



*Guide: What's in a name?
Selecting and protecting
a business entity's name*



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I. INTRODUCTION

A business entity's names are among its most valuable assets. Its sales, reputation, and even its chance for success are all affected, to some extent, by the names by which it is known.

Every statutory business entity, such as a corporation, limited liability company, or limited partnership, has a legal name. This guide will discuss some of the considerations when selecting a legal name. Some business entities may also choose to do business under an assumed name and may have to do business under a fictitious name in foreign states. This guide will discuss those names as well. In addition, this guide will discuss the steps involved in protecting a business entity's name or names

II. WHAT ARE BUSINESS ENTITY NAMES?

A. Business Entity Names

The term “business entity name,” as used within, refers to the words, phrases, and abbreviations that a business entity chooses when identifying itself to the public.

A business entity can have several names. The names discussed here are the following:

Legal Name – This is the name appearing on the formation document of a statutory business entity such as a corporation, limited liability company (LLC), or limited partnership (LP).

Fictitious Name – This is a name appearing on the qualification document of a statutory business entity in a state other than its formation state, that it had to select because its legal name was not available in that state. Some states refer to this name as an alternate name.

Assumed Name – This is a name a business entity chooses to do business under other than its legal name. It is also referred to as a “dba” or “doing business as name.”

B. Trademarks

A trademark is not a business entity name. Trademarks are words or symbols used to identify and distinguish a business entity’s products or services. However, trademark law can have an impact on the selection and protection of a business entity’s name and that impact will be discussed in this guide.

III. NAME SELECTION AND PROTECTION

A. Name Selection

There are a number of considerations involved in choosing a business entity's name. These may be divided into two categories – compliance related considerations and voluntary considerations.

The voluntary considerations are driven by marketing or business concerns. They are not driven by statutes, rules or regulations. For example, the people choosing the name may want one that will distinguish their company from their competitors. Or their concern may be that the name is memorable or easily pronounced and spelled. Some business owners want the name to describe their products or services. Others want to identify the company's founders or current owners.

The compliance related considerations are driven by a variety of state, federal, county and even international statutes, rules and regulations. These statutes, rules and regulations impose certain restrictions on the names business entities may select and use.

These restrictions deal mainly with the content of the names and on their availability in a jurisdiction. Name restrictions serve two main functions. One is to prevent the public from becoming confused as to the identity of a business entity. The other is to prevent unfair competition through the use of identical or nearly identical names.

B. Name Protection

Name protection refers to a variety of steps that may be taken by a business entity to attain, maintain and enforce rights to a legal, fictitious or assumed name.

A business entity's name is "protected," if the business entity can prevent another party from using an identical or a confusingly similar name. Statutory provisions providing some level of name protection can be found in, among other places, state business entity laws, state trademark and unfair competition laws, and federal trademark laws.

Steps in the name protection process typically include (1) filing a document with a government agency that results in the name being placed on a public register,

(2) checking public records and other sources to determine if any other business entity or other person hold rights to the name, (3) making renewal and other post-registration filings with the government agency, and (4) taking legal steps against parties improperly using the name.

IV. SELECTING A LEGAL NAME

A. What is a Legal Name?

The name that appears on the formation document of a corporation, LLC, LP or other statutory business entity is called its “legal name.” It is also sometimes referred to as its “true name,” “real name” or “official name.”

A business entity must select a legal name before it is formed. This is its original legal name. A business entity may change its legal name as often as it desires during the course of its existence. However, a statutory business entity can have only one legal name at any given time.

B. Statutory Restrictions on Legal Name Selection

One of the first and most important decisions that a business entity’s owners or managers will make after deciding to form the entity is deciding on its name. However, they cannot choose any name they want. They must take into account restrictions imposed by the statute under which the entity will be formed. In some cases other state or federal statutes may affect the selection as well.

These restrictions deal with three issues – required words, prohibited and restricted words, and name availability.

C. Required Words

Most business entity statutes require the name set forth in the formation document to contain a specific word, phrase, or abbreviation indicating the type of entity it will be.

This requirement first appeared in corporation statutes to ensure that people knew they were dealing with an artificial entity whose owners had limited liability - and not a sole proprietorship or partnership where they could look to the owners to satisfy a debt.

