

Monday, July 2, 2012

New Limited Liability Company Law a Boon for Small Business

On June 18, Gov. Lynch signed into law SB 203, the Limited Liability Company Act. The legislation completely rewrites RSA 304-C, the New Hampshire law on Limited Liability Companies. This Act was drafted by a committee of attorneys at the behest of the Business and Industry Association. I was privileged to be one of the eight attorneys on the committee. It was chaired by noted LLC guru Attorney John Cunningham.

The primary goal of the committee was to make the act more small business friendly by changing the "default" provisions. The "default" provisions are those parts of the statute that say something similar to "*unless otherwise stated in the operating agreement...*"

An operating agreement is a contract between the members and the company that spells out how the company is to be operated and defines the rights of the members. Most LLCs that are formed today are single-member LLCs and the next highest categories are two-member LLCs. Most of these companies have been formed by the members without the advice of an attorney. Problems arise when there is no written operating agreement – and why would anyone think that on an operating agreement is necessary if there is only one member? And how can you have an agreement with yourself?

Remember that when an LLC is created it is a legal entity therefore even in a single-member LLC there are two parties: the company and the member. Remember also that in the absence of an operating agreement the default provisions of the statute apply and there are at least 52 default provisions in the current (soon to be old) act. Many of those default provisions are not what the founders of the company would have wanted had they only known! Here are just a few of the problematic provisions that were fixed it by the new act:

1. Voting rights: unless stated otherwise in writing voting rights are equal. Therefore, if your LLC has two or more members but the intent was the number of votes each member was to have would be proportional to that member's ownership interest you could be in for a nasty surprise if you do not have a written operating agreement detailing the voting rights of each member. Despite your intent each member will have an equal vote.
2. Dissolution of the company upon death disability or bankruptcy. Under the current law, unless specified otherwise in the operating agreement, a member ceases to be a member upon the occurrence of any of these three events. If the company is a single-member LLC, it therefore will lose its only member and an LLC with no members ceases to exist – it "dissolves". Most people would want their personal representative – executor, trustee or agent under a power of attorney – to be able to continue the company at least for a while but technically there is no company to continue. In the case of bankruptcy a single member of the LLC may be totally shocked to realize that his or her company dissolves if he or she files personal bankruptcy. These issues are fixed in the new act.

There is much change in the new act I have given only a small sample here. The new act is effective January 1, 2013 for limited liability companies formed after that date and January 1,

2014 for all New Hampshire LLCs. There is also an "opt in" provision whereby existing LLCs can choose to be under the new act in 2013. For many companies the opt in will be a no-brainer. To see if this provision is right for you see an attorney who understands both the new act and the old.

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