

# Probationary Period & Termination

There are many different views out there in small business in relation to probationary periods and how to handle probationary terminations. Questions like “can I extend my employees probation past 6 months” or “do I have to give a reason for terminating my employees’ employment whilst in probation” are often asked.

In this HR update for small businesses, we aim to answer these questions and provide clarity around your probationary period obligations.

## What is a probationary period?

A predetermined length of time the business and employee have to assess the suitability and ongoing employment relationship. A probationary period is typically between 3 to 6 months for most organisations in Australia.

During the probationary period, employees are to be treated like all other permanent employees in the payment of normal wages as agreed at the commencement of employment as well as the obligation to accrue annual leave and personal leave from the day they started with your business. A probationary period does not mean you can provide less entitlements than you do for permanent staff members.

## Can I extend a probationary period?

Yes you can! However, there are a few things to be aware of first. As an employer of less than 15 employees, you have up to 12 months to assess the suitability of employees before they have access to unfair dismissal remedies via the Fair Work Commission. This is often referred

to as the **'qualifying period'**. In our humble opinion though, if you haven't decided by now if the employee is the right fit, you may want to seek some other professional help!

Anyhow, you can extend the probationary period past 12 months, but should you deem the employee unsuitable after this time, you will need to undertake a thorough performance improvement process before deciding to terminate.

If you employ more than 15 employees, the 'qualifying period' is 6 months. You can extend probation for an additional appropriate length of time, however if it is more than 6 months from the time the employee started, you are at risk of litigation should employment end in termination by reason of not meeting the probation period.

## **Termination whilst in probation**

If the business has reviewed the performance and suitability of the employee and yet the engagement with the employee is not working out, the business has the option to terminate the employment relationship within the probationary period, and the employee does not have claim to unfair dismissal. They are however, able to access general protections / adverse action claims through the Fair Work Commission.

General protections, as defined by the Fair Work Commission, are intended to protect workplace rights, protect freedom of association, provide protection from workplace discrimination, and provide effective relief for persons who have been discriminated against, victimised, or have experienced other unfair treatment. A person (such as an employer), must not take any adverse action against another person (such as an employee) because that person has a workplace right, has exercised a workplace right or proposes to exercise that workplace right.

## How to reduce your risk in terminating an employee on probation?

The best way to reduce risk within your business is to ensure you have regular 'check in' meetings with your new staff member. A great process to follow is to formally meet after their first two weeks, end of month 1, 3 and 6 if that is the length of your probationary period. These meetings should follow the same agenda and do not have to be overly onerous. We have included a snapshot of what could be an agenda for these meetings, ensuring that you are always focusing on performance vs expectations, and what the employee could be doing to improve or to meet their position expectations. By conducting regular meetings with your employee leaves no uncertainty as to the outcome of their probationary meeting, and should it result in termination, there would be no surprises.

Take the time...it is worth every minute!

### Example agenda

Item	Topic	Comments
1	Performance goals – list them	Insert their KPI's/targets
2	Progress towards achieving performance goals	Discussion on the employee's progress so far
3	Feedback on company values fit	Describe and discuss the employee's contribution to the behaviours and values of the business thus far
4	Opportunities for development	Discuss where the employee could benefit from improving, and how the business will assist to achieve progress

5	Feedback from the employee	Discuss how the employee is feeling so far, what's met their expectations, fell short of expectations and how their manager can assist in better supporting their contribution to the team/role
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Be sure to rate the employee's progress using a scale such as this:

Rating	Description	Tick
Above target	Progressing better than expected of someone at this stage of their employment	
On target	Progressing at the rate required of someone at this stage of their employment	
Below target	Employee is not meeting the required standards expected at this stage of their employment	

Not only will you have comfort that you provided the appropriate support should the result be unfavourable for the employee, but the employee themselves will feel comfortable with whatever decision is made. Probably not happy in some cases, but comfortable with the honest and transparent approach.

## Should I give reasons for termination in probation?

Yes, you absolutely should. Technically you are not obliged to, but if you have followed the steps above in your own way, it is going to be obvious as to why you have made the decision. If you don't, you may open yourself up to what was described above in a general protections or adverse action claim. Not always, but you may leave the door open.