

**48-3a-112 Operating agreement -- Scope, functions, and limitations.**

- (1) Except as otherwise provided in Subsections (3) and (4), the operating agreement governs:
  - (a) relations among the members as members and between the members and the limited liability company;
  - (b) the rights and duties under this chapter of a person in the capacity of manager;
  - (c) the activities and affairs of the limited liability company and the conduct of those activities and affairs; and
  - (d) the means and conditions for amending the operating agreement.
- (2) To the extent the operating agreement does not provide for a matter described in Subsection (1), this chapter governs the matter.
- (3) An operating agreement may not:
  - (a) vary a limited liability company's capacity under Section 48-3a-105 to sue and be sued in its own name;
  - (b) vary the law applicable under Section 48-3a-106;
  - (c) vary any requirement, procedure, or other provision of this chapter pertaining to:
    - (i) registered agents; or
    - (ii) the division, including provisions pertaining to records authorized or required to be delivered to the division for filing under this chapter;
  - (d) vary the provisions of Section 48-3a-204;
  - (e) eliminate the duty of loyalty or the duty of care, except as otherwise provided in Subsection (4);
  - (f) eliminate the contractual obligation of good faith and fair dealing under Subsection 48-3a-409(4), but the operating agreement may prescribe the standards, if not unconscionable or against public policy, by which the performance of the obligation is to be measured;
  - (g) relieve or exonerate a person from liability for conduct involving bad faith, willful misconduct, or recklessness;
  - (h) unreasonably restrict the duties and rights under Section 48-3a-410, but the operating agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;
  - (i) vary the causes of dissolution specified in Subsections 48-3a-701(4)(a) and (5);
  - (j) vary the requirement to wind up the limited liability company's activities and affairs as specified in Subsections 48-3a-703(1), (2)(a), and (5);
  - (k) unreasonably restrict the right of a member to maintain an action under Part 8, Action by Members;
  - (l) vary the provisions of Section 48-3a-805, but the operating agreement may provide that the limited liability company may not have a special litigation committee;
  - (m) vary the right of a member to approve a merger, interest exchange, conversion, or domestication under Subsections 48-3a-1023(1)(b), 48-3a-1033(1)(b), 48-3a-1043(1)(b), or 48-3a-1053(1)(b); or
  - (n) except as otherwise provided in Section 48-3a-113 and Subsection 48-3a-114(2), restrict the rights under this chapter of a person other than a member or manager.
- (4) Subject to Subsection (3)(g), without limiting other terms that may be included in an operating agreement, the following rules apply:
  - (a) The operating agreement may specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts.

- (b) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of a responsibility that the member would otherwise have under this chapter and imposes the responsibility on one or more other members, the operating agreement may, to the benefit of the member that the operating agreement relieves of the responsibility, also eliminate or limit any fiduciary duty that would have pertained to the responsibility.
- (c) If not unconscionable or against public policy, the operating agreement may:
  - (i) alter or eliminate the aspects of the duty of loyalty stated in Subsections 48-3a-409(2) and (9);
  - (ii) identify specific types or categories of activities that do not violate the duty of loyalty;
  - (iii) alter the duty of care, but may not authorize intentional misconduct or knowing violation of law; and
  - (iv) alter or eliminate any other fiduciary duty.
- (5) The court shall decide as a matter of law whether a term of an operating agreement is unconscionable or against public policy under Subsection (3)(f) or (4)(c). The court:
  - (a) shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and
  - (b) may invalidate the term only if, in light of the purposes, activities, and affairs of the limited liability company, it is readily apparent that:
    - (i) the objective of the term is unconscionable or against public policy; or
    - (ii) the means to achieve the term's objective is unconscionable or against public policy.

Enacted by Chapter 412, 2013 General Session