



Whiteford|Taylor|Preston^{LLP}

Employee Performance Improvement Plan: What Does It Really Improve?

LeadingAge Maryland 2017 Annual
Conference

Mark C. Franco
Associate Counsel
Whiteford, Taylor & Preston, L.L.P.
3190 Fairview Park Dr., Suite 800
Falls Church, VA 22042
703-280-3383
mfranco@wtplaw.com

BALTIMORE, MD

BETHANY BEACH, DE

BETHESDA, MD

COLUMBIA, MD

DEARBORN, MI

FALLS CHURCH, VA

LEXINGTON, KY

PITTSBURGH, PA

ROANOKE, VA

TOWSON, MD

WASHINGTON, D.C.

WILMINGTON, DE



What is a Performance Improvement Plan (PIP)?

Common Definition

A tool employers use to help underperforming employees succeed in the organization.



Hypothetical: PIP or no PIP?

Mark is nearing retirement age and has been working at a company for 10 years. He has a record of good but not stellar performance reviews. He is in a high-paying mid-level position and is at the top of his salary range.

In the last few years, Mark often has problems meeting deadlines and the work usually has errors. But, he has a great relationship with his supervisor Gail, who always lets him slide and compensates by doing some of his work herself. She has not documented anything negative with regards to Mark's performance.

Hypothetical Continued

Gail is an overachiever and eventually gets a great opportunity at another company. Following Gail's departure, supervision of Mark falls to Dawn, Gail's supervisor and the division head. Dawn never liked Mark personally and always thought they could find someone better for the position, but she let Gail deal with Mark's issues. In the first month under Dawn, Mark has missed 3 deadlines and his other work has numerous errors. Dawn considers putting Mark on a performance improvement plan.

Breakout Discussion

Should Dawn put Mark on a PIP?

Why or why not?



Should Dawn Put Mark on a PIP?

I would argue:



How can you improve performance when...

you don't want the employee to improve?



Breakout Discussion

Why would you use a PIP?

Or

How have you used a PIP?

Why use a PIP?

➤ General goals:

- To set baselines for employee performance
- To evaluate an employee's performance
- To document performance issues for the employee's record
- To approach performance problems in a systematic manner
- To develop and improve the employee's performance

➤ Often Additional goal:

- To protect the organization in advance of termination

Will a PIP help you achieve your intended outcome?

- If your intended outcome is performance improvement, then yes it could.
- If your intended outcome is to document issues to be able to terminate the employee, then yes a PIP could also help achieve that goal.
- But is it really the right tool for that?

It's called Performance Improvement Plan

What are you really trying to improve?

The employee's performance?



The case for termination?

Why use a PIP if you don't want to improve performance?

➤ Consider:

- Could be a waste of time and energy
- Could be challenged as pretextual in some circumstances
- Unfair to the employee
- Could undermine your ability to use the PIP in a positive manner

So why are PIPS often used prior to termination?

A perception that it is a magical shield that will protect the organization.



PIP in Case Law

The Fourth Circuit Court of Appeals has ruled that being placed on a PIP, by itself, is not an adverse employment action. But it does become actionable if subsequently used as a basis to detrimentally alter the terms or conditions of the recipient's employment.

Jensen-Graf v. Chesapeake Employers' Ins. Co., 616 Fed.Appx. 596, 598 (4th Cir. 2015)

Pretext

Pretext generally refers to a reason for an action which is false, and offered to cover up true motives or intentions.*

* USLEGAL.COM



PIP alleged as Pretext

In Buchahagen v. ICF Int'l, Inc., sixty-seven year old employee alleged that her placement on a performance improvement plan and subsequent termination was pretextual and that the actual reason for her termination was age discrimination. She noted younger employees who made the same mistakes covered by the PIP were not put on such plans. In fact, they were mentored and sent to management training courses.*

* Buchhagen v. ICF Int'l, Inc., 545 Fed.Appx. 217, 220 (4th Cir. 2013)



Is a PIP really the right tool?

- To set baselines for employee performance
 - What about a position description? Performance evaluation? Employee Manual?
- To evaluate an employee's performance
 - What about direct feedback? Performance evaluation? Team Meetings?
- To document performance issues for the employee's record
 - What about emails? Supervisor's notes? Performance evaluations? Complaints?

Cont.

- To approach performance problems in a systematic manner
 - Why do you need a PIP to be systematic?
- To develop and improve the employee's performance
 - Yes, it is the right tool.
- To reduce liability in advance of termination
 - Sorry to say, it's not a magic bullet.

Breakout Discussion

So when is it appropriate to use a
PIP?

Use a PIP to:

- Improve performance as the primary, intended outcome
- To develop talented employees in coordination with the organization's other development programs
- To comply with the organization's employment policies

Standard PIP Process

- Society for Human Resource Management Steps*:
 - Step 1: Document performance areas
 - Step 2: Develop an action plan
 - Step 3: Review the Performance Improvement Plan
 - Step 4: Meet with the Employee
 - Step 5: Follow Up
 - Step 6: Performance Improvement Plan Conclusion

*www.shrm.org



Document Performance Issues

Key Considerations

- Objective
- Factual
- Specific
- Standard/Established Format
- Use examples

Document Performance Issues

Components

- Employee information
- Relevant dates
- Description of performance discrepancy or gap
- Description of expected performance
- Description of actual performance
- Description of consequences
- Plan of action
- Signatures of the manager and employee
- Evaluation of the plan of action and PIP

Develop an Action Plan

Key Considerations

- Get employee's feedback on their plan
- Make the process collaborative
- Try to eliminate any confusion or misunderstanding at the beginning
- Use job description and HR policies to develop the goals and expectations
- Identify assistance available to employee
- Establish regular progress meetings
- Identify all the outcomes possible

Review the Performance Plan

With HR Personnel

- Seek assistance from supervisor's own manager and HR department
 - Allows for objective view
 - Can help to remove any emotional content
 - Can help confirm:
 - Specificity is appropriate
 - Goals are measurable
 - All areas of the action plan are relevant to the employee
 - Results are attainable
 - Timeframe is appropriate

Meeting with the Employee

- Have HR assist, if available
- Be clear:
 - How the process will work
 - Areas of concern for improvement
 - Expected performance and behavior
 - The assistance available to the employee
 - The potential outcomes at the conclusion
- Be open to feedback and suggestions by the employee
- Have both employee and supervisor sign

Follow Up

- Stick to the regular progress meetings
- Give the employee ample opportunity to seek guidance or feedback
- Be Objective
- Try to eliminate any roadblocks
- Try to keep the employee on track
- Take notes
- Recognize and reinforce any successful progress made
 - But don't mislead the employee

Conclusion: No Improvement

- Depends on how you are using the PIP:
 - Status Quo
 - Reassignment
 - Transfer
 - Demotion
 - Termination

Conclusion: Some improvement

- Depends on how you are using the PIP:
 - Status Quo
 - Extend the PIP
 - Re-evaluate and revise the PIP
 - Reassignment
 - Transfer
 - Demotion
 - Termination

Conclusion: Goal Achievement

- Depends on how you are using the PIP:
 - Status Quo
 - Promotion
 - Cake and Ice Cream

Parting Thoughts

- Evaluate why you want to use a PIP before you do so
- Don't rely on a PIP as a shield against an adverse employment decision
- Consider using it as a development tool rather than a protective tool

Contact Information

Mark Franco

Associate Counsel

Whiteford, Taylor & Preston

mfranco@wtplaw.com

703-280-3383

