

# Doing Business in United States: Oklahoma

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## LEGAL SYSTEM

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

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Oklahoma has a common law legal system, subject to pre-emption by the federal laws of the United States.

## FOREIGN INVESTMENT

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

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Generally, Oklahoma encourages foreign investment. However, certain business sectors are subject to federal or Oklahoma restrictions on foreign investment, such as:

- Defence contractors.
- Commercial aviation.
- Banking.
- Mining.

In addition, ownership of real property in Oklahoma by non-citizens is statutorily regulated. Specifically, non-US individuals that are not considered residents of Oklahoma cannot own real property within Oklahoma, subject to a five-year safe harbour in the event that a foreign person receives property through descent and devise, or obtains title to the property through a foreclosure of a lien held by the foreign person. Foreign corporations, if domesticated in Oklahoma (that are

not sham corporations formed for the sole purpose of owning real property in Oklahoma), are allowed to own property in Oklahoma, subject to the limitations placed on corporate ownership of real property located outside incorporated cities and towns (*Section 2, Article XXII, Oklahoma Constitution* and *18 OS §1020*) and on corporate ownership of farmland (*18 OS §955*).

### 3. Are there any exchange control or currency regulations?

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As exchange control and currency regulations are exclusively federal matters, there are no restrictions imposed under Oklahoma law.

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

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Although Oklahoma does not typically offer any grants or incentives exclusively to foreign investors, the state and local governments may provide some tax and non-tax incentives to encourage both local and foreign investment, such as:

- Inventory tax exemptions.
- Sales tax refunds.
- Employee training programmes.

Oklahoma also has four foreign trade zones (Oklahoma City, Muskogee, Durant and Catoosa).

## BUSINESS VEHICLES

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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.**

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The most common form of business vehicle used by foreign companies is a corporation. However, depending on the type of business, foreign companies may use other forms of business vehicles, such as a general or limited partnership or a limited liability company.

- **Registration formalities.** The corporation's incorporator must file a certificate of incorporation with the Secretary of State of Oklahoma. The certificate is generally effective on the date of filing.
- **Share capital.** There is no minimum or maximum limit on share capital.
- **Non-cash consideration.** A corporation's shares can be issued for non-cash consideration.
- **Rights attaching to shares.** The rights, powers and preferences of shares must be set out in a corporation's certificate of incorporation. If the certificate of incorporation fails to specify these, the Oklahoma General Corporation Act provides default rules (*18 OS §§ 1001 et seq.*).
- **Foreign shareholders.** There are no restrictions on foreign shareholders.

- **Management structure.** Unless the certificate of incorporation provides otherwise, an Oklahoma corporation is managed by, or under the direction of, its board of directors. There are no restrictions on foreign directors or officers.
- **Directors' liability.** Directors of corporations are fiduciaries and can be held liable for breach of fiduciary duty. Directors can also be held liable for the unlawful payment of dividends, or unlawful share purchase or redemption. Companies can include a provision in the certificate of incorporation limited liability for breach of fiduciary duty except for:
  - breaches of the duty of loyalty;
  - acts not taken in good faith;
  - unlawful dividends, share repurchase or redemption; or
  - acts from which the director derived an improper personal benefit.
- **Parent company liability.** Parent companies are not liable for the acts of their subsidiaries except in circumstances where the corporate veil can be pierced.
- **Reporting requirements.** Before 1 July 2010, corporations paid a franchise tax based on their capital invested in Oklahoma. While a three-year moratorium has been imposed on the franchise tax while a business activity tax is studied, corporations are required to pay each year an amount equal to the franchise tax that they actually paid for the year ended before 31 December 2010.

## EMPLOYEES

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6. What are the main laws regulating employment relationships?

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In addition to federal laws, state statutes and common law define employment relationships. Oklahoma is an at-will employment state, but an employment handbook or personnel policies can amount to an implied employment contract that limits the rights of an employer to terminate an employment contract.

In addition, employees in Oklahoma are protected from termination for engaging in the following practices:

- Taking time off from work for jury duty.
- Taking up to two hours off from work to vote on election day.

- Being injured on the job or participating in a workers' compensation claim.
- Making a hazardous substance complaint or a safety and health complaint.
- Being subject to garnishment or income assignment.
- Engaging in off-duty smoking.

Oklahoma has its own anti-discriminatory statutes (25 OS §§ 1101-1901) that are similar to Title VII of the Civil Rights Act 1964, the Age Discrimination in Employment Act 1967 (ADEA) and the Americans with Disabilities Act 1990 (ADA). Oklahoma also has:

- Specific statutes governing the employment of minors (40 OS § 71).
- A complex system of workers' compensation insurance (85 OS §§ 1 et seq.).
- A comprehensive drug testing statute (40 OS §§ 551-565).

