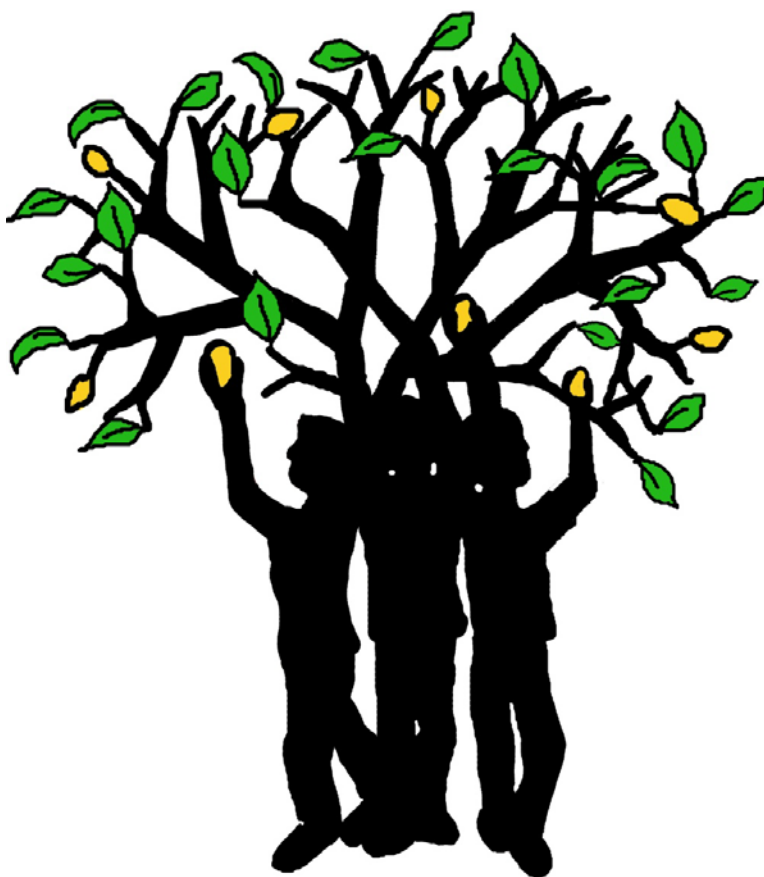


THINK OUTSIDE THE BOSS

How to Create a Worker-Owned Business



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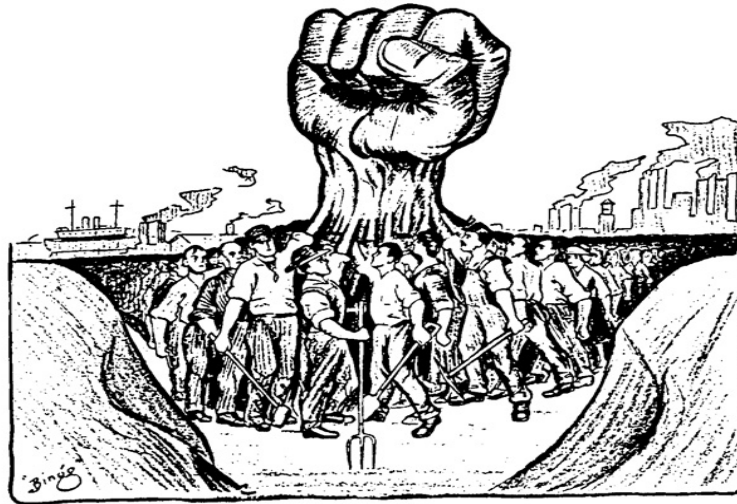
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DISCLAIMER: THIS MANUAL HAS BEEN PREPARED AS A HANDOUT FOR A 2014 WORKSHOP ON STARTING A WORKER-OWNED BUSINESS. THE CONTENTS OF THIS MANUAL SHOULD NOT BE RELIED ON AS LEGAL ADVICE. ALSO, SOME OF THIS INFORMATION COULD BECOME OUTDATED, AND LAWS VARY FROM PLACE-TO-PLACE. FURTHERMORE, ALTHOUGH WE TRIED TO COLLECT ACCURATE INFORMATION AND GIVE THE LAWS OUR BEST INTERPRETATION, SOME INFORMATION IN THIS BOOKLET COULD EVEN TURN OUT TO BE INCORRECT OR SUBJECT TO OTHER INTERPRETATIONS BY COURTS OR REGULATORS! WE SURE HOPE THAT'S NOT THE CASE, BUT, WHAT CAN WE SAY? LAW IS COMPLICATED STUFF! THAT'S WHY WE STRONGLY RECOMMEND THAT YOU CONSULT WITH AN ATTORNEY BEFORE USING THIS INFORMATION TO FORM OR OPERATE A COOPERATIVE.

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INTRODUCTION: WORKER COOPERATIVE ENTERPRISES



Credit for this image goes to: <http://ejfood.blogspot.com>.

What Are Worker Cooperatives?

Worker cooperatives are business entities that are (1) owned by their workers, (2) governed by their workers, and (3) operated for the benefit of their workers. Because worker cooperatives are owned and controlled by and for the people who work there, they operate differently from traditional businesses in some key ways.

- (1) **Joint Ownership:** In traditional for-profit businesses, the owners are sole proprietors or shareholders whose main interest is in generating a profit. Worker cooperatives are interested in making money too, but they are also invested in making sure that the business meets the needs of its members, such as paying fair wages, providing a sustainable livelihood, investing in the local community, and promoting a healthy environment.
- (2) **Democratic Control:** In typical business enterprises, elections are held and major decisions are made by investors who cast votes based on the number of shares they own. In worker cooperatives, directors are elected and major decisions are made by the workers, on a one-member, one-vote basis. Therefore, control is vested with each member, not each share of stock. No member has a larger or more influential vote because she invested more money in the business.

Cooperative Distribution of Earnings: In investor-owned businesses profits are distributed based on how many shares each person owns. Worker cooperatives instead distribute surplus earnings based on a patronage system. This means profit is distributed equitably based on factors such as hours worked or value of work provided. Profit distribution is thus based on labor input, not on capital contribution. Workers generally do not receive a greater profit share by contributing more money directly to the business or by purchasing shares.

Benefits of Worker Cooperatives:

When efficiently organized and managed, worker cooperatives convey the following benefits to the people who work there:

- ***Employment and the ability to generate income.*** A worker cooperative gives groups of people an opportunity to become economically independent in a mutually beneficial way.
- ***Control over the way their work is organized, performed, and managed.*** Worker cooperatives provide an opportunity to balance workers' needs and concerns with the need for profits and efficiency. Worker cooperatives also emphasize the training and development of the worker-members.
- ***Employment security,*** provided that the business is financially viable. Worker cooperatives are managed to generate income *and* provide stable employment for their members. When faced with a tradeoff between pursuing profits and maintaining employment, worker coops often choose the latter.
- ***A financial and ownership stake in the enterprise in which they work.*** Worker-members contribute directly to building the enterprise and sharing in its success.
- ***An opportunity to practice democracy in the workplace.*** Worker-members participate directly in decisions that affect them in their workplace as well as those that determine the growth and success of the business.

Cooperative businesses manifest in a variety of ways. The term “cooperative” can refer either to a

specific type of business entity recognized under the law or to the internal governance structure of an organization.

(1) **Cooperatives, as a legal entity:** “Cooperative” may refer to a specific type of corporation, recognized under the law. The legal requirements for forming a cooperative corporation vary from state to state. In California, cooperatives generally form as a corporation under the California Consumer Cooperative Corporation statute. The rules governing this type of corporation are found in the California Corporations Code provisions beginning with section 12200. In California, you cannot legally have the word “cooperative” in your name, unless you have formed under this statute.

(2) **Cooperatives, as a legal structure:**

Many organizations operate like cooperatives, but, for a variety of reasons, chose an entity other than a cooperative corporation. For example, some cooperatives form as Limited Liability Companies (LLCs) or Nonprofit Mutual Benefit Corporations, and incorporate cooperative principles and practices into their governing documents (their Articles of Organization, Articles of Incorporation, Operating Agreement, and/or Bylaws).

(3) **Cooperatives, as a set of practices and values:**

Some organizations or groups call themselves “cooperatives,” without having formed a cooperative corporation, or for that matter, without having formed an independent legal entity at all. For example, a group of tenants might create a housing cooperative, simply by adopting highly participatory and democratic ways of operating. Similarly, workers at a non-profit organization or fiscally sponsored project may elect to operate through cooperative, democratic principles, such as one-person one-vote. This type of cooperative organization may or may not have the other cooperative attributes of joint ownership and cooperative distribution of earnings, described above.

Why Form Worker Cooperatives?

In certain ways, worker cooperatives operate like regular businesses: they develop products or services to sell to the public, with the goal of generating a profit to support the business and its

owners. Like conventional businesses, cooperatives typically incorporate or file formation documents with the state, apply for appropriate business licenses, pay taxes, hire employees and/or independent contractors, and engage in other regular businesses activities.

However, worker cooperatives are unique in some key ways. In particular, cooperatives are more likely to create stable fair-paying jobs, adopt environmentally sustainable business practices and invest in the local community. Because they often evaluate success based on a variety of metrics in addition to profit, such as worker health and happiness, sustainability, and community benefit, worker cooperatives are often said to have “multiple bottom lines.”

- **Local Ownership.** Typical large corporations are owned by shareholders who do not live in the communities in which the business operates or from where it sources its products. These shareholders are usually less concerned about maintaining healthy workplaces and making sure the business does not harm its community than the worker-owners of a local cooperative business.
- **Increased Job Security in Economic Downturns.** In economic downturns, most corporations are narrowly focused on maintaining value for their shareholders, rather than maintaining employment for their workers. By contrast, because worker-owners call the shots in their cooperative, they value preserving jobs foremost, rather than maintaining shareholder value. Because they have increased job security as owners of the business, they can also plan for the long-term and invest in the continued health of their business and their community.
- **Worker Health and Happiness.** Because workers have an ownership stake in the cooperative business, they can make business decisions that directly promote and support worker health and happiness. Even the most benevolent owner/employer is unlikely to make business decisions that benefit workers if such decisions have a negative impact on profit. Conversely, worker-owners are interested in generating a profit, but also invested in ensuring that they work in a healthy environment, characterized by job stability, fair wages and benefits, and safe business practices.
- **Environmental Responsibility.** The people who own and run worker cooperatives also tend

to live, work, and play in the neighborhood where the business is located. Because worker cooperatives are deeply rooted in the local community, they are less inclined to engage in environmentally destructive business practices than companies controlled by outside investors. Using toxic chemicals, squandering natural resources, or damaging open spaces would have a negative impact on the very people in control of the business, as well as on their families, friends, and neighbors.

- **Contribution to Community.** Worker cooperatives help build community wealth through local ownership. Workers who own their jobs have a direct stake in the local environment, and the power to decide to do business in a way that creates community benefit. Worker cooperatives are likely to form relationships with other local businesses, hire local workers, and reinvest their profits back into the neighborhood.

Breadth of Worker Cooperative Enterprises

Successful worker cooperatives are found in many different business sectors including: housecleaning, restaurants, taxis, grocery stores, bakeries, bookstores, bike shops, nursing and construction. This is just a small list of examples. Worker cooperatives come in many different shapes, sizes, and industries. The US Federation of Worker Cooperatives estimates that there are over 300 worker cooperatives in the United States, which collectively employ over 3,500 people.

In the San Francisco Bay Area there are many notable worker cooperatives, including: The Cheese Board Collective and Arizmendi Bakeries (worker-owned pizza shops and bakeries), DIG Cooperative (gray water systems design), and Rainbow Grocery Cooperative (full service grocery store including both bulk and prepared foods), and many more. In addition, there are a number of Limited Liability Companies (LLCs) that are structured as worker cooperatives including WAGES (green home-cleaning services) and Teamworks (green landscaping).

Worker Cooperatives Might Not Be For Everyone:

A word of caution – worker cooperatives may not be the right fit for every organization or business entity. A worker cooperative may not be right for you if:

You do not want to make decisions democratically (through majority vote, super-majority vote, consensus, or modified consensus). If you are not comfortable sharing decision-making power with a group, a worker cooperative is probably not right for you.

You do not want to observe certain business “formalities” (such as holding regular governance meetings, complying with rules about meeting notice, keeping meeting minutes, holding elections, or recognizing officers). Establishing a cooperative corporation business entity will require adherence to certain rules and regulations. If you would prefer to keep things more informal then you should look into the Limited Liability Company form of organization (see the section on Entity Formation).

You do not want to deal with more complicated record-keeping and accounting. The cooperative corporation often involves more complicated record-keeping and accounting. You may find it necessary to work with a bookkeeper or accountant who specializes in worker cooperatives.

Please refer to the “28 Questions to Consider Before You Meet a Lawyer” resource in the Appendix section of this manual for more issues to consider.

Key Considerations in Forming Worker Cooperatives

Worker ownership can be a successful business model in nearly any industry. But, it is not for everyone and there are some important considerations to think about when deciding whether a worker cooperative model is right for you. A fundamental aspect of worker cooperatives is balancing the entrepreneurial and independent spirit needed to start and run a new business with

an appreciation for and commitment to the values of shared ownership. The essence of democratic control is that no one person has the final say.

The US Federation of Worker Cooperatives has developed a useful list of factors to help determine whether worker ownership is right for you (this is not exhaustive):

- Your members have a clear commitment to and understanding of worker-ownership and cooperative principles.
- Your members provide a product or service that is in demonstrated demand by the market; you have a viable business concept.
- Your cooperative has access to adequate financing, including meaningful capital contributions from members, in the form of cash, labor, or both.
- Your cooperative selects and develops a quality management team, either by recruiting from outside the firm or by consciously developing from within. Quality managers do not necessarily need to be MBAs, but they should have a firm understanding of the business and the environment in which it operates.
- Your cooperative provides membership to individuals with the technical skills and knowledge to make the business a success, and provides those individuals with the tools and environment necessary to succeed.
- Your cooperative places an emphasis on electing experienced directors with a clear commitment to building a fiscally sound organization and working on behalf of the membership overall.
- Your cooperative can aggressively position itself for changes in operations, markets, and member needs.

Of course, you can create a successful worker cooperative without having each of these factors in place, but this list represents good principles to strive toward. In addition, it can be challenging to establish a worker-owned business in an industry with high turnover or where work is generally seasonal. However, some worker cooperatives have been established in such industries for the

specific purpose of countering such trends and ensuring workers can earn a livelihood throughout the entire year.¹

International Cooperative Alliance's Cooperative Principles

(1) Voluntary and Open Membership

Cooperatives are voluntary organizations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.

(2) Democratic Member Control

Cooperatives are democratic organizations controlled by their members, who actively participate in setting policies and making decisions. Men and women serve as elected representatives and are accountable to the members. In primary cooperatives members have equal voting rights (one member, one vote).

(3) Member Economic Participation

Members contribute equitably to, and democratically control, the capital of their cooperative. At least part of that capital is usually the common property of the cooperative. Members usually receive limited compensation, if any, on capital invested as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their cooperative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their work for the cooperative; and supporting other activities approved by the membership.

(4) Autonomy and Independence

Cooperatives are autonomous, self-help organizations controlled by their members. If they enter into agreements with other organizations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintaining their cooperative autonomy.

(5) Education, Training and Information

¹ SOURCE: *Worker Cooperative Toolbox*, Published by Northcountry Cooperative Foundation in partnership with Northcountry Cooperative Development Fund.

Cooperatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their cooperatives. They inform the general public – particularly young people and opinion leaders – about the nature and benefits of cooperation.

(6) Cooperation Among Cooperatives

Cooperatives serve their members most effectively and strengthen the cooperative movement by working together through local, national, regional and international structures.

(7) Concern for Community

Cooperatives work for the sustainable development of their communities through policies approved by their members.

Useful Resources:

Additional online tools and worker cooperative start-up guides are available at:

- <http://american.coop/startup>,
- <http://www.usworker.coop/education>,
- http://cultivate.coop/wiki/Main_Page,
- <http://cooperative-curriculum.wikispaces.com/>,
- <https://sites.google.com/site/cooperativelawresources/>,
 - <http://cooperationtexas.coop/>,
 - <http://datacommons.find.coop/vision>

ENTITY FORMATION: HOW DO YOU CREATE A COOPERATIVE BUSINESS ENTITY?

Selecting what kind of legal entity you want to form is an important first step in creating your cooperative business. However, before such a decision can be made you will want to do some *preliminary* research not only into whether the cooperative form of business is the right choice for you, but also into the financial viability of your business plan. In other words, some work must be done to determine whether your business idea is profitable, which is the foundation of any business whether cooperative or traditional!

We have included a business planning guide in Appendix G: Cooperative Business Planning Resources from Project Equity, which provides some helpful tools to assist you in thinking through the goals and key questions you should address in your cooperative business planning. We strongly recommend that you use these guidelines to assess your business plan before you take steps to formalize the business itself. Some of the questions that are important to consider, include:

Preliminary Business Planning Questions:

- 1) **Why are you starting a business?**
- 2) **What product or service will you offer?**
- 3) **Why do you want to organize your business as a cooperative?**
- 4) **What is your business model?**
- 5) **Is there a market for your business?**
- 6) **Can you get enough of a “share” of this market for your business to be viable?**

Now that you have considered these key questions, and determined that your business plan is viable, it's time to consider what form your business should take.

What is a business entity? Why is it important to choose the right entity when forming your business?

A business entity is the legal structure under which a business operates. If you wish to start a cooperative business, there are a number of considerations in choosing the right entity, including governance, employment, liability and tax issues. This chapter includes a very broad overview of

these considerations; for additional discussion, please refer to the other relevant chapters in this manual.

What if I start doing business before forming an entity?

If you start doing business before officially forming an entity, the law presumes that you are either a sole

proprietorship (if there is one business owner), a general partnership (if there are multiple owners of the business) or, in certain cases, an unincorporated association. Sole proprietorships, general partnerships and unincorporated associations have UNLIMITED liability: that means the owners of these types of businesses are at risk, because someone who sues them can reach not only the assets of the business, but also the personal assets of the owners, such as their car, bank account, or home.

When thinking about whether you need to limit your personal liability exposure, think about the activities your business will engage in and the risks these activities may create. For example, will you be serving food to people? Will they be walking into your store? Will you be doing work on someone else's property? Will you have employees? Think about what could possibly go wrong in all of these scenarios, and then prepare yourself for the chance that you or your business may get sued.

So how do I protect my personal assets?

Form an entity that is protected by the limited liability shield. The most common limited liability entities are limited liability companies (LLCs) and corporations. In most cases, if you form and properly maintain your business as a separate limited liability entity, you can protect your personal assets; thus even if the business is successfully sued, you will only lose what you invested into it.

In order to maintain your entity's separate limited liability status, you must observe corporate formalities, avoid mixing personal assets with company assets, and provide adequate funding for the business to operate. Corporate formalities include filing the correct papers with state and local

Don't Forget the Minimum Tax:

If you form an LLC or corporation in CA, your business is generally subject to a minimum CA franchise tax of \$800.

governments, keeping a record of your meetings, maintaining separate bank accounts and financial records and contracting in the entity's name, not your own name.

Beware though—forming and maintaining a limited liability entity usually costs money. In California, for example, such entities are generally subject to a minimum annual franchise tax of \$800. This is in addition to income taxes paid at the state and federal level.

What about insurance?

Even if you have a limited liability entity, you should still get insurance. While the liability shield will protect your personal assets, it will still cost money to defend yourself or your business if you get sued. A good insurance policy can cover those legal expenses. The main type of insurance you should consider is general liability insurance, which covers bodily injuries, property damage and other losses that could occur as a result of the operation of your business. It may also be advisable to carry workers' compensation insurance, if you have employees (see the employment law section of this handbook); product liability insurance; and commercial automobile insurance if your business uses vehicles.

Helpful Tip:

Remember: Anyone can sue you for anything. Even if the claim is frivolous and gets dismissed, you'll still spend money on lawyers. Insurance can help cover these costs.

If I am starting a worker-owned business, which entity should I choose?

As discussed above, the business should probably form as some type of limited liability entity. These include the domestic stock corporation, LLC, cooperative corporation, flexible purpose corporation or benefit corporation. In limited situations, if the business will not be distributing its profits or is going to be operated for charitable or educational purposes, the members could also consider forming as a nonprofit mutual benefit corporation or a nonprofit public benefit corporation. Before choosing which entity is appropriate for your business, it is helpful to have a solid understanding of the proposed business model.

The most common form of business entity: General Corporation

The general corporation is the most common form of business entity. In California it is known as the general stock corporation. It is owned by shareholders, governed by a board of directors, and its general purpose is to make a profit for its shareholders. Shares of stock are usually issued in exchange for capital contributions and voting power of individual shareholders is directly related to the number of shares they own. At first glance, general corporations do not appear to provide for the kind of democratic voting rights found in a cooperative; however, it is possible to create a democratic and cooperative structure in a general corporation. For example, the corporation could restrict individuals to own the same number of shares, so that each shareholder would have equal voting power. A similar result would also be possible through a Shareholders' Agreement. A Shareholders' Agreement is a written agreement among all the shareholders with provisions regulating a variety of shareholder rights and responsibilities, including but not limited to voting rights and transfer of shares. A Shareholders' Agreement could include a provision for voting rights based on a "one shareholder-one vote" system, giving each shareholder equal voting power, and it could also prohibit the transfer of shares to outsiders. Shareholders' Agreements can be complicated to draft and you should seek an attorney's advice if you are looking to create a cooperative structure via the use of a Shareholder's Agreement.

General stock corporations are usually taxed as "C-Corporations", which are taxed as a separate taxpayer from the shareholders. This can lead to double taxation because does the corporation pays tax on its profits and the shareholders also pay a tax when those profits are distributed to them as dividends. To avoid this, a corporation can elect to be taxed as an "S-corporation." There is usually no federal income tax for S-corporations, and tax liability is passed to shareholders, meaning that income and losses flow through to the shareholders and they are assessed taxes at their individual income tax rates.² A corporation must meet a number of requirements in order to qualify for S-corporation status, such as having 100 or fewer shareholders and issuing only one class of common stock, though options and differences in voting rights are generally permitted. Thus an S-Corporation could have a Shareholder's Agreement in which the shareholders agree to alter the voting rights to create a cooperative and democratic structure.

² See IRS on S Corporations, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/S-Corporations>

The most common entities for worker-ownership: LLC and Cooperative Corporation

Because the main purpose of most worker-owned businesses is to create economic wellbeing and jobs for their worker-owners, the legal entities they form allow the worker-owners to share in the profits of the business and give each member a vote in the governance of the business. Both the limited liability company (LLC) and the cooperative corporation provide for these options.

- **Cooperative Corporation:** The cooperative corporation is the entity in California that best incorporates the cooperative principles of democratic decision-making and worker-ownership. Each member of the cooperative is required to have a vote for the board of directors and is entitled to share in the profits of the cooperative, if any are distributed, based on the member's "patronage" (i.e., hours worked for the cooperative). Cooperative corporations have to follow certain requirements that are described in the law related to governance, meetings, board of directors, officers and distribution of net earnings.
- **Limited Liability Company (LLC):** LLCs are business entities that have limited liability, but are not subject to the same tax principles and formalities as corporations (including cooperative corporations). They are governed primarily by a contract between all of the members of the business, called the Operating Agreement, which can adopt cooperative principles like "one member, one vote" and profit distributions based on labor-contributions. Because the Operating Agreement is a contract between the members, future members could decide to change the agreement and remove the parts that make it operate like a cooperative, such as governance and profit-sharing based on membership and labor.

Before we explore the differences between these two forms further, let's clarify why cooperatives are traditionally not considered "nonprofits," or other types of social enterprises.

Will the business be "nonprofit," and if so, will it be "charitable" or for the public benefit?

If the primary purpose of the cooperative is to create economic benefit for the worker-members, you should probably form a for-profit entity (likely the LLC or the cooperative corporation) or a nonprofit mutual benefit corporation. But if the main purpose of the business is to serve charitable or educational goals (such as job-training for low-income individuals), a better choice would likely

be a nonprofit public benefit corporation, which could likely be granted exemption from paying federal and state income taxes.

Nonprofit Mutual Benefit Corporations: A Special Type of “Nonprofit”

The mutual benefit corporation is a “nonprofit” that is unlike your typical nonprofit. The purpose of the mutual benefit corporation is to benefit its members, not the general public. Thus, it cannot receive a 501(c)(3) tax exemption (discussed below). Mutual benefit corporations are “nonprofits” because they cannot distribute any net earnings (i.e., profits) back to their members. Mutual benefit corporations have many attractive features for people who want to start cooperatives. Like cooperative corporations, they incorporate governance principles of “one member, one vote”, and are designed to benefit their members. Unlike cooperatives, however, mutual benefit corporations can’t distribute any of their profits to their members (unless the corporation is dissolved). Mutual benefit corporations are frequently used to form condo associations, business districts, social clubs, or homeowners associations. They may be attractive to worker-members who do not intend to distribute profits, but rather want to create an institution, such as a maker space, that will be democratically governed for the benefit of its members. Because mutual benefit corporations directly benefit their individual members (not the public at large), they will not qualify for 501(c)(3) tax-exempt status, and thus won’t be able to receive tax-deductible donations. However, it may be possible for a mutual benefit corporation to receive federal tax exemption under 501(c)(6), as a business league, under 501(c)(7), as a social or recreational organization, or under a variety of other categories of tax exemption. It may also qualify for exemption from California income taxes.

Nonprofit Public Benefit Corporations: 501(c)(3)-eligible nonprofits

By contrast nonprofit public benefit corporations are operated for a public or charitable purpose and are prohibited from distributing assets and profits to their members. These corporations can apply for tax-exemption from the federal and state government by filing applications that describe how their activities will be dedicated to a public or charitable purpose. It will be difficult for most cooperative businesses to achieve 501(c)(3) tax-

exemption, because such businesses are typically operated for the benefit of their individual members and not the general public.

While important to note these key differences between cooperatives and nonprofits, the two distinct entity forms can work well together, particularly through nonprofit incubation of cooperative businesses. This unique model is explored in further detail below in the “Nonprofit Organizations Incubating Worker Cooperatives” chapter.

Many People Are Curious About California’s Two New Types of Corporations...

Traditional corporations are formed to generate profit for their shareholders, often to the exclusion of pursuing benefit for the community and environment. Two new “hybrid” corporate entities in California – the Benefit Corporation and Flexible Purpose Corporation (FPC) – allow for other purposes to be included in the articles of incorporation. These are called “hybrids” because they are a blend between traditional for-profit businesses that are designed to maximize the wealth of their shareholder-owners, and traditional nonprofit organizations that pursue social and environmental missions.

While both of these “hybrids” represent an important departure from the traditional corporation, neither is well-suited for worker-ownership. Both the benefit corporation and the FPC are based on the typical model of shareholder ownership- i.e., ownership and profit distribution based on the number of shares owned. FPCs and benefit corporations were intended to give traditional corporations the flexibility to pursue socially beneficial goals instead of only pursuing profit for their shareholders, whereas cooperative corporations and cooperative LLCs embody the principles of worker-ownership, as opposed to shareholder-ownership. In order to structure a shareholder-based corporate entity as a worker-owned cooperative, you would need to draft a shareholder agreement. The shareholders’ agreement would have to provide for worker-members as shareholders and incorporate the cooperative principles of “one member, one vote” and cooperative profit sharing. Essentially, this would be recreating what is already provided in the California Cooperative Corporation. Nevertheless, what follows is a brief description of each type of entity:

Benefit Corporation: The Benefit Corporation is a new corporate form that was adopted in California in 2012 to promote social enterprise. To be a benefit corporation a company must

be committed to pursuing a “general public benefit” and must take a broad range of interests into account when making business decisions. Instead of the traditional corporate duty to make a profit for shareholders, benefit corporations must consider how the business will affect its employees and suppliers, the local community, and the environment. Additionally, benefit corporations must publish an annual report that uses a third party standard to assess how the company is pursuing its public benefit purpose.

The benefit corporation is NOT the same as a Certified B Corp., which is a company that completes a certification process by an independent third-party nonprofit organization, called B Lab, and pays for the use of the B Corp. logo. Any company, including LLCs, FPCs and cooperative corporations can apply to be a Certified B Corp.

Benefit Corporations are not B Corps.

Many people confuse the new Benefit Corporation entity with B Corp. While the names are unfortunately very similar, they are very different concepts. A Benefit Corporation is a legal entity that has specific requirements by law it has to abide by, while the B Corp is a certification by a nonprofit organization (B Lab) that the company meets rigorous standards of social and environmental performance, accountability, and transparency. Any company (corporations, LLCs, cooperative corporations, etc.) can apply for (and pay for) B Corp. certification, and forming as a Benefit Corporation does not mean that you meet B Corp. standards.

Flexible Purpose Corporation (FPC): The FPC, another new legal entity created in 2012 to promote social enterprise, requires that the corporation pursue a “special purpose,” i.e., a specific social or environmental mission beyond simply making a profit for the company’s shareholders. For example, a worker-owned business could choose a special purpose that designates that the corporation’s purpose is to promote the wellbeing of its local community or environment. Allowing the company to precisely tailor its special purpose makes this form more flexible but less comprehensive than the benefit corporation. To promote transparency and accountability, an FPC must also publish an annual report disclosing how well it has achieved its special purpose.

How do an LLC and a cooperative corporation differ?

The choice between an LLC and a cooperative corporation depends on each cooperative's specific circumstances. The following are some of the main differences between these two types of entities.

Naming the business

In California, only businesses incorporated under the California Consumer Cooperative Corporation Law may use the word “cooperative” in their name. Thus, if you want to include the word “cooperative” in your business's name, you should incorporate as a cooperative corporation. An LLC may not use the word “cooperative” in its name, but it may use related words like “collective” or “collaborative.”

