

How Wisconsin's New Business Entity Law affects LLCs

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On April 15, 2022, Wisconsin enacted a new business entity law (*2021 Wisconsin Act 258*). Among other changes, the law restates Chapter 183 governing limited liability companies (LLCs) based on the Revised Uniform Limited Liability Company Act (RULLCA) already adopted by many other states. Below is more information about the law's effective date and key changes for Wisconsin LLCs.

Effective Date: On January 1, 2023, the new law will govern all existing and future LLCs. An LLC can elect to be governed by the new law earlier by amending its Operating Agreement and filing a Statement of Applicability with the Wisconsin Department of Financial Institutions (DFI). An LLC can also opt-out and remain governed by the old law by amending its Operating Agreement and filing a Statement of Nonapplicability with the DFI before January 1. Even if an LLC does not opt-out, any terms of its Operating Agreement that were valid under the old law will remain valid under the new law.

Articles of Organization: An LLC's management will no longer be governed by its Articles of Organization. Rather, an LLC will be member-managed by default unless its Operating Agreement provides in writing that it is manager-managed.

Operating Agreement: An LLC's Operating Agreement was viewed as optional under the old law but now will appear to immediately exist upon formation. Such immediate existence reflects an Operating Agreement's new forms; it is no longer limited to a written document but can also be verbal, implied, or any combination of the three. The new law also redefines an Operating Agreement's scope by listing several topics that it can govern. Along with this list of topics, the new law includes a series of limitations on an Operating Agreement's terms, with a carveout for actions allowed by an Operating Agreement despite such limitations and a "sub-carveout" for actions allowed by a *written* Operating Agreement.

Fiduciary Duties: Under the old law, LLC members and managers were able to agree that they could waive fiduciary duties owed to each other including the Duty of Loyalty, the Duty of Care, and the imposed contractual obligations of Good Faith and Fair Dealing required under Wisconsin law. Such permissible waivers reflected the LLC statute drafters' goal of respecting the "entity of contract" nature of LLCs, permitting a highly flexible and entity structure. The new law, on the other hand, now attempts to impede these waivers ostensibly to protect the interests of minority interest holders and avoid potential member and manager disputes. However, it remains to be seen how effective these efforts to restrict waivers will be in practice. The new law explicitly states that written Operating Agreements may prescribe the standards and methods for determining the extent of said duties and the steps necessary to waive or disclaim them. Moreover, given that the new law will honor any provision in an Operating Agreement effective under the old law so long as the provision was enforceable under the old law, it appears that LLCs who have already waived some or all fiduciary duties of members and managers under the old law will not be required to conform to the new law's fiduciary duty provisions.

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