



CCCBA's Solo Small Firm Section proudly presents...

**#10 TAKING STOCK OF YOUR FIRM: PRACTICAL &
LEGAL ISSUES FACING SOLO & SMALL FIRM OWNERS**

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AGENDA

Pros and Cons of structuring your law firm's ownership as a Sole Proprietor versus a business entity

1. Options for Solos & Small firms
2. Types of Entities
3. Is a Business Entity Needed?
4. Liability Analysis
5. C Corporations.
6. Minimize Double Taxation with S Corp election
7. Professional Corporations
8. Avoiding Double Taxation with a general partnership
9. Avoid Unlimited Liability for Partnership Obligations with a Registered LLP
10. Achieving Limited Liability

Adapted from the ABA, CAL BAR Business section and Mr. William C. Staley's 2015 presentation

Employment law concerns facing small law firms

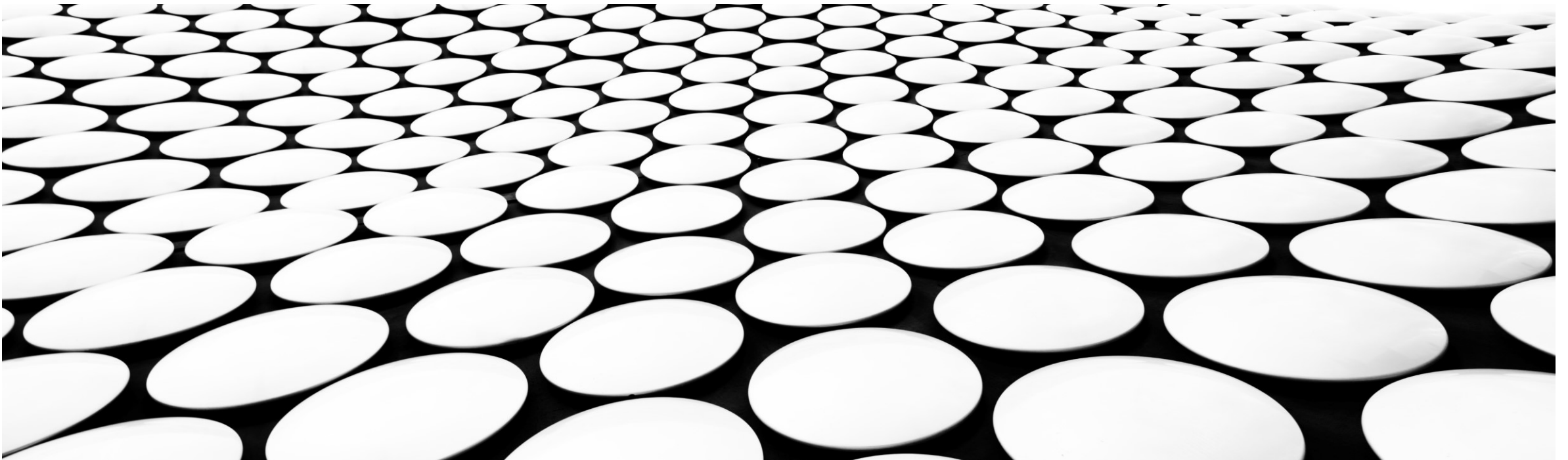
1. Employees v. Independent Contractors
2. Other Wage & Hour Issues
3. Hiring Right
4. What Does 5 or more employees require
5. Avoiding Harassment, Discrimination, & Retaliation
6. Firing Right
7. New Laws Alert



PROGRAM MATERIALS

1. TAKING STOCK OF YOUR FIRM: PRACTICAL & LEGAL ISSUES FACING SOLO & SMALL FIRM OWNERS

PRESENTER: LUIS M. MONTES PRINCIPAL AT LAW OFFICES OF LUIS M. MONTES



2. “ BEGIN WITH THE END IN MIND” 7 HABITS OF HIGHLY EFFECTIVE PEOPLE, COVEY *PROS AND CONS OF OPERATING YOUR SMALL FIRM AS AN ENTITY*

- Promise: general practical guide to proceed,
- Strategy – business entity for the biz of Law Practice,
- Clear understanding of your destination,
- Protect the business, your dreams, RISK - TAXES
- Check lists – hand outs – sources ;



3. OPTIONS FOR SOLOS AND SMALL FIRMS

TYPES OF ENTITIES AVAILABLE TO LAWYERS

- **A SOLE PROPRIETORSHIP**
- **General Partnership**
- **LLP, Limited Liability Partnership; (No LLC in CA) for Attorneys**
- **A Professional Corporation**
- **Is an entity needed?**

4. IS AN ENTITY NEEDED?

- LONG TERM PLANS
- RISK – growth, frequent review of entity,
- GOVERNANCE OF ENTITY
- TAX CONSIDERATION
 - (CONSULT AN APPROPRIATE TAX ADVISOR,
 - ACCOUNTANT OR TAX ATTORNEY)



5. THE BIG ONE: LIABILITY ANALYSIS

PROTECTION FROM PERSONAL LIABILITY

- **This is important:**
 - An attorney cannot limit his liability for his own negligence or his other wrongful acts.
 - But an attorney can limit her liability for no-fault liabilities, including the wrongful acts of his partners and to some extent her employees. .
 - She can also consider the ease with which her creditors can take her assets after there is a judgment against her.
 - But, see the theory and law of Respondeat Superior



6. CONSIDERATIONS FOR ENTITY SELECTION

- Sole Proprietor ship – bottom line – greatest liability, insurance
- A Corporation or LLP for liability imposed on lawyer without that lawyer's wrongful action
- Employees are liable for their own wrongful action (but, see respondeat superior.)
- General Partners' Liability: acts, contracts, debts, wrongful acts, employees, other partners, and
- TAXES – beyond the scope of this presentation and very important, entities.

7. CORPORATION LAW ENTITY.

1. Most “time-tested protection **for a shareholder**” – most involved for corporate governance
2. “C” election - entity income and their own expenses. **Income over deductible expenses is taxable.**
3. “S” election – shareholders pay tax on “flow through” tax items (distributions – shareholder income.)
4. It is recommended that an attorney(s consult with an **experienced** tax attorney or CPA.



8. 5.7 MINIMIZE THE DOUBLE TAX ON CORPORATE PROFITS WITH AN “S ELECTION.”

1. Advantages; Fed tax, State Franchise Tax,
2. Corporate Formalities Apply for “corporate shield.”
3. **Every S corporation should be carefully monitored to avoid an inadvertent termination of the election or other adverse consequences.**

9. PROFESSIONAL CORPORATIONS (PC)

1. The General Corporation Law applies to PC, if the Moscone-Knox Professional Corporation Act does not have a specific rule.
2. The Professional Corporation Act applies to law corporations because providing legal services falls under the Business & Professions Code.
3. Directors and Officers
4. The State Bar requires the bylaws to include its rules regarding shares of a law corporation.



SPECIAL LIVING TRUST FOR ESTATE PLANNING FOR “PC:

1. 7.5(a) If an attorney is not married to an attorney, the couple's living trust will need a special trust that enables only the attorney to vote the shares of the professional corporation.

STATE BAR REQUIREMENTS FOR A “PC.”

1. A law corporation must annually Pay and Renew its certificate of registrations from the State Bar. Or the firm will be suspended and will not be entitled to practice law. It may be reinstated upon submission within one year of the renewal, fee, and any penalty. If the suspension lasts more than one year, the registration of the law corporation may be involuntarily terminated.
2. If an attorney-shareholder dies, the shares must be bought back by the professional corporation or bought by an attorney within six months. Otherwise, the professional corporation ceases to be registered to provide legal services.



8. GENERAL PARTNERSHIP AVOID THE CORPORATEDOUBLE TAX

1. Double tax can be avoided by using an LLP when limited liability becomes important.
2. Modest legal and accounting expense to set up , but clear partnership agreement is prudent
3. Easiest and most flexible entity to manage

8.4 CONCERNS ABOUT USING GENERAL PARTNERSHIPS:

1. Joint and several liability to all partners
2. Each partner is an agent and thus can bind the partnership,
3. No requirement for a memorialized partnership agreement.

9. LIMIT LIABILITY FOR THE PARTNERSHIP OBLIGATIONS WITH A REGISTERED LIMITED LIABILITY PARTNERSHIP (AN "LLP")

- 1.** A partner in [an LLP] is not liable or accountable, directly or indirectly, including by way of indemnification, contribution, assessment, or otherwise, for debts, obligations, or liabilities of or chargeable to the partnership or another partner in the partnership, whether arising in tort, contract, or otherwise, that are incurred, created, or assumed by the partnership while the partnership is [an LLP], by reason of being a partner or acting in the conduct of the business or activities of the partnership.



THE LLP - CONSIDERATIONS

1. Partner liability issues
2. State Bar requirement to provide legal services
3. Creating an LLP – also see handout State Bar exemplar forms
4. Annual LLP filings
5. Limits on Distribution

10. ACHIEVING LIMITED LIABILITY

1. Entity governance to protect the corporate shield – avoid risk of “piercing the corporate veil.”
2. LLP issues ensuing from the underlying Partnership – restate the partnership agreement,
3. The important and critical “corporate formalities. “
4. Shareholders are not partners, and explain the role
5. Do NOT comingle bizness with personal

10. WORKING WITH PROFESSIONAL ADVISORS TO DEVELOP THE PLAN

- a. Business lawyer and
- b. a tax accountant
- c. books and affairs in order.

11. ESSENTIAL DOCUMENTS TO GET STARTED.

1. The failure of officers, directors and shareholders/partners to conduct business as required by law may have serious adverse consequences.
2. 10.5(a) Third parties could succeed in "**piercing the corporate veil**," potentially resulting in shareholder/partner liability for the entity's obligations.

THE DISCLAIMER;

The information presented is not intended, nor should it be taken as sound advice for any particular legal issue. Each case is unique due to the parties, the circumstances and the individual facts of the given transaction. Specific questions should be discussed in consultation with your business law attorney , tax attorney and Certified Public Accountant.

Questions and comments may be addressed to:

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- Luis M. Montes, Principal.
- LMMBUSLAW@GMAIL.COM
- (510) 749 - 1036
- Alameda, San Francisco, Menlo Park

OUTLINE
CHOICE OF BUSINESS ENTITY
FOR
PRACTICING LAW IN CALIFORNIA

1. Options for Solos & Small firms
 2. Types of Entities
 3. Is a Business Entity Needed?
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 10. Achieving Limited Liability
- Adapted from the ABA, CAL BAR Business section and Mr. William C. Staley's 2015 presentation

NOVEMBER 18TH, 2022
CONTRA COSTA COUNTY BAR ASSOCIATION

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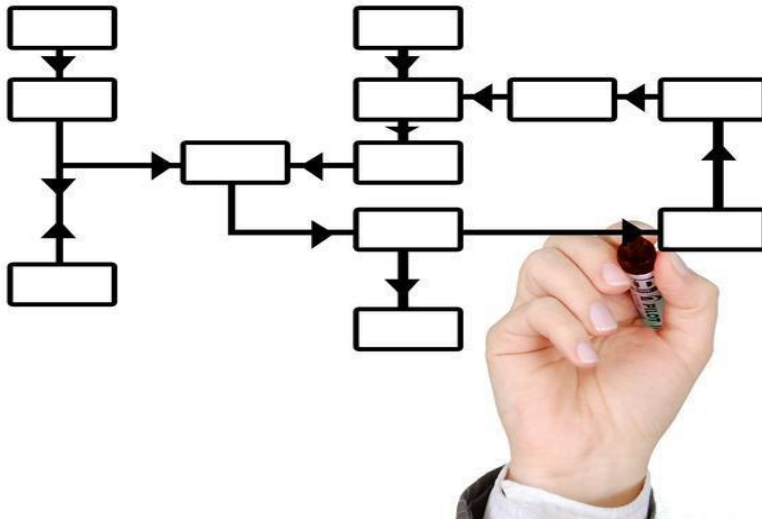
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**CHOICE OF BUSINESS ENTITY
FOR
PRACTICING LAW IN CALIFORNIA**

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This outline should be viewed only as a summary and guide and is not for tax or legal advice in any matter or case. Your comments and questions are always welcome.

CHOICE OF ENTITY FOR PRACTICING LAW IN CALIFORNIA

1. OPTIONS FOR SOLOS AND SMALL FIRMS

As any firm continues to grow, it may become necessary to revisit its structure, but by front-loading some of the planning, sole practitioners can achieve the liability protection they would want from forming any legal entity paired with some tangible tax benefits.

An additional partner will open up the opportunity to form an LLP in those jurisdictions not permitting a PLLC. Finally, a PLLC should be considered wherever that option is available.

Where LLCs are not permitted to provide legal services, a professional corporation filing an S election will suit many practitioners who wish to remain solo.

The advantages and disadvantages of each should be considered, and a tax professional should be consulted to tailor the analysis to the practitioner's unique situation.

A sole practitioner should not incorporate unless concerns about wrongful actions by employees push the sole practitioner into a professional corporation. In that case, the new professional corporation should be an S corporation for tax purposes. A sole practitioner who joins an LLP and wants to contribute to the LLP receivables and other assets of the professional corporation will probably need to participate in the LLP through the professional corporation.

It will rarely make sense to convert a professional corporation from a C corporation to an S corporation. Only in extremely rare circumstances should a professional corporation convert to an LLP.

Two or more attorneys practicing together should use an LLP and not a professional corporation or a general partnership. If they are using a general partnership now, they should convert to an LLP. If they are using a professional corporation with more than one shareholder, they should consider bringing new partners into an LLP of which the professional corporation is one of the partners.

2. TYPES OF ENTITIES

In California, the alternatives for the private practice of law are:

a sole proprietorship,

a general partnership,

a registered limited liability partnership (an "LLP," only for accountants, architects, lawyers, land surveyors and civil, electrical and mechanical engineers)

a professional corporation (taxed as a C corporation or an S corporation, rarely as a QSub)(**not discussed in this presentation.**)

In other states limited liability companies ("LLCs") can render legal services, but not in California.²

3. Is A BUSINESS ENTITY NEEDED?

3.1 A corporation or LLP is useful when liability can be imposed on an owner of the law practice *without wrongful action by that owner.*

3.1(a) Employees, like anyone else, are liable for *their own* wrongful acts.

Employers are also Liable for wrongful acts that employees commit in the course of their employment, even if the employee is violating company policy or specific instructions when the wrongful act occurs. The Latin name for this rule is "respondeat superior."³

² Cal. Corp. Code § 17701.04(b), (e).

