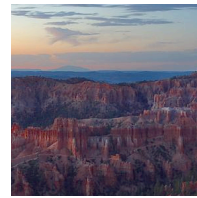
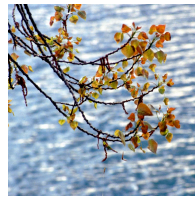


An Introduction to  
**UTAH BUSINESS LAW**



Contracts

Marketing

Antitrust

Securities

Employment

Real Estate

Tax

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Over the years, he has become a trusted advisor and counselor to many clients. His law practice includes business organization, business contracts, business finances, securities law compliance, private offerings, and oil and gas law. He also regularly handles matters in antitrust, securities, corporate governance, and contracts of all types and sizes.

Along with those areas just mentioned, he advises clients in numerous other areas of the law, including estate planning, probate, and commercial real estate.

This summary of business law is but one of Robert's several explanations of the law for clients and friends. Copies can be found on his website: [youngberglaw.com](http://youngberglaw.com).

### *About This Guide*

*This is a general guide to certain laws related to doing business in Utah, as of June 2011. It is given by way of general reference only, is not intended to provide legal advice, and is not to be relied upon in any factual situation, as it does not cover all laws or regulations that may apply in all circumstances.*

*Although he has done his best to accurately describe the many laws mentioned in this report, the author accepts no responsibility for inaccuracies or omissions, or for statements that might prove to be misleading. Seek professional advice on your specific questions and issues before making any legal decisions.*

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## Utah Business Law

***Thank you for your interest in this summary of Utah laws that relate to business.***

***This paper introduces business owners and managers, and their out-of-state attorneys, to some of the many important laws that apply to doing business in Utah. It includes those laws the author believes are most important to business clients.***

***However, please remember that no summary can adequately discuss - or even mention - every important law. Besides, every situation is different.***

***Consequently, a word of caution: this summary is given by way of general reference only. Do not rely upon it as your sole source for making legal decisions, as it does not cover all laws or regulations that may apply in all circumstances.***

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### Utah's Legal System

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#### ***1. What is the legal system in Utah?***

Like most states of the United States, Utah has a legal system with deep roots in English common law, along with a state constitution, statutory laws, and regulations. Utah is not a community property state.

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### Utah Business Entities

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#### ***1. What business vehicles are available in Utah?***

Utah statutes offer several different types of business vehicles, including:

- ▶ Limited liability company (LLC)
- ▶ Corporation
- ▶ Partnership
- ▶ Limited partnership

- ▶ Limited liability partnership
- ▶ Sole proprietorship

#### ***2. Why use a company to conduct business?***

The main reason is liability: limited liability companies and corporations are legal persons separate from their owners. When properly formed and operated, they have their own liabilities, which are separate and apart from those of their owners. Thus, business liabilities - everything from contractual debts to responsibility for a customer's slip and fall - are normally those of the company, not the company's owners.

#### ***3. What is Utah's most common business entity?***

The most common form of business vehicle in Utah is a Utah limited liability company, or LLC; next comes a Utah corporation, but a Delaware corporation is occasionally used.

#### ***4. How is a business entity formed?***

Various Utah statutes govern formation and operation of business entities. Generally, one forms most business entities by filing the required papers with the Utah Department of Commerce.

Recently, Utah adopted, with some exceptions, the Uniform Business Code for business entities (other than corporations). The new law is effective for new businesses registered after June 2012, and applies to existing business entities after June 2014. In the meantime, the current statutes govern formation and operation of Utah business entities.

#### ***5. What are the differences between business entities in Utah?***

The **chart on pages 8 through 11** lists the differences between most types of Utah business entities.

Which type is best for you is a matter of choice, dependent upon your business needs and purposes. Considerations should include the number of owners you have, type of management you desire, preferred tax treatment, and your goals in doing business, to name just a few.

	<b>SOLE PROPRIETOR</b>	<b>GENERAL PARTNERSHIP</b>	<b>LIMITED PARTNERSHIP</b>	<b>CORPORATION</b>	<b>"S" CORPORATION</b>	<b>LLC</b>
<b>WHO OWNS THE BUSINESS?</b>	sole proprietor	general partners	general and limited partners	shareholders	shareholders	members
<b>ARE OWNERS PERSONALLY LIABLE FOR BUSINESS DEBTS?</b>	yes, sole proprietor is personally liable	yes, general partners are personally liable	only general partner(s) are personally liable, not limited partners	shareholders not personally liable	shareholders not personally liable	members not personally liable
<b>ARE THERE LIMITS ON THE NUMBER OF OWNERS?</b>	only one; becomes a general partnership when additional owners join	must have at least two partners	must have at least one general partner and one limited partner	must have at least one shareholder	must have at least one shareholder, but may not have more than 100	must have at least one member
<b>WHO MAKES DECISIONS?</b>	sole proprietor	general partners	general partner(s) only	board of directors	board of directors	ordinarily members; but managers if LLC is manager-managed
<b>WHO MAY LEGALLY CONTRACT ON BEHALF OF THE BUSINESS?</b>	sole proprietor	any general partner	any general partner; not limited partners	directors and officers	directors and officers	ordinarily any member; but if LLC is manager-managed, any manager
<b>WHAT HAPPENS TO THE BUSINESS IF AN OWNER DIES OR OTHERWISE DEPARTS?</b>	dissolves automatically	dissolves automatically unless otherwise stated in partnership agreement	dissolves automatically unless otherwise stated in partnership agreement	no effect	no effect	no effect, unless the LLC is a single-member LLC
<b>ARE THERE LIMITS ON TRANSFERS OF OWNERSHIP INTERESTS?</b>	free transferability	consent of all partners usually required by partnership agreement	consent of all partners usually required by partnership agreement	transfer of stock may be limited by securities laws, bylaws or articles of incorporation	same as regular corporation, but transfers are limited to persons or entities that qualify as "S" corporation shareholders	free transferability of interests, unless restricted by operating agreement



	<b>SOLE PROPRIETOR</b>	<b>GENERAL PARTNERSHIP</b>	<b>LIMITED PARTNERSHIP</b>	<b>CORPORATION</b>	<b>“S” CORPORATION</b>	<b>LLC</b>
<b>ARE LEGAL FORMALITIES A BURDEN?</b>	minimal	minimal, but a written partnership agreement is important	requires startup filing with the state, and a written partnership agreement is important	requires startup filing with the state; bylaws and record-keeping important; annual meetings of shareholders required	same as regular corporation, plus filing with IRS for “S” corp status	requires startup filing with the state; operating agreement important; member meetings not required
<b>WHAT IS THE SOURCE OF STARTUP FUNDS?</b>	sole proprietor	general partners	general and limited partners	initial shareholders; payment may be cash, property, services, or a promise to contribute cash, property or services in the future	same as regular corporation, but cannot issue different classes of stock with different financial provisions	initial members; contributions may be cash, property, services, or a promise to contribute cash, property or services in the future
<b>HOW DOES THE BUSINESS USUALLY OBTAIN CAPITAL?</b>	sole proprietor’s contributions; loans backed by sole proprietor’s personal assets	contributions from general partners; loans backed by partnership and personal assets	investment capital from limited partners; loans backed by general partners’ personal assets	flexible; may offer various classes of shares to investors; loans backed by company property, or by shareholder guarantees (if corp has inadequate credit history)	generally the same as regular corp, but can’t have foreign or corporate shareholders, and can’t offer different classes of stock to investors except for shares without voting rights	capital contributions from members; loans backed by company property, or by member guarantees (if LLC has inadequate credit history)

