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Selecting a Business Structure

The decision regarding business structure is a decision that a person should make, in consultation with an attorney and accountant, and taking into consideration issues regarding tax, liability, management, continuity, transferability of ownership interests, and formality of operation.



Generally, businesses are created and operated in one of the following forms:

- **Sole proprietorship:** The most common and the simplest form of business is the sole proprietorship. In a sole proprietorship, a single individual engages in a business activity without necessity of formal organization. If the business is conducted under an assumed name (a name other than the surname of the individual), then an assumed name certificate (commonly referred to as a DBA) should be filed with the office of the county clerk in the county where a business premise is maintained. If no business premise is maintained, then an assumed name certificate should be filed in all counties where business is conducted under the assumed name.
- **General partnership:** A general partnership is created when two or more persons associate to carry on a business for profit. A partnership generally operates in accordance with a partnership agreement, but there is no requirement that the agreement be in writing and no state-filing requirement. If the business of the partnership is conducted under an assumed name (a name that does not include the surname of all of the partners), then an assumed name certificate (commonly referred to as a DBA) should be filed with the office of the county clerk in the county where a business premise is maintained. If no business premise is maintained, then an assumed name certificate should be filed in all counties where business is conducted under the assumed name.
- **Corporation:** A Texas corporation is created by filing a certificate of formation with the Texas Secretary of State. The Secretary of State provides a form that meets minimum state law requirements. Online filing of a certificate of formation is provided through SOSDirect.

A corporation is a legal person with the characteristics of limited liability, centralization of management, perpetual d . . . , and ease of transferability of ownership interests. The owners of a corporation are called "shareholders." The persons who manage

the business and affairs of a corporation are called "directors." However, state corporate law does provide for shareholders to enter into shareholders' agreements to eliminate the directors and provide for shareholder management. Choosing the best management structure for your corporation is a decision you make with the advice of an attorney. The Secretary of State cannot assist you.

An "S" corporation is not a matter of state corporate law but rather a federal tax election. A for-profit corporation elects to be taxed as an "S" corporation by filing an election with the Internal Revenue Service. Please contact the IRS or competent tax counsel regarding the decision to be taxed as an "S" corporation and the requirements for filing the election. This is not a matter with which the Secretary of State may assist.

- **Limited Liability Company:** A Texas limited liability company is created by filing a certificate of formation with the Texas Secretary of State. The Secretary of State provides a form that meets minimum state law requirements. Online filing of a certificate of formation is provided through SOSDirect.

The limited liability company (LLC) is not a partnership or a corporation but rather is a distinct type of entity that has the powers of both a corporation and a partnership. Depending on how the LLC is structured, it may be likened to a general partnership with limited liability, or to a limited partnership where all the owners are free to participate in management and all have limited liability, or to an "S" corporation without the ownership and tax restrictions imposed by the Internal Revenue Code. Unlike the partnership, where the key element is the individual, the essence of the limited liability company is the entity, requiring for its creation more formal requirements. 1 William D. Bagley & Phillip P. Whynott, *The Limited Liability Company*, §2.10, (2d ed. 2d rev. James Publishing, 1995).

The owners of an LLC are called "members." A member can be an individual, partnership, corporation, trust, and any other legal or commercial entity. Generally, the liability of the members is limited to their investment and they may enjoy the pass-through tax treatment afforded to partners in a partnership. As a result of federal tax classification rules, an LLC can achieve both structural flexibility and favorable tax treatment. Nevertheless, persons contemplating forming an LLC are well advised to consult competent legal counsel.

A limited liability company can be managed by managers or by its members. The management structure must be stated in the certificate of formation. Management structure is a determination that is made by the LLC and its members. The Secretary of State cannot give advice about management structure.

- **Limited Partnership:** A Texas limited partnership is a partnership formed by two or more persons and having one or more general partners and one or more limited partners. The limited partnership operates in accordance with a partnership agreement, written or oral, of the partners as to the affairs of the limited partnership and the conduct of its business. While the partnership agreement is not filed for public record, the limited partnership must file a certificate of formation with the Texas Secretary of State. The Secretary of State provides a form that meets minimum state law requirements. Online filing of the certificate of formation is provided through SOSDirect.
- **Limited Liability Partnership:** In order to limit the liability of its general partners, a general or limited partnership may opt to register as a limited liability partnership. The Secretary of State provides a form for registration as a limited liability partnership. Online filing of the registration is provided through SOSDirect.

