

Doing Business in the United States



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A GUIDE FOR NON-U.S. COMPANIES OPERATING IN
THE UNITED STATES



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Legal Counselors +
Business Advisors

BRENNAN MANNA DIAMOND

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Operating in the United States**

INTRODUCTION

Foreign companies and entrepreneurs encounter different challenges when expanding their business into new international markets like the United States. One of the principal challenges is how to operate and deal within the market in compliance with local law and regulations, and how to take advantage of the different legal instruments available to succeed in the United States.

FIRM OVERVIEW

Brennan, Manna & Diamond (“BMD”) was founded in 2000 with the goal of combining highly skilled, talented attorneys with practical experience in business matters to create a new way to provide legal and business services to its clients.

BMD’s access to a network of successful business entrepreneurs, consultants and developers allows for innovative solutions, symbiotic partnerships, and sound legal and business advice for our clients. With 70 attorneys in eight offices – BMD serves clients of all types and sizes in numerous industry sectors nationwide.

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- Mergers & Acquisitions
- Oil, Gas & Minerals
- Real Estate
- Tax, Estate & Asset Protection
- White Collar Crime

For a more detailed explanation of the services BMD provides, please visit <https://www.bmdllc.com>.

The purpose of this Guide is to provide foreign entrepreneurs and companies a general but valuable overview of the main legal topics they may face when operating or dealing in the United States market.

This Guidebook is intended to be used as a tool, not as providing legal advice to particular situations. Laws and regulations of other states may vary.

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Chapter 1 - Formation and Operation of Corporations and Limited Liability Companies

ENTITY SELECTION

Foreign entrepreneurs may wonder what options are available for company formation in the United States and specifically, Florida. Corporations and Limited Liability Companies (“LLCs”) offer a variety of advantages and disadvantages. Being familiar with both is important for any foreign business owner hoping to do business in the United States. Here, you will find a below an explanation of Florida business entities and considerations to keep in mind when deciding between a corporation and LLC.

FLORIDA ENTITIES

C-Corporation/S-Corporation

- **A corporation** is a type of business entity that exists apart from its owners.
- A corporation is a type of business entity that acts separately as a fictional person separate from its shareholders.
- Ownership
 - A **C-corporation (“C-corp”)** is formed by one or more shareholders.
 - An **S-corporation (“S-corp”)** is formed by one to one hundred shareholders.
 - A shareholder is a person, company, or institution that owns equity in a corporation. A shareholder is someone who owns shares in a corporation.
 - A shareholder may be a U.S. citizen, legal resident alien, or certain trust or tax-exempt organizations.
- Formation
 - A corporation is established through articles of incorporation. Articles of incorporation are documents that denote the formation of a corporation.
- Governing Instrument
 - Articles of incorporation and bylaws outline how a corporation will function. Shareholders can amend or repeal bylaws.
- Liability
 - Liability is lawful accountability. Liability is legal responsibility. A shareholder’s liability is the obligation to pay the full consideration for which the shareholder’s shares were issued.
- Management
 - A board of directors is a governing body responsible for managing a corporation. A board of directors is a body responsible for governing a corporation. The shareholders may restrict eliminate, limit, or restrict the board of directors.
- Fiduciary Duties
 - A fiduciary is a person or organization that acts on the behalf of a client or clients. A fiduciary is someone obligated to act on behalf of another for the other’s benefit. As fiduciaries acting on behalf of the corporation, directors have a duty to act in good faith and in a manner reasonably believed to be in the corporation’s best interests.

- Capital
 - Capital is cash being used for investment purposes. Capital is cash, or an asset, used for investment. A corporation may raise capital by either issuing equity to investors in the form of shares or incurring debt.
 - Equity is an ownership interest in a business entity. Equity is an ownership interest in a property, including business entities.
- Distributions
 - A distribution is a company's payment of equity to its owners. A corporation's distributions usually take the form of cash dividends.

Limited Liability Company (LLC)

- **A Limited Liability Company, or LLC**, is a type of business entity that provides limited liability for its member owners while also providing the tax benefits associated with a partnership.
- Ownership
 - An LLC is formed by one or more members. If the LLC is taxed as a partnership, at least two members are required.
- Formation
 - An LLC is established through articles of organization. Articles of organization are documents used to establish an LLC.
- Governing Instrument
 - Articles of organization and operating agreements outline how an LLC will function.
- Liability
 - Liability is lawful accountability. A member is not liable for the LLC's debts, obligations, or other liabilities.
- Management
 - An LLC may either be member-managed or manager-managed.
 - In a member-managed LLC, members are responsible for managing the LLC.
 - In a manager-managed LLC, the LLC may be managed by a member manager, a non-member manager, or a board of managers.
- Fiduciary Duties
 - A fiduciary is a person or organization that acts on the behalf of a client or clients. Members in a member-managed LLC and managers in a manager-managed LLC owe a duty of loyalty and care both to the LLC and other members.
- Capital
 - Capital is cash being used for investment purposes. An LLC may raise capital by either issuing equity in the form of membership interests or incurring debt.
 - Equity is an ownership interest in a business entity.
- Distributions
 - A distribution is a company's payment of equity to its owners. An LLC's distributions usually take the form of money as a person cannot demand or receive non-monetary distributions unless specific requirements are met.

General Partnership (GP) and Limited Liability Partnership (LLP)

- **A General Partnership, or GP**, is a type of business entity where two or more individuals are engaged in business for joint profit. A General Partnership, or GP, is a type of business entity where all partners run the business and share in profits and losses. **A Limited Liability Partnership, or LLP**, is a type of

business entity where each partner's liability is limited. A Limited Liability Partnership, or LLP, is a type of business entity where partners are not personally liable for the obligations of the partnership.

- Ownership
 - A GP or LLP is formed by at least two general partners.
 - An LLP does not have limited partners.
- Formation
 - A GP or LLP may be established by filing a partnership registration statement.
 - While a partnership registration statement is not required to form the business entity, a partnership registration statement is required for merger or conversion.
- Governing Instrument
 - A partnership agreement outlines how a GP or LLP will function.
 - A partnership agreement may be written or oral.
- Liability
 - Liability is lawful accountability. For a GP, all partners are jointly and severally liable for all partnership liabilities. For an LLP, obligations incurred by the partnership are solely the responsibility of the partnership.
- Management
 - In a GP and LLP, each partner has a right to manage the business.
- Fiduciary Duties
 - A fiduciary is a person or organization that acts on the behalf of a client or clients. Each partner owes a duty of loyalty and care to the partnership and other partners. The duties must be exercised in a manner consistent with the obligation of good faith and fair dealing.
- Capital
 - Capital is cash being used for investment purposes. A GP or LLP may raise capital through contributions of cash, property, other partner assets.
- Distributions
 - A distribution is a company's payment of equity to its owners. A distribution in kind is a distribution in a form other than cash. A GP or LP is not required to make a distribution in kind to a partner. However, each partner is entitled to share equally in the profits of the partnership.

Limited Partnership (LP) and Limited Liability Limited Partnership (LLLP)

- **A Limited Partnership, or LP**, is a type of business entity where two or more partners operate a business together, but the limited partner is liable up to the limited partner's investment. **A Limited Liability Limited Partnership, or LLLP**, is a type of business entity where both general and limited partners are protected against personal liability. A Limited Partnership, or LP, is a type of business entity where at least one general partner operates the business and is personally liable for the partnership's obligations and one limited partner provides capital but is not personally liable for the partnership's obligations. A Limited Liability Limited Partnership, or LLLP, is a type of business entity that acts as a partnership where the partnership's obligations remain those of the partnership and do not extend to the partners.
- Ownership
 - A LP or LLLP is formed by at one general partner and at least one limited partner.
 - A limited partner is a partner whose liability cannot exceed the amount invested into the partnership.
- Formation
 - A LP or LLLP is established through a certificate of limited partnership.

