

The Revolving Door: Rehired Employees



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What Will Be Covered

- Counting service
- Break in service rules including the “rule of parity”
- Entry requirements for rehires
- Buy-back rights
- Returning from military leave

Robert's Rules of Rehires

- Don't rehire former employees
- If the person was good enough to rehire, then why go to all this effort to keep the person out of the plan
- In 95 percent of the cases, the person will be eligible on the date of rehire

Eligibility Requirements

410(a) Maximum

- Code §410(a) limits maximum age and service condition plan can impose
 - Generally one year of service
 - Age 21
- Plan can't impose higher service requirement
 - Even if plan would pass coverage

Two Years of Service

- The law allows a plan to use a two-year eligibility condition
- But pay the price
 - Full and immediate vesting
- Exception: Can't use two-year rule for elective deferrals
- Can be years of service without an intervening break in service (first exception to rule that all service counts)

Entry Date

- EE generally enters plan on entry date after satisfying eligibility requirements
- Maximum entry date is earlier of:
 - First day of the first plan year beginning after the date requirements are met, or
 - Date that is six months after the date requirements are met
- Roughly 182 entry dates – but January 1st and July 1st meet the maximum

Employment on Entry Date

- Plan can require employment on entry date as condition to enter
- If EE comes back after entry date, must generally enter on day of return unless break in service rules let us disregard service

Example

- Judy hired May 1, 2014
- Quits April 1, 2015 with 1,800 HOS
- One year of service April 30, 2015 (?)
- Entry dates are first day of first and seventh months following (July 1, 2015 if Judy didn't quit)
 - If rehired before July 1, 2015 then enters on July 1, 2015
 - If rehired after July 1, 2015 then enters on date of rehire unless break in service rules apply

Year of Service

- 12-month Computation Period (CP) in which EE has at least 1,000 hours of service
- No requirement to be employed on a particular day
- Have YOS even if not employed at beginning or end of CP
 - No requirement to work 12 months
 - It is a 12-month computation period during which 1,000 hours of service are completed

YOS Example

- Craig starts work January 1, 2015
- Has 150 Hours of service/month
- Quits August 1, 2015
- Had 1,050 HOS before quit
- Credit Craig with YOS at end of 12-month eligibility computation period (2015)

What Date for Crediting YOS?

- Plan has entry dates of January 1 or July 1 “coinciding with” or next following satisfaction of one YOS
- Craig hired January 2, 2014
- Does Craig enter on January 1 or July 1 of 2015?
 - If YOS credited on January 1, 2015, that’s coincident with entry date
 - If YOS credited on January 2, 2015, then next entry is July 1, 2015

What Is an “Hour of Service?”

- An hour for which an EE is paid for performance of duties
- An hour for which an EE is paid for non-performance of duties (e.g., vacation pay, sick pay)
- An hour for which an EE receives an award for back pay

Credit for Nonperformance

- Some reasons for pay for nonperformance of duty:
 - Vacations
 - Holidays
 - Illness or incapacity, including disability
 - Layoff
 - Jury duty
 - Military duty
 - Leave of absence
- It does not matter whether the employment relationship has terminated at the time of the payment

Limits on Nonperformance Credit

- Don't have to credit more than 501 HOS for any given computation period for *paid* nonperformance
- No need for credits for payments under a plan to comply with:
 - Workers' compensation
 - Unemployment compensation
 - Disability insurance laws
- These are credited hours and differ from *unpaid* maternity and paternity absences (hours credited just to avoid a break in service)

Credit for Nonperformance

- Erin works 900 hours of service
- Takes a four-week paid leave of absence (160 hours)
- Erin has 1,060 hours of service

No Double Counting

- Double credit is not given for the same time
- Erin has 930 hours
- She gets paid for one week of unused vacation
- Does Erin have 970 hours or 1,010 hours?

