

# HR COMPLIANCE OVERVIEW

## Performance Improvement Plan Best Practices

Employee discipline is one of the most challenging aspects of workforce management and can take various forms. One common type of employee discipline is the use of a performance improvement plan (PIP). A PIP is typically a formal, written document that outlines an employee's performance or behavioral deficiencies, sets forth clear and quantifiable goals, and establishes a timeline by which an employee must successfully complete such goals.

In drafting and implementing a PIP, employers have to contend with a variety of considerations—including mitigating any legal risks and ensuring fair treatment of all employees. Effective practices when creating and carrying a PIP include:

- Establishing a lawful and nondiscriminatory reason for the PIP;
- Setting clear and attainable goals;
- Drafting an effective PIP with a reasonable timeline;
- Effectively communicating the PIP process with the affected employee; and
- Properly documenting the entire PIP process.

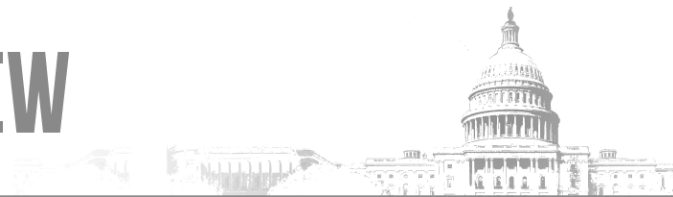
### ACTION STEPS

Prior to implementing a PIP, employers should carefully consider their obligations and any potential legal or business risks. This Compliance Overview provides best practices for employers to reduce risks when drafting and implementing a PIP by ensuring compliance with legal and contractual requirements.

### Highlights

When creating and implementing effective and legally compliant PIPs, employers may consider the following practices:

- Establish a lawful and nondiscriminatory reason for the PIP;
- Set clear and attainable goals;
- Draft an effective PIP with a reasonable timeline;
- Effectively communicate the PIP process with the affected employee; and
- Properly document the entire PIP process.



## Overview of PIPs

A PIP is a tool employers may use to help correct or improve poor employee performance, behavioral issues or other problems. Generally, it is a written document that sets forth identified employee performance deficiencies, establishes clear and attainable goals, and provides a timeline by which the employee must satisfy the PIP requirements and potential consequences for failure to achieve PIP goals.

### Benefits of a PIP

From an employee perspective, a PIP puts the employee on notice that there are issues that require remedial action and provides the employee with clear objectives that they can work to attain in a specified time frame. In some cases, employees may not be aware of the degree to which they are falling short of expectations or may not know how to fix these problems. A PIP helps ensure that the employer and the employee are on the same page.

From an employer perspective, a PIP provides a structure through which they can hopefully remedy an employee's shortcomings. However, most importantly, a well-structured and documented PIP process can protect an employer in the event the employer ultimately decides to terminate the employee or take some other adverse action. The PIP demonstrates that there were clearly identified issues, the employer attempted to work with the employee to address them, and the employee was unable to meet the goals set forth in the PIP.

## Preparing a PIP

### Establish a Lawful and Nondiscriminatory Reason for a PIP

#### *Lawful Reason for a PIP*

When determining whether to place an employee on a PIP, it's vital to establish a lawful, valid and nondiscriminatory reason for the PIP. Valid reasons for a PIP may include ongoing performance-related or attendance issues or inappropriate behavior in violation of company policy. However, a PIP may not be appropriate for more severe misconduct (such as violence, sexual harassment or theft) or for isolated incidents.

In all cases, employers may **not** put an employee on a PIP for any unlawful reason, including the following:

- Due to an employee's protected characteristic, such as those protected under the following laws:
  - **Title VII of the Civil Rights Act** prohibits discrimination on the basis of race, color, sex (including pregnancy and related medical conditions), national origin and religion;
  - The **Americans with Disabilities Act (ADA)** prohibits discrimination on the basis of an employee's disability;
  - The **Age Discrimination in Employment Act** prohibits discrimination on the basis of age (40 or older);
  - The **Genetic Information Nondiscrimination Act** prohibits discrimination on the basis of genetic information; and
  - The **Uniformed Services Employment and Reemployment Rights Act (USERRA)** prohibits discrimination on the basis of past, current or prospective military service;
- Because an employee seeks or takes protected leave, including:
  - Family and Medical Leave Act leave;
  - USERRA military leave;
  - Workers' compensation leave;

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- ADA disability leave; and
- Temporary or short-term disability leave (including on the basis of pregnancy);
- Because an employee seeks or obtains a disability, pregnancy or religious accommodation;
- In response to protected whistleblowing activities;
- In response to union-organizing activity as protected by the National Labor Relations Act; and
- In response to an employee who sought to enforce their wage rights, including those under the Fair Labor Standards Act.

