

Doing Business in United States: New York

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LEGAL SYSTEM

1. What is the legal system (civil law, common law or a mixture of both)?

New York has a common law legal system, with a state constitution and other laws and regulations that apply within its jurisdiction. It also has a separate federal court system.

FOREIGN INVESTMENT

2. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

In general, there are no restrictions on foreign investment in New York, except for industry-specific regulations established by the federal government.

3. Are there any exchange control or currency regulations?

New York does not have any exchange control or currency regulations.

4. What grants or incentives are available to investors? Are any of these aimed specifically at foreign investors?

New York actively encourages both domestic and foreign investment. A business can qualify to become almost tax free if it expands or relocates to one of the 85 Empire Zones (designated areas throughout New York that offer special incentives to encourage economic and community development). A business must obtain an Empire Zone Retention Certificate from Empire State Development to receive any Empire Zone benefits.

BUSINESS VEHICLES

5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction? In relation to this vehicle, please provide details on:

- Registration formalities (including timing).
- Minimum (and maximum) share capital.
- Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities).
- Any restrictions on the rights that can attach to shares.
- Any restrictions on foreign shareholders.
- Management structure and any restrictions on foreign managers.
- Directors' liability.
- Parent company liability.
- Reporting requirements (including filing of accounts) and cost of compliance.

The most common form of business vehicle used by foreign companies is a Delaware corporation followed by qualification to do business in New York. New York corporations are discussed below.

- **Registration formalities.** A New York corporation is formed by the incorporator filing a certificate of incorporation with the Department of State of the State of New York. Foreign corporations (such as Delaware corporations) can be authorised to do business in New York by filing an Application for Authority with the New York Department of State.

- **Share capital.** The Business Corporation Law does not require a minimum or maximum share capital.
- **Non-cash consideration.** Shares can be issued for any combination of money or other property, tangible or intangible, or labour or services actually received or performed for the corporation. In the absence of fraud, the determination of the board of directors (board) or shareholders as to the value of the consideration is conclusive and, once payment has been received, share certificates are issued to the shareholders.
- **Rights attaching to shares.** The corporation's certificate of incorporation and bye-laws can restrict the rights that can attach to shares. Shareholders can also contractually agree to restrictions on these rights.
- **Foreign shareholders.** There are no such restrictions under state law, but there may be federal industry-specific requirements in relation to foreign shareholders.
- **Management structure.** A corporation is managed by a board elected by the shareholders. Generally, the board elects the company's officers.
- **Directors' liability.** Directors owe fiduciary duties to the corporation and its shareholders. Directors can be liable to the corporation or shareholders if they do not act in good faith or exercise their duty of care.
- **Parent company liability.** Parent companies have the limited liability of shareholders and are treated separately from their subsidiaries, unless the corporate veil between the entities can be pierced. Additionally, under section 630 of the Business Corporation Law, the ten largest shareholders of any private company incorporated in New York can be held jointly and severally personally liable for all wages and salaries owing to its employees.
- **Reporting requirements.** New York corporations, and also non-New York corporations qualified in New York, must file a statement with the Department of State of the State of New York every two years, setting out:
 - the address for service;
 - the name and address of its chief executive officer; and
 - the principal executive office's address.

Corporations must file and pay annual franchise taxes (see *Questions 15 and 16*).

EMPLOYEES

6. What are the main laws regulating employment relationships?

Federal, state and local laws (*NY Lab Law §§ 1-1200*) regulate various employment issues, including:

- Minimum wages.
- Overtime payments.
- Employee benefit plans and health insurance offered by employers.

The terms of employment can also be established by contract between the parties, but they must not conflict with any mandatory provisions of these laws (for example, an employer cannot agree by contract to pay less than the minimum wage, and an employee who is entitled to overtime payment cannot agree not to be paid for the work).

Laws relating to employment issues can apply to both:

- Foreign persons working in New York.
- New York citizens working abroad.

The extraterritorial reach of the laws varies on a case-by-case basis. Choice of law provisions in employment contracts for employees in New York are respected provided the substantive provisions do not violate New York law.

7. Is a written contract of employment required? Are any agreements and/or implied terms likely to govern the employment relationship?

A written contract of employment is not required. Unless there is a promise or contract providing otherwise, the employment relationship is considered to be at will (that is, either the employer or the employee can terminate the employment relationship at any time, with or without notice or cause).

Other terms relevant to employees can be set out in:

- Employee handbooks.
- Confidentiality agreements.
- Collective bargaining agreements.

8. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

Employees are not entitled to management representation or consultation in relation to corporate transactions. However, federal law guarantees certain employees the right to take part in collective bargaining activities and to be represented by a union for the purpose of bargaining over employment terms and conditions.

