



# EuropaInstitut

AN DER UNIVERSITÄT ZÜRICH

RECHT BERATUNG WEITERBILDUNG

## Introduction to US Business Law 8. Company Law

FS 2024

Prof. Dr. Andreas Kellerhals

---

# Introduction to the US company law

---

1. Overview
2. Key Concepts of US Company Law
3. Formation of a Company
4. Corporate Governance
5. Securities Regulation
6. Mergers & Acquisitions
7. Employment and Labor Law
8. Intellectual Property
9. Taxation
10. Challenges
11. Conclusion

---

# Repetition last time

---

## Tort law

- > definition
- > State law – harmonization (Restatement of Torts 2nd)
- > 3 elements (duty to act, breach, injury incl. causation)
- > 3 categories (intentional, negligent, strict liability)
- > Product liability (negligent for risky products)
- > Strict liability
- > Exemples
- > Punitive damages
- > Excessive damages? (McDonnald)
- > Misuse?
- > Tort reform

---

# 1. Overview (1 of 3)

---

- > Companies must follow specific procedures for formation, which usually include registering with the state in which they operate.
- > Corporations typically require the filing of articles of incorporation, while LLCs file articles of organization.
- > Partnerships and sole proprietorship may not require formal registration.
- > Corporations have a structured governance system involving shareholders, a board of directors, and officers.
- > Shareholders elect the board of directors, who oversee company operations.
- > Officers, including CEOs and CFOs, manage the day-to-day activities.

---

# 1. Overview (2 of 3)

---

- > The issuance and trading of securities (stocks and bonds) are heavily regulated by the Securities and Exchange Commission (SEC).
- > Companies must comply with the Securities Act of 1933 and the Securities Exchange Act of 1934 when going public or engaging in securities transactions.
- > Merger & Acquisitions are subject to various regulations, including antitrust laws.
- > Companies must conduct due diligence and seek regulatory approvals for mergers, acquisitions, and other significant transactions.
- > US Company Law encompasses a complex web of employment and labor regulations, including wage and hour laws, discrimination laws, and rules governing collective bargaining.

---

# 1. Overview (3 of 3)

---

- > Protection of intellectual property, including patents, trademarks, copyrights, and trade secrets, is an important aspect of US Company Law.
- > Corporate taxation varies depending on the type of business entity, with C-corporations subject to double taxation and pass-through entities like LLCs passing income directly to owners.
- > Companies must adhere to various federal, state, and local regulations to ensure compliance (Sarbanes Oxley)
- > US Company Law often involves resolving disputes through litigation, arbitration, or mediation.
- > Companies may need to defend their rights or seek remedies through the legal system.

# Corporation = Own legal entity

---

- > reason for company law
- > Tax
- > Liability
- > Combination?

---

## 2. Key Concepts of US Company Law

### Capital Market Regulation

---

- > Securities and Exchange Commission (SEC)
  - > Sole power concerning federalwide business and supervision of financial services operators and mutual funds
  - > National Securities Market Improvement Act (1996)
  - > Securities Litigation Uniform Act (1998)
  - > Very powerful
  - > State authorities nowadays very limited powers
- > Sarbanes-Oxley Act (2000)
  - > Additional obligation on executives, audit committees, information)



---

## 2. Key Concepts of US Company Law

### Relevant Federal Laws

---

- > Securities Act of 1933
    - > After stock market crash 1929
    - > Regulates Securities (information, fraud)
  - > Securities Exchange Act of 1934
    - > Governs secondary trading of securities
    - > Stocks, bonds, etc.
    - > Antifraud provisions
  - > Sarbanes-Oxley Act of 2002
    - > After Enron
    - > The legislation set new or enhanced standards for all U.S. [public company](#) boards, management and public accounting firms.
    - > It does not apply to privately held companies
-

## 3. Formation of a business entity

---

1. Sole Proprietorship
2. General Partnership (GP)
3. Limited Partnership (LP)
- 4. Corporation (Company)**
- 5. Closed Corporation/Public Corporation**
- 6. Limited Liability Company (LLC)**
- 7. Limited Liability Partnership (LLP)**

