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Remote Notarization Laws in Pennsylvania and New Jersey Enacted Due to COVID-19 And Privacy Concerns

Legal Alert

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Pennsylvania and New Jersey have recently enacted remote notarization laws to comport with social distancing and quarantine measures put in place by both states to combat the spread of COVID-19. Knowing the requirements for notaries under each state's laws, and knowing how the laws differ, could be important for your business. Additionally, due to recording requirements, these new laws could raise privacy concerns. In this alert, we cover similarities and differences in the state laws followed by a list of Frequently Asked Questions to help guide you in navigating this new terrain.

MAIN TAKEAWAYS & BEST PRACTICES

When it comes down to it, the Pennsylvania and New Jersey laws (key aspects of both laws are explained in more detail below) are not that different. For example, both states:

- *Require that the notary public be able to identify and confirm that the logged record is the same record in which the remotely located individual executed the signature.* You should ensure that the video record is high quality so that you have a clear picture of the individual making the notarized statement or executing the notarized documents so that there are no authenticity or discovery issues in any future litigation with regard to the recording. Moreover, if a statement is being made—be sure to confirm that the remotely located person's voice is audible (as well as the notary public's).
- *Require an audiovisual recording*. You should therefore notify the remotely located individual as soon as you sign onto a virtual platform (such as Zoom) that you are recording and ask for his or her **consent in recording** the session to avoid liability for violating his or her privacy rights. You may also want to explain that recording the session is mandatory under the new remote notarization laws to prevent fraud. You should only utilize the recording for business purposes in connection with the matter at hand and save a copy of it in a secure location.
- *Apply different rules to remote notarial acts involving individuals located outside of the United States.*
- *Require that the certificate of notarization include some statement indicating that notarial act involved the use of communication technology.*
- *Require a notary public to retain a copy of the audiovisual recording for at least 10 years after the recording is created.*

Although there are many similarities between the two laws, there are some important differences detailed below.

THE SPECIFICS: PENNSYLVANIA'S REMOTE NOTARIZATION LAW

Pennsylvania passed Senate Bill 841, which provides that a remotely-located individual may comply with Pennsylvania's notary laws by appearing before a notary public by means of communication technology. This Bill shall be in effect *only* until 60 days after the termination of the COVID-19 disaster emergency. A notary public located in Pennsylvania may perform a notarial act facilitated by communication technology for a remotely-located individual if all of the following criteria are met.

- The notary public must have **personal knowledge of the identity of the individual**, must have satisfactory evidence of the identity of the remotely-located individual by oath or affirmation from a credible witness appearing before the notary public, or must be able to reasonably identify the individual by at least two different types of identity proofing processes or services.
- The notary public must be able to **reasonably identify a record** as the same record in which the remotely located individual made the statement or on which the remotely located individual executed the signature.
- The notary public, or person acting on behalf of the notary public, must create an **audiovisual recording of the performance of the notarial act, including all interactions** between the notary public and the remotely-located individual.
- There are **different rules that apply to remotely-located individuals located outside of the United States**. If this applies to you, refer to B. 841, Ch. 57(D)((4).
- If a notary public performs a notarial act via remote notarization, **the certificate of that notarial act must reflect that** with a statement such as "This notarial act involved the use of communication technology."
- Importantly, the notary public, or his or her agents, is required to retain the audiovisual recording created as a part of this new process or make sure the recording is retained by a repository designated on behalf of the notary public for **at least 10 years after the recording is created.**

Lastly, in Pennsylvania, a notary public is required to notify the Department of State that the notary public will be performing notarial acts facilitated by communication technology and identify the technology. If the Department has established standards for approval of communication technology or identity proofing, the communication technology and identity proofing must conform to the standards. You should ensure that an attorney or notary public you work with has done this prior to performing any remote notarization.

THE SPECIFICS: NEW JERSEY'S REMOTE NOTARIZATION LAW

Similarly, on April 14, New Jersey enacted A. 3903 enabling remote online notarization in the state for the duration of the COVID-19 pandemic. This Act will expire upon the rescission of Executive Order No. 103 by Governor Murphy. On March 19, the New Jersey Legislature passed Bill A. 3864 enabling remote online notarization. As of April 23, 2020, the bill awaits signature by the Governor and would become effective 90 days after enactment.