9. How is the termination of individual employment contracts regulated?

Employees have a statutory right under state and local law not to be dismissed for discriminatory reasons. The Human Rights Law (*Exec. Law Article 15*), which is broader than federal anti-discrimination law, prohibits discrimination in relation to employment issues (including dismissal) based on, among other things:

- Age.
- Race.
- Colour.
- National origin.
- Sex.
- Disability.
- Marital status.

Municipalities, such as New York City, also have anti-discrimination laws that differ from the federal and state laws. For example, in addition to the above, New York City prohibits discrimination in relation to employment issues based on domestic violence victim status.

As New York is an at-will employment state, there is no statutory minimum notice period. New York also does not require severance payment although an employee may be able to claim if the employee can show that it is the employer's regular practice to offer severance and the employee accepted or continued employment with the employer in reliance on that practice.

Employees who are terminated as a result of discrimination can bring an action for wrongful termination. Remedies can include:

- Future payments.
- Back pay.
- Emotional distress damages.

10. Are redundancies/mass layoffs regulated? If so, please give details.

In 2009, the New York's Worker Adjustment and Retraining Notification Act (*NY Lab Law §§ 860 to 860-l*) (NY WARN Act) entered effect. The NY WARN Act requires employers with at least 50 full-time employees to provide employees and their representatives with 90 days' notice in advance of certain plant closings and mass layoffs. These requirements differ from the federal Worker Adjustment and Retraining Notification Act (*29 USC 2101*) (WARN Act), which requires employers with more than 100 employees to provide employees or their unions with 60 days' notice in advance of certain plant closings and mass layoffs.

11. Do foreign employees require work permits and/or residency permits? If so, how long does it take to obtain them and how much do they cost?

New York does not have any separate immigration rules. However, work permits are generally required under federal law.

TAX

12. In relation to employees, what constitutes tax residency in your jurisdiction?

Generally, an individual is a tax resident of New York if either:

- The individual is domiciled in New York.
- The individual maintains a permanent place of abode in New York and spends more than 183 days of the taxable year in New York.

13. What income tax or social security contributions must the following pay:

- Tax resident employees?
 - Non-tax resident employees?
 - Employers, in relation to their employees?
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Tax resident employees

Tax resident employees must pay income tax on income from all sources, which, in many cases, is withheld at source by the employer, and may receive a credit for taxes paid to other jurisdictions.

Non-tax resident employees

Non-tax resident employees pay tax on New York source income.

Employers

New York laws require that employers maintain certain mandatory insurances and pay certain taxes for employees, including all of the following:

- State workers' compensation insurance.
- State short-term disability payments.
- State unemployment tax.

In addition, employers in many cases are required to withhold income taxes for employees.

14. In relation to business vehicles, what constitutes tax residency in your jurisdiction?

A general business corporation is generally a tax resident in New York if it is incorporated under the laws of New York.

15. Please give details on the main taxes that potentially apply to a tax resident business vehicle (including rates).

Corporation franchise tax (CFT)

CFT applies to general business corporations. However, corporations operating in certain sectors (such as banking and insurance) and certain utility businesses are subject to special franchise taxes rather than CFT.

The amount of CFT payable is equal to the highest of any of the following, plus a subsidiary capital tax (which is imposed at the rate of 0.09% on apportioned subsidiary capital):

- 7.1% of the apportioned entire net income.
- 0.15% of the apportioned business and investment capital.
- 1.5% of the minimum taxable income.
- A fixed dollar minimum amount ranging from US\$25 (about EUR17.10) to US\$5,000 (about EUR3,419), depending on the corporation's New York receipts.

A surcharge of 17% of the CFT is imposed on the portion of the tax that is attributable to business conducted within the Metropolitan Commuter Transportation District (MCTD). The MCTD consists of New York City and several surrounding counties.

Sales and use tax

New York imposes a tax of 4% (and localities can impose additional tax) on the receipts from retail sales of, and on the consideration paid for the use of, tangible personal property and certain enumerated services. An additional 0.375% tax is imposed in the MCTD.

Real estate transfer tax

A tax at the rate of US\$2 (about EUR1.37) for each US\$500 (about EUR342) of consideration is imposed on each conveyance of real property (or conveyance of a controlling interest of an entity with an interest in real property), when the consideration exceeds US\$500. An additional tax of 1% is imposed on conveyances of residential real property where the consideration is US\$1 million (about EUR683,821) or more.

Property taxes

Property taxes are generally levied by local jurisdictions on real property and special franchises. The rates vary by jurisdiction and type of property. They are not imposed on personal property.

