Country Guide
USA - Colorado

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GUIDE TO DOING BUSINESS IN COLORADO

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BUSINESS ORGANIZATIONS

Colorado recognizes all of the traditional forms of business entities, including corporations, general and limited partnerships, limited liability companies, sole proprietorships, joint ventures, and nonprofits. Business entities are formed and registered by filing the necessary documents with the Colorado Secretary of State. Information and forms needed to form, register, and license a company with the state of Colorado can be found at the websites of the following Colorado state agencies:

Colorado Secretary of State
Business Division
1700 Broadway, Suite 550
Denver, CO 80290
303-894-2200
www.sos.state.co.us/pubs/business

Colorado Secretary of State
Business Division
1700 Broadway, Suite 550
Denver, CO 80290
303-894-2200
www.sos.state.co.us/pubs/business

Colorado Department of Revenue
1375 Sherman Street
Denver, CO 80261
303-866-3091
www.colorado.gov/revenue

Colorado Department of Regulatory Agencies
1560 Broadway, Suite 110
Denver, CO 80202
303-894-7855
www.colorado.gov/pacific/dora/licensing-1

Colorado's Office of Economic Development and International Trade has also published a Colorado Business Resource Book that contains many helpful checklists and links to information about starting or registering a business in Colorado.

Corporations

The Colorado Business Corporation Act (CBCA) governs the formation, operation and dissolution of corporations in Colorado. *Colo. Rev. Stat. § 7-101-101.*

A corporation is incorporated when the articles of incorporation are filed by the Secretary of State. The corporate existence begins upon incorporation and the Secretary of State's filing of the articles of incorporation is conclusive that all conditions for incorporation have been met. *Colo. Rev. Stat. § 7-102-103.* There is a nominal fee to file articles of incorporation, which can only be filed electronically.

One or more persons may act as the incorporator by delivering articles of incorporation to the Secretary of State for filing. An incorporator who is an individual must be 18 years of age or older. *Colo. Rev. Stat. § 7-102-101.*

The articles of incorporation must contain the following:

- Domestic entity name, which must contain the term or abbreviation "Corporation," "Incorporated," "Company," "Limited," "Corp.," "Inc.," "Co.," or "Ltd.";
- Information regarding authorized shares;
- The name and address of the corporation's initial registered agent;
- The principal office address of the corporation; and
- The true name and mailing address of each incorporator.

Colo. Rev. Stat. § 7-102-102(1); Colo. Rev. Stat. § 7-90-601 (3)(a).

Although not required, the articles of incorporation may also contain:

- The names and addresses of the individuals who are elected to serve as the initial directors;
- Other provisions regarding the purpose of incorporation; managing and regulating the affairs of the corporation; defining, limiting, and regulating the powers of the corporation, its board of directors, and its shareholders; a par value for authorized shares or classes of shares; the imposition of personal liability on shareholders for the debts of the corporation; and any other provision under the CBCA that is required or permitted to be stated in the bylaws;

- A provision eliminating or limiting the liability of a director to the corporation or its shareholders, subject to certain exceptions; and
- A provision eliminating or limiting the duty of a director or other person to offer the corporation business opportunities before the pursuit of such opportunities by such director or other person.

Colo. Rev. Stat. § 7-102-102(2).

Bylaws

The board of directors or, if no directors have been elected, the incorporators, may adopt initial bylaws. If initial bylaws have not been adopted by either the incorporators or the board of directors, the shareholders may adopt initial bylaws. The bylaws of a corporation may contain any provisions, rules, or procedures for managing the business and regulating the affairs of the corporation that are not inconsistent with law or the articles of incorporation. *Colo. Rev. Stat. § 7-102-106.*

Management and Control

Corporations are managed by a board of directors and the corporation's officers. *Colo. Rev. Stat. § 7-108-101; Colo. Rev. Stat. § 7-108-301.* Additionally, the corporation's shareholders vote on important corporate issues, such as an election of directors, merger, sale of all assets, and dissolution.

Once the corporation has been established, the initial board of directors meets and ratifies the acts in connection with initial formation of the corporation and adopts bylaws. *Colo. Rev. Stat. § 7-102-106.*

In general, the bylaws of a corporation contain provisions governing director and officer qualifications; powers and duties; voting; meetings of shareholders, directors, and officers; filling of vacancies; committees; property holding and transfer; indemnification of directors and officers; bank accounts; fiscal year audits and financial reports; conflicts of interest; and amendment, merger, and dissolution procedures.

Liability of Members, Directors, and Officers

If provided in the articles of incorporation, the corporation can eliminate or limit the personal liability of a director to the corporation or to its shareholders for monetary damages for breach of fiduciary duty as a director. However, any such provision cannot eliminate or limit the liability for any breach of the director's duty of loyalty to the corporation or to its shareholders, acts or omissions not in good faith or which involve certain intentional misconduct or a knowing violation of law, failure to make appropriate inquiry about certain facts or circumstances brought to the attention of the director, or any transaction from which the director directly or indirectly derived a personal benefit. *Colo. Rev. Stat. § 7-102-102(2); Colo. Rev. Stat. § 7-108-402(1).*

No director or officer shall be personally liable for any injury to person or property arising out of a tort committed by an employee unless the director or officer was personally involved in the situation giving rise to the litigation or unless such director or officer committed a criminal offense in connection with such situation. *Colo. Rev. Stat. § 7-108-403.*

The corporation may indemnify a person who is party to a lawsuit against liability because of the person's position as a director if:

- The person's conduct was in good faith;
- The person reasonably believed:
  - In the case of conduct in an official capacity with the corporation, that such conduct was in the corporation's best interests;
  - In all other cases, that such conduct was at least not opposed to the corporation's best interests; and
- In the case of a criminal proceeding, the person had no reasonable cause to believe the conduct was unlawful.

Colo. Rev. Stat. § 7-109-102.

Unless limited by its articles of incorporation, a corporation shall indemnify a person who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the person was a party because the person is or was a director, against reasonable expenses incurred by the person in connection with the proceeding. *Colo. Rev. Stat. § 7-109-103.*

Merger

One or more domestic corporations may merge into another domestic entity if the board of directors of each domestic corporation that is a party to the merger and each other entity that is a party to the merger adopts a plan of merger and, if required, the shareholders of each corporation, approve the plan of merger. *Colo. Rev. Stat. § 7-111-101; Colo. Rev. Stat. § 7-90-203; Colo. Rev. Stat. § 7-111-103.*

The plan of merger shall state:

- The entity name, or for an entity that has no entity name, the true name;
- The jurisdiction under the law of which the entity is formed;
- The form of each of the merging entities;
- The form of the surviving entity into which the merging entities are to merge;
- The terms and conditions of the merger, including the manner and basis of changing the owners' interests of each merging entity into the owners' interests or obligations of the surviving entity or into money or other property in whole or in part; and
- Any amendments to the constituent documents of the surviving entity to be effected by the merger.

Colo. Rev. Stat. § 7-90-203.3.

After a plan of merger is approved by the shareholders, the surviving corporation shall deliver to the Secretary of State, for filing, a Statement of Merger. *Colo. Rev. Stat. § 7-90-203.7.* The Statement of Merger is a paper filing with the Secretary of State, and there is a nominal fee for the filing.

Recordkeeping and State Reports

Corporations must deliver to the Colorado Secretary of State an annual periodic report that states the entity name, the jurisdiction under the law of which the reporting entity was formed, and the organization's registered agent's name and address and the principal office address of the reporting entity. *Colo. Rev. Stat. § 7-90-501.* There is a small fee to file a timely periodic report and a larger fee to file a periodic report after its due date. The periodic report may only be filed electronically.

Partnerships

Partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships are forms of organization recognized as statutory entities under Colorado law.

Partnerships provide almost unlimited flexibility in governance and management. Profits and losses are allocated according to the capital contributions of each partner but unlike limited liability companies and nonprofit corporations, the total assets of each partner in a general partnership are at risk, not just the capital that has been put into the enterprise. *Colo. Rev. Stat. § 7-60-118; Colo. Rev. Stat. § 7-60-115.*

The advent of "limited partnerships" changed this by permitting the creation of a special class of partners, known as limited partners, who provide capital but do not participate in management. In limited partnerships, the limited partners are shielded from liability beyond their capital contributions, but the general partner—who manages the affairs of the limited partnership—does not have this liability protection. *Colo. Rev. Stat. § 7-62-303; Colo. Rev. Stat. § 7-62-403(2)(b).* Limited partnerships often are used as financing vehicles and are most useful when investors are to have no role in management, and a simple or flexible governance structure is needed.

Limited liability partnerships (LLPs) function like general partnerships but there is no distinction between the type of partners, and LLPs provide extra protections for each partner. Such protections include personal immunity of a partner for liability arising from the negligence and wrongful acts of other partners, unless the other partners were under the partner's direct supervision. *Colo. Rev. Stat. § 7-64-306(3), (4); Colo. Rev. Stat. § 7-60-115(2).* Thus, a partner's loss with respect to the LLP is usually limited to his or her investment in the partnership.

In Colorado, two statutes govern partnership formation. A partnership formed prior to November 1, 1998 is governed by the Uniform Partnership Law of 1931 (UPL). *Colo. Rev. Stat. § 7-60-101.* A partnership formed January 1, 1998 or after, or that elects to be so covered, is governed by the Colorado Uniform Partnership Act of 1997 (CUPA). *Colo. Rev. Stat. § 7-64-1202; Colo. Rev. Stat. § 7-64-1205.*

General Partnerships

Under both the UPL and CUPA, a general partnership is defined as an association of two or more persons to carry on, as co-owners, a business for a profit, but excluding an association formed under any other statute. *Colo. Rev. Stat. § 7-60-106; Colo. Rev. Stat. § 7-64-202(1).*

Formation

Unlike corporations or even some partnerships such as a limited liability partnership, general partnerships do not need to take formal action to organize. When two persons act as owners of a business for profit, they form a general partnership regardless of whether they intend to do so. *Colo. Rev. Stat. § 7-60-106; Colo. Rev. Stat. § 7-64-202(1).*

Filing

General partnerships may file a "statement of partnership authority" that shall contain the:

- True name of the partnership;
- Principal office address, or, if it has no principal office address, a street address, and, if different, the mailing address of its chief executive officer and the street address, and, if different, the mailing address of an office in Colorado, if there is one; and
- Names or a description of the partners authorized to execute an instrument transferring real property held in the name of the partnership.

Colo. Rev. Stat. § 7-64-303.

A general partnership doing business under a trade name must file a statement of trade name with the Secretary of State. *Colo. Rev. Stat. § 7-71-101.*

Management

Partners have the statutory right to participate in management. *Colo. Rev. Stat. § 7-64-401(6).* Also, unless otherwise agreed, differences in the ordinary course of business may be resolved by a majority vote. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all the partners. *Colo. Rev. Stat. § 7-64-401(10).*

Liability

Partners are jointly and severally liable, but creditors must exhaust remedies against the general partnership before executing against the partners. *Colo. Rev. Stat. § 7-64-306; Colo. Rev. Stat. § 7-64-307.* In addition, the partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of business of the partnership or for the preservation of its business or property. *Colo. Rev. Stat. § 7-64-401(3).*

Limited Partnerships

In Colorado, a limited partnership formed before November 1, 1981 is subject to the Uniform Limited Partnership Act of 1931 (ULPA). *Colo. Rev. Stat. § 7-61-129.5.* A limited partnership formed after October 31, 1981 is governed by the Colorado Uniform Limited Partnership Act of 1981 (CULPA). Limited partnerships subject to ULPA can elect to be governed by CULPA. *Colo. Rev. Stat. § 7-61-129; Colo. Rev. Stat. § 7-62-1104.*

A limited partnership is formed by two or more persons under the laws of Colorado and has one or more general partners and one or more limited partners. *Colo. Rev. Stat. § 7-62-101(7).* The name of a limited partnership must include "Limited Partnership," "Limited," "Company," "L.P.," "LP," "Ltd.," or "Co.," and must be distinguishable from the name of any other entity on the record. *Colo. Rev. Stat. § 7-90-601(3)(e)(1).*

Formation

A limited partnership is formed by filing a certificate of limited partnership with the Secretary of State. The certificate must set forth the:

- Name of the limited partnership;
- Name and address of the registered agent;
- Name and the mailing address of each general partner;
- A statement that there are at least two partners in the partnership, at least one of whom is a limited partner; and
- Any other matters relating to the limited partnership or the certificate that the general partners determine to include.

Colo. Rev. Stat. § 7-62-201.

In addition, a limited partnership must file a statement of trade name per criteria listed in the general partnership section of the statutes. *Colo. Rev. Stat. § 7-71-101.*

Liability

A general partner is jointly and severally liable for the obligations of the limited partnership. *Colo. Rev. Stat. § 7-62-403; Colo. Rev. Stat. § 7-64-306.* A limited partner is not liable for the obligations of the limited partnership unless the limited partner is also a general partner, or the limited partner participates in the control of the business. However, if the limited partner participates in the control of the business at the time such liability is incurred, the limited partner is liable only to persons who transact business or conduct activities with the limited partnership reasonably believing that the limited partner is a general partner. *Colo. Rev. Stat. § 7-62-303(1)(a).*

Limited Liability Partnerships

A limited liability partnership (LLP) is a general partnership in which the partners are not personally liable for the debts and obligations of the general partnership. *Colo. Rev. Stat. § 7-64-306(3), (4).* An LLP formed before January 1, 1998, and registered after May 23, 1995, will be governed by the LLP provisions of UPL unless it elects to be governed by CUPA. *Colo. Rev. Stat. § 7-60-101; H.R. 95-1061, 60th Gen. Assemb., Reg. Sess. (Co. 1995).* An LLP formed after December 31, 1997, or which elects to be governed by CUPA, will be subject to CUPA's LLP provisions. *Colo. Rev. Stat. § 7-64-1205.*

Formation

LLPs are formed after filing a statement of registration with the Secretary of State. *Colo. Rev. Stat. § 7-64-1002(1).* The statement may be included in the certificate of limited partnership and must declare the following:

- The name that has been the true name of the domestic partnership or of the domestic limited partnership and the name that will be the domestic entity name of the domestic limited liability partnership or domestic limited liability limited partnership;
- Address of its principal office; and
- Name and address of its registered agent.

Colo. Rev. Stat. § 7-64-1002(3).

A limited liability partnership also must file a statement of trade name. *Colo. Rev. Stat. § 7-71-101.* The name of an LLP must contain the term or abbreviation "Registered Limited Liability Partnership," "Limited Liability Partnership," "Limited," "L.L.P.," "LLP," "R.L.L.P.," "RLLP," or "Ltd." and must be distinguishable from the name of any other entity on the record. *Colo. Rev. Stat. § 7-90-601(3)(d).*

Management

LLPs are governed by a partnership agreement, which is the agreement, whether written, oral, or implied, among the partners that governs relations among the partners and between the partners and the partnership. *Colo. Rev. Stat. § 7-64-101(20).* Partners in LLPs have a statutory right to participate in management. *Colo. Rev. Stat. § 7-64-401(6).* Unless otherwise agreed, differences in the ordinary course of business may be resolved by a majority of the partners, and differences outside the ordinary course of business and amendments of the partnership agreement may be undertaken by consent of all of the partners. *Colo. Rev. Stat. § 7-64-401(10).*

Liability

Except as provided in a partnership agreement, a partner is not liable directly or indirectly, including by way of indemnification, contribution, or otherwise, for a debt, obligation, or liability of or chargeable to the LLP, other than for the partner's own negligence, wrongful acts, or misconduct. *Colo. Rev. Stat. § 7-60-115(2).*

Limited Liability Limited Partnership

A limited liability limited partnership (LLLP) is a domestic limited partnership and is subject to the LLP provisions of UPL unless it elects to be subject to CUPA. *Colo. Rev. Stat. § 7-62-101(12).*

The formation, management and liability for an LLLP are the same as that for an LLP in Colorado except that in an LLLP, the general partners are also protected from liability for the debts and obligations of partnership. *Colo. Rev. Stat. § 7-62-403(2)(a)(II).*

Limited Liability Companies

The Colorado Limited Liability Company Act governs the formation, operation and dissolution of limited liability companies (LLCs) in Colorado. *Colo. Rev. Stat. § 7-80-101.*

One or more persons may form an LLC by delivering the articles of organization to the Secretary of State for filing. Any such person must be 18 years of age or older but need not be a member of the LLC after formation has occurred. *Colo. Rev. Stat. § 7-80-203.* A limited liability company is formed when its articles of organization become effective. *Colo. Rev. Stat. § 7-80-207.* There is a nominal fee to file articles of organization, which can only be filed electronically.

The articles of organization must state:

- Domestic entity name, which must contain the term or abbreviation "Limited Liability Company," "Ltd. Liability Company," "Limited Liability Co.," "Ltd. Liability Co.," "Limited," "L.L.C.," "LLC," or "Ltd.";
- The principal office address of the LLC's initial office;
- The name and address of the LLC's initial registered agent;
- The name and mailing address of the persons forming the LLC;
- Whether the LLC's management is vested in one or more managers or the members;
- That there is at least one member of the LLC; and
- Any other matters relating to the LLC or the articles of organization that the persons forming the LLC determine to include.

Colo. Rev. Stat. § 7-80-204.

Operating Agreement

A limited liability company is bound by any operating agreement of its members. An LLC operating agreement may be entered into before, after, or at the time of filing the articles of organization, and may contain one or more provisions concerning the enforcement, interpretation, construction, application, or severability of provisions, integration, effect of parole evidence, and other matters with respect to the operating agreement or any of its provisions. *Colo. Rev. Stat. § 7-80-108.*

Management

According to the designation in the articles of organization, an LLC may be managed by a majority of the members, or, if the LLC has one or more managers, by a majority of the managers. *Colo. Rev. Stat. § 7-80-401(1).* The members of an LLC may designate the manager or managers of the LLC, and any such manager must be at least 18 years of age. *Colo. Rev. Stat. § 7-80-402.*

A majority of the members or managers, depending on the management structure, of an LLC may appoint officers with such titles, rights, and duties as the LLC determines. Officers may be given authority to do any act that is not in the ordinary course of the business of the LLC only with the consent of all of the members. *Colo. Rev. Stat. § 7-80-403.*

Regardless of the management structure, consent of each member is required to:

- Amend the articles of organization;
- Amend the operating agreement; and
- Authorize an act of the LLC that is not in the ordinary course of business.

Colo. Rev. Stat. § 7-80-401(2).

Liability

Members and managers of LLCs are not liable for the debts, obligations, or liabilities of the LLC. However, a member or manager of an LLC who commits a tort in the scope of his or her employment is liable for the torts he or she commits, even in the course of employment. *Colo. Rev. Stat. § 7-80-705.* While members of an LLC are generally not held personally liable, if a party seeks to hold the members liable for the acts of the LLC, the court looks to the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law. *Colo. Rev. Stat. § 7-80-107.*

Recordkeeping and State Reports

LLCs must deliver to the Colorado Secretary of State an annual periodic report that states the entity name, the jurisdiction under the law of which the reporting entity was formed, the organization's registered agent's name and address, and the principal office address of the reporting entity. *Colo. Rev. Stat. § 7-80-301; Colo. Rev. Stat. § 7-90-501.* There is a small fee to file a timely periodic report and a larger fee is required to file a periodic report after its due date. The periodic report may only be filed electronically.

Nonprofit Corporations and Cooperatives

The Colorado Revised Nonprofit Corporation Act governs the formation, operation, and dissolution of nonprofit corporations in Colorado. *Colo. Rev. Stat. § 7-121-101.*

A nonprofit corporation in Colorado is managed by its board of directors and operated by its officers and employees. *Colo. Rev. Stat. § 7-128-101; Colo. Rev. Stat. § 7-128-301.* A nonprofit corporation may, but is not required to, have members. *Colo. Rev. Stat. § 7-126-101.* No part of the income or surplus of a Colorado nonprofit corporation may be distributed to its members, directors or officers; however, reasonable compensation may be paid for services rendered. *Colo. Rev. Stat. § 7-133-101; Colo. Rev. Stat. § 7-133-102.*

Formation

A nonprofit corporation attains its separate legal status through the filing and approval by the Colorado Secretary of State of its articles of incorporation. *Colo. Rev. Stat. § 7-122-103.*

Incorporation

A nonprofit corporation is incorporated when the articles of incorporation are filed by the Secretary of State. The corporate existence begins upon incorporation. The Secretary of State's filing of the articles of incorporation is conclusive that all conditions precedent to incorporation have been met. *Colo. Rev. Stat. § 7-122-103.*

Incorporators

One or more persons may act as the incorporator or incorporators of a nonprofit by delivering articles of incorporation to the Secretary of State for filing. An incorporator who is an individual shall be 18 years of age or older. *Colo. Rev. Stat. § 7-122-101.*

Articles of Incorporation

Articles of incorporation must include the following:

- Domestic entity name, which may, but need not, contain the term or abbreviation "Corporation," "Incorporated," "Company," "Limited," "Corp.," "Inc.," "Co.," or "Ltd.";
- Name and address of the nonprofit corporation's initial registered agent;
- The principal office address of the nonprofit corporation;

- The true name and mailing address of each incorporator;
- Whether or not the nonprofit corporation will have voting members; and
- Provisions not inconsistent with law regarding the distribution of assets on dissolution.

Although not required, the articles of incorporation may also contain provisions:

- Naming the initial board of directors;
- Stating the purposes of the corporation;
- Managing and regulating the affairs of the corporation;
- Defining, limiting, and regulating the powers of the nonprofit corporation, its board of directors, and its members;
- Stating whether cumulative voting will be permitted;
- Specifying the characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of its members; and
- Any other provisions required or permitted to be stated in the bylaws.

Colo. Rev. Stat. § 7-122-102.

Management and Control

A nonprofit organization is managed by a board of directors. Once the nonprofit corporation has been established, the incorporators must meet to adopt initial bylaws and elect a board of directors. If the initial board of directors was named in the organization's articles of incorporation, the initial board of directors must meet to adopt initial bylaws and elect officers. *Colo. Rev. Stat. § 7-122-105.*

Action may be taken by incorporators or directors without a meeting if notice is given and the board:

- Votes in favor of the proposed action;
- Votes against such action, or abstains in writing from voting; or
- Fails to respond or vote and fails to demand that action not be taken without a reason.

Colo. Rev. Stat. § 7-122-105; Colo. Rev. Stat. § 7-128-202.

The board may meet to ratify the acts in connection with the initial formation of the corporation, and adopt bylaws that set forth the rules and procedures governing the decision-making process of the board of directors and the general operation and management of the corporation consistent with the applicable statutes of Colorado and the articles of incorporation. *Colo. Rev. Stat. § 7-122-106.*

Typically, the bylaws of a nonprofit corporation contain provisions governing matters such as the qualifications, powers and duties of members, directors, and officers, voting rights, filling of vacancies, meetings, holding and transfer of property, indemnification of directors and officers, the establishment of committees and bank accounts, fiscal year audits and financial reports, conflicts of interest, and amendment and dissolution procedures.

Liability of Members, Directors and Officers

If provided in the articles of incorporation, the nonprofit corporation may eliminate or limit the personal liability of a director of a nonprofit corporation to monetary damages for breach of fiduciary duty as a director. The articles cannot, however, limit or eliminate the liability of a director for monetary damages for any breach of the director's duty of loyalty to the nonprofit corporation or its members, or any transaction from which the director derived an improper benefit. *Colo. Rev. Stat. § 7-128-402(1).*

No director or officer will be personally liable for any injury to person or property from a tort committed by an employee unless the director or officer was personally involved in the situation giving rise to litigation or the director committed a criminal offense in connection with the situation. *Colo. Rev. Stat. § 7-128-402(2).*

A director who votes for or assents to a distribution made in violation of the statutes or articles of incorporation is personally liable to the nonprofit corporation for the amount of the distribution that exceeds what could have been distributed without said violation. *Colo. Rev. Stat. § 7-128-403.*

A nonprofit corporation may indemnify against liability a person who is party to a lawsuit because of the person's position as a director if:

- The person's conduct was in good faith; and
- The person reasonably believed:
  - That while acting in an official capacity, the action was in the organization's best interests;
  - In all other cases, that the conduct was at least not opposed to the nonprofit corporation's best interests; and
  - In the case of any criminal proceeding, the person had no reasonable cause to believe the conduct was unlawful.

Colo. Rev. Stat. § 7-129-102.

Unless limited by its articles of incorporation, a nonprofit corporation must indemnify a person who was wholly successful on the merits or otherwise, in the defense of any proceeding to which the person was a party because the person is or was a director, against reasonable expenses incurred by the person in connection with the proceeding. *Colo. Rev. Stat. § 9-129-103.*

Dissolution

If a nonprofit corporation has no members, a majority of its directors or a majority of its incorporators may authorize the dissolution of the nonprofit corporation. The incorporators or directors will adopt a plan of dissolution indicating to whom the assets owned or held by the nonprofit corporation will be distributed. *Colo. Rev. Stat. § 7-134-101.* If a nonprofit corporation has members, the board of directors may adopt a proposal to dissolve, and the majority of members may approve the proposal to dissolve. *Colo. Rev. Stat. § 7-134-102.* After dissolution is authorized, the nonprofit corporation may dissolve by delivering to the Secretary of State articles of dissolution stating:

- The domestic entity name of the nonprofit corporation;
- The principal office address of the nonprofit corporation; and
- That the nonprofit corporation is dissolved.

A nonprofit corporation is dissolved upon the effective date of its articles of dissolution. *Colo. Rev. Stat. § 7-134-103.*

Recordkeeping and State Reports

Nonprofit corporations must deliver to the Secretary of State an annual report that states the entity name, the jurisdiction under the law of which the reporting entity was formed, and the organization's registered agent's name and address. *Colo. Rev. Stat. § 7-136-107; Colo. Rev. Stat. § 7-90-501.*

Other Alternatives

Foreign Entity Authority

An entity organized under the laws of another state of the United States or of another country that transacts business in the state of Colorado must obtain a statement of foreign entity authority from the Colorado Secretary of State. *Colo. Rev. Stat. § 7-90-801.* Statements of foreign entity authority require only the disclosure of certain minimal information about the entity and the payment of a fee. *Colo. Rev. Stat. § 7-90-803.*

The Colorado Corporations and Associations Act identifies several activities that are not considered the transaction of business in the state, and for which no statement of foreign entity authority is required:

- Maintaining, defending, or settling in its own behalf any proceeding or dispute;
- Holding meetings of its owners or managers or carrying on other activities concerning its internal affairs;
- Maintaining bank accounts;
- Maintaining offices or agencies for the transfer, exchange, and registration of its own securities or owner's interests, or maintaining trustees or depositories with respect to those securities or owner's interests;
- Selling through independent contractors;
- Soliciting or obtaining orders, whether by mail or through employees, agents, or otherwise, if the orders require acceptance outside this state before they become contracts;

- Creating, as borrower or lender, or acquiring, indebtedness;
- Creating, as borrower or lender, or acquiring, mortgages or other security interests in real or personal property;
- Securing or collecting debts in its own behalf or enforcing mortgages or security interests in property securing such debt;
- Owning, without more, real or personal property;
- Collecting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of like nature;
- Transacting business or conducting activities in interstate commerce; and
- In the case of a foreign nonprofit corporation, granting funds or distributing information to members.

