

JUMPSTART Class #3

# Business Structure and Legal Concepts

# PURPOSE

- Introduce the types of legal entities (Pros and Cons)
- Provide some information regarding legal risks and mitigation strategies

A lawyer woke up in the hospital after surgery.

He asked, “Why are all the closed?”

The Nurse answered, “There’s a fire across the street and we didn’t want you to think the operation had been a failure.”

# Disclaimer

A countryman between two lawyers is like a fish between two cats.  
- Ben Franklin

These materials and the presentation to which they relate are intended to provide the seminar participants with general information. This information is not intended to be and should not be treated as legal advice, investment advice, or tax advice. Participants, including professionals, should independently verify all statements made in the materials and by the speakers before applying them to a particular situation and should under no circumstances rely upon this information as a substitute for their own research or for obtaining specific legal or tax advice from their own counsel. Under rules applicable to the professional conduct of attorneys in various jurisdictions, this information may be considered attorney advertising material.

# Outline

- Background
- Definitions
- Formation – Why? What? When? Where? How?
- Practical Matters
- Risks when operating –When should you consider getting advice?
- Question and Answer Segment

# Background

- University of Utah, B.S. Economics
- Brigham Young University J. Reuben Clark Law School, JD
  - Case Researcher for *Business Organizations: Cases, Problems, and Case Studies* by Cynthia Williams and D. Gordon Smith
  - Focused on business organizations, transactions, and contract law.
  - Worked as a legal consultant for business development boutique firm.
- Worked at one of the largest law firms in SLC in the business litigation section.

# Definitions

- **Term of Art**
  - A word that has a specific contextual meaning that may be different from common usage. All words within legal documents are presumed to be legal in context.
    - Cut and Paste
    - Redemption
    - Children
- **Statutory by Default**
  - Failure to create by-laws and operating agreements does not mean you don't have them.
- **Exposure**
  - The risks associated with doing business. Contractual, civil, criminal, regulatory, personal, etc.
- **Mitigation**
  - Strategies and practices put in place to limit or lessen exposure.

# Formation – The Why?

- Legitimacy
- Liability
- Tax Pros (or cons)
- Prenuptial
- Growth
- Cover your assets

# Piercing the Corporate Veil

- What does that mean?
- Factors courts consider
  - Fraud
  - Undercapitalization or Underinsured
  - Intermingling Funds - Funds and assets should be separated and not commingled. *Gasstop*, ¶ 11, 225 P.3d at 1078. Failure to maintain an arm's-length relationship between the member and company, as by not keeping separate bank accounts and bookkeeping records, may be weighed along with other factors.



# Formation – The What?

- Sole Proprietorships
- Partnerships
- Limited Liability Company – LLCs
- Corporations

## Sole Proprietorship

**Business is one and the same as the owner**

### Advantages and Disadvantages

- Owner has unlimited personal liability
- Pass-through taxes – personal tax return
- Owner-operated--Owner controls business
- Simplest form of organization
- Lowest cost to form
- Appropriate for small start-up
- Limited duration—life of owner

## General Partnership

Business association of two or more people formed by written or verbal agreement

### Advantages and Disadvantages

- Owners have personal liability
- Pass-through taxation
- Shared risk and costs
- One partner can bind the partnership
- Simple to form, low cost
- Easy to operate if agree with partner—Deadlock
- Limited duration—death of either partner

## Limited Partnership

One partner provides management & is liable; one partner provides capital & has liability limited to investment

### Advantages and Disadvantages

- Must register with state & designate life span
- May have to register as a security (+15 people or commission for sale of security)
- Pass-through taxation
- Limited partner has no management & non-liquid investment
- Complicated accounting, difficult to form & operate

## Limited Liability Company (LLC)

Unincorporated hybrid entity, with traits of corporation & gen. partnership (or sole prop.)

### Advantages and Disadvantages

- Greater flexibility than sole proprietorship and partnership in distributing profits (less restrictive than S-corporation)
- Limited liability – like corporation
- Pass-through taxation – like sole proprietorship or partnership
- Duration—can be limited or unlimited
- Requires formal formation, file with Sec. of State, annual report, use of LLC in name
- Non-transferrable interests (may require agreement of other members)
- Can use for professionals, family (close LLC), or single member

## Corporation

Legal entity, created under the laws of a state, which has its own privileges and liabilities distinct from those of its owners

### Types:

- C-corporation
- S-corporation
- Close
- Non-profit

### Advantages and Disadvantages:

- Unlimited life span
- Owners protected from liability
- Double taxation
- Formalities in formation and operation


Most businesses

DO NOT need to incorporate

## Choosing an Organizational Type

How do I decide which structure is best for my business?

