From the HR Hotline

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Zywave's HR consultants continue to provide expertise and serve as a valuable resource for navigating the pressing challenges facing employers today. This team, the HR Hotline, fields dozens of questions each day from employers seeking answers to their HR questions.

In recent months, employers have sought guidance on religious discrimination, employment visas, open enrollment and employee discipline. While answers to these topics can vary based on locality, employer and individual circumstances, federal agencies offer guidance that can aid employers in addressing day-to-day challenges in the workplace.

This article explores questions and answers to common HR situations.

What Are Some Best Practices for Preventing Religious Discrimination?

Religious discrimination claims may expose employers to time-consuming and costly administrative and legal proceedings. Employers may consider implementing the following best practices to mitigate the risk of religious discrimination claims. However, adopting these practices will not protect employers from liability for any religious discrimination that does occur, and employers may need to modify these practices to accommodate different workplace needs and circumstances.

Review and Update Workplace Policies

Dress Code and Grooming Policies

While employers may generally implement dress code and grooming policies, employers should ensure that such policies do not disproportionately affect individuals of a certain religion or enforce stereotypes about specific groups. Employers should generally apply neutral language and ensure policies are based on legitimate business requirements and safety concerns.

Sometimes an employee's religious garb or grooming practices may conflict with such policies. In this case, employers must make an exception to their policies to accommodate the religious practice, unless the policy is a safety requirement or such modification would otherwise impose an undue hardship on the employer. In most cases, employers can find a modification to comply with safety requirements or business needs and allow employees to practice their religious beliefs. Therefore, employers should carefully consider employee requests to modify such policies due to their religious beliefs before rejecting them outright. However, employers are not required to make exceptions for an individual's personal preference with respect to dress or grooming practices (assuming such policies are not otherwise discriminatory) that are not related to an individual's religious beliefs.

Anti-discrimination Policies

Employers may also consider reviewing and updating workplace discrimination policies to include a statement that the employer does not tolerate discrimination on the basis of an individual's religious beliefs.

Anti-harassment Policies

Religious harassment is also strictly prohibited under Title VII. Religious harassment may occur when an employee is required or coerced to abandon, alter or adopt a religious practice as a condition of employment. It may also occur when an employee is subject to unwelcome statements or conduct based on religion. Harassment may include offensive remarks about a person's religious beliefs or practices, or verbal or physical mistreatment motivated by an individual's religious beliefs or practices.

Employers are liable for harassment by employees and other third parties if they knew or should have known about the harassment and failed to take appropriate corrective action. Employers are also liable for harassment by supervisors if such harassment results in an adverse employment action (e.g., firing or demotion). Therefore, employers should consider reviewing their anti-harassment policies to include a statement that religious harassment is prohibited and provide examples of what behaviors may constitute unlawful religious harassment.

Foster an Inclusive Workplace

To prevent claims of religious discrimination, employers may take steps to foster an inclusive workplace and promote a culture that values diversity of religious beliefs and expression. One way employers can foster an inclusive workplace is to respect and encourage religious expression to the extent it does not interfere with business operations. Some examples of behaviors employers may allow in the workplace include:

- **Displaying and using religious items or icons**—In general, employees should be allowed to display and use items used for religious purposes or religiously significant icons at their desk (such as religious texts, artwork and jewelry), on their person and at their assigned workspace; and
- **Expressing religion with coworkers**—Employers should generally allow employees to engage in conversations regarding religion with their coworkers, only to the extent that such discussions are not harassing in nature (for example, aggressively attempting to persuade a colleague to convert to a particular religion). Further, employers should generally not require employee participation or attendance in such discussions. Some states have explicitly banned this practice, so employers should carefully review the laws of their state.

However, employers may generally limit the time, place and manner of employee speech to the extent it does not discriminate based on content or viewpoint.

Ensure Consistent and Nondiscriminatory Selection Criteria

Employers may also consider reviewing their existing selection criteria (including selection for hiring, recruiting candidate pools, programs, training and promotions) to ensure they do not discriminate against any individual on the basis of their religion, including any form of religious expression such as religious attire or grooming practices. Employers should ensure that selection criteria are neutral, consistently applied and not inadvertently disadvantageous to any particular individual because of their religion. For example, employers may not consider consumer preferences for or against employees of a particular religion or who wear certain religious attire.

