



102ND GENERAL ASSEMBLY

State of Illinois

2021 and 2022

SB1795

Introduced 2/26/2021, by Sen. Robert F. Martwick

SYNOPSIS AS INTRODUCED:

805 ILCS 180/15-3
805 ILCS 180/15-5

Amends the Limited Liability Company Act. Provides that the statutory fiduciary duties a member owes to a member-managed company and its other members do not limit any fiduciary duties owed at common law. Removes a provision requiring a member to discharge his or her duties to a member-managed company and its other members under the Act or under the operating agreement and to exercise any rights consistent with the obligation of good faith and fair dealing. Instead provides that the implied contractual covenant of good faith and fair dealing applies to the operating agreement and members of a member-managed company in the same manner and to the same extent that it applies at law to other contracts and parties to the contracts. Makes changes concerning the extent to which an operating agreement of a limited liability company may restrict or eliminate a fiduciary duty owed at common law or under the Act. Makes other changes.

LRB102 00032 KTG 13828 b

1 AN ACT concerning business.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 5. The Limited Liability Company Act is amended by
5 changing Sections 15-3 and 15-5 as follows:

6 (805 ILCS 180/15-3)

7 Sec. 15-3. General standards of member and manager's
8 conduct.

9 (a) Without limiting any fiduciary duties owed at common
10 law, the ~~The~~ fiduciary duties a member owes to a
11 member-managed company and its other members include the duty
12 of loyalty and the duty of care referred to in subsections (b)
13 and (c) of this Section.

14 (b) A member's duty of loyalty to a member-managed company
15 and its other members includes the following:

16 (1) to account to the company and to hold as trustee
17 for it any property, profit, or benefit derived by the
18 member in the conduct or winding up of the company's
19 business or derived from a use by the member of the
20 company's property, including the appropriation of a
21 company's opportunity;

22 (2) to act fairly when a member deals with the company
23 in the conduct or winding up of the company's business as

1 or on behalf of a party having an interest adverse to the
2 company; and

3 (3) to refrain from competing with the company in the
4 conduct of the company's business before the dissolution
5 of the company.

6 (c) A member's duty of care to a member-managed company
7 and its other members in the conduct of and winding up of the
8 company's business is limited to refraining from engaging in
9 grossly negligent or reckless conduct, intentional misconduct,
10 or a knowing violation of law.

11 (d) The implied contractual covenant of good faith and
12 fair dealing applies to the operating agreement and members of
13 a member-managed company in the same manner and to the same
14 extent that it applies at law to other contracts and parties to
15 the contracts. ~~A member shall discharge his or her duties to a~~
16 ~~member managed company and its other members under this Act or~~
17 ~~under the operating agreement and exercise any rights~~
18 ~~consistent with the obligation of good faith and fair dealing.~~

19 (e) A member of a member-managed company does not violate
20 a duty or obligation under this Act or under the operating
21 agreement merely because the member's conduct furthers the
22 member's own interest.

23 (f) This Section applies to a person winding up the
24 limited liability company's business as the personal or legal
25 representative of the last surviving member as if the person
26 were a member.

1 (g) In a manager-managed company:

2 (1) a member who is not also a manager owes no duties
3 to the company or to the other members solely by reason of
4 being a member;

5 (2) a manager is held to the same standards of conduct
6 prescribed for members in subsections (b), (c), (d), and
7 (e) of this Section;

8 (3) a member who exercises some or all of the
9 authority of a manager in the ~~and~~ conduct of the company's
10 business is held to the standards of conduct in
11 subsections (b), (c), (d), and (e) of this Section; ~~and~~

12 (4) a manager is relieved of liability imposed by law
13 for violations of the standards prescribed by subsections
14 (b), (c), (d), and (e) to the extent of the managerial
15 authority delegated to the members by the operating
16 agreement; and -

17 (5) subsection (d) of this Section applies to the
18 operating agreement and members and managers of the
19 company.

20 (Source: P.A. 99-637, eff. 7-1-17.)

21 (805 ILCS 180/15-5)

22 Sec. 15-5. Operating agreement.

23 (a) All members of a limited liability company may enter
24 into an operating agreement to regulate the affairs of the
25 company and the conduct of its business and to govern

1 relations among the members, managers, and company. The
2 operating agreement may establish that a limited liability
3 company is a manager-managed limited liability company and the
4 rights and duties under this Act of a person in the capacity of
5 a manager. To the extent the operating agreement does not
6 otherwise provide, this Act governs relations among the
7 members, managers, and company. Except as provided in
8 subsections (b), (c), (d), and (e) of this Section, an
9 operating agreement may modify any provision or provisions of
10 this Act governing relations among the members, managers, and
11 company.