The entity indicator requirement began to take on added significance as the number of different unincorporated entity forms increased. These entities differ on issues such as the authority of their owners to enter into contracts for the entity. They also differ as to who is a proper person to serve with process. These differences make it important that people know which type of business entity they are dealing with.

Therefore, for example, a corporation statute may require the name of a corporation to contain the word “corporation,” “incorporated,” or “company,” or the abbreviation “corp.,” “inc.,” or “co.” Or an LLC statute may require the name of an LLC to contain the words “limited liability company” or the abbreviations “L.L.C.” or “LLC.”

Generally, the statutes require the legal name to be in English letters or characters, although it may be in a foreign language. Under some statutes the required words or abbreviation must appear at the end of the name. Under other statutes they may appear anywhere.

Entities involved in certain types of regulated industries, such as banking or insurance, may be formed under a statute other than the state business entity law. Professional entities may be formed under separate statutes as well. These statutes often have their own required word provisions.

D. Prohibited and Restricted Words

Many business entity statutes prohibit or restrict the use of certain words or phrases in legal names. One reason for this is to prevent the public from being misled as to the type of business entity it is dealing with. Thus, for example, an LLC may be prohibited from using the word “corporation” in its name.

Another reason is to prevent the public from being misled as to the function being performed by a business entity. Thus, for example, a business entity may be unable to use a name containing a word such as “bank” unless the business entity is in the banking industry. Or it may be unable to use a word such as “law” that indicates that a professional service is being provided unless it is being formed to provide that service. In addition, some states require the agency regulating that industry or profession to consent to the use of a name containing one of these restricted words.

The statutory provisions prohibiting or restricting words take a variety of approaches. Some contain a general statement that no name may contain a word or phrase that is prohibited by law or that indicates or implies that the business entity is organized for a purpose not contained in its formation document. Some statutes proscribe a category of words. Such a statute might provide, for example, that a name may not contain any word that indicates that the business entity is a government agency.

Other statutes contain a specific list of words or phrases that either may not be used or that may only be used with the consent of the proper state agency. These statutory lists of words vary considerably from state to state.

The list of prohibited or restricted names may also be found in the regulations of the state agency in charge of business entities.

Federal statutes also prohibit the use of certain words or phrases in a business entity's name. For example, the improper use of words such as "federal" or "United States" or phrases indicative of certain federal corporations such as "National Credit Union" or "Deposit Insurance" is prohibited by federal law. Another section of federal law prohibits use of words that suggest a connection to an Olympic activity. Fines may be imposed for violations of these statutory provisions.

E. Name Availability

Most business entity laws provide that the name a business entity is formed under must be available for its use. To be available, the name must not conflict with the name of another domestic or foreign entity appearing in the filing office's records.

The main reasons for having an availability requirement are to (1) prevent confusion in the state business entity filing office and tax department, (2) permit accuracy in naming and serving business entity defendants in litigation, and (3) prevent unfair trade practices by business entities.

The statutes governing name availability vary somewhat. However, most statutes provide that a name must be distinguishable upon the records of the state filing office from the names of any other domestic or qualified foreign entity, a reserved name, a registered name or a fictitious name that appears on the state's records.

A few states, however, provide that the name must not be "deceptively similar to" or "likely to create a confusion with" another name. This is a more restrictive standard than the "distinguishable upon the records" standard. It can result in a name being rejected by the state even if it does not exactly match a name on the records.

F. Filing Office's Role in Determining Legal Name Availability

Upon receiving a formation document for filing, the filing office will search its database to see if the legal name set forth on the document is available. If it is not, the formation document will not be filed.

Few business entity statutes deal with the subject of what makes one name distinguishable from another. Instead, this is considered more appropriate for the filing office to determine.

Each filing office has its own rules and regulations for determining what makes a name distinguishable. Thus, two names may or may not be considered distinguishable if the only difference is that one name is singular and the other plural (i.e., “ABC Farm, Inc.” vs. “ABC’s Farms, Inc.”), or one is in upper case and the other lower case (“ABC FARM Inc.” vs. “abc farm, Inc.”) or because the names contain different articles (“The ABC Farm, Inc.” vs. “An ABC Farm, Inc.”).

