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Guide to Doing Business

Idaho

Prepared by Lex Mundi member firm,
Hawley Troxell

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Guide to Doing Business In Idaho

2017

HAWLEY TROXELL
ATTORNEYS AND COUNSELORS

BOISE / COEUR D'ALENE /
IDAHO FALLS / POCATELLO / RENO /
Call 208.344.6000 or visit HawleyTroxell.com

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SECTION I.

GEOGRAPHY

A. Describe your state's geography, location and climate:

Located in the Pacific Northwest, Idaho shares an international border with Canada and is most commonly associated with the mountain region of northern America. In the south, Idaho borders Nevada and Utah. Idaho is bordered by Montana and Wyoming on the east and by Washington and Oregon on the west. Idaho covers 83,574 square miles, making it the 14th largest of the 50 states. With 80 recognized mountain ranges, Idaho is home to some of the most spectacular scenery and most rugged landscapes in the United States. Dominated by the Rocky Mountains, Idaho's Shoshone Falls on the Snake River, drops 212 feet making it higher than Niagara Falls. Hells Canyon, also on the Snake River, is a gorge deeper than the Grand Canyon. Idaho can be divided into three major land regions geographically: the Rocky Mountains, the Columbia Plateau and the Basin and Ridge Region.

The four seasons are distinct in all parts of Idaho, but not simultaneous. Spring comes earlier and winter later to Boise and Lewiston, which are protected from severe weather by nearby mountains and call themselves "banana belts." Eastern Idaho has a more continental climate, with more extreme temperatures; climatic conditions there and elsewhere vary with the elevation. Mean temperatures in Boise range from 29°F (–2°C) in January to 74°F (23°C) in July. The corresponding extremes for Boise are –23°F (–31°C) and 111°F (44°C).

Humidity is low throughout the state. Precipitation in southern Idaho averages 13 in (33 cm) per year; in the north, over 30 in (76 cm). Average annual precipitation (1971–2000) at Boise was 12.2 in (31 cm), with more than 21 in (53 cm) of snow. Much greater accumulations of snow are experienced in the mountains.

B. Describe your state's cultural/ethnic background:

Idaho's population in 2016 is estimated to reach 1,675,054, an increase of just over 20 percent since 2000. Idaho has been one of the fastest growing states in the nation, increasing its population by 55 percent in the period from 1990 to 2010. In 2015 alone over 75,000 residents moved from other states to Idaho. Of this population, 23.7 percent age 25 and higher hold a Bachelor's degree or higher. The 2015 census included 8% percent of the population were black persons; 1.7 percent were American Indians and Alaska Native persons; 1.5 percent were Asian persons; 2 percent were Hawaiian and Other Pacific Islander; 2.3 percent were two more races; and 12.2 percent were persons of Hispanic or Latino origin. The foreign born accounted for about 6.1 percent of Idaho's population in 2015.

C. Describe your state's investment climate:

The total value of all the goods and services produced in Idaho grew 6.9 percent in 2013 to $62.25 billion in 2015, the third highest growth rate nationally. Adjusted for inflation, Idaho's gross state product exceeded $57 billion up 4.1 percent for the fifth highest growth rate in the nation. By Idaho industry, agriculture, forestry, fishing and hunting were the biggest contributors to the change in the gross domestic product amount. The major Industries of the state are manufacturing, agriculture, tourism, lumber, mining, and electronics. Chief manufacturing goods of the state are electronic component, computer equipment, processed foods, lumber and wood products, chemical products, primary metals, fabricated metal products and machinery. Important crops of the state are potatoes, peas, dry beans, sugar beets, alfalfa seed, lentils, wheat, hops, barley, plumps and prunes, mint, onion, corn, apples and hay.

Idaho has long looked beyond U.S. borders to find markets for their businesses' goods and services, and the export volumes have grown quickly. Since 2003, Idaho exports have more than doubled from $2 billion to $4.3 billion in 2015. Idaho has built strong trade partnerships with Canada and Europe and operate international trade offices in China, Mexico, and Taiwan.

As employment has rebounded, so has Idaho's personal income. The state's personal income has been edging up since 2010, growing at an average annual rate of 5 percent since that year, and exceeding the pre-recession level by 2012. The per capita income for 2015 was US $36,734. Idaho's population growth strongest since 2008.

Business profits, driven by a 26 percent increase in farm profits in the final quarter of 2015, were up 11.4 percent to more than $7.9 billion on an annualized basis, the largest percentage increase from 2013 in the nation. Wages rose 4.9 percent to $26.6 billion, a bigger gain than all but 11 other states.

The Idaho Department of Labor has recently published long-term projections forecasting what Idaho's labor market will look like in the year 2024. The outlook is very optimistic. Idaho's employment is projected to grow by 1.8 percent annually through 2024. This compares favorably to the national growth projections of only 0.6 percent annually over the same time period, according to the federal Bureau of Labor Statistics. This forecast would surely put Idaho in a familiar place among the fastest-growing states.

Optimism is warranted by more than just the overall growth rate. Within the projections program, Idaho Labor has forecast scenarios for dozens of different major sectors and industries in the economy, with accompanying forecasts for occupations. According to these projections, Idaho's economy will see significant growth in two important areas: service sectors and STEM occupations – science, technology, engineering and mathematics.

SECTION II.

BUSINESS ENTITIES

A. **Partnerships**. Explain your state's definition, requirements for:

1. General Partnerships.

a. Formation.

A general partnership results when two or more persons associate to carry on as co-owners a business for profit, with certain exceptions provided for under Idaho law. Partnerships formed before July 1, 2015 are governed by Idaho's Uniform Partnership Act (Idaho Code Sections 53-3-101 *et seq.*), while partnerships formed after this date are governed by the new Idaho Uniform Partnership Act (Idaho Code Sections 30-23-101 *et seq.*). The two acts share the same name buy are located under different titles within the Idaho statutory code. Differences between the two acts are largely limited to technical and organizational edits with no significant substantive changes. Beginning July 1, 2017, all partnerships will be governed by the new Idaho Uniform Partnership Act at Idaho Code Sections 30-23-101 *et seq.*

The persons' intention has little bearing in the analysis; the existence of a partnership may be implied from the facts and circumstances. The term "person" includes individuals, governmental agencies, and legal and commercial entities; and the term "business" includes every trade, occupation and profession. Accordingly, any association between two persons may constitute a general partnership by default.

An Idaho general partnership does not register with the state unless it operates under an assumed business name. If the true full name of each general partner is not included in the name of the partnership, the business name must be registered with the Idaho Secretary of State. https://idahobizhelp.idaho.gov/businessessentials/assumedbusinessname.aspx. A foreign limited liability partnership that transacts business in Idaho must file a statement of foreign qualification with the Idaho Secretary of State https://sos.idaho.gov/corp/llp_form.html.

Unless provided otherwise by the general partners in a partnership agreement, the provisions of Idaho's Uniform Partnership Act govern the general partnership. A partnership agreement may be written, oral, or manifested by conduct or statements of individual(s). The Act specifies certain nonwaivable rules that may not be varied by a partnership agreement.

As a recognized legal entity, a general partnership may own property in its own name. Property acquired by a general partnership is property of the partnership and not of the partners individually. Under the default rules of the Uniform Partnership Act, a partner's only transferable interest in the partnership is the partner's share of profits and losses and the partner's right to receive distributions. This interest is personal property.

2. Management.

A general partnership is managed by its partners. Under the statutory default rules, each partner has equal rights in the management of the partnership's business and, subject to the effect of a statement of authority, the authority to independently bind the partnership in the ordinary course of its business. A partnership may file with the Idaho Secretary of State a statement of authority which states the names of the partners authorized to transfer real property and which may include the names of partners whose authority to transfer the partnership's real property is limited; and a third party is deemed to know of the limitation on the authority of a partner to transfer real property. The statement of authority may also state the authority or limitations on the authority of some or all of the general partners to conduct other transactions on behalf of the partnership; but that statement is not constructive knowledge. The law of agency is also relevant to determine when partners' actions will bind the general partnership.

Partners owe to one another and to the partnership fiduciary duties of loyalty and care and accordingly may be personally liable to the partnership and other partners for breach of such duties. A partner's duty of loyalty includes an obligation to account to the partnership for use of partnership property or information or for appropriation of a partnership opportunity, and an obligation to refrain from competing with the partnership. A partner's duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law. In discharging his duties, a general partner has a duty of good faith and fair dealing. However, a general partner does not violate a duty merely because the general partner's conduct furthers the general partner's own interests.

3. Risk.

Idaho's Uniform Partnership Act permits a general partnership to become a limited liability partnership by filing a statement of qualification with the Idaho Secretary of State. http://www.sos.idaho.gov/corp/llpform.htm. An obligation of a general partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort or otherwise, is solely the obligation of the partnership; and a general partner in a limited liability partnership is not liable for such obligations except for the partner's own misconduct or misconduct of any person under the partner's direct supervision. http://www.sos.idaho.gov/corp/llpform.htm

A general partnership is liable for loss or injury caused by tortious conduct of a partner acting in the ordinary course of business or with authority of the partnership. In a general partnership existing by default or without becoming a limited liability partnership, all partners are jointly and severally liable for partnership obligations, including loss or injury caused by tortious conduct committed by a partner in the ordinary course of business or with authority of the partnership.

A general partnership may sue or be sued in the name of the partnership. An action may be brought against a partnership and, except in the case of a limited liability partnership, against any or all of the partners in the same or a separate action. A judgment against a partnership is not by itself a judgment against a partner and, unless a judgment is also obtained against a partner, cannot be satisfied from the partner's assets.

A judgment creditor of a partner may obtain from a court an order charging the partner's transferable interest with payment of the unsatisfied judgment. The charging order constitutes a lien on the partner's transferable interest; and the court may order that the interest be foreclosed.

4. Distributions; Taxation.

A general partnership is disregarded for federal and state income tax purposes; and gains and losses are passed through to the partners. Absent a partnership agreement, each partner is entitled to an equal share of partnership profits and losses. The partners may allocate profits and losses among the partners in a manner disproportionate to their ownership interest pursuant to a partnership agreement. However, such allocations are subject to complex tax rules; and the assistance of tax counsel is strongly recommended. There is a test to determine whether the allocations designated by partners reflect a defined "economic reality" and, if found not to reflect the economic reality of the partnership, the *United States Internal Revenue Service ("IRS") may reallocate profits and losses accordingly.

5. Dissociation; Dissolution.

The Uniform Partnership Act contains default rules governing the dissociation of general partners, the dissolution and winding up of the partnership, the settlement of partnership accounts and the distribution of the partnership's assets.

B. **Limited Partnerships**:

1. Formation.

A limited partnership formed under Idaho Law consists of at least one general partner and one limited partner. To form a limited partnership, a certificate of limited partnership must be filed with the Idaho Secretary of State's office. http://www.sos.idaho.gov/corp/lpform.htm. The limited partnership may be organized as a limited liability limited partnership by including a statement to that effect in the certificate of limited partnership.

Limited partnerships formed before July 1, 2015 are governed by Idaho's Uniform Limited Partnership Act (Idaho Code §§ 53-2-101 *et seq.*), while limited partnerships formed after this date are governed by the new Idaho Uniform Limited Partnership Act (Idaho Code §§ 30-24-101 *et seq.*). The two acts share the same name but are located under different titles within the Idaho statutory code. Differences between the two acts are largely limited to technical and organizational edits with no significant substantive changes. Beginning July 1, 2017, all limited partnerships will be governed by the new Idaho Uniform Limited Partnership Act at Idaho Code Sections 30-24-101 *et seq.*

A foreign limited partnership may apply to the Idaho Secretary of State for a certificate of authority to transact business in Idaho. http://www.sos.idaho.gov/corp/lpform.htm

Unless provided otherwise by a limited partnership agreement, the provisions of Idaho's Uniform Limited Partnership Act govern the limited partnership. A partnership agreement may be written, oral, or manifested by conduct or statements of individual(s). The Act specifies certain nonwaivable rules that may not be varied by a limited partnership agreement.

A limited partnership is an entity distinct from its members. As a recognized legal entity, a limited partnership may own property in its own name. Property acquired by a limited partnership is property of the partnership and not of the general or limited partners individually. Under the default rules of the Uniform Limited Partnership Act, a partner's only transferable interest in the partnership is the partner's right to receive distributions. This interest is personal property.

2. Management.

Each general partner is an agent of the limited partnership; and the act of a general partner in the ordinary course of the partnership's business binds the limited partnership. Under the statutory default rules, each general partner has equal rights in the management and conduct of the limited partnership's activities.

Limited partners cannot act for or bind the limited partnership. They have limited powers with respect to the management of the limited partnership and typically only have the right to vote on a limited number of topics and the right to inspect the books and records of the limited partnership. A general partner may also be a limited partner and have rights, powers, duties and obligations in each of those capacities.

The general partner owes the partnership only the fiduciary duties of loyalty and care to the limited partners and to the limited partnership and accordingly may be personally liable to the partnership and other partners for breach of such duties. A general partner's duty of loyalty includes an obligation to account to the partnership for use of partnership property or information or for appropriation of a partnership opportunity, and an obligation to refrain from competing with the partnership. The general partner's duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law. In discharging his duties, a general partner has a duty of good faith and fair dealing. However, a general partner does not violate a duty merely because the general partner's conduct furthers the general partner's own interests. Limited partners do not owe fiduciary duties to one another, to the general partner or to the limited partnership.

3. Risk.

Idaho's Uniform Limited Partnership Act permits a limited partnership to become a limited liability limited partnership by including a statement to that effect in the certificate of limited partnership. http://www.sos.idaho.gov/corp/lpform.htm. An obligation of a limited partnership incurred while the partnership is a limited liability limited partnership, whether arising in contract, tort or otherwise, is solely the obligation of the limited partnership; and a general partner in a limited liability limited partnership is not liable for such obligations except for the general partner's own misconduct or misconduct of any person under the partner's direct supervision.

A limited partnership is liable for loss or injury caused by tortious conduct of a general partner acting in the ordinary course of business or with authority of the partnership. All general partners are personally liable, jointly and severally, for the obligations of the limited partnership, except in the case of a limited liability limited partnership. However, the general partner may be organized as a limited liability entity, such as a corporation or limited liability company, so that the individuals controlling the general partner may be shielded from personal liability.

A limited partner is similar to a shareholder in a corporation because that limited partner's liability is generally limited to the amount of contribution to the limited partnership. An obligation of a limited partnership, whether arising in contract, tort or otherwise, is not the obligation of a limited partner. A limited partner is not liable, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in management and control of the limited partnership.

A limited partnership may sue or be sued in the name of the partnership. An action may be brought against a partnership and, except in the case of a limited liability partnership, against any or all of the general partners in the same or a separate action. A judgment against a limited partnership is not by itself a judgment against a general partner and, unless a judgment is also obtained against a general partner, cannot be satisfied from the general partner's assets.

A judgment creditor of a partner may obtain from a court an order charging the partner's transferable interest with payment of the unsatisfied judgment. The charging order constitutes a lien on the partner's transferable interest; and the court may order that the interest be foreclosed.

The Uniform Limited Partnership Act authorizes a partner to bring a direct action against the limited partnership or another partner to enforce the partner's rights and to protect the partner's interests, as well as a derivative action to enforce a right of the limited partnership.

4. Distributions; Taxation.

Similar to a general partnership, a limited partnership is disregarded for federal and state income tax purposes; and gains and losses are recognized by the partners.

In contrast to the default rules under the Uniform Partnership Act which requires that each general partner is entitled to an equal share of partnership profits and losses, the default rules under the Uniform Limited Partnership Act require that, unless the limited partnership agreement provides otherwise, profits, losses and distributions must be allocated among the partners on the basis of the value of unreturned contributions made by each partner. In a limited partnership agreement, partners may allocate gains and losses among the partners in a manner disproportionate to their ownership interest. However, such allocations are subject to complex tax rules and the assistance of tax counsel is strongly recommended. Allocations are subject to the economic realities test and the IRS may reallocate profits and losses if necessary to reflect the realities of the partnership.

A limited partnership may not make a distribution if, after the distribution, the limited partnership would not be able to pay its debts as they become due in the ordinary course or the partnership's liabilities would exceed its assets plus the amount needed to satisfy preferential rights upon dissolution.

5. Dissociation; Dissolution.

The Uniform Limited Partnership Act contains default rules governing the dissociation of general and limited partners and the dissolution and winding up of the partnership, disposition of known and unknown claims against the limited partnership and distribution of the partnership's assets.

C. Limited Liability Company.

1. Formation.

Under Idaho law, a limited liability company (LLC) is an unincorporated association having one or more members. To be a member of an LLC, one must make a contribution such as cash, property or services rendered. An LLC is a hybrid between a corporation and a partnership in that it combines the primary advantages of both entities: limited liability and flow- through tax treatment.

LLCs formed before July 1, 2015 are governed by Idaho's Uniform Limited Liability Company Act (Idaho Code §§ 30-6-101 *et seq.*), while LLCs formed after this date are governed by the new Idaho Uniform Limited Liability Company Act (Idaho Code §§ 30-25-101 *et seq.*). The two acts share the same name but are located under different chapters within the Idaho statutory code. Differences between the two acts are largely limited to technical and organizational edits with no significant substantive changes. Beginning July 1, 2017, all partnerships will be governed by the new Idaho Uniform Limited Liability Company Act at Idaho Code Sections 30-25-101 *et seq.*

To form an LLC in Idaho, a certificate of organization must be filed with the Idaho Secretary of State's office. http://www.sos.idaho.gov/corp/llc_form.html. The certificate of organization must include: (a) the name of the limited liability company; (b) the address of the LLCs initial registered office and the name of its initial registered agent at that office; (c) a mailing address to which notices may be mailed until an address has been designated by the LLC in its annual report; (d) the name and address of each organizer; (e) the latest date on which the

LLC is to dissolve or a statement that its existence is perpetual; and (f) if a LLC is to render professional services, the professional services to be rendered.

The Idaho Uniform Limited Liability Company Act, Idaho Code Sections 30-6-101 *et seq.* ("IULLCA"), provides that, with certain enumerated exceptions, the statutory provisions are default rules that apply only if the operating agreement (which can be oral, written, implied, or any combination thereof) does not address a particular matter. As an organizing principle, the drafters designed IULLCA to provide default rules that operate only in the arena where the members fail to address a particular issue in their operating agreement. This arena is more likely to be populated by unsophisticated business partners who do not regularly consult an attorney than by more sophisticated business persons who own or operate medium-or larger-sized businesses and are used to consulting lawyers. The latter, more savvy group, is much more likely to obtain legal counsel to document the agreement among the owners; in that situation the operating agreement should contain operative provisions that supersede the default rules of the statute.

IULLCA's default rules should be viewed in the context of those situations involving relatively unsophisticated business partners who do not reduce their agreement to writing. Much more important to more sophisticated business persons is the nearly complete flexibility that IULLCA allows in structuring the internal affairs of an LLC, including flexibility in allocating distributions and tax items among members that is not readily available in the corporate form.

As a recognized legal entity, an LLC may own property in its own name. Property acquired by an LLC is property of the LLC and not of its members or managers individually. A member's membership or membership interest includes a member's transferable interest, together with the member's governance rights. A person's transferable interest in the LLC is the right, originally associated with membership, to receive distributions. This interest is personal property.

2. Management.

Unlike LLC statutes in other states, the certificate of organization of an Idaho LLC does not state whether the LLC is member-managed or manager-managed. The LLC's business affairs are managed by the members unless the operating agreement specifically states that the LLC shall be managed by one or more managers. If the LLC chooses to be managed by managers, the members are like the shareholders of a corporation; and the managers can be compared to the board of directors.

The internal affairs of the LLC are governed by the operating agreement, or by the statutory default rules to the extent the operating agreement does not address a matter covered by the default rules. The operating agreement is the agreement of the members, whether written, oral, implied or a combination thereof, governing the relations among the members and between the members and the LLC, the rights and duties of managers, the company's activities, and the means and conditions for amending the operating agreement. Because of this broad definition, the LLC necessarily has an operating agreement once it comes into existence and has a member. Similar to the Uniform Partnership Act, IULLCA specifies certain nonwaivable rules that may not be varied by an operating agreement.

Under IULLC's default rules, in a member-managed LLC, each member has equal rights in management and conduct of company activities; and in a manager-managed LLC, each manager has equal rights in management and conduct of company activities.

Managers of a manager-managed LLC have actual authority to decide exclusively any matter relating to the LLC's activities. A member is not an agent of the LLC solely by reason of being a member. With that exception, the facts and circumstances tests of actual and apparent authority under general principles of agency law continue to apply to the LLC's external activities involving third parties.

IULLCA provides for filing a statement of authority with Idaho Secretary of State to state or limit the authority of any member or manager (identified by position or specific person) to bind the LLC. http://www.sos.idaho.gov/corp/llc_form.html. A filed statement of authority concerning real property provides constructive notice of authority concerning real property transactions. However, as is the case under the Uniform Partnership Act, a filed statement of authority granting or limiting authority regarding matters other than real property is not constructive notice. Actual knowledge is required to bind a third party. Nevertheless, actual delivery of a statement of authority can serve to disclose management structure and as alternative to disclosure of entire operating agreement when authority is at issue.

Internal Duties: Fiduciary Nature of Duties of Care and Loyalty. IULLCA fiduciary duties do not materially differ from the duties owed by management and owners of corporate entities. Under the Idaho Business Corporation Act ("IBCA"), corporate directors and officers owe duties of care and undivided loyalty to the corporation and its shareholders. Although the IBCA does not expressly provide that these duties are fiduciary in nature, the Idaho Supreme Court has held them to be fiduciary duties. Similarly, managers of a manager-managed LLC owe fiduciary duties of care and loyalty to the company and its members.

As for entity owners, a member of a manager-managed LLC does not have any fiduciary duty to the LLC or to any other member by reason of being a member, just as a shareholder generally has no fiduciary duty to other shareholders or to the corporation.

In a member-managed LLC, the fiduciary duties of care and loyalty are owed by each member to the other members. This rule reflects the partnership law genesis of IULLCA. While it is true that corporation statutes do not impose fiduciary duties on shareholders, courts have imposed such duties on controlling shareholders of closely-held corporations. In the analogous context in which IULLCA's default rules are designed to operate (i.e., the small group of unsophisticated business partners who choose to operate as a member-managed LLC because of its flexibility and lack of formality), the principles of partnership law are consistent with courts' treatment of closely-held corporations.

Internal Duties: Duty of Care. Subject to the business judgment rule, a member of a member-managed LLC or a manager of a manager-managed LLC must act with the care that a person in like position would reasonably exercise under similar circumstances and in a manner the member or manager reasonably believes to be in best interests of LLC. This duty is consistent with the duty of care owed by directors and officers under the IBCA.

Internal Duties: Duty of Loyalty. The duty of loyalty includes three components: (1) the duty to account and hold as trustee any property, profit or benefit derived by the member or manager from use of LLC property or appropriation of LLC opportunity; (2) the duty to avoid conflicting interest transactions with the LLC (subject to the defense that the transaction is fair to the LLC or that the transaction has been authorized or ratified by the members after full disclosure of all material facts); and (3) the duty not to compete with the company. The duty to hold as a trustee any profit derived by the member is directed at a member's or manager's profit or benefit derived from personal use of LLC property or appropriation of an LLC opportunity without consent of the members, not at profit or benefit from distributions to members or compensation paid or fringe benefits provided to managers.

