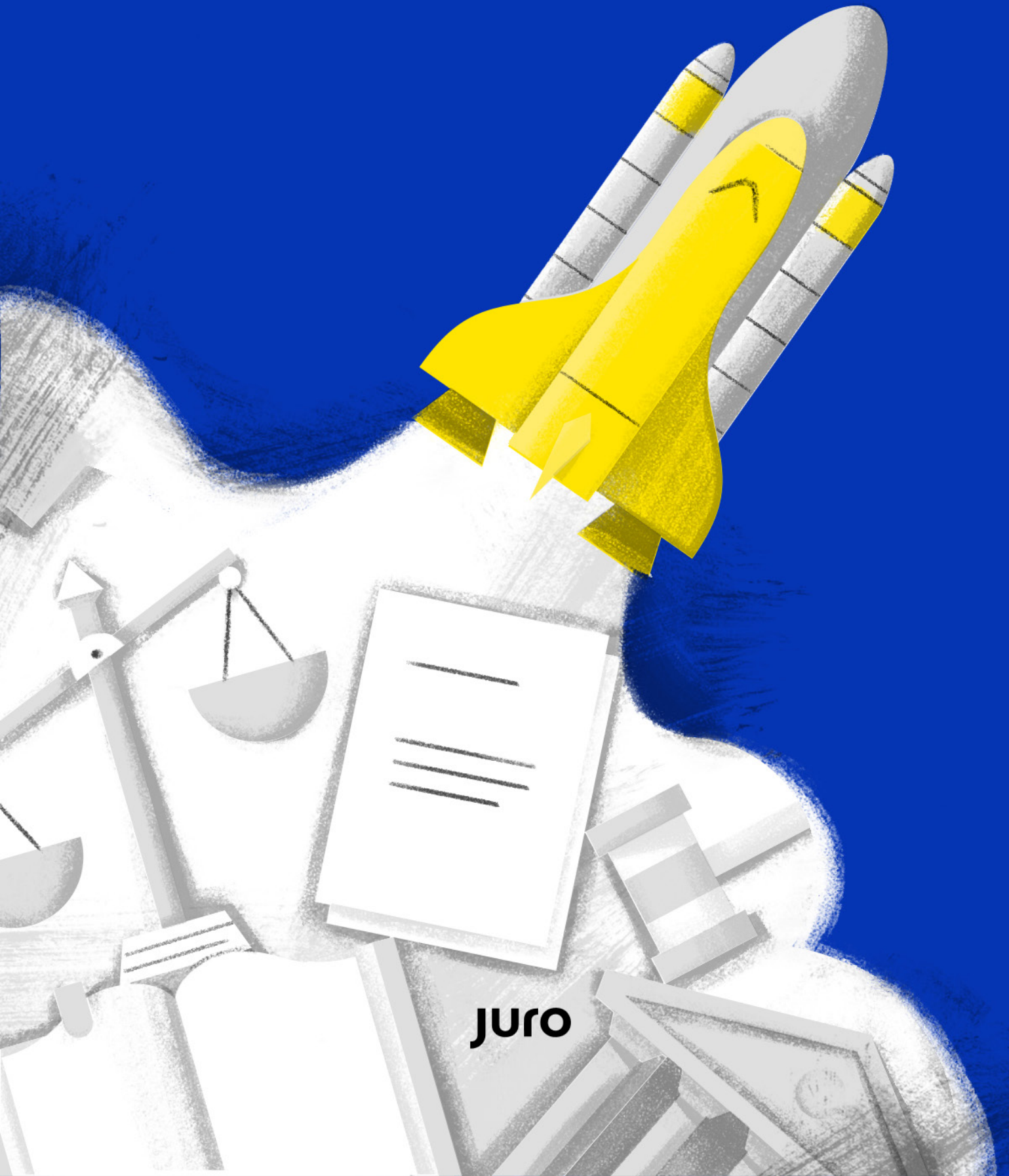


Legal for scaleups:

Create, build and scale a world-class legal function



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Entering the US



Daniel Glazer is the Managing Partner of Wilson Sonsini's US Expansion group and London office.

“Doing business and raising money in an unfamiliar, highly-competitive environment requires thoughtful advance planning and clinical execution”

For almost every type of tech scaleup, the US is the most valuable market to enter, and success there can make or break the company's long-term ambitions. Here's what you need to know about entering the US.

For many high-growth UK companies, there's nowhere better to start and grow than the UK, and nowhere better to expand and raise later-stage funding than the United States. The US offers the promise of massive commercial opportunities and plentiful venture and growth capital. However, doing business and raising money in an unfamiliar, highly-competitive environment requires thoughtful advance planning and clinical execution.

Here is an overview of key legal and other considerations for entering the US market.

Company formation

UK/European technology companies most commonly establish US subsidiaries that are incorporated in the US state of Delaware and are registered to do business in the US state(s) where the US subsidiary has employees and/or offices. There is no “national” corporation in the US, and Delaware has been the preferred state of incorporation for over fifty years due to (among other reasons) its robust corporate law, efficient incorporation process, and the quality of its judicial system in the event of disputes.

Here are some of the most common indicators that it's time to strongly consider setting up a US entity, and **here** are the various considerations for where to establish US operations.

Employment

A UK company hiring US-based employees will generally want to employ them through a US entity. US and UK employment laws **are vastly different**, and companies should avoid uncertainty as to which applies. Employing US hires directly from a UK/European company also increases the risk of multiple tax authorities making competing claims on the same US revenue and of the parent company being exposed to **US litigation**.

US employment is a business topic that is truly foreign to many UK companies; in fact, there is no “US employment,” as the vast majority of employment laws and regulations are state-specific. Employment matters in the States are best addressed by proactively seeking to avoid problems, and a careful and competent setup can mitigate most risks and deter many disputes. Don't take our word for it; we regularly hear experienced UK entrepreneurs, executives and GCs cite US employment pitfalls when answering the question “what do you wish you had done differently when entering the US?”

Here are some of the most common hiring-related employment considerations for companies entering the US.

Employee equity

When UK emerging companies venture outside the UK, they quickly need to address whether – and how – to extend equity-based compensation to non-UK employees.

“Getting into email tennis, sending competing drafts back and forth, is time-consuming and inefficient for the UK company”

Here are a few guidelines for making this work. One key takeaway: rarely – if ever – is it advisable to provide US employees with equity in the US subsidiary. Venture-backed enterprises typically look to maximize the value of their parent company for their investors; accordingly, the parent company should be the entity in which US employees have their options (even if awards are tied to hitting business milestones associated with US operations).

US contracts

Large US companies often insist on contracting based on their standard terms. They have large legal departments, with lawyers on salary, who are there to deal with these contracts. The main focus of these lawyers often is on protecting their company (and their legal department) on a “one-size-fits-all” basis, not on getting a deal done with a UK startup. Getting into email tennis, sending competing drafts back and forth, is time-consuming and inefficient for the UK company. If outside counsel are used, it's also likely to be expensive.

How can you avoid this? First of all, review the agreement itself. There will be many provisions that are objectionable, or that don't make sense in the context of the transaction, but if you focus on trying to fix all of them the deal will never get done.

However, there will be a number of items (hopefully no more than five to ten) that you absolutely cannot accept without risking material harm to the business. For example, there may be a provision that specifies that all intellectual property used in performing the contract will belong to the US company. There may also be a provision that limits the UK company's ability to do business with the US company's competitors, or one that puts a short time limit on confidentiality obligations. There also is probably going to be a broad-form indemnification provision that assigns the UK company responsibility in circumstances where it is not at fault.

Instead of sending a mark-up, consider going back to the US company's business lead – not its lawyers – with a two-column issues list. On the left side, list their unreasonable or inaccurate provisions. On the right side, show your reasonable alternative provision and any explanation for why the change is needed. Negotiate those points at a business level, and then ask the US company's business lead to get their legal department to redraft the contract to reflect the agreement on those points. This will probably take a few exchanges of drafts before they get it right, and there may be a few outstanding issues at the end that require each side's lawyers to engage. However, when this process works, it saves everyone involved time and money, by focusing on commercial outcomes.

Here are a few other considerations when negotiating contracts with US companies.



Data privacy

Complying with UK and EU data privacy regulations often presents a significant challenge for startups based in those regions. UK and EU startups expanding to the US similarly need to be aware of US data privacy regulations and whether their existing efforts will be sufficient.

While the precise guidance will vary depending on the company, [this guide](#) addresses a few fundamental US privacy questions. In particular, UK companies need to be conscious of complying with the new [California Consumer Privacy Act](#) – make sure you keep this front of mind.

Intellectual property

When entering the US, it is important for a UK company to protect its names and brands. The process for and considerations associated with securing trademark rights in the US can be complicated – find out more [here](#).

“Litigation risk is in fact higher in the US than in most other countries, and the threat of litigation is often used as leverage to achieve favorable business outcomes”

In certain businesses, like medical devices, patents may be critical. In other businesses, like many software-as-a-service businesses that rely on algorithms and machine learning, intellectual property may be best protected through maintaining confidentiality. The scope of patent protection is broader in the United States than in some other countries, particularly in the context of software-embodied inventions. Find out more [here](#) on how to design a US patent and trade secret strategy.

Litigation

We often speak with UK companies concerned that they'll be sued the moment they step off the plane in the States. That's simply not true – usually they'll be given at least a few hours to get comfortable...

Joking aside, litigation risk is in fact higher in the US than in most other countries, and the threat of litigation is often used as leverage to achieve favorable business outcomes, whether the potential claimant is an unhappy contractual counterparty, a disgruntled employee, or an aggressive US patent or trademark owner. The US generally doesn't have the “loser pays” rule common in the UK and many other countries; in many non-US countries, the loser in litigation bears a significant part of the winner's legal fees.

Consequently, even a relatively weak claim in the US has value because the party bringing the claim knows the defendant's cost to settle the claim is likely to be less than the cost of defending it. Well-funded companies and individuals represented by contingent-fee lawyers can leverage this dynamic to assert claims they wouldn't otherwise if they were at risk of paying the defendant's legal fees.

That said, millions of companies create trillions of dollars of GDP in the US each year; someone clearly has figured out how to navigate this landscape. You can find out more on how to do so [here](#).


Using US lawyers

Retaining legal counsel is an unavoidable part of the cost of doing business in the US. In the States, the approach to legal matters is often “problem-avoidance” rather than “problem-solving.” US companies obtain proactive legal advice to minimize potential future problems; reacting to and resolving current problems is expensive and time-consuming. This dynamic can take some getting used to – find out more [here](#) on how to make it work for you.

A [2017 study](#) found that, as a result of this dynamic, US companies spend nearly double the amount on legal services for every dollar of revenue than their counterparts around the world. If you're hoping to avoid that, [this article](#) includes a few tips for UK companies on minimizing that spend and maximizing value.

Non-legal matters

There are many other matters that you need to consider when it comes to US expansion. These include issues like immigration, tax structuring and compliance, business insurance, banking, HR, payroll and benefits, government support and fundraising. Check out this US expansion [checklist](#) and [video](#) to make sure that nothing trips you up in your move stateside.

For more information on the logistics and strategy of establishing US operations, check out valuable resources like the [Tech Nation US expansion and fundraising library](#); “[Question the Questions](#)” by Octopus Ventures; and “[Crossing the Atlantic](#)” by Notion. 

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