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Forming a Corporation in Georgia - A Starter's Kit

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Research Guides

Forming a Corporation in Georgia - A Starter's Kit

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Introduction

The goal of this project is to assist a lawyer who wants to set up a corporation for his client. It is also useful for a lawyer who wants to start his own business as a solo-practitioner. The scope of this project ranges from the basic requirements of forming a corporation to the factors one should consider while operating a corporation. One of the primary reasons doing business as a corporation is to shield oneself from liability against torts, breach of contract cases and the like. Therefore, this project will also give a short overview of corporate law in how the "shield" of limited liability is created, and possibly lost under Georgia law.

A good resource in addition to this project is the Secretary of State's website. Specifically, http://www.sos.state.ga.us/firststop has a nice pamphlet that compliments this project nicely.

General Information

Any information that is not contained in this project can likely be found on the Secretary of State's website: http://www.sos.state.ga.us/. The Secretary's office is the governmental authority primarily responsible administering corporate activities within Georgia.

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Categories of Corporations

Categories of Corporations

Basically, there are three general categories of corporations in Georgia: 1) Non-profit corporations; 2) Professional corporations; and 3) Business corporations.

Non-profit:

The basic characteristic of a non-profit corporation is that it may not generate a profit. A "profit" is defined as any money above and beyond the amount needed to run the corporation, including a reasonable salary for employees. Any additional money must be put back into the non-profit corporation and used to further the corporation's non-profit purpose.

- Statutory authority: Non-profit corporations are governed by the Georgia Nonprofit Corporation Code, O.C.G.A. § 14-3-101 (2006) et seq.
- Secondary sources: 14 Ga. Jur. Corporations §1:15, 1 Kaplan's Nadler Georgia Corporations, LP & LLC § 7-35.

Professional:

Professional corporations are special corporate forms for professions such as dentists, lawyers, engineers, architects, and land surveyors.

- Statutory authority: Professional corporations are governed by the Georgia Professional Corporation Act, O.C.G.A. § 14-7-1 (2006) et seq.
- Secondary sources: 14 Ga. Jur. Corporations, etc. §1:17, 1 Kaplan's Nadler Georgia Corporations, LP & LLC § 7-35.

Business:

Business corporations are the most common category of corporations in Georgia. There are several different varieties such as the: Limited Liability Corporation, Limited Partnership, Close Corporation, and "C" and "S" Corporation.

- Statutory authority: Business corporations are governed by the Georgia Business Corporation Act, O.C.G.A. § 14-2-101 to 14-2-1703 (2006).
- Secondary sources: 14 Ga. Jur. Corporations § 1:14, 1 Kaplan's Nadler Corporations, LP & LLC § 7.

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Choosing a Specific Corporate Form

Choosing a Specific Corporate Form

When starting a business it is recommended you choose a specific type of entity to conduct business operations with. There are several different types of corporate forms in Georgia, each with their different characteristics. The chart below is helpful in understanding each. The focus of this project is to explain how to start a corporation in Georgia rather than something like a partnership, although that possibility should be looked into as well.

	Control	Liability	Taxes	Administration
Sole Proprietorship	Sole Proprietor has total control of business operations and complete share profits	All of Sole Proprietor's personal and business assets are at risk	Taxes reported on Sole Proprietor's tax forms	No administrative requirements other than obtaining business license and registering trade name
General Partnership	Management and profits shred between partners per the terms of the Partnership Agreement	General Partners are generally liable for obligations of General Partnership and tort damages provided by other General Partners	"Pass-Through" Entity. Each general partner is taxed directly upon his/her share of profits	No formal administrative requirements other than obtaining proper licenses and permits.
Limited Partnership	General and Limited partners share in the control and profits of partnership per the terms of the Partnership Agreement.	Limited partners: not personally obligated for liabilities of partnership General partners: same as partners in a General Partnership	Pass-Through Entity. Each Partner is taxed directly upon his/her share of profits	Registration requirements similar to Corporations, but no burdensome record-keeping or tax filing requirements
Corporation	Shareholders: ownership rights & elect directors Directors: govern general affairs & appoint officers Officers: manage business operations	Neither Officers or Directors or Shareholders are liable for debts incurred by the Corporation or torts committed in conducting the Corporation's business	"Double-Taxation" unless 'S' Corporation, which is a "Pass-Through" Entity similar to a General Partnership	Formal incorporation process and annual registration with Secretary of State. Comprehensive record-keeping and tax filing requirements
Limited Partnership	Members share profits per Operating Agreement which specifies management procedures	Generally, Members risk only their investment in the LLC	May be taxed as Partnership or Corporation, depending upon the election filed with the IRS	Similar to Corporation's requirements with regard to formation and operation