IULLCA's default prohibitions of appropriation of LLC property or opportunities, related party transactions, and competitive activities—the three components of the duty of loyalty specified by IULLCA—are consistent with duty of loyalty imposed on corporate directors and officers. Each of the IULLCA components finds corresponding provisions in the IBCA.

Most importantly, IULLCA expressly permits the members to restrict or eliminate each of these components of the duty of loyalty. So, for example, the operating agreement of a family LLC would authorize family members to use the LLC's vacation cabin for personal purposes; a physician who owns a medical office building could be authorized to lease the building to the PLLC in which the physician participates in a group practice with other providers; and the manager of a real estate investment company could be permitted to devote time to management of other real estate investments, including properties that might compete in the same marketplace.

Internal Duties: Contractual Obligation of Good Faith and Fair Dealing. This obligation is not a fiduciary duty or a generalized duty of good faith, but rather arises out of the contract-based nature of LLCs. It applies to members and managers alike, requiring them to discharge the duties under IULLCA or the operating agreement and to exercise any rights consistently with the contractual obligation of good faith and fair dealing. It is intended to protect, but not allow the court to remake, the members' agreement.

Internal Duties: "Uncabined" Duties. Whereas Idaho's Uniform Partnership Act and its Uniform Limited Partnership Act "cabin in" fiduciary duties by providing that the duties of loyalty and care are the only fiduciary duties owed by general partners, IULLCA does not exhaustively codify, or "cabin in", the fiduciary duties of LLC members and managers. This open-ended structure leaves uncertainty for LLC members who fail to limit the scope of

IULLCA duties in their operating agreement. The Idaho Supreme Court has imposed a fiduciary duty not specified in the statute.

Nevertheless, IULLCA allows the careful drafter of an operating agreement to "cabin in" the scope of these duties by contract. IULLCA allows substantial flexibility in modifying or eliminating various duties of managers and members. In contrast to the IBCA (which makes no provision for alteration of statutory duties of care and loyalty), an LLC operating agreement may, if not "manifestly unreasonable", restrict or eliminate the specifically identified components of the duty of loyalty, identify specific types or categories of activities that do not violate the duty of loyalty, alter the duty of care, and alter any other fiduciary duty including eliminating particular aspects of that duty.

IULLCA provides guidance for court application of the "manifestly unreasonable" standard: The court must consider the circumstances as of date of the operating agreement, not in hindsight at the time of complaint; and the court may invalidate a challenged term of an operating agreement only if, in light of the purposes and activities of the LLC, it is readily apparent that (1) the objective of the term is unreasonable or (2) the term is an unreasonable means to achieve the objective. To date, this provision has not been applied or interpreted by an Idaho court. It remains to be seen whether this standard achieves the Uniform Laws Commission's objective of curtailing any inclination by a court to re-write the members' agreement.

3. Limited Liability; Risk.

LLC members enjoy the protection of limited liability, although in rare cases courts may disregard the entity and hold members personally liable for the obligations of the company.

Like the IBCA, IULLCA shields LLC owners from liability to third parties for company obligations. In comparison to the IBCA, however, IULLCA's limited liability provisions are even more protective: IULLCA expressly shields managers, as well as members, against liability for company obligations to third parties. There is no comparable provision in the IBCA that protects corporate directors or officers. Further, in contrast to corporate law where failure to maintain formalities may result in loss of the limited liability shield and subject shareholders to liability for the corporation's obligations, IULLCA expressly provides that "failure ... to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company".

IULLCA authorizes direct actions by members against the LLC, managers or other members, but only to the extent of an actual or threatened injury that is not solely the result of an injury suffered by the LLC. To have standing to bring a direct action, a member must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the LLC. Where the harm is caused or threatened to be caused to the LLC, a member may bring a derivative action to enforce a right of the LLC, following demand (or demand futility) and the opportunity for the LLC to convene a special litigation committee to investigate the claim to determine whether pursuit of the claim is in the LLC's best interest. These provisions correlate closely with the IBCA and corporate case law in Delaware and other jurisdictions.

Under IULLCA, a creditor of an LLC that extends credit or otherwise acts in reliance on a person's obligation to make a contribution to the LLC may enforce the obligation. Enforceability of an oral promise to contribute could be problematic for the creditor, member, and LLC.

4. Distributions; Taxation.

IULLCA's default voting rights and distribution rights are per capita, not per capital. On dissolution, the LLC's assets are distributed first to each person owning a transferable interest that reflects the member's previously unreturned contributions, and then to the members per capita.

An LLC has pass-through tax treatment similar to partnerships. Gains and losses will be recognized by the members. Each member will recognize gains and losses of the LLC in proportion to their interest in the business, unless they allocate gains and losses pursuant to an operating agreement. It is advisable to consult tax counsel prior to attempting any special allocation of profits and losses. Similar to the partnerships, allocations among members must satisfy the economic realities test; otherwise the IRS will reallocate gains and losses accordingly.

In some instances, the LLC may choose to be taxed as a C Corporation, thus incurring recognition of income at the entity level. One should consult tax counsel to determine whether this is advisable in any instance.

D. Domestic Corporation.

1. Formation.

Idaho has enacted the Idaho Business Corporation Act. Idaho Code §§ 30-29-101 *et seq.* ("IBCA"). A corporation is a legal entity formed by filing articles of incorporation with the Idaho Secretary of State. Corporations formed under Idaho laws are called "domestic" corporations. A corporation exists separate from its owners, must file its own tax returns and may own property, sue and be sued.

Articles of incorporation must be prepared and filed with the Idaho Secretary of State as provided in Idaho Code § 30-29-202. The articles of incorporation must include (1) the name of the corporation, (2) the number and class or series of authorized shares, (3) the name and street address of the corporation's registered agent as required by § 30-21-404(a) of Idaho's Registered Agents Act (Idaho Code §§ 30-21-401 *et seq.*), and (4) the names and addresses of each incorporator. Idaho Code § 30-1-401 specifies the requirements for and limitations on the corporation's name which, among other requirements, must be distinguishable on the records of the Idaho Secretary of State. A corporation's use of an assumed business name is controlled by the Assumed Business Names Act, Idaho Code §§ 53-501 *et seq.* A corporation must continuously maintain in the state of Idaho a registered office and a registered agent.

The articles of incorporation must authorize, and there must be outstanding at all times during the corporation's existence, one or more classes or series of shares that together have unlimited voting rights and one or more classes or series of shares that are entitled to receive the net assets of the corporation upon dissolution. Idaho Code §§ 30-1-601, 603. The articles of incorporation may authorize the board of directors to classify or reclassify any unissued shares and determine the preferences, rights and limitations of those shares (commonly known as "blank check stock") without shareholder approval. Unless provided otherwise in the articles of incorporation, shareholders do not have pre-emptive rights or cumulative voting rights. The IBCA authorizes the distribution of share dividends and the issuance of rights, options or warrants for the purchase of shares or other securities, with such terms and for such consideration as determined by the board of directors. Shares may be uncertificated or represented by certificates. Transfer restrictions must be conspicuously noted on the certificate or contained in an information statement delivered to the shareholders. Unless a board resolution or the articles of incorporation provide otherwise, shares reacquired by the corporation constitute authorized but unissued shares ("treasury shares").

Articles of incorporation may include the name and addresses of the initial directors and any other provisions not inconsistent with law, such as provisions that (i) define, limit and regulate the powers of the corporation, its directors and shareholders, (ii) impose personal liability on shareholders for the debts of the corporation to a specified extent or on specified conditions, or (iii) are required or permitted to be set forth in the bylaws.

The articles of incorporation may contain a provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken or failure to take any action as a director, except for liability for the amount of any financial benefit to which the director is not entitled, intentional infliction of harm on the corporation or the shareholders, authorization of an unlawful distribution, or an intentional violation of criminal law. Similarly, articles of incorporation may contain a provision permitting or making obligatory indemnification of a person for any action taken, or any failure to take action as a director, subject to those same exceptions.

Unless a delayed effective date is specified in the articles of incorporation, the corporation's existence commences upon filing the articles of incorporation. Although not required in order to commence its existence, the IBCA requires the initial board of directors to hold an organizational meeting to appoint officers and to adopt bylaws. The incorporators or initial board of directors are required to adopt bylaws which include provisions for managing the business and regulating the affairs of the corporation that are not inconsistent with law or the articles of incorporation.

Unless provided otherwise in the articles of incorporation, a corporation has perpetual existence, is authorized to conduct any lawful business, and has all powers necessary or convenient to carry out its business and affairs. The IBCA provides that the validity of corporate action may not be challenged on the ground that the corporation lacked power to act, except in certain specified circumstances.

The IBCA provides for dissolution of the corporation by action of the directors and shareholders, judicial dissolution and administrative dissolution. Following dissolution, the corporation continues its existence but must not conduct any business other than winding up of its business and affairs. The IBCA specifies procedures for the discharge of known and unknown claims. Dissolution does not subject the corporation's directors or officers to any different or heightened standards of conduct, and does not prevent commencement of a proceeding by or against the corporation.

2. Management.

Once the corporation is established, an organizational meeting of the board of directors is held to appoint officers, adopt bylaws and conduct any other business. The bylaws of the corporation may contain provisions to regulate and manage the affairs of the corporation consistent with applicable statutes and the articles of incorporation.

All corporate powers are exercisable by or under the authority of, and the business and affairs of a corporation are managed by or under the direction of, its board of directors, subject to any limitation in the articles of incorporation or a shareholder agreement authorized under Idaho Code § 30-1-732, which may eliminate the board of directors (thus enabling a shareholder-managed corporation) or restrict the board's discretion or powers. The board of directors may make certain high-level decisions and the officers will generally be responsible for the daily operations of the corporation. Certain actions, including amendments to the articles of the incorporation, mergers or share exchanges, or sales of substantially all the corporation's assets, require either a board or shareholder vote, or both, before such actions may be taken.

The IBCA provides rules for specification of the number, election terms (including staggered terms), resignation and removal of directors, notice and conduct of board meetings and action by unanimous written consent in lieu of a meeting and board committees. Directors owe statutory duties of loyalty and care and loyalty to the corporation and its shareholders: A director must act in good faith and in a manner the director reasonably believes to be in the best interests of the corporation. When becoming informed in connection with their decision-making function or devoting attention to their oversight function, the directors must discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances. The IBCA specifies standards of liability of directors and imposes the burden of proof of certain elements on the party asserting liability.

Subject to reservation of such power to the shareholders by the articles of incorporation, the board of directors is empowered to issue shares for consideration consisting of any tangible or intangible property, including cash, promissory notes and services performed prior to issuance. Pursuant to a limitation in the Idaho Constitution, future services cannot be accepted as consideration for issuance of shares. Idaho Const. art. XI, § 9. Subject to that limitation, the board of directors must determine that the consideration received for shares is adequate; and the board's determination is conclusive as to the adequacy of consideration for issuance of the shares and that the shares issued for such consideration are fully paid and nonassessable (an important conclusive presumption for opinion givers).

The board of directors is authorized to make distributions to the shareholders, except to the extent that, after giving effect to the distribution, either (i) the corporation would not be able to pay its debts as they become due in the usual course of business or (ii) the corporation's total assets would be less than the sum of its liabilities plus the amount of the liquidation preferences of senior securities. The term "distribution" is broadly defined to include any direct or indirect transfer of money or other property, including payment of dividends; purchase redemption or other acquisition of shares; and distribution of indebtedness. A director who approves an unlawful distribution may be personally liable to the corporation, but may be entitled to contribution from other directors and recoupment from shareholders.

The only required corporate officer is a secretary, who must be appointed by the board of directors to prepare minutes of directors' and shareholders' meetings and to maintain and authenticate the records required by the IBCA. The board may appoint other persons to offices provided in the bylaws or designated by the board. The same individual may simultaneously hold more than one office. The officers have the authority and duties set forth in the bylaws or prescribed by the board of directors. Officers are subject to essentially the same duties of loyalty and care as the directors.

The IBCA sets forth detailed provisions relating to mandatory and permissible indemnification of directors, officers and other agents of the corporation and conditions under which the corporation may advance expenses incurred in defense of a claim.

The IBCA defines certain safe harbors for the approval of a director's conflicting interest transactions, which may not be enjoined if fully disclosed and approved by independent directors or shareholders, or if the transaction, judged according to the circumstances at the time, is established to have been fair to the corporation.

3. Shareholders.

The IBCA established rules for shareholder meetings, including notice requirements, determination of record date, conduct of meetings, quorum and voting requirements, proxies, actions by unanimous written consents in lieu of meetings, voting agreements and other shareholder agreements.

Unless provided otherwise in the articles of incorporation, a shareholder of a corporation is not personally liable as such for the acts or debts of the corporation except for liability by reason of the shareholder's own acts or conduct; however, in rare instances, a court will disregard the corporate entity and "pierce the corporate veil" and impose liability on a shareholder. This may occur if there is such a unity of interest and ownership that the individuality of the corporation and such person has ceased, and it appears the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice.

Shareholder approval, following approval by and recommendation of the board of directors, is required for major transactions such as the amendment of the articles of incorporation, a merger, share exchange or sale of substantially all assets of the corporation. The IBCA provides detailed procedures for dissenting shareholders to assert appraisal rights in connection with those transactions. Other than shareholder approval requirements and dissenters' rights provisions, the effectuation of merger, interest exchange, conversion and redomestication transactions is governed by Idaho's Entity Transaction Act. Idaho Code §§ 30-18-101 *et seq.*

The IBCA authorizes shareholders to bring a derivative action in the right of a domestic corporation. The Act addresses a shareholder's standing to maintain a derivative action and requires that a written demand be made on the corporation in advance of commencement of the derivative action. The Idaho Supreme Court has ruled that the demand is a necessary prerequisite and is not excused because of "demand futility". A derivative action must be dismissed if a good faith determination is made by disinterested directors or a court-appointed panel of independent persons, after conducting a reasonable inquiry, that maintenance of a derivative action is not in the corporation's best interest.

A corporation is required to maintain specified records; and the shareholders are entitled to inspect and copy those records upon demand made in good faith and for a proper purpose. The corporation may impose a reasonable charge for labor and material for copies of corporate records. Directors are also entitled to inspect and copy the corporation's books and records that are reasonably related to the performance of the director's duties. Upon written request, a corporation shall furnish its shareholders with annual financial statements. The corporation must report to the shareholders in the event it indemnifies or advances expenses to a director in connection with a derivative action or if the corporation issues shares in consideration of promissory notes.

4. Taxation.

a. C Corporation.

For federal and state tax purposes, a C Corporation is taxed as a separate entity on the income of the business. The result is that income generated by the corporation will be taxed at the corporate level, and earnings and profits distributed to the shareholders as dividends will be taxed at the shareholder level. In effect, earnings of the C Corporation are subject to two layers of taxation.

b. S Corporation.

An S Corporation is a corporation (a) that qualifies as a “small business corporation” under Section 1361 of the Internal Revenue Code, and (b) for which an “S election” has been filed. Although the rules are more detailed, an S election must generally be made within approximately 2 1/2 months after the commencement of the corporation’s first taxable year.

S Corporations are taxed similar to partnerships, with the gains and losses of the corporation passed through to the shareholders. The corporation generally pays no tax at the entity level; instead shareholders are taxed on the income as it is earned.

To qualify as an S Corporation, (1) the corporation must be a domestic corporation, (2) it must have 100 or fewer shareholders, (3) nonresident aliens, partnerships (including LLCs) and most corporations may not be shareholders, (4) it may have only one class of stock, and (5) it must not be an ineligible corporation (e.g., certain financial institutions and insurance companies). If an S Corporation does not meet each of these requirements, the “S” status will be automatically revoked and the corporation will be taxed as a C Corporation for the portion of the tax year that it did not meet the requirements.

c. Foreign Corporation.

A foreign corporation, duly organized and validly existing under the laws of a different state, may not lawfully transact business in Idaho until it obtains authority to do so from the Idaho Secretary of State. A corporation that transacts business without a certificate of authority is liable for all license and administrative fees that should have been paid during the years it transacted business plus penalties, if applicable.

Failure to obtain a certificate of authority will not cause the foreign corporation to be disregarded in Idaho. However, a certificate of authority is necessary if the corporation that is transacting business in Idaho wishes to bring a lawsuit in an Idaho proceeding, which is especially important if the corporation wishes to enforce certain rights, including the enforcement of contracts. A court may stay a proceeding commenced by a foreign corporation until the corporation obtains a certificate of authority.

The IBCA includes a nonexclusive list of activities of a foreign corporation that do not constitute “transacting business” in Idaho, including: maintaining, defending or settling and civil, criminal, administrative or investigative proceeding; holding meetings of directors or shareholders or carrying on other activities concerning internal corporate affairs; maintaining bank accounts; selling through independent agents or soliciting or obtaining orders that require acceptance outside Idaho before becoming a binding contract; creating or acquiring indebtedness, mortgages or other security interests in real or personal property; and transacting business in interstate commerce.

To apply for corporate authority, a foreign corporation must submit an application to the Idaho Secretary of State that includes the name and address of its Idaho registered agent and an original certificate of existence or similar document from the jurisdiction of its incorporation. http://www.sos.idaho.gov/corp/corpform.htm.

d. Nonprofit Corporation.

Idaho has enacted the Idaho Nonprofit Corporation Act. Idaho Code Sections 30-30-10 *et seq.* A nonprofit corporation is a legal entity formed by filing articles of incorporation with the Idaho Secretary of State. Nonprofit corporations formed under Idaho laws are called "domestic" corporations. A nonprofit corporation exists separate from its members, must file its own tax returns and may own property, sue and be sued.

Articles of incorporation must be prepared and filed with the Idaho Secretary of State as provided in Idaho Code Section 30-30-201. The articles of incorporation must include (1) the corporation's name, (2) the corporation's purpose, (3) the names and addresses of the initial directors, (4) information related to the corporation's registered agent; (5) the names and addresses of the incorporators; (6) whether the corporation will have members; and (7) provisions regarding the distribution of assets on dissolution. Idaho Code § 30-30-201. Idaho Code Section 30-21-301 specifies the requirements for and limitations on the corporation's name which, among other requirements, must be distinguishable on the records of the Idaho Secretary of State. A corporation's use of an assumed business name is controlled by the Assumed Business Names Act, Idaho Code Sections 30-21-81 *et seq.* A corporation must continuously maintain an Idaho registered office and an Idaho registered agent.

The articles of incorporation may contain any provisions permitted under the Act to be in the corporation's bylaws, and may contain provisions for levying assessments on its members or stock holder, if the corporation issues stock instead of membership interests.

Unless a delayed effective date is specified in the articles of incorporation, the corporation's existence commences upon filing the articles of incorporation. The incorporators or the initial board of directors must hold an organizational meeting to appoint officers, adopt bylaws, and if the meeting is held by the incorporators, elect an initial board of directors. The incorporators or initial board of directors are required to adopt bylaws which include provisions for managing the business and regulating the affairs of the corporation that are not inconsistent with law or the articles of incorporation.

Unless provided otherwise in the articles of incorporation, a corporation has perpetual existence, is authorized to conduct any lawful business, and has all powers necessary of convenient to carry out its business and affairs. The validity of corporate action may not be challenged on the ground that the corporation lacked power to act, except in certain specified circumstances.

A corporation dissolves by action of the directors and shareholders, judicial dissolution and administrative dissolution. Following dissolution, the corporation continues its existence but must not conduct any business other than winding up of its business and affairs. The Act provides procedures to discharge known and unknown claims. Dissolution does not subject the corporation's directors or officers to any different or heightened standards of conduct, and does not prevent commencement of a proceeding by or against the corporation.

5. Management.

Once the corporation is established, an organizational meeting of the board of directors is held to appoint officers, adopt bylaws and conduct any other business. The bylaws of the corporation may contain provisions to regulate and manage the affairs of the corporation consistent with applicable statutes and the articles of incorporation.

All corporate powers are exercisable by or under the authority of, and the business and affairs of a corporation are managed by or under the direction of, its board of directors, subject to any limitation in the articles of incorporation. The board of directors may make certain high-level decisions and the officers will generally be responsible for the daily operations of the corporation. Certain actions, including amendments to the articles of the incorporation, mergers or share exchanges, or sales of substantially all the corporation's assets, require either a board or shareholder vote, or both, before such actions may be taken.

The Act provides rules for specification of the number, election terms (including staggered terms), resignation and removal of directors; notice and conduct of board meetings and action by unanimous written consent in lieu of a meeting and board committees. The articles of incorporation or bylaws can specify that a certain number of directors are designated or appointed by a person other than the members. In a corporation that does not issue membership interests, the articles of incorporation or bylaws can provide a procedure for selection of directors, but if no procedure is provided, the directors are elected by the board.

Directors owe statutory duties of loyalty and care to the corporation and its shareholders: A director must act in good faith and in a manner the director reasonably believes to be in the best interests of the corporation. When becoming informed in connection with their decision-making function or devoting attention to their oversight function, the directors must discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances. The Act specifies standards of liability of directors and imposes the burden of proof of certain elements on the party asserting liability.

The three required corporate officers are a president, a treasurer, and a secretary. The bylaws or the board must assign one officer to prepare minutes of directors' and shareholders' meetings and to authenticate the corporation's records. The board may appoint other persons to offices provided in the bylaws or designated by the board. The same individual may simultaneously hold more than one office, except that the president and secretary cannot be the same person. The officers have the authority and duties set forth in the bylaws or prescribed by the board of directors. Officers are subject to essentially the same duties of loyalty and care as the directors.

The Act sets forth detailed provisions relating to mandatory and permissible indemnification of directors, officers and other agents of the corporation and conditions under which the corporation may advance expenses incurred in defense of a claim.

The Act defines certain safe harbors for the approval of a director's conflicting interest transactions, which may not be enjoined if fully disclosed and approved by independent directors or shareholders, or if the transaction, judged according to the circumstances at the time, is established to have been fair to the corporation.

6. Members.

A nonprofit corporation need not have members. For a membership corporation, the Act establishes rules for members' meetings, including notice requirements, determination of record date, conduct of meetings, quorum and voting requirements, proxies, actions by unanimous written consents in lieu of meetings, and voting agreements and other shareholder agreements.

A member of a corporation is not personally liable as such for the acts or debts of the corporation except for liability by reason of the shareholder's own acts or conduct.

Member approval, following approval by and recommendation of the board of directors, is required for major transactions such as the amendment of the articles of incorporation, merger, share exchange or sale of substantially all assets of the corporation. Other than shareholder approval requirements, and with the exception of corporations engaged in certain businesses, the effectuation of merger, interest exchange, conversion and redomestication transactions is governed by the Idaho Model Entity Transactions Act. Idaho Code §§ 30-18-101 *et seq.*

The Act authorizes members to bring a derivative action in the right of a domestic corporation. The Act addresses a member's standing to maintain a derivative action and requires that a written demand be made on the corporation in advance of commencement of the derivative action.

