

# How to Start Your Own Business: A Lawyer's Perspective

By Michael R. Liss

What does it take to start a business? Guts, yes. Luck, yes. Perseverance, yes. What are the legal aspects of starting your own business? Do you know what your lawyer should be doing so that you can help him, keep him on track, and keep costs down? An overview of all the important areas would be very helpful, and that is what I propose to cover in this article. Some businesses will require a few extra items, but this list of eleven will cover most business startups.

## Sources of Capital

It takes money to make money. You may have savings available, but if you are like most business startups, you will need extra money to get started. Whether you obtain the money as debt or equity, there will be a need to review the financing arrangements and the drafts of the necessary legal documents. Typical agreements prepared by the business lawyer are the promissory note, security agreement, stock or partnership interests, options, and any other documents needed to help you raise capital for your business.

## Incorporation

How do you protect what you have already saved? How do you avoid putting all your personal savings at risk? How does your spouse become more comfortable with your starting this business? Should you incorporate your business? Incorporating your business, or if applicable, forming a limited liability company (LLC), can do a lot to help.

The primary reason people incorporate is to limit their liability: They want to protect their personal assets from business risks. This item on the legal checklist deals with choosing the best legal entity to own the business. Sole proprietorships and partnerships can own businesses but do not provide the owner with the limited liability protection that incorporation does.

The incorporation process is quick and inexpensive. It is typically a cornerstone that needs to be in place when you open for business.

## Tax

Taxes are everywhere. As a business owner, you must learn about taxes and how to minimize them. Unless you plan right, Uncle Sam can become in effect your "partner," taking a large percentage of your profits. You need to know if being an S-corporation will be right for you, or whether an LLC would provide better tax savings both now and later. You need

to apply for tax identification numbers. Federal and state tax requirements will be applicable. You will need to accurately calculate and pay your payroll taxes. Many business owners soon find that a knowledgeable tax preparer and a payroll service can provide welcome relief from complex paperwork as well as enabling the business person to avoid penalties.

## Books and Records

Do keep good business records and make sure they are current. Poor record keeping is one of the surest signals that a business will fail. If you are buying an existing business, then a review of three to five years of its financial statements will be critical to your understanding of the condition of the business.

## Shareholders Agreement

If more than one person owns the business, you need an agreement among those owners to cover topics such as what happens if one of the shareholders dies, becomes disabled or insolvent, or wants to sell his or her portion of ownership to an outsider. Shareholder agreements, buy-sell agreements, partnership agreements, or LLC operating agreements all spell out how to keep the stock closely held. If one shareholder dies, typically the corporation or the other shareholders are required to buy the shares from the estate, and the estate is required to sell the shares. The agreement specifies this requirement to buy and sell, the price, the payment terms and related obligations. If you are the sole shareholder of your corporation, you will not need a shareholders' agreement.

## Trademark Registration

Choosing a name for your business has not only important marketing considerations but also legal requirements. Before you spend money on signs, brochures and advertising, you may wish to have searches done to verify no one else is using the name you desire. If you wish to prevent others from using your business name or your name for some of the products and services that you sell, then you should have a federal trademark registration done. It gives you strong legal rights throughout the United States. Every franchise business lives or dies on the quality of its name. Choosing the right name and being able to protect your legal rights to that name could be a major key to your success.

## Real Estate Lease

Where will your business be located? If it is not at home, you will need permission from another person to use his or her location. This is what a lease is all about.

The lease document covers where the location is, how long you can use it and what rent you will pay for being allowed to use it. The owner of the location will typically require you to follow certain rules when you are using his location. The lease covers termination: You must relinquish the location if you do not pay rent. With lawyers writing and rewriting leases, leases are getting longer. What may once have been two pages, can now easily be 62 pages. Since location could be the number one determinant of your business success, it is very important to have the lease carefully reviewed and written.

## Franchise Agreement

Franchises make over a third of all retail sales. There is a good chance that if you are starting a business, you will want to consider buying a franchise. That way you can take advantage of a business name that is familiar to many people (a trademark) and support services to help you succeed. These benefits come with a cost: Up-front fees of \$10,000 to \$50,000 and ongoing royalty fees of 3% to 20% of all your sales. Review the pros and cons of your franchise opportunity with an experienced franchise lawyer. Negotiate the terms of your proposed franchise agreement. Be sure the amount of support and degree of control over how you run your business are what you expect and can live with. Contact many existing franchisees to get the inside story on the franchise. Investigate thoroughly before you invest.

## Agreement for the Sale and Purchase of a Business

Past performance can be best indicator of future success. Therefore, you might consider buying an existing business. You will receive extensive information on how the business has performed in good times and in bad. You will be able to start immediately. You will probably be able to have seller financing, so there is a built-in source of capital. You will have experienced employees already at work for you. The advantages of buying an existing business can be great, but finding a business to buy can be a difficult and frustrating task. Professional advisors like lawyers, bankers, accountants and business brokers can be helpful, but sometimes you have to just go and knock on doors of businesses that interest you to see if the owner(s) might be willing to sell. The legal document for buying a business is most typically called an Asset Purchase Agreement. It spells out what you are buying, the price and the payment terms. It also describes the condition of the business in great detail. The goal is to check out the business as much as possible before buying it. You want



to get what you expect. You want to avoid skeletons in the closet. The Asset Purchase Agreement is the device that protects you as you purchase the business.

## Contracts with Suppliers and Customers

Many businesses have important items to purchase or contracts for services or products they sell. These contracts are the lifeblood of the business. If the contracts allow payments over time, like an installment sale contract or an equipment lease, then a careful review of the default and cure provisions is necessary. For the sake of making sales and not scaring off potential customers, these contracts must be user-friendly. That means your business lawyer needs to write clearly, simply and in standard English.

## Employee Issues

People are probably the most important asset of any business. How you attract and keep talented and dedicated employees will be one of your most important challenges as a business owner. What compensation will you provide? What benefits? Will a key-employee become a co-owner? Employment agreements can assure the key employee that he should come on board with you and become a top performer.

There are many important pieces in the puzzle of starting a business successfully. Legal issues are one of those pieces. The eleven issues discussed here cover the most important legal areas you will need to know in order for you to start and succeed in a new business.

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