



A PRIMER FOR THE  
NEW ENTREPRENEUR

---

# Starting and Succeeding with a New Business

A NEW JERSEY STATE BAR FOUNDATION PUBLICATION





### **ACKNOWLEDGEMENT**

The New Jersey State Bar Foundation  
and the New Jersey State Bar Association  
Business Law Section gratefully acknowledge  
the work of author Barry J. Bendes,  
an attorney who concentrates his practice in  
business law, for his efforts in developing  
*Starting and Succeeding with a New Business:  
A Primer for the New Entrepreneur.*

*This pamphlet is made possible by funding  
from the IOLTA Fund of the Bar of New Jersey.  
It is issued as a public education service and does not  
constitute legal advice, which should only be given by your attorney.*

© 2008 Barry J. Bendes and the New Jersey State Bar Foundation

## INTRODUCTION

---

The decision to start a new business is a very personal one, filled with excitement as well as many conflicting and difficult choices. You must decide whether to go it alone or to go into business with one or more partners. In addition, you must decide whether to build your business from scratch, buy an existing business, purchase a franchise, or otherwise take advantage of outside experience. In any case, developing a business is not a 9 to 5 job. Dedication and a commitment to hard work are required for success.

Starting a business on your own can be daunting. With this in mind, entrepreneurs often choose to go into business with others. These “partners” may contribute money, time, expertise, customer or vendor relationships, patents and other intellectual property or assets. If collaborating with others is what you have in mind, it is imperative that you decide how the parties will own and manage the business, addressing, for example, percentage ownerships, respective decision-making authorities, who will be responsible for which aspects of the business, how profits will be split and when to distribute profits. These matters must be addressed early in the business development process, and must be memorialized in writing. Other key issues to discuss and put in writing are succession planning, restrictions on transfer of ownership interests, and what will happen if a dispute arises among the partners concerning management, salaries, distributions or other key issues.

The material contained in this pamphlet is intended to assist the entrepreneur in beginning the process of starting a business in an organized and systematic manner. By attending to the matters discussed in this booklet, it is hoped that the entrepreneur will be in a better position to effectively use legal, tax, accounting and other advisors in an organized fashion, thus keeping costs down and increasing the probability of a smooth launch and long-term success. This booklet is not a substitute for adequate tax, accounting and legal advice from experienced professionals, and no statements made in this primer should be construed as legal advice or as pertaining to specific factual situations. Actual legal advice can be given only in the context of an established, confidential attorney-client relationship. It is strongly recommended that you seek competent legal counsel, and tax and accounting advice with respect to your business venture.

## HOW DO I SELECT MY ADVISORS?

---



Selecting knowledgeable accountants, attorneys, consultants and bankers can be crucial to a successful startup, and to the long-term health and profitability of the enterprise. The relationship between you and your key advisors will, hopefully, last years. It is important that you become comfortable working with these professionals, and that the professionals work well together. Before selecting your team, obtain references from trusted sources. Interview and get to know the specific individuals who will be working with you. Do not merely rely on the reputation of the firms involved. While it may be difficult to tell family or friends who are licensed in certain areas that you have chosen another advisor, mixing business with personal relationships may not always be the best course.

A bank, consulting firm, law firm or accounting firm is only as good as the person who is working with you. Experience in the type of business, skills, personality, availability and reputation in the industry and community are significant factors to consider. Determine whether the professional you are considering is familiar with and experienced in handling businesses of your size and complexity before engaging the person as an advisor. Keep in mind that one professional can often recommend another. For example, attorneys often know knowledgeable accountants; accountants and bankers frequently recommend experienced attorneys. If the accountant or attorney you select has other clients in the target business or industry, or in an allied business, he or she can often provide both professional advice and business insights that are invaluable.

Additionally, a knowledgeable advisor can frequently introduce you to vendors, advisors and sources of funding that may not otherwise be available, and help you avoid the mistakes that others have made in growing their businesses. It is far better to learn from the mistakes made by others than to make these mistakes yourself.