---

## 3. Formation of a Company

### Legal entity – characteristics

---

- > Shareholder's liability limited to investment
- > Formation: filed with secretary of state
- > Taxes as separate entity
- > Statutory requirements (persons, no residence, name, officers, shares, address, purpose)
- > Financing (stocks, bonds)
- > Piercing corporate veil (torts, fraud, inadequate capitalization, parent liability)
- > Duties of directors and officers (duty of care, duty of loyalty, business judgement rule)
- > Private / public (listed) corporations (Securities and Exchange Act, Sarbanes – Oxley Act)

## 3. Formation of a Company

### Sole Proprietorship

---

- > Most simple way of running a business
    - > Only one owner
  - > Large part of US economy
  - > No separate legal existence from owner
  - > No formalities
    - > «John Miller – hairdresser»
  - > All debts of business are also personal debts
  - > No business taxes – personal taxes
  - > «Einzelunternehmung»
-

## 3. Formation of a Company

### General Partnership (GP)

---

- > Almost every business activity as goal
  - > At least 2 partners
    - > People or business entities
  - > No legal personality
  - > Each partner is personally, jointly and severally liable for all partnership debts (torts)
  - > duty of care and loyalty (no competition)
  - > General rule: profit share equally
    - > Agreement possible by contribution
  - > Dissolved when one partner leaves
  - > Partnership agreement not subject to any form requirements
    - > No registration necessary
-

---

## 3. Formation of a Company

### Limited Partnership (LP)

---

- > A limited partnership (LP) [not to be confused with a limited liability partnership (LLP)!] — is a partnership made up of two or more partners. The general partner oversees and runs the business while limited partners do not partake in managing the business. However, the general partner of a limited partnership has unlimited liability for the debt, and any limited partners have limited liability up to the amount of their investment.
    - > RUPLA (Rev. Uniform Limited Partnership Act)
  - > One or more general partners and one or more limited partners
    - > Liability limited to their investment
    - > Investment in money, kind or services
    - > No management function for limited partner
  - > „sworn certificate“ with Secretary of State
  - > Tax considerations have made LP very popular as investment vehicle, particularly in real estate or „venture capital“ companies
-

## 3. Formation of a Company Corporation (1 of 5)

---

- > Legal entity comparable to “AG”
  - > Easily formed by filing the articles of incorporatons with State Secretary
  - > Articles of incorporations (Statuten) and public notary
    - > Not very demanding
    - > Bylaws (Reglemente)
  - > Business name includes “Corp.”, “Inc.” or “Ltd.”
  - > Issuing shares
  - > Public corporation/closed corporation
-

## 3. Formation of a Company Corporation (2 of 5)

---

- > Board of Directors = VR / officiers (Angestellte)
    - > Z.B. CEO, CFO, etc, chairman of the board
  - > Board of Directors appoints the officers and monitors them
  - > Both have duty of care and loyalty
    - > Also majority stock owner
  - > Decisions protected from court review by “business judgement rules”
    - > Judges are no better business man, to protect board if acting in good faith
    - > Exception: conflict of interest
  - > Internal affairs-rule (law of the where company was created)
    - > For internal affairs (first Delaware, today all states)
  - > Stockholder not liable
    - > Exception: Piercing corporate veil (Expl.)
-



## 3. Formation of a Company Corporation (3 of 5)

---

- > Limited liability (corporation only)
  - > Yearly: income statement, balance sheet, evtl. auditing
  - > Stocks and stockholders
    - > Stock exchange – public corporation (AG)
    - > Stocks can be transferred with agreement
    - > Consent not required (otherwise in articles of incorp.)
  - > “one man corporations” possible
  - > Director’s duties
    - > Business judgement rule
-

## 3. Formation of a Company Corporation (4 of 5)

---

### > Closed corporation

- > “Closed corporation” (GmbH)
  - > Fixed shareholders (family business)
  - > Not more than 500
  - > < US \$ 5 million
  - > Not so many
  - > Same name
  - > Tax advantages
  - > Often specific duty of care
  - > Voting rights – agreements
  - > **Stock transfer restrictions**
-

## 3. Formation of a Company Corporation (5 of 5)

---

### > Advantages:

- > Perpetual lifetime (not dependend of lifetime owner)
- > No liability for stockholders
- > Board and officers are obliged to do business in best interest of stockholders

### > Disadvantages:

- > Double taxation
  - > Result: limited liability company
-

---

## 3. Formation of a Company

### Limitation of financial contributions to politicians?

---

In 2010 in a five to four decision, *Citizens United v Federal Election Commission* the USS held that corporations were persons that should be protected in the same way as natural persons under the First Amendment, and so they were entitled to spend unlimited amounts of money in donations to political campaigns.



