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# Application and Risk Mitigation of PIP in Termination of Employment Contracts Due to Incompetence

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LI YUNHUA<sup>1</sup>

## ABSTRACT

*The Performance Improvement Plan (PIP) is a management tool commonly used by enterprises to enhance employee performance and is often cited as a basis for terminating employment contracts due to incompetence. However, due to the lack of specific standards defining "incompetence", there are misunderstandings in its application. A comprehensive analysis of numerous cases reveals that PIP is typically associated with "incompetence", yet it does not fulfill the role of "training" as stipulated under the Labor Contract Law of the People's Republic of China for termination based on incompetence, thereby posing risks of unlawful termination. Employers should establish or clearly stipulate evaluation systems and standards, implementing PIP based on these guidelines. Adhering to a complete evaluation process, while respecting employees' rights to suggest training and be informed, is essential to mitigating legal risks.*

**Keywords:** PIP; Incompetence; Labor Contract; Training.

## I. INTRODUCTION

Before analyzing the legal application of PIP (Performance Improvement Plan) in cases of employee incompetence, it is essential to clarify its definition and legal position. A thorough exploration of the concept of PIP and its role within corporate performance management systems not only illuminates PIP's positive impact on enhancing employee performance but also provides a foundation for examining its legal validity in employment termination cases. By delineating the relationship between PIP and the grounds for termination due to incompetence as outlined in the *Labor Contract Law of the People's Republic of China of the People's Republic of China*, we can further investigate whether PIP may be considered a legitimate form of training for legal termination purposes (Zhang, 2017).

### (A) Definition of PIP

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<sup>1</sup> Author is a Teacher at School of Economics and Management, Zhaoqing University, Zhaoqing, Guangdong, China.

The Performance Improvement Plan (PIP) is a structured management plan developed by enterprises to enhance employee performance, typically created after a thorough discussion between the manager and the employee. Primarily aimed at addressing specific performance gaps, PIP sets clear performance and skill improvement goals to be achieved within a specified timeframe. The core of the PIP lies in establishing measurable objectives that help the employee progressively improve their performance, ultimately aligning individual achievements with the overall objectives of the organization.

Generally, PIP specifies areas needing improvement, intervention measures, timelines, and evaluation standards to ensure the employee completes the improvement process with targeted training and support. However, if an employee fails to meet the set performance goals—especially when the achievement rate falls below the company's designated standard or threshold—some organizations may use PIP as evidence of the employee's incompetence and subsequently initiate termination proceedings (Li, 2008). Although PIP allows companies to assess an employee's job suitability, failing to adhere to lawful termination procedures or lacking sufficient legal grounds when implementing termination could result in legal risks associated with wrongful termination.

In judicial practice, courts tend to adopt a cautious approach toward terminations solely based on PIP results. Typically, courts review whether the PIP aligns with the *Labor Contract Law of the People's Republic of China*, examining whether the company provided necessary training, whether the evaluation standards were objective and reasonable, and whether the termination procedures were compliant. In most cases, courts have ruled that unilateral termination due to PIP non-compliance constitutes unlawful dismissal, concluding that, without adequate evidence or legal procedures, PIP should not serve as a justified basis for termination (Gao & Zhang, 2022).

### **(B) Definition of Incompetence**

According to the *Explanations on Certain Provisions of the Labor Law* issued by the Ministry of Labor of China, “incompetence” is defined as an employee's inability to fulfill the tasks stipulated in the labor contract or to meet the workload standards of peers in similar roles. Furthermore, this document restricts employers from artificially increasing task quotas to prevent employees from meeting work requirements (Wu, 2003). This regulation provides a relatively succinct description of incompetence, but it does not specify the factors leading to an employee's incompetence. Indeed, legislation offers no explicit guidance on specific causes, and there is no unified standard in academic or judicial practice.

In academic discourse, there are two main views on the causes of incompetence. The first is the “objective standard,” which argues that incompetence should be judged based on objective factors, such as an employee’s inability to achieve work goals due to technical, health, or other uncontrollable circumstances. The second is the “objective-subjective standard,” which suggests that both subjective and objective reasons can lead to incompetence, with a recommendation to consider whether the employee demonstrates a “willingness but inability” to perform (Wu, 2003). This attitude-based assessment examines whether the employee, despite having the capability, proactively fulfills their responsibilities or fails due to intentional neglect. In judicial practice, courts tend to adopt a stringent approach to determining incompetence, favoring the protection of employee rights. Judicial decisions frequently restrict the grounds for incompetence to objective causes, while subjective factors are rarely considered legitimate grounds for termination. Although “incompetence” and “failure to meet job requirements” are similar in wording, they differ in meaning. “Incompetence” typically refers to an employee’s inability to complete work despite willingness, due to limitations in intellect, skills, or physical abilities, as opposed to intentional negligence.

