

# Company Names vs. Trade Names: Understanding the Legal Difference

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**So you did all the hard work that was necessary to get a new business off the ground. And you formed a new business entity with the Secretary of State to conduct that business, such as a corporation or limited liability company ('LLC').**

In forming your company, you may have given it the same catchy name under which you plan for it to sell its goods or services to the public – i.e., its *trade name*. And you may believe that the Secretary of State's acceptance of your company's organizational documents gives your company the right to use its legal name in commerce for that purpose. Unfortunately, as many people find out too late, it's not so simple.

In fact, the law governing the legal name that you may select for your new company at formation is, for most purposes, completely separate from the law that governs whether your company may lawfully use its legal name as a trade name.

## **Business Entity Names under North Carolina Law**

Corporations, LLCs, limited partnerships, and similar business entities are creatures of state law. They are created under the law of a particular state, and state law governs various aspects of their existence. One such aspect is their legal name for the purpose of conducting business within a state. In North Carolina, Chapter 55D of the North Carolina General Statutes ("Chapter 55D") sets forth the basic requirements for the legal name that a business entity may adopt, and they are relatively few in number.

First, because such entities generally offer their owners the benefits of limited liability, the entity's legal name must contain one or more words or abbreviations meant to signal to the public that they are dealing with such an entity. For example, "limited," "incorporated," and "inc." are among the words and abbreviations that are acceptable for a corporation to meet this requirement in North Carolina.

Second, the entity's legal name must not state or imply that it conducts a business that is unlawful or not permitted by its articles of incorporation or organization. For example, a name that suggested an entity was in the business of selling an illegal drug should arguably be disallowed by the Secretary of State.

Third, if the entity is a limited partnership, its legal name must not include the name of any limited partner unless their name also happens to be the name of a general partner, or unless the business has been carried

on under that name since before the limited partner was admitted to the partnership. The purpose of this rule is to avoid names that may deceive the public into believing a limited partner, who enjoys limited liability, is a general partner that does not.

Other than that, Chapter 55D simply requires that a business entity's legal name be "distinguishable" from the names of other entities already appearing on the Secretary of State's records. In this context, "distinguishable" is used quite literally. Even small differences in the spelling of a word, or the addition or removal of a word, can render one business entity's name *distinguishable* from that of another.

### **Trademarks, Service Marks, and Trade Names Generally**

Trademarks may consist of words, phrases, symbols, designs, or any combination of those things, identifying and distinguishing the source of the goods or services of one party from the goods or services of another. Trademarks can include all of the elements that constitute a "brand."

Technically, the term "trademark" is the precise term for a mark used for goods, while "service mark" is precise for a mark used for services. The term "trade name" is used for a mark describing the company or other organization providing the goods or services. Trademarks, service marks, and trade names are very similar, and the terms are often used interchangeably as simply "trademarks."

### **Business Entity Formation vs. Trademark Rights**

Unlike the rules applicable to forming a business entity found in state law, the rules applicable to trademarks are found in both state and federal law. But even at the state level, North Carolina's trademark law is separate and distinct from its law governing the legal names of business entities. Consequently, the Secretary of State's acceptance of your company's legal name at formation does not mean that it will have the right to use that legal name as a trade name to sell its goods and services. In fact, Chapter 55D expressly states that the reservation or registration of a company's legal name under the statute does not authorize a use of the legal name that would violate the rights of others under state or federal trademark law.

So, why can't all the rules be harmonized and put in one place? Well, a complete discussion of that question is beyond the scope of this article. But one reason is that trademark law seeks to accomplish different goals than Chapter 55D. One such goal is the prevention of consumer confusion as to the source of the goods and services being sold in the marketplace. To that end, trademark law protects trademark owners against uses of identical or confusingly similar marks by others that are likely to cause confusion as to a potential affiliation between the trademark owner and the other user, or confusion as to the trademark owner's potential sponsorship or approval of the other user's goods or services. If a likelihood of consumer confusion exists, there may be trademark infringement.

The test used by courts to determine whether a mark creates a likelihood of confusion with a preexisting trademark requires consideration of a number of different factors. But the essential inquiry is whether the marks are confusingly similar to each other, in terms of sound, appearance, and meaning, when used in the context of the goods or services provided under the marks. The test is not a side-by-side comparison of the marks, and it assumes that most consumers will have fallible memories. It also assumes that the time and energy a consumer will invest in scrutinizing and remembering a mark is generally proportional to the cost and nature of the relevant goods or services being provided. For example, the test would assume that a consumer who is looking to purchase a car is more likely to scrutinize and remember the brands of the various cars they are considering for purchase than is the consumer who is casually selecting a bottle of water to buy as they leave the grocery store. Theoretically, it would take a higher degree of similarity between trademarks to confuse the purchaser of the car than the purchaser of the bottle of water.

Obviously, this test for trademark infringement is very different from the standards applicable to the Secretary of State's acceptance of a company's legal name under Chapter 55D. Whether your new company's trade name is actually *confusingly similar* to someone else's trademark, for the purpose of trademark infringement, is a much broader and more subjective inquiry than whether its trade name is merely *distinguishable* from that trademark. Unfortunately, many new business owners only learn this after getting a cease and desist letter from someone claiming that the business's name infringes their trademark rights. If the infringement claim is valid, the business owner may need to adopt a different trade name. This can mean the loss of all the time, energy, and money invested in building brand recognition in the abandoned name.

### **Doing Your Due Diligence and Protecting Your Investment**

There is no requirement that a company conducts its business under its legal name. In fact, it is quite common for a company to have one legal name and then register to "do business as" a different trade name (frequently called a "DBA"). But regardless of whether you want to use your company's legal name or a DBA as its trade name, it is a good idea to put some due diligence into researching a trade name before its adoption and use. Some basic internet research of businesses selling similar goods or services can help you eliminate obvious conflicts with trademarks that are already in use by others. Once you have narrowed your list of the suitable trade names that might be available, a trademark attorney can assist you in further evaluating those trade names and conducting any additional trademark searching that might be advisable to reduce your risk of adopting one that is unavailable and infringes someone else's trademark rights.

Once you have selected a trade name for your new company, you should consider applying for a trademark registration to expand and protect your company's rights in the name. Although registration of a trademark is not required, the principal benefits of being a trademark owner will be limited without the appropriate registration. Registration of a trademark can be sought on a state or federal level, depending on the scope of your company's business and its goals.

### **Conclusion**

The Secretary of State's acceptance of your company's organizational documents and the legal name does not create or protect any trademark rights in its trade name. Before investing substantial time, energy, and money to develop and build value and goodwill in its brand, you should do your due diligence to research and select a trade name that is available and does not infringe someone else's trademark rights. Doing so will decrease the risk of a trademark infringement issue arising that could cause the loss of your investments in the brand, or even worse, liability to some else for infringing their mark. Finally, obtaining a trademark registration for your company's trade name can help you to expand and protect its trademark rights.

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