

# CERTAIN MATTERS RELATED TO THE LEGAL REGIME OF THE PROBATION PERIOD. DE *LEGE FERENDA* PROPOSALS

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## **Abstract**

*Law 40/2011 significantly changes certain important institutions of Labour Law, among which is listed the probation period. The establishment of probation periods longer than the ones recorded in the past and the renouncement to certain protective measures for the employees, such as, for example, the probation period of at most five days for unqualified workers, is the most controversial news in this field. These matters also occur in the framework of prior inconsistencies and, as a result, a new series of propositions for lege ferenda in this field is needed. Without pretending to be exhaustive in relation to the matters related to this important institution of the labour law, this study is aimed at analysing certain legal matters related to the current applicability of the probation period, providing solutions for a fair regulation of this matter, both for the employer, and the employee.*

**Key-words:** Law 40/2011, individual labour law, probation period, lege ferenda propositions

**JEL Classification:** K31

## **1. Notion**

The probation period is a manner of verifying, by the employer, of the overall skills of the employee (professional, human interaction, etc.) that recommend him/her for filling a specific position, and also, the employee's opportunity to verify whether the position he/she fills-in conform to his/her demands, subject to contract cancellation by both parties, during the probation period or at the end thereof, by a written notification, without the need to explain such decision and without giving a termination notice period.

The applicable law is the Labour Code, Art. 31 – 33, as amended by Law 40/2011<sup>2</sup>.

## **2. Legal Nature**

The probation period is a cancellation clause because both the employer and the employee may renounce each other during the probation period or at the end thereof<sup>3</sup>.

In the doctrine an opinion was issued according to which the probation period would have the legal nature of the condition, taking into account that 'to the extent the employee does not meet the position requirements, his/her labour relationship is terminated'<sup>4</sup>.

The probation period is the most objective possibility for verifying the employee's skills because an examination, as complex as it may be, cannot fully reveal the employee's compatibility with the envisaged position. It is not less true that the employee may also take a decision during the probation period in relation to the conditions under which he/she works for the new employer, having the opportunity to not continue. Even in this framework, the probation period continues to be an action meant to serve, in the first place, the employer's interest.

During the probation period, the employee benefits from all the rights and undertakes all obligations deriving from labour law, from the applicable collective labour contract, from the internal regulation and from the individual labour contract (Art. 31 [4] of the Labour Code). The employee shall be paid for his/her work and shall correspondingly benefit from work seniority.

However, the legal regime of the individual labour contract affected by the probation period is a derogatory one as compared to the one of common law.

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<sup>3</sup> I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, Universul Juridic Publishing House, Bucharest, 2014 p. 292 and following.

<sup>4</sup> M. Volonciu, in *Codul muncii, Comentariu pe articole Vol. I. Articolele 1-107*, Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, CH Beck Publishing House, Bucharest, 2007, p. 156.

As a result, unlike the termination of the individual labour contract by way of dismissal or resignation on the employee's initiative, in the case of the probation period, the only obligation incumbent on the parties is the transmission of the intent to terminate the contract by way of a written notice. The written form is provided by law as an *ad validitatem* condition.

The doctrine has judiciously stated that the renouncement to the termination notice is a derogation from Art. 1276 (2) of the Civil Code, providing for the obligation of the termination notice timeframe in the case of the unilateral denouncement of a contract with successive<sup>5</sup> execution.

The party denouncing the contract cannot be sued by the other party, and this fact is another consequence of the legal regime of the probation period<sup>6</sup>.

For the physically impaired persons, the lawmakers have provided the probation period as the only manner of verifying their professional skills. For these persons, the probation period cannot exceed 45 days. Please note that, although the Labour Code provides for a minimum 30 calendar day period, Law 448/2006 on the protection and promotion of the physically impaired persons' rights<sup>7</sup>, provides a 45 day period, which is applied with precedence over that provided by the Labour Code on the grounds of the principle *specialia generalibus derogant*<sup>8</sup>.