- **Governing Instrument**
 - A limited partnership agreement outlines how a LP or LLLP will function.
 - A limited partnership agreement may be written or oral.
- **Liability**
 - Liability is lawful accountability. For an LP, general partners are jointly and severally liable for an LP's obligations. Limited partners are not liable for the LP's obligations.
 - For an LLLP, an obligation incurred by the LP is solely the obligation of the LP.
- **Management**
 - For an LP, each general partner has a right to manage the business. Limited partners have no authority to act on behalf of the LP.
- **Fiduciary Duties**
 - A fiduciary is a person or organization that acts on the behalf of a client or clients. Each general partner owes the duty of loyalty and care to the LP and other partners. The duties must be exercised in a manner consistent with the obligation of good faith and fair dealing.
 - Limited partners do not owe a fiduciary duty to the LP or other partners unless the limited partner has management power.
- **Capital**
 - Capital is cash being used for investment purposes. A LP or LLLP may raise capital either by issuing equity in the form of partnership interests or incurring debt.
- **Distributions**
 - A distribution is a company's payment of equity to its owners. Any distribution made to all partners must be based on the value of the contributions received by the LP from each partner.
 - A distribution may only be made in cash unless the partner receives a percentage of the asset equal to the partner's share of distributions.

CORPORATION vs LIMITED LIABILITY COMPANY

Choosing a business entity can be a difficult decision for a foreign entrepreneur. Here, you will find some factors to consider when deciding between a corporation and an LLC.

- **Degree of Familiarity**
 - A corporation is most familiar to those in the financial industry while an LLC is less familiar to those in the financial industry.
- **Record Keeping**
 - A corporation involves greater record keeping and is subject to stricter regulations compared with an LLC. An LLC provides greater flexibility.
- **Degree of Selection**
 - A corporation is less chosen by entrepreneurs while an LLC is most chosen by entrepreneurs.

Chapter 2 – Patent, Trademark, Copyright, and Intellectual Property Protection

INTELLECTUAL PROPERTY

With the advent of technology, navigating intellectual property can be a challenge for foreign entrepreneurs who want to protect themselves against theft. Procedures exist in the United States for protecting intellectual property assets. Below, you will find an overview of the various areas associated with intellectual property.

INTELLECTUAL PROPERTY RIGHTS

- Intellectual property rights are intangible assets. These intangible assets are typically owned either by an individual or company. Intellectual property rights are afforded legal protection in that they cannot be used without the owner's consent.
- Intellectual property rights can be protected in several ways including:
 - Trademarks and service marks
 - Copyrights
 - Patents and inventions
 - Trade secrets
 - Licensing

TRADEMARKS AND SERVICE MARKS

- A trademark is an identifier that denotes where a product or good comes from and acts to distinguish the product or good from others. A service is an identifier that denotes where a service comes from and acts to distinguish the service from others.
- Identifiers may include, but are not limited, to:
 - Names
 - Symbols
 - Phrases
 - Logos
 - Colors
- Trademark and service rights come into effect when the identifier is used in combination with a good or service.
- Registration
 - In the United States, trademark and service mark registration is not required.
 - Certain words cannot be registered under United States Trademark Law.
 - For a trademark or service mark to be registered, it must be distinctive.
 - Trademark and service mark registration is valid for ten years.
 - To remain valid, the registrant must file an affidavit that certifies that the trademark or service mark has not been abandoned between the fifth and sixth year that the registration remains in effect.
 - U.S. domestic companies must prove actual use of a trademark or service mark before registering a trademark or service mark.
 - Non-U.S. domestic companies may be able to obtain U.S. registration without proving actual use.

COPYRIGHTS

- Copyright is legal right to copy. Copyright protects owners of intellectual property against unauthorized duplication or use. Copyright is the right to copy, a property right associated with authorship.
- Tangible
 - Copyright specifically protects intellectual property in tangible form.
 - Examples of intellectual property that can be protected include:
 - Sculpture
 - Literature
 - Photographs
 - Paintings
- Registration
 - Registration with the U.S. Copyright Office is not required for an owner to obtain a copyright. A copyright is obtained when the intellectual property exists in a physical form.
 - Registration with the U.S. Copyright Office is required to bring an action for copyright infringement.
- Duration
 - For copyright protected intellectual property that is created after January 1, 1978, the copyright exists for the life of the author plus an additional seventy years.
 - For a jointly created work, the copyright exists for the life of the last surviving creator plus an additional seventy years.
 - For a work for hire, anonymous work, or pseudonymous work, the copyright expires ninety-five years from the year of first publication or one hundred twenty years after creation.

PATENTS AND INVENTIONS

- A patent is a property right that grants the holder exclusive rights to an invention for a specific period of time. A patent is a right to exclude other from engaging in specific actions related to an invention for a specified period, usually twenty years.
 - The holder of the patent can exclude others from engaging in the following activities pertaining to the invention covered by the patent:
 - Making
 - Using
 - Offering for sale
 - Selling
 - Importing
- Protection
 - A U.S. patent will prevent a competitor from importing a product into the U.S. that uses the protected invention.
 - However, a U.S. patent will not afford protection in other countries.
- Application
 - Patent applicants are required to file a patent with the U.S. Patent and Trademark Office (“USPTO”).
 - The requirements for an invention to receive a patent include:
 - Patentable subject matter
 - Patentable subject matter includes a process, a machine, an article of manufacture, a composition of matter, or any improvement of the foregoing.

- A patentable invention must also have practical utility and patents do not cover abstract ideas, laws of nature, and natural phenomena.
- Novel
 - Novelty means that the invention must be new. The United States currently follows a first-to-file system. An invention is novel if the invention was not patented, not described in a printed publication, or not in public use, on sale, or otherwise available to the public before the effective filing date.
 - Exceptions to the novel requirement include a disclosure made one year or less before the application's effective filing date by the inventor or another individual who obtained the subject matter from the inventor or a disclosure made less than one year before the application's effective filing date by another party if the inventor publicly disclosed the invention prior to the disclosure.
- Non-obvious
 - Factors are considered when deciding whether an invention is non-obvious. Those factors include:
 - The differences between the inventory and the prior art
 - The level of ordinary skill in the art
 - The invention's commercial success
 - The invention's addressing of a recognized need
 - Proof of failure in producing the invention
 - Unanticipated results.
- An inventor may assign an or be obligated to assign a patent application to a company. The company can file the patent application with the USPTO.
- An applicant has a continuing duty to disclose information that would bear on the patent's success of being granted.
- Duration
 - A U.S. patent typically last 20 years from the effective filing date of the patent application for utility patents.
 - A utility patent is the most common type of patent and is interchangeable with patent. A utility patent is synonymous with patent.
- International Patents
 - A U.S. patent only protects against infringement in the United States.
 - U.S. patents, unlike patents obtained in other countries, provide a 1-year grace period to file a patent application.
 - The 1-year grace period means that an inventor can file a patent application up to one year following the inventor's public disclosure of the invention.
 - U.S. patents, unlike patents obtained in other countries, do not require that the patent be "worked" locally to remain in effect.
 - The U.S. and 150 other countries are parties to the Patent Cooperation Treaty ("PCT"). The PCT allows an inventor to file a single application with a "receiving office." Within 30 to 42 months, the inventor may nationalize the application in the inventor's desired signatory country. The deadline for the United States is 30 months.

TRADE SECRETS

- A trade secret is a company's process or practice that is not available to the public. A trade secret confers an economic benefit or advantage to the company that holds the trade secret.

A trade secret is a business formula, process, or other information that is not available to competitors or the public and confers an economic benefit.

- Examples of trade secrets include:
 - Formula
 - Pattern
 - Manufacturing process
- After a trade secret becomes available to the public, the trade secret is no longer afforded trade secret protection.
- Duration
 - Trade secret protection lasts as long as the trade secret remains unavailable to the public.
- Legislation
 - Trade secrets are governed by both state and federal law.
 - State trade secret law is modeled after the Uniform Trade Secrets Act.
 - On the federal level, the U.S. passed the Defend Trade Secrets Act in 2016.
 - The Defend Trade Secrets Act allows an owner of a trade secret to sue in federal court when the owner's trade secret has been misappropriated.

