

# Business Management Curriculum

## Module 6: Ownership, Liability, and Risk

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University of Nevada  
Cooperative Extension



THE UNIVERSITY OF ARIZONA  
COLLEGE OF AGRICULTURE & LIFE SCIENCES

**Cooperative Extension**

Tribal Extension Programs



United States  
Department of  
Agriculture

National Institute  
of Food and  
Agriculture



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Acknowledgments: Vicki Hebb, reviewing content, and Russ Tronstad (University of Arizona) and Stuart T. Nakamoto (University of Hawaii), content.

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## Module 6: Ownership, Liability, and Risk

### Teaching Notes:

This module allows students to examine their options with regard to the type of business structure they would like to establish and the unique risks, liabilities, and tax implications associated with each. Discussing the risks and liabilities allows your students an opportunity to make well informed decisions. Some tools for determining the types of risk they have on their operations or that they could encounter while in business are presented. Understanding the level of risk and how to deal with what you have is the first step in identifying how prepared or unprepared you are. With this level of knowledge, students will understand how their operation needs to be run to ensure success.

### Educational Objectives:

- Understand the different types of business structures and the pros and cons of each type
- Define risk and uncertainty
- Identify risk management areas and how to apply them to your business
- Identify the tools used for managing risk
- Assess the liability of your farm

### Discussion Topics

- What are the advantages of a corporation?
- What is the difference between an LLC and a partnership?
- What are the risk management areas on your farm/ranch?
- What are some active measurement you could do to reduce the risk to employees and visitors on your farm?

### Available Materials:

1. PowerPoint Presentation (1) – can be printed and used as a handout.
2. Worksheets (5) – can be provided as homework or completed in a workshop if time allows.
  - a. Potential Food Safety Risk - This worksheet tracks how a product or multiple products would affect an operation. Tracking the production of a food product will allow students to determine which areas are more prone to food safety risks and how to minimize them.
  - b. Regulations and Policies - Keep track of all the permits and policies your business has to adhere to on this worksheet. This worksheet will help you keep track of the renewal dates and any types of conditions that you have to meet. It is also a good idea to note the items you have trouble complying with so you will be prepared for the next renewal date.
  - c. Institutional Considerations - This worksheet is used to lay out any agreements or contracts you have to make as a business owner. Use this as a summary page and highlight key points of each agreement.
  - d. Business Health Checkup - This worksheet lets the students run through their business plan to decide how well they are maintaining their business. It also gives the students the ability to plan ahead after they have decided which areas need more or less attention.
  - e. Case Study -This lays out a scenario about a new rancher who wants to utilize land from the state for his cattle herd with very little start-up money. The worksheet runs through some questions about what this new farmer needs to do in order to receive benefits and loans from government farming programs. This should show how easy it can be to obtain help from the government as well as the correct steps to do so.

## Module 6: Ownership, Liability, and Risk

3. Other Resources:
  - a. [RMA.usda.gov](http://RMA.usda.gov) – This website is useful for farmers and rancher who would like to know more about any of the Federal Crop Insurance programs. There are also resources to help farmers and ranchers manage risk more effectively.
  - b. [In the Eyes of the Law](#) - This booklet explains the importance of having a legal operation and following all relevant rules.
  - c. [Risk Management Checklist](#) - This checklist, which focuses on farmers and ranchers, will go through various areas of your business and assess your level of risk preparedness.


### Outline:

#### Ownership Structure and Liability and Risk Assessment

1. Business ownership
  - a. Sole proprietorship
  - b. Partnership
  - c. Limited partnership
  - d. C corp
  - e. S corp
  - f. Limited liability company
  - g. Cooperatives
2. Farm liability considerations
3. Risk and uncertainty
4. 5 risk management areas
  - a. Production
  - b. Financial
  - c. Price or market
  - d. Institutional
  - e. Human or personal
5. Reasons for not managing risk
6. Essentials for evaluating risk
  - a. Data/info
  - b. Analysis
  - c. Wisdom
7. Tools for managing risk
  - a. Crop insurance
  - b. Other insurance and estate planning
  - c. Preparedness plans
  - d. Contracting

# Business Management Curriculum

## Module 6: Ownership, Liability and Risk



1

**Slide 1:** This module is called market assessment because you are assessing the potential of this market for this product. This module will go through steps necessary to assess a market for a particular product.

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## Objectives

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- Cover different business ownership structures.
  - Pros and cons of each type.
- Understanding the basics of farm risk and liability
  - Risk management areas

3

**Slide 3:** This module is about the business structure or the legal form of business. There is some risk and liability differences in the different types. This module will also touch on risk.

## Business Ownership

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- Sole proprietorship
- Partnership
- Limited partnership
- C Corp
- S Corp
- Limited liability company
- Cooperatives

4

**Slide 4:** This is a pretty good list. There are some others such as a non-profit, but these are the main ones. The first two are very common and they are what the business is by default if nothing was established. If you are the sole owner it's a sole proprietorship. If there are multiple owners it's a partnership.

## Sole Proprietorship

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- Simplest form of business organization
- Requires no formal written documentation other than basic farm/ranch financial and tax records
- The owner owns and manages the business, assumes all risks, and receives all profit
- Taxes on profit paid at tax rate of owner (individual or joint for couple)

5

**Slide 5:** This is what a business is by default.

## Sole Proprietorship

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Pros	Cons
<ul style="list-style-type: none"> <li>• Easy to start</li> <li>• Single taxation</li> <li>• Full control</li> </ul>	<ul style="list-style-type: none"> <li>• Full liability exposure</li> <li>• Non-transferable ownership</li> <li>• Harder to obtain financing</li> </ul>

6

**Slide 6:** Single taxation means that the owner pays the taxes on all the profits of the business. In some corporations the corporation pays taxes on all the profits, and then the owners pay taxes on their withdrawals from the corporation.

Full liability exposure means that not just the business assets are at risk. All the owners assets are at risk, not just the investment in the business.

It is harder to obtain financing only because a corporation may sell stocks, but a sole proprietor does not. The money must be raised as a loan unless the owner invests their own money.



## Partnerships

An association of two or more persons who share ownership of a business

- **General partners** contribute to the management of the business and are exposed to unlimited liability
- **Limited partners** do not participate in the management & are liable only for what they have contributed to the business
  - Limited partnerships are appropriate when families want to separate management responsibilities from ownership interests, such as when there are on & off-farm children

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**Slide 7:** A partnership is similar to sole proprietor in terms of liability, tax, and risk. The difference is that there are 2 or more partners. The partnership is committed by each partners actions.

A limited partnership is not that common. The limited partner cannot have any say in how the partnership/business is operated.

## General Partnerships:

### Organization and Characteristics

- Sharing of business profits and losses
- Shared control of property, with possible shared ownership of some property
- Shared management of the business
- Written partnership agreements not legally required, but highly recommended
- Frequently used to bring family members into the farm business
- Effective way to share ownership of operating assets
  - Gives the younger generation the opportunity to build equity in the business

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**Slide 8:** Because no written agreement is required, this is what the default structure is. However, a written agreement can help alleviate problems and say how certain things are handled.

## Written Partnership Agreements

- Management
  - Who is responsible for decisions and how they shall be made
- Property
  - List of property each partner will contribute and how it will be owned
- Share of profits and losses
  - Carefully describe how these will be divided
- Records
  - Designate who will keep the records

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**Slide 9:** These are some of the items that a written partnership agreement should address.

## Written Partnership Agreements

- Taxation
  - Include a detailed account of tax basis of property and copies of the partnership information tax return
- Termination
  - State the date of termination if one is known
- Dissolution
  - How will property be divided if a partner wants out?

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## Advantages of Partnerships

- Easier & less expensive form than a corporation
- A carefully written agreement can allow the partners to maintain much of their freedom
- Flexible form of business that can accommodate many different situations

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## Disadvantages of Partnerships

- Unlimited liability of each general partner
- Any partner individually can act for the partnership in legal and financial dealings & the other partners will also be held responsible
- Potential for poor business continuity

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**Slide 12:** One of the biggest disadvantages is the unlimited liability. However, it is cheap and easy to start. For some situations where protecting assets outside the business is not an issue, this is a simple way to operate.

## Partnership Taxation

- A partnership does not directly pay taxes
  - It files an information income tax return
- Each partner's share of income from the partnership is reported on his/her own tax return

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**Slide 13:** So this ends up being similar to the sole proprietor in that the individual pays the taxes.

## Partnerships

<ul style="list-style-type: none"> <li>• <b>Pros</b></li> <li>– Pass through taxation</li> <li>– Many financing options</li> <li>– Easy set up</li> <li>– Ownership buy-out</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Cons</b></li> <li>– Full liability exposure</li> <li>– Shared control</li> </ul>
--	--

14

**Slide 14:** The financing options are a bit easier because more partners can contribute capital. So capital can come from the partners and not just through loans. Although the partnership agreement may lay out how losses are handled, all of each partners assets (not just the partnership assets) are at risk. A partner with more assets outside the partnership may be bearing more risk.

Shared control is a con, because each partner is committed by the actions of any partner. In order to get things done all partners must agree or how it is handled in the written agreement. It can be useful to have multiple people to manage everything, but can be difficult, if partners have different ideas of what should be done.

## Corporations

- A corporation is a separate legal entity with liability protection
- Formed and operated in accordance with laws of the state of organization
- Shareholders in a corporation are liable only to the extent of their investment
- Existence of corporation is continuous even as individual owners change

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**Slide 15:** This adds liability protection.

Every state has their own laws about corporations.

Owners can transfer/buy/sell stock to another and the corporation goes on with no interruption.



## Forming a Farm Corporation

- File a preliminary application, reserving a name for the corporation
- Draft a pre-incorporation agreement outlining major rights and duties of all parties
- Prepare and file the articles of incorporation
- Turn property or cash over to corporation in exchange for shares of stock
- Shareholders meet to organize and elect directors
- The directors elect officers, adopt bylaws, and begin business

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**Slide 16:** A corporation gives protection for liability, but is harder to get started.

## Corporations

### S Corporations

- Pass income to shareholders
- Less than 75 shareholders
- One class of stock
- Taxed the same way as partnerships

### C Corporations

- Pass income along in the form of dividends
- Taxed at both the corporate & shareholder levels
- Fewer restrictions on the number of shareholders, different classes of stock
- Good for especially large businesses with many owners, regardless of the double taxation

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**Slide 17:** S corporations or sometimes call Sub Chapter S corporations, were created to allow family members to have some liability protection, but be taxed like a partnership.

Before LLCs, this was the popular way to organize farm businesses to reduce liability.

C corporations, are what most corporations are. The corporation pays taxes on their earnings. If the corporation issues dividends, shareholders pay taxes on the dividends. Since the corporation already paid taxes on the profits, this is referred to as double taxation.

For large businesses they can get capital by selling shares, and they can operate smoothly regardless of how many times their shares are resold and owners change.

## Corporations

### Pros

- Most liability protection
- Structured management
- Ownership transferability
- Non-participating ownership
- Greatest options for funding

### Cons

- Double taxation
- Least flexibility in structure

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## Corporate Veil

- Owners personal assets are shielded
- Only equity invested could be lost
- Liability protection loss
  - Fraud
  - Co-mingling of funds

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**Slide 19:** The liability protection is sometimes called the corporate veil. Personal assets are shielded by the veil, because only the corporations assets can be seized or used to pay for obligations. Owners personal assets are not as risk. Only their investment in the stock of the corporation.

Fraud and co-mingling assets can pierce the corporate veil and remove that protection.

## Preserving the Corporate Veil

- Maintain separate personal and business accounts
- If the company needs money- make a documented loan from personal monies to the company
  - Loan should be paid back in the future
  - Same applies to personal loans from the company
    - Should be a loan or a bonus paid out to the recipient, not a personal purchase made with the company account
    - All company assets fall under this structure
- Attempt to eliminate intentional dishonest business dealings
- Must have required meetings for board members and documentation required

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**Slide 20:** This is how to maintain the limited liability of a corporation. So a corporation is more difficult to start and also slightly more difficult to operate, because board or directors meetings and everything needs to be documented.

## Limited Liability Companies

- A limited liability company (LLC) resembles a partnership, but offers members advantages of a corporation
- Liability is limited to the assets of the LLC, not the individually owned assets of members
- An LLC can have any number of members, all can participate in management

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**Slide 21:** This is a newer form of business. Mostly used in the last 20 years. It has the liability protection of a corporation, but can be taxed like a partnership.

LLCs can be good options for grazing associations and irrigation associations because of the limited liability.

## Limited Liability Companies

- Ownership distributed according to fair market value of contributed assets
- Net farm income from an LLC passed to members, who pay taxes at their individual rates (no "double taxation")
  - IRS does not recognize LLC as a form or business, so it can be taxed as either sole proprietor /partnership or corporation, but general people choose sole proprietor / partnership rules.
- An LLC does not automatically continue in the event of a death of a member

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## LLC – Multiple Business Model

- LLC- Multiple Business Model
  - Liability is limited by breaking the total operation into different companies
- Example
  - Company 1 – Hay
  - Company 2 – Trucking
  - Company 3 – Livestock

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**Slide 23:** This may limit the liability, but all the businesses must be managed as separate businesses with their own records.