Document Employment Decisions

In any employment decision, such as hiring, discharging, promoting, disciplining and modifying compensation, employers should document the clear, legitimate and nondiscriminatory rationales for the decisions. Employers should also ensure that any such rationales are applied consistently to all individuals, regardless of their religious beliefs. Documentation can help employers defend against potential claims of religious discrimination.

Train Employees and Supervisors

Employers should consider administering training for both employees and supervisors regarding their obligations with respect to religious discrimination under Title VII. Employers should consider adding discussions and examples of religious discrimination, harassment and retaliation in training programs. Employers may also consider providing supplementary training for supervisors that focuses on how to handle internal complaints of discrimination or harassment, how to ensure nondiscriminatory and consistent selection practices, and how to recognize and prevent religious bias.

Implement a Fair Internal Complaint Process

Employers should review their internal complaint and investigation procedures to ensure that appropriate protocols are in place for allegations of religious discrimination. As noted above, under Title VII, employers may be liable for harassment by their employees and third parties if the employer knew or should have known of the harassment and failed to take appropriate corrective action. Therefore, it is imperative that employers have an internal complaint process that can address and act on such complaints in a prompt, thorough and equitable manner.

What Should I Know About Updates to H-1B?

On Sept. 24, 2025, the U.S. Department of Homeland Security (DHS) announced a proposed rule amending its regulations governing the process by which the U.S. Citizenship and Immigration Services (USCIS) selects H-1B registrations. The proposed rule would implement a weighted selection process that would generally favor higher-skilled and paid foreign workers.

The proposed rule follows a recent presidential proclamation, signed on Sept. 19, 2025, announcing a new $100,000 entry fee for each new H-1B visa recipient starting Sept. 21, 2025. According to the Trump administration, the increased fee aims to curb abuses of the H-1B system that may disadvantage the U.S. workforce and lead to wage suppression. The proclamation does not change any required fees in connection with H-1B renewals. More information about the new fee can be found on the U.S. Department of State's website.

Key Highlights

The proposed regulation would replace the lottery system with a weighted system prioritizing higher-paying jobs while still awarding H-1B visas at different wage levels. The proposal identifies four wage bands based on the Occupational Employment and Wage Statistics wage levels, as follows:

- Level I—Candidates would be entered into the selection pool one time.
- Level II—Candidates would be entered into the selection pool two times.
- Level III—Candidates would be entered into the selection pool three times.
- Level IV—Candidates would be entered into the selection pool four times.

Through a random, computer-generated selection process, candidates would only be eligible to be selected once, regardless of the number of entries.

What Happens if an Employee Misses Open Enrollment?

For an employee, missing this vital deadline can mean losing coverage or being unable to change benefits elections, which can have a significant financial impact on the employee. For employers, when employees miss this deadline, it can result in additional administrative burdens and unhappy or unproductive employees.

Legally, employers are not required to do anything for employees who have missed the open enrollment deadline. In fact, the terms of your benefits plans may prohibit you from making exceptions for employees who do not elect benefits within a certain period, such as before the new plan year begins.

The only exception to these terms is if an employee qualifies for a special enrollment period (SEP). Employees who experience qualifying life-changing events (such as getting married, divorced or legally separated; having or adopting a child; or moving to a new residence or work location that affects benefits eligibility) are eligible to enroll in or make changes to their benefits elections outside of the open enrollment period. It is in an employer's best interest to create simple and comprehensive policies and procedures so they are prepared in the event of a SEP.

Employers that are applicable large employers (ALEs) under the Affordable Care Act may have additional concerns. These employers must offer affordable, minimum-essential coverage to their full-time employees or potentially face the employer shared responsibility penalty. You will not be subject to this penalty if you offer appropriate coverage to employees, regardless of whether they enrolled.

In order to ensure that their businesses will not face any penalties, many ALEs should document that coverage has been offered. By requiring employees to sign either an acknowledgment of benefits form for those who opt in to coverage, or a waiver of coverage form for those who opt out or miss the deadline to enroll in employer-based benefits packages, employers will create a uniform policy.

What Are Common Cafeteria Plan Administration Errors?

A Section 125 plan, or a cafeteria plan, allows employees to pay for certain benefits on a pre-tax basis. To receive these tax advantages, a cafeteria plan must comply with the rules of Internal Revenue Code Section 125 and IRS regulations.

