



ROACH LAW

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NEW BUSINESS PACKAGE

- COVER LETTER WITH INSTRUCTIONS FOR MAINTENANCE OF THE BUSINESS
- ARTICLES OF INCORPORATION (INC.) OR ORGANIZATION (LLC)
- BY-LAWS OR OPERATING AGREEMENT
- INITIAL CONSENT RESOLUTIONS OF THE SHAREHOLDERS, DIRECTORS OR MEMBERS
- SHARE/MEMBER CERTIFICATES OF OWNERSHIP
- SHAREHOLDER OR MEMBER TRANSFER LEDGER
- EIN LETTER FROM THE IRS

1. **Proposed Company Name:** _____

LLC _____ Corp _____

[Note: For LLCs, must end in LLC, L.L.C. or Limited Liability Company.
For corporations, must end in Company, Co., Inc., or Incorporated.]

2. **DBA (“Doing Business As”) (if applicable):** _____

3. **Principal Incorporator/Contact:** _____

4. **Member SSN:** _____ (required to obtain the new business EIN)

5. **Email Address:** _____

6. **Company Address:** _____

7. **Registered Agent (with address):** _____

[Note: A Registered Agent is a person designated by the company to receive legal mail in the event the company is sued. Often it is the principal of the company, but an attorney or corporation specializing in this service (e.g., CT Corp) can also be named.]

8. **Company Telephone:** _____

9. **Shareholders/Members** (attach additional sheet if necessary):

- (a) Name: _____ %
Email: _____
Phone: _____
Address: _____
- (b) Name: _____ %
Email: _____
Phone: _____
Address: _____

10. **Directors (corporations only):**

(Note: A company can be run by its shareholders or members only, without a board of directors or managing members. If you do not wish to have a board of directors or managing members at this time, please skip this section.)

1. _____
2. _____
3. _____

11. **Officers:**

(Note: A corporation must name a President, Secretary and Treasurer. One person can fill all positions. Additional Vice-Presidents or co-Secretaries or Co-Treasurers may be named as desired. LLCs may also choose to have officers.)

President: _____
Secretary: _____
Treasurer: _____
Vice-President: _____

12. **Nature of Business.**

Briefly describe the company's business. Include the principal line of merchandise sold, construction work done, products produced or services provided:

Date business started or acquired: _____

Business Formation - Frequently Asked Questions

Starting a business can seem overwhelming. However, the legal organization of the new business, which may seem like a secondary concern at the time, will have a profound impact on the long-term success of the business. That is why it pays to plan ahead.

One of the first decisions that you will have to make as a business owner is how the company should be structured. This decision will have long-term implications, so you are strongly encouraged to consult with an accountant and attorney to help you select the form of ownership that is right for you.

Organization of a business entity is done for several reasons, the most important being to limit liability and financial expenses to the capital dedicated to the venture. You need to respect the entity, keep proper records and take appropriate actions. This will preserve the "insulation of liability" and make key issues like "who owns what and what rights are there" much easier to determine down the road.

While there are several factors that determine how a business is initially organized, tax factors generally play a primary role. The form in which a business is organized depends on an analysis of the particular facts of the business. However, start-ups often are organized as a "flow-through entity" which is an entity that is subject to a single level of tax. Specific types of flow-through entities include partnerships, limited partnerships, LLCs and S corporations. Subject to certain restrictions, start-up losses of such an entity may "flow-through" to its owners in the form of tax deductions. Alternatively, a company may be organized as a regular, or "C" corporation. A significant disadvantage to operating as a C corporation is that its earnings are exposed to "double taxation" which means that the corporation is subject to income tax on its earnings and the owners are taxed when the company distributes the earnings as a dividend. But there is no single "right" answer. It depends on what kind of business you have, who will own it, what sort of deductions it will generate and the accountant you use.

Before the early '90's, the "preferred" form of organization generally was an S corporation because it combined the limited liability associated with a corporate structure with flow-through treatment of tax benefits to its owners. An LLC is sometimes preferred because in addition to each of the aforementioned benefits, an LLC is not subject to many of the restrictions to which an S corporation is subject. In addition, future restructuring of an LLC generally avoids certain negative income tax consequences that future restructuring of a corporation may involve.

