

## How a New Wisconsin Law Affects Your Company if it is an LLC (Limited Liability Company)

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On April 15, 2022, Wisconsin enacted a new business entity law (*2021 Wisconsin Act 258*). Among other changes, the law rewrites the statute governing limited liability companies (LLCs). It follows a national model already adopted by many other states. Below is more information about 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 document 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 a document 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 is either managed by its members or by one or more “managers” (which can, but do not have to, also be members). While the LLC’s management was previously determined by what was listed in its Articles of Organization, an LLC will be *member*-managed by default unless its Operating Agreement provides in writing that it is *manager*-managed. The LLC no longer needs to determine its management status immediately, and has the flexibility to go back and forth between member-managed and manager-managed without needing to file a document with the DFI on each occasion.

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. While important before, the Operating Agreement takes on more significance under the new law and should be reviewed by all current LLCs.

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 limit 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. Again, all current LLCs should review all waiver provisions and consider their status now under the new law.