

Key Issues for New Business Start-ups

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Overview:

- ❖ Choosing your Business Structure
 - ❖ Business Plan with flow of funds
 - ❖ Raising Capital/Funding-bank loans/private funding/third party investments
 - ❖ Filing Entity (Corp/LLC) with State of NJ
- ❖ Business Professionals – Attorney/Accountant
- ❖ Operating Agreements
- ❖ Market Research – Know target customers
- ❖ Hiring Employees and Employment Contracts
- ❖ Buy/Sell Agreement – provisions for sale of LLC ownership interest/corporate stock
- ❖ Tradename/Trademark – Registration

- ❖ “If you fail to plan, you are planning to fail”
 - ❖ Benjamin Franklin
- ❖ READ EVERYTHING!

Challenges of Starting a New Business

- Leaving your day job – Managing dual careers
- Raising Capital
- Hiring the Right Professionals (Legal/Accounting)
- Building a team with defined responsibilities
- Marketing Strategy
- Time Management
- Fatigue

Choosing Your Business Structure

- Of all the decisions you make when starting a business, one of the most important is the type of legal structure you select for your company. This decision will have an impact on how much you pay in taxes, the amount of paper work you will be required to do, the personal liability you face and your ability to raise money.

Types of Business Entities

- A sole Proprietorship is the most common form of business organization. It is easy to form and easy to control. However, the owner is personally liable for all financial obligations of the business.
- A partnership involves two or more people who agree how to handle the profits or losses of a business. A primary advantage is that the partnership does not bear the tax burden of profits or the benefit of losses – they are passed through to partners to report on their individual tax returns. A primary disadvantage is liability – each partner is personally liable for the financial obligations of the business.

Types of Business Entities

- A Corporation is a legal entity that is created to conduct business. The corporation becomes an entity – separate from those who founded it – that handles the responsibilities of the organization. The corporation can be taxed and can be held legally liable for its actions. The corporation C-Corporation is subject to double taxation at the corporate level and again at the shareholder level. The key benefit of corporate status is the avoidance of personal liability. The primary disadvantage is the cost and the extensive paperwork required.
- S-Corporation – is the more attractive to small business owners than a C-Corporation due to tax benefits while still providing business owners with the liability protection of a corporation. Income and losses are passed through to shareholders and included on their individual tax returns and as a result there is just one level of federal tax to pay.

Types of Business Entities

- Limited Liability Companies, often referred to as LLC's have been around since 1977 and are popular among small business owners. An LLC is a hybrid entity, bringing together some of the best features of a partnership and corporation. The LLC creates a separate and distinct legal entity by isolating business assets from the members' personal assets and providing limited liability to the members of the LLC.
- If a business is sued, the plaintiff can only go after the LLC's business assets and not the owner's personal assets.
- Why use an LLC
 - Limited personal liability
 - Tax simplicity
 - Flexible Management – operation less formal than a corporation, usually only requiring an Annual Members' Meeting and Members agreeing to changes of the Operating Agreement and other major company decisions
 - Flexible distribution of profits and losses
 - Pass through tax treatment

Forming a LLC

- Necessary documentation
 - **Operating Agreement**- Sets out the terms of the business formation, purpose (limited or general), identify members, percentage of ownership interests, sharing of profit and losses, indemnification of Members and Managing Members.
 - Number of Members or Manager(s)
 - File with the State Corporation Commission or Secretary of State
 - EIN number- Is like a social security number for your business. It is essential to get your EIN number assigned as quickly as possible. Transacting without an EIN number will forfeit legal protections.
 - Designation of the Tax Partner to handle tax matters.

Buy Sell Agreement for LLCs and Corporations

- A legally binding contract that stipulates how a Member's/or Shareholders shares may be distributed if that partner dies, becomes disabled or otherwise leaves the business. Normally sold to remaining partners.
- Succession Planning: (Corporation/LLC) In the event of death, disability or unfortunate circumstance, designates where ownership interests or shares are to be distributed and price/terms. Avoids new Members who have no idea about the business but are going to leverage the remaining members for the maximum sale price of ownership interest/share.
- Restricts members/shareholders from selling their interest shares to outside investors without approval of other members or Shareholders, Percentage of required approval negotiated from 51% to 100%.
- Establishes a method for determining a business' value
- Concept of Minority Ownership- The value of a minority interest (<50%) of LLC is worth less than its actual percentage of the ownership percentage of the ownership interest share due to minority ownership and corresponding lack of control.

