

# Retirement **Spotlight**

Illuminating current industry news and events

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## Proposed Regulations Govern Making Participant Elections and Spousal Consents Electronically

The coronavirus pandemic resulted in restrictions on where and how people could meet. These limitations—including remote work requirements—made it harder for some participants to take distributions from employer-sponsored retirement plans. In response, the IRS issued temporary relief allowing spousal consent to be obtained using remote notary services. This relief was extended three times but expired on December 31, 2022. Responding to numerous requests to make the temporary provisions permanent, the IRS issued [proposed regulations](#).

There are several scenarios in which a retirement plan administrator would need to obtain spousal consent before processing a participant's withdrawal request. For example, some retirement plans contain provisions that normally require participants to take distributions in the form of a qualified joint and survivor annuity (QJSA), and if a married participant wants to take a distribution in any form other than a QJSA, or to take a loan from the plan, the plan administrator must obtain spousal consent. And some employers that do not require participants to take distributions in the form of a QJSA may still have a document provision requiring spousal consent for distributions and loans. Finally, spousal consent is required when a married plan participant designates any beneficiary other than the spouse. Historically, spousal consent has been obtained in the physical presence of an authorized plan representative or a notary public.

These proposed regulations are similar to the temporary relief, with a couple of additions. Most notably, the regulation clarifies that electronic medium rules that apply to participant elections also apply to obtaining spousal consent.

- The spouse must have effective access to the electronic medium.
- The medium must be designed to allow only the spouse to make an election.
- The spouse must have an opportunity to review, confirm, modify, or rescind the consent before it becomes effective.
- The spouse must receive confirmation of the effects of the consent within a reasonable time.

An employer may accept spousal consent remotely in one of two ways. First, consent that is witnessed remotely by a notary public may be accepted if

- the signature of the spouse signing the spousal consent is witnessed by the notary public using live audio-video technology,
- the process meets certain requirements related to access, authentication, review, and confirmation, and
- The remote witnessing is consistent with state law requirements that apply to the notary public.

Second, the employer may accept spousal consent witnessed remotely by a plan representative, provided that the employer is able to ensure that

- the signature of the spouse signing is witnessed using live audio-video technology,
- the process meets certain requirements related to access, authentication, review, and confirmation, and
- the remote witnessing process satisfies all of the following five requirements.
  - The person signing the spousal consent must present a valid photo ID.
  - The live audio-video conference must allow for direct interaction between the person signing and the plan representative.
  - The person signing must transmit by electronic means a legible copy of the signed document directly to the plan representative on the same date that the spousal consent is signed.
  - The plan representative must acknowledge that the signature has been witnessed and must transmit the consent and acknowledgement back to the person signing the consent.
  - A recording of the audio-video conference during which the spousal consent was signed remotely must be made and retained by the plan representative.

The last requirement—for the employer to retain a recording—is new. Employers must have the appropriate technology to produce and save the conference for potential future use. While employers may allow remote notarization, they cannot require it.

The regulation is proposed to apply beginning on the date that is six months after publication of these rules as a final regulation in the Federal Register. Taxpayers may, however, immediately rely on the proposed rule.

The preamble to the proposed regulations outlines industry comments that were solicited in Notices 2021-03 and 2021-40. Some believe that there is no longer a reason to allow an alternative to the physical presence requirement and that the new regulations will increase the opportunities for fraud and spousal coercion. They point to the limitation of the camera view, indicating that others may be outside the camera's view but within range to have influence over the signer. They also argue that inspecting identification is less effective remotely. Still others point out that in-person notary services are free, while having a remote notary may create an additional cost.

Those in favor of making the proposed rules permanent point out that it's easy to use, reduces the time to process a distribution, and saves time and money for participants. They have faith in the notarization laws enacted by states and believe that safeguards are adequate enough to discourage fraud.

As technology continues to advance, the IRS and other federal agencies will try to keep pace with their guidance. Meanwhile, employers and plan participants will have to adapt to the changing regulatory landscape. When these electronic spousal consent and election regulations become final, Ascensus will be sure to do its part to analyze and update this information.