Doing Business in Texas and the United States

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*Texas Business Climate: Why Texas?*

Texas has an economy nearly the size of the United Kingdom. We also enjoy diverse resources such as oil and gas and vast tracts of land, highly skilled (and friendly!) workers, and have diverse industries ranging from software, healthcare, aerospace, telecommunications, private equity, semiconductors, energy. It is no wonder that so many multinational corporations and non-resident investors seek to do business in Texas. Texas offers several major metropolitan areas including Houston, Dallas, Austin, Fort Worth and San Antonio. Houston, in particular, is considered the most diverse city in the United States.

Texas regularly claims a top spot in various rankings for ease of doing business. The state has a reputation of being business-friendly, with minimal state taxes and reasonable regulations. In recent years, we have seen many out-of-state multinational companies move facilities and even headquarters to Texas from states and counties with a heavier tax and regulatory burden. For instance, in recent years, companies like Tesla, HP, Oracle, and Toyota have moved headquarters or major operations to Texas.

With no corporate or personal income tax at the state level, companies operating in Texas enjoy one of the lowest overall tax burdens in the country. Also, the cost of living in Texas is lower than states like California and New York (which have seen recent net outbound migrations of residents).

The US and UK have a strong trade relationship worth more than $260 billion a year and a total of $1 trillion invested in each other’s economies. The relationship plays a pivotal role in Texas’ economy and supports thousands of jobs in the state. Transatlantic trade with the UK goes both directions. The total value of Texas goods exports to the UK is $9.4 billion, while the total value of Texas services exports to the UK is $5.5 billion.

Doing Business in Texas Checklist

Expanding your UK Business into the Texas Market

1. Business Formation and Structure

* Choose an entity for your subsidiary or new entity: Corporation, Limited Partnership, Limited Liability Company.
* Retain attorney and tax advisor to explore best legal and tax structure for the business (considering context of entire corporate group, availability of tax treaty benefits, and other tax strategies).
* Select an available name for the business
  + Select a name that is available in Texas
  + Consider registering a Trademark or Tradename to ensure the exclusive use of the name nationwide.

2. Obtain an Employer Identification Number

* Necessary for opening bank account
* Necessary for payroll, tax filings, and invoicing

3. Open a Bank Account with International Bank

* Select a bank with both local branches and international experience.

4. Obtain Applicable State Licenses and Permits

* Texas does not require a general license to conduct business, but consider what industry specific permits and licenses will be necessary for your industry.

5. Obtain Insurance

* Work with a broker or insurance provider to obtain customary levels of insurance for your given industry.

6. Visas and Immigration

* If employees from the United Kingdom will be working for the new venture, work with an immigration attorney to obtain the necessary visas prior to working in the United States.

7. Site Selection

* Texas offers several major metropolitan areas including Houston, Dallas, Austin, Fort Worth and San Antonio, as well as many mid-size cities with modern infrastructure near these large cities. Consult a commercial real estate broker about which city or cities are best for your operations based on industry, talent pools, and infrastructure.
* Inquire about the possibility of local incentives and tax abatements

8. Payroll and Human Resources

* Once you hire employees in the United States, retain a payroll service provider to ensure compliance with all income and payroll tax withholding and reporting obligations.
* Develop employee handbooks and/or employment agreements to establish guidelines for behavior and culture in the workplace.

9. Intellectual Property

* Determine if any of your intellectual property should be registered as a patent or protected as a “trade secret” through non-disclosure agreements and confidentiality agreements.

10. Localize UK Contracts, Terms and Conditions, etc.

* Contract law in the United Kingdom and the United States is similar but has significant differences beyond our differences in spelling. Retain Texas counsel to review existing contracts, employment agreements, terms and conditions, master service agreements, etc. for compliance with both federal and state law.

Doing Business in Texas Legal Summary

*Getting Started: Choice of Entity and Domicile*

A foreign company entering the US must decide on the form of business entity it will use to conduct its US operations. The most common types of domestic business entities are corporations, limited liability companies (LLCs), and partnerships. Each type of business entity must be formed according to the laws of the state in which the entity is formed. All entity types other than partnerships require organizing documents to be filed with the state government.

**Branch Office.** A foreign company is not required to conduct business in the US through a US entity and could instead open a branch office. Doing so, however, is generally not advised for tax and liability reasons. A branch office, unlike a subsidiary, is not a separate legal entity of the parent company. A branch office is considered to be the foreign company operating in the US. If a foreign company establishes a branch office in the US and conducts business in the US, the entire company is considered to be “doing business” in the US. This can subject the company to taxation on all income earned, rather than limiting taxation to the income of the branch office. Furthermore, liability of the foreign company would not be limited to liability incurred at the branch level. Accordingly, foreign businesses coming to the US do not generally elect to open a branch office unless specifically advised to do so by a US attorney. Selecting one of the entity forms discussed below is typically more advantageous than opening a branch office.

