

Professional Perspective

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Kathleen Salas Bass, KLB Benefits Law Group

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Spousal Consent Requirements Under a Qualified Retirement Plan

Contributed by [Kathleen Salas Bass](#), KLB Benefits Law Group

Spousal consent for qualified retirement plans has been in the spotlight recently as a result of the Covid-19 pandemic. In response to the temporary lockdowns in 2020, and the extended period of social distancing that followed, the Internal Revenue Service (IRS) began to permit remote consent rather than the standard requirement for a consenting spouse to sign in the presence of a notary public.

This temporary relief from the physical presence requirement expired on Dec. 31, 2022, per [IRS Notice 2022-27](#). However, at the last minute, on Dec. 30, 2022, the IRS issued proposed regulations (Use of an Electronic Medium for Participant Elections and Spousal Consents, [87 FR 80501](#), Dec. 30, 2022) (Proposed Rules) to make this accommodation permanent and stated that the Proposed Rules could be relied upon pending issuance of the final rules. Under this accommodation, as long as the consent is provided through an electronic system that meets certain standards, the spouse is not required to be physically present in front of the notary when giving that consent.

This article provides an overview of the spousal consent requirements under the Internal Revenue Code (Code), the proposed rules for remote consent, and best practices for spousal consent requirements under qualified retirement plans.

What Is Spousal Consent?

Spousal consent in this context is agreement by the spouse of a married participant to an action by the participant that affects the participant's qualified retirement plan account. Consent is generally given by completing and signing a section of an applicable administrative form and having that consent notarized by a licensed notary, or witnessed by a plan representative. Spousal consent is only required in certain situations.

Note that when spousal consent is required, the requirements also apply to spouses in same-sex marriages. Under provisions of the Respect for Marriage Act ([Pub. L. No. 117-228](#)), every state must recognize as valid same-sex marriages from other states.

When Is Spousal Consent Required?

- **Some Plans Require Spousal Consent for Certain Distributions and Forms of Benefit Payment.** Plans subject to [Code Sections § 401\(a\)\(11\)](#) and [§ 417](#), such as defined benefit plans, must provide for Qualified Joint & Survivor Annuities (QJSAs) and Qualified Pre-Retirement Survivor Annuities (QPSAs). These require that a married participant's spouse consent to any change in the optional form of benefit payment offered under the plan, such as a lump sum or installments, rather than the normal form of benefit payment, which is an annuity with survivor benefits. In addition, spousal consent is required for any in-service distributions or loans from the participant's account, as these actions could reduce the survivor benefit due to the spouse.
- **Some Plans Do Not Require Spousal Consent for Distributions.** Most profit sharing and 401(k) plans are not subject to the QJSA and QPSA requirements, as long as they meet certain requirements. The requirements for this exemption include all of the following:
 - The spouse must be the beneficiary of the participant's full benefit unless the spouse has consented to the alternative beneficiary.
 - There must not be a life annuity distribution option offered under the plan –or if it is, then it must not be selected by the married participant.
 - The participant's account must not include a direct transfer from a plan that was subject to the QJSA requirements.
 - The plan must not be part of a floor offset arrangement with a defined benefit plan. [Code § 401\(a\)\(11\)\(B\)\(iii\)](#).

Exempt profit sharing and 401(k) plans usually don't require spousal consent for distributions, including changes to the form of distribution, in-service distributions, or loans. However, it is important to review the plan documents

to make sure this is what your plan says. Plans that previously included QJSA and QPSA provisions may still retain vestigial spousal consent requirements.

In addition, beware of spousal consent requirements that apply only to certain transferred assets. A profit-sharing plan that does not require spousal consent for anything but beneficiary designations may have transferred assets from a money purchase pension plan. If so, those assets retain the QJSA requirements and related spousal consent process.

- **Spousal Consent Is Always Required When Changing a Beneficiary.** In all types of qualified retirement plans, even if there are no QJSAs or QPSAs, a spouse must give consent if a married participant is changing the designated beneficiary to someone other than the spouse. The spouse is the default beneficiary for married participants. For example, if a married participant wants to designate their child from an earlier marriage as either the primary beneficiary or a co-beneficiary, they will need to get their spouse to consent to this change.

Proposed Rules for Remote Consent

The Proposed Rules issued on Dec. 30, 2022, permit, but do not require, a plan to allow for remote notarization or remote witnessing by a plan representative. A plan must still accept in-person consents. The rules are proposed and are in a comment period, but the IRS has said that they may be relied upon now, until final regulations are issued.

