

High-touch Legal Services® for Startup and Early-stage Companies

Ten Tips for Success in the U.S.

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During the past several years, I have helped more than two dozen companies from other countries set up operations here. Based on my experiences with those companies, I offer the following tips for achieving success in the U.S.:

1 Work with complementary businesses that already are established here

Building a sales channel from nothing, on your own, takes a long time and is expensive. The fastest way to generate revenue is to work with a business partner that already is established in the U.S. – and listen to what the business partner and its customers tell you about your products and marketing approach.

Here are examples of the types of relationships that clients have found helpful:

- The client's home-country business partner came to the U.S. first, then provided engagements that the client was uniquely qualified to carry out here.
- The client identified an existing U.S. company with services that complemented the client's products. The client's new U.S. operation immediately had a sales channel.
- A company in the U.S. heard about the client's product (nothing equivalent existed here) and provided hot leads to the client on its first visit.

2 Manage overseas personnel based on the principle "trust but verify"

When you start in the U.S., you will be relying on a small group of personnel, perhaps just a single individual. There is a natural urge to minimize controls for such a small group.

You must resist that urge! It is easy for an employee half-way around the world to create problems by embezzling money, misdirecting IT resources, falsely representing his authority to third parties, etc. Controls for overseas personnel should be at least as strict as those for personnel at the home office. Better yet, send a founder or top-level executive, who will be both more trustworthy and more productive.

3 Form your corporation or limited liability company properly

When you set up business here, you almost certainly will form a new legal entity (a corporation or limited liability company) to keep any liabilities incurred here from flowing back to the parent company.

Some companies try to save money by using an online service, rather than an attorney, to form the new entity. That approach might not be too bad for *an individual* who wants to limit personal liability, but it is not appropriate for *a real business*, because you will not have anyone to (a) ensure that all documents are suitable for your company and (b) advise you on legal compliance issues as they develop. Spend a bit more money up-front to do things right and stay out of trouble down the road.

4 Be ready for a legal system that is different from the one back home

One of the most obvious differences is that agreements are longer and more detailed in the U.S. In many other countries, agreements can focus largely on business terms because detailed legal terms are provided by governing law. That is not the case in the U.S., so good agreements here include detailed, specific legal provisions.

Another reason for detailed agreements is to prepare for, but hopefully avoid, litigation. It is easy to sue or be sued here, and litigation is expensive, but the prevailing party generally does *not* get to recover its legal fees from the other party (unless an agreement so specifies), so litigation should be avoided whenever possible.

5 Identify and protect intellectual property (IP) that is used here

As you use existing IP or develop new IP in the U.S., be aware of that you may need to take certain steps to fully protect it, such as:

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- Registering patents or trademarks with the Patent and Trademark Office
- Reserving domain names
- Registering copyrights with the Copyright Office
- Protecting trade secrets by using nondisclosure agreements (NDAs)
- Assigning or licensing rights from the foreign parent to the U.S. subsidiary

6 Develop detailed employee and independent contractor agreements

Startup companies often use the services of both employees and independent contractors. In each case, it is essential that the company own any IP that is created by them.

Accordingly, among many other considerations, agreements with personnel need to provide for:

- Assignment of all rights (including IP rights) in work product to the company
- An obligation to help the company record or register those rights
- Confidentiality obligations
- Protection against third-party infringement claims

7 Choose an accountant with international tax experience

You will need to work with a local accountant to prepare federal and state tax returns. You should be aware, however, that there are federal tax laws and regulations pertaining specifically to U.S. companies that are owned by foreign entities. Make sure that you choose an accountant with expertise in this area.

8 Be prepared to obtain a federal employer identification number

Obtaining a federal employer identification number (EIN) is a theoretically simple task that sometimes can present a thorny problem when a foreign company starts a subsidiary here. The reason: The Internal Revenue Service requires that the principal officer (in the case of a corporation) or the primary member (in the case of an LLC) supply his, her or its social security number, EIN, or other tax

identification number. If your intended principal officer or primary member does not have such a number, you will need to make some adjustments.

9 Conduct due diligence on potential investors

While there are many reputable investors in the U.S., a few are less than honorable.

In one instance, a European company, without representation by legal counsel, accepted an investment in its U.S. subsidiary from a self-described “venture capitalist” in Southern California. While the investment was to be made in tranches, the investor obtained control of the board of directors immediately. When sales developed more slowly than expected, the investor was able to remove the founder from the board and as an officer, throw both the U.S. company *and the European parent* into bankruptcy, and walk away with the companies’ IP – *despite the fact that only a portion of the funding had been received!*

Before the investment was accepted, a modest amount of online research would have shown that the investor’s securities license had been suspended years earlier for a securities-law violation, and the investor had generated complaints in multiple states.

10 Agree on business terms before you prepare a written agreement

An existing client (the U.S. subsidiary of a foreign parent) wanted to form a new corporation with three other shareholders. The client was to provide funding, while the other shareholders were to provide IP.

I prepared a shareholder agreement based on terms that the client’s CEO assumed would be satisfactory to the other shareholders; that turned out not to be the case. A second attempt also was unsuccessful. Only on the third try, when the CEO issued a “take it or leave it” ultimatum, did the other shareholders agree. A lot of time and legal fees could have been saved if the parties had agreed on basic business terms before we began preparing the agreement.

The information in this article is not intended as legal advice and does not establish an attorney-client relationship. If you need legal advice on a matter, please contact an attorney directly.

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