

# Arizona

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# Arizona

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## **Introduction**

Located in the Rocky Mountains region of the southwestern United States, Arizona ranks sixth in size among the 50 states and is one of the best places in the country to do business.<sup>1</sup> A right-to-work state, Arizona's business climate offers several advantages: low operating costs; proximity to major markets in Mexico, California, Nevada, New Mexico, Utah, Colorado, and Texas; high quality of life; a skilled labor force; competitive taxes; and a robust infrastructure.

The Arizona Commerce Authority (ACA), established in 2010, is the economic development organization driving the state's economic transformation. From online simplified business registration services to loans, tax credits, and assistance provided by various state offices and agencies, Arizona is a truly business-friendly state that helps new businesses get started and enables established businesses to expand their services.

## **Establishment of Enterprises**

### **Arizona Corporation Commission**

Arizona's corporate laws were designed to ensure profitable cultivation of Arizona's natural resources and foster a fertile environment for investment and innovation. Consistent with this central concern, Arizona's Constitution authorized the formation of corporate entities and established the Arizona Corporation Commission (ACC). The ACC's broad responsibilities extend beyond the regulation of public service utilities. The ACC has the responsibility, subject to legislative oversight, over both the issuance of certificates of

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<sup>1</sup> The original version of this updated summary is taken from the greatly expanded publication by Snell & Wilmer, LLP entitled *Doing Business in Arizona: A Legal Guide* (forthcoming 2012). The author would also like to thank Richard C Katz and Jacob T Muklewicz for their additional contributions in the areas of customs regulation and immigration.

incorporation or licenses to foreign corporations to do business in Arizona and the administration of the Arizona Securities Act.<sup>2</sup>

In addition, the ACC is authorized to administer the Arizona Limited Liability Company Act,<sup>3</sup> collect annual reports from Arizona corporations, and to engage with the public and disseminate pertinent information to the business sector. The ACC also is empowered with the related rule-making, enforcement, and investigative powers to effectively carry out those responsibilities. The ACC has jurisdiction over all private corporations and public-service corporations. Thus, in addition to the Arizona Secretary of State, the ACC plays an important role in the formation, operation, and termination of Arizona businesses.

### **Limited-Liability Company**

One or more persons may form a limited-liability company (LLC) by signing and filing articles of organization with the ACC. The members in an LLC customarily enter into an operating agreement at the time the articles of organization are filed. The purpose of the operating agreement is to describe the members' financial responsibilities, management rights, and profit and distribution shares. As with general partnerships and limited partnerships, if the members do not define their rights and obligations in an operating agreement, Arizona law will supply any missing rights or obligations in a manner that may or may not be consistent with the members' expectations.

The principal benefit available with the use of an LLC is protection against the personal liability of the members. A member's risk associated with the LLC is generally limited to the amount contributed or required to be contributed to the LLC. LLCs also afford members significant freedom to structure member and/or manager rights and obligations according to the parties' wishes through the operating agreement. Rights and obligations include the allocation of economic rights such as the sharing of profits, losses, and distributions, as well as management powers and responsibilities. Members also benefit from the single level of taxation resulting from the treatment of the LLC as a non-taxable partnership for income tax purposes.

### **Stock Corporation**

#### *In General*

Corporations, popular vehicles for making investments or conducting business, can accommodate wide variations in the number of owners (shareholders), ranging from a corporation in which all the outstanding shares are owned by one person, to a 'closely held' corporation in which the shares are held by a limited number of persons, to a 'publicly held' corporation in which share ownership is

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<sup>2</sup> Arizona Revised Statutes, ss 44-1801 *et seq.*

<sup>3</sup> Arizona Revised Statutes, ss 29-601 *et seq.*

held by hundreds or thousands of shareholders. Arizona laws governing corporations are designed to permit corporate operations with minimal red tape.

Several formalities must be observed in forming a corporation. The incorporator (i.e., the person who forms the corporation) must file the corporation's articles of incorporation and a certificate of disclosure with the ACC, with the accompanying filing fee. After filing the articles of incorporation and the certificate of disclosure, the directors named in the articles of incorporation must hold an organizational meeting to elect officers and transact other appropriate business.

