

15 STEPS TO FORM A BUSINESS IN WEST VIRGINIA

Introduction

You have a great idea and you would like to start a new business in West Virginia. However, you have never gone through the process of forming a company. You start to research the many requirements to form your new organization and become a bit overwhelmed. No need to fear, the West Virginia University College of Law Entrepreneurship and Innovation Law Clinic has developed this checklist to assist you in this process and make forming your new company more manageable. Although this checklist was designed to encompass the main requirements to form a new organization in West Virginia, there may be additional steps you will need to take depending on the type of business you are forming.

Please note: This checklist is provided for informational purposes only. It does not provide legal advice for any individual situation and should be used in conjunction with, and not as a substitute for, qualified legal counsel. This checklist reflects the laws of West Virginia as of the date it is written. As such, you should verify that the information contained in this checklist remains current.

Online Registration and Resources

- Create a free online account for your business at www.business4wv.com.
- Helpful information and forms to be filed with the Business and Licensing Division are available on the “Business and Licensing” page of the Secretary of State’s website at sos.wv.gov.

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□ **STEP 1: Develop a Business Plan**

The first step in forming any new company is to develop a business plan. A business plan is important because it will help you to determine whether your business idea is even feasible. A business plan is a written document that outlines the goals for your company and how to achieve them, any potential issues your company may encounter and how to resolve those issues, the organizational structure of your company, and the amount of capital required to finance your business and to keep it running. A business plan consists of seven key sections listed below:

1. **Executive Summary** – This section of your business plan is essentially an overview of the entire document. It should be clear and concise. The goal is to capture your reader's attention so they want to learn more about your company.
2. **Business Description** – This section should discuss why you started your company, your organizational structure, and any goals you may have for your company.
3. **Products and Services** – This section should clearly describe the products or services offered by your company, details about your suppliers, product or service costs, and the net revenue expected from the sale of those products or services.
4. **Market Analysis** – Your market analysis should include the size and demographics of your intended customer segments, an industry description and outlook, current and projected marketing data for your product or services, and a detailed evaluation of your competitors.
5. **Strategy and Implementation** – This section will summarize your sales and marketing strategy, and how you plan to implement that strategy.
6. **Operations and Management** – This section will outline your company's organizational structure by identifying the owners and key individuals in the company.
7. **Financial Plan and Projections** – Finally, this section should include your company's forecasted income statements, balance sheets, cash flow statements, and capital expenditure budgets for the next five years.

As your company grows, you will need to continue to update your business plan. It is recommended to update your business plan annually but you may need to update your business plan monthly or even weekly. As changes in your company occur, it is important that your business plan reflects these changes. This will allow you to continually strategize how to improve your company and to meet any objectives you have set.

□ **STEP 2: Determine a Name**

The next step to form a business in West Virginia is to choose a name. Choosing a name for your company may seem easy. However, there is a lot that goes into determining the right name for your company. State law requires that the name requested be distinguishable from any other domestic or foreign business entities registered with the West Virginia Secretary of State's office. One of the most common reasons for rejection of business filings is that the proposed name of the company is already in use in West Virginia.

You can do an initial search for the names you are considering on the Business Organizations Information System. You can find the Business Organizations Information System on the Secretary of State's website or by following the link listed below.

<http://apps.sos.wv.gov/business/corporations/>

When conducting the search, you want to search using only the most distinctive word in the name. Refrain from searching common words like "construction" or "food" to prevent you from finding too many matches. In addition, you should check the database of trademarks registered with the U.S. Patent and Trademark Office (USPTO). Use the Trademark Electronic Search System (TESS) to conduct a free online search of the USPTO database. You may also wish to consult with a trademark lawyer on issues regarding business names.

Depending on the business entity type for your organization, you may have to include a corporate term in your name. For example, under West Virginia law, a limited liability company must contain "limited liability company" or "limited company" or the abbreviation "L.L.C.", "LLC", "L.C." or "LC". Additionally, a corporation

must include one of the required terms, "corporation," "company," "incorporated," "limited," or an abbreviation of one of these terms.

Once you have found a name you think is available, call the Business Division at (304) 558-8000 to see if the staff believes there will be no conflict. However, a telephone check on availability of a name is not a guarantee, but it will help find a name you can use. You can then file to reserve your name for 120 days by filing an Application for Name Reservation with the Business & Licensing Division. This form can only be filed by mail for a filing fee of \$15 with checks made payable to the West Virginia Secretary of State. This process is useful to reserve a business name while you prepare to file other organizational documents for your business. You can find the Application for Name Reservation on the Secretary of State's website or by following the link listed below.