Except for certain distributions by cooperative corporations, a nonprofit corporation cannot make distributions to its members.

A corporation is required to maintain specified records; and the members are entitled to inspect and copy those records upon demand made in good faith and for a proper purpose. The corporation may impose a reasonable charge for labor and material for copies of corporate records. Directors are also entitled to inspect and copy the corporation's books and records that are reasonably related to the performance of the director's duties. Upon written request, a corporation shall furnish its members with annual financial statements. The corporation must report to the members in the event it indemnifies or advances expenses to a director in connection with a derivative action.

E. **Professional Entities**.

Rule regarding professional entities are provided in Idaho Code Section 30-21-901. Professions subject to Idaho Code Section 30-21-901 include only the practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, occupational therapy, physical therapy, podiatry, professional geology, psychology, certified or licensed accountancy, social work, surveying and veterinary medicine. Allied professional services are professional services which are so related in substance that they are frequently offered in conjunction with one another as parts of the same service package to the consumer.

Idaho Code Section 30-21-901 does not modify or diminish the jurisdiction over a professional of any governmental authority or state agency which licensed, certified or registered the professional. With respect to the medical profession, Idaho State Board of Medicine historically attempted to enforce the corporate practice of medicine doctrine by seeking to discipline physicians who it asserted were employees of unlicensed entities. However, in March 2016 and in the context of a specific case, the Board of Medicine appeared to back away from that approach and included language in its board meeting minutes that said that the board "formally disavows and rejects" the "corporate practice of medicine doctrine," and declared that the board "will not discipline physicians or physician assistants solely because they practice medicine in association with or for unlicensed entities or persons.

F. **Unincorporated Association**.

1. Formation.

An unincorporated nonprofit association results when two or more members associate by mutual consent and outside unincorporated organizations for a common, nonprofit purpose. Idaho Code § 30-27-102(5). A "member" is a person who, under the association's rules or practices, may participate either in (i) selecting the persons authorized to manage the association's affairs or (ii) developing the association's policy. The term "person" includes individuals, governmental agencies, and legal and commercial entities; and the term "business" includes every trade, occupation and profession. Idaho Code § 30-27-102(4). The distinction between formation of a general partnership and an unincorporated nonprofit association, then, comes down to intent: the "nonprofit purpose."

Idaho's Uniform Unincorporated Nonprofit Association Act (Idaho Code Sections 53-701 to 53-717) governs unincorporated nonprofit associations and does not define "nonprofit."

An Idaho unincorporated nonprofit association does not register with the state unless it operates under an assumed business name.

Idaho's Uniform Unincorporated Nonprofit Association Act does not provide any rules for the internal governance of unincorporated nonprofit associations. The internal governance of a unincorporated nonprofit association is entirely a matter of the association's internal policies.

As a recognized legal entity, an unincorporated nonprofit association may: (i) own and transfer real and personal property; (ii) receive property as a legatee, devisee, or beneficiary; and (iii) sue or be sued.

2. Management.

An unincorporated nonprofit association is managed according to its internal governance rules.

3. Risk.

The Act establishes that an unincorporated nonprofit association is a legal entity separate from its members. Idaho Code § 30-27-105. The members of an unincorporated nonprofit association are not liable in tort or contract simply because they are members of the association. The Act extends this limitation on liability to "members" who satisfy the definition of membership set forth in Idaho Code Section 30-27-102(4) and to any person "considered to be a member by the nonprofit association." Idaho Code § 30-27-108. In addition, one member of the association's liability is not imputed to other members simply because both persons are members of the association, and a member may sue the nonprofit association. Idaho Code Idaho Code § 30-27-108.

4. Dissolution.

An unincorporated nonprofit association is dissolved according to its internal governance rules.

G. Entity Transaction Act.

Idaho Model Entity Transactions Act, Idaho Code Sections 30-22-101 *et seq.* ("IETA"), enables four types of transactions to be effectuated by nearly any form of entity by adopting a plan and filing a statement with the Idaho Secretary of State:

- Merger of one or more domestic entities with one or more domestic or foreign entities resulting in a domestic or foreign surviving entity; or merger of two or more foreign entities resulting in a domestic entity.

- Interest exchange in which a domestic entity acquires equity interest of another domestic or foreign entity in exchange for its own equity interests, cash or other property; or a domestic or foreign entity acquires the equity interest of a domestic entity in exchange for its own equity interests, cash or other property.

- Conversion of a domestic entity into an domestic entity of a different type or a foreign entity of a different type if permitted by the laws of the foreign jurisdiction.

- Redomestication of a domestic entity with a foreign entity of the same type, or the redomestication of a foreign entity with a domestic entity of the same type.

In each case, the participation of a foreign entity must be permitted by the laws of the foreign jurisdiction.

Each form of transaction under IETA requires the entity to adopt a plan in accordance with the requirements for approval of the entity's governing body and the approval of its equity owners as provided in the entity's organic statute. In all other respects, IETA governs each of these four forms of transaction. Following adoption of the plan, the transaction becomes effective upon filing with the Idaho Secretary of State (or a later date specified in the statement) of a statement containing certain information prescribed by the statute.

H. <u>Idaho Secretary of State Forms and Fees</u>.

Printable and fillable forms for domestic for-profit corporations, nonprofit corporations, professional service corporations and foreign corporations are available on the Idaho Secretary of State's website: http://www.sos.idaho.gov/corp/corp_form.html. Available forms for domestic entities include articles of incorporation, amendment and dissolution. For foreign for-profit and nonprofit corporations, forms include applications for certificate of authority, amended certificate of authority and certificate of withdrawal. Forms for all corporations include statement of change of business mailing address, change of registered office or registered agent, and applications for reservation and registration of legal entity name.

In addition, the Idaho Secretary of State's website enables free online filing of annual reports and business records searches. A fee is charged to order certificates of existence (good standing). http://www.sos.idaho.gov/. Fees for various business entity filings are accessible though that webpage as well.

I. <u>Sole Proprietorship</u>.

a. <u>Formation</u>.

A sole proprietorship is the simplest form of business where one individual owns and conducts the business. By default, an individual operating a business without forming a formally organized or registered entity to conduct that business is a sole proprietorship.

A sole proprietor does not have to register with the state unless he or she uses an assumed business name. If the name of the business does not include in full the proprietor's true legal name, it must be registered as an assumed name with the Idaho Secretary of State. http://www.sos.idaho.gov/corp/abn_form.html

2. Management.

A sole proprietorship is managed by the individual owner.

3. Risk.

This form of business does not protect an individual from personal liability.

4. Taxation.

Since a sole proprietorship is not a formally organized or registered entity, its taxable gains and losses are recognized by the individual owner.

5. Licensing and Franchising:

Any provision in a franchise agreement made or renewed after July 1, 2003 applying to a resident of or entity organized in Idaho which waives or has the effect of waiving venue or jurisdiction in the state of Idaho's court system is void. Otherwise, Idaho does not specifically regulate franchises.

SECTION III.

TRADE REGULATIONS

A. Federal Antitrust Law.

The antitrust laws of the United States are primarily reflected in five federal statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Act.

1. The Sherman Antitrust Act of 1890. The Sherman Act is divided into two primary sections. Section 1 prohibits contracts, combinations, and conspiracies made in restraint of trade. Section 2 prohibits unilateral and combined conduct that monopolizes or attempts to monopolize trade. Under the Sherman Act, some restraints are "per se" unreasonable (such as price-fixing agreements between competitors) and others are subject to analysis under a "rule of reason" (such as some restrictions placed on a distributor by a manufacturer). Restraints subject to the "per se" rule are never permitted, while those governed by the "rule of reason" test will be evaluated on a case-by-case basis.

2. The Clayton Act of 1914. The Clayton Act prohibits certain specific anticompetitive activities. For example, the Act prohibits some corporate mergers, exclusive

dealing contracts, and agreements under which one product is sold subject to the requirement that the purchaser also buy another product from the seller (known as a "tying" arrangement).

3. The Robinson-Patman Act of 1936. The Robinson-Patman Act prohibits a seller from discriminating (or inducing others to discriminate) among competing purchasers in the price charged for commodities "of like grade and quality." While the Act focuses on price discrimination, it also addresses other concerns such as discriminatory advertising allowances.

4. The Federal Trade Commission Act. The FTC Act declares unlawful "unfair methods of competition" and "unfair or deceptive acts or practices."

5. The Hart-Scott-Rodino Antitrust Improvements Act of 1976. The Hart-Scott-Rodino Act requires that, under certain circumstances, a company proposing to merge with or acquire another company must give prior notice of the proposed acquisition to the *Federal Trade Commission and the *Justice Department. Failure to report may result in very substantial fines.

Enforcement: Private individuals and corporations may bring lawsuits under the Sherman Act, the Clayton Act and the Robinson-Patman Act. Remedies may include injunctive relief, treble damages and attorney fees. The government may enforce the Sherman Act through criminal prosecutions and civil suits. In addition, the government may enforce the Clayton Act and the Robinson-Patman Act through the FTC or the Justice Department. Only the government can enforce the Federal Trade Commission Act and the Hart-Scott-Rodino Act.

B. Regulation of International Trade and Investment.

Foreign investment in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. statutes and related regulations. The following discussion outlines some of the more important aspects of these laws which might be relevant to someone investing in or trading with entities located in the U.S.

1. Restrictions on Foreign Investment.

Under a statutory provision commonly referred to as the Exon-Florio Amendment (Section 721 of Title VII of the Defense Production Act of 1950, as added by Section 5021 of the Omnibus Trade and Competitiveness Act of 1988), the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the *U.S. Congress has indicated that the term "national security" is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

The statute sets out a timetable for investigations of transactions which can take up to 90 days to complete. The President or his designee has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to decide whether to undertake a full-scale investigation of the transaction. The President has delegated the authority to make investigations pursuant to the Exon-Florio Amendment to the *Committee on Foreign Investment in the U.S. ("CFIUS"), an interagency committee made up of representatives of various executive branch agencies. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency.

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete an investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair the national security. If the President makes such a determination, Exon-Florio empowers the President to take any action which the President deems appropriate to suspend or prohibit the transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses which require a facility security clearance in order to perform contracts involving classified information. Under *Department of Defense regulations, foreign ownership may cause the Department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD5220.22-R). Assuming that a foreign owner will be in a position to "effectively control or have a dominant influence over the business management of the U.S. firm," the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a "special security agreement" approved by the Department of Defense and designed to preclude the disclosure of classified information to the foreign owner or other foreign interests.

2. Reporting Requirements for Foreign Direct Investment.

All foreign investments in a U.S. business enterprise which result in a foreign person owning a 10% or more voting interest (or the equivalent) in that enterprise are required to be reported to the *Bureau of Economic Analysis ("BEA"), a part of the *U.S. Department of Commerce. Pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. 3101-3108) and the regulations promulgated thereunder (15 C.F.R. 806), such reports must be made within 45 days after the investment transaction. Depending on the site of the entity involved, quarterly, annual and quintennial reports may be required thereafter.

3. The International Investment and Trade in Services Survey Act.

The International Investment and Trade in Services Act ("IISA" or the "Act"), passed in 1976, authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. The IISA's primary function is to provide the federal government with the information necessary to formulate an informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IISA, international investments are divided into two classifications—direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated the power to collect data on direct investments to the BEA, a part of the Department of Commerce, and on portfolio investments to the *Department of the Treasury.

A "foreign person" is any person who resides outside of the U.S. or is subject to the jurisdiction of a country other than the U.S. A "direct investment" is defined as the ownership or control, directly or indirectly, by one person of 10% or more of the voting interests in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because the IISA further defines "business enterprise" to include any ownership in real estate, any foreign investor's direct or indirect ownership of U.S. real estate constitutes a "direct investment" and falls within the requirement that reports be filed with the BEA.

Unless an exemption applies, a report on Form BE-13 must be filed with the BEA within 45 days of the date on which a direct investment is made. The form collects certain financial and operating data about the investment, the identity of the acquiring entity and certain information about the ultimate beneficial owner. In addition, a Form BE-14 must be filed by any U.S. person assisting in a transaction which is reportable under Form BE-13. The purpose is, obviously, to ensure that those required to file a Form BE-13 do so.

4. The Agricultural Foreign Investment Disclosure Act of 1978.

The Agricultural Foreign Investment Disclosure Act ("AFlDA" or the "Act") of 1978 requires all foreign individuals, corporations and other entities to report holdings, acquisitions and dispositions of U.S. agricultural land occurring on or after February 1, 1979. The Act contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the *Secretary of Agriculture to determine the nature and magnitude of this foreign investment. Unlike the reports filed under the International Investment Security Act of 1976, reports filed under AFIDA are not confidential but are available for public inspection.

For the purposes of the Act, a "foreign person" is (i) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (ii) a corporation or other legal entity organized under the laws of a foreign country; and (iii) a corporation or other legal entity organized in the U.S. in which a foreign entity, either directly or indirectly, holds 5% or more of an interest. The definition of "agricultural land" is any land in the U.S. which is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding more than a 5% interest in the ownership entity.

5. <u>Export Controls</u>.

In general, U.S. export controls are more stringent and restrict a wider array of items than the export controls of most other countries. (See the Export Administration Act of 1979, as amended, 50 U.S.C. App. 2401-2420 and the regulations promulgated thereunder, 15 C.F.R. 730-799.) Except for exports to U.S. territories and possessions, and in most cases, Canada, all exports from the U.S. are subject to an export "license." An export license is an authorization which allows the export of particular goods or technical information. Two basic types of licenses exist, general licenses and individual validated licenses.

There are many types of general licenses. These are authorizations which are generally available and for which it is not necessary to submit a formal application. They cover all exports which are not subject to a validated license requirement. Most exports can be made under one of these general classifications.

In contrast, individual validated licenses are required for those items for which the U.S. specifically controls the export for reasons of national security, foreign policy or short supply. If the export of a specific product to a specific destination is subject to an individual validated license requirement, it is necessary to apply for and obtain such a license from the *Office of Export Administration, an office within the U.S. Department of Commerce, prior to the export. Certain commodities cannot be exported to any country without an individual validated license, while certain other commodities may require a validated license only for shipment to specified countries.

For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs in the U.S. Thus, if disclosure of information is subject to a validated license requirement, the disclosure may not be made to a foreign national without first obtaining the necessary validated license, whether or not the disclosure is to occur outside the U.S.

6. <u>Foreign Trade Zones</u>.

Foreign trade zones are areas in or adjacent to ports of entry which are treated as outside the customs not subject to the customs laws of the U.S. until the goods are ready to be imported into the U.S. or exported. These foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, exhibiting and reshipment of merchandise. Foreign trade zones are created pursuant to the Foreign Trade Zones Act (19 U.S.C. 81a-u) and are operated as public utilities under the supervision of the *Foreign Trade Zones Board. Under the Foreign Trade Zones Act, the Board is authorized to grant to public or private corporations the privilege of establishing a zone. Regulations covering the establishment and operation of foreign trade zones are issued by the Foreign Trade Zones Board, while *U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.

7. Anti-dumping Law.

The U.S. anti-dumping law (19 U.S.C. 1671-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry, or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the "dumping margin" is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price which is less than their "foreign market value" (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.

The Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. The International Trade Commission makes the determination of whether such sales cause or threaten material injury to a U.S. industry.

C. **State Considerations**.

1. State Antitrust Laws.

Much like the Sherman Act, the Idaho Competition Act (Idaho Code §§ 48-101 *et seq.*) prohibits contracts, combinations, or conspiracies in unreasonable restraint of trade, as well as monopolization. Idaho Code §§ 48-104 – 106. Some exemptions apply, among them exemptions for activities exempt from federal antitrust laws, for activities required or approved by federal or Idaho law or regulatory authorities, for municipalities, for organized labor, and for agricultural cooperatives. Idaho Code § 48-107. Idaho has codified the "direct purchaser" rule of Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), except that *Idaho's Attorney General may bring actions on behalf of indirect purchasers. Idaho Code § 48-113(1).

Idaho's Unfair Sales Act (Idaho Code §§ 48-401 *et seq.*) prohibits below-cost retail and wholesale merchandise advertising and sales if their intent or effect is to induce purchases of other merchandise or to unfairly divert business from a competitor, and if they tend to deceive purchasers, substantially lessen competition, unreasonably restrain trade, or create a monopoly in any line of commerce. Idaho Code §§ 48-404, -405.

Finally, much like the Robinson-Patman Act, Idaho's Anti-Price Discrimination Act (Idaho Code §§ 48-201 *et seq.*) prohibits price discrimination in connection with sales of commodities. Price discrimination is prohibited if its effect is to substantially lessen competition or tend to create a monopoly in any line of commerce, or to limit competition with a seller that grants, or a buyer that knowingly receives, a discriminatory price. Idaho Code § 48-202(a). A limited exception for cooperative associations applies. Idaho Code § 48-203.

2. <u>State Consumer Protection Laws</u>.

In 1971, the Idaho Legislature passed the Consumer Protection Act to protect consumers and businesses against unfair methods of competition and unfair or deceptive business practices. The *Office of the Attorney General, as authorized by the legislature, has promulgated rules interpreting the Consumer Protection Act.

The Consumer Protection Division of the office of the Attorney General investigates complaints involving to seek legal remedies through private lawsuits. Thus, the statute may be enforced either by the Idaho State Attorney General's Office or by a private party injured by the deceptive acts or practices.

The Consumer Protection Act encourages consumers who have been damaged by deceptive trade practices to seek redress. To obtain a remedy, a plaintiff must establish that (i) a consumer purchased or leased goods or services and (ii) suffered an ascertainable loss of money or property, real or personal (iii) as a result of the use or employment by another person (iv) of an unfair or deceptive method, act or practice. Idaho Code § 48-608. A court may award the consumer a minimum recovery of $1,000, recovery of attorney fees and, at the judge's discretion, costs and punitive damages upon the showing of a violation of the Consumer Protection Act or the Idaho Rules of Consumer Protection and a loss to the consumer. Idaho Code § 48-608.

Idaho law allows consumers who are at least 62 years old or who are disabled to recover additional damages from an individual who violates the Consumer Protection Act. Elderly and disabled consumer are entitled to receive the greater of $15,000 or triple the amount of actual damages if the court finds: (1) the offender knew or should have known that the victim was elderly or disabled; and (2) the offender's conduct resulted in the loss or encumbrance of the elderly or disabled victim's home or the loss of more than 25% of the victim's income, money, or retirement funds. Idaho Code § 48-608.

Specifically, the Consumer Protection Act protects against "Unfair Methods and Practices," Idaho Code § 48-603; "Unfair Solicitation Practices," Idaho Code § 48-603A; "Unfair Tax Return Preparation Practices," Idaho Code § 48-603B; "Unconscionable Methods, Acts or Practices," Idaho Code § 48-603C; "Unfair Telephone Services," Idaho Code § 48-603D; "Unfair Bulk Electronic Mail Advertisement Practices," Idaho Code § 48-603E; and "Mortgage Loan Modification Fees," Idaho Code § 48-603F.

SECTION IV.

TAXATION

A. **Federal Taxation**.

1. Federal Income Taxation.

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.

2. Personal Income Tax.

Individuals are subject to U.S. income tax on their worldwide income if they are U.S. citizens or resident aliens. Resident alien status is determined under a set of complex rules. Any individual who is not a U.S. citizen, and who does not wish to be taxed as such, and who 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% for ordinary income and 28% for capital gains. A nonresident alien generally is subject to tax on dividends from U.S. corporations, as discussed below.

B. **State Taxation**.

1. Explain state personal income, corporate income, franchise, property, sales and uses taxes:

There are various taxes imposed that impact individual taxpayers. The following is a summary of such taxes.

2. Cigarette Tax.

The tax rate for a standard pack of cigarettes is 57 cents. Cigarettes bought over the Internet, over the phone, or from mail-order catalogs generally do not have Idaho tax stamps on the bottom of the packages and are considered unstamped. The penalty for having, buying, or using more than 10 packs of unstamped cigarettes is three times the cigarette tax due for each full or partial pack. The minimum penalty is $50.

3. Individual Income Tax.

Idaho residents are taxed on all income, including income from outside the state. Nonresidents of Idaho are taxed only on income from Idaho sources. Idaho part-year residents are taxed on all income received while living in Idaho plus any income received from Idaho sources when not living in Idaho. Individual Income Tax Rate is 1.6% to 7.4%. Individual (personal) income tax is graduated so higher earnings are taxed at a higher rate. Idaho residents are taxed on their total income, even if it is earned in another state or country. Idaho income tax brackets are adjusted for inflation each year. Credits to offset income tax due include: the grocery credit; credit for tax paid to other states; and credits for donations to Idaho educational entities and some nonprofit youth and rehabilitation facilities. Idaho does not have an Earned Income Tax Credit.

4. Sales Tax.

Sales tax applies to the sale, rental, or lease of tangible personal property and some services. Food is taxed in Idaho, but prescription drugs are not. There is an additional tax for hotel, motel, and campground accommodations. Some counties and resort cities collect a local sales tax. The sales tax rate is 6%.

5. Tobacco Tax.

The tobacco tax rate is 40 percent of the wholesale sales price of the tobacco. Tobacco tax is imposed on all "other tobacco products," excluding cigarettes. When tobacco products are bought over the Internet, over the phone, or from mail-order catalogs, Idaho tax generally is not charged. In that case, both use tax and tobacco tax are owed.

6. Use Tax.

Use tax is a tax on goods put to use or stored in Idaho. When items are bought on the Internet, by phone, or through mail-order catalogs, and they are shipped to Idaho, the items are subject to sales tax. Some retailers do not have a presence in Idaho and are not required to collect Idaho sales tax. If they do not charge Idaho tax on the purchases, a use tax is owed to the state, unless an Idaho exemption applies. A use tax can be paid with either an annual Idaho income tax return or a use tax return, or it can be submitted directly to the *Tax Commission. The use tax rate is 6%.

7. Estate Tax.

Idaho does not have an estate tax, although it did at one time. For this to be reinstated, either the *Idaho Legislature or Congress would have to change the law. In addition, Idaho has no inheritance tax or gift tax.

SECTION V.

TAXES IMPACTING BUSINESSES.

Taxes impacting the various separate legal entities and tax forms required to be filed are as follows:

A. **Business Income Tax**.

1. Corporation.

A Form 41, Idaho Corporation Income Tax Return, must be filed if the corporation is transacting business in Idaho; is registered with the Idaho Secretary of State to do business in Idaho; or has income attributable to Idaho. The income tax rate is 7.4 percent on the Idaho taxable income of a corporation transacting business or authorized to transact business in Idaho or with income attributable to Idaho. If the tax is less than $20, a minimum tax payment of $20 is required. Nonproductive mining companies are not required to pay the minimum $20 tax.

2. S Corporation.

A Form 41S, Idaho S Corporation Income Tax Return, must be filed if the corporation is transacting business in Idaho or is registered with the Idaho Secretary of State to do business in Idaho and files an S Corporation return for federal income tax purposes.

3. Partnership.

A Form 65, Partnership Return of Income, must be filed if the business is a partnership transacting business in Idaho or is a limited liability company treated as a partnership for federal income tax purposes and transacting business in Idaho.

