

Doing Business in United States: Colorado

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LEGAL SYSTEM

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

Colorado has a common law legal system, subject to pre-emption by the federal laws of the US. Under Colorado law, the Colorado constitution takes precedence over all other laws and the courts can declare statutes, regulations, or actions that violate the constitution invalid.

FOREIGN INVESTMENT

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

Generally, Colorado encourages foreign investment. However, certain business sectors (such as defence contractors, commercial aviation, banking and mining) may be subject to federal or Colorado restrictions on foreign investment and there may also be additional reporting requirements.

3. Are there any exchange control or currency regulations?

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

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

Although Colorado does not offer any grants or incentives exclusively to foreign investors, the state and local governments may provide some tax and non-tax incentives (such as enterprise zones and job training programmes)

to encourage investment, for which foreign investors are eligible. Colorado also has two Foreign Trade Zones (Colorado Springs and Denver).

BUSINESS VEHICLES

5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction? In relation to this vehicle, please provide details on:

- Registration formalities (including timing).
- Minimum (and maximum) share capital.
- Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities).
- Any restrictions on the rights that can attach to shares.
- Any restrictions on foreign shareholders.
- Management structure and any restrictions on foreign managers.
- Directors' liability.
- Parent company liability.
- Reporting requirements (including filing of accounts) and cost of compliance.

The most common form of business vehicle established by a foreign company to conduct business in Colorado is a corporation, incorporated under Delaware or Colorado law. However, depending on the type of business, foreign companies can use other forms of business vehicles, such as a general or limited partnership, or a limited liability company.

- **Registration formalities.** The corporation's incorporator must file its articles of incorporation (articles) with the Secretary of State of Colorado. The certificate is effective on the day of filing. A corporation

must also have bye-laws and organisational minutes of the board of directors (board). A corporation is not considered active until it has issued stock.

- **Share capital.** Colorado does not impose a minimum or maximum share capital.
- **Non-cash consideration.** Shares can be issued for property, goods and services provided to the corporation. The board's determination as to the adequacy of the consideration is generally conclusive, and when the corporation receives that consideration, the shares are fully paid and non-assessable. Special adequacy rules apply to certain forms of consideration, such as promissory notes. However, there may be tax implications for the corporation and for the recipient if shares are issued for past or future services or other non-cash consideration.
- **Rights attaching to shares.** Restrictions on rights can be imposed by:
 - the articles;
 - the bye-laws; or
 - a separate shareholders' agreement.

However, a shareholder cannot be prohibited from transferring shares.

- **Foreign shareholders.** Generally, there are no restrictions on the ownership of shares by foreign shareholders except in certain industries (*see Question 2*).
- **Management structure.** A corporation is managed by its board, which is generally elected by the shareholders at an annual meeting. Officers appointed by the board are responsible for the day-to-day management. There are no general restrictions on foreign officers or directors except in certain industries (*see Question 2*).
- **Directors' liability.** A director owes fiduciary duties to the corporation and its shareholders, and can be held personally liable for any breach of those duties. The articles can eliminate or limit a director's personal liability for damages for certain acts and breaches. A corporation also frequently agrees to indemnify its directors against certain liabilities. The extent and nature of the indemnification may be set out in the articles or bye-laws. Corporations may also enter into indemnification agreements with directors and officers, and purchase directors' and officers' insurance to cover claims against its directors or officers.
- **Parent company liability.** While there are some exceptions, a parent company generally is not liable for its subsidiaries' obligations. However, a court can, as an equitable remedy, revoke the shareholders' limited liability status.

- **Reporting requirements.** Colorado corporations must file with the Colorado Secretary of State:
 - certificates identifying any change of name, registered agent or registered office;
 - annual reports; and
 - annual franchise tax reports.

If the corporation is qualified to do business in another state, it must also comply with that state's reporting requirements, including payment of fees. In addition, a public corporation must comply with the reporting requirements of the US Securities Exchange Act of 1934 (*15 USC §78a et seq*).