The filing offices may also differ in whether they consider names distinguishable because they have different entity indicators, or because there are differences in punctuation, geographical terms, or symbols.

When the governing statute imposes a “deceptively similar to” or “likely to create a confusion with” standard, the filing office’s role is greater. Under that standard, a determination will have to be made whether the public will be confused by the two names. At one time, the “deceptively similar to” standard was common. However, most states have abandoned it because they believe it is not the state filing officer’s role to police the unfair competitive use of names.

G. What if the Proposed Legal Name is Unavailable?

If the legal name a business entity selects is not available there are generally two choices. The first is to select another name. The second is to try to obtain the holder of record’s consent to use the name.

The states will generally authorize formation under an unavailable name if the business entity with the name consents in writing and agrees to change its name as soon as practicable. This consent procedure is useful in mergers, reorganizations and asset sales where a new entity will take over the business of an existing entity and wishes to keep the existing entity’s name.

V. FICTITIOUS NAMES

A. Impact of Foreign State Law on Name Selection

A corporation, LLC, or other business entity that transacts business in a state outside of its formation state must qualify to do business in that state. The business entity statutes require the name of a qualified foreign business entity to meet the same required word, prohibited or restricted word, and name availability requirements as a domestic business entity. Consequently, the selection of a legal name can be affected by the business entity statutes of foreign states. This can happen if a business owner knows, before formation, that the entity will do business in other states, and wants to be able to use its legal name in one or more of those states. In such a case the legal name selected should be one that complies with the foreign states' laws as well as the formation states.

B. Name Availability in Foreign States

In order to qualify to do business in a foreign state, an application must be filed with the state filing office. This application sets forth the business entity's legal name. Before the filing office will approve the application to qualify and authorize the business entity to do business in the state, it will check to see if that legal name is available for use in the state.

If the name is not available, the business entity will have to qualify and do business under a fictitious name.

C. What is a Fictitious Name?

A fictitious name is a name adopted by a foreign business entity because its legal name did not comply with the foreign state's business entity law. This type of name is also known as an alternate name or an involuntary assumed name.

A fictitious name must be available for use in the foreign state. The fictitious name will be set forth, along with the legal name, on the application for qualification. Some statutes require the qualification document to be accompanied by a resolution from the business entity adopting the fictitious name.

VI. CHANGING A LEGAL NAME

A. Why Would a Business Entity Change its Legal Name?

Every year thousands of business entities change their legal names. There are many reasons why they do so. The surviving entity in a merger may choose to take the name of the discontinuing entity or combine the entities' names. A business entity that expands its product line or expands into new locations may want to change its name to indicate the change.

Sometimes a name change is made due to negative publicity. In other cases a word in a business entity's name may have developed negative connotations over time. In addition, business entities that were named after their founders may change their names when those individuals are no longer involved in the business.

Some businesspeople believe that changing a name can be a positive signal to workers, consumers and investors. Others make a change in hopes it will cause an increase in stock market activity.

B. Name Changes Before Reinstatement

Most name changes are voluntary. However, a business entity may have to change its legal name if it is attempting to be reinstated following its administrative dissolution.

Most business entity laws provide that a domestic entity can be dissolved if it fails to comply with certain statutory provisions. The most common grounds are a failure to file an annual report or pay franchise taxes.

In general, the states permit a dissolved business entity to apply for reinstatement of its charter. However, in some of these states the business entity's name becomes available once it is administratively dissolved. If another entity obtains the name – by, for example, forming or qualifying under it - the filing office will not accept the application for reinstatement until the applicant changes its name to one that is available.

C. How is a Legal Name Changed?

A business entity may change its legal name to any name that meets the requirements that must be met by a business entity being newly formed. Thus,

the new name will have to comply with any required, prohibited or restricted word provisions. It must also meet the state's availability requirements.

There are also certain statutory requirements that must be complied with in order for the name change to become effective. The procedure will differ depending upon the type of business entity and the state of formation.

