



Shield Yourself: The Top Ten Things You Should Do To Protect Your Business

A HAAS & CASTILLO EBOOK

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Introduction

This eBook is not intended to be a complete, in-depth list of everything a small business and the people who run it can possibly do to protect itself and them from liability to employees, customers, and others, but it is a starting point and lists ideas that are quickly and easily incorporated (no pun intended!) into business operations that could significantly limit exposure. If in doubt on how to implement any of these suggestions, consult with an attorney or CPA, as appropriate.

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The Top 10 Things You Should Do to Protect Your Business
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1. Choose an appropriate business entity.

Although you can do business as a sole proprietorship or de facto partnership, why would you want to? There is no limitation on liability of a proprietorship, and not much limitation in a de facto partnership. Many people opt for creating a corporation simply because they are most familiar with that type of business entity, but the choice of business entity should be driven by considerations of control, succession, transfer, business operations, and tax impacts.

Corporations (C and sub-S), LLCs, general partnerships, limited partnerships, limited liability partnerships, joint ventures, and other entities all have different benefits. No one type of entity is best for every business. The good news is that often a selected entity can be converted into a different type of entity, if necessary, although there may be limitations on certain types of elections for tax purposes.

GETTING STARTED:

- **Are you going into business by yourself or with others?**
Will you be equal owners?
- **Will some owners be active in the business and others only contributing capital?**
- **Will the business generate income from active services/product sales or from passive investment?**
- **Will the business require high capital investment, either for extended development or equipment?**
- **Will the domicile of the business be the same as its principal place of business, or will it choose a state like Delaware or Nevada for its creation?**

Your answers to these questions will help determine the best business entity to select for your business.

2. Make sure all regulatory conditions are met.

Has the business obtained a federal employer identification number? Has it filed any other necessary forms with the IRS (for example, subchapter S election)? Has it obtained a state employer number for unemployment compensation purposes? Has it obtained any county/city occupational licenses? Has zoning been checked to confirm that the business may legally be operated at its chosen location?

Are there any business licenses needed in addition to a personal license (for example, a qualified business entity for an individual holding a construction license)? Has it registered with the Department of Revenue to collect and remit sales tax?

GETTING STARTED:

- **Whether you decide to use a sole proprietorship, corporation, or some other entity, you need to file an SS-4 form with the IRS to obtain an FEIN immediately after the entity is created.**
- **Create a checklist of the potential licenses and registrations that may be required for your business entity and check off or cross off each one as you obtain it or determine you don't need it. Once you have them, keep them together in one place except for any that are required to be publicly displayed.**
- **If you're still not sure what licenses and registrations you need, ask. Call the local chamber of commerce or local business development agency of the municipality or county where the business is located.**

3. Create written contracts.

Start small and go from there. If you're in a retail business, consider whether your customers will need to enter into formal written contracts detailing a course of performance or whether simple invoices will do. Is there an ongoing relationship that will need to be spelled out in detail, or is the customer just making a one-time purchase of a product or service? If the customer is being given a receipt, is there language on it about the length of time the customer has for making returns or any conditions on the returns? Are there any limitations of liability on

the receipt? If you're utilizing a contract, is there a provision waiving jury trial of any dispute? A provision about what state's law will govern and where disputes will be resolved? (Particularly important if your business is not exclusively local.) One size does not necessarily fit all. Drafting written contracts and consistently utilizing them may seem a pain and overkill—until that first time you get sued and don't have a written contract in place to protect you.

GETTING STARTED:

- **Consider non-compete agreements for key employees, and non-disclosure agreements with employees, independent contractors, and others whom you share sensitive business information with.**
- **Add provisions that venue (location) of suit will be where your business is located and that both parties to the contract waive their right to jury trial. Consider whether litigation between you and the other party is more or less likely if there is a prevailing party attorneys' fee provision and whether you are prepared to bear the cost of litigation without reimbursement.**

4. Create a policies and procedures manual.

And make sure employees read it and sign written acknowledgements that they have read it. Keep each acknowledgement with that employee's personnel file. Things to include in the manual: vacations (how much time accrues each year, whether unused time carries over, payment for unused vacation time), sick/personal leave, fraternization with other employees, discrimination, harassment, internet use, handling confidentiality of employer information, use of company property, personal appearance/conduct, drug use, and progressive discipline. An important

policy to announce to job applicants and new hires is a probationary period (up to 90 days). That way, if the new hire doesn't work out, you can terminate within the 90 days and avoid having to pay an unemployment claim, which would otherwise cause your unemployment insurance rates to rise.

