

Performance Improvement Plans and FLSA Update

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What is a Performance or Professional Improvement Plan (PIP)

- Defined: “a plan, designed by a district with input of the employee, that may include mentoring, coaching, recommendations for professional development and intensive supervision based on the contents of the rating tool provided for under this section.”

24 P.S. § 11-1123(o)(7).

When to Use

- Must use: “An overall performance rating of “needs improvement” or “failing” shall require the employee to participate in a performance improvement plan.” 24 P.S. § 11-1123(f)(5).
- Can use: Anytime when a substantial increase in an employees job performance is necessary so that an employee meets expectations.
 - School Code definition does not apply

When to Use (cont)

Examples when a PIP can be used:

- Administrators or supervisors falling below job performance expectations.
- Professional employee with rating of “needs improvement” or “failing” in one or more of the four areas on an evaluation but overall rating is still at least “proficient”.
- Non-professional employee falling below job performance expectations.
- Do not use for employees of contractors

Why Use

- Overall goal of a PIP is to try to get the employee to meet performance expectations.
- PIP is generally not considered disciplinary (i.e., not considered a step in part of progressive discipline)
 - Part of management rights to set and establish standards of performance for employees
 - However, can lead to discipline and be thought of as a warning in certain instances

Why Use (cont)

- In achieving goal, properly created PIP will also fulfill several important purposes:
 - **Notice** - Provide employee with clear notice of performance deficiencies.
 - **Plan** – Memorialize the plan for improvement in the critical elements that are deficient.
 - **Support** – Identify resources, training and/or support for the employee to improve performance.

Why Use (cont)

- **Timeline** – Establish timeframe in which the employee will have an opportunity to correct performance deficiencies.
- **Consequences** – Establish at the outset the possible consequences of not correcting poor performance.
- **Document** – Create a clear record for District and employee.

Consequences for Use

- Because the purpose is not disciplinary
 - Generally not grieved
 - Generally not considered “adverse employment action” under discrimination statutes.
 - Reynolds v. Dep't of the Army, 439 Fed.Appx. 150, 153 (3d Cir. 2011)(holding that unless accompanied by a change in pay, benefits, or employment status, placement on a PIP does not amount to an adverse employment action for purposes of employment discrimination)

Consequences for Use (cont)

- However - maybe considered retaliation
 - “Adverse action” to establish employment discrimination typically involves a material change in the terms, conditions, and privileges of employment (termination, demotion, lower pay, failure to hire, etc.)
 - Retaliation claim only requires a showing that employer took some action likely to dissuade a reasonable employee from engaging in statutorily protected activity.

Poor Performance vs. Misconduct

- Poor performance typically means non-willful conduct that falls below the acceptable standard of performance for a position.
 - employee, who despite apparent effort is unable to meet your expectations concerning the quality, quantity, and/or speed of work.
- Poor performance = PIP

Poor Performance vs. Misconduct (cont)

- Misconduct typically means conduct that violates a particular practice, policy or directive done intentionally or with reckless disregard to the consequences.
 - employee understands and is capable of proper behavior but does not engage in proper behavior.
- Misconduct = progressive discipline

Poor Performance vs. Misconduct (cont)

- Same conduct can be treated as both poor performance and misconduct
 - In such a case, best to give some type of progressive discipline along with a PIP to maintain distinction that PIP is not disciplinary.
 - If practice is to use PIP as a disciplinary tool it will be treated that way by the union, arbitrators and courts.

Supervisor Perception

- Properly created PIPs are very time intensive
 - Takes time away from other tasks
 - Easier to avoid confrontation and work around problem employees
 - Nothing will come from all the work
 - Will be accused of favoritism and/or discrimination

Employee Perception

- Even though not considered discipline by District, employees view it as disciplinary.
 - View it as “papering the file”
 - View it as being picked on or harassed
 - Elicits an emotional reaction -people, in general, do not like to be criticized

Employee Perception (cont)

- Weingarten rights - union member has right to union representation at investigatory interview where the employee has a good faith belief that his or her responses to the employer's questions may result in disciplinary action.
 - Initial meetings to set performance expectations and to create a PIP do not normally trigger Weingarten rights.