	<b>SOLE PROPRIETOR</b>	<b>GENERAL PARTNERSHIP</b>	<b>LIMITED PARTNERSHIP</b>	<b>CORPORATION</b>	<b>“S” CORPORATION</b>	<b>LLC</b>
<b>EASE OF CONVERSION TO ANOTHER FORM OF BUSINESS</b>	may change form any time	may change to limited partnership, corporation, or LLC	may change to corporation or LLC	may change to “S” corp; may also change to LLC, but change will be treated as a sale of stock for tax purposes	generally the same as regular corp; may change to regular corp status but cannot re-elect “S” status for five years after	may change to general partnership, limited partnership, or corporation
<b>MUST OWNERSHIP INTERESTS BE REGISTERED UNDER FEDERAL OR STATE SECURITIES LAWS?</b>	generally not	generally not	issuance or sale of limited partnership interests must qualify for securities laws exemptions; otherwise, registration is required	issuance or transfer of stock must qualify for securities laws exemptions; otherwise registration is required	same as regular corporation	generally not if all members are active in the business; if some members are passive investors, issuance or sale of membership interests must qualify for an exemption, or registration is required
<b>HOW ARE BUSINESS PROFITS TAXED?</b>	at sole proprietor’s individual tax rates	at individual tax rates of general partners	at individual tax rates of general and limited partners	taxed first at corporate rates, then taxed as dividends at individual tax rates of shareholders	at individual tax rates of shareholders	at individual tax rates of members

	<b>SOLE PROPRIETOR</b>	<b>GENERAL PARTNERSHIP</b>	<b>LIMITED PARTNERSHIP</b>	<b>CORPORATION</b>	<b>"S" CORPORATION</b>	<b>LLC</b>
<b>ARE BUSINESS LOSSES DEDUCTIBLE?</b>	owner may deduct losses from other income on individual tax return	partners may deduct losses from other income on individual tax returns if "at risk" for loss or debt (to extent of partner's tax basis in partnership interest)	same as general partnership, but limited partners may only deduct "non-recourse debts" (for which general partners are not specifically liable)	corporation may deduct business losses; shareholders may not deduct losses	shareholders may deduct their share of corporate losses on individual tax returns, but must comply with special limitations	follows partnership, sole proprietorship or corporate loss rules, depending on how the company has elected to be taxed
<b>WHEN BUSINESS IS SOLD, WHAT TAX LEVELS APPLY?</b>	owner's personal tax level	personal tax level of individual general partners	personal tax level of individual general and limited partners	if sale involves appreciated property, two levels of tax apply: first at the corporate level, then at the personal tax levels of individual shareholders on their share of the total gain	at personal tax level of individual shareholders, but corporate level tax sometimes due if "S" corp was formerly a regular corp	follows partnership, sole proprietorship or corporate tax rules, depending on how the company has elected to be taxed
<b>ARE TAX-DEDUCTIBLE FRINGE BENEFITS AVAILABLE TO OWNERS WHO WORK IN THE BUSINESS?</b>	sole proprietor may set up IRA or Keogh retirement plan; can deduct medical insurance premiums	general partners and other employees may set up IRA or Keogh plans; can deduct medical insurance premiums	same as general partnership	full tax-deductible fringe benefits for employee-shareholders; may deduct medical and term life insurance premiums and reimburse employees' medical expenses	same as general partnership, but some restrictions on corporate fringe benefits for employee-shareholders owning 2% or more of stock	can get benefits associated with corporation, sole proprietorship or partnership, depending on how the company has elected to be taxed

## Foreign Investment

**(Please note: as used here, the term “foreign investment” means investment from another state as well as another country.)**

### 1. Are there restrictions on foreign investment?

There are no restrictions other than industry-specific regulations established by the federal government.

### 2. Are there exchange control or currency regulations in Utah?

No.

### 3. What must a foreign business do before it may transact business in Utah?

A foreign corporation or other business entity not formed under Utah law may not transact business in Utah until it obtains a Certificate of Authority from the Department of Commerce.

### 4. What constitutes “transacting business”?

Utah statutes do not define the term or specify what it means, but the following activities in Utah will not require a foreign business entity to obtain a Certificate of Authority:

- ▶ Maintaining, defending, or settling any court proceeding;
- ▶ Holding meetings of the board of directors or shareholders;
- ▶ Maintaining bank accounts;
- ▶ Selling through independent contractors;
- ▶ Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside Utah before they become contracts;
- ▶ Creating or acquiring any indebtedness, mortgages, or security interests in real or personal property;
- ▶ Securing or collecting debts or enforcing mortgages, security interests, or other rights in property securing debts;
- ▶ Owning real or personal property;
- ▶ Conducting an isolated transaction that is completed within thirty days and that is not one of many similar transactions;

- ▶ Transacting business in interstate commerce;
- ▶ Owning or controlling a subsidiary corporation incorporated in or transacting business within Utah.

However, when in doubt, most foreign businesses obtain a Certificate of Authority.

### 5. How does a foreign company obtain a Certificate of Authority?

A foreign business entity must file with the Department of Commerce (1) an application for authorization to conduct business as a foreign entity and (2) a Certificate of Existence, or similar document, authenticated by the Secretary of State or other official having custody of the records in the state or country under whose laws it is incorporated.

### 6. For employees, what constitutes tax residency?

In Utah, an individual is a resident for income tax purposes if one of the following applies:

- ▶ It is the employee’s intention to maintain a permanent home in Utah.
- ▶ Utah is the center of the employee’s financial, social and family life.
- ▶ If the employee is living outside of the state, the employee intends to return to Utah.

### 7. Besides taxes, what payments must an employer make in relation to employees?

- ▶ State worker’s compensation insurance.
- ▶ State unemployment tax.

### 8. What is generally required to form a subsidiary corporation?

**Registration formalities:** a corporation is formed by the organizer filing articles of incorporation with the Utah Department of Commerce.

**Share Capital:** Utah does not require that a corporation have a minimum or maximum amount of capital for shares.

**Non-cash consideration:** shares in a corporation can be issued for any combination of cash or other property, tangible or intangible, or services performed or agreed in writing to be performed.

**Rights attaching to shares:** the corporation's articles of incorporation may restrict the rights that can attach to shares, subject to certain limits. Shareholders may also contractually agree, subject to certain limits, to restrictions on these rights in a shareholder agreement. A restriction on transfer should be noted in the articles of incorporation and on the corporation's share certificates.

**Management structure:** a corporation is managed by a board of directors.

**Directors' liability:** directors owe duties to the corporation and to its shareholders. In the case of insolvency, these duties may extend to the corporation's creditors. With certain exceptions, directors can be liable if they violate their duties of loyalty and care, if they do not act in good faith, or if they authorize an improper distribution.

**Parent company liability:** a parent company of a corporation has the limited liability of a shareholder and is treated separately from its subsidiary.

**Reporting requirements:** Utah corporations, and non-Utah corporations qualified to do business in Utah, must file an annual report with the Utah Department of Commerce setting out certain information. In addition, the corporation must file tax returns and pay taxes

**Licensing and Regulatory Requirements:** most businesses must obtain a business license from the city or county in which they conduct business. However, some individuals and businesses must obtain a license from the state. These include banks, building contractors, insurance agents, investment advisers, mortgage brokers, attorneys, employment agencies, grocery stores, hospitals, motor vehicle dealers, real estate agents, automated dialing companies, telemarketers, and sellers of alcoholic beverages. The state department responsible for licensing varies depending on the type of business or occupation.

**Additional Requirements/formalities:** no matter what form of organization is selected, the business entity (other than a sole proprietorship or LLC taxed as a sole proprietorship) must obtain a federal Employer Identification Number from the IRS and a state Sales and Use Tax License from the Utah State Tax Commission. Other decisions that must be made include, among others, a means of providing for workers' compensation, types and

extent of property and liability insurance coverage, and types of employee benefit plans and means of funding. If the business is to be conducted under an assumed name, the assumed name should be registered with the Department of Commerce.

### **9. What laws apply to specific businesses in Utah?**

There is a legion of Utah statutes that affect the establishment and operation of specific types of businesses. For example, specific laws regulate building contractors, personnel agencies, and car dealerships. Many such statutes are archaic and little enforced, but some are designed to satisfy current needs and are rigorously enforced.

Because of their number, the many statutes that regulate specific types of businesses or occupations are beyond the scope of a legal summary such as this.

