



**Jessica  
Moyeda**

## Limited Liability Company Operating Agreements—What You Need to Know

By: *Jessica Moyeda, Associate, Brownstein Hyatt Farber Schreck*

A limited liability company (LLC) is often selected as a business entity due to its inherent flexibility. But such freedom cuts both ways should the members fail to delineate the terms governing the operation and management of the LLC, or simply rely on Nevada statutory provisions to provide the operating rules for the company. Recent changes to Nevada's LLC laws highlight the importance of formulating an operating agreement that is tailored to a company's specific needs and goals and that also provides a framework for how members and managers will interact.

### Importance of an Operating Agreement – Why Do I Need One?

A written operating agreement sets forth the mutual understanding of the members and managers that, especially in the event of a future dispute or misunderstanding, can provide essential guidance for all parties involved.

If the members fail to adopt an operating agreement, or the operating agreement does not address essential matters, then the default provisions of Nevada Revised Statutes (NRS) Chapter 86, which governs LLCs, will control. Such default rules do not always provide terms or rules that the parties would have chosen for themselves. As a result the company may find itself operating under rules that the members did not envision.

For example, NRS Chapter 86 does not directly specify the fiduciary duties of members and managers, as NRS Chapter 78 does for directors and officers of corporations. Notably, effective in October 2019, the Nevada Legislature amended NRS Chapter 86 to confirm that the duties of a manager or managing member are only the contractual duty of good faith and fair dealing and any other duties expressly prescribed by the company's articles of organization or operating agreement. As such, the only way to ensure that the LLC functions as the members wish is to adopt a comprehensive operating agreement with provisions (such as the fiduciary duties, if any, of managers and members) that best suits the members' intentions as to the company's business and management structure.

### What to Consider When Drafting an Operating Agreement

Although each operating agreement is different, it should generally set forth the following fundamental terms:

**Finance/Capital:** An operating agreement should describe the type and amount of capital contributed by each member at the outset and the corresponding ownership percentage of each member.

Other items to consider are: Who will decide if or when the company requires additional capital and what amount, if any, is required from each member? If any member fails to make a contribution, will there be any dilution of his, her or its interest in the LLC?

**Management:** Describing the manner in which the LLC will be managed is also critical, i.e., by its members, by a managing member, or by one or more managers.

Other management items to consider and address are: Will any major decisions be reserved to certain individuals or be subject to special approval requirements? Will the LLC have officers and, if so, what will be their roles, responsibility and authority? How will deadlock situations be resolved?

**Transfers of Member Interests:** An operating agreement should also specify when, and under what conditions, a member may transfer his, her or its interest.

Other issues to consider are: Will there be any restrictions or conditions regarding transfers, such as requiring the approval of a percentage or all of the other members, the manager(s) or the managing member? Will certain kinds of transfers be permitted, such as transfers to family members or trusts for estate planning purposes?

Other special items that should be addressed in the operating agreement, if applicable, include: Will the LLC be engaging in a regulated industry, such as gaming or the sale or distribution of liquor? Will members be entitled to buy out other members in the event of bankruptcy, divorce, death, finding of unsuitability or other major events?

Addressing at least some of these fundamental issues and questions will provide a solid framework for resolving disputes and ensure that the company operates in accordance with its members' preferences. 