Warning!

This presentation provides very basic, generalized information about business law.

Most of the legal rules outlined in this presentation have important exceptions.
Topic 1

Business Legal Structures

Proprietorships & Partnerships

Proprietorships and partnerships are the “default” business legal structures

- **One person** starts a business: proprietorship
- **Multiple people** start a business together: partnership

If the business loses a lawsuit, the owners’ **personal assets** (e.g., house, car, money in bank accounts, wages) can be taken

**Insurance** is critical
Legal Entities: Corporations & LLCs

A legal entity can **shield** an entrepreneur from business liabilities—if the business loses a lawsuit, its owners’ personal assets usually **cannot be taken**

There are two main types of entities: **corporations** and limited liability companies (**LLCs**)

Corporations and LLCs are very similar, but LLCs are **easier to manage** and corporations better facilitate equity **investment**

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When to Form a Legal Entity

If one or more of the following circumstances exist, forming a **legal entity** is probably beneficial:

- The business has or will have **multiple owners**
- The business has or will have **employees**
- The business’s operations entail high **risk** of causing injury or property damage
- The business’s owners have significant personal **wealth** that is not invested into the business (e.g., money in bank accounts, real estate)
The Limits of Limited Liability

Forming an entity does not automatically confer limited liability protection—the owners must maintain the entity’s separate identity.

E.g., Organizational documents, separate bank accounts (most important!), transactions in the entity’s name.

Even if limited liability protection does exist, a business owner is not protected if he or she personally signs a loan or lease, or if his or her own actions cause harm.

Insurance is critical.

Topic 2
Government “Permissions”
Licenses & Permits

Before engaging in certain business activities, entrepreneurs must obtain permission from the state, county, or city government.

This permission is usually called a “license” or “permit.”

Government permission is required for the operation of nearly all types of businesses (e.g., auto repair shops, daycare providers, restaurants, barber shops, beauty salons, convenience stores, tattoo and piercing businesses, contractors).

Licenses & Permits (cont’d)

In order to obtain a license or permit, an applicant usually must complete an application, pay a fee, and fulfill certain requirements.

Fees can range from dozens to hundreds of dollars.

Requirements may include insurance (including workers’ compensation and disability insurance); passing a background check, health and safety inspection, or classroom exam; and evidence of good character or relevant experience.
Business Certificates

A business certificate (also known as a d/b/a) is permission from the government to do business under a particular name

Who needs a d/b/a?

A **sole proprietor** doing business under a name that is not his or her real name

A **partnership**

A corporation or LLC doing business under a name that is **not its official name**

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Topic 3
Contracts
Forming a Contract

**Contracts** are legally-enforceable exchanges of promises

E.g., “I’ll give you 50 widgets if you pay me $400”

Three requirements: **offer**, **acceptance**, and **consideration** (i.e., all parties to the contract give something up or make some sacrifice)

A promise to give a **gift** is not an enforceable contract—consideration is absent

Written Contracts

Contracts generally **need not be in writing**

**Exceptions**: real estate contracts, sales of goods for $500 or more, contracts that can’t be completed within one year, and others

**Written contracts** (including emails) are almost always a good idea—they prevent misunderstandings and shenanigans, and they remedy forgetfulness

When a contract is in writing, **oral promises** that are not in the writing are sometimes unenforceable
Breach of Contract

If someone **breaches** a contract:

The “victim” can **sue** the person who breached and win money from him or her—courts will usually not force the parties to complete the contract.

**Example:** Supplier AA promises (in writing) to give Retailer 50 widgets in return for $1,000; Supplier AA backs out of the deal; Retailer then has to pay Supplier BB $3,000 in order to get 50 similar widgets.

If Retailer sues Supplier AA, it will probably win $2,000.

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Contract Provisions to Watch For

**Indemnity:** a promise to pay for someone else’s expenses (lawyer fees, judgements, settlements, property damage, etc.)

E.g., “If Owner sues General Contractor, then Sub-Contractor agrees to indemnify General Contractor”

**Liability waiver:** forfeiture of the right to sue someone for injury caused by negligence.

E.g., “If Tattoo Artist’s negligence causes injury to Client, then Client agrees not to sue Tattoo Artist”
Contract Provisions (cont’d)

Mandatory **arbitration** clause: forfeiture of the right to sue in court (arbitration is the only remedy)

**Forum selection** clause: an agreement that any litigation or arbitration will occur in a particular place, which could be inconvenient for one of the parties (e.g., California)

**Guaranty**: a promise to fulfill the obligations of another if that person defaults

E.g., “If LLC defaults on the loan, then LLC Owner agrees to pay the debt owed”

Notes on Commercial Leases

A **signed, written lease** is sometimes required and is virtually always a good idea

**Keep a copy** of the lease that is signed by all parties

Look out for the **lease term length**—if your business closes before the lease ends, you could be responsible for paying all rent due for the entire lease term
Commercial Leases (cont’d)

Who is responsible for what types of **repairs**?

Is **assignment and subleasing** allowed? Does the landlord need a good reason to reject an assignment or sublease?

Does the space have all required **permits** (e.g., Erie County health permit)? If not, who is responsible for obtaining the permits?

Is the building **physically ready** to be leased? If not, who pays for the required renovations?

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**Topic 4**

**Intellectual Property**
Types of Intellectual Property ("IP")

**Copyright**: creative works (e.g., songs, photographs, movies, drawings, books)

**Patent**: inventions that are new, useful, and not obvious (e.g., pharmaceutical drugs)

**Trademark**: distinctive indications of a good or service’s source (e.g., “Xerox”, Nike swoosh symbol)

**Trade Secrets**: secret, economically-valuable information (e.g., Coca-Cola formula, client lists)

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What is IP Protection?