Counting HOS

- Two options for counting HOS
 - Count actual hours
 - Easy to do for workers paid by the hour
 - Time cards work well
 - Nearly impossible for salaried professionals
 - Use equivalency
- Plan document must specify method being used

Available Equivalencies

- Working hours
 - Disregard nonperformance hours
 - 870 working hours = one YOS
- Regular hours
 - Disregard nonperformance and overtime
 - 750 regular hours = one YOS
- Earnings method
 - Divide compensation by lowest hourly pay rate
- Employment period method (next slide)

Employment Period Method

- 1 day = 10 HOS
- 1 week = 45 HOS
- ½ month = 95 HOS
- 1 month = 190 HOS
- 1 shift = entire length of shift

Eligibility Computation Period (ECP)

- 12-month period used to determine whether EE has YOS for eligibility purposes
- First ECP: always starts with Date of Hire (DOH) and ends 12 months later
- Subsequent ECPs: plan choice:
 - Base on anniversary of DOH
 - Shifting to plan year
 - Most plans shift to plan year

What's Date of Hire?

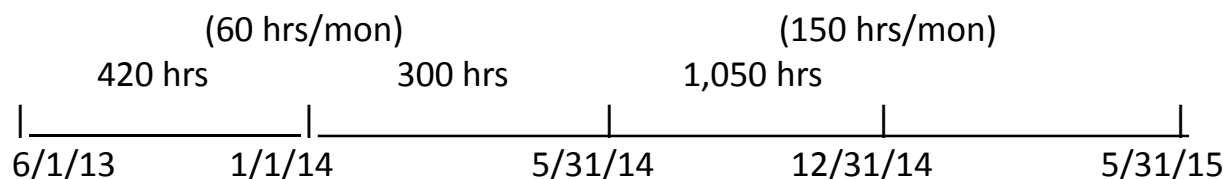
- Technical term: employment commencement date
- Date of first hour of service
 - Generally, as employee (not as contractor)
 - Leased or worksite EE – First day perform HOS for ER
 - Controlled or affiliated service group – first day of service for any group member

Shifting ECP

- JKL plan requires one YOS
- If you don't have one YOS in first year, subsequent ECP based on (calendar) plan year
- Jennifer hired May 2, 2013, works 800 hours/year
- First ECP May 2, 2013 to May 1, 2014
- Second ECP January 1, 2014 to December 31, 2014
 - Hours performed from January 1, 2014 to May 1, 2014 counted in two different ECPs

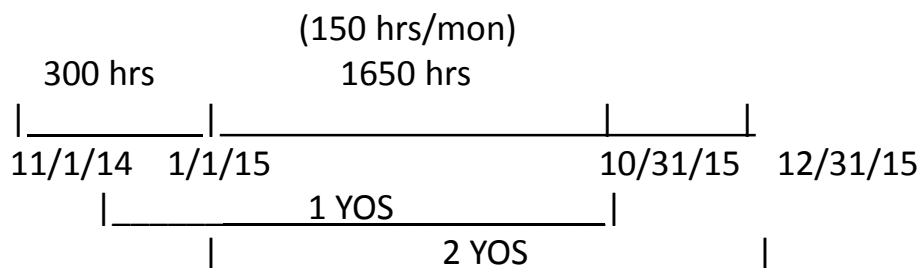
ECP Shift Example

- Jennifer begins employment June 1, 2013
- Works part-time (60 hours per month) through May 31, 2014
- June 1, 2014 begins full time (150 hours per month – for next couple of years)
- Plan shifts to (calendar) plan year
- When does Jennifer have one YOS for eligibility?



ECP Shift Example

- David begins employment November, 1, 2014
- Works full time (150 hours per month)
- Plan shifts to (calendar) plan year
- When does he have two YOS for eligibility?