The adoption of corporate bylaws is among the first items of business. The bylaws of a corporation set out the details of corporate governance and normally contain provisions relating to the conduct of business and to the rights and powers of shareholders, directors, and officers. Bylaws must be consistent with Arizona law and with the articles of incorporation.

#### *Shareholders' Meeting*

Corporations are generally required to hold an annual meeting at a time stated in or fixed in accordance with the bylaws. Annual shareholders' meetings may be held in or out of Arizona. If no place is stated in or fixed in accordance with the bylaws, annual meetings must be held at the corporation's known place of business. The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action. Special shareholders' meetings also may be called. In either case, the shareholders must be provided with notice of the meeting. The bylaws or the board of directors may fix the record date. The shareholders on such date are entitled to receive notice of and to vote at the meeting. The corporation must make a list of shareholders as of the record date available for inspection by the shareholders.

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all shareholders to participate in an annual or special shareholders' meeting or conduct the meeting through use of any means of communication by which all shareholders participating may simultaneously hear each other during the meeting. If the board of directors elects to permit participation by such means, the notice of the meeting must specify how a shareholder may participate. A shareholder participating in a meeting by these means is deemed to be present in person at the meeting.

At the annual meeting of shareholders, the corporation's shareholders may elect the directors, vote on director or shareholder proposals, and ratify the company's auditors, among other matters. At the annual election of directors, each shareholder has the right to vote the number of shares owned by him multiplied by the number of directors to be elected. A shareholder may cast all of his votes for one candidate or allocate votes in any manner among the candidates. Under this system of 'cumulative' voting, shareholders can elect directors in rough

proportion to the percentage of shares they own. Shareholders may vote in person or by proxy.

### *Board of Directors*

Management of a corporation is vested in its board of directors. Each director must be an individual. Generally, there is no limit to the number of directors that a corporation may have. Directors are required to manage the business of the corporation in good faith, with the ordinary care that a prudent person would exercise under similar circumstances, and in a manner they reasonably believe to be in the best interests of the corporation.

Directors need not be shareholders of the corporation nor need they be Arizona residents, unless the articles of incorporation or bylaws so provide. The board of directors elects the officers, and the officers may then appoint one or more assistant officers if authorized by the bylaws or the board of directors.

Meetings of the board of directors may be held within or outside Arizona and may be held by conference phone or other communications equipment. The directors also may take action by unanimous written consent without holding a meeting. Unless a different number is specified in the bylaws or articles of incorporation, a majority of directors constitutes a sufficient number of directors (quorum) necessary for the transaction of business at a board meeting.

If the articles of incorporation provide, and to the extent that it does not infringe upon the shareholders' cumulative voting rights, the term of office of the board of directors may be divided into a 'staggered board', usually consisting of two or three groups. With a staggered board, only the directors in a particular group stand for election at each annual meeting, so that only a half or a third of the board is elected in any given year. Staggered boards promote continuity of management by preventing a shareholder or group of shareholders from replacing all of the directors at a single annual shareholders' meeting.

## **Acquisition of Enterprises**

### **In General**

Arizona law permits an entity to acquire another entity, whether by consolidation, stock acquisition, or asset acquisition. Arizona requires board approval of a plan of merger or share exchange, and in some cases requires the board to submit the plan to its shareholders for approval.

If the company owns more than 90 per cent of another company, Arizona law generally permits the parents to merge the subsidiary into itself without the approval of its shareholders or the other shareholders of the subsidiary. This is commonly referred to as a 'short-form' merger. In either case, the plan of merger or exchange must be filed with the ACC to become effective.

**Merger**

Generally, when a merger takes effect, every other entity that is a party to the merger merges into the surviving corporation and the separate existence of every entity except the surviving entity ceases. The title to all real estate and other property owned by each entity that is a party to the merger is vested automatically in the surviving entity, without reversion or impairment. The surviving entity automatically has all of the liabilities of each entity that is a party to the merger.

A proceeding pending against any entity that is a party to the merger may be continued as if the merger did not occur or the surviving entity may be substituted in the proceeding for the entity whose existence ceased. The charter of the surviving entity is amended to the extent provided in the articles of amendment and merger. The shares of each entity that is a party to the merger that are to be converted into shares, obligations, or other securities of the surviving or any other entity or into cash or other property are converted, and the former holders of the shares are generally entitled only to the rights provided in the plan of merger.

