

Rehire Rules After the Affordable Care Act

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National Specialty Practices



Question: I am an Applicable Large Employer using the look-back measurement method to determine full-time status of my employees. One of our full-time employees left the company to pursue another career. Four months later, he returned to the company as a part-time employee. Do I need to offer him health insurance coverage?

Summary:

In addition to creating the Employer Shared Responsibility (ESR) mandate for Applicable Large Employers (ALEs), the Patient Protection and Affordable Care Act (ACA) also limited an employer's discretion to classify a returning employee as a new hire or as a continuing employee. Now, an individual rehired after a break in service of **less than 13 weeks is considered to be a continuing employee**. An individual rehired after a break in service of **at least 13 weeks**

is considered to be a new hire (26 weeks for educational organizations).¹ The determination of whether an individual is a new hire or a continuing employee affects how an employer must evaluate the returning employee's eligibility for health insurance benefits, and ultimately determines when the employer must offer healthcare coverage to avoid the risk of penalties under the ESR mandate.

Detail:

When beginning any post-ACA discussion on whether or not to make an offer of coverage, the first question to answer is whether or not an employer is an ALE. An ALE is any employer with an average of 50 full-time and full-time equivalent employees during the prior calendar year. If the employer is classified as an ALE, it is subject to the Employer Shared Responsibility mandate, also known as “Pay or Play.” This means that the employer must make certain offers of health insurance coverage to its full-time employees and their dependents or risk significant tax penalties.

The next question to explore is how that ALE is determining full-time status of its employees. An employee is classified as “full-time” if he or she has at least 130 hours of service a month (or 30 hours per week). The IRS provides only two ways an employer can measure full-time status: the monthly and/or look-back measurement methods. The monthly measurement method counts an employee’s actual hours of service each month. If the employee works full-time hours, he or she is classified as a full-time employee and offered coverage after undergoing a company’s designated waiting period (up to 90 days). The look-back measurement method averages an employee’s hours over a historical period of time (initial measurement period) to determine whether that employee should be classified as benefits eligible for a future period of time (the stability period). An employer can only use different measurement methods for specific IRS designated classifications: salary versus hourly, employees whose primary places of employment are in different geographic locations, collectively bargained versus non-collectively bargained employees, or different groups of collectively bargained employees with separate collective bargaining agreements.

When it comes to health insurance benefits, the ACA mandates that an individual rehired after a break in service (period in which there are no hours of service credited) of less than 13 weeks is considered to be a continuing employee. An individual rehired after a break in service of at least 13 weeks is considered to be a new hire. A continuing employee will step back in where he or she left off for benefits eligibility depending on the chosen measurement method:

- **Monthly Measurement Method:** if a continuing employee satisfied a waiting period during their previous period of employment, the employer cannot require the returning employee to undergo an additional waiting period. Coverage must be offered the first day the employee is credited with an hour of service, or no later than the first day of the calendar month following resumption of services (if immediate coverage is not administratively practicable).
- **Look-Back Measurement Method:** A continuing employee



must be credited for hours worked during the most recent measurement/look-back period, and offered immediate healthcare enrollment (no later than the first day of the calendar month following the employee’s return to service) if the employee’s average hours worked or paid meet the full-time threshold.

Conversely, if the returning employee is deemed to be a new employee, the ALE can again apply the established waiting period to the employee and delay the offer of coverage until completion, or place the employee in a new initial measurement period.

Example: Employee Bob is hired by Company X. Company X uses the monthly measurement method and has a 60-day waiting period. Bob is offered coverage after 60 days and accepts. Six months later, Bob gets laid off. Two months later, business picks back up and Bob is rehired as a full-time employee. Under the ACA rehire rules, Company X must offer coverage by the first day of the calendar month following Bob’s return to service without requiring Bob to complete another 60-day waiting period.

What if Bob never accepted coverage in the first place? At least in terms of health insurance, Company X should still offer coverage on the first calendar day following the date of rehire, regardless of whether Bob initially declined. With the monthly measurement method, because eligibility for coverage is actually based on a month-to-month analysis, employees are really regaining eligibility and have new election rights.

Now, assume that Company X is using the look-back measurement method. Upon returning to the company, Bob would step back into the measurement or stability period that he was in when he was laid off. If Bob had initially declined coverage for this stability period, Company X could rely on that declination and not offer coverage upon rehire. If Bob had initially elected coverage, Company X would offer the same coverage originally selected for the stability period.

Educational Institutions and Other Industries: The allowed

break in service increases to 26 weeks for educational organizations to account for scheduled academic breaks. If these rules weren't in place, a teacher could be considered a new hire after a summer break and therefore required to repeat a waiting period prior to being considered a full-time eligible employee.

While the IRS did make special considerations for educational industries, other industries were not as lucky. Commenters to the proposed regulations argued that the rehire rules should be adjusted for employees of temporary staffing firms by reducing the length of the required break in service before an employee could be treated as a new hire. However, the final regulations did not include those suggestions, likely because such a rule might encourage employers to use temporary staffing firms for employees in order to avoid having to offer coverage and avoid penalties under "Pay or Play."

Rule of Parity: If an employee works less than 13 weeks prior to the termination, an ALE may choose to use a "rule of parity." Under this rule, an employer may treat a rehired employee with a break of at least four weeks as a new employee if the break (with no credited hours of service) was longer than the employee's period of service immediately preceding the break. For example, let's say Company X uses a four-week rule of parity. Employee Bob works for

five weeks and is terminated, then rehired after no credited hours for six weeks. Bob may be treated as a new employee upon rehire. This rule of parity may allow the ALE to treat an employee as terminated with a break in service of less than 13 weeks.

Section 125 Cafeteria Plan Confusion: Finally, it is important to note that different rules may apply to Section 125 cafeteria plan elections and can often lead to confusion. Section 125 cafeteria plan documents generally cite 30 days when discussing the subject of "rehired employees." Cafeteria plan rules relate to the employee election, and not the ALE's requirement to offer coverage to its full-time employees. These rules are in place solely to prevent the plan from allowing an employee to terminate employment in order to drop their pre-tax insurance coverage election, and then be rehired the next day.

Enrollment forms showing date of hire sometimes lead to confusion in benefits administration systems and resulting eligibility. An employer should consult with its McGriff Benefits Consultant to ensure plan documents reflect the correct rehire rules and allow a continuing employee to re-enroll in the plan without undergoing the standard waiting period.

Conclusion:

An employer no longer has the discretion to determine whether an employee is a new hire or a rehire. An individual rehired after a break in service of less than 13 weeks is considered to be a continuing employee. An individual rehired after a break in service of at least 13 weeks is considered to be a new hire (26 weeks for educational organizations). The determination of whether an individual is a new hire or a continuing employee affects how an employer must evaluate the returning employee's eligibility for health insurance benefits, and ultimately determines when the employer must offer healthcare coverage to avoid the risk of penalties under the ESR mandate.

To directly respond to the example in the introduction, since the returning employee's break in service was greater than 13 weeks, this employee is a new part-time hire. He and should be put in an initial measurement period to determine whether or not he will average full-time hours, which would make him eligible for coverage during the following stability period.

References

1 - https://www.irs.gov/irb/2014-09_IRB



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