A rule of thumb has developed among many accountants that if the business will be actively managed by the shareholder[s], and it will be a small business, a sub-S corporation is the choice. For real estate or other "passive" investment type companies, the LLC is the choice. Again, because this decision is vitally important to the financial health of the company and its owners, you are strongly advised to obtain advice from your accountant before proceeding. If you do not have an accountant we can recommend one to you.

A brief explanation of all choices is in order so you are aware of the alternatives.

Sole Proprietorship: The sole proprietorship is a simple, informal structure that is inexpensive to form; it is usually owned by a single person or a marital community. The owner operates the business, is personally liable for all business debts, can freely transfer all or part of the business, and can report profit or loss on personal income tax returns.

Partnership: Partnerships are inexpensive to form; they require an agreement between two or more individuals or entities to jointly own and operate a business. Profit, loss, and managerial duties are shared among the partners, and each partner is personally liable for partnership debts. Partnerships do not pay taxes, but must file an informational return; individual partners report their share of profits and losses on their personal return. Short-term partnerships are also known as joint ventures.

Limited Liability Company (LLC): As discussed above, the LLC is advantageous for small businesses because it combines the limited personal liability feature of a corporation with the tax advantages of a partnership and sole proprietorship. Profits and losses can be passed through the company to its members or the LLC can elect to be taxed like a corporation. LLCs do not have stock and are not required to observe corporate formalities, such as the maintenance of annual director or shareholder minutes. Owners are called members, and the LLC is managed by these members or by appointed managers.

After submitting Articles of Organization to the Secretary of State's office, the members enter into a written agreement, called the "Operating Agreement", about how the LLC will be run, who is in charge of running it, how profits will be divided up, etc. If there is no operating agreement, then the "default" rules for running an LLC kick in. These default rules are found in the Indiana LLC statute. Generally speaking, it is better to have an operating agreement than it is to

rely on the default rules, if only because it forces the members to think about many practical aspects of running a business at the outset and then agree about such matters before real money is at stake.

If there are many members of an LLC, a limited number of people can be chosen to actually run the LLC for the members. They are called the managers. The managers can be, but do not have to be, members of the LLC. The managers can be set up to resemble a board of directors if that is what the members want. Managers are not required for an LLC. The members may simply retain all managerial authority for themselves. Or they can grant partial or limited powers to certain members and/or managers. In fact, almost any practical division of power among members and/or managers is possible with an LLC. This flexibility of control by the owners is one of the very best features of the LLC.

The death, retirement, withdrawal, or bankruptcy of a member or manager may end the existence of the LLC, depending on the terms of the operating agreement. Apart from the death, retirement, bankruptcy or withdrawal of a member or manager, an LLC usually only ends upon the date of expiration (often set at 25-30 years from the date of formation) or, if there is no expiration date, then upon mutual agreement of a majority of the members.

The LLC enjoys the same "flow-through" tax treatment that partnerships and S-Corporations do. The rules concerning capital accounts, contributions and other basic partnership taxation principles apply to LLCs as well. In short, this means that although the LLC must file a tax return, the LLC owners report income and pay the taxes owed on such income using their personal returns. The LLC itself does not pay taxes on its income. (Currently, the IRS has not developed a separate tax return form for LLC, so the same form used for partnerships is used, Form 1065.) The owners will each file a Schedule K-1 with their personal income tax return, which will show their "share" of the LLC income. While this structure avoids the double taxation dilemma of the C-corporation, there is a downside. The taxation downside is that, unlike a C-corporation, an LLC (like the partnerships and an S-Corporation) cannot retain earnings without the owners of the business having to pay income taxes on those earnings anyway.

One of the very best features of the LLC is the fact that the owners can divide up the ownership interests differently from the rights to distribution of profits (and losses). For example, an individual goes into business with another person and both wish to own 50% of the business. However, one individual is going to work for the LLC full time while the other wishes to keep another full-time job and work for the business part-time. Each may still own 50% of the ownership while dividing the profits interests into a 75%-25% split or some other ratio, to reflect the different levels of effort.

Corporation: A corporation is a more complex business structure generally. It is a legal entity separate from its owners, called shareholders, who own shares of stock in the company. For "regular" or C corporations (often used for large and publicly traded companies), profits are taxed both at the corporate level and again when distributed to shareholders. This is the tax disadvantage which is avoided by the "pass through" entities such as LLCs and S corporations.