## Farm Risk and Liability Considerations: Understanding the Basics

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## Risk and Uncertainty

- Risk can be defined as imperfect knowledge where the probabilities of the possible outcomes are known
- Uncertainty exists when the probabilities are not known

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**Slide 25:** Ask participants what are some of the things that we do not know the outcome of. When you plant corn, you do not know what the yield will be, what the price will be, etc.

This uncertainty is the risk.

## Risk Management

- Risk management can be defined as choosing among alternatives to reduce the effects of risk.
- An evaluation of tradeoffs between changes in risk, expected returns and entrepreneurial freedom is required

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**Slide 26:** For example, a crop insurance policy will cost money and therefore decrease returns. It may also limit what can be planted and production practices. However, it may increase returns when yields and or prices are low. This tradeoff in a certain cost, with potential different returns is evaluated.

## Risk Management Areas

- Production
- Financial
- Price or Market
- Institutional
- Human or Personal

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**Slide 27:** Production – Weather conditions, diseases, pests may decrease or eliminate yields. Agritourism enterprises that rely on production of commodities or specialty crops are also at risk  
Financial – Meeting cash flow needs, maintaining or growing equity in the agritourism enterprise. Risk of damage or stolen property.  
Market or Price – commodity prices fall below the profit margin  
Institutional – is also referred to as regulatory and legal risk. This could include a new regulation.  
Human or personal risk – employee may get sick and no one knows how to cover their job.

## Top 5 Reasons for Not Managing Risk

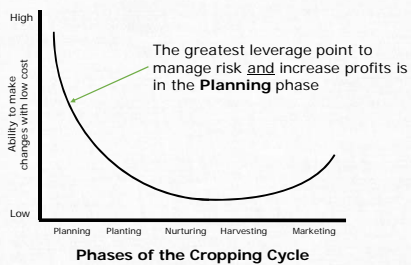
1. I'm waiting for my neighbor to try it.
2. Crop and livestock losses build character.
3. It's more fun to keep IRC guessing about my ability to repay.
4. Sleeping too soundly would make my spouse wonder.
5. Life would be dull without daily doses of fear

Source: Farm Futures

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**Slide 28:** Ask participants why they don't manage risks? If they do what is their motivation.

## Motivation



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**Slide 29:** The Planning phase is the time that you have to assess your risks and manage them without a big monetary investment relative to the later phases of the season.

## Niche Marketing: Payment Risk



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**Slide 30:** There is a lot of payment risk here. Customers may not pay and anyone could take what people have left.

You could ask participants how could the risk be minimized? What would be the costs to do so?

It may not be worth it to have someone at the stand all the time, but there might be other options.



## Essentials for Evaluating Risk

- Information: yields, prices, costs, resources, etc. taking stock of your operation and alternatives
- Analysis: pencil, calculator, or computer
- Wisdom : risk-profit tradeoff

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**Slide 31:** There are some very complex risk assessment tools. However, the more complex the tool the more data and knowledge are required. Just by looking around your operations and thinking the steps through they might find ways to manage risks.

## Tools for Managing Some Risk

- Crop Insurance
- Other Insurance and Estate Planning
- Crop/Enterprise Diversification
- Contracting/Futures/Direct Marketing
- Disaster Preparedness Plans

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**Slide 32:** Insurance reduced risk because you shift it to someone else (the insurance company). You pay a set fee a certain amount for them to take a risk.

Diversification can be done by having multiple enterprises or crops can reduce risk because the chance of all being bad at once is smaller. This is like don't put all your eggs in one basket. Diversification can also come through the markets. For example, you may sell to a farmers market and sell to wholesale markets. The problem with diversification is that some crops require a lot of specialized machinery and equipment. The additional costs for the addition equipment needed may out weigh the risk reduction.

Contracting allows a set price determined before the product is planted. There still is some risk, because if your yield is lower, you may not be able to fulfill the contract.

## Crop Insurance (RMA)

### Types of Federal Insurance

Traditional	Revenue	Other
Multi-Peril Crop Insurance	Income protection	Livestock risk prevention
Catastrophic	Whole Farm Revenue	Livestock gross margin
Group risk plan	Crop prevention coverage	Vegetation index
	Dollar	

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Disaster preparedness plans can increase your ability to cope with risk. Other ways to increase ability to cope include employee cross training, some equipment reserves (if a storm is coming during harvest or you have a breakdown) also having reserved will help with ability to cope.

**Slide 33:** These are some of the crop insurance options.

## Other Insurance and Estate Planning

- Life Insurance
- Building Etc.
- Key Personnel Coverage
- Estate Planning
  - Up to date
    - Directive "Does what you want it to do"

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**Slide 34:** These are other insurance products that can limit risk. The amount of the policy for liability insurance and life insurance is somewhat dependent on what is being insured, what would the insurance need to cover if something happened. It also depends on the cost.

## Analyze On-Farm Risk

- Risk assessment tools and surveys
- Develop plans based on high risk areas
- Each farm or ranch has their own specific risks

Source: Cinda Williams the University of Idaho; Assessing the Liability on your Farm

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**Slide 35:** Some of the Good Agriculture Practices and other certification tools, may have some planning materials that can be used to assess risk. Sometimes just walking around and seeing if there are hazards that could hurt someone.

## Personnel Risk

- Are you concerned with employees, volunteers or invited public?
- What are the liabilities of each?

Source: Cinda Williams the University of Idaho; Assessing the Liability on your Farm

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**Slide 36:** There is not one right answer with risk management. It is more about trying to think through what your risks are and if there is anything that can help. If you have volunteers, can you give them some safety guidelines and/or training? Can they sign waivers?

## Animals on the farm?

Make sure there is:

- Proper supervision
- Proper fencing
- Warnings that they may bite
- Hand washing



Source: Cinda Williams the University of Idaho: Assessing the Liability on your Farm

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**Slide 37:** Ask participants to think of risks that different types of operations would face and what they might do to limit the risk.

## Other On-Farm Concerns

- Activities (wagon rides, pony rides, etc.)
- Equipment, tools, ladders
- Farm storage of chemicals, gasoline
- Parking
- Bathrooms

Source: Cinda Williams the University of Idaho: Assessing the Liability on your Farm

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**Slide 38:** What risk would be associated with each of these? How could they minimize the risk?

## Limiting Farm Risks

- Inspect property and document
- Eliminate dangerous conditions, when possible
- Provide written or visual warnings for unsafe areas

Source: Cinda Williams the University of Idaho: Assessing the Liability on your Farm

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**Slide 39:** These next slides list some of the steps. Ask participants how they would do this? Why would they want to?

## Limiting On-Farm Risks

- Educate and train employees
- Educate visitors
- Document injuries if they occur

Source: Cinda Williams the University of Idaho; Assessing the Liability on your Farm

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## Food Safety Issues

- Reducing the risks of foodborne illnesses
  - Clean soil
  - Clean water
  - Clean Hands
  - Clean Surfaces



Source: Cinda Williams the University of Idaho; Assessing the Liability on your Farm

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## Disaster Preparedness Plan

- Operation Name & Location
- Emergency Contact Information
- Employee Emergency Contacts
- Land Managers, Suppliers & Contractors
- Customer Contacts
- Communication Plan
- Evacuation Plan
- Shelter Plan
- Finances, Insurances, & Succession

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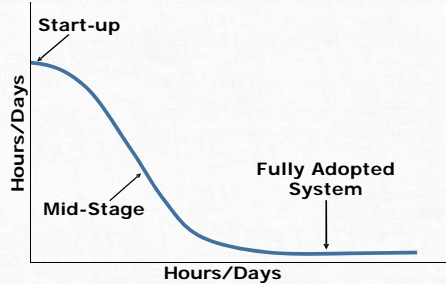
## Challenges & Opportunities Ahead

- Discriminating Consumer Preferences
- Globalization
- Rural-Urban Interfaces
- New Technologies
  - GIS/GPS
  - GMO's
- Food Safety and Tracking
  - COOL (Country-of-Origin Labeling)
  - Animal ID
  - GAPS (Good Agricultural Practices)
  - Food Safety Modernization Act (FSMA)

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**Slide 43:** These are some of the trends that will affect risks as we go forward. They also represent regulations and/or certification standards that you may need to meet.

## New System Adoption: Time Commitments



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**Slide 44:** When you make a change, the initial cost is high, however once it is adopted the ongoing cost is low. Many risk management options are like this. It will cost more initially to make the change, but once it is implemented it does not cost a lot to maintain it.

Questions?

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# Business Management Module 6: Potential Food Safety Risks

Choose a product you produce or plan to produce and identify potential food safety risks for each risk type—biological, chemical, and physical—for each stage of the production process.

Hazard/Risk Phase	Biological	Chemical	Physical
Production			
Harvest			
Post-Harvest			
Processing			
Storage			
Transportation			
Marketing			
Consumer			

## Business Management Module 6: Regulations and Policies

List any permits, institutional requirements, or other government policies that will affect your operations. When noting permit requirements, be sure to describe any ongoing compliance issues such as annual permit renewals and fees. Next, describe your ability to meet these conditions.

**Permit/License/Policy:** \_\_\_\_\_

Issued by: \_\_\_\_\_

Conditions and compliance issues:

\_\_\_\_\_

\_\_\_\_\_

Fees:

\_\_\_\_\_

\_\_\_\_\_

Can we meet these conditions?

\_\_\_\_\_

\_\_\_\_\_

**Permit/License/Policy:** \_\_\_\_\_

Issued by: \_\_\_\_\_

Conditions and compliance issues:

\_\_\_\_\_

\_\_\_\_\_

Fees:

\_\_\_\_\_

\_\_\_\_\_

Can we meet these conditions?

\_\_\_\_\_

\_\_\_\_\_

**Permit/License/Policy:** \_\_\_\_\_

Issued by: \_\_\_\_\_

Conditions and compliance issues:

\_\_\_\_\_

\_\_\_\_\_

Fees:

\_\_\_\_\_

\_\_\_\_\_

Can we meet these conditions?

\_\_\_\_\_

\_\_\_\_\_

## Business Management Module 6: Regulations and Policies

Describe institutional factors that will affect your ability to use and manage physical resources under your new operations strategies. Include any long-term leasing arrangements, conservation easements, permit requirements, legal restrictions, and production or marketing contracts.

### Long-Term Leasing Arrangements

Specify whether items will be leased in for your use or leased out for the use of others.

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### Long-Term Agreements and Easements

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### Permit and Legal Restrictions

Specify the agency responsible for issuing permits, conditions and compliance factors, fees, and your ability to meet these conditions.

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### Long-Term Production Contracts and Marketing Agreements

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University of Hawaii at Manoa  
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## Producer Business Checkup

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### Introduction

Agricultural producers face five types of risk, as defined by USDA: production, market or price, financial, legal or institutional, and human or labor risk. Producers typically focus on production or perhaps market risks, and may not be fully aware of other perils that could threaten their operations and livelihood.

The intent of this document is to build awareness of those perils that are related to the business side of your operation, and to help prioritize and address those that are business related.



### How to use this guide

This guide will walk you through a three-step process. First, we will evaluate a series of topics or items that are posed as questions. You will need to evaluate the importance of each item to your operation, and what it will cost to complete each one. The cost should include actual dollars spent plus time and effort.

Second, use your evaluations (high, medium, low) to place each topic in the appropriate quadrant of the graph. "Medium" items can either straddle the lines, or you can decide on a group based on how closely they match other topics. You can use either the number or the descriptive terms (in bold) to help identify each topic. All topics that are completed can be listed at the bottom of the graph.



Items in the upper left quadrant -- those that have a low cost to complete but are of high importance -- should be addressed first. Once you have listed all topics in the appropriate quadrants, revisit the ones in the upper left quadrant and list each of them in the "To Do List" by priority or in the order you are planning on doing them. Put a completion date and if applicable, key persons involved. The date started helps to remind you of topics that have been lingering.

This exercise should be repeated periodically to check your progress. Remember that most legal documents will need to be reviewed or redone after any major change with the family, business, estate tax law, and other related issues.



University of Hawaii at Manoa, College of Tropical Agriculture and Human Resources

# Producer Business Checkup

Please answer the following questions by circling the most appropriate answer for both the importance of each item and the cost to complete each item for your operation.

