

PROBATIONARY PERIODS IN THE DEPARTMENT OF DEFENSE

Section 1105 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 amended title 10, United States Code (U.S.C.), by adding section 1599e. In accordance with the new statutory requirement, the Department is updating probationary period policies and procedures, as appropriate.

Key points:

- Section 1599e requires that the appointment of “covered employees” within the Department of Defense (DoD) shall become final only after the employee has served a probationary period of two years.
- Covered employees include individuals who are appointed to permanent positions in the competitive service and any individuals who received career appointments in the Senior Executive Service (SES) within the DoD on or after November 26, 2015. This change does not apply to individuals appointed prior to that date. This change also does not apply to individuals appointed in the excepted service.
- Other than the change in the length of probationary service as specified above, there are no changes in determining when a probationary period is required. Employees who have completed a probationary period under an initial appointment in the competitive service, having attained full appeal rights to the Merit Systems Protection Board, do not have to serve another or extended probationary period under this authority. There are no changes for crediting prior Federal civilian service toward completion of a probationary period for competitive service employees, as outlined in 5 C.F.R. § 315.802(b) and 5 C.F.R. § 317.503(d)(4) for members of the SES. There is also no change in crediting periods of absence under 5 C.F.R. §§ 315.802(c) and 317.503(d)(1)-(3).
- The NDAA for FY 2016 also allows the Secretaries of Defense and the Military Services to exercise their discretion to extend a covered employee’s probationary period past the new two year requirement. Departmental policy for this provision is currently under development

Questions & Answers

Q1: The NDAA for FY 2016 requires that appointments for certain employees are final only after the employee has served a probationary period of two years. Why did Congress make this change to the law?

A1: Extending the probationary period will allow the Department additional time to assess and address an employee's performance. To that end, the Congress stated that the Department should take steps to ensure that DoD supervisors are aware of the range of tools and guidance available to assess and address employee performance, and that to be beneficial, the longer probationary period must be supported by effective performance management practices.

In April 2016, DoD began phased implementation of the Defense Performance Management and Appraisal Program, which aims to create a fair, credible, and transparent performance appraisal process throughout the Department, and calls for institutionalizing a culture of high performance through greater employee/supervisor communication and accountability, increased employee engagement, and added transparency in these processes. The Department has also published performance management tools and resources for supervisors and employees on a CAC-enabled webpage.

Q2. Who is considered a covered employee by the new law?

A2. Covered employees include any individuals who are appointed to positions in the competitive service, and any individuals who received career appointments in the SES in the DoD on or after November 26, 2015.

Q3. The NDAA for FY 2016 was effective on November 25, 2015. Was this also the effective date of two year probationary period? Why were new employees hired on or after this date not notified when they came on board?

A3. The effective date of the 2-year probationary period was November 26, 2015. The Department has been working diligently since the enactment of the law to draft policy for implementation of the law's discretionary provisions. We are also engaging with unions with National Consultation Rights.

Q4. Does the two year probationary period apply to employees hired prior to that date, or who were hired under a one year probationary period? Is this a change to employees' conditions of employment?

A4. The two year probationary period applies to covered employees appointed on or after November 26, 2015. Those appointed before the effective date are not affected.

No, the two year probationary period is not a change to employees' conditions of employment. In accordance with the law enacted via the NDAA for FY 2016, covered employees appointed on or after November 26, 2015, began serving a two year probationary period as of the date of their appointment, regardless of whether they were notified at the time of their appointment.

Q5. New employees are generally notified about a probationary period prior to coming on board, so if employees were not notified, are they still subject to the new two year probationary period?

A5. Yes, by law, covered employees are subject to the two year probationary period as of the date of their appointment, regardless of whether they were notified of the requirement to complete a two year probationary period.

Q6. My SF-50, which is the official notification of personnel action, states that I have a one year probationary period. What effect does the new law have in this case?

A6. By law, covered employees are subject to the two year probationary period as of the date of their appointment, notwithstanding their SF-50. SF-50s for new appointees should be properly notated.

Q7. What does this change really mean? Does the two year probationary period affect appeal rights? How about credit for prior Federal civilian service?

A7. Individuals who are terminated during their probationary period have limited appeal rights to the Merit Systems Protection Board (MSPB). This change in law extends those limitations for an additional year. The change in law does not change other determinations, including when a probationary period is required or the rules for crediting prior Federal civilian service.

