

May a Plan Impose a New Waiting Period on a Rehired Employee?

[EBIA](#) June 2, 2016

QUESTION: Our company sponsors a group health plan under which full-time employees are eligible for coverage after a 90-day waiting period. We are a small company (under 20 employees) and not subject to employer shared responsibility. Due to business needs, we occasionally rehire employees who previously terminated employment with our company. Are we permitted to impose the plan's waiting period on rehired employees?

ANSWER: In general, former employees who are terminated and rehired may be treated as newly eligible for coverage upon rehire—meaning that your plan may require such individuals to meet the plan's eligibility criteria and satisfy the plan's waiting period anew. However, regulations specify that imposition of the waiting period must be reasonable under the circumstances (e.g., the termination and rehire cannot be a subterfuge to avoid compliance with the 90-day waiting period limitation).

The regulations do not elaborate on what is required for a new waiting period upon rehire to be "reasonable under the circumstances" and not a "subterfuge," but they include an example in which the terminating employee had "no expectation of providing further services" and the gap between the termination date and the rehire date was approximately three months. In that scenario, the regulations permit the employee to be treated as newly eligible for coverage under the plan upon rehire, allowing the imposition of the plan's waiting period. This suggests that there should not be a prearranged understanding that the terminating employee will return to employment. In addition, there should be a sufficient period of time between the termination date and the rehire date. For example, applying a new waiting period to an employee who terminates on a Friday and is rehired on the following Monday likely would not be considered reasonable under the circumstances.

For applicable large employers subject to employer shared responsibility under [Code § 4980H](#), keep in mind that those rules differ from the waiting period rules, requiring some returning employees (including rehires) to be deemed continuing employees even after relatively lengthy absences. Thus, even though the waiting period rules may allow a new waiting period for a rehired employee, applying a waiting period to an employee who must be treated as a continuing full-time employee under [Code § 4980H](#) could expose an applicable large employer to penalties