## WHO SHOULD BE MY KEY ADVISORS?

---



In business, the accountant and attorney are usually the principal long-term advisors. Each should have broad business experience and be knowledgeable in tax, accounting, insurance, liability and other business concerns. A knowledgeable commercial lending officer can

be of great assistance to an entrepreneur who is looking for, or has found, an appropriate target business. If international sales or purchases are anticipated, it is helpful to select a banker with up-to-date knowledge and sufficient resources concerning these matters as part of the team.

An experienced insurance consultant or broker also provides invaluable assistance to startup and growing companies. Risk management, selecting appropriate insurance products and providing insights into the recurring and unusual risks the business will face can help you address, in advance, issues that could spell disaster later. Computer, software, marketing, manufacturing, personnel, pension and other business consultants may play important roles during the startup or acquisition process, during the growth period and as the enterprise is maturing.

#### ***Key Advisors Should Be:***

- Accountant and tax advisor
- Attorney
- Banker
- Insurance consultant/agent
- Real estate and business broker

## **HOW DO I CHOOSE A NAME FOR MY COMPANY?**



When contemplating a name, consider customer appeal, recognition, uniqueness and availability. Will the name be memorable, easily identifiable with the business and sufficiently different from other companies to avoid confusion in the marketplace?

Since the targeted market may be local, national or international, an appropriate search for conflicting names, trademarks and businesses should be undertaken. To save time and costs before an attorney is hired to research the availability of a name, you should search local telephone books, the New Jersey Business Gateway ([www.state.nj.us/njbgs/](http://www.state.nj.us/njbgs/)), the Internet (using such search engines as Google™, Live Search™ by Microsoft®, Ask.com™, Lycos®, Altavista™, etc.), the United States Patent and Trademark Office database ([www.uspto.gov](http://www.uspto.gov)), trade directories, the county clerk's office and related sources.

Once you have identified one or more names that have appeal, and have performed your own research to determine that the selected names do not appear to conflict with known names or trademarks, it is time to seek professional advice to further investigate their availability before the

business is formed. If you are not ready to launch your business, the names can be reserved at nominal cost for a limited period of time for your later use.

## HOW DO I PROTECT MY CHOSEN BUSINESS NAME?

---



If the name is available, you or your attorney may file the appropriate certificates with the appropriate state or local authorities. This filing offers limited protection to the chosen name. You can then decide, with your advisors, whether registration of the mark with the U.S. Patent and Trademark Office (USPTO) or another office is appropriate. Often, entrepreneurs decide to wait until their goods or services are actually in the marketplace before filing for trademark protection. However, they can also make “intend to use” filings with the USPTO, or elect not to make any filings and rely on rights acquired by actual use. In the United States, generally, trademark and service mark protection is obtained by use in commerce. Filing gives the owner of the mark the associated goodwill and certain additional rights against third parties.

## SHOULD I INCORPORATE?

---



Becoming a corporation may or may not be the best choice for you or for your business. Selecting the form of your business is a decision that should be based on a number of tax and personal factors. Simplicity must be balanced against the advantages available to more complex organizational structures. Some forms of business terminate upon the death or withdrawal of one or more of the owners, while other forms can have perpetual existence. Some are available only to businesses with multiple owners.

Your accountant and attorney can help you determine which form of business structure would work best for your business. You should discuss your options with your advisors, who can explain the advantages and disadvantages of each option from a business, tax, financing and personal liability standpoint. If more than one individual will be involved in the business, it is important to consider whether separate counsel or advisors are necessary to protect each party’s individual interests. Tax and other advantageous elections are available for some forms of business. Since there may be laws and rules that limit when these elections can be made,

consultation with legal and tax professionals is strongly recommended at the earliest stages and as the enterprise grows.

## WHAT FORMS OF BUSINESS STRUCTURE ARE AVAILABLE TO ME IN NEW JERSEY?

---



There are a number of different forms your business can take. Each has advantages and disadvantages, and may be customized to your specific business needs. Some tax or government incentive programs are only available to specific business structures. With this in mind, you should consult with your tax, accounting and legal advisors before choosing an organizational form for your business.

