

Guide to Probationary Periods

HUMAN RESOURCES

This guidance offers practical advice to businesses to help with the operation of probationary periods and issues associated with this. Following this guidance will help to ensure that probationary periods are productive for both employers and employees and reduce the risk of successful claims by employees.

A probationary or trial period is a designated period at the outset of a new recruit's employment, during which both employer and employee can assess whether the new arrangement works well.

Length of probationary period and notice periods due

You should make it clear to the employee before the new employment starts (ideally in a written contract of employment) how long the probationary period will last for and what notice the employee is entitled to receive, and must give, if either party wishes to terminate the employment during the probationary period. An employer will almost always want to be able to terminate on shorter than usual notice either during or at the end of the probationary period (the legal minimum notice that the employer must give – or pay in lieu of – is one day's notice where length of service is between one week and two years). You should also decide whether or not to reduce during a probationary period the notice period the employee would otherwise be required to give. It is permissible to require, in a contract of employment, an employee to give more notice than they are entitled to receive from you – but in many cases an employer will be happy to allow a new employee who wants to leave during a probationary period to do so at short notice.

Extension of probationary period

You should reserve the contractual right to extend the probationary period, which allows a further period to assess the employee if you are uncertain about retaining him/her at the conclusion of the original probationary period. When extending probationary periods, it is good practice to inform the employee:

- why the probationary period is being extended;
- the improvements required of the employee; and
- the length of the new probationary period. If a probationary period is to be extended, you should ensure that (taking into account any previous service that counts as continuous) the employee has less than 103 weeks' continuous employment (two years less one week). Once an employee attains this service, he/she will acquire the right not to be unfairly dismissed – meaning in practice there will be more risk attached to terminating the employment than there would have been before the employee had acquired this right.

Other issues

You also ought to ensure the employee is aware of:

- what is expected of the employee during the probationary period, enabling you to monitor progress and to resolve any problems early on;
- how and when feedback will be provided (it is good practice for you to keep a written record of all feedback, which helps to refute any allegation that a later termination of employment is based upon something other than unsatisfactory performance or lack of aptitude for the work); and
- how the outcome of the probationary period will be communicated to the employee. It is advisable to provide in a written contract of employment that the probationary period will not end until you have expressly confirmed this in writing to the employee, in order to minimise the scope for dispute if the specified number of weeks or months designated for the probationary period have passed and nothing has been said. It is also sensible for you to schedule probationary reviews before the end of the designated probationary period, so that decisions about the possible extension of the period and confirmation/termination of the employment can be taken in good time.

This guidance note is not intended to constitute a definitive, up-to-date, or complete statement of the law, nor is any part of it intended to constitute legal advice for any specific situation. You should take specific advice when dealing with specific situations and jurisdictions outside England & Wales.

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