## 3. Formation of a Company

### Closed corporation

---

- > A close corporation is a corporation which is held by a limited number of shareholders and is not publicly traded. A close corporation can generally be run directly by the shareholders (without a formal board of directors and without a formal annual meeting), and is exempt from a number of the formal rules which usually govern corporations.
- > A close corporation is also commonly referred to as a closely held corporation.

## 3. Formation of a Company

### Why Delaware? (1 of 2)

---

- > Why Delaware?
    - > No tax on activities outside the state
    - > Experienced courts
      - > Often no juries
    - > More case law than anywhere else
      - > Long tradition (since 19th century)
    - > Computerized registration system
    - > Confidentiality?
    - > Lax corporation laws
      - > Manager friendly approach
-

## 3. Formation of a Company

### Why Delaware? (2 of 2)

---

- > Why Delaware?
    - > Internal affairs doctrine
      - > For internal matters jurisdiction with state of incorporation
    - > All offices may be held by a single person who also can be sole shareholder
      - > US citizenship / residence not necessary
      - > May also operate anonymously
  - > Other states have followed up
    - > Race to the bottom? (Delaware effect)
-

## 3. Formation of a Company

### Creation of a company in Delaware

---

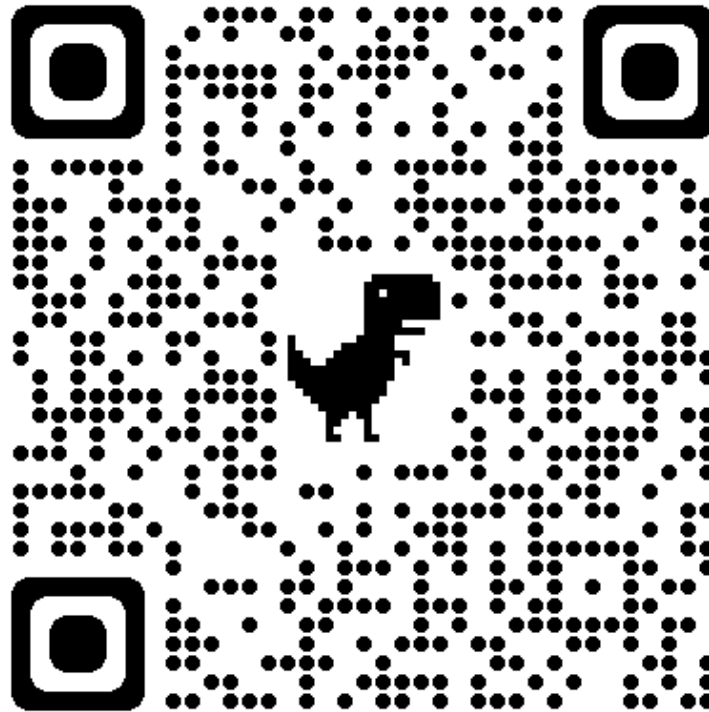




# 3. Formation of a Company

## Florida articles of incorporation

---



---

## 3. Formation of a Company

### Delaware code of ethics and company law

---



## 3. Formation of a Company

### Limited Liability Company (LLC) (1)

---

- > Relatively new type – more flexible
  - > Recently established by statutory law
  - > 1992 Uniform Limited Liability Company Act (NCCUSL)
  - > Between limited partnership and closed corporation
  - > Combines advantage of limited liability of corporation and tax status of partnership (no double taxation)
-

## 3. Formation of a Company

### Limited Liability Company (LLC) (2)

---

- > Similar formation like corporation
    - > Article of incorporation and certificate of formation from State Secretary
  - > Name: LLC oder Limited Liability Company
  - > Often only limited duration (f.e. 30 years)
  - > Transfer to third party without consent only interest, not voting rights
  - > Members do also manage LLC
-

