



Lowenstein Sandler's Emerging Companies, Venture Capital Podcast: The Founder's Hour

Episode 6

[Laura Cicirelli](#), [Eric Weiner](#), [Julie Levinson Werner](#)

SEPTEMBER 2026

Eric Weiner: Hi, everybody. Welcome to “The Founder’s Hour: From Idea to Exit,” happy hour conversations on forming, growing and Selling a Business, a Lowenstein Sandler podcast series. I am Eric Weiner.

Laura Cicirelli: I'm Laura Cicirelli.

Eric Weiner: We're partners in Lowenstein's Emerging Companies and Venture Capital Group. Whether you're forming your first company, negotiating your first term sheet, or preparing for an exit, the decisions you make early can shape your company's future.

Laura Cicirelli: Each month, we bring the conversations happening at our New York office to the broader founder and investor community, sharing practical, legal and business insights to help you navigate every stage of your company's growth.

Eric Weiner: Hey everybody. Welcome back to The Founder’s Hour. This week we have a very special guest, our employment partner, Julie Werner.

Last week we discussed price rounds, when a company raises a bunch of money. Then the question is what are you going to do with that money? Depending on the type of business it is, oftentimes they're using that money to start hiring the talent that's going to bring the company from the very early stage to the next steps in their life cycle.

Laura and I work very closely with Julie, and our employment team, on everything employment from the very basic, which we'll talk about to the very complex. We wanted to bring Julie along to help us all understand the issues, legal, business, practical, that we face. That companies face on the daily, and also to help answer some questions that Laura and I hear from our clients all the time.

Laura Cicirelli: Thank you for joining us, Julie. I think it would be really helpful for us to just talk from the very beginning. Now you have that money in the door and what are some considerations founders should think about when hiring talent?

Julie Werner: Early on, obviously, we have clients that are doing very complex things, AI, all these other things. I always like to make it granular. You have a lemonade stand. I know very few of our clients have lemonade stands these days, although Eric has a few.

Eric Weiner: We work with quite a few brands.

Julie Werner: In any event, you have two founders, and inevitably, maybe fast forwarding, sometimes there will be conflicts with the founders at different stages, including perhaps one leaving at one point or another, and maybe that's another episode, or maybe that's later in our discussion. When you're ready to hire somebody, often, the first consideration is whether or not they are an employee or an independent contractor, and how you're going to pay them, what you're going to pay them, how you're going to memorialize in writing what you're paying them.

That will depend on various things, including what state they're in, the amount of time they're committing, the degree to which they're involved with other things.

Eric Weiner: A lot of times we'll have clients be like, "we're going to hire a consultant." They're going to work 48 hours a week for us, come only to our office, and not be able to compete with anybody else. Now, that sounds like an employee to me.

Julie Werner: Often, because there is often a technically correct answer, and then to your point about practical, what's early stage, what's common? Often it boils down to risk assessment. What's your risk comfort level? Certainly, if you're just hiring one person early on, it may be a low-risk proposition whether they're properly classified or not.

As you start to grow, those things matter more, when you start to go raise money. I'm sure you guys would talk about reps that you're making and financing and things like that. Early on, as a threshold matter, who you're hiring, how you're classifying them, how you're paying them, how you're documenting, are immediate points of concern.

Laura Cicirelli: What are some factors when you're making the decision as a founder? Is this person really in this basket as an independent contractor, or an employee? What are some of those factors that we often advise them on and they should be looking out for?

Julie Werner: I always say the safest, most conservative option is to treat somebody as an employee and at least at a minimum, as a part-time employee, even if they're not giving a full-time commitment, there's lots of people who work part-time, and all that means is that you're taking out payroll taxes, getting workers comp insurance, and certain other base level things that companies don't necessarily think of, but if, and when, you don't have them, the penalties often are greater than if you had gotten them in the first place.

The time commitment, as you mentioned, the level of control. If you're exerting control, if you're giving direction, if they are limited, and where or how they can provide services to others, things like that. Oftentimes the state, states like California certainly are more rigorous in how they're classifying and treating people, but also like New Jersey, Massachusetts, all follow what's called the ABC test, which is the test that is used to determine if someone's an independent contractor or an employee. Nonetheless, it's always the safer, more conservative route.

