

Pillar Legal Tech Law Blog¹

Should I hire a lawyer to incorporate my company, or use an online service?

Incorporation is a well-established, mostly clerical process that can be completed without the assistance of an attorney. Many online services form companies at lower cost and sometimes even faster than an attorney. The incorporation process, however, involves more than just completing a filing with the applicable secretary of state's office. Founders who use online incorporation services should be diligent about finishing the process to comply with state and federal obligations, issue stock to founders, adopt bylaws and appoint directors and officers. A founder that is risk averse, that has more money than time, or that would like to have their questions answered during the incorporation process, could consider hiring an attorney either to supplement an online service or to complete the entire process.

What are the most popular online incorporation services, and how do they compare?

The table below lists some of the most popular online incorporation services, along with their publicly listed price ranges (excluding state filing fees) on the date of this post.

	ZenBusiness	Bizee	Northwest Registered Agent	LegalZoom	IncNow	Clerky
<i>Price</i>	\$0-\$349	\$0- \$299	\$39	\$99-\$249	\$199-\$398	\$427-\$819
<i>Jurisdiction</i>	50 states	50 states	50 states, Puerto Rico, and Guam	50 states	Delaware only	Delaware only
<i>Customer Support</i>	Yes	Yes	Yes	Yes	Yes	Limited

What's the difference between hiring an attorney and using an online incorporation service?

One key difference between hiring an attorney and using an online incorporation service is that when working with an attorney you can receive answers to your questions. In addition, the attorney will generally be responsible for the entire process, allowing you to focus on your business. When working with an online incorporation service you may need to invest additional time to find answers to any questions you have. Many of the online incorporation services do provide an overview of the incorporation process, but that overview is not always complete and

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is often general without many details. This makes it more likely that founders may miss key documents, leave certain tasks unfinished or have unanswered questions.

Clerky stands out among the online incorporation services we reviewed with respect to the information they provide to customers. Clerky's website has an outline of the forms that may be required, along with online handbooks for founders that explain core legal concepts and the entire incorporation process.

For founders with the time and energy to complete each step of the process, incorporation doesn't require an attorney.

What are the incorporation tasks that every founder should complete – in other words, what does it mean to finish the entire formation process?

Below, we list the documents and related tasks that should be completed to finish the incorporation process. State laws vary regarding the necessary corporate documents and filings, so we have tailored the list below for Delaware corporations headquartered in California.

1. **Incorporation Document.** This is the document² that incorporates the company once filed with and accepted by the relevant secretary of state's office.³
2. **Action of Sole Incorporator**
This document appoints the initial company director(s) and often adopts the company bylaws. The incorporator is responsible for forming the corporation and manages the company until director(s) are appointed, though that appointment generally happens immediately upon formation.
3. **Bylaws**
This document sets forth the general governing rules for the company including: (i) stockholder meeting and voting procedures; (ii) director powers, board composition and election, director meetings, and other board procedures; (iii) executive officer responsibilities; and (vi) other general matters including record keeping and stock certificates.
4. **Initial Board Resolutions**
Board approval is required for many important corporate actions. The initial resolutions often formalize (i) appointment of executive officers; (iii) approval of the stockholder(s) share purchase agreement(s); and (iv) ratification of all actions taken by the incorporator, officers and directors regarding organization prior to the date of the resolutions.

² This document is called the "Certificate of Incorporation," in Delaware, but the "Articles of Incorporation," in California.

³ Here, we're referring to the secretary of state for the state of incorporation, not the Secretary of State presiding over the US State Department.

5. **Director Indemnification Agreement**

In the event of a lawsuit naming the director or personal liability that arises while acting in a director capacity, this document obligates the company to pay or reimburse the director for any related costs, losses or damages, provided that the director did not violate her fiduciary duties to the company.

6. **Stock Purchase Agreement(s)**

These documents issue stock to the company's initial stockholder(s).

7. **Notice of Issuance of Uncertificated Stock**

This document evidences a stockholder's ownership interest in the company.

8. **Director and Officer Registry**

This document lists all company directors and officers. The document should be updated to reflect any changes in directors and officers from time to time.

9. **Stockholder Registry**

This document lists the company's stockholders, and is updated each time new stock is issued or existing stock is transferred, though many companies now track these matters with an online capitalization table management service.

10. **EIN Form SS-4**

An Employer Identification Number ("EIN") is generally needed to open a bank account and pay taxes. Form SS-4 can be filed online with the Internal Revenue Service (the "IRS") to apply for an EIN if a company responsible party has a U.S. social security number.

11. **Beneficial Ownership Filing with FinCEN**

Most newly formed companies are required to file a Beneficial Ownership Information report with the Financial Crimes Enforcement Network. This filing discloses the identities of individuals who own or control at least 25% of the company or exercise substantial control over its operations.

Other important incorporation documents may be necessary depending on the state in which the company is incorporated, the location(s) where the company does business, or the nationalities and residences of stockholders, including the following:

1. **83(b) Election Filing**

If the company issues stock subject to vesting, then it is critical for any U.S. taxpayer recipient to file an 83(b) election with the IRS within 30 days of the stock issuance. Failure to do so will result in taxation at the time of vesting instead of at the time of grant, which could result in large unfunded tax obligations if the value of the stock rises materially between the grant date and the various vesting dates. Stock purchasers should consult with their tax advisors to make the 83(b) election filing, and evidence of each stock purchasers' election filing should be saved in records. We recommend that stock

purchasers make the filing using USPS Certified Mail with a return receipt, since the IRS accepts Certified Mail as proof of timely delivery, and a copy of the return receipt can be retained by the company as evidence of each stock purchasers' election filing.

2. **California Form 25012(f)**

This form is relevant only if securities are issued to stockholder(s) based in California. Securities issued in California must either be exempted or qualified in California. This document claims the limited offering exemption provided by California Corporations Code § 25102(f). The limited offering exemption notice must be filed online with the California Department of Business Oversight.

3. **BE-13 Filing**

Filing either a Form BE-13B or Form BE-13 Claim for Exemption is required when a newly formed U.S. company has 10% or greater foreign ownership. This filing can be completed online with the Bureau of Economic Analysis, an agency under the U.S. Department of Commerce.

4. **Foreign Qualification Filing**

To operate in states other than the state of incorporation, a company must generally register as a foreign entity with such other states. The forms and filing processes required vary depending on the state. For example, a Delaware corporation that is headquartered in California would need to file a Form S&DC-S/N Statement and Designation by Foreign Corporation and Form SI-550 Statement of Information with the California Secretary of State, which can be done online.

5. **Tax Filings**

We recommend speaking with tax advisers about the specifics of your tax obligations, but in general a new corporation will need to pay state level franchise tax each year and to file income tax returns at both the state and federal level. The timing for filing income tax returns depends on the company's fiscal year, and the specific jurisdictions in which the company owes taxes.

When might it make sense to hire an attorney for incorporation?

Founders might consider hiring an attorney when the time required to manage the incorporation process in full is more valuable than the funds required to hire an attorney to complete the process. In addition, founders based outside of the U.S. or non-U.S. entities establishing a U.S. subsidiary might have additional considerations that warrants consulting with an attorney, especially founders from a country considered by the U.S. to be adversarial. Otherwise, unless founders want to do something customized, like establish super-voting privileges or issue Founders Fund style Series FF preferred stock that includes conversion features to facilitate founder sales to investors, a diligent founder can save funds by using an online incorporation service.

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