GAINER LAW

Forming A Business

"Looks" matter or do they?

by Stephen R. Gainer

Stephen R. Gainer
LAW OFFICES OF STEPHEN R. GAINER

*** OFFICES IN SAN FRANCISCO FIANCIAL DISTRICT, ***
CENTRAL AND NORTH MARIN COUNTY,
AND EAST BAY

PLEASE COMMUNICATE WITH:
North Marin County Office
1457 Cambridge Street, Suite 1
Novato, CA 94947
Telephone: (415) 892-7214
Facsimile: (415) 892-7216
E-Mail Address: srgainer@gainerlaw.com

Introduction

> ***"...there is no 'one size fits all' answer and it is important to talk to a business attorney as well as a tax advisor before or very soon after starting a business."***

One of the biggest areas of confusion for people starting or running a business has to do with

— the "legal form" they should put their business into,

— why this matters,

— and what continuing "care and feeding" steps they need to take after setting up

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"legal form" of the business in order to continue having the benefits of that form whether in lower tax burdens or insulating their personal money and other property from claims of people dealing with their business.

As in most areas of law and taxes, there is no "one size fits all" answer and it is important to talk to a business attorney as well as a tax advisor before or very soon after starting a business. So many people initially bypass such consultations because they want to avoid the fees of such advisors and they are attracted to incredibly inexpensive sources for business formation forms either available in "do-it-yourself " books or internet websites. However, to paraphrase another article I have included in my own website here, such "do-it-yourself " efforts can result in a "do-IN-yourself" result for these people.

First, an initial consultation with professional experts can result in either averting problems because the wrong form for the business is chosen, or because critical language is missing from a "do-it-yourself" form or the language used in a "do-it-yourself" form is the incorrect language for the person's particular situation.

Below is a general discussion of "legal forms" that a business can take, and the impact of these forms and the continuing actions which must be taken for these forms to meet the goals of the business owner or owners. I have tried to put the discussion into very simple form, but a sophisticated reader will recognize that the issues involved, and the choices called for, are far from simple and wrong choices can lead to serious negative consequences.

The discussion in terms of impact of State laws covers only California law, although in my experience most States have laws very similar to California law regarding the business entities discussed below. There are some significant differences which business owners try to take advantage of by forming their businesses in States such as Nevada or Delaware. Discussion of these differences is beyond the scope of this article but I can offer the very important advice that a business with what California views as "significant contacts" within California (for example, location of some or most owners, employees, buildings, equipment, etc. in California) will have a hard time escaping the application of California laws, including California tax laws.

Sole Proprietorships

A "**sole proprietorship**" is a business owned and operated by only one person. That

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person faces full financial exposure or "liability" for the business and any other assets of that person for any claims that arise against the business by "creditors" of the business (suppliers of equipment, etc. to the business; customers who now have a claim against the business due to injury by the products or services of the business). For this reason, many people forming a business want to place the business into the form of a one-person-owned corporation or limited liability company, as discussed below.

The sole proprietorship business may use its founder's name (so it is easy for outsiders to know who owns the business) -- for example, "Mary Brown's Bookkeeping Services". Or, it may use another name which does not easily identify the business owner and so is called a "**fictitious business name**" -- for example, "Reliable Bookkeeping Services". When a sole proprietorship uses a fictitious business name, California law requires that the owner of the business file a "**fictitious business name statement**", within 40 days after the owner begins to conduct business, in the county where the business office or store is located which lists the fictitious business name and the true name and street address of the business owner, and that the owner also have the fictitious business name published in a generally circulated newspaper in that county once a week for four consecutive weeks. This allows anyone wanting to make any claim against the business to go to the county offices to look up the fictitious business name and thus find the true name and where to find the business owner. Failure to timely file the fictitious business name can result in penalties and the inability of the buisness itself to sue for its own business claims.

There is a benefit to a sole proprietor filing the fictitious business name statement. Under California law the first person to file a particular fictitious business name is presumed to have the exclusive right to use that name for his or her business over anyone who later files such a name or a confusingly similar name. This right, however, is subject to rights of users of the same or a similar name under certain other California laws governing "**trade names**" for individuals or businesses identifying themselves by such a name, and under federal law governing marks or logos ("**trademarks**") for products made or sold by such individuals or businesses.

