

The Walk Law Firm

Round Table Series

The Florida Revised Limited Liability Company Act



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Overview of New Act

- 4 years in the making
- Repeals Chapter 608 entirely effective January 1, 2015
- Still Default Statute
- Expands list of things that you cannot contractually modify
- Several Improvements & Additions
- Modifies rules for the power of members and managers to bind company
- Modifies provisions addressing the LLC's management structure eliminating Managing Member role
- Better defines the agency and authority rules
- Some things didn't change - several clarifying provisions and provisions that expressly state already acceptable activities and affairs

Please Note: The information provided in this summary is not a comprehensive review of the New LLC Act, but rather is compiled to help you assess your own LLCs need and potential need to take action.



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Say Goodbye to the Existing LLC Act

- The Florida Revised Limited Liability Company Act (the “New Act”) creates an entirely new LLC act in the new Chapter 605
 - The New Act:
 - Improves FL’s already appealing business climate;
 - Maintains FL’s competitive advantage as a leader in LLC innovation;
 - More flexible and similar to other State laws
- *When does the New Act become effective?*
 - The New Act becomes effective for all new limited liability companies formed or registered to do business in FL as of January 1, 2014.
 - The New Act becomes effective for all other limited liability companies in existence before January 1, 2014, as of January 1, 2015
 - Members of an existing LLC may elect to have the New Act become effective as early as January 1, 2014.



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605 is Still a Default Statute

- What is a default statute?
 - A default statute is a statute used to fill the gaps when the parties to an agreement have failed to consider some matter in their agreement
 - Your LLC’s Operating Agreement can waive or modify many different parts of the statute
 - However, there are certain provisions that you cannot modify with your Operating Agreement, the “non-waivable” provisions – 17 in the New Act, up from 5
- The LLC is a creature of contract
 - Freedom to contract strengthened by New Act
 - Law favors agreement between the parties



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Operating Agreement

What does the OA govern?

- Contractual relationship between the members
- Contractual relationship between each member and the Company
- Rights and duties of the members and the managers
- Conduct of the company's activities and affairs
- Means for amending the agreement

Some common misconceptions of the OA:

- OA are filed with the state
- Single member LLCs or closely held LLCs don't benefit from OA
- Should include everything about the internal operations of your business
- Consequences of breach are minimal
- Not binding if I don't sign



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Operating Agreement Continued

If you don't have one – GET ONE!

Even if you are a single member LLC or a closely held LLC, it helps create corporate veil and prevents future partnership issues.

If you have one, you need to keep it with your corporate records, and you need to review it on a regular basis.

Online legal sites can be useful at times, but be careful – these forms might be adequate, but not in your interest; and are likely not tailored to your LLC or Florida law



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Things that you cannot eliminate with your Operating Agreement – the “non-waivables”

- The Operating Agreement can't change certain things:
 - Applicability of Florida Law
 - Company capacity to sue or be sued
 - Registered Agent obligations and other related Department of State matters
 - Grounds of judicial dissolution (fraud, illegal activity, corp. abuse)
 - Winding-up requirements
 - Power of Member to dissociate (don't confuse power and right)
 - Unreasonably restrict Members/Managers rights and access to information, books, and records
 - Restrict the rights of 3rd parties
 - Unreasonably restrict a Member's right to maintain a direct or derivative action
 - Vary a Member's right to approve merger, conversion, or interest exchange



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Non-Waivables Continued

- The Operating Agreement also can't:
 - Exonerate a Manager or Member for bad-faith conduct, or willful or intentional misconduct, or knowing violation of law
 - Indemnify a Manager or Member for certain kinds of misconduct
 - Unreasonably modify (manifestly unreasonable)
 - Duties of loyalty and care
 - Obligation of good faith and fare dealing



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Improvements and Additions

- NEW: Statement of Authority – puts the world on notice that this person can perform this task on behalf of the Company
 - Be Careful: Police your entity
 - Filed with the FL Dept. of State; and for real estate related authority, filed in the office for recording transfers of real property (county)
 - Statement of Denial
 - Side Notes: (1) Actual v. Apparent Authority; (2) How to revoke authority; (3) third-parties
- Annual Reports – improves former statute
 - Must file to engage in merger, conversion, share exchange, AND to maintain or defend action
- Non-economic Members
- Definition of Transferable Interest
- Management of LLC
 - Member-managed is default
 - Must include clear statement of Manager-managed in articles or operating agreement
 - NO MORE MANAGING MEMBER!!
 - **YOU MUST DESIGNATE IF YOU ARE A MEMBER-MANAGED OR MANAGER-MANAGED LLC**



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Removed Managing Member

- Removed to eliminate the confusion caused by the varying interpretations of the term
- All LLCs are now either Member-managed or Manager-managed
- If your management structure is Managing-member, 605.04071(1)(b) says that existing LLCs that are managed by a managing member are deemed to be member-managed rather than manager-managed
- Member-managed by default
 - Look to Articles and OA
 - Put something in your OA or amend your articles to make clear
 - Impact on compensation for services
 - Absent an agreement, a member in a member-managed LLC is not entitled to compensation for services, with limited exceptions



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Other Changes

- Service of Process Fixed – Now, service in the same manner as a corporation
- Clarifies Domestication
- Introduces Interest Exchange for LLCs – part of corporate structure for years
- Added a lot of definitions pertaining to mergers, conversions, appraisal rights



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Some Things Didn't Change

- Formation, Articles, other Filings
- LLC Property
- Annual Reporting
- Liability of Members and Managers
- Records to be kept
- Creditor Rights
- No Series LLCs and no Shelf LLCs



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How does the New Act affect my LLC?

- No more “Managing Member”
 - If your OA uses the term Managing Member, you will need to change your OA
- There may be provisions in your OA that contradict New Act, especially relating to “non-waivable” provisions
- Your LLC will be governed by Existing LLC Act until the end of this year, *unless you elect to have the NEW LLC ACT become effective sooner*
 - Your OA should tell you how to make such a decision; if it doesn’t, it certainly should
- You should police your company – anybody can file a statement of authority, or a statement of denial, or an annual report, or an amendment
 - Sunbiz.org is easy to maneuver, which makes it both easy to find and make changes to your corporate records



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What do I need to do?

- WLF is available to review your operating agreement in order to help you assess your company's need to modify and update your OA
- Depending on the adequacy and effectiveness of OA, may need amendment or full revision
- Review, amendment, full revision can all be done on flat fee
- Have you filed your annual report this year? Its due by May 1 – late fee is \$400; Reinstatement is \$100
- Be prepared to see overhaul changes to sunbiz.org; the Department of State is in the process of migrating its records to a new and much improved system



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Contact Information:

Walk Law Firm, PA - (813) 999-0199

Resources:

- sunbiz.org – FL Dept. of State
- dor.myflorida.com – FL Dept. of Revenue
- myfloridalicense.com – FL Dept. of Bus. and Professional Regulation



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