

# Prickly Pear

Legal Alerts for the Arizona Business Community  
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## Delaware Corporate Law Amended To Permit Protection Of Officers From Personal Liability For Breach Of Fiduciary Duty Claims

by Ken Witt and Geoffrey Neal

As anticipated in our earlier [Client Alert](#), Delaware has adopted an amendment to the Delaware General Corporation Law (DGCL) that will permit corporations to protect certain senior corporate officers from personal monetary liability for breach of the fiduciary duty of care. Delaware corporations have been able to protect directors from such liability since 1986, and the amendment to the DGCL will extend this permitted "exculpation" to officers.

Delaware Corporate Law - Continued on page 2

## 2022 AZ Legislative Update

by Daniel Romm and Marcus Osborn

The 55th Arizona State Legislature, 2nd Regular Session, adjourned *sine die* at 12:26 a.m. on Saturday, June 25, 2022 after 166 days.

At 166 days, the 2022 legislative session was tied for the fifth longest legislative session on record. Additionally, this year we witnessed the most pieces of legislation introduced in a single session with 1,851 bills, surpassing last year's record of 1,774; however, we fell short of last year's record number of bills signed into law by about 50 bills.

With the completion of his 8th legislative session, Governor Ducey became the first governor since Governor Jack Williams, five decades ago (1974), to complete two full terms in elected office. Previous twice-elected governors have all either been impeached (Mecham), resigned from office (Symington), died in office (Bolin), or were appointed to another position by the president of the United States (Castro, Napolitano).

### Back to Normal

Last year, the Arizona Legislature implemented a number of COVID-19 safety guidelines and protocols which essentially shut down most in-person activity at the Capitol; however, this session the Capitol complex returned to business as usual with all committee hearings and voting taking place in person. While a small handful of members still preferred to meet virtually, most interactions took place face to face and with minimal mask usage and social distancing. Additionally, unlike last year, Governor Ducey delivered his state of the state address in person to a joint session of the AZ Legislature.

Legislative Update - Continued on page 2



**Personal Property Tax Reform Legislation**

Earlier this session, the Legislature passed, and the Governor signed, a personal property tax reform bill, HB 2822, with bipartisan support that will dramatically simplify a complicated section of Arizona tax law.

In Arizona, compliance with business personal property tax is notoriously cumbersome. The Arizona Department of Revenue’s Business Personal Property Tax manual includes 76 pages of instructions and 49 pages of tables that explain how to value equipment ranging from cranes to TVs and chairs. The personal property tax requires businesses to pay taxes

on assets like machinery and equipment of all types, ranging from something as large as a farmer’s tractor all the way down to a simple laptop. The personal property tax is on top of the sales tax the buyer pays at the time of purchase.

HB 2822 sets the valuation factor at 2.5% for business personal property acquired after tax year 2022 in taxation classes 1, 2, and 6. These classes include commercial and industrial uses, agriculture, and non-profits.

The Arizona business community made passage of the bill one of its top priorities for the legislative session.

**COVID-19 Restrictions**

For the last couple of years, the Arizona Legislature has considered dozens of bills to limit public health measures in response to COVID-19 or the emergence of some other dangerous virus.

This session, Governor Ducey signed HB 2107, which prevents cities and counties from ordering business closures during an emergency. He also signed HB 2489 which prevents any level of government funded by taxpayers from requiring anyone to get a COVID-19 vaccination. This measure will prevent the COVID vaccine from ever being



The amendment will permit the exculpation of covered officers from fiduciary duty claims other than breaches of the fiduciary duty of loyalty, intentional misconduct or knowing violations of law, the same protection as afforded directors. However, unlike directors, officers may not be protected from claims made “in any action by or in the right of the corporation.” As a result, Delaware corporations will retain the right to bring actions against officers, and stockholder derivative claims may be brought against officers for breach of the duty of care if the demand requirements are met. Directors can be protected against a direct claim or class action brought by stockholders for breach of the duty of care. Retroactive amendments to the certificate of incorporation that would impose monetary liability on officers are prohibited.

