

The trial period is a period of time during which the employer assesses the employee's professional aptitude for the tasks entrusted to him or her and the employee assesses whether the work to be performed is suitable and corresponds to his or her expectations. Consequently, any contract, whether fixed-term or open-ended, may include a trial clause in order to assess the potential of the professional relationship in terms of sustainability and the needs of both parties to the contract. The advantage of including such a clause is that it can be easily broken without having to follow the more cumbersome procedure of dismissal.

As an employer, you will certainly be confronted one day with events in the lives of your employees that disrupt the trial period. Various situations may extend, suspend or interrupt said trial period. Moreover, in certain cases, the trial period may be shortened or even not included in the employment contract.

1) LENGTH OF THE TRIAL PERIOD

First of all, it should be noted that the trial period **may never be renewed**, even by mutual agreement, and must be recorded individually for each employee in writing in his or her employment contract, at the latest when he or she starts work.

Moreover, the trial period may never be less than 2 weeks nor more than:

- 3 months if the employee is considered « unskilled » ;
- 6 months if the employee is considered « skilled ».

By way of exception, the trial period may extend to 12 months when the gross monthly salary provided for in the employment contract is equal to or higher than € 4,700.77 (at index 877.01).

2) ILLNESS DURING THE TRIAL PERIOD

> REIMBURSEMENT FOR ILLNESS

One of the particular features of the trial period is that in the event of incapacity for work during the first three months thereof, the employer is **reimbursed 100% of the wages** paid to the employee. After this 3-month period, the reimbursement will be 80%.

> AUTOMATIC BUT TIME-LIMITED EXTENSION

The employee's incapacity to work has an impact on the duration of the trial period. The trial period is in fact extended in case of illness or leave for the employee for family reasons.

In point of fact, pursuant to Article L. 121-5 of the Labour Code, **the length of the trial period is automatically extended in the event of suspension**, for as many days as the employee is absent due to illness or leave for family reasons.

However, the total **duration of this extension may not exceed one month**.

In addition, the employee enjoys special protection against dismissal in the event of incapacity for work, provided that the employee has complied with two legal obligations, namely to:

- inform the employer of his or her incapacity to work from the first day of absence, and
- submit the medical certificate by the third day at the latest.

If the employee has complied with these two conditions cumulatively, he or she is protected against the termination of his or her trial contract by the employer, either with notice or with immediate effect, for as long as his or her incapacity for work lasts.

In the event of incapacity to work until the end of the trial period, such protection would prevent the employer from terminating the trial contract, which would then become permanent. In order to avoid such a situation, **the labour courts allow the employer exceptionally the discretion of terminating the trial contract, but only when the trial period has already been extended due to the employee's illness.**

In other words, in order to prevent the trial period from becoming an open-ended contract, the employer may terminate the employee despite his or her illness but must wait **until the very last moment and must take due account of the retroactive calculation of the period of notice.** The case law is very strict and does not allow any flexibility on the date to be chosen by the employer to terminate the contract. The end date of the period of notice must therefore correspond to the end date of the extended trial period. Otherwise, the dismissal will be considered unfair. It will to that end suffice to calculate the period of notice retroactively from the last day of the extended trial period.

Example: for an open-ended contract starting on 1 April 2022 with a 6-month trial period ending on 30 September 2022, the period of notice will be 24 days. If the employee is ill for 6 weeks, the trial period is extended by one month, i.e. until 31 October 2022. The employer should post his letter of termination by 8 October at the latest so that the period of notice ends on 31 October. The period of notice must be calculated retroactively from the last day of the trial period.

A judgment of the High Court of Justice dated 2 April 2016 clarified that in such a situation **the period of notice runs from the day the employer mails the letter of termination.**

3) PREGNANCY DURING THE TRIAL PERIOD

A fixed-term employment contract normally expires at the term initially foreseen, despite the employee's pregnancy. In such a case, the trial period is not suspended and the fixed-term contract is not extended beyond its term.

On the other hand, in the case of an open-ended contract, the trial period **is suspended from the day the pregnant woman gives her employer her medical certificate attesting to her pregnancy until the beginning of her maternity leave.** The remaining part of the trial period will resume at the end of a period of 12 weeks after the birth.

Example: An employee starts her employment contract on 1 January 2022 with a trial period of 6 months. On 1 March, she submits a medical certificate attesting to her pregnancy to her employer, so the trial period is immediately suspended. She will be on maternity leave from 30 March to 16 August 2022, so she will return to work on 17 August. As a result, the remaining duration of the trial period will start running again from that day, i.e. the remaining 4 months.

