Common Legal Concerns for Small Business and Nonprofits

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Common Legal Concerns for Small Businesses and Nonprofits

Small businesses often operate in the same market as larger companies, but differ in a multitude of ways, including size, financing, and short- and long-term goals. These differences create unique obstacles for small businesses. The same goes for nonprofits, which have distinct concerns about tax-exempt status. This article illuminates common legal concerns for small businesses and nonprofits, and briefly discusses strategies for dealing with them.

A small business is one that is limited in size and revenue. The maximum size and revenue allowed to be considered a small business varies by industry.

Texas alone has 2.4 million small businesses that make up 98.6% of all Texas businesses.¹

Legal Concerns for New Stage / Startup Entities

A startup entity is one in the initial stages of operations, and is often funded by its founders as they prepare to bring their product or service to market. Legal concerns often arise when choosing a type of entity, choosing a name, hiring workers, and drafting contracts.

I. Choice of Entity

When starting a business, one of the major decisions the founders must make is what type of entity to create. Under the Texas Bus. Org. Code (TBOC), founders may establish a corporation (including for-profit, non-profit, and special purpose), a limited liability company (LLC), or a partnership (including general and limited). A single founder could also establish a sole proprietorship. The Internal Revenue Code breaks corporations down further into C-Corporations and S-Corporations.

Each type of entity has pros and cons, and small businesses must consider the amount of resources they have to maintain compliance with the requirements for each type.

a. Corporations

Corporations are the most complex type of entity to establish and will require the most resources, including filing fees, legal fees and/or extensive time

¹ SBA Office of Administration, Texas Small Business Profile (2016).
drafting bylaws and other governance documents, and costs associated with maintaining compliance.

The management structure is highly regulated. Corporations are owned by shareholders who elect a board of directors. The board of directors then elects officers to manage the day-to-day business affairs.

Additionally, the business must comply with corporate formalities laid out in TBOC Chapters 21-23, which include creating and adopting bylaws, issuing stock, holding shareholder and director meetings, filing annual reports, and paying annual fees.²

One major consequence of failing to comply with corporate formalities is that this failure could be used against the corporation as support for piercing the corporate veil, exposing shareholders, officers, and directors to personal liability (although failure to comply with corporate formalities is not alone sufficient to pierce the veil).³

The corporate structure does have its benefits, however, including limited liability for shareholders, directors, and officers; the ability to spread profits between the corporation and shareholders for tax-planning purposes; ability to provide health and fringe benefits through the corporation; ability to offer stock options to employees; lower risk of being audited by the IRS; and the ability to easily sell your business – an important consideration that many small business fail to take into account.

Additionally, even a small business may choose to incorporate if it plans on financing through venture capital.

A small business that chooses to incorporate will most likely incorporate as an S-Corp.

An S-Corp is limited to no more than 100 shareholders, but offers advantages to smaller businesses that the C-Corp does not. For example, a C-Corp is taxed as a separate entity, meaning both the entity and the owners pay income taxes. This can result in more taxes being paid overall. An S-Corp on the other hand may elect pass-through taxation, meaning the business income is taxed only once – on the owners’ personal tax returns.⁴

Unlike a C-Corp, an S-Corp that has no more than $5,000,000 in gross receipts typically has more flexibility in choosing its accounting method.

Two limitations on S-Corps to consider are: (1) S-Corp shareholders must be either U.S. citizens or residents. So if one or more of the owners are non-U.S. citizens living in another country, the owners will want to consider forming an LLC. And (2) S-Corps cannot be owned by C-Corps, other S-Corps, LLCs,

² TBOC 21.002-23.110
³ See Tryco Enterprises, Inc. v. Robinson, 390 S.W.3d 497 (Tex. App.—Houston [1st Dist.] 2012) [stating “[Alter ego] is shown from the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed...”].
⁴ Internal Revenue Code, 26 U.S.C. 1366.
partnerships, or many trusts.\(^5\)

One significant tax implication to consider when deciding to form a corporation or other type of entity is that another type of entity, like an LLC or partnership, can convert later on often with less tax consequences than a corporation.

A relatively new concept, especially popular among millennials, is the social purpose corporation. The TBOC, now provides that a for-profit corporation may include in its certificate of formation one or more specific purposes aimed at “promoting one or more positive impacts on society or the environment, or minimizing one or more adverse impacts of the corporation’s activities on society or the environment.”\(^6\) Social purpose corporations may be formed, for example, to provide products or services to low-income individuals, preserve the environment, improve human health, or promote the arts or sciences.

The social purpose structure allows business to be formed for charitable, benevolent, cultural, or other similar purposes without having to be formed as a nonprofit corporation. While a social purpose corporation must pay income tax (unlike a nonprofit organization), it does not have to comply with the additional requirements for nonprofits. It also provides additional legal protections for directors and officers. For example, directors and officers are allowed to not only consider the interests of the corporation and shareholders in making decisions, but may also consider any social purpose specified in the certificate of formation.\(^7\)

Some drawbacks to consider are that social purpose corporations can be a little more complex to establish and govern and can potentially limit access to investors, who may be skeptical of this structure.

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Nonprofits are generally better off establishing a corporation, unless the organization is very small.

Nonprofit corporations and associations must both apply and meet the requirements set forth by the IRS and Texas Comptroller to obtain and maintain tax-exempt status.\(^8\) Corporations and associations have similar legal protections. However, it is typically easier for corporations to raise money to operate since most businesses and donors are more familiar with this type of entity.

In sum, the corporate structure will be best for social purpose companies, nonprofits, and entities with many resources or that need venture capital financing.

b. **LLCs**

LLCs are less complex than corporations to set up and govern, but more complex than partnerships and sole proprietorships.

\(^5\) Internal Revenue Code, 26 U.S.C. 1361(b).
\(^6\) TBOC 1.002(82-a).
\(^7\) TBOC 21.401.
LLCs are similar to S-Corps in that they provide limited liability protection to owners, are a separate legal entity created by a state filing, and are subject to formalities like filing annual reports and paying certain fees.

LLCs can also elect pass-through taxation so no income taxes are paid at the business level. To do so, the LLC must elect to be taxed as a partnership by the IRS. This election also plays into calculating the LLC’s Texas franchise tax. This, however, does not mean that an LLC is treated like a partnership for non-tax purposes, as explained by the 14th District Court of Appeals in SJ Medical Center, LLC v. Estahbanati. In that case, the medical center sought to be treated as a partnership so it could qualify as a “hospital district management contractor” under the Texas Health and Safety Code. The Court held that “a limited liability company does not fall within the ordinary meaning of ‘partnership.’”

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10 Tex. Tax Code 171.1011(c)(2).
11 SJ Medical Center, LLC v. Estahbanati, 418 S.W. 3d 867 (Tex. App.—Houston [14th Dist.] 2013).

LLCs have some benefits over S-Corps. They are not limited to 100 owners or less and their owners do not have to be U.S. citizens or residents. Additionally, LLCs do not have restrictions on what type of entities can own it or that it can own.

