

QUESTIONS TO CONSIDER IN FORMING AN ENTITY

1. Have you finally decided whether you prefer an LLC to a corporation or partnership structure?
2. Have you spoken to your accountant about the tax regimen (C-corp, S-corp or partnership) you prefer? What is the accountant's suggestion? Why? Have you considered the long-term benefits (e.g., §754 basis adjustment) as well as short-term benefits (e.g., avoiding self-employment tax)?
3. Do you have a formal business plan? If not, have you agreed on goals for the business? Do you have the same expectations about what each member will put into the business, and what each can expect to get out of the business?
4. To what extent is creditor protection a major issue? Enough to create an LLC in a state with stronger creditor protection, e.g. where a charging order is expressly made the exclusive remedy?
5. Who will exercise day-to-day control? Who will have the checkbook? Who can write checks? As a practical matter, how will decisions be made? How will you deal with disagreements?
6. Will new members be added later? Does everyone have to agree to add a new member? Do you anticipate having non-working members? E.g., pure investors?
7. Will the Entity have sufficient initial capital to avoid a creditor's claim that it should be disregarded as a separate Entity?
8. Do you anticipate additional contributions of capital to the Entity? Can the Entity insist on additional contributions? What if a member refuses, or cannot make a called for contribution? Do you anticipate loans from members? On what terms?
9. Will the Entity own any intellectual property? Service marks? Trade name? Copyrights? Trade secrets? URL? Website? If so, who will own the intellectual property? Will any intellectual property be brought into the Entity? Will it be treated as a contribution of capital? How will it be valued?
10. Is voting to be on a pure "one-man, one vote" basis, or on the basis of capital contributions? (This won't make a difference unless capital accounts have a different value, e.g. one member contributes more than another).

11. What if there is a deadlock in voting? Are any matters serious enough (e.g., termination, amending the operating agreement) that you want to require assent of all members?
12. How will profits and losses be allocated? By capital contribution? Equally? Special allocations?
13. Will members have expenses reimbursed? How? How often?
14. Can members freely transfer their shares? What limits? What approval process? Can the Entity be forced to buy back a member's interest, e.g. on retirement. Can a member be forced to sell his interest? Under what circumstances?
15. What if a member becomes disabled? Does he still receive distributions of profits? Does he have a duty to make additional contributions of capital?
16. Can a member be removed from the Entity because of misconduct? What should the grounds for removal be?
17. What should happen when the Entity winds up its affairs? I mean generally. What is the big picture? Pay creditors, pay taxes, and equally divide up what is left over? Or something else?
18. Do you want the Operating Agreement to include a general statement of background facts to help a court determine your intent? This can backfire if the statement is inaccurate or incomplete.
19. Do you want the Operating Agreement to spell out the duties of loyalty, candor, etc. members owe to the Entity and to each other?
20. Do you want the Operating Agreement to serve as a kind of "owner's manual" that spells out in plain English what the member's obligations are?
21. Any limits on ability of member to sue the Entity?
22. Do you want to provide for Alternative Dispute Resolution, e.g., mediation or arbitration, rather than litigation? For all disputes, or just for some?
23. Do the members have exit strategies in place? That is, have they thought about how the value of the company can be passed on to their loved ones? Do you expect that Entity interests will be gifted for estate planning purposes? Will it be important to obtain valuation discounts – e.g., if the taxable estate is more than \$1.5 Million and no other estate tax reduction strategies are in place?