³ B. Witkin, Summary of California Law, IV Agency and Employment, § 165 (10th Ed. 2012).

- 3.1 (b) All general partners are liable for all other **general partners' promises and contracts** involving the partnership business and for the wrongful acts of all **partners and employees** of the partnership in the course of the partnership business.⁴
- 3.2 Changes in federal and California tax laws in the 1980s greatly reduced the **tax benefits of incorporating**.
- 3.2(a) Although federal tax rates have changed over the years, for most attorneys saving taxes is *not* an important reason to incorporate.
- 3.2(b) However, in choosing a business entity it is important to minimize the risk of **high tax rates** and a possible **double tax** on operating profits.
- 3.3 Generally, the **primary reason to incorporate or to use an LLP** is the desire for *limited liability*: to protect the owner's personal assets and/or the assets of other businesses from creditors of the practice.

This is important:

An attorney cannot limit his liability for *his own* negligence or his other wrongful acts.

Again: An attorney cannot limit his liability for *his own* negligence or his other wrongful acts.

But an attorney *can* limit her liability for no-fault liabilities, including the wrongful acts of his partners and employees.

She can also consider the ease with which her creditors can take her assets after there is a judgment against her.

⁴ Cal. Corp. Code §§ 16305, 16306.

- 3.4 Other factors to consider include the availability and sufficiency of E&O and EPL **liability insurance** and the fact that the **personal guarantees** of the shareholders/partners generally will be required by lessors, and lending institutions .
- 3.5 Other **non-tax reasons to incorporate or to use an LLC** may include the (a) succession: continuity of the practice relocation, divorce, death of the attorney, and (b) centralized management of the firm.
- 3.6 MARKETING AND BRANDING of FIRM.

Also, forming a business entity with another attorney can smooth the transition when an attorney dies or is incapacitated, preserving the value of the practice for the attorney's family.⁵

4. LIABILITY ANALYSIS

- 4.1 In considering whether to use an entity, the first question is: "What are the liabilities that could result from the operation of this business?"

An attorney in private practice will need errors and omissions (E&O) liability insurance. Usually as much coverage as the attorney can get. That's a given.

Employment Practices Liability Insurance (EPLI) includes coverage for defense costs and damages related to various employment-related claims including allegations of Wrongful Termination, Discrimination, Workplace Harassment and Retaliation.

- 4.2 Professionals and their staffs sometimes embezzle from the firm or clients, harass and discriminate against each other and against people out- side the firm. Attorneys and their firms sometimes imperfectly follow California and federal labor and BRISA laws.

4.2(a) Employment practices liability ("EPL") coverage is available and should be seriously considered. It is expensive because

the risks are high.

⁵ Bus. & Prof. Code §§ 6180 et seq. and 6190 et seq. (court procedures to rescue a practice from an attorney who dies or for any other reason cannot attend to it); Cal. Prob. Code § 9764 (appointment of a "practice administrator" to wind down or sell the practice; note that a sole practitioner can and should nominate a practice administrator).

4 .2(b) If all of the activities which may generate liabilities will be conducted by the sole practitioner, *there is no protection to be gained from incorporating* and the practice should be conducted as a sole proprietorship ("Keep it simple."), whether or not adequate insurance is available.

^{4.3} General partners have unlimited liability for the actions of the other partners within the scope of the partnership business, as well unlimited liability for other claims against the partnership, for example, as an employer.⁷

4.3(a) Because these "vicarious" liabilities can be limited by using an LLP, it almost always makes sense to use an LLP rather than a general partnership.

4.3(b) In theory, a professional corporation with multiple shareholders is an alternative to the general partnership. However, the corporate structure is somewhat rigid for a professional practice. Also, several tax concerns arise with a corporation that are just not issues with an entity taxed as a partnership (which includes LLPs).

⁶ Cal. Corp. Code §§ 16301(8)(A), (9), 16953(a).

⁷ Cal. Corp. Code §§ 16305, 16306.

5. C CORPORATIONS

5.1 Corporations provide the most time-tested protection **for a shareholder** from claims that arise in the corporation's business through no fault of that shareholder.

5.2 Corporations have their own income and their own expenses. The excess of **income** over **deductible expenses** is **taxable income**.

5.2(a) A corporation that is a **C corporation** pays its own taxes on this taxable income. The taxable income of a C corporation does *not* flow through to its shareholders and they do *not* pay tax on the C corporation's taxable income.

5.2(b) In contrast, the tax items of an **S corporation** flow through to the shareholders and they pay tax on those items on the share- holders' personal tax returns.

5.3 Tax reporting and implications are beyond the scope of this presentation. It is strongly recommended that an attorney(s) contemplating an “S” or a “C” entity consult with an **experienced** tax attorney or CPA.

- o overpaid employment taxes (mostly Medicare taxes, for which no wage limits apply, unlike FICA taxes).
- o If the corporation's income is earned by the attorney's personal services, all of the compensation will probably be reasonable in amount.²⁴ The concern arises to the extent that the corporation's income is earned by others (associates, legal assistants, independent contractors, low-paid shareholders).

The double tax problem is particularly acute if the corporation has **appreciated property**. For this reason, real estate, art, collectibles and other appreciating assets should never be held in a corporation - whether it is a C corporation or an S corporation.

5.6 Corporate **formalities** must be observed to achieve limited liability.

5.7 MINIMIZE THE DOUBLE TAX ON CORPORATE PROFITS WITH AN "S CORPORATION ELECTION."

A new professional corporation should consider electing "**S corporation**" status for tax purposes.

5. Advantages:

6.1(a) Generally, there is no federal income tax on an S corporation's income.

6.1(b) Lower or no state tax in California, but **franchise tax** rate applies to S corporations.

6.1(c) Generally, there is **no tax on cash distributions** from the S corporation to its shareholders of profits earned while the S corporation election was in effect.

◇ Distributions of C corporation earnings are also taxable to the shareholders.

6.1(d) For the shareholders who *are* active in the corporation's business, neither the active pass-through income nor the distributions from the S corporation may be subject to the federal net investment income tax (the "NIIT").

6.1(e) Employment taxes may be reduced by taking a modest salary from the S corporation and receiving distributions of earnings instead.

5.1 Disadvantages:

6.2(a) All of an S corporation's income is subject to **individual rates** for federal income tax purposes. The maximum California personal income tax rate *usually* is higher than

the California franchise tax rate for C corporations. These and many other tax considerations should be discussed with a tax professional.

6.2(b) An S corporation's income is **taxed directly to shareholders**, *whether or not* distributions are made.

6.2(c) **Eligibility requirements** must be satisfied and **only one class of stock** is permitted.

Every S corporation should be carefully monitored to avoid an inadvertent termination of the election or other adverse consequences.

6.2(d) Restrictions apply to an S corporation's use of a **taxable year** other than the calendar year.

6.2(e) A corporation can deduct certain costs of **fringe benefits** it provides for its employees, including employees who are also its shareholders, and for income tax purposes the employees of a C corporation do not include in their income the value of most of these fringe benefits. *If a corporation elects S status, employees who are also shareholders must include in their income the value of certain fringe benefits:*

7. PROFESSIONAL CORPORATIONS

7.1 The General Corporation Law applies to professional corporations if the Moscone-Knox Professional Corporation Act does not have a specific rule.

7.2 The Professional Corporation Act applies to law corporations because providing legal services requires a license under the Business & Professions Code.

7.3 The articles of incorporation of a professional corporation must state that it is one.

7.4 The State Bar requires the bylaws to include its rules regarding shares of a law corporation.

7.5 Directors and officers: "A professional corporation which has only one shareholder need have only one director who shall be such share- holder and who shall also serve as the president and treasurer of the corporation.... A professional corporation which has only two shareholders need have only two directors who shall be such shareholders. The two shareholders between them shall fill the offices of president, vice president, secretary and treasurer."⁵³ Each director, shareholder, and each officer of a law corporation must be an attorney.

7.5(a) If an attorney is not married to an attorney, the couple's living trust will need a special trust that enables only the attorney to vote the shares of the professional corporation.

7.6 Before the corporation renders legal services, it must register with the State Bar.

7.6(a) To do so, the professional corporation must have adequate security for claims.

7.6(b) The only way to provide **security for claims**:

All law corporations, except as otherwise provided in this rule, must provide a Law Corporation Guarantee providing that the shareholders jointly and severally agree to pay all claims established against the law corporation for errors and omissions arising out of the rendering of professional services. The guarantee must name each shareholder and be executed by each.

7.6(c) See Handout Materials for State Bar forms samples.

7.7 **A law corporation must annually renew its certificate of registrations from the State Bar. A law corporation that fails to submit a complete Annual Renewal and fee will be suspended and will not be entitled to practice law. It may**

be reinstated upon submission within one year of the renewal, fee, and any penalty. If the suspension lasts more than one year, the registration of the law corporation may be involuntarily terminated.

- 7.8 **If an attorney-shareholder dies, the shares must be bought back by the professional corporation or bought by an attorney within six months. Otherwise, the professional corporation ceases to be registered to provide legal services.**

8. **AVOID THE DOUBLE TAX ON CORPORATE PROFITS WITH A GENERAL PARTNERSHIP**

- 81 A **general partnership** is not subject to the double tax. The income of the partnership is taxed to the partners. Consequently, the double tax can be avoided by never using a corporation and by using an **LLP when limited liability becomes important.**
- 82 Modest additional legal and accounting **expenses** are generally incurred when a sole proprietorship converts to a partnership, LLP or professional corporation.

Organizing an LLP or partnership with a written agreement is somewhat more expensive than organizing a professional corporation, for which the documents are much more standardized.

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8.2. For income tax purposes, an LLP is a general partnership.

8.3. Other benefits of general partnerships as compared to S corporations;

8.3(b) Ability to adjust inside tax basis when a partnership interest is sold or inherited

8.3(c) Easy to bring members in and out and to adjust interests, can use profits interests vs. capital interests;

8.3(d) Distributions and allocations can be tailored precisely (because there is no one-class-of-stock rule for general partnerships, so general partnership can have preferred interests and special allocations);

8.3(e) Entity-level borrowings can give partners tax basis in their partnership interest to absorb partnership losses.

The **conversion** of an S corporation or a C corporation to a partnership or LLP is treated as a taxable liquidation of the corporation.

- Corporation will rarely convert to an partnership or an LLP.

84 **Concerns about using general partnerships:**

8.5(a) All partners are jointly and severally liable for all obligations of the general partnership, unless a creditor agrees otherwise.

◇ The reason to use an LLP is to avoid this rule.

8.5(b) Each partner is an agent of the general partnership and can bind it.

8.5(c) A partnership agreement need not be written or signed by the partners.

9. **AVOID UNLIMITED LIABILITY FOR THE PARTNERSHIP OBLIGATIONS WITH A REGISTERED LIMITED LIABILITY PARTNERSHIP (AN "LLP")**

9.1 **The Why**

9.1(a) This is the reason to use an LLP:

[A] partner in [an LLP] is not liable or accountable, directly or indirectly, including by way of indemnification, contribution, assessment, or otherwise, for debts, obligations, or liabilities of or chargeable to the partnership or another partner in the partnership, whether arising in tort, contract, or otherwise, that are incurred, created, or assumed by the partnership while the partnership is [an LLP], by reason of being a partner or acting in the conduct of the business or activities of the partnership.

9.1(b) Note that using an LLP does *not* "affect the liability of a partner of [an LLP] to third parties for that partner's tortious conduct."

9.1(c) A majority in interest can provide in the partnership agreement or by vote that all of the partners will be personally liable for a specific debt.

- ◇ Partners who do not hold a majority in interest will want to see the partnership agreement prohibit this without unanimous consent of the partners.

- ◇ Partners in an LLP can individually guarantee specific obligations of the **LLP**.

9.1(d) A partner of an LLP is not a proper party to a suit against the LLP unless the suit also alleges tortious conduct by the partner or that the partnership agreed that each partner would be liable for the debt.

9.1(e) The liability limitations of an LLP do not apply to law LLPs unless the LLP "has a currently effective certificate of registration issued by the State Bar."

9.2 Requirements for an LLP That Provides Legal Services

- 9.2(a) Each of the partners must be licensed to practice law in California or another state.
- 9.2(b) The LLP must be licensed by the State Bar to engage in the practice of law.

9.3 The How

- 9.3(a) An LLP must use "LLP" or a permitted variant in the name of the entity.
- 9.3(b) To become an LLP, the entity must first be a general partnership.⁸² Limited partnerships, sole practitioners and professional corporations cannot become LLPs.
- 9.3(c) To become an LLP a general partnership files with the California Secretary of State Form LLP-1, Application to Register a Limited Liability Partnership (LLP), and pays a \$70 filing fee. **If the filing is proper and the Secretary of State accepts it, the entity remains an LLP until it converts back to a general partnership or dissolves. The statute provides that a paperwork error or missed filing will not terminate the LLP status with the Secretary of State. The State Bar is not so forgiving.**
- 9.3(d) The conversion of a general partnership to an LLP is a tax-free transaction.
- 9.3(e) The liability protection does not apply until the LLP registers with the State Bar.

- ◇ The LLP files with the State Bar an Application for Issuance of a Certificate of Registration as a Limited Liability Partnership (**LLP**).
- ◇ The effective date of the registration with the State Bar

(and the effectiveness of the liability protection) is the day the State Bar receives a complete application.⁸⁹

9.4 Security for Claims

9.4(a) Like a professional corporation, an LLP must provide security for claims. The most common way to provide security is

with an errors and omissions ("E&O") liability insurance policy. How much coverage is required?

This discussion is beyond the scope of this presentation, and is recommended to consult with an E&O insurance agent that IS EXPERIENCED in this important subject.

9.4(b) To register with the State Bar, the LLP must state that it has provided adequate security for claims.

9.4(c) At dissolution, the LLP must provide at least three years of "tail" coverage.

9.4(d) As alternatives to the insurance coverage, the LLP self-insure by reserving the appropriate amounts.

9.5 Annual Filings

9.5(a) Unlike a general partnership, an LLP must pay an annual minimum tax, which is currently \$800. The tax is due for all years until the LLP converts back to a general partnership or dissolves

9.5(b) Like a general or limited partnership (and unlike a corporation or LLC), an LLP is *not* required to file an annual statement of information with the Secretary of State.

9.5(c) An LLP must annually renew its certification with the State Bar by submitting an Annual Renewal with a fee. The Annual Renewal reports any changes to the information last

provided to the State Bar.

