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Dear Reader,

Thank you for downloading the Legal Checklist for New Businesses and Startups from our firm's website, [www.jameshsuilaw.com](http://www.jameshsuilaw.com).

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***Your use of this checklist is at your own risk. We make no guarantees and will not be responsible for any result that is not to your liking.***

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The information provided in this checklist is ***current as of 16 December 2015***; however, it is ***not a complete rendering of applicable law***. The law is vast, and it would be impossible to fit all that law in these few pages!

Starting a new business can be wrought with unforeseen complexity. The ***guidance of a lawyer can be instrumental in helping you achieve your vision*** as expediently and efficiently as possible.

We hope this information has been helpful to you. Thank you again for visiting our website.

Yours most faithfully,

James J. Hsui  
Principal  
on behalf of  
James Hsui, PLLC



## Legal Checklist for New Businesses & Startups

### The Business Plan

#### ☐ **Gathering the Team**

The team should include at minimum key persons (you, partners, prospective directors and managers, etc.), the CPA, and the business lawyer.

#### ☐ **Writing the Plan**

The business plan is often viewed as a “marketing document” for investors; it is also a necessary document for SBA loans. Regardless, the business plan can be helpful in helping you identify strengths, establish goals and benchmarks, and confront weaknesses in your business concept. The business plan can also help identify legal needs and requirements, tie them to business strategy, and help accelerate what is often a slow legal process.

### Forming a Company

#### ☐ **Choice of Entity (LLC, Series LLC, S-Corporation, C-Corporation, LP)**

Each entity has pros and cons. For example, LLCs can operate with less formalities, while C-Corporations are often the preferred entity for venture capital and other sophisticated investors. S-Corporations can easily be converted tax-free into C-Corporations, while converting an LLC into a Corporation can be quite expensive.

#### ☐ **State of Formation: e.g., Delaware or New York**

The place where a company is formed determines the law under which the internal affairs of a company are governed. Delaware law generally allows close to absolute freedom of contract, while New York takes a more paternalistic approach by limiting what members of an LLC or shareholders of a corporation can agree to.

#### ☐ **Name of Company (Trademark Strength)**

Trademarks are afforded different levels of protection based on how “distinctive” they are. The most distinctive mark is the “fanciful” mark, which generally means a made-up mark such as “Kodak” or “Xerox.” The next most distinctive is the “arbitrary” mark, which describes a mark that is unrelated to the goods or services provided – the most famous example of an “arbitrary” mark is “apple” to describe electronic goods. The third most distinctive mark is the “suggestive” mark, such “suggests” the goods or services being sold, such as “Microsoft” for computer software. The final two categories are the “descriptive” and “generic” categories.

#### ☐ **Name of Company (Availability for Registration)**

A company can only be formed under a name if it has not already been used by someone else. Additionally, if another company is already using the name, there is a risk that the name has already acquired some level of trademark protection. You will want to ensure that the company name you have chosen is at least available in the state where it will be formed, as well as any other states you will be operating in. Most states have an online database of registered business entities, including New York ([www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html)) and Delaware ([icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx](http://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx)).

### **Preparation of Formation Documents**



Before you can form a company, the appropriate formation documents, such as the Certificate of Incorporation, Certificate of Formation, or Articles of Organization must be prepared. These documents can be relatively simple or highly complex, depending on your vision. Form documents are usually available on the websites of the relevant department of states; some forms are also available in the resources section of this website.

### **Filing of Documents with the Secretary of State**



Once the formation documents have been prepared, they can be filed with the relevant secretary of state, with the appropriate filing fee. Information for New York and Delaware can be found on the websites of the New York Division of Corporations ([www.dos.ny.gov/corps/](http://www.dos.ny.gov/corps/)) and Delaware Division of Corporations ([www.corp.delaware.gov](http://www.corp.delaware.gov)). Your business lawyer can assist with the filing.

### **Preparation and Filing of Qualification Documents (Out-of-State Companies)**



If you will have business operations in any state other than the state where your company is formed, you will need to “qualify to do business” or “apply for authority to do business” in those states. The process is quite similar to the process of forming a company.

### **Publication Requirements (LLCs, LPs and LLPs in New York)**



New York requires some domestic and foreign entities to publish daily and weekly legal notices in two newspapers designated by the county clerk of the county where your company’s office is located (as stated the formation documents). Once the newspapers have published the notices, they will send your company Affidavits of Publication which must be forwarded with a completed Certificate of Publication to the New York Division of Corporations. Many private companies and business lawyers are able to handle the publication requirements on your company’s behalf.

### **Application for Employer Identification Number (EIN)**



Every company must apply for an EIN, which is akin to the Social Security Number of a Company. It will be used in most government filings. Information about obtaining an EIN can be found on the IRS’ website ([www.irs.gov/Businesses/Small-Businesses-&Self-Employed/How-to-Apply-for-an-EIN](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/How-to-Apply-for-an-EIN)).