Employee Perception (cont)

- Meeting with an employee to discuss progress on a PIP will trigger Weingarten Rights.
 - Pennsylvania Social Services Union Local 668 v. Office of Administration, Bureau of Labor Relations, PERA-C-13-362-E (PLRB held that it although discipline may not have resulted immediately following any particular meeting, information obtained during each meeting regarding performance would be used in support of any disciplinary action taken if the employee failed to meet expectations under PIP).

Addressing Issues of Perception

- To make PIPs more effective need to lessen negative stereotypes surrounding PIPs
 - Make PIP part of an overall evaluation process.
 - Should not come as a surprise to anyone.
 - Best practice – Involve union from the beginning
 - Avoids any misunderstandings
 - Minimizes surprises or bad feelings down the road
 - Can assist in resources for employees to improve

Addressing Issues of Perception (cont)

- Create consistency - make sure that PIPs addressing the same or similar issues have the similar requirements
- Divide responsibilities for drafting and monitoring PIPs
- Make sure that there is a real consequence for a failure to improve and follow through with consequences

Creating an Effective PIP

- PIP should not exist in isolation and performance improvement does not begin with a PIP.
- Step 1 - ensure that all employees receive clear communication of performance expectations from their administrators/supervisors.
- Step 2 - after employee understands performance expectations, give the employee a reasonable amount of time to perform in his or her position and informal feedback.

Creating an Effective PIP (cont)

- Step 3 - Performance Assessment
 - If the employee is falling short of expectations, prepare for the conversation in advance – bring notes to the meeting if necessary.
 - Provide as much specific performance feedback as possible, including concrete examples of when the employee fell below expectations and the impact of failing to meet expectations.

Creating an Effective PIP (cont)

- Step 4 – Draft the PIP
 - If informal means of improving performance have failed and significant performance issues remain, it is time to draft the PIP
 - Create a template for use in drafting PIPs for various employee classes
 - Will shorten time needed in each case
 - Ensure consistency and that areas are not missed
 - Will have the time to run by solicitor and others for input and review

Creating an Effective PIP (cont)

- **Gather Information** – If HR is tasked with creating first draft of a PIP, HR should
 - Meet with the administrator/supervisor
 - Make a list of relevant performance expectations
 - Review personnel file, prior evaluations and prior PIPs given to same employee or others with similar deficiencies

Creating an Effective PIP (cont)

- **Identify Specific Performance Problems**
 - Generic Feedback: Students in the class are not engaged.
 - Specific Feedback: When you were delivering the lesson plan on dividing fractions you only lectured to the students you did not ask questions or involve the students in solving sample problems and as a result, you had no feedback as to whether the students understood the material and the students stopped paying attention.

Creating an Effective PIP (cont)

▫ **Set forth Expectations**

- Common mistake restate all of the expectations from job description – provides no new direction
 - Instead, acknowledge all expectations of job but narrow the focus to the areas where the employee is substantially deficient
- Do not use vague and subjective language which would make it difficult to prove that the objective has been met.
 - Example: “improve communication skills”

Creating an Effective PIP (cont)

- Set forth expectations which are:
 - S Specific
 - M Measurable
 - A Appropriate to the Job
 - R Reasonable; and
 - T Time Bound
- **Resources**
 - Identify the resources, materials, training and/or mentoring which will be made available to help the employee meet expectations

Creating an Effective PIP (cont)

- **Set Forth Measures of Assessment**
 - What constitutes success (specifics)
 - Employee needs to know the objective criteria he/she needs to achieve
 - Who determines success
 - How long will employee have to become successful
 - Reserve the right to extend the time

Creating an Effective PIP (cont)

▫ **Monitoring the PIP**

- Establish times for employee to meet with supervisor(s) to review progress
- Establish who will be responsible for observing/monitoring employee
- Establish who will have a copy of the PIP

Creating an Effective PIP (cont)

▫ **Consequences**

- Communicate outcome if successful
 - Not held against employee in future, not become part of personnel file etc..
- Communicate outcome if unsuccessful
 - Right to extend the PIP or take disciplinary, up to and including termination, regardless of any deadlines in the PIP.
 - Need flexibility if things are going very badly
 - However, must give employee a fair chance to succeed

Creating an Effective PIP (cont)

▫ **Meet and Sign**

- Go over PIP and listen to employee and union comments
 - If done as a result of an overall “needs improvement” or “failing” rating, School Code requires that the PIP be “designed by a district with input of the employee”
 - If suggested changes are reasonable, make them
 - The more the employee feels that he/she has had input, the better the chances for success
- Include signature lines for the District, employee and, if involved in creating, the Union.