4. Fiduciary.

A fiduciary is a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in a position of trust or fiduciary capacity for any other person or group of persons. A fiduciary must file a Form 66, Idaho Fiduciary Income Tax Return.

B. **Business Sales Tax**.

Sales tax applies to the sale, rental, or lease of tangible personal property and some services. Food is taxed in Idaho, but prescription drugs are not. There is an additional tax for hotel, motel, and campground accommodations. Some counties and resort cities collect a local sales tax.

Idaho law requires retailers who are "doing business" in Idaho to get a seller's permit and collect sales tax on the sale of goods they ship or deliver to customers in Idaho. All retailers doing business in Idaho must file regular Idaho sales tax returns to pay the tax they collect.

A buyer who is a reseller of tangible property from a seller located in many states may be able to use the Uniform Sales and Use Tax – Multijurisdiction certificate for sales tax exemption. States vary in their policies for use of this certificate. Questions regarding the specific eligibility to use this certificate should be addressed to the revenue department of the relevant state.

C. Business Use Tax.

Use tax is a tax on goods that are put to use or stored in Idaho. If sales tax has not been paid on these goods, a use tax is owed (unless an Idaho exemption applies). Use tax is paid directly to the state, instead of the seller of the goods. Businesses that do not make retail sales either pay use tax with their annual Idaho income tax return or a use tax return, or they can submit it directly to the Tax Commission. Businesses that make retail sales pay use tax with their sales tax return. Business owners who are not retailers, and who owe use tax month to month, should get a use tax filing number. A buyer who is a reseller of tangible property from a seller located in many states may be able to use the Uniform Sales and Use Tax – Multijurisdiction certificate for sales tax exemption. States vary in their policies for use of this certificate. Questions regarding specific eligibility to use this certificate should be addressed to the revenue department of the relevant state. If tobacco products are bought, tobacco tax is owed in addition to use tax, and the Form 1350-U, Idaho Self-Assessed Tobacco Tax Worksheet and Return may need to be filed.

D. Miscellaneous Business Taxes - Beer, Cigarette, Tobacco, Etc..

The beer tax rate is 15 cents per gallon. Any business that sells beer at wholesale in Idaho must have a beer tax permit. Any business that sells "strong beer"—beer that contains more than 4 percent alcohol by weight—must have a wine tax permit. The tax rate for a standard pack of cigarettes is 57 cents. Any business that sells cigarettes at wholesale in Idaho must have a cigarette tax permit. The tobacco tax rate is 40 percent of the wholesale sales price of the tobacco. Tobacco tax is imposed on all "other tobacco products," excluding cigarettes. Every distributor or subjobber of tobacco products must have a tobacco tax permit. A retailer is often considered a distributor for Idaho tax purposes. The wine tax rate is 45 cents per gallon. Any business that sells wine at wholesale in Idaho must have a wine tax permit. All direct shippers of wine must have a wine tax permit.

E. Business – Withholding.

Generally, if a business has an employee earning income while in Idaho, it must have an Idaho income tax withholding account. This applies to all employees, including agricultural, household help, and family members. If a business voluntarily withholds Idaho income tax for an Idaho resident working outside of Idaho, it must have an Idaho withholding account.

SECTION VI.

PROPERTY TAX

The Property Tax Rates in 2015 are the Average Urban Rate of 1.574% and the Average Rural Rate of 1.027. A rough estimate of property taxes can be calculated by multiplying the average tax rate by the property value, less exemptions. The actual tax rate is the sum of the tax rates of all the taxing districts in one location.

SECTION VII.

LABOR AND EMPLOYMENT

A. Federal Considerations.

1. Immigration.

With the globalization of world markets, employers located in the United States often seek to employ foreign personnel. A variety of permanent and 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 United States employer and the foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the United States for a temporary time and often the employment authorization is limited to specific employers, jobs, and even specific work sites.

a. Permanent Residency (the "green card"). Permanent residency is most commonly based on family relationships, such as marriage to a United States citizen, or offer of employment. Permanent residence gained through employment often involves a time-consuming process that can take several years to obtain. 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 United States.

b. Temporary Visas. The following are the most commonly used temporary visas:

1) E-1 Treaty Trader and E-2 Treaty Investor 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 United States. E visas are commonly used to transfer managers, executives or technicians with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its United States location. E-1 and E-2 visa holders are allowed a maximum initial stay of two years, but requests for extension of stay may be granted in increments of up to two years each.

2) <u>H-1B Specialty Occupation Visas</u>: H-1B visas are for persons in specialty occupations that require at least a bachelor's degree. Examples of such professionals are engineers, architects, accountants, and, on occasion, business persons. 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.

3) <u>L-1 Intracompany Transferee Visas</u>: Most often utilized in the transfer of executives, managers or persons with specialized knowledge from international companies to United States-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. As in the case of certain E visa capacities, some L managers or executives may qualify for a shortcut in any permanent residence filings.

4) <u>B-1 Business Visitors and B-2 Visitors for Pleasure</u>: These visas are commonly utilized for brief visits to the United States of six months or less. Neither visa authorizes employment in the United States. 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 United States. B-1 or B-2 visitors cannot be on the United States payroll or receive United States-source remuneration.

5) <u>TN Professionals</u>: 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 some medical/allied health professionals, engineers, computer systems analysts, and management consultants. TN holders are granted three-year stays for specific employers and other employment is not allowed without prior INS approval. Particularly with regard to Canadians, paperwork required for filing these requests is minimal.

6) <u>F-1 Academic Student Visas Including Practical Training</u>: Often foreign students come to the United States in F-1 status for academic training or M-1 status for vocational training. 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.

7) <u>J Exchange Visitor Visas</u>: These visas are for academic students, scholars, researchers, and teachers traveling to the United States to participate in an approved exchange program. Training, not employment, is authorized. Potential employers should note that some J 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 United States.

8) O-1 and O-2 Visas for Extraordinary Ability Persons: O-1 and O-2 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim. Also included in this category are those persons who assist in such O-1 artistic or athletic performances.

9) P-1 Athletes/Group Entertainers and P-2 Reciprocal Exchange Visitor 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 of time, to come to the United States and work. Essential support personnel can also be included in this category.

10) There are a number of other non-immigrant visas categories that may apply to specific desired entries.

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

2. Labor and Employment Statutes.

A description of the various federal labor and employment statutes is provided below.

3. Employee Benefits.

a. Employee Retirement Income Security Act of 1974 ("ERISA"): ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, health care plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA generally preempts state laws governing employee plans and arrangements.

b. Consolidated Omnibus Budget Reconciliation Act ("COBRA"): COBRA requires employers to make continuing coverage under medical reimbursement and health care plans available to certain terminated employees, at the cost of the employees. The usual period for which this coverage must be continued is eighteen months. COBRA contains very specific procedures for notifying terminated employees of their COBRA rights.

SECTION VIII.

GENERAL ISSUES

A. **At Will Employment**.

The conventional relationship between an employer and an employee hired for an indefinite period of time 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, 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. Idaho generally is an "at will" state.

It is important to remember, however, that there are a number of laws, both federal and state, as well as common law exceptions, 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). Similarly, under Idaho common law, employees cannot be terminated in violation of public policy.

B. **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 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 independent contractor is self-employed, and payments made to the independent contractor are considered contract payments rather than wages. 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, which, despite variations among the tests, 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. Additional factors shared by the various tests include: the degree of control the employer exercises over the worker's hours and manner of performance; whether the employer provides the worker's tools and/or employee benefits (e.g., medical insurance, vacation pay); the length of service; and the method of payment (e.g., is the worker paid hourly or on a project basis).

The consequences of incorrectly classifying an employee as an independent contractor can be far-reaching and expensive (e.g., liability for unpaid payroll taxes and penalties, administrative claims for benefits provided to regular employees, liability for unpaid unemployment insurance and workers' compensation premiums, increased exposure to governmental audits, and potential exposure to employment-related civil suits and administrative claims).

C. **Employment Agreements**.

While it is not required or necessary to enter into a written employment agreement with any employee, organizations may wish to enter into written employment agreements with one or more key leaders. 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. 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 of time following termination. The provisions of these agreements and whether any such agreement should be used should be discussed with an employment attorney before they are presented to an employee or prospective employee.

D. **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.

E. **Employee Records**.

In general, under federal laws, an employer is either required to or should maintain the following records on each employee:

- One Year: Documents related to hiring, accommodations, promotions, discipline, and discharge, including: job applications, resumes, or any other form of employment inquiry whenever submitted in response to an advertisement or notice of job opening, including records pertaining to failure or refusal to hire any individual; records relating to promotion, demotion, transfer, selection for training or apprenticeship, layoff, recall, or discharge of any employee; job orders submitted to an employment agency or labor organization for recruitment of personnel; test papers completed by applicants or candidates for any position; results of any physical examination if such is considered in connection with a personnel action; advertisements or notices relating to job openings, promotions, training, or opportunities for overtime work; requests for reasonable accommodation for disability or religious observance and what accommodation, if any was granted. This will cover the limitations period of claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") (see Section 8 below for summaries of these and other federal laws).

- Two Years: Supplementary payroll records such as basic time sheets or production records that contain the daily starting and stopping times of individual employees and/or amount produced that day, wage rate tables for computing piece rates or other rates used in computing straight-time earnings, wages, salary, or overtime, and any records needed to explain the wage rate differential based on sex within the establishment (e.g., production, seniority, or other bona fide business criteria). Such information may be necessary in responding to claims under the FLSA, including the Equal Pay Act.

- Three Years: Payroll records listing the employee's full name, home address, date of birth, sex (for Equal Pay Act purposes), occupation/job title, time of day and day of week on which workweek begins, regular rate of pay, the basis for determining regular rate of pay (including any payments excluded from the regular rate of pay), straight-time earnings, overtime premium earnings, additions/subtractions from wages for each pay period, total wages for each pay period, and date of payment and pay period covered by each payment. This is for claims under the ADEA and Fair Labor Standards Act ("FLSA").

- Three Years: Records related to qualified family and medical leave including: basic payroll and employee data (used to determine qualification for protection under the Family and Medical Leave Act ("FMLA")), dates and hours FMLA leave is taken, hours worked in the 12 months prior to start of leave, copies of employee notices furnished to employer, copies of notices provided to employee of rights and responsibilities under FMLA, employer polices applicable to use of family and medical leave, documents verifying premium payments of employee benefits (both employer paid and employee portion of premium), records of any disputes with employees over use of FMLA leave. These documents will assist in supporting compliance with FMLA.

- Three Years or One Year After Termination: I-9 Employment Eligibility Verification Form. These forms must be kept for a minimum of 3 years or 1 year after the employee's employment ends, whichever is longer.

- Four Years: Tax records related to income tax withholdings. This is required by the Federal Insurance Contribution Act and the Federal Unemployment Tax Act.

- Five Years: Occupational illness or injury records. These records, required by OSHA, should be kept for 5 years after the year in which the injury was sustained or treatment ended, whichever is longer.

- Thirty Years: Records of employee exposure to toxic substances. Such records are required by the Occupational Safety and Health Act ("OSHA").

- One Year After Plan Terminates: Employee benefit plan records including: pension plans, insurance plans, seniority systems, merit systems. This includes benefit plans covered by ERISA as well as set plans for advancement, layoff, or reinstatement based on seniority, merit, or some other formula that will be pertinent to either an issue under a collective bargaining agreement or claims of age or other discrimination.

At a minimum, organizations should maintain one or more personnel files for each employee, containing any offer letters and agreements signed by the employee, required wage and hour records, records regarding promotion, additional compensation, termination, disciplinary action, and any documents used to determine the employee's qualifications for employment. Medical records, immigration information, and other confidential documents, such as reference checks and investigative files for harassment claims, should be kept separately from an employee's regular personnel file and should be kept confidential.

SECTION IX.

EMPLOYMENT POLICIES AND EMPLOYEE HANDBOOKS

Every employer, except perhaps those with very few employees, should have written employment policies. Written policies serve to clarify expectations, reduce risk and, in some cases, comply with statutory requirements such as those in the FMLA. In addition, both state and federal law require that certain laws be posted in an area accessible to all employees. There are several services that provide updated posters containing these notices. Most concern compliance with the FMLA, Title VII, ADA, ADEA, the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), workers' compensation, the organization's anti-harassment policy and state and federal wage and hour laws.

A. Nondiscrimination.

Under both federal and state law, employers are prohibited from discriminating on the basis of race, color, religion, sex, national origin, veteran status, pregnancy, age, or disability. These discrimination laws prohibit an employer from making employment related decisions, such as hiring, firing, promotions, pay increases, or conditioning other terms and conditions of employment on a person's protected status.

Failing to comply with discrimination laws can result in expensive lawsuits or administrative investigations. In general, these laws require that all employees be treated equally without regard to their protected status. In addition, employers may not retaliate against employees who seek to further or enforce employment discrimination laws. Employers also should be aware of their obligations to make reasonable accommodations for employees where the employees' disabilities or religious beliefs conflict with employment requirements. These obligations, which exist under both federal and state law, are unlike other equal employment opportunity laws in that treating all employees equally will not satisfy the obligations. Instead, employers must take positive steps to reasonably accommodate employees with disabilities and specific religious practices. See federal laws regarding discrimination in the "Federal Law" section and Idaho laws regarding discrimination in the "Other State Specific Considerations" section both of which are set forth below.

B. <u>Harassment</u>.

Both federal and Idaho laws also prohibit harassment in the workplace against any of the classes of employees protected under federal and state discrimination law. Two types of conduct constitute "harassment in the workplace." The most obvious occurs when a supervisor makes a job promotion or benefit dependent on the receipt or denial of sexual favors. The other type occurs when an employee is forced to endure comments, physical contact, physical gestures, or other behavior that creates an offensive atmosphere for that employee (often called "hostile environment" harassment). While sexual harassment is most often thought of, harassment on the basis of race, disability, age, etc. is also prohibited.

An employer is required to take all reasonable steps necessary to prevent the occurrence of either type of harassment, which includes having an appropriate and comprehensive policy against harassment. For this reason, a harassment policy that both expressly prohibits harassment and provides avenues for employees to report harassing behavior are a must in any workplace. Employees should be encouraged to report any harassing behavior to their supervisors and/or the human resources person, and a senior manager should be designated to investigate such claims. Reasonable steps to prevent harassment also include periodic dissemination of the harassment policy, harassment training (particularly for supervisors), investigations of any complaints, and, when harassment occurs, prompt and effective remedial action. As with discrimination, employers cannot retaliate against an employee who complains about harassment.

C. <u>OSHA Injury and Illness Prevention</u>.

The Occupational Safety and Health Act ("OSHA") regulates work place safety for employers in businesses which affect commerce. Under OSHA, employers are required to furnish their employees with a place of employment free from recognized hazards that are causing, or are likely to cause, death or serious physical harm. Employers must also comply with occupational safety and health standards which are issued under OSHA. "Right to know" regulations issued under OSHA require that employees in certain industries be warned about hazardous materials and chemicals to which they may be exposed. OSHA sets forth a detailed procedure for adopting safety and health standards and provides for inspection, investigation and enforcement. Citations issued for noncompliance can result in civil and criminal penalties, including fines and, for violations causing the death of an employee, imprisonment. States are allowed to develop and enforce their own plans setting and enforcing occupational safety and health standards. Some industries have specific statutes which regulate employee safety and health.

D. <u>Workplace Violence</u>.

Employers should take steps to prevent violence in the workplace. This may include policies against bringing weapons into the workplace, taking prompt and appropriate action against any acts or threats of violence, and creating an environment that will reduce the likelihood of violence in the workplace.

SECTION X.

HIRING PROCESS

The hiring process involves receiving and reviewing applications, interviewing potential candidates, and selecting the employee. Several federal and Idaho laws limit what employers can ask during the process.

A. <u>Applications, Interviewing, Reference Checks and Background Checks</u>.

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 that are not job related.

The hiring process generally involves interviews and reference checks. Federal and Idaho discrimination laws prohibit employers from asking certain questions during the hiring process. For example, questions regarding a person's age, disability, child bearing 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.

Employers which use outside organizations to conduct background checks must comply with the federal Fair Credit Reporting Act. This Act requires certain disclosures and reports to be made available to applicants.

Federal and Idaho disability laws impose certain affirmative obligations on employers to ensure that qualified individuals with disabilities have a fair opportunity to participate in the hiring process. If any pre-employment testing is administered, 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 applicants with disabilities. If an employer is going to administer a drug test, then it should have a set policy and make sure it is applied consistently. 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 should not be provided to the employer.

B. Immigration.

All employers are required 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.

Employers cannot discriminate against employees based on their immigration status. Thus, once an employee has proven 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.

SECTION XI.

COMPENSATION AND BENEFITS

Several different federal and Idaho laws regulate various forms of compensation and benefits. Employers should adopt a compensation scheme that is compatible with the organization's mission and furthers its human resources goals.

A. Wages.

Most employers—regardless of size—are governed by both federal and state wage and hour laws. Federal and state wage and hour laws differ slightly, and employers must follow both. Idaho ties its minimum wage to the federal minimum wage rather than setting its own. On July 24, 2009, the federal minimum wage was increased to $ 7.25/hr.

The two major requirements in both federal and Idaho wage and hour laws concern: (1) payment of the minimum wage and (2) payment for overtime hours. Under the minimum wage laws, employers must pay employees an amount that is at least the statutory minimum wage multiplied by the number of hours that the employee worked in any given work week. Under the laws governing overtime, employers must pay most employees additional compensation for overtime hours.

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. The minimum wage laws apply to all employees and the overtime laws apply to all employees except those who fall into one of the "exempt" classifications under federal law.

B. 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. Furthermore, how bonuses are determined and whether they are guaranteed (for example, for hitting certain production goals) or discretionary will also have an effect on calculating an employee's overtime.

C. Taxes.

Employers are required to withhold federal income tax and social security tax from taxable wages paid to employees. Under federal law, funds withheld must be deposited in certain depositories accompanied by a Federal Tax Deposit Coupon (IRS Form 8109) or through the Electronic Federal Tax Payment System (EFTPS). 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, including nonprofit organizations that are not 501(c)(3) organizations, must also file an Employer's Annual Federal Unemployment (FUTA) 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, available at http://www.irs.gov/publications/p15/index.html. Employers who are 501(c)(3) organizations, however, are not required to file a FUTA Tax Return. If payment of tax is required, any balance is due on or before January 31 of each year. Details may be found in IRS Circular E, available at http://www.irs.gov/publications/p15/index.html and in Publication 15A.

D. Mandatory Benefits.

1. Workers' Compensation.

Almost all employers with one or more employees must provide workers' compensation insurance for their employees. Workers' compensation benefits generally 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 his/her injury, but is compensated through workers' compensation.

2. Unemployment Insurance.

Employers must contribute to an unemployment compensation fund. When an employee is granted unemployment compensation benefits, those payments are usually counted against the employer's account.

3. Other Idaho Laws.

Idaho law does not require any particular job benefits other than the payment of minimum wages. This means that the law does not require that employees receive a certain amount of paid time off, whether for vacation, holidays, or sick leave. If benefits are provided, there is no requirement on how they are administered as long as they are administered in a non-discriminatory fashion. Idaho law also does not require that employers provide any disability or medical insurance benefits. However, if such benefits are provided, the plans may be subject to ERISA, COBRA or HIPPA. See summaries of those laws in "Federal Law" section below.

4. Federally Mandated Benefits.

See summaries of ERISA, COBRA and HIPPA in the "Federal Law" discussion below. If applicable, these federal laws mandate certain specified benefits.

E. Mandatory Leave of Absence.

Several federal and Idaho laws either require or govern 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. Various special leave provisions are discussed in the "Federal Law" and "Idaho Law" Sections below.

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, for the serious health condition of the employee or spouse, parent or child of the employee, or for a qualifying exigency arising out of the fact that a spouse, child or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in the support of a contingency operation. In addition, an employee who is the spouse, child, parent or next of kin of a covered member of the Armed Forces may be entitled to 26 weeks of leave in a 12 month period to care for the service member. A "serious health condition" includes inpatient hospitalization and subsequent treatment therefore and continuing treatment by a health care provider, including pregnancy. 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 his or her 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 his or her 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.

F. <u>Voluntary Benefits</u>.

The benefits listed below are not required by law. However, many employers choose to provide employees with such benefits in order to attract and retain the most qualified workers.

An employer is not required to provide employees with retirement benefits, welfare plans, severance pay, or other voluntary benefits. If an employer does establish such plans, however, they are governed by the Employee Retirement Income Security Act ("ERISA"). See "Federal Law" section below. Under ERISA, employee benefit plans must comply with numerous and complex procedural requirements.

An employer is not required to provide employees with vacation pay. If an employer elects to provide such benefits, however, they should be uniformly applied in conformity with a written policy. This will provide protection against claims of discrimination and may be necessary to ensure the employer complies with the pay provisions of the Fair Labor Standards Act ("FLSA") as it relates to "exempt" employees.

Although it is not uncommon to do so, employers are not required to give employees paid holidays. Indeed, except in cases where accommodation of religious holidays might be required, employers are not required to give employees time off during holidays.

Employers are not required to offer paid sick leave to employees. Traditional sick leave is often limited to time off for dealing with the employee's own illness or possibly to care for a sick child or spouse.

Many employers choose to combine vacation, sick leave, personal days, and floating holidays into a single "paid time off" or "PTO" policy. This makes it easier to administer employee time off, and a single policy for accumulating and using PTO will often suffice.

Paid leaves of absence, such as paid maternity or paternity leave, are not required by law.

SECTION XII.

TERMINATION OF EMPLOYMENT

Absent an expert or implied employment contract that provides otherwise, employment may ordinarily be terminated with or without cause provided there is no violation of applicable anti-discrimination laws or public policy. Prior to termination, the organizations should thoroughly review all records concerning the employee or employees in question and carefully assess the risks of litigation. Normally, advance notice of termination should be given. In most cases, employment counsel should be consulted before terminating one or more employees.

A. **Pay**.

Under Idaho law, all wages earned and unpaid at the time of discharge are due and payable upon the termination of employment and must be paid within 10 days after the termination of the employment or on the next regular pay date, whichever occurs first. Upon written request of the employee, wages must be paid within 48 hours of receipt of the request.

B. **Severance Agreements / Releases**.

Generally, employers are not required to provide severance pay, unless they have agreed to do so. If the employer wants to offer severance to an employee, the employer may ask the employee to sign a release in exchange for the severance, in which case the employee waives all legal claims he or she may have against the employer. If an employer seeks a release, the employee must be provided severance or other consideration in addition to any payments the employee was already entitled to receive. Federal law contains specific statutory requirements for waivers of age discrimination claims and prohibits the waiver of certain wage claims.

C. **Unemployment Insurance / Compensation**.

The purpose of unemployment compensation is to provide benefits to those who are unemployed through no fault of their own. Therefore, to be eligible for payments, an applicant must (1) have been laid off due to lack of work, (2) voluntarily quit with good cause connected with the employment, or (3) been discharged but not for misconduct. In addition, an applicant must (1) be physically able to work and available for work; (2) be actively seeking work during the entire period of benefits; (3) attempt to find a full-time position each week even if the applicant is working part time; (4) file for benefits weekly; and (5) keep a personal record of all job contacts, including the employer name, address, phone number, person contacted, date of contact, and the results of the job contact. The application must be unemployed for a waiting period of one week before the applicant is eligible to receive the benefits.