Date: \_\_\_\_\_

<b>GOALS AND BUSINESS OUTLINE.</b> Do you know or have.....	<b>Importance to Operation</b>			<b>Cost to Complete</b>			
1) Short term <b>s.t. goals</b> (within 1 year) that are in writing?	Low	Med.	High	Done	Low	Med.	High
2) Long-term <b>l.t. goals</b> (3 years and more) that are in writing?	Low	Med.	High	Done	Low	Med.	High
3) Current written <b>business plan</b> that includes goals and objectives with financial, production, and marketing components (formal or informal)?	Low	Med.	High	Done	Low	Med.	High
4) A current <b>marketing plan</b> ? If so is it tied to your business plan?	Low	Med.	High	Done	Low	Med.	High
5) A <b>contingency plan</b> in the event of disasters?	Low	Med.	High	Done	Low	Med.	High
6) Do you have or want to add any <b>agri-tourism</b> activities or events to your business?	Low	Med.	High	Done	Low	Med.	High
7) Do you want to add any <b>new products</b> to your business?	Low	Med.	High	Done	Low	Med.	High
8) Do other family members and key personnel know what your goals are? ( <b>goals known</b> )	Low	Med.	High	Done	Low	Med.	High
9) Does the <b>next generation</b> want your operation?	Low	Med.	High	Done	Low	Med.	High
10) <b>Transition plans</b> for passing your operation to the next generation?	Low	Med.	High	Done	Low	Med.	High
<b>RECORD AND DOCUMENT ITEMS.</b> Do you have.....							
11) Records that document your good agricultural practices ( <b>GAP</b> )?	Low	Med.	High	Done	Low	Med.	High
12) A <b>contact list</b> of key individuals and entities to your operation?	Low	Med.	High	Done	Low	Med.	High
13) An <b>operations manual</b> (formal or informal) for key activities on your farm/ranch?	Low	Med.	High	Done	Low	Med.	High
14) Legal documents such as wills, business license, leases, and other <b>documents on file</b> in more than one place?	Low	Med.	High	Done	Low	Med.	High
15) Do you file <b>income tax</b> every year? If so, do you use a schedule F or C ? (Please circle which one you use)	Low	Med.	High	Done	Low	Med.	High
16) Do you have a <b>will</b> ?	Low	Med.	High	Done	Low	Med.	High
17) Do you have a <b>living will</b> ?	Low	Med.	High	Done	Low	Med.	High
18) Do you have paid <b>employees</b> ?	Low	Med.	High	Done	Low	Med.	High
19) Do you have a current <b>balance sheet</b> ?	Low	Med.	High	Done	Low	Med.	High
20) Do you have a current <b>cash flow</b> statement?	Low	Med.	High	Done	Low	Med.	High
<b>ANALYSIS ITEMS.</b> Do you know or have .....							
21) Do you know your <b>break-even price</b> for each of your products?	Low	Med.	High	Done	Low	Med.	High
22) Do you know your total liabilities and assets, and current <b>net</b>	Low	Med.	High	Done	Low	Med.	High



<b>worth?</b>							
23) Have you determined the value, if any, of utilizing direct farm marketing or marketing any agri-tourism activities on your operation? ( <b>direct mkt/agtour value</b> )	Low	Med.	High	Done	Low	Med.	High
24) How confident are you that the next generation wants your operation? ( <b>transition</b> )	Low	Med.	High	Done	Low	Med.	High
25) Do you know your <b>working capital ratio</b> ?	Low	Med.	High	Done	Low	Med.	High
26) Do you know the current and potential size of your <b>markets</b> ?	Low	Med.	High	Done	Low	Med.	High
27) Do you know your current and potential <b>production capabilities</b> ?	Low	Med.	High	Done	Low	Med.	High
28) What is the availability of <b>local workers</b> ?	Low	Med.	High	Done	Low	Med.	High
29) What is the availability of <b>skilled workers</b> ?	Low	Med.	High	Done	Low	Med.	High
30) Have you completed a <b>SWOT</b> (Strength, Weakness, Opportunity and Threats) for your operation?	Low	Med.	High	Done	Low	Med.	High
<b>INSURANCE AND RISK.</b> Do you know or have.....							
31) Do you grow crops that are insurable for yield, price, and/ or revenue shortfalls? ( <b>insurable crops</b> )	Low	Med.	High	Done	Low	Med.	High
32) Do you have <b>crop insurance</b> for a disaster that may occur to your trees and/or nursery stocks?	Low	Med.	High	Done	Low	Med.	High
33) Do you have a <b>key employee</b> backup plan?	Low	Med.	High	Done	Low	Med.	High
34) Have you taken action to protect your operation against the risks of ( <b>4Ds</b> ) death, disability, divorce, and departure of key individuals?	Low	Med.	High	Done	Low	Med.	High
35) Do you have <b>structure insurance</b> on your buildings and other at-risk improvements?	Low	Med.	High	Done	Low	Med.	High
36) Do you have <b>liability insurance</b> ?	Low	Med.	High	Done	Low	Med.	High
37) Do you have <b>health insurance</b> ?	Low	Med.	High	Done	Low	Med.	High
38) Do you have <b>workman's compensation</b> ?	Low	Med.	High	Done	Low	Med.	High
39) (other)	Low	Med.	High	Done	Low	Med.	High
40) (other)	Low	Med.	High	Done	Low	Med.	High
41) (other)	Low	Med.	High	Done	Low	Med.	High

After you have complete all of your responses, look back through your answers in the table above and place the number of each question into the appropriate quadrant of the following graph. The terms in bold might be included to help identify the numbers. Repeat until all items are in their appropriate quadrant. List all done or completed items below the table.

Items in the upper left quadrant -- those that have a low cost to complete but are of high importance -- should be addressed first. Once you have listed all questions in the appropriate quadrants, revisit the questions in the upper left quadrant and using the To Do List, write down each item in the order that you plan on tackling them. Put a completion date and if applicable, key persons involved.

<b>Low Importance &lt;-----&gt; High Importance</b>	<b>(Low Cost: High Importance)</b>	<b>(High Cost High Importance)</b>
	<b>(Low Cost: Low Importance)</b>	<b>(High Cost: Low Importance)</b>
<b>Low Cost &lt;-----&gt; High Cost</b>		

Done or completed items: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



## Business Management Module 6: Case Study

Tom is a Shoshone American Indian who grew up on a reservation in central Nevada. Tom lives and works as a high school principal in a town located 150 miles from his reservation. After 20 years with the school district, Tom wants to retire and return to the reservation. He has always dreamed of cattle ranching and feels he will be able to do this in retirement with his 120-acre assignment and 60 acres of allotted land on the reservation. The tribe has grazing permits, Animal Units per Month (AUMs), with the U.S. Forest Service and Bureau of Land Management. However, Tom will need to get tribal approval to run cattle on these AUMs. The Tribal Cattle Association has told Tom that he cannot graze his cattle on Forest Service and BLM allotments because all AUMs are already in use. In addition, the reservation has a BIA "irrigation system" operated by the tribe, the BIA, Indian allottees, and non-Indian farmers.

Tom begins his retirement plan of returning to the reservation. He sells his house in town to remodel his family home on the reservation. The remodeling is finished and he is out of money. He hears that Farm Service Agency (FSA) has a beginning farmer/rancher program. He visits the local FSA office and begins to ask questions about applying for a start-up cattle loan in addition to infrastructure development. It looks like he could qualify. He decides to fill out the application.

The FSA loan office receives Tom's completed application. Tom requests funds to purchase 300 head of cattle with the land-base of 180 acres. He also needs an additional \$100,000 for water development, fencing, and land development. The FSA loan officer is concerned about whether or not Tom's cattle operation can show a projected positive cash flow. The officer determines that Tom's plan does not show a projected cash flow.

1. Whose responsibility is it to make sure that Tom reaches the place of most potential?

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- a. Brainstorm ideas on how Tom could make his operation cash flow.

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2. Identify the difference between assigned and allotted land tenure in terms of the following questions. Is there more than one right answer?

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## Business Management Module 6: Case Study

- a. Can the two land tenure types be encumbered in a FSA cattle loan package?

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- b. What USDA programs could Tom access to acquire the funds he needs to build needed infrastructure and purchase livestock?

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3. How are these programs impacted by assigned and allotted land and Indian irrigation infrastructure issues?

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4. Does the tribe or the BIA (or both) have authority and jurisdiction over the loan approval?

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5. Does the Tribe or BIA (or both) have authority and jurisdiction over how the loan is implemented? Seek first to understand, then to be understood.

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6. Identify Tom's alternatives, keeping in mind the issues surrounding Indian land tenure and irrigation and the lifestyle Tom wants. Find the place of most potential.

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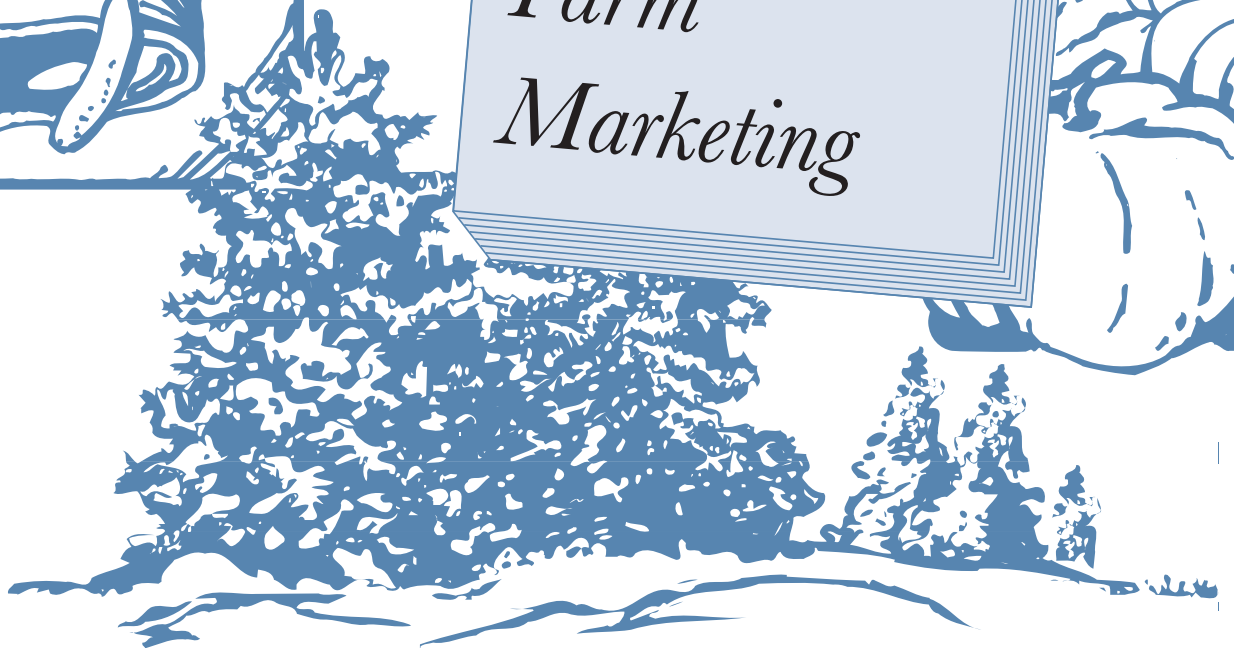
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# In the Eyes of the Law

Richard F. Prim  
Kaarin K. Foede



*Legal Issues  
Associated  
with Direct  
Farm  
Marketing*



*Tourism*  
CENTER

UNIVERSITY OF MINNESOTA  
**Extension**

PART OF THE ...

S E R V I C E



## ABOUT THE PUBLICATION

This project was coordinated by **Kent Gustafson**, extension educator, tourism, and professor. He can be reached at the Tourism Center—see the information below.

The Tourism Center of the University of Minnesota Extension Service, in cooperation with the Minnesota Office of Tourism and the Minnesota Department of Agriculture, has been exploring the potential of agritourism in Minnesota. Increased income for farm families as well as additional visitor attraction sites for communities are two major benefits of agritourism. One of the potential obstacles, however, is the perceived—as well as real—liability and risk farmers assume when they invite the public onto their property. This publication has been developed to respond to producer concerns about the liability issue and steps they can take to reduce the risks.

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The Tourism Center conducts tourism research and provides education and outreach programs for the tourism industry, community groups, and students. It is part of the University of Minnesota Extension Service and operates in partnership with various academic units, government agencies, and industry associations.

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# Foreword

*Many agricultural producers today are taking advantage of the opportunity to increase the value of their products by processing, shipping, packaging, and selling them directly to consumers. Consumers benefit by obtaining a product from a known source. The community benefits because the dollars generated by processing and marketing stay in the local economy.*

*This publication provides producers who are considering becoming direct marketers a brief introduction to legal issues that may affect their business so they can avoid or minimize risk and liability. It is not intended to constitute legal advice or address every situation, since direct marketing can be as varied and expansive as creativity, ambition, intuition, and resources allow.*

*Don't let the number of issues raised in this publication deter you from pursuing direct marketing. Because it is an overview, this publication necessarily addresses many general legal principles, any one or more of which may or may not be applicable to your situation. Use this publication as a discussion tool as you seek specific advice from an attorney and an accountant familiar with your goals and business plan.*

*You will notice case studies inserted in various places throughout this text. These are summaries of actual cases in which courts have applied the principles discussed in the immediately surrounding paragraphs. These summaries are not intended to take the place of legal advice, since many of the factual, legal, and procedural nuances of the cases had to be deleted in the process of condensing the information.*



# Risks Associated With Conducting an On-Site Business

If you sell products from the site where they were produced, from a shop, or from your home, you have an obligation to make such areas reasonably safe for entry. The following section discusses general **negligence** and premises **liability** principles related to that obligation.

## Negligence and Liability

If a customer is injured on the site at which you are conducting business, the customer may claim that you were negligent for allowing the condition that caused the accident. The injured customer alleging negligence will claim that he or she was hurt as a result of your **breach** of the duty to use **reasonable care** in keeping the premises free from dangerous conditions. The legal burden is on the customer to prove that you owed the customer a duty to keep the premises clear of such conditions, that you failed to fulfill that duty, and that the customer was injured as a result.

You have a legal duty to use reasonable care for the safety of customers invited onto your premises. How that duty is satisfied depends on the circumstances. In all cases the care you exercised will be judged as to whether it was reasonable under the circumstances. In many cases, the question of whether the direct marketer has acted reasonably is determined by the type of person involved.

