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Incorporation, LLC or LP Formation Checklist

* **Ownership of Intellectual Property**
	+ Who owns the IP, or rights to the Idea, Technology, or Trading Strategy?
	+ Co-developed with another party? If so, are rights assigned to you?
	+ Developed while you were employed elsewhere? Employer rights to it?
	+ Difference if they fired you?
* **Non-Compete Agreement**
	+ Does your current employer’s **Non-Compete Agreement** or **Employment Agreement** impede your starting your business? To what degree?
	+ Applicable after you leave? What if they fired you?
	+ Consider perhaps negotiating a supplement or waiver to the agreement that would allow you to start your business. Perhaps you can carve out a narrow exception, and can compete in their space, but not approach their customers or employees?
* **Intellectual Property**

 See an intellectual property lawyer about protecting your rights in: Copyrighted materials (writings, software, etc.), any Business Method or process that might be patentable, or any invention, device or composition; Your Trade name, Trademark, Logo, packaging, sound. If writing software based on others such as MS, get the developer’s kit, which licenses you to do so. Do not publicly disseminate your work or your idea until your legal rights are protected, or you may permanently loose them. IP rights are applied for in individual name, so you can take this step first, before you incorporate.

* **Trademark Issues Triggered by the Corporate Name Selection & Search Process, and by Product Name Selection.** Key to avoid “confusingly similar” words used in a similar industry. Importance of proper name searches and mechanisms for accomplishing them. “First to Use – Wins”. *See separate document “Name Search and Selection Check List” for critical name selection issues before incorporating.*
* **Website and IP Issues. Website Development.** Start sooner than you think. It takes longer, requires more time, attention, thought and revisions than you think. Informational websites are inexpensive and generally fast; however, any type of product or service website or e‑commerce transaction can be very expensive and take a long time to build.
* **Due Diligence,** Conduct it on any party with whom you will do business, customers, suppliers, and any employees or officers you hire. You are judged by the company you keep. Importance of conducting it, on your own partners, any business associate, any alliance partner, any employee, and any investor or any business you buy into. Background checks are $150 or less, worth their weight in gold so you walk into anything knowing your “partner”.
* **Accountant (Tax Professional)** – Involve your tax accountant early on, at least at this point, to weigh in on entity choice, “taxed as” status, and fiscal year ending date.
* **Entity Choice – Corporation or LLC**
	+ **This decision requires a discussion between your accountant and your lawyer, because both tax and legal issues are implicated.** *See your tax advisor, as the decision is very specific to your type of business, what level of income you expect, your personal tax situation, your spouse’s, benefits you receive from other sources.*
	+ **No sole props** because of liability, lack of professional appearance and reluctance of some large companies to hire you as sole prop as you would be deemed an employee of theirs unless you have your own company.
	+ ***Corporate entities***
		- Highly recommend S Corp (or C Corp) for most operating, non‑service, non-investment, and non-trading businesses. Your accountant may advise us to form C Corp or S Corp.
		- Use Corp (not LLC) if you will have equity investors in your business, though some sophisticated VC investors may want LLC if they expect long term losses. Use Corp if you will go public (very rare).
		- Form as an S Corp, then you can easily (automatically) change to C Corp status if you have future entity investors (other than trusts).
		- Use Corporation if you will be having employees who will receive stock (Stock plans, options, awards more complex with LLC. See your tax advisor if you will have employees, or want to pay benefits to yourself as an employee).
		- Use LLC for a one-person service company and will always stay that way, where tax flow through is the only way to go. (See tax advisor)
		- Use LLC or LP for trading fund investment fund, or real estate, where flow through is key.
		- Use LLC if any of the shareholders are not US Citizens or resident aliens.
	+ ***Funds and Fund Managers***
		- Form Fund Manager as S Corp or LLC, and
		- Form Fund as LLC or LP.
	+ ***LLC:*** LLC ongoing legal costs are a bit more for LLC than for corporation
		- Formation is $325 more in filing fees. (However this $325 higher cost should not be a deterring factor if LLC is the right form of entity for you, but ongoing legal fees might be.).
		- Operating provisions are intentionally omitted from the LLC statute, to allow for flexibility. Instead, they are to be included in the LLC agreement. Much flexibility in taxation, payments of profits, however.
		- LLC agreements (with flexibility) are therefore custom, and therefore can be more costly in legal fees.