- ◇ An LLP that fails to submit a complete Annual Renewal and fee will be suspended by the State Bar and lose its status as a registered LLP. It may be reinstated upon submission within one year of the renewal, fee, and any penalties.
- ◇ If the suspension lasts more than one year, the certification of the limited liability partnership will be involuntarily terminated by the State Bar.

9.6 Limits on Distributions

9.6(a) An LLP cannot make a distribution if, after the distribution:

- ◇ It would not be able to pay its debts as they become due in the usual course of the practice.
- ◇ Total liabilities would exceed total assets. If there are partners with preferred interests, the amount that the LLP is required to distribute to them on dissolution is added to liabilities.
- ◇ The statute does not say if these are conjunctive or disjunctive. Chapter 5 of the General Corporation Law and Section 17704.05 for LLCs are much more specific.

10. ACHIEVING LIMITED LIABILITY

When a corporate or LLP structure is adopted principally to minimize the risk of personal liability, it is critical to **operate** the business in a way that minimizes the risk that a claimant will "**pierce the corporate veil**," resulting in shareholder/partner liability for the entity's obligations.

- 10.1 It is imperative to amend and restate the **partnership agreement** for a general partnership that becomes an LLP. The partnership is likely to have provisions that will *entirely defeat* the LLP election if they are left in the agreement.

10.2 Accordingly, particular attention must be directed to the **formalities** of conducting the business in the entity, such as:

For a corporation, regularly prepare shareholders' and directors' **minutes**;

Show the full **corporate or LLP name** on all stationery, business cards and invoices;

Shareholders who are also officers of a corporation must sign documents in their capacity as **officers** (not as "owners");

- Eliminate oral and written **references** to another shareholder as "my partner";
- Don't refer to "principals" without an explanation that makes explicit that the "principal" is not a "partner." So "Joseph Attorney, Principal/Shareholder" is better than "Joseph Attorney, Principal."

Maintain separate personal and corporate/LLP bank accounts;

Carefully **document** and account for **transactions** between the shareholder/partner and the corporation/LLP (such as salary, bonuses, rents, royalties, loans, contributions to capital and distributions to shareholders/members); and when there are multiple partnerships, LLPs, LLCs and corporations under common control, **document transactions among the entities** with leases, invoices, promissory notes and corporate resolutions, and account carefully for the transactions.

Where applicable, it is important to have the board of directors approve **all** dividends and distributions, *even routine S corporation distributions*.

10.3 In addition to these formalities, each entity must have an **adequate combination of capital and insurance** to satisfy reasonably anticipated claims against the practice.

If the entity does not have enough capital and can't afford sufficient insurance, the officers/partners should document their attempts to obtain insurance.

Because S corporations, LLCs and partnerships can distribute earnings without adverse tax consequences, it is possible that the earnings will be distributed and not retained as capital. This may increase the need for insurance to avoid the "*thin capitalization*" problem. This factor should be considered in connection with the legal limitations on distributions.

However, a corporation or LLP generally should have no more capital than is necessary to run the practice and to minimize the "alter ego" risk.

- 10.4 To avoid confusion regarding the capacity in which a particular document is signed, any document requiring the signature of the entity should identify the entity, the person signing on its behalf, and the office held by that person. The following is an example of a **proper signature block** for a **corporation**:

ANYLAWYER, INC.,
a California professional corporation

By _____

Donna J. Any, President

- 10.4(a) This form of signature clearly indicates that the document is being signed by and on behalf of the corporation and not by an individual.

- 10.4(b) Signing properly helps to prevent individual liability for claims against the entity and helps to preserve its legal status as a separate entity.

[This space intentionally left blank.]

- 10.4(c) For an **LLP**, the signature is similar:

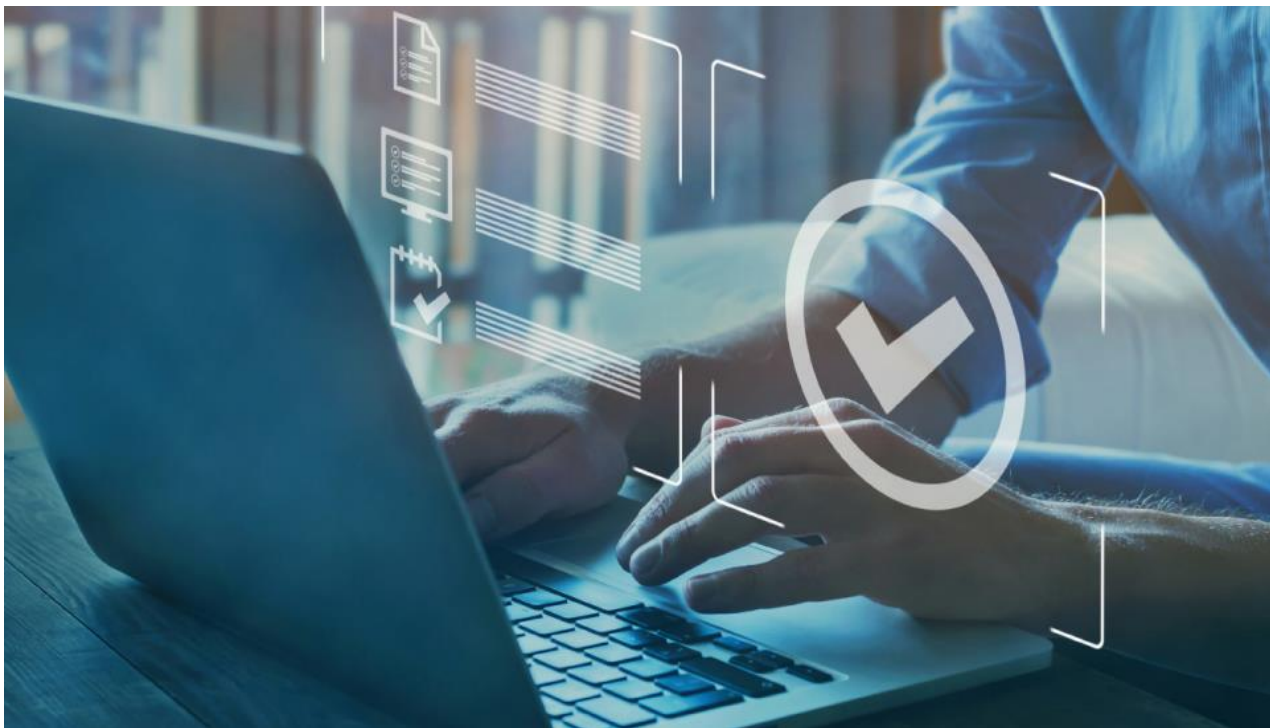
ANYLAWFIRM LLP,
a California registered
limited liability partnership

By _____

Donna J. Any, Partner

- 10.5 The failure of officers, directors and shareholders/partners to conduct business as required by law may have serious adverse consequences.
- 10.5(a) Third parties could succeed in "**piercing the corporate veil**," potentially resulting in shareholder/partner liability for the entity's obligations.

[End of outline.]



SCOPE OF REPRESENTATION:

Taking Stock of Your Firm: Practical and Legal Issues Facing Solo and Small Firm Owners

What Is a Professional Corporation?

A professional corporation or PC is one variation of a corporation. Licensed professionals who want to incorporate their practice can form a PC.

However, the shareholders, directors, and officers must belong to the same profession. PCs aren't as popular as they once were, in part because of tax law changes and in part because LLCs or PLLCs provide the same limited liability protection as a PC does and are easier to run.

The list of professions that are required by statute to incorporate as a PC varies by state, so check with your state's corporate filing office—usually the Secretary of State. The following are often required to form a PC:

- Accountants
- Attorneys
- Engineers
- Medical doctors
- Veterinarians

There are exceptions. Some states give professionals a choice between incorporating as a PC or as a regular corporation. In all states, certain professionals—again, check your state statutes—have the option to form a PC.

There are advantages and disadvantages to a PC.

If a professional retires or leaves, ownership is easily transferred to the others, and professionals can share management responsibilities and profits without worrying about being liable for each other's malpractice actions. The flat corporate tax rate, however, could limit corporate growth.

Differences in Taxation

There are differences between how a LLC vs. Professional Corporation is taxed. In the single-member LLC, taxes are handled as in a sole proprietorship, and all income passes through the LLC.

The owner reports all profits, or losses, as self-employment income on their Schedule C and submits it with the 1040 form in their personal taxes.

The PC pays corporation taxes, and this means a sole practitioner gets hit with double taxation.

Not only is their income taxed first at the corporation level, but it's taxed again as personal income. They can deduct corporate expenses, including disability insurance, life and health insurance, and payroll taxes.

LLCs are not required to pay state taxes in most states—again, check your state statutes. The owner pays state taxes on their personal tax return.

A few states require LLCs to also pay state taxes. In addition, some states impose a fee, often called an annual registration fee, franchise tax, or renewal fee.

Both can file as an S corporation—which is a special type of corporation that is created through an IRS tax election—to avoid double taxation. In an S corp., profits and losses pass through to your personal tax return.

Personal Liability

There are similarities between a PC vs. LLC when it comes to personal liability. Both limit an owner's personal liability for business debts and claims to business assets, and creditors cannot come after personal assets.

Neither protects you against personal liability for your own malpractice, negligence, or personal wrongdoing.

Malpractice protection is often why professionals file as a PC to avoid financial liability for the wrongdoings of others in the practice.

For solo practitioners, however, this advantage doesn't matter, unless they plan to add additional professionals at a later date.

In this case, forming as an LLC is often the better choice. In some states, however, single-member LLCs don't have any creditor protection.

It's important to choose the right business structure to protect your business from unforeseen legal and tax consequences.

When choosing between an LLC and a PC, check the state statutes to make sure the legal entity can operate in your state. While each shares many similarities, there are also differences between them, so choose the one that meets your needs. If you have any questions, always check with an attorney.

ABA ARTICLE:

Business Formation and Tax Considerations for Solos and Small Firms

Cameron Davidson

PLACE PIC HERE:

Aside from the familiar choice between a corporation, general partnership, or limited liability company (LLC), legal practitioners are afforded the option of particular professional entities formed under state law and registered with their local bar association. It may even be a requirement to form a professional entity if the company is to provide legal services. State professional codes will control which options a lawyer may have to choose from, so a starting point should be with your state bar. The decision to form a separate legal entity rather than practice as a sole proprietor should be predicated first on liability protection. In many states, attorneys cannot limit their liability for their own wrongful acts. If the practitioner is hiring employees, a professional corporation or professional limited liability company (PLLC) should insulate the practitioner from liability for the company's debts and wrongful acts of employees. Only a practitioner bringing on a partner may form a limited liability partnership (LLP), and doing so will add a layer of liability protection from the wrongful acts of other legal partners.

Not all states permit LLCs to render legal services; California is among them (Cal. Corp. Code § 17701.04(b)). Where allowed, a PLLC offers an attractive pass-through vehicle without requiring two or more partners. Sole practitioners in states disallowing LLCs from providing legal services will have the professional corporation as their chief option. Professional corporations are governed by the same rules as apply to corporations generally with added requirements imposed by state bar registration. C corporations provide time-tested protection against personal liability for the wrongful acts of employees, but the corporate entity pays tax at its own rate before paying dividends to the shareholder. As discussed below, it is probably advisable in almost every case for a sole practitioner to elect for the firm to be taxed as an S corporation for this reason.

C Corporations

If taxed as a C corporation, a sole practitioner will want to reduce the professional corporation's realized income by first taking out as much compensation as is reasonable. The compensation is an expense that will reduce the extent to which the sole practitioner is taxed twice on that single source of income (I.R.C. §§ 61(c)(1), 162(a)(1)). The key factor here is that such compensation is limited to the extent that it is reasonable. If it is determined to exceed a reasonable amount of compensation, the difference will be taxed as a dividend, leaving the attorney again to be taxed twice on that income (Treas. Reg. § 1.162-7).

There might still be ways a sole practitioner could zero out the income of their C corporation law firm. Whether by leasing property or contracting for services with the C corporation, a lawyer with a professional corporation taxed as a C corporation will engage in a strategy that focuses on

limiting the C corporation's realization of income. In the end, there will be a limit to how much a sole practitioner can mitigate the income realized at the corporate level, particularly as the receipts of the firm outstrip their own reasonable compensation. A lawyer might decide later to elect for S corporation status for this reason, but for reasons discussed below, the practitioner should consider making this election in the first tax year to avoid the added accounting headaches of a later conversion. It is also worth noting that a corporation of either C or S status should not be used to hold appreciated property if possible. A corporation will be forced to recognize a gain on appreciated property distributed to shareholders equal to the difference between the corporation's adjusted basis in the asset and the current fair market value (I.R.C. § 311(b)(1)). Worse still, the corporation cannot recognize losses on that same distribution of property unless the distribution is made in complete liquidation (*Id.*). If the practitioner owns any capital assets to be used in connection with the business, particularly real property, the practitioner should consider holding said property through another vehicle such as an LLC and lease the property back to the corporation as needed.

Payroll Tax Considerations

A final advantage of a corporation, with or without the S election, is deducting the employer's share of payroll tax. As discussed above, a C corporation shareholder will be incentivized to take as much as is reasonable out as compensation, meaning a greater deduction for Federal Insurance Contributions Act (FICA) taxes. As discussed below, the inverse might be true of corporations with an active S election. In either case, the amount of a shareholder employee's remuneration that must be treated as wages subject to FICA is determined from examining the particular facts and circumstances and is subject to IRS reclassification (*Joly v. Commissioner*, T.C. Memo. 1998-361, *aff'd by unpub. op.*, 211 F.3d 1269 (6th Cir. 2000)). It would be best for all practitioners to err on the side of caution when setting their wages, and the IRS provides the following factors to consider: (1) training and experience; (2) duties and responsibilities; (3) time and effort devoted to the business; (4) dividend history; (5) payments to non-shareholder employees; (6) timing and manner of paying bonuses to key people; (7) what comparable businesses pay for similar services; (8) compensation agreements; and (9) the use of a formula to determine compensation. Suffice to say, lawyers should set their compensation in accordance with the local norm for their area of practice and not get too creative with setting their wages if they want to avoid reclassification. Whatever amount is ultimately subject to employment taxes, the rate will be preferable to the Self-Employed Contributions Act (SECA) rates paid by sole proprietors.