Employment status

The question of whether cooperative corporation members are employees is a complicated legal issue discussed in the employment law section of this handbook. Sometimes, however, the members who form a cooperative corporation and work for that cooperative corporation are presumed to be employees. If those members are indeed treated as employees, then they would have to be paid at least minimum wage. The cooperative corporation would also have to comply with other employment requirements, including making payroll tax deductions, issuing W-2s, purchasing workers' compensation insurance, and paying overtime.

In contrast, the members of an LLC are not generally considered employees. Therefore, a worker-owned business that is formed as an LLC may have more flexibility with respect to minimum wage, overtime, payroll withholding, and workers' compensation insurance.

Governance structure

The LLC also tends to be more flexible than the cooperative corporation in terms of governance. The rules governing the operation of an LLC are contained in the LLC's Operating Agreement, which is agreed to by the worker-members of the LLC. The cooperative principles of “one member, one vote” can be written into this Operating Agreement. However, because the Operating Agreement is so flexible, there is a risk that future worker-owners could change and remove the cooperative provisions, unless the Operating Agreement is structured carefully to avoid

such possibilities. Conversely, the cooperative corporation has the ideals of “one member, one vote” embedded in its DNA. Although cooperative corporations thus sacrifice some structural flexibility, this bedrock principle ensures that worker-owners will continue to own and control the business. In addition, a cooperative corporation must have a board of directors; an LLC may or may not have a board of directors.

Profit-sharing and taxes

Both the LLC and the cooperative corporation allow for worker-owners to share in the profits of the business. Members of a worker cooperative share in the profits based on “patronage,” which most worker cooperatives measure based on the number of hours each member works. The more “patronage” a member has (for example, the more hours you work), the greater the share of profits to which that member is entitled. Both an LLC and a cooperative corporation could also include other factors such as “job creation” or a “founder’s multiplier” in considering how to distribute profits, based on how the business decides to calculate the value of each worker-owner’s contribution for a given year.

LLCs and cooperative corporations both have tax advantages when compared to other corporate entities, because both are able to avoid double taxation. The profits of typical domestic stock corporations are taxed twice: first at the corporate level, and then again when shareholders receive dividends. However, if it meets the requirements of Subchapter T of the Internal Revenue Code (discussed later in this manual), then a cooperative corporation can avoid double taxation on profits that are derived from members’ labor and paid out to the members as patronage distributions.

In comparison, an LLC is generally considered a “pass-through” entity, in which profits and losses are not allocated at the entity level, but directly accounted to the members. However, the tax flexibility involved with an LLC can also result in complex accounting and tax issues in cases of larger LLCs, where members are joining and leaving the organization. This could result in higher administrative costs to manage the organization. Cooperative corporations are somewhat easier to manage when they grow larger because when members leave, the cooperative’s bylaw provisions will address how to pay out the member’s capital contribution. The member usually does not have a further claim on the cooperative’s assets.

There are some other tax differences between LLCs and cooperative corporations, so it's a good idea to check with an accountant familiar with coops to find out if one will serve your business needs better than the other.

Contractor's license

In 2010, California passed a law that allows LLCs to obtain contractor's licenses. However, if you are considering forming a business that requires a contractor's license, the cooperative corporation may be a better option because an LLC must pay higher insurance and bond postings than a corporation.

Which should you choose: LLC or Cooperative Corporation?

Choosing an appropriate entity to carry out your anticipated activities is one of the most important first steps in establishing your cooperative business. The ultimate decision about which legal form to use will depend on specific facts and circumstances about your business plans and long-term goals.

	Cooperative Corporation	Limited Liability Company (LLC)
Ownership	1 or more persons or entities	1 or more persons or entities
Documents necessary to form entity	File Articles of Incorporation with the State	File Articles of Organization
Governance	Statutory requirement of one-member one-vote; must have a board of directors	Flexibility in choosing governance- need not have a board; need not have one-member, one-vote. Can have creative alternative arrangements
Employment status	Working members are likely to be considered employees of the cooperative for immigration and minimum wage purposes	Working members need not be classified as employees, can be classified as “partners”
Management	Corporation's Board of Directors, which may be all members/workers	Can be member-managed or manager-managed
Maintenance document requirements	Need to maintain minutes of meetings and by-laws	Need to draft and comply with an "Operating Agreement"
Lifespan	Unlimited (perpetual) existence, unless dissolved by directors or revoked by state for non-compliance	Can be for a specific agreed-upon time period, or it can be unlimited (perpetual)
Liability	Members' liability is limited to their investment in the corporation	Members are limited to the amount of investment in the company, or as specified in Articles of Organization
Taxation	Corporate taxation. May qualify for subchapter T tax treatment. Subchapter T: corporation taxed on profits, patronage refunds may qualify for federal deductions. Must file corporate income tax return - Form 1120-C	Partnership or corporate taxation. If partnership taxed, then members taxed on share of company income (profits). Taxes paid on personal tax return - Form 1040. If corporate taxed, may qualify for subchapter T tax treatment.
Advantages	<ul style="list-style-type: none"> • Legal entity separate from individuals • Equality of management rights for individual members • Tax deductions may be available • May benefit patrons other than members • Exemption from CA securities qualification for offerings to members (up to \$300) 	<ul style="list-style-type: none"> • Legal entity separate from individuals • More flexible entity for governance purposes • More recognizable entity, thus easier to raise capital than a cooperative • If partnership taxed, then no corporate income tax, but must pay state minimum franchise tax (\$800) • Net operating loss is deductible by members • Less "formal" record-keeping requirements - no need to hold an annual members meeting

<p>Disadvantages</p>	<ul style="list-style-type: none"> • Members are likely to be considered employees for most purposes • Distribution of patronage can get complicated • Must comply with statutory rules around meetings, notice and one-member, one-vote • Difficulty in raising capital • Unfamiliar corporate form 	<ul style="list-style-type: none"> • Profit distributions based on patronage and one-member, one-vote not provided by statute, so future members can change the operating agreement so that the LLC is no longer operating as a cooperative • Cannot raise capital through issuance of stock • Accounting can get complicated with many members in the company, especially if there is high turnover among members
	<p>Cooperative Corporation</p>	<p>Limited Liability Company (LLC)</p>
<p>Who finds this the best way to do business?</p>	<ul style="list-style-type: none"> • Owners who see themselves operating on a cooperative business • Desire to use the name “cooperative” • Interested in patronage distributions and flexibility of retaining earnings in the capital account- which may be taxed at a lower rate 	<ul style="list-style-type: none"> • Owners who want flexibility • Don’t want to be considered employees • Less traditional cooperative forms- may incorporate outside equity investors • Not available for certain licensed professions

What are the steps towards forming a cooperative corporation?

(1) Steps Before Incorporation

- a. Choose a business name (one that includes “Cooperative” and an abbreviation that indicates that the co-op is a corporation, such as “Incorporated” or “Inc.”) and check with the California Secretary of State’s office regarding its availability.
- b. Identify initial members and/or directors.
- c. Decide whether and how to issue membership shares.
- d. Prepare bylaws for the cooperative (See Appendix for Sample Bylaws).
- e. Draft a membership agreement (“disclosure document”) and receipt, to be given to prospective members (See Appendix for Sample Disclosure Document).
- f. Determine whether any licenses, permits, and insurance must be procured.
- g. Prepare and file Articles of Incorporation with the Secretary of State; the filing fee is \$30.
- h. Within 90 days of filling the Articles, file a Statement of Information with the Secretary of State; the filing fee is \$20.

(2) *Steps After Incorporation*

- a. Hold the first meeting of the Board of Directors, for the purpose of adopting the bylaws, appointing officers, and discussing other business plans (note that the members may jointly govern the cooperative by making each member a director).
- b. Obtain an employment identification number (EIN) with the IRS and an employer account number with the state.
- c. Open a bank account for the cooperative.
- d. Obtain the necessary licenses, permits, and insurance.
- e. Hire or retain an accountant or bookkeeper to manage the company's finances.
- f. Maintain up-to-date membership records, including names and addresses.
- g. Implement an operational and management structure, including designating committees or managers for the business's day-to-day operations.

What are the steps towards forming an LLC?

The legal steps to form an LLC in California are as follows:

- a. Choose a business name (which includes an LLC designator, such as “Limited Liability Company” or “Limited Company” or an abbreviation of one of those phrases, such as “LLC” or “Ltd. Liability Co.”) and check with the Secretary of State's office regarding that name's availability.
- b. Prepare and file Articles of Organization with the Secretary of State using Form LLC-1; the filing fee is \$70.
- c. Within 90 days of filing the Articles, file a Statement of Information with the Secretary of State using Form LLC-12; the filing fee is \$20.
- d. Negotiate and execute an Operating Agreement among the worker-owners, establishing rules for how the LLC will operate.

Note that a number of steps are critical to successfully launching *any* new business enterprise. The foregoing was a rundown of some key *legal steps* towards starting a worker-owned business. For a detailed outline of the *business steps* towards starting a worker cooperative, we recommend the *Steps to Starting a Worker Co-op* Manual, published by the Center for Cooperatives at the University of California, Davis and the Northwest Cooperative Federation, which is available at: http://www.usworker.coop/public/documents/start_worker_coop.pdf.

One more thing: Can I convert from an LLC to a cooperative corporation or from a cooperative corporation to an LLC?

Yes. There is a \$150 fee for conversion, as well as some tax and accounting hurdles. We advise our clients to choose one entity type and plan to remain as that entity type, as there may be negative tax consequences for conversion from one entity to another because certain transfers of assets may be subject to capital gains taxes.

Useful Resources:

Additional resources on entity formation can be found at:

- Legal Sourcebook for California Cooperatives: Startup and Administration.
<http://www.cccd.coop/files/LegalSourcebookForCaliforniaCooperatives.pdf>
- NOLO legal encyclopedia: <http://www.nolo.com/legal-encyclopedia>

ENTITY CONVERSION: HOW TO CONVERT YOUR EXISTING BUSINESS TO A COOPERATIVE³

Many worker cooperatives are start-ups: new business entities created out of whole cloth. However, forming a new business entity is not the only way to create a cooperative business. Existing businesses with traditional capitalist ownership structures can also be converted into worker cooperatives, with significant potential advantages for the existing owners and their employees.

The experience of Select Machine—a small Ohio-based manufacturer, vendor, and distributor of custom parts for construction and demolition equipment—is a textbook example of a conversion. Select Machine’s two owners founded the company with the goal of creating a strong community and an employee-friendly workplace. When the owners decided they were ready to sell the business, they found several potential purchasers. However, these would-be buyers were primarily interested in the company’s customer list; they planned to consolidate production, shut down Select Machine’s plant and leave its employees out of work. This was not what the owners had in mind, so they turned to the Ohio Employee Ownership Center, who teamed with attorneys Mark Stewart and Eric Britton to facilitate the sale of Select Machine to their employees. This chapter borrows heavily from the writings of Mark Stewart and Eric Britton published subsequent to the Select Machine conversion.

Why Do It?

For the owner:

- *Defer capital gains taxes:* Normally, sellers of ownership shares in a company must pay capital gains taxes on their sale proceeds. However, Section 1042 of the Internal Revenue Code⁴ allows owners to defer paying these taxes if they sell their shares to an Employee

³ *Acknowledgement: The legal issues and transaction structure outlined in this chapter borrows heavily from the transaction developed by the Ohio Employee Ownership Center and attorneys Mark C. Stewart and Eric D. Britton.*

⁴ 26 U.S.C. § 1042 (2012).

Stock Ownership Plan (ESOP)⁵ or a qualifying worker cooperative. The mechanics of a “Section 1042 rollover” are described below.

- *Maintain the company culture:* As the Select Machine experience demonstrates, many potential purchasers have very different plans for a business than its existing owners. If the owners want to maintain the direction of their business, however, one option is selling to the business’s existing employees, who may have longstanding professional and personal relationships with the owners. It should be noted, however, that transitioning to worker ownership and management itself will entail significant changes to a business’s governance and corporate culture.

⁵ ESOPs are a form of defined-contribution retirement plan in which employees take an ownership interest in the company. The employees’ shares are held in the ESOP trust until an employee retires or leaves the company. ESOPs allow for long-term deferral of taxes on employees’ earnings, but they are expensive to establish and maintain and must follow detailed regulations under the Employee Retirement Income Security Act (ERISA). Thus for many small businesses ESOPs are not a viable option.

- *Gradual transition from full-time management responsibilities:* Many business owners want to devise an exit strategy without getting out immediately and entirely. Cooperative conversions can be structured to allow the owners to make such a gradual transition. Moreover, owners who wish to keep working at the business can also become members of the cooperative.

For the employees: For the employees in a traditional capitalist business, converting to a worker cooperative presents them with all the potential benefits of worker-ownership—capturing the full value of their labor and sharing in the business’s profits; participating in the business’s management and decision-making; and working for a business that operates for their benefit.

Conditions for Success

Not all existing businesses are well suited to a worker cooperative structure. If a business has high employee turnover or low employee loyalty, selling to the employees will not be a good option. Additionally, for many large or capital-intensive businesses, securing financing for a sale to the employees may not be feasible.

However, in businesses with a smaller number of dedicated employees, and particularly companies where employees bring specific skills to the workplace—for example, in many small manufacturing, craftsperson, artisan, or specialized services industries—cooperative conversion may be a good fit. Conversions are particularly likely to succeed for companies where the existing owners take an active management role and have identified employees willing and able to take on those responsibilities.

The Legal Framework

Section 1042: As mentioned above, a special provision of the Internal Revenue Code, introduced in 1984, provides business owners with an incentive to sell their businesses to their employees. Section 1042 allows owners of closely held businesses⁶ who sell at least 30% of more of their stock to their employees (through an ESOP or “eligible worker-owned cooperative”) to shelter their capital gains from taxation if they roll over the sale proceeds into other qualified domestic securities within 12 months of the sale. To qualify for a “1042 rollover,” the seller must have owned the stock

⁶ A closely held business is a business with a small number of controlling shareholders.

for more than three years; the seller must reinvest in a portfolio of domestically operating companies; and the buyer must purchase at least 30% of the outstanding shares.

Subchapter T / State Cooperative Law: Owners can take advantage of the tax benefits provided by Section 1042 if they sell their shares to their workers as a cooperative that comports with the provisions of Subchapter T of the Internal Revenue Code.⁷ Subchapter T prescribes certain requirements regarding the tax treatment of the cooperative's income and the members' patronage income, which are described elsewhere in this manual. In addition to following these provisions, a converted cooperative will also have to comply with the relevant law governing cooperatives in the state in which the cooperative is incorporated.

Challenges to Conversion

Selling a business to a worker cooperative is an attractive option for many businesses, and presents advantages for both the selling owner and potential worker-owners. However, there are also challenges associated with cooperative conversion that require some creative solutions.

Risk Disclosure: Whenever ownership of a company changes hands, there are significant risks involved—the new owners generally will not be familiar with the business's finances, and the business could have unexpected liabilities. Disclosing these risks is an important part of business transactions. In an ESOP, a trust that manages the employees' ownership interest has fiduciary duties to the employees; that is, it is obligated by law to act in the employees' best interests, mitigating some of the risks of assuming ownership. In addition, transactions regulated by the federal securities laws often require elaborate disclosures of finances and liabilities. By contrast, converting a closely held business to a worker cooperative and then selling shares to the members, just like the sale of any security or business, is more a case of "buyer beware." Thus a cooperative considering a buyout should engage professional advisors to conduct the necessary due diligence, and insist on disclosures and warranties from the selling owner.

Financing: Although the selling owner may have identified employees who are enthusiastic about purchasing the company, the would-be worker-owners often lack the capital to purchase the

⁷ 26 U.S.C. §§ 1381–88 (2012).

business outright. The employees will have to choose a financing strategy that suits their particular circumstances. Possible sources of capital include issuing non-voting equity, acquiring a note from the sellers or a commercial lender, redeeming stock with future cash flows, or any combination of these sources.

Interested employees will often have to turn to a commercial lender in order to finance the purchase. Many lenders, unfamiliar with cooperative conversion, will be nervous about making such a loan and will demand some type of guarantee. The bank may require the cooperative to pledge its assets or stock, place limitations on patronage distributions until the debt is repaid, and, where the conversion entails the seller exiting the business completely, receive ongoing business consultation (to ensure that the business will remain profitable under the new, inexperienced cooperative management).

The Select Machine conversion is an excellent example of how a conversion can be structured to utilize multiple sources of capital. Select Machine structured the sale through several stock redemptions spread over a period of several years. The stock redemptions were financed through several different means. The first block of stock was financed by a note from a local bank. Later, the cooperative was able to purchase stock with cash from its business operations. The final stock redemption was financed by a note from the sellers themselves.

It is possible to sidestep traditional lending sources altogether. The employees of Real Pickles, a Massachusetts-based pickle manufacturer, raised enough capital from the issuance of preferred shares to purchase the business from the founders in a single transaction. The shares were structured on flexible terms which gave the company discretion in paying down their debt burden. The shares paid a cumulative dividend and were redeemable at a set price after a predetermined period of years. The investors came entirely from the local community.

Ownership-Control Disconnect: If a conversion is structured to sell the business through multiple transactions and to utilize the Section 1042 tax deferral, the multi-step nature of cooperative conversion can present a dilemma for the selling owner: after the first step (minimum 30% sale), the owner may still retain a majority ownership interest in the business. However, to take advantage of Section 1042, the members (a majority of whom must be employees) must elect a majority of the newly converted cooperative's board on a one-person, one-vote basis.⁸ In other

⁸ 26 U.S.C. § 1042(c)(2).

words, the majority owner no longer has majority control. The interests of the selling owner can be protected by including in the sale agreement assurances that the cooperative will act so as to protect the owner's remaining ownership interests. In addition, the cooperative's governance documents will often build in safeguards such as supermajority voting requirements for decisions affecting the owner's proprietary interests.

Business Planning: Conversion to a cooperative will not only transform how a company is governed, it will also affect every aspect of how the company does business, from its day-to-day operations to its determination of how salaries and profits are distributed. Especially for selling owners and employees who lack experience with worker cooperatives, it may be difficult to anticipate how the business might change post-conversion. As part of the conversion process, the sellers and buyers should collaborate on forward-looking business planning.

The Steps Towards Executing a Cooperative Conversion

Often, the decision to convert to a worker cooperative begins with the owners. As mentioned above, the Section 1042 sale may be an attractive option for owners who are looking to preserve their business while transitioning away from it and sheltering their capital gains from taxation. However, the "qualified securities" requirement of Section 1042 may be too cumbersome for some owners, who may opt to forego the rollover. For owners who do not take advantage of Section 1042, there may be other equally powerful motivations, such as the gratification that comes with knowing that the business they founded will continue after they exit and the knowledge that a conversion will help their employees keep their livelihood. Perhaps most importantly for such owners, the employees may be the only willing buyer in a depressed market.

If the owners decide to pursue a cooperative conversion, the process of a conversion may take the following steps⁹:

1. *Owner's Decision.* First, the owner should decide to sell the business to the employees, based on an understanding of the benefits of cooperative conversion as well as the attendant risks.
2. *Cooperative Steering Committee.* Next, the owner should approach employees who are potentially interested in becoming members of the cooperative. Once the owner has

⁹ The process outlined herein is not an all-encompassing. Each conversion is unique and the parties involved must evaluate which steps are necessary given their particular circumstances.

identified a “critical mass” of interested employees, those employees should form a cooperative steering committee that is authorized to act on their behalf. A company with few employees may not need a steering committee.

3. *Professional Advising and Appraisal.* The Steering Committee should engage professional advisors, such as lawyers and accountants, to investigate the feasibility of a cooperative conversion, the financial health of the business and its actual and potential liabilities. This will require the cooperation of the selling owner. The Committee should also obtain an independent appraisal of the value of the company’s stock.
4. *Draft and Sign a Sales Agreement.* The sales agreement should articulate the terms of the sale, including a list of assets belonging to the business and the agreed upon sales price.¹⁰ The sales agreement may also include such representations as demanded by the transacting parties or the lenders. The sales agreement should establish a date for the closing meeting, where the parties will sign documents to transfer ownership to the employees and reorganize the business into a cooperative.
5. *Closing Meeting.* At a minimum, the business ownership should transfer at the closing meeting. However, it is not unusual for several distinct events to occur at the closing meeting: in addition to a transfer of ownership, the business will be reorganized into a cooperative, and the lenders and the cooperative will sign a lending agreement.

Stock Redemption Agreement. The parties will sign a stock redemption agreement to transfer ownership, in the form of shares, from the sellers to the employees. The agreement should stipulate the terms of the deal, including the number of shares, the share price, and any other representations and warranties required by the parties or the lender. The agreement may also describe how the owner will support the employees’ financing of the stock purchase. In the case of a multi-stage sale, the agreement may articulate the future steps to complete the cooperative’s purchase of the owner’s stock.

Amend Governance Documents. The sellers or the buyers (depending on whether the reorganization is planned to occur before or after the transfer of ownership) should amend

¹⁰ See Nolo guide on selling a business, accessible at <http://www.nolo.com/legal-encyclopedia/selling-business-eight-steps-30143.html>.

the business's key founding and governance documents to adopt a cooperative structure. In California, the business must file a Certificate of Amendment of Articles of Incorporation with the Secretary of State to amend its articles.¹¹ In addition, the business will require new bylaws provisions regarding, for example, membership, the board of directors, how shares are voted, and how profits are distributed. The bylaws should also comport with the requirements of Subchapter T as well as the relevant state cooperative law. At this point, the business is officially a worker cooperative, at least on paper.

Offering Statement. The offering statement is a document prepared by the seller for the prospective worker-owners disclosing all the relevant risks associated with the transaction. (This addresses the “buyer beware” problem described above.) An offering statement will outline the risks of selling shares and transferring control; the risks of employee investment in the company; the terms of the Stock Redemption Agreement; and the securities and tax law issues surrounding the transaction and the continuing operation of the business. It will also describe the company's reorganization into a worker cooperative, including attaching the new articles and bylaws (spelling out the terms and conditions of membership), as well as its business planning and finances. The purpose of the Offering Statement is to make a fair disclosure to potential members of the risks and responsibilities of becoming a worker-owner; it also provides lenders with a clearer understanding of the transaction.

Secure Financing. Before closing, the sellers and employees will have already assessed and identified lending sources. As mentioned above, lenders may require some form of support or guarantee from the seller or the cooperative. As such, the lender may be present at the closing meeting to formalize the lending documents and to ensure that their interests are represented in the other transaction documents, such as the stock redemption agreement, governance documents (limiting patron dividends), insurance certificate (for secured assets), employment contract, or consulting contract.

6. *Elect Federal Taxation Under Subchapter T.* Following the reorganization and redemption of the owners' stock, the converted cooperative should terminate its existing election under

¹¹ See Cal. Corp. Code §§ 900–910 (West 2012).

the federal income tax laws and instead elect to be taxed under Subchapter T. This will enable the partial pass-through taxation characteristic of worker cooperatives, and permit the selling owner to take advantage of the tax benefits under Section 1042.

7. *Selling Owner: 1042 Election.* If applicable, after the initial sale of shares to the cooperative is executed, the selling owners should elect to have their capital gains income from that sale taxed under Section 1042. As mentioned above, if the owners reinvest their sale proceeds within one year, taxes on those capital gains will be deferred.
8. *Future Operations/Loan Repayment.* The converted cooperative will continue its business operations, albeit with a new board, new governance structure, and new system of distributing profits. The selling owners can continue as members of the cooperative, provided they meet all the conditions of membership (such as working for the cooperative full-time). In the years following the transaction, the cooperative will need to dedicate its profits towards repaying the loan that financed the transaction. This will depress the cooperative's cash flow, thus most of the patronage allocated to members will be in the form of equity interests rather than cash payments until the loan is repaid (although Subchapter T requires that 20% of all patronage allocations must be in cash). The decrease in their disposable income will affect the members' own financial planning, and during this time the members will be exposed to the enterprise risk of the business.

Conclusion

Converting an existing business to a cooperative is a complex transaction involving a number of legal and financial issues and risks. Indeed, successfully executing a conversion may require some novel, outside-the-box thinking. But the potential benefits of cooperative conversion are enormous—not least of which is the fact that the now-cooperatively-managed business is already up and running. More broadly, establishing conversion as a viable model for selling a business could encourage more businesspeople and lawyers to challenge the conventional wisdom and consider cooperative conversions when thinking about how to structure their deals.

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¹² This article can be accessed at: [http://www.slk-law.com/portalsresource/lookup/wosid/cp-base-4-5708/media.name=/MCS.SLK_TOL-_698879-v1-F_HOME_CDEMSKI_MCS_Employee_Cooperative_Journal_Article_doc\[1\].pdf](http://www.slk-law.com/portalsresource/lookup/wosid/cp-base-4-5708/media.name=/MCS.SLK_TOL-_698879-v1-F_HOME_CDEMSKI_MCS_Employee_Cooperative_Journal_Article_doc[1].pdf).

NONPROFIT ORGANIZATIONS INCUBATING WORKER COOPERATIVES

Why Incubate?

Many nonprofit organizations are considering worker-owned business development as a powerful tool for community economic development. This is because worker-owned businesses and cooperatives align with the mission of those nonprofit organizations that are seeking to build economic empowerment and opportunity in low-income and marginalized communities.

However, nonprofits should be aware of the risks that come with business development in general and worker-owned business development in particular. The most important legal risks from the nonprofit's perspective include jeopardizing the organization's tax-exempt status and becoming liable for the actions of the cooperative.

It is important to consider that a worker-owned cooperative is primarily organized for the benefit of its members, who are private individuals. Although in California a cooperative corporation is not technically a "for-profit" corporation, it is also not a nonprofit. Unlike a nonprofit organization, a cooperative's main purpose is not to benefit the public, but rather its members. Thus a nonprofit seeking to incubate such businesses will have to show that the beneficiaries of the cooperative's operation are a "charitable class" of people or that developing the cooperative will further the nonprofit's "charitable purpose." We will discuss below the definitions of these terms.

Although it's a frequent reminder, it's important for a nonprofit interested in starting a new business to consult with an attorney who specializes in nonprofits. This will prevent the nonprofit from getting into activities that may jeopardize its tax-exempt status.

An Example: Green Landscaping Cooperative

Green Commonwealth Cooperative ("Green") is a new worker-owned cooperative that has been incubated by Jobs Now, a community-based nonprofit. The nonprofit's mission is to bring employment opportunities to low-income, minority, and disadvantaged people in the East Bay, by providing jobs training assistance to disadvantaged workers and businesses that employ



disadvantaged workers. Green will employ low-income day laborers who have trouble finding work and do not have the resources to start their own business. Green will ultimately be owned by the day laborers as a worker cooperative. Jobs Now is providing the cooperative a start-up loan and business development services including helping them to organize, providing business training, assistance with maintaining financial, and accounting records, and providing an office space. As Green Landscaping becomes profitable, it will repay the nonprofit for services received through reduced rent and reduced fees.

The next sections of the manual analyze whether Jobs Now's assistance to incubate Green fits within the nonprofit's tax exempt purpose.

What Is a Nonprofit?

A nonprofit organization in California can be a public benefit corporation, a nonprofit religious corporation, or a mutual benefit corporation. For the purpose of this chapter, we will focus on public benefit corporations because they can get tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Public benefit corporations in California are established to engage in public or charitable work.

Although the public benefit corporation is a matter of California state law, tax exemption is largely a matter of federal law. The most familiar type of tax exemption falls under section 501(c)(3). To obtain tax exemption under section 501(c)(3), the organization must be organized and operated for a limited set of purposes, the most common of which are charitable, educational, scientific, or religious.

Beyond 501(c)(3)

Note that there are many other types of tax exemption under section 501(c) of the Internal Revenue Code. Tax exemption under section 501(c)(3) has a unique benefit, in that donations to the organization are tax deductible to the donors. However, tax exemption under sections 501(c)(4), 501(c)(5), 501(c)(6), 501(c)(7), or another section may afford an organization greater flexibility and allow a broader range of purposes. It is also possible for a nonprofit corporation to operate without obtaining tax exemption, in which case the corporation would be taxed like a normal business.

Nonprofits Doing Economic Development Work in General

The IRS has provided guidance to nonprofits that want to do economic development work, such as providing resources and assistance to for-profit businesses in low-income communities. The IRS issues what are known as “Revenue Rulings,” which are public rulings that apply the tax laws to particular cases. These rulings can be relied on by the public to analyze how the IRS would view a similar case in the future. We use these rulings to try to understand how the IRS would view a nonprofit that is trying to do for-profit activities and what factors the IRS uses to determine whether these activities have a tax-exempt or “charitable” purpose.

In analyzing nonprofit organizations providing business development services, the main question that the IRS is seeking to answer is whether this work is primarily charitable in nature and helping the public, which would qualify for tax exemption, or whether it is primarily benefiting private individuals, which would make it a non-exempt activity.¹³

IRS definition of “charitable”

The IRS has interpreted the term “charitable” to include the following purposes:

- relief of the poor,
- lessening the burdens of government,
- promotion of social welfare by organizations designed to lessen neighborhood tensions, eliminate prejudice and discrimination, or combat community deterioration and juvenile delinquency.¹⁴

A nonprofit organization that seeks to develop for-profit businesses, such as cooperatives, as a charitable activity, would likely want to argue that the activity advances a charitable purpose related to those listed above.

¹³ See, e.g., Robert Louthian and Marvin Friedlander, “Economic Development Corporations: Charity Through the Back Door” (an IRS publication), (providing that the IRS recognizes the charitable purpose of economic development activities that benefit for-profit companies where “the ultimate good received by the general public outweighs the private benefit accorded to the direct beneficiaries”), available at <http://www.irs.gov/pub/irs-tege/eotopicg92.pdf>.

¹⁴ IRS Regs. 1.501(c)(3)-1(d)(2).

Private Inurement

The IRS is concerned that a nonprofit may use its tax-exempt funds to benefit a private individual, especially someone who has a relationship with the organization. This is called “private inurement” and is a concern when a nonprofit is doing business development work that will benefit a group of private individuals. Moreover, an organization whose **primary purpose** is to render services to individuals in their private capacity generally cannot qualify as a tax-exempt, charitable entity.

