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The Viewpoint

Confirmed or Not? Tips for Effective Probationary Period Management

The article captures the legal nuances and the best practices concerning probationary periods.



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The clause on probationary period is one of the most standard terms included in employment documentation, as it provides the employer with an opportunity to assess the competence and capabilities of the employee to render assigned responsibilities specifically as regards the organisational standards and expectations. Jurisprudence on the granular aspects of probationary period has been evolving over the years, and accordingly, it is important for HR and legal professionals to remain cognizant of the same. Against this backdrop, we capture the legal nuances and the best practices concerning probationary periods.

Setting Minimum and N



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Employees are typically made t commencement of their emplo employee's performance, competence, and overall suitability for the role and alignment with the employer's work culture and ethos. Generally, an employee's probationary period does not guarantee continued services of the employee and as such the employee's services are "confirmed" only after the successful completion of the probationary period.

The statutory framework on the duration of probationary periods is limited. The model standing orders of certain States formulated under the Industrial Employment (Standing Orders) Act 1946, which in turn apply to specific establishments, do define 'probationers' as workmen who have not completed 3 / 6 months of service, and few courts have taken the position that the appointment letters cannot therefore prolong the probationary period beyond such duration. In Tamil Nadu, interestingly, the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act 1981 clarifies that a workman (non-managerial / non-supervisory employee) completing 480 days of continuous service shall be made permanent.

Subject to the above, employers have the prerogative to extend the duration of the probationary period to assess the suitability of the employee vis-à-vis organisational requirements and culture (among other relevant factors), although courts can intervene and examine whether the probationary period is unreasonably prolonged without any rationale or grounds that the employer may otherwise demonstrate in the event of such extension being subjected to judicial scrutiny.

Deemed Continuation of Probationary Period

Sometimes, probationary clauses are not express vis-à-vis the stage when the services of the employee shall be considered confirmed – these merely mention the probationary period but do not set out the manner of confirmation of services. In the absence of a specific intimation by the employer regarding confirmation of services, the continuance of the probationary period depends on the manner in which the relevant clause is drafted. For instance, if the clause mentions an outer timeframe for the probationary period and there is no confirmation regarding an extension, it will be deemed that the employee's services have been confirmed. However, if the probationary period clause has been drafted to indicate that confirmation will be provided in writing by the employer, the employee's services may not be deemed confirmed (even if the employee continues to serve the employer after completion of the stipulated probationary period) unless such written confirmation is provided to the

employee by the employer. Of course, such a continued probationary



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Entitlements during Probationary Period

During the probationary period of an employee, while the employee may not have the assurance of service continuity akin to a “confirmed” employee, there are generally no differences based on confirmation status as regards statutory benefits to be provided to employees. However, the applicable labour laws typically provide a minimum timeframe that should be completed by an employee before they become entitled to receive annual / earned leave (such as 240 days of continuous service), and as such, the annual / earned leave is either not extended to employees during their probationary period or provided on a monthly accrual / pro-rated basis. Courts have also taken a view that retrenchment (severance) compensation is not payable for an employee serving a probationary period even though the employee may have completed one year of service (i.e., the qualifying period for receipt of such compensation).

Notice Period for Probationers

It is often noted that employers do not provide for any notice period for termination of employment of an employee serving a probationary period. While an argument to back such clauses in employment agreements is that the employee is already put on notice that they are still being assessed for their suitability for the role, the shops and establishments laws of few States make it imperative for the employer to provide notice period of at least one month the moment an employee has completed a specified period of service (this minimum service period is 6 months in States such as Karnataka and Tamil Nadu and 3 months in states such as Punjab and Haryana, with Uttar Pradesh not providing any minimum period at all). Even where such a requirement is not applicable, a short notice period of 7-14 days may be considered, given that Indian courts recognise that employment is not an at-will relationship.

Concluding Remarks

With the above principles in mind, employers should consider including the following concepts when determining the verbiage on probationary period in employment agreements:

- (a) A standard duration of probationary period, with a stipulation that there will be no deemed confirmation of services post completion of such period;
- (b) Confirmation of services shall be in writing and contingent on determination on performance and overall alignment of the employee with the role and

organisational ethos; and

(c) Any shorter notice period for dispensation by the employer, with / without similar



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