



IRS Provides Relief from the Physical Presence Requirement for Elections Made by Retirement Plan Participants and Beneficiaries

JUNE 8, 2020

Under current law, certain participant elections must be witnessed in the physical presence of a plan representative or notary public. However, local shutdowns and social distancing practices in response to the Coronavirus (COVID-19) pandemic have made compliance challenging.

On June 3, 2020, the Internal Revenue Service (IRS) issued [Notice 2020-42](#), which provides temporary relief from the physical presence requirement by permitting use of remote electronic notarization and live audio-video technology, subject to certain requirements. The relief pertains to “participant elections,” including 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.

Particularly, the physical presence requirement for participant elections that must be witnessed by a notary public may be satisfied by utilizing an electronic system that facilitates remote notarization, as long as the elections are executed via live audio-video technology that otherwise satisfies the requirements for participant elections and complies with state law requirements for a notary public.

For participant elections that must be witnessed by a plan representative, the physical presence requirement will be met if the electronic system using live audio-video technology satisfies the following requirements:

1. **Photo ID.** The individual signing the participant election must present a valid photo ID to the plan representative during the live audio-video conference;
2. **Direct Interaction.** The live audio-video conference allows for direct interaction between the individual and the plan representative;
3. **Follow-up Document Required From Participant.** 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. **Follow-up Document Required From Plan Representative.** After receiving the signed document, the plan representative acknowledges that the signature has been witnessed in accordance with the requirements of this notice and transmits the signed document and the acknowledgment back to the individual under a system that satisfies the applicable notice requirements under § 1.401(a)-21(c).

Winston Takeaway

Notice 2020-42, which is available from January 1, 2020, through December 31, 2020, provides much-needed flexibility for participant elections during these difficult times. Although the IRS states the purpose for this relief is to facilitate the payment of coronavirus-related distributions and plan loans, the guidance broadly applies to all participant elections that have a physical presence requirement, including elections such as spousal waiver of a qualified joint and survivor annuity benefit under a defined benefit plan. Plan sponsors, however, should be careful to observe state remote electronic notarization laws, as some states have only passed temporary emergency legislation allowing for such notarization. Winston & Strawn has a team of professionals ready to assist plan sponsors in complying with the IRS guidance and state laws to efficiently coordinate remote participant elections.

Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice Group or your relationship attorney for further information.

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