The information on this page should not be considered a substitute for the advice and services of an attorney and tax specialist in deciding on the business structure.

FREQUENTLY ASKED QUESTIONS

Pulled from Secretary of State of Texas website

1. Should an assumed name certificate be rejected if there is a certificate already on file for the same or a similar name?

No. Chapter 71 of the Texas Business & Commerce Code does not authorize rejection of an assumed name certificate on the basis of a name conflict. Therefore, there may be multiple assumed name certificates on file with the secretary of state for the exact same name. An assumed name certificate provides information about the underlying business's identity and location. It does not give the registrant any right to use the assumed name in a way that violates the law, infringes on the rightful use of the name by others, and it does not prevent anyone else from filing the same assumed name or using the name to form a new entity with the secretary of state. It is up to each business entity to protect its name and good will.

2. Must an assumed name certificate have an original signature and be notarized?

When filing with the secretary of state, you do not need to submit an assumed name certificate with an original signature. Faxed copies and photocopies of signed certificates are acceptable for filing. Assumed name certificates filed with the secretary of state do not need to be notarized. Form 503 (Word, PDF) may be used for purposes of filing with the secretary of state.

3. Can I amend an assumed name certificate to change incorrect or dated information?

No. However, the law requires an assumed name registrant to file a new assumed name certificate when the information contained in the certificate is or becomes materially misleading. Certain events can cause the information in a certificate to become "materially misleading." For example, a change in the registrant's name, address, or business structure would be considered a material change. If a material change has been made, a new assumed name certificate must be filed within 60 days. See Tex. Bus. & Comm. Code §71.152.

4. How often do I have to file an assumed name certificate?

An assumed name certificate must include a stated term or duration for the filing, which cannot exceed 10 years from the date of filing. The certificate expires at the end of the stated term or 10 years from the date of filing. If the registrant decides to continue using the same assumed name, a new assumed name certificate must be filed prior to the expiration of the current certificate.

5. What if I am no longer using an assumed name for my business?

If you have filed an assumed name certificate with either the secretary of state or with a county clerk and you are no longer conducting business under that assumed name, you may file a statement of abandonment.

The statement of abandonment must include the following:

- The assumed name which is being abandoned;
- The offices with which the assumed name certificate was filed and the date of filing;
- The office where the statement is being filed; and
- Each registrant's name and residence or office address.

The secretary of state has a statement of abandonment form (Form 504 Word, PDF) that may be used to file an abandonment of an assumed name certificate recorded with the secretary of state. If you filed an assumed name certificate with the county clerk, and want to file an abandonment of the assumed name certificate, do not use Form 504. Different execution requirements apply when filing a statement of abandonment on the county level.

6. Are there restrictions on the assumed names I can file?

Yes. An entity may not file an assumed name for its exact legal name because this does not meet the definition of an "assumed name." This is true for both domestic entities and for foreign entities that are required to register with the secretary of state under a fictitious name.

- Example: If the legal name of your business is ABC, Inc:
 - You may not file an assumed name certificate for ABC, Inc.
 - You may file an assumed name certificate for ABC.
 - You may file an assumed name certificate for A.B.C., Inc.
 - You may file an assumed name certificate for Austin Boating Club.
- An assumed name certificate is not required to include an organizational identifier such as Incorporated, Inc., LLC, Limited, etc.

7. If I have an assumed name on file, when/how can I use the assumed name?

By filing an assumed name certificate, you are notifying the public that a particular business entity intends to conduct business under a name other than its legal name. This means that generally an entity may advertise under the assumed name, use the assumed name on business cards and letterhead, etc. However, if you have a question regarding how to sign any contracts or legal documents, or other uses of the assumed name, you should consult with a private attorney. The secretary of state's office cannot offer advice on how any entity should use its assumed name.

8. Where do I file my assumed name certificate?

Regardless of where in Texas you are using an assumed name, an assumed name certificate must be filed as follows:

The following types of persons are required to file an assumed name certificate with the county clerk in each county in which a business office is or will be maintained. If the person does not maintain a business office in Texas, then in each county in which the person conducts business.

- Sole proprietorship
- General partnership or joint venture
- Estates
- Real Estate Investment Trusts
- Any other type of business entity not included above or those listed below as filing with the secretary of state.

Persons who file on the county level should contact the applicable county clerks' offices for information on fees and on filing a certificate.

