



## Rewards Policy Insider 2023-02



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# IRS Proposes Allowing Permanent Remote Witnessing and Notarization for Spousal Consent

After issuing several extensions of the pandemic-related relief allowing remote notarization for spousal consent related to certain qualified plan distributions, the Internal Revenue Service is now proposing to make that relief permanent. Plans can rely on these new rules right away, even before the regulations are finalized.

## Background

In certain cases, qualified retirement plan participants who are married are prohibited from designating a non-spouse beneficiary or receiving a distribution in any form other than a qualified joint and survivor annuity unless the participant's spouse provides consent, and the spouse's consent is witnessed by a plan representative or a notary public. Existing IRS regulations allow electronic technology to be used for this purpose, but any spousal consent must be witnessed in the *physical* presence of a plan representative or notary. As a result of the COVID-19 pandemic, the IRS issued relief for this "physical presence" requirement in 2020. (See [Rewards Policy Insider](#) 2022-11 for a discussion of that earlier relief.) The relief was extended three times, but expired on December 31, 2022.

## Proposal for Permanent Relief

Just one day before the temporary relief was set to expire, the IRS published a [proposal](#) to make the rules allowing remote witnessing and notarization permanent. The proposal's permanent rules are very similar – though not identical – to the IRS's prior temporary relief. Importantly, the proposed regulations provide that the new relief can be relied on immediately (i.e., prior to the official effective date). As such, while the proposal technically does not extend the IRS's temporary relief, many plans and service providers should be able to continue relying on their remote witnessing procedures without interruption, to the extent those procedures meet the conditions in the proposed regulations.

Consistent with the IRS's prior temporary relief, the proposed regulations would amend the IRS's existing regulations to permanently allow for remote witnessing/notarization as long as certain conditions are satisfied, as generally described below:

- **Remote Notarization.** A plan could offer remote witnessing by a notary public as an alternative to physical witnessing for spousal consents. The conditions that must be met include: the notary must witness the spouse signing his or her signature using live audio-visual technology, and the remote witnessing must be consistent with any relevant state law requirements for notaries in the state in which the spouse is signing.
- **Witnessing by Plan Representatives.** A plan could allow remote witnessing by a plan representative as an alternative to physical witnessing for spousal consents. The conditions that must be met include: the plan representative must witness the spouse signing his or her signature using live audio-visual technology, and the spouse must

present a valid photo ID to the plan representative during the audio-video conference.

The proposed regulations contain some differences from the IRS's prior temporary relief. For example, with respect to remote witnessing by a plan representative, the proposed regulations add a new requirement that the plan representative must record and retain a copy of the audio-video conference for at least 3 years.

Public comments on the proposal will be accepted through March 30, 2023.

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## **IRS Permanently Provides Automatic 30-day Extension of Deadline to Furnish 1095-C to Individuals**

In a not surprising but still welcome development, the IRS has issued final regulations to grant a permanent, automatic 30-day extension of the deadlines for employers with self-insured plans and other providers of minimum essential coverage to furnish 1095-Bs to covered individuals, and for "Applicable Large Employers" to furnish individual statements (1095-Cs) relating to offers of health insurance coverage to full-time employees. The extension does not apply to the March 31, 2023 deadline for filing related information returns with the IRS or to any related requirements by states – including California and Massachusetts – that require residents to be covered by health insurance.

### **Background**

In general, health insurance issuers and employers with self-insured group health plans have to issue a statement each year to individuals to whom they provide "minimum essential coverage," and also provide relevant information to the IRS. The individual statements (typically Form 1095-B) are due by January 31 for the immediately preceding calendar year, and the reports to the IRS (Form 1094-B) are due by March 31 for electronic filers.

For Applicable Large Employers (ALE), there is a separate information return and individual statement requirement associated with the employer shared responsibility rules. (In general, ALEs are employers with at least 50 full-time equivalent employees.) Like the 1095-B, the individual statements (Form 1095-C) are due by January 31 for the immediately preceding calendar year, and the IRS information return (Form 1094-C) is due by March 31 for electronic filers).

For every year beginning with 2015, when these requirements first took effect, the IRS has granted automatic 30-day extensions for providing the 1095-Bs and 1095-Cs to individuals. In 2021, IRS issued proposed regulations that would

provide a permanent, automatic 30-day extension for furnishing Forms 1095-B and 1095-C to individuals.

