



# Arkansas

Prepared by Lex Mundi member firm,  
Rose Law Firm, a Professional Association

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# Guide to Doing Business in Arkansas

A Legal Guide for Out-of-State and Foreign Businesses



# GUIDE TO DOING BUSINESS IN ARKANSAS

## I. INTRODUCTION

Rose Law Firm, a Professional Association, is one of Arkansas's largest, full service law firms. Rose Law Firm traces its roots to the legal partnership of Chester Ashley and Robert Crittenden, established November 1, 1820.

It is our pleasure to provide this Guide to Doing Business in Arkansas. By its nature, this Guide is an overview. Any party seeking to do business in Arkansas should contact a Rose Law Firm lawyer for representation and counsel.

The materials in this Guide are intended to be accurate at the date of its delivery (January 7, 2018). This Guide cannot be relied on for legal advice, and use of this Guide does not create an attorney-client relationship. For more information about Arkansas legal issues, please contact:

Paul Parnell  
ROSE LAW FIRM,  
A PROFESSIONAL ASSOCIATION  
120 East Fourth Street  
Little Rock, Arkansas 72201-2893  
(501) 377-0436  
pparnell@roselawfirm.com  
**www.roselawfirm.com**

## II. GENERAL INFORMATION CONCERNING THE STATE OF ARKANSAS

### A. History

The first permanent European settlement in Arkansas was established at Arkansas Post, near the Mississippi River, in 1686 by French explorers. Arkansas was acquired by the United States as a part of the Louisiana Purchase in 1803 and was successively a part of the Indian, Louisiana, Missouri, and Arkansas Territories before being admitted to the Union as the 25th state on June 15, 1836.

### B. Location, Size, and Population

Arkansas is a south-central state located 700 miles from the east coast, 1,700 miles from the west coast, and 300 miles from the Gulf of Mexico, with the Mississippi River as its eastern border. The state is bounded on the north by Missouri; on the east by Tennessee and Mississippi; on the south by Louisiana; and on the west by Texas and Oklahoma. The state ranks 27th among the 50 states in area with 53,104 square miles, of which 1,159 miles are covered by waterways.

Arkansas is almost equally divided between lowlands and highlands, with the Gulf coastal plain on the east and south and the interior highlands in the west and north. Elevations range from 54 feet above sea level in the southeast to over 2,700 feet in the northwest.

The lowlands of eastern Arkansas have mainly been utilized as farmland. South Arkansas contains a wide range of forests as well as farmland. The highlands have been developed for grazing land, the poultry industry, and a large tourism industry.

The following table sets forth the population trend for Arkansas for the five most recent decennial censuses and the projected population for 2020:

#### ARKANSAS POPULATION TREND (In thousands)

<u>Year</u>	<u>Population</u>	<u>% Change</u>
1960	1,786	6.9 %
1970	1,923	7.7 %
1980	2,286	18.9 %
1990	2,351	2.8 %
2000	2,673	13.6 %
2010	2,916	9.1 %
2020 (projected)	3,287	12.7%

## C. Climate

Arkansas's climate is temperate with four distinct seasons, featuring long summers and short winters. The average annual maximum temperature in Little Rock is 72.9°, and the average annual minimum temperature is 52.5°. The average annual relative humidity at noon in Little Rock is 49%, and the total annual precipitation averages 50.6 inches.

## D. Major Urban Centers

Arkansas has seven metropolitan statistical areas (MSAs). The largest MSA is Little Rock-North Little Rock, which had an estimated population of 734,622 in 2016. Little Rock is centrally located in Arkansas and serves as the major transportation, governmental, and industrial center of the state. Other population centers include the following:

### Major Urban Centers Population (Source: U.S. Census Bureau 2016 Estimate)

Hot Springs MSA	97,477
Pine Bluff MSA	91,962
Jonesboro MSA	129,858
Texarkana MSA	150,098
Fort Smith MSA	281,277
Fayetteville-Springdale-Rogers MSA	525,032
Little Rock-North Little Rock-Conway MSA	734,622

Additionally, portions of Arkansas are included in the Memphis, Tennessee-Arkansas-Mississippi MSA having a 2016 estimated population of 1,342,842.

## E. Principal Industries

Like most of the United States, Arkansas's service industry accounts for the largest percentage of jobs in the state. Both manufacturing and agriculture, however, still play an important role in Arkansas's economy.

**1. Manufacturing.** In 2016, manufacturing constituted 13.2% of the state's jobs and approximately 14.4% of the gross state product. Arkansas manufacturers are now producing more sophisticated products such as electronics, rubber and plastic products, transportation equipment, and primary and fabricated metals.

**2. Service.** The largest percentage of jobs in the state are in the service industry. In 2016, service-oriented jobs accounted for 29.3% of the state's employment and 25% of the gross state product.

**3. Agriculture.** Agriculture is a significant and historical component of Arkansas's economy. As of 2016, there were approximately 43,000 farm operations in Arkansas. Arkansas

is the number one producer of rice in the United States and the third largest producer of broilers and meat-type chickens. Soybeans and cotton are also cash crops in Arkansas.

**4. Fortune 500 Firms.** Six Fortune 500 firms are headquartered in Arkansas: Dillard's, Inc., Tyson Foods, Inc., Wal-Mart Stores, Inc., Murphy USA, J.B. Hunt Transport Services and Windstream Holdings. Over 100 Fortune 500 firms have operations in Arkansas. In addition, two Fortune 1000 firms, ArcBest and Murphy Oil Corporation, are headquartered in Arkansas.

## **F. Employment Data**

**The following chart lists the 28 largest employers in Arkansas in 2015, divided by number of employees (Source: Arkansas Economic Development Commission Strategic Planning and Research Division):**

### **Companies with 7,500 or Greater Employees:**

1. Arkansas State Government
2. Wal-Mart Stores, Inc.
3. Tyson Foods, Inc.
4. U.S. Government

### **Companies with 5,000 – 7,499 Employees:**

5. Baptist Health
6. J.B. Hunt Transport Services, Inc.

### **Companies with 2,500 – 4,999 Employees:**

7. Community Health Systems
8. Arkansas Children's Hospital
9. Chi St. Vincent
10. The Kroger Company
11. Arvest Bank Group, Inc.
12. FedEx Corporation
13. St. Bernard's Medical Center
14. Lowe's Companies, Inc.
15. Union Pacific Railroad Company
16. Simmons Foods, Inc.
17. Harp's Food Stores, Inc.
18. Dollar General Corporation
19. Dillard's Inc.
20. Arkansas Blue Cross & Blue Shield
21. Koch Industries, Inc. (Georgia-Pacific/Molex)
22. ABB Ltd. (Baldor Electric Company)
23. USA Truck, Inc.
24. Entergy Corporation

**Companies with 2,000 – 2,499 Employees:**

- 25. Mercy
- 26. PAM Transportation Services, Inc.
- 27. AT&T, Inc.
- 28. United Parcel Service, Inc.

**Labor Force**

	<b>2014</b>	<b>2015</b>	<b>2016</b>
	1,300,600	1,330,099	1,342,691
Employed	1,220,900	1,260,615	1,288,994
Unemployed	79,700	69,484	53,697
Unemployment Rate	6.1 %	5.2 %	4.0 %
Mining, Logging & Construction	55,000	57,200	57,600
Manufacturing	154,300	155,200	154,800
Trade, Transportation, & Utilities	244,800	250,900	252,200
Information	13,600	13,500	13,600
Financial Activities	49,400	49,900	51,200
Professional & Business Services	133,800	138,700	142,500
Education & Health Services	171,900	175,100	181,400
Leisure and Hospitality	107,700	111,700	115,400
Other Services	43,700	44,600	43,700
Government	213,300	212,700	212,400

**Income and Wages**

	<u>U.S.</u>	<u>Arkansas</u>
Per Capita Personal Income (2016)	\$49,571	\$39,345
Average Hourly Earnings (2016)	\$26.09	\$19.79

**Employment Distribution**  
**(2016)**

Trade, Transportation, and Utilities	21.2 %
Government	15.1 %
Education & Health Services	15.1 %
Manufacturing	13.2 %
Professional and Business Services	12.1 %
Leisure and Hospitality	9.8 %

Construction	4.2 %
Financial Activities	4.2 %
Natural Resources and Mining	1.4 %
Other Services	2.1 %
Information	1.1 %

*Source:* Arkansas Department of Workforce Services, Bureau of Economic Analysis, Arkansas Covered Employment & Earning, and Arkansas Economic Development Commission.

## **G. Natural Resources**

**1. Timber.** Forests cover 18.8 million acres, which is more than half of the state. Pine woods make up 41%, and the rest is mixed hardwoods, mostly oak. Timber growing, harvesting, management, transporting, and processing are major industries in Arkansas. *Source:* Arkansas Forestry Commission at [www.aad.arkansas.gov/arkansas-forestry-commission](http://www.aad.arkansas.gov/arkansas-forestry-commission).

**2. Minerals.** Arkansas produces bromine (first in the world in production), cement rock, clay, gypsum, novaculite, quartz crystals, stone, sand and gravel.

**3. Oil.** Total crude oil production in 2016 was 5,467 thousand barrels. Reserves reported in 2015 were 51 million barrels.

**4. Natural Gas.** Total production of natural gas in 2016 was 823,223 million cubic feet. Reserves of 8,343 billion cubic feet were reported in 2015.

**5. Coal.** Total production of coal in 2015 was 91,000 short tons from two mines.

## **H. Transportation**

Arkansas's geographic location is advantageous for commuting to all parts of the United States. It has a multimodal transportation system, which includes waterways, highways, air routes, and railways.

**1. Water.** Arkansas has one of the largest inventories of navigable waterways in the nation with 1,099 kilometers (more than 1,000 miles) along five rivers. A navigable river is located within 65 miles of every county in Arkansas. Nine Arkansas cities have public terminals along the Mississippi, Arkansas, or Ouachita Rivers.

**2. Rail.** There are three Class I railroad companies in Arkansas, Burlington Northern Santa Fe, Kansas City Southern, and Union Pacific, which operate 1,893 miles of track. There are also 22 short line railroad companies operating 891 miles of track

**3. Highway.** Arkansas has approximately 589 miles of interstate highways. The two main interstates that run through Arkansas are Interstate 40 and Interstate 30. Interstate 40 is

the most traveled interstate highway in the nation and a major thoroughfare from coast to coast, providing access to markets from North Carolina to California. Interstate 30 is the shortest interstate ending with “0” and connects Arkansas with markets in the southwest including Mexico.

Planned Interstate 69 will run through Arkansas connecting Canada and Mexico.

**4. Airports.** According to the Federal Aviation Administration, there are approximately 100 public-use airports throughout the state. The Bill and Hillary Clinton National Airport has three runways with lengths of 8,273 feet, 8,251 feet, and 6,224 feet. In addition, it has one concrete helipad measuring 50 by 50 feet. Commercial service is provided by six airlines at this airport. A multi-story parking deck is available for travelers. In addition to Little Rock, the Northwest Arkansas Regional Airport (XNA) has commercial service available from five airlines. Commuter services are also available at airports located in El Dorado, Fort Smith, Harrison, Hot Springs, Jonesboro, Mountain Home, Pine Bluff and Texarkana.

## I. Education

Arkansas shares financial responsibility for public education with local school districts. The state provides its share of financial support, which is designed to equalize educational opportunities by compensating for local differences in the ability to support education.

In 2002, the Arkansas Supreme Court upheld a lower court’s ruling that the state’s system of funding public education was constitutionally inadequate and inequitable. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31 (2002). In response, the General Assembly adopted the Public School Funding Act of 2003, which revised the public school funding formula. Under the Act, Arkansas’s K-12 education foundation funding formula, also referred to as the matrix, is used to determine a per-pupil level of foundation funding disbursed to each school district. The matrix is not intended to reimburse schools for actual expenditures but rather to provide a methodology for determining an adequate level of funding to allow schools to meet minimum accreditation standards and adequately educate Arkansas students. For fiscal year 2017, the foundation funding amount was \$6,646.

As of the beginning of the 2017 – 2018 school year, there were 479,258 students enrolled in the 1,053 public schools in Arkansas, and there were 33,203 teachers employed in those schools.

There are 11 four-year public universities and 22 two-year public colleges in Arkansas. There are also 13 independent colleges and universities, and three technical institutes and vocational-technical schools. In total, these institutions enrolled 167,293 students in the fall of 2015. This is a 1-year decrease of 0.8 percent and the third consecutive year that total enrollments declined.

The state also has two publicly supported law schools located in Fayetteville and Little Rock. Little Rock is also the home of the University of Arkansas for Medical Sciences (“UAMS”), a comprehensive health center with five colleges, Medicine, Nursing, Pharmacy,

Health Professions, and Public Health, and a Graduate School that offers ten programs leading to Graduate Certificates, M.S. and Ph.D. degrees. UAMS is regularly mentioned in *U.S. News and World Reports* as one of America's best hospitals and graduate schools.

## J. Medical and Health Care Facilities

Arkansas has approximately 108 hospitals and related institutions licensed by the Arkansas Department of Health. In 2009, the General Assembly passed a bill to establish the framework for a statewide trauma system. The trauma system links trauma centers across the state to improve emergency medical care for Arkansas citizens. As of September 2017, the Arkansas Trauma Advisory Council had approved 56 hospitals to be a part of this system, including Arkansas Children's Hospital and UAMS, which are the only in-state Level I designated trauma centers.

UAMS is the only adult sickle cell, spina bifida and cystic fibrosis center in Arkansas. The UAMS Arkansas Cancer Research Center is internationally known in several areas, such as multiple myeloma. The Myeloma Institute at UAMS has performed more peripheral blood stem cell transplants than any other center in the world, and its five-year survival rate for newly diagnosed myeloma patients treated at the Myeloma Institute is 74 percent, compared to 43 percent for a comparable patient population according to the NCI cancer statistics database.

Arkansas Children's Hospital, for which UAMS provides the pediatric medical staff, is one of the 25 largest pediatric hospitals in the nation and is nationally ranked by *U.S. News and World Reports* in pulmonology and neonatal care. In 2017, Arkansas Children's Hospital achieved Magnet® recognition from the American Nurses Credentialing Center, putting Arkansas Children's among the elite six percent of hospitals worldwide that have earned Magnet® status.

## K. Government of the State of Arkansas

Under the present Constitution of Arkansas, adopted in 1874, the state government is divided into the three traditional branches — the Legislative, the Executive, and the Judicial.

**In 2014, the voters of the state approved an amendment to the Arkansas Constitution which made significant changes to Arkansas term limits. Under prior law, Senators could serve two 4-year terms and Representatives could serve three 2-year terms, for a total of no more than 14 years serving in both the Senate and House of Representatives. Under the law passed in 2014, lawmakers may serve up to 16 years total between the two chambers. The 2014 law does not limit divide this limitation between time in the House or the Senate, so all 16 years could be served in the House or the Senate or divided between the two chambers however the lawmaker sees fit.**

### 1. Legislative Branch

The legislative power of the State is vested in the General Assembly, which is composed of the Senate and the House of Representatives. The Senate consists of 35 members who are

elected to four-year terms. The House of Representative consists of 100 members who are elected to two-year terms. The General Assembly convenes on the second Monday of every year. In 2009, Amendment 86 of the Arkansas Constitution went into effect. Under this Amendment, the General Assembly will conduct its Regular Sessions in even numbered years and its Fiscal Sessions in odd numbered years. A session lasts for 60 days unless the General Assembly votes to extend it.

## **2. Executive Branch**

There are seven elected officials in the Executive Branch, and these officials are elected to serve four year terms. The elected officials are as follows:

**a. Governor.** The Governor is vested with the supreme executive power of the state. The Governor may control the rate at which any appropriation is expended by allotment or other means and may limit the expenditures for any state agencies below their appropriations whenever actual revenues are less than the revenue estimates upon which the appropriations were based. The Governor has line-item veto power for appropriations and general veto power as to other legislation.

**b. Lieutenant Governor.** The Lieutenant Governor is the ex-officio president of the state Senate. If for any reason the Governor is unable to fulfill his duties, or is absent from the state, the Lieutenant Governor assumes the duties of the office until the end of his term or until the Governor returns or the disabilities of the Governor are removed.

**c. Secretary of State.** The Secretary of State is the keeper of the Great Seal of the State of Arkansas and custodian of the state's records. He or she is the state's chief elections officer, administers corporate and other business laws, oversees political campaign spending and practices, and publishes state books and documents.

**d. Auditor of State.** The Auditor of State draws warrants on the State Treasury in payment of all claims, may pre-audit the accounts of all state agencies, and serves as voter registration coordinator for the state.

**e. Treasurer.** The Treasurer is the custodian of all state funds held in the State Treasury, has the responsibility for investment of state funds, and disburses funds for the operating expenses and obligations of the state. Investment of state funds is administered by the Treasurer with the advice and direction of the State Board of Finance, which is composed of the Governor, Treasurer, Auditor of State, State Bank Commissioner, and the Director of the Department of Finance and Administration, subject to statutory limitations as to permitted investments.

**f. Attorney General.** The Attorney General is the state's chief legal officer. The Attorney General prosecutes or defends certain appeals to which the state is a party, including criminal cases; represents various state officials, boards, and agencies in appeals taken from their decisions and orders; and institutes, in the name of and on behalf of the state, civil suits, and other proceedings necessary to protect the state's rights, interests, or claims.

**g. Commissioner of State Lands.** The Commissioner of State Lands maintains all records concerning state lands and supervises the sale of all lands forfeited for nonpayment of real property taxes.

### **3. Judicial Branch**

The Judicial Branch adjudicates the controversies that arise between persons and parties, determines the guilt or innocence of persons charged with criminal offenses, and interprets the laws of the state as enacted by the General Assembly. The Arkansas Judiciary consists of the Arkansas Supreme Court, Arkansas Court of Appeals, Circuit Courts, District Courts, and City Courts. All judges are elected on a nonpartisan basis. The Arkansas Supreme Court is comprised of one chief justice and six associate justices who are elected statewide for an eight-year term of office. The Arkansas Court of Appeals is made up of one chief judge and 11 judges, all of who are elected in seven Court of Appeals districts for an eight-year term of office. Arkansas has 23 judicial circuits. There are 121 circuit court judges who are elected circuit wide for a six-year term. Arkansas has 252 district court judges elected district wide to a four-year term and are responsible for hearing cases in the district courts.

## **III. BUSINESS SUPPORT**

### **A. Financing Programs for Businesses in Arkansas**

In addition to conventional financing sources (*e.g.*, banks and other commercial lenders), the following are some of the financing programs available to businesses in Arkansas:

#### **1. Arkansas Economic Development Commission**

The Arkansas Economic Development Commission (“AEDC”) provides financial assistance to businesses in Arkansas through a variety of economic development programs and incentives. These programs include the following:

**a. Bond Guaranty Program.** AEDC can guarantee payment of principal and interest of industrial development bonds up to \$5 million per company. AEDC’s guaranty is limited to bonds issued for manufacturing or processing. This program provides companies with long-term, fixed-rate financing and makes bonds more attractive to potential investors. AEDC charges a one-time upfront 5% fee for guaranteeing bond issues.

**b. Infrastructure Grants.** Through the Governor’s Quick Action Closing Fund and Community Development Block Grants, AEDC shares the cost of project infrastructure needs by committing grants from state and federal infrastructure funds. During the process of developing projects with new or expanding business and industry, the Commission considers grants to cities and counties for infrastructure needs to support private sector job creation, job preservation, port and waterway development, aircraft and aerospace industry development, and other economic development projects. The amount of assistance committed is

dependent upon the strength of the company, number of jobs, average wage, project investment and costs associated with facility/site improvements.

In addition to the programs listed above, AEDC administers various incentives based on a business's payroll and location and other criteria. For more information on these incentives and other programs offered by AEDC, see Section III(B) on "Business Incentives" or visit AEDC's website at [www.arkansasedc.com](http://www.arkansasedc.com).

## **2. Arkansas Development Finance Authority**

The Arkansas Development Finance Authority ("ADFA") was created in 1985 to "provide capital for qualified activities that enhance the quality of life for Arkansas." By issuing tax-exempt bonds and other debt instruments, ADFA provides funding for a variety of programs designed to promote economic development within the State of Arkansas. Some of these programs are as follows:

**a. Capital Access Program ("CAP").** CAP offers lending institutions the ability and the incentive to make loans of a more risky nature. Under this program, ADFA sets up a reserve fund for all participating lenders. Each bank has a separate reserve fund with ADFA and is given full lending discretion. Under CAP, a borrower must pay a loan "premium" of 3% to 7% of the principal amount of the loan to ADFA. This money is placed into the institution's reserve fund at ADFA. The lender must then match the borrower's "premium" by placing the same amount into its ADFA reserve fund. ADFA then transfers an amount equal to the combined contribution of the borrower and the lender into the institution's ADFA reserve fund. A bank may only withdraw funds from its ADFA reserve fund when necessary to cover losses on loans made under the program. CAP is an extremely flexible and non-bureaucratic financing option. There are, however, a few restrictions. First, the funds must finance a business purpose in Arkansas. Second, funds cannot be used for the purchase of residential housing. Third, the funds cannot be used to finance passive real estate ownership. Fourth, lending institutions cannot refinance a prior loan, which was not part of the program. Fifth, proceeds cannot be used for "insider transactions." Sixth, the maximum amount ADFA will contribute to the reserve fund for each borrower is \$150,000 for any three year period.

**b. Disadvantaged Business Enterprise Program ("DBE Program").** ADFA, in cooperation with the Levi Strauss Foundation and the Winthrop Rockefeller Foundation created the DBE Program to help provide working loan guarantees capital to minority businesses who cannot otherwise finance their working capital needs. The targeted business for the DBE program are those owned by African Americans, Native Americans, Hispanic Americans, Asian Pacific Americans, subcontinent Asian Americans, handicapped persons, or women who are certified DBE contractors by either the Arkansas State Highways and Transportation Department or 8(a) contractors by the Small Business Administration.

**c. Industrial Development Bond Guaranty Program (the "Guaranty Program").** ADFA can guarantee the repayment of ADFA-issued industrial development bonds for qualified companies. The minimum guaranty is \$200,000 and the maximum is \$6 million. The Guaranty Program can also be used in conjunction with AEDC's Industrial Development

Bond Guaranty Program for maximum guaranties of \$11 million. The Guaranty Program requires fees including a one-time guaranty fee of up to 5% of the guaranty amount and an annual service fee equal to 1/8% of bonds outstanding.

**d. Speculative Industrial Building Loan Program.** This program provides up to a \$1 million loan for local industrial development corporations in Arkansas for the construction of industrial buildings. ADFA, however, will only lend 75% of the building's cost.

**e. Venture Capital Investment Programs.** This program is designed to increase the availability of equity and near equity capital for emerging, expanding, relocating, and restructuring enterprises in Arkansas.

**f. Tourism Development Loan Program.** ADFA has set aside \$2 million for tourism development direct loans. Loans will be a 50/50 match with local financial institutions, and the institution will service the loan. The maximum state loan amount is \$250,000 and the minimum is \$1,000.

**g. Farm Mediation Program.** The Farm Mediation Program provides a forum for farmers and lenders to resolve loan debt service payment problems.

**h. The Arkansas Risk Capital Matching Fund ("ARCMF").** ARCMF works to strengthen and advance the financial infrastructure that supports and accelerates the growth of technology-based enterprises in Arkansas. The fund will target investments toward those technology-based enterprises that are in the early stages of development and are not yet able to attract adequate private sources of traditional financing or venture- or investor-backed capital for their growth and development. A portion of this fund will be used to validate early state technology before other investments can be made.

### **3. Arkansas Capital Corporation**

Arkansas Capital Corporation ("ACC") was established in 1957 for the purpose of providing small businesses in Arkansas with an alternative source of financing. ACC offers short-term and long-term loans for various purposes, including new construction, machinery, equipment, and working capital. ACC provides both direct and Small Business Administration ("SBA") lending. ACC is a "Preferred Lender" of the SBA and is also an "Approved Lender" of the USDA Business and Industrial Loan Program. For more information on the funding programs offered by ACC, contact Arkansas Capital Corporation, 200 River Market Avenue Suite 400, Little Rock, AR 72201, (800) 216-7237, or at [www.arcapital.com](http://www.arcapital.com).

### **4. AEDC Division of Science and Technology (formerly the Arkansas Science and Technology Authority)**

The Arkansas Science & Technology Authority was created by statute in 1983 with the mission to bring the benefits of science and advanced technology to the people and state of Arkansas. It is now the Science and Technology Division of the Arkansas Economic Development Commission. The Division is the driving force behind the commercialization of

job creating research. The primary objective of the division includes the development of the infrastructure to support the groundbreaking research conducted in Arkansas, which in turn leads the way to the successful launch of vibrant entrepreneurial and innovation companies. The Division administers Arkansas' arm of the National Science Foundation's Experimental Program to Stimulate Competitive Research (EPSCoR). Arkansas EPSCoR develops novel and innovative solutions to promote scientific progress within Arkansas. Investments encompass basic, medical, aerospace, energy research, education and training.

## **B. Business Incentives**

Certain manufacturers, eligible computer-related businesses, businesses primarily engaged in motion picture production, distribution centers, and scientific and technical services businesses may qualify for the following incentives in Arkansas:

**1. Job Creation Income Tax Credit (Advantage Arkansas).** Advantage Arkansas provides income tax credits for job creation. These benefits depend on the business's payroll of new full-time permanent employees and the economic ranking, i.e., tier, of the county in which the business locates. The tax credits offered range from 1% to 4% of the business's payroll for each of the first five years after the business has signed its financial incentive agreement with AEDC. The income tax credit cannot offset more than 50% of a business' income tax liability in any one year and may be carried forward for nine years beyond the tax year in which the credit was first earned.

**2. Payroll Rebate (Create Rebate).** Create Rebate is offered only at the discretion of the Executive Director of the AEDC. Like Advantage Arkansas, the benefits offered under the Create Rebate program depend on the business's payroll of new full time permanent employees and the economic ranking of the county in which the business locates. A minimum payroll of \$2 million is required, and businesses may receive a payroll rebate of anywhere from 3.9% to 5%. The benefits can be authorized for up to 10 years.

**3. Investment Income Tax Credit (ArkPlus).** ArkPlus is offered at the discretion of the Executive Director of AEDC. A business meeting certain investment and payroll thresholds may receive a credit on state income taxes for up to 10% of its investment in land, buildings, equipment, and costs relating to licensing and protecting intellectual property. The income tax credit cannot offset more than 50% of a business' income tax liability in any one year and may be carried forward for nine years beyond the tax year in which the credit was first earned.

**4. Sales and Use Tax Refund for New and Expanding Businesses (Tax Back).** A business which is eligible to receive benefits under the Advantage Arkansas, Create Rebate, or ArkPlus programs, and which meets certain payroll and investment thresholds may receive a sales and use tax refund for certain expenditures incurred in constructing a new business or expanding or renovating an existing business.

**5. Sales and Use Tax Refund for Targeted Businesses.** At the discretion of the Executive Director of AEDC, the sales and use tax refund offered under the Tax Back program

may be extended to other types of “targeted businesses,” which are start-up companies in emerging sectors, including businesses in the following categories: (i) advanced materials and manufacturing systems; (ii) agriculture, food, and environmental sciences; (iii) biotechnology, bioengineering, and life sciences; (iv) information technology; (v) transportation logistics; and (vi) bio-based products. To qualify as a targeted business, the company must (i) be less than five years old; (ii) show proof of an equity investment of at least \$250,000; (iii) pay at least 150% of the lesser of the state or county average hourly wage where the business is located; and (iv) meet requisite payroll thresholds.

**6. Equity Investment Tax Credit Program.** The Equity Investment Incentive Program is a discretionary incentive targeted toward new, technology-based businesses paying wages in excess of the state or county average wage. If offered, this program allows an approved business to offer an income tax credit to investors purchasing an equity investment in the business. The income tax credit(s) issued under this program are equal to 33 1/3% of the amount invested by an investor in an eligible business. The income tax credit cannot offset more than 50% of an investor’s Arkansas income tax liability in any one year and may be carried forward for nine years beyond the tax year in which the credit was first earned. The income tax credit earned may be sold upon approval by AEDC.

**7. Job Creation Tax Credit for Targeted Businesses.** A state income tax credit of 10% on a business’s annual payroll is available to start-up businesses, generally less than five years old, which are considered to be “targeted businesses” in one of six categories (see above), if the business seeking the credit meets certain qualifications. Under certain circumstances, credits earned under this incentive may be sold to other businesses so that targeted businesses may realize the benefits of this incentive earlier.

**8. Research and Development.** These programs are intended to provide incentives for university-based research, in-house research, and research and development in start-up, technology-based enterprises. The income tax credits can range from 20% to 33% and the term shall be for five years. This tax credit may be used to offset 100% of a business’ tax liability in a given year.

**9. Consolidated Incentive Act of 2003 (as amended by Act 1296 of 2005).** A business may be entitled to combine some or all of the above listed incentives. Each business desiring to receive benefits must enter into a financial incentive agreement with AEDC.

**10. Child Care Facility Tax Credit.** A business that provides child care for its employees may receive (i) a state income tax credit of 3.9% of the total annual payroll of child care center employees or (ii) a one-time state income tax credit of \$5,000 for the first year of operation.

**11. Customized Training Incentives.** New and expanding companies may receive financial assistance to recruit and train new employees, and existing businesses can receive direct funding or income tax credits for costs of providing classroom training to existing employees.

**12. Recycling Equipment Tax Credit.** Taxpayers may receive an income tax credit of 30% of the cost of purchasing and installing eligible recycling equipment. Eligibility is determined by the Arkansas Department of Environmental Quality.

**13. Digital Production/Film Requirements.** A state sales and use tax refund is available to qualified motion picture production businesses for certain expenditures incurred in connection with the filming or production of certain motion pictures. To qualify, a motion picture production business must meet the minimum spending requirement of at least \$50,000 within a six-month period in connection with a postproduction project or \$200,000 within a six-month period in connection with the production of one project. Under the incentive, there are rebates on production costs and a payroll rebate for the wages paid to cast and crew members from Arkansas. **For more information on this particular incentive, please contact Christopher Crane, Arkansas Film Commissioner, at (501) 682-7676 or [ccrane@arkansasedc.com](mailto:ccrane@arkansasedc.com).**

**14. Tourism Development.** Sales tax and income tax credits are available in connection with certain projects with a minimum cost of \$1,000,000, except in high unemployment counties, where it is \$500,000, for the development of tourism.

**15. Tuition Reimbursement Tax Credit.** Arkansas provides a 30% income tax credit to eligible companies for reimbursements they make to employees for approved educational expenses. The employees must attend an accredited Arkansas post-secondary educational institution.

**16. Equipment Donation or Sale below Cost Credit.** Act 759 of 1985 provides a tax credit to taxpayers who donate, or sell below cost, new machinery or equipment to a qualified educational institution. The credit is equal to 33% of the donation, reduction in cost, or research expenditures.

**17. Biodiesel Tax Credit.** The Biodiesel Incentive Act provided an income tax credit to biodiesel suppliers equal to 5% of the cost of facilities and equipment used directly in the wholesale or retail distribution of biodiesel fuels.

**18. Rice Straw Income Tax Credit.** Act 2247 of 2005 allows for an income tax credit in the amount of \$15.00 for each ton of rice straw in excess of 500 tons that is purchased by an Arkansas taxpayer who is the end user of the straw (person who purchases and uses the straw for processing, manufacturing, generating energy or producing ethanol). The amount of the credit is limited to 50% of the income tax due for the tax year. Unused credit may be carried forward for 10 consecutive tax years following the year in which the credit is earned.

**19. Venture Capital Investment Credit.** An income tax credit up to \$10 million per year as recommended by the Arkansas Development Finance Authority and approved by the State Board of Finance. The credit may not exceed the income tax otherwise due. Any unused credit may be carried forward for the next five (5) succeeding tax years or until exhausted, whichever occurs first.

**20. Coal Mining Tax Credit.** An income tax credit of \$2.00 per ton of coal mined, produced, or extracted on each ton of coal mined in Arkansas in a tax year. An additional credit of \$3.00 per ton will be allowed for each ton of coal mined in Arkansas in excess of 50,000 tons in a tax year. The credit can only be earned if the coal is sold to an electric generation plant for less than \$40.00 per ton excluding freight charges. The credit expires five (5) tax years following the tax year in which the credit was earned.

For more information about the incentives discussed above, visit the website of the Arkansas Department of Economic Development at [www.arkansasedc.com](http://www.arkansasedc.com) and the website of the Arkansas Department of Finance and Administration at [www.dfa.arkansas.gov](http://www.dfa.arkansas.gov).

## **C. Labor Laws**

### **1. Department of Workforce Services**

The focus of the Department of Workforce Service (“DWS”) is to provide individuals the tools they need to enhance and sustain their employability. It can assist employers in finding qualified employees, complying with Arkansas employment security law, and researching and utilizing applicable labor market information. The DWS is also responsible for collecting unemployment insurance contributions and administering the Temporary Assistance for Needy Families (“TANF”) program. Any business seeking additional information on these and other services should contact the Department of Workforce Services, Central Office, #2 Capitol Mall, Little Rock, AR 72201 or visit the DWS website at [www.dws.arkansas.gov](http://www.dws.arkansas.gov).

### **2. Arkansas Department of Labor**

The Arkansas Department of Labor provides a number of services in Arkansas, including safety, wage and hour, and various other services designed to foster, promote, and develop the health, safety and welfare of the wage earners of Arkansas. For more information on these services, contact the Arkansas Department of Labor, 10421 West Markham, Little Rock, AR 72205 or visit the website at [www.labor.arkansas.gov](http://www.labor.arkansas.gov).

## **D. Foreign Trade Zones**

Foreign trade zones (“FTZs”) are designated geographic areas in or adjacent to a United States Customs port of entry where commercial merchandise is treated as though it were in international commerce. As a result, such merchandise is not subject to U.S. customs duties and other ad valorem taxes. The FTZ program was created by Congress to lower the costs of United States-based operations and thereby create jobs and investment in the United States rather than abroad.

The Port of Little Rock is home to Foreign Trade Zone 14. For more information concerning Foreign Trade Zone 14, contact the Little Rock Port Authority, 10600 Industrial Harbor Drive, Little Rock, AR 72206, (501) 490-1468 or visit its website at [www.lrportauthority.com](http://www.lrportauthority.com). For information about FTZs generally, visit the Foreign Trade Resource Center website at [www.foreign-trade-zone.com](http://www.foreign-trade-zone.com).

## **E. Bond Financing**

**1. State Law Provisions.** Arkansas law authorizes the use of municipal bond financing to provide public funding for the benefit of certain private entities. For example, a city or county may issue bonds to finance industrial improvements, community redevelopment projects, or various other facilities for private users in accordance with state constitutional and statutory provisions.

**a. Revenue Bonds.** Under Amendment 65 to the Arkansas Constitution, a governmental unit may issue revenue bonds to finance facilities for the securing or developing of industry or agriculture or for other public purposes authorized by the Arkansas General Assembly. “Governmental unit” is defined as “any county, municipality, or other political

subdivision of the State of Arkansas; any special assessment or taxing district established under the laws of the State of Arkansas; and any agency, board, commission, or instrumentality of any of the foregoing.” Amendment 65 places the following restrictions on revenue bond issues for the benefit of private users:

- No revenue bonds can be issued to finance shopping centers or other establishments engaged in the sale of food or goods at retail;
- Without voter approval, no revenue bonds can be utilized for certain private business purposes, including the financing of hotels or motels, rental or professional office buildings, or facilities for recreation or entertainment; and
- Revenue bonds issued under the provisions of Amendment 65 are subject to the general usury restrictions provided under the Arkansas Constitution (see Section IX(B)) on “Arkansas Usury Law”).

Act 9 Bonds and Public Facilities Board Bonds (discussed below) are commonly used in Arkansas to provide revenue bond financing for private entities in accordance with the provisions of Amendment 65.

**i. Act 9 Bonds.** The Municipalities and Counties Industrial Development Revenue Bond Law (codified as Ark. Code Ann. § 14-164-201 *et seq.*) (commonly referred to as “Act 9”) authorizes municipalities and counties to issue revenue bonds for the purpose of financing industrial facilities, including, but not limited to, the following: manufacturing facilities, warehouses, distribution facilities, repair and maintenance facilities, agricultural facilities, and corporate and management offices. Act 9 generally prescribes the legal steps to be followed by a governmental unit when issuing revenue bonds for industrial development.

A company seeking to utilize Act 9 bonds to finance industrial improvements may receive a property tax abatement in connection with the project. Industrial facilities financed with Act 9 Bonds are typically owned by the governmental unit and leased to the private industry, with a purchase option at the end of the term of the lease which may be exercised for a nominal amount (*e.g.*, \$100). Because the facilities are publicly owned, they are exempt from ad valorem property taxation during the term of the lease. However, the private industry is generally required to enter into a PILOT, or Payment in Lieu of Taxes, Agreement.

In a PILOT Agreement, the municipality or county may abate a portion of the property taxes that would otherwise be payable on the facilities; provided, however, that payments under the PILOT Agreement must be at least 35% of the total amount of taxes that would be paid if the property were on the tax rolls (unless otherwise approved by the Director of AEDC and the Chief Fiscal Officer of the State of Arkansas). Thus, Act 9 financing can offer special benefits to companies seeking to locate or expand in Arkansas.

**ii. Public Facilities Board Bonds.** Another means of public financing for private borrowers under Arkansas law is through public facilities boards, which are entities created to assist in procuring certain public facilities projects. Under the Public Facilities

Boards Act (Ark. Code Ann. § 14-137-101 *et seq.*), a public facilities board can issue revenue bonds and loan the proceeds of the bonds to a private user for the purpose of financing certain projects, which include, but are not limited to, the following: health care facilities; residential housing facilities; off-street parking facilities; recreational and tourist facilities; facilities for securing or developing industry; energy facilities; hydroelectric power projects; and education facilities.

Repayment of the bonds is typically secured by payments under a loan agreement between the facilities board and the private user as the conduit borrower.

**b. Tax Increment Financing.** Private entities can also benefit from tax increment financing for community redevelopment in Arkansas. Amendment 78 to the Arkansas Constitution, which took effect on January 1, 2001, allows cities (but not towns) and counties to form redevelopment districts in order to carry out community redevelopment projects. To finance these projects, local governments may issue redevelopment bonds that are secured by and payable from property taxes levied against the increase in the assessed value of taxable property in the redevelopment district. This is referred to as “tax increment financing,” or “TIF.” TIF bonds may be used to redevelop blighted areas and to bring growth and economic prosperity to deteriorating communities.

## **2. Federal Tax Law Considerations**

Under the Internal Revenue Code (the “Code”), interest on municipal bonds is generally tax-exempt. However, interest on bonds issued to benefit private users (or “private activity bonds”) is *not* tax-exempt unless the bonds are issued for a “qualified” purpose. There are special rules under federal tax law which govern whether a private activity bond is “qualified” and thus exempt from federal income taxation.

If municipal bonds issued to benefit a private borrower are tax-exempt, the interest rate to the borrower can be lower than any other type of financing available because the interest is excluded from the gross income of the bondholders for federal income tax purposes. Issuers of municipal bonds and companies seeking to benefit from municipal bond financing should consult their tax advisors to determine whether the bonds will qualify for exemption from federal income taxation.

## **IV. BUSINESS ENTITIES**

### **A. Overview**

This outline sets out the various forms in which an individual, group of individuals or entity can operate as a business in Arkansas. Counsel should be consulted to answer specific organizational or operating issues.

### **B. Sole Proprietorship**

**1. Overview.** A sole proprietorship is a business in which one person owns all of the assets. Normally a person operates a sole proprietorship under an assumed name. There are

a few organizational formalities that must be complied with in order to operate a sole proprietorship, but not nearly as many as must be complied with if a business is operated as an entity. The owner can capitalize the sole proprietorship in any manner the owner desires. Management and control is vested in the owner. The owner receives all the profits and suffers all the losses. The owner is personally liable for all liabilities of the business.

**2. Organizational Formalities.** If a person operates a sole proprietorship under an assumed name, the person must file a certificate in the county clerk's office in the counties in which the person operates or intends to operate the business. The certificate must contain the assumed name and the name and post office address of the individual operating the business. The certificate must be acknowledged by a notary public. Ark. Code Ann. § 4-70-203. If a person does not properly register an assumed name, the person will be fined between \$25.00 and \$100.00 for each day the person carries on the proprietorship without complying with the law. Ark. Code Ann. § 4-70-202.

There are several Arkansas forms that the owner of a sole proprietorship must complete if the sole proprietorship has employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form must be mailed to Department of Finance and Administration, Withholding, P. O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a sole proprietorship hires its first employee and every additional employee, the owner must report to the Arkansas Department of Workforce Services through the Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095.

No later than the last day of the second month in which a sole proprietorship becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a sole proprietorship sells goods or services in Arkansas, the owner must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**3. Capitalization.** There are no requirements as to how a sole proprietorship must be capitalized.

**4. Management and Control.** The sole proprietor has the authority to make all decisions regarding how a sole proprietorship will be operated.

**5. Profit and Loss.** The owner receives all profits and suffers all losses. For federal income tax purposes, profits and losses are reported on Schedule C of Form 1040. For Arkansas income tax purposes, profits and losses are reported on Line 14 of Form AR 1000 for a full year resident of Arkansas or Form 1000NR for a nonresident or part year resident of Arkansas.

**6. Owner Liability.** The sole proprietor is personally liable for all liabilities of the business. It is recommended that the owner purchase sufficient insurance to insure all aspects of the business.

**7. Record Keeping.** Records that are required to be maintained include those necessary to file the required employment tax information and gross receipts (sales) tax information and to complete the owner's individual income tax returns.

**8. Dissolution.** If a sole proprietorship is operated under an assumed name, the owner must file a certificate of withdrawal in the county clerk's office in the counties in which the business was conducted if the owner withdraws from or disposes of the business. Ark. Code Ann. § 4-70-204.

If a sole proprietorship had employees, the owner should indicate on its final AR941M Monthly Withholding Report that the sole proprietorship is no longer withholding Arkansas income tax. This form may be obtained via the Arkansas Department of Finance and Administration's website. The form must be mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The owner should also file a Report To Terminate Account with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a sole proprietorship sold goods or services in Arkansas, the owner should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

## **C. Partnership**

**1. Overview.** A partnership is an arrangement where parties agree to cooperate for a certain business function in order to further business interests. Depending upon the structure, partners may be afforded no liability protection, mixed liability protection, or complete liability protection relative to the assets of the partnership. A partnership does not pay an entity level tax. All items of income and loss flow through to its partners.

