

Strategic Use of Performance Improvement Plans: How to Develop and Effectively Implement

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PIPs – An Overview

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- What is a PIP?
 - Formal document that puts an employee on notice of a performance issue and sets forth a process to give the employee an opportunity to remedy the problem.
 - View as a process that takes work – on everyone's part – the employee and management.

PIPs – An Overview

- Can be simple / complex depending on performance issues being addressed and employer's strategic objectives.

PIPs – An Overview

- What can a PIP be used for?
 - Anything, really.
 - To set/define expectations.
 - Specific behavior/conduct.
 - Failure to meet job expectations.
 - To identify a training gap.

PIPs – An Overview

- Policy violations(s).
- A prelude to termination or other discipline.

PIPs – An Overview

- Although PIPs are often used as a final step before termination, a PIP can be used at any point in the employment relationship. For example, a PIP can definitely be used before initiating the disciplinary process.

PIPs – An Overview

- What a PIP IS NOT
 - A set-up to cause the employee to fail.
 - The obligatory paper trail before termination.

Advantages and Disadvantages of PIPs

Advantages and Disadvantages of PIPs

- Advantages
 - With proper managerial/supervisor training, PIPs can be an effective tool to bring an employee back into compliance with expectations.
 - PIPs can and should be precise. Managers can hone in on specific, problematic behaviors and establish a clear roadmap of expectations and next steps.

Advantages and Disadvantages of PIPs

- Advantages (cont.)
 - PIPs are fluid. Serious performance issues can be addressed more rapidly than with an annual or semi-annual performance review. There is no need to “wait” for a scheduled review period.
 - PIPs focus on specific, problematic performance, not every aspect of the employee’s job.

Advantages and Disadvantages of PIPs

- Advantages (cont.)
 - PIPs provide an opportunity for the employer to tell its “story.” Take advantage this and put the necessary time and energy into the process.

Advantages and Disadvantages of PIPs

- Disadvantages/Challenges
 - Inherent bias. Many people believe that PIPs are nothing other than a disingenuous step before termination.
 - Use of the PIP must be legitimate.

Advantages and Disadvantages of PIPs

- Disadvantages/Challenges (cont.)
 - Training managers to use PIPs effectively and for the right reason.
 - Implementing a PIP takes work. A manager must be committed to following through on the PIP, which includes giving the employee a real chance to improve.

Legal Issues Related to PIPs

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- PIPs are an interesting legal “Creature?”

Legal Issues Related to PIPs

- The Eighth Circuit Court of Appeals does not recognize PIPs as constituting adverse employment action. See *Fiero v. CSG Sys., Inc.*, 759 F3d 874, 881 n.2 (8th Cir. 2014)(citing cases).

Legal Issues Related to PIPs

- The Eighth Circuit has also held that an employee's placement on a PIP does not support a claim for constructive discharge, i.e., where an employee attempts to establish the working conditions were so intolerable that a reasonable person would quit. See *Fischer v. Andersen Corp.*, 483 F.3d 553, 557-58 (8th Cir. 2007).

Legal Issues Related to PIPs

- Employers should nevertheless expect that employees may attempt to use his or her placement on a PIP to support a claim against the company. For example, in *Gatten v. Life Time Fitness, Inc.*, 2013 WL 1331231 (D. Minn. Mar. 29, 2013), the court held the employee created an inference of discrimination, and thus triable issues, relating to her employer's motivation when putting her on a PIP.

The Phases of Developing and Implementing a PIP

The Phases of Developing and Implementing a PIP

1. Assessment

- Although PIPs can be an important and useful tool, they do not fit every situation.
- An employer should consider the totality of the circumstances before implementing a PIP. Relevant considerations include ...

The Phases of Developing and Implementing a PIP

- Is the PIP being used for a legitimate purpose?
- Is the PIP likely to be effective, or will it be a waste of time and energy?
- Is a PIP a logical step in light of the employee's performance history and/or tenure with the company?

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- Is the manager committed to seeing the process through?
- Is the employee / employment relationship salvageable?

The Phases of Developing and Implementing a PIP

- An employer must always follow its own policies. If the employer has a policy on the issuance of PIPs or disciplinary action, review the policy – and follow it!