That said, I'm sure most of the early-stage companies you guys are working with aren't necessarily doing that.

Eric Weiner: You can't always take the most conservative route, but it is a good point that you made about the reps, Julie, which is, when the company, and we just talked about a price ran round. There are going to be representations about whether or not you're properly classifying your service providers as employees or consultants.

I think if there's one, there's two... you break one egg, it's fine. You drop the whole dozen eggs, then it becomes a bigger mess. You have to be careful about that. If a client is unsure about, "what should I do? How do I classify the service provider?"

Definitely reach out to your counsel and make sure you're thinking about the implications of what choice you're making. The other thing is, sometimes we'll have clients who say look, "I want this person to

be subject to a non-compete,” but it's very hard to have a consultant or an independent contractor be subject to a non-compete.

Laura Cicirelli: Absolutely. We talked about the classification and now documentation, because a lot of times our clients, they're bootstrapping the company at this stage, or they have done a financing round, but you don't want to spend all that money you just raised on legal. What are the type of documents that they should be thinking about when engaging these type of service providers?

Julie Werner: A basic offer letter is pretty straightforward. The most important concept is employment at will, to make very clear in writing that employment as it will, to be clear about comp and things like that. Oftentimes, though, that's where you guys see issues about promising equity and how that's being framed. That's something that people want to make sure they're being thoughtful and talking to you guys about.

Eric Weiner: The equity point is important and oftentimes we will deal with a client, maybe a client is coming from another firm and are like, look, I issued all this equity to people, and all they've ever shown to us as an offer letter that says we're going to give you equity. An offer letter doesn't give anybody equity.

It might give them a promise of equity. There are other steps that companies have to take to actually issue that equity. I do think that is also a very technical part of an offer letter, which is usually just a few pages, where you should make sure you have good, templated language that talks about “subject to the approval of the board, we're going to issue some options in the future at fair market value” and all these other technicalities that we don't have to get into on this podcast.

I also think, Julie, what's interesting, a question I feel like Laura, and I get a lot, and in fact, I got this morning is, what employment agreements should the founders enter into at formation?

None, because you could have an offer letter, but it's not necessary. For founders, their shares and their vesting is going to be in a separate agreement, that's not an employment agreement. Julie, why would, I guess if we're taking it to the next step, let's assume the company has now raised it's money, it's hiring a C-level executive. He or she may

want an employment agreement. What would be the things beyond just the basic offer letter we were just talking about that someone would want, or a company would want to give them?

Julie Werner:

Well, every employee, regardless of C-level, should also sign what we call our NDIA, which is for non-disclosure assignment of invention agreement, which may or may not have restrictive covenants. Often for the base level employee, it's the offer letter with the NDIA. The benefit of an employment agreement is more so for the individual, less so for the company.

Really, what changes it from just being an offer letter is more informational as opposed to an employment contractual agreement or things like commitments for severance and circumstances when someone could get severance. Always make it clear it's conditional on signing a release. That's often a mistake we see early-stage companies make. They may make a commitment to pay severance if somebody were to leave and not condition it on a release, or things like accelerated vesting, or other considerations like that.

But in general, an employment agreement, I would typically say, is more so for the benefit of the individual than it is for the company.

Eric Weiner:

Because in those cases, usually it will have some severance. If you terminate the individual without cause or they quit for good reason, they're entitled to some payment. Whereas a general, at-will employee, you can be fired at any time. You can quit at any time. You're not going to be entitled to some payment as a result of that.

Laura Cicirelli:

Just taking a step back to the point, Julie made, which is a great one about the IP assignment document that is so important and something that we make sure that all of our founders, that's something you have to have everyone signed when they join the company.

On our first episode of the podcast, when we talked about formation, we talked about when you sign up to the company, you are assigning, when you purchase your equity all past IP you've done to this point in time to the company for your shares, but on a go forward basis, you sign a separate document that you continue to assign all that IP to the company so that whatever you do while you're working on this endeavor belongs to the company.

