

**Legal Entity Options for May First: LLC Coop vs. Membership Nonprofit vs. Non-membership Nonprofit<sup>1</sup>**

	<b>LLC</b>	<b>Membership Nonprofit</b>	<b>Non-membership Nonprofit</b>
<b>What is it?</b>	A limited liability company (LLC) that is internally governed according to cooperative principles. This is possible because the LLC model is very flexible and you can shape its governance pretty much however you wish.	A nonprofit corporation that can apply for 501(c)(3) tax-exemption and has legal members. This means that the nonprofit has two governing bodies—the Board of Directors and the legal membership body. The bylaws can allow for democratic governance by the members, whether it is simply by members electing the Board of Directors or by members also having more direct authority to make certain governance decisions.	A nonprofit corporation that can apply for 501(c)(3) tax-exemption and does not have legal members. The Board of Directors is the governing body.  Note that a non-membership nonprofit can have non-legal members, sometimes referred to as “museum members.” For example, The Met has a membership program that grants members certain benefits (e.g. discount tickets, access to special events) in exchange for a membership fee, but these members do not have legal governance rights in the organization.
<b>Is it a coop?</b>	An LLC can be organized as a coop through its internal governance document (called the operating agreement). Many coops are formed as LLCs and operate by cooperative principles (namely, each worker/consumer/member has one vote and the workers/consumers/members share in the profits in proportion to their labor/consumption/patronage of the coop). However, the LLC is not formed under the New York Cooperative Corporation Law <sup>2</sup> , so it cannot use the word “Cooperative” in its legal name.	Not really, but this could depend on your definition of “cooperative”. While the nonprofit’s governance can be organized democratically and it may operate according to other cooperative principles, a nonprofit corporation does not have owners and therefore cannot have joint ownership by its workers or members, nor can it distribute profits based on patronage.	No, for the same reasons that a membership nonprofit is not technically a cooperative by most definitions of the word—plus the fact that a truly democratic governance structure is not possible because governance authority is ultimately legally consolidated in the Board of Directors. However, there are ways to share power, for example, if the bylaws establish a more representative nominations committee to nominate Board members, or if the Board adopts a resolution delegating certain decision-making power to the staff or committees.

<sup>1</sup> This chart does not include cooperative corporations because if the objective is for both staff/workers of May First and consumers/members who use May First’s services to be part of the cooperative structure, this would be a multi-stakeholder cooperative. Having two membership structures for consumer-members and worker-members under the New York Cooperative Corporation Law would require incorporating and maintaining two separate legal entities—a worker cooperative corporation and a membership cooperative corporation. This is not impossible, but could prove unwieldy. It also wouldn’t be especially worth it if May First does not intend to distribute profits to members.

<sup>2</sup> A number of states, including New York, have a cooperative statute under which cooperative entities such as worker coops, agricultural coops, consumer coops, producer coops, etc. can form.

			<p>But legally speaking, the directors still retain their legal duties and the Board can always change the bylaws or adopt new resolutions.</p>
<p><b>What does the governance look like?</b></p>	<p>The operating agreement can be shaped more or less however you wish (the LLC law does not impose many governance requirements compared to laws governing corporations)<sup>3</sup>. May First’s operating agreement could allow for multiple classes of members of the LLC coop, with staff/workers being one class and consumers/members who use May First’s services being another class, etc. The different classes could have decision-making authority over different aspects of the organization, or it could all be shared. There could be an entirely flat governance structure or a more hierarchical or representative one. Profit sharing can be structured creatively as well, or all profits can be reinvested in the business if you do not wish to distribute profits.</p>	<p>Governance is shared between the Board of Directors and the members. There can be one or more classes of members and the different classes can have different voting rights, but at least one class must have full voting rights on the subjects required by statute (more on this below). The bylaws may give the members decision-making authority over subjects in addition to just the statutorily required ones.</p> <p>The Not-for-Profit Corporation Law (NPCL) sets various requirements for nonprofit governance, including but not limited to:</p> <ul style="list-style-type: none"> <li>- There must be a Board of Directors with at least three directors.</li> <li>- There must be a meeting of the members at least once a year. This annual meeting is for the election of directors and any other business. The Board should prepare and present a report to the members on the finances and membership of the corporation at this meeting.</li> <li>- Specific notice requirements for member meetings<sup>4</sup>.</li> <li>- At least one class of members must have voting rights on the following statutorily required</li> </ul>	<p>The Board is the governing body, though it can delegate power to committees, for instance (see above for more detail).</p> <p>The NPCL sets various requirements for nonprofit governance, including but not limited to:</p> <ul style="list-style-type: none"> <li>- There must be a Board of Directors with at least three directors.</li> <li>- Specific notice requirements for some Board meetings (the annual meeting, any special meetings, and any regular meeting not fixed by the Board).</li> <li>- The minimum quorum for Board meetings is one-third of directors (or if there are more than 15 directors, the minimum quorum is five directors plus one additional director for every 10 directors in excess of 15).</li> <li>- Directors may attend meetings—and count toward quorum and participate in voting—by telephone, videoconference, or other communications technology that enables everyone to hear one another at the same time.</li> <li>- Directors may not vote by proxy.</li> </ul>

<sup>3</sup> One of the few statutory requirements for LLCs is that quorum not be less than one-third in interest of the members entitled to vote.

