**Forming an LLC or Corporation in New York**

This table lists the major differences between forming a corporation and a LLC.

|  | Corporation | LLC |
| --- | --- | --- |
| Governance Structure | Comprised of shareholders, directors, and officers.  S Corps have restrictions on types and number of shareholders. C Corps do not. | Flexible governance structure. Normally composed of a group of “members,” (the LLC’s owners), or members and manager/s. |
| Limited Liability (protection from personal liability) | Both corporations and LLCs have limited liability, meaning that the entity’s owners have no personal liability for obligations of the business. So the entity’s creditors can rely only on the assets of the business, not the personal assets of the business’s owners, for payment; in litigation, claimants against the business cannot come after the personal assets of the owners. | |
| Qualifying for Limited Liability | To benefit from limited liability protection, you need to take basic steps to ensure that the business is truly a separate entity: for example, setting up a separate bank account. We can advise further on these steps once the entity is formed | |
| Losses | **C Corporation**  Losses remain in the corporation. Shareholders cannot deduct them on their individual tax returns.  **S Corporation**  See the right column. | Losses pass through to business owners, who can deduct the losses against their personal income for tax purposes. |
| Raising Capital | C Corp is the entity of choice for venture capital and angel investors. | Most institutional investors will require you to re-incorporate as a C Corp before they will invest. |
| Ease of Establishing Entity | Requires some paperwork and filings, but the procedures are well known and many online resources are available to assist entrepreneurs. | Easiest form to establish, but can get complicated if the LLC wants to allow for employee equity compensation, or different classes of equity. |
| Formality & Structure of Business Operations | Corporate formalities must be followed – e.g., establishing a board of directors, holding regular board & shareholder meetings, keeping minutes of meetings. | Far more flexible. Can be as simple as a member-managed LLC where members (the term for an LLC’s business owners) run the business themselves. |
| Taxation | **Double Taxation**  A corporation’s income normally is taxed twice: the corporation itself pays tax on the income earned each year, and the corporation’s shareholders pay tax on any portion of that income that they receive as a dividend.  **S Corporation Taxation**  S Corps, by contrast, are “pass-through” entities (see right column). By electing S Corp tax treatment, the entity’s profits are allocated to its shareholders then taxed once at the shareholder level. | **Pass-Through Entity**  An LLC or S Corp does not pay a separate business income tax: it is a “pass-through” entity, because any income it earns is considered to “pass through” to the owners. This means that LLC and S Corp income is taxed only once, when the business’ owners file their personal income tax returns.  Although this pass-through taxation is often an advantage, we should discuss your personal circumstances. For example, in a business’s early stages, when the business may have losses, an LLC or S Corp’s owner who has taxable personal income might be able to use the business’ losses to offset personal tax liability. However, owners are also liable for taxes on the LLC’s or S Corp’s income every year, regardless of whether any of that income is actually distributed to the owners. So if you choose to reinvest income in the business, you could still find yourself paying tax on that income even if it never touched your bank account. We can discuss these issues further if you would like, and at some point you may need specialized tax advice. |
| Annual Report | Must file biennial reports with the New York Secretary of State. The filing fee is $9. | New York requires biennial reports. Filing fee is $9. |
| Converting from LLC to C Corp | New York doesn’t have a simple mechanism to convert an LLC to a C Corp. Instead, you need to set up a new C Corp (with a different name from your LLC), and then either (a) assign all of the LLC’s assets and liabilities to the new C Corp (and subsequently dissolve the LLC), or (b) merge the two entities, with the C Corp surviving the merger. In either case, you can subsequently rename the new C Corp to the former name of the LLC. Miscellaneous fees are involved. | |

**Required Fees and Taxes for New York Entities**

This table compares initial startup costs and annual fees of a New York Corporation and an LLC.

|  | Corporation | LLC |
| --- | --- | --- |
| Filing Fees | The state fee to incorporate in NY is a minimum of $125. This price is based on no more than 200 shares (required). | Filing fee for the articles of organization is $200 (required). |
| Publication Requirements | NY does not have a publication requirement for corporations. | NY requires a notice of formation published in two newspapers for six weeks. Costs can vary between $80 and $1,000.  Publication requires a $50 filing fee. |
| Registering as a Foreign Entity in New York | If you form your entity in Delaware or another state, but still plan on doing business in New York, you will have to register to do business in New York as well. Registering in New York is $225 (required).  Additionally, the business must obtain a certificate of good standing from Delaware ($50) fee (required). | |
| NY does not require publication for a corporation. | A foreign LLC would be subject to completing a New York publication requirement, which costs anywhere from $200 - $1,000 (required). |
| Registered Agent Fees | A registered agent is not required for a corporation or an LLC, but one can provide cheaper publication rates for an LLC.  A registered agent’s annual fees vary by company, from about $50 to $250 per year. | |
| Annual New York Franchise Tax | The franchise tax is complex and determined by corporate income and capital, with a minimum tax of $25. | There is an annual fee between $25 and $4,500 based on New York Adjusted Gross Income. Small businesses normally pay on the lower end. |
| Biennial Reports | New York requires biennial reports. The filing fee is $9. | New York requires biennial reports. The filing fee is $9. |
| Total Initial Cost | $125  Electing S Corp status has no additional cost. | Around $330 to $1,475. However, you will most likely be in the lower range. |
| Total Annual Cost | $9 for the biennial reports, plus C Corp’s franchise tax, plus corporate income tax and the tax on shareholder dividends. | $9 for the biennial reports, plus the New York annual fee of between $25 and $4,500 based on New York Adjusted Gross Income, plus owners will pay personal income tax on the income they receive. |

**Eligibility Requirements of an S Corporation**

As opposed to the other business entities, S Corporations have fairly strict requirements:

* Must limit the number of permitted shareholders to 100
* The shareholders must be individuals who are United States citizens or legal United States residents (this means that another corporation cannot be a shareholder in a S Corporation), or the shareholder must be a certain type of qualified trust or estate
* S Corps are limited to only one class of stock

**Conclusion and Recommendation**

The choice between entities depends on your goals. There are advantages and disadvantages to all six:

|  | NY C Corp | NY S Corp | NY LLC |
| --- | --- | --- | --- |
| Investors | A good choice for investors, because they prefer corporations, however, most investors prefer DE corporations to NY corporations. | The NY S Corp has the same limitations as the Delaware S Corp, and suffers because investors prefer DE corporations instead of NY corporations. | Investors prefer corporations over LLCs and prefer DE businesses to NY. |
| Taxation | Double Taxation. | Pass-through taxation.  The S Corp can have cheaper taxes than C Corp if you pay reasonable salaries and still have profits left over for distribution, because of pass-through taxation and the self-employment tax break. Additionally, if your total reported income is higher than $250,000 then you can avoid the LLC gross receipts tax. | Pass-through taxation.  If your reported income is less than $250,000 than it can be the cheapest option, however, after you reach $250,000, then the LLC gross receipts tax can make the S Corp’s tax burden less than the LLC’s. |
| Initial Costs | Potentially lowest initial cost. | Same as C Corp. | Higher initial cost than the NY corporation, because of publication requirement. |
| Annual Costs | Generally, double taxation makes a C Corp more expensive than an S Corp (although see page 3). | See page 3. | Potentially cheapest annual costs, because the franchise tax is low. |