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Startup Venture Legal Checklist + Reference Materials

A Practical Checklist & Guide for Startups

While every start-up and early-stage company faces unique situations, all companies must deal with common issues prior to and immediately after commencing business, such as formation and organization, management and governance, capital structuring and tax planning. This guide is intended to provide new and early-stage companies with a checklist of items to consider not only before, during and immediately after the time of formation, but also items to consider as companies seek to grow their business through outside investment. While this guide is not comprehensive and every item won't be applicable to everyone, we think it's a good general guideline for any new venture.

The first part of this guide provides a general overview of the pre-incorporation, incorporation and post-incorporation processes and items to consider during each stage. For those interested in a more thorough discussion of the incorporation process, **Appendix A** presents a more technical breakdown of incorporation matters for those who might find it useful. For those looking for a more detail on what an investor might want to see prior to investing in a startup, **Appendix B** contains an example of a Due Diligence Checklist that might be used in a Series A financing. That checklist has more detail than any venture needs on Day One, but it can be a useful roadmap and planning tool for the future.

Pre-Incorporation Checklist:

1. **Review Prior Agreements and Restrictions.** Prior to incorporation, review any agreements that the founders may have signed previously with employers or clients that could restrict their activities for the new venture (non-competes, IP assignments, etc.)
2. **Initial Brand Clearance.** While it's not strictly necessary to fully lock down your branding prior to launch, it's generally a good idea to ensure that your company or product name does not infringe the IP rights of anyone else.
3. **Alignment on Founder Expectations.** This will be fleshed out in more detail later in the process, but it's generally wise to ensure that all founders are on the same page regarding equity splits, roles, and the company's vision prior to getting too far off of the launchpad. Having those tough conversations early in the process can make the rest of the journey much easier.
4. **Hire Experienced Tax Help.** The tax implications for founders are more important when the company is an LLC because the finances of the business affect the personal tax liability of the founders. When the company is an LLC, we strongly encourage founders to engage competent and experienced tax attorneys and accountants (both personally and for the company) as soon as possible, and perhaps even before forming the entity. See item 4 in Post-Incorporation Administrative Matters for more information.

Incorporation Process:

Check out Appendix A for a more technical breakdown of the incorporation process.

This section provides a brief overview of what we'd typically put in place for a new startup. For purposes of this checklist, we assume that the entity will be a Delaware C-Corp but try to note where there may be differences (mainly in nomenclature and tax structure) if the founders are going the LLC route.

1. **Incorporate as a Delaware C-Corporation.** Incorporating as a Delaware corporation is accomplished by filing a certificate of incorporation, which is the primary governance document of the corporation. . While Delaware only requires minimal information to be contained in the certificate of incorporation, it is important to consider whether the certificate should include additional provisions, such as indemnification of directors and officers and different classes of stock with varying rights. Since the certificate may only be amended with stockholder consent once stock is issued, we often advise adjusting the basic form documents to provide for indemnification and two classes of stock (voting and non-voting) to account for granting potential future equity incentive grants in a manner that keeps the voting dynamic simple.

LLC Note: *If you decide to form an LLC, the initial documentation would be similar; the form filed with Delaware is called a certificate of formation.*

2. **Memorialize Corporate Structure and Agreements Among Founders.** At this stage, it's essential to have all the basic documents in place to structure the relationship among the founders and cover a few other "check the box" items. These generally include:
    - ***Action by the Incorporator and Initial Corporate Resolutions.*** This is the first batch of the Company's board minutes that establishes the board of directors, elects officers, adopts bylaws, approves issuances of stock and addresses other housekeeping matters.
    - ***Documented Equity Grants for the Founders.*** While the organizational resolutions of the Board approve the issuances of stock, such issuances should be properly documented through a subscription agreement, contribution and exchange agreement, or restricted stock award agreement. Generally, stock issued to founders is "restricted stock" granted through a restricted stock award agreement. Regardless of the form of agreement, we recommend that the founders contribute cash or property to the company in exchange for the stock to avoid or otherwise minimize taxes upon formation.
    - ***Agree Upon and Document Appropriate Vesting Schedules for the Founders.*** Vesting protects all founders from someone leaving early and maintaining an unfairly large portion of equity. This is usually captured in the restricted stock grants referenced above. With rare exception, we believe <u>all</u> founders should have some vesting requirements as this serves to protect everyone involved with the venture. "Standard" vesting is over four years with a one-year "cliff" at the beginning.
    - ***83(b) Filings for the Founders.*** If stock is subject to future vesting, we highly recommend that all founders make an 83(b) election with the IRS so founders are taxed, if at all, on the value of the stock at the time of grant rather than at future vesting dates, as the value of such stock at the time of the company's formation and grant of stock is typically much lower than the value in future years when such stock vests. As mentioned above, if a founder contributes cash or property in exchange for such restricted stock, no taxes would be due at the time of grant if the value of the cash or property equals the value of the stock granted. Timing is important because there is a 30-day deadline for this filing, and it **cannot** be fixed after the fact if someone misses that window.
    - ***IP / Invention Assignments.*** There must be clear documentation showing that all company IP is actually owned by the company itself and that all IP developed going forward will be similarly owned by the company.
    - ***Bylaws.*** Bylaws set out the governance rules of the corporation, though they are secondary to the certificate of incorporation, which controls in the event of any conflict. Bylaws generally set forth details on board structure, procedures for director and stockholder meetings (including notice requirements, record dates and voting), officers and committees and other matters that track applicable statutory requirements.

    LLC Note: *With an LLC, the substance of what is covered by the Bylaws and Stockholders Agreement would usually be covered in the Operating Agreement.*

- ***Stockholders' Agreement.*** While not always done at this stage, we think it's usually best practice to have a simple agreement in place among the founders regarding potential transfers, rights of first refusal, drag-along rights, and other protections designed to serve as a set of checks and balances among the founding team.
- ***Create a Pro-Forma Cap Table.*** While this is a bit of a formality at this stage, we think it's best practice to create and maintain an organized cap table from Day One. This can potentially save a lot of headaches in the long run.

Post-Incorporation:

Administrative Matters

1. **Apply for an EIN*.*** Every company at this stage should obtain a Federal Employer Identification Number from the IRS. An EIN will be necessary for tax purposes as well as administrative/operational matters like setting up a bank account.
2. **File State and Local Registrations**. Most states require companies that are formed in other states (like Delaware) to register to do business in the states where they have actual operations. You'll also likely need to register for tax IDs or accounts at the state and local level. You'll want to check with your accountant on your specific needs and obligations at this stage.
3. **Insurance.** At this point, it's generally a good idea to talk with an experienced insurance provider to determine what types and levels of insurance coverages will be appropriate for the venture. The startup's needs will vary greatly based on the industry and stage. If nothing else, this will be a helpful data point for future needs.
4. **Accounting.** While it may not be strictly necessary for the very early stages, we recommend finding a good accountant for the business who can assist with basic corporate tax matters. This helps to ensure that, from the outset, the company is making all necessary filings and elections. We recommend our sister company, Full Velocity Consulting, for your accounting needs. We formed this sister company so that attorneys and accountants could work together closely to help clients achieve their goals. For more information on Full Velocity Consulting, go to https://www.fullvelocity.com/ or contact Julie Herzog.

Intellectual Property and Related Matters

1. **Assess Potential IP Portfolio and Develop a Game Plan to Protect IP.** This can include:
   - Formal clearance searches to ensure that any marks being used do not infringe upon the rights of third parties;
   - Trademarking key brand or product names; and
   - Assessing whether you have IP that might benefit from patent protection.
2. **Privacy Policies and Terms of Use.** If you maintain a website, mobile application, or any equivalent online sales/distribution/service, you should have a privacy policy and terms of use in place. These legal agreements will define your relationship with your customers, so it's important that they be specific and well-designed and comply with applicable privacy laws.

