

Temporary Relief from the Physical Presence Requirement for Spousal Consents Under Qualified Retirement Plans

Notice 2020-42

I. PURPOSE

In response to the unprecedented public health emergency caused by the Coronavirus Disease 2019 (COVID-19) pandemic, and the related social distancing that has been implemented, this notice provides temporary relief from the physical presence requirement in Treasury Regulations § 1.401(a)-21(d)(6) for participant elections required to be witnessed by a plan representative or a notary public, including a spousal consent required under § 417 of the Internal Revenue Code (Code). While this temporary relief, which covers the period from January 1, 2020, through December 31, 2020, is intended to facilitate the payment of coronavirus-related distributions and plan loans to qualified individuals, as permitted by section 2202 of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020) (CARES Act), the temporary relief applies to any participant election that requires the signature of an individual to be witnessed in the physical presence of a plan representative or notary.

II. BACKGROUND

On March 13, 2020, the President determined that the COVID-19 pandemic was of sufficient severity and magnitude to warrant an emergency determination under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207. Providing alternative procedures for notarization and consent related to plan distributions that do not require physical presence is an appropriate emergency

protective measure during this declared emergency period and is consistent with the physical distancing procedures implemented by the states.

As part of the response to the COVID-19 pandemic, Congress passed the CARES Act to allow participants greater access to their retirement benefits. Section 2202(a) of the CARES Act permits certain individuals to receive up to \$100,000 for a coronavirus-related distribution from an eligible retirement plan (as defined in § 402(c)(8)(B) of the Code). A coronavirus-related distribution is defined as any distribution from an eligible retirement plan to a qualified individual made on or after January 1, 2020, and before December 31, 2020. A distribution is not subject to the 10% additional tax under § 72(t) to the extent it meets the requirements of a coronavirus-related distribution. In addition, the coronavirus-related distribution may be included in gross income ratably over the 3-year period beginning with the taxable year of the distribution and may be recontributed to an applicable eligible retirement plan in which the taxpayer is a beneficiary and to which a rollover can be made.

Section 2202(b)(1) of the CARES Act provides that in the case of any loan from a qualified employer plan (as defined under § 72(p)(4) of the Code) to a qualified individual made during the 180-day period beginning on the date of enactment of the CARES Act, the \$50,000 aggregate loan limit in § 72(p)(2)(A)(i) of the Code is increased to \$100,000. In addition, the rule in § 72(p)(2)(A)(ii) limiting the aggregate amount of the loans to one-half of the present value of the vested accrued benefit of the employee is increased to 100 percent of the employee's vested accrued benefit under the plan.

Section 1.401(a)-21 sets forth standards for the use of an electronic medium to provide applicable notices to recipients or to make participant elections with respect to a retirement plan, an employee benefit arrangement, or an individual retirement plan.

Section 1.401(a)-21(e)(6) defines a participant election as any consent, election, request, agreement, or similar communication made by or from a participant, beneficiary, alternate payee, or an individual entitled to benefits under a retirement plan, employee benefit arrangement, or individual retirement plan. Section 1.401(a)-21(d) sets forth the following conditions for participant elections:

- (1) The individual must be effectively able to access the electronic medium used to make the participant election;
- (2) The electronic system must be reasonably designed to preclude any person other than the appropriate individual from making the participant election;
- (3) The electronic system must provide the individual making the participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before it becomes effective; and
- (4) The individual making the participant election, within a reasonable time, must receive confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements under § 1.401(a)-21.

The participant election rules in § 1.401(a)-21(d) apply to plans that are subject to the qualified joint and survivor (QJSA) requirements of § 417. Accordingly, for a plan subject to the QJSA requirements, a participant's consent to a distribution may be provided through the use of electronic media if the plan complies with the standards

described in § 1.401(a)-21(d), provided that the participant also obtains a valid spousal consent, if applicable.

Section 417 requires spousal consent to a waiver of a QJSA, which includes the waiver of a QJSA as part of a request for a plan distribution or a plan loan. Section 417 further requires that the spousal consent be witnessed by a plan representative or a notary public. Section 1.401(a)-21(d)(6)(i) provides that, in the case of a participant election that is required to be witnessed by a plan representative or a notary public (such as a spousal consent to a waiver of a QJSA under § 417), the signature of the individual making the participant election must be witnessed in the physical presence of a plan representative or a notary public. Section 1.401(a)-21(d)(6)(ii) provides that, if the signature is witnessed in the physical presence of a notary public, an electronic signature acknowledging the signature (in accordance with section 101(g) of the Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (2000) (E-SIGN),¹ and applicable state law for notaries public) will not be denied legal effect.