General Partnerships

> ***"A major problem for people doing business together as a partnership is that any partner can 'hang for the sins' of another partner."***

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The discussion that follows deals with partnerships called "**general partnerships**", in which for the most part, as discussed below, all partners shoulder full liabilities toward outsiders for actions of other partners or the partnership as a whole. Just to mention, there is also a "**limited partnership**" form of business in which one or a few partners, acting as "general partners", have all the control or "voice" in most partnership actions, shoulder all liabilities toward outsiders (and get compensated "extra" for doing this) while the remaining "limited partners" are merely "passive" investors who invest in the partnership and expect to make a profit from the efforts of the general partners.

When two or more people go into business together with the hope of making a profit, they are automatically viewed as "general partners" in a "general partnership" by the laws of every State
including California. This is not changed by the fact that they never bother to sign a written partnership agreement together. However, when two or more people hold joint interests in land or other forms of real estate, this does not by itself make them partners; they own the property as individual owners unless they obtain their interests in the real estate in the name of the partnership, and specifically as partners. (As individual owners, they can own the property in forms such as "joint tenants" or "tenants in common", with consequences beyond the scope of this article). In the absence of their own signed written partnership agreement California and most other States have kindly provided them with a "free" partnership agreement; however, this "free" agreement may dictate results among the partners which they did not expect and do not want. For example, under this "free" agreement

— each partner has the same vote or "voice" in running the partnership as other partners even though some partners put in more investment money than others;

— each partner is entitled to the same share of partnership profits and burdened by the same share of partnership losses even though some partners put in more investment money than others;

— no partner is entitled to compensation for that partner's services to the partner ship except if closing down or "dissolving" the partnership;

Partners creating their own tailored written partnership agreement can arrange their voting powers or "voices" in unique ways. For example one partner may be given the sole or exclusive "voice" to make certain kinds of decisions (for example, what property to buy or sell or lease) while another partner may be given the sole or exclusive "voice"

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to make other kinds of decisions. As examples of such “control” or “voice” differences,

— they can arrange for the first member to have 51% of the voting power to decide on specified day-to-day decisions for the business while the second member enjoys 29% and the third member only enjoys 20%,

— and they can arrange for the first member to enjoy only 15% of the voting power to decide on terms of sale of the business while the second member enjoys 60% and the third member enjoys 15%,

And, one partner may be given the right to an unequal share of profits from certain partnership activities, even though all partners contributed equal amounts of investment to form the partnership. As examples of such differences in profit sharing,

— they can arrange for the first member to have 80% of the day-to-day profits of the business while the second member enjoys 15% and the third member only enjoys 5%,

— and they can arrange for the first member to enjoy only10% of the profits from sale of the business while the second member enjoys 20% and the third member enjoys 70%,

Partners may, but are not required, to file a “**statement of partnership**” with the California Secretary of State so as to give notice to outsiders as to the identity of all partners and the authority granted by a partnership agreement to different partners. If the partnership owns land or other real property, the statement of partnership can also be filed (“recorded”) in the office of the county recorder of the county where the real property is located. Outsiders dealing with the partnership are expected to check for such a statement of partnership and they are responsible to themselves to make such checks. (In “legalese”, these outsiders are “**deemed to have notice**” or are “**charged with constructive notice**” of these statements).

As is the case for sole proprietorships, if the name of the partnership is not simply the last names of earch partner, or if that name suggests additional partners whose last names are not included, a partnership must file a fictitious business name statement. The statement must be filed within 40 days after the partnership begins conducting business, with the county clerk of the county in which the partnership has its principal place of business listing the fictitious business name and the true name and street addresses of each of

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the partners, and the partners also must have the fictitious business name published in a generally circulated newspaper in that county once a week for four consecutive weeks. As with sole proprietorships, failure to timely file the fictitious business name can result in penalties and the inability to sue for business claims.

A major problem for people doing business together as a partnership is that

1. the partnership as an "entity" or group is liable for any losses or injuriesto outsiders caused by the wrongful conduct of any partner who is acting within the scope of the partnership's ordinary and usual business, or acting with any special authority given to that partner by the other partners;

2. in turn each partner is fully liable to pay for the entire amount of liability faced by the partnership due to the wrongful conduct of another partner in the situation described under (1) immediately above, although a person who becomes a partner after the wrongful conduct is not liable for that conduct.

