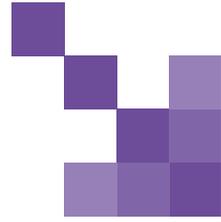


# Doing business in United States: Delaware



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## LEGAL SYSTEM

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

Delaware has a common law system.

## FOREIGN INVESTMENT

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

Delaware does not impose restrictions on foreign investment.

3. Are there any exchange control or currency regulations?

Delaware does not impose exchange control or currency regulations.

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

Delaware does not have grant or incentive programmes specifically for foreign investors. However, foreign investors may be able to participate in grants and incentives available to investors generally, including programmes such as the Delaware Competitiveness Fund and the Technology-Based Seed Fund.

## BUSINESS VEHICLES

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

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

The most common business vehicles used are Delaware corporations and Delaware limited liability companies. Delaware is a leading jurisdiction in the US for the formation of business vehicles. Both forms are described below.

- **Registration formalities.** A corporation is formed by filing a certificate of incorporation with the Secretary of State of Delaware. A limited liability company is formed by filing a certificate of formation with the Secretary of State of Delaware and entering into a limited liability company agreement. Filing can be completed within one day.

- **Share capital.** Delaware does not impose minimum or maximum limits on share capital.
  - **Non-cash consideration.** A corporation's shares can be issued for non-cash consideration. Members of limited liability companies can also make contributions in non-cash consideration, subject to provisions in the limited liability company agreement.
  - **Rights attaching to shares.** The rights, powers and preferences of shares must be set out in a corporation's certificate of incorporation. The rights, powers and preferences of limited liability company interests must be set out in the limited liability company agreement. If the certificate of incorporation or limited liability company agreement fails to set out these matters, the General Corporation Law of the State of Delaware (*8 Del C § 101 et seq*) and the Delaware Limited Liability Act (*6 Del C § 18-101 et seq*) provide default rules.
  - **Foreign shareholders.** Delaware does not impose restrictions on foreign shareholders or limited liability company members.
  - **Management structure.** Unless the certificate of incorporation provides otherwise, a Delaware corporation is managed by, or under the direction of, its board. A Delaware limited liability company can be managed either by its members or by a manager, depending on what the limited liability company agreement provides. There are no co-determination rules or citizenship requirements for management.
  - **Directors' liability.** Directors of corporations and managers of limited liability companies are fiduciaries and can be held liable for breach of fiduciary duty. Directors can also be liable for the unlawful payment of dividends or unlawful share purchase or redemption. Companies can include a provision in the certificate of incorporation limiting liability for breach of fiduciary duty except for:
    - breaches of the duty of loyalty;
    - acts not taken in good faith;
    - unlawful dividends or share repurchase or redemption;
    - acts from which the director derived an improper personal benefit.
- Limited liability company managers can be protected from personal liability in the limited liability company agreement.
- **Parent company liability.** Parent companies are not liable for the acts of their subsidiaries except in circumstances where the corporate veil can be pierced.
  - **Reporting requirements.** Delaware does not require corporations to file accounts publicly, but a short annual franchise tax report is due annually. The filing fee for the report is US\$25 (about EUR17.5), which is payable with the franchise taxes.

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## EMPLOYEES

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### 6. What are the main laws regulating employment relationships?

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Employment is governed by statute and common law. The Delaware Department of Labor enforces employment statutes and investigates discrimination charges and wage and hour violations. The principal state employment laws are the:

- Discrimination in Employment Act (*19 Del C § 710 et seq*), applicable to employers of four or more persons, which prohibits employment discrimination on the grounds of:
  - race;
  - colour;
  - age;
  - religion;
  - sex;
  - national origin;
  - genetic information;
  - marital status.
- Handicapped Persons Employment Protection Act (*19 Del C § 720 et seq*), applicable to em-

employers of 15 or more employees, which prohibits discrimination against disabled persons.

- Wage Payment and Collection Act (*19 Del C § 1100 et seq*), which governs payment of wages and benefits.

Employers may not require polygraph examination as a condition of employment or continuation of employment (*19 Del C § 704*).

These laws apply to foreign employees working in Delaware. Their applicability to Delaware employees working abroad depends on a number of factors including the law, if any, governing the employment contract.

A written contract can provide that Delaware or some other law will apply. Certain laws may apply irrespective of choice of law in the employment contract, but the scope of such application has not been defined by statute or case law.

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

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Written employment contracts are not required. However, employers of four or more employees must provide employees with written notification of the rate, time and place of payment. In addition, employers of four or more employees must also provide employees with:

- Written notice of employment fringe benefits and policies.
- Written notice of any reductions in the rate of pay, and any changes in the day, hour or place of payment or benefits.
- A pay statement showing the:
  - amount of wages due;
  - pay period covered by the payment;
  - amounts and deductions made from wages;
  - total number of hours worked in the pay period (for employees paid on an hourly basis).

Every employment relationship includes an implied duty of good faith.

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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 and/or to be consulted in relation to corporate transactions.