GETTING STARTED:

- **In addition to the items listed above, have a chain of responsibility. Make sure each person in the chain is qualified to address issues presented. For example, don't put someone who has negative attitudes towards women in charge of the human resource functions of the business.**
- **A business can often qualify for insurance discounts by adopting a drug-free workplace. Often, the cost of qualifying is less than the insurance savings, making this a no-brainer.**

5. Read contracts carefully and know what's in them before you sign.

If you're not sure what you're getting into, consult with an attorney who can explain the potential impacts. It's a lot cheaper than having to pay a lawyer to handle a lawsuit because the other side has a different view of the contract's terms than

you do. The lawyer may also be able to help you negotiate changes to the contract that are more favorable to you or eliminate uncertainty for both parties.

GETTING STARTED:

- **Take a business law class at a local community college.**
- **Don't sign any contract presented by someone else without reading it completely. If you disagree with a particular provision, ask that it be changed. If the person won't agree, ask yourself whether you really need to do business with this other party, whether any other alternative provider would insist on the same type of provision, and how substantial the risks are if you proceed.**

6. Get the right insurance.

Many businesses go no further than workers' compensation insurance and a CGL (comprehensive general liability) policy, and that might be fine for a small business that is just starting out and needs to preserve capital. However, as the business grows, its risk of losses and lawsuits grows also. Other insurance policies to consider include key person life and disability, EPLI (employment practices liability

insurance), D & O (directors and officers liability), E & O (errors and omissions), and employee fidelity bonds. If you don't already have an insurance agent you have confidence in, find one through talking with another business owner who has multiple lines of insurance and is satisfied.

GETTING STARTED:

- **Make a complete list of business assets.** You'll probably need it for tax purposes anyway, but it will be essential for creating an inventory for insurance purposes and to make sure there is no dispute about what the covered assets of the business were after a loss occurs.
- **Look for key person life and disability policies that have additional purchase benefit options.** These may permit you to purchase more insurance as the business grows without buying new policies.
- **Ask your agent about ways to cut premiums without necessarily increasing deductibles beyond what you can afford to carry.** Often, these methods are also good business practices to adopt anyways.

7. Have a plan.

Consider the old saying, “People don’t plan to fail. They fail to plan.” Do you have a business plan that covers day-to-day operations as well as methods to grow the business? Do you create goals and a plan to reach them? Do you review those goals and plans to see whether you are on target

to meet the goals, or to evaluate whether the plans need to be revised to meet the goals? Do you have contingency plans for situations that may occur in the business?

GETTING STARTED:

- **If you’re just starting out, use the “My Business Protection Checklist” at the end of this e-book. Schedule due dates for each task and be sure to review your progress on accomplishing those tasks.**
- **What are your goals for the business? What does it need to accomplish for you to consider it a success? Write it down. Then consider, how long will it take for you to get there? What steps must be taken for it to get there? Write down those steps and then a timeline for their completion. Revisit all of this at least once a year, preferably more often.**

8. Don't trust more than you know.

In a retail transaction of a few dollars paid by credit card, not much trust is required, and neither is much knowledge of your customer. In a transaction where you are providing goods or services and expecting payment afterward, the trust factor goes up, and your knowledge should too. By the same token, committing to purchase a good or service without assurance that it will live up to your expectations involves a great deal of trust. Even a well-drafted contract is no substitute for finding out who you are dealing with. Many businesses have found out too late that they had a great case for breach of contract but no way of collecting because the other party to the transaction had no assets or was otherwise judgment-proof. If you're not in

a financial position to take the risk, consider using a factoring company, requiring personal guarantees from individuals who have verifiable financials, or requiring escrowed payments. If you're dealing with a vendor, make sure that the contract can be terminated for lack of performance. If the vendor won't agree, find another vendor. Sometimes, the money you think you will make on a deal disappears after dealing with a difficult or litigious customer that eats up any profit. In those situations, the best business decision can often be to not do business with that customer or vendor.