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## **Employment**

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### **1. Must employees have a written contract of employment?**

No written contract is required. Unless there is a promise or contract providing otherwise, the employment relationship is considered to be at will (that is, either the employer or the employee can terminate the employment relationship at any time, with or without notice or cause). However, depending on how they are written, employee handbooks can be viewed as creating contractual rights and obligations.

### **2. Is the termination of employment contracts regulated?**

Unless an employment contract provides otherwise, employment is at-will and may be concluded at any time by either the employee or the employer, with or without notice or cause. There is no minimum notice or severance payment required for terminations. However, Utah statutory law provides penalties for an employer's failure to pay all compensation due at the time of termination.

### **3. Are employees entitled to management representation?**

No.

#### 4. Are layoffs regulated?

Not by state law. The federal **WARN Act** (29 USC §2101) requires employers with more than 100 employees to provide employees or their unions with 60 days' notice before certain plant closings and mass layoffs.

#### 5. What about union membership in Utah?

Utah is a "right to work" state. Utah law prohibits any agreement, understanding, or practice denying the right to work based on membership in a labor organization, or compelling any person to join or not join any labor organization. Employers cannot require union membership or abstinence from membership, or payment of union dues or fees.

#### 6. Do courts enforce employment contracts with covenants not to compete?

Utah courts will enforce certain covenants not to compete, but in a contract of employment they are generally disfavored, are critically examined, and are strictly construed against the employer. To be enforceable, such covenants must be (1) in writing, (2) entered into at the time and as part of the contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. Utah courts have been hostile to the enforcement of such covenants, particularly if they are unduly broad as to time or territory. The courts are more willing to enforce noncompete agreements with the sale of a business, rather than in the employment context.

#### 7. What laws require posting of notices in the workplace?

Many laws require an employer to post notices in the workplace notifying employees of their rights. The U. S. Department of Labor maintains a list of required federal notices and makes posters available for online download and printing or for purchase. The Utah Labor Commission likewise makes state-required posters available online or by mail.

#### 8. Do employers own their employees' inventions?

The **Employment Inventions Act** (Utah Code §§34-39-1 et. seq.) allows a business to require its employees to sign employment agreements that assign or license to the business any

or all the employees' rights in employment inventions. The act defines "employment invention" very broadly, and in the employer's favor. Employment, or even continuation of employment, is adequate consideration to support enforcement of an agreement to assign or license an invention.

#### 9. What are the primary Utah statutes regulating employment?

Both state statutory law and common law affect various employment issues, including payment of compensation, the effect of employee handbooks, and the permissible grounds for termination.

Along with federal laws affecting employment (which are many), specific state laws include the following:

##### \* UTAH ANTI-DISCRIMINATION ACT

*Applies to:* any employer with fifteen or more employees.

*What it does:* prohibits discrimination based on race, color, sex, age (if over forty), religion, national origin, disability, pregnancy, childbirth, or pregnancy-related conditions.

##### \* UTAH MINIMUM WAGE ACT

*Applies to:* employees not covered by federal minimum wage standards.

*What it does:* (as of July 24, 2009) sets minimum wage at \$7.25 per hour; however, minors under the age of 18 may be paid \$4.25 per hour for the first 90 days of employment, and tipped employees may be paid \$2.13 per hour so long as the tips they earn bring them up to minimum wage (there are certain exemptions).

##### \* UTAH PAYMENT OF WAGES STATUTE

*Applies to:* all employers

*What it does:* establishes responsibilities regarding paydays, electronic payroll deposits, lawful deductions from paychecks, payroll records, and final paychecks. Payments are to be paid at regular intervals, but in periods no longer than semi-monthly.

\* **STATE HOLIDAYS**

State holidays in Utah include: (1) New Year's Day, (2) Martin Luther King, Jr. Birthday, (3) President's Day, (4) Memorial Day, (5) Independence Day, (6) Pioneer Day (July 24), (7) Labor Day, (8) Columbus Day, (9) Veterans Day, (10) Thanksgiving, and (11) Christmas (see Utah Code § 63-13-2).

\* **CHILD LABOR STATUTE**

*Applies to:* all employers

*What it does:* prohibits employment of minors in any hazardous occupation; and from working during school hours, or from working before or after school for more than four hours a day; or more than eight hours in any 24-hour period, more than 40 hours per week, or before 5:00 a.m. or after 9:30 p.m. (unless the next day is not a school day).

\* **UTAH DRUG AND ALCOHOL TESTING ACT**

*Applies to:* all employers

*What it does:* allows employers to test employees or potential employees for drugs and alcohol as a condition of hiring or continued employment, so long as employers and management submit to testing on a periodic basis; testing must be conducted at the employer's expense, must be done during or immediately after the regular work period of current employees, and is considered work time for the purposes of compensation and benefits; testing must be conducted within the terms of a written policy of the employer that has been previously distributed to employees and which is available for review by prospective employees; an employer's drug testing policy may require testing to investigate possible impairment by an individual employee, to investigate workplace accidents or incidents of theft, to maintain productivity and quality, or to maintain security of property, information, and the workplace; information obtained through testing programs must be treated as confidential information.

\* **UTAH OCCUPATIONAL SAFETY AND HEALTH ACT**

*Applies to:* all private employers with one or more workers

*What it does:* requires employers to provide a safe workplace, free from hazards that are likely to cause

death or physical harm to employees, and which complies with safety and health standards and regulations of the Utah Labor Commission, Division of Occupational Safety and Health; incorporates federal OSHA standards for workplace safety and employer reporting and record keeping of injuries, exposures, and illnesses, and provides additional requirements for the drilling industry, farming operations, hazardous materials, materials handling and storage, construction activities, and a number of additional occupations.

\* **WORKERS COMPENSATION ACT**

*Applies to:* every employer that employs one or more workers or operatives regularly in the same business

*What it does:* requires that employers have workers' compensation insurance covering every employee; to report injuries or work-related illnesses to the Utah Labor Commission within seven days of being notified of the injury or illness. Employees suffering a job-related injury or illness are paid part of their wages while they are unable to work, with a maximum limit, and an additional amount for any permanent impairment or disability; medical bills are also covered by workers' compensation (some exceptions apply).

**Note:** one good side of workers' compensation for employers is that employers who comply with the workers' compensation requirements are generally immune from any liability or damages resulting from injuries suffered by employees while working.

\* **UTAH EMPLOYMENT SECURITY ACT (unemployment compensation)**

*Applies to:* all employers

*What it does:* requires employers to make quarterly payments and reports to the Utah Department of Workforce Services. Payments are kept in a fund, and money from the fund is paid to workers who are unemployed through no fault of their own. To become eligible for benefits, unemployed workers must make a claim, register for work at an employment office, be able and available to work, be actively seeking work, and meet the wage amount requirements. Workers may be ineligible for benefits if they left employment voluntarily without good cause, were discharged for "just cause" (a term that is statutorily defined), failed actively to seek or accept employment, or are seeking to obtain unemployment benefits from another jurisdiction.

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## Taxes

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### **1. What are the main taxes that potentially apply to Utah businesses?**

The principal taxes that potentially apply to a business entity doing business or owning property in Utah are:

- ▶ The franchise or income tax (5%)
- ▶ Sales and use tax (sales tax is levied statewide, but is set at rates specified by local governments, which are generally in the 6-7% range)
- ▶ Property tax (payable on real and certain personal property at varying rates)

### **2. Does Utah tax the activities of non-tax resident businesses?**

Utah taxes a business entity's income from business done in Utah and property owned in Utah regardless of the entity's tax home.

### **3. What is the individual income tax rate?**

Utah imposes a single rate of 5 percent of taxable income. Individuals domiciled in Utah must pay state income tax, and all income received during the period of domicile is taxable, regardless of its source. Nonresident individuals must pay Utah income tax on all income from Utah sources.

