



# LEGAL RESOURCES FOR TECH SMBs







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## INTRODUCTION

As a Tech SMB, guidance from qualified legal experts is an essential investment for your business. However, selecting the right counsel and spending your money wisely can be daunting.



CompTIA's *Legal Resources for Tech SMBs* can help make your decisions easier with tools like:

- Updated Essential Legal Formation and Operating Considerations for MSPs (Including a NEW section on Employment)
- A request form for a free MSA template
- A checklist on How to Find and Hire Legal Counsel
- Common IT Business Legal FAQs
- A list of CompTIA-reviewed Legal Service Providers

As a CompTIA member, you get exclusive access to these resources, which have been reviewed by CompTIA's in-house legal team, to jumpstart your business's legal foundation.

#### Disclaimer

This information provided by CompTIA's does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available in this document are for general informational purposes only. Readers of this document should contact their attorney to obtain advice with respect to any particular legal matter. No reader or user of this document should act or refrain from acting on the basis of information in this document without first seeking legal advice from counsel in the relevant jurisdiction. Use of, and access to, this document or any of the links or resources contained within the document do not create an attorney-client relationship between the reader or user and CompTIA, this document's author(s), contributors or their employers.



# ESSENTIAL FORMATION AND OPERATING CONSIDERATIONS FOR MSPS

Managed Services Providers play an increasingly important role in today's growing market for outsourced IT services. Each Managed Services Provider ("MSP") faces a variety of critical decisions when forming and operating their business. This article outlines four (4) core areas that MSPs should focus on in order to strengthen and streamline their operations.



## Organizational Documents and Corporate Governance

Whether an MSP is just starting out or has been in business for several years, proper corporate formation and good corporate governance are risk management tools that cannot be ignored. For an MSP getting started from the ground up, the first consideration is its choice of corporate entity. While there are several options - and individuals should consult their tax and legal advisors before making a decision - limited liability companies ("LLCs") and S corporations ("S corps") typically fit the bill for most MSPs. With limited exceptions, LLCs and S corps have the advantage of providing for "pass-through" taxation, which allows the company to "pass through" its tax liability directly to its owners or partners and pay taxes once, rather than paying twice (at both the corporate and individual levels).

**Organizational Documents:** MSPs must prepare the following organizational documents:

- Articles of Incorporation or Articles of Organization
- Bylaws or Operating Agreement
- Select a Registered Agent
- Federal Employer Identification Number (required for company bank account)
- Open Bank Account
- Elect Tax Status (e.g., if electing S corp status, fill out IRS Form 2553)
- Obtain appropriate licensing or certification depending on the jurisdiction

**Corporate Governance:** MSPs must maintain, and in some cases file, the following documents:

- File annual report with the Secretary of State where the entity was formed
- Conduct annual meetings (if a corporation)
- Keep meeting minutes
- Prepare an annual budget
- Maintain accurate financial records, including shareholder or partner capital accounts, corporate balance sheets, company borrowing or lending



## Key Contracts

**Master Service Agreements:** In the world of MSPs, one of the most important documents is the Master Service Agreement (“MSA”). An MSA is an agreement which governs the relationship between the MSP and its clients. The MSA sets forth the terms and conditions under which the MSP will provide services to the customer, and the rights and obligations of both the MSP and the customer. The terms of the MSA are often extensively negotiated between the parties. Depending on the size and market influence of the customer, the customer will often have some leverage to dictate certain terms under the MSA. Some essential terms in the MSA include:

- Term of the agreement
- Intellectual property protections (for the MSP and sometimes the customer)
- Indemnification (often mutual)
- Limitation of liability (often mutual)
- Warranty provisions
- Statement of work (schedule of services to be provided by the MSP)
- Fee schedule (for services provided by the MSP)
- Termination provisions

**Employment Agreements:** Most employer-employee relationships are “at will.” This means that the employer can terminate the employee at any time for any reason. The termination cannot be illegal or against public policy.”

Sometime, however, an employer will find it beneficial to enter into an employment agreement that outlines the terms and conditions of the relationship. These often go beyond identifying compensation and benefits, to include restrictive covenants. These agreements are not necessary for every employee, but they can be advantageous for solution providers who employ individuals who, by virtue of their job duties, will have access to confidential and proprietary information that would cause harm to the business, if disclosed to competitors. Some examples of restrictive terms that a solution provider should consider include the following::

- **Confidentiality:** This restriction is aimed at preventing a current and former employee from disclosing or using the confidential or proprietary information (e.g., financial data, customer data, company products, company business plans, intellectual property, prototypes, etc.) of the employing solution provider to third parties, including but not limited to, potential competitors.
- **Non-Solicitation:** This restriction is aimed at prohibiting an employee from attempting to solicit the solution provider's customers or employees for the benefit of a competitor, for a period of time after the employee's separation from employment.
- **Non-Competition:** This restriction is aimed at prohibiting an employee from competing with the solution provider's competitors during their employment, and for a period of time after the employee's separation from employment. The restriction typically applies whether the employee will work as an employee of a competitor in the same market or starting up a business in the same field. Notably, this restriction is typically reserved for more "high-level" employees.