Copyright: *exclusive right* to copy, modify, publicly display, publicly perform, and distribute the work

Trademark: no business can use a mark that is **confusingly similar** to a pre-existing mark (e.g., a new restaurant in Buffalo called “Wagmuns” would be a trademark violator)

Patent: exclusive right to **make, use, and sell** the invention

Trade secrets: prevent others from **leaking** the secrets

*These rules have important **exceptions**
When Does IP Protection Arise?

Copyright and trademark: registration is not required, but it is very helpful.
- Copyright protection arises as soon as a work is created.
- Trademark protection arises as soon as a business uses an eligible mark in commerce.

Patent: registration is required.
- Trade secrets: a business must take reasonable steps to keep the information secret.

Topic 5
Taxation
Income Tax

Taxable income is roughly equal to profit: the money a business makes MINUS the money that the business spends in order to make that money (e.g., cost of inventory, employee compensation, vehicle mileage).

Tax owed is calculated by applying the tax rate (e.g., 10% of first $1,000, 15% of next $3,000...) to taxable income.

Recordkeeping is critical.

Sales Tax

Sales tax is money that a purchaser pays in addition to the price of the good or service purchased.

The seller collects the tax from the purchaser and sends it to the government.

Sales tax applies to the sale of many retail items, of food and drink at restaurants, of certain types of services (including building repair and landscaping), and more.
Sales Tax (cont’d)

Businesses that make sales subject to the sales tax must register with the state’s tax department (at least 20 days before beginning business operations), and they must keep detailed records of their taxable sales.

Sales taxes are generally due once every three months, even if the business does not make any taxable sales during that period.

Customers pay sales tax to retailers, but retailers do not pay sales tax to wholesalers (only the “last sale” is taxed).

The Buffalo News
Owners of Desperado's BBQ in Angola guilty of keeping $56,000 in sales tax

By Barbara O'Brien (http://buffalonews.com/author/barbara-o/)
Published Wed, Apr 22, 2015

The owners of a Desperado's BBQ in Angola pleaded guilty to walking away with more than $56,000 in sales tax rather than sending it to New York State.

Shelly Firsich Hunt, 56, and William J. Francis, 65, both of Angola, pleaded guilty to third-degree grand larceny, a felony, according to the state Department of Taxation and Finance.

The joint operators failed to file 13 sales tax returns and remit more than $56,000 in sales taxes collected from their customers to New York State, according to an investigation by the department's Criminal Investigations Division.

Hunt and Francis are scheduled to be sentenced July 13 in Erie County Court. They could face prison sentences of up to seven years.
Employment Taxes

Two employer duties: pay employment taxes, and help employees pay their own taxes

Taxes owed by employers: FICA, unemployment, disability, workers’ compensation

Taxes that employers withhold from employee paychecks: FICA, state income tax, federal income tax, paid family leave
Don’t Go It Alone

Consult an accountant for help with taxes, recordkeeping, and more.

Many companies sell computer software (e.g., QuickBooks) that helps small businesses manage their accounting, income taxes, sales taxes, employment taxes, and employee compensation.

Payroll companies help businesses pay employment taxes and employee compensation.

Topic 6
Employment Law
Independent Contractors

The employment laws generally apply to employees only, not to independent contractors.

When determining whether a worker is an employee or an independent contractor, courts consider many factors:

- More likely to be independent contractor: skilled, paid per job, has multiple clients, uses own tools, not supervised, control over hours of work, performs work not in hirer’s normal line of business.

The terminology used by the parties in their contract is not determinative.

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Hiring Employees

When a business hires its first employee, it must, among other things:

1. Obtain an EIN from the federal government;
2. Register with New York State as an employer (“NYS 100” system); and
3. Report information to the State about the new employee (and about each new employee in the future).
Hiring Employees (cont’d)

**Oral promises** of job security can be enforceable—be careful about what you say

E.g., “If you do a good job, you can keep working here as long as you want”

**Written employment contracts** are not necessary, but they are helpful

They should state that the employment relationship is “at-will”, if appropriate

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Hiring Employees (cont’d)

Employment **discrimination** (including refusal to hire someone) based on certain characteristics is illegal

Protected characteristics: race, religion, gender, sexual orientation, disability, age, and more

Be careful when writing help wanted **ads** and when asking **application and interview** questions
Firing Employees

Employees are “at-will” employees by default, meaning that they can be fired for any lawful reason or for no reason.

Employers must notify a fired employee of his or her firing, in writing, within five business days of the termination.

Firing Employees (cont’d)

Because of anti-discrimination laws and other employee protections, it is very risky to fire an employee without good reason.

When feasible, employers should (i) warn employees in writing when they act inappropriately, (ii) fire employees only if they engage in similar action again, and (iii) document the reason for the firing.
Wage & Hour

Most employees must be paid at least the minimum wage ($10.40 in 2018)

Most employees also must be paid overtime (150% of normal pay rate) for every hour in excess of 40 worked in a single week

Employers must keep detailed payroll records

Other Issues

Employers must provide safe workplaces for employees

Employers must verify employees’ immigration statuses

The law restricts businesses’ ability to hire people under age 18

Employers can sometimes be liable for injury or damage caused by an employee or independent contractor, even if the employer did nothing wrong—consider doing business through a corporation or LLC
The Western New York Law Center’s Small Business Legal Clinic

Free legal services for entrepreneurs and small businesses

716.828.8417
SBLCteam@WNYLC.com

This presentation provides only a summary of business law. It is accurate as of November 2017, but relevant laws may have changed since then. Consult an attorney for more detailed and complete information.
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