



OPENING UP SHOP IN THE UNITED STATES

Jackson Lewis P.C. is a member of L&E Global, the alliance of employment counsel worldwide

The employment relationship in the United States is subject to markedly less regulation than in other countries. With the exception of protections on matters such as leaves and wage/ hours and a prohibition on discrimination, the parties to an employment relationship in the United States are generally free to negotiate and set the terms and conditions of their relationship. That said, US labor and employment law is composed of a variety of legal sources including federal, state

and local statutes, constitutional law, agency regulations and case law. As a result companies opening shop in the US face the task of navigating a wide array of legal requirements that do not always align, in a highly litigation-intensive context

Jackson Lewis P.C. is a law firm with more than 850 attorneys in major cities nationwide serving clients across a wide range of practices and industries. We combine local expertise and

national resources to deliver creative and strategic solutions for employers. In all matters, our goal is to help clients develop proactive strategies and business solutions that reduce workplace law risk. For over 55 years, our top priority has been providing the highest level of client service and legal representation, whether that is preventive reviews, responsive advice and counsel, or defending employers in litigation.

I. LABOUR AND EMPLOYMENT REQUIREMENTS

A. EMPLOYER POLICY REQUIREMENTS

US employers adopt and utilize personnel policies, both required and recommended, to facilitate employment relationships. Most often, an employee handbook sets forth these policies. Well-drafted employer policies serve as defense mechanisms for employers to prevent and minimize employment law liabilities.

Key Required and Recommended Employer Policies Include:

- “At-Will” Employment. As most employment relationships in the US are “at-will”, employers should implement a clear and unequivocal policy that informs employees of their “at-will” status at the time of hiring.
- Equal Employment Opportunity Policy. All employees should be judged on their merits and not on such factors as sex, age, national origin, religion, disability, or other legally protected categories under federal, state or local laws.
- Anti-Harassment Policy and

Complaint Procedure. The Equal Employment Opportunity Commission (EEOC), some local statutes, and court decisions provide guidance on implementing an anti-harassment policy and complaint procedure and emphasize that such policy should be widely disseminated and rigorously enforced.

- Reasonable Accommodation Policy. Employers are required to provide “reasonable accommodation” to persons with disabilities unless such

Jackson Lewis P.C. is a law firm with more than 850 attorneys in major cities nationwide serving clients across a wide range of practices and industries. This material is for informational purposes only and not for the purpose of providing legal advice. For advice about a particular problem or situation, please contact an attorney of your choice. Use of and access to this material does not create an attorney-client relationship between Jackson Lewis and the recipient, reader, or user. The opinions expressed in this material are the opinions of the individual author(s) and may not reflect the opinions of the firm or any individual attorney. This material may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome.



accommodation would pose an undue hardship to the business or pose a direct threat to the health and safety of employees.

- **Religious Accommodation.** Employers have an affirmative obligation to accommodate the religious observances of employees unless it would pose an undue hardship to the business.
- **Leave Policies.** Federal and state laws cover several types of leave of absence rights, in particular family and medical leave.
- **Confidentiality Policy.** Employers should identify business data, strategy, and other workplace information deemed confidential and require employees to treat this information on a confidential basis and not share with unauthorized parties.
- **Ethics Policy.** An ethics policy provides employers with discretion to discipline employees whose behavior is damaging to the company's reputation.

B) EMPLOYEE TRAINING REQUIREMENTS

- **Federal Training Requirements.** Although under federal law no training requirements apply universally to all to employers, certain laws and agency regulations apply to specific types of employers or industries. For example, there are federal training requirements for positions involving safety of the public (FAA, DOT), safety sensitive occupations (OSHA), and certain categories of public-sector employees. Also, under the Health Insurance Portability and Accountability Act (HIPPA), health industry employers are required to train "as necessary

and appropriate for the members of the workforce to carry out functions within the covered entity".

- **State Training Requirements.** There are some state laws that include employer training requirements. For example, some states require all employers to provide sexual harassment training. There may also be employer obligations to ensure training is provided in certain licensed occupations, such as in licensed child care facilities.
- **Establishing a Compliance Program.** Although training is typically not mandated per se, under various federal and state laws training is suggested as part of an effective compliance program. For example, in the corporate context, the Sarbanes-Oxley Act includes business ethics training obligations.
- **Establishing an Affirmative Defense.** Training may also be used to establish an affirmative defense. This is applicable to several employment-related laws, but is most common in the context of nondiscrimination training under Title VII.