They are also not required to follow the extensive corporate formalities. For example, LLCs do not have to adopt bylaws or an operating agreement, issue membership shares, or hold or record annual meetings (although these things are recommended). Moreover, LLCs offer greater flexibility in management structure.

On the other hand, ownership in LLCs is typically not as freely transferrable as ownership in corporations. If transferability of ownership is important to the business, the LLC structure may be a hindrance. It can also be expensive to convert an LLC to a C-Corp in the event the LLC requires funding from venture capitalists.

Corporations may also have more preferable self-employment taxes than LLCs. This is because the owner can be treated as an employee and paid a reasonable salary upon which FICA taxes are paid. Additional earnings that are considered to be unearned income are not subject to self-employment taxes.

Small businesses must be particularly cognizant of the hazards that can arise from piercing the corporate veil, a mechanism allowing for personal liability of the members.

This is particularly true for single-member LLCs, whose owner often thinks that merely registering as an LLC is sufficient to protect him or her from personal liability. The owner, however, must be meticulous in isolating business matters from personal matters. For example, the owner should always comply with the laws, regulations, and the LLC’s policies as well as avoid comingling personal bank accounts with business expenses.

The owner must also make sure the LLC has adequate liability insurance. Relying on personal funds to fill in the gap can destroy the liability shield if the LLC is underinsured.

Even if the LLC does not commit actual fraud or
intend to deceive, as required to pierce the corporate veil, failure to isolate business matters and maintain adequate insurance expose the business to devastating litigation.\textsuperscript{12}

In sum, an LLC provides greater flexibility and requires fewer resources. It provides the same legal protections as a corporation. It is more limited than corporations, however, when it comes to raising funds and transferring ownership.

Common types of businesses that form as LLCs include consulting firms, real estate projects, and private equity and investment funds.

c. Partnerships

A partnership is a business with two or more owners and can be created with or without a written agreement. It is fairly easy and inexpensive to establish, and offers flexibility in management and governance structure.

As discussed further in this section, one of the main drawbacks to partnerships is that the owners tend to have less protection from liability.

The TBOC recognizes three types of partnerships – a general partnership, a limited partnership, and a limited liability partnership.

A general partnership is the least complex to establish and requires only that two or more people associate “to carry on a business for profit.”\textsuperscript{13} There is no state-filing requirement for a general partnership, although it does have to file an assumed name certificate (DBA) if its name does not contain the last name of all partners.

A limited partnership (LP) consists of at least one general partner (who remains personally liable for the debts and obligations of the partnership) and at least one limited partner (who is exercises little or no control over the entity and is protected from liability). A limited partnership must file a certificate of formation with the Secretary of State.

A limited liability partnership (LLP) protects all partners from personal liability, but must be registered with the State. It also must include “limited liability partnership”, LLP, or similar term or abbreviation in its name.

All three types of partnerships are subject to pass-through taxation. Unlike an LLC, however, they do not have the option to elect to be taxed as a corporation.

Additionally, only the LLP provides the liability protection that an LLC or corporation provides, and an LLC offers the advantage of a more flexible management structure.

In sum, an LLP would be most suitable for a business with fewer resources and for which a flexible management structure is not a concern. In addition to the above, a general partnership or LP would be most suitable for a low-risk business for which general and liability insurance policies provide sufficient protection.

\textsuperscript{12} See, e.g., \textit{Fin & Feather Club v. Leander}, 415 S.W.3d 548 (Tex. App.—Texarkana 2013); see also \textit{Metroplex Mailing Services, LLC v. RR Donnelly & Sons Company}, 410 S.W.3d 889 (Tex. App.—Dallas 2013).

\textsuperscript{13} TBOC 152.051.

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A sole proprietorship is the least complex and least expensive entity to establish. According to the Secretary of State, it’s also the most common.

All it takes to establish a sole proprietorship is for an individual to engage in some business activity. No formal organization and no stating-filing are required. If the owner operates the business under a name other than the owner’s last name, he or she must file a DBA certificate at the county level or an assumed name certificate with the Secretary of State’s office.

Sole proprietorships are not considered separate entities apart from their owner and are thus subject to pass-through taxation like partnerships, LLCs, and S-Corps. Also like a partnership, a sole proprietor is personally liable for all debts and obligations of the business. Like S-Corps, an individual and not some other entity like a corporation, LLC, partnership, or trust must own a sole proprietorship.

Because an LLC can operate with only one member, thought should be given to whether an LLC or sole proprietorship is right for an individual’s business.

II. Naming the Entity

Choosing a name is important for any business. It sends a message to a business’s target market and is a valuable marketing tool.

Selecting a name can also expose an unknowing small business to a host of legal problems if not done properly. For example, if the name is confusingly similar to an already established name, the business may find itself wrapped up in litigation for infringement. In addition, the business will want to protect itself from infringement as well.

Laws that should be considered when choosing a name include the common law, the Trademark Act of 1946, Texas Business and Commerce Code chapter 16 (Trademarks), and the TBOC chapter 5 (Names of Entities). All of these laws provide protections for businesses with established trademarks and a right to sue and recover damages for infringement.

The U.S. Patent and Trademark Office (USPTO) defines “trademark” as “a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others.” A subcategory of trademarks is a service mark, which is essentially the same thing, but for services. This definition encompasses names of businesses (e.g., Nike) as well as logos (e.g., the Nike swoosh). All businesses will have a name, and most will have a logo of some sort as well.

Whether a business decides to rely on common law rights or rights established by registering its mark, it is a good idea for the business to search local, State, and Federal databases to ensure the mark is not already in use. Since these databases only show registered marks or assumed names filed with the county, the business might consider doing an Internet search as well for its desired name or logo.

a. Common Law
Trademark rights arise out of distinctiveness and actual use of the trademark. For example, selling a product under a brand name creates common law trademark rights.

Therefore, (1) a trademark can last forever, as long it is it used; and (2) registration of a trademark is not mandatory (although, for reasons explained below, it is recommended) to establish common law rights.

A business’s common law trademark rights are established only in the geographic region where the trademark is used. So, for example, a business that operates only in Texas has common law trademark rights in Texas only and cannot sue a business in California for using the same name or mark, unless of course the California company tried to enter the Texas market.

On that same note, a business that operates only in Houston, Texas, cannot, under the common law, prevent a business from using the same name or mark in Dallas, Texas.

Under the common law, the first business to use the trademark has the rights to it.

Problems can arise, however, making it difficult to enforce common law rights when there is no public record of when a business began using the trademark.

A business that does not register its trademark should use the letters “TM” (or “SM” for service mark) to notify the public of its claim to common law rights in the mark. As described below, however, registering a trademark provides additional advantages.

b. Trademark Act of 1946

The Trademark Act of 1946 (or the Lanham Act), protects trademarks that are used in interstate commerce. This gives rise to two legal considerations for businesses. First, if the business plans to engage in interstate commerce, for example, it intends to sell products not just in Texas, but also in other states, it will need to register its trademark with the USPTO to take advantage of the most protection.