According to Art. 31 (5) of the Labour Code, for the graduated of higher education institutions, the first six months after their initiation in the profession are considered to be traineeship, excepting the professions for which the traineeship period is regulated by law.

The employer has the obligation, at the end of the traineeship period, to issue a certificate endorsed by the territorial labour inspectorate in the area of which the employer's headquarters is located.

The traineeship performance manner is regulated by a special law, according to Art. 31 (5) of the Labour Code<sup>9</sup>.

### 3. Applicability of the probation period.

As a rule, during the period of the individual labour contract, the employee may be subject to a single probation period.

By way of exception, the employee may be subject to a new period in two cases: first, when he/she makes his/her debut at the same employer in a new position or profession, and second, when he/she is to perform his/her activity in a new position under hard, detrimental or dangerous conditions (Art. 32 [2] of the Labour Code).

According to Art. 17 (3) (n), the probation period is subject to the employer's information obligation, aimed at avoiding potential abuses of the employee<sup>10</sup>.

Art. 33 of the Labour Code provides that the period during which successive trial hiring of several persons for the same position are allowed is at most 12 months.

This provision, newly-introduced by Law 40/2011 assures better applicability of this institution from the employer's perspective because, under the former regulation, the employer has the obligation, after verifying the skills of three employees, to hire the fourth one without applying the probation period. Currently, the lawmakers do not provide for limitation in terms of the maximum number of employees who may be tested under a probation period, but they establish a maximum period for the probation for each position (hence, for a position as many employees as necessary may be tested, but within at most 12 months).

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<sup>5</sup> I. T. Ștefănescu, see above. p. 293.

<sup>6</sup> However, when one of the parties denounces the contract in an abusive manner (for example, as a result of tasks impossible to perform being assigned), the other party is entitled to legal action.

<sup>7</sup> Republished in the Official Journal, Part I, no. 1 of the 3<sup>rd</sup> of January 2008.

<sup>8</sup> See R. Dimitriu, *Dificultăți în aplicarea noului regim al perioadei de probă*, in „Tribuna Juridică”, Vol. I, no. 1/2011, p. 19 – 20. Otherwise, see Al. Țiclea, *Tratat de Dreptul muncii. – Legislație. Doctrină. Jurisprudența*, Universul Juridic Publishing House, Bucharest, 2014, p. 437.

<sup>9</sup> It relates to Law 335/2013 on university graduates' traineeship, published in the Official Journal, Part I, no. 776 of the 12<sup>th</sup> of December 2013.

<sup>10</sup> To this effect, also see Al. Țiclea, see above, p. 438.

#### 4. Controversial matters

In terms of applicability of this institution, certain controversial matters can be identified which the legislator should rethink, establishing a fair regime for the conduction thereof.

A first matter relates to a potential accumulation of the probation period with another form of examination of the employees. For example, if an employee passed the contest or examination for the position may he/she be subject to a probation period? Although conceptually one may say that it is not fair for the employees to be subject to several forms of examination in order to fill a position, to date, there is not another legal text which to expressly provide this. Moreover, when the legislator wanted to establish the probation period as a sole possibility for employee skill verification, they expressly provided for this such as in the case of physically impaired persons who can be verified from a professional point of view only by a probation period<sup>11</sup>.

In conclusion, having regard to the current regulation, after passing an examination or a contest for filling a position, the employees may also be subject to a probation period aimed at verifying their skills.

We consider this provision to be of the nature to be to the disadvantage of the employees, who, although passing an examination/contest for filling a position, may subsequently face the possibility of losing their job according to the employer's unilateral will. In order to assure a balance within the labour relationships, this institution should be used by the employee as a single alternative for verifying the employee's skills, but the legislator will have to expressly provide for this.

Another controversial matter relates to the duration of the probation period. Unlike the previous regulations, the legislator established longer durations, namely, at most 90 days for executive positions and at most 120 days for management positions. Moreover, under the former regulation, the unqualified workers could have been subject of at most five days. To date, considering the abrogation of these provisions, the unqualified workers may also be subject to a probation period of at most 90 days, the common law regime applying for them, too.

