



Authorizing Activity with Respect to Employee Benefit Plans Based on a Power of Attorney

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Introduction

- Participants of employer-sponsored retirement or health & welfare benefit plans often submit requests to the plan administrator seeking to take action with respect to their benefits.
- For example, participants may request to change beneficiaries, begin receiving distributions, or update their mailing address.
- Sometimes, participants (or their family members or friends) submit a power of attorney which purports to authorize another person (the "agent") to take action on the participant's behalf.
- For example, an agent may submit a power of attorney on behalf of a participant and request, on the basis of that document, to select the participant's beneficiaries or update the participant's mailing address or direct deposit information.
- Before acting on such instructions, plan administrators must ensure that the agent is duly authorized to act on behalf of the participant.
- Such verification is necessary in order for the plan administrator to comply with its duty of prudence under ERISA.
- If the plan administrator takes action based on instructions from an agent who is not authorized, the plan administrator may be liable to make whole the affected participant or beneficiaries.
- In this edition of Benefits Bullets, we present some key practice pointers for authorizing activity with respect to employee benefits based on a power of attorney.

Governing Statute



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- Perhaps the most common mistake that arises when plan administrators process powers of attorney is interpreting the document based exclusively on what is written within its "four corners."
- In fact, state power of attorney statutes set forth specific rules for interpreting the provisions of a power of attorney.
- The applicable state statute is typically the statute for the state where the principal resided when executing the power of attorney, and that state is typically identified in the document.
- The state statutes provide choice of law rules in cases where a power of attorney involves more than one jurisdiction.
- When analyzing the validity or meaning of a power of attorney, it is important to do so under the state statute in effect on the date of its execution.
- The following sections illustrate some key issues that may be governed by state power of attorney statutes.

Principal's Grant of Authority

- Many state statutes set forth certain actions that an agent cannot undertake on a principal's behalf unless the principal specifically granted those powers in the power of attorney.
- Examples include changing beneficiaries or survivorship interests, or waiving the principal's interest in a joint and survivor annuity.
- Plan administrators should not assume that broad, general grants of authority set forth in a power of attorney necessarily authorize the agent to take all actions with respect to a principal's retirement benefits.

Agent's Acceptance of Authority

- Under some state statutes, an agent is not authorized to act on behalf of a principal unless the agent has executed a signed acknowledgment of their duties as an agent.
- Even if a power of attorney has been validly executed under such a statute, plan administrators should not accept instruction from the agent before receiving the required acknowledgment form signed by the agent.

Principal's or Agent's Incapacity

- Some powers of attorney may stipulate that they do not take effect unless the principal becomes incapacitated.
- Others may stipulate that a successor agent will replace the original agent if the original agent becomes incapacitated.
- Most powers of attorney usually set forth their own criteria for determining incapacity.



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- When dealing with a power of attorney that does not define incapacity, the governing state statute should be consulted.

Memorializing the Analysis

- The best practice when processing an agent's request with respect to retirement or health & welfare benefits is to memorialize the analysis used to determine the validity and scope of the power of attorney.
- This task can be accomplished reliably and efficiently with the assistance of counsel who has experience reviewing powers of attorney across many states.