C) EMPLOYMENT AGREEMENTS

Under US law, there are no minimum requirements for an employment contract. Also, in most states, no written memorialization of any terms is required. An employment relationship in the United States is presumed to be "at-will," i.e., terminable by either party, with or without cause or notice. Indeed, a majority of employees in the US are employed on an "at-will" basis, without a written employment contract, and only with a written

offer of employment that outlines the basic terms and conditions of their employment. In most states, there are no requirements as to the minimum contents of an offer letter. In some states, such as New York, employers must by law notify employees in writing of some of the terms of employment (but not as extensive as is required under the law of EU Member countries). Highly-skilled and compensated employees (e.g., high-level executives) are traditionally employed pursuant to written employment contracts. These contracts specify the basic terms and conditions of employment, such as position, job responsibilities, salary, compensation, incentive pay, and stock options. These also define what conduct will justify termination for cause and provide for severance pay in case of termination without cause.

Whether the employment relationship is "at-will" or pursuant to a written employment contract, parties are free to negotiate and set the terms and conditions of their relationship, so long as none of the provisions violate any federal, state or local law, rules or regulations governing the employment relationship (e.g., the pay practices established in the Fair Labor Standards Act, the prohibition of discrimination under the federal Civil Rights Act of 1964, and the like).



II. CORPORATE LAW REQUIREMENTS

A. COMPLIANCES FOR INCORPORATION

Which are the steps and requirements that are needed to ensure legal compliance for incorporation?

When forming a business entity, there are a number of organizational structures to choose from. The most common organizational structures include: (i) Sole Proprietorships; (ii) Partnerships (General & Limited); (iii) Limited Liability Companies; and (iv) Corporations. Which structure you choose will depend upon the level of responsibility and control versus the extent of liability offered under the law for a particular structure. For example, with a sole proprietorship, one person has complete control over the business. Consequently, this unfettered control subjects the owner to unlimited personal and professional liability. Partnerships, however, are business entities co-owned by two or more individuals. Partnerships are separated into two types: general, where partners collectively have absolute control, but unlimited liability for external obligations of the business; and limited, which require at least one or more general partners with unlimited liability and one or more limited partners who have less control and but enjoy limited liability. A limited liability company (LLC), functions as a hybrid structure that allows multiple owners to participate in responsibility and control while maintaining limited liability. Finally, corporations

are entities whose ownership is shared among investors who own interest or shares in the business. Corporations are deemed separate from its owners, providing a veil of personal protection. Common types of corporations include: C corporations, S corporations, B corporations, and nonprofits.

In addition to considering the desired level of control and liability, each type of entity carries various tax implications. For that reason, it is always advisable to work with an accountant or other tax professional in determining which type of organizational structure would best benefit the individuals and business involved.

BUSINESS ORGANIZATION FORMATION REQUIREMENTS

To provide a broad overview, the types of organizational/governing documents for common business organizations are:

(1) Sole proprietorships do not have any formation requirements per se; however, if the sole proprietor will conduct his/her activities under an assumed business name, then an assumed name or “doing business as” (d/b/a) should be filed with the appropriate county or other agency.

(2) For partnerships, it is most common that a written partnership agreement be put in place. These entities may also be required to file a certificate of partnership with a county or other agency. If there are two or more owners who join together to conduct

business activities, however, a legal partnership may be formed without a written partnership agreement (and sometimes unbeknownst to the participants). A limited partnership requires not only a partnership agreement, but also the filing of a certificate of limited partnership. Similar to LLCs, LPs may have other requirements to be addressed, such as the publication requirement (which in New York applies to LPs also).

(3) For limited liability companies, the initial step is the filing of formation articles. Again, the title may vary, but these are often referred to as articles of organization or certificates of formation. The main governance document for LLCs is an operating agreement. In some states, such as New York, a LLC is required to adopt a written operating agreement; in other states, such as Delaware, the adoption of a written operating agreement is not required (but it is recommended). [These differences can be important when the LLC seeks to set up a bank accounts, or if, for example, the LLC seeks financing.] LLCs are not legally required to have annual meetings, but it is recommended that the approval of significant events to be codified in minutes. In some states, there may be additional steps to be taken, such as the requirement in New York that the LLC publish and file a certificate of publication with the New York Department of State (this is step is often overlooked and can result in unwanted delays with financing or other activities).



