

Doing Business in Georgia by Chorey, Taylor & Feil*

We often receive inquiries from individuals and companies from other countries who wish to do business in the State of Georgia. While every situation is different, this checklist will provide a general overview of some of the legal issues to be considered and legal steps to be taken by such individuals and businesses wishing do business in the State of Georgia and the attached explanatory materials provide more details.

STARTUP CHECKLIST

Forming the Business

- Engage an Attorney and an Accountant.
- Start a new company or a subsidiary.
 - Choose entity structure.
 - Choose a name.
 - Form the entity.
 - Consider agreements regarding transfer of ownership.
- Obtain tax identification number.
- Obtain any required licenses.
- Make any necessary tradename or fictitious name filings.

Operating the Business

- Open a US bank account.
- Hire employees.
 - Consider Using Employment Agreements.
 - Consider Using Agreements to Protect Business Interests.
- Take and Maintain Proper and Separate Permanent Company Records.
- Annual Registration.
- Obtain Insurance and Determine Benefits.

*Chorey, Taylor & Feil, a Professional Corporation ("CTF") is an Atlanta business law and business litigation firm with offices at 3399 Peachtree Road, N.E., The Lenox Building, Suite 1700, Atlanta, Georgia 30326. CTF represents domestic and international companies from startup through all aspects of their business needs. Contact Tom McLain or John Watkins at (404) 841-3200 or by email at tmclain@ctflegal.com or jwatkins@ctflegal.com. **Important.** This checklist and the related explanatory materials are for informational purposes only and are not intended to refer to or to address particular circumstances faced by any individual or business. The statements in this checklist and the related explanatory materials are based on Georgia law existing at the time the checklist was written and do not constitute legal advice or create an attorney-client relationship. Any business or individual having questions, concerns or issues regarding the formation or operation of an entity in Georgia should consult with counsel to address their own particular circumstances and the law applicable to their situation. CTF provides legal services only pursuant to written engagements specifying the services to be provided.

EXPLANATORY MATERIALS

The following is offered to provide more information relating to the items on the checklist. These explanatory materials intentionally exclude consideration of starting a local office or consideration of other types of entities because they are less commonly used for legal and practical reasons.

Forming the Business

1. Engage an Attorney and an Accountant. The checklist and these explanatory materials provide an overview of most of the common requirements related to coming to do business in Georgia, but there are likely to be other legal requirements under federal, state and local laws and regulations, whether tax related or otherwise. It is highly recommended that anyone starting a business in Georgia engage an attorney and an accountant before taking the first steps.

2. Starting a New Company (or Subsidiary).

- **Choosing the Entity Structure.** In Georgia, a for-profit business may generally be formed and operated in a number of different ways. Since most choose either a corporation or a limited liability company ("LLC"), the checklist and these explanatory materials focus on these two types of entities. Corporations and LLCs both protect the owners of the company from liability for the obligations of the company. In contrast, other types of entities like a sole proprietorship or a general partnership is not usually recommended because those entities do not protect the owners of the company from liability for the obligations of the company.

Tax considerations are a primary factor in choosing the entity structure. In general, a corporation will pay a separate corporate tax on its earnings. Currently the highest federal corporate tax rate is 35% and the top Georgia corporate tax rate is 6%.¹ Since distributions to shareholders from corporations are also taxed, it is often said that corporations and their owners are subject to double taxation. In contrast, an LLC that has not elected to be taxed as a corporation is taxed as a partnership. For an LLC, this means that, for tax purposes, the income of the LLC is passed through to its members in proportion to their ownership, reported on the member's tax returns, and taxed to the members at their personal (or corporate, if the member is a corporation) tax rates.

Immigration issues can also impact the entity structure. To the extent that the principals of the new company wish to work in the United States or send non-US citizens to work in the United States, an immigration attorney should be consulted before finalizing the business structure. Depending on the circumstances, the structure chosen or the manner in which the company is owned may either ease or complicate the process of obtaining a proper visa.

- **Choosing the Name.** The name of a new corporation or LLC may not be the same as the name of an existing entity that is registered with the Georgia Secretary of State. There are other legal requirements which can be explained by your attorney.

- **Forming the Entity.** In order to create a corporation or an LLC, appropriate documents have to be filed with the Georgia Secretary of State and certain other notice requirements exist. For a corporation, Articles of Incorporation are filed. The shareholders of the corporation will adopt bylaws (bylaws govern the operation and management of the corporation), elect directors (directors will manage the corporation), and issue stock certificates to the shareholders. The directors of the corporation will elect officers who will manage the day to day affairs of the corporation. Minutes of each of these actions are kept in the corporate records.

¹ We are often asked about "Subchapter S" corporations. Although "Subchapter S" corporations are not subject to double taxation, they cannot have a foreign owner and are therefore not a viable option for international businesses.

For an LLC, Articles of Organization are filed. The members of the LLC will adopt a written operating agreement, which governs the operation and management of the LLC. The LLC may be managed by its members or by one or more managers, and the LLC may also elect officers if it so desires. Minutes of each of these actions are kept in the LLC's records.

