

The Impact of Act 170 on LLCs, LLPs, LPs and GPs

Management Structures for LLCs

Management Structures of LLCs Generally

- LLCs are either member managed or manager managed
 - This is the same as prior law
- However, there are several notable differences from the prior law:

Notable Differences

- Company defaults to member managed unless the *operating agreement* expressly provides that the company will be manager managed (§8847(a))
 - Previously if a manager managed company was desired, such must have been noted in the *certificate of organization*
 - But; we will talk later about the agency authority of managers and the role of the certificate of organization

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Notable Differences

- Statute now lists *default rules* for member managed companies (§8847(b)) and for manager managed companies (§8847(c))
- Default rules, in this case, govern management of the LLC where the operating agreement is silent on an issue.
- Default rules sometimes cite other laws or rules that apply, but otherwise may always be amended by the operating agreement (§8815(a)(2))

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Default Rules for Member Managed LLCs (§8847(b))

- (1) Except as expressly provided in this title, the management and conduct of the company are vested in the members.
- (2) Each member has equal rights in the management and conduct of the company's activities and affairs.
- (3) A difference arising among members as to a matter in the ordinary course of the activities and affairs of the company may be decided by a majority of the members.

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Default Rules for Member Managed LLCs (§8847(b)) (continued)

- (4) Except as provided under section 325 (relating to approval by limited liability company) with respect to a transaction under Chapter 3 (relating to entity transactions), an act outside the ordinary course of the activities and affairs of the company may be undertaken only with the affirmative vote or consent of all members.
- (5) Except as provided in section 8822(d) (relating to amendment or restatement of certificate or organization), the certificate of organization may be amended only with the affirmative vote or consent of all members.
- (6) The operating agreement may be amended only with the affirmative vote or consent of all members

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Default Rules for Manager Managed LLCs (§8847(c))

- (1) Except as expressly provided in this title, any matter relating to the activities and affairs of the company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers.
- (2) Each manager has equal rights in the management and conduct of the company's activities and affairs.
- (3) The affirmative vote or consent of all members is required:
 - (i) except as provided under section 325 with respect to a transaction under Chapter 3, to undertake any act outside the ordinary course of the company's activities and affairs;
 - (ii) except as provided under section 8822(d), to amend the certificate of organization, or
 - (iii) to amend the operating agreement.

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Default Rules for Manager Managed LLCs (§8847(c)) (continued)

- (4) A manager may be chosen at any time by the affirmative vote or consent of a majority of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed or dies, or, in the case of a manager that is not an individual, terminates. A manager may be removed at any time by the affirmative vote or consent of a majority of the members without notice or cause.
- (5) A person need not be a member to be a manager, except that the dissociation of a member that is also a manager removes the person as a manager. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member.
- (6) A person's ceasing to be a manager does not discharge any debt, obligation or other liability to the limited liability company or members which the person incurred while a manager

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Agency Authority

- Agency authority in an LLC changes significantly under the new law:
 - A member will not be an agent of an LLC solely by reason of being a member regardless of whether the LLC is member-managed or not (§8831(a))
 - A manager will not possess statutory apparent authority, unless the **certificate of organization** states that the LLC is manager-managed (§8831(b))

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Certificate of Authority (§8832)

- An LLC may file a certificate of authority that pertains to:
 - a position in the LLC (i.e. a manager or an officer); or
 - a specific person.
- The certificate may state the authority of a person holding the position or the specific person to:
 - transfer real property held in the name of the LLC; or
 - enter into other transactions involving the LLC.

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Certificate of Authority (continued)

- An effective certificate of authority protects a third party dealing with the LLC without knowledge to the contrary
- A copy of a certificate may be recorded in the land records
- A person named in a filed certificate of authority may file a certificate of denial which acts as an amendment of the certificate and may be recorded in the land records
- A substitute certificate of authority may be included in the certificate of organization (§8821(d))

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Examples of Management Provisions in LLC Forms

- certificate of organization provisions designating manager managed:
 - Forms 26, 28, 30, 32, 34 and 36

- **Sample Management Provision:**

Management of the company shall be vested in one or more managers. The number of managers, the manner in which they are selected, and the manner in which they may authorize and take action shall be as prescribed in or by the operating agreement.

[Except as otherwise provided by resolution adopted by the managers or in the operating agreement, the managers may act only collectively as a committee and by resolution duly adopted. Individual managers shall have only such authority and perform such duties as the management committee may, from time to time, delegate to them.]

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Examples of Management Provisions in LLC Forms (continued)

- operating agreement provisions dealing with managers:
 - Form 27, single manager
- Definition
 - “Manager.” _____ and any other person serving at the time as a manager of the company as provided in this agreement.

