



New Jersey Limited Liability Companies

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I. INTRODUCTION: WHY FORM AN LLC?

The Limited Liability Company (LLC) is considered one of the most flexible forms of business.¹ Although the LLC dates back to 1977, it is considered a relatively new form of business and is increasingly popular because it combines several important advantages of two business entities: (1) flow-through taxation and the operating flexibility of partnerships in which all members are allowed to participate in the management of the business² and (2) limited liability for members, a signature feature of corporations.³

A. WHAT IS FLOW-THROUGH TAXATION?

A major advantage of the LLC is flow-through taxation. Unlike corporations, which are subject to double taxation whereby the corporation is taxed first and then the members are each taxed separately, the LLC allows taxes to be passed directly to the members, as is the method followed by Partnerships. However, the flexible nature of the LLC allows the members to elect corporate tax treatment if they so choose, by indicating such preference on their federal taxation forms as permitted by the so-called "check the box" regulations.⁴ With regard to state income tax, flow-through taxation requires the individual owner to pay state income taxes in every state in which the LLC does business.⁵ Registrants may consult the New Jersey Division of Taxation web site at <http://www.state.nj.us/treasury/taxation> for additional information.

B. LIMITED LIABILITY

Unlike Partnerships, all LLC statutes explicitly state that neither individual members nor managers of an LLC are to be held liable for either the debts or obligations or other liabilities of the business.⁶ While members and managers of an LLC may enjoy limited liability, there is no outright protection for all individual actions. There are several important exceptions to the general "no-liability" rule: tort liability premised upon actionable conduct of individual members acting outside the scope of their position, contractual liability, and liability under the doctrine of piercing the corporate veil.

A tort is considered any act, intentional or unintentional, that violates a legal duty and results in damages or injury.⁷ Common torts are assault, battery, trespass, defamation, and infliction of emotional distress, to name a few.⁸ Should a member or manager commit one of these wrongs outside the scope of her business, she will be held individually liable and cannot look to the LLC for protection. Torts that occur within the scope of a member's business may be sheltered by the LLC. Akin to tort is professional malpractice, which is not sheltered under the LLC.⁹

Under contract liability, a member or manager may be held personally liable if she enters into contract under which she has no authority.¹⁰ The LLC may be bound to a contract when the LLC is member-managed and a member enters into a valid contract within the scope of the LLC's business or when a third party relies on the apparent authority of a member and enters into a contract.¹¹ In contrast, if the member enters into the contract without proper authority she may be held personally liable.¹² Alternatively, if the member individually guarantees performance of a contract then she will be held personally liable.¹³ A member may choose to contractually opt out of her limited liability by contracting with a creditor to guarantee the LLC's debts.¹⁴

An individual member may also be held personally liable if that member uses the LLC as a front, or "alter-ego," for personal gain or to cheat or defraud another. In such cases, liability attaches to an individual member by "piercing the corporate veil."¹⁵ Should a member be found guilty of utilizing her company in such a manner, the normal protections afforded to her will disappear and the individual may become personally liable for the debts incurred by the LLC.¹⁶ While case law in this area is underdeveloped, authorities believe that the corporate doctrine of veil-piercing will apply nonetheless.¹⁷ Some indicators that weigh in favor of veil-piercing are: lack of following the appropriate formation procedures, overlooking standard formalities such as meetings, undercapitalization, evidence of personal use of the LLC's funds, and a lack of records.¹⁸ Evidence of a lack of following corporate formalities may not play a huge role in veil-piercing as LLCs are intended to be free and flexible entities, unlike corporations.¹⁹

II. HOW TO FILE FOR AN LLC IN NEW JERSEY

Setting up an LLC is quite simple and can be performed with relative ease. Filing may be performed by a member or non-member including an attorney.²⁰ Under New Jersey statute, an LLC may be comprised of one or more members.²¹ However, New Jersey statute mandates that one-member LLCs will lose the benefit of treatment as a separate legal entity for tax purposes.²² All new LLCs are required to file a Certificate of Formation (also called Articles of Formation) and must register for employer and tax purposes.²³ This can be performed online or the proper forms may be filled out and submitted to the New Jersey Division of Revenue.²⁴

A. FILING THE CERTIFICATE OF FORMATION

The Certificate of Formation must be filed with the Division of Revenue either on-line at the Division of Revenue's website <https://www.state.nj.us/cgi-bin/treasury/revenue/dcr/filing/page1.cgi> or by filling out and submitting the Public Records Filing Form (pages 23-24 of the New Jersey Complete Business Registration Package which is available for download at <http://www.state.nj.us/treasury/revenue/forms/2000.pdf>). The fee for filing this form is \$125. To complete the form, the registrant must be prepared to include:

- Business name that has not already been taken (the website will check the name against a database).
- Purpose of the Business.
- Name and address of the registered agent (This may be the name of an individual of the business entity being formed and the address must be a New Jersey address).
- Address of the registered office (New Jersey address is recommended).
- Latest date of dissolution (registrant may indicate perpetual existence).
- Any other matters the registrant wishes to include.
- Payment of \$125.