It is the same thing. Employees are treated the same way as the founders, in the sense that anything you do when you're engaged by this company belongs to the company. That's something that's certainly going to be diligence by investors in the future and a buyer.

Eric Weiner: I think that is just a critical point to reiterate, because I know we did speak about it at formation, but the special sauce of the company needs to belong to the company. You have service providers and employees who are helping you create that special sauce, whatever it may be. That has to be assigned over to the company.

If it's not, the company is not valued nearly as much as it should be, or if it is, you've given those service providers leverage to say that value belongs to me, so you're going to have to give me something to get it. Anytime you hire anybody, whether it's an employee or a consultant, make sure they're signing some sort of an invention assignment agreement to get the IP that they are creating on behalf of the company into the company's hands.

Laura Cicirelli: And these are documents that we talked about in connection with employees. But if you have someone like a consultant or an advisor, they have separate documentation that we would usually see. I get asked a lot of times by founders, is this person really a consultant or are they advisor? How do I know what the difference is between the two? In your opinion, what is really the difference there?

Julie Werner: I guess an advisor is probably more periodic. It's not as regular in terms of providing service. It's more of a resource typically, or just equity. Where an independent contractor is typically someone with more expertise for a specific project or specific engagement. It's more of a short-term engagement, where an advisor, although I'm sure you have at well, language is kind of a different construct.

Some states, like New York, for example, has this really cheesy name law called Freelance isn't Free, which requires that you have independent contractor agreements in writing, and if you don't, there's added penalties.

Eric Weiner: Penalties to whom?

Julie Werner: The company.

Eric Weiner: Like what?

- Julie Werner:** Double damages, and all this other kind of stuff. There's all kinds of inferences.
- Eric Weiner:** In practice, Laura, what we typically do with our clients is for advisors, we kind of have a pretty basic couple page advisor agreement where they're providing ad-hoc services, whether maybe they get a little bit of equity. Some of our clients will ask to over-equitize ad-hoc advisors who are giving you a couple of hours a month or maybe less of advice or advisory services or whatever.
- Definitely think about how much you're equitizing people because if you have a 10% pool, and you give ten advisors 1% each, you now don't have any pool left and you're very diluted. With an independent contractor, sometimes we'll see more defined services, maybe a more detailed agreement.
- Laura Cicirelli:** Very project based. You'll see too.
- Eric Weiner:** Exactly. I do think there are times where they should be clear about what they're providing expectations about what they're going to provide, and then some clear provisions about if you're not doing a great job, I can fire you.
- Julie Werner:** Well, I could terminate your consulting agreement.
- Also to your other point earlier, the confidentiality and assignment of invention typically would just live in the independent contractor agreement. Also, California has this weird quirk that you can't use the phrase "work for hire" for an independent contractor the way we would for an employee, or you could have the impact of sort of de facto making them an employee. It's not exactly the precise language for the assignment language for an independent contractor if they're in California.
- Eric Weiner:** I think the practical point there is if you're hiring anyone in California, make sure you're talking to an expert about it, because there's such quirks and nuances. There's one other thing I wanted to say about termination. Another issue we see with startups all the time is, you start your company, you start hiring advisors, or maybe you're putting together an advisory board. You want to have some great people on your website or something. And then you start running the company and they've all received equity grants that vest over time, but they haven't really done anything.

That happens. It's not because the advisors are bad. People are not trying to do a good job of you, but you are accepting a service or you're not. If advisors are not providing the services you expected them to, make sure you clearly terminate them so that they don't, three years later, you haven't spoken to them in three years, they come back to you and say, "I have a fully vested option that I want to exercise," when if you terminated them, they would not. It happens all of the time. You want to stay on top of your advisors.

Laura Cicirelli: We've mentioned compensating these service providers a couple of times now on this podcast. I do want to just flag that we will have a separate podcast episode where we go into more detail about equity grants, option grants, all of that stuff. Certainly, giving equity is a great way to incentivize these service providers. We'll get into that in more detail later.

Julie Werner: I do want to flag once somebody is an employee, or even if there's any question whether they're an employer independent contractor, there's wage and hour laws that apply. Certain states have mandatory thresholds to be considered what's called exempt or nonexempt. If a person is not making above a certain salary threshold and meeting a duties test, then they could be eligible for overtime, things like that.