LICENSING

- Licensing is a contract between two parties that grants a party permission to use an owner's intellectual property. Licensing is the sale of a license to another. Licensing intellectual property grants a licensee authorization to use the licensor's intellectual property.
- Benefits
 - A non-U.S. company that licenses its intellectual property to a company operating in the U.S. can save costs as doing business in the U.S. can be cost prohibitive.
 - Licensing intellectual property can generate royalties or financial consideration.
- Downsides
 - Licensing typically involves a third party, which can result in lesser control over the intellectual property.

Chapter 3 – Mergers, Acquisitions, and Joint Ventures

Mergers, acquisitions, and joint ventures are avenues available to foreign entrepreneurs who intend to do business in the United States. There are several factors to consider when deciding which avenue to pursue as a non-U.S. business owner. Here, you will find an overview of the law surrounding mergers, acquisitions, and joint ventures.

MERGERS

- A merger is the absorption of one business entity that ceases to exist into another.
 - The acquiring company retains its identity and acquires the assets and liabilities of the absorbed company.
 - Mergers are typically voluntary, whereas acquisitions are typically involuntary.
 - Mergers involves companies that are equals.
- Types of mergers include:
 - Conglomerate
 - Congeneric
 - Market extension
 - Horizontal
 - Vertical

ACQUISITIONS

- An acquisition is the takeover of one business entity over another.
 - Both companies retain their identities after the takeover is complete.
- In an acquisition, the Buyer is required to act with due diligence.
 - Due diligence is the diligence reasonably expected from an individual or entity who attempts to satisfy a legal requirement or discharge an obligation.
- The documents used in an acquisition can be lengthy and typically include the following provisions:
 - Recitals or Statement of Purpose
 - Definitions
 - Purchase and Sale
 - Representations and Warranties
 - Interim and Post-Closing Covenants
 - Conditions to Closing
 - Termination
 - Indemnification
- Stock Acquisition
 - A stock acquisition is the acquisition of a corporation by purchasing the majority of shares directly from the shareholders.
 - A stock acquisition is easier than other methods because the acquisition only involves the transfer of a membership interest.
- Asset Acquisition
 - An asset acquisition, compared with a stock acquisition, is an acquisition of a corporation by purchasing the corporation's assets directly from the corporation.
 - An asset acquisition affords the Buyer the opportunity to select the assets and liabilities the Buyer is willing to assume.

JOINT VENTURES

- A joint venture is a business undertaking where two or more individuals are engaged with a project under defined parameters.
 - The elements necessary for a joint venture include:
 - An express or implied agreement
 - A common purpose
 - Shared profits and losses
 - Equal opportunity to exercise control over the project
- Joint ventures undertaken in the United States are typically complex.
- Different types of business entities may be used for joint ventures.
- The state of formation for the joint venture business entity need not be the same state in which the joint venture business entity engages in business.

Chapter 4 – Commercial Transactions

Contracts govern all commercial transactions in the United States, including supplier and customer transactions. Contracts often involve complicated language that can prove difficult to navigate for foreign entrepreneurs. Clear language is important when drafting a contract because contract disputes are a common cause of action for lawsuits in the United States. Here, you will find an overview of commercial transactions.

CONTRACT LANGUAGE

- A contract is an agreement between two parties that creates binding legal obligations.
- Supplier and customer contracts should include, among other provisions:
 - What is to be produced
 - Order procedures
 - The required specifications
 - The expected delivery terms
 - Warranty obligations
 - Prices and payment terms
 - Confidentiality requirements
 - Indemnification obligations
 - Official language of the contract
 - Governing law

GOVERNING LAW

- Generally, a commercial transaction that involves a customer or supplier is governed by the law of the state specified in the contract.
- States usually apply the Uniform Commercial Code (“UCC”) as adopted by the state and common law.
- It is important to note that a contract performed whole or in part in the United States, may be subject to laws not specifically mentioned in the contract.
- CISG
 - The CISG is the United Nations Convention on Contracts for the International Sale of Goods.
 - The CISG is a treaty that interprets international contracts.
 - The United States is a party to the CISG.
 - If both parties are domiciled in CISG contracting countries, the CISG will automatically apply.
 - Differences between the CISG and UCC include:
 - Easier contract formation under the CISG
 - More restriction to reject non-conforming goods under the CISG
 - Broader ability to cure non-conformities under the CISG

CONTRACT FORMATION

- Contracts in the United States require offer, acceptance, and consideration.
- Disputes often arise because of disagreement as to when an offer has been made or when an offer has been accepted.
- The forms and correspondence associated with contract formation include but are not limited to:
 - Proposals
 - Letters of intent
 - Deal points
 - Order forms

- Acknowledgment forms
- Invoices
- Many actions may suffice to create a binding contract and for that reason, parties must act carefully, which includes reviewing any and all correspondence.
- Even if a contract has not been formed, a party may still be liable for its actions.
 - For example, if a party relies on another's party's representations to the affected party's detriment, the adversely affected party may recover damages.

DELIVERY

- Delivery is the transfer of a commodity that is the subject of a contract. Delivery is the act of transferring a good between parties.
- Delivery can create confusion between the parties if responsibilities are not clearly defined and understood.
 - Buyers and seller use standardized terms to minimize the risk of confusion.
 - The Uniform Commercial Code is in effect in most states and the following terms are used:
 - FOB (Free on Board)
 - FOB is a shipment term that indicates liability. FOB is a shipment term that means delivered free of charge. "FOB the place of destination" shifts liability to the buyer once the seller ships the goods. "FOB the place of shipment" shifts liability to the seller until the buyer receives the goods.
 - FAS (Free Alongside Ship)
 - FAS is a shipment term that indicates liability. FAS is a shipment term that means delivered alongside a ship free of charge. The seller assumes risk and expense of delivering goods alongside a vessel to a designated port.
 - CIF (Cost Insurance and Freight)
 - CIF is a shipment term that indicates liability. CIF is a shipment term that outlines buyer and seller responsibility with respect to goods in transit. The seller assumes the risk and expense of the costs, insurance, and freight while the goods are in transit. The seller assumes risk and expense up until the goods are loaded onto a ship docked at a port.
- Incoterms
 - Incoterms, otherwise known as international commercial terms, are terms that clarify the responsibilities of buyers and sellers with respect to international trade contracts.
 - Incoterms are divided into four main categories that include:
 - EXW (Ex Works)
 - EXW is an international shipment term whereby the seller provides a good at an agreed upon designation and the buyer assumes transportation costs. EXW is an international shipment term where the seller's risk and loss passes to the buyer once the seller provides the good or goods to the buyer at a location chosen by the seller.
 - FCA (Free Carrier), FAS, and FOB
 - FCA is an international shipment term that where the seller assumes all risk for the delivery of goods. FCA is an international shipment term where the

seller's risk and loss passes to the buyer once the seller provides the good or goods to the buyer at a location chosen by the buyer. As incoterms, FAS and FOB are synonymous with FCA in that all terms eliminate the buyer's risk in the delivery of goods.

- CFR (Cost and Freight), CIF, CPT (Carriage Paid To), and CIP (Carriage and Insurance Paid To)
 - CFR, CIF, CPT, and CIP, as incoterms, are international shipment terms where the seller assumes specific costs even after the assumption of the risk of loss takes effect. Assumption of risk is the act of taking on the risk of damage, injury, or loss. Assumption of the risk is the act of acquiring risk under a contract.
- DAP (Delivered at Place), DDU (Delivered at Place Unloaded), and DDP (Delivered Duty Paid)
 - DAP, DDU, and DDP are international shipment terms that place maximum liability on the seller. The seller guarantees that the goods will arrive at a designated location.
- FAS, FOB, CFR, and CIF only apply to goods delivered by sea and inland waterway transportation.

