

## LEGALINK

### INVESTMENT AND BUSINESS START UP IN PENNSYLVANIA, U.S.A.

#### (A) Legal system

1. What is the legal system (i.e. common law system, civil law system or both) in your state?

Pennsylvania (PA) is a common law jurisdiction.

2. What are the major law courts in your state?
  - i. At the state level the courts are:
    - a. PA Supreme Court
      - i. PA's highest court.
      - ii. Can take control of any case in PA when it believes the issues are of immediate public importance.
      - iii. Can hear discretionary appeals from the Commonwealth Court and Superior Court.
      - iv. Can hear direct appeals from the Court of Common Pleas at its discretion.
    - b. PA Superior Court
      - i. Hears criminal and most civil appeals from the Courts of Common Pleas and appeals of matters involving children and families.
    - c. PA Commonwealth Court
      - i. Hears original civil actions brought by, or against, state.
      - ii. Hears appeals from decisions of state agencies and Courts of Common Pleas.
    - d. PA Courts of Common Pleas
      - i. The general trial courts of Pennsylvania. They are organized into 60 judicial districts.

- ii. Most major suits will first be filed in these courts.
        - iii. Can hear appeals from minor courts and matters involving children and families.
  - e. Various minor courts
    - i. These include Municipal courts and traffic courts.
    - ii. Typically hear non-jury civil and criminal cases.
    - iii. Set bail for many cases and hear preliminary arraignments and hearings.
- 3. What are the sources of laws (such as constitution, statute law and common law) in your state?

In Pennsylvania the major sources of law are the Constitution of Pennsylvania, the Consolidated Statutes of Pennsylvania, unconsolidated statutes, the Pennsylvania Code and common law.

- 4. What is/are the official language(s) in your state?

There is no official language in PA, but the de facto official language used is English.

## **(B) Foreign investment**

- 5. Are there any restrictions faced by a foreign individual or company when they want to invest in your state? Is an approval or permit required if a foreign individual or company wants to enter a certain industry?

There exist no restrictions on foreign investment in Pennsylvania, but there are certain procedures foreign businesses seeking to do business in Pennsylvania must follow. Foreign corporations may not do business in Pennsylvania without receiving a Certificate of Authority from the Secretary of the Commonwealth. To receive a Certificate of Authority, a foreign corporation must file the Application for a Certificate of Authority accompanied by a docketing statement. A foreign Limited Liability Company (LLC) or Limited Liability Partnership must file an Application for Registration-Foreign accompanied by a docketing statement with the Corporation Bureau of the PA Dept. of State. All enterprises providing full and/or part time employment to one or more workers must register with the Office of UC Tax Services. An enterprise may be a sole proprietorship, partnership, corporation, limited liability company, business trust, association, etc. The Pennsylvania Enterprise Registration Form, allows an enterprise to register for certain taxes and services administered by the Pennsylvania Department of Labor & Industry, as well as the PA Department of Revenue. See PA Dept. of State and PA Dept. of Labor & Industry websites below for forms and further filing requirements.

[http://www.portal.state.pa.us/portal/server.pt/community/corporations/12457/filing\\_guidelines/571876](http://www.portal.state.pa.us/portal/server.pt/community/corporations/12457/filing_guidelines/571876)

<http://www.portal.state.pa.us/portal/server.pt/community/registration/18210>

6. Are there any exchange control or currency regulations in your state?

There are no exchange control or currency regulations in Pennsylvania.

7. What grants or incentives are available to a foreign individual or company to encourage investment in your country?

Pennsylvania provides funding in the form grants, loans, loan guarantee, and tax credits among others. The details of the various incentive programs can be found at [www.newpa.com](http://www.newpa.com). Pennsylvania serves as the haven for over 6000 foreign owned businesses, and it has set the goal of encouraging Foreign Direct Investment by providing advanced infrastructure, and an educated workforce.

**(C) Business vehicles**

8. What is the most common form of business vehicle used by foreign investors in your state?

The most common business vehicles in PA are the corporation (C Corporation or S Corporation) and Limited Liability Companies (LLC). Entities owning or controlling real estate are also typically formed as limited partnerships.

