



Legal Guide for Small Businesses In Mississippi

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Introduction

Background

This Legal Guide for Small Businesses in Mississippi was prepared as part of the work of the GrowDelta Initiative. The GrowDelta Initiative is non-profit, independent group dedicated to fostering economic growth and development in the Mississippi Delta region. Our focus is on serving as an incubator and enabler for those considering new business ventures in the region. We focus on both high-level strategic business thinking and nuts-and-bolts practical guidance – both of which are necessary to succeed in today’s marketplace. The driving focus of The GrowDelta Initiative is to create a “Cycle of Success” whereby individuals can grow and learn from our programs and later give back to future generations of budding entrepreneurs through mentoring, education, and support.

The GrowDelta Initiative was founded by Charles Noble, PhD, a professor at the University of Mississippi, and Emily Broad, JD, Director of the Delta Directions Consortium and Joint Fellow, Harvard Law School and Mississippi State University Social Science Research Center. GrowDelta held its first small business training in July 2009, which was a one-day course covering various areas of small business development, including finding the right idea, marketing, finances, perspectives from successful businesses, and legal issues. The event was a great success, with 50 aspiring entrepreneurs in attendance. Beginning in January 2010, GrowDelta began a curriculum of monthly workshops on areas of specific interest to the GrowDelta participants: marketing, management, legal issues, financial planning, and business plan development.

This guide was prepared as a more detailed follow-up to the March 20 session entitled “Legal Issues in Starting and Maintaining Your Mississippi Business.” The guide was drafted by Harvard Law School students, who also presented the material to small business owners and aspiring entrepreneurs at the March 20 event.

About This Guide

This guide is meant to provide aspiring small business owners, entrepreneurs, and other interested parties with an overview of legal and business issues that arise in the course of running a business. The selection of topics covered in this guide came from interviews with new small business owners from the Mississippi Delta region, but the information will apply more broadly throughout Mississippi, as it is mostly based on laws that apply statewide. We have not attempted to catalog all the issues that a small business may face; instead, this guide focuses on major issues and provides a starting place.

Although we have made an effort to provide as much information as possible, every situation is unique and requires a tailored approach. This guide is **not** intended to serve as legal advice and you should not rely on it alone to make decisions. Whenever possible, you should consult with an attorney, certified public accountant, or insurance representative.

We hope that this guide will help generate ideas and describe some of the questions that entrepreneurs should be asking as their businesses develop. We strongly urge you to do additional research before making important decisions.

We wish you all the best and hope that you find the information useful to advancing the cause of grassroots business development in Mississippi.

About the Authors

In the spring of 2010, five Harvard law students worked to compile much of the information contained in this manual. Based on their research regarding business and legal issues in Mississippi, they drew up this guide to help the aspiring small business owners they interviewed and to help other business owners and entrepreneurs in the region and throughout the state. The students involved in the project were Robb Eastman, Tom Ferriss, Jeremy Haber, Rachel Mehlsak, and Ashley Nyquist. Cynthia Mitchell and Robert Tyner, attorneys practicing law in Clarksdale, Mississippi served as legal advisers to this project.

In addition to the individuals named above, this guide owes much of its value to countless other individuals. Not all of them can be named here, but a debt of gratitude is owed to Rosalie Bouck, Lee Branson, Isaiah Castilla, Janet Coursin, Chuck and Lynn Espy, Charles Evans, Billy Howell, Bill Lockett, and Lois McMurchy.

Entity Structure

One of the first decisions you will need to make when you start your small business is the legal form it will take. This is called entity structure. The structure that you choose is important because it can determine the amount of taxes you will pay, how much control you will have over the operation of the business, your potential liability if you are sued, and other aspects of the business. These are the factors you should think about when deciding on your entity structure.

When it comes to choosing a legal entity for your small business, you have roughly four options: You may operate as a sole proprietorship, a partnership, a corporation, or a limited liability company (LLC).

Sole Proprietorship

The sole proprietorship is your simplest business entity. You and your business are one and the same. For example, suppose I have a business that sells radios called Robb's Radios. If that business is a sole proprietorship, Robb's Radios and I are the same entity; "Robb's Radios" and "Robb" are just two different names for the same thing.

Pros

- You have sole control and decision-making authority (which may be delegated to employees).
- An advantage of this form of ownership is that your business is not considered a separate entity for tax purposes. This means that while you must pay tax on the income that you receive from the operation of your business just as you normally would, that income is not taxed a second time at the company level.
- There are relatively few required formalities. For example, you don't have to hold board meetings or maintain separate books and records. This saves you time and effort.

Cons

- Doing business as a sole proprietorship leaves you exposed to unlimited personal liability in the event that someone sues your business. However, you can decrease the risk of loss by purchasing liability insurance. In addition, your house may be protected from seizure by creditors under Mississippi's Homestead Exemption Statute.¹

Who this type of entity would best serve

- Sole proprietorships may in some cases best serve the needs of individual business owners who manage the entire business themselves without the help of employees. For such individuals, the limited liability protection provided by an LLC may serve no purpose for reasons that will be explained in the LLC section below.

General Partnership

You must have two or more individuals to form a partnership. A partnership can be entered into intentionally; however, you do not need to consider yourselves a partnership to be one. That is, you do not have to have a written partnership agreement to be a partnership; two or more people acting like partners is sufficient – if you act like a partnership, courts will treat you as a partnership. Under

¹ In general, the Homestead Exemption protects personal residences from seizure up to a value of \$75,000. Miss. Code Ann. § 85-3-21 (2009).

Mississippi law, you act like a partnership if you and another “carry on as co-owners a business for profit.”² For example, if someone is receiving a share of the profits from the business, that is evidence that he or she is a partner, unless the payment was for a debt owed, wages, or loan interest. Additionally, if multiple people have control over business decisions, they are likely acting as partners.³

Pros

- Like a sole proprietorship, partnerships do not pay tax at the corporate level. (Corporate level taxes will be discussed below in the section on corporations.) Taxes are paid only at the individual level. Specifically, you must pay tax on your share of the partnership’s earnings by filing a Schedule K-1 along with your individual income tax return.
- Just as with a sole proprietorship, there are few required formalities when operating your business as a partnership, which makes a partnership an easy and inexpensive way to do business.
- Many of a general partnership’s default features can be modified through the partnership contract. As a result, partnerships can be made to reflect many kinds of business relationships and structures. If you decide to enter a partnership, you should ensure that your rights are protected by putting them in writing in a partnership agreement. You should seriously consider hiring a lawyer to assist you in the preparation of such an agreement.

Cons

- Whereas you have sole control and decision-making authority with a sole proprietorship, in a partnership you must share control and decision-making authority with your partner(s).
- One partner’s actions and agreements can bind the other partner(s). For example, if your partner promises on behalf of the partnership to buy property for \$100, even if he did not consult you beforehand, you can be held liable for his promise.
- In a general partnership, each partner is personally liable for the debts of the partnership. Like a sole proprietorship, this form of organization puts no limitation on your personal liability.
- Your general interest in a partnership is not transferable. You may only transfer your interest in the earnings of the partnership.⁴ This means that you may transfer your rights to the profits and losses of the partnership, but after the transfer you remain a partner and the transferee does not become a partner. The transferee has no right to share in the control of the partnership and you are still personally liable for the debts of the partnership. This is because people are not required to share control of a partnership with people with whom they did not at some point agree to be partners or act as partners. To use an example, if you started Robb’s Radios as a partnership between Robb and Jim and then Robb transferred his interest to Judy, Judy would be able to receive the percentage of earnings that would have gone to Robb, but Judy would not be able to make any partnership decisions, and if a creditor sued Robb’s Radios then Robb would still be liable (as well as Jim, the other partner). If at some point you want to exit a partnership, you have found a willing and able buyer, and your partner(s) would agree to such an exit, you should consult a lawyer regarding the structure of any potential sale.
- Like sole proprietorships, general partnerships are not very long-lived, since the partnership automatically dissolves upon the death, disability, or withdrawal of a partner.⁵

² Miss. Code Ann. § 79-13-202 (2009).

³ See *Allied Steel Corp. v. Cooper*, 607 So. 2d 113, 117-18 (Miss. 1992).

⁴ Miss. Code Ann. §§ 79-13-502 & 79-13-503 (2009).

⁵ Miss. Code Ann. §§ 79-13-601(7) & 79-13-801(1) (2009).

Who this type of entity would best serve

- If you are going into business with another person, you should consult with a lawyer regarding the risks and benefits associated with operating as a partnership.

C-Corporation

A corporation is a legal “person.” That is, it has its own existence separate from yours or mine. It can sue or be sued, enter into contracts, etc. The shareholders are the owners of a corporation. Their ownership interests are represented by their shares in the corporation. There does not need to be more than one shareholder. Directors have the control and decision-making authority within the corporation. They are the ones ultimately responsible for the affairs of the business. Officers (such as the Chief Executive Officer, Chief Financial Officer, President, Treasurer, etc.) are employees hired by the board of directors to manage the everyday affairs of the corporation.

A corporation’s internal affairs are governed by the corporation’s Articles of Incorporation and the Bylaws, which are required by law. The Articles and Bylaws are created at the foundation of the corporation, and they dictate such things as how elections of directors must be conducted, what kind of approval must be obtained for important corporate actions, and when the annual shareholder meeting must be held.⁶ There are sample Articles of Incorporation and Bylaws available online, but we recommend that you consult with an attorney when creating these documents.

Pros

- Shareholders have limited liability. If the corporation is sued, usually shareholders cannot be held liable for the acts, debts, and liabilities of the corporation.
- It is much easier to exit your investment in a corporation, since shares are easily transferable and can be sold without affecting the business of a corporation. This is primarily due to the separation between ownership and management imposed by the corporate form of organization. Remember that in a general partnership there is no separation between ownership and management; the owners are the managers of the business.

Cons

- In certain circumstances, if the corporate formalities – like holding shareholder meetings – are not respected, shareholders can be held liable for the corporation’s acts, debts, and liabilities. The additional layer of formality needed to prevent this liability can make the operation of your business as a corporation more costly than it would be as another kind of entity.
- A significant disadvantage to conducting business as a corporation is the double taxation imposed by the corporate income tax. Remember that a corporation is a separate legal person. So, when it earns income, it is taxed on that income. If, as a shareholder, you want to distribute those funds out to yourself, that distribution (often characterized as a dividend) will be taxed again, but this time it will be taxed to you as income.

Who this type of entity would best serve

- Typically, large organizations that benefit substantially from providing their many investors with access to public markets (such as the New York Stock Exchange) choose this form of organization. However, for a small business owner, the burden of double taxation often outweighs its advantages. You should be aware that there is another corporate form called an

⁶ Miss. Code Ann. §§ 79-4-2.02(b)(2) & 76-4-2.06(b) (2009).

“S-corporation” that eliminates the burden of double taxation while giving you the protections of a C-corporation. However, there are a number of formal requirements that must be satisfied in order to form an S-corporation and it is easy to lose your status as one. You should consult with a lawyer to determine whether an S-corporation or an LLC is best suited to your needs.

Limited Liability Company (LLC)

Pros

- As with a partnership, the members of an LLC can determine their respective rights through an agreement.⁷ This makes the LLC adaptable to many kinds of business relationships and structures.
- As its name suggests, an LLC offers its members the protection of limited liability.⁸ Note, however, that if you *personally* are the one who performs the action that causes a lawsuit, the LLC will not shield you from personal liability. For example, suppose you own a pizza place that offers delivery service. If, while driving to deliver a pizza, you negligently cause a traffic accident, the fact that your LLC owns the delivery vehicle and that you were going about the business of the LLC when you caused the accident will not shield you from personal liability for any harm you caused. The limited liability provided by an LLC is not different in kind from that provided by a corporation. However, since shareholders of large, public corporations are often not involved with the management of the business, there is usually no possibility that they could be held personally liable for the actions of the corporation.
- Like partnerships, LLCs are not subject to double taxation of income under the corporate tax. In fact, it is even easier to report income from an LLC on your federal tax return than it is to report income from a partnership, since you do not need to file a separate schedule. You can report income from an LLC just as you would report income from a sole proprietorship.
- LLCs are more stable entities than general partnerships, since LLCs do not automatically dissolve upon the death, disability, or withdrawal of a member.⁹

Who this type of entity would best serve

- An LLC is the entity of choice of most entrepreneurs and small business owners. It is a hybrid entity, combining some of the best features of partnerships and corporations. Note that there are a few other forms of business organization, such as the limited liability partnership (LLP), the limited liability limited partnership (LLLLP), and the S-corporation. These are not discussed here, but you should be aware that such options exist and should consult with a lawyer regarding their suitability to your needs.

Creating Your Business Entity

If you choose to do business as a partnership, a corporation, or an LLC, you must register your business with the Mississippi Secretary of State. You will first need to register your name, and then you can also fill out forms for the formation and the registration of each of the above entities online at:

http://www.sos.ms.gov/business_services_business_formation.aspx. If you are creating a corporation, you will also need to file your Articles of Incorporation with the Mississippi Secretary of State.

In addition, you will need to register your business with:

⁷ Miss. Code Ann. § 79-29-306 (2009).

⁸ Miss. Code Ann. § 79-29-305 (2009).

⁹ Miss. Code Ann. § 79-29-801 (2009).

- The Federal Internal Revenue Service in order to receive an Employer Identification Number (EIN) so that you can begin to pay federal taxes. EIN numbers can be obtained by filling out form SS-4. This can be done at their website at <http://www.irs.gov/businesses/small/article/0,,id=97860,00.html>.
- The Mississippi State Tax Commission in order to receive a sales tax permit and begin paying other required state taxes. You can register by visiting <http://www.mstc.state.ms.us/regist.html>.
- Your local city or county in order to receive a Privilege Tax License (also called a business license). You will need to contact your city or county tax collector to obtain this license.