ACCEPTANCE AND PAYMENT

- It is important for contracts to include acceptance and payment provisions.
- Contracts typically provide for ways in which unsatisfactory delivery of goods is handled including:
 - Permitting the buyer to unilaterally, or independently, reject the good or goods
 - Permitting the seller an opportunity to notify the buyer of any deficiencies and cure the deficiencies
 - Imposing an obligation on the buyer to pay upon delivery of the goods
- If a contract does not specify how the unsatisfactory delivery of goods, the governing law may provide baseline guidance.
- Contracts also typically specify how payment of goods is handled and cover a range of areas including:
 - Invoices
 - When the obligation of payment occurs
 - Discounts for on-time payment
 - Interest for unpaid invoices
 - Supplemental charges
 - Method of payment, including currency
 - Reimbursable expenses
 - Offsetting payment against other obligations

TERMINATION

- Termination, with respects to commercial transactions, refers to the way in which the contractual relationship between both parties will come to an end. However, a contract must also specify the duration of the contractual relationship.
- Duration
 - Contracts must specify the duration of the contractual relationship. Possibilities include:
 - A date certain, or the exact date by which one or both parties' actions must occur or a specified date

- An evergreen provision where the relationship automatically renews for a set amount of time
 - A date certain with an option for one or both party's to unilaterally extend the date
 - An open-ended term
 - A fixed initial term with an automatic extension on an open-ended basis
- Default or Breach
 - A default or breach is a violation of a party's obligations under a contract. A default or breach is a violation of a legal obligation, including those legal obligations established under contract. Examples of breach include:
 - Material default in performance
 - Material default in performance refers to a party's significant failure to honor its obligations under a contract. There is an emphasis on significant as not all failures will result in a violation under a material default in performance contractual clause. A material breach is a contract violation that is significant enough that it can be treated as a total violation.
 - Any default in performance
 - Misrepresentations or false or misleading statements
 - A misrepresentation is a false statement of material, or significant, fact. The misrepresentation adversely affects a party's ability to make decisions under a contract. Misrepresentation is the act of making a false or misleading statement with the intent to deceive another.
 - Insolvency or bankruptcy
 - Actions or omissions that result in material harm
 - Contracts typically provide for ways in which a non-breaching party may cure a default or breach. Those ways may include:
 - Terminating a contract unilaterally upon notice to the breaching party
 - Terminating the contract upon notice to the breaching party and providing the breaching party an opportunity to cure the default or breach

DISPUTE RESOLUTION

- Dispute resolution is the process of settling disagreements between the parties of a contract. Dispute resolution is the process or procedure for settling a dispute or disagreement.
- Dispute resolution may take the form of:
 - Negotiation
 - Mediation
 - Arbitration
 - Litigation
- Negotiation
 - Negotiation is the process by which the contracting parties come to an agreement over a dispute. Negotiation is the process by which disputing parties attempt to reach an agreement.
 - Contracts may specify a negotiation procedure.
 - Negotiation can occur at various levels of an organization or company.
- Mediation
 - Mediation is the process by which the contracting parties attempt to resolve a dispute through the use of a third party, also known as the mediator. Mediation is dispute resolution involving a neutral third party known as a mediator.
 - The results of a mediation do not usually bind either party.

- Arbitration
 - Arbitration, like mediation, is dispute resolution through a third party. Arbitration is more structured than mediation, and the results are binding.
 - Advantages:
 - The New York Convention, an international treaty, requires courts in participating countries to enforce arbitration decisions.
 - Arbitration is usually confidential, which may be a consideration for parties that do not want to publicize the dispute.
 - Arbitration clauses can require the third party, or arbitrator, to possess specialized knowledge in a particular area of the law that is the subject of the dispute.
 - Disadvantages:
 - Arbitration can be costly.
 - Arbitration decisions cannot be appealed.
 - Arbitration is usually confidential, which may be a consideration for a party that wants to publicize the dispute to appeal to the public.
- Litigation
 - Litigation is the process of resolving disputes through the court system in the United States.
 - Litigation adheres to a formal, structured process, outlined in the governing state's Rules of Civil Procedure.
 - Unlike arbitration, decisions in the court system can be appealed.

WARRANTIES AND LIABILITY

- A warranty is a party's guarantee, usually the seller, regarding the condition of a good or goods. A warranty is a promise by a party, usually the seller, that an aspect of a contract is guaranteed. A seller may make a promise regarding the condition of a good or goods.
 - A warranty can be limited or extensive depending on the language in the contract.
- Buyers will typically seek warranty clauses in a contract.
- Sellers will typically honor only express warranties.
 - An express warranty is an agreement by a seller to provide repairs for deficient good or goods. An express warranty is a warranty created from the seller's plain words or actions.
 - Sellers frequently disclaim implied warranties.
 - An implied warranty is an assurance, written or oral, that a good is fit for its intended purpose and meets the buyer's expectations. An implied warranty is an obligation that arises from law, not from a party's promise or representation.
 - Implied warranties are governed by state laws.
- Liability
 - Sellers typically seek to limit liability by restricting the damages a buyer may recover with dispute resolution.
 - Those types of damages sellers seek to limit include:
 - Indirect
 - Direct
 - Consequential
 - Punitive
 - Exemplary
 - Buyers typically resist sellers attempts to restrict damages.

OTHER CONTRACT PROVISIONS

- Contracts may include any number of other provisions including but not limited to:
 - Production
 - Tax obligations
 - Import and export
 - Indemnification
 - Compliance
 - Acts of God
 - Incidental waiver
 - Contract amendment

Chapter 5 – Securities Offerings

Foreign entrepreneurs may intend to engage with business investment as part of a larger business plan. Such investments will likely involve securities laws. Securities laws can often prove difficult to navigate given the federal and state laws that govern the area. A general understanding can help business owners avoid potential pitfalls and litigation. Here, you will find an overview of securities law.

SECURITIES

- A security is an instrument that acts as evidence of a holder’s ownership right in a business entity.
- Stocks and bonds are the most common types of securities.
 - Other types of securities include loans and mortgages.

FEDERAL LAW

- The federal government enacted securities laws to help regulate the offer and sale of securities.
- Securities laws help to protect investors, even if no sale ultimately occurs.
- The Securities Act of 1933 prohibits the issuance of a security unless:
 - The security is registered with the United States and Exchange Commission
 - A registration exemption applies
- States also enact securities laws known as “Blue Sky Laws” that serve to supplement federal securities laws.

PUBLIC VS. PRIVATE OFFERINGS

- A securities offering may be either public or private.
- A public offering is when a security is offered to the public and requires that a disclosure statement be filed with the SEC.
- The disclosure statement often includes extensive information about the stock issuer’s business.
- A private offering is the sale of equity to investors.
- Unlike a public offering, a private offering does not require that a disclosure statement be filed with the SEC.
 - However, with a private offering, a statement of disclosure must be given to investors or **potential investors**.

COMPLIANCE

- The Securities Act of 1933 mandates compliance once registration with the SEC is complete.
- Compliance involves:
 - The filing of regular reports
 - The filing of quarterly and annual reports
 - If there is a “voting class,” the preparation of a proxy statement
 - Disclosure requirements about the ownership interests of officers and other major shareholders

Chapter 6 – Immigration

Foreign entrepreneurs who expand their businesses or invest in the United States, as part of the commercial interest and with the aim of being able to develop their business in the United States, question what alternatives of immigration processes they can access as an investor, executive or employee of their company, or how they can send workers to their controlled companies, subsidiaries or affiliates in the United States.

In the United States, a company can only legally employ those workers who are U.S. citizens, residents ("green card" holders), or those foreigners who have a visa that allows them to work or have a work authorization document. Hiring foreign workers without proper work authorization can generate different legal problems for the company, including criminal offenses, penalties, fines, and the expulsion of the undocumented worker, among others.

Below, we describe the visa programs most used by employers to hire foreign workers:

B1/B2 Visa

- This is a nonimmigrant visitor visa for persons who want to enter the United States temporarily for business (visa category B-1), for tourism (visa category B-2), or for a combination of both purposes (B-1/B-2).
- **Category B-1**
 - Activities Permitted:
 - Consult with business associates
 - Attend a scientific, educational, professional, or business convention or conference
 - Settle an estate
 - Negotiate a contract
 - This visa is not an employment authorizing visa. Thus, the foreign national is not allowed to work within the United States, except to conduct certain business activities.
 - The foreign national may not perform services on behalf or for any United States business
 - The foreign national may not be paid from a United States source.
- **Category B-2**
 - Activities Permitted:
 - Tourism
 - Vacation (holiday)
 - Visit with friends or relatives
 - Medical treatment
 - Participation in social events hosted by fraternal, social, or service organizations
 - Participation by amateurs in musical, sports, or similar events or contests, if not being paid for participating
 - Enrollment in a short recreational course of study, not for credit toward a degree (for example, a two-day cooking class while on vacation)
- The foreign national must maintain her main residence in its country of residence and no intention of abandoning such residence.