### **4. Does Utah have a corporate income or franchise tax?**

Domestic corporations and foreign corporations doing business in Utah must pay a corporate franchise tax equal to 5 percent of taxable income, the same as the individual income tax rate. "Doing business" includes owning, renting, or leasing real or personal property in the state. The corporate franchise tax must be paid even if no profit was made. Corporations with Utah tax liability of \$3,000 or more in the current or past tax year must make quarterly estimated tax payments at the same time and using the same method required by the IRS.

Foreign corporations not subject to the corporate franchise tax must pay corporate income tax in Utah if they derive income from Utah sources, regardless of whether they are qualified to do business in Utah or have a place of business in Utah. The

corporate income tax rate is 5%, the same as the corporate franchise tax rate and the individual income tax rate.

### **5. What about property taxes in Utah?**

Utah counties assess a tax on both real and tangible personal property located within the county.

Real property includes land, buildings, and improvements, and is generally taxed based on 100 percent of the fair market value of the property (based on location, cost, comparable sales, and income).

Personal property includes items such as machinery, equipment, furnishings, and fixtures, and is typically taxed based on part of their acquisition cost (according to valuation schedules). Businesses must file statements with the county assessor each year estimating the value of their taxable tangible personal property.

### **6. How are property values assessed for tax purposes?**

Commercial and personal property at 100%, and primary residential property at 55% of "fair market value." The actual tax rate varies in each local area. In recent years, the total rate averaged 1.35% of assessed property valuation.

### **7. Does Utah impose sales and use taxes?**

Utah imposes a sales tax on the rental or retail sale of personal property and the charges for certain services. The amount of sales tax varies in each location but is generally between 6% and 7% of the sales price. Sales tax is collected by the vendor at the point of sale. The vendor must remit the tax collected to the Utah State Tax Commission on an annual, quarterly, or monthly basis, depending on the amount collected. Vendors filing on a monthly basis are eligible for a discount.

Utah also imposes a use tax on the rental or purchase of personal property outside of the state that is stored, used, or consumed within the state. Currently, the state makes no effort to monitor or otherwise track sales or purchases that require payment of the use tax; the state relies solely on reports and payments by purchasers. Use tax is reported on the income tax return. The use tax rate is the same as the sales tax rate.

### **8. Are there other taxes related to sales?**

Utah imposes a tax on the purchase and sale of cigarettes and other tobacco, the importation or manufacture of beer, and



on gasoline and special fuels. Some local governments also impose taxes on transactions related to tourism, such as motor vehicle rentals, hotels, and restaurants.

### 9. Does Utah impose an unemployment tax?

Utah requires all employers to register and pay an unemployment insurance contribution. The rate is determined each year by formula and is generally paid on a quarterly basis. Employers may not deduct the amount paid from the wages of its employees.

### 10. Is there a mining severance tax?

Yes, 2.6% of the gross value of metalliferous ore sold or disposed of, with the first \$50,000 exempt.

### 11. Is there a severance tax or conservation fee on oil and gas?

Yes, a severance tax of 3% to 5%, depending upon the price of oil or natural gas (per barrel or MCF, respectively) and 4% on natural gas liquids, based on the gross amount received or gross value of gas and oil sold, with the first \$50,000 exempt.

Utah also imposes a gas and oil conservation fee, which is 0.2% of the value at the well on oil and gas produced, saved, sold or transported from the production site.

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## Antitrust Laws: trade regulation

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### 1. What are antitrust laws?

Antitrust laws prohibit certain practices by businesses that injure competition in the marketplace. The laws target “restraints of trade” in the form of contracts or requirements that unreasonably restrict competition or attempt to monopolize markets.

The antitrust laws came about in the late nineteenth century with the rise of giant industrial monopolies, such as John D. Rockefeller’s *Standard Oil Trust* (hence, the term “antitrust”). Because most businesses that engage in anticompetitive practices are very large and do business nationwide, the federal government and federal statutes take the lead in enforcing against these types of unfair business practices.

### 2. Do the antitrust laws apply to small businesses?

Generally, the primary targets of the antitrust laws are businesses with large market shares in the markets in which they compete. However, the laws apply to all businesses, large and small. For example, participation by a small business in a trade association that imposes boycotts, unreasonable restrictions on trade, or other restraints on competition, may subject the small business to the antitrust laws. What is more important, small business owners should become familiar with the antitrust laws to better recognize when their suppliers or large competitors impose unreasonable restraints on their ability to successfully compete in the market place.

### 3. Generally, what do the antitrust laws do?

The following is a listing of most federal antitrust laws and what they do:

\* **SHERMAN AND CLAYTON ACTS**, Title 15, U.S. Code. These statutes broadly prohibit “contracts, combinations, or conspiracies in restraint of trade,” as well as certain monopolies and monopolistic practices.

\* **SHERMAN ACT, SECTION 1**, Title 15, U.S. Code. This statute prohibits, among other things, the following agreements between competitors as illegal *horizontal* restraints of trade:

- ▶ Agreements to fix prices. This is the most serious and most strictly enforced rule under the statute. Agreements among competitors that affect the price at which a product or service is sold are strictly prohibited. Such an agreement can be informal and indirect; mere acquiescence to a price fixing scheme may make one liable for price fixing.
- ▶ Agreements among competitors to allocate territories or customers.
- ▶ Agreements among competitors to boycott third parties.
- ▶ Agreements among competitors to restrict output.

The following practices, which typically occur between a manufacturer and its distributors or customers, are considered, under certain circumstances, to be illegal *vertical* restraints of trade:

- ▶ Attempts to tie the sale of two distinct products. A “tying arrangement” exists when a seller agrees to sell a product or service (the “tying” product) on the condition that the buyer also purchases a different product or service (the “tied” product) or agrees not to purchase that product or service from any other supplier. The essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms.
- ▶ Attempts by a seller to require exclusive dealing or requirements contracts.
- ▶ Attempts by a manufacturer to limit dealer territories or customers.
- ▶ Attempts to sell only on the condition that the purchaser not use or deal in the goods of a competitor of the seller.

★ **SHERMAN ACT SECTION 2 AND CLAYTON ACT**

**SECTION 7.** These laws prohibit monopolization and attempts or conspiracies to monopolize. Among other things, courts have found predatory pricing to be evidence of intent to monopolize. Predatory pricing is pricing below some appropriate measure of cost with the purpose of profiting later by destroying competitors.

★ **ROBINSON-PATMAN ACT**, Title 15, U.S. Code. This law prohibits price discrimination between competing customers of the seller’s products, where such discrimination might lessen competition among (i) the seller and its competitors or (ii) the favored customer and its competitors.

★ **HART-SCOTT-RODINO ANTITRUST IMPROVEMENT ACT.** This law requires parties to certain acquisitions (including tender offers), mergers, or joint ventures to give notice (on required forms) to the Justice Department and Federal Trade Commission before completing the transaction. Formulas contained in the regulations determine whether a notice is required. The key factors are the size of the parties and the value and percentage of the assets that are being acquired.

★ **FEDERAL TRADE COMMISSION ACT.** This law bars unfair methods of competition and unfair and deceptive acts or practices. Among other things, courts have found such acts to

include false and misleading advertising, false disparagement of competitors or their products, and commercial bribery.

**4. Does Utah have its own antitrust laws?**

Utah has specific antitrust statutes, which are similar to the federal statutes. A business operating in Utah, or whose operations affect Utah, is subject to the Utah antitrust statutes.

The **UTAH ANTITRUST STATUTE** (Utah Code §§ 76-10-911 et seq.) is similar to the federal Sherman Act.

The **UTAH UNFAIR PRACTICES ACT** (Utah Code Ann. § 13-5-1, et seq.) is generally similar to the federal Robinson-Patman Act and The Federal Trade Commission Act. It broadly prohibits unfair methods of competition and unfair or deceptive practices in the conduct of business. Specifically, it prohibits: price discrimination, discrimination between purchasers, below-cost sales, and certain advertising practices. However, the act does not prohibit price differentials based on differences in cost of manufacture, sale, or delivery. Nor does it prohibit price differentials resulting from general market conditions.

