

Seven Essential Considerations for Opening a Business



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Getting Started

Starting a business is one of the most exciting things a person can do. Creating your own company can open doors you never imagined existed. You can control your own schedule. Your ability to make money can grow exponentially. And you can spend your life doing what you love.

Everyone hopes to create a successful business. And while proper planning cannot ensure success it can help alleviate some of the pitfalls that plague small businesses.

This guide is intended as a primer to help new business owners ask some tough questions while still in the planning stages so that they can make smart decisions on topics that will affect the longevity of their enterprises.

By creating your own business you're entering an exciting new world. Let's get started.

Entities and Limited Liability



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Almost everyone knows what a corporation is. It is a classic business entity. Many businesses of the businesses we interact with daily are corporations. Others businesses are different kinds of organizations like partnerships or LLCs.

Technically, you do not need an entity at all to do business. Many people do business as sole proprietors.

But many people choose to do business as an entity because of the advantages it offers. First and foremost for most businesses is limited liability. Limited liability is a special status that can separate an individual's personal assets from their business assets. Most entities have limited liability.

But other factors go into choosing an entity and which entity to choose. The decision is somewhat complex. Several major factors can help reach a decision.

First, consider the number and type of co-owners you have. Different entities do are better suited to uneven ownership than others.

The nature of the business will influence your decision. Professional businesses are often required to use a special professional entity like a PLLC or a Professional Corporation.

Future growth is worth considering. If your company is positioned to grow, some investors are more inclined to invest in corporations.

Finally, tax liability is an important consideration that should be discussed with an accountant.

A corporation is a classic business entity. Investors typically like it because it is easier to transfer an equity interest and because of the tax treatment corporations can enjoy under certain circumstances. Corporations are centrally managed by a board of directors. They have limited liability. And it is relatively easy to transfer of ownership. Corporations also continue to exist despite death or retirement of shareholders. One drawback of the corporation as a business entity is that it is arguably taxed twice – once at the corporate level, another time when the shareholder receives their dividend.

A limited liability company (LLC) is quickly becoming one of the most popular business entities in the United States. In many cases, an LLC can provide limited liability status without the sometimes onerous rules related to governance one sees in corporations. An LLC is not taxed at the business entity level like a corporation. An LLC has powers like a corporation: to sue and be sued, to enter into contracts, etc. But there are important differences.

To a very great extent, an LLC is what lawyers call, 'a creature of contract.' In fact, the Virginia Limited Liability Company Act, in one of its opening paragraphs, states that the Act "shall be construed in furtherance of the policies of giving maximum effect to the principle of freedom of contract and of enforcing operating agreements." See Va. Code § 13.1-1001.1. This means that the creators of the LLC can design internal rules and the overall structure of the company as they generally see fit.

An operating agreement is the private agreement between the owners, or members of the LLC, which outlines their rights and responsibilities. An operating agreement is a lot like the bylaws of a corporation. One of the most important terms you will have to decide for your LLC is whether it will be manager-managed or member-managed. The default rule is that an LLC is member-managed. If the articles of organization or operating agreement state as much, the LLC can be managed by managers.

A manager-managed LLC is more akin to the governing structure of a corporation. The name suggests their roles. Managers in an LLC are somewhat analogous to directors in a corporation; managers run the limited liability company as provided in the articles of organization, which is the forming document, or the operating agreement. There can be one manager or there could be many. The managers can act on behalf of the company, so-called limited members cannot. Their investments provide them with an interest in the company, but does not bestow authority on limited members to transact business on behalf of the company or to represent the company. In short, the managers become the agents of the company while the limited members are investors.

There are some other drawbacks to the limited liability company. One shortcoming of the LLC is that it can be tough to transfer an equity interest. A members can, however, assign their rights to receive profits. This interest is sometimes called the economic interest.

Fascinatingly, there can be general members and limited members. General members of an LLC typically manage the company, unless they designate the company as manager-managed. Limited members are typically investors.

