

NEW REGULATION OF THE GRADUATES OF HIGHER EDUCATIONAL INSTITUTION'S PROBATION PERIOD

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Abstract

Romanian Labor Code – Law no. 53/2003¹ has stipulated from its modification in 2011 (operated by the Law no. 40/2011), in art. 31, that the persons who had graduated a higher educational institution shall be considered in probation period during the first months after their debut in profession. Those professions in which the probation is regulated by special laws shall be exempted. The Labor Code did not developed the regulation of this kind of probation period, but it mentions that the modality of performing the probation period for the graduates of higher educational institutions shall be regulated by a special law.

After almost three years after the Romanian Labor Code had been modified and begun to be applied the new normative content, the legislator enforced the regulation of the special law having object the probation period of the graduates of higher educational institutions (Law no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions²).

The present paper represents a juridical analyze of the probation period for the graduates of higher educational institutions' normative framework.

Keywords: *probation period, probationer, mentor, probation period contract, employer, evaluation, evaluation commission*

Introduction

It is a specific of the labor market that the persons who entered in a specific profession have to go through a specific probation period. This probation period has specific main purposes consisting in the graduate's accommodation at the professional activities he is going to perform and the verification by the employer of the graduate's abilities.

The Romanian Labor Code – Law no. 53/2013, republished in 2011 – is regulating two form of probation period: (1) the principal form of probation period, which represents the first stage of the individual labor contract's execution, for every employee [art. 31 paragraphs (1) – (4), art. 32-33]; (2) the specific probation period for the graduates of higher educational institutions [art. 21 paragraphs (5) and (6), correlated with Law no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions).

We are referring in the present paper only to the specific probation period of the higher educational institutions' graduates who go through this probation as employees. The Labor Code exempts the probation period for those professions which are regulated by special laws (as specific professional statutes).

The Romanian Labor Code's provisions having object the probation period of higher educational institutions' graduates are few and extremely generally. The Code mentions only the following aspects:

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¹ Republished in the "Official Gazette of Romania", 1st part, no. 345 of 18 May 2011.

² Published in the "Official Gazette of Romania", 1st part, no. 776 of 12 December 2013. The regulation will come into force after 90 days from its publication.

- the duration of the probation period is 6 months;
- the employer has the mandatory obligation to issue a certificate at the end of the probation;
- the attribute of the territorial labor inspectorate within the territorial jurisdiction of the employer's headquarter to endorse the certificate;
- the exemption from the Labor Code probation period's regulation of those professions in which the probation is regulated by special laws and
- the normative solution consisting in developing the graduates of higher educational institutions probation period's regulation through a special law.

This special law is Act no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions. The law had been published in the Official Gazette in December 2013, but the regulation will come into force at the beginning of March 2014 (after 90 days after the law was published).

The Law no. 335/2013 regulates the following aspects:

- the general provisions having object the purpose of the probation period for the graduates of higher educational institutions and the significance of the specific terms and expressions used by the legislator;
- the probation period contract;
- the rights and the obligations of the probation period contract's parts;
- the organization of the probation period;
- the probationer's evaluation procedure at the end of the probation period;
- the ways of the probation period's funding;
- the juridical liability for the inobservance of the law provisions.

We assume that is important to correlate properly Labor Code's provision regarding the conclusion and the execution of the individual labor contract with the specific provisions of the probation period's regulation in order to determine in a correct manner the status – rights and obligations – of the parts and the specific relation between the individual labor contract and the probation period contract, which are concluded by the same parts.

1. Romanian Labor Code's provisions having object the general regulation of the probation period

a) In order to check the abilities of the employee, on the conclusion of the individual labor contract, a trial period of 90 calendar days at the most may be established for executive positions, and 120 calendar days at the most for management positions [art. 31, paragraph 1]³. The check of professional abilities when employing disabled persons shall be based only on a trial period of 30 calendar days at the most⁴.