Thus, any partner can "hang for the sins" of another partner.

A partnership in California can limit the authority of one or more partners to bind the partnership by filing a "**Statement of Partnership Authority**" with the California Secretary of State for most kinds of partnership activity, and also filing that same document, specially "**certified**", with the County Recorder Office of the county in which land or other real property is located, to deal with authority of one or more partners to sell that real property. On the other hand, the authority of one or more partners can be denied by them or any other partner by the filing of a "**Statement of Denial of Partnership Authority**" in the same places as the Statement of Partnership Authority was or would be filed. The law places the burden of knowing about such partner authority, by going to the appropriate government agencies, on the outsider dealing with the partnership, who is "**charged with constructive notice**" of such authority.

Also an innocent partner can avoid liability for partnership actions by filing a "**Statement of Withdrawal**" from the partnership prior to the anticipated actions by another partner. This statement is filed in the same county in which the partnership's fictitious business name statement was filed and like the fictitious business name statement must be published in a newspaper in that county.

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As another alternative, a partner can avoid liability to outsiders for partnership or partner actions by filing a "**Statement of Disassociation**" with the California Secretary of State. The disassociating partner is then liable only for action of the partnership or other partners which occurred before that filing. The disassociating partner may also be free from liability to the outsider if the outsider knew of the disassociation even if no statement of disassociation were filed.

"Partners have duties toward each other -- 'fiduciary duties' -- duties to act in good faith toward each other..."

Partners also have duties toward each other. These fall under the "legalese" label of "**fiduciary duties**" -- duties to act in good faith toward each other, and consist of two types:

- a "**duty of loyalty**" -- meaning a duty of each partner NOT to take any profits, or any opportunity for profits, which ought to be coming to the partners as a group, for that partner's own exclusive benefit, and not to compete against the partnership in the partnership's area of business; exceptions can be made to this duty of loyalty in a tailored partnership agreement

- a "**duty of care**" -- meaning a duty of each partner NOT to engage in extreme ly careless or intentionally wrongful acts and/or omissions in carrying out the business of the partnership.

"A set of often overlooked issues by people working in a partnership ... is what to do with the ownership interest of a partner who dies, becomes unable to function properly, gets divorced, or wants to sell his / her share of the partnership."

A set of often overlooked issues by people working in a partnership (as well as other businesses entitites discussed here having more than one owner) is what to do with the ownership interest of a partner who dies, becomes unable to function properly, gets divorced and is ordered by a court to divide his/her ownership interest in the partnership business with the ex-spouse, or wants to sell his / her share of the partnership. These

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issues can and should be dealt with at an early stage of the partner relationship by an agreement which is called a "**buyout agreement**". At such early stage no one can be sure what will happen in the future – for example, which partner might die, get divorced, or become disabled, or want to leave the partnership business. Unless these possibilities are dealt with at such early stage (which I like to call a "**context neutral time**") the partners who remain able bodied and in the partnership may find themselves dealing with one or more people (widows or widowers, ex-spouses, children, etc.) whom they would not want to deal with.

Dealing with these issues of liability among partners or toward persons outside the partnership and rights among partners themselves may appear to be simple tasks involving simple "fill-in-the-blanks" or do-it-yourself documents obtained from a bookstore or the internet, but in fact they often involve unique situations to be looked at and are loaded with hidden issues and so are best reviewed by an experienced lawyer.

A brief discussion of the federal and California income tax laws on partnerships and partners is given at the end of the material immediately below on corporations.

Corporations

> ***"Unlike in the case of a partnership, no innocent owner (a 'shareholder') of the corporation can 'hang for the sins' of another shareholder."***

There are several major attractions for business owners to form their business as a corporation instead of a partnership.

