

EPISODE 12

[0:00:00.2] AWB: Welcome to the Legal Road Map podcast. This is episode 12. Today I have a super special guest with me. I have Ashley Cox of Sprout HR. we're going to be talking about everything you need to know about hiring contractors and employees.

[INTRODUCTION]

Welcome to the Legal Road Map Podcast with lawyer Autumn Witt Boyd. She's bringing creative entrepreneurs the copyright, trademark, and business info you need. Learn how to navigate legal issues for your business and protect your rights so you can confidently build your dream business.

[INTERVIEW]

[0:00:43.1] AWB: Thanks so much for joining us today. If this is your first time listening, welcome. This is going to be our final episode in the first season of 12 episodes that's going to give you all the information you need to get your business legally legit. Today we're going to have a special link. You can access the show notes as always at awbfirm.com/podcast12, but our freebie today is going to be on Ashley's website. So be sure to listen, she's going to give you that link as we're chatting.

I'll go ahead and start with the disclaimer that I include on every episode, which is that this is information not legal advice. I am a lawyer, licensed in Tennessee but I'm not your lawyer unless you actually hire me and we do one-on-one work together. Everything that Ashley and I are chatting about today is going to be based on US law and she and I will both be sure — we are both in Tennessee, we'll both be sure to point out when you might want to speak with someone in your own state about something specific.

So, Ashley, welcome. I'm so excited to have you here.

[0:01:35.4] AC: Thank you so much Autumn, it is such a pleasure to be here today and to join you on the last episode of season one of your exciting new podcast.

[0:01:44.2] AWB: Yay! Well, why don't you give yourself a little introduction. I always mess them up, so I want you to just tell people a little bit about yourself and your business, how you work with creative entrepreneurs.

[0:01:53.7] AC: Absolutely. Well, I am as Autumn said, Ashley Cox and I'm the HR partner for creatives at sprout HR. I help you hire, train and lead your thriving team with confidence and heart and I really love helping you take the scary and the overwhelming parts of growing your team and making them simple and fun so that you can start taking action right away on those big goals that you have to scale your business and grow your team.

I'm excited to be here today; I love helping people really navigate kind of the craziness that is HR and hiring people and knowing the differences in those very confusing areas and so when Autumn asked me to be on her podcast today, I was thrilled. So I'm really excited and looking forward to a great show today.

[0:02:40.6] AWB: Awesome. Well, this is something I get asked about all the time, "Do I need to hire a contractor, do I need to hire an employee, what's the difference, how can I make sure I'm doing it the right way?" And in the legal world, employment law is a really specific area and so it is not my specialty, although I'm certainly dealing with it more now that I'm working with a lot of solopreneurs growing their teams and getting bigger. So I'm excited to have an expert here to get into the nuts and bolts of it.

[0:03:04.8] AC: Absolutely. Yeah, I've been in the HR field now for a decade and it's definitely its own little unique world, with employment law being so specific and there's so many different laws. So I have a lot of experience working with individuals in this very specific areas. I'm happy to help you and your audience.

[0:03:23.8] AWB: Yeah, this is definitely somewhere where it pays to consult an expert, because it's very easy to do something the wrong way. So let's start out just by talking about what is the difference between an independent contractor and an employee? I know that's a big question.

[0:03:36.3] AC: That is a loaded question, and if you do any sort of Google search on this, you are going to find so much different information. It really comes down to one pretty specific point, and that's the degree of control that you as the business, the company have over the worker and so we're going to use the word or the term "worker" to signify any type of person doing any type of work as we talk about this positions today. Because if we say "employee", that can be confusing when we're going to be talking about two different varied types of employee.

It's really the degree of control that you have over a worker in your business and you know, a lot of people think that an independent contractor is someone who just has their own business but even if a person has their own business, they can still be considered an employee by the laws in the United States. So it's really specific, some of the things we're going to talk about today, to help you differentiate between the two types of workers.

[0:04:39.3] AWB: Do you find, when you're working with clients that you suggest that they, as they're thinking about hiring a worker, that they start with an independent contractor or start with an employee. Is that something to think about as far as a timeline?

[0:04:50.8] AC: That's such a great question Autumn and honestly it's different with every single case. The reason I say that is because it depends on your business and your business needs. If you are a product based business for example — I've worked with some product based businesses before — that needs somebody on site doing physical manual labor like putting together orders and packaging those orders and shipping those orders out. That person's going to be an employee and you need to start there first.

However, if you're a one line entrepreneurs, say you're a coach or a consultant and you need a website designed or some branding done for you then you would be hiring someone who is not actually going to be working in your team necessarily, but is going to be creating a tool or helping you create a tool to use for your business. So it's really dependent upon what your specific needs are.

So when I work with clients Autumn, I always make sure to talk about, "Well, where is it that you're struggling, where do you need help, what specific task do you want to get off of your

plate?" So that way we can determine is an independent contractor right for you to begin with or is an employee the right person for you to begin with?

[0:06:00.0] AWB: That's a really great way to think about it. Now, when you're talking about a product based business, is it because they're in person that that is the important distinction or is it something else? What shall we think about there?