EMPLOYEES

6. What are the main laws regulating employment relationships?

Both state statutes and the common law define the rights of employers and employees in Colorado.

In addition to federal law, similar (but not identical) state statutes prohibit employment-related discrimination on the basis of:

- Criteria such as race, religion, age and gender (*Colorado Revised Statutes (CRS) § 24-34-301 et seq*).
- An employee's participation in lawful off-duty activities (*CRS § 24-34-402.5*).
- An employee's marriage to another employee (*CRS § 24-34-401(1)(h)*).

State statutes also govern labour relations, labour standards such as minimum wage, overtime and child labour, and benefits. The Colorado Employment Security Act (*CRS § 8-70-101 et seq*) provides for unemployment compensation. These state and federal statutes apply to employees working in Colorado regardless of any choice of law provision contained in an employment contract.

To compensate workers for employment-related injuries, Colorado has a workers' compensation statutory scheme (*CRS § 8-40-101 et seq*).

An employer based outside Colorado who employs individuals to work in Colorado is subject to Colorado laws that:

- Prohibit employment discrimination.
- Govern labourer relations and standards.
- Provide for unemployment compensation and workers' compensation for Colorado employees.

Colorado-based employees are protected by Colorado laws even if those employees travel out of the state as part of their employment. However, if a Colorado-based company has employees at locations outside of Colorado, those employment relationships, particularly the statutory rights and entitlements, will be governed by the laws of the forum state.

7. Is a written contract of employment required? Are any agreements and/or implied terms likely to govern the employment relationship?

Neither Colorado nor federal law requires employees and employers to enter into written contracts governing employment relationships.

8. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

This is not regulated under Colorado law, but there are federal laws governing the matter.

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

Both state statutes and the common law regulate the termination of employment contracts (see *Question 6*).

In the absence of an employment agreement providing for a specified term of employment, employment in Colorado is presumed to be at-will, which means that both the employer and the employee can terminate employment at any time, with or without notice and with or without cause; provided, however, that the employer is not terminating the employee in violation of statutes prohibiting employment discrimination or other illegal motivations for employment termination.

Terminations are not classified as fair/justified or unfair/unjustified, and no statutory minimum notice period or severance payment is required. A terminated employee can file an action, alleging that he was terminated for reasons prohibited by statute and/or common law.

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

This is not regulated under Colorado law, but there are federal laws governing the matter.

11. Do foreign employees require work permits and/or residency permits? If so, how long does it take to obtain them and how much do they cost?

Foreign employees do not need any permits to work in Colorado, apart from those required under federal law.

TAX

12. In relation to employees, what constitutes tax residency in your jurisdiction?

Individuals become Colorado residents for tax purposes if they are either:

- Domiciled in Colorado.
- Present in Colorado for more than six months of the tax year. A taxpayer who is a resident for only part of the year may be entitled to apportion income between taxing jurisdictions.

13. What income tax or social security contributions must the following pay:

- Tax resident employees?
 - Non-tax resident employees?
 - Employers, in relation to their employees?
-

Tax resident employees

Residents are liable for Colorado income tax at the rate of 4.63% of Colorado taxable income. Colorado taxable income is federal taxable income, subject to certain adjustments. Generally, the tax year for Colorado purposes is the tax year for US federal purposes.

Non-tax resident employees

Non-residents are liable for Colorado income tax at the rate of 4.63% of Colorado source income. Colorado source income includes wages for services performed in Colorado.

Employers

Employers must pay on behalf of their employees:

- State unemployment tax.
- Federal social security taxes.
- Federal unemployment tax.

The state employment tax rate varies with the unemployment experience of the employer.

They must also withhold and make timely payments to the tax authorities:

- Federal and state income taxes paid by employees.
- Employees' share of social security and unemployment taxes.

Employers may also be liable for minor occupational or commuter taxes levied by local jurisdictions.

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

A business entity is tax resident in Colorado if it does business, has an office, or has employees in the state and is therefore potentially liable for Colorado income tax.

