The much debated 90-day trial period becomes effective from 1 March 2009. It effectively allows employers with fewer than 20 employees to terminate the employment of new staff during their first 90 days of employment without risk of a personal grievance for unjustified dismissal.

The most important aspect is that it only applies to employers who have less than 20 employees at the time the relevant employment agreement was signed. There will be a significant number of employers - and employees - for whom the legislation is not relevant. For those employers for whom it is relevant, it is important to remember that other employee protections including minimum rights of pay, and the ability to claim for unlawful discrimination or serious breaches of good faith, remain. Trial periods can only be entered into once and cannot be rolled over.

There are a number of issues which remain to be ironed out in practice and it will be interesting over the next year to see how the employment court deals with this.

The legislation undoubtedly has an upside for some employers, in speaking with clients they have been overwhelmingly in their support for this legislation. Some have commented how they wish it had been implemented long ago as they may not taken a risk on some potential staff members due to the "hassle of getting rid of them". Even with this law employers will have to move quickly to be able to rely on the new law. Experience has shown that, recognition of performance concerns tends to evolve slowly so the reality is that many will not take steps within the 90-day timeframe.

To rely upon this law you will need to rewrite your employment agreement offers to new staff. A trial period is not automatic, but must be agreed to between the employer and employee in good faith. Given that it can be negotiated out, those employees with bargaining power and unions are likely to try and do so. One unintended consequence of the legislation may be that more people will move to collective agreements with the unions using this as a selling point.
While the new legislation does clarify when an employer will be held to have less than 20 employees - i.e. as at the date the employment agreement was entered into, it is silent on who will be counted as employees. On its face, it appears that part-time and casual employees will be counted. Employers with fluctuating workforces will need to bear this in mind. Until clarification comes from the Court you should think head count rather than full time equivalency.

In order to be protected under the trial provision an employer must give notice before the end of the trial period. You cannot get to the end of the 90 days and go "thanks but no thanks". Even if the notice itself does not expire until after the 90 days, there will still be no ability to bring a claim for unjustified dismissal. However, if you find yourself in a position where you have given the employee notice, something happens during that notice period and then you want to dismiss (and it is after the 90 days) this can be challenged in the usual way.

Some larger organisations could fall within the trial period legislation if they employ staff through smaller subsidiary companies. If these subsidiaries in fact employ less than 20 employees then as drafted they will be covered under the trial period legislation. Some employers may set up companies for this purpose.

The introduction of trial periods may lead to more creative claims by employees. For example, the obligations of good faith remain during a trial period, although the specific good faith obligation to consult and provide information prior to dismissal is excluded. Arguably then it will still be possible for employees to pursue a penalty claim for breach of good faith. Claims for unjustified disadvantage will still remain.

Confusingly the new “trial” period sits alongside, rather than replacing, the existing ability to contract for a “probationary” period. Currently the Employment Relations Act specifically provides that parties can agree in writing on a probationary period. This can be of any length and may have a shorter notice period but employees retain the right to claim unjustified dismissal if dismissed unfairly. There is now no reason an employment agreement could not contain both types of period - which may lead to confusion.

Employees who are dismissed within the 90 days will retain benefit support. The benefit stand down period does not apply to those employees who were receiving assistance but were then hired and dismissed under the 90 day provisions.

While there are a number of issues that might arise, we remain of the view that the 90-day trial period is a major change in principle rather than a major change in practice. Overall, we consider that the existence of trial periods should not be seen by employers as a substitute for good recruitment or good management. For the most part, we doubt employers will rely on them this way, because the costs - in terms of recruitment, culture and morale - will not justify that sort of approach.