In general, cafeteria plans that fail to operate according to their written plan terms or that otherwise fail to operate in compliance with Section 125 and the regulations will not be considered cafeteria plans, which means employees' elections between taxable and nontaxable benefits will result in gross income to the employees. Errors affecting component benefit plans may also violate other federal group health plan laws, such as ERISA or COBRA.

Section 125 and the accompanying regulations do not address how to correct cafeteria plan administration mistakes. As a starting point, the best way to avoid cafeteria plan administration mistakes is to understand how and why errors typically occur, and to take proactive steps to prevent them from happening in the first place. Many plan administration issues stem from miscommunication, operational issues or unfamiliarity with Section 125 and its accompanying regulations, with the errors outlined below being among the most common.

Improper mid-year election changes without a qualifying event

In most cases, an employee cannot change their elections under a cafeteria plan during the coverage period (usually the plan year). However, the IRS allows employers to design their cafeteria plans to allow employees to change their elections during the plan year only if specific conditions are met:

1. The employee experiences a mid-year election change event recognized by the IRS;
2. The cafeteria plan explicitly allows mid-year election changes for that event in its written plan document; and
3. The employee's requested change is consistent with the mid-year election change event (e.g., adding a dependent after birth).

A common mistake occurs when employers, as plan sponsors, permit mid-year election changes without verifying that all three conditions are satisfied. For example, an employee may experience a qualifying event, such as marriage, that is recognized by the IRS. While it may be appropriate for the employee to change from employee-only to family coverage in response to that event, the plan must also specifically allow such a change (condition 2). If the plan document does not permit mid-year changes for marriage, the election would be invalid. Additionally, even if the plan allows changes due to marriage, the employee cannot use that event to discontinue contributions to group term life insurance, since that change is unrelated to the nature of the qualifying event (condition 3).

Another important consideration for employers is that some of the IRS's mid-year election change events apply to all qualified benefits that can be offered under a cafeteria plan, while others are limited to specific benefits. For example, not all of the IRS's mid-year election change events apply to elections for health flexible spending accounts (FSAs). Thus, it is important to carefully review which events apply to each benefit and ensure that the cafeteria plan document clearly outlines the permitted changes.

Incorrect salary reduction withholdings

Cafeteria plans are primarily funded through salary reduction agreements between employers and employees, where employees agree to have a portion of their salary withheld on a pre-tax basis to pay for qualified benefits such as health insurance. These elections must generally be made on a prospective basis, typically during an annual open enrollment period, with the elections taking effect on the first day of the upcoming plan year. Employees who become eligible for benefits during a plan year (for example, new hires) will usually make their elections during an initial enrollment period.

Mistakes can occur when salary reduction amounts are either miscalculated or applied retroactively, often due to administrative oversight. If the amount withheld does not match the employee's authorized election, resulting in either too much or too little salary being withheld, the plan will fall out of compliance with Section 125.

Offering or reimbursing nonqualified benefits under the plan

Cafeteria plans may offer a variety of qualified benefits, such as accident and health benefits, adoption assistance, dependent care assistance, and dental or vision benefits. However, benefits not recognized as qualified under Section 125 cannot be offered under a cafeteria plan, such as Archer medical savings accounts, long-term care insurance, or employer-provided meals and lodging. If a plan offers nonqualified benefits, it risks losing its status as a cafeteria plan, which means employees' elections would become taxable.

Enrollment mistakes

Eligibility errors in cafeteria plan administration can occur when individuals who do not meet the criteria under Section 125 are mistakenly allowed to participate, or when eligible individuals are inadvertently excluded from plan participation. These issues often occur during open enrollment, when large volumes of elections are processed, and can lead to discrepancies in salary reduction amounts and errors in the administration of component benefit payments.

When correcting these issues, it is important for employers to assess whether and how adjustments should be made across the various benefits offered under the plan.

Failing to comply with applicable nondiscrimination rules

To receive favorable tax treatment, cafeteria plans must generally pass a series of nondiscrimination tests designed to ensure that the plan does not disproportionately benefit highly compensated employees. If a cafeteria plan fails these tests, highly compensated employees lose the tax benefits of participating in the plan and must include the benefits or compensation in their income. However, employees outside the highly compensated group will retain the tax benefits of plan participation, even if the plan fails nondiscrimination testing. Nondiscrimination testing should be performed each plan year; if performed early, employers will have time to make any necessary adjustments to maintain compliance. Because nondiscrimination testing is complex, most employers use outside service providers to perform it. It's also important to remember that additional nondiscrimination tests apply to specific benefits that may be offered under a cafeteria plan, such as health and dependent care FSAs.