When assessing an employee's competence, companies must first identify whether the cause of unmet goals is due to deficiencies in the employee’s knowledge, skills, or physical capacity, or rather a lack of effort or commitment. Tasks uncompleted due to deficiencies in knowledge, skills, or physical limitations may be classified as incompetence, while those uncompleted due to a passive attitude should be treated as breaches of work discipline or company regulations.

To determine incompetence, four conditions generally need to be met. First, job responsibilities or requirements should be clearly defined, meaning the employer must specify the scope of duties and specific tasks for the position in the labor contract or job description, ensuring the employee fully understands these expectations. Second, employees must be informed of the performance evaluation system, which entails that the employer ensures the employee is aware of the performance criteria and evaluation procedures prior to assessment, allowing them to understand the specific behaviors affecting their evaluation. This awareness not only aids in self-adjustment but also serves as valuable evidence for the employer in potential performance evaluation disputes. Third, the evaluation process must be fair and impartial. The employer must avoid personal biases during assessment, apply objective and reasonable methods, and ensure consistency in the evaluation criteria. A fair evaluation process is essential for maintaining trust between the company and its employees and is critical in preventing disputes. Lastly, the evaluation results must clearly reflect performance consistent with incompetence standards. If the employee fails to meet performance goals, and the results align with

incompetence criteria, this may serve as grounds for termination, providing the employer with a legitimate basis for further actions. These standards ensure that the employer's judgments are well-founded while safeguarding the employee's legal rights (Chen, n.d.).

### **(C) Relationship Between Bottom-Ranking Elimination and PIP in Termination Due to Incompetence**

The bottom-ranking elimination system is a management approach based on performance evaluations that ranks employees according to their work performance and dismisses or terminates those with the lowest rankings (Fu, 2020). This management model was first introduced by former General Electric (GE) CEO Jack Welch and is also referred to as the “vitality curve” system. Its core logic involves arranging employee performance in descending order along the horizontal axis, with the number of employees meeting the standard increasing along the vertical axis, thus leading to the elimination of the bottom 10% of employees. Known as the “10% rule,” this system fosters a competitive environment to motivate employees, thereby enhancing organizational efficiency and departmental performance. This approach is widely applied by companies such as General Electric, Hewlett-Packard, and prominent Chinese corporations like Huawei and Haier (Guo, 2015).

Although both the Performance Improvement Plan (PIP) and bottom-ranking elimination are performance management tools, their purposes and applications differ significantly. PIP is primarily designed to aid employees in improving job performance through achievable goals, while the purpose of bottom-ranking elimination is to optimize the overall team by removing the lowest-performing employees. When implementing bottom-ranking elimination, companies must ensure the maturity and scientific robustness of the performance management system, utilizing a fair and transparent evaluation process to gain employees’ trust and recognition. However, even when implemented internally, bottom-ranking elimination cannot automatically serve as a basis for terminating an employment contract. Specifically, if bottom-ranking elimination is applied to a particular role, the ranking alone cannot justify a transfer or dismissal; instead, a competency review must assess the employee's actual performance and capability to determine whether a transfer or further action is appropriate.

In judicial practice, courts generally uphold a clear distinction between bottom-ranking and incompetence. Courts have often ruled that an employee’s low ranking does not equate to incompetence and thus does not constitute grounds for lawful termination. The Supreme People’s Court has underscored this in guiding cases, stating that an employee’s low ranking in a company’s grading assessment is not equivalent to incompetence and does not meet the

statutory requirements for unilateral termination of the employment contract by the employer. Therefore, while bottom-ranking elimination can function as an internal management tool, it lacks legal validity as grounds for contract termination based on incompetence (Qiu, 2017).

**II. CASE INTRODUCTION**

A search on Covi for the keyword “incompetence termination of employment contract” reveals 21,991 judicial cases from 2001 to the present, with Guangdong having the highest proportion at 13.16%. Nearly half of these cases have emerged within the last five years, with almost half of first-instance verdicts fully or partially supporting the plaintiff’s claims, indicating that the termination was unlawful. Four representative cases involving the application of PIP as grounds for termination due to incompetence are summarized below.

