INFORMATION MEMO

Employee Probationary Periods

Understand the risks and rewards of establishing a probationary period for employees in your city. Find practice pointers for avoiding legal pitfalls, how to document performance, establish standards, and deal with special categories of probationary employees such as veterans.

RELEVANT LINKS: Minn. Stat. §§ 44.02 - .10.

I. Employment probation

Unless established in an employment contract, including labor agreement, or pursuant to a municipal merit system under Minn. Stat., ch.44, there is no legal requirement for a city to offer a probationary period to a new hire. Some cities voluntarily choose to utilize probationary periods as an employment screening and supervision tool. Although probationary periods can happen at various times in an employment relationship, they are typically associated with a new hire in the first months on the job. Both the city and the new hire know at the outset the relationship is subject to a trial period—a time where the probationary employee has the opportunity to learn the job and where, at the same time, supervisors can evaluate to see if the employee has what it takes to succeed.

A. Rewards

Flexibility is the largest perceived reward of having a probationary period policy. If the employee performs well and is suitable for the job, probation is passed and the employee moves to a regular or more on-going status. If the employee does not perform up to expected standards or engages in behavior not suitable to the position, then the city is legally able to end the employment without identifying a specific cause nor providing any grievance or other post-termination process.

The flexibility of a probation period has its limits, particularly when applied to qualified veterans (see Section III A below). Also, while the city has the right to end the probation for any reason or no reason at all, employment action cannot be taken for an unlawful reason. In other words, while a probationary employee cannot bring a wrongful termination claim challenging the sufficiency of a lawful reason, he or she can bring other claims challenging the termination such as for illegal discrimination or retaliation.
B. Risks

If your city applies a probationary period to new hires, or is contemplating doing so, it is important to follow best practices and to understand the legal implications or non-implications when labeling an employee “probationary.”

II. Practice pointers

All probation periods should be defined in a written policy, preferably made part of a city’s personnel policy manual or handbook. Supervisors and employees should be trained on the policy. The importance of documenting and developing an individual performance plan, especially when there are performance deficiencies, cannot be overstated. At a minimum, a probation performance plan should include:

- Clear and concise statements of job duties and performance expectations.
- Periodic reviews/meetings with the employee.
- Specific feedback and counseling.
- Assessment of additional training or possible accommodations.
- Input from other employees/supervisors/customers (if possible).

It is very important all of this is then transferred to a written record of the employee’s work performance during the probationary period. Beware of creating foregone conclusions or projections about an employee’s likelihood of success in probation. Include objective information supporting the employee’s proficiencies and deficiencies, rather than personal opinions or speculation.

III. Status of probationary employees under selected laws

A. Veterans preference and military leave

Minnesota’s Veterans Preference Act provides qualified veterans with certain rights in the public recruitment process as well as in situations of proposed termination from employment.

Previously, state law effectively precluded qualified veterans from serving a probationary period with a city. In July 2016, a law change allowed a city to require all employees, including veterans, to complete an initial probationary period as defined under Minn. Stat. § 43A.16 (defined to be no less than 30 days but not exceed two years of full-time equivalent service). However, after serving an initial probationary period for a city, a veteran would not be subject to additional probationary periods, such as for a promotion or new assignment.
Thus, once the initial probationary period expires, a veteran may be not be removed unless incompetency or misconduct is shown through a removal hearing.

Given this change in law, cities who have previously not required probationary periods for employees might consider doing so now. In those situations, it will be important to work with your city attorney to include strong disclaimer language stating no contractual relationship is created by the probationary period to avoid weakening the at will status of those city employees to whom it applies.

In addition, both federal and state military leave laws apply to employees in the active military who are also serving probationary periods, including re-employment rights under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA).

B. Unemployment benefits

Terminated probationary employees may be entitled to receive unemployment benefits. A city is not exempt simply because of an employee’s probationary status. Entitlement to unemployment or re-employment benefits is based on how long an employee worked for an employer and whether or not the employee engaged in misconduct or other disqualifying activity. So, bottom line, probationary status doesn’t affect unemployment benefits eligibility and should be factored in as a possible cost of terminating a probationary employee.

C. Health insurance benefits

While a city is not legally obligated to provide its employees with health insurance benefits, if it does, the laws for benefit continuation cover all employees, regardless of probationary status as long as the employee is benefit eligible.

The federal Affordable Care Act (ACA) prohibits employers from requiring waiting periods in excess of 90 days before an employee becomes eligible for group health plan coverage starting with the first plan year beginning on or after Jan. 1, 2015. The 90-day rule applies to all grandfathered and non-grandfathered group health plans and group health insurance issuers, including multi-employer health plans and single-employer group health plans maintained pursuant to collective bargaining arrangements.

In addition, in circumstances where an employee is terminated during a probationary period, it is important to recognize and follow federal and state benefit continuation laws. When an employee loses employment, these laws apply, regardless of the reason for the termination or probationary status, as long as continuing eligibility criteria are met.
The only exception to this is for some cases when the reason for termination is gross misconduct. Additionally, Minnesota benefit continuation law requires continuation of group health benefits (defined to the left under Minn. Stat. § 62A.011). Most cities offering health benefits are required to comply with state law as well as federal COBRA requirements.

D. Family and Medical Leave Act and other leaves

Many federal and state employment leave laws, such as the Family and Medical Leave Act (FMLA) and Minnesota’s Sick and Safety Leave and Pregnancy and Parenting Leave statutes, will not apply to probationary employees because of the length of service requirements. Most, but not all, of these leave laws provide entitlements to employees who have worked at least 12 months for an employer preceding the request, and most probationary periods do not exceed one year. It is very important that a city understand the exceptions to this, however, and know when certain leave rights also apply to a probationary employee.

In Minnesota, all employees who average 20 or more hours a week for an employer, regardless of length of employment, are entitled to take bone marrow and organ donor leave. Also, all employees, including probationary employees, have victim/witness leave rights. A city employer must allow a victim or witness, who is subpoenaed or requested by the prosecutor to attend court for the purpose of giving testimony, reasonable time off from work to attend criminal proceedings related to the victim’s case. A city must also allow a victim of a violent crime, as well as the victim’s spouse or immediate family members, reasonable time off from work to attend criminal proceedings related to the victim’s case.

E. Minnesota Government Data Practices Act

The Minnesota Government Data Practices Act (MGDPA) does not differentiate between regular status and probationary status employees. The information a city collects and maintains from the employment process on all employees is classified as personnel data, which is mostly presumed to be non-public or private. Personnel data are defined as information collected about an individual because that person has or had an employment relationship or applied for a job with the city. The MGDPA sets forth specific criteria and requirements for cities in the area of classification and release of personnel data and these should be followed when dealing with probationary employees.

IV. Due process

The Fourteenth Amendment to the United States Constitution prohibits public employers such as cities from taking any action that deprives an
individual of a protected property or liberty interest without first providing due process of law. Certain disciplinary actions such as terminations and demotions require a city to provide “due process” before a decision becomes final.

Due process in the case of employment discipline consists of providing the employee notice of the allegations against him or her and an opportunity to respond prior to final action on the discipline.

At-will employees or those considered probationary, do not have a property interest in continued employment and so no due process is required by the city prior to termination of employment.

In limited situations, however, some employees, even probationary ones, will have entitlement to constitutional due process by way of a name-clearing hearing after a discipline decision has been reached. In these cases, an employee’s liberty interest in his or her good name is implicated by the public statements made about the employee in connection with a discipline decision.

V. Further assistance

The League’s Human Resources and Benefits Department is available to take your questions on probationary employees.