Business Leases: Material Clauses

- Construction Allowance:
 - Based on per square ft, also a bases for increased rent
- Security Deposit:
 - 1-3 months rent in advance held in rent account maintained by Landlord.
- Personal Guaranty:
 - For a start-up landlords will ask for a personal guaranty in connection with the lease agreement
- Operating Expenses:
 - Proportionate Common Area Maintenance (CAM) share of the landlord's operating expenses of building operating Statements to be provided to Tenant with back-up documentation upon request.
- Individual Component of Rent
 - Gross amount paid or Net lease meaning the tenant pays Real Estate Taxes, Insurance, proportionate share of operating expenses (triple net); maintenance etc.
 - Base Rent is only the rent for the space without addition components for tenants share of real estate taxes, maintenance, operating expenses.

Business Leases: Event of Default

- Consequences (Default)
 - Re-entry – the circumstances for the landlord’s right of re-entry should be specifically detailed in the lease such as nonpayment of rent, breach or nonperformance, failing to occupy, abandoning the premises or unauthorized use.
 - Acceleration Clause- Allows landlord to declare all amounts due under the lease are immediately due
 - Lease Termination- Landlord is given the right of re-enter and take possession of the property. Right of termination should be specified in the lease and should only be exercised upon written notice to tenant.
- Negotiate a 5-7 day written cure period.

Tradenames/ Trademarks

- File for trademark with the USPTO – takes 6 months to 1 year
- www.uspto.gov
- Tradename – tradename registration is limited to sole proprietorships or general partnerships. Businesses that are incorporated or formed as limited liability corporations or partnerships, must file with the State of New Jersey.
- <https://www.state.nj.us/treasury/revenue/regmark>

Get the right business lawyer

- In a effort to save on expenses, startup businesses often hire inexperienced legal counsel.
- Lawyers or the law firms should have expertise in most, if not all, of the following legal areas:
 - Corporation, commercial, and securities law
 - Contract law
 - Employment law
 - Intellectual property laws
 - Tax laws
 - Franchise laws

Hiring Employees

- Have employee sign a well-drafted employment “at will” letter (allowing you to terminate the employee for any reason, except for discrimination).
- Confidentiality and Non-competition Agreements (Restrictive Covenants) to protect proprietary and confidential information: customers, formulae, financial information, research and development and marketing plans.
 - A post-employment restrictive covenant will be found reasonable if:
 - A. It protects the legitimate interest of the employer
 - B. It imposes no undue hardship upon the employee; and
 - C. It is not injurious to the public
 - *Karlin v. Wienberg*, 77 NJ 408, 417 (1978); *Solari Indus., Inc. v. Malady*, 55 NJ 571, 576 (1970)
 - NJ Law will not enforce restraints “merely to aid the employer in extinguishing competition” *Whitmyer*, 58 NJ Super. at 33.
 - Pending legislation to restrict enforceability of employee restrictive covenants – The California Trend

Hiring Employees

- NJ Sick Leave Law (effective 10/29/18)
 - Applies to any business entity irrespective of size
 - Certain Exceptions: public employees, employees covered by collective bargaining agreements.
 - Accrual – 1 hour for every 30 hours worked up to 5 days per benefit period – can front end the 5 days from the first day of employment

Most common forms of Litigation

- Contract disputes/non-performance/non-payment/breach
- Business Disputes – disputes among shareholders/members- allocations of profit/losses; management and transferee of shares/ownership
- Real estate – dispute or breach of lease agreement
- Employment Agreements – employee disputes; termination; pay
- Discrimination-NJ Law Against Discrimination (NJLAD); federal laws
- IRS/TAX – Filing annual tax returns with IRS and State; sales tax returns with remittance of applicable sales tax; payroll tax

Presentors

- Rudi R. Grueneberg, Esquire
 - Managing Member- Grueneberg Law Group, LLC
 - University of Pennsylvania – Wharton School
 - Villanova School of Law
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- Scott Dougherty
 - Current Law Clerk and Student – Delaware Law School
 - Fairfield University – Finance and Management