## **Internal Affairs of Company**

### **Internal Affairs Documents: e.g., Bylaws and Operating Agreements**



Once your company is formed (or before), you will need to have certain documents prepared to define how your company will operate internally. These documents include the bylaws and shareholders’ agreements for corporations, and Operating Agreements or LLC Agreements for LLCs. Depending on the type of entity and the state of incorporation, preparation of these documents are not always mandatory, but it is generally very risky to operate a business without them. A business lawyer can help your company tailor these documents to help you achieve your business vision or objectives.

### **Founders’ Agreement (Optional)**



A “founders’ agreement” is a subset of internal affairs documents. For example, in a corporation, the typical founders’ agreement is a shareholders’ agreement that states that shareholders will put their votes to electing the “founders” as directors.

### **Distribution of Equity**

- ☐ The stock, membership interests, or partnership interests will need to be distributed. This should be negotiated between the partners. While “equal shares” may sound fair at first, it is only fair if everyone will feel that it is fair based on contributions prior to the company being formed, contributions to the company at its formation, and each person’s expected workload moving forward. It is too often that we see companies fail because the parties accept “equal shares” at first and then one party feels taken advantage of. A related consideration is the preparation of vesting schedules. The premise behind vesting schedules is that equity owners only gain full ownership of the equity over a period of time, and if they leave prior to when a portion of the equity “vests” they forfeit the equity. This is one measure used to ensure that equity owners remain invested in the company for a period of time.

### **Ratification**

- ☐ Once everything has been prepared and decided upon, a formal procedure called ratification is often performed. This basically means that all relevant persons have examined what has been done and have signed off on it.

## **Intellectual Property (Trademarks, Trade Secrets, Copyrights and Patents)**

### **Trademarking the Company Name**

- ☐ As previously discussed in relation to choosing a name for the Company, trademark protection in the United States is acquired by using the relevant marks in commerce. The trademark registration process will require evidence of use of the mark; thus, actual registration of the company name as a trademark may not be possible for a new company. On the other hand, an “Intent to Use” registration is possible, and allows for a retroactive date of first use. However, this is also a little costlier. Depending on the decided upon name, an “intent to Use” registration may or may not make sense.

### **Assignment and Ownership of Pre-Formation Intellectual Property**

- ☐ Sometimes, shareholders, partners or members may have created intellectual property for the business operations of the company prior to the company being formed. It should be part of equity distribution negotiations as it is important to have all such intellectual property assigned to the company, in writing, at the outset. Extremely important intellectual property should be subject to pre-formation agreements so as to help prevent the possibility of the company losing such intellectual property if the creator decides to leave before the company is formed.

### **Pre-Formation Independent Contractor Created Intellectual Property**

- ☐ Sometimes, outside parties are contracted to create intellectual property for a business, such as logos, before the company is formed. Since there is no company, it is usually not part of the assignment agreement. The proper processes must be put into place to ensure that the company receives ownership of all such intellectual property the moment it is formed.

### **Post-Formation Intellectual Property**

- ☐ Intellectual property created post-formation to be owned by the company should be properly protected by confidentiality and assignment agreements. This is especially true for businesses anticipating venture capital funding, as an intellectual property review will likely be part of the due diligence process.

## **Registration of Intellectual Property in the U.S.**



As previously discussed in relation to choosing a name for the Company, trademark protection in the United States is based on a “first-to-use” system. This is also true for copyright.

However, registration with the appropriate authorities does confer benefits. Trademarks and inventions (as patents) can be registered with the USPTO ([www.uspto.gov](http://www.uspto.gov)), while important creative matter can be registered with the United States Copyright Office ([www.copyright.gov](http://www.copyright.gov)).

## **International Registration of Intellectual Property**



While not applicable to all companies, this is something that businesses in certain industries consider. Under the Berne convention, the moment your material is published in the United States, it obtains copyright protection in all countries that are party to the Berne convention. The international registration of trademarks are administered through the World Intellectual Property Organization (WIPO) ([www.wipo.int](http://www.wipo.int)), a United Nations system organization, through the Madrid Protocol system for trademarks, or the Patent Cooperation Treaty procedure for patents. Additionally, registrations for trademarks and patents can be made via the procedure set forth in the Paris Convention for the Protection of Industrial Property. For protection in countries that are not signatories to the relevant treaties, registration must be made directly with the relevant governmental agencies in such countries.

## **Licenses**

### **Check Required Licenses**



Depending on the business of your company, the company may have to obtain one or more licenses to legally do business. For example, a New York City restaurant will need to obtain a “Certificate of Authority to collect sales tax,” perhaps obtain a Liquor License, a Food Service Establishment Permit, and the kitchen must have at all times at least one person with a Food Protection certificate. New York State has an Online Business License Wizard ([bw.licensecenter.ny.gov/BW/chooseBusnsTypeAction.els](http://bw.licensecenter.ny.gov/BW/chooseBusnsTypeAction.els)), and New York City has a Business Regulation Page ([www1.nyc.gov/nycbusiness/index](http://www1.nyc.gov/nycbusiness/index)), that can assist potential businesses in determining the licenses they may need.