Odd Result

- CY plan has YOS with quarterly entry
- Shift to PY for eligibility
- Individual A (rehire):
 - May 2013 - August 2013: 430 hours
 - Rehired August 2014
 - January 1 – December 31, 2014 – 950 hours
 - January 1 – December 31, 2015: if 1000 hours enters on January 1, 2016
- Individual B (new hire):
 - Hired August 2014
 - B has one YOS in August 2015 and enters on October 1, 2015
- The result: A and B (re)hired on same date but B enters earlier than A

Vesting Computation Period

- May be any 12-month period specified in plan
- Most plans use the plan year as the computation period

Elapsed Time Method

- Based on period of time that elapses while EE is employed
- Period of service
 - Starts on date of hire
 - Ends on “severance from service” date = the earlier of date of severance (e.g., quit) or one year after a leave of absence
- Period of severance
 - Starts on the “severance from service” date
 - Ends when employee returns to service

Elapsed Time (continued)

- Service spanning rule
 - If employee returns to work within one year, then must be credited with that year
 - Period of severance can also be period of service
- One-year period of service for eligibility is anniversary of employment date
 - Fractional years count
 - 30 days equals month or can use 365 days
- Break in Service (BIS) = a period of severance that isn't counted as a period of service

Elapsed Time Example

- Frank has following employment history:
 - Hired March 1, 2012
 - Quits October 2012
 - Rehired January 2013
 - Quits February 2013
 - Rehired December 2013
- Frank has two periods of service in March 2014
 - Did not have one-year break

Other Rules

- If ER is “maintaining” a predecessor ER’s plan, the plan must count service with the predecessor ER
- If the ER is not “maintaining” a predecessor ER’s plan, the plan may credit predecessor service on a nondiscriminatory basis
- If a controlled or affiliated service group exists, the plan must treat service with any group member as service with the ER
- If a multiple employer plan (MEP) service with all adopting employers counts

Counting Service

General Rule – All YOS Count

- Break in service rules only way to disregard service
- Example:
 - Dave works five years full-time for XYZ Contractors as union employee
 - XYZ plan excludes union employees
 - Doesn't matter: Dave has five YOS
 - Same result if working for foreign company
- Must count service before plan established or before participant enters plan
- Break in Service (BIS) = computation period where EE does not complete more than 500 HOS

Maternity/Paternity Leave

- For purposes of determining BIS only, plan must count unpaid hours for:
 - EE's pregnancy
 - Birth of EE's child
 - Placement of an adopted child with EE
 - Child care by EE starting right after birth
- Limit: enough hours to prevent a BIS in current year (or next year if no actual BIS in current year)
- Remember: *paid* leave = up to 501 actual HOS

Overview of Eligibility BIS Rules

- Allow you to disregard service
 - Temporarily or permanently
- Otherwise you must count prior service
- Three rules
 - Two-YOS eligibility rule
 - One-year holdout rule
 - Rule of Parity (five BIS)

Two-YOS Eligibility Rule

- Only applies to plans using two-YOS eligibility condition
 - Requires full vesting
- Plan can require completion of two YOS without intervening BIS

One-Year Holdout Rule

- If EE has BIS, then not required to count prior service until EE completes one YOS after rehire (based on date of rehire)
- Situation:
 - EE enters plan
 - Terminates employment
 - Incurs BIS
 - Rehired
- Retroactive entry to reemployment commencement date or, if later, first day of ECP that EE completes 1,000 HOS

One-Year Holdout Rule

Date	Event
January 1, 2010	Hired
December 31, 2010	Credited with one YOS
January 1, 2011	Enters plan
May 15, 2011	Quits (700 HOS)
December 31, 2012	Credited with one year BIS
August 14, 2014	Rehired: reemployment commencement date
March 1, 2015	Completes 1,000 HOS after rehire; enters retroactively to August 14, 2014

One-Year Holdout Rule Usually Bad Choice

- May have to give retroactive contributions
 - Including top-heavy
- Unusable for elective deferrals
 - How can you defer retroactively?
 - IRS does not believe the rule can be used for elective deferrals
- Only people it keeps out permanently are part-time rehires or those who leave soon after rehire

Rule of Parity

- Only applies to non-vested participants
- Can treat rehired EE as new employee if consecutive BIS at least equal to greater of:
 - Five, or
 - YOS prior to BIS
- If participant has five or fewer YOS, then must have five BIS
- If participant has more than five YOS, then must have BIS equal to number of YOS (but rule rarely applies because if five YOS, then at least partially vested)