More information about paying your taxes and obtaining the required permits and licenses can be found in the following sections.

Taxation

Your business is subject to taxation by the state and federal governments, as well as the local city or county government. The provisions of the federal Internal Revenue Code¹⁰ and the tax portion of the Mississippi Code¹¹ are very complex. The description of various state and federal taxes found below is not complete and is intended just to give you an idea of the kinds of taxes you may be required to pay. You should see a Certified Public Accountant to assist you in preparing your taxes. You can also contact the IRS and the local Tax Commission, or visit their websites at <http://www.irs.gov> and <http://www.mstc.state.ms.us>.

Federal Tax

Your business *will* be subject to the Federal Income Tax.

Your business *may* also be subject to the following:

- Federal Corporate Income Tax
- Federal Withholding Tax on salaries and wages payable to employees
- Social Security Tax, which is also withheld from employees' salaries and wages and which funds retirement benefits
- Unemployment Insurance Tax

You must apply for and obtain a Federal Employer Identification Number (EIN). This number is used to identify your business entity. You may use the IRS's website to apply online at: <http://www.irs.gov/businesses/small/index.html>.

State Tax

Your business *will* be subject to the State Income Tax.

Your business *may* also be subject to the following:

- Corporate Income Tax and Corporate Franchise Tax
 - If you choose to conduct your business in a corporation, the corporation will be subject to a state corporate income tax and a corporate franchise tax.¹² The franchise tax is imposed on both Mississippi corporations and out-of-state corporations that are doing business in Mississippi.
- Employee Withholding Tax
 - If you have employees, you must provide for withholding of state individual income tax from all employees' salaries and wages.¹³ This is in addition to any federal income taxes required to be withheld. With very few exceptions, all employers are required to withhold employee taxes regardless of the number of employees you have. However, you may not have to withhold an individual employee's tax if that employee makes under a certain amount of wages in a year. See the Employment section of this manual for more information about employee withholding.

¹⁰ 26 U.S.C. § 1 et seq.

¹¹ Miss. Code Ann. § 27-1-1 et seq. (2009).

¹² Miss. Code Ann. §§ 27-7-5, 27-13-1 et seq. (2009).

¹³ Miss. Code Ann. § 27-7-301 et seq. (2009).

- Unemployment Insurance Tax
 - You are required to pay state and federal taxes to fund unemployment insurance benefits for terminated employees. See the Employment section of this manual for more information.
- Sales Tax and Use Tax
 - You may be required to pay sales or use tax, depending on the nature of your business. Generally, retailers of tangible personal property are required to pay a 7% sales tax, calculated upon the basis of gross proceeds of retail sales.¹⁴ However, there are many exceptions to this general rule that apply depending on the nature of the goods or services you are selling. For example, if you, as a retailer, purchase goods from a manufacturer or a wholesaler, no sales tax is owed on the transaction.¹⁵ Only retail sales to your customers incur a sales tax. You should check the Mississippi Code for more information or contact the local tax commission.
 - Sales tax is paid monthly or, providing certain conditions are met, quarterly.¹⁶
 - Although you pay the sales tax, you are responsible for collecting the sales tax from your customers. If you collect the sales tax (and you are presumed to have collected it) and do not pay it to the state tax commission, then you may be assessed a penalty equal to three times the amount of the taxes due.¹⁷
- Alcohol and Tobacco Tax
 - Privilege and excise taxes are imposed in connection with the sale of alcoholic beverages and tobacco.¹⁸ See the Permits, Licensing, and Zoning section of this guide for more information about alcohol and tobacco licensing. (This privilege tax is a different tax from the local privilege tax – or business license – that is required to operate any business in Mississippi. See the Local Tax section below for more information.)

For purposes of the various state taxes, **you must register with the Mississippi State Tax Commission** and obtain a Mississippi income tax account number. The proper forms are available online at: <http://www.mstc.state.ms.us/regist.htm>. After registering, you may file and pay sales tax by mail or online at: <http://www.mstc.state.ms.us/taxareas/sales/salesinetfiling.html>.

Failure to pay taxes will result in a tax lien being placed upon the property that you own. Also, as mentioned above, you may be forced to pay a penalty equal to three times the amount due if you collect but fail to pay sales tax.

Local Tax

Your business *will* be subject to the Privilege Tax. Mississippi state law requires every business to apply for a privilege license from your city or county tax collector, depending on the location of your business. This license is also sometimes called a privilege tax or a business license. The license authorizes you to do business in the state of Mississippi, and you must renew the license – and pay the tax – every year for

14 Miss. Code Ann. § 27-65-17 (2009).

15 Miss. Code Ann. §§ 27-65-5, 7, and 17(a)(1) (2009).

16 Miss. Code Ann. § 27-65-33 (2009); Sales and Use Tax Rule 54.

17 Miss. Code Ann. § 27-65-31 (2009).

18 Miss. Code Ann. § 27-71-5, 7; § 27-71-303 et seq.; § 27-69-1 et seq. (2009).

as long as you do business.¹⁹ The license expires every year on September 30; the first year will be prorated if you apply mid-year.²⁰

The Privilege Tax varies depending on the number of employees you have:

- For 0-3 employees, you must pay \$20 per year.
- For 4-10 employees, you must pay \$30 per year.
- For more than 10 employees, you must pay \$30 plus \$3 for each additional employee over 10, up to a maximum of \$150 per year.²¹
- Additionally, if your business is a retail store and you have an inventory of goods for sale, you must pay an additional privilege tax depending on the value of your goods.²²
- For certain types of businesses, additional taxes may be required.²³

Note that in this section “employee” refers to full-time employees who work 30 hours or more in a seven day period, or in the case of a professional firm or clinic, a partner, but does *not* include seasonal employees.²⁴

In some localities, you may also be required to submit to other inspections before you can receive the privilege license. For example, in Clarksdale, every business is required to receive a fire inspection before obtaining the privilege license. This process costs \$5, and you can obtain the relevant form at the City Clerk’s office and take it to the Fire Department to be signed.²⁵

Before taking steps to acquire a Privilege Tax License, it is important to check with your local City or County Clerk’s Office to get a list of the requirements that must be fulfilled before applying for the license. There may be additional taxes owed at the county and municipal levels. To learn more, contact your city or county clerk or tax collector, or visit your city’s website.²⁶

Once you receive the Privilege Tax License, you will need to post it in a conspicuous location in your place of business.²⁷

¹⁹ Miss. Code Ann. § 27-17-9 (2009).

²⁰ Miss. Code Ann. § 27-17-463 (2009).

²¹ Miss. Code Ann. § 27-17-9(2) (2009).

²² Miss. Code Ann. § 27-17-365 (2009).

²³ Miss. Code Ann. § 27-17-25 – § 27-17-425 (2009).

²⁴ Miss. Code Ann. § 27-17-3 (2009).

²⁵ Interview with the Clarksdale City Clerk’s office, April 6, 2010.

²⁶ The City of Clarksdale website can be found at <http://www.cityofclarksdale.org>.

²⁷ Miss. Code Ann. § 27-17-469 (2009).

Permits, Licensing, and Zoning

Overview and General Considerations

When starting a new business, there are certain local, state, and federal government regulations that need to be followed. Determining the regulations with which your business must comply depends on considerations like the type of business, what products you offer, and if you will be doing any new construction.

You will need to consider zoning regulations, which are established at the local level. Certain types of businesses can only be operated in areas zoned for that particular type of use. Additionally, you will need a permit if you want to build anything.

You also may need certain permits or licenses in order to operate your business. Regulations related to permits and licensing exist at the federal, state, and local level. The state of Mississippi does not license all businesses, but you might need a state license or permit for certain types of activities. Common types include permits for selling or serving alcoholic beverages and preparing and serving food. For certain types of work (such as doctor, lawyer, tattoo artist, bail bondsman, etc.), you will also need a professional license.²⁸ Your local city or county government also requires you to have a Privilege Tax License which permits you to have the privilege of doing business in that locality. If you operate without a required license or permit, you could be subject to a fine.

Once you have a license, you may be required to display it prominently, and you will need to renew it periodically. You should keep copies of all license and permit applications and paperwork.

Zoning

Your city or county probably has a zoning commission, which will often have a comprehensive plan to promote the health and safety of the community, prevent traffic congestion, provide sufficient schools or parks, or prevent overcrowding of land or over-concentration of population.²⁹ This commission can divide land into zones to facilitate or prevent certain uses. Common types of zones include residential, commercial, agricultural, and industrial. Zoning regulations also include rules related to building height, frontage requirements (the space between the building and the edge of the property), parking availability, and various other specifications. When you look for a location to start your business, you should look at a zoning map of the city or county. Make sure the zoning of the area where you want to operate allows your type of business.

Conditional Use Permits

You probably will not have much trouble opening your business in an area zoned for commercial use. However, if you want to open your business in an area zoned for a different purpose, you may need to apply to the city or county zoning or planning commission for a **conditional use permit**. If you want to open a business in an area zoned for residential use, for example, you would need to apply for a

²⁸ For a partial list of necessary professional licenses, see http://www.mississippi.gov/ms_sub_sub_template.jsp?Category_ID=20.

²⁹ Encyclopedia of Mississippi Law, Zoning § 10.

conditional use permit from the local zoning commission. If your proposed use is “in harmony with the spirit, intent, and purpose” of the city’s ordinance,³⁰ and it is not a nuisance to the surrounding area,³¹ it might be approved. However, the zoning commission will not permit a use inconsistent with the surrounding area that confers a special benefit on one particular landowner – this would constitute illegal “spot zoning.”³² For example, if another person in the same area sought permission to build an apartment in a commercial district but was denied, you will also be denied permission.

Variances

If you are in the proper zoning area but want to do something else inconsistent with the city zoning ordinances, you need to apply for a **variance**. If you are in an area zoned for commercial use, for example, but would like to build closer to the edge of the property than regulations allow, you would need a variance. If the commission finds that the requirements set out by the regulations pose an undue hardship to you, your variance might be approved.³³ Practically speaking, if the owners or occupants of the neighboring properties do not mind that you are building close to the property line, or doing something else inconsistent with the city ordinance, you probably will not have any trouble doing so.

Public Notice

The zoning or planning commission will give public notice of your application for a variance or conditional use permit before making a decision. If the community opposes it, the variance or permit probably will not be granted.

Building Permits

Before building anything or making any additions or changes to an existing building, you will need to get a **building permit** from the local zoning administrator.³⁴ Once you get your permit, you will need to start building within a certain time frame (for example, in Clarksdale, 90 days) or else your building permit will expire.³⁵ Your city or county might also have other regulations, such as where and how you can hang a sign, or required inspections for the addition of new electrical or gas lines. Check with your City or County Clerk’s Office to find out more.

General Business Permits and Licenses

In Mississippi, any business subject to sales tax is required to register with the Tax Commission to receive a **sales tax permit**.³⁶ This is the same registration form as the one that is required for paying state taxes generally. Once you are registered, your sales tax permit is valid for as long as you operate that same business at the same location, unless revoked by the commissioner for good cause.³⁷ If you do business without registering with the Commission or fail to pay your sales tax to the State, you will lose your privilege to do business in Mississippi until you pay the tax and certain penalties.³⁸

³⁰ Encyclopedia of Mississippi Law, Zoning § 12.

³¹ See Clarksdale Code, Appendix A, Article V.

³² Encyclopedia of Mississippi Law, Zoning § 13; Modak-Truran v. Johnson, 18 So. 3d 206 (Miss. 2009).

³³ See, e.g., Clarksdale Code, Appendix A, Article V.

³⁴ See, e.g., Clarksdale Code, Appendix A, Article V, §502.01.

³⁵ See, e.g., Clarksdale Code, Appendix A, Article V, §504.07.

³⁶ See Miss. Code Ann. §27-65-27 (2009); Register For Taxes, Mississippi Tax Commission, <http://www.mstc.state.ms.us/regist.html>.

³⁷ See Miss. Code Ann. §27-65-27(2) (2009).

³⁸ See Miss. Code Ann. §27-65-27(5) (2009).

If you are selling goods from a store or other location where people visit your business, then you are considered as having a permanent place of business and you are only responsible for registering with the Tax Commission to receive a sales tax permit.

However, if you sell goods from your home, this means that you do not have a permanent place of business under Mississippi law. In this case, in addition to registering for the sales tax permit, you must also post a cash sales tax bond or a surety bond for a minimum of \$100.³⁹ To find out the exact amount of the bond you are required to post you should contact your local tax officer.

As mentioned above in the Tax section of this guide, you will also have to apply for a **general privilege license** from your city or county tax collector. The license authorizes you to do business in the state of Mississippi and must be renewed annually.⁴⁰ You will need to show proof of your tax registration in order to receive your privilege license. In some localities, you may also be required to submit to other inspections before you can receive the privilege license. Make sure to contact your local City or County Clerk's office before you start the process – they may have a list of requirements that you can use to make sure you fulfill all the requirements needed to get your privilege tax license.

More information about registering with the Tax Commission and the forms you will need for posting a bond can be found online at <http://www.mstc.state.ms.us/regist.html>. For more information about the tax requirements of operating a small business, see the Tax section of this guide.

Specific Business Permits and Licenses

This section will introduce other common types of activities for which a separate license or permit is required. To be safe, you should always check with your local City or County Clerk's office to determine whether your proposed business requires any type of license or permit. The following categories contain information on licenses and permits that you may be required to obtain for your business:

Professional License

Certain professions require a license. You can find a partial list of necessary professional licenses at http://www.mississippi.gov/ms_sub_sub_template.jsp?Category_ID=20. Check to see if the business you want to start requires a professional license.

Environmental

Permits from the Mississippi Department of Environmental Quality (MDEQ) may be necessary for certain activities involving or affecting hazardous waste, solid waste, water, and air.⁴¹ If you are working with any type of chemical or hazardous material, or doing agricultural work, you should check whether any special permits are required or whether you need to follow special procedures for disposing of the hazardous waste created by your business.