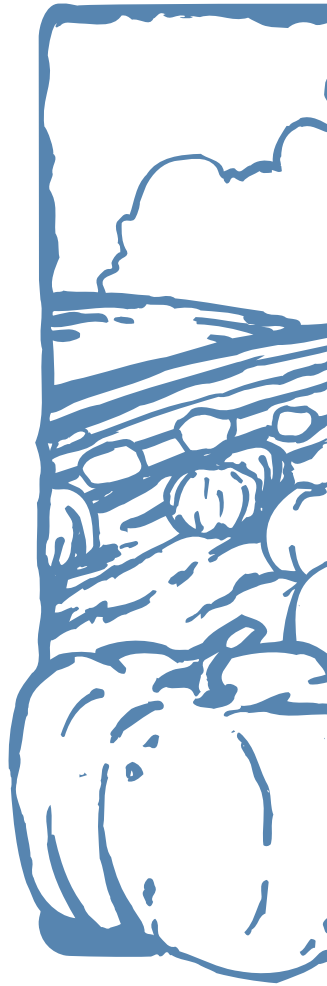
You must exercise ordinary reasonable care toward children. When children are involved, the diligence required of you is expanded to take into account their smaller size and lack of caution or knowledge of particular dangers. However, you are not responsible for supervising children unless it is clear the parent is transferring supervision to you and you accept that responsibility. For example, in a case involving a child who drowned after falling from the dock of a social host, the court held that the social host did not have a special duty to the child because the child's parents were present and were responsible for supervising the child. However, if you accept responsibility for the care and custody of children, you are

**Negligence:** The failure to exercise the care that a reasonable person would exercise. It means doing something that a reasonable person would not do, or failing to do something that a reasonable person would do.

**Liability:** Being legally responsible or obligated, or exposed to the possibility or likelihood of legal accountability.

**Breach:** Failure to act in conformity with a duty or standard of conduct required of a person.

**Reasonable Care:** The quality of care a reasonable person would exercise in the same or similar circumstances.





assuming the responsibility to act as that child's parent or guardian and will be judged according to that heightened standard.

You generally owe no duty of care to adult **trespassers**, and the law recognizes that trespassers are required to be alert to conditions of the premises. An exception is that you must exercise reasonable care to warn trespassers about hidden, artificial (not solely the work of nature) dangers created or maintained on site. Whether a condition is hidden depends upon whether it is visible, not whether the trespasser actually sees it.



Minnesota courts apply a different standard when the trespasser is a child and artificial conditions exist on the premises that are considered highly dangerous or attractive to children. According to case law, artificial conditions include, but are not limited to, buildings, swimming pools, retaining walls, wood piles, large machinery, and dividing walls. With respect to children, a **possessor** of land is subject to liability for harm to trespassing children caused by an artificial condition if

- (1) the place is one upon which the possessor knows or has reason to know that children are likely to trespass; AND
- (2) the possessor knows or has reason to know that children are likely to trespass; AND
- (3) the children because of their youth do not discover the condition or realize the risk involved in it or in coming within the area made dangerous by it; AND
- (4) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved; AND
- (5) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

Each of these five elements must be proven to establish your liability to trespassing children.

## Case Study

A snowmobiler trespassing on railroad property sued the railroad for failing to warn snowmobilers of the existence of a trestle after she drove off the edge in inclement weather and was injured. Due to the nature of a procedural question involved, the Minnesota Court of Appeals did not make a decision regarding the liability of the railroad, but did state that a possessor of land who knows (or should know) that trespassers consistently intrude on a limited area of the possessor's land is subject to liability for harm caused to the trespasser by an artificial condition on the land if the condition was created or is maintained by the possessor, the condition is likely to cause death or serious bodily harm to trespassers, the condition is of the nature that the possessor has reason to believe the trespasser will not discover the dangerousness of the condition, and the possessor fails to exercise reasonable care to warn the trespasser of the condition and the risks involved.

**Trespasser:** A person who is on the property of another without permission.

**Possessor:** One or more who have direct physical control over land at a given time; for title insurance purposes, possessor has open, visible, and exclusive use.



## Case Study

A customer pushing a shopping cart in a crowded aisle at a supermarket was injured when her cart bumped against and dislodged a display of glass containers perilously stacked in several tiers on empty cardboard boxes. The court decided that the supermarket failed to use reasonable care in displaying the merchandise because this injury was readily foreseeable, since shoppers constantly passed by the heavy but rickety structure, pushing sometimes unwieldy and unmaneuverable shopping carts.

Alternatively, a woman in a shopping mall was injured when she tripped over a brick-enclosed planter in a common walkway. The plaintiff claimed that she did not see the planter as she was walking along and looking at the shops. The court found that the mall was not negligent. There was no evidence that the planter was a hazard, as it was in plain view, was obvious in its presence, and had not previously presented any problems in spite of heavy customer traffic over several years.

## Owners, Occupiers, and Possessors

The nature or extent of your responsibilities to keep safe the premises on which you conduct business are affected by whether you own the site, have entered into a **lease** or another kind of arrangement that allows you to use the area, or are sharing the site with another person or entity.

The most important factor is the identity of the person or entity responsible for keeping the premises safe. If you own the premises, you will likely have the greatest ability to control the conditions of the premises and the greatest amount of exposure to risk. If you do not own the premises, you can still exercise some degree of control over the area by virtue of your presence and use, and therefore have some responsibility to keep the premises safe.



You will need to assess your duty to use reasonable care for the safety of persons invited to the premises in light of the following factors:

- (1) the circumstances under which the person enters the premises;
- (2) the foreseeability or possibility of harm;
- (3) the duty to inspect, repair, or warn;
- (4) the reasonableness of inspection or repair; and
- (5) the opportunity and ease of repair or correction.

Simply put, you will owe your customers a duty to exercise reasonable care for their safety commensurate with the circumstances involved.

**Lease:** A contract to rent property on the terms, for the period of time, and for the amount of rent agreed to by all parties to the contract.

**Landlord:** A person or entity with a legal right to possession of property and who rents the property to others.

**Tenant:** A person or entity that by contract has the temporary use or possession of the property of another.

## Landlords and Tenants

The rights and obligations of **landlords** and **tenants** are affected not only by the written lease agreement, but also by Minnesota statutes and rules. This section outlines the premises liability obligations of each party in a lease situation. It does not address other aspects of landlord-tenant law. You should consult an attorney when considering any lease relationship.





Landlords are responsible for safely maintaining areas over which they retain control, such as hallways, stairways, and other common areas. If the landlord does not retain control of the premises, he or she normally will not be liable for injuries caused by the negligence of the tenant/occupant, provided the site was turned over to the tenant in good condition.

If a landlord performs repairs on the property, he or she is liable for injuries resulting from the negligent performance of the repairs, whether he or she performed such repairs voluntarily or was obligated to do so as part of the lease.

Tenants are obligated to exercise reasonable care for their guests and co-tenants, including both the tenant's use of the area and any repairs undertaken by the tenant.

## Negligence Per Se

**Negligence per se** is negligence that results from violation of a statute or ordinance enacted for the protection of others (e.g., a traffic law or fire code) or of regulatory rules.



Merely breaking the law can constitute negligence because it is a departure from a legally defined standard of conduct. Such a violation constitutes negligence if the person harmed is within the class of persons intended to be protected by the statute, ordinance, or regulation and the harm suffered is of the type the statute, ordinance, or regulation was intended to prevent. For example, you may be liable if you maintain a site that does not comply with the Minnesota Building Code and a customer is injured as a result.

## Foreseeability

The duty you owe a customer is affected by the foreseeability or probability of harm. You generally are not liable for failing to prevent unforeseeable injuries. If a danger is obvious, you will not be liable for injury caused by that danger unless the harm can be anticipated.



If injured, a customer must show that you had either actual or constructive knowledge of a hazard, and that the hazard could foreseeably produce injuries of the nature that harmed the customer. In Minnesota law,

## Case Study

Adjoining property owners and their tenants sued a building owner for damage that occurred to their structures resulting from a fire that began in the building owner's store. Evidence showed that the fire's cause and severity were due to several Uniform Fire Code violations. The Minnesota Supreme Court examined the code and determined that the code violations constituted negligence per se because the injured property owners were within the class of persons the code was designed to protect and the underlying purpose of the code was to prevent the type of damages suffered by the property owners.

## Case Study

While descending a steep slope on the property of her hosts, a guest unintentionally gained momentum and collided with a utility pole and was injured. The guest sued the hosts for failing to warn her of the danger. The court held that no warning was necessary, as the danger was open and obvious.

**Negligence per se:** Negligence that results from violation of a statute or ordinance enacted for the protection of others.

## Case Study

A spectator was injured while attending a horse show late one evening at the Minnesota State Fair when she slipped in a puddle covering a step as she descended the stairs. The spectator testified at trial that the puddle hadn't been on the step when she had ascended 30 minutes earlier. The court held that the spectator could not recover for her injuries because she had failed to prove that the coliseum owners had any direct or actual knowledge of the puddle (the plaintiff did not provide evidence that the owner created the puddle or was informed of its presence). Additionally, the court found that the owner did not have constructive knowledge of the puddle in this case, since 30 minutes was not sufficient time to give the coliseum owner constructive notice of a late-night puddle in the coliseum stands occurring during a horse show.

**actual knowledge** means possession of knowledge or notice of a hazard that involved danger to another. **Constructive knowledge** means knowledge that should have been possessed through the exercise of reasonable care.



To avoid being charged with constructive knowledge, you must satisfy your continuing duty to inspect the area to identify dangerous conditions and repair them or provide adequate and appropriate warning about them. The effort you expend toward discovering the hazard through inspection must be reasonable, and you must exercise reasonable care when carrying out the warning or repair.

## Limits on Liability

Your responsibility to your customers is not absolute. All persons entering the premises have a duty to safeguard themselves, as is recognized by general legal principles as well as Minnesota's comparative fault statute. Therefore, if an entrant is injured and alleges the injury is due to your negligence, the entrant's own conduct should be scrutinized for fault.

Any damages recovered by the entrant may be reduced or avoided by comparing the fault of the direct marketer and the entrant. A permitted entrant is allowed to assume that you have exercised proper care to make the premises safe, and is not required to be alert for unusual circumstances or to use extraordinary caution. However, he or she must exercise reasonable care for his or her own safety.

## Insurance

Many events are beyond our control, no matter how diligent or careful we are. Insurance can help you manage risks and increase your ability to recover from such events. However, you must make sure you have adequate coverage. To adequately cover your business, objectively review the activities occurring or promoted on the premises, including known hazards and foreseeable misconduct, and assess all facets of the business activities—for example, entrance by delivery persons, prospective employees, inspectors, and refuse haulers as well as customers.

Establish a relationship with your insurance agent(s) and maintain consistent communication. Keep the agent fully apprised of all changes to your business, including expansion, use of new sites, and addition of machinery or new products, so he or she can adjust your coverage accordingly. If you fail to adequately inform your agent of something in an effort to maintain a lower premium, you could be denied coverage if a problem does arise.

**Actual knowledge:** Possession of knowledge or notice of a hazard that involved danger to another.

**Constructive knowledge:** Knowledge that should have been possessed through the exercise of reasonable care.

## *Homeowner's Liability Insurance vs. Business Liability Insurance*

Even if you conduct your business at or around your home, a standard homeowner's insurance policy will likely not be adequate because commercial uses are generally excluded. Thus, a standard homeowner's policy will likely not cover a customer if he or she is injured on the premises. Work with your agent to inquire into, and obtain, the necessary business insurance. This may be as simple as adding a commercial enterprise rider to your homeowner's policy.

### *Language in Policies*

A common area causing disputes between the insurance company and the insured is the language used in the policy. It is important that you carefully review your policy or have an attorney review and explain your coverage to you with particular emphasis on exclusions from or limitations on the policy's coverage.

First, make sure the proper persons or entities are insured. Does the definition of the insured person include the business entity (if one exists) or you personally?

Second, be sure you understand what premises are insured. Do the insured premises include your retail business, manufacturing site, distribution site, production area, barn, or warehouse? Review your insurance policy to make sure the definition of "premises" is sufficiently broad to encompass all structures and aspects of the operation.

Third, confirm that the damages or injuries most likely to be suffered are covered by the policy. Be careful that what constitutes damage or injury is not too narrowly defined to provide the necessary coverage.

Be sure you understand how conduct affects your coverage. Insurance policies generally do not cover willful, intentional, or even reckless conduct. For example, a reckless environmental spill, failure to repair a particularly dangerous hazard, or intentionally harmful or violent acts of an insured or its employees or agents generally are not covered.

### *Notice and Cooperation*

To trigger coverage, you must inform the insurance company that a covered event has occurred and describe the nature of the injury. You most likely are required to provide the notice within a certain period of time, usually measured in terms of hours. Failure to do so may void coverage. This is especially true in situations involving physical injury to a person, since the insurance company may want to move quickly to preserve evidence, interview witnesses, and conduct other aspects of investigation.

Following timely notice you normally will be required to cooperate with the insurance company's efforts to determine the cause and amount of damages. You may be required to provide



sworn statements and access to your premises and employees. Failure to do so may result in the denial of coverage.

## *Deductibles*

A **deductible** is a dollar value that damage must exceed before the insurer will compensate the insured for a loss. Coverage excludes the amount of the deductible. Scrutinize your policy and speak with your agent to make sure you understand both the amount of the various deductibles, and under what circumstances they apply.

