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Doing Business in the United States

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CHAPTER 66 Limited, Limited Liability, and Limited Liability Limited Partnerships \*

*4-66 Doing Business in the United States § 66.02*

## § 66.02 Formation of Limited Partnerships

### [1] Generally

Limited partnerships are solely creatures of statute. In order to form a limited partnership, there must be compliance with the limited partnership statute in effect in the jurisdiction in which the partnership is being formed. The ULPA provides that a limited partnership is formed if there is substantial compliance in good faith with provisions requiring that a certificate containing certain specified information about the partnership be signed, sworn to, and publicly recorded. n1

The question of whether a limited partnership has been formed is important principally for the purposes of determining whether a person has achieved the status of a limited partner and the limited liability to third persons dealing with the partnership afforded by such status. The statutory formation requirements are intended primarily to protect such third persons. As a general rule, when a partnership venture has been formed, but the formation requirements of the limited partnership statute have not been complied with, the result is a general partnership with consequent unlimited liability of all partners. n2

Failure to comply with the statutory formalities of organizing a limited partnership generally does not in and of itself affect the rights of the partners, general and limited, as between themselves. n3

Persons who agree to form a limited partnership at some future time, or upon the occurrence of some contingency, do not become partners until the future time or contingency. n4

**[a] The Limited Partnership Agreement** A limited partnership agreement is a contract that controls the partners' rights and obligations among themselves. n5 The members of a limited partnership may include in their partnership agreement any lawful provisions governing the relations between themselves. n6 An agreement or provision between the partners limiting their liability, or otherwise restricting their obligations, is not binding upon third parties. n7 However, an agreement so made, if complete, controls as between the partners themselves. n8 A limited partnership agreement is deemed to incorporate the mandatory portions of the state's limited partnership statute, and any contractual provisions that contravene or defeat the purpose of those sections will not be enforced. n9

**[b] Who May Become Limited Partners** The revised ULPA does not specify the number of persons required to form a limited partnership. The term *person* is broadly defined to include a natural person, partnership, limited

partnership (domestic or foreign), trust, estate, association or corporation. n10

The ULPA provides that a person may be a general partner and a limited partner in the same partnership at the same time. n11

### **[2] What Business May Be Transacted**

The ULPA provides that a limited partnership may carry on any business that a partnership without limited partners may carry on, with the exceptions designated, if any. n12 In approximately twenty-five states the Act contains no exceptions. Approximately twenty other states that have adopted the Act except banking and insurance; some of which exclude a few other businesses as well.

Failure to comply with statutory requirements regulating entrance into certain businesses may render the limited partnership agreement void and unenforceable.

### **[3] Contribution And Financing Of The Partnership**

The ULPA eliminated the requirement that a limited partner must make a capital contribution to the firm. n13 This is in recognition of the fact that the partnership agreement, not the certificate of limited partnership, has become the authoritative and comprehensive document for most limited partnerships, and that creditors of the partnership should refer to the partnership agreement and other information furnished to them directly by the partnership to obtain facts concerning the capital and finances of the partnership.

### **[4] Restrictions on Partnership Name**

Under prior versions of the ULPA, n14 the name of the limited partnership must contain the words "limited partnership" without abbreviation of these words; may not contain the name of a limited partner unless (a) it is also the name of a general partner or the corporate name of a corporate general partner, or (b) the business of the limited partnership had been carried on under that name before the admission of that limited partner; may not be the same as, or deceptively similar to, the name of any other domestic or foreign corporation or limited partnership which is organized, licensed or registered to do business in that particular state; and may not contain words prohibited by that particular state.

The 2001 ULPA eliminated these restrictions and expressly permits the limited partnership to contain the name of any partner. n15 The 2001 ULPA's provision places limited partnerships on equal footing with other entities that offer limited liability to their members, such as corporations and limited liability companies.