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## Sales and Marketing

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**1. Which parts of the Uniform Commercial Code are effective in Utah?**

Utah’s legislature has adopted the following UCC Articles:

- ▶ **Article 1 – General Provisions** (Utah Code §§ 70A-1-101, et seq.)
- ▶ **Article 2 – Sales** (Utah Code §§ 70a-2-101, et seq.)
- ▶ **Article 2A – Leases** (Utah Code §§ 70A-2A-101, et seq.)
- ▶ **Article 3 – Negotiable Instruments** (Utah Code §§ 70A-3-101, et seq.)
- ▶ **Article 4 - Bank Deposits and Collections** (Utah Code §§ 70A-4-101 et. seq.)
- ▶ **Article 4A – Funds Transfers** (Utah Code §§ 70A-4A-101, et seq.)
- ▶ **Article 5 – Letters of Credit** (Utah Code §§ 70A-5-101, et seq.)
- ▶ **Article 7 – Documents of Title** (Utah Code §§ 70A-7A-101, et seq.)

- ▶ **Article 8 – Investment Securities** (Utah Code §§ 70A-8-101, et seq.)
- ▶ **Article 9 – Secured Transactions** (Utah Code §§ 70A-9-101, et seq.)

Utah has not adopted **UCC Article 6 (Bulk Transfers)**, which relates to certain high volume sales not in the ordinary course of business, such as sales by a seller who is going out of business. Under UCC Article 6, such a seller must tell the buyers if the goods being sold were purchased on credit. Without such protections, buyers of goods in a bulk sale must rely on written contracts to afford them the necessary protections.

### **2. Which warranties are imposed with the sale of goods?**

Regarding the sale of goods, Utah law provides for warranties of title, merchantability, fitness for a particular purpose, and conformity with promises, descriptions, and samples. A warranty can be excluded or modified only by specific language as provided by statute.

### **3. What laws regulate franchises and other marketing agreements?**

Generally, Utah law regulates marketing agreements, which generally include three types of marketing arrangements:

- a) **Agency.** Utah common law of agency regulates the principal-agent relationship.
- b) **Distribution.** Distribution agreements may be subject to the Utah version of the Uniform Commercial Code where the distribution agreement constitutes a sale of goods.
- c) **Franchising.** There are both federal and Utah laws regulating franchising agreements, including the **Utah Business Opportunity Disclosure Act** (Utah Code §§13-15-1 et seq.).

The **Utah Business Opportunity Disclosure Act** relates to franchising in the following way: under the Act, a "business opportunity" is the sale or lease of products, equipment, supplies, or services to enable the purchaser to start a business and in which the seller represents that the purchaser will have income from the business, or that the seller will provide the purchaser with a sales or marketing plan.

Most, if not all, franchises involve a sales or marketing plan, and franchisors discuss with franchisees potential sales or profits

the franchisee may make. Consequently, most franchises fall within the definition of "business opportunity" under the Act.

For the marketing of business opportunities, the Act requires the seller to "file and disclose"; that is, to file detailed disclosures with the Utah Division of Consumer Protection before doing business in Utah. However, certain franchises (those defined as "franchises" by Federal Trade Commission rules) are exempt from these disclosure requirements so long as they file a notice of exemption with the state before locating in the state or offering to sell any franchise to a Utah resident. The exemption must be renewed yearly.

### **4. What is the law in Utah regarding product liability?**

Utah product liability law is governed by common law and statute. Makers of defective products are strictly liable, consistent with **Restatement (Second) of Torts, § 402A (1965)**. According to the Utah Supreme Court, "The cost of injuries caused by defective products . . . sold for profit should be considered a cost of business borne by manufacturers . . . rather than by the injured individuals." *Berry v. Beech Aircraft Corp.*, 717 P. 2d 670, 673 (Utah 1985). In Utah, a legal action alleging a defective product must be brought within two years of the date on which the alleged injury occurred.

### **5. Does Utah have laws that regulate telephone solicitations?**

Yes, the **Telephone and Facsimile Solicitation Act** (Utah Code Ann. § 13-25a-101, et seq.) prohibits the operation of automated dialing systems with recorded messages to make sales by telephone. It also prohibits transmission of advertising by fax machine to any person with whom the solicitor has no prior business relationship without that person's prior written consent. Businesses may not make telephone solicitations before 8:00 a.m. or after 9:00 p.m., on a Sunday, or on a legal holiday, without the prior written consent of the person called. Telephone solicitors must identify themselves, their business, and their purpose for calling. They also must discontinue the solicitation when the person being solicited gives a negative response. Further, a telephone solicitor may not withhold display of the solicitor's number from caller identification equipment.

### **6. What laws apply to consumer sales transactions?**

The **Utah Consumer Sales Practices Act** (Utah Code Ann. § 13-11-1, et seq.) broadly prohibits deceptive practices in

consumer transactions, such as intentional misrepresentations about goods or services. Examples include the following:

- ▶ Claims that a product has sponsorship, approval, characteristics, or uses that it does not have
- ▶ Claims that a product is of a particular quality or standard when it is not

This law gives buyers the right to cancel a purchase from a direct seller within three business days of the sale, and requires sellers to notify buyers of that right.

### **7. Does Utah law set a maximum interest rate for loans?**

Yes and no. In Utah, the maximum allowable interest rate is 10% - unless the parties to the loan agree upon a different rate:

*“Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan . . . shall be 10% per annum”* (Utah Code §15-1-1).

The result? Since lenders almost always use form contracts that specify the loan rate, as a practical matter there is no maximum interest rate.

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## **E-Commerce and Electronic Data Protection**

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### **1. Are there specific laws regulating e-commerce?**

Utah has adopted the *Uniform Electronic Transaction Act* (Utah Code §§46-4-101 et seq.), which, like a similar federal law (15 USC §7001), gives the same legal effect to electronic versions of contracts, signatures, and other records as their traditional paper-based counterparts.

### **2. Are there data protection laws in Utah?**

Utah’s *Protection of Personal Information Act* (Utah Code §13-44-201) requires every company doing business in the state and maintaining personal information about others (such as social security numbers and other identifying information) to:

- ▶ Safely maintain that information;
- ▶ Establish reasonable procedures to prevent unlawful use or disclosure of that information;

- ▶ Investigate any breach of system security relating to that information,
- ▶ Notify affected individuals if the information is misused or reasonably likely to be misused; and
- ▶ Destroy records containing personal information that no longer are required in the ordinary course of business.

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## **Intellectual Property: patents, trademarks, copyrights**

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### **1. What intellectual property rights are capable of protection in Utah?**

#### **\* PATENTS**

**Nature of right.** A patent gives its owner the right to exclude others from making, using, offering for sale or selling in, or importing an invention into, the US.

**How protected.** Protection is obtained by filing an application with the US Patent and Trademark Office (USPTO).

**How enforced.** Once a patent is issued, the patent owner must enforce the patent without aid of the USPTO, by suing in a federal court - state courts lack jurisdiction to handle patent suits.

**Length of protection.** New utility or plant patents have a 20-year term from the date the application was filed in the US. Design patents have a 14-year term from date of issue.

#### **\* TRADE MARKS**

**Nature of right.** A trade mark is any word, name or symbol that is used in trade with goods to:

- ▶ Indicate the source of goods; and
- ▶ Distinguish them from the goods of others.

Trade mark rights can be used to prevent others from using the same, or a confusingly similar, mark with the same or similar goods or services that are sold under the trade mark.

**How protected.** Trade marks can be protected by:

- ▶ Common law;
- ▶ Utah statute; and
- ▶ Federal law.

Owners of trade marks can register them with the USPTO. Applications for the registration of trade marks in Utah must be filed with the Utah Department of Commerce.

**How enforced.** Trade mark rights can be enforced through litigation in both state and federal courts.

**Length of protection.** Registrations last for ten years, renewable for successive ten-year terms. Trade marks are legally protected for as long as they are continuously used in commerce.