## 3. Formation of a Company

### Limited Liability Partnership (LLP)

---

- > More recent model
  - > General partnership in which the partners enjoy certain types of liability protection
  - > Protection varies from state to state
    - > Insurance instead of personal liability
  - > Registered with Secretary of State
  - > Popular legal form for professional like lawyers
    - > Many big law firms are LLP
  - > Can have unlimited term
  - > Change in partnership only with consent
-

## 3. Formation of a Company

### General difference: LLC and LLP

# LLP

# VS

# LLC

- A partner is not liable for any debts or obligations incurred from negligent acts of another partner
- For specific types of partnerships: lawyers, accountants, architects
- Requirements vary across states
- Not available in all states

- All members are liable for each other's negligent business acts
- For all types of businesses
- Requirements consistent across states
- Available in all states



---

## 3. Formation of a Company

### Liability in LLC and LLP

---

In the United States, both Limited Liability Companies (LLCs) and Limited Liability Partnerships (LLPs) provide limited liability protection to their owners, but there are differences in how they are structured and the extent of liability protection they offer.

> In an LLC, members practice limited liability protection, which means their personal assets are generally shielded from the business's debts and liabilities.

**If the LLC incurs debts or legal obligations, the members' personal assets are usually not at risk beyond their investment in the company.**

> LLPs in the United States also provide limited liability protection to their partners. Like with LLC members, partners are generally not personally liable for the partnership's debts and obligations, except for their own professional misconduct or negligence.

**In other words, partners in an LLP are personally responsible for their own actions, but not necessarily for the actions of other partners.**

## 3. Formation of a Company

### Closed corporation

---

Some of the largest private companies are as follows:

- > Koch Industries: A conglomerate of industrial and manufacturing enterprises, the company had revenues of \$115 billion in 2022 and employed 122,000 people.
- > Publix: The Florida-based supermarket chain employs 227,000 workers, generating \$45 billion in sales.
- > Mars, Inc.: A global candy, pet food, and food product manufacturer that is 100% family-owned. It earned roughly \$40 billion in 2022 and employed 130,000 people.



---

## 4. Corporate Governance

---

There are four key sources of corporate governance law and regulation in the United States:

- > **state corporate law** (predominantly Delaware, in which over half of all US publicly traded corporations are incorporated);
- > **federal securities law**, including the US Securities Act of 1933 and the US Securities Exchange Act of 1934, and the regulations of the US Securities and Exchange Commission (SEC) under those Acts;
- > **stock exchange listing rules** (predominantly the New York Stock Exchange (NYSE) and the NASDAQ);
- > and **federal and state laws regarding particular areas of corporate practice** (eg, regulations promulgated by the Federal Reserve and other federal and state agencies with respect to financial institutions, and by other similar regulatory bodies in other regulated fields).

## 4. Corporate Governance

---

- > Securities laws and regulations are enforced by the SEC, and the SEC reviews and may comment on important corporate disclosure documents (such as proxy statements and securities registration statements).
- > Larger and older corporations with a history of securities law compliance are subject to fewer pre-clearance requirements and may in certain cases use abbreviated forms of disclosure. Investors may also bring actions under many provisions of the securities laws to recover damages for misstatements or omissions in public statements and in certain other circumstances.
- > The Department of Justice prosecutes criminal violations of federal securities laws and SEC rules.

## 5. Securities Regulation

### General basics

---

- > Securities regulation in the United States is a complex and comprehensive system of laws and regulations designed to protect investors and ensure the integrity and transparency of the financial markets.
- > The primary regulatory body responsible for overseeing securities markets and enforcing securities laws at the federal level is the Securities and Exchange Commission (SEC).

---

## 5. Securities Regulation

### Popular cases

---

- > **Valeant Pharmaceuticals International (2015):** Valeant Pharmaceuticals faced scrutiny for its business practices, including allegations of accounting irregularities and price gouging on prescription drugs. The company's stock price plummeted, and the case raised concerns about pharmaceutical pricing and transparency.
- > **Wells Fargo Account Scandal (2016):** Wells Fargo was fined for creating millions of unauthorized customer accounts to meet aggressive sales targets. The scandal led to regulatory penalties, changes in executive leadership, and increased scrutiny of the banking industry's sales practices.
- > **Theranos (2016):** The Theranos scandal involved allegations of fraudulent claims by the blood-testing startup about the capabilities of its technology. Founder Elizabeth Holmes faced charges of criminal fraud, and the case raised questions about the regulation of healthcare startups and the need for accurate medical testing.