An applicant receives an amount based on the applicant's earnings during the "base period," which is a one-year period. The base period is based on the first four of the last five calendar quarters the applicant completed work at the time the applicant files the claim. In order to qualify for benefits, the applicant must have earned at least $1,872.00 in one quarter and wages in the other three quarters that are at least 25 percent of the wages in your highest quarter.

Unemployment benefits come from taxes paid by employers on wages of their workers. These taxes are put in a special trust fund that is used solely to pay unemployment benefits to workers who lose their jobs through no fault of their own. The benefits are intended to be temporary to help people with basic needs while seeking new employment.

Employers fund the Unemployment Insurance program by paying quarterly payroll tax. Each employer, unless a cost reimbursement employer, is assigned a tax rate known as an experience rate. This rate is used to calculate quarterly unemployment insurance taxes and experience rates are assigned each year. New employers are assigned a standard rate until they have sufficient employment experience (typically 1 1/2 - 2 years) upon which to base an experience rate.

Idaho's Employment Security Law provides an experience rating system which assigns rates to employers each year based on the employer's actual employment experience. The tax payments and benefit charges in relationship to average payrolls are used to calculate each employer's experience rating.

Unemployment insurance protects workers against a complete loss of wages during periods of involuntary unemployment. An applicant cannot claim benefits for any week in which the applicant worked full time. However, if the applicant works part time and earns less than one and a half times the applicant's weekly benefit amount, the applicant may be eligible to receive full or partial benefits. If the applicant earns over half the applicant's weekly benefit amount, the applicant's unemployment benefit is reduced dollar for dollar. The applicant must report all earnings for any week the applicant works, including holiday, severance, bonus, and vacation pay.

D. Health Care Continuation (COBRA) Requirements.

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires employers who provide employee health and medical benefits to provide notification to employees of their COBRA rights at the time of a "qualifying event" such as a resignation or an involuntary termination of employment. COBRA applies to employers with more than 20 employees. See "Federal Law" section below.

SECTION XIII.

EMPLOYMENT ELIGIBILITY

A. Immigration and Nationality Act ("INA").

The Immigration and Nationality Act ("INA") includes provisions addressing employment eligibility, employment verification and nondiscrimination. Employers may hire only persons who may legally work in the U.S. (i.e., citizens and nationals of the U.S.) and aliens authorized to work in the U.S. The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing Employment Eligibility Verification Form (I-

9). Employers must keep each I-9 on file for at least three years, or one year after employment ends, whichever is longer.

B. <u>Immigration Reform and Control Act ("IRCA")</u>

The Immigration Reform and Control Act ("IRCA") requires that employers, regardless of size, 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. IRCA also prohibits employers of four or more workers from discriminating against lawfully admitted aliens.

SECTION XIV.

FEDERAL LAW

Described below are some of the more significant federal laws, not including immigration, affecting the employment relationship.

A. <u>Title VII of the Civil Rights Act of 1964 ("Title VII")</u>.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on race, sex, color, national origin, or religion. Title VII applies to all employers with 15 or more employees and prohibits discrimination in areas of advertising, recruiting, hiring, promotion, compensation, benefits administration, and termination. Title VII also prohibits harassment based on an individual's protected characteristics, as well as retaliation for engaging in conduct protected by Title VII. To recover damages, any individual who has suffered such discrimination must file a complaint with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged discrimination. In Idaho, however, this time period is extended to 300 days from the alleged discrimination. Once the EEOC investigates the allegations and makes a determination regarding the sufficiency of the evidence to prove the alleged discrimination, the EEOC will notify the employee in writing of his or her right to bring a civil action. Regardless of the EEOC's determination, the employee may, within 90 days of receipt of the notice, bring a legal action based on his or her allegations. An individual's possible remedies under Title VII include compensatory and punitive damages, back pay and front pay, reinstatement, and attorneys' fees.

B. <u>Age Discrimination in Employment Act ("ADEA")</u>.

The Age Discrimination in Employment Act ("ADEA") makes it unlawful for employers to fail or refuse to hire, to discharge, limit, segregate or classify protected employees, or otherwise discriminate against them with respect to their compensation, terms, conditions or privileges of employment because of their age. The ADEA protects employees who are at least

40 years old and applies to all employers with 20 or more employees employed in an industry affecting commerce. There are limited exceptions to the ADEA where age is a "bona fide occupational qualification" necessary to the particular business, or where the differentiation is based on reasonable factors other than age. Employees may file charges of discrimination with the EEOC, which enforces the ADEA. The employee or the EEOC may then sue in federal court for damages and other relief. Remedies under the ADEA include reinstatement or front pay, back pay, liquidated damages, and attorneys' fees.

C. Americans with Disabilities Act ("ADA").

The Americans with Disabilities Act ("ADA") makes it unlawful for employers to discriminate against a qualified individual with a disability based on the existence of the disability, a record of the disability, or on the employer's perception that an employee is disabled. The ADA requires that employers take reasonable steps to accommodate disabled individuals in the workplace unless such measures would constitute an undue hardship on the employer. The ADA applies to employers engaged in interstate commerce that have 15 or more employees. The procedures for pursuing a claim under the ADA, as well as the available remedies, are similar to those provided by Title VII.

D. Pregnancy Discrimination Act of 1978 ("PDA").

The Pregnancy Discrimination Act of 1978 ("PDA") explicitly prohibits discrimination based on pregnancy and its related conditions.

E. Employee Polygraph Protection Act ("EPPA").

The Employee Polygraph Protection Act ("EPPA") generally prohibits the use of polygraph machines by an employer in determining whether to hire, promote or terminate an individual. Some private employers, including those within the security field, those involved in the protection of the public, those involved in operations impacting national security, and those authorized to manufacture, distribute, or dispense any controlled substance, are exempt from the EPPA. The EPPA also permits the use of a lie detector by any employer when the employer sustains an economic loss, the employee to be tested had access to the property that is the subject of the investigation, the employer has a reasonable suspicion that the employee was involved in the incident being investigated, and the employer obtains a statement from the employee authorizing the test. Even in these limited situations where use of a lie detector is permissible, an employee being tested can terminate the examination at any time. Either the Secretary of Labor or an aggrieved employee can bring an action against an employer for violating the EPPA. Remedies include reinstatement, promotion, back pay, and attorneys' fees. The Department of Labor may also impose a fine up to $10,000.

F. Equal Pay Act of 1963 ("EPA").

The Equal Pay Act of 1963 requires employers to pay men and women equal wages for equal work. Equal pay is required for any jobs "the performance of which require equal skill, effort and responsibility and which are performed under similar working conditions." There are exceptions for seniority systems, merit systems, pay systems based on quantity or quality of production, or other pay differentials based on factors other than sex. The Equal Pay Act applies to employers who have two or more employees engaged in interstate commerce, in the production of goods for interstate commerce, or in handling or working with goods and materials in interstate commerce. An employee who believes his or her employer has violated the EPA may bring an action in federal court or file a charge with the EEOC. The employee need not first bring the claim before the EEOC in order to sue. Remedies include back pay, attorneys' fees, and court costs.

G. Fair Labor Standards Act ("FLSA").

The Fair Labor Standards Act ("FLSA") regulates wages and hours of certain covered employees. Employers must keep accurate records of hours worked by covered employees and those employees must receive a regular rate of pay for each hour they work up to 40 hours in a week. The regular rate must be at least equal to the required "minimum wage," which was increased to $7.25 on July 24, 2009. All hours over 40 in a week are considered "overtime." Generally, an employer must provide compensation to any covered (i.e., non-exempt) 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 the FLSA's overtime pay requirements and some occupations and industries have special minimum wage provisions. Employees can make either oral or written complaints under the FLSA. 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.

H. Family and Medical Leave Act ("FMLA").

The Family and Medical Leave Act ("FMLA") requires that eligible employees working for organizations with 50 or more employees be allowed to take up to 12 weeks of unpaid leave per year for the birth or adoption of a child, for the serious health condition of the employee or spouse, parent or child of the employee, or for a qualifying exigency arising out of the fact that a spouse, child or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in the support of a contingency operation. In addition, an employee who is the spouse, child, parent or next of kin of a covered member of the Armed Forces may be entitled to 26 weeks of leave in a 12 month period to care for the service member. A "serious health condition" includes inpatient hospitalization (including for pregnancy), subsequent treatment therefore, and continuing treatment by a health care provider. 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 have worked at a site within 75 miles of where the employer has 50 or more employees. If the employee's need for leave is foreseeable, the employee must provide his or her 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 his or her 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.

I. Federal Employee Retirement Income Security Act of 1974 ("ERISA").

The Federal Employee Retirement Income Security Act of 1974 ("ERISA") regulates employee benefit plans maintained by employers engaged in commerce or in an industry or activity affecting commerce. ERISA contains specific requirements governing the creation, modification, maintenance and reporting of employer pension and retirement plans as well as other plans relating to employee health and welfare benefits. Welfare plans include, for example, plans providing medical, hospital, death or other insurance benefits, vacation and severance benefits. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, providing exemptions for religious institutions, setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA does not prescribe any particular level of severance, insurance, pension or welfare benefits, nor does it require that they be provided at all. This is a matter to be decided by the employer and, if the employer is unionized, to be bargained between the employer and the union. However, if benefits are offered, they must comply with regulations prohibiting discrimination and must be administered fairly under the terms of the benefit plan. ERISA generally preempts state laws governing employee plans and arrangements.

J. Consolidated Omnibus Budget Reform Act ("COBRA").

The Consolidated Omnibus Budget Reform Act ("COBRA") requires employers with more than 20 employees which provide health and medical benefits to offer continuation of those benefits to former employees and their covered dependents ("qualified beneficiaries") upon the occurrence of certain "qualifying events." COBRA generally provides a maximum continuation period of 18 months. In certain circumstances where a qualified beneficiary is disabled at any time during the first 60 days of COBRA coverage, the period can be extended to 29 months. Also, if certain qualifying events occur during the original 18 months of COBRA coverage, qualified beneficiaries become entitled to receive 36 months of continuation coverage. Employers may require electing qualified beneficiaries to pay the entire premium for COBRA coverage plus a 2% administrative charge. COBRA contains very specific procedures for notifying qualified beneficiaries of their COBRA rights. COBRA applies whether employees leave voluntarily or involuntarily.

K. Health Insurance Portability and Accountability Act ("HIPAA").

The Health Insurance Portability and Accountability Act ("HIPAA") establishes limitations on the use of preexisting condition exclusions (so-called "portability" rules). HIPAA prevents group health plans or health insurance issuers from imposing a preexisting condition exclusion of more than 12 months (18 months for late enrollees) for coverage of any condition that was present during the six-month period ending on the individual's enrollment date. In addition to various other provisions, HIPAA mandates that preexisting condition limitations generally may not be imposed upon newborns or adopted children under age 18, and may not apply to pregnancy. The preexisting condition exclusion period must be reduced by periods of "creditable coverage," generally defined as periods of continuous coverage the individual has under other health plans. HIPAA also imposes various other requirements on employers and group health plan providers and insurers, such as nondiscrimination and disclosure requirements, special enrollment rights, and special notice obligations. HIPAA privacy rules extend privacy protection to all types of "protected health information" held by "covered entities." Covered entities include health plans, health care clearinghouses, and health care providers. HIPAA security rules impose requirements with respect to safeguarding and protecting the confidentiality, integrity and availability of electronic protected health information.

L. Occupational Safety and Health Act ("OSHA").

The Occupational Safety and Health Act ("OSHA") regulates workplace safety for employers in businesses which affect commerce. Under OSHA, employers are required to furnish their employees with a place of employment free from recognized hazards that are causing, or are likely to cause, death or serious physical harm. Employers must also comply with occupational safety and health standards which are issued under the Act. "Right to know" regulations issued under OSHA require that employees in certain industries be warned about hazardous materials and chemicals to which they may be exposed. OSHA sets forth a detailed procedure for adopting safety and health standards and provides for inspection, investigation and enforcement. Citations issued for noncompliance can result in civil and criminal penalties, including fines and, for violations causing the death of an employee. States are allowed to develop and enforce their own plans setting and enforcing occupational safety and health standards. Some industries have specific statutes which regulate employee safety and health.

M. Fair Credit Reporting Act ("FCRA").

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. The Act's requirements also extend to criminal background checks conducted by a third party. The FRCA 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. The disclosure/consent may not be made a part of the employer's application form. Additionally, employees/applicants must be notified of any adverse decision based in whole or in part upon credit information. Additional requirements apply to investigative consumer reports.

N. **Uniformed Services Employment and Reemployment Rights Act ("USERRA")**.

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

O. **Genetic Information Nondiscrimination Act ("GINA")**.

The Genetic Information Nondiscrimination Act ("GINA") prohibits an employer from discriminating against an individual in hiring, firing, compensation, terms, or privileges of employment on the basis of genetic information of the individual or family member of the individual. The law defines genetic information as (1) an individual's genetic tests; (2) an individual's family member's genetic tests; or (3) the manifestation of a disease or disorder in the individual's family member. Subject to a number of narrowly defined exceptions, GINA prohibits an employer from requesting, requiring, or purchasing genetic information of the individual or family member. An employer may engage in genetic monitoring of biological effects of toxic substances in the workplace but only in certain narrowly defined situations. Employees may sue in a court of competent jurisdiction for relief from violations of GINA and obtain back pay, front pay, compensatory and punitive damages and attorney's fees.

P. **National Labor Relations Act ("NLRA")**.

These statutes set forth the guidelines governing labor-management relations. They apply to all employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts.

SECTION XV.

OTHER STATE SPECIFIC CONSIDERATIONS

A. **Idaho Human Rights Act ("IHRA")**.

The IHRA prohibits discrimination on the basis of age, race, color, religion, sex, national origin or disability. It is applied much like Title VII of the Civil Rights Act of 1964, the ADA, and the ADEA. Claims of discrimination under the Act must be filed with the Idaho Human

Rights Commission within one year of the alleged discrimination. The statute states that it is to be applied consistent with federal law. Prevailing employees or applicants may obtain back pay, front pay, compensatory and punitive damages, equitable relief, and attorney's fees.

B. Idaho Protection of Public Employees Act.

Idaho law prohibits any adverse employment action or retaliation against a public employee who refuses to participate in any conduct that violates any law, rule, or regulation, who participates in a governmental investigation of a violation of any law, rule, or regulation, or who files or threatens to file a complaint with an appropriate governmental agency. Employees who have been retaliated against may sue for lost wages, reinstatement, and other compensatory damages.

C. Idaho Wage Law.

Employers in Idaho must pay the federal minimum wage.

An employer who fails to pay all wages due after separation of employment may be subject to penalties of up to $750.00 or treble damages. If the wages are paid prior to the Department filing a state lien, the maximum penalty shall not exceed $500.00. The Department determines the appropriateness and amount of any penalties awarded.

With regard to a civil claim for wages, if the court issues a judgment in favor of the plaintiff, the judgment may include all costs and attorneys' fees, and the plaintiff is entitled to recover from the defendant either the unpaid wages and penalties, or damages in the amount of three times the unpaid wages found due, whichever is greater.

SECTION XVI.

EMPLOYMENT LAW RESOURCES

A. Federal.

1. Agencies.

- US Dept. of Labor, http://www.dol.gov
- National Labor Relations Board (NLRB), http://www.nlrb.gov
- U.S. Equal Employment Opportunity Commission (EEOC), http://www.eeoc.gov
- Dept. of Justice Civil Rights Division http://www.usdoj.gov/crt
- Immigration and Naturalization Service (INS) https://www.uscis.gov/

2. Websites.

- Code of Federal Regulations, http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
- United States Code, http://www4.law.cornell.edu/uscode/
- Department of Labor Employment Law Guide, http://www.dol.gov/compliance/guide/
- Family and Medical Leave Act (FMLA)Compliance Guide: http://www.dol.gov/whd/regs/compliance/1421.htm
- Federal Register, http://www.federalregister.gov/
- Additional Materials.
- Employment Law tips, http://employmentlawpost.com/
- Society of Human Resources Management, http://www.shrm.org/Pages/default.aspx
- Bureau of National Affairs (BNA) publications on employment
- Publications by the American Bar Association Section on Labor and Employment

B. State.

1. Agencies.

- Idaho Human Rights Commission, http://humanrights.idaho.gov/
- Idaho Department of Labor, http://labor.idaho.gov/dnn/Default.aspx?alias=labor.idaho.gov/dnn/idl

2. Websites.

- Idaho Code, http://www.legislature.idaho.gov/idstat/TOC/IDStatutesTOC.htm
- Idaho Administrative Code, https://adminrules.idaho.gov/rules/current/index.html

SECTION XVII.

ENVIRONMENTAL LAW

A. <u>Federal Programs Addressing Discharges to Land, Air and Water</u>.

1. Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. 6901, *et seq.* RCRA's primary goal is to control the storage, treatment and disposal of hazardous waste. The administration of RCRA has been delegated to a number of states by statute and, therefore, the states regulate most aspects of hazardous waste management within their borders.

By statute, the disposal of hazardous waste is prohibited except in accordance with a permit. Section 7003 of RCRA authorizes the Federal Environmental Protection Agency (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.

2. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 42 U.S.C. 9601, *et seq.* CERCLA, or Superfund as it is commonly called, was enacted in 1980 to provide for the clean-up of abandoned disposal sites. It also provides a vehicle for the EPA to recover for damage to natural resources caused by hazardous substance releases. This statute has possibly generated more litigation and controversy than any other federal legislation.

CERCLA allows the government and private parties to sue "potentially responsible parties," or PRPs for reimbursement of clean-up costs caused by releases, actual or threatened, of hazardous substances. Liability is strict, joint and several, with little or no regard for causation. By statute, there are three categories of persons liable for clean-up costs:

- "Owners or operators" of the contaminated facility. A "facility" is virtually any place in which a hazardous substance is found. The current or prior owners or operators can be liable, regardless of when the hazardous substance was disposed of at the facility and whether the owner or operator did anything to contribute to the release.
- "Arrangers" who contracted or arranged to have hazardous substances, disposed of at a site.
- Transporters of hazardous substances to a site.

There are limited defenses under Superfund that are narrowly construed.

3. The Clean Air Act ("CAA"). 42 U.S.C. 7401, *et seq.* The CAA regulates air pollutants under federal standards implemented and enforced by the states. The Act was

amended in 1990 to add several new programs, including acid rain control and stratospheric ozone protection programs, coupled with modification of existing programs for attaining the national ambient air quality standards ("NAAQS") and reducing emissions of hazardous air pollutants. Because of the nature of air pollution and its sources, this program is generally considered to be the most complex of the federal environmental programs.

Under the Act, air emissions are regulated through various controls. The sources that can be affected range in size from large petrochemical complexes to neighborhood dry cleaners.

The CAA, as amended, requires a new operating permit for all "major" air sources, with state administration and enforcement. A significant feature is a permit fee based on tons of pollutants emitted on an annual basis; the permit fees are to fund and support the state operating permit programs.

4. The Clean Water Act ("CWA"): 33 U.S.C. 1251, *et seq*. The CWA regulates the discharge of pollutants into waters of the United States. The CWA prohibits point source discharges of pollutants into the waters of the U.S. unless a permit has been issued. Permits are issued by either the state under an approved state program 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 National Pollutant Discharge Elimination System ("NPDES") permit. Additionally, Section 404, permitting programs applicable to discharges of dredged or fill materials into waters of the U.S. The U.S. Army Corps of Engineers administers the CWA's.

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, EPA promulgated new rules regarding permits for storm water discharges under the NPDES permit program.

B. State Considerations.

1. Explain any state environmental organizations.

The major Idaho environmental organizations are the *Idaho Conservation League ("ICL"), *Idaho Rivers United ("IRU"), *Western Watersheds Project ("WWP"), and the *Snake River Alliance ("SRA"). ICL focuses on public lands, IRU on river protection and endangered aquatic species, WWP on public lands and SRA on energy and nuclear power issues. In addition there are chapters of national or regional environmental organizations including *Trout Unlimited, *The Nature Conservancy, the *Wilderness Society and *Greater Yellowstone Coalition, with significant presence in Idaho. Idaho is home to a large number of sportsman organizations, which are typically chapters of national organizations, like *Ducks Unlimited, and *Pheasants Forever.

2. Explain State Environmental Laws.

Idaho's environmental laws are generally modeled after the federal environmental laws, and often have a requirement that they be interpreted by the state's Department of Environmental Quality no more stringently than required by corresponding federal law. Idaho has detailed water quality regulations establishing beneficial uses for waters of the State. It is awaiting approval from EPA to administer a delegated NPDES program under the Clean Water Act. It has been delegated authority by EPA to administer RCRA. Idaho actively strives to avoid federal threatened and endangered species by the development of conservation plans.

SECTION XVIII.

INTELLECTUAL PROPERTY

A. Federal Law.

1. Copyright Law.

This area is governed exclusively by federal law. Title 17, U.S.C.

In general, Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to use, distribute, modify and display the work. Generally, works are entitled to copyright protection for the life of the author plus 70 years. However, as to works made for hire, copyright protection is for the shorter of 95 years after publication or 120 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright and may be liable for actual or statutory damages and subject to injunctive relief.

a. Copyrightable Works. Works of authorship that qualify for copyright protection include literary works, musical works (including lyrics), dramatic works, choreographic works, audiovisual works, pictorial, graphic and sculptural works, sound recordings and architectural works. The Computer Software Copyright Act of 1980 expressly made computer software eligible for copyright protection, a point previously in doubt. The precise scope of copyright protection for computer software has not yet been fully defined. Constantly developing technology is likely to present many new issues, presently unforeseen. All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in some tangible form; there must be a physical embodiment of the work so that the work can be reproduced or otherwise communicated. Second, the work must be the result of original and independent authorship. The concept of originality does not require that the work entail novelty or ingenuity, concepts of importance to patentability.

b. Advantages of Copyright Registration. Copyright protection automatically attaches to a work the moment that the work is fixed in a tangible medium.

