

## Counseling Employers About Performance Improvement Plans

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In situations where an employee's work or workplace conduct falls below acceptable standards or the employee receives a subpar performance review, an organization may include in its process a requirement that the employee be placed on a performance improvement plan (PIP).

A well-written and managed PIP serves to minimize legal claims because employees clearly understand their performance problems and have a meaningful stake in resolving them. PIPs also memorialize the organization's earnest efforts to help an employee avoid termination and aid the defense of performance-based terminations. Consequently, they are often produced as evidence and scrutinized in administrative and legal proceedings. Note, however, that some organizations misuse PIPs to manage employees out. They do not intend to give the employee an opportunity to avoid termination. Instead, a PIP just provides a "paper trail" that "objectively" leads to termination. This is a dangerous practice that fuels employee emotion and can escalate claims. It also creates issues about motive, can memorialize unfair organizational tactics, and can sorely undermine credibility.



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This article discusses the recommended elements of a PIP, your considerations in evaluating a PIP, and how the employer should deliver a PIP to an employee.

### Elements of the PIP

As the employee's "last chance" to improve performance and avoid termination, you should recommend that the PIP contain the following elements:

1. **Employee Information:** PIPs generally include the employee's name, position, department, supervisor's name and date of the PIP; it may include the employee's date of hire, date the employee assumed her current position, date of prior evaluation and rating, etc. While this point may seem obvious, make sure the PIP does not include any statements that reference race, gender, ethnicity, age or any other protected characteristic and avoids language from which such characteristics may be inferred.
2. **Grounds for the PIP:** The PIP should contain the reason for the PIP, including detailed information and examples about the employee's subpar performance (e.g., the occasions on which the employee was tardy, missed deadlines, turned in substandard work, failed to work well with colleagues, etc.). Ideally, this section should refer back to the employee's job

description, last evaluation or previous discipline, and should describe what the expected performance was, and how the actual performance failed to meet standards.

3. **Objectives of the PIP:** The PIP should set necessary and reachable objectives for improvement. You should advise the organization to be candid and realistic with its expectations and not set the bar too high or too low.
4. **Expectations:** The PIP should provide clear guidance about how and when the employee must meet the objectives to avoid termination (e.g., complete all reports one week before they are due; attend all department meetings; respond to all emails within 36 hours, etc.).
5. **Resources:** The PIP should specify any training and other resources that the employer will provide to aid the employee.
6. **Monitoring and Feedback:** The PIP should include a provision for periodic monitoring and feedback to help the employee gauge his progress and adjust performance. You should recommend that the employer tailor its monitoring to the particular circumstances. The feedback provided to the employee on a PIP should be productive and geared to assisting the employee. Regular feedback will eliminate unpleasant surprises at the end of the PIP.
7. **Term:** The PIP should include the term of the PIP (e.g., 30, 60, 90 days), but provide that it may end sooner if the employee shows improvement and does not engage in misconduct, etc. Sometimes the initial term is extended to provide the employee an opportunity to sustain his or her improvement and/or give the organization a better feel for the employee's ability to do so; nonetheless, the term should be long enough to allow for improvement and short enough to motivate the employee.
8. **Warning About Possible Termination:** The PIP should include a statement that termination of employment may result for failing to meet the objectives and deadlines stated in the PIP.
9. **At-Will Disclaimer:** The PIP should include a statement that successfully completing the PIP does not guarantee continued employment and does not alter the employee's at-will status. This part should include a specific statement, in bold, that this "PIP does not create a contract."
10. **Acknowledgement:** The PIP should include an acknowledgement provision (e.g., acknowledging discussion about, not agreement with, the PIP) and employee and manager signature lines. You or the employer should caution managers that employees will often "refuse to sign", in the belief that their signature indicates agreement with the PIP and any criticisms of the employee in it. In this case, the manager should give the employee a copy of the PIP and then note on the PIP, "copy provided and employee refused to sign." Alternatively, if the employee wants to take the document and return it later with comments, the manager should allow the employee to do so.
11. **Employee Response/Comment:** Some organizations, depending on culture and past practice, have a specific section in their PIPs allowing employees to "comment" or "respond" to a PIP. This process can provide valuable information and further legal defenses. For one, if there is a section which allows an employee to comment or disagree with the PIP, and they choose not to — that could be used as evidence that the employee

agreed with it. On the other hand, if an employee does choose to comment or disagree with the PIP, those comments may sometimes give human resources or legal valuable information that they might otherwise not have known — such as a manager showing favoritism, being unfair or engaging in discriminatory or abusive behavior. For these reasons, you should recommend that a PIP include a section for employee comments.

If a PIP is prepared well and administered properly, it can provide an excellent defense to a later legal challenge. The PIP gives the employee a “final” documented warning, and an opportunity to improve before the organization terminates the employee. If the employee is terminated, the employer can rely on the document to prove that the termination was both fair and based on legitimate concerns.

On the other hand, a PIP can be fraught with legal risk. If the grounds for the PIP are inaccurate, or the PIP is not administered correctly, it can create legal liability for the organization. For that reason, you should consider recommending a protocol that requires that you review all PIPs before employees receive them, and that HR follow up with managers during PIPs to ensure the correct administration of PIPs.