A **SOLE PROPRIETORSHIP** is the simplest form of business structure. The business is not incorporated, but must file a trade name certificate if it is to use an assumed or fictitious name. The owner is personally liable for the debts of the business.

A **PARTNERSHIP** is a business formed by two or more people or businesses to carry on a trade, business or enterprise. The partners are personally liable for the debts of the enterprise, and sometimes for each other's debts if they are business related. Each partner has the right to bind the partnership. To outsiders, each partner has the apparent authority to make decisions for the enterprise regardless of whether or not the partnership agreement grants authority only to certain partners to exercise certain powers (for example, hiring, firing, buying goods, making contracts, etc.). A partnership ordinarily does not pay taxes on its income; however, the partners personally must pay taxes on the partnership income allocated to them, whether or not the income is distributed.

A **LIMITED PARTNERSHIP** is a structure where at least one partner is personally liable for the debts of the business, but the remaining partners have limited personal liability (frequently limited to their investment in the enterprise). However, limited partners can face personal liability if they are active in the business and make decisions. The general partner (the partner with the unlimited liability) manages the business and makes the management decisions subject to the terms of the limited partnership agreement. For tax purposes, the limited partnership may elect to be treated as a partnership or as an entity taxed as a corporation.

A **LIMITED LIABILITY COMPANY** is governed by the terms of an operating

agreement, and created in accordance with the Limited Liability Company Act. LLCs may be member-managed or manager-managed, and members generally do not have personal liability for the debts of the enterprise. There is great flexibility in the governance structure of LLCs. In most jurisdictions, the company can be treated as a partnership for tax purposes or as an entity taxed as a corporation by making appropriate tax elections.

- A **CORPORATION**, regardless of size, is a more formal structure than the structure of other business forms described above. In a corporation, the business is managed by officers who are elected by a board of directors. Directors are elected by shareholders acting at a meeting or by unanimous written consent. While there can be multiple classes of shares, typically in a small business, each share has a single vote. Annual meetings are required, and the relationship between shareholders, officers, directors and the public follows specific legal rules. For general corporate governance purposes, the same rules apply to small businesses as apply to the largest public companies. Some special provisions may be added to the certificate of incorporation to accommodate the needs of small businesses, but care must be taken in adding these provisions.
- An **S-CORPORATION** is a corporation that has only one class of shares and that has elected to be treated for tax purposes as an S-corporation. If an effective and timely election is made for state and federal purposes the corporation will be required to file tax reports on its profits and losses, and not be required to pay corporate income taxes. Rather, the shareholders must then pay taxes on the corporation's earnings and profits, even if they are not distributed. With an S-corporation, there are limitations on who can be shareholders, and upon the number of shareholders. Some jurisdictions do not recognize the S-election and require S-corporations to pay corporate level taxes.
- A **C-CORPORATION** is any other business corporation that has not chosen to be treated as a small business corporation for tax purposes. C-corporations pay their own taxes.

It should be emphasized that both S-corporations and C-corporations are creatures of the same corporate law and are required to have meetings and formal governance structures in order to receive the benefit of limited personal liability for their shareholders.

*NOTE: In some cases it may be advantageous to form your business under the laws of a state other than New Jersey. Professional legal, tax and accounting advice is crucial in deciding where your business should be formed and whether a corporation should elect S-corporation status for state or federal purposes or both.*



## DO I NEED A BUSINESS PLAN?

---



Yes. A key ingredient to the success of any new business is a realistic business plan. The business plan can form the basis for raising money from investors, obtaining loans, grants, or other funding, and for measuring success. Input from accountants and other advisors can be crucial to

building a meaningful business plan.

A good business plan is put in writing and requires that you understand and carefully consider a number of essential issues and business decisions that will determine the short-term and long-term prospects and health of the business. The plan often starts with a vision, and moves on to the more concrete aspects of building and running the business.

