



THE NEW HAMPSHIRE REVISED LIMITED LIABILITY COMPANY ACT  
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On January 1, 2013 the New Hampshire Limited Liability Company Act will be replaced in its entirety by the **New Hampshire Revised Limited Liability Company Act (the “New Act.”)** Since the first New Hampshire limited liability companies were formed in 1993, they have become the entity of choice for both small and large businesses in New Hampshire. Businesspeople, courts, creditors and many others having conducted business in the form of and with limited liability companies, have through their experiences and interactions found the limitations, the uncertainties and ambiguities in the current act. Although the New Act retains most of the provisions of the current act, many of them have been revised to eliminate those uncertainties and ambiguities, and to make the New Act particularly user-friendly for small New Hampshire businesses. Some of the revisions include:

- New organization of the provisions of the law, making it much easier for the LLC members, managers and their advisors to locate topics within the law;
- New provisions which define in detail the (fiduciary) duties the LLC members and managers owe to one another;
- Elimination of uncertainties and ambiguities in the current act;
- Maximum use of plain English;
- Addition of definitions of several critical terms, including “allocation,” “distribution,” “dissociation,” and “dissolution;” and
- Provisions validating oral and implied operating agreements of LLCs which lack written operating agreements.

The New Act will govern limited liability companies (“LLC”) formed in New Hampshire on and after January 1, 2013 as well as all LLCs formed in any other state, regardless of the date of formation. New Hampshire limited liability companies formed prior to January 1, 2013, may opt to be subject to the New Act by a written document signed by all of the members. In any event, all New Hampshire limited liability companies will be subject to the New Act commencing on January 1, 2014

Currently, a very large number of limited liability companies do not have operating agreements. The drafters of the New Act recognized that the current act did not adequately provide a very user friendly set of default rules for members, managers, their advisors and ultimately the courts to utilize in situations where no written operating agreement provided guidance as to what the parties intended. As a result, the New Act contains what the drafters

refer to as “off the shelf” operating agreements embedded in its provisions. These are rules that control in situations where the members have not otherwise agreed on how the conflict or matter will be resolved. For example, under the current act, unless in their operating agreement the members imposed certain duties on themselves in their interactions with each other, there are no such duties. In the absence of such duties, a member of a limited liability company has no duty to relay a business opportunity to the limited liability company, but instead may keep it for herself individually. The New Act contains the duty of loyalty and in the absence of an operating agreement provision to the contrary, imposes that duty on members. A member hearing of an opportunity for the limited liability company, who keeps the opportunity for himself, could be subject to a legal action by the limited liability company and the other members for damages caused by the wrongful actions of the member.

Although the default provisions fill a void, there are many examples of why altering the default provisions should be considered by the members in a written operating agreement. A very good example is the number of votes a member may cast when voting on limited liability company matters. Under the current act, in the absence of a written operating agreement provision to the contrary, each member has one vote – probably not what the member who contributed 98% of the money and equipment in connection with the formation of the limited liability company would think was an appropriate amount of control in a two person limited liability company. The New Act contains a revised default rule which provides that each member is entitled to cast the number of votes proportionate to the member’s share of contributions of cash, property and services provided to the limited liability company in connection with formation. Under the voting default provision of the New Act the member contributing 98% would hold 98% of the total member votes. (This is a default rule, which the members may want to override under certain circumstances.)

Both the current act and the New Act recognize and are intended to provide the maximum flexibility by allowing many of their provisions to be modified by agreement of the parties. The New Act acknowledges that parties may have agreements which are not in writing, but parties wanting certainty and predictability are well advised to work with their lawyers, accountants and other business advisors to enter into written operating agreements.