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Probationary workers and at-will employees. What you need to know

An at-will employee who completes a probationary period generally enjoys no greater workplace legal rights than a probationary employee

In recent months, the federal government has fired tens of thousands of probationary employees. [According to the American Federation of Government Employees \(AFGE\)](#), the largest federal employee union, a probationary employee generally is one serving in their current position for less than one or two years, depending on the position.

Probationary federal employees employed essentially at-will

According to the AFGE, probationary employees have “extremely limited” rights to challenge their termination. As The New York Times recently wrote: “While on probation, a federal employee can essentially be fired at will, although the person’s superiors [need to show](#) that the employee’s ‘work performance or conduct fails during this period to demonstrate his fitness or his qualifications for continued employment.’ (Many termination notices included language about the employee’s supposedly inadequate performance, typically without evidence.) Probationary employees may also appeal if they believe they were fired for partisan political reasons or on the basis of unlawful discrimination,” such as race or sex.

Private sector at-will probationary employment

In California, most private sector, nonunion employment is at-will, meaning the employment may be terminated by either party at any time for good cause or no cause, even an arbitrary reason. Employers sometimes include in their offer letters or employee handbooks a statement that the first 60 or 90 days of employment are a trial period, much shorter than the federal probationary period, during which the employee and employer will assess whether the job is a good fit.

A California employee who completes a 90-day probationary period is entitled to start accruing statutory [paid sick leave](#). An employer also may extend paid vacation leave and other benefits after such a waiting period.

Outside of benefits, most of which are discretionary, an at-will employee who completes a probationary period generally enjoys no greater workplace legal rights than a probationary employee. Employment at will means the right to end the relationship at will at any time.

To make this clear, the California Chamber of Commerce Labor Law Digest suggests employers frame a probationary period provision in an employee handbook like this: “An introductory period is a training period and a time to get acquainted. Completing an introductory period does not guarantee continued employment. After you complete that period, you still can resign and the company still has the right to terminate your employment at any time, with or without cause.”

An at-will probationary employee nonetheless has the same right as longer term employees to challenge adverse employment actions motivated by their membership in a protected classification or for engaging in protected whistleblowing activity.

Timing of discharge may matter

The timing of a termination or other adverse action may affect evaluation of its legality. Effective Jan. 1, 2024, [SB 497](#) created a rebuttable presumption that an employee was subject to unlawful retaliation if an adverse employment action occurred within 90 days of the employee engaging in such protected activity as complaining about a gender-based gap in wages.

One legislative committee analyst explained the measure this way: “The idea behind shifting the burden to the employer is to force the employer to approach taking adverse action with extra care to make sure that there is a valid, non-retaliatory basis for taking the adverse action.” In other words, whether the presumption applies or not, it is not illegal to terminate or otherwise discipline an employee who has complained of a suspected unlawful practice. It is illegal to terminate or otherwise discipline an employee *because* they have complained of a suspected unlawful practice, regardless of when the complaint was made.

A private sector, at-will employee is not defenseless against unlawful termination before completing a probationary period. A private sector, at-will employee is not invulnerable to broadly justifiable termination after completing a probationary period.

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