Throughout the trial period or at the end of it, the individual labor contract may be terminated exclusively by a written notification, without notice, following the initiative of either party, without being necessary its motivation [art. 31, paragraph 3].

³ For the exhaustive analyze of the trial period, see I.T. Ștefănescu, *Theoretical and Practical Paper for Labor Law*, Second edition, Universul Juridic Editor, Bucharest, 2012, p. 275-285; Al. Țiclea, *Paper for Labor Law*, Sixth Edition, Universul Juridic Editor, Bucharest, 2012, p. 421-425; Ș. Beligrădeanu, I.T. Ștefănescu, *The Labor Code's regulation of the trial period*, in "Dreptul" no. 8/2003, p. 24-32; C. Belu, *The new Labor Code's regulation of the trial period*, in Romanian Labor Law Magazine no. 2/2004, p. 27-31; Ș. Beligrădeanu, *Probation period – recantation clause and its consequences regarding the individual labor contract's cessation*, in "Dreptul" no. 9/2007, p. 67-69.

⁴ We mention that the art. 83, paragraph 1, subparagraph d) from the Law no. 448/2006 regarding the protection and the promotion of the disabled persons (republished in the "Romanian Official Gazette", part I, no. 1 of 3rd January 2008) the duration of the trial period is 45 days. Taking into account that the Law no. 448/2006 is a special regulation in relation with the Labor Code, its provisions are first applicable. See I.T. Ștefănescu, *op. cit.*, p. 282. For the opposite interpretation, see Al. Țiclea, *op. cit.*, p. 422.

During the trial period, the employee shall benefit from all the rights and have all the obligations stipulated in the labor legislation, the applicable collective labor contract, the internal regulations, as well as the individual labor contract.

b) For graduates of higher educational institutions, the first 6 months after their debut in profession shall be considered probation period. Those professions in which the probation is regulated by special laws shall be exempted. At the end of the probation, the employer shall mandatory issue a certificate, which shall be endorsed by the territorial labor inspectorate within the territorial jurisdiction of its headquarters.

The modality of performing the probation mentioned above shall be regulated by special law.

c) During the progression of an individual labor contract, there may only be one trial period [art. 32, paragraph 1].

As an exception, an employee may be subject to a new trial period if he starts up in a new position or profession with the same employer, or is to perform his activity in a work place under difficult, harmful, or dangerous conditions.

The trial period shall represent length of service.

The period when successive trial hiring of more persons for the same job may be made shall be of maximum 12 months [art. 33].

d) The contractual clause referring to the probation period (the one which is regulated by art. 31, paragraph 1 from Labor Code) represents also a mandatory element of the employer's obligation to inform [art. 17 from Labor Code]; the person selected for employment or, as applicable, the employee, shall be informed about the length of the trial period [art. 17, paragraph 3, subparagraph n)].

The trial period is an employer's right. So, it is possible that the employer to inform the person selected for employment or the employee (who shall perform another kind of work) that the length of the trial period is shorter than the one stipulated by art. 31, paragraph 1 from Labor Code, or even that the employer renounces to the trial period.

2. The trial period of the high educational institution's graduates. Purposes and specific terms

a) Art. 1 paragraph (2) from Law no. 335/2013 stipulates that the specific purposes of the probation period are:

- to assure the higher educational institutions' graduates transition from the educational system to the labor market;
- to consolidate the professional competences and skills in order to adapt the graduate to the workplace's practical demands and requirements;
- to assure a quicker integration in the labor process;
- to allow the probationers the conditions to acquire experience and length of service or of specialty.

b) The law mentions in art. 2 the main terms and expressions which are specific for this regulation:

- *the probationer* is the debutant in profession, hired on the individual labor contract, excepting the persons who prove that they had practice a professional activity in the same field, previous their graduation;
- *the probation period contract* is the contract signed by the employer and the probationer, annex to the individual labor contract concluded by the same persons;
- *employer* is the person who has this status based on the Labor Code's provisions;
- *mentor* is the person indicated by the employer who coordinates the probationer during the probation period and participates at the evaluation procedure (at the end of the probation period);

