



Managing Re-Hires

Aaron R. Moody

As we approach Halloween, let's take a look at a real nightmare of a topic. While the consequences of rehiring an employee may not be comparable to Michael Myers stalking you, it can raise a new set of concerns you may not have expected. In addition, the rules relating to rehires can be very complicated to navigate. We're here to help you understand these complex rules. Whatever you do, *don't let rehire issues sneak up on you in the dark.*

The rehire rules for eligibility and completed service hinge on whether the employee had a "break-in-service" prior to rehire, so this is where you must start. What constitutes a break-in-service depends on the plan's eligibility requirements. If you determine plan eligibility based on the mere passage of time (without reference to how many hours the employee worked during that time), a break-in-service occurs when the employee does not perform any hours of service during 12 consecutive months. (This is called the "elapsed time" method.) If you use actual hours worked to determine whether someone is eligible to be in the plan (the "credited hours" method), a break-in-service occurs when there is a year (using the eligibility computation period that the plan uses for someone who does not meet eligibility in the first year of service, i.e., plan year or the anniversary of employment) during which an employee is credited with 500 or fewer hours of service. For this purpose, you must include all hours for which an employee is entitled to payment: actual hours, vacation hours, PTO hours, etc.

Example: The XYZ plan uses elapsed time. Penelope was hired on February 10, 2016. She terminates employment on June 15, 2018. If she works no hours for a full year – that is, between June 16, 2018, and June 15, 2019, she will have sustained a break-in-service.

If the XYZ plan uses the credited hours method for eligibility, you need to check to see if the plan measures breaks-in-service over the plan year or the employment year. If it is the plan year (and the plan year is a calendar year), Penelope would have a break-in-service on December 31, 2018, if she worked 500 or fewer hours during the 2018 calendar plan year. If she worked more than 500 hours, you would need to look to see if she works 500 or fewer hours in 2019; if so, she would have a break-in-service.

If the XYZ plan uses employment years to determine breaks-in-service, you would look for a one-year periods beginning on her employment anniversary of February 10 and ending on the following February 9. So, did Penelope work more than 500 hours between February 10, 2018, and February 9, 2019? What about between February 10, 2019, and February 9, 2020 (taking into account her hours after her rehire). If not, there is a break-in-service.

Once you have determined what the break-in-service definition is for the plan: did your rehired employee experience one before the rehire?

No break-in-service. Generally speaking, employees who were already participating in your plan before they terminated will immediately re-enter upon being rehired, if they have not had a break-in-service.

If an employee completed the eligibility requirements but terminated before actually entering the plan, s/he enters the plan on the date of rehire, unless the entry date that would have applied to the employee had s/he stayed with the company has not yet passed. In that case, s/he enters on that entry date. These rules apply whether you use the elapsed time method or the credited hours method for determining eligibility.

If the employee has suffered a break-in-service, the real work begins. If you've been in this field a while, this may not scare you. But don't go reanimating corpses in the Pet Sematary just yet, because things don't come back the same as they were. This is where it can get scary.

There are some optional plan provisions that can keep the employee from reentering the plan immediately. Some plans incorporate a One-Year Hold-Out Rule. This rule requires a rehired employee to earn a year of service after re-employment before re-entering the plan. However, once that employee does earn that one year of service, s/he enters the plan retroactively to the rehire date. This can cause a great administrative headache, and is usually not used (and, in fact, some believe cannot be used) for 401(k) plans.

Another optional election that can be made is the Rule of Parity. If a plan has this rule, it applies only to individuals who were not vested in any benefit when they terminated employment. Under the Rule of Parity, a rehired employee's prior service is disregarded if the employee's breaks-in-service exceed either the number of years of service s/he had prior to the breaks, or five years—whichever is greater. If the employee's breaks-in-service do not exceed the greater of those two periods, the service prior to termination must be counted for eligibility purposes.

Remember that the Rule of Parity does not apply, even if it is in the plan, if the employee has even one dollar of vested benefit in the plan, including salary deferrals in a 401(k) plan. If the employee is vested at all, s/he will re-enter the plan upon rehire.