When you're founders and you're working 100 hours a week and you expect everybody early stage to work 100 hours a week also, that's not necessarily true or a fair expectation. People will later come back and say that I should have been receiving overtime.

Eric Weiner: Can you give us a little bit of an explanation? What is the difference between an exempt and a nonexempt employee, and which one is entitled to overtime, and which one is not?

Julie Werner: Okay, there's a law called the Fair Labor Standards Act that is literally 90 years old, and it's unfortunately still the law. These some of these laws are very antiquated and they don't really keep up with reality. The Fair Labor Standards Act that was passed during the New Deal, like FDR is the law. The presumption is the starting point is that a worker, if they work more than 40 hours a week, is entitled to overtime at a rate of one and a half times their hourly rate.

To be exempt from that, to be excused from that law, you have to meet a series of tests. You could either, which they refer generally is the

salary test and the duties test. The person has to make above a certain salary. It's a flat salary every week. It can't fluctuate, can't deviate depending on the number of hours worked.

They also have to meet a duties test, and the duties tests range from being an executive, like supervising two or more people. Being a professional, they call it either a learned professional, somebody with an advanced degree, or a creative, somebody who is doing something that's fully creative. The computer professional exemption, which they make the distinction between somebody who's like a software engineer versus somebody who's working in like the helpdesk. Not to minimize a helpdesk, but they distinguish that to be typically an hourly level position, whereas somebody who's a software engineer, developer, coder, it's a bit nuanced in the test.

Eric Weiner: The most basic explanation would be if you're just an hourly employee, you're getting X dollars per hour and you're not salaried, you're going to be entitled to overtime if you over that particular number.

Julie Werner: Not only that, but even if you're nonexempt and you don't go over, there's still a requirement to keep weekly timesheets, so not having the time sheets is an issue.

Eric Weiner: It's an easy thing to foot fault. I'm sure a lot of companies are foot faulting this.

Julie Werner: Well, what happens candidly in the early stage, not to minimize people, but early stage, you don't have somebody sharpening your pencils for you. You're doing all the things.

Eric Weiner: 100%.

Julie Werner: At some point you're going to hire people to sharpen your pencils. Those are typically the people that are nonexempt. Once you start to, for example, grow a sales force, sales is one of the most commonly misclassified areas. Depending on whether somebody meets, again, certain tasks, we don't have to get into the weeds. Where we see, once a business is more commercialized and is really growing, one of the most common areas, whether they're misclassified or not, but where plaintiff's lawyers, though, for example, will push and try to claim misclassification is once you start to develop a sales force.

You're not there yet in the early stage, founders, but the goal is to get to that point.

Eric Weiner: Here, the misclassification we're talking about is not employee versus consultant. It's exempt versus nonexempt.

Julie Werner: That's right. In California, again, because it's California, it's not just 40 hours a week. It's whether it's eight or more hours in a day, which somebody could end up working more than eight hours in a day. These are all the things that collectively, at some point can make it tricky, which is why a lot of companies will use a professional employer organization, a PEO, like TriNet Justworks, Gusto, or Rippling to help navigate. They'll have the platforms to keep track of time, all the payroll tax withholdings for all the states, offer health insurance and benefits. There are pros and cons of working with a PEO, but on balance, I think especially for early stage companies, it really helps with a lot of the background groundwork.

Laura Cicirelli: I think that's important because I was just listening to all these different things and considerations when you're onboarding people. It's a great step in your journey as a founder to help alleviate some of the stress of taking it all on yourself when you can get a workforce behind you. However, if you then have to think about payroll taxes and all these things that you're not an expert in, it could be overwhelming, and having those resources is crucial.

Eric Weiner: You're moving 100 miles an hour. It is helpful to have help.

Julie Werner: Especially for remote workforce, where you're increasingly having people in different states and it's so hard to keep up. That is tremendous, once you're on the stage of hiring one to however many people, working with a PEO in early stages.

