



UPSTART KIT

Thank you for requesting UpstartLegal.com's Upstart Kit.

This Upstart Kit includes:

1. Upstart Checklist – a "to do" list for your new business
2. "Startup Legal Documents" - our analysis of 6 contracts that new businesses need
3. Mutual Nondisclosure Agreement - one of our business agreement forms

Questions?

215-964-9201 (direct)
877-744-8778 (toll free)
support@upstartlegal.com

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UPSTART CHECKLIST

1. *Planning*

- a. Business model, pricing analysis and basic business plan
- b. Firm budget (startup and monthly forecast)
- c. Home budget
- d. Financing plan to meet budget requirements (where is the money coming from)

2. *Entity Formation*

- a. Company name selection and clearance (trademark search as applicable)
- b. LLC or S corporation formation
- c. LLC Operating Agreement or Shareholders Agreement (if multiple owners)
- d. Federal Employer Identification Number (EIN)
- e. State tax registration
- f. Local business registrations or licenses (as applicable)
- g. Professional or other licenses (as applicable)

3. *Banking and Finance*

- a. Tax accountant
- b. Bookkeeper (accounting setup and monthly for billing, expense and close)
- c. Banker relationship and application for credit (as applicable)
- d. Operating bank account (confirm bank for requirements before visiting branch)
- e. Dedicated credit card for business expenses
- f. Sales tax analysis and, if applicable, permit

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4. *Communications*

- a. Domain name registration
- b. Website development
- c. Email address setup/hosting
- d. Office phone number
- e. Mobile phone and account/number
- f. Office internet access

5. *Office (assumes home office)*

- a. Furniture (desk, chairs, storage, other)
- b. Administrative support / virtual receptionist (if needed)
- c. Office/portable computer
- d. Battery power backup
- e. Business class printer/copier/scanner/fax
- f. Office phone system
- g. Secure document storage (cloud, server and/or computer with backup drive)
- h. Office software (Outlook, Office, other)
- i. Accounting software (Quickbooks or other)
- j. Third party mailbox service
- k. Supplies
- l. Publications, reference materials and subscriptions (hard copy and electronic)

6. *Insurance*

- a. Professional liability / errors and omissions (if applicable)
- b. Other business insurance
- c. Personal health, disability and life
- d. General liability (homeowners umbrella)
- e. Auto (cover business activity)
- f. Individual retirement plan (SEP)

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7. *Identity*

- a. Logo, business cards, letterhead, envelopes
- b. Brochure
- c. Announcement
- d. E-mail “stationery” (signature block, confidentiality statement, branding)

8. *Promotional Activities*

- a. Marketing plan
- b. Individual meetings / networking plan
- c. Referral agreement
- d. Mass mailing / email marketing

9. *Operations*

- a. Client services agreement
- b. Timesheet entry and invoicing system
- c. Filing and records system

10. *Staff*

- a. Employee vs. independent contractor analysis
- b. Contractor agreement for 1099s
- c. Offer letter for employees (compensation, responsibilities)
- d. Unemployment, workers compensation and other employee legal compliance
- e. Payroll setup for employees
- f. Benefits for employees

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STARTUP LEGAL DOCUMENTS

When starting a new company, there are a number of common concerns faced by all of us “entreprofessionals”.

These include:

1. Ensuring that we properly form a legal entity through which we’ll conduct our business
2. Determining how our company will be managed and how profits will be allocated (if we own the business with someone else)
3. Minimizing the company’s liability exposure when it provides services to clients
4. Utilizing the work of third parties to assist the company in providing its services
5. Developing referrals relationships to grow the company’s client base
6. Protecting confidential information

Fortunately, there is a document or agreement to address each of these concerns. Those documents are discussed below.¹

¹ You can find more detail about each of these documents and agreements on the Package Details page of UpstartLegal.com (<http://www.upstartlegal.com/package-details.aspx>).

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Document 1 - LLC Formation

Your first decision will be which legal entity to use for your business, typically an LLC or S corporation for single owner or closely held businesses. At UpstartLegal.com, we specialize in forming LLCs for new businesses. Below are 6 things you need to know about forming an LLC for your business.

