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### IRS Guidance on Remote Notarization of Retirement Plan Consent Documents

In a recent Bolton Insight, we discussed remote notarization of retirement plan consent documents. The Internal Revenue Service (IRS) 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 as well. In response to challenges posed by the COVID-19 pandemic, some states have provided for remote notarization of legal documents. However, until now, the IRS had not issued guidance as to whether remote notarization would satisfy the physical presence requirement in Treasury Regulation Section 1.401(a)-21(d)(6).

In response to requests from various industry groups, on June 3 the IRS issued Notice 2020-42, which provides temporary relief from the physical presence requirement. This relief extends until December 31, 2020. Although the relief was primarily intended to facilitate distributions pursuant to the CARES Act (for example, coronavirus-related distributions from 401(k) plans), it was extended to cover all retirement plan elections that require notarization or witness by a plan representative.

The physical presence requirement for a notary is deemed satisfied if:

- Live audio-video technology is used, and
- The process follows all state law requirements that apply to notaries public.

In order for the physical presence requirement to be satisfied by a plan representative, the following must occur:

- Live audio-video technology which allows for direct interaction between the individual and the plan representative,
- The individual signing the election must present a valid photo ID to the plan representative during the live audio-video conference,
- The individual must transmit a copy of the signed document by fax or electronic means 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 was witnessed and transmit the signed document with acknowledgement back to the individual.

If you decide to use a remote waiver process, you should contact your legal counsel to ensure that your process meets all of the requirements under IRS Notice 2020-42. 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.