Registering a trademark puts the public on notice of a business’s claim to the mark, provides prima facie evidence of validity and ownership of the mark, and provides a statutory case of action for infringement.

Second, even if the business plans to operate only in Texas, it must ensure that its trademark is not infringing on another business’s rights under the Trademark Act. Under the Act, an infringement occurs when a business uses a mark that is likely to cause confusion or mistake, or is likely to deceive, the public about the source of the goods or services.

For example, an electronics store may want to think twice about naming itself Macrosoft, even if it operates only in Texas.

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14 Singh v. Duane Morris, LLP, No. 338 S.W.3d 176 (Tex. App.—Houston [14th Dist.] 2011) (stating that a mark “is not entitled to trademark protection unless it has become distinctive…”).

The Trademark Act provides for both injunctive relief and monetary damages for infringement upon a registered mark. To obtain injunctive relief, a plaintiff must show only that the infringing mark is like to cause confusion. To receive monetary damages, the plaintiff must show that the mark caused actual confusion. **In most cases, the infringer does not need to be in direct competition to be held liable.**

So, using our example above, even if Macrosoft did not produce or sell its own products, but only sold those of other software companies, it could still be subject to infringement litigation brought by Microsoft.

c. **Texas Business and Commerce Code and TBOC**

Like the federal Trademark Act, Chapter 16 of the Tex. Bus. & Com. Code provides for a statutory cause of action for infringement of a registered trademark.

Under the Code, a person commits infringement if he or she uses a registered mark, without consent, and “the use is likely to deceive or cause confusion or mistake as to the source or origin of the goods or services.”17 If infringement has occurred, the Court will enjoin the violator and may grant monetary relief for all damages resulting from the infringement.

**This is so regardless of whether or not the violator intended to infringe on a registered trademark.**

TBOC chapter 5 further provides that a filing entity (such as a corporation, LLC, LP, or LLP) cannot register under a name that is the same or deceptively similar to the name that is already registered or reserved with the Secretary of State. It also specifically advises that filing a certificate of formation does not authorize use of a name in violation of another’s right under the Trademark Act, Tex. Bus. & Com. Code, or the common law.

Because litigation can quickly deplete a small business’s resource, it is crucial that a new business take steps to ensure it is not infringing on an already registered trademark as well as take the necessary steps to protect itself from infringement.

A person can search for Texas registered marks and assumed names by calling or e-mailing the Secretary of State at no charge, or by searching the SOSDirect database for $1 per search. A new business should also search county records for assumed names, as well as the Internet for non-registered marks.

### III. Hiring Workers

One of the first decisions a new business will have to make is whether to hire employees or independent contractors. Whichever route the business goes will affect its bottom line and a range of other employment issues.

Whether to hire employees or independent contractors will depend on a variety of factors, such as type of business, available resources, profit margins, and existence of fluctuating or steady demand.

a. **Pros and Cons**

An independent contractor (IC) is essentially has his or her own business

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and typically works on a project-basis. **Advantages to hiring ICs include less labor cost; less exposure to liability; and increased flexibility, predictability, and expertise.**

A business does not have to pay an IC overtime or make contributions, such as a share of his or her Social Security / Medicare taxes, unemployment compensation insurance, and workers’ compensation insurance, on behalf of the IC. It also does not have to provide benefits like health insurance and retirement. These expenses can easily increase a business’s payroll costs by over 20% – a substantial amount especially for a small business with limited resources.

Unlike an employee, an IC does not typically have the right to sue a business for things like discrimination based on national origin, religion, or gender and wrongful termination. Additionally, unlike employees, ICs do not have the right under the law to take time off to care for a sick family member, to form a union, or to receive minimum wage or overtime.

Using ICs rather than employees also gives a business more flexibility to handle fluctuating demand. For example, it is much easier to hire more or less ICs than to hire and fire employees to deal with period of high and low demand.

Hiring ICs provides greater predictability since the contract is typically for a fixed period of time or for a specific task or project. After the task is complete, the contract is up without the need to fire or lay anyone off.

Lastly, an IC is likely to have more specialized expertise without the need to expend time and money on training.

**On the other hand, hiring employees has its advantages as well.** For example, an employer is able to exercise more control over an employee than an IC, allowing for more supervision and monitoring to make sure the job is done properly.

Additionally, a business can terminate an “at-will” employee for any reason that does not violate the law. It typically does not, however, have such unrestricted ability to fire an IC. There are often limitations on a business’s ability to fire an IC in the contract, and an IC may be entitled to monetary damages for a breach.

A business who subscribes to workers’ compensation insurance may consider hiring employees rather than ICs if there is a high risk of injury involved in the job. Employees injured on the job are usually covered by the insurance and, therefore, cannot sue their employer for damages. ICs, on the other hand, do not give up this right and may be able to sue for damages if they are injured on the job.

A company involved in a creative or inventive business may also prefer to hire employees. This is because the business owns the rights to anything created by an employee, but not an IC.

Last, but definitely not least, businesses with more employees are less likely to get audited by the IRS and other government agencies than businesses with more independent contractors. This can result in increased costs in the form of back taxes. Additionally, if an IC is found to actually be an employee, the business may required to reimburse the IC for overtime, pay back taxes and penalties, and provide certain benefits.
b. Determining Who to Hire

A small business has much to consider when deciding whether to hire employees or ICs. The Texas Workforce Commission (TWC) offers extensive guidance on how to classify a worker as an employee or IC.18 Among other things, it explains that the employer typically seeks ICs out, the terms of the contract are negotiated, and that independent contractors have special expertise and should not need training.19

Typically, a business in an industry with a steady demand and that provides goods rather than services will prefer to hire mostly employees.

If cost is a concern, the business may consider hiring some or most employees on a part-time basis to eliminate costs associated with employee benefits.

Hiring employees rather than ICs will give the business more control over the worker’s hours, performance, uniform, etc. Although an employer may expend additional resources up front training employees, this allows for greater consistency in the performance of work. It also ensures work is performed according to the employer’s standards.

Even a business that relies primarily on independent contractors will likely want to hire some employees, such as an office manager and secretary.

All businesses should seriously consider contributing to workers’ compensation insurance. This is particularly so if there is a high risk of injury associated with the type of work involved.

A business that hires primarily employees, but experiences a predictable fluctuation in demand, may also consider hiring ICs. For example, a department store may hire seasonal workers as ICs rather than employees to work only during the short holiday season.

Note: any business who hires an employee must also obtain an Employer Identification Number (EIN) from the IRS.

IV. Contract Drafting

An area that can potentially cause serious problems for a small business is contract drafting. Contracts, whether written or verbal are involved in almost every aspect of running a business, from leasing space to buying and selling goods, providing a service, and hiring employees or independent contractors.

A small business that is less sophisticated and has fewer resources to devote to legal services can easily enter into troublesome contracts.

a. Drafting Tips
It is important that small businesses understand the necessity of drafting contracts designed to protect themself from loss caused, for example, by litigation and liability limitations.

