchase in advance of completing the deal.

This does not apply in the context of a share purchase as the company will remain the employer.

### Pensions

The buyer may have to take over the target company's existing pension arrangements or offer equivalent pension arrangements to transferring employees.

### Intellectual property rights

A brand, trade mark or patent may be the most valuable asset of the target business. Take legal advice to check that the target business:

- owns the rights
- has adequately protected the rights
- can transfer the rights to the buyer in the case of an asset sale.

### Environmental issues

The buyer could face huge liabilities (possibly including criminal liability) if it buys contaminated land or a company that caused or allowed contamination.

### Shared assets

If the target business is part of a larger corporate group, it may share assets (such as computer systems, property and insurance policies) with other group members. Consider whether these arrangements can be unravelled without incurring prohibitive costs or disruption to the target business.

An agreement can be drafted to deal with how the assets are divided and shared after the completion of the sale.

### Key staff

Consider whether the buyer wants to incentivise or tie in key staff or management on special terms.

### Consents and third party approval

The acquisition may need the approval of third parties (for example, industry regulators) or require approval from competition authorities. Consider when to approach them and whether consent is likely to be given.

If the buyer is acquiring all the shares in the target company, check that no important contracts can be terminated on a change of control.

If the buyer is acquiring the assets, check that any contracts can be assigned to the buyer and that this is not prohibited under the terms of the contract.

The transaction may require approval from either the buyer's or the seller's shareholders.

## Documentation

The following paragraphs give a guide to the various documents which may be required on purchasing a business:

### Confidentiality agreement

Acquisitions are highly business sensitive. Depending on the size and nature of the transaction, you should try and sign a confidentiality agreement (also called a non-disclosure agreement) at an early stage.

This will generally require both parties to keep the deal secret until it is formally announced and protect any information exchanged by the parties.

A buyer should take legal advice before signing a confidentiality agreement to ensure that its position is adequately protected and its obligations under the agreement are reasonable.

## A guide to buying a business

### Heads of terms

Heads of terms are usually signed at an early stage of a deal before detailed due diligence. Heads of terms are also known as:

- heads of agreement
- memorandum of understanding
- letter of intent
- term sheet.

They set out the key terms of the deal and are generally not legally binding. However, legal obligations can be created inadvertently and a strong moral commitment can be created that could weaken the buyer's negotiating position later on. The buyer will normally prepare this document. A buyer should always take legal advice before signing such a document.

### Exclusivity agreement

An exclusivity agreement (also known as a lock-out agreement) gives the buyer a period of exclusivity in which to negotiate the transaction by preventing the seller from actively seeking or negotiating with other prospective buyers during the specified period.

An exclusivity commitment can be dealt with in a separate agreement or as part of the heads of terms for the transaction.

### Acquisition agreement

The acquisition agreement sets out the agreed terms governing the transaction and the mechanics of the deal (for example, the parties involved, the consideration for the shares/business, the timing of completion and any consents or approvals required before completion). It will typically contain a number of provisions designed to protect the buyer, including:

- **Warranties** - these are contractual promises given by the seller about different aspects of the target business (for example, that it owns all the assets and there are no disputes with third parties). If they are untrue, the buyer can sue for damages
- **Indemnities** - these require the seller to compensate the buyer (on a pound for pound basis) for specific liabilities if they arise (for example, potential tax or environmental liabilities)

- **Restrictive covenants** - these can prevent the seller from competing with the target business or poaching key customers or employees for a period following completion. They will only be enforceable if they are reasonable in scope, duration and geography.

### Disclosure letter

The disclosure letter is an important document that must be read in conjunction with the warranties in the acquisition agreement. A buyer cannot make a warranty claim for anything disclosed in this letter, although it may want to negotiate alternative protection for disclosed issues (such as a price reduction or an indemnity to cover the issue).

If the buyer knew about a problem before signing the acquisition agreement, it may be unable to make a warranty claim for that issue even if it is not disclosed in the disclosure letter.

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## About Willans

We provide regional, national and overseas commercial businesses, private individuals, charities and not-for-profit organisations with expert, practical and personal service.

Established in the 1940s, we are known for taking good care of our clients, many of whom we have acted for since they first started trading.

The firm is Lexcel-accredited, a UK quality mark awarded only to solicitors who meet the highest management and customer care standards.

What sets us apart is our distinctive mix of top quality lawyers (some of the best legal brains around), continuity (you know who you are dealing with), accountability (work is led by a partner) and our competitiveness (regional fee rates).

Don't just take our word for it, national independent legal directories recommend us year-on-year having spoken to our clients and peers about their experiences of our services.

## Meet the authors



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- handles both contentious & non-contentious issues
- protection of confidential business information
- particular focus on acting for technology and high-end engineering companies.



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