The exception to this general rule is where the private individuals receiving the benefit are members of a “charitable class,” or if they are not part of this class, then the individuals are a means for advancement of a charitable objective. Finally, the IRS also looks to see if the private benefit involved is incidental to or unavoidable in pursuit of the charitable purpose.

Charitable Class

A “charitable class” of people includes terms like “poor and distressed,” “minority,” and “disadvantaged.” In our modern parlance that usually refers to low-income people, people of color or other marginalized individuals. If the nonprofit can show that the direct beneficiaries are charitable, i.e., the worker-members of the new cooperative are limited to a charitable class of people, then it has a much stronger argument for why its business development work with the cooperative is “charitable.” This is because by helping such people form their own business, the nonprofit can show that its activity is contributing to relief of the poor or disadvantaged.

Charitable Purpose

By contrast, if the nonprofit is not working directly with disadvantaged or low-income people, then the nonprofit will want to show that its assistance to these individuals to form a cooperative will accomplish a charitable goal such as combating community deterioration. It would be even stronger if the nonprofit could show that by aiding non-poor people in creating a cooperative, the nonprofit’s activities are aiding a business that will locate in an economically depressed or blighted area, for example.

In such cases, the nonprofit should show that the assistance they are providing is *primarily* relieving poverty and lessening tensions caused by the lack of jobs in the area; lessening prejudice and discrimination against minorities; or some other similar charitable purpose.

The main lesson is that the nonprofit should not be providing business development assistance to non-poor or non-disadvantaged people without showing that this assistance is achieving a greater, *charitable* purpose.

The Factors That the IRS Considers

When the IRS analyzes tax-exempt organizations that are doing economic development work, the following factors are very important in determining whether the organization is primarily accomplishing charitable purposes, despite the fact that private individuals are benefiting from the work. The IRS looks to see if the nonprofit's assistance is **targeted to**:¹⁵

- (1) **benefit** a “**charitable class**,” such as minorities, the unemployed or underemployed, or other disadvantaged groups (i.e., by providing them training);
- (2) **aid an area** that is economically depressed or blighted;
- (3) **aid businesses** that would locate or remain in the economically depressed or blighted areas and provide jobs and training to the unemployed or underemployed from such area only if the nonprofit's assistance was available; and
- (4) **aid businesses** that have actually experienced difficulty in obtaining conventional financing **due to**
 - a. the **deteriorated nature of the area** in which they were or would be located or
 - b. their **composition by minority** or disadvantaged people.¹⁶

HELPFUL TIP:

BEWARE: Job training and creation is not always a tax-exempt activity!

While all of these factors are important, the IRS generally considers the first factor to be most important because it provides a **direct link** between the economic development activity and assistance to the disadvantaged through the provision of jobs.

¹⁵ See Robert Louthian and Marvin Friedlander, “Economic Development Corporations: Charity Through the Back Door” (an IRS publication), available at <http://www.irs.gov/pub/irs-tege/eotopicg92.pdf>.

¹⁶ See IRS Rev. Rul. 74-587, 1974-2 C.B. 162; Rev. Rul. 76-419, 1976-2 C.B. 146; and Rev. Rul. 77-111, 1977-1 C.B. 144.

Nonprofits Making Money

Thus far we have discussed the issue of whether a nonprofit can provide business development services to a worker-owned cooperative. But we must also address the question of whether the nonprofit can engage in business itself, either within the nonprofit or by forming a subsidiary. This is because the nonprofit may want to create the cooperative as a part of the nonprofit's activities, or eventually spin it off as a "subsidiary" business.

Related Versus Unrelated Business

The law allows nonprofits to operate income-generating businesses of two sorts: 1) **related** (the income from which IS NOT taxed) and 2) **unrelated** (the income from which IS taxed). The main point to take from nonprofits doing business is: **it's not what you do WITH the money, it's what you do TO EARN the money.** Many organizations believe that their business should be tax exempt simply because they reinvest all profits into the nonprofit organization. However, this is a given with any nonprofit – the earnings should not be distributed to private individuals. What matters to the IRS is the nature of the activity that earns the money, and whether the activity is operated with the primary purpose of achieving a tax-exempt, or charitable purpose.

Related Business

A "related" business is one in which the primary purpose behind the conduct of the activities is **substantially related to the tax-exempt purpose of the organization, as discussed above.** **The primary purpose** of the activity must be to further the exempt purpose, and it must have a **substantial causal relationship** to achieving those purposes. The primary motivation behind the activity and its primary impact should be the furtherance of the tax-exempt purpose. **The money that you earn must be incidental to, and not the primary goal of, the project.** When the nonprofit makes decisions about the business activity, it should be with the question: "What will most help us achieve our educational or charitable goals?" and not "How can we earn the most money?" The IRS wants to ensure that nonprofit business activities do not unfairly compete with for-profit businesses. A nonprofit's **business activity should not be operated on a scale that is larger than necessary** to achieve the tax-exempt purposes.

An example of a “related business” according to the IRS was a nonprofit’s sale of a software program when its charitable purpose was to make new technology available for the benefit of the public. The IRS noted that the software program constituted only 2.3% of the nonprofit’s total operations and that the budget for the software program showed that the program’s expenses exceeded its revenues. This helped persuade the IRS that the primary purpose of the program was not to earn money.¹⁷

It is important to note that the nonprofit is not insulated from liability for the actions of a related business, and so the nonprofit may be responsible for covering liabilities with its own insurance or assets if someone were to sue the related business.

Unrelated Business

In contrast to a “related” business, an “unrelated” business can be operated with the primary goal of earning money for the nonprofit, so long as it’s a small portion of the nonprofit’s total activities.

The IRS has provided guidance to show when a nonprofit’s work on behalf of a for-profit is an unrelated business. The following activities tend to show an unrelated, or commercial purpose:

- Competition with commercial firms
- Lack of voluntary financial contribution from the public
- Presence of net profits
- Failure to offer any free or below-cost services
- Failure to limit its clientele to exempt organizations.¹⁸

In general, the more the business looks like a competitive, commercial business rather than just one that furthers the nonprofit’s exempt purpose, the more likely the IRS is to consider it an unrelated business. In addition, if the activity itself is not substantially related to the organization’s exempt purpose, regardless of how the money earned from the activity is used, the activity is likely an unrelated business. In one instance, the IRS ruled that a nonprofit’s provision of veterinary services was an unrelated business because the nonprofit’s exempt

¹⁷ I.R.S. Priv. Ltr. Rul. 85-120-84 (Dec. 31, 1984).

¹⁸ See *B.S.W. Group, Inc. v. Comm’r*, 70 T.C. 352 (1978).

purpose was to prevent cruelty to animals but the services were not provided to animals that were unwanted or victims of cruel treatment.

Income from such a business is subject to Unrelated Business Income Tax (UBIT), and must be reported in the organization's annual 990 filing. The purpose of UBIT is to ensure that nonprofits do not gain an unfair advantage if they are competing in a regular market. The most important thing to remember about unrelated business is that it should not become substantial in relation to the nonprofit's total activities. There is no bright-line rule for determining when the unrelated business has become "substantial," but the safest thing to do is keep it at less than 10% or 15% of the organization's activities or income. If the activity grows and is successful in generating income, the organization may want to create a for-profit subsidiary. If the unrelated business is "substantial," and the nonprofit does not create a for-profit subsidiary, it may be in danger of losing its tax exemption.

Is the Green Cooperative a charitable activity of Jobs Now?

In the example of Jobs Now and the Green Landscaping Co-op, the first question to consider is whether the primary purpose of the organization is to provide business development services to a charitable class of people. Jobs Now can probably show that its business development work with low-income day laborers will contribute to relief of the poor by showing that:

- it is **directly benefiting** a charitable class of individuals,
- its services are **targeted to assist** that class,
- it is **not in competition** with commercial firms,
- it is providing services that are **free and below-cost**,
- it is **not making net profits off its work**; and
- it has **support from the public**.

By helping these workers to create their own business, it is **directly benefiting** the charitable class of low-income and disadvantaged people. In addition, Jobs Now can show that its services are **targeted to assist** disadvantaged people, not just anyone who wants a job.

In addition, Jobs Now should show that its assistance to the cooperative is **not in competition** with commercial firms, because there are no commercial firms that would provide free or below-

cost support to help day laborers start their own businesses.¹⁹ Finally, Jobs Now should show that it is **not making net profits off** of the business development services it provides; and that Jobs Now has support in the form of voluntary contributions from the public. All of these factors suggest that Jobs Now's business development activity is charitable in nature.

Beware: Jobs training is not always an exempt activity!

While we've given examples of where the IRS permits nonprofits to operate related businesses that are conducted for the primary purpose of providing skills training to the disadvantaged, the IRS is not always consistent!

For example, in one case, the IRS deemed a nonprofit's business to have a charitable purpose because it trained and provided employment to people who were unemployed or underemployed. In that case the nonprofit manufactured and sold toy products using the labor of disadvantaged residents. The trainees were placed in permanent positions in the community as soon as they were adequately trained.²⁰

But in another case, the IRS denied tax-exempt status to a nonprofit that provided job training to unemployed residents. In that case the nonprofit operated a low-price grocery store in which only a small portion of earnings was allocated to provide job training to unemployed residents from the surrounding low-income community. The nonprofit made a profit off of food sales, although they were sold at low prices to the community. However, food was not distributed free or at reduced cost to those who could not afford to pay. For these reasons, the IRS found that running the grocery store was not a tax-exempt purpose.²¹

We can distinguish these two cases because in the first case the *primary purpose* of the nonprofit's business was to train disadvantaged people, not to operate the business. In the second case, the nonprofit's activities were not primarily motivated by a desire to help unemployed or disadvantaged people. However, because conducting business activities as a nonprofit can be tricky, it is important to carefully plan your business such that it meets the

¹⁹ See IRS Rev. Rul. 69-572 for an example of where a nonprofit differentiates its services from those offered by for-profit providers. Please note that the issue of competition applies to the non-profit's activities, not those of the cooperative. It is assumed that the cooperative business itself will be competing with other businesses, and helping it compete may in fact be the goal of the nonprofit providing technical assistance.

²⁰ IRS Rev. Rul. 73-128, 1973-1 Cu. Bull. 222 (1973).

²¹ IRS Rev. Rul. 73-127, 1973-1 Cum. Bull. 221 (1973).

IRS requirements. Consult a nonprofit attorney for assistance with setting up any business your nonprofit may want to operate.

What Is a Subsidiary?

Often nonprofit organizations choose to form subsidiary entities to undertake business activities. Forming a subsidiary can help to protect a nonprofit's tax-exempt status. If the nonprofit seeks to engage in business activity that is not related to the nonprofit's tax-exempt purpose, then forming a subsidiary can be a good strategy. Another reason for forming a subsidiary is to protect the nonprofit from liability.

A subsidiary is usually owned or controlled by the nonprofit "parent" entity. The nonprofit exerts control over the subsidiary in a variety of ways. Usually the nonprofit controls the new entity by owning the stock, received in exchange for capital contributed by the nonprofit. This allows the parent nonprofit to select the subsidiary's board of directors and officers. Additionally, the nonprofit may incorporate the subsidiary, choose the subsidiary's business purpose, and create bylaws that protect the parent's ability to control the subsidiary. By controlling the board of directors, the nonprofit ensures that its vision is carried on in the subsidiary's activities.

The importance of corporate formalities

In order to prevent the nonprofit from becoming liable for the subsidiary's activities, the two should be treated as distinct entities. This means observing "corporate formalities." Corporate formalities include ensuring that both the nonprofit and the subsidiary have their own boards of directors with separate meetings and minutes; have separate officers and employees; maintain separate bank accounts, bookkeeping, records, and financial accounts; and use separate stationery. In addition, the subsidiary should enter into transactions in its own name. If these procedural formalities are followed, then the two entities will be treated by the courts as separate legal entities. If anyone tries to sue the nonprofit parent organization for the actions of the subsidiary, the lawsuit will likely fail because the parent will usually not be liable for the actions of the subsidiary.

Are worker cooperatives subsidiaries?

It is not advisable to structure the relationship between a nonprofit and a worker-owned cooperative as a parent-subsidary relationship. A worker-owned cooperative is supposed to be an entity that is owned by its members, who are the workers. Thus, if a nonprofit is the “parent” and wholly-owns the cooperative, this would defeat the purpose of creating the cooperative in the first place. Instead, it is better to have the nonprofit become a member of the cooperative or have control over the board of the cooperative, as we discuss in the next section.

Nonprofits Creating Cooperatives

In California, when someone incorporates a corporation, that person (known as the “incorporator”) has the power to appoint the cooperative’s initial board of directors. California cooperative law provides that only “natural persons” may hold seats on a cooperative’s board of directors. This means that a nonprofit entity cannot be a member of the cooperative’s Board.²² However, the cooperative law allows for a “specified designator” to choose “all or any portion of the directors authorized in the articles or bylaws” of the cooperative.²³ By selecting itself as the specified designator of board seats for the new cooperative, the nonprofit can ensure that, after the initial board of director’s term expires, it retains indirect influence over the activities of the cooperative through representation on the Board. However, by asserting excessive control over the cooperative’s board, the nonprofit risks violating the fundamental principles of a worker cooperative, which grants governing authority to the workers.

²² Cal. Corporations Code Section 12233.

²³ Cal. Corporations Code Section 12360(d).

The Nonprofit as Member

California cooperatives allow for different classes of membership. This means that the nonprofit could create a class of membership for the workers and a class for itself, as an organizational member. However, how the IRS would view a nonprofit member of a California cooperative corporation is not completely clear. In the LLC context, the IRS views nonprofit members of LLCs as entering into a joint venture with the other LLC members. Such LLCs are subject to strict rules: the LLC must be set up to achieve one of the nonprofit's charitable purposes; and the nonprofit must retain ultimate control of the LLC to ensure that the charitable purpose is the primary focus. In the case of a California cooperative corporation, the IRS may not subject the cooperative and the nonprofit to joint venture rules, because the cooperative corporation *is not a pass-through entity like an LLC.*²⁴ However, this area of law has not been tested and we recommend you consult with an attorney before making your nonprofit a member of a cooperative corporation.

Rather than become an official member of the cooperative, it may be advisable for the nonprofit to retain influence over the cooperative through designating a minority of seats on the board of directors, as described above. Alternatively, or in addition, the nonprofit could retain influence over the cooperative vision by naming itself in the bylaws of the new cooperative as a "specified person." This specified person has power to ensure that certain changes to the bylaws, such as a decision to stop operating as a cooperative, or to merge or sell to another business entity, cannot happen without the nonprofit's approval.²⁵ In this way the nonprofit can serve as an "anchor" to ensure that the cooperative maintains its founding principles and vision.

Reasons to avoid having a membership in the cooperative

It may be that the nonprofit would not like to become a member of the cooperative. This may be because the nonprofit does not want to be considered the parent of the cooperative or be liable for the cooperative's actions.

²⁴ See IRS Revenue Ruling 98-15 for a discussion of joint venture rules.

²⁵ California Corporations Code Section 12330(d) provides that a cooperative's bylaws may allow that the repeal or amendment of the bylaws (or any specified parts of the bylaws) "occur only with the approval in writing of a *specified* person or persons other than the Board of Directors or members."

From a tax perspective, it may be risky for the nonprofit to exert too much control over the cooperative. Even if the nonprofit and the cooperative are not in a “parent-subsidary relationship,” the IRS may find that the relationship exists due to the nonprofit’s excessive control and close supervision of the affairs of the cooperative.²⁶ If a parent entity exerts too much control over a subsidiary, the IRS could find that the subsidiary is not in fact a separate entity, but rather an “instrumentality” of the parent entity. The rationale behind this is that when the parent nonprofit is too involved in the day-to-day management of the subsidiary, the activities of the subsidiary are imputed to the parent. The effect of this could be that the income of the cooperative will be “attributed” to the parent nonprofit. The lesson here is that the nonprofit should take care to make sure that the cooperative is treated as a separate entity, with a separate board and separate management.

Further, in order to allow the new cooperative to be truly worker-owned and managed, the nonprofit should allow the workers to become members with voting powers in all respects. In addition, the nonprofit should not reserve to itself, as “specified person,” excessive power over the board of directors or over changes to the bylaws. As the cooperative becomes established, the nonprofit may want to designate itself to appoint no more than a minority of the board seats and let the balance be elected by the workers. By allowing the workers to elect a majority of the board seats, and thus retain democratic control of the board, the nonprofit will be well-positioned to show that the cooperative is not its subsidiary.

Services provided to the cooperative

The nonprofit can provide essential services to ensure the success of the cooperative such as: pre-startup business development planning and analysis, investment of start-up capital, development of business systems, management of human resources, strategic planning, start-up financing, public education, and creating strategic partnerships for the cooperative. If desired, staff members of the nonprofit can be independent consultants or employees of the cooperative.

If the nonprofit plans to provide certain services for free or below-cost to the cooperative, the nonprofit should make sure that such services are in furtherance of the nonprofit’s tax-

²⁶ Rev. Ruling 68-26 (finding that even though a technical parent-subsidary relationship did not exist between two nonprofits, the parent-subsidary relationship can be present if a “substantially similar relationship does in fact exist through the control and close supervision of its affairs.”).

exempt purpose. If the nonprofit is a charitable organization focused on assisting disadvantaged people, the nonprofit can show this by having the cooperative restrict its membership to such a disadvantaged class of people. However, if this is not possible, then it is important that the nonprofit be paid by the cooperative for the fair market value of the services it provides. Similarly, if the cooperative is the subsidiary of the nonprofit, then the nonprofit should make sure to charge market rate for its services to the subsidiary, so as to avoid an improper benefit to the cooperative.

Note that some of the services provided to the cooperative by the nonprofit would be considered “related business” activities (described near the beginning of this section), which means the nonprofit would not pay tax on any income for those services. However, some of the services may be considered operation of an “unrelated business,” in which case the nonprofit would need to pay taxes on the income (including any patronage dividends) derived from those services.

Cooperatives should “operate on a cooperative basis”

The purpose of a cooperative is to be democratically controlled by its members. Although the nonprofit may exert control over the cooperative through designating the board of directors, it should not fully control the cooperative. The other worker members should have the ability to control the cooperative through electing the board of directors and having a voice in the daily operations of the cooperative. If the nonprofit exerts too much control, this may violate fundamental cooperative principles as well as violate IRS provisions in Subchapter T of the Code.

As discussed in the “How the Money Flows” chapter, one of the advantages of Subchapter T is that the cooperative may deduct patronage dividends that are distributed to members based on their contribution to the cooperative.

The IRS allows Subchapter T tax treatment for cooperatives that are “operating on a cooperative basis.” This means that the cooperative should: (1) subordinate capital, (2) have democratic control by members, and (3) allocate and distribute net earnings to members.²⁷ In

²⁷ The Internal Revenue Code does not define “cooperative” or “operating on a cooperative basis.” Instead case law and IRS guidance have provided the determining criteria. The seminal case which provided these three factors is *Puget Sound Plywood, Inc. v. C.I.R.*, 44 T.C. 305 (1965); see also Charles Autry and Roland Hall, *The Law of Cooperatives*, American Bar Association, (2009), pg.88.

order to “subordinate capital,” the cooperative should place the control and direction of the organization in its members, not outsiders. Similarly, member democratic control requires the cooperative to generally govern itself on a one-member, one-vote basis. Thus, the nonprofit should avoid undue control over the cooperative, either through control of the board of directors or unequal voting power, which may violate the IRS requirements that the cooperative operate on a cooperative basis. However, this is a disputed topic and deserves more discussion. In some cases it may make sense for the nonprofit to exert control in the initial stages of the co-op’s development, to ensure that the business is successful.

The third principle, allocate and distribute net earnings to members, means that in general the profits of the cooperative should be allocated or distributed to the members’ accounts.

Be careful about how much the nonprofit controls.

In sum, it may not be a good idea for the nonprofit to have too much control over the new cooperative it creates for several reasons. How much is too much? This is a gray area and deserves more attention than can be given in this manual. Some argue that the nonprofit needs to retain control in the startup years of the co-op to ensure that the co-op is successful. This is especially true if the co-op’s members are disadvantaged workers who may lack access to the business and financial resources required to run a business. As we have discussed above, however, too much control over a Subchapter T governed cooperative may violate IRS rules about “operating on a cooperative basis.” Because this has not yet been tested, we recommend you consult with an attorney about incubating a worker cooperative corporation subject to IRS Subchapter T rules.

Protecting your tax-exempt status

In sum, take care to ensure that the business development work falls into the nonprofit’s tax-exempt purpose. Then make sure that all services provided to the cooperative from the nonprofit are “arms-length,” that is that they are fair to both the nonprofit and to the cooperative. If the cooperative is composed of a charitable class of individuals, then the nonprofit can offer these services free or at substantially lower costs. If these two conditions are met, then the non-profit is unlikely to face a threat to its tax-exempt status.

Steps To Take If Your Nonprofit Wants To Get Involved In Business Activities

Review your nonprofit's incorporation documents and tax exemption determination

Before your nonprofit undertakes to provide business development services for the development of new worker cooperatives, review your nonprofit's articles of incorporation to make sure that this activity fits within your organization's charitable purpose.

- Review the Articles of Incorporation to see if it contains a specific purpose clause that would encompass the contemplated activity. For example, the specific purpose might be to promote employment opportunities for the disadvantaged or poor, in which case a business that employs significant numbers of this charitable class may be consistent with this narrow purpose.
- Review the Articles of Incorporation to see if there is a broad purpose clause permitting the organization to engage in "any activities that further its charitable or educational purposes," in which case the new activity may be permitted without amendment provided it furthers the exempt purpose.
- Review your tax-exemption application and determination letter from the IRS to see whether the new activity contradicts any requirements the IRS imposed in the determination letter.

If your Articles do not include the contemplated purpose, then:

- Amend the Articles of Incorporation to include the new purpose and business activity and send a copy of the amendment to the IRS and the California Franchise Tax Board.
- In the amendment, include a letter describing the new purpose and business activity and why the nonprofit organization considers them to be charitable and educational.
- In California, the nonprofit corporation must draft a Certificate of Amendment and submit it to the Secretary of State's office. Here is a sample Certificate with further detailed instructions:

<http://www.sos.ca.gov/business/corp/pdf/amendments/corp-amdtnp.pdf>

For more information on nonprofits starting for-profit subsidiaries see this article: [http://www.adlercolvin.com/pdf/revenue_generating_activities/AC_Web_Docs--Revenue_Generating_Activities_\(00160207\).PDF](http://www.adlercolvin.com/pdf/revenue_generating_activities/AC_Web_Docs--Revenue_Generating_Activities_(00160207).PDF).

Different Entities Available for Formation of Cooperatives

Most of this section has been written under the assumption that a nonprofit has formed a cooperative corporation. However, a nonprofit that incubates cooperatives may choose, for a variety of reasons, to form the cooperative as an LLC, partnership, or other entity. For more information on this, see the chapters on entity choice and employment law, “Forming Cooperatives of Foreign Nationals.”

Non-legal Considerations: Does your nonprofit have the capacity or experience to start a cooperative?

Hilary Abell, a non-profit management and cooperative development consultant, speaks about the “entrepreneurial culture” and long-term commitment required of the nonprofit organization itself, if it is going to find success in incubating worker cooperatives. As former executive director of WAGES, a non-profit that incubates worker-owned businesses for Latina women, Hilary has helped incubate successful co-ops in low-income communities and has advised non-profits that are exploring or involved in co-op development. In her view, one of the main non-legal considerations for nonprofits is the fit between the sponsoring nonprofit and the organizational capacities and culture needed to build a successful cooperative business. She states,

“While the competencies needed for community organizing or providing social services may be helpful in co-op incubation, the daily rhythm, underlying logic, and actual activities of incubating and operating a business are quite different. Experience has shown that the nonprofits that are most likely to succeed at social enterprises or co-op development are the ones that already have the entrepreneurial skills and business-like culture that are needed to make small businesses thrive, or that recognize that the culture and skills needed to run their other programs may be different from what they’ll need to incubate businesses. Some complex negotiations and cultural shifts are often necessary in order to integrate people with new skill sets and enable the staff or department responsible for the co-op project to do their job well.

It is also important for non-profits to realize that co-op development is a long-term commitment. If the sponsoring organization removes its technical assistance and

organizing support prematurely, it can backfire both for the non-profit and for co-op members. A nonprofit should know in advance how many years of support it can provide to the new co-op and how it will secure the skilled staff and resources to fulfill this commitment. Because people put so much of their heart and soul into cooperatives, a developer does a dis-service if it is too optimistic or idealistic in its assumptions about what is needed. As we know, about half of small businesses fail within five years due to lack of experience, planning or investment capital. In under-resourced communities, small businesses may need even more support. The cooperative model can be more intensive and, when done well, can yield great rewards, but it is a complex undertaking.”

There are many non-legal considerations to take into account in incubating a worker-owned cooperative. Nonprofit organizations may not have the staff with the requisite skills or experience necessary to start or manage a new business, especially one that is to be eventually owned and controlled by other people. Before embarking on such a project, you should consult with a social enterprise or nonprofit management consultant to determine whether your nonprofit has the capacity to take on a new venture.

If Your Nonprofit Wants To Start A Cooperative, Consult A Lawyer!

The ability for nonprofits to contribute to the worker cooperative movement by creating new cooperatives is very promising. Nonprofits who are considering such a move should seek legal and tax advice from certified public accountants and attorneys who are familiar with nonprofits engaging in business ventures as well cooperative attorneys to properly structure the relationship. You can also reach out to the East Bay Community Law Center and Sustainable Economies Law Center as resources!

MANAGING YOUR COOPERATIVE BUSINESS

Governance refers to how the company is controlled and how decisions are made. Governance also includes how the company and its workers are held accountable both to their internal members

and to external stakeholders. In a worker-owned, democratically-governed business, the workers own the company's assets, but equally important, they control the company and business. If your cooperative is incorporated, it must comply with formal governance requirements as defined by statute, such as having a Board of Directors and Officers. If your cooperative is an LLC, governance can be more flexible and it may or may not have a Board of Managers. If you are an LLC, be careful. In an LLC that has no Board, each member has the legal power to bind the entire cooperative, unless expressly restricted in the Operating Agreement.

Governance Structure



(1) Board of Directors

If you choose to form your business as a California Cooperative Corporation, i.e., under the cooperative corporation statute, you must have a Board of Directors and Officers. The Board of Directors is a group of individuals who serve as the governing body of the cooperative. In most cases, the worker-members of a worker cooperative elect the Board of Directors. The Board of a cooperative has legal responsibilities to be loyal to the company, to act with care and honesty and to operate the company for the benefit of the membership. The Board generally sets its company's goals and strategies and makes important decisions such as whether to borrow money, purchase capital assets and hire executive management. The role of the Board in day-to-day decisions depends on the size and complexity of the company. If there are few employees, the Board may be composed of all of the workers, frequently referred to as a collective Board. In such cases, the Board functions as the policy-making body, deciding everything from whether to move to a larger location to the company's return policy. Under the cooperative corporation statute, the Board must have a minimum of three directors.

If the Board is a subgroup elected from the membership, its authority derives from election by the members. To prevent corrosive "us vs. them" scenarios, the Board should and sometimes must adopt measures to ensure its accountability to the workers such as: regular elections,

distribution of meeting minutes, solicitation of worker input, appointment of worker-directors to special Board committees, etc.

(2) **Officers**

The California cooperative corporation statute requires that a cooperative have at least three officers: a president, a secretary and a chief financial officer. Unlike the Board, which has the ultimate governing authority over the cooperative, the officers are the executive agents who carry specific responsibilities within the cooperative. For example, a president is often empowered to sign documents on behalf of the cooperative. A secretary usually provides required notices to members and keeps meeting minutes. A financial officer manages finances and accounts, and often signs checks for the cooperative.

Officers may be executive managers with authority from the Board to implement company goals, or they may be figureheads who are deployed only to sign necessary documents for outside parties. The role of officers, like that of the Board, varies based on the size and complexity of the business and the company culture.

If the company is adopting a collective, nonhierarchical model, its workers may not choose to give its named officers executive authority, but they would need to decide how these officers will be represented to outside parties. For example, if a figurehead treasurer were to sign a contract on behalf of the cooperative without the authority to do so, this could lead to a lawsuit or be generally detrimental to the cooperative's future business relationships.

Regardless of the size of the company, the relationship of workers to the Board and to executive officers should be established at the outset and regularly reviewed and evaluated. Worker-owners might resent having the responsibilities of ownership if they do not feel they are able to make decisions that affect their workplace. If workers perceive the Board as not connected to their daily work lives, then there may not actually be democracy in the workplace.

Workplace Structure

The fact that workers are owners does not compel them to adopt any one particular workplace organizational model. A democratically-managed business might sometimes be organized along the traditional hierarchies found in American businesses. For example, the Board may hire

executive managers who hire employee-owners who carry out board decisions under the managers' supervision.

Some worker cooperatives, by contrast, are characterized by minimal hierarchy, perhaps flat or nearly flat pay scales, job rotation, and individuals held accountable not to a single supervisor, but to the whole cooperative. Of course, hybrids of these two extremes are common. Each company needs to evaluate which model works for their particular business and industry.

A business founded on democratic workplace principles should spend extra time exploring how the ideals of democracy in the workplace will be manifested in the business organization. Be aware that many cooperatives evolve through different models as they grow in size and complexity. What worked when there were 5 members starting the business sometimes becomes unmanageable when there are 25 or more members, so flexibility is important. If the organization grows and becomes more complex, its internal mechanisms for ensuring accountability of workers to the organization as a whole should expand as well. In a cooperative, members should pay special attention to those wearing multiple "hats" in the company, as these de facto leaders are often the first to expand their roles without authority from the membership.

Members vs. Nonmembers Within The Company

Having employees who are not members of the cooperative has positive and negative consequences. Non-member employees can provide an effective temporary workforce for a seasonal business that cannot maintain a year-round level of employment. Non-member employees can also help a company manage volatile revenue swings. This is because, unlike a traditional company, a worker-owned company cannot dispense with unneeded members when the market changes or the business experiences a setback.