## *Workers' Compensation Insurance*

Minnesota's workers' compensation law requires employers to pay compensation for the personal injury or death of an employee in the workplace. The compensation includes wage replacement, payment of medical and rehabilitation costs, and benefits paid to an employee's dependents in case of death. If you have employees, confer with several licensed insurance agents who sell workers' compensation insurance to review your business and obtain quotes before choosing workers' compensation insurance.

Individually run or family-run sole proprietorships in which all employees are the operator's spouse, parents, or children may not have to obtain workers' compensation coverage. Partnerships in which the employees are a partner or a spouse, parent, or child of a partner may be exempt. Certain closely held corporations, limited liability companies, and family farm operations may also be exempt. Contact the Minnesota Department of Labor and Industry to determine whether your enterprise is subject to Minnesota's workers' compensation law.

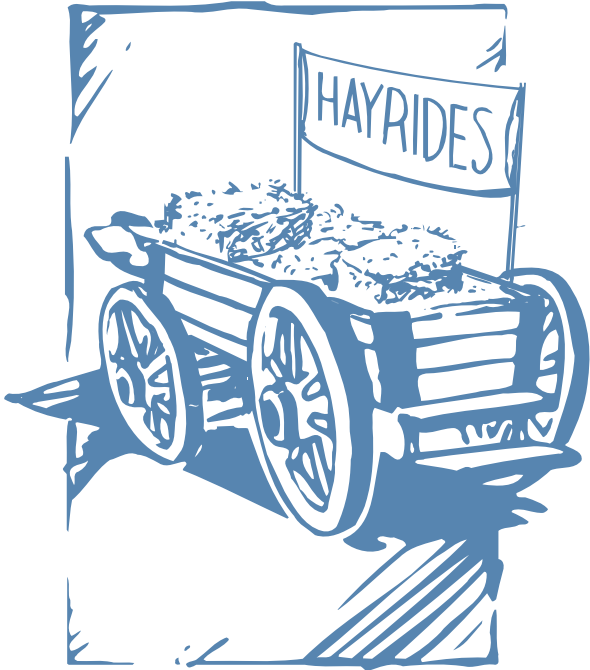
## **Risk Management Strategies**

The following suggestions can help you manage the risks associated with any business enterprise, including direct marketing.

### *Inspect, Repair, Warn*

Regularly inspect your premises for hazards or hidden conditions. How often and thoroughly you need to inspect depends on factors such as the location, type and constancy of use and whether the hazards likely to appear are open and obvious or are within the reasonable expectation of the persons entering your property. For example, a slippery substance on the floor of a grocery store left for an hour in a highly trafficked area is clearly a breach of duty to inspect. A mud puddle covering a path in an outdoor nursery is not so clearly a breach, provided it isn't covering another hazard.

When you discover a hazard, repair it or warn customers about it. Providing a warning may be less difficult or costly than repairing the hazard. However, some dangers remain unreasonably



**Deductible:** A dollar value damage must exceed before an insurer will compensate for loss.

dangerous even with a warning, and should always be addressed. For example, say you had a leaky gutter directly above the only entrance to your shop that resulted in formation of a large sheet of ice in front of the entrance during winter. Merely warning about the existence of the hazard would be insufficient in this circumstance.

## Learn and Follow Laws, Regulations, and Ordinances

It takes time to learn about all laws, regulations, and ordinances applicable to your business. However, the law requires you to be aware of all such regulations. Considering the legal and financial consequences of failing to adhere to such requirements, it is time well spent.

Your business site may be subject to zoning requirements and other city or county ordinances limiting the uses to which it may be put. The premises are likely subject to building and fire codes, and possibly restrictive covenants as to use. The building may be a landmark, or located on property protected by state or federal law. Inquire with the appropriate officials to learn about any use restrictions.

Your direct marketing activity may require oversight by a regulatory agency (e.g., sale of edible products is regulated by state and federal laws and regulations that require inspection and licensing). A business or its employees and agents must be certified or licensed to conduct certain activities. Contact trade associations and agencies charged with oversight for more information.

## Use Disclaimers

You can attempt to limit your liability by having the customer or other entrant, in advance of entering or engaging in the business enterprise, sign an **exculpatory contract** (more commonly known as a disclaimer or waiver and release from liability). The purpose of such a contract is to limit your exposure to liability by having customers acknowledge the risk and indicate that they are proceeding at their own discretion despite the risk.

Exculpatory contracts are considered valid if the service does not involve abnormally hazardous activities and if the contracts are not ambiguous or overbroad; do not purport to exonerate the landowner from liability for intentional, willful, or wanton acts; and are not against public policy. However, the courts may consider them invalid if there is a disparity of bargaining power between the parties or the service being offered is a public or essential service (e.g., services offered by common carriers, hospitals, public utilities, and innkeepers). For example, there is no disparity of bargaining power between the parties when a person voluntarily chooses to pursue an activity that is readily available elsewhere.



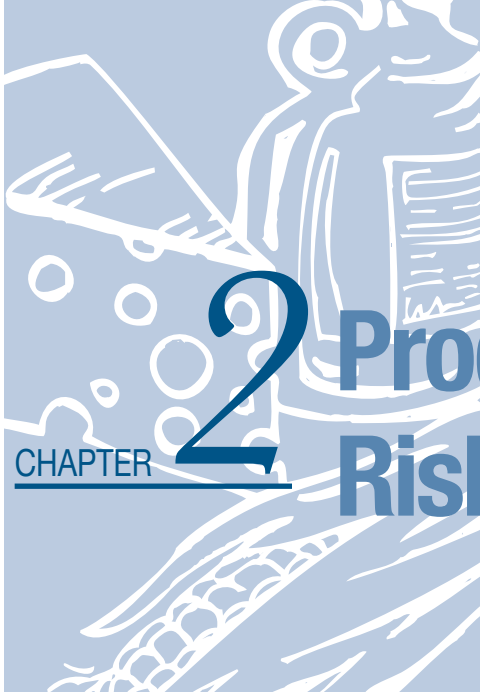
**Exculpatory contract:** An agreement to forgo or waive one's right to a legal claim of negligence. Also known as a disclaimer or waiver.

### Case Study

A student who enrolled in a skydiving course sued his instructor for injuries incurred when the parachute failed to open properly. The court concluded that there was no disparity of bargaining power between the parties, skydiving lessons were not an "essential service," and the exculpatory clause was not vague or overbroad, as it limited only the instructor's negligence (as opposed to attempting to waive liability for intentional wrongs).







CHAPTER

# 2 Product-Associated Risks



A manufacturer or seller may be found at fault for products-related injuries to a person or property. If a product you produce or sell is involved in an injury, a suit may be brought against you on the theories of negligence, strict liability, or breach of warranty. In any of these situations, the injured person must be able to prove that he or she was injured by the product.

You are expected to produce and sell products that are fit for their intended use and for uses that are unintended but reasonably foreseeable. This means that you are expected to design, manufacture, and give instructions relating to or warning about the product's intended use and about misuse that is unintended but is nonetheless reasonably foreseeable.

## Case Study

A child's parent sued a window screen manufacturer after the child fell through a second-story apartment window, on the basis that the screen was defectively designed so as to fail to keep persons from falling through it. The court determined that the window screen manufacturer had no duty to design a screen that would prevent a child's accidental dislodging of it and fall through the window, that the screen was not unreasonably dangerous when used for ventilation, that the child was not injured by a danger inherent to the product or by the screen itself, and that the screen manufacturer had no duty to warn potential users that screens would not keep children from falling through the window.

## Negligence

You must use reasonable care in designing, manufacturing, and providing sufficient instructions or warnings about your product. A person is negligent and will be found liable for damages if (1) a duty of care is owed to another; (2) that duty is breached; (3) the breach causes injury; and (4) the injury results in damages.

When designing a product, you must exercise reasonable care to avoid unreasonable risk of harm to the consumer when the product is put to its intended use or to an unintended but reasonably foreseeable use. What "reasonable care" means in this case depends on the circumstances, including the likelihood and seriousness of the potential harm compared to the feasibility and burden of precautions that would prevent it.



Sometimes a safely designed product leaves the possession of the producer in a condition that wasn't intended by its design, making it unreasonably dangerous. For example, you design a safe product, but something happens during construction or manufacture that renders it unsafe, such as failing to follow the design specifications. If an injury occurs, the person injured may allege that the product



was manufactured in a negligent manner. To avoid this, exercise reasonable care in manufacturing, inspecting, testing, and assembling your product so that it is safe when used for its intended purpose, and for unintended purposes that could be reasonably expected.

An injured person also may allege negligent warning or instruction, meaning that you didn't provide sufficient instructions or warnings about the product. You must provide adequate instructions for the safe use of the product and warn of dangers inherent in the improper use of the product when those improper uses are reasonably foreseeable.

## Strict Liability

Strict liability differs from negligence in that negligence focuses on the conduct of the direct marketer, whereas strict liability focuses on the condition of the product. Strict liability imposes the costs of the injury caused by a **defect** in a product upon the direct marketer without requiring proof of negligence or even proof of a contractual relation between the direct marketer and the person injured.

To establish strict liability for a defective product, the person injured must show that the product was purchased in a defective condition unreasonably dangerous for its use, that this defective condition existed when the product left the hands of the direct marketer, and that the defect caused the injury suffered. The defect may be due to a defective design, the use of defective materials, defective manufacture, defective installation, or defective warning or instruction.

To avoid strict liability, exercise reasonable care in performing all of the above responsibilities. If you do not and the product is in a defective condition, you will be liable if that defective condition makes a product unreasonably dangerous to the consumer and causes injury.



### Case Study

A parent of a child injured in a sledding accident (the child was kneeling on the sled, as opposed to sitting on it) brought a products liability suit against the sled seller and manufacturer on the basis that both failed to provide warnings regarding its safe use. The court decided that all of the elements necessary to prove strict liability against the seller and manufacturer were present: The sled was in a defective condition unreasonably dangerous to the user because it failed to provide adequate warnings or instructions for safe use, the manufacturer made the sled and the store sold the sled involved in the accident, and the defective condition was a direct cause of the child's injuries.

## Breach of Warranty

Product liability may also arise due to a claim of breach of **warranty**. When a consumer claims breach of warranty, he or she is saying that the product did not perform appropriately or as promised. To claim breach of warranty, a consumer must prove that a warranty exists, that the warranty was breached, and that the breach harmed him or her.

The law recognizes three types of warranties: implied warranties of merchantability, implied warranties of fitness for a particular purpose, and express warranties. The difference between implied and express warranties is that an implied warranty is created as a matter

**Defect:** A condition not contemplated by the user that renders the product unreasonably dangerous to the user.

**Warranty:** A promise regarding the quality or quantity of goods made in conjunction with their sale or lease.



of law and solely by virtue of the existence of the sales transaction, whereas an express warranty exists when the manufacturer or seller creates it.

## *Implied Warranty of Merchantability*

Implied warranty of merchantability means the product is fit for the ordinary purpose for which it was intended. This warranty attaches automatically to a product when the manufacturer or seller is also a **merchant** of the product (i.e., deals in, or purports to have knowledge or skill peculiar to, the product). You are a merchant if you engage in commercial activity that involves selling a product to consumers. A breach of the implied warranty of merchantability occurs when the product fails to perform for the purpose it was reasonably intended.

You can disclaim implied warranties of merchantability by using expressions such as “As Is” or “With All Faults.” However, you must put these expressions in writing and make them conspicuous so as to clearly inform the buyer (prior to the sale) that (1) the product is being sold on an “As Is” or “With All Faults” basis, and (2) all risk as to the quality and performance of the product is on the buyer.

## *Implied Warranty of Fitness*

An implied warranty of fitness exists automatically if you know the buyer’s purpose for buying the product, you know the buyer is relying on your skill or judgment to provide a product appropriate for that purpose, and the buyer relies on your skill or judgment in that way. A breach occurs when the product’s performance fails to conform with the specific purpose for which the buyer purchased it. Again, you can avoid this warranty by providing the conspicuous written disclaimer.

## *Express Warranties*

Express warranties are created by the direct marketer. If you represent that a product will perform a certain way, and if the buyer relies on that statement to purchase the product, your representation becomes an express warranty. If you describe a product and the buyer relies on the description when purchasing the product, the description becomes an express warranty. If you use a sample or model and the buyer relies on the fact that the product will be identical to the sample or model used, then the buyer’s impression or beliefs based upon the

### **Case Study**

A lumber company that used a faulty design and inadequate materials in building a grain storage building that later collapsed could be held liable for breach of implied warranty of fitness where the lumber company held itself out as competent to perform the contract, and the farmers’ cooperative that owned the building had no particular expertise in the kind of work contemplated; did not furnish any plans, designs, specifications, details, or blueprints; and indicated its reliance on the experience and skill of the lumber company after making known to it the specific purposes for which the building was intended.



**Merchant:** Someone who deals in, or purports to have knowledge or skill peculiar to, a particular product.

sample becomes the warranty. A breach of an express warranty occurs when the product does not confirm to the representation made.

## Defenses to Product Liability Claims

Minnesota law recognizes several defenses to products-related claims.