One way to avoid loss is to ensure that neither party takes action until the contract is finalized. If one party begins work before the contract is final, that party may end up losing out on payment if no contract was intended. On the other hand, at some point it may become too late for the other party to back out resulting in payment that the party did not want to pay.

When negotiating the terms of a contract, a business might consider calling the initial writing a “non-binding letter of intent” or adding a “DRAFT” watermark to it to avoid any confusion.

Any business or individual should carefully read all terms of the contract before signing it to ensure they accurately reflect the parties’ intentions. The terms should clearly lay out what is expected of each party.

The business will likely want to include a force majeure clause providing for circumstances (such as natural disasters or unavoidable catastrophes) under which it would not be liable to perform. This can protect a small business from incurring insurmountable expense in the event of a disaster.

On a similar note, the business will want to ensure there are no unintended escape clauses that could allow the other party to get out of its obligations at the business’s expense or severely limit the other parties’ liability.

The business should consider whether a liquidated damages clause would be beneficial. While a penalty is typically not enforceable, reasonable liquidated damages typically are.

The consideration is two-fold. A liquidated damages clause can help protect the business financially if the other party breaches. At the same time, it could also require the business to pay out a large sum if it finds it has to breach the contract for some reason.

An NDA restricts the activities of the party receiving the confidential information, and can be essential to protecting things like innovations and trade secrets.

Additionally, small businesses will want to pay close attention to the terms of any financial agreements with lenders or investors. The business may want to ensure that the contract lays out its rights, for example, to delay or stop the sale of collateral or to remedy a default.

So far, much of what has been discussed has been in terms of contracts with outsiders.

However, internal contracts are just as important.

For example, two friends starting a business together may not think that having a partnership agreement is important because they will just work out any issues as they arise. This could lead to irreconcilable disputes on (NDA) in place before disclosing any key information about the business, including to potential investors and employees.
issues that were not discussed up front and ultimately result in dissolution of the partnership.

Business associates will want to carefully consider the structure of the business and the terms of investing, dividing profits, sharing losses, and delegating responsibilities to avoid future conflict that could have a devastating impact on the business and on the founders’ relationships with each other.

Entities with less easily transferrable ownership interests may want to have an agreement in place detailing how and to whom an owner can sell his or her interest to protect themselves from a disruptive disputes or changes in ownership.

Entities with easily transferrable ownership interests may consider including a right of first refusal giving the owners the first right to buy back stock or ownership interests. This can protect the business from dilution and unwanted changes in ownership.

Lastly, whether drafting an external or internal agreement, the business should consider whether to include some type of alternative dispute resolution clause.

The expense of litigation can easily deplete a small business’s financial resources.

Because of this, a small business may want to include a clause requiring mediation, non-binding arbitration, or binding arbitration – all alternatives to litigation shown to significantly reduce the cost and time spent resolving disputes. These alternatives can also provide for more amicable resolution and even save a business relationship that would have been ruined by the adversarial nature of litigation.

b. Statute of Frauds

Another important consideration that is often unknown to small businesses is that, to be enforced, many contracts must be in writing and signed by the person against whom enforcement is sought (recall the Statute of Frauds).  


It’s not uncommon for individuals or small businesses to enter into verbal agreements of some sort only to find that they are unable to enforce the agreement because it wasn’t in writing.

For example, under the UCC Article 2 an agreement to sell goods for $500 or more must comply with the Statute of Frauds. So when a small business owner calls up a vendor and asks to buy $750 of goods to sell at his store, he may find he has no recourse when the vendor fails to deliver the goods on time.

Other agreements that a small business is likely to encounter and that must be in writing include:

- Real estate leasing for a term greater than one year
- Contracts for the sale of real estate
- Agreements to pay commissions for the sale or purchase of an oil or gas mining lease or royalty, minerals, or a mineral interest

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• Agreements that will not be performed within a year of making it
• Promises to pay another’s debt

So, a business looking to lease a small space in a retail center for a term of three years must put the lease in writing. Same goes if the business is buying or selling a space or other real estate.

If the business is in the oil and gas industry, it must put lease and royalty agreements in writing; otherwise it may be unable to collect any commission it’s owed.

Importantly, if a business plans to hire an IC for a term of two years, the agreement must be in writing. If not, the business may be at a loss if the IC suddenly quits after a few months.

Legal Concerns for Scaling / Growing Enterprises

An entity will face additional legal concerns when it is ready to grow its operations and increase performance or efficiency. Legal concerns often arise with regard to revisiting choice of entity based on changing needs; protecting intellectual property; employment structure, and compliance with federal, state, and local laws; dispute resolution; and adequate insurance coverage and policy limits.

I. Revisiting Choice of Entity

Because of limited resources, a startup may initially form as a less complex type of entity, but later find that its needs change.

The three major reasons a business would want to convert to a different structure are (1) for additional protection from liability; (2) to raise additional capital needed to sustain growth; or (3) decrease complexity and compliance obligations.

The simplest “conversion” is turning a sole proprietorship into another entity like an LLC or corporation because, with a sole proprietorship, there really isn’t anything to convert. A sole proprietor need only file the same materials required for any other startup.

The sole proprietor may have been initially unsure about the viability of the business and so did not want to expend the additional resources required to establish an LLC or corporation. Now that the business is succeeding and growing, the sole proprietor may desire additional protection from personal liability.

Additionally, if the sole proprietor seeks to grow his or her business substantially, establishing a corporation may be best in order to attract venture capitalist funding.

The same goes for a general partnership, although the process is slightly more complex. An LLC may wish to convert to a corporation, particularly a C-Corp, so that it can raise venture capitalist funding to sustain growth. There are also times when a corporation may wish to convert to an LLC or
partnership to gain more flexibility in its management structure and reduce the need to comply with corporate formalities.

The process to convert a Texas entity is relatively streamlined by TBOC Chapter 10, which provides for statutory conversion.

Under the Code, an entity that wishes to convert must formulate a plan for conversion that is approved by all owners or members. It then must file a Certificate of Conversion along with the plan of conversion, approval of the plan, and certificate of formation for the converted entity.

There are additional requirements for a partnership to convert. For a partnership to convert to a filing entity, the partnership agreement must contain provisions that authorize the conversion. TBOC 10.107.

A business that wishes to convert to a different type of entity will also want to seriously consider the tax consequences of converting, and should consult a tax professional.

For example, converting a C-Corp to a partnership or LLC taxed as a partnership can result in significant taxes to the business and its shareholders. While converting an LLC to a corporation typically does not result in as significant tax consequences, the taxes can still be substantial.

II. Protecting IP

a. Generally

Any growing business will need to take steps to protect its intellectual property (IP), including trademarks (discussed above), creative products, innovations, inventions, and trade secrets. Failing to protect IP can result in competitors with more resources duplicating a business’s ideas and taking away market share. Losing market share can be particularly devastating to small businesses.

Just as for startups, having a well-written nondisclosure agreement in place is one of the first steps to protecting IP. A NDA should be included in all employment and investor agreements, licenses, and sales contracts.

