

# Power of Attorney

Issue Date 04/03/2019

## A. Background and Introduction

An individual may appoint another person(s) as an agent(s), to perform actions on his or her behalf through a document referred to as a power of attorney (POA). PBGC reviews the power of attorney to see if an agent has been granted the authority to handle a payee's benefits and transactions related to that benefit. This internal guidance provides the rules that PBGC will apply regarding the acceptance and interpretation of powers of attorney and recognition of authority granted to the agent(s).

In prior editions of this internal guidance:

- PBGC clarified that durable powers of attorney may be accepted if they are prepared using a PBGC provided form or the power of attorney meets the requirements of applicable state law; and
- Eliminated references to guardianship and conservatorships which are addressed in Internal Guidance Guardianships and Conservatorships.
- Clarified that an agent acting under a POA whom PBGC identifies as a probable locator, will not be recognized as having authority to take certain actions with respect to PBGC pension payments, regardless of the language in the POA.

In this sixth edition of this internal guidance:

- PBGC clarifies that an agent acting under a POA whom PBGC identifies as a probable locator, will be recognized as having authority to take only certain actions with respect to PBGC pension payments, if the principal authorized those actions under a POA. Thus, PBGC further limits the permitted actions that it will recognize for agents identified as a probable locator to include several previously permitted actions, including applying for benefits, selecting an optional form of benefit, or changing a customer's address. PBGC will no longer recognize such actions if requested by probable locators.

## B. Scope and Effective Date

This internal guidance applies to powers of attorney submitted to the agency for participants, beneficiaries, and alternate payees in PBGC-trusted and administered plans.

Subject to the uses and limitations set forth in Section F, PBGC will continue to honor POAs that it accepted before the date of this internal guidance revision, including any PBGC Form 715 Power of Attorney accepted as a DPOA before November 13, 2003.

This internal guidance is effective upon issuance.

## C. Definitions

For purposes of this internal guidance, the following definitions apply:

1. **Agent.** The agent is the person who is authorized under a POA to act on behalf of the principal. The agent may also be referred to in the document as a representative, attorney-in-fact, holder, grantee or donee.

2. **Capacity.** Capacity refers to the ability to make decisions and understand the action(s) one is taking. Capacity may also be referred to as competence. All persons are presumed to have the capacity to take any particular action (i.e., execute a POA or apply for a benefit) unless medical or legal documentation is provided.
3. **Durability.** A POA is durable when it remains in effect even if the principal becomes incapacitated. Some states require specific language of durability for a POA to be durable, often referred to as a "durability clause". Other states have a presumption of durability so that a POA that is silent on its effect when the principal becomes incapacitated is presumed to be durable unless the document states otherwise.
4. **Independent Authority.** An agent with independent authority may exercise authority singly even when there are multiple agents named in a power of attorney.
5. **Joint Authority.** An agent with joint authority must act together with the other agents named in a power of attorney to exercise authority.
6. **Power of Attorney (POA).** A POA is a document that authorizes someone to act on behalf of a principal in handling his personal or financial affairs. PBGC distinguishes POAs into these three types. In this internal guidance, the term "POA" refers to all types of POAs unless otherwise stated.
  - a. **Durable Power of Attorney (DPOA).** A durable POA is a POA that continues in effect even when the principal is incapacitated.
  - b. **Non-Durable Power of Attorney (NDPOA).** A non-DPOA is a POA that is in effect only while the principal is competent; it is invalid during any period when the principal has been determined to be incapacitated.
  - c. **Springing Durable Power of Attorney (SDPOA).** A springing DPOA is a DPOA that takes effect only upon the occurrence of a specified event, such as a determination that the principal is incapacitated.
7. **Principal.** The principal is the person who granted authority to another person to act on his or her behalf. The principal is also referred to as the grantor or donor.
8. **Probable Locator.** As determined by PBGC, a person or firm (or an employee or representative of a firm) that appears to be engaged in the business of offering to find lost property (or informing an owner about how to obtain unclaimed property) in exchange for a fee or percentage of the value of the property.
9. **Revocation.** A revocation of a POA occurs when a principal who has capacity terminates the POA. The principal effects a revocation by notifying the agent(s) that the POA is no longer in effect. For PBGC to have knowledge that a POA has been revoked and is no longer in effect, PBGC must receive written notification of the revocation.
10. **Successor Agent.** An agent named in a power of attorney to act in the event the first-named agent is unable or unwilling to act. Example: If the first named agent dies and is unable to act, authority passes to the successor agent.

