

LGBTQ+ BUSINESS ALERT

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Building your LGBTQ+ business: Avoiding legal pitfalls that could derail your LGBTBE® Certification

Of the 4.5% of United States adults who openly identify as lesbian, gay, bisexual, transgender or queer, [data shows](#) they are younger and less wealthy than the general population. Consequently, LGBTQ+ business owners and entrepreneurs face more challenges than most other U.S. adults.

Recognizing these challenges, the National LGBT Chamber of Commerce (NGLCC), the only national not-for-profit advocacy organization specifically dedicated to expanding economic opportunities for LGBTQ+ businesses, has created benefits for LGBTQ+ businesses and major corporations who are invested in creating an LGBTQ-inclusive supply chain. These benefits include increased procurement opportunities, training/mentoring on best practices, scholarships, and matchmaking events for LGBTQ businesses and corporate procurement representatives. These benefits fall within what NGLCC calls its [Supplier Diversity Initiative](#).

Get to know LGBTBE® Certification

As part of its Supplier Diversity Initiative, the NGLCC has created nationwide certification standards and procedures for designating businesses as *LGBT Business Enterprises*® (LGBTBEs). Modeled after the standards and procedures adapted from 49 Code of Federal Regulations (CFR) Parts 23 and 26, and developed by other national diverse certifying bodies, including the National Minority Supplier Diversity Council (NMSDC) and the Women's Business Enterprise National Council (WBENC), [NGLCC's standards and procedures](#) describe the criteria for an LGBTQ+ business to become certified as an LGBTBE and the application process for those

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seeking certification. The NGLCC's standards and procedures ensure that the certification is a mark of distinction for LGBTBEs and is held in the highest regard by corporate procurement representatives.

Business certification is not unique to the LGBTQ+ business community. There are [differentiated certifications](#) for women, ethnic minorities, people with disabilities, veterans, and other socially and economically disadvantaged persons. Also, business certification will not guarantee that a certified LGBTBE will be awarded a contract. Instead, certification simply gives certified LGBTBEs a seat at the bidding table. But, for those looking to do business with NGLCC's 140 corporate partners and the more than 50 local, state and federal government agencies that recognize [NGLCC's LGBTBE certification](#), then getting certified is one way to grow one's business as an LGBTQ+ entrepreneur.

Qualifying as an NGLCC-certified LGBTBE

According to the [NGLCC's certification guidelines](#), any business that meets these criteria is eligible to become a certified LGBTBE:

- The business is at least 51% owned, operated, managed and controlled by a person or persons who identify as part of the LGBTQ+ community (including transgender and non-binary/gender non-conforming individuals) and are U.S. citizens or lawful permanent residents;
- The business operates independently from any non-LGBTQ+ business enterprise; and
- The business is headquartered and has been formed as a legal, for-profit entity in the United States.

Agents, brokers, non-profit organizations, manufacturer's representatives and strategic alliances are not eligible for certification as an LGBTBE. An LGBTQ+ business operating under a franchise or license agreement may be certified as an LGBTBE if it meets the above criteria, so long as the franchise or license agreement contains no provision which unreasonably restricts the ability of the LGBTQ+ owner(s) from exercising the managerial control and operational authority of the business. [Provisions which may disqualify a franchised business](#) from certification are:

- Termination of the franchise agreement by the franchisor without cause;
- Lack of ownership of receivables by the franchisee;
- Exclusive ownership of account receivables and/or contracts by the franchisor;
- Restrictions on the sale of the business below market value;
- Terms and conditions not related to the brand or systems can be altered without franchisee's notification and/or approval;
- Contracts are prepared and approved by the franchisor;

- Management decisions cannot be made independently by the franchisee;
- No financial risk is borne by the franchisee;
- Hiring and firing decisions cannot be made independently by the franchisee; and
- Equity interest in the franchise is owned by the franchisor.

How does one prove they are LGBTQ+?

To determine whether a business is 51% owned, operated, managed and controlled by a person or persons who identify as part of the LGBTQ+ community, [NGLCC requirements](#) state that an applicant submit one or more [LGBT Status Qualifiers](#). The typical LGBT Status Qualifiers are:

- A letter from an NGLCC affiliate chamber leader attesting to LGBT status of each business owner.
- A copy of a valid municipal or state license/certificate of marriage, civil union or domestic partnership.
- Three letters of reference from personal contacts on their company letterhead or stationery who:
 - have known the owner for over a year; and
 - can vouch/attest to LGBT status.
- Evidence of completed or attempted parenting or family building efforts with same-sex partners including surrogacy, adoption or in-vitro fertilization procedures.
- A physician carry letter evidencing gender reassignment or medical procedures.
- Media (publications, newspapers, articles or otherwise explicitly stating LGBT status of owner(s)).
- An attorney letter establishing LGBT status of owner(s).
- Certificates, awards or other recognition of owners as outstanding members of the LGBT community.
- Philanthropic donation receipts with same-sex partner.
- Legal petition for name/gender change.
- Joint living arrangement paperwork naming same-sex partner, including property deeds/titles, insurance (auto, health, home, etc.), phone/utility bills, wills, retirement plans, loans, lines of credit, investment holdings, hospital visitation, etc.

