

## Harter Secrest &amp; Emery LLP

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## EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

**IRS RELAXES “PHYSICAL PRESENCE” REQUIREMENTS FOR NOTARIZATION FOR RETIREMENT PLAN ELECTIONS/SPOUSAL CONSENT DURING 2020**

Defined benefit plans and money purchase pension plans, as well as any other qualified retirement plans and 403(b) plans that are not designed to qualify for an exemption, require a married participant to obtain spousal consent to receive payment in any form other than a “qualified joint and survivor annuity” (i.e., a form of monthly pension that provides the spouse with a monthly survivor benefit of at least 50% of what the participant was receiving). These plans also require spousal consent for plan loans and for waiver of the “qualified pre-retirement survivor annuity” death benefit that these plans are mandated to offer a surviving spouse. Qualified retirement plans and 403(b) plans not subject to these annuity rules require a married participant to obtain spousal consent to designate a beneficiary other than the participant’s surviving spouse to receive all or any part of the participant’s account balance that remains when the participant dies, and also require spousal consent if a married participant chooses to elect a life annuity other than a qualified joint and survivor annuity.<sup>1</sup> In order to be valid, the spouse’s consent must be witnessed by a notary or a plan representative.

Under normal circumstances, the witnessing must occur in the “physical presence” of the notary or plan representative. However, the IRS issued Notice 2020-42 on June 3, 2020, waiving the “physical presence” requirement for “elections” from January 1, 2020 through December 31, 2020 as a result of the COVID-19 pandemic, if certain safeguards are met. An “election” is “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.”

A plan’s benefit election process must continue to meet all the usual notice and disclosure requirements applicable to elections requiring spousal consent. As always, the spouse’s consent must be provided voluntarily and within the applicable time limits. In order for a plan to allow electronic elections, the plan also must ensure that the electing participant, beneficiary or alternate payee can effectively access the electronic medium, and that the system is designed to preclude any other person from exercising the participant’s/beneficiary’s/alternate payee’s election right (i.e., that there are appropriate safeguards against fraud). The system must allow the electing individual the opportunity to review, confirm, modify or rescind the election before it becomes effective. The plan must provide an appropriate paper or compliant electronic confirmation within a reasonable time. Notice 2020-42 does not change these rules.

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<sup>1</sup> Governmental and most church plans are not subject to the annuity and spousal consent rules as set forth under Section 401(a)(11) and 417 of the Internal Revenue Code. Spousal consent requirements applicable to those plans and associated waiver processes generally will be governed by state law.

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The existing regulations already permit the use of electronic signatures if the signature is witnessed in the physical presence of a notary public or plan representative, so long as the electronic signature “together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.” However, if the plan wants to allow remote notarization or remote witnessing by a plan representative in 2020 under Notice 2020-42, it must also satisfy the following rules with respect to the notarization/witnessing process:

- **Remote Notarization:** the state law relevant to the notary must permit remote notarization, the requirements of state law must be met, and the notarization must be performed by live video/audio technology.
- **Remote Witnessing by a Plan Representative:** the witnessing must be performed via live video/audio technology that allows for direct interaction (*e.g.*, no pre-recorded video), the person whose signature is being witnessed must present an actual photo ID during the witnessing (and cannot simply provide a copy or scan in advance or after the fact), a legible copy of the signed document must be provided to the witnessing representative via fax or electronic means on the same day, and the witnessing representative must acknowledge that he/she witnessed the document in accordance with IRS Notice 2020-42 and transmit the acknowledged document back to the signer in a manner that the signer has the effective ability to access and must offer a free paper copy.

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