In light of the nature and scope of work of a solution provider, an Assignment of Inventions condition may also make sense for some employees. This condition is aimed at covering any intellectual property conceived by an employee during the period of employment. The term typically requires the employee to disclose all inventions and assign the intellectual property rights to the employer if created in the scope of employment.

It is important to note that the laws that govern the legality of these employment agreements differ by state. For example, some states have compensation minimums that affect the validity of some of these restrictions. Different states also have different rules regarding requirements for "consideration" (what the employee gets in return for accepting the restriction). Some states also



require specific review periods and written notices to the employee to have the agreement reviewed by their own attorney. After all, these agreements are legal contracts between the employer and employee.

**What about Independent Contractors?** Some of the restrictions in these employment agreements are commonly used in a solution provider's agreement with an independent contractor. However, there are some different parameters regarding the scope of the restrictions that can be enforced against one and not the other. These independent contractor-client agreements can become further complicated by the evolving standards and closer scrutiny of relationships between businesses and those individuals who are engaged to perform work for them.

As employees generally have more rights (unemployment benefits, workers' compensation, etc.) than contractors, the issue of whether or not the relationship between a business and an individual is a bona fide independent contractor-client relationship (as opposed to an employer-employee relationship) is a source of significant controversy.



## Business Considerations

In addition to the foregoing, MSPs should prioritize the below business considerations in order to maximize value to their customers and to develop robust organizational strength.

- **Insurance:** Maintain appropriate insurance minimums and obtain additional lines of insurance where necessary (e.g. cyber, E&O, "key man").
- **Corporate organizational chart:** Clearly set forth the structure and responsibilities of the organization and update at least once every 12 months.
- **Client testimonials:** Develop positive and persuasive testimonials from clients that can be promoted on the MSP's website, social media, and other platforms.
- **Technical certifications:** Maintain and develop a list of certifications held by the MSP and its personnel. Promote continued growth and advancement.
- **Backup protections:** Ensure that the MSP is protected with adequate security and disaster recovery protocols which allow it to continue serving its client base during an emergency.
- **Proactive maintenance** of MSP servers and systems



## Compliance

- **Privacy and Data Compliance:** Develop and adhere to strict privacy and data compliance policies. Train and educate staff on the importance of adhering to these policies.
  - Website privacy policy
    - i. For any companies that operate a website in the United States, develop an appropriate website privacy policy.
    - ii. At a minimum most companies must (1) ensure they do not run afoul of the Federal Trade Commission, by making sure the privacy policy is complete and accurate; and (2) meet the specific requirements of California's law (and other states' laws) on website privacy practices, including the core components for such a policy and the recent changes involving do not track commitments
- **Security Testing** of MSP compliance with data privacy requirements.
  - Overall data security:
    - i. Develop and implement a written and comprehensive information security program appropriate to the size of your MSP, the nature and scope of its activities, and the sensitivity of the customer information at issue.
    - ii. Develop a security program.
    - iii. Designate specific employees to coordinate security.
    - iv. Identify reasonably foreseeable risks and assess sufficiency of safeguards.
- **Third Party Compliance:** to cybersecurity incidents.
  - Breach notification:
    - i. Ensure you have an Incident Response Plan—a playbook for if or when a cybersecurity incident occurs.
    - ii. There are laws that apply to protect individuals residing in a state, the laws apply to any kind of company, large or small, regardless of industry or geographic location.
- **CompTIA Certification:** Maintain appropriate CompTIA certifications for the MSP or its individual staff members.

Article authored by:

*Gary Zhao, Partner Amundsen Davis, LLC*

*Nikhil Mehta, Associate, Amundsen Davis, LLC*



## CompTIA Members: Receive a MSA Template

CompTIA corporate members can request a sample master services agreement (MSA) template from Amundsen Davis, LLC. In light of the above, please note that it is important to contact an attorney to customize the MSA to your organization's needs. Amundsen Davis, LLC will provide a free 30-minute consultation on the customizations best suited for your organization. If you would like to receive a MSA sample and free consultation, [please fill out the form](#).