However, non-member employees can become a second-class employee group. This can change the dynamics of the democratic workplace. Members then become like bosses to the non-member employees, creating divisions between workers.

It is essential that owners clarify the role of non-member employees. If there is a company program for moving employees to member status, it should be presented clearly and made available to all. Narrowing the gap between members and non-members in their relative access to decision making and profit-sharing may be critical for workplace unity and democracy.

External Governance Issues

If the business was organized under the auspices of a parent non-profit or with the aid of outside investors, it may need to include these outside entities in the internal governance of the cooperative. Co-op founders will need to establish the level of participation of a parent non-profit on the Board of Directors. For instance, how many seats on the Board will be allocated to outside entities? If the participation of the parent non-profit requires a separate membership class, how will that entity share in the risk of the enterprise? If outside investors are involved, will they have some decision-making power related to the protection of their investment? Will these outside investors have more direct representation on the Board? This topic will be discussed in more detail in the section on “Nonprofit Incubators.”

When the cooperative engages with business partners, will this engagement occur under the authority of the Board, or will individuals with management-level roles transact directly with third parties? The members may identify specific contracts that require Board approval and those that may be concluded directly by individual workers.

If a community member or customer has an issue with the company, will their concerns be addressed by the Board or by an individual worker? What sorts of issues warrant resolution by one mechanism or another?

The bylaws or operating agreement of the cooperative are very important because they provide the answers to these and other important governance questions.

Helpful Tip:

The bylaws or operating agreement of the cooperative are very important because they provide the answers to these and other important governance questions.
(See Appendix for sample bylaws)

Cooperative Principles and Cooperative Governance

The “one-member, one-vote” principle of cooperatives provides only the starting point for decision-making in a cooperative. Consider these more advanced issues: (1) When will a decision be final: when the board approves by majority, by a 2/3 vote, by consensus, by a vote of directors present, or by all directors? (2) Should some decisions require a higher approval level than others? (3) The Board will not make every decision. If incorporated under a specific cooperative statute, which decisions does the law reserve only to members instead of to the Board? What decisions can

be made by the members? By work teams? By individual supervisors? (4) Can the members appeal a decision of the Board? What kinds of decisions are eligible to be appealed?

The cooperative principles include concern for the community in which the cooperative operates, but how will this play out in practice? Will members of the community be invited onto the Board of Directors? How will the company monitor its social, economic, and environmental impacts on the community?

Internal Governance Controls

The company should adopt measures to hold directors accountable to each other and to the Board as a whole. Directors can be evaluated for meeting attendance, participation, and knowledge of issues affecting the business. If an individual director or executive officer acts according to her own beliefs on what is best for the cooperative, but not in accordance with the deliberated decision of the Board, how does the Board reclaim its own authority?

What mechanism does the cooperative have for members to exercise control over decisions affecting their workplace? Regular Board elections can help make directors accountable, but there often needs to be more than that. Managers need to be directly accountable to the worker-owners, inviting participation from workers prior to making a decision, explaining their decisions, and providing means for review and evaluation by workers. If there are loose structures or no structures of command and control, leaders will arise spontaneously. Most cooperatives want to encourage this process. However, without formal structures, these leaders may operate without accountability and in a way that impairs democracy in the workplace.

Useful Resources:

Additional tools on governance can be found at:

- Worker Coop Toolbox- US Federation of Worker Cooperatives:

http://www.cccd.coop/files/worker_coop_toolbox.pdf

- California Governance Resources:

<http://www.lawforchange.org/NewsBot.asp?MODE=VIEW&ID=3678>

COOPERATIVES AND EMPLOYMENT LAW

Old-Fashioned Jobs: Working *FOR* Others

Employment laws have been created mostly to balance the relationship between “master” and “servant.” Employment laws recognize that employees are vulnerable because they are dependent on and work under the control of employers. Employment laws give certain rights to employees, like the right to minimum wage, to reasonable work hours, to a safe and healthy workplace, to protection from discrimination, to compensation for workplace injuries, and so on.

Versus...

Cooperatives: Working *WITH* Others

Now how do employment laws apply when you form a cooperative to work *with* others, rather than *for* others? You might think employment laws no longer apply, but, actually, they often do! Employment laws are designed to cover as many people as possible, so that no workers are left unprotected by a loophole. The safe thing is to assume that everyone working for a cooperative is an employee, and then work backward from there to see if you can find any exceptions.

Question:

If you form a cooperative and work for it, are you an employee of the cooperative?

Umm, maybe. It's complicated. But it's very important to consider.

What Does It Mean To Have Employees?

Having employees comes with a list of obligations and requirements, including:

- Paying minimum wage and overtime;
- Complying with standards for hours and working conditions;
- Payment of payroll taxes and other withholdings;
- Maintaining workers compensation insurance;
- Complying with occupational safety and health laws;
- Verifying employees' eligibility to work in the U.S.;
- Posting of certain kinds of notices and posters related to employees' rights; and

- Adhering to certain recordkeeping requirements.

However, if someone is not an employee, most of these requirements do not apply.

Who Is NOT an Employee?

There are four primary legal categories of workers that are not considered employees; here are some basic explanations of each:

- A. **Volunteers** = People who do work for charitable, religious, or humanitarian benefit.
- B. **Interns** = People who do work for their own educational or therapeutic benefit.
- C. **Independent Contractors** = People who do work for others in an independent manner.
- D. **Partners** = People who work together as relative equals for their own and mutual benefit.

A. Who Can Be Considered a VOLUNTEER?

As a general rule, you **CANNOT volunteer for a for-profit business** unless you can be classified under one of the other three categories below (interns, independent contractor, or partners). But as a general rule, you **CAN volunteer for nonprofit organizations** that are engaged in charitable, religious, or humanitarian purposes. Most cooperatives will not meet the definition of “charitable, religious, or humanitarian,” unless they are nonprofit organizations that are tax exempt under 501(c)(3) or 501(c)(4). Most childcare cooperatives are 501(c)(3) nonprofits. Here are some extra rules and exceptions to the rules:

1. **You MIGHT be able to volunteer for a for-profit business if it has a defined and separate charitable project:** Let’s say you have a cooperative café and once per month it opens up to the public and serves only free food to people in need. This is a grey area, but this may be a situation where members of the public could volunteer. If the café has regular employees however, those employees probably could not volunteer because the work is too similar to the work they normally do as employees.
2. **You MIGHT NOT be able to volunteer for a nonprofit if it is operating a commercial enterprise serving the general public.** This is also a grey area, because many high profile nonprofits, such as Girl Scouts, allow volunteers to sell things to the public. But the rule

stated by the Supreme Court and California law is: People cannot volunteer for “ordinary commercial activities,” even if those activities are operated by and for the benefit of charities and religious organizations.²⁸

3. **“Paying” volunteers with food or other valuable perks might mean they are employees:**

The rule expressed by the Department of Labor and in the Fair Labor Standards Act (FLSA) is that people are allowed to volunteer so long as it is “without promise, expectation, or receipt of compensation for the services rendered, although a volunteer can be paid expenses, reasonable benefits, or a nominal fee to perform such services.”²⁹ So you can give your volunteers a little something, but not a lot.³⁰

B. Who Can Be Considered an INTERN?

For-profit businesses can have unpaid interns, so as long as the arrangement in which the intern is working meets the criteria for a valid internship. In California and in most jurisdictions, the following criteria are considered in determining who is an intern (also known as trainee or student):

- “The training, even though it includes actual operation of the employer’s facilities, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainees or students;
- The trainees or students do not displace regular employees, but work under their close observation;
- The employer derives no immediate advantage from the activities of trainees or students, and on occasion the employer’s operations may be actually impeded;
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

²⁸ *Tony & Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290, 302 (1985). See also California Division of Labor Standards Enforcement Opinion Letter dated October 27, 1988, *available at* <http://www.dir.ca.gov/dlse/opinions/1988-10-27.pdf>, which states: “[W]hen religious, charitable, or nonprofit organizations operate commercial enterprises which serve the general public, such as restaurants or thrift stores, or when they contract to provide personal services to businesses, such enterprises are subject to the Industrial Welfare Commission Orders and volunteers may not be utilized.”

²⁹ See Department of Labor Opinion Letter, “Volunteer emergency crew as separate and independent agency under section 3(e)(4)(A),” FLSA 2008-13, December 18, 2008, and FLSA, which notes that volunteers may receive “nominal fees” and “reasonable benefits” (29 U.S.C. § 203(e)(4)(A)).

³⁰ If you want to know more about what kinds of benefits you can provide volunteers, see *Hoste v. Shanty Creek Management, Inc.*, 592 N.E.2d 360 (Mich. 1999), and Department of Labor Opinion Letter, “Nonexempt employees who volunteer as coaches/advisors and nominal fees under section 3(e)(4)(A),” FLSA 2005-51 (November 10, 2005).

- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.”³¹

The Importance of Being Unhelpful:

Most businesses struggle especially with the fourth criteria in the internship test, which is the requirement that “the employer derives no immediate advantage from the activities of trainees or students, and on occasion the employer’s operations may be actually impeded.” Some businesses do seek interns for the sole purpose of providing an educational experience, but let’s be real: Most employers hope that interns will also be helpful to the enterprise, and the framing of this law makes that hard. It’s difficult to know where courts will draw the line, and we are left to wonder: can’t an intern be just a little bit helpful? Fortunately, one case decided by the 9th Circuit Court of Appeals seems to indicate that intern can be helpful, as long as the intern is the true beneficiary in the relationship.³² Note, however, that this remains a grey area, and if your cooperative would like to have interns, it’s best to focus primarily on teaching them.

How to Have an Intern

Given the limitations on how interns can work in enterprises, here are some recommendations on how to create an internship program:

1. **Create a curriculum to accompany the work:** This helps to meet the requirement that the training be “similar to that which would be given in a vocational school.”
2. **Implement a systematic training program whereby interns will be exposed to nearly every aspect of running the business:** If an intern is exposed to multiple aspects of running the business, it means that they will not spend a significant amount of time repeatedly doing one task. This helps to undermine any argument that the employer is benefiting from the

³¹ From Department of Labor Non-Administrator Letter, “Internship program and employment relationship under FLSA” FLSA2004-5NA, dated May 17, 2004. See also the April 7, 2010 Opinion Letter from the California Department of Labor Standards Enforcement, available at <http://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf>.

³² See *Williams v. Strickland*, 87 F. 3d 1064 (9th Cir. 1996), where the Ninth Circuit looked at a case involving a man that volunteered for a long time for a Salvation Army store, primarily for the purpose of his rehabilitation. Even though he participated in and benefited a business activity, and even though he may have done work typically done by employees, the court *still* decided that he wasn’t an employee, arguing that he was a *beneficiary* of the opportunities Salvation Army offered him for his rehabilitation.

intern's work, since the intern never has the opportunity to be that helpful on any one task, and the employer is constantly training the intern in a different facet of the business.

3. **Limit the amount of time that interns spend doing rote tasks or work normally done by employees:** In the case of a farm, an intern should not spend a significant amount of time planting, weeding, or harvesting a field, but may do this work on a limited basis, for the purpose of developing basic skills. It is better to engage the intern in projects somewhat separate from the day-to-day work of the farm, such as installing a new demonstration project or building a rainwater catchment system. This helps to prevent any argument that the intern is displacing an employee.
4. **Create an affiliation with an educational institution or nonprofit:** If a business serves as an educational laboratory for school or university students, this helps to create a clearer educational purpose to the work an intern does with the enterprise.

C. Who Can Be Considered an INDEPENDENT CONTRACTOR?

Independence and cooperation sound somewhat like opposites, but they are actually closely intertwined in a cooperative economy. Through cooperative production, cooperative marketing, cooperative ownership of equipment, and cooperative purchasing of supplies and services, many small-scale and independent enterprises can access economies of scale usually only harnessed by big businesses. When multiple independent entrepreneurs come together and form a producer, marketing, and/or purchasing cooperative, the relationship between the entrepreneurs and the cooperative is *usually* one of independent contractors, but be aware that there are some grey areas.

The test for who is an independent contractor varies across jurisdictions, but one U.S. Supreme Court³³ opinion summed up the factors that are weighed together in determining who is an employee versus who is an independent contractor:

- The hiring party's right to control the manner and means by which the product is accomplished;
- The skill required;
- The source of the instrumentalities and tools;
- The location of the work;
- The duration of the relationship between the parties;

³³ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989).

- Whether the hiring party has the right to assign additional projects to the hired party;
- The extent of the hired party's discretion over when and how long to work;
- The method of payment;
- The hired party's role in hiring and paying assistants;
- Whether the work is part of the regular business of the hiring party;
- Whether the hiring party is in business;
- The provision of employee benefits; and
- The tax treatment of the hired party.

If a group of independent home bread bakers form a cooperative to jointly market their breads and to collectively purchase ingredients, a court would likely find that the bread bakers are not employees of their cooperative, so long as the bakers work in their own homes, use their own appliances, hire their own assistants, set their own hours, decide on the manner in which the bake, and have the freedom to sell bread elsewhere.

However, if an autocratic manager or board of the cooperative began to exert more control over each baker, the relationship might change. If the cooperative dictates how much each baker must produce, sets specifications for ingredients, and fixes prices on the breads of all bakers, and if one manager has the power to hire and fire bakers, this could potentially be ruled to be an employment relationship. This was essentially the outcome of the Supreme Court's 1961 ruling in *Goldberg v. Whitaker House Cooperative, Inc.*,³⁴ where 200 home-based clothing manufacturers (primarily women engaged in knitting and embroidery) joined a cooperative and sold clothing items to the cooperative. The Court determined that an employment relationship existed, due to the level of control the cooperative had over each member's work (dictating design, order size, timing, payment, and other terms of work).

The moral to the story is that if multiple independent entrepreneurs, such as health care practitioners, gardeners, or food artisans, come together to form a producer, marketing, or purchasing cooperative, it's very important to look at the various factors listed above to determine whether the relationship is more like an independent contractor relationship or an employer/employee relationship. If it's the latter, then congratulations, you may have created a

³⁴ *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961).

worker cooperative! However, see the next section to learn more about when workers in a worker cooperative need to be treated as employees.

D. Who Can Be Considered a PARTNER?

Employment law does not apply when there is truly no master/servant relationship. It is widely accepted that if you start a sole proprietorship and work for yourself, you are not your own employee. Now how does that apply when two people own, manage, and work for their own business in partnership with one another? How about when 100 people own, manage, and work for their own business? And does it matter what kind of business entity it is – a partnership, LLC, cooperative corporation, or other corporation?

Let's start with the question of what is a master/servant relationship. Strong precedent was created in answer to the question when the U.S. Supreme Court decided the case of *Clackamas Gastroenterology Associates, P.C. v. Wells* in 2003.³⁵ There, the Court was asked to decide whether the Americans with Disabilities Act applies to working shareholders of a small professional corporation. The Court then adopted the following guidelines for determining when a master-servant relationship exists:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether, and if so to what extent, the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Note that not every court or labor law agency will apply the same test, and there are many tests that have been developed to determine who is a partner to an enterprise. Another case that summarized the factors courts consider is *Simpson v. Ernst & Young*, decided by the 6th Circuit in 1996.³⁶ The court named the following factors as relevant to the determination:

- The right and duty to participate in management;

³⁵ *Clackamas Gastroenterology Associates, PC v. Wells*, 538 U.S. 440 (2003).

³⁶ *Simpson v. Ernst & Young* 100 F.3d 436, 443-444 (6th Cir. 1996).

- The right and duty to act as an agent of other partners;
- Exposure to liability;
- The fiduciary relationship among partners;
- Use of the term “co-owners” to indicate each partner's ‘power of ultimate control’;
- Participation in profits and losses;
- Investment in the firm;
- Partial ownership of firm assets;
- Voting rights;
- The aggrieved individual's ability to control and operate the business;
- The extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits;
- The extent of that individual's employment security; and
- Other similar indicia of ownership.

Does it make a difference if you form a partnership, LLC, or cooperative corporation?

In some jurisdictions and under some statutes, courts have leaned heavily toward the assumption that shareholders of corporations are employees when they work for the corporation they co-own.³⁷ This assumption has caused stress for California worker cooperatives, which are generally formed as cooperative corporations. If there is an assumption of an employer/employee relationship from the moment of incorporation, this means that cooperatives must have enough start-up capital to pay members minimum wage, obtain workers compensation, and so on. The Catch-22 is that most workers cooperatives have great difficulty raising start-up capital, due to the reluctance of banks to loan or of individuals to invest. This means that most worker cooperatives must bootstrap their business, and work for little or no pay in the beginning, like most partners in a start-up business do. Some worker “cooperatives” choose to act as partnerships or limited liability companies (LLCs)³⁸ in order to avoid application of employment law to members.

The simple fact of incorporation, in the eyes of some courts and agencies, is enough to establish a presumption that the shareholder is separate from the entity, and therefore cannot be

³⁷ For an examination of this issue, see McGinley, Ann C. “Functionality or Formalism - Partners and Shareholders as Employees under the Anti-Discrimination Laws” 57 S.M.U. L. Rev. 3 (2004).

³⁸ Note that, for employment law purposes, LLCs and partnerships are generally treated the same.

considered a partner. California attorney Neil A. Helfman has written about this in his 1992 article “The Application of Labor Laws to Workers’ Cooperatives.”³⁹ Mr. Helfman writes:

“As the law presently stands, it looks at form over function. The fact of incorporation may have more bearing upon the determination of an employment relationship, than the actual relationship between the parties. A worker in an incorporated cooperative who has managerial authority, for example, may be considered an employee just because the business is incorporated; while a junior partner of a thousand-partner accounting firm, who is under the control of others, is not. The rationale for this distinction is not entirely clear; one explanation is that in the former, worker members are providing services to an entity. For example, in the Matter of Construction Survey Cooperative (Case No. T-62-3) (1962)) before the California Unemployment Insurance Appeals Board, members of a workers' cooperative were held not to be employees. In that case, member workers received compensation on the basis of their contributed labor. By common consent, the activities of the cooperative were directed by a manager, although ultimate authority for managerial decisions rested with the membership. The appeals board found the workers to be principals of the cooperative, and held that under California law that it was incompatible for them to be employees of their own organization. When presented to the Employment Development Department, EDD representatives took the position that if the entity were incorporated, workers should be considered employees even if no other facts had changed.”⁴⁰

The good news is that the U.S. Supreme Court, in the *Clackamas* case, has since rejected the de facto assumption that the formation of a corporation should determine employment status.⁴¹

³⁹ <http://sfp.ucdavis.edu/cooperatives/reports/LaborLawWorkerCoops.pdf>.

⁴⁰ As a source of this info, Mr. Helfman cites: Interview at California Employment Development Department (E.D.D.), November 4, 1991, with David Johnson (Senior Tax Counsel), Terry Savage (Section Chief Auditor and attorney), and Noreen Vincent (tax auditor).

⁴¹ See *Clackamas Gastroenterology Associates, PC v. Wells*, 538 U.S. 440, 443 (2003), where the Court rejected the Ninth Circuit’s reliance on a Second Circuit decision that held that “the use of any corporation, including a professional corporation, ‘precludes any examination designed to determine whether the entity is in fact a partnership.’” 271 F. 3d 903, 905 (2001) (quoting *Hyland v. New Haven Radiology Associates, P. C.*, 794 F. 2d 793, 798 (CA2 1986)). It saw ‘no reason to permit a professional corporation to secure the “best of both possible worlds” by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to

The *Clackamas* Court's rejection of the presumption acts as powerful precedent, which may even serve to relieve California worker cooperatives of the automatic presumption of employment relationships, at least for the purpose of *some* employment laws (see more below).

Note also that other courts have found that a "partnership" relationship exists even when the entity is a corporation.⁴² The court in *Godoy v. Rest. Opportunity Ctr. of New York, Inc.* also held that the members of a worker-owned cooperative were "partners," in spite of the fact that they were working under a corporation.⁴³ Many courts may ultimately consider the incorporation status of an entity as relevant, but only as one factor among many in determining whether an employment relationship exists.

The lesson here is: If you are planning to form and work for a cooperative corporation in California, tread very carefully in determining whether you are an employee, and talk to a lawyer.

How much control must each cooperative member have in order to be considered a "partner" under employment law?

If all members of a small worker cooperative serve on the Board of Directors and take part in a collective decision-making process, then arguably each member could be considered a "partner" for the purpose of some employment laws. But where do courts draw the line? How much control do the workers need to have in order to be considered partners?

One case that examined the question of who is a "bona fide partner" is *Wheeler v. Hurdman*, decided by the 10th Circuit.⁴⁴ In that case, the court actually de-emphasized the need for each partner to have a significant amount of control, noting that the practical needs of the business may result in partners giving up a certain amount of control over the day-to-day, and abdicating such control to managers, teams, or committees. The court essentially recognized the following practical reality: Any time a group of people voluntarily works together, each individual gives up a certain amount of control to the group or to members of the group.

In another case, *Fountain v. Metcalf, Zima & Co.*, the court focused on certain voting rights as the indicator of control, and not on the actual realities of management in the firm. There the court ignored the argument that a managing partner was running the firm autocratically, and

argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.'" 271 F. 3d, at 905.

⁴² See *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984).

⁴³ *Godoy v. Rest. Opportunity Ctr. of New York, Inc.*, 615 F. Supp. 2d 186, 195 (S.D.N.Y. 2009).

⁴⁴ *Wheeler v. Hurdman*, 825 F. 2d 257, 276, (10th Cir. 1987).

focused instead on the fact that the plaintiff partner “had a right to vote his thirty-one percent ownership on member/shareholders' amendments to the agreement, on admission of new member/shareholders, on termination of relationship with member/shareholders, on draws, and on distribution of profits and income.”⁴⁵

In contrast to *Wheeler* and *Fountain*, however, other courts have focused heavily on the issue of control, and found that factor to be a deal-breaker. For example, the court in *Caruso v. Peat, Marwick, Mitchell & Co.*⁴⁶ examined the employment status of a partner in a 1350-member accounting firm, and the court looked at three primary factors:

- (1) the extent of ability to control and operate the business
- (2) the extent to which compensation is calculated as a percentage of the firm's profits
- (3) the extent of employment security

On the question of “ability to control and operate the business” in the *Caruso* case, it was significant that the firm was “managed by a board of directors separated from plaintiff by six levels of hierarchy” and that the plaintiff tended to seek approval of management-level partners in decisions about his own work. The court held that the plaintiff was, indeed, an employee.

The Court in *Clackamas* also focused heavily on the question of control and common law definitions of the master-servant relationship. The Court wrote:

“A court should examine ‘whether shareholder-directors operate independently and manage the business or instead are subject to the firm's control.’ [...] [i]f the shareholder-directors operate independently and manage the business, they are proprietors and not employees; if they are subject to the firm's control, they are employees.’⁴⁷

Another case that examined this issue specifically in application to a worker cooperative was *Wirtz v. Construction Survey Cooperative*, decided by a federal district court in Connecticut in

⁴⁵ *Fountain v. Metcalf, Zima & Co.*, PA, 925 F. 2d 1398, 1401 (11th Cir. 1991).

⁴⁶ *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144, 149-150 (S.D.N.Y. 1987).

⁴⁷ *Clackamas Gastroenterology Associates, PC v. Wells*, 538 US 440, 448 (2003), quoting the EEOC's Amicus brief in the case.

1964.⁴⁸ In that case, the court emphasized numerous elements in support of a finding that the cooperative members were not employees.⁴⁹ Even though two members of the cooperative exercised management over the others:

“It is true [that two members] exerted some measure of leadership over the [other members]. But the Court finds this was due to their longer experience, more extensive knowledge, and driving interest rather than due to positions of control or power. What little guidance they supplied was by consent not authority.”⁵⁰

The lesson with all these cases is: there is no clear set of rules to determine when members of a worker cooperative are employees. Some of the cases described above indicate that, even with somewhat hierarchical management structures, working co-owners of a business may still avoid classification as employees. However, if you want to argue that members of your worker cooperative are not employees, then the safest thing to do is to:

- (1) Have all members serve on the Board of Directors.
- (2) Make decisions by a consensus process or with supermajority voting; this arguably gives each member a strong voice in each decision.
- (3) Give each member a lot of control over their own work, or create many semi-autonomous departments or committees that control their own work, procedures, and hours.
- (4) Make it somewhat difficult to fire people, by requiring a vote of a large number of members.

You Should Really Check With a Lawyer

⁴⁸ *Wirtz v. Construction Survey Cooperative*, 235 F.Supp. 621 (D. Conn. 1964).

⁴⁹ See *Wirtz* at 624, where the court described: “The members of the Cooperative constitute a small, closely-knit partnership of intelligent technicians, working together as a unit to improve their economic lot as a unit. It was not organized to avoid the application of the Act but existed in the same form long before the Act. The members are not regimented and conduct themselves as self-employed, independent craftsmen. They come and go as they please and work or not work at will. No corporate structure is involved and the Cooperative has no officers, officials or board of directors. All the members share the losses as well as the profits on a monthly basis. No member receives a salary; the terms of remuneration are determined by vote of the entire membership. No one may be expelled. Each member has an equal voice in management and unanimous consent is necessary on all decisions.”

⁵⁰ *Wirtz* at 624-625.

Now that you've read all of the information above, you probably feel like you've gone to law school! But even with the detailed lists we've provided above, it can sometimes be very hard to determine who is an employee versus who is a partner, volunteer, intern, or independent contractor. And it can be hard to determine who exactly needs to be covered by workers compensation insurance or subject to overtime rules. The ultimate answer may lie in a grey area and the best way to answer it is to look at court cases that have examined similar situations. That is where a lawyer can be helpful to you in determining how to legally categorize someone working in your cooperative.

Ok, Our Cooperative Members Might Be Employees.... Now What?

You should be prepared to do the following:

- (1) Obtain Workers' Compensation
- (2) Pay Minimum Wage
- (3) Comply With Overtime Laws
- (4) Comply with Meal, Break, and Time Off Requirements
- (5) Deduct Payroll Taxes and Other Withholdings
- (6) Provide Safe Working Conditions and Comply With Safety Standards
- (7) Allow Employees to Unionize
- (8) Comply With Additional Government Requirements
- (9) Verify Employee Eligibility to Work in the U.S.

Being an employer comes with a lot of responsibilities – both to employees and to the government. For a more thorough guide to your responsibilities as an employer, we recommend the book “The Employer’s Legal Handbook,” published by Nolo Press. In the meantime, here are a few of the basic responsibilities, and some thoughts about how these rules apply to worker cooperatives in particular.

(1) Obtain Workers' Compensation

Employers in California are required to get workers' compensation insurance, even if they only have one employee. When a worker suffers an injury, illness or death because of work, worker's compensation insurance can provide medical care, temporary disability benefits,

permanent disability benefits, supplemental job displacement benefits or vocational rehabilitation and death benefits

More info: See the California Department of Industrial Relations website for a more detailed explanation of worker's compensation insurance and links to relevant forms. (www.dir.ca.gov/dwc/employer.htm) You can find a worker's compensation fact sheet for employers at the link below. (www.dir.ca.gov/dwc/FactSheets/Employer_FactSheet.pdf)

How to Get Coverage: You can get coverage through an agent or broker from a private insurer. Insurance Brokers & Agents of the West can help you select a broker (visit: www.ibawest.com). You can also get insurance through the State Compensation Insurance Fund (State Fund), a division of the California Department of Industrial Relations (visit: <http://www.statefundca.com>).

Cost: The cost of workers' compensation will depend on a number of things, such as how many employees you have and the type of work they are doing. Prices differ depending on the insurance broker, so you should shop around. Generally, workers' compensation can run between 10 to 20 percent of the wages you pay your employees.

Are worker cooperatives exempt from the requirement to carry workers compensation?

In some cases, worker cooperatives will be exempt from the requirement to carry workers compensation, even if they do consider their workers to be employees for some purposes. The California Labor Code requires that all employees be covered by workers' compensation insurance; however, Section 3351 provides (emphasis added):

"Employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

[...] (c) All officers and members of boards of directors of quasi-public or private corporations while rendering actual service for the corporations for pay; provided that, where *the officers and directors of the private corporation are the sole shareholders*

thereof, the corporation and the officers and directors shall come under the compensation provisions of this division only by election as provided in subdivision (a) of Section 4151

[...] (f) All working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company; provided that where the *working members of the partnership or limited liability company are general partners or managers*, the partnership or limited liability company and the partners or managers shall come under the compensation provisions of this division only by election as provided in subdivision (a) of Section 4151.

Thus, in the case of a cooperative corporation, if the directors are the only members (meaning they are the only “shareholders”) of the cooperative, then they may not need to be covered by workers’ compensation. Most worker cooperatives that are managed collectively meet this requirement. However, if there are co-op members that do not serve on the Board of Directors, then it’s possible that workers’ compensation will be required for everyone; that might not make intuitive sense, but that is how the above law reads. Note that a worker cooperative that hires non-member employees will definitely need to carry workers compensation for those employees. Note also that a worker cooperative that choose to form as a partnership or LLC will also be exempt from carrying workers compensation if the working partners/members participate in management.

(2) **Pay at least Minimum Wage**

Wage laws require an employer to pay at least minimum wage, which is currently \$9.00 per hour in California, and may be higher in certain cities such as San Francisco, Berkeley and Oakland. The Fair Labor Standards Act (FLSA) is the main federal law that affects workers’ pay. California Labor Code 1171 is the main state law related to wage requirements.

(3) **Comply With Overtime Laws**

The law also requires an employer to pay a worker extra for overtime work and comply with other rules regarding work hours, unless the worker can be considered an “exempt” employee. Generally, employees are exempt from overtime rules if they engage in certain

categories of work, such as managerial, administrative, or professional work. California overtime rules can be found in Labor Code Sections 500-558. More information about determining overtime requirements can be found at: <http://www.dir.ca.gov>.

Are worker cooperative members subject to overtime rules?

This is a grey area and courts and labor agencies have yet to provide clear enough guidance. It may be hard for worker cooperative members to argue that they are exempt from overtime on the more typically invoked grounds that they are all managers or executives, since the law in such cases generally requires that the managers and executives be in a position to manage, direct, and supervise other people.