Please provide details on:

i. Registration formalities

1. To form a corporation in Pennsylvania, The Articles of Incorporation, accompanied by a docketing statement, should be filed with the Bureau of Corporations and Charitable Organizations.
2. To create an LLC, a Certificate of Organization is required to be filed with the Bureau of Corporations and Charitable Organizations, accompanied by a docketing statement.

ii. Minimum (and maximum) share capital

1. Pennsylvania does not place upper or lower limits on shares, but in the application filed with Bureau of Corporations the corporation must state the number of shares it is issuing, or state it is organized on a non-stock basis.

iii. Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities)

1. Under Title 15 of the PA Code, consideration for shares may consist of money, obligations (including an obligation of a shareholder), services performed whether or not contracted for, contracts for services to be performed, shares or other securities or obligations of the issuing business corporation, or any other tangible or intangible property or benefit to the corporation. If shares are issued for other than money, the value of the consideration shall be determined by or in the manner provided by the board of directors.
  2. An interest in a limited liability company may be issued in exchange for cash, tangible or intangible property, services rendered or a promissory note or other obligation to contribute cash or tangible or intangible property or to perform services.
- iv. Any restrictions on foreign shareholders
1. In PA there are no restrictions on foreigners as shareholders of corporations, or interest holders in an LLC.
- v. Management structure and any restrictions on foreign managers
1. There are no restrictions in PA on foreign management. In a corporation foreigners are eligible to sit on the board of directors, which manages the corporation. In an LLC, which is either member managed or manager managed, a foreigner can serve in either position.
- vi. Directors' liability
1. For the most part directors will be insulated from liability as long as they follow good business judgment, which indicates they have exercised due care, acted in good faith, and had a rational basis for their decision. Directors will also be unlikely to be held liable for a decision made in good faith reliance on expert advice. The applicable standards of review may change in the case of a merger or acquisition.
  2. Directors may be held personally liable if they breach either their duty of loyalty or duty of care. These are standards established by PA law. Directors could also be held personally liable for violation of certain environmental laws or failure to pay certain employment related taxes. Liability of the directors may, for the most part, be eliminated or reduced in the Articles of Incorporation or the bylaws.
  3. The members of an LLC are protected from liability for the obligations of the organization, and their personal assets are

protected from seizure as long as the LLC is properly formed and capitalized.

vii. Parent company liability

1. Parent companies will usually be protected from liability for the acts of their subsidiaries. However, in certain instances the corporate veil will be pierced, and directors, shareholders (including parent companies), and officers will be held individually liable. The piercing of the corporate veil usually occurs when formalities of separate corporate procedures for each corporation are not observed; e.g. overlapping directors and officers, or joint meetings of the boards, and very similar corporate policies and practices. The corporate veil can also be pierced if the subsidiary is inadequately capitalized, and when necessary to prevent fraud.
2. Piercing the veil in the context of a Parent company serving as a member of the LLC follows in the same vein as the corporate context.

viii. Reporting requirements (including filing of accounts)

1. Pennsylvania does not require any annual filings for corporations or regular Limited Liability Companies. Restricted Professional Limited Liability Companies and Nonprofit corporations must make annual filings..

**(D) Employment**

9. What are the main laws regulating employment relationships in your state?

For the Federal regulations please refer to the document “Doing Business in the United States”. The main PA regulations are outlined below.

- i. The PA Human Relations Act is an act prohibiting certain practices of discrimination on the basis of race, color, sex, age, ancestry, national origin, religious creed, having a GED (equivalent to a high school diploma) rather than a high school diploma, handicap or disability, the use of a guide or support animal for disability, or relationship to a person with a disability. There are local ordinances which have additional protected classes.
- ii. The PA Uniform Arbitration Agreement enforcing and regulating arbitration agreements.
- iii. The PA Labor Relations Act is an act to protect the right of employees to organize and bargain collectively. This applies only to public employers.

- iv. The Strikebreakers Act prohibits hiring professional strikebreakers in place of employees involved in a labor dispute. This applies only if the workforce is organized.
  - v. The Labor Anti-Injunction Act prescribes procedure by which, and the conditions under which, injunctions may be granted in labor disputes. This applies only if the workforce is organized.
  - vi. The Worker and Community Right to Know Act requires employers to give employees information on hazardous substances in the workplace.
  - vii. PA common law principles including duty of loyalty and privacy.
  - viii. PA Employment Criminal History Record Information Act states that when an employer is deciding whether to hire or reject an applicant for employment, an employer may only consider felony and misdemeanor convictions to the extent that the convictions relate to the applicant's suitability for employment. An applicant must be notified in writing of the employer's decision to reject an applicant if it is based in whole or in part on the criminal history information.
  - ix. PA Workers Compensation Law.
  - x. PA Unemployment Compensation Law.
  - xi. PA Personnel File Act requires employers to give its employees access to their personnel file.
  - xii. PA Polygraph statute makes it a misdemeanor for an employer to require a polygraph test as a condition for employment.
10. Is a written contract of employment required in your state, and if so, must it contain any particular language? Are any agreements and/or implied terms likely to govern the employment relationship?
- i. Written employment contracts are not required in PA. In PA generally, unless there is a contract stating otherwise, employment is presumed to be at will, and the employee may be terminated at any time, for any or no reason. There are no particular terms implied but the existence of an employee handbook or manual can, in certain instances, create a binding obligation.
11. Do foreign employees require work permits and/or residency permits if they work in your state? If so, how long does it take to obtain them and how much do they cost?
- i. PA does not have any permit requirements for foreign workers. However, there are Federal immigration requirements for foreigners wishing to work in the United States. For an outline of those requirements please refer to the document "Doing Business in the United States".

12. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals) in your state?
  - i. Unless otherwise stated in the employees' contracts or formation documents of the business, employees are not entitled to management representation or consultation on corporate transactions. (Unions are allowed representatives of their choice on issues of collective bargaining.)
13. Are there any employment protection laws (such as minimum wage law and/or maximum working hours law) in your state?
  - i. PA has a Minimum Wage Act which establishes the minimum wage rate and overtime rate. The act states that overtime is 1½ times the regular rate of pay after 40 hours worked in a workweek. The minimum wage rate as of July 24, 2009 is \$7.25 per hour.
  - ii. The Pennsylvania Wage Payment and Collection law specifies how frequently employees must be paid, how they may be paid and other details.
14. Is there any pension system in your state? Is it on a mandatory or voluntary basis? If so, please give details.
  - i. In PA there is no pension system for private employees. Only public employees of the state are guaranteed a pension, otherwise it is at the discretion of the employer.
15. How is the termination of individual employment contracts regulated in your state? Under what circumstances is the dismissal of an employee unlawful?
  - i. The termination of an employment agreement in PA will be governed by the terms of the agreement itself. Employers are restricted by the PA Human Relations Act, as well as various Federal regulations, from dismissing employees on varying grounds (See Question 9). Local ordinances will also offer additional protections to individuals, based on classifications such as sexual orientation.
16. Are redundancies and mass layoffs regulated in your state? If so, please give details.
  - i. There are no regulations for mass layoffs and redundancies in most of Pennsylvania. However, the City of Philadelphia has adopted a version of the Federal Worker Adjustment and Retraining Notification Act, which requires employers of 50 or more employees in the city to provide written notice of any plans to relocate or close any of their establishments at least 60 days before such relocation or closing. Mass layoffs are also regulated by Federal law.

**(E) Tax**

17. In relation to employees, what is the basis of taxation (i.e. whether a territorial source principle, tax residency principle or other principle is adopted) in your state?

- i. Employees are taxed based on their residency in the state. Residency is determined by the employee having a domicile or statutory residence in PA where they spend the most time during the year. Employees not residing in PA, are only taxed on income from sources within PA.

18. Under what circumstances are employees subject to taxation in your state?

- i. As emphasized in the previous questions, employees are subject to taxation on all compensation earned in PA, such as interest; dividends; net profits from the operation of a business, profession or farm; net gains or income from the dispositions of property; net gains or income from rents, royalties, patents and copyrights; income derived through estates or trusts; and gambling and lottery winnings other than Pennsylvania Lottery winnings

19. What income tax or social security contributions must be paid by:

- i. Employees?
  1. There is a flat tax rate in PA on individuals of 3.07%.
  2. Depending on the employees' residence there are likely be local taxes for the employee to pay.
- ii. Employers, in relation to their employees?
  1. Employers must withhold personal income tax from the compensation of resident employees for work inside or outside PA. PA personal income tax must also be withheld from nonresidents unless they live in Reciprocal Tax Agreement states (Indiana, Maryland, New Jersey, Ohio, Virginia and West Virginia).

20. In relation to corporations, what is the basis of taxation (i.e. whether a territorial source principle, tax residency principle or other principle is adopted) in your state?

- i. The basis for corporate taxation in PA is formation, and activities within the state.

21. Under what circumstances are corporations subject to taxation in your state?

- i. Corporations are subject to taxation in PA if they do business in PA, carry on activities in PA, have capital or property employed or used in PA, or own property in PA.

