

COVID-19 Update: New Retirement Plan Guidance on Electronic Notarization

COVID-19 has made traditional notarization, where the notary is in the same physical location as the signatory, a potentially hazardous and often undesirable requirement. Many states have reacted to this by permitting remote notarization, either permanently or on a temporary basis.¹ However, generally speaking, retirement plan administrators have been unable to take advantage of this liberalization because Internal Revenue Code Regulations stipulate that if a participant election (including a spousal consent) is required to be witnessed by a plan representative or a notary public, the signature of the individual making the election must be witnessed in the physical presence of the plan representative or notary (Treasury Regulation §1.401(a)-21(d)(6)(1)).

IRS Notice 2020-42

New guidance has recently been issued, however, which provides some relief with respect to in person notarization and witness requirements. Internal Revenue Service Notice 2020-42 ("Notice 2020-42"), available [here](#), provides limited relief from the physical presence requirement for the period from January 1, 2020 through December 31, 2020. The relief applies to participants, beneficiaries, and administrators of qualified retirement plans and other tax-favored retirement arrangements, and has slightly different requirements depending on whether the witness is a notary or a plan representative.

Notary as Witness

If the witness is a notary, the physical presence requirement will be deemed satisfied for an electronic system that uses remote notarization if it is executed via live audio-video technology that otherwise satisfies the requirements of a participant election under Treasury Regulation §1.401(a)-21(d)(6) and is consistent with state law applicable to the notary. It appears that this may make using a system like Zoom or Skype possible for notarization, provided that the requirements of applicable state law are met.

Plan Representative as Witness

If the witness is a plan representative, an electronic system which uses live audio-video technology and meets the following criteria will be deemed to meet the physical presence requirement: (1) the individual signing the participant election presents a valid photo ID to the plan representative during the live audio-video conference (transmitting a copy of the ID before or after the witnessing is specifically prohibited), (2) the live audio-video conference allows for direct interaction between the plan representative and the individual (for example, a pre-recorded video of the individual signing the document is not acceptable), (3) the individual faxes or otherwise electronically transmits a legible copy of the signed document directly to the plan representative on the same date it is signed, and (4) after receipt of the signed document, the plan representative acknowledges that the signature has been witnessed by the plan representative in accordance with the requirements of Notice 2020-42, and transmits the signed document, including the acknowledgement, back to the individual using a system that satisfies the applicable notice requirements under Treasury Regulation §1.401(a)-21(c) (which generally provides that the electronic medium used in the transaction must be effectively available to the individual signing, and that the individual must be informed that paper copies of the notice are available at no charge).

General Requirements

In addition, Notice 2020-42 specifies that regulations governing electronic participant elections apply to plans that are subject to the qualified joint and survivor requirements, therefore, the participants in such plans may consent to a distribution electronically only if the election satisfies applicable electronic participant election regulations and the participant has obtained a valid spousal consent, if applicable. The electronic participant election requirements generally include: (1) the individual must be effectively able to access the electronic medium used to make the participant election, (2) the electronic medium must be reasonably designed to preclude any person other than the appropriate individual from making the participant election, (3) the electronic system must provide the individual making the election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before it becomes effective and (4) the individual making the participant election, within a reasonable time, must receive confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements.

¹ New York State authorized notaries to officiate documents remotely, subject to certain conditions, on March 19, 2020.

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