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# Business Law 101: What You Should Know For Your Startup

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Angela is a shareholder and chair of Devine Millimet's Startup Team. She is co-founder of the Business Launch Initiative which focuses on assisting startup companies, and she specializes in mergers and acquisitions. She assists entrepreneurs with structuring their business entity (drafting and negotiating governing documents) and then taking the company through its growth phase (hiring employees, protecting intellectual property, implementing equity incentive plans for executives and owners, assisting with and positioning the company for institutional financing, private security offerings, and strategic acquisitions). She also helps companies achieve their goals through successful exit planning whether that event involves bringing in the next generation of business owners, selling to a key management team or going out to market for a third party sale transaction to a financial or strategic buyer.

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This presentation is a legal summary and, because of its generality, may not be applicable to your individual situation. For specific legal advice, you should consult with your business attorney about your particular needs.



## Overview

- Sole Proprietorship (trade name)
- General Partnership
- Limited Liability Company
- Corporation (including B corporations)

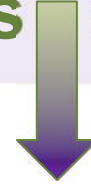


# Sole Proprietorship

- Not a Business Organization
- Simplest way to do business – but remember, no limited liability!
- Must register a trade name/assumed business name (d/b/a) (go to [www.sos.nh.gov/corporate/tradename](http://www.sos.nh.gov/corporate/tradename) for the forms)
- Taxed as an individual – but consult with your CPA regarding NH business taxes
- Obtain separate Employer Identification Number (IRS Form SS-4 - <http://www.irs.gov/formspubs/index.html>)



# Sole Proprietorship – The Downsides



- No limited liability!
- Difficult to raise equity capital
- Is not perpetual – so may foreclose valuable business succession and estate planning options
- Insurance, Insurance, Insurance
  - General comprehensive, Liability, etc.
  - Do not rely on homeowners' policy!



# General Partnerships

- Formed by the intent of the parties – no formalities required to create
- An association of two or more persons to carry on as co-owners of a business for profit
- Must register trade name and file notice of addition or withdrawal of any partner
- Written partnership agreement is strongly recommended, otherwise statutory default provisions apply
- Partnership is a “pass-through” entity for federal tax purposes
- Partners are taxed as individuals, no double taxation





# WHAT IS A BUSINESS ORGANIZATION?

- A legal “entity” similar to a natural person
- Can sue and be sued
- Can own property
- Can enter into contracts
- Can lend and borrow money
- May pay taxes depending on type of entity
- Forms can be found at <http://www.sos.nh.gov/corporate/forms.html>





# Why Form a Business Organization?

- Limit liability exposure of the business owner
- Used to attract investors
- Credibility factor
- May be necessary for some independent contractors



## Some Important Caveats

- Piercing the corporate veil
  - ignoring statutory formalities
  - undercapitalizing
  - co-mingling of funds
- Expenses of formation and continuation
- Formalities must be adhered to
- Most lenders will probably still require a personal guarantee from at least one of the owners

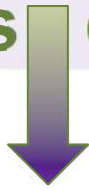


# Limited Liability Company

- Hybrid of partnership and corporation with limited liability for its owners
- Multi-member LLCs are taxed as a partnership (“pass through”) unless members make election to be taxed as a corporation
- Single member LLCs are taxed as a sole proprietorship
- Very flexible regarding governance and types of interests



# Limited Liability Company – The Downsides



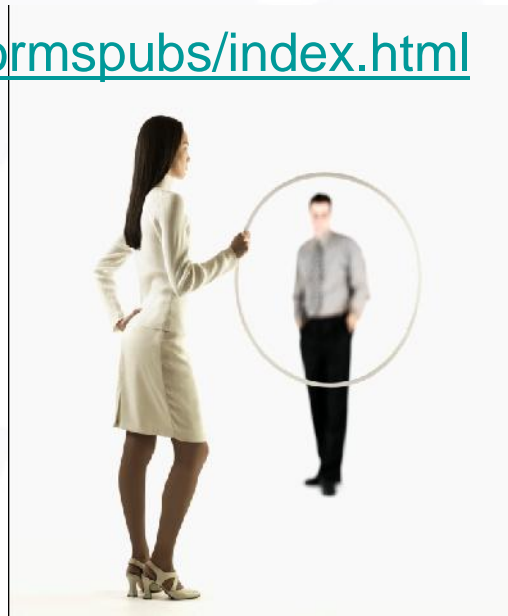
- **But** there are formal requirements that **must** be met
- Owned by Members and may be managed by Managers
- Not a lot of predictability about some issues because it is a fairly “new” type of business organization – having been established in NH in 1993
- May be subject to New Hampshire Business Profits Tax, Business Enterprise Tax, and Interest and Dividends Tax