Both S and C corporations are formed the same way – by the filing of Articles of Incorporation with the Secretary of State's office. As a *legal* matter, the S corporation is identical in many ways to the C corporation because both limit the shareholders' personal liability. But as a *tax* matter, the S corporation offers the advantage of avoiding taxation at the corporate level. In order to obtain S status, a company files Form 2553 to "elect" to be treated as an S corporation. If accepted by the IRS, the company is then taxed like a partnership. The corporation is not taxed, but the income flows through to shareholders who report the income on their individual returns.

(Note: You are strongly advised to consult a tax lawyer or accountant with respect to all matters relating to tax treatment of your business, including the filing of the sub-chapter S election. This law office does not provide tax advice, does not handle the filing of the S election form, and cannot provide counseling on tax matters.)

Note that the 2553 is a tax election only, and enables the shareholder to treat the earnings and profits as distributions, and have them pass through directly to their personal tax return. The catch here is that the shareholder, if working for the company, and if there is a profit, must pay herself wages, and it must meet standards of "reasonable compensation". This can vary by geographical region as well as occupation, but the basic rule is to pay yourself what you would have to pay someone to do your job, as long as there is enough profit. If you do not do this, the IRS can reclassify all of the earnings and profit as wages, and you will be liable for all of the payroll taxes on the total amount.

In all corporations, shareholders are not personally liable for corporate obligations unless corporate formalities have not been observed. Such formalities provide evidence that the corporation is a separate legal entity from its shareholders. Failure to do so may open the shareholders to liability of the corporation's debts. Corporate formalities include issuing stock certificates, holding annual meetings, and recording the minutes of the meetings. Many of these tasks involve simple preparation of documents, which can be prepared by your attorney on an annual basis and included in your corporate book.

What should I name my business?

There is more to naming your business than just coming up with something that sounds good and you happen to like. Thought must be given to state and local requirements and making sure you don't infringe upon the rights of someone else's business name. You will need to determine whether your trade name will be the same as the full legal name of your business. Of equal importance is finding out whether your name or a very similar name is being used by another business, and if so, what rights they may or may not have to use the name in the area where you do business. Keep in mind that some businesses only file trademarks within their locality, so it is possible that the same name can be used elsewhere.

Trade names can be registered through the Indiana Secretary of State, and for wider marketplace protection, through the U.S. Patent and Trademark Office. A search can be done through the USPTO's online system for all state and federal trademark registers to see if a proposed name is being used.

For many businesses that operate on the Web, trade names are synonymous with domain names, such as Amazon.com and Monster.com. Domain names are not registered through state or local government; rather they can be obtained through numerous online businesses, most of which will allow you to conduct a name search prior to purchase to make sure your chosen name is not taken.

How do I need to protect my name or other "brand" names I want to use?

If you want to protect your business name or other names associated with your business, you can do so by filing for trademark protection. Some background information on trademarks, which is one type of "intellectual property", follows.

A trademark is any word, slogan ("It's the Real Thing!"), name (Microsoft), or symbol (Apple Computer's logo) or device (the Pillsbury Doughboy) adopted and used by a manufacturer or merchant to identify his goods and to distinguish them from those manufactured or sold by others. Service marks are generally the same thing except they are employed by service providers rather than manufacturers or merchants. Trademark law is a sub-part of the larger body of law called unfair competition. Trademark law is designed to protect businesses from others who would misappropriate the business's reputation or identity.

When you select a trademark and/or name for your business, remember that if your chosen name or trademark is being used by someone else, it could lead to a legal fight over who is entitled to the name or trademark. Also, you do not want to choose a name that is not unique in some way because the company may not be able to keep others from using it once you have established your business (example: Good Computers).

Trademark protection is supposed to do two things: (1) Prevent Deception: By allowing businesses to reserve names and trademarks, this is supposed to protect consumers from mistake, confusion, or deception as to the origin of goods or services. (For example, if there were no trademark or tradename protection there would be thousands of companies called Microsoft all selling word processing software. (2) Goodwill: To allow businesses owners to make investments into their business's goodwill without fear of others profiting from it.