The officers who may be covered by the expanded exculpation include the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer,

the company’s most highly compensated executive officers identified in SEC filings and certain other officers who have consented to be identified as an officer and to service of process.

This additional protection of officers is not automatically effective. The certificate of incorporation of the Delaware corporation must be amended to include the exculpation of liability, requiring the approval of the board of directors and stockholders. Newly incorporated Delaware corporations may include the provision in the originally filed certificate of incorporation.

If you have questions about amending the certificate of incorporation of your Delaware corporation to give effect to the exculpation of senior officers, you should consult with your Kutak Rock attorney, one of the attorneys listed on page 9 or any attorney in Kutak Rock’s [Business, Corporate & Securities Practice Group](#).



added to the list of required school vaccinations; however, it leaves private businesses free to impose vaccination requirements on their employees. Additionally, the governor signed HB 2616 which bars any school or government agency from requiring a face covering for anyone under the age of 18 without the written permission of the student's parent.

Several problematic bills that would have negatively impacted the business community were also introduced; however, they failed to advance. HB 2043, a bill sponsored by state representative Quang Nguyen, would have allowed an employee to recover no less than \$500,000 if their employer denied a religious exemption and required the employee to receive a COVID-19 vaccination as a condition of their employment and the person suffered a significant injury. This legislation, and others like it, failed.

### Election Bills

The specter of the 2020 election once again hung over Capitol proceedings, most notably with the Senate-assigned audit of Maricopa County's results. As a follow up to last year's 23 controversial election bills, the Arizona Legislature introduced well over 100 election-related proposals this session; however, most of them failed or were fairly benign with regard to impact.

Many of these election bills represent a broader attempt nationally by Republicans to change election laws following the challenges to the 2020 presidential election. They included raising the threshold for triggering an automatic recount in close elections, requiring the Arizona Department of

Game and Fish to hand out voter register forms when people sign up for hunting and fishing licenses, requiring court clerks to report new felony convictions monthly so voter registration can be canceled, and requirements for county officials to count and publicly report on the number of uncounted early ballots on election night, if practical. Additionally, the Legislature passed a bill that banned same-day voter registration; however, the practice is already illegal in Arizona, making the legislation simply a message bill from Republican lawmakers.

Legislative Democrats opposed most of the election proposals, stating that they were a misdirected attempt at changing election law to appease the Stop the Steal crowd. Additionally, they argued that the state's current election laws are working fine.

### Arizona Passes Historic Water Legislation

In his January state of the state address, Governor Ducey called for a major new investment in water. On the last day of the 2022 legislative session, the Arizona Legislature passed an historic water bill, SB 1740, with overwhelming bipartisan support.

As passed by the Legislature, SB1740 will greatly enhance the Arizona Water Infrastructure Financing Authority (WIFA), which will be responsible for managing a \$1 billion appropriation to address the water issues in our state. That money will be used for conservation, developing groundwater, or possibly importing water from other states.

WIFA is a statewide entity with the necessary new governance structure, duties, authorities, and staffing to

promote water conservation, while identifying and developing new, innovative long-term water sources.

Under the legislation, WIFA will be tasked with finding new water solutions, but will not be a regulatory body. WIFA will achieve this through limited ownership and control of new water resources, as well as by providing financing to other water projects.

This legislation contains strong guiding principles and a purpose statement that will help to create a focused vision for fiscally responsible implementation. The enhancement of WIFA will enable Arizona to take a proactive approach to water management rather than relying on the federal government.

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### Arizona Supreme Court Reinstates Historic Tax Cuts

Back in mid-April, the Arizona Supreme Court ruled that last year's historic income tax cuts cannot be referred to the November ballot. The Court ruled that the tax cut legislation, passed last session, cannot go to the ballot because it falls under the Arizona Constitution's "support and maintenance" exception for citizen referenda.