New York City taxes

Corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York City are generally subject to the general corporation tax (GCT) (which is similar, but not identical, to the CFT (*see above*, *Corporation franchise tax (CFT)*)).

However, corporations which carry out certain types of business within New York City (such as banking, insurance and some utility businesses) are subject to special income taxes rather than the GCT.

New York City also imposes:

- A transfer tax, with rates ranging from 1% to 2.625%, on transfers of real property within the City (and transfers of a controlling interest in an entity with an interest in real property) when the consideration exceeds US\$25,000 (about EUR17,095).
- A 4% tax on an unincorporated business' income that is apportioned to the City.
- A sales and use tax of 4.5%, except on certain parking services which are taxed at 6%.

16. How are the activities of non-tax resident business vehicles taxed?

A corporation that is not incorporated in New York is generally subject to franchise (income) tax only if it does

business, employs capital, owns or leases property, or maintains an office in New York. The corporation calculates its liability in the same way as a corporation incorporated in New York (see *Question 15*).

17. Please explain how each of the following is taxed:

- **Dividends paid to foreign corporate shareholders.**
 - **Dividends received from foreign companies.**
 - **Interest paid to foreign corporate shareholders.**
 - **Intellectual property (IP) royalties paid to foreign corporate shareholders.**
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- **Dividends paid.** New York does not impose a withholding tax on dividends paid to foreign corporate shareholders. However, under certain circumstances, if the foreign corporate shareholder is otherwise subject to New York tax, then the dividend is initially included in the foreign shareholder's tax base.
 - **Dividends received.** These are treated in the same way as dividends received from domestic corporations.
 - **Interest paid.** New York does not impose a withholding tax on interest paid to foreign corporate shareholders. However, under certain circumstances, if the foreign corporate shareholder is otherwise subject to New York tax, then the interest is initially included in the foreign shareholder's tax base.
 - **IP royalties paid.** New York does not impose a withholding tax on IP royalties paid to foreign corporate shareholders. However, under certain circumstances, if the foreign corporate shareholder is otherwise subject to New York tax, then the royalty payments are initially included in the foreign shareholder's tax base.

18. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)? If so, please give details.

New York does not have thin capitalisation rules.

19. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

New York does not have controlled foreign company rules.

20. Are there any transfer pricing rules? If so, please give details.

The New York Department of Taxation and Finance can adjust items of income, deductions and capital where the taxpayer's activity, business, income or capital is improperly reflected as a result of an agreement, understanding or arrangement between the taxpayer and another person.

21. How are imports and exports taxed?

New York does not have any specific rules regarding the taxation of imports and exports.

COMPETITION

22. Are restrictive agreements and practices regulated by competition law in your jurisdiction? If so, please give brief details.

Yes. Restrictive agreements and practices are regulated both by United States federal law (the Sherman and Clayton Acts in particular) and by New York state law (the Donnelly Antitrust Act in particular).

United States federal law applicable in New York addresses unlawful agreements (*Section 1, Sherman Act*), unlawful monopolies (*Section 2, Sherman Act*), and a variety of other acts and practices in the Clayton Act, the FTC Act and the Robinson-Patman Act.

The New York anti-trust statute set out in sections 340 to 347 of the New York General Business Law (Donnelly Antitrust Act) broadly prohibits contracts, agreements, arrangements and combinations that create monopolies or restrain trade, and that impact competition within the state of New York. The Donnelly Antitrust Act is modelled on the federal Sherman Antitrust Act (*15 USC §§ 1 to 7*), but is intended to expand the protection of the Sherman Antitrust Act (which applies to activities involving interstate commerce) to New York citizens for acts occurring within the state. The Donnelly Antitrust Act is generally applied using the same standards developed under federal anti-trust statutes, although there are some differences. New York has also enacted special anti-trust laws that apply to specific industries, such as those involving the sale of alcoholic beverages, dairy products and insurance.

INTELLECTUAL PROPERTY

23. Please outline the main intellectual property rights that are capable of protection in your jurisdiction. In each case, please state:

- **Nature of right.**
- **How protected.**
- **How enforced.**
- **Length of protection.**

Patents

- **Nature of right.** Patents are issued under federal law. To be patentable under US law (*35 USC*), an invention must relate to a machine, article or substance produced by manufacture, or the process of manufacture of an article. A patent can also be obtained for an improvement of an article or of a process of manufacture. An invention or improvement must also be useful, novel and not obvious. There are three types of patents:
 - utility patents for a new process, machine, article of manufacture, or composition of matter, or any new and useful improvement of the above;
 - plant patents for distinct and new varieties of plants;
 - design patents for new, original and ornamental designs for an article of manufacture.