22. What are the main taxes that are potentially applicable to a corporation and what are their tax rates?

- i. Corporate Net Income Tax is a 9.99% (72 P.S. 7402(b)) tax on corporations doing business in PA, carrying on activities in PA, having capital or property employed or used in PA, or owning property in PA. The tax is levied on federal taxable income with PA modifications.

ii. Capital Stock/Franchise Tax, and Corporate Loans Tax

1. Capital Stock Tax is a property tax on the capital stock value of domestic corporations (72 P.S. 7602). The PA Franchise Tax is a privilege tax imposed on the capital stock value of foreign corporations doing business, carrying on activities, or employing or using capital or property in PA. The Capital Stock/Franchise Tax is imposed at a rate of 0.89 mills for 2013 (72 P.S. 7602(h)), with the view to have it phased out completely at the end of 2013.
2. The Corporate Loans Tax is imposed on indebtedness owed to PA residents by PA corporation and foreign corporation doing business in PA at a rate of 4 mills (.004) per dollar of nominal value of taxable indebtedness of a corporation(72 P.S. 3250-10). A foreign corporation without a treasurer performing their duties in PA, need not withhold the corporate loans tax.

iii. Sales and Use Tax is an excise tax imposed on each retail sale of tangible personal property and specified services within PA at the rate of 6% of the purchase price, and the vendor must collect it ((72 P.S. 7202[a])). The tax rate is set at 7% in Allegheny county, and Philadelphia county, the two most populous counties in PA.

23. Please explain how each of the following is taxed in your state:

i. Dividends paid to foreign corporate shareholders?

1. Nonresidents are not subject to PA income tax on dividend income from investments from sources within PA.

ii. Dividends received from foreign companies?

1. All income received by PA residents is taxed, and dividend income from outside the state would be classified and taxed as dividend income, unless it fell into an exception.

iii. Interest paid to foreign corporate shareholders?

1. Nonresidents are not subject to PA income tax on ordinary interest income from investments from sources within PA.

iv. Intellectual property (IP) royalties paid to foreign corporate shareholders?

1. Nonresidents are subject to PA tax on net income from rents, royalties, copyrights, or patents from property located and/or used within PA. Royalty income is allocable to Pennsylvania only if, and to the extent that, the patent or copyrighted material is employed by the payer in production, fabrication, manufacture or other processing in Pennsylvania, the patented products are produced by the payer in Pennsylvania

or the printing or publication by the payer originates in Pennsylvania.

24. Are there any thin capitalization rules (i.e. restrictions on loans from foreign affiliates) in your state? If so, please give details.
  - i. PA has no thin capitalization rules.
25. Are there any controlled foreign company rules (i.e. the profits of a foreign subsidiary must be imputed to a local parent company) in your state? If so, please give details.
  - i. Income earned by subsidiaries doing business outside PA are not treated as income of the PA based parent company.
26. Are there any transfer pricing rules (i.e. restrictions on the pricing of transaction between a local entity and a foreign entity) in your state? If so, please give details.
  - i. PA has no transfer pricing rules.
27. How are imports and exports taxed in your state?
  - i. PA does not have the authority to tax imports and exports. That power is left with the Federal government.
28. Is there a wide network of double tax treaties in your state? If so, please give details.
  - i. See question 19(ii) referring to the Reciprocal Tax Agreement.

**(F) Competition**

29. Is there any competition law in your state? If so, please give details.
  - i. The PA Unfair Trade Practices and Consumer Protection Law governs the Pennsylvania unfair competition laws. The broad language of the act serves as a large umbrella for plaintiffs, who are afforded many protections under the wide sweeping scope of the act.
30. Are restrictive agreements and practices regulated by competition law in your state?
  - i. Restrictive covenants (i.e. agreements restricting the ability of a person to compete with another business or otherwise transact a particular business) in PA are regulated by common law. The courts in PA have determined that for a restrictive covenant to be valid, it must be reasonable in geographic scope and time, be reasonably necessary to protect the employer without depriving the employee of the opportunity to work in their chosen profession, and be supported by consideration.
31. Is unilateral (or single-firm) conduct regulated by competition law in your state?
  - i. The PA Unfair Trade Practices and Consumer Protection Law applies to acts by any Person, and "Person" means natural persons, corporations, trusts,

partnerships, incorporated or unincorporated associations, and any other legal entities.

32. Are mergers and acquisitions subject to merger control in your state?

- i. Pennsylvania does not have any merger controls. Mergers with foreign corporations are predicated on whether the merger is legal in the jurisdiction in which the foreign corporation is incorporated. Pennsylvania does have a series of “anti-takeover” laws, including a “control share” statute, and “anti-greenmail statute” and a statute requiring approval by disinterested shareholders of certain transactions with “interested shareholders.”