Parity BIS Eligibility Example

Date	Event
January 1, 2007	Hired
January 1, 2008	Enters plan
November 1, 2008	Quits with two YOS; no vesting
December 31, 2009	First one-year BIS
December 31, 2013	Fifth one-year BIS
August 1, 2014	Rehired; reemployment commencement date; must satisfy current eligibility requirements and pass entry date to enter plan again

Rule of Parity – No Prior Plan

- Employee worked full time for five years but employer did not have plan
- Quits
- Rehired after ten years
- Do the five years count?
 - Not clear since rule of parity applies to vested participants and there was no plan

Other BIS Notes

- BIS rules must be in plan document to apply
- Don't assume they are there – check the document
- Remember: other than through BIS rules, rehired participant generally enters plan on date of rehire

Classes of Rehired Employees and When They Enter (Re-enter)

Class	Entry
Already satisfied minimum age and service and entered plan	Immediately upon rehire
Already satisfied minimum age and service but terminated employment before entry date	Immediately upon rehire (or original entry date, if later)
Already satisfied minimum service but didn't enter plan because of minimum age requirement	Immediately upon rehire (or entry date following attainment of minimum age, if later)
Didn't satisfy minimum service requirement	Wait until entry date following satisfaction of eligibility requirements

Assumes no BIS rules and that person is an eligible employee

When Does Marty Enter (Re-enter?)

- ABC hired Marty (age 30) May 1, 2012
- ABC calendar year 401(k) plan has:
 - One YOS/age 21 entry requirements
 - January 1/July 1 entry dates
 - Shifting eligibility computation period
 - No eligibility break in service rules
- Marty always works 150 hours/month
- When does Marty enter/re-enter plan after rehire?

	Marty Quits	Marty Rehired
a)	Aug. 1, 2013	May 15, 2015
b)	Feb. 1, 2013	May 15, 2015
c)	Feb. 1, 2013	May 18, 2013
d)	Aug. 1, 2012	Mar. 1, 2014

Additional Rules for Vesting

- May exclude service (subject to terms of plan):
 - Prior to age 18
 - Prior to initial effective date or predecessor plan
 - During which mandatory employee contributions were not made
- After five BIS, future service is excluded in determining vesting of prior contributions
 - This is why plans provide for a forfeiture after five BIS – vested percentage of the existing account will not be increased
 - This rule does not affect vesting of future contributions

Forfeiture

- May be earlier of distribution of vested interest in plan or five BIS
 - Requires buy-back provisions
- May be after five BIS in service regardless of whether distribution is made
 - Requires full vesting if plan is terminated before participant has five BIS

Buy-Back Provisions

- Applies if employee receives distribution due to termination of participation in plan and plan forfeits non-vested interest
 - Repayment must be made by earlier of
 - Five years after re-employment
 - five breaks in service
- Deemed cash-out of \$0 = deemed repayment of \$0 if rehired before repayment period ends

Buy-Back and Forfeiture Restoration

- No guidance requiring notification of buy-back rights (other than in SPD)
- Buy-back
 - May be made with:
 - After-tax amount
 - Rollover
 - No adjustment for earnings unless DB plan
 - 401(k) plan may require payment of elective contributions
- Forfeiture restoration
 - Can use current year forfeitures
 - Employer must contribute

Rehired Employees and Distributions

- Example:
 - Plan allows distributions upon termination of employment
 - Plan does not permit in-service distributions
 - Larry quits July 15, 2011
 - Larry is rehired June 1, 2015
 - Larry requests distribution on June 2, 2015 claiming he was entitled to termination distribution
- IRS has informally indicated that plan could refuse to make distribution

Automatic Enrollment – Special Rules

- EACA – refund available 90 days from first automatic deferral
 - If no automatic deferrals for entire PY then treat as new participant
 - New 90 withdrawal right based on next automatic deferral
- QACA – escalation of automatic deferral based on year of initial automatic deferral
 - If no automatic deferrals for entire PY then treat as new participant
 - QACA escalation starts all over
- Rules are not limited to re-hired employees