## ***Additional Legal Risks***

Even if the employer has established a lawful justification for placing an employee on a PIP, employees may take legal action when other circumstances could reasonably suggest the PIP was implemented for unlawful reasons. Such circumstances may include:

- The employee recently requested or received an accommodation for disability, pregnancy, childbirth or a related medical condition, or religious beliefs;
- The employee recently complained of discrimination, retaliation, unfair labor practices or inadequate wages, or similar complaints; and
- The employee has engaged in union-organizing activity.

## ***Document the Reason for the PIP***

To avoid a potential claim of discrimination or retaliation, it is imperative that employers document the lawful, nondiscriminatory reason for placing an employee on a PIP. Specifically, in the event an employee later claims that they were disciplined for any unlawful reason, proper and timely documentation can provide a contemporaneous defense for the employer.

## **Gather Information and Review Performance**

Before drafting a PIP, it is important that employers understand an employee's deficiencies and are able to clearly articulate and support such deficiencies. Therefore, as an initial step, employers should carefully review existing documentation and information for any employee being considered for a PIP. Such documentation may include but is not limited to:

- Prior performance reviews and evaluations;
- Disciplinary actions;
- Relevant communications (including emails from supervisors or managers);
- Attendance data; or
- Performance metrics (e.g., failure to meet sales or production quotas).

Such documentation may serve as a helpful resource when establishing goals and objectives and communicating the decision to implement a PIP to the employee.

## **Consider Preliminary Disciplinary Measures**

Typically, a PIP is not implemented as a first step in addressing employee deficiencies or used to address isolated incidents. Rather, it is a tool used to address ongoing employee deficiencies that have not improved through other methods. Therefore, before placing an employee on a PIP, employers may wish to consider using other progressive forms of discipline to see if any of those can remedy such deficiencies. These measures may include:

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- **Verbal warnings**—For less severe or isolated issues, employers may consider first issuing a verbal warning as an informal method of corrective action;
- **Written warnings**—In the case of a more severe issue or where a verbal warning was insufficient, employers may consider issuing a more formal written warning to the employee; and
- **Coaching or training**—In some cases, employees may need more guidance than can be provided through verbal or written warnings. One method can be to offer individualized coaching or training to correct the underlying issue. Depending on the nature of the problem, employers may consider either assigning another qualified employee to provide such training or outsourcing such training to a third party.

## Establish Clear and Attainable Metrics

After determining that a PIP is the appropriate course of action, employers should establish the clear and attainable metrics they will include in the PIP. When establishing such goals, employers should ensure that they are:

- **Tied to the performance or behavioral issue**—Effective goals should be clearly tied to the performance or behavior deficiency. For example, if an employee struggles with meeting sales goals, the PIP could include targeted sales quotas;
- **Measurable**—To ensure fairness and objectivity, employers should try to make goals as measurable as possible. For example, if an employee is inefficient, rather than set a goal of increased efficiency, an employer may include in the PIP a goal for an employee to complete a certain number of concrete tasks in a specified time frame;
- **Realistic and attainable**—Any goals set should also be realistic with the hope that the employee will successfully achieve them. Additionally, any goals set forth in the PIP should not exceed the employer's expectations for similarly situated employees.

