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Employee Benefits Corner

IRS Extends Remote Notarization Through June 2022 (And Is Considering Permanent Relief)

By Elizabeth Thomas Dold and David N. Levine

On June 24, the Internal Revenue Service (“IRS”) issued Notice 2021-40 extending the temporary relief provided in Notice 2021-3, set to expire on June 30, 2021, from the requirement for participant elections to be witnessed in the “physical presence” of a plan representative or notary public, including spousal consents. This 12-month extension of the Notice—through June 30, 2022—is in response to continued challenges due to the COVID-19 pandemic. Notably, the IRS expressly seeks comments regarding whether to make this relief permanent. A summary of the relief, along with the focus of the requested comments, is set forth below, followed by action steps plan sponsors should consider (although the relief is optional so no action is mandated).

Background

In response to the pandemic, Congress gave participants greater access to their retirement benefits *via* the CARES Act (P.L. 116-36). Specifically, Act Sec. 2202(a) of the CARES Act provided plan sponsors the option to offer coronavirus-related hardship distributions and a temporary expansion of plan loans. However, it is difficult for participants to take advantage of these relief provisions, along with existing plan distribution and loan provisions, when certain elections and waivers are required to be witnessed in person. For example, the qualified joint and survivor annuity (“QJSA”) provisions of Code Sec. 417 generally require pension plans to obtain spousal consent to a participant’s request for a plan distribution or loan since the spouse would be waiving his or her right to a survivor annuity. Spousal consent to a QJSA waiver generally must be witnessed in the physical presence of either a plan representative or a notary public under Reg. §1.401(a)-21(d)(6). Moreover, 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. These notary requirements became difficult to satisfy in light of mandatory lock-downs, social distancing measures and stay-at-home practices, and continue to be a challenge in a changed post-pandemic world.

To address the problem, Notice 2020-42 provided relief for the 2020 calendar year from the physical presence requirement under Reg. §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 if certain requirements are met. Thereafter, Notice 2021-3 extended that relief through June 30, 2021.

Second Extension of Relief

Notice 2021-40 further extends relief from physical presence requirements through June 30, 2022. This relief covers the physical presence requirement under Reg. §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 requirements must be satisfied (which are set forth in Notice 2021-3):

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, and may not merely transmit a copy of the photo ID prior to or after the witnessing;
- the live AV conference allows for direct interaction between the signing individual and the plan representative (for example, a pre-recorded video of the person signing is not sufficient);
- the signing individual transmits by fax or email a legible copy of the signed document to the plan representative the same date it was signed; and
- after receiving the signed document, the plan representative acknowledges the signature has been witnessed in accordance with this Notice and transmits the signed document, including the acknowledgment, back to the individual under a system that satisfies the applicable notice requirements under Treasury Reg. §1.401(a)-21(c) (“effective ability to access” rules).

Request for Comments

Included in Notice 2021-40 is a request from Treasury and the IRS for comments on whether permanent guidance modifying the physical presence requirement should be issued. Comments are specifically requested by September 30, 2021, on the following:

- (1) how the temporary removal of the physical presence requirement has affected costs and burdens for all parties and whether there are costs and burdens associated with the physical presence requirement that support modifying the requirement on a permanent basis;
- (2) whether there is evidence that the temporary removal of the physical presence requirement has resulted in fraud, spousal coercion, or other abuse and how, if the physical presence requirement is permanently modified, increased fraud, spousal coercion, or other abuse may be likely to result from that modification (this is long been an area of concern);
- (3) how participant elections are being witnessed, or are expected to be witnessed, as the COVID-19 pandemic abates;
- (4) if guidance permanently modifying the physical presence requirement is issued, what procedures should be established to provide the same safeguards for participant elections as are provided through the physical presence requirement; and
- (5) whether guidance should establish procedures for witnessing by plan representatives that are different from procedures for witnessing by notaries.

Next Steps

Plan sponsors should review their plan policies and procedures to understand the use of notary/plan representative witness for various plan purposes, and consider using more flexible electronic processes to the extent it remains difficult to comply with the physical presence requirement. Plan sponsors and recordkeepers alike can rely on this important relief through June 30, 2022. For example, plan sponsors of defined benefit plans and money purchase pension plans should consider modifying distribution and loan procedures accordingly through June 2022. Moreover, for all plans, consider incorporating these additional options in their beneficiary designation procedures for another year (through June 2022). And stay tuned to see if the IRS will make this relief permanent—which has been on many a plan sponsor wish list for some time now!

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