### **2. General Partnership**

**a. Organizational Formalities.** Partnerships in Arkansas are governed by the Revised Uniform Partnership Act as adopted in Arkansas. A partnership is formed by "[t]he association of two (2) or more persons to carry on as co-owners a business for profit." Ark.

Code Ann. § 4-46-202(a). No documents are required to be filed with the Secretary of State in order to form a general partnership. It is recommended that the partners enter into a written partnership agreement to govern the operation of a general partnership.

Normally, partners operate a general partnership by the use of an assumed name. If a general partnership is operated under an assumed name, the partnership must file a certificate in the county clerk's office in the counties in which the partnership operates or intends to operate the business. The certificate must contain the assumed name and the name and post office address of each partner. The certificate must be acknowledged by a notary public. Ark. Code Ann. § 4-70-203(b). If a partnership does not properly register an assumed name, the partnership will be fined between \$25.00 and \$100.00 for each day it fails to comply with the law. Ark. Code Ann. § 4-70-202.

There are several Arkansas forms that a general partnership must complete if it will have employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form may be retrieved via the Arkansas Department of Finance and Administration's website. The form must be mailed to Department of Finance and Administration, Withholding, P. O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a general partnership hires its first employee and every additional employee, the partnership must report to the Arkansas Department of Workforce Services through the Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095.

No later than the last day of the second month in which a partnership becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a general partnership sells goods or services in Arkansas, it must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**b. Capitalization.** Normally, the partnership agreement provides the amount of capital that is to be contributed to the partnership by each partner at formation in exchange for an interest in the partnership. Unless otherwise specified in the partnership agreement, a partner's capital contribution may be property or the performance of services. The partnership agreement should contain a provision regarding additional capital contributions in the event additional capital is needed to continue the business. The provision should state whether additional capital contributions are optional or mandatory. A partnership may also receive capital in the form of loans from its partners and third parties.

**c. Management and Control.** Absent agreement to the contrary, in a general partnership, “[e]ach partner has equal rights in the management and conduct of the partnership business.” Ark. Code Ann. § 4-46-401(f). Also, absent agreement to the contrary, matters in the ordinary course of business “[m]ay be decided by a majority of the partners.” Ark. Code Ann. § 4-46-401(j). However, unless provided otherwise, matters not within the ordinary course of business and amendments to the partnership agreement require the unanimous vote of the partners.

Each partner in a general partnership has authority to bind the partnership in the ordinary course of the partnership’s business. Ark. Code Ann. § 4-46-301(1). The partnership may file a statement of partnership authority with the Arkansas Secretary of State that authorizes certain partners to execute instruments transferring real property owned by the partnership. Ark. Code Ann. § 4-46-303. The statement of partnership authority may also provide authority or limit the authority of other partners “to enter into other transactions on behalf of the partnership” regarding any other type of transaction. Ark. Code Ann. § 4-46-303(a)(2). The statement of partnership authority must be delivered to the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. A certified copy of a statement of partnership authority authorizing certain partners to execute instruments transferring real property should be filed in the real estate records in the office of the circuit clerk in the counties in which the partnership owns real property. Ark. Code Ann. § 4-46-303(d)(2).

**d. Profit and Loss.** Absent an agreement to the contrary, Arkansas law provides that each partner receives an equal share of profits and losses. Ark. Code Ann. § 4-46-401(b).

**e. Partner Liability.** All partners in a general partnership are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law. Ark. Code Ann. § 4-46-306(a). It is possible that the Civil Justice Reform Act of 2003 (Ark. Code Ann. §§ 16-55-201 to –220) may limit the joint and severability of partners for partnership torts. See J. Flaccus, *Joint and Several Liability and Partnership Law*, 2003 Ark. L. Notes 72 (2003). Each partner owes the partnership and the other partners the duties of loyalty and care. Ark. Code Ann. § 4-46-404. If a partner breaches one of these duties, the partner may be liable to the partnership or the other partners. Ark. Code Ann. § 4-46-405.

**f. Foreign General Partnerships.** There are no separate provisions of Arkansas law regarding foreign general partnerships. However, if a foreign partnership transacts business in Arkansas, the foreign partnership should file the necessary documents discussed in Section IV(C)(2)(a) in “Organizational Formalities” above.

**g. Books and Records.** A general partnership is required to keep its books and records at its chief executive office. The partners and their agents and attorneys must have access to the books and records maintained by the general partnership. Also, former partners and their agents and attorneys must have access to the books and records pertaining to the time they were partners. The partnership and every partner owe a duty to every other partner, to the representative of a deceased partner, and to a partner with a legal disability (i) to furnish

information necessary for the proper exercise of the partner's rights and duties under Arkansas law or the partnership agreement, and (ii) to furnish any other information on demand concerning the partnership's business and affairs except when the demand is unreasonable or improper under the circumstances. Ark. Code Ann. § 4-46-403.

**h. Dissolution.** Ark. Code Ann. § 4-46-801 provides that a general partnership is dissolved upon the occurrence of any of the following events:

- (1) a partner in a partnership at will gives notice of intent to withdraw;
- (2) in a partnership for a definite term or a particular undertaking:
  - (i) at least half of the remaining partners vote to wind up the partnership within 90 days after a partner's dissociation by death or any of the following:
    - (a) becoming a debtor in bankruptcy;
    - (b) executing an assignment for the benefit of creditors;
    - (c) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property;
    - (d) failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;
    - (e) in the case of a partner who is an individual:
      - (i) the partner's death;
      - (ii) the appointment of a guardian or general conservator for the partner; or
      - (iii) a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;
    - (f) in the case of a partner that is a trust or is acting as a partner by virtue of being a trustee of the trust, distribution of the trust's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor trustee;

- (g) in the case of a partner that is an estate or is acting as a partner by virtue of being a personal representative of an estate, distribution of the estate's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor personal representative; or
    - (h) termination of a partner who is not an individual, partnership, corporation trust, or estate;
  - (ii) the express will of all of the partners to wind up the partnership business;
  - (iii) the expiration of the term or the completion of the undertaking;
- (3) an event agreed to in the partnership agreement resulting in the winding up of the partnership business;
- (4) an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but a cure of illegality within ninety (90) days after notice to the partnership of the event is effective retroactively to the date of the event for purposes;
- (5) on application by a partner, a judicial determination that:
  - (i) the economic purpose of the partnership is likely to be unreasonably frustrated;
  - (ii) another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business of the partnership with that partner; or
  - (iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement;
- (6) on application by a transferee of a partner's transferable interest, a judicial determination that it is equitable to wind up the partnership business:
  - (i) after the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; or
  - (ii) at any time, if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer.

If a general partnership had employees, it should indicate on its final AR941M Monthly Withholding Report that it is no longer withholding Arkansas income tax. The form must be

mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The general partnership should also file a Report To Terminate Account with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a general partnership sold goods or services in Arkansas, it should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

### **3. Limited Partnership**

**a. Organizational Formalities.** Limited partnerships formed in Arkansas are governed by the Uniform Limited Partnership Act as adopted in Arkansas. A limited partnership is formed when its certificate of limited partnership is filed with the Arkansas Secretary of State. Ark. Code Ann. § 4-47-201(a). The certificate of limited partnership must be delivered to the Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409.

Except for certain non-waivable provisions, the partnership agreement sets forth the rights and obligations of the partners. Arkansas law provides default rules in many areas regarding the operation of a limited partnership if the partnership agreement is silent on a particular issue. Ark. Code Ann. § 4-47-110.

There are several Arkansas forms that a limited partnership must complete if it will have employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form must be mailed to Department of Finance and Administration, Withholding, P. O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a limited partnership hires its first employee and every additional employee, the limited partnership must report to the Arkansas Department of Workforce Services through the Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095.

No later than the last day of the second month in which a limited partnership becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a limited partnership sells goods or services in Arkansas, it must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax

Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**b. Capitalization.** A limited partnership's capitalization "may consist of tangible or intangible property or other benefit to the limited partnership, including money, services performed, promissory notes, other agreements to contribute cash or property, and contracts for services to be performed." Ark. Code Ann. § 4-47-501.

**c. Management and Control.** Unless otherwise provided in the partnership agreement or by law, a general partner is an agent of the partnership for purposes of its activities. Ark. Code Ann. § 4-47-402. Therefore, the partnership is liable for the general partner's conduct in carrying out those activities. Ark. Code Ann. § 4-47-403. If there are multiple general partners, each general partner is jointly and severally for the obligations of the partnership. Ark. Code Ann. § 4-47-404. Each general partner has equal rights in the management of the limited partnership. Ark. Code. Ann. § 4-47-406(a).

**d. Profit and Loss.** Profits and losses are allocated among the partners as provided in the written partnership agreement. If the issue is not addressed in the written partnership agreement, profits and losses are allocated among the partners on the basis of the value of the contributions made to the limited partnership by each partner. Ark. Code Ann. § 4-47-503.

**e. Partner Liability.** A limited partner, unless also a general partner, is not liable for the limited partnership's obligations unless the limited partner participates in the control of the limited partnership. Unless otherwise provided in the partnership agreement, the general partner's liability to the limited partnership and the other partners is identical to the liabilities of a partner in a general partnership. Ark. Code Ann. § 4-47-303.

**f. Foreign Limited Partnerships.** A foreign limited partnership's organization, internal affairs, and the liability of its limited partners are governed by the laws of the jurisdiction where it is organized. Ark. Code Ann. § 4-47-901. In order to transact business in Arkansas, a foreign limited partnership must file an application for registration with the Secretary of State. The application for registration must be delivered to Secretary of State. For additional information, call (501) 682-3409. Pursuant to Ark. Code Ann. § 4-47-902, the application for registration must contain the following information:

- (1) The name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in Arkansas;
- (2) The state and location of the partnership's principal office;
- (3) The name and address of any agent for service of process whom the foreign limited liability partnership elects to appoint; the agent must be an individual resident of Arkansas, an Arkansas corporation, or a foreign corporation having a place of business in and authorized to do business in Arkansas;

- (4) The name and street address of each general partner;
- (5) A statement regarding whether it is a foreign limited liability limited partnership.

If a foreign limited partnership transacts business in Arkansas without registering, it cannot maintain an action in a court in Arkansas. Ark. Code Ann. § 4-47-907(b). However, the failure to register in Arkansas will “not impair the validity of a contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending an action or proceeding in [Arkansas].” Ark. Code Ann. § 4-47-907(c).

When a foreign limited partnership registered to transact business in Arkansas decides to cancel its registration, it must file a certificate of cancellation with the Arkansas Secretary of State. The certificate of cancellation must be delivered to the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409.

**g. Record Keeping.** Ark. Code Ann. § 4-47-111 requires a limited partnership to maintain the following records at its office:

- (1) an alphabetical list, separately identifying general and limited partners, along with each partner’s business address;
- (2) a copy of the certificate of limited partnership along with any amendments and any powers of attorney that were used to execute any amendments;
- (3) copies of any filed certificate of conversion or merger;
- (4) copies of all income tax returns and financial statements for the three most recent years;
- (5) a copy of any record of any consent given by or vote taken of any partner;
- (6) copies of the annual reports filed with the Secretary of State each year;
- (7) copies of the then-effective written partnership agreements; and
- (8) if not contained in a written partnership agreement, a writing showing the amount of property contributed by each partner, the times when additional contributions are required, for any person that is a general and limited partner, a specification of what transferable interests are owned in each capacity, and events causing dissolution.

**h. Dissolution.** Ark. Code Ann. § 4-47-801 provides that a limited partnership is dissolved upon the first of the following to occur:

- (1) time specified in the partnership agreement;

- (2) written consent of all partners;
- (3) 90 days after the dissociation of the last general partner, or if there is a remaining general partner, then 90 days after the consent of a majority (determined by profits interest) of the partners to dissolve the partnership;
- (4) the passage of 90 days after the limited partnership's last limited partner's dissociation;
- (5) entry of dissolution by the Secretary of State.

A partner may petition the circuit court of the county where the limited partnership's principal place of business is located to issue a decree of dissolution if it is not practical to carry on the business of the limited partnership in conformity with the partnership agreement. Ark. Code Ann. § 4-47-802.

After dissolution, the general partners (or the limited partners if there are no general partners) wind up the limited partnership's affairs. In winding up, the partnership shall discharge the liabilities, close the activities, and marshal and distribute the remaining partnership assets. Ark. Code Ann. § 4-47-803(b).

If a limited partnership had employees, it should indicate on its final AR941M Monthly Withholding Report that it is no longer withholding Arkansas income tax. The form must be mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The limited partnership should also file a Report To Terminate Account with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a limited partnership sold goods or services in Arkansas, it should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

#### **4. Limited Liability Partnership**

**a. Organizational Formalities.** In order to be classified as a limited liability partnership, a general partnership, by a vote of the partners necessary to amend the partnership agreement, must approve of the general partnership becoming a limited liability partnership. After approval, the general partnership must file a statement of qualification with the Arkansas Secretary of State. Ark. Code Ann. § 4-46-1001. Pursuant to Ark. Code Ann. § 4-46-1001(c), the statement of qualification must include:

- (1) the name of the partnership;

- (2) the street address of the partnership's chief executive office and, if different, the street address of an office in Arkansas;
- (3) if there is no office in Arkansas, the name and street address of the partnership's agent of service who must be an individual resident of Arkansas or a person authorized to transact business in Arkansas;
- (4) a statement that the partnership elects to be a limited liability partnership; and
- (5) a deferred effective date, if desired.

The statement of qualification must be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. A general partnership becomes a limited liability partnership upon the later of the date the statement of qualification is filed or the effective date specified in the statement of qualification. Ark. Code Ann. § 4-46-1001(e).

A limited liability partnership's name "must end with 'Registered Limited Liability Partnership', 'Limited Liability Partnership', 'R.L.L.P.', 'L.L.P.', 'RLLP,' or 'LLP.'" Ark. Code Ann. § 4-46-1002.

A limited liability partnership must file an annual report with the Arkansas Secretary of State between January 1 and April 1 of each year after a general partnership becomes a limited liability partnership. Ark. Code Ann. § 4-46-1003. The annual report must be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. If a limited liability partnership fails to file an annual report, the Secretary of State may revoke a general partnership's limited liability partnership status. A general partnership has two years after revocation to apply for reinstatement as a limited liability partnership. A reinstatement obtained within two years relates back to the date of the revocation "and the partnership's status as a limited liability partnership continues as if revocation had never occurred." Ark. Code Ann. § 4-46-1003(f).

For federal income tax purposes, a limited liability partnership must file IRS Form SS-4 to obtain an employer identification number. Form SS-4 and its instructions may be accessed via the IRS's website at [www.irs.gov](http://www.irs.gov).

There are several Arkansas forms that a limited liability partnership must complete if it will have employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form must be mailed to Department of Finance and Administration, Withholding, P. O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a limited liability partnership hires its first employee and every additional employee, it must report to the Arkansas Department of Workforce Services through the

Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095.

No later than the last day of the second month in which a limited liability partnership becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a limited liability partnership sells goods or services in Arkansas, it must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**b. Capitalization.** Normally, the partnership agreement provides the amount of capital that is to be contributed to the limited liability partnership by each partner at formation in exchange for an interest in the partnership. Unless otherwise specified in the partnership agreement, a partner’s capital contribution may be property or the performance of services. The partnership agreement should contain a provision regarding additional capital contributions in the event additional capital is needed to continue the business. The provision should state whether additional capital contributions are optional or mandatory. A partnership may also receive capital in the form of loans from its partners and third parties.

**c. Management and Control.** Absent agreement to the contrary, “[e]ach partner has equal rights in the management and conduct of the partnership business.” Ark. Code Ann. § 4-46-401(f). Also, absent agreement to the contrary, matters in the ordinary course of business “may be decided by a majority of the partners.” Ark. Code Ann. § 4-46-401(j). However, unless provided otherwise, matters not within the ordinary course of business and amendments to the partnership agreement require the unanimous vote of the partners.

Each partner has authority to bind a limited liability partnership in the ordinary course of the limited liability partnership’s business. Ark. Code Ann. § 4-46-301(1). The limited liability partnership may file a statement of partnership authority with the Secretary of State, which authorizes certain partners to execute instruments transferring real property owned by the limited liability partnership. Ark. Code Ann. § 4-46-303(a)(1). The statement of partnership authority may also provide authority or limit the authority of other “partners to enter into other transactions on behalf of the partnership” regarding any other type of transaction. Ark. Code Ann. § 4-46-303(a)(2). The statement of partnership authority must be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. A certified copy of a statement of partnership authority authorizing certain partners to execute instruments transferring real property should be filed in the real estate records in the office of the circuit clerk in the counties in which the partnership owns real property. Ark. Code Ann. § 4-46-303(d)(2).

**d. Profit and Loss.** Absent an agreement to the contrary, Arkansas law provides that partners share profits and losses equally. Ark. Code Ann. § 4-46-401(b).

**e. Partner Liability.** A partner in a limited liability partnership is not personally liable for the limited liability partnership's obligations. The obligations belong solely to the limited liability partnership. Ark. Code Ann. § 4-46-306(c). Each partner owes the partnership and the other partners the duties of loyalty and care. Ark. Code Ann. § 4-46-404. If a partner breaches one of these duties, the partner may be liable to the partnership or the other partners. Ark. Code Ann. § 4-46-405.

**f. Foreign Partnerships.** Before a foreign limited liability partnership transacts business in Arkansas, it must file a statement of foreign qualification with the Arkansas Secretary of State. Ark. Code Ann. § 4-46-1102. The statement of foreign qualification must be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409.

If a foreign limited liability partnership transacts business in Arkansas without filing a statement of foreign qualification, the foreign limited liability partnership "may not maintain an action or proceeding in [Arkansas]." Ark. Code Ann. § 4-46-1103(a). Pursuant to Ark. Code Ann. § 4-46-1104(a), the following transactions, among others, do not constitute transacting business in Arkansas:

- (1) creating or acquiring indebtedness, mortgages, or security interests in real or personal property;
- (2) securing or collecting debts or foreclosing mortgages or other security interests in property securing debts, and holding, protecting, and maintaining property so acquired; and
- (3) conducting an isolated transaction that is completed within 30 days and is not one in the course of similar transaction of like nature.

Generally, the ownership of income providing real property constitutes transacting business in Arkansas. Ark. Code Ann. § 4-46-1104(b).

**g. Books and Records.** A limited liability partnership is required to keep its books and records at its chief executive office. Ark. Code Ann. § 4-46-403(a). The partners and their agents and attorneys must have access to the books and records maintained by the limited liability partnership. Ark. Code Ann. § 4-46-403(b). Also, former partners and their agents and attorneys must have access to the books and records pertaining to the time they were partners. The limited liability partnership and every partner owes a duty to every other partner, to the representative of a deceased partner, and to a partner with a legal disability (i) to furnish information necessary for the proper exercise of the partner's rights and duties under the Arkansas law or the partnership agreement, and (ii) to furnish any other information on demand concerning the partnership's business and affairs except when the demand is unreasonable or improper under the circumstances. Ark. Code Ann. § 4-46-403(c).

**h. Dissolution.** Ark. Code Ann. § 4-46-801 provides that a limited liability partnership is dissolved upon the occurrence of any of the following events:

- (1) a partner in a partnership at will gives notice of intent to withdraw;
- (2) in a partnership for a definite term or a particular undertaking:
  - (i) at least half of the remaining partners vote to wind up the partnership within 90 days after a partner's wrongful dissociation under the statute, dissociation by death, or one of the following:
    - (a) becoming a debtor in bankruptcy;
    - (b) executing an assignment for the benefit of creditors;
    - (c) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property;
    - (d) failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;
    - (e) in the case of a partner who is an individual:
      - (i) the partner's death;
      - (ii) the appointment of a guardian or general conservator for the partner; or
      - (iii) a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;
    - (f) in the case of a partner that is a trust or is acting as a partner by virtue of being a trustee of the trust, distribution of the trust's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor trustee;
    - (g) in the case of a partner that is an estate or is acting as a partner by virtue of being a personal representative of an

estate, distribution of the estate's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor personal representative; or

- (h) termination of a partner who is not an individual, partnership, corporation trust, or estate.
  - (ii) the express will of all of the partners to wind up the partnership business; or
  - (iii) the expiration of the term or the completion of the undertaking;
- (3) an event agreed to in the partnership agreement resulting in the winding up of the partnership business;
- (4) an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but a cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes;
- (5) on application by a partner, a judicial determination that:
- (i) the economic purpose of the partnership is likely to be unreasonably frustrated;
  - (ii) another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner; or
  - (iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement;
- (6) on application by a transferee of a partner's transferable interest, a judicial determination that it is equitable to wind up the partnership business:
- (i) after the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; or
  - (ii) at any time, if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer.

If a limited liability partnership had employees, it should indicate on its final AR941M Monthly Withholding Report that it is no longer withholding Arkansas income tax. The form

must be mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The partnership should also file a Report To Terminate Account with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a limited liability partnership sold goods or services in Arkansas, it should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

## **5. Limited Liability Limited Partnership**

**a. Organizational Formalities.** In order to be classified as a registered limited liability limited partnership, a limited partnership must file an application for registration as a limited liability limited partnership with the Arkansas Secretary of State. Ark. Code Ann. § 4-47-102(9). An application for registration as a limited liability limited partnership may be retrieved from the Arkansas Secretary of State’s website at [www.sosweb.state.ar.us](http://www.sosweb.state.ar.us). The application for registration as a limited liability limited partnership must be delivered to the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. If the limited partnership’s partnership agreement does not permit its registering as a registered limited liability limited partnership, all of the general partners and each class or group of limited partners, and in either case limited partners who own more than fifty percent (50%) of the outstanding profits interests of the limited partnership must approve the limited partnership registering as a registered limited liability limited partnership.

A limited liability limited partnership’s name must end with “‘Registered Limited Liability Limited Partnership’ or the abbreviation ‘L.L.L.P.’ or ‘LLLP’”. The word ‘Limited’ may be abbreviated as ‘Ltd.’” Ark. Code Ann. § 4-47-108(c).

For federal income tax purposes, a limited liability limited partnership must file IRS Form SS-4 to obtain an employer identification number. Form SS-4 and its instructions may be accessed via the IRS’s website at [www.irs.gov](http://www.irs.gov).

There are several Arkansas forms that a limited liability limited partnership must complete if it will have employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form may be retrieved from the Arkansas Department of Finance and Administration’s website. The form must be delivered to Department of Finance and Administration, Withholding, P. O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a limited liability limited partnership hires its first employee and every additional employee, it must report to the Arkansas Department of Workforce Services through the Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New

Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095.

No later than the last day of the second month in which a partnership becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a limited liability limited partnership sells goods or services in Arkansas, it must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**b. Capitalization.** Normally the partnership agreement provides the amount of capital that is to be contributed to the limited liability limited partnership by each partner at formation in exchange for an interest in the partnership. Unless otherwise specified in the partnership agreement, a partner's capital contribution may be property or the performance of services. The partnership agreement should contain a provision regarding additional capital contributions in the event additional capital is needed to continue the business. The provision should state whether additional capital contributions are optional or mandatory. A partnership may also receive capital in the form of loans from its partners and third parties.

**c. Management and Control.** Unless otherwise provided in the partnership agreement or by law, a general partner is an agent of the partnership for purposes of its activities. Ark. Code Ann. § 4-47-402. Therefore, the partnership is liable for the general partner's conduct in carrying out those activities. Ark. Code Ann. § 4-47-403. Each general partner is not liable for the obligations of the partnership. Ark. Code Ann. § 4-47-404(b). Each general partner has equal rights in the management of the limited partnership. Ark. Code Ann. § 4-47-406(a).

**d. Profit and Loss.** Profits and losses are allocated among the partners as provided in the written partnership agreement. If the issue is not addressed in the written partnership agreement, profits and losses are allocated among the partners on the basis of the value of the contributions made to the limited partnership by each partner. Ark. Code Ann. § 4-47-503.

**e. Partner Liability.** A limited partner, unless also a general partner, is not liable for the limited partnership's obligations unless the limited partner participates in the control of the limited partnership. Unless otherwise provided in the partnership agreement, the general partner's liability to the limited partnership and the other partners is identical to the liabilities of a partner in a general partnership. Ark. Code Ann. § 4-47-303.

**f. Foreign Limited Liability Limited Partnerships.** A foreign limited liability limited partnership's organization, internal affairs, and the liability of its limited partners are governed by the laws of the jurisdiction where it is organized. Ark. Code Ann. § 4-47-901. In order to transact business in Arkansas, a foreign limited liability limited partnership must

submit an application for registration with the Secretary of State. An application for registration may be retrieved from the Secretary of State's website. The application for registration must be delivered to Secretary of State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. Pursuant to Ark. Code Ann. § 4-47-902, the application for registration must contain the following information:

- (1) The name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in Arkansas;
- (2) The state and location of the partnership's principal office;
- (3) The name and address of any agent for service of process whom the foreign limited liability partnership elects to appoint; the agent must be an individual resident of Arkansas, an Arkansas corporation, or a foreign corporation having a place of business in and authorized to do business in Arkansas;
- (4) The name and street address of each general partner;
- (5) A statement regarding whether it is a foreign limited liability limited partnership.

If a foreign limited liability partnership transacts business in Arkansas without registering, it cannot maintain an action in a court in Arkansas. Ark. Code Ann. § 4-47-907(b). However, the failure to register in Arkansas will not impair the validity of any contract or act of the foreign limited liability limited partnership or prevent the foreign limited liability limited partnership from defending any action or proceeding in Arkansas. Ark. Code Ann. § 4-47-907(c).

When a foreign limited liability limited partnership registered to transact business in Arkansas decides to cancel its registration, it must file a certificate of cancellation with the Arkansas Secretary of State. Ark. Code Ann. § 4-47-907. The certificate of cancellation must be delivered to the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information call, (501) 682-3409.

**g. Record Keeping.** Ark. Code Ann. § 4-47-111 requires a limited partnership to maintain the following records at its office:

- (1) an alphabetical list, separately identifying general and limited partners, along with each partner's business address;
- (2) a copy of the certificate of limited partnership along with any amendments and any powers of attorney that were used to execute any amendments;
- (3) copies of any filed certificate of conversion or merger;
- (4) copies of all income tax returns and financial statements for the three most recent years;

- (5) a copy of any record of any consent given by or vote taken of any partner;
- (6) copies of the annual reports filed with the Secretary of State each year;
- (7) copies of the then-effective written partnership agreements; and
- (8) if not contained in a written partnership agreement, a writing showing the amount of property contributed by each partner, the times when additional contributions are required, for any person that is a general and limited partner, a specification of what transferable interests are owned in each capacity, and events causing dissolution.

**h. Dissolution.** Ark. Code Ann. § 4-47-801 provides that a limited partnership is dissolved upon the first of the following to occur:

- (1) time specified in the partnership agreement;
- (2) written consent of all partners;
- (3) 90 days after the dissociation of the last general partner, or if there is a remaining general partner, then 90 days after the consent of a majority (determined by profits interest) of the partners to dissolve the partnership;
- (4) the passage of 90 days after the limited partnership's last limited partner's dissociation; or
- (5) entry of dissolution by the Secretary of State;

A partner may petition the circuit court of the county where the limited partnership's principal place of business is located to issue a decree of dissolution if it is not practical to carry on the business of the limited liability limited partnership in conformity with the partnership agreement. Ark. Code Ann. § 4-47-802.

After dissolution, the general partners (or the limited partners if there are no general partners) wind up the limited partnership's affairs. In winding up, the partnership shall discharge the liabilities, close the activities, and marshal and distribute the remaining partnership assets. Ark. Code Ann. § 4-47-803(b).

If a limited liability limited partnership had employees, it should indicate on its final AR941M Monthly Withholding Report that it is no longer withholding Arkansas income tax. This form may be obtained via the Internet from the Arkansas Department of Finance and Administration's website. The form must be mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The limited liability limited partnership should also file a Report To Terminate Account with the Arkansas

Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a limited liability limited partnership sold goods or services in Arkansas, it should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

## **D. Corporation**

**1. Overview.** A corporation is a form of entity that provides centralization of management in a board of directors and a limitation on liability for its shareholders. It is the most common form of entity utilized in Arkansas.

### **2. For Profit Corporation**

**a. Filing Requirements.** Unless a later date is specified, a corporation is formed when its articles of incorporation are filed with the Secretary of State. Ark. Code Ann. § 4-27-203(a). Articles of incorporation may be retrieved from the Arkansas Secretary of State's website. Articles of incorporation must be delivered to the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. The incorporator of a corporation should enclose a franchise tax registration with the articles of incorporation. A franchise tax registration form may also be retrieved from the Secretary of State's website. As provided in Ark. Code Ann § 4-27-202, articles of incorporation must contain the following information:

- (1) the name of the corporation which "must contain the word 'corporation,' 'incorporated,' 'company,' or 'limited,' or the abbreviation 'corp.,' 'inc.,' 'co.,' or 'ltd.,' or words or abbreviations of like import in another language." Ark. Code Ann. § 4-27-401(a)(1);
- (2) the number of authorized shares, the classes of shares, and the par value, if any, of the shares of each class;
- (3) the street address of the corporation's registered office and the name of the registered agent at the registered office; the registered agent must be an individual who resides in Arkansas and whose business address is the same as the corporation's registered office, a domestic corporation whose business office is the same as the corporation's registered office, or a foreign corporation authorized to transact business in Arkansas whose business office is the same as the corporation's registered office;
- (4) the name and address of each incorporator; and
- (5) the primary purpose(s) for which the corporation is organized.

After incorporation, the directors, if named in the articles of incorporation, must hold an organizational meeting to adopt bylaws, elect officers, and complete any other action needed to organize the corporation. If directors are not named in the articles of incorporation, the incorporator(s) must hold an organizational meeting to elect directors. Either the incorporator(s) or directors may complete the organization of the corporation. Ark. Code Ann. § 4-27-205(a). Either the incorporators or the board of directors must adopt bylaws for the corporation. The bylaws “may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.” Ark. Code Ann. § 4-27-206. Pursuant to the 2017 legislative session, any would-be incorporator who is between 16 and 18 years of age shall appoint a person who is at least 21 years of age to act as incorporator for him. Ark. Code Ann. § 4-27-201.

For federal income tax purposes, a corporation must file IRS Form SS-4 to acquire an employer identification number. Form SS-4 and its instructions may be accessed via the IRS’s website at [www.irs.gov](http://www.irs.gov).

There are several Arkansas forms that a corporation must complete if it will have employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form may be retrieved from the Arkansas Department of Finance and Administration’s website. The form must be mailed to Department of Finance and Administration, Withholding, P. O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a corporation hires its first employee and every additional employee, the corporation must report to the Arkansas Department of Workforce Services through the Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095.

No later than the last day of the second month in which a corporation becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a corporation sells goods or services in Arkansas, the owner must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**b. Capitalization.** A corporation receives its capital in exchange for its shares. The shareholders or board of directors may authorize shares to be issued in exchange for money, property, or services contributed to the corporation. Shares cannot be issued in exchange for promissory notes or the promise of future services. Ark. Code Ann. § 4-27-621(b). Before

shares are issued, the board of directors must determine if the consideration received or to be received is adequate. Ark. Code Ann. § 4-27-621(d).

Before incorporation, a corporation may issue shares pursuant to a subscription agreement. Ark. Code Ann. § 4-27-620(a). This enables a corporation to have access to capital before incorporation.

If authorized by its articles of incorporation, a corporation may have more than one class of stock. In order to draw capital, a class of stock may have a preference with respect to dividend and dissolution distributions. Also, a class of stock may have special or limited voting rights, or no voting rights, except for the right to vote on increasing capital stock or bond indebtedness of the corporation. Ark. Code Ann. § 4-27-601(c).

**c. Management and Control.** The business and affairs of a corporation are managed by its board of directors, subject to any limitation imposed by the articles of incorporation. Ark. Code Ann. § 4-27-801(b). If a corporation has fifty (50) or fewer shareholders, it may dispense with or limit the authority of the board of directors. Ark. Code Ann. § 4-27-801(c). The articles of incorporation or bylaws may contain qualifications for directors. Unless otherwise provided in the articles of incorporation or bylaws, a director does not have to be a resident of Arkansas or a shareholder of the corporation. Ark. Code Ann. § 4-27-802. A director must discharge the director's duties "[i]n good faith; with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner [the director] reasonably believes to be in the best interests of the corporation." Ark. Code Ann. § 4-27-830(a).

If the initial directors are not listed in the articles of incorporation, the initial directors are elected at the organizational meeting of incorporators. Unless the articles of incorporation provide for staggered terms, directors are elected at each annual meeting of the shareholders. Ark. Code Ann. § 4-27-803(d). If the articles of incorporation provide for dividing the shares into classes, they may also provide for the election of directors by class. Ark. Code Ann. § 4-27-804.

Unless the articles of incorporation provide otherwise, the shareholders may remove a director with or without cause at a shareholders meeting called for the purpose of removing the director. Ark. Code Ann. § 4-27-808. A director may be removed by the circuit court in the county of the corporation's principal office, if located in Arkansas; otherwise, by the circuit court in the county of its registered office. The proceeding must be commenced by the corporation or shareholders owning at least ten percent (10%) of the outstanding shares of any class of stock. In order to remove a director, the court must find "[t]hat (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and (2) removal is in the best interest of the corporation." Ark. Code Ann. § 4-27-809(a).

Regular and special meetings of the board of directors may be held in or outside Arkansas. Ark. Code Ann. § 4-27-820(a). Unless prohibited by the articles of incorporation or bylaws, directors may participate in any meeting of the board of directors by "[a]ny means of communication by which all directors participating may simultaneously hear each other during

the meeting.” Ark. Code Ann. § 4-27-820(b). Also, unless prohibited by the articles of incorporation or bylaws, any action may be taken without a meeting if the action is taken by the unanimous written consent of the directors. Ark. Code Ann. § 4-27-821(a).

The bylaws may provide that a corporation has officers. Normally, a corporation has a president, vice president, secretary, and treasurer. An individual may hold more than one office at a time. If a corporation has officers, the bylaws or the board of directors must delegate to one of the officers the duty to prepare minutes of the shareholder and director meetings and authenticate the corporation’s records. Ark. Code Ann. § 4-27-840. The bylaws or the board of directors prescribes the authority and duties of the officers. Ark. Code Ann. § 4-27-841. If an officer has discretionary authority, the officer must discharge the officer’s duties “[i]n good faith; with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner [the officer] reasonably believes to be in the best interests of the corporation.” Ark. Code Ann. § 4-27-842. An officer may be removed by the board of directors at any time with or without cause. Ark. Code Ann. § 4-27-843(b).

**d. Profit and Loss.** See Section VI(B)(4) on “State Taxation of Corporations.”

**e. Shareholder Liability.** Generally, a shareholder’s liability to a corporation or its creditors is limited to the consideration paid for the shareholder’s shares, and a shareholder is not personally liable for a corporation’s acts or debts. Ark. Code Ann. § 4-27-622. If a corporation is illegally used to injure a third party or if a corporation is undercapitalized or does not comply with corporate formalities, it is possible that a third party may be allowed to “pierce the corporate veil” and hold the shareholders personally liable for the debts of the corporation. See *Rhodes v. Veith*, 80 Ark. App. 362; 96 S.W.3d 734 (2003).

**f. Foreign Corporation.** Before a foreign corporation transacts business in Arkansas, it must submit an application for a certificate of authority with the Secretary of State. Ark. Code Ann. § 4-27-1501(a). An application for a certificate of authority may be retrieved from the Arkansas Secretary of State’s website. The application for certificate of authority must be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. It is recommended that a franchise tax registration be enclosed with the application for certificate of authority. A franchise tax registration form may also be retrieved from the Arkansas Secretary of State’s website. Ark. Code Ann. § 4-27-1503(a) provides that an application for certificate of authority must contain the following:

- (1) the name of the foreign corporation, or if its name is unavailable in Arkansas, a fictitious name;
- (2) the state or country where it is incorporated;
- (3) its date of incorporation;
- (4) its period of duration;

- (5) the street address of its principal office;
- (6) the address of its registered agent in Arkansas and the name of its registered agent at that office; and
- (7) the number and par value, if any, of shares of the corporation's stock owned or to be owned by residents of Arkansas.

If a foreign corporation transacts business in Arkansas without obtaining a certificate of authority, it may not maintain a proceeding in any court in Arkansas. Ark. Code Ann. § 4-27-1502(a). A foreign corporation that transacts business in Arkansas without obtaining a certificate of authority is subject to a penalty of not more than \$5,000. Ark. Code Ann. § 4-27-1502(d). Transacting business in Arkansas without a certificate of authority does not affect a foreign corporation's acts or prevent it from defending an action in Arkansas. Ark. Code Ann. § 4-27-1502(e).

A foreign corporation authorized to transact business in Arkansas must obtain a certificate of withdrawal from the Secretary of State in order to withdraw from Arkansas. Ark. Code Ann. § 4-27-1520(a). A certificate of withdrawal may be retrieved from the Arkansas Secretary of State's website. A certificate of withdrawal must be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. When a foreign corporation files a certificate of withdrawal, it must also file its final franchise tax report with the Arkansas Secretary of State. A final franchise tax report form may be retrieved from the Arkansas Secretary of State's website. Pursuant to Ark. Code Ann. § 4-27-1520(b), an application for certificate of withdrawal must state:

- (1) the name of the foreign corporation and the name of the state or country under whose laws it is incorporated;
- (2) that it is not transacting business in Arkansas and that it surrenders its authority to transact business in Arkansas;
- (3) that it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process;
- (4) a mailing address to which the Secretary of State may mail a copy of any process served; and
- (5) a commitment to notify the Secretary of State of any changes in its mailing address.

The Secretary of State may revoke a foreign corporation's certificate of authority if the foreign corporation:

- (1) does not deliver its annual franchise tax report to the Secretary of State within sixty (60) days after it is due;

- (2) does not pay within sixty (60) days after they are due any franchise taxes or penalties;
- (3) is without a registered agent or registered office in Arkansas for sixty (60) days or more; or
- (4) does not inform the Secretary of State that its registered agent or office has changed, that its registered agent has resigned, or that its registered office has been discontinued within sixty (60) days of the change, resignation, or discontinuance.

The Secretary of State may also revoke a certificate of authority if an incorporator, director, or the agent of the foreign corporation signed a document known to be false in any material respect with the intent that the document be delivered to the Secretary of State or if the Secretary of State receives a certificate from the secretary of state of the state or country under whose laws the foreign corporation is incorporated stating that it has been dissolved or disappeared as a result of a merger. Ark. Code Ann. § 4-27-1530. A foreign corporation may appeal the revocation of its certificate of authority to the Pulaski County Circuit Court. Ark. Code Ann. § 4-27-1532(a).

**g. Record Keeping.** Pursuant to Ark. Code Ann. § 4-27-1601, a corporation shall maintain the following records:

- (1) minutes of all meetings of its shareholders, board of directors, and committees of its board of directors; records of action taken by the shareholders or board of directors without a meeting; and records of action taken by committees of the board of directors;
- (2) appropriate accounting records;
- (3) records of its shareholders;
- (4) articles of incorporation and bylaws along with amendments and restatements;
- (5) resolutions adopted by its board of directors creating one or more classes or series of shares;
- (6) all written communications to shareholders within the past three years;
- (7) names and business addresses of current directors and officers; and
- (8) most recent franchise tax report.

Shareholders, and their agents, have various rights to inspect corporate records. Ark. Code Ann. § 4-27-1602. Pursuant to the 2017 legislative session, a corporation shall furnish annual

financial statements to its shareholders within six (6) months of the close of each fiscal year. Ark. Code Ann. § 4-27-1620.

**h. Merger.** One or more corporations may merge if the plan of merger is adopted by the board of directors of each corporation and approved (if required) by the shareholders of each corporation. Ark. Code Ann. § 4-27-1106 – 1107.

The shareholders of the surviving corporation do not have to approve the plan of merger if the surviving corporation's articles of incorporation will not be different after the merger, the shareholders of the surviving corporation have the same number of shares with identical rights both before and after the merger, and the number of voting and participating shares outstanding after the merger does not exceed by more than 20% the number of voting and outstanding shares outstanding immediately before the merger. Ark. Code Ann. § 4-27-1107(g). If shareholder approval is required and a shareholder is opposed to the merger, the shareholder may vote against the merger and exercise dissenter rights as set forth in Ark. Code Ann. §§ 4-27-1301 to – 1331.

After the plan of merger is approved by the shareholders, the surviving corporation must file articles of merger with the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. Pursuant to Ark. Code Ann. § 4-27-1109, articles of merger must set forth the following information:

- (1) the name and form of each organization and the jurisdiction of its governing statute;
- (2) the name and form of the surviving corporation and the jurisdiction of its governing statute;
- (3) the date the merger is effective;
- (4) any amendments to the organizational documents of the surviving corporation;
- (5) the plan of merger;
- (6) if shareholder approval was not required, a statement to that effect;
- (7) if shareholder approval of one or more corporations was required, information regarding the shareholder vote; and
- (8) any additional information required by a foreign jurisdiction.

Ark. Code Ann. § 4-27-1110 provides that the effects of merger include:

- (1) the existence of every corporation except for the surviving corporation ceases;

- (2) all property owned by every corporation that was a party to the merger vests in the surviving corporation;
- (3) the surviving corporation inherits all liabilities of each corporation party to the merger;
- (4) the surviving corporation may be substituted as a party in any proceeding pending against any corporation that merged into the surviving corporation; and
- (5) the terms and conditions of the merger, and any amendments to the organizational documents take effect.

**i. Dissolution.** Arkansas law provides three methods for a corporation to dissolve. A corporation may be voluntarily dissolved, which normally occurs by the vote of its shareholders. The Secretary of State may seek administrative dissolution if the corporation does not file its annual franchise tax report, does not pay its franchise tax, does not have a registered office or agent in Arkansas, or does not notify the Secretary of State that its registered office or agent has changed. The Arkansas Attorney General, a shareholder, a creditor, or the corporation may bring a judicial proceeding to dissolve the corporation.

The most common method of dissolution is voluntary dissolution. If shares have not been issued, the incorporators or directors may dissolve the corporation. Ark. Code Ann. § 4-27-1401. If shares have been issued, the shareholders must approve the dissolution upon recommendation of the board of directors. Ark. Code Ann. § 4-27-1402. After dissolution is approved, the corporation files articles of dissolution with the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. Articles of dissolution may be retrieved via the Secretary of State's website. For additional information, call (501) 682-3409. The corporation must also file a final franchise tax report with the Secretary of State. Pursuant to Ark. Code Ann. § 4-27-1403(a), articles of dissolution must contain the following information:

- (1) the name of the corporation;
- (2) the date dissolution was authorized; and
- (3) if dissolution was authorized by the shareholders, the number of votes cast for and against dissolution.