Food

If your business deals with prepared food in any way (as a restaurant, caterer, etc.), you need a license from your local Health Department.⁴² To get a license, you need to be in compliance with local and state

³⁹ Miss. Code Ann. §27-65-27(3) (2009).

⁴⁰ Miss. Code Ann. § 27-17-9 (2009).

⁴¹ http://www.deq.state.ms.us/MDEQ.nsf/page/epd_epd_small_business_environmental_permitting_page?OpenDocument.

⁴² FDA 2005 Food Code §8-301.11. Any "food establishment" needs a license. The Mississippi version of the Food Code defines food establishment as:

health department regulations. You will need to speak with the County Health Department about the cost and method for obtaining your license (it will cost between \$30 and \$200 depending on the level of risk).⁴³ Generally, for a new establishment, you will need to undergo a plan review and inspection. If you operate without a license, you can be fined.⁴⁴

Mississippi has adopted the 2005 U.S. Food and Drug Administration (FDA) Food Code, with a few small modifications.⁴⁵ The Code is very detailed as to the requirements for the physical facility, food preparation and handling, sanitation, inspection, and licensing.

Every business that sells prepared food needs to follow these requirements:

- Certified Kitchens
All prepared foods must be produced in a certified kitchen.⁴⁶ The Mississippi Department of Health certifies kitchens that meet certain requirements, but home kitchens generally cannot be certified.⁴⁷ For more information, call the Food Protection Office at 601-576-7689. The FDA Food Code gives detailed specifications about physical facilities in Chapter 6.⁴⁸
- Licenses
Food permits are not transferable or assignable—so if you take over someone else’s properly licensed business, you cannot just operate under the old license; you must apply for your own license.⁴⁹ You must apply for your license at least 30 days before opening your business.⁵⁰ Licenses usually are valid for one year, and must be renewed each year.
- Food Handling and Employee Training
You should check the FDA Food Code for regulations regarding food safety for different types of food products, as well as requirements related to cleanliness of the facility, reporting of employee health problems, rules about sending employees home when they are sick, etc.⁵¹ At

Food Establishment.

(1) **"Food establishment"** means an operation that stores, prepares, packages, serves, vends, or otherwise provides FOOD for human consumption (for pay):

(a) Such as a restaurant; satellite or catered feeding location; catering operation if the operation provides FOOD directly to a CONSUMER or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or FOOD bank; and

(b) That relinquishes possession of FOOD to a CONSUMER directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(2) **"Food establishment"** includes:

(a) An element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location *unless the vending or feeding location is permitted by the REGULATORY AUTHORITY*; and

(b) An operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the PREMISES.

⁴³ You can visit http://www.msdh.state.ms.us/msdhsite/_static/4,0,204.html to find your county’s contact information, or call the Jackson office at (601) 576-7400 from 8a.m. to 5p.m. weekdays. The Jackson office also has a “Frequently Asked Questions” page at http://www.msdh.state.ms.us/msdhsite/_static/4,0,204,201.html.

⁴⁴ See FDA 2005 Food Code Annex 1 §8-8.

⁴⁵ Available at <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2005/default.htm>.

⁴⁶ Please note that even if you have a mobile food truck, you must have a certified kitchen where the food is prepared, even if it is at another location.

⁴⁷ FDA 2005 Food Code § 8-301.11 (“A person may not operate a Food Establishment without a valid permit to operate issued by the Regulatory Authority.”).

⁴⁸ See FDA 2005 Food Code Chapter 6.

⁴⁹ FDA 2005 Food Code §8-304.20.

⁵⁰ FDA 2005 Food Code §8-302.11.

⁵¹ See FDA 2005 Food Code Chapter 2.

least one employee from each site must undergo food safety training.⁵² The training is required once every five years, and the one trained employee must then train his/her coworkers of the food safety precautions.⁵³

➤ Inspections

To keep your license, you will need to pass periodic inspections. Inspectors will probably visit your business a minimum of one to four times each year, and they can enter at any time during normal business hours.⁵⁴ They will look for risk factors that could increase the risk of food-borne illness and require their correction, and they will assign a “grade” of A, B, or C to your restaurant. (Or, if there are any serious health hazards, they may shut down a restaurant.) Some areas they will inspect include employee health and hygiene, storing and serving of potentially hazardous food, chemicals, approved surfaces, prevention of contamination, and proper supervision. The Department of Health website has a flowchart with an overview of the inspection and licensing process at <http://msdh.ms.gov/msdhsite/index.cfm/30,4098,77,311,html>.

In addition to the general food services requirements, if your business deals with certain types of foods, you may have special requirements as to how to store or prepare those foods:

➤ Potentially Hazardous Food

According to federal and state regulations, “potentially hazardous food” means a food that requires time and temperature controls because it is capable of supporting the growth of infectious or toxic microorganisms.⁵⁵ Meat, poultry, fish, shellfish, eggs (except eggs treated to eliminate Salmonella), cooked vegetables, dairy products, mushrooms, raw seed sprouts, cut melons, untreated garlic-in-oil mixtures, and baked goods that are subject to spoilage (such as custard or cream-filled pastries or other baked goods that must be refrigerated) are examples of potentially hazardous foods.⁵⁶ Check the FDA Food Code or speak with the Health Department if you work with potentially hazardous foods so you can be sure to comply with all regulations.

Alcohol and Beer

If you want to serve or sell alcohol at your business, you will need a state privilege license. To obtain the license, you will have to pay an “annual privilege license tax” to the state and an additional license tax to your city or county.⁵⁷

You will need to register with the **federal** Alcohol and Tobacco Tax and Trade Bureau before commencing operations. You do not need to pay any federal tax. The registration form is fairly simple,

⁵² http://msdh.ms.gov/msdhsite/_static/30,0,77,456.html. Information about ServSafe, a food safety training program, is available from the Mississippi Hospitality & Restaurant Association. For class dates, you can also visit Mississippi State University Extension calendar for ServSafe at http://msucare.com/health/food_safety/servsafecal.htm. The course lasts two days and costs \$130. For information on TAP Series, a Food Safety Management certification program, visit <http://www.TAPSeries.com/>.

⁵³ Interview with Jill Sherman, Mississippi State Department of Health, Coahoma County Branch. April 8, 2010. Jill is available to answer questions or distribute information on the health and safety requirements. She can be reached at 662-647-4528.

⁵⁴ MSDH 15-3-75-04-106.02.

⁵⁵ For more information on suggested temperature controls, visit the FDA site at <http://www.cfsan.fda.gov/~comm/ift4-4.html>.

⁵⁶ FDA 2005 Food Code § 1-201.10 (B) Potentially Hazardous Food (2)(a). “Potentially hazardous food” includes foods that contain greater than 0.85 water activity, contain protein, or are neutral to slightly acidic (pH between 4.6 and 7.5). The FDA definition of “potentially hazardous food” is incorporated into Mississippi law at M.C.A. § 69-1-18 (1)(a).

⁵⁷ See Miss. Code Ann. §27-71-5 (2009).

and it is available at <http://www.ttb.gov/forms/f56305d.pdf>. After registering, you will need to file the form again only when something changes or when you discontinue business.

All alcoholic beverage dealers (including restaurants, bars, clubs, grocery stores, etc.) also need a **state** permit from the Mississippi State Tax Commission. There are separate permits and rules for the sale of beer or light wine and the sale of hard liquor.⁵⁸ Once you have a permit, you need to display it prominently in your business at all times.⁵⁹ Your permit needs to be renewed each year.⁶⁰

1. Permits dependant on the type of beverages sold. There are two types of alcoholic beverage permits. One covers light wine and beer, and the other covers hard liquor.

➤ Light Wine and Beer⁶¹

A permit for selling light wine and beer is available through your district's office of the Mississippi State Tax Commission, Miscellaneous Tax Division and costs \$30 a year for retailers. This fee must be paid before starting business. If you fail to pay beforehand, you face a fine of 50% of the amount of the tax (and, of course, you still must pay the tax).⁶² Your city may have an additional privilege tax; for example, Clarksdale's tax is \$15 per year for a permit to sell light wine and beer, and the fine for not paying is also 50% of the amount of the tax.⁶³ Check with your City Clerk for information on this tax.

➤ Hard Liquor⁶⁴

If you want to sell or serve hard liquor on the premises of your business, you will need a permit from the Mississippi State Tax Commission, Alcoholic Beverage Control (ABC). They can be reached at (601) 856-1301, or you can visit their website at: <http://www.mstc.state.ms.us/abc/main.html>. When applying for a permit, you will need to give public notice in two consecutive issues of your local newspaper.⁶⁵ A \$5,000 bond payable to the State of Mississippi is also required for alcohol retailers.⁶⁶

A state ABC on-premises retailer's permit is more expensive than a permit for beer and light wine, and must be procured before starting business. Check the State ABC Regulations for details on the amount.⁶⁷ Selling alcohol without a permit is a misdemeanor and can be punishable with a fine of up to \$1,000 and/or up to six months in jail. You will also have to pay the tax, of course, plus a penalty equal to the amount of the tax.⁶⁸ There may be an additional fee (license tax) to be paid to the city or county where your business operates.⁶⁹ Check with your City Clerk for information on this local tax.

⁵⁸ See Miss. Code Ann. §27-71.

⁵⁹ Miss. Code Ann. §§67-1-61, 67-3-23 (2009).

⁶⁰ Miss. Code Ann. §67-1-61 (2009).

⁶¹ Miss. Code Ann. §67-3-5 (2009). Beer or light wine is defined as having an alcohol content of less than 5% by weight.

⁶² Miss. Code Ann. § 27-71-303 (2009).

⁶³ Miss. Code Ann. § 27-71-345 (2009), Clarksdale Code §13.1, §13.13 (d).

⁶⁴ Miss. Code Ann. §67-1-05 (a) (2009). Hard liquor or "alcoholic beverages" have an alcohol content of more than 5% by weight. This category includes wine of over 5% alcohol by weight.

⁶⁵ Miss. Code Ann. §67-1-53 (2) (2009).

⁶⁶ Miss. Code Ann. §27-71-21 (2009).

⁶⁷ Miss. Code Ann. § 27-71-5 (2009).

⁶⁸ Miss. Code Ann. § 27-71-5 (5) (2009).

⁶⁹ Miss. Code Ann. § 27-71-5 (2) (2009).

2. Permits dependant on the location where the alcohol is being sold. In addition to differences in permits for the type of alcohol sold, there are many different types of permits that you might need for the sale of hard liquor, depending on the type of establishment in which the hard liquor is sold. These are the two most common types:

➤ On-premises Retailers

If you want to serve alcohol to be consumed on the premises (e.g. a drink in a bar or restaurant), you will need an on-premises retailers' permit. This type of permit allows alcohol consumption on the premises only, with the exception that customers can take away one bottle of wine that they were not able to finish during their meal.⁷⁰

In general in Mississippi, if you hold an on-premises retailer's permit, you can sell alcohol between 10am and midnight (except on New Year's Eve, when sales are permitted until 1am) on every day except Sunday.⁷¹ However, municipalities can ask the state for special permission to sell for extended hours. In Clarksdale, for example, alcohol can be served between 7 a.m. and 2 a.m., 7 days a week.⁷² To check on the hours and days permitted in your locality, call the state Alcoholic Beverage Commission.

In an establishment serving alcohol, employees must be over age 18 to take or deliver orders and wait tables, and must be over 21 to bartend or serve as a manager.⁷³

➤ Package Retailers

A different permit is needed for selling packaged liquor to be consumed off the premises. These package retailers may sell alcoholic beverages between 10 a.m. and 10 p.m. Monday through Saturday.⁷⁴ A package retailer must display its ABC permit number on its sign along with the business name.⁷⁵

3. Location regulations for the sale of alcohol. State regulations prohibit the sale or service of hard liquor within 400 feet of schools, churches, kindergartens, day cares, or funeral homes (unless both are in a commercially zoned area, in which case the distance is only 100 feet).⁷⁶ You will also want to check with your City Clerk or zoning commission about whether there are special requirements about selling or serving beer within a certain distance of these establishments.

Licensing and Zoning Resources

General Questions and Assistance:

Small Business Development Centers:

See <http://www.mssbdc.org/> to find your local office.

⁷⁰ Miss. Code Ann. § 67-1-51 (2009).

⁷¹ See the Mississippi State Tax Commission's Alcohol Beverage Control (ABC) Regulations, Title 35, Part II, Mississippi Administrative Code, Chapter 04-100 (2007). Available at http://www.mstc.state.ms.us/info/rules/Part_II_effective_20080815.pdf.

⁷² By special order from the State Tax Commission in 1998. Phone conversation with State ABC Permitting Department, 3/19/10.

⁷³ ABC Regulations 35.II.09.101 (2007).

⁷⁴ Miss. Code Ann. § 67-1-83 (3) (2009).

⁷⁵ Miss. Code Ann. § 67-1-85 (2009).

⁷⁶ ABC Regulations, 35.II.01.03 (2007), Miss. Code Ann. §67-1-51 (3) (2009).

U.S. Government's site on how to get business licenses and permits:

<http://www.business.gov/register/licenses-and-permits/>

Professional Licenses:

http://www.mississippi.gov/ms_sub_sub_template.jsp?Category_ID=20

Clarksdale City Clerk's Office:

Cathy Clark, (662) 621-8136

Coahoma County Administrator's Office:

Daniel Vassel, (662) 624-3028

Environmental Permits and Questions:

Mississippi Department of Environmental Quality:

http://www.deq.state.ms.us/MDEQ.nsf/page/epd_epd_small_business_environmental_permitting_page?OpenDocument

Small Business Environmental Compliance information:

<http://www.smallbiz-enviroweb.org/default.aspx>

Food-related Permits and Questions:

Health Department:

visit http://www.msdh.state.ms.us/msdhsite/_static/4,0,204.html to find your county's contact information, or call the Jackson office at (601) 576-7400.