A patent gives its owner the right to exclude others from making, using, offering for sale or selling the patented invention in, or importing it into, the US during the patent's term.

- **How protected.** Protection is obtained by filing an application with the US Patent and Trademark Office (USPTO).
- **How enforced.** Patents are enforced through litigation in federal courts. Remedies for patent infringement may include:
 - injunctions;
 - damages;
 - lawyers' fees; and
 - costs.
- **Length of protection.** New utility or plant patents have a 20-year term from the date the application was filed in the US. Design patents have a 14-year term from date of grant.

Trade marks

- **Nature of right.** A trade mark is any word, name, symbol or device that is used in trade with goods or services to:
 - indicate the source of goods or services; and
 - distinguish them from the goods or services of others.

Trade mark rights can be used to prevent others from using the same, or a confusingly similar, mark in connection with the same goods or services that are sold under the trade mark.

- **How protected.** Trade marks can be protected by:
 - common law;
 - state law (*NY General Business Law, § 360 (2006)*); and
 - federal law (*Lanham Act (15 USC)*).

Owners of trade marks can register them with the USPTO. Applications for the registration of trade marks in New York must be sent to the Miscellaneous Records Unit of the New York State Department of State.

- **How enforced.** Trade mark rights can be enforced through litigation in both state and federal courts. Remedies in both state and federal courts include:
 - injunctions;
 - damages; and
 - seizure and/or destruction of infringing goods.

In New York, treble damages are available for wilful infringement.
- **Length of protection.** Registrations last for ten years, renewable for successive ten-year terms, provided the mark is still in use in commerce. Unregistered marks can be protected for as long as they are continuously used in commerce.

Design patents

- **Nature of right.** A federally registered design is any new, original and ornamental design applied to, or embodied in, an article of manufacture used in commerce (commonly known as a design patent) (*35 USC 171*). Generally, a design patent protects an article's appearance, but not the article's structural or functional features. New York does not have corresponding protection.

A design patent gives its owner the right to exclude others from making, using, offering for sale or sell-

ing products embodying the patented design in, or importing products embodying the patented design into, the US during the term of the design patent.

As a general matter, infringement is based on whether, in the eye of an ordinary observer with knowledge of the prior art giving such attention as a purchaser usually gives, two designs are substantially the same, where the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other (*Egyptian Goddess, Inc. v Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008)).

- **How protected.** Protection is obtained by filing an application with the USPTO.
- **How enforced.** Design patents are enforced through litigation in federal courts. Remedies for design patent infringement may include:
 - injunctions;
 - damages;
 - lawyers' fees;
 - costs; and
 - recovery of the infringer's profits.
- **Length of protection.** Design patents have a 14-year term from date of grant.

Trade dress

- **Nature of right.** Trade dress can include the overall non-functional appearance of a product or its packaging, as well as a combination of any non-functional elements in which a product or service is presented to the consumer. The owner of the trade dress can sue in federal or state court for infringement if the competing product is likely to cause a consumer to be confused as to the product's origin.
- **How protected.** Many types of trade dress are registrable as trade marks. In addition, unregistered trade dress is protected under federal law (*15 USC § 1125*) and common law, and certain principles of trade dress can protect the non-functional shape, appearance or layout (or a combination of these factors) that make a product or its packaging inherently distinctive or that has acquired distinctiveness through secondary meaning in the marketplace.
- **How enforced.** The owner can seek an injunction against the infringer and recover monetary damages.
- **Length of protection.** Protection lasts as long as the design continues to be distinctive in the minds of consumers and is used in commerce.

Copyright

- **Nature of right.** Copyright is available for authors of original works, including literary, dramatic, musical, artistic, and certain other works. Copyright is exclusively governed by federal law.

The copyright owner generally has the exclusive right to:

- reproduce the work;
 - prepare derivative works of the work;
 - distribute copies or phonorecords of the work;
 - perform the work publicly (in the case of sound recordings, by means of a digital audio transmission); and
 - display the work publicly.
- **How protected.** Copyright protection subsists from the time the work is created in fixed form and immediately becomes the property of the author of the work. Copyrights can be registered with the US Copyright Office of the Library of Congress.
 - **How enforced.** Registered copyright owners can file a claim in federal court. Remedies for infringement include:
 - injunctions, impoundment and destruction;
 - damages (including statutory damages and actual damages);
 - costs and lawyers' fees; and
 - seizure and forfeiture.
- Criminal penalties are also available for certain instances of wilful infringement.