### *Useful Life*

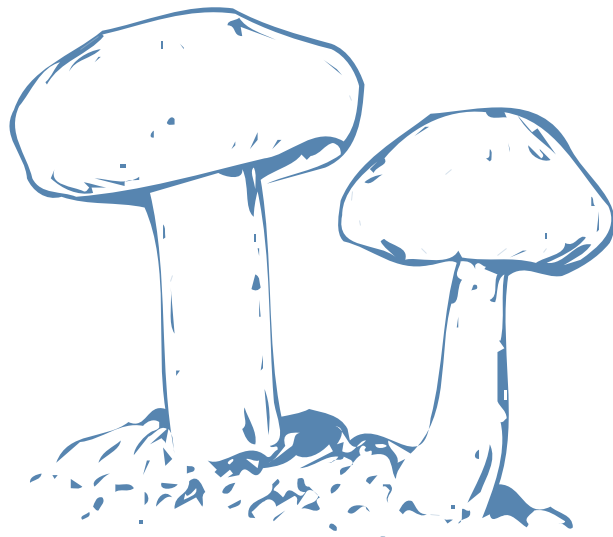
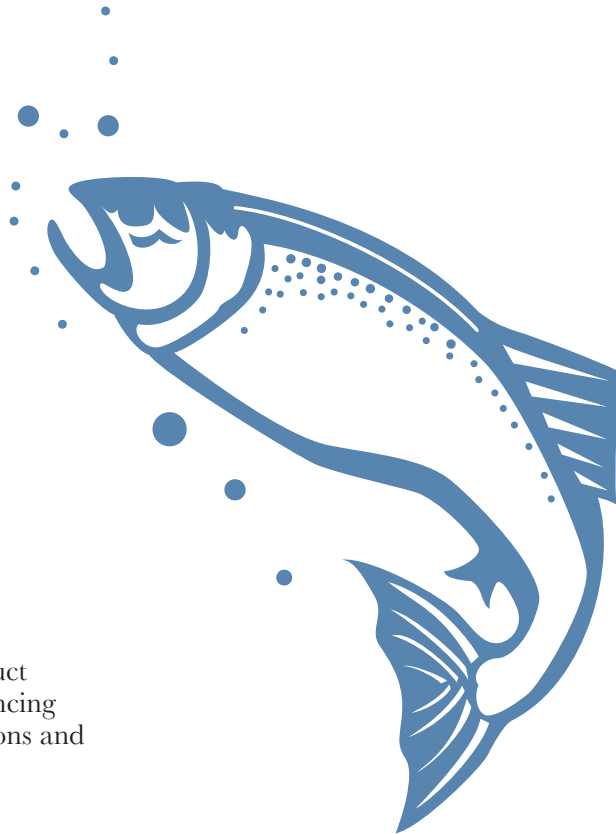
You can argue that the product's useful life had expired by the time the injury or breach of warranty occurred. The period of time in which a product is expected to be useful will be determined by referencing similar products, taking into account present conditions and past developments within the industry.

### *State-of-the-Art*

You can assert that you should only be expected to guard against or warn about defects if it was technologically feasible to detect them at the time of production. In this type of defense, known as a state-of-the-art defense, the law focuses on the consumer's expectation of the product. You argue that the consumer should have lowered his or her expectations.

Whether this is an effective defense depends on whether there is a significant lapse in time between the period during which the product was state-of-the-art and the time of purchase. The passage of a significant period of time supports your argument that the purchaser was on notice that the product was not new, since it did not look like it had been manufactured recently. The argument is most effective if you have tried to keep the product line state-of-the-art.

You can assert that you should only be expected to guard against or warn about hazards if it was technologically feasible to detect them at the time of production. Again, efficacy of this type of defense depends on the existence of a discrepancy between the period during which the product was state-of-the-art



and the time of purchase and on whether you have tried to keep the product line state-of-the-art. You may have a duty to warn when the state of the art changes and existing products are rendered unreasonably dangerous.



### *Alteration or Misuse*

You must provide a product that will be safe when used as intended and when misused in a way that is reasonably foreseeable. However, you will not be responsible if the product is altered or abused in a way that is not foreseeable, or put to a use that is not foreseeable. Alteration or misuse by the consumer can be used to show that the product was not unreasonably dangerous at the time it left you.

### *Inherent Danger*

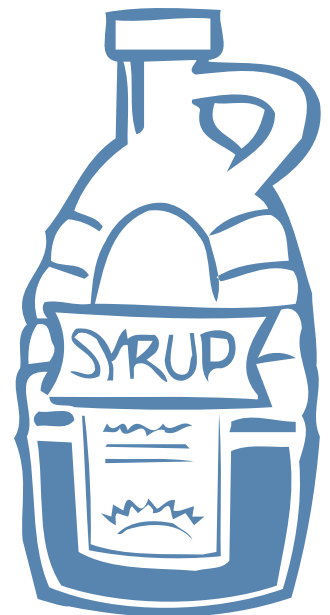
Some products (e.g., knives or explosives) are inherently dangerous and can't be designed in a way that is totally safe because the safety features would render the product useless. In such cases where the danger is open and obvious, the consumer's conduct will be scrutinized to see if his or her actions reveal appropriate consideration for his or her own safety.

### *Comparative Fault*

Minnesota's comparative fault and statute law allows the consumer's conduct when using the product to be compared with yours. This statute prohibits any recovery by a consumer if his or her fault is greater than yours. Even if you are more at fault than the consumer, the law allows the consumer's damages to be reduced by the percentage of fault attributable to the consumer.

### *Statute of Limitation*

A claim may be barred by a statute of limitation if it is brought too long after the alleged injury or damage occurred. Statutes of limitation can range from three to six years, depending on the injury incurred.



## Risks Associated With Food Products

If you sell products to be consumed by humans or animals, you are subject to possible claims of negligence if the product is spoiled or unwholesome. Sale of unwholesome food may also expose you to regulatory enforcement action. Regulations governing the site, methods, and personnel associated with preparing, processing, packaging, and selling edibles are beyond the scope of this publication.

If you offer edible products for human or animal consumption, you will likely be required to undergo licensing and inspection processes mandated by the state and/or federal government. It is recommended that you also seek legal assistance before you begin your operation to determine the identity of the regulatory agencies by which you will be regulated.



# 3 Business Structures for Direct Marketers



You can conduct your business through one of a variety of business structures. Each has advantages and disadvantages. Some are legally considered a separate legal identity, and, if established correctly, provide a liability shield. Each structure is accompanied by tax-related issues, so consult your accountant when choosing your business structure. Depending on your circumstances, the tax consequences may be the determining factor.

## Sole Proprietorship

In a sole proprietorship, you own and operate the business essentially as yourself. Therefore, you are personally responsible for it. This structure lets you minimize start-up costs, simplify management, address fewer regulatory/reporting requirements than are required of certain business entities, and avoid the burden of corporate formalities. Disadvantages include personal liability for the debts and liabilities of the business, difficulties in transferring ownership, and exposure of personal assets to the claims of business creditors.

## General Partnership

A general partnership is a contractual relationship between two or more persons to carry on an activity as co-owners for profit. General partnerships are easy to form and require no corporate formalities. They provide a pass-through taxation structure (the partnership's income is not taxed at the partnership level but instead is taxed once it is received by the partners) and low start-up costs. A significant disadvantage is joint and several liability for all part-



ners. This means that each partner is liable for some or all of the debts and liabilities of the general partnership if the general partnership is unable or unwilling to pay them.

## Limited Partnership

A limited partnership is a business structure formed by two or more persons, at least one of whom is a general partner, and at least one of whom is a limited partner. General partners are allowed to manage the partnership, but are also exposed to liability for partnership debts and obligations. Limited partners are protected from partnership liability, have an expectation of receiving the income of the partnership, but are not allowed any role in managing the limited partnership. This type of structure is also useful because it allows general partners to benefit from capital provided by limited partners without relinquishing management and control of the entity.



## Corporation

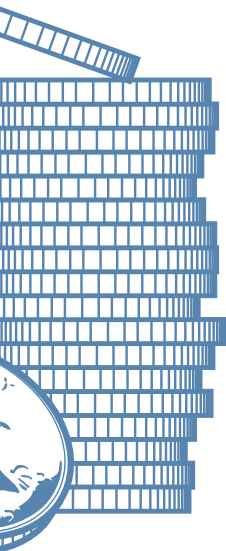
A corporation's biggest advantage over sole proprietorships and general partnerships is the liability shield it offers. This means that the owners of the corporation (the shareholders) can be "shielded" from the debts and liabilities of the corporation. Other advantages include transferability of ownership and perpetual life. Disadvantages include the necessity of conducting regular shareholder and director meetings, detailed record-keeping requirements, start-up costs, and the need to maintain corporate formalities to protect the liability shield. Tax implications should also be considered when deciding whether to incorporate.

### *Sub-Chapter C Corporations*

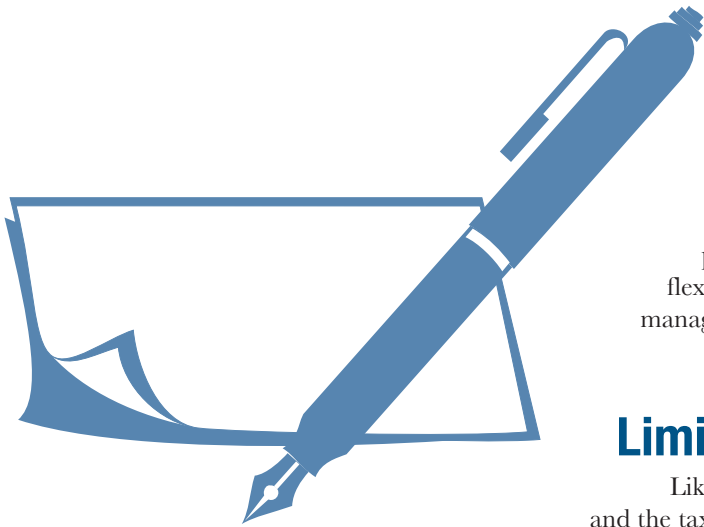
In sub-chapter C corporations, income is taxed once at the corporate level and again at the individual shareholder level upon distribution. Qualifying corporations can avoid this double taxation by electing to be a sub-chapter S corporation.

### *Sub-Chapter S Corporations*

In sub-chapter S corporations, profits and losses "pass through" the corporation and are reflected on the individual shareholders' taxes. In order to qualify as a sub-chapter S corporation, the corporation has to meet



certain requirements and file a sub-chapter S corporation election with the Internal Revenue Service. Many corporations whose shareholders are few or are family members choose this option. However, you should consult your accountant to determine the best structure for you.



## Limited Liability Partnership

A limited liability partnership (LLP) is a general partnership that registers as an LLP with the Minnesota secretary of state. The advantage of an LLP is its ability to shield individual partners from personal liability that arises merely because they are partners while still allowing for pass-through tax treatment of revenue. An LLP is also more flexible than a corporation because it does not require the formal management procedures or arrangements required by corporations.

## Limited Liability Company

Like an LLP, a limited liability company offers both limited liability and the tax status of a partnership. The LLC ownership form is therefore substantially similar to LLPs and sub-chapter S corporations.

## Cooperative

Minnesota cooperatives are **entities** organized on a “cooperative plan,” established primarily to provide services to their members and controlled on a democratic basis. Because cooperatives are formed for the purpose of providing services to members at the lowest possible cost, they are not organized to produce a profit for investors. Rather, any income remaining after expenses is distributed to members as a patronage refund.



**Entity:** A loose description of legal structures that separate ownership of the business enterprise and liability therefor from the ownership of the legal structure. For example, corporations, limited liability partnerships, limited liability companies, and cooperatives are entities. Sole proprietorships and general partnerships are not.



Form of Business Entity	Advantages	Disadvantages
<b>Sole Proprietorship</b>	<ul style="list-style-type: none"> <li>• Easy start-up</li> <li>• Minimum start-up costs</li> <li>• Streamlined management</li> <li>• Minimal business formalities</li> </ul>	<ul style="list-style-type: none"> <li>• Personal responsibility for the debts and liabilities of the business</li> <li>• Creditors can reach personal assets</li> <li>• Difficulty transferring ownership</li> <li>• Finite duration</li> </ul>
<b>General Partnership</b>	<ul style="list-style-type: none"> <li>• Low start-up costs</li> <li>• Simple formation</li> <li>• Minimal business formalities</li> <li>• Pass-through taxation</li> </ul>	<ul style="list-style-type: none"> <li>• Personal responsibility for the debts and liabilities of the business</li> <li>• Limited duration</li> </ul>
<b>Limited Partnership</b>	<ul style="list-style-type: none"> <li>• Partners have the flexibility of choosing to be a limited partner or a general partner</li> <li>• Allows general partners to find a source for influx of cash from a limited partner without relinquishing control of managing the partnership to limited partners</li> <li>• Allows limited partners to benefit from the liability shield and income stream of the partnership</li> </ul>	<ul style="list-style-type: none"> <li>• Initial registration with the state</li> <li>• General partners are subject to personal responsibility for the debts and liabilities of the business</li> <li>• Limited partners are not allowed to participate in managing the partnership</li> <li>• Formal management and record-keeping requirements</li> </ul>
<b>Corporation</b>	<ul style="list-style-type: none"> <li>• Liability shield</li> <li>• Perpetual life</li> <li>• Relative ease in transferring ownership interests</li> </ul>	<ul style="list-style-type: none"> <li>• Start-up costs</li> <li>• Initial filing with the state</li> <li>• Annual registration</li> <li>• Requires regular shareholder and board of directors meetings</li> <li>• Detailed record-keeping requirements</li> <li>• Maintenance of liability shield requires maintaining corporate formalities</li> </ul>
<b>Limited Liability Partnership</b>	<ul style="list-style-type: none"> <li>• Liability shield</li> <li>• Pass-through taxation</li> <li>• Less formal management procedures than are required for corporations</li> </ul>	<ul style="list-style-type: none"> <li>• Requires an initial filing with the state</li> <li>• Annual registration and fee</li> <li>• Requires more than one person to form</li> </ul>
<b>Limited Liability Company</b>	<ul style="list-style-type: none"> <li>• Liability shield</li> <li>• Can be formed by one or more persons</li> <li>• Perpetual duration</li> <li>• Members can choose benefits of partnership taxation method</li> </ul>	<ul style="list-style-type: none"> <li>• Requires initial filing with the state</li> <li>• Annual registration</li> <li>• Management and formal record-keeping formalities must be observed</li> </ul>
<b>Cooperative</b>	<ul style="list-style-type: none"> <li>• Created by persons with common economic interests</li> <li>• Can be organized by one or more persons</li> </ul>	<ul style="list-style-type: none"> <li>• Requires initial filing with the state</li> <li>• Periodic registration</li> <li>• Limited purpose</li> <li>• Management, taxation, and record-keeping formalities must be observed</li> </ul>

# Employment Issues

If you hire employees, you must comply with state and federal regulations regarding hours, wages, conditions of employment, and workers' compensation insurance. You also may be responsible for employees' actions if you fail to take reasonable precautions to guard against employee misconduct. This section addresses the bases for such liability, and methods commonly used to avoid or minimize exposure.