### **Evaluating the PIP**

You should take the following steps to evaluate the PIP:

1. **Compare with Job Description:** Compare the objectives and other requirements of the PIP with the job description. Confirm that they are consistent with the requirements of the position and not excessive.
2. **Learn About the Employee:** Review all employee files, not just the personnel file, including any leave/medical file, workers’ compensation file, complaint/investigation file, etc. These files might contain information suggesting the PIP is retaliatory. Also determine the temporal proximity of the PIP to any leave, workers’ compensation claim, complaint, etc. The fact that an employee took leave under the Family & Medical Leave Act, for example, does not necessarily prevent the PIP from proceeding. However, it is a red flag and the timing of a PIP may prove critical. For example, as a general rule, employees should receive a reasonable amount of time to “get back up to speed” when returning from leave. Therefore, a PIP on the heels of a leave may not be appropriate.
3. **Understand the Employee’s Performance History:** Review all employee performance evaluations relative to the current position to determine the necessity of the PIP. Again, look at the timing of the PIP. If performance fell short over several review cycles, why did the manager wait so long? If performance evaluations indicate the employee “met expectations” why has the manager suggested a PIP? It could be that while the job is the same, business needs have been increasing and the employee has not been able to keep up or has kept up but the quality of his or her work has continually declined despite receiving adequate assistance.

If the employer added new job responsibilities for the employee, did the employee receive adequate training? Ask HR and the manager to explain all the reasons leading up to the PIP. Also determine if the manager contributed to the employee’s failures. For example, did the manager fail to train the employee? Was the manager lax in supervising the employee’s

work? Did the manager previously repeatedly ignore obvious issues (e.g., missed deadlines, incomplete work, etc.)? If the reasons, timing and manager's conduct do not justify the PIP, it would be best to recommend that the organization postpone the PIP until justifiable and defensible reasons exist.

4. **Assess Previous Performance Warnings:** Determine if the organization has issued prior documented warnings about performance and, if not, why.
5. **Speak to the Manager's Superiors:** Discuss the employee's performance with the manager's supervisor and/or department head if they have knowledge about the employee's performance; doing so will help uncover any bias the employee's direct manager may have.
6. **Evaluate in Light of Organization Policies:** Determine whether the PIP conforms to or violates a relevant contract, policy or organization practice.
7. **Look at Similarly Situated Employees:** Determine whether other similarly situated employees (e.g., those in the same position) with the same level of performance were also put on PIPs; if not, determine whether any reasons justify the difference in treatment.

## **Delivering the PIP**

The employer should deliver a PIP to an employee face-to-face in a quiet and private setting. You should recommend that — in addition to the manager and the employee — another witness (ideally an HR representative) attend the meeting. An HR representative's presence can help diffuse some of the tension the employee will feel, as well as keep the meeting on track and focused. If the manager-employee relationship has deteriorated, the tension may interfere with the employee's ability to "hear" what the manager says. In that case, HR should do most of the speaking at the meeting; the manager can explain details and provide other support as needed.

If the PIP is particularly sensitive and you have concern about the manager's or HR representative's capability to keep the meeting on track or deliver the PIP, you should consider providing a "script." You should mark the script as "Privileged and Confidential — Attorney-Client Communication/Attorney Work Product," and request that it be returned to you. The script would generally outline the points the manager or HR representative should make (apart from those that will be reviewed in the PIP) or avoid, and the order in which to discuss the items. The script could also provide specific language for the speaker to use.

Explain to both the manager and HR representative that the employee should be allowed to ask questions, challenge points in the PIP, and express concerns freely, and should be invited to do so at the beginning of and at points throughout the meeting. These points could be included in a script you provide. However, the meeting should remain focused and the discussion should not turn into a debate. The employer should note the employee's comments in the "comments" section of the PIP to ensure that the employee feels "heard," to document the issues raised by the employee, and to keep the meeting on track.

At the end of the meeting, the manager or HR representative (1) should ask the employee if he or she has any questions, and if the employee understands everything covered in the meeting, including the PIP; and (2) should ask the employee to sign the PIP, acknowledging it was discussed; that he or she

understands what was communicated and the expectations going forward; and that he or she received a copy of the PIP. The employer should not ask the employee to sign a document indicating her agreement with the PIP. Often, employees refuse to sign the document. In that case, you should instruct the manager or HR representative to indicate on the PIP that the employee declined to sign it. The manager or HR representative should also follow up the meeting with an email to the employee (which you must first review) that factually memorializes the PIP meeting (e.g., the date, subject matter, who was present, general substance of the meeting, person to contact as questions arise, and, if the employee did not sign the PIP, that he or she declined to sign it).

Just as the organization must take care to set reasonable performance standards in the PIP, it is equally critical for the organization to be candid about the employee's performance at the conclusion of the PIP. It is very hard to defend an employment discrimination lawsuit when the employee's PIP states that the employee met the employer's expectations, even when the employee only minimally improved. If the employee did not improve on the PIP, the organization should say that. Honesty is the best policy when it comes to PIPs.

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