#### \* REGISTERED DESIGNS

**Nature of right.** A federally registered design is any novel, non-obvious and ornamental design applied to, or embodied in, an article of manufacture used in commerce (commonly known as a design patent). Utah does not have corresponding protection. The holder of the right can exclude others from making, using and selling designs that are substantially similar to the patented design.

**How protected.** A design patent is protected by federal law and must be registered at the USPTO.

**How enforced.** Design patents are enforced through litigation in federal courts.

**Length of protection.** Protection lasts for 14 years. Design patents cannot be renewed.

#### \* UNREGISTERED DESIGNS

**Nature of right.** An unregistered design can include the nonfunctional elements of a product or its packaging. The owner of the unregistered design can sue in federal or state courts for infringement if the competing product is likely to cause a consumer to be confused as to the product's origin.

**How protected.** There is no formal protection for unregistered designs; however, under federal, state and common law, certain principles of trade dress can protect the shape, appearance or layout (or a combination of these factors) that

make a product or its packaging distinctive and recognizable such that it has acquired secondary meaning in the marketplace.

**How enforced.** The owner can enforce rights through litigation in both state and federal courts.

**Length of protection.** Protection lasts as long as the design continues to be distinctive in the minds of consumers and is used in commerce.

#### \* COPYRIGHT

**Nature of right.** Copyright is available for authors of original works, including literary, dramatic, musical, artistic, architectural, and certain other types of works. Copyright is exclusively governed by federal law. The copyright owner generally has the exclusive right to:

- ▶ Reproduce the work;
- ▶ Prepare derivative works;
- ▶ Distribute copies of the work;
- ▶ Perform the work publicly; and
- ▶ Display the work publicly.

**How protected.** Copyright protection is in force from the time the work is created in fixed form and immediately becomes the property of the author of the work. Copyrights must be registered with the US Copyright Office before the owner can file suit for infringement.

**How enforced.** Federal courts have exclusive jurisdiction over suits for copyright infringement.

**Length of protection.** Protection lasts for the life of the author plus 70 years. In the case of an anonymous work, a pseudonymous work, or a work made for hire, protection lasts for either 95 years from the year of publication or 120 years from the year of creation, whichever is shorter.

#### \* CONFIDENTIAL INFORMATION

**Nature of right.** A trade secret is business information not generally known in the industry, that provides the owner a competitive advantage, and for which the owner makes efforts to maintain confidentiality.

**How protected.** Utah has adopted a modified version of the *Uniform Trade Secrets Act*.

**How enforced.** The owner of the confidential information can bring suit for misappropriation in state court.

**Length of protection.** Protection lasts as long as the information is maintained in confidence and not generally known in the industry. Trade secret law does not protect against the discovery of the trade secret by lawful means.

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## Environmental Law

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### **1. What are the main federal environmental laws, and what do they do?**

\* The **Resource Conservation and Recovery Act** ("RCRA"). The RCRA's primary goal is to regulate hazardous waste. The federal government has delegated the administration of RCRA in Utah to the state and, therefore, the **Utah Department of Environmental Quality** ("DEQ") regulates most aspects of hazardous waste management in Utah.

\* The **Comprehensive Environmental Response, Compensation and Liability Act** ("CERCLA"). CERCLA, or *Superfund* as it is commonly called, was enacted in 1980 to provide for the cleanup of abandoned disposal sites. It also provides a vehicle for the federal Environmental Protection Agency 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 cleanup costs caused by releases, actual or threatened, of hazardous substances. Liability is generally strict, joint and several, with little or no regard for causation. Under CERCLA, there are four categories of persons liable for cleanup costs:

- 1) "Owners or operators" of a contaminated facility. A "facility" is virtually any place in which a hazardous substance is found. The current owner and operator are liable, regardless of when the hazardous substance entered the facility and whether the present owner or operator did anything to cause the release.

- 2) "Owners or operators" of the facility at the time of release of the hazardous substances.
- 3) Any person who contracted or arranged to have hazardous substances taken to, disposed of, or treated at a facility.
- 4) Transporters of hazardous substances.

A PRP can escape liability only if it can establish that the hazardous substance release was caused solely by an act of war, an act of nature ("Act of God"), or an act of unrelated third parties. This latter "third party" defense does not apply if the damage from hazardous substances was caused by an employee or agent of the PRP, or a third party acting under a contract with the PRP.

\* The **Clean Air Act** ("CAA"). The CAA regulates air pollutants under federal standards implemented and enforced by the state agencies. *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 CAA, air emissions are regulated and operating permits are required for all "major" air pollution sources, with state administration and enforcement.

\* The **Clean Water Act** ("CWA"). The CWA regulates the discharge of pollutants into all "navigable waters." It prohibits the discharge of any pollutant into the water of the United States unless a permit has been issued. Since Utah has few navigable waters, the CWA has limited application to businesses in Utah.

### **2. How are federal environmental laws enforced in Utah?**

The federal government has delegated to the state primary permitting and enforcement authority to administer the federal hazardous waste management program, the federal underground storage tank program, the federal safe drinking water program, and the federal **Clean Water Act** discharge permitting and pretreatment programs in Utah. Utah also has a State Implementation Plan (SIP) and operating permits program approved under the federal **Clean Air Act**.

### 3. How does the state administer federal laws and programs?

Utah's **Environmental Quality Code** establishes programs for regulating air quality, water quality, drinking water, solid and hazardous waste management, radiation control, hazardous substance mitigation, and emergency response. The **Utah Department of Environmental Quality** ("DEQ") administers these programs. The DEQ has authority to set standards for air and water quality.

In addition, Utah has its own environmental statutes to help it administer federal laws. Such laws, all of which are administered by the DEQ, include:

(each statute's name fairly describes its purpose)

*Air Conservation Act*

*Indoor Clean Air Act*

*Water Quality Act*

*Safe Drinking Water Act*

*Solid and Hazardous Waste Act*

*Hazardous Waste Facilities Management Act*

*Hazardous Substances Mitigation Act*

*Underground Storage Tank Act*

*Lead Acid Battery Disposal Act*

*Radiation Control Act*

Here is specific information about the more important state statutes:

The **Air Conservation Act** requires a permit for any new or modified facility or other commercial source of pollution and for installation of pollution control equipment, even if the facility would not be subject to permitting under federal law because of the small amount of its emissions. There are few exemptions from the DEQ's permitting requirements.

► **Note About Asbestos:** under Air Conservation Act, any renovation or demolition project involving asbestos conducted at a commercial facility or by a third party at a non-commercial facility is subject to stringent requirements.

The **Indoor Clean Air Act** prohibits smoking in all enclosed indoor places except in designated smoking areas. Exceptions include taverns, private clubs, and guest rooms in lodging facilities. Proprietors and employers must provide their patrons and employees with a smoke-free environment.

The **Water Quality Act** prohibits the discharge of pollutants into the "waters of the state" without a permit, and prohibits placement of any wastes in a location where there is probable cause to believe they will cause water pollution. "Waters of the state" include both surface and underground waters. The act requires immediate reporting of spills or discharges of any oil or other substance which may cause pollution of the waters of the state; requires permits for construction of "treatment works," which include most impoundment structures, wastewater ponds, and treatment facilities; permits are required in almost any case where pollution to the state's underground waters is possible.

The **Hazardous Waste Facilities Management Act** regulates the management of solid and hazardous waste in Utah. The federal government has delegated to the state authority to administer the federal hazardous waste management program under Subtitle C of the **Resource Conservation and Recovery Act**. Under the Utah statute, no person may own, construct, modify, or operate any facility or site for disposal of non-hazardous solid waste, or treating, storing, or disposing of hazardous waste without obtaining a permit. In addition, approval from both the governor and the legislature is required to construct any facility for the treatment or disposal of hazardous waste or non-hazardous solid waste.

