

A black and white photograph of two people in business attire sitting at a desk. They are looking at a document on a clipboard. One person is holding a pen over the document, and the other is also holding a pen. The scene is dimly lit, focusing on the document and hands.

A GUIDE TO BUSINESS & COMMERCIAL LPAS

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Many of us have Lasting Powers of Attorney (LPA) for our personal financial affairs, but what about our business affairs?

The following information is aimed at those with business interests who wish to protect them in case of incapacity.

A Business Lasting Power of Attorney (BLPA) allows you (the donor) to appoint an attorney to make decisions concerning your business interests either when you are unavailable or lack mental capacity. A BLPA should be distinguished from a financial affairs LPA created to manage your personal finances.

Powers of Attorney (POA) are already widely used by businesses to manage a range of commercial situations. BLPAs should be seen as an extension of managing business interests, as part of the business crisis management practice and reducing business risk. As businesses already use POAs, these must be distinguished from BLPAs. Two separate LPAs should be made by you, a personal LPA (Financial and also Health and Welfare) and a second financial LPA to purely manage your business interests, a BLPA.

A business may be at risk if it does not have in place a BLPA as part of its crisis management strategy. It may also affect insurance costs and future claims.

Why make a separate Business LPA?

If you lose capacity and you have executed a valid enduring or lasting power of attorney, an application to the Court of Protection (COP) seeking the appointment of a deputy may be required. Applications to the COP take around six to seven months on average. During this time, there would be no one who could lawfully make financial decisions on your behalf and bank accounts may be frozen until the deputy is appointed. This often happens with personal finances and is more likely to occur with business matters.

This situation may be problematic for someone like you with business interests who is unavailable or lacks mental capacity. Without a BLPA it may not be possible to pay staff and suppliers, complete unfinished transactions, or enter into new contracts. This is likely to significantly impede the day-to-day running of the business and, in some cases, may threaten its very existence.

Even where bank accounts are jointly held in the names of business partners or directors, the bank may choose to freeze the account if you as a partner or director loses capacity to deal with their financial affairs. Following such an event the business becomes exposed to failure or winding up.

Having a BLPA in place enables you, as the business owner, to ensure that someone you trust and who understands your particular business, will be able to continue the day-to-day running of the business. If you leave it to the COP it may not be the right person and someone you would not have chosen, because you knew this, is appointed and all that

you built falls apart. Attorneys are able to deal with property owned or leased by a business, organise insurance, access bank statements and accounts, invest assets, deal with the tax affairs of the business, pay staff and suppliers and sign contracts.

In many instances, it will not be appropriate for the same person to make both personal financial decisions and business decisions on your behalf. Commercial legislation and practices, financial regulatory bodies, conflicts of interest, the partnership agreement or articles of association may prevent such an appointment.

An attorney who takes on the management of your business interests without the requisite competency, understanding or skills, may find themselves subject to a claim against them due to their unsuitability to act as an attorney. This is why choosing the right attorney is crucial.

Types of business clients

Essentially there are four types of business owners:

a) Sole traders

Sole traders frequently run specialist or technical businesses. The business does not have its own legal personality or separation from the business owner. A sole trader who does not make provision for when they are unwell, away on holiday, off on longer term sick leave or lack mental capacity, exposes their business to an unnecessary risk.

b) Partners (general partnerships and limited partnerships)

There are effectively two types of partnership governed by either the Partnership Act 1890 or the Limited Partnerships Act 1907. Partners should consult their partnership agreement as this may contain provisions relating to the incapacity of the partners. Such provisions removing partners who lack mental capacity may be in breach of the Equality Act 2010. In order to manage a potential situation with a partner who lacks mental capacity and to reduce the risk of discrimination, the partners should each consider putting in place a BLPA.

c) Partners (Limited Liability Partnerships)

Limited Liability Partnerships (LLPs) are governed by the Limited Liability Partnerships Act 2000. This means that some or all of the partners or members limit their liabilities. In practice this means one member may not be responsible or liable for another member's misconduct or negligence. LLPs are subject to many of the provisions under the Companies Act 2006. LLPs frequently adopt as their partnership agreement the Companies Act Model Articles. The LLPs articles should be reviewed, as with partnership agreements, to remove any potentially discriminatory clauses where a claim for discrimination may arise. As with partnerships, LLP members may wish to appoint either themselves or independent third parties as their attorneys under a BLPA.

d) **Company directors**

The law relating to the removal of a director who lacks mental capacity changed in April 2013. From this date, Sch 1, para 18(e), Sch 2, para 18(e) and Sch 3, para 22(e) of the Companies (Model Articles) Regulations 2008, SI 2008/3229 were removed by the Mental Health (Discrimination) Act 2013 (MH(D)A 2013), section 3. Prior to this date, if a director lacked mental capacity the other directors could seek a court order to remove them but this is no longer possible.

An attempt to remove a director lacking mental capacity using the provisions under SI 2008/3229, Sch 1, para 18(d) (and similar provisions under Schedules 2 and 3) may also fail if the grounds for or process of removal are found to be discriminatory.