Colo. Rev. Stat. § 7-90-801(2).

Branch Offices

The maintenance of a branch office within the state is likely sufficient activity to constitute the transactions of business in the state, requiring the foreign entity to obtain a statement of foreign entity authority from the Colorado Secretary of State. *Colo. Rev. Stat. § 7-90-801, annotations.*

Independent Distributors

The use of an independent distributor to sell goods or provide services generally does not require a non-Colorado entity to obtain a statement of foreign entity authority. With very limited exceptions, the relationship between such an entity and the Colorado independent distributor would be based solely on the terms of the agreement pursuant to which the entity engaged the services of the distributor. The exceptions pertain principally to statutory limitations on the right of a vehicle or alcoholic beverage supplier to terminate its arrangements with its distributor. *Colo. Rev. Stat. § 12-6-120; Colo. Rev. Stat. § 12-47-406.3.*

Licensing

The state of Colorado does not issue or require a generic, general business license. Certain activities require a license from a governmental or quasi-governmental authority. For example, lawyers, accountants, architects, engineers, and other professionals must have a license from the relevant authority to practice their trade. Licenses are also mandatory for a wide range of other business activities, including automobile dealers, plumbers, and the like. More detailed information about such licensing requirements is published by the Colorado Department of Regulatory Agencies.

There are a wide variety of city and county regulations regarding licensing of entities that do business within their jurisdictions. A business that delivers goods and/or services to many locations within the state should check with the city or county clerk of each delivery area to determine which, if any, local licenses apply.

Each seller of goods or services in the state is required to obtain and renew each year a retail sales license from the county in which it makes sales. The fee for such license is nominal.

Franchising

Colorado has no special statutory scheme in place for the regulation of the business of franchising. Certain practices of franchisors may, however, be subject to regulation under the Colorado Consumer Protection Act. *Colo. Rev. Stat. § 6-1-101.* The business of franchising is also subject to the disclosure requirements of the Trade Regulation Rule on Franchising of the U.S. Federal Trade Commission. *16 C.F.R. 436.*

Sales Representatives

The statutory rights of a wholesale sales representative to collect commissions arising under a written agreement with a distributor, jobber, or manufacturer are governed by *Colo. Rev. Stat. §§ 12-66-101 et seq*.

Applicability of State Usury Laws

The maximum rate of interest or finance charge that may be agreed to in a business or other non-consumer transaction is 45% per year, calculated on the unpaid balances of the debt on the assumption that the debt is to be paid according to its terms and will not be paid before the end of the agreed term. The rate of interest or finance charge will be deemed in excess of 45% per year only if it could have been determined at the time of the transaction by mathematical computation that such rate would exceed such permitted rate. There is no public policy in Colorado limiting or prohibiting the compounding of interest. *Colo. Rev. Stat. § 5-12-103.*

Colorado also has a criminal usury statute imposing a substantially similar limit on the rate of interest or finance charge that may be imposed. The violation of this criminal statute is a class six felony punishable by a fine of up to $100,000 and up to 18 months in prison. *Colo. Rev. Stat. § 18-15-104.*

Where there is no agreement as to the rate of interest, the legal rate of interest is 8% per year. *Colo. Rev. Stat. §§ 5-12-101; Colo. Rev. Stat. § 5-12-102.*

OVERVIEW OF FEDERAL & STATE COURT SYSTEMS IN COLORADO

In Colorado, litigation can occur in either the federal court or state court system, depending on the nature of the case and the amount in controversy. While federal courts are courts of limited jurisdiction, meaning that certain requirements must first be satisfied before the federal court can hear a matter, Colorado's state courts are courts of general jurisdiction, which means they can hear any matter where venue is appropriate in Colorado.

Both Colorado's federal and state courts hold similar organizational hierarchies for civil litigation. First, matters are typically brought before a trial court, which handles pre-trial litigation (such as discovery and dispositive motions) and conducts a trial if one is necessary. Next, for both federal and state courts in Colorado, cases are usually first appealed to the intermediate court of appeals, which must hear the appeal. If a federal or state litigant is unsatisfied with the disposition of the decision by the intermediate court of appeals, they may ask the highest court, the U.S. Supreme Court or Colorado Supreme Court, respectively, to hear the matter. However, the high court may elect not to hear the matter; in fact, both the U.S. Supreme Court and the Colorado Supreme Court only hear a fraction of the matters that are presented to them by petition.

Below is an overview of the federal and state court systems in Colorado, including jurisdictional and venue-related requirements for the federal court system, the different matters that may be heard in the different court systems, the composition of the two judiciaries, and the litigation process for both court systems.

Federal Court System

Federal courts are courts of limited jurisdiction, meaning they are limited in which cases that they may hear. The largest considerations for whether a matter can be heard in federal court revolve around whether the matter is in fact a "case or controversy," whether the plaintiff holds "standing," whether there is proper jurisdiction, and if venue requirements are satisfied.

First, under Article III of the U.S. Constitution, there must be an actual "case or controversy." Second, if an actual "case or controversy" does exist, the plaintiff must have "standing" to pursue the case based on an actual, legally-recognized injury.

Third, litigants can only bring a case in federal court if jurisdictional requirements are met. There are two principal avenues to jurisdiction in federal courts: "federal question" and "diversity" jurisdiction. Under "federal question" jurisdiction, the claims presented in a case must involve a question of federal law, such as bringing a claim under a federal statute. Federal question jurisdiction may be present in cases involving: bankruptcy, patent and copyright, antitrust, postal matters, admiralty, customs, international trade, international treaties, federal taxation, federal crimes, federal contracts, federal torts, federal legislation (particularly in the areas of securities, environmental, and labor matters), claims against the federal government, claims between states, claims against foreign sovereign parties, and certain other areas defined in the U.S. Constitution or federal statutes.

Alternatively, jurisdiction may be satisfied under "diversity" jurisdiction even when the case involves claims under state, rather than federal, law. For diversity jurisdiction to be met, none of the plaintiffs or defendants can be citizens of the same U.S. state (or the matter involves citizens of different foreign states), and the amount in controversy must exceed

$75,000. Finally, federal courts may only adjudicate cases in which the federal court obtains personal jurisdiction over the parties.

The judges on federal courts are appointed by the President with confirmation by the U.S. Senate and hold life tenure. Increasingly, federal trial courts also utilize magistrate judges who handle most non-dispositive issues in a case, such as discovery and scheduling matters, and who may make recommendations to the trial court judge on dispositive motions. Parties can also consent to a magistrate judge presiding over all aspects of the case, including trial. Unlike other federal judges, magistrate judges are appointed for a set term by the district court judges that serve above them; the President and the U.S. Senate are not involved in the selection of magistrate judges.

Under the federal court hierarchy, the U.S. District Courts are its trial courts. There are 94 Federal Districts in the United States. The U.S. District Court for the District of Colorado is based in Denver, Colorado, with some matters heard in other Colorado locations, including Colorado Springs, Grand Junction, and Durango. Presiding over cases emanating from the state, the federal trial court's jurisdictional boundary is congruent with the state's geographical boundaries.

While federal district judges are appointed for life, they may elect to reduce their workload by taking "senior status." Once a federal judge takes senior status or retires, the President may appoint another judge to that district. However, the senior judge will still hear cases, albeit typically at a lower caseload than before. Currently, there are seven active district judge positions in the U.S. District Court for the District of Colorado and eight senior district court judges.

In addition, the U.S. District Court for the District of Colorado has eight magistrate judges. Since 2014, the U.S. District Court for the District of Colorado has directly assigned civil cases to magistrate judges to conduct any or all proceedings in any jury or nonjury civil action. All parties to a case in which a magistrate judge has been assigned must file a Consent Form with the court stating whether they accept or decline the magistrate judge's assignment to the case. If any party to the action (or any later-added party to the action) refuses to consent to the assignment, then the matter is assigned to a district judge for further proceedings, though the district judge will usually still utilize the magistrate judge for non-dispositive management of the case, as noted above.

Appeals from final decisions of the U.S. District Courts generally are decided by a three-judge panel from one of 12 geographically-defined U.S. Circuit Courts of Appeals, with decisions made by a majority vote of the three-member panel. The U.S. Court of Appeals for the Tenth Circuit, based in Denver, Colorado, handles appeals from federal districts located in Colorado, Oklahoma, Kansas, New Mexico, Wyoming, and Utah. As discussed above, circuit court judges are also appointed for life, but may take senior status to reduce their workload and allow for another judge to be appointed. Currently, there are 12 active judge positions for the U.S. Court of Appeals for the Tenth Circuit, and eight senior judges also hear cases.

Appeals from the U.S. Circuit Court of Appeals for the Tenth Circuit may proceed to the U.S. Supreme Court, which is based in Washington, D.C. A party must apply for permission to appeal to the U.S. Supreme Court, which is known as petitioning for a writ of certiorari. Generally, the nine justices of the U.S. Supreme Court only adjudicate a small fraction (typically one to two percent) of the petitions presented to it.

The federal court system also includes a number of other specialized federal courts, including the U.S. Bankruptcy Court, U.S. Court of International Trade, U.S. Court of Claims, U.S. Tax Court, U.S. Court of Veterans' Appeals, and U.S. Court of Military Appeals, each with prescribed jurisdictions set out by federal statute.

A series of rules govern the conduct of litigation in federal courts. These rules include the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, Rules of the Supreme Court, and Federal Rules of Evidence. These various rules constitute a uniform body of procedural and evidentiary rules applicable to all courts in the federal system. In addition, each U.S. District Court and each of the U.S. Courts of Appeals have adopted additional and supplementary rules and procedure. The U.S. District of Colorado has developed its own local rules, and so has the U.S. Court of Appeals for the Tenth Circuit. In the U.S. District Court for the District of Colorado, the District Judges and Magistrate Judges may also have their own additional and supplementary rules and procedures for handling cases.

In general, the typical case path includes some or all the following: a complaint, service of legal process, motion to dismiss, answer, discovery of evidence, motion for partial or full summary judgment, procedural and evidentiary motions, trial (either to the court or a jury), judgment, and appeal. Civil cases generally are given a lower priority in case administration vis-à-vis criminal cases. In the U.S. District Court for the District of Colorado, as of 2022, the average period of time from commencement of a new federal civil case that proceeds to a jury trial until there is a judgment was 45 months. Once a matter has concluded in the District Court, appeals may then take a year or more to resolve following trial. As a result of the time and cost of the litigation process and other factors, a very high portion (perhaps as high as 95 percent or more) of federal civil cases are settled or resolved prior to a trial. In the U.S. District Court for the District of Colorado, as of 2022, the number of civil trials occurring in that year (32) equaled less than one percent of the total number of civil case filings.

Colorado State Court System

Unlike the federal courts, which are courts of limited jurisdiction, Colorado's state courts are courts of general jurisdiction. Access to the Colorado state court system is not restricted to residents. Instead, the Colorado Constitution provides that: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial, or delay." *Colo. Const. Art II § 6.*

Like the analogous federal court system, the Colorado state court system generally is divided into three levels: trial courts, an intermediate court of appeals, and the Colorado Supreme Court. The judges and justices on these courts are appointed by the Governor of Colorado and are subject to periodic retention elections.

The first level of the Colorado state court system consists of the District Courts, which are trial-level courts organized by District and County. Beginning in 2025, there will be 23 Judicial Districts in Colorado. The District Courts hear civil, criminal, domestic relations, juvenile, probate, and other cases. Smaller civil cases (in which less than $15,000 is at issue) and minor criminal matters involving misdemeanors and traffic infractions may be heard by County Courts. Appeals from the County Courts are heard by the District Courts. Depending upon the nature of the claim, juries may be available for adjudication in Colorado trial-level courts.

The Colorado state trial courts handle many more civil cases than their federal counterpart; Colorado's District Courts received 25 times more new civil cases in 2022 than the U.S. District Court for the District of Colorado.

Specialized courts also exist within the Colorado state court system, including water, probate, municipal, and juvenile courts.

The largest Judicial Districts (in terms of the volume of cases) are:

- Second Judicial District, servicing the City and County of Denver;
- First Judicial District, servicing Gilpin and Jefferson Counties (the west side of the Denver metropolitan area);
- Fourth Judicial District, servicing El Paso and Teller Counties (Colorado Springs and its environs);
- Eighteenth Judicial District, servicing Arapahoe County (Aurora and other parts of the southern and eastern Denver metropolitan area); and
- The new 23rd Judicial District, servicing Douglas, Elbert, and Lincoln Counties (the south and southeast sides of the Denver metropolitan area).

After their initial appointment by the Governor and a provisional two-year term, judges of the Colorado District Courts serve six-year terms subject to retention elections in which the electorate votes either to "retain" or "not retain" the judge in his or her position for another six-year term. Most District Court judges are retained.

Final decisions of the Colorado District Courts generally are first taken to the Colorado Court of Appeals, which is based in Denver. The Colorado Court of Appeals is an intermediate court of appeals that handles appeals on a state-wide basis and must hear all appeals that are filed before it. There are 22 judges on the Colorado Court of Appeals. Colorado Court of Appeals judges sit in panels of three to decide matters, with decisions made by a majority vote of the three-member panel. After their initial appointment by the Governor and their provisional two-year term, judges of the Colorado Court of Appeals serve eight-year terms subject to retention elections for additional eight-year terms. Most Colorado Court of Appeals judges are retained.

Appeals from the Colorado Court of Appeals are taken to the Colorado Supreme Court, which is based in Denver. This court is the court of last resort in the Colorado state court system. While the Colorado Supreme Court is the court of last resort for all matters of state law, the Court's decisions concerning federal law may be appealed to the United States Supreme Court. The Colorado Supreme Court is composed of seven justices who are initially appointed by the Governor.

After their initial appointment and a provisional two-year term, justices serve 10-year terms subject to retention elections for additional 10-year terms. Most Colorado Supreme Court Justices are retained.

Colorado state court judges and justices face a mandatory retirement age of 72.

Generally, a party must apply for permission to appeal a decision from the Colorado Court of Appeals to the Colorado Supreme Court, which is known as petitioning for a writ of certiorari, as explained above. The justices of the Colorado Supreme Court adjudicate only a small fraction of the appeals presented to the Court, granting certiorari on approximately five percent of petitions filed each year. Some matters have a right of direct appeal from the trial court to the Colorado Supreme Court, including cases from the specialty water court, cases where the trial court declares a statute unconstitutional, and attorney and judicial discipline matters. Decisions are made by majority vote. The Colorado Supreme Court also governs the Colorado attorney regulation system.

While most matters that appear before the Colorado Supreme Court arrive via a petition for a writ of certiorari from the Colorado Court of Appeals, some cases may qualify for an interlocutory appeal directly from the trial court under Colorado Appellate Rule 21. Although Rule 21 is "extraordinary in nature," the Colorado Supreme Court may exercise its original jurisdiction to hear matters "when no other adequate remedy, including relief available by [direct appeal to the Colorado Court of Appeals], is available." Colorado Appellate Rule 21(a)(1).

While it is rarely used, the Colorado Supreme Court may hear certified questions presented by federal courts that concern open questions of Colorado state law.

The Colorado Supreme Court has also promulgated a series of rules to govern the conduct of litigation in Colorado state courts. These rules include the Colorado Rules of Civil Procedure, Colorado Appellate Rules, and Colorado Rules of Evidence. These various rules constitute a uniform body of procedural and evidentiary rules applicable to all courts in the state system, which mostly align with the federal Rules of Civil Procedure, Rules of Appellate Procedure, and Rules of Evidence.

In general, the typical case follows the same path as federal court. Civil cases generally are given a lower priority in case administration vis-à-vis criminal cases. The average period from commencement of a new state civil case to a trial-level decision is approximately 18 to 24 months in the Colorado state court system, although there can be a large variety in length depending on the specific judge, the specific Judicial District, and the complexity of the case. Like federal cases, appeals may take years and many Colorado state civil cases are settled or resolved prior to a trial.

ENVIRONMENTAL LAW

Environmental matters are governed, regulated, and enforced by an array of laws and administrative agencies at the federal, state, local, and tribal levels. Besides environmental laws of general application, there are many laws and regulations targeting specific activities and/or particular industries. While several federal environmental laws are administered and enforced at the federal level, others authorize a substantial role for state enforcement. And several environmental statutes permit certain private parties to take legal action to enforce regulatory requirements and/or seek private and public damages against an entity for non-compliance. These many laws, regulations, and stakeholders make it difficult to generalize about environmental enforcement in Colorado.

Federal Regulation

The primary federal agency regulating environmental matters in the U.S. is the Environmental Protection Agency (EPA). Founded in 1970, EPA handles a variety of federal research, monitoring, standard-setting, and enforcement activities to ensure environmental protection. EPA is headquartered in Washington, D.C. and has 10 Regional offices, of which Denver-based Region 8 serves Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, and 28 Tribal Nations.

Certain federal environmental laws are administered and enforced by other federal agencies, such as the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, Occupational Safety and Health Administration, Consumer Product Safety Commission, Food and Drug Administration, Department of Energy Office of Environmental Management, and National Response Center. Criminal enforcement of federal environmental laws is initially investigated by the EPA or the relevant federal agency but may be handled in tandem with the Environment & Natural Resources Division of the U.S. Department of Justice.

What follows is a summary of the significant federal laws that govern some of the major kinds of activities that implicate environmental concerns.

Hazardous Waste & Substances

The primary goal of the Resource Conservation and Recovery Act (RCRA) is to control the generation, transportation, storage, treatment, and disposal of hazardous (and non-hazardous solid) waste. *42 U.S.C. § 6901 et seq.* Hazardous wastes can be liquids, solids, gases, or sludges, and can be discarded commercial products or the by-products of manufacturing processes. The administration of RCRA has been delegated to a number of states by statute and, therefore, the states (including Colorado) regulate most aspects of waste management within their borders. To receive RCRA authorization, a state's waste management rules must be at least as stringent as, and consistent with, the federal RCRA rules.

By statute, the disposal of hazardous waste is prohibited except in accordance with a permit. Section 3008(h) of RCRA authorizes the EPA to bring suit against any person or entity contributing to the handling, storage, treatment, or disposal of a hazardous waste in a manner presenting an imminent and substantial endangerment to health or the environment.

RCRA was amended by the Hazardous and Solid Waste Amendments of 1984, which added new requirements pertaining to groundwater contamination and response actions for the release of hazardous waste. Currently, a permit for a treatment, storage, or disposal facility must detail required corrective action for any release of hazardous waste from any solid waste management unit, regardless of when the waste was placed on the site.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly known as "Superfund," was enacted in 1980 to provide for the cleanup of abandoned and uncontrolled hazardous waste and disposal sites, as well as accidents, spills, and other emergency releases of contaminants into the environment. *42 U.S.C. § 9601 et seq.* It also provides a vehicle for the EPA to recover damages for injury to natural resources caused by hazardous substance releases.

CERCLA allows the government and private parties to sue potentially responsible parties (PRPs) for reimbursement of cleanup costs caused by releases, actual or threatened, of "hazardous substances." Hazardous substances are broadly defined under CERCLA, but generally exclude releases of petroleum and limited other materials covered by other federal laws. In 2022, EPA issued a proposal to designate two of the most widely used Per- and Polyfluoroalkyl Substances (PFAS) as hazardous substances under CERCLA, but as of the date of this publication the rule had not been finalized.

Liability under CERCLA is strict, joint and several, with little or no regard for causation. By statute, there are four categories of persons liable for cleanup costs:

- Current owners or operators of the contaminated facility;
- Former owners or operators of the facility at the time of release of the hazardous substances;
- Arrangers (persons who arranged for disposal, treatment, or transportation of hazardous substances at the facility); and
- Transporters of hazardous substances.

There are limited defenses under Superfund that are narrowly construed. For example, a PRP can escape liability if it can establish that the hazardous substance release was caused solely by an act of war, an act of God, or an act or omission of unrelated third parties. This latter third party defense does not apply if the damage from hazardous substances was caused by an employee or agent of the PRP, or a third party acting in connection with a contract with the PRP. Other defenses exist, which are similarly limited in scope.

Air Quality

The Clean Air Act (CAA) regulates the emission of air pollutants through a comprehensive permitting program required to attain or maintain air quality meeting or exceeding federally-established health-based standards. Among other things, the CAA requires EPA to divide the country into areas designated as "nonattainment," "attainment," or "unclassifiable" for each criteria air pollutant, depending on whether the area meets the national ambient air quality standards (NAAQS). *42 U.S.C. § 7401 et seq*. These criteria air pollutants are particulate matter, ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead. The states and tribes are primarily responsible for developing enforceable plans to achieve or maintain the NAAQS. The CAA was amended in 1990 to add several new programs, including acid rain control, stratospheric ozone protection, and Title V operating permit program. The amendments also modified pre-existing programs for attaining the NAAQS and reducing emissions of hazardous air pollutants (HAPs)—including benzene and formaldehyde—from certain major and non-major (area) sources of HAPs. Because of the nature of air pollution and its many sources, this program is generally considered to be the most complex of the federal environmental programs.

EPA also develops technology-based New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) for certain categories of new, existing, modified, and reconstructed stationary sources of criteria air pollutants and HAPs. NSPS and NESHAP are found in 40 C.F.R. Parts 60 through 63 and are typically delegated to and enforced by the states, although EPA retains authority to implement and enforce the standards. The NSPS reflect the degree of emission limitation achievable for such sources through the application of the "best system of emission reduction," which takes into account the costs of achieving such reductions and any non-air related health and environmental impacts and energy requirements. For "major sources" of HAPs, these standards must reflect the maximum degree of emission reductions of HAPs achievable—also known as Maximum Achievable Control Technology (MACT). NSPS and NESHAP consist of specific emission limitations, work practice, or design standards, as well as monitoring, recordkeeping, and reporting requirements.

In 2022, the Inflation Reduction Act (IRA) amended the CAA to add seven new sections providing the following: funds for clean heavy-duty vehicles, a grant to reduce air pollution at ports, a Greenhouse Gas (GHG) reduction fund, a low emissions electricity program, a methane emissions reduction program, climate pollution reduction grants, and environmental and climate justice block grants. Key existing provisions of the CAA apply to the IRA amendments, including Section 301 of the CAA granting EPA rulemaking authority to issue regulations implementing the seven new sections added by the IRA.

Water Quality

The Federal Water Pollution Control Act, known as the Clean Water Act (CWA), is the primary Federal statute governing the restoration and maintenance of the "chemical, physical, and biological integrity of the Nation's waters." The CWA regulates the discharge of pollutants into all navigable waters and regulates quality standards for surface waters. 33 *U.S.C. § 1251 et seq.*

The CWA regulates discharges to waters of the United States (WOTUS) pursuant to the National Pollutant Discharge Elimination System (NPDES). The statute generally prohibits the discharge of any pollutant into a WOTUS unless a NPDES permit has been issued (or an exemption applies). The definition of what constitutes a WOTUS has been in flux for many years as a result various agency interpretations, U.S. Supreme Court case law, and multiple administrative rulemakings. As of the date of this publication, EPA and the U.S. Army Corps of Engineers (USACE) plan to issue an amended rule in 2023 or 2024 for the definition following the U.S. Supreme Court case *Sackett v. EPA*, 2022 U.S. LEXIS 751 (Jan. 24, 2022).

CWA permits are issued by either the state under an approved state NPDES program (including Colorado) or by the EPA if the state program has not been approved. The permit limits are based upon the EPA's effluent limitation regulations and are incorporated into a NPDES permit. The CWA effluent limitations for industrial dischargers will also specify standards for pretreatment for those who discharge to a publicly owned treatment work. In 1990, the EPA promulgated rules regarding permits for storm water discharges under the NPDES permit program.

A separate type of permit is required to dispose of dredged or fill material in WOTUS, including wetlands. Authorized by Section 404 of the CWA, this permit program is administered by the USACE, subject to and using EPA's environmental guidance.

Colorado Regulation

Solid and Hazardous Wastes

The EPA has delegated to the state of Colorado the authority to administer and enforce RCRA's requirements, including the permitting of hazardous waste treatment, storage, and disposal facilities. The Colorado Department of Public Health and Environment (CDPHE), acting through the Hazardous Materials and Waste Management Division, administers the RCRA solid and hazardous waste program. Unless otherwise exempt, all facilities that treat, store, dispose of, or recycle hazardous waste must obtain a permit. With some exceptions, Colorado's RCRA regulations closely mirror those of the federal regulations. The Solid and Hazardous Waste Commission is charged with promulgating and adopting rules pertaining to solid and hazardous waste, setting fees and issuing interpretive rules for hazardous waste, and hearing appeals of administrative law judges' determinations regarding administrative penalties for hazardous waste violations.

Voluntary Cleanup and Redevelopment Program & Brownfields Program

In 1994, the Colorado General Assembly passed the Voluntary Cleanup and Redevelopment Act, which formalized the Voluntary Cleanup and Redevelopment Program (VCUP) for certain types of sites. VCUP aims to permit and encourage voluntary cleanups by providing methods for determining various cleanup responsibilities in the planning for reuse of a property.

Sites at which hazardous waste or substances have been released into the environment prior to November 19, 1980, are eligible for inclusion in the VCUP so long as they:

- Are not on the EPA's National Priorities List for Superfund sites;
- Do not have a RCRA permit or interim status;
- Are not subject to RCRA corrective action under orders or agreements issued by CDPHE;
- Are not subject to an order issued by or an agreement with the CDPHE's Water Quality Control Division; or
- Are not underground storage tank sites to be handled by the Colorado Department of Labor and Employment.