Corporate forms continued:

Non-profit corporations:

- 14 Ga. Jur. Corporations § 1:15
- O.C.G.A. §§ 14-3-101 to 14-3-1703 (2006)

Professional corporations:

- 14 Ga. Jur. Corporations 1:17
- O.C.G.A. §§ 14-7-1 to 14-7-7 (2006)

- http://www.sos.state.ga.us.plb/
  - This is the Professional Licensing Boards Division of the Secretary of State

Business corporations:

- 14 Ga. Jur. Corporations § 1:14
- O.C.G.A. §§ 14-2-101 to 14-2-1703 (2006)
- Kaplan, Georgia Corporations, Limited Partnerships, & Limited Liability Companies with Forms §§ 3-1 to 3-5, 3-9, 7-1 to 8-11, 9-1 to 9-37, 12-1 to 13-12 (2004 Ed.).

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Basic Requirements to Form a Corporation

Employment

(See generally 14 Ga. Jur. Employment § 2:9)

When most corporations begin the employees are also the "incorporators," the people who took the effort to form the corporation. If a corporation is to grow a basic knowledge of employment law is essential to protect the corporation's officers from personal liability and protect the corporation itself from liability.

Georgia is an "at-will employment" state. This basically means that an employer can fire an employee for any reason whatsoever. Schuck v. Blue Cross & Blue Shield of Georgia, 244 Ga. App. 147 (2000). See also O.C.G.A. § 34-7-1 (2006). However it is important to realize that this changes if there is an actual employment contract involved.

An employment contract may be implied through conduct (implied in fact) and may be written or oral. Your best bet when hiring an employee for the first time is have them sign a short employment contract that specifically states that employment will be "at-will." Below are some additional resources regarding employment laws, rules, and regulations:

- Department of Labor: The DOL promulgates general rules and regulations concerning the hiring and firing of employees. http://www.dol.state.ga.us/.
- The Occupational Safety and Health Administration: OSHA also creates rules and regulations regarding safety in the workplace that a corporation's owner should be aware of. http://www.osha.gov/.
- Employee reporting requirements: Pursuant to O.C.G.A. § 19-1109.2 (2006) all corporations in Georgia are required to report who they employ. You should also check out 42 U.S.C. 653A for federal reporting requirements. A business may report their employees online at http://www.ga-newhire.com/.
- Employment contract considerations: 7B Am Jur. Legal Forms 2d Employment Contracts § 99:4, 1 Ga. Forms Legal & Bus. § 2:4.
- Minimum Wage: Be careful to pay your employees enough money. 29 U.S.C.A. § 206.
- Overtime: Working your employees longer hours requires higher pay. 29 U.S.C.A. § 207.
- Fair Labor Standards Act: Make sure and review this statute to see what requirements the federal government puts on employers' treatment of their employees.
- Work breaks: Georgia does not require a certain amount of breaks or time for lunch. However, federal law requires compensation for breaks less than thirty (30) minutes. For more information see 29 C.F.R. §§ 785.18, 785.19.
- Discrimination: Be fairly well versed federal law regarding discrimination before making a hiring or firing decision. A discrimination claim can bankrupt a young business.
  - Federal Title VII discrimination:
    - www.eeoc.gov/policy/vii.html
    - 87 A.L.R.2d 120 (explains what types of corporations are covered by the federal civil rights statutes)
    -
  - Federal age discrimination: www.eeoc.gov/policy/adea.html.
  - Federal disability discrimination: www.eeoc.gov/policy/rehab.html.
  - Sex Discrimination in Employment Act:
    - O.C.G.A. §§ 34-5-1 to 34-5-7 (2006)
    - 14 Ga. Jur. Corporations § 10:28
  - Georgia Age Discrimination in Employment Act:
    - O.C.G.A. § 34-1-2 (2006)
    - 14 Ga. Jur. Corporations § 10:31
  - Georgia Equal Employment for Persons with Disabilities Code:
    - O.C.G.A. §§ 34-6A-1 to 34-6A-6 (2006)
    - 14 Ga. Jur. Corporations § 10:34

Basic Requirements to Form a Corporation

(See generally 14 Ga. Jur. Corporations § 2:4 et seq.)