Any business that produces works of authorship or develops innovative products or inventions can also obtain monopoly rights to the creations and effectively prohibit others from reproducing, selling, or renting them without consent or a license. The purpose is to encourage and promote innovation by allowing the creator to reap the benefits of his or her creation.

Recognizing the importance of monopoly rights for a limited period of time dates all the way back to the U.S. Constitution. As Article I, Section 8 of the Constitution states, “Congress shall have the power...To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive
right to their respective writings and discoveries.”

**Two ways that the law allows for this is through copyrights and patents.**

Works of authorship include creations such as literary works music, artwork, photographs, other audio and visual recordings, and software. The author of such a work automatically owns the rights to the work.

However, if the author needs to sue another for infringement or wrongful use of the work, the author must register the copyright with the U.S. Copyright Office.

It is important to register the copyright within five years of publication in order for it to serve as prima facie evidence of the copyright. Additionally, unless the author registers within three months of publication or prior to an infringement, the author is limited to actual damages in a lawsuit.

A copyright begins at the moment the work is created and typically lasts for the author’s life plus 70 years. Title 17 of the U.S.C. governs copyright law.

Copyright registration is particularly important for small businesses such as magazines, artists, musicians, photographers, videographers, and app and software developers. Any business that develops its own images or graphics for marketing purposes will also want to register those works.

Small businesses that develop an innovative product or invention should seek patent protection for that product. A patent prohibits others from making, using, or selling the invention without permission.

To be patentable, an innovation or invention must satisfy four requirements.

Fist, it must fall within the one of the statutory categories of patentable materials. The U.S. Patent Act (codified in Title 35 U.S.C.) states that a person may patent “any new and useful process, machine, manufacture, composition of matter, or any new and useful improvements thereof.”

The definition includes most tangible products, but excludes things like mere data structures and nonfunctional descriptive material like compilations of data. There are also three judicial exceptions – abstract ideas, laws of nature, and natural phenomenon cannot be patented. Notably, the U.S. Supreme Court has determined that algorithms fall under laws of nature and are not patentable.

In addition to falling into a statutory category, patentability requires that the creation be new, useful, and nonobvious.

The newness requirement provides that a creation cannot be patented if certain public disclosures about it have been made. The timing, therefore, of applying for a patent is crucial.

The usefulness requirement is relatively easy to meet, as the creation must only have some useful purpose.

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22 U.S. Const. art. 1, sec. 8, cl. 8.
24 17 U.S.C. 410(c).
Lastly, the nonobvious requirements provides that the creation must be different from previous products or processes in a way that was not obvious to a person of ordinary skill in that type of product or process.

Businesses that develop their own products will definitely want to patent those products. The same goes for researchers who develop a new process or compound, app developers, and technology startups, for example.

Businesses that have patentable materials should be advised to timely consult with a patent attorney.

b. Trade Secrets

Trade secrets are considered intellectual property and are protected under the law. According to the Texas Uniform Trade Secrets Act, a trade secret is essentially information, not easily obtained by others, that generates independent economic value. This includes formulas, patterns, compilations, programs, devices, methods, techniques, processes, financial data, and lists of actual or potential customers or supplies.\(^{30}\)

The Act protects trade secrets that are in continuous use as well as those that have not yet been used or are not currently being used. It also protects information about what not to do.

For a trade secret to be protected under the Act, the owner must take reasonable steps to maintain its secrecy.

This requirement is significantly more lax than the prior common law, which required a substantial element of secrecy; however, it can still be easily overlooked by small businesses with limited resources.

The first step to protecting its trade secrets is for a business to identify what those secrets are. For example, a small accounting firm may have a list of clients or potential clients that it wants to keep secret from competitors. A grocery store that sells uncommon produce may want to protect its list of suppliers. A restaurant or bakery may rely on a “secret” recipe or ingredient to set its goods apart.

Other examples of trade secrets include innovative marketing strategies and manufacturing techniques. Particularly important in the modern era, computer algorithms are protected trade secrets even though, as stated above, they are not patentable.

Once a business has identified its trade secrets, it will want to ensure that the secrets are properly labeled as confidential and securely stored in a place that is not easily accessible to others.

A business may not be able to avoid disclosure of trade secrets to employees or independent contractors. For example, an accountant working for a small accounting firm will naturally have access to the identities of many, if not all, of the firm’s clients. In situations like this, the business should have a well-written nondisclosure agreement in place.

III. Employment Structure and Compliance

A growing business will constantly need to monitor its employment structure and update its policies to ensure compliance with
state and federal employment laws.

Employment laws are many and complex, making them easy for a small business to miss. A business that is not in compliance opens itself up to potentially devastating litigation, particularly for a small business with already limited resources.

a. Federal Laws

There are numerous federal laws enforced by various agencies, including the EEOC, OSHA, and the IRS. Whether or not a particular law applies to a particular employer depends on the number of employees the business employs.

Essentially all employers must:
• Provide pension and welfare plan information
• Provide equal pay for work that requires equal skill, effort, and responsibility
• Comply with the various requirements in order to obtain and use credit reports for employment purposes

• Pay the prevailing minimum wage and overtime
• Pay their portion of their employees’ Social Security tax
• Provide a safe workplace
• Report newly hired workers to the state directly of new hires

Additionally, employers cannot:
• Discharge employees because wages have been garnished
• Require employees to take a lie detector test except under very limited circumstances
• Terminate employees for taking time off for jury duty
• Engage in unfair labor practices

A growing business will have additional compliance concerns. Once a business grows to 15 employees, it becomes subject to Title VII, the Americans with Disabilities Act and Amendments, the Genetic Information Nondiscrimination Act, and the Pregnancy Discrimination Act. The Equal Employment Opportunity Commission (EEOC) enforces these laws. Among other things, a business with 20 or more employees must extend health insurance coverage for employees who would otherwise lose the coverage due to termination or some other event.

Once a business reaches 50 or more employees, it must allow eligible employees to take up to 12 weeks of unpaid leave, continue health benefits during the leave, and restore the employee to the same or comparable position when he or she returns.

The Occupational Safety and Health Administration (OSHA) enforces health and safety standards that almost all businesses, including small ones, must meet. Regardless of the number of employees, a business must identify and eliminate workplace hazards, take measures to protect employees from injury or illness, implement an emergency safety plan, have a written fire safety plan, have first aid supplies, and educate employees on safety measures including those related to hazardous materials. Additionally, businesses with 10 or more employees must keep records of significant work-related injuries and illness.

Lastly, it’s important that a business stay in

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31 See Appendix A for a list of applicable Federal Laws.
compliance with IRS requirements for withholding federal income tax and paying social security and Medicare taxes. The IRS advises that business should keep employment tax records for at least four years.

As the size of the business increases, so do its compliance requirements and their associated costs in both time and resources. A small business will need to take these costs into consideration as it grows.

Recall that an independent contractor is not considered an employee. A business can therefore limit its compliance requirements by utilizing an independent contractor structure. A business must be careful, however, to maintain a clear IC relationship so that ICs do not end up classified as employees by a court or government agency, which could result in large unexpected expenses to the business.

b. State Laws

Employment issues can also arise at the state level.