Frequently Asked Questions:

http://msdh.ms.gov/msdhsite/_static/30,3432,77,311.html

Food Safety:

http://www.fsis.usda.gov/Fact_Sheets/?cm_sp=ExternalLink_-_Federal_-_USDA

Food Protection Office:

601-576-7689

ServSafe:

Mississippi Hospitality & Restaurant Association; Mississippi State University Extension calendar at

http://msucares.com/health/food_safety/servsafecal.htm

TAP Series Food Safety Management certification program:

<http://www.TAPSeries.com/>

Alcohol-related Permits and Questions:

Federal TTB Registration Form:

<http://www.ttb.gov/forms/f56305d.pdf>

Mississippi Alcoholic Beverage Control (ABC):

<http://www.mstc.state.ms.us/abc/main.html>, phone: 601-856-1301

Tobacco, Beer, and Alcohol FAQs:

<http://www.mstc.state.ms.us/info/faqs/TobaccoBeerandAlcohol.html>

Zoning-related Permits and Questions:

Clarksdale City Clerk, Cathy Clark, City Hall, (662) 621-8136

County Administrator's Office, Daniel Vassel, (662) 624-3028

General Liability

If you are operating any kind of business it is very likely that you will be exposed to some kind of legal liability at some point, although the kinds of liability might depend on what kind of business you are running.

If you are exposed to liability it means, in simplified terms, that someone can sue you and win a money award from you in a court proceeding. There are a number of kinds of liability that might arise for small businesses in Mississippi.

General Negligence

In general, when acting as a businessperson, you have a duty to act with **reasonable care**.⁷⁷ Any negligent (ie, not acting with reasonable care) act that you commit while working that results in an injury could result in a lawsuit. For example, if you are delivering a product to someone and run a red light, any injury that you cause as a result of running that light could result in a lawsuit.

Premises Liability

Premises liability concerns accidental injuries to customers and other visitors to the property. For example, if an employee spills paint on the floor and then a customer slips on the paint and breaks his leg, the business owner might be liable for this injury.

If you own a business that customers might regularly visit, such as a store or a restaurant, premises liability could be an issue. “Slip and fall” accidents, a common kind of lawsuit, are examples of premises liability lawsuits.

For a customer (invitee) to sue a business for an accidental injury that results from a dangerous condition on the business’ premises, he/she must show one of the following:

- 1) Some negligent act of the store caused his/her injury OR
- 2) The store had actual knowledge of a dangerous condition and failed to warn customers OR
- 3) A dangerous condition existed long enough so that the store should have known it existed, even if they did not actually know about it.⁷⁸

Courts in Mississippi have held that a landowner owes invited guests two duties of care: one is to keep the premises reasonably safe, and the other is to warn the guest of any hidden dangers.⁷⁹ Thus, the best way to protect against premises liability is to repair dangerous conditions that exist on your businesses premises or, if repairing the condition is not possible, to warn customers and other visitors to the property of the dangerous condition. One way of warning is by posting or hanging a sign alerting customers of the dangerous condition.

⁷⁷ River Production Co., Inc. v. Baker Hughes Production Tools, Inc., 98 F.3d 857 (5th Cir. 1996).

⁷⁸ Hardy By and Through Hardy v. K Mart Corp., 669 So. 2d 34 (Miss. 1996).

⁷⁹ Mayfield v. The Hairbender, 903 So. 2d 733 (Miss. 2005).

Note that it is possible that your liability for injuries that occur on your premises will depend on whether you rent or own the premises. If the dangerous condition is more the fault of your landlord, then you may be less liable.

In Mississippi, **attractive nuisance** is considered a kind of premises liability. Attractive nuisance liability arises when a child trespasses on property controlled by a business, individual, or other entity and that child becomes injured by a condition likely to attract children.⁸⁰ For example, if there is a tractor in the middle of your yard that is not fenced in and some children trespass on the property to play with it after school and end up hurting themselves, a court might rule that the tractor is an attractive nuisance, thus, you would be liable.

If a business maintains dangerous equipment or conditions on the property and these conditions are likely to attract children who might play with them, then the business may be liable for any resulting injuries (even if the children are trespassing, or are coming onto the property without permission of the owner).⁸¹

Breach of Contract

If you fail to perform a promise that you agreed to in a contract (for example, failing to pay your rent) then you might be liable for breach of contract. If you lose a lawsuit for breach of contract, you will generally be required to pay the amount of damages that will put the other party in the financial position they would have been in if you had not breached the contract (so, paying all of your back rent, in the example where you failed to pay rent).

The best way to avoid breach of contract lawsuits is to make only those agreements that you are confident that you can perform.

Third Party Liability

Sometimes employers are responsible for the negligent actions of third parties (their employees), even when the employer personally did not act negligently. This happens because the agent negligently caused an injury while working for the benefit of the principal, or business owner. For example, if your employee negligently leaves a box of nails on the ground in the middle of a repair project and a customer steps on a nail, injuring his foot, your business could be liable.

One type of third-party liability is called *respondeat superior*. This type of liability holds the employer responsible for the tort (a wrongful act that gives rise to a lawsuit) of an employee when it is committed **within the scope of employment**. In other words, the act must have been committed in the course of employment, under the purposes of employment, and in furtherance of the employment purposes.⁸²

If you need to entrust an inherently dangerous tool or appliance to an employee, you should make sure they are capable of using it responsibly, it should probably be operated under supervision, and you should not allow it to be used for non-work purposes.⁸³

⁸⁰ Keith v. Peterson, 922 So. 2d 4 (Miss. Ct. App. 2005).

⁸¹ Id.

⁸² Adams v. Cinemark USA, Inc., 831 So. 2d 1156 (Miss. 2002).

⁸³ See Barmore v. Vicksburg, S. & P. Ry. Co., 38 So. 210 (Miss. 1905).

Respondeat superior falls under the more general legal doctrine of Principal-Agent law. Under Principal-Agent law, you can be liable for the acts of others, even if they are not your employees, **if they are acting on your behalf**. Under the rules of agency, an entity or individual can be held liable for the negligence of any individual whom the court considers to be its “agent.” The key to determining whether an agency relationship exists is whether the organization has control or the right to control the specifics of an individual’s actions.⁸⁴ Crucially, the key is not whether the individual is being paid but whether the principal has the power to direct the agent’s actions.⁸⁵

Under these rules, you are generally **not** liable for the acts of independent contractors, as to whom you have no right to control the specifics of their work. For instance, a business owner is generally not liable under *respondeat superior* for negligence of someone like an electrician with whom the business owner contracts to put in a new electrical system. You are, however, liable for the negligence of someone over whom you have the right to control specifics, such as an employee paid with a W-2 form. See the discussion under “Employment Law” regarding the difference between an employee, for whose acts you are generally liable, and an independent contractor, for whose acts you are not generally liable.

Safe Work Environments and Assumption of Risk

Employers in Mississippi generally have a duty to provide a safe work environment. Failure to do so can lead to a lawsuit if an employee is injured.⁸⁶

In some special cases, even if an employee hurts his or herself in an unsafe work environment, the employer may not be liable for the injury because the employee had knowledge of and assumed the risk of becoming injured when he/she accepted the job. In other words, if the employee knowingly agreed to work in an environment that contained dangers, they cannot be awarded damages in a lawsuit because of injuries that might foreseeably result from those dangers. However, this exception generally only applies to clearly dangerous work environments, like a tugboat or a coal mine. Whether the employee assumed the risk of injury is determined by a jury on a case-by-case basis.⁸⁷

If an employer has workers’ compensation insurance, generally the employer cannot be sued in a lawsuit. In that event, the employee’s only recourse is to make a workers’ compensation claim against the workers’ compensation insurer. See the discussion under “Employment Law.”

Products Liability

Products liability concerns lawsuits that arise out of injuries that customers sustain from products that they have bought or otherwise acquired. For example, if you sold someone a beverage in a glass bottle, but the bottle had a flaw in it that caused it to explode when the customer tried to open the bottle, the manufacturer and possibly even the merchant could be subject to a products liability lawsuit.

If you produce or sell products or goods to the public, you might be responsible for products liability.

84 See *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 199 (Miss. 1988); *Taylor v. Gill*, 326 Ark. 1040, 1042 (1996).

85 See Restatement (Second) of Agency § 16 (1958), Comment b.

86 *Gulfport Creosoting Co. v. White*, 157 So. 86 (Miss. 1934).

87 *Lloyd G. Oliphant & Sons Paint Co., Inc. v. Logan*, 12 So. 3d 614 (Miss. Ct. App. 2009).

The Mississippi Legislature passed a law called the Products Liability Act that details the state’s product liability laws.⁸⁸ Generally, for a business to have exposure to a products liability lawsuit, the injured customer must show:

- that a product was defective
- that the defect caused the product to be unreasonably dangerous
- that the unreasonably dangerous defect caused the harm complained of, AND
- that the defective condition existed at the time the product left the control of the manufacturer or seller.⁸⁹

In other words, if you produce a product that has an unreasonably dangerous defect and that defect injures someone, then you could get sued. Sometimes this can be avoided by including warnings or instructions, since failure to warn is itself sometimes considered a “defect.”⁹⁰

You should be aware that if a seller does not produce, but simply sells, a product manufactured by someone else that turns out to be unreasonably dangerous, under the Products Liability Act, the seller is generally not liable and can recover back from the manufacturer any costs of litigation and damages awarded against the seller *unless any* of the following is true:

- the seller exercised substantial control over that aspect of the product that caused the harm, or
- the seller modified the product in a way that caused the harm, or
- the seller had actual knowledge of the defective condition of the product, or
- the seller made an express factual representation or promise about the aspect of the product that caused the harm.⁹¹

Dram Shop Liability

In some states, businesses that serve alcoholic beverages can become liable for injuries caused by people who drink alcohol in their establishments. However, the Mississippi Legislature has passed a statute that excuses businesses that sell alcohol from the injuries caused by intoxicated customers, unless alcohol is sold to a person who is “visibly intoxicated.”⁹² Therefore, in Mississippi, a business owner that sells alcohol will generally not be liable for injuries caused by someone who became intoxicated in their establishment if the business owner can show alcohol was not served to a person who was “visibly intoxicated,” so long as the injury does not occur on their premises and so long as the alcohol was sold legally (for example, not to a minor).

To avoid this kind of liability, do not sell alcohol to customers who are visibly drunk.

⁸⁸ Miss. Code Ann. § 11-1-63 (2009).

⁸⁹ *Williams v. Bennett*, 921 So. 2d 1269 (Miss. 2006)

⁹⁰ Miss. Code Ann. § 11-1-63(a)(i)(2) (2009).

⁹¹ Miss. Code Ann. § 11-1-63(g), (h) (2009).

⁹² Miss. Code Ann. § 67-3-73 (2009).

Contract Liability

What is a contract?

Not all of your legal obligations arise from laws that the government passes. Some arise privately from contracts. A contract is an agreement between parties to exchange things of value (whether it be goods, services, or even a promise to not do something that you could otherwise do). If one party fails to live up to the bargain, it is called a “breach of contract,” and it is possible to get monetary damages by suing in court for breach of contract. For example, if you agree in writing to build an expensive product for a customer for \$1000 and you build it perfectly and deliver it to them, then if they fail to pay they have breached the contract and are probably liable for at least \$1000. Sometimes, although rarely, you can also obtain a court order via a breach of contract lawsuit that forces the other party to live up to the bargain (called “specific performance”).

A Practical Introduction to Forming Contracts

Contracts can be verbal or they can be in writing. It is smart to have attorneys draft and review important contracts that involve large sums of money. However, some simple contracts can be downloaded from the internet (you basically fill in the blanks). Free sample agreements are easy to find—here are some examples: <http://www.free-legal-document.com/>, http://www.hooverwebdesign.com/business/menu_legal.php.

It is generally preferable to have your contracts in writing, because then, if you have to sue, you have something that you can submit as evidence to back up your claim that the other party breached, or to defend yourself against the claim that you breached. Written contracts do not have to be long or legal sounding, but they should be signed by both parties. For example, the following would be an enforceable contract between two hypothetical people, John Doe and Jane Doe:

“I, John Doe, agree to pay \$800 before the end of May, 2010 in exchange for Jane Doe’s 1998 Ford Taurus”

(signed) John Doe Jane Doe

Deciding to Put Contracts in Writing

Sometimes business owners might feel uncomfortable, especially when doing business with friends and family or in a town where everyone knows each other, to insist that business transactions be put in writing. In fact, you might be afraid that asking for written contracts might hurt your business, as it might offend your customers or undermine a sense of mutual trust.

These are difficult decisions but, generally, the more money at stake and the more important a deal, the more important it is (and the more professional it is) to have an agreement in writing. After all, it can also be of benefit to the person you are doing business with. They will know exactly what to expect from you, and will also take you more seriously as a businessperson.

On the other hand, if the deal involves a small sum of money, it may be pointless to have an agreement in writing because the cost of litigating (in terms of time and lawyers’ fees) for breach of contract might

turn out to be more than you can recover if you win the lawsuit. However, it should be standard business procedure to use written contracts between strangers.

Examples of Types of Contracts

The following are examples of types of contracts or business agreements you might encounter as a small business owner:

- Sale of Property
- Lease/Rental of Property and Land
- Equipment Rental Agreement
- Sale of Goods Agreement
- Contract for Manufacture of Goods
- Consignment Agreement
- Promissory Note/IOU
- Partnership Agreement
- Property Management Agreement
- Indemnity Agreement (or indemnity clause in other agreement)

Avoiding Liability/Purchasing Insurance

Don't worry—businesses that exercise diligence and common sense can minimize their exposure to lawsuits. Such lawsuits only really have merit when a business acts unreasonably. Fortunately, if you do get sued for some reason, there are ways to minimize the expense to you and your business. A main way to minimize risk is by buying insurance prior to any injuries occurring.

