

CORPORATE MATTERS: IF I CAN MAKE IT THERE, I CAN MAKE IT...

Author
Simon H. Prisk

Tags
Corporate Law
Cross Border Tax Planning
New York
Retail

We have recently been receiving instructions from a variety of European clients looking to open either an office or retail location in New York. Typically, this is their first foray into the United States, and clients often take the view that a product that does well at home simply cannot miss when it migrates to New York. These clients are looking for advice across a range of topics: from location and leases to signage and insurance. We thought it might be helpful to set out a brief description of what to expect when opening a retail store in New York.

LOCATION AND LEASE

The first time we meet the client is when they are in New York looking at space. The typical client has a successful product in its home county, and often, the United States is their second largest market. Many feel there is still a general reluctance to purchase through the internet from Europe and hope that a store in New York will enhance sales and brand recognition. While many of the tasks required before opening can be completed simultaneously, we advise clients to hold off on entity formation and other basic tasks until a site is identified and discussions with the owner are close to completion. The term of the lease or sublicense agreement may be relatively short – clients are generally not looking for long-term commitments, and if the arrangement is initially only for a year or two, many landlords treat the tenant almost like a “pop-up” store. In any event, a review by a real estate attorney is a must. Once the lease is close to being finalized, discussions can begin with the contractor who will fit out the store.

ENTITY FORMATION

We have discussed types of entities and jurisdiction of formation in previous articles. Typically, we form entities in Delaware and qualify them to do business in the jurisdiction where operations are taking place. This is particularly the case if the thought is to open more than one location in the United States. It may be, however, that after discussion with the client a New York corporation is formed. For reasons discussed in previous articles, we typically recommend forming a C corporation as the vehicle through which the operations in the United States are conducted. Various tax reasons and asset protection reasons drive this recommendation.

BANK ACCOUNT

The business will require a bank account, and while each bank is different, we have noticed that the procedures for foreign controlled entities opening bank accounts in New York has become somewhat more streamlined. This can depend on where the foreign owner resides, however, and some research on this point should be done

early in the process. To open a bank account, the entity will need a tax identification number, commonly referred to as an E.I.N. Depending on the status of the applicant, an E.I.N. can be obtained in as little as one day, but in any event, is generally available in less than a week. An E.I.N. is also often required by vendors as part of the credit authorization process.

OTHER ADVISORS

We work with a cadre of experienced accounting firms who cater to small- and middle-market clients. Often, those clients have difficulty being serviced by front-line staff at national or super-regional accounting firms. We usually try to get an accounting firm involved early in the process, as they can help with matters such as setting up payroll and tax projections.

We also work with insurance brokers, as all leases will have a clause requiring the tenant to carry comprehensive liability insurance. The contract will state the minimum amount of coverage required and will request that the owner and the bank holding the mortgage, if there is one, be named as additional insured under the policy.

EMPLOYEES

Employment agreements are not generally required for employees of retail stores. If an experienced President or C.E.O. is to be hired, an agreement for that individual may be advisable. Payroll systems can be put in place with the assistance of an accountant or a payroll service.

Initially, many clients prefer to have an existing employee come to oversee the start-up operations at the new location. The visa issues raised by this must be addressed early on so appropriate filings can be made on a timely basis.

Workers Compensation Insurance will most likely need to be obtained. The penalties for non-compliance with the regulations can be onerous, both as to fines and use of management time, so attention should be paid to this matter.

INTELLECTUAL PROPERTY

The company's trademark should be registered in the United States, and the extent of required filings should be discussed with a trademark attorney. Use of trademarks should be licensed in order to protect valuable I.P. from claims in the event that U.S. operations are unsuccessful and creditors attempt to seize the mark.

“Clients are generally not looking for long-term commitments, and if the arrangement is initially only for a year or two, many landlords treat the tenant almost like a “pop-up” store.”