TN NAFTA Professionals

- The North American Free Trade Agreement (“NAFTA”) permits to qualified citizens of Mexico and Canada to seek temporary entry into the United States to work for temporary periods.
 - Who are considered qualified citizens?
 - Accountants
 - Engineers
 - Lawyers
 - Pharmacists
 - Scientists
 - Teachers
- Eligibility requirements:
 - The professional is a citizen of Canada or Mexico
 - The profession qualifies under the regulations
 - The position in the United States requires a NAFTA professional
 - The professional has a prearranged full-time or part-time job with a U.S. employer (but not self-employment); and
 - You have the qualifications to practice in the profession in question.
 - Some professions may require professional license
- Canadian citizens are generally eligible for admission as nonimmigrants without a visa.
- Mexican citizens are required to obtain a visa to enter the United States as a TN nonimmigrant.
- Period of stay:
 - The initial period of stay is up to 3 years, but it may be subject to three-year increment extensions with no limit on the total period of stay.
- Dependents of TN nonimmigrant
 - Dependents allowed to join the TN nonimmigrant are
 - Spouse
 - Unmarried children under the age of 21
 - They are not permitted to work while in the United States.
 - They are permitted to study.
 - The TD status is granted for the same period of time granted to the principal.

H-1B Specialty Worker Visa

- This work visa applies to foreign nationals seeking to perform professional services in a specialty occupation.
- The specialty worker must hold at least one of the following:
 - Hold a U.S. bachelor’s or higher degree required by the specialty occupation from an accredited college or university
 - Hold a foreign degree that is the equivalent to a U.S. bachelor’s or higher degree required by the specialty occupation from an accredited college or university
 - Hold a state license or certification that authorizes the worker to practice the specialty occupation
- Labor condition application certified by the Department of Labor is required.
- The employer must be the petitioner and the worker will be considered the beneficiary.
- Period of stay and renewals:
 - The period of stay in the U.S. under the H-1B visa is three (3) years with extensions available for up to three (3) years more

- Considering the demand for this visa classification, the H-1B Specialty Worker Visa has an annual limit, known as “cap,” of 65,000 new visas for each fiscal year. There are 20,000 additional visa petitions for beneficiaries with a master’s degree or higher from a U.S. institution of higher education are exempt from the cap.
- H-1B beneficiaries for employment at nonprofit entities, nonprofit research organization, institutions of higher education or its affiliated, or a government research organization, are exempt from the numerical cap limit.
- Dependents of H-1B workers:
 - Dependents allowed to join the H-1B nonimmigrant under an H-4 nonimmigrant classification are:
 - Spouse
 - Unmarried children under the age of 21
 - Certain H-4 spouses can request employment authorization

E-1 – Treaty Trader

- The E-1 Visa allows international traders, or their senior or skilled employees, to enter the United States for the purpose of carrying out substantial trade.
- The Treaty Trade applicant must be coming to the U.S. to engage in “**substantial trade.**”
- To qualify (Treaty Trader):
 - Be a national of a country with which the United States maintains a treaty of commerce and navigation
 - Carry on substantial trade, and
 - Carry on principal trade between the United States and the treaty country which qualified the treaty trader for E-1 classification
- Period of Stay:
 - Qualified treaty traders and employees will be allowed a maximum initial stay of two years.
- Renewal:
 - Requests for extension of stay in, or changes of status to, E-1 classification may be granted in increments of up to two years each.
- Dependents:
 - Dependents allowed to join the E-1 treaty trader:
 - Spouse
 - Unmarried children under the age of 21
 - Spouses of E-1 traders are authorized to work in the United States.

E-2 – Treaty Investor

- The E-2 Visa allows individual with significant funds to invest to come to the United States to set up a business, practice, or office.
- To qualify (Treaty Investor):
 - Be a national of a country with which the United States maintains a treaty of commerce and navigation;
 - Have invested, or be actively in the process of investing, a “**substantial amount**” of capital in a bona fide enterprise in the United States; and
 - Be seeking to enter the United States solely to develop and direct the investment enterprise

- Substantial Investment:
 - Substantial in relationship to the total cost of either purchasing an established enterprise or establishing a new one
 - Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise
 - Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise
 - The lower the cost of the enterprise, the higher, proportionately, the investment must be to be considered substantial
- Period of Stay:
 - Qualified treaty investors and employees will be allowed a maximum initial stay of two years.
- Renewal:
 - Requests for extension of stay in, or changes of status to, E-2 classification may be granted in increments of up to two years each.
- Dependents:
 - Dependents allowed to join the E-2 treaty investor:
 - Spouse
 - Unmarried children under the age of 21
 - Spouses of E-2 investors are authorized to work in the U.S.

L-1 - Intracompany Transfer

- The L-1 visa allows companies to open a U.S. operation for the transfer of its executives, manager, and specialized employees in temporary positions.

L-1A - Intracompany Transferee Executive or Manager

- The L-1A Visa is for managers and executives, who are either transferring to a U.S. office, or coming into the United States for the purpose of setting up a U.S. office.
- To qualify (L-1A) - Employee:
 - Generally, have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding his or her admission to the United States; and
 - Be seeking to enter the United States to provide service in an executive or managerial capacity for a branch of the same employer or one of its qualifying organizations
- To qualify - Employer:
 - The U.S. petitioning employer must have a qualifying relationship with the foreign company where the beneficiary works, by being a parent, subsidiary, branch, or affiliate company
 - The U.S. petitioning employer must be currently doing business, or will be doing business in the United State and in at least other country during the Beneficiary's temporary position in the U.S.
- Period of Stay:
 - Qualified employees entering the United States to establish a new office will be allowed a maximum initial stay of one year. All other qualified employees will be allowed a maximum initial stay of three years

- Renewal:
 - For all L-1A employees, requests for extension of stay may be granted in increments of up to an additional two years, until the employee has reached the maximum limit of seven years
- Dependents:
 - Dependents allowed to join the L-1A employees:
 - Spouse
 - Unmarried children under the age of 21
 - Spouses of L-1A employees are authorized to work in the U.S.
- The L-1A visa is considered a dual-intent visa, which means that employees under the L-1A classification may seek permanent residence under the EB-1 multinational executive or manager category

L-1B - Intracompany Transferee Specialized Knowledge

- The L-1B visa is for specialized employees, who have essential specialist skills or knowledge.
- To qualify (L-1B) - Employee:
 - Generally, have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding his or her admission to the United States; and
 - Be seeking to enter the United States to provide services in a specialized knowledge capacity to a branch of the same employer or one of its qualifying organizations
- To qualify - Employer:
 - The U.S. petitioning employer must have a qualifying relationship with the foreign company where the beneficiary works, by being a parent, subsidiary, branch, or affiliate company.
 - The U.S. petitioning employer must be currently doing business or will be doing business in the United States and in at least other country during the Beneficiary's temporary position in the United States.
- Period of Stay:
 - Qualified employees entering the United States to establish a new office will be allowed a maximum initial stay of one year. All other qualified employees will be allowed a maximum initial stay of three years.
- Renewal:
 - For all L-1B employees, requests for extension of stay may be granted in increments of up to an additional two years, until the employee has reached the maximum limit of five years.
- Dependents:
 - Dependents allowed to join the L-1B employees:
 - Spouse
 - Unmarried children under the age of 21
 - Spouses of L-1B employees are authorized to work in the U.S.

EB-1-3 - Immigrant Multinational Manager or Executive

- The EB-13 is first-preference petition for permanent residence of certain multinational manager or executive employees.

