

# David Tingstad's Article On WA State's New LLC Act Published In ABA Reporter

Beresford Booth managing partner [David Tingstad](#) recently had his article on Washington State's new LLC Act published in the American Bar Association's (ABA's) LLC & Partnership Reporter November 2015 edition. Here is the full text of David's article:

After initially considering the Uniform Law Commission's Revised Uniform Limited Liability Company Act ("RULLCA"), Washington's Partnership and LLC Act Committee decided against adoption of RULLCA. The result is a complete replacement of Washington's LLC Act (the "New Act"). The current version of the LLC Act was initially passed in 1994. Washington's Senate and House passed the New Act by unanimous votes. The New Act will apply to new or existing LLCs on January 1, 2016.

The most significant changes to Washington's LLC Act are identified in summary form below:

**Default Rules and LLC Agreements.** The New Act identifies default rules that may not be changed by an LLC Agreement. The non-modifiable rules are codified in a single section in an effort to eliminate the need to review the complete statute when identifying non-modifiable rules. This approach is consistent with the Uniform Limited Partnership Act ("ULPA") and Washington's version of the Revised Uniform Partnership Act ("RUPA"). Of particular interest, pursuant to the New Act, an LLC Agreement may not:

- a. Eliminate or limit the duty of a member or manager to avoid intentional misconduct and knowing violations of law, or the implied contractual duty of good faith and fair dealing;
- b. Vary the power of a court to decree judicial dissolution; or
- c. Unreasonably restrict a member's right to maintain a derivative action.

1. **Oral or Implied LLC Agreements.** The previous LLC Act required LLC Agreements to be in writing. The New Act provides that an LLC Agreement may be "oral, implied, in a record, or in any combination."

3. **Manager Managed or Member Managed.** The New Act maintains the distinction between member managed and manager managed LLCs. However, there is no

longer a requirement to identify in the Certificate of Formation whether the LLC is member managed or manager managed. Under the New Act the LLC Agreement will determine whether an LLC is member managed or manager managed. In the absence of an LLC Agreement identifying the distinction, the LLC will be member managed.

4. **No Statutory Apparent Authority.** The New Act removes a statement of a member's apparent authority in a member managed LLC for matters in the ordinary course of the LLC's business.
5. **Board as Manager.** The New Act clarifies that the Manager of an LLC may be "a person, board, committee, or other group of persons" designated by the LLC Agreement.
6. **Standards of Conduct.** The New Act describes a manager's or member's fiduciary duties as the duty of loyalty and the duty of care. "The only fiduciary duties that a member in a member managed LLC or a manager has to the LLC and its members are the duties of loyalty and care...."
  - a. The duty of loyalty is limited "to account to the LLC and hold as trustee for it any property, profit, or benefit derived by such manager or member... To refrain from dealing with the LLC as or on behalf of a party having an interest adverse to the LLC... And to refrain from competing with the LLC..."
  - b. The duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.
7. **Voting by Members.** For actions requiring member approval, the New Act's default rule requires a majority of members to vote on a per capita basis for members to approve an action. This replaces the current Act's approval by members contributing more than 50% of the agreed value of contributions made by all members.
8. **Records and Information.** The New Act requires members seeking certain records of the LLC to have a purpose reasonably related to the member's interest in the LLC and their requested records must be directly related to the member's purpose.
9. **Allocations of Profits and Losses.** The New Act provides no default rule for allocating profits and losses, but provides a default rule for distributions based on the agreed value of contributions.

10. **Liability for Consenting to Improper Distributions.** The New Act imposes personal liability on a manager or member who consents to a distribution from an LLC when the LLC is insolvent.
11. **Mergers and Personal Liability.** The New Act provides that if a member of a merging LLC will have personal liability to the surviving entity, then the member must sign a separate written consent to become subject to such liability in order for the merger to be approved.
12. **Charging Orders.** The New Act continues to provide for charging orders such that a judgment creditor has only the rights of a transferee. The charging order constitutes a lien on the judgment debtor's transferable interest which may be foreclosed subject to certain rights of redemption prior to foreclosure. The New Act clarifies that the charging order procedure is the "exclusive remedy by which a judgment creditor ... may satisfy a judgment out of the judgment debtor's transferable interest."

## **Hub Bill**

In addition to the New Act, during the 2015 legislative session, the Washington Legislature adopted a "Hub Bill" based on the Uniform Law Commission's Uniform Business Organizations Code. The goal of the Hub Bill is to provide a more uniform approach to the administrative functions common to most Washington business entities. The Washington entities covered by the Hub Bill are corporations (profit and non-profit), partnerships, limited partnerships and LLCs.

## **Conversions**

Although not new to the New Act, in 2014, Washington passed an Act authorizing the conversion of Washington LLCs and Corporations into other types of entities in Washington or other states and the conversion of entities from other states into Washington LLCs and Corporations. The language of the 2014 act was included in the New Act without modification.

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