Under the new law, rates for most taxpayers will drop to a flat 2.5% and revenue would be cut by \$1.9 billion

once the tax cuts are fully in place. That's down from a range of 2.59% to 4.5%. This represents the largest tax cut in state history and the lowest flat tax in the nation.

The Legislature's budget analysts, JLBC, said the average Arizonan earning between \$75,000 and \$100,000 will save \$231 per year in state income taxes, and the average taxpayer earning between \$500,000 and \$1 million per year will save more than \$12,000.

### Arizona Expands School Voucher Program to All 1.1 Million Students

The Arizona Legislature passed the largest school voucher expansion in the country this session. House Bill 2853, sponsored by house majority leader representative Ben Toma, expands Arizona's Empowerment Scholarship Accounts in the 2022-2023 school year to all 1.1 million Arizona students who are eligible to enroll in any public school in the state, including a preschool program for students with disabilities, a kindergarten program, any student in grades 1 through 12 and any other student who otherwise does

not qualify for an ESA, and students who attended a nonpublic school for pupils with disabilities in the prior year. ESA dollars can be spent on anything a student needs, from tuition for a private school to tutoring or to homeschooling materials; however, the bill excludes allowing families to use ESA moneys to pay for computer hardware and technological devices primarily used for an educational purpose.

More than 11,775 students now use ESAs to attend private schools using public taxpayer dollars. The average student receives \$6,641, or about 90% of per-pupil funding for a student attending a district public school.

While the legislation was signed into law, Arizona voters may have the final say on the matter. The education group Save Our Schools Arizona, which advocates on behalf of public school education, successfully referred a previous expansion of the ESA voucher program to the ballot in 2018 which was overwhelmingly rejected by the voters. The group once again plans to refer this expansion to the ballot.

## Corporate Transparency Act Essentials: Everything You Need to Know Regarding the Forthcoming Regulations

by *Matthew Ditman*

In January of 2021 Congress enacted the Corporate Transparency Act ("CTA"), legislation that will create federal reporting requirements for millions of private companies that have never been required to disclose information about company ownership. New rules implementing the CTA will be put in place later in 2022.

If you set up a limited liability company for your small business, your company is now likely considered a "reporting company" that is required to report information to the Financial Crimes Enforcement Network ("FinCEN"), a division of the U.S. Treasury Department. Penalties for non-compliance with the CTA's reporting requirements can be quite severe, including \$500,000 fines and jail time, so it is paramount that all business owners understand how to properly navigate the CTA and forthcoming regulations.

Congress' intent behind the legislation is to prevent the use of anonymous shell and front companies for illegal purposes (like money laundering, terrorist financing, tax fraud, etc.) and to align the U.S. with international practice. To accomplish these objectives, the CTA will require certain legal entities to disclose those who control or own at least 25% of the company and those who organize the company. As currently drafted, FinCEN's CTA regulations will affect an estimated 30 million existing business entities and an additional 3-4 million new entities each year. If you are forming a company to (i) start a new business venture, (ii) operate as a holding company, (iii) acquire the assets of an existing company, or (iv) for any other purpose, there is a good chance that the CTA will impose reporting obligations on the company.

## Moving, Starting Or Growing Your Business In Arizona: A User's Guide

by *Christina Poletti*

Arizona is the third-fastest-growing state in the country, with job and economic forecasts among the best in the United States, and employment growth expected to be almost as strong. People are gravitating toward Arizona for not only some of the best restaurants and mountain views, but for the extremely business-friendly climate.

If you are looking to move your existing business to Arizona, interested in starting a new business in Arizona, or have an existing Arizona business that you are looking to grow, the following list of resources will help get you get started:

While FinCEN has yet to issue its final ownership reporting rules or set an effective date for the CTA, the proposed rule contains important information for individuals who form, own, or control business entities, including (1) who must comply with the CTA's reporting requirements, (2) what information must be reported to FinCEN, (3) who may access the information that is collected, (4) deadlines for reporting information to FinCEN, and (5) penalties for non-compliance with the CTA's reporting requirements.