1. Choice of entity. The LLC is generally easier to manage than an S corporation and offers the same benefits of limited liability and pass-through (or single-level) tax treatment to its owners. And, if there is only one owner, the LLC doesn't require a separate tax return with the IRS. You also don't need to have a Board of Directors, hold meetings and maintain corporate minutes. Down the road, the LLC has the benefit of offering flexibility if you are going to raise money or add other owners. There are circumstances in which an S corporation makes sense, so you should consult an attorney or accountant to be sure which entity is right for your circumstances.

2. Choice of state. An LLC must register in the states where it conducts business. If your business provides services from a local office (or home office) or at clients' locations in the same state as your office, then it generally makes sense to form your LLC in the state where your office is located. Forming the LLC in another state does not mean you can bypass filing taxes in the state where your office resides.

3. Name search. Your LLC needs a name that is dissimilar to other entities in its state of formation. It is also advisable for you to choose a name that won't be confused with other existing businesses. If you intend to brand your company name, or conduct significant business outside your state of formation, you should consider engaging an attorney to conduct a trademark search to assure that your desired name will be clear of claims from others.

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4. Registered agent designation. Most jurisdictions require that any business registered within their borders designate a "Registered Agent" to receive service of process. If you maintain an office in the state where your LLC is formed, you can serve as the Registered Agent for your LLC, and do not need to retain the services of a third party Registered Agent. Since the Registered Agent's address becomes public record, if you use a home office address, that will be publicly available.

5. Federal and state registration. In addition to filing a certificate of formation in your state, the IRS and many states require additional identification numbers for your LLC. Generally, businesses need both Federal and State numbers.

6. Licensing. Additional state and/or local level filings may be required for the conduct of your business, such as local licenses, permits and registrations, employment, sales, use and other tax registrations, or professional licensing.

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Document 2 - Operating Agreement

The Operating Agreement of an LLC establishes, among other things, the management structure of the company and the economic rights of the owners. Below are 6 key points that should be covered in the agreement.

1. Ownership Percentage. Commonly, membership interests in an LLC will be expressed as percentages. The percentage ownership of the member will reflect the relative capital contributions, such as cash, property or services, of the members.

2. Management. An LLC may be managed by majority vote of the members as a group, based on their percentage ownership. If there is a single member, then that person's 100% membership interest obviously constitutes a majority of the members. If there are two 50/50 members, then both of them must consent under this structure. If there are multiple members, then so long as any member who retains greater than 50% membership interest will control the management of the LLC.

Alternative management structures are available. For example, the agreement may provide that the founding member will have exclusive control of the LLC even if there are other members (i.e., they won't have the opportunity to vote, notwithstanding that they are owners). Or, it may provide the minority percentage members with veto rights over certain significant actions of the company.

3. Allocations and distributions of profits. These provisions control how the members share profits and losses of the business. In addition to any regular compensation for their work on behalf of the LLC, the members are entitled to any net profit that the company may produce. Commonly, profits and losses of the LLC will be shared among the members, if there are more than a single member, on a pro rata basis in accordance with their ownership percentages in the LLC. However, the LLC is a flexible entity that permits priority distributions and special allocations if the members desire.

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4. Indemnification. Companies frequently agree to indemnify, with some exceptions, the members and management of the LLC against certain costs they may incur as a result of their participation in the LLC. More specifically, the LLC will often cover defined litigation costs and damages of its members, managers, employees and officers that they may face personally as a result of decisions they make, or work they do on behalf of the company.

5. Transfer of ownership restrictions. In LLCs where all of the members will either be active in the business or “relationship” investors, an Operating Agreement usually prohibits the members from transferring their membership interests without the prior consent of the other members. This prohibition has the effect of keeping the company and its business together without unwanted or unapproved participants. This also forces a member who desires to exit, whether voluntarily or otherwise, to do so in a way that is satisfactory to the other members. However, free transferability (i.e., the right to sell or gift membership interest to anyone without the consent of the other members) is an option, sometimes subject to a right of first refusal to the company and/or surviving members on the terms obtained.

6. Buy/Sell. In most small businesses, the members want to provide for the purchase of an exiting member’s interest on certain events. Typically, these are events where the member can no longer be active in the business or does or experiences something that adversely affects the member’s rights (breach of the Operating Agreement or any other agreement with the Company, death, disability, failure to provide adequate time and effort to company, etc.).

