

LEGAL ISSUES TO CONSIDER WHEN ESTABLISHING A FOOTPRINT IN THE UNITED STATES

By:

Philip P. Crowley, Esq.
Crowley Law LLC

<https://www.crowleylawllc.com>
Philip.Crowley@CrowleyLawLLC.com

INTRODUCTION

You've made the decision to create an on-site presence in the United States.

Congratulations!

Now what???

Expanding business operations to the United States offers significant market opportunities for companies from other countries. However, it is crucial to navigate the complex legal landscape of the United States to ensure compliance with applicable laws and government regulations and to mitigate potential risks. This white paper provides a survey analysis of some key legal issues that companies should consider as they explore reaching across the border to operate, sell or otherwise do business in the United States.¹

1. Overview of Legal Regime in the United States

Operating in the United States involves navigating a multilayered legal framework, comprising Federal, State and local laws. While Federal laws establish a uniform baseline, State and local laws can impose additional requirements. Companies must familiarize themselves with the applicable laws in the jurisdictions they plan to operate in to ensure compliance. Examples of areas where laws may overlap include employment regulations, tax obligations and consumer protection laws. Understanding the division of powers and the interaction between different levels of legislation is crucial for companies to navigate the U.S. legal system successfully.

¹ Please note that this white paper does not provide legal advice or create an attorney client relationship. It covers basic factors that a company seeking to create a physical presence in the United States should consider with its U.S. legal counsel, giving full attention to the company's unique situation.

Federal laws provide a foundation for business operations in the United States. The U.S. Constitution grants the Federal government the authority to regulate interstate commerce, foreign relations and issues of national importance. This authority enables the Federal government to enact laws that impact various aspects of business operations, such as intellectual property protection, taxation, antitrust regulations, securities laws and employment regulations. Federal agencies, including the Securities and Exchange Commission (SEC), the Internal Revenue Service, the Federal Trade Commission (FTC) and the Environmental Protection Agency (EPA), play significant roles in enforcing Federal laws and regulations.

At the State level, companies must comply with laws specific to each State where they operate. State laws can vary significantly, particularly in areas such as employment law, tax regulations and corporate governance. For instance, employment laws governing minimum wage, paid leave and non-competition agreements can differ from State to State. Additionally, State tax laws may impose different tax rates, reporting requirements and compliance obligations.

Local governments, such as cities, counties and municipalities, may also enact laws and regulations that impact businesses. These local laws typically address zoning, licensing and permits, although some larger cities, such as New York City, have a more expansive reach of their respective regulatory regimes and can impact taxation, employment and other aspects of business operations.

2. Structuring Operations

As an initial consideration, companies expanding into the U.S. should first consider the appropriate structure for their operations. This may involve setting up a branch of the existing firm, creating a new entity as a subsidiary of the overseas parent or other arrangements such as a joint venture. The choice of entity is influenced by factors such as liability protection, tax considerations and operational flexibility. Each structure has advantages and disadvantages that need to be evaluated to determine the most suitable option.

Setting up a branch allows companies to establish a presence in the United States without creating a separate legal entity. A branch is an extension of the foreign parent company and as such, it does not provide liability protection. This means that the assets of the foreign company would be exposed to the risks of business operations in the United States.

It also involves some Federal tax complexities that can be avoided by setting up a limited liability entity to carry on the U.S. business. And setting up a limited liability entity has a number of potential risk management, tax and cash flow advantages.

Creating a subsidiary involves establishing a separate legal entity in the United States. This structure offers limited liability protection, as the subsidiary is distinct from the foreign parent company. The subsidiary can shield the parent company's assets from liabilities incurred by the U.S. operations. This structure allows for greater operational autonomy and can facilitate compliance with U.S. regulations and tax requirements.

Another option is forming a joint venture or some type of distribution or selling agent agreement with a U.S. partner. Joint ventures allow companies to collaborate with a local entity and share resources, knowledge and risks. They can also provide access to the U.S. market and local expertise, while mitigating some of the cost associated with branching an entity or creating a new one. Joint ventures however involve costs and complexity that go beyond the scope of this analysis.²

Distribution and selling agent agreements are less complex but still require negotiating the logistical requirements of the counter-party. And this can be perceived as diminishing the perceived “presence” of the parent company’s brand in the United States. This approach also diminishes the parent company’s control of U.S. operations and the deployment of its brand.

In addition to choosing the appropriate entity, capitalization matters must also be considered. Companies must determine how to fund their U.S. operations, whether through equity financing, debt financing or a combination of both. Equity financing involves raising capital by issuing shares of stock, granting ownership interests to investors or sending capital from the parent entity. Debt financing, on the other hand, involves borrowing money that must be repaid with interest, whether as a loan from the parent or from a bank or other entity. The capitalization decision has implications for ownership, control, tax liabilities and financial stability.