For the individual labour contracts concluded for a definite period, the legislator have established timeframes of five to 45 working days, according to the contract duration (five days for a duration lower than three months, 15 days for a contract with the duration three to six months and 30 days for the contracts on more than six months, and, for management positions, in the case of the employees hired under an individual labour contract with a duration more than six months, 45 days).

The Constitutional Court has ruled on the extension of the probation periods as follows: 'this legislative solution imposes periods that are relevant from the employer's perspective, during which, the latter is able to assess the professional appropriateness of the employee for the concerned position. The establishment of these maximum periods gives the employer the possibility to collectively assess the employee's professional performance'<sup>12</sup>.

For us, we consider that the duration of the periods is too high, both for the execution positions, and the management ones.

An argument for the legal rearrangement can be found in the contents of the collective labour contracts concluded at the level of the activity sector and of groups of units, concluded under the Law no. 62/2011 (on Social Dialogue). This is a relevant aspect because, in the doctrine, the functions that define the role of the collective negotiation also include the relevance of the subsequent enactment for the matter, because the needs of the social partners are implemented by means of the collective negotiation<sup>13</sup>. On the same line, one said that 'in a way, since the result of the collective negotiation is the collective labour contract, it has an exploratory, verification role, prior to the actual enactment'<sup>14</sup>.

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<sup>11</sup> For the analysis of these matters, also see I.T. Ștefănescu, see above, p. 299.

<sup>12</sup> Constitutional Court Decision no. 383/2011, published in the Official Journal, Part I, no. 281 of the 21<sup>st</sup> of April 2011.

<sup>13</sup> See Al. Athanasiu, *Drept social comparat. Negocierea colectivă în țările occidentale și în România*, University of Bucharest, 1992, p. 6.

<sup>14</sup> I.T. Ștefănescu, *Dreptul colectiv al muncii*, Lumina Lex Publishing House, Bucharest, 1998, p. 94-95.

Below we shall detail the provisions of the collective labour contracts concluded at the level of activity sectors and of groups of units after the entering into force of Law 62/2011 (Law on Social Dialogue) and are still in force, in terms of the matters relating to the probation period regulation.

*In the collective labour contract concluded at the level of the activity sector 'Health. Veterinarian Activities' for the years 2014 – 2015*<sup>15</sup>, in Art. 21, the parties have established probation periods differently, depending on the employees' experience. As a result, for the execution positions, pharmacists, biologists, biochemists, chemist, medical physical culture teachers, physiokinetotherapists, nurses, dentists, speech therapists, etc. with higher education, short-term higher education studies or post-secondary education studies, may be subject to a probation period of 20 days if they have been employed by another healthcare unit, and of 30 days if they have already practised, but not within another healthcare unit. It is only in the case of the initiation in the profession that the employees may be subject to a probation period of 90 days. Other personnel categories, excepting the health professionals, may be subject to a probation period of 30 days. A period of 30 days is also provided for the personnel with secondary education studies who are employed in positions, other than medical and healthcare ones. The health professionals with secondary education studies will be subject to a probation period of 20 days.

In regard to the management positions, the social partners have established a term of 30 days for the employees filling other positions within the unit and are to fill management positions, of 45 days for the employees coming from similar units and are to fill management positions, of 60 days for the employees coming from outside the healthcare system and of 90 days for the initiation in profession on management positions.

Please note that the social partners have established a probation period of five days for the unqualified personnel, reverting to the legal provisions of the previous Law 40/2011.

*The collective labour contract concluded at the level of groups of units under the management of the Bucharest Administration for Hospitals and Medical Services and concluded for the period 2012 - 2014*<sup>16</sup>, undertakes, in the collective labour contract 'Health. Veterinarian Activities', provisions on the probation period, confirming the utility and fairness thereof.

*The collective labour contract concluded at the level of groups of units from the healthcare network of the Ministry of Transportation and Infrastructure for the period 2012 - 2014*<sup>17</sup> has also undertook provisions on the probation periods also maintaining the provision on the five day period for unqualified workers.