- To qualify - Employee:
 - Generally, have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding the petition or the most recent lawful non-immigrant admission if already working for the U.S. petitioning employer
- To qualify – Employer:
 - Have being doing business in the U.S. for at least 1 year
 - Have a qualifying relationship with the foreign entity where the Beneficiary worked for
 - Intent to Beneficiary in a permanent managerial or executive position
- Period of Stay:
 - The Beneficiary is now considered permanent resident of the United States
- Dependents:
 - Spouse and unmarried children under the age of 21 also get the permanent residence

EB-5 - Immigrant Investor Program

- The EB-5 Visa grants permanent resident status to investors who satisfy certain criteria
- USCIS administers the EB-5 Program. Under this program, investors (and their spouses and unmarried children under 21) are eligible to apply for a Green Card (permanent residence) if they:
 - Make the necessary investment in a commercial enterprise in the United States; and
 - Plan to create or preserve 10 permanent full-time jobs for qualified U.S. workers
- All EB-5 Investors must invest in a new commercial enterprise that was established:
 - After Nov. 29, 1990; or
 - On or before Nov. 29, 1990, that was:
 - Purchased and the existing business is restructured or reorganized in such a way that a new commercial enterprise results; or
 - Expanded through the investment, resulting in at least a 40% increase in the net worth or number of employees
- There are two investment Alternatives which make you eligible for an EB-5 Visa:
 - Investing at least \$800,000 in a Targeted Employment Area (TEA) or a Regional Center
 - Direct investment of at least \$1,050,000 outside a TEA in a Commercial Enterprise
- Regional Center:
 - An economic unit, public or private, in the United States that is involved with promoting economic growth
- Targeted Employment Area (TEA):
 - An area that, at the time of investment, is a rural area or a non-rural area which has experience unemployment that is at least 150 percent of the national average rate
- Commercial Enterprise:
 - Any for-profit activity formed for the ongoing conduct of lawful business
- Requirements (EB-5 Visa Investment):
 - It must meet the minimum capital amount.
 - It must create at least 10 new full-time jobs for at least two years. If you cannot prove immediately that the investment has created the positions, you should be able to prove that the need for at least 10 new full-time employees will arise
 - The investment must be approved by the USCIS
 - The enterprise you invest in must be a “for-profit” new commercial enterprise established after 1990
 - The money you invest must be considered “at-risk”, meaning that there is no guarantee of capital return

Chapter 7 – Taxation

The U.S. tax system is rather complex as it is enforced on the federal level by the Internal Revenue Services (the “IRS”), on the individual state level by the state Departments of Revenue, Comptroller’s offices, as well as on the local level by local taxing authorities or similar agencies. Although some states and local agencies choose to impose taxes in a manner that is similar to the federal level, many others deviate their taxing schemes to varying degrees while the rest simply do not have a federal counterpart. Hence, special attention should be given to specific state and local laws.

Types of Taxes Imposed

- There are different types of taxes imposed, such as taxes on what you earn, what you buy and what you own.
 - The income taxes are generally determined by applying a tax rate to taxable income, which is broadly defined.
 - Companies, individuals, estates and trusts, and certain gifts may all be subject to income taxes.
 - When you decided to purchase furniture for a U.S. company that you just formed, you will likely need to pay taxes on your purchases. One might think that the purchase of any vacant land or commercial property is a one-time investment. While that might hold some truth, you must be aware that those purchase will incur certain tax obligations on a regular basis, such as property taxes, and any business automobiles, equipment, furniture, inventory, and machinery that can be touched or moved may be subject to Tangible Personal Property taxes.

Tax Planning

- Tax planning is facts and circumstances specific and must be tailored towards each individual or company’s specific objectives. Any foreign company wishing to do business in the U.S., or a U.S. company wishing to do business in a foreign country must take taxing planning seriously and address it early in the planning process.
- Companies should consult with professional tax advisors and preferably retain local legal counsel that has experience and knowledge in the taxation field so legal and tax issues can be considered as a whole in an organic way as opposed to independent from each other.
- BMD has attorneys who choose to receive advanced training in taxation and have attorneys licensed to practice in 17 states in the United States. In addition, the attorneys at BMD have worked with accounting firms of varied sizes so that legal and tax issues can be discussed and considered efficiently between professionals.

Inbound

- When a foreign company decides to engage in a trade or business in the U.S., it can either set up a subsidiary, or operate through a branch or division.
 - Generally speaking, a subsidiary can be more cost effective. The reason is that a U.S. subsidiary is setup as a U.S. company and all of its income will fall under the U.S. taxing authority.
 - As stated above, a natural person must pay taxes on what s/he earns.
 - For a corporation, it must also pay taxes on its earnings on top of the federal employment taxes for its employees.

- If the foreign company decides to operate its business directly in the United States through a branch or division in the United States, it must evaluate whether the home country of the foreign company is a party to a tax treaty with the United States.
 - If there is one and if it is more favorable, then it needs to determine if the foreign company is eligible and qualified under the specific provisions. Otherwise, if the home country does not have a tax treaty, then the Code will govern the taxation.
- Foreign companies must carefully plan, anticipate, and deal with the transfer pricing regulations.
 - When a foreign company sells certain goods in the United States at an inflated price, the result is a lower profit thus reducing its taxes in the United States.
 - The transfer pricing rules are put in place so that IRS are permitted to reconstruct the pricing to reflect a lower than FMV pricing which yields higher profits for its U.S. trade or business in order to impose additional tax owed to the United States

Outbound

- Similar to the inbound analysis, a domestic U.S. company may decide to reach the international market.
 - The first important issue is to determine whether to operate directly in the foreign country or form a separate entity.
 - A major consideration is who recognizes the income and losses and what types of deductions, if any, can be utilized.
- For a foreign branch or a foreign disregarded entity, the U.S. company typically would recognize the income or losses earned, which is also subject to separate Foreign Tax Credit limitation baskets.
 - In the case of operating through a foreign corporation, the U.S. company would have to include subpart F income as well as GILTI earned by the foreign corporation.
 - However, certain income from the foreign corporation that had been included by the U.S. company can be distributed tax-free.

FIRPTA

- Real estate transactions involving non-U.S. parties often are subject to the Foreign Investment in Real Property Tax Act of 1980 (“FIRPTA”).
 - When a foreign person (the “Transferor”) disposes of a U.S. real property interest, FIRPTA income tax withholding is triggered on the Transferor where the transferee must deduct and withhold a tax on the total amount *realized* by the foreign person on the disposition then remit it to the IRS.
 - FIRPTA essentially assures that any profits made from the sale and purchase of the real property interest are taxed in the United States regardless of whether the Transferor is doing business in the U.S. or have a permanent establishment in the United States.
 - The rate of the withholding generally is 15% (or 10% for dispositions before February 17, 2016) as of November 19, 2021.
 - The definition of “U.S. real property interest” is expansive and can include any interest in real property (including mine, well or natural deposit) located in the U.S. or U.S. Virgin Islands, certain personal property associated with the use of real property, any interest in a domestic corporation unless such corporation was at no time a U.S. real property holding corporation during the shorter period of: (a) during which the interest was held, or (b) the 5-year period ending on the date of the disposition.

- The amount “realized” is the sum of: (a) cash paid or to be paid, (b) fair market value of other properties transferred or to be transferred, if any, and (c) liability assumed by the transferee (i.e., purchaser) or to which the property is subject immediately before and after the transfer.
- There are specific considerations if the Transferor consists of both U.S. and foreign persons, the Transferor being a foreign corporation or a domestic corporation with foreign shareholders.
- Section 1445 of the Internal Revenue Code and certain regulations include additional information on the withholding rules on corporations, trusts, estates, and REITs.

