

FORMING A LIMITED LIABILITY COMPANY **- WHEN TO ENGAGE COUNSEL -**

Limited liability companies are governed by Minnesota Statutes Chapter 322B, which is also called the Minnesota Limited Liability Company Act. They are formed mainly to give members protection from liability for certain acts. Some of the benefits of organizing as a limited liability company rather than a corporation, partnership, or other type of entity include, among other things, tax benefits, the ease of organization, no limitation on number of members, and less stringent dissolution proceedings or even dissolution avoidance.

Limited liability companies are not difficult to organize and can easily be created without the assistance of an attorney. However, there are certain instances where legal counsel would be beneficial when creating a limited liability company. At the outset, it is important to think about the purpose of the limited liability company, how many members it will have, the name of the limited liability company, etc. Asking these questions will immediately expose any issues which might require the attention of legal counsel.

ORGANIZATIONAL ISSUES

A limited liability company is created by filing Articles of Organization with the Minnesota Secretary of State's office and by paying the filing fee. The Articles of Organization must contain the following:

1. the name of the limited liability company;
2. the registered office of the limited liability company;
3. the name and address of the registered agent; and
4. the names, addresses and signatures of the organizers.

The Minnesota Secretary of State has online instructions and forms to assist individuals with the organization of a limited liability company. Most filing can now be done online at their website www.sos.state.mn.us.

The Articles of Organization may contain additional information depending on the complexity of the limited liability company, such as:

1. changing the power to adopt, amend or repeal the Operating Agreement;
2. voting matters;
3. the manner in which profits and losses are distributed;
4. the length of the term that each governor shall serve, etc.

The number and complexity of the matters that an organizer seeks to modify in the Articles of Organization may require the assistance of an attorney.

POST-ORGANIZATIONAL ISSUES

After the limited liability company is formed, it must perform certain start-up tasks. Federal and/or state tax identification numbers must be obtained. These are easily obtained through an online application with the Internal Revenue Service. You can find a link for this through the Minnesota Secretary of State website, mentioned above.

The members must also conduct the initial meeting of the board of governors or members. At the meeting, it should be determined who shall serve on the Board of Governors, who the officers of the limited liability company will be and what office they will hold, the process for maintaining the books and records of the business, etc. A limited liability company must, at the very least, have a president/chief manager and a treasurer/chief financial officer.

OPERATING AGREEMENTS/MEMBER CONTROL AGREEMENTS

Depending on the number of members and purpose of the limited liability company, it may be wise to have an Operating Agreement and Member Control Agreement created. An Operating Agreement contains the guidelines of the limited liability company and how it operates. Operating Agreements are fact-specific to the circumstances of each limited liability company. A Member Control Agreement governs the acts of the members of the limited liability company, as well as how to add and remove members, the amount of capital each member must contribute, if applicable, etc. Not all limited liability companies have Operating Agreements and Member Control Agreements. Sole-purpose or sole-member organizations, such as real estate holding companies, may not require formal agreements. If it is determined that an Operating Agreement and/or Member Control Agreement is necessary, consulting with an attorney is a good idea to ferret out any additional concerns and to ensure the agreements are drafted clearly.

ANNUAL REGISTRATION

Once the limited liability company has been established, an annual registration must be filed, along with the annual fee, with the Minnesota Secretary of State. This process is very simple and may be completed online with the Minnesota Secretary of State's website.

AMENDING ARTICLES OF ORGANIZATION/CHANGING OF REGISTERED OFFICE OR REGISTERED AGENT

In some instances, a limited liability company may change the information contained in its Articles of Organization, change addresses or even change the name of its registered agent. Any of these changes may be done online at the Minnesota Secretary of State's website.

If an amendment is being made to the Articles of Organization, first a meeting of the members should be called to approve any such changes. All amendments to Articles of Organization must contain:

1. the name of the limited liability company as it appears in the records of the Minnesota Secretary of State;
2. the text of the amendment; and
3. a statement that the amendment was adopted pursuant to a proper meeting of the Board of Governors or members.

Likewise, any changes in the limited liability company's registered office or registered agent must be reported to the Minnesota Secretary of State, and the form must contain the same criteria as listed above for amending Articles of Organization.

TAX CONSIDERATIONS

The organizers of a limited liability company may choose how the limited liability company will be taxed. Generally, a limited liability company with one member may be taxed either as a corporation or as a sole proprietorship. Limited liability companies with two or more members may be taxed either as a partnership or as a corporation. If a limited liability company elects to be taxed as a corporation, the limited liability company's income is taxed at the company level and any distributions to members are taxed at the individual level.

Alternatively, if a limited liability company elects to be taxed as a sole proprietorship or a partnership, the income and losses of the limited liability company pass directly through to the owners. In other words, the limited liability company does not get taxed; the individual owners are taxed on the limited liability company's income. This option avoids the "double taxation" that the corporation experiences, as described above.

TERMINATION

A limited liability company's life ends more easily and may happen at the occurrence of a member's death, retirement, resignation, expulsion or bankruptcy. Once dissolution has occurred, the members of the limited liability company need to wind up the affairs of the limited liability company and terminate its existence. Mainly, the remaining members of the limited liability company must file Articles of Dissolution with the Minnesota Secretary of State, as well as finalize all outstanding business concerns of the company.

Termination may be avoided if there are two or more members remaining and they agree to continue the business of the limited liability company. An attorney would be extremely beneficial to assist with ensuring the limited liability company's existence following an event of termination.

CONCLUSION

Limited liability companies are being used more and more because they are easy to create and they provide substantial benefits to its members. However, it is important to recognize when to involve legal counsel in the organization, operation, or termination of the limited liability company. Although limited liability companies are very user-friendly, a poorly organized entity may create unforeseen issues for its members.