### Who must comply with the CTA's reporting requirements?

Under the CTA, only "reporting companies" (both domestic and foreign) are required to submit reports containing "beneficial owner" and "company applicant" information to FinCEN. Generally, a "domestic reporting company" is any legal entity that is created by filing a document with a state's Secretary of State ("SOS") (or similar office), and a "foreign reporting company" includes entities formed under the laws of a foreign country that are registered to do business in the U.S. The reporting company definition would include any corporation, limited liability company, limited partnership or other entity that is formed by filing with an SOS.

While these definitions seem all-encompassing, the CTA provides twenty-three (23) specific exemptions from the definition of "reporting company," generally categorized as (i) "larger" companies that are already subject to significant state or federal regulation (e.g., public companies), (ii) service providers, and (iii) tax-exempt entities. One specific exemption

is for entities with an operating presence at a U.S. office with over 20 full-time employees, provided such entity filed federal income tax returns in the U.S. reflecting more than \$5 million in gross receipts or sales.

### What information must "reporting companies" report to FinCEN?

FinCEN's proposed regulations require reporting companies to report information about (i) the entity itself, (ii) the company's "beneficial owners," and (iii) the "company applicants."

To ensure each reporting company can be uniquely identified by FinCEN, a reporting company will be required to report its name, any alternative names through which the company is engaging in business (e.g., d/b/a names), its business street address, its jurisdiction of formation or registration, as well as a Taxpayer Identification Number ("TIN") or Employer Identification Number ("EIN").

In addition, a reporting company must report information about every "beneficial owner" and "company applicant." A beneficial owner is defined as any individual who (i) exercises substantial control over the reporting company,

or (ii) owns or controls at least 25% of the ownership interests of the reporting company. Generally, a company applicant is the individual who files to (1) form the entity (in the case of a domestic reporting company) or (2) register the entity to do business in the U.S. (in the case of a foreign reporting company). However, company applicants also include anyone who directs or controls these filings by another. In many cases, a reporting company might have several company applicants. For example, both the attorney who incorporates a company on behalf of a client, and the client individually, would be considered company applicants under FinCEN's proposed regulations.

Reporting companies must disclose each beneficial owner and company applicant's full legal name, date of birth, current residential or business street address, and either a unique identifying number from an acceptable identification document (e.g., a passport) or a FinCEN identifier (i.e., a unique identifying number FinCEN will issue to individuals upon request). This information is, of course, a treasure trove for identity thieves. One can only hope that FinCEN will be a more responsible custodian of this information than other federal agencies.

### When will reports to FinCEN be due?

The time at which a required report is due depends on (i) when the reporting company was created or registered, and (ii) whether the report is an initial report, an updated report providing new information, or a report correcting erroneous information in a previous report.

Reporting companies created or registered to

If you are forming a company to:

1. start a new business venture,
2. operate as a holding company,
3. acquire the assets of an existing company, or
4. for any other purpose,

there is a good chance that the CTA will impose reporting obligations on the company.



## 1. Getting Started

The Arizona Commerce Authority (“ACA”) provides a [free online checklist](#) designed to help new business owners navigate what is needed to get the business off the ground in Arizona. The checklist takes only about 10 minutes to complete and will generate resources and to-dos specific to you. The ACA also has [this helpful PDF](#) that outlines how to turn your idea into a functioning business. The PDF includes planning and communication tips, financial worksheets, and a list of research resources from across the state.

If you follow [this link](#), you’ll find a short 10-step guide curated by the Arizona Corporation Commission (“ACC”) outlining what you’ll need to start a business in Arizona. The ACC also has this [PDF of contact information](#) listing relevant state agencies that you may need while starting your business.

Once you have a general idea of the type of business you want to create, you’ll want to think of a business name. Make sure to check with the ACC that your business name is available in Arizona by visiting [this link](#) and searching the name you’d like to use for your business. Keep in mind that there may be certain naming requirements that correspond to your entity type.