**Table 1 Representative Cases of Contract Termination Due to Incompetence Using PIP**

Case Number	Specifics of Implementation	PIP	Court’s Ruling on PIP	Relationship to Incompetence
(2021) Jing 03 Min Zhong No. 7567	The <i>Personal Performance Improvement Plan</i> included the following: assessment of current employee performance, improvement plan and feedback, and final evaluation results. Zhao was required to receive weekly 30-minute training sessions on “recruitment hard skills” and “collaborative work skills,” with four feedback sessions for each type of training.	<i>Personal Plan</i>	The company provided training to Zhao via email, which did not align with the methods and content stipulated in the <i>Improvement Plan</i> .	The company failed to provide sufficient evidence of specific training content or Zhao’s post-training work performance. The court found no evidence to confirm that Zhao “was unable to perform after training or reassignment.”
(2021) Yue 01	According to section 6.1 of the employee		The company submitted substantial evidence,	The training method adhered to the handbook,

Case Number	Specifics of PIP Implementation	Court's Ruling on PIP	Relationship to Incompetence
Min Zhong No. 16081	handbook on training: “The company decides on training for employees unable to perform, with supervisors and employees discussing schedules, locations, areas for improvement, and training plans, and setting a time for review or testing. Training may be on-site or off-site, as determined by the company.”	including emails, and performance management plans, and the <i>Improvement Plan</i> , showing that various training and weekly meetings were conducted to address Deng's deficiencies. This approach did not contravene the employee handbook.	and the performance management and evaluation results detailed over ten areas of deficiencies in Deng's work. These specific evaluations could serve as a basis for assessing whether Deng was fit for the role.
(2021) Hu 0106 Min Chu No. 22803	The supervisor sent Chen an email stating: “The business plan you submitted does not align with the discussions we had for over three hours before the New Year. I need to understand how you intend to break down the annual goal of 1,300,000... We discussed your performance improvement plan, and I am disappointed that you failed to meet	Although the company claimed to have provided training to Chen, the emails sent were merely work-related requirements and not demonstrable efforts to enhance Chen's skills. Moreover, there was no concrete evidence from call recordings or group sharing sessions provided by the company, nor was there evidence from recorded WeChat calls beyond timestamps. Therefore, it could not be	Even if training was provided, there was insufficient evidence to prove that Chen failed the improvement plan and remained incompetent. The company provided only the first month's evaluation and translations, while the evaluations for the second and third months were left blank, rendering the termination based on

Case Number	Specifics of PIP Implementation	Court's Ruling on PIP	Relationship to Incompetence
	expectations in several areas. We will soon conduct a final evaluation of the plan, and I hope you make significant improvements to meet the company's performance standards."	established that the company conducted training.	poor sales performance unsubstantiated.
(2021) Hu 02 Min Zhong No. 8630	The company initiated a three-month improvement plan and sent it to Chen. (The ruling does not reflect specific details of the plan or training.)	Chen exhibited numerous mistakes at work, corroborated by colleagues. In emails to the company, Chen stated that "prior training does not relate to the current role, making it difficult to understand and perform the job in a short time." Therefore, Y Company's initiation of the improvement plan was deemed reasonable. Based on the evidence on record, Chen continued to demonstrate numerous errors throughout the duration of the PIP and following its conclusion. This persistent underperformance	The process spanned over a year, from Chen's role reassignment and agreed job change to training and improvement efforts, culminating in termination. Despite extensive training, Chen's performance continued to exhibit significant errors, justifying the company's decision to terminate the contract based on incompetence after improvement training, with no evident bad faith.



Case Number	Specifics of PIP Implementation	PIP Court's Ruling on PIP	Relationship to Incompetence
		substantiated the company's assessment that Chen did not successfully meet the improvement criteria set forth by the PIP.	

An extensive review of cases reveals that PIP is frequently linked to situations of employee incompetence, with employers often establishing performance improvement plans to train and assess employees deemed unfit for their roles. The design of a PIP and the extent to which it is integrated with training have a direct impact on the legal validity of using incompetence as grounds for contract termination.