Although the Virginia State Corporation Commission makes creating an LLC simple and affordable, there are certain quirks you certainly want to consider before moving forward with one. For instance, you would like to know whether you want to be taxed as a corporation or a partnership. Additionally, you would likely want to know how potential investors would view the LLC. Does an LLC make your business more attractive or less attractive to the investors, you want to court.

There are other business entities and depending on your needs, they may be preferable than a corporation or a limited liability company. Some of these entities include business trusts, real estate trusts, and partnerships.

Roles of the Owners



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A little planning can go a long way when it comes to forming a business. Though plans and positions can and often do change as businesses grow and evolve, some things are really good to have figured out before starting.

While states have default rules for businesses, it is usually a very good idea to have some form of private equity or operating agreement. This agreement is basically a contract that describes how a business will run.

In a limited liability company, it is an operating agreement. In a corporation, it is a shareholders' agreement and bylaws. In a general partnership, it is a partnership agreement.

But at their core all of these agreements define some important things about the businesses. One of the initial things that needs to be divided up is equity or ownership. Who gets how much? Can new owners buy in? What are the procedures for doing so?

Another important provision is a tiebreaker provision. At the beginning, it may seem like partners will get along forever. But what happens if that congeniality does not last?

Creating an agreement early is essential so that there is no confusion regarding the terms' applicability. A lot of disagreements arise when an owner resigns or withdraws with terms that are either nonexistent or unclear on relevant procedure.

Businesses with investors should have investor agreements. A corporation can conveniently have a continuing offer that

does not become enforceable until accepted – this is called a subscription agreement. Subscriptions for shares must typically be accepted by a resolution of the board of directors. Subscriptions entered into before the creation of the corporation are irrevocable for six months unless agreed to otherwise. Subscriptions are payable upon demand although it cannot discriminate among shareholders in calling for payment.

These agreements usually require an attorney with some experience to be put together properly. It is also good to have someone neutral to make people answer tough questions. It is good to get disagreements out early rather than letting them come to a head when all the parties have substantial interests tied up.

Businesses that hire labor need to wade through the myriad of employment laws: wage and hour laws, family medical leave laws (both state and federal), anti-discrimination laws, workers' compensation laws, and the list goes on. An attorney can help keep you compliant.

If your business would benefit from engaging independent contractors instead, it is imperative that these contractors are not misclassified employees.

A big part of correct classification hinges on control of the person.

Controlling how and what is to be done, tends to indicate exerting control consistent with an employer-employee relationship. So does controlling how the worker is paid, whether expenses are reimbursed, who provides the tools and supplies as well as other aspects.

Finally, Written contracts, pension plans, insurance, vacation pay, et cetera and the relationship being integral to the business tend to increase the chances that the arrangement is deemed one of employer and employee.

But the classification is not always simple; an attorney should review it.

Why is this important? Well, a misclassification can be really harmful to a business. The IRS makes clear that wrongly classifying an employee as an independent contractor without an

independent basis for doing so, can result in being held liable for employment taxes.

Depending on the jurisdiction and the number of employees you have, you will have minimum wage requirements, medical leave requirements as well as insurance requirements. By failing to comply, a business's owners can be liable for taxes, fines, or worse.

Do you need any licenses, variances and permits?



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Does Virginia or the U.S. Government require any permitting or licensing for the type of business you are conducting? Most businesses need a basic business license. But it gets trickier from there. Everything from martial arts instructors to contractors can require occupational licenses. Additionally, many localities will require occupancy permits, even for home-based businesses before allowing you to conduct business!

For international sales, the delivery destinations for your goods or services may also require licensing and compliance. The U.S. government may have restricted the sale of certain goods and services to certain countries, entities or people. Further, the United States has the right to restrict certain products and services, such as military technology. You'd want approval from the myriad offices, agencies and departments before endeavoring to sell restricted goods or services. It is not entirely intuitive what goods and services are restricted; advice from an attorney can be priceless.