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

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Delaware is an employment-at-will state. The employee and the employer are free to terminate the employment relationship, at any time, with or without notice and with or without cause. Severance payment is not required unless the employer voluntarily has such a policy. However, there are some general exceptions:

- Certain federal and state anti-discrimination laws restrict discriminatory or retaliatory dismissal.
- The Delaware Whistleblowers Protection Act (*19 Del C § 1700 et seq*) prohibits dismissing, threatening, or otherwise discriminating against an employee for:
  - refusing to violate federal, state or local law;
  - reporting such a violation; or
  - participating in an investigation of such a violation.
- An employer must not discharge an employee for:
  - filing a worker's compensation claim (*19 Del. C. § 2365*);
  - refusing to take a polygraph test.
- The implied covenant of good faith can be a basis for wrongful dismissal claims, limited to:
  - violations of public policy;
  - misrepresentation by an employer of a material fact;

- ❑ an employer's use of superior bargaining power to withhold past remuneration;
- ❑ falsifying records to create fictitious reasons for dismissing an employee.

The remedies available to employees if the above rules are not followed vary by statute, but may include:

- Actual damages.
- Back and front wages.
- Punitive damages.
- Penalties.
- Lawyers' fees and interest.
- Reinstatement.
- Injunctive orders.

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

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Redundancies/mass layoffs are not regulated.

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

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Foreign employees must have work permits under federal law. There is no supplemental Delaware state law.

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**TAX**

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

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Tax residency in Delaware arises from either:

- Domicile in Delaware.
- The maintenance of a place of abode in Delaware, plus presence in Delaware for more than 183 days in the taxable year.

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

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

Tax resident employees are subject to Delaware income tax on their worldwide income, at rates between 2.2% and 5.95%. Social security contributions and other federal taxes are governed by federal law.

**Non-tax resident employees**

Non-tax resident employees are subject to Delaware income tax only on their Delaware source income, at rates between 2.2% and 5.95%. Social security contributions and other federal taxes are governed by federal law.

**Employers**

Employers must withhold Delaware income tax from amounts paid to resident employees and non-resident employees who are subject to Delaware income tax and to pay the amount withheld to the Delaware Division of Revenue. Social security contributions and other federal taxes are governed by federal law.

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

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A corporation or other taxable entity is subject to Delaware income tax only on the portion of its income allocated or apportioned to Delaware. Partnerships and certain other types of entities are not subject to Delaware income tax (*see Question 15*).

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

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**Corporations**

A corporation is subject to the following taxes:

- **Corporate income tax.** A corporation is subject to Delaware corporate income tax only on income

from Delaware sources or income apportioned to Delaware, at the rate of 8.7%, regardless of jurisdiction of incorporation or tax residence.

- **Gross receipts tax.** A corporation doing business in Delaware and having receipts from Delaware sources is subject to Delaware gross receipts tax at various rates depending on the nature of the business conducted in Delaware.
- **Corporate franchise tax.** A corporation incorporated under the laws of Delaware is also subject to an annual corporate franchise tax.

### Limited liability companies

No Delaware income tax is imposed on a limited liability company classified as a partnership for federal income tax purposes. Any limited liability company, regardless of jurisdiction of formation or tax residence, is subject to Delaware gross receipts tax on receipts from Delaware sources.

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

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The Delaware taxation of corporations and limited liability companies depends on their sources of income and gross receipts, not jurisdiction of incorporation or formation, or tax residence (*see Question 14*).

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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.**
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- **Dividends paid.** Delaware does not impose withholding taxes on dividends paid to a corporation's shareholders.
  - **Dividends received.** A corporation doing business in Delaware must include, in its Delaware taxable income, dividends received from a foreign corporation, unless foreign tax is:
    - paid;
    - deemed paid; or

- accrued under applicable provisions of the US Internal Revenue Code.

A limited liability company that is classified as a partnership for federal income tax purposes is not subject to Delaware income tax on dividends it receives from a foreign corporation.

- **Interest paid.** Delaware does not impose withholding tax on interest paid to a corporation's shareholders.
- **IP royalties paid.** Delaware does not impose withholding tax on IP royalties paid to a corporation's shareholders.

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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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Delaware does not impose thin capitalisation rules.

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

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Delaware does not impose controlled foreign company rules.

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

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Delaware does not impose transfer pricing rules.

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

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Delaware does not tax imports or exports.

### COMPETITION

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

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The Delaware Antitrust Act (*6 Del. C. §§ 2101-2114*) prohibits contracts, business combinations and con-

spiracies in restraint of trade. The statute specifically permits the incorporation of judicial interpretations of 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 governed by federal law. There is no state patent law.
- **How protected.** Patents are registered with the United States Patent and Trademark Office.
- **How enforced.** Patents typically are enforced by infringement proceedings in federal court.
- **Length of protection.** Patents typically protect inventions for 20 years from the earliest filing dates.