- **Length of protection.** Generally, protection for works created on or after 1 January 1978 lasts for the life of the author plus 70 years. In the case of an anonymous work, a pseudonymous work, or a work made for hire, protection lasts for either 95 years from the year of first publication or 120 years from the year of creation, whichever is shorter.

Confidential information

- **Nature of right.** Generally, a trade secret is business information for which the owner makes reasonable efforts to maintain confidentiality, and that has value because it is not generally known in the industry.
- **How protected.** Trade secrets are not registered, and to date, New York has not adopted a version of the Uniform Trade Secrets Act 1985. New York protects trade secrets under common law.

- **How enforced.** The owner of the confidential information can sue under a claim of misappropriation and seek remedies such as:
 - injunctive relief;
 - damages;
 - profits; and
 - reasonable royalties.
- **Length of protection.** Protection lasts for as long as the information is maintained in confidence and not generally known in the industry. Trade secret law does not protect against the discovery of trade secrets by other means (for example, independent discovery).

MARKETING AGREEMENTS

24. Are marketing agreements regulated in your jurisdiction? If so, please give brief details in respect of the following arrangements:

- **Agency.**
 - **Distribution.**
 - **Franchising.**
-
- **Agency.** New York agency laws regulate the principal-agent relationship, including the:
 - agent's authority;
 - mutual obligations of principals and agents;
 - principals' and agents' obligations towards third parties; and
 - termination of the agency relationship.
 - **Distribution.** A distribution agreement may be subject to the New York version of the Uniform Commercial Code (*NY UCC § 2-106*) where the agreement constitutes a sale of goods.
 - **Franchising.** There are both federal and New York laws (*16 CFR § 436.1 and NY General Business Law § 681*) regulating franchising agreements. The Federal Trade Commission regulates franchising relationships (for example, it requires certain disclosures to be made by franchisers to prospective franchisees). Certain industries may be subject to special industry franchise laws.

E-COMMERCE

25. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)? If so, please give brief details.

The federal and New York e-commerce laws that give the same legal effect to electronic versions of contracts, signatures, disclosures and other records as their traditional paper-based counterparts, are as follows:

- Electronic Signatures in Global and National Commerce Act of 2000 (*15 USC § 7001*).
- Electronic Signatures and Records Act of 1999 (*NY State Technology Law §§ 301-309*).

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (*15 USC § 7701*) (the CAN-SPAM Act) is the principal federal statute affecting the use of e-mail as an advertising and promotion channel. It provides a federal framework for regulating certain unsolicited commercial electronic mail messages. For example, it prohibits certain fraudulent and misleading practices relating to the transmission of these messages and requires that recipients be given a means to opt out from receiving future messages. New York has not enacted state legislation regulating commercial electronic mail messages, however, New York's Attorney General has attempted to enforce other statutes (for example, NY General Business Law § 349 concerning deceptive trade practices, and NY General Business Law § 350 concerning false advertising) against spammers.

In 2009, the Federal Trade Commission revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising to require that endorsers, including bloggers and other online reviewers, disclose material connections between themselves and advertisers, for example, by stating that they received payment or free product samples from such advertisers. Both advertisers and endorsers may be liable for false and unsubstantiated claims made in an endorsement, including online endorsements.

DATA PROTECTION

26. Are there any data protection laws? If so, please give brief details.

New York has a law regarding the confidentiality of Social Security numbers (*NY General Business Law § 399-dd*4*) that prohibits persons and entities from using Social Se-

curity numbers in certain ways and requires safeguards be taken to prevent unauthorised access to them. In addition, in the event of a security breach involving personal information, the following must be notified (*NY General Business Laws § 899aa*):

- Affected individuals.
- The New York State Attorney General's Office.
- New York State Office of Cyber Security.
- New York State Consumer Protection Board.

Employers are also prohibited from communicating employee personal information to the general public and are required to implement policies or procedures to safeguard against a violation of this law, including policies to notify relevant employees of this prohibition (*NY Lab Law § 203-d*).

PRODUCT LIABILITY

27. Are there any laws regulating product liability and product safety? If so, please give brief details.

Product liability claims are generally governed by common law. Product liability claims can be brought under theories of:

- Negligence.
- Failure to warn.
- Strict liability.

The claimant must generally prove all of the following:

- The product was defective or harmful and capable of causing injury.
- The defective product was the proximate cause of bodily harm or property damage.

- The defendant's action (or inaction) resulted in the manufacture or sale of the defective product.

Product liability claims are sometimes asserted in conjunction with claims for:

- Breach of warranty (a contract-based claim).
- Deceptive business practices (including claims under NY General Business Law § 349).
- Fraud (a common-law claim).

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