Commercial Leases



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Rent is usually the single largest payment businesses will make every month, make sure you do not leave money on the bargaining table. The largest investment your business makes should be researched, reviewed and then researched and reviewed some more. It cannot be overemphasized that you should diligently negotiate the agreement. What should customarily go into the lease varies widely on many factors such as class, location and zoning of the property. Even if you understand what should be in the lease, the landlord may have a convoluted agreement that makes it extremely difficult to decipher its exact content. A lot of money is lost due to unfair lease terms. It can make or break a new business like almost nothing else.

Some common clauses you should pay attention to are the following:

Americans with Disabilities Act Compliance – Will the landlord or the tenant carry the risk of compliance? Everything from entrances and exits to the number and types of restrooms will be governed by the ADA. Who will be financially responsible? This is often an often overlooked, but very important provision in a lease.

CAM – Common area maintenance (CAM) charges are some of the net charges billed to tenants in a commercial triple net lease. The landlord will sometimes charge an administrative fee for carrying out the duties associated with this charge.

Triple Net – In addition to common area maintenance, taxes and insurance round out the three “Nets.” In a Triple Net

lease, the tenant agrees to pay the three items in addition to rent and utilities. CAM fees are generally negotiated up front and it is a smart idea to make sure they are reviewable and not too high. Accountability is key.

Percentage Rent – Although generally disfavored, sometimes a landlord will insist on a tenant paying, in addition to monthly rent, a percentage of gross sales. It is important to discuss whether a percentage rent is agreeable and what would be customary under the circumstances.

Delivering Possession – Tenants want the landlord to be on the hook for not delivering actual possession of the premises. Landlords don’t want to be on the hook for damages if the current tenant becomes a holdover, for instance. Provisions can be drafted that will fit a particular set of circumstances – perhaps having the tenant waive damages for failure to deliver possession in a pro-landlord lease and detailing damages in a pro-tenant lease.

Subassignment – Generally, a tenant cannot avoid restrictions on subleasing or subassignment in a commercial lease. However, if the tenant has a strong negotiating position, it can get language that would prevent a Landlord from arbitrarily withholding their consent to sublet.

Operation of Business – A tenant may want to discuss with their business law attorney what kind of business hours and restrictive covenants it can live with. For instance, if the landlord desires you are open seven days a week and you only need to be open five days, then a tenant may want to work

that out before agreeing to the landlord's term. It is common for these agreements to have terms that no one ever expects to comply with. This is dangerous because if not complied with, the provision's violation can form the basis for a very costly eviction. With a franchise or a chain, tenants may not want to agree to restrictions on opening similar stores within a radius of miles either.

Repairs – Repairs can be very general or very specific. It will depend on what side of the agreement you are on, but people may prefer a broad and general provision or a specific one. Typically, common areas and structural issues are the domain of the landlord to repair, but every case differs.

Morality – Increasingly, morality clauses are finding their way in ordinary agreements not just sports sponsorships. A landlord will prefer to hold a tenant responsible for its moral conduct and also that of its customers; a tenant will want these clauses removed from the agreement typically.

Insurance – These insurance provisions must be negotiated by experienced attorneys because they will be aware of what is customary – both the limits and the scope.

Indemnification – Tenant will generally protect the landlord or hold him harmless in case of loss arising from its own negligence, but an overreach in most circumstances would be when a landlord insists on the tenant holding the landlord harmless regardless of fault.

Destruction of Premises – It is in the tenant's interest to be able to walk away without further obligation in case of total or even partial destruction of the leased premises. The landlord will want to release the tenant only in its sole discretion or after a lengthy period of time.

Damages – There are different types of damages: compensatory, liquidated, consequential, incidental and the list goes on. Waiving them may be beneficial or not; this will depend on a number of different factors.

And there are tons more to discuss, but this is a snapshot of the important issues that an experienced business law attorney can negotiate to your benefit so that your business, whether landlord or tenant, can really have a shot at succeeding.

