

IRS Allows Remote Notarization of Participant Elections for 2020

PUBLISHED: June 4, 2020

On June 3, the Internal Revenue Service (“IRS”) issued Notice 2020-42 to provide temporary relief for certain participant elections required to be witnessed in the “physical presence” of a plan representative or notary public, including spousal consents. The Notice is a welcomed response to the major challenges posed by the social distancing measures put in place due to the COVID-19 pandemic, and it provides plan administrators with additional flexibility to use remote notarization and similar services for all of 2020.

Background

In response to the pandemic, Congress gave participants greater access to their retirement benefits via the COVID-19 relief bill, known as the CARES Act (Pub. L. 116-36). Specifically, Section 2202(a) of the CARES Act provides two key economic relief mechanisms for plan participants: coronavirus-related hardship distributions and a temporary expansion of plan loans. With regard to distributions, the Act allows certain individuals to receive up to \$100,000 for a coronavirus related distribution from an eligible retirement plan, along with special tax relief. Plan loan limits under section 72(p)(2)(A)(i) of the Code were increased from \$50,000 to \$100,000 until September 22, 2020 under the CARES Act. Additionally, the provision under section 72(p)(2)(A)(ii) of the Code limiting aggregate plan loans was increased to 100 percent of the employees vested accrued benefit under the plan.

However, these relief provisions, along with existing plan distribution and loan provisions, are difficult for participants to use when certain elections and waivers are required to be witnessed in person. For example, pension plans subject to the qualified joint and survivor annuity (“QJSA”) provisions of section 417 of the Code require a spousal consent waiver as a part of a request for a plan distribution or loan. Spousal consent to a QJSA waiver generally must be witnessed in the physical presence of either a plan representative or a notary public under section 1.401(a)-21(d)(6). This requirement has become difficult to satisfy in light of social distancing measures and stay-at-home practices. In addition,

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spousal consent is required for payment of a 401(k) or ERISA-covered 403(b) plan account balance to a designated beneficiary other than the spouse upon the participant's death; such non-spouse beneficiary designations are subject to the same witnessing requirements.

Relief for 2020

To address this problem, Notice 2020-42 provides relief for the 2020 calendar year from the physical presence requirement under section 1.401(a)-21(d)(6) for any participant election witnessed by a notary public of a state that permits remote electronic notarization or any participant election (or consent) witnessed by a plan representative. In order to access this relief, the following must be satisfied:

Notary Rules – Where a participant election is witnessed by a *notary*, physical presence is deemed satisfied for an electronic system that uses remote notarization if executed via live audio-video (AV) technology that otherwise satisfies the requirements for participant elections under section 1.401(a)-21(d)(6), and is consistent with state law requirements that apply to the notary public.

Plan Representative Rules – Where a participant election is witnessed by a *plan representative*, the physical presence requirement is deemed satisfied for an electronic system using live AV technology if:

- the individual signing the election presents a valid photo ID to the plan representative during the live AV conference;
- the live AV 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 this Notice and transmits the signed document, including the acknowledgement, back to the individual under a system that satisfies the applicable notice requirements under section 1.401(a)-21(c) (“effective ability to access” rules).

Next Steps

Many states have passed legislation (or permit executive orders) to allow for remote online notarization, and Notice 2020-42 will allow many plan administrators to take advantage of such services for 2020. Although it is unclear whether the IRS will move to make a more permanent change for future years, plan sponsors and recordkeepers can rely on this important relief for this year (retroactive to January 1).

Plans subject to these notary restrictions (e.g., defined benefit plans and money purchase pension plans) should consider modifying distribution and loan procedures accordingly for 2020. And 401(k), etc. plans may wish to incorporate these steps in their account beneficiary designation procedures for the year.

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We note that pending legislation (H.R. 6364/S. 3533), the Electronic (SECURE) Notarization Act, would permit the use of electronic notarizations under specified conditions to ensure their validity. This legislation would generally apply in any situation where notarization is required under federal or state law. However, Congressional action on the legislation is uncertain.

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