Shareholders may consider removing a director lacking mental capacity by calling a shareholders' meeting to remove them. Using this procedure, the director needs to be served special notice and given the opportunity to defend themselves. If they lacked mental capacity they would not be in a position to receive notice, to suitably defend themselves or to give valid receipt for the sale of the business interest. In such circumstances, shareholders may be best advised to make an application to the Court of Protection for representation to be made on their behalf.

Companies with articles which include provisions requiring a director to relinquish their directorship without regard for the provisions of the equality legislation may find themselves subject to discrimination claims.

To protect the company's interests and avoid discrimination claims and regularity investigations, a BLPA should ideally be created by all directors.

It is quite possible for a director to amend their articles to include delegation authority by an individual director. A difficulty did arise following the change in 2007 from companies using Table A to using Model Articles. Regulation 65 of the Table A provisions provides as follows:

"Any director (other than an alternate director) may appoint any other director, or any other person approved by resolution of the directors and willing to act, to be an alternate director and may remove from office an alternate director so appointed by him".

When SI 2008/3229 was introduced to replace the Table A articles, the above individual director delegation provision was omitted and companies were instead given the option to include individual director delegation if they wish.

Unless the donor is a sole director, he may not appoint an individual to be a director in his place without approval from the board of directors. Applying the rules of agency however, a principal (donor) may appoint a proxy (attorney) to make decisions on their behalf. This is different from appointing someone to take on the full "job role" of director.

This is the underlying principle when using an LPA within a business context. It does not mean the attorney becomes a director – the attorney remains the agent.

The Mental Capacity Act 2005 (MCA 2005) Code of Practice at 7.58 says, “An attorney appointed under an LPA is acting as the chosen agent of the donor and therefore, under the law of agency, the attorney has certain duties towards the donor”. These duties in a limited way are performed by the attorney standing in your shoes, but they do not become you.

Creating a business LPA

Mental capacity of the donor

The law provides that everyone has mental capacity until disproved. A person lacks capacity in relation to a matter if at the material time he/she is unable to decide for himself/herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

For the purposes of MCA 2005, s 2, a person is unable to make a decision for himself/herself if he/she is unable:

- To understand the information relevant to the decision;
- To retain that information;
- To use or weigh that information as part of the process of making the decision; and
- To communicate this decision (whether by talking, using sign language or any other means).

If you are deemed to be able to do all of the above, you should have sufficient mental capacity to make a BLPA.

Intention

As well as having sufficient mental capacity, you also need to demonstrate the intention to create this particular BLPA. To assess intention involves evaluating what is on your mind at the time of a) giving instructions, and b) executing the LPA, and ensuring that you understand:

- The purpose of making this BLPA at this time;
- The consequences flowing from this BLPA; and
- The consequences of their choice of attorney(s).

The choice to make an LPA or BLPA stems from your own understanding and decision making, together with information received from us as your legal advisers to inform that decision. It is free choice and should be unencumbered by pressure or undue influence.

Choice of attorney

As mentioned, it is important that the attorney(s) under a BLPA is familiar with the business concerned and is someone whom you trust with your business affairs. Where you wish to appoint more than one attorney, you will need to decide how the attorney(s) are to act - i.e. jointly, jointly and severally or jointly for some decisions and jointly and severally for others.

When making these decisions, you should consider the nature of the business and the decision making procedures of the particular business. This will vary depending on whether the business is a sole trader business, a partnership, an LLP or a company.

It is also essential that you ensure the attorney(s) understand their role as this may otherwise lead to claims against the attorney(s).

Form of a business LPA

It is important to note that, where you wish to make LPAs covering your personal finances and business affairs, separate LPAs should be made dealing with the two sets of assets. Attempts by donors to appoint, within the same LPA form, different attorneys to make decisions regarding their personal finances and business affairs have been rejected by the Office of the Public Guardian. This is the body who governs and administers lasting Powers of Attorney.

Where two LPAs are being made, each should contain instructions in limiting the scope of the respective LPAs accordingly.

Dealing with disputes as to where an attorney's authority ends

If having made both a personal financial LPA and a BLPA appointing either the same attorneys or different attorneys, a dispute arises as to where an attorney's authority ends.

Attorneys must make decisions in your best interests. The attorney who is disputing the extent of their authority may not be recognising your views and wishes regarding this particular LPA. By creating a separate BLPA you are showing what your views and wishes are in relation to a particular set of individuals acting in a particular fashion regarding a particular enterprise. The attorney who does not recognise your views and wishes regarding making and using a BLPA, may no longer be following your views and wishes. It could be said this attorney may have stepped outside of acting in your best interests.

By creating a BLPA you are demonstrating your expressed wish and intentions of appointing different attorneys to manage different aspects of your life using their different skills and abilities. If an attorney no longer acts in your best interests, consideration should be given to removing that attorney.

As this guidance highlights it is important to take proper legal advice in relation to creating and registering Lasting Powers of Attorney.



If you have any queries and/or wish to make a personal and/or business Lasting Power of Attorney please contact one of our Specialist Private Client team members who would be happy to assist.

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