Laura Cicirelli: That's all great. Another thing that we get asked a lot is, especially when you're bringing on more C-suite level employees, or even the founders themselves at formation, but if they had previously just left another job. A lot of these C-suite potential hires are already hired by someone else, and they'd be leaving to come over to the New Co.

It's a question of what are they kind of obligated or held to at that company? Are there any conflicting covenants that we need to worry about in their existing documentation? What are some things to look

out for there, so that the company is not at risk of hiring someone who is subject to some type of restriction at their prior employer.

Julie Werner:

Certainly, as we just said, when you hire people, you want them to be signing all those types of things. You have to think about what they already have signed from their prior jobs to be mindful of that, and to make sure that they don't have restrictions like a non-compete or a non-solicit in particular. The laws on those are very state specific.

It's looking at the agreements we often get asked, early-stage companies will say we want to hire this person. We get a copy of the agreement, make sure that we don't have a conflict with the other company. I've had a few times where our own documents came back to us when they wanted to hire, and we can really help with that.

Again, to make sure that there isn't a restriction, and sometimes it is a workable restriction, and sometimes it's just to have a conversation.

Eric Weiner:

I find that that happens a lot where it's like "my manager knows I'm leaving. They know what I'm going to do," or "I have a good relationship with them." Leverage that relationship. It doesn't always work out this way, but we have seen many clients when they talk to their existing companies and say they're going to be starting a new company, and they're given a very clear waiver of any restrictive covenant to go and start their new thing. That doesn't work every time, but it does work quite a bit. It is a very important thing.

If you worked at a startup company or a more established company, you very likely signed an invention assignment agreement. You very likely sign a confidentiality agreement. You very likely have restrictive covenants you may not even be thinking about. It's also important if you're an employee at a company, and you're thinking of starting something, your invention assignment agreements may have language that says if you do any of this on company time, 9 to 5, or on company equipment, even if you're in your apartment, and you're working on a company laptop, that company my own your idea. That's another thing to understand, your existing employment obligations before you start your new thing.

Julie Werner: And conflict of interest policy. Even if you are not able, even if it's not a competing business, and even if it's off hours, they may still have a contract where you may still be required to notify them and get their consent. That's common. Especially, a lot of California startups will allow people. They understand and know they have side gigs, but they allow it subject to telling you in advance and getting a conflict waiver or a conflict of interest disclosure type thing, and that's important.

Laura Cicirelli: Why is this important? As we talked about earlier on the podcast, when you do a price round, there's going to be reps. You want to make sure that you're not in conflict of any of those reps about IP ownership and not being in conflict with any prior documentation that you may have had. And then also, an investor is going to diligence this stuff, and if you think, "they're not going to know what I signed with my prior employer." When you're pitching your company, you're going to talk about your past experience. An investor is going to know about it. LinkedIn is a huge thing now. People will know what you did previously and it may be on their radar.

Eric Weiner: I think the risk is that ultimately the thing you're creating is owned by somebody else, it's going to be a problem. I know Julie and I have recently been working on a number of things where the startup that's hiring, we're hiring the C-level executive. You really do want to vet those people that you're hiring. How they're behaving with their existing company, what their obligations are, because if their relationship with their prior employer isn't great, and maybe they're acting in a particular way, it could become the hiring companies problem.

Julie Werner: It could become the problem in a couple of ways. It certainly could be a potential risk of a tortious interference claim, or taking confidential information, allegations like that. Again, at some level, if you cheat on your first wife, you might cheat on your second wife. You need to think about how this person is behaving, and what are they going to do to me?

Eric Weiner: Now you've hired people and your workforce is going to be filled with people all different ages, of different genders, so Julie, when do the federal and state statutory laws start applying to these companies, just as the base level obligations that they have as employers?

Julie Werner: Most state discrimination laws apply, some as soon as having 1 or 2 employees, so very early on. Federal statutes are at a higher threshold. Title seven, which is the federal law of the Civil Rights Act that prohibits discrimination, technically doesn't apply unless you have 15 or more employees. Oftentimes when we do separation agreements, if the person is being asked to waive age discrimination under federal law, that applies to companies that have 20 or more employees.