[0:06:10.8] AC: Yeah, there's actually several different reasons; there's a seven guidelines that the Fair Labor Standards Act or FLSA, actually use to determine when a person is an employee and when a person is an independent contractor. So, I'd love to go over those with you if that would be helpful.

[0:06:25.3] AWB: Yeah.

[0:06:25.8] AC: Okay, great. The first is the extent to which the services being performed are an integral part of your business. The more integral it is to you actually operating your business, the more likely it is to be someone who is an employee versus an independent contractor. A really easy example for everyone to kind of understand is a construction company that builds homes.

A carpenter is an integral part of that business because they're the person who is actually framing up and building a home. So that person would need to be an employee. But if the company hired let's say a software developer to help them put together a system to accept job proposals, to create bids, to help them with billing and project management, that person wouldn't be an integral part. They're not actually building the house.

So really making sure you understand is this person someone who is providing the direct service that we provide to our clients or is this someone who is providing a service that helps us in our business?

[0:07:29.9] AWB: That's a great way to think about it.

[0:07:31.1] AC: Yeah. Number two is the permanency of the relationship. Long term relationships are often viewed by the government as more of an employee type of relationship

versus an independent contractor relationship. So if you're thinking that his person is going to be on your "team" for a long period of time, then that may be something you want to look at as part of the entire package. Is this person going to be with me for a long time, what is their role, is their role going to evolve over time to become more of an integral part of our team?"

So making sure that you kind of look at that upfront and see what is my goal for this person? Is it going to be a one month contract, a one year contract or am I thinking really long term while I hope they stay with me for five years?

[0:08:17.5] AWB: If you're looking at someone who is just doing a project for you where it has kind of a start date and then they're delivering something to you, that sounds like that's going to be an independent contractor rather than employee.

[0:08:28.0] AC: Yes, that could. Independent contractors often work on very specific projects. So you think of individuals like graphic designers, you think of coaches and consultants like myself, attorneys like yourself Autumn. Those people often are working with you on a more short term basis, even if that short term is a year. That's still a lot less time than when you hire an employee, you hope they stay with you for several years.

Number three is the amount of the worker's investment in facilities, tools, equipment, programs, et cetera. The more investment or the more dollars they put towards those types of things, the more likely it is that they're an independent contractor.

[0:09:07.3] AWB: They're providing their own tools.

[0:09:08.5] AC: Yes.

[0:09:09.3] AWB: Their own way of doing whatever you've asked them to do?

[0:09:11.7] AC: Exactly. But if you're providing the tools and you're providing them with an email address that says you know, "Autumn@sprouthr.co" then that's going to look like an employee because they have now an employee email address with your company. So the more that they have invested both monetarily as well as being intertwined with your company?

[0:09:35.6] AWB: Yeah.

[0:09:35.3] AC: Then you need to take a look at the two differences between those. The next one, number four, is the nature and degree of control, which is what I mentioned earlier that the company has over the worker. Just controlling the outcome of the work or the end result isn't an employee relationship. If you're...

[0:09:56.1] AWB: So you say, if I hire somebody to do a website and I say, "This is the website I want," that doesn't necessarily make them an employee.

[0:10:01.3] AC: Correct. Really, it's dictating how they do the work and when they do the work. So let's say that you hire someone to do your website and you say, "Well I expect you to use this program." Let's say, "I expect you to use WordPress," but that person's a SquareSpace user and, "I expect you to build exactly this specifications using this specific html codes," and that person has no idea what you're talking about.

Or you tell them, "Well, I need you to work on my website between the hours of Monday through Friday, eight AM to 12 PM and then you can do whatever you want with the rest of your time." Those are very specific controls and so that would dictate an employee type relationship.

With an independent contractor, you can say, "Hey, I've got this project, I need this website built, are you available to have it completed by October the 10th, that's when I need this website to be completed." Setting a deadline is not controlling, that's just having an expectation in place that that's when the work will be completed by the independent contractor for your business.

[0:11:07.2] AWB: Got it.

[0:11:07.9] AC: Yeah. So that one gets a little crazy, a little nutso sometimes and I know folks get a little worried about, "Oh my gosh, am I controlling too much, am I not controlling enough?" But some of the things that you really are a benefit of having an employee is that you do have a lot more control. If you want someone who is working in your business and you want to be able

to have them working on specific programs at specific times of the day then you probably will want an employee versus a contractor.

The next one is number five; this one's a little weirdly worded, the way that the FLSA has this. The worker's opportunities to profit or loss — basically what it means is their kind of managerial influence — their ability to earn more money because of the things that they're doing in the market and marketing themselves or their ability to lose money because they're not taking on jobs or they're rearranging their schedule to plan for a vacation time or whatever that may be. Now, if that's an employee, you pretty much dictate, "You're coming to work these days, this hours, I'm paying you this rate," and you really have no influence over that.

[0:12:17.7] AWB: Right.

[0:12:19.1] AC: Hopefully that makes sense because that's worded a little bit funky.