The most prominent considerations at the state level have to do with hiring, retention, firing, and promoting employees.

Aside from being liable to employees for certain hiring decisions (like those based on discrimination), businesses can also be held directly liable to third parties for negligently hiring, supervising, or retaining an unsafe employee. This places an affirmative duty on employers to investigate a potential employee’s background to determine if the employee is incompetent or unfit to perform the job duties.

For example, a restaurant that hires an employee to deliver food, thereby requiring him to operate a vehicle, may need to investigate the potential employee’s driving history for excessive tickets and at-fault accidents.

Because of the added cost of performing a background check, a small business may see it as a low priority. But failing to adequately screen employees can result in enormous costs if an employee ends up injuring someone.

Issues can arise when firing employees as well.

The default relationship in Texas is at-will employment, meaning either party can end the relationship or change the terms at any time with or without notice.

The ability to terminate an employee, however, is not absolute. Even under an at-will relationship, an employer cannot fire an employee a reason that is unlawful.

For example, an employer with 15 or more employees cannot fire, or otherwise discriminate against, an employee based on “race, color, disability, religion, sex, national origin, or age.” The same goes for determining an employee’s wage or reducing his or her wage rate or hours. The Texas Workforce Commission enforces Texas’ anti-discrimination laws.

In addition to discrimination, an employer cannot terminate even an at-will employee in retaliation; for whistleblowing, filing an employment claim, military duty, jury duty, voting, engaging in union activity, refusing to commit a crime; or if termination would violate an express employment agreement.

32 See Appendix B for a list of relevant State laws.

e.g., a company policy to provide at least one warning before firing.

An employer who discriminates against or wrongfully terminates an employee opens itself up to litigation.

To avoid these types of claims, it’s a good idea for any business to keep detailed records of an employee’s violations or careless acts, warnings given to the employee, and the employer’s reasoning for various decisions such as hiring, firing, or modifying wages or hours.

IV. Dispute Resolution

Dispute resolution is a major consideration for small businesses.

While a large corporation may have the resources to engage in expensive and drawn-out litigation, a small business can be destroyed by it.

Because of this, small businesses should give careful thought to including well-drafted alternative dispute resolution (ADR) clauses in its contracts with employees, independent contractors, suppliers, distributors, buyers, and other third parties.

Two common types of ADR are arbitration and mediation. Arbitration is binding, whereas mediation is non-binding, but both have been shown to significantly reduce the time and money spent on resolving disputes. These methods also tend to be more amiable than litigation, and are therefore preferable if the business wants to salvage any of the relationship.

There are times when a small business may consider leaving the ADR clause out of an agreement. For example, the ability to litigate would be beneficial if the other party is likely to breach and the small business wants to be able to use litigation as leverage.

V. Insurance Coverage and Policy Limits

In Texas, a business is generally not required to purchase insurance, including workers’ compensation insurance, although certain clients or businesses may require it.34 For example, healthcare providers (except for nursing homes) are not required by law to purchase malpractice insurance; however, hospitals and HMOs typically require it.

It’s important to keep in mind that a business does not actually have to make a mistake to get sued. Any person can bring a lawsuit that is not frivolous, even if the business is ultimately found to not be liable. Without insurance, the business is stuck paying the costs of litigation even if it didn’t do anything wrong.

Because of the cost associated with purchasing insurance, it’s easy for a small business to want to forego it, especially if the business is low-risk and has few assets. Foregoing insurance, however, can put the business at risk of losing the assets it does have or having to file bankruptcy.

a. Types of Insurance

What kind of insurance is right for a business depends on the business’s specific needs. There are several different types of insurance, including general liability insurance, auto liability insurance, product liability insurance, and health insurance,

34 Every person operating a motor vehicle is required, however, to have auto insurance.
professional liability insurance, and commercial property insurance.

General liability insurance typically covers the cost of defending a lawsuit brought for injuries or other damages resulting from negligence, libel, or slander. If a business requires its employees to drive a vehicle, it will also need auto liability insurance.

Businesses that manufacture, distribute, or sell products will want to consider product liability insurance, which provides additional coverage for injuries caused by a defective product. Alternatively, businesses that provide a professional service will want to consider professional liability insurance to protect against claims for malpractice, negligence, and other errors. These businesses include lawyers, healthcare providers, and accountants.

Businesses that own commercial property will need to have commercial property insurance, and the business’s lender will likely require this. Additionally, a lease will typically require the business-lessee to maintain renters insurance. These policies protect against loss of property due to things like fire, hail storms, and vandalism. Property covers not just the real estate or structure, but also equipment, computers, company papers, and income.

If the business is home-based, it will want to consider home-based business insurance as opposed to commercial property insurance. Most homeowners’ policies do not cover business risks, so a home-based business will likely need this additional coverage.

A business engaged in especially risky activity, such as a transportation company, construction company, or research lab, will want to consider getting excess, or umbrella, liability coverage.

b. Coverage and Policy Limits

How much coverage to take out on an insurance policy will depend on the cost of coverage and the risks sought to be covered. A business with greater exposure to risk will want higher policy limits than a business with less risk.

For example, a business that handles hazardous materials will want more coverage than a business without hazardous materials. A restaurant may need more coverage than a clothing store to cover things like food poisoning and slip-and-falls from spilled drinks.

A business in a high crime area may want a higher limit (or be required to have it) on its property insurance to cover an increased risk of vandalism than a business in a low crime area.

Finally, a trucking company, even a small one, may want to take out excess liability coverage because of the potentially high exposure involved if a driver gets into an accident. On the other hand, a small pizza shop that delivers most likely doesn’t need the extra coverage.

A policy will contain different limits for different things. A common limit for personal/advertising injury is $1,000,000. This means that if a person were injured by a business’s negligence, the policy would cover up to $1,000,000 of that person’s expenses (or a settlement or jury award). This limit applies to each person injured. Without excess/umbrella coverage, the business would be responsible for any amount over $1,000,000.
Insurance policies also include a general aggregate limit. The general aggregate limit is the most the insurer will pay for any occurrence. General liability insurance policies will also contain a limit for damage to the premises.

Again, the higher the risk, the more coverage the business will need. A small business in particular will want to balance the amount of coverage selected with its available resources, taking into consideration potential costs of not having enough coverage and the likelihood of such costs.

**Legal Concerns for Nonprofits**

Nonprofit entities are established to benefit the general public and are not profit-motivated. Because of this they are given special tax treatment at both the federal and state levels, and must comply with various laws to obtain and maintain their tax-exempt status. Governance and funding are also major concerns for nonprofits.

I. **Obtaining / Maintaining Tax-Exempt Status**

The Internal Revenue Code Section 501 provides that certain organizations are exempt from paying federal income taxes. \(^{35}\) Sections 501(c), 501(d), and 401(a) lay out a long list of tax-exempt organizations, the most familiar falling under Sections 501(c)(3) and 501(c)(4).