### III. PIP IS NOT EQUIVALENT TO TRAINING REQUIRED FOR TERMINATION DUE TO INCOMPETENCE

Article 40 of the *Labor Contract Law of the People's Republic of China* outlines conditions under which an employer may unilaterally terminate a labor contract, including if an employee “fails to perform satisfactorily, even after receiving training or being reassigned to a different position.” For a lawful termination based on incompetence, the employer must first complete either training or reassignment; bypassing this prerequisite constitutes unlawful termination. In practice, many employers treat PIP as a retraining measure for underperforming employees. However, does PIP qualify as training under the law? Can PIP fulfill the *Labor Contract Law of the People's Republic of China* requirements for training in cases of termination due to incompetence? In the cases above, Cases 1 and 3 conclude that PIP does not constitute training, while Cases 2 and 4 treat PIP as retraining for underperforming employees. What accounts for this discrepancy?

First, Article 40, Item 2, of the *Labor Contract Law of the People's Republic of China* includes the training requirement to specifically enhance employees' work capacity, enabling them to gain skills necessary to meet job requirements. When a PIP is focused primarily on company performance metrics rather than on evaluating employee abilities, it may not adequately include training content designed to improve employee competence. A PIP lacking a component that specifically aims to develop employee skills does not meet the *Labor Contract Law of the People's Republic of China's* definition of training.

Second, although training formats and frequencies fall within the employer's discretionary management rights, they should be as targeted and specific as possible. Case 1 illustrates that, although the performance improvement plan between the employer and employee was thoroughly detailed—including specific training content, scheduling, feedback mechanisms, and outcomes—the employer still lost the case. This was because the actual coaching provided did not align with the training content and formats outlined in the *Improvement Plan*, leading the court to rule that no actual training had taken place. The court observed, “The training provided to Zhao via email did not match the content and format specified in the Improvement Plan. Therefore, the claim that Zhao was unable to perform satisfactorily after receiving training or being reassigned to a different role cannot be substantiated.” This suggests that the court uses a dual approach of substantive and formal criteria when examining training provided to employees deemed incompetent. Alongside proper training formats, employers must customize the content of such training by referring to job standards, identified skill gaps, and competency requirements, thereby providing training tailored to the specific deficiencies of the employee. This highlights the need for employers to establish a structured training system based on job standards and close cooperation between HR and operational departments (Gao & Zhang, 2022).

Thus, a Performance Improvement Plan (PIP) does not inherently meet the Labor Contract Law's definition of “training.” It can only be considered a legitimate training tool when it satisfies specific conditions. To serve as a lawful basis for contract termination, PIP must fulfill training requirements in both form and implementation. In terms of form, the employer and employee should mutually agree on a clear PIP that details the content of improvement training, including timing, frequency, methods, and feedback mechanisms, ensuring that training is targeted and that the employee fully understands the training content. Training schedules must be reasonable, respecting the employee's rights and balancing their workload while offering substantial skill enhancement opportunities, thus avoiding excessive burdens or implicit penalties. In terms of implementation, the employer must rigorously adhere to the PIP's stipulated content, maintaining comprehensive records of the entire training process—such as attendance, training content, feedback, and relevant documentation—to serve as valid evidence if needed. When a PIP satisfies these formal and implementation requirements, and the employee remains unable to meet job standards post-training, the employer then has legal grounds for contract termination. In practice, as seen in Case 2, the court upheld the employer's action by recognizing that the employee did not meet specific quantifiable evaluation standards. In Case 4, the court deemed termination lawful as the employer demonstrated the employee's

continued incompetence despite training, affirming that PIP could serve as legitimate training when formal and implementation requirements are met.

#### **IV. RISK MITIGATION IN USING PIP FOR CONTRACT TERMINATION**

Given the legal risks associated with applying PIP for termination due to incompetence, employers should adopt systematic risk mitigation measures to ensure PIP aligns with legal requirements. Through a sound evaluation system and clear standards, employers can guarantee the fairness of performance evaluations and provide robust evidence in case of disputes. In establishing and implementing evaluation systems and standards, employers must prioritize rationality, legality, and transparency—key factors that enhance the objectivity of evaluation results and offer vital legal protection for subsequent managerial actions.

##### **(A) Establishing Rigorous Evaluation Systems and Standards**

In judicial practice, courts closely scrutinize PIP evaluations, examining whether evaluation methods are objective and reasonable, if adequate grounds exist for conclusions, and whether employees had opportunities to validate training outcomes. Courts also review whether specific standards for determining incompetence are defined in the company's regulations. Therefore, a fair and objective evaluation process is essential in determining incompetence. Employers must provide substantial evidence supporting legally established evaluation standards and specific behaviors that fail to meet those standards.