There are several things that must be in order before a corporation is formed. If these basic things aren't completed you might risk losing the limited liability that operating a corporation provides. This danger is discussed more below, but here are the basic requirements:

- Business license: Whenever a person wishes to start a corporation Georgia requires that they first receive a business license from the county where the corporation will operate. This allows the county to exert some "local control" over the corporations that operate within its boundaries. To apply for a business license go to the chamber of commerce of the county where the business will operate at http://www.gachamber.com/.
- Tax ID number: Since a corporation is a separate legal entity it must be assigned a federal tax ID number. The Department of Revenue is responsible for taxation and more information can be found at their website: www.irs.gov/business/small. A corporation may also be subject to taxation in Georgia. More information can be found at the Department of Revenue's website: http://www.etax.dor.ga.gov/.
- Articles of incorporation: The best way to think of the Articles of Incorporation is as a birth certificate for the corporation. Remember, that there is no limited liability shield until a corporation is actually formed which officially occurs when the Secretary of State's seal is affixed to the Articles of Incorporation. See O.C.G.A. § 14-2-203(b) (2006). In Georgia, Articles of Incorporation must contain several things:

1) A corporate name. O.C.G.A. § 14-2-401 (2006).

2) The number of shares the corporation is authorized to issue. O.C.G.A. § 14-2-202(a)(2) (2006).

3) The street address and county of the corporation's initial registered office and the name of its registered agent at that office. O.C.G.A. § 14-2-202(a)(3) (2006).

4) The corporation's mailing address, if different than the initial registered office. O.C.G.A. § 14-2-202(a)(5) (2006).

5) The number of directors or the manner in which a number will be fixed. O.C.G.A. § 14-2-803(a) (2006).

- Close corporations: A close corporations is a special type of corporation in Georgia. If your corporations is going to be run by a very few individuals and/or the incorporators/shareholders/directs are going to be one and the same, a close corporation may be the right form for you. For example, in a regular corporation the directors must act in the best interest of the stockholders, which creates a problem in a close corporation because the shareholders and directors are one and the same.
  - It must be specified in the Articles if a Corporation will be a "close corporation."
  - O.C.G.A. §§ 14-2-901 to 14-2-950 (2006) governs close corporations
- Publication: Whenever a corporation is formed a "notice of incorporation" must be published in a newspaper. O.C.G.A. § 14-2-201.1(b) (2006). For example:

[Name of newspaper]
[Address]

Re: [Name of corporation]

In accordance with O.C.G.A. § 14-2-201.1(b), please print the following notice of incorporation in your newspaper once a week for two consecutive weeks beginning within 10 days after you receive this request:

NOTICE OF INCORPORATION

Notice is given that the articles of incorporation, which incorporated [name of corporation], have been delivered to the Secretary of State for filing in accordance with the Georgia Business Corporation Code. The initial registered office of the corporation is located at [address of registered office] and its initial registered agent at that address is [name of agent].

A check for $40 is enclosed to cover the cost of publication. We will appreciate your prompt response to our request.

Sincerely,

[Signature and address of incorporator(s) or representative]

2 Ga. Forms Legal & Bus. § 13:85.50 (gives a sample form for giving notice of incorporation)

- The Secretary of State's website has a list of which newspaper to publish a notice of incorporation depending on where the corporation will operate: www.sos.state.ga.us/corporations/legal_organs.htm

- Fees: There are several fees to incorporate a business, including filing of the articles of incorporation, applying for a certificate of authority, and annual registration. If they aren't paid it may prevent a corporation from officially being formed (and hence limited liability attaching). So pay attention to any fees that must be paid.
  - O.C.G.A. § 14-2-122 (2006) gives a list of fees that are associated with forming and maintaining a corporation. If these fees are not paid the Secretary of State might revoke a corporation's legal status, which would obviously cause serious problems if you continue to operate your business you could be held personally liable during the time its

license is revoked.

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Risks and Liability

Director or Shareholder Liability

Directors and officers of a corporation owe the corporation a "duty of care, which basically means that before making a business decision they must take reasonable efforts to inform themselves of important facts and ultimately make a responsible decision based on those facts. The standard "duty of care" that it owed to a corporation is that of a reasonable director/officer in the same situation, and there are two elements to this standard of care: 1) were reasonable efforts taken to inform oneself of the risk and benefits of the decision and 2) was the decision rationally based off of those facts.

So basically, as long as a person making a decision for the corporation collects the necessary facts surround their decision; it will be protected by the business judgment rule's lax standard of a "rational" purpose. This rule reflects the reality that in the corporate world businesses are expected to take risks, even those that a normal person wouldn't make with their own money.