However, "registration" of the work with the U.S. Copyright Office provides advantages. A certificate of registration is prima facie evidence of the validity of the copyright, provided registration occurs not later than five years after first publication. With respect to works whose country of origin is the U.S., registration is a prerequisite to an action for infringement. With respect to all works, regardless of the country of origin, certain damages and attorneys' fees relating to the period prior to registration cannot be recovered in an infringement action. Registration also is a useful means of providing actual notice of copyright to those who search the copyright records. Copyright Registration Application Process. In order to obtain registration of copyright, an application for registration must be filed with the *U.S. Copyright Office. The application must be made on the specific form prescribed by the Register of Copyrights and must include the name and address of the copyright claimant, the name and nationality of the author, the title of the work, the year in which creation of the work was completed, and the date and location of the first publication. In the case of a work made for hire, a statement to that effect must be included. If the copyright claimant is not the author, a brief statement regarding how the claimant obtained ownership of the copyright must be included. An application must be accompanied by the requisite fee, and a copy of the work must be submitted.

c. <u>Copyright Notice</u>. Until March 1, 1989, all publicly distributed copies of works protected by copyright and published by the authority of the copyright owner were required to bear a notice of copyright. A copyright notice is no longer mandatory, but a copyright notice is still advantageous. For example, the defense of "innocent infringement" is generally unavailable to an alleged infringer if a copyright notice is used. If a copyright notice is used, the notice should be located in such a manner and location to sufficiently demonstrate the copyright claim. The notice should consist of three elements. First should be the symbol of an encircled "C," or the word "copyright," or the abbreviation "copr." Second should be the year of first publication. Third should be the name of the copyright owner.

d. <u>Works Made for Hire</u>. In a "work made for hire" the employer is presumed to be the author. Authorship is significant because a copyright initially vests in the author. The parties can rebut the presumption of employer authorship by an express written agreement to the contrary. The term "work made for hire" generally applies to any work created by an employee in the course and scope of employment. On occasion there is dispute as to whether a work created by an employee arose from the employment. Employers often require execution of a formal employment agreement under which the employee expressly agrees that all copyright rights will belong to the employer. A similar agreement is also advisable in connection with the engagement of an independent contractor to perform copyrightable services for a business, but the employer should be aware that only certain types of works may be considered a "work made for hire" when created by an independent contractor. If the particular matter cannot be a "work made for hire," the employer should negotiate an agreement for the assignment of the copyright by the independent contractor.

e. <u>Copyright Protection for Foreign Authors</u>. Copyright protection is available under U.S. law for foreign authors until the copyrightable work is published. If the work has been published, the availability of continued U.S. copyright protection is dependent upon the location of the publication and the nationality or domicile of the author. Copyright protection continues in the U.S. subsequent to publication if publication by the foreign author occurs in the U.S., or occurs in a country that is a party to the Universal Copyright Convention or to the Berne Convention, or occurs in a country named in a Presidential copyright proclamation. If the work is first published by a foreign author outside the U.S., continued copyright protection in the U.S. is only available if the foreign author is either a domiciliary of the U.S. or a national or domiciliary of a country that is party to a copyright treaty to which the U.S. is also a party. A person is generally a domiciliary of the country in which the person resides with the intention to remain permanently.

2. Patents: This area is governed exclusively by federal law. Title 35, U.S.C.

a. In General. One who invents or discovers a new machine or device or a new manufacturing process may be able to obtain a U.S. patent. A U.S. patent provides the inventor with the exclusive right for a specified time to make, use, import, offer to sell, or sell in the U.S. the patented invention. A patent provides the holder with a limited monopoly on the use of the patented invention. A valid patent forecloses use of the patented invention by any other party, even if another party independently conceives the identical invention.

A utility patent, which generally governs the functional aspects of a machine, manufacturing process, or composition of matter is enforceable beginning at the grant of the patent and ending 20 years (plus up to 5 more years for certain delays) after the filing date of the regular patent application. A design patent, which covers the ornamental nonfunctional design or appearance of an article of manufacture, is enforceable for 14 years from the granting date of the patent. A provisional patent application, which is filed before a regular, or nonprovisional, patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a regular patent application. Anyone without authority from the patent holder who makes, uses, imports, or sells in the U.S. the patented invention during the life of the patent is considered to "infringe" the patent and may be liable for damages and injunction relief.

b. Effect of Foreign Patents. A foreign patent is generally not enforceable in the U.S. Furthermore, an invention that is the subject of a foreign patent cannot be the subject of a U.S. patent, unless an application for a U.S. patent is filed within one year following issuance of the foreign patent. Accordingly, an inventor who holds a foreign patent and who fails to apply for a U.S. patent within one year from the date of issuance of a foreign patent will usually have no recourse against others who use the invention in the U.S.

c. Patentability Under Federal Patent Statutes. To be eligible for a federal utility patent, an invention must fall into one of the classes of patentable subject matter set forth in the United States patent statutes. These classes are machines (e.g., a mechanism with moving parts), articles of manufacture (e.g., a hand tool), compositions of matter (e.g., a plastic), and processes (e.g., a method of refining). An improvement falling within any of these classes may also be patentable. Discoveries falling outside these categories are not patentable, unless some other statutory provision applies.

In addition to being within one of the four classes and being fully disclosed, a utility invention must also be:

d. "novel," in that it was not previously known to or used by others in the United States or printed or described in a printed publication anywhere;

e. "non-obvious" to a person having ordinary skill in the relevant art; and

f. "useful," in that it has utility, actually works, and is not frivolous or immoral.

A design patent may be obtained for the ornamental design of an article of manufacture. A design patent offers less protection than a utility patent, because the patent protects only the appearance of an article, and not its construction or function.

A plant patent may be obtained by anyone developing a new variety of a sexually reproduced plant, such as a tree or flower. Some plants may also be protectable with a utility patent or under the Plant Variety Protection Act, administered by the *United States Department of Agriculture.

In order to determine novelty and, hence, patentability of an invention, it is often useful to search the records of the *U.S. Patent and Trademark Office. There one may examine all U.S. patents, many foreign patents, and a large number of technical publications. A patent search is customarily performed by a patent attorney or by an individual with similar technical training, sometimes referred to as a patent agent. A patent attorney or patent agent may be asked to render an opinion regarding the patentability of a particular invention. An inventor can then make an informed decision as to whether to proceed with the cost of an actual patent application.

g. <u>Patent Application Process</u>. A U.S. patent application must be filed with the U.S. Patent and Trademark Office. A complete patent application includes four elements. First, the application must include the "specification." The specification is a description of what the invention is and what it does. The specification can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period. Second, the application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English, the oath or declaration must be in a language that the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included.

After a proper application is filed, the application is assigned to an examiner with knowledge of the particular subject matter. The examiner makes a thorough review of the application and the status of existing concepts in the relevant area to determine whether the invention meets the requirements of patentability. The patent review process takes from 18 months to three years. Rejection of a patent application by the examiner may be appealed to the Board of Patent Appeals. Decisions of the Board of Patent Appeals may be appealed to the federal courts. Provisional patent application requirements are less stringent than a regular patent application. The oath or declaration of the inventor and claims are not required and the application is held for the 12-month period without examination.

h. Markings. After a patent application has been filed, the product made in accordance with the invention may be marked with the legend "patent pending" or "patent applied for." After a patent is issued, products may be marked "patented" or "pat.," together with the U.S. patent number. Marking is not required, but it may be necessary to prove marking in order to recover damages in an infringement action.

i. Rights to Patented Inventions. Disputes sometimes arise between employers and employees over the rights to inventions made by employees during the course of employment. Because of this, employers often require employees to execute formal agreements under which each signing employee agrees that all rights to any invention made by the employee during the term of employment will belong to the employer.

3. Trademarks.

This area is governed by both state and federal law.

a. In General. A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination. 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 a business title or the name of a business; a trademark is used to identify the goods manufactured by the business. A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

b. Selection of Trademark. A manufacturer should carefully consider the trademark selected for its merchandise. The level of protection against infringement of a trademark varies with the "strength" or "uniqueness" of the trademark. "Descriptive" marks are the weakest and least defensible. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A "fanciful" mark, the strongest type of mark, is a coined name that has no dictionary definition.

Evaluation should also include consideration of the likelihood of success in obtaining federal and state registrations of the trademark.

Selection of a trademark should be accompanied by a trademark search to determine whether another manufacturer 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, lest the manufacturer become involved in an expensive infringement lawsuit. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.

c. Advantages of Trademark Registration. Under the trademark laws of the United States, 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 is also a prerequisite for bringing a lawsuit under the federal trademark laws.

After five years of continued use of the mark following federal registration the registrant's exclusive right to use of the trademark becomes virtually conclusive. 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.

d. Federal Registration Application Process. 15 U.S.C. § 1051, *et seq.* Federal trademark registration requires that a trademark application be filed with the U.S. Patent and Trademark Office. The application must identify the mark and the goods with which the mark is used or is proposed to be used, the date of first use, and the manner in which it is used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and three specimens of the mark as it is actually used. After the application is filed, it is reviewed by an examiner who evaluates, among other matters, the substantive ability of the mark to serve as a valid mark and the possibility of confusion with existing 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 thirty 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 actual use receives, upon approval of the application, a "notice of allowance." An application 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 results in rejection of the application.

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

After at least 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.

B. State Considerations.

1. State Trademark Law.

Protection of registered trademarks in Idaho is through Idaho Code Title 48, Chapter 5. To register a mark, the applicant must submit a trademark application that may be found on the state's website along with a fee to the Secretary of State. The fees start at $30 for a new registration. The application may be found on the state's website at: http://www.sos.idaho.gov/tmarks/forms.html. Applicants may not register marks that are likely to cause confusion, mistake, deception or disparagement, but the examination process is less rigorous than the federal process. When a mark has been accepted, the Secretary of State's Office will provide the applicant with a certificate as evidence of registration.

Registrations are effective for a period of ten years, and may be renewed for successive ten years by submission of a form provided by the Secretary of State within six months of the expiration of the term of registration.

2. Trade Names.

A trade name is distinguishable from a trademark in that a trade name may identify not only goods and services, but also the business of and/or goodwill of an organization as a whole.

The protection of trade names is governed by state law and is not covered by federal statutes.

Under state law, trade names are sometimes referred to as "DBAs" (doing business as) or "fictitious business names." Persons conducting business under a "fictitious business name" typically must make a filing with the state in which they are doing business.

a. Idaho Filing Requirements & Fees.

In Idaho, a trade name is called an "assumed business name" and is considered any name used in the course of business that does not include the full legal name of all the owners of the organization. In the case of a limited partnership, corporation, or LLC, it is any name that differs in any respect from the name registered with the Secretary of State.

Persons conducting business in Idaho under an assumed business name must disclose their true names by registering with the Secretary of State at http://sos.idaho.gov/corp/abn_form.html. There is a $25 filing fee for each name registered. There is no particular filing deadline in the statute, but filing is recommended as soon as possible. An organization must register its trade name in order to file a lawsuit (for any purpose) on behalf of the organization. However, failure to file will not invalidate contracts made by the entity and will not prevent an entity from defending itself in court in Idaho.

b. Actions for infringement under Idaho Law.

Trade names are not afforded any specific protections under Idaho law. If a trade name is not registered as a trademark but is sufficiently distinctive to acquire common-law trademark rights, then the owner of the trade name will have an action for trademark infringement. In addition, the owner of a trade name may have a common-law action for unfair competition if a competitor adopts the same trade name.

3. Trade Secrets.

The protection of trade secrets is a distinctly state-controlled area and is not covered by any federal statutory grant of rights. A trade secret owner is not required to make continuous use of a trade secret in order to receive protection. Trade secret protection exists for as long as the secrecy of the trade secret is maintained.

a. Definition of a Trade Secret.

Many states have adopted the Uniform Trade Secrets Act which protects information that (1) derives economic value from not being known to the public and (2) is the subject of reasonable efforts to maintain its secrecy. A trade secret can include a business formula, compilation, pattern, program, device, method, technique, or process which, though neither copyrighted nor patented, is used in the conduct of the owner's business, is not disclosed to the public, and provides the owner with some competitive advantage.

The following factors will likely be considered in determining whether a trade secret exists:

- The extent to which the information is known outside the owner's organization;
- The extent to which it is known by employees and others involved in the organization;
- The extent of measures taken by the owner to guard the secrecy of the information (e.g., labeling the information "Trade Secret" or "Confidential," advising employees of the existence of a trade secret, limiting access to the information within the company on a "need-to-know basis," and controlling company access);
- The economic value of the information to the owner and the owner's competitors;
- The amount of effort or money expended by the owner in developing the information; and
- The ease of difficulty with which the information could be properly acquired or duplicated by

b. Misappropriation of Trade Secrets.

Misappropriation of a trade secret occurs when a person acquires the trade secret of another by means which the person knows or has reason to know constitutes improper means, or when a person discloses or uses the trade secret without the express of implied consent of the trade secret owner.

The Uniform Trade secrets Act provides for injunctive relief if a trade secret is misappropriated or there is a threat that a trade secret will be misappropriated. The Uniform Trade Secrets Act also provides for awards of monetary damages, covering both actual loss and unjust enrichment caused by the misappropriation. Absent proof of actual loss or unjust enrichment, a reasonable royalty may be awarded. If the misappropriation is "willful and malicious," the court may award exemplary damages of up to twice the above-mentioned damages, plus attorneys' fees if a misappropriation claim is made in bad faith.

Pursuant to the Uniform Trade Secrets Act, misappropriation is not limited to the initial act of improperly acquiring trade secrets. The use and continuing use of the trade secrets is also misappropriation. It is noteworthy that the Uniform Trade Secrets Act does not require that the defendant gain any advantage from disclosure of the trade secret in order for misappropriation to occur. It is sufficient to show "use" by disclosure of the trade secret with actual or constructive knowledge that the secret was disclosed under circumstances giving rise to a duty to maintain its secrecy.

It is important for organizations to take significant steps to keep the information secret; an organization may not claim misappropriation of a trade secret if there was no effort taken to treat the information as secret. Some practical means by which a company can help avoid misappropriation of its secrets include reminding employees about confidential communications, asking employees to sign confidentiality agreements, and marking sensitive communications with the word "secret" or "confidential."

One may also be criminally liable for the intentional misappropriation of a trade secret.

An action for misappropriation must be brought within three years after the misappropriation is, or reasonably should have been, discovered.

A trade secret is not protected against discovery by fair and honest means, such as independent invention, accidental disclosure, or reverse engineering.

As a general principle, the more difficult the information is to obtain and the more time and resources expended by the employer in gathering it, the more likely it is that a court will find such information to be a "trade secret" under the Uniform Trade Secrets Act.

c. Idaho Trade Secrets Law.

Idaho has adopted the Uniform Trade Secrets Act as Idaho Code Title 48, Chapter 8. As provided by the Act, the common law of trade secrets continues to exist with regard to contractual law and civil liability not premised on misappropriation.

C. Intellectual Property Resources

1. Federal.

a. Agencies.

- U.S. Patent and Trademark Office, www.uspto.gov
- U.S. copyright Office, www.copyright.gov
- U.S. Department of Justice, Computer Crime and Intellectual Property Section, https://www.justice.gov/criminal-ccips
- U.S. Federal Trade Commission, www.ftc.gov

b. Websites.

- Stanford Copyright and Fair use Center, http://fairuse.stanford.edu/
- World Intellectual Property Organization ("WIPO"), http://www.wipo.int/
- Google Patents, http://www.google.com/patents
- Berkman Center for Internet and Society, https://cyber.harvard.edu/

- United States Patent and Trademark Office, http://www.uspto.gov/web/offices/pac/doc/general/index.html

c. Treatises.

- McCarthy on Trademarks and Unfair Competition
- Nimmer on Copyright
- Chisum on Patents

d. Trademark Search Services.

The following is a sample list of trademark search services. It is not intended to include all search services, nor is it intended as a recommendation or endorsement of any of these services.

- Thomson Compumark, http://compumark.thomson.com/do/cache/off/pid/1
- TradeMark Express, http://www.tmexpress.com/services3.php
- Trademark Center, http://tmcenter.com/
- Creative Trademark Services, http://www.creativetrademark.com/
- Allmark Trademark, http://allmarktrademark.com/

2. State

- Idaho Secretary of State, http://www.sos.idaho.gov/

SECTION XIX.

DISPUTE RESOLUTION

A. Federal Court System.

The trial courts of the federal court system are the U.S. District Courts. Federal district court judges are appointed by the President for life terms upon approval by the *United States Senate. Appeals are to the *Ninth Circuit Court of Appeals.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the U.S. Constitution and federal statute. They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, and federal crimes, federal torts, and customs. All other jurisdiction is concurrent with that of the state courts. There are generally two ways to gain access to the federal district courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding $75,000. To be brought in federal court, there must be complete diversity, i.e., none of the plaintiffs may be a citizen of the same state as any of the defendants. The second primary basis involves a federal question, i.e., presenting an issue arising under the Constitution, statutes, or treaties of the United States. If a party's case does not fit within one of the statutorily mandated jurisdictions, there is no recourse to the federal courts.

The workings of the federal district courts are governed by the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court and approved by the U.S. Congress. These are a uniform body of procedural rules applicable to every federal district court in the U.S. Each federal district court also establishes its own rules applicable only to the procedure in that district court.

These rules often set forth very specific guidelines for the handling of an action, and close attention must be paid to them. Thus, one participating in a suit in federal district court must be aware of that court's local rules as well as the Federal Rules of Civil Procedure.

B. State Court System.

1. Describe the state trial court system:

Idaho's trial court system includes the Magistrate Division and the District Courts.

a. Magistrate Division.

The Magistrate Division hears misdemeanor criminal cases, initial criminal felony proceedings (through the preliminary hearing stage), and civil cases where the amount of money in dispute does not exceed $10,000. The Magistrate Division also handles juvenile, family law, and probate cases. In addition, the Magistrate Division handles all original small claims disputes, which are cases where the amount in dispute does not exceed $5,000. Each of Idaho's 44 counties has at least one magistrate judge, and larger counties have more magistrate judges.

b. District Courts.

The District Courts have jurisdiction over criminal felony cases as well as civil disputes where the amount of money in dispute exceeds $10,000. The District Courts also have jurisdiction to hear appeals from the Magistrate Division. Each county in Idaho has a District Court. Idaho has seven judicial districts, each of which has between four and nine judges, depending on the population of the district.

2. Describe the state appellate courts:

Idaho's appellate courts are the Idaho Supreme Court and the Idaho Court of Appeals.

a. Idaho Supreme Court.

The Idaho Supreme Court has appellate jurisdiction over all cases—civil and criminal—appealed from the District Courts. A party may appeal a decision from the District Court to the Idaho Supreme Court as a matter of right. The Idaho Supreme Court also hears appeals from the Idaho Public Utilities Commission and the Idaho Industrial Commission.

The Idaho Supreme Court consists of the Chief Justice and four Associate Justices. Most appeals are heard in Boise, where the Court is located. However, the Idaho Constitution requires that the Court hear cases in Lewiston at least once during the year. In addition, the Court typically hears cases each year in Coeur d'Alene, Moscow, Idaho Falls, Pocatello, and Twin Falls.

Although the Idaho Supreme Court has jurisdiction over all cases appealed from the District Courts, the Court, at its discretion, assigns certain cases to Idaho Court of Appeals. Appeals from the *Idaho Public Utilities Commission and the *Idaho Industrial Commission, as well as all death penalty case appeals, cases involving claims against any state, and extraordinary writs, must be heard by the Idaho Supreme Court and are not assigned to the Idaho Court of Appeals.

The Idaho Supreme Court also establishes statewide rules and policies for the operation of the entire state's court system.

b. <u>Idaho Court of Appeals</u>.

The *Idaho Court of Appeals consists of a Chief Judge and three Associate Judges, with the cases being heard by three-judge panels. The Court of Appeals hears cases assigned to it by the Idaho Supreme Court. Like the Idaho Supreme Court, the Idaho Court of Appeals is located in Boise but, at times, also hears cases in other Idaho cities.

A party may petition the *Idaho Supreme Court to rehear a decision from the Idaho Court of Appeals, but the Idaho Supreme Court is not required to grant the petition.

3. <u>Describe the state tax court system</u>:

Although Idaho does not have a separate tax court, Idaho does utilize a State Board of Tax Appeals, a quasi-judicial body made up of three citizen board members.

A party wishing to contest the tax liability determination of a local or state taxing authority must first exhaust its administrative remedies by appealing to the taxing authority that made the tax determination. Once the party receives a final decision from the taxing authority, the party may generally appeal such a decision to the Board of Tax Appeals or directly to the District Court.

The Board of Tax Appeals conducts hearings around the state in locations convenient to the parties. For example, most appeals from the decision of a County Board of Equalization (regarding property tax assessments) will be heard in the county courthouse of the county where the property at issue is located. In Ada County, where Boise is located, most hearings will be conducted at the Board's offices. For appeals from a decision of the State Tax Commission, the hearings are typically conducted in a location close to the taxpayer's business or residence.

Hearings are generally conducted by a Board Member and a staff hearing officer. At least two of the three Board Members must concur to arrive at a final decision.

Follow the decision of the Board of Tax Appeals, the aggrieved party may choose to request a rehearing before the Board or appeal the Board's decision to the District Court. If the Board's decision is not timely appealed to the District Court, the Board's decision becomes conclusive. Following the decision of the District Court, a party may appeal the decision to the Idaho Supreme Court.

SECTION XX.

FINANCING INVESTMENTS

A. **Explain the tax-exempt financing opportunities in your state**:

Idaho law permits the issuance of most forms of obligations that are entitled to tax exempt treatment under the federal income tax laws. Typically, the obligations must be issued by or through a governmental unit or conduit entity. There are a number of other tax driven limitations and state law limitations on these financing mechanisms that require careful analysis.

Industrial revenue bonds for manufacturing plants may be issued in Idaho pursuant to Idaho Code Title 50, Chapter 27, which authorizes financings for industrial development facilities in Idaho, including manufacturing, processing, production, assembly, warehousing, solid waste disposal, recreation and energy facilities, but excluding facilities to transmit, distribute or produce electrical energy. Recreation facilities financed under these provisions are limited to the acquisition and preparation of land for ski areas, and the acquisition and construction of ski lifts and like facilities and equipment. Industrial development bonds issued under this chapter require the formation of an Industrial Development Corporation, which acts as the issuer of the bonds. As with other types of private activity bonds, the operator of the facility is typically the borrower, who repays the obligations.

In addition, many other types of private activity bonds are authorized and permitted by Idaho law, including bonds or similar obligation for the financing of certain housing facilities through Idaho's housing authorities, the financing of airport facilities through a regional airport authority, and certain other qualified 501(c)(3) bonds for certain facilities.

Private activity bonds are often issued solely on the credit of the borrower and any credit enhancer. These bonds do not obligate the state or any governmental unit, including the issuer of the bonds, for repayment beyond monies received from the borrower.

Private activity bonds may also be issued for 501(c)(3) corporations for certain capital needs of charitable organizations. These financings are usually conducted through local boards or authorities established for such purpose. For example, the *Idaho Health Facilities Authority, established under Idaho law, issues private activity bonds on behalf of 501(c)(3) health care entities (as well as governmental health institutions) to assist the entities in financing needed health care institutions.

The Internal Revenue Code has established a ceiling on private activity bonds that may be issued in each state during a calendar year. Idaho has rarely exhausted its volume cap allocation for qualified private activity bonds.

Tax increment financing ("TIF") may be available through a partnership with one of Idaho's urban renewal agencies. TIF financing is used by state and local governments to pay costs of qualifying improvements necessary to create new development, redevelopment or publicly assisted housing. In general, tax increment may be defined as the difference between existing property taxes on a parcel or area of land before development occurs and the increased property taxes created by the new development. The tax increment revenue is used by the local government to finance the qualifying improvements for a specified term of years. The development or redevelopment financed by TIF must be financed through an urban renewal agency for a permissible public purpose, as authorized by Idaho Code and the applicable urban renewal plan.

Financing for developers may be available through the formation of local improvement taxing districts, such as a Local Improvement District or a Community Infrastructure District. Like the other options, the issuance of obligations pursuant to these statutes requires the formation of a local taxing district. Properties within the district are subject to assessments on the properties, which may be used to repay bonds or other obligations issued to finance certain public improvements within the district.