Despite the suspension of the trial period, the employee continues to work until the beginning of her maternity leave, without this period of work being qualified as a trial period. During this period of suspension (from the day the medical certificate attesting to the pregnancy is submitted to the employer until 12 weeks after the birth), the employee is protected against dismissal.

4) REQUEST FOR PARENTAL LEAVE DURING THE TRIAL PERIOD

Employees may **neither take nor request parental leave during the trial period**. They must first wait until the trial period has expired.

Conversely, it should be noted that the employee during the probationary period may freely take ten days of paternity leave. In point of fact, this paternity leave is an extraordinary leave which is not affected by this restriction. Like any other extraordinary leave, the employee can benefit from it from the beginning of the trial period without any impact thereon.

5) WHAT ABOUT THE TRIAL PERIOD INSERTED IN A SUBSEQUENT CONTRACT?

When an employee has been hired **under a fixed-term contract and the contract is renewed or the employment relationship is continued under an open-ended contract**, it is forbidden to insert a new probationary period in the contract as long as the job offered is identical. The reason for this is that it is assumed that the employment relationship is continued because it has been successful.

Similarly, when an employee is hired **under an open-ended contract following a temporary assignment**, the duration of the assignment should be taken into account. In fact, the duration of the temporary assignments carried out during the year preceding the hiring will be deducted from any trial period.

Thus, if the duration of the assignments carried out with the employer during the year preceding the hiring of an open-ended contract exceeds the maximum duration of the legally authorized trial period, it will no longer be possible to provide for a trial period under the open-ended contract.

In another situation, **when the contractual employment relationship is continued after the end of a fixed-term contract by means of a new fixed-term contract** which is merely a continuation of the previous employment relationship, the new contract may not provide for a trial period.

In all these cases, the position offered to the employee must be identical to the first contract. More specifically,

if in the new contract the employee occupies a different function and tasks, then it will be possible to insert a new trial period in order to test the employee on the new tasks entrusted to him.

Finally, **in the case of an open-ended contract concluded following an apprenticeship contract with the same employer**, there is no provision in the Labour Code that prohibits an employer who recruits his former apprentice under an open-ended contract from providing for a trial period.

6) BREAKING THE TRIAL PERIOD AND GIVING NOTICE

By way of reminder, the trial period is a probationary period at the beginning of the performance of work during which the employer and the employee can break the employment contract quickly and easily **without giving any reasons and without compensation**.

Neither party may terminate the employment contract during **the first two weeks of the trial period, except in the case of serious misconduct or by mutual agreement**.

After these two weeks, the contract may be terminated at any time by either party thereto. This termination may be effected by registered letter or against a signature on the duplicate termination letter. **A period of notice** must be observed. This period, which is counted in calendar days, is the same for both parties, i.e. in the case of dismissal by the employer as in the case of resignation by the employee.

Length of the trial period	Period of notice
2 weeks	Termination not possible except for gross negligence
3 weeks	3 days
4 weeks	4 days
1 month	15 days
2 months	15 days
3 months	15 days
4 months	16 days
5 months	20 days
6 months	24 days
7 months	28 days
8 to 12 months	1 month

The employer does not have to give reasons for dismissal during the trial period. In fact, during this period, the employer has discretionary power to terminate the contract. Thus, even if the employee expressly requests it, the employer will not be obliged to justify the termination. Moreover, no prior interview is required.

Due care must be taken when calculating the period of notice. It must end **at the latest on the last day of the trial period**. Thus, it may under no circumstances exceed the end of the trial period, otherwise the contract will be reclassified as an open-ended contract.

Example: An open-ended contract provides for a trial period of 6 months from 15 January to 14 July. The period of notice for termination is 24 days. The contract must be terminated by 20 June at the latest. The period of notice will start on 21 June and end on 14 July.

If the termination takes place after 20 June, the period of notice will exceed the trial period and the contract will be deemed to be open-ended and the periods of notice for open-ended contracts will apply.

CONCLUSION

In conclusion, we strongly advise you to include a trial period systematically in all fixed-term and open-ended contracts in order to test your employees during their first months of employment. If the trial period is successful, it will have no impact on your employee. Conversely, if you are not satisfied with the skills demonstrated by your new employee, you will be able to terminate the contract easily, while of course respecting the period of notice and ensuring that it ends no later than the last day of the trial.

In order to ensure effective monitoring of your new employees, it is strongly recommended that you schedule at least two interviews with them. The first, halfway through the trial period, to take stock of the situation and, if necessary, to inform them of the areas for improvement on which they need to work. The second, at the latest one month before the end of the trial period, so as to assess the months that have passed and to inform them whether the trial period has been approved.

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