[0:12:22.5] AWB: Yeah, I've heard this talked about too, you know, is there an opportunity if the contractor has some efficiencies? Like if they have a project done faster, can they maybe make more money, spend less time, and make the same amount of money. Do they have some kind of opportunity to increase their profit?

[0:12:39.3] AC: Absolutely.

[0:12:40.6] AWB: Which an employee, they just do the work and they work the hours and...

[0:12:43.8] AC: Then they get more work to do. Pretty much.

[0:12:47.0] AWB: Right, they can't really benefit if they are able to find a better way of doing something or to build some efficiencies into their process.

[0:12:53.1] AC: Exactly. That's kind of the benefit of being an independent contractor.

[0:12:56.5] AWB: To lose if they're really slow.

[0:12:57.6] AC: Yes. They really don't lose out then? Well, you know, that's a whole different side of HR. But yeah, exactly. You know, it's your ability to control your profit and loss through your ability to manage your own schedule.

[0:13:12.1] AWB: Right.

[0:13:12.6] AC: Number six is the amount of initiative, judgment, or foresight in open market competition with others. So this kind of ties into the last one and again, you guys, I'm really super sorry, this is not creative friendly lingo. It is totally government lingo, and so I try to make it really as simple as I can for you. Again, it ties in to the last one we just talked about, it's their ability and their initiative to really advertise their business as an independent contractor to make more money, to have more clients, to manage their schedule the way they want or have less clients or make less money. Again, if they're able to influence those factors then that would be an independent contractor.

The last one, number seven, the degree of independent business organization management or operation. More than likely, they're going to be an independent contractor if they have an EIN and a business name and a business license and they have that whole structure setup. But again, just because they have an EIN does not mean that the relationship is an independent contractor depending on how you are working with that individual. Then also, just making sure that you're not dictating to someone that they have to start their own business in order to work for you because that does not mean that they're an independent contractor.

That means that you've kind of finagled your way in there to get them to be a business so you didn't have to pay taxes, and that's not okay. Really making sure that you're being super cautious, if somebody's not already a business owner, with that establish not making them establish a business just in order to work with you. That's a really big no-no.

[0:14:55.2] AWB: You mentioned EIN and I just wanted to make comment that I spoke about that. That's an employer identification number and that's basically like the social security number for your business that you can use with the IRS and I went into that in detail in episode four. So if you haven't listened to that, hop on back and that will go into all of those details. We won't delve too deeply in that in this episode.

[0:15:16.8] AC: Yeah.

[0:15:17.9] AWB: Ashley, you've gone through all of this different seven things. Now, tell me how it works. Is it that you have to check off every single thing and you are an employer, you are a contractor or is there some sort of kind of balancing or how does it work?

[0:15:32.0] AC: Yeah, this is the fun part of the law that I wish I could say that there was a magic formula or there was a magic worksheet where you ticked off the numbers and when you got 20 points, you knew that you had an independent contractor. But that's not the way this works. Really, depending on the various laws, the person could be viewed as an independent contractor or an employee in various cases.

I did go over the most prevalent that is often the one that is audited and researched and that people are looking into with the Fair Labor Standards Act. That is what is going to be the most common that you should be taking a look at but I actually have put together a work sheet to help you figure out, "Okay, is this person an independent contractor or are they an employee?" And so we're going to put in the show notes a web link for you that you can go to sprouthr.co/yourteam.

That way you can grab that free worksheet and make sure that you are at least taking a look at what are the differences between an independent contractor and an employee, are the people working for me contractors or employees? Is the person I'm looking to hire, should that be an independent contractor or employee? And really helping you determine what's the degree of control that I would like to have or that I need to have and then being able to figure out what your specific worker will be.

[0:16:57.9] AWB: Yeah, that's awesome, that's going to be super useful.

[0:17:00.3] AC: Yeah, I hope so, it's definitely confusing territory to be in but you know, it's just really making sure that you're doing your due diligence and if you have questions reaching out and saying hey, I'm confused about this, I don't really know if this is a contractor or an employee and those are absolutely things that I could help with.

[0:17:18.2] AWB: Awesome. Now, tell me why this matters Ashley? We've been talking about the Fair Labor Standards Act, is that the law that deals with when you're supposed to pay overtime and hourly workers versus salary workers, all of that, rigmarole them all.

[0:17:30.9] AC: Yes, it has a lot of provisions in it that deal with hours worked and overtime pay and how long you can work an employee and what's considered fair and just and equal. Basically, it goes back to the saying a fair day's pay for a fair day's work. That's what the fair labor standards act was based on so many years ago like in 1930's.

It's just continued to evolve over time and so there's a lot of things in there that this does impact and misclassification of a worker is one of the biggest things that the government is watching right now with small businesses. Just in the last few years, they've really cracked down and the wage and hour division of the department of labor has partnered together with the IRS to start auditing and finding employers who are willfully and maybe unintentionally classifying their workers incorrectly.

Just in fiscal 2015, this resulted in over \$74 million dollars in back wages being paid by employers to over 102,000 employees or workers. That's crazy.