<sup>4</sup> NPCL Section 605(a) states that, “written notice shall state the place, date and hour of the meeting and, unless it is an annual meeting, indicate that it is being issued by or at the direction of the person or persons calling the meeting. Notice of a special meeting shall also state the purpose or purposes for which the meeting is called. A copy of the notice of any meeting shall be given, personally, by mail, or by facsimile telecommunications or by electronic mail, to each member entitled to vote at such meeting. If the notice is given personally, by first class mail or by facsimile telecommunications or by electronic mail, it shall be given not less than ten nor more than fifty days before the date of the meeting; if mailed by any other class of mail, it shall be given not less than thirty nor more than sixty days before such date. If mailed, such notice is given when deposited in the United States mail, with postage thereon prepaid, directed to the member at his address as it appears on the record of members, or, if he shall have filed with the secretary of the corporation a written request that notices to him be mailed to some other address, then directed to him at such other address. If sent by facsimile telecommunication or mailed electronically, such notice is given when directed to the member’s fax number or electronic mail address as it appears on the record of members, or, to such fax number or other electronic mail address as filed with the secretary of the corporation. Notwithstanding the foregoing, such notice shall not be deemed to have been given electronically (1) if the corporation is unable to deliver two consecutive notices to the member by facsimile telecommunication or electronic mail; or (2) the corporation otherwise becomes aware that notice cannot be delivered to the member by facsimile telecommunication or electronic mail. An affidavit of the secretary or other person giving the notice or of a transfer agent of the corporation that the notice required by this section has been given shall, in the absence of fraud, be prima facie evidence of the facts therein stated. Whenever a corporation has more than five hundred members, the notice may be served by publication in a newspaper published in the county in the state in which the principal office of the corporation is located, once a week for three successive weeks next preceding the date of the meeting, provided that the corporation shall also prominently post notice of such meeting on the homepage of any website maintained by the corporation continuously from the date of publication through the date of the meeting. A corporation shall send notice of meetings by first class mail to any member who requests in writing that such notices be delivered by such method.”

		<p>subjects: electing directors, amending the certificate of incorporation or bylaws, approving a sale or lease of substantially all of the corporation's assets (must be approved by two-thirds vote), approving a plan of merger, consolidation, or dissolution (must be approved by two-thirds vote), and revoking a voluntary dissolution proceeding (must be approved by two-thirds vote).</p> <ul style="list-style-type: none"><li>- Directors may be removed for cause by a vote of the members.</li><li>- The minimum quorum for member meetings is 10 percent of members or 100 members, whichever is less. The most likely interpretation of this statutory requirement is that "presence" for purposes of quorum is physical/in-person presence.</li><li>- Proxy voting is permitted by members, but not by directors.</li><li>- Specific notice requirements for some Board meetings (the annual meeting, any special meetings, and any regular meeting not fixed by the Board).</li><li>- The minimum quorum for Board meetings is one-third of directors (or if there are more than 15 directors, the minimum quorum is five directors plus one additional director for every 10 directors in excess of 15).</li><li>- Members or the Board can make decisions without a meeting only if the decision is unanimous and in writing or email.</li><li>- Members can amend or repeal any bylaw. The Board can amend or repeal any bylaw, unless the certificate of incorporation or a bylaw adopted by the members says the Board cannot amend or repeal a member-adopted bylaw.</li></ul>	<ul style="list-style-type: none"><li>- The Board can make decisions without a meeting only if the decision is unanimous and in writing or email.</li></ul>
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<p><b>What is the mechanism by which one becomes a member?</b></p>	<p>By signing the operating agreement (or a joinder to the operating agreement). This can be done electronically.</p>	<p>By any method prescribed in the certificate of incorporation or bylaws (e.g. issuance of a membership certificate or card, maintenance of a list of member names, etc.). The method need not include an action on the part of the member.</p>	<p>No legal members.</p>
<p><b>What are the tax implications?</b></p>	<p>LLCs are typically taxed as partnerships<sup>5</sup>, which are pass-through entities, meaning they do not pay corporate taxes at the entity level and taxes are passed through to the members.</p> <p>Assets currently owned by the existing nonprofit entity could not simply be given to the LLC (this would violate tax rules for 501(c)(3) organizations that prohibit conferring a private benefit on private individuals or entities). Such a transfer would have to be an arm’s length transaction for which the nonprofit entity receives a fair price for the assets.</p>	<p>The nonprofit could qualify for 501(c)(3) tax-exemption (income, sales, real estate, etc.) and receive tax-deductible donations.</p>	<p>The nonprofit could qualify for 501(c)(3) tax-exemption (income, sales, real estate, etc.) and receive tax-deductible donations.</p>

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<sup>5</sup> Unless, for example, an LLC elects to be taxed as a corporation.