



*This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

### **HANDLING PROBLEM EMPLOYEES: THE IMPORTANCE OF A “PAPER TRAIL”**

By Lori Shapiro, Employment Counsel, Pro Bono Partnership of Atlanta

Often a nonprofit organization client calls to tell me that the organization **needs** to terminate an employee who is not performing adequately **right away**. My first request is always “please send me all the documentation showing that this employee had performance issues.” All too often, the answer is “we don’t have any documentation.”

The failure to document performance issues, including providing accurate feedback in regular performance reviews and following appropriate progressive discipline processes to support employment decisions, can create significant risks for a nonprofit organization. Not only does the failure to manage and document performance issues affect employee morale and motivation, but it may also lead to: (1) delays in the organization’s ability to carry out a termination of employment; (2) employment discrimination lawsuits or other claims against the organization challenging the termination decision; or (3) significant cost to the organization if the organization opts to pay severance to the employee at issue in exchange for a release of legal claims.<sup>1</sup>

#### *Why Conduct Regular Performance Reviews?*

An employer should maintain documentation of an employee’s job performance to create a contemporaneous record of problems or issues and how those problem impact the organization. As discussed in this [article](#), performance reviews are important for a number of reasons, including:

- Providing candid feedback to employees on a regular basis about their performance,
- Putting employees on notice of areas where their performance is not meeting expectations, and
- Letting employees know that continued performance issues in these areas may lead to implications under the organization’s progressive discipline or corrective action process.

#### *What is Progressive Discipline?*

If an organization continues to have performance problems with an employee, progressive discipline (sometimes called “corrective action”) is the process an organization follows to manage and document those ongoing employee performance issues. Most organizations typically follow this series of escalating steps to support employment decisions: verbal warning, written warning, performance improvement plan, and then employment termination. While serious infractions or policy violations can lead to immediate termination under appropriate circumstances, if a termination is performance-based, the organization should be able to demonstrate that it followed the steps of its progressive discipline

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<sup>1</sup> Please keep in mind that legal counsel should be consulted if an organization is contemplating paying severance to an employee as part of a termination to ensure that appropriate agreements releasing legal claims are drafted and used.

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process before dismissing the employee (or that it had a good reason for skipping any steps in the process).

All levels of progressive discipline (including the initial verbal warning) should be documented and communicated to the employee (with a request that the employee sign the document acknowledging the communication of the disciplinary action).

Every time a warning is issued, regardless of the level of the warning, the following language should appear in the warning: “The failure to improve performance on an immediate and sustained basis to an acceptable level will lead to further disciplinary action up to and including termination of employment.”

See this [article](#) for more information about employee discipline and documenting disciplinary action.

#### *What is a Performance Improvement Plan?*

A Performance Improvement Plan (“PIP”) is the employee’s last chance to improve his or her performance before termination. It typically includes performance goals that must be achieved within a certain time period and regular check-ins with a supervisor or manager to monitor achievement of those goals.

For more specific guidance on how to draft an effective Performance Improvement Plan, see this [webcast](#).

#### *What If an Employee Refuses to Sign?*

If an employee refuses to sign a performance review, warning, or PIP, the organization should indicate (on that document) that the employee refused to sign with the signature or initials of the manager who communicated the contents of the document to the employee, and then should proceed with the plan outlined in the document.

The refusal to sign the document, or even an employee’s request to review or submit comments at a later time, should not delay implementation of the action steps outlined in a warning or PIP. Any follow up, including goal-setting or meetings to review accomplishment of goals, should be scheduled on the timeline indicated in the document. Please bear in mind that a delay or failure to move forward with the promised action steps could delay the organization’s ability to take further action, such as terminating employment if the goals of the plan are not achieved.

#### *What Happens When Performance Management and PIP Steps Have Been Exhausted?*

If you have managed and documented performance issues and followed a PIP, but performance has not improved, the organization must decide if termination is warranted. If so, there are several steps you should take in carrying out a termination of employment. Please review this [podcast](#), which includes information about how to conduct employment terminations, and this [link](#) to the Georgia Separation Notice form required for all employment terminations in Georgia.

Please contact your PBPA attorney if you have any questions or to receive more specific guidance on performance management, performance improvement plans, and employment terminations.

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