

June 2021

Internal Revenue Service Extends Relief from Physical Presence Requirement

On June 24, 2021, the Internal Revenue Service (IRS) issued Notice 2021-40, which provides for an additional extension through June 30, 2022 for temporary relief from the physical presence requirement for participant elections required to be witnessed by a plan representative or a notary public. Prior to the issuance of Notice 2021-40, this relief was set to expire on June 30, 2021.

Background

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 that 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.

Conditions for Relief from Physical Presence of Notary Public or Plan Representative

Notice 2021-40 continues the conditions for relief described in IRS Notice 2021-3 and Notice 2020-42. During the temporary relief period now extended through June 30, 2022, the physical presence requirement is deemed satisfied and may be accepted by the plan under one of the following mechanisms:

- ***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;
- 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
- 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 Notice 2021-3, as modified by Notice 2021-40, 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.

IRS Seeking Public Comment

Notice 2021-40 also solicits comments from the public as to whether this relief should be made permanent. Interested parties should submit comments in writing no later than September 30, 2021. Additional information regarding the means for submitting comments can be found at <https://www.irs.gov/pub/irs-drop/n-21-40.pdf>.

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

IRS Circular 230 Disclosure

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