

# Can I Get an E-Witness? Retirement Plan Consents in the Age of Social Distancing

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As the world faces the ongoing threat of the coronavirus pandemic, pension plan administration is often taking place from remote working locations. Prospective retirees and their spouses may increasingly find themselves in those vulnerable populations that are encouraged to avoid public outings as much as possible. Pension plan administrators are understandably eager to adapt their processes to the current situation in order to accommodate an individual’s request to commence retirement benefits. However, plan administrators may want to consider carefully whether to waive the requirement to obtain in-person pension elections.



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### **Participant Elections and Spousal Consent**

The normal form of retirement benefit for a married participant in a defined benefit plan is a qualified joint and survivor annuity (QJSA). A QJSA pays a monthly annuity for the life of the participant and then following the participant's death, pays a monthly annuity (frequently equal to 50 percent of the participant's monthly annuity) to the participant's surviving spouse. Neither the participant nor the spouse has to consent if a benefit is paid as a QJSA.

[Note: This article specifically discusses the QJSA rules as they apply to defined benefit plans, but similar rules apply to money purchase pension plans, as well as certain 403(b) plans and 401(k)/profit-sharing plans where the normal form of payment is a QJSA. In those instances, the spousal consent rules may apply to all distributions, including hardship withdrawals and loan requests.]

A defined benefit plan may offer optional forms of benefit and allow a participant to choose a different type of annuity, or possibly a lump-sum distribution. To choose an optional form of benefit, the participant must properly waive the QJSA benefit and elect the optional form of benefit. If the participant is married, the spouse must consent to the participant's choice of the optional form of benefit or payment of the benefit to a person other than the spouse.

### **In-Person Witnessing Required**

The requirements for spousal consent are straightforward: the spouse's consent must be in writing, must designate the optional form of benefit or alternate beneficiary, and must be witnessed by a plan representative or notary public. This "witnessing" requirement may be difficult, if not impossible, for some individuals to satisfy while practicing social distancing.

The most recent [guidance on obtaining spousal consent](#) is from 2006, long before anyone contemplated the impact of a pandemic on pension plan administration. Those rules address the use of an electronic medium to make a participant election or to obtain spousal consent. Many plans have implemented these electronic delivery and signature rules in their administrative procedures. Even though electronic notices and electronic signatures are permitted, the regulations specifically require that a participant's and spouse's elections be "witnessed in the physical presence of a plan representative or a notary public."

### **Deemed Physical Presence**

Some states have adopted remote notarization laws that permit a notary to notarize an electronic signature when a two-way video-audio connection is established. In days when electronic face-to-face encounters are prevalent among people everywhere, these rules are practical and easily satisfied. Other states that did not have specific remote notarization laws in place before the coronavirus pandemic have put these processes in place on an emergency basis.

In spite of the state laws relaxing the requirements for in-person notarizing of documents, defined benefit pension plans must establish procedures that comply with the Internal Revenue Code. Although Department of the Treasury regulations allow the Internal Revenue Service (IRS) commissioner to permit the "physical presence" requirement to be satisfied under an electronic system, no such guidance has been issued to date.

Plan administrators that are deciding whether to implement remote witnessing or accept remote notarization without the "physical presence" of the participant and spouse may want to keep in mind that there are serious risks. These risks include (1) plan disqualification and (2) liability for the survivor benefit. Obtaining proper participant elections and spousal consents are plan qualification requirements, and not obtaining proper consents is an operational failure that could potentially disqualify the plan. In

many cases, this operational error can be corrected under the Employee Plans Compliance Resolution System, [Revenue Procedure 2019-19](#) (EPCRS) to avoid plan disqualification.

Additionally, if a spouse consents electronically but not in the “physical presence” of the notary or plan representative, the spouse could later claim the consent was not valid. Theoretically, a plan could remain liable for the spouse’s survivor benefit calculated under the QJSA rules, regardless of the participant’s remaining accrued benefit at the time of the participant’s death.

One could argue that in the context of COVID-19 quarantines and isolation orders, the plan administrator might reasonably determine that the physical presence requirement is deemed to be satisfied when the individual meets certain denoted requirements. For example, the plan administrator might limit the availability of this option to individuals for whom an in-person visit to a notary is medically inadvisable or precluded by state law. In that case, the plan administrator might develop detailed procedures that meet the requirements of the state’s remote notary law and require the individual to later follow up with a witnessed signature in the presence of a notary or plan representative. It would be prudent for any such procedure to be put in writing and limited in its application.

While the IRS is aware of this issue, it has not yet issued guidance providing relief to the physical presence requirement. Even in these extraordinary times, unless such guidance is provided, plan administrators may want to remain wary of the risks of granting an exception to the physical presence requirement for participant and spousal consents and proceed cautiously.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm’s [Coronavirus \(COVID-19\) Resource Center](#) as additional information becomes available. Critical information for employers is also available via the firm’s [webinar programs](#).

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