"Piercing the corporate veil" may occur when an officer or director does not live up to their standard of care. If this is the case, the corporations "shield" of liability will be pierced so as to hold the individuals personally liable.

In addition to failing to satisfy the standard of care, an officer or director of a corporation may be held personally liable if they act in a way that displays a disregard for the corporation's separate legal status.

For more information see the following resources:

- O.C.G.A. § 14-2-842(a)(2) (2006)
- 1 Kaplan's Nadler Georgia Corporations, LP & LLC § 10-18, "Responsibilities and Liabilities of Directors and Officers of a Corporation."
- 1 Kaplan's Nadler Georgia Corporations, LP & LLC §10-21, "Officers of a Corporation."
- 14 Ga. Jur. Corporations §5:26

For specific information on piercing of the corporation veil see:

- 14 Ga. Jur. Corporations § 1:22
- NEC Technologies, Inc. v. Nelsen, 267 Ga. 390 (1996).
  - NEC held that a corporation's veil could be pierced if 1) a person's use of the corporation rendered the corporation a "mere instrumentality" of its owner, 2) the separate personalities of the corporation and stockholders no longer exist, and 3) adherence to the separate corporate form would promote injustice or protect fraud.

Business Torts and Risks

Once a corporation is up and running it is important to know the risks of doing business. Much like a human being, a corporation may be held liable for its conduct in an action for tort or contract. An important point to remember is that even though a person commits a tort while acting in the scope of their employment, they are still personally liable. This is a well established rule of law regarding corporations. However, some protections are afforded if the tort was not intentional. Below is a good list of resources to further research business torts:

- See generally 14 Ga. Jur. Business Torts and Trade Regulation § 1:1
- Consumer protection laws:
  - Georgia Uniform Deceptive Trade Practices Act - This Act's overall purpose is to protect consumers against false advertising and misrepresentation of a product's characteristics, quality, etc...
  - O.C.G.A. §10-2-370 (2006).
  - See also 18 Ga. Jur. Employment and labor § 9:11
- Practices forbidden by states generally:
  - 89 A.L.R. 44
- Georgia Fair Business Practice Act
  - This Act protects consumers from deceptive trade practices and ensures a "level playing field" between businesses. O.C.G.A. § 10-1-390 (2006). It is administered by the Governor's Office of Consumer Affairs (OCA) and statute. http://www.consumer.ga.gov/.
  - See also Georgia Law of Torts § 32-6, "Fair Business Practices Act of 1975
- Retail Installment and Home Solicitation Act:
  - Governs installment contracts, where a consumer can buy something and make periodic payments. The purpose of the Act is to protect from extremely high rates among other practices. O.C.G.A. § 10-1-1 (2006) et seq

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Additional Resources

Securities

When incorporating one thing the Articles of Incorporation must have is the number of shares, if any, the corporation is authorized to issue. It is important to think ahead of time how many shares you want the corporation to issue because it issuing any shares above and beyond that amount requires amending the Articles of Incorporation, which might be difficult if there are multiple stockholders. Here are some basic resources about corporate shares in Georgia.

- O.C.G.A. §§ 10-5-1 to 10-5-24 (2006)
- 14 Ga. Jur. Corporations §19:1
- Georgia Securities Act of 1973
- http://www.sos.state.ga.us.securities/

Additional Resources

United States Small Business Association

- The United States Small Business Administration was created to help small businesses succeed. There is a local office in Atlanta. The website is excellent secondary sources on how to run a small business. For example, one section has "standard operating procedure" manuals that are specifically tailored for a certain type of business. There's also a step-by-step page that walks you through the process of starting a small business. The Small Business Development center does the same thing basically. (http://www.sbdc.uga.edu/). www.sba.gov/ga

Georgia Tech Economic Development Institute

- Georgia Tech has the Economic Development Institute, which provides a host of resources to increase productivity and develop you business. It is especially tailored to businesses involving technology. http://www.edi.gatech.edu/

Uniform Commercial Code

The Uniform Commercial Code is a law passed by scholars that most states have adopted, including Georgia. The Code provides the contract law for the buying and selling of all types of "goods" as defined in the Code. So if you're business will be involved in selling goods, knowledge of the UCC will be very important. It is good to know anyways, just in case you corporation needs to buy goods from another vendor as well.

- O.C.G.A. § 11-1-101 (2006) et seq.
- 15A Am. Jur. 2d, Commercial Code
- Anderson on the Uniform Commercial Code (3d Ed.)

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