LEGAL UPDATES

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What You Need to Know About Wisconsin's New LLC Laws

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AURIEL ACKERMAN
MILWAUKEE:
414.978.5650
AURIEL.ACKERMAN@HUSCHBLACKWELL.COM

SCOTT W. BRUNNER
MILWAUKEE:
414.978.5440
SCOTT.BRUNNER@HUSCHBLACKWELL.COM

PHILIP R. KOUTNIK
MILWAUKEE:
414.978.5310
PHILIP.KOUTNIK@HUSCHBLACKWELL.COM

On January 1, 2023, the revised Wisconsin business laws go into effect. Among the changes, is a complete overhaul of Chapter 183, leading to the creation of the Wisconsin Uniform Limited Liability Company Law (WULLCL). This revision aligns Wisconsin LLC laws with the Revised Uniform Limited Liability Company Act (RULLCA). Businesses and holding companies operating as Wisconsin LLCs should pay very close attention to these changes, a few of which we highlight below. In many instances, particularly for multi-member and multi-class LLCs, amendments to those entities' operating agreements are likely warranted.

Opt-in or Opt-out. The new WULLCL provides for an "opt-in" or "opt-out" decision. Any LLC interested in having the new laws apply sooner than the effective date can do so by amending its Operating Agreement and filing a Statement of Applicability with the Wisconsin Department of Financial Institutions (WDFI) before January 1, 2023. An existing LLC may also take no action and, as a result, on January 1, 2023, the LLC will be governed by the WULLCL by operation of law. However, if an LLC is interested in staying under the current Chapter 183, it will have to opt-out of the WULLCL by filing a Statement of Nonapplicability with the WDFI. LLCs that opt out of the WULLCL may later "opt in" by filing a Statement of Applicability at any time. Any decision to opt out should be made with careful consideration of the future; notably, the WULLCL will become the norm when it comes to understanding Wisconsin's core LLC laws, and it will be difficult to recall, many years down the road, whether any particular LLC chose to continue following the old laws. It will be especially difficult and cumbersome to administer any LLC under the old laws once they become less readily accessible or remembered by practitioners or businessowners.

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Operating Agreements. Under the predecessor law, LLC members could execute a written operating agreement, and many do; however, for LLCs governed by the WULLCL, operating agreements can be any combination of written, verbal, and implied forms. This change highlights the importance of having a written operating agreement and including an integration clause and to ensure the written agreement constitutes the entire operating agreement. Furthermore, LLCs under the WULLCL should adopt language in their written operating agreement that prevents amendment or restatement of the "operating agreement" unless it is done in writing.

Manager-Managed designation. Under the predecessor law, an LLC designated its managerial status via its Articles of Organization. Under the WULLCL, LLCs may designate that the LLC will be manager-managed in its Articles of Organization, but that designation alone is no longer sufficient under the WULLCL. An LLC's manager-managed election must now be documented in its operating agreement. Many current operating agreements state expressly whether management is by and through the members or the managers, but all LLCs should revisit their current operating agreements to confirm that their agreements, indeed, make this express determination.

Fiduciary Duties. Fiduciary duties for members and managers are made more express under the WULLCL than under the predecessor Chapter 183. The WULLCL requires that members and managers comply with (1) the duty of loyalty, (2) the duty of care, and (3) the obligations of good faith and fair dealing. The WULLCL permits contracting around certain aspects of these duties in some respects, but none may be eliminated completely. LLCs governed by the WULLCL must make a more careful assessment of how and to what extent any fiduciary duties may be waived or reduced by and among the member and managers than in the past with LLCs governed under the predecessor Chapter 183.

Applicability. A significant implication arises from Wis. Stat. § 183.0110(2)(d)(2), which provides that any provisions of an existing operating agreement, valid under the predecessor law, will remain valid under the WULLCL, to the extent allowed under prior law. For example, it appears that where an operating agreement, effective under the predecessor law, waives fiduciary duties of members and managers, such a provision in an operating agreement, to the extent enforceable, as written, under the prior law, will remain valid under the WULLCL.

Authority. Under the WULLCL, a member is not an agent of the LLC solely by means of being a member, which eliminates the concept of "apparent authority" as is relates to a member taking an action on behalf of the LLC. This means that a member may not have the power to bind the company to contracts or other undertakings unless authority is established. Authority may be established through documentation in the operating agreement or the filing of a Statement of Authority with the WDFI. Again, we recommend a well-written operating agreement that establishes clear lines of

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decision-making and authority by and among the members, managers, and any other designated persons.

Articles of Organization. Under the WULLCL, an LLC's articles of organization must include a street address and email address for a registered agent. The WDFI, which administers LLC forms and filings, appears to still be working on the new forms. It is unclear whether including this information in an annual report will suffice or if an amendment will be needed, but the new forms may help clarify this issue, once released. LLCs must be mindful of a few things here: (1) the forms you receive from the WDFI will start to look different and may be requesting different (or additional) information, and (2) notices from the WDFI, in the future, may include e-mail correspondence.

What this means to you

Businesses and holding companies operating as Wisconsin LLCs should pay very close attention to these changes. In many instances, particularly for multi-member and multi-class LLCs, amendments to those entities' operating agreements are likely warranted. Additionally, the decision to opt in or opt out is a decision current members and managers must make, and the current operating agreements governing Wisconsin LLCs very likely require amendment to ensure the LLC's intended governing terms continue to remain in place after the WULLCL goes fully into effect.

Contact us

If you have questions or require additional information about these material changes to Wisconsin's LLC laws, please contact Scott Brunner, Philip Koutnik, Ben Streckert, Auriel Ackerman or your Husch Blackwell lawyer.

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