1. Unlike in the case of a partnership, no innocent owner (a "shareholder") of the corporation can "hang for the sins" of another shareholder. Thus, there is no exposure of the innocent shareholder's assets not part of his or her investment in the corporation to liability to outsiders for actions or failures to act by the corporation as a whole, or by other individual shareholders)

2. And, the corporation itself is not exposed to any liability for the carelessness or wrongdoing of that shareholder that causes loss or injury to an outsider when the shareholder was merely taking the role of a passive owner

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of the corporation and not one of the corporation's active "arms and legs" (not a "director" or "officer" of the corporation, as described below);

3

Also, no shareholder who is merely taking the role of a passive owner of the corporation -- not one of the corporation's active "arms and legs" -- has any duty of loyalty or duty of care to a fellow shareholder in terms of the business activities of the first-mentioned shareholder, even if his or her business activities are similar to those carried on by the corporation. However, the people who are the primary "arms and legs" of a corporation (its "directors") do have duties of loyalty and duties of care to the corporation as a whole and hence indirectly to all shareholders.

And the primary level employees of the corporation (the "officers", such as the "president", "secretary", "treasurer" or "chief financial officer", etc.) appointed by the directors usually must sign employment contracts, prepared by an attorney for the corporation, imposing duties of loyalty and duties of care upon these officers.

For convenience I refer to these barriers for business owners against liabilities to outsiders as "**liability insulation protections**".

There are some key limitations on the liability insulation protections provided to owner - shareholders.

- First, the owner of a small business, even if formed as a corporation (or as later discussed, a limited liability company), is directly liable, with all his or her assets at stake in a lawsuit in addition to the interest in the business, for substandard services performed directly by that owner to a customer or client or patient which causes loss or injury. The liability falls on this owner as an "employee" of the business entity or as an agent who has been delegated responsibilities to act for hat business. So small business owners should always have adequate insurance covering their performance of services, the safety of their products, and the safety of their business site for visitors.

- Second, while a a large number of individuals or entities with which the owner - shareholders wish their corporation to do business (lenders, equipment

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sellers, landlords, etc.) will be perfectly willing to enter into contracts directly with the corporation they will insist that the individual shareholders each give "**personal guarantees**" backing up the contractual obligations of the corporation. So, these shareholders will not escape their liability as individuals on these contractual obligations of the corporation.

A corporation is formed by the filing of "**articles of incorporation**" with the California Secretary of State, using a name that has not already been used by, or is not "confusingly similar to", another corporation on file with that agency. The Secretary of State's acceptance of the articles of incorporation for filing merely signifies that that agency has not determined that the name of the new corporation has not already been used by, or is not "confusingly similar to", another corporation on file with that agency. This acceptance does not give the new corporation superior rights to using the name over a sole proprietor or a partnership that has earlier filed the same name or a confusingly similar name in a fictitious business name statement, or superior rights to using the name over a sole proprietor or partnership or any other business entity that has obtained "trade name" or "trade mark" protection under federal law. So, there remains the chance for serious dispute over use of a corporate name except as far as the California Secretary of State is concerned. See the discussion above on this dealing with fictitious business name statements of sole proprietors.

The articles of incorporation are filed by a person or business called an "**incorporator**" (usually the attorney forming the corporation for a client). This incorporator also appoints the

- approving the procedural rules for running the corporation ("**bylaws**") -- these rules deal with meetings or other actions by shareholders, directors, and other topics;
- issue shares to one or more new owners of the corporation ("**shareholders**")
- appoint the first "**officers**" ("**president**", "**secretary**", "**treasurer**" or "**chief financial officer**", etc.) to run the day-to-day business of the corporation, including hiring, promoting, or firing, etc. lower level employees. and to take other actions needed to get the corporation "up and running".

A corporation need have only one owner or shareholder, and that shareholder need only

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elect one director, and that director can appoint himself or herself to all officer positions.

A corporation is required to hold a shareholder meeting annually, and an annual director meeting following the shareholder meeting (since the shareholder meeting deals, among other topics, with appointing the same or new directors for the coming year). Besides the annual meetings, "special" meetings can be called for actions by shareholders or directors. Shareholder and director meetings can be conducted by conference telephone.

In place of any shareholder meeting, all the shareholders can unanimously sign a written consent approving actions which would normally be approved at a shareholder meeting. The same rule applies to directors unanimously signing a written consent approving actions which would normally be approved at a director meeting.

