

3 Probationary Employment Traps to Avoid



Put probationary employment agreements in writing and provide fair performance review.

Trying to determine how well a prospective employee will perform based on a job interview and screening check is anything but an exact science. Probationary employment takes at least some of guess work out of the process. The probationary period becomes a kind of rehearsal in which you get to see employees in action before determining whether to hire them on a permanent basis. In addition to minimizing the risk of making them, probationary employment reduces the costs of bad hiring decisions since you don't have to provide termination notice to probationary employees.

But for all of these advantages, hiring on a probationary basis can also get you into trouble if you don't follow the tricky employment standards and other legal requirements that apply to probationary employment. Here are 5 common probationary employment pitfalls to avoid.

Pitfall 1. Not Expressly Spelling Out that Employment Is Probationary

Pitfall: Employment isn't automatically probationary unless the contract spells this out.

Solution: Enter into a written contract that specifically says that the employment is probationary and defines the rights and duties of each side

Pitfall 2. Extending the Probationary Period Too Long

Pitfall: Employment standards law provide minimum protection for probationary employees. That's because employees generally must be employed a minimum amount of time to become entitled to termination notice and other employment standards benefits. But once employees put in the required time, you can't fire them without providing the required termination notice—either 1 or 2 weeks, regardless of whether you label them as probationary or permanent employees.

Solution: Make sure that your written contract specifies the term of the probationary employment and that this stated duration doesn't exceed the period after which the right to termination notice vests. The question of how long it takes for employees to become entitled to termination notice, aka, how long employment can remain probationary, varies by jurisdiction:

Jurisdiction Statute		Maximum Probationary Period
Federal	<i>Canada Labour Code</i> , Sec. 230(1)	One day less than 3 consecutive months of continuous employment
AB	<i>Employment Standards Code</i> , Sec. 55(2)	90 days
BC	<i>Employment Standards Act</i> , Sec. 63(1)	3 consecutive months of employment
MB	<i>Employment Standards Code</i> , Sec. 62(1)(a)	29 days
NB	<i>Employment Standards Act</i> , Sec. 30(1)(a)	One day less than 6 months
NL	<i>Labour Standards Act</i> , Sec. 55()(1a)	One day less than 3 months
NS	<i>Labour Standards Code</i> , Sec. 72(3)(a)	One day less than 3 months
NT/NU	<i>Labour Standards Act</i> , Sec. 14.03	89 days
ON	<i>Employment Standards Act</i> , Sec. 54	One day less than 3 months
PEI	<i>Employment Standards Act</i> , Sec. 29	One day less than 6 months
QC	<i>Act Respecting Labour Standards</i> , Sec. 82.1	One day less than 3 months
SK	<i>Labour Standards Act</i> , Sec. 43	One day less than 13 consecutive weeks
YK	<i>Employment Standards Act</i> , Sec. 50(1)	One day less than 6 consecutive months

Pitfall 3. Not Giving Probationary Employees a Fair Chance to Succeed

Pitfall: To terminate a permanent employee without notice, you need just cause; by contrast, you can terminate a probationary employee for lack of suitability or fitness for the position. While it's far less strict than just cause, lack of suitability is still a meaningful standard that courts and arbitrators enforce in actual cases. **Basic rule:** You must give probationary employees a fair and reasonable opportunity to demonstrate that they're fit for the job.

Example: An accounting firm fired a tax accountant during the first month of her 3-month probationary employment for not performing at the suitable and expected level. The Ontario court ruled that the dismissal was not only wrongful but in bad faith and awarded the accountant 4 months' notice, or \$20,000 in damages. The accountant never got a fair chance to succeed, the court reasoned, noting that she had received only 5 assignments and no performance review or feedback, negative or positive, at all [Cao v. SBLR LLP, [2012] O.J. No. 3328].

Solution: Set forth clear and specific performance standards for probationary employees just as you would for permanent employees. Conduct performance review so that probationary employees understand their strengths and weaknesses and

what they must do to improve. And keep careful documentation of your performance evaluations in case the probationary employee sues you for wrongful dismissal.