

Via Electronic Delivery

November 30, 2022

Ms. Rachel Levy
Associate Chief Council, Office of Chief Counsel
Employee Benefits, Exempt Organizations, and Employment Taxes
Internal Revenue Service
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Permanent Relief for Remote Witnessing Procedures

The undersigned urge the Internal Revenue Service (Service) to make permanent the temporary relief from the physical presence requirement for spousal consent because of the COVID-19 emergency as originally announced in Notice 2020-42 and extended by Notices 2021-03, 2021-40 and 2022-07. Plans have been using this relief for nearly two years, and we believe that its use and effectiveness warrants it be made permanent. If the Service feels it cannot make this relief permanent before it expires after December 31, 2022, we urge the Service to provide at least an additional 12-month extension while the Service either provides permanent relief on its own or through notice and comment. By doing so, the Service will avoid disrupting a valued tool many have come to rely on.

Allowing for remote notarization has saved participants and beneficiaries time and money in obtaining spousal consent. It also has benefitted individuals with mobility limitations, those working a non-traditional schedule (such as first responders, health care professionals and manufacturers) and those living in more remote areas.

None of our members, from plan sponsors to recordkeepers, have indicated there has been fraud or coercion related to remote notarization. In fact, remote notarization can involve additional protections that do not exist with in-person notarizations, such as a video or audio recording.

For nearly two years, plans and service providers have implemented remote notarization and witnessing using the guidelines laid out in Notice 2020-42. According to data provided by one key provider, since the issuance of Notice 2020-42, tens of thousands of participants and spouses have taken advantage of remote notarization. The safeguards in this Notice provide the necessary protections to participants and beneficiaries and no additional procedures are needed. If authorized, plans and service providers will continue to allow its use. However, this would be along-side in-person notarization for those who wish to use it. Allowing remote notarization is just one tool, but not the exclusive tool, for plans to obtain the required spousal consent. How this is obtained would be left to the discretion of a participant and beneficiary.

Current regulations allow the Commissioner to provide guidance in the Internal Revenue Bulletin relating to procedures for using electronic systems to satisfy the physical presence requirement. Treasury Regulation Section 1.401(a)-21(d)(6)(iii) provides the following:

Delegation to Commissioner. In guidance published in the Internal Revenue Bulletin, the Commissioner may provide that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement under paragraph (d)(6)(i) of this section, 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.

Notices 2020-42 and 2021-03 should be the basis for such procedures because the Notices provide workable procedures for remote notarization and witnessing for both notary publics and plan representatives. They also contain security requirements and participant and beneficiary protections that are stricter than the current in-person physical presence requirements.

If the Service believes notice and comment is necessary to address the physical presence requirement, the Service should extend Notice 2022-07 through the notice and comment period so as not to disrupt the structure that plans and service providers have had in place for nearly two years and which has benefitted many participants and beneficiaries. A temporary lapse in the relief, while the Service considers next steps, simply creates additional cost and uncertainty.

An additional extension also would be consistent with other federal agencies, which have extended COVID related relief beyond the end of the year citing the ongoing public health emergency. For example, in October 2022, HHS Secretary Xavier Becerra extended the Public Health Emergency through January 31, 2023. Also, in late October, the Department of Homeland Security extended the Form I-9 flexibilities first through July 31, 2023, which exempts those who work exclusively in a remote setting due to COVID-19-related precautions from the physical inspection requirements associated with the Employment Eligibility Verification (Form I-9) until they undertake non-remote employment on a regular, consistent, or predictable basis.

We applaud the work the Service has done to assist participants, beneficiaries and plan sponsors during the pandemic, including Notices 2020-42, 2021-03, 2021-40 and 2022-07, and we look forward to continuing to work with you.

Sincerely,

American Bankers Association

American Benefits Council

American Council of Life Insurers

American Retirement Association

DocuSign
Electronic Signatures & Records Association
ERISA Industry Committee
Fidelity Investment
Financial Services Institute
Finseca
Institute for Portfolio Alternatives
Insured Retirement Institute
Investment Company Institute
National Association of Insurance and Financial Advisors
National Coordinating Committee for Multiemployer Plans
Securities Industry and Financial Markets Association
The SPARK Institute
U.S. Chamber of Commerce

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