

The Written Plan Document Matters—20 Helpful Tips to Avoid Written Plan Document Problems

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The Internal Revenue Service is fairly particular about qualified retirement plans; and for a good reason, which we will talk about below.

This article discusses the written plan document requirement for qualified retirement plans. The first part of the article provides a list of twenty tips to employers to avoid problems with the written plan document requirement for qualified retirement plans. The second part of the article discusses a 2018 Tax Court case that may have lessened the burden on employers to keep up with their written plan documents, and the nearly immediate response by the IRS that took the teeth out of the Tax Court's new "dog ate my homework" defense.

First, here is a little background on why the written plan document requirement is so important. Let's agree that qualified plans include 401(k), 403(b), ESOP, some profit-sharing, and most pension plans. The IRS is concerned about qualified plans for three main reasons. First, qualified plans provide upfront tax deductions to the employer when contributions are made. Second, qualified plans provide deferral of tax to the employee until the time of distribution (and even later with rollovers). Third, qualified plans are exempt from tax on their investment income. The Government calls these three benefits a "tax expenditure," which is a fancy name for an area in which the Government loses money because of a tax benefit provided in the law. Qualified retirement plans collectively account for one of the highest tax expenditures in the economy.

Now, on to Part 1.

Understandably, the IRS expects something in return for these tax expenditures. What the IRS expects is compliance with the requirements of Section 401(a) of the Internal Revenue Code, which is best achieved through the written plan document requirement. Without getting bogged down into too many details, here is a list of twenty tips that an employer may use to help avoid problems with the written plan document requirement:

1. Adopt a written plan document.
2. Have an authorized person sign the written plan document.
3. Read or at least be familiar with the written plan document.
4. Know that the written plan document is important.
5. Make sure that plan fiduciaries know how to get a copy of the written plan document, and talk about the written plan document in administrative committee meetings.

6. Administer the plan the way the written plan document says to.
7. Hire qualified specialists (lawyers, CPAs, and recordkeepers) to help you administer the written plan document.
8. Check periodically to make sure that the administration of the plan aligns with the written plan document.
9. Make sure that recordkeepers are administering the plan in accordance with the written plan document, and not their plan administrative manual or an out of date version of the written plan document.
10. Be sure the written plan document complies with current legal requirements.
11. Know where your company keeps the written plan document.
12. Tell employees about the written plan document.
13. Amend the written plan document when the law changes.
14. Amend the written plan document when you want to change how the plan works.
15. Know and comply with the deadlines for voluntary amendments and compliance amendments.
16. Know that amendments to the written plan document are part of the written plan document.
17. Know that the written plan document is not the same as the summary plan description.
18. Provide the written plan document to employees upon request.
19. Provide the written plan document to the IRS and the DOL when they want to see it.
20. Check with legal counsel before you let your company-wide document retention policy destroy or delete your old written plan documents.

The IRS is very serious about the written plan document. These twenty tips could help avoid a real problem in the future, including the problem that we discuss below in Part 2.

Now on to Part 2 and the problem of Val Lanes' unsigned plan amendment.

In May 2005, the IRS started an examination of the qualified plan of Val Lanes Recreation Center Corporation in West Des Moines, Iowa. The IRS found several issues with the Val Lanes plan, which was an ESOP. One of those problems was the inability to provide the IRS with a copy of the signed USERRA amendment that Val Lanes was required to adopt as a result of legislative changes to the tax qualification requirements.

Because of the unsigned amendment, the IRS proposed to take away favorable tax treatment—called disqualification—of the Val Lanes ESOP plan from 2001 to the present.

USERRA is a very important law because it protects the qualified plan rights of employees who are called to active duty in the U.S. Armed Forces. USERRA was originally adopted in 1994. The IRS provided a model amendment for employers to use to comply with USERRA. The model

amendment is only a few lines long and basically incorporates the wording of the USERRA statute in the adopting plan by reference.

When the IRS audited the Val Lanes' qualified plan, it asked for all of the signed amendments to the written plan document and was provided with an unsigned copy of the USERRA amendment. A signed copy of the USERRA amendment could not be found. The problem for Val Lanes was how to satisfy the IRS requirement that the USERRA amendment had been timely signed.

The dispute about the missing amendment went through the IRS administrative procedures and ended up in the Tax Court case called Val Lane Recreation Center Corporation v. Commissioner, which was finally decided in 2018. You can read the case at this link <https://www.ustaxcourt.gov/UstclnOp/OpinionViewer.aspx?ID=11686>

The Tax Court concluded that Val Lanes had put on credible testimony that allowed it to conclude that the USERRA amendment must have been signed timely and that the IRS had abused its discretion in proposing to disqualify Val Lanes' qualified plan. The evidence that the Tax Court found favorable included: testimony by Val Lanes' CPA that he remembered that the USERRA amendment had been signed; testimony from the owner of Val Lanes that he always signed whatever the CPA sent him to sign; further testimony of the owner that his office experienced flood damage and many documents were lost or destroyed; and finally, the testimony of another witness that the IRS and DOL had seized the CPA's records in a separate proceeding and had not returned them.

Needless to say, the Tax Court's decision in Val Lanes was an important win for the taxpayer and plan sponsors generally. All of a sudden, it seemed that the Tax Court had recognized a new Beaver Cleaver defense to the written plan document requirement.

This new holding worried the IRS, which in December 2019 issued a Chief Counsel Memorandum that took the teeth out of the "**dog ate my homework**" defense. You can read the Chief Counsel Memorandum at this link <https://www.irs.gov/pub/foia/am-2019-002.pdf> According to the IRS, it intends to continue to pursue disqualification when employers are unable to provide signed copies of the written plan document, including required amendments.

All is not lost for employers with incomplete written plan document files. The IRS will help employers avoid disqualification due to late or missing amendments through the EPCRS correction program in Revenue Procedure 2019-19, which you can read at this link <https://www.irs.gov/pub/irs-drop/rp-19-19.pdf> In addition, the IRS adopted a policy in 2001 called "Verification of Prior Plan Documents in the Absence of a Determination Letter." That policy is no longer on the IRS website, but you can find a copy at this link. <https://benefitslink.com/src/irs/ep-qual-assurance.pdf>. To the extent the IRS still follows the 2001 policy or its principles, some additional relief may be available to employers with written plan document problems.

In conclusion, employers should take the written plan document requirement very seriously, and the twenty tips offered here should help employers stay on the right side of the compliance line. The Val Lanes case may provide some relief to employers who are experiencing written plan document requirement problems in appropriate cases. However, the IRS is prepared to pursue harsh sanctions against employers that have late or missing written plan documents.

Employers should consider seeking professional advice for any questions about the written plan document requirement and how to protect themselves through effective administrative compliance policies and the EPCRS.