		- Less case law, in the event of litigation; some unfamiliar issues. Though cases now becoming more and more prevalent, thorough and analyzing, so we are no longer shooting in the dark on legal interpretation issues. However, anything out of the ordinary, including litigation or dispute resolutions may be costly, perhaps more costly than corporation?
		- Often not appropriate to waste limited corporate assets of a start‑up company on LLC structure, if solely for the personal income tax benefits to the founders, because legal fees can be higher (unless flexibility and tax savings are higher priority over legal fee spending).
		- Most transactions have tax implications, which are often recited in the LLC agreement, or other agreement with the LLC. (More costly legal fees and then accountant or tax lawyer must review LLC.)
* **State of Incorporation Choice. We recommend:**
	+ Illinois if service business or retail business located in Illinois.
	+ Illinois for any other type of company if company will be located in Illinois, and will be acquired as an exit strategy, rather than IPO.
	+ Illinois for fund and fund manager located in Illinois.
	+ Recommend Delaware if company will ever go IPO, or if will be a public fund, or otherwise will have ***public*** investors. Can change to Delaware when close to public offering.
	+ Private investors in Illinois are fine for an Illinois corporation or LLC.
	+ Delaware Corporations must also “qualify to do business” in Illinois, file annual reports, and pay franchise tax on revenue, assets and/or equity invested by investors.
	+ For LPs, and generally for LLCs, law is pretty much the same among states.
* **Corporate Structure/Capital Structure** – Decide Ownership between the partners: Who owns what %, who invested what, who will do what, for what %. Hard questions. What are people contributing? Time, money, property? What % of voting rights to pass an issue? Importance of documenting ownership with a stock ledger (or LLC ledger), and issuing stock certificates (or LLC Certs), capitalization table if later shares are, or will be issued. Avoid use of family members without proper background. Presumption of incompetence.
* **Order minute book, seal and stock certificates**: Cost $74.
* **Issue Stock Certificates**, including type printed certificates and legends on the back.
* Prepare **Stock Issue Ledger** (who owns what shares of stock, names addresses).
* Prepare **Capitalization Table** (who owns what % of stock, and who paid what for stock). The founders must make their capital contribution, or the corporate veil may be able to be pierced.
* If shareholders are in other states, make **Blue Sky** **Filings** (even if they are family or close friend shareholders).
* **Selection of Officers and Directors** – Avoid use of family members without proper background as owners, officers, directors, unless they will truly be heavily involved in the business and have the background to qualify for the role. Will be subject to scrutiny for their competence. Presumed incompetent and overpaid if a family member.
* **Avoid Piercing the Corporate Veil**; following corporate formalities, use of signature blocks
* **Two businesses, two entities** (no lumping!)
* **Formation Documents to File**: BCA 2.10 or LLC 5.5, IRS SS-4, IRS 2553 for S Status, Illinois REG-1 for IL Taxpayer registration, County filing, Business License, Professional Licensing
* **File Illinois BCA 2.10** for incorporation (or **Delaware Certificate of Incorporation** if Delaware) or **Illinois LLC 5.5, or Illinois LP 201**
	+ Use the “expedited filing” service, through an incorporation service, which hand delivers the documents for same day filing. (Extra $100); Otherwise the incorporation will be delayed by 4-6 weeks, and the filing date is uncertain.
	+ Use Yourself as the registered agent, no lawyers or accountants, because you may change them, and because they are not always in your same county
	+ If Delaware, chose DE registered agent, and file in the county where registered agent resides.
* **IRS Form SS-4** application and filing (applies to the IRS for FEIN # (your company’s tax id # or Federal Employer ID #) (Estimate a very long date for your first employees, so IRS will not expect employer tax returns soon.). (Landmine questions on this form, consult accountant and attorney before filing this form online, or allow attorney or accountant to file it for you.)
* **IRS Form 2553** Electing S Corporation Status.
	+ Cannot be an S corp. if:
		- More than one class of stock to be issued,
		- Corporation will have entities for shareholders. Trusts and estates can be shareholders.
		- Nonresident Aliens will be shareholders.
		- OK to Form as S Corp now, and then if you have more than one class of stock or add entity shareholders; you will merely quietly loose S status, which is no problem.
	+ Must file within 75 days of forming business, or blows the exemption.
* Illinois **REG-1 Business Taxpayer** Registration with Illinois Department of Revenue filing to establish:
	+ Illinois Employer withholding account,
	+ Illinois Corporate Income Tax Account,
	+ Obtain IBT #, or “Sales Tax” number.

Required before hiring employees, or purchasing inventory, or making sales from Illinois. File ***early*** if you will be selling goods subject to sales tax, and petition for expedited issuance of IBT. Sales tax reports are due the 15th of the month following the month of sales of the goods.