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

State income tax

This is levied at the rate of 4.63% of the company's taxable income. To calculate the basis of state income tax in Colorado, certain adjustments are applied to the company's federal taxable income.

If the entity is taxable in other states, then its business income is apportioned to Colorado based on a formula that, for tax years beginning in 2009, takes into account the proportion of the company's sales revenue that is Colorado-source sales revenue and its non-business income is allocated to Colorado based on situs rules.

Sales or use tax

This is levied on tangible personal property and certain enumerated services at the rate of 2.9% for the state tax and between 1% and 7% for the county and local tax.

Real property tax

Real property is taxed throughout Colorado, and the rate of tax depends on location and other factors.

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

For the purpose of state tax in Colorado, non-tax resident companies are generally taxed in the same way as resident companies (see *Question 15*).

17. Please explain how each of the following is taxed:

- Dividends paid to foreign corporate shareholders.
- Dividends received from foreign companies.
- Interest paid to foreign corporate shareholders.
- Intellectual property (IP) royalties paid to foreign corporate shareholders.

■ **Dividends paid.** If the shareholder is otherwise subject to tax in Colorado, dividends are generally taxed in Colorado at the rate of 4.63%. Colorado does not impose a withholding tax on dividends paid although foreign shareholders are generally subject to federal withholding. Dividends are not generally deductible by the payer.

■ **Dividends received.** If the shareholder is otherwise subject to tax in Colorado, dividends received are generally subject to tax in Colorado at the rate of 4.63%.

■ **Interest paid.** If the shareholder is otherwise subject to tax in Colorado, interest is generally subject to tax in Colorado at the rate of 4.63%. Colorado does not impose a withholding tax on interest. Interest is generally deductible by the payer.

■ **IP royalties paid.** If the shareholder is otherwise subject to tax in Colorado, royalties are generally subject to tax in Colorado at the rate of 4.63%. Colorado does not impose a withholding tax on royalties although foreign payees are generally subject to federal withholding unless a tax treaty applies. Royalties are generally deductible by the payer.

18. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)? If so, please give details.

This is generally a matter of federal tax law. However, as Colorado taxable income is based on federal taxable income, the federal rules in this area affect Colorado taxable income indirectly.

19. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

This is the same as for thin capitalisation rules (see *Question 18*).

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

This is the same as for thin capitalisation rules (*see Question 18*).

21. How are imports and exports taxed?

Generally, Colorado (and many local jurisdictions) impose a use tax on goods brought into the state for consumption in the state, but allow a credit for sales tax paid to another state or local jurisdiction. Goods sold for use outside the state are generally not subject to sales or use tax in the state, or if sales tax is paid in Colorado, the state where the goods are consumed may allow a credit for such tax paid.

COMPETITION

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

The Colorado Antitrust Act (*CRS § 6-2-101 et seq*) generally parallels federal anti-trust laws. However, some significant differences from federal law include the following:

- The indirect purchaser rule under federal law does not apply to actions brought by the Colorado Attorney General on behalf of governmental or public entities.
- Certain contracts or agreements entered into in violation of the Colorado Antitrust Act are deemed void, and all payments made under such contracts can be recovered.
- Treble damages are available for *per se* violations only.

The Colorado Unfair Practices Act (*CRS § 6-4-201 et seq*) prohibits certain forms of price discrimination based on geographic locality, secret rebates, and below cost sales. Persons injured by violations can recover treble damages, but not lawyers' fees.

Non-compete covenants that restrict the right of a person to receive compensation for performance of skilled or unskilled labour for any employer are made void by *CRS § 8-2-113(2)*. The statute provides certain exceptions, including for:

- Contracts for the sale of a business.
- Contracts for protection of trade secrets.
- Certain executive, management and professional personnel.