In the case of a corporation the statutes generally require the directors to adopt a resolution recommending that an amendment to the articles of incorporation be adopted to change the name. The resolution is submitted to the shareholders for their approval. After approval is obtained, articles of amendment to the incorporation document must be filed with the incorporation state's filing office.

In the case of unincorporated entities, the statutes generally defer to any procedures for making changes set forth in the owners' governing agreement. However, the statutes do require the filing of a document with the filing office to inform the state and public of the change. In general, articles of amendment to the formation document are filed.

If the name change is resulting from a merger, the governing statute may permit the change to be set forth as part of the merger documents filed with the state to effect the merger. This allows the survivor to avoid having to file a separate amendment document.

D. Changes in Foreign States

If the business entity changing its legal name is qualified to do business in foreign states, those foreign states will have to be notified of the change. Some statutes require the filing of an amendment to the qualification document. Others, a certificate of change of name.

Some statutes provide that a certificate evidencing that the name change was filed with the home state has to accompany this filing. Others provide that a certified copy of the articles of amendment to the formation document has to accompany the filing. Furthermore, some statutes require the name change filing to be made within a certain period of time after the name change becomes effective in the home state.

VII. ASSUMED NAME

A. What is an Assumed Name?

When a business entity does business under a name other than its legal name it is using an assumed name. At one time it was not clear whether a business entity could do business under a name other than its legal name. However, it is now well established that a business entity may enter into contracts and otherwise transact business under a name other than its legal name and have those contracts and actions be considered valid.

B. Why Would a Business Entity Use an Assumed Name?

Many business entities are better known to the public by their assumed names than their legal names. There are a variety of reasons why a business entity would choose to do business under one or more assumed names. It may have several divisions or products and wishes to do business under names that reflect each of those divisions or products. Some business entities wish to be known by different names in different regions of the country.

Sometimes a business entity might want to be identified by a name other than its legal name because of negative publicity. Rather than changing its legal name, it may adopt an assumed name. It is also common for business entities with legal names that are long, hard to spell or pronounce, or difficult to remember to choose to do business under a shortened version of their name.

C. Assumed Name Statutes

A majority of states have statutory provisions governing the use of assumed names. Most of these statutes require business entities doing business under an assumed name to make a public filing. The document that is filed typically sets forth the assumed name, the legal name of the business entity, its state of formation and its principal place of business.

The main function of assumed name statutes is to protect members of the public who deal with businesses that use assumed names. It is believed that the public needs access to the legal names of businesses for various purposes. These purposes include, among others, checking credit ratings, searching for legal judgments, searching for security interests, bringing suit, and serving process.

Beyond requiring a filing, there is little uniformity among the assumed name statutes. The statutes even differ as to what they call this kind of name. Most use the term assumed name. Some, however, use fictitious name, trade name, or another term.

Another difference is in the location of the statutes. Some assumed name provisions are found in the state's business entity statutes. Others are found in the state's laws dealing with consumer protection or unfair trade practices.

The treatment of business entity indicators also lacks uniformity. Some assumed name laws prohibit the use of business entity indicators. Some require their use. Others are silent on the issue.

D. Assumed Name Filing Procedures

The assumed name filing procedures also vary by state. Some states require the assumed name document to be filed with a state agency. Typically, this will be the business entity filing office. Others require filings to be made on the county level. This may be in the county where the principal place of business is located, where the registered office is located, or where business is to be transacted. There are also states that require a filing with the state office, followed by a recording of the document with the county. Some states require publication in a local newspaper of the intention to register and do business under an assumed name.

A business entity may conduct business under multiple assumed names. If so, a separate document will generally have to be filed for each name. If a business entity decides to stop using one or more of its assumed names it can generally make a filing to cancel its assumed name registration.

Under the statutes of some states the assumed name filing is effective for a limited period of time and must be renewed. Others, however, do not limit the term.

Some assumed name statutes require the filing of an amendment upon a change in the information set forth in the assumed name document. In others there is no procedure for filing an amendment. Instead, they require the filing of a new assumed name document upon a material change in the contents set forth in the original document. In some cases the amendment or new document will have to be filed within a specified period of time after the occurrence of events necessitating the change.

E. Protection of Assumed Names

Another area in which the state assumed name statutes differ is in their protection of assumed names.

