

Time to Ditch the Probationary Period

I recently received a call from a client asking what his rights were to fire an employee who was still in her probationary period. It was a good question which I answered with my own question: Why do you have a probationary period in the first place?

Typically, a probationary period is a period of time after hiring an employee—usually between 30 and 90 days—when an employee is assessed to determine whether s/he is able to satisfy the requirements of the job. It can also be used to define a period of time when the employee is not eligible for certain benefits and/or be set on the state's unemployment base period, neither of which need a defined "probationary period" to be valid. They are also often used as part of a performance improvement plan for poor-performing employees. The assumption is that, during the probationary period, the employee could be fired if s/he is found to be underperforming or otherwise not a good fit for the company. While probationary periods are a very strong tool in a progressive discipline program, they actually serve little purpose for a new hire and, more concerning, can actually put an employer in a legal bind.

Here's why. In the United States, there is already a common law legal precedent called "*Employment at Will*," which establishes that an employer (or the employee) can terminate the employment relationship at any time with or without a valid reason provided the reason for the termination is not illegal (i.e., because of the employee's race, religion, sex, age, disability, etc.). Unless there is a contract or collective bargaining agreement or other legal agreement in place, employers always have the right to fire at will no matter how long the employee has been on the job.

And that's the catch. If the suggestion is that the employee could be fired for any reason during the probationary period, what does that mean once the probationary period has expired? That the employer no longer has that legal right? And what does that suggest to the employee? That once they get through the trial period, they don't have to worry about being fired for any reason or no reason at all?

For these reasons, having a probationary period can create the impression that the employment relationship is somehow different or special during the trial period. Worse yet, if they are not crafted correctly, they can actually imply that, outside of the trial period, an employer is restricted in why and when a termination can occur thereby jeopardizing the employer's right to employment at will.

This is why I'm not a fan of probationary periods. In fact, I think they should be ditched altogether. Instead, how about establishing a New Hire Development Plan in its place?

A New Hire Development Plan is essentially a formal training and evaluation plan for the employee's first few weeks. During this time, you can closely monitor and interact with the employee to ensure s/he has the right talent and fit for the company. A solid plan ensures that you:

- Set clear and well-documented expectations for performance
- Establish a plan for who will conduct the training and education necessary for the employee to satisfy those expectations
- Monitor the employee's performance and progress, and
- Provide feedback daily and weekly so the employee can adjust his/her performance and you can adjust your training and expectations accordingly.

Swapping a probationary period for a development plan has the added advantage of ensuring that the employee will be on-boarded into your company, thereby improving the chances that they will end up being a productive, engaged employee. And it may also help you to reduce turnover. Statistics suggest up to 22% of turnover happens within the first 45 days. A New Hire Development Plan can go a long way toward reducing this turnover.

Still not convinced? Want to keep your probationary period? Okay, then here's what you need to do.

1. **Employment At Will Language** - Ensure all of your documents, including your application, offer letter, employee handbook and any documentation relating to the probationary period include employment at will language stating that the employer may terminate its employees at will, for any or no reason, that the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment, and that nothing within the documentation is intended to establish an employment contract. Also clearly state employment is at-will during and after the probationary period.
2. **Probationary Period Terms** – Clearly define the terms of the probationary period, such as how long it lasts, what expectations you have for the employee, how often the employee will meet with his/her supervisor, and any effect on benefits or other workplace policies and programs that are impacted by the trial period.
3. **Feedback** – Provide regular and ongoing feedback to the employee during the period so that s/he can adjust and develop and grow according to your expectations. And if the employee is not developing sufficiently, let the employee know what s/he can do to improve.
4. **Support** - Provide the resources and support necessary to help the employee perform, perhaps with a mentor, technology, or training.
5. **Documentation** - Document all of the training, development, and performance feedback provided during the probationary period so that, if you need to terminate the employee, there will be no question either in the employee's mind or in a court of law that the termination was for legal, non-discriminatory reasons.

As you can see, many of the elements recommended for a sound and effective probationary period mirror those of a well-structured New Hire Development Plan. The added advantage of

the development plan is that it avoids the risk of creating an unintentional legal obligation for the employer.

If you are considering ditching your probationary program, feel free to call us at 877-660-6400 to talk about a New Hire Development Plan.

By Claudia St. John, SPHR, SHRM-SCP - President, Affinity HR Group

Claudia St. John is president of Affinity HR Group, Inc., AOCA's affiliated human resources partner. Affinity HR Group specializes in providing human resources assistance to associations such as AOCA and their member companies. To learn more, visit www.affinityhrgroup.com.