S Corporations

S corporations are in most respects like C corporations, except that there are added limitations that apply to the shareholders. There may not be more than 100 shareholders, and there may be only one class of stock. In every instance, the sole practitioner would have little trouble qualifying personally as a shareholder of an S corporation. It is worth noting, however, that this will prevent other legal entities such as C corporations from participating in ownership. The advantage is that the income of the S corporation is only taxed on the shareholder's return. This gives the attorney-shareholder many of the advantages of a C corporation without having to find

a means to zero out the C corporation's income through a combination of compensation and other expenses.

S corporations generally owe no tax on cash distributions to shareholders (I.R.C. § 1368(b)(1)); however, distributions of appreciated property will generate taxable gains on distributions to the shareholders (I.R.C. § 311(b)). For this reason, if the practitioner should own real property related to the business, it would be better not to have the professional corporation own this asset outright. One strategy might be to have a separate LLC hold such appreciated assets and lease them back to the professional corporation. As a pass-through, a corporation under an S election would also permit sole practitioners to mitigate payroll tax by setting their compensation to a lower reasonable figure and taking more of the corporation's income out as a distribution if they so choose.

While there is certainly a preference for a sole practitioner to form a professional corporation and make an S election where local law does not permit PLLCs, the timing of the S election is another consideration. Practitioners may well infer that their own individual rates are higher than the applicable corporate rates and therefore seek to defer the S election until a later point when they can no longer find the means to zero out the professional corporation's income, thereby taking greatest advantage of both. While this is at first promising, lawyers should be wary of the built-in gains of C corporations for ten years after making their first S election (I.R.C. § 1374). Gain on built-in assets can include both accounts receivable and corporate goodwill if the practice is sold within those first ten years after having made the S election (I.R.C. § 1374(d)(7)(A)).

Considerations in Making a Later S Election

C corporations that later make an S election do not get the full benefit of pass-through taxation in assets acquired by the corporation before the effective date of the S election and will need to carry forward built-in gains on these assets and realize the gain thereon when they are sold if they are sold in the first ten years after making the S election (I.R.C. § 1374). The upshot is that the S election cannot be used to avoid the double tax on assets the firm holds. This includes the accounts receivable of a cash method law practice. The shareholders would be well advised to purchase the accounts receivable, agreeing to pay the amounts received back to the corporation, and having the firm elect out of the installment method of reporting under I.R.C. § 453(d). This accelerates the income into the final year the corporation is taxed as a C corporation and avoids later paying the double tax on the amounts realized in a later year (Treas. Reg. § 1.1374-4(h)). If the practice is sold in the next ten years following the S election, the goodwill of the firm may also be subject to this carried over double tax from the final C corporation year (*Id.* § 1.1374-3(c)). This is all to say that the business owner would do well to make an initial S election when forming the professional corporation. The accounting challenges can be overcome with added preparation and the double tax mitigated by not having the C corporation hold such appreciated assets in the first place where possible.

QBID Considerations

A practitioner attentive to the recent changes in the law precipitated by the Tax Cuts and Jobs Act of 2017 may be familiar with the qualified business income deduction (QBID) (I.R.C. § 199A). The QBID was intended to give taxpayers operating a pass-through business such as an LLC or S corporation a special pass-through tax rate akin to the recently reduced C corporation rates. And as any practitioner may already be aware, there are limitations to the application of this special deduction. Chiefly, a specified service trade or business (SSTB), including legal services, is subject to an additional phaseout of the deduction (I.R.C. § 199A(d)(2)). The SSTB limitations don't apply for taxpayers with taxable income at or below the threshold amount. Limitations are phased in between two inflation-adjusted thresholds, at present completely eliminating the deduction for joint filers by \$415,000. This deduction isn't available to the shareholders in a C corporation, so while it may at first seem to incentivize using a pass-through for your law practice, the income limitation means this will not be a deciding factor in initial entity selection.

Limited Liability Partnerships and Professional Limited Liability Companies

If sole practitioners decide to partner with another attorney in forming a new law firm, they will have the added option of forming either an LLP or PLLC. Functionally, the two are similar in that they will each limit liability as to the other partner/member's wrongful acts, as well as personal liability for the debts of the business. For federal income tax purposes, an LLP is a general partnership (Treas. Reg. § 301.7701-2(a)). In states permitting the formation of PLLCs, this may prove the clear choice for practitioners as a single-member LLC in addition to practitioners partnering with another attorney. PLLCs, just as LLCs, have the option of selecting corporate tax treatment for their income or taxing the entity as a partnership. With respect to LLCs taxed as partnerships, there are additional pitfalls to be familiar with, and these concerns will extend to LLPs as well. Unlike the concern with corporations holding appreciated assets, distributions of appreciated property should rarely trigger tax on the gain, assuming the adjusted basis of such partner's interest in the partnership is not exceeded by the built-in gains for the asset (I.R.C. § 731).

The key difference is in the liability for the wrongful acts of general partners. The LLP will insulate practitioners from their partner's wrongful acts where a general partnership would not. This is also the aim of PLLCs. Partnerships offer some advantages in terms of their flexible management that can come with some accounting headaches if the partners are not mindful. In a professional setting, this may be less of a concern as the partners are less likely to engage in contributions of appreciated assets, but it could mean added complexity to liquidating distributions when a partner finally retires from the firm.

There is a long history of litigation considering whether a partner can also be an employee of the partnership. The partnership passes its income through to the partners in accordance with the operating agreement, which is reported annually to the IRS on a K-1 statement. The partnership itself pays no tax and files only an informational Form 1065. However, the IRS takes the view that this fixed, periodic payment to the partner is not compensation as an employee but a guaranteed payment in exchange for services rendered.

Options for Solos

As any firm continues to grow, it may become necessary to revisit its structure, but by front-loading some of the planning, sole practitioners can achieve the liability protection they would want from forming any legal entity paired with some tangible tax benefits.

An additional partner will open up the opportunity to form an LLP in those jurisdictions not permitting a PLLC. Finally, a PLLC should be considered wherever that option is available.

Where LLCs are not permitted to provide legal services, a professional corporation filing an S election will suit many practitioners who wish to remain solo.

The advantages and disadvantages of each should be considered, and a tax professional should be consulted to tailor the analysis to the practitioner's unique situation.



The State Bar of California

180 Howard Street, San Francisco, CA 94105

OFFICE OF ATTORNEY REGULATION & CONSUMER RESOURCES

LawCorp@calbar.ca.gov

Application for Issuance of a Certificate of Registration as a Law Corporation

1) CORPORATE INFORMATION

Name of Law Corporation including Corporate Designation:

Contact Name:

E-mail:

Address Line 1:

Address Line 2:

City:

State:

Zip:

Phone:

2) ATTACHMENTS

Complete and Attach the following:

- ☐ **Attachment A:** Listing all shareholders, officers, directors and all other attorneys practicing law on behalf of the corporation, including all individuals/entities practicing in partnership, association, "of counsel", part-time or on a contract basis.
- ☐ **Attachment B:** Declaration of Compliance with Rules 7.1-7.5, Rules of Professional Conduct of the State Bar of California.
- ☐ **Attachment C:**

Attachment C-1: the Standard Law Corporation Guarantee	OR	Attachment C-2: the Standard Law Corporation Guarantee for Law Corporations Practicing in Partnership with Other Law Corporations
---	----	--
- ☐ **Secretary of State Certification:**

California Law Corporation: Attach a two-page certified copy of the law corporation's Articles of Incorporation	OR	Out of State Law Corporation: Attach BOTH a two-page certified copy of Statement of Designation by Foreign Corporation AND a Certificate of Status of Foreign Corporation
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- ☐ **Bylaws Excerpts:** Please refer to the Law Corporation Rules of the State Bar amended January 1994. Use the exact language from Rule 3.157, paragraphs A – F, in the portions of your bylaws that pertain to ownership and transfer of shares in the corporation. Attach only the portions of the law corporation's bylaws which contain this language. Do not submit your entire set of bylaws.
- ☐ **Secretary's Certification of Bylaws Excerpts:** Certifying that the excerpts attached are a true and correct copy of excerpts from the bylaws of the corporation. Signature of the corporate secretary must be **original**.
- ☐ **Specimen Share certificate:** Photocopy of both sides, containing the legend required by State Bar Law Corporation Rule 3.157.
- ☐ **Payment:** A \$200 non-refundable fee must accompany this Application. Make checks payable to: The State Bar of California.

3) DECLARATION

I am

(Name of Officer)

(Title of Officer)

of

(Complete Name of Corporation)

and as such make this declaration

for and on behalf of said corporation. I have read the foregoing and all attachments thereto and know the contents thereof and the same are true of my own knowledge. I declare under penalty of perjury under the laws of the State of California that the foregoing application and all attachments are true and correct and that the applicant is an existing corporation and its organization, bylaws, Articles of Incorporation and general plan of operation are such that its affairs will be conducted in compliance with the State Bar Act, and the applicable provisions of the Corporations Code, The Rules of Professional Conduct of the State Bar, the Law Corporation Rules of the State Bar and such other laws, rule and regulations as may be applicable.

Executed On:

Print Name:

Signature:

4) SUBMISSION INFORMATION

Submit completed application with all attachments and payment to:

The State Bar of California
Law Corporations Apps
PO Box 849784
Los Angeles, CA 90084-9784



The State Bar *of California*

180 Howard Street, San Francisco, CA 94105

OFFICE OF ATTORNEY REGULATION & CONSUMER RESOURCES

LawCorp@calbar.ca.gov
888-800-3400

LAW CORPORATION NAME DEFINITIONS AND ABBREVIATIONS

GROUP

To remain in compliance with Rules 7.1–7.5 of California Rules of Professional Conduct, you must justify the use of the word "Group" in your name. You may do this by naming at least one other individual employed by your corporation. This person need not be an attorney.

LAW OFFICES

Including the term "Law Offices" implies that the law corporation has more than one address, or more than one attorney including the shareholder at the address of record for the corporation. Thus, the term should not be used unless this arrangement is true. The Law Corporation Program will accept a home address as the second office. The law corporation must provide The State Bar with both addresses.

LAWYERS

Including the term "Lawyers" implies that the corporation has more than one attorney including the shareholder at the address of record for the corporation. Thus, the term should not be used unless this arrangement is true. In the alternative, you may amend the name of the corporation and provide this office with an original certified Amendment Articles of Incorporation from the Secretary of State, a new "Declaration of Compliance with Rule 7.1–7.5" form, and a new guarantee, all setting forth the corporation's new name.

ASSOCIATE

Including the term "Associate" means an employee or fellow employee who is employed as a lawyer. The corporation must execute a guarantee in the amounts sufficient to cover the number of attorneys practicing on behalf of the corporation as required by the State Bar Law Corporation Rule IV-B.

ASSOCIATES

Including the term "Associates" implies that in addition to the shareholder, the corporation must name at least two (2) other attorneys employed by the corporation and execute a guarantee in the amounts sufficient to cover the number of attorneys practicing on behalf of the corporation as required by the State Bar Law Corporation Rule IV-B.

ABBREVIATIONS ALLOWED

A Law Corporation name must include an ending designation such as: A Professional Corporation, A Professional Law Corporation, Professional Corporation, Professional Law Corporation, Law Corporation, APC, A.P.C., PC, P.C., A PC, A P.C., Prof. Corp., A Professional Legal Corporation, Professional Legal Corporation, A Legal Corporation, Inc., Incorporated, A California Professional Corporation, L.C., Ltd., Limited, P.A., and Professional Association.

ABBREVIATIONS NOT ALLOWED

"APLC & PLC" are not permitted because in other states/foreign countries, APLC may suggest that the entity is "a Public Liability Company" or "Professional Legal Consultant" and therefore is misleading to the public.

"LLC" is also not allowed since it is defined as "a Limited Liability Company", which does not pertain to the practice of law.



The State Bar *of California*

Certificate of Secretary Of (Law Corporation Name)

The undersigned, (name), hereby certifies as follows:

1. They are duly elected, qualified and acting Secretary of (Law Corporation Name) California professional corporation (the "**Company**").
2. Attached hereto as **Exhibit A** is a true and correct copy of excerpts from the Bylaws of the Company, including the restrictions on ownership required under Rule 3.157 of the Law Corporation Rules of the State Bar, which are in full force and effect on the date hereof.

IN WITNESS WHEREOF, the undersigned has executed this Certificate as of (date).

By: _____
Secretary



The State Bar *of California*

By laws Addendum Re: Shares of Corporate Stock Per CA Bar Rule 3.157 et seq.

- (A) A shareholder of a law corporation must be licensed and entitled to practice law.
- (B) The shares of a law corporation must be owned only by that corporation or a shareholder.
- (C) The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death.
- (D) The share certificates of the law corporation must be set forth the preceding restrictions of this rule regarding ownership, sale, or transfer of shares. These restrictions must also set forth in the articles of incorporation or bylaws.
- (E) The shares of a shareholder who is ineligible to practice law or legally disqualified to render professional services to the law corporation must be sold or transferred to a qualified shareholder within ninety days after the date of ineligibility or disqualification. The terms of such sale or transfer of shares must be set forth in the articles the bylaw, or a written agreement.
- (F) The shares of a shareholder disqualified for any reason may be resold to that shareholder upon his or her becoming eligible to practice law.

June 10, 2019

NUMBER SHARES
INCORPORATED UNDER THE LAWS OF CALIFORNIA

LAW CORPORATION NAME

AUTHORIZED: 10,000,000 COMMON SHARE STOCK PAR VALUE \$0.01 EACH

This Certifies that _____ is the
registered holder of _____ Shares of the
above named Corporation, transferable only on the books of the Corporation by the holder
hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its
duly authorized officers and its Corporate Seal to be hereunto affixed.

this _____ day of _____ A.D. _____

Secretary

President

Rule 3.156 Shares/Restrictions

- (A) A shareholder of a law corporation must be licensed and entitled to practice law.²⁴
- (B) The shares of a law corporation must be owned by that corporation or a shareholder.²⁵
- (C) The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death.²⁶

For Value Received _____ hereby sell, assign and transfer
unto _____

_____ Shares
represented by the within Certificate, and do hereby irrevocably
constitute and appoint _____

A ttorney to transfer said Stock on the books of the within named
Corporation with full power of substitution in the premises.

Dated _____

I n the presence of _____

NOTICE: THE SIGNATURES OF THIS ASSIGNMENT MUST CORRESPOND WITH THE
NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE, IN EVERY PARTICULAR,
WITHOUT ALTERATION OR ENLARGEMENT, OR ANY CHANGE WHATSOEVER.



