

**JOHN CUNNINGHAM'S LLC NEWSLETTER  
FOR TAX AND LEGAL PROFESSIONALS**

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**WHICH LLC ACT IS BETTER FOR YOUR CLIENTS—  
THE NEW HAMPSHIRE ACT  
OR THE MASSACHUSETTS ACT?**

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EXECUTIVE SUMMARY

The financial provisions of the Massachusetts Limited Liability Company Act (the “Massachusetts Act”) and numerous other provisions in that act are essentially the same as those in the New Hampshire Limited Liability Company Act (the “New Hampshire Act”). However, on many important LLC issues, there are significant differences between the two statutes. For some clients, these differences may be critical in choosing the act that will govern their LLC deal.

DISCUSSION

Many New Hampshire accountants and lawyers—and especially those practicing in the southern tier of New Hampshire—have clients both in New Hampshire and in Massachusetts. These accountants and lawyers sometimes assist clients in LLC deals in which some of the parties reside in New Hampshire and others in Massachusetts. In these situations, clients may ask their lawyers or accountants which LLC act—the New Hampshire Act or the Massachusetts Act—is likely to be better for the various individual parties or for the deal overall.

The answer to this question will depend to a substantial degree on the individual situations of the clients in question; and in many such situations, the best resolution of the question will be to form the LLC under the Delaware LLC Act—often referred to as “everybody’s second choice” in choosing among LLC acts.

However, for New Hampshire and Massachusetts clients who don’t want the extra expense and complexities of using the Delaware Act, I’ll describe below the chief general points of comparison between the New Hampshire and Massachusetts acts.

- 1) Filing fee. The filing fee to create an LLC under the New Hampshire Act is \$100. The corresponding Massachusetts fee is \$500. However, if you form an LLC under the New Hampshire Act but plan that it will engage in significant business activities not only in New Hampshire but also in Massachusetts, you will have to register the LLC in Massachusetts—and the Massachusetts registration fee is also \$500.
- 2) Online formation of LLC. You can create an LLC online under the Massachusetts Act. In order to create a New Hampshire LLC, you must file a certificate of formation in person or by mail; there is no online filing.

- 3) The seven chief LLC statutory characteristics. Under most U.S. LLC acts, LLCs have seven chief statutory characteristics. As illustrated in the following table, the New Hampshire Act provides for all seven of these characteristics; the Massachusetts Act provides for only six.

STATUTORY CHARACTERISTIC	IS THE CHARACTERISTIC PROVIDED FOR IN THE NEW HAMPSHIRE ACT?	IS THE CHARACTERISTIC PROVIDED FOR IN THE MASSACHUSETTS ACT?
1. LLCs are legal entities independent of their members.	Yes	Yes
2. LLCs may have any number of members but must have at least one.	Yes	Yes
3. LLCs provide their members with statutory liability shields.	Yes	Yes
4. Multi-member LLCs provide their members with the special LLC statutory business asset protections known as “charging order protections.”	Yes	Yes
5. LLCs may have either of two management structures—management by the members or management by persons appointed as managers	Yes	Yes
6. LLCs impose very few statutory formalities on their members regarding voting, meetings and other matters.	Yes	Yes
7. The courts must give great deference to the contractual arrangements among the members of an LLC.	Yes	No express provision

The last of the above seven statutory characteristics—namely, that concerning contractual freedom and enforceability—is discussed in greater detail in paragraph 7(a) of this newsletter.

- 4) Mergers and conversions. Every soundly drafted LLC act should enable business people (a) to merge non-LLC entities (e.g., corporations) into LLCs and vice versa; and (b) to make “statutory conversions” between non-LLC entities and LLCs. (In a statutory conversion, an entity changes its business organization form—e.g., from the corporate to the LLC form—but remains the same entity before and after the conversion. Statutory conversions provide many legal and tax advantages that mergers do not provide.) Both the New Hampshire and the Massachusetts Act contain easy-to-use merger and conversion provisions.
- 5) Financial provisions. The financial provisions of the New Hampshire and Massachusetts Acts are essentially identical. Both acts provide that unless the

agreement among the members provides otherwise, an LLC's allocations of its profits and losses among its members and its distributions of its profits and other assets to the members must be proportionate to the members' respective shares of LLC contributions.