### **[5] Duration of Firm**

Under the ULPA, a limited partnership is formed and may commence to do business when there has been substantial compliance in good faith with its provisions. n16 The 2001 ULPA expressly provides that a limited partnership's duration is perpetual n17 and dispenses with the requirement that the latest dissolution date be stated in the certificate of limited partnership. n18 Nonetheless, the partnership agreement may state a definite term or specify an event that causes dissolution. n19

Prior versions of the ULPA provided that once formed, a limited partnership continues its existence only for such period of time as is specified in the certificate and, unless renewed, terminates upon expiration of that period. n20

### **FOOTNOTES:**

(n1)Footnote 1. ULPA § 201(c). *See Saulnier v. Fanaras Enterprises, 136 N.H. 565, 618 A.2d 841 (1992)*, when parties substantially complied with the statutes governing formation of limited partnerships, a limited partnership was created despite the general partner's failure to perform under the limited partnership agreement.

(n2)Footnote 2. *Dwinell's Central Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 587 P.2d 191 (1978) .

(n3)Footnote 3. *Pacific Investment Co v. Townsend*, 58 Cal. App. 3d 1, 129 Cal. Rptr. 489 (1956) .

(n4)Footnote 4. *Bencoe v. Bencoe*, 62 N.M. 95, 305 P.2d 370 (1956) .

(n5)Footnote 5. *See e.g., Hendry v. Wells*, 286 Ga. App. 774, 650 S.E.2d 338 (2007) ; *Della Ratta v. Larkin*, 382 Md. 553, 856 A.2d 643 (2004) .

(n6)Footnote 6. *Riviera Congress Associates v. Yassky*, 18 N.Y.2d 540, 277 N.Y.S.2d 386, 223 N.E.2d 876 (1966) .

Partnership certificates and partnership agreements are not identical. Certificates are required to be filed at a designated State governmental office. They contain:

I. The name of the partnership,

II. The address of the office and the name of the agent for service of process required to be maintained by Section 104,

III. The name and the business address of each general partner,

IV. The latest date upon which the limited partnership is to dissolve, and

V. Any other matters the general partners determine to include therein.

The 2001 ULPA require the certificate to disclose if the partnership is a limited liability limited partnership as well as certain information regarding conversions and mergers. The partnership agreement may be express or implied and clarifies the relations among the partners. Most partnership agreements are written, and typically contain the name and address of the firm, the nature of its business, its duration, the contributions of the partners, salaries to be paid, division of duties and managerial powers, admission requirements for new partners, division of profits, and dissolution provisions.

(n7)Footnote 7. *See Ryan v. Brophy*, 755 F. Supp. 595 (S.D.N.Y. 1991) (an indemnification clause in a partnership agreement created obligations between the limited partners and the general partner, but created no obligation between the limited partners and an employee of the partnership); *see also Mud Control Laboratories v. Covey*, 2 Utah 2d 85, 269 P.2d 854 (1954) .

(n8)Footnote 8. *Riviera Congress Associates v. Yassky*, 18 N.Y.2d 540, 277 N.Y.S.2d 386, 223 N.E.2d 876 (1966) .

(n9)Footnote 9. *Kelsey v. Kelsey*, 714 N.E.2d 187 (Ind. Ct. App. 1999) .

(n10)Footnote 10. ULPA §§ 102 (14).

(n11)Footnote 11. ULPA § 113.

(n12)Footnote 12. ULPA § 104(b).

(n13)Footnote 13. ULPA § 501.

(n14)Footnote 14. Practitioners must check the law of the state which will control the limited partnership. There are states that have not adopted the 2001 ULPA and the name restriction may still apply.

(n15)Footnote 15. ULPA § 108(a).

(n16)Footnote 16. ULP § 201(c).

(n17)Footnote 17. ULP §104(c).

(n18)Footnote 18. ULP §201(a).

(n19)Footnote 19. ULP §104, Official Comment.

(n20)Footnote 20. Once a limited partnership expires, the special partners may become liable as general partners if the business is continued by the firm. *The Catherine C Sarmiento v. The Catherine C*, 110 Mich. 120, 67 N.W. 1085 (1896) .

\* This chapter was revised in 2010 by James M. Wilson, Jr., of Chitwood Harley Harnes, LLP.