

MEMORANDUM

DATE: May 24, 2022

TO: Personnel Officers

FROM: /s/ **LORI GILLIHAN**
Lori Gillihan
Chief, Policy Division

SUBJECT: PROBATIONARY PERIODS

The Third District Court of Appeal recently issued a published decision in *Nancy Michaels v. State Personnel Board* (2022) 76 Cal.App.5th 560, interpreting Government Code section 18525's definition of "appointment" as it relates to calculating the one-year period for voiding an unlawful appointment under section 19257.5. The court held that, under section 18525, the appointment occurs on the date the employee accepts the offer of employment from the appointing authority. While the court's holding was limited to the timely voiding of a good faith unlawful appointment, the decision has raised the question of whether the court's reasoning extends to the timeframe for rejections during probation.

The court appeared to recognize a distinction between the timeframe involved in voiding an appointment and evaluating an employee's performance during the probationary period when the court referenced the following language in the trial court's decision,

[The departments] worry that if section 18525's definition of the term 'appointment' applies to sections 19170 and 19171, then an employee's probation period could conceivably begin before their actual start date. Given that the purpose of a probationary period is to give an employer the opportunity to observe and evaluate a new employee's job performance, this would indeed be an absurd result. [Citations.] If this case involved the timeliness of CalPERS' rejection of Michaels during her probationary period, the Court might agree that section 18525's definition of 'appointment' did not apply. But, again, that is not the situation in this case.

Michaels v. State Personnel Board, supra, 76 Cal.App.5th at 571.

Based on the above-referenced discussion, the *Michaels* decision does not appear to be determinative as to when a probationary period commences. It is important to keep in mind that the purpose of a probationary period is to permit the employer the opportunity to “evaluate the work and efficiency of a probationer in the manner and at such periods as the department rules may require.” (Gov. Code, § 19172; *Wiles v. State Personnel Bd.* (1942) 19 Cal.App.2d 344, 346.) The opportunity to evaluate an employee’s performance cannot logically or practically occur until the employee reports to work. (*Department of Corrections & Rehabilitation v. State Personnel Bd.* (2015) 238 Cal.App.4th 710, 721, “In practical terms, that ‘opportunity to observe’ an employee’s work conduct begins on the first day of his or her service in the appointed position.”) The period between the employee’s acceptance of an offer of employment and the date the employee reports to work would likely be outside the probationary period where an employer could observe the employee’s performance.

Significantly, the Legislature has granted the Board authority to extend probationary periods when the probationary period is insufficient to evaluate an employee’s performance due to absences. (Gov. Code, § 19170.) Under California Code of Regulations, title 2, section 321 (Rule 321), employees are required to work a requisite number of hours attendant to their six-month or one-year probationary period regardless of when an employee may have accepted the offer of employment. If an employee has not completed those hours within the probationary period, the employer may automatically extend the probationary period up to the date the employee completes those hours. The automatic extension may cover the period between the employee’s acceptance of the offer of employment and the period the employee reported to work. In addition, Rule 321 also provides for other specified circumstances in which an extension may be granted by the Board if the employer has not had the opportunity to evaluate the employee’s performance. For situations where the employer is considering a rejection but fears the rejection may be untimely based on the date the employee accepted the offer of employment, the employer may want to consider its options under Rule 321.

While this memorandum does not provide any definitive answer as to the applicability of *Michaels* to probationary periods, it nonetheless provides employers with some guidance as to the purpose behind the probationary period and the option of extending the probationary period when considering the possible rejection of an employee during probation.

The Board is presently exploring legislative amendments to provide some clarity to this issue.