At the state level, a lot of times, like New York, California, and New Jersey are typically... you should assume 1 or 2. Obviously, those are laws that prohibit discrimination. Regardless of size, we would never encourage our clients to discriminate based on those various characteristics.

Even things like leave laws. The federal FMLA doesn't apply unless you have 50 or more employees. FMLA is Family Medical Leave Act. That is a law that requires, again, once you reach 50 employees and other conditions for an employee's own medical condition, birth of a child or sick parent, spouse or child. At the state level, the state laws, many of them increasingly require making leave available for employees at much lower thresholds for things like their own medical condition, family member, birth of a child, things like that.

Again, it becomes very state specific. It's increasingly quite state specific in terms of those laws applying.

Laura Cicirelli: Those service providing companies that you talked about previously for payroll and all that, do they have any guidance on when these type of laws may be triggered to help founders?

Julie Werner: They always are careful to say they don't provide legal advice. I don't know that you can fully rely on them. At the same time, they provide HR support. They're supposed to.

Laura Cicirelli: It's a resource.

Julie Werner: They give so many caveats. I don't know that you could fully rely on what they're saying.

Eric Weiner: I know this sounds self-serving, but if you're seeking legal advice, talk to a lawyer. I mean that's just what you should do. The good thing about having experts that that know these laws backwards and

forwards and practice this law 24/7 is you will get a pretty efficient answer. Don't be afraid to ask.

The answer is going to be efficient, and it's going to be easy. There are edge cases. There always are. Don't take legal advice from non-lawyers. The one thing that I will say, you're not going to find it in a statute for leave purposes, but what we often see is you want to make sure that your equity incentive plan gives the company leeway with respect to leave and part-time services about how it can treat vesting of equity.

That is not going to be statutory. That's going to be contractual in the plan. That's another thing to think of. Sometimes we'll get a question. A person is going on leave and they want to make sure they understand how vesting works in those situations. If the plan isn't clear, the answer is not going to be clear.

Julie Werner: In general, commercially, we can say what's typically market, in terms of parental leave and things like that, a lot of the stuff is setting it up and you can collect benefits from the states in a bunch of the states. Some companies may pay the difference for some period of time, like parental leave and things like that.

Increasingly, men are taking seemingly just as frequently now as women. What's commercial in terms of paying the difference, yes, no, for what period of time? Things like that. Again, that also depends on market conditions. For a while people were increasingly generous. It seems people are scaling back, and that's understandable too.

Eric Weiner: What's a typical vacation policy that you see these companies taking?

Julie Werner: For many reasons, I think the best vacation policy is what I would call flex, the adult policy, which is: be responsible, take time, we want you to take time. If you have somebody who's taking off literally every Friday or Monday in the summer or those kinds of things. Maybe that's agreeable if the company is agreeable.

Early-stage companies may not have a 100-page employee handbook, but there are some base level policies that are important early on. Many states mandate, like New York, for example, it's mandatory to have a sexual harassment policy. Obviously, it's just good hygiene for any company. However, a PTO policy could be a half a page, but really

just spelling out the parameters because you'll often see people abuse those kinds of things.

Eric Weiner: I feel we hear about PTO policies quite a bit, and in my experience, it matches yours, which is when companies go to the flex policy, it seems like it's easier to manage. If you're an employee and you're taking advantage. It's just like if you're taking advantage of anything else.

Julie Werner: You still have to get your job done. Again, somebody will go out for some extended medical situation and they'll say, "I have unlimited, so pay me for three months." No, I'm not going to pay. It's not necessarily intended for that. Did we say that? Did we say except for this, that and the other? That's an early-stage policy that's not complicated that I definitely think is valuable. In some states it's just good hygiene to have like a sexual harassment policy.

A PTO policy early on I think is important, including if you're going to have a set number of days being clear and writing about whether you pay out or not upon separation, because some states require you to pay out regardless, but the states that don't will say, we will honor whatever your policy says, but you have to have it in writing.

For example, if you're in New York or New Jersey and you have a set number of days, they don't require you to pay it out, but you have to have said so in writing.

Eric Weiner: It's interesting. A lot of companies, when they're early, they don't focus on these policies. It's not like they're wrong for not focusing on these policies.