<https://sos.wv.gov/business-licensing/forms/Documents/Multiple-Company-Types/nr1.pdf>

STEP 3: Register a Tradename (DBA)

Additionally, West Virginia allows companies to conduct business under a tradename (or "DBA") that is different from the registered name of your company. For example, a company may want to register a tradename if they normally refer the company by a completely different name, a shortened name, or a name which drops the corporate term such as "incorporated" or "LLC". West Virginia law sets no limits on the number of DBAs which may be registered by one person or company. Before filing a DBA, the business should again conduct an initial search of the name on the Business Organizations Information System.

You can then file a DBA by filing an Application for Tradename (DBA) with the Business & Licensing Division. This form can be filed online on your www.business4wv.com account or by sending the form to the Business Organizations Division. There is a \$25 filing fee made payable to the West Virginia Secretary of State for each DBA your company would like to register. It is important to note that DBAs are not "protected" from use by other companies through trade name registration. To protect a DBA that is in actual use, a service mark, or trade mark application should be considered. You can find the Application for Tradename (DBA) on the Secretary of State's website or by following the link listed below.

<http://sos.wv.gov/business-licensing/forms/Documents/Multiple-Company-Types/nr3.pdf>

STEP 4: Determine the Principal Office Address

The next step in forming a business in West Virginia is to select an address for your company's principal office. This is generally the address where all organizational documents are maintained and where correspondence with your company can be sent. You will need to know this address when you begin registering your business with the Secretary of State. For many startup organizations, the principal office will be the organizer's home. In West Virginia, the principal office address does not need to be located in West Virginia. After you have determined the initial address for your principal office, you may change the principal office address at any time by filing with the Secretary of State an Application to Appoint or Change Address, Agent, or Officers [Form AAO] for a \$15.00 fee. You can find the Form AAO on the West Virginia Secretary of State's website or by following the link below.

<http://sos.wv.gov/business-licensing/forms/Documents/Multiple-Company-Types/ao.pdf>

STEP 5: Designate a Registered Agent

Your organization may want to designate a registered agent. A registered agent is a responsible third-party located in West Virginia who is designated to receive service of process notices or correspondence from the Secretary of State's office. Under West Virginia law, most organizations are not required to have a registered agent. However, if the principal office address for your company is located outside of West Virginia and the company does not have a physical location inside of the state, you may want to designate a registered agent to ensure that any governmental notifications or service of process notices are received. Additionally, you can change your registered agent at any time by filing the Form AAO with the West Virginia Secretary of State's office for a \$15.00 fee. Please note, a West Virginia unincorporated nonprofit

association is required to file a statement appointing an agent authorized to receive service of process (Statement of Agent of Process for Unincorporated Non-Profit Association) with the Secretary of State's office for a \$15.00 fee. You can find the Statement of Agent of Process for Unincorporated Non-Profit Association on the West Virginia Secretary of State's website or by following the link below.

<http://sos.wv.gov/business-licensing/forms/Documents/Other/una1.pdf>

STEP 6: Determine an Entity Type

Now that you have determined the basic aspects of your organization, it is time to decide the best legal structure for the company. There are many factors that go into determining what structure works best for your type of organization such as who will control the company, how decisions are to be made, and liability and tax considerations. Choosing the right structure for your business the first time is very important because attempting to change the structure later can be very time consuming and costly. Below is a list of the most common types of legal structures that can be formed in West Virginia.

Sole Proprietorship – A Sole Proprietorship is the simplest and most common form of business structure. In a sole proprietorship, a single individual owns the business and engages in a business activity without creating a legal entity. This type of business structure can be very risky because the owner assumes all the liability of the company. However, the business entity is not taxed, as the profits and losses are passed through to the sole proprietor.

General Partnership – A general partnership is created when two or more persons associate to carry on a business for profit. Under a general partnership, all partners are liable for the acts of the organization. Thus, even innocent partners can be held responsible when another partner commits inappropriate or illegal actions. Additionally, a partnership has pass through taxation similar to a sole proprietorship.

Limited Partnership (LP) – A limited partnership is formed by two or more persons who act as one or more general partners and one or more limited partners. A limited partnership is a relationship where the limited partner may not be involved in the day-to-day management of the business. This partner may have just contributed funds to the business, and often the funds that they contribute are the extent of their liability. Limited partnerships are required to have at least one general partner to run the day-to-day operations of the business. However, unlike a general partnership, limited partners may not be liable for the acts of the organization

Limited Liability Partnership (LLP) – A limited liability partnership is similar to a Limited Partnership but can limit the liability of its general partners. The difference between a LP and a LLP is that a LP can be formed by any business type, while LLPs can only be used by certain types of professions, such as accountants and lawyers.