Colorado's VCUP provides a streamlined process for obtaining a "no further action" determination from CDPHE that is less rigorous than the RCRA corrective action process. A "no further action" determination can serve as an assurance that the state or EPA will not order a more costly and onerous conventional cleanup.

Properties that are untouched due to real or perceived contamination can be rehabilitated pursuant to Colorado's Brownfields Program. This can occur in conjunction with the VCUP. The Brownfields Program assists property owners with environmental site assessments, tax credits, revolving loans, and project funding.

Colorado has not enacted a state law equivalent to CERCLA, but CDPHE is authorized and does participate in the CERCLA program pursuant to CERCLA and Colorado law.

Water Quality

The CDPHE's Water Quality Control Division regulates the discharge of pollutants into Colorado's surface water and groundwater under the Colorado Water Quality Control Act. *Colo. Rev. Stat. § 25-8-101 et seq.* The Water Quality Control Commission is the state agency responsible for developing state water policies and adopts water quality classifications and standards for state surface water and groundwater, as well as regulations implementing such classifications and standards. The basic water quality standards for surface water and groundwater are set forth in regulations promulgated by the Water Quality Control Commission. *5 Colo. Code Regs. § 1002-31; 5 Colo. Code Regs. § 1002-41*. Separate regulations contain the classifications and water quality standards for specific river basins and stream segments in the state. The Water Quality Control Division also protects the quality of drinking water supplied by public water systems. The Colorado Board of Health is responsible for a wide variety of important health matters, including regulations pertaining to swimming pools and natural swimming areas.

Colorado has been delegated permit authority for the federal NPDES permit program, including storm water permits, for all areas in the state except for Indian lands and Federal facilities. A Colorado Discharge Permit System (CDPS) permit is required for the discharge of any pollutant into any state water from a point source. The term "state waters" is defined broadly in Colorado and includes both surface and subsurface waters. The Water Quality Control Division issues both general and individual CDPS permits for certain types of industrial facilities, municipal dischargers, natural resource extraction, concentrated animal feeding operations, and other discharges. Implementing regulations for the CDPS Program are located at *5 Colo. Code Regs. § 1002-61*. Some CDPS permits include permit conditions for PFAS, which includes monitoring, source investigation and source control, and PFAS effluent limits.

Storm water discharges into state waters also are subject to CDPS permitting requirements. Colorado has developed a number of general permits for storm water discharges associated with non-extractive industrial activities and sand and gravel mining and processing. Colorado also has developed a general permit for storm water discharges associated with construction activities resulting in land disturbance equal to or greater than one acre, including oil and gas construction activities, and construction activity that is part of a common plan of development or sale. Additional permitting and compliance requirements apply to constructions sites exceeding five acres in total area.

The Water Quality Control Division has statutory authority to issue a notice of violation or cease and desist order upon determining that a violation of an order, permit, or control regulation has occurred, issue cleanup orders, and impose civil penalties for non-compliance. Although maximum civil penalty amounts are set by statute at $54,833 per day for each violation (and may be adjusted annually for inflation), the Water Quality Control Division will typically employ a civil penalty policy to set penalty amounts based on a number of factors that account for the gravity of harm, fault, compliance history, and other aggravating and mitigating factors.

The Water Quality Control Act requires that any person engaged in an activity in Colorado that results in a spill or discharge of oil or other substance that may cause pollution of state waters, including groundwater, must notify the Water Quality Control Division as soon as practicable of the spill or discharge. *Colo. Rev. Stat. § 25-8-601.* The spill should be reported to Colorado's Environmental Release and Incident Reporting Line at 1.877.518.5608. This notification requirement is in addition to reporting requirements that may be imposed under other applicable statutes and regulations, including the CWA and CERCLA and in addition to notifications to the Federal National Response Center or EPA that may be required by federal law.

Storage Tanks

The Colorado Department of Labor and Employment, Division of Oil and Public Safety (OPS) regulates storage facilities with underground storage tanks (USTs) and aboveground storage tanks (ASTs) of qualifying sizes, largely through the Colorado Underground Storage Tank Act (USTA). *Colo. Rev. Stat. § 8-20.5-101 et seq.* OPS regulations govern the design, installation, registration, construction, operation, and removal of storage tanks and cleanup of associated contamination. These requirements apply to storage tanks containing petroleum and other CERCLA-regulated substances, excluding RCRA hazardous waste. Each owner or operator installing a new tank must apply for a permit, submit a site plan to OPS prior to installation, and receive agency approval confirming that the tank design, performance, construction, and installation conform to OPS regulations. All new storage tanks also must be registered with the agency within 30 days of being placed into operation.

The regulations address response to releases of regulated substances from storage tanks and establish financial responsibility guidelines for tank owners and operators. Specifically, the regulations identify release detection and reporting requirements for suspected and confirmed releases from storage tanks. The term "release" is defined broadly to include any spilling, leaking, emitting, discharging, escaping, leaching, or disposing of a regulated substance from a regulated tank system into the environment. Confirmed and suspected releases must be reported to OPS within 24 hours. Confirmed releases include those that exceed 25 gallons, releases of any volume not cleaned up within 24 hours, site checks or sample analysis that indicate a release, fuel outside the system, and the presence of regulated substances in soil or water with a known tank source. Suspected releases occur when there is an environmental issue (e.g., presence of regulated product in soil or water and source is unknown) and where there are system issues (e.g., failed test results, unusual operating conditions, or unexplained loss of product).

If a release of petroleum or other regulated substance is confirmed, OPS regulations require owners or operators to take a variety of actions, including immediately preventing further release and exposure, conducting soil sampling and monitoring, and undertaking measures to mitigate the effects of the release and clean up the site.

Owners and operators of regulated tanks must provide evidence of financial responsibility to ensure their ability to clean up and remediate a release. This evidence can be in the form of self insurance, insurance coverage, letter of credit, trust fund, certificate of deposit, or other secured financial instrument approved by OPS.

The OPS and its Petroleum Storage Tank Committee administer the Petroleum Storage Tank Fund, which serves as the primary financial assurance mechanism for costs related to assessment and cleanup of petroleum contaminated sites. Subject to eligibility requirements, aboveground and underground petroleum storage tank owners and operators may use these funds for characterization and remediation of releases, as well as third party property damage and bodily injury.

Asbestos-Contaminated Soil

CDPHE's Hazardous Materials and Waste Management Division enforces the Colorado Solid Waste Act, including regulations regarding management of asbestos-contaminated soil.

Colorado's asbestos-contaminated soil regulations impose notification and management obligations on the owner or operator of any property with asbestos-contaminated soil at which soil disturbing activities are occurring or are planned for any area containing asbestos-contaminated soil (excluding certain permitted landfills). These regulations do not apply to asbestos-containing material that is on a "facility component" such as a building or a pipe.

If asbestos-contaminated soil is unexpectedly encountered during soil disturbing activities, the owner or operator must stop the activities, restrict access, stabilize the soil, and notify CDPHE's Hazardous Materials and Waste Management Division within 24 hours.

If asbestos-contaminated soil is anticipated to occur during a planned soil disturbing activity, the owner or operator must notify CDPHE and provide a project-specific Regulated Asbestos Contaminated Soil (RACS) management plan 10 working days in advance of the activity. The RACS plan must include a description of site management, emissions control activities, and work practices to control the release of and/or exposure to asbestos outside of the regulated work area.

PFAS

In response to EPA's health advisories on PFAS, CDPHE created the PFAS Grant Program, added PFAS permit conditions to its CDPS Permits, launched a PFAS in Fish Pilot Project, required registration for anyone using or storing Class B firefighting foam, and launched a takeback program for firefighting foam containing PFAS. Under the PFAS Grant Program, CDPHE provides funding for sampling efforts to test groundwater, surface water, and water treatment infrastructure, and offers emergency assistance for communities and water systems impacted by PFAS. The registration program requires anyone using or storing Class B firefighting foam containing PFAS to register with CDPHE. The takeback program allows CDPHE to purchase and store firefighting foam containing PFAS chemicals so that CDPHE can safely dispose of it.

Air Pollution

Any business in Colorado that emits air pollution may be required to report its emissions and apply for a permit to emit. The type of permit required is determined by the volume and type of emissions. In 2021, Colorado began adopting state-specific air toxics legislation to complement federal requirements regarding HAPs. Among other things, this legislation requires fence line monitoring for four specified facilities and creates a community monitoring program.

Sources of air emissions in Colorado are regulated by CDPHE's Air Pollution Control Division (APCD) under the Colorado Air Pollution Prevention and Control Act. *Colo. Rev. Stat. § 25-7-101 et seq.* Colorado's Air Quality Control Commission (APCD)is responsible for air pollution control policy, adopting regulations for stationary and certain mobile sources, and adjudicating contested violations of the state's air pollution laws and regulations.

Air Pollutant Emission Notices

The APCD is responsible for Colorado's Stationary Sources Program. Unless specifically exempted, a stationary source of regulated air pollutants must report air emissions to the APCD through the submission of an Air Pollutant Emission Notice (APEN). *5 Colo. Code Regs. § 1001-5.* Revised APENs must be submitted when certain business or operational changes occur, such as a change in ownership, the installation of new or different pollution control equipment, or modification of an existing permit. Revised APENS for purposes of a significant change in actual emissions is required only on an annual basis, rather than whenever a significant change in emissions occurs. APENs are valid for five years.

For criteria pollutants in Colorado, APENs are required for sources with actual emissions above two tons per year in attainment areas meeting the NAAQS for pollutants, and one ton per year in nonattainment areas. Criteria pollutants in Colorado include carbon monoxide, nitrogen dioxide, sulfur dioxide, PM10, PM2.5, total suspended particulate matter, ozone, volatile organic compounds, lead, nitrogen oxides, fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, reduced sulfur compounds, municipal waste combustor organics, municipal waste combustor metals, and municipal waste combustor acid gases). For non-criteria pollutants—including certain designated hazardous and non-hazardous air pollutants—APENs are required for sources with actual emissions that exceed specified *de minimis* levels.

The APCD maintains an extensive library of industry-specific guidance relating to the division's Stationary Sources Program.

Construction Permit

All new or modified stationary sources of emissions in Colorado that exceed certain emissions thresholds are required to obtain a construction permit from the APCD. *5 Colo. Code Regs. § 1001-5 Part B*. Once a construction permit is obtained, the source can commence construction and begin operating.

Operating Permit

Any source that emits or has the potential to emit more than 100 tons of any regulated air pollutant per year will be required to obtain a Title V Operating Permit. This threshold is lower for volatile organic compounds, nitrogen oxides, carbon monoxide, and PM10 in nonattainment areas. In addition, any source that emits or has the potential to emit more than 10 tons per year of a single HAP, or more than 25 tons per year of a combination of HAPs, will be required to obtain a Title V Operating Permit. This includes older sources that previously were not required to obtain an air pollution permit.

New and modified major sources must obtain a construction permit prior to construction, and then must apply for an operating permit within 12 months of commencing operation. Operating Permits must be renewed every five years, and each operating permit issued or renewed may be subject to public comment.

FINANCING INVESTMENTS

Banking Institutions

Colorado is home to offices of many out-of-state financial institutions. They include:

JPMorgan Chase

Wells Fargo

U.S. Bank

KeyBank

PNC Bank

CIBC Bank USA

Bank of America

BMO Financial

Northern Trust

Commerce Bank

Huntington Bank

Vectra Bank

UMB Bank

Independent Financial

BOK Financial

FirstBank

Each of these institutions has commercial loan activity and/or other commercial bank operations in the state. In many instances, they also exercise trust powers in Colorado.

Offerings of Securities

While the registration, offer, and sale of securities are regulated and enforced at both the federal and the state level, the U.S. Securities and Exchange Commission (SEC) is the primary regulator of securities offerings and enforcer of anti-fraud regulations in the U.S. Each individual state also has its own securities laws and rules, known colloquially as "blue sky laws," which regulate the offer and sale of securities. These laws also typically include registration and reporting requirements for broker-dealers and individual stock brokers doing business in the state, as well as investment advisers and their personnel seeking to offer their investment advisory services in the state.

The SEC has delegated certain responsibilities to designated "self-regulatory organizations," which include major securities exchanges such as the NYSE and Nasdaq, as well as the Financial Industry Regulatory Authority (FINRA). These organizations have significant oversight and enforcement authority in the securities industry, impacting the conduct of listed companies, underwriters, brokerage firms, investment advisors, and others in the securities industry.

An offering of securities must be registered under both the federal Securities Act of 1933 ('33 Act) and applicable state securities laws, unless an exemption from registration is available. Practically speaking, however, state authority to review or restrict securities offerings that are offered on a national basis is quite limited. Nevertheless, issuers must comply with each state's notice and filing requirements, and state regulators retain the authority to investigate and bring fraud charges against securities violators. In addition, private rights of action for securities fraud often exist under state law.

Because of the broad reach of the federal securities laws, issuers of securities should begin any analysis of a potential transaction with a review of federal law governing the offer and sale of securities. After these federal requirements have been assessed, issuers will need to review the securities law of each state in which offers or sales of securities will be made to determine the appropriate course of action in those states.

Colorado Regulation of Securities Offerings

The Colorado Division of Securities is the state agency responsible for the administration and enforcement of the Colorado Securities Act. *Colo. Rev. Stat. § 11-51-101 et seq.* Similar to regulation under federal securities laws, the Colorado Securities Act is intended to protect investors by regulating offers and sales of securities – specifically, by requiring the issuer to register such offer or sale or to determine that an exemption applies to such offer or sale, and to make appropriate disclosures to investors. The Colorado Securities Act also prohibits fraudulent, manipulative, and deceptive practices in connection with the offer or sale of securities, and requires the registration of broker-dealers, agents, and investment advisors.

Registration Requirement

It is unlawful for any person to offer to sell or sell any security in Colorado unless (1) the security or transaction is exempt from registration or (2) it is registered in Colorado. *Colo. Rev. Stat. § 11-51-301*.

Registration Exemptions

The Colorado Securities Act provides two types of exemptions from registration: exemptions based on the nature of the security, and exemptions based on the nature of the transaction. *Colo. Rev. Stat. §11-51-307; Colo. Rev. Stat. §11-51-308*.

Section 307 of the Colorado Securities Act exempts from registration certain types of securities and the securities of certain types of issuers. Generally, these securities are issued by certain governments (and agencies thereof), banking institutions and credit unions, railroads and common carriers, public utilities and holding companies, non-profit entities, chambers of commerce, trade and professional associations, electricity cooperatives, and certain issuers registered under the federal Investment Company Act of 1940. Section 307 also exempts from registration several types of securities, such as short-term commercial paper, securities issued in connection with an employee's stock purchase or employee benefit plan, and securities listed or approved for listing on a national security exchange such as the NYSE or Nasdaq. The exemption afforded by Section 307 applies to the initial transaction in the exempt security as well as all subsequent sales or transfers of that security.

Section 308 of the Colorado Securities Act provides registration exemptions for certain types of transactions. Unlike Section 307, however, the Section 308 exemption applies only to the specific transaction at issue and does not extend to any future sale or transfer of the security, which will continue to bear a written transfer restriction on its certificate. Therefore, subsequent sales or transfers of securities initially issued pursuant to the exemption provided by Section 308 of the Colorado Securities Act (with the exception of securities issued pursuant to federal Regulation A, which permits limited resales without further registration) will require either registration or a new basis for exemption from registration.

Section 308 incorporates the federal transaction exemptions of Regulation A as well as Rules 504, 505 and 506 of Regulation D, which provide exemptions and safe harbors for the sale of securities on a private or limited basis. *Colo. Rev. Stat. §11-51-308(1)(p).* This Colorado transaction exemption requires the issuer to file with the division of Securities a federal Form 1-A (for Regulation A offerings) or a Form D (for Regulation D offerings), any other documents filed with the SEC, and a consent to service of process with the Colorado Securities Commissioner, and to pay a filing fee.

Section 308 also provides transaction exemptions from registration for offers and sales made to underwriters, financial or institutional investors, broker-dealers, and existing security holders. *Colo. Rev. Stat. §11-51-308(1)(d); Colo. Rev. Stat. §11-51-308(1)(h); Colo. Rev. Stat. §11-51-308(1)(l).*

Colorado also has a private placement exemption for offers to not more than 20 persons and sales to not more than 10 buyers in Colorado (in each case excluding institutional investors) during any 12 consecutive month period. *Colo. Rev. Stat. §11-51-308(1)(j).* This exemption is self-executing and there is no Colorado filing requirement.

There is also an exemption for any transaction not involving any public offering of securities. *Colo. Rev. Stat. §11-51-308(1)(i).* The issuer must demonstrate that the offering meets the requisite purchaser qualification and informational requirements, is not part of another exempt or registered offering, does not include any general solicitation or advertisement, and includes appropriate resale restrictions.

Section 308.5 provides a crowdfunding exemption for businesses organized in Colorado, provided the securities being offered meet the federal intrastate offering exemption in section 3(a)(11) of the ‘33 Act and rule 147 for an intrastate offering being conducted in Colorado. The issuer may only issue securities having an aggregate value of up to $1 million during any 12-month period, unless the issuer provides audited financial statements to the securities commissioner, in which case the issuer may offer up to $2 million worth of securities in any 12-month period. The aggregate amount sold to any one purchaser during any 12-month period must not exceed $5,000, unless the purchaser is an accredited investor as defined by the SEC in rule 501 of Regulation D. There are various disclosure and filing requirements contained in *Colo Rev. Stat. § 11-51-308.5(3)(a)(IV)(A)-(F)* which must also be satisfied prior to the offering. The offering must be made through an online intermediary, sales representative, or licensed broker-dealer. *See Colo Rev. Stat. § 11-51-308,* and *3 CCR 704-1:51-3.20-3.30*.

Several of the transaction exemptions afforded by Section 308 place restrictions on commissions or finder’s fees payable in connection with the offering, require the issuer’s reasonable belief as to the investment intent of the purchaser, and exclude transactions where the issuer or its affiliates, significant stockholders or promoters have been convicted within the past 10 years of any felony in connection with the purchase or sale of any security.

Registration Provisions

Unless exempt from registration as described above, the offer and sale of securities in Colorado must be registered in Colorado by means of either “coordination” or “qualification.” Coordination registration is available for securities that are registered with the SEC but are not “federal covered securities” as defined by the National Securities Markets Improvement Act. This situation is most likely to arise when a security does not meet the listing standards of a national securities exchange. Qualification registration applies to all other non-exempt offerings being made within Colorado.

Registration by Coordination

Securities for which a registration statement has been filed with the SEC under the ‘33 Act or any securities issued pursuant to SEC Regulation A, may be registered in Colorado by coordination. *Colo. Rev. Stat. § 11-51-303*. To effect registration by coordination, the issuer must file certain records with the Colorado Division of Securities, including:

- An application to register securities on North American Securities Administrators Association (NASAA) Form U-1;
- A consent to service of process on NASAA Form U-2;
- Corporate resolutions authorizing the registration on NASAA Form U-2A;
- A copy of the registration statement;
- A copy of the latest form of prospectus filed under the ’33 Act;

- A current copy of the issuer's articles of incorporation and bylaws (or substantial equivalent);
- A copy of any agreement with or among the underwriters of the security to be registered;
- A copy of any indenture or other instrument governing the issuance of the security to be registered; and
- A specimen, copy, or description of the security;
- A closing report on Colorado Form RC-C.

Any amendments to the federal prospectus (other than one that only delays the effective date of the registration statement) must also be promptly filed with the Division.

Colorado currently does not require a state-level substantive review of registrations by coordination. A registration statement is considered effective simultaneously with, or subsequent to, the federal registration statement. This generally occurs after the registration statement has been on file with the securities commissioner for 20 days, unless a stop order has been issued by the SEC or securities commissioner, or the commissioner rules that a period less than 20 days is acceptable. The registrant must file a closing report with the securities commissioner within 30 days of the close of the offering or the termination of the registration statement (whichever occurs first).

Registration by Qualification

The Colorado Securities Act permits the offer and sale of securities in Colorado to be registered in Colorado by qualification. *Colo. Rev. Stat. § 11-51-304*. The traditional public offering registration is filed with Colorado's Form RQ. A complete registration statement meeting all of the disclosure requirements of Sections 302 and 304 of the Colorado Securities Act must be filed with this application. Audited financial statements prepared according to generally accepted accounting principles (GAAP) are required on an annual basis; interim financial statements may be reviewed rather than audited.

A second method of registration by qualification exists for certain small offerings conducted by Colorado companies. This "limited offering" registration is affected by filing Colorado's Form RL and is available if:

- The gross offering proceeds do not exceed $5 million within any 12-month period;
- At least 80 percent of the proceeds raised in the offering "come to rest" in Colorado; and
- The main office of the company conducting the offering is located in Colorado, and most of the full-time employees are also be located in Colorado.

Financial statements filed with Form RL do not need to be audited, but must be reviewed and prepared according to GAAP.

The disclosures required from issuers registering by qualification on Form RQ are substantially more involved than those required by Form RL. In both qualification registrations (Form RQ and Form RL), the Colorado Division of Securities will conduct a substantive review of the registration statement. The total review process typically takes six to eight weeks. Both types of registration usually require the establishment of an escrow account, and the depository institution will not be permitted to distribute funds to the company until a sufficient minimum amount has been raised.

Broker-Dealer and Investment Advisor Registration

A person cannot transact business in Colorado as a broker-dealer or sales representative, a broker-dealer or an issuer cannot employ or otherwise engage an individual to act as a sales representative in Colorado, and an investment adviser cannot employ or otherwise engage any individual to act as an investment adviser representative in Colorado unless he or she is licensed in Colorado or determined to be exempt from such licensing. *Colo. Rev. Stat. § 11-51-401.*

Broker-dealers and investment advisers with a place of business in Colorado are generally subject to licensing. Investment advisers who are registered with the SEC are designated as "federal covered advisers" and are subject to certain filing fees, investment advisory representative requirements, and antifraud jurisdiction in Colorado, but not the particular licensing requirements of the Colorado Securities Act

Broker-dealers are exempt from Colorado's separate licensure requirements as long as they are registered as broker-dealers under the Securities Exchange Act of 1934, have no place of business in Colorado, and transact business in Colorado exclusively with:

- Issuers in transactions involving their own securities;

- Other broker-dealers licensed or exempt from licensing (except when the broker-dealer is acting as a clearing broker-dealer for such other broker-dealers);
- Financial or institutional investors;
- Individuals who are existing customers of the broker-dealer and whose principal places of residence are not in Colorado; and
- Not more than five persons in Colorado during any 12 consecutive months (excluding those referenced above).

Colo. Rev. Stat. § 11-51-402(1).

Sales representatives are exempt from Colorado's separate licensure requirements if they are:

- Employed or otherwise engaged by a Colorado-exempt broker-dealer;
- Employed or otherwise engaged by an issuer in effecting transactions only in certain government or institutional securities exempt from Colorado registration under Section 307 of the Colorado Securities Act; or
- Employed by an issuer in effecting transactions only with employees, partners, officers, or directors of the issuer, its parent or subsidiaries, if no commission or other similar compensation is paid or given directly or indirectly to the sales representative for soliciting an employee, partner, officer, or director in Colorado.

Colo. Rev. Stat. §11-51-402(2).

An investment adviser with no place of business in Colorado is exempt from Colorado's separate licensure requirements if:

- They are exempt from registration as an investment adviser pursuant to Section 203(b) of the federal Investment Advisers Act of 1940;
- Their only Colorado clients are other investment advisers, federal covered advisers, broker-dealers, depository institutions, insurance companies, employee benefit plans with assets of not less than one million dollars, or other institutional investors (other than any local government investment pool trust fund); or
- They have had no more than five Colorado clients during the preceding 12-month period (other than those specified above).

Colo. Rev. Stat. § 11-51-402(5).

An investment adviser representative employed by or otherwise associated with an exempt investment adviser described above is also exempt from Colorado licensing. Investment advisory representatives of "federal covered advisers" may be federally pre-empted from having to be licensed in Colorado. *Colo. Rev. Stat. § 11-51-402(6).*

Anti-Fraud Provisions

The Colorado Securities Act prohibits fraudulent, manipulative and deceptive practices in connection with the offer or sale of securities. *Colo. Rev. Stat. § 11-51-501.* This provision parallels the federal anti-fraud provisions contained in Section 10b of the Securities Exchange Act of 1934. 15 U.S.C. *§ 78j.* Violations of Section 501 of the Colorado Securities Act carry the possibility of both criminal and civil penalties. *Colo. Rev. Stat. § 11-51-603; Colo. Rev. Stat. § 11-51-604.* The statute also allows for private rights of action. *Colo. Rev. Stat. § 11-51-604.*

Section 501 of the Colorado Securities Act makes it unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:

- To employ any device, scheme, or artifice to defraud;
- To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

Colo. Rev. Stat. § 11-51-501(1).

While Colorado has an established body of case law interpreting the anti-fraud provision of the Colorado Securities Act, courts may also look to federal precedent as persuasive authority in construing similar language. *People v. Riley*, 708 P.2d 1359, 1362 (Colo. 1985).

Section 501 also contains a separate anti-fraud prohibition applicable to persons who receive, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or of any purchase or sale thereof. *Colo. Rev. Stat. § 11-51-501(5).* Such persons may not, whether through the issuance of analyses or reports or otherwise:

- Employ any device, scheme, or artifice to defraud any client or prospective client;
- Make an untrue statement of a material fact to any client or prospective client, or omit to state to any client or prospective client any material fact necessary to make the statements made in light of the circumstances under which they are made, not misleading (in any disclosure statement or similar document prepared pursuant to Colorado or federal law, during the solicitation of any client, or otherwise in connection with providing investment advisory services); or
- Engage in any transaction, act, practice, or course of business that operates or would operate as a fraud or deceit upon any client or prospective client or that is fraudulent, deceptive, or manipulative.

Colo. Rev. Stat. § 11-51-501(5).

In addition, Section 501 of the Colorado Securities Act places further disclosure requirements on investment advisers and investor adviser representatives. When acting as principal for a client's own account or on behalf of a third party, these professionals cannot sell a security to a client without first disclosing in writing the capacity in which the investment adviser or investment adviser representative is acting. Following such disclosure, the investment adviser or investor adviser representative must obtain the written consent of the client to such transaction before completion of the transaction. *Colo. Rev. Stat. §11-51-501(6).*

INTELLECTUAL PROPERTY

Trademarks

Under Colorado Revised Statute §7-70-101, a trademark is "a word, name, symbol, device, or any combination thereof, including packaging, configuration of goods, or other trade dress, used by a person to identify and distinguish the person's goods or services from those manufactured, sold, or rendered by others and to indicate the source of the goods or services, even if that source is unknown." While trademarks usually consist of written words or symbols, various sounds, fragrances, and colors may also be registered as trademarks. Trademark law has also expanded to include design elements, known as "trade dress," used to promote a product or service.