[0:18:46.6] AWB: Wow, they actually, yeah, they came after the employer, the business owner and said, "You didn't pay them enough, you need to pay them more."

[0:18:54.4] AC: Correct. That is just the implication of back wages. That doesn't count a whole host of other things that can be penalized if you're misclassifying your worker. So I have a list of some of those things that can be penalties. If you'd like, I can share those with our audience.

[0:19:12.9] AWB: Yeah, I think it's good for people to know what's the downside if you're doing this the wrong way.

[0:19:17.1] AC: Absolutely. I know a lot of you have probably thought about or heard the terms independent contractor versus employee and which one should I use for my business but if you

haven't considered the actual real very possible penalties of misclassifying your workers, this is definitely where you want to listen in and take some notes.

As I mentioned, over 74 million dollars just in the US alone, just in back wages was what happened last year and, you know, that could very easily shut down a small creative business, the thousands of dollars. So some of the things that can happen when we're misclassifying an employee as an independent contractor may result that they're being denied minimum wages. That they're denied overtime compensation that they're missing out on family and medical leave which is a federal program that they are missing out on unemployment and work place safety protections, not to mention anti-discrimination and anti-retaliation protections as well.

As an employer, if you're misclassifying an employee as an independent contractor, you could be liable for unpaid overtime, wages, back pay on wages, back pay on taxes, court costs, attorney's fees. Being scrutinized by the government at an even higher level going forward because they will come back and watch you and even punitive damages. Going above and beyond what you were responsible for paying as an additional punishment for not properly classifying.

Just like with any other law, this laws have statutes of limitations. So if you've been willfully avoiding coding or classifying your employee correctly, then you could be facing three years of statute of limitations and when they say willful, they mean, you knowingly violated or you were lax in your understanding and complying with the laws. Even if you're not taking the time to really understand and know what you're supposed to be doing, they don't care.

[0:21:19.1] AWB: You can't just burry your head in the sand.

[0:21:20.0] AC: Exactly. It's just like with any other legal matter, they're going to say, "Hey, the information was out there, it was your responsibility, you wanted to run a business." So don't get yourself in that situation. Autumn and I are here to help you work through things like that so that you can avoid paying thousands and thousands of dollars with back wages and tax penalties. Even things like I-9 form violations.

That's a form you complete when you hire someone on to your team that really verifies that they're able to be employed in the united states and if you are classifying someone as an independent contractor, you're obviously not filling out this form. But you've now just double whammied yourself because well you didn't fill out this form. It was an employee. Definitely a lot of things to really be concerned about and to really take seriously, not to scare you but to really help you understand what your responsibilities are as an employer.

[0:22:13.6] AWB: Yeah, it's always easier and cheaper to do it the right way in the beginning than to try and fix it when the government notices that you've done something wrong.

[0:22:21.7] AC: Yes, absolutely. We want to keep you safe and out of the radar.

[0:22:26.0] AWB: Yeah, exactly. Now why do you find Ashley that so many people want to classify their workers as independent contractors rather than employees? What's the upside to that?

[0:22:36.2] AC: Such a great question Autumn. The upside is that you're not going to be liable for their employment taxes. You're not going to be paying into social security, you're not going to be paying into Medicare, you're not going to be paying unemployment insurance or worker's compensation insurance and that's a huge savings to companies. Until you upset the government and you get to pay all that plus some. Then it's not a good savings.

[0:22:59.4] AWB: Right, you're not really saving by doing it the wrong way.

[0:23:04.2] AC: But you know, if you really legitimately need an independent contractor, that is a great way to help your small business avoid unnecessary costs. Just because you have the opportunity to hire an employee, doesn't necessarily mean you need one. Independent contractors are an amazing resource for our small businesses because they are very cost effective, they offer a great deal of flexibility.

So as your business is growing, there's all this weird peaks and valleys, right? You've got, "Oh my gosh, this was an amazing month and I'm on top of the world," and then the next month you're like, crickets. You know, it's a really great opportunity to have someone who can come on

temporarily as you need them to work on special projects or as you're able to take on more work flow. So they're a great way to help you scale your business and really grow smartly while saving you a bundle on taxes and insurances and other things that you're required to pay.

[0:24:01.9] AWB: Yeah, let's talk about an example that I think a lot of creative businesses, one of their first hires, is a virtual assistant.

[0:24:07.8] AC: Yes.

[0:24:09.3] AWB: Maybe not somebody who is coming into their office every day but they're working online, they're located somewhere else and I can just give an example of the virtual assistant I work with. She's actually located in Chattanooga here where I am, but we work totally virtually and it's awesome. I have tasks that I ask her to do but she's in charge of her own hours, she provides her own computer, she has her own business setup and she invoices me just for the hours worked.

So her hours kind of go up and down as my workload goes up and down. She was super helpful, I just had a baby in April, and she was able to help me during my maternity leave but obviously she was doing much less during that time. So it was great flexibility for me and my business with those peaks and valleys.