For example, an analysis of the following matters, among others, should be considered when developing a business plan:

- capital requirements and financing
- employee resources in the community
- product lines
- markets
- relationships with vendors and suppliers
- availability of raw materials or components
- marketing and marketing requirements
- communication needs, equipment and facilities
- competitive advantages
- permits, zoning and environmental matters
- location (town, access roads, frontage, etc.)
- type and size of facilities required (office, store, manufacturing, warehouse, industrial)
- competition (domestic and foreign, Internet, etc.)
- skills and abilities of owners and key employees
- systems, assistance and education available from franchisors

If certain specifics are not available when the plan is first being written, they can be added as you move toward creating your new business. A good business plan should not be lifeless. It should change as the enterprise grows and develops.

If the business plan is kept current, and reviewed periodically, it can be a handy reference tool for measuring the health of the business, for preparing the business for the next steps in its development or for possible sale. It also can provide you with a platform for critical discussions with banks and potential investors. The business plan often

provides a ready reference for the owners, and a refreshing look back at the progress made and the work to be done. It can highlight areas for improvement or signal when a change in direction is warranted.

There are many good books and computer programs to assist in the building of a good business plan. However, regardless of the strengths or weaknesses of the book or program, the effort made by you will determine whether the plan is realistic or has any real value. No “canned” plan can deal with the actual needs of a particular business. The effort you make with your advisors to tailor the business plan to the needs of the business will be richly rewarded.

### **DO I NEED TO HAVE A WRITTEN AGREEMENT AMONG THE OWNERS?**

---



Any company with more than one owner should have a written agreement among all of the owners dealing with key management, ownership and financial matters. If a limited liability company structure has been selected, then the agreement is mandatory.

Sometimes, the partners feel they do not need an agreement “until the money comes rolling in.” This is frequently a mistake. The investment in a shareholders’ agreement (for corporations), partnership agreement (for partnerships and limited partnerships) and operating agreement (for limited liability companies, LLCs) is well worth the time, effort and money at the outset. It provides guidelines and structure for the owners and often saves time, aggravation and a substantial amount of money in the long run. It helps to define the relationships among the principals and to refine the parties’ expectations.

### **WHEN IS THE BEST TIME TO PREPARE AN AGREEMENT AMONG THE OWNERS?**

---



The terms of the agreement are best discussed during the honeymoon period (the time between the date the parties agree to work together and the date the business actually begins to operate). It is during this honeymoon period that the parties are most likely to reach an agreement on the key issues they will face over the life of the business.

Frequently, the needs of the owners change and may diverge over time.

### *Seven Keys to Success*

1. Engage only experienced advisors.
2. Make and update an effective business plan.
3. Understand the business and market before you begin.
4. Know how much capital you will need to sustain the business and to live on during the entire start-up period.
5. Execute a written agreement among the owners.
6. Hire or associate with the right people.
7. Setup and keep accurate records.

The partner who “only put in money” wants a return of his or her capital. The partner who is working hard inside the company, or who may be the “creative” partner, wants a living wage and profit distributions. The partner who is the “outside person,” responsible for sales or dealing with the public, wants to be recognized as the person who generates the income that everyone else shares in. These roles have different levels of importance at the

beginning of the business, during its growth and when it is a successful enterprise. When all of these individuals are convinced the company will succeed and are eager to get it going, they are often more willing to compromise and work out differences that seem small at the time. Later on, these differences will seem to be of greater importance, and the different needs and different power bases of the partners will likely result in divergent views that are not easily accommodated.

### **WHAT SHOULD BE INCLUDED IN THE AGREEMENT?**



The agreement should deal with a number of factors that are contemplated at the outset of the business and others that can be anticipated with some planning. Death, disability and retirement of the owners should be considered, as should decision-making, when to distribute earnings and profits, and the possible sale of the business. In most instances, these agreements also provide for restrictions on the sale of shares (or partnership interests or LLC membership interests) to outsiders. There are frequently provisions that deal with rights of first refusal, prohibitions on any sale or transfer (for a limited period), and what happens if one or more owners wish to sell some or all of their shares and the others do not. Other issues may include hiring and firing authority, whether each owner is to be employed by the business, receive a salary or guaranteed

distributions, what tax elections will be made, and by whom, etc.

