

June 4, 2020

IRS Issues Temporary Relief for Physical Presence to Obtain Spousal Consent

Acknowledging the challenges presented by the unprecedented public health emergency, the Internal Revenue Service issued Notice 2020-42 on June 3, 2020 to provide temporary relief from physical presence for spousal consent to be witnessed by a notary public or by a plan representative. This relief is available from January 1, 2020 through December 31, 2020 and applies to any participant election (including but not limited to coronavirus related distributions and plan loans permitted under the Coronavirus Aid, Relief, and Economic Security (CARES) Act) that requires the signature of an individual to be witnessed in the physical presence of a plan representative or notary.

In general, a 401(a) plan, a 401(k) plan, or a 403(b) plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) must provide a qualified joint survivor annuity (QJSA) as the normal form of benefit to married participants unless the participant and spouse consent in writing to an alternative form of benefit permitted under the plan. The Internal Revenue Code provides for an exemption for requiring such plans to offer a QJSA where the vested account balance is \$5,000 or less. Relief from the spousal consent requirement is also provided for a 401(a) profit sharing plan, 401(k) plan, and ERISA 403(b) plan if that plan:

- provides that, upon death, the participant's entire vested account balance is payable to the participant's surviving spouse unless the surviving spouse consents to the designation of another beneficiary;
- does not offer a life annuity option as a form of benefit; and
- does not accept a direct transfer from another plan was subject to the QJSA requirements.

If a plan is subject to these QJSA rules, a participant seeking a different form of payment must obtain the spouse's consent to that disbursement and the spouse's consent must be witnessed by a notary public or by a plan representative.

Treasury regulations permit the IRS to provide procedures under an electronic system that is deemed to meet the physical presence requirements if there are sufficient procedural safeguards. Balancing access to account balances, protection of spousal rights, and social distancing recommendations, the IRS is granting temporary relief from the physical presence requirement to witness participant and spousal elections under the following circumstances:

- ***Elections witnessed by a notary public***

The requirement that a notary public be physically present to witness a participant's or spouse's election is deemed satisfied if the election is executed using live audio-video technology that otherwise satisfies the regulatory requirements and is consistent with state law requirements that apply to the notary public.

Note that this relief applies only to elections witnessed by a notary public in a state that permits witnessing via remote electronic notarization.

- ***Elections witnessed by a plan representative***

The requirement that a plan representative be physically present to witness a participant's or spouse's election is deemed satisfied if the election is executed using live audio-video technology that meets all of the following requirements:

- The individual signing the participant election presents a valid photo ID to the plan representative during the live audio-video conference. Transmitting a copy of the photo ID prior to or after the witnessing does not satisfy this requirement.
- The live audio-video conference must allow for direct interaction between the individual and the plan representative. The IRS notes that a pre-recorded video of the individual signing is insufficient to meet this "direct interaction" element.

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- 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.
 - 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 IRS Notice 2020-42 and transmit the signed document, including the acknowledgement, back to the individual under a system in accordance with the IRS regulatory requirements for electronic notices to plan participants and spouses

Employers whose plans require spousal consent will need to consider whether or not to extend this relief to participants, in addition to how to obtain spousal consent under this IRS relief, including an assessment of whether state law permits a notary public's services to be provided electronically.

Voya continues to monitor these and all regulatory developments impacting retirement plans.

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