## 6. Mergers and Acquisitions

### General basics

---

- > Mergers and acquisitions (M&A) is a practice area of the law, focused on domestic and global transactions aimed at consolidating businesses of two or more companies through legal operations such as mergers, purchase of assets, tender offers, hostile takeovers, among others.
- > M&A activity in the U.S. is governed by a well-established legal framework. Federal laws and regulations, such as the Securities Act of 1933 and the Securities Exchange Act of 1934, provide a foundation for regulating M&A transactions. Additionally, state corporate laws, which can vary from state to state, influence how businesses are structured and governed.

## 6. Mergers and Acquisitions

### Popular cases

---

- > Facebook's Acquisition of WhatsApp and Instagram: Facebook's acquisitions of WhatsApp in 2014 for \$19 billion and Instagram in 2012 for \$1 billion have been pivotal in the growth and evolution of the social media giant. These acquisitions expanded Facebook's user base and diversified its services.
- > Amazon's Purchase of Whole Foods: In 2017, Amazon acquired the upscale grocery chain Whole Foods for \$13.7 billion. This move marked Amazon's entry into the grocery industry and demonstrated its ambition to expand beyond e-commerce.
- > Microsoft's Acquisition of LinkedIn: In 2016, Microsoft acquired LinkedIn, the professional networking platform, for approximately \$26.2 billion. This acquisition aimed to integrate LinkedIn's extensive user base and business-related data into Microsoft's suite of products.

## 7. Employment and Labor Law

---

- > Workers are generally protected against discrimination under federal law on the basis of race, colour, religion, sex, sexual orientation, gender identity, pregnancy, national origin, age, disability, genetic information, military and veterans' status and union activity.
- > Many states and cities also protect employees against discrimination based on additional characteristics, such as arrest or conviction record, caregiver status, credit history, unemployment status, sexual and reproductive health decisions, salary history, status as a victim of domestic violence, stalking and sex offences.
- > Employees are distinguished by categories such as at-will-employment, employment under a union collective bargaining agreement or other contract, hourly worker or salaried worker.

---

## 7. Employment and Labor Law

---

- > There are federal, state and local employment laws.
- > The primary federal employment laws are:
  - > Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits employment discrimination based on race, colour, religion, sex and national origin; the Americans with Disabilities Act of 1990;
  - > the Age Discrimination in Employment Act of 1967;
  - > the Equal Pay Act of 1963;
  - > the Fair Labor Standards Act of 1938 (FLSA);
  - > the Family and Medical Leave Act of 1993 (FMLA);
  - > the Immigration Reform and Control Act of 1986;
  - > the National Labor Relations Act of 1935 (NLRA);
  - > the Occupational Safety and Health Act of 1970;



## 7. Employment and Labor Law

---

- > the Pregnancy Discrimination Act of 1978;
- > the Genetic Information Nondiscrimination Act of 2008 (GINA);
- > the Uniformed Services Employment and Reemployment Rights Act;
- > the Employee Retirement Income Security Act of 1974 (ERISA);
- > and Executive Order 11246 for government contractors.

---

## 8. Intellectual Property

---

- > Intellectual property is a crucial component of US business law, as it provides legal protections for the creations and innovations of individuals and organizations. Intellectual property laws in the United States aim to incentivize innovation and creativity by granting exclusive rights to creators and inventors for a limited period.
- > There are several key types of intellectual property protection in US business law:
  - > **Copyright:** Copyright protection is granted to original works of authorship fixed in a tangible medium, such as books, music, software, and artwork. Copyright owners have the exclusive right to reproduce, distribute, perform, and display their works. Copyright protection typically lasts for the life of the author plus 70 years.
  - > **Trademarks:** Trademarks protect symbols, words, or phrases that identify the source of goods or services. Trademark protection helps prevent consumer confusion and ensures that consumers can identify the origin of products or services. Trademarks can be renewed indefinitely as long as they are in use and properly maintained.