(4) For corporations (both business and not-for-profit), the initial step is the filing of a formation certificate. The exact title of these certificates varies based on state law, but they are often referred to as certificates of incorporation or articles of organization. In addition, the corporation must adopt bylaws, which are the principal governing documents, and have minutes approving the organization of the corporation and significant events, as well as documenting annual meetings of the shareholders and directors. If a corporation has more than two shareholders, it is strongly recommended that a shareholders' agreement be put in place to address matters between the shareholders, such as any restrictions on the transfer of shares.

B) POST INCORPORATION REGISTRATIONS

Once formation of the particular entity has occurred, there are several post formation registrations or filings which are either necessary, or strongly recommended. The entity will need to apply to the IRS for an Employer Identification Number ("EIN"), in order to hire employees

and open up a bank account. If the business intends to have employees it will need to register for unemployment insurance tax, employee withholding tax, and any other employment related taxes. Registration with the state tax collecting agency is also necessary if the entity intends to sell goods to customers. Depending on the nature of the business to be conducted, the entity may be required to obtain a license or permit (which is sometimes required prior to the actual formation).

Corporations are required to submit federal and state tax returns on an annual basis, while LLCs, LLPs and sole proprietorships are considered "pass-through" entities and normally do not pay federal or state taxes, but instead pass this burden to the owners of the entity. Some states, like New York, require LLC's and LLPs generating income to pay an annual filing fee based on the number of members or partners in the entity. Other states, like Delaware have a flat annual Alternative Entity Tax which must be paid by all LLCs and LLPs. New York also requires business corporations and LLCs to file a biennial report (which

includes a small fee), providing current information regarding the corporate name, address, officers, and address for service of process. Similarly, most states require not-for-profit corporations that are considered charitable, to register and provide information to the state agency regulating charitable not-for-profits (typically the Attorney General's Office), on an annual basis.

Upon formation a corporation has certain formalities that it must comply with. The corporation must have an initial organizational meeting to adopt the bylaws and approve of directors. The corporation is required to keep the minutes of the proceedings of its shareholders, board of directors and any executive committees, with its corporate books and records. In addition, a shareholder meeting must be held annually for the election of directors and the transaction of other business. Although similar corporate formalities are not required for LLCs, LLPs or sole proprietorships, we recommend documenting important business decisions and maintaining them with the entity books.



This guide is intended as general information only. For legal advice and assistance with your business needs, please contact our US firm, Jackson Lewis P.C.



III. PAYROLL AND BENEFITS PROVIDERS

In the US, the majority of employers outsource payroll and benefit responsibilities to third party service providers. This reduces the administrative burden faced by the company by outsourcing payroll deductions and benefits administration to qualified companies that specialize in these areas.

We would be happy to recommend payroll and benefits providers to fit your business's requirements.

If you have any questions, please contact

John Sander
Partner, Jackson Lewis P.C.



212-545-4050



John.Sander@jacksonlewis.com

We look forward to working with you.



L&E Global CVBA is a civil company under Belgian Law that coordinates an alliance of independent member firms. L&E Global provides no client services. Such services are solely provided by the member firms in their respective jurisdictions. In certain circumstances, L&E Global is used as a brand or business name in relation to and by some or all of the member firms. L&E Global CVBA and its member firms are legally distinct and separate entities. They do not have, and nothing contained herein shall be construed to place these entities in, the relationship of parents, subsidiaries, agents, partners or joint ventures. No member firm has any authority (actual, apparent, implied or otherwise) to bind L&E Global CVBA or any other member firm in any manner whatsoever.

This L&E Global publication is intended for informational purposes only. Nothing in the document is to be considered as either creating an attorney client relationship between the reader and L&E Global, or any of the law firms that are part of the L&E Global alliance and/or named in the publication, or as rendering of legal advice for any specific matter. Readers are responsible for obtaining such advice from law firms of L&E Global upon retaining their services. The independent law firms of L&E Global are not responsible for the acts or omissions of each other, nor may any firm or any of its partners or other employees, act as agent for any other L&E Global firm. Absent the express agreement and consent of the parties involved, no L&E Global firm has the authority to obligate or otherwise bind any other L&E Global firm.