

# Ohio's New Limited Liability Company Act – Revised Code Section 1706

**By Terry Link, Andrew Medoro & Mark Peasley**

The Ohio General Assembly recently passed a new Ohio Limited Liability Company (“LLC”) Act to replace the original LLC Act passed in 1994. Formally known as the “Enact Ohio Revised Limited Liability Company Act” (the “Act”), the Act was signed into law by Governor Mike DeWine in early January 2021 and will go into effect on January 1, 2022. The intent of the Act is to make it easier to conduct business in Ohio.

The Act was drafted with the assistance of the Ohio State Bar Association’s Corporate Law Committee and amends and restates the Ohio Revised Code to update and clarify Ohio’s approach to LLCs. Rather than further amend Chapter 1705, the Act creates a wholly new Chapter 1706. There are several important provisions in the Act that will interest those looking to form an LLC in Ohio or amend their existing domestic LLC. Below are some highlights of the Act:

## **Series LLCs Permitted**

The Act allows for the formation of “series LLCs” in Ohio. A “series LLC” permits the creation of multiple distinct entities under the name of a single LLC. Delaware, often considered the legal corporate hub of the United States, has allowed series LLCs since 1996. Ohio is the 15th state to adopt series LLCs.

One strategy used to protect assets and separate liabilities is the use of “parent” and “subsidiary” LLCs, with one LLC owning one or more other LLCs. Series LLCs offer similar benefits as regular LLCs. The main advantages of series LLCs over parent/subsidiary LLCs are reduced setup and maintenance costs and ease of upkeep in the state of formation. For the cost of registering a single LLC, a party can create a large number of entities under the same LLC through which assets can be insulated. Much like in parent/subsidiary LLCs, to preserve liability separation, separate records must be kept for each entity that allows for reasonable identification of the entity’s assets. For those already familiar with keeping assets separate, the record-keeping required for a series LLC should not impose a significant burden. Additionally, the articles of organization must authorize multiple series of assets and the operating agreement must utilize specific language.

## **Failure to Maintain a Statutory Agent**

The Ohio Secretary of State will now provide notice to registered LLCs when an LLC fails to maintain a statutory agent or keep the agent’s information up to date. If the LLC cannot update the statutory agent within 30 days of the mailing of the notice, the articles of organization or foreign registration of the LLC will be canceled, and the LLC will be required to pay a filing fee, apply for reinstatement, and update its statutory agent information.

## **Additional Clarity Regarding LLC Governance**

Chapter 1706 will now be considered the “default” governing guidance for LLCs, which can be amended by the LLC’s operating agreement so long as the operating agreement does not conflict with R.C. Section 1706.08, which prohibits, among other things, (1) the elimination of the implied covenant of good faith and fair dealing, (2) the elimination of liability for bad faith violations of the covenant of good faith and fair dealing, (3) limitations on a court’s power regarding mandatory LLC filings, and (4) the issuance of certificates of membership interest in bearer form. No longer will there be ambiguities whether statutory defaults can be amended if they do not contain the words “unless otherwise provided in the operating agreement” or “unless otherwise provided in the articles of organization.”

## **Fiduciary Duties**

Ohio Revised Code Sections 1706.31 and 1706.311 establish baseline fiduciary duties that apply to members and managers. In a manager-managed LLC, members owe to the LLC and other members only the duty of good faith and fair dealing. The manager in such an LLC owes to the LLC and the members, the duty of loyalty, duty of care, and duty of good faith and fair dealing. Members in a member-managed LLC owe duties of loyalty and care. These “default” fiduciary rules can be modified in writing by the governing documents of the entity.

## **Certificates of Existence and Full Force and Effect**

Often, banks, law firms, and other entities are required to provide a certificate of existence or full force and effect for an LLC. The Act provides that a certificate of existence or certificate of full force and effect will be conclusive evidence, for a period of thirty days after the date of such certificate, that the LLC is in existence or authorized to transact business, unless the certificate states otherwise.

## **Transacting Business in Ohio without Registration**

The Act grants enforcement powers to the Ohio Attorney General to deal with foreign LLCs that have not registered to transact business in Ohio. A foreign LLC will be liable to the State of Ohio for a set fee, should the foreign LLC transact business in Ohio without filing for authorization to do so. Such fees may be recovered in an action brought by the Ohio Attorney General. This action could also result in an injunction against the foreign LLC, court costs, and interest. Currently under R.C. 1705.58, an unregistered foreign LLC does not owe fees, and is only prevented from maintaining a lawsuit.

## **Conclusion**

Existing LLCs, practitioners, and business owners should familiarize themselves with the changes and additions made to Ohio’s LLC laws prior to the effective date of the Act, January 1, 2022. The Act provides significant opportunity to more closely tailor an LLC’s operations to the intentions of its members. Roetzel & Andress attorneys are available to assist with drafting or editing LLC governing documents to ensure your business is run in accordance with your intentions and in compliance with the Act.

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