However, some leaders in the cooperative movement have argued quite persuasively that overtime rules should not apply to worker cooperatives, since such application would contradict the intent of the overtime laws. Here is cooperative advocate and attorney Tim Huet's explanation of this:

“Perhaps the clearest indication of the legislature’s intent in passing the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 is in the legislative findings underpinning the Act:

(c) Ending daily overtime would result in a substantial pay cut for California workers who currently receive daily overtime.

(d) Numerous studies have linked long work hours to increased rates of accident and injury.

(e) Family life suffers when either or both parents are kept away from home for an extended period of time on a daily basis.

It is evident that the design of the overtime law is to discourage employers - through the financial disincentive of premium pay - from requiring employees to work extended hours, with the attendant hazards to body and family. The logic of the financial disincentive is sound as long as premised on the idea of an employer ordering an employee to work extended hours; the logic fails when a worker is responsible for her or his own scheduling since, under those conditions,

premium pay becomes an *incentive* to work extended hours. If compulsory overtime is applied to members, I, as a member of a cooperative, would be giving myself a 50% pay increase by scheduling myself to work longer than eight hours. I would be giving myself a 100% raise by continuing to work beyond twelve hours. And I have no supervisor to tell me to go home. There would be powerful incentive to work longer hours, even at the risk of injury/accidents and at the cost to family life. *The effect would be the exact opposite of that intended by the legislature.*

Moreover, the internal dissension caused by members voluntarily scheduling themselves for overtime, and thereby giving themselves sizeable pay raises outside the collective process, would result in the demise of our freedom to self-schedule – and would push us towards surrendering a measure of our democracy in favor of having supervisors to schedule and enforce work hours. While an employee arbitrarily scheduling himself for overtime might be soaking an adversarial employer, a cooperative member would be taking money from his co-members/co-owners. The legislature’s finding that “[e]nding daily overtime would result in a substantial pay cut for California workers who currently receive daily overtime” makes sense in the context of employer-employee relations; its logic does not carry in the cooperative context where any financial surplus left after paying wages, benefits, etc. reverts to the members in the form of patronage. Indeed overtime premiums would reduce member income through increasing our workers compensation payments and other payroll-related costs.

Clearly the intent of compulsory overtime pay is to “protect” otherwise defenseless employees from being required to work overtime by an employer who might wish to exploit them. Where workers have some other form of protection or need no protection, the government has refrained from intervening. The Act in question provides a mechanism by which workers under a collective bargaining agreement can “opt-out” of the overtime scheme provided, as long as some premium pay is provided. Under a collective bargaining agreement, the rate of premium pay could be nominal – perhaps even fractions of a penny (*see* DLSE memorandum of 12/23/99: “The amount by which the premium exceeds the regular rate is left to the parties to negotiate; we will recognize any rate higher than the regular rate as a premium.”). One can only conclude that the legislature was willing to rely on the power of the unions involved to protect their members and express their hours preferences. It stands to reason if a union with limited power is left to negotiate premium pay that cooperative members, owners who hold ultimate power and need not negotiate with anyone, would be left to devise their own schedules and pay.”

(4) **Comply with Meal, Break, and Time Off Requirements**

Employers must comply with rules governing breaks and meal periods during the work day. Employers must provide non-exempt employees one day off per week, and provide a 30-minute meal break for any shift of 5 hours or more, and a 10 minute break for every 4 hours worked, with a few exceptions. For more info, see: http://www.dir.ca.gov/dlse/FAQ_MealPeriods.htm

Are worker cooperative members exempt? For the same reason that some people argue that worker collective members should be exempt from overtime, they may also be exempt from meal, break, and time off requirements. Remember, this is a grey area, so the safest thing to do is to give people breaks.

(5) **Deduct Payroll Taxes and Other Withholding**

An employer is required to withhold money from each employee's paycheck for federal and state income taxes, social security tax, Medicare tax, and unemployment tax. The California Employment Development Department provides state payroll tax services and information on their website here: http://www.edd.ca.gov/Payroll_Taxes/default.htm

An employer can also withhold money from an employee's paycheck for health, welfare, or pension contributions – but only with the employee's consent. The State rules on deductions can be viewed here: http://www.dir.ca.gov/dlse/faq_deductions.htm

Worker cooperatives and withholding from patronage dividends: Note that, for worker cooperatives, the law remains somewhat unclear as to whether the cooperative must withhold from and pay payroll taxes on patronage dividends. See Gregory Wilson's article on this subject.⁵¹ The IRS has yet to issue clear guidance on this, and in the meantime, most worker cooperatives do not treat patronage dividends as employment income for the purpose of withholding.

⁵¹ See "Taxation of Patronage Dividends from Worker Cooperatives: Are They Subject to Employment Tax?" By Attorney Gregory R. Wilson, available at [http://www.gwilson.com/documents/Article4\(PatronageDivTax\).pdf](http://www.gwilson.com/documents/Article4(PatronageDivTax).pdf).

(6) Provide Safe Working Conditions and Comply With Safety Standards

The Occupational Safety and Health Act (OSHA) requires an employer to provide a safe workplace free from hazards that could likely cause serious physical harm to employees.

Employers **MUST** also:

- Inform employees about hazards through training, labels, alarms, color-coded systems, chemical information sheets and other methods.
- Keep accurate records of work-related injuries and illnesses.
- Perform tests in the workplace, such as air sampling required by some OSHA standards.
- Provide hearing exams or other medical tests required by OSHA standards.
- Post OSHA citations, injury and illness data, and the OSHA poster in the workplace where workers will see them.
- Notify OSHA within 8 hours of a workplace incident in which there is a death or when three or more workers go to a hospital.
- Not discriminate or retaliate against a worker for using their rights under this law.

OSHA's resources for small businesses: <http://osha.gov/dcsp/smallbusiness/index.html>

Free consultations: OSHA also provides free consultations and advice to small businesses to help businesses comply with the OSHA regulations. You can call the toll-free number, or you can call the local office to set up a consultation or get advice. *Cal/OSHA Consultation toll-free number 1-800-963-9424.*

Posting notices: OSHA requires that you post a notice called "Job Safety and Health Protection" for employees to see. The notice is available for free online, or you can get one from the nearest OSHA office. <http://www.osha.gov/Publications/osha3165.pdf>

Logging injuries: All businesses with 11 or more employees must keep a log of all workplace injuries and illnesses. This log must be available for employees to see, and any incident must remain on the log for at least 5 years.

(7) Allow Employees to Unionize

The National Labor Relations Act (NLRA) protects the rights of employees to organize unions and collectively bargain with employers.

Does NLRA apply to members of worker cooperatives?

The NLRA protects employees, and whether this applies to members of worker cooperatives depends on the ways courts have interpreted the definition of “employee” under the NLRA. Whether members of a worker cooperative have a protected right to form or join unions is an interesting question, addressed in great depth by attorney Neil A. Helfman in his 1992 article “The Application of Labor Laws to Workers’ Cooperatives.”⁵²

(8) Comply With Additional Government Requirements

Notices and records: Employers are also required to post notices related to employees’ rights, and to keep employee records according to the government’s requirements. You can view, download and print all the required employer postings here: <http://www.dir.ca.gov/wpnodb.html>

Register with the CA Employment Development Dept using this form: edd.ca.gov/pdf_pub_ctr/de1.pdf, or using this form for non-profit employers: http://www.edd.ca.gov/pdf_pub_ctr/de1np.pdf

(9) Verify Employee Eligibility to Work in the U.S.

Immigration laws require employers to complete the Form I-9, the Employment Eligibility Verification form to be sure that the employee can legally work in the United States. For more detailed information, and to see the forms, go to the U.S. Citizenship and Immigration Services (USCIS) website www.uscis.gov. On the right side of the page there is a section titled “Employment Verification,” you can click on the link below “Employment Verification” that says “I-9 Central” to get specific information on completing and filing the I-9 Form. Note that if the cooperative members are not considered employees, as described in above sections, then it is not necessary for the cooperative to complete an I-9 for them.

Who Enforces Employment Laws?

⁵² Available at <http://sfp.ucdavis.edu/cooperatives/reports/LaborLawWorkerCoops.pdf>.

At the California state level, the Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) is the primary body that enforces wage and hour laws, child labor laws, etc. The Division of Occupational Health and Safety (Cal/OSHA) and the Division of Workers' Compensation (DWC) also play a role in enforcing employment-related laws and regulations. The Department of Fair Housing and Employment protects employees from discrimination. In addition to the state-level agencies, agencies operate at the federal level to enforce similar laws. Although it is somewhat rare, employment law agencies may audit a business and fine it for violations. Most of the time, employment laws are enforced by workers that bring claims for back wages, health and safety violations, or some other complaint.

Cooperatives With Members Who Are Foreign Nationals

Various organizations are interested in creating cooperatives for undocumented people. "Undocumented people" refers to foreign nationals who are unauthorized to live and work in the United States. In official speak they are labeled "unauthorized aliens." This is a very complicated and unsettled area of law, but in short, while a worker-owned business may provide some benefits, business ownership will not resolve a person's legal status. However, foreign nationals are not prohibited from owning a business in the U.S.

There are currently 11 million unauthorized people living and working in the U.S. The Immigration and Nationality Act provides that anyone living in the United States without authorization is deportable. So clearly not everyone who is "deportable" is actually being deported. Despite this reality, a federal law, known as IRCA, or the Immigration Reform and Control Act of 1986, bans "hiring for employment" of "unauthorized aliens." This makes it very difficult for undocumented people to find and maintain work.

"Unauthorized aliens" are people who are not authorized to live or work in the U.S. Pursuant to IRCA, any business entity that would be considered to be "employing" unauthorized aliens would be violating federal law. However, IRCA does not ban foreign nationals from owning businesses outright. Thus, in setting up a business that is to be owned by unauthorized aliens, or foreign nationals, it is very important that organizations and workers prevent the owners from being characterized as employees of the business.

As discussed above, in California, the law sometimes assumes that members of cooperative corporations are employees. This would mean that a cooperative corporation composed of

unauthorized aliens could be liable for violating IRCA. However, as also discussed above, managing members of LLCs or partnerships are generally not considered employees under California law.

Therefore, if you are structuring a worker-owned business composed of foreign nationals it is advisable not to choose the consumer cooperative statute to create your business. Further, if structured properly, members of LLCs will generally not be considered “employees” of the business, and thus within the narrow bounds of IRCA’s prohibition of hiring “unauthorized aliens.” However, care must be taken to structure the business such that the individual working members have control over the business. The *Clackamas* factors discussed above would most likely be used to determine whether an individual member of the LLC has enough control over her work and over the entity to not be classified as an employee.

Despite the fact that an LLC may not be in violation of IRCA does not mean that an individual member of the LLC is authorized to work in the U.S. Business ownership does not change a person’s unauthorized status, nor does it put an undocumented person on the path to citizenship. The client must still resolve his or her legal status. In sum, all we can comment on is that, in our opinion, owning the business as a partner (or member of an LLC) is not prohibited. However, please consult an attorney if you are considering creating such an entity. This is an untested legal theory and an unsettled area of law.

FOR MORE INFORMATION: SEE APPENDIX A: NEW EMPLOYER CHECKLIST

GETTING THE GREEN: FINANCING A WORKER CO-OPERATIVE

Part I: Bank Loans and Alternative Financing

Due to their unique ownership structure, worker-owned businesses typically have a difficult time financing their business ventures. This section of the manual seeks to provide tips to go about financing your worker-owned business. It is important to note that worker-owned businesses come in multiple forms and have unique, and sometimes complex accounting, tax, and financing issues. This portion of the manual does not substitute for the advice of a qualified attorney, business advisor or financial advisor.

What is Capitalization?

Capitalization is the money that a business needs to start and continue running. It is defined as the amount and source of money needed to start and operate a business.

Financing a Worker Cooperative, Generally:

One of the keys to success in starting a worker-owned business, or any business for that matter, is obtaining adequate financing. Traditionally, businesses look to three sources of capital: contributions from the founders of the business (internal equity), loans (debt), and outside investors (outside equity).

The initial source of funding for a worker-owned business is capital contributions provided by the founding members (e.g., each founding member contributes an amount as a membership share). Membership share is a term used to refer to the contribution required for a person to become a member of the cooperative. The initial funding provided by founding members is also known as equity capital. Equity capital reflects the member's ownership stake in the cooperative.

Equity capital is one of the measures by which financial institutions will gauge a business' potential for receiving loans. By contrast, debt financing is borrowing money that the business will have to pay back. The lender, such as a bank, does not receive an ownership share in the business. When analyzing the creditworthiness of a business, lenders like to see that the members of the business have invested their own money in the business first, before seeking outside funding. Lenders are also more comfortable giving loans if they feel that a business has its own resources to

pay the loan back. Banks are not in business to lose money, so you need to convince them that lending to your worker-owned business is a worthwhile investment. Thus, in the eyes of banks and other lenders, the more equity capital the cooperative holds in the form of membership shares and other capital contributions, the better the investment.

Outside Equity: Issues Specific To Cooperative Corporations

Outside equity is more complicated for a worker-owned cooperative business than a traditional business. First, in California, cooperatives are not permitted to have “outside” or non-member investors. Thus these investors need to become members of the cooperative most likely as a separate class of “investor members” who do not participate in the cooperative’s business activities. Second, cooperative businesses follow the principle that voting rights are based on one’s membership in the cooperative, not on one’s investment of capital. This is different from a traditional capitalist enterprise in which ownership and voting are based on the number of shares an individual owns. In a cooperative, ownership and voting are based on your membership. Thus, no one member should have more votes than another.

This is a problem when a cooperative tries to attract capital investors, because such investors typically would like to have increased ownership and voting rights based on their capital investment. They may not be familiar with the concept of cooperative ownership and may not be interested in giving up the rights they would otherwise have in a conventional corporation.

Cooperative businesses have sought ways around these obstacles to raising capital by issuing memberships to a separate class of “investor members” who have limited voting rights. These memberships may allow the outside investors limited voting protections related to protecting their investments in the case of special events, such as mergers, acquisitions, or the dissolution of the cooperative. In addition these shares can offer dividends, which may incentivize people to invest. However, dividend distributions (i.e., returns that are not based on patronage) from a California cooperative corporation are limited by statute (to 15% of the capital contribution per year). The IRS also disfavors excessive dividend distributions to non-participating investor members.

Small Business vs. Cooperative Business Funding

As discussed above, worker cooperatives face difficulty in getting outside investors. Thus, most worker cooperatives are debt financed, as opposed to outside-equity financed. We have found that

cooperatively-run businesses have a difficult time obtaining private banking loans and investment capital, but it is by no means impossible.

Best Practices For Cooperatives Interested in Traditional Sources of Funding

If you are interested securing a bank loan or other traditional financing options. The following outlines best practices when approaching a traditional lender, such a bank or credit union. Potential challenges that a worker-owned cooperative in the start-up stage may face in accessing traditional loans include:

- **Requirement of a personal guarantee.** Lenders require borrowers to put up collateral to secure the loan in the event of default. If one member is unable or unwilling to pledge personal assets as collateral for a loan, lenders may require a third-party guarantee.
- **Business Plan.** Lenders look for a very specific business plan, a clear vision for the business, and an understanding of the cash conversion cycle. This is true of any business, regardless of whether it is worker-owned or not.
- **Trend of profitability.** Traditional lending institutions often require two to three years of profitability before being eligible for a loan.
- **Size of the loans.** Historically, it is easier to get larger loans from traditional lenders. Sometimes worker-owned cooperatives, especially those not in manufacturing or another capital-intensive industry, don't need a large loan amount.

The goal of this section is not only to help you understand the difficulties that cooperatives face when approaching a lender, but more importantly, **prepare you to overcome**, to the best of your abilities, these challenges.

Best Practices:

(1) Preparation

Preparation is a key step in both business development and obtaining funding for your business. Very few people can simply walk into the bank without preparation and obtain a significant loan. To prepare before you meet with the bank, start by evaluating your financial situation and the financial situation of the other

Best Practices:

1. Preparation
2. Understand their
Perspective
3. Pay Attention to Detail
4. Follow-up/ Keep at it!

founding co-op members. You will want to collect documents from all founding members and evaluate personal income, credit scores, debts etc. You will then want to decide whether it is in the best interest of your cooperative to obtain funding individually (e.g., one member has outstanding credit and is willing to try and obtain a loan) or collectively (e.g., you all pool your resources and sign together for a loan). You can receive

one free credit score per year at the government sponsored site www.annualcreditreport.com (but beware of credit report scams at other websites). You will want to bring all financial documents with you when speaking to bank loan officers. Be sure to cast a wide net, bringing more documents is better than bringing less. Do not neglect any information that is less favorable to you (e.g., a bad credit score or default on loans). You need to realistically consider the pros and cons of your financial situation, individually or as a group, and be prepared to discuss these pros and address the cons where necessary.

(2) Understanding Their Perspective

A bank is a business. They want to reduce their risk and increase their returns. It is important to understand that bankers, loan officers, or whomever you are dealing with at a financial institution have to follow institutionally determined standards. These standards are not all the same and some are less difficult to overcome than others. Ultimately, a financial institution will be interested in knowing how much money you want, what you plan on doing with it, and how you are going to pay the money back (on time!).

Research Project: Talk to other Cooperative Businesses!

Helpful Tip:

If you find something in your credit report that stands out in a negative way (e.g., a creditor noting late payments) then you should be proactive about its removal. Try talking to your creditor about removing the negative comment.

If that doesn't work, try adding your own statement to your credit file. "You have the right to put a statement in your credit file up to 100 words explaining misunderstandings."⁵³

⁵³ The Entrepreneur Magazine: Small Business Advisor, 258 (1995).

Not all banking institutions make public the standards they use to assess loan candidates; however, some do, and you may be able to find useful information from other co-ops in the community. Successful worker cooperatives may be willing to share which banks they do business with, and which to stay away from! As someone seeking a loan from a financial institution, you will be well served to realistically consider your business' assets, collectively and individually.

(3) **Pay Attention to Detail**

Details are key! Neglecting a negative financial history or failing to point out the strengths of your business are just two important details that might get skipped in the process of obtaining a loan. A financial institution should not have to search for necessary and persuasive information about you or the business. Present all the details of your unique financial circumstances to the bank clearly. Also, being detailed and thorough will only make the process run more smoothly.

(4) **Follow-Up/Be Creative/Keep At It!**

Receiving financial assistance in the form of a loan is undoubtedly a difficult and time-consuming process; however, persistence is the key. Many small businesses face hurdles when they are just beginning. Do not let a few undesired events get in the way of your business's success. Be creative when preparing for and communicating with financial institutions and potential investors. Remember not to burn bridges and do not stop trying when one door closes.

Government Funding

There are also some decent government financing options, the most notable of which is the Small Business Administration (SBA) Loan.

- Most relevantly, the SBA offers the CDC/504 Loan Program
 - A Certified Development Company (CDC) is a private, nonprofit corporation which is set up to contribute to economic development within its community. CDCs work with SBA and private sector lenders to provide financing to small businesses, which accomplishes the goal of community economic development.
 - **Must** be used for fixed-asset projects:

- The purchase of land, including existing buildings;
- The purchase of improvements, including grading, street improvements, utilities, parking lots and landscaping;
- The construction of new facilities or modernizing, renovating or converting existing facilities; and
- The purchase of long-term machinery and equipment.
- **Cannot** be used for working capital or inventory, consolidating or repaying debt, or refinancing.
- There is also the California Small Business Loan Guarantee.
 - It allows a business to not only acquire a loan it could not otherwise obtain, but to establish a favorable credit history with a lender so that the business may obtain future financing on its own.
 - Eligible Applicants:
 - Any small business as defined by the SBA (typically businesses that employ 100 people or less).
 - Eligible Uses:
 - Proceeds must be used primarily in California and for any standard business purpose beneficial to the applicant's business, such as expansion into new facilities or purchase of new equipment.

Conclusion

Applying for a loan, for most businesses, is not easy. The process can be even more complicated for cooperative business because most banking and financial institutions either do not trust a business that is primarily debt-financed or do not understand the concept of cooperatively owned business, or both. Being aware of these challenges makes it possible to overcome them. In approaching a financial institution for a loan, members of a cooperative should follow the best practices outlined above. Remember that although a loan may not be a viable option at the outset of your business' development, over time your business assets will grow and loans may become a more viable option once your business develops. Despite the difficulties associated with obtaining a financial loan, keep at it and be creative!

Getting the Green Part II: Securities Law

How To Comply With Securities Law

Most financing and fundraising options you will pursue to raise investments for your business require compliance with securities laws. So, don't just ask for loans and investments! Make sure you follow the law. Even asking a potential investor for money can be considered a violation of securities law, unless you're just applying for a regular business loan from your bank as described above. This section of the manual does not substitute for consultation with a qualified lawyer in the field of securities law. **Securities law is highly complex and failure to comply with securities regulations may lead to civil and criminal sanctions. Consult an attorney before trying to raise money.** This section of the manual will attempt to provide you with a basic overview of securities law as it relates to finding funding for your cooperative business.

What Is A Security?

A security is a financial instrument representing ownership, a debt agreement, or the rights to ownership. Examples include stocks, bonds, derivatives, and many other types of financial assets.⁵⁴ You create a security when you ask people to put money into your business or venture, and you offer them a return. For example, a security could be:

- Selling stock in your business
- Asking people to lend money to your business
- Offering a share of your business's profits
- Interests in limited liability companies

It is important to know what is or is not a security because when you sell or even offer to sell a security, it needs to either: 1) be registered with the U.S. Securities and Exchange Commission and/or with the state agency where you want to raise money (in California, the agency is the Department of Corporations); or 2) qualify for an exemption from registration. Registration is an expensive, time-consuming process. If possible, your business should try to find an exemption, which is simpler and less expensive.

⁵⁴ See <http://www.investopedia.com>.

Ways To Raise Capital *Without* Securities

(1) Member Capital Contributions

If the worker-member will be participating in the management of the business, the member's capital contributions are generally exempt from registration. If the member is not going to be participating in management, then there is a \$300 exemption available in California for cooperative corporations.⁵⁵

(2) Donations

When people give money without the expectation of receiving anything in return, they are donating. Many entrepreneurs are using so-called crowdfunding websites such as Kickstarter.com and Indiegogo.com to raise money for various enterprises. Entrepreneurs that solicit donations often provide non-monetary rewards to donors.

Helpful Tip:

When raising money through donations, any reward to your donors should be small (i.e., less than the donation amount) and non-monetary. If the reward is high in value or money-based, it could be seen as a financial return on an investment, also known as a security. In that case, you could be in violation of securities laws.

(3) Micro Loans

While traditional banking loans are sometimes difficult for cooperatives to obtain, an alternative is a micro loan. A micro loan is a small, low interest rate loan, supplied through various sources. Typically, the organizations that provide micro loans are socially conscious about the difficulties that community entrepreneurs face when trying to secure financing. Two examples of micro lenders are Kiva Zip and Working Solutions. For additional socially responsible investment and loan organizations in the Bay Area, please see Appendix H, Chapter IV: Financing, at the end of this manual.

⁵⁵ See Corporations Code Section 25100(r)

Quick Comparison: Traditional Sources of Financing Versus Alternative Financing⁵⁶

Traditional Sources (Banks and Credit Unions)	Alternative Financing (Micro Loans)
<ul style="list-style-type: none"> • Greater funding • Potentially higher interest rates • May require 2 to 3 years of profitability • May require good credit, collateral, or equity 	<ul style="list-style-type: none"> • Less funding • Potentially lower interest rates • May invest in startups • Credit, collateral, and equity requirements vary by lender

Pre-Selling

If you're an existing business and want to expand your business, one possible way to raise funds is to pre-sell gift certificates. For example, you might sell a \$150 gift certificate that a customer can redeem at your business, but only charge \$100 for the gift certificate. Charging less than the value of the certificate gives the buyer an extra incentive to purchase the gift certificate.

(4) Loans with Return of Principle Only

Return of principle only means giving back the money that the funder gave, and not offering a return on the investment. Not offering a return means that the business will not offer anything more than the original investment amount, such as an additional dividend, interest, or appreciation in value. It is important to note that in California, this is likely considered to be a security, so you should proceed with caution and consult with a lawyer if you choose to utilize this funding method.

(5) Product Discounts

Another way to raise capital for your business is to charge a membership fee and offer product discounts in exchange. REI provides an interesting model for product discounts funding. REI is a consumer cooperative that sells memberships to its customers. At the end of the year, REI members receive a "dividend" based on the amount spent at REI during the year. This "dividend" can then be used to shop at REI.

⁵⁶ This quick comparison borrowed from Berkeley Law's Community Food Enterprises Project Loan Handbook.

(6) **Bartering**

One unique and often forgotten way to gain needed resources is to avoid money altogether for certain goods or services your business needs. Bartering, or exchanging services or goods directly, is a means of obtaining resources. If you need to raise money to pay for something such as web design or compostable cups, consider whether you might be able to barter your goods or services to get what you need. This is not a traditional means utilized by businesses when financing their business; however, it can be utilized as an alternative way to obtain much needed resources for your business. However, you should note that bartering may be subject to taxation.⁵⁷

Ways to Raise Capital *With* Securities

Worker cooperatives are business entities that are (1) owned by their workers, (2) governed by their workers, and (3) operated for the benefit of their workers. Because worker cooperatives are owned and controlled by and for the people who work there, it is important to consider what kind of security you choose to offer. Specifically, be mindful when offering equity investments (as opposed to debt) to individuals who will not be working for the cooperative. Below are several methods for raising capital through securities offerings.

(1) **California Limited Offering Exemption (California Corporations Code Section 25102(f))**

California Corporations Code Section 25102(f) offers a special securities law exemption to certain kinds of private securities offerings, if they meet the following criteria:

First, you must be exempt from federal securities filing requirements:

- Your company must be formed under California law (i.e., if you are a corporation you filed your articles of incorporation in California, etc.)
- You plan only to offer securities to California residents
- Your contract with your investors includes that they will not resell the security to anyone outside the state for nine months
- Your business is very California-focused – here is a test for this:
 - You get at least 80% of your revenues from California

⁵⁷ See SELC's resources on barter: <http://www.barterlaw.org/>

- At least 80% of your assets are in California
- You plan to use at least 80% of the money you raise within California

Then, you must meet the requirements for 25102f:

- You can sell your securities to up to 35 investors that are not wealthy as long as they meet one or more of the following criteria:
 - The investors have a preexisting personal or business relationship with you “consisting of personal or business contacts of a nature and duration such as would enable a reasonably prudent purchaser to be aware of the character, business acumen, and general business and financial circumstances of the person with whom such relationship exists.” These investors can be friends or family;
 - The investors have enough financial experience to protect their interests; or
 - The investors have experienced professional financial advisors.
- You can sell an unlimited number of securities to officers and directors of the company and accredited investors. Accredited investors are 1) people with \$1 million in net worth (excluding their home) or \$200,000 in annual income, or 2) entities with more than \$5 million in assets.
- Your securities offering cannot be advertised to the public.
- The investors must sign something saying that they are not investing for the purpose of reselling the securities to someone else.
- You have to file a simple form with the California Department of Corporations.

(2) **California Cooperative Equity Exemption**

Under California Corporations Code Section 25100(r), a California cooperative can raise up to \$300 from each member without qualifying the securities. For example, a cooperative might set its initial capital contribution requirement at \$300. However, any person who purchases a security under this exemption becomes a member and must have voting rights in the cooperative. Also, you cannot use a “promoter” to sell these securities. As with the California Limited Offering Exemption above, you could use the federal intrastate offering exemption to satisfy the federal securities regulations.

Note that if a cooperative member will be participating in the management of the business, the members' capital contributions are generally not considered a security, which means each member can contribute more than \$300 to the cooperative. It is primarily for non-managing cooperative members that you would need to use the 25100(r) exemption.

(3) **Angel Investors and Venture Capital**

Finding an angel investor or venture capitalist to invest in your business can be competitive and challenging. At the same time, angel and venture capital funds have helped to launch and grow many successful businesses.

(4) **Crowdfunding**

Crowdfunded investing occurs when many members of the general public invest small amounts of money in a business. Instead of relying on a small pool of wealthy “accredited” investors, crowdfunded investing allows a business to raise capital from its customers, neighbors, friends, family, and other community members, most of whom might be non-wealthy people who want to support your business. At the time of writing this manual, we are still waiting for the SEC to release regulations governing the recently enacted federal crowdfunding exemption in the Jumpstart Our Business Startups (JOBS) Act. In the meantime, a Direct Public Offering is one of the only viable methods to advertise and issue securities publicly to the crowd.

- **Direct Public Offering (DPO)** Registering a DPO is not simple and it may require assistance from a lawyer, but it's a nice option if you need to raise a lot of money and you want to offer shares of your business to local community members. A DPO is a securities offering that is registered at the state level and allows a business to publicly advertise investment opportunities to both accredited and non-accredited investors. Unlike an initial public offering (IPO), which requires an investment bank to underwrite the security, or the anticipated Crowdfunding exemption, which will require the online funding portal to be registered as an intermediary, a DPO allows an entity to sell securities directly to the public without a third party intermediary. Upon the state's approval of your DPO plan, you can begin offering securities directly to the public.
- **Crowdfunding Exemption (2012 JOBS Act)** In April 2012, President Obama signed the JOBS Act. Among other things, the JOBS Act includes a provision that would

exempt certain small investments from securities registration requirements.⁵⁸ Although this new exemption is not specific to cooperatives, some cooperatives might consider using this exemption at some point, after considering related issues such as how crowdfunded investing might affect a cooperative's governance or control by its members. However, until the SEC releases regulations governing the exemption, we know very little about how useful this exemption will be. A good resource for information on crowdfunding is Cutting Edge Capital:
<http://cuttingedgecapital.com/>.

(5) **Socially Responsible Investing or Community Investment**

Socially responsible investment organizations have grown rapidly over the past 30 years and continue to expand, even in the down economy. Many of them are located in the Bay Area.