A corporation is also required to file one or more annual reports with the California Secretary of State or other California agencies. There are penalties for failure to timely file these reports, and a corporation can have its power to function eliminated or "**suspended**".

> ***"If the owner - shareholders or the directors fail to timely meet 'corporate housekeeping formalities' (formal meetings etc.), filing annual reports) then the corporation may be treated as merely a partnership in which case the liability insulation protections are lost."***

If the owner - shareholders or the directors fail to timely meet these "**corporate housekeeping formalities**" (formal meetings or written unanimous consents of shareholders and directors, annual report filings) then the corporation may be treated by these agencies and by California courts as merely a partnership in which case the above mentioned liability insulation protections are lost.

A corporation generally has significant inflexible rules as to the sharing of control or "voice" of the owner / shareholders and the sharing of profits and losses of owner / shareholders: each shareholder has a "voice" and is allocated profits and losses from the day-to-day operations or the final sale of the corporation exactly according to the number of ownership interests or "**shares**" that shareholder has in the corporation in proportion to the total number of shares owned by all shareholders.

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These forms of inflexibility can be modified by creating different types or "**classes**" of shares but it can cost a lot in attorney fees to define and create these share classes as part of corporate documents or the final sale of the corporation exactly according to the number of ownership interests or "**shares**" that shareholder has in the corporation in proportion to the total number of shares owned by all shareholders.

These forms of inflexibility can be modified by creating different types or "**classes**" of shares but it can cost a lot in attorney fees to define and create these share classes as part of corporate documents.

> ***"As with a partnership's partners, the corporation's shareholders should consider having an attorney prepare a 'buyout agreement' among the shareholders to deal with the consequences of a shareholder who 'drops out' in one way or another from ownership participation in the corporation."***

As with a partnership's partners, the corporation's shareholders should consider having an attorney prepare a "**buyout agreement**" among the shareholders to deal with the consequences of a shareholder who "drops out" in one way or another from ownership participation in thecorporation.

Federal and California income tax laws present significantly inflexible rules on how shareholders are taxed for their share of income from a corporation. A full discussion of these rules are beyond the scope of this article, but here is a brief and incomplete summary to give perspective on why business people in the past were torn between selecting a partnership for their business entity as opposed to a corporation:

- An ordinary "**C corporation**" (named after a part of the Internal Revenue Code) pays taxes on its net income or net profits (total or gross income minus all expenses), and then when its net profits are paid to its owner - shareholders as "**dividends**" these shareholders again pay their own personal income taxes on this profit distribution; so these owner - shareholders face a "**double layer of taxation**";

  Furthermore, if the ordinary "C corporation" experiences net losses in a tax year, the owner- shareholders can't take advantage of these losses to apply

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hem to offset income which a shareholder has from other sources (net profits from another business, a salary, investment income, etc.)

In contrast the net profits of a partnership are allowed by federal and California income tax law to "**pass through**" the partnership to the indiviual owner - partners, so there is no "double taxation" effect.

And, furthermore, if a partnership experiences net losses in a tax year, the owner - partners can take advantage of these losses to apply them to offset income which a partner has from other sources (net profits from another business, a salary, investment income, etc.)

As a practical matter in most small C corporations the owner - shareholders "wear other hats" as employees of the corporation and with the help of their attorney and tax advisor these employees have employment contracts that provide for compensation pay-outs from the corporation which leave the corporation with little or no net profits, so no tax hits at the "corporate level" and the only income taxes paid are by the owner - shareholders as employees taxed on employment compensation for their employment services to the corporation.

- The directors of an ordinary C corporation can choose, at about the time that the corporation is formed, to be treated by the Internal Revenue Service as an "**S corporation**" (also named after a part of the Internal Revenue Code) in which case the net profits and net losses of the corporation "flow through" to the individual owner - shareholders so they then enjoy the beneficial tax treatment of partners in a partnership.

  Still, even the owner - shareholders of a corporation that elects S corporation tax treatment must allocate profits among themselves in proportion to each shareholder's shares relative to the total of all shareholder shares.

A corporation formed in California must pay a minimum income tax to California each year regardless of whether the corporation had any net income for that year.

