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A Hidden Hazard of Plan Administration-A Mishandled Power of Attorney

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Plan sponsors have a lot to think about with the administration of their employee benefit plans. There may be loans, hardship distributions, beneficiary designations, and numerous optional benefit forms. It can spin heads. Fortunately, federal law (i.e., ERISA and the Internal Revenue Code) generally governs all of these events, so even if you are a plan sponsor with participants in multiple states, you know that you will be looking solely at federal law when a participant makes certain requests under the plan.

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When those requests are being made by a participant's agent under a power of attorney, however, a different analysis must be performed. When it comes to a power of attorney, state laws govern, and your work becomes a bit more burdensome.

A power of attorney (POA) is a formal written grant of authority from an individual (sometimes referred to as the principal) to his or her agent in order for the agent to act on the individual's behalf in financial, business, or other matters. A POA can be a general grant of authority, or it can be quite narrow, such as a POA for the purpose of transferring a vehicle title. Plan administrators commonly see general POAs and have the task of deciding, for example, if the agent's completion of a benefit election form or a loan application is authorized by the POA.

The reason "getting it right" is so important is that the failure to appropriately determine the validity of a POA, leaves plans at legal risk. Imagine issuing a substantive



plan loan to a participant under what is assumed to be a valid POA from a son that the administrator knows is on the beneficiary form. The administrator thinks, therefore, the POA must be valid. The participant then dies, and the primary beneficiary informs the plan administrator that the loan actually went to his brother, a contingent beneficiary, under an invalid POA. Imagine the plan sponsor having to restore the funds (plus interest) to the participant's account for distribution to the rightful beneficiary. It could happen.

When it comes to determining the validity of a POA, it's not worth cutting corners. Analyzing a POA can be time-consuming under arcane law, or it can be relatively simple. The good news is the trend favors more streamlined administration of POAs submitted to a plan.

Currently, there are 26 states that have enacted the Uniform Power of Attorney Act (Act). Two more states and the District of Columbia have introduced the Act. Over time, more and more POAs will follow the Act's form, which will ease the burden of reviewing POAs. Plan administrators will be able to adopt a checklist of the Act's requirements for a valid POA. For now, a plan administrator can be faced with various POA forms—even from states that have adopted the Act more recently. That's because the POA might have been executed prior to the state's adoption of the Act, which would subject its review to pre-Act law.

After determining the governing state law and the date of the POA, the plan administrator needs to determine if the state law's requirement for a valid POA have been met. These requirements may include, for example, notarization or witnesses. If notarization is required, the state's notary laws then must be consulted to determine if the notarization is valid. Even where notarization is not required, a notarization of the POA should be reviewed to determine its validity, as the POA was apparently intended to be notarized.

Once the POA's form has been determined to be valid, the more difficult task comes with determining if the agent's act is authorized by the POA.

Ideally, the POA authorizes any and all actions with respect to the specific retirement plan and the participant's benefits at issue. That's rarely the case. A plan administrator must look at the listed areas where agency is given as well as the intent of the POA as a whole. Does the POA mean to encompass any and all acts that the participant could do with respect to the listed matters? Does it include a reference to retirement benefits? A potential "landmine" comes from an agent's request to change a beneficiary under a POA (noting that the Act specifically requires an affirmative statement in the POA to cover this situation).

The responses of plan sponsors to these questions may fall on a spectrum. One plan sponsor may be comfortable with "stretching" to see that the agency is authorized in a POA that encompasses all financial matters, while another plan sponsor will only feel comfortable with a POA that lists retirement matters. Needless to say, the more specificity, the better.

As plan sponsors and administrators, you are the plan's fiduciaries who are ultimately responsible for determining the validity of a POA. If you haven't already done so, determine who is reviewing the POAs submitted to your plan. Make sure there is a process that considers the state law applicable to POAs and notarization. You may want to consider creating POA policies and procedures and designating a person who can make the tough calls on the POAs that are not straightforward. Making sure your plan's POAs are handled appropriately protects your plan's integrity and can save headaches and expenses down the line.

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