



May 24, 2022 - IRS Further Extends Temporary Relief from the Physical Presence Requirement through December 31, 2022

By: Melanie N. Aska

On May 13, 2022, the IRS issued Notice 2022-27 (available at <https://www.irs.gov/pub/irs-drop/n-22-27.pdf>), which further extends, by six months, from July 1, 2022 to December 31, 2022, the IRS's previously-granted temporary relief from the "physical presence requirement" otherwise applicable to participant elections made in connection with retirement plans and other benefit arrangements.

As background, IRS Regulations require that, in the case of a participant election which is required to be witnessed by a plan representative or a notary public (such as a spousal consent to a participant's waiver of a qualified joint and survivor annuity under a retirement plan), the signature of the individual making the participant election must be witnessed in the physical presence of the plan representative or notary public (referred to here as the "physical presence requirement"). [Treas. Reg. §1.401(a)-21(d)(6)(i)]

The "participant elections" to which the physical presence requirement applies include any consent, election, request, agreement or similar communication made from a participant, beneficiary, QDRO alternate payee or an individual entitled to benefits under a retirement plan, an employee benefit arrangement or an individual retirement plan. [Treas. Reg. §1.401(a)-21(e)(6)]

IRS Regulations further provide that, if the signature in a participant election is witnessed in the physical presence of a notary public, the notary's electronic signature acknowledging the signature in the participant election (in accordance with the federal E-SIGN Act and applicable state law for notaries public) will not be denied legal effect. [Treas. Reg. §1.401(a)-21(d)(6)(ii)]

Although IRS Regulations Section 1.401(a)-21(d) permits electronic notarization of participant elections, absent IRS published guidance providing relief (as permitted by Treas. Reg. §1.401(a)-21(d)(6)(iii), but only for electronic systems that provide the same safeguards for participant elections as are provided through the physical presence requirement), the physical presence requirement would preclude the use of *remote* notarizations of participant elections (including spousal consents). Remote electronic notarizations differ from electronic notarizations in that remote electronic notarizations generally are conducted remotely over the internet using digital tools and live audio-video techniques, whereas electronic notarizations can be signed electronically but still require that certain signatures be witnessed in the physical presence of a notary public or plan representative.

Beginning in mid-2020, in response to the unprecedented public health emergency caused by COVID-19, and the related social distancing that has been implemented, the IRS issued a series of four Notices, each of which provided temporary relief from the physical presence requirement in IRS Regulations Section 1.401(a)-21(d)(6)(i) for participant elections (including spousal consents) required to be witnessed in the physical presence of a plan representative or a notary public:

IRS Notice 2020-42. Issued on June 3, 2020, Notice 2020-42 (available at <https://www.irs.gov/pub/irs-drop/n-20-42.pdf>) provided temporary relief from the physical presence requirement for the 12-month period from January 1, 2020 to December 31, 2020. Although Notice 2020-42 was intended to facilitate the payment of coronavirus-related distributions and loans from retirement plans to qualified individuals (as was permitted, for a limited period, by the CARES Act, enacted on March 27, 2020), the two types of temporary relief from the physical presence requirement which Notice 2020-42 provided, described below, applied to any participant election (including spousal consents) that required the signature of an individual to be witnessed in the physical presence of a plan representative or notary public:

Temporary Relief from the Physical Presence Requirement for any Participant Election Witnessed by a Notary Public. In the case of a participant election witnessed by a *notary public*, Notice 2020-42 provided that, for the 12-month period from January 1, 2020 through December 31, 2020, the physical presence requirement in IRS Regulations Section 1.401(a)-21(d)(6)(i) would be deemed satisfied for an electronic system that used remote notarization if executed via live audio-video technology that otherwise satisfied the requirements for participant elections under IRS Regulations Section 1.401(a)-21(d)(6) and was consistent with state law requirements that applied to the notary public.