Section 1.401(a)-21(d)(6)(iii) provides that the Commissioner may provide in guidance published in the Internal Revenue Bulletin that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement, but only if those procedures with respect to the electronic system provide the same safeguards for participant elections as are provided through the physical presence requirement.

¹ Section 101(g) of E-SIGN provides that “[i]f a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.”

Section 1.401(a)-21(d) permits electronic notarization of participant elections. However, the physical presence requirement in § 1.401(a)-21(d)(6) would preclude the use of remote notarizations of participant elections, including spousal consents.

Remote electronic notarizations differ from electronic notarizations in that remote electronic notarizations generally are conducted remotely over the internet using digital tools and live audio-video technologies, whereas electronic notarizations can be signed electronically but still require that certain signatures be witnessed in the physical presence of a notary public or plan representative. The Department of the Treasury and the Internal Revenue Service have received several requests from stakeholders to permit remote electronic notarization of spousal consents for plan loans and distributions during the COVID-19 pandemic. These stakeholders state that due to the social distancing measures with respect to the COVID-19 pandemic, the physical presence requirement in § 1.401(a)-21(d)(6) makes it difficult, if not impossible, for a participant to receive a plan distribution or plan loan (or for a qualified individual to receive a coronavirus-related distribution or plan loan) for which spousal consent is required. While recognizing the need for relief, one stakeholder requested that any relief take into account spousal protections, including limiting the relief solely to the physical presence requirement and making the relief temporary.

Remote electronic notarization is not uniformly applied by the states. In the majority of states, remote electronic notarization is either permanently or temporarily permitted by law, but in some states remote electronic notarization is not currently permitted.

III. GRANT OF RELIEF

For the period from January 1, 2020, through December 31, 2020, if the related requirements in subsection A or B of this Section III are satisfied, this notice provides the following temporary relief from the physical presence requirement in § 1.401(a)-21(d)(6):

(1) temporary relief from the physical presence requirement for any participant election witnessed by a notary public of a state that permits remote electronic notarization, and

(2) temporary relief from the physical presence requirement for any participant election witnessed by a plan representative.

A. Temporary Relief from the Physical Presence Requirement for any Participant Election Witnessed by a Notary Public

In the case of a participant election witnessed by a notary public, for the period from January 1, 2020, through December 31, 2020, the physical presence requirement in § 1.401(a)-21(d)(6) is deemed satisfied for an electronic system that uses remote notarization if executed via live audio-video technology that otherwise satisfies the requirements of participant elections under § 1.401(a)-21(d)(6) and is consistent with state law requirements that apply to the notary public.

B. Temporary Relief from the Physical Presence Requirement for any Participant Election Witnessed by a Plan Representative

In the case of a participant election witnessed by a plan representative, for the period from January 1, 2020, through December 31, 2020, the physical presence requirement in § 1.401(a)-21(d)(6) is deemed satisfied for an electronic system if the electronic system using live audio-video technology satisfies the following requirements:

(1) The individual signing the participant election must present a valid photo ID to the plan representative during the live audio-video conference, and may not merely transmit a copy of the photo ID prior to or after the witnessing;

(2) The live audio-video conference must allow for direct interaction between the individual and the plan representative (for example, a pre-recorded video of the person signing is not sufficient);

(3) The individual must transmit 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 must acknowledge that the signature has been witnessed by the plan representative in accordance with the requirements of this notice and transmit the signed document, including the acknowledgement, back to the individual under a system that satisfies the applicable notice requirements under § 1.401(a)-21(c).

IV. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1632. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information is in Section III.B of this notice. One of the conditions for receiving temporary relief from the physical presence requirement in § 1.401(a)-21(d) is that the plan representative acknowledge that he or she has

witnessed the signature and transmit the signed document, including the acknowledgement, back to the person under a system that satisfies the applicable notice requirements under § 1.401(a)-21. This condition is similar to the confirmation requirement for participant elections in § 1.401(a)-21(d), requiring that the individual making a participant election, within a reasonable time, receive a confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements under § 1.401(a)-21(c). It has been determined that the plan representative's acknowledgment that he or she witnessed the signature of the participant election is a minor modification to the control number 1545–1632 and should not result in any additional paperwork burden.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

V. DRAFTING INFORMATION

The principal authors of this notice are Arslan Malik and Pamela R. Kinard of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, contact Arslan Malik at (202) 317-6700 and Pamela R. Kinard at (202) 317-6000 (not toll-free numbers).