The **Hazardous Substances Mitigation Act** is comparable to, but much less extensive than, the federal CERCLA. It authorizes the DEQ to respond to hazardous materials emergencies that threaten public health or the environment, and requires responsible parties to undertake appropriate abatement action. The statute broadly defines "hazardous materials" to include hazardous substances subject to CERCLA, and includes PCBs, asbestos, dioxin, and petroleum. Responsible parties are the same as under CERCLA. Although liability under the Utah statute is strict, unlike under CERCLA it is not several, and therefore liability is apportioned among responsible parties according to their respective contributions to the release of hazardous materials.

**Underground Storage Tank Act.** This statute regulates petroleum underground storage tanks. The federal government has delegated to the state authority to administer the federal

Underground Storage Tank Program in Utah. The DEQ certifies tank installers, inspectors, testers, and removers.

The **Radiation Control Act** aims to protect against sources of radiation that constitute a significant health hazard. The statute requires that permits be obtained for sources of ionizing radiation.

#### **4. How does a business obtain the necessary permits?**

Much of the work of complying with environmental laws in Utah involves obtaining permits from state agencies. The DEQ's Office of Planning and Public Affairs works with and helps businesses obtain the necessary environmental permits.

#### **5. Does Utah require certification of cleanup before property may be transferred?**

No, Utah does not have a transaction-triggered environmental law requiring notification or certification of cleanup before property may be sold or otherwise transferred.

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## **Securities Laws: raising capital from investors**

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#### **1. What are "securities"?**

The government's official definition of "securities," found in the **Securities Exchange Act of 1934**, is very broad, but generally a security includes any arrangement where a person invests money expecting to realize a profit through the efforts of others. Stocks, bonds and shares in mutual funds are the most common type, but interests in limited partnerships and non-managerial interests in LLCs can be securities too.

#### **2. What are the securities laws and what do they do?**

Securities laws protect investors and the general public by prohibiting fraud and misrepresentation in the sale of securities and by requiring companies to make full disclosure of all important information about their securities.

#### **3. How do I know if ownership interests in my business are securities?**

Generally, when business owners rely on their own efforts to make a profit, their ownership interests in the business - such as corporate stock, limited partnership interests, or LLC

membership interests - are normally not considered securities under federal and state laws. However, if an investor invests in a business with the expectation of making money from the efforts of others, federal and state laws usually treat that investor's interest in the company as a security, and the securities laws apply.

#### **4. What is the main legal requirement for selling securities?**

Generally, those who offer securities to investors must register them with the **Securities & Exchange Commission (SEC)**, unless the securities meet the conditions for an exemption. Registration can be complicated, time-consuming and expensive.

#### **5. Are there exemptions from the registration requirements?**

Although registration is the rule, a number of exemptions from the general rule are available. For example, securities issued or guaranteed by federal, state, or local governments, or by banks, savings and loans, credit unions, or public utilities need not be registered. Also exempt are securities listed on approved stock exchanges. Other exemptions include securities distributed as a dividend; transactions by executors, receivers and trustees in bankruptcy; and offers and sales of securities of nonpublic companies made under employee benefit plans and employment contracts.

However, there are 3 primary exemptions from the registration requirements that every business owner should know:

1) **The Private Offering Exemption.** One of the most commonly used exemptions applies to transactions that do not involve a "public offering." This is a private sale of securities, without advertising or promotion, to a limited number of people (usually no more than 15). Since this exemption came about not by statute but by federal case law (law developed by judges in the courts), there are few specific rules for a business that wants to qualify for this exemption, and the exemption is therefore more risky for businesses that insist on strict compliance with the law.

To qualify for this exemption, the following factors are relevant: the number of people who are offered the securities and their relationship to each other and to the seller; the size and manner of the offering, the sophistication of those who are offered the securities, and the nature and kind of information concerning the offering provided to them. A business stands a better chance of being eligible for this exemption if it sells ownership interests to people who have a close family or business



relationship with current owners or managers and who have substantial experience investing in similar businesses. Make sure investors are buying their ownership interests for themselves, and place restrictions on the further transfer of ownership interests to others.

2) **Regulation D Exemption.** This exemption can be characterized as a formal, more complicated version of the Private Offering Exemption described above. Unlike the judge-made law on which the Private Offering Exemption is based, the SEC's Regulation D provides specific "safe harbor" rules for this exemption, providing an extra level of legal certainty to businesses wanting to raise capital from investors.

If followed, the Regulation D rules ensure that an offering of securities will be exempt from the registration requirements. They impose objective standards for the dollar amount of the offering, the number of purchasers, informational requirements, advertising and solicitation restrictions, and limitations on resale. They also require a business to file formal exemption paperwork with the SEC and the Utah Department of Commerce.

Generally, a business may qualify for this exemption if it privately offers and sells ownership interests, without advertising or promotion, to 35 or fewer investors, who because of their significant investment experience or private net worth can reasonably be assumed to be able to protect themselves without all the disclosures required in a registered offering.

3) **One-State Sales Exemption.** This exemption, called the "intrastate offering exemption," exempts certain offers and sales of securities conducted exclusively in the state where the company is organized and does a substantial amount of its business.

A business that privately offers or sells ownership interests to no more than 15 Utah purchasers during any twelve consecutive months may qualify for this federal exemption. Even though filing with the SEC may not be required to qualify for this exemption, a business will need to qualify for state exemption or register the sale with the Utah Department of Commerce.

### **6. What if my offer and sale of securities will not qualify for an exemption?**

If no exemption is available, then registration is required.

You must file a registration statement with the SEC, and provide investors with a prospectus containing detailed information, before you may offer or sell your securities. The SEC's registration forms call for varying levels of ongoing disclosures depending on the size and type of the company offering the securities.

### **7. What federal laws regulate registration and sales of securities?**

The **Securities Act of 1933** (the "1933 Act") and the **Securities Act of 1934** (the "1934 Act") are the federal statutes that regulate the offer and sale of securities.

The 1933 Act prohibits the offer or sale of a security unless either the transaction is registered with the SEC or the transaction or the particular type of security is exempt from registration.

The 1934 Act requires those whose securities are held by the public to ongoing disclosure requirements in their quarterly, annual and other reports; imposes reporting and trading restrictions on directors, officers, principal shareholders, and other "insiders" with their personal transactions in securities; and regulates securities brokers and dealers.

Both Acts also prohibit the making of material misstatements or omissions and other fraudulent practices with the sale of any security, whether or not the transaction is registered with the SEC.

### **8. What are Utah's requirements for sales of securities?**

#### **REGISTRATION**

The Division of Securities, a part of the Utah Department of Commerce, regulates securities offerings and registration in Utah. The state's securities laws are based for the most part on the **Uniform Securities Act**. As such, it is unlawful for any person to offer or sell securities unless the securities are registered in Utah, are exempt from registration, or are "federally covered securities" for which a notice filing has been made with the state.

#### **BROKER-DEALERS AND INVESTMENT ADVISERS**

Broker-dealers and agents who offer or sell securities must obtain a license from the Department of Commerce, Division of Securities. Investment advisers must also be licensed unless their only Utah clients are investment companies, other investment

advisers, banks, and the like, or they have no place of business in the state and had no more than five clients during the preceding twelve month period.

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## Real Estate

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### **1. Does Utah have laws that prevent a company from owning real estate?**

Generally, Utah has no laws restricting ownership of property by business entities, either domestic or foreign. Any domestic or foreign business may own real property in Utah, and mere ownership of that property does not constitute transacting business in the state. Domestic and foreign partnerships of any kind may acquire real property in Utah in the partnership's name.

### **2. What kinds of joint or concurrent ownership are available in Utah?**

#### \* JOINT TENANCY

**Nature of Right.** In Utah, a joint tenancy creates an undivided interest in property with rights of survivorship. Upon the death of one of the owners, the property interest of the deceased owner automatically transfers to the surviving owner or owners without probate, regardless of any contrary provision in the deceased owner's will.