Dissolution is effective upon the effective date of the articles of dissolution. Ark. Code Ann. § 4-27-1403(b). Articles of dissolution may be revoked within 120 days after they are filed. Ark. Code Ann. § 4-27-1404(a).

After a corporation is dissolved, the corporation collects its assets, satisfies its liabilities, and transfers its remaining property to its shareholders. Ark. Code Ann. § 4-27-1405. A corporation may give actual notice of its dissolution to known claimants in order to dispose of the claims. If the notice is proper, known claimants have 120 days to present their claims or their claims will be forever barred. Ark. Code Ann. § 4-27-1406. In order to put unknown creditors

on notice of the dissolution, a corporation may publish notice in a newspaper of general circulation in (1) the county where its principal office, if there is one, (2) or in Pulaski County if the corporation did not have a principal office in Arkansas. Unknown claimants have five (5) years from the date of publication to commence a proceeding to enforce a claim. If a proceeding is not commenced within five (5) years, the claim is barred. Ark. Code Ann. § 4-27-1407.

Pursuant to Ark. Code Ann. § 4-27-1420, the Secretary of State may begin a proceeding to administratively dissolve a corporation if:

- (1) the corporation does not pay franchise taxes or penalties within sixty (60) days of their due date;
- (2) the corporation does not file its annual franchise tax report within sixty (60) days of its due date;
- (3) the corporation does not have a registered office or agent in Arkansas for sixty (60) days or more;
- (4) the corporation does not notify the Secretary of State within sixty (60) days that its registered agent or office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or
- (5) the corporation's period of duration stated in its articles of incorporation has expired.

Once the Secretary of State serves a notice of determination on a corporation, the corporation has sixty (60) days to come into compliance or show that it is in compliance. If the corporation does not act within the sixty (60) day period, the Secretary of State must file a certificate of dissolution. Ark. Code Ann. § 4-27-1421. After a corporation is administratively dissolved, it has two (2) years to be reinstated. In order to be reinstated, the corporation must eliminate the grounds for administrative dissolution or state that the grounds did not exist. If a certificate of reinstatement is issued, it dates back to the date of the administrative dissolution, and the corporation continues as if dissolution had not occurred. Ark. Code Ann. § 4-27-1422. If the Secretary of State denies reinstatement, the corporation may bring an action for reinstatement in the Pulaski County Circuit Court within thirty (30) days after service of the denial. Ark. Code Ann. § 4-27-1423.

The Arkansas Attorney General may bring a judicial action to dissolve a corporation if the corporation committed fraud in completing its articles of incorporation or has exceeded or abused its legal authority. A shareholder may bring an action for judicial dissolution if the directors are deadlocked, the shareholders cannot resolve the deadlock, and irrevocable injury is threatened to the corporation; the directors have acted in a manner that is illegal, oppressive, or fraudulent; the shareholders are deadlocked and have failed for two (2) consecutive annual meetings to elect directors; or the corporation's assets are being misplaced or wasted. A creditor may bring an action for judicial dissolution if a creditor's judgment has been returned unsatisfied, and the corporation is insolvent, or the corporation has admitted in writing that the

creditor's claim is due and that the corporation is insolvent. Also, a corporation may bring a proceeding for its voluntary dissolution if it wants the dissolution to be court supervised. Ark. Code Ann. § 4-27-1430.

If a corporation had employees, it should indicate on its final AR941M Monthly Withholding Report that it is no longer withholding Arkansas income tax. The form must be mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The corporation should also file a Report To Terminate Account with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268..

If a corporation sold goods or services in Arkansas, it should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

### **3. Non-Profit Corporation**

**a. Filing Requirements.** Unless a later date is specified, a non-profit corporation is formed when its articles of incorporation are filed with the Secretary of State. Ark. Code Ann. § 4-33-203(a). As provided in Ark. Code Ann § 4-33-202(a), articles of incorporation must contain the following information:

- (1) the name of the corporation;
- (2) a statement that the corporation is either a public benefit, mutual benefit, or religious corporation;
- (3) the street address of the registered office and the name of the registered agent at the registered office;
- (4) the name and address of each incorporator;
- (5) whether or not the corporation will have members; and
- (6) provisions not inconsistent with law regarding the distribution of assets on dissolution.

After incorporation, the directors, if named in the articles of incorporation, must hold an organizational meeting to adopt bylaws, elect officers, and complete any other action needed to organize the corporation. If directors are not named in the articles of incorporation, the incorporator(s) must hold an organizational meeting to elect directors. Either the incorporator(s) or directors may complete the organization of the corporation. Ark. Code Ann. § 4-33-205(a). Either the incorporators or the board of directors must adopt bylaws for the corporation. Ark.

Code Ann. § 4-33-206(a). The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation. Ark. Code Ann. § 4-33-206(b).

For federal income tax purposes, a corporation must file IRS Form SS-4 to acquire an employer identification number. Form SS-4 and its instructions may be accessed via the IRS's website at [www.irs.gov](http://www.irs.gov).

There are several Arkansas forms that a corporation must complete if it will have employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form may be retrieved from the Arkansas Department of Finance and Administration's website. The form must be mailed to Department of Finance and Administration, Withholding, P. O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a corporation hires its first employee and every additional employee, the corporation must report to the Arkansas Department of Workforce Services through the Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095.

No later than the last day of the second month in which a corporation becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law (Form ESD-ARK-201) with the Arkansas Employment Security Department. The form should be mailed to the Arkansas Employment Security Department, P.O. Box 2981, Little Rock, AR 72203-2981. For additional information, call (501) 682-3268.

The general rule on sales and use tax in Arkansas is that if a corporation sells goods or services in Arkansas, it must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104. However, certain non-profit corporations may be exempted from sales and use tax. See Rule GR-31 of the Arkansas Gross Receipts Tax Rules.

**b. Management Control.** The affairs of a corporation are managed by its board of directors, subject to any limitation imposed by the articles of incorporation. Ark. Code Ann. § 4-33-801(b). The articles of incorporation or bylaws may contain qualifications for directors. Ark. Code Ann. § 4-33-802. The board of directors must consist of at least three individuals. Ark. Code Ann. § 4-33-803. A director must discharge the director's duties "[i]n good faith; with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner the director reasonably believes to be in the best interests of the corporation." Ark. Code Ann. § 4-33-830(a).

If a corporation has members, all the directors, except the initial directors, are elected at the first annual member meeting and at each annual meeting thereafter. If the corporation does not have members, all the directors, except the initial directors, are elected, appointed, or designated pursuant to the articles of incorporation or bylaws. Ark. Code Ann. § 4-33-804.

The terms of directors must be specified in the articles of incorporation or bylaws. If the articles of incorporation or bylaws are silent, the term is one year. Unless a director is designated or appointed, the term “[m]ay not exceed the lesser of six (6) years or the stated duration of the corporation.” Ark. Code Ann. § 4-33-805(a).

Directors elected by members may be removed without cause at a members’ meeting called for the purpose of removing a director. The notice of the meeting must provide that a purpose of the meeting is to remove a director. Ark. Code Ann. § 4-33-808(e). A director elected by the board of directors may be removed without cause by the majority of the board of directors at a meeting called for the purpose of removing a director. The notice of the meeting must provide that a purpose of the meeting is to remove a director. Ark. Code Ann. § 4-33-808(h). In order to remove a designated director, the articles of incorporation or bylaws that made the designation must be amended. Ark. Code Ann. § 4-33-809(a). The circuit court in the county of the corporation’s principal office may remove a director. The proceeding must be commenced by the corporation or members owning at least ten percent (10%) of the voting power of any class. In order to remove a director, the court must find “[t]hat (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation, or a final judgment has been entered finding that the director has violated [the director’s statutory duties], and (2) removal is in the best interest of the corporation.” Ark. Code Ann. § 4-33-810(a).

Regular and special meetings of the board of directors may be held in or outside Arkansas. Ark. Code Ann. § 4-33-820(b). Unless prohibited by the articles of incorporation or bylaws, directors may participate in any meeting of the board of directors by “[a]ny means of communication by which all directors participating may simultaneously hear each other during the meeting.” Ark. Code Ann. § 4-33-820(c). Also, unless prohibited by the articles of incorporation or bylaws, any action may be taken without a meeting if the action is taken by the unanimous written consent of the directors. Ark. Code Ann. § 4-33-821.

Unless the articles of incorporation or bylaws provide otherwise, a corporation has a president, secretary, and treasurer. An individual may hold more than one office at a time. The bylaws or the board of directors must delegate to one of the officers the duty to prepare minutes of the member and director meetings and authenticate the corporation’s records. Ark. Code Ann. § 4-33-840. If an officer has discretionary authority, the officer must discharge the officer’s duties “[i]n good faith; with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner the officer reasonably believes to be in the best interests of the corporation and its members, if any.” Ark. Code Ann. § 4-33-842(a). An officer may be removed by the board of directors at any time with or without cause. Ark. Code Ann. § 4-33-843(b).

**c. Foreign Non-Profit Corporation.** Before a foreign non-profit corporation transacts business in Arkansas, it must submit an application for a certificate of authority with the Secretary of State. Ark. Code Ann. § 4-33-1501(a). An application for registration may be retrieved from the Arkansas Secretary of State's website. The application for registration must be delivered to the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. Ark. Code Ann. § 4-33-1503(a) provides that an application for certificate of authority must contain the following:

- (1) the name of the foreign corporation, or if its name is unavailable in Arkansas, a fictitious name;
- (2) the state or country where it is incorporated;
- (3) the date of its incorporation;
- (4) its period of duration;
- (5) the street address of its principal office;
- (6) the address of the registered agent in Arkansas and the name of its registered agent at that office;
- (7) the names and usual business or home addresses of its directors and officers;
- (8) if the corporation has members; and
- (9) if incorporated in Arkansas whether it would be a public benefit, mutual benefit, or religious corporation.

If a foreign corporation transacts business in Arkansas without obtaining a certificate of authority, it may not maintain a proceeding in any court in Arkansas. Ark. Code Ann. § 4-33-1502(b). A foreign corporation that transacts business in Arkansas without obtaining a certificate of authority is subject to a penalty of not less than \$100 or more than \$5,000. Ark. Code Ann. § 4-33-1502(d). Transacting business in Arkansas without a certificate of authority does not affect a foreign corporation's acts or prevent it from defending an action in Arkansas. Ark. Code Ann. § 4-33-1502(e).

A foreign corporation authorized to transact business in Arkansas must obtain a certificate of withdrawal from the Secretary of State in order to withdraw from Arkansas. Ark. Code Ann. § 4-33-1520(a). Pursuant to Ark. Code Ann. § 4-33-1520(b), an application for certificate of withdrawal must state:

- (1) the name of the foreign corporation and the name of the state or country under whose laws it is incorporated;

- (2) that it is not transacting business in Arkansas and that it surrenders its authority to transact business in Arkansas;
- (3) that it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process;
- (4) a mailing address to which the Secretary of State may mail a copy of any process served; and
- (5) a commitment to notify the Secretary of State of any changes in its mailing address.

Pursuant to Ark. Code Ann § 4-33-1530(a), the Secretary of State may commence a proceeding to revoke a foreign corporation's certificate of authority if the foreign corporation:

- (1) does not pay within 120 days after they are due any franchise taxes or penalties;
- (2) is without a registered agent or registered office in Arkansas for 120 days or more;
- (3) does not inform the Secretary of State that its registered agent or office has changed, that its registered agent has resigned, or that its registered office has been discontinued within ninety (90) days of the change, resignation, or discontinuance; or
- (4) does not file the annual disclosure statement required under Ark. Code Ann. § 4-33-131.

The Secretary of State may also commence a proceeding to revoke a certificate of authority if an incorporator, director, officer, or agent of the foreign corporation signed a document known to be false in any material respect with the intent that the document be delivered to the Secretary of State or if the Secretary of State receives a certificate from the Secretary of State of the state or country under which law the foreign corporation is incorporated stating that it has been dissolved or disappeared as a result of a merger. Ark. Code Ann. § 4-27-1530. A foreign corporation may appeal the revocation of its certificate of authority to the Pulaski County Circuit Court within 30 days after service of the certificate of revocation is perfected. Ark. Code Ann. § 4-27-1532.

The Arkansas Attorney General may bring a judicial action to revoke the certificate of authority of a foreign non-profit corporation if the corporation exceeded or abused its legal authority, or, if it would have been a public benefit corporation, had it been an Arkansas corporation, and its assets are fraudulently misapplied or wasted. Ark. Code Ann. § 4-33-1530 (b).

**d. Record Keeping.** Pursuant to Ark. Code Ann. § 4-28-218, a non-profit corporation shall maintain the following records:

- (1) correct and complete books and records of account;
- (2) minutes of the meetings of its members, board of directors, and committees of its board of directors; and
- (3) names and addresses of its members entitled to vote.

Any member may examine the records of the corporation at any reasonable time for a proper purpose. Ark. Code Ann. § 4-28-218(e).

**e. Merger.** Unless otherwise provided by Arkansas law, the articles, or bylaws, two or more corporations may merge if the plan of merger is approved by the board of directors, and the members, if any, “[b]y two-thirds (2/3) of the votes cast or a majority of the voting power, whichever is less.” Ark. Code Ann. § 4-33-1103(a)(2). If the articles require a specified person to approve amendments to the corporation’s articles or bylaws, such person must also approve the plan of merger. Pursuant to Ark. Code Ann. § 4-33-1101(b), the plan of merger must contain the following information:

- (1) the name of each corporation planning to merge and the name of the surviving corporation;
- (2) the terms and conditions of the merger;
- (3) the manner and basis of converting the memberships of each public benefit or religious corporation into memberships of the surviving corporation; and
- (4) if a mutual benefit corporation is involved, the plan must contain the manner and basis of converting the memberships of the merging corporation into memberships, obligations, or securities of the surviving corporation or into cash or other property.

Ark. Code Ann. § 4-33-1102(a) provides that without obtaining the approval of the circuit court in the county of the corporation’s principal office (or registered office if a foreign corporation), a public benefit or religious corporation may only merge with:

- (1) a public benefit or religious corporation;
- (2) a foreign corporation that would qualify as a public benefit or religious corporation; or
- (3) a mutual benefit corporation, provided the public benefit or religious corporation is the surviving corporation and continues to be a public benefit or religious corporation after the merger.

Also, without court approval a member may not receive anything pursuant to the merger except a membership interest of the surviving corporation. The court must approve the merger if the merger benefits the public interest. Ark. Code Ann. § 4-33-1102(b).

After the plan of merger is approved, the surviving corporation must file articles of merger with the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. Pursuant to Ark. Code Ann. § 4-33-1104, articles of merger must set forth the following information:

- (1) the plan of merger;
- (2) if member approval was not required, a statement to that effect, and a statement that the plan of merger was approved by the sufficient vote of the board of directors;
- (3) if member approval was required, information regarding the membership vote; and
- (4) if approval was required by someone other than the members or the board of directors, a statement that the approval was obtained.

Ark. Code Ann. § 4-33-1105 provides that the effect of merger includes:

- (1) the existence of every corporation that was a party to the merger, except the surviving corporation, ceases;
- (2) all property owned by every corporation that was a party to the merger vests in the surviving corporation;
- (3) the surviving corporation inherits all liabilities of each corporate party to the merger; and
- (4) the surviving corporation may be substituted as a party in any proceeding pending against any corporation that merged into the surviving corporation.

**f. Dissolution.** Arkansas law provides three methods for a corporation to dissolve. A corporation may be voluntarily dissolved, which normally occurs by the vote of its directors and members, if any. In general, the Secretary of State may seek administrative under certain circumstances described below. The Arkansas Attorney General, its members, a creditor, or the corporation may bring a judicial proceeding to dissolve the corporation.

The most common method of dissolution is voluntary dissolution. Unless otherwise provided by Arkansas law, the articles, or bylaws, a corporation is dissolved upon the approval of the board of directors, and members, if any, “[b]y two-thirds (2/3) of the votes cast or a majority of the voting power, whichever is less.” Ark. Code Ann. § 4-33-1402(a)(2). If the articles require a specified person to approve an amendment to the corporation’s articles or

bylaws, such person must also approve the dissolution. Ark. Code Ann. § 4-33-1402(a)(3). After dissolution is approved, the corporation files articles of dissolution with the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. Articles of dissolution may be retrieved via the Secretary of State's website. For additional information, call (501) 682-3409. Pursuant to Ark. Code Ann. § 4-33-1404(a), articles of dissolution must contain the following information:

- (1) the name of the corporation;
- (2) the date dissolution was authorized;
- (3) a statement that dissolution was approved by sufficient vote of the board of directors;
- (4) if member approval was not required, a statement to that effect;
- (5) if approval of the members was required, the number of votes cast for and against dissolution; and
- (6) if approval was required by someone other than the members or the board of directors, a statement that the approval was obtained.

Dissolution is effective upon the effective date of the articles of dissolution. Ark. Code Ann. § 4-33-1404(b).

After a corporation is dissolved, it preserves its assets, discharges its liabilities, and distributes its assets according to its articles or bylaws. If the articles or bylaws of a public benefit or religious corporation do not contain provisions for the distribution of assets upon dissolution, the dissolved corporation, if it is described in Internal Revenue Code ("IRC") § 501(c)(3), distributes its assets to a person described in IRC § 501(a)(3). If the dissolved corporation is not described in IRC § 501(a)(3), it distributes its assets to another public benefit or religious corporation. If the articles or bylaws of a mutual benefit corporation do not address the distribution of assets upon dissolution, the assets are distributed to its members, if any, otherwise to persons benefited by the corporation. Ark. Code Ann. § 4-33-1406.

In order to dispose of known claims, a dissolved corporation must give its known creditors notice of its dissolution. If the notice is proper, known creditors have 120 days to present their claims, or their claims will be forever barred. Ark. Code Ann. § 4-33-1407. In order to put unknown creditors on notice of the dissolution, a corporation may publish notice in a newspaper of general circulation in the county where its principal office, if there is one, or its registered office is located. Unknown claimants have one year from the date of publication to commence a proceeding to enforce a claim. If a proceeding is not commenced within one (1) year, the claim is barred. Ark. Code Ann. § 4-33-1408.

Pursuant to Ark. Code Ann. § 4-33-1420, the Secretary of State may begin a proceeding to administratively dissolve a corporation if:

- (1) the corporation does not pay any taxes or penalties imposed by the Arkansas Nonprofit Corporation Act of 1993 within sixty (60) days of their due date;
- (2) the corporation does not have a registered office or agent in Arkansas for 120 days or more;
- (3) the corporation does not file its annual disclosure statement;
- (4) the corporation does not notify the Secretary of State within 120 days that its registered agent or office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or
- (5) the corporation's duration expires.

Once the Secretary of State serves a notice of determination on a corporation, the corporation has sixty (60) days to come into compliance or show that it is in compliance. If the corporation does not act within the sixty (60) day period, the Secretary of State may file a certificate of dissolution. Ark. Code Ann. § 4-33-1421. After a corporation is administratively dissolved, it has two (2) years to be reinstated. In order to be reinstated, the corporation must eliminate the grounds for administrative dissolution or state that the grounds did not exist, state that the corporation's name complies with Arkansas law, and provide proof from the Department of Finance & Administration that all state taxes owed have been paid. If a certificate of reinstatement is issued, it dates back to the date of the administrative dissolution, and the corporation continues as if dissolution did not occur. Ark. Code Ann. § 4-33-1422. If the Secretary of State denies reinstatement, the corporation may bring an action for reinstatement in the Pulaski County Circuit Court within ninety (90) days after service of the denial. Ark. Code Ann. § 4-33-1423.

The Arkansas Attorney General may bring a judicial action to dissolve a corporation if (i) the corporation committed fraud in completing its articles; (ii) exceeded or abused its legal authority; or (iii) a public benefit corporation fraudulently misapplied or wasted its assets. Generally, the lesser of fifty (50) members or members owning five-percent (5%) of the voting power, or a director, may bring an action for judicial dissolution if (i) the directors are deadlocked and the members are unable to break the deadlock; (ii) the directors have or willfully acted in a fraudulent or illegal manner; (iii) the members are deadlocked and have failed for two (2) consecutive annual meetings to elect directors; or (iv) the corporation's assets are being used fraudulently. A creditor may bring an action for judicial dissolution if (i) the creditor's judgment has been returned unsatisfactory and the corporation is insolvent or (ii) the corporation has admitted in writing that the creditor's claim is due and that the corporation is insolvent. Also, a corporation may bring a proceeding for its voluntary dissolution if it wants the dissolution to be court supervised. Ark. Code Ann. § 4-33-1430.

If a corporation had employees, it should indicate on its final AR941M Monthly Withholding Report that it is no longer withholding Arkansas income tax. The form may be obtained from the Arkansas Department of Finance and Administration's website. The form

must be mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The corporation should also file a Report To Terminate Account with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a corporation sold goods or services in Arkansas, it should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**g. Unincorporated Nonprofit Association.** An unincorporated nonprofit association is a legal entity distinct from its members and managers that has a perpetual duration, and is governed by the governing principles. Ark. Code Ann. § 4-28-605. The governing principles means the agreement, whether written or oral, or implied from its established practices, that govern the purpose or operation of the association. *Id.* § 4-28-602(2). An unincorporated association has the same powers as an individual to do all things necessary to carry on its business. Such an organization may engage in profit making activities provided that the profits are set aside for the association's non-profit purposes.

An unincorporated nonprofit association may acquire, encumber, or transfer in its name an interest in real or personal property. Ark. Code Ann. § 4-28-606. An interest in real property may be transferred by a person authorized to do so in a statement of authority recorded in the county in which the transfer of real property would be recorded. *Id.* § 4-28-607.

A statement of authority must set forth the name of the unincorporated association, the address in this state, a statement that the association is a non-profit association, and the name, title, or position of the person authorized to transfer the property. *Id.* A statement of authority must be executed in the same manner as an affidavit by a person other than the person authorized in the statement to transfer the interest. Unless cancelled earlier, a recorded statement of authority expires five (5) years after it has been recorded.

A debt or other obligation of an unincorporated non-profit association does not become a debt of a member or manager solely because the member acts as a member or the manager acts as a manager. *Id.* § 4-28-608. An unincorporated association may sue or be sued in its own name. A member or manager may assert a claim the member or manager has against the unincorporated association, and the association may assert a claim it has against a member or manager. *Id.* § 4-28-609.

An unincorporated association may file a statement appointing a registered agent with the Secretary of State. A statement appointing an agent must set forth the name of the association, and the name of the person authorized to receive service of process and the person's address, including the street address. The statement must be signed and acknowledged by a person authorized to manage the affairs of the unincorporated non-profit association. *Id.* § 4-28-611.

A member is not an agent of the association solely by reason of being a member. An association must have the approval of its members to (1) admit, suspend, dismiss, or expel a member, (2) select or dismiss a manager, (3) adopt, amend, or repeal the governing principles; (4) sell, lease, exchange or otherwise dispose of the associations property, (5) dissolve or merge, (6) undertake any activity outside the ordinary course of business, and (7) determine the policy of the association. Unless the governing principles provide otherwise, any approval of the members requires an affirmative vote of the majority of votes cast.

A manager does not have to be a member, but must be selected by the members. If a manager is not selected, then all members are managers. A manager owes the association and its members the fiduciary duties of loyalty and care. *Id.* § 4-28-623.

On a reasonable notice, a member or manager may inspect and copy during regular operating hours any record maintained by the association regarding its activities, financial condition, and other circumstances, to the extent the information is material to the member or manager's rights and duties under the governing principles. *Id.* § 4-28-625. The association may impose reasonable restrictions on access to information, including designating the information confidential and imposing obligations of nondisclosure on the recipient. *Id.*

An unincorporated non-profit association may not pay dividends or make distributions to a member. The association may pay reasonable compensation or reimburse reasonable expenses, confer benefits in conformity with the association's non-profit purpose, repurchase a membership or capital contribution, or make distributions of property to members upon winding up and termination to the extent permitted by § 4-28-629.

An unincorporated non-profit association is dissolved if (1) the governing principles provide a dissolution date, (2) upon approval of the members, (3) by the last manager if the association has not operations for the past three years, (4) court order, or (5) under law other than this subchapter. Upon dissolution, all known debts must be paid or adequately provided for, any property subject to a condition must be returned to the donor, and any property subject to a trust must be distributed in accordance with the trust agreement. Any remaining property must be distributed to an organization with similar nonprofit purposes, if available, otherwise, in accordance with the association's governing principles, or to the members per capita or as they direct, if any, otherwise, pursuant to the Arkansas Unclaimed Property Act (Ark. Code Ann. § 18-28-201). Ark. Code Ann. § 4-28-629.

## **E. Limited Liability Company**

**1. Organizational Formalities.** A limited liability company is formed when its articles of organization are filed with the Arkansas Secretary of State, unless the articles of organization specify a delayed effective date. Ark. Code Ann. § 4-32-206(a). Articles of organization may be retrieved from the Arkansas Secretary of State's website. Articles of organization must be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. It is recommended that the organizer of a limited liability company enclose a franchise tax registration with the articles of organization. A franchise tax registration form may also be retrieved from the Arkansas

Secretary of State's website. Pursuant to Ark. Code Ann. § 4-32-202, articles of organization must contain the name of the limited liability company which "[m]ust contain the words 'Limited Liability Company' or 'Limited Company' or the abbreviations 'L.L.C.,' 'L.C.,' 'LLC,' or 'LC.'" "The word 'Limited' may be abbreviated as 'Ltd.' and the word 'Company' may be abbreviated 'Co.'" Ark. Code Ann. § 4-32-103(a).

After a limited liability company is formed, its members must enter into a written operating agreement. Ark. Code Ann. § 4-32-102(11). The purpose of the operating agreement is to set forth how the business affairs of the limited liability company will be conducted. Arkansas law provides default rules in many areas regarding the operation of a limited liability company if the operating agreement is silent on a particular issue.

If a limited liability company only has one member, it does not need an employer identification number. If a limited liability company will have more than one member, it must file IRS Form SS-4 to acquire an employer identification number. If a limited liability company will have employees, it may apply for an employer identification number. Form SS-4 and its instructions may be accessed via the IRS's website at [www.irs.gov](http://www.irs.gov).

There are several Arkansas forms that a limited liability must complete if it will have employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form may be obtained from the Arkansas Department of Finance and Administration's website. The form must be mailed to Department of Finance and Administration, Withholding, P.O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a limited liability company hires its first employee and every additional employee, it must report to the Arkansas Department of Workforce Services through the Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095.

No later than the last day of the second month in which a limited liability company becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a limited liability company sells goods or services in Arkansas, the owner must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**2. Capitalization.** "A limited liability company interest may be issued in exchange for property, services rendered, or a promissory note or other obligation to contribute cash or property or to perform services." Ark. Code Ann. § 4-32-501.

**3. Management and Control.** Management of a limited liability company may be vested either in its members or in a manager or managers. If the articles of organization do not provide that management is vested in a manager or managers, management is vested in the members. If management of a limited liability company is vested in a manager or managers, the limited liability company is operated similar to a corporation. If the management of the limited liability company is vested in members, the limited liability company is operated similar to a partnership.

Arkansas law provides that if management of a limited liability company is vested in its members, and unless there is an agreement to the contrary, the approval of more than one-half (1/2) by number of the members is required to decide most matters. Ark. Code Ann. § 4-32-403(a). Regardless of whether management is vested in a manager or in the members, the default rule is that the approval of all members is required to amend the operating agreement or authorize a member or manager to perform an act which contravenes the operating agreement.

If a limited liability company's management is vested in a manager or managers, the default rule is that managers act by majority. Ark. Code Ann. § 4-32-403(a). Unless otherwise provided in the operating agreement, managers (1) may be elected or removed by more than one-half (1/2) by number of the members; (2) need not be members of the limited liability company or natural persons; and (3) unless they are removed or resign, hold office until their successors have been elected and qualified. Ark. Code Ann. § 4-32-401(c). Many times the operating agreement will provide that a manager can be removed only by vote of members owning more than one-half (1/2) of the limited liability company interests. If management of a limited liability company is vested in a manager or managers, a member of the limited liability company, who is not a manager, does not owe any duty to the limited liability company or the other members, solely by reason of being a member of the limited liability company. Ark. Code Ann. § 4-32-402(3).

**4. Profit and Loss.** Unless the members provide otherwise in the operating agreement, profits and losses are shared equally among the members. Ark. Code Ann. § 4-32-503.

**5. Manager and Member Liability.** The default rule is that a manager or member is not liable to the limited liability company or its members “[f]or any action taken or failure to act on behalf of the limited liability company unless the act or omission constitutes gross negligence or willful misconduct.” Ark. Code Ann. § 4-32-402(1). However, for interested transactions, unless otherwise provided in the operating agreement:

Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by that person without the consent of more than one-half (1/2) by number of the disinterested managers or members, or other persons participating in the management of the business or affairs of the limited liability company, from any transaction connected with the conduct or winding up of the limited liability company or any use by the member or manager of its property, including, but not limited to, confidential or

proprietary information of the limited liability company or other matters entrusted to the person as a result of his or her status as manager or member.

Ark. Code Ann. § 4-32-402(2).

An operating agreement may eliminate or reduce the liability of a member or manager contained in Ark. Code Ann. § 4-32-402. Ark. Code Ann. § 4-32-404(1). An operating agreement may also “[p]rovide for indemnification of a member or manager for judgments, settlements, penalties, fines, or expenses incurred in a proceeding to which a person is a party because the person is or was a member or manager.” Ark. Code Ann. § 4-32-404(2).

**6. Foreign LLCs.** A foreign limited liability company’s organization, internal affairs, and liability and authority of its managers and members are governed by the laws of the jurisdiction where it is organized. Ark. Code Ann. § 4-32-1001. In order to transact business in Arkansas, a foreign limited liability company must submit an application for registration with the Secretary of State. An application for registration may be retrieved from the Arkansas Secretary of State’s website. The application for registration must be delivered to the Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. It is recommended that the foreign limited liability company enclose a franchise tax registration with the application for registration. A franchise tax registration form may also be retrieved from the Arkansas Secretary of State’s website. Pursuant to Ark. Code Ann. § 4-32-1002, the application for registration must contain the following items:

- (1) the name of the foreign limited liability company and, if different, the name under which it proposes to transact business in Arkansas;
- (2) the state or jurisdiction where it was formed and the date of its formation;
- (3) the name and address of a registered agent or a statement that the Secretary of State is appointed agent for service of process if the foreign limited liability company fails to appoint or maintain a registered agent;
- (4) the address of the office required to be maintained in the state of its formation or, if not required, the principal office of the foreign limited liability company; and
- (5) statement that the foreign limited liability company is a foreign limited liability company as defined in Ark. Code Ann. § 4-32-102(5).

If a foreign limited liability company transacts business in Arkansas without registering, it cannot maintain an action in a court in Arkansas. Ark. Code Ann. § 4-32-1007(a). However, failure to register in Arkansas will not: (1) impair the validity of any contract or act of the foreign limited liability company; (2) affect the right of any other party to the contract to maintain any action, suit, or proceeding on the contract; or (3) prevent the foreign limited liability company from defending any action, suit, or proceeding in any court [in Arkansas]. Ark. Code Ann. § 4-32-1007(b).

A foreign limited liability company that transacts business in Arkansas without registration is subject to a penalty “[n]ot to exceed five thousand dollars (\$5,000) for each twelve (12) month period or part thereof, beginning with the date it began transacting business in [Arkansas] and ending on the date it becomes registered.” Ark. Code Ann. § 4-32-1007(e).

Pursuant to Ark. Code Ann. § 4-32-1008, the following activities, among others, do not constitute transacting business in Arkansas: (1) creating or acquiring indebtedness, mortgages, and security interests in real or personal property; (2) securing or collecting debts or enforcing mortgages and security interests in property securing debts; (3) owning, without more, real or personal property; or (4) conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature. A 2017 case, *Serio v. Copeland Holdings, LLC*, 2017 Ark. App. 280, highlights the distinction between purchasing property for investment for profit compared to merely owning property “without more.”

When a foreign limited liability company that is registered to transact business in Arkansas decides to cancel its registration, it must file an application for cancellation with the Secretary of State. An application for cancellation may be retrieved from the Arkansas Secretary of State’s website. A final franchise tax report form may also be retrieved from the Arkansas Secretary’s website. The application for cancellation must be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. Ark. Code Ann. § 4-32-1006 requires a certificate of cancellation to contain the following information:

- (1) the name of the foreign limited liability company and the state under the laws of which it was formed;
- (2) that the foreign limited liability company is not transacting business in Arkansas;
- (3) that the foreign limited liability company surrenders its certificate of registration to transact business in Arkansas;
- (4) that the foreign limited liability company revokes the authority of its registered agent for service of process in Arkansas and consents that service of process be made by service upon the Secretary of State; and
- (5) and an address to which a person may mail a copy of any process served against the foreign limited liability company.

**7. Record Keeping.** Unless otherwise provided in its operating agreement, Ark. Code Ann. § 4-32-405(a) requires a limited liability company to maintain the following records at its principal place of business:

- (1) an alphabetical list of all current and past members and managers along with their addresses;

- (2) a copy of the articles of organization along with any amendments and any powers of attorney that were used to execute any amendments;
- (3) copies of all income tax returns and financial statements for the three most recent years;
- (4) copies of the current operating agreement and all amendments as well as prior operating agreements; and
- (5) if not contained in the operating agreement, a writing showing the amount of property contributed by each member, the times which require additional contributions, and events causing dissolution. A member has the right to inspect and copy, at the member's expense, any records during ordinary business hours. Ark. Code Ann. § 4-32-405(b).

**8. Merger and Consolidation.** Unless otherwise provided in an operating agreement, one or more limited liability companies may merge or consolidate with or into one or more other business entities. Ark. Code Ann. § 4-32-1206. Unless the operating agreement provides otherwise, more than one-half (1/2) of the members must approve the merger or consolidation. Ark. Code Ann. § 4-32-1207(a). Normally, an operating agreement will provide that the merger or consolidation must be approved by a supermajority of the membership interests. The surviving or resulting entity is required to file articles of merger or consolidation with the Secretary of State. Ark. Code Ann. § 4-32-1208(a).

**9. Dissolution.** Ark. Code Ann. § 4-32-901 provides that a limited liability company is dissolved upon the first of the following to occur:

- (1) time specified for dissolution in the articles of organization or operating agreement;
- (2) written consent of all members;
- (3) any time there are no members, unless within ninety (90) days or some other time specified in the articles of organization or operating agreement, the personal representative of the last member agrees in writing to continue the limited liability company; or
- (4) the entry of judicial dissolution. A decree of judicial dissolution may be entered if a circuit court, upon petition from a member, determines that “[i]t is not reasonably practicable to carry on the business of the limited liability company in conformity with the operating agreement.” Ark. Code Ann. § 4-32-902.

Upon an event of dissolution, the members or managers of the limited liability company close the business, dispose of properties, pay the liabilities, and distribute the remaining assets to the members. Ark. Code Ann. § 4-32-903.

The limited liability company may file articles of dissolution with the Secretary of State. Articles of dissolution may be delivered to Arkansas Secretary of State, State Capitol, Little Rock, AR 72201-1094. For additional information, call (501) 682-3409. A limited liability company must file a final franchise tax report with the Arkansas Secretary of State. Ark. Code Ann. § 4-32-906 requires articles of dissolution to contain:

- (1) the name of the limited liability company;
- (2) the date of filing of its articles of organization and all amendments thereto;
- (3) the reason for filing the articles of dissolution; and
- (4) the effective date of the articles of dissolution if they are not to be effective upon filing.

If a limited liability company files articles of dissolution and gives proper notice to its known creditors, the known creditors must present their claim within 120 days or be forever barred from presenting their claims. Ark. Code Ann. § 4-32-907. A limited liability company may publish notice of its dissolution in a newspaper of general circulation in the county of its principal office, if there is one; otherwise, in Pulaski County, in order to require unknown creditors to bring their claims within five (5) years, or the applicable period of limitations, or be forever barred. Ark. Code Ann. § 4-72-908.

If a limited liability company had employees, it should indicate on its final AR941M Monthly Withholding Report that it is no longer withholding Arkansas income tax. This form may be obtained via the Internet from the Arkansas Department of Finance and Administration's website. The form must be mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The limited liability company should also file a Report To Terminate Account with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a limited liability company sold goods or services in Arkansas, it should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

## **F. Cooperative Associations**

**1. Overview.** Arkansas law provides for various cooperatives. Generally, a cooperative is formed for the purpose of providing mutual benefits to its members.

**2. Organizational Formalities.** A cooperative is formed by filing articles of incorporation with the Secretary of State. The articles of incorporation must be signed and acknowledged by its members. Pursuant to Ark. Code Ann. § 4-30-108, the articles of

incorporation, which must be signed and acknowledged by the members, must contain the following information:

- (1) name of the cooperative;
- (2) names and residences of the persons forming the cooperative;
- (3) purpose of the organization;
- (4) principal place of business;
- (5) amount of capital stock;
- (6) number of shares and par value of each share;
- (7) number of directors and names of those selected for the first term; and
- (8) time for which the cooperative is to continue if it is not of perpetual duration.

A cooperative must have bylaws. The bylaws must set forth “[t]he duties of the directors and officials, the manner of distributing the profits of its business, the manner of becoming a member, and such other rules and instructions to its officials and members as will tend to make the corporation an effective business organization.” Ark. Code Ann. § 4-30-109(a).

For federal income tax purposes, a cooperative must file IRS Form SS-4 to acquire an employer identification number. Form SS-4 and its instructions may be accessed via the IRS’s website at [www.irs.gov](http://www.irs.gov).

There are several Arkansas forms that a cooperative must complete if it will have employees. Form AR4ER – Withholding Registration must be filed with the Revenue Division of the Arkansas Department of Finance and Administration. The form may be retrieved from the Arkansas Department of Finance and Administration’s website. The form must be mailed to Department of Finance and Administration, Withholding, P. O. Box 8055, Little Rock, AR 72203-8055. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290.

When a cooperative hires its first employee and every additional employee, it must report to the Arkansas Department of Workforce Services through the Arkansas New Hire Reporting Center. Any correspondence should be directed to Arkansas New Hire Reporting Center, P.O. Box 2540, Little Rock, AR 72203. For additional information, visit <https://newhire-reporting.com/AR-Newhire/default.aspx> or call (800) 259-2095..

No later than the last day of the second month in which a cooperative becomes an employer, it must file a Report to Determine Liability Under the Department of Workforce Services Law with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268.

If a cooperative sells goods or services in Arkansas, the owner must obtain a Sales and Use Tax Permit. A permit is obtained by completing Form ST-1 – Application for Sales and Use Tax Permit. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

**3. Capitalization.** The only capitalization requirement for a cooperative is that twenty percent (20%) of its capital must be paid in cash before it can be organized. Ark. Code Ann. § 4-30-111.

**4. Management and Control.** A person may not own more than 10% of the stock of a cooperative. All matters that are decided by the members are decided by the members individually and not by the number of shares owned. Ark. Code Ann. § 4-30-112. A cooperative is managed by a board of directors that must have at least five (5) members. The directors are elected by the stockholders. The timing of the election and the terms of the directors are as specified in the bylaws. A director may be removed for cause by the majority of the stockholders at any regular or special shareholders meeting called to remove a director. The board of directors must select a president, vice president, secretary, and treasurer to operate the cooperative. Ark. Code Ann. § 4-30-110.

**5. Profit and Loss.** Profits and losses are distributed to the members as provided in the bylaws. Ark. Code Ann. § 4-30-109(a).

**6. Owner Liability.** Except for debts with the cooperative, a member's liability for a cooperative's debts is limited to the amount unpaid, if any, on the member's membership fee or stock subscription. Ark. Code Ann. § 4-30-117.

**7. Record Keeping.** A cooperative must keep correct and complete books and records of account at its registered office or principal office in Arkansas. The cooperative must maintain minutes of shareholder and director meetings along with a list of the names and addresses of all shareholders and the number and class of shares held by each. Any person who has been a shareholder for at least six (6) months has the right to make a written demand for a full itemized accounting of all expenditures during the previous six (6) month period. A shareholder also has the right to examine the cooperative's books and records of account, minutes, and shareholder records at any reasonable time for a proper purpose. Ark. Code Ann. § 4-30-113.

If a cooperative had employees, it should indicate on its final AR941M Monthly Withholding Report that it is no longer withholding Arkansas income tax. The form may be obtained from the Arkansas Department of Finance and Administration's website. The form must be mailed to Department of Finance and Administration, P. O. Box 9941, Little Rock, AR 72203-9941. The Individual Income Tax Withholding Branch may be contacted by telephone at (501) 682-7290. The cooperative should also file a Report To Terminate Account with the Arkansas Department of Workforce Services. For additional information, visit <https://www.arkansas.gov/esd/wioa.htm> or call (501) 682-3268..

If a cooperative sold goods or services in Arkansas, it should file a Notice of Business Closure or Sale of Business (Form ST-200) with the Arkansas Department of Finance and Administration. The form should be mailed to the Arkansas Department of Finance and Administration, Sales and Use Tax Section, P.O. Box 1272, Little Rock, AR 72203-1272. For additional information, call (501) 682-7104.

## V. BUSINESS AND TRADE REGULATION

There are a number of federal and state laws that regulate business and commercial activities. These laws are designed to promote two major objectives: (1) protecting contracting parties with different levels of bargaining position, and (2) promoting efficiency and predictability in the marketplace. A few of these laws are highlighted below, including the Arkansas Uniform Commercial Code, antitrust laws, banking laws, business name registration, public carriers, consumer protection, and securities laws.

### A. The Uniform Commercial Code (“UCC”)

The UCC is a uniform state law drafted by the National Commission on Uniform State Laws and enacted, with modifications, by state legislatures, including Arkansas at Ark. Code Ann. §§ 4-1-101 *et seq.* The UCC governs, in broad terms, the sale and lease of goods; commercial paper, negotiable instruments and electronic funds transfers; warehouse receipts; transfer and pledge of investment securities; and the creation and enforcement of security interests and certain liens on personal property. Arkansas has adopted most of the UCC, with limited changes to accommodate state public policy, including Articles 2A (Leases) and Revised Article 9 (Secured Transactions).

Article 9 of the UCC deals with security interests and personal property liens and is of particular interest in multi-state financings. Like other states, Arkansas has a public filing procedure in place to indicate whether a creditor has taken a security interest on a debtor’s personal property. The agreement by which a debtor gives a security interest to a creditor is called a security agreement. The personal property pledged to a creditor in a security agreement is called collateral. The document a creditor files to evidence it has a security interest is called a financing statement.