## 8. Intellectual Property

---

> **Patents:** they protect new, useful, and non-obvious inventions or discoveries. There are three types of patents in the US: utility patents (for processes, machines, and compositions of matter), design patents (for new, original, and ornamental designs), and plant patents (for new plant varieties). Patents provide exclusive rights to the inventor for a limited period, usually 20 years from the date of filing.

> **Trade Secrets:** Trade secrets are confidential business information, such as formulas, methods, or processes, that give a company a competitive advantage. Unlike patents, trade secrets can potentially last indefinitely if they are properly protected and maintained.

---

## 9. Taxation

---

Taxation is a critical aspect of US business law, and it involves various federal, state, and local taxes that businesses must comply with. Here is a difference between tax regulation of different.

- > Sole Proprietorship: The income of the business is reported on the owner's personal tax return, and the owner is personally responsible for all taxes and liabilities.
- > Partnership: Income is typically passed through to the individual partners' tax returns, and the partnership itself does not pay income tax. Partners pay taxes on their share of the profits.
- > Limited Liability Company (LLC): LLCs offer flexibility in taxation. They can be treated as pass-through entities, like partnerships, or elect to be taxed as corporations.
- > C Corporation: C corporations are separate legal entities from their owners. They pay corporate income tax on their profits, and shareholders pay taxes on dividends and capital gains.
- > S Corporation: S corporations are pass-through entities for tax purposes, like partnerships, but they have certain restrictions on ownership and structure.

---

## 9. Taxation

---

Also, taxes are divided into:

- > **Federal Income Tax:** The federal government imposes income taxes on businesses, and the rates vary depending on the entity type. C corporations are subject to corporate income tax, while other entities pass income through to their owners' personal tax returns.
- > **State and Local Taxes:** In addition to federal taxes, businesses may be subject to state income tax, sales tax, property tax, and other state and local taxes. Each state has its own tax laws and rates, which can significantly impact a business's tax liability.
- > **Sales Tax:** Businesses that sell goods and services may be required to collect and remit sales tax to the state and local governments. Sales tax rates and rules vary by jurisdiction.
- > **Employment Taxes:** Employers are responsible for withholding and remitting payroll taxes, such as Social Security and Medicare taxes, as well as federal and state income tax withholdings for their employees.

---

## 10. Challenges (1 of 2)

---

> **Regulatory Changes.** Laws and regulations governing businesses can change frequently. Staying updated and compliant with new regulations can be challenging, especially for multinational corporations operating in different jurisdictions.

The United States has a complex regulatory environment, with federal, state, and local regulations that can vary widely by industry and jurisdiction. Navigating this regulatory landscape can be challenging for businesses.

> **Taxation.** Tax laws in the U.S. are intricate and subject to frequent changes. Businesses must comply with federal, state, and local tax laws, which can be burdensome and require significant resources.

> **Antitrust and Competition Law.** Regulatory agencies, such as the Department of Justice (DOJ) and the Federal Trade Commission (FTC), scrutinize mergers and acquisitions and anticompetitive practices. Large technology companies, in particular, have faced increased antitrust scrutiny.

## 10. Challenges (2 of 2)

---

- > **Data Privacy:** Data privacy regulations in the U.S. vary by state, with the California Consumer Privacy Act (CCPA) being one of the most notable examples. The challenge lies in navigating these state-specific regulations, as well as potential federal privacy legislation.
- > **Environmental Regulations.** Environmental laws and regulations, including those related to emissions, clean energy, and sustainability, are evolving and can significantly impact businesses, especially those in energy-intensive industries.
- > **Healthcare Regulations.** Healthcare-related businesses and companies offering employee health benefits must navigate complex healthcare regulations and compliance requirements.
- > **Corporate Governance and Ethics.** Corporate governance practices and ethical considerations are increasingly important for businesses, and failure to maintain high standards can lead to legal and reputational risks.

## 11. Conclusions (1 of 2)

---

- > Like Swiss law US law distinguishes between two fundamental types of legal organizations:
    - > Partnership and corporations
    - > But also „hybrid“ legal forms
  - > Choosing right form mostly depends on
    - > Liability risks
    - > Tax
-



---

# 11. Conclusions (2 of 2)

---

- > Legal basis of corporations: state law mostly in accordance with model laws
- > Creation of company very easy
- > No minimum required capital
- > One man corporation legal
- > Liability / management

Next time

---

antitrust