Other Contracts and Documents:

1. **Form Employment Agreements.** Well-drafted employment agreements not only set forth duties, expectations and compensation for employees, but also serve to protect the company and its competitive advantage. Often, there will be an ancillary agreement that covers IP, confidentiality, and other competitive restrictions that supplements the employment agreement. Regardless of whether employment agreements are in place, it's important that certain core concepts be addressed with all key employees.
2. **Form Agreements for Consultants and Other Service Providers**. Independent contractor, consultant or advisor agreements are critical in protecting the company and its intellectual property, trade secrets and other confidential information. Accordingly, it is best practice to have comprehensive agreements covering not only the basic commercial terms, but also IP ownership to ensure anything created or developed by the contractor while performing services to the company is owned by the company.
3. **Equity Incentive Plan and Form Grant Documents.** If the company intends to make equity grants (e.g., stock option grants) to employees or service providers, it will need to adopt a formal equity incentive plan along with the appropriate form documentation to make any grants under that plan. Prior to making any grants, the company will likely need to have a 409A valuation performed to determine the value/exercise price of any option grants and have the company's board of directors approve the plan and any grants.
4. **Form Customer Agreement.** Regardless of the type of venture, it's valuable to have a vetted standard agreement to be used with the company's customers, covering the basic terms and conditions necessary to protect the company. These terms will vary based on the business model, but provisions regarding payment terms, IP rights, indemnification obligations, and limitations on liability will be important for any company.
5. **Form Mutual NDA (Confidentiality / Non-Disclosure Agreement).** These documents have become 99% standardized at this point, but it's good to have a well-drafted (but reasonable) form on hand for when people request it. This is the "low hanging fruit" in your form contract library. We've included a sample mutual NDA in **Appendix C** as a reference**.**

We can't overemphasize or stress the value of having comprehensive agreements, staying organized and developing coherent/consistent document storage and contract management processes and systems from the inception of the company. Having legally compliant and comprehensive agreements and an organized set of all fully executed documents in one place will save you countless hours and legal fees as the company grows, as the time and costs associated with reviewing existing documents, rectifying errors, replacing agreements and getting organized is much more than the time and expense incurred at the beginning of each stage of a business's lifecycle. Moreover, a good system will also make it easier to keep track of important dates, milestones, and notice requirements that cut down on "unforced errors" that will be costly and time-consuming to rectify down the road.

For cap table and employee equity management, many startups use Carta (or similar platforms) as their central repository for all equity and cap table adjunct documents, which can be incredibly useful during investor due diligence.

Appendix A:

A More Technical Guide on Incorporation

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Introduction

I'll start this with two important caveats:

1. This is really intended for what you'd consider a "conventional" modern tech startup (Airbnb, Snowflake, GoPuff, etc.) that will be looking for funding in the near future. If you're starting a more traditional business (restaurant, professional service organization, retail store, etc.), then some of these general principles will still very much apply, but the process will likely be somewhat different (and simpler in some ways).

2. Some of this is more art than science. There is no shortage of online (and offline) resources on this process, and there is no one "right" answer (though there are certainly wrong ones). Two lawyers might feel differently about the specifics/details of the process, but both can be right. Even when the details differ, you'll note that there are (usually) the same basic principles involved.

Where should I form my company?

If you're looking for funding from sophisticated angel investors or VC firms, Delaware probably makes the most sense for your state of incorporation. Although Delaware has a reputation (sometimes accurate, sometimes not) of having business-friendly tax rules, that's not the real driving force here. Delaware has a more thoroughly developed body of corporate law than any other state. This means that if you have a corporate legal issue, there is a greater chance that the Delaware courts have addressed that particular issue before (in comparison to, for example, Colorado). This doesn't necessarily mean the result is going to be in your company's favor, but it means that you'll be able to predict the outcome (good or bad) with more certainty (at least in theory). Any additional certainty makes it easier for the company to plan around and predict potential liabilities. This is especially true for matters pertaining to shareholders and/or the board's fiduciary duties.

For this reason, investors typically favor Delaware, as well. When I say "typically," I mean that the vast majority will have no issue with your company being a Delaware entity and some/most will prefer it that way. Some will be OK with another state, but Delaware is the most common denominator so to speak.

My general rule of thumb is that if a startup plans on looking at any sort of traditional startup/seed/venture funding, Delaware is likely the right choice. On the other hand, if a company has already formed in another state, I might not necessarily have them convert into a Delaware corporation until there was a tangible reason to do so (i.e., investor preference/insistence). That last point might vary with the circumstances (or with the personal opinion of your counsel).

Technical Point 1: If you don't have a physical office in Delaware, you'll need to utilize a registered agent within its state lines. The basic intent is that the state needs a definitive way to reach you (and potentially serve notice on you) within its borders. There are plenty of services that will act as your registered agent in Delaware (i.e., get your official mail as needed), and you can expect that to cost somewhere around $150 annually (give or take). It's a small cost and hassle; it in no way should be your determining factor when deciding where to incorporate.

Technical Point 2: If your actual location/office/core presence is not in Delaware, you'll also likely need to register your company to do business in your home state. For example, a Delaware corporation with a headquarters in Colorado would have to register to do business in Colorado (by filing a document with the state + paying a filing fee). The broader point here is that you ultimately need to be (a) registered in each state where you need to be registered and (b) set up to pay taxes everywhere you need to pay taxes. Lawyers can (and probably should) be somewhat helpful on this front, but a good accountant probably adds the most value in this area. Things can get a little more nuanced where a company might have a regional/national presence or employees in multiple states.

Technical Point 3: If you are a non-venture path startup like a professional services firm, retail store, etc., incorporating in your home state usually makes the most sense and should be your "default" option outside of a compelling reason to stray from the home-court advantage.

What type of entity should I form?

I am going to drastically over-simplify this. My general rule of thumb is that a corporation usually makes the most sense for a company seeking funding from experienced investors in the near- to mid-term. While some early-stage investors may be comfortable investing in LLCs, the logic here is the same as the state of incorporation decision above. The vast majority of investors will be OK with a corporation, and some will prefer it (or even insist on it). While some are OK with investing in LLCs at this point, corporations are still the most common denominator.

Again, if a company has already been formed as an LLC, I might leave it like that until there was a tangible reason to convert to a corporation (such as in connection with a new round of financing). The conversion process involves some paperwork with the state, some filing fees and some legal costs, but isn't necessarily a huge deal in most circumstances (at least for an early-stage company) but situations can vary. Some conversions will have more moving parts than others.

Another benefit to the corporation (as opposed to an LLC) is that the process of granting equity compensation/stock options to employees is a little bit more straightforward than with an LLC. Those things can still be done with an LLC, but that process can be a little more nuanced and have some wrinkles.

To net it out, a corporation usually makes sense for a company that fits into the modern startup mold. For a "normal" new company, I tend to prefer an LLC since it can be a little bit more flexible and a little less complex than a corporation.

Technical Point: Different entities and structures can lead to different tax consequences. Each situation is different, so the accounting/tax considerations of a particular situation can drive your choice to one form over another. This is another area where a good accountant can add tremendous insight and value. While a good lawyer will be able to raise tax issues to be considered, it's probably asking a bit too much of them to give a specific answer on the ultimate tax effects.

What sort of paperwork needs to be filed? (The Technical Aspects of Incorporation)

For simplicity's sake, I am going to assume that we are starting a Delaware corporation. The process is very similar in most states, but some of the nomenclature and steps might vary slightly.

1. Certificate of Incorporation. Often referred to as the "Charter", this document gets filed with the State of Delaware to start off the incorporation process. This is usually (especially if there are no investors on Day One) a pretty simple document without that many substantive decisions. Other than basic information (such as address), the only real decision is how many shares of stock to authorize and what par value should be. You can see the form here: http://www.corp.delaware.gov/incstk.pdf.