Financing statements for Arkansas entities generally are filed with the Arkansas Secretary of State in Little Rock and may be filed or searched electronically for a fee on the Secretary of State’s website, which is [www.sosweb.state.ar.us](http://www.sosweb.state.ar.us), by those with an account. In some instances, however, a financing statement is filed with a county filing clerk, depending on the nature of the collateral pledged, particularly fixtures, as-extracted collateral (such as crops, timber, oil, and gas), and, if the debtor is engaged in farming operation, equipment used in farming operations.

UCC central filing financing statements should be filed with the Arkansas Secretary of State at the following address: Arkansas Secretary of State, State Capitol, 500 Woodlane Street, Room 256, Little Rock, AR 72201. The UCC Division may be contacted by phone at (501) 682-1010.

If you are an Information Network of Arkansas (“INA”) subscriber (\$95 initial setup fee and \$95 per year as of 2017), financing statements may also be filed and searched electronically with the UCC Division. Additionally, the Secretary of State has adopted Filing Office Rules for UCC filings, which may be found at <http://www.sos.arkansas.gov/BCS/Documents/UCCFilingOfficeRulesJune2014.pdf>.

## **B. Antitrust Regulation**

**1. Federal Antitrust Law.** The basic antitrust laws of the United States are codified in five federal laws: the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Act. These laws apply in Arkansas.

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

**b. The Clayton Act of 1914.** The Clayton Act prohibits certain well-defined anticompetitive activities. For example, the Clayton Act restricts or limits some corporate mergers, exclusive dealing contracts, and “tying” agreements under which one product is sold subject to the requirement that the purchaser also buy another product from the seller.

**c. The Robinson-Patman Act of 1936.** The Robinson-Patman Act generally prohibits sellers from discriminating among competing purchasers in the price charged for commodities “of like grade and quality.” While the Act’s primary focus is on price discrimination, it also addresses discriminatory advertising allowances.

**d. The Federal Trade Commission Act.** The FTC Act makes unlawful “unfair methods of competition” and “unfair or deceptive acts or practices.”

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

Private rights of actions exist under the Sherman Act, the Clayton Act, and the Robinson-Patman Act. Remedies may include injunctive relief, treble damages, and attorney fees. The federal government may enforce the Sherman Act through criminal prosecutions and civil suits. In addition, the government may enforce the Clayton Act and the Robinson-Patman Act through the Federal Trade Commission or the Department of Justice. However, only the federal government can enforce the Federal Trade Commission Act and the Hart-Scott-Rodino Act.

**2. Arkansas Antitrust Law.** Arkansas antitrust laws are generally set forth at Ark. Code Ann. §§ 4-75-301 - 320. Monopolies are unlawful in Arkansas. Additionally, the fixing of prices or quantities of products is made illegal under Arkansas law, as is unfair competition. Provisions of Arkansas antitrust law are enforced by the Arkansas Attorney General. Actions for monopolies and unfair competition must be commenced within five years after the cause of

action arose. Arkansas antitrust laws apply to any economic activity occurring wholly or partly within the state or that affects economic activity within Arkansas.

### **C. Banking Regulation**

In addition to various federal agencies, Arkansas state banks are regulated by the State Banking Board through the Arkansas State Bank Department. The Arkansas Banking Code of 1997 (the “Banking Code”) (Ark Code Ann. §§ 23-45-101 – 23-50-110) governs state-chartered banks and bank holding companies. Included within the Arkansas Banking Code is the Arkansas Trust Institutions Act (Ark. Code Ann. § 23-51-101 *et seq.*).

The Banking Code is enforced by the Arkansas State Bank Department located at Arkansas State Bank Department, 400 Hardin Road, Suite 100, Little Rock, AR 72211. The Arkansas State Banking Department’s website is <http://banking.arkansas.gov>, and the Arkansas State Bank Department may be contacted by phone at (501) 324-9019. The Arkansas State Bank Department has adopted rules and regulations, which govern in detail the operations of the Arkansas State Banking Board and Arkansas State Bank Department. These rules and regulations are available at: <http://banking.arkansas.gov/public/userfiles/RulesRegsManual.pdf>.

This area of the law is complicated and detailed, and any person desiring to start or operate a banking business in Arkansas should seek expert advice concerning the effect of federal and state banking laws.

### **D. Business Name Registration**

Arkansas has a number of provisions dealing with the naming of business organizations. For more information, see Section IV on “Business Entities.”

**1. Corporations.** Arkansas has two business corporation acts: the Arkansas Business Corporation Act (Ark. Code Ann. § 4-26-101 *et seq.*) and the Business Corporation Act of 1987 (Ark. Code Ann. § 4-27-101 *et seq.*). For a discussion of which act applies to a particular corporation, see M.E. Matthews, *Corporate Statutes – Which One Applies*, 13 UALR L.J. 69 (1991).

The use of fictitious names by corporations is generally governed by Ark. Code Ann. § 4-27-404, which provides that domestic and foreign corporations doing business in Arkansas under fictitious names must file those names with the Secretary of State. In any event, foreign corporations must register their corporate names with the Arkansas Secretary of State. A foreign corporation’s name is governed by Ark. Code Ann. § 4-27-1506, which permits a foreign corporation to register under its real name or a fictitious name if its real name is unavailable.

**2. Limited Liability Companies.** Similar rules dealing with the names and fictitious names of limited liability companies are codified at Ark. Code Ann. §§ 4-32-108 - 109.

**3. Limited Partnerships and Limited Liability Partnerships.** Rules for names of limited partnerships or limited liability partnerships, whether domestic or foreign, are provided for under Ark. Code Ann. §§ 4-47-108 - 109.

**4. Other Business Entities Doing Business Under an Assumed Name.** Any business which has not registered its name as a corporation, partnership, or limited liability company must file a certificate of “assumed” name with the county clerk in all counties in which that business conducts, transacts, or intends to conduct business under an assumed name differing from its real name. This rule covers general partnerships, as well as individuals “doing business as” a name other than their own. Ark. Code Ann. § 4-70-201 *et seq.* Additionally, if there is a change in ownership of any business operated under an assumed name, then each person disposing of his or her interest in that business or withdrawing from it must file a certificate with the county clerk of each county in which the business is being conducted.

**5. Trademark.** Lastly, Arkansas has adopted a trademark and labeling act (Ark. Code Ann. §§ 4-71-201 - 218) that permits the local registration of trademarks or service marks. Applications must be filed with the Arkansas Secretary of State, Business and Commercial Services Division, which may be reached at (888) 233-0325 or (501) 682-3409 or by e-mail at [corprequest@sos.arkansas.gov](mailto:corprequest@sos.arkansas.gov). For more information, see Section VII(A) on “Trademarks.”

**6. Forms.** Forms for the various Secretary of State registrations may be accessed at <https://www.sos.arkansas.gov/BCS/Pages/feesFormsProcedures.aspx>.

## **E. Public Carriers**

Statutes dealing with the operation and maintenance of railroads, motor carriers, and air carriers generally are set forth in Ark. Code Ann. §§ 23-10-101 to 23-14-128. In particular, the operations of public motor carriers are governed by Ark. Code Ann. § 23-13-101 *et seq.* The Arkansas State Highway Commission and the Arkansas Department of Transportation enforce these statutes. Applicable federal laws have generally preempted Arkansas laws, rules, and regulations dealing with motor carriers.

**1. Arkansas Motor Carrier Act.** The Arkansas Motor Carrier Act, 1955 (Ark. Code Ann. §§ 23-13-201 *et seq.*) governs the operation of motor carriers transporting passengers or property over Arkansas public highways. “Motor carriers” include common carriers and contract carriers, as well as persons performing for-hire transportation services without authority from the appropriate state agency. A “common carrier” includes “any person who or which undertakes, whether directly or indirectly, or by lease of equipment or franchise rights, or any other arrangement, to transport passengers or property of any classes of property for the general public by motor vehicle for compensation whether over regular or irregular routes.” A “contract carrier” is defined as “any person not a common carrier . . . who or which, under individual contracts or agreements, and whether directly or indirectly, or by lease of equipment or franchise rights or any other arrangements transports passengers or property by motor vehicle for compensation.” Ark. Code Ann. § 23-13-203. Exemptions from these categories include motor vehicles (a) used exclusively for transporting school children or teachers to or from school or (b) used in carrying set-up houses, ordinary livestock, unprocessed fish, unprocessed agricultural

commodities, baled cotton, cottonseed, cottonseed mill, cottonseed hulls, cottonseed cake, rice hulls, rice bran, rice mill feed, rice mill screenings, soybean mill, and commercial fertilizer. Ark. Code Ann. § 23-13-206(a). However, such exempt carriers are still subject to safety of operation and equipment standards prescribed by Arkansas. Further, taxicabs, trolley buses, and other motor vehicles may be regulated by the state. Ark. Code Ann. § 23-13-206. Lastly, brokers who arrange for the sale of any transportation that is the subject of the Arkansas Motor Carrier Act are subject to rules and regulations relating to that business. Ark. Code Ann. § 23-13-230.

**2. Highways and Transportation.** The Arkansas State Highway Commission and the Arkansas Department of Transportation have promulgated regulations implementing Arkansas public carrier laws. The Commission and Department may be reached at P.O. Box 2261, Little Rock, Arkansas 72203, (501) 569-2000, e-mail: [Info@ardot.gov](mailto:Info@ardot.gov), or [www.arkansashighways.com](http://www.arkansashighways.com).

Generally, carriers who desire to transport “general freight” must file an application and pay a filing fee (\$25.00 as of 2017) and a per vehicle insurance filing fee (\$5.00 per vehicle as of 2017), while carriers transporting passengers or household goods must submit three (3) copies of an application and pay a filing fee (\$50.00 as of 2017).

## F. Consumer Protection

Arkansas has adopted a number of state-specific consumer protection laws. A few such laws are highlighted below.

**1. Deceptive Trade Practices Act.** The Arkansas Deceptive Trade Practices Act (“DTPA”) (Ark. Code Ann. § 4-88-101 *et seq.*) prohibits a person from engaging in false or misleading representations and practices in the sale of goods or services. In addition to a non-exhaustive list of improper conduct, the statute also prohibits “[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade.” Ark. Code Ann. § 4-88-107(10). The broad scope of this “catch-all” provision was challenged, but the Arkansas Supreme Court rejected the argument and found that the provision was not “too vague for enforcement.” See *State v. R & A Inv. Co.*, 336 Ark. 289, 985 S.W.2d 299 (1999). Violators may be subject to civil suit by the Attorney General’s office or private suits by individuals and may be liable for actual damages, punitive damages, and attorneys’ fees.

While there has been little litigation under Arkansas DTPA, courts in other states have construed comparable statutes broadly. There are no enumerated exclusions from its scope, and it does not limit the types of unfair trade practices actionable at common law or under other statutes in Arkansas. The DTPA applies to “persons,” which includes individuals, organizations, groups, associations, partnerships, corporations, or any combination of them. Ark. Code Ann. § 4-88-102(5). Relief under the DTPA is not, therefore, limited to injured natural persons. Class actions are permitted under the DTPA. See *Ark. Blue Cross and Blue Shield v. Hicks*, 349 Ark. 269, 78 S.W.3d 58 (2002); *Tay-Tay, Inc. v. Young*, 349 Ark. 675, 80 S.W.3d 365 (2002). The statute of limitations is generally five years after the date the violation occurs. Ark. Code Ann. § 4-88-115.

**2. Home Solicitation Sales.** Home solicitation sales of certain goods and services are regulated in Arkansas by statute (Ark. Code Ann. § 4-89-101 *et seq.*). The statutes regulate such sales in amounts exceeding \$25 where the solicitation takes place away from the seller's customary business premises or where goods are normally offered for sale by telephone. If applicable, a seller is required to give to the buyer notice of the buyer's right to cancellation at the time the sales agreement is signed by furnishing a completed form captioned "Notice of Cancellation."

There is a three-day cooling-off period during which the buyer may cancel the sales agreement; the buyer has an absolute right to cancel a home solicitation contract until midnight of the third day, excluding Sundays and holidays, after the day on which the buyer signs the agreement. Within ten days after a buyer cancels the contract, the seller must tender any payment, trade-in, note, or other evidence of debt received from the buyer. Within 20 days after cancellation, the buyer must tender goods to the seller on demand, but if the seller fails to demand possession of goods during this time, the goods become the property of the buyer without obligation to pay for them.

Certain transactions and contracts, including those executed in connection with the making of emergency repairs or services that are necessary for the immediate protection of persons or real or personal property, are excepted from regulation. Ark. Code Ann. § 4-89-103. Violations of the home solicitation sales provisions are Class A misdemeanors. Consumers may recover actual damages plus the greater of \$100 or 10% of the total transaction. Violation of these provisions may also constitute a violation of Arkansas Deceptive Trade Practices Act.

**3. Telemarketing and Do-Not-Call List.** The Arkansas Mail and Telephone Consumer Product Promotion Fair Practices Act (Ark. Code Ann. § 4-95-101 *et seq.*) regulates telephonic sellers who solicit sales and imply that a prospective buyer will receive a prize, gift, or additional items for making a purchase or that the price offered is below the regular price of the item. This Act also regulates telephone solicitation made in response to inquiries generated by notifications sent by sellers indicating or implying that the recipient is specially selected or will receive a gift. Certain solicitations are exempted from regulation, such as a solicitation made to a consumer who has previously purchased from the solicitor. Ark. Code Ann. § 4-95-107.

Telephonic sellers generally are also subject to additional rules under Ark. Code Ann. § 4-99-101 *et seq.* Prospective purchasers must be supplied with certain written information at the time of solicitation and prior to the sale. Telephonic sellers are prohibited from using a service to prevent transmission to the recipient's caller identification service. Ark. Code Ann. § 4-99-302. Telephonic sellers also must obtain a bond in the amount of \$50,000 in favor of the state (Ark. Code Ann. § 4-99-107) and must register with the Consumer Protection Division of the Attorney General 10 days before doing business in state and pay a registration fee of \$100 (as of 2017). Registration and payment of the fee is required annually. Ark. Code Ann. § 4-99-104.

It is unlawful for any telemarketers to obtain or submit for payment checking, savings, share, or other forms of negotiable instruments drawn on a person's checking, savings, share, or other depository account without the customer's express written authorization. Ark. Code Ann. §

4-99-203. It is also unlawful for a person who calls residential phone numbers for the purpose of offering merchandise or prizes to a consumer to dispatch couriers or other individuals to the consumer's residence to collect money. Ark. Code Ann. § 4-99-202. Professional telemarketers who solicit funds for charitable organizations are subject to certain regulations including registration with the Arkansas Secretary of State. *See* Ark. Code Ann. § 4-99-201. Telephonic sellers who fail to register are guilty of a Class A misdemeanor, and willful violations are punishable as a Class D felony. Ark. Code Ann. § 4-99-110. Additionally, the Attorney General and individuals may enforce the Act or any of the additional rules in the same manner as the Deceptive Trade Practices Act. Ark. Code Ann. § 4-99-111.

Pursuant to the Arkansas Consumer Telephone Privacy Act (Ark. Code Ann. § 4-99-401 *et seq.*), the Arkansas Attorney General's office has established and operates a single statewide database comprised of a list of the phone numbers of consumers who object to receiving telephone solicitations. It is unlawful for a person to make or transmit telephone solicitations to a telephone number of any consumer included in the database, and the Act further incorporates the Federal Trade Commission's "Do-Not-Call" Rule (16 C.F.R. § 310.4). Ark. Code Ann. § 4-99-405.

**4. Prize Promotion Act.** The Prize Promotion Act (Ark. Code Ann. § 4-102-101 *et seq.*) requires Arkansas consumers to be provided with all relevant information necessary to make an informed decision concerning sweepstakes, contests, and prize promotions. The Act prohibits misleading and deceptive prize promotions. Ark. Code Ann. § 4-102-105. It defines a "prize" as a gift, award, or other item or service that is offered or awarded to a participant in a real or purported contest. Ark. Code Ann. § 4-102-102(1). The Act requires the prize sponsor to provide a written prize notice describing the identity of the sponsor, the retail value of the prize, the odds of receiving a prize, the requirements for payment of shipping or handling fees, etc., any restrictions on receipt, any limitations on eligibility, and the maximum number of persons in any group or purported group with an enhanced likelihood of receiving prize. The Act also prescribes a specific form of such notice. Ark. Code Ann. § 4-102-106.

The Act substantially limits the kinds of representations that a plan sponsor can make, directly or by implication, regarding prizes or the probability of receipt of a prize. Sponsors are prohibited from requesting any individual to disclose phone numbers, ages, birth dates, credit card ownership, or financial data in connection with prize promotion that is not in compliance with the Act.

Exemptions from the Act include the following: advertising media; free prize promotions; promotions in connection with the sale or purchase of books, recordings, video cassettes, periodicals, and similar goods through membership groups, continuity plans, or subscription arrangement; and sales by catalog sellers. *Pari-mutuel* wagering on horse racing and greyhound racing permitted and regulated by Arkansas law is also exempt. Ark. Code Ann. § 4-102-104.

Violation of the Act also violates Arkansas Deceptive Trade Practices Act and is subject to those enforcement provisions. In addition, any person suffering pecuniary loss because of an intentional violation of the Act may bring an action in any court of competent jurisdiction.

Recovery by a successful party includes costs, reasonable attorneys' fees, and the greater of \$500 or twice the amount of pecuniary loss. Ark. Code Ann. § 4-102-103.

## **G. Franchise and Distributorships**

Arkansas has adopted the Arkansas Franchise Practices Act (Ark. Code Ann. § 4-72-201 *et seq.*) to regulate franchises and distributorships. In addition to the Act, other subchapters deal with the regulation of farm equipment retailer franchises (Ark. Code Ann. § 4-72-301 *et seq.*), petroleum product suppliers and distributors (Ark. Code Ann. § 4-72-401 *et seq.* and Ark. Code Ann. § 4-72-501 *et seq.*), and procedural fairness for restaurant franchisees (Ark. Code Ann. § 4-72-601 *et seq.*). A franchise is defined as a “written or oral agreement for a definite or indefinite period in which a person grants to another person a license to use a tradename, trademark, service mark, or related characteristic within an exclusive or non-exclusive territory or to sell or distribute goods or services within an exclusive or non-exclusive territory, at wholesale or retail, by lease agreement, or otherwise.” Ark. Code Ann. § 4-72-202. The Act does not apply to business relations, actions, or transactions subject to the Federal Trade Commission Regulations (16 C.F.R. § 436.1 *et seq.*) dealing with “disclosure requirements and prohibitions concerning franchising and business opportunity ventures.” Ark. Code Ann. § 4-72-203.

If a franchise or distributorship is controlled by the Act, then there are a number of substantive limitations on an agreement between the franchiser and the franchisee, including the provision that no franchise may be cancelled without good cause. Ark. Code Ann. § 4-72-204. Additionally, there are limitations and restrictions on transferability and assignability, as well as specific unlawful practices that regulate the franchisers. Ark. Code Ann. §§ 4-72-205 - 206. Violations of the Act may result in recovery for treble damages, as well appropriate injunctive or other equitable relief. The Attorney General has authority to file enforcement actions. Ark. Code Ann. § 4-72-208.

## **H. Securities Laws**

Offers and sales of securities are generally subject to regulation by the United States Securities and Exchange Commission (the “SEC”) and the Arkansas Department of Securities. The federal securities laws generally apply to the offer and sale of securities in Arkansas. Additionally, Arkansas rules and regulations dealing with the offer and sale of securities may also apply to securities being sold in Arkansas or to Arkansas residents outside of Arkansas. In addition, persons engaged in the securities business, such as broker dealers or investment advisors, must register, follow strict guidelines concerning their customer dealings, and meet certain capital adequacy requirements. Failure to comply with applicable federal and state securities laws may result in criminal and civil penalties.

**1. Regulation.** Security transactions in Arkansas are regulated by the Arkansas Securities Commissioner through the Arkansas Securities Department, which has promulgated rules and regulations pursuant to applicable state statutes regulating the issuance and sale of securities and the registration and licensing of broker-dealers, sales agents, and investment advisors. The Department may be reached at Heritage West Building, Suite 300, 201 East

Markham, Little Rock, AR 72201, (501) 324-9260, fax (501) 324-9268 or visit the Department's website at [www.securities.arkansas.gov](http://www.securities.arkansas.gov).

In addition to regulating the sale and purchase of securities, the Department also regulates broker dealer firms, investment advisors, mutual funds, check issuers, savings and loan brokers, mortgage brokers, bankers and servicers, perpetual care cemeteries, and state chartered credit unions and savings and loan associations.

**2. Definition of a Security.** Under Arkansas law, the term “security” or “securities” includes notes, stock, bonds, debentures, or other evidences of indebtedness, treasury stock, certificates of interest or participation in any profit-sharing agreement, collateral-trust certificates, pre-organization certificates or subscriptions, investment contracts, variable annuity contracts, voting-trust certificates, certificates of deposit for security, certificates of interest for participation in an oil, gas or mining title or lease for payments out of production under such title or lease, or in general, any other “interest or instrument commonly known as a ‘security’ or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.” Ark. Code Ann. § 23-42-102(17)(A). Generally, Arkansas securities law will apply any time there is an offer to sell or buy a security when the offer or sale is deemed to have been made in Arkansas; however, an offer to sell or buy may be made in Arkansas even if neither party is then present in Arkansas when the offer originates. Ark. Code Ann. § 23-42-103.

**3. Registration.** Ark. Code Ann. §§ 23-42-301 - 309 requires the registration of broker-dealers, agents, and investment advisors. Generally, it is unlawful for any person to transact business as a broker-dealer or agent in Arkansas unless registered under Ark. Code Ann. § 23-42-301 *et seq.* The Arkansas Securities Department supervises testing and on-going education and qualification programs and bonds. Non-exempt securities or securities sold in Arkansas in non-exempt transactions are subject to registration in Arkansas. Arkansas permits registration by notification, registration by coordination, and registration by qualification. Ark. Code Ann. § 23-42-401 *et seq.*

**4. Exempt Securities.** Securities exempt from registration without regard to a particular transaction include (a) securities issued by political subdivisions of Arkansas, (b) securities sold pursuant to Section 4(5) of the Securities Act of 1933 or that are “mortgage related securities” as defined in Section 3(a)(41) of the Securities Exchange Act of 1934, (c) securities issued or guaranteed by Canada or any Canadian political subdivision, (d) securities issued by or representing an interest in or a debt of any bank organized under the laws of the United States or any other federally insured institution organized under the laws of any state or any bank holding company regulated under the Bank Holding Company Act of 1956, (e) securities issued and representing interests in or debt of any such state or federal institution, (f) securities issued or guaranteed by any public utility or holding company which is a registered holding company under the Public Utility Holding Company Act of 1935, (g) securities of a world-class foreign issuer that meet qualifications set forth by rule of the Arkansas Securities Commissioner, (h) securities issued by any person organized and operating not for private profit but exclusively for religious, educational, benevolent, and other charitable purposes, (i) investment contracts or other securities issued in connection with an employee stock purchase,

savings, pension, profit sharing, or similar benefit plan, and (j) any other securities as to which the Arkansas Securities Department by rule or order finds that the registration is not necessary. Ark. Code Ann. § 23-42-503. The most recent rules from the Arkansas Securities Department may be found at <http://www.securities.arkansas.gov/page/347/rules>.

**5. Exempt Transactions.** Transactions exempt from registration include (a) isolated non-issuer transactions, (b) non-issuer transactions by registered agents or broker-dealers in a security of class that has been outstanding in the hands of the public for at least 90 days at the time of the transaction (subject to certain additional rules concerning the issuer), (c) transactions between the issuer or other person on whose behalf the offering is made and an underwriter or among underwriters, (d) transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, (e) transactions by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator, (f) transactions executed by a bona fide pledgee without any purpose of evading the securities registrations, (g) transactions by an issuer to a person in a state other than Arkansas if that offer or sale would be lawful in that other state, (h) offers or sales to a bank or other financial or institutional buyer or to a broker-dealer, (i) transactions pursuant to an offer and sale to not more than 35 purchasers, other than those designated in Ark. Code Ann. § 23-42-504(a)(8) (dealing with institutional buyers) during any period of any 12 consecutive months (subject to certain additional rules of the Securities Department), (j) transactions pursuant to an offer to existing security holders if no commissions or other remuneration, other than standby commissions, are paid, (k) any offer, but not a sale, of securities before a registration statement has been filed both under Arkansas law and the Securities Act of 1933 if no order or refusal order is in effect and no public senior examination looking toward such an order is pending, and (l) such other transactions which the Securities Department by rule or order exempts as not being necessary or appropriate in the public interest for the protection of buyers. *See* Ark. Code Ann. § 23-42-504(a). Generally, proofs of exemption are required for institutional buyer transactions, and transactions involving 35 or fewer purchasers during any consecutive 12-month period are required to be filed with the Securities Department. Ark. Code Ann. § 23-42-504(b). The most recent exemption rules may be found at <http://www.securities.arkansas.gov/page/347/rules>.

## **I. Bankruptcy**

Bankruptcy law is federal statutory law that preempts state law. Bankruptcy permits a debtor to resolve debts through a supervised payment plan or a division of assets among creditors. Although states cannot regulate bankruptcy, they can and do pass laws that govern other aspects of the debtor-creditor relationship. The federal Bankruptcy Code addresses applicable debtor-creditor state law, such as state law property rights, in its provisions.

There are two basic types of bankruptcies: (a) liquidation, which often occurs in Chapter 7s and in some Chapter 11s, and (b) reorganization, which often occurs in Chapter 11s and 13s and allows a debtor to use future earnings to pay off creditors.

Chapter 7, the most common type of bankruptcy, involves the appointment of a trustee who collects the debtor's non-exempt property, sells it, and distributes the proceeds to creditors.

A bankruptcy proceeding can be entered into either voluntarily by a debtor or involuntary through the initiative of creditors.

The Bankruptcy Abuse Prevention and Consumer Protection was signed into law on April 20, 2005. A key provision of the new law subjects certain petitions for debt relief under Chapter 7 to a means test. Bankruptcy petitioners with relatively high incomes could be prevented from filing under Chapter 7 (where many unsecured debts are discharged, or wiped out, by the court) and instead given the choice of converting to Chapter 13 (where some debt must be repaid out of future income) or having their petitions dismissed and receiving no bankruptcy relief at all. The means test takes into account the petitioner's income, debt burden, and various allowable living expenses, which can vary significantly according to the debtor's place of residence and particular circumstances. If income minus allowable living expenses exceeds certain levels, a Chapter 7 petition is presumed to be abusive.

After a bankruptcy proceeding is filed creditors are stayed from collecting their debts without bankruptcy court approval. A bankrupt debtor cannot transfer property that has been declared part of the bankruptcy estate out of the ordinary course of business without court approval. Some pre-bankruptcy property transfers and liens can be invalidated during the bankruptcy proceedings.

A bankrupt debtor may choose to use federal or state exemptions. While Arkansas has, by statute, created a number of classifications of exempt property, local bankruptcy precedent generally limits exemptions to those provided for under the Arkansas Constitution, namely a homestead and a small amount of cash. *See e.g., FSLIC v. Holt*, 97 B.R. 997 (W.D. Ark. 1988), affirmed by 894 F.2d 1005 (8th Cir. 1990).

Arkansas is divided into Bankruptcy Courts for the Western and Eastern Districts of Arkansas. The Bankruptcy Courts in Arkansas have adopted electronic filing systems. Filings for certain counties are made in Fayetteville, Arkansas, at the following address: United States Bankruptcy Court, Fayetteville Division Office, United States Courthouse, 35 E. Mountain Street, Room 316, Fayetteville, Arkansas 72701, (479) 582-9800. Filings for the rest of Arkansas are made in Little Rock at the following address: U.S. Bankruptcy Courthouse, 300 West 2<sup>nd</sup> Street, Little Rock, Arkansas 72201, (501) 918-5500.

The U.S. Trustee's Office is located at 200 West Capital Suite 1200, Little Rock, AR 72201. The Trustee's Office may be contacted at (501) 324-7357. Arkansas has three Chapter 13 Trustees:

**Joyce B. Babin**  
P.O. Box 8064  
Little Rock, AR 72203-8064  
E-mail: [jbabin@13ark.com](mailto:jbabin@13ark.com)  
Phone: (501) 537-2500  
Fax: (501) 537-2501

**Jack W. Gooding**  
P.O. Box 8202  
Little Rock, AR 72221  
E-mail: info@ark13.com  
Phone: (501) 537-4400  
Fax: (501) 537-4401

**Mark T. McCarty**  
P.O. Box 5006  
North Little Rock, AR 72119  
E-mail: mmccarty@ch13ark.com  
Phone: (501) 801-5600

## **VI. TAXATION**

### **A. Federal Taxation**

The following is an introductory overview of some major federal income, estate, and gift tax rules.

#### **1. Personal Income Tax**

**a. Income.** An individual's income is comprised of income from wages, salaries, tips, taxable interest and dividend income, business and farm income, realized net capital gains, income from rents, royalties, trusts, estates, partnerships, taxable pension and annuity income, and alimony received. To arrive at taxable income, a taxpayer starts with his or her total income and reduces it by the reductions described below.

#### **b. Reductions**

**i. Adjustments.** Alimony payments, some interest paid on student loans, and contributions to some retirement accounts all reduce the amount of income to be taxed.

**ii. Deductions.** The taxpayer may either itemize deductions or take the standard deduction set by the Internal Revenue Service. If the taxpayer decides to itemize, he or she may deduct home mortgage interest payments, state and local income and property taxes, charitable contributions, and some medical expenses.

**c. Exemptions.** Finally, income is further reduced by exemptions for the individual taxpayer, the taxpayer's spouse, and the taxpayer's dependents.

**d. Rates.** After arriving at taxable income, the taxpayer must apply the individual income tax rates to determine his or her gross tax liability. The federal income tax for individuals has six marginal rates of tax ranging from 10% to 35%. There are special, lower rates for many long-term capital gains.

e. **Net Tax Liability.** A taxpayer's net tax liability may be reduced by applicable tax credits. The most common are the earned income credit, the child tax credit, the American Opportunity tax credit, the tax credit for the elderly and permanently disabled, and the credit for child and dependent care expenses. The net tax liability is the amount of tax owed to the federal government.

f. **Estimated Tax Liability.** Under the federal income tax code, there are varying requirements for estimated taxes for individuals, estates, and corporations.

g. **Due Date.** Personal income tax returns must be filed on or before April 15 of each year.

## 2. **Federal Taxation of Partnerships, Limited Liability Companies, and 'S' Corporations**

a. **Partnerships.** Partnerships themselves are not subject to federal income taxation. They are pass-through entities, meaning that partnership income and losses pass through the partnership and are taxed to the individual partners. The partnership must file a return on Form 1065, but the profits and losses are taxed to the individual.

b. **Limited Liability Companies ("LLCs").** LLCs, like partnerships, are not themselves subject to federal income taxation. Members of LLCs record the profits and losses of the LLC on their individual income tax returns. When an LLC has only one member, the LLC is treated as a sole proprietorship, and the member will file a Schedule C with the member's income tax return.

c. **'S' Corporations.** As with partnerships and LLCs, 'S' Corporations are pass-through entities. 'S' Corporations themselves do not pay federal income taxes, but do file a return on Form 1120S with the Internal Revenue Service. Owners report their share of the corporation's profits and losses on their individual income tax returns.

## B. **State Taxation**

### 1. **Personal Income Tax**

#### a. **Basic Structure**

i. **Rates.** In Arkansas, resident and non-resident individuals, estates, and trusts deriving income from within the state are subject to tax on their net taxable income at rates ranging from 1% to 6.9%.

ii. **Deductions.** To arrive at net taxable income, taxpayers may either itemize their deductions or use the standard deduction of \$2,000 per taxpayer (including \$2,000 per spouse when married filing jointly). The amount paid to the federal

government in federal taxes is not deductible in the calculation of the Arkansas income tax.

**iii. Credits.** A credit is allowed for Arkansas residents equal to the amount of income tax paid to any other state. This credit is limited to the amount that would have been due under the Arkansas rate structure had the amount been added to Arkansas income.

Personal credits are also allowed. For 2018, the credit for individuals is \$23. Heads of household are entitled to an extra \$23, as are those individuals who are blind or deaf, over 65, and with dependents. A \$23 credit is provided for each dependent with income less than \$3,500. If there is a developmentally disabled individual in the household, the credit is \$500, in addition to the \$23 credit.

**iv. Residents and Non-Residents.** Residents are those taxpayers domiciled in Arkansas (those with a settled connection for legal purposes) as well as those maintaining a permanent home in the state and spending more than six months per year within the state. All other taxpayers deriving income from Arkansas sources are taxed as non-residents. These Arkansas sources include property as well as income from businesses or occupations carried on in Arkansas. Non-residents are subject to the same tax and rates as residents, but the tax is imposed only as to the net income earned within Arkansas.

**b. Special Features**

**i.** Residents of Texarkana, Arkansas are exempt from the personal income tax, but are subject to an increase of 1% in the gross receipts tax. This relates to the geographic proximity of Texarkana, Arkansas to Texarkana, Texas where residents face no income tax.

**ii.** Thirty percent (50%) of long-term net capital gains are exempt from tax in Arkansas, and gains in excess of \$10-million are exempt from tax.

**c. Estimated Taxes.** A taxpayer who reasonably anticipates that the tax liability for the income year will exceed \$1,000 must file a declaration of estimated tax with the Arkansas Department of Finance and Administration. If the estimated tax liability is less than \$1,000, the payment must be made at the time the declaration is filed or at the time the return for the income year is filed. If the estimated liability is greater than \$1,000, the payment may be made at the time the declaration is filed or in four installments. The first payment must be made on the 15th day of the fourth month of the taxable year, to be followed by payments on the 15th days of the sixth and ninth months with the final payment to be made by the 15th day of the month after the close of the taxable year.

**d. When and Where to File.** Individual income tax returns are due April 15. Tax returns are filed with the Arkansas Department of Finance and Administration.

**2. State Estate and Gift Tax**

**a. Gift Tax.** Arkansas does not have a gift tax.

**b. Estate Tax:** Arkansas repealed its estate tax in 2005.

**3. State Taxation of Partnerships, Limited Liability Companies, and ‘S’ Corporations**

**a. Taxation of Partnerships.** Partnerships themselves are not subject to income taxation. Rather, each partner’s share of the partnership’s net income and loss is included on that partner’s tax return.

Partnership income must be allocated to the state in which the income was earned. Therefore, non-residents with partnership income arising from an Arkansas source must file an Arkansas non-resident individual tax return reflecting that income. However, if the partnership is an investment partnership, the nonresident partner does not need to file a non-resident income tax return for income from qualifying investment securities.

**b. Taxation of Limited Liability Companies (“LLCs”).** Like a partnership, an LLC is a pass-through entity. The LLC itself is not subject to taxation. Each member is taxed on that member’s share of the company’s income and losses.

**c. Taxation of ‘S’ Corporations.** A “S” corporation must elect federal Subchapter S treatment for income tax purposes before electing Subchapter S treatment for Arkansas income tax purposes for tax years beginning on or after January 1, 2017. A separate state election is not required. Once filed, an ‘S’ Corporation itself is not subject to taxation. Resident shareholders of qualified ‘S’ Corporations are taxed on the current corporate income as though they had earned it themselves. Nonresident shareholders receiving ‘S’ Corporation income must report that income by filing a state income tax return with the Department of Finance and Administration. Failure to do so could result in a revocation of the state ‘S’ election.

**d. When and Where to File.** Income tax returns are due April 15 or on the 15th day of the fourth month after the end of the fiscal year. Tax returns are filed with the Arkansas Department of Finance and Administration.

#### **4. State Taxation of Corporations**

All corporations organized under Arkansas law or doing business in Arkansas are subject to tax on their net income at rates ranging from 1% to 6.5%. If a corporation does business both inside and outside the state of Arkansas, the net income is apportioned under the Uniform Division of Income for Tax Purposes Act (“UDITPA”) according to the percentage of property and payroll in Arkansas and the amount of sales attributable to Arkansas. The resulting amount is then subject to the Arkansas rate structure.

Arkansas has not adopted federal taxable income as its starting point, but has adopted many provisions of the Internal Revenue Code (“IRC”). In Arkansas, amendments to the IRC must be specifically adopted in order to be incorporated into Arkansas law. As the Arkansas legislature usually meets biannually, there will often be discrepancies between federal and state taxation of corporations.

**a. Basic Structure.** The starting point for computing Arkansas taxable income is gross sales minus cost of goods sold. Other items are added to arrive at gross income. Statutory deductions are subtracted to arrive at taxable income.

**i. Additions.** To determine gross income, Arkansas requires corporations to add federally-exempt interest, including interest on other state’s obligations, bank deposits and mortgages, taxable dividends, except those received from 80%-owned subsidiaries and capital development corporations, and rents and royalties.

**ii. Subtractions.** Arkansas allows the deduction of out-of-state manufacturing or merchandising costs, interest income attributable to federal or Arkansas governmental obligations and capital corporation bonds, net operating losses for a carry-forward period of five years, capital losses, charitable contributions (within limits), and depreciation (often consistent with federally allowed depreciation).

**iii. Treatment of Taxes Paid.** Taxes paid to other states are deductible from Arkansas corporate income, while income taxes paid to the federal government are not.

**b. Allocation and Apportionment.** Anytime a corporation does business in more than one state, questions arise about how to allocate and apportion that income between states for tax purposes. Arkansas has adopted UDITPA and has signed on to the Multistate Tax Compact, both of which are intended to allocate and apportion income in a manner consistent with other states. The important provisions are listed below.

**i. Business Income.** Business income is income arising from transactions or activities in the regular course of the taxpayer's trade or business. When income is subject to apportionment between states, it is business income when a unitary relationship exists between the income and the taxpayer's business activities in Arkansas. A unitary relationship exists when the activity conducted in one state benefits or is benefited by the activity in another state. If the business is the same type of business in both states, if there is a strong centralized management, or if the steps are part of a vertical transaction, there is usually a unitary relationship.

Business income is apportioned between states based on a formula that takes into consideration three factors of the business in question: property, sales, and payroll. Arkansas formula uses a double-weighted sales factor when apportioning business income.

**ii. Non-Business Income.** Income that does not arise from transactions or activities in the regular course of the taxpayer's trade or business is non-business income. Rather than being apportioned, non-business income is allocated between states based on its source. Generally, non-business income is allocated to the commercial domicile of the corporation.

**c. Filing**

**i. Estimated Taxes.** When the corporation reasonably anticipates that the tax liability for the income year will exceed \$1,000, it must file a declaration of estimated tax with the Arkansas Department of Finance and Administration. If the estimated tax liability is less than \$1,000, the payment must be made at the time the declaration is filed. If the estimated liability is greater than \$1,000, the payment may be made at the time the declaration is filed or in four installments. The first payment must be made on the 15th day of the fourth month of the taxable year, to be followed by

payments on the 15th days of the sixth and ninth months with the final payment to be made by the 15th day of the last month of the taxable year.

**ii. When and Where to File.** Income tax returns are due March 15 for corporate calendar year taxpayers or on the 15th day of the third month following the

end of the fiscal year. Tax returns are filed with the Arkansas Department of Finance and Administration.

**iii. Consolidated Returns.** There are some differences between the federal and Arkansas requirements for consolidation, but generally, corporations that file a federal consolidated return and have Arkansas source income may elect to file a consolidated return in Arkansas.

## **5. Franchise Tax**

The franchise tax is imposed on all domestic and foreign (Arkansas-based and non-Arkansas-based) corporations, associations, joint stock companies, business trusts, limited liability companies, and all other organizations exercising or attempting to exercise corporate-type acts in Arkansas. It applies whether the corporations are active or inactive. The franchise tax does not apply to non-profit corporations, savings and loan associations, credit unions, agricultural markets, rural utility cooperatives, or partnerships. As of 2011, the franchise tax is a 0.3% tax on the corporation's outstanding capital stock that is apportioned to Arkansas. Insurance companies are subject to a flat fee depending on the outstanding capital stock or corporate assets. There is a tax of \$300 on non-stock corporations and mutual assessment insurance companies.

### **a. Calculation**

**Step One:** The number of outstanding capital shares is multiplied by the par value of those shares providing the value of the outstanding capital stock.

**Step Two:** The shares are apportioned based on the ratio of the corporation's real or personal property in Arkansas to the corporation's total of real or personal property in all states.

**Step Three:** The resulting percentage (from Step Two) is multiplied by the value of the outstanding capital stock (from Step One), providing the total Arkansas capital stock.

**Step Four:** The Arkansas capital stock (from Step Three) is multiplied by .003 providing the amount of the franchise tax due.

**b. Stock Without a Par Value.** "No par" value stock is assumed to have a value of \$25 per share for application of the franchise tax.

**c. Limitations.** No corporation will pay a franchise tax amount less than \$150.

**d. When and Where to File.** The tax is due on May 1 of the calendar year following incorporation and is then due every subsequent May 1. Tax returns are filed with the Arkansas Department of Finance and Administration.

## 6. Property Tax

Property tax in Arkansas is levied on both real and tangible personal property by counties, municipalities, school districts, and certain improvement districts. The state is constitutionally prohibited from levying any statewide property tax.

**a. Property Subject to Taxation.** Real property and tangible personal property are subject to property tax in Arkansas. Real property is defined as land and those items permanently affixed to the land. Tangible personal property is defined as every tangible thing that is subject to ownership including automobiles, farm equipment, boats, heavy equipment, and mobile homes. Mineral interests are assessed separate from the fee simple interest in land when the mineral interests are owned by someone different than the owner of the fee simple interest in the land.

**i. Exemptions.** The following items are exempt from property tax in Arkansas: (a) household items such as furniture, furnishings, appliances, and clothing; (b) intangible personal property; (c) public property; (d) new or expanded manufacturing establishments for 10 years if the facility was built or expanded with an industrial development bond; and (e) textile mills, for seven years after locating in Arkansas.

**ii. Property Tax Credit.** There is a \$350 dollar property tax credit for Arkansas residents' homesteads. A homestead consists of the principal place of residence and all contiguous land excluding agricultural, pasture, or timber land.

**b. Tax Rate.** The property tax due is established by multiplying the millage rate to the assessed value of the taxpayer's real and personal property.

**i. Valuation and Assessment.** Property in Arkansas is assessed according to its value on January 1 of the taxable year. Merchants' and manufacturers' tangible, personal property is assessed at the average value of property in their possession or control during the previous year.

The assessment takes place at the county level. Once the value of the property is assessed, the county assessor enters 20% of that value in the assessment records. The resultant "assessed value" is then multiplied by the millage rate to determine the amount of property tax due.