Military Service

USERRA

- Uniformed Services Employment and Reemployment Rights Act of 1994
- Internal Revenue Code §414(u)
- USERRA generally requires employers to re-employ former employees who entered US military service
- We won't cover re-employment rights as these are labor law issues

Most Pension Rights Contingent on Reemployment

- If an employer reemploys a worker following military service:
 - The employee is not treated as having incurred a break in service by reason of military service
 - Military service is treated as service with the employer
 - The employee receives the contribution he or she would have received had the employee remained at the employer

Compensation

- A participant's compensation for retirement plan purposes while the participant is in the military is:
 - The pay the participant would have received had the participant not gone into the military
 - If that cannot be determined, use average pay during the year preceding military service

Contributions Included

- All contribution types
 - Top-heavy minimum
 - Safe-harbor contributions
 - Matching contributions
 - Discretionary or fixed contributions
 - Profit-sharing or pension contributions
 - Defined-benefit accruals
- No need to adjust for earnings or reallocate forfeitures

Make-Up Contributions

- Reemployed personnel have time to make up for missed deferrals or other EE contributions which they could have contributed
- Employer must then make any match
 - EE can designate year

Time in military	Employee contribution make-up deadline
Less than 20 months	Three times length of service
At least 20 months	Five years

Affect of USERRA Contributions

- Employer and employee contributions count in year to which contribution relates, not in year of contribution
 - Limits such as 401(a)(17), 402(g), 415
- You do not rerun coverage, ADP, ACP and other nondiscrimination tests to take into account USERRA contributions

HEART

- Heroes Earnings Assistance and Relief Tax Act of 2008
- Retirement issues
 - Clarifies treatment of payments to employees in military
 - Allows death benefits for employees in military
 - Extends qualified reservist distributions

Military Differential Wage Payments

What is a Differential Wage Payment?

- Employer's payment to an individual with respect to service in the uniformed services
 - Must be for active duty
 - Minimum: 30 days
 - All or a portion of the wages the individual would have received from the employer if the individual continued to work for the employer

Tax Treatment

- Differential wage payments are wages for federal income taxes
 - Moves them to W-2
 - Had been 1099-MISC if military service “disturbed” employment relationship
- FICA/FUTA
 - No change
 - Not taxable if employment relationship “disturbed” by military service

Impact on Retirement Plan

- Made final 415 regulations obsolete on this issue
 - HEART applies for years after 2008
- Inclusion of differential pay for most plan purposes is optional
 - IRS Notice 2010-15 allows exclusion for 414(s) compensation but not 415 compensation

Employment Status

- Plan must treat employee receiving differential wage payments as still employed
- No severance except for “deemed distributions” (covered later)
- Employed on last day of year
- Post-severance compensation rules are irrelevant
 - Payment for nonperformance of duties limited to 501 hours

Compare HEART versus USERRA

	HEART	USERRA
Applies to	EEs receiving differential wage payments	EEs reemployed after qualified military service
Compensation	Differential wage payments	What compensation would have been
Count service for vesting	Up to 501 hours	Count all military service for vesting
Eligible to defer	Optional	Mandatory
Top heavy	Yes for differential wage pay	Yes for compensation
Other contributions	Optional	Mandatory
Nondiscrimination exemption	Yes, subject to conditions	Yes

Deemed Severance

- A plan may provide for a “deemed severance” for distribution purposes (IRS Notice 2010-15)
- If an individual elects to receive a distribution, then plan must suspend elective deferrals or after-tax for six months beginning on the date of the distribution

Mandatory Death Benefits

- Plan must provide death benefits to participant who dies in qualified military service as though reemployed on day prior to death
- Notice 2010-15 clarified that reemployment is based on reemployment under USERRA (for vesting purposes)

Application

- Does not require additional benefit accrual or allocation (i.e., not deemed compensation that would normally apply under USERRA)
- Does apply to:
 - Accelerated vesting
 - Ancillary life insurance benefits
 - Waiver of allocation conditions
 - Other survivor benefits contingent upon a participant's death while employed

Questions?