In general, foreign entities may merge with or into an Arizona entity, provided the transaction complies with the law of both jurisdictions.

**Share Exchange and Asset Purchase**

If the directors desire to sell, exchange, or otherwise dispose of all or substantially all of the corporation's property other than in the usual and regular course of the corporation's business, a majority of the outstanding voting shares of the corporation usually must approve the transaction.

If a shareholder disagrees with (or 'dissents from'), among other things, the sale or disposition of all or substantially all of the corporation's assets or a merger of the corporation with another corporation, subject to certain limitations, the dissenting shareholder may, by complying with certain notice and other statutory requirements, require the corporation to purchase his/its shares. If the corporation and the dissenting shareholder cannot agree on a value for the shares, the corporation must request a court to determine their value. These dissenters' rights do not extend to holders of shares of an Arizona corporation registered on a national securities exchange (e.g., NYSE or NASDAQ), nor to a class or series of shares that are held by 2,000 or more shareholders of record, unless the corporation's articles of incorporation provide otherwise.

**Corporate Anti-Takeover Protections**

In certain cases, Arizona law provides rights to existing management to avoid the effects of hostile takeovers. For example, the voting rights of shares of issuing public corporations that are acquired in a control share acquisition may be limited. An issuing public corporation would include certain publicly held

companies and companies that elect to be subject to such rules in their articles of incorporation if certain additional conditions are satisfied.

In addition, subject to certain conditions, an issuing public corporation may be prohibited from engaging in any business combination (such as a merger or share exchange) with any interested shareholder (or affiliate) for a period of three years after the date on which the interested shareholder acquired his/its shares in the corporation. Arizona law also permits a corporation to specify in its articles of incorporation that certain matters must be approved by a greater voting requirement than would otherwise be required by law. Mergers and acquisitions also are subject to federal and state antitrust laws. The distinctions between Arizona and federal antitrust laws are discussed in the section 'Competition Law'.

## **Acquisition of Realty**

### **In General**

A common investment in Arizona is ownership and development of real estate. Business operations in Arizona are often accompanied by the purchase or lease of local real estate. Foreign persons who contemplate investment or business activities that involve real estate will find Arizona attractive from a legal standpoint. Arizona has no 'alien land laws' that restrict the acquisition or lease of real estate by foreign persons.

Foreign persons have the same rights and opportunities as American citizens to acquire or lease Arizona real estate. In acquiring Arizona real estate, an investor usually acquires either outright ownership of the property ('fee simple' ownership) or a leasehold interest.

### **Purchase Agreements**

#### *In General*

The purchase of fee simple ownership of Arizona real estate is best accomplished through a written purchase agreement. An oral agreement to purchase or sell Arizona real estate is generally not enforceable. Arizona laws give wide latitude to the parties to structure their transactions. As a result, a written purchase agreement in Arizona is often lengthy and detailed.

A purchase agreement will cover basic matters such as the purchase price of the property, the identity of the property, the timing of the transaction, and the allocation between the potential buyer and seller of ongoing income and expense, such as rents or utilities. Most real estate purchases also require investigation of the property by the potential buyer, a process that can involve substantial expenditures of time and money. Therefore, most written purchase agreements provide for a period of time during which the buyer may investigate the property for defects or problems.



Matters of concern to the buyer are title, the physical condition and state of repair of any improvements to the property, soil and subsurface conditions, zoning and land use regulations, environmental matters, the availability of financing, the availability of water and other utilities, the financial history of the property, and the economic feasibility of the particular investment. The buyer's satisfaction as to such matters may be made an explicit condition of the buyer's obligation to purchase the property. The importance of such investigations and of the prospective buyer making a thorough analysis of all aspects of the transaction are critical if the seller is unwilling to make representations and warranties with respect to the property. Without seller representations and warranties, the buyer may be left without legal recourse against a creditworthy party for problems discovered after the property is purchased.

In Arizona, it is customary for a purchase agreement to provide for an 'escrow', an arrangement in which an independent third party (such as a title insurance company) holds documents and money until the parties are prepared to complete the transaction. When the transfer of title and payment of the purchase price finally take place (called the 'closing'), the escrow agent disburses the purchase money deposited by the buyer to the seller and records the deed to the property in the public records, thereby completing the purchase.