Kinds of Insurance

Buying insurance is a way to make smaller payments for certain to avoid the risk of paying a large, potentially devastating expense if you get unlucky. Your smaller payments buy the right to force the insurance company to pay in the event of the type of misfortune that is covered by the policy.

Many insurance companies offer **general liability insurance**, which covers most lawsuits **except** those that arise from breach of contract or those where the business caused intentional injury. If you are worried about potential lawsuits, it may make sense to buy liability insurance, since a big enough lawsuit can bankrupt your business.

Many kinds of insurance exist for the other sources of risk that one might want to insure against, other than legal liability. For example, you might want to insure for the loss you might suffer if something happens to your business. Often it is possible to buy an “**umbrella policy**” that insures many of your interests under one policy—for example it might include insurance for fire, personal property, theft, medical payments, etc. Additionally, if your business has an automobile, you will have to obtain **automobile insurance**. If affordable, an umbrella insurance policy could be a very good idea.

There may be supplemental forms of insurance that you might want to purchase based on the particular risks of your business. For example, if your business is located in an area of high risk for flooding, you may want to purchase flood insurance. If you manufacture products that might be dangerous if defective, you may want to purchase products liability insurance. You can purchase insurance to cover almost anything, but of course the more types of insurance you purchase, the more you will spend.

In addition to the above suggestions, note that in Mississippi, contractors are required to become “bonded,” or purchase mandatory insurance, by paying a bond to their locality (approximately \$5,000) and to the state (\$10,000).

Strategies for Buying Insurance

There are a few things to keep in mind when purchasing insurance. Start by shopping around before you purchase. Talk to different insurance providers, because the price quotes can vary very significantly. Even if you have a friend in the insurance business, this does not guarantee that you will receive the best rate or even a good rate.

When purchasing insurance, you should investigate the details of the policy as much as is practical, in order to choose one that is right for your business. To figure out what is right for your business, you should look at:

- The premium—the amount that you are required to pay for your insurance coverage.

- The deductible—the amount of an insurance claim that is not covered by the insurance policy. For example, you might be required to pay the first \$500 of any insurance claim.
- The amount of total coverage—the maximum amount that the insurance policy will cover for a given claim.

If these sorts of things sound unfamiliar, it may be smart to choose an insurance provider that has good customer service. For example, there may be advantages to choosing a local insurance provider (instead of a national provider) because you will have someone that you can speak to face to face if you have a problem or a question, even if a local provider is slightly more expensive.

Workers' Compensation Insurance

If you have employees, you need to obtain Workers' Compensation Insurance.

Workers' Compensation is a kind of insurance that is mandated by state law. Any business with five or more employees (full-time or part-time) must purchase Workers' Compensation Insurance, as mandated by the Workers' Compensation Law.⁹³ If you have fewer than five employees, you can still purchase Workers' Compensation insurance, if you want, but it is not mandatory.

Workers' Compensation insurance covers employees for accidents that they suffer while on the job. In exchange, an employee who is injured in the course of his/her employment can *only* recover money through the Workers' Compensation system (they cannot sue you to recover additional money).⁹⁴ An employee can recover money from Workers' Compensation even if the injury was his/her fault. It is a "no fault" system. In other words, if you have Workers' Compensation insurance, your employees can recover from the system but cannot sue you unless you hurt them intentionally or there is some other extraordinary circumstance. Note that this is not true of independent contractors who are injured while working for you, because they are technically not your employees.

⁹³ Miss. Code Ann. § 71-3-5 (2009).

⁹⁴ Miss. Code Ann. § 71-3-9 (2009).

Employment Law⁹⁵

Employment law governs the rights and responsibilities of employees and employers. If you are planning to hire employees for your business, it is essential to understand the basic requirements of the law. Failing to follow the law can result in significant fines or other penalties. Acting in accordance with the law will protect you if an employee brings a complaint against your business.

Overview

*Independent Contractor vs. Employee*⁹⁶

You have different responsibilities to different people who work for you depending on whether they are your employees or they are independent contractors. For example, you generally must withhold taxes from employees and pay certain taxes on their behalf, but you do not have to do so for independent contractors.⁹⁷

An **employee** is anyone who performs services for you if you control what will be done and how it will be done.⁹⁸ Employees are generally supervised and provided with supplies by their employers. If you are providing someone with a benefits plan, that person is likely to be considered an employee. Likewise, if you have a continuing relationship with someone and that person is performing a key aspect of your business, he or she is probably an employee.⁹⁹

An **independent contractor** is someone who you hire to perform a service, but for whom you have no control over how the work is done.¹⁰⁰ You have the right to control the result of the work, but not the method of accomplishing it. Independent contractors also generally supply their own work tools.

Courts, and the IRS, consider the definition of employee to be very broad, so almost anyone who works for you on a regular basis is likely to be considered an employee. This means that you are required to follow all of the relevant laws – including minimum wage, overtime, discrimination, etc. In general, part-time employees are treated the same as full-time employees under employment law.

For more information about whether to classify workers as employees or independent contractors, see IRS Publication 15-A, <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

Mississippi STEPS Program – **Limited Time Opportunity for Small Businesses!**

In 2009, Mississippi enacted the Subsidized Transitional Employment Program & Services – or the STEPS program – to help small businesses hire new employees. **Until September 30, 2010**, MS STEPS will provide wage and benefit subsidies for up to 6 months to businesses that hire new employees.

⁹⁵ Unless otherwise noted, the information in this section is based on *Employment Law Guide*, United States Department of Labor, <http://www.dol.gov/compliance/guide/index.htm>.

⁹⁶ For Mississippi cases discussing the difference between employees and independent contractors, see *Miss. Dep't of Employment Sec. v. Product Connections, LLC*, 963 So. 2d 1185, 1187 (Miss. Ct. App. 2007) and *Kisner v. Jackson*, 132 So. 90 (Miss. 1931).

⁹⁷ *Independent Contractor (Self-Employed) or Employee?*, IRS.gov, <http://www.irs.gov/businesses/small/article/0,,id=99921,00.html>.

⁹⁸ *Employee (Common-Law Employee)*, IRS.gov, <http://www.irs.gov/businesses/small/article/0,,id=179112,00.html>.

⁹⁹ *Independent Contractor (Self-Employed) or Employee?*, IRS.gov, <http://www.irs.gov/businesses/small/article/0,,id=99921,00.html>.

¹⁰⁰ *Independent Contractor*, IRS.gov, <http://www.irs.gov/businesses/small/article/0,,id=179115,00.html>.

For more information and eligibility requirements, contact your local WIN Job Center representative, call 1-888-844-3577, or visit the Mississippi Department of Employment Security website, http://www.mdes.ms.gov/wps/PA_1_0_CH/docs/STEPS/STEPS.html.

Employment Taxes & Withholding

Federal Tax Withholding

All employers are required to withhold federal income taxes from employee wages.¹⁰¹ You are also required to withhold part of the Social Security and Medicare taxes from employee wages, and you pay a matching amount.

Employee tax withholding is required regardless of the number of employees you have. This means that even if you have just one employee, you are required to withhold taxes. The amount of income tax you withhold depends on a number of factors, and in some cases, employees with very low wages will have a 0 withholding rate. Certain kinds of employees are exempt from the withholding requirements, including domestic workers and certain agricultural workers, among others.¹⁰² However, most employees are subject to the requirements.

W-4

All newly hired employees must fill out a Form W-4, which will help you determine how much tax to withhold.¹⁰³ This form must be sent to the IRS upon request.

W-2

At the end of the year, you must fill out a Form W-2, which tells your employees how much they were paid and how much tax was withheld. You must send a copy of this form to your employees as well as to the Social Security Administration (SSA). More information about the SSA requirements can be found at <http://www.ssa.gov/employer>.

1099

To report payments to independent contractors, you fill out a federal 1099 form and send this to the person who provided the service as well as to the IRS. The 1099 form is only to be used for people who provide one-time services, not employees who work for you on a regular basis. You only need to report payments of \$600 or more.¹⁰⁴

Self-Employment Tax

If you are self-employed – meaning you work for your own business – and you make at least \$400 per year, you must pay a self-employment tax that is similar to the Social Security and Medicare taxes that you pay for your employees.¹⁰⁵ You report this tax on your regular tax return.

Recordkeeping

¹⁰¹ 26 U.S.C. § 3402(a)(1) (2006).

¹⁰² 26 U.S.C. § 3402(a) (2006).

¹⁰³ 26 U.S.C. § 3402(f)(2)(A) (2006).

¹⁰⁴ *General Instructions for Certain Information Returns*, IRS.gov, <http://www.irs.gov/instructions/i1099gi/ar02.html>.

¹⁰⁵ *Self-Employment Taxes*, IRS.gov, <http://www.irs.gov/businesses/small/article/0,,id=98846,00.html>.

You must keep employee tax records for at least 4 years. For information about what to include in these records, see <http://www.irs.gov/businesses/small/article/0,,id=98548,00.html>.

For more information about employment taxes, see the IRS website <http://www.irs.gov/businesses/small/article/0,,id=172179,00.html> and the IRS Employer's Tax Guide <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

State Tax Withholding

Mississippi also requires employers to withhold state income taxes from employees.¹⁰⁶ To determine how much state tax to withhold, you must have your employees fill out form 89-350, which is available on the Mississippi Tax Commission website. You must keep this form in your records.

As with federal income tax withholding, certain kinds of employees are exempt, including farm and domestic workers.¹⁰⁷

At the end of the year, you must submit a form to the Tax Commission to report the amount of wages paid and tax withheld.¹⁰⁸ This is form 89-140, and it can be found online. There is no separate state form to send to your employees – you include the amount of state taxes withheld on the federal W-2 form that you send to your employees and the SSA.

For more information about state tax withholding, and to find the required state forms, see <http://www.mstc.state.ms.us/taxareas/withhold/main.html>.

Unemployment Insurance

Federal Unemployment Insurance

Most businesses are required to pay the Federal Unemployment Tax Act (FUTA)¹⁰⁹ tax to contribute to the unemployment compensation received by workers who are laid off or terminated. You are allowed a tax credit for any state unemployment insurance taxes paid – meaning, in general, that you can subtract the amount of state tax that you paid from the amount of FUTA tax that you owe.¹¹⁰

You are subject to the FUTA tax if you paid \$1,500 or more in total wages to your employees, or if you had at least one employee working for you for at least one day out of at least 20 weeks during the current or previous year.¹¹¹ Note that there are slightly different rules for agricultural and domestic workers.¹¹²

You must report FUTA taxes on IRS Form 940.

For more information about FUTA tax requirements and rates, see http://www.irs.gov/publications/p15/ar02.html#en_US_publink1000202541.

¹⁰⁶ Miss. Code Ann. § 27-7-305 (2009).

¹⁰⁷ Title 35, Mississippi Administrative Code, Part III, subpart 11, chapter 3, http://www.mstc.state.ms.us/info/rules/Part_III_effective_20090701.pdf.

¹⁰⁸ Miss. Code Ann. § 27-7-311 (2009).

¹⁰⁹ 26 U.S.C. § 3301 et seq. (2006).

¹¹⁰ 26 U.S.C. § 3302(a)(1) (2006).

¹¹¹ 26 U.S.C. § 3306(a)(1) (2006).

¹¹² 26 U.S.C. § 3306(a)(2), (3) (2006).

State Unemployment Insurance

Most employers in Mississippi are also required to pay state unemployment insurance (UI) taxes.¹¹³

Unemployment insurance is administered by the Mississippi Department of Employment Security (MDES). When you start a new business, you are required to submit a Status Report (Form UI-1) to MDES. You can find this form at: http://www.mdes.ms.gov/wps/PA_1_0_CH/docs/Employer/UI-1_STATUS_REPORT.pdf

When you terminate employees, they will generally be eligible for UI benefits. Your UI tax rate is partly determined by the number of UI claimants against your company, so the more former employees you have collecting unemployment benefits, the higher your payments will be.¹¹⁴

Employees are ineligible to receive UI benefits if they leave work voluntarily or if they are fired for work-related misconduct.¹¹⁵ However, if you fire an employee for simply unsatisfactory conduct or for not doing good work due to inability or unintended errors, he or she will generally be eligible for UI.¹¹⁶

For more information about when you must begin paying UI taxes, applicable rates, and eligibility requirements for employees, see the MDES website at <http://www.mdes.ms.gov> or contact your local tax representative. You can find your county's representative by going to the MDES website (<http://www.mdes.ms.gov>) and following the links to Employer Services → Quick Links → Find Tax Field Reps.

Workers' Compensation

All employers with more than 5 employees are required to purchase Workers' Compensation insurance. This includes full-time and part-time employees.¹¹⁷ For more information, see the Workers' Compensation information in the Insurance section of this guide.

Hiring & Firing

In order to hire employees and report information about your employees to the appropriate state and federal agencies, you will need to have an Employer Identification Number (EIN) – also called a Tax ID number. See the Entity Structure and Tax sections of this guide for more information about registering for an EIN.

Discrimination

A number of federal laws prohibit employers from discriminating against employees or job applicants based on a variety of protected characteristics. These characteristics include:

- Race, color, religion, sex (including pregnancy), national origin, age, disability, or genetic information

¹¹³ Miss. Code Ann. § 71-5-351, 353 (2009).

¹¹⁴ Miss. Code Ann. § 71-5-355 (2009).

¹¹⁵ Miss. Code Ann. § 71-5-355, 71-5-513 (2009).

¹¹⁶ See *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982).

¹¹⁷ Miss. Code Ann. § 71-3-5 (2009).