A trademark should not be confused with a trade name. Although the same designation may function as both a trademark and a trade name, a trade name refers to the name of a business or company; a trademark is used to identify the products manufactured by or for the business. Similarly, a service mark is used to distinguish the services sold by a business. Generally, service marks and trademarks receive the same legal treatment, and are frequently both referred to as "trademarks."

Trademarks are governed by both federal and state law. The source of federal law on trademarks is the Lanham Act of 1946, also known as the U.S. Trademark Act. *15 U.S.C. § 1051 et seq.* The U.S. Patent and Trademark Office is the federal agency that registers, examines and regulates trademarks under federal law. Colorado's trademark statute begins at § 770-101 of the Colorado Revised Statutes, and is administered by the Colorado Secretary of State.

Selection of Trademark

A business should carefully consider the trademark selected for its products or services, both to evaluate protectability of the mark and to examine whether it would infringe the trademark rights of a prior user. The level of protection against infringement of a trademark varies with its "distinctiveness." Trademarks are traditionally divided into four categories of distinctiveness (in descending order of protection): arbitrary/fanciful, suggestive, descriptive, and generic.

An arbitrary or fanciful mark bears no logical relationship to the underlying product. A “fanciful” trademark has no meaning but is created for the sole purpose of functioning as a trademark – famous examples of fanciful marks include Reebok and Starbucks. An “arbitrary” mark is a common word whose meaning is unrelated to the goods or services sold under the trademark. Amazon and Blackberry are examples of arbitrary marks. Arbitrary and fanciful marks are inherently distinctive and are given the highest degree of protection.

A “suggestive” mark alludes to a characteristic of the underlying good or service but requires some imagination, thought, and perception to reach a conclusion as to the nature of the good or service. For example, the word “Coppertone“ is suggestive of sun-tan lotion, but does not specifically describe the underlying product. Suggestive marks are frequently difficult to distinguish from merely “descriptive” marks, potentially leading to litigation and a lower level of protection.

“Descriptive” marks are the weakest and least defensible form of protectable trademark. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A trademark that is “merely descriptive” cannot be registered under either federal or Colorado law. However, merely descriptive marks can acquire distinctiveness, or “secondary meaning,” over time if used consistently and exclusively, thereby becoming eligible for trademark protection.

Generic marks are those that describe an entire category of product or service within which the “trademarked” product is classified. A generic mark cannot be protected as a trademark as a matter of public policy. For example, “boots” are a generic type of footwear and not trademarkable for those products, but “Boots” can serve as an arbitrary trademark for cosmetics.

Selection of a trademark should be accompanied by a trademark clearance search to determine whether another company has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and there are businesses that specialize in trademark searches. Actual and potential trademark conflicts should be avoided as infringement lawsuits can be expensive, complex, and lengthy. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising and building brand recognition and goodwill in the mark.

Advantages of Trademark Registration

Under the trademark laws of the U.S. and Colorado, the principal method of establishing rights in a trademark is actual use of the trademark. “Registration” of a trademark is not legally required but can provide certain advantages.

Federal registration of a trademark is presumptive evidence of the ownership of the trademark and of the registrant’s exclusive right to use of the mark in interstate commerce, strengthening the registrant’s ability to prevail in any infringement action. Federal registration also entitles the registrant to certain enhanced remedies that are only available under the federal trademark laws.

The registrant’s ownership of the trademark becomes virtually conclusive after five years of continued use of the mark following federal registration. Federal registration may assist in preventing the importation into the U.S. of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.

State registration of a trademark provides some advantages to the owner, but none as extensive as federal registration. Under C.R.S. §7-70-103(2), “filing of a statement of trademark registration does not confer upon the registrant any substantive right or create any remedy not otherwise available,” and “[a]ll substantive rights and remedies created by the laws of this state with respect to trademarks are created exclusively by common law.” State registration is usually advisable, particularly in situations in which a business expects to sell or operate only in Colorado.

Federal Registration Application Process

Federal trademark registration can be obtained by filing an application (in-use or intent-to-use application if the mark is not in use) with the U.S. Patent and Trademark Office. The application must identify the mark, the goods or services with which the mark is used or is proposed to be used, the date of first use (if any), and manner in which the mark is or is to be used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and specimens of the mark in actual use in commerce unless an intent-to-use application is filed. An examining attorney evaluates, among other matters, whether the mark is eligible for trademark protection, and whether its use and registration will create a likelihood of confusion with existing registered marks. If the examiner rejects the application, the examiner's decision can be appealed to the Trademark Trial and Appeals Board. An adverse decision by that body can be appealed to federal court.

If the application is approved, the mark is published in an official publication of the Patent and Trademark Office. Opponents of the registration have 30 days after publication, or such additional time as may be granted, to challenge the registration. If no opposition is raised, or if the opponent's claims are rejected, an applicant whose mark is already in use receives a "certificate of registration."

An applicant whose trademark is proposed for registration before its actual use will receive, upon approval of the application, a "notice of allowance." An applicant who receives a notice of allowance must, within six months of the receipt of the notice, furnish evidence of the actual use of the trademark. The applicant then is entitled to a certificate of registration. Failure to furnish evidence of the actual use of the mark within the time allowed will result in rejection of the application.

Post-Certificate Federal Procedures

A certificate of trademark registration issued by the Patent and Trademark Office remains in effect for 10 years. However, this registration will expire at the end of six years unless the registrant furnishes evidence of continued use of the trademark. The initial 10-year term of a certificate of registration can be renewed within the term's last six months for an additional 10-year term by furnishing evidence of continued use of the mark and paying a fee.

After five years of continuous use of a trademark following the receipt of a certificate of registration, a registrant can seek to have the status of the trademark elevated from "presumptive" evidence of the registrant's exclusive right to use of the trademark to virtually conclusive evidence of an exclusive right. To do so, the registrant must furnish the Patent and Trademark Office with evidence of continuous use of the trademark for at least five years. Additionally, there must not be any outstanding lawsuit or claim that challenges the registrant's rights to use the mark.

Colorado Trademark Registration

A trademark may be registered in Colorado by submitting an application with filing fees to the Colorado Secretary of State. The Colorado trademark registration process does not involve an examination to determine the validity or trademarkability of the mark, other than a basic search of the Colorado Secretary of State's own records to ensure that an identical mark has not already been registered as a trademark or as a business or entity name. A state trademark registration serves only as a rebuttable proof of ownership of the mark in the geographic territory within Colorado where the mark is actually in use. Under C.R.S. §7-70-104, a statement of trademark registration is effective for a term of five years from the date of filing with the secretary of state. The statement of trademark registration can be renewed for successive terms of five years by delivering a statement of renewal to the secretary of state.

Trade Secrets

A trade secret is any information that is economically valuable by virtue of not being generally known or readily available, and is protected by conduct and measures that are reasonable under the circumstances to protect its secrecy. Examples of types of trade secret information include non-public information related to technology, whether or not patentable, financial information, marketing and business strategy and plans, customer, contractor, or personnel information and contacts, formulas, recipes, and methods of doing business.

Federal Protection of Trade Secrets

While trade secrets are primarily protected under state law, the federal Economic Espionage Act of 1996 makes the theft or misappropriation of a commercial trade secret a federal crime. *18 U.S.C. § 1831 et seq.* The Act provides fines of up to $5 million (up to $10 million for organizations) and imprisonment of up to 15 years for individuals who misappropriate, conspire to misappropriate, or acquire misappropriated trade secrets with the knowledge or intent that the theft will benefit a foreign power. *18 U.S.C. § 1831.* The Act also provides imprisonment for up to 10 years for individuals, and fines of up to $5 million for organizations, for the misappropriation of trade secrets related to or included in a product that is produced for or placed in interstate or international commerce, with the knowledge or intent that the misappropriation will injure the owner of the trade secret. *18 U.S.C. § 1832.* The U.S. Department of Justice can institute civil proceedings to enjoin violations of the Act. There is also a private right of action available to victims of trade secret theft. *18 U.S.C. § 1836.*

Colorado Protection of Trade Secrets

The National Conference of Commissioners on Uniform State Laws, also known as the U.S. Uniform Law Commission, has published the Uniform Trade Secrets Act in an effort to codify and harmonize state trade secret standards and remedies for misappropriation that had developed unevenly among the 50 U.S. states. Forty-six states, the District of Columbia, and U.S. Virgin Islands have adopted the framework of the Uniform Trade Secrets Act. Colorado adopted the Uniform Trade Secrets Act in 1986. *Colo. Rev. Stat. § 7-74-101 et seq.* In addition, Colorado has made the theft of trade secrets a crime, punishable by up to 120 days imprisonment and a $750 fine for the first offense. *Colo. Rev. Stat. § 18-4-408; Colo. Rev. Stat. § 18-1.3-501.*

Colorado's Uniform Trade Secrets Act protects information that is considered a trade secret. A trade secret is defined under Colorado law as the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a "trade secret," the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. *Colo. Rev. Stat. § 7-74-102(4).* Colorado's trade secret law specifically gives trade secret protection to actual and prospective customer lists that otherwise meet the confidentiality requirements of the law. *Hertz v. Luzenac Group*, 576 F.3d 1103 (10th Cir. 2009)

Six factors are considered in determining whether certain information is a trade secret:

- The extent to which the information is known outside the business;
- The extent to which the information is known to those inside the business;
- The precautions taken by the holder of the trade secret to guard the secrecy of the information;
- The savings effected and the value to the holder in having the information as against competitors;
- The amount of effort or money expended in obtaining and developing the information; and
- The amount of time and expense it would take for others to acquire and duplicate the information.

Harvey Barnett, Inc. v. Shidler, 143 F. Supp.2d 1247 (D. Colo. 2001).

The owner of trade secrets acquires rights to the information by obtaining it legitimately, either by independent development, discovery, assembly, or purchase, and must take steps to protect the secrecy of the information. Secrecy precautions must be more than normal business procedures, and may include advising employees of the existence of a trade secret, limiting access to a need-to-know basis, and controlling access to locations where the information may be learned. *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp.2d 1247 (D. Colo. 2001). Information can be a trade secret notwithstanding the fact that some of its components are well-known. *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125 (10th Cir. 2003); *Hertz v. Luzenac Group*, 576 F.3d 1103 (10th Cir. 2009).

A "misappropriation" of trade secrets occurs when:

- The trade secret is acquired by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- The trade secret is disclosed or used, without express or implied consent, by a person who:
  - Used improper means to acquire knowledge of the trade secret;
  - At the time of the disclosure or use, knew or had reason to know that their knowledge of the trade secret was:
    - Derived from or through a person who had utilized improper means to acquire it;
    - Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
    - Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
  - Before a material change of such person's position, knew or had reason to know that it was a trade secret and that their knowledge of it had been acquired by accident or mistake.

Colo. Rev. Stat. § 7-74-102(2).

The statute defines "improper means" as including theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. *Colo. Rev. Stat. § 7-74-102(1).* Although a trade secret owner can prohibit others from accessing or using its trade secret without authorization, it cannot prohibit others from independently developing the identical information.

Trade secrets rights can be enforced in legal actions alleging theft or misappropriation of the trade secret, unauthorized access to computer systems, or a breach of contractual nondisclosure or nonuse obligations. It is not necessary to show that the misappropriated trade secret was put to actual or commercial use. *Sonoco Prod. Co. v. Johnson*, 23 P.3d 1287 (Colo. App. 2001).

Civil remedies include damages for the actual loss resulting from the wrongful act, damages for the amount by which the violator was unjustly enriched by the misappropriation, the imposition of liability for a reasonable royalty, or an injunction against future use of or access to the trade secret. In cases where fraud, malice, or a willful and wanton disregard of the injured party's rights is proven, exemplary (punitive) damages may be awarded as well.

LABOR & EMPLOYMENT

The relationship between an employer and its employees, and the requirements applicable to the employer's policies, practices, and benefits, are governed by federal law as well as the laws of each state in which the employer or its personnel are located. This chapter provides an overview of the major federal and Colorado employment laws that apply to Colorado businesses and employees located in Colorado.

Employment Relationships

At-Will Employment

The conventional relationship between an employer and an employee hired for an indefinite period is called "employment at-will." Under this arrangement, and setting aside the potential applicability of a number of special laws, either the employer or the employee may terminate the employment relationship at any time, for any reason, with or without cause, and with or without advance notice. In the absence of a written contract or other evidence indicating that an employee may be terminated only "for cause," employment is generally presumed to be "at-will."

It is important to remember, however, that there are a number of special laws, both federal and state, that limit an employer's unfettered right to terminate traditional at-will employees. These laws, many of which are identified and discussed below, prevent employers from firing any employee, whether at-will or not, for illegal reasons (e.g., discriminatory reasons, whistleblowing, or engaging in certain activities protected by law).

Temporary Employment and Consulting Relationships

In addition to traditional at-will employees or contract employees, many employers may use the services of temporary employees, independent contractors, or consultants (and employees of independent contractors or consultants).

When an employer hires an employee for a temporary period or for a season, the temporary employee is still an at-will employee of the employer, and the relationship is governed by the same laws as those applicable to any at-will employees. As with permanent employees, legally mandated benefits, such as workers' compensation insurance and unemployment insurance, must be offered to temporary employees. Optional benefits, such as 401(k) plans, need not be offered to temporary employees.

An independent contractor or consultant is not considered an employee of the employer. Instead, an individual independent contractor is self-employed, and payments made to the independent contractor are considered contract payments rather than wages. A business may find certain advantages to engaging independent contractors rather than employees. However, the consequences of incorrectly classifying workers as independent contractors (rather than employees) can be far-reaching and expensive. Examples of these consequences include liability for unpaid payroll taxes and penalties, administrative claims for overtime and other benefits provided to regular employees, liability for unpaid unemployment insurance and workers' compensation premiums, increased exposure to governmental audits, potential exposure to employment related civil suits and administrative claims, and even fines if the misclassification is willful. Thus, businesses should consult with an employment attorney before categorizing service providers as independent contractors.

The U.S. Internal Revenue Service (IRS) and other governmental agencies have a variety of tests for determining whether a worker is an employee or an independent contractor. These tests vary somewhat but tend to share the same primary factors. Essentially, workers who are performing the same job and performing under the same supervision as regular employees are usually deemed to be employees. In January 2024, the U.S. Department of Labor issued a final rule governing the test used to classify employees and independent contractors under the FLSA, effective March 11, 2024.

Colorado law has established a number of factors to consider in determining if a contractor is considered an employee. The inquiry includes whether or not the person or entity for whom the contractor performs services:

- Requires the individual to work exclusively for that person (except that the individual may choose to work exclusively for that person for a finite period of time specified in a written document);
- Establishes a quality standard for the individual (except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed);
- Pays a salary or an hourly rate instead of at a fixed or contract rate;
- Terminates the work of the service provider during the contract period (unless the service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract);
- Provides more than minimal training for the individual;
- Provides tools or benefits to the individual (except that materials and equipment may be supplied);
- Dictates the time of performance (except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established);
- Pays the service provider personally instead of making checks payable to the trade or business name of such service provider; and
- Combines the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

Employment & Non-Compete Agreements

It is not required or necessary to enter into an employment agreement with any employee. If an organization chooses to enter into an employment agreement with a particular employee, such agreements typically spell out the term of employment (even if it is "at-will"), duties, compensation, and circumstances under which the agreement may be terminated by either party. In addition, such agreements often contain provisions requiring key employees to keep information confidential even after they leave employment and barring them from becoming employed by certain competing organizations for a limited period following termination.

It is important to note, however, that non-compete agreements are generally void and therefore unenforceable in Colorado. Colo. Rev. Stat. § 8-2-113. Colorado law presumes that post-employment noncompete agreements are void unless (1) the employee is "highly compensated" (i.e., makes more than the statutory threshold), (2) the purpose of the agreement is the protection of trade secrets, and (3) the agreement is limited in scope to what is "reasonably necessary to protect the employer's legitimate interest in protecting trade secrets."

The prohibition against non-compete agreements does not apply to restrictive covenants in agreements:

- For the purchase and sale of a business or the assets of a business; and
- For recovery of the expense of educating and training an employee who has served an employer for a period of less than two years.

A non-compete covenant or agreement that qualifies under one of the exceptions noted above must nonetheless also be reasonable in terms of duration and geographic scope. There is an extensive body of case law in Colorado as to the applicability and limitations of non-compete agreements; the decision whether to use a non-compete agreement in Colorado and the precise terms of such agreements should be discussed with a Colorado employment attorney before they are presented to an employee or prospective employee.

Government Contractors

A number of laws impose specific requirements on employers who contract with the government or a government funded agency and on employers who receive grants or other funding from the government. These laws include special equal opportunity laws, affirmative action laws, prevailing wage laws, and drug-free workplace laws. The application of the laws depends on the value of the contract or funding and/or the number of employees in the company.

Hiring Process

The hiring process involves receiving and reviewing applications, interviewing potential candidates, and selecting the employee. Several federal and Colorado laws limit how employers engage in this process.

Applications, Interviewing, Reference Checks, and Background Checks

The application process generally includes publishing the open position and accepting applications. Every help-wanted advertisement should contain an equal employment opportunity statement. Discrimination laws prohibit certain questions on the application, particularly those that elicit information about a person's protected status and are not job related.

Colorado's Job Application and Fairness Act (JAFA), effective July 1, 2024, prohibits employers from making certain inquiries related to an applicant's age, date of birth, and/or dates of attendance at or graduation from an educational institution. Among other narrow exceptions, employers may request that applicants verify compliance with age requirements that are required by federal, state, or local law to the extent necessary for a bona fide occupational qualification (such as age requirements related to public or occupational safety). Even so, such verification requests may not require disclosure, on an initial employment application, of an individual's specific age, date of birth, or dates of attendance at or graduation from an educational institution. Penalties for employer violations of JAFA increase with each subsequent violation and may include civil penalties assessed per violation.

The interviewing process generally involves interviews and reference checks. Federal and Colorado discrimination laws prohibit employers from asking certain questions during the hiring process. For example, questions regarding a person's age, disability, childbearing decisions or plans, or other questions related to a person's protected status that are not directly related to the qualifications for the job are absolutely prohibited. Every person who interviews candidates and conducts reference checks should have a working knowledge of the laws that govern employment interviews.

The Fair Credit Reporting Act (FCRA) prescribes the extent to, and manner in which, employers may use credit information in making employment decisions, including hiring and termination. FCRA imposes strict guidelines requiring employers to use such credit reports only for a permissible purpose, after disclosure to employment applicants or employees of the intent to seek and use credit information, and after obtaining the written consent of the employee/applicant. Employees/applicants must be notified of any adverse decision based in whole or in part upon credit information.

Federal and Colorado disability laws impose certain affirmative obligations on employers to ensure that disabled persons have a fair opportunity to participate in the hiring process. If any pre-employment testing is administered, then reasonable accommodations must be made to those applicants who require them. Further, the use of testing or other criteria not related to the essential functions of the position being filled should not be used, as they may tend to have a discriminatory impact on disabled applicants.

If an employer is going to administer a drug test, then it should have a set policy and make sure it is applied across the board. Applicants may be required to disclose the use of prescription drugs to the test administrator, and that information should be kept confidential and only used to determine if the applicant passed or failed the drug test. Such information is not provided to the employer.

Pay Disclosure and Transparency Requirements

Colorado requires employers to give notice of and provide certain information about all job opportunities. This information includes details about a position's hourly pay or salary (or a range thereof), a general description of benefits and any other applicable compensation, the anticipated date the application period will close, and how to apply for the opportunity. Because Colorado's pay transparency law includes many additional requirements, exceptions, interpretations, and exemptions, it is not capable of short summary. For more details, see Colo. Rev. Stat. § 8-5-201 *et seq.* and 7 CCR 1103-13.

Prohibition Against "Luring" Employees

Colorado employers are prohibited by statute from inducing, influencing, persuading, or engaging workers to move from one place of employment to another by "means of false or deceptive representations, false advertising, or false pretenses." Colo. Rev. Stat. § 8-2-104. A violation of this statute is a misdemeanor. In addition, a worker who is the subject of a violation of this statute may bring suit against the worker's employer and recover attorneys' fees as well as actual damages.

Colorado employers that lure workers to move to another place of employment based on false representations may also be liable under a common law theory of fraud.

Verification of Legal Work Status

The Immigration and Nationality Act requires employers to verify that every new hire is either a U.S. citizen or authorized to work in the U.S. All employees must complete Employment Eligibility Verification (I-9) Forms and produce required documentation within three days of their hire date. Failure to follow the I-9 process can result in penalties and an audit by the U.S. Immigration and Customs Enforcement.

The Immigration Reform and Control Act (IRCA) requires employers, regardless of size, to inspect and verify documentation establishing the identity and eligibility to work in the U.S. of every newly hired employee, and makes it unlawful to hire an alien who is ineligible for work in the U.S. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under the IRCA, as well as for hiring unauthorized workers.

In addition, employers in Colorado are required to affirm in writing, within 20 days after hiring a new employee, that the employer has:

- Examined the newly hired employee's legal work status;
- Retained file copies of documents required by 8 U.S.C. § 1324a (regarding the employment of unauthorized aliens);
- Not altered or falsified the employee's identification documents; and
- Not knowingly hired an unauthorized alien.

The employer is required to keep a copy of the affirmation, as well as the documents required by Section 1324a, for the duration of the employment relationship. Colo. Rev. Stat. § 8-2-122.

Employers cannot discriminate against employees based on their immigration status. Thus, once an employee has proved that he or she is eligible to work in the U.S., the employee's immigration status should not be used in any other employment decisions.

Employing Foreign Personnel

With globalization and the increasing benefits of a diverse workforce, employers located in the U.S. often seek to employ foreign personnel. This is particularly true with organizations that are already conducting business not just in the U.S. but around the world.

Permanent residency and a variety of temporary visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the U.S. employer and foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the U.S. for a temporary time and often the employment authorization is limited to specific employers, jobs, and even specific work sites.

When planning to bring foreign personnel to the U.S., employers should allow several months for processing by the U.S. Citizenship and Immigration Services, as well as the U.S. Department of State and the U.S. Department of Labor. Furthermore, employers should be aware that certain corporate changes, including stock or asset sales, job position restructuring, change of job sites, and changes in job duties, may dramatically affect (if not invalidate) the employment authorization of foreign employees.

Permanent Residency

Permanent residency, also called a "green card," is commonly based on either family relationships, such as marriage to a U.S. citizen, or an offer of employment. Permanent residence gained through employment often involves a time-consuming process that can take several years. Therefore, employers considering the permanent residence avenue for an alien employee should ascertain the requirements for that immigration filing prior to bringing the employee to the U.S.

Temporary Visas

The following are the most commonly used temporary visas:

Business Visitors (B-1) and Pleasure Visitors (B-2) Visas

These visas are commonly used for brief visits to the U.S. of six months or less. Extensions can be granted, but the maximum stay is one year. Neither visa authorizes employment in the U.S. B-1 business visitors are often sent by their overseas employers to negotiate contracts, to attend business conferences or board meetings, or to fill contractual obligations such as repairing equipment for brief periods in the U.S. B-1 or B-2 visitors cannot be on the U.S. payroll or receive U.S. source remuneration.

Student Visas (F-1 or M-1)

Often foreign students come to the U.S. in F-1 status for academic training or M-1 status for vocational training, not including language training programs. Students in F-1 status can often engage, within certain constraints, in on-campus employment and/or off-campus curricular or optional practical training for limited periods of time. Vocational students cannot obtain curricular work authorization but may receive some post-completion practical training in limited instances.

Exchange Visitor Visas (J-1)

These visas are for academic students, scholars, researchers, and teachers traveling to the U.S. to participate in an approved exchange program. Employment is only authorized within the terms of the applicable exchange program. Potential employers should note that some J-1 exchange visitors and their dependents are subject to a two-year foreign residence requirement abroad before being allowed to change status and remain or return to the U.S.

NAFTA Professional (TN) Visas

Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include accountants, engineers, lawyers, pharmacists, scientists, and teachers. TN holders are granted a period of stay of up to three years for specific employers and other employment is not allowed without prior approval by the Department of Homeland Security. Canadian citizens need not apply for a TN visa at a U.S. consulate; they may apply for a TN visa at the same time they apply for entry into the U.S. at designated entry-points. Mexican citizens must obtain a TN visa at a U.S. consulate or embassy before applying for entry into the U.S.

Specialty Occupation (H-1B) Visas

H-1B visas are for persons in specialty occupations that require at least a bachelor's degree. Examples of such professionals are computer programmers, engineers, architects, accountants, and, on occasion, businesspersons. Initially, H-1B temporary workers are given three-year temporary stays with possible extensions of up to an aggregate of six years. H-1B visas are employer and job specific. A U.S. employer must pay H-1B workers the higher of actual wage paid by such employer to U.S. workers or the prevailing wage paid to U.S. workers in the local commuting area as determined by Department of Labor online wage library or other valid salary survey.

Treaty Trader (E-1) and Treaty Investor (E-2) Visas

These are temporary visas for persons in managerial, executive, or essential skills capacities who individually qualify for or are employed by companies that engage in substantial trade with or investment in the U.S. Persons must be nationals of a country with which the U.S. maintains a treaty of commerce and navigation. The U.S. State Department maintains a list of such countries. E visas are commonly used to transfer managers, executives, or engineers with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its U.S. operations. The maximum initial stay of an E visa holder is two years. An unlimited number of two-year extensions are available; however, all E visa holders must maintain an intention to depart the U.S. when their visa expires.

Austrialian Specialty Professional (E-3) Visas

E-3 visas are for Australian citizens who will be employed in the U.S. in specialty occupations that require at least a bachelor's degree or its equivalent. Like H-1B visas, the U.S. employer must pay the E-3 worker the higher of the actual wage paid by such employer to U.S. workers or the prevailing wage paid to U.S. workers in the local commuting area as determined by Department of Labor online wage library or other valid salary survey. These temporary visas are granted for a period of two years and are renewable indefinitely.