#### *Deeds*

Ownership of Arizona real estate is conveyed by delivery of a deed to the buyer. To be valid, a deed must be in writing, must adequately describe the property, must be signed by the seller, and must be acknowledged before a notary public. There are additional requirements that apply to deeds to or from trustees or to or from two or more individuals who give or take title in some form of co-ownership.

A deed may or may not contain warranties concerning the condition of title. A buyer often prefers to receive a 'general warranty deed' in which the seller warrants that the seller owns the property and that no one, including the seller, has done anything to cause the title to be less than as described in the deed. The seller often prefers to provide only a 'special warranty deed' in which the seller warrants merely that the seller owns the property and that the seller has not done anything to diminish the title from that described in the deed.

An alternative to a general warranty deed or to a special warranty deed is a 'quitclaim deed'. In a quitclaim deed, the seller makes no promise or warranty whatsoever concerning ownership or condition of title, but merely transfers to the buyer all rights, if any, that the seller has in the property. A buyer should carefully consider the consequences in a given situation before accepting a quitclaim deed.

A deed to Arizona real estate should be recorded promptly with the county recorder of the county in which the property is located. Failure to record a deed

promptly may permit third parties, such as innocent purchasers or lien holders, to acquire rights superior to the rights of the buyer.

Arizona law generally requires that an ‘affidavit of property value’ be completed and signed by the parties. The affidavit, which includes a number of details concerning the real estate transaction, must be filed with the county recorder at the same time as when the deed is recorded. All of the information disclosed on the affidavit of property value is a matter of public record. There is a small recording fee for both deeds and affidavits of property value. Arizona does not impose a documentary stamp tax or real estate transfer tax on real estate transactions.

#### *Methods of Holding Title*

When acquiring Arizona real estate, attention must be given to the manner in which title to the real estate will be held. Arizona real estate may be owned by any natural person or legal entity or by combinations of persons and legal entities. Title may be held by an individual, a corporation, a partnership, a trust, an estate, or by multiple owners.

Although foreign persons have the same rights and opportunities as American persons to acquire Arizona real estate, United States law requires that certain investments in real estate by foreign persons be disclosed to the federal government. Generally, all information disclosed is confidential, and access to the disclosed information is limited to officials and employees of governmental agencies. However, certain disclosure information required in connection with the ownership of agricultural land is available to the public.<sup>4</sup>

#### **Leases**

A foreign investor may prefer to lease rather than own real estate. A lease of real estate is the exclusive right to possess and use real estate for a specified period of time in consideration for the payment of money as rent. The property owner under a lease is the landlord or lessor. The party acquiring the leasehold interest in the property is the tenant or lessee. The time period when the lease is in effect is the lease term. Although the lessor transfers the use and possession of the leased property to the lessee for the term of the lease, the lessor retains ownership of the property. Upon expiration of the term of the lease, the right to use and possess the property reverts to the lessor. Leases with a term of more than one year must be in writing to be enforceable.

A lease allocates the economic risks and expenses of property ownership, possession, and operation between the lessor and lessee. For example, a lease generally specifies which of the parties will be responsible for the payment of

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<sup>4</sup> The disclosure requirements associated with ownership of real estate by foreign persons are discussed in the chapter ‘Disclosure of Foreign Investments’ in Snell & Wilmer LLP, *Doing Business in Arizona: A Legal Guide*, (forthcoming 2012).

taxes, assessments, utility charges, building maintenance, and other costs; what type of insurance coverage each party must maintain; which of the parties is to bear the risk of loss if buildings, structures, improvements, or personal property on the leased property are damaged or destroyed; and which of the parties is responsible for maintaining and repairing the property.

Various factors, including the proposed use of a particular property, determine the appropriate contents of a specific lease. Most leases of nonresidential property fall within one of three categories: ground leases, agricultural leases, or commercial leases.

Occasionally, foreign investors may acquire real estate interests other than fee simple ownership or leasehold. Many such other types of real estate interests exist. The three most common are easements, mineral interests, and water rights.

