

# Avoid Probationary Period in Employee Handbooks

**T**ake a look at your organization's employee handbook. Does it contain a "probationary period" policy? Or maybe it's called an "introductory" or "orientation" period. Regardless of its title, a handbook policy that establishes a "probationary" period could increase the liability for employers who want to end employment during this time.



## A Probationary Period Could Imply a Contract

Probation is typically a trial period during which an employee is observed and monitored to determine whether he or she is suitable for the position. However, some employers have the misperception that an employee does not have any employment rights during this period and that an employee may be terminated for any reason, or no reason at all, irrespective of other employment laws. In fact, employees are afforded certain employment rights on the first day of employment and are subject to employment-at-will during and after the "probationary" period.

A "probationary" period implies guaranteed employment following completion of this initial period of employment. Employees may think that anyone who stays with the organization beyond the probationary period is a "permanent" employee.

Referring to employees as "probationary" and "permanent" or "regular" only adds to the misperception that employees have a more permanent employment status once they complete the probationary period.

For union employers, a probationary period is often a mandatory component in collective bargaining agreements and subject to the bargaining process. For nonunion employers, however, there is no legal, compliance-related, or contractual reason to designate a separate probationary period for new employees, particularly for the purpose of determining employment status. In fact, nonunion employers using this terminology may imply a contractual agreement, which could conflict with the basis of the employment-at-will relationship.

## Why Do So Many Handbooks Include a Probationary Period Policy?

The use of a standard "probationary period" historically allowed a supervisor to terminate a new hire for any reason, or no reason at all, within an established period of time, typically 90 days. Those employees successfully completing the probationary period were given the nod and awarded "regular" employment status, while those who were not successful were asked to leave, sometimes with little or no explanation or justification.

However, the philosophy of probationary periods may conflict with the basic employment-at-will doctrine. In general, employment-at-will allows either the employee or the employer to terminate the employment relationship for any reason, at any time, with or without notice—regardless of the individual's length of service—as long as there is no violation of applicable federal and state laws.

Some courts have even gone so far as to rule that employees in a probationary status may have a separate employment relationship with the company than those in a non-probationary status, thus providing the basis of a challenge to basic employment-at-will.

### Eliminate the Probationary Period

Avoid implying that an individual has any more employment security once the probationary period is completed. You can do this by omitting any policy from the handbook that implies employees have one employment status upon hire and a different employment status following completion of a certain period of service (i.e., a "probationary period").

Instead, tie the initial period of employment to something other than continued employment, such as eligibility for benefits and/or an initial performance evaluation. Clearly state in benefit policies that benefits are effective after a certain waiting period, such as 60 days, rather than after completion of the probationary period. In addition, include a statement in the performance evaluation policy that performance may be evaluated following an initial period of service, such as 60 days, instead of stating that an evaluation will be received following completion of the probationary period.

### Emphasize At-Will Employment

Include provisions in the handbook stating that employment is at-will and nothing in the handbook should be considered a contract. State in your employee handbook and in offer letters that employees are not guaranteed employment for any specific length of time and that all employees are governed by employment-at-will. Require employees to sign and return an acknowledgment form that also contains at-will employment language.

### Reduce the Risk of Unfair Treatment

Eliminate any handbook statement that employees may be fired for any reason during the initial employment period, but may only be fired "for cause," "for just cause" or for "good cause," following the initial employment period. Even in an at-will state, employers cannot terminate employees for any reason that is prohibited by local, state or federal law, such as discrimination or public policy rights. Employers need to document the business-related reasons for a termination decision, regardless of when it occurs in an employee's tenure.

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