Intra-company Transferee (L-1A/L-1B) Visas

Most often used in the transfer of executives, managers, or persons with specialized knowledge from international companies to U.S. related companies, L-1 visas provide employer specific work authorization for an initial three-year period with possible extensions of up to seven years in certain categories. If the transferee is opening a new office, the initial stay is limited to one year. L-1A visas are designed for the transfer of executives and managers while L-1B for specialized knowledge persons. As in the case of certain E visa capacities, some L managers or executives may qualify for a shortcut in any permanent residence filings.

Extraordinary Ability or Achievement (O) Visas

O-1 visas are for persons who have extraordinary abilities in the sciences, arts, education, business, or athletics and sustained national or international acclaim. O-2 visas are those persons who assist in such O-1 artistic or athletic performances.

Athletes/Group Entertainers (P-1) and Reciprocal Exchange Program (P-2) Visas

These temporary visas allow certain athletes who compete at internationally recognized levels, or entertainment groups who have been internationally recognized as outstanding for a substantial period, to come to the U.S. and work. Essential support personnel can also be included in this category.

Compensation

Several different federal and Colorado laws regulate various forms of compensation. Each business should adopt a compensation scheme that furthers its human resources goals.

Wages

Most employers are subject to the Fair Labor and Standards Act (FLSA). The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.

Effective July 24, 2009, the federal minimum wage for covered nonexempt workers is $7.25 per hour. Employees who are not "exempt" from the FLSA's provisions must receive a regular rate of pay at least equal to the required minimum wage for each hour they work up to 40 hours in a week. All hours over 40 in a week are considered "overtime." Generally, an employer must provide compensation to any nonexempt employee who works in excess of 40 hours in a week at an amount not less than one and a half times the worker's regular rate of pay for each hour of overtime. These protections may not be eliminated by individual agreement or by union contract.

While appearing simple, the FLSA is subject to many regulations, exceptions, interpretations, and exemptions and is not capable of short summary. For example, professional, executive, and administrative employees, as defined by regulations, are exempt from both the minimum wage and overtime pay requirements and some occupations and industries have special minimum wage provisions. Employers who violate the FLSA are subject to civil penalties, including fines, and prevailing employees may recover unpaid wages, unpaid overtime compensation, liquidated damages, and attorneys' fees.

The Colorado Wage Act applies only to private sector employees and employers; thus, it does not apply to the public sector or to independent contractors. Colo. Rev. Stat. § 8-4-101 *et seq.* The Colorado Wage Act, which is sometimes referred to as the Colorado Wage Claim Act, requires Colorado employers to pay employees their earned wages in a timely manner, and addresses deductions from wages, vacation, commissions, bonuses, final pay, pay periods and paydays, and pay statements.

Effective January 1, 2024, the minimum wage rate for non-exempt employees in Colorado is $14.42 per hour. The state minimum wage is increased annually for cost of living as measured by the Consumer Price Index used for Colorado.

Colorado Overtime and Minimum Pay Standards (COMPS) Order Number 39 (also known as the "Wage Order"), effective January 1, 2024, regulates wages, hours, working conditions, and procedures for certain employers and employees in Colorado (7 CCR § 1103-1). A copy of the Wage Order must be posted in an area where employees may easily read it during the workday. The Wage Order is promulgated by the Colorado Division of Labor.

Colorado employees who work in excess of 40 hours per workweek and/or 12 hours per workday, or 12 consecutive hours, must be paid time and one-half for that excess time. Covered employees may also be entitled to a duty-free meal period and rest periods, depending on the number of consecutive hours worked.

A complaint made pursuant to the Wage Order must be made within two years and three years for non-willful and willful violations, respectively. Employers that commit violations of the Wage Order are subject to potentially significant consequences, including but not limited to monetary penalties. For example, non-willful violations are subject to an automatic penalty of either double the wages owed or $1,000, and willful violations are subject to a penalty of triple the wages owed or $3,000 (whichever is greater).

Minimum wage and overtime laws are not limited to hourly employees. Employees who are paid in other ways, such as by salary or commission, may also be entitled to minimum wages and overtime pay. If an employee is subject to both federal and Colorado minimum wage laws, the law providing the greater protection or benefit for the employee will apply.

Bonuses

Bonuses can improve employee retention and provide extra incentives for reaching certain targets. Employers who provide bonuses (other than gift bonuses like holiday bonuses) should have a written bonus plan to ensure clarity, and to avoid unintended implied bonuses in contracts. In Colorado, bonuses earned in accordance with the terms of any agreement between an employer and employee are deemed "wages" under the Colorado Wage Act.

Paid Time Off & Vacation Pay

Colorado law does not require employers to provide employees with vacation leave (or PTO). However, if an employer chooses to provide vacation leave to its employees, the employer must pay out all accrued but unused vacation pay to an employee upon termination. Employers may not treat unused vacation pay as forfeited year-over-year, but employers may cap the maximum amount of vacation pay hours employees may accrue. For example, many employers cap vacation pay accrual at 48 hours.

Wage Taxes

Employers are required to withhold federal income tax and social security tax from taxable wages paid to employees. Funds withheld must be deposited by electronic funds transfer. This is generally accomplished through the Electronics Federal Tax Payment System. An Employer's Quarterly Federal Tax Return (IRS Form 941) must then be filed before the end of the month following each calendar quarter. Willful failure on the part of the employer to collect, account for, and pay withholding taxes will subject the employer to a significant monetary penalty, and in some cases will impose personal liability on those responsible for remitting the withholding taxes.

Most employers must also file an Employer's Annual Federal Unemployment Tax Return (IRS Form 940) and pay any balance due on or before January 31 of each year. Details may be found in IRS Circular E.

Mandatory Benefits

Workers' Compensation

Generally, all employers must provide workers' compensation insurance for their employees. There are some limited exemptions from this requirement, but the workers' compensation benefits are the only benefits available for an employee injured in an "on the job accident." What this means for employers is that an employee who is injured while performing work for the employer cannot sue the employer for their injury but is compensated through the workers' compensation insurance program.

Unemployment Insurance

The Colorado Employment Security Act, which governs unemployment benefits, applies to all private-sector employers that employ at least one person in covered employment. The Act also covers most public-sector employees, as well as those nonprofit and charitable organizations that have had four or more employees for some portion of a day in each of 20 different weeks within the current or preceding calendar year.

Leaves of Absence

Several federal and Colorado laws either require or govern unpaid leaves of absence, depending upon the reason for the leave. Although these leave laws can be very complicated, application of the laws usually depends on the size of the employer, and some of the more complicated laws do not apply to small employers.

Sick Leave

Colorado law requires employers to allow employees to accrue, and carry forward year-over-year, a minimum of 48 hours of unused sick leave. Unlike accrued vacation pay, however, employers are not required to pay employees for accrued but unused sick leave upon termination.

Family & Medical Leave Act

With certain exceptions, the federal Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to provide unpaid family or medical leave of up to 12 weeks in a 12-month period for the birth or adoption of a child; serious health condition of the employee or the employee's spouse, parent, or child; or qualifying exigency arising out of the fact that an employee's spouse, child, or parent is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces (including National Guard or Reserves) in the support of a contingency operation. A "serious health condition" includes inpatient hospitalization and subsequent treatment therefore, and conditions involving "continuing treatment by a healthcare provider," including pregnancy or prenatal care, chronic conditions, permanent or long-term conditions, and conditions requiring multiple treatments.

To be eligible for FMLA leave, the employee must have worked 12 months or longer, performed at least 1,250 hours of service for the employer in the 12 months prior to the date of leave, and must work at a site within 75 miles of which the employer has 50 or more employees. If the employee's need for leave is foreseeable, the employee must provide their employer with 30 days' notice before taking leave. When the need for leave is unforeseeable, the employee is required to provide notice as soon as practicable.

An individual who believes their FMLA rights have been violated is entitled to file a lawsuit. Remedies include lost compensation, liquidated damages, other out of pocket expenses, equitable relief, and attorneys' fees.

Colorado's Family & Medical Leave Insurance Act

Colorado's Family & Medical Leave Insurance (FAMLI) Act, under which eligible employees may take leave effective January 1, 2024, establishes a repository designed to provide Colorado employees with up to 12 weeks of paid family and medical leave where needed due to birth, adoption, family member care, self-care, exigency leave, or safe leave, and up to 16 weeks of paid leave if related to pregnancy and childbirth. FAMLI leave is funded in part by Colorado employer and employee premiums, remitted quarterly.

Employers with nine or fewer employees must remit 0.45% of their Colorado employees' wages to the FAMLI fund. These smaller employers can either voluntarily pay the amount in full or deduct the premium from employees' wages. Employers with 10 or more employees must remit 0.90% of their Colorado employees' wages to the FAMLI fund, and these employers must pay at least half (0.45%) of the FAMLI premium.

FAMLI premiums apply to employee wages, including but not limited to final wages, salaries, bonuses, commissions, and payouts of accrued but unused vacation pay. Deferred compensation disbursements, pension disbursements, and legal settlements paid by an employer to an employee all are examples of payments to which FAMLI premiums do not apply.

An employee may be eligible for FAMLI leave if the employee earned at least $2,500 over the previous year for work performed in Colorado. There is no minimum amount of time that an employee must work for the employer to qualify for FAMLI leave. However, if an employee has worked for the employer for at least 180 days, the employee is entitled to additional job security protections.

The FAMLI Act does not entitle employees to continue accruing employer-provided PTO (or any other benefits) while out on FAMLI leave. Employers cannot require their employees to use accrued PTO before or during their FAMLI leave, but employees may choose whether to use accrued PTO (including vacation and/or sick leave) before using FAMLI leave.

The FAMLI program is designed to run concurrently with FMLA. Thus, if leave is taken for a reason that qualifies under FAMLI and FMLA leave, then time taken under FAMLI counts as "used" FMLA leave. If an employee applies for FMLA, the employer must inform that employee about the FAMLI program and the employee's potential eligibility for paid leave under the same.

Domestic Abuse Leave

Colorado law provides that an employer must permit an employee to take up to three working days of leave in any 12-month period if the employee is the victim of domestic abuse. Colo. Rev. Stat. § 24-34-402.7. The leave may be with or without pay at the discretion of the employer. This law applies to employers of 50 or more employees and employees who have been employed for at least 12 months. To be eligible, the employee must first exhaust all available annual, vacation, personal, or sick leave, unless the employer waives that requirement.

The leave may be used to obtain medical care and mental health counseling (for both victims and their children), seek an injunction for protection, make the employee's home secure from the perpetrator of the domestic violence, seek new housing to escape the perpetrator, seek legal assistance in addressing issues arising from the act of violence, or attend and prepare for court related proceedings arising from the act of domestic violence.

All information related to such leave must be maintained as strictly confidential. An employer may not discharge, demote, suspend, retaliate, or in any manner discriminate or interfere with a person exercising their rights under the statute. Employees may sue for lost wages and benefits should the statute be violated.

MINING

Prospectors found gold near Denver, Colorado in 1859. Mining spurred the development of Colorado and remains an important part of Colorado's economy. Early Colorado mining focused on copper, silver, and gold. The increasing population of Colorado led to the development of coal reserves for domestic and industrial use. At present, mines in Colorado produce gold, coal, gypsum, uranium, molybdenum, soda ash, and other minerals and commodities. According to the Colorado Mining Association, Colorado's mining industry generates more than $7 billion toward Colorado's Gross Domestic Product each year.

As a state in the Western U.S., Colorado includes lands owned and managed by the federal government, as well as state owned lands and tribal lands. Mineral developers can prospect for some minerals on public lands, and other minerals (such as coal) can be leased from the government for development. Many public lands were deeded to early settlers and homesteaders under a variety of statutes designed to promote settlement of the West. As a result, the owners of the surface of a parcel may be different from the owners of the minerals beneath that surface. Mineral operations on these "split estate" lands can be complex.

Coal Mining

Coal companies in Colorado mine coal at surface mines and underground mines. All coal mining operations are regulated under the federal Surface Mining Control and Reclamation Act (SMCRA) and the related state of Colorado coal program. SMCRA is a federal statute creating a program to assure the reclamation of coal mines. SMCRA requires, among other provisions, that an operator of a coal mine have a permit for the mine. *30 U.S.C. § 1256*. The Department of the Interior implements SMCRA through the Office of Surface Mining Reclamation and Enforcement (OSM). OSM has its Western Regional Research Center in Lakewood, Colorado.

SMCRA contemplates the delegation of administration of the SMCRA program to the states, subject to federal approval and oversight. *30 U.S.C. § 1253*. Colorado operates a delegated program pursuant to the Colorado Surface Coal Mining Reclamation Act. *Colo. Rev. Stat. § 34-33-101 et seq.* Thus, the permitting process is administered by the State of Colorado, acting through the Division of Reclamation, Mining and Safety (DRMS).

In Colorado, many administrative agencies report to a citizen's board. The Division of Reclamation Mining and Safety reports to the Mined Land Reclamation Board. The board is comprised of seven members, representing mining, conservation, agriculture, and other interests. The board promulgates rules for mining in Colorado and provides for administrative review of decisions made by DRMS.

The actions of the board and DRMS remain subject to some oversight by the federal OSM. The OSM can conduct inspections of coal mining operations and respond to complaints from citizens. Because primary enforcement responsibility rests with the state of Colorado, if OSM believes that the state has not properly enforced its coal regulations, OSM can issue a 10-day notice to DRMS, indicating OSM's belief that the DRMS's enforcement of its program is inadequate. DRMS can respond by undertaking its own enforcement action, or by explaining to OSM why its existing approach is in fact consistent with program requirements.

The Colorado regulations implementing its coal program are found at *2 CCR 407-2*. Under the Colorado law, a coal company must get a permit for "surface coal mining activities," which constitute "[a]ctivities conducted on the surface of lands in connection with a surface coal mine or activities... which involve surface operations and surface impacts incident to an underground coal mine." *Colo. Rev. Stat. § 34-33-103(26).* These activities include "excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, removal of coal from coal mine waste disposal facilities, the use of explosives and blasting, and the use of in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site." Coal exploration activities are subject to a separate (and less involved) permitting process. *Colo. Rev. Stat. § 34-33-117.*

An applicant for a coal mining permit must submit a permit application to DRMS. *Colo. Rev. Stat. § 34-33-110(1).* The permit application must include information about the permittee, its corporate affiliation, its legal right to mine the coal subject to the permit application, a description of mining methods, information about probable hydrological consequences of mining, reclamation plans, and other technical information. *Colo. Rev. Stat. § 34-33-110(2)*; *Colo. Rev. Stat. § 34-33-111*. DRMS will provide notice to OSM of a permit application and will solicit public comment on the permit application. *Colo. Rev. Stat. § 34-33-118; Colo. Rev. Stat. § 34-33-119.* If approved, a permit is issued for a term of five years, subject to renewal. *Colo. Rev. Stat. § 34-33-109(5); Colo. Rev. Stat. § 34-33-109(7)(a).* Permit decisions are subject to appeal by the applicant (if the permit is denied) or by a person with an interest which is or may be adversely affected who has participated in the requisite administrative process. *Colo. Rev. Stat. § 34-33-119*.

The permittee can make technical revisions to its permit (i.e., minor changes that will not cause significant alteration of the mine's reclamation plan) with the approval of DRMS. *Colo. Rev. Stat. § 34-33-103(27); Colo. Rev. Stat §34-33116*. These technical revisions do not require all the procedures applicable to a complete permit. *Colo. Rev. Stat. § 3433-116.* Coal exploration is similarly subject to DRMS approval, but with a streamlined approval process. *Colo. Rev. Stat. § 34-33-117.*

The permittee must post a bond to guarantee performance of reclamation. *Colo. Rev. Stat. § 34-33-113.* Colorado, unlike many coal mining states, allows a mine permittee to self-bond, if the permittee can demonstrate the financial means to support the costs of reclamation without a surety bond or similar third-party bond. *Colo. Rev. Stat. § 34-33-113(3).*

Mine operations must comply with performance standards set out by regulation *2 CCR 407-2, Rule 4. Colo. Rev. Stat. § 34-33-120.* DRMS conducts partial inspection of coal mines each month, with a complete inspection at least quarterly. *Colo. Rev. Stat. § 34-33-122; 2 CCR 407-2, Rule 5*. DRMS has the authority to issue a notice of violation to a mine operator for violations of performance standards or permit conditions. *Colo. Rev. Stat. § 34-33-123(2).* DRMS may also issue an order requiring cessation of mining when a condition or practice exists at a mine which creates an imminent danger to the health or safety of the public, or which is causing or can reasonably be expected to cause significant imminent environmental harm to land, air, or water resources. *Colo. Rev. Stat. § 34-33-123(1).* Notices of violation and cessation orders issued by DRMS are subject to review by the Board, and then in the Colorado state district court where the mine is located. *Colo. Rev. Stat. § 34-33-124; Colo. Rev. Stat. § 34-33-128.* A cessation order may be reviewed on an expedited basis. DRMS may also rescind a mining permit, after a public hearing before the board, if a mine operator demonstrates a pattern of violations showing an unwarranted failure to comply with Colorado's Surface Coal Mining Reclamation Act or where violations are willfully caused by the permittee. *Colo. Rev. Stat. § 34-33-123(7).* Citizen suits are also permitted to enforce the provisions of Colorado's Surface Coal Mining Reclamation Act. *Colo. Rev. Stat. § 34-33-135.*

Mining for Hardrock Minerals

Gold, silver, molybdenum, lead, zinc, and other hardrock minerals are mined in Colorado at surface and underground mines. To the extent those activities are undertaken on lands owned by the federal government within the state of Colorado, they are subject to the General Mining Law of 1872, *30 U.S.C. § 22 et seq.,* the Federal Land Policy and Management Act of 1976, *43 U.S.C. §§ 1701-1787*, as well as regulations promulgated thereunder. *See generally 43 C.F.R. § 3809* (for activities on federal lands managed by the Bureau of Land Management), and *36 C.F.R. § 254* (for activities within National Forests). Either the Bureau of Land Management (BLM) or the U.S. Forest Service administers and permits hardrock mining activities on federal lands.

In order to conduct exploration, development, and mining activities for hardrock minerals on federal lands within the State of Colorado, one must "locate" unpatented mining claims. Possessory title to an unpatented mining claim or a millsite (which can also be located under the General Mining Law) arises as a matter of law from the performance of certain acts of mining claim location in accordance with the General Mining Law, regulations promulgated pursuant thereto (see *43 C.F.R. §§ 3830-3837*) and the applicable laws of the State of Colorado (collectively the Mining Laws). Upon proper performance of these acts of location, the locator obtains the equitable title to and a beneficial interest in the lands covered by the mining claim or the millsite subject to the requirement of maintaining the claim or site in accordance with the Mining Laws.

Unpatented mining claims and unpatented millsites, to be valid, must be supported and evidenced by the following:

- An actual discovery of a valuable, locatable mineral deposit within the boundaries of each mining claim (the discovery requirement does not apply to millsites);
- Proper marking of the surface boundaries of each claim or millsite on the ground with substantial monuments and posting of the certificate or notice of location on the claim (which, except as to millsites, is to be posted at the point of discovery); and
- Timely recording and filing of evidence of the claim or millsite with the proper county and federal offices.

See 43 C.F.R. §§ 3830-3832.

Prior to a discovery, a locator may maintain rights to an unpatented mining claim through actual possession of the ground covered thereby (so-called "*pedis possessio* rights"). With respect to millsites, to be valid, in addition to the requirements set forth above, each millsite:

- Must not include more land than is reasonable or necessary for mining purposes;
- Must be located on land that is non-mineral in character and not contiguous to a vein or lode;
- Must be actually used or occupied for mining or milling purposes; and
- Depends for its validity on the validity of the unpatented or patented lode claim with which it is associated.

43 C.F.R. § 3832, Subpart C.

In addition, in 1997 the Secretary of the Interior approved a Solicitor's Opinion which concluded that the Mining Laws imposed a limitation that only one single five-acre millsite may be claimed in connection with each associated unpatented or patented lode mining claim. That opinion instructed the BLM that it should reject those portions of millsite patent applications that exceed the acreage limitation, and that the BLM should not approve of plans of operation that rely on a greater number of millsites than the number of associated unpatented mining claims being developed, unless the use of additional lands is obtained through other means.

To implement this Solicitor's Opinion, the BLM issued Instruction Memorandum (IM) 98-154, which appeared, despite the Solicitor's Opinion, to maintain the BLM's existing practice as to millsites. IM 98-154 allowed approval of a plan of operations without any evaluation by the BLM of the millsite acreage-to-mining claim ratio involved in the plan, with two exceptions. The first exception was if the lands to which the plan of operations pertained were withdrawn from the operation of the Mining Laws, in which case IM 98-154 advised that the plan of operations should not be approved if it relied on millsite acreage which was in excess of the five acres per associated claim within the plan area. The second exception arose if the plan of operations unacceptably conflicted with other significant resources in the area covered by the plan of operations.

Despite the rather limited circumstances under which IM 98-154 purported to apply the Solicitor's Opinion, and despite the fact that the Solicitor's Opinion addressed only the practices of the BLM and not the Forest Service, the first time that the millsite limitation was applied to deny the approval of a proposed mining plan of operations, it was applied to a project that included both BLM and Forest Service lands in a situation where neither of the two exceptions referred to in IM 98-154 were present. On August 27, 1999, the BLM issued proposed revisions to its regulations on locating, recording, and maintaining unpatented mining claims or millsites. *64 Fed. Reg. 47023*. Those proposed regulations would have codified the millsite limitation contained in the Solicitor's Opinion. Subsequently, however, the Secretary of the Interior approved an opinion by the deputy Solicitor that concluded that the Mining Laws do not impose a limitation that only one single five-acre millsite may be claimed in connection with each associated unpatented or patented lode mining claim. The regulations referred to above were then finalized without the millsite limitation. Whether the millsite limitation is part of the Mining Laws is currently at issue in a lawsuit filed in the U.S. District Court for the District of Columbia, *Earthworks v. Department of the Interior*, Case No. 1:09-cv-01972-HHK. That lawsuit also asks the court to order the BLM and the USFS to require mining claimants to pay fair market value for their use of the surface of federal lands where those claimants have not demonstrated the validity of their unpatented mining claims and millsites. In 2020, the U.S. District Court for the District of Columbia granted summary judgment for the federal defendants, *Earthworks v. DOI*, 496 F. Supp. 3d 472 (D.D.C. 2020); and the plaintiffs appealed. If the plaintiffs in that lawsuit were to prevail, that could have an adverse impact on a mining claimant's ability to use unpatented millsites for facilities ancillary to its mining activities, and when combined with the limitations imposed by the *Rosemont Copper* case discussed below, could significantly increase the cost of using and potentially limit the availability of other federal lands in the vicinity for such ancillary facilities.

On July 31, 2019, the federal district court for the District of Arizona halted construction of the Rosemont Copper Mine. *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 409 F. Supp. 3d 738 (D. Ariz. 2019) (the *Rosemont Copper* case). The Rosemont Mine was a proposed open-pit copper mine located in the Coronado National Forest outside of Tucson, Arizona. Rosemont, after a 10-year permitting process, obtained its final project approval from the USFS in May of 2019. Rosemont announced that mine construction would commence on August 1, 2019.

In the interim, however, five separate lawsuits had been filed by opposition groups (consisting of four environmental groups and three Native American tribes) challenging the mine's approval. Among the numerous claims made by those opposition groups was that there were limits on Rosemont's ability to use the surface of its unpatented mining claims for mining-related purposes (but not mining). The court concluded that the Forest Service's approval of the mine plan was invalid.

The court's decision focused on perceived errors in the Forest Service approval process. The key error identified relates to Rosemont's rights to utilize the national forest land surrounding the copper deposit for its project infrastructure and disposal of waste rock and tailings material. Rosemont owned patented and unpatented mining claims at the mine obtained under the General Mining Law. It appears from the court's decision that the copper deposit Rosemont planned to mine is located primarily beneath the patented mining claims (which for all intents and purposes are owned like any other private fee land). Rosemont planned to conduct many of its ancillary activities, however, including the above-referenced waste rock and tailings disposal, on the surface of its unpatented mining claims in the vicinity of the deposit. The court repeatedly referenced, in its decision, the fact that the mine plan contemplated disposing of 1.2 billion tons of waste rock and 700 million tons of tailings on 2,447 acres of unpatented mining claims. As discussed above, an unpatented mining claim creates a unique real property right whereby the locator owns the exclusive right to use and possess the property for mining purposes, subject to compliance with the requirements for location and maintenance of such claim and subject to the paramount title of the United States and certain uses by third parties allowed under applicable law. Under the General Mining Law, a valid unpatented mining claim is established by discovering and locating a valuable mineral deposit. In the court's view, however, if there was no valuable mineral deposit beneath the purported unpatented mining claims, the unpatented mining claims were completely invalid under the General Mining Law of 1872, and no property rights attach to those invalid unpatented mining claims.

The court decided that the primary issue was, in essence, a question regarding the validity of the unpatented claims surrounding the deposit. After reviewing the facts of the case and summarizing the applicable laws, the court presumed that Rosemont's unpatented mining claims were invalid because there was no evidence in the court record that such claims contained a valuable mineral deposit, which the court inferred, in part, based on the fact that Rosemont planned to bury these unpatented mining claims under 1.9 billion tons of waste rock and tailings. Rosemont argued that because it has a valid right to the claims overlaying the deposit (a total of 955 acres), it had the right to use the surrounding land to support its mining operations, including for purposes ancillary to mining, such as the disposal of waste rock and tailings. The Forest Service (the actual defendant in the case), argued that the applicable regulations by their terms apply to activities both on and off of mining claims, and thus the question of claim validity was extraneous. The court, however, disagreed.

In the court's view, because the Forest Service accepted at face value that Rosemont had valid unpatented claims to the lands surrounding the deposit, its process for approving the mine plan was fatally flawed. In its Record of Decision, the Forest Service stated that it was not authorized to reject the proposed project outright - it could only impose reasonable conditions to protect surface resources - as a rejection would interfere with Rosemont's lawful right to use the land in support of its mining operations. The court ruled that this conclusion was premised on the Forest Service's incorrect assumption that Rosemont had valid unpatented mining claims on the surrounding lands. Because in the court's view Rosemont did not in fact have valid claims, in the absence of any statutory right on the part of Rosemont, the Forest Service could deny Rosemont's off claim activities. In other words, because the Forest Service was regulating public land not subject to valid claims by Rosemont, it had the authority to consider a wider range of alternatives that it did not consider, including denying approval of the mine plan entirely or limiting the scale of the project.

