

Expertise Matters

Incorporated or LLC?

Should I incorporate or form a limited liability company?

Should I incorporate or form a limited liability company (“LLC”) is a question that is often asked of attorneys. The question is sometimes posed prior to the commencement of a business and sometimes after a business has been in operation for a period of time. The question cannot be answered with an absolute yes or no. Instead, each case must be analyzed on a case-by-case basis.

There are multiple factors that should be considered in making this decision. Some of the issues that should be considered are as follows:

An issue that distinguishes a corporation or an LLC from a sole proprietorship or a general partnership is the liability exposure of its owners. A sole proprietor (i.e., a person who owns all assets used in a business) is personally liable for all debts, obligations and liabilities of the business. In most instances, general partners in a general partnership are jointly and severally liable for the debts, obligations and liabilities of the partnership. In contrast, a shareholder’s liability in a corporation is limited to the consideration (value, cash or otherwise) paid for the person’s shares in the corporation and a member in an LLC is not liable for the debts, obligations or liabilities of the LLC solely by reason of being a member of the LLC. It should be noted, that the liability of a shareholder or a member can be modified by contract; for example, if the shareholder or member signs a guaranty personally guaranteeing a corporate or LLC debt. Generally, however, if one is seeking liability protection, forming a corporation or an LLC is a way to achieve that goal.

Formation issues also need to be considered. There is no requirement that any document be filed with the

Department of State to form a sole proprietorship or a general partnership. Filings are required to form a corporation or an LLC. The filing fee is currently \$125.00. No operational agreement is required for a sole proprietorship. Generally, a partnership will have a written partnership agreement, a corporation will have bylaws and an LLC will have an operating agreement. It is advisable to have an attorney draft these documents.

Operational issues are a final area that will be discussed. A sole proprietor makes all decisions for the sole proprietorship. In a partnership, unless otherwise provided in a partnership agreement, each partner has an equal right in the management of the partnership. Corporations are generally managed by a board of directors and must have certain officers who act on behalf of the corporation. An LLC is managed by its members unless its organizational document or operating agreement provide for management by a manager or managers. Also, when dealing with a

partnership, corporation or an LLC, one is dealing with an entity that must file a tax return and maintain separate accounting. Obviously, there is more involved operationally with operating a corporation or an LLC.

This article is not an exhaustive discussion of all issues that must be considered in making a decision on whether or not to incorporate or form an LLC. Instead, it is intended to provide guidance on some of the issues that often arise when this issue is discussed. Those considering incorporation or formation of an LLC should thoroughly discuss all issues with their attorney before making a decision on which course to follow.



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About George Gvozdich, Jr.

Attorney George Gvozdich, Jr. has been actively engaged in the general practice of law in western Pennsylvania since 1980. He is general counsel to JARI and its affiliated organizations. His practice includes advising clients regarding, and handling, simple to complex commercial lending transactions, real estate transactions, purchases and sales of business interests and general corporate and business matters. Visit his website at www.gvozdichlaw.com

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