### **Taxation**

Individual and corporate income taxation is governed by laws of the United States, and not by the laws of the State of Arizona. In the United States, federal law generally preempts state law. Table I provides a summary of the tax implications of each corporate form in Arizona.

Table I: Corporate Taxation and Reports

Company Structure	Taxation	Reports
Sole Proprietorship	Not a separate taxable entity; income or loss exclusively allocable to proprietor	Preparation of tax return
General Partnership	Not a separate taxable entity; income or loss generally allocable to partners in accordance with partnership agreement	Preparation of tax return
Limited Partnership	Not a separate taxable entity; income or loss generally allocable to partners in accordance with partnership agreement	Preparation of tax return
Corporation	Generally, a separate taxable entity that pays tax on entity profits; additional tax results to shareholders upon distribution of dividends	Preparation of annual tax returns; certain corporate transactions involving foreign parties subject to special federal tax record-keeping requirements
LLC	Not a separate taxable entity; income or loss generally allocable to members in accordance with the operating agreement	Preparation of annual tax returns, except in the case of certain single-member companies

## **Customs Regulation**

Customs regulation is governed by laws of the United States, and not by the laws of the State of Arizona. In the United States, federal law generally preempts state law. However, there are a number of advantages available to companies engaging in import-export operations in Arizona.

Arizona maintains a number of Foreign-Trade Zones (FTZs) within its borders. FTZs are enterprise zones which are legally outside the customs territory of the United States. Merchandise may be admitted free of duty and other customs requirements and manipulated within the zone for further manufacture and/or eventual re-export. One great advantage of using an FTZ is that a high duty rate component may be entered into the zone and later imported into the customs territory of the United States under a potentially lower rate or even duty-free provision.

In addition to the customs duty advantages of FTZ operations, Arizona currently provides very favorable property tax treatment to operations located within an FTZ. Property taxes for businesses with FTZ status are approximately one-quarter of the regular tax rate. Not surprisingly, many Arizona businesses with import operations consider FTZ status in locating their operations in the state. FTZ status and operations must be approved by the Foreign-Trade Zone Board in Washington, DC (a separate federal agency) before zone benefits will be granted.

Most companies that establish volume import operations in Arizona will hire an outside logistics services company, which will act as an agent for the arrangement of freight from overseas and also assist in the performance of customs clearance in the United States. While it is definitely possible to clear customs at various ports of entry (including Phoenix) within Arizona, many companies that bring foreign merchandise into Arizona will actually clear customs at a port on the West Coast, particularly if they are using ocean freight.

## **Currency Regulation, Capital and Profit Transfer, and Investor Incentives**

### **Currency Regulation**

Currency regulation is governed by laws of the United States, and not by the laws of the State of Arizona. In the United States, federal law generally preempts state law.

### **Capital and Profit Transfer and Investment Incentives**

These matters are generally restricted by federal tax and securities laws, which are very fact-specific in their application.

## Competition Law

### In General

Competition issues are generally governed by laws of the United States; however, the Arizona legislature has enacted its own Arizona Antitrust Act,<sup>5</sup> which shares many features of the federal law and is enforced by the Arizona Attorney General. Although Arizona permits private plaintiffs to bring civil suits under its antitrust laws, only violations of federal law are subject to criminal penalties.

Manufacturers or other producers may seek to enter into agreements with distributors and retailers of their products (vertical agreements). Very few vertical agreements are unlawful *per se*. All other vertical agreements are analyzed under the rule of reason and are generally regarded as legal.

Generally, under federal law a plaintiff can only maintain an antitrust action against a vertical participant that has directly sold the goods or services to the plaintiff. Arizona courts have adopted a different approach and permit so-called 'indirect purchasers' (those who purchased the product after the initial purchase from entities involved in anti-competitive conduct) standing to sue.

### Covenants Not to Compete

A covenant is often included in an agreement for sale of a business that prohibits the seller from later competing with the purchaser of the business in a particular area for a particular time. Even though most agreements among competitors not to compete in certain geographical areas are illegal *per se*, a covenant not to compete that is an element of a sale of a business is evaluated under the 'rule of reason'.