Limited Liability Companies

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“The limited liability company form gives business owners ... the best of many worlds... -- liability insulation protections like a shareholder in a corporation PLUS flexibility as to ownership voting power and profit-taking as in a partnership.”

The ability of business owners to form their business as a limited liability company is a relatively new development (depending on the age of the attorney viewing this development).

The limited liability company form gives business owners the “best of both worlds” or maybe even the best of many worlds.

- Each owner (“**member**”) enjoys the same liability insulation protections as does a shareholder in a corporation (no exposure of the member’s assets which are not part of his or her investment in the limited liability company to outsiders for actions or failures to act by the limited liability company as a whole, or by individual members). This is the situation for a limited liability company in which the members have arranged for “**managers**” (who may also be members) to manage the operations of the company (a “**manager managed limited liability company**”) so the non-manager members are merely passive investors like people whose only relation to their corporation is as shareholders. Where each member has the authority and responsibility to participate in managing the company (a “**member managed limited liability company**”), each member DOES NOT have liability insulation for that member’s actions in managing the limited liability company.

- Unlike the situation for a corporation but like the situation for a partnership, the owners can allocate their voting control for day-to-day operation or final sale of the limited liability company in ways not tied to the ratio of each member’s ownership interest in the limited liability company to the total ownership interests. See the discussion above on partner voting control in partnerships.

- Unlike the situation for a corporation but like the situation for a partnership, the owners can allocate their share of profits or losses from day-to-day operation or final sale of the limited liability company in ways not tied to the ratio of each member’s ownership interest in the limited liability company to the total

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ownership interests. See the discussion above on partner profit allocations in partnerships.

A limited liability company need have only one member - owner.

To form a limited liability company in California it is only necessary to file a simple form called the "**articles of organization**" and pay a filing fee. California law permits but does not require limited liability companies to have the equivalent of corporate bylaws (an "**operating agreement**") to govern procedures for managing the company, and this law does not require any kind of regular meetings or written confirmations of actions without meetings. While this "freedom from formalities" would seem to be a real gift of freedom from dreaded forms and rules and lawyers (dreaded not necessarily in that order), I think that this apparent freedom is really an illusion and a trap for business owners, for at least the following reasons:

- California law, with lack of consistency, fails to make it clear that members of a limited liability company who fail to follow any formalities, particularly as regards separating the money and other assets of the company from money and assets owned by the members or due to be paid to the members, will be free from liability insulation protections toward outsiders any more than shareholders in a corporation will enjoy such insulation if corporate house-keeping formalities are not followed.

- The members of a limited liability company, regardless of their label, are really business partners who ought in each other's best interests prepare written records of their decisions on their relations with each other in terms of managing the company and sharing of profits and losses and dealing with the usual subjects of a well-written buyout agreement (the contingency of one or more owners dying or getting divorced or becoming incapacitated or wanting to retire before other owners).

  Not keeping such records, indeed not having an operating agreement signed by all members and having periodic meetings reflected in later written meeting summaries, is equivalent to the actions of all the new clients who come to me with stories of their failed business deal and without written documentation of who agreed to what for the deal that has now led to disputes

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especially as to owner buyout issues which could have been covered just as in the case of partners in a partnership or shareholders in a corporation.

And as with the corporate form of business, the liability of the owner of a small busness, particularly a service-providing business, for substandard services performed by that owner, is as true for a business formed as a limited liability company. That owner's assets, in addition to the interest in the business, are at stake. Again, there is no substitute for adequate insurance.

Regarding the income taxation aspects of a limited liability company, the owner - members of these entities are permitted to choose to be taxed as if they were partners in a partnership so the avoid the "double layer of taxation" income tax problems of C Corporations discussed above.

As with corporations, limited liability companies must pay at least a minimum amount of a tax to California each year for the "privilege" of being allowed to "set up" in California, regardless of whether the company made any net income for that year.

Conclusion

As already stated, a wise reader will gather that decisions on business formation even with documents available in "plain English", is often not a simple decision regardless of what the mail order or internet "forms suppliers" say. Indeed, in my experience with sad clients, it was not a wise financial decision to pay a fraction of what a lawyer's services would cost to make a business formation decision and then to cast the business into a mold which turns out to have been either a waste of time and money or even, later on, a very costly decision.

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