**Corporations.** Many foreign companies do business in the US as corporations. Corporations are organized under state law and each state has its own rules for creating and operating corporations. In the US a corporation may be created under the laws of one state and have its principal place of business in a different state. A logical choice is to incorporate in the state where the business intends to locate its operations. The state of Delaware is popular choice for business to incorporate in due to predictable and business-friendly laws. The Delaware Uniform Business Organizations Code and the Delaware Business Corporation Act govern the formation of a Delaware corporation. But Texas laws tend to reflect Delaware law. So, registering in Delaware but doing business primarily in Texas (or New York) is not common, unless you plan to take on investors.

US law treats corporations as legal persons, meaning that a corporation can enter into contracts, sue and be sued, and carry its own liabilities as a natural person does. In general, individual owners can avoid personal liability for the actions of the corporation and, in the event of insolvency; the corporation can declare bankruptcy without putting the owners’ personal assets at risk. It is, however, important for the owners to maintain corporate formalities and keep separation between the owners’ personal affairs and company business in order to prevent creditors from imposing liability on directors and owners personally. Protection from personal liability for directors and owners is among the most important features of a corporation.

LLCs. A common and flexible entity in the US is the limited liability company. It is a go to entity for many US companies. But an LLC is a hybrid entity that can be taxed either as a partnership, corporation, or division of a corporation. So, consult a tax attorney or accountant before selecting an LLC to ensure that this entity fits within an overall international tax structure.

Partnerships. A foreign company can also form a partnership by agreeing with another party to do business together in the US. While a written agreement is not required to form a partnership, it is advisable to formalize the arrangement through a written agreement. General partnerships do not offer the same liability benefits as corporations and LLCs.

Joint Ventures.A joint venture is typically a form of partnership or LLC (but could be a corporation). The United States does not have local content requirements. So, unlike entering China or other markets, it’s not necessary to find a US partner to enter the American market. But having a JV may accelerate market penetration.

Acquisitions. Another common approach would be to buy access to the American market by acquiring a US company. This often is not the first step into the market. But, once a foreign corporation has tested the waters, and learned the market, they might consider an acquisition to accelerate penetration in the US. An acquisition gives you access to a workforce, a customer base, and possibly complementary products and services, as well as new IP.

*Legal System: State and Federal Law*

Like the United Kingdom, the legal system in the US (except Louisiana) is based on the English common law.

The United States has a federal system of government. This means that laws are made at the national (federal), state, and local levels. “Local” laws are those made by cities and counties that apply in those geographic regions. All 50 states (along with US territories and the District of Columbia) have their own state and local laws that apply in those jurisdictions. Some areas of law, such as patent and copyright, are governed exclusively by federal law. Many other laws, including laws governing contracts, employment relationships, and sales transactions, are primarily set by individual states. And many other areas of law are governed by both federal and state law. When doing business in the US, foreign companies should be aware that they are subject to these parallel systems of laws which often differ from state to state.

Contracts. Contracts are governed by state law. Generally speaking, if parties enter into a written agreement, courts will interpret that agreement based on the plain language of the writing, the parties’ conduct, industry custom, and applicable laws. However, all 50 states have adopted some variation of the Uniform Commercial Code (UCC) which makes US commercial law rather standardized across the states.

Limiting Liability. Beyond obtaining insurance, companies should manage their risks with carefully crafted contracts, terms and conditions that limit liability, and clearly allocates liability to parties who cause harm.

**Product Liability.**  If you are building your own products, you will need to be aware of product liability law. To limit liability, you will want to use proper customer labels, limit liability in agreements (where possible), but also be sure to get product liability insurance.

US product liability laws differ greatly from product liability laws in other countries. Unlike in many other countries, a majority of US states have adopted the doctrine of strict liability in tort. The adoption of strict liability expanded the scope of entities that can be liable for product injuries and lessened the proof necessary to establish such liability. Under strict liability, a company anywhere in the production chain (makers, distributors, retailers) can be liable if they sell a product in a defective condition that is “unreasonably dangerous” to the user. This is true even if the seller was not negligent (meaning the seller exercised reasonable care) and even if the consumer did not enter into a contractual relationship with the seller. The focus of the inquiry is on the product and not the conduct of the seller.

Unlike in many other countries, damages for product liability cases are commonly decided by juries and may include compensation for all direct and indirect losses caused by the injury. This means that damages in product liability cases can be very high.

Because the entire production chain could potentially be liable for harm caused by a product, it is important for businesses to include indemnification provisions in US sales contracts.

In addition to negotiating indemnification and defense clauses, foreign companies doing business in the US should consider carrying adequate insurance coverage to protect against product liability claims.

*Labor and Employment.*

In business, there may be no greater asset than your human capital. But, your most common risk for liability is also your employees.