A covenant not to compete in the context of the sale of a business is regarded as part of a larger agreement that has a legitimate objective as its principal goal, and the public interest in facilitating a transfer of a business is deemed to justify the rule-of-reason approach. If the covenant is not unreasonably broad in geographical scope and is not unreasonably long in duration, it is legal.

Indeed, in Arizona, a properly structured covenant not to compete in terms of reasonable time and geographic scope will likely be legal. Arizona courts follow the 'blue pencil' rule, which means that they will strike unreasonable covenants not to compete and enforce reasonable covenants not to compete that remain.

Thus, in Arizona, covenants not to compete are often drafted with alternatives in terms of scope and duration.

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<sup>5</sup> Arizona Revised Statutes, ss 44-1401 *et seq.*

## **Intellectual Property Protection**

### **In General**

The protection of intellectual property is governed by laws of the United States, and not by the laws of the State of Arizona. In the United States, federal law generally preempts state law.

However, Arizona law provides for state registration of trade marks and trade names.

### **Trade Marks**

Arizona trade mark registration law requires that a trade mark application be filed with the Arizona Secretary of State. The application must identify the mark and the goods or services with which the mark is used and must be accompanied by the requisite fee.

In contrast to registration of a mark under federal law, the mark must actually be in use before an Arizona registration application can be filed. If the trade mark application is approved, the applicant receives a certificate of registration.

A certificate of registration has an initial 10-year term and can be renewed indefinitely for successive 10-year terms. Arizona registration provides some advantages, but not as extensive as federal registration.

However, Arizona registration is usually advisable, particularly in situations in which a business's sales will occur only in Arizona.

### **Trade Names**

Arizona provides separate registration of trade names with the Arizona Secretary of State. The application process is simple. The registration remains in effect for five years and may be renewed for successive five-year terms.

The Secretary of State will not register any trade name if it might mislead the public or is not readily distinguishable from names, titles, or designations previously registered and still in effect, or if it is the same as, or deceptively similar to, an existing corporate name or one which has been reserved.

## **Employment Law**

### **In General**

Employment is generally governed by laws of the United States and not by the laws of the State of Arizona. In the United States, federal law generally preempts state law. However, many features of employment law are unique to or enhanced by Arizona laws.

### **Civil Rights**

The Arizona Civil Rights Act (the Arizona Act)<sup>6</sup> mirrors the federal civil rights laws and applies to Arizona employers with 15 or more employees. A claimant may pursue identical claims under Title VII of the United States Civil Rights Act and under the Arizona Act simultaneously. The Arizona Act's prohibition against sexual harassment applies to employers with one or more employees. The Arizona Act is administered by the Civil Rights Division of the Arizona Attorney General's Office.

### **Wages and Hours**

Arizona laws relating to wages and working hours generally follow the federal laws governing these issues. In addition, an employer in Arizona is required to designate at least two days each month, not more than 16 days apart, as fixed paydays.

Discharged employees must be paid all wages due within three working days from the date of discharge or by the end of the regular pay period in which they are discharged, whichever is sooner. Employees who quit must be paid all wages due by the end of the regular pay period in which they terminate. Violations can result in employer liability of three times the amount of wages due.

### **Safety Measures**

The Occupational Safety and Health Act (OSHA)<sup>7</sup> is a federal law enforced by the United States Labor Department that imposes a duty on employers to provide employees with a safe and healthful place to work. OSHA covers employers and their employees either directly through federal OSHA or through an OSHA-approved state program that must meet or exceed federal OSHA standards for workplace safety and health.

Accordingly, Arizona operates an occupational safety and health program, called the Arizona State Plan. Through the Arizona State Plan, Arizona has assumed responsibility for workplace safety in the state in accordance with standards set by the United States Labor Department. The Arizona Division of Occupational Safety and Health (ADOSH)<sup>8</sup> is responsible for enforcement and voluntary compliance.

### **Workers' Compensation Act**

Arizona has workers' compensation insurance laws, as do most states. The law requires employers to maintain insurance that provides specified benefits to employees for job-related accidents causing injury. The cost of the insurance is

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6 Arizona Revised Statutes, ss 41-1401 *et seq.*

7 United States Code, ss 651 *et seq.*

8 Arizona Revised Statutes, ss 23-401 *et seq.*

paid by employers through payment of premiums into a state fund or to a private insurance carrier. Some employers qualify to be self-insured. Employers are required to document and report workplace accidents resulting in injuries.

