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“Physical presence” relief for witnesses and notaries extended

In response to the continued COVID-19 pandemic, the IRS has extended the remote notarization relief for certain qualified retirement plan participant elections.

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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, participants and beneficiaries continue to have difficulties adhering to the “physical presence” requirement for having qualified retirement plan participant elections (including spousal consents) witnessed or notarized.

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

Extended relief announced

As noted in our [July 14, 2020 FYI](#), the IRS initially issued Notice 2020-42 to provide temporary relief from the physical presence requirements for the 2020 calendar year (retroactive to January 1, 2020).

In response to continued issues relating to the COVID-19 pandemic, the IRS recently issued Notice 2021-03 to extend temporary relief from the physical presence requirement through June 30, 2021 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.

The rules to access this relief have not changed and are as follows:

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.

The rules for allowing electronic participant elections were finalized in 2006. They were a welcome change to plan administrators and employers who now could conduct many types of employee benefit transactions electronically, saving them considerable time and money and providing built-in recordkeeping for required procedures.

In closing

Although still temporary, this extended relief was provided to help plan administrators and participants through the upcoming months. It is unclear whether the IRS will make this a more permanent change.

Buck comment. Plan administrators of qualified retirement plans should consider adding or adopting this IRS guidance for their distribution and/or loan procedures.

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