Useful Resources:

Additional tools on financing your worker co-op can be found at:

- California Business Portal (Forms, fees, requirements)
- Small Business Administration (General guidance)
- Alameda County Small Business Development Center
- Alameda Community Development Agency

⁵⁸ http://www.huffingtonpost.com/jenny-kassan/jobs-act_b_1405844.html.

HOW DOES MONEY FLOW THROUGH A COOPERATIVE?

Laying down the green⁵⁹



Amy and Bernardo decide to go into business for themselves. They start Green Commonwealth, a landscaping cooperative to help people create outdoor spaces that showcase colorful native plants. The cooperative has properly complied with relevant securities laws to raise money. In the beginning, it has two members, Amy and Bernardo.

Amy puts in \$10,000 and Bernardo puts in \$10,000. This is their *initial capital contribution*. They each have a *capital account*, which now contain \$10,000 (in the sample bylaws, the capital account is also known as *Member Account*).

Note: The Member Account (capital account) is not a separate bank account for the member. The Member Account includes not only the member’s initial capital contribution, but also his or her shares of the cooperative’s earnings (Patronage Dividends), plus or minus anything else that might affect the balance in the Member Account. Those funds in the Member Account do belong to the member, but they actually sit in the cooperative’s bank account or are used for business expenses and are accounted for separately. The cooperative’s bylaws provide rules on how and when the member can take out those funds. We’ve provided a set of bylaws for “Green Commonwealth” in Appendix A of this Manual.

Amy’s Capital Account/Member Account	Bernardo’s Capital Account/Member Account
\$10,000 initial capital contribution	\$10,000 initial capital contribution
Total: \$10,000	Total: \$10,000

⁵⁹ Please refer to the appendix for the relevant sections in the sample “Bylaws of Green Commonwealth Landscaping Cooperative, Inc.”

Carla then joins as a regular employee. Carla isn't yet a member and she hasn't made an initial capital contribution. Therefore, unlike Amy and Bernardo, Carla has no capital account. Carla does get paid regular wages, like Amy and Bernardo. We will assume that Amy and Bernardo have chosen to treat themselves as employees; however, see the section of this handbook that describes when you do or do not need to treat working cooperative members as employees.

The beautiful gardens are a hit! Green Commonwealth makes a nice profit. What happens now?

Green Commonwealth earns \$150,000 from their landscaping services. This is the gross income before business expenses. It spent \$105,000 to buy materials, pay wages to Amy, Bernardo, and Carla, buy insurance, etc. So Green Commonwealth earned *net income* of \$45,000 (\$150,000 - \$105,000 = \$45,000). As members of Green Commonwealth, Amy and Bernardo are entitled to a share of this net income. But how do we know how much they get?

First, look at how many hours everyone worked that year and figure out how much of that \$45,000 was attributable to members' labor (work done by Amy and Bernardo) and how much was attributable to non-members' labor (work done by Carla).

Members Hours Worked	Non-Members Hours Worked
Amy: 1200 hours	Carla: 1500 hours
Bernardo: 1800 hours	
<i>Total Member Hours:</i> 3000	<i>Total Non-Member Hours:</i> 1500
Total Member and Non-Member Hours: 4500	

$3000 \text{ Member Hours} / 4500 \text{ Total Hours} = 2/3$

$1500 \text{ Non-Member Hours} / 4500 \text{ Total Hours} = 1/3$

2/3 of the \$45,000 was attributable to Amy and Bernardo's hours of work (member labor). This is what the bylaws call a \$30,000 *Surplus*.

1/3 of the \$45,000 (or \$15,000) was attributable to Carla's hours of work (non-member labor). This is what the bylaws call a \$15,000 *Profit*.

Like most businesses, Green Commonwealth wants to build a financial reserve to help cover ongoing and also future operating costs. When drafting their bylaws, they decided one way to build their financial reserve was by agreeing to put some of the net revenue (in this case, some of the \$45,000) into their *Collective Account* before putting the rest into the individual Member Accounts (in the form of Patronage Dividends). The Collective Account sits with the Member Accounts in Green Commonwealth's bank account. However, it does not belong to any one individual Member, but to Green Commonwealth itself.

In the bylaws (see Section 7.3 of the sample "Bylaws of Green Commonwealth Cooperative, Inc."), they agreed to allocate 100% of Profit (i.e., the net revenue that was attributable to non-member labor) to the Collective Account. So they put the \$15,000 Profit into the Collective Account as *retained earnings*. Retained earnings are the earnings that Green Commonwealth does not pay out. Instead, they are usually retained as capital for the cooperative to use. If the cooperative paid the Profit out as patronage dividends, it would likely violate IRS rules for operating on a cooperative basis.. Note that the cooperative will need to pay tax on the retained Profits; see the tax section below.

Okay. So far, so good. What else do the bylaws say?

In Section 7.3 of their bylaws, they agreed that "[a]ny Surplus shall be credited to the Collective Account as necessary to bring the year's contribution to the Collective Account up to 25% of the year's combined Profit/Surplus. All other Surplus shall be paid as Patronage Dividends in direct proportion to Patronage during the fiscal year." Fortunately, Green Commonwealth has already allocated 33% of the combined Profit/Surplus to the Collective Account, thanks to the large amount of earnings attributed to non-member labor. Thus, no additional funds are required to be put into the Collective Account to bring it up to 25%.

Now that they've put enough retained earnings into the Collective Account, let's figure out how Amy and Bernardo will get their shares of the year's earnings (*Patronage Dividends*).

The amount of *Patronage Dividends* each Member gets is based on how much *patronage* each of them had that year. In a worker cooperative, patronage is measured by the work done for the cooperative. In most worker cooperatives, it is calculated based on how many hours each Member

worked relative to each other. Thus, Patronage Dividends are calculated by dividing up the *Surplus* at the end of the fiscal year.

We know from the previous table that Amy worked 1200 hours and Bernardo worked 1800 hours.

Now, let's do the math:

$$\text{Amy's Hours/Total Member Hours} = 1200/3000 = 2/5$$

$$\text{Bernardo's Hours/Total Members Hours} = 1800/3000 = 3/5$$

$$2/5 \text{ of the } \$30,000 \text{ } \textit{Surplus} = \$12,000 \text{ in Patronage Dividends to Amy}$$

$$3/5 \text{ of the } \$30,000 \text{ } \textit{Surplus} = \$18,000 \text{ in Patronage Dividends to Bernardo}$$



Amy gets \$12,000 in Patronage Dividends. Does this mean she gets a \$12,000 check to take home with her?

Do they get it all back in cash? Well, let's look at the bylaws again! Section 7.4 of the bylaws says that Patronage Dividends get paid to their members "50% in cash and 50% as written notices of allocation." When a Member receives a *written notice of allocation* for a specified amount, that amount goes into his or her Member Account as a credit which will be paid out in cash sometime in the future, according to what the bylaws provide for.

Why don't Amy and Bernardo get it all back in cash? Green Commonwealth needs a certain amount of cash on hand for operating expenses, and the funds that are in the Collective Account (retained earnings, etc.) may not be enough to run the business day to day. By paying part of the Patronage Dividends as written notices of allocation, Green Commonwealth will help ensure that it has enough cash on hand to pay for things like rent, salaries, landscaping supplies, etc. In return, Green Commonwealth might pay a modest interest rate on the Member Accounts (under 15%).

Note that the cooperative can decide each year how much it wants to distribute as cash versus notices, and it will vary based on capital needs. So the cooperative doesn't need to put this

in its bylaws since it may change year to year. The cooperative does need to decide how it will calculate patronage before the start of the fiscal year (e.g. based on hours worked). But it can wait and decide how much of the distribution will be in cash until after the end of the fiscal year. For example, in December 2013, a cooperative decides it will use hours to calculate patronage during 2014. After the end of 2014, sometime before August 15 of 2015, the cooperative calculates surplus and decides whether to distribute the patronage as cash or allocation.

So Amy and Bernardo get their Patronage Dividends as follows:

- \$6,000 cash and \$6,000 written notice of allocation for Amy
- \$9,000 cash and \$9,000 written notice of allocation for Bernardo

And here’s how their Member Accounts look now:

Amy’s Capital Account/Member Account	Bernardo’s Capital Account/Member Account
\$10,000 initial capital contribution	\$10,000 initial capital contribution
\$6,000 written notice of allocation	\$9,000 written notice of allocation
Total: \$16,000	Total: \$19,000

(Carla doesn’t get any Patronage Dividends because she isn’t a Member. She only gets her regular salary.)

Amy and Bernardo are pretty happy. Green Commonwealth had a great year and they both received a good chunk of profits in cash--\$6,000 for Amy and \$9,000 for Bernardo. Their Member Accounts are looking healthy too--\$6,000 written notice of allocation added to Amy’s Member Account and \$9,000 written notice of allocation to Bernardo’s Member Account.

Will IRS give me the finance blues? Tax me to the limit of my revenues?

Businesses pay a variety of state and federal taxes. Besides state and federal income tax and employment taxes, they pay excise taxes, unemployment insurance and temporary disability taxes, etc. For purposes of this discussion, we focus on federal income and employment taxes. Taxation

is complicated, and cooperative taxation is even more complicated. You should consult with an experienced tax attorney who specializes in cooperative taxation.

Subchapter T and Federal Income Tax

Cooperatives can receive special tax treatment under Subchapter T of the Internal Revenue Code. Regular corporations face double-taxation, which means that the corporation gets taxed on their earnings at the corporate level, and then, when it pays dividends to its shareholders, the shareholders have to pay tax on those dividends. In contrast, Subchapter T allows a cooperative to avoid double-taxation on some of its earnings, if those earnings are paid out as patronage refunds (known in this scenario as Patronage Dividends). This is because patronage refunds are considered a tax-deductible business expense for the cooperative. In the case of Green Commonwealth, it will pay some tax, because 33% of the earnings were attributable to non-member labor and were therefore not paid out as patronage refunds.

Each member will pay tax on the patronage dividend distributed or allocated to him/her. Note that the member must pay income tax on the *entire* patronage dividend, even if some of it was only received in the form of a written notice of allocation, rather than as a cash pay-out. So, Amy must pay income tax on her \$12,000 patronage dividend, even though she received \$6,000 of it in cash and \$6,000 of it as written notice of allocation. Since she is paying taxes on all of it now, when the additional \$6000 is paid to her over the next few years, she will not have to pay tax on it again.

To take advantage of Subchapter T, Green Commonwealth has to meet the requirements outlined in the relevant part of the Internal Revenue Code, 26 U.S.C. § 1388. For the patronage refunds/Patronage Dividends to be tax-deductible, two of the more important requirements are (1) that at least 20% of the Patronage Dividend gets paid out in cash/check within 8.5 months of the end of the fiscal year; and (2) each member of the co-op receives a “qualified” written notice of allocation for the noncash portion of the Patronage Dividend.

Another note on CA taxes: Green Commonwealth also has to pay either the CA Corporation Franchise Tax (state income tax), which is based on its taxable income, or the \$800 CA Minimum Franchise Tax, whichever amount is greater. However, in its first taxable year, Green Commonwealth is not subject to the CA Minimum Franchise Tax (although it does still have to pay the Corporation Franchise Tax, even if it’s less than \$800).

What about employment and self-employment tax?

Besides paying income tax based on what a business earns, a business must pay employment taxes based on the wages it pays to its employees. As discussed above, Green Commonwealth pays wages to employees. Carla is an employee, and Amy and Bernardo, as members of the worker cooperative, have also chosen to treat themselves as employees. Therefore, Green Commonwealth has to pay employment tax on those wages. Employment taxes include Medicare, Social Security, and unemployment insurance.

If you are self-employed, you pay self-employment tax (Medicare and Social Security) based on your self-employment income. The IRS defines self-employment income as the income that an individual earns from a trade or business carried on by that individual.

As we saw in the employment law chapter, Green Commonwealth has to pay employment taxes on the wages it paid to Amy, Bernardo, and Carla. What about the Patronage Dividends it paid to Amy and Bernardo? Would these coop members have to pay self-employment tax on the Patronage Dividends? Would Green Commonwealth have to pay employment tax on the Patronage Dividends?

On the issue of whether patronage refunds (Patronage Dividends) are subject to self-employment tax, the IRS has gone back and forth. Over the past several years, the IRS audited members of a worker cooperative and told them they had to pay self-employment tax on their patronage refunds. Bay Area tax attorney Greg Wilson fought those cases, asserting that patronage refunds paid by a worker cooperative are not subject to self-employment taxes for several reasons.⁶⁰ Eventually, the IRS agreed and dropped those cases, concluding that patronage refunds from a worker cooperative are not subject to self-employment tax. The IRS said that, in cases where members of a worker cooperative are employees, employees generally do not receive both employment income and self-employment income from the same entity. However, this leads to the possibility that the IRS might conclude that patronage refunds are employee bonuses. If this is true, the worker cooperative may have to pay employment tax on patronage refunds, since employee bonuses are considered employee wages.

Redeeming the Member Account

⁶⁰ See “Taxation of Patronage Dividends from Worker Cooperatives: Are They Subject to Employment Tax?” By Attorney Gregory R. Wilson, available at [http://www.gwilson.com/documents/Article4\(PatronageDivTax\).pdf](http://www.gwilson.com/documents/Article4(PatronageDivTax).pdf).

Amy and Bernardo's Member Accounts are looking pretty good. But how do they get money out of them? Most cooperatives will try to pay the funds out slowly over time, either on a regular payment schedule, or when the cooperative feels that it is on solid enough financial ground. According to Section 7.7 of their bylaws, Green Commonwealth "shall aim to pay out in cash all funds credited to their Member Accounts within three years of the date they were first credited." So, three years from now, assuming all is well, Amy and Bernardo will have gotten back all of the \$6,000 and \$9,000 written notices of allocation as cash. Since they will already have paid taxes on those amounts, they will not need to pay taxes again when they receive the money.

Allocating Losses and Rewarding Founders

This story so far assumes that Green Commonwealth is successful from the beginning. But what if it's like most businesses and loses money in the first year or so? Suppose Amy and Bernard put in \$20,000 but only earn \$10,000. Should the cooperative allocate that \$10,000 loss equally, so that Amy and Bernard each only have \$5,000 in their cooperative account? But remember, Bernard worked more hours than Amy. What about dividing the losses based on patronage? That might not be fair, because the person who worked the hardest ends up losing more. A third option is allocating losses to the collective account rather than to the members. But if the members don't bear the risk of loss, will they behave recklessly? A lot of cooperatives struggle with how to allocate loss.

A related issue is how to reward founders for the risk they took and all of the work they expended to create new enterprises and local wealth. To illustrate, imagine that the initial members end up absorbing losses from the early years of the cooperative, and then new members join once the business is a bit more stable. If the surplus is still divided on the basis of patronage, those new members may end up with more valuable capital accounts than the founders. Cooperatives sometimes give greater value to some members' contributions because of their seniority, experience, etc. But doing this can be tricky, because the IRS doesn't want arbitrary measures of value that make the cooperative look like it is devolving into a less equal business. If you decide to value founders' patronage differently, talk to a lawyer first.

Green Commonwealth's bylaws address issues of loss allocation and founders' risk in this way: "Any Loss shall be allocated 75% to Member Accounts in direct proportion to Patronage during the fiscal year and 25% to the Collective Account, with the exception of Losses occurring

and/or carried over from the Cooperative's first two fiscal years, which shall be allocated 100% to the Collective Account." By allocating the loss to the collective account for the first two years, the bylaws provide the founders with a degree of insulation from the risk of starting the enterprise. After those first two years, when founders and other members are on equal footing, Green Commonwealth allocates most of the loss to the members based on their patronage.

What happens if Amy or Bernard leaves Green Commonwealth?

Unlike in a typical business, a member leaving a cooperative usually would not get to cash out the market value of their share. This would place too great a strain on the cooperative and remaining members. Also, it is difficult to measure the value of cooperatives. Instead, when a member leaves a co-op, the amount in his or her capital account becomes a debt that the co-op then pays back to the member over a specified amount of time. Under Section 7.8 of Green Commonwealth's bylaws, the cooperative would repay the debt, plus interest, within five years after Amy or Bernardo leaves. Amy or Bernardo may receive some cash up front, and a promissory note, which formalizes the cooperative's promise to pay the rest out over time. This is like a loan from the member to the cooperative.

What happens if the business is sold or dissolves?

According to their bylaws, if Green Commonwealth is ever sold or dissolves, all proceeds (after paying out Member Accounts and debts) will be distributed to everyone that was ever a member of the cooperative, on the basis of the number of hours each put in. This method of distribution is consistent with the requirement that earnings of cooperatives be distributed to members on the basis of their patronage, and it means that current members will not get an inappropriate bonus. This helps to keep businesses locally owned, because it gives current members a disincentive to vote to sell a business for the purpose of cashing out and getting a lot of money, since proceeds will need to be distributed among past members as well. Cooperatives should keep the contact info of past members and keep a record of how much those members worked over the years. This way, the value of each member's work toward the cooperative's success will determine his or her share of the payout.

GLOSSARY OF USEFUL TERMS

- **Assets**- resources with an economic (typically monetary) value that an individual, or business has ownership of.
- **Board of Directors**- the individuals that serve as the governing body of the organization.
- **Bylaws**- the document that regulates the governance and internal affairs of a corporation.
- **California Corporations Code**- state law governing formation and operation of business entities.
- **Capital**- money used in a business, whether supplied by owners (equity) or borrowed (debt).
- **Capitalization**- the amount and source of money needed to start and operate the cooperative.
- **Collateral**- asset used to secure a loan.
- **Debt Financing**- obtaining money for a business by borrowing from a bank or other lender. While some collateral may be required to obtain the loan, the lender does not have any ownership or direct control of the business affairs, except in certain instances of default.
- **Dividend**- amount paid to business owners based on their investment. Typically, dividends represent a portion of profits paid to members proportionate to the shares held. In a worker cooperative, patronage “dividends” are also distributed on the basis of patronage with the cooperative, usually determined by wages earned or hours worked.
- **Equity**- the ownership interest in a business, typically calculated by subtracting all liabilities (amounts owed) from all assets (amounts and property owed). Equity is generally made up of investments by worker-owners, other than loans, and the cumulative profits of the business.
- **Equity Capital**- money supplied by the owners of a business, which is used towards financing the various needs of the business.
- **Governance**- this refers to the way a company is controlled and how decisions are made.
- **Liabilities**- a financial obligation that arises out of a prior transaction.
- **Limited liability entity**- this refers to a type of business that provides extra protection to its owners if it is sued. The owners of a limited liability business, if sued, may lose the business, but in most cases, will not lose their personal assets.

- **Margins**- in cooperative terminology, net income is often referred to as “margins.”
- **Officers**- executive agents of the business, responsible for certain duties, such as signing documents, keeping meeting minutes, providing notices, signing checks, and so on.
- **Operating Agreement**- the document that regulates the internal affairs and governance of an LLC.
- **Profits**- in the context of California cooperative corporations, this is defined as the excess of revenues over expenses for a fiscal year attributable to non-Member labor.
- **Revenue**- income that a business receives from normal business activities.
- **Revolving Capital Accounts**- written notices of allocation that are paid to members on a first-in, first-out basis, rather than upon termination of membership or fixed maturity dates. Dates of redemption are generally flexible and controlled by the board or other designated decision-making body.
- **Revolving Funds**- funds made available for cooperative and business investment purposes by some public agencies or nonprofit organization. These may be borrowed and then repaid on specified terms so that others may borrow the money at a later time.
- **Surplus**- in the context of California cooperative corporations, this is the net income that is attributable to member labor.

APPENDIX A: NEW EMPLOYER CHECKLIST

If you think your entity and management structure might implicate employment laws in some way, here are some things to consider and/or do before hiring your first employee. This Checklist is adapted from the Small Business Administration.⁶¹

1. Obtain an Employer Identification Number (EIN)

- a. Before hiring your first employee, you need to get an employment identification number (EIN) from the U.S. Internal Revenue Service.⁶² The EIN is often referred to as an Employer Tax ID or as Form SS-4. The EIN is necessary for reporting taxes and other documents to the IRS. In addition, the EIN is necessary when reporting information about your employees to state agencies. Apply for EIN online or contact the IRS at 1-800-829-4933.

2. Set up Records for Withholding Taxes

- a. According to the IRS, you must keep records of employment taxes for at least four years. Keeping good records can also help you monitor the progress of your business, prepare financial statements, identify sources of receipts, keep track of deductible expenses, prepare your tax returns, and support items reported on tax returns. Below are three types of withholding taxes you need for your business:
- b. **Federal Income Tax Withholding**
Every employee must provide an employer with a signed withholding exemption certificate (Form W-4)⁶³ on or before the date of employment. The employer must then submit Form W-4 to the IRS. For specific information, read the IRS' Employer's Tax Guide.⁶⁴
- c. **Federal Wage and Tax Statement**
Every year, employers must report to the federal government wages paid and taxes withheld for each employee. This report is filed using Form W-2, wage and tax statement.⁶⁵ Employers must complete a W-2 form for each employee who they pay a salary, wage or other compensation.
- d. Employers must send Copy A of W-2 forms to the Social Security Administration by the last day of February to report wages and taxes of your employees for the previous calendar year. In addition, employers should send copies of W-2 forms to their employees by Jan. 31 of the year following the reporting period. Visit SSA.gov/employer for more information.⁶⁶
- e. **California State Taxes**
Withhold California State Taxes. The California Employment Development Department provides state payroll tax services and information on their website.⁶⁷

⁶¹ <http://www.sba.gov/content/hire-your-first-employee>

⁶² <http://www.irs.gov/>

⁶³ <http://www.irs.gov/uac/Form-W-4,-Employee%27s-Withholding-Allowance-Certificate-1>

⁶⁴ <http://www.irs.gov/pub/irs-pdf/p15.pdf>

⁶⁵ <http://www.irs.gov/uac/Form-W-2,-Wage-and-Tax-Statement>

⁶⁶ <http://www.ssa.gov/employer/>

⁶⁷ http://www.edd.ca.gov/Payroll_Taxes/default.htm

3. Provide Safe Working Conditions and Comply With Safety Standards

- a. The Occupational Safety and Health Act (OSHA) requires an employer to provide a safe workplace free from hazards that could likely cause serious physical harm to employees.⁶⁸

4. Employee Eligibility Verification

- a. Federal law requires employers to verify an employee's eligibility to work in the United States. Within three days of hire, employers must complete Form I-9, employment eligibility verification, which requires employers to examine documents to confirm the employee's citizenship or eligibility to work in the U.S. Employers can only request documentation specified on the I-9 form.
- b. Employers do not need to submit the I-9 form with the federal government but are required to keep them on file for three years after the date of hire or one year after the date of the employee's termination, whichever is later.
- c. Employers can use information taken from the Form I-9 to electronically verify the employment eligibility of newly hired employees by registering with E-Verify.

5. Register with California Employment Development Department

- a. All employers are required to report newly hired and re-hired employees to a state directory within 20 days of their hire or rehire date.⁶⁹

6. Obtain Workers' Compensation Insurance

- a. See the California Department of Industrial Relations website for a more detailed explanation of worker's compensation insurance and links to relevant forms.⁷⁰ You can find a worker's compensation fact sheet for employers at the link below.⁷¹

7. Pay At Least Minimum Wage

- a. Wage laws require an employer to pay at least minimum wage, which is currently \$9.00 per hour in California, and may be higher in certain cities such as San Francisco, Berkeley and Oakland. The Fair Labor Standards Act (FLSA) is the main federal law that affects workers' pay. California Labor Code 1171 is the main state law related to wage requirements.

⁶⁸ <http://osha.gov/dcsp/smallbusiness/index.html>

⁶⁹ <https://eddservices.edd.ca.gov/index.html>

⁷⁰ www.dir.ca.gov/dwc/employer.htm

⁷¹ www.dir.ca.gov/dwc/FactSheets/Employer_FactSheet.pdf

8.

9. Comply with Overtime Laws

- a. The law requires an employer to pay a worker extra for overtime work and comply with other rules regarding work hours, unless the worker can be considered an “exempt” employee.

10. Comply with Meal, Break, and Time Off Requirements

- a. Employers must comply with rules governing breaks and meal periods during the work day. Employers must provide non-exempt employees one day off per week, and provide a 30-minute meal break for any shift of 5 hours or more, and a 10 minute break for every 4 hours worked, with a few exceptions. For more info see below.⁷²

11. Notices and records

- a. Employers are also required to post notices related to employees’ rights, and to keep employee records according to the government’s requirements. You can view, download and print all the required employer postings.⁷³

12. Post Required Notices

- a. Employers are required to display certain posters in the workplace that inform employees of their rights and employer responsibilities under labor laws. Visit the Workplace Posters⁷⁴ page for specific federal and state posters you’ll need for your business.

13. File Your Taxes

- a. Generally, employers who pay wages subject to income tax withholding, Social Security and Medicare taxes must file IRS Form 941, Employer's Quarterly Federal Tax Return.
- b. New and existing employers should consult the IRS Employer's Tax Guide⁷⁵ to understand all their federal tax filing requirements.
- c. See the Franchise Tax Board website for guidance for California Employers.⁷⁶

⁷² http://www.dir.ca.gov/dlse/FAQ_MealPeriods.htm

⁷³ <http://www.dir.ca.gov/wpnodeb.html>

⁷⁴ <http://www.sba.gov/content/employment-and-labor-law>

⁷⁵ <http://www.sba.gov/content/employment-and-labor-law>

⁷⁶ https://www.ftb.ca.gov/businesses/index.shtml?WT.mc_id=Global_Businesses_Tab

APPENDIX B: SAMPLE BYLAWS OF GREEN COMMONWEALTH COOPERATIVE, INC.

Prepared by the Green Collar Communities Clinic (GC3) of the East Bay Community Law Center (EBCLC) and by the Sustainable Economies Law Center (SELC) based on Bylaws created by Tim Huet of Arizmendi Association of Cooperatives and adapted by Jenny Kassin of K2 Law Group.

A few things to note about these Sample Bylaws:

1. **About the Explanatory Notes:** These Bylaws are provided for teaching purposes. All Explanatory Notes, contained within brackets, are meant to explain the purpose, meaning, alternatives, or legal background of a Bylaws provision. The Explanatory Notes should be deleted if you use and adapt the Bylaws for your own purposes. They are not meant to be legally enforceable provisions of the Bylaws.
2. **Use These Bylaws With Caution:** Please note that you should not assume these Bylaws are sufficiently thorough or applicable to your cooperative. Please seek the advice of an attorney before adopting Bylaws, and be sure that any Bylaws you adopt are tailored to the specific needs of your cooperative and to the requirements of California law. **These Bylaws Were Written to Adhere to California Law:** Unless otherwise specified, all references to a particular code section or to the “Statute” are to the California Consumer Cooperative Corporations Statute, which is found starting at section 12200 of the California Corporations Code. If you are uncertain about whether you can change provisions of these Bylaws, refer to the relevant section of the Statute, which often sets minimum requirements for meeting procedures, notice, and other matters.
3. **These Bylaws Were Designed for a Collective:** These Sample Bylaws assume that all Members are also on the Board of Directors, also known as a “collective board.” However, a larger cooperative may wish to have a smaller Board of Directors that does not include every Member.
4. **We Are Continually Improving on These Bylaws:** This draft was prepared in May of 2012. Please check our website for updates: <https://sites.google.com/site/cooperativelawresources/>, and let us know if you have any suggestions or find any errors. Thank you!

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ARTICLE 1 - Membership

1.1 **Classes of Members.** The Cooperative shall have one class of Members.

[Explanatory Note: A class of members is a group of people or organizations who all have the same specified rights and responsibilities according to the Bylaws. Some cooperatives may have more than one class of members depending on their needs. For example a cooperative may wish to create a class of worker-members and a class of consumer-members.]

1.2 **Becoming a Member.** To become a Member of this Cooperative, a person must:

- a. Be a resident of California;
- b. Pay an Initial Capital Contribution; the amount of the Initial Capital Contribution will be determined by the Board of Directors;
- c. Work for the Cooperative for 650 hours or six months, whichever period is longer; this period of time is called the “Candidacy Period;”
- d. Be approved by the existing Members, by means of the process described in Section 1.3; and
- e. Receive a copy of the Cooperative's Disclosure Statement, Bylaws, and a receipt for payment of the Initial Capital Contribution.

[Explanatory Note: Although the Statute does not require these qualifications for membership, most cooperatives list a set of membership qualifications. Limiting membership to California residents is helpful, because the cooperative might otherwise have to deal with federal securities law issues. Cooperatives are not required by statute to have an initial capital contribution or membership fee, but these kinds of payments are helpful to cover initial start-up and operating costs. If your cooperative does want to require an initial capital contribution or recurring membership fee, the bylaws should provide for it. (See 12400 and 12401).]

1.3 **Acceptance of Members.** The application review and approval process for a Prospective Member is as follows:

- a. The Board of Directors or an empowered hiring committee shall receive the membership application from a Prospective Member and shall submit it to the Members for approval.
- b. The Members shall then decide by the decision-making process described in Section 5.1 whether to approve the application.
- c. If the application is not approved, the applicant's employment shall be immediately terminated, unless the Members choose to specify a further Candidacy Period to be followed by a second decision of the Members on whether to approve the application.
- d. Upon approval of the application, and meeting the qualifications listed in Section 1.2, the applicant shall immediately become a Member.
- e. The Cooperative may waive the Candidacy Period and renew a former Member's Membership immediately by a 75% vote of all the Members.

[Explanatory Note: A cooperative may choose to design its membership application process and approval process in whatever way it chooses.]

- 1.4 ***Members May Not Transfer Their Memberships.*** No Member may transfer her or his Membership or any right arising from that Membership. Any attempted assignment or transfer of Membership shall be void, and will not confer rights on the intended assignee or transferee.

[Explanatory Note: The Statute generally prohibits transfer of memberships unless the cooperative's articles or bylaws allows for transfers. See 12410.]

