

Publications

Can't Find an In-Person Notary to Witness a Spousal Consent? IRS Provides Relief to Retirement Plans

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In IRS [Notice 2020-42](#), the IRS temporarily waived the physical presence requirement for spousal consent to participant benefit elections in a qualified retirement plan. Between January 1, 2020 and December 31, 2020, the IRS has approved a revised spousal consent process (in lieu of requiring that the spouse's signature be witnessed in the physical presence of a plan representative or notary). Under the revised process, spousal consents may be provided by an election witnessed by remote electronic notarization (so long as permitted in the state in which the notarization occurs) or may be witnessed virtually by a plan representative.

To accept electronic consents:

- The individual must be able to access the electronic medium used to make participant elections;
- The electronic system must be reasonably designed to preclude any person other than the appropriate individual from making the election;
- The electronic system must provide the individual with a reasonable opportunity to review, confirm, modify or rescind the terms of the election before it becomes effective; and
- The individual making the electronic election must receive confirmation of the election, within a reasonable time, either through a written paper confirmation or an electronic confirmation.

Remote electronic notarization must be executed via live audio-video technology that satisfies applicable state notary requirements and otherwise satisfies the electronic consent requirements.

For a plan representative witness of an electronic consent, in addition to the electronic consent requirements, the following additional requirements must be satisfied:

- The spouse and plan representative must connect through a live audio-video conference that allows for direct interaction between

the spouse and the plan representative;

- The spouse must present a valid photo ID to the plan representative during the live audio-video conference;
- The spouse must sign the consent during the live audio-video conference;
- A legible copy of the signed consent must be sent by fax or other electronic means directly to the plan representative on the same day that the consent was signed (we think that an e-mail containing a photograph of the signed consent would satisfy this requirement); and
- The plan representative must acknowledge that the signature has been witnessed and transmit a copy of the witnessed, signed document back to the spouse.

If plans intend to use this flexibility, we recommend a participant communication about the revised consent process be included in participant election package.

These relaxed procedures will be a welcome relief for married retirement plan participants who want to waive a survivor annuity and have been frustrated by the physical presence requirement. Pension plan sponsors will want to work with their TPAs to determine how systems and communications will be modified to take advantage of this temporary relief.

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VORYS COVID-19 TASK FORCE

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts [located here](#)). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.