When buyout provisions are included in the agreement, as they most often are, the means of determining value, timing of the buyout after a triggering event and funding sources are often hotly debated matters. Accountants, lawyers and other advisors with business experience can offer guidance on varying methods and approaches. Some of these may be applicable to the owners of the new business, while others may not. Nevertheless, it is a good idea to explore all avenues with your advisors and your partners' representatives in order to determine at the outset how these matters will be handled in various possible situations. Since it is impossible to know which partner will die first, become disabled, be involved in a divorce or face a life event that will affect the business or other partners, early discussion and consideration of these factors is highly recommended.

## **HOW DO I RAISE MONEY FOR MY BUSINESS AND HOW MUCH IS ENOUGH?**

---



It is important that you have enough initial capital to support your business for a reasonable period of time and to carry it through its initial growth. This will depend in large part upon the type of business you are starting. Service companies traditionally do not need as much capital as companies that require inventory or heavy equipment. Your business plan will highlight your needs and help you to plan for success.

The start-up funding often comes from friends and family, personal and bank loans, investors and "sweat equity." Before attempting to raise capital for your business, it is important to have a clearly written plan for the sources and use of funds. This should be provided to the investors and lenders for their review prior to taking any money. A pro-forma balance sheet and income statement will often be generated as part of the business plan.

The terms of the investment (whether equity or loan) should be in writing and signed by all parties. If the investment is in the form of a loan, the terms of the loan (amount, interest rate, repayment schedule, security for repayment, subordination to senior debt, personal guaranties, etc.) should be clearly documented for the safety of all concerned.

If securities are to be issued (stock, preferred stock, LLC membership interests, partnership interests, profit participations, convertible debt, options, etc.), it is important that the rights of each class of security are clearly set out in the organizational documents and in the shareholders'

agreement, partnership agreement or LLC operating agreement. If there is a guaranteed return on any investment before other investors participate in profits, this should be clearly set out as well, along with the penalty for failure to meet the guaranty. If any security holder has a priority in dividends, a liquidation preference, superior or inferior voting rights, the absolute right to elect one or more directors or managers, or other fundamental rights, these should be defined in your governing instruments or agreements. There may be restrictions on dividends or distributions to certain classes of ownership while or until the senior classes receive a return on their investments. If so, all concerned should be clear on these restrictions and how long they continue.

Whenever sweat equity (the value of the work done by the founders at below market rate compensation or for no compensation for a period of time) is contemplated, it should be valued by the investors and the parties should agree, in writing, on its value and how long the reduced pay arrangement will continue.

As stock or other equity is issued, it should be recorded in the official records of the business and appropriate certificates should be issued to the extent required by law. This will help to avoid claims and arguments later. Applications for exemption or filings with the Securities Exchange Commission, the New Jersey Bureau of Securities or regulators in other jurisdictions may be required before or immediately after the monies are received or solicitations for funds are made.

## **HOW DO I CHOOSE THE BEST ACCOUNTING, FINANCIAL AND BUSINESS SYSTEMS?**

---



A number of general computer software packages are available for financial books and records, inventory control, manufacturing and logistics, order/data processing and payroll systems. Many of these packaged programs are easy to use. Most of the accounting and payroll packages do not require an extensive accounting or bookkeeping background or considerable training. These may or may not be the best systems for your business. Having a qualified accountant assist in selecting the package or system best suited for your business can save a great deal of time and effort, and help get your business on the path to success.

In an existing business or industry there is often an established system already in place. While it may be easier to keep the existing computer, payroll, inventory or accounting systems in place, you might consider upgrading. Specialized computer, accounting, inventory control, logistics,

manufacturing and other systems are available. The systems used by other businesses in an industry can be an excellent guide for you as you develop your business plan.

It is important to fully understand the strengths and weaknesses of the software and systems that will be the backbone of your business, and to obtain or arrange for adequate training before a system is implemented or acquired. A good business accountant and a business and computer consultant may be able to recommend off-the-shelf programs capable of performing satisfactorily with or without customization. If customization is required, your advisors may know of competent, experienced programmers or companies that can assist you.