Julie Werner: But it's an easy thing to get done.

Eric Weiner: Usually once they hire an HR manager or someone, someone who has experience and is thinking about this 24/7, then those policies start getting put in place. This is also as you're hiring. It doesn't mean you were going to have to put in every single policy, but it is a worthy question to ask your attorney.

Julie Werner: Employees will be asking that too when you interview them.

Eric Weiner: We're going to move to termination shortly, which is important. Usually, these things don't matter until there's a termination, until someone is unhappy with the company and they want to start digging

in. When everything's going great, and this is the world we live in, startup land, everything's going great.

It usually is all great until something happens, and that's when you want to make sure you have the protection that you want. These policies seem to make sense.

Now I think we should move to termination. What are the things, Julie, that we want to make sure our clients are focusing on or taking or putting together paperwork-wise with respect to a termination of an employee?

Laura Cicirelli: Before digging in, though, I think that it's important to note the difference between when you terminate an advisor or a consultant, its very different than terminating an employee. A lot of times what we have in those documents, advisor agreements, consulting agreements, is upon a certain amount of time written notice the separation can happen. Now we're kind of diving into employees and kind of those additional considerations you need for employees versus independent contractors.

Julie Werner: An offer letter should make clear, employment as it will. You're going to have a handful of policies. Again, it's good to have an employment at will policy. That said, it's always good to be able to have a reason.

If somebody said to you in a sentence, "why is this person being fired?" I always feel like it's just best practice, that you should be able to have an answer, not that you're going to ever have to give the answer, but worst case, in front of a judge, a jury, or whoever. You want to be able to have a basis for it, and you want to be able to back up if you need to. If the person was a poor performer, we have a stitch of paper that could demonstrate show that. It doesn't have to be fancy memos, and it doesn't have to be... Performance management is a whole subject in and of itself, and you don't have fancy performance reviews either. It is always better to overcommunicate on those kinds of things than less. The best terminations are the ones that are not a surprise.

Eric Weiner: You want to be letting the employee know how they're performing over time. You just don't want on a Tuesday out of nowhere, terminate somebody because you've been thinking about it for a while and they had no idea that they were not performing.

Julie Werner:

Also, they could have improved if they had known. If there was something you were unhappy about and you told them, then at least, not even just from a fairness standpoint, which is a consideration, but also it costs you time and money to have to recruit, and find replacement, and all those kinds of things. Give them a chance and tell them the things, and if they don't do the things, then okay.

Then there's a whole discussion about how you terminate. It's not a debate. We've made the decision. It should typically be a relatively quick discussion. It should be respectful, all those kinds of things. Ideally, if you have the luxury of a second person who could be present with you, if you have the luxury of being able to offer at least a little severance condition on a release.

I just think a lot of it, you can at least try to minimize the legal risks, even just being human about it, and those kinds of things. Many of us, we associate our job, it's our identity. Just putting yourself in that person's shoes, I think, helps minimize the legal rights.

Eric Weiner:

We always tell clients that, look, even under the best circumstances, nobody likes to be told they're less than. It is an emotional thing and you have to give people grace even if it hasn't been the best working environment. It's a gut punch even in the best of circumstances. Treating people well is always the best policy period.

It is also from a legal perspective, a little bit easier when we say, look, we want you to sign this piece of paper pursuant to which you are going to release the company from any claims you may have, period, end a story, from before the period of time you sign the release, and usually that requires some severance.

It can be cash. It can be acceleration of vesting. It doesn't necessarily need to be cash, but you have to give some consideration to the terminated employee for the release to be valid. But that's best practice. And to Laura's point earlier about when you're dealing with investors and reps and warranties, it's diligence 101. If an employee is terminated and the company does not have a release, it doesn't mean you're not going to get the deal done, but it certainly means you're going to have to have a conversation about it. Everyone's going to ask the question, "what happened here? Is there risk? Etc."