Joint Venture – Joint ventures act as a general partnership, but for only a limited period of time or for a single project.

Corporation (For-Profit) - A corporation is a legal entity that is separate and distinct from its owners. A corporation has limited liability, central management, perpetual duration, and transferability of ownership interests. The owners of a corporation are shareholders who represent their ownership by the holding of common stock. The shareholders elect a board of directors who manage the affairs of a corporation. A corporation has double taxation. This means that the income of a corporation is taxed at both the corporate level and at the shareholder level.

Nonprofit Corporation – A corporation can be formed for profit or non-profit. A nonprofit corporation is usually formed for some charitable purpose. A nonprofit may not have or issue stock. However, a nonprofit corporation may have members. Additionally, forming a nonprofit corporation in West Virginia does not automatically qualify you for federal tax exemption with the IRS. Once you have created your nonprofit, you must file a separate application with the IRS for federal tax exemption.

Benefit Corporation – In West Virginia, you can also form a benefit corporation. A benefit corporation is a for profit corporation that combines aspects of both a profit and nonprofit corporation. One of the purposes that a benefit corporation must be formed for is creating a “general public benefit.” Under West Virginia law, a “general public benefit” is defined as “a material positive impact on society and the environment taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation.” This purpose is in addition to its principal business purpose. It may also identify one or more “specific public benefits” that it is the purpose of the corporation to create. A “specific public benefit” is defined as “a benefit that serves one or more public welfare, religious, charitable, scientific, literary or educational purposes, or other purposes or benefit beyond the strict interest of the shareholders of the benefit corporation, including: (1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) preserving or improving the environment; (4) improving human health; (5) promoting the arts, sciences or advancement of knowledge; (6) increasing the flow of capital to entities with a public benefit purpose; and (7) conferring any other particular benefit on society or the environment.”

Cooperative Corporation– A cooperative is an association of persons that is owned and controlled by the members to meet their common economic, social, and/or cultural needs through a jointly-owned business. In West Virginia, three or more persons engaged in the production of "agricultural products" may form a corporation as a "cooperative association" with or without capital stock. Additionally, twenty incorporators may form a cooperative to "engage in any qualified activity in connection with any internet service."

Limited Liability Company (LLC) – A Limited liability company (LLC) is a type of business structure that has traits of both a partnership and a corporation. Like a corporation, the LLC protects its owners from the liabilities and debts of the business. Like a partnership, the LLC passes its profits and losses to its owners, who report them on their personal tax returns. The ownership of an LLC lies with the members. A member can be an individual, partnership, corporation, trust, and any other legal entity. An LLC can be managed by its members or managed by managers.

Voluntary Association – A voluntary association is formed by a group of individuals for the purpose of conducting business, whether profit or nonprofit, to accomplish a common purpose. A statement of consent and recognition of the application of the laws of West Virginia with respect to corporations to the voluntary association is required as part of the application.

Unincorporated Non-Profit Association – An unincorporated non-profit association consists of members and is a legal entity separate from its members for the purposes of determining and enforcing rights, duties and liabilities in contract and tort.

STEP 7: Obtain your EIN

If your company has or intends to have employees or is a corporation, LLC, association, LP, or LLP you must register with the Internal Revenue Service to obtain a Federal Employer Identification Number (EIN). You may complete an online registration at www.irs.gov or you may request a paper application by contacting the IRS at 1-800-829-1040. If you are registering one of the business structures that registers through the West Virginia Secretary of State, you must obtain the EIN before attempting to register online through www.business4wv.com. You will be offered the opportunity to apply for the EIN (if you do not already have one assigned to your business) during the online registration process, but your online registration will be delayed until you can provide your EIN when prompted to do so through the online registration system.

STEP 8: Register with the Secretary of State

You have done all of the beginning planning for your organization and are now ready to form your company. In order to form your company in West Virginia you must register with the Secretary of State by filing the appropriate formation documents. However, not all business entity types must register with the Secretary of State's office. If you are forming a sole proprietorship, a general partnership, or joint venture there is no

filing requirement with the Secretary of State's Office. However, all business entities (including the three listed above) are required to register with the West Virginia State Tax Department for the Business Registration Certificate to obtain a business license identification number listed in Step 9. Below is a list of the most common formation documents along with links to the fill-in-the-blank documents developed by the West Virginia Secretary of State's office.