In proving an employee's incompetence, employers bear a "threefold burden of proof"—namely, the existence of “policies, standards, and evidence.” First, employers must have institutional support, meaning that standards for competence should be clearly defined within company regulations or the labor contract, typically in the form of internal regulations or an employee handbook. Second, the employer must establish clear evaluation standards that categorize employee performance, distinguishing between “competent” and “incompetent.” These standards should be based on the characteristics of the position, ensuring fairness and reasonableness in evaluations. The third proof requirement is “evidence”: the employer must collect and retain specific evidence of the employee's incompetence that aligns with the evaluation policies and standards. For instance, records of unmet performance expectations or uncompleted key tasks can substantiate an incompetence determination (Qiu, 2017).

Overall, the core basis for determining an employee's incompetence lies in the employer's evaluation system. To ensure this system's effectiveness and legality, employers should meet four additional conditions: (1) define job responsibilities clearly, allowing employees to understand their roles and responsibilities; (2) ensure that the evaluation process directly relates

to job responsibilities; (3) establish clear criteria for assessing incompetence, providing actionable metrics during evaluations; and (4) follow democratic procedures and notify employees when establishing regulations, ensuring procedural legality. For position responsibilities and evaluation criteria, employers wishing to use performance evaluations to determine incompetence should ensure that evaluation content encompasses metrics like efficiency, quality, and capability, enabling comprehensive and accurate competency assessment. Additionally, evaluation methods should vary according to job nature. For roles with directly quantifiable outcomes, employers can use metrics based on work output and quality, with multiple levels of assessment such as “excellent,” “good,” “competent,” and “incompetent.” Quantifiable roles include not only traditional production jobs but also customer-facing service positions, where complaint rates might serve as an evaluation metric, or management positions, where incident rates may be used. This evaluation framework allows employers to objectively and fairly assess employee competence, thereby safeguarding their managerial rights within legal bounds.

#### **(B) Adhering to a Complete Evaluation Process**

First, competency standards should be clearly defined within the company’s performance evaluation policies, as this is a prerequisite for implementing a PIP. These competency standards should be established in the form of internal policies or employee handbooks and must comply with the legal requirements for democratic procedures and disclosure. According to Article 4 of the *Labor Contract Law of the People’s Republic of China*, employers must discuss policies affecting employees’ immediate interests with all employees or their representatives, consult equally with unions or employee representatives, and disclose such policies to employees. Under Article 19 of the *Interpretation of the Supreme People’s Court of the People’s Republic of China on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases*, company policies formulated through democratic procedures in compliance with Article 4 of the *Labor Law of the People’s Republic of China*, provided they do not contravene national laws, administrative regulations, or policies, and are disclosed to employees, may be used as grounds in court during labor dispute cases. Since competency standards directly impact the employer’s right to adjust roles or terminate employment contracts, such standards are deemed to be “policies or significant matters directly affecting employees’ immediate interests” under the aforementioned laws. If the standards for evaluation have not followed the democratic procedures or disclosure requirements, the court may rule that the evaluation results based on these standards are invalid, rendering such standards inadmissible in court and placing the employer at a disadvantage in litigation (Zhou, 2012).

Second, competency standards may also be individually agreed upon between the employer and employee. Such individually established standards do not constitute company policies and therefore do not require compliance with the democratic procedures outlined in Article 4 of the *Labor Contract Law of the People's Republic of China*. However, the following points should be noted: (1) the employee should sign and confirm the agreed-upon standards, and the agreement should be properly stored; (2) the agreed-upon competency standards should be as specific and clear as possible; and (3) although setting these standards by mutual agreement demonstrates the employee's awareness and acceptance of the standards, the agreed standards should still be within a reasonable scope. According to Article 26 of the *Explanations on Certain Provisions of the Labor Law* (issued by the Ministry of Labor of China), "incompetence" refers to an inability to fulfill tasks specified in the labor contract or meet the work output of peers in similar roles, and employers may not raise quotas arbitrarily to prevent employees from meeting work requirements. In judicial practice, if the evaluation standards are vague to the extent that employees cannot understand specific requirements, or if the standards are unreasonably high and unachievable, the court may reject these standards as valid.

Third, employers may issue evaluation results to specific employees through notifications. In practice, some employees, despite having an employment relationship, may refuse to sign the evaluation standards due to concerns about meeting the targets. In such cases, the evaluation standards are issued unilaterally by the employer. The question then arises: are evaluation standards issued as a notification without mutual agreement valid? Unilateral standards are not automatically invalid. Even without the employee's signature, the validity of such standards may be established if the employee's behavior and documents generated during the employment relationship indicate acceptance of the standards. For instance, if the employee prepares performance reports based on the evaluation standards, or if the employer provides rewards or compensation as stipulated by the evaluation standards, these may be used as evidence of acceptance.

