

IRS: SPONSORS MUST RETAIN COPIES OF SIGNED RETIREMENT PLAN DOCUMENTS

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Adoption and maintenance of a compliant plan document by a sponsor of a qualified retirement plan has been and remains important to establishing and keeping the plan's tax qualified status and preserving the special tax benefits provided by the plan. A recent generic legal advice memorandum written by the Office of Chief Counsel for the Internal Revenue Service (AM 2019-002) serves as a strong reminder that a sponsor of a retirement plan that comes under IRS examination must be able to produce copies of signed and dated documents and amendments that demonstrate the timely adoption of required plan documentation. In the absence of evidence of timely signed and adopted plan documentation, the memorandum indicates that it would not be inappropriate for the exam agent to pursue plan disqualification.

The memorandum addresses the fundamental question of whether a plan sponsor must retain a validly executed plan document. The memorandum's ultimate advice is clear, and reiterates the IRS position on the issue:

"A plan is considered adopted only if proof of adoption of the plan is provided. A validly executed plan document should be retained and upon audit given to the exam agent to support the qualified status of the plan. Upon failure to produce an executed plan, the employer has the burden of proof that it executed a plan document as required."

The memorandum points to Internal Revenue Service (IRS) regulations under Section 6001 for its position that a signed copy of the plan document must be retained by the plan sponsor and made available for inspection by exam agents. The memorandum, however, acknowledges that there are certain and specific circumstances in which a plan sponsor might be able to meet its burden of proof that a plan document or amendment had been signed without producing that actual signed document. The memorandum references a recent case (see *Val Lanes Recreation Center v. Commissioner* (2018)) where the court found, despite the lack of a signed restated plan, there was credible evidence the plan and amendments were adopted. Nonetheless, the memorandum signals the IRS's expectation that a plan sponsor, "in normal circumstances," is unlikely to be able to meet that burden of proof.

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Prudent operation of a qualified retirement plan should include establishing and adhering to procedures for the approval, execution and retention of their retirement plan documents and amendments, including earlier versions of the plan documentation.

