

## **ARE PROBATIONARY PERIODS NECESSARY?**

“All employees serve a 90-day probationary period.”

The above or similar language is often included in an employer’s personnel policies, frequently, however, that is all that is said. Unless carefully drafted, probationary period language can cause problems.

The concept of probationary periods arose from union contracts which usually provide employees may only be discharged “for cause”. Union contracts also commonly have a grievance procedure culminating in independent arbitration to determine whether management had sufficient “cause” to discharge an employee. As a result, employers often negotiate a probationary period during which management may discharge an employee without the employee having access to the grievance procedure and arbitration.

In a non-union setting, as exists for most employers, this traditional reason for a probationary period does not exist. Therefore, if your personnel policies state employees are probationary for a particular period, you should ask yourself several questions:

### **What is the significance of the probationary period?**

In other words, “so what?” What is the difference between an employee being “probationary” versus having completed the probationary period? What, if anything, does an employee gain by having successfully completed the probationary period? If your policies contain no significant to being probationary versus non-probationary, you should consider deleting the concept entirely or redrafting your policies to clearly state the significance desired.

### **What impact does the probationary period have upon the employment-at-will doctrine in your state?**

Employment-at-will refers to the traditional legal doctrine that unless there is a contract establishing how long employment will continue, employment may be terminated at anytime by either the employer or the employee for any reason or for no reason at all.

In some states, the manner in which you address probationary periods in your personnel policies can work to negate this doctrine. For example, in 1985 the Wisconsin Supreme Court stated:

“...abrogation of an at-will relationship, if such were originally intended, is clear from the language of the handbook... The...corporation differentiated between those employees still within a probationary period and those who were not and provided a different process for discharging employee in the different groups. If all employees were “at-will” employees, these provisions would not have been necessary. All employees could have been dischargeable at the whim of the employer subject to the usual public policy considerations that may occasionally arise... Clearly, some sort of tenured diachrony between probationary and regular employee was contemplated in the employee contract.

The point is, as you draft your probationary period language, you must be aware of its effect under your state’s law.

## **What is a “day”?**

If your probationary period is defined only as a certain number of “days,” do you mean calendar days or workdays? If you mean workdays, do you mean workday of the agency or of the employee involved? Is a workday a period of eight hours? What of an employee who works a 24-hour shift? Is a day calculated the same for a part-time employee? Perhaps your interests are better served by defining it as a certain number of hours actually worked. The key is to draft the language in a way which is very clear and not subject to argument.

## **How does the probationary period apply to part-time employees?**

The manner in which you want to apply a probationary period can differ for part-time employees than for full-time employees? For example, if an employee is off work due to illness, do your policies state whether or not the time-off counts towards completion of the probationary period? If it does count, you need to understand you may not have as much time to observe the employee as would otherwise be the case.

## **Do you want to be able to extend the probationary period?**

What happens at the end of the probationary period if you are still dissatisfied with the employee? Must you discharge or are you able to extend the probationary period? If you want to be able to extend the period, for how long? Often the ability to extend a probationary period is helpful to both the employer and the employee.

## **What happens if an employee changes jobs?**

Do you want the employee to serve a new probationary period in the new job? If so, clearly say so in your personnel policies. Otherwise, a common interpretation will be an employee only serves one probationary period in your operation.

**Suggestion:** Determine the effect of the probationary period under your state law, particularly with regard to the employment-at-will doctrine. If you want to have a probationary period for your employees, be sure it is carefully drafted and addresses the various situations which can arise.

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