



HEW & BORDENAVE
A LIMITED LIABILITY LAW PARTNERSHIP LLP

What is an Operating Agreement?

If you intend to conduct business and have a business banking account in the state of Hawaii as a limited liability company (LLC) then you will need an Operating Agreement, along with Article of Organization, a state tax id, and a federal employer identification number. The Operating Agreement serves as a binding agreement among and between members and managers of the LLC. The Operating Agreement regulates the inner workings of the LLC and determines how the members and managers govern themselves with respect to each other and the business. Many times, Articles of Organization are referred to as the “birth certificate” of a LLC, if that is true, then the Operating Agreement is the bone structure of the business entity.

Do I Need an Operating Agreement is it a Public Document?

While, Hawaii’s Revised Statutes do not require a LLC to have an operating agreement, more often than not a LLC is used as a vehicle for starting up a business among several individuals, which should require some written agreement to evidence what was promised. In addition, certain institutions and agencies require a copy of the Operating Agreement, such as banks to open a bank account or the Liquor Commission to obtain a liquor license. However, unlike the Articles of Organization, which are filed with the state’s Department of Commerce and Consumer Affairs, your Operating Agreement is not a public document. You and your fellow members may elect to keep it a private agreement, depending on your business.

What if I use a Downloaded Operating Agreement or Draft one on my Own?

Many business owners have a member draft their Operating Agreement or they insist on downloading one from the Internet, but there are two instances that make these choices problematic if you do not understand the laws that govern LLCs. The situations are Default Rules and Non-Waivable Provisions.

What are Default Rules?

Many standard Operating Agreements do not deviate from default rules under the law. This essentially defeats the purpose of choosing to do business as a LLC over a corporation. For instance, if an operating agreement does not address a specific issue, the default rules under the law may be unfavorable to a member depending on the situation. As another example, if one default provision states that each member of a member-managed LLC has equal rights to manage the company and decisions are made by a majority of members irrespective of the economic contribution made at the beginning (i.e. some members give more than others to start the business). This is one example of several default rules that will control, unless addressed otherwise.

What are Non-Waivable Provisions?

While, most LLC owners take advantage of the wide variety of flexibility and versatility allowed in Operating Agreements, such as handling distributions and the assignment of losses, there are some terms that cannot be drafted in a way that goes against the law. They are as follows: (1) accessibility to information for members; (2) a member’s or manager’s duty of loyalty; (3) the duty of care wed by members and managers; (4) the obligations of good faith and fair dealing by members and managers; and (5) the expulsion of a member. These five aspects represent situations that cannot be modified in such a way that runs counter to the law.

This information is not a substitute for specific legal advice. Feel free to contact our office and we can arrange a meeting to discuss your Operating Agreement as part of our LLC package or as a separate service, depending on your situation. -Hew & Bordenave, LLP