

Wisconsin Creates a New Type of For-Profit Business Entity: "Benefit Corporations"

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On November 27, 2017, Governor Walker signed into effect 2017 Wisconsin Act 77, which creates a new category of Wisconsin corporation, the "benefit corporation." This new business entity provides an avenue for businesses to pursue profits and at the same time strive to fulfill a socially responsible mission. Through 2017 Wisconsin Act 77, Chapter 204 of the Wisconsin Statutes has been established to regulate the creation and operating standards of Wisconsin benefit corporations. Although Wisconsin is the thirty-fourth state to enact legislation authorizing benefit corporations (with at least five more states in the process of drafting legislation), the concept is a relatively recent idea. The advent of benefit corporations is consistent with the rapid worldwide growth of socially- and environmentally-conscious corporate investors, customers and employees.

What is a benefit corporation? Traditionally, the concern of "stakeholders" having interests other than the corporate "bottom line" (including non-owner employees, charities and community interests) have not factored significantly in corporate decision-making. Instead, shareholder value has been the only legally-required standard directors and officers consider when making decisions on behalf of the corporation. The newly-created category of benefit corporation has changed that calculus to require directors and officers to consider the benefits to the public in determining the corporation's actions. This does not mean corporate management in a benefit corporation must disregard profit and other financial considerations. To the contrary, benefit corporations remain *for-profit* business entities and should not be confused with non-profits or charities.

Benefit corporations have an expanded set of obligations a board of directors and officers *must* consider in governing a corporation, including general societal benefits or more specific benefit criteria. Proponents of benefit corporation legislation have espoused the idea that benefit corporations bring added transparency and accountability into corporate governance. Given the increasing market presence of socially- and environmentally-conscious investors, funds, and customers, being a benefit corporation may also provide additional opportunities for the corporation to raise capital and/or expand its customer base by aligning interests with those who otherwise may not be willing to invest in or purchase a company's products. Finally, by aiding the communities in which benefit corporations operate, a corporation may realize a return on an investment in jobs and well-being in the community.

Wisconsin Benefit Corporations. New Chapter 204 creates an expanded set of statutory requirements for businesses wishing to be designated as benefit corporations. Many of the existing statutory laws contained in Chapter 180 will continue to govern the formation and operation of Wisconsin benefit corporations, except where a provision in Chapter 180 conflicts with a provision in the new Chapter 204 (in which case the provision in Chapter 204 will control). Many business owners, directors, and practitioners familiar with existing Wisconsin corporate law will note that Wis. Stat. § 180.0827 currently *permits* directors of a Wisconsin corporation to take into account the effect of a corporate action on not only employees and customers, but also on the communities in which a corporation operates. Chapter 204 expands these factors and *requires* the board of directors and officers of a Wisconsin benefit corporation to consider, in addition to those factors identified in Wis. Stat. § 180.0827, the interests of customers as beneficiaries of the public benefit of the benefit corporation, the local and global environment, the short- and long-term interests of the benefit corporation, and the ability of the benefit corporation to accomplish its public benefit purpose. Directors and officers of benefit corporations, unlike their counterparts in traditional corporations, may be held accountable by shareholders for the failure to take these factors into consideration.

The new law contains several features that clearly distinguish Wisconsin statutory benefit corporations from traditional corporations:

- Formation or election. A benefit corporation may be formed under Wisconsin law in the same manner as a traditional corporation, with the addition of a statement that the corporation elects to be a benefit corporation. Similarly, an existing business corporation may elect to become a benefit corporation.
- General vs. Specific Public Benefit. The statute permits a Wisconsin benefit corporation to have a “general public benefit” (defined as “a material positive impact on society and the environment”). In addition to the general public benefit, a benefit corporation may add a variety of specific public benefits under § 204.102(7), many of which are similar to the purposes of nonprofit corporations.
- Standard of Conduct. Unlike a traditional corporation, the standard of conduct in a Wisconsin benefit corporation requires directors and officers to consider the effects of corporate actions on not only the shareholders, but employees, customers, the environment and other community stakeholders, as further described in Wis. Stat. § 204.301. A benefit corporation must designate one director as a “benefit director” (and may designate a “benefit officer” as well) charged with monitoring compliance with the benefit corporation’s public benefit mission.
- Annual Benefit Statement. As part of the effort to boost accountability, a benefit corporation must provide its shareholders an annual benefit statement within 30 days of its fiscal year end assessing the corporation’s efforts at achieving its public benefit purposes.

What’s in store? The new law is not without ambiguity. For instance, although the statute contains protections similar to the familiar “business judgment rule” for officers and directors seeking to implement the public benefit mission of the corporation, there may potentially be instances where competing community or social interests conflict, particularly where a corporation is founded to advance multiple community benefits or benefits that vary in their immediacy and importance. For example, a board might find itself faced with two courses of action, one that benefits the homeless in the local vicinity, but at the expense of an equally important larger or longer-term goal (perhaps the

environment). Since shareholders are able to bring legal action to hold a benefit corporation accountable for its social mission(s), it is not difficult to envision conflicts between shareholder constituents with differing priorities.

Given that the concept of benefit corporations is still recent and Wisconsin's new legislation ventures into uncharted territory for some Wisconsin businesses looking to be more than just a business with a profit motive, there may be growing pains and some tweaks to the new statute in the coming years. Moreover, the fact that thirty-four states and the District of Columbia have all enacted statutes allowing the creation of benefit corporations means this new form of business is here for the long term. Several states are also contemplating expansion of the public benefit concept into limited liability companies ("benefit LLCs"), although, to date, Wisconsin has not done so.

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