The State Bar of California

180 Howard Street, San Francisco, CA 94105

888-800-3400

LawCorp@calbar.ca.gov

OFFICE OF ATTORNEY REGULATION & CONSUMER RESOURCES

FOR OFFICIAL STATE BAR USE ONLY

Law Corporation Application – Attachment A List of Attorneys

Complete Name of Law Corporation:

Application #: _____

1) Shareholders

A) Name	CA Bar Number (if applicable)	Jurisdiction(s) in which admitted
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

B) Are any of the above-listed shareholders:

Shareholders in another California law corporation?

Yes ☐ No ☐

Partners in a limited liability partnership?

Yes ☐ No ☐

C) If you checked "Yes" for either question in Part B, complete this section. In the third column, indicate which type of law practice relationship with the Applicant applies: C for "of counsel"; P for "in partnership"; A for "in association"; or N for "no law practice relationship".

Name of Law Corporation or LLP	CA State Bar Cert. Of Reg. Number	Law Practice Relationship "C", "P", "A", or "N"
_____	_____	_____
_____	_____	_____
_____	_____	_____

☐ Check here if additional sheets are attached. Attach additional sheets labeled "Att-A: Shareholders" as necessary.

2) Officers

NOTE: In law corporations with more than one shareholder, all officers must be shareholders. See California Corporations Code § 13403

Name	CA Bar Number (if applicable)	Jurisdiction(s) in which admitted
(President)	_____	_____
(Treasurer)	_____	_____
(Secretary)	_____	_____

San Francisco Office
180 Howard Street
San Francisco, CA 94105

www.calbar.ca.gov

Los Angeles Office
845 S. Figueroa Street
Los Angeles, CA 90017

3) Directors

NOTE: Directors of a law corporation must also be shareholders. See California Corporations Code §13403

Name	CA Bar Number (if applicable)	Jurisdiction(s) in which admitted
_____	_____	_____
_____	_____	_____
_____	_____	_____

☐ Check here if additional sheets are attached. Attach additional sheets labeled "Att-A: Directors" as necessary.

4) Attorney Employees

Name	CA Bar Number (if applicable)	Jurisdiction(s) in which admitted
_____	_____	_____
_____	_____	_____
_____	_____	_____

☐ Check here if additional sheets are attached. Attach additional sheets labeled "Att-A: Attorney Employees" as necessary.

5) Attorneys Practicing Law on Behalf of a Partnership in Which the Law Corporation is a Partner

A) Name	CA Bar Number (if applicable)	Jurisdiction(s) in which admitted
_____	_____	_____
_____	_____	_____
_____	_____	_____

B) Is the partnership a limited liability partnership (LLP)?

Yes ☐ No ☐

C) If Yes: LLP Name

CA State Bar LLP
Cert. of Reg. No.

_____	_____
_____	_____
_____	_____

☐ Check here if additional sheets are attached. Attach additional sheets labeled "Att-A: Law Corp Partnership" as necessary.

6) Attorneys Practicing Law on Behalf of an Association in Which the Law Corporation has Established a Relationship of a Continuous Nature.

Name	CA Bar Number (if applicable)	Jurisdiction(s) in which admitted
_____	_____	_____
_____	_____	_____
_____	_____	_____

☐ Check here if additional sheets are attached. Attach additional sheets labeled "Att-A: Law Corp Relationship" as necessary.

7) Other Law Corporations Practicing in the Partnership or Association

Name	State of Incorporation	CA State Bar Cert. of Reg. No (If Applicable)
_____	_____	_____
_____	_____	_____
_____	_____	_____

☐ Check here if additional sheets are attached. Attach additional sheets labeled "Att-A: Law Corp Association" as necessary.

8) Other Attorneys ("Of Counsel", "Contract Attorneys", Part-Time Attorneys)

Name	CA Bar Number (if applicable)	Jurisdiction(s) in which admitted
_____	_____	_____
_____	_____	_____
_____	_____	_____

☐ Check here if additional sheets are attached. Attach additional sheets labeled "Att-A: Law Corp Others" as necessary.

9) Total number of Persons Practicing law on behalf of the Law Corporation: *

*Use the total in item #9 to calculate the dollar amounts to be set forth on the Standard Law Corporation Guarantee (Attachment C-1) or Standard Law Corporation Guarantee for Law Corporations Practicing in Partnership with other Law Corporations (Attachment C-2) See the Guarantee Worksheet for how to calculate the correct dollar amounts for the guarantee.



Law Corporation – Special Report Form

FOR OFFICIAL STATE BAR USE ONLY

Name of Law Corporation (current):

Application #:

Certificate Number: Total Number of Attorneys Covered:

Contact Name: Phone Number:

E-mail:

1) REQUEST FOR NAME CHANGE

(Existing Law Corporation)

Are you changing your Law Corporation Name? ☐ Yes ☐ No *(If NO, please skip to section 2)*

Complete name of Law Corporation (NEW):

Please submit all of the following with this form:

- ☐ Amended Articles of Incorporation showing approval of name change and effective date (original certified copy from the Secretary of State)
- ☐ Revised Law Corporation Attachment B: 7.1-7.5 Declaration (with new name)
- ☐ Revised Law Corporation Attachment C: Law Corporation Guarantee (with new name)

2) REQUEST FOR CHANGE OF ADDRESS

Are you changing your Law Corporation Address? ☐ Yes ☐ No *(If NO, please skip to section 3)*

New Address now in effect – Line 1:

New Address now in effect – Line 2:

3) REQUEST FOR CHANGE IN SHAREHOLDERS

Are you changing your Law Corporation Shareholder information? ☐ Yes ☐ No *(If NO, please skip to section 4)*

Please submit all of the following with this form:

- ☐ Special Report Form– Attachment D: Supplement
- ☐ Revised Law Corporation Attachment C: Law Corporation Guarantee (with signatures from all existing shareholders)

4) REQUEST FOR CHANGE OF DIRECTORS AND/OR OFFICERS ON RECORD

(Directors and/or Officers must be Shareholders)

Are you changing your Law Corporation Director and/or Officer Information? ☐ Yes ☐ No *(If NO, please skip to section 5)*

Please submit all of the following with this form:

- ☐ Special Report Form – Attachment D: Supplement

5) REQUEST FOR CHANGE IN TOTAL # OF ATTORNEY EMPLOYEES COVERED UNDER EXISTING GUARANTEE

Are you changing your Law Corporation's total number of attorneys? ☐ Yes ☐ No (If NO, please skip to section 6)

Please submit all of the following with this form:

- ☐ Special Report Form – Attachment D: Supplement
☐ Revised Law Corporation Attachment C: Law Corporation Guarantee (with signatures from all existing Shareholders)

6) REQUEST FOR CHANGE IN LAW PRACTICE RELATIONSHIPS

Are you reporting changes in the law practice business relationship between your Law Corporation and other law corporations, Limited Liability Partnerships, and/or other entities or individuals?

☐ Yes ☐ No (If NO, please skip to section 7)

Please submit all of the following with this form:

- ☐ Special Report Form– Attachment D: Supplement
☐ Revised Law Corporation Attachment C: Law Corporation Guarantee (with signatures from all existing shareholders)

7) DECLARATION

I am

(Name of Shareholder)

(Title of Office)

of

(Complete Name of Corporation)

and as such make this declaration for and on behalf of said corporation. I have read the foregoing report and any attachments to it and know the contents thereof, and the same are true of my own knowledge. I declare under penalty of perjury, under the laws of the State of California, that the foregoing and any attachments to it are true and correct.

Executed On: _____

Signature: _____

8) SUBMISSION INFORMATION

Submit completed Special Report form and all attachments:

**The State Bar of California
Law Corporations
180 Howard Street
San Francisco, CA 94105-1617**



THE STATE BAR OF CALIFORNIA
LIMITED LIABILITY PARTNERSHIPS
(888) 800-3400 · llp@calbar.ca.gov

FOR OFFICIAL STATE BAR USE ONLY # _____

Amt Rcvd \$ _____ Chk # _____

____ No Check

Initials: _____

Application #: _____

Application for Issuance of a Certificate of Registration as a Limited Liability Partnership (LLP)

1) LLP INFORMATION

Name of Limited Liability Partnership (LLP): _____
(The LLP name must comply with Rule 1-400 of the California Rules of Professional Conduct)

Address 1: _____

Address 2: _____

City: _____ State: _____ Zip: _____ + _____

Contact Name: _____

E-mail: _____ Phone: _____

The following partners are authorized to act on behalf of the LLP:

Partner Name: _____ Attorney License or Member #: _____

Partner Name: _____ Attorney License or Member #: _____

Partner Name: _____ Attorney License or Member #: _____

2) ATTACHMENTS

Complete and Attach the following:

- ☐ **Attachment 1:** LLP List of Partners.
- ☐ **Attachment 2:** LLP List of Non-Partners.
- ☐ **Attachment 3:** Declaration of Compliance with Rule 1-400, Rule of Professional Conduct of the State Bar of California.
- ☐ **Attachment 4:** Declaration of Compliance with California Corporations Code Section 16956 (a)(2).
- ☐ **Secretary of State Certification:** Attach an **original** certified copy of the Secretary of State's Registered Limited Liability Partnership Registration (LLP-1) including Secretary of State date-stamp. The form is available from the Office of the Secretary of State.
- ☐ **Payment:** A \$50 per partner (minimum of \$100 up to a maximum of \$2500) non-refundable fee must accompany this Application. Make checks payable to: The State Bar of California.

3) DECLARATION

I am _____ and I am authorized to act on behalf
(Name of partner authorized to act on behalf of the LLP)

of _____ and as such make this declaration
(Full Name of Limited Liability Partnership)

for and on behalf of said partnership. I have read the foregoing and all attachments thereto and know the contents thereof and the same are true of my own knowledge. I declare under penalty of perjury under the laws of the State of California that the foregoing application and all attachments are true and correct and that the applicant is an existing Limited Liability Partnership and that its affairs will be conducted in compliance with the State Bar Act, and the applicable provisions of the Corporations Code, The Rules of Professional Conduct of the State Bar, the Limited Liability Partnership Rules of the State Bar and such other laws, rules and regulations as may be applicable.

Executed On: _____

Print Name: _____

Signature: _____

4) SUBMISSION INFORMATION

Submit completed application with all attachments and payment to:

The State Bar of California
LLP Application
P.O. Box 885017
Los Angeles, CA 90088-5017

Instructions for Application for Issuance of Certificate of Registration as a LLP

A \$50 per partner (minimum of \$100, up to a maximum of \$2,500) non-refundable fee must accompany this application.

SPECIFIC INSTRUCTIONS

Fill in the **complete** name of the limited liability partnership (LLP). This name must be the same name set forth on the Secretary of State's Registered Limited Liability Partnership Registration (LLP-1).

Fill in the address of record for the LLP. To change the address of record of the LLP or to file any special reports other than the Annual Report, notification must be forwarded in writing to The State Bar of California, MSC, 180 Howard Street, San Francisco, CA 94105. Note that change of an individual's bar member's official State Bar address **does not** change the address of record for an LLP.

Fill in the name the telephone number, and the e-mail address of the person the State Bar will contact should issues arise.

Fill in the name of the partner or partners authorized to act on behalf of the LLP for State Bar purposes. If the authorized partner is a law corporation, set forth the complete name of the corporation. A shareholder of the law corporation may sign on behalf of the corporation wherever the signature of the authorized partner is required. Please specify that you are signing on behalf of the corporation.

Complete and submit the following:

- A. **Attachment 1.** List the names of all attorney and/or law corporation partners in the LLP. Attorney License/Member Number need only be provided for attorneys licensed to practice in California. For Jurisdiction(s) in which Admitted to Practice, list only states and/or countries. If your LLP includes a partner or partners who are licensed only in a non-U.S. jurisdiction, see State Bar LLP Rule 3.172(A)(3). If a partner is licensed in more than one jurisdiction, list the primary jurisdiction first. (A partner licensed to practice law in California will be entered as a California partner unless you specify otherwise.) You may attach additional pages if necessary.

NOTE: If you list the name of a law corporation partner on Attachment 1, do not list the shareholder(s) as an individual attorney partner(s), unless the shareholder(s) *and* the law corporation are separate partners in the LLP.

- B. **Attachment 2.** List the names of all non-partners, including employees and all other persons and/or law corporations practicing in partnership, association and/or "of counsel" with the LLP in a continuous relationship. "Continuous relationship" means co-counsel, contract attorneys, any person sharing office space, and/or any person practicing "of counsel" to the LLP. You may attach additional pages if necessary.
- C. **Attachment 3.** See State Bar LLP Rule 3.171(C) and California Rule of Professional Conduct 1-400.
- D. **Attachment 4.** See Corporations Code Section 16956 (a)(2), Business and Professions Code 6174.5, and State Bar Limited Liability Rule 3.172 (A)(2).
- E. **Secretary of State Certification.** Attach an **original** certified copy (including the cover with the date stamp) of the Secretary of State's Registered Limited Liability Partnership Registration (LLP-1). The form is available from the office of The Secretary of State.

NOTE: The application will not be processed or certified until all attachments are received in our office.

The declarations must be signed by a partner authorized to act on behalf of the LLP. If the authorized partner is a law corporation, set forth the complete name of the corporation. A shareholder of the law corporation may sign on behalf of the corporation. Please specify that you are signing on behalf of the corporation. The application is not complete unless it has an **original** signature. No copies of signature, please. Without the original signed declaration by a partner authorized to act on behalf of the LLP, certification cannot be issued and the application will not be processed until we receive a declaration with the original signature of an authorized partner.

If you are attaching a separate list of partners, or separate lists of partners who practice in different offices or jurisdictions, as an addendum to Attachment 1, please use the following format:

Last Name, First Name, Middle Initial *in alphabetical order*; Jurisdiction(s) Where Licensed to Practice (list the primary jurisdiction first); California State Bar Attorney License Member Number (if applicable).

Do not list partners and non-partners together on one list. If a "mixed list" is submitted, certification cannot be issued and the application will not be processed until you submit separate lists of partners and non-partners.



**THE STATE BAR OF CALIFORNIA
LIMITED LIABILITY PARTNERSHIP**
180 Howard Street · San Francisco, CA 94105-1617
(888) 800-3400 · llp@calbar.ca.gov

FOR OFFICIAL STATE BAR USE ONLY

Application #: _____

Limited Liability Partnership (LLP) – Attachment 4

Declaration of Compliance with California Corporations Code Section 16956 (a)(2)

The undersigned, on behalf of

Complete Name of LLP: _____

does hereby certify that this limited liability partnership complies with the security requirements described in paragraph (2) of subdivision (a) of Section 16956 of the California Corporations Code.