Tax-exempt status is not automatic, and a qualifying organization must apply for the exemption and meet rigorous requirements.

a. 501(c)(3) & (4)

Section 501(c)(3) provides that any entity operated exclusively for the benefit of the public is tax-exempt as long as it meets various requirements. The purposes that such an organization can operate for include religious, charitable, scientific, testing for public safety, literary, educational, fostering national or international sports competition, and preventing cruelty to children or animals.

In addition to having an express exempt purpose, a 501(c)(3) must permanently pledge its assets to nonexempt purposes. In other words, its organizing documents must require that all assets be distributed for an exempt purpose in the event the organization dissolves.

There are also several things these entities cannot do if they wish to enjoy tax-exempt status. For one, they cannot distribute profits, such as dividends, to any individual as this would defeat the point of being “nonprofit.” They also cannot devote a substantial part of their activities to lobbying and absolutely cannot participate in any political campaign on behalf of any candidate for public office.

While a 501(c)(3) can receive income from unrelated business activity, this income may be taxable if the income is derived from a regularly carried on trade or business that is not substantially related to furthering the organization’s exempt purpose. For example, if a charity that provides free after-school activities for children of low-income families also maintains a sandwich shop open to the public, income derived from the sandwich shop will most likely be taxable. It will not, however, prevent the charity from

\(^{35}\) Internal Revenue Code, 26 U.S.C. 501(a).
obtaining or maintaining its tax-exempt status with regard to other income, grants, or donations.

On the other hand, a sandwich shop whose primary purpose is to generate profit from selling sandwiches to the public, but that also provides free after-school activities at its shop once a week will NOT qualify for tax-exemption under Section 501. Similarly, a public benefit organization that obtains tax-exempt status but ends up operating primarily for a non-exempt purpose will lose its tax-exempt status.

Nonprofit organizations designed to promote social welfare are given tax exemption under Section 501(c)(4). Examples of 503(c)(4) organizations include volunteer fire departments and labor unions. Social welfare organizations have more flexibility than the 501(c)(3) public benefit organizations to participate in politics as long as politics does not become their primary focus.

b. Requirements for All Nonprofits

Regardless of the type of nonprofit, all organizations seeking tax-exempt status under Section 501 must file an application with the IRS along with organizing documents and bylaws. The application must contain a detailed description of the organization’s activities and, typically, financial statements for the current and preceding three years.

Except for a few select organizations, all nonprofits must file an Annual Exempt Organization Return. An organization will automatically lose tax-exempt status if it fails to file its annual return for three consecutive years, and the organization may be required to pay applicable income taxes. The organization must re-apply to reinstate its tax-exempt status.

Like 501(c)(3) organizations, other nonprofits must also pay taxes on unrelated business income. All nonprofits must also ensure that they pay any applicable employment taxes.

All nonprofits must make their exemption application and annual returns available to the public upon request.

c. Texas Tax-Exempt Status

In addition to being exempt from federal income tax, a nonprofit may be exempt from various state taxes, including sales tax, hotel occupancy tax, franchise tax, and property tax.

The organization must apply to the Texas Comptroller for exemption from State taxes. To maintain its tax-exempt status with the State, the organization must also meet various reporting and disclosure requirements.

II. Governance – Board of Directors as Fiduciary

Requirements for nonprofits are set out in the TBOC.

Nonprofits in Texas are governed by a board of directors, which is required

36 Internal Revenue Code, 26 U.S.C. 501(b) (Unrelated Business Income Tax); 26 U.S.C. 501(d) & (h) (rules relating to lobbying); 26 U.S.C. 503 (requirements for exemption); IRS Publication 557 (Tax-Exempt Status for Your Organization).

37 Texas CASA has developed a Best Practices Manual detailing policies, procedures, and processes it has found effective. The manual can be tailored to various different types of programs.
to have a minimum of three members. The board is legally responsible for managing the nonprofit and essentially takes on a fiduciary role. 38 Ultimately, the board is responsible and accountable for the actions of the nonprofit.

In managing the nonprofit and its affairs, the directors must act in good faith, with ordinary care, and in the best interest of the nonprofit. 39 In addition to their duty of care, board members also have a duty of obedience and duty of loyalty.

Pursuant to its duty of obedience, the board must comply with all rules governing the nonprofit, including those found in federal and state law as well as the nonprofit’s own corporate documents. In exercising their duty of loyalty, board members must always put the interests of the nonprofit before their own personal or business interests.

Violating its fiduciary duties can result in personal liability of one or more directors. The increased scrutiny of nonprofits by government agencies as well as donors and the general public make it that much more important for the board to take the upmost care in performing its duties.

To avoid potential problems, the board should take affirmative steps ensure compliance with legal formalities.

For example, the board should regularly review the certificate of formation and bylaws to ensure that the nonprofit’s activities are furthering its stated purpose. If the nonprofit wishes to act outside of its stated purpose, it will need to amend or restate its corporate documents.

It should also review its corporate documents to ensure compliance with procedures for voting, electing officers, and the like. If board finds that compliance is impracticable or ineffective, it will want to update the procedures.

The board should also ensure that all reporting and disclosure requirements are met in order to protect the nonprofit’s tax-exempt status.

Board members are not allowed to receive compensation for their time or effort, but may receive reimbursement for expenses. Additionally, compensation for officers must be reasonable taking into consideration the size and type of the nonprofit. Board members should therefore regularly review compensation and reimbursement and should record the rationale behind all amounts paid to officers and directors. The board may want to consider bringing in an independent body to conduct a comparability review to help determine reasonable compensation for officers.

Nonprofits must give careful consideration to who it chooses as board members. It’s important that the members take their responsibilities and role as a fiduciary seriously to ensure the nonprofit’s success.

III. Funding 40

40 Rice Center for Philanthropy and Nonprofit Leadership offers countless courses on fundraising and nonprofit management, which can be found at cpnl.rice.edu/courses; The National Council of Nonprofits also provides extensive resources on fundraising and other nonprofit issues, www.councilofnonprofits.org.
Funding is a major concern for nonprofits, both because they are not operating for profit and because there are numerous restrictions on how they can raise money.

For example, there are disclosure requirements when a nonprofit receives a certain amount as a donation. The nonprofit must also provide written acknowledgment upon the donor’s request for donations of $250 or more.

As discussed above, there are also rules regarding unrelated business income, including that a nonprofit may have to pay income taxes if it earns money by regularly carrying on a trade or business that is not substantially related to its exempt purpose. If that trade or business becomes a substantial purpose to the nonprofit, it could lose its tax-exempt status.

Nonprofits must be careful when raising money through corporate sponsorships as these could be considered unrelated business income if the payer receives a substantial benefit, e.g. in the form of an advertisement that promotes the sponsor as opposed to an acknowledgement that merely identifies the sponsor.

There are also restrictions on the use of funds raised through donations. For one, a nonprofit cannot use tax-exempt donations for any purpose other than that stated in its certificate of formation. Additionally, if the nonprofit raises money for a specific purpose, it cannot redirect the funds to a different purpose without permission.