Foreign Nationals in the United States

- Nationals of any foreign country (i.e., non-U.S. nationals) may be treated as U.S. residents and are subject to the U.S. taxes.
 - Nationals of any foreign country (i.e., non-U.S. nationals) may be treated as U.S. residents and are subject to the U.S. taxes.
 - If s/he meets the Green Card Test or the Substantial Presence Test for the calendar year, that non-U.S. national will be treated as a U.S. resident for tax purposes.
 - If at any time during a given calendar year, a non-U.S. resident gained lawful permanent resident status, that person is considered to have met the Green Card Test and is treated as a U.S. resident.
 - On the other hand, the Substantial Presence Test is more complex. As of July 27, 2022, and subject to certain exceptions, if a non-U.S. national are physically present in the U.S. on at least:
 - (a) 31 days during the current year, and
 - (b) 183 days during a three-year period including the current year and the two years preceding the current year, counting the following:
 - (i) all the days the individual was present in the current year, and
 - (ii) one third (1/3) of the days the individual was present in the first year immediately preceding the current year, and
 - (iii) one sixth (1/6) of the days the individual was present in the second year before the current year.
 - There are special IRS definitions on what “days of presence in the U.S.” or “United States (U.S.)” mean in this context. The above information, coupled with the estates and gifts tax that were mentioned previously made it necessary for nationals of any non-U.S. country to consult with legal and tax advisors concerning the non-U.S. nationals’ immigration status and applications of taxes.

Chapter 8 – Trade

An understanding of commercial trade in the United States is critical for foreign entrepreneurs. Business operation typically involves many cross-border transactions including the importation of goods. An understanding of customs, laws, and tariffs will help foreign entrepreneurs avoid any pitfalls associated with commercial trade. Here, you will find an overview of trade law.

IMPORTATION OF GOODS

- The importation of goods into the United States involves:
 - Entry
 - Examination
 - Liquidation

UNITED STATES-MEXICO-CANADA FREE TRADE AGREEMENT

- The USMCA is an agreement between the United States, Canada, and Mexico that establishes a free trade area between the countries.

TARIFFS

- A tariff is a duty imposed by the government on imported goods.
- A tariff-rate quota is a quota that restricts the number of imported goods entering the United States.

NORTH AMERICAN FREE TRADE AGREEMENT (“NAFTA”)

- The North American Free Trade Agreement is an agreement that establishes a free trade area between the countries constituting North America: Canada, the United States, and Mexico.

Chapter 9 – Employment Law

EMPLOYMENT LAW AND AGENTS

Foreign entrepreneurs who hope to do business in the United States will need to hire employees. Depending on classification, U.S. employees enjoy a range of protections and benefits. Employment law can vary widely between the United States and other countries. Foreign entrepreneurs must exercise caution to avoid many of the pitfalls associated with employment law. Here, you will find an overview of employment law.

AT WILL EMPLOYEES

- An “at will” employee is an employee who can be terminated by the employer at any time for any reason or without cause. Unlike other countries, the United States does not automatically afford employees the right of continued employment.
 - Employees are presumed to be at will unless an employment contract specifies otherwise.

EMPLOYMENT AGREEMENTS

- Employment agreements are contracts that govern the terms of employment. Employment agreements may include the following provisions:
 - Compensation
 - Bonus arrangements
 - Duties and responsibilities
 - Protection of confidential information
 - Rights to intellectual property
 - Noncompetition provisions
 - Duration of the contract
 - Termination
 - Severance
- Eliminating Presumption of At Will Employment
 - An employment agreement may eliminate the presumption of at will employment. Certain protections such as a specific term of employment may act to eliminate the presumption.

RESTRICTIVE COVENANTS

- A restrictive covenant is an agreement a party enters into that restricts the party in some way. A covenant is a formal agreement between two parties. A restrictive covenant is a formal agreement between two parties that restricts one or both parties in some way.
- Employers will typically ask employees to enter into a restrictive covenant where the employee is prohibited from competing with the employer both during and after employment, in the event employment is later terminated.
- Most jurisdictions in the United States will enforce restrictive covenants, but only narrowly.
- Most jurisdictions in the United States require restrictive covenants to be reasonable in:
 - Duration
 - Territory
 - Scope of the restricted activity

PROTECTING THE EMPLOYER'S INTELLECTUAL PROPERTY

- Intellectual property rights are intangible assets. Intellectual property rights are intangible assets afforded property rights protection. In the United States, intellectual property created by an employee in the scope of employment belongs to the employer.
 - Employers should protect themselves by specifying the employer's rights with respect to intellectual property in employment agreements.
 - An employer may expressly retain all intellectual property related to the business or all intellectual property that arise during the employee's employment.

INDEPENDENT CONTRACTORS

- An independent contractor is a self-employed person contracted to perform work for an entity. Independent contractors are not employees. An independent contractor is a person allowed to accomplish a project through the person's own means. An independent contractor is not an employee, and the independent contractor, not the employer, is liable for wrongdoing.
- There is a default assumption in the United States that a worker is an employee.
- Employee vs. Independent Contractor
 - The main difference between an employee and independent contractor is the way in which taxes are handled by the employer.
 - With an employee, employers are obligated to comply with tax obligations including income tax withholding and employment tax contribution.
 - With an independent contractor, the independent contractor is responsible for tax obligations.
 - When determining whether a worker is an employee or independent contractor, regulatory agencies will typically focus on the degree of control the employer exercises over the tasks to be performed by the worker.

WAGE AND HOUR REQUIREMENTS

- Wage and hour requirements are determined by the employee's status.
- Nonexempt
 - In the United States, there is a presumption that an employee is nonexempt.
 - A nonexempt employee is entitled to the federal minimum wage and overtime pay.
 - With overtime pay, federal law requires that nonexempt employees be paid not less than time and one-half the regular rate of pay for hours worked over forty hours in a workweek (the typical workweek in the United States is forty hours).
- Exempt
 - An exempt employee is paid on a salary basis regardless of the number of hours worked.
- Misclassification
 - If an employer misclassifies an exempt employee as nonexempt, the employer may be entitled to:
 - Unpaid wages, including overtime pay
 - Liquidated damages

LABOR UNIONS

- A labor union is an organization formed by employees for the purpose of improving working conditions. A labor union is an organization formed by employees for the purpose of collectively negotiating with an employer or employers.

- In the United States, labor unions are more prominent in states in the Northeast, including Pennsylvania, New Jersey, and New York.
- A federal statute, the National Labor Relations Act protects the rights of employees to organize and bargain collectively.
- Many employers resist the formation of labor unions, given the protections afforded to labor unions and the employees they represent.

ANTI-DISCRIMINATION

- Discrimination is unfair treatment based on an individual's sex, race, age, or other protected attribute. Federal, state, and local laws in the United States protect all employees, including at will employees, from discrimination.

EMPLOYEE BENEFITS

- In the United States, state and federal law impose few employee benefits on employers.
 - However, employers are required to pay a certain percentage of an employee's wage base as a contribution to the U.S. Social Security Program.
- Workers' Compensation
 - Workers' compensation is a form of insurance that pays benefits to workers who are injured as a result of their employment. Workers' compensation is a system that confers benefits to employees for injuries sustained during employment.
 - All fifty states require employers to obtain workers' compensation insurance.
- Qualified Retirement Plan
 - A qualified retirement plan is an optional employee benefit that meets IRS requirements.
 - A qualified retirement plan supplements the federal Social Security system.
 - The most qualified retirement plan requires:
 - The employer and employee to both contribute to the plan
 - A separate retirement account for each employee
 - The employee determines the amount of money invested
 - Qualified retirement plans are used by employers to attract qualified applicants.
- Employee Incentive Considerations
 - An employee incentive is a different name for an employee benefit. A business entity may provide employee incentives to its employees based on the type of business entity.
 - A C-corporation and S-corporation may provide share options to employees. A share option is a right to buy or sell shares in a company at a designated price for a specific period of time.
 - An LLC, GP, LLP, LP, and LLLP may provide profits interests or non-qualified options to acquire a membership, partnership, or LP interest to employees. A profits interest is an equity interest that gives the holder the right to share in the future profits of a partnership. A non-qualified option to acquire a membership interest is a contractual right to purchase a membership interest in the business entity.

SEVERANCE

- Severance is the compensation an employer provides to an employee after employment ends. Severance is the money paid to a terminated employee by an employer.
- In the United States, contract provisions, not federal and state law, govern severance terms.
- If an employer does not pay severance, the employer may be responsible for unpaid wages, lawyer's fees, and liquidated damages.

