

Commercial LPAs

What they are and what they do!

Commercial LPA

Many business owners, partners and directors may not consider what would happen to their business should they be unable to make decisions for their business in the case of their mental incapacity, or if they plan on leaving the country for a long period of time. The answer could be an Lasting Power of Attorney (LPA).

For many Partnerships, LLPs and companies, under the Mental Health Discrimination Act 2013, in the case of a Director/Partner losing their mental capacity they cannot be removed as a Director for that company. This will leave the company in a difficult position, where the best way around this, is to apply for a Deputyship, which as we all know is a timely and costly procedure.

For a Sole Trader, if they lose their mental capacity, in most cases this would result in losing the business as there is no one able to take it on and keep it running, or to wind up or sell the business. For all those who are dependent on the business that could no longer function, despite the business owner or director no longer having capacity, these people can sue the estate of the owner/director for negligence.

For these very reasons, we would recommend setting up a business/commercial LPA, so a business owner, director or partner can appoint an individual(s) to act in their place should this ever occur.

How are they different?

Commercial LPAs are different to a normal LPA for a couple of reasons, more so than just the basic preparation and drafting of the documents. For example, the nature of the business, the articles of associations and any partnership or shareholder agreements need to be consulted to ensure that they allow the creation of an LPA, and if not, they will need amending.

Attorneys

The appointment of attorneys need to be carefully considered based on not only trust, but if they are capable of the doing the job in a way that the donor would do. For example, the donor will need to consider if their chosen person is familiar with the business, or at least the market of the business along with sharing the same business ideas as the donor to ensure they act in the best interest of the donor.

When an Attorney is appointed, they must take out their own Personal Liability Insurance to ensure that there are protected whilst acting on behalf of the Donor. The Donor needs to understand the business value, the value of money and what their intention behind making the Commercial LPA is. The Attorneys must also be made aware of this, and what the working practices of the business is and who the business competitors are.

Before the Attorneys accept their roles they must understand the responsibilities that they will have as both Attorney and effectively a director. This means any contracts that the business has in place, they must oblige by. The Health and Safety regulations and policies that the Donor has in place must also be followed, the requirement of insurance and any tax implications of the business. This again, is best achieved by appointing an Attorney that shares similar views to that of the Donor.

Instructions

When taking the instructions, you must ensure that the Donor is who they say they are within the business e.g. are they a director? What kind of business is it, e.g. Partnership, LLP, Company, and is it a registered company regulated by the CA?

Are there other types of Powers in existence that prevent the creation of a Commercial LPA, or a substitute director, i.e. a 'Shadow director'?

You must also ensure that there are no other businesses that the Donor is a partner or director of. If there is more than one, it is highly recommended that an LPA is created per business. If the LPA is created for business affairs in general, the Office of the Public Guardian will consider this too vague and reject the document. If we appoint an LPA for multiple businesses, if one business should cease trading, the LPA will cease to exist, as the LPA will specify that the appointment refers to all businesses. The Donor should not be too concerned over the costs, as these will be company documents, the company should be able to endure the costs.

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