

Tips for U.S./Canada Cross-Border Business

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Set forth below is Garvey Schubert Barer's tips for conducting U.S./Canada cross-border business. This is obviously not intended to be a comprehensive list. We just want to share with our clients and colleagues some tips based on our experience. We hope you will find them to be useful!

Immigration

Despite the many commonalities in language and business, there is a border, and immigration laws that must be taken into account. Consider immigration issues at the early stages of evaluating business opportunities. Without the right personnel, even a great project cannot succeed.

Allow enough time for government review and action...which can sometimes be hours, and sometimes months.

Fully brief employees before they leave for cross-border business activities so that they are prepared for encounters with immigration officers.

Plan for U.S. Immigration of family members. Different procedures and visas may be required.

Take personal history into account before attempting U.S. Immigration. Certain past acts can bar admission, depending on severity and when they have occurred.

General Business

Although there are many similarities in basic contract law, remember that the laws of Canada and the U.S. are not identical. Make sure agreements are reviewed for enforceability under the laws in the place where you might need to enforce them.

Make sure you know of any applicable reporting requirements that may be triggered by investing in a U.S. business enterprise.

State or federal securities laws may include pre-filing requirements even before one can make offers of investment. For example, Canadian Private Investment Funds will often making offerings into the United States without consideration of a variety of applicable laws, including the Investment Company Act, the Investment Advisers Act, the Commodity Exchange Act, ERISA, state and federal securities laws and cross border tax treaties, to name just a few. The proximity of our markets sometimes lulls those offering investments, including such Funds, into forgetting to think about the regulatory requirements in the U.S. for such cross-border offerings.

Even activities of one employee or an independent contractor can potentially trigger corporate, labor or tax registration obligations in some states.

Inform yourself about applicable laws. Your U.S. business counterpart may or may not know the full extent of legal requirements for a Canadian enterprise conducting business in the U.S.

Employment

Employers may have to pay overtime regardless of whether an employee is salaried. The issue depends on qualifying for specific exemptions and certain actions can disqualify an employee from an exempt classification.

During or after a complaint has been raised by an employee, take affirmative steps to prevent retaliation. Retaliation claims are the most frequent type of claims raised with the Equal Employment Opportunity Commission in 2010. Absent guidance, the target of the complaint can behave inappropriately, even by mistake. Plus, the complainant often expects retaliation and hence perceives it in innocent actions.

Make sure to understand how temporary impairment of an employee can be a protected “disability.” Washington law, for example, broadly defines employees as disabled and entitled to reasonable accommodation, including leave, to perform the essential functions of their jobs.

National Security and Other Federal Government Regulations

Make sure you understand the scope of US national security, export control laws and ITAR jurisdiction for both doing business in the US and also for sending goods/services/data/IP back to Canada.

Get to know US government contracting rules regarding Buy America/Ship America as applied to Canadian goods and services.

Learn to recognize/register for lobbying activities before the US federal agencies.

Watch for deemed exports that trigger export licensing obligations when you transfer employees cross-border.

Tax

Despite enactment of the Fifth Protocol to the Canada-United States Income Tax Convention, significant tax and accounting issues still exist for Canadians investing in U.S. limited liability companies treated as partnerships or disregarded entities for United States tax purposes.

Investment in real property, either directly or indirectly through an entity or trust, can have significant U.S. tax consequences and should be properly structured to minimize U.S. income tax, estate tax and reporting requirements by the Canadian investor.

Litigation

Keep data/documents/tangible pieces of evidence that are critical to the prosecution of/defense against claims. This includes instituting a “litigation hold” on all document destruction and all deletions of electronic files the instant the possibility of potential litigation appears on the horizon. Failures here can lead to arguments that a claim or defense should be stricken.

Maintain confidentiality of communications with attorneys (and, in the context of possible litigation, information about actions taken at the direction of attorneys). Failing to do so waives the privilege of secrecy otherwise associated with such information and the waiver can be very damaging indeed.

Involve counsel timely in disputes – before the hint of disagreement has ripened into a full blown dispute, and before the client has taken positions in writing in communications with his/her/its future adversary. Words written early, and without the benefit of thinking through their legal implications, have a way of coming back to haunt one at the most inopportune times.

In the context of pursuing claims of infringement of intellectual property, register or otherwise obtain U.S. rights. This includes referencing the U.S. on any PCT patent applications and follow-up to obtain the patent. The process of obtaining a U.S. patent, even after it is obtained elsewhere, can be time consuming, and there is no infringement until the U.S. patent issues.

In contracts, consider the choice of law and forum clauses. Also, consider the possibility of requiring both mediation as a condition of initiating litigation and, if desired (e.g., to keep disputes out of the public eye and to avoid a jury), requiring that all disputes be resolved by binding arbitration.