The decision and the reasoning of the Arizona District Court in the *Rosemont Copper* case was subsequently affirmed by the 9th Circuit Court of Appeals. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 33 F. 4th 1202 (9th Cir. 2022). The holding in the Rosemont case has subsequently been applied with respect to similar proposed uses of the surface of unpatented mining claims in Nevada. *See, Bartell Ranch, LLC v. McCullough,* 2023 U.S. Dist. LEXIS 19280, 2023 WL 1782343, (D. Nev., Feb. 6, 2023), *aff'd, Western Watersheds Project v. McCullough,* 2023 U.S. App. LEXIS 18063, 2023 WL 4557742 (9th Cir., July 17, 2023); *Great Basin Res. Watch v. DOI,* 2023 U.S. Dist. LEXIS 56292, 2023 WL 2744682 (D. Nev, March 31, 2023). Whether Colorado state or federal courts or other federal courts in the 10th Circuit will adopt that decision is uncertain, but if and perhaps regardless of whether that does happen, mining claimants in Colorado will be faced with similar issues.

Colorado law requires the locator of a lode claim to, "within three months from the date of discovery," record a location certificate for the claim in the office of the recorder for the county in which the claim is situated. *Colo. Rev. Stat. § 34-43-103.* For a placer claim, Colorado law requires that the locator must record a location certificate in the county "within 30 days from the date of discovery." *Colo. Rev. Stat. § 34-43-112.* In addition, a copy of the certificate of location for a mining claim or millsite recorded or to be recorded with the county recorder under state law must be filed with the BLM within 90 days after the date of location of that claim. *43 C.F.R. § 3833.1.* Location certificates for all unpatented mining claims or millsites existing as of the date of enactment of the Federal Land Policy and Management Act were required to be filed with the BLM not later than October 22, 1979. Failure to timely file the certificate with the BLM renders the claim null and void. The Mining Laws also require that location certificates include certain specific information described in the pertinent federal and state statutes.

Assuming an unpatented lode mining claim has been properly located, the Mining Laws, through 1992, required the locator, in order to maintain the claim, to perform $100 worth of labor or improvements on or for the benefit of the claim during each assessment year (which commences at noon on September 1 of each calendar year and ends at noon on September 1 of the following calendar year) following the assessment year in which the claim was located. Through the assessment year ending on September 1, 1992, the required amount of qualifying assessment work then had to be completed on a continuing basis during each ensuing assessment year. In 1993, federal legislation was enacted that required payment of a $100 per claim annual maintenance fee (now increased to $165) in lieu of the performance of assessment work, except for certain qualified small miners owning fewer than 10 unpatented mining claims. That requirement applies to both unpatented mining claims and millsites.

Colorado law requires the owner of an unpatented mining claim to record with the office of the county recorder in the county where the claim is situated an affidavit of the person or persons performing the annual assessment work (or causing that work to be performed) or paying the claim maintenance fees containing certain required information. *Colo. Rev. Stat. § 34-43-114.* Such affidavits must be filed with the county recorder on or before December 30 of each calendar year following the end of each respective federal assessment year ending on September 1.

Until enactment of the federal legislation requiring payment of the claim maintenance fee in lieu of the performance of assessment work, copies of the assessment affidavit as recorded in the county records, or of a notice of intention to hold the claim, had to be filed with the BLM on or before December 30 of each year, commencing in the calendar year following the year in which the claim was located. Failure to either (1) timely file with the BLM a copy of the affidavit (or notice of intention to hold) recorded (or to be recorded) in the county records, or (2) timely record an affidavit or notice of intention to hold in the county, was deemed conclusively to constitute an abandonment of a mining claim. Similarly, failure to pay the required claim maintenance fee on or before September 1 of each year under current law would result in forfeiture of a mining claim or millsite. *30 U.S.C. §28i.* Qualified small miners may still maintain their claims by the performance of assessment work rather than the payment of claim maintenance fees.

Mineral exploration, development, and mining activities pertaining to hardrock minerals on all lands in the state of Colorado are subject to compliance with the Colorado Mined Land Reclamation Act, *Colo. Rev. Stat. § 34-32-101 et seq.*, as well as regulations promulgated thereunder.

As with coal operations, the permitting process under the Colorado Mined Land Reclamation Act, also known as the Hardrock Act, is administered by the State of Colorado, acting through DRMS, which reports to the Mined Land Reclamation Board. The board maintains a separate set of regulations, “Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for Hard Rock, Metal and Designated Mining Operations.” *2 CCR 407-1*.

Under the Hardrock Act, all operators proposing to engage in mining operations must obtain a reclamation permit. *Colo. Rev. Stat. § 34-32-109.* There are separate categories of permits for:

- Limited impact operations (operations on less than two acres, which will result in the extraction of less than 70,000 tons of mineral or overburden per year). *Colo. Rev. Stat. § 34-32-110.*
- Designated mining operations (operations at which toxic or acidic chemicals used in extractive metallurgical processing are present on-site, acid or toxic forming materials will be exposed or disturbed, or uranium is developed or extracted). *Colo. Rev. Stat. § 34-32-112.5; Colo. Rev. Stat. § 34-32-103(3.5).*
- Regular mining operations (operations which are neither limited impact operations nor designated mining operations). *Colo. Rev. Stat. § 34-32-112.*

Designated mining operations (DMOs) are subject to a higher level of scrutiny and more stringent reclamation requirements than other mining operations. The Hardrock Act also requires operators to submit Notices of Intent in advance of conducting any prospecting or exploration activities. *Colo. Rev. Stat. § 34-32-113.*

All permit applications are subject to the right of the public to file written objections. *Colo. Rev. Stat. § 34-32-114.* The board may, at its discretion, hold a hearing on whether the permit should be granted based on those objections. Ultimately, for hardrock mining applications, the board must make a final decision on the permit application, at a hearing, within 120 days after receipt of the completed application. *Colo. Rev. Stat. § 34-32-115.* That period may be extended for up to an additional 60 days for complex applications, serious unforeseen circumstances, or due to significant snow cover on the affected lands. *Colo. Rev. Stat. § 34-32-115(2).*

Each permit will include a detailed reclamation plan with which the operator must comply. *Colo. Rev. Stat. § 34-32-116.* For DMOs, compliance with a more detailed (and typically more stringent) environmental protection plan is also required. *Colo. Rev. Stat. § 34-32-116.5.* Operators must provide a financial warranty to cover anticipated reclamation costs, which can be in the form of surety bonds, letters of credit, or other forms of assurance. *Colo. Rev. Stat. § 34-32-117.* Operations conducted without a permit or in violation of permit conditions can result in notices of violation, fines, shut down orders, and even civil and criminal penalties. *Colo. Rev. Stat. § 34-32-123 – 124.5*.

Uranium Mining

The statutory and regulatory schemes that apply to hardrock mining, as discussed above, generally apply to uranium mining operations as well. However, uranium mining activities are by definition DMOs, and thus subject to increased scrutiny and more stringent and complex permitting requirements. For example, the Mined Land Reclamation Board has 240, rather than 120 days, to hold a hearing on uranium mining permit applications. *Colo. Rev. Stat. § 34-32-115(2).* In addition, an applicant for an *in situ* uranium mining permit, unlike other hardrock mining permit applicants, must certify that it has not engaged in a pattern of willful violations of the Hardrock Act or other analogous state or federal statutes at other sites. *Colo. Rev. Stat. § 34-32-112(2)(i); Colo. Rev. Stat. § 32-34-115(5)(d).* An applicant for an *in situ* uranium mining permit must also include in its application a description of at least five other *in situ* mining operations that demonstrate the ability of the applicant to conduct the proposed mining operation without any leakage, migration, or excursion of any leaching solutions or groundwater – containing minerals, radionuclides, or other constituents from the *in situ* leach process into any groundwater outside the permitted area. *Colo. Rev. Stat. § 34-32-112(j).* Applicants for *in situ* uranium mining permits must also submit a detailed baseline site characterization and plans for monitoring and protecting the affected lands and affected surface and groundwater. *Colo. Rev. Stat. § 34-32-112.5(5).* All *in situ* operations must reclaim all affected groundwater to either pre-mining baseline water quality or better or quality which meets the most stringent criteria of basic standards for groundwater as established by the Colorado Water Quality Control Commission. *Colo. Rev. Stat. § 3432-116(8).* The Board also has broader authority to expressly deny the issuance of permits for *in situ* uranium mining operations than for other operations. *Colo. Rev. Stat. § 34-32-115(5).*

Mine Safety

The U.S. Department of Labor, acting through the Mine Safety and Health Administration (MSHA) regulates mine safety pursuant to the Mine Safety and Health Act. *30 U.S.C. § 801 et seq.* This law applies to mines, operators of mines, and miners, and creates a comprehensive mine safety scheme. It imposes safety performance standards on all mine operations and authorizes MSHA to conduct inspections and enforce those standards. The federal MSHA program has the lead in mine safety enforcement. DRMS provides training and support to mine operators to enhance their safety systems and to comply with MSHA training requirements.

Environmental Laws

In addition to reclamation requirements, all of the mining and related activities described above are subject to compliance with, and the operator obtaining whatever permits and other approvals are required in connection with, the full panoply of applicable federal, state and local environmental laws.

OIL & GAS DEVELOPMENT

According to the U.S. Energy Information Administration, as of the end of May 2019, Colorado had about 40,000 active oil and natural gas wells. More than a third of the wells are located in Weld County.

According to the U.S. Energy Information Administration, from 2010 to 2022, crude oil production in Colorado more than quintupled. As of 2022, Colorado ranked eighth in the nation for natural gas production and fifth in the nation for crude oil production. According to a 2021 study completed by Pricewaterhouse Coopers LLP for the American Petroleum Institute, the oil and natural gas industry represented 8.6 percent of Colorado's total employment. According to the Top 100 U.S. Oil and Gas Fields report published by the U.S. Energy Information Administration, in 2015, Colorado's Wattenberg field was the 4th largest oil field in the United States. Additionally, the San Juan Basin Gas Area located in Colorado and New Mexico was the 4th largest gas field in the United States.

Colorado Oil and Gas Conservation Commission

All Colorado oil and gas development is governed by statutory provisions of the Oil and Gas Conservation Act, *Colo. Rev. Stat. § 34-60-100 et seq.,* and rules promulgated by the Colorado Energy & Carbon Management Commission (ECMC). As the state agency charged with promoting the exploration, development, and conservation of Colorado's oil and gas resources, the ECMC also handles the drilling permit process and ensures industry compliance with statewide oil and gas statutes and regulations, including those related to the protection of the environment and wildlife.

A commission made up of nine voting members oversees the ECMC. Commission members include the executive director of the Department of Natural Resources, the executive director of the Department of Public Health and Environment, and five additional members appointed by the Governor and approved by the Colorado senate. The ECMC staff is divided into nine work units: community relations, compliance, engineering, environmental, finance, hearings, information and applied technologies, planning and permitting, and orphaned well program.

The ECMC's records contain a plat book of all wells drilled since 1953, individual well files, and files on spacing and other orders. Pertinent information and forms can also be found on the ECMC's website.

Permitting

On April 16, 2019, Senate Bill 19-181 was enacted which altered the permitting process in Colorado. Permitting is governed by the 300 series of the general rules promulgated by the ECMC.

Before commencement of operations, the Operator must submit an Oil and Gas Development Plan which must be approved in writing by the ECMC. As part of the Oil and Gas Development Plan, the Operator must submit a Form 2A, Oil and Gas Location Assessment. The Form 2A provides detailed information about the oil and gas location. An "oil and gas location" is defined as a definable area where an Operator has disturbed or intends to disturb the land surface in order to locate an oil and gas facility. An "oil and gas facility" is defined as the equipment or improvements used or installed at an oil and gas location for the exploration, production, withdrawal, gathering, treatment, or processing of crude oil, condensate, E&P waste, or gas. The Operator must also submit Form 2B that provides quantitative and qualitative data to evaluate incremental adverse and beneficial contributions to cumulative impacts caused by Oil and Gas Operations associated with the Proposed Oil and Gas Development Plan, including any measures the Operator will take to avoid, minimize, or mitigate any adverse impacts to (i) air resources, (ii) public health), (iii) water resources), (iv) terrestrial and aquatic wildlife resources and ecosystems, (v) soil resources, and (vi) public welfare. Finally, the Operator must submit Form 2C which is an Oil and Gas Development Certification, which certifies the submission of all components of the Oil and Gas Development Plan and to identify all components of the application. If the proposed Oil and Gas Development Plan is complete, the Director will approve the Form 2C and issue a completeness determination to the Operator. After the Director issues a completeness determination, the Operator is required to provide notice of a completeness determination within seven days to the parties identified in the rule.

The Oil and Gas Development Plan application components, exemptions pursuant to Rule 304.d, and supporting documents will be posted on the ECMC website for a public comment period. The date by which public comments must be received to be considered is (i) 45 days if the Oil and Gas Development Plan includes any proposed Oil and Gas Locations within 2,000 feet of a Residential Building Unit, High Occupancy Building Unit, or School Facility within a Disproportionately Impacted Community; and (ii) 30 days for all other Oil and Gas Development Plans. However, the Director may extend the public comment period if the Director determines an extension or reopening is reasonable in order to obtain public input. Following the end of the public comment period and the Director's review, the Director will then make a recommendation to approve or deny an Oil and Gas Development Plan and provide notice of its decision. The ECMC can then either delegate consideration of the Oil and Gas Development Plan to and Administrative Law Judge or Hearing Officer or approve, deny, or stay the Oil and Gas Development Plan.

Under Rule 302.a, Local Governments may regulate surface Oil and Gas Operations in a manner that is more protective or stricter than the ECMC's rules. Accordingly, an Operator must provide notice to Relevant and Proximate Local Governments no less than 30 days prior to submitting the Oil and Gas Development Plan and the Relevant and Proximate Local Governments may request and provided an opportunity to consult with the Operator and Director.

Surface Damages – Accommodation

The owner of a severed mineral estate or the owner's lessee is privileged to access the surface and use that portion of the surface estate that is reasonably necessary to develop the severed mineral estate. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926 (Colo. 1997). The rules of the ECMC contain numerous requirements regarding surface access, reclamation and notice before commencing operations for the drilling of any well. Rule 304(b)(12) requires the oil and gas operator to provide the ECMC with a redacted copy or memorandum of the surface use agreement negotiated with the surface owner as part of the Oil and Gas Location Assessment Application.

Colorado has codified the accommodation doctrine under *Colo. Rev. Stat. § 34-60-127*. The statute requires the mineral owner to consider the rights of the surface owner and to accommodate the existing uses of the surface if those uses do not unreasonably interfere with the mineral owner's operations.

Spacing and Pooling

When two or more separately owned tracts are embraced within a drilling unit, or when there are separately owned interests in all or a part of the drilling unit, then persons owning the interests may pool their interests for the development and operation of the drilling unit. In the absence of voluntary pooling, the commission, upon application of a person who owns, or has secured the consent of the owners of, more than forty-five percent of the mineral interests to be pooled, may enter an order pooling all interests in the drilling unit for the development and operation of the drilling unit. *Colo. Rev. Stat. § 34-60-116(6)(a)* and *(b)(1).*

Prior to obtaining an involuntary pooling order, the lands sought to be pooled must be spaced pursuant to an order from the ECMC establishing the drilling unit. This spacing order defines, for each drilling unit, the number of acres to be included, shape, common source of supply or formation, and number of permitted wells. *Colo. Rev. Stat. § 34-60-116(6)(2)* and *(3).*

In order to involuntary pool an interest, the party seeking the order must provide evidence that:

- All unleased mineral owners have been tendered a reasonable offer to lease upon terms no less favorable than those currently prevailing in the area; and

- The unleased mineral owner has been furnished in writing that owner's share of the estimated drilling and completion costs of the well, the location and objective depth of the wells, and the estimated spud date for the wells or the range of time in which spudding is to occur.

Colo. Rev. Stat. § 34-60-116(7)(d).

After notice and hearing, the ECMC may enter an order pooling all interests in the drilling unit for the development and operation thereof upon terms and conditions that are just and reasonable and afford the owner of each tract the opportunity to recover his equitable share without unnecessary expense. The consenting owners who pay for the drilling and operation of the well receive reimbursement from the non-consenting owner until the consenting owners recover 100 percent of the non-consenting owner's share of the cost of surface equipment beyond the wellhead connections, plus 100 percent of the non-consenting owner's share of the cost of operation of the well and 200 percent of that portion of the costs and expense of staking, well site preparation, obtaining rights-of-way, rigging up, drilling, reworking, deepening or plugging back, testing, and completing the well and that portion of the cost of equipment in the well including the wellhead connections. *Colo. Rev. Stat. § 34-60-116(7)(b).*

A non-consenting owner of a tract in a drilling unit that is not subject to any lease or other contract for oil and gas development shall be deemed to have a landowner's proportionate royalty of (a) thirteen percent for a gas well, or (b) sixteen percent for an oil well. *Colo. Rev. Stat. § 34-60-116(7)(c).* The operator is required to provide the non-consenting owner with a monthly statement of all costs incurred, together with the quantity of oil and gas produced, and the amount of proceeds realized from the sale of production during the preceding month. *Colo. Rev. Stat. § 34-60-116(8).*

Oil and Gas Land Issues

Record Repositories for Oil and Gas Title Examination

County Clerk

The elected County Clerk and Recorder for each county in Colorado is required to maintain a grantor index and a grantee index of every document filed or recorded concerning or affecting real estate. *Colo. Rev. Stat. § 30-10-408*. The County Clerk and Recorder also keeps a reception book listing each document chronologically for recording or filing. The County Clerk and Recorder is not required by law to keep a tract index. *Colo. Rev. Stat. § 30-10-409.* Colorado statutes mandate that all subdivision plats are kept in a file for recording and indexed along with the grantor index and grantee index. *Colo. Rev. Stat. § 30-10-410*. Finally, the County Clerk and Recorder keeps an index of trade name registration records provided by the Colorado Department of Revenue. *Colo. Rev. Stat. § 30-10-420.*

Assessor and Treasurer

Colorado separately assesses and taxes severed mineral interests for ad valorem tax purposes. Either the owner of the surface estate or mineral estate may file a schedule with the County Assessor listing the severed mineral interest. *Colo. Rev. Stat. § 39-5-102(1).* There are two categories of ad valorem taxation of the mineral estate, one for producing or capable of producing mineral estates and the other for non-producing mineral estates. The operator of a producing mineral estate is required to prepare and submit to the county assessor, on or before April 15th of each tax year, a statement generally setting forth the location of the lands, operator information, and the amount of oil and gras production for the prior year. *Colo. Rev. Stat. § 39-7-101(1).* There is no requirement for an owner of a non-producing mineral estate to submit an annual statement. However, if one is submitted by the owner the assessment of taxes will be determined by the "income approach capitalizing the annual net rental income for such nonproducing mineral interests at an appropriate market rate." *Colo. Rev. Stat. § 39-7-109.* The County Treasurer is responsible for collecting all taxes and other money due to each county. *Colo. Rev. Stat. § 30-10-707.*

District and County Court Records

The courts maintain civil action, judgment, and probate indices. A judgment is not a lien on real property until it is recorded in the county records. *Colo. Rev. Stat. § 13-52-102(1).* However, a thorough oil and gas title examination in Colorado should include a search for judgments and civil actions as well as all probate information.

Colorado State Land Board

The State Board of Land Commissioners manages the lands owned by the state of Colorado.

Colorado State Office of the Bureau of Land Management

Colorado has more than 8.3 million acres of Bureau of Land Management public lands, along with more than 27 million acres of mineral estate, which are concentrated primarily in the western portion of the state. The records related to the federal ownership of the oil and gas are maintained at the Colorado State Office of the Bureau of Land Management.

Recording Issues

The Colorado Recording Act is a race-notice statute. *Colo. Rev. Stat. § 38-35-109(1).* In Colorado, a great deal of oil and gas exploration activity occurs on federal and state lands. The Colorado Supreme Court has held that the purchaser may have a duty of inquiry with respect to instruments reflected in the records of the Colorado State Office of the Bureau of Land Management or the Colorado State Land Board. *Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980); *Grynberg v. City of Northglenn*, 739 P.2d 230 (Colo. 1987).

Colorado also has a unique statutory provision related to recording which states that, when an instrument in writing has been recorded and such instrument makes reference to some other instrument which is not recorded in the county records, such reference shall not be notice to any other person. *Colo. Rev. Stat. § 38-35-108.* No person other than the parties to the instrument shall be required to make inquiry or investigation concerning such recitation or reference.

This statute can create a number of problems related to the customary practices of many oil and gas companies. First, the custom of making reference to agreements not of record in the conveyancing documents, such as purchase and sale agreements, farm out agreements, or joint operating agreements, does not place third parties on notice and the statute arguably eliminates the duty to make further inquiry. Second, the statute calls into question the notice that would otherwise be provided by a memorandum or notice of agreement (e.g., a memorandum of operating agreement). It is better practice to set out the pertinent terms when recording any memorandum of agreement or notice of agreement.

Nature of Oil and Gas Interests

Oil and Gas Estate

Oil and gas as well as minerals may be severed from the realty and a separate estate created therein. *Simson v. Langholf*, 293 P.2d 302, 306 (Colo. 1956); *Mull Drilling Co. v. Medallion Petroleum*, *Inc.*, 809 P.2d 1124 (Colo. App. 1991); *Pierce v. Marland Oil Co. of Colorado*, 278 P. 804 (Colo. 1929).

The owner of a mineral interest has a right to convey to another the executive right to lease such interest. The exclusive right to execute leases is not personal to the grantee but passes to his or her successors in interest. *Mull Drilling Co. v. Medallion Petroleum, Inc.*, 809 P.2d 1124 (Colo. App. 1991).

Leasehold Estate

The lessee's interest in an oil and gas lease is an interest in real estate. *Hagood v. Heckers*, 513 P.2d 208 (Colo. 1973); Maralex Resources, Inc. v. Chamberlain, 320 P.3d 399 (Colo. App. 2014). An overriding royalty interest carved out of a working interest in an oil and gas lease is an interest in real property. *Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980); Globe Drilling Co. v. Cramer, 562 P.2d 762 (Colo.App. 1977).

Non-Participating Royalty

This particular interest has given Colorado a great deal of difficulty. Two Colorado Supreme Court decisions in the 1950s seem to hold, as a rule of property law and not as a rule of construction, that a person who holds the right to the profits or a share of the profits that a mineral fee estate might yield owns the mineral fee estate itself. *Simson v. Langholf*, 293 P.2d 302 (Colo. 1956); *Corlett v. Cox*, 333 P.2d 619 (Colo. 1958). These cases proved to be so troublesome that the mineral law bar in Colorado lobbied for a legislative solution that altered the interpretation set forth in the case law. Effective July 1, 1991, Colorado law provides:

> Any conveyance, reservation, or devise of royalty interest in minerals or geothermal resources, whether of a perpetual or limited duration, contained in any instrument executed on or after July 1, 1991, creates a real property interest which vests in the holder or holders of such interest, the right to receive the designated royalty share of the specified minerals or geothermal resources or proceeds therefrom in accordance with the terms of the instrument. Unless otherwise provided in the conveyance, reservation, or devise, the holder of such interest shall

not have the right to: (a) explore for or develop the minerals or geothermal resources, (b) grant a mineral development lease, or (c) receive any share of rentals, bonus payments, surface damage payments, or similar sums that might be payable under the terms of any mineral development lease.

Colo. Rev. Stat. § 38-30-107.5.

The statute is not retroactive; however, in *Keller Cattle Co. v. Allison*, 55 P.3d 257 (Colo. App. 2002), the Colorado Court of Appeals undercut the harsh result in the *Simpson* and *Corlett* cases and held that the reservation in that case created a non-participating royalty. The case indicates that the Court of Appeals does not recognize a rule of property law with respect to non-participating royalties.

Oil and Gas Lease Issues

Affidavit of Extension

In order to provide notice of the extension of the term of an oil and gas lease beyond the primary term, a lessee must, prior to the expiration of six months after expiration of the primary term, record in the county records where the lands are located, an affidavit claiming an extension of the term. *Colo. Rev. Stat. § 38-42-106.*

Statutory Release of Oil and Gas Lease

Colorado has a statutory requirement to release oil and gas leases. It is the duty of the lessee to execute a release of an oil and gas lease within 90 days after the date of forfeiture or expiration, and file the same in the county records. *Colo. Rev. Stat. § 38-42-104*. If the owner of the lease neglects to execute a release, then the owner of the leased premises may sue to obtain the release and may recover from the lessee $100 as damages and all costs together with reasonable attorneys' fees. *Colo. Rev. Stat. § 38-42-105.*

Definition of Production

In *Bd. of County Comm'rs of Boulder County v. Crestone Peak Res. Operating LLC*, 2023 Colo. LEXIS 1086 (Colo. Nov. 20, 2023), the lessor filed suit claiming that a shut-in due to pipeline maintenance constituted a cessation of production which terminated leases under the cessation-of-production clauses. The Court of Appeals found for the lessee and adopted the "commercial discovery rule" which provides that the term "production" means "capable of producing oil or gas in commercial quantities." The Colorado Supreme Court granted certiorari to review whether the Court of Appeals erred in adopting the "commercial discovery rule." The Colorado Supreme Court ultimately declined to adopt a universal definition of "production" in Colorado oil and gas lease, instead holding that Colorado courts should interpret each oil and gas lease pursuant to its own terms.

Royalty Clause – Post Production Costs

Colorado follows the "first marketable product" approach illustrated by the following Colorado Supreme Court cases:

Garman v. Conoco, 886 P.2d 652 (Colo. 1994)

This case arose on a certified question from the U.S. District Court regarding the deductibility of post-production costs, such as processing, transportation, and compression, when the assignment creating the overriding royalty is silent as to how post-production costs are to be borne. Therefore, the Colorado Supreme Court did not review the language of any royalty clause. The court ruled that, because of the implied covenant to market in every oil and gas lease, any post-production costs incurred "to convert raw gas into a marketable product" are to be borne solely by the lessee. The court did not define what constitutes a marketable product, although it did cite dictionary definitions such as "sufficiently free from impurities that it will be taken by a purchaser." The court acknowledged that transportation of a marketable product is a deductible cost.

