



IRS Permits Remote Witnesses

July 2020

Participant elections may be witnessed remotely in 2020.

KEY POINTS

- To help facilitate coronavirus-related distributions and loans, the IRS provides temporary relief from the “physical presence” requirement for spousal consent.
- The relief broadly applies to any participant election that requires a signature to be witnessed in the physical presence of a plan representative or notary, including spousal consents.
- The relief is available for the period January 1, 2020, to December 31, 2020.

On June 3, 2020, the Internal Revenue Service (“IRS”) issued Notice 2020-42 to allow a notary public or plan representative to witness participant elections (including spousal consents) remotely by live audio-video communication. This temporary relief is retroactive to January 1, 2020 and extends through December 31, 2020.

Background

Certain types of qualified plans provide automatic survivor benefits to a participant’s spouse. Defined benefit, money purchase, stock bonus, and employee stock ownership plans are subject to survivor benefits requirements under Internal Revenue Code (“Code”) §417.

The plan must provide that, unless a participant elects otherwise and unless the spouse consents to the election, benefits will be distributed in the form of a qualified annuity. The annuity is payable to the participant during his or her lifetime, and to the spouse after the participant’s death.

Consent by the spouse is required if a married participant elects an alternative form of distribution or designates a non-spouse (alternate) beneficiary. Treasury Regulations (“Reg.”) §1.401(a)-21(d) requires that participant elections and waivers that require a notary public or plan representative witness (including spousal consent under Code §417) occur in the “physical presence” of the notary public or plan representative.

Notice 2020-42: Access to Retirement Funds During the COVID-19 Crisis

Electronic notarization (legally effective in every state) is a process of affixing the notary's digital signature and digital notary seal to a document using tamper-evident technology to protect the document from subsequent changes. The person signing the document and the notary meet in person to complete the notarial process (unless remote electronic notarization is also allowed under the circumstances). Reg. §1.401(a)-21(d) specifically allows electronic notarization but its "physical presence" requirement poses a challenge for remote electronic notarization.

In Notice 2020-42, the IRS recognizes that stay-at-home/quarantine orders and social distancing practices make access to retirement plan funds difficult or impossible if a participant election requires meeting with a witness in person.

Remote electronic notarizations are also creatures of state law and are conducted using the internet, digital tools, and live audio-video technologies to complete the notarial act. The person signing the document and the notary public are at separate locations and interact in real time.

While the relief provided by Notice 2020-42 is intended to facilitate payment of coronavirus-related distributions and plan loans to qualified individuals under section 2202 of the CARES Act, it applies to any participant election that requires the signature of an individual to be witnessed in the presence of a notary or plan representative.

Safeguards for Using Electronic Medium vs. Physical Presence

Courts have held generally that "strict ERISA requirements designed to ensure a valid waiver of a spouse's retirement plan are consistent with the legislative policy of protecting spousal rights," including the witness requirement.¹ The identity of the person giving consent

must be verified, consent must be in writing, and it must acknowledge the specific rights released and the scope of consent given.

Prior to Notice 2020-42, plan sponsors were permitted to use an electronic medium to provide applicable notices and to make participant elections², provided that the process maintains "physical presence" requirement safeguards. Notice 2020-42 provides standards and procedures to satisfy the "physical presence" requirement.

Notice 2020-42 Standards for Remote Electronic Notarization

"Physical presence" is deemed satisfied if the document is executed via live audio-video technology that otherwise satisfies Reg. §1.401(a)-21(d) standards for using an electronic medium to provide notices to recipients or to make participant elections. The remote electronic notarization must also be consistent with state law requirements that apply to the notary public.

As of July 7, 2020, 24 states allow remote electronic notarization in some form. Due to the COVID-19 public health emergency, remaining states may issue emergency short term measures to allow remote electronic notarization.

Notice 2020-42 Procedures for Remote Witness by a Plan Representative

Remote witness by a plan representative using audio-video technology satisfies the "physical presence" requirement if:

- The individual signing presents a valid photo ID to the plan representative during the live audio-video conference;
- The live audio-video conference allows for direct interaction between the signing individual and the plan representative;
- The signing individual transmits by fax or email a legible copy of the signed document to the plan representative the same day it was signed; and

- The plan representative acknowledges the signature has been witnessed in accordance with Notice 2020-42 and transmits the signed document, including the acknowledgment, back to the individual under a system that satisfies applicable notice requirements.

What About Future State?

Just as states are enacting temporary measures to allow remote electronic notarization, it's unclear whether the IRS will move to make a more permanent change when Notice 2020-42 sunsets on December 31, 2020. Pending legislation introduced in March 2020 (H.R. 6364/S. 3533), the Electronic (SECURE) Notarization Act, would authorize every notary in the U.S. to perform remote online notarizations using audio-video communications and tamper-evident technology in connection with interstate transactions and would generally apply in any situation where notarization is required under federal or state law.

For additional information about implementing coronavirus relief, please contact your T. Rowe Price representative.

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¹(Lasche v. George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863,867 21 EBC 1001 (11th Cir. 1997).

²Reg. §1.401(a)-21(d.)

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