

September 30, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-40)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington D.C.20044

RE: IRS Notice 2021-40, Physical Presence Requirement for Spousal Consents

The undersigned organizations write to express our disagreement and deep concerns that the Service is giving serious consideration to weakening spousal rights to retirement benefits.

Pensions earned and retirement assets saved during a marriage are a marital asset, perhaps the most valuable one a couple owns (other than a home). Federal pension law requires that the spouses of retirement plan participants must automatically receive a surviving spouse pension from a traditional defined benefit pension plan, and must be the named beneficiary of a 401(k)-style retirement account, unless the spouse provides witnessed, signed consent to give up those rights. The requirement for properly witnessed spousal consent to surrender guaranteed rights to retirement benefits has been a cornerstone of protecting spousal pension rights for nearly four decades. Proper witnessing has required the spouse's signature to be affixed in the physical presence of the notary or plan administrator, in order to help prevent and deter participants from engaging in fraud (e.g., using imposters) or coercion to get that signature.

This longstanding spousal protection recognizes both that future retirement security is at stake, and that a very real conflict of interest may exist between the spouses over the form and timing of retirement plan payments. Women reach retirement with fewer assets than men, due to lower pay, a greater likelihood of working for an employer with no retirement plan, and more time out of the workforce spent caregiving for family. In addition, women are more likely to outlive their husbands, and thus need to make their retirement income last longer. As a result, while spousal pension rights apply to both women and men, the right to collect a surviving spouse pension or to inherit a worker's 401(k) balance is disproportionately more important to the retirement security of women than men. The protection is robust because it needs to be: if the participant wants access to retirement savings or a larger retirement income during his lifetime, or even to deprive the spouse of any retirement funds, he may put significant pressure on the spouse to sign away her rights.

When the COVID pandemic shut down businesses and limited face-to-face transactions, it made sense for the IRS to temporarily waive the physical presence requirement and permit retirement plans to accept spousal consents that had been remotely notarized or witnessed online (e.g., Zoom).

Now, however, a substantial portion of the population has been vaccinated, social distancing requirements have been relaxed, businesses have reopened, and notaries are once again available for in-person services. In other words, there is no longer a public health emergency justification for waiving the physical presence requirement, let alone permanently eliminating it.

The entire purpose of in-person witnessing is to validate a signer's identity, and to ensure that the person before them is signing a document knowingly and voluntarily. We have significant concerns about permanent elimination of the physical presence requirement, especially given instances of

employee-spouses forging the signature of the non-employee spouse, using imposters posing as the spouse, and coercing or otherwise pressuring a spouse to sign the consent form.

Physical presence is not fool-proof, but the efficacy of remote online notarization platforms to confirm identity is overstated. Their “credential analysis” just checks ID to ensure that the photo is in the right place, the verbiage is correct, and the ID has not expired. Unlike an in-person notary, an online notary cannot look or feel for signs of tampering, or physically inspect the visual (holograms) and tactile (raised lettering) security features of government IDs that are intended to prevent forgeries. Worse, so-called “knowledge-based authentication,” which has been widely discredited in an age of widespread hacking, is virtually meaningless as applied to married couples who know key facts (like previous addresses) about each other. Unfortunately, it usually takes many years for evidence of this kind of fraud to come to light.

In addition, remote witnessing is an inferior method for detecting whether the signer is being coerced or pressured. The webcam’s field of vision is extremely narrow, and is focused on the signer; it does not “see” others, in the room or just outside but in earshot, who may be exerting undue influence. An in-person notary, in contrast, can observe the entire room and determine whether the employee-spouse or others who may be present appear to be pressuring the non-employee-spouse. Moreover, online interactions make it more difficult to discern cues and read body language in order to gauge diminished capacity or duress. Economic control is a component of domestic violence, which has increased during the COVID pandemic and lockdowns. Advocates for survivors of domestic violence have reported that abusive spouses have prevented survivors from accessing stimulus payments, tax refunds, and other economic benefits. It is not beyond imagination that some have threatened a spouse to get consent to tap retirement funds after the CARES Act gave participants immediate and penalty-free access to their retirement plans.

We urge the IRS to end the temporary waiver and restore the physical presence requirement for spousal consents. However, if the IRS is considering any changes to this longstanding protection, the agency should publish a well-supported proposed regulation in a more formal notice-and-comment rulemaking proceeding, and it should strengthen protections for spouses, not weaken them. Please do not hesitate to contact Amy Matsui, Director of Income Security and Senior Counsel at the National Women’s Law Center, should you have any questions (amatsui@nwlc.org).

Sincerely,

National Women’s Law Center

Alliance for Retired Americans

APWU Retirees Department, AFL-CIO

National Caucus and Center on Black Aging

National Committee to Preserve Social Security and Medicare

National Domestic Violence Hotline

National Coalition Against Domestic Violence

National Network to End Domestic Violence

National Organization for Women

Social Security Works

Tahirih Justice Center

UFCW International Union

Women's Institute for a Secure Retirement (WISER)