

**Probationary Periods in Times of Pandemic:
Don't Let the Coronavirus Distract You from the Need to
Effectively Evaluate New Employees**

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The ongoing COVID-19 pandemic has disrupted our lives in profoundly significant ways, and there is as of now no clear end in sight to the changes which it has wrought. Municipalities across the Commonwealth have been forced to implement radical operational changes in response to rapidly evolving circumstances, and additional changes could be forthcoming as the situation continues to develop. However, the ongoing pandemic should not distract municipal employers from the need to evaluate those recently hired employees who are currently serving probationary periods.

It is said that the most important decision which can be made during the life of an employer-employee relationship is the hiring decision. This is particularly true in the public sector. In an at-will employment relationship – by far the most common in Pennsylvania – an employee may be discharged for any reason or for no reason, as long as the discharge does not violate federal or state anti-discrimination laws. However, many public employees in Pennsylvania – including those employees subject to a collective bargaining agreement and those with civil service protections – have a property right in their continued employment. These employees may only be terminated for reasons specified in an applicable statute or for “just cause” as set forth in a collective bargaining agreement. Further, such employees have a right to appeal their dismissal through a contractual grievance arbitration process or by filing an agency appeal, and such discharge may be overturned (and the employee reinstated) if the adjudicator finds that the termination did not meet the applicable standard.

Probationary periods represent a time-limited exception to these principles. At the beginning of an employee’s tenure, a probationary period serves as an opportunity to evaluate the employee’s job performance while that employee is still employed at-will and during which a legitimate discharge is not subject to exacting reasons and review by an agency or arbitrator. At the end of a probationary period, an employee may be evaluated to determine whether he or she will remain an employee – often referred to as “receiving a permanent appointment” – or whether the employee will be separated from service. In this way, a probationary period serves as an employer’s last chance to identify and separate a problematic or underperforming employee.

Employers should be considering whether it is possible to fully and carefully evaluate the job performance of any employees who are serving their probationary period during these unprecedented times. Many public employers have taken steps to mitigate the spread of disease and those actions may also limit the ability to fully assess an employee’s capabilities. Whether it is reduced police call volume coupled with an effort to resolve remaining calls with as little contact and intervention as possible; or work from home arrangements for employees where telework is in place; or periods where employees were off work but remained on payroll until clearer arrangements could be made; public employers need to carefully assess whether adequate evaluations have or can be made under these circumstances. Where it is possible to develop new ways to carefully review a new employee’s work under these changed circumstances, those efforts

should be considered and implemented. Where, despite best efforts, it is not possible to adequately assess the job performance of a probationary employee, employers should not simply accept the risk and potential liability of a hiring mistake occasioned by permitting the probationary period to lapse. Public employers should be willing to explore extensions of the probationary period where possible or consider making the difficult decision not to retain a probationary employee past the end of a probationary period where circumstances have made a comprehensive evaluation impossible.

In certain circumstances, it may be possible to negotiate with the union for the extension of a probationary period. While an extended probationary period is a mandatory subject of bargaining, an employer will be in a strong position in these negotiations where the alternative is non-retention of the employee. However, public employers must know that there may be statutory or regulatory limitations to the extension of probation such as, civil service statutes or rules that set forth a maximum possible period of probation. An employer who permits an employee to remain on probation beyond this statutory limitation exposes itself to an argument that the employee has received a permanent appointment – with full job protected status –irrespective of any purported agreement between the parties to extend probation.

As difficult as it may be to believe right now, there will come a time when the COVID-19 pandemic is a distant memory. A bad hiring decision made now could impact a public employer for decades. Accordingly, public employers should not neglect the obligation to evaluate their probationary employees, to assess whether adequate evaluation can occur under the present circumstances and to seek available opportunities to address any inability to meaningfully evaluate by legally extending probation where possible and by making the difficult decisions where the probationary period reveals that is necessary. The attorneys at Campbell Durrant, P.C. are ready and able to assist employers in confronting these challenging questions.