Finally, employers should establish and retain detailed records of performance evaluation results, ensuring that results are communicated to employees in writing and signed by the employee. The complete PIP implementation process is illustrated in Figure 1:

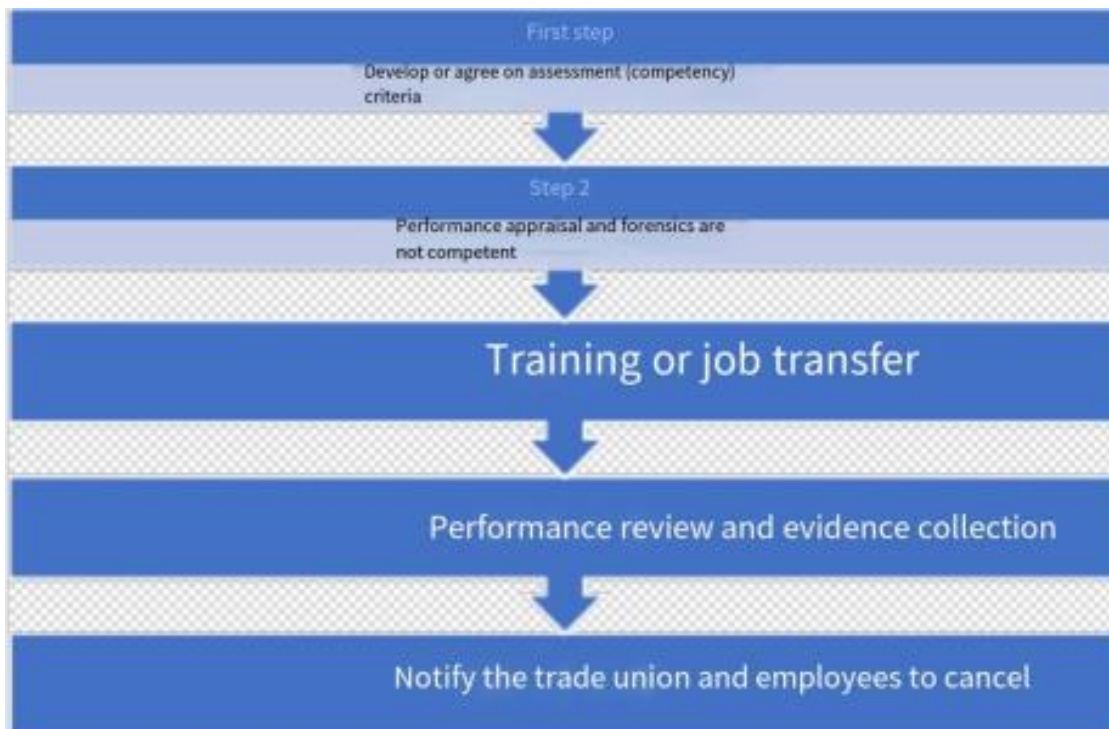


Figure 1 Complete PIP Process Flow

### **(C) Respecting Employees' Right to Suggest Training and Right to Information**

While the *Labor Contract Law of the People's Republic of China* grants employers the right to provide training to employees deemed unfit for their roles, this does not imply that employers can make unilateral decisions and merely notify employees. From a labor management perspective, employers should carefully design relevant processes before implementing training, ensuring that employees are consulted at every step of the plan's execution. This approach not only allows employers to fully consider employees' suggestions and opinions but also maintains transparency and fairness throughout the process, thereby fostering employee understanding and cooperation.

Additionally, employers should retain essential documentation, such as records of consultations with employees, to confirm the rationality and adequacy of the training plan and thereby reduce legal risks effectively. Specific details of the training, including content, schedule, methods, progress, and expected outcomes, should be communicated to employees in advance, with training commencing only after employees sign to acknowledge their agreement.

Moreover, to prevent potential future labor arbitration disputes, employers should keep comprehensive written or audiovisual records of all training-related documentation. This includes training notifications, specific training plans, content, attendance logs, employees' signed confirmations, and feedback results. Such documentation serves as reliable evidence in

arbitration or litigation, demonstrating the employer's fulfillment of reasonable training obligations and reducing legal risks arising from procedural deficiencies.

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