**How Created.** Create a joint tenancy by using the words "joint tenancy" or "with rights of survivorship" or "and to the survivor of them" in the conveyance. Any conveyance of real property to a married couple is presumed to be in joint tenancy.

#### \* TENANCY IN COMMON

**Nature of Right.** Upon the death of an owner, the interest of the deceased owner does not automatically transfer to the co-owner(s), but passes by will or by intestate succession. A tenancy in common is a separate interest in property that is freely transferable by any of the co-owners.

**How Created.** Create a tenancy in common by using the words "tenancy in common" or "with no rights of

survivorship" or "undivided interest" in the conveyance. Unless conveyed to a married couple, any conveyance of an ownership interest in real estate to more than one party is presumed to be a tenancy in common, unless the conveyance expressly states otherwise.

### **3. What contracts are commonly used for sales of real property?**

For residential real estate transactions, real estate brokers must use the standard Utah Division of Real Estate purchase contract, unless the buyer or seller requests an alternative contract. For commercial real estate transactions, attorneys commonly write custom purchase contracts.

### **4. Is there a transfer tax accompanying real property sales?**

Unlike many states, Utah does not impose any transfer tax on the conveyance of real property.

### **5. Are land sales contracts used in Utah?**

Utah law recognizes the use of land sales contracts, but they are seldom used.

### **6. What documents are used to convey real property?**

Convey real property by general or special warranty deed or quitclaim deed signed by the party conveying the property. Utah statutes provide sample language for deeds. A notary must acknowledge a deed before the deed may be recorded, and the deed must contain a sufficient legal description *and* the real estate tax parcel number of the property conveyed. A deed recorded in the county where the property is located imparts constructive notice to all third persons.

### **7. What are the different types of deed?**

**General Warranty Deed.** In a general warranty deed, the seller warrants title subject only to exceptions listed in the deed.

**Special Warranty Deed.** In a special warranty deed, the seller warrants ownership of the property only as against claims arising by or through the seller.

**Quitclaim Deed.** In a quitclaim deed, the seller makes no warranties as to ownership or condition of title.

### **8. What document is used to convey real property as security for a loan?**

Trust deeds are most commonly used to convey interests in real property as security for loans, but mortgages also can be used. Trust deeds and mortgages must be signed with the same formalities as deeds, and to impart notice to third parties, they must be recorded in the county where the property is located.

### **9. Who may serve as trustee under a trust deed?**

A trustee under a trust deed must be either:

- 1) an active member of the Utah State Bar practicing in Utah,
- 2) a qualifying bank or other depository institution or an insurance company doing business in Utah,
- 3) a corporation authorized to conduct a trust business in Utah,
- 4) a licensed title insurance company or agency doing business in Utah,
- 5) an agency of the federal government, or
- 6) an association or corporation licensed, chartered, or regulated by the Farm Credit Administration.

### **10. Is title insurance required?**

Commercial lenders typically require title insurance as a part of any sale of real estate, but title insurance is not required by law.

### **11. How are closings on real estate transactions handled?**

Title companies typically conduct closings on real estate transactions, and act as the escrow agent. Title is transferred at the time of closing, upon payment of the purchase price.

### **12. Are there specific laws governing the landlord/tenant relationship?**

Compared to other states, Utah has few statutes governing the landlord/tenant relationship, which is largely a matter of contract law. Likewise, commercial leases are primarily governed by the common law of contracts, and the practices in Utah do not differ significantly from those in other states. There is no standard

form for a commercial or residential lease.

For lease terms greater than one year, a residential or commercial lease on real property must be in writing and signed. To impart record notice to third parties, have the lease, or a memorandum of the lease, acknowledged by a notary and recorded like a deed.

### **13. Generally, what is the law in Utah regarding foreclosures?**

Upon default, a trust deed or mortgage may be foreclosed through judicial proceedings in which the court may award an amount equal to the outstanding amount of the obligation plus costs, disbursements, and attorney fees. The court may also order the property sold to satisfy the judgment, and direct the sheriff to go ahead with the sale.

A trustee may foreclose a trust deed by non-judicial means through the power of sale. Utah law specifies notice periods and other necessary foreclosure procedures.

Utah has a “one-action” or “security-first” rule that prohibits bringing an action on a debt, rather than foreclosing, if the debt is secured by a trust deed or mortgage.

### **14. What easements are recognized, and what rights attach to easements?**

Utah law recognizes different types of easements, including rights of way, conservation easements, and solar easements. Determine an easement’s scope by the wording of the deed or contract that created the easement or, if the easement is not in writing, by the intent of the parties. Owners of easements are entitled to reasonable and prudent exercise of their easements.

### **15. What are the zoning rules in Utah?**

Zoning power is generally exercised at the county or city level, and requirements vary throughout the state.

### **16. Who can exercise the right of eminent domain?**

The state government, railroads, utilities and mining companies exercise the right of eminent domain or condemnation for most public uses, including public buildings, reservoirs, roads, and public works.

### **17. How are mineral rights treated in relation to surface rights?**

Mineral rights are severable from surface rights. The terms of the specific deeds, contracts and statutes under which the minerals are severed from the surface largely determine the relative rights of mineral and surface owners. As a rule, the mineral estate is considered dominant, and the mineral owner has the right to access and use the surface as reasonably necessary to extract the minerals. Otherwise, as between the mineral and the surface owner, each is entitled to use and enjoy the respective property interest to the highest degree possible, considering the rights of the other.

### **18. How are mineral rights regulated?**

The Division of Oil, Gas and Mining regulates development of minerals in Utah under specific laws governing the different types of minerals.

For oil and gas, Utah's oil and gas conservation laws provide for the orderly development of oil and gas resources in a manner that prevents waste, maximizes recovery, and protects the corresponding rights of all owners. The Division of Oil, Gas and Mining regulates the drilling and density of wells, and upon the application of an operator or other interest owner, defines the geographic area of the property interests that will share in production or by issuing well spacing and pooling orders or approving field-wide unit operations.

Regarding mining, Utah's mining and reclamation laws require mine operators to obtain the Division's review and approval of their plan of operations and to post adequate financial assurance to ensure proper reclamation of the mined land.

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## **Financial Incentives**

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### **1. What financial incentives are available to businesses that invest in Utah?**

Although not strictly a part of any discussion of Utah laws, financial incentives are available to businesses that move operations to, or expand operations in, Utah.

Utah actively encourages both domestic and foreign investment and offers a variety of incentives to businesses that

construct or expand manufacturing and other business facilities in the state. Incentives include both tax rebates and grants.

The **Governor's Board of Economic Development** evaluates and approves all incentives. Incentive programs include:

- ▶ ***Economic Development Tax Increment Financing.***
- ▶ ***Industrial Assistance Fund Grants.***
- ▶ ***Rural Fast Track Program.***
- ▶ ***Enterprise Zone Tax Credits.***

Contact the Board's staff at: 324 South State Street, Suite 500, Salt Lake City, UT 84111; Phone: 877-488-3233.

Other incentive programs include:

**Tax Credits for Research.** Companies conducting research in Utah may receive income tax credits of up to 6% of qualified research expenses, such as wages paid to employees engaging in research, and the purchase price of software, computers, computer equipment and other machinery and equipment primarily used for conducting research in Utah.

**Sales Tax Exemption for Manufacturing Equipment.** Manufacturers (SIC Codes 2000-3999) are exempt from sales tax on purchases of new or replacement equipment.

**Industrial Revenue Bonds.** Local county and city governments regularly issue bonds to attract businesses.

**Film Production Incentives.** Businesses engaged in film production in Utah locations are eligible for tax rebates up to 10%; and if their films are with Utah story lines or content, they may be eligible for tax rebates of up to 12%. □

***This is one of a series of articles meant to provide a brief and informative summary of certain laws for clients and friends of Robert A. Youngberg, Attorney & Counselor at Law, PLLC. The articles are not intended to provide specific legal advice. Before relying on any of the information discussed in these articles, consult with an attorney to ensure that your use of the information is appropriate in your situation.***