INTELLECTUAL PROPERTY

23. Please outline the main intellectual property rights that are capable of protection in your jurisdiction. In each case, please state:

- **Nature of right.**
 - **How protected.**
 - **How enforced.**
 - **Length of protection.**
-

Patents

- **Nature of right.** Patent rights are created under federal law. Utility patents protect an invention that is:
 - new;
 - useful; and
 - non-obvious.

The patent holder can prevent others from manufacturing, selling, importing, licensing, and practising the patented invention. Patentable subject matter includes:

- business methods;
- software;
- processes;
- chemical compositions;
- manufactured products and parts;
- plants;
- any improvements on these inventions.

Design patents protect new and original, non-functional, ornamental designs in manufactured products.

- **How protected.** Patent rights are protected by an application filed with the US Patent and Trademark Office (USPTO).
- **How enforced.** Patent rights are enforced in court. Patents can be enforced by patent holders and by exclusive licensees. Remedies include injunctive relief and monetary damages.
- **Length of protection.** Utility patents are protected for 20 years from the date the patent application is filed, and design patents are protected for 14 years from the date the patent application is filed.

Trade marks

- **Nature of right.** A word, name, design, logo, phrase, colour, packaging or combination of any of these, which identifies the source of products or services

in commerce, can be protected as a trade mark. A registered trade mark must not be generic or merely descriptive, or otherwise statutorily ineligible for registration.

The holder of a trade mark right has the exclusive right to use the trade mark in commerce in connection with products and services associated with the trade mark.

- **How protected.** Common law trade mark rights begin to accrue on the use of a mark in commerce. A product design can be eligible for protection as a trade mark if it identifies the source of the product. Trade marks can also be registered with the Colorado Secretary of State (Secretary) and the USPTO.
- **How enforced.** Trade mark rights can be enforced in court under claims for:
 - trade mark infringement;
 - unfair competition; and
 - deceptive trade practices.

Remedies for infringement of registered and unregistered trade marks include injunctive relief and monetary damages.

- **Length of protection.** Common law trade mark rights last as long as the mark is in use in commerce. Trade marks registered with the Secretary or with the USPTO are valid for ten years from the date of registration, and can be renewed for successive ten-year periods.

Registered designs

- **Nature of right.** The nature of rights for a registered design depends on the form of registration sought for the design. A design can be protected as a design patent, a trade mark, a copyright, or any combination or all of these.
- **How protected.** A product design can be protected as a design patent registered with the USPTO (see above, *Patents*). A product design and other designs can also be registered as a trade mark with the USPTO or the Secretary (see above, *Trade marks*), or may be registered as a copyright with the US Copyright Office (see below, *Copyrights*).

Unregistered designs

An unregistered design can be protected:

- As a common law trade mark if it meets the protection requirements of a trade mark (see above, *Trade marks*).
- As a copyright (see below, *Copyrights*).

Copyrights

- **Nature of right.** Copyrights are protected under federal law. Copyrights protect creative expressions in works of original authorship that are fixed in a tangible medium. The copyright holder has the exclusive right to copy, sell, license, publicly display, publicly perform, and make derivative works based on the copyrighted work. The following can all be subject to copyright:

- books;
- sculptures;
- paintings;
- lyrics;
- sound recordings;
- architectural drawings;
- software;
- dramatic works;
- databases.

- **How protected.** Copyright is automatically created and can be protected once the copyrightable subject matter is fixed in a tangible medium. However, a copyright must be registered with the US Copyright Office to be enforced in court.
- **How enforced.** Copyright is enforceable in court, and remedies include injunctive relief and monetary damages. Copyright owners and exclusive licensees can enforce copyrights.
- **Length of protection.** Copyright protection lasts during the lifetime of the copyright creator, plus 70 years. For anonymous works, pseudonymous works or works made for hire, copyright protection lasts for either 95 years from the date the work was published or 120 years from the date the work was first created, whichever is the shorter. There is no right of renewal beyond these terms.

Confidential information

- **Nature of right.** Confidential information is information that:
 - its holder restricts access to;
 - is valuable to the holder; and
 - lends its holder a competitive advantage.

