

Opt In/Out Deadline for New Wisconsin LLC Law is December 31, 2022

Corporate News: A Legal Update

By Joseph Tierney IV on December 8, 2022

On January 1, 2023, Wisconsin's new limited liability company (LLC) law goes into effect. The Wisconsin Uniform Limited Liability Company Law (WULLCL), created by 2021 Wis. Act 258 and signed by Governor Tony Evers on April 15, 2022, completely repeals and replaces Wisconsin's existing LLC laws in Chapter 183 of the Wisconsin Statutes (the "Old Laws"). The WULLCL—the new Chapter 183 of the Wisconsin Statutes—represents Wisconsin's take on the Revised Uniform Limited Liability Company Act, which has been adopted in some form by nearly half of all states. With less than a month before the WULLCL becomes effective, LLC owners should carefully consider the implications that the law may have for their businesses.

Does the WULLCL apply to my LLC?

Yes, unless the LLC opts out of being governed by the WULLCL. By default, the WULLCL will apply to all existing LLCs as of January 1, 2023. It will also apply to all new LLCs formed on or after January 1, 2023.

How can my LLC opt out of the WULLCL?

Existing LLCs may opt out of being governed by the WULLCL. To do so, the LLC must file a "Statement of Nonapplicability" with the Wisconsin Department of Financial Institutions (WDFI) by December 31, 2022. The Statement of Nonapplicability is available on the WDFI's website and may be filed with WDFI at no charge, or for \$25.00 on an expedited basis. LLCs that opt out of the WULLCL will be governed by the Old Laws.

Can my LLC elect to be governed by the WULLCL earlier than January 1, 2023?

Yes. An existing LLC may file a "Statement of Applicability" with the WDFI prior to January 1, 2023. This form is also located on the WDFI's website and may be filed with the WDFI at no charge, or for \$25.00 on an expedited basis. The Statement of Applicability is effective on the day it is received by the WDFI for filing.

My LLC previously opted out of the WULLCL, can I later elect to be governed by the WULLCL?

Yes. By filing a Statement of Applicability with the WDFI, an LLC that previously opted out of the WULLCL can elect to be governed by the WULLCL. Please note that upon filing a Statement of Applicability, the election to be governed by the WULLCL is permanent.

If my LLC is going to be governed by the WULLCL, does my operating agreement need to change?

Maybe. This depends on the individual operating agreement. To the extent that any of the provisions of your operating agreement are prohibited by the WULLCL, those provisions would be unenforceable. If you intend to be governed by the WULLCL, you should carefully review your operating agreement with legal counsel.

What does my LLC need to do right now to prepare for the WULLCL?

Members and managers should immediately review the WULLCL and consider whether they want their LLC to be governed by the WULLCL. If the members and/or managers of an LLC want the LLC to be governed by the WULLCL, they should review the LLC's operating agreement to ensure the validity of the operating agreement's provisions. At this point, if an LLC chooses to be governed by the WULLCL, but is fine waiting until January 1, 2023, then nothing further needs to be done. However, if the LLC (1) wants to be governed by the WULLCL prior to January 1, 2023; (2) wants to opt out of the WULLCL; or (3) needs to amend its operating agreement, it will need to act quickly as these actions may require meetings and/or votes of the LLC's members, or written consents in lieu of meetings.

What are some of the most significant differences between the Old Laws and the WULLCL?

- **Articles of Organization.** The WULLCL allows for articles of organization to contain certain, optional information as opposed to containing only specific, required information as was required under the Old Laws. For example, the Old Laws required that articles of organization state whether an LLC was member-managed or manager-managed. Under the WULLCL, it is optional to state whether an LLC is member-managed or manager-managed on the articles of organization.
- **Management.** Under the WULLCL, it is optional for an LLC to state its form of management in its articles of organization. If an LLC does not do so, and if it also does not state its form of management in its operating agreement, the LLC is automatically treated as being member-managed.
- **Operating Agreement.** As defined under the WULLCL, an "operating agreement" is any agreement between all members of an LLC, including a sole

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member, whether oral, implied, in a record, or some combination thereof, that covers the governance of an LLC. The WULLCL has also defined a “written operating agreement” as an operating agreement, or part thereof, that is set forth in a record. Previously, operating agreements were only found in writing. Certain information must be contained in a written operating agreement to be valid, such as modifications to fiduciary duties.

- **Authority.** Members of an LLC are not agents of the LLC merely by virtue of being a member under the WULLCL. The LLC may, however, file a “Statement of Authority” with the WDFI that grants specific positions or individuals with authority to bind the LLC. Statements of authority last for five years but may be amended or renewed.
- **Duties of Loyalty and Care.** The WULLCL sets forth the duties of loyalty and care owed by the members of a member-managed LLC and by the managers of a manager-managed LLC.
 - The duty of loyalty requires, among other things, that members of member-managed LLCs and managers of manager-managed LLCs:
 - (1) account to the company and hold as trustee for it any property, profit, or benefit derived in or from the conduct or winding up of the company’s activities and affair, a use by the member or manager of the company’s property, and the appropriation of a limited liability company opportunity;
 - (2) refrain from dealing with the company in the conduct or winding up of the company’s activities and affairs as or on behalf of a person having an interest adverse to the company; and
 - (3) refrain from competing with the company in the conduct of the company’s activities and affairs before the dissolution of the company, unless such transactions have been approved by members in advance, or your operating agreement allows for such competition.
 - The duty of care requires that the members of member-managed LLCs and managers of manager-managed LLCs refrain from:
 - (1) willfully failing to deal fairly with the company or its members in connection with a matter in which the person has a material conflict of interest;
 - (2) violating criminal laws; or
 - (3) engaging in transactions from which the person derives an improper personal profit; or
 - (4) willful misconduct.
- **Access to Records.** The WULLCL provides greater access to records than did the Old Laws. Under the WULLCL, LLCs now have an affirmative duty to provide material information concerning their activities, affairs, financial conditions, and other circumstances to their members, unless the LLC can establish that it reasonably believed the members had notice of, or were aware of the information. This means that an LLC must be proactive in

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compiling and providing material information to its members. Furthermore, LLCs must allow, with limited constraints, their members to inspect and copy records maintained by the LLC regarding its activities, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement and the WULLCL. In addition, at a member's request, an LLC must provide other information to that member, even if it is not material, unless the information requested is unreasonable or improper under the circumstances. Finally, LLCs have a duty to provide dissociated members with certain information relating to the LLC at the request of the dissociated member.

There are, however, numerous other differences between the Old Laws and WULLCL.

Should my LLC elect to be governed by the WULLCL?

This depends on the individual LLC. However, if an LLC needs more time before committing to being governed by the WULLCL, it can file a Statement of Nonapplicability by December 31, 2022 and revisit its decision later.

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