    - ***How many authorized shares do we need?***
      The goal here is simply to have "enough" without picking a number so high it seems ridiculous. 10 shares is too few; 10 billion shares is too many. There isn't necessarily a right or wrong answer, but, at least in Delaware, having a larger number of authorized shares usually makes sense. For example, I might authorize 10-15 million shares of common stock and think about authorizing "blank check" preferred stock in some cases. This doesn't mean that I am issuing those shares now (or any time soon), it just means that those are currently the maximum number of shares that the company can issue over the life of the company. The number of shares can be, and often is, modified later. Among other reasons, larger numbers are better because (a) it makes the math easier (less fractional shares and decimal places for your already math-challenged lawyer) and (b) people like getting 1,000,000 shares more than they like getting 10 shares even if it represents the same sized-stake in the company (we are simple creatures after all). We'll often create a second class of shares at this stage to have "non-voting" stock available to grant as equity incentives.

- ***What is Par Value and what should it be*?**

  The charter can also contain an archaic number called "par value". This is no longer a meaningful number (unless someone messes something up) and most states have done away with the concept entirely. Essentially, it is the minimum price at which a company can offer stock. Because of this, the number is often as close to $0 as possible. You'll typically see $0.001 or $0.0001 if an experienced corporate attorney put the docs together. In Delaware, this number still matters somewhat for tax purposes. In general (and with rare exception), a lower number is better.

Technical Point 1: Because this document is so simple, it typically gets amended in connection with raising capital in order to capture all of the more complex rights and benefits that can come with investors (usually in the form of preferred stock). Whereas the initial charter is likely 1-2 pages in most situations, the amended charter in connection with a round of capital might be 10+ pages and cover more complex topics like voting rights, dividends, board composition, liquidation preferences, and conversion rights.

Technical Point 2: If you aren't based in Delaware, you'd also obtain a registered agent at this time. There are plenty of folks who offer this service and you can expect to spend around $150 per year for this (non-optional) service.

Technical Point 3: Delaware has a standard cover sheet that must be submitted with corporate filings. This can be found at: https://corp.delaware.gov/filingmemo.pdf.

Technical Point 4: Like many states, Delaware requires that every corporation incorporated in the state file an annual report. The report is due by March 1 every year, along with an annual Franchise Tax payment for all corporations. You can find more information (for Delaware at least) here: https://corp.delaware.gov/paytaxes.shtml.

Technical Point 5: Some states require that you "publish" the fact that you have formed a new entity by taking out an ad in a local newspaper or two. Please check your state rules and/or confirm with your counsel. Although it's a bit of an archaic concept, it's still something that needs to be thought about even if it's mainly a "check the box" type requirement. This is not a requirement in Colorado.

2. **Apply for a Federal Employer Identification Number.** This is an application filed with the IRS and this number is typically necessary to open a bank account, file taxes, and do other things

that a corporation needs to do. Thankfully, the IRS has done a pretty good job of making this simple and a FEIN can now be obtained relatively pain-free at: https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online.

This is something you can likely handle yourself but often your lawyer or accountant will handle as part of their services if they are already doing work for you.

3. **Register to do Business in your Home State.** If you formed a Delaware corporation but aren't based in Delaware, then you'll likely need to register to do business in your home state (i.e. the location of your main office). Typically, this means filing a document with the state and paying a relatively small fee (in most states). As context, this is what Colorado's form looks like: https://www.coloradosos.gov/pubs/business/sampleForms/AUTHORITY.pdf.

Technical Point 1: If you have a presence in multiple states (offices, employees, etc.) you might also need to register to do business in multiple states. If you think this might apply to you, talk to your lawyer or accountant. Each state is slightly different as to what qualifies as "doing business" but, in general, it boils down to having a "nexus" in that state. Explaining what constitutes a nexus is beyond the scope of this primer (and beyond the understanding of most non-accounting folks). There also may be other local requirements; for example, Denver requires an additional business license and a few tax registrations of its own. For more information on this in Colorado, see Appendix D.

Companies registered in Colorado will need to do the following:

- File annual reports with the State of Colorado. The annual report form is available on-line at the Secretary of State's website (www.coloradosos.gov) and can be filed electronically (at a greatly reduced cost), by mail, or in person. If you have signed up for email notification with the Secretary of State's office, you will receive an email notification reminding you about this filing and its due date.

- Maintain a registered agent in the State of Colorado. The initial registered agent is identified in the Articles of Organization. If the person who is serving as the registered agent changes, an appropriate filing must be made with the Colorado Secretary of State. This too can be accomplished electronically.

- Inform the State of certain changes. Changes to the Company's Articles, or documentation of certain other transactions involving the Company need to be filed on appropriate forms with the Colorado Secretary of State. Again, most filings can be done electronically at greatly reduced cost.

Technical Point 2: You will also need to sort out which taxes need to be paid and in which states. Please talk to your accountant about making sure you are properly set up from a state (and local) tax standpoint. This is one of those things that is much easier/cheaper to do right from Day One than it is to try and fix later.

From a technical standpoint (in most states), the paperwork described above is all that is strictly necessary to officially "form" a new corporation. However, the much more important stuff is discussed below. Ensuring that the right corporate records/formalities are in place and that we have thoughtfully structured the relationship among the co-founders is absolutely critical. Again, these are things that are much more difficult and expensive (and sometimes impossible) to fix after the fact if not properly done in the first place.

What Kind of Agreements and Documents Should We Have in Place to Do Things "Right"?

This is usually the most important stuff. Making the bare minimum of filings to establish the entity and remain compliant is pretty straightforward and, in some ways, more of a "check the box" type process.

Properly structuring relationships among the co-founders, early employees, investors, etc. is a much more important and nuanced step in launching your company. I typically refer to this as "building the proper foundation" or "putting the right system of checks and balances in place." There is sometimes a tendency to "punt" this stuff down the road, but it's usually much more expensive, time-consuming, and difficult to fix things later. This is especially true once the company has value and/or outside money has been invested. Once those milestones occur, there simply isn't as much flexibility to modify things without at least some headaches. If nothing else, most investors will either absolutely require that some of these documents are in place (or at least view it as a market signal that you do/don't have your house in order). This process can also help align expectations among co-founders and avoid misunderstandings that can be easily avoided. For that reason alone, it's a valuable process.

Technical Point 1: As a reminder, I am focusing solely on Delaware corporations for the sake of simplicity but many of these steps are similar in other states. With regards to an LLC, the general concepts are pretty much the same but the nomenclature and how the concepts are addressed may differ significantly. For example, an LLC's operating agreement might essentially serve as a combination of charter, bylaws, shareholders' agreement, etc. in a single document. In many ways, it's the same information/issues presented in a different format. The LLC might have a few more nuanced differences in comparison to a corporation (especially on the tax front), but the goal of this primer is to focus mainly on the overlapping high-level concepts.

1. **Bylaws.** Of all the documents in this section, this is probably the least exciting and most standardized. It will cover things like the formalities involved with calling a board meeting, board structure, voting processes, and indemnification of officers and directors. While there are certainly important topics here, these are usually less substantive decisions to make on Day One in comparison to other documents. That being said, it's important to do them and do them right (again, missteps are harder to fix later).

2. **Founder IP Assignment / Contribution to the Company.** Especially if there are multiple co-founders/early employees (and even if there aren't), it's important that the company owns (or at least has a license to freely use) any intellectual property that it needs to get started and grow into a real business.

You will see this document with a few different similar names but the core concept is the same. In exchange for receiving an ownership stake in the company (and/or other compensation), the founder/employee officially transfers any intellectual property that he/she may have created for the venture to the company. When completed properly, it should be easy to demonstrate that the company now owns all the intellectual property it needs to run the business. While it's usually a non-controversial concept, sometimes it gets delayed (or is simply never done). It can often fall into that "important, but not necessarily urgent" section of our to-do list and create issues when investors do their due diligence.

