

# Doing business in United States: South Carolina



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## LEGAL SYSTEM

1. What is the legal system (civil law, common law or a mixture of both)?

South Carolina has a common law system, along with a state constitution, statutory laws, and regulations.

## FOREIGN INVESTMENT

2. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

There are no restrictions other than industry-specific regulations established by the federal government.

3. Are there any exchange control or currency regulations?

There are no exchange control or currency regulations.

4. What grants or incentives are available to investors? Are any of these aimed specifically at foreign investors?

South Carolina actively encourages both domestic and foreign investment and offers a variety of tax incentives to businesses that construct or expand manufacturing and other business facilities in the state.

## BUSINESS VEHICLES

5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction? In relation to this vehicle, please provide details on:

- Registration formalities (including timing).
- Minimum (and maximum) share capital.
- Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities).
- Any restrictions on the rights that can attach to shares.
- Any restrictions on foreign shareholders.
- Management structure and any restrictions on foreign managers.
- Directors' liability.
- Parent company liability.
- Reporting requirements (including filing of accounts) and cost of compliance.

The most common form of business vehicle used by foreign companies is a Delaware corporation or a South Carolina corporation, but a South Carolina limited liability company (LLC) is occasionally employed.

- **Registration formalities.** A South Carolina corporation is formed by the incorporator filing articles of incorporation together with an Initial Annual Report of Corporations with the S.C. Secretary of State.

- **Share capital.** South Carolina does not require a minimum or maximum share capital.
- **Non-cash consideration.** Shares in a South Carolina corporation can be issued for any combination of cash or other property, tangible or intangible, or services performed or agreed in writing to be performed. Before issuing shares, the board of directors must determine that the consideration for the shares is adequate. Generally, if shares are issued for a contract for future services or benefits or for a promissory note, the shares must be held in escrow until the services are performed, the note is paid or the benefits are received, and the corporation must inform its shareholders of such issuance.
- **Rights attaching to shares.** A South Carolina corporation's articles of incorporation and bye-laws may restrict the rights that can attach to shares, subject to certain limits. Shareholders may also contractually agree, subject to certain limits, to restrictions on these rights through the execution of a shareholder agreement. A restriction on transfer should be noted on the corporation's stock certificates.
- **Foreign shareholders.** There are no such restrictions under South Carolina law, but there may be federal industry-specific requirements in relation to foreign shareholders.
- **Management structure.** A South Carolina corporation is typically managed by a board of directors elected by the shareholders. Generally, the board elects the company's officers.
- **Directors' liability.** Directors of a South Carolina corporation owe duties to the corporation and to its shareholders. In the case of insolvency (and perhaps near insolvency), these duties may extend to the corporation's creditors. With certain exceptions, directors can be liable if they violate their duties of loyalty and care, if they do not act in good faith, or if they authorise an improper distribution.
- **Parent company liability.** A parent company of a South Carolina corporation has the limited liability of a shareholder and is treated separately from its subsidiary, unless the corporate veil between the entities can be pierced or the parent company is directly liable for its own acts or conduct.

- **Reporting requirements.** South Carolina corporations, and also non-South Carolina corporations qualified to do business in South Carolina, must file an annual report with the S.C. Department of Revenue setting out certain information. In addition, corporations must file tax returns and pay annual licences fees or taxes.

## EMPLOYEES

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### 6. What are the main laws regulating employment relationships?

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State statutory and common law affects various employment issues, including payment of compensation, the effect of employee handbooks, and the permissible grounds for termination of employment or other adverse employment decisions. Laws relating to employment issues can apply to foreign persons working in South Carolina and South Carolina citizens working abroad. The extraterritorial reach of the laws varies on a case-by-case basis. Choice of law provisions in employment contracts for employees in South Carolina are respected, provided the substantive provisions do not violate South Carolina law or public policy.

### 7. Is a written contract of employment required? Are any agreements and/or implied terms likely to govern the employment relationship?

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No written contract is required. Unless there is a promise or contract providing otherwise, the employment relationship is considered to be at will (that is, either the employer or the employee can terminate the employment relationship at any time, with or without notice or cause). Depending on how they are written, employee handbooks can be viewed as creating contractual rights and obligations.

### 8. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

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Employees are not entitled to management representation or consultation.

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## 9. How is the termination of individual employment contracts regulated?

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Unless an employment contract provides otherwise, employment is at-will and may be terminated at any time by either the employee or the employer, with or without notice or cause. In addition to federal laws prohibiting certain employment practices, there are state statutory and common law limits on the employer's power to terminate at will. South Carolina statutory law also provides penalties for an employer's failure to pay all compensation due at the time of termination. There is no minimum notice or severance payment required for lawful terminations.

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## 10. Are redundancies/mass layoffs regulated? If so, please give details.

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The federal WARN Act (*29 USC § 2101*) requires employers with more than 100 employees to provide employees or their unions with 60 days' notice in advance of certain plant closings and mass layoffs. While there is no equivalent to the WARN Act in state law, if a South Carolina employer requires notice from any employee who quits work, that employer must give employees the same amount of notice in the event of a plant shutdown.