### **Economic Security Act**

The Arizona Economic Security Act (AESA)<sup>9</sup> provides for the payment of benefits for specified periods to individuals who become unemployed through no fault of their own. The cost of the benefits is provided by employers, who are required to make periodic contributions to a state unemployment insurance fund.

### **Drug Testing of Employees Act**

While the Drug Testing of Employees Act<sup>10</sup> neither requires nor prohibits employee drug screening, it grants legal protection to employers who conduct drug or alcohol impairment tests that conform to the requirements of the Act. Compliance protects the employer from liability for actions taken in good faith relating to positive test results, failure to test or detect a specific drug or condition, or the elimination of a prevention or testing program.

### **Employment Protection Act**

The Employment Protection Act<sup>11</sup> strengthens the employment-at-will doctrine, allowing employers or employees to terminate the employment relationship at any time, for any reason, unless there is a written contract to the contrary. The Act also limits 'wrongful discharge' suits based on public policy. The Act also protects whistleblowers against termination in retaliation for a refusal to violate Arizona law.

### **Medical Marijuana Act**

Arizona voters passed the Arizona Medical Marijuana Act (AMMA)<sup>12</sup> in 2010. The AMMA provides expansive workplace protections to employees who are users of medical marijuana. The most significant of AMMA's provisions impacting employers are found in Arizona Revised Statutes, Section 36-2813. These provisions protect applicants and employees who use medical marijuana from discrimination.

### **Unions**

Arizona is a right-to-work state. No employee in Arizona may be required to join a union or to pay dues to a union as a condition of employment.

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9 Arizona Revised Statutes, ss 46-101 *et seq.*

10 Arizona Revised Statutes, ss 23-493 *et seq.*

11 Arizona Revised Statutes, ss 23-1501 *et seq.*

12 Arizona Revised Statutes, ss 36-2801 *et seq.*



## **Immigration**

### *Legal Arizona Workers Act*

The Legal Arizona Workers Act<sup>13</sup> is one of the toughest employer sanction laws in the United States. Despite numerous court challenges, the Supreme Court of the United States upheld the law as constitutional, and it therefore remains in full force and effect. As such, employers are advised to take the requisite measures to comply with its provisions. Compliance measures should include not only an internal audit of the company's I-9s<sup>14</sup> and registering for E-Verify,<sup>15</sup> but also ensuring that employers have the infrastructure and culture in place to take full advantage of any and all good faith arguments that may otherwise negate the intent or knowledge to hire undocumented workers.

The new law applies to nearly every employer who does business in Arizona. It covers any employer that transacts business in Arizona, that has a license issued by an Arizona agency, and that employs one or more individuals who perform employment services in Arizona.

Violation of the law carries severe penalties. If a company is found to have knowingly violated the state law, the employer must terminate the worker, sign an affidavit that it will not knowingly or intentionally hire unauthorized workers, and file quarterly reports for a three-year probationary period. A court also may suspend the employer's business license for not more than 10 business days. The intentional hiring of an unauthorized worker extends the probation period from three years to five years and requires mandatory suspension of the employer's business license for at least 10 days. Repeat offenders face permanent revocation of their business license.

Notably, the Legal Arizona Workers Act does not govern the admission or work authorization of foreign nationals. Instead, this law is intended to curb the presence of unauthorized workers in Arizona by imposing certain sanctions on employers. The intent to sanction employers for intentionally and/or knowingly hiring unauthorized workers also can be found in federal statutes such as the Immigration and Nationality Act and the Immigration Reform and Control Act of 1986. Employers should therefore be aware that while Arizona law provides limited sanctions associated with business licenses, federal laws may impose severe civil and criminal penalties. Indeed, worksite enforcement by the Immigration and Customs Enforcement has increased dramatically, especially in Arizona, and will probably continue to intensify in the coming years.

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13 Arizona Revised Statutes, ss 23-211–23-216.

14 The Employment Eligibility Verification Form I-9 is a US Citizenship and Immigration Services form that employers use to verify an employee's identity and to establish that the employee is eligible to accept employment in the US.