Foreign business coming to the United States must comply with US law when hiring employees that will be working in the US. US laws distinguish between “employees” and “independent contractors.” Employees are subject to tax withholding requirements and protected by federal labor laws. Independent contractors, on the other hand, are not subject to tax withholding requirements and are not covered by many labor laws, such as federal minimum wage. A true independent contractor exercises a greater degree of behavioral and financial autonomy than an employee. Companies doing business in the US need to be aware of these distinctions and accurately classify workers. If a government agency or court determines a worker is actually an employee rather than an independent contractor, the employer can be liable for back taxes and civil claims under labor laws.

**Intellectual Property and Inventor Agreements.** Under US law, discoveries and inventions made by an employee during their employment generally belong to the employer. Nevertheless, it is common for employment contracts to contain language expressly granting such rights to the employer and requiring that the employee cooperate to secure federal registration of the intellectual property at issue. Employment contracts can also be used to broaden the scope of an employer’s rights to include any and all discoveries and inventions related to the business or made using company equipment during the employment term. Employment contracts can further be used to limit employees’ ability to derive inventions from their knowledge of proprietary systems or information.

**Non-Disclosure Agreements.** Many US employers require employees to sign broad non-disclosure agreements to prevent employees from sharing proprietary information with competitors or any other valuable, unflattering, or otherwise sensitive information. Non-disclosure agreements are also common before negotiating deals that involve exchanging sensitive information.

**Non-Compete Agreements.** Non-compete agreements that limit a former employee’s ability to work for a competing company can be tricky under US law. Such agreements are flatly unenforceable in some states and are construed narrowly by courts. Nonetheless, they are often favored by employers and can be effective in some instances. Where allowed, non-compete agreements must be reasonable in scope, time, and geography and may not make it impossible for the former employee to earn a living in their field.

Texas is more likely than other states like California to enforce a non-compete. But, even in Texas, the non-compete must relate to a legitimate business reason because a non-competition agreement is inherently a restraint on trade.

*Intellectual Property*

Patents. A utility patent protects the functional and structural aspects of an invention. In order to secure a patent, the invention must be new, novel, and non-obvious. New, original, and ornamental designs for an article of manufacture can also be patented in the US. Once a patent is granted by the US Patent Office (USPTO), the patent owner has the right to exclude others from making, using, selling, and importing the invention or design in the US for a period of 20 years from the application filing date. A foreign company doing business in the US may not infringe the patent rights of a US company. If the patent owner believes its patent rights are being violated, the owner can bring an infringement action in federal court and seek damages and an injunction.

Trademarks. Trademark rights in the US are based on the use in commerce of a word, name, symbol, or combination thereof which the public sees as indicating the source of goods or services. Federal protection for a trademark is secured by registering the trademark with the USPTO. A registered trademark holder can sue competitors whose marks deceive or confuse customers or dilute the value of the registered owner’s brand. Trademark owners may also register their mark at the state level, but state registration confers fewer rights than federal registration. Foreign companies should consider seeking trademark protection for company and product names by registering with the USPTO to avoid challenges to their name later.

Copyrights. US copyright law gives the author of a work exclusive right in the work for the life of author plus seventy years (for works created on or after January 1, 1978). Copyright protection is available for literary, musical, architectural, artistic, graphic, sound recordings and other works that are written down or otherwise fixed in a tangible medium. Copyright protection is automatically secured when the author creates the work—registration is not required for protection. This protection applies to unpublished works regardless of the nationality or domicile of the author.

Trade Secrets. A trade secret is any information that adds value to a business or provides a competitive advantage to the owner because the information is not known by others. For example, a trade secret could be a formula, a device, a compilation of data, or a manufacturing technique. Trade secrets are broadly protected by state law in all 50 states. Trade secrets are also protected under federal law as of the May 2016 passage of the Defend Trade Secrets Act. The owner must make reasonable efforts to maintain the secret for continued protection. Trade secret law can protect intellectual property that is not patentable but is crucial to a company’s operations or product. Companies often require that employees sign agreements to protect trade secrets.

The most common fact pattern I have seen for litigation involving my clients are suits for theft of trade secrets, typically by a departing employee.

*Getting Products or Services to Market*

Once you have decided your structure for entering the US, you have to decide how you will initially take your products or services to market. First, make sure you can lawfully sell your product or service in the US or the states where you want to do business. Unless you are selling cannabis, there probably won’t be an outright prohibition. But, depending on your business, there may be various permits, licenses or import clearances you will need.

You will also need to decide whether to import UK or other foreign products into the US and comply with any custom and trade laws.

Alternatively, you might decide to manufacture or assemble your product in the US. You will have to determine your supply chain and enter into contracts with suppliers and vendors. Also, you could consider having your products made by a contract manufacturer in the US under an OEM agreement.

Once you have figured out how to manufacture your product, you will need to determine how to sell it. If you are a retail shop, the answer is probably straightforward: Sell the product directly in your store or via ecommerce. But, if you are an industrial manufacturer, you will have to decide whether to do direct sales or do sales and marketing through sales representatives or distributors. If you choose the latter, you will want to ensure that you have properly documented the relationship with a sales representative agreement or distribution agreement.