



Hospitality Recruitment Solutions

## Extending an Employees Probationary Period

The purpose of a probationary period (typically 3 months or 6 months) is to allow the Employer and Employee to decide if the position and company culture is suitable for both. If it is deemed to be unsuitable by either party, the employment contract can be terminated (by either party) within the probationary period for any reason, without any unfair dismissal implications arising for the Employer.

Under the *Fair Work Act 2009 (Cth)*, the following restrictions apply with regards to an employee making an unfair dismissal claim:

- Business employs less than 15 employees – the employee cannot make a claim if they have worked for less than 12 months for the employer; or
- Business employs 15 or more employees – the employee cannot make a claim if they have worked for less than 6 months for the employer.

Based on the above, technically all new employees are subject to an automatic 6 month or 12 month 'probationary period' (depending on the size of the business), and this would be the case even if your employment agreement stipulated a lesser probationary period (i.e 3 months). In such circumstances, it would be unnecessary for you to extend that period, because the above provisions of the *Fair Work Act 2009 (Cth)* would ordinarily apply anyway.

### **Can an employee's probationary period be extended beyond 6 or 12 months?**

Yes you can, however there would really be no sense or reason for doing so, because extending the probationary period beyond these timeframes would not restrict your employee from making an unfair dismissal claim under the provisions of the *Fair Work Act 2009 (Cth)* if his or her employment was terminated. An employment agreement cannot override the *Fair Work Act 2009 (Cth)*.

Please also note that it should not be assumed that notice periods dictated within an employment contract can be changed in the case where a probationary period is extended. For more information about minimum notice periods, please visit the Fair Work Commission at <http://www.fairwork.gov.au/termination/notice-periods/pages/default.aspx>.

### **Summary**

- The *Fair Work Act 2009 (Cth)* overrides any employment agreement
- Businesses that employ less than 15 employees have up to 12 months to assess the suitability of a new employee
- Businesses that employ 15 or more employees have up to 6 months to assess the suitability of a new employee
- An employee cannot make an unfair dismissal claim if they are terminated within the above time periods
- Given the above, there is no need to also have a separate probationary period within an employment agreement



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- If a probationary period is extended, do not assume that the notice period within the employment contract can be changed accordingly. Contact the Fair Work Commission for further information on legal minimum notice periods.

Another important point to remember is that Unlawful Termination (which is different to Unfair Dismissal, and involves an employer terminating an employee for a prohibited reason, such as reasons relating to the employee's race, sex, religion, pregnancy etc) still applies regardless of how long the employee has been employed.

**Information referenced from 'Fair Work Online' at [www.fairworkonline.com.au](http://www.fairworkonline.com.au)**

*Are you confident that your HR practices are limiting your risk of exposure to claims and disputes? We can assist you to implement streamlined performance management processes in your business to reduce your risk of exposure. Please contact our HR Specialist, Kim Chesswas, at [kim@hospitalityrecruitmentsolutions.com.au](mailto:kim@hospitalityrecruitmentsolutions.com.au).*