In addition to the requirements of federal law, Oklahoma requires that the following notices be posted where employees can readily access the information:

- Unemployment Insurance "Notice to Workers".
- State Workers' Compensation Notice.
- Anti-Discrimination Act (15-employee minimum).
- Summary of Minimum Wage Rates and Provisions.
- Smoking and Non-Smoking Area Designations.
- Drug and Alcohol Testing Policy.

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#### 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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Written contracts of employment are not required. An employment handbook or personnel policies can amount to an implied employment contract that limits an employer's right to terminate an at-will employee.

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#### 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.

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

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Both state statutes and the common law regulate the termination of employment contracts (see Question 6). In the absence of an employment agreement, employment in Oklahoma is likely to be at-will so that both the employer and the employee can terminate the employment at any time, with or without notice and with or without cause; provided, however, that the employer is not terminating the employee in violation of:

- Fundamental public policy.
- Statutes prohibiting employment discrimination.
- Other illegal motivations for employment termination.

Terminations are not classified as fair/justified or unfair/unjustified and no statutory minimum notice period or severance payment is required. However, terminated employees can file actions alleging that they were terminated for reasons prohibited by statute and/or common law.

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

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Redundancies are not regulated.

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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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Apart from permits required by federal law, foreign employees do not need permits to work in Oklahoma.

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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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For tax purposes, an Oklahoma resident is a person domiciled in Oklahoma for the entire tax year. "Domicile" is the place established as a person's true, fixed and permanent home, and is the place the person intends to return to whenever he is away (as on vacation abroad, business assignment, educational leave or military assignment). A domicile, once established, remains until a new one is adopted.

A part-year resident is an individual whose domicile was in Oklahoma for a period of less than 12 months during the tax year. A non-resident is an individual whose domicile was not in Oklahoma for any portion of the tax year.

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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**

Residents must pay Oklahoma income tax on Oklahoma taxable income. The tax rate is calculated using a graduated scale, with the top marginal income tax rate being 5.5% for 2010. Oklahoma taxable income is federal taxable income, subject to certain adjustments. Generally, the tax year for Oklahoma purposes is the tax year for federal purposes.

**Non-tax resident employees**

Non-residents must pay Oklahoma income tax on Oklahoma source income. The tax rate is calculated using a graduated scale, with the top marginal income tax rate being 5.5% for 2010. Oklahoma source income includes wages for services performed in Oklahoma.

**Employers**

In addition to certain federal taxes and withholding requirements, employers must pay state unemployment tax on behalf of their employees. The state unemployment tax rate varies according to the unemployment experience of the employer. Employers must also withhold and make timely payments of state income taxes to the tax authorities.

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

A resident business vehicle has its principal place of business in Oklahoma. Oklahoma may tax a business vehicle on a far broader basis of "nexus" with Oklahoma. Nexus can arise from one or more of the following activities in Oklahoma (among others):

- Maintenance of any business location.
- Ownership of real estate.
- Ownership of a stock of goods in a public warehouse or on consignment.

- Ownership of a stock of goods in the hands of a distributor or other non-employee representative, if used to fill orders for the owner's account.
- Usual or frequent activity by the employee or representative soliciting orders with authority to accept them.
- Usual or frequent activity by the employee or representative engaged in a purchasing activity or in the performance of services (including construction, installation, assembly or repair of equipment).
- Operation of mobile stores (such as vans with driver-salespersons), regardless of frequency.
- Other miscellaneous activities by employees or representatives such as credit investigations, collection of delinquent accounts, conducting training classes or seminars for customer personnel in the operation, repair and maintenance of its products.
- Leasing of tangible property and licensing of intangible rights for use.
- The sale of other than tangible personal property, such as real estate or services.
- The performance of construction contracts or service contracts.

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

**State income tax**

This is levied at 6% of the company's Oklahoma taxable income. If the business is part of a unitary business enterprise, various types of income are allocated by type or apportioned between Oklahoma and other jurisdictions on the basis of a three-factor apportionment formula generally using sales, payroll and property.

**Franchise tax**

Before 1 July 2010, corporations paid a franchise tax based on their capital invested in Oklahoma. The franchise tax was levied on capital used or invested in Oklahoma at 0.125%. The maximum amount of franchise tax was US\$20,000 (as at 1 October 2010, US\$1 was about EURO.7).

While a three-year moratorium has been imposed on the franchise tax while a business activity tax is studied, corporations are required to pay each year an amount equal to the franchise tax that they actually paid for the year ended before 31 December 2010.