In some states, assumed names are subject to an availability requirement. In these states, upon receiving an application to register an assumed name, the filing office will search its assumed name register to see if another business entity has already registered that assumed name. If so, it will reject the application. In some states, the filing office will not only check the assumed name register but will check for conflicts with legal names appearing on its records and will reject an assumed name if a conflict is found.

However, there are a number of states where assumed names are not subject to an availability requirement. In those states the filing office will not be given authority to review the assumed name against its records. Consequently, it cannot reject the filing due to a conflict. In some of these states the statutes specifically provide that the sole effect of an assumed name filing is to give notice to the public that the entity is conducting business under that name and that the filing does not have the effect of establishing any rights to the name under unfair competition, trademark or similar laws.

F. Penalties for Non-Compliance

Most assumed name statutes impose penalties on entities that do business under an assumed name without making the required filing. In some states there is civil penalty. In others non-compliance is a misdemeanor. There are also states imposing both civil and criminal fines. In addition, some assumed name statutes provide that a business entity in violation of the statute may not maintain a suit or enforce a contract until it complies.

VIII. PROTECTION OF LEGAL NAMES UNDER BUSINESS ENTITY LAWS

A. What Rights Are Acquired Upon Formation or Qualification?

Upon the effective date of a business entity's formation or qualification, no other business entity may be formed or qualified in that state under that name. In addition, no other business entity may change its name to that name, nor may that name be reserved or registered. As a result, the state business entity laws protect the legal names of domestic entities and the legal or fictitious names of qualified foreign entities through their name availability requirement.

B. Checking Name Availability

A step that is often taken before filing a formation, qualification or name change document is to check with the state filing office to determine if the chosen name is available.

The websites of most filing offices contain the names of the business entities on their records. This database can be searched to see if there is a conflict with the desired name. Names can be checked in a number of states by calling the filing office. In a few states a written search request may be made.

C. What Does A Confirmation of Availability Mean?

Some business owners or managers will want to begin using their chosen name as soon as they determine that it is available. They may order office supplies, advertising, and other material bearing the name. They may also enter into pre-formation agreements using the name.

However, a confirmation of availability, whether learned from an Internet search of the state's filing office's records or from the filing office itself does not provide protection. The name remains available to any other business entity. This can cause a problem because names are often chosen, and their availability checked, days, weeks, or even months before the business' owners or managers are ready to form or qualify the entity.

There are many examples of business entities that invested a significant amount of time, effort and money on a name they thought was available, only to find that

by the time they filed their formation, qualification or name change document, another entity had taken the name.

This situation can be avoided, however. The main vehicle for doing so is a name reservation. In foreign states there may also be the option of a name registration.

D. Name Reservation

Most business entity statutes permit a domestic or foreign business entity to reserve a legal name for a short period of time. Foreign business entities qualifying under a fictitious name may also reserve that name. The name reservation period varies depending upon the statute. The periods generally range from 30 days to one year. However, 120 days is a common statutory reservation period.

A name is typically reserved by filing an application for reservation with the state filing office. The filing office will search its records to see if the name is available. If it is, the name may be reserved. The effect of a name reservation is that another business entity may not form or qualify under, change its name to, reserve or register the name while the reservation is in effect.

The main reason for having a name reservation procedure is to allow persons intending to form or qualify a business entity to order office supplies, enter into pre-formation transactions, and take other steps on the assumption the name will be available. It is not intended to allow a business entity to keep a name away from another party or to gain other competitive advantages. Consequently, some statutes provide that only persons actually intending to form or qualify under (or change its name to) the name may reserve it. Other statutes, however, do not limit the purposes for which a name may be reserved.

The statutes also differ as to whether the reservation may be renewed. Often, where the reservation period is 120 days or longer, renewal is not authorized. It is generally believed that this is a sufficient period of time to complete the formation or qualification process. Where the reservation period is shorter renewal may be allowed. Under some statutes, renewal is permitted but limited to one additional period.

Because name reservations have a limited duration, care needs to be taken to time the name reservation filing so that it will not expire before the effective date of the formation, qualification, or name change document establishing the business entity's rights to the name.