15 E-Verify is a free Internet-based program run by the US government that compares information from an employee's Form I-9 with data from US government records. If the information matches, that employee is eligible to work in the US.

### *Trade NAFTA Visa*

Given Arizona's geographic location, Canadian and Mexican citizens and companies frequently take advantage of business opportunities in Arizona, often requiring the relocation of Canadian and Mexican citizens to Arizona. One strategy companies and individuals may consider is the Trade NAFTA (TN) visa. The TN visa category is available only to citizens of Canada or Mexico, which are parties to the North American Free Trade Agreement (NAFTA). In order to qualify for TN visa status, a Canadian or Mexican citizen must work for an American employer in an occupation listed under Appendix 1603.D.1 of the NAFTA and possess the requisite qualifications.

The procedure for obtaining TN visa status from abroad depends on the individual's country of citizenship. Canadian citizens, who in most cases are exempt from having to obtain visas to enter the United States, may submit TN applications at either designated pre-flight inspection offices or ports of entry at the United States–Canadian border. Mexican citizens must submit TN visa applications to a United States consular post abroad.

## **Banking Law**

### **Types of Loans**

A loan may be either a term loan or a demand loan. A term loan is a loan for a specified period. Under a term loan, the borrower may be required to make periodic payments of loan principal and interest throughout the term or may be permitted to make a single payment of the entire loan balance at the end of the term. The borrower of a demand loan is required to repay the loan within a short period following the lender's demand for repayment, which may be made at any time.

Most loans by conventional lenders are term loans. Most commercial loans and real estate construction loans have terms of between one and five years. Other real estate loans, such as permanent financing, have terms of up to 30 years.

### **Interest**

Conventional loans, like other loans, require payment of interest by the borrower. The two most common methods for charging interest are the flat rate and the variable rate. Under a flat rate, the borrower pays the same rate of interest on the unpaid principal throughout the term. Under a variable rate, the rate of interest is determined at various intervals throughout the term by reference to an objective rate standard, such as the London Interbank Offered Rate or other cost of funds index, or to the 'base' or 'prime' rate of interest charged by the lender or by a designated institution.

As the objective rate standard changes, the interest rate on a variable rate loan changes. Thus, an interest rate equal to the 'prime rate of interest charged by the

lender plus 1 per cent' results in a periodically adjusted rising or falling interest rate that always exceeds by one percentage point the prime rate of interest charged by the lender.

Arizona does not have a general usury statute, unlike many other states. Thus, in most circumstances the interest rate can be any rate the parties agree to in writing. There are certain varieties of loans that do have set interest rate maximums.

### **Security**

A lender may require security for repayment of the loan. Security may be real property, personal property, or both. Documentation used to evidence real property security differs from the documentation used when personal property is security. The laws governing the two types of security also differ.

Raw land, buildings, improvements to land, and the right to collect rent under leases may serve as security for a loan. The real property may be owned by the borrower or by another person or entity that pledges its interest in the property. Under Arizona's community property law, for a valid encumbrance upon community real property, both the husband and wife must sign the encumbrance document.

Mortgages and deeds of trust are used to encumber real property to secure loans. Under either a mortgage or a deed of trust, the owner of the property has the right to possess and use the property while the loan is not in default. Included in any mortgage or deed of trust are representations and warranties by the property owner, such as warranties of ownership and of authority to encumber the property as security.

Covenants also are commonly included, such as that the property will be maintained in good repair, that all applicable insurance will be kept in force, real estate taxes will be paid when due, and that the property will not be sold or further encumbered.

### **Guarantees**

A guarantee is an agreement made by a person other than the borrower that the loan will be paid or that other actions to be performed by the borrower will be performed. Guarantees are taken when the borrower's credit or security is considered weak or inadequate.

For example, in a loan to a small or closely held corporation, the lender will often require guarantees from the shareholders of the corporation. A guarantee may be unlimited, or it may be limited to a specific amount or percentage, or to a single or limited number of transactions, or to obligations incurred within a given period of time.

The obligation of the guarantor comes due upon the borrower's default. If the guarantee so provides, the lender may proceed independently against the guarantor, without first attempting to collect from the borrower or to recover against other security. In Arizona, a married individual executing a guarantee cannot bind the community property of the marital estate without the other spouse's joinder in the guarantee.