**ii. Millage Rates.** The local millage rate determines the amount taxable per \$1,000 of assessed value. A mill, or one one-thousandth of a dollar (.001), is the basis for Arkansas property taxes. There is a constitutional limit on the maximum number of mills that can be levied by a city (up to 20) or county (up to 21). Conversely, school districts must levy at least a 25-mill tax on property in the district with no maximum limit.

**c. Payment.** Each taxpayer must remit payment of property taxes to the county tax collector. The tax collector in each county is either the Sheriff or a locally elected individual. Payments for real and personal property taxes are due beginning the third Monday in February and are payable until October 15 of the same calendar year.

## **7. Gross Receipts and Use Tax**

The Arkansas gross receipts (sales) tax is an excise tax on gross receipts from the sale or rental of tangible personal property and certain selected services. The use tax is a complementary tax applied to items purchased out of state, but used, stored, or consumed within Arkansas. As of 2018, the gross receipts and use tax rate is 6%.

**a. Taxpayer.** The taxpayer is the seller of goods or the provider of services. The seller/provider is the party responsible for the payment of the tax, but may pass along that tax to consumers.

**b. Sales.** A sale is defined as the transfer of either title or possession of the tangible personal property for valuable consideration. The consideration paid or to be paid is the basis for the gross receipts tax. A sale also includes leases, barter, or rentals. In the case of a lease or rental, the basis for the tax is the rental or lease payment. There is a rebuttable presumption that a seller is engaged in the business of selling tangible personal property or taxable services for use in the state if affiliated persons are subject to the sales and use tax jurisdiction of the state. In the case of services, the consideration provided or to be provided for the service is the basis for the gross receipts tax.

**c. Use.** The use tax is applied to items purchased out of state, but used, stored, or consumed within Arkansas. The use tax rate is equal to the difference between the rate of tax paid outside of Arkansas and the Arkansas rate, provided that the Arkansas rate is higher. The use tax does not apply to services performed outside of Arkansas.

**d. Exemptions.** A variety of goods or services are exempt from the sales and use tax. Some of the most important exemptions are for machinery and equipment used in producing articles of commerce, manufacturing forms, gas and energy produced from biomass, isolated sales, and most resale sales.

**e. Food and Food Ingredients.** A 2011 Act reduced the sales and use tax on groceries to 1.375% effective July 1, 2011.

**f. Sales Tax Holiday.** Arkansas has a sales tax holiday for clothing, clothing accessories or equipment, school supplies, school art supplies, and school instructional material from 12:10 a.m. on the first Saturday in August until 11:59 p.m. the following Sunday.

**g. Border Cities.** Arkansas cities that are separated from an incorporated city or town of a greater size by a street state line may set the rate of sales tax equal to the rate imposed by the adjoining state.

**h. Local Taxes.** In addition to the state level gross receipts and use tax, cities and counties may levy local taxes. The rates vary from county to county and city to city.

**i. Collection.** Tax returns are due monthly to the Department of Finance and Administration. Some large retailers must remit the tax payment in advance while some smaller retailers may file quarterly or yearly returns based on the amount of tax actually due.

## **8. Privilege and License Fees**

Many municipalities and counties in Arkansas require licenses to engage in business in that municipality or county. The first step in the permitting process is to certify compliance with the municipality's zoning regulations. There is no fee assessed for the initial compliance check. Once certified, application needs to be made with the city/municipal clerk for a business (privilege) license. Fees for this license vary between \$25 and \$1,000 depending on business type and inventory. The city/municipal clerk collects fees. If the business is a sole proprietorship or general partnership operating under an assumed name, the business must acquire a "Doing Business As" certificate from the county clerk. The fee is \$10 and is collected by the county clerk.

## **9. Severance Tax**

A severance tax is imposed on producers of natural resources and each producer of timber in the State of Arkansas. The individual rates of the taxes vary based on the type of natural resource or timber severed. The tax is payable to the Director of the Department of Finance within 25 days after the end of each month. When the average amount of severance tax for which the taxpayer is liable for the previous fiscal year does not exceed \$100 per month, the taxpayer may report and pay the tax on a quarterly basis. Taxpayers owing less than \$25 per month may report and pay severance taxes on annual basis.

## **C. Tax Incentives for Businesses**

The laws governing tax incentives in Arkansas are based on payroll and location. Counties in Arkansas are divided into four tiers based on unemployment, per capita income, poverty rate, and population growth. Incentives are higher in the less developed counties. The tiers are assigned each July based on the statistics from the previous year. Many of the incentives listed below may be combined to allow for flexibility in business and tax planning. See Section offered III (B) for more information on available incentives.

## VII. INTELLECTUAL PROPERTY

### A. Trademarks

Both federal and state law govern trademarks. Arkansas provides both statutory (Ark. Code Ann. §§ 4-71-201 - 218) and common law protection against trademark and service mark infringement and/or dilution. Under the common law, in order to establish a claim that the defendant has infringed its rights in a trademark, a plaintiff has the burden of showing that it owns the mark and has used it in the trademark sense, that the mark was used without consent, and that such use is likely to cause confusion.

Arkansas enacted a new trademark statute in 1997. It was intended to provide a system of state trademark registration and protection substantially consistent with the federal statute. Accordingly, the act specifically provides that construction of the federal act should be given persuasive authority for interpreting and construing the Arkansas act. However, unlike the federal statute, the act does not provide for intent to use applications. Therefore, all applications must be based on actual use.

Trademarks and service marks may be registered in Arkansas by filing with the Secretary of State, on a form to be provided by the Secretary of State, an application for registration of the mark. The application must contain certain specified information (*e.g.* name and address of the applicant, a description of the goods or services in connection with which the mark is used, the date the mark was first used anywhere, and the date it was first used in Arkansas by the applicant or a predecessor in interest). The application must be signed and verified by the applicant or by a member of the firm or an officer of the corporation or association applying. The application must be accompanied by three specimens showing the mark as actually used. There is a fee for registration of \$50, regardless of the number of classifications listed. Note that there are some limitations imposed on the type of trademark that may be registered in the state (*e.g.*, a mark shall not be registered if it consists of or comprises a mark that so resembles a mark registered or used in this state and not abandoned or registered in the United States Patent and Trademark Office and not abandoned as to cause confusion or mistake or to deceive). Forms may be obtained from the Secretary of State, State Capitol, Little Rock, AR 72201 or online at [www.sosweb.state.ar.us](http://www.sosweb.state.ar.us).

Registration of a mark is effective for a term of five years from the date of registration. Renewal applications for five-year periods may be filed during the six-month period prior to the expiration of the term on a form furnished by the Secretary of State. There is a fee for each renewal of \$50.

Any mark properly registered with the Secretary of State, and any registration of the mark, is assignable with the goodwill of the business in which the mark is used. In order to be valid, an assignment must be effected by a duly executed written instrument recorded with the Secretary of State. If an assignment is not recorded with the Secretary of State within three months of the assignment or before a subsequent purchase, the assignment is void as against a subsequent purchaser for valuable consideration without notice. The fee for recording an assignment is \$20.

Infringement and/or dilution of a trademark may be enjoined, and a registrant may recover all profits derived from, or all damages suffered by reason of, such infringement. Registration of a trademark does not adversely affect the rights or the enforcement of rights in trademarks or service marks acquired in good faith at any time at common law. Specific goods and services for which marks may be registered are classified for the convenience of the Secretary of State, but a single application for registration of a mark may include any and all goods or services upon which the mark is actually being used.

## **B. Business Name Registration**

A trade name, or the term used for a business and its goodwill, is protected in Arkansas by the common law and by statute (Ark. Code Ann. §§ 4-71-212 - 213). A person or entity can acquire an interest in a trade name by purchasing the name or simply by using the name in connection with a business over the course of time and giving a “secondary meaning” to the name. Under the common law, descriptive words may not be afforded the status of a trade name unless they have acquired a “secondary meaning,” which associates the descriptive words with a particular source of goods or services.

Pursuant to Ark. Code Ann. §§ 4-70-201 - 206, any person conducting business under an assumed name in Arkansas must file in the office of the county clerk of each county in which he or she conducts such business a duly executed and acknowledged certificate. The certificate must set forth the name under which the business is, or is to be, conducted and the full name and mailing address of each person conducting such business. Whenever there is a change in ownership of any business operated under an assumed name, each person disposing of his or her interest in the business or withdrawing therefrom shall file a certificate with the county clerk of each county in which the business is being conducted setting forth that fact. Each day of violation of this statute is a separate offense punishable by a fine of not less than \$25 or more than \$100. Domestic and foreign corporations lawfully doing business in the state and limited partnerships, limited liability companies, or limited liability partnerships that have filed with the Secretary of State are not subject to this Act.

## **C. Trade Secrets**

Arkansas has enacted a Trade Secrets Act (Ark. Code Ann. § 4-75-601 *et seq.*), which is based on the Uniform Trade Secrets Act. The Arkansas statute defines a “trade secret” as information, including a formula, pattern, compilation, program, device, method, technique or process that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and (2) is the subject of reasonable efforts to maintain its secrecy.

Arkansas courts have granted trade secret protection to various types of information including customer lists, computer programs, methods, processes, operations, marketing programs, and future plans. The Arkansas Supreme Court has adopted the following factors as controlling the determination of what constitutes a trade secret: (1) the extent to which the information is known outside the business; (2) the extent to which the information is known by employees and others

involved in the business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to its competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Under the Arkansas statute, a cause of action for trade secret misappropriation requires proof of the following: (1) the plaintiff's ownership of a valid trade secret; (2) the defendant's acquisition of the plaintiff's trade secret by improper means; and (3) the defendant's actual or threatened unauthorized use or disclosure of the plaintiff's trade secret.

The Act provides for injunctive relief and monetary damages for actual or threatened misappropriation of a trade secret. A court may also award reasonable attorneys' fees to a prevailing party under certain circumstances. An action for misappropriation of a trade secret must be commenced within three years after the misappropriation is discovered or reasonably should have been discovered. The Arkansas Trade Secrets Act displaces any prior conflicting state law pertaining to civil liability for misappropriation of a trade secret.

#### **D. Copyrights**

Federal law governs copyrights. See 17 U.S.C. § 101 *et seq.* Arkansas does not have a separate copyright statute. The federal copyright laws protect the expression of ideas but not the ideas themselves. The copyright laws typically protect literary works, musical works, dramatic works, architectural drawings, computer programs, sound recordings, and dramatic works.

In order to qualify for copyright protection, a work must be fixed in a tangible medium of expression and must be a product of original and independent authorship. Copyright protection automatically attaches to a work upon its creation. However, a copyright registration generally must be obtained for a work prior to bringing an action for copyright infringement of that work. Of similar interest, certain statutory provisions, most notably statutory damages for infringements prior to registration, are available only when a copyright registration is obtained prior to the infringement of the copyright.

#### **E. Patents**

Patents are governed exclusively under federal law. See 35 U.S.C. § 1 *et seq.* In general, an inventor or other person may be able to obtain protection for a new machine, device, or process under the federal patent laws. The protection afforded by a patent is limited to a certain number of years, usually 14 years for a design patent and 20 years for a utility patent. Patent protection may be available if a product falls within the particular classes of patentable subject matter set forth in the relevant statutes and is novel, non-obvious, and useful. Unlike the copyright laws, the patent laws protect the ideas themselves. Accordingly, a valid patent may prohibit the use of the patented invention by someone else even if the other party independently developed the same invention.

## VIII. LABOR, EMPLOYMENT, AND CIVIL RIGHTS

### A. Immigration

The Immigration Reform and Control Act of 1986 (“IRCA”), which is applicable to virtually all employers, prohibits an employer from employing aliens whom the federal government has not authorized to work in the United States. IRCA requires that an employer certify to the federal government that an employee is authorized to work in the United States.

Employers may hire foreign workers as long as those workers have received the appropriate visa from the federal government. One such visa for “specialty occupations” is the H-1B Visa. A specialty occupation is one that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor’s degree or higher (or its equivalent) in the specific specialty as a minimum for entry in the field in the United States. The employer, rather than the foreign worker, has the obligation of applying for and obtaining the H-1B Visa. The federal government permits a worker with an H-1B Visa to remain in the United States for a maximum of six years with this resident alien status. The employer may seek to extend this period for one or three years by filing the appropriate documents with the federal government.

### B. Civil Rights Laws

#### 1. Federal

Employment in Arkansas is governed by numerous federal civil rights statutes, including Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, Americans with Disabilities Act of 1990, Equal Pay Act of 1963, Section 1981 of The Civil Rights Act of 1866, and Pregnancy Discrimination Act of 1978.

**a. Title VII of the Civil Rights Act of 1964 (“Title VII”).** Title VII prohibits employment discrimination based on race, sex, color, national origin, or religion. Title VII applies to all employers with 15 or more employees and prohibits discrimination in the areas of advertising, recruiting, hiring, promotion, compensation, benefits administration, and termination. Title VII also prohibits harassment based on an individual’s protected characteristics, as well as retaliation for engaging in conduct protected by Title VII.

In order to recover damages, any individual who has suffered such discrimination must file a complaint with the Equal Employment Opportunity Commission (“EEOC”) within 180 days of the alleged discrimination. Once the EEOC makes a determination regarding the alleged discrimination and notifies the employee in writing of his or her right to bring a civil action, the employee may, within 90 days of receipt of the notice, bring a legal action. An individual’s possible remedies under Title VII include injunctions, compensatory and punitive damages, back and front pay, reinstatement, and attorneys’ fees.

**b. Age Discrimination in Employment Act of 1967 (“ADEA”).** The ADEA prohibits an employer with 20 or more employees from discriminating on the basis of age

against anyone who is at least the age of 40. The ADEA applies to all aspects of the employment relationship. As with Title VII, an aggrieved person must pursue recovery through the EEOC by filing a charge of discrimination within 180 days of the alleged discrimination. The aggrieved person may file an action in federal court, as long as he or she does so within 90 days of receipt of notice from the EEOC of the notice of right to sue. A person's remedies under the ADEA include reinstatement or front pay, back pay, liquidated damages, and attorneys' fees.

**c. Americans with Disabilities Act of 1990 (“ADA”).** Under Title I of the ADA, an employer with 15 or more employees is prohibited from discriminating against a qualified individual with a disability on account of the disability. Covered employers are required to accommodate the known disabilities of employees and applicants. A “qualified individual” is someone who can perform the essential functions of his or her job with or without a reasonable accommodation. A “disability” is: 1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; 2) a record of such impairment; or 3) being regarded as having such impairment. The procedures for pursuing a claim under the ADA, as well as the available remedies, are similar to those provided by Title VII.

**d. Equal Pay Act of 1963 (“EPA”).** The EPA, which applies to almost all employers, prohibits an employer from paying an employee of one sex less than an employee of the other sex for performing equal work, requiring equal skill, effort, and responsibility, under similar conditions at the same work site. An employee who believes his or her employer has violated the EPA may bring an action in federal court or file a charge with the EEOC. The employee need not first bring the claim before the EEOC in order to sue. Remedies may include back pay, attorneys' fees, and court costs.

**e. Section 1981 of the Civil Rights Act of 1866 (“Section 1981”).** Section 1981 prohibits employment discrimination on the basis of race and applies to all employers, regardless of the number of employees. An individual pursuing a Section 1981 claim may pursue that claim initially in court, and possible damages include back pay, reinstatement, compensatory, and punitive damages.

**f. Pregnancy Discrimination Act of 1978 (“PDA”).** The PDA, which is part of Title VII, explicitly prohibits discrimination based on pregnancy and its related conditions.

## **2. Arkansas**

The Arkansas Civil Rights Act of 1993 (“ACRA”) (Ark. Code Ann. §§16-123-101 *et seq.*) closely parallels Title VII and portions of the ADA. Under the ACRA, any employer with nine or more employees in the state of Arkansas is prohibited from discriminating against anyone on the basis of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability. An individual is entitled to bring a state court action without first pursuing a remedy through an administrative agency. Any claim filed in state court under the ACRA must be brought within the latter of one year of the alleged employment discrimination or, if a charge has been filed with the EEOC, within 90 days of receipt of the right to sue notice. Remedies

under the ACRA include reinstatement, back pay, compensatory and punitive damages, attorneys' fees, and court costs.

## **C. Wage and Hour Laws**

### **1. Federal**

**a. Fair Labor Standards Act of 1938 (“FLSA”).** The FLSA applies to most employers and governs minimum wage, maximum hours, and overtime compensation for covered employees. Employees who qualify as executive, administrative, professional, or outside sales personnel and are paid on a “salary basis” are exempt from minimum wage and overtime requirements of the FLSA.

Generally, an employer must provide compensation to any non-exempt employee who works in excess of 40 hours in a week at an amount not less than one and a half times the worker's regular rate of pay for each hour of overtime. Employers who violate the FLSA are subject to civil penalties, including fines and imprisonment, and prevailing employees may recover unpaid wages, unpaid overtime compensation, liquidated damages, and attorneys' fees.

**b. Davis-Bacon Act.** Under the Davis-Bacon Act, most employers that contract with the federal government must pay their employees the “prevailing wage,” which is the wage paid to other employees doing similar work in the same geographical area. The United States Department of Labor enforces the Davis-Bacon Act.

### **2. Arkansas**

As of 2018, the minimum wage under Arkansas law is \$8.50 per hour for adult employees. Like the FLSA, Arkansas law requires overtime compensation for each hour above 40 hours in a one week period to be one and a half times the worker's regular hourly rate. The Director of the Arkansas Department of Labor has enforcement responsibility for Arkansas wage and hour laws.

Under Arkansas law, employers must pay non-executive employees at least as often as semimonthly. Employees who qualify as executives can be compensated monthly. An employer must maintain records regarding time worked and compensation for each employee for a period of three years. An employer that violates the record keeping requirement is subject to a fine for each violation.

Children under 14 may not be employed, except during school vacations and then only by parents or guardians. Children under 16 may not be employed in occupations that are hazardous, in any place where alcohol is sold or dispensed, or in any theater production, except when a parent also performs in the production. An employer is prohibited from having a child under 16 work more than six days or 48 hours in one week or more than 8 hours in one day. Arkansas law imposes a civil penalty on an employer for violating this law.

## **D. Employee Benefits**

Most employee benefits are regulated by the Employee Retirement Income Security Act (“ERISA”), which is a federal law. ERISA preempts most state regulation of employee benefits.

## **1. Health Insurance**

Under Arkansas and federal law, an employer may elect to provide partial or full health insurance coverage for its employees. If an employer elects to provide health insurance coverage for its employees, the United States Internal Revenue Code (“IRC”) dictates that such coverage not discriminate in favor of highly compensated employees.

The Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”), requires that employers with more than 20 employees offer at the employee’s expense a temporary extension of health insurance benefits to an employee whose coverage is on the verge of expiring. This extension generally is available when an employee retires, resigns, is laid off, loses group health insurance coverage as a result of becoming a part time employee, or is discharged.

## **2. Retirement and Pension**

Generally, there are two broad categories of retirement plans: “qualified plans” and “nonqualified plans.” Qualified plans are those which satisfy certain requirements and are governed by the IRC and ERISA. A qualified plan offers numerous tax benefits, including employer tax deductions for plan contributions and deferral of taxation of employee benefits until actual receipt of those benefits by the employee. The most typical qualified retirement plans are defined benefit pension plans, money purchase plans, and Section 401(k) plans.

ERISA places the following duties on employers and plan administrators, trustees, and fiduciaries for qualified plans: minimum funding requirements, fiduciary obligations, and periodic reporting and disclosure requirements.

Nonqualified retirement plans are not subject to ERISA. Nonqualified plans are subject to the IRC, but to a lesser extent than qualified plans. Some employers prefer this type of plan because it permits the employer to provide particular retirement benefits to executive employees without providing the same benefits to lower ranking employees. The two primary forms of nonqualified retirement plans are excess benefits plans and deferred compensation plans. Under an excess benefit plan, the employer may provide an executive with the remaining benefits he or she would have received had there been no limitation placed on the employer’s plan by the IRC.

A deferred compensation plan permits an executive to defer a portion of his or her income to a later date, usually after retirement, when the employee is likely to be in a lower personal income tax bracket. To avoid ERISA requirements, this type of plan cannot be funded and must remain unsecured.

### **3. Profit Sharing**

A profit sharing plan permits an employee and his employer to make contributions to the employee's profit sharing account. Most of these plans are subject to regulation by ERISA. An employee is entitled to receive the balance of his or her profit sharing account upon retirement or termination of employment. The most common profit sharing plan is a Section 401(k) plan. Under this plan, the employee makes regular pre-tax contributions to the plan. The employee's benefits are not subject to taxation until retirement. An employer is permitted but not required to make tax-deductible contributions to its employees' 401(k) plans.

### **4. Stock Options**

A stock option is a right granted by an employer to an employee that authorizes the employee to purchase shares of the employer's stock at a fixed price within a specified time. There are two primary forms of stock options: statutory, or incentive, stock options and nonstatutory, or nonqualified, stock options.

An incentive stock option is subject to the IRC. The IRC requires that the exercise price of the option not be below the fair market value of the stock on the date the employee was granted the option. In addition, the employee must exercise the stock option within 10 years of the date of the grant of the option. The primary attraction of an incentive stock option is that an employee receiving this type of option is not subject to a tax either at the time the option is granted or at the time he or she exercises the option.

Stock options that do not qualify as incentive stock options are known as nonqualified stock options. Unlike with incentive stock options, an employee realizes taxable income when he or she exercises the nonqualified stock option or at the sale of the stock received by exercising the option. Most nonqualified stock options cannot be exercised until a certain period ends and expire upon termination of employment.

### **5. Workers' Compensation**

Workers' compensation is governed by Arkansas law. With limited, explicit exceptions, this law applies to all employers with at least three employees. An employer subject to the law must carry insurance or be self-insured.

Compensation is provided for various injuries and for total and partial disability. Generally, maximum weekly payments are set at an amount no greater than 66 2/3% of the employee's average weekly wage. An employee may be entitled to benefits for up to 450 weeks. However, some of the limitations do not apply to cases of permanent total disability or death. In the case of workplace injuries that result in death, benefits are paid to the decedent's dependents.

Claims must be filed with the Arkansas Workers' Compensation Commission ("WCC"). An employee dissatisfied with a ruling by the WCC may appeal to the Arkansas Court of Appeals. Most claims must be filed with the WCC within two years of the compensable injury or death.

## **E. Safety Laws**

### **1. Federal**

The Occupational Safety and Health Act of 1970 (the “Safety Act”) regulates safety in the workplace for all private employers. The Safety Act, which establishes standards for safety in the workplace, is enforced by the Occupational and Safety Health Administration (“OSHA”). Virtually all employers are subject to the Safety Act. It obligates them to provide a work environment free of recognized hazards that might cause death or serious harm. The Safety Act also sets general industry standards governing a broad range of safety issues from stairways to roofs. Under the Safety Act, employers also must create a log of “recordable” occupational incidents in which employees suffer injuries or illnesses. The U.S. Secretary of Labor enforces the Safety Act, and no private right of action exists.

### **2. Arkansas**

Under Arkansas law, virtually every employer who employs at least 5 people must provide a safe working environment for their employees. The Arkansas Department of Labor promulgates and enforces regulations regarding workplace safety in Arkansas under the direction of the Director of the Department of Labor.

## **F. Other Federal Laws**

### **1. Family and Medical Leave Act of 1993**

The Family and Medical Leave Act (“FMLA”) applies to all employers with 50 or more employees. Any employee who has worked 12 months or longer, performed at least 1,250 hours of service for the employer in the 12 months prior to the date of leave, and works at a site within 75 miles of which the employer has 50 or more employees may be eligible for up to 12 weeks of unpaid leave under the FMLA for one of the following reasons:

- birth of employee’s child and subsequent need to care for infant;
- placement of child with employee for foster care or adoption;
- care of child, spouse, or parent with “serious health condition;” or
- employee’s “serious health condition.”

A “serious health condition” includes inpatient hospitalization and subsequent treatment therefore and continuing treatment by a health care provider, including for pregnancy. If the employee is taking leave to care for a spouse, son, daughter, or parent who is a covered service member, the leave is extended to 26 work weeks. A “covered service member” is a member of the armed forces who is undergoing medical treatment, recuperation, or therapy, is in outpatient status, or is on the temporary disability retired list for a serious injury or illness.

If an employee’s need for leave is foreseeable, the employee must provide his or her employer with 30 days notice before taking leave. When the need for leave is unforeseeable, the employee is required to provide notice as soon as practicable.

An individual who believes his or her FMLA rights have been violated is entitled to file a lawsuit. In some instances, an employee has up to three years from the date of the FMLA violation in which to file a lawsuit against the employer. Remedies include lost compensation, liquidated damages, compensatory damages, and attorneys' fees.

## **2. Fair Credit Reporting Act (“FCRA”)**

The FCRA governs investigations regarding the credit history or background of an applicant or existing employee. In order to comply with the FCRA, the employer must, among other things, give an employee notice of and obtain a written authorization from the employee for a credit history inquiry. The employer also must provide a written disclosure to the employee or applicant no later than three days after requesting a credit report that such a report was requested. The employer must make a complete and accurate disclosure of the investigation within five days of requesting the report. If an employer elects not to hire an applicant because of information obtained in the credit report, the employer must notify the applicant of the role of the credit information in the decision not to hire, as well as provide the applicant with the name and address of the consumer reporting agency from which the employer obtained the information. The employer also must explain to the applicant that he or she can obtain a free copy of the report and challenge any information contained in it.

## **3. Worker Adjustment and Retraining Notification Act (“WARN”)**

WARN requires that an employer with 100 or more employees provide notice to its employees of a plant closing or mass layoff. Under WARN, an employer must provide 60 days notice of a mass layoff or plant closing to affected workers or their bargaining representative, the state dislocated worker unit, and the chief elected official of the local government where the action will occur. Employers that violate WARN are liable to each employee who did not receive notice for back pay and benefits for a period of up to 60 days.

## **4. Employee Polygraph Protection Act (“Polygraph Act”)**

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

pay, and costs including attorneys' fees. The Department of Labor may also impose a fine of up to \$10,000.

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

USERRA entitles those in the armed services to time off from work to fulfill their military obligations. Upon completion of their military obligations, most protected employees are entitled to reinstatement. USERRA also entitles those employees serving in the military to continue to receive benefits, such as health insurance and pension benefits, during the period they are off from work to fulfill military obligations. Remedies for a violation of USERRA include reinstatement, back pay and benefits, liquidated damages, and attorneys' fees.

## **6. Drug-Free Workplace Act of 1988 ("DFWA")**

The DFWA applies to government contractors and those receiving federal financial assistance and requires that a covered employer develop steps to establish a drug free workplace. Under the DFWA, all covered employers must develop and distribute policies prohibiting the manufacture, distribution, dispensation, possession, and use of controlled substances. An employer is obligated to notify a United States official of any employee who is convicted of violating a drug law while at work. An employer who is found to have violated DFWA is in jeopardy of having all existing government contracts and/or grants terminated and losing the right to apply for future government contracts and/or grants.

## **7. National Labor Relations Act ("NLRA")**

The NLRA governs the relationship between a labor union and employer. It defines impermissible "unfair labor practices" for both unions and employers. An employer commits an unfair labor practice when it does any of the following: interferes with an employee's attempt to engage in protected concerted activity; interferes with the formation or administration of any labor organization; contributes financial support to a labor organization; discriminates against any employee because of the employee's membership in a union; takes adverse action against an employee in retaliation for the employee exercising rights protected by NLRA; or refuses to bargain over certain matters with the employees' authorized representative.

Section 7 of the NLRA governs certain activity of all employers, not just union employers. Under Section 7, an employer is prohibited from preventing or attempting to prevent an employee from engaging in "protected concerted activity."

## **G. Other Arkansas Laws**

### **1. Nature of Employment Relationship**

Under Arkansas law, ordinarily employment is at-will, meaning that the employer or employee can terminate the employment relationship at any time with or without cause as long as the reason for taking such action is not otherwise unlawful. As a result, very few types of

wrongful discharge actions that are not based on federal law or the Arkansas Civil Rights Act exist in Arkansas. The two primary types of wrongful termination actions are described below.

**a. Breach of Contract.** If an employer explicitly states in an employee handbook that employees can only be terminated for cause or for the reasons explicitly referred to in the handbook, a terminated employee can bring a claim for wrongful discharge alleging breach of contract. Similarly, if an employer states in an employment agreement with a particular employee that the employee's employment will not end until a specific date or that he or she can be terminated only for cause, the relationship is no longer employment at-will. Under these circumstances, termination of employment prior to expiration of the stated employment period or without cause may subject the employer to liability.

**b. Public Policy Exception to At-Will Doctrine.** An employer is prohibited from terminating an employee when the termination violates public policy. This is a very narrow exception to the at-will employment doctrine. To determine the public policy of Arkansas, Arkansas courts look to the state's constitution and statutes. A whistleblower claim is the primary example of a wrongful termination claim under this exception.

## **2. Non-Competition Agreements**

Covenants not to compete are recognized under Arkansas law. In order to be enforceable, they must protect a legitimate interest and be reasonable in scope. Legitimate interests include trade secrets, special training, confidential information, and customer lists. Whether the scope of a covenant is reasonable is based on two considerations: 1) the size of the restricted geographical area and 2) the duration of the restriction. If the restricted geographic area of a covenant exceeds the employer's trade area, the covenant is too broad and unenforceable. Whether the duration of a covenant is reasonable depends on a complete analysis of the covenant, since Arkansas courts have not explicitly enumerated a duration period beyond which a covenant is *per se* unreasonable. Courts look for a relationship, or "tie-in," between the time period imposed by the non-compete agreement and the business interest being protected when determining whether a time limitation is reasonable. Arkansas courts may alter a covenant not to compete by, for example, reducing the restricted period or area to render it enforceable under Arkansas law.

## **3. Unemployment Compensation**

Arkansas has a compulsory unemployment compensation program that applies to virtually all employers. Under this program, employers contribute to an Unemployment Compensation Fund. Benefits are payable upon the involuntary unemployment of an individual. Employees who satisfy the following requirements are likely eligible for compensation:

- filed proper claim;
- registered for work;
- physically and mentally able to work;
- available to work;
- unemployed for waiting period of one week;

- earned wages of at least 27 times the weekly benefit amount; and
- unemployment is not the result of a labor dispute or employee misconduct.

#### **4. Unions in Arkansas**

Arkansas has adopted a right-to-work law. This means that no person may be denied employment because of membership in or failure or refusal to join a labor union, nor be compelled to pay union dues as a condition to continued employment. The practical effect of this law is that unions are not pervasive in Arkansas. Arkansas does not have a state equivalent of the National Labor Relations Act (“NLRA”). Therefore, labor union activity is governed almost entirely by the NLRA.

## IX. FINANCING ISSUES

### A. Private Financing

This section summarizes the kinds of traditional financing that are generally available to Arkansas businesses.

**1. Loans.** The most common sources of debt financing are loans from financial institutions such as banks, savings and loan associations, and finance companies. Debt financing also includes public offerings of bonds or other debt securities. Loans may be secured by all or part of the borrower's assets or may be unsecured and backed only by the borrower's general credit. Debt financing transactions vary in structure. Most, however, contain a number of similarities.

Typically, a loan has a term and may include periodic payments of principal during the term. Loan payments may fully pay the debt during the term, or they may only partially cover the debt, leaving a "balloon payment" at the expiration of the loan. Interest is usually paid at regular intervals throughout the term of a loan at either a fixed rate or at a rate that varies with some agreed-on standard, such as "prime" rate.

**2. Documentation.** Documents used in a conventional loan transaction include loan agreements, promissory notes, mortgages, security agreements, and guaranties.

**a. Loan Agreement.** The loan agreement sets out the basic agreement between the parties concerning the loan. It usually contains the terms, principal amount of the loan, the interest rate, and the repayment schedule. It also generally contains conditions that must be fulfilled to disburse the loan. It may also contain a series of representations that describe the borrower's legal ability to enter into the loan transaction, the borrower's financial condition, and other similar matters.

The loan agreement will often contain a series of covenants, sometimes referred to as affirmative and negative covenants, which the lender may require the borrower to observe during the term of the loan. Other provisions typically found in loan agreements include a default provision defining the conditions under which the lender may seek recourse for nonpayment or other non-performance and provisions relating to security and guaranties.

**b. Guaranty.** A lender often insists that a guarantee of the borrower's obligations be provided by the principal owner of an entity borrower.

**c. Note.** A promissory note is the specific promise to pay an amount of money and interest over a period of time in accordance with the terms of the note. The note usually includes default provisions that, on occurrence of a default, will enable the lender to accelerate the entire debt.

**d. Security Agreement.** A lien or security interest in property is intended to give a lender a right to recover amounts owed to it from the value of that property, generally

from the sale of the property. Security for repayment takes two common forms: (i) a deed of trust or mortgage (which is more commonly used in Arkansas) on real estate and (ii) a security interest in personal property. The same transaction may include both types of security.

A security interest in collateral is created by a security agreement. In a security agreement, the borrower (or other party granting the security interest) represents that it owns the collateral, has the right to grant a security interest in the collateral, and will maintain the collateral, not dispose of it, or grant any other secured interest in it. The security agreement will also contain default provisions and the rights of the secured party upon default. These will normally include the right to sell the collateral and apply the proceeds to repayment of the loan and associated expenses. If the sale is governed by the Uniform Commercial Code (“UCC”), a uniform statute adopted with variations in Arkansas and other states, as would be common, the secured party must act in a commercially reasonable manner in disposing of the property and comply with other applicable requirements.

**e. Financing Statement.** Security interests in personalty are typically governed by the UCC. Certain property is not covered by the UCC, such as aircraft and intellectual property. Typically, however, for the most common kinds of security, such as accounts receivable and most tangible personal property such as machinery, equipment, and inventory, perfection requires the filing of an appropriate financing statement with the Arkansas Secretary of State if the debtor is domiciled in Arkansas, or other state office if the debtor is domiciled out of state, and, in selected instances, with local authorities. Financing statements constitute public notice of the existence of a security interest. Perfection of a security interest grants the secured party priority in the collateral over unperfected creditors and over other, later-perfected creditors. Failure to properly perfect a security interest may cause a secured party to lose its ability to foreclose on collateral ahead of other creditors.

## **B. Arkansas Usury Law**

Until the 2011 passage of a constitutional amendment increasing the maximum lawful rate of interest, Arkansas has had a long history of strictly construed usury law. Unlike most states, Arkansas’s usury limit is constitutional, not statutory.

Prior to 1982, the Arkansas usury limit was a flat 10%. As a result of the volatile interest rates of the late 1970’s and early 1980’s, in 1982, Arkansas adopted Amendment 60 to its Constitution (Ark. Const. Art. 19, § 13), which provided that the “maximum lawful rate of interest on any contract entered into . . . shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract” with a maximum of seventeen percent (17%) per annum for “consumer loans and credit sales.”

In November of 2011, Arkansas voters approved an amendment to the Arkansas Constitution that increased the maximum rate of interest that can be charged on loans or contracts to 17%. Ark. Const. Amendment 89, § 3. The amendment also removed entirely the maximum interest rates on bonds issued by and loans made by or to state governmental units. A lawsuit challenging the amendment on the grounds that the amendment proposal submitted to

voters improperly combined multiple proposals was rejected by the Arkansas Supreme Court in June of 2011. Thus, effective as of January 1, 2011, the usury rate is 17%.

There are a number of points, discussed below, that credit providers must consider to determine whether the interest rate proposed in a particular transaction is legal under Arkansas law. Although the usury law ceiling has now increased, cases decided under prior law with a lower usury rate likely will have continued applicability as to the topics addressed below.

**1. Application of Usury Law.** Under prior law, Arkansas courts have held that Arkansas's usury limit applies not only to loans, but also to credit sales and any other transaction which in fact is a contract calling for the payment of interest. Thus, the rate cap may apply to transactions such as pawns, check cashing, option contracts, and any other contract which a trial court determines in fact involves a forbearance of debt in consideration of money or other equivalent consideration without regard to labels.

**2. What Is "Interest."** Arkansas courts have held that any charge for the forbearance of debt is "interest" under Arkansas law, again, without regard to labels. Thus, discount points, cash/credit price differentials, late charges, loan guaranty fees, service charges, pawn fees, check cashing fees and excessive storage, insurance, and other expenses incurred to induce the forbearance of payment can be interest.

**3. Recovery When Transaction Usurious.** While prior usury law addressed the effect of a usurious contract and provided for certain recovery, Amendment 89 is silent as to recovery for usurious transactions.

**4. Determination of Usurious Rates.** Generally usury is determined from (i) the face of the contract or (ii) actual charges to a debtor. Therefore, usury savings clauses generally are ineffective.

**5. Federal Exemptions.** There are numerous federal exemptions to the application of Arkansas's usury law to Arkansas related transactions and contracts. These include the following:

- Residential real property loans covered by the Depository Institution Deregulation and Monetary Control Act of 1980, as amended (12 U.S.C. § 1735f-7a), are exempt.
- Federal law is applicable to interest charged by nationally chartered banks that are headquartered outside of Arkansas but have branches in Arkansas (12 U.S.C. §§ 85 - 86).
- Section 731 of the Gramm-Leach-Bliley Financial Modernization Act of 1999 (12 U.S.C. § 1831u) states that federal or state banks headquartered in Arkansas may charge the same rate as any out-of-state bank that has a branch in Arkansas. *Johnson v. Bank of Bentonville*, 122 F. Supp.2d 994 (W.D. Ark. 2000).
- Arkansas courts recognize that the law of a jurisdiction other than Arkansas may govern transactions with significant out-of-state contacts, even though the borrower may be a resident of Arkansas. However, these cases are extremely fact intensive, and counsel should seek to determine whether the facts of a particular proposed transaction or contract fit within the Arkansas Supreme Court's case-by-case analysis of out-of-state

transactions or contracts having multi-state contacts applying the usury law of a state other than Arkansas to those transactions.

**6. Statute of Limitations.** The statute of limitations for a usurious transaction that is in writing is five years. The statute of limitations for a usurious transaction that is not in writing is three years.

## **C. Real Property Liens**

### **1. Mortgages/Deeds of Trust**

Either a mortgage or a deed of trust may create mortgage liens. However, if a deed of trust is used, then the trustee must either be a natural individual who is a resident of Arkansas or a company with trust powers resident in Arkansas. The mortgage lien is subject to a statute of limitations which is the same as that of the underlying debt. Ark. Code Ann. § 18-49-101(a). If the payments are noted in the margin of record, then the statute of limitations shall run five years from the date of the last payment noted in the margin of the record. However, if the debt payments are not noted of record, then the statute of limitations will run as to third parties five years from the maturity date, and thus, it is customary to state the final maturity date of the indebtedness secured by the mortgage in the mortgage instrument. Ark. Code Ann. § 18-49-101(d).

Mortgage liens may be enforced by judicial foreclosure proceedings commenced in the circuit court of the county in which the land is located. Unless expressly and specifically waived in a mortgage, which the debtor/mortgagor typically does, the debtor/mortgagor has a one year right of redemption from the date of the sale of the property. Ark. Code Ann. § 18-49-106.

In addition to judicial foreclosure, Arkansas has adopted statutory foreclosures (Ark. Code Ann. § 18-50-101 *et seq.*). Generally, no particular language is required in a mortgage to permit a statutory foreclosure. However, as a condition to the exercise of the power of statutory foreclosure, the following conditions must be met: (a) a recorded mortgage or deed of trust; (b) a default of the secured obligations; (b) a notice of that default and intention to sell filed for record with the Circuit Court of the county in which the property is situated; (c) no action at law filed to recover a part of the debt; and (d) at least 60 days elapsed since the recording of the notice of default. Ark. Code Ann. § 18-50-103.

The notice of default requires specific statutory language. Ark. Code Ann. § 18-50-104. The notice must be published at least one time a week for four consecutive weeks prior to the sale with the final publication not more than 10 days prior to the date of the sale. Ark. Code Ann. § 18-50-105. The statutory foreclosure provisions govern the manner of sale and the effect of sale. A deficiency judgment is permitted in the same manner as a judicial foreclosure.

### **2. Mechanic's and Materialman's Liens**

Ark. Code Ann. § 18-44-101 to § 18-44-135 governs Arkansas's mechanic's and materialman's liens (also known as "M & M liens") on real property.

**Article I.**

**a. Persons to Whom Lien Extends.** Any person who performs labor on or furnishes material for the construction or repair of any improvement to real estate is entitled to a lien on the “improvement and on up to one (1) acre of the land upon which the improvement is situated, or to the extent of any number of acres upon which work had been done or improvements erected or repaired” to secure payment. Ark. Code Ann. § 18-44-101. The statutes also provide a lien for materials and labor furnished to repair a boat or vessel (Ark. Code Ann. § 18-44-101), for soil or drain pipe or tile for drainage of land (Ark. Code Ann. § 18-44-104), and for the services of an architect, engineer, surveyor, appraiser, landscaper, abstractor, or title insurance agent (Ark. Code Ann. § 18-44-105).

The work must have been performed or materials furnished under an agreement with the owner of the property, proprietor, contractor, subcontractor, or agent thereof. Ark. Code Ann. § 18-44-101; *Gillison Discount Bldg. Materials, Inc. v. Talbot*, 253 Ark. 696, 488 S.W.2d 317 (1972). The Arkansas Supreme Court has interpreted this to mean that the chain of potential lien claimants extends no further than to those who supply labor or material to a subcontractor who is in direct privity with a prime contractor. *Valley Metal Works, Inc. v. A.O. Smith-Inland, Inc.*, 264 Ark. 341, 572 S.W.2d 138 (1978); *American States Ins. Co. v. Tri Tech, Inc.*, 35 Ark. App. 134, 812 S.W.2d 490 (1991).

**b. Required Notices to Contractor and/or Property Owner**

**i. Pre-Work Notice (Residential Real Estate with Four or Fewer Units).** No person may acquire an M & M lien for supplying material, fixtures, labor, or services to the construction of or improvement to residential real estate containing four or fewer units, unless the property owner or the owner’s authorized or registered agent has received a statutory form of written notice that certain persons who supply material, fixtures, labor, or services are entitled to a lien against the property if not paid. Ark. Code Ann. § 18-44-115.

The notice must be personally delivered or delivered by certified mail. The notice does not require the signature of the owner or his or her authorized or registered agent if the notice is delivered by certified mail. While it is the duty of the contractor to give the owner or the owner’s authorized agent the notice required by statute on behalf of all potential lien claimants prior to the supply of contract of materials or fixtures, any potential lien claimant may also give the notice.