DECLARATION

I am a Partner authorized to act on behalf of the LLP, and do hereby make this declaration on behalf of said partnership. I have read the foregoing and the same is true of my own knowledge. I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on: _____

Signature: _____

Print Name: _____
(Partner authorized to act on behalf of the partnership)

TITLE 3. PROGRAMS AND SERVICES

Adopted July 2007

DIVISION 2. CALIFORNIA LICENSEES

Chapter 3. Law Corporations

(Formerly Chapter 2; renumbered effective November 4, 2011.)

Rule 3.150 Scope

- (A) Subject to Supreme Court approval, the State Bar is authorized by law to establish and enforce rules for corporations that practice law in California.¹ To practice law in California, a corporation must be certified by the California Secretary of State and registered by the State Bar. These rules refer to such a corporation as a law corporation.
- (B) These rules do not reiterate or supersede the State Bar Act,² statutory requirements for law corporations,³ or any other legal requirement.⁴
- (C) For law corporations, the governmental agency referred to in the Professional Corporation Act is the State Bar.⁵

Rule 3.150 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

Rule 3.151 Eligibility

A corporation, including a nonprofit public benefit corporation that applies to register as a law corporation must meet statutory requirements.⁶

Rule 3.151 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

Rule 3.152 Application to register as a law corporation

- (A) To apply to register as a law corporation an applicant must
 - (1) submit an Application to Register as a Law Corporation⁷ with the fee set forth in the Schedule of Charges and Deadlines; and

¹ Business & Professions Code § 6171.

² See especially Business & Professions Code, Article 10, §§ 6160-6172. See also State Bar Rule 1.4.

³ See especially Title 1, Part 4, Division 3 of the Corporations Code, commencing with section 13400 (Moscone-Knox Professional Corporation Act).

⁴ See especially *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 40 Cal.Rptr.3d 221 regarding nonprofit public benefit corporations.

⁵ Business & Professions Code § 6160.

⁶ Business & Professions Code § 6161 and Corporations Code § 13406.

⁷ Business & Professions Code § 6161.

- (2) provide the proof of security for claims required by Rule 3.158.⁸
- (B) The name under which the law corporation intends to practice law must include a designation of corporate existence such as "Professional Corporation," "Prof. Corp.," "Corporation," "Corp," "Incorporated," or "Inc."⁹
- (C) The effective date of registration as a law corporation is the date an applicant files a complete application.¹⁰ The State Bar has discretion to grant a later effective date requested by the applicant.

Rule 3.152 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

Rule 3.153 Amendment or abandonment of incomplete application

If the State Bar notifies an applicant that an Application to Register as a Law Corporation is incomplete or otherwise fails to meet application requirements, it must provide the applicant at least sixty days to amend the application. If the applicant fails to meet application requirements within this time, the application is deemed withdrawn.

Rule 3.153 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

Rule 3.154 Duties of a law corporation

- (A) A law corporation must have a currently effective certificate of registration issued by the State Bar; submit an Annual Renewal with any required fee,¹¹ unless exempt by these rules;¹² report to the State Bar within thirty days a change of address or e-mail address; and otherwise comply with these rules and applicable law.
- (B) A law corporation may practice law only under the name registered with the Secretary of State and approved by the State Bar. Use of the name must comply with requirements of the Rules of Professional Conduct.¹³
- (C) A law corporation must observe all rules and law that apply to a licensee of the State Bar and must not do or fail to do anything that would constitute a cause for discipline of a licensee.¹⁴
- (D) A law corporation employing an attorney who has resigned, been disbarred, been suspended from the practice of law, or resigned with charges pending

⁸ Business & Professions Code § 6171(b).

⁹ Business & Professions Code § 6171(c).

¹⁰ Rule 1.24.

¹¹ Rule 3.156.

¹² Rule 3.156(C).

¹³ Business & Professions Code § 6171(c).

¹⁴ Business & Professions Code § 6167.

- (1) may not permit the attorney to practice law or represent that he or she is available to practice law and must supervise the performance of any duties assigned to such an attorney;¹⁵ and
- (2) must remove the name of any attorney who is disbarred or resigned with charges pending from its business name, signs, advertisements, letterhead, and other materials within sixty days of the disbarment or resignation.¹⁶

Rule 3.154 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011; amended effective January 25, 2019.

Rule 3.155 Special reports

- (A) A law corporation must submit within forty-five days as a Special Report any change in directors, officers, share ownership, articles of incorporation, or bylaws.¹⁷
- (B) This rule does not apply to a qualified legal services project or qualified support center¹⁸ incorporated as a nonprofit public benefit corporation.¹⁹

Rule 3.155 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

Rule 3.156 Annual renewal²⁰

- (A) A law corporation must annually renew its authorization to practice law by submitting an Annual Renewal with the fee set forth in the Schedule of Charges and Deadlines. The form must report any changes to the information last provided to the State Bar in an Annual Renewal, a special report, or a Law Corporation Guarantee. If the information required for the guarantee has changed, the renewal must also include a current guarantee executed by all shareholders. The deadline for submission of the Annual Renewal and the amount of the fee are set forth in the Schedule of Charges and Deadlines.
- (B) A law corporation that fails to submit a complete Annual Renewal and fee is suspended and is not entitled to practice law. It may be reinstated upon submission within one year of the renewal, fee, and any penalty. If the suspension lasts more than one year, the registration of the law corporation is involuntarily terminated.

¹⁵ Business & Professions Code § 6133. See Rule 1-311, Rules of Professional Conduct of the State Bar of California.

¹⁶ Business & Professions Code § 6132.

¹⁷ Business & Professions Code § 6162.

¹⁸ Business & Professions Code §§ 6213(a) and 6213(b).

¹⁹ Corporations Code § 13406(c).

²⁰ Business & Professions Code §§ 6161.1, 6163.

- (C) This rule does not apply to a qualified legal services project²¹ or qualified support center²² incorporated as a nonprofit public benefit corporation.²³

Rule 3.156 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

Rule 3.157 Shares

- (A) A shareholder of a law corporation must be licensed and entitled to practice law.²⁴
- (B) The shares of a law corporation must be owned only by that corporation or a shareholder.²⁵
- (C) The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death.²⁶
- (D) The share certificates of the law corporation must set forth the preceding restrictions of this rule regarding ownership, sale, or transfer of shares. These restrictions must also be set forth in the articles of incorporation or bylaws.
- (E) The shares of a shareholder who is ineligible to practice law or legally disqualified²⁷ to render professional services to the law corporation must be sold or transferred to a qualified shareholder within ninety days after the date of ineligibility or disqualification. The terms of such a sale or transfer of shares must be set forth in the articles, the bylaws, or a written agreement.
- (F) The shares of a shareholder disqualified for any reason may be resold to that shareholder upon his or her becoming eligible to practice law.
- (G) This rule does not apply to nonprofit public benefit corporations.

Rule 3.157 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

Rule 3.158 Security

- (A) Each law corporation must provide the State Bar with proof of security for claims for errors and omissions of the corporation or any person who practices law on

²¹ Business & Professions Code § 6213(a).

²² Business & Professions Code § 6213(b).

²³ Corporations Code § 13406(c).

²⁴ Business & Professions Code § 6165.

²⁵ Corporations Code § 13406(a).

²⁶ Business & Professions Code §§ 6171(a) & 6171.1.

²⁷ Business & Professions Code §§ 6166, 6171(a), and Corporations Code § 13401(e).

behalf of the corporation, on its behalf as an employee or otherwise. The law corporation must provide proof of security with its Application to Register as a Law Corporation and provide new proof of security when that last provided is no longer current. Proof of security must be provided as indicated below.

- (1) All law corporations, except as otherwise provided in this rule, must provide a Law Corporation Guarantee providing that the shareholders jointly and severally agree to pay all claims established against the law corporation for errors and omissions arising out of the rendering of professional services. The guarantee must name each shareholder and be executed by each.²⁸
 - (2) A nonprofit public benefit corporation²⁹ must provide a certificate of annual insurance.
 - (3) Law corporations incorporated and registered with the State Bar before October 27, 1971, and that have elected to provide security by insurance, must provide a certificate of insurance.
- (B) For purposes of determining the amount required as proof of security, a person who practices law on behalf of a law corporation includes
- (1) any employee, other person, or partnership in which the law corporation is a partner and that the law corporation holds out as being of counsel or otherwise available to practice law on behalf of the law corporation; and
 - (2) any association that has a continuous relationship with the law corporation for the practice of law, or that the association, with the consent of the law corporation, holds out as being of counsel or otherwise available to practice law on behalf of the association.
- (C) The Schedule of Charges and Deadlines sets forth the minimum amount of security that a law corporation must provide annually for a single claim and for all claims, whether against the corporation or a person practicing law on behalf of the corporation.

*Rule 3.158 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.
Amended March 2, 2012; amendment approved by the Supreme Court effective December 1, 2014.*

Rule 3.159 Voluntary termination of registration

A law corporation may by resolution request that the State Bar terminate its registration. The date of termination will be the date of the resolution, a later date requested by the law corporation, or an earlier date at the discretion of the State Bar.

²⁸ Business & Professions Code § 6171(b).

²⁹ Corporations Code § 13406(b).

*Rule 3.159 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.
Amended March 2, 2012; amendment approved by the Supreme Court effective December 1, 2014.*

Rule 3.160 Involuntary termination of registration

- (A) A law corporation that fails to submit a complete Annual Renewal and fee is suspended and is not entitled to practice law.³⁰
- (B) The State Bar may terminate the certification of a law corporation for failure to comply with these rules or applicable law.³¹ Termination is effective sixty days after it has issued a notice to the law corporation stating the grounds for the termination. The law corporation may request Supreme Court review of the termination.³²

Rule 3.160 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

Rule 3.161 Public information

State Bar records regarding the certification of a law corporation are public information, except for correspondence, internal memoranda, complaints, and any other document for which disclosure is prohibited by law.

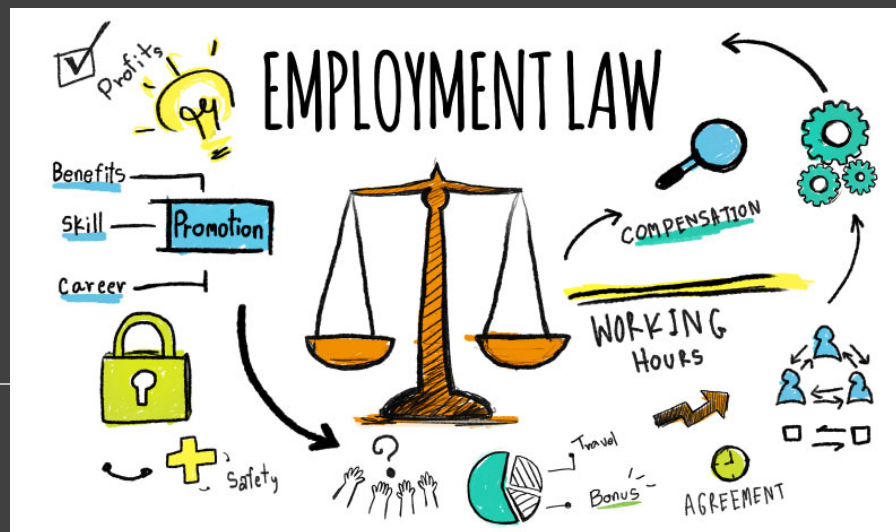
Rule 3.161 adopted September 22, 2010; approved by the Supreme Court effective April 15, 2011.

³⁰ Rule 3.156(B).

³¹ Business & Professions Code § 6169.

³² Rule of Court 9.13(d). And see Business & Professions Code § 6170.

Current Employment Issues for Solos & Small Firm Owners



CCCBA MCLE Spectacular
November 18, 2022

Terry R. Leoni | Leoni Law

- ❑ Employment Advice & Counsel for Small Businesses
- ❑ All things employee
 - ✓ Wrongful/Constructive Termination
 - ✓ Harassment, Discrimination, Retaliation
 - ✓ Severance/Separation Agreements, including Stock Options
 - ✓ Workplace Investigations for Subjects, Witnesses, & Victims
 - ✓ Public Employees & Union Counsel (PERB & NLRB matters)
 - ✓ Professional Licensing Defense

“Labor Law Lioness”



Independent Contractor v. Employee



UNDER THE ABC TEST, A WORKER IS ONLY AN INDEPENDENT CONTRACTOR IF THEY MEET ALL THREE REQUIREMENTS:



- 1 The worker is free from the control and direction of the hirer in relation to the performance of the work, both under the contract and in fact.
- 2 The worker performs work that is outside the usual course of the hirer's business.
- 3 The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.

ABC Test to Determine (mis)Classification:

A – Autonomy

B – Business

C – Custom

(Labor Code 2775)

Lawyers as Independent Contractors?

Certain occupations are exempted from the “ABC Test”, including lawyers.

(AB 5, AB 2257)









BUT, this does not mean lawyers are safe from analysis. Simply, having a law degree doesn’t mean firms are free to only hire IC or lawyers are only classified as IC.

The pre-AB5 “*Borello Test*” is applicable & not ABC Test.

- 11 factors that look primarily at control
- Supervised & controlled? Own supplies? Own office? Your area of expertise? Temporary/ fixed or indefinite time?

Examples under Borello

- Proper IC: Own firm or hired for their specific expertise, i.e. outside firm hired me for NLRB assistance
- Misclassified IC: Need extra help & bring on a lawyer to work full-time for you

Minimum Wage 	California Minimum Wage (2022) <ul style="list-style-type: none"> \$15 per hour Exc: Local Ordinances	Off-the-Clock Work 	Pay for All Hours Worked <ul style="list-style-type: none"> California workers cannot be forced to work off-the-clock All time spent working must be paid
Time and a Half 1.5x 	California Overtime: 1.5x pay <ul style="list-style-type: none"> Over 8 hours a day Over 40 hours a week 7th consecutive work day 	Paychecks 	California Paycheck Laws <ul style="list-style-type: none"> Must be paid at least every 2 weeks Must receive check within 10-11 days of payday Final paycheck due on same day as termination
Double time 2.0x 	California Overtime: 2x pay <ul style="list-style-type: none"> Over 12 hours a day Over 8 hours on 7th consecutive work day 	Vacation 	California Vacation Laws <ul style="list-style-type: none"> Employers can choose to offer paid-time-off (PTO), but not mandatory If offered, unused vacation days must be cashed out when employee leaves
Independent Contractors 	Misclassification Damages/Penalties <ul style="list-style-type: none"> Up to \$25,000 for each misclassified worker Minimum wage shortfalls Overtime Business expense reimbursement 	Business Expenses 	Expense Reimbursement Law <ul style="list-style-type: none"> Employers must reimburse all incurred expenses that were "necessary" for performing job duties
			Work from Home

Other Misclassification/ Wage & Hour Concerns

Hiring Right!