B. FILING FOR TAX/EMPLOYER REGISTRATION

Additionally, a Tax/Employer Registration form must be filed with the Division of Revenue either on-line at https://www.state.nj.us/treasury/revenue/dcr/reg/sos_dcrnew01.prod.htm or by filling out and submitting the Business Registration Application (pages 17-19 of the New Jersey Complete Business Registration Package available for download at <http://www.state.nj.us/treasury/revenue/forms/2000.pdf>). Filing this form will provide the LLC with a tax identification number and ensure that the proper tax returns are received.²⁵ The LLC should not file the Business Registration Application without first obtaining a Federal Employer Identification Number (“FEIN”), which is used by the IRS to identify taxpayers required to file certain business tax returns.²⁶ The registrant may apply for a FEIN either on-line at <http://www.irs.gov/businesses/small/article/0,,id=102767,00.html> or by filling out and submitting the SS-4 Form available for download at <http://www.irs.gov/pub/irs-pdf/fss4.pdf>. The Division of Revenue recommends the new business entity register for employer purposes either immediately or no more than sixty days after filing the Certificate of Formation.²⁷ There is no fee for filing the Tax/Employer Registration form.

III. MAINTAINING THE BUSINESS

The LLC is legally formed on the date of the filing of the Certificate of Formation unless the registrant indicates otherwise on the certificate.²⁸ To continue the LLC, it is required that the business submits annual reports and pay annual filing fees²⁹ currently at \$125.³⁰ Failure to file for two consecutive years will result in the business being placed on an inactive list and the name of the business may be subject to use by another organization seeking such name.³¹ Reinstatement will be granted upon payment of all delinquent fees from the last date of filing to the date of reinstatement.³²

IV. LLC RESOURCES

New Jersey Division of Revenue Contact Information	John E. Tully, CPA Director P.O. Box 628 Trenton, NJ 08646-0628
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New Jersey Division of Revenue	http://www.state.nj.us/treasury/revenue
New Jersey Division of Taxation	http://www.state.nj.us/treasury/taxation
New Jersey Complete Business Registration Form (Downloadable)	http://www.state.nj.us/treasury/revenue/forms/2000.pdf
Public Records Filing For New Business Form (Online Certificate of Formation)	https://www.state.nj.us/cgi-bin/treasury/revenue/dcr/filing/page1.cgi
Public Records Filing For New Business Form (Downloadable Certificate of Formation)	http://www.state.nj.us/treasury/revenue/pdfforms/pubrec.pdf
Business Registration Form for Tax/Employment (Online NJ-REG)	https://www.state.nj.us/treasury/revenue/dcr/reg/sos_dcrnew01.prod.htm
Business Registration Form for Tax/Employment (Downloadable NJ-REG)	http://www.state.nj.us/treasury/revenue/forms/njreg.pdf
Database of All New Jersey Business Filing Forms	http://www.state.nj.us/treasury/revenue/revprnt.htm
Federal Employment Identification Number Application (FEIN) (Online)	http://www.irs.gov/businesses/small/article/0,,id=102767,00.html
Federal Employment Identification Number Application (FEIN) (Downloadable)	http://www.irs.gov/pub/irs-pdf/fss4.pdf

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¹ ROBERT W. WOOD, LIMITED LIABILITY COMPANIES: FORMATION, OPERATION, AND CONVERSION xxv (Robert W. Wood, P.C. ed. (2d ed. 2001)).

² *Id.* at 5.

³ *Id.* at 3.

⁴ KARON S. WALKER, FORMATION OF LLCs, IN LLCs FOR START-UPS & GROWING COMPANIES CHOOSING THE BEST ENTITY 75 (PLI Corp. Law and Practice, Course Handbook Series No. B-1272, 2001).

⁵ CLEMENT B. WOOD, FINANCING OF LLCs, IN LLCs FOR START-UPS & GROWING COMPANIES CHOOSING THE BEST ENTITY 75 (PLI Corp. Law and Practice, Course Handbook Series No. B-1272, 2001).

⁶ 2 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES §12.1, 1 (2d ed. 2005).

⁷ WOOD, *supra* note 1, at 23.

⁸ *Id.*

⁹ RIBSTEIN, *supra* note 6, at 12 (citing *Young v. Hamilton*, 92 F. App'x 389 (9th Cir. 2003)).

¹⁰ WOOD, *supra* note 1, at 22.

¹¹ *Id.* at 30.

¹² *Id.* at 31.

¹³ *Id.*

¹⁴ RIBSTEIN, *supra* note 6, at 13.

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ WOOD, *supra* note 1, at 32.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ N.J. STAT. ANN. § 42:2B-2 (West 2004).

²² N.J. STAT. ANN. § 42:2B-6 (West 2004).

²³ N.J. DIV. OF REVENUE, GENERAL INFORMATION,
<https://www.state.nj.us/treasury/revenue/dcr/filing/keyinfo2.htm#ovrbe>.

²⁴ *Id.*

²⁵ N.J. DIV. OF REVENUE, GETTING REGISTERED,
<http://www.state.nj.us/treasury/revenue/gettingregistered.htm#taxpurposes>.

²⁶ *Id.*

²⁷ N.J. DIV. OF REVENUE, GENERAL INFORMATION,
<https://www.state.nj.us/treasury/revenue/dcr/filing/keyinfo2.htm#overall>.

²⁸ N.J. STAT. ANN. § 42:2B-11 (West 2004).

²⁹ N.J. STAT. ANN. § 42:2B-8.1. (West 2004).

³⁰ N.J. DIV. OF REVENUE, GENERAL INFORMATION,
<https://www.state.nj.us/treasury/revenue/dcr/filing/keyinfo2.htm#ovrbe>.

³¹ N.J. STAT. ANN. § 42:2B-8.1 (West 2004).

³² *Id.*