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

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

|  | Corporation | LLC |
| --- | --- | --- |
| Governance Structure | Comprised of shareholders, directors, and officers.  S Corps have restrictions on types and number of shareholders. C Corps do not. | Flexible governance structure. Normally composed of a group of “members,” (the LLC’s owners), or members and manager/s. |
| Limited Liability (protection from personal liability) | Both corporations and LLCs have limited liability, meaning that the entity’s owners have no personal liability for obligations of the business. So the entity’s creditors can rely only on the assets of the business, not the personal assets of the business’s owners, for payment; in litigation, claimants against the business cannot come after the personal assets of the owners. | |
| Qualifying for Limited Liability | To benefit from limited liability protection, you need to take basic steps to ensure that the business is truly a separate entity: for example, setting up a separate bank account. We can advise further on these steps once the entity is formed | |
| Losses | **C Corporation**  Losses remain in the corporation. Shareholders cannot deduct them on their individual tax returns.  **S Corporation**  See the right column. | Losses pass through to business owners, who can deduct the losses against their personal income for tax purposes. |
| Raising Capital | C Corp is the entity of choice for venture capital and angel investors. | Most institutional investors will require you to re-incorporate as a C Corp before they will invest. |
| Ease of Establishing Entity | Requires some paperwork and filings, but the procedures are well known and many online resources are available to assist entrepreneurs. | Easiest form to establish, but can get complicated if the LLC wants to allow for employee equity compensation, or different classes of equity. |
| Formality & Structure of Business Operations | Corporate formalities must be followed – e.g., establishing a board of directors, holding regular board & shareholder meetings, keeping minutes of meetings. | Far more flexible. Can be as simple as a member-managed LLC where members (the term for an LLC’s business owners) run the business themselves. |
| Taxation | **Double Taxation**  A corporation’s income normally is taxed twice: the corporation itself pays tax on the income earned each year, and the corporation’s shareholders pay tax on any portion of that income that they receive as a dividend.  **S Corporation Taxation**  S Corps, by contrast, are “pass-through” entities (see right column). By electing S Corp tax treatment, the entity’s profits are allocated to its shareholders then taxed once at the shareholder level. | **Pass-Through Entity**  An LLC or S Corp does not pay a separate business income tax: it is a “pass-through” entity, because any income it earns is considered to “pass through” to the owners. This means that LLC and S Corp income is taxed only once, when the business’ owners file their personal income tax returns.  Although this pass-through taxation is often an advantage, we should discuss your personal circumstances. For example, in a business’s early stages, when the business may have losses, an LLC or S Corp’s owner who has taxable personal income might be able to use the business’ losses to offset personal tax liability. However, owners are also liable for taxes on the LLC’s or S Corp’s income every year, regardless of whether any of that income is actually distributed to the owners. So if you choose to reinvest income in the business, you could still find yourself paying tax on that income even if it never touched your bank account. We can discuss these issues further if you would like, and at some point you may need specialized tax advice. |
| Annual Report | **Delaware**  Must file an annual report each year with the Delaware Secretary of State. The filing fee is $50.  **New York**  Must file biennial reports with the New York Secretary of State. The filing fee is $9. | **Delaware**  A Delaware LLC does not have to file an Annual Report.  **New York**  New York requires biennial reports. Filing fee is $9. |
| Converting from LLC to C Corp | **Delaware**  If you want to convert your LLC to a C Corp in the future, the filing fee needed to convert a Delaware LLC to a C Corp is between $200-$300.  **New York**  Unlike Delaware, New York doesn’t have a simple mechanism to convert an LLC to a C Corp. Instead, you need to set up a new C Corp (with a different name from your LLC), and then either (a) assign all of the LLC’s assets and liabilities to the new C Corp (and subsequently dissolve the LLC), or (b) merge the two entities, with the C Corp surviving the merger. In either case, you can subsequently rename the new C Corp to the former name of the LLC. Miscellaneous fees are involved, and the total costs are likely comparable to conversion in Delaware. | |

**Required Fees and Taxes for Delaware Entities**

This table compares initial startup costs and annual fees of a Delaware C Corp. and an LLC.