E. Name Registration

Name registration is a statutory device used by an entity to preserve the right to its legal name in a foreign state in which it has not yet qualified, but in which it may decide to qualify in the future.

Name registration is intended to benefit a business entity by ensuring the availability of its legal name in the case of future expansion. As a result, fictitious names typically may not be registered. Inactive entities generally may not register their names either.

Name registration provisions are found in most corporation statutes. Some statutes governing unincorporated entities authorize name registrations as well.

A name is registered by filing an application for registration with the foreign state's business entity filing office. A certificate of existence from the formation state generally has to accompany the application.

Upon receiving the application, the filing office will check its records to see if the name is available. If it is, the name may be registered. The effect of a name registration is that another business entity may not form or qualify under, change its name to, or reserve or register the name in that state while the registration is in effect.

By registering its name in a foreign state, a business entity does not become subject to the provisions of the state's business entity statute that apply to qualified foreign business entities. Thus, for example, it would not have to comply with a statutory annual report requirement merely because it registered its name pursuant to the provision of that state's business entity law.

A name registration is intended to provide long term protection. The registration is generally effective for one year. It is also renewable indefinitely. Renewal applications for successive years typically must be filed between October 1 and December 31 of the preceding year.

IX. TRADEMARK LAW AND NAME SELECTION AND PROTECTION

A. How Do Trademark Laws Affect Name Selection?

Trademark laws should be taken into account whenever a business entity is selecting a legal, fictitious or assumed name.

Trademark laws impact business entity name selection in two main ways. First, a business entity will want to select a name that does not infringe upon another entity or person's trademark rights.

Secondly, not all trademarks qualify for protection under the trademark laws. Therefore, if the business entity is going to use its name as a trademark it will want to select a name that will qualify for protection.

B. What Does Name Approval by the State Filing Office Mean?

The fact that a state business entity filing office accepts for filing a formation, qualification, name change, name reservation or name registration document does not necessarily mean that no other party has established superior rights to the name. In fact, some business entity statutes specifically provide that approval of a name by the filing office is not a determination of rights under trademark or unfair competition laws.

What approval by the business entity filing office means is that the filing office searched its records and found no other name that conflicted with the name set forth on the document.

Very few filing offices, in considering the availability of a name, are required to check federal or state trademark registers to look for conflicts. Even fewer will look for conflicting unregistered trademarks.

Consequently, a business entity may be formed and conduct business under a name in which another party has trademark rights. And it is well established that a filing office's acceptance of a name is not a defense in a trademark infringement or unfair competition action.

C. Conducting a Trademark Search

The penalties for trademark infringement can be severe. One step that a business entity can take to avoid those penalties when selecting a name is to conduct a trademark search.

In a trademark search information is obtained concerning the use and registration of business entity names and trademarks. This information is obtained from a variety of sources. These include federal and state trademark registers, yellow page listings, trade directories, industrial indexes, the Internet, and other public and private databases that list the names of businesses in different fields.

The main purpose of the trademark search is to uncover any names or trademarks already in use that are identical or similar to the proposed legal, fictitious or assumed name and that could confuse consumers as to the origin of a product or service. By revealing these names or trademarks the search lets a business entity know in advance of any potential trademark problems it could face if it uses a particular name.

D. What is the Difference Between Trademarks and Names?

A business entity's legal, assumed or fictitious name is not necessarily a trademark. A trademark identifies a business entity's goods or services. A legal, assumed, or fictitious name identifies the business entity itself. However, a legal, assumed or fictitious name may be a trademark if the business entity uses it in commerce to identify the business entity's products or services.

E How Do Trademark Laws Affect Name Protection?

A business entity that has selected a distinctive legal, fictitious or assumed name and that will be using the name to identify its goods or services in commerce will probably want to take full advantage of the protections of the trademark laws.

Obtaining this protection generally means taking the following steps: (1) registering under federal or state trademark laws, (2) making sure its trademark rights do not lapse, and (3) enforcing its rights when improper use of its trademark is detected.

CT Corporation
28 Liberty Street
New York, NY 10005
855 316 8948

Please visit www.wolterskluwer.com/en/solutions/ct-corporation for more information.