## D. Acceptable Powers of Attorney

### 1. Requirements for Accepting Powers of Attorney

- a. **Non-PBGC Power of Attorney.** PBGC will accept a power of attorney that is not prepared using a PBGC form, provided the power of attorney includes:

- i. The principal's name;
  - ii. The principal's signature;
  - iii. The agent(s) name;
  - iv. Specifies end date if the POA is of temporary duration;
  - v. Specifies the authority granted to the agent including the power to conduct some or all possible pension matters with PBGC on behalf of the principal, see sections F and G; and
  - vi. Meets the requirements of the laws of the state in which it was executed.
- b. **PBGC Power of Attorney.** PBGC will accept powers of attorney properly completed using a PBGC provided form. In addition to item i. through v. above, the PBGC Form will include the following:
- i. Principal's Acknowledgment.
  - ii. Agent's Notice signed by the agent.
  - iii. One witness to the Principal's signature, who may not be:
    - a. An attending physician or medical service provider to principal, or relative of same;
    - b. An owner or operator of health care facility in which principal is a patient or resident, or relative of same;
    - c. A Parent, sibling or child of principal, or any spouse of the parent, sibling or child; and
    - d. Agent or successor agent named in power of attorney.
  - iv. Notarization of Principal's signature.

## 2. Recognition of Power of Attorney

- a. After PBGC has completed a review of a POA, it will respond in writing regarding whether it will recognize the POA. If PBGC recognizes a POA, it will confirm the agent(s) named in the POA and the actions PBGC will permit the agent(s) to take pursuant to the limits in this internal guidance and the authority granted by the POA. If PBGC cannot recognize a POA, it will identify the reason(s) the document will not be recognized by PBGC.
- b. If PBGC questions whether a POA is still in effect, before permitting an agent to act under a POA, PBGC may require the agent to execute an acknowledgment or affidavit affirming the power of attorney is still in effect and acknowledging his or her responsibilities as an agent.

## E. Documentation Indicating Incapacity

- 1. Unless PBGC has been provided acceptable medical or legal documentation that a principal is incapacitated, the principal is presumed to have capacity. Assertions from other non-medical sources such as family members are insufficient to show incapacity.
- 2. PBGC must confirm that the principal is incapacitated before it can permit the agent under a DPOA to perform an action permitted only when the principal is incapacitated, see section F.2 and section F.3.

3. PBGC must confirm that the principal is incapacitated before it can recognize a springing DPOA as taking effect.
4. PBGC criteria for confirming a principal is incapacitated is:
  - a. A documented determination of incapacity from a licensed physician; or
  - b. A ruling of incapacity issued by a court of competent jurisdiction.

## F. Actions by Agents who are not Probable Locators

1. **Actions Permitted by Powers of Attorney.** PBGC will permit an agent under a POA, who is not a probable locator, to perform some or all of the following actions (also referred to as authorities) if the authority to do so is granted by the POA:
  - a. Apply for PBGC benefits.
  - b. Select an optional form of benefits and/or name a contingent annuitant.
  - c. Designate a beneficiary, including an agent.
  - d. Change a beneficiary previously selected by the principal.
  - e. Request/receive information from PBGC pertaining to principal (ex. verification of income).
  - f. Request PBGC forms.
  - g. Respond to PBGC's requests for information or documents.
  - h. Change the address or bank account information for PBGC payments. (The principal's name must be on the bank account.)
  - i. Change customer's contact information, such as home address, phone number(s) and/or email.
  - j. Represent the principal before the PBGC Appeals Board.
  - k. Change federal income tax withholding.
  - l. Direct payment of a principal's payment into an account bearing the principal's name.
  - m. Delegate all or a portion of the agent's authority to another person to act on behalf of the principal to the extent permitted by the power of attorney. If it is unclear from the POA what actions the agent may delegate, request guidance by emailing [PSDGuidance@pbgc.gov](mailto:PSDGuidance@pbgc.gov) for assistance if it is necessary to determine whether the agent has delegation authority for a specific action.
2. **Actions Permitted only when Principal is Incapacitated.** PBGC will allow the agent of a DPOA, who is not a probable locator, to perform the following additional actions, only if the authority to do so is granted by the DPOA and the principal has been determined to be incapacitated under PBGC criteria, see section E.4 above.
  - a. Spousal Consent. An agent may give spousal consent (i.e., as described in PBGC Internal Guidance Spousal Content (Qualified Joint-and-Survivor Annuities) for an incapacitated spouse (the "Principal"), even if the agent is the participant.
  - b. Third-Party Payment Agreement. An agent may execute a third-party payment agreement (i.e. as described in Internal Guidance Assignment or Alienation of Benefits) directing that the principal's PBGC payments be made to a third party by check or direct deposit to an account that does not have the principal's name on it. (Direction to make payments to a

third party must follow the rules in section D.4 of Internal Guidance Assignment or Alienation of Benefits.

