

Legal Considerations in Setting Up a Business

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Your business plan is finished so that your idea for a new business venture is outlined on paper. You've targeted your niche in the market and identified your financial resources. Now it's time to move from idea to reality and to turn your attention to the legal aspects of getting your new business venture up and running.

FORMING A LEGAL ENTITY

Not so many years ago, many small businesses were owned by individuals as either a sole proprietorship or general partnership. In today's business climate, however, it is of paramount importance to form your business in a way that will protect your personal assets and minimize the possibility that they will be exposed to attachment by creditors of the business.

It is important for asset protection purposes that you choose an appropriate form of legal entity to operate your business, rather than doing business either under your individual name or as a partnership. You have the choice of forming either a corporation or a limited liability company (LLC). Both are formed by filing either a Certificate or Incorporation (for a corporation) or a Certificate of Formation (for an LLC) with the State of New Jersey (or any other state that may be determined to be appropriate).

Of course, before forming an

entity, you will need to check that you have chosen a name for your business that is available for use (i.e., no one else has formed an entity under that name).

As part of setting up your business in New Jersey, you also need to obtain an employer identification number from the IRS and to register with the State of New Jersey. Your attorney, in forming the entity, will assist in those items, and will also draft Bylaws (if you have formed a corporation) or an Operating Agreement (if you have formed an LLC).

In order to be able to benefit from the limited liability protection that these entities offer, it is important that the formation of your entity involve the complete preparation of all appropriate documentation, in addition to filing the Certificate itself.

SHAREHOLDERS AGREEMENTS AND BUY-SELL AGREEMENTS

Now that you have formed your business entity and, in the process, have identified who the owners of the business are and what percentage interest each owns, you should consider having an agreement prepared that clearly identifies the duties and obligations of each owner and what happens down the road if one owner withdraws from the business.

If you have formed as a corporation, such an agreement will most likely take the form of a "Shareholders Agreement". If you

have formed as an LLC, it may be part of the Operating Agreement, or may be a separate "Buy-Sell Agreement".

These agreements address issues such as: What happens if one owner dies or declares bankruptcy? If the owners are active participants in running the business, what happens if one owner becomes disabled? What if one owner decides that she or he no longer wants to participate in the business and wants to sell her or his interest? Should that owner be required to sell her or his interest to the other owner(s) or should the ownership interest be freely transferable? How will the purchase price of any ownership interest be determined and how will it be paid?

The answers to all of these questions are important for the owners to agree upon at the outset of the business venture in order to minimize uncertainty and disagreement in the future that could be detrimental to the business.

EMPLOYMENT AGREEMENTS

As with the Shareholders Agreement/Buy-Sell Agreement, good business planning suggests that Employment Agreements be entered into between the business entity and the owners where there is more than one owner and where the owners are active participants in the business.

The purpose of an Employment Agreement is to clearly define the



duties of each owner in running the business, as well as to specify any salary and benefits. Questions as simple as the extent of each owner's ability to be reimbursed by the company for expenses, whether each owner is to have a car allowance or other allowance for technology (computer, blackberry, etc.) or the expenses of a home office, if any, and whether the owners are to devote their time exclusively to the business are important to discuss upfront in order to ensure compatibility of expectations and to avoid any disagreement in the future.

Depending on the type of business that you will be conducting, the inclusion of non-competition and non-solicitation provisions may also be important. These serve to restrict an owner who leaves the business from being able to compete with the business to its detriment by using the unique knowledge, experience, and customer information developed while an owner of the business.

These concerns are equally applicable to non-owner employees of the business.

LEASE OF SPACE

Wherever your business is to be located, be sure to have a lease in

place. This is important even if you only have a home office, as there may be tax advantages in having your business lease home office space from you as the individual homeowner.

Certain basic provisions are important and are in every lease. They

include a definition of the space to be leased, the term of the lease, and the amount of rent to be paid; whether the rent includes utilities; if there are any additional charges to the tenant such as real property taxes and/or maintenance expenses attributable to the leased space; whether the landlord is obligated to make any improvements to the space in connection with the lease; the amount of any security deposit; and the amount of any insurance coverage required to be maintained by the tenant. A well-drafted lease protects the tenant as well as the landlord.

Keep in mind that leasing new space usually requires that a Certificate of Occupancy be obtained from the town in which the property is located. A tenant should understand what that process involves and identify whether the tenant or the landlord has the responsibility to obtain such a Certificate.

LEASE OF EQUIPMENT

Virtually every business involves the use of equipment. The use may be as simple as leasing computers or a copying machine, or entering into a maintenance agreement for the operating systems at your leased space. In addition, for some types of businesses such as manufacturing

or production, leased equipment is key to the success of the business. The leasing of vehicles may also be important in operating the business.

Regardless of the type of business, it is important to identify what equipment will need to be leased and to have written lease agreements in place, both to ensure the availability of the equipment for the time period needed, as well as to quantify the costs involved from a budgeting perspective.

As an aside, note that if there is significant equipment that will be purchased for the business, it is important to identify whether the use of a separately formed business entity is advantageous, either for tax purposes, for limitation-of-liability purposes, or for both. Under such a scenario, the equipment purchased by one business entity would be leased to the related business entity for use in its operation.

SEEK LEGAL COUNSEL

The above discussion is far from exhaustive and only begins to outline the various legal considerations in getting your business up and running. It does, however, highlight the need to discuss your new business venture with a trusted legal advisor who will take the time to understand your business concept and be able to guide you in setting up your business. •

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