GETTING STARTED:

- **Consider a Dun and Bradstreet report, check Better Business Bureau rating, or do a Google search on any business you consider doing business with.**

9. Document your communications, transactions, and events.

If it isn't writing, it's more difficult to prove. In some situations, such as lack of documentation to disprove employee overtime, it's almost impossible. Without a written paper trail, there is more room for dispute, and where there's a

dispute, there's probably a lawsuit just waiting to be filed. Don't forget to retain all documentation (whether in paper or electronic format) until after the time has expired for suit to be filed.

GETTING STARTED:

- **Create a filing system, both for paper and electronic communications. Make sure the documents are protected from alteration or destruction, through password protection and backup.**
- **When responding to electronic communications from others, give yourself a 24 hour cooling off period. With the immediacy of electronic communications, there is often a tendency to respond quickly and make statements that are later regretted.**
- **Impose a reasonable deadline in any demand you make for response or action by others. Calendar a follow-up date for yourself for after the deadline date.**

10. Don't stick your head in the sand.

Too often, businesses refuse certified mail or fail to respond to a demand, thinking that ignorance is bliss or that ignoring a situation will make it go away. Ignorance is not bliss and the situation will

not go away—in fact, it will probably get worse. Be proactive in dealing with problems. If you need to get a CPA or attorney involved, don't wait till the last possible minute.

GETTING STARTED:

- **Adopt a calendaring system, either a basic Google or Outlook calendar, or some other, and enter deadlines in that calendar. Also enter an action date in advance of the deadline for you to do whatever is necessary to meet the deadline.**
- **Have procedures in place for handling official communications and demands. If a demand or threat is made, assign responsibility for handling the demand or threat to a limited number of persons, and make sure everyone in the business knows who those persons are to refer any demands or threats to them.**
- **If you become aware of a situation that may develop into a problem, gather as much information as you can immediately and see if there are action steps you can or should take to avoid the situation growing into a problem.**

11. And finally...know that there are no guarantees.

You've probably heard the expression, "Nothing is certain but death and taxes." Unfortunately, in today's society, litigation is almost as certain. Even if you scrupulously follow the other 10 items on this list and run your business in an ethical manner, you may still find yourself the target of a criminal, administrative, or civil action, or

needing to sue someone else. If that happens, remember that you did the best you could to avoid the situation, learn how you may be able to avoid a repeat of it, and know that you have put yourself in the best possible circumstance to successfully defend yourself or pursue your claim.

Business Protection Checklist

To Do	Due	Completed
Decide on type of business entity.		
File business organization paperwork with appropriate state agency.		
File for FEIN with IRS.		
File any elections (e.g. Subchapter S) with IRS.		
Register business with state unemployment office.		
Acquire worker's compensation insurance or confirm entitlement to exemption.		
Decide where business will be operated from (lease, purchase, or home office).		
If signing a lease, put it in the name of the business entity!		
If a home office, make sure deed restrictions and zoning do not prohibit. Otherwise, check zoning.		
Check with county and municipality to acquire any business/occupational licenses required.		
Register with state tax agency for collection of sales tax (or determine if exempt from tax collection).		
If a professional individual license is required, see if a separate license or qualification is required for the business.		
If more than one owner, create a shareholder (corporation) or operating (LLC) agreement.		
If more than one owner, decide whether business needs life insurance on key person(s).		
Obtain commercial general liability insurance. Consider employer practices liability insurance.		
Have key personnel sign non-compete and non-disclosure agreements.		
Create a list of business forms needed. Have them reviewed by an attorney to make sure they protect the business.		
Create a policies and procedures manual for employees to follow and prepare acknowledgements for them to sign.		
Create a business hierarchy chart for chain of command – even if starting out with just one person.		
Create an operations manual for the business, and make sure it is protected from disclosure.		
Create a business plan for the growth of the business and revisit it at least once every 6 months.		
Adopt a document management plan, including electronic documents and communications.		



About the Author

Lee Haas, B.C.S. is Florida Bar Board Certified in Business Litigation and 'AV' rated by the Martindale-Hubbell legal directory. He leads our business litigation practice and also handles other civil cases for the Firm including: appeals, Business Litigation, Commercial Torts, Construction Litigation, Contract Disputes, Corporate Disputes, Real Property

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Our business and construction litigation practice, led by Lee Haas, includes these types of disputes: contracts, collections, construction, real estate, corporate, trade secrets, noncompetition contracts, and landlord/tenant, as well as appeals of these cases.



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