#### Trade marks

- **Nature of right.** Trade marks and service marks are words, names, symbols or devices used to identify goods or services, and which can be used to distinguish goods or services of the holder of the mark from those of other persons (*6 Del. C. § 3302*).
- **How protected.** In addition to federal trade mark law, the Delaware Trademark Act (*6 Del. C. §§ 3301-3315*) allows a person to register a mark with the Secretary of State of Delaware.
- **How enforced.** Trade mark enforcement under the Delaware Trademark Act is by court proceedings for injunctive relief or damages.
- **Length of protection.** Protection for registered marks under the Delaware Trademark Act lasts for ten years from the date of filing, renewable for successive ten-year periods. Protection for unregistered trade marks lasts for as long as the mark is used continuously in commerce.

#### Registered designs

This is the same as for trade marks (*see above, Trade marks*).

#### Unregistered designs

- **Nature of right.** Words, names, symbols, and devices used to identify goods and to distinguish them from the goods of others that are not registered trade marks can be protected under the Uniform Deceptive Trade Practices Act (*6 Del. C. §§ 2531-2536*).
- **How protected.** The Act regulates activities such as:
  - passing off goods and services as those of another;
  - making false representations in connection with goods offered to the public; and
  - deceptively advertising goods for sale with intent not to deliver those goods or to adequately supply reasonable demand for those goods.
- **How enforced.** The Act provides for injunctive relief and payment of attorneys' fees.
- **Length of protection.** Protection for unregistered marks lasts for as long as the mark is used continuously in commerce.

#### Copyright

Copyright is governed by federal law. There are no Delaware copyright laws.

#### Confidential information

- **Nature of right.** Delaware has adopted the Uniform Trade Secrets Act (*6 Del. C. §§ 2001-2009*). Trade secrets include any information that derives independent economic value from not being broadly known, and is the subject of reasonable efforts to keep it secret.
- **How protected.** Trade secrets are protected automatically. There is no requirement to register them.
- **How enforced.** Trade secret enforcement is by court proceedings for injunctive relief or damages.

- **Length of protection.** Protection lasts for as long as the information remains a trade secret but an action for misappropriation must be brought within three years after the misappropriation is, or reasonably should have been, discovered.

## MARKETING AGREEMENTS

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

- **Agency.**
- **Distribution.**
- **Franchising.**

- **Agency.** Delaware has no specific laws relating to agency relationships in the marketing agreement context.

- **Distribution.** Delaware provides statutory protection for retail sellers in distribution arrangements, including laws protecting retail sellers of motor fuel (*Retail Sales of Motor Fuel*, 6 Del. C. § 2901, et seq) and provisions applicable to equipment dealers and their suppliers (*Equipment Dealer Contracts*, 6 Del. C. §§ 2720-2727).

- **Franchising.** Delaware's Franchise Security Law (6 Del. C. § 2551, et seq) gives franchised distributors the right to advance notice of termination, and sets out restrictions on excessive payments made to franchisers and certain other statutorily defined remedies. Delaware also has a comprehensive statutory framework regulating motor vehicle sales franchises (*Motor Vehicle Franchising Practices*, 6 Del. C. § 4901, et seq).

## E-COMMERCE

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

Delaware's Uniform Electronic Transactions Act (6 Del. C. §§ 12A-101 to 12A-117) regulates e-commerce. The Act:

- Provides that an electronic signature may satisfy the legal requirement of a signature (6 Del. C. § 12A-107).

- Addresses contract formation between persons and electronic entities by specifically recognising the existence of an enforceable contract, even where it is created by interaction of electronic agents of the parties or interaction between an electronic agent and individual (6 Del. C. §§ 12A-114).

- Addresses evidentiary problems (such as the statute of frauds and the best evidence rule) that could arise due to the non-tangible nature of the medium (6 Del. C. §§ 12A-107, 113).

## DATA PROTECTION

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

Delaware imposes criminal penalties for unauthorised interception, access or theft of data from computer systems. Injunctive relief and restitution are also available (11 Del. C. §§ 931-941).

## PRODUCT LIABILITY

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

Delaware does not recognise strict liability in product liability actions, but applies the warranty provisions of the Uniform Commercial Code and general negligence principles (*Cline v Prowler Indus. of Md., Inc*, 418 A.2d 968 (Del. 1980)):

- Warranties: a claimant can bring a claim for breach of:
  - an express warranty;
  - an implied warranty of fitness for a particular purpose;
  - an implied warranty of merchantability.
- The claimant must prove the existence of the warranty and that the defendant breached it (6 Del. C. §§2-313 to 2-316, 2-718 to 2-219).
- Negligence: to proceed under a negligence cause of action, the claimant must prove that both:

- the defendant failed to exercise the care of a reasonably prudent manufacturer under all circumstances (*Franchetti v Intercole Automation, Inc*, 529 F. Supp. 533 (D. Del. 1982));
- the manufacturer's breach caused damage to the claimant.
- Strict liability may exist for lease-bailment transactions and defective products distributed in non-sale, promotional situations (*Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976)).
- There are additional statutory provisions applicable to product liability cases, such as statutes of limitations for bringing such actions (6 Del. C. § 2-201).

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