[0:24:51.8] AC: Absolutely.

[0:24:52.6] AWB: So talk a little bit about what people should be thinking about if they're working with a virtual assistant?

[0:24:56.9] AC: Exactly what Autumn just outlined. Just do it that way.

[0:25:01.2] AWB: Don't send them a computer.

[0:25:02.8] AC: Yeah. The reason I say that is because your virtual assistant Autumn is not providing an integral service in your business. Your business' primary function is to provide legal

counseling services to creative entrepreneurs. Your virtual assistant is not providing legal counseling services.

[0:25:20.5] AWB: Right.

[0:25:21.6] AC: Yeah, exactly.

[0:25:22.5] AWB: She's just supporting me.

[0:25:23.7] AC: Yes, exactly. She's supporting you and helping you get this things done. However, if this other things didn't get done, you could still do the integral part of your business. You could still provide those counseling services. So that's are really great example of a way to really make that visual, I guess, in our creative world.

[0:25:41.4] AWB: Yeah.

[0:25:41.8] AC: You don't control her hours but you have projects that need to be done and you have deadlines that that need to be met. If she wants to take on other client work, she has the freedom and the flexibility to do that.

[0:25:52.9] AWB: Yeah, and she does.

[0:25:53.7] AC: That's really important. The person that's working for you should not be working for you full-time. Otherwise, the government is going to be looking at that saying, "That's an employee, they don't have time to go out and get other business because you're keeping them so busy." When it gets to the point where you need someone full time in your business 40 hours a week then you need to have an employee versus an independent contractor.

[0:26:15.8] AWB: Yeah, that's a great way to think about it. Yeah, and I don't control her hours, she's free to work whenever is convenient for her. I ask her every now and then we'll set up a time to chat so that we can be on the same page.

[0:26:26.1] AC: Yeah, absolutely.

[0:26:28.2] AWB: Yeah, she has a lot of flexibility, which works really work well for both of us.

[0:26:30.2] AC: VA's are a really great place to start when you need a little help just breathing. Whether it's helping you manage the email or it's helping you manage social media or it's helping you do a variety of tasks in your business and you can find a VA who will work for you for two hours a week, or who will work for you for 10 hours a week. Or you need them less, or you need them more and so that again goes back to the pros of having an independent contractor is having that flexibility, being able to increase or decrease hours as needed. That person isn't reliant upon you solely for their financial wellbeing for their financial livelihood.

[0:27:09.6] AWB: Yeah, well I'm going to shift gears here Ashley, unless you had any other points on the independent contractor versus employee?

[0:27:11.6] AC: No, that's perfect.

[0:27:16.2] AWB: Awesome. Well, I want to just talk a little bit about some of the documents that you should have in place as you're working with any kind of worker, whether it's an employee or a contractor. I love contracts so this is something...

[0:27:28.8] AC: This is your jam.

[0:27:30.3] AWB: That's right. I always want people to have contracts. Something I usually recommend is that when people are hiring their first contractor that they do put a contract in place with that contractor.

[0:27:39.5] AC: Absolutely.

[0:27:40.1] AWB: Is that kind of a best practice that you've seen also?

[0:27:42.4] AC: Absolutely. I agree 100%, you should always have a contract in place to protect you and your business and also to help you set expectations as to how we're going to work together. What did we agree on when we came into this relationship? And that's going to help

you be able to manage your team, whether they're contractors or whether they're employees, a lot easier going forward.

[0:28:07.2] AWB: Yeah, talk with me a little bit about this term people have probably heard about being an "at will" employee.

[0:28:12.6] AC: Oh my goodness, yes.

[0:28:13.4] AWB: In Tennessee, we're an "at will" state, not every state is an "at will" state.

[0:28:17.7] AC: Yeah, every state except for one is now an at will state.

[0:28:21.9] AWB: Oh wow.

[0:28:21.7] AC: Yeah, I actually just read that last week. I was like, "I'm so impressed, I didn't know this." But yeah, at will just means that you can end the relationship or terminate employment at any time, with or without a cause and with or without a notice. So a really out there example is while Autumn, I know that you love the color purple but I don't love the color purple so sorry, you've got to go.

[0:28:47.2] AWB: You're fired.

[0:28:49.5] AC: You've got to go, we can't work together. Obviously that's going to create a lot more problems for you in the long run so I don't recommend that as you're firing reason.

[0:28:59.0] AWB: You can fire someone for any reason or no reason except to prohibited reason right? Something like, we can't discriminate because of a disability or gender or race. Those categories are still there.

[0:29:09.0] AC: Correct.

[0:29:10.6] AWB: So your independent contractor agreement then, it might change that requirement because you could put something in your contract maybe that does require the

employee to give you a notice or that does set out certain circumstances where you can or cannot be fired.

[0:29:22.9] AC: Yes, absolutely. You can override the employment at will law; you don't have to follow that. If you make that agreement though, you need to follow through on it and sometimes that agreement is in writing, like Autumn mentioned in the contract, and sometimes...

[0:29:38.5] AWB: It should be.