For example, a UK-based software company expanding its operations to the United States may choose to set up a subsidiary in one of the States here. By establishing a subsidiary, the company can limit its liability exposure and comply with local laws and regulations. The subsidiary can be capitalized through a combination of equity and debt

² Consideration of a joint venture should involve careful study by a company and coordination between its home country and U.S. counsel to ensure that the company’s expectations are reflected in the agreements governing the joint venture.

financing. The parent company can inject capital by issuing shares of stock to investors, while also securing a loan from a U.S. bank to cover initial operating expenses. This capitalization strategy allows the company to fund its U.S. expansion while maintaining control and minimizing risk.

3. Conducting Operations

To effectively conduct operations in the United States, companies might find a location, enter into agreements with vendors, engage in marketing and establish a workforce. Key agreements may include real estate purchase or lease agreements, contracts with suppliers, distributors or customers and licensing or distribution agreements. These agreements should clearly outline the rights and obligations of the parties involved and address important considerations such as intellectual property rights, warranties and dispute resolution mechanisms, all governed by an appropriate State's laws.

In terms of personnel, companies must carefully evaluate their staffing needs and determine whether to hire employees or engage independent contractors. Hiring employees entails complying with Federal, State and local employment laws, such as those governing minimum wage, working hours and benefits. Engaging independent contractors, on the other hand, offers greater flexibility but requires adherence to specific legal criteria to ensure proper classification and avoid misclassification risks and attendant tax penalties.

See also the discussion of Federal immigration law issues below when employing in the United States residents of the company's home country or having officers or other employees of the parent company visit and provide services to the U.S. subsidiary in the United States.

4. Employment Law Issues

Operating in the United States entails compliance with numerous Federal, State and local employment laws. Understanding and adhering to these laws is vital to protect both the rights of employees and the interests of the company. Some essential employment law considerations include:

- Employment at Will: The United States generally follows the principle of employment at will, which means that employees can be terminated for any reason, as long as it is not discriminatory or in violation of an employment contract. This doctrine provides flexibility to employers, allowing them to terminate employees based on performance, organizational restructuring or other legitimate business reasons. However, employers should be aware of potential exceptions to the employment-at-will doctrine that may arise from employment contracts or collective bargaining agreements if dealing with unionized workers.
- Independent Contractors vs. Employees: Distinguishing between independent contractors and employees is crucial to determine tax obligations, benefits and potential liability. Misclassifying employees as independent contractors can lead to legal and financial consequences. To classify a worker as an independent contractor, the employer typically must analyze the nature of the work being performed to ensure it meets applicable legal standards.

Despite the general rule of “employment at will”, Federal and State laws prohibit termination for prohibited reasons. Those laws also prohibit companies from permitting a “hostile work environment” to exist.

Other Federal employment laws establish a baseline of protections for employees nationwide. These laws include:

- Non-Discrimination: Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex and national origin.
- The Age Discrimination in Employment Act (ADEA) protects individuals aged 40 and older from age discrimination.
- The Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities.
- Non-Harassment: Federal laws also address workplace harassment, including sexual harassment. Employers have a responsibility to provide a safe and harassment-free work environment. This includes implementing policies, conducting training and promptly addressing harassment complaints.

At the State and local level, employment laws can add additional protections and requirements. For example:

- Non-Discrimination: Many States and localities have enacted their own non-discrimination laws that expand the protected categories beyond those covered by

Federal law. These may include protections based on sexual orientation, gender identity and marital status.

- **Non-Harassment Training:** Several States and cities have implemented laws mandating sexual harassment prevention training for employees. Employers must provide interactive training sessions to employees, ensuring they understand their rights and responsibilities regarding workplace harassment.
- **Limits on Post-Employment Non-Competition:** Certain jurisdictions impose restrictions on post-employment non-competition agreements, limiting their enforceability or imposing specific requirements. These restrictions aim to protect employee mobility and foster competition.

5. Insurance

Given all the potential contractual and legal risks associated with operation in the United States, it's important to have a connection with an insurance professional familiar with your particular business. Finding an expert with knowledge of the relevant business and its attendant risks can help a company find coverage that is cost effective – when it can afford the coverages offered. And the U.S. market is very different from the home markets of most foreign companies. So, the home market insurer may be unwilling – or unable – to provide adequate insurance coverage in the United States.

Typical U.S. insurance coverages to consider include:

Employment liability – for violations of law or government regulations that result in litigation or government fines or inquiries in an area that is rife with litigation

Directors and Officers Insurance – to protect the officers and directors of your subsidiary from the costs of litigation that names them personally

Comprehensive liability – for non-specific liabilities that arise from the business (except for products liability)

Cyber liability – for alleged injury or damage caused by external “hacking” of computer systems and disclosure of confidential client data

6. Tax Issues

Understanding the Federal, State and local tax systems and complying with tax obligations is essential for operating within the United States. Companies may be subject to laws and regulations in any State they conduct business with, depending on numerous factors and are well-advised to maintain appropriate records in case of audit by tax officials. Tax considerations include:

- **Federal/State/Local Reporting Requirements:** Companies must comply with various reporting obligations at the Federal, State and local levels. This includes filing tax returns, financial statements and other necessary documents. For example, businesses are required to file annual Federal tax returns with the Internal Revenue Service (IRS). State and local reporting requirements may include income tax returns, sales and franchise tax returns and property tax filings. Compliance with reporting obligations is crucial to avoid penalties and maintain good standing with tax authorities.
- **Federal/State/Local Withholding Requirements:** Employers are typically required to withhold taxes from employee wages and remit them to the respective tax authorities. Failure to withhold and remit taxes properly can result in penalties and interest charges.
- **Transfer Pricing:** Transfer pricing refers to the pricing of goods, services or intellectual property transferred between related entities within a multinational corporation. This is an area in which dealing with experienced U.S. tax experts can greatly enhance the ability of the parent company to optimize cash flows from the U.S. subsidiary.
- **Effects of Debt vs. Equity Capitalization:** The capital structure of a company can have significant tax implications. Here coordination between home country and U.S. tax experts can provide additional opportunities to maximize after tax cash flows from the subsidiary.

