

Trial period and illness: What is important to know!

An employee's incapacity for work has an impact on the length of the trial period. More specifically, the trial period may be extended in the event of illness or leave for family reasons on the part of the employee.

I. What about the extension of the trial period?

Pursuant to Article L. 121-5 of the Labour Code, the trial period is automatically extended for the duration of the suspension thereof, i.e. by as many days as the employee is absent because of illness. Such an extension may not exceed one month, however.

Illustration: the employment contract provides for a trial period of 6 months, from 15 January to 14 July.

If the employee is ill from 1 to 15 February during this trial period, said period will be extended by 15 days, i.e. until 29 July.

If the employee is ill from 1 February to 10 March, i.e. a period of over one month, the trial period will be extended until 14 August, as the extension cannot exceed one month, even if the period of incapacity for work is longer than one month.

II. What about an employee who falls ill during the trial period while the employer wishes to terminate the contract?

The employee is covered by special protection against redundancy in the event of incapacity for work, provided two obligations have been fulfilled, namely s/he:

- informed the employer of his or her incapacity for work as of the first day of absence; and
- Submitted the medical certificate by the third day at the latest.

If the employee has met these two conditions concurrently, s/he is protected against the termination of his or her trial contract by the employer, either with notice or effective immediately, for as long as the incapacity for work lasts.

In the event of incapacity for work until the end of the trial period, such protection would prevent the employer from terminating the trial contract, which would then become a final contract. To avoid such a situation, the labour courts accept that the employer can regain the option of terminating the



trial contract, but only when the trial period has already been extended on account of the employee's illness.

In other words, to prevent a trial contract from becoming final, the employer may dismiss the employee in spite of his or her illness, but will have to wait until the **very last moment**. Case law is very strict and does not grant any flexibility on the date to be chosen by the employer to terminate the contract. Thus, the end date of the notice period must correspond to the end date of the extended trial period. Otherwise, the dismissal will be considered unfair. To that end, it suffices to calculate the notice period retroactively from the last day of the extended trial period.

A decision by the Superior Court of Justice of 2 April 2016 ruled that in such a situation, **the period of notice runs from the very day on which the employer/employee posts the letter of termination/resignation**.

Illustration: For an open-ended contract commencing on 3 June 2019 with a trial period of 6 months expiring on 2 December 2019, the notice period will be 24 days. The employee was ill for 1 month. The trial period will therefore be extended until 2 January 2020.

The employer will have to terminate the contract on 10 December in order for the notice period to end on 2 January 2020

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