

Remote Witness Protection: Retirement Plan Consents in the Age of Social Distancing, Part II

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The novel coronavirus pandemic has presented novel questions for pension plan administration. One such question has concerned how to balance the spousal consent requirements of participants’ pension elections with the need to protect prospective retirees and their spouses, who may be vulnerable to COVID-19 and avoiding public outings. Since the publication of our article on April 14, 2020, the Internal Revenue Service (IRS) has answered the question and provided guidance for plan administrators in Notice 2020-42.



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Background

A married participant in a defined benefit plan (and certain defined contribution plans) generally receives a retirement benefit in the form of a qualified joint and survivor annuity (QJSA). A QJSA pays the participant a monthly annuity during his or her life; upon the participant's death, the participant's surviving spouse receives a monthly annuity, which is typically a smaller percentage of the participant's annuity.

If the plan has optional forms of benefit, the participant must properly waive the QJSA benefit to elect an optional form of benefit. Where the participant is married and elects an optional form of benefit or payment of the benefit to an individual other than the spouse, the spouse must provide consent to the election. Spousal consent must be in writing, must designate the optional form of benefit or alternate beneficiary, and must be witnessed in the "physical presence" of a plan representative or notary public.

The “physical presence” requirement has been a challenging standard for plan administrators during the pandemic, given the reality of public health restrictions and the consequences for failing to follow participant election rules. If a participant’s election or the spouse’s consent has not been properly executed, a plan faces significant risks, including plan disqualification and liability for the survivor benefit.

IRS Relief

In Notice 2020-42, the IRS has provided temporary relief from the “physical presence” requirement for spousal consents made from January 1, 2020, through December 31, 2020, and for any participant election that requires witnessing in the physical presence of a plan representative or notary during that period, provided certain requirements are met:

- For spousal consents and participant elections witnessed by a notary public, the physical presence requirement is satisfied if the consent or election otherwise meets the requirements for proper consent or election, is made over a live audio-video connection, and meets the applicable state law requirements for remote notarization.
- For spousal consents and participant elections witnessed by a plan representative, the physical presence requirement is met if it otherwise meets the requirements for proper consent or election, is made over a live audio-video connection, and (1) the individual signing presents “a valid photo [identification] to the plan representative” during the live conference; (2) the conference allows for “direct interaction between the individual [signing] and the plan representative”; (3) the individual transmits “by fax or electronic means a legible copy of the signed document directly to the plan representative on the same date it was signed”; and (4) after receiving the signed document, the plan representative acknowledges that the signature has been witnessed by the plan representative and transmits the signed and acknowledged document back to the individual, under the same guidelines for providing electronic participant notices.

Meeting the Requirements

An individual seeking remote notarization will need to check the remote notarization laws of the individual’s state of residency. Some states already have remote notarization laws in effect and other states have recently created processes that can be used on an emergency basis during the COVID-19 pandemic. Provided the election or consent meets the state’s notarization requirements and is made over a live audio-video connection, the consent or election will meet the “physical presence” requirement.

The process for remote witnessing by a plan representative is more complex, but provided that the requirements are met, this process permits plan administrators to be responsive to the safety concerns of participants and their spouses. With the relief granted for remote witnessing by a notary public, plan administrators could choose to use the option of remote witnessing by a plan representative only in those circumstances where remote notarization is not available.

Plan administrators may want to review consents and elections made since January 1, 2020. Some plan administrators took steps to develop procedures to address the “physical presence” requirement prior to the issuance of Notice 2020-42. If the consents and elections made during that time period meet the requirements of the new guidance for either remote notarization or remote witnessing, the plan administrator now has confirmation that those elections and consents meet the “physical presence” requirement and are valid.

However, if the procedures did not meet the requirements of the new guidance, the consents and elections may not have met the “physical presence” requirement when made. In that case, plan administrators may want to identify those instances and seek new consents and elections that meet the requirements of Notice 2020-42.

Although the IRS guidance is only applicable until December 31, 2020, there is pending legislation for more permanent relief through the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (S. 3533 / H.R. 6364). In the absence of this enacted legislation, the IRS would need to update its regulations to provide permanent relief. For now, this is a positive step to alleviate concerns for plan administrators along with prospective retirees and their spouses.

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. Important information for employers is also available via the firm’s [webinar programs](#).

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