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## 11. Do foreign employees require work permits and/or residency permits? If so, how long does it take to obtain them and how much do they cost?

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Under federal law, foreign nationals employed in the US must obtain appropriate work authorisation which employers must verify at the time of hire. The time and cost varies depending on the type of temporary or permanent status sought. The South Carolina Illegal Immigration Reform Act (*Act 280 of 2008*) requires employers to take additional steps to verify an employee's work authorisation beyond the steps required under federal law.

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## TAX

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### 12. In relation to employees, what constitutes tax residency in your jurisdiction?

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In South Carolina, an individual is a resident for income tax purposes if one of the following applies:

- It is his intention to maintain his permanent home in the state.
- South Carolina is the centre of his financial, social and family life.
- If he is living outside of the state, he intends to return to South Carolina.

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### 13. What income tax or social security contributions must the following pay:

- Tax resident employees?
  - Non-tax resident employees?
  - Employers, in relation to their employees?
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#### Tax resident employees

Tax resident employees must pay income tax on income from all sources and may receive a credit for taxes paid to other jurisdictions. The tax year is the calendar year.

#### Non-tax resident employees

Non-tax resident employees pay tax on South Carolina source income.

#### Employers

Employers must pay certain taxes for employees, including:

- State workers' compensation insurance.
- State unemployment tax.

In addition, employers generally are required to withhold income taxes for employees.

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**14. In relation to business vehicles, what constitutes tax residency in your jurisdiction?**


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A business entity is subject to South Carolina income tax on income earned from business done in South Carolina and property owned in South Carolina.

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**15. Please give details of the main taxes that potentially apply to a tax resident business vehicle (including rates).**


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The principal taxes potentially applicable to a business entity doing business or owning property in South Carolina are the income tax (5%), sales and use tax (sales tax is levied state-wide at 6% but local governments may add up to 1%), and property tax (payable on real and certain personal property at varying rates). A real estate transfer tax is also imposed at the rate of US\$1.85 (about EUR1.29) per US\$500 (about EUR350) of the fair market value of the real estate transferred when the consideration exceeds US\$100 (about EUR70).

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**16. How are the activities of non-tax resident business vehicles taxed?**


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South Carolina taxes an entity's income from business done in South Carolina and property owned in South Carolina regardless of the tax residence of the entity.

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**17. Please explain how each of the following is taxed:**

- **Dividends paid to foreign corporate shareholders.**
  - **Dividends received from foreign companies.**
  - **Interest paid to foreign corporate shareholders.**
  - **Intellectual property (IP) royalties paid to foreign corporate shareholders.**
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- **Dividends paid.** A non-resident foreign shareholder of a corporation doing business or owning property in South Carolina is generally not taxable on dividends paid by the corporation. However, certain types of business entities, such as partnerships and limited liability companies, do not pay entity level taxes; instead, the income of

such entities is allocated to the partners/members and taxable directly to them.

- **Dividends received.** South Carolina residents must include in taxable income all dividends received, including those from foreign companies.
- **Interest paid.** A non-resident foreign shareholder of a corporation doing business or owning property in South Carolina is generally not subject to South Carolina income tax on interest paid to such shareholder by the corporation.
- **IP royalties paid.** A non-resident foreign shareholder of a corporation doing business or owning property in South Carolina is generally not subject to South Carolina income tax on IP royalties paid to such shareholder by the corporation.

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**18. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)? If so, please give details.**


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South Carolina does not have thin capitalisation rules, but does apply the piercing the corporate veil doctrine in appropriate cases.

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**19. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?**


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South Carolina does not have controlled foreign company rules.

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**20. Are there any transfer pricing rules? If so, please give details.**


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South Carolina has adopted and applies Internal Revenue Code Section 482, which requires pricing between related entities to be set on an arm's-length basis.

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**21. How are imports and exports taxed?**


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South Carolina does not have any specific rules regarding the taxation of imports and exports.

## COMPETITION

### 22. Are restrictive agreements and practices regulated by competition law in your jurisdiction? If so, please give brief details.

The South Carolina anti-trust statute prohibits contracts, agreements, arrangements and combinations that create monopolies or restrain trade. The statute is similar to the federal Antitrust Act (*15 USC §§ 1-7*), but has different damages provisions.

## INTELLECTUAL PROPERTY

### 23. Please outline the main intellectual property rights that are capable of protection in your jurisdiction. In each case, please state:

- **Nature of right.**
- **How protected.**
- **How enforced.**
- **Length of protection.**

#### Patents

- **Nature of right.** A patent gives its owner the right to exclude others from making, using, offering for sale or selling in, or importing an invention into, the US.
- **How protected.** Protection is obtained by filing an application with the US Patent and Trademark Office (USPTO).
- **How enforced.** Once a patent is issued, the patentee must enforce the patent without aid of the USPTO, by suing in a federal court.
- **Length of protection.** New utility or plant patents have a 20-year term from the date the application was filed in the US. Design patents have a 14-year term from date of issue.