- **Agreements Regarding Transfer of Ownership.** Although not required, it is prudent for all companies to adopt restrictions on the transfer or pledge of ownership interests (stock or a membership interest), as well as rights or obligations to purchase or sell ownership interests of the company upon the occurrence of triggering events such as death, incapacity, divorce, bankruptcy, and termination of employment should be addressed in writing. For an LLC, these sorts of provisions are typically included in the operating agreement. For a corporation, these types of provisions are typically set forth in a shareholder's agreement.

3. Tax Identification Numbers. After the new company is formed, the company will need to obtain a Federal Employer Identification Number (FEIN) from the IRS. In order to obtain an FEIN, a foreign individual or company (or a principal officer, partner or owner of a foreign company) will need to provide their Social Security Number, FEIN or Individual Taxpayer Identification Number. Additionally, the company may be required to make filings with the Georgia Department of Revenue and obtain identification numbers.

4. Licensing Required. The new company will need to determine what licenses are needed. In the State of Georgia, business licenses are required and may be obtained from the county and/or city in which the primary place of business is located. In addition to a business license, some types of businesses will be required to obtain licenses from the federal government to operate. Other types of businesses and professions are also licensed and regulated by the state and local authorities. Examples of businesses that require additional licenses include but are not limited to, accountants, architects, athletic trainers, engineers, utility contractors, used car and car parts dealers, residential and general contractors, and auctioneers.

5. Tradename or Fictitious Name Filings in Georgia or Other States. If the new plans to use a name other than its full legal name as reflected in its filings with the Georgia Secretary of State, the company will need to "register" such other name (sometimes referred to as a tradename) in the applicable state or local office. The company may also need to consider registering a trademark with the U.S. Patent and Trademark office to protect its tradename.

Operating the Business

1. Bank Account. The new company should establish its own bank account in Georgia. In order to do this, a company needs to either be organized in Georgia or qualified to transact business in Georgia.

2. Hiring Employees. First-time employers in Georgia must complete an application for a Georgia Department of Labor tax account and return it to the Georgia Department of Labor. Georgia and federal law both require all employers to report newly hired employees to a state directory within ten days of their hire date. Employers must also report re-hires or employees who return to work after being laid off. All U.S. employers must also complete and retain Form I-9 for each individual hired for employment in the U.S. This includes citizens and non-citizens. On Form I-9, the employer must verify the employment eligibility and identity documents presented by the employee and record such document information on the form.

- **Employment Agreements.** Georgia generally applies the doctrine of employment at will which means that, in the absence of a written contract of employment for a defined duration, an employer can terminate an employee's employment at any time, for any reason, so long as it does not violate the law. For various reasons, the employer may want to enter into an employment agreement that includes provisions regarding the employee's duties, term of employment, compensation and benefits. An employment agreement can alter the employment at will doctrine by, for example, specifying the duration of the employment or stating that the employee may only be discharged for good cause.

- **Agreements to Protect Business Interests.** Whether or not the company uses employment agreements, the company should consider implementing one or more types of restrictive covenant agreements with its owners, key executives, other employees, or contractors. While restrictive covenant agreements can contain a variety of provisions, some of the most common ones include the following:

- i. an agreement to keep the company's information confidential;
- ii. agreements to restrict competition with the company;
- iii. an agreement to restrict the solicitation of the company's employees.²

1. Permanent Company Records. Corporations are required to maintain a minute book. It is recommended that LLCs maintain a minute book. The originals of all company governance documents, director and shareholder minutes (or manager or member minutes as applicable) or written consents in lieu thereof, stock or membership interest ownership records, and other material or important agreements, contracts or documents should be kept in the company's minute book.

Georgia law requires annual meetings by the shareholders and the directors of a corporation, but Georgia law permits the use of annual consents in lieu of holding formal annual meetings under certain circumstances. The satisfaction of the annual meetings requirement is important for keeping the protections of the corporation. Limited liability companies are not required to hold annual meetings of members or managers, however, it is recommended that they do so. Members may meet in person or approve actions by the use of consents, as allowed by the Georgia Limited Liability Act.

4. Annual Registration. Georgia law requires that each business entity registered or filed with the office of the Secretary of State must file an annual registration with the Georgia Secretary of State and update its information on file each year with an annual registration. For a corporation, this filing puts on record the three principal officers of the company, the "Chief Executive Officer," "Chief Financial Officer," and "Secretary," or persons holding similar positions. The same individual may hold more than one position. LLCs need not list officers. Failure to satisfy annual registration requirements in a timely manner, can ultimately lead to administrative dissolution of the business entity by the Secretary of State.

5. Insurance / Benefits. The new company will need to purchase appropriate levels of liability insurance for the intended business. Health insurance is not provided by the government in the United States and health insurance for employees may be needed as well. Any other employee benefit programs also need to be identified.

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² It should be noted that the case law in Georgia makes it quite difficult to draft a restrictive covenant agreement that is enforceable. Due to enforceability issues and other requirements, these types of agreements need to be tailored by an attorney to fit the particular business and situation.