



LLC Update

New Utah Law for LLCs Ushers in Sweeping Changes

The Utah Legislature recently adopted the Utah Revised Uniform Limited Liability Company Act, which becomes effective July 1, 2012. The new law, however, will not fully replace the current Utah limited liability company act until January 1, 2014. All new LLCs organized on or after July 1, 2012 will immediately be subject to the new law. Existing LLCs have a choice to be governed by the new law when it goes into effect in 2012 or wait until it is mandatory in 2014. Outlined here are highlights of key changes and noteworthy provisions of the new law.

Operating Agreements: Be Careful What You Say

The operating agreement is the key governance document for LLCs. Under the current law, an LLC's initial operating agreement must be adopted by unanimous consent of all members, and all operating agreements must be in writing. If an LLC does not adopt a written operating agreement, then, by default, the LLC statute becomes the entity's operating agreement.

Under the new law, the operating agreement can be oral, memorialized in one or more writings or established through course of conduct, or any combination of the foregoing. This expansive definition of "operating agreement" means LLC members will need to exercise caution with respect to discussions occurring before and during the formation of the LLC, since such discussions and communications, including emails and text messages, might be relied upon to establish the terms of a binding operating agreement. In other words, if a person is not careful, he or she could find themselves being legally bound by terms they believed were still in negotiation.

In addition, under the new law, a person joining an existing LLC is deemed to assent to the operating agreement, including any oral or implied component to it, without having to sign any

documents. The practice pointer here is that before joining an existing LLC, an individual should make certain they are aware of all of the terms of the operating agreement. This can be done by requiring the operating agreement to be completely reduced to writing.

Formation of Utah LLC: No More Public Disclosure

Unlike the current law, the new law does not require public disclosure of information such as the names and addresses of the members (or managers of a manager-managed LLC), a business purpose or the name and address of each organizer who is not a member or manager.

Indeed, the only items required under the new law in the certificate of organization (which replaces the current articles of organization) are the name and address of the LLC and its registered agent, whether the LLC is a low-profit LLC and, if the LLC provides professional services, a statement to that effect.

Duties: Watch Your Back

The current law does not specifically set forth the duties of loyalty or care for members or managers other than obligating such persons to account to the company and hold as trustee for it any profit or benefit improperly derived by them without the consent of the members. The new law, on the other hand, specifically identifies the duties of loyalty and care owed by a member of a member-managed LLC (or a manager of a manager-managed LLC).

The new law also provides great latitude to members of an LLC to alter or define such duties, provided, among other things, such changes are not "unconscionable or against public policy" or "manifestly unreasonable." Specifically, members may identify specific types or categories of activities that do not violate the duty of loyalty and they may alter the duty of care subject to the standards noted above and others set forth in the

Utah Revised Uniform Limited Liability Act:

- Effective July 1, 2012
- All new LLCs subject to new law
- All existing LLCs subject to new law in 2014

new law. The new law also permits members to specify how a transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons.

If the LLC does not have a written operating agreement, or if its operating agreement does not contain provisions governing the duties of members or managers, then the members or managers will be subject to the full scope of the new law regarding fiduciary duties. Accordingly, LLC members, including members of existing LLCs organized prior to the effective date of the new law, should take great care to properly define the scope and parameters of their fiduciary duties and to draft their operating agreement to avoid any default rules that do not fit their desired business relationships. This may require an amendment to an existing LLC's operating agreement.

Although the new law contains many rules consistent with Utah's current LLC law, it also introduces several major changes. This article presents a limited overview of the new law. We recommend you carefully review the new law with legal counsel to see how it affects your business prior to the effective date to avoid unintended, adverse consequences to your business. **UB**

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