[0:29:39.9] AC: Yes, it should be, and sometimes it's implied by accident. You may say something like, "You'll always have a job here as long as you do great work," and I can see Autumn's face is about to explode because...

[0:29:51.8] AWB: The bad idea.

[0:29:53.0] AC: ...you don't want to say that because you never know what's going to happen down the road and you don't want to put an implied verbal contract into place when they may still be doing great work but all of a sudden, they are harassing your clients, or they're not being a team player, or the quality of their work is suffering even though they're still getting it done.

So there's a lot of different variables that you want to be very cautious of and I would encourage you to keep that "employment at will" contract in your paperwork and keep it in your mouth.

[0:30:31.5] AWB: That's great advice. Now, something that I typically will include in an independent contractor agreement or an employment agreement, if I am drafting them for my clients, is a non-compete what people may have heard of or a non-competition, non-solicitation provision. So can you talk a little bit about how that works, what those mean and people are always saying, "I've heard those won't hold up or they're not effective, so why should I even put them in there?" Can you talk a little bit about that?

[0:30:58.6] AC: Absolutely and feel free if you know, if you have things to add to jump right in as well. Since I know that this is what you live for a lot of days too. You know, having those things in place again protects you and your business and it also protects your trade secrets.

You know, you're inviting this people into your business and that's scary enough. I totally get it. I know it's hard to hire someone, I know it's hard to trust and to let go but the more layers of protection that you can have there, the better off you're going to be. With the non-compete, that means they're not going to be able to take your trade secrets now and go out and open a business "right across the street", I guess — right across the inter webs — that is exactly your business and has your trade secrets. Your trade secrets are protected so that they can't just hijack those.

[0:31:48.8] AWB: Right, they've learned everything you know about how to run a business that they can't take it and open up basically the same business with the same processes.

[0:31:56.1] AC: Exactly. Especially if you have, I know a lot of businesses have their custom process or they have something that they have developed or they have a methodology that they use or they have a series of worksheets that they've created to walk you through how to create this product or a process. Or even with a product based business. Maybe they have a really top secret way that they create whatever art it is that they create or the product that they create. Making sure we keep those nice and safe is a huge part of working with anyone and so that's the confidentiality agreement as well as the non-compete kind of all intertwined together.

[0:32:39.3] AWB: Yeah, they kind of go hand-in-hand. The non-compete is going to keep your employees or your contractors from going out. It can apply while they're working for you so maybe, although I know this is a little dicey because it might make someone look less like an independent contractor if you're saying they can't work for your competitors. It's a bit of a plus and a minus.

[0:32:58.5] AC: That one's a little crazy there. We're not 100% sure that one needs to be there.

[0:33:04.8] AWB: Right. I try and think about it mostly after they've left you, so either if you get fired, if you fire them, or if they just decide to leave and do something else that they can't open the same business or they can't go work for one of your competitors and that non-solicitation is going to keep them from soliciting or contacting your — either trying to take your employees or trying to contact your customers or other people that they had exposure to while they were

working with you. Basically you just don't want them to have an unfair advantage from having worked with you and then use it against you.

[0:33:34.9] AC: Exactly. I know that's where a lot of small businesses that do employ independent contractors don't allow them to have access to their client lists. So you can absolutely put safeguards in place depending on the type of work they're doing. Sometimes you're not going to really have much of a choice. Like with a VA, they're going to have a lot more contact and interaction with your clients. But, you know, other people working on projects for you don't necessarily need to have full access to everything.

Really being able to limit that exposure to multiple areas of your business as well will be a really smart way for you to help limit some of the things that can go wrong with non-competes and confidentiality agreements and things like that.

[0:34:18.4] AWB: Yeah, absolutely. If you want to learn more about trade secrets, that's the word we've kind of been tossing around, I went into that in detail in episode five when I talked about all different kinds of intellectual property.

[0:34:28.3] AC: Excellent.

[0:34:28.7] AWB: So go back and listen to that if you want more info on that. Trade secrets are so important to your business and this is how you protect them; you keep them under lock and key and you make your employees agree that they're going to treat them like the secrets that they are.

[0:34:40.1] AC: Yes, absolutely.

[0:34:42.9] AWB: So that's awesome. Can you talk a little bit about when we're looking at a non-compete, how it has to be reasonable and what people might need to think about there?

[0:34:49.6] AC: Yeah, definitely. I mean, you could make the wildest, craziest non-compete, that's not going to ever hold up in court.

[0:34:55.8] AWB: Exactly.

[0:34:57.3] AC: You know, there's definitely things within reason. You say, "Well, you can't compete within 25 miles of my business."

[0:35:06.1] AWB: If it's a really local business.

[0:35:07.1] AC: If it's a really local business, that would be a reasonable thing. On the internet, it's a little bit harder though. You can't really set a mileage parameter. You can't say, "Well you can't ever work with anyone else who is in my exact industry ever again."

[0:35:23.3] AWB: Right, "No other graphic designer."

