



NATIONAL INSTITUTE *of* PENSION ADMINISTRATORS

2013 NAFE

Rehired Employees – Are They In or Are They Out
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What We'll Cover

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

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- 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% of the cases, the person will be eligible on the date of rehire

Eligibility Requirements

410(a) Maximum

- Code § 410(a) limits maximum age & service condition plan can impose
 - Generally 1 Year of Service
 - Age 21
- Plan can't impose higher service requirement
 - Even if plan would pass coverage

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Two Years of Service

- The law allows a plan to use a 2-year eligibility condition
- But pay the price
 - Full and immediate vesting
- Exception: Can't use 2-year rule for elective deferrals
- Can be Years of Service without an intervening break in service (first exception to rule that all service counts)

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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 6 months after the date requirements are met
- Roughly 182 entry dates – but January 1st and July 1st meet the maximum

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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

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Example

- Biff hired 5/1/11
- Quits 4/1/12 with 1,800 HOS
- 1 YOS 4/30/12
- Entry date 7/1/12
 - If rehired before 7/1/12 then enters on 7/1/12
 - If rehired after 7/1/12 then enters on date of rehire unless break in service rules apply

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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

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YOS Example

- Marty starts work 1/1/11
- Has 150 Hours of Service/month
- Quits 8/1/11
- Had 1,050 HOS before quit
- Credit Marty with YOS at end of 12-month Eligibility Computation Period (2011)

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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

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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

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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)

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Credit for Nonperformance

- Marvin works 900 hours of service
- Takes a 4 week paid leave of absence (160 hours)
- Marvin has 1060 hours of service

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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

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Available Equivalencies

- Working hours
 - Disregard nonperformance hours
 - 870 working hours = 1 YOS
- Regular hours
 - Disregard nonperformance & overtime
 - 750 regular hours = 1 YOS
- Earnings method
 - Divide compensation by lowest hourly pay rate
- Employment period method (next slide)

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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

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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

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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

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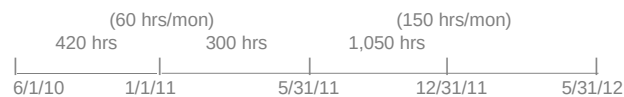
Shifting ECP

- JKL plan requires 1 YOS
- If you don't have 1 YOS in first year, subsequent ECP based on (calendar) plan year
- Jennifer hired 5/2/11, works 800 hours/yr
- First ECP 5/2/11 – 5/1/12
- Second ECP 1/1/12 to 12/31/13
 - Hours performed from 1/1/12-5/1/12 counted in 2 different ECPs

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ECP Shift Example

- Jennifer begins employment 6/1/10
- Works part-time (60 hours per month) through 5/31/11
- 6/1/11 begins full time (150 hours per month – for next couple of years)
- Plan shifts to (calendar) plan year
- When does Jennifer have 1 YOS for eligibility?



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ECP Shift Example

- Lorraine begins employment 11/1/11
- Works full time (150 hours per month – for next couple of years)
- Plan shifts to (calendar) plan year
- When does she have 2 YOS for eligibility?



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Odd Result

- CY plan has YOS with quarterly entry
- Shift to PY for eligibility
- Individual A (rehire):
 - May 2011 - August 2011: 430 hours
 - Rehired August 2012
 - 1/1/12 - 12/31/12 – 950 hours
 - 1/1/13 – 12/31/13: If 1000 hours enters on 1/1/2014
- Individual B (new hire):
 - Hired August 2012
 - B has 1 YOS on August 2013 and enters on October 1, 2013
- The result: A and B (re)hired on same date but B enters earlier than A

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Vesting Computation Period

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

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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

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Elapsed Time (cont'd)

- Service spanning rule
 - If employee returns to work within 1 year, then must be credited with that year
 - Period of Severance can also be Period of Service
- 1-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

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Elapsed Time Example

- Einstein has following employment history:
 - Hired March 1, 2011
 - Quits October 2011
 - Rehired January 2012
 - Quits February 2012
 - Rehired December 2012
- Einstein has 2 Periods of Service on March 2013
 - Did not have 1-year break

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- 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 5 years full-time for XYZ Contractors as union employee
 - XYZ plan excludes union employees
 - Doesn't matter: Dave has 5 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