Example: Suppose Mike... er, Myers ...disappeared from the company with 16 years of service, but without any vested benefit in the plan. (He never worked for the division covered by the plan.) Nobody sees or hears from him until 15 years later, when he returns on Halloween night and is rehired by your Haddonfield branch (which does participate in the plan). Needless to say, Mike suffered a break-in-service during his missing years. If the plan has the Rule of Parity in place, we look to see if his pre-break service years exceed the greater of 5 or the breaks-in-service. Because Mike was an employee for 16 years, but gone for only 15, the Rule of Parity will not apply. If, on the other hand, he returned 20 years later, his break-in-service period would exceed his years of prior service, and that prior service would all be disregarded. (That might make Mike angry, which can be a whole other ... horror.)

You can always just choose not to put these elections in your plan, right? Then you won't have to worry about any crazy exceptions. But then how would there be a sequel? Yes, there are still a few more rules surrounding rehired employees that are important to keep in mind.

Employees taking maternity or paternity leave may not have a break-in-service due to the leave. For purposes of applying the break-in-service rules, an employee taking maternity or paternity leave is credited with enough hours to avoid suffering a break-in-service during the leave. However, usually only one break-in-service is avoided. So, an employee taking leave for more than a year might still have a break.

Second, what otherwise would be considered a break-in-service will not be one if the employee's absence is due to Qualified Military Service. Instead, that employee's service earned is paused at the time s/he leaves, and resumes when s/he returns. So, for example, if an employee earns one year of service and then leaves to perform Qualified Military Service for a two-year period, s/he will still be credited with the service earned before the leave, and will continue earning service immediately upon return from enlistment.

Finally, if the plan requires two years of service for eligibility, the employee's first year of service can be disregarded if s/he has at least a one-year break-in-service prior to completing the two-year eligibility requirement. So, if an employee has earned one year of service before terminating and experiencing a one-year break-in-service, when that employee is rehired, s/he must start over in completing the two years of eligibility service.

The rules surrounding rehired employees are very complex. The chart below summarizes them. But, if they still scare you, phone us at FBLC. We'll help you find your way safely. After all, we are your ERISA solution.

	Employee Was Never Eligible to Participate	Eligible Before Terminated, But Never Entered the Plan	Participated in the Plan Before Termination, No Break-in-Service	Participated Before Termination, Had a Break-in-Service
Credited Hours Method	Employee must complete eligibility before entry; enter at entry date after eligibility completed	Employee enters the plan on the later of (a) date of rehire; or (b) entry date that would have applied had employee not terminated	Employee reenters the plan immediately on rehire	<p><i>If One-Year Hold-Out Rule applies:</i> employee reenters the plan retroactively to date of rehire after completing one year of service after rehire.</p> <p><i>If Rule of Parity applies,</i> if participant was not vested at termination, and the total breaks-in-service exceed</p>

				<p>the greater of 5 or the pre-break years of service, employee starts over as new hire.</p> <p><i>Otherwise,</i> employee reenters the plan immediately on rehire.</p>
Elapsed Time Method	Employee must complete eligibility before entry; enter at entry date after eligibility completed	Employee enters on later of (a) date of rehire; or (b) entry date that would have applied had employee not terminated	Employee reenters the plan immediately on rehire	<p><i>If One-Year Hold-Out Rule applies:</i> employee reenters the plan retroactively to date of rehire after completing a one-year period of service</p> <p><i>If Rule of Parity applies:</i> if participant was not vested at termination, and the total periods of severance exceed the greater of 5 or the pre-break periods of service, employee starts over as new hire.</p> <p><i>Otherwise,</i> employee reenters the plan immediately at rehire</p>



FERENCZY
BENEFITS LAW CENTER

ERISA
We are your ^ solution™

Ilene Ferenczy • ilene@ferenczylaw.com | Alison Cohen • acohen@ferenczylaw.com
Adrienne Moore • amoore@ferenczylaw.com | Adriana Starr • astarr@ferenczylaw.com
Tia Thornton • tthornton@ferenczylaw.com | Leah Dean • ldean@ferenczylaw.com

2635 Century Parkway Suite 200, Atlanta, GA 30345
T 404.320.1100 | F 404.320.1105 | www.ferenczylaw.com