Rogers v. Westerman Farm Co., 29 P.3d 887 (Colo. 2001)

In this case, the Colorado Supreme Court adopted the "first marketable product" rule for valuing production for royalty purposes, even where the lease provides for royalties to be paid "at the well" or "at the mouth of the well." The Colorado Supreme Court concluded that the "at the well" language in the leases did not address the allocation of costs between the royalty owner and the lessee (although it did not explain what the purpose of that language is). Because the court interpreted the lease to be silent on the allocation of post-production costs (such as gathering, compression, and dehydration), the court applied the implied covenant to market to reach the conclusion that it is the lessee's obligation to place gas in a marketable condition at no cost to the lessor.

The court defined marketable condition in terms of both the physical condition of the gas and the location of the gas. According to the Colorado Supreme Court, gas is marketable when it is both in a physical condition acceptable to the commercial market and in a location where the gas is saleable. The court noted that it may be that gas is in the first marketable condition when it is in a physical condition and location "to enter the pipeline," implying a market pipeline and not just a gathering line. However, the court did not impose an obligation as a matter of law that the royalty be based on the value of the gas at the interstate pipeline connection without deduction to the lessor because it concluded that the question of whether gas is in a marketable condition is a factual question for the trial court. Lessee's oil and gas lease forms should specifically address the deduction of costs incurred to condition gas or to move it from the wellhead. The decision also applies to overriding royalties, so any instruments creating overriding royalties must be similarly specific in order to allow the deduction of post-production costs.

Statutory Payment Requirements

Payments of proceeds derived from the sale of oil, gas, or associated products shall be paid by a payor to a payee commencing not later than six months after the end of the month in which production is first sold. *Colo. Rev. Stat. § 3460-118.5.* Thereafter, such payments shall be made on a monthly basis not later than 60 days for oil and 90 days for gas and associated products following the end of the calendar month in which subsequent production is sold. Payments may be made annually if the aggregate sum due a payee for 12 consecutive months is $100 or less.

Statutory Oil and Gas Lien

Colorado has a specific statutory procedure for filing, securing, and enforcing oil and gas liens. *Colo. Rev. Stat. §§ 38-24101-38-24-111.* There is some debate, not resolved by case law, about whether compliance with the oil and gas lien statute alone is sufficient or whether one must also comply with a general mechanic's lien. A very cautious approach may compel compliance of both the oil and gas lien statute and the general mechanic's lien statute.

The lien statement must be filed with the County Clerk and Recorder of the county in which the property is situated. *Colo. Rev. Stat. § 38-24-104.* The lien can be filed at any time after performance of the work or furnishing of materials and must be filed within six months of the final performance of the work or the last furnishing of materials. *Colo. Rev. Stat. § 38-24-104.* A suit to foreclose a lien filed pursuant to the oil and gas lien statute must be brought within six months after the date of filing the lien. *Colo. Rev. Stat. § 38-24-105.* The lien attaches upon the initial provision of services or furnishing of goods. *Colo. Rev. Stat. § 38-24-101.* The lien does not attach to the proceeds of oil and gas sales. C*hambers v. Nation*, 497 P.2d 5, 8 (Colo. 1972).

Seismic Operations

Whoever has authority to execute a mineral lease on the land may grant a geophysical exploration permit; the mineral owner is the one who has the right to conduct geological and geophysical operations. *Grynberg v. Northglenn*, 739 P.2d 230 (Colo. 1987); *Mallon v. Bowen/Edwards Associates, Inc.*, 940 P.2d 1055 (Colo. App. 1996), *aff'd* 965 P.2d 105.

REAL ESTATE

Ownership

Any legal person, including any individual, corporation, limited liability company, partnership, limited partnership, or trust, may acquire and hold title to real property in Colorado. There is no limitation on the ability of limited liability companies, limited partnerships, or trusts (which are treated as entities under Colorado law) to own property in Colorado. Individual ownership of commercial real estate is usually avoided due to the risk of environmental or other liability which may arise.

The right of foreign individuals or business entities to hold title is not restricted under Colorado law. Foreign business entities are not required to obtain a certificate of authority from the Colorado Secretary of State to simply hold title to property; however, if a corporation, limited liability company, or limited partnership will undertake any activity with respect to the property beyond mere ownership, such entity is expected to register with the Colorado Secretary of State as a foreign corporation, limited liability company, or limited partnership.

Limited liability companies are considered the favored form of ownership for Colorado property. A limited liability company can provide its owners with both the pass-through of income and losses through the entity and limited liability regarding property ownership. Beginning in 2024, the Corporate Transparency Act requires reporting of ownership interests in certain LLCs, corporations and other entities to the federal government.

In Colorado, the preferred form of ownership of trust property is directly in the name of the trust, rather than in the names of its trustees. When conveying trust property, the trustee records a statement of authority along with the deed, which states the trustee's authority to execute documents on behalf of the trust.

Concurrent Ownership

Colorado recognizes tenancies in common and joint tenancy with right of survivorship, but does not recognize a tenancy by the entireties form of ownership. Any conveyance in Colorado styled as a conveyance to tenants by the entireties will create a joint tenancy.

Tenants in Common

In Colorado, two or more tenants in common may each own undivided fractional interests in the property. Each co-tenant may individually deal with its interest in the real property, by mortgaging it, transferring or conveying it separate from the interests of any other tenant. Each tenant in common has the right to possess the property and no right to exclude any other tenant in common from the property. There is no right of survivorship among tenants in common, so that upon the death of a tenant in common, his or her interest in the property will pass through the estate of the deceased tenant in common, rather than to his or her co-tenants. Tenancy in common is considered the "default" form of co-ownership in Colorado, in that if the form of ownership is not specifically identified in a deed to more than one person as joint tenancy, the parties will be considered tenants in common.

Joint Tenants

Joint tenancy carries with it the right of survivorship, so that if one joint tenant dies, the deceased joint tenant's interest passes directly to the remaining joint tenant, or if there are more than two surviving joint tenants, to the remaining joint tenants in equal shares. Joint tenancy requires specific identification in a deed. Common language to be found in a deed intended to convey to joint tenants would be, "as joint tenants with right of survivorship and not as tenants in common." An exception to the requirement to specifically identify the type of ownership as joint tenancy is in the case where two or more personal representatives or trustees hold title to property. Then, the personal representatives or trustees are considered to be joint tenants, and the interest they hold in the real property does not pass through the estate of the deceased personal representative or trustee, but devolves to the other personal representative(s) or trustee(s).

Joint tenancies may only be created between natural persons; corporations and other entities that do not have a natural life are not able to hold title as joint tenants in Colorado. Unlike joint tenancies under common law, by statute in Colorado, joint tenants may hold their interests in unequal shares. One or more joint tenants may sever the joint tenancy between themselves and all remaining joint tenants unilaterally by executing and recording an instrument conveying his or her interest in the real property to them as a tenant in common. If there are two or more remaining joint tenants, they will continue to be joint tenants among themselves.

Spousal Rights

Colorado does not have ownership by tenancies by the entireties and is not a community property state, so that ownership rights of one spouse in the property of the other are no different than the ownership rights of two unrelated parties in real property. The most common form of ownership for spouses in real property in Colorado is as joint tenants. For properties jointly owned by spouses in Colorado, both spouses must execute a mortgage or deed of trust.

Life Estate

Life estates are valid in Colorado. Life estates have recently gained a new popularity and acceptance as an estate planning vehicle. Life estates may be created by deed or by will, with either a direct grant or devise, or by reservation. Any language that expresses the intent of the grantor/testator will suffice.

Purchase of Real Property

Contracts for the sale of land in Colorado are required to be in writing, subject to enforcement of oral agreements under certain limited equitable theories. Under Colorado law, a real estate broker can prepare a purchase and sale agreement for an individual or entity seeking to purchase real estate in Colorado utilizing only those forms approved by the Colorado Real Estate Commission (CREC). Real estate brokers, other than those licensed to practice law, can fill in information within those forms, including dates, deadlines, and transaction terms, but cannot draft any additional provisions or addenda. Brokers can engage attorneys to prepare such additional language and it is not unusual for brokers in Colorado to use counsel prepared "standard addenda forms."

Individuals or entities can utilize any form purchase agreement they wish, and if using the CREC forms, can insert any additional terms, provisions, or addenda in their discretion. Real estate lawyers are not often involved in residential sales transactions in Colorado, and CREC approved forms are the forms ordinarily used in such transactions. Counsel are more typically used in commercial transactions and, while such transactions may be done using such CREC approved forms (and there are CREC approved forms for vacant land and improved commercial property transactions), they are frequently undertaken using customized forms prepared by the parties' counsel.

Purchase agreements in Colorado for commercial transactions are often preceded by negotiation of a non-binding term sheet or letter of intent of the main terms thereof. Such non-binding term sheet or letter of intent is typically drafted by the buyer and submitted to the seller for review. It is typical for a buyer to deliver an earnest money deposit (in an amount agreed to by the seller and the buyer) to the title company that is serving as escrow agent and issuer of the title commitment for the transaction, although the deposit holder could also be one of the brokers involved in the transaction. A buyer then generally has a period of time to investigate and evaluate the property, as well as to review the condition of title thereto. That period is typically not less than 30 days in a commercial setting.

For improved property, a potential buyer's investigations would typically include obtaining an American Land Title Association survey of the property, a Phase I environmental assessment of the property, and, if areas of concern are identified, Phase II testing of aspects of the property (seller typically having the right to consent to any Phase II testing before being conducted by the buyer), a physical inspection report, evaluation of land use conditions (such as access, zoning, and building code compliance for the property), review of all exceptions, conditions, and limitations on title to the property reflected in the title commitment, and, if there are tenants or occupants of the property, review of applicable leases or use agreements and estoppel certificates from such parties. For vacant land or property for which additional improvements are planned, evaluation of the site's developability, including soil tests, access to municipal or special district water and sewer service or other water and waste services, land development regulation procedures and applicable zoning, off-site improvements necessary for development of the site, and similar considerations would be typical. In addition, for vacant land or property for which additional improvements are planned, evaluation of the site's water rights can also be an important consideration, especially with some water districts requiring, as a precondition to providing water service for the proposed development, that the site have and convey to the district, sufficient water and/or cash-in-lieu thereof.

Buyers typically are responsible for the costs of their diligence, other than the costs of obtaining a title commitment, copies of all title exception documents, and an owner's title policy (which are typically paid by the seller in Colorado with the buyer typically paying for extended coverage and any non-curative endorsements). The costs of surveys and, if required to legally convey the property, subdivision approval, are often negotiated and it is not unusual to have the seller pay some or all of such costs. If the property has known environmental issues, participation by the seller in the associated costs of evaluation of such conditions is not unusual in Colorado. Mineral development, primarily oil and gas development, is prevalent throughout Colorado, and evaluation of any property should include evaluation of whether the mineral rights have been severed from the surface estate and what potential impacts exploitation of those mineral rights could have on the use of the particular real property.

Customarily in Colorado, the seller pays the commissions for all brokers involved in the transaction (it is typical, although not required, for a buyer to have its own broker and the seller to be represented by a separate broker), either through one commission agreement between the seller and the listing broker which will also cover payment of the buyer's broker's commission; or by separate commission agreements between the seller and listing broker and seller and buyer's representative directly. Real estate brokers can work either as agents for the parties that they are assisting (in which case they have certain duties of loyalty to such parties) or as transaction brokers, in which case they are not the agent for either party (with more limited duties to the parties). Commission amounts and allocation between the brokers are not fixed by Colorado law and are subject to negotiation.

Brokers are required by Colorado law to disclose all known latent defects affecting the property, but do not have any duty to investigate. Sellers are required by Colorado common law to make similar disclosures, as well as certain other statutorily required disclosures. With respect to residential property, required disclosures include whether the property is included in special taxing districts or in a common interest community (delivery of copies of the governing documents for such common interest community is also required), whether a property has been used as methamphetamine laboratory (this required disclosure applies to hotels and motels as well as individual residences), the availability of potable water sources to the property, and any known radon test results as well as the seller's knowledge of radon concentration at the residential property. Additionally, all residential real estate contracts must contain a disclosure that "strongly recommends" that the buyer obtain a radon test. For transactions using the CREC forms, the CREC approved seller property disclosure form is normally used as well. The CREC seller disclosure form is not required by Colorado law and is not typically used in commercial transactions. However, real estate brokers are not authorized to provide a different disclosure form to a seller to use. If the CREC disclosure form is used, reporting of the existence of any proposed or existing transportation projects abutting the property is required. Builders of new residences are also required by Colorado law to make certain solar and water efficiency options available to purchasers.

Commercial real property is typically conveyed by special warranty deed in Colorado, by which the grantor warrants and defends title to the grantee and his or her heirs and assigns against all persons claiming to hold title by, through, or under grantor. Other deed forms used in Colorado are general warranty deed, quit claim deed, and bargain and sale deed, which is a non-warranty deed and conveys after acquired title. General warranty deeds were historically used for residential transactions, but in light of the custom in Colorado for the seller to pay the cost of an owner's title policy for the buyer, it is better practice to use special warranty deeds for such transactions.

Real property conveyances in Colorado for consideration exceeding $500 are subject to a state documentary fee calculated at one cent per $100 of purchase price, customarily paid by the buyer. In addition to the state documentary fee, twelve municipalities in the mountains and Western Slope of Colorado charge a transfer tax of anywhere from one-half to four percent of the purchase price. A ban on increasing such local transfer taxes and on municipalities imposing new local transfer taxes has been in place since 1992. If personal property is included in a transaction, that personal property could be subject to sales or use tax payment, customarily paid by the buyer. Certain properties may be subject to private or contractual transfer fees in addition to the state documentary fee; with respect to residential properties, private transfer fees are only enforceable to the extent that they were in place prior to May 23, 2011 and the beneficiaries thereof have satisfied applicable notification requirements. In addition, owners association fees may also be payable upon transfer.

While not required, real property closings are typically held in Colorado at the offices of the title company serving as escrow agent for the transaction; in-person closings in Colorado are not required and are becoming infrequent, other than for residential transactions. At a closing of a sale of real property in Colorado, the seller will deliver the original deed, a bill of sale for any personal property included in the transaction, as well as, if applicable, an assignment of agreements affecting the property, such as existing leases, warranties, management agreements, service contracts, and similar documents. In addition, for conveyances in which a documentary fee is required, a Real Property Transfer Declaration a/k/a Form TD-1000 (which may be completed by the seller or the buyer but is usually completed by the buyer) is required for commercial real property transactions. The Real Property Transfer Declaration is submitted to the county clerk and recorder (but is not recorded by the county clerk and recorder) together with the deed to provide a basis for the amount of the documentary fee. When an entity is the seller (or the buyer if the transaction involves buyer-executed recorded documents such as a deed of trust), a Statement of Authority, which provides prima facie evidence of the existence of the entity and authority of the person executing documents on the entity's behalf, is also typically required.

Real property taxes are paid in arrears in Colorado and are typically prorated to the date of closing utilizing the prior tax year's information; re-proration upon receipt of the actual year's tax information can be negotiated, but it is typical to have the closing day proration serve as a final adjustment. For operating properties, other items such as rents and service agreement costs and expenses, are also typically prorated to the date of closing and reflected on a settlement statement; depending on the complexity of such items, a post-closing final proration may be negotiated.

Upon receipt of all closing documents and purchase funds, the title company will close the transaction and record the deed in the real property records for the county in which the property is located. If a title company handles the closing for a transaction for which it is issuing title insurance, by Colorado regulation, such company is required to insure against the impact of any instruments or agreements recorded during the "gap" period between the effective date of the title commitment it issued and the actual date of recording of the deed. Title companies can now record electronically in a number of counties in Colorado, which shortens the duration of any such "gap" period. Recording fees are typically paid by the buyer in Colorado.

While a small amount of real property in Colorado is subject to a Torrens title registration system, most property in Colorado is not registered and record notice of interests in all unregistered real property is evidenced by recording of documents in the real property records maintained by the clerk and recorder for the county in which the real property is located.

Financing Property

Buyers of real estate in Colorado often finance those transactions. Typically, such financing is done using a deed of trust for the benefit of the lender in favor of the "public trustee" for the county in which the property is located. In a system, which may now be unique to Colorado, the public trustee is a county level official authorized by statute to act as trustee under deeds of trust. The public trustee is the only party in Colorado authorized to exercise a power of sale. A deed of trust that names a private trustee as opposed to a public trustee is treated as a mortgage and must be judicially foreclosed. Mortgages are infrequently used in Colorado but are permitted. Mortgages and deeds of trust are recorded in the county in which the real estate is situated. There is no tax or state documentary fee imposed on deeds of trust or mortgages in Colorado, only the county's recording fees for recordation thereof.

In Colorado, the loan is typically evidenced by a promissory note executed by the buyer and delivered to the lender. Additional documents, including loan agreements, security agreements and UCC financing statements, assignments of rents and leases, and environmental indemnity agreements may also be required. For buyers that are newly formed entities or entities with limited assets, a guaranty from a parent entity or the owners or members thereof is often required, although the circumstances triggering liability under a guaranty may be limited to certain "bad boy" events or actions.

Lenders typically require the issuance of a loan title policy, which is paid for by the borrower (if a loan transaction is closed simultaneously with the purchase of property, the base loan title insurance policy premium is typically a nominal fee, with the additional cost of any endorsements required by the lender).

Foreclosure

Non-judicial foreclosure in Colorado can only be undertaken with a deed of trust in favor of the public trustee for the county in which the property is located. Thus, while a private trustee deed of trust or mortgage can also be used in Colorado, they are not typical, because such documents would have to be foreclosed upon judicially. Non-judicial foreclosures are typically more expeditious than judicial foreclosures. Other liens, such as judgment liens, homeowners association liens, and mechanics liens, may only be foreclosed upon judicially. There may be certain circumstances where a beneficiary of a public trustee deed of trust may elect to foreclose judicially rather than non-judicially (if the secured property is located in several counties or states, or the loan is extremely large in proportion to the value of the Colorado real estate, since the public trustee's fee is based upon the amount of the outstanding loan).

Public trustee foreclosures are commenced by the recordation of a notice of election and demand by the public trustee in the real property records for the county in which the property is located. To initiate a foreclosure, the lender must submit to the public trustee various documents required by statute. One such document is the original note of other evidence of debt, unless the beneficiary is a "qualified holder" under Colorado law. Qualified holders are limited to certain entities, including state or federally chartered banks, savings and loans, credit unions, and certain public corporations. A corporate surety bond in the amount of one and one-half times the face amount of the original evidence of debt must be provided to the public trustee if the original evidence of debt is not available and the foreclosing lender is not a qualified holder. Other documents that the lender must provide include, among other things, an original or certified copy of the deed of trust to be foreclosed upon, including any recorded modifications or partial releases of such deed of trust, a mailing list of interested persons to be noticed, and a statement by the lender identifying the current owner of the property.

Residential property in Colorado may be subject to certain foreclosure deferment rights and regardless thereof, minimum default notice (including notice of Colorado foreclosure hotline services), is required to be given to residential loan borrowers prior to commencement of foreclosure on a residential property in Colorado.

Colorado law requires issuance of notice of the sale date by the public trustee prior to the sale. After the notice of election and demand to foreclose is recorded, the sale date will be set for 110 to 125 calendar days (215 to 230 calendar days for agricultural property) from the recording date. The owner may cure the loan default by submitting an intent to cure form to the public trustee at least 15 days prior to the sale of the property and effecting a cure by noon, the day prior to the sale. If the borrower is only in default of payment or certain other technical obligations, the borrower may cure by bringing the loan current or performing such technical requirements. If the loan has matured, cure would only be effective by payment of the loan balance in full; if there are other defaults, the owner would not be entitled to cure, but could bid at the foreclosure sale. There is no post-sale redemption right in favor of a property owner in Colorado.

At least 15 days prior to the foreclosure sale, the foreclosing lender is required to obtain a court order pursuant to Rule 120 of the Colorado Rules of Civil Procedure authorizing the sale which is issued pursuant to a hearing of limited jurisdiction; notice prior to such hearing is required to be provided to the borrower, and if the sale is for residential property, the notice must also be posted at the property. The appointment of a receiver is also permitted under Colorado law, by court order.

The foreclosing lender must produce a written bid no later than noon two business days before the public trustee sale. Other parties may submit bids on the date of sale. The sale may take place in person or electronically. The bidding is competitive, with the highest bidder winning. A certificate of purchase is issued to the winning bidder and recorded with the county's clerk and recorder. Junior lienholders, if their lien was of record prior to the recordation of the notice of election and demand for foreclosure, have a post-sale right of redemption. A similar right exists in favor of certain other holders of beneficial interests in the property, such as lessees and easement holders. Following expiration of all applicable redemption periods, the public trustee will record a confirmation deed in favor of the holder of the certificate of purchase or, if there was a redemption made, the holder of the certificate of redemption.

Leases

Other interests or estates in land may be created in Colorado, including easements and leasehold interests. Easements typically are granted for the benefit of adjoining properties and run with title to the land. Easements in gross are permitted in Colorado but disfavored and enforcement thereof is typically limited. Restrictive use agreements are also generally enforced narrowly in Colorado.

There are no statutory restrictions on the term of a lease in Colorado, but as a general practice landlords and tenants in Colorado do not enter into leases for a term longer than 99 years, including renewals. In at least one case, the Colorado Court of Appeals has avoided giving effect to lease language that appeared to grant the tenant an indefinite renewal right. There is no applicable state transfer tax to commercial or residential leases, however, certain home rule cities have transfer taxes, and local law varies regarding the transactions on which it is imposed. While generally such taxes are not imposed on leaseholds, the parties to a proposed long-term lease in a municipality that imposes a real estate transfer tax should consider reviewing local law to evaluate whether the local transfer tax applies to the lease.

Long-term ground leases, whereby the tenant leases the property from the landlord and constructs and owns, for the leasehold term, the improvements thereon, are used from time to time in commercial settings in Colorado; but typically, a tenant is leasing certain space within an existing (or to be constructed or improved property) for a fixed term, with certain renewal rights, if any, specified in the lease. Leases will typically specify the permitted uses that may be made of the leased premises, as well as restrictions on alterations or improvements thereto by the tenant.

Landlords in Colorado are not required to allow a tenant to renew its lease. However, there is precedent that if the tenant holds over, and the landlord continues to collect rent, and the lease is silent as to the consequences of holdover, the lease may be deemed to have renewed for a period equal to or less than the original lease term, depending on the duration of the original term and the apparent intent of the landlord and tenant. The best practice is to clearly specify the consequences of holdover in the lease document, including the specific term of any holdover period, and to adhere to those provisions to avoid waiving them.

Commercial tenants do not have any right to terminate a lease early under Colorado law, but Colorado common law does include a concept of constructive eviction. In addition to that common law concept, there is a statutory warranty of habitability applicable to residential property in Colorado, which affords residential tenants certain early termination rights in the event that the minimum habitability requirements are not satisfied. *See* C.R.S. §38-12-503. Colorado law also provides an early termination right for tenants who are victims of domestic violence. *See* C.R.S. §38-12-402.

Also with respect to leases for residential property, Colorado law provides for various additional requirements and restrictions that do not apply to leases for commercial properties and that prohibit: the inclusion of a penalty provision in the lease; the inclusion of one-way fee shifting provisions for attorneys' fees and costs in the lease; the inclusion of a waiver of a jury trial in the lease; the inclusion of any provision that limits the ability of the tenant to pursue joint, class, or collective actions in the lease; the inclusion of a waiver of the implied covenant of good faith and fair dealing and quiet enjoyment in the lease; and the inclusion of a penalty for the tenant failing to provide notice of nonrenewal in the lease. Additionally, a residential landlord is prohibited from considering information relating to a prospective tenant's income or rental history. A residential landlord is also required to cap a tenant's minimum rent requirements at twice the cost of the monthly rent, to limit the amount of the security deposit to no more than the amount of two months' rent, and to disclose to the tenant landlord's knowledge of any radon test results and radon concentration levels.

There are no state law restrictions on the amount of rent that may be charged to a tenant. Commercial leases in Colorado are often structured as either "gross" or "triple net" leases. Gross leases include a fixed rent, which includes the costs of operation and maintenance of the property, including real property taxes and property insurance costs. Triple net leases have a base rent for the space, with the tenant paying additional rent for operation and maintenance, taxes, insurance, and utility costs. Variations between those two categories, with base rent including certain, but not all, property expenses with the tenant responsible for payment of additional rent for the non-included expenses, are often used in Colorado. In such cases, specifying the maintenance and repair obligations of landlord and tenant, as well as who is responsible for the costs of such maintenance and repair of the premises is important. Percentage rent, charged upon the revenues of the tenant earns in the leased premises, is often found in retail leases in Colorado.

There is no Colorado law that limits restrictions on assignment or subleasing. However, in the absence of such a restriction in the lease, a tenant can generally freely assign a lease or sublet the premises. Leases in Colorado typically are drafted to restrict assignment or subletting without consent of the landlord, or with only certain permitted exceptions to the consent requirement. A tenant that is a debtor in a proceeding under the U.S. Bankruptcy Code may have the right to assign its lease without the landlord's consent pursuant to *11 U.S.C. § 365* if the conditions to such an assignment are satisfied, regardless of whether the lease contains restrictions on assignment or subletting.

The only form of eviction proceeding in Colorado is the statutory procedure provided in the Colorado Revised Statutes. C.R.S. *§ 13-40-101 et seq.* The length of time for the proceeding varies, but the eviction hearing can usually be conducted within about three weeks after the initial eviction notice is given, and a writ of restitution entitling the landlord to re-enter the premises can be obtained 48 hours after the hearing. Before the landlord can bring an eviction action, it must serve a written demand with a notice period, the length of which depends on the nature of the housing and whether an exempt residential agreement is involved, for compliance with the lease or possession of the premises. *See* C.R.S. *§ 13-40-104(1)(d).* If the lease requires any additional notice or cure periods, those additional periods must be honored prior to commencement of an eviction. The statute provides time periods for the service of the summons and complaint, scheduling of the initial return hearing, and setting of trial. The courts require strict compliance by the landlord with the notice and service requirements of the statute and the time periods set forth in the statute, except in the event of a residential eviction meeting certain limited conditions for waiver of the initial notice.

When an employer provides housing to an employee pursuant to a license to occupy such housing, the termination of such license and such employee's right to occupy such housing upon such employee's termination may not need to follow the statutorily-created eviction procedure. *See* C.R.S. § 8-4-123.

There is no statutory lien right in Colorado in favor of a landlord for commercial property, but such a right may be negotiated by the parties. Residential landlords do have a lien on tenant's personal property to secure performance of the lease obligations. Commercial real estate brokers have a lien right to secure the commissions payable thereto in connection with the lease of commercial property.