#### Trade marks

- **Nature of right.** A trade mark is any word, name, symbol or device that is used in trade with goods to:
  - indicate the source of goods; and

- distinguish them from the goods of others.

Trade mark rights can be used to prevent others from using the same, or a confusingly similar, mark in connection with the same or similar goods or services that are sold under the trade mark.

- **How protected.** Trade marks can be protected by:
  - common law;
  - South Carolina statute; and
  - federal law.

Owners of trade marks can register them with the USPTO. Applications for the registration of trade marks in South Carolina must be sent to the South Carolina Secretary of State.

- **How enforced.** Trade mark rights can be enforced through litigation in both state and federal courts.
- **Length of protection.** Registrations last for ten years, renewable for successive ten-year terms. Trade marks are legally protected for as long as they are continuously used in commerce.

#### Registered designs

- **Nature of right.** A federally registered design is any novel, non-obvious and ornamental design applied to, or embodied in, an article of manufacture used in commerce (commonly known as a design patent). South Carolina does not have corresponding protection. The right holder can exclude others from making, using and selling designs that are substantially similar to the patented design.
- **How protected.** A design patent is protected by federal law and must be registered at the USPTO.
- **How enforced.** Design patents are enforced through litigation in federal courts.
- **Length of protection.** Protection lasts for 14 years without maintenance fees. Design patents cannot be renewed.

## Unregistered designs

- **Nature of right.** An unregistered design can include the non-functional elements of a product or its packaging. The owner of the unregistered design can sue in federal or state courts for infringement if the competing product is likely to cause a consumer to be confused as to the product's origin.
- **How protected.** There is no formal protection for unregistered designs; however, under federal, state and common law, certain principles of trade dress can protect the shape, appearance or layout (or a combination of these factors) that make a product or its packaging distinctive and recognisable such that it has acquired secondary meaning in the marketplace.
- **How enforced.** The owner can enforce its rights through litigation in both state and federal courts.
- **Length of protection.** Protection lasts as long as the design continues to be distinctive in the minds of consumers and is used in commerce.

## Copyright

- **Nature of right.** Copyright is available for authors of original works, including literary, dramatic, musical, artistic, architectural, and certain other types of works. Copyright is exclusively governed by federal law. The copyright owner generally has the exclusive right to:
  - reproduce the work;
  - prepare derivative works;
  - distribute copies or phonorecords of the work;
  - perform the work publicly; and
  - display the work publicly.
- **How protected.** Copyright protection subsists from the time the work is created in fixed form and immediately becomes the property of the author of the work. Copyrights must be registered with the US Copyright Office before the owner can file suit for infringement.

- **How enforced.** Federal courts have exclusive jurisdiction over suits for copyright infringement.
- **Length of protection.** Protection lasts for the life of the author plus 70 years. In the case of an anonymous work, a pseudonymous work, or a work made for hire, protection lasts for either 95 years from the year of publication or 120 years from the year of creation, whichever is shorter.

## Confidential information

- **Nature of right.** Trade secrets are business information not generally known in the industry, that provides the owner a competitive advantage and for which the owner makes efforts to maintain confidentiality.
- **How protected.** South Carolina has adopted a modified version of the Uniform Trade Secrets Act (*SC Code §§ 39-8-10 et seq.*).
- **How enforced.** The owner of the confidential information can bring suit for misappropriation in state court.
- **Length of protection.** Protection lasts as long as the information is maintained in confidence and not generally known in the industry. Trade secret law does not protect against the discovery of the trade secret by lawful means.

## MARKETING AGREEMENTS

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

- **Agency.**
  - **Distribution.**
  - **Franchising.**
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- **Agency.** South Carolina common law of agency regulates the principal-agent relationship.
  - **Distribution.** Distribution agreements may be subject to the South Carolina version of the Uniform Commercial Code where the distribution agreement constitutes a sale of goods.
  - **Franchising.** There are both federal and South Carolina laws regulating franchising agreements,

including the South Carolina Business Opportunity Sales Act (*SC Code §§ 39-57-10 et seq*).

## E-COMMERCE

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

South Carolina has adopted the Uniform Electronic Transaction Act (*SC Code §§26-6-10 et seq*), which, like the federal law (*15 USC § 7001*), gives the same legal effect to electronic versions of contracts, signatures, disclosures and other records as their traditional paper-based counterparts.

## DATA PROTECTION

**26. Are there any data protection laws? If so, please give brief details.**

South Carolina has recently enacted a law, which becomes effective on 1 July 2009, concerning disclosure of Social Security Numbers and other identifying information and requiring notification of a person whose in-

formation has been disclosed (*SC Code §§ 37-20-110 et seq*). While much of the act seems to apply only to consumer credit agencies, there are also general provisions that prohibit posting or requiring submission of social security numbers, and that require shredding or similar destruction or obliteration of documents containing a customer's social security number.

## PRODUCT LIABILITY

**27. Are there any laws regulating product liability and product safety? If so, please give brief details.**

South Carolina product liability law is governed by statute and common law. State law provides strict liability for defective products.

### CONTRIBUTOR DETAILS

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