ARTICLE 2 – Termination of Membership

2.1 Resignation of a Member.

1. Every Member has the right to resign from the Cooperative.
2. When a Member resigns from the Cooperative his or her Membership will be terminated.
3. To resign from the Cooperative, a Member must provide the Secretary of the Cooperative with a written notice of resignation. The resignation shall become effective immediately without any action on the part of the Cooperative. The individual who

resigned from the Cooperative will not be allowed to work for the Cooperative for one month following voluntary termination of Membership unless her or his Membership is renewed by the Cooperative.

4. If a Member resigns, he or she is still responsible for any charges, dues, or other obligations that the Member owes to the Cooperative. The Cooperative shall still have the right to enforce any such obligation or obtain damages for its breach.

[Explanatory Note: In general, the Statute provides that Members can resign at any time, but the Bylaws may require reasonable notice before the effective resignation date. See 12430.]

2.2 Death of Member. A Membership shall immediately terminate upon the death of a Member.

2.3 Expulsion of a Member. No Member may be expelled or suspended except according to procedures satisfying the requirements of this section:

- a. A Member may, for any lawful reason, be expelled from the Cooperative by a vote of 75% or greater of the Members at a duly called meeting at which a quorum is present.
- b. The Member must be given 15 days' prior notice of the expulsion, suspension, or termination, and the reasons for that expulsion, suspension, or termination.
- c. The Member shall have an opportunity to be heard, orally or in writing, not less than five days before the effective date of expulsion, suspension, or termination, by a person or body authorized to decide that the proposed expulsion, termination, or suspension not take place.
- d. Any notice required under this section may be given by any method reasonably calculated to provide actual notice. Any notice given by mail must be given by first-class or registered mail sent to the last address of the Member shown on the Cooperative's records.
- e. A Member who is expelled or suspended shall be liable for any charges, dues, or other obligations incurred before the expulsion, suspension, or termination.
- f. The Cooperative may direct a Member whose expulsion is being considered to refrain from conducting business as a Member until the expulsion decision is made, provided the Cooperative pays the Member her or his average weekly wage or compensation –

calculated based on the three months preceding the date of the notice given pursuant to this section – until the expulsion decision is made. The Cooperative may also direct a Member whose expulsion is being considered to stay away from the Cooperative’s places of business except as necessary to exercise her or his rights under law

[Explanatory Note: The Statute provides that expulsions, terminations, and suspensions must be done “in good faith and in a fair and reasonable manner.” They are fair and reasonable if they meet the notice and hearing requirements described in 12431(c). These Sample Bylaws closely follow the language found in 12431(c). The cooperative may only expel a member for a lawful reason, i.e., it cannot be due to discrimination on the basis of race, national origin, sex, sexual orientation, or another protected class. Furthermore, a cooperative may not expel a member if the expulsion violates other contractual rights.]

ARTICLE 3 – Member Meetings

3.1 ***Distinction between Member Meetings and Director Meetings.*** All Members are elected Directors of the Board when they become Members. Meetings of the Members in their capacity as Members shall be governed by this Article 3. Meetings of the Members in their capacity as Directors shall be governed by Article 4. Except as required by law or these Bylaws, votes are cast as Directors rather than as Members. The following acts require voting as Members, rather than as Directors:

- a. Acceptance of Members;
- b. Expulsion of Members;
- c. Election of Directors, if applicable; and
- d. Bylaw changes that would:
 - i. Materially and adversely affect the rights or obligations of Members as to voting, dissolution, redemption, transfer, distributions, patronage distributions, allocations, patronage, dividends, property rights, or rights to repayment of contributed capital;
 - ii. Increase or decrease the number of Members authorized in total or for any class;
 - iii. Effect an exchange, reclassification or cancellation of all or part of the Memberships;

- iv. Authorize a new class of Memberships;
- v. Specify or change the maximum or minimum number of Directors or change from a variable number of Directors to a fixed number;
- vi. Increase the terms of Directors; and
- vii. Increase quorum for meetings.

[Explanatory Note: These sample Bylaws assume that all Members of the cooperative are also on the Board of Directors. Because the Statute requires that cooperative Members make certain decisions and that Directors make other decisions, it is necessary for a cooperative to clarify in meeting minutes when decisions are being made by Members and when they are being made by Directors.]

3.2 *Member Voting.*

1. Each Member will have one vote on each matter submitted for a vote.
2. If a vote requires that Members cast a written ballot, only Members that have been Members of the Cooperative for more than 10 days prior to the meeting date may be entitled to cast ballots.
3. Cumulative voting shall not be permitted for any purpose.
4. Proxy voting shall not be permitted for any purpose.
5. Unless otherwise specified, all votes shall be conducted using the modified consensus process in Article 5.

[Explanatory Note: See Code Sections 12480 through 12484 for membership voting requirements for cooperatives. Also, the Statute prohibits proxy voting (12405).]

3.3 *Annual Members Meeting.*

1. The Annual Members Meeting shall be held on the first Thursday in November at 7:00 pm at the Cooperative's main office.
2. At this meeting, the Members shall elect all of the Members to the Board (unless there are fewer than three Members in which case the Members shall elect the number of non-Member Directors required to bring the number of Directors to three). The Members shall also elect Officers and conduct any other proper business.

3. If the bylaws are amended to change from a variable to fixed number of Board Members (e.g., the Members vote to have seven Directors instead of having all Members serve as Directors), Board elections shall be held at the Annual Members Meeting, and these Bylaws shall be amended to provide for reasonable election procedures and procedures for the removal of Directors.
4. If the meeting falls on a holiday it should be held at the same time/place the following business day.

[Explanatory Note: An annual meeting is required. See Code Section 12460(b). While the annual meeting may be held at any time, it may be helpful to hold it close to the time that the annual report must be made available to members. Membership meetings may be held anywhere that is stated in or fixed in the Bylaws; if no place is fixed or stated, the meetings must take place at the main office. See Code Section 12460(a). The annual meeting may be conducted wholly or partly by electronic communication if there is a reasonable opportunity to participate and vote through this means and a record of electronic participation is maintained by the organization. See Code Section 12460(f).]

3.4 **Special Member Meetings.**

1. Special meetings of the Members for any lawful purpose may be called by the Board, President, Secretary, or by at least 5% of the Members.
2. The procedure for calling a special Members meeting shall be as follows:
 - a. The person(s) requesting the special meeting shall submit a written request to the Cooperative addressed to the attention of the President or Secretary;
 - b. Within 20 days after receipt, the President or Secretary shall cause notice to be given to the Members entitled to vote that a meeting will be held at a time fixed by the Board not less than 35 nor more than 90 days after the receipt of the request.
3. Special meetings shall be held at the principal office of the Cooperative.

[Explanatory Note: This section is governed, in part, by 12461(c).]

3.5 **Notice.**

1. Whenever the Members are required to take any action at a meeting, a written notice of the meeting shall be given not less than 10 nor more than 90 days before the date of the

meeting to each Member who, on the record date for notice of the meeting, is entitled to vote.

2. The notice shall state the following:
 - a. Meeting place, date, and time of the meeting;
 - b. If applicable, the log-in or call-in information for telephone/video/web conference;
 - c. In the case of a special Members meeting, the general nature of the business to be transacted, and that no other business may be transacted, or
 - d. In the case of the regular Members meeting, those matters which the Board intends to present for action by the Members. The notice of any meeting at which Directors are to be elected shall include the names of the nominees.
3. Notwithstanding the above, any of the following decisions, other than by unanimous approval by those entitled to vote, shall be valid only if the general nature of the proposal was stated in the notice of meeting or in any written waiver of notice:
 - a. Removal of Directors;
 - b. Election of a Director to fill a vacancy;
 - c. Approval of a contract or other transaction between the Cooperative and one or more of its Directors, or between the Cooperative and any corporation, firm, or association in which one or more of its Directors has a material financial interest or is a Director;
 - d. Amendment of the articles of incorporation; and
 - e. Approval of a plan of distribution upon winding up of the Cooperative.
4. Notice of a Members' meeting or any report shall be given personally, by electronic transmission, or by mail or other means of written communication, addressed to a Member at the address of such Member appearing on the books of the Cooperative or given by the Member to the Cooperative for purpose of notice.

[Explanatory Note: The minimum/maximum days for when a written notice must be given before the meeting are fixed by statute.]

- 3.6 **Members Entitled to Notice.** A Member shall be entitled to notice of any meeting, so long as their Membership became official 30 days before the meeting date.

3.7 *Meetings Held Without Proper Notice.*

1. **Members not present:** The transactions of a meeting, whether or not validly called and noticed, are valid if a quorum is present and each of the absent Members who is entitled to vote, either before or after the meeting, signs either: a written waiver of notice, a consent to the holding of the meeting, or an approval of the minutes of the meeting. All waivers, consents, and approvals shall be filed with the corporate records or made a part of the minutes of the meeting.
2. **Members present:** A Member's attendance at a meeting shall constitute a waiver of notice of and presence at the meeting, unless the Member objects at the beginning of the meeting. However, attendance at a meeting is not a waiver of any right to object to the consideration of matter required to be included in the notice but not included, if an objection is made at the meeting.

3.8 *Use of Written Ballots at Meetings.*

1. Written ballots will be used for the election of Officers and may be used for Directors, when applicable. Written ballots may also be distributed for other matters if the Board authorizes.
2. Ballots for Officer and Director elections must:
 - a. Be distributed at least 10 days before the annual meeting;
 - b. Include the names of all nominees; and
 - c. Include a space for write-in candidates.
3. Other written ballots must:
 - a. Describe the proposed action; and
 - b. Provide an opportunity to approve or disapprove of the proposed action.
4. All ballots shall specify:
 - a. The number of responses necessary to reach quorum; and
 - b. The deadline by which the ballot must be filled out and turned in, in order to be counted.

5. When ballots are distributed at a meeting, the number of Members voting shall be considered present for the purposes of determining quorum with respect to the specific actions in the ballot.

[Explanatory Note: See Code Section 12463. While a cooperative generally does not have to use written ballots, such ballots must be used for “referendums.” Ballots can be used for actions other than election of Officers and Directors, in which case ballots must state the proposed action and provide space for Members to indicate approval or disapproval. For contents of written ballot used at a meeting see Code Section 12461(b).]

- 3.9 **Quorum.** A majority of Members shall constitute a quorum at a meeting of Members. When a quorum is present, proposals shall be adopted using the modified consensus process as described in Section 5.1, unless otherwise required in the Articles or Bylaws.

[Explanatory Note: Section 12462 addresses quorum requirements. In absence of a specified quorum in the Bylaws, the Statute sets the quorum at 5% of Members. Note that if a regular meeting is attended by less than 1/3 of voting Members, only matters described in the notice may be voted on. See Code Section 12462(b).]

- 3.10 **Loss of Quorum at a Meeting.** If there is a quorum present at the beginning of a meeting and then some Members leave so that less than a quorum remains, the remaining Members may continue to conduct business, as long as any actions they take (other than adjournment) reflect consensus of, or when voting is called for, at least three-fourths of the Members required to constitute a quorum.

[Explanatory Note: This section is governed by 12462(c).]

- 3.11 **Adjournment for Lack of Quorum.** In the absence of quorum, a majority of present Members can vote to adjourn the meeting, and no other business may be transacted, except as provided in Section 3.10 above.

[Explanatory Note: This section is governed by 12462(d).]

- 3.12 **Adjourned Meetings.**

1. If a meeting is adjourned to a new time/place, Members may conduct any business at the new meeting that could have been conducted at the original meeting.
2. If the new meeting is announced at the original meeting, no additional notice is required. However, if the new meeting is more than 45 days after the original meeting or if a new record date is fixed for the adjourned meeting, notice of the new meeting must be given to each Member entitled to vote at that meeting.

[Explanatory Note: This section is governed by 12461(d).]

3.13 *Action Without Meetings.*

1. Any action which may be taken at any regular or special Members meeting may be taken without a meeting if the Cooperative distributes a written ballot to every Member entitled to vote on that proposal.
2. The written ballot shall set forth the proposal, provide the opportunity to specify approval or disapproval of the proposal, indicate the number of responses needed to meet quorum, the percentage of approvals necessary to pass the proposal; and provide a reasonable time within which to return the ballot.
3. Approval under this section shall be valid only when:
 - a. The Cooperative receives within the specified timeframe a number of written ballots that is at least equal to the quorum required for a meeting; and
 - b. The number of approvals is at least equal to the number of approvals required at a meeting.
4. The Secretary shall cause a vote to be taken by written ballot upon any action or recommendation proposed in writing by 20 percent of the Members.

[Explanatory Note: This section is governed by 12463.]

ARTICLE 4 – Director Meetings

4.1 *Directors and Board Composition.*

1. All Members shall serve on the Board of Directors.
2. Only Members shall serve on the Board, except as provided in the next paragraph.

3. There shall be no more than 40 and no fewer than 3 Directors on the Board with the exact number of Directors to be fixed, within the limits specified, by a vote of the Members. If there are fewer than 3 Members, the Member(s) shall elect non-Members to the Board, enough to bring the total number of Directors to 3.

[Explanatory Note: See Code Sections 12331 and 12360 for requirements for a cooperative Board of Directors. A cooperative must have at least 3 Directors, according to section 12331(a). The statute does not require that Directors be Members, although most cooperatives tend to require that Directors have to be Members. Section 12331(a) requires that the bylaws “set forth [...] the number of directors of the corporation, or the method of determining the number of directors of the corporation, or that the number of directors shall be not less than a stated minimum or more than a stated maximum with the exact number of directors to be fixed, within the limits specified, by approval of the board or the members (Sections 12222 and 12224), in the manner provided in the bylaws, subject to {12331(e)}.” Note, also, that section 12360(d) permits all or some Directors to hold office other than by election of Members. For example, a coop’s incubator might appoint some Directors to the Board, so long as the Bylaws provide for it.]

4.2 **Terms of Directors.**

1. The term of office of the Directors shall be one year or until the next Annual Member Meeting.
2. At each Annual Member Meeting, the Secretary will propose that all Members be elected as Directors. If this proposal fails, the Directors will continue to serve until the Bylaws are amended to provide for a smaller Board and/ or a new election.
3. Notwithstanding the above, a person whose Membership is terminated shall immediately cease to be a Director.

[Explanatory Note: The maximum term is four years. See Code Section 12360 regarding Director terms.]

4.3 **Director Voting.** Directors shall vote using the modified consensus process described in Section 5.1.

4.4 **Notice of Board Meetings.**

1. Regular meetings of the Board will be held the first Monday of every month at 7:00 p.m. at the principal office of the Cooperative. If the day fixed for the regular meeting falls on a legal holiday, the meeting shall be held at the same time on the next day.
 2. Special meetings of the Board shall be held upon four days' notice by first-class mail or 48 hours' notice delivered personally, by telephone, including a voice messaging system, or by electronic transmission by the Cooperative. A notice, or waiver of notice, need not specify the purpose of any regular or special meeting of the Board.
- 4.5 ***Waiver of Notice.*** Notice of a meeting need not be given to any Director who provides a waiver of notice or consent to holding the meeting or an approval of the minutes in writing, whether before or after the meeting, or who attends the meeting without protesting the lack of notice to that Director. All waivers, consents, and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.
- 4.6 ***Quorum.***
- a. A majority of Directors shall constitute a quorum for a Board meeting.
 - b. When a quorum is present, proposals shall be adopted using the modified consensus process as described in Section 5.1, unless otherwise required in the articles or bylaws.
[Explanatory Note: Code Section 12462(a) provides quorum requirements unless Bylaws provide otherwise.]
- 4.7 ***Loss of Quorum at Meeting.*** If there is a quorum present at the beginning of a meeting and then some Directors leave so that less than a quorum remains, the remaining Directors may continue to conduct business as long as any actions they take (other than adjournment) reflect consensus of, or when voting is called for, at least three-fourths of the Directors required to constitute a quorum.
[Explanatory Note: See Code Section 12462(c).]
- 4.8 ***Adjournment for Lack of Quorum.*** In the absence of quorum, a majority of present Directors can vote to adjourn the meeting. No other business may be transacted, except as provided in Section 4.7 above

[Explanatory Note: See Code Section 12462(d).]

- 4.9 **Adjourned Meetings.** A majority of the Directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the meeting is adjourned for more than 24 hours, notice of any adjournment to another time or place shall be given prior to the time of the adjourned meeting to the Directors who were not present at the time of the adjournment.

[Explanatory Note: See Code Section 12461(d).]

- 4.10 **Action Without Meeting.** The Board of Directors may take action without a meeting if all Directors individually or collectively consent in writing to the action. The written consents shall be filed with the minutes of the Board's meetings. Action by written consent has the same force and effect as a unanimous vote of the Directors.

[Explanatory Note: See Code Section 12463(a) and (f)]

4.11 **Resignation.**

1. The only way that a Director may resign is by ceasing to be a Member, unless:
 - a. The provision of these Bylaws requiring that all Members serve on the Board is amended; or
 - b. There are fewer than three Members and there are non-Member Directors, in which case, such non-Member Directors may resign.
2. In a case where a Director may resign, the following procedure shall be followed:
 - a. A Director may resign effective upon giving written notice to the President, the Secretary of the Cooperative, unless the notice specifies a later time for the effectiveness of such resignation.
 - b. The Board shall then appoint a person to fill the vacancy and serve until the next Annual Members Meeting.

[Explanatory Note: See Code Section 12364(c)]

4.12 **Removal.**

1. So long as all Members are required by these Bylaws to serve on the Board, Directors may not be removed except if they cease to be Members.
2. Should the provision by which all Members constitute the Board be amended, the following shall apply:
 - a. The Board may declare vacant the office of a Director whose eligibility for election as a Director has ceased, or who has been declared of unsound mind by a final order of court, or convicted of a felony.
 - b. Directors may be removed without cause by the Members, if removal is approved by a vote of 75% or greater of all Members at a duly called meeting at which a quorum is present.
 - c. Vacancies caused by removal may only be filled by approval of a majority of all Members.
3. Any reduction of the authorized number of Directors does not remove any Director prior to the expiration of the Director's term of office.

[Explanatory Note: See Code Section 12362(a)(1)]

4.13 **Empowered Committees.** Portion

1. The Board may establish committees through the decision-making process in Section 5.1. Each committee shall consist of two or more Directors who serve at the pleasure of the Board.
2. An empowered committee shall have the same authority as the Board, except with respect to:
 - a. Approval of any action that by law requires approval by the majority of the Members;
 - b. Filling vacancies of the Board or any committee that has authority of the Board;
 - c. Fixing compensation of Directors for serving on the Board;
 - d. Amendment or repeal of the Bylaws or adoption of new Bylaws;
 - e. Amendment or repeal of any resolution that the Board has expressly deemed not amendable or repealable;
 - f. Establishment of committees of the Board or appointing Members to such committees;

- g. Expenditure of corporate funds to support a nominee for Director (if there are more people nominated for Director than open slots available).

[Explanatory Note: Committees must have at least two directors. See Code Section 12352]

ARTICLE 5 – Decision-Making Process

5.1 Modified Consensus Decision-Making Process.

1. Matters will be discussed with the goal of reaching consensus.
2. If consensus cannot be reached, Members will vote on whether the issue must be decided at the current meeting or can be tabled for future discussion.
3. If at least three-fourths of the quorum believe that an immediate decision is needed, voting will be held on proposals regarding the issue.
4. The proposals can then be carried by a three-fourths vote, except as otherwise provided in these bylaws.

[Explanatory Note: Note that consensus-based decision-making is consistent with cooperative principles, however, there is no statutory requirement that cooperatives must use consensus-based decision-making. In some situations, it might make more sense to use a simple-majority or three-fourths vote. Cooperatives that use consensus-based decision-making may also wish to adopt a much more detailed set of processes and guidelines for how proposals will be made and considered. For a sample of a detailed consensus policy, see Tree Bressen's Sample Consensus Process Policy at <http://treegroup.info/topics/consensus-in-sharing-law.pdf>]

ARTICLE 6 – Officers

6.1 Titles of Officers.

1. Officers of the Cooperative shall be:
 - a. A President,
 - b. A Secretary,
 - c. A Chief Financial Officer, and
 - d. Any other Officer with a title and duties determined by the Board

2. The President is the Chief Executive Officer of the Cooperative.
3. One person may hold any number of offices, except the President and Secretary shall not be the same person.

[Explanatory Note: Section 12353(a) requires that a cooperative corporation have a Chairman of Board or President, a Secretary, and a Chief Financial Officer. One person can hold all three titles. The President (or chairperson) must be a Director elected by the Members. A cooperative corporation may create any other officer position, in addition to the three required positions. Officers need not be members of the co-op, they can be non-member employees.]

6.2 **Duties of Officers.**

1. Officers' duties include those duties:
 - a. Prescribed by law,
 - b. Granted by these Bylaws, and/or
 - c. Granted by resolutions of the Board.
2. The Secretary must ensure that the Cooperatives' records and reports are properly kept and filed.
3. The President shall take on the duties of the Secretary if the Secretary is unable or unwilling to do so.

[Explanatory Note: These provisions are governed by Code Section 12353(a).]

6.3 **Nomination and Election of Officers.**

1. Any Member can nominate any Member, including himself/herself, for any office. Nominations shall take place at the Annual Member Meeting and at the preceding regular meeting.
2. Officers shall then be elected at the Annual Member Meeting by written ballot, to serve one-year terms. The candidate receiving the highest number of votes for an office shall be elected.

[Explanatory Note: The nomination and election of Officers is governed by Code Sections 12353(b).]

6.4 *Resignation or Removal of Officers.*

1. Officers can be removed by a vote of the Board.
2. Any Officer may resign at any time with written notice to the Cooperative.
3. Vacancies shall be filled at the next Board meeting.

[Explanatory note: See Code Sections 12364(c) (resignation) and 12362(a)(1) (removal). Vacancies are to be filled [at the next meeting of the Board]. See Code Section 12364(a).]

ARTICLE 7 – Financial Provisions

7.1 *Fiscal Year.* The fiscal year of the Cooperative is January 1st through December 31st.

[Explanatory note: A fiscal year is the 12-month period that the cooperative uses to calculate its yearly earnings and to prepare its yearly financial statements. The cooperative also calculates the patronage dividends/patronage refunds owed to each member based on the patronage conducted during the fiscal year. In this example, the fiscal year is January 1st through December 31st.]

7.2 *Definitions.*

- a. “Surplus” shall be defined as the excess of revenues over Expenses for a fiscal year attributable to Member labor.
- b. “Profit” shall be defined as the excess of revenues over Expenses for a fiscal year attributable to non-Member labor.

[Explanatory Note: These bylaws make a distinction between revenues that are attributable to member labor versus non-member labor because federal tax law says that only “patronage-sourced” income may be distributed as tax-deductible patronage refunds/patronage dividends. In the case of a worker cooperative, patronage is defined by the member’s labor.]

- c. “Loss” shall be defined as the excess of Expenses over revenues for a fiscal year.
- d. Surplus, Profit, and Loss shall be determined on a tax basis. Surplus and Profit shall not include cash contributions by Members to capital.

- e. “Expenses” shall include Distributions paid pursuant to Section 7.6, payments of any interest and principal on any debts of the Cooperative, and reasonable reserves as determined by the Board of Directors.
- f. The “Collective Account” shall be Surplus, Profit, and reserves that are retained in the Cooperative and not distributed to Members.
- g. “Patronage” shall be defined as hours worked by each Member for the Cooperative.

[Explanatory Note: The statutory definition of “patronage” found in CA Corps. Code Section 12243 does not fit for worker cooperatives because the statute was designed for consumer and marketing cooperatives. Surplus earnings in a cooperative are divided among the members, in the form of patronage refunds (called Patronage Dividends in this sample), based on the members’ relative patronage. Worker cooperatives typically calculate patronage based on the hours that each member works.]

- h. “Patronage Dividends” shall have the definition contained in Internal Revenue Code Section 1388(a) (dividends paid to Members based on Patronage).

[Explanatory Note: The CA statute (see Section 12244) refers to patronage dividends as “patronage refunds.” However, some worker cooperatives choose to use the term “patronage dividend” to better clarify that such payments are owner distributions instead of additional employment compensation. This is because, in the past, the IRS has tried to establish that patronage refunds are subject to employment or self-employment tax.]

- i. “Member Account” shall be defined as each Member’s capital account in the Cooperative (initial capital contribution plus written notices of allocation minus Distributions minus Losses plus/minus any other item that affects the balance in the Member’s capital account).
- j. “Distribution” means the distribution of interest on capital contributed, but does not include Patronage Dividends.

[Explanatory Note: This is a paraphrase of the definition that is found in the Corporations Code Section 12235.]

7.3 Allocations.

1. Any Profit shall be credited to the Collective Account.
2. Any Surplus shall be credited to the Collective Account as necessary to bring the year's contribution to the Collective Account up to 25% of the year's combined Profit/Surplus. All other Surplus shall be paid as Patronage Dividends in direct proportion to Patronage during the fiscal year.
3. Any Loss shall be allocated 75% to Member Accounts in direct proportion to Patronage during the fiscal year and 25% to the Collective Account, with the exception of Losses occurring and/or carried over from the Cooperative's first two fiscal years, which shall be allocated 100% to the Collective Account.
4. The percentages referred to in this section can be changed for a coming fiscal year by the Board.

[Explanatory Note: See Corporations Code Section 12201 and 26 U.S.C. § 1388]

7.4 Patronage Dividends.

1. Patronage Dividends shall be made 50% in cash and 50% to each individual Member Account as a written notice of allocation, unless different proportions are approved by the Board within eight-and-a-half months of the fiscal year's close – however, at least 20% must be distributed in cash.
2. Patronage Dividends may be by qualified or non-qualified written notices of allocation or a combination of the two.

[Explanatory Note: See 26 U.S.C. §§ 1382, 1385, and 1388. A cooperative that meets the requirements of Subchapter T of the Internal Revenue Code does not pay corporate income tax on the earnings that are paid out as patronage dividends/refunds. Rather, they are tax deductible for the cooperative. For the patronage dividend/refund to be fully tax deductible, at least 20% must be distributed in cash and the remainder that is distributed in a written notice of allocation must be “qualified” as defined in 1388(c). (See <http://www.rurdev.usda.gov/rbs/pub/cir23/CIR23.html> for a general discussion of Subchapter T and qualified vs. nonqualified written notices of allocation). Sometimes, the written notice of allocation may not be qualified, in which case the cooperative would pay corporate income tax on the amount represented by the unqualified written notice of allocation.]

7.5 *Members' Covenant to Declare Income for Tax Purposes.* Each Member shall take into account on his or her income tax return any Patronage Dividends which are made in qualified written notices of allocation (as defined in 26 U.S.C. Section 1388) at their stated dollar amounts in the manner provided in 26 U.S.C. Section 1385(a) in the taxable year in which the Member receives such written notices of allocation.

[Explanatory Note: See 26 U.S.C. § 1385(a)-(b) and § 1388(c). One of the requirements for qualifying a written notice of allocation, so that the entire patronage refund becomes tax deductible for the cooperative, is that the member consents to report the written notice of allocation on his or her income tax return in the year in which he or she receives the allocation. Some cooperatives include this section in their bylaws as a way to establish that consent.]

7.6 *Distributions of Interest on Member Accounts.* The Cooperative may, by a decision of the Board, pay interest to Members on the Members Accounts. The interest may be paid in cash or as an additional credit to the Member Accounts. The rate of interest shall be determined by the Board, but may not, in one year, exceed 15 percent of each Member's contributed capital, which includes capital contributions, membership fees, and capital credits.

[Explanatory Note: See Corporations Code Sections 12376, 12451-12455.]

7.7 *Periodic Redemption of Member Accounts.*

1. The Cooperative shall aim to pay out in cash to the Members all funds credited to their Member Accounts within three years of the date they were first credited.
2. As a general rule, written notices of allocation credited to Member Accounts (including notices now converted to debt) will be paid out in the order in which they are credited, with the oldest paid out first. However, the Board can decide to accelerate the repayment of debt owed to former Members on a case-by-case basis.
3. If the Cooperative does not have sufficient funds to pay out all funds credited to Member Accounts for a given fiscal year, then funds will be paid out in proportion to the balance in the Member Accounts.

[Explanatory Note: See Corporations Code Section 12445.]

7.8 *Payment Rights Upon Membership Termination.*

1. When a Membership is terminated for any reason, including a Member's death, the amount in the Member Account will automatically be converted to debt owed to the former Member, or, if necessary, to the Member's estate, or to another assignee designated by the Member.
2. The Cooperative shall repay the debt within five years of the Membership termination, with interest accruing at the discount rate – as set by the Federal Reserve Bank of San Francisco – plus two percent, on the amount outstanding at the end of each fiscal year.
3. The Cooperative, in settling a Member Account, shall have the right to set off any and all indebtedness of the former Member to the Cooperative.

[Explanatory Note: See Corporations Code Section 12445.]

7.9 *Priority of Payments.* Notwithstanding anything else to the contrary in this Article, payments by the Cooperative shall be made in the following order of priority:

1. First, to make payments of any necessary expenses related to the operation of the cooperative, including wages, and payments of any interest and principal on any debts of the Cooperative,
2. Second, to pay Patronage Dividends to all eligible Members,
3. Third, to pay Distributions to all eligible Members, and
4. Fourth, to make periodic redemptions pursuant to Section 7.7.

[Explanatory Note: See Corporations Code Section 12445.]

7.10 *Dissolution Distributions.*

1. Upon liquidation, dissolution, or sale of the assets of the Cooperative, any assets left after payment of all debts and Member Account balances shall be distributed to all persons who are current or living past Members in proportion to the number of hours each Member worked during the time he or she was a Member of the Cooperative.
2. No distribution need be made to any person who fails to acknowledge the receipt of notice of liquidation in a timely manner. Said notice shall be deemed sufficient if sent

by certified mail, at least 30 days before distribution of any residual assets, to the person's last known business or residence address.

[Explanatory Note: See Corporations Code Sections 12653, 12655, 12656.]