Because most of the federal laws only cover businesses with 15-20 employees, most very small businesses are exempt. In Mississippi, there are no state anti-discrimination laws governing employment. However, you should still be aware of the protected categories, because as your business grows, you may become covered by the federal laws, and it is good business practice to treat your employees fairly.

Additionally, **Section 1981 prohibits intentional race discrimination in employment.** There is no minimum number of employees required, so all businesses, whatever the size, are prohibited from discriminating based on race.¹¹⁸

In general, the anti-discrimination laws prohibit:

- Unfair treatment because of the characteristics protected by the laws
- Harassment in the workplace based on the protected characteristics
- Denying a reasonable accommodation for employees with a disability or certain religious beliefs
- Retaliation against employees for complaining about discrimination

Several federal laws that prohibit discrimination:

Title VII¹¹⁹

Your business is covered by Title VII if you have *15 or more employees*.¹²⁰ Title VII of the Civil Rights Act prohibits employers from discriminating on the basis of *race, color, religion, sex (including pregnancy), or national origin*. Discrimination under Title VII includes refusing to hire someone, firing, failing to promote, paying someone less, or treating someone unfairly in any way because of the protected characteristics.¹²¹ It also includes harassment based on the protected characteristics.

Age Discrimination in Employment Act (ADEA)¹²²

Your business is covered by the ADEA if you have *20 or more employees*.¹²³ The ADEA prohibits *age discrimination* against employees or job applicants who are 40 or older.

Americans with Disabilities Act (ADA)¹²⁴

Your business is covered by the ADA if you have *15 or more employees*.¹²⁵ The ADA prohibits discrimination against an employee or job applicant with a *disability* who is otherwise qualified for the job. The law also requires that employers provide a reasonable accommodation to allow the employee with a disability to perform the job, unless this would cause an undue hardship on the employer. The ADA contains specific definitions of disability, reasonable accommodation, and undue hardship, so you should be sure to consult the law or an employment lawyer if you have questions about whether a particular employee or job applicant is protected by the ADA.

¹¹⁸ 42 U.S.C. § 1981 (2006).

¹¹⁹ 42 U.S.C. § 2000e et seq (2006).

¹²⁰ 42 U.S.C. § 2000e (b) (2006).

¹²¹ See 42 U.S.C. § 2000e-2(a) (2006).

¹²² 29 U.S.C. § 621 et seq (2006).

¹²³ 29 U.S.C. § 630(b) (2006).

¹²⁴ 42 U.S.C. § 12101 et seq (2006).

¹²⁵ 42 U.S.C. § 12111(5)(A) (2006).

Equal Pay Act (EPA)¹²⁶

Your business is covered by the EPA *if you are covered by the Fair Labor Standards Act (FLSA)*. See the FLSA section below for more information about coverage. The EPA makes it illegal to pay men and women different wages if they are doing substantially equal work under similar working conditions.

Genetic Information Nondiscrimination Act (GINA)¹²⁷

Your business is covered by GINA if you have *15 or more employees*.¹²⁸ GINA prohibits discrimination against employees or job applicants based on *genetic information*, which includes genetic tests and family medical history.

Lawsuits for discrimination

If your business is covered by the anti-discrimination laws, you may be subject to investigation if your employee files a complaint with the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing these laws. You may also be subject to a lawsuit by your employees.

For more information about the anti-discrimination laws applicable to your business, visit the EEOC website at <http://www.eeoc.gov/employers/index.cfm>.

Employment Eligibility

It is illegal to hire someone who is not a United States citizen or legal alien.¹²⁹ Certain procedures are required to ensure that your employees are authorized to work in the United States.

Federal I-9 Form¹³⁰

The federal I-9 form allows you to verify newly hired employees' eligibility to work in the United States. The form requires you to examine certain kinds of identification provided by the employee.

You are required to keep a copy of each employee's I-9 form in your records for 3 years after the date of hire, or for 1 year after termination, whichever is later. You do not need to file a copy with the government, but the forms must be made available for inspection if requested.

For a copy of the I-9 form and a handbook with instructions for filling out the form, see <http://www.uscis.gov/i-9>.

State-Required Status Verification

The Mississippi Employment Protection Act also requires employers to utilize the E-Verify program operated by the Department of Homeland Security for all new employees. The program allows you to electronically verify your employees' authorization to work in the United States.¹³¹

- Businesses with **between 30 and 100 employees** need to begin using E-Verify by **July 1, 2010**.
- Businesses with **fewer than 30 employees** need to begin using E-Verify by **July 1, 2011**.¹³²

¹²⁶ 29 U.S.C. § 206(d) (2006).

¹²⁷ 42 U.S.C. § 2000ff et seq (2006).

¹²⁸ 42 U.S.C. § 2000ff (2)(B)(i) (2006) (referring to 42 U.S.C. § 2000e (b) (2006)).

¹²⁹ Illegal Immigration Reform and Immigration Responsibility Act, 8 U.S.C. § 1324a (2006).

¹³⁰ The information in this section is based on *Employment Eligibility Verification*, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/i-9>.

¹³¹ Miss. Code Ann. § 71-11-3(4)(b)(1) (2009).

¹³² Miss. Code. Ann. § 71-11-3(7) (2009). Earlier deadlines apply for businesses with greater than 100 employees.

*Failure to comply with the Employment Protection Act can result in loss of your business permits, licenses, and certificates for doing business in Mississippi for up to 1 year and/or cancellation and ineligibility for state or public contracts for up to 3 years.*¹³³

For more information about E-Verify, see <http://www.uscis.gov/everify>.

State Reporting

You must report all new employees to the Mississippi State Directory of New Hires within 15 days of the day they start.¹³⁴

For more information about what and where to report, visit <http://www.MS-NewHire.com> or call 800-241-1330.

At-Will Employment and Termination

In Mississippi, employment is **at will**. This means that, in general, you can terminate employees *at any time for any reason*.¹³⁵

There are a few exceptions to the at-will rule:

- You may not terminate an employee for a reason that is prohibited by the federal anti-discrimination laws (see above under Discrimination).
- If you have signed a written contract with your employee stating that he or she will work for a certain period of time or will only be fired for good cause, you may not fire the employee at will.¹³⁶ This kind of contract is not necessary, but you might consider creating a simple agreement with employees in some situations. For example, if you only need an employee to work for 10 days or 6 months, a written contract with a specific end date will allow you to terminate the employee at that time. Additionally, if you would like to offer your employees the benefit of termination for just cause – meaning that you need to have a good reason for firing them – you can choose to write a simple agreement to that effect. In general, creating a contract will provide more protections for employees than under the standard employment-at-will system.
- You may not terminate an employee for refusing to participate in an illegal act or for reporting illegal acts.¹³⁷

Workplace

Occupational Safety and Health Act (OSHA)¹³⁸

The Occupational Safety and Health Act (OSHA) requires businesses to comply with certain health and safety standards.

¹³³ Miss. Code Ann. § 71-11-3(7)(e)(i) (2009).

¹³⁴ Miss. Code Ann. § 43-19-46, §93-11-101 (2009), Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), 42 U.S.C. § 653A (2006). The Mississippi Code section governing new hire reporting is repealed as of July 1, 2010, so employers should check with the State Directory of New Hires after this time to determine what reporting procedures are required. Under the PRWORA, employers have 20 days to report new hires, 5 days longer than under Mississippi law as of March 2010.

¹³⁵ *Kelly v. Mississippi Gas Co.*, 397 So. 2d 874, 874-75 (Miss. 1981).

¹³⁶ *Shaw v. Burchfield*, 481 So. 2d 247, 254 (Miss. 1985).

¹³⁷ *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993).

¹³⁸ 29 U.S.C. § 651 et seq (2006).

Almost all private employers are covered by the OSHAct, although self-employed individuals are exempt, as are farms that only employ immediate members of the farmer's family.¹³⁹

The major requirement of the OSHAct is called the "general duty" clause. It says that employers must provide "a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees.¹⁴⁰ Additionally, employers must comply with the safety and health regulations that are implemented by OSHA, the agency responsible for enforcing the law.¹⁴¹

Employees are legally allowed to file complaints about working conditions with OSHA, and they may not be retaliated against for doing so.¹⁴² Employees may also assist OSHA in doing inspections of the workplace.

Recordkeeping under OSHAct

Although most businesses must follow OSHA standards, if you have 10 or fewer employees you do not need to keep records of employee illnesses and injuries, unless you are specifically asked to do so in writing by OSHA or another federal agency.¹⁴³

Additionally, certain kinds of businesses are exempt from the recordkeeping requirement. These include retail stores, educational services, furniture repair, and eating and drinking places. For a full list of the kinds of businesses that are exempt from the recordkeeping requirement, see <http://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html>.

However, if your business involves manufacturing or certain other hazardous activities, then you must keep a log of various work-related injuries and illnesses on specific forms provided by OSHA.

- Find out more about what incidents are covered at <http://www.dol.gov/compliance/guide/osha.htm>
- Find the required forms at <http://www.osha.gov/recordkeeping/RKforms.html>

Reporting under OSHAct

Even if you are exempt from the recordkeeping requirement, **all businesses must report** to OSHA within 8 hours of any workplace incidents that result in death or the hospitalization of **3 or more employees**.¹⁴⁴

You must report the incidents by phone or in person. To report, you can call the central OSHA number at 1-800-321-6742, or the Jackson Area Office at 601-965-4606. You can also report in person to the Jackson Area Office, which is located at:

3780 I-55 North, Suite 210
Jackson, MS 39211

Penalties

¹³⁹ 29 C.F.R. § 1975.4.

¹⁴⁰ 29 U.S.C. § 654(a)(1) (2006).

¹⁴¹ See 29 C.F.R. §§ 1900 to 2400.

¹⁴² 29 U.S.C. § 660(c)(1) (2006).

¹⁴³ 29 C.F.R. § 1904.1.

¹⁴⁴ 29 C.F.R. § 1904.39

Your business is subject to inspection by OSHA. Businesses with a lot of injuries will be subject to more regular inspections; other businesses will be inspected when employees file complaints or if there is a major safety-related incident.¹⁴⁵

For some small violations that do not directly relate to safety or health, there are no penalties or citations. However, safety- or health-related violations can result in fines of up to \$7,000. Penalties can go up to \$70,000 for intentional violations. Intentional violations that result in death can lead to more serious penalties, including greater fines, imprisonment, or both.

For more information about workplace safety and health, see
<http://www.dol.gov/compliance/guide/osha.htm>.

Required Posters

Both Mississippi and federal law require all employers to post certain posters in the workplace to inform employees of their rights and responsibilities. (The specific posting requirements are found within the particular statute at issue.) These posters must be prominently displayed.¹⁴⁶

All of the required posters are available by free download online, or you can request them from local or federal agencies.

Mississippi Posters:

- Workers' Compensation Poster
 - Available at: <http://www.mwcc.state.ms.us/forms/noticeofcoverageform.pdf>
- Unemployment Insurance Poster
 - Available at: http://www.mdes.ms.gov/wps/PA_1_0_CH/docs/Employer/poster.pdf or by calling 601-321-6146

Federal Posters:

You should check the coverage provisions for each law to determine which posters you need. Your business may not be covered by one of the following laws, so you may not be required to display the poster in your workplace.

- Fair Labor Standards Act (FLSA)
 - Available at: <http://www.dol.gov/whd/regs/compliance/posters/minwage.pdf>
- Job Safety and Health Protection (OSHA)
 - Available at: <http://www.osha.gov/Publications/osha3165.pdf>
- Family and Medical Leave Act (FMLA)
 - Available at: <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>
- Equal Employment Opportunity
 - Available at: <http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf>
- Employee Polygraph Protection Act (EPPA)
 - Available at: <http://www.dol.gov/oasam/programs/osdbu/eppac.pdf>
- Notice to Workers with Disabilities
 - Available at: <http://www.dol.gov/regs/compliance/posters/disabc.pdf>
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
 - Available at: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf

¹⁴⁵ 29 C.F.R. § 1903.

¹⁴⁶ See, e.g., OSHA Regulations, 29 C.F.R. § 1903.2; FLSA Regulations, 29 C.F.R. § 516.4; EEOC Regulations, 29 C.F.R. § 1627.10.

For help determining which posters you are required to display, see the Department of Labor Poster Adviser at <http://www.dol.gov/elaws/posters.htm>.

Citations and Penalties

For some posters, there are no penalties for failing to display them, but for others you may receive a citation or be required to pay a fine. For more information about which posters carry penalties, see <http://www.dol.gov/oasam/programs/osdbu/sbrefa/poster/matrix.htm>.

Drug Testing

You might want to consider performing drug tests of your employees or job applicants if your workplace is potentially hazardous to your employees or if your employees are responsible for the health and safety of others, as in transportation jobs, food-related settings, or health care.

You may require all job applicants to undergo drug and alcohol testing, and you can use a refusal to take the drug test or a positive test result as a basis for refusing to hire the applicant.¹⁴⁷

You may also require all of your employees to undergo drug and alcohol testing if you have a reasonable suspicion that there is a reason to do so.¹⁴⁸ You can institute a drug testing program as long as the selection process is neutral or if it is part of an established policy of testing employees' fitness to work.¹⁴⁹

If you choose to implement a drug testing program, you must notify your employees at least 30 days before the program begins, and you must follow the specific procedures outlined in the Mississippi Code.¹⁵⁰ The Code includes requirements governing testing procedures, information disclosure, and confidentiality, among other conditions for testing.

Family & Medical Leave Act (FMLA)¹⁵¹

The Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to provide up to 12 weeks of unpaid leave per year for eligible employees who have serious health conditions, who need to care for family members with serious health conditions, or who wish to take parental leave for a birth or adoption.¹⁵²

Employees must have worked for you for a certain period of time to be eligible to take FMLA leave.¹⁵³ They are required to be put back into their previous position or an equivalent position upon their return, and you may not retaliate against employees who elect to take FMLA leave.¹⁵⁴ You may, however, require employees to provide a doctor's statement certifying that they have a serious health condition.¹⁵⁵

¹⁴⁷ Miss. Code Ann. § 71-7-5 (2009).

