



New-Hire Probation
→


Probies are Real Employees, Too:
Best Practices for Working With Probationary Employees


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AGENDA

1. Background Information
2. Top Myths About Working With Probationary Employees
3. Probationary Employees in the Courts
(and the Employers who Unwillingly Join Them There)
4. Parting Thoughts




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Quick Terminology Guide

For purposes of this presentation:

PROBATIONARY
=
TRIAL SERVICE
=
INTRODUCTORY
=
Whatever Terminology Your Organization Uses

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Background Information



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Definition

- A collective bargaining agreement between a union and an employer may place newly hired workers in a "probation" period.
- During that "probation," the employee is usually not allowed to use the union's grievance procedures if he/she is disciplined or discharged, making him/her essentially an "at will" employee.



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Yes, but . . .

"Under the common law principles of at-will employment, an employer is free to terminate a 32-year employee — just as it is free to terminate a probationary employee with just a few months under his belt — for good reason, bad reason or no reason at all."

— *Bellas v. CBS, Inc.*, 211 F.3rd 517 (3rd Cir. 2000).



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. . . “at will” isn’t all it’s cracked up to be!

The idea that an employment relationship may be terminated by the employer or employee at any time and for any lawful - or no – reason, isn’t as strong as it used to be:

- Weakened by collective bargaining agreements
- Impaled by public sector employee rights
- Diminished by juror expectations



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Top Myths About Working With Probationary Employees



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Myth #1

I am required by law to have a probationary period of employment.



“New hires have a probationary period.”




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Myth #1

- This is a “myth” with respect to employees who aren’t represented by a union.
 - Employees who are *not* represented by a union are *not* entitled to a probationary period of employment.



But . . .



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Myth #1

- This is not a myth if you have employees who will become eligible for membership in an existing union after working for an agreed-upon period of time.
 - The terminology of the collective bargaining agreement rules here.



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Myth #2

Probationary employees can't sue me for discrimination, harassment or retaliation.



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Myth #2

The definition of “employee” under Oregon and federal law does not exclude “probationary employees.”

- Example (Oregon law): “‘Employee’ does not include any individual employed by the individual’s parents, spouse or child or in the domestic service of any person.”



Myth #2

The definition of “employee” under Oregon and federal law does not exclude “probationary employees.”

- Example (Federal law): “[T]he term “employee” shall not include any person elected to public office in any State or political subdivision of any State . . . or any person chosen by such officer to be on such officer’s personal staff The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.”



Myth #2: Bottom Line

Probationary employees cannot grieve a dismissal for not meeting the high standard of “just cause” under a CBA. But they can:

- Sue their employers for discrimination, harassment and retaliation;
- Make a wage complaint with BOLI or the DOL;
- File complaints and charges with BOLI, the EEOC, OR-OSHA, etc.;
- Hire an attorney and file a Tort Claims Act notice with your organization.



Myth #2, Sub-Bottom Line

CIS' General Liability policy provides coverage for probationary employees' discrimination, harassment, and retaliation claims against your organization.

- Thus, a CIS member is responsible for paying the \$5,000 deductible attached to those claims unless the member contacts Pre-Loss and follows Pre-Loss' reasonable advice.



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Myth #3

Probationary employees are not eligible for workers' compensation benefits.

Workers' Comp



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Myth #3

For workers' compensation law:

“‘Worker’ means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer. . . .” (ORS 656.005)





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Myth #3: Bottom Line

Your probationary employee could file a claim for workers' compensation benefits on day one of his/her employment with you.



- **Sub-Bottom Line:** The probationary employee who seeks workers' compensation benefits can also sue you for workers' compensation retaliation or harassment!

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Myth #4


Probationary employees are never eligible for leaves of absence.

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Myth #4

Name of Law	When an Employee Becomes Eligible for Leave or Benefits for His or Her Medical-Related Issue
Family Medical Leave Act	If the employee has worked 1,250 hours within the last 12 months leading up to the leave
Oregon Family Leave Act	If the employee has worked an average of 25 or more hours per week in the 180 days (6 months) leading up to the leave
<ul style="list-style-type: none"> • Americans with Disabilities Act; • Oregon's disability laws; and • Workers' Compensation 	On day one of employment, including "probationary" periods of employment



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Myth #4

Other Oregon leave laws available to probationary employees:

- Oregon Military Family Leave Act leave (employee must work an average of 20 hours per week); and
- Leave for Victims of Domestic Violence, Harassment, Sexual Assault or Stalking
 - Both require the employer to employ 25 or more employees!



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Myth #5

I have to hold my probationary employees to the same standards of conduct as my "regular" employees.



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Myth #5



- "Probationary status" is not a protected class under federal or Oregon law!
- It is acceptable, therefore:
 - To prohibit probationary employees from using vacation during the probationary period;
 - To implement an attendance policy with stricter attendance requirements for probationary employees;
 - To require written summaries from probationary employees regarding their performance in a given week.



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Myth #5

- Be careful with different standards, however!
 - Problems can arise from policies if they are not drafted or implemented properly.
 - Example will follow later in this presentation!

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Myth #6

I don't have to give probationary employees written "progress reports" or written warnings about poor performance.



- Excellent
- Very good
- Good
- Average
- Poor




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Myth #6: The Truth

- See Myth #2.
- The best defense to a claim of wrongful termination, unfair treatment or discrimination **by any employee** is pre-termination documentation.