Franchisors often supply or require specialized software or systems, and provide training in their use. While the vendors or value-added resellers often provide training (with or without an additional fee), occasionally it will be necessary to go to outside service providers or consultants to obtain the necessary training.

#### **WHAT KIND OF BOOKS AND RECORDS MUST I KEEP?**

---



Good record keeping is essential to a successful business venture. IRS Publication 583, titled “Starting a Business and Keeping Records,” highlights some of the key business reasons and tax requirements for good record keeping. The IRS does not mandate that any specific types of records be kept. Records may be paper-based or electronic; however, they should show gross income, deductions and credits, as well as asset purchases, depreciation, amortization, improvements and dispositions. The supporting documents, which are usually generated in the regular course of the business, should be retained for appropriate periods.

Some records must be maintained for the life of the business (and sometimes beyond the sale, dissolution or termination of the business). Others, such as employment records, immigration records, OSHA records, records relating to government inspections, permits, insurance, financial records, etc. have different retention periods. If your business is subject to government regulation then special care must be taken to understand the requirements for record retention in your industry. You should ask your attorney and accountant for advice on document retention programs and requirements, corporate compliance requirements, internal control matters and disaster recovery recommendations.

Good record keeping will help you:

- Monitor the progress of your business (know what is selling, how fast SKUs are moving, etc.)
- Prepare financial statements for management, lenders, investors and owners
- Identify sources of payments (sales, services, liquidation of equipment or other assets, etc.)
- Track expenses (for business and tax purposes)
- Prepare tax returns

It is easier and far less expensive to start out with good systems than to recreate or redo existing systems when flaws, problems or audits arise.

When the time comes to dispose of records, or archive or image records, it is wise to speak to your accountant or attorney concerning the applicable record retention requirements for different types of records.

## **HOW DO I KEEP MY TAX LIABILITY DOWN?**

---



The form of business and the elections made by the owners and the business determine what taxes must be paid and what returns, information statements and forms must be filed. Generally there are five basic categories of business taxes: income tax, self-employment tax, employment and withholding taxes, sales and compensating use taxes and excise taxes. Within these categories are a number of different kinds of taxes that must be considered. A good accountant and tax advisor will work with you to make certain that the proper taxes are paid and reports and returns are filed in a timely fashion. It is important that you obtain the appropriate identification numbers, resale numbers and other identifying numbers so the taxing authorities and governmental agencies can track and record payments appropriately. The IRS provides some guidance on these issues at its website, [www.irs.gov](http://www.irs.gov).

## **WHAT ARE RESTRICTIVE COVENANTS AND HOW DO THEY AFFECT ME?**

---



Restrictive covenants are sometimes called non-compete agreements, non-solicitation agreements or non-disclosure agreements, and are designed to protect the intellectual property or trade secrets of businesses from adverse claims by departing employees, or employees that might otherwise



claim ownership of inventions, systems or developments made during their tenure. If you will be requiring that your employees sign employment agreements, it is important to consider including properly worded restrictive covenants to ensure that the courts will enforce them, if necessary.

It is important to have your attorney analyze any and all restrictive covenants, intellectual property ownership agreements, agreements not to compete and employee handbooks that may apply to you, your partners or any new hires, since they may limit your and their ability to work for your business.

Among the things that should be reviewed are employment agreements and applications; offer letters; engagement letters with consultants; confidentiality policies; intellectual property assignments or work for hire agreements; and restrictions imposed by law, court order, arbitration award, government regulations or otherwise. It is also important to ask whether the individual took anything that belongs to his or her former employer.

#### **WHAT MAY I DO WHILE I AM STILL EMPLOYED BY ANOTHER COMPANY?**

---



You should consult with your attorney to determine whether you are bound by a restrictive covenant or other limitations, and if you are, what your rights and duties are. While you can make preparations to leave your employer, engage professionals, and, often can organize your new business, you should not breach your duty of loyalty by soliciting employees or customers to join you or to leave your old firm before you give notice and leave yourself. You should not take any property belonging to your employer (this includes tangible things such as documents, PDAs and computers, and intangible things such as databases, software, designs, customer lists, etc.).

