

JUNE 2012 BUSINESS COUNSELOR UPDATE

By Alan S. Gutterman¹

Performance Evaluation Programs

Many of the important decisions during the employment relationship that raise legal issues, such as promotion, discipline and termination, turn on the results of a process commonly referred to as “performance evaluation” and it is important for companies to formalize and institutional their performance evaluation procedures. The main functions of a performance evaluation program should include measuring how employees are currently fulfilling their job duties and responsibilities; establishing strategies for improving the performance of employees in the future; identifying any present or future problems relating to the employee’s performance; and determining whether the employee, his or her manager and the company are benefiting from the activities performed by the employee.

The first step in establishing a performance evaluation program is to create a list of the goals and objectives of the program, the information that needs to be collected and the steps that need to be taken in order to analyze the information and clearly and effectively communicate the assessment to employees. For a checklist on conducting performance reviews, see the specialty form at § 100:220. Notice of the performance evaluation process should be disseminated as a separate policy and/or as part of the company’s employee handbook or personnel manual. See the specialty form at § 100:221. Information is generally collected using a comprehensive performance evaluation form. For an example, see the specialty form at [§ 100:222](#). The employee should also be given an opportunity to share his or her own views regarding performance and areas where the employee would like to have more support. For an example of an employee self-appraisal form, see specialty form at [§ 100:223](#). In instances where the employee’s performance has become so problematic that it raises real doubts as to whether or not the employee can continue to work for the company, the human resources department may prepare an issue a performance improvement plan that includes not only a plan for

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improvement but also the employee's written acknowledgement that assistance has been offered and that failure to improve may result in additional discipline including termination of employment. See specialty form at [§ 100:224](#), which is reproduced below.

For further discussion of the laws and regulation pertaining to the employment relationship and practice tools to assist client in complying those laws and regulations, see Gutterman, Business Transactions Solutions § 100:1.

§ 100:224 Performance improvement plan [New]

MEMORANDUM

TO: *[Name of employee]*
FROM: *[[Name of supervisor]/Human Resources]*
RE: Performance Improvement Plan
Date: *[date of memorandum]*

This memo outlines our specific expectations for your performance and it serves as formal written notice that areas of your performance are unsatisfactory and must be improved in order to continue in your current position with the Company. The objective of placing you on this formal Performance Improvement Plan is to give you an opportunity to bring your job performance to a level that is acceptable. It is our intent to provide you the necessary tools and/or training to assist you in attaining satisfactory performance.

The Plan Principles

This Performance Plan will be effective immediately and will remain in place for [number] calendar days, until [date]. You must demonstrate immediate and sustained improvement in the areas listed below. While we are hopeful you will take the necessary steps to improve your performance, if you fail to make sufficient progress toward the goals in the Plan, disciplinary action up to and including termination from the Company may result before the [day] period has been completed. If you successfully complete the Plan, we expect you to continue sustain the improved performance throughout your tenure with us. A deterioration in your performance after successfully completing the improvement plan may also result in your being dismissed from the Company with or without the issuance of another warning or improvement plan. It is important that you realize the responsibility to improve your performance is yours and yours alone.

Communication

You and [name of supervisor] will initially meet on a [frequency] basis to discuss your progress toward goal achievement and performance improvement. [name of supervisor] or I may modify the meeting frequency if appropriate or necessary. As always, the Company maintains an Open Door Policy and encourages you to speak with [name of human resources director] to discuss concerns you may have.

The Performance Measures

The following areas need to show immediate and sustained improvement:

1. [description of area]

Current Status: You continue to struggle in [description].

Required Actions: You need to immediately [description].

2. [description of area]

Current Status: You continue to struggle in [description].

Required Actions: You need to immediately [description].

3. [description of area]

Current Status: You continue to struggle in [description].

Required Actions: You need to immediately [description].

Conclusion

As defined above, these specific areas must show immediate improvement. [name of supervisor] is available to provide direction, if necessary, to aid you in achieving and maintaining this required level of performance. [name of employee], remember it is your responsibility to achieve and maintain the status of, at a minimum, satisfactory performance, which will allow your continued employment with the Company.

This Performance Improvement Plan does not alter your status as an at-will employee and is not a contract for employment. The Company and you retain the right to terminate our employment relationship at any time and for any reason, with or without prior notice. While we are hopeful that you will take the steps to improve your performance, the Company reserves the right to terminate your employment if you do not show sufficient progress toward your goals in this Performance Improvement Plan or if your performance deteriorates after successfully completing the Performance Improvement Plan.

Acknowledgement

The above information was presented to me on this date. I understand that if any of this information is unclear, it is my responsibility to contact [name of supervisor] or [name of human resources representative] to discuss the questions I may have about this document.

[employee signature]

[name of employee]

[date]

Notes

Use of form: This form is an example an employee performance improvement plan issued in a memorandum form by a representative of the employer's human resources department. While every performance evaluation process should focus, at least in part, on identifying areas where employee performance and skills can be improved and creating a development plan, there are situations where performance has been so poor that it raises real doubts as to whether or not the employee can continue to work for the employer. In such instances the issues should be documented in a form such as this one and a plan for improving performance within a specific period should be laid out with specificity. The memorandum should also clearly put the employee on notice that failure to follow the plan and achieve the improvement goals will subject him or her to additional discipline including termination of employment. This form, which is written and issued by a representative of the human resources department, should include an acknowledgment of receipt and understanding by the employee which clearly indicates that he or she has been told to seek assistance from his/her supervisor or someone in the human resources department. If the employee fails to adhere to the plan and make the necessary improvements, and is later terminated, this form becomes valuable protection for the employer against a later claim of unlawful discharge.