- Laura Cicirelli:** The waiver is in there certainly. Sometimes we've also seen Julie, I think we just had this recently. We find the company says, oh my gosh, I never had this person assign their IP over to the company. Now they're leaving. That's a great opportunity to do any cleanup in the separation agreement. If there's anything else like that that needs to make its way in, confirm that the IP has been assigned.
- Eric Weiner:** You best believe, depending on how that termination went, that that is exactly the circumstance that that employee is going to use to leverage, and trying to get extract way more value out of the company than he or she otherwise could have.
- Julie Werner:** The language in the release will matter. Making sure there's certain exceptions and things like that. There are laws now, post "Me Too," that limit your ability to impose confidentiality about certain things. There are just compliance issues associated with that, but it is best practice. Even how you message it to the person, how you message it to the rest of the team, and all those kinds of things are definitely real considerations for startups as they're moving forward.
- Eric Weiner:** I know we don't always get super technical on this podcast, but what's the significance of being 40 years old?
- Julie Werner:** Back in the day, again, some of these laws are very old. I yearn for the days of being 40. In the 1960s when that law was passed, companies of a certain size, must have 20 or more employees. If you want to get an effective release as to an age claim under the federal age law, and the person is age 40 or over, there's certain specific language that you have to include, a certain amount of time that they have to review the release, time to revoke it after they've accepted it.
- Also, if you do a group layoff, which is just two or more people who are 40 or over, there are additional requirements. These are all things to think about.
- Eric Weiner:** Usually what we ask our clients when they tell us they're going to be terminating somebody, is "how old are they? What state do they live in?"
- Julie Werner:** That'll affect the language in the release.

- Laura Cicirelli:** When do you recommend having a release of claims? Do we need to sign a separation agreement with every single employee that we terminate?
- Julie Werner:** No. Firstly, sometimes people will ask for it in a resignation. You could. It feels a little weird in the sense that as if we're concerned about something. Once a company has it and it's an established practice, then people don't necessarily read too much significance in it.
- If you're doing it very one off and people know: "Oh, they don't normally do it," sometimes I get a little concern that somebody could read into it. I do, at some level, like it in any separation just for that level of consistency. That said, certainly there are situations that are higher risk than others, and that may result in negotiations about severance. Sometimes there's lawyers that get involved on the other side. Increasingly, ChatGPT gets involved. They're all writing things that used to think it was coming from a lawyer. Now it's coming from chat.
- Eric Weiner:** This circles back to a point, Julie, you made earlier in the podcast. If you're going to have an employment agreement with an executive or an employee, and it entitles them to severance, it is very important that that agreement makes clear that they only receive that severance if they sign a release.
- Julie Werner:** The company's form of release.
- Eric Weiner:** On behalf of the company, because that gives the company protection against claim later. You're going to pay out. Better get that release.
- Julie Werner:** I mean, really in general, dealing with startups is the same. A lot of what I do, I like the startups, the early stage because I feel like there's just a lot going on. The life cycle of an employee is pretty similar regardless of the size of the company. It's all the things to think about from early stage, recruiting and hiring, the performance management, the leadership absence, and then to the terminations.
- Eric Weiner:** The early-stage companies become late-stage companies. That goes back to our listeners who are probably used to Laura and I saying basement of the house. It's the same thing here. You're building the foundation, so that as the company grows you have the policies and procedures in place so you can go. You can run the business.

You don't have to worry so much about these little details. You're going to have an HR team. You're going to have your PEO. You're going to have your counsel. It's good to have this stuff in place.

Laura Cicirelli: Absolutely. That's why we talked about it after the fundraising. It's definitely something that's going to be a little bit more of a cost to the company, making sure that you have all this set up properly, but it's super important.

Well, now that we've really covered everything from the whole life cycle of service providers. Thank you, Julie. This was great. Everyone can reach out to Julie through [Lowenstein.com](https://www.Lowenstein.com) if they have any further questions. Thank you so much.

Julie Werner: Absolutely.

Laura Cicirelli: On this podcast, we talked a lot about equity grants and incentivizing service providers through equity. On our next episode, we're going to be joined by one of our executive comp team members to talk about that in more detail. I hope you join us then.

Eric Weiner: Thank you so much for joining us for "The Founders Hour." If you enjoyed this episode, be sure to subscribe on Apple Podcasts, Spotify, YouTube, or wherever you listen so you don't miss future conversations.