



HOUSE BILL 776: Remote Notarization/Gov't Transparency.

2021-2022 General Assembly

Committee:

Introduced by: Reps. D. Hall, Davis, Hardister, Reives
Analysis of: Fourth Edition

Date:

September 23, 2021
Prepared by: Erika Churchill
Staff Attorney

OVERVIEW: *House Bill 776 would do the following:*

- *Allow, effective January 1, 2022, authorized North Carolina notaries to remotely perform electronic notarial acts using real time online communication technology. The notary and the principal to the transaction would be required to be physically located in North Carolina at the time of the notarial act.*
- *Amend, effective December 1, 2021, various statutes governing confidentiality of personnel records of governmental employees to provide the public access to the date and a general description of each demotion, transfer, suspension, separation, and dismissal in addition to each promotion. The bill would also require each affected governmental employer to adopt policies to allow employees to challenge the wording of the general descriptions.*

REMOTE ELECTRONIC NOTARIZATION

CURRENT LAW: The North Carolina Department of the Secretary of State Notary Public Section regulates, educates, tests, qualifies, and commissions notaries public. Generally, notaries public are governed by Chapter 10B of the General Statutes which sets forth requirements for an individual to be qualified to notarize documents.

The Electronic Notary Public Act, Article 2 of Chapter 10B of the General Statutes, allows for acknowledgments, jurats, verifications or proofs, and oaths or affirmations to be performed electronically. Under that Article, a notary cannot perform an electronic notarization if the signer of the electronic document is not in the presence of the electronic notary at the time of the notarization and is not personally known to the notary or identified by the evidence. Upon completion of performing an electronic notarial act, all of the following components must be attached to or associated with the electronic document by the electronic notary: notary's name, state, and county of commission; the words "Electronic Notary Public"; the words "State of North Carolina"; the expiration date of the commission; the notary's electronic signature; and the completed wording of the notarial certificate performed.

In 2020, the General Assembly temporarily authorized video witnessing during a state of emergency, allowing any person who witnesses the signature of a record through video conference technology to be considered an "in-person" witness, and the record to be considered to have been signed by the principal signer "in the presence of" such witness, if the video conference technology allowed for direct, real-time audio and video interaction between each principal signer and the witness. Section 4.1 of S.L. 2020-3, as amended by S.L. 2020-74, S.L. 2020-80, and S.L. 2021-3. The temporary authorization is set to expire December 31, 2021.

Jeffrey Hudson
Director



Legislative Analysis
Division
919-733-2578

House Bill 776

Page 2

BILL ANALYSIS: The bill would establish statutory authority under a new Part 4A of Article 2 of Chapter 10B of the General Statutes, for a notary to register with the Secretary of State (Secretary) as a remote electronic notary (REN) authorized to perform remote electronic notarizations where the REN does not need to be in the presence of the principal, but rather must be simultaneously communicating by sight and sound using audiovisual technology.

In addition to the existing definitions in Chapter 10B of the General Statutes, Part 4A of Article 2 would add the following definitions applicable specifically to remote electronic notarizations:

- Communication technology. – An electronic device, process, or system that allows a REN and a remotely located principal (RLP) to communicate with each other simultaneously by sight and sound using audiovisual technology.
- Communication technology recording. – The simultaneous, synchronous audio and visual recording of the notarial act.
- Credential analysis. – A process or service through which a third party or service performs a remote analysis of the characteristics and security features of the RLP's identity.
- Electronic journal. – A secure electronic record of notarial acts that contains certain required information.
- Identity proofing. – A process or service through which a third party or service affirms the identity of a principal through the review of personal information from public or proprietary data sources.
- Remote electronic notarial certificate. – The portion of a notarized electronic document completed by the REN containing certain required information.
- Remote electronic notarization or remote electronic notarial act. – A notarial act performed by means of communication technology.
- Remote electronic notary public or remote electronic notary. – A notary public who is registered with the Secretary to perform remote electronic notarizations.
- Remotely located principal. (RLP) – A principal who is not in the physical presence of the remote electronic notary.
- Third party vendor. – Any person providing communication technology, credential analysis, identity proofing, or custodial services to remote electronic notaries.

The following types of notarial acts authorized using communication technology would be the same as electronic notaries (acknowledgements, jurats, verifications or proofs, and oaths or affirmations), however the remote electronic notary could not be used for any of the following types of documents:

- A self-proved will.
- An advance directive for a natural death.
- A health care power of attorney.
- A revocable or irrevocable trust or any document amending the same.
- A death beneficiary form that requires an acknowledgment.
- A durable power of attorney except a statutory limited power of attorney for real estate.
- A codicil to a will.
- Any document related to the renunciation of parental rights in an adoption.
- Mail-in absentee ballots.

House Bill 776

Page 3

The above prohibitions would not apply if, at the time the remote electronic notarial act is performed, the RLP is all of the following:

- A member of the Armed Forces of the United States or the spouse of a member of the Armed Forces of the United States.
- Located out of this State pursuant to military orders assigning the member of the Armed Forces of the United States to active duty outside this State for more than 120 days.
- Physically located on the military installation or vessel named in the military orders.