## HOW TO FIND AND HIRE LEGAL COUNSEL

There are many reasons why SMB tech firms today rely on legal expertise to help their business—from setting up the company and protecting intellectual property to negotiating commercial leases and understanding how changes in laws and regulations might impact the business. Not to mention how to handle a potential lawsuit.

Unfortunately, finding quality legal representation can feel quite daunting. Attorneys rarely advertise their services the same way that marketing and other consultants do, and legal services often seem intangible given their perceived high price tags. However, it's likely in the best interest of your business to identify and hire legal counsel, even on a retainer basis, to ensure you're adequately prepared and covered for any situation.

Don't wait until you have a significant legal problem to contact an attorney. By establishing a relationship with legal counsel even with a small matter, you can evaluate their services and they can get to know you and your company better as well. This experience for both sides can be valuable when a “bet the company” issue affects your business.

CompTIA has compiled a checklist of tips and advice below to help you navigate the process of finding legal counsel to meet your business's needs.



### To Begin

- Do your research.  
Get recommendations from respected sources including peers, colleagues, and business partners to find lawyers in your area who specialize in IT business law. In addition, consider resources such as CompTIA's curated list of legal providers, the [National Association of Women and Minority Owned Law Firms](#), or your local bar association.
- Set up a meeting with prospective attorney(s).  
Many attorneys will not charge for an introductory meeting, but some may—so inquire when scheduling. Do not decline a meeting with a prospect because they charge a fee for their time. In advance of the meeting, specify any immediate legal needs and identify future areas where you may require legal services.



## During the Meeting

- ❑ Provide a thorough overview of your organization.
  - Ensure that the attorney(s) understand your business and your needs. Provide details about your customers, products and services, company history, structure, business model, and other key relationships. A complete picture will allow the prospective counsel to tailor their responses accordingly.
  - Expect the prospective counsel to introduce themselves and their firm, to highlight their areas of expertise, and to provide examples of other work they have performed for similar clients and matters.
- ❑ Feel empowered to ask hard questions. These may include:
  1. How many years of experience do you have in the IT business field? Does it make up all or part of your portfolio?
  2. Which individual(s) will represent my company on legal matters?
  3. How do you approach negotiations?
  4. What is your fee structure for services rendered and what options are available?
  5. Have you ever been fired by a client? If so, why?
- ❑ Expect to answer questions from prospective counsel as well.
  - Answer all questions honestly and completely. The attorney is evaluating you and your needs, just as you are evaluating them. It is crucial that you are forthcoming with information when asked so the attorney can accurately assess if they are capable of representing you. Even if you do not hire this lawyer, you will still appreciate confidentiality for anything you tell them.
- ❑ Do not sign anything you do not understand.
  - You should not feel rushed into a commitment or agreement for legal services. In addition, you should not sign any documents you do not fully understand. Ask questions or request more information until you feel comfortable with the arrangement.



## After the Meeting

- ❑ Think, don't act.
  - Give yourself some time to reflect about the meeting and the attorney(s) you talked with before taking any action. You may need to ask follow-up questions or meet with other potential attorneys before you find the right fit.
  
- ❑ Hire the attorney who best meets your needs.
  - After you have received sufficient information and answers to all your questions, met with as many attorneys as you need and reviewed all your options, let the attorney or law firm you chose know that you are ready to sign a letter of engagement (a document used to hire an attorney and establish the fee structure). Review this letter to confirm it meets your expectations on services and billing.
  
- ❑ Set up follow-up meetings and communications.
  - Once you're on board, set up regular meetings or other communications as stated in your letter of engagement. Congratulations, you've got a lawyer!



# COMMON IT BUSINESS LEGAL FAQs

**1. Are free legal templates downloaded from the internet okay to use or do I need a lawyer?**

It's fine for businesses to leverage the free or inexpensive legal templates available to them. However, it's also likely in your best interest to hire a legal professional in addition to using free templates. Templates may not include protections specific to your services and local jurisdictions may have laws that apply to you that are not included in these templates.

**2. How do I hire a lawyer?**

Refer to CompTIA's Legal Checklist to help you navigate the process of identifying and hiring the right attorney to meet your specific business needs.

**3. We provide services only in the state of X. Does my website need to comply with GDPR?**

If your website does not collect any personal data (including IP addresses), does not use cookies or supply contact forms or newsletters, you do not need to comply with GDPR. The regulation requires all personal data to be secured, so data encryption should be considered.