State and local government units, including states, counties, cities, school districts and special purpose districts (such as fire districts, sewer and water districts and others) as well as the State Bond Bank are authorized to issue general obligation bonds and revenue bonds. Idaho Const. art VIII § 3 generally requires that these entities, before issuing bonds, must first obtain approval by two-thirds (2/3) of their voters before incurring indebtedness. Unlike many other states, Idaho acknowledges very few exceptions to the voter approval requirement.

B. <u>Explain commercial banking opportunities in your state</u>:

Idaho has numerous financial institutions that invest in companies and individuals both in Idaho and outside of Idaho. Idaho enjoys the presence of many local community banks, national banks, credit unions, savings and loans associations, bridge lenders and private equity investors. The *Idaho Department of Finance is charged with regulating lenders and loans made in Idaho.

Under Idaho law there is no requirement to obtain any licensing for commercial loans. Further, there is no usury law in Idaho. A lender is not required to register to do business in Idaho merely as a result of making a loan in Idaho. There are a few parts of the Idaho Credit Code, Idaho Code Title 28, chapter 42, with which commercial loans must comply.

Idaho law allows for both judicial foreclosures under a mortgage or a deed of trust, or non-judicial foreclosures under a deed of trust, pursuant to Idaho Code Titles 6 and 45, respectively.

Idaho is a “one-action” rule state, but does allow for deficiencies following foreclosure sales provided that statutory requirements for timely filing of deficiency actions and other specified procedures are followed. Significantly, Idaho courts have ruled that the “one action” rule does not preclude actions against guarantors who are not also borrowers.

Idaho has adopted, with a few variations, the Uniform Commercial Code.

For a consumer loan, or the extension of credit for personal, family or household purposes, the lender is required to obtain a Regulated Lender’s License from the Idaho Department of Finance, pursuant to Idaho Code Section 28-46-301. There are a few exemptions to the necessity to obtain a license, and there is no “one-time” exemption for regular lenders.

Loans that are secured by residential real property, which is defined as real property that contains one to four family dwellings, require the lender to be licensed under the Idaho Residential Mortgage Practices Act, Idaho Code Title 26, Chapter 31. There are a few exemptions to the necessity to obtain a license, and there is not a “one-time” exemption for regular lenders. Further, a consumer loan or a loan secured by residential real property requires that the lender comply with the Idaho Credit Code, Idaho Code Title 28, Chapter 41 through Chapter 46.

Commercial lenders make many types of loans to Idaho entities and individuals, including but not limited to commercial real estate loans, revolving lines of credit, home mortgage loans, unsecured loans, secured loans, and convertible notes.

Idaho also has a very active private investor sector. These investors tend to make many types of loan which are more weighted on the equity investment side. These investments include, but are not limited to secured and unsecured loans, convertible stock options, warrants, and preferred stock options.

To organize a bank under Idaho law requires compliance with regulations contained in Idaho Code, Title 26 and close work with the Idaho Department of Finance. Further information related to forms necessary to organize a bank under Idaho law can be found at Idaho Department of Finances website. http://finance.idaho.gov/. The investments that Idaho banks are allowed to make are regulated by Idaho Code Title 26, Chapter 7. Further there are limitations on an Idaho banks’ ability to borrow and to pledge assets contained in Idaho Code Title 26, Chapter 8.

C. **Describe any out-of-state financial institutions in your state**:

See above

D. **Describe prominent foreign banks in your state**:

Idaho has no foreign banks with branches located in the state. We are aware of limited investments in Idaho loans by foreign banks.

E. **Describe state securities issues**:

1. Securities Regulation.

Idaho has enacted the Uniform Securities Act (2004) ("Idaho Securities Act"). Idaho Code §§ 30-14-101 *et seq.* The Securities Bureau of the Idaho Department of Finance administers the Idaho Securities Act, regulating the offer and sale of investment securities (e.g., stock, bonds, and limited liability company membership interests) and those individuals and entities that offer investment opportunities to the public. http://finance.idaho.gov/Securities/Securities.aspx. The Act encourages cooperation with securities regulators in other states, the *U.S. Securities and Exchange Commission and other federal agencies to achieve greater uniformity in securities matters. Cooperation may include (among other things) sharing records and conducting joint investigations and administrative proceedings. The Department of Finance has adopted Rules Pursuant to the Uniform Securities Act (2004). https://adminrules.idaho.gov/rules/current/12/0108.pdf.

2. Jurisdiction.

The Idaho Securities Act contains detailed provisions defining the scope of the Department's jurisdiction over the offer and sale of securities in or from Idaho.

3. Registration exemptions.

It is unlawful to offer or sell securities in the state of Idaho unless the securities are registered, the security is a "federal covered security", or an exemption of the security, transaction or offer is available. The Act allows registration by qualification upon filing a registration statement with the Idaho Department of Finance, registration by coordination where the issuer has filed a registration statement with the U.S. Securities and Exchange Commission.

The Act exempts certain securities from its securities registration requirements, including "federal covered securities" such as securities exempt from federal registration requirement under Regulation D of the Securities Act of 1933, provided that the issuer of federal covered securities is required to file a notice and a copy of federal Form D, to consent to service of process and to pay a fee to the Department.

The Act also exempts certain transactions from its securities registration requirements, including isolated nonissuer and other nonissuer transactions, an exchange of securities approved in a fairness hearing, offers and sales to institutional investors, certain limited offerings to not more than ten purchasers present in Idaho during any twelve month period where there is no general advertising and no commission or other remuneration is paid to person other than a registered broker-dealer, a rescission offer, employee benefit plan transactions including securities issued under a written compensatory benefit plan or compensation contract for employees, issuance of securities to directors and other control persons, and stock dividends.

4. Broker-dealer, investment advisor registration.

It is unlawful for any agent, broker-dealer, investment advisor and investment advisor representative to transact business in Idaho unless registered or exempt from registration.

An "agent" is an individual, other than a broker-dealer, who represents a broker-dealer in effecting purchases or sales of securities. The Act exempts an agent of an issuer who offers and sells the issuer's securities, including federal covered securities, if the agent is not compensated by a "success fee"—i.e., payment of commissions or other remuneration based on transactions in the issuer's securities. It is also unlawful for an issuer to employ an agent to offer and sell its securities unless the agent is registered or exempt. The Act exempts certain persons under limited circumstances.

A "broker-dealer" is a person engaged in effecting transactions in securities for the account of others or the person's own account, but excludes certain persons such as an agent or an issuer. It is unlawful for a broker-dealer to transact business in Idaho unless registered or exempt from registration. The Act exempts certain persons under limited circumstances.

An "investment advisor" is a person who, for compensation, engages in the business of advising others as to the value of securities or the advisability of investing in, purchasing or selling securities, or issues analyses or reports concerning securities. An "investment advisor representative" is a person who is employed by or associated with an investment advisor and who makes recommendations or gives investment advice regarding securities, manages accounts or portfolios of clients, or receives compensation to solicit, offer or negotiate for the sale of or to sell investment advice. The Act provides that certain persons are not investment advisors, such as lawyers, accountants or other professionals whose investment advice is incidental to the practice of the person's profession, a "federal covered investment advisor" (i.e., a person registered as an investment advisor under the Investment Advisors Act of 1940) and any other person that is excluded by that Act from the definition of investment advisor. In some circumstances, a federal covered investment advisor is required to file with the Idaho Department of Finance a notice and consent to service of process.

It is unlawful for an investment advisor or investment advisor representative to transact business in Idaho unless registered or exempt from registration. The Act exempts certain persons under limited circumstances, including exemption from investment advisor registration of a person without a place of business in Idaho if the person has had, during the preceding twelve month period, not more than five clients resident in Idaho.

5. Antifraud provisions.

Mirroring federal Rule 10b-5 under the Securities Act of 1933, it is unlawful for any person (including an investment advisor), in connection with the offer, sale or purchase of a security, to employ a device, scheme or artifice to defraud, to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made not misleading, or to engage in any act, practice or course of business that operates as a fraud or deceit upon another person. Enforcement of civil liability for violation of the antifraud provisions is subject to the Securities Litigation Uniform Standards Act of 1998. The Idaho Securities Act provides for liability of a securities seller to a purchaser and for liability of a purchaser to the seller. Control persons are jointly and severally liable to the same extent as controlled persons, subject to certain limited defenses. The Act also imposes joint and several liability on persons who materially aid and abet violations of the Act. The Act provides for rights of contribution and statutes of limitation. In addition, a purchaser or seller of securities or a recipient of investment advice may not maintain an action if a rescission offer is made incompliance with the statutory requirements.

6. Enforcement.

The Department of Finance is authorized to conduct investigations and issue subpoenas, and to institute judicial and administrative enforcement actions. Court actions may be commenced if the Director believes that a person has engaged, is engaging or is about to engage in an act, practice or course of conduct constituting a violation of the Idaho Securities Act and may seek an order imposing injunctive relief, freezing assets, appointing a receiver to take control of a defendant's assets, rescission, restitution or disgorgement or imposing civil monetary penalties. Administrative enforcement actions can result in cease and desist orders, orders suspending or revoking securities, broker-dealer and investment advisor registration exemptions, and imposition of civil monetary penalties. Willful violations of certain provisions of the Idaho Securities Act or rule or order of the Department may constitute a felony that can result in fines and imprisonment. Enhanced criminal penalties may be imposed if the violator knowingly accepts money representing home equity or retirement funds. The *Idaho Attorney General's office or a prosecuting attorney may institute criminal proceedings with or without a reference by the Director.

The Director of the Department of Finance is authorized to commence disciplinary proceedings to deny, revoke, suspend, withdraw, restrict or condition any registration of a broker-dealer, agent, investment advisor or investment advisor representative if the director determines such sanction to be in the public interest. The Director may also impose civil monetary penalties. The Act defines the grounds for such sanctions.

7. Online Resources.

In addition to protection of investors from and prevention of investment fraud, the Securities Bureau's mission includes preservation and promotion of legitimate securities markets and assisting companies in raising capital. The Idaho Department of Finance website includes securities regulation resources such as information about enforcement actions, no action and opinion letters, statutes and regulations, application requirements and forms, fee schedules, assistance for small business in capital formation, and education materials for investors. http://www.finance.idaho.gov/Securities/Securities.aspx.

F. Control Share Acquisition and Business Combination Acts.

The Securities Bureau of the Department of Finance has limited duties under Idaho's corporate takeover acts. In 1988, the Idaho Legislature adopted the Control Share Acquisition Act (Idaho Code §§ 30-1601 *et seq.*), which gives public company shareholders more authority to decide the terms of a takeover, and the Business Combination Act (Idaho Code §§ 30-1701 *et seq.*), which governs certain public company mergers, share exchanges and asset dispositions. These statutes apply to certain public companies incorporated or having a place of business or principal place of business in Idaho. The Business Combination Act allows a corporation to limit the effects of a takeover.

SECTION XXI.

REAL ESTATE

A. Ownership.

1. Who can hold title in your state?

Idaho Code § 55-103 provides that any person, whether citizen or alien, may take, hold and dispose of property, real or personal.

A "person" is defined in various Idaho Code sections. For example, Idaho Code § 30-21-102 (35), with respect to business entities, defines "person" as being an individual, corporation, business trust, estate trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

2. When can an individual own property in your state? Explain. Be sure to include information concerning foreigners.

Generally, there is no limitation as to when an individual can own property. For example, there is no age threshold for minors. However, there are provisions in Idaho law for the appointment of a conservator or for the issuance of a protective order in relation to the estate and affairs of a minor or a person under a disability. See Idaho Code § 15-5-316.

3. When can a domestic/foreign business entity own property in your state?

a. What advantages does a corporation have when purchasing property?

b. What are the disadvantages?

Generally, a domestic business entity (corporation) can own property at any time. See Section II, above, for a more in-depth discussion.

Generally, a foreign business entity (corporation) can own property at any time, but to do business in Idaho with respect to that property requires a certificate of authority from the Secretary of State. Idaho Code § 30-21-502 provides that a foreign corporation may not transact business in the state until it obtains a certificate of authority from the Secretary of State. It should be noted that the mere ownership of property, without more, does not constitute transacting business within the meaning of the statute.

The advantages and disadvantages that a domestic or foreign entity (corporation) has when purchasing property are more fully discussed in Section II above.

4. When can domestic/foreign partnerships own property in your state? Explain the advantages, the disadvantages.

Generally, a domestic or foreign partnership can own property at any time.

5. When can limited liability corporations own property in your state?

In Idaho, this entity is referred to a limited liability company. Generally, a limited liability company can own property at any time.

B. Concurrent Ownership.

Explain the advantages/disadvantages of the following:

1. Tenancy in common.

Tenants in common have the following rights in Idaho:

- Right to partition, in the absence of a valid agreement otherwise (59A Am. Jur. 2d (Partition) § 5; see also Idaho Code § 6-501)
- Right to contribution

- For expenditures on common property for improvements, repairs, incumbrances, or taxes; can get a lien on the moiety of noncontributing cotenant (Thurston v. Holden, 265 P. 697 (Idaho 1928))
- For expenditures absolutely necessary for preservation of common property (Keyser v. Morehead, 130 P. 992 (Idaho 1913))
- For expenses paid in preserving common property (Watts v. Krebs, 962 P.2d 387 (Idaho 1998))
- Right to sell their interest (Anderson v. Carrigan, 298 P. 673 (Idaho 1931))
- Right of entry, use, and possession of common property, subject to same rights in other cotenants (Watts v. Krebs, 962 P.2d 387 (Idaho 1998))

Tenants in common have the following duties and liabilities in Idaho:

- Duty to hold property for all cotenants (Watts v. Krebs, 962 P.2d 387 (Idaho 1998))
- Duty to disclose, derived from duty to hold property for others (Watts v. Krebs, 962 P.2d 387 (Idaho 1998))

2. Joint tenancy.

Joint tenants have the following rights in Idaho:

- Concurrent holders of interest hold as tenants in common unless clear intention to hold as joint tenants is evidenced.
- Right of survivorship.
- Co-owner is not entitled to exclusive possession of property (Steve v. Roby, 254 P. 210 (Idaho 1927))
- During lifetime of parties to joint account, ownership of the funds in the account is determined by the net contributions of each party to the account, unless there is clear and convincing evidence of a different intent (I.C. § 15-6-103(a)).
- Generally, a joint tenant cannot maintain an action at law for trespass or damages without joining the cotenant (Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2, 45 F.2d 649 (D. Idaho 1930)).

Joint tenants have the following duties and liabilities in Idaho:

- Any act of a joint tenant, which destroys one or more of its necessary coexistent unities of interest, time, title and possession, operates as a severance of the joint tenancy (Matter of Estate of Ashe, 753 P.2d 281 (Idaho 1988)).
- Debts secured by jointly owned property by a debtor joint tenant are not enforceable against joint tenancy property after death of the debtor joint

tenant unless one or more of the essential unities was destroyed prior to a joint tenancy's termination by death, and then only to extent of the debtor joint tenant's interest (Ogilvie v. Idaho Bank & Trust Co., 582 P.2d 215 (Idaho 1978)).

3. Tenancies by the entireties.

Idaho does not have a tenancy by entirety statute or applicable body of common law.

C. Spousal Rights.

1. What rights does a spouse, partner have to properties in the event of death or separation?

Idaho is a community property state. Property titled in both spouses' names is presumed to be held as community property. Upon death or divorce, each spouse is the presumed owner of one-half of the property.

2. What responsibilities does a spouse, partner have in the execution of mortgages?

Idaho is a community property state. If the real property which is to be covered by a mortgage is the community property of the husband and wife, pursuant to Idaho Code Section 32-912, both the husband and wife must execute the mortgage.

If the real property which is to be covered by a mortgage is partnership real property, the terms and provisions of the partnership agreement would control who is authorized to execute a mortgage covering partnership real property. In the absence of a partnership agreement, Idaho Code Section 30-23-301(1) provides that each partner is an agent of the partnership for the purpose of its business. The act of a partner executing a mortgage in the partnership name when done in the ordinary course of the partnership business binds the partnership unless the partner had no authority to bind the partnership and the mortgagee knew that the partner did not have authority to bind the partnership.

D. Purchase/Sale of Property.

1. Purchase.

a. What are the procedures in drafting purchase agreements?

There are no specific drafting procedures. The client's transaction determines the drafting procedure. Many local and regional REALTOR® associations have developed their own forms.

b. What should a purchase statement in your state include?

Identify buyer, seller, essential deal terms, the form of transfer document (i.e.; warranty deed, quit claim deed, etc.) and a sufficient legal description of the real property. Sale of residential property under foreclosure requires additional seller warning statement. *See* I.C. 45-1602.

c. What state legislation protects buyers against fraud?

The Idaho Property Condition Disclosure Act, as codified in Idaho Code Section 55-2501, *et seq.*, and 54-2086(1) and 54-2087(4), related to the duties owed by real estate agents to buyers and sellers in a regulated real estate transaction.

d. What kind of taxes are levied on a seller, buyer?

There are no transfer taxes in Idaho for the sale of real property.

e. How are taxes prorated in your state between buyer/seller?

Real and personal property taxes are prorated to the date of closing. Real property taxes are assessed in arrears. The first 1/2 payment is due December 20 and the second half payment is due June 20 of the following year.

2. <u>Closing</u>.

Explain state procedures that affect the following:

a. <u>Deed</u>.

Deeds must be notarized. Use of the word "grant" has statutory meaning. See I.C 55-612

b. <u>Bill of sale</u>.

No special procedures.

c. <u>Mortgage</u>.

Mortgages must be in writing and notarized.

d. <u>Financing</u>.

Any obligation to loan money in excess of $50,000 must be in writing.

e. Closing statement.

The closing statement must show all receipts and disbursements relating to the transaction and all charges by the escrow agency. A copy of the signed written closing statement is to be delivered to all principals to the transaction.

E. <u>Explain foreclosures in your state</u>:

Depending upon the number of acres or location of the real property collateral, Idaho allows the use of either a mortgage or a deed of trust to secure the payment of an obligation. A mortgage may only be foreclosed in a judicial proceeding. A deed of trust may be foreclosed either non-judicially as provided in Idaho Code Title 45, Chapter 15 or foreclosure judicially as a mortgage as provided in Idaho Code Title 6, Chapter 1.

1. <u>Deed of Trust Non-Judicial Foreclosure</u>:

The process to foreclose a deed of trust non-judicially (by advertisement and sale) is set forth in Idaho Code Title 45, Chapter 15. Upon the trustee in a deed of trust declaring a default, the trustee must (i) record a notice of default in the county where the real property is located and (ii) mail a copy of this notice by registered or certified mail, return receipt requested, to any person who owns an interest in the real property or who may have requested such notice.

After the notice of default has been recorded, the trustee may schedule a non-judicial sale of the real property no earlier than 120 days after the recording of the notice of default. The notice of the sale, which must set forth the date, time and location of the sale, must be given by registered or certified mail, return receipt requested to the grantor of the deed of trust, any successor in interest of the grantor, and to any person having a lien or interest in the real property subsequent to the trustee. The trustee must also attempt to serve the adult occupant of the real property at least 30 days before the scheduled sale and post the notice on the real property in question. In addition, the notice of the sale is to be published in a newspaper of general circulation in the county where the real property is located once a week for 4 consecutive weeks before the sale, with the last date of publication occurring at least 30 days prior to the day of the sale. An affidavit of mailing the notice of sale and posting and publication must be recorded in the county where the real property is located at least 20 days before the sale.

A Trustee's Sale may be postponed by the trustee as provided in Idaho Code § 45-1506(B).

A lender may seek to recover a deficiency judgment against the borrower by instituting a judicial action therefore within 3 months after the trustee's sale. A deficiency may not exceed the difference between what was owed on the debt at the time of the trustee's sale and the fair market value of the real property at the time of the trustee's sale.

2. Judicial Mortgage Foreclosure Action:

In order to foreclose a mortgage, a judicial foreclosure action must be filed in the county where the real property is located. If the real property is located in two counties, the mortgagee may file its lawsuit in either county. All defendants in the lawsuit have 21 days after the service of the summons and complaint to file an answer or other responsive pleading with the court. Upon the entry of a judgment and decree of foreclosure and order of sale ("Judgment") by the court, the judgment creditor may proceed to execute on the judgment and have the foreclosed real property sold at a Sheriff's sale.

The procedures which must be followed to execute on real property are set forth in Idaho Code Title 11, Chapter 3. A writ of execution must be issued by the clerk of the court, the Sheriff of the county will issue a Notice of Levy and Notice of Sheriff's Sale and after posting of the notice of sheriff's sale and its publication in a newspaper of general circulation in the county where the real property is located once a week for 20 days the Sheriff's Sale will be held.

If the real property is less than 20 acres, there is a six month period of redemption after the sale and if the real property is 20 acres or more there is a one year period of redemption after the sale. Following the expiration of the applicable redemption period a Sheriff's Deed to the real property in question will be issued.

In the event the proceeds from the Sheriff's sale are insufficient to satisfy the judgment, a deficiency judgment for the difference between the remaining amount of the judgment, plus costs of the foreclosure and sale, and the reasonable value of the foreclosed real property as of the date of the Sheriff's sale.

F. **Land Contracts**.

Land contracts are recognized in Idaho but in recent years the practice has been not to use them. Generally a seller and buyer will enter into a land contract to sell and buy specific real property. The contract and the deed will be placed in escrow until the purchase price is paid at which time the deed is released from escrow and recorded. Possession of the real property is delivered to the Buyer upon execution of the contract. In most situations a Memorandum of Land Contract is recorded in order to put third parties on notice of the sale.

G. **Easements**.

In Idaho, an easement is an interest in real property; it is the right which one person has to use the land of another. I.C. § 50-1301 defines it as "A right of use, falling short of ownership, and usually for a certain stated purpose." It is a nonpossessory interest in land which is in the possession of another: because it is a nonpossessory interest, the holder of an easement has no right to exclude others who are not interfering with the easement owner's rights. Idaho recognizes the historic definition treatment of easements appurtenant and easements in gross.

The guiding principle in interpreting an express easement is the intent of the parties: the intent of the parties controls the scope of the easement.

An easement may be created by an exception to or the reservation in the granting of a deed. *Seccombe v. Weeks*, 115 Idaho 433, 436, 767 P.2d 276, 279 (Ct. App. 1989). An exception is the withholding of title to a portion of the property conveyed and a reservation creates some new right in favor of the grantor in the conveyed property. *Id*. Exceptions and reservations are considered express grants of easements. *Id*.

Because an easement is an interest in real property, to properly convey an express easement, the easement must be in writing to comply with the statute of frauds. Idaho Code Section 9-503; *Sun Valley Land and Minerals v. Hawkes*, 138 Idaho 543, 547, 66 P.3d 798 (2002). *McReynolds v. Harrigfield*, 26 Idaho 26, 140 P. 1096 (1914)." *Fajen v. Powlus*, 96 Idaho 625, 629, 533 P.2d 746 (1975). It should also contain the formal requisites of a deed, including 1) the names of grantor and grantee; 2) the address of the grantee; 3) operative words of conveyance; 4) a description of the easement and servient tenement so the easement can be located; and 5) the Grantor's signature. An express easement can also be created by very general language in a deed making reference to "all easements in view and of record." The Idaho Appellate Court affirmed an easement referenced in this matter in *Seccombe v. Weeks, supra*.