## Case Study

A tenant who was assaulted by an apartment manager sued the owner and operator of the apartment complex, alleging negligent hiring. The manager had a history of violent offenses, and the court held that the employer's failure to make a reasonable investigation into the employee's background constituted a breach of its duty to exercise reasonable care in hiring the manager. The court stated that under the circumstances where prospective employees are furnished passkeys permitting entrance to tenant residences, the employer must use reasonable care to investigate the prospective employee's competency and reliability prior to employment. However, this does not mean that all employers are required to make inquiry as to a prospective employee's criminal record, even where it is known that the employee is to regularly deal with members of the public.

## Liability for Employees' Acts

In Minnesota, an employer can be held responsible for damages caused by an employee acting within the scope of employment. The employer can also be held liable for the situations involving negligent hiring, negligent retention, and negligent supervision whether or not the employee's actions are considered to be within the scope of employment.

### *Negligent Hiring*

You may be accused of negligent hiring if you hire a person with known or reasonably discoverable dangerous propensities when you should have foreseen that he or she posed a threat of injury to others.

The law requires the employer to exercise reasonable care under the circumstances. The definition of "reasonable care" depends on the responsibilities of the job. The primary consideration in determining whether an employer breached the duty of reasonable care is whether the employer made a reasonable investigation before hiring the individual.





## Negligent Retention

Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated the employee's unfitness for the position, but fails to take further action such as investigation, discharge, or reassignment. The employer is expected to minimize the risks created by exposing members of the public to particularly dangerous individuals. The difference between negligent hiring and negligent retention focuses on when the employer was on notice that an employee posed a threat and failed to take steps to insure the safety of third parties.

## Negligent Supervision

Negligent supervision is the failure of an employer to exercise ordinary care in supervising the employment relationship so as to prevent the foreseeable misconduct of an employee from causing harm to other persons. This means you can be liable if your employee, acting within the scope of employment, injures another person or property. Negligent supervision requires that the person injured prove the employee's actions occurred within the scope of his or her employment.



## Minimizing Risk

You can minimize the risk of being liable for negligent hiring, retention, or supervision by conducting appropriate background checks before hiring the employee and exercising reasonable care in supervising the employee. Be consistent about enforcing procedures for oversight of employee work-related responsibilities and maintain strict adherence to disciplinary procedures.

## Case Study

A company had employed a man from 1977 to 1979 and again from 1984 to 1988. The gap in employment occurred when the man was imprisoned for killing a co-employee. Upon release from prison, the man was rehired as a custodian but due to repeated workplace confrontations (harassing female co-employees and challenging a male co-employee to a fight) was transferred twice, landing at another facility in August 1987. A woman was assigned to his maintenance crew in April 1988. He began to harass and threaten her at work and at home. Near the end of June, the woman asked the company to transfer her. On July 1 she found a death threat scratched on her locker door at work. The man did not appear for work on or after July 1, and the company accepted his formal resignation July 11. On July 19, the man shot and killed the woman in her driveway. A wrongful death suit was subsequently brought against the company based on the theories of negligent hiring, retention, and supervision of a dangerous employee.

The court held that the claim of negligent supervision was not viable because the man was neither on company property nor using company property when he killed the woman. Further, unlike the apartment manager case (case study, page 20), the company's act of hiring the man did not breach a legal duty to the woman because the specific nature of his employment did not create a foreseeable risk of harm. However, the court found that the man's work history and escalation of abusive behavior revealed the foreseeability of his acting violently against the woman. The court also determined that further proceedings would be required to determine whether the company breached its duty to the woman by failing to terminate or discipline the man, or whether the breach was the cause of her death.



## Hiring Issues

### *Background Checks and Testing*

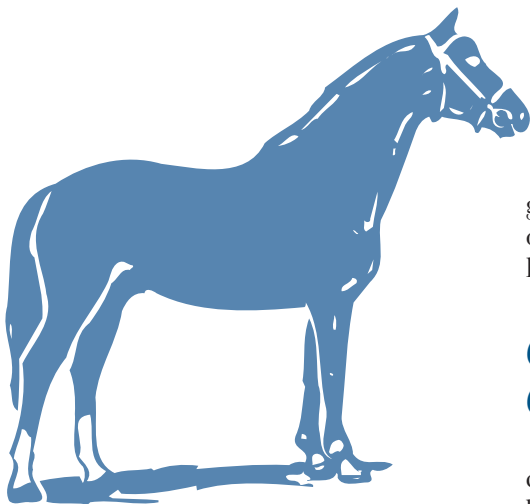
Some forms of background checks and pre-employment testing are allowed for all applicants, while others are allowed only for applicants who have received a conditional offer of employment contingent upon passing the check or test. Most employee testing is highly regulated by law. Minnesota law contains very complex requirements regarding drug and alcohol testing. Application of laws regarding physical, psychological, and personality testing differ depending on whether the person is a pre-offer applicant, post-offer but pre-employment applicant, or employee. Obtain legal advice when considering such testing.

### *Inappropriate Questions*

You may not ask a prospective employee questions that don't reasonably relate to the job. Generally speaking, do not ask questions regarding marital status, employment history beyond the previous five years, gender, race, creed, disability, color, religion, national origin, sexual orientation, date of military discharge, pregnancy, children, use of birth control, test status with respect to any disease, spouse's occupation, arrests, languages spoken at home, credit rating, physical impairments, receipt of workers' compensation benefits, height and weight, or tobacco use.

### *Criminal Background Check*

You can obtain limited criminal background information by contacting individual counties, the Minnesota Bureau of Criminal Apprehension (BCA), and the federal court. The county can release information without the consent of the applicant, but the information provided by the county will include only adult convictions for the past 15 years. It will not include juvenile records or arrests. To obtain criminal history from the BCA, you will need the applicant's consent. The results will include all arrests and criminal convictions, but exclude any juvenile records.



## *Driving Record*

If the job requires the employee to drive, you may conduct a driver's license check to obtain information about license validity, driving-related convictions, suspensions, and revocations. At a minimum, the potential employee should affirm in writing that he or she has a valid driver's license.

## *Credit Check*

While a great deal of information is available from credit reporting agencies, the Federal Fair Credit Reporting Act and the Minnesota Access to Consumer Reports Act restrict the compilation and use of such information. Both acts establish disclosure, notice, and consent requirements for both consumer reports and investigative reports. A consumer report is prepared by a consumer reporting agency, and addresses credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and mode of living. An investigative report obtains information regarding a consumer's character, general reputation, personal characteristics, or mode of living by personal interviews with friends, colleagues, associates, or neighbors.

Numerous restrictions apply to obtaining and using such reports for employment purposes. Obtain legal advice before demanding either type of report.

## *Additional Requirements*

Minnesota law requires some form of background check under certain circumstances. For example, home care and board and lodging providers and personal care attendants are subject to background checks. Property owners are required to perform background checks on property managers who have access to a tenant's dwelling unit. Contact an attorney or a trade association to determine whether certain background checks are mandated for your employees.

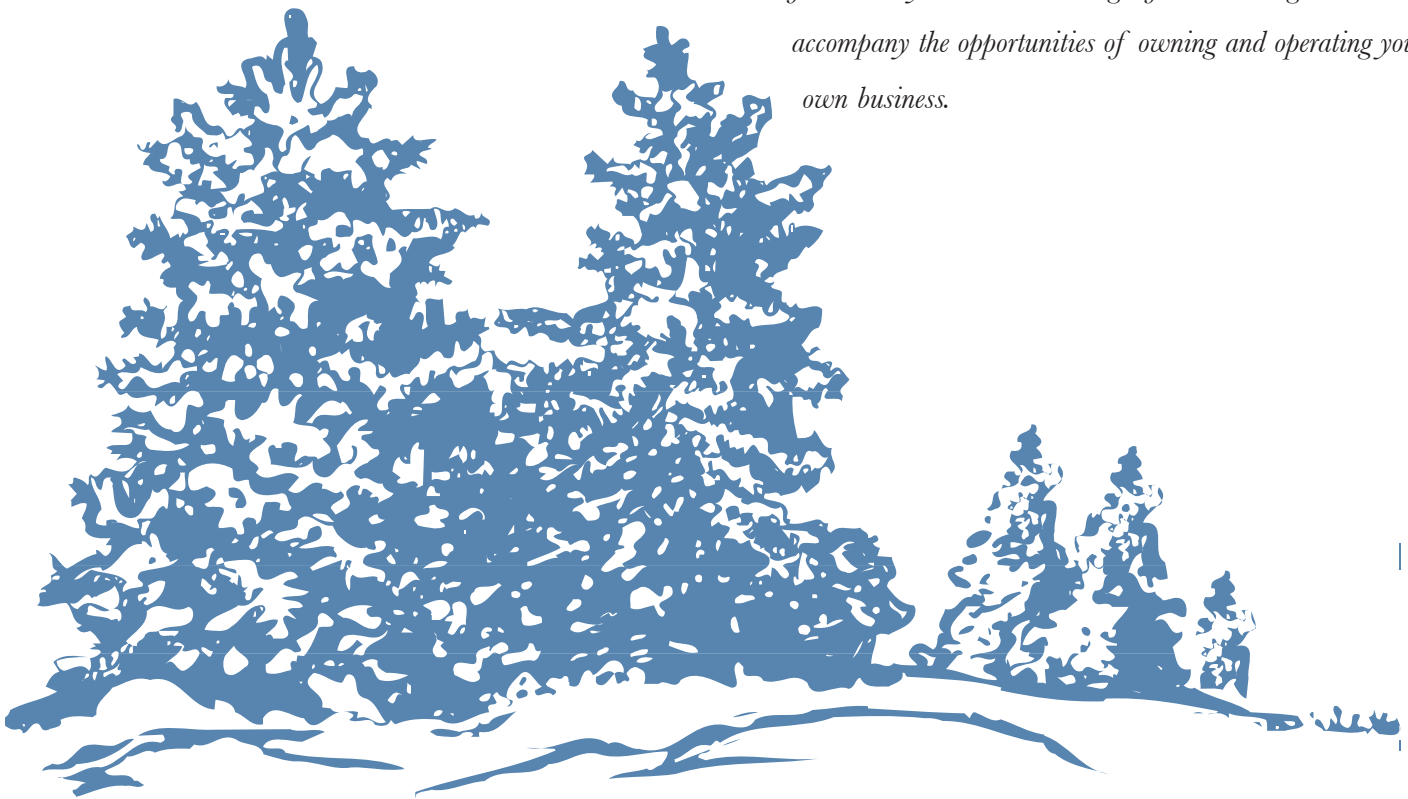


# Conclusion

*The legal considerations associated with forming a direct marketing business can initially appear quite formidable. However, once you identify them, you can take the necessary steps to eliminate or manage the risks.*

*This publication is not intended to be legal advice. Use it to become acquainted with the numerous legal principles you should discuss with your attorney. The publication points out circumstances where liability can arise. It explains how exposure to these circumstances can be limited.*

*We hope that after reading this publication you feel more comfortable in your own knowledge of the challenges that accompany the opportunities of owning and operating your own business.*







# Checklist

The following checklist is intended to provide a list of items for which you should seek legal or other professional advice as you become involved in direct marketing. This list will not apply to all endeavors; nor is it intended to be comprehensive.