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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

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- Allow you to disregard service
 - Temporarily or permanently
- Otherwise you must count prior service
- Three rules
 - 2 YOS eligibility rule
 - 1 year holdout rule
 - Rule of Parity (5 BIS)

- Only applies to plans using 2 YOS eligibility condition
- Plan can require completion of 2 YOS without intervening BIS

1-Year Holdout Rule

- If EE has BIS, then not required to count prior service until EE completes 1 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

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1-Year Holdout Rule

Date	Event
January 1, 2008	Hired
December 31, 2008	Credited with 1 YOS
January 1, 2009	Enters plan
May 15, 2009	Quits (700 HOS)
December 31, 2010	Credited with 1-yr BIS
August 14, 2012	Rehired; reemployment commencement date
March 1, 2013	Completes 1,000 HOS after rehire; enters retroactively to August 14, 2012

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1-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

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Rule of Parity

- Only applies to nonvested participants
- Can treat rehired EE as new employee if consecutive BIS at least equal to greater of:
 - 5, or
 - YOS prior to BIS
- If participant has 5 or fewer YOS, then must have 5 BIS
- If participant has more than 5 YOS, then must have BIS equal to number of YOS (but rule rarely applies because if 5 YOS, then at least partially vested)

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Parity BIS Eligibility Example

Date	Event
January 1, 2005	Hired
January 1, 2006	Enters plan
November 1, 2006	Quits with 2 YOS; no vesting
December 31, 2007	First 1-yr BIS
December 31, 2011	Fifth 1-yr BIS
August 1, 2012	Rehired; reemployment commencement date; must satisfy current eligibility requirements and pass entry date to enter plan again

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Rule of Parity – No Prior Plan

- Employee worked full time for 5 years but employer did not have plan
- Quits
- Rehired after 10 years
- Do the 5 years count?
 - Not clear since rule of parity applies to vested participants and there was no plan

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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

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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

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When Does Marty Enter (Re-enter?)

- ABC hired Marty (age 30) May 1, 2010
- ABC calendar year 401(k) plan has:
 - 1 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, 2011	May 15, 2013
b)	Feb. 1, 2011	May 15, 2013
c)	Feb. 1, 2011	May 18, 2011
d)	Aug. 1, 2010	Mar. 1, 2012

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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 5 BIS, future service is excluded in determining vesting of prior contributions
 - This is why plans provide for a forfeiture after 5 BIS – vested % of the existing account will not be increased
 - This rule does not affect vesting of future contributions

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Forfeiture

- May be earlier of distribution of vested interest in plan or 5 BIS
 - Requires buy-back provisions
- May be after 5 BIS in service regardless of whether distribution is made
 - Requires full vesting if plan is terminated before participant has 5 BIS

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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
 - 5 years after re-employment
 - 5 breaks in service
- Deemed cash-out of \$0 = deemed repayment of \$0 if rehired before repayment period ends

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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

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Rehired Employees and Distributions

- Example:
 - Plan allows distributions upon termination of employment
 - Plan does not permit in-service distributions
 - Marvin quits July 15, 2009
 - Marvin is rehired June 1, 2013
 - Marvin requests distribution on June 2, 2013 claiming he was entitled to termination distribution
- IRS has informally indicated that plan could refuse to make distribution

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- 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

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Military Service

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- 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

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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

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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

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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

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Make-up Contributions

- Reemployed personnel can make up deferrals or other employee contributions which they could have contributed while absent because of military service
- If you make up the deferral, you get the match
 - Can designate year

Time in military	Employee contribution make-up deadline
Less than 20 months	3 X length of service
At least 20 months	5 years

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Effect 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

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- 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

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Military Differential Wage Payments

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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

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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

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Impact on Retirement Plan

- Makes final 415 regulations obsolete on this issue
 - Those regulations apply to limitation years beginning after 6/30/07
 - 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

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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 comp rules are irrelevant
- Payment for nonperformance of duties limited to 501 hours

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Compare HEART v 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 diff wage pay	Yes for comp
Other contributions	Optional	Mandatory
Nondiscrimination exemption	Yes, subject to conditions	Yes

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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 6 months beginning on the date of the distribution

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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)

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Application

- Does not require additional benefit accrual or allocation (i.e., no deemed comp 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

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