As a consequence, the company and/or the remaining members will be granted the right or obligation to buy back the membership interest of the exiting member. Often, the purchase price is heavily discounted for a purchase in the event of a materially adverse action by the member or the member’s breach, or if the member quits working for the business. And the price will be an appraised or fair value, over a time period, in the event of a member’s death or disability.

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Document 3 – Client Services Agreement

How you bring in revenue will be key to your business. You will want consistent legal terms across your client base, with clear allocations of responsibility and protections against liabilities you do not expressly accept. Below are certain contractual terms and conditions you should keep in mind.

1. Statement of work and compensation. People get in trouble when they ignore the risks in what they're doing and, as a result, either start doing their business without written contracts or fail to define their responsibilities and obligations. Problems frequently arise when there's a difference in understanding between what you believe you are supposed to do and what the client believes you are supposed to do. Or as to the amount the client believes he is supposed to pay you. The client services agreement needs to create a clear scope of work, specify the amount and terms of payment and clarify expectations between you and your client.

2. Ownership of work product. Your clients will want to know that your work is provided to them in accordance with applicable laws and without infringing on the rights of any third parties. Additionally, when the client pays you in full, the client will likely want to own all of the copyrights in the work you produced (if applicable). Those terms should be stated, reserving, however, that you will not grant rights to the client in your own intellectual property, in work other than the work you actually produce for the client or in anything you created prior to your engagement with the client.

3. Limitations on liability. A common entrepreneurial mistake is failing to address the consequences of problems and liabilities that may arise out of the provision of their services. Your client services agreement should include a multi-layered approach that (1) spells out the allocation of liabilities both between your LLC and your client, (2) limits the areas of your LLC's liability to a defined set of circumstances (such as breach of confidentiality obligations, violation of third-party IP or other rights, and your company's negligence) and (3) caps the damages that the client may receive based on actual (as opposed to consequential) damages to a maximum tied to the fees paid under the agreement.

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Document 4 – Subcontractor Agreement

Anyone, friends included, who helps with a project adds to your legal responsibility and, therefore, potential liability. Uncertainty in that relationship can lead to unclear deliverables, possible violations of your contract with your client, and a lost client or the end of a friendship.

You need a subcontractor agreement that it covers, among other things, the following.

1. Scope of work and pay. The agreement should provide clarity regarding the work your contractor will perform and how much he or she will get paid. Misunderstandings about the services for which the contractor will be responsible, as well as when, where and how they will be delivered, are common problems.

2. Contractor status. The agreement should include a statement that the parties are independent contractors, and that the contractor is not your employee. Whether a worker is an employee or contractor is often not a simple determination. IRS and applicable state requirements govern this issue, and you should consult with an attorney to assure contractor status for the relationship if there is any question.

3. Intellectual property. Your clients expect that you won't expose them to legal liability for violation of third-party rights, such as copyright, trademark or trade secrets. Your agreement should make the contractor responsible for any of these issues that arise from his or her work. Additionally, the agreement should ensure, through an assignment or "work made for hire" provision, that work that you engage others to perform belongs to your firm, and not the person you engage.

4. Confidentiality. Your contractor should agree to protect and not disclose confidential information of yours, as well as your clients, that he or she may receive in connection with the engagement.

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5. Contractor's authority. The contractor is not your representative and should have no authority to bind you or your company to any contract or obligation. This includes additional subcontractors, as can often be the case when small companies take on big engagements.

6. Noncircumvention. You can impose prohibitions against the contractor soliciting your clients, employees, and other key business relationships, including for a period of time after termination of the contractor relationship. While enforceability varies from state to state, it is important to have a statement that the contractor will not compete for your clients.

7. Termination rights. You should have the ability to end the relationship if it isn't working out to your satisfaction, and you may be able to enforce different consequences depending on whether you have cause for termination.

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Document 5 – Referral Agreement

When you want to pay someone outside your company for referring business to you, it's good business practice, as is usually the case, to have a written agreement in place. The Referral Agreement will describe which referrals will be covered (you don't want to pay, for example, for clients that you already have a relationship with) and how payment will work. Though referral business is often done without a contract, with a simple level of formality, you can add clarity to the terms of the relationship and avoid problems. Here are 4 terms of Referral Agreements you should know.