¹⁴⁸ Miss. Code Ann. § 71-7-5 (2009).

¹⁴⁹ Miss. Code Ann. § 71-7-7 (2009).

¹⁵⁰ Miss. Code Ann. § 71-7-3 (2009).

¹⁵¹ 29 U.S.C. § 2601 et seq (2006).

¹⁵² 29 U.S.C. § 2612(a)(1) (2006).

¹⁵³ 29 U.S.C. § 2611(2)(A) (2006).

¹⁵⁴ 29 U.S.C. § 2614(a), 2615 (2006).

¹⁵⁵ 29 U.S.C. § 2613 (2006).

If you operate a business with 50 or more employees, you may find out more about the FMLA requirements at <http://www.dol.gov/compliance/guide/fmla.htm>.

*Uniformed Services Employment and Reemployment Rights Act (USERRA)*¹⁵⁶

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination on the basis of military service. It requires that service members be reemployed in the position they would have reached if they had not been absent for military service, or placed in the next closest position. USERRA also allows service members to continue their healthcare coverage during absences for duty.

For more information about USERRA, see <http://www.dol.gov/compliance/guide/userra.htm>.

Compensation

Fair Labor Standards Act,¹⁵⁷

The Fair Labor Standards Act (FLSA) includes minimum wage, overtime pay, and child labor requirements for businesses covered by the Act.

Entire Business

Under the federal law, your **entire business** is covered if your business has *gross sales or receipts of \$500,000 or more in one year*.

Gross sales or receipts includes the total amount of money your business collects from sales, credit, or other charges.¹⁵⁸ This is determined by the price paid by your customers, not your total profit. For example, if you sell 5,000 lamps for \$100 each, then your gross sales would be \$500,000 and your business would be covered by the FLSA – even if it cost you \$50 to produce each lamp, making your profit only \$250,000.

Individual Employees

Even if your business is not generally covered under FLSA, **individual employees** may be covered in a particular workweek if:

- That employee is *engaged in interstate or foreign commerce*
- That employee helps to *produce goods for interstate or foreign commerce*

Interstate or foreign commerce means any work that is related to or involves the movement of people, goods, or information across state lines.¹⁵⁹ This means that if your business includes making products – like food, furniture, or artwork – that you sell to people in states outside of Mississippi, you are engaged in interstate commerce. Any employee who helps with the production or shipment of these products would be covered by the FLSA. Tourism-related businesses – like hotels – are also engaged in interstate commerce.

Additionally, if you have an employee who communicates by phone, fax, email, or regular mail with people in other states, that employee is also covered by the FLSA. Other kinds of employees who are

¹⁵⁶ 38 U.S.C. §§ 4301-4335 (2006).

¹⁵⁷ 29 U.S.C. § 201 et seq (2006).

¹⁵⁸ 29 C.F.R. § 779.259.

¹⁵⁹ 29 U.S.C. § 203(b) (2006); *Engagement in Interstate Commerce*, U.S. Dept. of Labor, <http://www.dol.gov/elaws/esa/flsa/scope/er2.asp>.

covered on an individual basis include employees who unload or work with goods that came from an out-of-state supplier, employees who drive across state lines for business, and any employee who uses an electronic device to process a credit card payment.¹⁶⁰

NOTE: It is possible that an individual employee may be covered by the FLSA in one workweek but not in the next, depending on the type of work that he or she is doing.

Generally, “interstate commerce” is understood to apply to a wide range of activities, so almost all employees are covered by the FLSA. If you have questions about whether your business or individual employees are covered by the FLSA, contact the Jackson Area Office of the Department of Labor Wage and Hour Division:

McCoy Federal Building
100 West Capitol St., Ste. 608
Jackson, MS 39269
Phone: 601-965-4347 or 1-866-487-9243

NOTE: In Mississippi, there is no state minimum wage or overtime law, so the federal minimum wage and overtime laws apply to all businesses in the state.

Exempt employees

Employees in *executive, administrative, or professional* positions are generally not covered by the FLSA. Some of the job duties that make an employee exempt are having hiring and firing authority, managing or making decisions about the operation of the business, and directing two or more other employees. Exempt employees must be paid on a salary basis of at least \$455 per week – not on an hourly basis.¹⁶¹

What does the FLSA require?¹⁶²

Mississippi has no state minimum wage or overtime laws, so this means that the federal law from the FLSA applies to businesses in the state.

Federal Minimum Wage:

- \$7.25 per hour
- \$4.25 per hour for youths under 20 years old in the first 90 calendar days of employment
- \$2.13 per hour for employees who regularly receive \$30 or more per month in tips

Tipped employees – like waiters or bartenders – may be paid at the lowest rate because the tips are considered part of their wages. However, if the actual amount of tips received by the employees does not add up to the full minimum wage of \$7.25 per hour, then you must supplement your employees’ wages to reach that amount.¹⁶³

Employees under 20 years old may not be paid less than \$4.25 per hour for the initial 90-day period, even if they are partly paid in tips. After this period, they must be paid the full minimum wage of \$7.25

¹⁶⁰ For more examples of what kinds of employees are covered, see <http://www.dol.gov/compliance/guide/minwage.htm>.

¹⁶¹ To learn more about which employees are exempt, see http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf.

¹⁶² The FLSA contains exemptions for a number of job categories, including some agricultural workers and students. For more information about which jobs are not subject to the FLSA requirements, see <http://www.dol.gov/compliance/guide/minwage.htm>.

¹⁶³ 29 U.S.C. § 203(m) (2006).

and could then be subject to the tipping reduction if applicable. The 90-day period is determined by calendar days, *not* working days, and it may not extend past the employee's 20th birthday.¹⁶⁴

There are also special minimum wage provisions for workers with disabilities. For more information, see <http://www.dol.gov/whd/regs/compliance/whdfs39.pdf>.

Overtime

- Employees who work more than 40 hours in a workweek must be paid 1.5 times their regular rate of pay for each hour worked over 40 hours.¹⁶⁵
- There is no limit to the number of hours employees are allowed to work if they are 16 years old or older, as long as they are paid overtime rates.

Child Labor Laws:¹⁶⁶

- You may not hire employees younger than 14 years old in non-agricultural jobs.
- Employees who are 18 years old and older can work in any job.
- Employees who are 16 years old or younger can only work in non-hazardous jobs.
 - For more information about what jobs are allowed at which ages, see <http://www.youthrules.dol.gov/jobs.htm>.
- Employees who are younger than 16 years old can only work certain hours:
 - Non-school hours
 - 3 hours in a school day
 - 18 hours in a school week
 - 8 hours on a non-school day
 - 40 hours in a non-school week
 - Only hours between 7 a.m. and 7 p.m., or until 9 p.m. from June 1 through Labor Day

The child labor provisions of the FLSA apply to youth employees who work in a business where goods are produced for interstate commerce, even if the youth employee is not personally involved in the production of those goods.¹⁶⁷

For employers who are **not** covered by the FLSA, Mississippi has its own child labor laws that apply. Under Mississippi state law, you may not employ children under 14 years old, and children under 16 years old may not work more than 8 hours per day or 44 hours per week. They also may not work before 6 a.m. or after 7 p.m.¹⁶⁸

The child labor laws do not apply to children under 16 years old who are employed by their parents in non-manufacturing or other non-hazardous jobs.¹⁶⁹

Recordkeeping under FLSA

Businesses covered by the FLSA must maintain certain kinds of records about their employees. For a list of what information is required, see <http://www.dol.gov/whd/regs/compliance/whdfs21.pdf>.

¹⁶⁴ 29 U.S.C. § 206(g) (2006); *Fact Sheet #32: Youth Minimum Wage*, <http://www.dol.gov/whd/regs/compliance/whdfs32.pdf>.

¹⁶⁵ 29 U.S.C. § 207(a)(1) (2006).

¹⁶⁶ 29 U.S.C. § 203(l)(1) (2006); 29 C.F.R. § 570.

¹⁶⁷ 29 U.S.C. § 212(a) (2006).

¹⁶⁸ Miss. Code Ann. § 71-1-21 (2009).

¹⁶⁹ 29 U.S.C. § 203(l)(1) (2006).

Pay Frequency

Under Mississippi law, if you have 50 or more employees, you are required to pay them at least every 2 weeks. This does not include executive, administrative, and professional employees.¹⁷⁰

Penalties

- FLSA violations can be expensive for employers. You may be required to pay back wages and additional damages to employees, attorneys' fees, and fines of \$10,000 or more.¹⁷¹
- Violations of Mississippi child labor laws are misdemeanors and can result in fines of up to \$100 and/or imprisonment for up to 60 days.¹⁷²

For more information on minimum wage, overtime, and child labor laws, visit:

- United States Department of Labor, <http://www.dol.gov/compliance/guide/minwage.htm>
- Title 71, Chapter 1 of the Mississippi Code.¹⁷³

Health & Retirement Benefits

If you plan to provide your employees with health or retirement benefits, you should be sure to familiarize yourself with the federal law requirements contained in the Employee Retirement Income Security Act (ERISA).¹⁷⁴ Because these laws can be very complicated, you should consider speaking with an attorney before implementing a health or retirement benefit plan.

For more information about providing employee benefits plans, see the U.S. Department of Labor *Employment Law Guide* at <http://www.dol.gov/compliance/guide/erisa.htm>.

You may also want to consider providing your employees with other benefits like paid sick days and vacation time or flexible work arrangements that allow them to balance work with family caregiving responsibilities.

Employee Handbooks

You may want to consider creating an employee handbook or policy manual outlining your responsibilities to your employees and their rights and responsibilities in the workplace.

Employee handbooks may be enforced by courts as legal contracts between employers and employees, so if you do not intend the policies in your manual to be binding on yourself or your employees, you should include a conspicuous disclaimer in the handbook.¹⁷⁵ Here is a sample disclaimer: "This handbook is not a contract, express or implied, nor does it guarantee employment for any specific duration."

¹⁷⁰ Miss. Code Ann. § 71-1-35 (2009).

¹⁷¹ For more specific information about penalties and sanctions, see 29 U.S.C. § 216 (2006); <http://www.dol.gov/compliance/guide/minwage.htm#Penalites>.

¹⁷² Miss. Code Ann. § 71-1-29 (2009).

¹⁷³ This can be accessed online at <http://www.michie.com/mississippi>.

¹⁷⁴ 29 U.S.C. § 1001 et seq (2006).

¹⁷⁵ See Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1088 (Miss. 1987).

Having an employee handbook can potentially reduce liability for your business. For example, businesses that have a policy in place to prevent and respond to sexual harassment in the workplace are more likely to be protected in a lawsuit than businesses that have no such policy.¹⁷⁶

You should have a lawyer review your handbook to be sure you are adequately protecting your business and complying with the necessary laws.

For more information about what to include in an employee handbook, see the Business.gov website maintained by the U.S. Small Business Administration, <http://www.business.gov/business-law/employment/hiring/employee-handbook.html>.

¹⁷⁶ See Faragher v. Boca Raton, 524 U.S. 742 (1998).

Intellectual Property

Intellectual property includes many of the creative components of your business – your company name, artwork or photographs that you produce, and original products that you invent. It is important to protect your intellectual property because that is how you maintain the identity of your business as a brand and prevent other people from using your work to make a profit.

What kind of intellectual property protection does your business need?

There are three different kinds of intellectual property: trademark, copyright, and patent. They are used in different situations and offer different kinds of protection. Your first task will be to determine which kind of protection is best suited to your business. It is possible that your business could benefit from more than one type of intellectual property protection.

The process for gaining trademark, copyright, and patent protection is outlined below. As with all specific legal questions, you are advised to consult an attorney if you have intellectual property issues.

The Difference Between The Major Kinds Of Intellectual Property Protection

Trademark: protects your brand and associated words, phrases, symbols, or designs.

Copyright: protects original works of authorship.

Patent: protects inventions or discoveries.

Quick Glance at the Kind of Protection You Need

Do you...

Want protection for your business's name and logo? → *trademark*

Want protection for an article you have written or photo you have taken? → *copyright*

Want protection for an invention? → *patent*

Trademarks: Protecting Your Brand

Your brand can be one of your business's most valuable assets. Trademark protection covers words, names, symbols, logos, or sounds that identify and distinguish the manufacturer of goods and services.¹⁷⁷ Examples of common trademarks are Coca-Cola, Nike, and Xerox. Trademarks, unlike patents or copyright, can be held as long as they are properly renewed and are being used.

The good news is that you do not need to do anything to get trademark protection – it starts as soon as you begin using a novel name in connection with the sale of goods or services. However, there are simple steps you can take to increase your brand's security.

Below are actions you can take to ensure and increase your trademark protection, ranging from the essential to the recommended. Just as you try to protect your trademarks, you should take steps to ensure that you are not violating another person's or company's trademark – avoid anything that could cause confusion for customers.

¹⁷⁷ Federal trademark law is governed by the Lanham Act, 15 U.S.C § 1051 et seq. The full text of the Act can be found at, <http://www.bitlaw.com/source/15usc/>. You can also examine the USPTO's detailed "Rules of Practice and Federal Statutes" at http://www.uspto.gov/trademarks/law/CFR_12-28-09_tmlaw2.pdf.

Essential Steps

1. Pick a brand or product name that is new and distinctive. The more original and creative a brand or product name is, the more protection you will have from someone else using it. For example, PepsiCo can trademark “Pepsi,” but PepsiCo cannot trademark “soda.” Aim for something you and your friends have never heard before – it is much easier to protect a made-up name.