*The same provisions are also undertaken in the collective labour contract for the Group of hospital healthcare units under the coordination of the Maramureş Public Health Division for the years 2012 – 2013*<sup>18</sup>. However, the parties have not maintained the provision according to which the unqualified personnel cannot be subject to a period longer than five days.

*In the collective labour contract concluded at the level of the activity sector 'Pre-University Education', concluded for the period 2012 – 2014*<sup>19</sup>, in Art. 66, the social partners have established a regime distinct from that of the Labour Code for the probation periods. Therefore, for the employees from the pre-university education hired under an individual labour contract with an indefinite duration or under a management contract, the parties have established the following periods: 30 calendar days for the non-didactic personnel and the auxiliary didactic personnel and 90 calendar days for the management, guidance and control personnel.

Another inconsistency of the legislator relates to the durations, which are established in calendar days for the individual labour contracts concluded for an indefinite duration, and in working days for the individual labour contracts concluded for a definite duration, respectively.

We are of the view that the duration of the probation periods should be symmetrically regulated for both categories of contracts; moreover, establishing the duration in working days

<sup>15</sup> Recorded under no. 1726 of 29.11.2013

<sup>16</sup> Recorded under no. 58692/20.06.2012.

<sup>17</sup> Recorded under no. 58804/2012

<sup>18</sup> Recorded under no. 58705/21.06.2012. The applicability thereof was extended by Addendum no. 722/16.06.2014

<sup>19</sup> Recorded under no. 59276 of 2012.

appears to be more relevant, because, during the non-working days, the employees cannot be verified and, in their turn, they cannot assess the conditions offered by the employer.

## 5. Conclusions and *de lege ferenda* proposals

Given the above-mentioned, we consider that the legal regime of the probation period should be improved by the legislator with a view to assuring the balance between the employer and the employee as part of the labour relationships.

First of all, we are of the view that the legislator should provide that the probation period cannot be cumulated with another form of employee evaluation. To date, taking the legal framework into consideration, the legislator may also appeal, additionally to contests and examinations, the probation period, which appears to be to the disadvantage of the employees.

Second, the legislator should make legal arrangements concerning the durations that are fairer for both parties. The terms of 90 calendar days for execution position and 120 days for management positions, respectively, in the case of the individual labour contracts concluded for an indefinite duration, appear to be excessively high. This, also in framework of the former regulation, under which the legislator established much more reasonable terms, providing even a term of at most five working days for unqualified workers. This last measure seemed to be judicious considering the qualification level of unqualified workers.

Under this framework, we are of the view that the legislator should have provided a more reasonable term for the probation periods, and potentially, to revert to the previous provisions, namely, 30 days for execution positions and 90 days for management ones. The analysis of the collective labour contracts concluded under Law 62/2011 (on Social Dialogue) indicates that, under some of them, as already detailed, the social partners have configured an objective legal regime for the applicability of this institution, using criteria covering the specialisation, professional experience, work within the concerned unit, etc. We are of the view that the legislator, taking inspiration from these provisions, should transpose them also in the contents of the labour legislation.

Another *de lege ferenda* proposal is based on an observation from the legal doctrine relating to the possibility of providing for a termination notice in the case of the written notification under which a party renounces to the contractual partner<sup>20</sup>.

It is a reasonable opinion especially nowadays, when the duration of the probation periods is very high. To date, both the employer, and the employee may renounce each other under a simple written notification, which may cause inconveniences for the contractual partner, especially when a higher period is provided, which may extend over several months.

By providing a short termination notice term (at most five days), a fair relationship between the contractual parties would be assured - similarly to the case of the unilateral denouncement of the individual labour contracts not affected by the probation period - therefore, the employer or the employee having the time to reorganise if the contractual partner wishes to terminate the contract.

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<sup>20</sup> C. Gâlcă, *Scurtă analiză a modificărilor Codului muncii (I) – Încheierea contractului individual de muncă*, in „Revista de Drept Social” (*Social Law Magazine*) no. 3/2011, p. 8