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Myth #6: The Truth

- Remember, too, that if jurors are more concerned with fairness than the “letter of the law” . . .
 - Firing a new employee without giving him or her an opportunity to fix the situation and do better may be perceived as **unfair by a jury**



Myth #6: The Truth

- Probationary employees need “love,” too – this is a time to give an otherwise good person notice and an opportunity to succeed.



Pre-Termination “Conversations”



Myth #6: The Better and Best Way

You need:

(1) Something in writing showing that you had a “conversation” with an employee about his or her poor performance (i.e., a warning); and

(2) Proof that the probationary employee received it.



Myth #6: The Better and Best Way

Example: Sample “mid-probationary notice” provided as a download for this webinar.

Example: Email documenting a conversation.

- Get the employee to sign it and place it in his/her “personnel records” (consider using return receipt on the email).
- OK to copy the union on the document, even if employee isn’t entitled to union representation yet.
- Give the employee a copy of the signed version.



Myth #6: Bottom Line

Probationary employees only have one less tool at their disposal to challenge a termination than do employees who have just cause rights.



Myth #7

I don't need to give probationary employees a reason when I fire them.

- OR -

If I fire a probationary employee, I can leave it at, "You didn't pass probation" and say nothing more.



Myth #7: The Facts

- See Myth #2.
- If you fail to give an employee a reason for his or her termination, you are at risk for discrimination and retaliation claims (i.e., "wrongful termination").
- More importantly, there is *no good reason* to **not** give a reason for the termination (provided it is a lawful reason).



Just Give Me
A Reason

Myth #7: The Better Way at Termination

Consider providing probationary employees with "mini-Due Process."

- Give the employee something in writing at the time of termination regarding why you're contemplating firing him/her *that day*.
- Give the employee an hour or so to consider it, ideally in a conference or private room.
- Then meet with the employee and hear what he/she has to say.



Myth #8

It's always better to terminate an employee on the last day of his or her probationary period of employment instead of extending the probationary period a couple of weeks.



Myth #8: The Facts

- Unless specifically prohibited by a policy or CBA provision, an employer may extend a probationary period of employment.
- If you have no documentation about a probationary employee's poor performance, *it is always better* to extend probation instead of terminating that employee on his or her "last day."




Myth #8: Best Practice


- Extend the probationary period by no less than one month.
- Present to the employee at the end of the probationary period a "probation review" or a "last-chance agreement" that contains:
 - Specific examples and details about behavior or performance that you thought was unacceptable
 - Specific examples and details about behavior or performance you want to see "right now"
 - A promise that the employee will be terminated if performance doesn't improve.



Probationary Employees in the Courts

(and the employers who unwillingly joined them there)





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Different Standards or . . . ?


Feingold v. The State of New York, et al. (2004 – 2nd Court of Appeals)

- Employee, an ALJ, alleged disparate treatment and that he had been fired because of his race, religion, and sexual orientation. He also alleged a hostile work environment and that he was retaliated against.


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Feingold v. The State of New York, et al.

- Employer alleged that employee had been terminated for mishandling a case in violation of policy, and for swearing and slamming a glass-paned door that broke. Employee's conduct "bespoke a lack of judicial disposition, justifying termination." Employee received no discipline or bad reviews during his eight months of employment.
- Court denied employer's pretrial motion; employee would get to tell his story to a jury.


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Probationary Employees & Policies

Rohloff v. Metz Baking Co. (U.S. Dist. Court Iowa 2007)

– Probationary employee was fired for violating employer’s attendance policy (if a probationary employee had four unexcused absences during the probationary period, he or she could be terminated). Employee sued employer, asserting that she had really been terminated because the employer learned she was pregnant.



Rohloff v. Metz Baking Co.

– Court denied employer’s motion to dismiss. Employee had presented enough information to raise an issue about her stated reason for termination. Specifically, the policy at issue had not been drafted or implemented in a careful manner.

– Outcome: Employee would get her day in front of a jury.




City of ___ v. A.D.

- Employee hired 3/5/12 and terminated on last day of probation period (3/5/13).
- Employer did not give a reason for the termination other than to state that A.D. had not passed probation.
 - Employer records showed that employee had difficulty communicating with employees and the public, and he didn’t do a good job following through on tasks. Employee was “counseled” on these issues. Employee, did not, however, receive a six-month review (per policy).
- Status: Lawsuit filed in January 2014.



City of ___ v. J.S.


- City had six-month probationary period that could be extended at the City's prerogative.
- Employee's probationary period was extended by three months, and again for another three months. Employee was presented with a "work improvement plan" each time.




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City of ___ v. J.S.

- City terminated employee after almost a year on probation (poor performance). Employee contended she was fired because she had complained about "ongoing sexual harassment and discrimination." Employee was provided with "Notice of Potential Termination," and given a chance to explain her situation/performance.
- Status: BOLI/EEOC currently investigating employee's complaint, more than a year after her termination.




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Questions?

*"Take the attitude of a student:
Never be too big to ask questions,
Never know too much to learn something new."*

- Og Mandino
(Author of *The Greatest Salesman in the World*)



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Final Thoughts

- Recruitment and turnover can be expensive.
- Avoid being known as the employer who fires “at will.”
- Handled properly, your decision to terminate a probationary employee’s employment will be supported by CIS Pre-Loss!



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