Articles of Incorporation – If you are forming a corporation (for-profit), a nonprofit corporation, or cooperative corporation you must develop and file an Articles of Incorporation with the West Virginia Secretary of State. Below is a link to the Business & Licensing Division's fill-in-the-blank form, which may be used as the articles of organization. The first link is to the articles of incorporation for a for-profit corporation (Form CD-1). The filing fee for the articles of incorporation of a for-profit corporation is \$100.00. The next link is to the articles of incorporation with a nonprofit IRS attachment (Form CD-1NP). The filing fee for the articles of incorporation of a nonprofit corporation is \$25.00. The final link is the articles of Incorporation for a cooperative association (Form CAD-1). The filing fee for the articles of incorporation of a cooperative association is \$25.00.

<http://sos.wv.gov/business-licensing/forms/Documents/Corporation/cd-1.pdf>

<http://sos.wv.gov/business-licensing/forms/Documents/Corporation/cd-1np.pdf>

<http://sos.wv.gov/business-licensing/forms/Documents/Corporation/cad-1.pdf>

Articles of Organization – To form an LLC, you must prepare and file the articles of organization for the LLC. Below is a link to the Business & Licensing Division's fill-in-the-blank form (Form LLD-1), which may be used as the articles of organization. The filing fee for the articles of organization for an LLC is \$100.00.

<http://sos.wv.gov/business-licensing/forms/Documents/Limited-Liability-Company/lld-1.pdf>

Certificate of Limited Partnership – To form an LP, you must prepare and file a certificate of limited partnership. Below is a link to the Business & Licensing Division's fill-in-the-blank form (LP-1), which may be used as the certificate of limited partnership. The filing fee for the certificate of limited partnership for an LP is \$100.00.

<http://sos.wv.gov/business-licensing/forms/Documents/Limited-Partnership/lp1.pdf>

Statement of Limited Liability Partnership – To form an LLP, you must file a statement of limited liability partnership. Below is a link to the Business & Licensing Division's fill-in-the-blank form (Form LLP-1), which may be used as the statement of limited liability partnership. The filing fee for the statement of limited liability partnership is \$250.00.

<http://sos.wv.gov/business-licensing/forms/Documents/Limited-Liability-Partnership/llp1.pdf>

Statement of Organization – If you intend to form a voluntary association, you must file a statement of organization. Below is a link to the Business & Licensing Division's fill-in-the-blank form (Form VA-1), which may be used as the statement of organization. The filing fee for a statement of organization for a voluntary association is \$50.00.

<http://sos.wv.gov/business-licensing/forms/Documents/Voluntary-Association/va1.pdf>

STEP 9: Register with the State Tax Department

All businesses are required to register with the State Tax Department for the Business Registration Certificate (i.e., Business License) to obtain a business license identification number. The West Virginia Office of Business Registration paper application (Form WV/BUS-APP) is the primary form provided by that agency to apply for this certificate. You can find the Form WV/BUS-APP on the State Tax Department's website or following the link below. When filling out the Form WV/BUS-APP, all businesses must also register for an Unemployment Compensation Account. The State Tax Department also provides information relating to all taxes such as sales and use, license, severance, gasoline, withholding, and much more.

<https://tax.wv.gov/Documents/TaxForms/busapp.pdf>

STEP 10: Develop Organizational Documents

Depending on the type of business entity you have formed, there are some additional internal documents that you should develop that will govern the internal affairs of your organization. Below is a list of some of the. Below is a list of the most common types of internal documents.

Partnership Agreement – If you are forming a partnership, limited partnership, or limited liability partnership, you may want to develop a partnership agreement. A partnership agreement is a contract between partners in a partnership which sets out the terms and conditions of the relationship between the partners.

Bylaws – If you have formed a Corporation (for-profit), a Nonprofit Corporation, or Cooperative Corporation state law requires that you adopt Bylaws for your organization. Bylaws act as an internal plan on how the corporation is to be run and operated. Bylaws also state the rights and powers of the shareholders, directors and officers.

Shareholders' Agreement – Also, if you have formed a Corporation (for-profit), a Nonprofit Corporation, or Cooperative Corporation you might consider developing a shareholders' agreement. A shareholders' agreement is an arrangement among a company's shareholders, describing how the company should be operated, along with shareholders' rights and obligations.

Membership Agreement – If you have formed a Cooperative or Nonprofit Corporation you may need to develop membership agreements. A membership agreement is a contract between the organization and the organization's members which states the responsibilities and rights of the organization and the members.

Operating Agreement – If you are forming an LLC, you should consider developing an operating agreement even if it is a single-member LLC. An operating agreement is a written agreement between the owners (called "members") of the LLC. The operating agreement is like a partnership agreement or corporate bylaws in that it is designed to govern the internal operations of the business in a way that suits the specific needs of its members. Once the document is signed by the members of the LLC, it becomes an official contract between the members which binds them to its terms of the agreement.