Chapter 10 – Real Estate Investment and Development

The purchase, sale, construction, leasing, management, and holding of real property is one of the most common and active ways to invest, establish operations within the United States, and continue to build wealth by foreign businesses and entrepreneurs.

In recent years, the value of real property – whether vacant land or property with improvements such as residential, commercial, medical, industrial real estate – has increased providing healthy returns for investors. Even with the advent of increasing interest rates, real estate transactions continue to provide attractive opportunities for international investors, particularly by foreign investors seeking to immediately invest or strategically plan for long-term business presence in the United States.

Our attorneys at BMD represent:

- **Individuals**
- **Developers**
- **Investors**
- **lenders and**
- **businesses**

in the acquisition, development, financing, sale, and leasing of real estate. We assist in planning the structure of, negotiating, financing, and documenting and closing real estate transactions.

Our BMD team is positioned to advise and guide from initial search to final closing, with the ability to facilitate parties executing sale and loan documents abroad via remote online notarization.

Real estate transactions within the United States may include and necessitate the following legal assistance to ensure the transaction is completed properly and to protect the foreign party interests:

- Negotiation and closing of real estate acquisitions and sales, including the preparation of purchase agreements, sale/leaseback agreements, conveyance documents, financing documents, tax-deferred and multiple-party exchange agreements, escrow instructions and other related documents. BMD is also able to assist our clients in structuring and documenting “like-kind” or “1031” exchanges.
- Negotiation and preparation of leases for landlords and tenants, including ground leases, build-to-suit leases, residential leases, office leases, retail leases, industrial leases, and subleases.
- Assisting clients in all types of real-estate development, including residential, multi-family, golf-course, shopping-center, industrial, office, hotel, and urban developments.
- Creation and operation of residential, commercial, and mixed-use condominiums; planned-unit developments; and with construction and design contracts for such projects.

BMD also represents clients seeking financing as well as varied lending institutions in providing financing. Our lawyers advise clients on current methods and alternatives of real estate financing and assist in the structuring, restructuring and documentation of interim, permanent, and securitized real estate mortgages, loan agreements and financing, and security documents.

Other areas of real estate services to be considered:

- [Title and closing services for commercial and residential transactions](#)
- Work with Association Boards to create and amend bylaws, covenants, conditions and restrictions, rules, amendments, and articles of incorporation
- Enforcement of the association’s rules

- Legal advice and interpret laws as they apply to the association
- Prepare and review contracts with vendors and employees
- Assist with association elections
- Handle collections issues, including the filing of liens, if necessary, against homeowners
- Represent the board in dealings with government agencies
- Litigate against developers and contractors
- Review the association's insurance and recommend areas where additional coverage is necessary
- Advise on appropriate procedures and processes when the association is conducting board meetings

PROPERTY TAX CONSIDERATIONS

- Foreign investors are subject to federal, state, county, and city taxes as U.S. Citizens. Among these tax obligations, foreign investors are subject to real estate taxes that are specific to foreign investors namely the taxes required under the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA").
 - When a foreign person (the "Transferor") disposes of a U.S. real property interest, FIRPTA income tax withholding is triggered.
- Property tax is an ad valorem tax on the value of property, assessed usually at the local jurisdiction level. Property tax can be assessed on real property or tangible personal property.
 - Taxes that are assessed on real property and personal property in the United States are considered "ad valorem" taxes. This type of tax is assessed on the value of the property on an assessment date each year.
 - Real property is fixed property, such as land and buildings.
 - Tangible personal property is a type of asset that has value but is not physical in nature, such as patents, patent applications, trade names, trademarks, copyrights, and trade secrets.
 - Real property is often taxed based on its class, with classification grouping properties based on similar use. Properties in different classes are taxed at different rates. Examples of property classes are residential, commercial, industrial, and vacant real property.
- County assessors and state assessors determine the taxable value of property each year. The taxable value is usually limited to its fair market value at the time of acquisition plus an adjustment for inflation.
 - The rates of tax on each type of real property vary greatly among jurisdictions.
- Local jurisdictions can also impose special assessments to owners of real property. Special assessments are charges levied against a particular property that will gain a benefit from a public project. Examples include infrastructure improvements such as roads, streetlights, or sewer, stormwater, and water connections to a municipal water supply. Special assessments may also be imposed to owners of condominium properties; these special assessments are imposed by condominium association governing that particular condominium property.
- In addition to direct Taxes described in Section 7 of this Guide, including FIRPTA, there are other special considerations for transactions involving real estate investments and development, including the purchase, sale, leasing, construction, and property management of vacant lots, residential, commercial, industrial, and other real property transactions.

BMD REAL ESTATE ATTORNEYS can assist in all aspects of real estate investment and development, including special tax considerations, to ensure the real estate transactions and obligations of foreign investors are handled efficiently and in compliance with federal, state, county, and local laws.

How Can BMD Help

BMD has a history of providing personalized and professional services to the business community in every aspect of our business. Our team of experienced attorneys offers valuable counsel in a variety of transactional, litigation and arbitration matters. In step with the global economy, our firm has offered these services on an international basis for years.

Our attorneys have the legal experience and the business, cultural and linguistic expertise necessary to help our clients navigate the complexities of business abroad. We also have an extensive track record in helping clients establish, grow, and protect their business interests worldwide. To ensure valid practices are being followed, our international experts' knowledge of the Foreign Corrupt Practice Act (FCPA) provides the vital guidance to American companies so that they meet the compliance, enforcement, and public policy requirements to conduct business internationally without fear of running afoul of the law.

Our team's commitment to our clients enables them to build lasting partnerships, gain government and private contracts, acquire foreign businesses, deal with various trade issues, and invest successfully in overseas economies. Regardless of our client's industry, size or location, BMD can apply our expansive knowledge and expertise to represent a broad spectrum of businesses to achieve their corporate objectives. Representation has included venture capital and private equity, manufacturing, healthcare, and technology.

The United States remains a favorable destination for global investment and offers a competitive environment in which to do business. However, the accelerating pace of change in US regulations and policy, combined with a more complex global environment, including unexpected developments such as the COVID-19 pandemic, amplify the need for layered planning. Global companies doing business in the United States should be even more vigilant with respect to their US tax situation and management of their US operations

Our firm's varied law practices enable foreign entrepreneurs navigate through all aspects of doing business in the United States and can guide foreign investors, business owners, and emerging and established entrepreneurs alike.

In the current challenging economic environment, our BMD attorneys, with our support staff and business alliances, can advise on:

- formation of a new business entity and restructuring to maintain privacy and asset protection
- financing your US operations in a tax-efficient manner
- planning for growth through tax-efficient transactions and deals
- applying for and protecting patent, trademark, copyright, and intellectual property rights
- mergers, acquisitions, and joint ventures
- securities offerings
- navigating the complex immigration system to enable a personal and business footprint in the U.S.
- representation and "closings" of asset purchase agreements and real estate transactions, including purchase, sale, leasing, and management of real property
- trade, commercial transactions, and employment law
- meeting tax and trade compliance obligations

Brennan Manna & Diamond understands the multi-tiered needs of international entrepreneurs focused on doing business in the United States.

As complexity in trade increases, the need for experienced legal counsel practicing in established and emerging areas of international, state, and local law is critical in ensuring success. BMD is available to advise and help international businesses and individuals establish, navigate, and succeed in Doing Business in the United States.

BRENNAN, MANNA & DIAMOND

With offices in:

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Canton, Ohio	Jacksonville, Florida
Columbus, Ohio	Orlando, Florida
Cleveland, Ohio	Phoenix, Arizona

MORE INFORMATION AVAILABLE ONLINE

For more information, please visit our BMD Website at: <https://www.bmdllc.com>.

To explore BMD's varied practice areas, please visit: <https://www.bmdllc.com/practice-areas/>

To learn more about BMD's international practice, please visit: [International Law \(bmdllc.com\)](https://www.bmdllc.com/international-law/).

To contact us at BMD, please visit: <https://www.bmdllc.com/contact-us>



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