## Draft the PIP Document

After finalizing the reason for the PIP, obtaining supporting documentation, and establishing clear and attainable metrics, employers must then draft the PIP document. Although a PIP may take many forms and may vary depending on the nature of the deficiency at hand, an effective PIP may generally include the following:

- The **relevant parties**, including the employee, their manager, an HR representative or any other party to be involved in the implementation of the PIP;
- A **summary of the relevant performance issues** to be addressed by the PIP, including concrete examples;
- A description of **prior measures** taken to address the performance issues (e.g., warnings or counseling) and the manner in which such measures were unsuccessful;
- Documentation showing how such deficiencies do not satisfy **job expectations or company policy**;
- **Clear, objective and attainable goals** to be achieved under the PIP, including specific actions the employee is expected to take;
- The means by which the employer will **monitor** and **evaluate** the employee's progress;
- A clear **timeline** for completion of the PIP (common durations are 30, 60 or 90 days);
- **Resources** (including personnel) available to assist the employee in meeting their goals; and
- **Consequences** for failure to successfully complete the PIP.

## Consider Restrictions on Implementing a PIP

In some cases, employers will either be restricted from placing an employee on a PIP or required to satisfy certain requirements before doing so pursuant to a contract or other agreement. One of the most common instances in which



employers are restricted is with respect to collectively bargained employees. Frequently, collective bargaining agreements will set forth a specific disciplinary policy that employers must adhere to with respect to any employees covered by such agreement. Less frequently, employers may be limited by their own policies or pursuant to an individual employment agreement.

Therefore, employers should carefully review any relevant documentation to ensure their proposed PIP does not violate their contractual obligations.

## Implementing a PIP

### Communicate With the Employee

After preparing the PIP, employers should generally conduct an in-person or, for remote work environments, a video meeting to communicate the PIP. Doing so allows the employee to ask questions and understand expectations and helps to promote a collaborative approach. Employers may wish to consider the following measures when conducting such meetings:

- Focus on the **valid and nondiscriminatory reason** for the PIP;
- Identify the specific **employer policy** that the employee violated;
- Clearly state the **objective and measurable goals** for the employee moving forward;
- Establish a clear **timeline** by which the goals are expected to be met;
- Ensure **confidentiality** of the PIP to the extent feasible;
- Offer an opportunity for the employee to **ask questions**;
- **Document the PIP meeting**; and
- Obtain the employee's **signature** agreeing to the PIP.

### Schedule Regular Check-ins

An effective PIP should establish regular check-ins between the employee and the party or parties responsible for overseeing the employee's progress. During such check-ins, employers may identify additional resources, provide more feedback or offer positive encouragement. Employers should also ensure they properly document any progress or lack thereof to support future employment or disciplinary actions.

### Evaluate Employee Progress and Next Steps

Once the PIP period has concluded, employers will need to assess whether and to what degree an employee has satisfied the PIP. In general, one of the following outcomes is possible:

- **The employee successfully meets the goals set forth in the PIP.** In this instance, employers will generally choose to allow the employee to continue in their previous position. Employers may wish to acknowledge the employee's success but remain mindful of the issues in case they arise in the future and need to be addressed again.
- **The employee meets some, but not all, of the PIP goals or makes meaningful progress toward their goals.** Depending on the degree to which an employee improved during the PIP, the employer may consider concluding the PIP and allowing the employee to return to their normal employment. Alternatively, the employer may consider extending the PIP period if they believe the employee is on track to meet their goals



with extra time. An employer may also consider other remedial measures, such as additional training or coaching.

- **The employee does not demonstrate any improvement.** Where an employee cannot meet their goals, employers may need to reevaluate whether they are still qualified for their position or employment at the company altogether. For example, if the employer feels the employee may be able to succeed in a different or lower role, they may consider a demotion or transfer. However, in many cases, employers may determine that termination is the preferred course of action.

Regardless of the employer's approach, it is important to properly document the decision and the factors that led to the decision. Employers should also meet with the employee to discuss their performance and next steps.

## Employer Takeaways

Employee discipline can be challenging. However, an effective PIP practice can be a critical tool for an employer. PIPs can provide a helpful framework for employees to understand and improve performance deficiencies and for employers to work with employees to improve poor performance. Further, a PIP can help provide support for employers who decide to take further disciplinary action against an employee who cannot improve through a PIP. Therefore, it is important for employers to develop a clear and consistent PIP practice and ensure proper documentation. Employers may also wish to train managers, supervisors and HR personnel on how to create and implement effective PIPs.