The following types of Texas or foreign business entities are required to file an assumed name certificate with the secretary of state.

- Corporations (for-profit, nonprofit and professional) or other incorporated entities
- Limited liability companies (including professional limited liability companies)
- Limited partnerships
- Professional associations
- Limited liability partnerships
- Foreign filing entities

Business entities that file an assumed name certificate with the secretary of state are not required to file an assumed name certificate with the county clerk. House Bill 3609 (PDF), which became effective September 1, 2019, amended Chapter 71 of the Texas Business & Commerce Code to eliminate the county-level filing requirement for such entities.

9. I filed an assumed name certificate, but another business is using a name that is similar/the same as mine. What should I do?

You should contact a private attorney about what steps can be taken to protect your business name and good will in commerce. Filing an assumed name does not give you any right to use the assumed name in a way that violates the law, including the laws of unfair competition, unfair trade practices, copyright, and trademark, and it does not prevent anyone else from filing the same assumed name or using the name to form a new entity. The secretary of state will file an assumed name certificate without determining what rights, if any, you have to use the name. Consequently, more than one person can have the same assumed name on file.

10. I am using an assumed name, but I have not made the proper filings at the state or county levels. Are there any penalties?

Yes. The Texas Business & Commerce Code sections 71.201, 71.202 provide for civil and criminal penalties for noncompliance with the assumed name provisions of Chapter 71.

11. I have a limited partnership (LP) that is registered as an LLLP. How does the partnership file an assumed name certificate with the Secretary of State?

When a limited partnership (LP) that has registered as a limited liability limited partnership (LLLP) uses an assumed name in Texas, the partnership must file two assumed name certificates with the secretary of state. The LP must file a certificate, and a second certificate must be filed for the LLLP registration. See Form 503 (Word, PDF). The partnership must also file assumed name certificates at the county level. Tex. Bus. & Com. Code §§ 71.101, § 71.103(b)-(c).

12. If the series does business under a specific name, should an assumed name certificate be filed?

Yes. If each or any series of the LLC conducts business under a name other than the name of the LLC, the LLC must file an assumed name certificate for the name of the series in compliance with chapter 71 of the Texas Business & Commerce Code. [See HB 1624 (PDF), effective 9/01/13]. See Form 503 (Word, PDF).

*The information on this page should not be considered a substitute for the advice or services of an Attorney.

For Tax ID information and help, please visit:

<https://www.irs.gov/businesses>



SAN JACINTO COUNTY APPRAISAL DISTRICT

PO Box 1170 · Coldspring, Texas 77331 · 936-653-1450 · 936-653-5271 (Fax)

Congratulations on your venture of owning a new business. An account for your business will automatically be created by the Appraisal District once your DBA has been filed and received.

As per The Texas Property Tax Code Section 22.01 Rendition Generally (a) Except as provided by Chapter 24, a person shall render for taxation all tangible personal property used for the production of income that the person owns or that the person manages and controls as a fiduciary on January 1. This report is confidential and not open to public inspection; disclosure is permitted pursuant to the terms of Tax Code Section 22.27.

Filing Instructions: This document and all supporting documentation must be filed with the appraisal district office in the county in which the property is taxable and is to be filed every year according to the law.

Deadlines: Rendition statements and property report deadlines depend on property type. The statements and reports must be delivered to the chief appraiser after Jan. 1 and no later than the deadline of April 15th for Property Generally. May 15 upon written request and additional 15 days for good cause shown.

Penalties: The chief appraiser must impose a penalty on a person who fails to timely file a rendition statement or property report in an amount equal to 10 percent of the total amount of taxes imposed on the property for that year by taxing units participating in the appraisal district.

Good Faith Estimate of Market Value: Your best estimate of what the property would have sold for in U.S. dollars on Jan. 1 of the current tax year if it had been on the market for a reasonable length of time and neither you nor the purchaser was forced to buy or sell. For inventory, it is the price for which the property would have sold as a unit to a purchaser who would continue the business.

Business Personal Property to render includes but is not limited to Furniture, Fixtures, Equipment, Machinery, Inventory, Supplies, Office Equipment & Computer Equipment.

The Business Personal Property Rendition can be found on our website SJCAD.ORG. It is also mailed out to you as a courtesy in January of every year.

For any questions please contact the San Jacinto County Appraisal District at 99 Slade Street, Coldspring Texas 77331 or by phone at 936-653-1450