

Do Probationary Periods Protect Employers?

Is it less risky to terminate a new hire within the first 90 days of employment?

The short answer is, NO.

A 60 or 90-day probationary period (aka introductory period, training period or orientation period) does not reduce the legal risks associated with termination. Even though most new-hire employment relationships fall under employment at will, this does not limit the reach of federal, state or local employment laws. **If the employer is unable to articulate the reason for termination and show clear documentation to support this decision**, then the employer could have a difficult time fighting any claim of discrimination or retaliation. Thus, the need to document performance or conduct issues for new hires *is just as important* as documentation of progressive discipline for a long-term employee.

Employers should address concerns about performance, attendance or behavior early in the employment relationship. Overlooking problems may cause employees to believe their performance is acceptable, thus making later disciplinary action seem unfair, discriminatory or retaliatory.

Employers should consider that in some situations, termination within the first 60 or 90 days is necessary, but they should not rush into a decision. Legal risk associated with termination should be carefully considered. For example, a manager wants to fire a new hire for attendance issues because he takes a day or two off a month for medical appointments. Even when new hires are not yet eligible for paid time off or FMLA (Family and Medical Leave Act) leave, they may be covered under the ADA (Americans with Disabilities Act) if they have a disability. In this situation, making a decision to terminate before assessing whether a reasonable accommodation should be provided may create an ADA violation.

Prior to termination, employers should consider whether new hires have been given the appropriate training and resources to be successful as well as the opportunity to correct mistakes. Employers should not continue to employ an individual who is unable to improve or correct errors or behavior after counseling or training is provided. However, if the individual has not been made aware of performance or conduct concerns, the organization should consider whether providing coaching, additional training, a performance improvement plan, or final warning is a more appropriate next step.

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Our goal is to deliver a preventive approach to employment situations and ensure these approaches are managed appropriately. If you have questions about our services, or **WHY A PROBATIONARY PERIOD DOES NOT REDUCE LIABILITY FOR AN EMPLOYER**, please contact us.