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October 2021

Legal Considerations for Your Online Business

As the COVID-19 pandemic has reshaped life as we know it, it also accelerated many business trends, including e-commerce. As online sales of goods and services continue to replace the in-store purchase experience, more businesses are moving to establish an online presence and many new businesses are being launched to sell products or services exclusively online. Below, we have summarized the key legal considerations for starting an online business.

Business Structure

If you are launching a new business, due consideration should be given to the pros and cons of the different business structures. While a sole proprietorship is the least complicated and least expensive way to set up your business, it may be not your best choice, because it offers no distinction between the owner's business and personal assets, and the owner remains personally liable for all the business debts and liabilities. A partnership is a similarly simple business form used when two or more individuals co-own a company. Like a sole proprietorship, owners (called partners) will be personally liable for all the business's obligations—including those incurred by their partner(s). A limited liability company (LLC) is a separate business entity that can be formed by a single business owner or multiple owners. Members of the LLC are protected from personal liability for business decisions or actions of the LLC, and the members' personal assets are generally protected if the LLC incurs debt or is sued. This business form affords members significant organizational, managerial and taxation flexibility, allowing members to decide these matters as they deem fit. A corporation is a unique legal entity, separate and apart from its owners - called "shareholders". Corporations are responsible for their own liability and business debts, and therefore shareholders' liability is normally limited to the amount of money they paid for their shares. All corporation by default are "C" corporations unless shareholders elect an "S" treatment.

The most common structures used by online businesses are LLCs and corporations. Once you decided on an entity organization form, you should familiarize yourself with the governance and corporate housekeeping requirements pertaining to the selected organizational structure. We can help you evaluate which business structure will best achieve your goals and advise on the governance and other business legal requirements.





Business Name and Avoiding Trademark Infringement

It is worth spending some time choosing an original name for your online business. It is important to ensure that you are legally allowed to use the name by conducting a business search on the website of the NYS Department of State Division of Corporations. Note that corporation or LLC names must be different than all other entity names registered in New York.

Also, while you may not be ready to register a trademark from the outset, but you do want to make sure that you are not using someone else's trademark name.



In many countries trademark rights are granted to the party that is the first to register the trademark. In some countries, including the United States, trademark rights arise from use of the trademark and can be strengthened by registration. Trademark rights prevent others from using the same or similar mark in a manner that is likely to cause consumer confusion.

You can search the United States Patent and Trademark Office database to determine if the name has been taken. If your selected business name is identical or appears to be confusingly similar to the existing trademark, you may want to reconsider your name selection and choose a different name for your business.

Applications to register trademarks are subject to various requirements, including that the mark be distinctive. Trademark rights are territorial and rights in one country generally do not confer rights in other countries, thus it is essential that you understand which rights your business will have with respect to the trademark upon its registration.

Domain Registration

Once you decide on a name, register a domain name for your online business. A domain name is your internet address, typically ending in ".com". You can check the availability of your desired domain name by typing it into the address bar of your browser and seeing if a website under this name already exists.

Filing Your Business Formation Documents and Obtaining a Tax ID

Forming a business entity in New York requires filing of documents with the New York State Secretary of State. Formation of a business entity in New York is evidenced by a certificate of incorporation (for corporations) and articles of organization (for limited liability companies) stamped by the filing authority.

The next step will be to obtain a federal tax ID (also called "employer identification number" or "EIN") from the Internal Revenue Service. You will need a tax ID to open a business bank account for your online business.



Business Account

It is important to keep your business financial transactions separate from your personal finances. Once your business has a tax ID, you should apply to open a business bank account in your business's name. Business merchant services also offer purchase protection for your customers and ensure that their personal information is secure, helping your business to stay compliant.

Licenses and Permits

Businesses, including online businesses, may need a combination of licenses and permits from federal, state, or local agencies. The requirements and fees to obtain these regulatory documents vary based on your business activities, location, and applicable rules. Prior to engaging in



business, it is important to understand which agencies regulate your business activities and find out about the business license application requirements and costs. Some licenses and permits expire after a set period of time, so it is important to keep

close track of when they need to be renewed. It is essential that you obtain all required licenses and permits before you engage in your business operations.

Examples of local regulatory considerations may include zoning, parking, signage regulations, as well as various licensing requirements depending on the occupations conducted by the business.

Sales Tax

Your online business must be properly set up to handle sales tax obligations. Thus, it is essential that you determine the jurisdictions in which you must collect sales tax and register with each applicable sales tax authority. Many categories of purchases require collection of sales tax, but some do not. Thus, you should determine if your products are subject to sales tax. If you outsourced the store operation function to a third-party service provider, it is your business's responsibility to provide such entity with accurate sales tax collection instructions for each jurisdiction. Online sales tax law and regulations constantly evolve; therefore, it is important to stay abreast of all the applicable developments and make updates to your e-commerce sales tax operations as appropriate.

Website and Consumer Legal Materials

When launching e-commerce business, you will typically sell your products or services through third-party platforms or directly through your website. If using your website, you should create consumer legal materials to be posted on the website, including, in particular:

- Website terms of use, which are intended to be a contract governing the relationship between the website owner and each user of the website and typically including disclaimer and limitation of liability provisions.



- Website privacy policy, to notify users about your company practices concerning the collection, storage, use, and disclosure of information, including personal information.
- Sale and purchase terms of use, intended to form an additional contract between your company as a seller of products or services and the purchaser regarding the sale of your products or services, and typically covers payment, customer service, order confirmation, order changes, order processing, sales tax, shipping and handling charges and policies, returns, data security, etc.

If your business does not have capacity or desire to operate the e-commerce website and handle order fulfillment, you can enter into an e-commerce platform services agreement with third-party service providers. These agreements may cover various e-commerce services, such as: warehousing of physical inventory, order taking and processing, payment and sales tax calculation and collection, order fulfillment, customer services, handling of returns, setting up procedures to comply with privacy, data security and legal requirements. It is advisable that your business has appropriate contractual arrangements with third parties to reduce your business' legal risks.

Business Insurance

Companies often face the risk of significant financial exposure for damages or injuries occurring in the course of their business. Thus, it is important that your business have adequate insurance coverage. Each company's insurance needs may differ depending on its size, industry, and risk profile. Common coverage typically includes commercial general liability, including property damage and bodily injury; personal and advertising injury; errors and omissions; third party crime; workers' compensation and employer liability; and directors' and officers' liability. Companies often engage insurance brokers to assist them with selecting appropriate coverage for their business. It is important that business owners understand the scope of coverage under each policy and verify that the coverage recommended by an insurance broker is accurately reflected in one or more insurance policies.

We prepared this information to provide a general overview of some of the most common issues faced by online businesses, which, by no means, is conclusive. There may be other legal considerations not covered above which owners of e-commerce businesses should take into account. Every situation is different, and you should consult an attorney about your specific question or situation. Bousquet Holstein PLLC provides advice on a broad range of business and commercial matters, including the ones addressed in this article. If you have any questions regarding e-commerce business issues, please contact Anna Putintseva.



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