### Sales tax

This is levied at 4.5% of the gross receipts from the sale of rental or tangible personal property and from the furnishing of specific services, unless an exemption is available. In addition, counties and incorporated cities and towns may, and generally do, levy sales taxes.

### Use tax

This is levied at 4.5% on the purchase price of tangible personal property stored, used or consumed in Oklahoma, even if the property was purchased in another state, unless an exemption is available. In addition, counties and incorporated cities and towns that levy a sales tax may also levy a use tax.

### Property tax

All real and tangible personal property is subject to taxation on the value of the property. The amount is generally based on the appraised fair cash value, which is the price the property would bring at a fair voluntary sale. Assessed values are determined by applying an assessment ratio of between 11% and 13% to the fair cash value. The tax is calculated by multiplying the assessed value by the applicable rate per US\$1,000 for the location of the property. These rates generally range between US\$100 and US\$120 per US\$1,000 of assessed value.

### Business activity tax

Oklahoma has recently enacted a new business activity tax. The business activity tax will levy a US\$25 flat tax annually on people doing business in Oklahoma and a tax equal to 1% of business activity in Oklahoma. The 1% tax will not apply for the next two tax years (with corporations paying an amount equal to the franchise taxes that they paid for the year ended 31 December 2010). The business activity tax will be studied over a two-year period and is scheduled to expire on 31 December 2012.

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

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The only distinction between the taxation of tax resident business vehicles and non-tax resident business vehicles is the treatment of passive income (such as dividends and interest). Such items of income are not taxable in the hands of non-tax resident business vehicles.

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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.** Dividends paid are not generally deductible by the payor and are generally taxable to the payee if the payee is otherwise taxable in Oklahoma. Oklahoma does not impose withholding tax on dividends paid to foreign shareholders, although such dividends may be subject to federal withholding requirements.

■ **Dividends received.** Dividends received by shareholders otherwise subject to tax in Oklahoma are taxable.

■ **Interest paid.** The treatment of interest paid in Oklahoma generally tracks the federal treatment, in that interest paid is generally taxable income to the payee and, if incurred in connection with a trade or business or the production of income, is generally deductible by the payor.

■ **IP royalties paid.** The treatment of IP royalties paid in Oklahoma generally tracks the federal treatment, in that IP royalties paid are generally taxable income to the payee and, if incurred in connection with a trade or business or the production of income, is generally deductible by the payor. Oklahoma provides certain tax incentives in narrow circumstances for IP developed and deployed in Oklahoma.

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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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There are no thin capitalisation rules.

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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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The imputing of a foreign subsidiary's profits to a parent company is controlled by federal tax law.

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

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This issue is governed by federal tax law.

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

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Oklahoma has no import or export taxes other than use taxes (see *Question 15*). Imports and exports may, however, be subject to federal import or export taxes.

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**22. Is there a wide network of double tax treaties? If so, please give details.**

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See *Doing Business in... United States* for information on double tax treaties.

## COMPETITION

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

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The Oklahoma Antitrust Reform Act (*79 OS §§ 201 et seq.*) generally follows federal anti-trust laws.

In the absence of a partnership dissolution or a sale of a business, covenants not to compete are generally not enforceable. At most, former employees are not permitted to solicit the sale of goods, services or any combination of these from the established customers of their former employers.

## INTELLECTUAL PROPERTY

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**24. 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.**
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### Patents

Patent protection is a matter of federal law, and there are no additional Oklahoma laws protecting patents.

### Trade marks

- **Nature of right.** Trade mark rights are acquired through use under the common law and may be registered with the Secretary of State. Registered trade marks can include any of the following, if they are adopted and used by a person to identify goods made or sold, or services rendered, to distinguish them from goods made or sold, or services rendered, by others:

- words;
- names;
- symbols;
- emblems;
- devices; or
- any combination of these.

Trade mark protection prevents the reproduction, counterfeiting, copying, or colourable imitation of a registered trade mark in connection with any of the following:

- the sale, offering for sale, or advertising of any goods;
  - use of the mark likely to cause confusion or a mistake;
  - use of the mark likely to deceive about the goods' source of origin.
- **How protected.** Trade marks are primarily protected by federal law but additional protections and remedies are provided through registration with the Secretary of State.
  - **How enforced.** Trade mark rights are primarily enforced through legal action. Remedies can include:
    - injunctive relief;
    - damages;
    - an award of profits derived from the infringement; and
    - an award of triple damages and profits, plus attorneys' fees, when the infringement was committed knowingly or in bad faith.
  - **Length of protection.** Trade mark registrations are effective for an initial ten-year term and can be renewed every five years without limitation.