Monitoring Compliance

- Once created PIP is only effective if it is followed by both the District and the employee
 - If District fails to do the monitoring and supervision required, the process will fail and no discipline will be possible from the employees failure to improve
 - Example: If PIP says that resources will be made available, then make resources available and document that you did so



Questions

- Any questions on PIPs



FLSA Update

- Hot Topics for 2017
 - New Labor Secretary
 - Overtime Regulations
 - Independent Contractor Misclassification
 - Joint Employers
 - Use of Technology

New Labor Secretary

- Alexander Acosta has been nominated
 - An assistant attorney general for the Justice Department's civil rights division under President George W. Bush
 - Former U.S. attorney for the S.D. of Florida.
 - He served on the National Labor Relations Board
 - Served as a clerk to Supreme Court Justice Samuel Alito, Jr., when he was a judge on the Third Circuit

New Labor Secretary

- What impact on FLSA
 - Will be more conservative and business friendly
 - Passive advice vs. aggressive enforcement
 - However, not viewed as a radical
 - Endorsed by the International Union of Operating Engineers, the Laborers' International Union of North America and the International Association of Fire Fighters
 - AFL-CIO – “nomination deserves serious consideration”

New Overtime Regulations

- On May 23, 2016, DOL published final rule updating the salary levels needed for Executive, Administrative and Professional workers to be exempt under the FLSA.
 - Sets the standard salary level at \$913 per week (approx. \$47,476 annually for a full-year worker);
 - Automatically updates levels every three years
 - Effective Date December 1, 2016

New Overtime Regulations (continue)

- On November 22, 2016, a federal court in Texas issued nationwide injunction which halted the implementation of regulations.
- DOL appealed decision to Fifth Circuit Court of Appeals and asked to have appeal “fast tracked” (Obama Administration)
- On February 17, 2017, DOL attorneys filed a second uncontested motion asking the Fifth Circuit for an extension to May 1, 2017 to file their brief (Trump Administration)



New Overtime Regulations (continue)

- Most commentators believe new regulations will be revoked and/or dramatically scaled back

Independent Contractor vs. Employee

- **FLSA “economic realities” test**
- DOL Administrator’s Interpretation 2015-1
 - Remains to be seen how much deference courts will give the guidance or whether guidance will be rescinded, changed or left intact
 - In the meantime, the law will remain “unsettled”
 - Expect more contentious litigation
 - Plaintiffs lawyers are focusing on this area

Economic Realities Test

- Degree of control exercised by employer over the worker
- Worker's opportunity for profit or loss and investment in the business
- Degree of skill and independent initiative required to perform the work
- Permanence or duration of the working relationship
- Extent to which work is integral part of employer's business

DOL AI 2015-1

- Employers still follow economic realities test, but must not do so in a “mechanical” way
- Consider totality of the circumstances, no single factor is determinative
- Cautions against placing undue weight on “degree of control”

DOL AI 2015-1

- Focuses on whether worker is economically dependent on a single business for his/her livelihood
- Provides list of factors to determine whether worker is economically dependent or, instead, in business for him or herself



Legal Implications of Misclassification

- Employment taxes
- Unpaid wages (including overtime) and benefits

FLSA Joint Employer Guidance

- Administrator's Interpretation 2016-1
- Published January 20, 2016
- Articulated standard for when employers are deemed to jointly employ the same workers
- When multiple entities jointly employ individuals, all entities are jointly and severally liable for compliance with the FLSA

Joint and Several Liability

- Each party may be individually liable for the full extent of any award
- Plaintiff can collect full value of any award from either party
 - No clear signal as to how new administration will view this guidance

Use of Technology Under FLSA

- The fact that an non-exempt employee is working remotely does not alter requirement to pay overtime
- *Allen v. City of Chicago* (N.D. Ill. 12/10/15)
- First judicial decision on whether non-exempt employees are owed overtime for off-the-clock work
- Currently pending before Seventh Circuit.

Allen v. City of Chicago

- Did Chicago Police Department violate FLSA by failing to pay police officers for off-duty time working on their employer-issued BlackBerrys?
- Decision will likely have impact nationwide for Non-exempt employees who have District issued smart phones



Questions

- Any questions on the FLSA