If a residential contractor fails to give this required notice, the contractor is barred from bringing an action at law or in equity, including a quantum meruit action, to enforce any provision of a contract and also is guilty of a criminal offense punishable by a fine not to exceed \$1,000. Therefore, it is critical that a residential contractor give the required notice.

The notice must read exactly as follows, be in boldface type, and all capital letters:

**“IMPORTANT NOTICE TO OWNER”**

**I UNDERSTAND THAT EACH CONTRACTOR, SUBCONTRACTOR, LABORER, SUPPLIER, ARCHITECT, ENGINEER, SURVEYOR, APPRAISER, LANDSCAPER, ABSTRACTOR, OR TITLE INSURANCE AGENT SUPPLYING LABOR, SERVICES, MATERIAL, OR FIXTURES IS ENTITLED TO A LIEN AGAINST THE PROPERTY IF NOT PAID IN FULL FOR THE LABOR, SERVICES, MATERIALS, OR FIXTURES USED TO IMPROVE, CONSTRUCT, OR INSURE OR EXAMINE TITLE TO THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY SERVICES, FIXTURES, MATERIALS, OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS AND SERVICE PROVIDERS UNDER THE CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS, LABOR, FIXTURES, AND SERVICES FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIERS AND SERVICE PROVIDERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES AND SERVICES PROVIDED UNDER THE CONTRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER OR SERVICE PROVIDER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER OR OTHER SERVICE PROVIDER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY.**

**SIGNED: \_\_\_\_\_**

**ADDRESS OF PROPERTY: \_\_\_\_\_**

**DATE: \_\_\_\_\_**

**I HEREBY CERTIFY THAT THE SIGNATURE ABOVE IS THAT OF THE OWNER, REGISTERED AGENT OF THE OWNER, OR AUTHORIZED AGENT OF THE OWNER OF THE PROPERTY AT THE ADDRESS SET OUT ABOVE.**

\_\_\_\_\_  
**CONTRACTOR**

The foregoing notice need not be given in the following instances: (a) the residential contractor has supplied a performance and payment bond; or (b) the

transaction is a direct sale to the property owner, which occurs only if the owner orders the materials or services from the lien claimant. Ark. Code Ann. § 18-44-115.

**ii. 75 Day Notice (Commercial Projects).** Material suppliers and suppliers of labor to commercial real estate must provide a post-supply notice to the owner of commercial real estate being improved that such supplier, laborer, or service provider is currently entitled to payment and has not been paid. The definition of “commercial real estate” is non-residential real estate and residential real estate containing five or more units. The form of notice is statutory. Ark. Code Ann. § 18-44-115(b).

The notice must be sent to the owner or his authorized or registered agent and to the contractor “before seventy-five (75) days have elapsed from the time that the labor was supplied or the materials furnished.” The notice may be served by any a) officer authorized by law to serve process, b) form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or his agent, or c) means that provides written, third party verification of delivery at any place where the owner, owner’s agent or registered agent maintains an office, conducts business, or resides. The notice must contain the following information:

- General description of labor, service, or material furnished;
- Amount due and unpaid;
- Name and address of the person furnishing the labor, service, or material;
- Name of the person who contracted for purchase of the labor, service, or material;
- Description of the job site sufficient for identification; and
- The following statement set out in bold face type and all capital letters:

**“NOTICE TO PROPERTY OWNER”**

**IF BILLS FOR LABOR, SERVICES, OR MATERIALS USED TO CONSTRUCT OR PROVIDE SERVICES FOR AN IMPROVEMENT TO REAL ESTATE ARE NOT PAID IN FULL, A CONSTRUCTION LIEN MAY BE PLACED AGAINST THE PROPERTY. THIS COULD RESULT IN THE LOSS, THROUGH FORECLOSURE PROCEEDINGS, OF ALL OR PART OF YOUR REAL ESTATE BEING IMPROVED. THIS MAY OCCUR EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. YOU MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY PAYING THE ABOVE NAMED PROVIDER OF LABOR, SERVICES, OR MATERIALS DIRECTLY, OR MAKING YOUR CHECK PAYABLE TO THE ABOVE NAMED PROVIDER AND CONTRACTOR JOINTLY.**

**iii. 10 Day Notice.** Under Ark. Code Ann. § 18-44-114, every lien claimant must give at least 10 days’ notice before filing a lien of the claimant’s lien claim. The notice must: (a) state the amount of the claim; (b) state from whom such

amount is due; and (c) be given by a process server, by anyone who will be a competent witness, by certified mail, return receipt, restricted delivery, or by means that provide written third party verification of delivery at any place where the owner of the building or improvement maintains an office, conducts business, or resides. The giving of such notice must be evidenced by return, affidavit, or signed receipt.

**iv. 120 Day Filing.** A lien must be filed within 120 days after the last work is completed or last item furnished. Ark. Code Ann. § 18-44-117. The lien claimant must file a) a lien account of demand due after giving all credits, and a description of the property to be charged with the lien verified by affidavit; and b) a sworn statement of compliance with the applicable notice provisions and a copy of each notice given.

**c. Bonding of Lien; Protesting Lien.** If a lien claimant files a lien, a property owner, contractor, or other party with an interest in the real estate may file a bond in double the amount of the lien claim, and if the lien claimant does not contest the amount of the bond, the circuit clerk shall discharge the lien. There is also a procedure to file a civil action to protest the validity of a claimed lien. Ark. Code Ann. § 18-44-118.

**d. Time When Lien Attaches.** Since an M & M lien can only arise pursuant to a contract to make improvements or furnish material, the lien cannot attach before the contract is entered into. Ark. Code Ann. § 18-44-101; *Hawkins v. Faubel*, 182 Ark. 304, 31 S.W.2d 401 (1930); *Mark's Sheet Metal, Inc. v. Republic Mtg. Co., Inc.*, 242 Ark. 475, 414 S.W.2d 106 (1967). Furthermore, since the lien has priority over all subsequent encumbrances but need not be filed of record until 120 days after the last work is completed or last item furnished, it would be unfair to permit an M & M lien to attach against such subsequently filed encumbrances without some form of notice. To this end, Ark. Code Ann. § 18-44-110 provides that the lien is not effective as against subsequent encumbrances until after “commencement” of the construction or repair. Commencement means there is a “visible manifestation of activity on real estate that would lead a reasonable person to believe that construction or repair . . . has begun or will soon begin.” This includes grading, laying out lines, delivery of significant amounts of material, and demolition.

**e. Priorities.** The four most common priority problems likely to arise in connection with an M & M lien are as follows: a) lienholder v. owner; b) lienholder v. lienholder; 3) lienholder v. subsequent mortgagee of real estate; and d) lienholder v. prior mortgagee of real estate.

**i. Lienholder v. Owner.** If the lienholder complies with all notice and filing requirements described above, it will prevail over the owner of the real estate.

**1. ii. Lienholder v. Lienholder.** Competing claims of mechanics and materialmen who have supplied labor and materials for an improvement and have perfected their liens are of equal rank, regardless of when the work was done, materials furnished, or liens filed. Ark. Code Ann. § 18-44-110. If the property subject

to the lien is of insufficient value to fully satisfy all liens, a pro rata distribution will be ordered.

2.

3.

**iii. Lienholder v. Subsequent Encumbrancer.** There is a first in time, first in right rule of priority as between the M & M lienholder and subsequent encumbrancers. Ark. Code Ann. § 18-44-110. Stated simply, the M & M lien will prevail if it dates prior to the attachment of the competing lien. Establishing an effective date for the competing lien is fairly easy. A mortgage lien attaches upon recordation (Ark. Code Ann. § 18-40-102), a judgment lien attaches either on the day of rendition or filing (Ark. Code Ann. § 16-65-117), and an execution lien attaches upon the delivery of a writ of execution to the sheriff (Ark. Code Ann. § 16-66-112). The priority date of an M & M lien has consistently been held to be the date construction or repair of the improvement commenced (Ark. Code Ann. § 18-44-110), and this is the case regardless of when the goods or services of the particular lienholder were rendered or delivered. Thus, under Ark. Code Ann. § 18-44-110, perfected M & M liens arising out of construction of or repair to improvements to real estate will prevail over all encumbrances that attach after commencement of construction or repair, with the exception that liens given for the purposes of funding construction or repair have priority over all M & M liens. Ark. Code Ann. § 18-44-110(b)(1)(B).

4.

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**iv. Lienholder v. Prior Encumbrances.** M & M liens for labor performed or materials or fixtures furnished attach to the improvement on which the labor was performed or the materials or fixtures were furnished in preference to any encumbrance existing on the real estate prior to the commencement of construction or repair of the improvement. In addition, as set forth above, any prior encumbrance given as security for the funding of construction or repair to improvement has priority over all M & M liens.

6.

## X. REAL PROPERTY

### A. Ownership

#### 1. Types of Estates in Land

a. **Fee Simple Absolute.** Fee simple ownership is absolute ownership in the real estate and has potentially infinite duration. Whenever an estate in lands is created by a will, it is deemed to be an estate in fee simple, unless a lesser estate is clearly indicated.

b. **Life Estate.** A life estate is an interest in real estate that is measured by the life of a person. It can be measured by the life of the person to whom the property is conveyed or by the life of another person, which is known as a “life estate per autre vie.” A life tenant has a duty to maintain the property and a limited duty to make repairs. A life tenant is liable for waste if he or she does anything more or anything less than maintain the property. Because a life tenant has a duty to return the property in the same condition as when received, a life tenant may not make any substantial changes to the property even if the change increases the property’s value; this type of modification of the property is referred to as “ameliorative waste.”

c. **Leasehold Estate** – See Section X(E) on “Landlord-Tenant Law” below.

#### 2. Concurrent Ownership

a. **Tenancy in Common.** Tenants in common own an undivided interest in the real estate. A tenancy in common is presumed in every conveyance of real estate to two or more persons, unless the conveyance expressly declares it to be a joint tenancy (see below). The possession of one tenant in common is considered to be the possession of all the tenants. In the absence of an agreement to the contrary, tenants in common share equally in profits on the land. Each tenant has the right to occupy the entire premises, and no tenant can lawfully exclude another. A tenant in common’s undivided interest may be the subject of a mortgage or deed of trust, but a mortgage by only one tenant in common conveys only his or her interest in the property. A tenant in common has the right to partition the land.

In order for a cotenant to establish complete ownership by adverse possession, a cotenant must give actual notice to the other cotenants that his or her possession is adverse to their interest or commit sufficient acts of hostility so that their knowledge of his or her adverse claim may be presumed.

b. **Joint Tenancy with Right of Survivorship.** Express language is required to create a joint tenancy. Although the words “joint tenancy” do not have to be used, the conveyance must be clear that the grantor intended to convey a survivorship estate, which means that each joint tenant owns the whole, subject to the other’s interest. When one joint tenant dies, his or her interest is removed, and the survivor(s) own the whole. A conveyance to grantees “jointly” or “jointly and severally” does not create a joint tenancy with right of survivorship.

Any two or more persons can hold property as joint tenants with right of survivorship, regardless of their relation to one another. In Arkansas, after 1991, an owner of property can convey his or her interest to himself or herself and one or more other persons as joint tenants with right of survivorship. If one joint tenant conveys his or her interest to a third party, the new relationship between the parties is tenancy in common.

Joint tenants have the right to partition the property into two equal parts and end the concurrent ownership. The individual interests of joint tenants are subject to execution by their creditors, if the creditor takes all necessary steps before the death of the joint tenant-debtor.

**c. Tenants by Entirety.** A tenancy by the entirety is created automatically when property is conveyed to a husband and wife jointly, regardless of whether the instrument of conveyance recognizes that the grantees are married. A tenancy by the entirety includes the right of survivorship. Tenants by the entirety have no right to partition the property.

A transfer of an interest in a tenancy by the entirety to a creditor of one of the tenants does not destroy the right of survivorship. The creditor takes the interest subject to the other spouse's survivorship right. Therefore, if the debtor spouse dies first, the non-debtor spouse takes the property free of the creditor's claim; however, if the non-debtor spouse dies first, the creditor takes the whole property. When a husband and wife divorce, the tenancy by the entirety is severed and converted to a tenancy in common.

### **3. Rights to Property**

**Article II.** **a. Ownership.** Individuals over age 18, corporations, nonprofit corporations, limited liability companies, and partnerships can own property. All persons 18 years of age or older may acquire title to, own, and dispose of real property in the same manner and subject to the same rights, obligations, and liabilities with respect thereto as provided for persons 21 years of age or older. In addition, all aliens are capable of taking, by deed or will, lands and tenements in fee simple, or other less estate, and of holding, aliening, and devising them. Notwithstanding the foregoing, whenever any foreign (non-U.S.) party acquires any interest in agricultural land in Arkansas by any means (or in any lease in agricultural land for more than 10 years) or when any agent, trustee, or fiduciary acquires title to agricultural land on behalf of a foreign party, the foreign party, agent, trustee, or fiduciary must register the ownership in the office of the circuit clerk in the county in which the land is located within sixty (60) days after the acquisition, describing the property and providing the name and address of the foreign party. See Ark. Code Ann. § 2-3-101 *et seq.* Additionally, foreign business trusts, as defined by statute, desiring to conduct business in Arkansas are required to register to do business with the Secretary of State See Ark. Code Ann. § 4-31-401 *et seq.*

**b. Limitations on Ownership.** In 2007, Arkansas adopted the Uniform Statutory Rule Against Perpetuities ("Act") (See Ark. Code Ann § 18-3-101 *et seq.*) abolishing the common law rule against perpetuities and making conforming changes to existing law. If a property interest is potentially invalid, upon petition of an interest person, a court shall reform a disposition in a manner that most closely approximates the transferor's manifested plan of distribution. The Act became effective March 9, 2007, has prospective application, and thus

applies to a non-vested property interest or power of appointment that is created on or after March 9, 2007. However, if a nonvested property interest or power of appointment was created before March 9, 2007, and is determined by a judicial proceeding to violate the common law rule against perpetuities, a court may reform the document to effectuate the transferor's intent.

**c. Spousal Rights in Property.** Arkansas has a statutory spousal allowance called dower (woman's right) or curtesy (man's right). If a person dies leaving a surviving spouse and a child or children, the surviving spouse is entitled to a life estate in one-third (1/3) of the real estate of which the deceased spouse was seized of an estate of inheritance during the marriage and fee simple in one-third (1/3) of the personal property of the deceased spouse. Ark. Code Ann. § 28-11-301.

If a spouse dies leaving no surviving children, the surviving spouse is entitled to one-half (1/2) of the real estate in fee simple and is entitled to personal property absolutely as against collateral heirs and entitled to one-third (1/3) of personal property as against creditors. However, if the real estate of the deceased spouse is an ancestral estate, meaning an estate that was inherited by the decedent, then the surviving spouse is entitled to a life estate of one-half (1/2) of the estate as against collateral heirs and one-third (1/3) as against creditors. Ark. Code Ann. § 28-11-307.

Any conveyance by a spouse without the assent of the other spouse is subject to that spouse's claim of dower or curtesy. A married person may relinquish dower or curtesy in the spouse's real estate by joining with the other spouse in the deed of conveyance or by a separate acknowledged instrument executed to the grantee of the spouse or anyone claiming title under the spouse. Ark. Code Ann. § 18-12-402.

#### **4. Adverse Possession**

In order to establish possession of property by adverse possession, the following elements must exist: 1) hostile possession; 2) exclusive possession; 3) possession for seven years or, in the case of a minor, person imprisoned, or mentally incompetent person, the greater of seven years or three years after the disability is removed; 3) uninterrupted, continuous possession; 4) visible possession; 5) actual or constructive possession; and 6) either of the following: a) color of title and payment of taxes on the land for seven years or b) color of title and payment of taxes for seven years on land contiguous to land being claimed.

A person or entity exempt from payment of ad valorem taxes may establish adverse possession of real property by having actual or constructive possession of and color of title to the claimed property for at least seven years or actual or constructive possession of and color of title to the real property contiguous to the property being claimed for at least seven years. Ark. Code Ann. § 18-11-106.

Color of title may be established by paying the taxes on the land for at least seven years, in the case of unimproved and unenclosed land, or 15 years, in the case of wild and unimproved land, provided that the real owner has not also paid the taxes or made a good faith effort to pay

the taxes, but they were misapplied by the taxing authority. See Ark. Code Ann. § 18-11-102-103.

## **B. Purchase or Sale of Property**

### **1. Procedural Requirements**

**a. Statute of Frauds.** In Arkansas, no action may be brought on any contract for the sale of land or any interest in land or on a lease for longer than one year unless the contract is in writing and signed by the person against whom the action is brought. However, if the purchaser, in the case of a land sale contract, or the tenant, in the case of a lease, takes possession of the land, makes payments on the land, and makes valuable improvements, such action takes the contract or lease out of the Statute of Frauds, and thus, no writing is required to bring an action against the purchaser or tenant.

**b. Purchase Agreements/Contract for Deed.** A purchase agreement for the sale of land must name the parties, adequately describe the land, provide all material terms of the agreement, and be in writing and signed by the party to be charged in order to be enforceable.

Between the time a contract is signed and the time the purchase and sale transaction is closed, the doctrine of “equitable conversion” treats the seller’s interest as personal property, *i.e.* money, and treats the buyer’s interest as real property. Therefore, the risk of loss to the property is on the buyer, even if the buyer is not in possession of the property.

**c. Deeds.** A deed is used to convey ownership of real estate. Ark. Code Ann. § 18-12-102. All deeds are construed to convey a complete estate of inheritance in fee simple unless expressly limited by appropriate words in the deed. Ark. Code Ann. § 18-12-105 (see Section X(A)(1)(a) on “Fee Simple Absolute” above). A deed purporting to convey fee simple title also conveys property acquired after the conveyance. A deed that contains the words “grant, bargain, and sell” gives the grantee, his or her heirs and assigns, an express covenant of warranty, unless the warranty is limited by other express words in the deed. The word “heirs” is not necessary to convey an estate of inheritance. If the word “trustee,” “as trustee,” or “agent” appear after the name of the grantee but there is no other language establishing a trust, the words are not sufficient to put anyone dealing with the land on notice that a trust or agency exists.

In order for a conveyance of real estate to be effective against third parties who do not have notice of the conveyance, the deed must be recorded in the office of the circuit clerk of the county in which the land is located. The person recording the deed must supply the name and address of the grantee to which the future tax statement should be mailed. The name and address of the person who prepared the deed must also appear on the first page of the deed. The circuit clerk maintains a grantor/grantee deed index, which is the most common method of searching title. While a title search may be conducted by an attorney, a title search generally is conducted by a title examiner working for a title company. Act 648 of the 2007 Arkansas General Assembly, which is effective January 1, 2008, transferred regulation of title insurance to the State Insurance Department. This Act established the Arkansas Title Insurance Act (codified at Ark. Code Ann. § 23-103-401), which among other things, requires a title search to review all

matters affecting title to the property that is to be insured for a continuous period of not less than thirty years.

As of 2017, the recording fee for a deed is \$15 for the first page and \$5 for each additional page, which amounts are adjusted from time to time. See Ark. Code Ann. § 21-6-306. A deed may be acknowledged by a notary public. If a deed is acknowledged, it is not necessary to have two subscribing witnesses to the deed. If a grantor's spouse joins in the conveyance, the deed should provide that the joining spouse relinquishes dower or curtesy rights. (See Section X(A)(3)(c) on "Spousal Rights in Property" above). In order to establish delivery of the deed, it ordinarily must be shown that the grantor relinquished his dominion and control over the instrument.

**i. General Warranty Deed.** A general warranty deed is the most common type of deed. This deed makes the following covenants of title:

- *Covenant of Seisen:* The grantor warrants that he or she owns the estate that he or she purports to convey.
- *Covenant of Good Right to Convey:* The grantor warrants that he or she has the right to convey the property.
- *Covenant against Encumbrances:* The grantor warrants that there are no encumbrances on the property, such as an outstanding lease, easement, or mortgage.
- *Covenant for Quiet Enjoyment:* The grantor warrants that the grantee will not be disturbed in possession and enjoyment of the property by the assertion of a superior title to the property.
- *Covenant of General Warranty:* The grantor warrants that he or she will defend title against all lawful claims whether they arose before or after the grantor took title and that the grantor will compensate the grantee for any loss that the grantee suffers by the assertion of a superior title.

**ii. Special Warranty Deed.** A grantor conveying by a special warranty deed only warrants that he or she has not done anything to cause a defect in title, but does not warrant against anyone else's actions.

**iii. Quitclaim Deed.** A quitclaim deed contains no warranties and merely conveys whatever title the grantor has. If the grantor has no title to convey, the grantee takes nothing.

**d. Mortgage Financing.** See Section X(D) on "Security for Real Estate Financing" below.

**e. Closing Statement**

At a closing of a purchase and sale of real property, the title company provides a "closing statement," which details all monies due to or owed by the buyer and seller. For residential

sales, the national HUD and RESPA forms are used. In practice, the HUD forms are often also used in commercial contracts.

## f. Recording Requirements, Fees and Taxes

Arkansas has adopted the Uniform Real Property Electronic Recording Act. Ark. Code Ann. § 14-2-301 *et seq.* The Uniform Real Property Electronic Recording Act provides county clerks and recorders the legal authority to prepare for electronic recording of real property instruments. The act creates legislation authorizing land records officials to accept records in electronic form, store electronic records, and set up systems for searching for and retrieving these land records. The act equates electronic documents and signatures to original paper documents and manual signatures so that electronic documents pertaining to real estate transactions may be electronically recorded. For recording requirements and recording fees, see Section X(B)(1)(c) on “Deeds” above.

Arkansas imposes a real property transfer tax on conveyances of property between individuals. The tax does not apply to certain transfers, including mortgages, leases, or transfers between corporations, partnerships, limited liability companies, or other business entities or between a business entity and its shareholders, partners, or members incident to the organization, reorganization, merger, consolidation, capitalization, asset distribution, or liquidation of a corporation, partnership, limited liability company, or other business entity.

When the consideration for the sale exceeds \$100, the transfer tax is equal to \$3.30 for each \$1,000 or fractional part thereof. Ark. Code Ann. § 26-60-101 *et seq.* Unless agreed upon otherwise, it is customary for the transfer tax to be split equally between the buyer and seller.

In order to be recorded, the deed must have the correct number of documentary stamps attached to it, evidencing full payment of the transfer tax. The deed must also contain either: 1) a notation on its face that a “Real Property Transfer Tax Affidavit of Compliance” was completed, or 2) a notation on the deed that states: “I certify under penalty of false swearing that the legally correct amount of documentary stamps has been placed on this instrument,” and the grantee or his or her agent must sign the statement and provide his or her address. Ark. Code Ann. § 26-60-101 *et seq.* To be recorded, all instruments must meet the paper, size, and margin requirements of Ark. Code Ann. § 14-15-402.

## 2. Types of Purchase Contracts

**a. Mortgage/Promissory Note Transaction.** In a typical purchase contract, all or a portion of the purchase price for the land is financed by the seller or a third party lender. The buyer is given the deed to the property at closing and gives to the lender a promissory note for the amount of money borrowed and a mortgage on the property as security for the debt owed.

**b. Installment Land Sale Contracts.** In an installment land sale contract, the buyer pays for the property in periodic payments, and the seller retains the deed to the property until the purchase price has been paid. After the buyer has made all payments, the buyer receives the deed. Often an installment land sale contract will specify that if the buyer defaults, the seller gets possession of the land and retains all payments made as liquidated damages. Arkansas courts have allowed such a forfeiture but will look for a waiver of the default by the seller.

### **3. Real Estate Brokers**

Real estate brokers and salespersons must be licensed by the Arkansas Real Estate Commission (the “Commission”). Selling real estate without a license is a felony. Only individuals, as opposed to entities, may be licensed as salespersons or brokers, but a licensee can do business as a professional corporation. The Arkansas licensing statutes have varying requirements and duties associated with the positions of real estate salesperson, associate broker, executive broker, and principal broker. The Commission should be consulted for the specific requirements. For more information, see Section XII(C)(8) on “Real Estate/Environmental Licenses” below.

In every real estate transaction, a licensed broker must clearly disclose to all parties involved which party or parties the broker is representing. A broker may represent more than one party to a real estate transaction. If the broker represents both the buyer and the seller, the broker must get the written consent of all the parties involved in the dual agency. For more information on selling real estate in Arkansas and licensing requirements, contact the Commission at 612 South Summit Street, Little Rock, Arkansas 72201-4740, (501) 683-8010 or visit the Commission’s website at [www.arkansas.gov/arec](http://www.arkansas.gov/arec).

#### **C. Foreclosure of Property**

**1. Statutory (Power of Sale) Non-Judicial Foreclosure.** Upon default by a borrower under a mortgage or deed of trust, the mortgagee or trustee can foreclose on the property without court authority if certain requirements are followed. If the mortgage or deed of trust contains a “power of sale” clause, in which the borrower authorized sale upon default, then the terms of the sale must be followed, including the time, date, and place of the sale. Even without an express power of sale clause, the power of sale upon default is implied in every mortgage of real property in this state that is acknowledged and recorded, and the exercise of the implied power must be made in accordance with the procedures set forth in Ark. Code Ann. § 18-50-101 et seq., which are summarized below. Ark. Code Ann. § 18-50-101 et seq. was amended in 2011 to require beneficiary or mortgagee to have certain knowledge and provide certain information to the grantor before initiating a statutory foreclosure. Ten days prior to instituting a statutory foreclosure the grantor must have received by standard mail (a) A true and correct copy of the note with all required endorsements, the mortgage, or the deed of trust; (b) The name of the holder and the physical location of the original note; (c) A true and correct copy of the original mortgage or deed of trust and if in the possession of the beneficiary or mortgagee, each assignment or allonge of the mortgage or deed of trust; (d) Information, including the applicable telephone number and Internet address, regarding the availability to the grantor, mortgagor, or obligor of each program for loan modification assistance or forbearance assistance offered. Non-judicial foreclosure law is strictly construed. See *In Re Gatlin*, 357 B.R. 519 (Bankr. W.D. Ark. 2006). Ark. Code Ann. § 18-50-101 et seq. should be consulted and its requirements strictly followed.

The mortgagee or trustee must give a notice of default and intention to sell the real property (the “Notice”) to the following parties: the mortgagor or grantor of the deed of trust, any successor in interest to the mortgagor or grantor whose interest appears of record or whose

interest the mortgagee or trustee has actual notice of, any person having a lien or interest of record on the property subsequent to the interest of the mortgagee or trustee or where the mortgagee or trustee has actual notice of such a lien or interest, and any person requesting notice pursuant to the statute. The notice of default must contain the following: (1) the names of the parties to the mortgage or deed of trust; (2) a legal description of the property and street address; (3) the book and page numbers where the mortgage or deed of trust is recorded; (4) the default for which foreclosure is made; (5) the mortgagee's or trustee's intention to sell the trust property to satisfy the obligation, including in conspicuous type a warning as follows: "YOU MAY LOSE YOUR PROPERTY IF YOU DO NOT TAKE IMMEDIATE ACTION;" and (6) the time, date, and place of the sale and name, address, and telephone number of the party initiating foreclosure. The sale must be held between 9:00 a.m. and 4:00 p.m. and cannot be held on a Saturday, Sunday, or a legal holiday. The sale must be held at the property or at the front door of the county courthouse of the county in which the property is located. This Notice must be recorded with the county courthouse and mailed by certified mail, postage prepaid, to certain parties, including to the last known address of the mortgagor, within 30 days of recording.

The mortgagee or trustee must publish the Notice in a newspaper of general circulation in the county in which the property is situated or in a newspaper of statewide daily publication one time a week for four consecutive weeks prior to the date of sale, and the final publication must not be more than 10 days prior to the sale. The mortgagee or trustee may also employ a third party, including an Internet foreclosure sale notice information service provider to post notice. On or before the date of the sale, the mortgagee or trustee must file an affidavit of mailing and publication of the notice of default and intention to sell with the county recorder. The U.S. Bankruptcy Court for the Western District of Arkansas has held that the notice of default and intention to sell is required to contain a legal description of the trust property; and, if applicable, the street address of the property. *See In re Gatlin*, 357 B.R. 519, 522 (Bankr. W.D. Ark. 2006) (citing Ark. Code Ann. § 18-50-104 and 18-50-105).

Any person, including the mortgagee and the beneficiary of a deed of trust, may bid at the sale. The trustee may bid for the beneficiary but not for itself. The mortgagee or trustee must employ a third party to conduct the sale and act as the auctioneer of the mortgagee or trustee. The property may not be sold for less than two-thirds (2/3) of the entire indebtedness due at the date of sale. The sale may be postponed from time to time; however, notice of the postponement must be given in the manner specified by law.

Unless otherwise agreed to by the trustee or mortgagee, the purchaser shall pay the price bid at the time of the sale, and interest accrues on any unpaid balance. Within 10 days after the sale, the mortgagee or trustee must deliver the trustee's deed or mortgagee's deed to the purchaser. The mortgagee or beneficiary receives a credit on its bid for the amount representing the unpaid principal owed; accrued interest as of the date of the sale; advances for the payment of taxes, insurance, and maintenance of the property; and costs of the sale, including reasonable trustee's and attorney's fees.

The purchaser is entitled to immediate possession of the property. If necessary, possession may be obtained by filing a complaint in the court of the county in which the property lies and attaching a copy of the recorded trustee's or mortgagee's deed, which entitles the

purchaser to an ex parte writ of assistance. Alternatively, the purchaser may bring an action for forcible entry and detainer pursuant to state law. Ark. Code Ann. § 18-50-116 provides that the mortgagor may assert a claim of fraud or failure to strictly comply with certain provisions of the statutory foreclosure act as a defense to the foreclosure. However, such claims or defenses may not be asserted against a subsequent purchaser for value of the property. For more information on statutory foreclosure, see Ark. Code Ann. § 18-50-101 *et seq.* Non-judicial foreclosure law is strictly construed. See *In Re Gatlin*, 357 B.R. 519 (Bankr. W.D. Ark. 2006). This summary is not exhaustive and Ark. Code Ann. § 18-50-101 *et seq.* should be consulted and its requirements strictly followed.

**2. Judicial Foreclosure.** In a judicial foreclosure, a court will order a sale of the property and may order the recovery of the debt from the borrower personally. Traditionally, judicial foreclosure has been the foreclosure method of choice. This fact may be because the action is deemed equitable, and thus, a court can determine the right to foreclose the mortgage lien and enter judgment. No jury is introduced into the process.

When the court orders a sale, the mortgagee publishes a notice of the sale, at least 10 days prior to the sale, in a newspaper that has a general circulation in the county in which the property is situated or, if this is not available, in a newspaper of statewide daily publication one time.

Sales of real property made by court order shall be on a credit of not less than three months nor more than six months or on installments equal to not more than four months' credit on the whole. In all sales on credit, the purchaser must give a bond with surety in the amount of the purchase price, and a lien is retained on the property for its price.

If the property does not sell for an amount sufficient to satisfy the amount due, an execution may be issued against the borrower as an ordinary judgment. The borrower has the option to redeem the property at any time up to one year from the date of the sale by paying the amount for which the property was sold, plus interest and the costs of the foreclosure and sale. However, the mortgagor may waive this right of redemption in the mortgage or deed of trust. For more information on judicial foreclosure, see Ark. Code Ann. § 18-49-101 *et seq.*

## **D. Security for Real Estate Financing**

### **1. Mortgages**

A mortgage is the grant of an interest in real property to be held as security for the performance of an obligation by the borrower/mortgagor. Mortgages are executed in the same manner as deeds and must be recorded in the county in which the lands lie in order to become a lien as against third parties. The filing of the mortgage is notice to all third persons of the lien on the real estate.

Whenever a mortgage has been satisfied, the borrower can request that the mortgagee acknowledge satisfaction on the margin of the record in which the mortgage is recorded, which releases the mortgage. In practice, most parties request release instruments to be filed of record.

## 2. Mortgage-Related Laws

**a. Fair Mortgage Lending Act.** The Fair Mortgage Lending Act (Ark. Code Ann. § 23-39-501 *et seq.*), which governs mortgage brokers and other mortgage-related companies, became effective January 1, 2004. It replaces most of the provisions of the Mortgage Loan Company and Loan Broker Act. This Act contains licensing requirements, provisions on prepayment penalties, restrictions on refinancing during the first 12 months of a loan, continuing education requirements, and specific duties for managing principals and branch managers of mortgage companies.

Like the replaced Mortgage Loan Company and Loan Broker Act, the Fair Mortgage Lending Act is not limited to residential mortgages. For more information and regulations, contact the Arkansas Securities Department at Heritage Building West, Suite 300, 201 E. Markham, Little Rock, AR 72201, (501) 324-9260 or visit the Department's website at [www.securities.arkansas.gov](http://www.securities.arkansas.gov).

**b. Arkansas Home Loan Protection Act.** The Arkansas Home Loan Protection Act (Ark. Code Ann. § 23-53-101 *et seq.*) governs high-cost home loans, which are defined as loans made to individuals (1) that do not exceed \$150,000; (2) are obtained primarily for personal, family, or household purposes; and (3) are secured by a mortgage or deed of trust. High-cost home loans do not include loans which within 60 days after closing will be insured by, securitized for, or sold to a government agency or government sponsored enterprise (such as the Department of Housing and Urban Development, the Department of Veterans Affairs, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Arkansas Development Finance Authority, or the United States Department of Agriculture) or loans that the lender can demonstrate were in good faith intended to be so insured by, securitized for, or sold to the government agency or government sponsored enterprise.

This act prohibits certain practices associated with high-cost loans, including financing certain types of insurance for debt cancellation and "flipping" practices, call provisions, fees for balance, balloon payments, negative amortization, increasing interest rates after default, advance payments, mandatory arbitration clauses, lending without home ownership counseling, lending without due regard to ability to pay, prepayment fees and penalties, home improvement contract creditors, and modification or deferral fees.

**c. Reverse Mortgage Protection Act.** The Reverse Mortgage Protection Act (Ark. Code Ann. § 23-54-101 *et seq.*) applies to reverse mortgage loans executed on or after January 1, 2006. A reverse mortgage loan is defined as a nonrecourse loan secured by a borrower's principal residence that (i) provides cash advances to a borrower based on the amount of equity in the borrower's home and (ii) requires no payment of principal or interest until the entire loan becomes due and payable. The Act regulates the provisions of reverse mortgage lending and requires certain conspicuous disclosures to borrowers concerning the nature of the transaction and advising them of the right to seek independent counsel before entering into a reverse mortgage loan.

### **3. Deeds of Trust**

A deed of trust is a deed that conveys real property to a trustee in trust to secure the borrower's obligations to the seller, who is the beneficiary of the trust. A deed of trust grants the trustee a power of sale for breach of the borrower's obligation and can be foreclosed upon in the manner set forth in Section X(C) on "Foreclosure of Property" by either judicial or statutory foreclosure.

### **E. Landlord-Tenant Law**

Arkansas adopted the Residential Landlord-Tenant Act of 2007, which applies to rental agreements for dwelling units and is codified at Ark. Code Ann. § 18-17-101 *et seq.*

#### **1. Tenant's Rights/Duties**

Every duty and right exercised under Residential Landlord-Tenant Act must be in good faith. In addition to paying rent, a tenant has a duty not to commit waste. A tenant may not commit voluntary waste (*i.e.* knocking out windows), permissive waste (*i.e.* allowing water leak that could have been repaired easily and without great expense), or ameliorative waste (*i.e.* making improvements to the premises). A tenant must comply with all building and housing codes, keep the dwelling safe and clean, use the premises in a reasonable manner, not deliberately destroy the premises, and not disturb others' quiet enjoyment. A landlord may charge a tenant for costs associated with remedying noncompliance with these duties. A tenant shall not unreasonably withhold access and shall not change the locks without the permission of the landlord. A tenant must occupy the dwelling unit, not permit illegal activities in the premises, and pay rent. Ark. Code Ann. § 18-71-101 *et seq.*

#### **2. Landlord's Rights/Duties**

Every duty and right exercised under Residential Landlord Tenant Act must be in good faith. The landlord covenants with the tenant for quiet enjoyment, which is an assurance against defects in title and a covenant that the tenant will enjoy possession in peace without disturbance by hostile claimants. The landlord also has a duty to make the property available for the tenant to possess. If the tenant is prevented from entering the property, he or she can sue for damages. In Arkansas, there is no implied warranty of habitability of leased property, and in the absence of a covenant to the contrary, the landlord has no responsibility to make repairs.

When a tenant vacates or abandons the premises, the landlord has three options: 1) refuse to accept the abandonment, let the property lie idle, and sue the tenant as the rent comes due; 2) accept the keys as a surrender of possession, thereby terminating the lease and re-enter on the landlord's own account; or 3) re-enter and re-let the premises for the tenant's account and hold the tenant liable for any difference in the agreed rent and that of the new tenant. Any rental the landlord receives from a new tenant reduces the former tenant's liability. If the landlord is not able to re-lease the premises, the former tenant is liable for the full amount of rent remaining on the lease term.

No landlord shall be liable to the tenant, the tenant's licensees, or invitees for death, personal injury, or property damage proximately caused by a defect or disrepair on the premises absent an agreement supported by consideration to maintain or repair the premises and failure by the landlord to perform that agreement in a reasonable manner. Ark. Code Ann. § 18-16-110 (codifying Arkansas common law).

### **3. Term**

**a. Tenancy for Years.** In a tenancy for years, there is a fixed beginning and ending date, and the lease expires automatically upon expiration of the ending date. No notice is required to terminate a tenancy for years. In order to be enforceable, a tenancy for more than one year must be in writing and signed by the party against whom the action is brought.

**b. Periodic Tenancy.** A periodic tenancy continues from period to period, such as month to month or year to year, until notice of termination is given. Generally, notice to terminate must be equal to the rental period but never longer than six months; in the case of a year-to-year tenancy, six months' notice must be given. A periodic estate may be express or may be implied from the manner in which rent is paid. For example, if rent is paid on a monthly basis, a month to month tenancy may be implied. A landlord or tenant may terminate a week-to-week tenancy by written notice at least seven (7) days before the termination date specified in the notice. A landlord or tenant may terminate a month-to-month tenancy by written notice given at least thirty (30) days before the termination date specified in the notice. Ark. Code Ann § 18-17-704. Unless the rental agreement fixes a definite term, the tenancy is week to week in the case of a roomer who pays weekly rent and in all other cases month to month. See Ark. Code Ann. § 18-17-401.

**c. Tenancy at Will.** Under Arkansas common law, a tenancy at will has no fixed period of duration, can be terminated by either the landlord or tenant at any time without notice, and may be express or implied. A tenancy at will is also terminated by the death of one of the parties. However, under the Residential Landlord-Tenant Act, of 2007, unless the rental agreement fixes a definite term, the tenancy is week to week in the case of a roomer who pays weekly rent and in all other cases month to month. Ark. Code Ann § 18-17-401.

**d. Tenancy at Sufferance.** A tenancy at sufferance is created when a tenant unlawfully holds over after the term of the lease has expired. See Section X(E)(5)(b) for remedies for tenant holding over after end of term.

### **4. Assignment and Subletting**

In Arkansas, the intent of the parties governs whether a transfer by the tenant is considered an assignment or a sublease. If a tenant subleases the premises, the tenant is still obligated on the lease, and the sub-tenant has no liability to the landlord. If the tenant assigns the lease to a third party, the tenant remains responsible unless the landlord releases the tenant, even if the new tenant assumes the obligation. However, unlike a sublease, with an assignment, the landlord can sue either the assignee or the original tenant for default.

If a lease is silent as to the ability to sublease or assign, then a tenant can do either. In Arkansas, in the case of a commercial lease, if there is a covenant against assignment or subleasing, the landlord cannot unreasonably withhold his or her consent. However, in the case of a residential lease, the landlord can withhold consent for any reason.

## 5. Remedies on Default/Termination

**a. Misdemeanor.** If a tenant fails to vacate the premises at the expiration of a lease, then the landlord can give the tenant 10 days' written notice in writing to vacate the premises. If the tenant refuses to vacate and surrender possession of the premises at the end of the 10 days, then the tenant is guilty of a misdemeanor. Ark. Code Ann. § 18-16-101. A form of the written notice is generally available at the county prosecutor's office.

**b. Periodic Tenancy Holdover Remedies.** If the tenant remains in possession without the landlord's consent after the expiration of the term of the rental agreement, the landlord may bring an action for possession. Ark. Code Ann. § 18-17-704(c). If the tenant's holdover is a willful violation of the Residential Landlord-Tenant Act, the landlord may also recover three months rent or twice the actual damages, whichever is greater, and reasonable attorneys' fees. See Ark. Code Ann. § 18-17-704.

**c. Ejectment, Eviction, and Remedy after Termination.** A landlord may commence eviction proceedings against a tenant in district court when the tenant fails to pay rent when due, the term of tenancy has ended, or the terms of the rental agreement have been violated. Ark. Code Ann. § 18-17-901. For residential rental agreements, nonpayment of rent within five (5) days of the date due constitutes legal notice to the tenant that the landlord has the right to begin eviction proceedings. Ark. Code Ann. § 18-17-901(b). The landlord commences an action for eviction by filing a complaint and affidavit in district court. Ark. Code Ann. § 18-17-902. Upon filing of the complaint, the district court shall issue an order to the tenant to show cause why the tenant should not be evicted within ten (10) calendar days after service of a copy of the complaint and affidavit on the tenant. Ark. Code Ann. § 18-17-902(b). If the tenant does not show cause within the ten (10) calendar days, the court shall enter judgment in favor of the landlord and direct the clerk to issue a writ of possession, and the tenant shall be evicted by the sheriff of the county. Ark. Code Ann. § 18-17-904. If the tenant appears and contests the eviction, the court shall hear and determine the case as any other civil case. Ark. Code Ann. § 18-17-905. If the judgment is for the landlord, the court shall issue a writ of eviction. Ark. Code Ann. § 18-17-907. If a tenant fails to pay rent within five (5) days from the due date contained in the rental agreement, the landlord may terminate the rental agreement. The landlord may recover actual damages and obtain injunctive relief, judgments, or eviction in circuit court or district court. If the tenant's nonpayment of rent is not in good faith, the landlord is entitled to reasonable attorneys' fees. Ark. Code Ann. § 18-17-701. If the rental agreement is terminated, the landlord has the right to possession and rent, a separate claim for actual damages for breach of the rental agreement, and attorneys' fees. Ark. Code Ann. § 18-17-703. See also Ark. Code Ann. § 18-17-706 regarding payment of rent during the pendency of a landlord's action for possession if the tenant raises defenses or counterclaims to landlord's complaint.