The type of company you choose to set up is one of the first and most important decisions in creating a business. You must make an informed decision about which [Arizona entity type](#) is best for you. The most popular choices are corporations and limited liability companies (LLCs). It may be desirable to file a Subchapter S tax election for your corporation.

Once you have landed on your entity structure and name, you can reserve that name for up to 120 days, which will give you time to file the proper paperwork for your business and purchase a domain name. Name reservations are \$45 and can be coordinated [here](#).

## 2. Finding Funding

Securing capital can be one of the hardest parts of a new business venture and you must be careful to avoid hidden traps that may implicate securities laws or unwanted tax liability. While legal counsel should be involved if capital financing is sought, the ACA provides a very helpful resource for Arizona business owners, and [their website](#) periodically posts grant opportunities, competitions, tax relief programs, and more.

According to the ACA, the primary source of capital for most new businesses is from personal savings or other personal resources such as friends and family. However, for many businesses that are still interested in growing, owners look elsewhere for the capital to create a thriving business model. If you are interested in looking at other options for funding your business, take a look at the [ACA Financial Options and Funding Sources Guide](#). There you’ll find information on different types of loans, tips on applying for loans, available tax credits and other incentives, and links to local venture capital firms.

## 3. Growing Your Business

Arizona is the perfect place to grow your business and your network. There are many different business affiliations to belong to where you can meet likeminded individuals, expand your network, and make new connections. Joining a chamber of commerce is a great place to start, and the ACA compiled a [list of all of the chambers of commerce](#) and other associations across the state so you can find the best networking organization for you.

The state of Arizona, as well as the three major state universities, each have programs to help grow your business. Follow [this link](#) for a list of all relevant programs, such as ASU Venture Catalyst, Arizona Center for Innovation, and more.

Arizona is ready to be your business’s home, and we are here to help make your transition as smooth as possible. For more information regarding starting your business in or bringing your business to Arizona, contact any member of Kutak Rock’s Scottsdale Corporate & Securities Practice Group.

do business in the U.S. before the effective date of FinCEN's final reporting regulations will have one year from the effective date to file their initial report with FinCEN. Reporting companies created or registered on or after the effective date of the final regulations will be required to file their initial report with FinCEN within fourteen (14) calendar days of the date on which they are created or registered.

If there is a change in the information previously reported to FinCEN, reporting companies will have thirty (30) calendar days to file an updated report. Finally, if a reporting company filed information that was inaccurate at the time of filing, the reporting company will have to file a corrected report within fourteen (14) calendar days of the date it knew, or should have known, that the information was inaccurate.

**What are the penalties for non-compliance with the CTA's reporting requirements?**

Any individual, reporting company, or other entity who “willfully provides, or attempts to provide, false or fraudulent beneficial ownership information to FinCEN” or “willfully fails to report complete or updated beneficial ownership information to FinCEN” may be subject to both civil and criminal penalties. Such penalties for non-compliance include (i) a civil penalty of up to \$500 for each day a violation continues or has not been remedied, and (ii) a fine of up to \$500,000 and up to two (2) years’ imprisonment, or both, for criminal violations.

**Next Steps**

As noted above, FinCEN has yet to issue its final rule regarding the CTA's reporting requirements, but as Congressional pressure mounts to finalize the regulations, Kutak Rock is keeping close tabs on the situation and will continue to monitor any updates regarding the regulations.



If you have questions about how, if at all, the CTA will affect your business, or whether you will need to report under the CTA, please contact the Scottsdale Corporate & Securities Practice Group.

# The Future is DAO

*by Christina Ribble and London Burns*

Digital assets, including DAOs—Decentralized Autonomous Organizations—are increasingly growing in popularity in the global economy and becoming a mainstream investment vehicle due to the explosion of blockchain-based decentralized finance (DeFi) in recent years. The term “DAO” was coined by Vitaly Buterin, the founder of the Ethereum network, in 2014. Although bitcoin could be viewed as a species of DAO, DAOs are generally defined as online communities that control a cryptocurrency wallet (a “treasury”) to pursue common goals. Although there are many DAOs in operation today, there are a number of legal pitfalls to consider if you are planning on joining or organizing a DAO.

