

CHOOSING A BUSINESS NAME



The following is a summary of the various requirements and provisions for registration and protection of business names in the State of Minnesota.

ASSUMED NAMES

The purpose of an assumed name is to provide notice to the public of the true ownership interest of a business entity. Minnesota Statutes Section 333.01-.06 provides that a person or entity may not conduct business in the state unless the business conveys the true name of every person interested in the business. If the business name does not convey the true ownership of the business, the owner is required to file a Certificate of Assumed Name with the Secretary of State. For example, James Smith, doing business as "Quick Press Dry Cleaners" should file a Certificate of Assumed Name to reflect the true ownership of Quick Press Dry Cleaners. James Smith Dry Cleaners would not have an obligation to file an assumed name certificate.



An assumed name filing is completed by filing a certificate with the Secretary of State and then publishing the certificate in an authorized newspaper for two consecutive issues. The filing fee is currently \$25.00. '333.06 provides that a business may be subject to a fine of \$250 if it commences litigation prior to filing an assumed name certificate and completing the publication requirements. There appears to be no means of penalizing an entity for non-filing or non-publication prior to the business entity's involvement in litigation. An assumed name filing must be renewed every 10 years.

An assumed name filing does not grant the filing party the exclusive right to use of the business name. However, it does grant some practical advantages because a new corporation cannot use a name similar to an existing assumed name on file without consent from the assumed name owner. Likewise, a new assumed name filing will not be accepted if it is similar to a corporation or trademark filing on record with the Secretary of State. However, a new assumed name filing will be accepted for a business using the same or similar name as an existing assumed name. The Secretary of State will give the existing name owner notification of the filing of the similar name. The existing owner would have certain trademark rights to the name which are created by the use of the name, but will have to enforce those rights privately.

TRADEMARKS

Trademark rights are acquired by use of the name, phrase or other type of mark. Registration of the trademark is not required to establish rights in a mark; however, registration can secure benefits beyond the rights acquired by merely using the mark. For example, registration on a state level gives notice of the owner's use of the mark for the goods and services specified in the registration and establishes the presumption that the owner is entitled to use the mark throughout the state. Registration of a trademark on a federal level establishes the presumption that the owner has the right to use the mark nationwide.

On a state level, registration of a trademark is accomplished by filing a trademark application which is accompanied by a sample showing the applicant's use of the mark. The filing fee is \$50.00 and the registration must be renewed every 10 years.

A state trademark registration does not authorize the use of the mark in violation of another person's rights. A federal trademark registration or certain common law rights may grant prior rights to the name which would have priority over the state filing, subject to each party's first use of the name. The right to use the registered name is limited to the goods and services identified on the trademark application.

RESERVATION OF A NAME

Another means of obtaining rights to the use of a business name is to file a name reservation with the Secretary of State. The exclusive right to the use of a corporate name may be reserved by (i) a person doing business in this state under that name; (ii) a person intending to incorporate in Minnesota; or (iii) domestic or foreign corporations intending to do business by that name in the State of Minnesota. The filing fee is \$35.00 and must be renewed every 12 months. Reservation of a name grants only temporary rights; a party placing the reserved name in actual use must subsequently file assumed name, trademark, or incorporation papers to preserve rights to the name.

INCORPORATION

The act of creating a corporation by filing Articles of Incorporation with the Secretary of State also will secure exclusive rights to the business name. The Secretary of State will not accept for filing incorporation documents which use a business name which is the same or similar to another corporation or trademark filing of record in the State of Minnesota. The filing fee for filing incorporation documents is \$135.00 and the life of a corporation may be perpetual. Every corporation must file an annual registration statement with the Secretary of State; there is no fee for the annual statement.

Items to consider when choosing a business name:

- ✓ Use of an Assumed Name
- ✓ Establishing Trademark Rights for your Business Name
- ✓ Reserving a Name with the Secretary of State for Future Use
- ✓ Incorporating for Exclusive Rights to a Business Name
- ✓ Common Law Rights of Prior Users of a Business Name
- ✓ Extent of Marketing Your Business Name
- ✓ Interstate Commerce

A corporation's right to use its registered corporate name may also be affected by prior federal trademark filings or common law usage which is discussed in more detail below.

PRIOR USE OF NAME

A state incorporation filing or trademark filing may not grant exclusive rights to use a designated business name. The right to use the designated name may be affected by prior usage of the name by someone who has gained common law rights to the name or by the filing of a federal trademark. Some extra precautionary steps would be advisable for any entity which possibly may do business outside of the State of Minnesota or which will invest significant time and expense in marketing its business name to obtain general public recognition or in creating product packaging or other related items. Precautionary steps would include a general telephone book and internet search for business names similar to the desired name. If another business is already in existence using the desired name, it is advisable to choose another name or distinguish the name in some way to separate it from the business already in existence.

Another prudent step is to complete a federal and/or 50-state common law trademark search to identify other entities which may have filed federal or state trademarks using a name similar to the desired name for goods and services similar to those provided by the new business. A preliminary search of the federal trademark database can be performed with relatively little expense. The results should be considered preliminary and are limited to filings entered on the federal database; however, such a search, if performed properly, can offer constructive guidance to companies seeking to name a business or a product. Additionally, it is possible to obtain the services of a trademark search firm to complete an in-depth federal and 50-state search. A search of that type is extensive and will generally cost from \$400-500. The searches generally take from 3-5 days. A federal search made in advance of naming a business or product which will be used in interstate commerce may avoid the expense of a subsequent name change due to superior rights asserted by another party.

SUMMARY

Any entity which does business in the marketplace using a name other than the entity's real corporate name or owner's name is required to complete an assumed name certificate to be filed with the Secretary of State. That assumed name filing does not grant any exclusive rights to the use of the name. The primary means to obtain exclusive rights to the use of a non-corporate name are to complete a trademark registration or to reserve the name with the Secretary of State. A trademark registration is more durable; however, actual use of the name must be established in order to have trademark rights and exclusivity is limited to the goods or services identified in the trademark application. A corporation has the exclusive right to the use of the corporate name, subject to federal trademark or common law rights discussed above. If a corporation seeks to do business in other than its corporate name, it is also subject to the assumed name filing requirements and may wish to gain exclusivity to that name by completing a trademark registration.