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Risk Mitigation Tips for Foreign Retailers Rolling Out New Products in the U.S.

Today, when a foreign retailer plans to roll out new products in the United States, there are some major legal risks that they may they encounter....

By Amanda Ciccattelli | January 08, 2018



Today, when a foreign retailer plans to roll out new products in the United States, there are some major legal risks that they may they encounter. By undertaking an analysis and implementing appropriate risk mitigation measures, the retailer can, in most cases, achieve a risk profile it determines to be acceptable and limit exposure to potentially costly litigation.

David J. Rabinowitz and Dan Avery, both directors at Goulston & Storrs, recently sat down with Inside Counsel to discuss the approach a foreign retailer should take before rolling out a retail concept into the U.S.

Before a retailer enters the U.S., according to Rabinowitz, it is important that they study the market and develop a business plan. Some factors to consider are: who its competitors will be; the demographics of its customers; its entry strategy; what legal entity will be established for the U.S. business for legal and tax purposes; the retailer's existing structures outside the U.S.; hiring needs and whether a local operating partner will be needed; the supply chain; how its merchandise may need to be modified for the U.S. customer; and its expected profit over a period of time, taking into account anticipated revenue and operating expenses in the U.S.

In addition, there are many legal risks that a non-U.S. retailer may encounter opening a business in the U.S. Per Rabinowitz, these can include: lease provisions which could restrict its business operations; the sale of its U.S. business or transfer of its lease to a third party that could expose it to unexpected liabilities; exposure of the foreign parent company to liability for its U.S. operations absent adequate legal insulation of the parent; exposure of the retailer's global operations to the jurisdiction of taxing authorities; a consumer-oriented legal system in many major U.S. jurisdictions and an active community of plaintiff attorneys; claims by employees for discrimination, sexual harassment, etc.; fines and penalties for not complying with federal, state and local employment laws pertaining to wages and hours, overtime pay, work breaks, payment of benefits, vacation and sick pay, etc., even if the non-compliance is of a technical nature; claims arising from unlawful data collection and data security breaches; and IP claims.

"In our experience, it is extremely rare for a non-U.S. retailer to decide against a U.S. expansion solely because of legal risks," he said. "With the assistance of competent U.S. counsel, the lease can be negotiated in a way to protect the foreign retailer regarding its manner of operations and exit strategy."

Moreover, a new U.S.-based legal entity can be established to help insulate the foreign parent from liability in connection with its U.S. operations and a plan can be established to integrate the U.S. ownership structure within the foreign retailer's overall global tax planning and structure to manage tax exposure. And an effective risk management plan can be developed for the retailer's risk profile which include appropriate insurance coverages, and approved contracting terms and conditions.

The non-U.S. retailer would adopt an employee manual, tailored to each state in which it will be doing business, combined with proper training and human resource practices and procedures to effectively reduce the risks with work place issues. They would also develop data collection and storage policies and procedures to make sure they are following applicable law and best practices and review existing IP protections and file any required protections in the U.S. to establish procedures for ongoing protection of its IP, per Avery.

So, how will this limit exposure to potentially costly and distracting litigation?

Avery explained, "By implementing the above measures, the foreign retailer will put itself in the best position to either create an environment which would reduce the likelihood of claims in the first place or, if a claim is filed, can successfully defend against the applicable claim or to turn such defense over to its insurance carrier."

Amanda G. Ciccatelli is a Freelance Journalist for Corporate Counsel and InsideCounsel, where she covers intellectual property, legal technology, patent litigation, cybersecurity, innovation, and more.

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