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Remote Notarization of Retirement Plan Consent Documents

The Internal Revenue Service requires that spousal consent to the waiver of a qualified joint and survivor annuity in a defined benefit plan must be signed in the “physical presence” of a plan representative or notary. Some plan administrators go further and require that other retirement plan election documents be notarized. In light of the COVID-19 pandemic, this “physical presence” requirement is in many cases more difficult to satisfy.

In response, some states are offering their own relief in the form of remote notarization. Maryland Governor Larry Hogan has signed an executive order offering temporary flexibility for documents that require notarization. To reduce the spread of COVID-19 and to encourage social distancing, the order allows for notarization to be performed remotely, given that certain conditions are met. Specifically:

- the notary must have notified the State that he/she intends to perform notarizations remotely,
- the notary must use a process that allows him/her to view the individual in real time,
- the notary must be able to compare clearly the information and photos on identification credentials,
- the notary and the individual must communicate with each other simultaneously by sight and sound,
- the notary must create and retain an audio-visual recording of the notarization, and
- the notary must certify that the notarial act was performed using a communication technology without the physical presence of the individual.

The existence of remote notarization and specific requirements vary by state but are becoming more common as stay-at-home orders and social distancing remain in place in many locations.

We believe that given current health and safety concerns, remote notarization may be a reasonable alternative to in-person notarization. Plan administrators who want to consider utilizing remote notarization should discuss the options and potential risks with their ERISA counsel. The IRS has been asked by industry groups to issue guidance on the use of electronic means to satisfy the “physical presence” requirement, but to date no guidance has been released.

Please contact Erika Bode at 443-573-3907 or Jim Ritchie at 443-573-3924 if we can assist with your compliance efforts in this area.