OFFER LETTER APPROVAL PROCESS



Verbal Offer



Formal offer letter



Candidate accepts
the position



Closing the position



Welcome letter
and onboarding

Hiring Checklist

Employee Name	Date of Hire	Company Name			
Need to Use?	Form Description	Date Given	Date Rec'd	Date Filed/Sent	
<input type="checkbox"/>	Employment Application				
<input type="checkbox"/>	Credit and Background Checking Forms				
	<i>(Required if you do a credit or background check. Credit checks are severely limited in California. Criminal background checks are very limited, can only be done after a conditional job offer and require a specific process and notices. See Credit Check Checklist and Criminal Background Screening Checklist)</i>				
<input type="checkbox"/>	Employment Interview Checklist				
<input type="checkbox"/>	Employment Offer Letter				
<input type="checkbox"/>	Written Commission Agreement				
	<i>(Required if commissioned employee)</i>				
<input type="checkbox"/>	Letter to Temporary Employees				
<input type="checkbox"/>	W-4 Form: Employee Withholding				
<input type="checkbox"/>	DE-4: California Employee Withholding Certificate				
	<i>New hires are required to submit both the federal Form W-4 and the state Form DE-4.</i>				
<input type="checkbox"/>	I-9 Form: Employment Eligibility Verification				
<input type="checkbox"/>	Workers' Compensation Pamphlet, with:				
	Personal Chiropractor or Acupuncturist Designation Form , and				
	Personal Physician Designation Form				
	<i>(Brochure must be provided in Spanish if employee's primary language is Spanish)</i>				
<input type="checkbox"/>	Disability Insurance Pamphlet (Form DE 2515).....				
<input type="checkbox"/>	Paid Family Leave Pamphlet (Form DE 2511)				
<input type="checkbox"/>	Sexual Harassment Pamphlet				
<input type="checkbox"/>	Rights of Victims of Domestic Violence, Sexual Assault and Stalking Pamphlet				
<input type="checkbox"/>	General Notice of COBRA Continuation Coverage Rights				
	<i>(Required for employers with 20 or more employees if offering a health plan. Separate forms for employees inside/outside California)</i>				
<input type="checkbox"/>	New Employee(s) Report: Form DE-34				
<input type="checkbox"/>	New Health Insurance Marketplace Coverage Options and Your Health Coverage				
	<i>(Required if employer is covered by the FLSA/ separate forms for employers who do/do not offer a health plan)</i>				
<input type="checkbox"/>	Wage and Employment Notice to Employees				

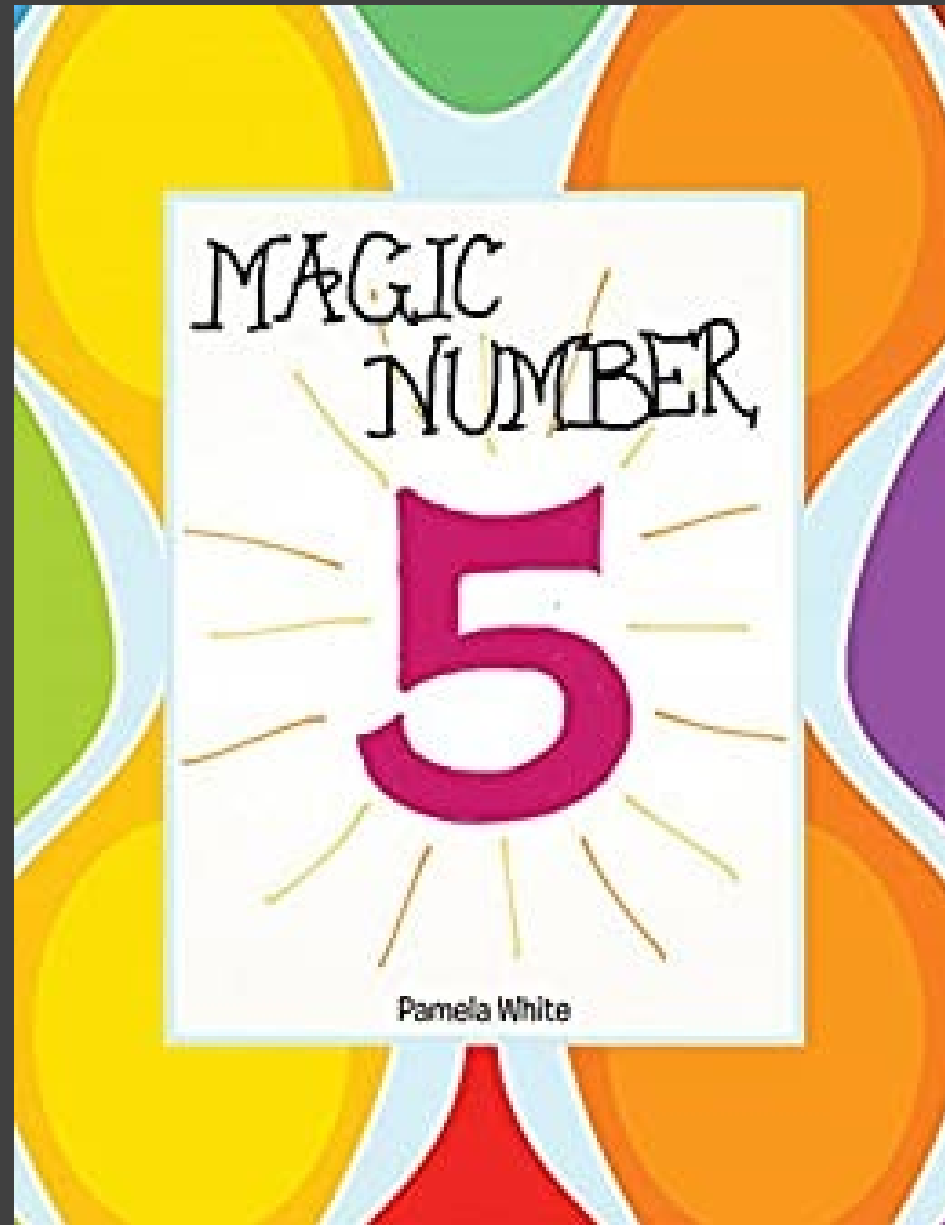
Hiring Checklist

Need to Use?	Form Description	Date Given	Date Rec'd	Date Filed/Sent
<input type="checkbox"/>	Harassment, Discrimination and Retaliation Prevention Policy , with			
<input type="checkbox"/>	Confirmation of Receipt			
<input type="checkbox"/>	Mandatory Harassment Prevention Training			
	<i>(Must be completed within six months of hire)</i>			
<input type="checkbox"/>	Lactation Accommodation Policy			
<input type="checkbox"/>	Permit to Work - Form B1-4			
	<i>(Required if employee is a minor)</i>			
<input type="checkbox"/>	Initial Safety Training			
<input type="checkbox"/>	Emergency Information			
<input type="checkbox"/>	Employee Handbook and Confirmation of Receipt			
<input type="checkbox"/>	Code of Conduct/Ethics Policy (if separate from Handbook).....			
<input type="checkbox"/>	Health Insurance and Benefits Information			
<input type="checkbox"/>	Property Return Agreement			
<input type="checkbox"/>	Absence Request Forms			
<input type="checkbox"/>	List of Holidays for Current Year			

Note: Forms in bold are legally required for all California employers.



5 is the New Magic Number



Do you have 5 or more employee?
(Who is considered an employee?)



Are you offering/providing the correct benefits
and know what Labor Laws apply?



- Criminal & Credit Checks
- Cal-COBRA
- CFRA
- Child Labor
- C19 Notices
- Crime Victim Leave
- Crime Victim Accommodation
- Disability Leave
- Immigrant Workers

- Discrimination
- Employee Safety
- FEHA
- Fair Pay Act
- Injury & Illness Prevention Program
- Jury Duty Time Off
- Lactation Accommodation
- Sexual Harassment Training
- Military Leave

- Paid Family Leave
- Paid Sick Leave
- Posters & Notices
- Pregnancy Disability Leave
- Prior Salary History Ban
- School Appearances Leave
- Smoking Prohibition
- Unemployment Insurance
- Volunteer Leave
- Workers' Compensation

Avoiding Harassment, Discrimination, & Retaliation



Avoiding Harassment, Discrimination, & Retaliation

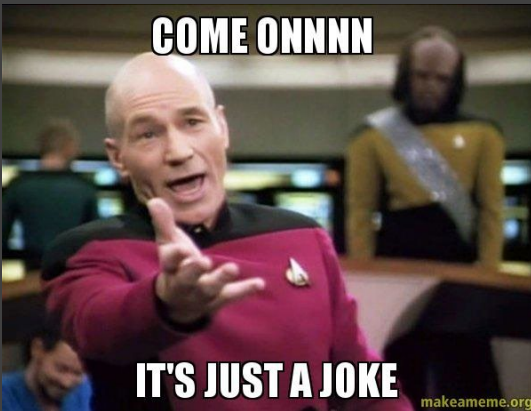


- ✓ Harassment: Treating someone *badly* bc of their protected class, e.g. Hostile Work Environment
- ✓ Discrimination: Treating someone *differently* bc of their protected class
- ✓ Retaliation: Punishing an employee for a “legally protected” complaint

Other Considerations



- ✓ Not just at the office, i.e. happy hour, texting, emails, IG
- ✓ Bystander Effect
- ✓ Flirting is not “just” flirting
- ✓ Joking is not “just” joking
- ✓ You must respond to complaints...*and the response is not retaliation*
- ✓ Toxic Boss Syndrome – Reputation & Liability



Firing Right!



Termination Checklist

Employee Name _____

Termination Date _____

Company Name _____

<i>Need to Use?</i>	<i>Form Description</i>	<i>Date Given</i>	<i>Date Rec'd</i>	<i>Date Filled/Sent</i>
<input type="checkbox"/>	Termination Decision Checklist	N/A	N/A	_____
<input type="checkbox"/>	Final Paycheck Worksheet	N/A	N/A	_____
<input type="checkbox"/>	Final Paycheck Acknowledgment	_____	_____	_____
<input type="checkbox"/>	Notice to Employee as to Change in Relationship	_____	_____	_____
<input type="checkbox"/>	For Your Benefit (Form 2320)	_____	N/A	N/A
<input type="checkbox"/>	Cal-COBRA Notice to Carrier	N/A	N/A	_____
<input type="checkbox"/>	COBRA Notice to Plan Administrator	N/A	N/A	_____
<input type="checkbox"/>	COBRA Continuation Coverage Election Notice*	_____	_____	_____
<input type="checkbox"/>	Acknowledgement of Receipt of Notification of COBRA Rights*	_____	_____	_____
<input type="checkbox"/>	Health Insurance Premium (HIP) Notice	_____	N/A	N/A
<input type="checkbox"/>	Exit Interview	_____	_____	_____
	Claims: Responding to/Appealing Unemployment (UI) Insurance			
<input type="checkbox"/>	Appealing a UI Claim to an Administrative Law Judge	N/A	N/A	_____
<input type="checkbox"/>	Appealing a UI Claim to the UI Appeals Board	N/A	N/A	_____
<input type="checkbox"/>	Responding to a Claim for UI	N/A	N/A	_____
<input type="checkbox"/>	Other:	_____	_____	_____

* Required at time of termination for some employers.

Note: Forms in bold are legally required for all California employers.

Other Considerations:

- ✓ Reason for termination
- ✓ Empathy & sympathy
- ✓ Severance?
- ✓ The replacement

New Laws Alert!





Questions & Thank You!

Terry R. Leoni | Leoni Law
925.699.1800 | tleoni@leonilawfirm.com



2023 New & Revised Labor & Employment Laws

AB 152 COVID-19 Supplemental Paid Sick Leave

- Extending C19 leave to require employers with 26 or more employees to provide full-time employees who cannot work or telework up to 40-hours of leave after a C19 diagnosis or to care for a family member who has been diagnosed.
- There is also an additional 40-hours for full-time employees who cannot work or telework due to their C19 quarantine or isolation or a family members', to care for a child whose school or daycare is closed or unavailable due to C19, or due to their or their family members' vaccination appointment or side effect from a vaccination.
- Employers do not have any obligation to provide C19 paid sick leave if the employee refuses to provide documentation of a test result and may require the employee to submit to a second test within 24 hours. The leave does not need to be consecutive.
- For taxable years beginning on or after January 1, 2020 and before January 1, 2030, excludes from gross income grant allocations received by a taxpayer pursuant to the California Small Business and Nonprofit COVID-19 Supplemental Paid Sick Leave Relief Grant Program.
- Establishes a grant program to assist qualified small businesses or nonprofits that are incurring costs for COVID-19 supplemental paid sick leave.

AB 257 Food Facilities and Employment

- Establishes the Fast Food Council to create sector-wide minimum standards on wages, working hours, and other working conditions related to the health, safety, and welfare of fast food restaurant workers.
- Among other things, the Council defines the characteristics of a fast-food restaurant, creates minimum fast-food restaurant employment standards, including minimum wages, maximum hours of work, and other working conditions.
- Prohibits a fast-food restaurant operator from discharging or in any manner discriminating or retaliating against any fast-food restaurant employee for specified reasons, and creates a cause of action and right to reinstatement for employees for discrimination/retaliation.

AB 551: Disability Retirement Presumption

- Requires PERS to presume that a disability retirement arose out of employment, making the member eligible for an IDR, if the retirement was based at least in part on a COVID-19 related illness if certain criteria are met. Presumption sunsets on January 1, 2024.
- The presumption applies to (1) firefighters, public safety officers, certain healthcare workers, and equivalent classifications, and (2) members in other job classifications who test positive during a COVID-19 outbreak at the member's workplace.

AB 1041 Employment: CFRA Leave

- Expands the class of people for whom an employee may take family care and medical leave (up to a total of 12 work weeks in any 12-month period) to a "designated person", or any individual related by blood or whose association with the employee is the equivalent of a family relationship; applies to employers with 5 or more employees.
- Expands the definition of the term "family member" to include a designated person, meaning a person identified by the employee at the time the employee requests paid sick days, subject to limitation by the employer, as prescribed.
- Authorizes a designated person to be identified at the time the employee requests the leave and allows an employer to limit an employee to one designated person per 12-month period.



