

# The 7 Things You Need to Know to Make Probationary Employment Work



Hiring on a probationary basis is supposed to limit your legal commitments to new employees. The problem is that mishandling the probationary employment process can actually increase the risk of grievances, lawsuits and liability. Here are the 7 things about probationary employment HR directors need to know to implement effective and legally sound probationary employment arrangements.

## **1. What Probationary Employment Is**

Probationary employment involves hiring employees on a trial basis for a predetermined trial period before deciding whether to offer them a permanent position. The probationary period is like an audition that gives employees the chance to prove their worth.

## **2. Why Probationary Employment Makes Sense**

There are 2 big advantages to hiring new employees on a probationary basis rather than offering them permanent employment right away:

- **Better Hiring Decisions:** Bad hires happen even at companies with the best pre-employment screening and interviewing programs. But trying out new employees under “real life” job conditions reveals strengths and weaknesses far more effectively than any job interview ever could.
- **Cheaper & Easier to Terminate:** Probationary employees have weaker legal rights than permanent employees. Probationary employees can be terminated at any time during the probationary period if you think they’re “unsuitable”; and unlike permanent employees, probationary employees aren’t entitled to notice or wages in lieu of notice.

## **3. How Long Probationary Employment Can Last**

The key to probationary employment is to ensure that the probation period ends before employees put in the service time necessary to accrue the right to receive termination notice under employment standards laws. How long is that? Answer: Although 3 months is the basic standard, it varies by jurisdiction. Here’s how long probationary employment can last under each of the different ESA laws:

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

#### **4. Why You Need a Written Probationary Employment Contract**

But while they may be less substantial than those of permanent employees, probationary employees do have some rights. That's why it's important to have a written contract spelling out the rights and duties of each party.

#### **5. What to Include in a Probationary Employment Contract**

Like the [Model Contract](#) in the HR Compliance Insider website, a good probationary employment agreement should:

- Clearly state that the employment is probationary;
- Specify the duration of the probationary periods;
- State that you can terminate the employee at any during the probationary period without providing notice or wages in lieu of notice if you determine that he/she is not "suitable" for permanent employment;
- Expressly indicate that the employee waives the right to "common law notice," i.e., termination notice an employee is entitled to receive beyond ESA statutory notice—common law notice is typically longer than ESA notice;
- Specify the performance criteria by which the employee will be judged.

#### **6. How to Manage Probationary Employees**

Of course, you want probationary employees to succeed. A good way to increase the odds of success is to conduct at least one interim review of the employee's performance before the probationary period ends. You should also provide a final review at the end of the period to determine whether to fire or retain the employee.

## **7. How to Fire Probationary Employees**

To fire permanent employees without notice, you need just cause; to fire probationary employees without notice, you only need to find them “unsuitable.” Although this is a much less stringent standard, it is still a standard. In other words, termination can’t be arbitrary and you must be able to document why the probationary employee was unsuitable. Suggested criteria to use include quality of work, completeness, accuracy, productivity, punctuality, character, judgment, conduct, attitude and professionalism.

### **Conclusion**

Trying to judge how well a person will perform a job based on an interview and a screening is at best an educated guess. Probationary employment reduces the odds of getting burned. And it minimizes the harm of bad hiring decisions. Just recognize that there are delicate legal issues involved and make sure you take appropriate steps to manage them.