Temporary Relief from the Physical Presence Requirement for any Participant Election Witnessed by a Plan Representative. In the case of a participant election witnessed by a *plan representative*, Notice 2020-42 further provided that, for the 12-month period from January 1, 2020 to December 31, 2020, the physical presence requirement would be deemed satisfied for an electronic system if the electronic system using live audio-video technology satisfied the following four requirements:

1. The individual signing the participant election must present a valid photo ID to the plan representative during the live audio-video conference, and may not merely transmit a copy of the photo ID prior to or after the witnessing;
2. The live audio-video conference must allow for direct interaction between the individual signing the participant election and the plan representative (for example, a pre-recorded video of the individual signing is not sufficient);
3. The individual signing the participant election 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
4. After receiving the signed document, the plan representative must acknowledge that the individual's signature has been witnessed by the plan representative in accordance with the requirements of Notice 2020-42 and must transmit the signed document, including the acknowledgement, back to the individual under a system that satisfies the applicable notice requirements under IRS Regulations Section 1.401(a)-21(c).

IRS Notice 2021-03. On December 23, 2020, just days before the temporary relief provided by Notice 2020-42 was set to expire (on December 31, 2020), the IRS issued Notice 2021-03 (available at <https://www.irs.gov/pub/irs-drop/n-21-03.pdf>), which extended, for six months, from January 1, 2021 through June 30, 2021, the two types of temporary relief from the physical presence requirement that had been provided by Notice 2020-42, under terms that were identical to the temporary relief that had been provided by Notice 2020-42.

In Notice 2021-03, the IRS and the Treasury Department also requested public comments on whether relief from the physical presence requirement in IRS Regulations Section 1.401(a)-21(d)(6)(i) should be made permanent, and if made permanent, what, if any, procedural safeguards would be necessary in order to reduce the risk of fraud, spousal coercion or other abuse in the absence of a physical presence requirement. Notice 2021-03 noted that any permanent modification of the physical presence requirement would be made through the regulatory process that is subject to notice and comment.

IRS Notice 2021-40. On June 24, 2021, just days before the temporary relief provided by Notice 2021-03 was set to expire (on June 30, 2021), the IRS issued Notice 2021-40 (available at <https://www.irs.gov/pub/irs-drop/n-21-40.pdf>), which extended, for 12 months, from July 1, 2021 through June 30, 2022, the two types of temporary relief from the physical presence requirement that had been provided by Notice 2021-03.

In Notice 2021-40, the IRS and the Treasury Department also requested public comments, by September 30, 2021, on whether relief from the physical presence requirement should be made permanent, and stated that after review and consideration of the comments received in response to Notice 2021-40 and Notice 2021-03, they would determine whether to propose modifications to the physical presence requirement as part of the regulatory process (which would include the opportunity for further comment), or instead to issue an announcement that the current physical presence requirement would be retained without modification.

IRS Notice 2022-27. Most recently, on May 13, 2022, the IRS issued Notice 2022-27 (available at <https://www.irs.gov/pub/irs-drop/n-22-27.pdf>), which noted the President's recent extension of the COVID-19 national emergency beyond March 1, 2022, and which extended, for six months, from July 1, 2022 through December 31, 2022, the two types of temporary relief from the physical presence requirement that had been provided by Notice 2021-03.

Notice 2022-27 stated that, following the publication of Notices 2020-42, 2021-03 and 2021-40, the IRS and the Treasury Department received comments from numerous stakeholders regarding the physical presence requirement, some of whom requested permanent relief from the physical presence requirement, and others who stated that the existing physical presence requirement should be retained.=

Notice 2022-27 also stated that the IRS and the Treasury Department are currently reviewing the stakeholder comments to determine whether to retain the physical presence requirement without modification or to propose to modify the requirement through the regulatory process (which would include the opportunity for further comment).

Finally, Notice 2022-27 stated that, in light of the recent easing of public health precautions relating to the COVID-19 pandemic, a further extension of temporary relief from the physical presence requirement beyond the end of 2022 is not expected to be

necessary.

If you have any questions, please contact Melanie N. Aska, at 617-457-4131 or maska@murthalaw.com.

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