



# We Can't Find our Signed Plan Document, Now What?

## Facts

We have a new TPA for our 401(k) plan and they've asked for our current plan document that was effective January 1, 2017. We know the document was signed back when it was prepared, but we can't locate the signed copy.

## Question

If we've been following the terms of the plan document all this time, is it a big deal if we can't find the executed signature page? Can we just sign a new plan document and move forward?

## Answer

The short answer is yes; it is kind of a big deal. But as we are sure you already guessed, there is a little more to it.

There are a couple of foundational requirements that help set the stage here:

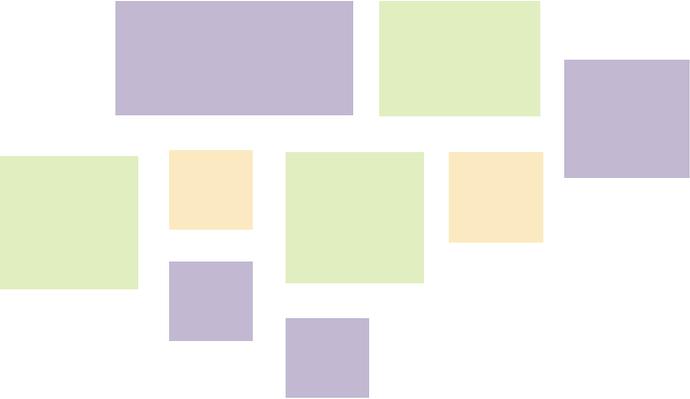
- The company must adopt a written plan, and
- The benefits a plan provides must be definitely determinable.

This is to ensure that companies and participants alike have an "official" resource as to what the plan does and does not promise with regard to items such as plan eligibility, contribution amounts, vesting, availability of distributions, etc. By executing the plan document, a plan sponsor agrees to the terms of the plan and promises specific benefits to employees. This requirement and reasoning have been articulated in numerous federal court decisions over the years.

In other words, with very few exceptions, the only proof that you (or any plan sponsor) has that you have adopted a plan and that identifies these and other parameters for definitely determining benefits is the executed plan document. In addition, plan sponsors must also maintain their plan documents via certain [mandatory](#) or [voluntary](#) plan amendments that must also be signed. That is part of their "deal" with the IRS: the plan sponsor and participants are entitled to tax benefits as long as the plan is properly maintained.

## So, what does it mean to "adopt" a written plan?

Only businesses can sponsor qualified retirement plans, and that can only be done through some sort of official action on the part of the sponsoring company. Generally, each business's bylaws or operating agreements will specify what constitutes official action, but it typically involves some affirmative step by an individual who is legally authorized to act on behalf of the company. It might be sufficient to have any single owner or officer sign, but in another case, a company may require signatures from all the owners or from a specific officer of sufficient "rank" such as the CEO.



Another place to look for instruction on what is required in this context, specifically with regard to plan amendments, is the plan itself. There was a court case a few years ago involving a dispute over the applicability of a plan amendment. The plan document provided clear instruction that in order for the plan to be amended, the amendment had to be signed by a majority of the members of the retirement plan committee. Although the committee did meet and verbally agree to the change, only the secretary of the committee physically signed. The court invalidated the amendment, because the committee did not follow its own rules.

### **What if the plan document was timely executed, but the records were lost?**

The IRS addressed this in [Chief Counsel Memorandum 2019-002](#) (issued December 13, 2019). That memo discusses a situation in which the IRS had revoked the tax-favored status of a plan (known as plan disqualification) due to the sponsor not being able to produce signed copies of plan documents. The sponsor challenged the disqualification and, in a hearing, presented evidence that it had executed the questioned documents on a timely basis; however, the documents were destroyed in water damage due to a roof leak. To make matters worse, the IRS and DOL seized the sponsor's accountant's records in an unrelated matter.

The Tax Court agreed that the evidence presented (which included testimony about their normal procedure for signing documents and attestation by other service providers that the documents had been signed) was sufficient to demonstrate that the sponsor had timely executed the documents. It certainly helped matters that they had applied for and received a favorable determination letter on the plan.

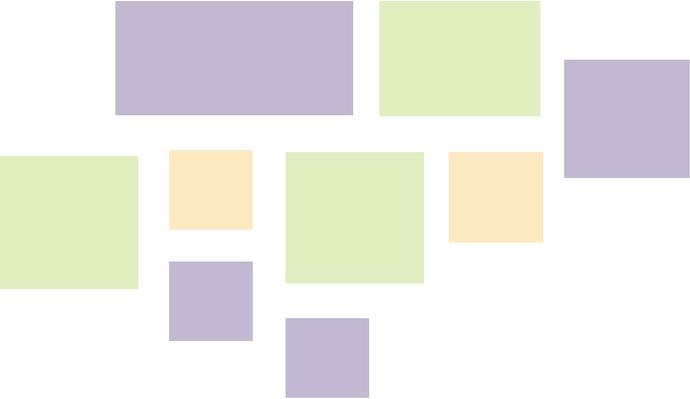
That sounds like a fair result, right? Most people would likely agree. However, the IRS Office of Chief Counsel points out in the memo that this case should not be interpreted as relaxing the requirement to retain signed plan documents. They say, "...the taxpayer bears the burden of proof that it executed the document, which is ordinarily met by producing the signed document."

The memo goes on to say, "Since, in normal circumstances, it is unlikely that a taxpayer could meet its burden of proof that the plan document had been executed without providing a signed document and the decision [in this case] should be limited to its specific facts, it is appropriate for IRS exam agents and others to pursue plan disqualification if a signed plan document cannot be produced by the taxpayer." That doesn't leave much room for interpretation.

### **Well, we know the document was signed, so how about we just executed the unsigned copy and backdate the signature?**

Please don't! Backdating a plan document is tax fraud, punishable with significant fines and potential imprisonment. We briefly worked with a plan sponsor several years ago who thought this might be a good solution. It ended up costing them well into six figures, and that was after they talked the IRS agent out of pursuing criminal charges.

Instead, let DWC assist you through the IRS correction program. By voluntarily coming forward and addressing the situation before being caught, the IRS will issue a compliance statement that serves as your proof that your [plan document is back on track](#).



## Related Resources

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- [DWC Plan Corrections](#)
- [Record Retention](#)



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