7. Immigration Law Issues

Expanding operations to the United States often involves sending employees from the home country to work in the United States. Navigating immigration laws is crucial to

ensure the legal entry and stay of foreign employees, whether they are on short-term or long-term stints.

Various short-term visa options may be available for employees who need to travel to the U.S. for specific business purposes. Examples include:

- B-1 Business Visitor Visa: This visa allows individuals to enter the U.S. temporarily for business activities such as attending meetings, negotiating contracts or participating in conferences or trade shows.
- L-1A/L-1B Visa: The L-1 visas are available to employees of multinational companies who are being transferred to the U.S. to work in a managerial, executive or specialized knowledge capacity.

Companies may need to secure long-term work permissions for non-U.S. resident employees who will be stationed in the United States for extended periods. Navigating the immigration process requires understanding the eligibility criteria, filing requirements and potential challenges associated with each visa category. Companies should engage immigration attorneys or consultants to ensure compliance with immigration laws and avoid delays or issues in securing necessary work permissions for their employees.

8. Privacy Law Considerations

Companies expanding their footprint to the United States must also be mindful of privacy laws and regulations, particularly in light of increased data protection awareness and evolving legislation. As of June 2023, there is no singular overarching Federal law on data privacy, although many industry experts expect that the U.S. Congress will eventually take up the issue at some point. For EU companies, the General Data Protection Regulation (GDPR) in the European Union has set high standards for data protection and companies subject to EU oversight must ensure compliance when transferring personal data from to the United States.

In the absence of comparable Federal legislation, several U.S. States have implemented their own data privacy laws, which may impose additional obligations and requirements on companies. The notable California Consumer Privacy Act (CCPA) grants certain rights to California residents concerning their personal information held

by businesses and requires businesses to disclose their data collection and sharing practices. And some States and Federal regulations impose data breach notification requirements—in the event of a data breach involving personal information, companies may be obligated to notify affected individuals, State or Federal authorities and potentially other entities.

9. Government Incentives

A number of State governments (e.g., New Jersey, New York, Pennsylvania) have incentive programs that provide grants to companies that establish a presence in the State and hire and pay employees in the State. Some of these grants are focused on stimulating the formation of businesses in select sectors (e.g., biotechnology, artificial intelligence). Others are independent of industry or technology focus. In setting up operations, it's important to incorporate assessment of the various types of grants available as a part of the overall planning process.

Besides the monetary incentives, many State governments have set up programs to assist incoming companies with planning, logistics and connecting with outside experts who can help with the siting of an incoming business's facilities. These programs also provide access to networks of companies in the States in the same or similar "ecosystems".

10. Controlling Risk

Controlling and mitigating risk is one of the key issues to be addressed in setting up operations in the United States. Insurance can cover some of that. Establishing good contracting practices is important as well. Having standard agreements for the sale or license of goods and services should employ as many protective provisions as are feasible. Restricting who may sign agreements binding the company can also provide greater control.

Negotiating changes to "standard" contracts from large customers is important, where it is possible. If it's not possible to avoid the negative provisions of customers' contracts, understanding fully the nature of their import and potential impacts is a key element in managing the risks attendant to the business.

Conclusion

Expanding business operations to the United States offers exciting opportunities for companies from other countries.

While doing so, it is essential to navigate the legal landscape carefully to ensure compliance with a multi-faceted legal regime and mitigate potential risks to the assets of the parent company. By considering the factors we've discussed above, companies can establish a strong and legally compliant footprint in the United States. Engaging legal counsel and consultants with expertise in U.S. law and regulations as well as tax matters can provide invaluable guidance throughout the expansion process, ensuring that companies can seize opportunities while effectively managing legal challenges.

For those companies with an interest in exploring these issues further, please contact us at Info@CrowleyLawLLC.com to arrange a complimentary conversation about your situation and plans. We're here to help.

For companies with interest in other aspects of legal matters in the United States, please visit our website at <https://CROWLEYLAWLLC.COM/RESOURCES-EVENTS> where we house a library of materials on various topics focused on the needs of life sciences and other technology companies.

CROWLEY LAW LLC

NEW YORK OFFICE

11 Broadway, Suite 615
New York, New York 10004

NJ OFFICE

89 Headquarters Plaza
North Tower 14TH Floor
Morristown, New Jersey 07930

Email: Info@CrowleyLawLLC.com

Tel: (844) 256-5891

Fax: (908) 325-0217