Remotely notarized powers of attorney could not be used by the attorney-in-fact with any other remotely notarized document to convey title to, or transfer any interest in, a remotely located principal's real property. This limitation would not apply to powers of attorney executed by the remote military principal or spouse. The remote electronic notarial certificate would be required to contain the REN's attestation that at the time of the remote electronic notarial act, the REN was physically present in North Carolina and the REN verified that the RLP was physically present in North Carolina. Also required is an acknowledgment or jurat certification identifying the North Carolina county where the RLP was physically located at the time of the remote electronic notarization and that this location be verified through either the RLP's verification to the REN by oath or affirmation or by the IP address shown by the communication technology being used.

A REN would also be prohibited from performing a remote electronic notarial act unless the REN has personal knowledge of the RLP or through all of the following methods:

1. Credential analysis by a third party vendor using identification based on at least one current document issued by a federal, state, or federal or state recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.
2. The remote electronic notary's comparison of the remotely located principal with the photographic image on the same document used for the credential analysis.
3. Identify proofing by third party vendor.

The communication technology used by the REN must be capable of hosting the remote electronic meeting between the REN and the RLP, allow for direct interaction between the REN and the RLP, include sufficient quality audio and visual for the REN and the RLP to observe and hear each other, not include any prerecorded audio or video, be capable of being recorded for future storage, and reflecting the physical location of the IP address being used by the RLP. The REN is required to take reasonable steps to protect against unauthorized interception and the communication technology must provide for automated backup of any recording.

The REN must inform all parties that North Carolina law requires that the notarial act must be recorded using the communication technology. The RLP must demonstrate to the REN's satisfaction that the principal is not under duress or being coerced. The REN must verify the RLP's identity, and the RLP must state what documents are being signed. The REN is prohibited from conducting the remote electronic notarization if it is not secure, or if RLP cannot affix an electronic signature on the electronic documents.

The REN would be required to maintain an electronic journal that contains all of the following with respect to each remote electronic notarial act performed: the date and time when the REN observed the document being signed, the date and time the remote electronic notarization was complete, the first and last name of each RLP, the type of notarial act performed, the document(s) being notarized or type of proceeding being performed, the type of identification document presented, the type of communication technology used, whether any person other than the RLP was present, and whether the REN charged a fee. The REN or the

House Bill 776

Page 4

designee or agent of the REN would be required to maintain the electronic journal for 10 years after the last notarial act.

The REN must implement security measures, including keeping the electronic journal safe, taking reasonable steps to prevent the audio visual communications from being intercepted, and retaining the electronic journal and a backup for 10 years. The REN may surrender the electronic journal to the REN's employer upon termination of employment. The REN would be required to notify the Secretary's office within 10 days of learning of a security breach.

Third-party vendors providing communication technology, credential analysis, identity proofing, or custodial services to REN would be required to meet all standards established by the Secretary for the provision of those services. If the Secretary has not established any standards, the third-party vendor may not furnish that service until the Secretary has determined that the provided service meets security standards generally accepted within the industry for that service. Third-party vendors would be liable to any person damaged by a remote electronic notarial act proximately caused by the failure of that third-party vendor to meet established standards and the person damaged was a party to, or in privity with a party to, the remote electronic notarial act proximately causing the damage. The bill would prohibit the venue in civil actions against third-party vendors from being controlled or established through a third-party vendor agreement and would prohibit mandatory binding arbitration in third-party vendor agreements.

The bill also sets forth how electronic documents remotely notarized, whether through e-signatures or through remote electronic notarization may be converted to paper form and makes conforming changes.

This portion the bill would become effective January 1, 2022 and would authorize the Secretary to begin rulemaking prior to January 1, 2022, to implement the act, but no temporary or permanent rule could become effective prior to that date.

PERSONNEL RECORDS OF PUBLIC EMPLOYEES

CURRENT LAW: Current law provides that personnel files of State and local government employees are confidential and cannot be released, except for certain items of information which must be maintained as separate public records. Similar statutes govern the personnel records of: local boards of education, community colleges, area mental health authorities, State employees, public health authorities, public hospitals, counties, cities, and water and sewer authorities. Generally, the items that may be released as public records are: name; age; date of original employment or appointment; current position; title; current salary; date and amount of most recent increase or decrease in salary; date of most recent promotion, demotion, transfer, suspension, separation or other change in position classification; and office or station to which the employee is currently assigned; date and amount of each salary change; date and general description of the reasons for each promotion; date and type of each promotion, demotion, transfer, or suspension, separation, or other change in position classification; date and type of each dismissal, suspension or demotion for disciplinary reasons; and a copy of the written notice of final decision setting forth the specific acts or omissions for a dismissal.

BILL ANALYSIS: The bill would expand the categories of where the public has access to a general description of the reasons for each personnel action taken by certain governmental employers to include any employee demotion, transfer, suspension, separation, and dismissal, in addition to each promotion.

If the general description is prohibited from being disclosed by law, no description would be listed, and instead the notation would read "description of action prohibited by applicable law."

House Bill 776

Page 5

Each affected governmental employer would be required to adopt personnel policies to allow its employees to challenge the wording of the general description listed by the employer. The general description would become public upon the later of the expiration of the time period to file an appeal under the employer's administrative appeals process or a final decision being entered in that appeals process.

This portion of the bill would become effective December 1, 2021, and apply to promotions, demotions, transfers, suspensions, separations, and dismissals occurring on or after that date.