The Phases of Developing and Implementing a PIP

2. Drafting

- Reasons for performance-related documentation – including PIPs
 - To create a record in order to protect against infallible human memories.
 - PIPs have evidentiary weight/value.

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- *Rossman v. RDO Equipment Co.*, WL 503242 (D.Minn. 2006) (citing examples of objectively written warnings describing the violations and the consequences for future violations, as well as noting the employee's reaction to the warnings).

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- *Brody v. Starbucks Coffee Co.*, 2009 U.S. Dist. LEXIS 24044 (D.Minn. 2009) (rejected employee's discrimination claim, in part, because there was no evidence employer deviated from its policies in issuing employee a PIP that led to his termination).

The Phases of Developing and Implementing a PIP

- **Essential elements of a PIP.**
 - Clear identification of the employee performance or behavior issue(s).
 - The policy or performance standard at issue and an explanation why the employee is not meeting it.
 - Specific, measurable, objective and *achievable* goals in order to bring the employee back into compliance.

The Phases of Developing and Implementing a PIP

- **Essential elements of a PIP. (cont.)**
 - Clear timeframes associated with the compliance goals.
 - Defined and scheduled “touch points” with management.
 - Unambiguous notice of consequences if the employee fails to comply with the plan.

The Phases of Developing and Implementing a PIP

- **Common drafting errors.**
 - Sloppiness. Drafting errors/inaccuracies related to, for example:
 - Prior disciplinary history
 - Company policies/standards
 - Facts giving rise to the PIP
 - Silly mistakes – dates, policy descriptions, etc.

The Phases of Developing and Implementing a PIP

- **Common drafting errors. (cont.)**
 - Subjectivity vs. objectivity.
 - Bad Example:
 - “Employee has a bad attitude and is absent a lot.”

The Phases of Developing and Implementing a PIP

- **Common drafting errors. (cont.)**

- Good Example:

- “During a meeting on March 23, 2018, Employee said to me, his manager, “you are an A\$\$H@LE supervisor, and you are stupid.” This behavior violates the Company’s Respectful Workplace Policy, Section 2(a). ***

The Phases of Developing and Implementing a PIP

- **Common drafting errors. (cont.)**
 - “Company attendance standards require regular and reliable attendance. The Company’s policy prohibits more than 3 absences in a 60 day period. Employee has been absent 12 times in the last sixty days. ***.”

The Phases of Developing and Implementing a PIP

- **Common drafting errors. (cont.)**
 - Failure to set precise, measurable PIP goals and objectives.
 - Failure to identify consequences if the employee fails to meet the plan.

The Phases of Developing and Implementing a PIP

- **Always review, revise and reconsider the PIP.**
 - Once the PIP is drafted, review it critically and revise it as necessary.
 - WWAJT? (What Would A Jury Think?) Review the PIP from the perspective of a future juror.
 - Does the PIP tell a story? Does the PIP tell a persuasive story?

The Phases of Developing and Implementing a PIP

3. Implementation

- The initial meeting to issue the PIP.
 - Plan the message in advance; don't just wing it.
 - Take the necessary time to thoroughly review the PIP with employee in order to set clear expectations.

The Phases of Developing and Implementing a PIP

- However, a meeting to implement a PIP should not take too long. It is not the time for an employee to engage in a debate about whether he has performance problems or whether the PIP is warranted.

The Phases of Developing and Implementing a PIP

- An effective PIP will establish regular touch points with management to review progress. This is not just going through the motions.
- It is essential that the employer follow the schedule set forth in the PIP.

The Phases of Developing and Implementing a PIP

- Revise and/or clarify the PIP based employee feedback or changed circumstances.
- However, a *PIP cannot be a moving target either.*

The Phases of Developing and Implementing a PIP

4. Closure

- The PIP should always be brought to an end.
- Although a PIP can be extended for legitimate reasons, it should never be open-ended, *i.e.*, the dreaded ...

“PIP in perpetuity.”

The Phases of Developing and Implementing a PIP

- The best case scenario is that the PIP was effective, the employee's performance improved, and everyone can move on.
- On the other hand, if the employee failed to adhere to the plan, the PIP should be closed out and the employer should proceed with the next step in the process, i.e., discipline or termination.

Presenter



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