Myths About Employee Probation Periods



Many employers mistakenly assume that three-month trials are standard for new employees. Clarifying probation terms will help keep everyone involved clear of legal liabilities.

Opinions are often mixed as to whether or not it is necessary to have probation periods for new employees. On one hand, a probationary period lets an employer decide if the employee is a good fit for the organization prior to investing significant resources and incurring severance liability. On the other hand, unless the probation requirement is clearly communicated and implemented correctly, it will be a source of liability rather than a valuable screening tool.

Usually, misunderstandings about what an employer can and cannot do vis-á-vis probation periods are at the root of these problems. The following are some of the most common myths that sabotage new-employee probation programs and create liability for employers.

Myth 1: A probation period is an implied term of all employment contracts.
Fact: Despite the fact that some older trial decisions held that a probation period was implied, courts are much less willing to agree that a probationary period is part of the employment contract terms unless the employer clearly explained before the employee was hired that a probation period was required.

Myth 2: If an employee is terminated within three months after being hired, the employee is not entitled to notice or pay in lieu of notice (i.e. severance).
Fact: While the B.C. *Employment Standards Act* does not require an employer to provide notice or pay in lieu of notice if an employee is terminated within three months after date of hire, that employee may be entitled to severance under common law unless an employment contract exists which explicitly limits severance if terminated during the probation period.

Myth 3: Probation periods are always three months.
Fact: While three months is frequently the probation period duration chosen by employers, it can be any period an employer deems necessary to fairly evaluate whether the employee is suitable for the position and organization. Three months is often chosen because an employer can lawfully not pay severance when terminating an employee of less than three months service if the employer made the terms clear.

Myth 4: An employer is not required to inform the employee of the reasons for the termination during the probation period.

Fact: All employers owe an obligation of good faith in the way that employees are terminated. This means employers are required to inform the employee of the reasons for the termination. In addition, some courts have also held that employers are expected to let employees know of any performance issues during the probation period so employees have an opportunity to correct any deficiencies before the end of the probation period.

Myth 5: An employer can terminate an employee for any reason during a probation period.
Fact: If a probationary period is established and an employer wishes to terminate the employee during this period, the reasons for the termination must be related to the employee's qualifications and suitability for the position (i.e. an unexpected lack of work or financial problems are not proper reasons to terminate an employee using the probation period termination provisions).

Myth 6: An employer can unilaterally extend the probation period.
Fact: Just as an employer cannot unilaterally change material terms of an employee's contract, it cannot extend a probationary period without the employee's agreement and fresh "consideration."

Probation periods for new employees can be valuable to employers who actively review employee suitability early on. In organizations where team work (including compatibility with existing employees) or special skills are required, a probationary period can provide employers an opportunity to determine if the new employee is a good fit. However, because of the B.C. *Employment Standards Act* and common law rules regarding probationary employees, it is important that employers wanting to use probation periods follow these rules:

- Ensure that employees understand there will be a probationary period, the skills and qualities that employees will be evaluated on during this period and the duration of the probationary period;
- Have standardized evaluation processes in place, which include feedback before the probationary period ends;
- Extend probation periods with caution, preferably only after obtaining legal advice on implications for severance obligations;
- Be clear as to what severance employees terminated during a probationary period are entitled to.

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