- *evaluation* is the procedure to finalize the probation period and which is accomplished by the evaluation commission;

- *the probation period* is the interval between the moment of probationer's employment and the moment of the probation period's finalizing, which ends with issue of a certificate signed by the employer;

- *evaluation commission* is the commission constituted on members designated by the employer and which evaluates and issues to each probationer an evaluation report at the end

3. *The probation period contract*

a) The probationer is an employee. In order to obtain this status, he needed to conclude an individual labor contract. Based on the provisions of art.16 from the Law no. 335/2013, the probation period contract is concluded at the same time with the individual labor contract.

b) The length of the contract is 6 month. Are exempted those cases regulated by special laws in which there are stipulated other lengths for the duration period.

We assume that the probation period length stipulated by art. 31, paragraph 5 from Labor Code and art. 16, paragraph 1 from Law no. 335/2013 represents a maximum. The employer and the employee (which could be also probationer) have the right to diminish the length of the duration period and also to renounce at his right to verify the professional competences and skills of his new employee through probation period. As we mentioned above, the duration period is a right of the employer and the renounce to it is legally possible⁵.

c) The form of the contract is the written one. The obligation to conclude the probation period contract in written form belongs to the employer.

The parts' rights and obligations regarding the performing of the probation period are stipulated in the probation period contract and, in addition, in the collective labor agreements and/or in the internal regulations.

The monthly base wage of the probationer is determined through the individual labor contract, based on regular work duration of 8 hours per day and 40 hours per week (full time work).

d) The probation period contract shall be suspended (art. 19, paragraph 1 from Law no. 335/2013):

- if the individual labor contract is suspended;
- if the probationer is on sick leave for more the 30 days.

The probation period contract can be terminated as follows (art. 22 from Law no. 335/2013):

- rightfully;
- based on the parties' consent, on the date agreed upon by them;
- as a result of one of the parties' unilateral will, in the cases and under the limitation terms stipulated by the law.

If the probation period contract is terminated for the reasons which are not imputable to the probationer, he can continue the probation period till the accomplishment of the 6 month length if in a term of 60 days he concludes a new individual labor contract (and a new probation period contract) with another employer.

After the termination of the probation period contract, the employer can employ only once another probationer on the same workplace.

⁵ Only for the employee Labor Code prohibits the renounce or diminishing of a right. Art. 38 stipulates: "Employees may not waive the rights acknowledged to them by the law. Any transaction the aim of which is to waive the rights recognized by the law to employees, or to limit such rights shall be null".

4. The rights and the obligations of the probation period contract's parts

- a) The probationer has the following rights:
- to benefit of the mentor's coordination and support;
 - to be set a program of activities suitable for his workplace, which difficulty level and complexity to gradually increase during the probation period;
 - to benefit of an objective evaluation;
 - to be assured the necessary time for individual training, the access to the sources of information necessary for his improvement and which allow him to consolidate his knowledge;
 - to participate at the professional training organized by the employer for probationers;
 - to receive the evaluation report or the certificate issued at the end of the probation period;
 - to contest the evaluation reference issued by the evaluation commission, if appropriate.
- b) The probationer has the following obligations:
- to prepare his professional skills and competences on the field he perform the probation;
 - to organize and manage an own evidence for his professional activities;
 - to observe the tasks provided by the mentor and by his superior;
 - to consult the mentor in order to accomplish the tasks allocated by the compartment's leader;
 - to respect the confidentiality regarding the entire aspects of his activity, observing the internal regulations issued by the employer;
 - not to perform during the probation period activities which is competing with the one performed for his employer;
 - to participate at the evaluation procedure.
- c) The employer has the following rights:
- to set on the probationer, through his job description, the attributions in the field the probation period is performed;
 - to harness the theoretical and practical probationer's knowledge in the work process;
 - to exercise the control over the way in which the job duties are carried out;
 - to find whether departures from discipline have taken place and to apply adequate sanctions, under the law.
- d) The employer has the following obligations:
- to designate a mentor who will coordinate an support the probationer to achieve the specific objectives and the level of performance settled on the probation period's program;
 - to set on a work program in the field of activity in which the probation is performed;
 - to assure a proper endowment – logistic, technical and technological – necessary to harness the theoretical and practical knowledge received by the probationer during the probation period;
 - to evaluate the probationer's level of knowledge at the termination of the probation period;
 - to issue the probationer a certificate proving the period of probation, the competences and the skills acquired during the probation period.
 - not to use the probationer in activities which are not stipulated in the probation period contract.