Employer Takeaway

Resolving cafeteria plan administration errors involves many factors and can present significant compliance risks. Due to limited formal guidance from regulatory agencies in this area, employers who discover such errors should promptly consult with benefits counsel or their plan advisors to determine the most appropriate corrective strategy.

Links and Resources

- Internal Revenue Code Section 125
- IRS's proposed Section 125 regulations from 2007 (reliance by taxpayers permitted until final regulations issued)
- IRS Publication 15-B "Employer's Tax Guide to Fringe Benefits" (overview of cafeteria plan requirements)
- IRS Memorandum No. 201413006 (correction procedures for improper health flexible spending arrangement payments)

When Is an Employee Improvement Plan an Appropriate Use of Employee Discipline?

Employee discipline is one of the most challenging aspects of workforce management and can take various forms. One common type of employee discipline is the use of a performance improvement plan (PIP). A PIP is typically a formal, written document that outlines an employee's performance or behavioral deficiencies, sets forth clear and quantifiable goals, and establishes a timeline by which an employee must complete such goals successfully.

Lawful Reason for a PIP

When determining whether to place an employee on a PIP, it's vital to establish a lawful, valid and nondiscriminatory reason for the PIP. Valid reasons for a PIP may include ongoing performance-related or attendance issues or inappropriate behavior in violation of company policy. However, a PIP may not be appropriate for more severe misconduct (such as violence, sexual harassment or theft) or isolated incidents.

In all cases, employers may not put an employee on a PIP for any unlawful reason, including the following:

- Due to an employee's protected characteristic, such as those protected under the following laws:
    - Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, sex (including pregnancy and related medical conditions), national origin and religion.
    - The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of an employee's disability.
    - The Age Discrimination in Employment Act prohibits discrimination on the basis of age (40 or older).
    - The Genetic Information Nondiscrimination Act prohibits discrimination on the basis of genetic information.
    - The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination on the basis of past, current or prospective military service.
- Because an employee seeks or takes protected leave, including:
    - Family and Medical Leave Act leave;
    - USERRA military leave;

   - Workers' compensation leave;
   - ADA disability leave; or
   - Temporary or short-term disability leave (including on the basis of pregnancy).
- Because an employee seeks or obtains a disability, pregnancy or religious accommodation;
- In response to protected whistleblowing activities;
- In response to union-organizing activity as protected by the National Labor Relations Act; or
- In response to an employee who sought to enforce their wage rights, including those under the FLSA

Additional Legal Risks

Even if the employer has established a lawful justification for placing an employee on a PIP, employees may take legal action when other circumstances reasonably suggest the PIP was implemented for unlawful reasons. Such circumstances may include:

- The employee recently requested or received an accommodation for disability; pregnancy, childbirth or a related medical condition; or religious beliefs.
- The employee recently complained of discrimination, retaliation, unfair labor practices or inadequate wages, or similar complaints.
- The employee has engaged in union-organizing activity.

Document the Reason for the PIP

Employers must document the lawful, nondiscriminatory reason for placing an employee on a PIP to avoid a potential claim of discrimination or retaliation. Specifically, if an employee later claims they were disciplined for any unlawful reason, proper and timely documentation can provide a contemporaneous defense for the employer.

Employer Takeaways

Employee discipline can be challenging. However, an effective PIP practice can be a critical tool for an employer. PIPs can provide a helpful framework for employees to understand and improve performance deficiencies and for employers to work with employees to improve poor performance. Further, a PIP can help support employers who decide to take further disciplinary action against an employee who cannot improve through a PIP. Therefore, employers must develop a clear and consistent PIP practice and ensure proper documentation. Employers may also wish to train managers, supervisors and HR personnel to create and implement effective PIPs.

Employers should note that compliance requirements vary by locality, and they should contact local legal counsel for legal advice. We'll keep you apprised of noteworthy updates on these topics. For resources on any of these topics discussed, contact us today.

The HR Hotline can provide general guidance but cannot provide tax advice or review plan documents for compliance.