

# Doing business in the 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 al-

most tax free if it expands or relocates to one of the 72 Empire Zones (designated areas throughout New York that offer special incentives to encourage economic and community development).

## 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 state:

- 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.

Foreign companies typically form corporations and limited liability companies to do business in New York.

However, many US and foreign businesses choose to incorporate under the laws of Delaware, and then qualify or register to do business in New York.

- **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.
- **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.
- **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? What, if any, other terms are 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.

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

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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.

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### **9. What statutory rules govern the termination of individual employment contracts?**

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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.

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.

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

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Redundancies are not regulated by state law. The federal Worker Adjustment and Retraining Notification Act (*29 USC 2101*) (WARN Act) 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.

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### **11. In relation to employees, what constitutes tax residency in your jurisdiction?**

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Generally, employees who receive income for services performed in New York, regardless of the source, must pay federal and New York income tax.

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### **12. 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 New York sources, which, in many cases, is withheld at source by the employer.

Employees must make social security payments at the fixed rate of 6.2% until a maximum amount of payment is reached, which is currently US\$5,840.40 (about EUR4,552).

#### **Non-tax resident employees**

Non-tax resident employees' income tax liability is the same as tax residents (*see above, Tax resident employees*).

## Employers

Federal and New York laws require that employers maintain certain mandatory insurances or pay certain taxes for employees, including:

- State workers' compensation insurance.
- State short-term disability payments.
- State unemployment tax.
- Federal unemployment tax.
- Federal social security contributions.

The rates of these payments depend on the experience rating of the employer (that is, the number of claims and the amount of payments received by employees of the organisation).

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### 13. 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?

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

## TAX

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

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A corporation is generally tax resident in New York if it is incorporated or domiciled in the state.

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### 15. What proportion of tax resident business entity's income is taxed and what are the main taxes that potentially apply (including rates)?

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#### 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):

- 7.5% of the apportioned entire net income.
- 6.85% of the apportioned business and investment capital.
- 2.5% of the minimum taxable income.
- A fixed dollar minimum amount ranging from US\$100 (about EUR77.9) to US\$10,000 (about EUR7,794), depending on the corporation's gross payroll.

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 EUR1.56) for each US\$500 (about EUR390) 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 EUR779,417) 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. It is 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 EUR19,485).
- A 4% tax on an unincorporated business' income that is apportioned to the City.

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

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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*).

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#### 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.**

- **Dividends paid.** New York does not impose a withholding tax on dividends paid to foreign corporate shareholders. However, if the foreign corporate shareholder is otherwise subject to New York tax, then the dividend is initially included in the New York tax base.
- **Dividends received.** These are treated in the same way as dividends received from domestic corporations (*see above, Dividends paid*).

- **Interest paid.** New York does not impose a withholding tax on interest paid to foreign corporate shareholders. However, 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, which is then apportioned to New York.

- **IP royalties paid.** New York does not impose a withholding tax on IP royalties paid to foreign corporate shareholders. If the shareholder is subject to New York tax, then the royalty payments are included in the foreign shareholder's tax base, which is then apportioned to New York.

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

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New York does not have thin capitalisation rules.

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#### 19. Are there any controlled foreign company rules? If so, please give details.

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New York does not have controlled foreign company rules.

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

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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.

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#### 21. How are imports and exports taxed?

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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.

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.

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 solely within the state. Generally, the Donnelly Antitrust Act is applied using the same standards developed under federal anti-trust statutes.

## 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 the US Patent 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, 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 in, or importing an invention into, the US.

- **How protected.** Protection is obtained by filing an application with the US Patent and Trademark Office (USPTO).
- **How enforced.** Once a patent is issued, the patentee must enforce the patent without aid of the USPTO, by suing in a federal court. Remedies 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 issue.

#### Trade marks

- **Nature of right.** A trade mark is any word, name, symbol or device that is used in trade with goods to:
  - indicate the source of goods; and
  - distinguish them from the goods 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. Unregistered marks can be protected for as long as they are continuously used in commerce.

### Registered designs

- **Nature of right.** A federally-registered design is any novel, non-obvious and ornamental design applied to, or embodied in, an article of manufacture used in commerce (commonly known as a design patent) (*35 USC*). New York does not have corresponding protection.

The right holder can exclude others from making, using and selling designs that are substantially similar to the patented design.

- **How protected.** A design patent is protected by federal law and must be registered at the USPTO.
- **How enforced.** Design patents are enforced through litigation in federal courts. If a third party infringes the holder's design patent, the holder can recover the infringer's profits from the misuse of the design patent.
- **Length of protection.** Protection lasts for 14 years without maintenance fees. Design patents cannot be renewed.

### Unregistered designs

- **Nature of right.** An unregistered design can include the non-functional elements of a product or its packaging. The owner of the unregistered design can sue in federal or state courts for infringement if the competing product is likely to cause a consumer to be confused as to the product's origin.
- **How protected.** There is no formal protection for unregistered designs; however, under federal (*15 USC § 1125*), state (*NY General Business Law, § 360 (2006)*) and common law, certain principles of trade dress can protect the shape, appearance or layout (or a combination of these factors) that make a product or its packaging distinctive and recognisable such that it has acquired secondary meaning in the marketplace.
- **How enforced.** The owner can obtain 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 intellectual works. Copyright is exclusively governed by federal law.

The copyright owner generally has the exclusive right to:

- reproduce the work;
- prepare derivative works;
- distribute copies or phonorecords of the work;
- perform the work publicly; 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.** Protection 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 publication or 120 years from the year of creation, whichever is shorter.

### Confidential information

- **Nature of right.** Trade secrets are business information not generally known in the industry, that provides the owner a competitive advantage and for which the owner makes efforts to maintain confidentiality.
- **How protected.** Trade secrets are not registered and 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, seeking remedies such as:
  - damages;
  - profits;
  - reasonable royalties;
  - injunctions.
- **Length of protection.** Protection lasts 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 the trade secret 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.**
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- **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.** Distribution agreements may be subject to the New York version of the Uniform Commercial Code (*NY UCC § 2-106 (2006)*) where the distribution 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 (2006)*) 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, which give the same legal effect to electronic versions of

contracts, signatures, disclosures and other records as their traditional paper-based counterparts, are the:

- 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) 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 are given a means to opt out from receiving future messages. New York has not enacted state legislation regulating commercial electronic mail messages.

## DATA PROTECTION

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

There are no data protection laws in New York. However, in the event of a security breach involving personal information, affected individuals must be notified (*NY General Business Laws § 899aa*).

## PRODUCT LIABILITY

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

Product liability is governed by common law. Product liability claims can be brought under:

- Negligence.
- Breach of warranty.
- Fraud.
- Strict liability in tort.
- Failure to warn.

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.

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