

Ohio's New LLC Law

At the end of 2020 the Ohio passed a bill that completely rewrote Ohio's limited liability company (or LLC) laws. These changes were originally supposed to go into effect on January 1, 2022 but was delayed until February 11, 2022.

The new law enacts some significant changes to the law. So much so that the LLC law will be renumbered to Ohio Revised Code 1706 from its current 1705. The new law will apply to all Ohio LLCs and all non-Ohio LLCs conducting business in Ohio. The new LLC law was a product of many years of work and advocacy by the Ohio State Bar Association's Corporation Law Committee working with various state lawmakers. Ohio's new LLC law is based on the American Bar Association's Prototype LLC Act but with significant differences. For instance, the new Ohio LLC law largely retains Ohio's somewhat unique terminology such as "operating agreement" instead of "limited liability company agreement" and "articles of incorporation" instead of "certificate of formation" as used in the Prototype Act.

Ohio's current LLC Law dates back to 1994, when LLCs were a relatively new form of legal entity. The current LLC law has been amended many times but never comprehensively replaced until now. The new law is anticipated to bring Ohio more into line with more "modern" LLC acts as Ohio had lagged behind other states in a number of new provisions and concepts in LLC law while many other states had conformed to the Prototype Act. This is especially relevant as LLCs have become the dominate form of business entity due to their customizable nature, ease of management, and usual tax friendly treatment.

While there are too many new concepts in the new LLC law to hit all of the changes, there are some notable new or different concepts that I will highlight in this article. Under Ohio's current LLC law, an LLC can be managed either by a manager or by the members with the powers and obligations of each of those management stated in the law. Ohio's new LLC law will eliminate this dichotomy instead providing that a person's ability to act as an agent for, and thus be able to bind, the LLC can be authorized in one of the following ways: (1) explicitly in the company's operating agreement, (2) through written action of the members in accordance with the company's operating agreement; (3) through a new "statement of authority" which would be filed with the Ohio Secretary of State; or (4) via the new Ohio LLC law's "default rules." This significant change is anticipated to resolve ambiguity with the managerial titles in the current Ohio LLC law surrounding the roles of members, managers, and managing members and along with it also provide more flexibility for LLC management.

Ohio's current LLC law provides that the company's operating agreement generally controls the company's structure, operations, management, and ownership. For the most part, the new LLC law will maintain that reality; however, there will be a new comprehensive section, Section 1706.08(C), that will contain the list of such items that cannot be modified by an LLC's operating agreement. Those provisions that cannot be altered include: (1) eliminating the obligation of good faith and fair dealing in a member's dealings with the LLC or with the other members or (2) restricting certain third-party rights afforded by law. Other than these statutorily-prescribed prohibitions, Ohio's new LLC law expressly clarifies that an LLC is permitted to customize its operating agreement in nearly unlimited ways with some new options that were not permitted before.

For instance, Ohio's new LLC law will also authorize for the first time so-called "series LLCs." When the new law goes into effect an LLC will be able to establish in its operating agreement one or more separate "series" of assets and liabilities organized under the main parent LLC. These "series" must have either: (1) separate rights, powers, or duties with respect to specific property or obligations of the LLC or to

those profits and losses associated with such property or obligations and/or (2) have detailed a specific purpose or investment objective. Also, at least one (1) member of the parent LLC must be associated with each series.

The purpose of the series LLC is to alleviate risk and limit exposure to liabilities with respect to certain assets and/or activities of the company. The idea being that liabilities stemming from a particularly specified business activity are enforceable against only the assets of that series not against the assets of the parent LLC or of those against any of the company's other series. Similarly, the liabilities of the parent LLC are generally not enforceable against any sub-series. Naturally, in order to take advantage of these protections, as with general owner asset protections, the assets of the LLC and those of each series in the LLC, must be kept separate from each other and separate books and records must be kept for the parent LLC and each series. The LLC operating agreement must specifically authorize the series structure and specifically delineate for the assets and liabilities of each series.

As these series LLCs will be new to Ohio it has yet to be developed how banks, taxing authorities, and the courts will treat series LLCs. As much of the same benefit can be obtained using a holding company parent LLC and subsidiary LLC entities it may be worth maintaining those tried and true methods until more is sorted out with the new series LLCs.

Finally, Ohio's new LLC law will impose statutory penalties on LLCs that fail to continuously maintain (or fail to update) the name or address of their statutory agent with the Ohio Secretary of State. This is something that many business owners simply forget about leaving an old address or listing the person that helped them form the company to begin with. This is a good time to go the Ohio Secretary of State's website, search up your company, and make sure your agent information is accurate.

While the new LLC law will have many new bells and whistles, it is not mandatory to replace your company's old operating agreement when the new law goes into effect; however, it is a good time to review your current company operating agreement to see if it still meets your needs or, if you do not have an operating agreement, now is a good time to finally have one put together using the new law's provisions.

Our business attorneys at Dworken & Bernstein can assist with any of your business needs from forming new businesses, drafting new operating agreements and other contracts, to helping with business and real estate sales and acquisitions. Call us for a free consultation.

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