A complete list of the LGBT Status Qualifiers are published in the [NGLCC's Standards and Procedures](#). The NGLCC may request the submission of several LGBT Status Qualifiers to expedite the process or to unequivocally demonstrate to its National Certification Committee the LGBTQ status of the business's owner(s).

Applying for LGBTBE Certification

There are several articles the NGLCC and others have published to explain the steps an LGBTQ+ business owner must take to get certified. Examples include:

- [Ready to grow? Here's how](#) (NGLCC);
- [Top 10 NGLCC Supplier Diversity Initiative questions](#) (NGLCC);
- [The benefits and process of becoming a certified LGBT-owned business](#) (Forbes);
- [How to become a certified LGBT-owned business](#) (Invoice2go); and
- [Obtaining & leveraging business certifications](#) (The Seed Collective).

[According to the NGLCC](#), the basic steps for getting certified as an LGBTBE are:

- Completing the online application process, which includes building a business profile and submitting supporting documentation to verify your eligibility for the LGBTBE certification;
- Scheduling a site visit with a member of the NGLCC team to verify the information in your application and address any additional information that may be needed by the National Certification Committee;
- Waiting for the application and site visit report to be reviewed and approved by the National Certification Committee; and
- Participating in a Certified LGBTBE Orientation webinar after approval.

Typically, once the NGLCC receives the application and supporting documents are submitted, it takes the NGLCC between 60 and 90 days to complete the review and approval process. Through a Memorandum of Understanding (MOU) with other certifying bodies, such as WBENC, the NGLCC offers an [expedited process](#) (see section six) to businesses already certified by one of its MOU partners. Under the expedited process, an additional site visit is not required if one had been completed by an MOU partner.

An NGLCC LGBTBE certification remains valid for two years. Before the certification's expiration date, an LGBTBE must [complete a recertification](#) application which may require the submission of additional supporting documentation if there has been any change in the ownership and/or control of the business. Site visits will be required at least every four years and may be conducted before expiration of one's certification. Unless an extension of time is granted, an LGBTBE who fails to file a timely recertification application will have its status adjusted from *certified* to *expired* and its name will be removed from the NGLCC's Certified Supplier List.

There is a [non-refundable fee](#) (\$400 for certification; \$200 for recertification) that must be paid as part of the application process. The NGLCC waives this fee for all applicants who submit proof of a valid membership with their local NGLCC-affiliated chamber of commerce.

Typically, most NGLCC-affiliated chambers charge \$200 per year to be a member, and an applicant does not necessarily need to be based locally to be a member of an affiliate chamber. Therefore, most LGBTQ+ businesses join a chamber to take advantage of the complimentary national certification.

All applicants, including those who have been certified as an NGLCC LGBTBE, must notify the NGLCC within 30 days of any substantive change in ownership or control of their business. Such change may affect their certification status. Also, the NGLCC retains the [right to revoke](#) (see section 13) one's LGBTBE certification if (a) the business is no longer a *bona fide* LGBTQ+ business in the National Certification Committee's reasonable judgment, (b) the business is engaging in practices that circumvent the intent of the NGLCC's programs or (c) the business is no longer an active one. Finally, upon written request before an eligibility determination, any applicant may withdraw an application without cause or prejudice.

Can an LGBTBE certification determination be challenged or appealed?

The NGLCC standards and procedures for its LGBTBE certification include both challenge procedures and an appeal process. The [challenge process](#) (see section 12) is for any third party who questions whether a certified LGBTBE meets the qualification criteria for certification. Any such challenge must be made in writing and include all evidence challenging the eligibility of the certified LGBTBE. Within 15 business days, the chair of the Appeals Committee will determine, based on the information provided, whether there is any reason to evaluate the challenge. If the Appeals Committee chair determines that no reason to evaluate exists, then the challenging party will be so informed and the investigation will be closed, subject to the challenging party's appeal rights. If, however, the Appeals Committee chair or the National Certification Committee chairs determine that a reason to evaluate exists, then notice of the challenge will be provided to the certified LGBTBE and a request will be made for the certified LGBTBE to provide information/documents to refute the challenge. Also, further hearings may be held. Thereafter, a written decision will be made subject to both parties' appeal rights. While the challenge is pending, the challenged LGBTBE certification shall remain in place. If the decision is made to revoke the challenged LGBTBE certification, the adversely affected party may not reapply for certification until after the revocation.