### **Apply for Required Licenses**



Once the required licenses have been identified, your company will have to gather the required documents and apply for each of them. Until the licenses have been obtained, the company generally cannot begin business operations; therefore, it is important to start early as the processes can take quite some time.

## **Marketing**

### **Compliance with Federal, Local, and Foreign Law**



Advertising and Marketing can be subject to various laws, such as consumer protection laws under the Federal Trade Commission (FTC) at the federal level and the departments of consumer affairs at the state level, commercial email regulations under the CAN-SPAM act, and the European Union (EU) Cookie Directive (for companies engaging in cross-border business with the EU). Before embarking on any marketing or advertising campaign, it is highly suggested that you at least familiarize yourself with the FTC’s guidelines ([www.ftc.gov/tips-advice/business-center/advertising-and-marketing](http://www.ftc.gov/tips-advice/business-center/advertising-and-marketing)).

### **Website Legal Documents: Terms of Service and Privacy Policy**



If your company or brand will have a website, a “Terms of Service,” “Terms of Use” or “Terms and Conditions” should be prepared. Additionally, you will also want to have a proper “Privacy Policy” in place. Your business lawyer can help tailor these legal web-documents to fit the specific needs of your business.

### **Use of Intellectual Property**



In your advertising and marketing campaigns, it is important to remember that you cannot use the creations and content of others without their permission. These creations and content may be protected by copyright or trademark laws. You may be able to use “royalty free” or “stock” photos and images, but be sure to check the conditions of use.

## **Contracts & Agreements**

### **Review of Contracts**



Your company will be party to many contracts in the course of doing business. At minimum, the important ones should be properly reviewed. If in doubt, consult your business lawyer.

### **Drafting of Contracts**



Your company may need several contracts in the course of its business. Some typical contracts include independent contractor agreements, employee agreements, non-disclosure agreements, licensing agreements, contracts for the sale of goods, and service agreements. A lawyer can help your company craft contracts tailored to address limitless different situations.

### **Signing of Contracts**



Contracts signed on behalf of the company should explicitly state that the person signing is signing on behalf of the company. This is typically done with terms “for,” “on behalf of,” or similar synonyms.

### **Contracts can be Formed at Any Time**



A contract is formed when there is a voluntary exchange of promises that the law believes should be protected. Only certain classes of contracts need to be written. You can form a contract through email.

## **Investors**

### **Compliance with Securities Laws**



The sale of equity, whether membership interests of an LLC or stock of a corporation is subject to securities laws. This includes investments by friends and family. For most new businesses and startups, this means that securities must be sold under a “securities registration exemption.” The most often used exemption is Rule 506 of Regulation D of the Securities Exchange Commission (SEC), which allows unlimited funds to be raised from unlimited “accredited investors” and 35 “sophisticated investors.” If any number of “sophisticated investors” are participating, extensive disclosures must be prepared and distributed to all investors. There can be severe civil and criminal consequences for failure to comply with securities laws. Before an IPO can occur, a company’s compliance with securities laws will be carefully scrutinized. Thus, this is an area where a business lawyer can be very helpful.

### **Convertible Notes and Purchase Agreements**



Depending on the stage of financing and the preferences of the company and investors, the company may issue convertible notes or sell equity. A convertible note is basically a loan that “converts” into equity into a later date based on an agreed upon formula.

### **Amending Internal Affairs and Formation Documents**



Amendments to certain internal affairs documents such as shareholders' agreements or formation documents such as the Certificate of Incorporation may need to be made in order to accommodate the terms of the investments. For example, the Certificate of Incorporation may need to be amended to provide for "preferred stock."

## **Employees**

### **Compliance with Employment Laws**



Employees may have rights such as overtime pay and minimum wage under state and federal law. Several states, including New York, have laws that make the principals of a business personally liable to their employees for certain violations of employment laws. Criminal liability may also attach to such violations.

### **Classification of Employees**



The fact that an "Independent Contractor Agreement" has been signed does not make a person an independent contractor. A person's classification as an employee or independent contractor depends on the degree of "control" over such person. Information about classification (and misclassification) can be found in a classification memorandum issued by the United States Department of Labor (DOL) ([www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf)) and on the IRS' website ([www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee](http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee)).

### **Cost Reduction Considerations**



Startups and new businesses often begin with a small budget, and the costs of labor can be a concern. In trying to reduce upfront costs, some businesses make mistakes in hiring "unpaid interns" or by issuing equity in lieu of wages. Regarding "unpaid internships," at least six criteria must be met for interns to be unpaid. If not met, an "unpaid intern" may be classified as an employee and entitled to minimum wage and overtime. The DOL has provided some guidelines ([www.dol.gov/whd/regs/compliance/whdfs71.pdf](http://www.dol.gov/whd/regs/compliance/whdfs71.pdf)). New York, which uses the DOL's six criteria and five of its own, also has provided a set of guidelines for unpaid internships ([www.labor.ny.gov/formsdocs/factsheets/pdfs/p725.pdf](http://www.labor.ny.gov/formsdocs/factsheets/pdfs/p725.pdf)). Regarding "sweat equity," it is important to remember that being a "shareholder" does not preclude a person from being an employee.