Many
businesses
have IP and
don't even
know it



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This is easily the most overlooked asset business owners have, but is often the most valuable. Businesses that own a business method, design or invention, may consider patenting it. Businesses that have trademarks, should consider registering them. Commercial literature can be copyrighted. Buying or selling intellectual property is also important to consider and manage carefully. The wording of such transfers can be both very difficult and very important.

A trademark can be a word or design or a combination of the two that identifies the source of goods. The more unique the trademark, the stronger the trademark will be. If the mark is descriptive, then it will likely not obtain any trademark protection; for instance, Chair brand chairs could never be trademarked. If, however, Chair brand computers wanted trademark protection, it has a much better shot because the association of chair with computers is arbitrary.

For even greater trademark protection, made up words work better. Kodak is one such trademark. Most businesses focus on a name and mark protection much later in the life of the business, reasoning that they need not worry when there are other more important things to think about such as orders and accounts receivable. This is a huge mistake. Consider the business impact if and when you're sued for having a confusingly similar name and you need to change the name of the company. All that good will goes out the window! Consider your trademark early on and protect it then. Trademark law is territorial, which means people want to seek the protection of their marks wherever they envision their use.

Copyright is also a form of intellectual property. It is a legal right bestowed on a creator of a work fixed in a tangible medium of expression, usually written down. Copyright grants a bundle of rights, typically the rights to exclude others from selling, distributing or using your copyright without express permission for a term of years (the life of the author plus 90 years in the United States). Copyright does not protect ideas in any meaningful way, but the way the ideas are expressed. There are other limitations and exceptions. Further, as a business owner, you will want to know how to get your creative staff to appropriately assign their intellectual property to the company without reservation.

Patent is a product or process that meets the requirements for patentability, such as novelty, usefulness and non-obviousness. The protection is short-lived, but it offers the patentholder the exclusive right to use the technology or invention without the fear of others copying the technology and using it. The protection period is short-lived. The patentholder obtains a patent in the United States by being the first to file. Therefore, quick action is advisable. What is patentable is constantly changing and the courts struggle to keep up with the state of the art.

Intellectual Property is much more complex than a short summary on the three major types can describe. If you have an intellectual property question, you should consult privately with an attorney.

Financing



Financing new businesses can be tricky. Banks will usually require personal guarantees from small businesses. So before going into business with people it is often wise to review their assets and credit-worthiness.

A new business should have a set plan of the initial capital expenditure of the new partners and investors. Many businesses take months or years to turn a profit. It is important to plan for this and have enough capital to keep running. Information is widely available on the amount of time various types of businesses take to get to profitability. It is much better to estimate profitability at the long end of the standard timeline rather than an overly optimistic shorter estimate.

Before starting, it is essential to put together a budget—usually for several years. It is important to have a discussion at the beginning of a business whether the initial investors will add more capital if funds run short, at what point they will add capital, and whether they have money to contribute.

It is also valuable to set out conditions before starting where if the business is not doing well, it will declare bankruptcy. Failure is not fun to think about. But it is often less painful when carefully planned out.

Beyond cash in hand, business owners may be able to take out loans for the business. But most banks will require personal guarantees for loans to new businesses. So the limited liability that the business worked so hard to get may not matter much in the case of these loans.

A business can also seek financing through investors. The SEC and state laws have made it a little easier for small offerings to occur. A ‘small offering’ in this context means an amount or number of investors deemed small by law or regulation. However, there are still reporting requirements in most instances.

A business owner will want to see if its prospective offering will be exempted from the registration requirement and to comply with whatever requirements may be left to deal with, both state and federal. So it is smart for businesses taking money like this to consult an attorney to be certain they are compliant with all applicable laws.

Additional Resources



**For More information about our law firm, contact us
at info@coppolajabaly.com**

or visit our website

www.coppolajabaly.com

Additional resources

[Virginia State Corporation Commission](#)

[IRS Definition of Independent Contractor](#)

[SBA Starting a Business](#)

[Department of Professional and Occupational Regulation](#)

[Arlington County, Virginia Information for New Businesses](#)