

RAINEY COLLINS LAWYERS

Employers' Guide to 90-Day Trials

Set out below are:

- the steps involved in including a valid 90-day trial clause in an Individual Employment Agreement,
- how and when one may be relied upon.

Trial clauses are useful for allowing an employer to assess whether a new employee is a good fit for the company (and vice versa). However, when using 90-day trial clauses it is important that:

- The clause in the Employment Agreement is legal;
- No actions are taken to invalidate the clause; and
- When a clause is relied upon to end the trial period, the process is carried out correctly.

When a clause may be used

A 90-day trial clause may be used by employers when hiring new employees. The trial period may only apply up to the first 90 days of the employment period, beginning on the day on which the employment starts.

Prior to Saturday 23 December 2023, the 90-day trial clause only applied to employers with up to 19 employees.

Specific requirements

The wording of the clause must abide by the requirements in the Employment Relations Act 2000. The trial clause must be in writing in the Employment Agreement and state:

1. That the employee will serve a trial period commencing from the beginning of their employment;
2. For what period the trial clause will be effective (may be 90 days or less);
3. The date that the trial begins on;
4. That the employer may dismiss the employee during the trial period; and
5. That if the employer does dismiss the employee during the trial period, the employee is not entitled to raise a personal grievance (or other legal challenge) with regard to the dismissal.

Invalidating the clause

1. The employee must not have been employed previously by the employer and you must both sign the Employment Agreement before the date and time that the employee is to begin their employment.

It is too late if one of you signs it a few minutes after they start employment on their first day. Get the agreement signed by both parties well before their first day.

If the agreement is signed after they commenced employment, they are considered to already be a permanent employee at the time that they sign the employment agreement, and the trial clause will be invalid. The reason for this is that current and previous employees cannot be subject to a 90-day trial clause.

2. If the employee is a union member employed on a collective employment agreement, the trial period in their individual agreement must be consistent with the collective employment agreement.

If the collective employment agreement stipulates that the employee cannot be subject to a 90-day trial clause, then the employee's individual agreement cannot include a trial period clause.

Relying on a 90-day trial clause

If an employer wants to rely on a 90-day trial clause to end an employee's employment, it is important that it is done correctly.

1. An employer must give notice to an employee, ending their employment, according to the notice clause in their Employment Agreement.
2. The notice is not required to have reasons for the employee's dismissal.
3. The trial clause may still be relied upon if notice is given on the 90th day, but the employee's last day is after the 90-day period ends.
4. The trial clause does not protect an employer from a personal grievance related to giving the incorrect notice to the employee.

Clauses do not prevent all grievances

Although the 90-day trial clause records that an employee may not raise a personal grievance related to their dismissal, grievances may still be raised for:

1. Discrimination;
2. Harassment;
3. Unjustifiable disadvantage;
4. Employer pressure regarding union membership.

Trial clauses are an important part of businesses being able to ensure that they hire the right employees. However, it is important that the clauses are correctly written into Employment Agreements, and used properly.

Many employers in the past have tried to rely on illegal trial clauses or dismissed employees incorrectly, resulting in many expensive personal grievances.

If your business includes 90-day trials in its Employment Agreements and you are unsure whether they comply with employment law, it is wise to speak with a professional experienced in the area.