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Examples of Management Provisions in LLC Forms (continued)

- operating agreement provisions dealing with managers (continued):
 - Form 27, single manager (continued)
- **5.01. Management by Manager.**
- **(a) Exclusive Responsibility. The company shall be manager-managed and the business and affairs of the company shall be managed by or under the direction of the manager. The member, as such, shall not take part in, or interfere in any manner with, the management, conduct, or control of the business and affairs of the company, and shall not have any right or authority to act for or bind the company. The company may act only by actions taken by or under the direction of the manager in accordance with this agreement.**

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Examples of Management Provisions in LLC Forms (continued)

- operating agreement provisions dealing with managers (continued):
 - Form 27, single manager (continued)
- (c) **Limitation.** Notwithstanding subsection (a), the manager shall not, without first receiving the affirmative consent of the members:
- (1) admit additional members or issue additional transferable interests;
- (2) undertake any act outside the ordinary course of the company's activities and affairs;
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- (3) except as provided under section 8822(d) of the Act amend the certificate of organization; or
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- (4) amend the operating agreement.

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Examples of Management Provisions in LLC Forms (continued)

- operating agreement provisions dealing with managers:
 - Form 37, board of managers
- Definition
- **“Manager.” Any person serving at the time as a manager of the company as provided in this agreement. The managers collectively constitute the “board of managers.”**

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Examples of Management Provisions in LLC Forms (continued)

- operating agreement provisions dealing with managers (continued):
 - Form 37, board of managers (continued)
- **5.01 Management by Managers.**
- (a) **Exclusive Responsibility.** The business and affairs of the company shall be managed by or under the direction of the managers. A member, as such, shall not take part in, or interfere in any manner with, the management, conduct, or control of the business and affairs of the company, and shall not have any right or authority to act for or bind the company. The company may act only by actions taken by or under the direction of the board of managers in accordance with this agreement.
- (b) **Authority and Duty of Managers.** Except as otherwise provided by resolution adopted by the board of managers, the managers may act only collectively as a board and by resolution duly adopted. Individual managers shall have only such authority and perform such duties as the board of managers may, from time to time, delegate to them.

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Examples of Management Provisions in LLC Forms (continued)

- operating agreement provisions dealing with managers (continued):
 - Form 37, board of managers (continued)
- **5.02. Number and Term of Office of Managers; Qualifications.**
- (a) **Election of Managers.** The managers shall be elected annually by the members. Nominees for election as managers receiving the highest number of votes, up to the number of managers to be elected, shall be elected as managers. The members shall not have the right to cumulate their votes in the election of managers.
- (b) **Number of Managers.** The number of managers of the company shall be [____], or such other number as may be determined from time to time by the board of managers] [such number, not less than ____ nor more than ____, as may be determined from time to time by the board of managers].
- (c) **Term of Office.** Each manager shall hold office until the next annual meeting of members and until such manager's successor shall have been elected and qualified, or until such manager's earlier death, resignation, or removal.

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Examples of Management Provisions in LLC Forms (continued)

- operating agreement provisions dealing with managers (continued):
 - Provisions delegating authority of managers
- Form 27:
- **(b) Delegation.** The manager may delegate the right, power, and authority to manage the day-to-day business, affairs, operations, and activities of the company to any officer, employee, or agent of the company, subject to the ultimate direction, control, and supervision of the manager. If the manager appoints an officer of the company with a title that is commonly used for officers of a business corporation, the assignment of that title shall constitute the delegation of the authority and duties that are normally associated with that office, subject to any specific delegation of authority and duties made by the manager. Any number of offices may be held by the same person. The salaries and other compensation, if any, of the officers and agents of the company shall be fixed from time to time by the manager.

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Examples of Management Provisions in LLC Forms (continued)

- operating agreement provisions dealing with managers (continued):
 - Provisions delegating authority of managers (continued)
- Form 37:
- **5.03. Officers; Delegation and Duties.** The company shall have such officers, other employees, and agents as shall be necessary or desirable to conduct its business. The board of managers may elect a member, manager, or other person to serve as an officer of the company. The board of managers may assign titles to the officers they elect. If the board of managers elects an officer of the company with a title that is commonly used for officers of a business corporation, the assignment of that title shall constitute the delegation of the authority and duties that are normally associated with that office, subject to any specific delegation of authority and duties made by the board of managers. Any number of offices may be held by the same person. The salaries or other compensation, if any, of the officers, other employees, and agents of the company shall be fixed from time to time by the board of managers or such other persons as have been delegated that authority.

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Examples of Management Provisions in LLC Forms (continued)

- certificate of organization provisions containing substitute certificate of authority:
 - See all forms
- **The manager of the company has all authority to enter into transactions on behalf of the company and otherwise bind the company, including, without limitation, the authority to transfer real property held in the name of the company and sign any instrument of transfer with respect to such transfer of real property**

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Questions

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