Easements can be created by express dedication. This occurs when, under the laws regarding the creation of subdivisions, a plat is recorded dedicating areas to public use.

An implied grant or reservation creating an easement may occur, based on the circumstances of separation of land, implied by public policy, or informed by continuous use, but these are not favored by courts. In order to establish an easement by implication from prior use, the party trying to establish such an easement must demonstrate (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparently continuous use long enough before conveyance of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Bear Island Water Assn. v. Brown*, 125 Idaho 717, 725, 874 P.2d 528, 536 (1994); *Close v. Rensink*, 95 Idaho 72, 76, 501 P.2d 1383, 1387 (1972); *Davis v. Gowen*, 83 Idaho 204, 210, 360 P.2d 403, 406-07 (1961).

An easement may also be created by necessity where there is (1) unity of title or ownership prior to division of the parcels; (2) necessity of an easement at the time of the severance; and (3) great present necessity for the easement. *Bob Daniels and Sons v. Weaver*, 106 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984). Moreover, an easement by necessity may not be granted if there is an alternate access, though it be expensive or inconvenient. Substantial inconvenience may be an important factor, but it must be weighed against the inconvenience and possible damage that could result to the other party as a result of imposing an easement across their property. *Bob Daniels and Sons v. Weaver*, 106 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984). The person claiming the easement must have a present necessity for it. *Id*. The easement of necessity only lasts as long as the necessity itself lasts; however, following the present necessity, the party claiming the easement need only show that it is reasonably necessary for the easement to continue. *Id*. at 81, 665 P.2d at 1091.

Prescriptive easements can be established by adverse use, where the claimant proves open, notorious, continuous, uninterrupted use, under claim of right, with knowledge of the owner of the servient estate for the prescriptive period. *Gibbens v. Weisshaupt*, 98 Idaho 633, 636, 570 P.2d 870, 873 (1977); *Roberts v. Swim*, 117 Idaho 9, 12-13, 784 P.2d 339, 342-43 (Ct. App. 1990); *Sinnett v. Werelus*, 83 Idaho 514, 522, 365 P.2d 952, 960 (1961). The prescriptive period in Idaho changed in 2006 to twenty (previously, five) years.

Furthermore, prescriptive easements may not be established over wild, unimproved lands. The general rule is that the under the wild, unenclosed, unimproved land exception to the presumption of adverse use in prescriptive easement cases, no adverse use is possible even with the servient owner's knowledge. *Chen v. Conway*, 121 Idaho 1006, 829 P.2d 1355 (Ct. App. 1991); *Cox v. Cox*, 84 Idaho 513, 373 P.2d 929 (1962). The Idaho Supreme Court further addressed the wild, unimproved doctrine in *Wood v. Hoglund*, 131 Idaho 700, 963 P.2d 383 (1998): "when lands over which the prescriptive easement is claimed are wild, unenclosed, or unimproved, the presumption of adversity does not apply; it is presumed that the claimant's use was permissive." *Wood*, 131 Idaho at 704, 963 P.2d at 387.

Joint use also negates the presumption of adversity. The legal requirements for joint use states "the rule would seem to be that where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission." *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941); *Melendez v. Hintz*, 111 Idaho 401, 404, 724 P.2d 137, 140 (1986) (emphasis added).

The legal theory of tacking allows an owner of a dominant estate to benefit from the amount of time the property was held adversely, in addition to any time a subsequent owner of a dominant estate holds the property adversely. *Marshall v. Blair*, 130 Idaho 675, 681, 946 P.2d 975, 981 (1997). Once adverse use is established, the burden is then on the owner of the servient estate to show that the use was permissive, or by virtue of a license, contract or agreement. *Gibbens*, 98 Idaho at 636-37, 570 P.2d at 873-74. Furthermore, once a prescriptive easement is established, it cannot later be defeated by an allegation of subsequent permission. *Marshall v. Blair*, 130 Idaho at 681, 946 P.2d at 981 (1997); *Gibbens*, 98 Idaho at 636-37, 570 P.2d at 873-74.

Additionally, an easement may be created by estoppel or common law dedication, where property is sold or conveyed in reliance upon or with reference to the existence of access. In such case a vendor who induces a buyer to purchase in reliance on vendor's representations and its successors may be estopped to deny the easement, and improvements made in reliance on the representations of the existence of an easement may be basis for estoppel.

One who purchases land expressly subject to an easement or with notice, actual or constructive, that the land is burdened with an easement, takes the land subject to the easement. *Checketts v. Thompson*, 65 Idaho 715, 721, 152 P.2d 585, 591 (1944). When that person takes the land with an easement, he must then refrain from interfering with the use of the easement. *Boydstun Beach Assn. v. Allen*, 111 Idaho 370, 377, 723 P.2d 914, 921 (Ct. App. 1986). In cases where a party is obstructing use of the easement, the trial court has authority to order removal of the obstructions. *Id*. Absent language in the easement to the contrary, the scope of that easement is such that the servient and dominant owners may use the easement but they can only adjust the easement consistent with the normal development of their respective lands. *Id*. at 378, 723 P.2d at 922.

The general rule in Idaho is that the owner of an easement has the duty to maintain and repair the easement, but the servient estate has no such duty. *Gibbens v. Weisshaupt*, 98 Idaho 633, 640, 570 P.2d 870 (1977).

Several methods of enforcement exist for easements, depending on the type of easement. For example, express easements are generally in writing and can be construed as a contract that binds the land. Thus, basic contractual remedies exist between the original grantor and grantee. If the title has passed on the property bound by an express easement, and privity of contract is not present, then other enforcement methods exist.

In addition, a party can seek declaratory relief from a court to enforce the easement. Likewise, injunctive relief is common when seeking to keep an easement open that has been used and later obstructed by owners of the servient estate. Finally, actions can be initiated to quiet title to an easement, depending on the nature of the easement and the type of easement sought. In Idaho, however, quiet title actions to enforce or confirm easements rights are costly and no provisions in Idaho law allow for an award for attorney fees to the prevailing party in easement disputes.

An easement terminates upon the end of a stated term, event, contingency, or condition.

An easement may be terminated if there is merger of the dominant and servient estates. It is well established in Idaho that an easement is the right in lands of another and an owner cannot have an easement on her own property. *Gardner v. Fliegel*, 92 Idaho 767, 450 P.2d 990 (1969). Thus, when the owner of the dominant estate benefiting from an easement also takes title to the servient estate, burdened by the easement, the easement is extinguished.

An easement may be terminated by an express written agreement between the dominant and servient estate owners. Because express easements are treated like contracts, they can be modified and terminated in writing, so long as the written agreement complies with the statute of frauds.

An easement can be abandoned by an act of the dominant owner indicating an intention never to make use of the easement again. The mere nonuse of a previously granted easement does not result in an abandonment of the easement. *Winn v. Eaton*, 128 Idaho 670, 917 P.2d 1310 (Ct. App. 1996); *Kolouch v. Kramer*, 120 Idaho 65, 813 P.2d 876 (1991). Courts rarely find abandonment of an easement without a clear and express intent to abandon the easement.

An easement can be lost under the theory of adverse possession, however. *Sheldon v. Boydstun Beach Association*, 102 Idaho 818, 641 P.2d 1008 (Ct. App. 1982). In Shelton, the owner of the servient estate for an ingress and egress easement constructed a retaining wall, erected fences and planted grass and flowers in the easement area. The trial court found that the servient owner had prevented the use of the property by the dominate estate for its stated purpose, that of boating, bathing, driving and parking, for a period in excess of five years. The trial court found that the use was "actual, open, visible, notorious, continuous, and hostile to the party against whom the claim of adverse possession is made." *Shelton*, 108 Idaho 819, 641 P.2d 1006. The Court of Appeals affirmed the decision and held that because the property owner had "prevented use of the property for the stated purpose," the easement was appropriately terminated. *Id*., 102 Idaho at 820, 641 P.2d at 1007.

When a party has established an easement by necessity, the easement lasts only as long as the necessity. *Cordwell v. Smith*, 105 Idaho 71, 665 P.2d 1081 (Ct. App. 1983). Explaining the reason an easement by necessity is self-extinguishing, the court noted:

> A way of necessity arises from public policy considerations. It is, literally, a creature of necessity. The necessity must exist at the time of the severance by the common owner, and the person claiming such an easement must also show there is a present necessity for it. Once established, a way of necessity exists only so long as the necessity lasts, for it is the policy of the law not to burden a servient estate more or longer than is necessary.
>
> *Id*., 105 Idaho at 79, 665 P.2d at 1089.

Easements are rights in property and they can be extinguished by condemnation or eminent domain proceedings just like ownership interest in property. If the government condemns land burdened by an easement, the government must pay the benefited owner damages for the loss of the easement. *Southern California Edison Co. v. Bourgerie*, 9 Cal.3d 169, 507 P.2d 964 (1973)

H. Lease.

1. Residential.

A lease is an agreement between a landlord and a tenant that governs their relationship, including their rights, duties and obligations as to each other and third parties with respect to the leased premises. A lease sets forth the term, amount of rent, premises leased, among other obligations. Types of leases include but are not limited to residential, commercial, and ground leases. Most lease terms are negotiable between a landlord and a tenant, unless otherwise prescribed by statute. For example, the statutes commonly known as the Idaho Landlord-Tenant Act ("ILTA") govern the relationship between a landlord and tenant as to certain duties, rights and obligations, including the availability of any action for damages and specific performance by the tenant against the landlord. Idaho Code § 6-320. Pursuant to the ILTA, a landlord must return a tenant's security deposit within 21 days unless the lease provides otherwise, but in any event, no more than 30 days from the date the tenant vacates the premises. Idaho Code § 6-321. Commercial leases are subject to ILTA.

Idaho recognizes tenancies at will, tenancies at sufferance, tenancies for life, month to month tenancies, home parks are subject to the Mobile Home Park Landlord-Tenant Act. Idaho Code §§ 55-2001 - 55-2019. Leases must be in writing if for more than one year. Idaho Code § 9-505. An unrecorded lease for more than one year is unenforceable against third parties unless such third party has actual notice of the tenant's right to possession. Idaho Code § 55-812. The recording of a lease or a memorandum thereof provides constructive notice to third parties as to the tenant's right to the premises. Idaho Code §§ 55-811 and 55-818. A tenancy at will must be terminated in writing, and may be terminated by either the landlord or the tenant; provided that not less than one month's notice is provided. Idaho Code § 55-208. After the termination of a tenancy at will, or otherwise pursuant to the terms of the lease, the landlord has a right of re-entry upon three days' notice, or as otherwise provided in the lease if more than three days. The terms of a month-to-month tenancy may be changed by the landlord upon 15 days' notice to the tenant prior to the expiration of the month. Idaho Code § 55-307. If the tenant continues to hold the premises after the expiration of the month, such terms become part of the lease. *Id*. Subject to applicable federal law, a purchaser at a trustee's sale of a foreclosure of a deed of trust is entitled to possession of the premises on the tenth day following the trustee's sale, and any persons remaining except one prior to the deed of trust is deemed a tenant at sufferance. Idaho Code § 45-1506(11). A tenant at sufferance is one who remains in possession of the premises after the expiration of the term of tenancy. Idaho Code § 6-303(1). Except in the case of agricultural land, the landlord may commence a summary eviction proceeding if the tenant fails to pay rent when due, upon three days' notice or longer if required by the lease, if the tenant is or has been engaged in the unlawful delivery, production or use of a controlled substance on the premises during the term, without notice, or in the case of a tenant at sufferance after notice is provided pursuant to Idaho Code § 45-1506(11). Idaho Code §§ 6-303, 6-310. Where the premises consists of agricultural land, if the tenant has held over and retained possession for more than 60 days after expiration of the term without demand from the landlord for possession, the tenant is entitled to hold the premises under the same lease terms for another year. Idaho Code § 6-303(3).

During the lease term, a tenant may remove its fixtures from the premises; provided no damage is caused to the premises, and provided that the fixtures have not become an integral part of the premises. Idaho Code § 55-308. Idaho does not have a statutory landlord's lien provision; however, the tenant may grant the landlord a lien in the tenant's personal property pursuant to the lease. Pursuant to the Property Condition Disclosure Act, unless exempt, a landlord must make certain disclosures to a tenant in a lease with option to purchase, or a ground lease coupled with improvements, or real property improved with or consisting of one to four dwelling units. Idaho Code §§ 55¬2501 - 55-2518.

2. Commercial.

Commercial leases are subject to general contract law and the ILTA.

I. Explain State Zoning.

Land use and zoning in Idaho are governed by local ordinances and procedures adopted in accordance with the Local Land Use Planning Act, Idaho Code §§ 67-6501 - 67-6538 ("LLUPA"), the primary statute governing zoning in Idaho. The planning and zoning powers lie solely with "[a] city council or board of county commissioners." Idaho Code § 67-6504.

Idaho cities and counties have a certain mandatory planning and zoning duties. They must adopt a comprehensive plan in accordance with the procedures and including the information required in Idaho Code Sections 67-6507 through 67-6509. Cities and counties must adopt a zoning ordinance including one or more "zoning districts" which are "in accordance with the policies set forth in the adopted comprehensive plan." Idaho Code § 67-6511. The comprehensive plan is a forward looking aspirational document. Although decisions must be in accordance with the policies of the comprehensive plan, it is not an independent zoning document and it does not supersede or trump the existing zoning designation of property.

They must also adopt an ordinance governing the approval of subdivisions. Idaho Code § 67-6513. Cities and counties must adopt an ordinance regulating the granting of variances, Idaho Code § 67-6516, and adopt a procedure for the granting of permits. Idaho Code § 67-6519. They must provide for the issuance of written decisions in planning and zoning matters in the form of findings of fact and conclusions of law, Idaho Code § 67-6535, and create and preserve a transcribable, verbatim record of all administrative proceedings and keep it for at least six months. Idaho Code § 67-6536.

The planning and zoning power must be exercised "within [the] limits" of the jurisdiction. Const., art. 12, § 2. The result of this is that all incorporated cities exercise all zoning powers within their boundaries and counties exercise all powers in unincorporated areas. In those areas designated for future incorporation, the county exercises the zoning power, but it does so based upon the plans and ordinances of either the city or the county depending upon what arrangement they have negotiated. Idaho Code § 67-6526

LLUPA requires a city or county's governing body to create a planning and zoning commission, when the governing body chooses not to exercise "all of the powers required and authorized by [LLUPA] . . ." Idaho Code § 67-6504. A governing body may create a planning commission and a separate zoning commission. Generally, planning and zoning duties are given to a single commission. Certain approvals can be delegated to a planning and zoning commission, such as the review of certain applications for conditional use permits, variances, and the like. However, a planning and zoning commission does not have the ability to adopt ordinances and cannot approve a final plat of property. Those matters require action by the jurisdiction's governing body but typically requests recommendations on those matters are sought from the planning and zoning commission.

An approval or denial of an application must be in writing with a reasoned statement that (1) explains the criteria and standards considered relevant, (2) states the relevant contested facts relied upon, and (3) explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record. Idaho Code § 67-6534(b).

Therefore, in evaluating a land use issue in Idaho, the specific jurisdiction where the property is located should be identified. Then the jurisdiction's comprehensive plan and zoning ordinance should be obtained and be reviewed. The jurisdiction will have a map identifying the actual zoning designation of the property.

J. Explain State Mineral Rights.

The existence of mineral rights, mining claims, and associated interests in Idaho require knowledge of federal law as to the creation and patenting of such, an understanding of Idaho law, and an understanding of the unique mining history and geology of the state. Private lands in Idaho typically had their genesis from various federal grants under a multitude of federal statutes. Some federal reservations reserved all mineral, including oil and gas, others did not. Consequently, determination of the existence of mineral rights and the scope of any reservation necessitates a review of the original patent in determining what rights an owner has to minerals.

The State of Idaho has historically reserved its interest in the mineral rights located on lands that the State of Idaho has conveyed away. As there are many areas that were originally state lands prior to conveyance, the title and history of the property is an important consideration. The scope of the mineral reservation is based upon both the plain language of the reserving instrument as well as the date of the reservation, as the Idaho Legislature has from time to time changed the statutory definition of what is contained within the scope of the mineral reservation. Due to the unique and complex nature of mineral rights in Idaho, legal matters relating to mineral rights necessitate the involvement of local Idaho counsel.

In the conveyance of real property, the failure to mention minerals either in grant or reservation transfers all the mineral estate to the grantee. To reserve a mineral right, the mineral estate must be specifically stated. A reservation which reserves all minerals will include oil and gas.

K. Explain Eminent Domains.

Whenever a state or local unit of government or a public utility is beginning negotiations to acquire a parcel of real property in fee simple, the condemning authority shall provide the owner of the property a form containing a summary of the rights of an owner of property to be acquired.

Fee simple title, an easement and temporary possession of real property may be taken for public use when the taking is necessary for such use. There are limitations on what constitutes a public use. *See* I.C. 7-701A. In all cases where the owner of the lands sought to be taken resides in the county in which said lands are situated, the condemning authority must seek, in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof.

For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected. Idaho Code section 7-711 describes the way in which a property is assessed for compensation and damages. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed. For purposes of ascertaining the value of the property, the minimum amount for damages shall be the greater of the assessed value for property tax purposes unless the court, jury or referee finds the property has been altered substantially, or the plaintiff's highest prelitigation appraisal. If the property sought to be condemned constitutes only a part of a larger parcel, severance damages are awarded. Furthermore, any business having more than five (5) years' standing at the property sought to be taken may recover business damages. The business must be owned by the party whose lands are being condemned or be located upon adjoining lands owned or held by such party. Business are not awarded if the loss can reasonably be prevented by a relocation of the business or by taking steps that a reasonably prudent person would take, or for damages caused by temporary business interruption due to construction. *See* I.C. § 7-111.

SECTION XXII.

MISCELLANEOUS Explain the following:

A. Restrictions on Specific Professions.

Idaho has statutory licensing requirements for various professions, which are primarily found in Title 54 of the Idaho Code. In addition, mortgage brokers, mortgage lenders and mortgage loan originators are required to obtain a license in Idaho pursuant to Title 26, Chapter

31 of the Idaho Code. Further information on professional licensing can be found at the State of Idaho's website at http://idaho.gov/business/licensing.html.

B. Business Name Registration Requirements

A person's use of an assumed business name in Idaho is controlled by the Idaho Assumed Business Names Act, Idaho Code §§ 30-21-801 *et seq.* In Idaho, an "assumed business name" is considered (i) any name other than the true name of the entity under which name the entity holds itself out for the transaction of business in Idaho, or (ii) any name used in the course of business in Idaho that does not include the full legal name of all the owners or other persons who have a financial interest in the business which is or may be transacted by the entity.

Persons conducting business in Idaho under an assumed business name must disclose their true names by registering with the Secretary of State at http://sos.idaho.gov/corp/abn_form.html. There is a $25 filing fee for each name registered. Any person that intends to transact business under an assumed business name in Idaho must file with the Secretary of State prior to beginning to transact business, although there is no particular deadline in the Idaho Code for filing. I.C. § 30-21-805. An organization must register its trade name in order to file a lawsuit (for any purpose) on behalf of the organization. However, failure to file will not invalidate contracts made by the entity and will not prevent an entity from defending itself in court in Idaho.

SECTION XXIII.

APPENDIX

Please go back through your answers and mark any agencies, institutions or contacts you referenced with an asterisk (*). Use the section below to list addresses and contact information for these people and places.

Bureau of Economic Analysis
4600 Silver Hill Rd.
Washington, DC 20233
(301) 278-9004

Committee on Foreign Investment in the U.S.
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220
(202) 622-1860

Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400
(703) 571-3343

Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220
(202) 622-2000

Ducks Unlimited, Inc.
One Waterfowl Way
Memphis, Tennessee, USA 38120
1-800-45-DUCKS or
(901) 758-3825

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2222

Foreign Trade Zones Board
U.S. Department of Commerce
1401 Constitution Ave., NW,
Room 2111
Washington, DC 20230
(202) 482-0862

Greater Yellowstone Coalition
215 South Wallace Avenue
Bozeman, Montana 59715
(406) 586-1593

Idaho Conservation League
710 N 6th St Boise, ID 83702
(208) 345-6933
1-877-345-6933 (toll free)

Idaho Court of Appeals
PO Box 83720
Boise, ID 83720-0101
(208) 334-2210

Idaho Department of Finance
800 Park Blvd., Suite 200
Boise, ID 83712
(208) 332-8000

Idaho Health Facilities Authority
PO Box 8867
Boise, Idaho 83707
(208) 342-8772

Idaho Industrial Commission
P.O. Box 83720
Boise, Idaho 83720-0041
(208) 334-6000

Idaho Legislature
P.O. Box 83720
Boise, ID 83720-0054
(208) 334-2475

Idaho Public Utilities Commission
472 W Washington 83702
P O Box 83720
Boise, ID 83720-0074
(208) 334-0300

Idaho Rivers United
PO Box 633
Boise, ID 83701
(800) 574-7481

Idaho Secretary of State
450 N. 4th Street
P.O. Box 83720
Boise, ID 83720-008
(208) 334-2301

Idaho State Attorney General's Office
700 W. Jefferson Street
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Idaho State Board of Medicine
PO Box 83720
Boise, Idaho 83720-0058
(208) 327-7000

Idaho State Tax Commission
P.O. Box 36
Boise ID 83722-0410
(800)-972-7660

Idaho Supreme Court PO Box 83720
Boise, ID 83720-0101
(208) 334-2210

Immigration and Naturalization Service
1185 South Vinnell Way
Boise, ID, 83709

Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939
(415) 355-8090

Office of Export Administration
700 West State Street
2nd Floor
Boise, ID 83720
(208) 364-7791

Pheasants Forever
1783 Buerkle Circle
St Paul, MN 55110
(651) 773-2000
1-877-773-2070 (toll free)

Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250
(202) 720-2791

Snake River Alliance
PO Box 1731
Boise, ID 83701
(208) 344-9161

The Nature Conservancy
4245 North Fairfax Drive, Suite 100
Arlington, VA 22203-1606
(703) 841-5300

Trout Unlimited
1300 N. 17th St.
Suite 500
Arlington, VA 22209-2404
1-800-834-2419

U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
(202) 707-3000 or 1-877-476-0778 (toll free)

U.S. Customs Service
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20229
1-877-227-5511

U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230
(202) 482-2000

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 514-2000

U.S. Patent and Trademark Office
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

U.S. Securities and Exchange Commission
Idaho Attorney General
700 W. Jefferson Street
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Uniform Law Commission
(312) 450-6600

United States Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250
(202) 720-2791

United States Internal Revenue Service (“IRS”)
550 West Fort St.
Boise, ID 83724
(208) 387-2847

United States Senate
Office of Senator (Name)
United States Senate
Washington, D.C. 20510
(202) 224-3121

US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
(866) 487-2365

Wilderness Society
1615 M Street NW
Washington DC 20036
(202) 833-2300

Western Watersheds Project
P.O. Box 1770
Hailey, Idaho 83333
(208) 788-2290