A tenant may also be evicted by the prosecuting attorney, the city attorney, the owner of the premises, or his or her agent pursuant to certain procedures, which are outlined in Ark. Code Ann. § 18-16-501 *et seq.*, if the tenant uses or allows another person to use the leased premises as a common nuisance, such as for the manufacture, sale, or distribution of controlled substance or for gambling, prostitution, or the unlawful sale of alcohol to minors.

**d. Unlawful Detainer.** Arkansas's unlawful detainer statutes provide for an additional procedure by which landlords may seek eviction when a tenant has defaulted under a rental agreement. If a tenant willfully holds over the leased premises after the expiration of the lease term; fails to pay rent when due and after three days' written notice to leave, refuses to leave; fails to maintain the premises in a safe, healthy, habitable condition; or causes the premises to become a common nuisance, the tenant is guilty of an "unlawful detainer." The landlord can then file a complaint and an affidavit stating that he or she is entitled to possession, and the clerk will issue a summons directed to the sheriff to serve the defendant with the following notice:

#### **"NOTICE OF INTENTION TO ISSUE WRIT OF POSSESSION**

You are hereby notified that the attached complaint in the above styled cause claims that you have been guilty of [forcible entry and detainer] [unlawful detainer] (the inapplicable phrase shall be deleted from the notice) and seeks to have a writ of possession directing the sheriff to deliver possession of the lands, tenements, or other possessions described in the complaint delivered to the plaintiff. If, within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, you have not filed in the office of the clerk of this court a written objection to the claims made against you by the plaintiff for possession of the property described in the complaint, then a writ of possession shall forthwith issue from this office directed to the sheriff of this county and ordering him to remove you from possession of the property described in the complaint and to place the plaintiff in possession thereof. If you should file a written objection to the complaint of the plaintiff and the allegations for immediate possession of the property described in the complaint within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, a hearing will be scheduled by the court to determine whether or not the writ of possession should issue as sought by the plaintiff. If you continue to possess the property described in the complaint, you are required to deposit into the registry of the court a sum equal to the amount of rent due on the property and continue paying rent into the registry of the court during the pendency of these proceedings in accordance with your written or verbal rental agreement. Your failure to tender the rent due without justification is grounds for the court to grant the writ of possession.

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Clerk of Circuit/District Court"

Ark. Code Ann. § 18-60-307 (West).

If the defendant does not file an objection within five days, the clerk of the circuit court must immediately issue a writ of possession directing the sheriff to cause possession of the premises to be delivered to the landlord without delay. If the tenant files an objection within five

days (excluding Sundays and legal holidays) following service of the above summons, then the landlord must obtain a date for a hearing on matter and must give notice of the date, time, and place of the hearing by certified mail, postage prepaid to the tenant or his or her counsel. Additionally, if the tenant continues to possess the property during the pendency of the unlawful detainer complaint, then the tenant is required to deposit into the registry of the court at the time of filing the written objection a sum equal to the amount of rent due on the property and continue paying rent into the registry of the court in accordance with the rental agreement. The failure of the tenant to deposit rent due is grounds for the court to grant the writ of possession. Ark. Code Ann. § 18-60-307.

At such hearing for an immediate writ of possession, the landlord must present sufficient evidence to establish that he or she is entitled to possession of the property, and the tenant is entitled to present evidence to rebut the landlord's evidence. If the court decides that the landlord is likely to win at a full hearing and if the landlord provides adequate security (as decided by the court), then the court will order the clerk to issue a writ of possession directing the sheriff to remove the tenant and place the landlord in possession. However, if the tenant desires to retain possession pending a full hearing, the court shall allow it if the tenant provides adequate security within five days of the issuance of the writ of possession. See Ark. Code Ann. § 18-60-307.

If the landlord wins at trial, the court shall assess as damages the amount of rent due plus the following: (1) for residential leases, the landlord shall receive an amount equal to the rental value for each month or portion thereof and (2) for commercial or mixed residential and commercial purposes, the landlord shall receive three times the rental value per month for the time that the tenant unlawfully detained the property. The court shall also issue a writ of possession commanding the sheriff to remove the tenant from possession. If the tenant wins at trial, and the property has already been turned over to the landlord, the court shall issue a writ of restitution directing the sheriff to put the tenant back in possession. Ark. Code Ann. § 18-60-309. Ark. Code Ann. § 18-60-306 gives the circuit and the district court concurrent jurisdiction with regard to actions for forcible entry and detainer and unlawful detainer.

If the sheriff receives a writ of possession, the sheriff shall notify the tenant by delivering a copy of it to the tenant or if the sheriff cannot locate the tenant within eight hours of receiving the writ, the sheriff can post the writ at the property. If within 24 hours after the writ was served on the tenant, the tenant has not left the premises, the sheriff shall notify the plaintiff and shall be provided with all labor and assistance required to remove the tenant's possessions and place them in a safe place of storage until a final determination is made on the lawfulness of the action. If the tenant succeeds, his or her possessions will be returned. If the landlord succeeds, then the court will order a sale of the tenant's belongings with the proceeds to be applied first to the cost of storage, second to any monetary judgment in favor of the landlord, and any excess goes to the landlord. See Ark. Code Ann. § 18-60-310.

**e. Self-Help.** In Arkansas, self-help is generally not available to a landlord if a tenant defaults. Self-help is considered an unlawful "forcible entry and detainer." For example, a landlord may not enter the leased premises by breaking open the doors and windows

or other parts of the house or using other methods of threat or intimidation. Changing the locks at the premises may also be considered a forcible entry and detainer.

## **6. Third Party/Tort Liability Issues**

A landlord has no duty to protect tenants from crimes unless there is a special relationship between the parties, the landlord brought about the opportunity for the criminal conduct, or the crime was foreseeable. A tenant has a duty to third parties to maintain the premises in good repair. Neither the landlord nor the tenant is liable for injuries to trespassers on the premises.

Arkansas Code Annotated § 18-16-110 codifies Arkansas' common law rule that no landlord or agent of a landlord is liable to a tenant or his or her licensees or invitees for death, personal injury, or property damage proximately caused by any defect or disrepair on the premises absent the landlord's agreement supported by consideration or assumption by conduct of a duty to maintain or repair the leased premises and failure to perform the agreement or duty in a reasonable manner.

## **7. Condemnation**

Condemnation of land by eminent domain (see Section X(K) on "Eminent Domain" below) is not a breach of the landlord's covenant of quiet enjoyment. If the entire leased premises are taken by condemnation, then the tenant is relieved of the duty to pay rent. However, if only a portion of the premises is taken, the tenant must still pay rent but may be entitled to damages for the fair market value of the leasehold interest.

## **8. Security Deposits**

Arkansas law has certain restrictions relating to the collection and application of security deposits, which apply to leases of residential property. However, there is an exception for landlords who own five or fewer dwelling units, unless the units are managed by third parties for a fee. Ark. Code Ann. § 18-16-303.

A landlord may require a security deposit that does not exceed two months' rent. Ark. Code Ann. § 18-16-304. The security deposit must be returned to the tenant within sixty (60) days after the termination of the tenancy, but the deposit may be applied to the payment of unpaid rent and to damages caused by the tenant's noncompliance with the rental agreement. If the landlord applies the deposit to damages, he or she must itemize the damages and how the deposit was applied and deliver a notice detailing this to the tenant, along with any remaining portion of the deposit within sixty (60) days after termination of the tenancy and delivery of possession by the tenant. The landlord must mail this statement via first class mail to the last known address of the tenant. If the notice is returned and the landlord is unable to locate the tenant after reasonable effort, then the deposit becomes the landlord's property 180 days after the notice was mailed. Ark. Code Ann. § 18-16-305. If the landlord fails to comply with the above, the tenant may recover double damages, costs, and attorneys' fees. Ark. Code Ann. § 18-16-306.

## **9. Recording of Leases**

A lease must be recorded in the office of the circuit clerk of the county in which the leased premises are located in order to give constructive notice of the lease to third parties, and the lease must be acknowledged in order to be recorded. A tenant's possession of the premises is notice of an unrecorded lease.

## **10. Abandoned Property**

After the expiration of a lease, all property left at the premises by the tenant is considered abandoned and may be disposed of by the landlord without recourse by the tenant. Ark. Code Ann. § 18-16-108.

## **11. Property of Tenant on the Premises**

All property placed on the premises by the tenant is subject to a lien in favor of the landlord for the payment of rent and other sums agreed to by the tenant. Ark. Code Ann. § 18-16-108. At the expiration of the lease, the performing tenant can remove all items of property placed on the premises that are moveable, such as appliances. However, items that are incorporated into the structure of the premises, or fixtures, may not be removed, unless there is an agreement to the contrary.

## **12. Agriculture Leases**

The owner of farmlands that are rented or leased under an oral agreement may elect not to renew the agreement for the following calendar year by giving written notice by certified mail to the tenant on or before June 20 that the oral lease will not be renewed for the following calendar year. Ark. Code Ann. § 18-16-105.

Every landlord of agricultural land has a lien upon the crop grown on the premises for rent accrued for that year, and the lien continues for six months after rent is due and payable. In addition to the lien, if a landlord advances any supplies or money to the tenant in order for the tenant to harvest a crop, the landlord has a lien on the crop raised for the value of the advances. Both of these liens are perfected and have priority over a conflicting security interest in or agricultural lien on the crop regardless of when the conflicting security interest or agricultural lien is perfected. Ark. Code Ann. § 18-41-101.

## **F. Easements**

An easement is a right to use the land of another. An easement is classified as "appurtenant" if it benefits the holder as the owner of certain property. An easement appurtenant is transferred when the land benefiting from the easement is transferred. An easement is "in gross" if it benefits the holder without regard to his or her property. Commercial in gross easements, such as utility easements, may be transferred, but personal in gross easements, such as hunting rights, may not be transferred.

## 1. Creation

**a. Express.** Easements are typically created by an express grant in writing. Because an easement is an interest in land, it is subject to the Statute of Frauds, and, thus, must be in writing to be enforceable (see Section X(B)(1)(a) on “Statute of Frauds” above). Conveyance or transfer of an easement for consideration may also trigger taxation (see Section X(B)(1)(f) on “Recording Requirements, Fees, and Taxes” above).

**b. Implied.** An easement may also be created by implication in one of four ways: prior use, necessity, prescription, and estoppel. An easement implied by prior use arises when an owner of land conveys part of the land and does not expressly reserve an easement of access over the land conveyed. An easement by necessity arises when a right of access over another’s property is necessary, or else the landowner would be land-locked. For example, if a landowner conveyed a portion of his or her property that was land-locked and did not expressly grant the transferee an easement over the property, the transferee would have an easement by necessity over the owner’s property. In Arkansas, there is a limited right of private condemnation, which allows a landowner to institute suit to force his or her neighbor to sell an easement over the neighbor’s land in order that the landowner can obtain access to his or her own land. An easement may also arise by prescription if one party uses another party’s property to his or her own benefit for a period of seven years without the permission of the owner. The use must be continuous and uninterrupted for the seven years and must be “open and notorious,” or noticeable. Finally, an easement may arise by estoppel if one party grants another an easement orally and that party detrimentally relies on it.

## 2. Proper Use

An easement may be used only for the purpose for which it was granted. A landowner with an easement on his or her land can use the property in any manner as long as he or she does not interfere with the easement holder’s use of the easement. An easement holder has the duty to make repairs with respect to the easement.

## 3. Termination

An easement cannot be terminated by simply not using the easement or by orally relinquishing it. An easement may be terminated only in writing or if the land burdened by the easement is merged with the easement holder’s land.

## G. Licenses

A license is a contractual right to use land, but is not an interest in land. A license can be created orally and results when a party attempts to convey an easement orally. If there is a breach of a license, the complaining party receives damages. Licenses are generally revocable by the party granting the license.

## **H. Mineral Interests**

Ownership of land includes ownership of the minerals on and beneath the surface, unless the rights to the minerals are excepted from the deed conveying the interest in land. An owner of mineral rights has an implied right to go upon the surface to open mines or drill wells to obtain his or her minerals and to occupy so much of the surface beyond the well as is necessary to operate the mines or wells and to remove the minerals. However, the owner's use of the surface must be reasonable.

If a person owns minerals beneath the surface of another's land, then ownership of the minerals is not lost by nonuse of the minerals or by adverse possession of the surface. Adverse possession of mineral rights can only be established by an adverse use of the mineral rights by opening the mines or drilling wells and continuing such action for the necessary statutory period.

If a person dies leaving a surviving spouse and a child or children, the surviving spouse is entitled to one-third (1/3) of all money received from the sale of timber, oil, gas, or other mineral leases, royalties, or mineral sales from lands in which the surviving spouse has a dower, curtesy, or homestead interest, unless the surviving spouse waived such interest in legal form.

## **I. Water Rights**

### **1. Surface Water**

A landowner has the right to fend off surface water so long as he or she does not unnecessarily damage his or her neighbor. When draining surface water from one's land, the landowner may not direct the flow of the water onto adjoining lands or increase the volume of the flow by the construction of a drain or ditch.

### **2. Ground (Percolating) Water**

Where two or more persons own different tracts of land that are saturated by percolating water, each owner has a common right to use the water upon his or her land to the full extent of his or her needs, if the supply is sufficient, and if the supply is insufficient, the owner can use a reasonable share of the water.

### **3. Riparian Rights**

Riparian water rights arise when a landowner has land that touches a flowing stream or river. Riparian rights grant the owner the right to make reasonable use of the water. Riparian landowners on a navigable stream have a right to prohibit the public from crossing their property to reach the stream. A riparian owner may remove subterranean and percolating water and use it away from the land in the same watershed from which it was pumped if it does not injure the common supply of other riparian owners, and adjacent riparian owners cannot complain if they are not damaged by the removal. Pursuant to state statute, the Arkansas Natural Resources Commission ("ANRC") can grant water rights to non-riparians and can allocate water rights in the event of shortage conditions. ANRC can be contacted at 101 East Capitol, Suite 350, Little

Rock, AR 72201, (501) 682-1611 or visit ARNC's website at: <http://www.anrc.arkansas.gov/index.html>.

#### **4. Municipal Water Rights**

A municipality that owns riparian lands has the same rights as an individual riparian owner.

### **J. Real Estate Development**

#### **1. Zoning and Planning Requirements**

Zoning and planning regulations are governed by each city's municipal code. An example of such a code is the City of Little Rock's Municipal Code, which can be accessed at: [www.littlerock.org](http://www.littlerock.org) or <http://library.municode.com>.

The City of Little Rock's Department of Planning and Development governs the development and redevelopment and the stabilization of neighborhoods through planning, land use controls, permitting, and enforcement. For more information on planning and development, contact the Department at 723 West Markham, Little Rock, AR 72201, (501) 371-4790 or visit the Department's website at: [www.littlerock.org/CityDepartments/PlanningAndDevelopment](http://www.littlerock.org/CityDepartments/PlanningAndDevelopment).

The Department's Division of Zoning and Subdivision regulates platting, rezoning, and site development through ordinances and addresses use permits and zoning variances. The Division is a resource for developers, realtors, and other citizens who are presented with requests for current zoning, plat status, development standards, or statistical information. For more information, contact the Division at 723 West Markham, Little Rock, AR 72201, (501) 371-4790 or visit the Division's website by going to the site listed above and then clicking on "Zoning and Subdivision."

The Department's Division of Building Codes issues construction-related permits and provides plan review and inspection services for building, plumbing, mechanical, and electrical construction in the City of Little Rock. This Division has six primary areas: Building Inspections, Electrical Inspections, Permits, Plan Review, Mechanical Inspections, and Plumbing/Gas Inspections. For more information, contact the Building Codes Division at 723 West Markham, Little Rock, AR 72201, (501) 371-4790 or visit the Division's website by going to the site listed above and then clicking on "Building Codes."

The Department's Planning Division prepares neighborhood plans and reviews and drafts amendments to existing plans, including reviewing and developing reports for land use amendments and reviewing zoning changes requested by various groups. The Planning Division also responds to requests for statistics, graphics, and GIS products. For more information, contact the Planning Division at 723 West Markham, Little Rock, AR 72201, (501) 371-4790 or visit the Division's website by going to the site listed above and clicking on "Planning."

The Little Rock Board of Adjustment considers requests for zoning variances and considers appeals of administrative decisions relating to the City's zoning ordinances. The Board meets the last Monday of each month at 2 p.m. in the City Hall Board Room. For more information, contact the Board at 723 West Markham, Little Rock, AR 72201, (501) 371-6817 or visit the Board's website at: <http://www.littlerock.org/CityCommissions/Detail.aspx?IS=11> and select "Board of Adjustment."

## **2. Subdivision Ordinances**

The City of Little Rock has certain regulations relating to the subdivision of land. The ordinances, which are located at Section 31 of the Little Rock Municipal Code, can be accessed at [www.littlerock.org](http://www.littlerock.org), then click on the link to City Departments, and then the link to the City Attorney's Office. A developer of a subdivision must follow certain procedures to obtain the approval of the City of Little Rock's planning commission, including filing a preliminary plat with the commission, which must be approved by the commission before it can be recorded. For more information, contact the Department of Planning and Development at the address listed above.

## **K. Eminent Domain**

In Arkansas, various government entities, such as counties, municipal corporations, and levee and drainage districts, and certain types of private companies, such as electric companies, railroad companies, and mineral oil and lumber companies, have the power of eminent domain, which is the power to condemn privately-owned land for certain purposes. Certain procedures must be followed in the condemnation of land, and no more property can be condemned than is absolutely necessary.

When a government entity desires to condemn land, it must apply to the circuit court and give notice of the time and place of the application to the owner of the land. In addition, the notice must be published for three weeks preceding the time of the application in a newspaper of general circulation in the county. If notice is proper, the court will set a hearing for a jury to determine the compensation due the owner for the taking of his or her land.

The measure of damages in a condemnation case depends on whether the land is taken by the government or by another entity. When the government condemns land, the proper measure of damages due the landowner is the difference in fair market value of the entire tract immediately before and after the taking. However, when a private entity, such as a railroad, telephone, or electric company, exercises the right of eminent domain, just compensation is measured by the value of the portion of the land taken plus any damage to the remaining property. When only a portion of land is taken, the measure of damages is the difference between the market value of the whole tract before the taking and the market value of remaining tract, less any enhancement peculiar to the lands. For more information on eminent domain, see Ark. Code Ann. § 18-15-101 *et seq.*

## **L. Miscellaneous Property Acts**

### **1. Arkansas Horizontal Property Regime**

Condominium owners can submit their property to the governance of the Arkansas Horizontal Property Regime by recording a “master deed.” The master deed is a description of the land and the building that identifies each apartment, the common areas of the building, and the value of each apartment.

The administration of a horizontal property regime is governed by bylaws, which are attached to the master deed. The bylaws should provide for the form of administration of the regime, such as an administrator or a board of administration; the method of calling a meeting of the owners and provisions for voting; care and maintenance of the building and its common areas; the manner of collecting payment for the common expenses; and a designation of the personnel necessary for the works and services of the building.

A condominium owner has exclusive ownership of his or her condominium and has a common right to a share with the other co-owners in the common elements of the property. Any conveyance of an individual condominium conveys the owner’s interest in the common areas of the regime.

The co-owners of the condominiums are required to contribute a pro rata share, according to their percentage owned (which is generally the value of the individual condominium in relation to the value of the property as a whole), toward the expenses of administration and of maintenance and repair of the common areas and toward any other expense lawfully agreed upon. For more information, see Ark. Code Ann. § 18-13-101 *et seq.*

### **2. Arkansas Time-Share Act**

The Arkansas Time-Share Act governs the creation and regulation of time-share estates. A time-share program is an arrangement whereby the occupancy and possession of property circulates among purchasers of the time-share property according to a schedule on a periodic basis occurring annually over any period of time in excess of three years. A developer of a time-share project may not offer or sell interests in the time-share unless the time-share is registered with the Arkansas Real Estate Commission. The documents offering the time-share units must meet certain requirements, and all advertising materials related to the time-share must be filed with the Commission. In addition, the documents creating the time-share program must contain certain provisions regarding the management and operation of the time-share program and the maintenance, repair, and furnishing of units. For more information on the regulation of time-share estates, see Ark. Code Ann. § 18-14-101 *et. seq.* or contact the Real Estate Commission at 612 South Summit Street, Little Rock, AR 72201-4740, (501) 683-8010. The Commission’s website is [www.arkansas.gov/arec](http://www.arkansas.gov/arec).

### 3. Beneficiary Deeds

Act 1918 of 2005 authorized the creation and recording of a beneficiary deed that transfers an interest in real estate at the death of the grantor. The deed must be recorded before the death of the owner or last surviving owner in the country in which the real property is located. The deed may be revoked prior to the grantor's death and is subject to all encumbrances existing at the date of the grantor's death and any claims for benefits that could have been recovered by the Department of Health and Human Services. The Act provides a form of a beneficiary deed. For more information, see Ark. Code Ann. § 18-12-608.

## XI. ENVIRONMENTAL LAW

### A. Overview

As in any state, the environmental laws of Arkansas are affected by a variety of sources. The primary sources are common law and federal and state statutory and regulatory law.

Environmental law in every state is unique. There are, however, common themes. Arkansas has been delegated primary authority by the Environmental Protection Agency ("EPA") and is therefore deemed an authorized state for permitting and management under the federal Clean Air Act, Clean Water Act, and hazardous waste laws. Thus, Arkansas's programs are deemed equivalent to federal programs. In addition, Arkansas has unique air, water, solid waste, hazardous waste, storage tank, and brownfields laws.

The primary state agencies that regulate and enforce environmental laws and environmentally related issues in Arkansas are the Arkansas Department of Environmental Quality ("ADEQ") and the Arkansas Natural Resources Commission ("ANRC"). Each of these state agencies operates pursuant to a series of regulations. In addition, the EPA, Department of Justice, and Corps of Engineers ("Corps") retain additional oversight powers, both civilly and criminally. ADEQ can be contacted at 5301 Northshore Drive, North Little Rock, AR 72118-5317, (501) 682-0744 or visit ADEQ's website at [www.adeq.state.ar.us](http://www.adeq.state.ar.us). ANRC can be contacted at 101 East Capitol, Suite 350, Little Rock, AR 72201, (501) 682-3986 or visit ANRC's website at [www.anrc.arkansas.gov](http://www.anrc.arkansas.gov).

Arkansas prides itself in its natural beauty and is called the "Natural State." Environmental issues facing Arkansans arise from mining, metal processing, poultry operations, timber operations, and demands on aquifer water because of industry, agriculture, and municipal needs.

The primary federal laws regarding the environment are: (a) Resource Conservation and Recovery Act ("RCRA"); (b) Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"); (c) Clean Air Act ("CAA"); and (d) Clean Water Act ("CWA"). Each federal law has a state corollary.

### B. RCRA

## 1. Federal Law

RCRA is our nation's primary law governing the disposal of solid and hazardous waste. RCRA addresses hazardous waste from its inception to its disposition, or what is commonly referred to as regulation from "the cradle to the grave." 42 U.S.C. § 6901 *et seq.* This law applies mostly, but not exclusively, to active treatment, storage, and disposal facilities and hazardous waste generators and transporters.

When deciding to do business in Arkansas, or elsewhere, one must review all industrial processes to determine compliance with RCRA. Certain wastes are not classified as RCRA covered hazardous wastes. To be regulated as a hazardous waste, the waste must be deemed a solid waste (certain materials and recycled materials are excluded), and if not excluded, the waste must either be listed as a hazardous waste, or it must exhibit a hazardous waste characteristic.

RCRA regulated parties must file notices and reports, including a uniform manifest form, which provides a chain of custody and always accompanies the hazardous waste shipment. The waste may be properly transferred only to permitted treatment, storage, and disposal facilities. In addition, generators are responsible for packaging and labeling the waste and waste shipments. Depending on the quantity and type of waste, generators must keep records of their activities, waste types, storage times, and treatment history.

To obtain a permit as a treatment, storage, or disposal facility, the permittee must have proper record keeping and also proper training, security, and emergency planning. Permitting includes requirements for financial assurance in the event of a facility closure to address ultimate material disposition.

RCRA includes extensive corrective action requirements for owners or operators of facilities where there has been a release of hazardous substances.

## 2. Arkansas Law

The Arkansas laws governing hazardous waste are found in the Hazardous Waste Management Act ("HWMA") (Ark. Code Ann. § 8-7-201 *et seq.*) and the Arkansas Resource Reclamation Act (Ark. Code Ann. § 8-7-301 *et seq.*). In addition, the Arkansas Pollution Control and Ecology Commission ("Commission") adopted Regulation No. 23, Hazardous Waste Management. The Commission adopts regulations administered by the ADEQ. The Arkansas Remedial Action Trust Fund Act ("RATFA") (Ark. Code Ann. § 8-7-501 *et seq.*) provides authority for corrective action and provides ADEQ's authority to mandate cleanup.

Regulation No. 23 includes the statement of purpose of Arkansas's Hazardous Waste Management program, which is "to protect the public health and safety and the environment from the effects of improper, inadequate, or unsound management of hazardous wastes."

Arkansas law is more protective or stringent than federal law in certain respects, and some provisions, such as the following, differ from federal law:

**a. Delisting.** Under federal law, a party may seek to have a particular waste delisted, making hazardous waste regulations inapplicable. A party desiring to delist files a delisting petition to exempt a waste from RCRA.

Arkansas law does not provide a similar program. If a RCRA regulated entity wished to delist a waste under Arkansas law, the applicant would have to follow the EPA guidance on this issue and obtain a binding decision from the EPA Administrator.

**b. Regulation No. 23.** This Arkansas regulation requires that any transporters in Arkansas or who are transporting waste in, from, or through Arkansas, must have a permit. Therefore, in Arkansas, transporters, like treatment, storage, and disposal facilities, must have a permit. This requirement is broader than federal law.

**c. Uniform Manifest.** In Arkansas, the EPA uniform manifest must be supplemented.

**d. Corrective Action.** State corrective action for facilities found not to be in compliance covers materials that are not considered hazardous waste as prescribed under RCRA, including state-defined hazardous substances that include petroleum and petroleum-based products. Thus, Arkansas requirements are broader than federal requirements in this respect.

**e. Contingency Planning.** Under Arkansas law, certain contingency planning is required that is broader than the federal requirement, including consultation with the local fire department, mayor, or other governing city or county official, and certification or documentation that the waste to be disposed has been treated to the full extent of known technology and economics.

**f. Annual Permit Review.** An Arkansas permittee must submit, as a part of its annual permit review, a plat for any landfill in which waste has been disposed.

**g. Disclosure Statement.** Arkansas law requires a disclosure statement to be submitted as part of all permit applications. The disclosure statement requires identification of the principals of the applicant and whether the applicant or its principals have a history of environmental compliance or noncompliance both in Arkansas and other states. This application must be filed both on initial permitting and on any requests for a permit transfer and, as noted, is required in all ADEQ permitting decisions.

**h. Confidential Business Information.** Arkansas has both statutory and program specific requirements for claiming and handling confidential business information in conjunction with permit applications.

**i. RATFA.** Under RATFA, the state can require cleanup of hazardous waste releases at active sites, as well as abandoned hazardous substance sites. There is little Arkansas law regarding RATFA, and there is some debate on whether the specific language under RATFA is as broad as federal law.



## **C. CERCLA and SUPERFUND**

### **1. Federal Law**

CERCLA is probably the most well-known federal environmental law. Well known sites across the country, such as Times Beach, Missouri, have been addressed under CERCLA. This Act is commonly referred to as the “Superfund” law and covers the federal government’s authority to require cleanup of abandoned industrial sites and assess joint, several, and strict liability. Joint and several liability means that any party singly or the parties as a whole can be held liable for the entire costs of the potential cleanup. Strict liability means that an innocent party, if holding a certain status such as owning title, can be found liable.

Superfund gets its name because it is supported by taxes on petroleum and chemical operations, which provide a hazardous substances “Superfund.” This Superfund is used by the EPA in cleaning up some of the nation’s worst hazardous waste sites. CERCLA’s coverage is broad and relates to hazardous substances, as defined under other statutes. Excluded, however, from the definition of hazardous substances is “petroleum, including crude oil or any fraction thereof.” As noted, the same exclusion does not apply under the Arkansas HWMA or hazardous waste management regulations.

Before a site may become a Superfund site, a detailed EPA review is done to determine if the site has a high priority of possibly affecting public health. A variety of factors are considered, including possible contamination of drinking water supplies and other threats. If the site scores high in relation to other sites, the property is placed on what is called a National Priority List (“NPL”) for cleanup. Being on the NPL is a prerequisite for a Superfund remedial action.

There have not been a substantial number of Superfund or NPL sites in Arkansas. The ones that have existed, however, have been well publicized and have led to significant amounts of liability and protracted litigation.

CERCLA covers the cleanup of inactive waste sites, which is not the primary focus of RCRA. CERCLA also attempts to obtain cost recovery for the cleanup among the parties that generated, handled, or otherwise were connected to the property. Another important provision under CERCLA addresses when releases must be reported to the National Response Center. The National Response Center’s toll free number is 1-800-424-8802.

CERCLA is triggered by a release or substantial threat of release of a hazardous substance into the environment. Except as to reporting responsibilities, no particular hazardous substance quantity is required under CERCLA. A release, unless exempted, is broadly defined to include “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment” (including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substances or pollutants or contaminants). 42 U.S.C. § 9601(22). Other federally permitted releases, however, such as releases pursuant to a validly issued water body permit, are not included.

Sites listed on the NPL qualify for the longer-term remedial actions financed by Superfund. A site not listed on the NPL, but that has a potential to threaten public health, welfare, or the environment, may be the subject of a more short-term action called a removal action. CERCLA response actions are governed by the National Contingency Plan (“Contingency Plan”). The Contingency Plan also governs both the EPA’s and private parties’ actions in conducting CERCLA response actions.

As noted, removal actions are shorter and deal with environmental emergencies. The time and dollar amount that may be spent on the action is capped, with limited exceptions. Remedial actions are longer-term cleanups. The longer-term remedial process is subject to public notice and comment. The EPA must put together a comprehensive administrative record and allow the public to review and comment on its proposed actions. Comments and responses must be included in the administrative record.

After review of the comments, the EPA issues its Record of Decision, which is the document that sets forth the EPA’s chosen remedy, includes the factors that led it to this remedy, and responds to comments. Judicial review is limited to the administrative record, including the Record of Decision.

Private parties conducting a CERCLA cleanup may also recover costs. Such a party, however, must have been the subject of a CERCLA civil action or have entered into a binding settlement with the EPA to resolve its CERCLA liability. One court has concluded that settlement with a state is insufficient, unless the state has an agreement or contract with the EPA for authority to act under CERCLA. In the alternative, the EPA seeks an order requiring a liable party to act, or the EPA can conduct the remedy itself and then sue private parties to recover expenses.

CERCLA liability is strict, meaning that in certain circumstances no fault is required, as well as joint and several. Thus, a defense to liability that actions taken were in strict compliance with industry standards is not available. In addition, CERCLA law has been found to be retroactive, meaning that parties can be found responsible for actions they took, even if proper, before CERCLA’s enactment.

Under CERCLA, potentially liable parties include current owners and operators; former owners and operators who were involved with the facility during the time any hazardous substance was disposed of at the facility; persons who arranged for disposal or treatment of hazardous substances that are owned or possessed at the facility; and persons who accepted hazardous substances for transport to disposal or treatment facilities or sites they selected.

One complex area of environmental law concerns whether traditional notions of corporate liability will be respected under Superfund. Many cases have found that an owner or operator under CERCLA can include a person who participates in management and owns an interest in a business. The reason behind this rule is because, under CERCLA, the term “owner” or “operator” is defined as not including “a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security in

the vessel or facility.” 42 U.S.C. § 9601(20)(A). Therefore, the statement indicates that other people who do provide such oversight activities or have ownership can be held liable, contrary to traditional notions of corporate liability. Such is the rule in Arkansas as the federal Eighth Circuit Court of Appeals has interpreted the law.

There are some, but not many, defenses to CERCLA liability, including acts or omissions of a third party, other than an employee, agent, or party with whom the defendant has a contractual relationship. These defenses are available, as long as the defendant exercised due care and took precautions against foreseeable acts or omissions of the third party. 42 U.S.C. § 9607(b). As a defense to a CERCLA action, a party can claim that it performed “all appropriate inquiry” as to the property’s environmental use and condition. This defense is available for innocent landowners, bona fide prospective purchasers or contiguous landowners.

The EPA’s All Appropriate Inquiry rule, effective November 1, 2006 (“AAI Rule”) provides a useful guide to property acquirers. If contamination were discovered, however, while the owner that meets the AAI Rule may not incur strict liability under CERCLA, it will have to properly act to prevent any ongoing CERCLA violation.

Important issues under Superfund laws also include whether the responsibility and liability for the harm is divisible, and contribution actions, where the court is allowed to apply such equitable factors as it deems appropriate. Contribution actions can be brought either during or after CERCLA cost recovery actions or abatement mandates. Often, they are addressed in a second phase of a proceeding. As noted, a party seeking contribution under CERCLA must have been the subject of a CERCLA civil action or have entered into a binding settlement with the EPA to resolve its CERCLA liability. Settlement authority and consent decrees have also created an additional important body of EPA guidance and law that must be reviewed whenever a hazardous substance release issue is encountered.

## **2. Arkansas Law-Remedial Action Trust Fund Act**

Arkansas has state laws to address cleanups. The Remedial Action Trust Fund Act provides the ADEQ with authority and funding for addressing releases of hazardous substances. Ark. Code Ann. § 8-7-501. Under RATFA, the Arkansas Supreme Court has not found potential responsibility for innocent customers who do not cause, at the time of disposal, hazardous substances to be disposed of at a hazardous substance site. CERCLA law has generally been broadly interpreted regarding generators or arrangers, including the rule that a party need not know that the disposal of hazardous substances would result from a particular contractual arrangement. In 2005, the Arkansas legislature modified RATFA to respond to the Court’s ruling. Third parties are no longer required to act at the time of disposal, and the legislature clarified its intent that RATFA has retroactive effect.

## **D. Clean Air Act**

### **1. Federal Law**

The CAA compiles a set of pollution control standards and air quality mandates through state plans. New sources of air pollution are required to have control technologies and permits to address specific pollution issues, in part depending on the level of pollution in the area of permitting. The 1990 amendments to the CAA implemented a comprehensive operating permit program to incorporate all CAA requirements and guidance into one permitting decision, known as the Title V permit.

## **2. State Law**

The ADEQ has received all delegable air programs, including the Title V comprehensive permitting program, established under the Commission's Regulation 26. Under the EPA's delegated approach, ambient air quality standards for certain pollutants must meet the National Ambient Air Quality Standards ("NAAQS"). Arkansas has established a state implementation plan designed to achieve this goal. As of December 2017, Arkansas is in full attainment of all of the federal NAAQS. Ozone and fine particulate matter concentrations in the state have continued to decline concurrent with progressive reductions in the level of the standards.

As noted, the federal Title V provisions are addressed under Regulation 26. Under Arkansas law, a "major source," which is generally defined as a source with the potential to emit 100 tons per year of any regulated air pollutant, 10 tons a year of a single hazardous air pollutant ("HAP"), or 25 tons per year of a combination of HAPs (Regulation 26 § 26, Chapter 2), must obtain a Title V permit. Non-attainment limits are lower. Only federally regulated air pollutant emissions trigger the need for a Title V or Regulation 26 permit. The basic goal of Regulation 26 is to provide for operational flexibility.

Other permits and permit modifications regarding federally regulated air pollutant emissions are addressed by Regulation 19. Also, not all facilities emitting air pollutants are required to obtain permits under Regulations 19 and 26. Some facilities may be required to obtain a permit under Commission Regulation 18, which is the Arkansas Air Pollution Control Code.

An attorney should be consulted regarding current operations or activities that must be permitted under Arkansas law, including whether a permit must be obtained under Regulation 26, Regulation 19, or Regulation 18. In addition, guidance must be obtained on whether an air contaminant is covered because some Arkansas laws may be more expansive than federal laws. For instance, in Arkansas, air pollution control programs may address odors.

## **E. Clean Water Act**

Arkansas has generally been considered to have an abundance of fresh water, which has enabled the state to become a leading recreational state and the leading rice producer in the nation.

### **1. Federal Law**

Under the CWA, a permit must be obtained if a pollutant is discharged through a point source into waters of the United States. The terms “pollutant,” “point source,” and “waters of the United States” are interpreted broadly. The definition of “waters of the United States” currently in effect is the definition promulgated in 1986/1988. The 2015 revised regulatory definition has been stayed by the U.S. Court of Appeals for the Sixth Circuit. In response to the stay, the EPA, Department of Army, and the Army Corps of Engineers resumed nationwide use of the agencies’ prior regulations defining the term. In February of 2017, the President of the U.S. issued an Executive Order directing those agencies to review and rescind or revise the 2015 Rule. Parties not discharging to water of the United States may discharge to a publicly owned treatment work. Such parties may have pre-treatment responsibilities.

The CWA’s goal is to achieve a level of water quality sufficient “for the protection and propagation of fish, shellfish, and wildlife” and “for recreation in and on the water.” 33 U.S.C. § 1251(a)(2). The CWA is also aimed to prevent the discharge of toxic pollutants in toxic amounts. The CWA includes a system for determining limitations on regulated discharges.

## **2. Arkansas Law**

In Arkansas, the ADEQ is responsible for approving all permits relating to water discharges. Also, the state is responsible for issuing permits relating to “no discharge” waste disposal systems, such as systems that do not discharge directly into waters of the state. ADEQ also permits salt-water disposal systems, which are associated with Class II Underground Injection Control wells permitted by the Arkansas Oil & Gas Commission.

Under Arkansas law, a two-part permit is issued for water discharges, which include construction and discharge. Both permits are incorporated into the National Pollutant Discharge Elimination System (“NPDES”) permit, which is the state certification that the discharges will comply and not result in a violation of effluent limitations.

Arkansas water quality standards that are designed to meet the CWA are promulgated pursuant to the Arkansas Water and Air Pollution Control Act (Ark. Code Ann. § 8-4-101 *et seq.*). Water quality standards are set out for designated uses for each jurisdictional water body in the state. See Commission Regulation 2, App. A.

The types of uses and designations depend on the type of water body. Approved uses can be altered, and a facility can sometimes initiate a discharge without a permit. In addition, pursuant to the CWA and the Arkansas Water and Air Pollution Control Act, discharges of stormwater require permitting. Review of a facility’s operations should determine whether a facility is properly permitted regarding stormwater discharges or construction related stormwater activities. Both state general permits and individual permits are authorized.

## **F. Regulated Storage Tanks**

### **1. Installation, Operation, and Maintenance**

The ADEQ Regulated Storage Tank Division regulates both underground and aboveground storage tanks (collectively “Storage Tanks”). Generally, a regulated underground storage tank (“UST”) is a tank, 10% of which is underground, containing regulated substances. Regulated substances include CERCLA substances and petroleum, but do not include hazardous wastes regulated under RCRA.

Regulated aboveground tanks (“ASTs”) are generally stationary containers holding certain fuels and petroleum products whose capacity is between 1,320 and 40,000 gallons. Newly installed USTs must meet federal design and safety standards. USTs must be registered with the ADEQ within 30 days after bringing the tank into use. A tank owner of ASTs may choose to register the ASTs for the purpose of allowing potential eligibility for reimbursement under the Petroleum Storage Tank Trust Fund. Registration must be current to receive regulated substances into the storage tank.

A licensed technician must perform UST installation and maintenance. Regulation 12 sets forth the detailed licensing requirements for professionals who install, service, test, upgrade, repair, and close USTs. Importantly, licensed UST service personnel must perform all UST certifications required of UST owners and operators by ADEQ.

## **2. Spill Notification and Corrective Action**

Arkansas regulations require prompt notice to the ADEQ upon suspected and confirmed spills, overfills, and releases. Confirmed releases must be reported within 24 hours, and if the release is of a hazardous substance, it must be reported to the National Response Center and appropriate state and local agencies pursuant to CERCLA.

## **3. Petroleum Storage Tank Trust Fund**

In the event of releases, the Petroleum Storage Tank Trust Fund Act (Ark. Code Ann. § 8-7-901 *et seq.*) can provide reimbursement to eligible owners or operators of Storage Tanks in an amount up to:

- \$1,492,500 for corrective action for accidental releases per occurrence (with the owner or operator responsible for a \$7,500 deductible); or
- \$992,500 for compensating third parties for bodily injury and property damage caused by accidental releases (with the owner or operator responsible for a \$7,500 deductible).

There are strict notice requirements for obtaining Storage Tank fund coverage. In addition, to be eligible, an owner or operator must register each Storage Tank and pay the annual Storage Tank fees required by Commission Regulation 12 for each tank until such time as the permanent closure requirements of the regulation are satisfied; and maintain financial responsibility in the amount of \$7,500 per occurrence.

## **G. Other Arkansas Laws**

### **1. Audit Privilege**

Arkansas has adopted an environmental audit privilege that provides a limited privilege for environmental audits, reports, and audit work. Ark. Code Ann. § 8-1-301 *et seq.* In the event that state or federal violations are revealed by the audit work, diligent remediation efforts must be pursued in order to retain the privilege or avoid civil or criminal penalties. Both the attorney-client privilege and the attorney work product privilege may protect audit work.

## **2. Concentrated Animal Feeding Operation Permits**

Recently, Arkansas has focused on nonpoint sources of water pollution, including agricultural sources. The ANRC is responsible for developing the Nonpoint Source Pollution Management Plan. A statewide general permit has been prepared for concentrated animal feeding operations, which includes large poultry feeding operations. Permitting is handled through the ADEQ.

## **3. Water Regulations**

**a. Water Rights.** Arkansas is the largest national producer of rice, and Stuttgart, Arkansas has been called the rice and duck capital of the world. This region is home to the Grand Prairie, a vast prairie landscape that has exceptional rice production, storage, and processing and water usage. Water depletion in the Mississippi River Valley's alluvial aquifer and the deeper Sparta Aquifer (primarily used for drinking water) has led the ANRC to declare this area as a critical groundwater area. Pursuant to the ANRC, such a designation allows the state to regulate the use of surface and groundwater; as a result, there is a possibility of regulation on water use in this area in the future, and currently, water projects are planned to sell water to users.

There are many that believe water usage in Arkansas will be one of the key issues in future years. Therefore, a party planning on doing business in Arkansas must ensure it has an adequate water supply in order to continue or establish its operations. Certain deadlines allow grandfathered use rights under ANRC regulations.

**b. Minimum Streamflow in Arkansas.** With some exceptions and common law developed standards, Arkansas has traditionally followed the reasonable use theory of the riparian doctrine. A riparian user must use water in a manner that is reasonable compared to others' rights (including as to ground water).