- \_\_\_ Choose, form, and name a business structure, properly filing the entity with the office of the Minnesota Secretary of State, if necessary, and registering it with the proper regulatory agencies.
- \_\_\_ Obtain all federal and state tax and employer identification numbers.
- \_\_\_ Obtain workers' compensation insurance, if necessary.
- \_\_\_ Obtain employee withholding information, if necessary.
- \_\_\_ Obtain a Minnesota unemployment compensation employer identification number, if necessary.
- \_\_\_ Determine whether you will need to purchase or lease any structure and/or real estate on which it is located.
- \_\_\_ Determine whether you will require any occupational or environmental licenses, permits, or bonds.
- \_\_\_ If you seek financing to help with your start-up costs, have your attorney review all loan agreements and related financing documents.
- \_\_\_ Confer with your accountant to determine what type of information should be compiled to make the necessary tax-related filings.
- \_\_\_ Confer with your insurance agent to make sure you have the appropriate liability and property damage insurance coverage. If you feel it necessary, ask your attorney to review your policy with you.
- \_\_\_ You may wish to protect your intellectual property rights by seeking patent, trademark, or copyright protection.
- \_\_\_ Seek legal advice when hiring, testing, disciplining, and terminating employees.

# Glossary



This glossary is intended to help you understand terms used in this publication. Keep in mind that all legal terms are to some extent context specific. Therefore, consider the following definitions only in the specific context in which they are used within this publication.

**Actual knowledge:** Possession of knowledge or notice of a hazard that involved danger to another.

**Breach:** Failure to act in conformity with a duty or standard of conduct required of a person.

**Constructive knowledge:** Knowledge that should have been possessed through the exercise of reasonable care.

**Deductible:** A dollar value damage must exceed before an insurer will compensate for loss.

**Defect:** A condition not contemplated by the user that renders the product unreasonably dangerous to the user.

**Disclaimer:** See *exculpatory contract*.

**Entity:** A loose description of legal structures that separate ownership of the business enterprise and liability therefor from the ownership of the legal structure. For example, corporations, limited liability partnerships, limited liability companies, and cooperatives are entities. Sole proprietorships and general partnerships are not.

**Exculpatory contract:** An agreement to forgo or waive one's right to a legal claim of negligence. Also known as a disclaimer or waiver.

**Landlord:** A person or entity with a legal right to possession of property and who rents the property to others.

**Lease:** A contract to rent property on the terms, for the period of time, and for the amount of rent agreed to by all parties to the contract.

**Liability:** Being legally responsible or obligated, or exposed to the possibility or likelihood of legal accountability.

**Merchant:** Someone who deals in, or purports to have knowledge or skill peculiar to, a particular product.

**Negligence:** The failure to exercise the care that a reasonable person would exercise. It means doing something that a reasonable person would not do, or failing to do something that a reasonable person would do.

**Negligence per se:** Negligence that results from violation of a statute or ordinance enacted for the protection of others.

**Possessor:** One or more who have direct physical control over land at a given time; for title insurance purposes, possessor has open, visible, and exclusive use.

**Product liability:** A term that encompasses a substantive area of law addressing the claims of persons who have been injured by a product, and a determination of responsibility for those damages on the part of all persons or entities in the chain of custody of the product.

**Reasonable care:** The quality of care a reasonable person would exercise in the same or similar circumstances.

**Tenant:** A person or entity that by contract has the temporary use or possession of the property of another.

**Trespasser:** A person who is on the property of another without permission.

**Waiver:** See *exculpatory contract*.

**Warranty:** A promise regarding the quality or quantity of goods made in conjunction with their sale or lease.

# Resources

## **Internal Revenue Service**

Warren E. Burger Federal  
Building  
316 North Robert Street  
Room 400  
St. Paul, MN 55101  
651-312-7777  
[www.irs.ustreas.gov](http://www.irs.ustreas.gov)

## **Minnesota Department of Agriculture**

90 West Plato Boulevard  
St. Paul, MN 55107  
651-297-2200  
[www.mda.state.mn.us](http://www.mda.state.mn.us)

## **Minnesota Department of Commerce**

85 7th Place East  
Suite 500  
St. Paul, MN 55101-2198  
651-296-4026  
[www.commerce.state.mn.us](http://www.commerce.state.mn.us)

## **Minnesota Department of Labor and Industry**

443 Lafayette Road N.  
St. Paul, MN 55155-4307  
651-296-6107  
800-342-5354  
[www.doli.state.mn.us](http://www.doli.state.mn.us)

## **Minnesota Department of Revenue**

600 North Robert Street  
St. Paul, MN 55146-7100  
651-296-3403  
800-657-3605  
[www.taxes.state.mn.us](http://www.taxes.state.mn.us)

## **Minnesota Department of Trade and Economic Development**

500 Metro Square Building  
121 East 7th Place  
St. Paul, MN 55101-2146  
651-296-6424  
800-657-3858  
[www.dted.state.mn.us](http://www.dted.state.mn.us)

## **Minnesota Office of Environmental Assistance**

520 Lafayette Road N, Floor 2  
St. Paul, MN 55155-4100  
651-296-3417  
800-657-3843  
[www.moea.state.mn.us](http://www.moea.state.mn.us)

## **Minnesota Secretary of State**

180 State Office Building  
100 Constitution Avenue  
St. Paul, MN 55155-1299  
651-296-2803  
877-551-6767  
[www.sos.state.mn.us](http://www.sos.state.mn.us)

## **USDA Rural Development Division**

Rural Development State Office  
410 Farm Credit Service Building  
375 Jackson Street  
St. Paul, MN 55101-1853  
651-602-7800  
[www.rurdev.usda.gov](http://www.rurdev.usda.gov)

## **U.S. Department of Labor**

220 South Second Street  
Room 100  
Minneapolis, MN 55401  
612-370-3111  
[www.dol.gov](http://www.dol.gov)

## **U.S. Equal Employment Opportunity Commission**

330 Second Avenue South  
Suite 430  
Minneapolis, MN 55401-2224  
612-335-4040  
[www.eeoc.gov](http://www.eeoc.gov)

## **U.S. Small Business Administration**

Minnesota District Office  
100 North Sixth Street  
Suite 610-C Butler Square  
Minneapolis, MN 55403  
612-370-2324  
[www.sba.gov/mn](http://www.sba.gov/mn)





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United States Department of Agriculture  
Risk Management Agency

# Risk Management Checklist

Print out this checklist. Answer yes or no to the following questions. Review your answers with your family and/or your business team and employees.

You may identify some risk exposure. On the other hand, you may find that you are protected against risk enough so that you have the resources to explore some new venture.

If you do not know all the dates in the “Deadlines” section, you should contact your crop insurance agent for help. If you need assistance locating an agent, go to the agent locator at <http://www3.rma.usda.gov/apps/agents/>.



**Farm-Risk-Plans.USDA.gov**  
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## Production

- \_\_\_\_\_ 1. Have you recently evaluated your risk in the event of the loss of your crops?
- \_\_\_\_\_ 2. Have you recently evaluated your risk in the event of the loss of your animals?
- \_\_\_\_\_ 3. Have you investigated other alternative production methods and their consequences?
- \_\_\_\_\_ 4. Do you have the necessary knowledge to consider an additional or alternative enterprise?
- \_\_\_\_\_ 5. Is your crop insurance protection adequate to cover a severe crop loss?
- \_\_\_\_\_ 6. Have you reviewed all of your crop insurance options with your agent?
- \_\_\_\_\_ 7. Have you conducted a Strengths, Weaknesses, Opportunities, and Threats (SWOT) analysis for your operation?
- \_\_\_\_\_ 8. Are you in an area capable of supporting irrigation?

## Marketing

- \_\_\_\_\_ 1. Do you have a current, written marketing plan?
- \_\_\_\_\_ 2. Have you coordinated your marketing plan with your goals and objectives and your financial and production plans?
3. Managing marketing risks:
  - \_\_\_\_\_ a) Are you comfortable with your knowledge of marketing opportunities?
  - \_\_\_\_\_ b) Have you reviewed your marketing options within the past 6 months?
  - \_\_\_\_\_ c) Do you understand how crop insurance revenue guarantees can enhance marketing opportunities?

## Financial

- \_\_\_\_\_ 1. Do you have a current business plan?
- \_\_\_\_\_ 2. Have you planned for a best-case scenario and developed a plan for how additional income will be used?
- \_\_\_\_\_ 3. Have you planned for a worst-case scenario and considered an alternative plan?
- \_\_\_\_\_ 4. Do you know your cost of production?
- \_\_\_\_\_ 5. Do you know your break-even costs?
- \_\_\_\_\_ 6. Do you have the knowledge to create a balance sheet, cash flow, and income statements?
- \_\_\_\_\_ 7. Do you have the knowledge to interpret important financial ratios?
- \_\_\_\_\_ 8. What is your debt-to-asset ratio?
- \_\_\_\_\_ 9. Is the growth of your net worth exceeding inflation?
- \_\_\_\_\_ 10. Have you reviewed your ratio trends with your lender?
11. Is your crop insurance protection adequate to:
  - \_\_\_\_\_ a) Repay current operating loans?
  - \_\_\_\_\_ b) Allow you to take advantage of marketing opportunities?
- \_\_\_\_\_ 12. Have you reviewed your tax liability within the past 3 months to determine your tax strategies?
- \_\_\_\_\_ 13. Have you investigated all of your potential financing options?
- \_\_\_\_\_ 14. Have you investigated all available government programs?
- \_\_\_\_\_ 15. Have you considered the trade-offs between maintaining your current investments (certificates of deposit/savings/etc.) and/or reinvesting in expanding your own operation?
- \_\_\_\_\_ 16. Do you consult a financial management consultant, lender, accountant, insurance provider, or other professional when making major financial decisions?
- \_\_\_\_\_ 17. Are you comfortable with your level of debt?



## Legal

*This list does not cover every legal risk exposure faced by farmers and ranchers, and is not meant as legal advice. You should consult an attorney to review your legal risk exposure.*

- \_\_\_\_\_ 1. Is your will up to date?
- \_\_\_\_\_ 2. Do you have a living will?
- \_\_\_\_\_ 3. Do you have a farm transfer plan or exit strategy that has been reviewed within the past 3 years?
- \_\_\_\_\_ 4. Have you recently reviewed your farm owner's insurance policy?
- \_\_\_\_\_ 5. Have you recently evaluated your risk exposure to:
  - \_\_\_\_\_ a) Liability covering the public entering your property?
  - \_\_\_\_\_ b) Liability of direct marketing?
  - \_\_\_\_\_ c) Your State department of agriculture's direct marketing regulations?
  - \_\_\_\_\_ d) Livestock breaking through fences?
  - \_\_\_\_\_ e) Environmental and pesticide issues?
  - \_\_\_\_\_ f) Land use issues with neighbors?
- \_\_\_\_\_ 6. Do you understand the provisions of all of your contracts, leases, and loans?
- \_\_\_\_\_ 7. Have you recently evaluated all the different business entity options for your operation?
- \_\_\_\_\_ 8. Do you have a working relationship with your attorney and accountant and have you reviewed your goals and objectives with each?
- \_\_\_\_\_ 9. Are you in compliance with such regulations as worker protection, pesticide use records, vehicle registrations, and necessary safety inspections?

## Human

- \_\_\_\_\_ 1. Is your personal insurance coverage current:
  - \_\_\_\_\_ a) Do you have adequate medical and disability insurance?
  - \_\_\_\_\_ b) Do you have adequate life insurance to cover your wishes and farm transfer at current values?
- \_\_\_\_\_ 2. Have you calculated your risk exposure to employee accidents or dishonesty?
- \_\_\_\_\_ 3. Have you provided all employees with comprehensive safety training?
- \_\_\_\_\_ 4. Do you have an employee handbook?
- \_\_\_\_\_ 5. Are your goals Specific, Measurable, Attainable, Reasonable, and Timed (SMART)?
- \_\_\_\_\_ 6. Have you conveyed the goals and objectives of the business to all family members, business team, and employees?
- \_\_\_\_\_ 7. Are your goals written?
- \_\_\_\_\_ 8. Is everyone in your family (or on your team) employed to the full extent of his or her education, training, and experience?

## General

- \_\_\_\_\_ 1. Do you have a confident relationship with your risk management advisors?
- \_\_\_\_\_ 2. Do you have the knowledge to evaluate new technologies?
- \_\_\_\_\_ 3. Are you planning for your children's educational needs and are these savings protected?
- \_\_\_\_\_ 4. Are your savings for retirement on course with your plans?
- \_\_\_\_\_ 5. Do family members know the location of all important documents?
- \_\_\_\_\_ 6. Do you have the knowledge and skills to assess all areas and levels of risk?
- \_\_\_\_\_ 7. Are you constantly looking for ways to increase your profitability?

## Crop, Revenue, and Livestock Insurance Deadlines

If you do not know all the dates in this section, you should contact your crop insurance agent for help.

- \_\_\_\_\_ 1. Do you know all critical dates and sign-up deadlines?
2. **Sales closing date** — *last date to apply for coverage is:*  
\_\_\_\_\_
3. **Cancellation date** — *give notice if I do not want insurance next year:*  
\_\_\_\_\_
4. **Production reporting date** — *actual production history must be reported by:*  
\_\_\_\_\_
5. **Final planting date** — *if unable to plant, I must contact my agent by:*  
\_\_\_\_\_
6. **Acreage reporting date** — *I must report my acreage planted to my agent by:*  
\_\_\_\_\_
7. **Payment due date** — *interest charges will be incurred after:*  
\_\_\_\_\_
8. **Final date to file notice of crop damage** — *any perceived damage must be reported no later than:*  
\_\_\_\_\_
9. **End of insurance period** — *latest date of coverage for current year's crop:*  
\_\_\_\_\_
10. **Debt termination date** — *insurance coverage for next year will be canceled if payment is not made by:*  
\_\_\_\_\_



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