**What is a DAO?**

DAOs are member-owned communities that are built and maintained on a blockchain (most often, Ethereum) and that have a common purpose but without traditional, hierarchical leadership and organizational structure. Ethereum is a cryptocurrency network that allows tokens to be exchanged between wallets, and “smart contracts” to be written to control transactions. A smart contract is a piece of software that will execute a transaction or an event on a cryptocurrency network if conditions defined in the contract are satisfied. Smart contracts are the building blocks of DAOs.

A DAO is collectively owned and managed by the members, with transparent rules, decisions and transactions. DAOs usually have a treasury in the form of a cryptocurrency “wallet” that is funded by the members. Each DAO may have a different purpose related to an innumerable list of industries and possibilities.



DAO - Continued from page 7

Most DAOs issue a “token” — a cryptocurrency — that must be owned in order to become a member. Typically, you must obtain some ether (ETH) via an exchange like [Coinbase](#) or [Binance](#), send it to a wallet and then swap it for the DAO token in [Uniswap](#).

Interesting examples of DAOs include [LexDAO](#), which creates smart contracts capable of carrying out legal services, and [Decentraland](#), an online virtual world governed by a DAO. Decentraland is gaining traction among global brands like Morgan Stanley, Coca Cola, and Adidas as a means of reaching a wider digital audience. [BitDAO](#), a decentralized investment fund backed by PayPal founder Peter Theil, was created to allow anyone to buy a stake in new digital finance initiatives. The members (i.e., the token holders) of BitDAO are able to vote on how to manage capital and whether to invest in various projects.

A prominent local example of a DAO is [Dash](#), started here in Phoenix in 2017 in a business incubator at Arizona State University. Dash is an open-source cryptocurrency that is spawned from the bitcoin protocol. It is operated by a DAO run by a subset of its members, which are called “masternodes,” that manage, fund, maintain, improve and expand the project. Dash demonstrates the flexibility in DAO governance. Although member-managed, each member has a different weight to its votes.

### **What kind of liability may DAO members have for acts of the DAO?**

In May 2022 a class action lawsuit was filed against a DAO and its members seeking to recover \$55 million in cryptocurrency losses stolen during a hack of the DAO’s platform. The bZx protocol (governed by a DAO) enabled users to lend cryptocurrency tokens and earn interest on those tokens when other users borrowed them. The lawsuit alleges that the bZx DAO, its co-

liable for negligence by failing to adequately secure the platform. Joint and several liability means that each person (each member in this case) is independently liable for the full extent of the damages. The legal theory behind this claim rests on the undefined legal status of the bZx DAO, which the plaintiffs assert to be a general partnership. Unlike a limited partnership, a limited liability company or a corporation, the members of a general partnership are personally jointly and severally liable for the debts and obligations of the general partnership, without limit. It is difficult to dismiss this kind of risk for a DAO that is, like nearly all of them, not organized as a limited liability company, corporation or other legal entity that offers protection from liability.

To address this problem, [Wyoming’s new DAO Supplement statute](#) permits DAOs to organize and obtain legal status under state law as a form of limited liability company. See State of [Wyoming ST0039](#). Following Wyoming, Tennessee’s new DAO statute also allows DAOs to register as a type of limited liability company. See State of [Tennessee Amendment No. 1 to HB2645](#). Wyoming and Tennessee are currently the only states that have created definitive legislative guidance for the legal status of a DAO. (It should be noted, however, that organizing as an LLC gives rise to tax issues that are beyond the scope of this article.)

In a future article, we will address securities law issues presented by DAOs, including the federal Securities Act of 1933 and the Securities Exchange Act of 1934.

Arizonans who are interested in becoming members of DAOs, are currently members of a DAO, or are considering creating another DAO, should make educated decisions about the risks and possibilities of this novel form of business organization. If you have questions, please contact the Scottsdale Corporate & Securities Practice Group.

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