For example, if a nonprofit that delivers meals to underprivileged communities raises $1000 specifically to purchase a new truck for these deliveries, it cannot redirect those funds to purchase office supplies.

Another way nonprofits can raise money is through private and government grants. While nonprofits can raise substantial funds this way, obtaining and keeping grants is not easy. The application process is rigorous and time-consuming, and grants almost always come with restrictions on use of the funds. This is particularly true when it comes to public grants.

Public grants are often given for specific projects. They specify the time period and budget for the project as well as the terms and conditions for the grant. It’s important that nonprofits ensure compliance with these terms and conditions.

Failure to comply can result in loss of funding. Federal awarding agencies can also designate a non-complying nonprofit as high risk. This can seriously hurt the nonprofit’s ability to obtain grant funding in the future. These consequences of noncompliance can be devastating, especially if the nonprofit relies heavily on grants for funding.

When obtaining public grants, nonprofits will need to ensure that funds are spent exactly as specified in the grant agreement and that any deviation is first approved by the agency. Good recordkeeping is essential since the federally funded portion of the program will be audited. It can be helpful to establish an internal committee to oversee compliance.

**Conclusion**

Small businesses and nonprofits often have unique considerations when it comes to forming, governing, and maintaining
their organizations. While many issues are similar to those faced by medium and large companies, how small businesses and nonprofits approach those issues will vary due to their size, resources, and individual needs. Nonprofits, especially, have to be thorough and meticulous in their operations due to the additional requirements placed on them. Throughout their business cycle, both small businesses and nonprofits should continue to evaluate their needs, identify areas for improvement, and invest in the things that will help their organization succeed and protect it from unnecessary litigation and preventable consequences.

**About the Authors**

**Terry Bruner** is the founder and managing attorney at Terry Bruner Law Office, PLLC, a boutique transactional law office in Houston, Texas that focuses on government-insured multifamily real estate transactions and business law matters. He has closed transactions for developers and investors valued in the hundreds of millions of dollars. Terry’s practice also focuses on helping small businesses and non-profit organizations to organize and position themselves for growth as well as to protect their intellectual property. Terry is outside counsel to several organizations, advising on formation, compliance issues, tax exemption status, trademark registration and protection, and a range of other matters.

A veteran, Terry received the Army Achievement Medal and Humanitarian Service Medal for his honorable military service. He is an alumnus of the Entrepreneurship Bootcamp for Veterans with Disabilities at Texas A&M University. Additionally, the German Marshall Fund of the United States selected Terry a 2014 Marshall Memorial Fellow, which afforded him the opportunity to liaise with business and government leaders in five European countries. He also formerly served as Executive Director of Teach For America-Houston and attorney-advisor at the U.S. Department of Housing & Urban Development. A member of the State Bar of Texas and the American Bar Association Business Law Section, as well as the Forum on Affordable Housing and Community Development, he is also Chair of the Board of Directors of The Woods Project, and pro bono legal counsel to the Boards of Uhambo USA and Leadership Houston. He is also a member of the Harris County Precinct One Street Olympics. The Houston Jaycees/Junior Chamber of Commerce selected him as one of five outstanding young Houstonians in 2013. He is also the recipient of multiple proclamations from Members of Congress.

He earned his Juris Doctorate degree *with honors* from Southern Methodist University (SMU) Law School, completed the M.Phil. degree in international relations at Cambridge University, and graduated with his B.A. degree *summa cum laude* Phi Beta Kappa from Howard University.
Jayme Reisler graduated from the University of Houston Law Center, after which she began her career in civil litigation. She has since left the litigation world to pursue a career in small business law and estate planning.
## Appendix A
### Federal Employment Laws

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<tr>
<th>All employers who work on mine property</th>
<th>DOL, Mine Safety and Health Administration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Mine Safety and Health Act of 1977</td>
<td>DOL, Mine Safety and Health Administration</td>
</tr>
<tr>
<td>Health plans, etc.</td>
<td>HHS, Office for Civil Rights</td>
</tr>
<tr>
<td>Health Insurance Portability and Accountability Act (HIPAA)</td>
<td>HHS, Office for Civil Rights</td>
</tr>
<tr>
<td>Newborns and Mother’s Health Protection Act</td>
<td>DOL, HHS, &amp; Department of Treasury</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Contract in federally financed construction &gt; $2,000</th>
<th>DOL, wage and hour division</th>
</tr>
</thead>
<tbody>
<tr>
<td>Davis Bacon Act</td>
<td>DOL, wage and hour division</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Government contract &gt; $2,500</th>
<th>DOL, Office of Federal Contract Compliance Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rehabilitation Act of 1973, Section 503</td>
<td>DOL, Office of Federal Contract Compliance Programs</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Government contracts &gt; $10,000</th>
<th>DOL, Office of Federal Contract Compliance Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Walsh-Healey Public Contracts Act</td>
<td>DOL, wage and hour division</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Government contract &gt; $50,000 AND over 50 employees</th>
<th>DOL, Office of Federal Contract Compliance Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Order 11246</td>
<td>DOL, Office of Federal Contract Compliance Programs</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Publicly traded</th>
<th>Securities and Exchange Commission (SEC)</th>
</tr>
</thead>
</table>
## Appendix B
### State Employment Laws

<table>
<thead>
<tr>
<th>Source</th>
<th>Law</th>
<th>Enforcement Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tex. Labor Code 21.051</td>
<td>Employer with 15+ employees cannot discriminate based on race, color, disability, religion, sex, national origin, or age in hiring, firing, or in any other manner</td>
<td>Texas Workforce Commission (TWC)</td>
</tr>
<tr>
<td>Tex. Labor Code 21.055</td>
<td>Employer cannot retaliate against an employee who opposes a discriminatory practice; makes or files a charge; files a complaint; or testifies, assists, or participates in an investigation, proceeding, or hearing</td>
<td>TWC</td>
</tr>
<tr>
<td>Tex. Labor Code, Ch. 61</td>
<td>Wages • Employer must pay employees exempt from overtime at least once per month and nonexempt employees at least twice a month (61.011) • Employer must pay an employee who was discharged no later than 6 days after discharge, and an employee who left no later than the next regularly scheduled payday (61.014)</td>
<td>TWC</td>
</tr>
<tr>
<td>Tex. Labor Code 62.051</td>
<td>Must pay employees at least the federal minimum wage</td>
<td>TWC</td>
</tr>
<tr>
<td>Tex. Labor Code, Ch. 51</td>
<td>Child Labor • May not employ a child under age 14 (51.011) • Restrictions on hours worked by 14 and 15 year olds (51.013)</td>
<td>TWC</td>
</tr>
<tr>
<td>Common Law</td>
<td>Wrongful discharge violating public policy</td>
<td>Private action by employee wrongfully discharged</td>
</tr>
<tr>
<td>Common Law</td>
<td>Respondeat superior/vicarious liability; negligent hiring, retaining, supervising, and training</td>
<td>Private action by third party injured by employee</td>
</tr>
</tbody>
</table>