STEP 11: Hold an Organizational Meeting

Now that you have decided on the entity type that works best for your organization, you should hold your initial organizational meeting. During your organizational meeting you will determine who will run/own the organization. If you are forming a Sole Proprietorship or single member LLC, this may just be you. However, if you are in a corporation you will need to elect a Board of Directors and also issue shares of stock. Under West Virginia law, a board of directors must consist of three or more individuals. It is important to place individuals in the organization that have experience in the type of business you are forming.

STEP 12: Apply for Permits and Licenses

Depending on the type of business you are forming and location of your business, you may need to apply for additional permits and licenses. For example, you may have to get an additional business license to operate your business in a certain city or municipality. Also, you may have to get additional permits depending on the type of business you are operating such as professional or occupational license. For more information regarding additional permits and licenses you may need, visit the Secretary of State's website or follow the link below.

<http://www.business4wv.com/B4WVPublic/default.aspx?pagename=applyforlicense#resultsBookmark>

STEP 13: Open a Bank Account

Now that you have formed your business in West Virginia, your next step is open a business bank account. It is important to keep your business banking separate from your personal banking. This will allow you to keep accurate records of your business's financials. Additionally, if your business is incorporated, the IRS requires that you keep a separate business bank account.

□ **STEP 14: Obtain Business Insurance**

There are various forms of business insurance that you may consider to obtain for your company. However, if you plan to have employees in West Virginia, you are required by law to obtain workers' compensation insurance coverage. Failure to obtain and maintain proper Workers' Compensation Insurance coverage will subject you to a number of consequences, including the following:

- Administrative fines by the Insurance Commissioner up to \$10,000;
- Loss of immunity against civil liability (you may be sued by your employee);
- Immediate revocation of business license and permits;
- Business may be enjoined from continuing operation;
- Business and personal liability for all workers' compensation claims paid plus attorney's fees.

For more information regarding Workers' Compensation Insurance you can contact the following:

Offices of the Insurance Commissioner
Employer Coverage Unit
1124 Smith Street
Post Office Box 11682
Charleston, West Virginia 25339-1682
Web site: <http://www.WestVirginiainsurance.gov>
Telephone: 304 558-6279, Ext. 1202

Additionally, your organization may want to consider obtaining other types of business insurance such as:

Property and Casualty Insurance – Property insurance covers the physical location of the business (even if it is rented or leased) and its contents from things like fire, theft, flood, and earthquakes—although read the terms carefully to make sure they include everything you need. Casualty insurance, on the other hand, covers the operation of the business, but the two are usually grouped together in policies.

Commercial Auto Insurance – Commercial auto insurance covers your business for loss or damage to vehicles used by your business and for damage to others caused by your business vehicles. Note that vehicles used for business are not covered under your personal auto insurance policy even if a vehicle is used for both business and personal purposes.

Liability Insurance – Liability insurance covers you in the event someone sues you for negligence, which can occur, for instance, if someone falls on your property.

Product Liability Insurance – Product liability insurance covers your business for damages caused by a product designed, supplied, or manufactured by your business.

Business Interruption Insurance – Business interruption insurance can make up for lost cash flow and profits incurred because of an event that has interrupted your normal business operations.

Health Insurance – Health insurance provides health coverage for you and your employees.

Life and Disability Insurance – Life and disability insurance covers your business in the event of the death or disability of key owners, partners, or employees.

□ **STEP 15: Maintain your Tax Filings.**

Now that you have followed all of the steps to form your business in West Virginia, you must make sure to maintain your tax filings. It is advisable to hire an accountant to assist you in this process. The form of business you operate determines what taxes you must pay and how you pay them. All businesses except partnerships must file an annual income tax return. Partnerships file an information return. The form you use depends on how your business is organized. You can follow the link below to learn more about which form you will need to file based on the business entity you established.

<https://www.irs.gov/businesses/small-businesses-self-employed/business-structures>

Additionally, depending on the type of your business entity, you may have to pay state taxes. If your business is incorporated in West Virginia and does business or participates in certain other activities in West Virginia, you may have to file an annual West Virginia State Corporation tax return. The Corporation Net Income Tax is a tax on the West Virginia taxable income of every domestic or foreign corporation which derives income from property, activity or other sources in West Virginia. For additional information regarding your state taxes, visit the West Virginia State Tax Department's website or follow the link below:

<https://tax.West Virginia.gov/Business/Pages/Business.aspx>