



## Effectively Utilizing 90-Day Probationary Periods for New Employees

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**Urgent message:** A 90-day probationary period suspends the standard employment rules for new employees, enabling them to learn the position, but providing an “out” before the employee becomes too entrenched.

### Introduction

Whenever a company hires a new employee, despite the most sound recruiting and interviewing processes, they’re taking a risk that the individual could be a poor fit. The hiring process is time-consuming and expensive. To help increase the odds of hiring someone who is both skilled in their trade but who also aligns with the organization’s culture and values, many companies institute a 90-day probationary period.

A probationary period of 30 or 90 or even 180 days provides time to give a new hire extra feedback while they become oriented to the position.<sup>1,3</sup> The primary rationale for instituting a probationary period is to have the ability to fire the employee for any or for no reason. Generally, once the probationary period has ended, an employee can only be fired for cause.<sup>4</sup>

However, in some circumstances, the actions of the employer may create a contractual relationship for continued employment. This is a critical concern of executives, human resources professionals, and legal departments that want to be certain that employment is indeed “at will.”

### Express or Implied Contract Obligations

Again, a company’s 90-day probationary period may create an

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unintended legal consequence—an impact that would affect the employment-at-will doctrine that is the law of most states.<sup>5</sup> The doctrine permits an employer to terminate an employee at any time for a good reason, a wrong reason, or no reason at all.<sup>6</sup> However, the reason cannot be illegal, such as a form of protected employment discrimination.<sup>7</sup> An employer can lose this right to fire at-will if it makes a promise or creates some expectation of continued employment that is not consistent with at-will employment.<sup>1</sup>

Employers using probationary periods may have employees who believe that once they successfully complete a probationary period, they are no longer at risk for termination based upon their performance. This can lead to increased risk of wrongful termination lawsuits if the employer terminates the employee.<sup>6</sup> In light of these concerns, but for collective bargaining agreements or situations where the employer wants to enter into a contract with a particular employee, probationary periods are typically not recommended.<sup>8</sup>

Those in favor of doing away with probationary periods say that employees are subject to the same standards of performance and conduct *throughout* their employment. As a result, there’s no reason to require a probationary period.<sup>8</sup>

Those labor experts who believe in keeping traditional probationary periods propose changing the outdated term, which has been interpreted unfavorably by the courts. They recommend terms such as *introductory, evaluation, training, initiation,*



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eligibility, or orientation periods.<sup>8</sup> While these descriptions may help eliminate some of the unwanted connotations and guarantees that the term *probation* has historically carried, a new hire may yet construe that these alternatives mean the employer has a policy of not discharging without good cause once the probationary period is over. The employer could thus land in a legal battle over an allegation that it had an obligation to provide due process once an employee passed probation.<sup>9</sup>

#### Company Policies and Procedures

Every company should create and maintain a personnel or employee handbook, which should be reviewed by an employment lawyer. The handbook must be clear that employment is *at will*.<sup>4</sup> To establish that the probationary period is the time at which a new hire's performance is evaluated before full benefits begin, an employer can create a written policy for its handbook that states something such as the following:

"Completion of the trial period does not entitle you to remain employed by the company for any definite period of time. Both you and the company are free, at any time, with or without notice and with or without cause, to end the employment relationship. After completion of the trial period, eligible employees will receive the benefits described in this handbook."<sup>8</sup>

The company policy should be communicated to all new employees and referenced in the employee handbook at orientation.<sup>10</sup>

One court has explained that to become a binding promise, the language used in the handbook must be specific enough to constitute an actual offer rather than a mere general statement of policy.<sup>11</sup> However, the court went on to say that "whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, rather than by their uncommunicated beliefs."<sup>12</sup>

Thus, if the employer doesn't want the policies contained in an employee handbook to be construed as an offer for a unilateral contract, they are free to say so in the handbook. In the case discussed above, the court refused to hold the provisions of a handbook enforceable against an employer where the handbook expressly stated: "This Handbook and the policies contained herein do not in any way constitute, and should not be construed as a contract of employment between the employer and the employee, or a promise of employment."<sup>13</sup>

#### Employee Termination During the Probation Period

Despite public opinion to the contrary, a probationary status does not impact whether an employer must pay unemployment insurance. The same rules on eligibility for unemployment still apply. Regardless of the employee duration of employment, the employer must pay unemployment insurance on that em-

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ployee.<sup>14</sup> However, the length of the new hire's employment may be a component in calculating how much the employer will pay on the employee's unemployment claim.<sup>8</sup>

#### Other Legal Considerations

One other important note: In the U.S., employment relationships are typically presumed to be at-will everywhere except for the State of Montana. Montana enacted the Wrongful Discharge from Employment Act<sup>15</sup> (WDFEA). That Act is designed to balance the need to protect employees from wrongful terminations with an employer's need for protection from employee poor performance or bad behavior.<sup>16</sup> In that state, employers generally are permitted to terminate employees only for good cause after they have finished the probationary period,<sup>8</sup> unless they are probationary or employed pursuant to a written contract for a specified term.<sup>17</sup>

There may also be specific exceptions to the doctrine of employment at-will in a specific jurisdiction. For example, the Supreme Court of Ohio has recognized an exception to employment at-will doctrine where an employer who discharges an employee for reasons that contravene clear public policy is subject to an action for damages.<sup>18</sup> In that instance, to prevail on a claim for wrongful discharge in violation of public policy, a plaintiff must prove:

- a clear public policy exists and is manifested in a state or federal constitution, statute, or administrative regulation, or in the common law
- dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy
- the plaintiff's dismissal was motivated by conduct related to the public policy; and
- the employer lacked an overriding business justification for the dismissal<sup>19</sup>

#### Summary

If a company decides to use a probationary period, it should be certain that employees know and understand that they may still be fired at any time.

All employment documents should reference the probationary period. The employee handbook, performance appraisals,

performance improvement plans, hiring paperwork, and other forms should clearly state that the probationary period doesn't change the at-will employment relationship.

All these documents should clearly state that an employee may still be fired for any reason at any time, during the probationary period or after completing it.<sup>1</sup> ■

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