7.11 Unclaimed Equity Interests. Any proprietary interest in the Cooperative held by a Member that would otherwise escheat to the State of California as unclaimed personal property shall instead become the property of the Cooperative if the Cooperative gives at least 60 days prior notice of the proposed transfer to the affected Member by (1) first-class or second-class mail to the last address of the Member shown on the Cooperative's records, and (2) by publication in a newspaper of general circulation in the county in which the Cooperative has its principal office. No property or funds shall become the property of the Cooperative under this section if written notice objecting to the transfer is received by the Cooperative from the affected Member prior to the date of the proposed transfer.

[Explanatory Note: See Corporations Code Section 12446. As in most states, California has an Unclaimed Property Law that provides for unclaimed property or funds to "escheat" to California (i.e., becomes the property of the state), if the owner does not claim his/her property or funds after three years. This is because businesses are sometimes unable to locate their shareholders or other people to whom they owe money. However, Corporations Code Section 12446 allows a cooperative to keep a member's equity interest that would otherwise escheat to the state, if the cooperative includes such a provision in its bylaws and complies with the proper notice requirements that are set forth in Section 12446.]

ARTICLE 8 – Corporate Records and Reports

8.1 Records Required to Be Kept. The Cooperative shall keep at its principal office:

1. The original or a copy of its Articles and Bylaws as amended to date;
2. Adequate and correct books and records of account;
3. Minutes of the proceedings of its Members, Board, and committees of the Board; and
4. A record of its Members, providing their names and addresses.

Minutes and other books and records shall be kept either in written form or in any other form capable of being converted into clearly legible tangible form or in any combination of the foregoing.

[Explanatory Note: See Code Section 12590 for record keeping requirements.]

8.2 *Inspection Rights.*

1. The Cooperative's Bylaws and Articles shall be open to inspection by the Members at all reasonable times during office hours.
2. Any such inspection may be made in person or by agent or attorney and the right of inspection includes the right to copy and make extracts.
3. The accounting books and records and minutes of proceedings of the Members and the Board and committees of the Board shall be open to inspection upon the written demand on the Cooperative of any Member at any reasonable time, for a purpose reasonably related to such person's interests as a Member.
4. Every Director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the Cooperative.

8.3 *Annual Report.*

1. The annual report shall be prepared no later than 120 days after the close of the Cooperative's fiscal year and shall be distributed to Members at or before their next meeting.
2. The annual report shall contain in appropriate detail:
 - a. A balance sheet as of the end of the fiscal year;
 - b. An income statement;
 - c. A cash flow statement of the fiscal year;
 - d. A statement of where the names and addresses of current Members are located; and
 - e. An annual statement of transactions and indemnifications to "interested persons" as defined by law.
3. For fiscal years in which the Cooperative has (at any given time) over 25 Members, the Cooperative shall notify each Member of his/her right to receive an annual financial report.
4. The annual report shall be accompanied by any pertinent report by independent accountants.
5. If there is no such report from an independent accountant, an authorized Officer of the Cooperative shall certify that the annual report was prepared from the books and records of the Cooperative, without audit.

[Explanatory Note: See Code Section 12591 for financial report requirements. Note that a Balance Sheet should show assets, liabilities, and balances in Members' capital accounts as of the last day of the period covered in the statement.]

ARTICLE 9 – Indemnification

- 9.1 ***Indemnification.*** The Cooperative shall have the power to indemnify its Officers, Directors, Members, employees, and agents to the fullest extent permitted by law.

ARTICLE 10 – Bylaws Changes

10.1 ***Bylaws Changes.*** The Bylaws can be changed only by a vote as Members in the circumstances defined in Section 3.1.d. All other Bylaws changes can be effected by a vote as Directors.

Certificate of Secretary

I certify that I am the duly elected and acting Secretary of _____ Cooperative, Inc. that these Bylaws, consisting of _____ pages, are the Bylaws of this cooperative as adopted by the Members on _____, 2012 and that these Bylaws have not been amended or modified since that date.

Executed on _____, 2012 at _____, California, by _____.

ENTER NAME, Secretary

APPENDIX C: SAMPLE ARTICLES OF INCORPORATION

SAMPLE ARTICLES OF INCORPORATION
California Consumer Cooperative Corporation

About This Form: The East Bay Community Law Center – Green Collar Communities Clinic (GC3) and Sustainable Economies Law Center have designed the following form Articles of Incorporation document for a California Consumer Cooperative Corporation to serve as a drafting tool for the individuals organizing their entity under the laws of California and the attorneys who represent them.

This form Articles of Incorporation document has been tailored to more closely embody the values emblematic of the worker cooperative: worker ownership, democratic governance, and equitable profit distribution. This tailoring reflects the work of the GC3 Clinic, which works with low-income individuals and community groups to help them form sustainable and equitable business entities that will empower the communities in which they are located. It is not appropriate for all business ventures.

Important Notes: The Sample Articles of Incorporation are annotated with explanatory endnotes, including citations to applicable laws. It is important to consider the explanations in the endnotes, as particular drafting choices will better serve one's business entity, depending on the entity's activities and the concerns of its membership.

It is crucial that all drafting choices made in the organization of a California Consumer Cooperative Corporation are fully understood by all involved because once the Articles of Incorporation are filed, the cooperative's officers and directors will be *required* to follow the procedures described within them. Please see the first endnote for additional information.⁷⁷

⁷⁷ **HOW TO USE THIS FORM:** For each section of the form Articles of Incorporation, the endnote discusses the applicable law and indicates if the provision is required to be included in the bylaws. If the provision recites a default rule in the law that may be changed by putting a

DISCLAIMER: *This form should not be construed as legal advice.* This form’s endnotes discuss relevant provisions of the law as of March 13th, 2013 and have not been updated to reflect changes in the law. Please contact an attorney for legal advice about your organization’s specific situation. This form should not be used “as is” but should be modified after careful consideration of the explanations and alternative wording choices in the text of the bylaws and endnotes. Some corporations may need to include additional provisions not discussed in this document to effectuate particular business objectives.

Introductory note:

The California Consumer Cooperative is one of an incredibly small number of business entities that California allows to use the term “cooperative” – or terms similar to or derived from the word “cooperative” – in its name. [Cal. Corp. Code § 12311(b).] This means that if you have formed a different kind of business entity (i.e., an LLC, partnership or other kind of Corporation) and adopted rules that embody cooperative values, you will likely have to use another term to publicize your adoption of those values. For this reason, many such unincorporated associations refer to themselves as “collectives.”

different rule into the bylaws, the endnote explains the parameters within which the bylaws may vary from the default rule.

ARTICLES OF INCORPORATION OF [NAME OF COOPERATIVE]

Article 1. The name of this Corporation is [Name of Cooperative], Inc.⁷⁸

Article 2. This Corporation is a cooperative corporation organized under the California Consumer Cooperative Corporation Law. The purpose of this Corporation is to engage in any lawful act or activity for which a corporation may be organized under such law.⁷⁹

Article 3. The name and address in the state of California of this Corporation's initial agent for service of process is: [Address of the Agent for Service].⁸⁰

Article 4. The Corporation's initial street address is [Location of Business]. The Corporation's initial mailing address is [Mailing Address].⁸¹

⁷⁸ **Law:** The name of the Corporation *must* be recited in the Articles of Incorporation. [Cal. Corp. Code § 12310(a).] The names of all California Consumer Cooperative Corporations *must* include the word “cooperative” **and** some word or abbreviation indicating that the co-op is a corporation. Acceptable abbreviations include: “inc.” and “corp.” [Cal. Corp. Code § 12311(a).]

Law: The State of California will not approve the Articles of Incorporation of a company with a name that is identical or overly similar to that of a Corporation authorized to operate in California. [Cal. Corp. Code § 12302(b).] As a result, one should consider: 1) checking the California Secretary of State's website to ensure that their desired name has not already been taken; or 2) filing a Name Availability Inquiry Letter with the Secretary of State's office.

⁷⁹ **Law:** All California Cooperative Corporations' Articles of Incorporation *must* contain the statement: “This corporation is a cooperative corporation organized under the Consumer Cooperative Corporation Law. The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under such law.”

⁸⁰ **Law:** The corporation's Agent for Service of Process is the individual designated to be served potential lawsuits and legal paperwork on behalf of the corporation. The Articles of Incorporation *must* contain a name and street address for the corporation's initial Agent for service of process. The legal requirements for this designee are that: their address, if required, is within the State of California; they are either a person or corporate entity; that an address be provided for them only if they are a natural person; that no address be provided if they are a corporate entity. [See Cal. Corp. Code 12310(c) and 12570(b).]

⁸¹ **Law:** The Articles of Incorporation *must* contain the initial street address of the corporation and the initial mailing address of the corporation, *only if* different from the initial street address. [Cal. Corp. Code § 12310(d)-(e).]

Article 5. The voting rights of each member of the Corporation are equal, and each member is entitled to one vote. The proprietary interests of each member of the Corporation are unequal⁸² and the rules by which the proprietary interests are determined shall be prescribed in the Bylaws of the Corporation.⁸³

[Name], Incorporator⁸⁴

⁸² **Note:** California Cooperative Corporations may elect to make member voting power or member proprietary interests unequal. Equal voting power means voting power apportioned on the basis of one vote for each member. Equal proprietary rights means property rights apportioned on the basis of one proprietary unit for each member. While it is generally impermissible for cooperatives to make voting power unequal (unless you are a federated cooperative), many cooperatives place a provision in their Articles of Incorporation that allows for unequal proprietary interests. Such a provision gives cooperatives greater flexibility in financing their operations, and allows them to garner additional (and unequal) investments from members interested in investing greater amounts than other members.

⁸³ **Law:** The Articles of Incorporation *must* indicate whether the voting power and proprietary interests of the cooperative are equal or unequal. If the voting power or proprietary interests of the company are unequal, the Articles must state either: the rules by which the voting power or proprietary interests is unequally apportioned; or that the rules governing the apportionment of the unequal item(s) can be found in the company’s Bylaws. [Cal Corp Code 12310(f)]

⁸⁴ **Law:** The Articles of Incorporation must either be signed by **either: each** of the company’s “Incorporator(s),” meaning the individual(s) undertaking the cooperative’s business until its initial Board of Directors is appointed; **or** by each of members of the cooperative’s Board of Directors, if they have been appointed, **but not both Incorporators and Directors**. If the Directors are filing and signing the Articles, they need to be named within them. [Cal. Corp. Code § 12300(a)-(b).]

If the company’s Articles of Incorporation is being filed and signed by its initial Board of Directors, in addition to signing the Articles, they must also attach a signed, written “Declaration.” This Declaration must state that they are the individuals who are named in the Articles of Incorporation and have executed them. It must also state that the Articles are their “act and deed”. [Cal. Corp. Code § 12221(b).]

Note: The board of directors **must** have **at least three directors**. [Cal. Corp. Code. § 12331(a)].

APPENDIX E: 28 QUESTIONS TO CONSIDER BEFORE MEETING A LAWYER

Thinking about starting a worker co-op? Here are some questions to consider before meeting with a lawyer, by Jenny on August 1, 2010 in Cooperatives⁸⁵

1. What state will you be operating in? Will you have operations in more than one state? Will you have members that live in more than one state?
2. What will be the main activities of the co-op? How will it earn revenue?
3. Does it need to raise capital? If so, how will it raise capital? Through member contributions and/or through outside investors?
4. Will all the workers be members? (In other words will there be employees that never become members?)
5. Will there be a probationary period before a worker can become a member? If so, how long?
6. Can the co-op pay . . . at least minimum wage from the very beginning and pay all the other costs associated with having employees like employment tax, workers comp, etc.?
7. Will all the workers have the legal right to work in the United States?
8. Will the workers be more like employees or independent contractors?
9. How do you want the co-op to be governed? By a board elected by the members, by the members themselves, by one or more managers?
10. Would it bother you to have to observe certain “formalities” (such as holding regular governance meetings, complying with rules about meeting notice, keeping meeting minutes, having elections, having officers)?
11. How will decisions be made? Majority vote, super-majority, consensus, modified consensus? Will different decisions be made in different ways?
12. If you will have a board, what do you want the term of office to be? Do you want term limits? Do you want to have any qualifications for who can serve on the board? Can only members serve on the board? How many board members do you want? Do you want staggered terms?

⁸⁵ <http://k2-legal.com/thinking-about-starting-a-worker-co-op-here-are-some-questions-to-consider-before-meeting-with-a-lawyer/>

13. If you have officers, what officers do you want to have and what will be their duties and qualifications?
14. Do you want to have committees? If so, what powers do you want them to have?
15. How do you want to distribute excess revenues? Do you want some of it to be able to be held within the co-op and not become the property of the members? Do you want to pay dividends to the members? Do you want to pay dividends to investors? How will you decide how much of excess revenues to allocate to various uses? How will you decide how much of the patronage dividend to pay in cash versus an allocation to the member's capital account?
16. How will you allocate losses?
17. How will you set member capital contributions? Do you want there to be a limit on how much they can increase from year to year?
18. Do you want to have member capital accounts? If so, do you want to pay "interest" on the balance in the member accounts? How often do you want to redeem member accounts?
19. When a member leaves the co-op how will their capital account be redeemed?
20. What do you want to happen with the assets of the co-op upon dissolution?
21. Given your business plan, what are your biggest concerns about taxes? Dividends being taxed twice (at the entity and investor level)? Having to pay a tax on gross receipts? Having to pay employment tax on distributions? Having to deal with "pass through" tax treatment?
22. Who will have check signing authority? Who will have the authority to sign contracts on behalf of the co-op?
23. Would it bother you to have an entity that is not well understood by most lawyers and accountants?
24. Is it important to you to use the word "cooperative" in your name?
25. How will you decide whether to admit new members?
26. How will you decide whether to remove members? How will you decide whether to remove managers, directors, officers?
27. Do you want the founders to receive some sort of extra benefit to compensate them for the risks they took?
28. How will you decide on amending your governing documents – a majority of members, 2/3 of members?

APPENDIX F: REFERRAL LIST

Note: The following are some professionals who have experience with worker cooperatives. We do not necessarily recommend or vouch for any of the service providers listed here. It is up to you to evaluate service providers prior to hiring them

ATTORNEYS

East Bay Community Law Center- Green-Collar Communities Clinic	www.ebclc.org; sjacob@ebclc.org	Cooperatives, nonprofits
K2 Law Group	K2-legal.com	Social enterprise law and cooperatives
Jesse Palmer	jesse@cathaus.org	Cooperatives and nonprofits
Tim Huet	timhuet@arizmendi.coop	Cooperatives
Van Baldwin	vanbaldwin@pacbell.net	Coop accountant and attorney
Neil Helfman	nhelfman28@aol.com	Cooperatives
Cameron Holland	cameronholland.com	Nonprofits, social enterprise and cooperatives
Myrrhia Resneck	myrrhieresneck.com	Small business and cooperatives
Don De Leon	grassrootslawyers.com	Social enterprise, nonprofits, cooperatives
Janelle Orsi	janelle.orsi@gmail.com	Cooperatives, cohousing, and sharing economy
Sarah Kaplan	sarah@sarahkaplanlaw.com	Worker Cooperatives
Jill Jacobs	jmgjacobs@gmail.com	Cooperatives and social enterprises
Jennifer Loda	jlodalaw@gmail.com	Cooperatives, nonprofits

ACCOUNTING AND ENROLLED AGENTS

Denis Maurer, EA	dsmaurer@sbcglobal.net	Some experience with cooperatives
Leslie Kosareff, EA	kosareff@comcast.net	Experience with worker cooperatives
Joan Taylor	joantaylor@pon.net	Coop accountant
Van Baldwin	vanbaldwin@pacbell.net	Coop Accountant and Attorney
Dmitriy Kustov	info@taxprivet.com	Coop accountant
Doris Forman	doridf@hotmail.com	Certified Public Accountant

BUSINESS PLANNING/COACHING

Project Equity	hilaryabell@gmail.com // http://www.project-equity.org/	Focus on worker cooperatives
Lift Business Coaching	shawn@lifteconomy.com // http://lifteconomy.com/	Experience with worker cooperatives

APPENDIX G: COOPERATIVE BUSINESS PLANNING RESOURCES FROM PROJECT EQUITY

Note: The following three worksheets and excel sheet are meant to assist you in thinking through the goals and key questions you should address in your cooperative business plan. These materials have been developed and graciously shared with us by Project Equity (<http://www.project-equity.org/>).

WORKSHEET 1: What are your goals? (*Why are you doing this?*)

You've decided you want to start a business, and organize it as a cooperative. Great! Let's dig in to understand what is motivating you. Write down the answers to the following questions by checking all that apply, then ranking the top three.

1. Why are you starting a cooperative business?

___ To do what I love

___ To work with people I like

___ To be my own boss

___ To make more money than I could working for somebody else

___ Because I love starting and running businesses

___ Because the product or service I want to sell is really needed, and nobody else is offering it

___ Other (write in)

___ Other (write in)

Additional comments:

2. Why do you want to sell a product or service?

___ Since I was a kid, I've always figured out ways to sell stuff to other people (marbles, my Halloween candy, lawn-mowing or babysitting, stuff I made, you name it)

___ I've started and run at least one successful business already and want to do it again

___ I've helped grow other people's businesses and I know I love it

___ Actually, I'm less interested in selling something and more interested in _____.

___ Other (write in)

___ Other (write in)

Additional comments:

3. Why do you want to organize your business as a cooperative?

___ Because I don't believe that one person should be the boss

___ Because I believe in shared decision-making in the workplace

___ Because I want to work with people who feel and act with the same sense of ownership of our business

___ Because I think that workers should share in the profits of their (our) workplace

____ Because I believe our business can be more successful as a cooperative (for reasons like: we will make better decisions, it will be better run, our customers will trust us more and therefore buy more from us)

____ Other (write in)

____ Other (write in)

Additional comments:

WORKSHEET 2: Three key business questions

Everybody has said you need a business plan. Where to start? Answer these three questions first, to make sure your business idea has potential.

4. What is your business model?

What will you do?

EX: Sell cars – this is an existing and well understood business model

EX: Sell apps on iPhone – Apple created this new business model and developed the market for it

Who will you do it for?

EX: Sell cars to eco-conscious consumers

EX: Sell apps to existing iPhone users

Who pays you?

EX: Eco-conscious consumers who buy my hybrid car

EX: App developers, Apple takes a cut of each app sale

5. Is there a market?

Who will buy what you have to sell?

EX: Eco-conscious consumers

EX: iPhone users

How many of these buyers are there?

EX: Research how many cars are sold, and estimate % of buyers that are eco-conscious based on buying patterns for other eco-products

EX: Make wild guesses about how many iPhone users will purchase apps, and investing marketing dollars to convince them they want to do it. Also invest to make sure developers believe there is a market, to make sure there are enough apps to sell.

How much of your product or service will they buy, and at what price?

Estimate total sales volume of hybrid cars (yours and others), and price you could charge. If this is an existing product category in an existing market, research what the current sales volume and pricing is. If a new product or new product category, do some light customer research, or research into similar, existing businesses to help you estimate.

6. Can you get enough of a “share” of this market?

Who are your major competitors, and what share of this market do they have?

What are their annual sales and annual revenues?

What makes your product or service different or better? Answer this from the perspective of your customers.

Better quality? Better selection? Better service? Unique characteristics or features? Lower price (be careful here, the only way to compete on price is if your costs are somehow lower)?

EX: Hybrid car has better gas mileage and is better for the environment.

How much do I need to sell to break even (after paying all the worker-owners a fair wage and benefits)? How much do I need to sell to make a profit, so I can reinvest in growing my business? What share of the total market is this?

Do some back of the envelope math. Your numbers don't need to be perfect, but your estimates do need to be good enough for you to decide whether to invest your time and money in this business.

Start up costs

- Factory (buy or lease down payment)
- Factory build out
- Design costs
- Develop car sales channel (through existing dealership or build your own dealership)
- Legal
- Branding, marketing

Annual costs

Fixed costs

- Factory (cost of lease or loan payments, insurance)

Variable costs (are higher when more cars are made)

- Hire workers (wages, benefits, payroll taxes, workers comp insurance)
- Buy raw materials and parts
- Make cars (utilities, factory upkeep, etc.)
- Distribute cars to dealerships
- Sell cars (marketing and sales)
- Customer service

Revenue

- Revenue per car sold * estimated annual sales volume
- Other revenue streams (service agreements, etc.)

Break even point: Sales volume where Revenue - Annual costs (fixed + variable) = zero

WORKSHEET 3: What kind of cooperative do you want to create?

You've decided you want to start a cooperative business, and you have begun to define your business model. Now that you have a sense of how your business will operate, it's a great time to define what kind of cooperative you want it to be.

7. What ownership structure do you want to have?

How will someone become a worker-owner? What will be their membership fee or initial equity contribution?

What compensation structure do you want to use (pay and benefits)?

EX: a flat pay scale where everyone earns the same; different pay scales for different positions;

Raises based on seniority, performance or both. You have lots of options.

How will you share profits?

In worker co-ops, profits are shared based on hours worked. You can also consider variations, like differentials based on pay rate or some extra compensation for founders when the co-op can afford it.

Additional questions or comments:

8. What different roles will you need in your business?

Does the business require specialized roles? What different jobs will you have?

Do you need people to come in with highly-developed skills or will everyone be trained on the job?

Will there be any management or administrative positions?

Will there be a board of directors?

Will there be any departments or committees?

Additional questions or comments:

9. How will decisions be made in your cooperative business?

There is a wide range of decision-making models in co-ops – from collectives where all members make decisions together or delegate decisions to committees to large companies like Equal Exchange or the Mondragon co-ops, which have managers, boards & worker general assemblies.

What form of democracy do you want for your co-op: direct democracy, as in a collective and in worker general assemblies or representative democracy, as in a board of directors with the majority of members elected by the worker-owners?

What are the different positions and bodies or groups that will make decisions? Which decisions will be made by which?

We recommend making a decision-matrix to sketch this out on a chart – the specific decisions that are important in your co-op and who or what body will make each one.

Who else other than the decision maker will provide input into important decisions or, in some cases, ratify decisions? What processes will you have to ensure authentic participation?

10. What legal structure is right for your cooperative business?

We recommend making this decision together with a lawyer who understands cooperatives, based on your answers to the questions on this worksheet and other factors.

Sample Decision Matrix

[Name of cooperative]

Decision-maker	D
Ratifier	R
Required input	I
Develop proposal	P

Six Elements of Cooperative Decision-Making

When designing a good decision-making process, ask these questions:

1. What is the decision to be made? [define the question well]
2. What are the proposed solutions? [ensure >1 well-conceived proposals]
3. When does the decision have to be made? [set a realistic timeline]
4. What are the forums for input and debate? [ensure all voices are heard]
5. Who will make the decision?
6. What body, if any, will ratify the decision?

Decision	All worker-owners	Board of Directors	General Manager	Committees	Individual role	Quorum required?	NOTES
STRATEGY							
Approve business plan							
Approve annual growth plans							
FINANCIAL							
Approve annual budget							
Modify annual budget > X%							
Allocate patronage distribution							

Approve new debt over \$X							
Approve capital expenditures over \$X							
Modify financial limits for budget modifications, new debt, capital expenditures							
Decide new financial accounts and signers							
PERSONNEL							
Define or modify compensation structure							
Change salary max: min ratio							
Define or modify personnel policy							
Define membership processes							
Approve new members							
Hire / fire employees							
CORPORATE ORGANIZATION							
Amend Articles of Incorporation							
Amend By-Laws							
Elect Board Members							
Elect Officers							
Hire, fire, and evaluate General Manager							
Appoint Committee Chairs							
OPERATIONS							
Change or add company location							

Add new service, or new operation type							
Add new product line							
Create guidelines for day-to-day operational decisions							
Create shift schedules							

Project Equity developed this matrix by combining our own experience with a matrix used at Equal Exchange between 1996 & 2008. Thanks to Equal Exchange for their contribution!

Updated 11/26/12

APPENDIX H: OTHER RESOURCES

Introduction – Resources:

1. Worker Cooperative Toolbox, Published by Northcountry Cooperative Foundation in partnership with Northcountry Cooperative Development Fund, *available at:* http://www.cccd.coop/files/worker_coop_toolbox.pdf
2. Steps to Starting a Worker Co-op, published by the Center for Cooperatives at the University of California, Davis and the Northwest Cooperative Federation, *available at:* http://www.usworker.coop/public/documents/start_worker_coop.pdf
3. Worker Co-op Startup Guides: <http://american.coop/startup>
4. US Federation of Worker Cooperatives: <http://www.usworker.coop/education>
5. Cultivate coop is an online site to pool resources on cooperatives: http://cultivate.coop/wiki/Main_Page
6. Cooperative curriculum wiki site: <http://cooperative-curriculum.wikispaces.com>
7. East Bay Community Law Center and Sustainable Economies Law Center legal resource site: <http://sites.google.com/site/cooperativelawresources/>
8. Cooperation Texas has the goal of creating dignified jobs for the people, for the planet: <http://cooperationtexas.coop/>
9. Data Commons Cooperative website: <http://datacommons.find.coop/vision>

Entity Formation – Resources

1. Legal Sourcebook for California Cooperatives: Startup and Administration: <http://www.cccd.coop/files/LegalSourcebookForCaliforniaCooperatives.pdf>
2. NOLO legal encyclopedia: <http://www.nolo.com/lega-encyclopedia>

Governance – Resources

1. California Governance Resources: <http://www.lawforchange.org/NewsBot.asp?MODE=VIEW&ID=3678>
2. Legal Sourcebook for California Cooperatives: <http://www.cccd.coop/files/LegalSourcebookForCaliforniaCooperatives.pdf>

3. Worker Coop Toolbox – US Federation of Worker Cooperatives:
www.usworker.coop/howtos/startups

Financing – Resources

1. The Entrepreneur Magazine: Small Business Advisor, 258 (1995).
2. JOBS Act: Crowd Funding Could Give a Boost to Small Business:
http://www.huffingtonpost.com/jenny-kassan/jobs-act_b_1405844.html
3. Opportunity Fund:
<http://tmcworkingsolutions.org/opportunity-fund>
4. Youth Business America:
<http://www.youthbusinessamerica.org/entrepreneurs/>
5. Kiva Zip:
<https://zip.kiva.org/borrow>
6. Whole Foods Loan Fund:
<http://www.wholefoodsmarket.com/mission-values/caring-communities/local-producer-loan-program>
7. Full Circle Fund:
<http://www.fullcirclefund.org>
8. RSF Social Finance
<http://rsfsocialfinance.org>
9. Oakland Business Development Corporation
<http://www.obdc.com/index.php>
10. Slow Money (does not itself provide financing):
<http://slowmoneynocal.org/submission>

Securities – Resources

1. Small Business Administration www.sba.gov
2. Alameda County Small Business Development Center: acsbdc.org/
3. Alameda Community Development Agency: www.acgov.org/cda/

Cooperatives and Employment Law - Resources

1. Taxation of Patronage Dividends from Worker Cooperatives: Are They Subject to Employment Tax? By Attorney Gregory R. Wilson, *available at:* [http://www.gwilson.com/documents/Article4\(PatronageDivTax\).pdf](http://www.gwilson.com/documents/Article4(PatronageDivTax).pdf)
2. California Division of Labor Standards Enforcement Opinion Letter dated October 27, 1988 <http://www.dir.ca.gov/dlse/opinions/1988-10-27.pdf>
3. Department of Labor Opinion Letter, “Volunteer emergency crew as separate and independent agency under section 3(e)(4)(A),” FLSA 2008-13, December 18, 2008.
4. Department of Labor Non-Administrator Letter, “Internship program and employment relationship under FLSA” FLSA 2004-5NA, dated May 17, 2004.
5. McGinley, Ann C. “Functionality or Formalism – Partners and Shareholders as Employees under the Anti-Discrimination Laws” 57 S.M.U.L. Rev. 3 (2004).
6. The Application of Labor Law to Workers; Cooperatives: <http://sfp.ucdavis.edu/cooperatives/reports/LaborLawWorkerCoops.pdf>
7. California Department of Industrial Relations: www.dir.ca.gov/dwc/employer.htm
8. Workers Compensation Fact Sheet: www.dir.ca.gov/dwc/FactSheets/Emp Employer FactSheet.pdf
9. Insurance Brokers & Agents of the West: www.ibawest.com
10. State Compensation Insurance Fund: statefundca.com
11. For information on determining overtime requirements: <http://www.dir.ca.gov>
12. For information on meal, break, and time off requirements: http://www.dir.ca.gov/dlse/FAQ_MealPeriods.htm
13. California Employment Development Department: http://www.edd.ca.gov/Payroll_Taxes/default.htm
14. For more on California rules on tax deductions: http://www.dir.ca.gov/dlse/faq_deductions.htm
15. OSHA’s resources for small businesses: <http://osha.gov/dcsp/smallbusiness/index.html>
16. Cal/OSHA Consultation toll free number: 1-800-963-9424
17. Job Safety and Health Protection Notice: <http://www.osha.gov/Publications/osha3165.pdf>
18. Neil A. Helfman “The Application of Labor Laws to Workers’ Cooperatives”: <http://sfp.ucdavis.edu/cooperatives/reports/LaborLawWorkerCoops.pdf>

19. Required employer postings: www.dir.ca.gov/wpnodb.html
20. CA Employment Development Department Registration:
http://www.edd.ca.gov/pdf_pub_ctr/de1.pdf or
http://www.edd.ca.gov/pdf_pub_ctr/de1np.pdf (for non-profit employers)
21. U.S. Citizenship and Immigration Services: www.uscis.gov

Non-Profit Incubators – Resources

1. Robert Louthian and Marvin Friedlander, “Economic Development Corporations: Charity Through the Back Door” (an IRS Publication) <http://www.irs.gov/pub/irs-tege/eotopicg92.pdf>.
2. Revenue-Generating Activities of Charitable Organizations: Legal Issues: [http://www.adlercolvin.com/pdf/revenue_generating_activities/AC Web Docs--Revenue Generating Activities \(00160207\).PDF](http://www.adlercolvin.com/pdf/revenue_generating_activities/AC_Web_Docs--Revenue_Generating_Activities_(00160207).PDF)