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IRS Allows for Remote Notarizations for Retirement Plan Withdrawals

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Congress acted swiftly to allow participants greater access to their retirement plan funds through special withdrawal and loan provisions in recognition of the financial impacts of the COVID-19 pandemic. See our [blog post](#) on CARES Act loans and withdrawals. However, participants may still face obstacles in accessing their retirement funds due to notarization requirements for distribution elections because physically meeting with a notary public may be impracticable or present health risks. On June 3, 2020, the IRS issued [Notice 2020-42](#), which provides temporary relief allowing for remote notarizations that comply with state laws.

Background

Married participants must obtain a written spousal consent that is witnessed by a notary public or a plan representative in order to elect a lump sum or other form of payment that is not a qualified joint & survivor annuity (QJSA) from a pension plan subject to the QJSA requirements. Spousal consents must also be obtained for a married participant to designate a beneficiary other than the participant's spouse for retirement plans, including pension plans, 401(k) plans and 403(b) plans. Retirement plans may also require spousal consents or notarized elections under their terms when not otherwise required by ERISA.

IRS regulations allow for electronic notarizations, in which elections are submitted electronically. However, these regulations still require that the signature be witnessed in the “physical presence” of the notary public or plan official as a safeguard to protect spouses from fraudulent consents.

Many states have passed “remote notarization” laws before or in response to the COVID-19 pandemic as either permanent or temporary measures. See our remote notarization [blog post](#). Remote notarization laws vary from state to state, but generally they allow a notary public to witness a signature through audio-visual technologies and to obtain appropriate identification of the individual signing the document. Other terms, such as rules for verifying identities, transmitting signed documents and retaining records, may vary from state to state. Some states do not currently permit remote notarizations. However, some states allow for remote notarization even when the individual signing is not physically present in the state.

Prior to the relief provide under Notice 2020-42, a spousal consent witnessed through a remote notarization may not be effective under IRS rules even if it is in compliance with state law because of the requirement that the signature be witnessed in the “physical presence” of the notary public.

Temporary Relief

Notice 2020-42 provides that the “physical presence” for an electronic notarization is deemed to be satisfied if the notarization is executed using audio visual equipment and is consistent with the state remote notarization law that applies to the notary public.

This temporary relief applies to notarizations for the period of January 1, 2020 through December 31, 2020. Accordingly, plans that relied on a state remote notarization statute prior to the grant of relief will be able to rely on this relief.

The temporary relief also allows for spousal consents or other signatures to be witnessed by a plan representative remotely through an audio-visual conference from January 1, 2020 through December 31, 2020. To qualify for this relief:

The individual signing must provide a valid photo ID during the audio-visual conference (not follow up with ID afterward).

The conference must be a live interaction that allows for interaction between the individual and the plan representative (a prerecorded video would not suffice)

A legible copy of the signed document must be faxed or scanned and emailed to the plan representative on the same day it is signed.

The plan representative must acknowledge that the signature has been witnessed under the terms of Notice 2020-42, and transmit the signed document with the acknowledgement back to the individual electronically.

This temporary relief applies to any participant elections that must be notarized or witnessed by a plan representative. However, this relief is only temporary. After December 31, 2020, spousal consents may again be subject to the requirements of being witnessed in the “physical presence” requirement unless the IRS extends this relief.