Sometimes, however, you can get trademark protection for a name that is just a normal word if you use it in an unusual and unexpected context. For example, Apple can trademark its company name and logo because using “apple” to sell computers is arbitrary and not related to the kind of product they sell. The more descriptive the term, the less likely it is to be protected. Similar to the Pepsi example above, you would not be able to trademark the brand name “Apple” if you owned a fruit company.

You also may not trademark names that include geographic terms, like city names. Words that are common in a region, like “delta” in the Mississippi Delta, cannot be protected. You are free to open a bookstore called “Delta Books,” but you could not register that name. Both federal law and the Mississippi Code list a number of other restrictions on the kinds of brand names you can use.¹⁷⁸

2. Use your brand early and often. Attaching your brand name to your products or to the services you are selling – in advertisements, for example – is the best way to initiate trademark protection. The more likely consumers are to connect your brand name with your specific products or services, the more likely it is that your name will be protected as a trademark.

You may also add the “TM” symbol to your brand or product logo. For example, if you wanted to print the name of your soap company, Sunshine Soap, on your packaging, you could do it like this: Sunshine Soap™. Note: Do **not** use the federal registration indication ® unless you **federally** register your mark. See below for more information.

3. Do not use the name or symbol of any other company. You could be violating *their* trademark, resulting in costly litigation or penalties. This is particularly true for brand names and symbols that are federally registered before you start your business. Since a federally registered trademark gives the company that owns it national priority, you may not use the name or symbol even if the first company does not sell its products in your area.

However, if you started your business first and have been using your brand name in connection with the sale of products or services, then you have the right to continue using it in your geographic area, even if another company later registers the name. Additionally, if you want to start a business called Sunshine Soaps in Mississippi, but there is already a Sunshine Soaps company in California, as long as they have not federally registered that name, you may use it as well – you just won’t be able to sell or advertise in California.

What if you find out that there is a company in Mississippi called Sunshine Scarves? Can you still call your business Sunshine Soaps? Most likely the answer is yes. Because the products being sold – soaps and scarves – are different enough that consumers will not be confused about which company is making which product. However, if there were a Mississippi company called Sunshine Scents that sold perfume, their product might be too similar to soap for you to be able to use “Sunshine” in your name. If you were

¹⁷⁸ 15 U.S.C. § 1051 et seq.; Miss. Code Ann. § 75-25-1 et seq. (2009).

sued by another company called “Sunshine,” the court would try to figure out what the likelihood is that consumers will be confused about whose product is whose.

Note that the rules are a little different for famous brands, like Pepsi, Nike, or Xerox. Even if you wanted to start a housecleaning business called Pepsi Cleaners, you probably could not do this because Pepsi is such a famous brand name that they have special rights under trademark law.

Highly Recommended

Register with the Mississippi Secretary of State

Just like income taxes, there are two kinds of trademark registration, state and federal. Both will dramatically increase your brand’s protection.

How do you register your trademark with the state?

1. Ensure that your name is original. You should search both Google and the Mississippi trademark database (http://www.sos.ms.gov/business_services/trademarks.aspx) for anything close to your name. Ideally, you would do this before choosing your business or product name. Remember, you cannot trademark anything that someone else already uses for a similar product in the same geographic area, or anything that would cause confusion for customers.

2. Read the instructions for filing a trademark application. These are available on the Secretary of State’s website: <http://www.sos.ms.gov/links/business/fees/other/i0023.pdf>.

3. Complete the application. The application fee is \$50 for a Mississippi resident and \$60 for a non-resident. You can find the application at: <http://www.sos.ms.gov/links/business/fees/other/F0023.pdf>.

Recommended

Federal Registration

Federal registration with the U.S. Patent and Trademark Office gives you the **highest** level of brand protection should there be a legal dispute over your trademark, but this comes with additional cost. The current cost to federally register your trademark is \$375.

The U.S. Trademark Office offers resources to prospective applicants:

- Basic information page: <http://www.uspto.gov/trademarks/basics/index.jsp>
- Searchable database: <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=4005:ldjr9p.1.1>
- On-line filing system: <http://www.uspto.gov/teas/e-TEAS/index.html>

Trademark Summary

- Trademark protection comes from use first and the law second. Pick a name that is new, original and distinctive – use it early and often.
- State and federal registration are key measures to protect your brand and business.
- Do not use, copy, or modify another brand, name, logo, or advertisement. If there is any chance that a consumer would be confused by a potential name, do not use it.

Recommended Trademark Reading

“Making a Mark: Introduction to Trademarks for Small and Medium Size Business”
World Intellectual Property Organization,

http://www.wipo.int/freepublications/en/sme/900/wipo_pub_900.pdf

Copyright: Protecting Your Original Work

Copyright protection starts with the creation of your work and begins immediately. You do not need to do anything to have some copyright protection. However, it is important to know which types of work get copyright protection and which do not.¹⁷⁹

Copyright protects original works including:

- poetry
- fiction
- songs
- photographs
- artwork
- computer code

Copyright does NOT protect:

- facts
- ideas
- methods

Registration of Copyrights

Even though copyright protection is to some degree automatic, you can also register important and valuable works with the U.S. Library of Congress.

Why register?

- Should a dispute arise, registration provides much better evidence and proof of authorship of your work.
- It is easy. Registration can be done online and costs \$35. For more information about how to register online, consult the U.S. Copyright Office's tutorial, <http://www.copyright.gov/eco/eco-tutorial.pdf>.

Note: Even if you do not register your work, you may still use the copyright symbol © on your original work, along with the year and your name. For example, if Sunshine Soaps had a website, it could include a copyright notice at the bottom of the page that looked like this: © 2010 Sunshine Soaps. This will provide you with extra protection by notifying the public that you created the work.

Copyright Infringement

For many small businesses, the biggest copyright concern will be ensuring that you do not infringe on copyrights belonging to other people or companies. As a general rule, always assume that work done by other people is under copyright. This means you may not use other people's work, even if you are not profiting from the use. This would include copying material that you found on a website or, if you have your own website, posting an article that was published somewhere else. You may include links on your website to other people's websites, and you may use small excerpts if you include quotation marks and

¹⁷⁹ Federal copyright law is governed by the Copyright Act, 17 U.S.C. § 101 et seq. Full text of the Act can be found at: http://www.uspto.gov/trademarks/law/CFR_12-28-09_tmlaw2.pdf. It is also founded in Article 1, section 8, clause 8 of the Constitution.

the name of the author. If you want to include the whole work, like a full article or a photograph, you must receive permission from the copyright holder. See the Fair Use section below for more information.

Another important form of copyright infringement to be aware of is “derivative work.” In other words, you cannot write a script or novel for a sequel to a movie or book written by someone else. Other forms of derivative works include translations and drawings based off of someone else’s photograph.¹⁸⁰

“Fair Use” Exception to Copyright

Fair use is an exemption to copyright law that allows the use of small portions of a work under copyright for the purpose of commentary, satire, research, reporting, or education.¹⁸¹ For example, a news blog can quote a paragraph from *The New York Times* in order to comment on it. It is important that when you use a portion of a work under copyright that you give appropriate credit, identifying the author and publisher. If you want to use someone else’s full piece of writing or photograph – on your business’s website, for instance – it is not enough just to list the author’s name. You must receive explicit permission from the copyright holder.

How much is fair use? There is no exact answer, so it is best to use as little as possible and to do nothing to diminish the commercial value of the work in question.¹⁸²

Patent: Protecting Your Inventions

What is a patent?

A patent is an intellectual property right that excludes others from making or selling a new, novel, and non-obvious invention for a defined period, usually 17 years.¹⁸³ The patent system is a central part of modern business, especially for those companies that rely on new technology. For example, a new digital camera could use dozens of patented parts licensed by the producer from several different suppliers.

Do you need a patent?

Many businesses, especially small businesses in the food/beverage or service industries (restaurants, carpenters, lawyers, and accountants) will never have the need to file for a patent. The kinds of inventions that are patentable are numerous and varied. Here are some questions and steps to consider about your invention.

1. Is your invention new? Is it already patented?

Only novel inventions can be patented and many inventions are already patented, even if they never make it to market. The first step in considering a patent application is to be sure that your product has not already been invented and that it is not already under patent protection. Generally, if something already exists, even if it is not patented, you will not be able to claim that you invented it and file for

¹⁸⁰ 17 U.S.C. § 106 (2006).

¹⁸¹ 17 U.S.C. § 107 (2006).

¹⁸² 17 U.S.C. § 107 identifies four factors to be considered in determining whether or not a particular use is fair: “(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work.”

¹⁸³ Federal patent law is governed by the Patent Act, 35 U.S.C. § 1 et seq. Full text of relevant sections can be found at <http://www.law.cornell.edu/uscode/35/>. Patent law is also grounded in Article 1, section 8, clause 8 of the Constitution.

patent protection.¹⁸⁴

A good place to start is with this University of Texas tutorial on the patent search process: <http://www.lib.utexas.edu/engin/patent-tutorial/tutorial/pattut.html>.

2. How likely is your invention to be a commercial success?

Compared with the registration of trademarks and copyright, patent applications are expensive and complicated. The U.S. government fees alone are over \$1,000. In addition, a successful patent application will almost always require the help of a patent attorney, which could add thousands of dollars to the total cost.

Important difference between patents and copyright/trademark

While trademark and copyright protection begins from the moment you begin to use a brand name or create an original work, patent protection is not guaranteed. It is up to the U.S. Patent Office to determine if your invention qualifies as novel enough for patent protection. Patents also require maintenance fees.

Patent fees

Filing a provisional application	\$105
Filing a non-provisional application	Approximately \$515
Issue Fee	Approximately \$650
Maintenance Fees:	
➤ Due at 3 ½ years	➤ Approximately \$465
➤ Due at 7 ½ years	➤ Approximately \$1,180
➤ Due at 11 ½ years	➤ Approximately \$1,955

*Source: U.S. Trademark and Patent Office, 2010.

For all of these reasons, it is essential that your invention have a very high likelihood of commercial success to justify the costs of patent protection.

How do you get a patent?

You have one year to file for a patent after your invention is first used in public, sold, or described in a printed publication.¹⁸⁵ You should keep detailed records of your invention so that you can prove when you first invented it. This is important because if someone else invents the same thing independently and tries to file for a patent, if you were actually the first person to come up with the idea, then you have priority for patent purposes.¹⁸⁶ However, the rules about who has priority are complicated, and under some circumstances – for example, if you waited too long to actually turn your idea into a usable product – then someone else may be able to claim the patent.

Once you have established that your invention is new and have assessed its commercial viability, you should consult the World Intellectual Property Organization’s guide for small and medium businesses: http://www.wipo.int/freepublications/en/sme/917/wipo_pub_917.pdf.

¹⁸⁴ 35 U.S.C. § 102(f) (2006).

¹⁸⁵ 35 U.S.C. § 102(b) (2006).

¹⁸⁶ 35 U.S.C. § 102(g) (2006).

This guide explains the different kinds of patents and the challenges of the application process in detail. If, after reading this report, you still want to move forward, you should consult a patent attorney to help you with the filing process.

Trade Secrets

This is a final form of intellectual property protection, seldom used in a typical small business environment. Trade secrets are any confidential business information that provides an enterprise with a competitive edge.¹⁸⁷

What qualifies as a trade secret?

- The information must be secret, held tightly, and not readily accessible.
- Part of its commercial value must be tied to the fact that it is secret.
- You must take measures to keep the information secret.

Advantages of trade secrets:

- Trade secret protection does not expire and does not have a registration cost.
- Example: Coca-Cola does not have a patent on its formula. Rather, it has held the formula secret within the company.

Disadvantages of protecting confidential business information as a trade secret:

- If the secret is made public, anyone can use it.
- A trade secret provides less protection and is more difficult to enforce than a patent.
- Someone can patent the same thing you keep as a trade secret if they develop it independently.

Additional Resources

- U.S. Patent & Trademark Office: <http://www.uspto.gov>
- U.S. Copyright Office: <http://www.copyright.gov>
- ABA Section of Intellectual Property Law: <http://www.abanet.org/intelprop/home>
- American Intellectual Property Law Association (AIPLA): <http://www.aipla.org>

¹⁸⁷ 18 U.S.C. § 1839(3) defines a trade secret as “all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if— (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public.”

Resources

- Mississippi District Office of the US Small Business Administration:
http://www.sba.gov/localresources/district/ms/index.html?cm_sp=ExternalLink- -Federal- -SBA
- Mississippi Business Office: <http://www.business.gov/states/mississippi/>
- Womens' Business Center (appears to be for women or men, but site isn't really updated): <http://www.deltamace.org/wbc.html>
- State Office of the Mississippi Small Business Development Center:
<http://www.mssbdc.org/DocumentMaster.aspx?doc=1001#WHATFORMWILLYOURBUSINESSTATE>
- Mississippi Development Authority: <http://www.mississippi.org/index.php?id=113>
- Mississippi Tax Structure booklet: <http://www.tax.ms.gov/revenue/TaxStructure2004.pdf>
- Mississippi Code: www.michie.com/mississippi
- IRS Small Business and Self-Employed Tax Center:
<http://www.irs.gov/businesses/small/index.html>
- Alcoholic Beverage Control: <http://www.mstc.state.ms.us/abc/main.html>
- Restaurant and Food Service Business Guide:
<http://www.business.gov/industries/food/restaurants.html>
- Tobacco, Beer, and Alcohol FAQs:
<http://www.mstc.state.ms.us/info/fags/TobaccoBeerandAlcohol.html>
- North Delta Planning and Development District: <http://www.ndpdd.com/index.html>
- Workers' Compensation Commission: http://www.mwcc.state.ms.us/_main.asp
- Workers' Compensation Facts: <http://www.mwcc.state.ms.us/INFO/wcfacts.pdf>
- STEPS Program (Subsidized Transitional Employment Program & Services):
http://www.mdes.ms.gov/wps/PA_1_0_CH/docs/STEPS/STEPS.html

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