- Establish business plan, think about business
- Initial guidelines: Owner-operator? Partnership?
- Multiple owners? Product with significant liability?
- Ask attorney
- Research through Small Business Administration, Wyo. Secretary of State and I R S websites



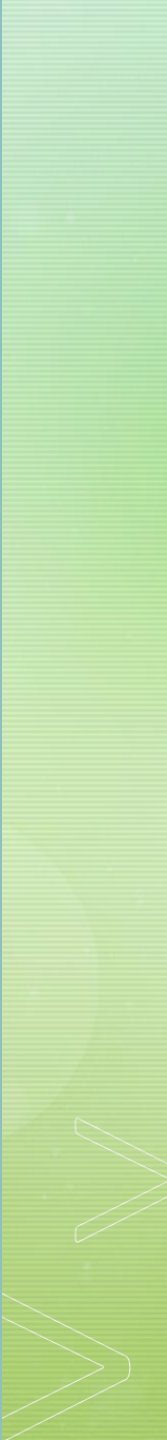
# Formation – The When?

- Prior to Operations
- After the fact?





# Formation – The Where?

- State of Organization (domestic registration)
  - Qualification to do business in other states (foreign registration)
  - What is Nexus?
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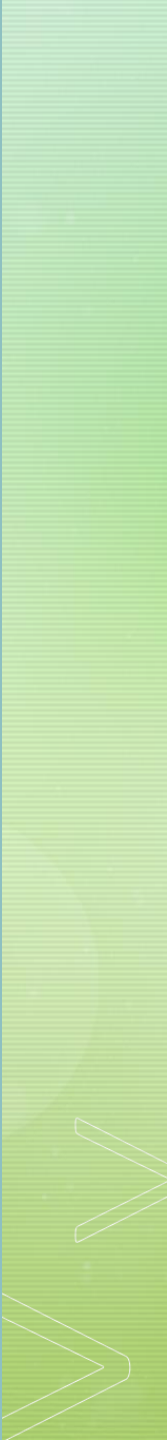


# Formation – The How?

- Informal formation
- Formal formation





# Practical Matters

- Paperwork
  - Taxes
  - Operating
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# Practical Matters – The Paperwork

- Selection of a Name
- Articles of Organization/Incorporation
- Consent of Registered Agent
- Operating Agreement/Bylaws
- Meeting Minutes/Resolutions/Consents
- IRS Form SS-4 – Applying for an EIN
- IRS 2553 – S-Corp Election
- Annual Reports
- City Business License



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**Lobbyist Registration: Now Available Online!**  
Register as a Lobbyist and be ready for the 65th Legislative Session.

- 1
- 2
- 3

### Online Tools

- ▶ Campaign Finance Information
- ▶ Online Business Tools
- ▶ Administrative Rules System
- ▶ Annual Report Filing
- ▶ Business Entity Search
- ▶ Good Standing Certificates
- ▶ Lobbyist Registration

### News and Highlights



**Commercial Registered Agents - Your Registration is Past Due!**

Registrations received after December 31st

# Practical Matters – Filing with WYSOS

Visit

[www.sos.wyo.gov](http://www.sos.wyo.gov)

**Business E-Filing**

**Form or Register a New Business**

**Read the Instructions!**

**Start Now!**

# Practical Matters – Obtaining an EIN

[Help](#) | [Apply for New EIN](#) | [Exit](#)

## EIN Assistant

### Important Information Before You Begin

For help or additional information on any topic, click the underlined key words, or view Help Topics on the right side of the screen. Make sure that pop-ups are allowed from this site.

Use this assistant to apply for and obtain an Employer Identification Number (EIN).

[Do I need an EIN?](#)

[Do I need a new EIN?](#)

### About the EIN Assistant

- You must complete this application in one session, as you will not be able to save and return at a later time.
- For security purposes, your session will expire after 15 minutes of [inactivity](#), and you will need to start over.
- You will receive your EIN immediately upon verification. [When will I be able to use my EIN?](#)
- If you wish to receive your confirmation letter online, we strongly recommended that you install [Adobe Reader](#) before beginning the application if it is not already installed.

