



Oscar A. Gómez of EPGD Business Law. Courtesy photo

COMMENTARY

## Resigning and Starting Your Own Business in 2022: Steps to Avoid Getting Sued

As the Great Resignation wave that started in 2021 is still among us, the United States is seeing more and more entrepreneurs in all aspects of the economy. For those that are contemplating jumping on the resignation bandwagon and taking the entrepreneurial route in 2022—“go for it but know what you are getting into,” contributor Oscar A. Gomez, partner and chair of the litigation practice at EPGD Business Law writes.

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By Oscar A. Gómez

As the [Great Resignation](#) wave that started in 2021 is still among us, the United States is seeing more and more entrepreneurs in all aspects of the economy. For those that are contemplating jumping on the resignation bandwagon and taking the entrepreneurial route in 2022—“go for it but know what you are getting into.” COVID-19 and remote work provided a pause for most in the workforce to look inward and decide if they were happy at their current job or wanted to do something else. That is a good thing. Happier people = more productive people.

Oftentimes the legal aspect of going from being an employee to being your own boss is unintentionally overlooked. The key to ensure a smooth transition from corporate to small business owner is “planning and research.”

If you are making the decision to resign and start your own business there are several steps you need to take beforehand to ensure that your new business venture is complying with the law to help avoid being sued or face litigation in the future:

Before anything else, you must ensure you are not violating any prior contracts. Since it is possible that you signed an employment contract or noncompetition agreement with your previous employer, it is highly advised that you review that contract prior to setting up your own business. That employment contract itself may contain noncompetition, nonsolicitation or nondisclosure provisions that may survive the termination of that contract. As a result, even though you no longer work with your previous employer, the employment contract executed between you and the company may have lasting effects on any new employment or business venture you undertake. If you are not familiar with all of the termination clauses and terminology used, it is recommended you take the contract to a business attorney who can help you make sense of it.

Once you are satisfied with and understand your obligations, the next step would be to set up your business as a proper entity. It is vital to lay a strong foundation when starting a new business and one way to do this is by setting up the business in the proper entity form—either as an LLC, corporation, LLP or partnership. Each of these business forms has its respective pros and cons, and it is essential that you undertake some research into which entity would suit your business best. There are also important tax implications for each business form and setting up your business as the “wrong” entity can have detrimental, long-lasting effects on your business.

For instance, if you are a lawyer wanting to start your own business you should create a professional association, apply for an EIN number with the IRS, and draft corporate documents. Lawyers have less to worry about in terms of noncompetition obligations than in other areas; however there is a Florida Bar approved correspondence that can be sent jointly from the departing lawyer and employer to current clients regarding representation going forward. Lawyers planning on leaving their current firm should play out that scenario in their heads before anything is put into motion.

Whether you are a sole proprietor, a partnership, or an LLC with several members, it is crucial that you manage expectations of every individual involved in the business venture by memorializing everything in writing from the very beginning. This includes creating operating agreements; employment contracts (if you plan on hiring employees); properly registering members when filing the registration of the business with the state; and confidentiality agreements.

Every business owner should have a lawyer, accountant, insurance broker, and banker that they can rely on. I cannot tell you the amount of cases I see where a small business owner has to deal with defending lawsuits that threaten the business in its early stages because they failed to get a certain type of insurance that would have been easy to procure but they just did not know any better. Consulting with a business lawyer early on in the process will help you know what you don't know. What laws you need to abide by, what permits you need to obtain, how to pay employees and independent contractors.

As with any entrepreneur journey there are milestones new business owners hit along the way. An exciting and often quite daunting one can often be taking that first step in being able to hire an employee/s. For the entrepreneur it signifies growth and knowing you are scaling your business to another level.

However, a common mistake entrepreneurs make during this time is misclassifying their employees. For example, it could be a simple mistake such as classifying an employee as a contractor, or a contractor as an employee, which may not seem like a big deal, but it is a very serious violation of the law. The most common kind of lawsuit faced by small businesses in this realm are Fair Labor Standards Act (FLSA) overtime claims. The problem starts many times simply by not keeping time records for employees and contractors and can extend to not paying overtime to employees. Not paying overtime many times comes in the form of paying a flat daily or weekly amount to employees who work over 40 hours a week (on a five day work week). This misclassification mistake is one of the easiest ways to get yourself involved in serious lawsuits and possibly face expensive litigation.

It is also important to note that simply calling someone an independent contractor or having them sign an independent contractor agreement is not dispositive in FLSA overtime cases. If the person actually did not work independent contractor hours, acted and operated as an employee, a court will find them to be an employee entitled to overtime pay. There are a variety of factors that courts look to here. It is crucial that you review the requirements for classification of both employees and contractors in your respective state of operation before hiring. Some employers misclassify with eyes wide open but many do it unknowingly.

While many are taking new chances in 2022 and taking the leap to resign and start their own business, it is easy to forget and think that you have enough knowledge based on your years of work experience to know what you are doing. However, the reality is that even the most seasoned professional in their field may be a complete “newbie” when it comes to entrepreneurship and it’s nuances.

It is crucial that you hire a knowledgeable business attorney to advise you during the process of setting up your business, as well as being able to aid you if any legal obstacles come up at any stage of your business. It's best for you to have reinforcements and backup than being caught off guard or having to completely derail your new business venture journey.

*Oscar A. Gómez is a partner and chair of the litigation practice group at EPGD Business Law. His practice focuses on Business Litigation, including but not limited to business and partnership disputes.*