3. **Actions Permitted under Springing DPOA.** An agent under an SDPOA may only perform the actions granted in the SDPOA and listed in section F.1 or G.1 *if applicable*, if the condition for the document to take effect is met (typically a determination that the principal is incapacitated). If the SDPOA becomes effective upon the incapacity of the principal and the SDPOA is silent about how to determine incapacity, PBGC criteria is used, as described in section E.4. Regardless of the conditional event specified in an SDPOA, the agent may only act upon the special authorities listed in section F.2 if the Principal has been determined incapacitated based on PBGC criteria as described in section E.4.

## G. Actions by Agents who are Probable Locators

1. **Actions Probable Locator Agents Permitted to Take.** PBGC **will** permit an agent under a POA, whom PBGC identifies as a Probable Locator, to perform only those actions listed below (also referred to as authorities) if the authority to do so is granted by the POA:
  - a. Request/receive information from PBGC pertaining to principal (ex. verification of income).
  - b. Request PBGC forms.
  - c. Respond to PBGC's requests for information or documents.
  - d. Represent the principal before the PBGC Appeals Board.
  - e. Change federal income tax withholding.
2. **Actions Probable Locator Agents Prohibited from Taking.** PBGC **will not** permit an agent under a POA, whom PBGC identifies as a Probable Locator, to perform any of these actions listed below (also referred to as authorities) even if the authority to do so is granted by the POA:
  - a. Apply for PBGC benefits.
  - b. Select an optional form of benefits and/or name a contingent annuitant.
  - c. Designate a beneficiary, including an agent.
  - d. Change a beneficiary previously selected by the principal.
  - e. Change customer's contact information, such as home address, phone number(s) and/or email.
  - f. Direct payment of a principal's payment into an account bearing the principal's name.
  - g. Delegate all or a portion of the agent's authority to another person to act on behalf of the principal.
  - h. Give spousal consent, i.e., as described in PBGC Internal Guidance Spousal Content (Qualified Joint-and-Survivor Annuities) for an incapacitated spouse (the "Principal").
  - i. Execute a Third-party payment agreement (i.e. as described in Internal Guidance Assignment and Alienation of Benefits)

## H. Duration of a Power of Attorney

A POA remains in effect until the earlier of one of the following events occurs:

1. **Death.** The principal dies.
2. **Expiration.** The POA expires in accordance with express terms in the POA.
3. **Revocation.** The principal revokes the POA in writing.
4. **Agent related.** The agent and any successor die, becomes incapacitated, or resigns.
5. **Incapacity.** The principal of a non-DPOA is determined to be incapacitated by medical professionals/licensed physicians.

## I. Miscellaneous

1. **Multiple POAs.** In some instances, multiple POAs may be submitted for one principal. The POAs may have different agents that have been granted the same or different authority. If multiple POAs relating to the same principal appear to be in conflict, PBGC will seek clarification from the principal. If necessary, PBGC may ask the principal to submit a written revocation of all other POAs except the one he or she wishes to be in effect. If the principal is incapacitated or one or more agents challenges the validity of a POA, request guidance by emailing [PSDGuidance@pbgc.gov](mailto:PSDGuidance@pbgc.gov).
2. **Concurrently Effective Guardianship/Conservatorship.** When a guardian or conservator is appointed by the court for an individual with an existing DPOA (a DPOA executed by the ward while competent and before the appointment), the court may terminate the DPOA or allow it to continue in effect. Sometimes the court may provide that a guardian or conservator acting for the ward has the authority to terminate the DPOA or appoint a new agent under a new POA. Please request guidance by emailing [PSDGuidance@pbgc.gov](mailto:PSDGuidance@pbgc.gov) when a customer appears to have a concurrently effective guardianship or conservatorship and DPOA.
3. **Revocations.** A POA will often contain language revoking previously executed POAs. A revocation of a POA can also be submitted to PBGC in a separate writing. Keep in mind that a principal who lacks capacity may not be able to revoke a previously executed POA.
4. **Checks for Validity of POA.** A staff member who questions the validity of a POA for any reason (e.g., incapacity of an individual, scope of the agent's authority, validity of a signature) should request guidance by emailing [PSDGuidance@pbgc.gov](mailto:PSDGuidance@pbgc.gov).