

Important changes to probationary periods in Ireland

Insights - 10/02/2023

The European Union (Transparent and Predictable Working Conditions) Regulations 2022 (the 2022 Regulations) became law on 16 December 2022.

[See our previous article EU Directive on Transparent and Predictable Working Conditions.](#)

The regulations make a significant change to probationary periods in an area of employment law which until 16 December 2022 was governed by contract, as opposed to legislation. The new regulations specify that probationary periods cannot exceed six months.

The regulations amend the Terms of Employment (Information) Act 1994 and the Protection of Employees (Fixed-Term Work Act) 2003 and also introduce other important changes. This article deals solely with the changes to probationary periods.

Impact of regulations on probationary periods for recent recruits

Under Regulation 10, for employees who started employment before 16 December 2022 and are subject to a probation period of longer than six months, their probationary periods will now expire, provided the employee has completed six months of the probationary period, on either (1) the date on which the probationary period was due to expire or, (2) by 1 February 2023, whichever is earlier. This provision is bound to cause confusion.

The key piece is that the employee must have completed six months of their probationary period and if they were subject to a longer initial probationary period, that additional period can no longer be enforced.

For example, if an employee was employed on 1 August 2022 and was subject to a 10-month probationary period, then under the regulations once they have six months' service the probation will end on 1 February 2023. The last four months of the contractual probationary period can no longer be

applied.

Exception to six-month probationary period

Under Regulation 10, probationary periods can be longer, but not longer than 12 months, on an exceptional basis, where it would be in the interest of the employee.

Unfortunately, "in the interest of the employee" has not been defined. It is also unclear whether the extended probationary period must be specified at the date of commencement of employment or whether it may be extended during the initial probationary period.

The regulations amend the Terms of Employment (Information) Act by requiring an employer, among other things, to provide an employee within one month of starting of "where a probationary period applies, its duration and conditions." While an employer has one month to give this information, we strongly recommend that all terms are agreed prior to commencement of employment.

If an extended probationary period is "in the interests of the employee" then arguably it should be included at the outset, with the justification being documented by the employer should it ever need to explain the exceptional basis for the extended period. Trying to impose an extended period after the six-month period may prove to be very difficult.

Suspension of the probationary period

If an employee is absent from work during the probationary period due to adoption, carers, maternity, paternity, parents, parental or sick leave, the probationary period shall be extended by the employer for the duration of the employee's absence. The probationary period will be suspended during that period of absence.

Impact on fixed-term contracts

The regulations specify that the length of any probationary period must be proportionate to the expected duration of the contract and the nature of the work. A new probationary period cannot be imposed in any renewal of a fixed term contract.

Breach

If a longer than permitted probationary clause is enforced by an employee, without an exceptional basis in the interests of the employee, the employer is at risk of claim under the Terms of Employment (Information) Act, 1994. If successful, the Workplace Relations Commission may award the employee compensation of up to four weeks' remuneration.

Next steps

Employers should review the use of probationary periods and ensure that there are controls in place to assess performance during the six-month probationary period. Any employer who had longer probationary periods should ascertain whether there is an exceptional basis, in the interest of the employee to extend the probationary period. If you have any questions on the above, please contact Mary Gavin at Ogier Leman for further information.

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