#### **WHAT SHOULD I DO BEFORE I HIRE MY FIRST EMPLOYEE?**

---



It is important that your business establish a systematic approach to hiring, retaining and discharging employees. Employment applications containing only permitted questions should be used. Background checks and physical exams should be undertaken strictly in accordance with applicable law.



Each job should have a written job description outlining the essential elements of the position. Job descriptions help employees focus on what will be expected of them and provide a basis for determining what, if any, accommodations must be made if an employee is injured or disabled. Clear job descriptions also provide a measure for performance reviews and for hiring, promotion and firing decisions. Also, they can be a line of defense against wrongful discharge claims.

Appropriate employment policies should be in place and enforced consistently concerning harassment and other forms of discrimination. Inappropriate behavior, even by the owners, should not be tolerated. The

New Jersey Law Against Discrimination, as well as federal laws, rules and regulations, prohibits discrimination in employment.

Plan from the start to maintain employment records in an organized and systematic manner. Many vendors can supply appropriate applications, employment jackets (file

### ***Six Predictors of Failure***

- 1. Poor preparation**
- 2. Inadequate capital**
- 3. Lack of a realistic business plan**
- 4. Lax record keeping**
- 5. Failure to heed experience**
- 6. Lack of systems to measure success**

folders with preprinted blocks for information concerning position, salary, reviews, discipline, etc.), review and warning forms, etc. The appropriate immigration forms (and backup information), as well as tax and benefits forms, should be obtained from each employee before they start work, and should be filed appropriately. It is important that you obtain correct tax identification and employment information for each employee and respond appropriately if you receive a “no-match” letter from the Social Security Administration or the Federal Department of Homeland Security, since you can be fined for “knowingly” hiring or retaining unauthorized alien workers.

Certain documents must be maintained confidentially, and appropriate safeguards should be put in place. It is important to confirm the Social Security number for each employee, and to verify that they have legal employment status. Additionally, all reviews and disciplinary actions should be documented. The period of retention for these documents varies depending upon the length of employment and other factors.

## **WHAT KINDS OF QUESTIONS MAY I ASK AN APPLICANT AT A JOB INTERVIEW?**

---



You can ask about training, skills, work experience and the ability to perform the essential elements of the job. There are a number of questions that you may not ask. These involve matters that generally do not involve the ability to perform the job. They include, but are not limited to, questions concerning age, race, color, religion or creed, national origin, citizenship, sexual preferences, marital status, prior arrest records or disability. While the Equal Employment Opportunity Commission (EEOC) and other governmental agencies have issued guidelines concerning what questions may or may not be asked, it is important to consult with an attorney if there are specific questions you feel must be asked due to the nature of your business or industry.

## **MUST I MAKE JOB OFFERS IN WRITING?**

---



No, there is no requirement that job offers be made in writing. Interviewees can accept oral job offers and hold employers to the terms of the offer. Multiple communications and documents, employee manuals and company policies, when taken together, can be evidence of the terms of an employment relationship and may be deemed employment agreements.

## **DO I NEED WRITTEN EMPLOYMENT AGREEMENTS?**

---



It is usually a good idea to have something in writing memorializing the terms of employment. Many companies prefer written employment agreements, others use offer letters, and some operate on a handshake. It is important to understand that all of these can be enforceable as contracts. These documents provide newly hired employees with details regarding what is expected of them and what they will be paid. They help to avoid arguments later concerning wages, salaries, benefits, hours and duties. Using contracts created for other companies can have unfortunate consequences. Contracts should always be tailored to specific situations. Often, these types of agreements are enforceable by the employee against

the employer but not by the employer against the employee. You should keep in mind that an employee handbook can be considered a contract of employment if it is not carefully written.