- 6) Do operating agreements have to be in writing? Under the New Hampshire Act, an LLC agreement is not valid unless it is in writing. Under the Massachusetts Act, operating agreements (the Massachusetts term for LLC agreement) are valid even if they are merely oral.

However, not only under the New Hampshire Act but also under the Massachusetts Act, LLC members should always have written agreements defining their respective rights, duties and liabilities. Among other considerations, these agreements are necessary in order to alter LLC statutory default rules that don't work in the deal in question. In both the New Hampshire and the Massachusetts Act, there are many default rules potentially inappropriate in particular deals.

In addition, under both the New Hampshire and the Massachusetts Acts, written agreements are necessary to address any disputes that may arise among the members about matters not covered by statutory default rules, such as disputes about member buy-outs and about alleged member and manager fiduciary breaches.

- 7) Case law. There are eight reported cases under the Massachusetts Act; there is only one under the New Hampshire Act. However, all of these cases deal with facts that are unlikely to be relevant to any LLCs except those named as parties in the cases. Thus, the fact that there is more LLC case law under the Massachusetts Act than under the New Hampshire Act is unlikely to be relevant in helping clients to choose between the two acts.

- 8) Significant differences between the two acts. In choosing between the New Hampshire Act and the Massachusetts Act, clients and their lawyers and accountants should be aware of six main differences between these acts:

a) Freedom and enforceability of contracts. The New Hampshire Act contains a provision specifically providing, in effect, that the courts must give maximum deference to the arrangements of the parties in their LLC agreement and must enforce these arrangements except in extreme cases. The Massachusetts Act contains no such provision. Thus, the New Hampshire Act provides LLC organizers and members with greater contractual flexibility and certainty than the Massachusetts Act.

b) Fiduciary provisions. The Massachusetts Act contains no fiduciary provisions whatsoever concerning the duties of care and loyalty and other fiduciary matters. The New Hampshire Act contains at least a few such provisions. Thus, in the event of a fiduciary dispute among LLC members, the New Hampshire Act will provide significantly more guidance than the Massachusetts Act.

However, in view of the great importance of fiduciary rules in multi-member LLCs, persons forming LLCs under either act should not put their faith in statutory provisions or even in case law; rather, they should comprehensively address fiduciary issues in written agreements.

- c) Events of dissociation. The Massachusetts Act provides virtually no guidance about the types of events—referred to by LLC practitioners as “events of dissociation”—that will cause members to lose their management rights. (Typical events of dissociation include death, disability, resignation and bankruptcy.) The New Hampshire Act provides substantial guidance about these events. However, as in the case of fiduciary duties, prudent LLC organizers and members, whether they are forming their LLC under the New Hampshire Act or the Massachusetts Act, will want to address these events comprehensively in a written agreement.
- d) Delegations. The Massachusetts Act expressly permits its members and managers to delegate their power and authority to other persons. Whether such delegations are valid under the New Hampshire Act is ambiguous. In a large LLC with numerous employees and complex operations, this ambiguity in the New Hampshire Act can be a problem.
- e) Right of non-manager members to participate in LLC management. The provisions of the Massachusetts Act suggest that members who are not expressly endowed with management authority in manager-managed multi-member LLCs may have less opportunity to participate in their LLC’s management than is possible under the New Hampshire Act.
- f) Personal liability of members and managers for breaches of their LLC duties. The Massachusetts Act permits LLC members to eliminate the personal liability of members and managers for breaches of their fiduciary duties. The New Hampshire Act is significantly less permissive than the Massachusetts Act in reducing or eliminating members’ and managers’ personal liabilities for these breaches.

## CONCLUSION

On the basis of the above discussion, it can be argued that, in general, the New Hampshire Act is likely to be superior to the Massachusetts Act in many LLC deals, particularly with respect to the fundamental issue of contractual freedom and enforceability. However, both acts have significant flaws; and in any event, the organizers of LLCs that involve significant financial or personal stakes should not rely on statutory provisions, but rather, should address all legal and tax issues likely to be relevant to them in comprehensive written agreements. Through these agreements, they can tailor their LLCs under both the Massachusetts and the New Hampshire Acts and, effectively, can write their own legal and tax rules.