Q8. Under what conditions may a supervisor extend the probationary period beyond two years? How will employees be notified?

A8. Departmental policy for this provision of the law is currently under development. The policy will include requirements for notifying employees if the probationary period is extended beyond the initial 2 year period.

Q9. What are the bargaining obligations for implementing the new two year probationary period?

A9. If employees who are subject to the two year probationary period are included in collective bargaining units, the labor organizations having representational rights for those positions must be informed, as appropriate. Because the 2-year probationary period was directed by law, collective bargaining obligations are limited to the procedures to be followed in bringing conflicting provisions of labor agreements, if any, into conformance with the new statutory requirement, as well as to any procedures used for notifying employees in the bargaining unit.

Q10. How does this affect other personnel actions, such as employee promotions, time-in-grade, and within grade increases? Does the longer probationary period affect an employee's eligibility for such actions?

A10. Employees who otherwise meet established performance expectations for their positions remain eligible for within grade salary increases and career ladder promotions, regardless of the fact that they may also be serving a probationary period.

Q11. Does the two year probationary period only apply to employees new to DoD or does it also apply to current DoD employees?

A11. The requirement to serve a two-year probationary period applies to covered employees appointed to positions within the DoD on or after November 26, 2015. Current DoD appointees serving a probationary period who were appointed before November 26, 2015, are not affected by the new law and will continue to complete a one year probationary period. Current DoD employees who completed a probationary period prior to the effective date of the new law will not be required to serve a new probationary period as a result of the new law.

However, any covered employee, regardless of whether he/she is a current DoD employee or an employee transferring from another agency, may be required to serve a two year probationary period if the individual is appointed to a permanent position within the competitive service at the DoD. Notwithstanding the change in the length of the probationary period from one to two years, there are no changes in determining when a probationary period is required. However, employees who have completed a probationary period under an initial appointment in the competitive service, having attained full appeal rights to the MSPB, do not have to serve another or extended probationary period under this authority (see 5 U.S.C. §7511 and *McCormick v. Department of Air Force*, 307 F.3d 1339 (2002)).

There are also no changes for crediting prior Federal civilian service that counts toward completion of the two year probationary period (see 5 C.F.R. §315.802(b) for competitive service and 5 C.F.R. §317.503(d)(4) for the SES).

Q12. If a DoD employee is appointed to a different position in another agency within the Department and has already completed a probationary period, what rules apply for serving another probationary period? Have the rules changed with the enactment of the new law?

A12. Notwithstanding the change in the length of probationary period from one to two years, there are no changes in determining when a probationary period is required. Employees who have completed a probationary period under an initial appointment in the competitive service, having attained full appeal rights to the MSPB, do not have to serve another or extended probationary period under this authority.

However, employees who have not completed a probationary period, and are appointed to different position in another agency within the Department, may be required to complete a new probationary period.

Q13. Does the two year probationary period also apply to employees newly appointed to supervisory positions?

A13. The supervisory probationary period, as required in accordance with 5 C.F.R., part 315, subpart I, is not affected by the new two year probationary period.

However, those employees who are newly appointed to a supervisory position who are required to serve both a supervisory probationary period and a probationary period under 10 U.S.C. §1599e, will serve the supervisory probationary period and the two year probationary period concurrently.

Q14. Isn't a one year period more than sufficient for a supervisor to assess whether an employee should continue in federal employment? Why aren't supervisors simply doing their jobs? What is the Department doing about better supervision and training for supervisors to manage employee performance?

A14. Due to the increasingly complex nature of much of the work being performed by Department of Defense employees, one year often does not allow sufficient time for a supervisor to form conclusions regarding the performance of a new employee, either because the employee spends much of the first year in training before beginning work in his/her assigned area, because individuals often rotate through various offices within his/her first year of employment, or because occupations are project based and an employee may not have an opportunity to demonstrate all of the skills associated with their position. Regardless of the reason, the longer probationary period offers employees a greater opportunity to showcase their talents and for supervisors to properly assess their capabilities.

Q15. The current system default for probationary periods in the Defense Civilian Personnel Data System is one year. Will the system be updated in accordance with the new law? How should two year probationary periods be coded in the system?

A15. The Defense Civilian Personnel Data System (DCPDS) will be updated to default to a two year probationary period on or about December 18, 2016. In the interim, two year probationary periods may be coded in DCPDS via a manual override of the default date by deleting the default date and entering the correct two year probationary period end date.