Surviving the Pains of Birthing a New Business

BY MARCUS REED
For the Oregon Beer Growler

My wife is a midwife, so she frequently experiences the incredible joy of helping a mother bring a new child into the world. As a business lawyer, I enjoy the similar, though admittedly less profound, experience of helping brewers and other business people bring their companies to life. Like new parents, new business organizers often see this "birth" as mysterious, complicated, stressful, and intimidating, but a basic understanding of the reasons for forming and properly maintaining a business may at least ease the pain.

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Corporations, LLCs: Why bother?

Under Oregon law, "the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership." So, for example, if two brewers collaborate to make and sell beer, they have formed a partnership without doing anything else. Why, then, would those brewers go to the sometimes considerable trouble and expense of forming a limited liability company [LLC] or corporation? Note: LLCs and corporations are not the only business entity types available, but are the most commonly used entities for breweries and other small businesses in Oregon.

First and foremost, LLCs and corporations provide their owners with limited liability. Whereas sole proprietors or general partners are personally responsible for the liabilities of the business, members of an LLC and shareholders in a corporation are, if the entity is properly formed, shielded from those liabilities. Insurance can protect you from many, but not all, risks, and coverage has financial limits.

Second, the business entity provides structure and formality to the ownership and operation of the company. An LLC's Operating Agreement or a corporation's bylaws and shareholder agreements provide internal mechanisms for management, distribution of profits, dispute resolution, ownership transfers, and more, each of which can prevent disputes throughout the life of the company. Many of the decisions made when crafting these documents may seem irrelevant to a couple of brewers filling kegs from a 3.5 bbl nano system, but vitally important when they've built the business to a 20 bbl brewpub. At stake are the assets, investors, employees, reputation, relationships, and permanence of the business.

Third, LLC or corporation ownership can involve multiple individuals with differing levels of involvement and financial investment. For instance, a common brewery formation is an LLC managed by a small number of active "manager" members with several other passive members investing financially. Owners can transfer ownership [as permitted] and the company may issue additional ownership.

Why bother doing it right?

A brewer does not simply throw a bunch of hops, barley, and yeast in some boiling water and call it beer, and a business owner should not simply throw together a registration and some documents and call it a business. In Oregon, the basic requirements for forming a company are simple– just go to www.filinginoregon.com and file Articles of Organization [LLC] or Articles of Incorporation [Inc.]. If forming an LLC, you are technically done, while corporations also require adoption of bylaws and naming of a board of directors. But that's just the beginning.

A properly formed company includes written agreements among the owners, adequate capitalization [the owners contribute enough assets to cover the anticipated liabilities of the company], separation of company and owner finances, and adherence to formalities, such as annual meetings and written resolutions. Failure to abide by these formalities will not put you in the slammer or on a government blacklist, but it could result in a creditor "piercing the corporate veil." In a "piercing" action, the creditor claims that the individual owner[s] is using the company as an "alter-ego" for the individual, instead of as a separate and distinct entity. A successful piercing action results in the creditor gaining access to an owner's personal assets.

This only scratches the surface of business entity formation, but hopefully instills the importance of doing it, and doing it right.

B.I.N.G.
Beverage Industry Networking Group

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BUSINESS IS BREWING IS WRITTEN BY B.I.N.G. Members of this beverage industry support group meet each second Wednesday in the Portland area. Info at: bingoregon.wordpress.com