## Formalities of Limited Liability Companies

- Must file a Certificate of Formation and Securities Addendum with New Hampshire Secretary of State
- Must file Annual Report before April 1 of each year
- Must obtain Employer Identification Number (IRS Form SS-4)

<http://www.irs.gov/formspubs/index.html>



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# Limited Liability Companies – the Operating Agreement

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- An Operating Agreement is **essential**
  - ***Negotiated contract among the members***
  - ***Using a form is not appropriate***
  - ***Must be tailored to meet your business needs***
  - ***Covers internal governance and management matters, limits on transfer of ownership interests and exit strategies, among other things***



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# Corporations

- Owners are generally not liable for debts and obligations of corporation beyond their capital investment in the corporation
  - ***Keep good records!***
- Not as flexible as an LLC because rights are governed by statute for the most part
- Most attractive for venture capital or institutional investors or the granting of stock options



# Characteristics of Corporations

- Owners are called “shareholders” or “stockholders”
- Company is run by officers and directors
- Shareholder, officer and director can all be one person



# Formalities of Corporations

- Must file Articles of Incorporation and Securities Addendum with New Hampshire Secretary of State
- Must obtain Employer Identification Number (IRS Form SS-4)  
<http://www.irs.gov/formspubs/index.html>
- By-laws must be adopted to govern internal operations

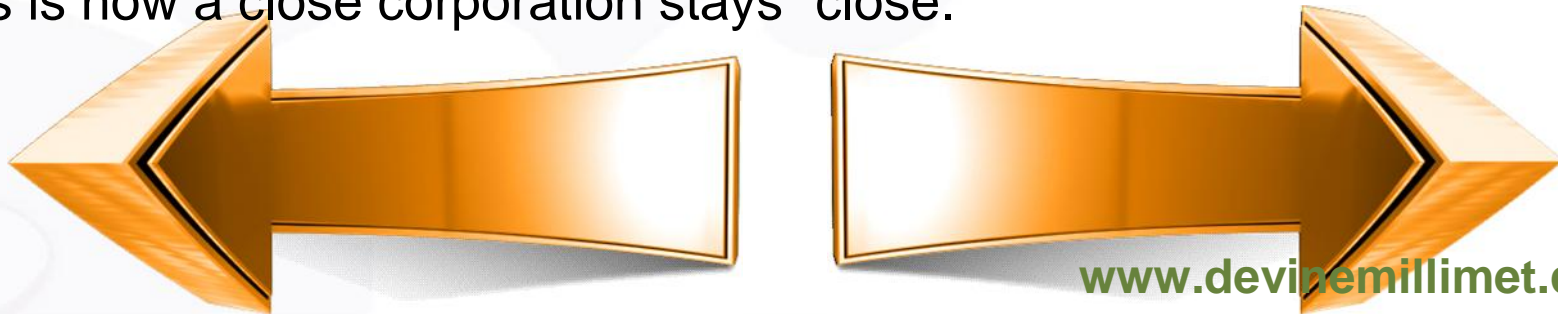


# Corporations – the Buy/Sell Agreement!

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- Negotiated contract among the shareholders that sets the orderly disposition of interests in the company
- “Exit Strategies”
- Typically covers the transfer of stock to outsiders, through a right of first refusal or other means
- Helps to set the value of the stock
- This is how a close corporation stays “close.”



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## B Corporations

- B Corporations became effective as of January 1, 2015
- Any New Hampshire corporation can make an election to be treated as a B Corporation
  - ***Have as an additional business purpose the creation of general public benefit by having a material positive effect on society and the environment***
  - ***Fiduciary duties of directors and officers as to B corporations***
  - ***Annual assessment and reporting requirements***

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## Doing Business in Other States

- Companies “doing business” in states other than their state of incorporation are considered “foreign” entities
- Examples of “doing business” are owning an office, selling goods and making repairs or installing the goods, and exercising or enforcing contract rights
- A foreign business entity wishing to do business in states other than its state of incorporation, generally must register with the foreign Secretary of State by filing forms





## Doing Business in Other States

- You may also need to file income tax returns and pay income tax in the states where you conduct business activities
- You may need to collect and remit sales and use or other taxes to other states where you do business
- You should speak with an attorney or accountant in that state for guidance



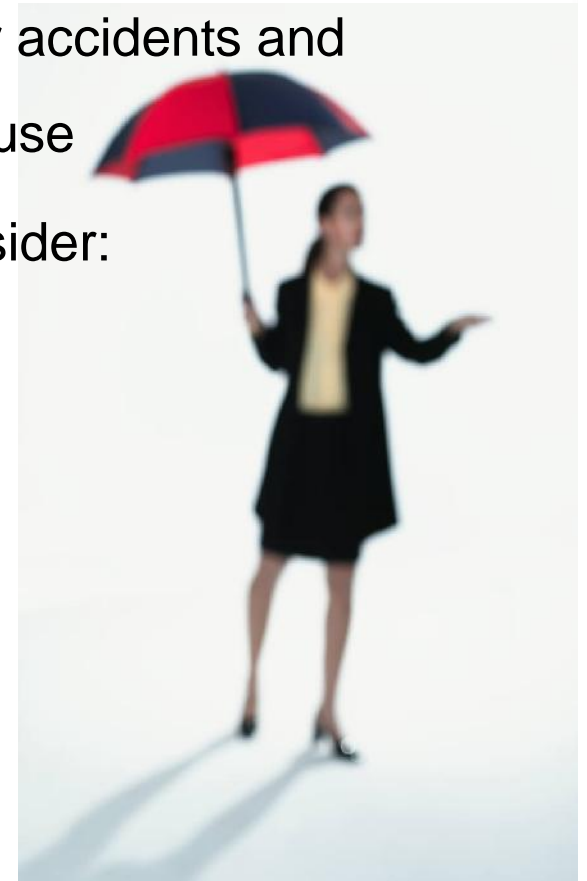
# A Brief Introduction to Securities Laws

- A “security” is generally defined as an investment of money in an enterprise with profits to come solely from the efforts of others
- Securities must be registered with federal and state regulators unless an exemption applies
- If you are considering selling an interest in your business, call your attorney
- Do not assume you are exempt from securities registration requirements!



# Insurance

- All businesses should have insurance protection for accidents and injuries at the workplace and as a result of product use
- Depending on your business, you may want to consider:
  - Products and completed operations insurance
  - General liability insurance
  - Malpractice insurance
  - Employment practice insurance
  - Commercial property insurance



# Hiring Employees

- Confidentiality Agreements
- Non-Compete Agreements
- Non-Solicitation Provisions
- Does a potential hire have a non-compete with a former employer?
- Written agreement vs. trade secret
- Employment Agreement for key personnel
- Work for Hire Provisions
- Misclassification (\$2,500 fine plus back amounts and unpaid taxes)



## Hiring Employees Cont'd

- Documentation
  - Rate of pay
  - Day and place of payment
  - Paying other than weekly
  - Practices and policies (written handbook)
  - Benefits (vacation)
  - Deductions from wages
  - Leave



# Terms and Conditions/Contracts

- Establishing contracting parties – signature block
- Payment Terms – default interest rate, bounced check coverage, late fees, net 15/30/45
- Battle of the Forms
- Governing Law / Jurisdiction
- Assignment / Change in ownership and control
- Force Majeure
- Warranty Disclaimers
- Using purchase orders as contracts – legal “boilerplate”





# Commercial Leases

- Term of lease
- Termination provisions
- Personal guaranty
- Security interest
- Relocation / space options
- Common areas
- Build out – who pays?
- Parking spaces
- Triple net



# Intellectual Property

- Confidentiality and “work for hire” agreements
- Trade secret – contract versus statute
- Patents, trademarks and copyrights



# Funding Your Business

- Concise and organized business plan
- Originality of the business opportunity
- Strength of management team
- Competitive market analysis
- Financial projections
- Passion of the pitch



## Miscellaneous

- Name choice, name availability and name reservation
- Transferring assets to your business:
  - Capital contribution
  - Bill of Sale
  - Review existing contracts for transferability
- Forming multiple entities may be appropriate
- Hiring professional advisors – get references from other business people
- Keep lenders up to date on any changes!

