

NEW STATE LAW OVERSEEING LLCs

Has Wide-Ranging Effects

by **Michael K. Goswami** and **Nicole Gore**

On September 1, 2021, Arkansas' Uniform Limited Liability Company Act, § 4-38-101 et seq. (ULLCA) took effect. The enactment of the ULLCA, which is intended to prospectively govern Arkansas LLCs, is significant as it repeals and replaces the state's longstanding Small Business Entity Tax Pass Through Act (the Old Act). Critics welcome the adoption of the ULLCA because it simplifies and provides guidance on both entity processes and ambiguities in the Old Act.

While some changes under the ULLCA are relatively minor, such as changing the name of the formation document from "Articles of Organization" to "Certificate of Organization," others are quite significant, such as disposing of the requirement of a written operating agreement. Although this article is not a comprehensive overview, below are various ways in which the ULLCA differs from the Old Act.

FORMATION

In addition to the implementation of a "Certificate of Organization," practitioners should note the following three provisions regarding formation. First, the ULLCA does not require that the Certificate of Organization to include a statement defining the LLC as member-managed or manager-managed. Such designation is now included in the operating agreement. If no designation is made, the LLC is de facto a member-managed LLC. A second formation difference is that ULLCA does require that the LLC's principal address be listed in the Certificate of Organization. Third, the ULLCA provides that an LLC is legally formed when the Certificate of Organization is effective and at least one person has become a member or manager.

This change deviates from the Old Act, which provided that an LLC was formed by the mere delivery of the Articles of Organization to the Secretary of State, a fact that caused issues in instances when



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MANAGEMENT

Under the ULLCA, members of member-managed LLCs and managers of a manager-managed LLCs are not automatically agents of the LLC (i.e. they cannot automatically bind the LLC) merely because of their position. Rather, the ability to bind the LLC is determined under general principles of agency law.

FIDUCIARY DUTIES

Fiduciary duties were not clearly defined in the Old Act. However, the ULLCA contains a non-exhaustive list of express fiduciary duties for both LLC managers and members, including a duty of care, a duty of loyalty, and a duty of good faith and fair dealing.

REMOVAL

The ULLCA permits the removal of a member from the LLC upon the affirmative vote or consent of all other members in certain circumstances, including if (a) it is unlawful to carry on the LLC activities and affairs with the person as a member; (b) there has been a transfer of all of the person’s transferrable interest in the LLC (with certain exceptions); or (c) in certain situations, a person is an entity and the entity has dissolved. Further, an LLC, or any member of an LLC, may petition the court for removal of a member if the member engaged in wrongful conduct, committed willfully or persistently a material breach, or engaged in conduct that makes it impracticable to carry on the activities and affairs of the LLC with the person as a

member. These changes will be welcome in highly-regulated industries, but increases the potential for significant litigation in the instance of oral operating agreements.

This brief overview is not an exhaustive list of all of the provisions in the newly-enacted ULLCA. Ultimately, it is good practice for those considering forming an LLC, or transacting business with an LLC governed by the ULLCA, to consult with an advisor and inform them of the new status quo for LLCs in Arkansas. ▀

the Articles of Organization contained incomplete or incorrect information.

OPERATING AGREEMENTS

A written operating agreement signed by all members is no longer required under the ULLCA. Rather, operating agreements, which do not even need to be referred to as an operating agreement under the ULLCA, may be formed at the discretion of the members and can be written, oral, implied by conduct, or any combination thereof. This change may present difficulties for businesses in conducting due diligence or confirming entity authority to transact business.



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