LEGAL UPDATES

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Remote Online Notarization and COVID-19

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As the novel coronavirus (COVID-19) continues to change our daily life, obtaining the notarizations required to close a real estate deal has become not only inconvenient, but imprudent. Thankfully, many states have laws that allow parties to a transaction to obtain notarizations while remaining in their homes.

The RON process

These laws provide for remote online notarization ("RON"), a process by which notarization is conducted via remote, two-way, audio-visual conferencing. In a RON audio-visual conference, the signing party (the "principal") must undergo an identity-proofing process that differs by state. In most states, the principal must answer a series of personal questions and exceed an accuracy threshold to pass. The principal must also show valid ID, which in many states, must be examined and verified by a third-party security service. Once the principal's identity is confirmed, he or she signs the document with a digital signature, and the remote online notary witnesses the document by affixing an electronic seal –all while streaming the live, audio-visual conference.

Most states have software security or encryption requirements to ensure data privacy. Many states also have data retention requirements, so that the remote online notary must retain the audio-visual recording for a certain number of years after the transaction—the digital analogue to the traditional notarial journal. In order to meet these requirements, many states require use of an approved RON provider.

Note that many states have carve-outs in their Uniform Electronic Transfer Act (UETA) statutes or similar electronic signature laws for certain types of

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documents. Documents that fall within these carve-outs cannot be notarized with RON since the RON process requires electronic signature. For example, most states do not allow electronic signature for documents such as wills, codicils, and testamentary trusts. Those interested in RON should consult their state's UETA or similar electronic signature statute to ensure that their transaction can be conducted with an electronic signature.

Rapidly evolving state and federal law

The first state RON statute was implemented in Virginia in 2011, and the practice has rapidly gained widespread acceptance. Currently, 23 state legislatures have passed legislation authorizing RON, and nearly every state legislature has introduced RON legislation. In at least eight states, RON is temporarily authorized by emergency order to respond to the need to maintain social distance in the global pandemic. In a few of these states, RON is authorized until the end of the state's declared public emergency. At least one state has set a definite end date to the validity of RON notarization. The National Notary Association maintains a frequently updated webpage where one can find RON laws on a state-by-state basis.

Federal RON legislation has also been introduced to address concerns about transacting in the age of COVID -19. Recently, Senators Mark Warner and Kevin Cramer introduced the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (the "SECURE Act"), which would enable every notary in the United States to perform remote online notarizations. It requires tamper-evident technology in electronic notarizations, requires multi-factor authentication, and complements existing state laws by allowing states the flexibility to implement their own RON standards. The American Land Title Association ("ALTA") has voiced public support for this bill. ALTA and the Mortgage Bankers Association are also pushing for the inclusion of a federal RON provision in federal COVID-19-related stimulus packages.

Many states without RON legislation have electronic notarization ("e-Notarization") statutes. It is important to distinguish these statutes from RON statutes when examining your state's notarization laws. E-Notarization statutes still require a principal to be physically present with a notary but allow the notary to use an electronic seal while the principal signs electronically. While e-Notarization does not provide the same level of safety and social distance as RON, e-Notarization can at least somewhat decrease potentially dangerous contacts by allowing for electronic transmission of documents, as opposed to mailing physical documents with original signatures.

Finally, those seeking notarization should consult legal counsel to determine the status of RON legislation in their state before using a third-party service with technology that appears available and effective in their state. Several states, including California, New Jersey, Oregon, and Rhode Island,

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have issued public statements expressly prohibiting notarizations using online communications, and clarifying that signers are still required to physically appear before notaries.

RON in real estate

In real estate, one area of concern is whether the county in which you are transacting allows for electronic recording of documents ("e-Recording"). According to the Property Records Industry Association (PRIA), as of March 1, 2020, only half of the recording jurisdictions in the United States accept e-Recorded documents. Some counties without e-Recording have adopted "papering-out" provisions whereby a county without e-Recording capabilities can print out electronically executed documents for recording. Those interested in RON should ensure that the county in which they are transacting has e-Recording capabilities, or a provision allowing "papering-out" of digital signatures. However, because of COVID-19-related office closures, e-Recording may not be available in some jurisdictions. Certain county clerk's offices have completely closed and are unable to physically or electronically record documents.

Contact us

Previously touted as a time-saving measure facilitating smooth transacting, RON has become a possible life-saving measure, enabling transacting in these uncertain times. If you'd like more information on the status of remote online notarization in your state, please contact Charles Morris, Lauren Capitini or Maddie Bailey.

COVID-19 resource

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and unemployment, retailing, and supply chain management, among others.

Twenty-three state legislatures have passed RON legislation. These include: Arizona, Nebraska, Tennessee, Texas, Utah, Wisconsin, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Vermont, Virginia, and Washington. ***Note*:** At least one of the states listed has passed legislation that has yet signed into law by the Governor. ***Also note*:** Some states have enacted legislation that has not yet become effective. Please reach out with any questions regarding the status of specific states' RON legislation.

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The eight states with temporary RON orders are: Colorado, Connecticut, Illinois, New Hampshire, New York, Pennsylvania, Wisconsin, and Wyoming. ***Note*:** As COVID-19 rapidly evolves, we expect this list to grow.

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