Leases are not required to be recorded in Colorado, and are typically not recorded. A short form or memorandum of lease, setting forth the material terms of the lease, including any renewal, expansion or purchase options, is often recorded for commercial leases, but is subject to negotiation between the parties.

Zoning and Eminent Domain

Colorado does not have any state-wide zoning, and instead leaves zoning designations, restrictions, and requirements to its local municipalities (towns and cities) and counties, both of which may be either home rule or statutory. Real property is therefore subject to zoning imposed by the applicable municipality or, if in an unincorporated area, county in which the property is located.

Colorado primarily employs traditional Euclidian zoning, where similar uses are grouped together in districts to the exclusion of others, such as residential districts, commercial districts, or industrial districts. Some municipalities and counties also allow for planned unit developments, which consist of one or more zoning districts that differ in character and use from the applicable municipality's or county's standard zoning designations within their respective codes, such as mixed-use districts. Uses within any district may be permitted or conditional. Conditional uses are typically subject to special review and permitting requirements. Uses not falling within permitted or conditional categories for a particular district could be permitted by approval of a variance from the applicable requirement by the municipality or county. If a use is not approved within a particular zoning district by code or variance, it will be prohibited. In addition to use restrictions and requirements, zoning codes typically impose property development requirements and conditions, which may include, among other restrictions and requirements, density and height restrictions, as well as setback, access, and parking requirements.

The power of eminent domain and the condemnation process, including the requirements put on parties that have the power of eminent domain, is governed by the U.S. Constitution and the Colorado Constitutions, state statute, and a large body of caselaw. The federal government and the State of Colorado are vested with the power of eminent domain, as are home rule municipalities. The Colorado Constitution also allows for the taking of "private property" for "private use" for various identified purposes, including "private ways of necessity. . . reservoirs, drains, flumes or ditches . . . for agricultural, mining, milling, domestic or sanitary purposes." Other governmental entities, such as statutory municipalities and counties, special districts, urban renewal authorities, the department of transportation, public highway authorities, and the regional transportation district have been granted condemnation authority by the Colorado legislature through statute; as have certain private entities, including tunnel, pipeline, electric power, and telecommunications companies for specific purposes. The Colorado Constitution, like the Fifth Amendment to the U.S. Constitution, requires condemning entities to pay "just compensation" for any taking of private property for public use. In Colorado, "just compensation" is defined as the "reasonable market value" of the property taken plus all damages to the remaining property after the taking. "Reasonable market value," in turn, is defined as "the fair, actual, cash market value of the property" – or the price the property could have been sold for on the open market under usual and ordinary circumstances where the owner was willing to sell and the purchaser was willing to buy the property. There is a large body of case law in Colorado controlling what damages can and cannot be recovered in condemnation cases and how "just compensation" can and cannot be evaluated. In addition to just compensation, property owners are entitled to recover their reasonable costs and expert witness fees. Colorado statutory law also authorizes courts to award reasonable attorney fees in certain circumstances, such as if the fact finder's just compensation award equals or exceeds 130% of the condemnor's last written offer or if the court dismisses the condemnation action.

Colorado statute controls the process by which an entity with the power of eminent domain may acquire property through condemnation. All condemnation actions must be filed in Colorado district court in the district where the property is located. There are certain prerequisites to filing a condemnation action, including a statutory "notice of intent" and good faith negotiations. All condemnors must be able to establish, among other things, that their taking is necessary to serve a public purpose. Condemnors can obtain possession of property during the pendency of a condemnation action upon a deposit of estimated just compensation into the court registry if they show a need for such possession and a court concludes the condemnor has met all the requirements to condemn. Under Colorado statute, a landowner may choose whether to have the final determination of just compensation made by the judge, a jury, or a three-person commission.

TAX

Federal Taxation

Business Income Tax

Federal income taxes are not affected by where a business chooses to locate in the U.S. There are various methods of controlling the amount of the U.S. income tax payable, and many of these apply to domestic corporations as well as foreign owned corporations or foreign individuals.

Personal Income Tax

U.S. citizens and residents are subject to U.S. income tax on their worldwide income. Resident alien status is determined under a set of complex rules. Any individual who is not a U.S. citizen or permanent resident, does not wish to be taxed as such, and plans to spend a substantial amount of time in the U.S. should pay careful attention to these rules. Currently, the highest marginal U.S. individual income tax rate is 39.6 percent for ordinary income and 20 percent for long-term capital gains. A nonresident alien generally is subject to tax on dividends from U.S. corporations, as discussed below.

Colorado Taxation

The principal state and local taxes encountered by individuals and entities doing business in Colorado include: income tax, sales and use tax, property (ad valorem) tax, and occupational privilege tax.

The state imposes individual and corporate income taxes. No such taxes are imposed at the local level. Sales and use taxes are imposed at the state, county, city, and local district level. Property taxes are imposed at the county, city, and local district level. Occupational privilege taxes are imposed by a small number of Colorado cities.

Corporate Income Tax

A C corporation "doing business" in Colorado or deriving income from Colorado sources is liable for Colorado corporate income tax, generally at a rate of 4.40 percent. Insurance companies are exempt from Colorado income tax, but are liable for a tax on gross premiums. Corporations exempt from federal income tax are generally exempt from Colorado income tax. However, an otherwise tax-exempt corporation earning unrelated business income is subject to Colorado income tax on such income.

A C corporation is deemed to be doing business in Colorado if it exceeds the minimum standards of P.L. 86-272 and either:

- is organized in, or has its commercial domicile in, Colorado; or,
- has property, payroll, or sales exceeding any one of these thresholds:
    - $50,000 of property in Colorado;
    - $50,000 of payroll in Colorado;
    - $500,000 of sales in Colorado; or
    - 25 percent of total property, payroll, or sales in Colorado.

The definitions of property, payroll, and sales applicable to determining whether a C corporation is doing business in Colorado generally follow the regulations of the Multistate Tax Commission regarding the determination of property, payroll, and sales for purposes of apportionment of income between states.

The starting point for Colorado taxable income of a corporation is its federal taxable income, which is then subject to certain Colorado additions and subtractions. Significant additions include any federal net operating loss, state and foreign income taxes deducted for federal purposes, and interest from certain non-Colorado state and municipal obligations. Significant subtractions include any Colorado net operating loss, state income tax refunds, interest on certain U.S. government obligations, and excludible Colorado-source capital gains (discussed below).

A corporation's net operating loss is computed in the same manner as a federal net operating loss, except that a corporation that apportions its income is required to determine the amount of federal net operating loss that is attributable to its Colorado-source income. Net operating losses of C corporations may not be carried back, but (in the case of tax years beginning on or after August 6, 1997) are carried forward for up to twenty years.

Most federal credits do not have a Colorado analogue, although Colorado does offer an investment tax credit based, in part, on the former federal investment tax credit. In addition, Colorado offers a wide variety of income tax credits.

Capital gains and dividends are generally not subject to any rate preferences in Colorado and are thus taxed at 4.40 percent. Although taxpayers could formerly exclude certain capital gains, for tax years beginning on or after January 1, 2022, the exclusion is limited to certain gains of farmers from their dispositions of agricultural property.

A C corporation taxable in another state will apportion its business income and allocate its nonbusiness income between Colorado and such other state (or states). Apportionment of business income to Colorado is generally based on a single factor of sales within and without Colorado. Special rules may apply to specific industries or where single factor apportionment would be inequitable.

Filing alternatives for a C corporation include filing a separate, consolidated, combined, or combined/ consolidated return. A consolidated return for an affiliated group (as defined in §1504 of the Internal Revenue Code of 1986, as amended) may be filed only for members doing business in Colorado. The election to file a consolidated return is binding for four years and requires consent of the Colorado affiliated group members.

A combined return may be filed by an "affiliated group." A corporation may be a member of an affiliated group if it meets three criteria:

- It is an "includable corporation" (generally, a C corporation with more than 20 percent of its property and payroll within the United States);
- It meets ownership requirements (generally, a parent-subsidiary relationship defined by more than 50 percent ownership of voting and non-voting classes of stock); and
- It satisfies at least three of the six tests of "unity" for the current and two preceding tax years. The tests of unity include intercompany sales or leases, services, debt, use of intangibles, and overlapping directors or officers.

A combined/consolidated return may be filed by an affiliated group filing a combined return that has a member that was included on a federal consolidated return, conducts business in Colorado, but is otherwise not eligible to be part of the affiliated group.

In lieu of the regular Colorado corporate income tax, a C corporation can elect to pay a gross receipts tax at a rate of 0.5 percent if it has no Colorado activities other than sales, does not own or rent Colorado real estate, and has gross sales in, or into, Colorado of $100,000 or less. This option is only available for income tax years beginning before January 1, 2023.

Individual Income Tax

Colorado levies a 4.40 percent tax on the worldwide taxable income of Colorado resident individuals and on the taxable income of nonresident and part-year resident individuals attributable to Colorado.

An individual is considered a resident for Colorado income tax purposes if they are either domiciled in Colorado or has a permanent place of abode in Colorado and spend more than six months (in the aggregate) during a tax year in Colorado. An individual is considered a part-year resident if they were a resident for part but not all of a tax year. An individual who is neither a resident nor a part-year resident is a nonresident, even if they temporarily worked in Colorado during the tax year.

The determination of individual taxable income for Colorado purposes begins with federal taxable income, which is then subject to certain Colorado additions and subtractions. Significant additions include state income taxes deducted for federal purposes and interest from certain non-Colorado state obligations. Significant subtractions include state income tax refunds and interest on certain U.S. government obligations.

Nonresidents and part-year residents compute their Colorado taxable income by apportioning tentative tax (computed as if the taxpayer were a full-year resident) to Colorado in the ratio that Colorado adjusted gross income (which includes income earned in Colorado or received while a Colorado resident and income attributable to Colorado) bears to total modified federal adjusted gross income. The net operating loss of a nonresident or part-year resident is deductible to the extent that the loss relates to Colorado sources, or, in the case of a part-year resident, is apportionable to the portion of the year during which the individual was a Colorado resident.

Capital gains and dividends are generally not subject to any rate preferences in Colorado and are thus taxed at 4.40 percent. Although taxpayers could formerly exclude certain capital gains, for tax years beginning on or after January 1, 2022, the exclusion is limited to certain gains of farmers from their dispositions of agricultural property.

Residents may claim a Colorado income tax credit for taxes paid to another state, subject to limitations. Colorado offers an extraordinary variety of other income tax credits, a discussion of which can be found on the Colorado Department of Revenue's website.

Nonresident owners of pass-through entities (including entities treated as partnerships and S corporations for federal income tax purposes) are subject to Colorado individual income tax to the extent that the pass-through entity has income attributable to Colorado. Pass-through entities must determine Colorado source income by using the single factor apportionment method where apportionment is generally based on a single factor of sales within and without Colorado. Special rules may apply to specific industries or where single factor apportionment would be inequitable.

Income tax returns for individuals and pass-through entities (including entities treated as partnerships for federal income tax purposes and S corporations) are generally due on the same date as federal income tax returns for individuals.

Colorado taxable income of individuals is potentially subject to Colorado alternative minimum tax.

Income Tax Withholding and Estimated Tax Payment Obligations

Employers are generally required to withhold and pay over Colorado income tax with respect to compensation paid to Colorado resident employees and the Colorado-source compensation of Colorado nonresidents. There appears to be no *de minimis* exception to withholding. Accordingly, employees training in or attending meetings or tradeshows in Colorado may be subject to withholding with respect to the portion of their compensation attributable to their presence in Colorado.

For income tax years beginning on or after January 1, 2024, pass-through entities (including entities treated as partnerships for federal income tax purposes and S corporations) must file a composite return and make a composite payment of tax with respect to income attributable to Colorado that is allocated to nonresident partners, members, or shareholders. However, nonresident partner, member, or shareholder who files a nonresident filing agreement, as well as tax-exempt entities, corporations, and partnerships are not includible in the composite return. A pass-through entity that elects to be taxed at the entity level, publicly-traded partnerships, or that consists solely of partners, members, or shareholders who are not includible in a composite return need not file a composite return.

An individual is required to make estimated tax payments if it can reasonably be anticipated that his or her Colorado income tax liability for a tax year will be $1,000 or more (after taking into account credits for taxes withheld and prior year refunds applied to the current year).

A C corporation is required to make estimated tax payments if it can reasonably be anticipated that the corporation's Colorado income tax liability for a tax year will be $5,000 or more (computed as total tax plus prior year credit recapture, less all income tax credits other than withholding and estimated tax credits).

A pass-through entity (including an entity treated as a partnership for federal income tax purposes or an S corporation) that files a composite return for nonresident partners, members, or shareholders must make estimated tax payments on behalf of their individual nonresident partners, members, or shareholders if any such individual will have a net Colorado income tax liability in excess of $1,000.

Estimated tax payments are due in equal installments on April 15, June 15, September 15, and January 15 of the subsequent year. Penalties may apply if estimated tax payments are insufficient.

Sales and Use Tax

Colorado imposes a sales tax of 2.9 percent on the retail sale of tangible personal property and certain enumerated services, and a use tax of 2.9 percent on the use, consumption, or storage of tangible personal property or certain enumerated services purchased at retail. Licensed vendors are required to collect and remit sales taxes from retail purchasers, but if a purchase is made from a non-licensed vendor or a vendor who fails to collect sales tax, the purchaser is required to remit the required tax. Uncollected sales taxes may be assessed against either the vendor or the purchaser.

Local sales and use taxes are also imposed at the county, city, and local district level, and the actual sales and use tax rate in Colorado may accordingly be considerably higher than the state sales and use tax rate of 2.9 percent. The local sales and use tax regime is particularly complex because home rule cities and counties – of which there are many – may legislate their own sales and use tax codes and regulations that provide for different exemptions, exclusions, and procedures than state statutes and regulations.

Non-home rule cities and counties may opt for state-collection (which is the norm) or may collect their own sales and use taxes. In either case, non-home rule cities and counties generally are required to follow state rules regarding sales and use taxes, except that they may opt out of certain exemptions. A significant exception to this practice is that non-home rule counties may not impose use taxes, except on building materials and motor vehicles. Local district sales and use taxes are usually state-collected and follow all state rules.

The laws of Colorado and its home rule jurisdictions provide for numerous exclusions and exemptions from sales and use taxes that may apply to specific businesses, transactions, or types of goods or services, a complete tabulation of which is beyond the scope of this chapter. Colorado and its home rule jurisdictions do not exempt or exclude occasional or isolated sales and thus an asset sale of a business will generally trigger sales tax.

A retailer with a physical presence in a taxing jurisdiction in Colorado generally must collect sales taxes on retail sales. If any member of a controlled group of corporations is a retailer with a physical presence in the state, Colorado considers a member of such group to have nexus for sales tax purposes, and thus subject to the requirement to collect sales taxes, although this presumption can be rebutted by showing that the member does not meet the standards for sales tax nexus set forth by the U.S. Supreme Court.

A retailer must also collect Colorado sales tax once retail sales into Colorado during the current calendar year exceed $100,000. If a retailer's Colorado sales in the previous year exceeded $100,000, the retailer is subject to Colorado sales tax licensing and collection requirements for the entire calendar year.

A non-collecting retailer (i.e., a retailer who does not have physical presence or is under the $100,000 threshold) must provide a transactional notice and an annual purchase summary to Colorado purchasers regarding use tax liability and make an annual filing with the Colorado Department of Revenue reporting sales to Colorado customers.

Sales and use tax returns are generally required to be filed and the tax remitted monthly on the 20th of the following month, although quarterly or annual filing might apply if collections are below certain thresholds.

Property (Ad Valorem) Tax

Property taxes are imposed on real and business personal property. Jurisdictions that levy property taxes include counties, cities, school districts, and other local jurisdictions. However, property taxes are billed and collected on a unified bill administered at the county level. Generally, property classification and valuation are performed by the County Assessor, and property taxes are billed and collected by the County Treasurer. Certain property is valued (and, if necessary, apportioned among counties) by the Colorado Division of Property Taxation (CDPT), including utility, railroad, mineral, and certain renewable energy property. (Such property is known as "state-assessed" property, although the process is in reality one of classification and valuation).

Colorado property is classified into one of 10 categories: vacant land, residential, commercial, industrial, agricultural, natural resource, utility, producing mineral, producing oil and gas, and exempt property. Although assessors are required to treat all property within the same classification similarly, valuation procedures can (and do) vary between classifications.

The actual value of taxable property is determined by the County Assessor (or the CDPT, in the case of state-assessed property), generally by taking into account the cost, income, and market approaches to valuation. Notices of valuation for a tax year must be mailed to property owners no later than May 1st of the tax year (or June 15th in the case of taxable personal property).

Assessed value is generally fixed at 29 percent of actual value, although that percentage is reduced for certain classifications for the 2023 and 2024 tax years. The percentage is generally 7.20 percent for residential real estate, although that percentage is 6.70 percent for the 2023 and 2024 tax years (or 6.80% percent for multi-family residential real property for the 2024 tax year). The total annual mill levy is set no later than December 22 of each tax year by the Board of County Commissioners.

The assessed value is multiplied by the total annual mill levy to determine the annual property tax bill. Tax bills for a tax year are mailed to property owners after January 1st of the year following the tax year and are payable in the year following the tax year. Payment is generally due in a single payment by April 30th or, if the bill is for more than $25, in two equal installments on the last day of February and June 15th.

Owners of state-assessed property must file a report describing taxable property with the CDPT by April 1st of the tax year.

Owners of taxable personal property must file an annual statement listing such property with the County Assessor by April 15th of the tax year. Household goods, business inventories, intangible personal property, and motor vehicles (which are subject to specific vehicle taxes) are not subject to property tax. An annual exemption is available ($52,000 in 2023).

Occupational Privilege Tax

Several cities in Colorado, including Denver, Aurora, Greenwood Village, Sheridan, and Glendale, impose occupational privilege taxes on both employees and employers, ranging from $4 to $10 per month, if an employee earns more than a threshold amount of wages (which varies, depending on the jurisdiction, between $250 and $750 per month). Employers are required to withhold and pay over the employee portion of the occupational privilege tax, generally on a monthly basis. In the case of an employee who performs services in more than one jurisdiction imposing occupational privilege tax, the tax is generally owed to the jurisdiction in which the employee performs the plurality of services (computed on a time basis).

Other Colorado Taxes

Certain industries or activities may be subject to special taxes that are not discussed in this chapter. Such taxes include:

- Unemployment insurance premium
- Vehicle specific ownership tax
- Severance tax
- Gasoline and special fuel tax
- Oil and gas conservation tax
- Alcoholic beverage tax

- Cigarette and tobacco product tax
- Realty conveyance tax
- Lodging tax
- Telecommunications business tax
- Insurance company tax.

Unemployment premiums are payable under the Colorado Employment Security Act and are collected and administered by the Colorado Department of Labor.

Vehicle specific ownership taxes are collected by the Colorado Department of Motor Vehicles as an incident of vehicle registration.

Insurance company tax is collected and administered by the Colorado Commissioner of Insurance.

Overview of Colorado Tax Administration

The Colorado Department of Revenue (CDOR) collects and administers the Colorado individual and corporate income taxes. The CDOR also collects and administers sales and use taxes on behalf of the state, non-home rule counties, most local districts, and a number of state-collected cities, as well as a variety of special sales taxes (such as local option, short-term rental, and lodging taxes). Severance, gasoline and special fuel, oil and gas conservation, alcoholic beverage, and cigarette and tobacco product are also collected and administered by the CDOR.

Home rule cities and counties that have not elected to be state-collected jurisdictions administer their own sales and use taxes and, where applicable, local taxes such as occupational privilege and lodging taxes.

In general, the statute of limitations for assessment of income taxes is one year longer than the federal income tax statute of limitations applicable to a tax year (including any agreed upon extensions). The statute of limitations for other CDOR taxes is generally three years from the due date (or if later, the date of filing) of an applicable tax return. In all cases, the statute of limitations is tolled if no return is filed. Home rule cities and counties establish their own statutes of limitations for assessment.

The period in which a refund of a CDOR administered tax may be sought is generally the same as the period for assessment of such tax (except where no return has been filed). However, home rule cities and counties may—and many do—reduce the period in which a refund may be claimed.

Protest and hearing rights and procedures vary depending on the type of tax and the jurisdiction imposing the tax. Protests of CDOR administered taxes are made to the CDOR, where a taxpayer will receive a protest resolution procedure and, if still unresolved, a hearing before the executive director of the CDOR (or his or her designee). Taxpayers may appeal an adverse decision of the executive director to the district courts of the state.

Protests with respect to the taxes (other than property taxes) of home rule cities and counties must first be made to the taxing authority of the home rule jurisdiction. Hearings in such cases are heard by a local hearing officer. In the case of local sales and use taxes, the hearing is informal and may be appealed to the CDOR and ultimately to a district court for a de novo trial.

Property-tax protests with respect to valuation of property are initially made to the County Assessor (or, in the case of state-assessed property, to the state Property Tax Administrator). A determination adverse to the taxpayer can be appealed to the county Board of Equalization (or the state Board of Assessment Appeals, in the case of state-assessed property). Further appeals of a decision of a Board of Equalization can be taken to the Board of Assessment Appeals or the district court, or may be submitted to arbitration. Decisions of the Board of Assessment Appeals may be appealed to the Court of Appeals. In the case of state-assessed property, counties may also initiate protests of valuation.

Property tax may also be subject to abatement or refund where there has been an erroneous or illegal levy of tax, an irregularity in the levy, clerical error, or overvaluation. An aggrieved taxpayer initiates an abatement by petition to the County Treasurer, with an administrative appeal to the Board of Assessment Appeals permitted.

In all cases relating to refunds, protests, hearings, and appeals described above, complex jurisdictional and procedural rules apply (including requirements to timely file protests and appeals and to exhaust administrative remedies) and failure to comply may lead to a loss of protest or appeal rights.

Upon request, the CDOR may issue general information letters and private letter rulings. General information letters are intended to provide a general overview of a particular tax law issue and are not binding on the CDOR. Private letter rulings are a response to specific set of facts and are binding on the CDOR only with respect to the requesting taxpayer. Home rule cities generally do not issue such written advice.

TRADE REGULATION

Antitrust Regulations

Clayton Act: Section 7

Section 7 of the federal Clayton Act, 15 U.S.C. § 18, prohibits mergers and acquisitions of stock or assets that may substantially lessen competition or tend to create a monopoly. Depending on the circumstances, mergers and acquisitions also may be challenged as unreasonable restraints of trade or unlawful monopolization under the Sherman Act. The Clayton Act standard, however, is slightly lower because it permits such challenges before the proposed merger has been consummated in order to prevent anticompetitive consolidations in their "incipiency," as well as after the transaction has taken place. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 315-23 (1962).

Hart-Scott-Rodino Antitrust Improvements Act

The federal government also regulates anticompetitive behavior through the pre-merger notification program established by the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). 15 U.S.C. § 18a. This program requires parties involved in mergers and acquisitions of a certain size to notify the government and obtain pre-transaction clearance before consummating the proposed transaction. This is accomplished by filing a recently revised and highly technical form with both the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ), the two agencies that jointly regulate the pre-merger notification program. Once a filing is made, a mandatory waiting period allows the agencies time to analyze the antitrust implications of the proposed transaction and then either clear the merger to proceed or request additional materials from the parties (commonly referred to as a "second request"). If the government determines that the proposed transaction is anticompetitive, it can seek injunctive relief to prevent the transaction. Parties are cautioned to comply with the pre-merger notification program because the penalties for non-compliance are severe. The government can impose fines of up to $16,000 per day for every day that the party was in violation of the HSR Act.

Robinson-Patman Act

Section 2 of the Clayton Act, 15 U.S.C. § 13, more commonly referred to as the Robinson-Patman Act, bans price discrimination and certain related activities such as promotional payments and brokerage fees that result in competitive injury. At its core, the Robinson-Patman Act is a legislative attempt to level the playing field between large and small retailers. *See Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 75-76 (1979) ("The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chain stores and other big buyers that threatened the existence of small independent retailers"). Unless an exception applies, sellers must sell their commodities to competitors at the same price. 15 U.S.C. § 13(a).

The Robinson-Patman Act itself and common law provide various affirmative defenses, although all exceptions to antitrust enforcement (particularly the Robinson-Patman Act) are strictly construed. *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11-12 (1976). The "cost justification" defense allows sellers to modify prices to account for cost savings associated with the manufacture, sale or delivery to different purchasers. *15 U.S.C. § 13(a)*. Another defense found in Section 2(a) of the Robinson-Patman Act is the "changed market conditions" defense. Sellers who modify prices in response to changes in the marketability of their goods are exempt from liability under the Robinson-Patman Act. 15 U.S.C. § 13(a). Sellers also can avoid running afoul of the Robinson-Patman Act if they are making a good faith effort to meet a competitor's equally low price. 15 U.S.C. § 13(b). The "availability" defense protects sellers from liability when they offer goods at two different prices, both of which are available to a purchaser. *DeLong Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1515-17 (11th Cir. 1989). The theory is that price discrimination does not occur when a purchaser fails to take advantage of a lower price. *Shreve Equip., Inc. v. Clay Equip. Corp.,* 650 F.2d 101, 105 (6th Cir. 1981). Finally, the "functional discount" rule permits a seller to provide a discount to a distribution source, such as a wholesaler, that provides a function the seller would otherwise perform itself. *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 554 n.11 (1990).

Federal Trade Commission Act

The Federal Trade Commission Act (FTC Act) prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45 *et seq.* Congress intended this language to be broad, allowing the FTC to respond to a wide variety of activities. All violations of the Clayton Act and Robinson-Patman Act likewise are unlawful under Section 5 of the FTC Act. In addition, the Supreme Court has held that all violations of the Sherman Act also violate the FTC Act. *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). Thus, even though the FTC does not enforce the Sherman Act, it may bring cases under the FTC Act based upon those same activities that are prohibited under the Sherman Act.

The FTC Act further extends to activities that reach beyond these federal antitrust laws. Over the several decades since the FTC Act was first enacted, the Supreme Court has tried to determine the appropriate scope of "unfair" practices under the FTC Act, expanding the scope at times and limiting the scope when it had become too broad. The expansive view relies on the "basic policies" of the Clayton, Robinson-Patman, and Sherman Acts to demonstrate anticompetitive activities, even where the activities do not actually violate those antitrust laws. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). The FTC continues its struggle to find a balance between this expansive doctrine and more limiting court decisions.