[Appeals](#) (see section 14) generally may be taken by those whose certification applications have been denied or wrongfully revoked by third parties whose challenges have not been evaluated or sustained. However, those whose LGBTBE certification was revoked because of a challenge deemed credible by the National Certification Committee chairs have no right to appeal. An appeal must be made in writing no later than 30 days from the challenged decision. All decisions of the Appeals Committee is final. If the decision of the Appeals Committee results in a denial, then the applicant may reapply for certification one year from the NGLCC's original denial letter.

Common pitfalls that result in a denial or revocation of certification

The most common problem that LGBTQ+ businesses face in getting certified is demonstrating that one's business is owned, operated, managed and controlled by at least 51% of persons who identify as part of the LGBTQ+ community. For those who are in business for themselves, this is not a problem. However, for those who conduct business with more than one person as owners, how the business is structured can create unexpected pitfalls in the certification process.

For example, consider for the moment that A and B desire to start a company. A is a Asian-American lesbian veteran and B is a African-American heterosexual male. Both agree that they should equally own, manage and control the business, and go online and register a multi-member limited liability company through LegalZoom.com, reflecting that they are 50-50 owners with the company being 100% managed by the members. A learns about the NGLCC LGBTBE certification and a similar certification program for veterans and desires to submit applications for both programs, whereas B learns about the certification available for African-Americans and desires to similarly apply for that program. However, because A and B set up their business with each being 50-50 owners, the business will not qualify for the certification programs.

After deciding they should apply for the NGLCC LGBTBE certification, A and B go back to LegalZoom and modify their ownership structure to reflect that 51% of the member interests in the company will be vested in A. However, A and B agree that no other changes will be made to their previously drafted operating agreement which includes provisions requiring both A and B manage the business. The operating agreement also includes provisions that require both A and B to agree on certain major decisions, including liquidating the company and executing contracts or expenditures over a certain dollar amount. Upon submission of the application to the NGLCC, this business will be denied certification because it fails to be operated and managed by A as the LGBTQ+ member.

Let's assume that A and B rewrite the operating agreement and delete the provisions requiring 100% member management. Instead, B is, on paper, a silent partner. Yet, the business that A and B have started is one in which A has no prior education or experience and requires certain licenses or certifications which only B holds. Upon review of the application, which requires disclosure of the applicant's resume and experience and whether the business requires any licenses or certifications to operate, the business will likely be denied certification because, again, it is not being operated by A as the LGBTQ+ member.

Finally, let's assume A and B have started a company which the NGLCC has certified, but neither A nor B have sufficient funds to continue its operations. So, they approach their friend C, a Caucasian heterosexual male, who agrees to invest \$250,000 in the business. As part of his investment, C insists on having the operating agreement re-written to provide him preferential interests which he can exercise at any time and

remove A as the managing member and replace her with B or some other person of C's sole choosing. Upon challenge by a third-party, the business's certification will likely be revoked because it is no longer being operated, managed or controlled by A as the LGBTQ+ member.

Sometimes, other factors come into play which may make these pitfalls true obstacles to obtaining certification. However, if such other factors do not exist, then all these pitfalls can be avoided through careful planning and by consulting with an attorney familiar with the LGBTBE certification requirements.

Conclusion

American corporations and government organizations have made diversity and inclusion a top priority, and many are looking to work with certified women-owned, minority-owned and LGBT-owned businesses. The NGLCC Supplier Diversity Initiative provides certified LGBTBEs with access to its network of corporate partners and their supplier diversity professionals who are interested in helping LGBTQ+ business owners grow their business. Consequently, if your business is eligible, the NGLCC LGBTBE certification can be a rewarding way to grow one's business.

Visit all of the NGLCC LGBTBE certification process details and websites referenced in this article at the following links:

- [NGLCC: Ready to grow? Here's how \(undated\)](#)
- [NGLCC: Top 10 NGLCC Supplier Diversity Initiative questions \(undated\)](#)
- [NGLCC: Get certified in four easy steps! NGLCC certification process \(undated\)](#)
- [NGLCC Standards & Procedures: Supplier Diversity Initiative & National Certification Committee \(2020\)](#)
- [Reuters: Some 4.5 percent of U.S. adults identify as LGBT: study \(Mar. 5, 2019\)](#)
- [Forbes: The benefits and process of becoming a certified LGBT-owned business \(Aug. 9, 2015\)](#)
- [Invoice2go: How to become a certified LGBT-owned business \(undated\)](#)
- [The Seed Collective: Obtaining & Leveraging Business Certifications \(Apr. 23, 2020\)](#)

For more information please contact [Ron Hicks](#) or any member of Porter Wright's [LGBTQ+ Business Practice Group](#).