**(G) Intellectual property**

33. Please outline the main intellectual property rights that are capable of protection in your state.

Most Intellectual Property Law in Pennsylvania is governed by Federal law, thus for a briefing on Federal IP law, please refer to the document “Doing Business in the United States”. The area with significant differentiation in PA is in Trademark.

Trademark:

- i. What is the nature of the right?
  1. A trademark under, 54 Pa. Cons. Stat. 1102, is any word, name, symbol or device, or any combination thereof, used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured or sold by others and to indicate the source of the goods even if that source is unknown.
- ii. How is it protected?
  1. PA state trademark law protects trademarks registered in the state. To be registered, the mark must be first used in the state,
- iii. How is it enforced?
  1. Under 54 Pa. Cons. Stat. 1123, anyone who infringe on the mark shall be liable to a civil action by the registrant for any or all of the remedies provided in section 1125 (relating to remedies), except that under paragraph (2) the registrant shall not be entitled to recover profits or damages unless the acts have been committed with the intent to cause confusion or mistake or to deceive. The provision shall not apply to any advertising agency, publisher of newspapers, magazines or

other advertising media accepting authorization for the reproduction or copy of any such mark innocently and in good faith in the usual course of business.

iv. How long is it protected?

1. Mark registrations are effective for five years from the date of registration, and upon application for renewal within six months before the expiration of the initial term, a similar five year term may be granted, beginning at the termination of the prior term. Successive renewals can be filed in similar manner.

**(H) Marketing agreements**

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

i. Agency

1. PA has not enacted any legislation regulating agency relationships relating to marketing agreements.

ii. Distribution

1. In PA, issues dealing with distribution of goods are subject to regulation by the PA Uniform Commercial Code (13 Pa. Cons. Stat.). Otherwise, such agreements are not regulated specifically by PA law.

iii. Franchising

1. PA is a non-registering state for franchises, and has no specific law in place. Franchisors must still abide by the Federal Trade Commission Franchise Rules.

**(I) E-commerce**

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

- i. E-commerce retailers with a Pennsylvania nexus (in-state activity) are required to become licensed in PA, and collect sales tax. Mostly this is meant to apply to retailers who exist and transact almost purely in electronic forms.
- ii. Pennsylvania applies its sales and use tax to electronically downloaded software and software updates. Most states do not apply their sales and use tax to this type of transaction.

- iii. Pennsylvania, under its Electronic Transaction Act (73 P.S. 2260), accepts electronic records and signatures, provided that consent is received from both parties to the transaction. Electronic notarization is permitted under the act, and the authorized individuals electronic signature can accompany the item to be notarized. The provisions of the act require that in transactions, to which a consumer is a party, there be express acknowledgment that specifically indicates which parts of the transaction will be conducted electronically, and how.

**(J) Data protection**

36. Are there any data protection laws in your state? If so, please give brief details.

- i. In 2005 PA enacted a data breach disclosure law, the Breach of Personal Information Notification Act applies to all state agencies and individuals or businesses doing business in the state that "maintain, store, or manage computerized data that includes personal information."
- ii. Under Chapter 76 of 18 Pa. C.S.A. dealing with Hacking and Similar Offenses it is a third degree felony to gain unauthorized access to data, or to launch a denial of service attack on any computer or network with the process of disrupting the initiation or completion of any sale or transaction by users of that computer or network.

**(K) Product liability**

37. Are there any laws regulating product liability and product safety in your state? If so, please give brief details.

- i. Pennsylvania permits suits for defective products under strict liability, negligence, and breach of warranty theories.
  1. Strict liability claims are brought under Section 402A of the Restatement (Second) of Torts, which provides that (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. Courts will also consider cases of failure to provide a proper warning under a strict liability theory. A product can

be found defective, and unreasonably dangerous, due to a lack of an adequate warning of the danger posed.

2. In most negligence suits the courts in PA only require that the elements of negligence be established; duty, breach, causation, and damages. However, in some cases courts have asked plaintiffs to prove the defect, and also that the defect caused the plaintiff's injury. Negligence can also be found in cases of defective design or manufacture, though plaintiff may be required to show the availability of an alternate design.
3. In a breach of an implied warranty action anyone can bring an action that was injured by the defective product. Breach of warranty claims mostly arise from breaches of implied warranties of merchantability or fitness for a particular purpose. The defendant will almost invariably raise the defense that the warranty only runs to the buyer of the defective product, and not to other injured parties.
4. It should be noted that the aforementioned Unfair Trade Practices and Consumer Protection Law (UTCPL) creates a private right of action for any person who "purchases or leases goods . . . primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act, or practice declared unlawful by section 3 of the [UTCPL]."