5. The organization of the probation period

a) The probation period is performing based on a *program of activities* approved by the employer, at the proposal of the department's leader where works the probationer.

The program of activities on the period of probation period has to include:

- the objectives and the quantifiable level of performance based on the evaluation shall be accomplish;

- the planning of the activities which the practitioner shall held, depending on the level of competences and skills needed to be achieved during the probation period.

b) The mentor is designated by the employer, based on the proposal of the department's leader where the probationer will work. In order to be mentor, the person has to fulfill the following demands:

- the mentor has to be an employee;

- the professional experience of the mentor, in the field of probation activity, is minimum 2 years;

- not to be disciplinary punished by the employer;

- the mentor can coordinate the activity of at most 3 probationers.

The mentor has the following obligations:

- to coordinate the probationer's activity on the entire probation period;

- to propose to the employer ways to accomplish the probationer's tasks;

- to supervise the manner of accomplish the specific demands of the probationer's workplace;

- to be member in the evaluation commission;

- to prepare a report regarding the probation period, if his individual labor contract ends before the termination of the probation period or the mentor is disciplinary punished by the employer (and its status ends because of that punishment);

- to prepare the probation period report, 10 days before the termination of the probation period.

6. The probationer's evaluation procedure at the end of the probation period

a) The evaluation commission has the obligation to prepare an evaluation report 5 days before the termination of the probation period. The evaluation report has to include the following elements:

- the description of the activity performed by the probationer;

- the degree of achievement by the probationer of the objectives and the level of performance set on by the activities program;

- the competences and the skills achieved by the probationer, the way of fulfillment of the specific attributes and the contractual clauses;

- the probationer's behavior and degree of implication during the probation period;

- conclusions regarding the probation period;

- other mentions.

The employer issues the certificate of probation period's termination based on the commission report in 15 days after the receiving of the report. The certificate has to be endorse by the territorial labor inspectorate within the territorial jurisdiction of the employer's headquarter.

b) The evaluation accomplished by the commission has to be based on the following elements:

- the analyze of the objectives and indicators' degree of fulfillment;

- the assessment of the competences' level of consolidation and practical skills needed for the exercise of the occupation in the specific field of the probation;

- the probation period's report.

If the result of the evaluation is negative, the employer shall issue an attestation recognizing the completion of the probation period. The probationer can contest the negative evaluation and if the result is also negative, he can address to the court.

Conclusion

The actual legal framework of the probation period allows distinction between the probation period of the employees who are at the beginning of the activity for their new employer and the probation period of the graduates of higher educational institutions.

The probation period in case of the graduates of higher educational institutions is regulated by Labor Code – art. 31, paragraph 5 – and Law no. 335/2013.

The Law no. 335/2013 is a necessary regulation because the act contains the development of the principal aspects of the probation period in case of the graduates: the general provisions having object the purpose of the probation period for the graduates of higher educational institutions and the significance of the specific terms and expressions used by the legislator; the probation period contract; the rights and the obligations of the probation period contract's parts; the organization of the probation period; the probationer's evaluation procedure at the end of the probation period; the ways of the probation period's funding; the juridical liability for the inobservance of the law provisions.

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