### Registered designs

The US does not have a concept of registered designs similar to the concept in many other foreign jurisdictions. Instead, certain types of designs may be protected by federal patent or trade mark law (see *above*).

### Unregistered designs

- **Nature of right.** An unregistered design may include the non-functional elements of a product or its packaging. The owner of an unregistered design may be able to sue for infringement if the competing product is likely to cause a consumer to be confused regarding the product's origin.
- **How protected.** There is no formal protection specific to unregistered designs. Under federal, state and common law, certain principles of trade dress (the product's appearance) may protect the shape, appearance or layout that make a product or its packaging distinctive and recognisable such that it has acquired secondary meaning in the marketplace.
- **How enforced.** Unregistered designs may be enforced through an injunction or recovery of damages from the infringer.
- **Length of protection.** Protection lasts as long as the design:
  - continues to be used in commerce; and
  - is distinctive in the minds of consumers.

### Copyright

Copyright protection is a matter of federal law.

### Confidential information

- **Nature of right.** The protection of a party's confidential information depends on:
  - the information, which must be of a confidential or proprietary nature; and
  - the party seeking protection, which must have taken reasonable efforts to maintain the information's confidentiality.

To qualify for statutory protection as a trade secret under Oklahoma's Uniform Trade Secrets Act (78 OS §§ 86 *et seq.*), confidential information must:

- derive independent economic value from not being generally known; and
- not be readily ascertainable by others.
- **How protected.** Confidential information may be protected by agreement, common law or statute.
- **How enforced.** Rights relating to confidential information are enforced through legal action. Remedies can include:

- injunctive relief;
- an award of damages for actual loss;
- an award of a reasonable royalty for the use of such information;
- unjust enrichment;
- double the amount of damages, plus lawyers' fees, in the event of bad faith misappropriation.

### Trade names

- **Nature of right.** Common law ownership rights in trade names is acquired through the use of such names, but business entities doing business in Oklahoma must report use of a trade name to the Secretary of State. The right to exclusively use a trade name may arise when it has been used for a sufficient period of time to become identified with the user by the general public.
- **How protected.** A business entity doing business in Oklahoma under any name other than its legal name must file a report with the Secretary of State giving, among other things, the trade name the entity is acting under. There are common law and statutory prohibitions on using the same trade name as another entity.
- **How enforced.** A party whose trade name is misappropriated may seek an injunction prohibiting the use of the name and an award of damages.
- **Length of protection.** Trade name registrations are effective for five years and can be renewed every five years without limitation.

## MARKETING AGREEMENTS

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**25. 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.** There are no specific Oklahoma laws on agency agreements. However, Oklahoma and federal anti-trust laws may apply.

- **Distribution.** Some types of distribution agreements, such as automobile and controlled substance agreements, are regulated by Oklahoma law. Oklahoma and federal anti-trust laws may also apply.
- **Franchising.** Franchise agreements for franchised vehicle dealers are subject to regulation under Oklahoma law. Oklahoma and federal anti-trust laws may also apply.

## E-COMMERCE

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

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This issue is governed by federal law and Oklahoma does not have any specific statutes.

## DATA PROTECTION

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

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It is unlawful for any person to willingly obtain another person's personal identifying information or use the personal identity of another person, with fraudulent intent to obtain money, credit or goods without consent. In addition, Oklahoma has enacted other laws governing other privacy issues, such as the release of certain:

- Court records.
- Financial records.
- School records.
- Vital records.

## PRODUCT LIABILITY

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

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Product liability is governed by common law. To impose strict product liability, the defendant must be a seller engaged in the business of selling the allegedly dangerous product. To determine whether this is the case in a strict product liability action, the relevant inquiry is whether the seller's conduct would justify a conclusion that:

- It has undertaken a special responsibility for product safety.
- The public has a right to expect that it will stand behind the product.
- Between the consumer and the seller, it is equitable to impose upon the seller the loss caused by the product and the burden of spreading that loss as a cost of doing business.

## CONTRIBUTOR DETAILS



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**Areas of practice.** Corporate; M&A and securities.



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**Qualified.** Oklahoma, 1986

**Areas of practice.** Corporate; M&A and securities.

#### Recent transactions

- Representing privately held distribution business in asset sale.
- Representing public manufacturer in stock acquisition of private manufacturer.
- Representing equity fund in asset acquisition of retail business.

**Qualified.** Oklahoma, 2001

**Areas of practice.** Corporate; M&A and securities.

#### Recent transactions

- Representing public oil and gas exploration company in simultaneous public offering of common stock and convertible senior notes.
- Representing public oil and gas exploration company in joint venture of midstream gas gathering/pipeline assets.
- Representing public energy company in asset acquisition of private drilling/fluids business.