Let's walk through an example to illustrate what can go wrong.

NewCO Example:

Founder 1 and Founder 2 start NewCo with the intent to change the world together and never part ways. Founder 1 is the "business" person and Founder 2 is the "tech" person. Founder 2 has created the "Secret Sauce" for the company which he has created from scratch and without pay. As can sometimes happen, a rift eventually forms between Founder 1 and Founder 2. Founder 2 quits and storms out of the building, never to work for NewCo again. There is nothing in writing stating that the company owns the "Secret Sauce" and that Founder 2 doesn't.

Three months later, Founder 1 is trying to raise capital for NewCo and is in deep discussion with an investor. Both are dismayed when Founder 2 launches his/her own company with similar technology. When Founder 1 confronts Founder 2, Founder 2 proclaims that he/she owns the "Secret Sauce" loud enough that the investor can hear. The investment falls through; there is forever a cloud over whether NewCo actually owns the IP it needs. No bueno.

Again, this is a great example of something that is super-easy to address on Day 1 and super difficult to fix after the fact. Once things have started to go south, it's already too late. No disgruntled former co-founder is going to sign away their IP after he/she has left the company without extracting a pound of flesh.

3. **<u>Equity Split</u>.** While this isn't an agreement per se, it's a critical part of the process and the one that usually provokes the most discussion and hand-wringing. Unfortunately, there really isn't a mathematical formula to plug in and crank out the proper ownership percentages. You can read a thousand blog posts and each might have a slightly different take on how to slice up the equity pie. All of them could present a different and perfectly rational way to divvy up those initial shares.

Note: For that reason, I am going to focus on a few guiding principles that I've found helpful. I would make the typical lawyer "every situation is different" disclaimer but you're smart enough to realize that it's implied.

a. Vesting (see below) is critically important and offsets some of the risks associated with this process. Especially in the early stages, you're making a lot of these decisions based on how you think things will play out (i.e. an estimate). If reality doesn't match your plans, then vesting/repurchase rights are probably the best mechanisms to re-calibrate the split. "Standard" vesting is often four years with a one-year "cliff."
b. There needs to be an honest conversation about roles and expectations among the founders. At the end of the day, this is more art than science. Just like any job, co-founders / employees won't feel motivated if they feel undervalued. Conversely, someone with a large chunk of the company with no vesting in place may be incentivized to coast and place the burden on others (i.e. a free-rider). The right answer is the one that keeps the company and the early team moving forward in a (relatively) harmonious fashion.
c. The ultimate goal is to create the right system of checks and balances among the early team. This shouldn't be about one founder "winning" these discussions and another founder "losing." It's about building the right foundation for the company moving forward. Like any relationship, there may be compromises necessary to make things work. If this process becomes untenable, it may also say something about the company's prospects (or at least about the ability of the founders to work together long-term).
d. This process may not be fun or easy. That's fine. If there are potential issues lying dormant, it's better to know sooner than later, so course corrections can be made. Again, it is much simpler (and cost-effective) to deal with potential issues now than it is to "just figure it out later."

Educate yourself here. Honestly assess what your company needs to go from Point A to Point B. Ask peers in similar companies how they handled the process. Read anything credible you can find on the subject. Again, there won't be a clear cut "right" answer, so deliberately and thoughtfully approaching this process is important. To me, this is about understanding the principles, concerns, and factors involved with the equity split process generally and then finding the approach that makes sense for your specific situation. I think this is one of the areas where having experienced early-stage counsel can be an incredibly valuable resource; similarly, mentors who have "been there before" can be a huge help in thinking through these issues.

Non-Technical Note: Sometimes the myriad of information out there is both a gift and a curse. There are hundreds and maybe thousands of approaches on this topic. Educate yourself, think critically/deliberately and don't necessarily change your entire course if you read something else that is different or if another founder says "that isn't how I did it." The challenge is taking all those sources/approaches/insights and synthesizing them into something that works for your company and specific situation.

4. **Founders' Restricted Stock Agreements.** You'll see this document with a few different names but the underlying concept remains the same: if the founder leaves "early," then the company gets to repurchase any "unvested" shares at a nominal price.

   In my mind, these are the most important documents for a startup since they mitigate a lot of the (potentially difficult) issues and risks that can arise from founder disputes, fallouts, and early exits.

Technical Point: Comparing restricted stock to stock options provides some helpful context (since people are usually more familiar with the concept of stock options). With options, you get the right to purchase shares of the company at a point down the road at a certain price (but you don't own the shares on Day One). These options typically vest over a period of a few years (four years with a one-year "cliff" is typical). For example, someone with 100 options might be able to exercise 25 options (i.e. purchase 25 shares) after year one, another 25 options after year two, etc. Restricted stock is different in that you actually own all of the shares on Day One, but the company can repurchase a certain percentage of shares based on the founder's tenure with the company. If a founder leaves on Day Two, the company might be able to repurchase 100% of the founder's shares. If they leave on Day 366, then the company might be able to repurchase 75% of the restricted stock (the founder keeps the remaining 25%) and so on until the company's right to repurchase any shares fully lapses and the founder truly owns those shares outright without any risk of them being repurchased.

Although this technically isn't vesting (it's probably more accurate to think of it as reverse-vesting), this mechanism essentially serves the same purpose. For that reason, you will often still hear the terms vesting and vesting schedule used in connection with restricted stock. While technically not quite accurate, it's a helpful shorthand for the concept and easier to say/type/express than "company's right to repurchase shares that lapses based on service to the company and potentially other milestones." For that reason, you might hear me refer to "vesting" in the context of restricted stock, but we both know what I mean.

Taxes, Part 1. Think about the *Price is Right*. When someone wins a $30,000 car, the IRS views this in the same manner as if their employer paid them $30,000 in salary (i.e. taxable income). With salary, we can simply set side x% of that cash to pay the IRS. With the car, you can't pay the IRS with x% of a car so the "winner" often ends up with a tax bill from Uncle Sam but no corresponding cash to pay it. For that reason, game show winners will often take the cash prize instead of the car/boat/trip/blender. The IRS treats any valuable property received as "income" and no different than cold, hard cash in most situations.

What does this have to do with stock in my startup? Stock is really no different than the game show car. It's property that can have value and, therefore, tax consequences. If you receive income that is worth $1M, there might also be a millionaire's tax bill associated with it.

From a startup perspective, a new company typically only has nominal value on Day One. If you receive stock outright in a company that is brand new and worth $1, then there really aren't any major tax issues. As the company grows, hits milestones, and raises capital, then there is some real value in the company (if only on paper). As the company's value increases, granting equity/stock/etc. becomes more and more complex due to tax implications. This is partly why stock option plans and 409A valuations exist.

What does this all mean? It probably makes sense to grant the founders' stock relatively early in the process when the company has nominal value. If we wait until the company has real value, then the process of granting equity becomes more complex and less flexible. Although there is no hard and fast rule here, these grants should typically occur well before the company raises money. When raising capital, you are usually setting some sort of value for the company's stock (otherwise an investor wouldn't be giving you money) so it becomes much harder to argue that the founder's restricted stock you were granted is worth nothing.

Taxes, Part 2. So, this is probably beyond the scope of the article, but I wanted to raise a few points to keep in mind. For all intents and purposes, the IRS generally treats stock as officially being granted (from a tax perspective) once it is "no longer subject to a substantial risk of forfeiture." What does this mean in the context of restricted stock and how it affects your taxes? Suppose, for sake of argument, that you are granted 100 shares of restricted stock that vest five years from now (not a typical schedule but helpful for this example). On Day One, the stock is worth $0.000001 per share (it's a brand new company after all). By year five, however, the company is now worth $100M and the stock is now worth $20,000 per share. Since the stock is still "subject to a substantial risk of forfeiture" until it "vests", the IRS treats the stock as being granted in year five (when it has real value). If you were taxed as if you received those shares on Day One, there really wouldn't be much (if any) taxable compensation or consequences. In contrast in this example, if the stock is treated as being granted in year five then you might have $2,000,000 in taxable compensation at that point (but no corresponding cash payment to handle the taxes). This can equate to a huge (and avoidable) tax bill regardless of whether there is any associated liquidity. This outcome can typically be avoided by making an 83(b) election with the IRS when the restricted stock is initially granted (i.e. Day One).

So, after all that exposition, what are the key benefits of granting restricted stock to founders and why is it (usually) the best option for a founding team?

a. It protects the founders and creates a system of checks and balances among the initial team.
b. It addresses the very real possibility that things, like life in general, will not go exactly according to plan.
c. Investors will likely want to have some sort of vesting schedule in place anyway. If you're proactive and the schedule is reasonable, they are more likely not to modify or extend it.

How long should the "vesting" periods be?

Every situation is different. Probably the most common figuration is four years total with a one-year "cliff". This means that 25% of the total shares vest on the first anniversary and the remaining 75% vest in equal installments over the subsequent 36 months. Depending on the circumstances, there may be valid reasons to shorten or modify this schedule. For example, if a founder has worked on the concept independently for three years prior to incorporation, there is an argument that the vesting period could or should be shorter.

5. **<u>Corporate Records</u>.** These are a few relatively "routine" documents and practices that should be in place after you launch. Since none of them are too exciting, I am going to lump them all together here.
   a. <u>Initial Actions by the Incorporator</u>. These essentially serve like board minutes that officially adopt the company bylaws and name the initial directors.
   b. <u>Board of Directors Action by Written Consent</u>. This document will officially approve initial setup matters such as:
      i. appointing the officers of the company;
      ii. recognizing the initial ownership of the company;
      iii. approving/adopting the initial corporate records (minute books, stock certificates, etc.); and
      iv. various other "administrative" matters.
   c. <u>Create and Maintain an Organized Cap Table</u>. It sounds simple and obvious, but please keep track of the equity you're giving out in some sort of organized fashion.
   d. <u>Ongoing Maintenance and Upkeep</u>. Determine how you will keep/manage your corporate records. Less and less people use the hard-copy minute books these days,

but it's still important to have some sort of system in place. The bottom line is that you need to have all of your corporate records organized and accessible in one place (whether physical or digital) so that you're organized for any investor diligence. It's a little bit of an effort and seems trivial, but it will save you significant time/energy/money/headaches in the long run. It's also a pragmatic signal for how much someone has their sh*t together (legal term).

Final Thoughts:

While the reality of this process will be a bit more nuanced than as presented above (and may vary wildly based on specific circumstances), hopefully, this has given you a fairly helpful roadmap for the process from zero to launch. While your details may differ, many of the principles in this primer are critical for any startup and are absolutely worth discussing among the founding team to avoid (potentially messy) issues down the road.

Many startup founders wrestle with the tension between keeping service provider/vendor fees down (or at $0 in some cases) and making sure they are getting the right advice and avoiding potential landmines. That calculus is different for each startup/founder and, in many ways, that's a business decision to be made. I genuinely believe the right advisors (legal, accounting, regulatory, etc.) provide more value in the long run than they cost and are usually sensitive to the often-precarious financial environments in which startups exist. The cost difference between a mediocre service provider and a great one is usually incremental, but the difference in results can be dramatic. In reality, however, costs must be taken into account when sourcing advisors. There is nothing wrong with seeking "cost-effective" resources, but simply seeking the "cheapest" option (or the free one) can end up being a misstep that can have an effect on the company for its entire life cycle.

Like anything in business (and life), do your homework, approach the situation thoughtfully, and find the right fit.

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Appendix B

Sample Series A Due Diligence Request List

Series A Preliminary Due Diligence Document Request

Below is a list of documents and other information that we will need to review in connection with a possible transaction with the Company and its subsidiaries and affiliates (collectively, the "Company"). This is a preliminary request, and upon review of any materials provided to us hereunder, additional requests for documents or information may be forthcoming.

Please furnish for our review copies of the requested documents or indicate in the column provided that none exist. In addition, please provide a short summary of each oral agreement or arrangement and any circumstances which are responsive to the requests set forth below. Any documents identified as originals will be returned to you promptly.

Unless otherwise indicated, (i) all requests are for any matters which are currently existing and in effect or which have occurred within the last five years (even if they are not now existing or in effect if such matters are material), except as otherwise noted, and (ii) each request applies to the Company, all past and present subsidiaries and affiliates (if any) and all predecessors, whether corporations, partnerships or joint ventures (for purposes of this request, all such entities also are included in the

I. **Corporate Records**		
	Provided	**NA/None**
A. Charter documents, including all amendments.		
B. By-Laws, including all amendments.		
C. Minutes of all prior meetings of the following (or written consents in lieu of meetings):		
1. Board of Directors;		
2. All committees of the Board; and		
3. Stockholders.		
D. List of all affiliated business entities or organization chart.		
E. A list of officers and directors of the Company.		
F. List of jurisdictions in which the Company is (or has applied to be) qualified to do business and evidence of such qualification.		

II. **Securities**		
A. A list naming each stockholder and option holder and the number of shares and/or options held for each class of stock outstanding and options outstanding, respectively.		
B. A summary of vesting schedules of any stock or options subject to vesting, including any vesting acceleration.		
C. Copies of agreements relating to outstanding options, warrants, rights (including conversion or preemptive rights) or agreements for the purchase or acquisition of any of the Company's securities.		
D. Voting agreements, voting trusts, shareholder agreements or other similar arrangements.		
E. Stock purchase, exchange, redemption and repurchase agreements and stock restriction and related agreements.		
F. Private placement memoranda, investment letters, questionnaires, and other documents relating to any offering of securities of the Company.		
G. Any securities or blue sky filings that have been made in connection with the issuance of stock.		
H. Agreements between stockholders or with the Company relating to special dividend rights, preemptive rights, anti-dilution rights, rights of first refusal, or other rights affecting stock ownership.		
I. Any agreements granting registration rights with respect to the Company's stock.		
III. **Employee Benefits and Other Employment Matters**		
A. All employee benefit and profit-sharing plans, including all bonus plans, deferred compensation plans, severance pay plans, stock option or equity inventive plans and "phantom equity" plans.		
B. Employee handbooks.		
C. Notes or other documents evidencing management loans, perquisites or other similar arrangements.		
D. Employment, consulting, compensation, severance or other agreements or arrangements to which any current or former director, officer or employee of the Company is a party.		

E.	Contracts for consulting or management services.		
F.	All contracts or arrangements (whether written or oral) between the Company and its officers and directors (or their family members). All documents relating to any transaction between the Company or any subsidiary and such persons or entities (including receivables from or payables to such persons or entities).		
	IV. **Intellectual Property**		
A.	Copies of confidentiality, proprietary rights and invention assignment agreements signed by employees and consultants.		
B.	A list of employees and consultants who have not signed confidentiality, proprietary rights and invention assignment agreements.		
C.	Any licenses or agreements of any king with respect to the Company's or others' patent, copyright, trade secret or other proprietary rights, proprietary information or technology.		
D.	If the development of any of the Company's Intellectual Property has been funded by third parties, including government or academic funds, identify and provide copies of any relevant documents.		
E.	Copies of standard consulting services agreements.		
F.	All documents pertaining to disputes involving Company and/or third-party Patents, Inventions, Marks, Works of Authorship, Software, Databases, Products, trade secrets, websites, domain names, or otherwise pertaining to the Company's business; the plaintiff party(ies), adverse party(ies), dates, situs and disposition or resolution of such dispute.		
G.	List of all issued, pending, abandoned, and rejected patents ("Patents") of Company and descriptions of all ideas (including inventions, developments and business methods and processes) which Company believes may be patentable or otherwise protectable or proprietary ("Inventions").		
H.	List of all trademarks and trade names, including logos, designs and slogans (hereinafter collectively referred to as "Mark(s)") used or planned to be used by Company; and descriptions of goods/services in connection with which such Marks are used.		
I.	List of all works of authorship (such as software or Internet websites; literary, graphic, audiovisual or musical works; sound recordings and		

the like) used or planned to be used by Company ("Works of Authorship"), and all registrations and applications therefor, and a description of any such Work of Authorship		
J. List of all software products ("Software") used or planned to be used by Company; including description of any such Software and a list of all third party and/or public domain materials included in the Software.		
K. List of all domain names and websites used or planned to be used by Company; all registrations and applications therefor; information including top-level, secondary and further higher domains to which the domain name(s) relate(s), date(s) of application and registration.		
V. **Material Agreements and Financing Documents**		
A. Schedule of all material real property owned, leased or used by the Company.		
B. Any agreements, understandings, instruments, contracts or proposed transactions to which the Company is a party or by which it is bound which involves obligations of, or payments to, the Company in excess of $25,000.		
C. Loan agreements (long-term and short-term), indentures, revolving credit agreements, note purchase agreements, notes, other evidences of indebtedness and all related documents (including all amendments thereto) concerning any material debt financing, or any other agreements relating to the indebtedness of the Company.		
D. Any agreements in principle or otherwise, with respect to mergers, acquisitions or sale of material assets of the Company, whether or not consummated.		
E. Mortgages, pledges or other evidence of liens, security interests, letters of credit and corporate and personal guarantees securing the obligations described in response to Item VI.A. above or other Company obligations.		
F. Private financing documents, if any.		
G. Franchise, partnership, joint venture, strategic or business alliance and similar agreements.		
VI. **Insurance**		
A. Schedule of insurance policies (including key-person policies and policies relating to property, general liability, worker's		

	compensation, product liability, directors and officers' indemnification, accident and business interruption) with details of coverage and limitations.		
B.	Details of material insurance claims presently pending and material insurance claims accepted or denied by the insurer over the past three years.		
	VII. **Operations**		
A.	Forms of all standard or sample contracts used by the Company in the ordinary course of business (including standard purchase orders and billing agreements).		
B.	List and description of major suppliers and top 20 customers, to the extent not previously provided.		
C.	Policies and procedures manuals in use at the Company.		
D.	Provide a copy of the Company's privacy policy.		
	VIII. **Accounting and Tax Matters**		
A.	Financial Data/Information (to the extent not previously provided).		
	1. Financial projections/budgets to the extent available.		
	2. Financial statements for the previous three years.		
	3. Description of the nature and extent of any related party transactions.		
	4. Accounts receivable aging and history including any amounts written-off over the past three years.		
	5. Detailed listing and description of other receivables.		
	6. Schedule of all investments including general description of terms and maturities.		
	7. Schedule of and documents relating to liabilities and obligations, including material contingencies (with a description thereof), incurred otherwise than in the ordinary course of business since the last consolidated		

	balance sheet or not fully reflected or reserved against in such balance sheet.		
8.	Monthly operating statements for the current year when available.		
9.	Detailed general ledgers for all periods available.		
10.	Chart of accounts and description of accounting policies and practices		
11.	Explanation of the effect of any changes in accounting practices during the last three years.		
12.	Description and explanation of any extraordinary or significant non-recurring revenues and expenses during the last three years.		
13.	Schedule and description of accounts payable and accrued liabilities.		
14.	Schedule of any assets pledged as security for liabilities.		
15.	Schedule and explanation of any financial or other guarantees to which the Company is or has been a party over the past five years.		
B.	Tax Information		
1.	Material consents and agreements with any tax authority or any pending or threatened material disputes concerning tax matters (last three years).		
2.	Closing letters and other material IRS documents of the Company (last three years).		
3.	Federal and state tax returns for all years available and list for years that are still open.		
4.	Description of any tax audit adjustments or settlements during the last five years including any items under appeal or disputed.		
	IX. **<u>Legal Matters</u>**		
A.	Schedule of all threatened or pending litigation, arbitration or investigations, including description of parties, nature of actions and remedies sought (after an initial review, we may need access		

	to actual litigation files and/or to contact counsel handling particular matters).		
B.	List of judgments or consent decrees to which the Company is subject.		
C.	Schedule of government licenses, permits, permissions approvals and the like.		
D.	All correspondence between the Company and any governmental or regulatory agency.		
	X. **<u>Other Matters</u>**		
A.	Copies of any other documents or information material to the ongoing operation of the Company's business.		

APPENDIX C

Sample Mutual NDA

DISCLAIMER: This sample is provided for informational purposes only and does not constitute legal advice or create a lawyer/client relationship. Use at your own risk.

MUTUAL NON-DISCLOSURE AGREEMENT

This Mutual Non-Disclosure Agreement (this "**Agreement**"), dated ______________ (the "**Effective Date**"), is entered into between _____________________________, a ___________________________ having its principal place of business at ____ (the "**Company**") and ___________________________, a __________________________________ having its principal place of business at __________________________________ (the "**Undersigned**" and, together with the Company, the "**Parties**", and each, a "**Party**") in connection with the discussions between the Parties of a potential business relationship (the "**Potential Transaction**"). The Parties recognize that during and in connection with discussions between them, there may be disclosure of certain confidential, proprietary information relating to the Potential Transaction, which disclosure is intended to assist the Parties in their evaluation but that must not be disclosed by the other Party. In consideration of the premises and mutual covenants contained herein, the Parties hereto agree as follows:

1. **Definition**. The term "Confidential Information" shall mean all information, data, software, trade secrets, reports, interpretations, forecasts, business plans and records, financial or otherwise, and whether written, oral, electronic, visual or otherwise (whatever the form or storage medium), concerning or related to a Party or its subsidiaries or affiliates (the "Disclosing Party") or the Disclosing Party's business that has been or may be furnished to the other Party or its representatives directly or through inspection ("Receiving Party"). Confidential Information includes, without limitation, business plans, financial, pricing, customer, vendor and other business information, product, materials, constructions, formulations, drawings, know-how, ideas, inventions, product plans, specifications, training materials, software designs and code (including source code), and any other technical information, materials or documents. Confidential Information also includes information that should reasonably have been understood by the Receiving Party to be proprietary and confidential to the Disclosing Party or to a third party because of legends or other markings, the circumstances of disclosure or the nature of the information itself. The existence of this Agreement and the Potential Transaction and the subject matter or purpose of the Potential Transaction shall also constitute "Confidential Information."

2. **Use; Obligation Not to Disclose**. The Confidential Information is being furnished solely in connection with the Potential Transaction and both Parties agree that such Confidential Information shall be treated as "secret" and "confidential." The Receiving Party agrees to use the Confidential Information solely for evaluation of the Potential Transaction and, without the written consent of the Disclosing Party, agrees not to disclose such Confidential Information to any other person or entity other than those of its employees, contractors, agents, accountants, advisors, attorneys, consultants and other representatives

and those of its affiliates who must have access to such Confidential Information for evaluation purposes and who have signed confidentiality agreements or are otherwise bound by confidentiality obligations under a fiduciary or ethical duty at least as restrictive as those contained herein (collectively, "Permitted Recipients"). The Receiving Party will take reasonable steps to require its Permitted Recipients to preserve such trust and confidence, and shall be responsible for any breach of this Agreement by its Permitted Recipients. The rights and obligations contained herein with respect to Information that constitutes a trade secret under the laws of any jurisdiction, shall survive the Term until, if ever, such Information no longer qualifies as a trade secret or otherwise loses its trade secret protection, other than due to an act or omission of the Parties contemplated in this Agreement.

3. **Protection; Return.** The Receiving Party shall in all respects treat such Confidential Information disclosed to it hereunder at least as carefully (but no less than a reasonable standard of care) as that accorded its own trade secrets or confidential information and will carry out with respect to the Confidential Information those security measures that it follows for its own trade secrets or confidential information. Upon the request of the Disclosing Party, the Receiving Party will return to the Disclosing Party or destroy, at the Receiving Party's option, all Confidential Information (including copies) received by it, and will destroy all summaries, extracts and the like prepared by the Receiving Party that incorporate Confidential Information. Notwithstanding the foregoing, the Parties and/or their representatives shall not be obligated to return or destroy Confidential Information or any copies thereof maintained in accordance with its and/or their legal or regulatory compliance, record retention, security and/or disaster recovery procedures; provided further that it and/or they shall not be required to destroy any system back-up media such as copies of any computer records or files containing Confidential Information that has been created pursuant to automatic archiving or back up procedures on storage servers and that cannot reasonably be deleted; it being understood that all such retained Confidential Information will continue to be maintained in confidence in accordance with the terms herein.

4. **Exceptions**. These obligations will not apply, and all obligations as to non-disclosure by the Parties shall cease, to any part of such Confidential Information to the extent the Receiving Party proves that: (a) such information is or has become generally known to the public or publicly available through no wrongful act of the Receiving Party; (b) the Receiving Party rightfully knew such information prior to the time of first disclosure to it; (c) the Receiving Party independently developed such information without using any Confidential Information; (d) the Receiving Party rightfully obtained such information, after due inquiry, without restriction from a third party who had the right to disclose such information to the Receiving Party without breach of any confidentiality obligation; or (e) the Receiving Party is legally compelled, based on advice of the Receiving Party's counsel, to disclose such information by order of a court of law, administrative agency or other governmental authority and uses its best efforts to give the Disclosing Party advance notice of such disclosure and cooperates with the Disclosing Party to prevent or limit the scope of such disclosure.

5. No Warranties or Obligations; Expenses. All Confidential Information is provided "AS IS". The Disclosing Party will have no liability to the Receiving Party relating to the use of the Confidential Information or any inaccuracies or errors therein or omissions therefrom and makes no warranties regarding the Confidential Information. The Parties agree that unless and until a definitive agreement between the Parties or related persons has been executed and delivered with respect to the Potential Transaction, the Parties will not be under any legal obligation of any kind whatsoever with respect to the

Potential Transaction, including, any obligation to (i) consummate the Potential Transaction, (ii) conduct or continue discussions or negotiations regarding the Potential Transaction, (iii) enter into or negotiate a definitive agreement regarding the Potential Transaction, or (iv) continue to furnish Confidential Information concerning the Potential Transaction. Each Party is responsible for the performance and expense of its due diligence review of any actual transaction.

6. **Ownership**. All Confidential Information is and will remain the Disclosing Party's sole property. The Receiving Party does not acquire (by license or otherwise, whether express or implied) any intellectual property rights or other rights in the Confidential Information, except the limited right to use such information in accordance with this Agreement.

7. **Privilege**. By disclosure of the Confidential Information, the Disclosing Party does not intend to waive its attorney-client, attorney work product or other applicable privilege held by it or any of its affiliates ("Privilege"). Any disclosure by the Disclosing Party of any Confidential Information protected by Privilege shall not constitute a waiver of any such Privilege, and the Receiving Party agrees that, upon request by the Disclosing Party, the Receiving Party will, and will cause its Permitted Recipients to, immediately return and/or destroy such inadvertently produced Confidential Information.

8. **Other Initiatives**. Each Party understands that the other Party may have present or future initiatives, including initiatives with third parties, involving similar products, technologies or processes that compete with a product, technology or process contemplated or offered by the other Party. Accordingly, each Party acknowledges that nothing in this Agreement shall be construed as a representation or inference that the other Party will not develop for itself or enter into business relationships with other third parties, that involve products, technologies or processes that are similar to or compete with any product, technology or process contemplated or offered by the other Party, provided that Confidential Information is not used in breach of this Agreement.

9. **Non-Circumvention**. The Parties (including their respective affiliates, employees, agents, and representatives) agree that they shall not make contact with any person or entity introduced by the other Party without first obtaining written permission and agreement from such Party.

10. **Term and Termination.** This Agreement commences on the Effective Date and will continue for three (3) years or until terminated by written notice given by one Party to the other, whichever is sooner (the "Term"). The Receiving Party's confidentiality obligations under this Agreement will survive termination of the Agreement and continue in full force and effect indefinitely. Any Confidential Information disclosed prior to the Effective Date is considered to be within the scope of this Agreement. The Receiving Party represents and warrants to the Disclosing Party that such previously disclosed Confidential Information has been maintained in confidence by the Receiving Party and has not been disclosed to any third party except as authorized in writing by Disclosing Party.

11. General Provisions.

(a) **Equitable Relief.** Each Party recognizes that the covenants contained in this Agreement are reasonable and necessary to protect the Disclosing Party's legitimate interests and that the Receiving Party's breach or threatened breach thereof would cause irreparable harm and significant injury to the Disclosing Party, the amount of which would be extremely difficult to estimate, making any remedy at law inadequate. The Disclosing Party shall be entitled, without the necessity of posting any bond or security, to injunctive relief, specific performance and any other equitable relief a court deems appropriate.

(b) **Interpretation; Disputes.** This Agreement shall be governed by the internal laws of the State of Colorado without regard to choice of law principles. Any dispute regarding this Agreement shall be subject to the exclusive jurisdiction of the state courts in the City and County of Denver, Colorado (or, if there is federal jurisdiction, the U.S. District Court in Denver, Colorado), and the Parties agree to submit to the personal jurisdiction and venue in these courts. Each Party waives the right to a trial by jury in any such dispute. If any provision of this Agreement is found or held to be unenforceable, then such provision shall be enforced to the maximum extent possible so as to effect the Parties' intent, and the other provisions shall not be affected thereby. The prevailing Party in any dispute (as determined by the court or respective tribunal or, if no such determination is available, the Party that receives substantially the relief sought) shall be entitled to reimbursement of all reasonable expenses, including without limitation court costs and attorneys' fees incurred in good faith.

(c) No Assignment. Neither Party may assign or delegate this Agreement or any of its rights and obligations hereunder without the prior written consent of the other Party. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns and not for the benefit of any third party.

(d) **Miscellaneous.** This Agreement is the final, complete and entire agreement of the Parties with respect to its subject matter and supersedes and merges all prior or contemporaneous discussions and agreements relating thereto and all past courses of dealing or industry custom. No amendment shall be effective unless in writing and signed by both Parties. No waiver shall be effective unless in writing signed by the Party to be bound. No delay or failure by a Party to exercise any right or remedy shall impair such right or remedy or be construed as a waiver. Except as otherwise provided in this Agreement, all rights and remedies shall be cumulative, and none shall limit any other right or remedy. Headings are inserted for convenience and shall not affect this Agreement's meaning. This Agreement may be executed in two or more counterparts with the same effect as if the Parties had signed the same document. Signatures to this Agreement transmitted by facsimile or electronic transmission will have the same effect as physical delivery of an original signature.

[*Remainder of page intentionally left blank*.]

IN WITNESS WHEREOF, each Party has executed or has caused its duly authorized representative to execute this Agreement as of the date first written above.

THE COMPANY:	**THE UNDERSIGNED:**
Name__________________________	**Name________________________**
By: ____________________________________	By: ____________________________________
Name:	Name:
Title:	Title:

APPENDIX D

Tax and Licensing Requirements

As an employer, you should be aware of the procedures to comply with federal and state tax laws, labor laws and licensing regulations. Obviously there are many procedures to follow that are not mentioned here and I urge you to consult with the appropriate governmental body and your accountant for any additional filings or procedures he or she may recommend.

For your further information, you can obtain publications addressed mostly to smaller, closely held businesses, which should be helpful in getting your business underway, from the Denver Metro Small Business Development Center, located at 1445 Market St., Fifth floor, Denver, CO 80202. They can be reached at 303-620-8076 or info@denversbdc.org. They are open Monday through Friday from 8:00am to 5:00pm. Their website can be found at: http://www.denversbdc.org/.

General information on many aspects of doing business in the Denver area can be obtained at the website for the City and County of Denver, at: http://www.denvergov.org/DoingBusinessinDenver/tabid/435548/Default.aspx.

1. Federal Employee Income Tax and FICA Withholding. An employer is responsible for deducting a percentage of each employee's wage to pay income and social security tax. Income tax and FICA withholding are reported together on Form 941 and deposited together periodically. The IRS has implemented a system for electronic funds transfers of Federal and FICA taxes; information is available at: http://www.irs.gov/uac/EFTPS-TheElectronic-Federal-Tax-Payment-System. The percentage of the amount to be deducted for each tax is computed in two separate tables, however, and it is important to make certain that you have used the table specifically designated for income tax withholding or social security. The tax tables, reporting dates, procedures for depositing payments, and other pertinent information are contained in an Internal Revenue Service publication entitled "Circular E - Employer's Tax Guide". You may request a copy of this circular from any IRS office or through the IRS' website, at http://www.irs.gov/, which is also a very useful resource for all federal tax issues.

The members or managers of an LLC are responsible for insuring the proper payment of salaries, wages and payroll taxes. In fact, the IRS will hold members, managers or officers personally liable for failure to pay FICA taxes. The Colorado Supreme Court held that officers of a corporation can be personally liable for failure to pay wages due under the Colorado wage statute but it is unclear, although likely, that such personal liability would be imposed on members or managers of an LLC.

2. Federal Unemployment Insurance. You will also be required to pay federal unemployment insurance. Along with your federal identification number you will receive an unemployment compensation card and Form 940 "Employer's Annual Federal Unemployment Tax Return." Further information on the reporting and paying of this tax may be found in Circular E, mentioned above. Instructions for Form 940 can be found here: https://www.irs.gov/pub/irs-dft/i940--dft.pdf.

3. State and Local Employment Taxes. To ascertain the requirements for state and local tax withholding and remittance you should visit the website for the Colorado Revenue Department at

http://www.colorado.gov/revenue/tax. To ascertain what employment taxes are payable to the local municipal government you will need to inquire of that government authority. Most have websites that are a good starting point for making the necessary inquiries.

4. Considerations during COVID-19. The CARES Act made changes to section 163(j) by imposing a limitation on deductions for business interest incurred by certain large businesses. The CARES Act replaces the 30 percent ATI Rule for tax years beginning in 2019 and 2020 by allowing non-partnership taxpayers (including S corporations) to deduct up to 50 percent of the taxpayer's ATI. For any tax year beginning in 2020, taxpayers (including partnerships) can elect to compute their section 163(j) limitations based on ATI from the taxpayer's last tax year beginning in 2019 rather than the taxpayer's ATI from the 2020 tax year. Further details can be found at: https://assets.kpmg/content/dam/kpmg/us/pdf/2020/05/tnf-wnitpartnerships-may11-2020.pdf.

5. Colorado Employer Registration. Companies can use the form CR100 to establish wage withholding for state income taxes, to apply for a state sales tax license, and to establish Colorado unemployment insurance accounts. The forms as well as information packets on each of these areas can be obtained from the Colorado Department of Revenue, 1375 Sherman Street, Denver, CO 80261, phone number: (303) 238-7378. Their website is: http://www.colorado.gov/revenue/.

6. Employer Registration for Municipalities and Counties within Colorado. Certain municipalities and counties also require an employer to register to establish wage withholding for income taxes. The forms are normally available via the local government websites, but we recommend that this possible requirement be considered, particularly with employees who work from home. Information on Denver requirements for employers can be found at https://www.denvergov.org/content/denvergov/en/treasury-division/business-taxes.html.

7. Federal Labor Laws. There are certain federal requirements relating to the hiring of illegal aliens that must be complied with by all Companies and individuals hiring employees. You must keep the U.S. Citizenship and Immigration Service's I-9 form on file for each employee. This form must be completed by the time employment begins. There are severe penalties for failure to comply. Further information can be obtained from the USCIS at 1-888- 464-4218, e-verify@uscis.dhs.gov or at their website, at http://www.uscis.gov/e-verify. There are other federal labor law requirements relating to payment of minimum wage or overtime compensation with which you will also need to comply.

8. Colorado Unemployment Insurance. Anyone who employs one or more employees, full or part time, must make quarterly unemployment insurance payments to the State of Colorado. Additional information can be obtained from the Colorado Department of Labor and Employment, Unemployment Insurance, phone: (800) 480-8299, email: cdle_employer_services@state.co.us. Their website is located at: https://www.colorado.gov/pacific/cdle/unemployment.

9. State Labor Laws. If you desire more detailed information on Colorado labor laws, equal opportunity and minimum wage requirements, contact the Colorado Department of Labor and Employment, Division of Labor at 633 17th Street, Suite 200, Denver, Colorado, 80202-3611, phone: (303) 318-8441, and email: cdle_labor_standards@state.co.us. Companies are also required to provide workers' compensation coverage for their employees. The insurance may be purchased through a private

insurance company or through the Colorado Compensation Insurance Authority d/b/a/ Pinnacol Assurance, a state-owned insurance company, phone: (303) 361-4000. For information on worker's compensation laws contact the Colorado Department of Labor and Employment, Division of Workers' Compensation at (303) 318-8700. More information on Colorado state labor laws can be found at: https://www.colorado.gov/cdle/labor.

10. Colorado Retail Sales and Use Tax. Retail Companies located in Colorado must collect a retail sales tax, to be paid on either a monthly or quarterly basis. Vendors who have no business location in the state but do business in Colorado must collect a retailer's use tax. Companies selling entirely wholesale must also obtain a sales tax license. Further information and a schedule of tax rates can be obtained from the Colorado Department of Revenue. Additional information can be found at the Colorado government's taxes website at http://www.colorado.gov/revenue/tax.

11. Local Sales and Use Taxes. Counties, cities and incorporated towns are authorized to impose sales taxes, some of which are administered and collected locally, and some by the director of the Colorado Department of Revenue. Once you know where your Company will be located, you should check into local tax and licensing requirements. For additional information, visit: http://www.colorado.gov/cs/Satellite/Revenue/REVX/1251608978938.

12. Property Taxes. Those owning property in Colorado are subject to county taxation. Taxable property consists of all real and all personal property, including inventory, furniture, fixtures and equipment, located in the county, unless specifically exempted by statute.

With respect to personal property, you are required to file a schedule of taxable personal property with the county assessor in whose county the property is located no later than April 15 of each year. The form utilized for this purpose may be obtained from the county assessor. The assessor will then notify you of the assessed valuation and of the amount of tax due on such property. As in the case of real property, this tax becomes due and payable to the county treasurer on January 1 of the year following the year in which it is assessed and may be paid without penalty either in full by April 30 of such year or in equal installments by February 28 and July 30 of such year. For additional information, visit: http://www.colorado.gov/cs/Satellite/DOLA-Main/CBON/1251590375296.

13. Some Important Reminders. (1) Ask to see each new employee's social security card so that you can verify and record the name and the number. (2) Always keep a Form W-4 on file for each person in your employ. This form and other payroll information should be kept on file permanently, even if an employee ceases to work for you. (3) Employers are subject to severe penalties for hiring non-U.S. citizens without proper federal work visas. Each employee must complete Form I-9, Employment Eligibility Verification, by the time employment begins.