The Edge: Get to know Florida’s revised LLC laws

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(Photo: For FLORIDA TODAY)

A hot topic in the state of Florida has been the creation of jobs and making Florida a friendlier place for businesses to set up shop.

In an effort to make the formation and operation of limited liability companies more attractive to entrepreneurs and business owners, the Legislature enacted Florida’s Revised Limited Liability Act on Jan. 1, 2014, for all LLCs formed on or after that date. LLCs formed prior to Jan. 1 were provided a one-year period of transition, but as of Jan. 1, 2015, all Florida LLCs will be subject to the new act. It is important to know how these new laws may affect your business.

The provisions of the new act will apply if an LLC’s operating agreement fails to address certain issues related to the management and operation of the company. Although many of the default provisions can be overridden by an LLC’s operating agreement, there are now 17 statutory provisions that cannot be waived.
Some examples of new “non-waivable” provisions to be aware of:

- Liability for a member’s bad faith or willful misconduct cannot be avoided by placing exculpatory language in the operating agreement.

- A member cannot be restricted from bringing direct legal action against the company.

- The power of a member to disassociate cannot be limited.

Outside of the “non-waivable” provisions, an LLC’s operating agreement is a powerful tool to control most of the rights and responsibilities of its members. For this reason, it is critical that existing operating agreements are reviewed and revised, if needed.

Some things to consider when reviewing your existing LLC operating agreement:

- Florida’s existing concept of “managing member” has been eliminated in favor of the clearer concepts of “member-managed” and “manager-managed.” If an operating agreement provides that the LLC is managed by a “managing member,” the LLC will be considered member-managed” under the Act. It is important to revise this terminology in the agreement to avoid unintended consequences in the management structure.

- The new act replaces the “business judgment rule” with a duty to refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law.

- The new act allows an LLC to file a “Statement of Authority” to place the public on notice as to who can bind the company. Used in conjunction with a well-drafted operating agreement, the Statement of Authority could serve as a valuable protection for an LLC.

- Under the new act, members and/or managers may be exposed to liability to third parties who suffer losses by relying on inaccurate information in the articles of organization and other LLC documents submitted to the state. An LLC can limit responsibility and potential liability by including a provision in the governing documents identifying the responsible member(s).

- Under the prior act, LLC members were entitled to an appraisal of their interests in the company upon the consummation of a merger or conversion if the members possessed the right to vote on such transactions. The new act provides six additional events that trigger appraisal rights. An LLC can modify, restrict or eliminate the appraisal rights of a member or group of members so long as the right to do so is set forth in the LLC’s governing documents.

- In dealing with conflict of interest issues, the new act provides that a conflict of interest transaction will not be void or voidable if the transaction is fair to the LLC at the time it is
authorized. A transaction is deemed fair if it is beneficial to the LLC and its members, taking into account what might have been obtainable in an arm's length transaction.

• In another notable change, Florida LLCs are now allowed to have a non-economic member, which is a member who doesn’t contribute capital or have an economic stake in the LLC.

If you have an interest in a Florida LLC formed prior to Jan. 1, 2014, it would be prudent to consult with your legal adviser about the implications of the new act and the potential need to revise your existing operating agreement before the end of this year. If you regularly deal with Florida LLCs, spend some time to acquaint yourself with the new act. Being proactive will help prevent issues and unintended consequences down the road.

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