### **CAN I FIRE AN EMPLOYEE ANY TIME I WISH?**

---



Even though New Jersey is an “employment at will” state (employees may quit at any time and employers may fire employees, with or without cause), it may still be unlawful to fire an employee if he or she is in a protected classification; the termination violates the rights granted to the employee under the New Jersey Law Against Discrimination, federal law or applicable regulations; or the termination is in retaliation for a complaint involving a violation of law, sexual or other forms of harassment or relates to another form of protected action. If you have any doubts concerning a termination, whether for or without cause, a consultation with knowledgeable counsel is highly recommended before you take action.

### **ARE THERE SPECIAL ISSUES THAT ARISE IN FRANCHISE BUSINESS OPPORTUNITIES?**

---



The franchisor will provide disclosure statements, franchise agreements, leases, supply contracts, policies and operating manuals. The language in these documents is often complex and detailed, so it is important to have knowledgeable, experienced advisors review them carefully, and for you to thoroughly understand what will be expected of you as the franchisee. Key issues dealt with in these documents include the fees you will be required to pay, mandatory advertising expenses, whether the new business will have an exclusive territory, rules and regulations on how the franchise will be required to operate and the hidden costs of franchise ownership. Remember, while the experience of other franchisees in similar locales can provide some insight into what you can expect, your experience may be quite different.

The franchisor will have significant control over the operation, choice of location, how the business is built and decorated, and how employees are trained and complete their day-to-day tasks. These can be significant plusses or minuses, depending upon the value the franchisor brings to

the relationship and the cost of these “benefits” of franchise ownership. Franchise fees, advertising fees, mandatory participation in promotions, decorating charges, training fees, and other charges can add up quickly and dissipate the start-up capital you plan to bring to the venture.

### **SHOULD I USE PREPRINTED CHECKLISTS, THE INTERNET AND PRINTED FORMS TO MANAGE MY WORKFORCE?**

---



Checklists, Internet information and printed forms can provide valuable assistance to startups and mature businesses. Form legal posters disclosing labor laws and other mandatory notices are the traditional inexpensive ways to comply with legal posting requirements and educate employees concerning their rights. Printed employment applications and labor and employment forms and programs can simplify record keeping and assist with many human resource functions. However, they should be state-specific, current and must be used with discretion. Since these documents may have been drafted under the laws of states that may not be the same as our state, and were intended to deal with specific situations that may or may not apply to your business, they should not be viewed as a substitute for professional advice.



### **ABOUT THE NEW JERSEY STATE BAR FOUNDATION**

---

The New Jersey State Bar Foundation, founded in 1958, is the educational and philanthropic arm of the New Jersey State Bar Association. The Foundation is committed to providing free legal education programming for the public. Programs provided by the Foundation include seminars on such topics as wills, divorce, taxes, retirement planning, disability law and health issues; mock trial programs for students in grades K to 12; and training sessions for teachers on the topics of conflict resolution, peer mediation and teasing and bullying prevention. Publications geared for the public include *Law Points for Senior Citizens* (Second Edition), *Consumer's Guide to New Jersey Law, Legal Consequences of Substance Abuse, AIDS and the Law in New Jersey* (Second Edition), *Disability Law: A Legal Primer* (Fifth Edition), *Domestic Violence: The Law and You* (Second Edition), *A Basic Guide to Personal Bankruptcy* and *Residential Construction and Renovation: A Legal Guide for New Jersey Homeowners* (Second Edition). School-based publications available through the Bar Foundation include *Bill of Rights Bulletin*, *Constitutionally New Jersey*, *Legal Consequences of Substance Abuse*, *Historical Documents of New Jersey and the United States*, *What You Need to Know About Plagiarism*, *The Legal Eagle*, *Respect*, a newsletter about tolerance and diversity, and *Students' Rights Handbook* (Third Edition), which is cosponsored with the ACLU-NJ. Some publications are available in Spanish and all are available in alternative formats for the visually impaired. For more information or copies of program materials, visit the New Jersey State Bar Foundation online at [www.njsbf.org](http://www.njsbf.org) or call 1-800 FREE LAW.



New Jersey State Bar Foundation  
One Constitution Square  
New Brunswick, NJ 08901-1520  
1-800-FREELAW  
[www.njsbf.org](http://www.njsbf.org)