Confidential information is treated as a trade secret and includes non-public information related to:

- technology;
- financial and marketing matters;

- business strategy;
- personnel, contractor and customer information.

The owner of confidential information is entitled to prevent unauthorised access to and use of its confidential information, but cannot prevent others from independently developing or discovering the same information.

- **How protected.** Confidential information is protected by the actions of its holder, for example, by restricting access to the information through security measures and confidentiality agreements that restrict use and disclosure of the information.
- **How enforced.** Rights in confidential information are protected under civil and criminal federal and Colorado laws, and by contract, and can be enforced by the owner of the confidential information by actions for:
 - theft of trade secrets;
 - misappropriation;
 - trespass to computer systems and data;
 - breach of contract.
- **Length of protection.** Confidential information can be protected as long as the information remains confidential.

MARKETING AGREEMENTS

24. Are marketing agreements regulated in your jurisdiction? If so, please give brief details in respect of the following arrangements:

- **Agency.**
- **Distribution.**
- **Franchising.**

- **Agency.** There are no specific Colorado or federal laws on agency agreements. However, Colorado and federal anti-trust laws may apply.
- **Distribution.** Some types of distribution agreements, such as automobile and petroleum product agreements, are regulated by federal and Colorado laws. Colorado and federal anti-trust law may also apply.
- **Franchising.** Federal laws, including changes to the Federal Trade Commission Franchise Rule that became effective on 1 July 2008, regulate and require disclosure of the material terms of certain kinds of franchising agreements. Colorado and federal anti-trust law may also apply. Colorado has not enacted a franchising law of general application.

E-COMMERCE

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

The laws governing e-commerce are as follows:

- **The federal Electronic Signatures in Global and National Commerce Act (Pub L 106-229, June 30, 2000, 114 Stat 464 (15 USC §7001 et seq)) (E-Sign Act).** This federal law was enacted in 2000 and was intended to help facilitate the use of electronic records and signatures in commercial transactions involving interstate and foreign commerce. It defines the term “electronic signature” to mean an electronic sound, symbol, or process attached to, or logically associated with, a contract or other record and executed or adopted by a person with the intent to sign the record. The E-Sign Act allows an electronic signature to have the same legal effect as a written signature if the policies and procedures established by the Act are followed. The E-Sign Act does not apply to non-commercial transactions, such as information filings with governments or between government entities.
- **The Uniform Electronic Transactions Act 2002 (CRS § 24-71.3-101 et seq) (UETA).** This state law was adopted in 2002. Under the UETA, parties that wish to enter into contracts and other transactions relating to the conduct of business, commercial, charitable or governmental affairs can do so using electronic records and electronic signatures, in place of traditional paper documents signed with original handwritten signatures. Although UETA applies for many government filings and transactions between government entities, several transaction types are specifically excluded, such as election ballots, wills and testamentary trusts (see CRS §24-71.3-102(16) and §24-71.3-103 for complete descriptions).

DATA PROTECTION

26. Are there any data protection laws? If so, please give brief details.

In addition to protections under federal data protection laws, Colorado has data protection laws in several areas, but no comprehensive single privacy law. For example, the theft, disclosure, stealing, or copying of physician, healthcare worker, or hospital information without authorisation is a felony under Colorado law. In addition, there are laws governing other privacy issues, such as the release of sealed and certain other court records, certain information contained in government data banks, and school records.

PRODUCT LIABILITY

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

State statutes and common law govern product liability claims filed in Colorado, (*CRS §13-21-401 et seq*). Strict liability, negligence and breach of warranty claims are recognised. Claims can also be based, among other things, on the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (*15 USC §§ 2301-2312*). Negligence and defects in product design, manufacture and warnings can give rise to liability. Innocent distributors and sellers are protected from liability by statute. Fault can also be allocated between party tortfeasors and so-called “non-parties at fault”. Additionally, there are statutory caps on the recovery of non-economic and punitive damages.

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