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IRS Reiterates Requirement to Sign Plan Documents and Amendments

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At the heart of tax qualified retirement plan compliance is a requirement to timely adopt plans and plan amendments. Failure to adopt plan amendments when required can result in plan disqualification. Accordingly, it is very important for plan sponsors to prove that amendments were properly executed in a timely manner. In a General Legal Advice Memorandum from the IRS's Office of Chief Counsel dated December 13, 2019, the IRS provided a reminder of this important qualification requirement and the ramifications of noncompliance.

(The issue of *when* plan amendments must be made is a technical issue and will vary based on a number of factors, including whether the amendment is a legally-required amendment, an optional/design amendment, or an amendment required as a condition of obtaining a favorable IRS determination letter for the plan. This blog addresses the separate technical requirement to prove that a plan amendment was properly adopted.)

The question of how to prove timely adoption of plan amendments arose following the Tax Court's decision in *Val Lanes Recreation Center v. Commissioner, TC Memo 2018-92*. The taxpayer in *Val Lanes* was an employer sponsoring an employee stock ownership plan (ESOP) that was under examination by the IRS. The IRS proposed to disqualify the ESOP for several reasons, one of which was that the employer could not prove timely adoption of a plan amendment. All that was in the record was an unsigned amendment that the employer agreed to adopt upon receipt of its favorable determination letter; but the employer could not later produce a signed version of the amendment. The problem was that the employer's records were destroyed when bad weather caused extensive damage to the business premises and the employer thought the signed plan amendment might have been destroyed. However, the employer could credibly show that it had a practice of always signing plan documents sent by its tax advisor. After considering all the facts, the Tax Court agreed with the employer and determined that the plan amendment in question was indeed validly executed by the employer in a timely fashion.

In the General Legal Advice Memorandum, the IRS emphasized that employers should not try to rely on the arguments presented in *Val Lanes* because they were highly fact-specific. The burden of proof to show timely adoption, according to the IRS, is on the plan sponsor. The IRS emphasized that it would be unlikely for a plan sponsor to meet its burden of proof that a plan amendment had been executed without providing an actual signed plan amendment. Therefore, the IRS concluded by stating that "it is appropriate for IRS exam agents and others to pursue plan disqualification if a signed plan document cannot be produced by the taxpayer."

As this IRS memorandum emphasizes, plan sponsors should make sure that all plan amendments are properly and timely adopted. Sometimes plan sponsors might simply rely on board resolutions or committee resolutions as proof of adoption without a corresponding signed document. In light of the IRS emphasis on relying on *signed* documentation, plan sponsors should consider how best to document proper and timely adoption. For example, a contemporaneous signed certificate of the corporate secretary might corroborate the timing of unsigned board resolutions. It would also help plan sponsors to keep clear records (perhaps in a plan amendment tracking chart like this sample chart identifying plan amendments and when they were adopted.

The bottom line is that the IRS General Legal Advice Memorandum serves as a reminder that this is an issue the IRS will be looking for on examination and that plan qualification could hang in the balance.

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