

Starting a Business? Remember That Hope Isn't a Plan.

Optimism is a necessary component of the entrepreneurial spirit. When it comes to starting and running a business, however, ignoring legal risks and hoping that nothing bad will happen is not a plan. There is just too much that can go wrong. Identifying your legal risks and then addressing them to eliminate the risks you can and minimize and manage the risks you cannot eliminate is not a failure of optimism. Instead, knowing what your business liability risks are and managing those risks should free you to move forward with developing and growing your business with realistic hope, not nagging worries.

What are the most common (and most important) legal liability issues businesses (no matter how small) face? I don't know that any business attorney would be able to produce a comprehensive list of every possibility, but here's my attempt at a reasonably complete outline of the issues which should at least be considered by every entrepreneur:

1. **Business Formation Issues:** Should the business entity be a sole proprietorship, partnership, LLC or corporation? Even a single owner can incorporate or form a single-member LLC, and this decision is not strictly a legal matter, but should be made in consultation with an experienced business accountant as well.
2. **Business Governance Issues:** Once a decision regarding the type of legal entity the business should be is made, creating governing documents for that entity must be considered. Even a single-member LLC should, ideally, have an operating agreement (and may have to have one to keep its legal status, depending on the jurisdiction). A business with more than one owner (whether LLC members, shareholders or partners) needs governing documents, period, even when the business is family owned and operated. What happens if someone wants "out"? What happens if someone wants someone else "out"? How will decisions be made if everyone doesn't agree (particularly if there are only two owners)? How do you get paid, how much, and how is that to be decided? And, something which is very important to cover (but often entirely overlooked) – what happens when it's all over (also known as the "exit strategy")? You have a choice – hire a lawyer at the beginning, while everyone still likes each other, to formalize your relationship, or wait until a conflict develops and then hire a lawyer to litigate it. I'll give you three guesses about which approach costs less, and the first two guesses don't count.
3. **Employment Issues:** Whether the business has employees or independent contractors, there are legal liability issues which should be addressed and managed with appropriate written agreements. As far as I am concerned, there is no good reason not to have a written employment and/or independent contractor agreement. In addition, serious consideration should be given to creating an employee handbook to cover not only the terms and conditions of employment, but such issues as technology use and potential abuse (including e-mail, social media, your website, etc.) and intellectual property issues such as non-disclosure agreements and/or assignments (if pertinent to your business).

4. Transactional Issues: What will your business buy, rent or sell? Whatever it is, you'll need a contract. As discussed below, form agreements from the internet are worth just about what you pay for them (probably much less). If you start there, be sure not to end there, if you'd like to keep the money you earn.

5. Capitalization Issues: Unless you are a sole proprietor bootstrapping the startup of a business with your own personal savings, the manner in which the business will be capitalized must be considered and the associated legal issues handled appropriately. Venture capital, equity and stock option compensation all give rise to legal liability issues which must be effectively managed in order for the business to succeed. Even small businesses with no employees, in which the owners provide all of the "sweat equity", can benefit greatly from an agreement which explains just exactly what in the way of rolling up the sleeves is expected of every member; it sure helps to prevent misunderstandings, hurt feelings and, ultimately, deadlock or worse among the business owners.

Can you handle some of this stuff yourself, and save some money? This may sound strange coming from an attorney, but yes, I think you can. One can easily stumble into "penny wise, pound foolish" territory in doing so, however. Several times over the past year, for example, I have been consulted by sole proprietors who used an online service to create their business entities a while back, but then didn't have any guidance on what to do with them (required filings with the Secretary of State, tax payments, corporate finalities such as minutes and meetings, that sort of thing). As a result, they derived no protection against personal liability by forming their business entities. They may as well have saved the money creating a corporation or LLC altogether, purchased great insurance coverage, and operated as a sole proprietor for a while, until they were ready to take on a partner or investor, or hire an employee. A corporation or LLC you don't know what to do with is really a waste of time and money to create, even through an online source.

Another example is using form contracts you buy (or find) on the internet. Again, this may sound strange coming from an attorney, but you may be able to save some legal fees that way. If you've found some contracts on the internet the terms of which you like, there's no harm in giving them to your lawyer and explaining what it is you like about them. Certainly, lawyers use their own template contract terms when they create new agreements (you didn't think we start from scratch every time, did you?) My own templates are only valuable to me because they are the end product of years of learning and "tweaking", and they are only the beginning (there is a significant amount of customized drafting required to tailor a template to fit the specific needs of a particular business transaction). Here's a perhaps more concrete example. An employment agreement you found on the internet may be worse than not using an employment agreement at all if its terms violate the employment law of your specific jurisdiction. So for heaven's sake, at a minimum you will want to have a business attorney at least review the contracts you intend to use in your business. And by that I mean all of them. Because using agreements with conflicting provisions may (you've got it) be worse than using no agreements at all. So, strictly from a cost-benefit analysis perspective, you have two choices. You can hire a business lawyer to create your business contracts for you up

front (i.e., template contracts you can actually use to make money), or you can hire an attorney to litigate disputes over inapplicable or misused internet forms later. I'll leave it up to you to guess which approach is the most cost effective for your business.

My sense is that there are three big reasons why small business owners (particularly start-ups) don't want to hire an attorney to help them. They are ego, money and fear, and I'd say they vary in order of importance depending upon whether or not the business owner(s) has/have prior entrepreneurial experience. What I mean is this:

1. Ego: You have to be a pretty confident, self-assured person to start a business. Often, the belief that one knows all one needs to know about all things related to that business, and better than anyone else could possibly, is an associated personality trait. Of course, most entrepreneurs who try to start and run a business, and actually succeed at it, learn at some point in time that failing to enlist the assistance of a trusted legal advisor is a mistake. For those entrepreneurs, the second time around is usually the charm, because they have learned to set aside ego in favor of effective legal assistance.

2. Money: If you don't have it, it's hard to spend it. Or, there may be some ego overlap (why pay for something you don't need?) Again, there are things you can do yourself to save money, but "penny wise and pound foolish" just doesn't work for most businesses. If you can't afford a large, expensive business law firm, find an experienced solo practitioner who will agree to help you by "unbundling" his or her legal services and performing work for a flat fee, and at least get the basics covered so you can make money and keep some of it too. It won't get easier (or cheaper) to handle the legal "basics" than at the very beginning of a business.

3. Fear: Entrepreneurs who have tried to work with attorneys in the past who tended to thwart rather than facilitate getting business transactions done are understandably fearful of travelling that path again. The best I can recommend here is that you find a lawyer who advises but doesn't dictate, and that you spend some time with that lawyer explaining your business and your risk tolerance. Find the right attorney, and treat that lawyer as part of your business team. It is his or her job to advise you on how to manage your legal risks. They won't go away because you refuse to hire a lawyer at all, or do but then avoid discussing your business risks with your lawyer. And you won't save yourself any legal fees that way either.

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