2023 New & Revised Labor & Employment Laws

AB 1601 Employment protections: Mass Layoff, Relocation, or Termination

- Authorizes the Labor Commissioner to enforce certain notice requirements concerning a mass layoff, relocation, or termination of employees, including call center employees, authority to investigate alleged violations, order temporary relief to mitigate violations, and issue citations.
- Prohibits employer from various actions for call center employees when terminations, relocations, or mass layoff occurs as specified, and establishes certain remedies.
- Precludes the withholding or denial of payments, compensation, or benefits under any other state law to workers based upon these provisions, as specified.

AB 1751: Workers Compensation and COVID19

- Extends the rebuttable presumption that peace officers and firefighters who COVID19 “injury” arose out of the course of their employer to January 1, 2024.
- Employees must exhaust their paid sick leave before getting any TTD benefits.

AB 1775 Occupational Safety: Live Events

- Require a contracting entity to require an entertainment event’s vendor to certify for its employees and subcontractor employees that those individuals have complied with specified training and workforce requirements, including employees involved in the setting up, operation, or tearing down of a live event at its public events venue.

AB 1949 Employees: Bereavement Leave

- Creates mandatory bereavement leave for any employer with 5 or more employees to provide up to 5 days of unpaid time off in the case of the death of a spouse, child, parent, or other qualifying member.
- Leave must be completed within 3 months of the date of death, and can be taken pursuant to any existing bereavement leave policy of the employer or, in the absence of an existing policy, the bereavement leave may be unpaid. Employees are authorized to use certain other leave balances otherwise available to the employee, including accrued and available paid sick leave.
- Employers cannot discriminate, interfere, or retaliate for taking the leave.
- Does not apply to an employee who is covered by a valid CBA that covers working conditions.

AB 2068 OSHA Postings & Spoken Languages

- Requires an employer to post employee notifications containing citations, orders, and special orders issued by OSHA at or near each place a violation occurred when the citations or orders are issued.
- Require notifications made available in English and the top 7 non-English languages.
- Make a violation of these provisions enforceable by a civil penalty.

AB 2091 Disclosure of information: Reproductive Health

- Prohibits employers from releasing medical information that would identify an employee seeking or obtaining an abortion in response to a subpoena, request, or from law enforcement if the subpoena, request, or law enforcement is for enforcement of either another state’s laws that interfere with a person’s rights to choose or obtain an abortion or a foreign penal civil action.

AB 2188 Discrimination in Employment: Use of Cannabis

- On and after January 1, 2024, makes it unlawful for an employer to discriminate or otherwise penalize in hiring, termination, or any term or condition of employment for use of cannabis off the job and away from the workplace, except for preemployment drug screening or upon an employer-



2023 New & Revised Labor & Employment Laws

required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

- Exempts certain applicants and employees, including building and construction trades and positions requiring a federal background investigation or clearance.
- Does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, receiving federal funding or licensing-related benefits, or entering into a federal contract.

AB 2693 COVID-19: Exposure

- Until January 1, 2024, allows OSHA to cease operations or entry into an employer that, in its opinion, exposes workers to the risk of C19 and constitutes an imminent hazard to employees.
- Until January 1, 2024, requires various notice requirements and record keeping requirements for C19 hazards and closures.

AB 2777 Sexual Assault: Statute of Limitations

- Until December 31, 2026, revives sexual assault claims that occurred on or after January 1, 2009 that would otherwise be barred solely because the statute of limitations expired.
- Revives sexual assault claims occurred on or after the plaintiff's 18th birthday when an entity or their agent engaged in a cover up that would otherwise be barred prior to January 1, 2023 because the statute of limitations expired.
- Excludes claims fully litigated and settled before January 1, 2023.

SB 523 Contraceptive Equity Act of 2022

- Prohibits specified discriminatory practices based on reproductive health decision making by employers, labor organizations, apprenticeships and training programs, and licensing boards.
- Makes it unlawful for an employer to require as a condition of employment, continued employment, or a benefit of employment, the disclosure of information relating to an applicant's or employee's reproductive health decision making.

SB 931 Deterring Union Membership: Violations

- Authorizes a Union to bring a claim before PERB for allegations that a public employer deterred or discouraged public employees or applicants from becoming or remaining members of a Union, authorizing representation by a Union, or authorizing dues or fee deductions to a Union.
- Upon a finding by the board that the public employer violated those provisions, the public employer would be subject to a civil penalty (\$1000 - \$100,000).

SB 984 Military Service: Leave of Absence

- Requires employers to provide leave of absence provided by federal law to members of reserve military units and the National Guard required to perform inactive duty obligations, other than inactive and active duty training drill periods. Employees can to use vacation time or accumulated compensatory time off to attend those other obligations.
- Entitles an employee to receive their salary or compensation for the first 30 calendar days for short-term military leave of absence for National Guard active duty and inactive duty training drill periods.



2023 New & Revised Labor & Employment Laws

SB 1044 Employers: Emergency Condition: Retaliation

- In the event of an emergency condition, employers cannot take or threaten adverse action against an employee for refusing to report to or for leaving a workplace or worksite within the affected area because the employee has a reasonable belief that the workplace or worksite is unsafe.
- Employers, including public employers, cannot prevent employees from accessing the employee's mobile device or other communication device to seek emergency assistance, assess safety, or communicating with others to confirm their safety.

SB 1126 CalSavers: Retirement Savings

- Generally, employers with 5 or more employees that do not offer a retirement savings program must have a payroll deposit retirement savings arrangement that allows employee participation in the program within 36 months after the board opens the program for enrollment.
- Excludes from the definition of "eligible employer" sole proprietorships, self-employed individuals, or other business entities that do not employ any individuals other than the owners of the business.

SB 1162 Employment: Pay Transparency and Pay Data Reporting

- Employers with 15 or more employees must provide the pay scale for a position in any job posting upon request and include on job postings.
- Employers with 100 or more employees must submit a pay data report to the Civil Rights Department within the Business, Consumer Services, and Housing Agency on or before the second Wednesday of May 2023, and for each year thereafter on or before the second Wednesday of May. Employers with 100 or more employees hired through labor contractors to also submit a separate pay data report to the department for those employees.
- Pay data reports must include the median and mean hourly rate for each combination of race, ethnicity, and sex within each job category.
- Requires an employer to maintain records of a job title and wage rate history for each employee for a specified timeframe.
- Permits courts to impose a civil penalty up to \$100 per employee for failure to file the required report and up to \$200 per employee for subsequent failures, and employees can bring civil actions.

Updates to California Consumer Privacy Act of 2018

- Requires qualified businesses to notify consumers of the length of time they will keep personal data.
- Consumers have the right to direct businesses to not share their personal data, take reasonable efforts to correct personal data that they possess, and limit use of personal data.

AB 1655 Juneteenth Holiday; AB 1801 Genocide Remembrance Day Holiday

- Adds June 19th to the list of State holidays, in celebration and remembrance of Juneteenth.
- Adds April 14th to the list of State Holidays for in remembrance of various genocides and holocausts.

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California Governor Signs AB5 Clearing Path
for Freelance Lawyers: Which Other Industries
are Exempt?

California Governor Signs AB5 Clearing Path for Freelance

Lawyers: Which Other Industries are Exempt?

October 10, 2019



California Governor Gavin Newsom signed legislative Assembly Bill 5 ("AB5") into law on September 18th, after much drama and contention between lawmakers and gig economy companies. After 18 months of uncertainty, California worker classification law is finally clear since the landmark *Dynamex* decision of April, 2018. The *Dynamex* case radically changed 30 years of worker classification law from the multi-factor test set forth in *Borello*, to the ABC Test, which essentially eliminated the independent contractor status for California workers. AB5 brought back the possibility of independent contractor

status for some industries, including attorneys.

The *Dynamex* decision sent California employers into a panic, especially within the gig economy, which heavily relies on independent contractors. The ABC test set forth in *Dynamex* signaled the probable demise of the gig economy, especially if the test expanded beyond the wage order, either judicially or legislatively. The freelance attorney model was in serious trouble. But we sat tight, and the *Dynamex* decision was later limited to the wage order in *Garcia v. Border Transportation Group, LLC*. The gig economy breathed a temporary sigh of relief.

Montage Legal Group wrote an article about AB5's effect on freelance attorneys, [New Bill Clears Path for Freelance Attorney Independent Contractor Status](#), which was published on Law.com on September 12, 2019.

The freelance attorney marketplace is distinct from the traditional notion of contract attorneys who are

*brought in to law firms
for basic litigation
support or due
diligence. Rather,
freelance attorneys
represent a previously
untapped crop of talent
– lawyers who have fled
BigLaw due to intense
work demands and need
for a more balanced
family life. The
freelance attorney model
– where freelance
attorneys work remotely
for other law firms – has
given these attorneys a
place to land.*

This exodus of women, many of whom are graduates from the country's most prestigious law schools, has resulted in the birth of companies that connect them with law firms seeking top notch attorneys. These platforms, such as Montage Legal Group, have been thriving. Montage currently has approximately 350 attorneys participating in its platform, about 85% of whom are women, and a growing client roster of law firm clients. In short, the freelance attorney model is a game changer for

some of the country's elite legal talent, as more attorneys and law firms realize the cost and lifestyle benefits of the freelance relationship. Many freelance attorneys feared that they may be forced to join law firms again, or quit law entirely, depending on their circumstances. Neither was an attractive option. Law firms similarly feared they would lose access to true freelance attorneys who provide intermittent assistance, and have been an important resource.

"Freelance attorneys have generally been treated as independent contractors. However, the decision set forth in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 ("Dynamex") radically altered 30 years of California worker classification law by utilizing the "ABC Test" instead of the multi-factor test set forth under *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341 ("*Borello*"), and essentially eliminated the independent contractor status for California workers."

Under the ABC test, a worker is presumed to be an employee unless the hiring entity proves that (A) the worker is free from the hiring entity's control; (B) the worker performs work that is outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independent business of the same nature as the work performed for the hiring entity.

The "B Factor" is the biggest issue with the ABC Test. Under the B Factor, a company can never hire an individual as an independent contractor if they perform work that is within "the usual course of the hiring entity's business." This means that a lawyer cannot be an independent contractor if working for another lawyer, a graphic designer cannot be an independent contractor if working for a graphic design company, a journalist cannot be an independent contractor if they are writing for a publication. This all makes sense when dealing with workers who need protection, but it quickly defies logic when dealing with licensed professionals.

"The *Dynamex* decision is intended to shield California workers from misclassification as independent contractors, which provides fewer legal protections for workers than employee status. Worker protection is an important goal, but blanket application to all workers goes far beyond protection and creates unintended negative consequences for some workers, businesses, and consumers. Certain industries, including licensed professionals and independent business owners, do not logically fall under blanket employee classification. Under the ABC Test, an attorney assisting a law firm with legal projects would be classified as an employee, regardless of how tenuous or infrequent the relationship between the contract attorney and the law firm."

AB5 – Hero for Some, Villain for Others

Thankfully for some, in late 2018,
Assembly Member Gonzales

introduced legislation to clarify and codify the *Dynamex* decision. The bill is intended to “codify the decision in the *Dynamex* case and clarify its application,” and expands the *Dynamex* decision beyond the wage order to include the Labor Code and other provisions. AB5 has not been without drama. The California Senate placed the Bill in the suspense file when it lacked agreement on exempted professionals. Not surprisingly, gig companies like Uber, Lyft, and DoorDash unsuccessfully pushed for exemption. But the Bill made it out of the suspense file, and it went to a full vote on September 11th, passing 56-15. Governor Gavin Newsom signed the bill on September 18, 2019.

Which Industries are Exempt?

AB5 limits the ABC test to a certain extent and provides an exempted list of workers who are not affected by its reach. This list includes:

- doctors, dentists, and veterinarians;
- lawyers, architects, engineers, private investigators, and

accountants;

- securities broker-dealers and investment advisers;
- human resources administrators;
- travel agents;
- marketers, graphic designers, grant writers, fine artists, certain photographers or photojournalists, and certain freelance writers and editors.

There are also several additional classifications of exemptions that carry certain conditions. For example:

- Commercial fishermen are exempt from all requirements except from unemployment insurance;
- Estheticians, electrologists, manicurists, barbers, and cosmetologists are exempt but only if they set their own rates, are paid directly by clients, schedule their own appointments, and follow several other requirements more akin to independent workers than employees; and
- Salespersons are exempt, but their pay must be based on

actual sales as opposed to
wholesale purchases or referrals.

See [AB-5 Worker status: employees and independent contractors \(2019-2020\)](#).

We Are Not Lawless! ***Borello* Still Applies**

The *Borello* “multi-factor” or “economic realities test” has remained unchanged since 1989, but law firms and freelance attorneys should be vigilant in light of increased worker misclassification scrutiny.

The *Borello* test indeed includes many factors, but it is also fairly easy to determine whether a worker is truly an independent contractor or an employee. Do you have an exclusive relationship with your independent contractor? (That’s not an independent contractor). Have you provided your independent contractor with an office? Supplies? A title? (That’s an employee). Have you paid for your independent contractor’s licensing dues or professional development? (Also an employee). Do you dictate your independent

contractor's hours? Location?

Probably an employee!

In light of these factors, there are considerations that businesses and freelance professionals should recognize to ensure that they remain contractors:

- Does the freelance professional work on site, or remotely?
- Does the freelance professional work exclusively for one business, or many?
- Does the freelance professional set his or her own rate?
- Does the freelance professional supply his or her own office equipment?
- Is there an understanding between the freelance professional and the business that they are not in an employer/employee relationship?

Freelance legal platforms – where freelance attorneys set their own rates, supply their own office equipment, and decline work at will – provide the safest bet. Law firms procuring freelance attorney assistance directly need to exercise

caution, and keep the *Borello* factors in mind. The very thing that attracts attorneys to freelance work – autonomy – is the key to ensuring the industry's survival.

AB5 is the law for worker classification in California, although there may be additional industries exempted by future legislative amendments. Thanks to AB5, legal freelancing, and other high-level professional freelancing, remains an option. Other industries will need to adjust, or may cease to exist. As for Montage, freelance attorneys are grateful for the ability to continue handling flexible legal consulting projects, and law firms will continue benefiting from an important resource.

To read more about AB5 and the gig economy, check out Fisher & Phillips partner Benjamin Ebbink's blog articles, which provide useful information about legislative updates: <https://www.fisherphillips.com/california-employers-blog/the-fisher-phillips-guide-to-pending-employment>.

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