### Restrictions

- Effective May 21, 2012, to ensure fair and equitable treatment for all taxpayers, the Internal Revenue Service will limit Employer Identification Number (EIN) issuance to one per [responsible party](#) per day. This limitation is applicable to all requests for EINs whether online or by phone, fax or mail. We apologize for any inconvenience this may cause.
- If a [third party designee](#) (TPD) is completing the online application on behalf of the taxpayer, the taxpayer must [authorize the third party](#) to apply for and receive the EIN on his or her behalf.
- The business location must be within the United States or [U.S. territories](#).
- Foreign filers without an Individual Taxpayer Identification Number (ITIN) cannot use this assistant to obtain an EIN.
- If you were incorporated outside of the United States or the U.S. territories, you cannot apply for an EIN online. Please call us at 267-941-1099 (this is not a toll free number).

If you are not comfortable sending information via the Internet, download the [Form SS-4](#) PDF file and the instructions for alternative ways of applying.

[IRS Privacy Policy](#) | [Accessibility](#)

Form **SS-4**

**Application for Employer Identification Number**

OMB No. 1545-0045

(Rev. January 2010)

(For use by employers, corporations, partnerships, trusts, estates, churches, government agencies, Indian tribal entities, certain individuals, and others.)

809

Department of the Treasury  
Internal Revenue Service

See separate instructions for each line. Keep a copy for your records.

**1** Legal name of entity (or individual) for whom the EIN is being requested

**2** Trade name of business (if different from name on line 1)

**3** Executor, administrator, trustee, "care of" name

**4a** Mailing address (room, apt., suite no. and street, or P.O. box)

**5a** Street address (if different) (Do not enter a P.O. box)

**4b** City, state, and ZIP code (if foreign, see instructions)

**5b** City, state, and ZIP code (if foreign, see instructions)

**6** County and state where principal business is located

**7a** Name of responsible party

**7b** SSN, TIN, or EIN

**8a** Is this applicant for a limited liability company (LLC) (or a foreign equivalent)?  Yes  No

**8b** If 8a is "Yes," enter the number of LLC members

**9a** If 8a is "Yes," was the LLC organized in the United States?  Yes  No

**9b** Type of entity (check only one box. Caution: If 8a is "Yes," see the instructions for the correct box to check.)

Sole proprietor (SSN) \_\_\_\_\_

Partnership \_\_\_\_\_

Corporation (enter form number to be filed) \_\_\_\_\_

Personal service corporation \_\_\_\_\_

Church or church-controlled organization \_\_\_\_\_

Other nonprofit organization (specify) \_\_\_\_\_

Other (specify) \_\_\_\_\_

Estate (SSN of decedent) \_\_\_\_\_

Plan administrator (TIN) \_\_\_\_\_

Trust (TIN of grantor) \_\_\_\_\_

Not a national guardian \_\_\_\_\_

State/local government \_\_\_\_\_

Farmers' cooperative \_\_\_\_\_

Federal government/military \_\_\_\_\_

REMIC \_\_\_\_\_

Indian tribal government/enterprise \_\_\_\_\_

Group Exemption Number (GEN) if any \_\_\_\_\_

**9c** If a corporation, name the state or foreign country (if applicable) where incorporated

**State** \_\_\_\_\_

**Foreign country** \_\_\_\_\_

**10** Reason for applying (check only one box)

Started new business (specify type) \_\_\_\_\_

Hired employees (Check the box and see line 13.) \_\_\_\_\_

Compliance with 949 withholding regulations \_\_\_\_\_

Other (specify) \_\_\_\_\_

Banking purpose (specify purpose) \_\_\_\_\_

Changed type of organization (specify new type) \_\_\_\_\_

Purchased going business \_\_\_\_\_

Created a trust (specify type) \_\_\_\_\_

Created a pension plan (specify type) \_\_\_\_\_

**11** Date business started or acquired (month, day, year). See instructions.

**12** Closing month of accounting year

**13** Total number of employees expected in the next 12 months (enter -0- if none).  
If no employees expected skip line 14.