A notary public in New Jersey may perform remote notarizations if all of the following criteria are met:

- A notary public, or an officer authorized to take oaths, affirmations, and affidavits or to take acknowledgments, **may perform notarial acts using communication technology for a remotely-located individual if the notary public has personal knowledge of the identity of the individual** appearing before the notary public or officer. This personal knowledge should be based upon dealings with the individual sufficient to provide reasonable certainty that the individual has the identity claimed, has satisfactory evidence (such as a valid passport or driver's license) of the remotely located individual by oath or affirmation from a credible witness appearing before the notary public or officer, or has obtained satisfactory evidence of the identity of the remotely located individual by using at least two different types of identity proofing.
- The notary public or officer **must be reasonably able to confirm that a record** is the same record in which the remotely located individual executed a signature.
- The notary public, or his or her agents, **must create an audiovisual recording of the performance of the notarial act**.
- For a **remotely located individual located outside of the United States**, see A3903(1)(b)(4). This section shall not apply to a record to the extent it is governed by: (1) a law governing the creation and execution of wills or codicils; (2) the U.C.C., other than §§ 1-107 and 1-206, Article 2 and Article 2A; or (3) a statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law.
- The **certificate of notarization must indicate** that the notarial act was performed using communication technology.
- The notary public, or his or her agents, **must retain the audiovisual recording for a period of at least 10 years** after the recording is made.

FAQS

What is the correct course of action for a notary public if a remotely located individual refuses to be audiovisually recorded and/or does not possess the requisite technology to be audiovisually recorded?

At this time, there does not appear to be a workaround for this legal requirement. The notary public should explain why the audiovisual recording is required by law and confirm that any recording will only be used for business purposes in connection with the matter at hand. There does not appear to be an exception for persons who lack access to the requisite technology.

We will continue to track these developments and update this guidance as necessary.

If using the remote notarization platform, DocVerify, should notaries vet their clients before attempting to notarize a statement or document remotely?

Yes. DocVerify recommends vetting a remotely located individual with the following questions because if he or she cannot pass the identification verification requirements, he or she will not be able to complete the remote notarization using DocVerify. Vetting the individual up front will ultimately be a time saver because the third-party providers require the information below to generate at least five questions they need to answer. Even if the individual has most of the following information, if five questions cannot be generated, he or she will not be able to continue.

1. Is he or she a United States citizen?

2. Does he or she have a valid state driver's license?

3. Does he or she have a valid social security number?

4. Does he or she have a credit history that spans 5 to 10 years?

5. Is he or she old enough to have enough history?

▪ Does DocVerify record the entire remote notarization session?

No. It only records the actual signature. This is why you should continue to record the entire session on a virtual meeting platform like Skype, Zoom, or Microsoft Teams to cover all bases and to be able to resolve potential issues of fact down the line. Moreover, **Pennsylvania specifically requires a recording of the notarial act, including all interactions between the notary public and the remotely located individual.**

▪ What should a notary public do if a remotely-located individual wants to conduct a remote notarization via a public internet connection?

We do not recommend using a public internet connection to perform remote notarizations. Not only are public internet connections typically not secure but the connections are very unpredictable. If a remotely located individual *must* use a public connection, then the notary public should be prepared for issues such as video dropping, bandwidth throttling, blocking, and any other methods that might be used to control their users (such as time limitations on free internet connectivity). These issues may adversely affect the quality of service and security of the remote notarization (*e.g.*, Zoom-bombing the audiovisual recording).

Therefore, to the extent practicable, notaries should attempt to utilize secure and private internet connections on both ends of the remote notarizations.

▪ What happens if there are issues with the recording?

Start over! For example, if any connections drop or are disconnected, DocVerify recommends starting the entire session over to protect not only the transaction, but the possibility that signers could switch during the time it is disconnected. Moreover, if a DocVerify account is cancelled, and is no longer a paid account, then the recording may be permanently removed from the system. Accordingly, it is the responsibility of the notary public to maintain the recording as DocVerify will only maintain the recording for as long as the account is paid and current.

We recommend using a virtual meeting platform to audiovisually record each session in its entirety, and store the recorded sessions on your protected document storage system.

Stay safe, everyone!

If you have any questions, please feel free to reach out to Donna Urban, Krishna Jani, or any member of Flaster Greenberg's Telecommunications or Privacy & Data Security Groups.