For a valid remote consent, the witnessing process must be conducted by some form of live audio-video technology and must otherwise comply with the existing rules regarding electronic elections—i.e., effective access by the spouse and security to ensure the spouse is the only person who could give the consent as described in [Treasury Regulation § 1.401\(a\)-21\(d\)](#). In addition to these general requirements, the Proposed Rules have other requirements that apply to the specific type of witness to the consent:

- **Notary.** The process must comply with state law requirements that apply to the notary. This will obviously vary by state.
- **Plan Representative.** The Proposed Rules set out five requirements for the remote consent witnessed by a plan representative:
 - The spouse must present a valid photo ID during the live audio-video conference. A copy of the ID transmitted before or after the conference is not sufficient.
 - The live audio-video conference must allow for interaction between the spouse and the plan representative. A pre-recorded video of the spouse signing the consent will not be acceptable.
 - The spouse must electronically transmit a legible copy of the signed consent document directly to the plan representative on the date of the signature.
 - The plan representative must acknowledge witnessing the signature and transmit the signed spousal consent with their acknowledgement back to the spouse using an electronic system that meets the general requirements for electronic disclosures under [Treasury Regulation § 1.401\(a\)-21\(d\)](#).
 - The plan representative must record the live audio-video conference and retain the recording consistent with the rules regarding plan document retention.

Note that this last requirement was not part of the temporary relief, so if a plan was following the temporary relief prior to Dec. 30, 2022, procedures for remote consent should be updated accordingly.

Best Practices

- **Know Your Plan.** Always check your plan for spousal consent requirements and make sure you know what your plan provides. As noted above, spousal consent is always going to be required when a married participant wants to change their designated beneficiary to someone other than their spouse.

But does the plan have provisions for QJSAs and QPSAs that will require spousal consent for the participant to take other actions? Even if the answer is “no,” does the plan include spousal consent requirements for anything other than a non-spouse beneficiary designation? Unless the plan is subject to [Code § 417](#)—such as a defined benefit plan or a money purchase pension plan—or has assets that were transferred from such a plan, and so these requirements are retained with respect to those assets specifically, it may be worth considering eliminating spousal consent requirements where possible. It would simplify administration for both the plan and the participant by eliminating unnecessary headaches.

- **Know Your Procedures.** Now is the time to review plan administrative procedures for spousal consent and ensure they are being followed. If the plan will permit remote consent, then it is important to have the applicable procedures updated for the Proposed Regulations, and to verify that all of the technology is in place to carry them out.
- **Know Your Records.** It is also a good idea to review any spousal consents, and beneficiary designation forms on file, to ensure that they are correct and complete. This review will provide you with an opportunity to correct any incomplete forms before any significant time goes by and correction becomes more complicated. For example, if a participant is still alive, they are available to take any steps needed to complete a beneficiary designation form, including obtaining spousal consent.

However, if the participant dies with a non-spouse beneficiary designated without spousal consent, then, unless the surviving spouse is willing to give consent now, the result could be competing claims for death benefits. This in turn could lead to litigation between the parties and require the plan to go to a court through an interpleader action to get a judge's determination of who is entitled to the death benefits. Clearly this is an undesirable situation that can be avoided by the filing of all appropriate designations and consents.

- **Know Your Participants.** Even if your spousal consents on file are complete, there may be changes in your employee's marital status that can affect the validity of the consent. For example, a participant wanted to designate a child as the beneficiary, and the spouse, the child's mother, gives her consent. A divorce follows, then, several years later, the participant dies. The child files a claim for the death benefits, when, surprise, the deceased participant's new wife files a claim. Because the participant's spouse at the time of the participant's death did not consent to the designation of the child of the first marriage, the spousal consent on file is no longer valid. Litigation ensues, embroiling the plan in interpleader chaos.

While employers can't always know about changes to their employees' marital status, it is a best practice to remind participants periodically during the annual open enrollment period, to make sure that their beneficiary designations are up to date. Similarly, if the employer is aware of a change in the employee's marital status—divorce, remarriage, death of spouse—reach out and remind the employee to review and update the beneficiary designation on file.

Conclusion

Spousal consent is not a big deal, until it is. And it becomes a big deal at the worst possible time—when the participant dies and is no longer available to make corrections, or when the participant divorces and many issues cannot be agreed upon. Plans that follow best practices and pay attention to the issue will dodge the worst outcomes.