## Final Regulations

The final regulations adopt the permanent, automatic 30-day extension as proposed. As a result:

- Health insurance issuers and employers with self-insured plans will have until March 2, 2023 (instead of January 31, 2023) to furnish covered individuals with the Form 1095-B. Additionally, entities will be able to satisfy this requirement by posting a notice on their websites that covered individuals can receive their Forms 1095-B upon request.
- Applicable Large Employers (i.e., those with 50 or more full-time employees) will have until March 2, 2023 (instead of January 31, 2023) to provide the Form 1095-C to all full-time employees, and to part-time employees and non-employees covered by the employer's group health plan (if self-insured).
- The deadline for electronically filing the Forms 1094-B and 1094-C information returns with the IRS will still be March 31, 2023.
- Certain states (e.g., California, Massachusetts, and D.C., et al.) have their own requirements for furnishing this information to individuals and reporting to state regulators. The final regulations do not affect any of the state law timing requirements, which may be different.

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## District Court Holds that Health Plan's Exclusion of Gender Affirming Care Violates the ACA

In December 2022, a federal district court in North Carolina held that the state health plan's exclusion for gender affirming care violates the nondiscrimination provision of the Affordable Care Act ("ACA"). While a district court case such as this does not have any precedential value, the decision represents a broader trend in recent litigation of which employers should be aware.

### Background

The ACA prohibits certain health programs and activities that receive federal funding or are administered by the Department of Health and Human Services ("HHS") from discriminating against or denying benefits on the basis of race, color, national origin, sex, age, or disability. There has been uncertainty over whether a health plan's exclusion of care for transgender individuals would violate the ACA's nondiscrimination rules.

### Case Overview

In *Kadel v. Folwell*, a group of current and former state employees who participate in the North Carolina State Health Plan for Teachers and State Employees (“NCSHP”) sued the NCSHP, the state treasurer, and other state entities because the plan explicitly did not cover treatment for “sex changes or modifications and related care.” The plaintiffs, who are transgender or had dependents who are transgender, argued that the plan’s blanket exclusion of gender affirming care violated the ACA by discriminating on the basis of sex and transgender status.

In June 2022, a North Carolina district court ruled that the plan’s exclusion discriminated on the basis of sex and transgender status under the U.S. Constitution and because of sex under Title VII of the Civil Rights Act of 1964. In that decision, the court concluded that the exclusion necessarily rests on a sex classification because it cannot be stated or effectuated without referencing sex. The court ordered the plan to reinstate coverage for medically necessary services for the treatment of gender dysphoria. The court did not address the issue of discrimination under the ACA at that time because HHS was in the process of proposing new regulations to implement the ACA’s nondiscrimination rules. The [proposed regulations](#) were released in August 2022 and generally expand the nondiscrimination rules to clearly prohibit discrimination on the basis of sexual orientation and gender identity. (Note that the new regulations have not yet been finalized.)

On December 5, 2022, the district court revisited the ACA issue, ruling that the NCSHP is indeed a “health program or activity” that is subject to the ACA’s nondiscrimination rules. The court explained that even though the ACA doesn’t explicitly define that term, it plainly includes health insurance providers and plans. Relying on the same reasoning in its June decision that the exclusion violates the U.S. Constitution and Title VII, the court held that the plan’s exclusion of medically necessary transgender-related treatment violates the nondiscrimination rules of the ACA.

## What is the Impact on Health Plans?

The *Kadel* decision has no precedential value because it is a district court case. It is nevertheless important for employers to be aware of this decision – and others like it – because it is the latest evidence of a growing trend involving litigation on policy exclusions for gender affirming treatment. For example, around the same time as the *Kadel* decision, a federal district court in Washington ruled that a third-party administrator administering a self-insured plan violated the ACA’s nondiscrimination rules when it denied benefits for gender affirming care (*C.P. v. Blue Cross Blue Shield*).

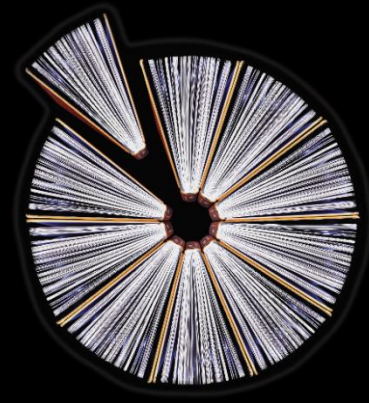
To date, no federal appellate court has considered whether an exclusion like the one in *Kadel* violates the ACA’s nondiscrimination rules. While the nondiscrimination rules’ application to employer-sponsored health plans is not yet clear and is the subject of current litigation, plan sponsors, insurers, and third-party administrators should be aware of the increasingly common nature of disputes involving policy exclusions for gender affirming care.

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