**Agricultural** \_\_\_\_\_ **Household** \_\_\_\_\_ **Other** \_\_\_\_\_

**14** If you expect your employment tax liability to be \$1,000 or less in a full calendar year and want to file Form 944 annually instead of Forms 941 quarterly, check here. (Your employment tax liability generally will be \$1,000 or less if you expect to pay \$4,000 or less in total wages.) If you do not check this box, you must file Form 941 for every quarter.

**15** First date wages or salaries were paid (month, day, year). Note: If applicant is a withholding agent, enter date income will first be paid to nonresident alien (month, day, year) \_\_\_\_\_

**16** Check one box that best describes the principal activity of your business.

Construction  Rental & leasing  Transportation & warehousing  Real estate  Manufacturing  Finance & insurance  Other (specify) \_\_\_\_\_

Health care & social assistance  Wholesale-retail trade  Wholesale-other  Retail trade  Accommodation & food services  Other (specify) \_\_\_\_\_

**17** Indicate principal line of merchandise sold, specific construction work done, products produced, or services provided.

**18** Has the applicant entity shown on line 1 ever applied for and received an EIN?  Yes  No  
If "Yes," write previous EIN here \_\_\_\_\_

Designate the party you want to authorize the named individual to receive the entity's EIN and answer questions about the completion of this form.

**Third Party Designee**

Designee's name \_\_\_\_\_

Designee's telephone number (include area code) \_\_\_\_\_

Address and ZIP code \_\_\_\_\_

Designee's tax number (include area code) \_\_\_\_\_

Applicant's telephone number (include area code) \_\_\_\_\_

Applicant's tax number (include area code) \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

# Practical Matters – Form SS-4



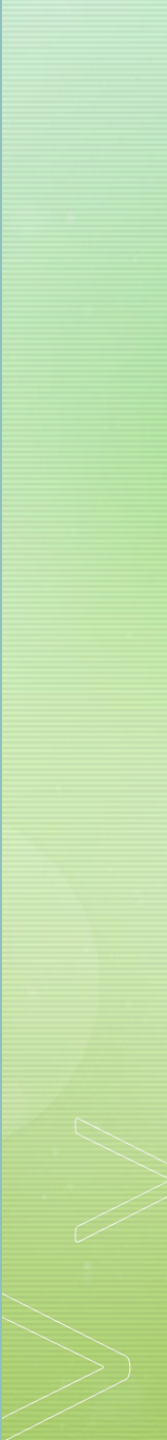
# Practical Matters – The Taxes

- Accurate Accounting is critical
  - Audits are not fun and can be expensive
- Separate v Individual





# Practical Matters – Operating

- Separate bank accounts
  - Separate checks
  - Separate credit cards
  - Insurance
  - Sales Tax
  - Obtaining necessary licenses
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# Creating and Preserving the Corporate Veil

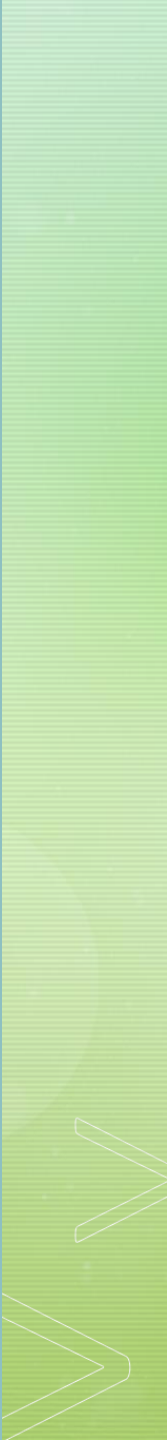
- Assets owned by the business are used by and for the business
- Contract in the name of the business
- CMP (Company Maintenance Program)
  - Minutes of Meetings
  - Bylaws
  - Operating Agreements
- Operate in the name of the business.

## Risks when operating –When should you consider getting advice?

- Signing Contracts
- Being Served
- Permitting
- Hiring Employees
- Tax Notices
- Large Capital Purchases (secured transactions)
- Personal Guarantees



# Example Risk Web

- Every relationship is a potential risk
  - Every relationship can form a contract.
  - You can form a contract without intent.
  - Contracts have terms, clauses, conditions; implied and explicit
  - Contracts are relationships. Correct is not always Right.
- 



Questions?