In the United States, unlike most of the rest of the world, trademark rights come into being upon use of the trademark. The first business to use a trademark or a tradename obtains protection against others who want to use that same name or logo in geographical areas where the first business operates. So regardless of whether or not an individual registers a trademark or tradename, a business can obtain certain rights to exclusive use of a trademark or tradename solely from use. (Innocent mistake is no excuse in cases of infringement, so there is no "oops" defense for businesses infringing.) But please note that once a business begins using a trademark, they exist only so long as it continues to use the trademark. If it stops using it, the company may lose its trademark rights. Trademark rights continue indefinitely as long as the trademark is used. Once a business has a trademark and it becomes recognizable to others, it **must** be vigilant about protecting it.

Rights should be obtained through federal registration of a business' tradename and trademark if it will be engaged in interstate or foreign commerce, the name or logo is distinctive, and the name or logo is not going to cause consumer confusion between your business and its products and the products of another business with a similar name or logo. The federal registration extends the protection you automatically get due to your use of a name or logo across the country rather than limiting it to the particular geographical area in which you operate. Federal registration also provides significant advantages to you when it comes time to enforce your rights against others seeking to infringe upon your tradename or trademark.

In brief, the federal registration system works this way: The business owning the trademark files an application for

federal registration of a mark based on the prior actual use of the trademark or based on a "bona fide" (true) intent to use the mark in interstate or foreign commerce. The filing date of the application becomes the date that the mark or name is first "used" by the business. Whoever used the trademark or tradename first, gets priority.

A trademark is infringed (whether or not the trademark is registered), if a party not entitled to use the trademark uses (i) the same or a confusingly similar trademark; (ii) on the same or closely related products; (iii) in the same geographical area as that in which the trademark is used (or within an area of possible expansion). A court may order an infringer to stop using the trademark, destruction of the infringing products, or even award monetary damages suffered by the trademark owner (after a trial on the merits).

What do I need to do to organize/get started?

Once you determine which entity type is right for your business, you will need to execute a number of documents to commence existence. An entity will require a filing (for example, Articles of Incorporation for a corporation and Articles of Organization for a limited liability company) with the Secretary of State. In addition, documents governing the operations of the business, such as Bylaws (for a corporation) or an Operating Agreement (for an LLC), must be prepared. Additionally, in order to open a bank account, a business must have an Employer Identification Number from the IRS. This requires the filing of a form with the IRS. In addition to the fundamental documents that must be in place to commence operations, businesses must keep appropriate records (for example, Minute Books that record the decisions made meeting of shareholders and boards of directors) that are required by law.

Why do I need to do all of this – isn't it a waste?

The primary benefit offered by any type of business entity other than the partnership is limited liability – as mentioned above, protection for the owners from debts or liabilities of the business. To obtain this protection, owners of a business must organize properly and operate in the manner prescribed by the law. In the event that businesses do not, adverse parties can seek to "pierce the corporate veil" and proceed against individual owners' assets in the event that a business fails or does not have adequate capital to pay creditors. Frequently the key asset of a start-up business (in addition to you, the entrepreneur) is its "intellectual property" consisting of patents, licenses, know-how, trademarks and trade secrets. It is essential that ownership and rights to this property be clearly established and maintained.

If you have business partners, you will need what is in essence a "prenuptial" agreement spelling out your relationship. This would cover what happens if one of you dies, become disabled, quits or goes off the deep end. This is often called a "buy/sell agreement."

What else do I need to do to maintain the corporation or LLC?

Indiana has specific record-keeping and reporting requirements with which corporations must comply in order to ensure that it will receive the benefits of the corporate choice of entity. These generally include annually preparing corporate minutes of director and shareholder meetings, and filing a biennial report (along with a \$30.00 filing fee) with the Secretary of State's office every two years.

If you already formed a corporation or LLC, you should review your minute book or corporate file where these documents are maintained, to determine if the necessary corporate minutes exist and are current, and if the required Secretary of State reports have been filed. If there is anything missing or yet to be filed, the entity could risk being administratively "dissolved" by the Secretary of State, which would leave shareholders vulnerable to personal liability potentially. This can be corrected if it has occurred, but in any event, the necessary filings need to be prepared as soon as possible.

What are the costs to form my company?

The total attorneys' fee for the below package of documents is \$600. The Secretary of State has a filing fee of \$97.14, for a total of \$697.14. Do not be deceived into thinking that the certificate of formation and EIN letter are all you need to be fully compliant under Indiana law. You are not fully protected if you do not comply with the Indiana statute governing LLCs and corporations, leaving your personal assets at risk to creditors through a "piercing of the corporate/LLC veil".