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HOW DO WISCONSIN'S NEW LLC LAWS IMPACT MY COMPANY?

In April of 2022, Wisconsin passed new business entity laws, greatly impacting limited liability companies and their members, and largely overhauling and replacing Chapter 183 of the Wisconsin Statutes, which governs LLCs. This article will help you identify the key changes under the new LLC laws, as well as point you towards the next steps in preparing for this overhaul—including decisions to be made before year-end. For purposes of this article, we'll refer to the new Chapter 183, the Wisconsin Uniform Limited Liability Company Law (WULLCL), as the "New LLC Laws," and refer to the pre-WULLCL Chapter 183 as the "Old LLC Laws."

The first significant deviation from the Old LLC Laws impacts your LLC's operating agreement—the agreement governing the relationship between the members or owners of an LLC. Under the New LLC Laws, the meaning of an "operating agreement" has been expanded to include not only your formal, written agreements (if you have one), but also any verbal agreements, implied understandings, and any combination thereof. It has always been important for the members of an LLC to have a written operating agreement to clearly set forth the understandings governing their relationship. However, that importance is magnified under the New LLC Laws now that you must ensure that ancillary agreements, whether verbal or implied, do not rule the day on a particular issue or disagreement between members.

The New LLC Laws have also brought changes to the reach of certain fiduciary duties that members or managers may owe one another. Under the Old LLC Laws, members and managers of an LLC could waive some of these duties, including those duties of good care and loyalty, as well as the obligation of good faith and fair dealing. However, under the New LLC Laws, these duties are now mandated against members and managers by default unless otherwise provided for in your operating agreement (subject to restraints on how far fiduciary duties can be limited). With that said, if your LLC has an operating agreement currently in place that provides for the waiver of these duties, that waiver will be valid and honored under the New LLC Laws.

Another impactful departure from the Old LLC Laws relates to a member's authority to act on behalf of your LLC simply by virtue of their status as a member (commonly referred to as "apparent authority"). Under the New LLC Laws, the members of your LLC are not

automatically granted the authority to act on behalf of the company merely because they are members. Instead, this authority needs to be established, most often either by documentation in your LLC's operating agreement, or by filing a Statement of Authority with the Wisconsin Department of Financial Institutions ("WDFI"). Whichever the method, those documents need to set forth who or what positions in your LLC possess the authority to act on behalf of the company as an agent.

The New LLC Laws may also broaden the rights of certain members to access information regarding your LLC, purely as a result of their membership status, and with no regard for their role in management. Where the Old LLC Laws were silent as to a dissociated member's right to access an LLC's information, the New LLC Laws make clear that dissociated members possess the same rights to access, inspect and copy information regarding an LLC and its activities as an active member possesses, albeit these rights must be exercised through a representative. This means that under the New LLC Laws, a dissociated member may have the right to access certain sensitive information regarding your LLC, including its financial statements, subject to certain statutory restrictions or restrictions set forth in your operating agreement.

Depending on your circumstances, it may also be worth considering some of the more technical updates brought on by the New LLC Laws, particularly with respect to your LLC's Articles of Organization—your company's charter. For one, under the Old LLC Laws, the management designation had to be set forth in your LLC's Articles. However, under the New LLC Laws, if you want your LLC to be managed by a manager or group of managers specifically rather than the members generally, then your LLC's operating agreement must provide for this designation, but its Articles can remain silent as to the same. With that said, your LLC's Articles, in addition to your operating agreement, may still provide for a management designation if your members so choose. Additionally, under the New LLC Laws, your LLC's Articles must provide for both a street address and an email address for your LLC's registered agent.

Given all these updates, the WDFI has provided LLCs with the opportunity to opt in to the New LLC Laws early or opt out in favor of the Old LLC Laws. If you want your LLC to opt in to the New LLC Laws, you can either file a Statement of Applicability no later than December 31, 2022, or, alternatively, do nothing between now and the end of the year and your LLC will automatically be governed by the New LLC Laws beginning January 1, 2023. However, if you want your LLC to opt out of the New LLC Laws and continue to be governed by the Old LLC Laws, **you must file a Statement of Nonapplicability no later than December 31, 2022**. Additionally, this opt-out filing should be paired with member or manager approval, likely in the form of a consent resolution approving the filing.

If you have any doubts or concerns about your LLC being governed under the New LLC Laws, it may be worth filing a Statement of Nonapplicability before the end of the year, even if only

precautionary. If you ever decide to be governed by the New LLC Laws in the future, you can simply file a Statement of Applicability and opt in, but once opted in—whether by default on January 1, 2023, or by an opt-in filing—your LLC cannot revert back to governance under the Old LLC Laws.

As always, O’Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.