12 (b) The operating agreement may not:

13 (1) unreasonably restrict a right to information or
14 access to records under Section 1-40 or Section 10-15;

15 (2) vary the right to expel a member in an event
16 specified in subdivision (6) of Section 35-45;

17 (3) vary the requirement to wind up the limited
18 liability company's business in a case specified in
19 subdivision (4), (5), or (6) of subsection (a) of Section
20 35-1;

21 (4) restrict rights of a person, other than a manager,
22 member, and transferee of a member's distributional
23 interest, under this Act;

24 (5) restrict the power of a member to dissociate under
25 Section 35-50, although an operating agreement may
26 determine whether a dissociation is wrongful under Section

1 35-50;

2 (6) (blank);

3 (6.5) eliminate or reduce the obligations or purposes
4 a low-profit limited liability company undertakes when
5 organized under Section 1-26;

6 (7) eliminate or reduce the implied contractual
7 covenant ~~obligation~~ of good faith and fair dealing under
8 subsection (d) of Section 15-3, but the operating
9 agreement may determine the standards by which the
10 performance of the member's or manager's duties or the
11 exercise of the member's or manager's rights is to be
12 measured;

13 (8) eliminate, vary, or restrict the priority of a
14 statement of authority over provisions in the articles of
15 organization as provided in subsection (h) of Section
16 13-15;

17 (9) vary the law applicable under Section 1-65;

18 (10) vary the power of the court under Section 5-50;

19 or

20 (11) restrict the right to approve a merger,
21 conversion, or domestication under Article 37 or the
22 Entity Omnibus Act of a member that will have personal
23 liability with respect to a surviving, converted, or
24 domesticated organization.

25 (c) In addition, with respect to fiduciary duties, the ~~The~~
26 operating agreement ~~may~~:

1 (1) may not restrict or eliminate a fiduciary duty
2 owed at common law or under this Act, unless ~~other than~~
3 ~~the duty of care described in subsection (c) of Section~~
4 ~~15-3, but only to the extent~~ the restriction or
5 elimination in the operating agreement is clear and
6 unambiguous;

7 (2) may not restrict or eliminate the fiduciary duty
8 described in paragraph (2) of subsection (b) of Section
9 15-3, except in the manner described in paragraph (4) of
10 this subsection (c); ~~identify specific types or categories~~
11 ~~of activities that do not violate any fiduciary duty; and~~

12 (3) may not alter the duty of care, ~~except~~ to
13 authorize intentional misconduct or knowing violation of
14 law; and ~~-~~

15 (4) may identify, subject to paragraph (1), specific
16 types or categories of activities or provide one or more
17 examples of activities that do not violate any fiduciary
18 duty described in subsection (b) of Section 15-3 or any
19 fiduciary duty owed at common law and may determine
20 standards by which the performance of the fiduciary duty
21 is to be measured.

22 The changes made to paragraphs (2) and (4) of this
23 subsection by this amendatory Act of the 102nd General
24 Assembly apply to: (i) any operating agreement entered into
25 before the effective date of this amendatory Act of the 102nd
26 General Assembly if the fiduciary duties of the members or

1 managers of the company described in paragraph (2) of
2 subsection (b) of Section 15-3 are modified in any respect on
3 or after the effective date of this amendatory Act of the 102nd
4 General Assembly; and (ii) any operating agreement entered
5 into on or after the effective date of this amendatory Act of
6 the 102nd General Assembly.

7 (d) The operating agreement may specify the method by
8 which a specific act or transaction that would otherwise
9 violate the duty of loyalty may be authorized or ratified by
10 all the members or by one or more disinterested and
11 independent members or persons after full disclosure of all
12 material facts.

13 (e) The operating agreement may alter or eliminate the
14 right to payment or reimbursement for a member or manager
15 provided by Section 15-7 and may eliminate or limit a member or
16 manager's liability to the limited liability company and
17 members for money damages, except for:

18 (1) subject to subsections (c) and (d) of this
19 Section, breach of the duties as required in subdivisions
20 (1), (2), and (3) of subsection (b) of Section 15-3 and
21 subsection (g) of Section 15-3;

22 (2) a financial benefit received by the member or
23 manager to which the member or manager is not entitled;

24 (3) a breach of a duty under Section 25-35;

25 (4) intentional infliction of harm on the company or a
26 member; or

1 (5) an intentional violation of criminal law.

2 (f) A limited liability company is bound by and may
3 enforce the operating agreement, whether or not the company
4 has itself manifested assent to the operating agreement.

5 (g) A person that becomes a member of a limited liability
6 company is deemed to assent to the operating agreement.

7 (h) An operating agreement may be entered into before,
8 after, or at the time of filing of articles of organization
9 and, whether entered into before, after, or at the time of the
10 filing, may be made effective as of the time of formation of
11 the limited liability company or as of the time or date
12 provided in the operating agreement.

13 (Source: P.A. 99-637, eff. 7-1-17; 100-561, eff. 7-1-18.)