[0:35:25.4] AC: It's like, "Well, you basically just shut them down," which the government is not going to look at as very kindly of you. Making sure that it's reasonable. Maybe it's you can't work with someone in a similar industry or in a specific niche for six months. Because at that point you're thinking, "Okay, by then most people have kind of started to forget things and maybe they don't have access." Obviously, you're going to take all the access away from them that they once had.

You want to make sure that they don't have access to your business and that they didn't just run out the very next day and say, "Oh my gosh, I have all this great secrets, I want to share them with you." Really making sure that it's not over the top and that's again one of those things that you would want to have an attorney take a look at. Is this a reasonable expectation? Is it not? And how can we make it a point that's valuable both for my business but also reasonable for their business?

[0:36:21.9] AWB: Right, and that it's going to hold up because putting something in the contract that then if you do have to sue over it and it's not going to hold up, you might as well not have it in there. It's just a waste of your time.

[0:36:31.4] AC: Just because you make a contract does not mean that it's actually legally defensible.

[0:36:38.3] AWB: I will say, non-competes are one area where the state law really is different in different places. Some states are really hostile to non-competes and other states have no problem holding them up. So you definitely want to consult with somebody who can check out your own state law on that.

[0:36:52.4] AC: Absolutely, I agree 100%.

[0:36:54.2] AWB: Awesome. Looking at some other things that people should think about when they're putting documents in place, tell me about what kind of forms, you mentioned the I-9, are there other tax forms? People have often heard of a 1099 for contractors, what are some other documents we should be thinking about?

[0:37:11.4] AC: Yeah, absolutely. It really depends on if you're hiring an independent contractor or you're hiring an employee. With an independent contractor, there's a lot less paperwork. That's another pro. They're responsible for paying their own taxes, they're responsible for invoicing you. You should not have them on your payroll. Oh my goodness. I saw something at a Facebook group the other week that I about just fell out of my chair on. Somebody was asking how to pay their independent contractor with their pay system, how to get them in their payroll system, and I was like, "No, no, no."

[0:37:44.9] AWB: Payroll is for employees.

[0:37:46.5] AC: Yes, don't they have their own business? Because they need to be invoicing you and if they don't, well that's a whole different situation. If you need to talk, let's talk. Yes, your independent contractors should be invoicing you just like they would invoice any other client. They shouldn't be on your weekly or your biweekly or your monthly payroll. They should be reaching out to you saying, "Hey, this is what's due."

You don't have any payroll paperwork to setup, you don't have any tax forms to fill out, you just have the 1099 if you're making or if you're paying over \$600. With which most of our services...

[0:38:17.6] AWB: For the year, correct?

[0:38:17.8] AC: For the year. If you're working with that person on a really small project and you pay them \$200 and that's it for the whole entire year, you don't even have to fill out a form. But if you're paying for a service of \$600 or multiple services that add up to \$600 or more per calendar year — so January 1st to December 31st — then you are required to send them a 1099 for tax purposes. If they tell you that they don't have to fill it out, send it to them anyways and let your CPA or your accountant know because that is what you should be doing.

I know last year, as I was seeing people online talking about, "Well I got this form and why did they send this to me?" I'm definitely going to be talking a lot about that this year and kind of helping you guys understand why it's important, why you should fill out the form and no, they're not trying to get more money from you."

[0:39:08.5] AWB: Right, and when it needs to be done, what the deadlines are.

[0:39:11.4] AC: Exactly.

[0:39:12.4] AWB: Awesome.

[0:39:13.3] AC: So we'll definitely talk about that. Right now we're recording in October, so November and December are coming up and the end of the year. But if you're listening to this any other time throughout the year, it is a form that you will fill in at the end of the year with tax time beginning of the next year.

[0:39:28.2] AWB: Yeah, and is there a best practice with when you should get that w-9? I know people often ask me, before they'll pay me, they'll ask me for the w-9. I think that's a great way to incentivize people.

[0:39:38.5] AC: Yeah, exactly. You know, it's just whatever works best for your business and some people like to be very proactive about it and to make sure that they're covered, especially if they already know, "I know I'm going to be spending more than \$600 with this person." If you're unsure of whether you're going to be spending \$600 or more with that person then I

would just recommend that you wait until you actually do because there's no sense in sending out a 1099 if you're not meeting the requirement.

Again, you work with a graphic designer who creates your branding and your website and all of this things and you pay them \$2,500, you know right away, go ahead and send the form. You can send the form anytime to this individuals throughout the year but you have to make sure that it is done and submitted along with your taxes. The sooner you can get it done and filled out, gives you time to kind of chase it around a little bit.

[0:40:28.5] AWB: It's never easy to get all of those, the paperwork in a row.

[0:40:32.4] AC: My mission and philosophy in life is the more proactive that you can be, the more problems you're going to avoid upfront.

[0:40:40.2] AWB: Preach.

[0:40:42.4] AC: We're on the same wavelength. As far as employees, obviously you're going to have the tax forms for your state that you need to fill out. So again, this was kind of one of those "I can't be a 100% specific because each data is very different". If you go to the department of labor website, if you go to your specific state labor website, there's tons of great information out there on each specific website and also, don't underestimate the power of your CPA. Those people know stuff.

