

The Affordable Care Act—Countdown to Compliance for Employers, Week 12: The Treatment of Unpaid Leaves of Absence Under the Look-back Measurement Method

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Final regulations implementing the Affordable Care Act's employer shared responsibility rules furnish employers with two alternative methods—the monthly measurement method and the look-back measurement method—for identifying full-time employees. (The Act's employer shared responsibility standards are codified in Internal Revenue Code § 4980H; the final regulations can be accessed [here](#).) For each method, the final regulations provide standards governing breaks-in-service that are unique to Code section 4980H. For employers choosing to apply the look-back measurement method, the principle purpose of the break-in-services rules is to determine whether an employee, upon his or her return from a service break, may be treated as a "new employee" or a "continuing employee." The employee's status as a new or continuing employee governs when the employee must be offered group health plan coverage without exposing the employer to assessable payments under the Act's employer shared responsibility standards.

Generally, employees returning from a break-in-service of 13 weeks or more (26 weeks in the case of an educational institution) may be treated as newly hired. Alternatively, under a "rule of parity," an employer may treat a rehired employee who has had a break of at least four weeks as a new employee if the employee's break in service (with no credited hours of service) is longer than the employee's period of service immediately preceding the break in service. But if an employee's break in service is less than 13 weeks (or 26 weeks in the case of an educational institution), and the employee previously qualified for coverage during the then current stability period, he or she is treated, upon rehire or resumption of service, as a continuing employee to whom coverage must be offered by the first day of the following month.

What constitutes a break in service is determined based on "hours of service." The final regulations provide in this regard as follows:

"An employee who resumes providing services . . . after a period during which the employee was not credited with any hours of service may be treated as having terminated employment and having been rehired, and therefore may be treated as a new employee upon the resumption of services, only if the employee did not have an hour of service . . . for a period of at least 13 consecutive weeks immediately preceding the resumption of services." (Emphasis added). Treas. Reg. § 54.4980H-3(d)(6)(i).

The final regulations define the term "hour of service" as follows:

"The term hour of service means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence..." (Emphasis added). Treas. Reg. § 54.4980H-1(a)(24).

Thus, there is no break-in-service during a paid leave of absence for purposes of applying the rules governing look-back measurement periods. The final regulations also include rules governing "special

unpaid leave” that includes FLMA leave, military leave and jury duty. Special unpaid leave is treated similarly to paid leave.

But what about an unpaid leave of absence (LOA) that is not special unpaid leave? How must this leave be treated for purposes of the look-back measurement method? That is, for unpaid LOAs longer than 13 weeks, when does the employee’s full-time status end? The answer controls when the employer need no longer continue making an offer of coverage to affected employees.

The final regulations make clear that the break-in-service rules described above apply—

“solely for the purpose of determining whether the employee, upon the resumption of services, is treated as a new employee or as a continuing employee, and does not determine *whether the employee is treated as a continuing full-time employee or a terminated employee during the period during which no hours of service are credited.*” (Emphasis added). Treas. Reg. § 54.4980H-3(d)(6)(i).

Under a technical reading of the applicable rules (but a reading that is nevertheless consistent with our understanding of the individual views advanced by the regulators), service continues during an unpaid LOA for purposes of determining whether an employer must make an offer of coverage or extending a measurement period. Of course, an employer might be tempted to artificially limit unpaid LOAs to 13 weeks, but that may not be possible based on other laws such as the Americans with Disabilities Act.

The examples that follow illustrate the treatment of unpaid LOA under the look-back measurement method. In each case, assume that a terminated/rehired employee (Employee A): (i) is in a stability period that ends December 31, 2015, with respect to which A worked on average 30 or more hours per week during the corresponding measurement period (and therefore qualified for an offer of coverage during the stability period); (ii) goes out on an unpaid LOA (that is not special unpaid leave) on March 15, 2015; and (iii) later resumes service as of the date indicated:

- A is rehired May 15, 2015 (break is 61 days/8 weeks): A does not have a break-in-service for look-back measurement period purposes, since the period between the date services cease and the date on which they resume is less than 13 weeks. Coverage must be offered during the period the employee was on unpaid LOA in order to avoid penalties. In addition, A’s employer must continue to use the same measurement period (with zero hours credited during the period from March 15 to May 15). But if A simply terminated employment on March 15, no coverage would have to be offered during the period that A was not employed.
- A is rehired August 10, 2015 (break is 148 days/21 weeks): A has a break-in-service for look-back measurement period purposes, since the period between the date services cease and the date on which they resume is greater than 13 weeks. Coverage must be offered during the period the employee was on unpaid LOA in order to avoid penalties, but coverage need not be offered when A resumes performing services on August 10. A’s employer may apply a new initial measurement period (starting, e.g., August 10 or September 1) upon A’s resumption of services.
- A is rehired December 15, 2015 (break is 275 days/39 weeks): A has a break-in-service for look-back measurement period purposes, since the period between the date services cease and the date on which they resume is greater than 13 weeks. Coverage must be offered during the period the employee was on unpaid LOA in order to avoid penalties, but coverage need not be offered when A resumes performing services on December 15. A’s employer may instead apply a new initial measurement period (starting, e.g., December 15 or January 1, 2016) upon A’s resumption of services.
- A is rehired January 15, 2016 (break is 306 days/43 weeks): A has a break-in-service for look-back measurement period purposes, since the period between the date services cease and the date on which they resume is greater than 13 weeks. Coverage must be offered during the balance of the stability period ending December 31, 2015 in order to avoid penalties. A’s employer may apply a new initial measurement period (starting, e.g., January 15 or February 1, 2016) upon A’s resumption of services.

These examples were originally prepared by Linda Mendel of Vorys, Sater, Seymour and Pease, LLP, and co-Chair of the Welfare Plan Issues, EEOC, FMLA, and Leave Issues Subcommittee of the Employee Benefits Committee of the American Bar Association. Special thanks to Linda for her gracious willingness to permit the use of her work for this post.

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