|  | Corporation | LLC |
| --- | --- | --- |
| Filing Fees | * The state fee to incorporate in Delaware is a minimum of $89. This price is based on a corporation with 1,500 shares at no par value. The Delaware incorporation fees vary depending on the number of shares and their par value (required). * After filing, a Statement by Domestic Stock Corporation must be filed for $25. | * Filing fee for the certificate of formation is $90 (required). |
| Registering as a Foreign Entity in New York | If you form your entity in Delaware but still plan on doing business in New York, you will have to register to do business in New York as well. Registering in New York is $225 (required).  Additionally, the business must obtain a certificate of good standing from Delaware ($50) fee (required). | |
| NY does not require publication for a corporation. | A foreign LLC would be subject to completing a New York publication requirement, which costs anywhere from $200 - $1,000 (required). |
| Registered Agent Fees | A registered agent’s annual fees vary by company, from about $50 - $250 per year. For example, Harvard Business Services, Inc. offers their service for $50 per year, which they claim is the lowest in the industry (see this [link](https://www.delawareinc.com/llc/delaware-llc-annual-fee/) for more details) (required). | |
| Annual Delaware Franchise Tax | A corporation can choose between two options for calculating the franchise tax:   * The authorized shares method starts from a minimum tax of $175, and it increases incrementally to the extent the corporation has > 5,000 authorized shares. * The par value method starts from a minimum tax of $400. This method uses the company’s total assets and the number of issued shares to calculate an assumed par value for the shares, and the franchise tax increases incrementally as that assumed par value increases. | For an LLC, the amount is fixed at $300 per year. |
| Annual Report | The annual filing fee is $125. | An LLC does not require an annual report. |
| Total Initial Cost | Around $440 to $1,500  Electing S Corporation status has no additional cost. | Around $615 to $1,465. |
| Total Annual Cost | $350 or more per year, plus corporate income tax and the tax on shareholder dividends, plus the New York franchise tax. | $350 per year, plus owners will pay personal income tax on the income they receive, plus the New York annual fee between $25 - $4,500 based on New York Adjusted Gross Income. |

**Taxes and Fees for Forming a NY Corporation or LLC**

This table compares initial startup costs and annual fees of a NY corporation and LLC.

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

**Eligibility Requirements of an S Corporation**

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

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

**Conclusion and Recommendation**

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

|  | DE C Corp | DE S Corp | DE LLC | NY C Corp | NY S Corp | NY LLC |
| --- | --- | --- | --- | --- | --- | --- |
| Investors | The best entity type for investors. They are familiar with Delaware law, and it is the most developed for businesses. | Limits corporate and foreign investors. Can convert easily to C Corp, however. | Investors prefer corporations over LLCs. | A good choice for investors, because they prefer corporations, however, most investors prefer DE corporations to NY corporations. | The NY S Corp has the same limitations as the Delaware S Corp, and suffers because investors prefer DE corporations instead of NY corporations. | Investors prefer corporations over LLCs and prefer DE businesses to NY. |
| Taxation | Double taxation is generally more expensive than pass-through taxation (although see page 2).  Also, if you are doing business in NY, you will have to pay both NY and DE franchise taxes. | Pass-through taxation.  The S Corp can have cheaper taxes than C Corp if you pay reasonable salaries and still have profits left over for distribution, because of pass-through taxation and the self-employment tax break. Additionally, if your total reported income is higher than $250,000 then you can avoid the LLC gross receipts tax. | Pass-through taxation.  If your reported income is less than $250,000 than it can be the cheapest option, however, after you reach $250,000, then the LLC gross receipts tax can make the S Corp’s tax burden less than the LLC’s. | Like the DE C Corp, a NY C Corp suffers from the double taxation disadvantage. If you are doing business in NY, however, you do not have to pay both NY and DE franchise tax, which makes a NY C Corp cheaper than a DE C Corp. | See DE S Corp for the advantage of pass-through taxation and the possibility that the S Corp can have the lowest tax burden out of the various entity options. | See DE LLC for the advantage of pass-through taxation and the possibility that the LLC can have the lowest tax burden out of the various entity options. |
| Initial Costs | Slightly greater initial costs than the NY corporation, unless the DE C Corp is planning on doing business in NY, in which case, it will be significantly more expensive. | Same as DE C Corp. | Around the same costs as starting an DE corporation, however, if doing business in NY, the DE LLC will have to complete the NY publication requirement, which makes it substantially more expensive than the DE corporation. | Potentially lowest initial cost. | Same as NY C Corp. | Higher initial cost than the NY corporation, because of publication requirement. |
| Annual Costs | Comparable to the NY corporation unless the DE C Corp is planning on doing business in NY, in which case, it will have to pay both franchise taxes.  Generally, double taxation makes a C Corp more expensive than an S Corp (although see page 2). | Less annual costs than the DE C Corp because of the pass-through taxation.  About the same annual cost as the NY S Corp unless the DE S Corp is doing business in NY, in which case, the NY S Corp is cheaper.  Potentially the cheapest initial costs (although see the taxation row above) | Potentially cheapest annual costs, because the franchise tax is low, however, if you are doing business in NY, the NY LLC is cheaper. | Comparable to the DE C Corp, unless the DE C Corp is doing business in NY, in which case, the NY C Corp is less costly. | Comparable to the DE S Corp, unless the DE S Corp is doing business in NY, in which case, the NY C Corp is less costly. | Comparable to the DE LLC, unless the DE LLC is doing business in NY, the NY LLC is cheaper. |