They know lots of stuff, and so being able to get with your local CPA or the CPA who knows the state laws and be able to say, "Okay, I'm going to hire this employee, what specific tax paperwork do I need to fill out?" Because you're going to have the state tax forms, federal tax forms, you're going to have unemployment insurance, which is variable by state again.

You're going to have workers comp insurance, which is again variable by state that you're going to have to get set up as long, as well as with your pay roll system. With pay roll, you can do pay roll through a lot of different systems. I know that Intuit It has a payroll system. Square just added a payroll system, I've heard really great things about how easy it is.

[0:41:58.0] AWB: Oh wow. And a lot of people are already using Square for accepting payments.

[0:42:01.7] AC: Exactly, that's a great way to just build it right in and we all know how easy Square is to use so I can imagine that their payroll system is really easy. Another great system is Gusto. They're a really great payroll system. I've had a lot of really happy clients using Gusto and I'm not being compensated. This is not any sort of...

[0:42:19.3] AWB: These are just things we like.

[0:42:20.9] AC: These are just thing we like people, if we like them and they're easy to use, we want to make sure that you know about them as well.

[0:42:27.1] AWB: We'll include links to all of this in the show notes for this episode and that's at awbfirm.com/podcast12.

[0:42:33.5] AC: Awesome. There's a lot more to setup when you're going out to establish a relationship with an employee. So making sure that you understand those, and one of the things I do to help my actual clients is that I will do the research in the state for them so that I know what websites to go to. I know what's actually legit information and when there's people out there writing a blogpost that they're just saying what they think is the right way to do it because of their experience.

So when you work with me, I help you take off all that research, I help you get rid of the stress and the overwhelm of am I looking at the right information? Am I going to the right place? And then also if you do have the CPA or an accountant, they can help you go even further into the tax laws for your state because I don't deal with tax laws.

[0:43:21.7] AWB: Yeah, that's awesome, that's a huge value that you're giving to your clients to just get it all, make it easy, all in one place. That's awesome.

[0:43:29.3] AC: Absolutely.

[0:43:30.6] AWB: Well, Ashley, this has been so fun and I want to just wrap up by asking if there was one thing that you want creative business owners to think about as they're hiring their first worker, whether it's an independent contractor or an employee, what would that be?

[0:43:43.1] AC: It's never too soon to start thinking about it. Never too soon. I say that because there are a lot of things that go into hiring an employee, whether it's a contractor or an actual employee on your team, and the sooner you can think about it, do you have a one year goal? Do you have three year goals? Do you have five year goals? What do those goals look like? What does the team look like that you need to have in place in order to reach those goals. Because you're not going to get there on your own.

[0:44:12.8] AWB: You can't do it all.

[0:44:14.9] AC: If you expect to be making six figures in your business or you expect to hit a million dollars, you're not going to do it on your own and so it's going to take a team. Start now, even if you're in month three of your business. Start now, think about those goals and think about what kind of person you need to hire first in order to help you get to that next level in your business.

Because when you're proactive and when you think ahead, you're not going to get to the point where your pants are on fire and you're running around like a crazy person. You're like, "I don't care, I'll hire anybody who can help me." Because that's not going to help you and you're going to be hiring that person over and over because you don't have a plan in place to make sure you've got the right person on your team.

[0:44:55.8] AWB: That is awesome. Well, thank you so much for all of your thoughts and your insight and your expertise. Tell people how they can work with you, where they can find you, to learn more about all the awesome services that you provide?

[0:45:07.8] AC: Absolutely, thank you. Again, If you want to grab that free worksheet that we talked about, about how to determine if your worker is an independent contractor or an employee, just go to sprouthr.co/yourteam. You can find me online at sprouthr.co, you can find me on Facebook, SproutHR and you can find me on Instagram @sprout_hr. I'm also messing

around a little bit on Twitter this days, @sprouthr but I'm not sure I really kind of know exactly what I'm doing out there. So if you're out there, come find me and help me.

That's where I'm hanging out, I'm mostly active on Instagram and you can contact me, hello@sprouthr.co and that comes directly to me, and I would love to just talk to you. If you have questions, we'll setup an initial free consult. I'll chat with you about what your needs are, what your questions are and we can put a custom plan together to help make sure that you are hiring and training and leading your thriving team.

[0:46:08.6] AWB: Awesome. Well, thank you so much, I know you are my go to person when I have HR questions so I really appreciate you sharing your knowledge with the audience today.

[0:46:15.5] AC: Thank you so much, Autumn.

[0:46:17.4] AWB: Yeah, and that will wrap up our 12 season episode, I will talk to you guys soon.

[END OF EPISODE]

[00:46:25.9] AWB: Has listening to the Legal Road Map Podcast opened your eyes to the legal holes in your business? I'd love to help. I work with entrepreneurs who need help navigating the legal issues in their business; bloggers, online entrepreneurs and influencers, authors, photographers, videographers, musicians, and designers, just to name a few.

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