

FYI[®]

For Your Information[®]

“Physical presence” requirement for witnesses and notaries temporarily lifted

On June 3, 2020, the IRS announced temporary relief for certain participant elections required to be witnessed in the “physical presence” of a plan representative or notary public, including spousal consents.

Spousal consents and notarization requirements

Certain participant elections, including distributions and loan provisions, require spousal consent to be witnessed in the physical presence of either a plan representative or a notary. Because of the COVID-19 social distancing measures and stay-at-home practices, it has been difficult for participants and beneficiaries to adhere to the “physical presence” requirement for having qualified retirement plan participant elections (including spousal consents) witnessed or notarized.

The CARES Act was enacted by Congress to help plan sponsors provide relief to plan participants impacted by COVID-19, including coronavirus-related hardship distributions and the expansion of plan loan provisions. However, because of the physical presence requirement for witnesses and notaries, these provisions are currently difficult for participants to use.

In addition, even though many states relaxed their notarization rules and allow for remote electronic notarization, federal rules still require certain elections to be signed in the physical presence of a witness, plan representative, or notary public.

Temporary relief announced for 2020

To address this issue, the IRS issued Notice 2020-42, which provides temporary relief from the physical presence requirement for the 2020 calendar year (retroactive to January 1, 2020) for any participant election that is required to be witnessed by a plan representative or a notary public of a state that permits remote electronic notarization.

Volume 43

Issue 40

July 14, 2020

Authors

Cynthia Hall, QKA, QPFC
Mary H. Roth, JD, MLT

In order to access this relief, the following rules 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 the notarization is executed via live audio-video technology that satisfies the requirements for participant elections and is consistent with state laws 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 audio-video technology if:

- The individual signing the election or consent 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 sends, by fax or email, a legible copy of the signed document to the plan representative on the same day it was signed;
- After receiving the signed document, the plan representative acknowledges the signature has been witnessed in accordance with the electronic notice requirements; and
- The plan representative sends the signed document, including the acknowledgement, back to the individual under a system that satisfies the applicable electronic notice requirements (“effective ability to access” rules).

Welcome relief

Although temporary, this change is a welcome relief for retirement plan administrators and participants. It is unclear whether the IRS will make this a more permanent change.

Buck comment. Plan administrators should consider implementing this new IRS guidance for distribution and loan procedures for their qualified retirement plans for 2020.

Produced by the Compliance Consulting Practice

The Compliance Consulting Practice is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, training, and knowledge management. For more information, please contact your account executive.

You are welcome to distribute *FYI*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.