1. Compensation for referrals. You'll want to set the amount your company will pay for a referral. This can be a percentage of the gross revenue received under the referred client contract or a fixed payment. You will also want to identify when your company will pay the referral fee. Is it up front when the client contract is signed? Or over time as you collect payment from the client? Importantly, you need to make it clear that the referral fee applies only if the customer comes to you initially and exclusively from the referrer.

2. Restrictions on authority. When someone other than you is talking to potential clients about your company and services, you need to be certain that all legally binding statements regarding your work and contractual commitments are ultimately made by you. The Referral Agreement should include provisions that address these issues by clarifying the limited scope of authority granted to the referring party.

3. Ownership of client relationships. Even though you might receive referrals for customers that are qualified for your company's services, your company should always have the exclusive right to determine whether to do business with the client and the terms of any client relationship and to assert your ownership (and not the referring party's) of the client relationship after the referral is made.

4. Indemnification to protect your company. To cover against violations of authority and other improper acts of the referring party, the Referral Agreement should include indemnification provisions that obligate the referring party to cover the cost of claims and damages against your LLC arising out of such matters.

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Document 6 – Nondisclosure Agreement

Even if your business doesn't have what seems like top secret intellectual property to protect, you need a good form of Nondisclosure Agreement. Maybe a potential vendor or business partner asks you for financial information about your company. Perhaps you need to present aspects of your creative work to a client in a proposal in advance of getting the contract. You'll want to have an NDA in place before making your confidential information and materials available to others. Here are 3 essential terms of the NDA.

1. Protection of your information and materials. A good NDA will require the other party to maintain confidential information and materials you provide in strict confidence and not to disclose any of it to anyone else. Confidential information will include information about your business, such as your financials and client list, as well as information contained in any work you provide. The NDA should also prohibit the other party from using your information and materials for that person's or someone else's financial benefit. For fairness, you should be prepared to accept reciprocal obligations on you with regard to the other party's confidential information and materials.

2. Protection of your business relationships. It is advantageous, though not always legally enforceable, to expressly prohibit the other party from soliciting, for some period of time (such as 2 years), your clients, employees and other key business relationships that you disclose. Despite the enforceability issue, which varies from state to state, these provisions serve to express the intent that the parties wish to disclose and discuss their important relationships without the risk that the other party may interfere with them.

3. Equitable remedies for breach. If things go bad, and the other party breaches its confidentiality or non-circumvention obligations, your immediate concern will be to have the improper behavior stopped. You may not be able to quantify your damages in money. You will want a court to order an injunction for the other party to stop the breach, and these provisions expressly grant that right. Again, enforceability will vary by state, and, given the cost, you will have to evaluate whether the expense of legal action is justified under the circumstances.

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MUTUAL NONDISCLOSURE AGREEMENT

In connection with the consideration by the undersigned parties of a possible business relationship, each of the parties is prepared to make available to the other certain Confidential Information (defined below). The party disclosing Confidential Information is referred to as the "Discloser", and the party receiving Confidential Information is referred to as the "Recipient" (and in such capacities a party may be both a Discloser and a Recipient under this Agreement). The parties, intending to be legally bound by this Mutual Confidentiality Agreement, agree as follows:

1. Confidential Information. "Confidential Information" means all information, in any form (including, without limitation, oral or visual), relating to the possible business relationship between the parties or made available by Discloser to Recipient in the course of discussions, site visits, demonstrations or meetings regarding their possible business relationship. Confidential Information does not include information that is (i) available to the public other than as a result of disclosure by Recipient, (ii) available to Recipient on a nonconfidential basis from a third party that is not in breach of a duty to maintain the confidentiality of such information, (iii) is independently developed by Recipient without any use whatsoever of Confidential Information, or (iv) is known to Recipient at the time of disclosure.

2. Confidentiality. Recipient may disclose Confidential Information only to its members, shareholders, partners, managers, directors, officers, employees, agents, representatives, advisors and consultants ("Representatives"), to the limited extent they need to know such information solely for the purpose of evaluating or pursuing the proposed business relationship, which shall be Recipient's sole use of the Confidential Information, and provided that they have been informed of the confidentiality obligations of the parties under this Agreement. Recipient and its Representatives shall maintain in strict confidence, protect and safeguard the Confidential Information of Discloser, and, except as expressly provided in the preceding sentence, shall not, directly or indirectly, (i) disclose, reveal or make available to any third party any such Confidential Information, (ii) assist or enable any third party to access or use any such Confidential Information, or (iii) use or exploit any such Confidential Information to its or any other person's or entity's enrichment or pecuniary advantage or to derive any economic gain whatsoever or for any other purpose whatsoever.