* **Payroll? Employees?** How many, when? Decide whether you will pay yourselves salary? If so when? We need this info for the tax ID application
* **Categorization of your workers as Employees vs. 1099 Independent Contractors**: The IRS and IL will deem most workers as employees, even if part-time and in some cases even if intermittent or seasonal. Landmines in hiring even one employee part-time – You are an employer – and you owe payroll taxes on their pay!
* **Illinois Unemployment Tax Registration.** Register to pay unemployment insurance (IL Dept. of Revenue does not do this). To register to remit unemployment insurance payments for your employees, contact the Illinois Department of Employment Security at: 800 247-4984 [**www.ides.state.il.us**](http://www.ides.state.il.us)<https://taxnet.ides.state.il.us/Login/Default.aspx> Illinois Department of Employment Security, Revenue Division
401 S. State Street
Chicago, IL 60605
* **Register your employees**, part-time and full-time, under the “New Hire Registration” national registry. <https://secure.myhfs.illinois.gov/NewHireWeb/newhire.htm?_flowExecutionKey=_c4F0C9AD8-B17D-58B5-8EF5-10AFEDE34704_k0D1DD0A9-2D7D-E5B8-D786-D6DB8C9E3E6A>
* **Sales in Use Tax – When you least expect it**. Sales Tax applies when you sell ANYTHING, even with your service, even server rack and bolts for IT Firm installation, or shampoo with a haircut. Use tax applies when you buy goods, even for your company’s own use, from out of state and don’t pay sales tax on them.
* **County** **Recorder Filing** required in county in which your business is located. File in multiple counties if you have multiple locations.
* **City or Local Business License.** Most cities and villages require business license, including Chicago.
	+ A simple, limited license is required for consulting or office type business, even in the home
	+ A more expanded license is required for a business that sells goods/products, or has employees
	+ An even more complex license is includes for retail space, or for food service.
	+ More complex still if business will conduct manufacturing, make noise, give off emissions, have busy deliveries, or sell liquor.
* **Professional Certifications or Industry Certifications/Filings:** File for the Corporation as well as for the individual owner: Practicing Law, Medicine; Selling Insurance, Real Estate or Securities; Banking, Telecommunications (CLEC status) Food Service, Drugs, Cosmetics (FDA); Manufacturing (EPA regulations.); others.
* **Qualify to do Business** **in Illinois**, if you are a Delaware or other non-Illinois corporation, LLC or LP. File before doing business in Illinois, opening office in Illinois, placing assets in Illinois, or before taking investor checks from any state. The Illinois qualification filing fee is based on the net capital of the corporation.

If an Illinois corporation, qualify to do business in other states in which you are doing business (have employees, rent office, own real estate, sell goods into)

* **Qualify to Do Business in other states** in which you are doing business. Doing Business includes owning real estate, renting office space, having employees or other types of physical presence in the state. In some states, "doing business" includes selling into that state. Check with your tax accountant and lawyer on whether your activity is considered “doing business”.
* **Corporate Resolutions** (the engine that makes the car work), and Operating Resolutions, (interim substitute for bylaws or operating agreement, Minute book of corporate records
* **Relationship between founders** – Buy-Sell Agreement or Shareholder’s Agreement
* Importance of Contracts
* **Insurance / Liability**
	+ Obtain relevant business insurance, from a good *business insurance* provider, not from your homeowner’s insurance provider.
	+ See NFH website [www.nfhlaw.com](http://www.nfhlaw.com) for referrals to business insurance agents.
* **Banking / Banker Relationship**
	+ **Open Business Bank Account.** Separate account from your personal. Banker will need FEIN and copy of articles of incorporation.
	+ Signbanking resolution from your bank
	+ See NFH website [www.nfhlaw.com](http://www.nfhlaw.com) for referrals to business bankers
* **Accounting and Bookkeeping**
	+ Talk to a good **business accountant** before you form the business. If they tell you to operate the entity as a sole proprietorship, find a different accountant.
	+ **Buy QuickBooks**, or some other accounting program; and use it for *every* transaction, income, expense, loans from you to the corp., stock issuance, etc. Allow some time to get QB accounts set up, it is quite time consuming and complex. Probably need to hire accountant or consultant. Tempting to write checks by hand because it is a pain to setup QB, but QB is a must.
	+ **Do Not Mix Personal and Business Expenses or Income. Record in the company books, all loans between you and the corporation.**
	+ **Do No Mix Expenses and Income between this Company and any other company. If you have two businesses, set up two corporations.**
	+ Secure a **Bookkeeper** to do your payroll and bank reconciliations, and any other accounting tasks you don’t have time to do (expense reports, paying bills/writing checks.
	+ Secure an **Accountant** to do your taxes, advise on tax related issues
	+ Notify **Accountant** **and Bookkeeper** of corporate formation. Forward copies of the articles of incorporation and IRS FEIN letter, so that accountant can:
		- File your 2553 if lawyer not filing it, and
		- Prepare your business tax return.
	+ Arrange with Accountant or Bookkeeper who will do **Employer Tax Returns** (you or accountant).
* **Payroll**
	+ Establish who will pay payroll, payroll taxes and payroll tax returns.
	+ Will you have employees? How many? When? Need info for the Tax ID application.
* **Classification of staff** as independent subs or employees. (**Discussion between attorney and accountant.)**
* **Shareholder Agreement** (if more than one shareholder running the company).
* Document **all agreements** with all parties in form of **Contract,** even if simple. Contracts are business issues, more than legal issues, but they have legal implications. The business parties must record their thinking in order to prevent misunderstandings.
	+ Including Consultants
	+ Employees
	+ Vendors/Suppliers
	+ Customers
	+ Financing Transactions
	+ Stock Options to Employees
	+ Medical Expense Reimbursement Plan

#### Post-Incorporation

* See “Corporate Maintenance Checklist”