As a mid-south state, Arkansas receives a moderate amount of rain per year (approximately 49.19 inches on average since 1895 compiled from the Arkansas Natural Resource Commission's Arkansas Ground Water Protection and Management Report for 2016). The 2015-16 average precipitation for the state was approximately 64.03 inches, far exceeding the historical average. Stress on the amount, use of, and quality of its underground aquifers,

primarily in east and southeast Arkansas, has resulted in increased scrutiny and planning for alternate water sources, including from conservation, recovery, and surface water.

Arkansas has no current active system in operation for regulating water usage. The Arkansas Natural Resources Commission, however, is directed to monitor our state's water resources and can set minimum streamflows by rulemaking (but this step requires consultation with other state agencies). Water needs to be considered are domestic and municipal water supplies; agricultural and industrial; navigation; recreational; fish and wildlife and other ecological needs. The regulations and laws describe preferences and priorities, but are untested in practice.

Minimum streamflows are to be set on a case by case basis, defining such stream flows as the "quantity of water required to meet the largest of the following instream flow needs as determined on a case-by-case basis:" (1) interstate compacts, (2) navigation, (3) fish and wildlife, (4) water quality, and (5) aquifer recharge.

After minimum flows are established, non-riparian permits may be applied for from "excess surface water." Excess surface water means twenty-five percent (25%) of the amount of water available on an average annual basis from any watershed basin above that amount required to satisfy all of the following:

- Existing riparian rights as of 1989 water year
- The water needs of federal water projects existing on June 28, 1985
- The firm yield of all reservoirs in existence on June 28, 1985
- Maintenance of instream flows for fish and wildlife, water quality, aquifer recharge requirements, and navigation
- Future water needs of the basis of origin as projected in the state's Water Plan

Minimum streamflow is important because of its relevance to the ANRC's planning in the case of a possible shortage. Separate and apart from its use in this way, minimum streamflows are also used to determine when excess surface water is available for transfers to non-riparians. Arkansas's riparian rights doctrines are yielding to state systems of oversight based on depleted aquifers and increased demands. For more information on Arkansas's water resources and rules go to <http://www.anrc.arkansas.gov/>.

#### **4. Arkansas Brownfield Program**

Arkansas's voluntary cleanup act (Ark. Code Ann. § 8-7-1101 *et seq.*) and the Commission's Regulation 29 govern brownfield redevelopment. Brownfields are properties that may have been contaminated by prior commercial, industrial, or agricultural use. These initiatives concern contaminated property or property perceived to be contaminated and are designed to encourage parties that have no responsibility for the site's condition to assist in returning the property to productive use. Before possibly contaminated property is acquired, the brownfield redevelopment program should not be overlooked. It is important to note, however, that parties, including lenders, are ineligible to participate in the program if they, either through affirmative action or omission, caused or contributed to the contamination.

## **5. Permitting**

As noted, Arkansas law requires a disclosure statement to be submitted as part of all permit applications. The disclosure statement requires identification of the principals of the applicant and whether the applicant or its principals have a history of environmental compliance or noncompliance both in Arkansas and other states. This application must be filed both on initial permitting and on any requests for a permit transfer and is required in all ADEQ permitting decisions.

## **6. Administrative Procedures**

Under Arkansas law, its Administrative Procedures Act does not apply to the ADEQ. Careful attention must be paid to Regulation 8 in all hearings, permit proceedings, rulemaking and other ADEQ actions. This regulation was rewritten in 2009, including the requirement that a corporation be represented by counsel in an adjudicatory proceeding (Reg. 8.602). Definitions were added for major modifications and administrative permit amendments. Provisions for filing pleadings and public comments by fax and electronically were added. Provisions to address statutory disclosure statements, interim authority and variances were added.

## **XII. LICENSED PROFESSIONS/BUSINESSES IN ARKANSAS**

Arkansas regulates the business practices and registration of participants in varying industries. While the below information contains information on the many industries which are regulated, practitioners should carefully review Arkansas law, specifically including but not limited to Title 17 of the Arkansas Code Annotated, to determine whether a particular trade or industry is regulated. Chapters 10 through 107 of Title 17 each govern specific trades or industries.

### **A. Legal Licensing and Regulation**

Admission to practice law in Arkansas is governed by Amendment 28 to the Arkansas Constitution and the rules promulgated by the Arkansas Supreme Court. Arkansas requires a degree from a law school accredited by the American Bar Association and a passing score on the Arkansas Bar Exam. The application form for the Arkansas Bar Exam may be downloaded from the Arkansas Judiciary website at <http://courts.state.ar.us> or may be requested from the State Board of Law Examiners, 120 Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201, (501) 374-1855.

The bar exam lasts two days. The first day is composed of both the Multi-State Performance Test (“MPT”) and the Multi-State Essay Examination (“MEE”). The second day includes the Multi-State Bar Examination (“MBE”). Although Arkansas uses the same test that is administered in Uniform Bar Exam (“UBE”) districts, it uses a proprietary grading scale which does not mirror the UBE grading scale.

In addition, as a prerequisite to admission to the Bar of Arkansas, the applicant must be of good moral character and must have successfully complete the Multistate Professional Responsibility Examination (“MPRE”) by obtaining a scaled score of 85 or more. It is the applicant’s responsibility to timely arrange transfer of MPRE scores to Arkansas.

Licensed, active attorneys are required to complete twelve (12) hours of continuing legal education, at least one of which must be in ethics, between July 1 and June 30 of each year.

### **B. Medical Licensing and Regulation**

#### **1. Requirements for Physicians**

There are several requirements to become a physician in Arkansas. First, one must be 21 years of age and must be of good moral character. An applicant will not be admitted if he or she has been found guilty of certain acts constituting unprofessional conduct, as defined in the Arkansas Medical Practices Act (Ark. Code Ann. § 17-95-409). Among these acts are the conviction of felonies or crimes “involving moral turpitude”; fraud in the application for a license, taking of the examination, or renewal of a license; violation of certain drug-related laws; aiding or abetting an unlicensed person to practice medicine; alcoholism; malpractice; drug or substance addiction; and certain mental diseases. The applicant must complete a background check.

The applicant must be a graduate of an approved medical school and pass a licensing examination. The applicant must have taken and passed within three attempts all steps of the United States Medical Licensing Exam (“USMLE”), or other approved examination, including the Federal Licensing Exam (“FLEX”), National Boards, National Board of Osteopathic Exam, Comprehensive Osteopathic Medical Licensing Exam (“COMLEX”), Licentiate of the Medical Council of Canada Qualifying Exam (“LMCC”), or state exams taken prior to 1975. The applicant must have completed one year as an intern or resident in an accredited program.

If the applicant is an international medical graduate, he or she must meet more stringent requirements. The further requirements include:

- (1) verification of:
  - (i) three years of an internship or residency in an ACGME approved program in the United States; or
  - (ii) three years served as an intern or resident in a postgraduate medical education program outside the United States, in addition to completion of one year of fellowship training in an ACGME approved program in the United States, and board certification by the American Board of Medical Specialties;
- (2) proof of certification of a Standard Educational Commission for Foreign Medical Graduates (“ECFMG”); and
- (3) verification that the applicant has taken and passed, within three attempts, all steps of the USMLE.

The completed application with the appropriate fee and documentation should be sent to the Arkansas State Medical Board, Attn: Licensure Department, 1401 W. Capitol Avenue #340, Little Rock, Arkansas 72201. The State Medical Board may also be contacted at (501) 296-1802 and **[www.armedicalboard.org](http://www.armedicalboard.org)**. The State Medical Board’s website was the source of the information in this section. The application may be reviewed at [https://www.armedicalboard.org/Professionals/pdf/MD\\_AppPack.pdf](https://www.armedicalboard.org/Professionals/pdf/MD_AppPack.pdf).

## **2. Requirements for Respiratory Care Therapists**

Persons seeking licensure for respiratory care in Arkansas must be at least 18 years of age and of good moral character. They must have completed a high school diploma or equivalent and a respiratory care program approved by the Respiratory Therapy Examining Committee. They must also have passed the Certified Respiratory Therapy (“CRT”) examination. Applicants must submit an application to the Arkansas State Medical Board (“ASMB”) and pay a licensing fee.

The application should include certain documents as required, including but not limited to a passport photo, a Rules and Regulations Affidavit, a driver's license, and proof of citizenship.

Act 1249 of 2005 requires the ASMB to conduct criminal background checks (both state and federal) on all applicants for licensure. If the applicant has been practicing outside Arkansas, the applicant must provide verification of state license from the other state(s) where a license has been or is currently held by the applicant.

Persons seeking a temporary license should submit a completed application to the ASMB. Subject to Regulation 10 of the Regulations Governing the Licensing and Practice of Respiratory Care Practitioners, the Board may issue a temporary permit without examination to practice respiratory care to persons who are not licensed in other states but otherwise meet the qualifications for licensure. A temporary license generally may not extend beyond six months.

The State Medical Board's website, [www.armedicalboard.org](http://www.armedicalboard.org), was the source of the information in this section. Applications may be found at [http://www.armedicalboard.org/professionals/pdf/RC\\_AppPack.pdf](http://www.armedicalboard.org/professionals/pdf/RC_AppPack.pdf) and may be delivered to Arkansas State Medical Board, Attn: Licensing, 1401 West Capitol Avenue #340, Little Rock, Arkansas 72201.

### **3. Requirements for Occupational Therapists**

Persons seeking a full license must submit a completed application to the Arkansas State Medical Board. The applicant must be at least 18 years of age and of good moral character. The applicant must have successfully completed the academic requirements of an educational program in Occupational Therapy. The applicant must have successfully completed a period of supervised field work and have passed an examination as approved by the Board.

Act 1249 of 2005 requires the ASMB to conduct criminal background checks (both state and federal) on all applicants for licensure.

Applicants may also apply for a Temporary License to practice until the examination requirement has been met. A Temporary License can only be issued when the application process is completed and is ready for Board approval. A Temporary License will expire in thirty days and can be extended one time.

The State Medical Board's website, [www.armedicalboard.org](http://www.armedicalboard.org), was the source of the information in this section. The application may be retrieved at [https://www.armedicalboard.org/Professionals/pdf/OT\\_AppPack.pdf](https://www.armedicalboard.org/Professionals/pdf/OT_AppPack.pdf) and may be delivered to Arkansas State Medical Board, Attn: Licensing, 1401 West Capitol Avenue #340, Little Rock, Arkansas 72201.

#### 4. Requirements for Physician Assistants

An applicant for a Physician Assistant license must submit an application composed of various forms approved by the ASMB. The applicant must have successfully completed an educational program for Physician Assistants or Surgeon Assistants accredited by the Committee on Allied Health Education and Accreditation, or by its successor agency, and must have passed the Physician Assistant National Certifying Examination administered by the National Commission on Certification of Physician Assistants. The applicant must certify that he or she is mentally and physically able to practice safely as a physician assistant; has no licensure, certification, or registration as a Physician Assistant under current discipline, revocation, suspension, or probation for cause resulting from the applicant's practice as a Physician Assistant; and is of good moral character. The applicant must be at least 21 years of age. Act 1249 of 2005 requires the ASMB to conduct criminal background checks (both state and federal) on all applicants for licensure.

In addition, the applicant must have at least a bachelor's degree in some field of study from a regionally accredited college or university, unless the applicant satisfies one of the following criteria:

- (1) has prior service as a military corpsman and is a graduate of a Physician Assistant education program recognized by the Committee on Allied Health Education and Accreditation or the Commission on Accreditation of Allied Health Education Programs, or is currently certified by the National Commission on Certification of Physician Assistants;
- (2) was serving as a Physician Assistant in a federal facility located in Arkansas on or after July 1, 1999, and was a graduate of a Physician Assistant education program recognized by the Committee on Allied Health Education and Accreditation or the Commission on Accreditation of Allied Health Education Programs;
- (3) was licensed in good standing on June 30, 1999, by the Arkansas State Medical Board; or
- (4) was enrolled on or before July 1, 1999 in a Physician Assistant program recognized by the Commission on Accreditation of Allied Health Education Programs.

The State Medical Board's website, [www.armedicalboard.org](http://www.armedicalboard.org), was the source of the information in this section. The application may be retrieved at [https://www.armedicalboard.org/Professionals/pdf/PA\\_AppPack.pdf](https://www.armedicalboard.org/Professionals/pdf/PA_AppPack.pdf) and may be delivered to Arkansas State Medical Board, Attn: Licensing Department, 1401 West Capitol Avenue #340, Little Rock, Arkansas 72201.

#### 5. Requirements for Medical Corporation

To obtain a medical corporation license, the applicant must submit a completed and notarized Application for Registration along with the requisite fee and a certified copy of the Articles of Incorporation or Articles of Organization to the ASMB. All officers, directors, and shareholders must hold and maintain a permanent Arkansas medical license. Ark. Code Ann. § 4-29-307.

The State Medical Board's website, [www.armedicalboard.org](http://www.armedicalboard.org), was the source of the information in this section. The application may be retrieved at [https://www.armedicalboard.org/Professionals/pdf/MC\\_AppPack.pdf](https://www.armedicalboard.org/Professionals/pdf/MC_AppPack.pdf).

## **C. Other Types of Business Regulations and Licensing Requirements**

### **1. Alcohol Licenses**

The Alcoholic Beverages Control Division ("ABC") of the Department of Finance and Administration conducts a four-hour educational seminar twice monthly. Applicants who wish to receive a permit to serve alcohol are required to attend the seminar before a permit is issued, even if the applicant is buying a business with an existing permit. The duties of the Administrative Division of the ABC are to receive applications and issue, refuse to issue, suspend, or revoke permits to manufacture, wholesale, retail, and transport alcoholic beverages in Arkansas. The Administrative Division also promulgates and adopts rules and regulations necessary to comply with Arkansas alcoholic beverage control laws, and it conducts hearings regarding the cancellation, suspension, or revocation of any and all alcoholic beverage permits.

The Enforcement Division of the ABC enforces all laws and regulations pertaining to the sale of alcoholic beverages and cigarettes in Arkansas, and it trains and assists all law enforcement agencies with respect to alcoholic beverages. Agents of the Enforcement Division conduct inspections, report on applications, investigate violations, apprehend violators, and investigate and inspect damaged shipments of controlled beverages that have been involved in a fire, vehicle accident, or other casualty to certify the extent and amount of damage for taxation purposes. The agents also answer alcohol-related complaints, confiscate unlicensed alcoholic products, and perform other special assignments. All ABC Enforcement agents must be certified law enforcement officers.

For more information, contact the ABC at Alcoholic Beverages Control Division, Administrative Division, 1515 West Seventh Street, Suite 503, Little Rock, Arkansas 72201, (501) 682-1105, or visit the ABC's website at [www.state.ar.us/dfa/abcadministration](http://www.state.ar.us/dfa/abcadministration), which was the source of the information provided in this section.

### **2. Architects**

When the Arkansas State Board of Architects issues a Certificate of Registration to an architect, it entitles that person to assume the title of "Architect" and practice the profession of architecture in Arkansas. In order to practice in a manner other than as an individual, such as in a firm, business corporation, partnership, or limited liability corporation, additional registration is required. *See* Ark. Code Ann. § 17-15-303. The completed application, with the requisite

fees, should be sent to the National Council of Architectural Registration Boards (“NCARB”) in Washington D.C. for processing. The NCARB’s website is [www.ncarb.org](http://www.ncarb.org). Applications will not be considered without the required fee of \$250.00 paid by certified check or money order payable to the Arkansas State Board of Architects.

In order to qualify for an individual license, an applicant must, among certain other requirements:

- (1) hold a professional degree in architecture from a program accredited by the National Architectural Accrediting Board (“NAAB”);
- (2) enroll in the NCARB Intern Development Program one year prior to applying for the exam;
- (3) successfully complete the Intern Development Program; and
- (4) successfully pass the Architecture Registration Examination.

Applicants are not required to reside in Arkansas, but nonresident applicants must satisfy the Arkansas requirements for licensure.

To become licensed by reciprocity, an applicant must:

- (1) hold a current Certificate from NCARB;
- (2) hold a current license to practice architecture in another state;
- (3) complete the Arkansas application form from NCARB, which can be obtained from NCARB’s website at [www.ncarb.org](http://www.ncarb.org); and
- (4) submit to NCARB the completed application and a certified check or money order payable to the Arkansas State Board of Architects in the amount of \$250.00.

All applications for registration by reciprocity must be accompanied by an NCARB Blue Cover Council Certificate. The application will be reviewed and processed once the Council Certificate is received.

There are additional requirements for applicants seeking a professional organization license. Arkansas State Board of Architects Rules and Regulations Section XI(A)(1) states as follows: “Any corporation, professional corporation, and/or any partnership, whether organized under the laws of this or any other jurisdiction, may not offer to engage in or engage in the practice of architecture in the State of Arkansas until such corporation or partnership has obtained a certificate of authorization issued by the Board . . .” Therefore, a firm may not practice architecture until it has successfully registered with the Board. If the firm does not have a professional organization license issued by the Board, the firm’s name cannot appear on any plans, display signs, etc.

To be eligible for a professional organization license, two-thirds (2/3) of the partners or directors must be registered under the laws of any state to practice architecture or engineering, and the person having the practice of architecture in his or her charge must be a partner or a director who is registered to practice architecture in Arkansas. Ark. Code Ann. § 17-15-303. Once it is determined that applicant is qualified to receive a professional organization license, the applicant must do the following:

- (1) Complete an application supplied by the Board;
- (2) If applying as a corporation, the application must be accompanied by articles of incorporation certified by the Secretary of State of the jurisdiction where the corporation is organized, or if applying as a partnership or limited liability organization, the application must be accompanied by a certified copy of the articles or organization;
- (3) If the corporation is organized under the laws of a jurisdiction other than Arkansas, the applicant must register as a foreign corporation with the Arkansas Secretary of State and include a copy of the registration from the Arkansas Secretary of State with the application. The Arkansas Secretary of State can be contacted at State Capitol, Room 256, Little Rock, Arkansas 72201, (501) 682-1010, [www.sos.arkansas.gov](http://www.sos.arkansas.gov);
- (4) Submit a fee of \$250.00 with the application;
- (5) Renew the Certificates of Authorization annually by the 31st of December; and
- (6) Report to the Board within 30 days any changes which occur in the information provided on the application.

The Arkansas State Board of Architects website, <http://www.state.ar.us/arch>, was the source of the information in this section.

### **3. Collection Agencies**

The licensing requirements of collection agencies are prescribed under the Arkansas Collection Agency Act (Ark. Code Ann. § 17-24-101 *et seq.*). An applicant must be at least 21 years of age. If a partnership is the applicant, all partners must be 21 years of age. If a corporation is the applicant, at least 50% of the stock must be owned by persons at least 21 years of age. Generally, law enforcement personnel are prohibited from being licensed in any manner to operate a collection agency.

Unless licensed under this Act, it is unlawful for any person or entity to (1) engage in collecting delinquent accounts, bills, or other forms of indebtedness; (2) use a fictitious name or any name other than their own in collecting their own accounts receivable; (3) solicit claims for collection; and (4) purchase and attempt to collect delinquent accounts or bills. Ark. Code Ann. § 17-24-301. Licensees must provide a bond in an amount not less than \$5,000 and not more

than \$25,000 for each location. Ark. Code Ann. §§ 17-24-301, 17-24-306. Detailed information regarding licensing requirements may be obtained from the State of Arkansas, State Board of Collection Agencies, Lafayette Building, 523 South Louisiana Street, Suite 460, Little Rock, Arkansas 72201, (501) 376-9814, or visit the Board's website at [www.asbca.org](http://www.asbca.org), which was the source of the information in this section.

#### **4. Engineers and Land Surveyors**

The “practice of engineering” is “any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge in the mathematical, physical, and engineering sciences to services or creative work such as consultation, investigation, evaluation, planning, and design of engineering works and systems relating to the use of air, land, water, municipal and regional planning, forensic services, engineering teaching of advanced engineering subjects or courses related thereto, engineering surveys, and the inspection of construction for the purpose of assuring compliance with drawings and specifications, any of which embraces service or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, or projects including such architectural work as is incidental to the practice of engineering.” Ark. Code Ann. § 17-30-101(4)(A).

An engineer licensed under Arkansas law has the legal authority “to provide consultation, investigation, evaluation, planning, and design of buildings intended for accommodation of equipment, vehicles, goods, and/or processes or other utilitarian functions with human occupancy including office space as required for the support of these functions, provided the engineer is practicing within his or her area of competency as defined by [Arkansas law].” Ark. Code Ann. § 17-30-104.

Each applicant for registration must take an examination by the State Board of Registration for Professional Engineers and Land Surveyors (the “State Board”), and, if found to be qualified, will be registered, depending on his or her education and experience, either as a professional engineer or an engineer-intern. A person may apply to be registered as an engineer if he or she is a graduate of an Accreditation Board for Engineering and Technology, Inc. approved engineering curriculum, or its equivalent as approved by the State Board, has had four years from a school or college approved by the State Board, and has had four years of experience in engineering work of a type satisfactory to the State Board. In its discretion, the State Board may consider satisfactory graduate study in engineering equal to one year of experience. A person may apply to be registered as an engineer-intern if the applicant is a graduate of an approved Accreditation Board for Engineering and Technology, Inc., or its equivalent as approved by the State Board, and has engineering curriculum of four years from a school or college approved by the State Board. Ark. Code Ann. § 17-30-302.

To apply for registration as a professional engineer or engineer-intern, or for reciprocity registration, contact the Arkansas State Board of Registration for Professional Engineers and Land Surveyors at Arkansas State Board of Registration for Professional Engineers and Land Surveyors, 623 Woodlane Avenue, P.O. Box 3750, Little Rock, Arkansas 72203 (501) 682-2824, or visit the State Board's website at [www.state.ar.us/pels](http://www.state.ar.us/pels).

## **5. Financial Advisors, Stock Brokers, Etc.**

An applicant for registration as an investment adviser or investment adviser representative in Arkansas must provide the Securities Commissioner with proof of a passing score on one of the following examinations: (1) the Uniform Investment Adviser Law Examination (Series 65 examination); or (2) the General Securities Representative Examination (Series 7 examination) and the Uniform Combined State Law Examination (Series 66 examination). This examination requirement is waived for individuals holding certain professional designations.

Any individual who is currently registered as an investment adviser or investment adviser representative in any jurisdiction in the United States is not required to satisfy the examination requirements for initial registration, but that the Securities Commissioner may require any individual who has violated any state or federal securities law to take additional examinations. Additionally, an individual who has not been registered in any jurisdiction for two years is required to comply with the examination requirement above.

For additional information, applicants can contact the Arkansas Securities Department, Heritage West Building, Suite 300, 201 E. Markham Street, Little Rock, Arkansas 72201, (501) 324-9260, [www.securities.arkansas.gov](http://www.securities.arkansas.gov), which was the source of the information in this section.

## **6. Insurance**

The Arkansas Insurance Department License Division is responsible for licensing and appointing resident and nonresident producers and agencies that solicit or sell insurance in Arkansas. The License Division also licenses individuals and entities as agent producers, broker producers, adjusters, consultants, surplus lines producers, third party administrators, and viatical providers and brokers.

The requirements for licensure and appointment vary for individuals and entities depending on the type of license sought. The insurance commissioner is required to examine the affairs, transactions, accounts, records, market activity, and assets of each insurer as the Commissioner deems necessary in his or her discretion. Ark. Code Ann. § 23-61-201.

For more information, contact the Arkansas Insurance Department at 1200 West Third Street, Little Rock, Arkansas 72201, (501) 371-2600 or (800) 282-9134, or visit the Department's website at [www.insurance.arkansas.gov](http://www.insurance.arkansas.gov).

## **7. Public Accountancy**

First-time applicants for a certificate in public accountancy must meet certain education requirements outlined at Rule 3 of the Arkansas State Board of Public Accountancy Rules and Regulations. The education requirements include attainment of a graduate or undergraduate degree from an accredited institution, either of which includes at least thirty (30) credit hours of

business classes, and thirty (30) upper-level or twenty (20) graduate-level credit hours in accounting.

Applicants for the CPA exam must complete the form provided by the Board, and Board must receive the application by the date specified on the application form. An application is not complete until the Board has received the applicable fees and supporting documentation, including proof of identity, official transcripts, and proof of satisfaction of the education requirement.

A candidate for the CPA exam may take the required test sections individually and in any order. Credit for passing any test section is valid for eighteen (18) months from the date of the exam. For more information, please refer to Ark. Code Ann. § 17-12-101 *et seq.* or contact the Arkansas State Board of Public Accountancy, 101 East Capitol, Suite 450, Little Rock, Arkansas 72201, (501) 682-1520, or visit the Board's website at [www.arkansas.gov/asbpa](http://www.arkansas.gov/asbpa), which was the source of the information in this section.

## **8. Real Estate/Environmental Licenses**

Arkansas law charges the Arkansas Real Estate Commission (the "Commission") with the responsibility of administering the Real Estate License Law (Ark. Code Ann. § 17-42-101 *et seq.*), the Real Estate Recovery Fund (Ark. Code Ann. § 17-42-401 *et seq.*), the Continuing Education Program (Ark. Code Ann. § 17-42-501 *et seq.*), and the Arkansas Time-Share Act (Ark. Code Ann. § 18-14-101 *et seq.*).

The Real Estate Commission can be contacted at 612 South Summit Street, Little Rock, Arkansas 72201-4740, (501) 683-8010, or visit their website at [www.state.ar.us/arec](http://www.state.ar.us/arec), which was the source of the information in this section.

The Licensing section of the Commission is responsible for reviewing applications of individuals who are applying to take the Arkansas real estate exam, issuing licenses to persons who enter the profession, annually renewing licenses issued to real estate brokers and salespersons, maintaining current license data and history for each licensee, and maintaining continuing education data for each licensee. Licensure applicants are examined for competency in the real estate profession by a professional testing company. The Investigative Section of the Commission is responsible for investigating public complaints regarding alleged violations of the Real Estate License Law or Time-Share Law.

To obtain a license, a Salesperson Applicant must meet the following requirements:

- (1) have reached the age of eighteen (18);
- (2) successfully complete sixty (60) classroom hours of real estate education, at least thirty (30) of which must be in the basic principles of real estate, from an accredited postsecondary school or a school or organization licensed by the Arkansas Real Estate Commission;

- (3) pass the licensure examination;
- (4) submit the proper forms and fees to the Arkansas Real Estate Commission no later than ninety (90) days after passing the examination; and
- (5) complete an additional eighteen (18) classroom hours of post-licensure education within twelve (12) months following licensure. Such post-licensure must be obtained from an approved provider in the subject areas required by the Commission.

A Broker Applicant must meet the following requirements:

- (1) have reached the age of eighteen (18);
- (2) successfully complete, within the previous thirty-six (36) months, sixty (60) classroom hours of real estate education instruction in real estate principles, license law, and commission regulations from an accredited postsecondary school or a school or organization licensed by the Arkansas Real Estate Commission;
- (3) have been licensed as an active real estate salesperson or broker for a period of not less than twenty-four (24) of the previous forty-eight (48) months immediately preceding the date of application; however, upon written request, such experience requirement may be waived for a real estate broker applicant who has either held an active real estate broker's license for a period of not less than eighteen (18) months or has acceptable experience in a field related to real estate for at least twenty-four (24) of the previous forty-eight (48) months;
- (4) pass the licensure examination;
- (5) send the proper forms and fees to the Arkansas Real Estate Commission no later than ninety (90) days after passing the examination; and
- (6) complete an additional thirty (30) classroom hours of post-licensure education within twelve (12) months following licensure. Such post-licensure must be obtained from an approved provider in the subject areas required by the Arkansas Real Estate Commission.

A Salesperson Applicant currently licensed in another state and seeking licensure in Arkansas at the same level may request a waiver of the general portion of the examination. An applicant who meets all three of the following requirements may be required to take only the Arkansas law portion of the examination:

- (1) The applicant has passed a uniform, general, or multi-state part of an examination for a real estate license in another state in which the examination is determined by the Commission to meet generally acceptable standards of real estate testing;
- (2) The other state requires a minimum passing grade no lower than that required for the general part of the Arkansas examination (70); and

- (3) The applicant is licensed in the other state at the time of taking the Arkansas examination. See Commission Regulation 4.2(d).

The Commission accepts applications for licensure prior to the applicant's completing of the sixty (60) hour pre-licensing course; however, the applicant is required to submit proof of completing the education requirement before the applicant will be eligible to sit for the exam.

## **8. Medical Marijuana Industry Members and Patients**

In 2016, Arkansas voters passed the "Arkansas Medical Marijuana Amendment of 2016" (the "Amendment"), which is codified as the 98<sup>th</sup> Amendment to the Constitution of the State of Arkansas of 1874. The Amendment allows for the manufacture, growing, sale, and usage of certain marijuana products for medicinal purposes. Any involvement with medical marijuana is highly regulated by a triad of state agencies, including the Arkansas Medical Marijuana Commission, the Arkansas Alcoholic Beverage Control Division, and the Arkansas Department of Health.

The Arkansas Alcoholic Beverage Control Division governs the operations and compliance of cultivation facilities and dispensaries within the state. It is tasked with promulgating requirements for record keeping, security, facility personnel, manufacturing, processing, packaging, dispensing, disposing, advertising, marketing, and inspection of facilities. It also possesses the authority to sanction, suspend, or terminate licenses for rule violations. The Arkansas Alcoholic Beverage Control Division publishes its Rules and Regulations Governing the Oversight of Medical Marijuana Cultivation Facilities and Dispensaries at its website, [http://www.dfa.arkansas.gov/offices/abc/Documents/ABC\\_MMRules.pdf](http://www.dfa.arkansas.gov/offices/abc/Documents/ABC_MMRules.pdf).

The Arkansas Medical Marijuana Commission is an independent subdivision of the Arkansas Department of Finance and Administration. The Commission is tasked with promulgating the Rules and Regulations Governing the Application For, Issuance, and Renewal of Licenses for Medical Marijuana Cultivation Facilities and Dispensaries in Arkansas. The Rules govern the license application procedure for industry participants, including cultivation centers, dispensaries, transporters, distributors, and processors. Applications are reviewed by the Commission and licenses are awarded by the Commission based upon a merit process. The Amendment allows a maximum outstanding issuance of forty (40) dispensary licenses and a maximum of eight (8) cultivation facility licenses. Although Act 642 of 2017 outlines some requirements for licensing of transporters, distributors, and processors, the procedures to apply for a license for these types of entities have not yet been promulgated by the Commission as of year-end 2017.

To apply for a dispensary or cultivation license, applicants must meet the stringent requirements outlined in the Rules and submit the applicable fee to the Medical Marijuana Commission. The Medical Marijuana Commission Rules are published at its website, <http://www.mmc.arkansas.gov/Websites/mmsar/images/MMCMedicalMarijuanaRules.pdf>.

The Arkansas Department of Health issues the Rules and Regulations Governing Medical Marijuana Registration, Testing, and Labeling in Arkansas. The Rules are designed to govern the application for and renewal of registry identification cards for qualifying patients and designated caregivers. The Rules also establish labeling and testing standards for distribution of marijuana. Finally, the Rules govern the modification of the list of Qualifying Medical Conditions under the Amendment.

Qualifying Patients under the Amendment may be issued a registry identification card to purchase, possess, and use marijuana if they submit certain identifying information, a fifty-dollar (\$50) application fee, and a written certification provided by a physician which documents the person's need to use marijuana. Physicians may complete a written certification if a person has a Qualifying Medical Condition. Under the Amendment, current Qualifying Medical Conditions include:

- (1) Cancer, Glaucoma, HIV/AIDS, Hepatitis C, Amyotrophic Lateral Sclerosis, Tourette's Syndrome, Crohn's Disease, Ulcerative Colitis, Post-Traumatic Stress Disorder, Severe Arthritis, Fibromyalgia, Alzheimer's Disease, or the treatment of these conditions; and
- (2) A chronic or debilitating disease or medical condition or its treatment that produces at least one of the following: Cachexia or Wasting Syndrome, Peripheral Neuropathy, Intractable Pain, Severe Nausea, Seizures, Epilepsy, Severe and Persistent Muscle Spasms

The Arkansas Department of Health's Rules may be found at its website, [http://www.healthy.arkansas.gov/images/uploads/rules/Medical\\_Marijuana\\_Emergency\\_Rule\\_4-27-2017\\_\(Signed\).pdf](http://www.healthy.arkansas.gov/images/uploads/rules/Medical_Marijuana_Emergency_Rule_4-27-2017_(Signed).pdf).

## **XIII. LEGAL SYSTEMS**

### **A. Federal Courts**

#### **1. Overview**

Federal courts are the creation of the United States Constitution and federal statute and are arranged in a three-tiered system: (1) district courts which are the trial courts; (2) courts of appeal which hear all appeals from district courts; and (3) the United States Supreme Court, which hears appeals from the court of appeals. In Arkansas, as in all states, each district has four federal district court judges who are appointed by the President for life terms upon approval by the United States Senate.

Federal trial courts have limited jurisdiction over the types of civil cases they may hear. They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, and federal crimes, torts, and customs. Federal courts may only hear civil disputes that involve questions of federal law, or suits in which the amount in dispute exceeds \$75,000, and there is complete diversity of citizenship among the parties.

#### **2. Federal Courts in Arkansas**

Federal courts in Arkansas sit in one of two judicial districts: the Eastern and the Western Districts of Arkansas. Congress has further subdivided each district into judicial divisions.

The Federal District Court for the Eastern District of Arkansas sits in Helena as the Eastern Division, in Little Rock as the Western Division, in Pine Bluff as the Pine Bluff Division, in Batesville as the Northern Division, and in Jonesboro as the Jonesboro Division.

For the District Court for the Western District of Arkansas, court is held in Texarkana for the Texarkana Division, in El Dorado for the El Dorado Division, in Fort Smith for the Fort Smith Division, in Harrison for the Harrison Division, in Fayetteville for the Fayetteville Division, and in Hot Springs for the Hot Springs Division.

All appeals from federal courts in Arkansas are heard by the Eighth Circuit Court of Appeals, which sits in St. Louis, Missouri.

#### **3. Local Rules**

The workings of the federal district courts are governed by the Federal Rules of Civil Procedure. Like all federal courts, the Eastern and Western Districts of Arkansas have instituted a number of local rules governing practice and procedure in those courts.

### **B. Arkansas Courts**

The Arkansas judicial system's structure mirrors that of its federal counterpart. Disputes are tried before a trial court, and verdicts are appealable, usually to the Arkansas Court of

Appeals. Some appeals of trial court decisions can be taken directly to the Arkansas Supreme Court. In addition, the Arkansas Supreme Court may, but is not required to, entertain appeals from decisions of the Arkansas Court of Appeals.

A few notable differences distinguish the Arkansas court system from its federal counterpart. First, Arkansas has two levels of trial courts. Most actions begin in circuit courts, but minor misdemeanors and small claims matters can be heard in district and/or city courts. Second, the rules of appeal differ. All decisions of the district and city courts are appealable to the circuit courts. From the circuit court, most appeals make their way to the Arkansas Court of Appeals, but as noted, parties can take certain matters directly to the Arkansas Supreme Court.

## 1. Inferior Courts

**a. Description.** Inferior courts in Arkansas come in two sorts: district courts and city courts. Both hear minor misdemeanors and disputes with low amounts in controversy. The chief distinctions between the two are the jurisdiction of the court and the size of the community in which the court sits. District courts sit in larger communities and have county-wide jurisdiction; city courts sit in smaller communities and have city-wide jurisdiction.

**b. Jurisdiction.** District courts exercise county-wide jurisdiction over misdemeanor cases, preliminary felony cases, and civil disputes in matters of less than \$5,000. District court cases are tried without a jury. Each district court has the following subject-matter divisions: criminal, civil, traffic, and small claims. The small claims division permits citizens to represent themselves in minor civil matters. Collection agents and entities in the business of lending money at interest are not permitted to bring actions in small claims court. Other closely held corporations may sue and be sued in small claims court.

City courts exercise jurisdiction over the same minor civil and criminal cases that district courts hear. Unlike district courts, city courts' jurisdiction extends only within the limits of the incorporated city or township in which it sits.

## 2. Circuit Courts

**a. Description.** Most litigation in Arkansas begins in one of 28 circuit courts. The jurisdiction of most circuit courts covers a number of counties. Each circuit court consists of five subject-matter divisions: criminal, civil, probate, domestic relations, and juvenile. The number of judges in a circuit varies from 17 judges in the more populated circuits to one judge in rural areas. The judges are elected by the public to six-year terms.

**b. Jurisdiction.** Circuit courts have jurisdiction over all matters not otherwise assigned to a different court. Except for a rare number of cases over which the Arkansas Supreme Court exercises original jurisdiction, all lawsuits begin in circuit court. Circuit courts also serve an appellate function. All verdicts rendered in an inferior court may be appealed to the circuit court for a *de novo* trial.

### 3. Appellate Courts

**a. Arkansas Court of Appeals.** Most appeals first make their way to the Arkansas Court of Appeals. The Court of Appeals consists of 12 judges elected to eight-year terms from seven districts. The Court of Appeals exercises jurisdiction over all first appeals from circuit courts except those brought before the Arkansas Supreme Court.

**b. Arkansas Supreme Court.** The Arkansas Supreme Court is Arkansas's highest court. Seven justices sit on the court, each elected in statewide, non-partisan races to an eight-year term. The Supreme Court may accept appeals from the Court of Appeals at the Supreme Court's discretion. The Supreme Court has original appellate jurisdiction over eight types of appeals:

- all appeals involving the interpretation or construction of the Constitution of Arkansas;
- criminal appeals involving the death penalty or life imprisonment;
- petitions for quo warranto, prohibition, injunction, or mandamus directed to the state, county, or municipal officials, or to circuit courts;
- appeals pertaining to elections and election procedures;
- appeals involving the discipline of attorneys or arising under the power of the Supreme Court to regulate the practice of law;
- appeals involving the discipline and disability of judges;
- second or subsequent appeals following an appeal which has been decided in the Supreme Court; and
- appeals required by law to be heard by the Supreme Court.

The Supreme Court has original jurisdiction to (1) issue writs of quo warranto to persons holding judicial office, (2) answer questions of state law certified by a U.S. court, and (3) determine the sufficiency of state law regarding initiatives, referendum petitions, and proposed constitutional amendments.

### 4. Other Adjudicative Bodies

**a. State Claims Commission.** The Arkansas State Claims Commission has exclusive jurisdiction over all claims against the State of Arkansas, or its agencies, departments, or institutions. The Arkansas Constitution affords the state liberal sovereign immunity, which means Arkansas cannot be sued for damages in her own courts. The Commission exists to ameliorate that harsh prohibition. It serves as a fact-finding body for the General Assembly, conducts hearings, and accepts evidence on all types of claims, with the exception of certain, enumerated types of claims, including those arising under the Workers Compensation Act, the Employment Security Act, and the Teacher Retirement Act.

The Commission can award up to \$10,000 in damages to individuals it determines suffered injury due to the action of the state. For damages in excess of \$10,000, the Commission's award must be submitted to the Arkansas General Assembly for approval and

appropriation of funds. The only appeal from the Commission's decision is to the General Assembly.

The State Claims Commission consists of five members appointed by the governor to five-year terms. Two members must be attorneys, and one must be a public-spirited person of recognized standing.

**b. Public Service Commission.** The Arkansas Public Service Commission regulates all utility services and functions. Its rules apply to providers of telephone, water, electric, natural gas, and other utility services. The PSC is vested with expansive power to supervise public utilities. Among those powers, the PSC regulates rates for public utilities, determines the safe and adequate standards for furnishing utility services, assesses the value of property owned by public utilities for ad valorem taxes, and promulgates rules to insure that retail customers have access to safe, reliable, and affordable utility services. The PSC also has specifically designated enforcement powers, including the power to subpoena witnesses and records.

The PSC has three Commissioners, one of whom must be an attorney. All three are appointed by the governor for six-year terms.

**c. Workers' Compensation Commission.** The Workers' Compensation Commission enforces Arkansas workers' compensation laws. The Commission also regulates all claims and benefit payments to injured workers; processes settlements, lump sum payments, and requests for changes in physicians; ensures that employers maintain required insurance coverage; assists employers in acting as self-insurers; and works to explain the functions of the Commission to the general public.

When a dispute arises over the extent of disability or the fairness of compensation, the Commission, through its three Commissioners and a staff of Administrative Law Judges, adjudicates workers' compensation cases with binding decisions that are appealable to the Arkansas Court of Appeals and the Arkansas Supreme Court.

The Workers' Compensation Commission consists of three members appointed by the governor for terms of six years. One of the Commissioners represents the interests of labor, another represents the interests of management, and the Chairman acts a neutral party representing the interests of the public.

#### **XIV. ARKANSAS CONTACT INFORMATION**

State of Arkansas Home Page: **[www.state.ar.us](http://www.state.ar.us)**

Secretary of State  
State Capitol, Room 256  
Little Rock, AR 72201  
(501) 682-1010

State Chamber of Commerce: Arkansas State Chamber of Commerce  
1200 West Capitol Avenue  
P.O. Box 3645  
Little Rock, AR 72203-3645  
(501) 372-2222  
**[www.arkansasstatechamber.com](http://www.arkansasstatechamber.com)**

Tourism: Arkansas Department of Parks & Tourism  
One Capitol Mall  
Little Rock, AR 72201  
1 (800) Natural or 501-682-7777 (V/TT)  
**[www.arkansas.com](http://www.arkansas.com)**

Business Development: Arkansas Small Business & Technology  
Development Center  
2801 S. University  
Little Rock, AR 72204  
(501) 683-7700  
**[www.ualr.edu/asbdc](http://www.ualr.edu/asbdc)**

Institute for Economic Advancement  
University of Arkansas at Little Rock  
College of Business  
2800 South University  
Little Rock, AR 72204-1099  
(501) 569-8519  
**[www.ualr.edu/aedi](http://www.ualr.edu/aedi)**

## Contributing Editors

**Paul Parnell**

Supervising Editor

[pparnell@roslawfirm.com](mailto:pparnell@roslawfirm.com)

501-377-0436

**Erin Anderson**

Contributing Editor, Business Entities

[eanderson@roslawfirm.com](mailto:eanderson@roslawfirm.com)

501-377-0326

**Michael Goswami**

Contributing Editor, Tax and Licensing Professionals

[mgoswami@roslawfirm.com](mailto:mgoswami@roslawfirm.com)

501-377-0313

**Victoria Jones**

Contributing Editor, Environmental and Public Finance

[tjones@roslawfirm.com](mailto:tjones@roslawfirm.com)

501-377-0435

**Madeline Taylor**

Contributing Editor, Real Estate and Finance

[mtaylor@roslawfirm.com](mailto:mtaylor@roslawfirm.com)

501-377-0303