3. Required Disclosure. Recipient may disclose Confidential Information to the extent (and only to the extent) required by applicable law (including by request for information or documents through legal proceedings, subpoena, governmental investigation or any similar process) without liability hereunder, but only if prior to making such disclosure Discloser has been given written notice of such required disclosure and a reasonable opportunity to seek a protective order or other appropriate assurance that confidential treatment will be accorded.

4. Confidential Materials. All materials (including, without limitation, electronic media) provided by Discloser, and copies thereof, in which Confidential Information of Discloser may be contained shall remain the property of Discloser. Upon Discloser's written request, Recipient will promptly deliver to Discloser all such materials and destroy all materials, copies and extracts prepared or reproduced by Recipient, regardless of the media or the location, in which Confidential Information of Discloser may be contained. Notwithstanding the delivery or destruction of such materials, Recipient and its Representatives shall continue to be bound by their obligations of confidentiality and the other obligations hereunder.

5. Indemnification. In addition to any other rights and remedies of Discloser, Recipient shall indemnify, defend and hold harmless Discloser from and against any and all Damages (defined below) arising in connection with any misrepresentation, breach of covenant or other breach of this Agreement by Recipient or its Representatives. "Damages" means any and all losses, claims, obligations, liabilities, commitments, actions, suits, proceedings, demands, judgments, assessments, penalties, payments, costs, expenses (including reasonable attorney fees and other expenses), and damages of any kind, nature or description whatsoever.

6. Remedies. Each of the parties acknowledges that the provisions herein are reasonable and necessary for the protection of the legitimate interests of Discloser and that, in the event of a breach or threatened breach of any of the

provisions of this Agreement, Discloser would have no adequate remedy at law and would be irreparably harmed in the event that the provisions herein were not specifically enforced. Accordingly, Recipient agrees that upon any breach or threatened breach of a provision hereof, Discloser shall be entitled to equitable relief, including an injunction and specific performance, without the necessity of proving actual damage and without a bond. All remedies provided under this Agreement shall be cumulative with and in addition to, not exclusive or in lieu of, any other available remedies. If a court of competent jurisdiction determines that Recipient or any of its Representatives have breached this Agreement, Recipient shall be liable and shall pay to Discloser all reasonable counsel and other fees, costs and expenses incurred in connection with any actions taken by Discloser to protect or enforce its rights hereunder.

7. **Disclaimers.** Nothing in this Agreement shall imply or create an exclusive relationship between the parties with respect to any possible business relationship. This Agreement and the disclosure and receipt of Confidential Information do not create or imply any right conferred, by license or otherwise, in any Confidential Information or in any intellectual property. Recipient acknowledges that Discloser and its Representatives make no representation or warranty as to the accuracy, completeness, non-infringement, fitness for a particular purpose or otherwise of information disclosed or material provided. Neither party will be under any legal obligation of any kind whatsoever with respect to any business relationship by virtue of this Agreement, except for the matters specifically agreed to herein. Each party further acknowledges and agrees that the other reserves the right, in its sole discretion, to reject any and all proposals made by the other party with regard to a business relationship between the parties, and either party may terminate discussions and negotiations with the other at any time for any reason or no reason at all.

8. **Miscellaneous.** This Agreement constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof. This Agreement and the enforcement hereof shall be governed by the laws of the _____. Each of the parties hereby consents to the exclusive jurisdiction and venue of the federal and state courts located in the county in which Company's principal place of business in such state is located. This Agreement shall be binding on the parties and their respective successors and permitted assigns, and shall survive the termination of any relationship or possible relationship between the parties. This Agreement may not be assigned, directly or indirectly (including, without limitation, by merger or change of control), without the prior written consent of the other Party. Each party, and each person executing this Agreement, represents and warrants to the other that the person executing this Agreement on behalf of such party is duly authorized to do so and that this Agreement is binding on and enforceable against such party in accordance with its terms.

The undersigned have executed this Agreement this ____ day of _____, 20__.

Print Name

Print Name

By: _____

By: _____

Name:

Name:

Title:

Title: