KRIEG DEVAULT

Insights

Foreign Entities – To Register or Not to Register

July 11, 2024

By: Charles O. Richert

In today's business environment, many businesses operate across state lines. Such interstate activities include sales (online or in-person), transportation and shipping, advertising, professional services, manufacturing, hospitality and tourism, and much more. Most companies also employ workers remotely in a different state. If your business carries out any of these activities in one or more states other than its state of formation, it may need to file a foreign registration statement authorizing it to do business in those states. Read on to find out more.

The Meaning of "Doing Business"

Most states have enacted a statute requiring foreign entities to file a registration statement if it is "doing business" within state lines. Instead of defining what constitutes "doing business" within the state, most statutes list certain activities which do not constitute "doing business" in that state. These permitted activities typically include (but are not limited to): (1) maintaining a bank account, (2) holding a board meeting, (3) owning real property, (4) selling through independent contractors, (5) obtaining orders by any means if the orders require acceptance outside of another state prior to becoming contracts, (6) making loans, or (7) doing business in interstate commerce.

While listing out activities which do not constitute "doing business" can provide helpful clarity regarding the activities listed in the statute, business leaders will likely find it frustrating if an activity undertaken by a company in another state is not listed in the statute. The resulting gray area will require a company to determine whether it is necessary to file a foreign registration statement. When this happens, it is likely time to consult a legal advisor.

Process for Qualifying to Do Business as a Foreign Business Entity

The steps necessary to register as a foreign business entity are straightforward. After deciding to file, the company typically needs to register with the foreign state's Secretary of State (or comparable office). The filing process involves submitting a form containing identifying information about the company, paying a fee, and providing a certificate of good standing or existence from the home state. Once registered, the business must comply with the new state's ongoing requirements, including periodic report filings, maintaining a registered agent in the foreign state, and paying applicable state taxes and fees.

Ramifications of Not Qualifying and of Qualifying

Failure to qualify when required can result in adverse consequences.

A defendant can usually assert a foreign entity's unqualified status as a defense in an action in state court. If the court determines that the foreign entity was required to qualify but failed to do so, the action brought by the foreign entity may be barred from the state's courts until the failure is cured. In most states, including Indiana, such failure can be cured by simply registering to do business in the state[1].

In at least one state, under certain circumstances, an entity's failure to register may render a contract executed in that state invalid.

In addition to being barred from litigating in state court, most states also impose monetary penalties on foreign entities that do business and fail to qualify. These monetary penalties vary from state to state and may be based on the number of transactions the foreign entity completed or the amount of time the foreign entity did business without qualifying. Further, in certain states, liability is not limited to the entity but can be imposed on individuals who act on behalf of the unqualified entity[2].

Proper business registration can provide businesses with certainty regarding access to state courts and clarity regarding the amount of fees (and, potentially, taxes) that must be paid to do business in a foreign state, avoiding costly penalties and in some circumstances, personal liability. Registering in a foreign state will almost always bring the company into the foreign state's tax regime, if it wasn't already there.

How to Qualify to Do Business in Indiana

To qualify to do business in Indiana, Indiana Code § 23-0.5-5-2 requires foreign entities[3] to register with the Indiana Secretary of State to qualify to do business in Indiana. To register, a foreign entity must deliver a foreign registration statement to the Indiana Secretary of State, and the statement must be signed by the entity and provide information about the foreign entity. Ind. Code § 23-0.5-5-3.

The Meaning of "Doing Business" in Indiana

Indiana Code § 23-0.5-5-5(a) lists twelve activities a foreign entity may engage in that do not constitute "doing business":

1. maintaining, defending, mediating, arbitrating, or settling an action;
2. carrying on any activity concerning internal affairs, such as holding meetings;
3. maintaining accounts at financial institutions;
4. maintaining offices for the transfer, exchange, and registration of securities of the entity;
5. selling through independent contractors;
6. obtaining orders by any means if the orders require acceptance outside Indiana before becoming contracts;
7. making loans or otherwise creating mortgages or security interests in real or personal property;
8. securing or collecting debts or enforcing mortgages or security interests;
9. conducted an isolated transaction completed within thirty days that is not conducted repeatedly;
10. owning property;
11. doing business in interstate commerce; and
12. if a nonprofit entity, soliciting funds if otherwise authorized.

This list of activities is not exhaustive, and the Indiana code does not attempt to create an inclusive definition of what constitutes doing business in the state.

A foreign corporation may safely engage in the above activities without being required to qualify. If a foreign entity engages in any business activity in Indiana outside of the listed activities, it should consider qualifying to do business by registering with the Indiana Secretary of State.

The Ramifications of Not Qualifying to Do Business in Indiana

A foreign entity that fails to qualify to do business in Indiana may not maintain an action or proceeding in Indiana and is liable for a civil penalty of not more than $10,000. Ind. Code § 23-0.5-5-2. Though not able to maintain an action, a foreign entity can still defend an action in Indiana and its contracts will still be valid. Additionally, the Indiana Attorney General may maintain an action to enjoin a foreign entity from doing business in Indiana if it is in violation of the qualification requirements. Ind. Code § 23-0.5-5-14. Therefore, foreign entities doing business in Indiana should consider whether registration with the Indiana Secretary of State is necessary.

In many circumstances, determining whether to register as a foreign entity requires business leaders to exercise their business judgment. Deciding to register will likely result in increased compliance costs, including (but not limited to) additional fees, taxes, and filing requirements. However, failure to register may result in monetary penalties or a temporary loss of access to a jurisdiction's state courts.

If you have any questions regarding whether your entity should register as a foreign entity in Indiana or another state, please reach out to Charlie Richert or any member of the Krieg DeVault Business Practice Group.

**The author thanks Hannah Huff, a 2024 summer associate at Krieg DeVault, for her assistance in drafting this Alert.*

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

---

[1]Charles W. Smith & Sons Excavating, Inc. v. Lichtefeld-Massaro, Inc., 477 N.E.2d 308, 309 (Ind. Ct. App. 1985)

[2]See, e.g., California Corporations Code, Sec. 2259.

[3]The type of 'entities' to which § 23-0.5-5-5(a) applies includes: corporations, benefit corporations, professional corporations, partnerships, limited partnerships, non-profit corporations, limited liability companies, and series limited liability companies.