**4. What is included in a typical Service Agreement?**

- a. Contact information for all parties
- b. Description of service and scope of work
- c. Changes to offered services
  - i. MSP signature
  - ii. Customer signature
  - iii. Blank Change Order attachment
- d. Escalations
- e. Compliance and insurance requirements
- f. Payment terms
  - i. Term
  - ii. Termination for cause
  - iii. Termination without cause
  - iv. Termination by mutual consent
  - v. No liability for termination

- g. Remedies for nonpayment
- h. Confidentiality agreements
  - i. Confidential information defined
  - ii. Use of confidential information
  - iii. Survival of obligations
- i. Indemnification
- j. Warranty, technology limitations
- k. Default terms
- l. Remedies and dispute resolution
- m. Limitation of liability

**5. Does a Service Agreement have to be in writing?**

While verbal agreements may be enforceable, it is best to have Service Agreements in writing, whether on paper or online, signed by all parties involved. It also shows professionalism and your commitment to carry out your obligations for your customers.

**6. What is an SLA?**

A service-level agreement (SLA) is a commitment between a service provider and a client to meet mutually-agreed-upon expectations for the service delivered, as well as defined penalties for failing to meet those expectations. Not meeting the SLA terms can be cause for termination of the agreement.

**7. What is the difference between an MSA and SOW? Do I need both?**

A Master Services Agreement (MSA) is usually accompanied by a Statement of Work (SOW). The MSA is usually the governing document for the entire relationship, while the SOW focuses on the specifics of a single project or scope of work. Most MSP SOW's should include a Service Level Agreement. A contract with a client should include both in order to cover a multitude of scenarios.

**8. How long should MSP or solution provider contracts with clients last?**

There are a number of variables to consider when deciding upon the length of agreement. For one, short term contracts may work better if you have no immediate plans to sell your business. However, longer-term contracts might be more attractive if you are looking to build the value of the business for a potential acquisition. Also, all parties should consider their long-term goals when considering the contract length. If any side believes the service will be obsolete or not profitable enough after a certain length, don't put your company (or your client) in a position to hurt the business.



**9. What should I do if terms of a contract are not met?**

If either party cannot fulfill their part of the agreement, it should be discussed amicably first. Your next option may be to simply amend or alter the original contract. If altering the contract is not an option, review the original agreement to look for other options for ending the contract. You may be able to find a resolution without legal consequences if both parties agree on how the contract can be terminated. If both parties cannot agree on how to solve the problem, you may need to consider mediation or other legal options.

**10. What is the best way to manage billing for MSP or solution provider customers?**

Make it clear in your agreement what services are included and excluded from the fixed fee. Also, make the payment terms and due dates clear, as well as penalties for late payments. If you do not have an internal accounting department, consider utilizing a third-party service to perform this function.

**11. How much liability insurance should I get as a solution provider?**

The amount of liability insurance coverage you need is based on the type of services you are providing and to what type of customer. Certain contracts will require a minimum general liability coverage, usually around \$1 million (in addition to workers' compensation insurance). To obtain liability insurance, solution providers should speak to their insurance advisor/broker and explain they need professional liability coverage for technology services. Then they need to carefully evaluate the specific coverages that are available under each of the liability insurance policies considered. For example, cyber insurance is not automatically included in general liability insurance. The cost of liability insurance is based on the solution provider's revenue but usually ranges from \$2,500-\$10,000 or more a year. Consider the premium (upfront cost) and the retention (works like a deductible if there is a covered loss).



## CompTIA-REVIEWED LEGAL SERVICES FOR MSPs

This members-only resource provides a list of CompTIA-reviewed legal providers who specialize in the following practice areas:

- Employment
- Privacy
- Corporate
- Transactions
- Litigation
- Intellectual Property
- Real Estate
- Tax

Attorneys and firm representatives who practice in these areas submit their professional information through an online form that is then reviewed by CompTIA's legal team. Once submissions are approved, they are entered into a collective list of CompTIA-reviewed legal providers, accessible by CompTIA members only.

**Access the list here:**

<https://app.smartsheet.com/b/publish?EQBCT=7ffc09c772724e038cf552d56e9d240>.



## ABOUT CompTIA

The Computing Technology Industry Association (CompTIA) is a leading voice and advocate for the \$5.2 trillion global information technology ecosystem; and the estimated 75 million industry and tech professionals who design, implement, manage, and safeguard the technology that powers the world's economy. Through education, training, certifications, advocacy, philanthropy, and market research, CompTIA is the hub for advancing the tech industry and its workforce. CompTIA is home to thousands of member technology companies and millions of professionals that provide the technology solutions and IT services that are powering the world's economy.

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**Questions? Email [membership@CompTIA.org](mailto:membership@comp-tia.org).**

