

Memorandum of Understanding Regarding the Performance Management Process

Preamble: The United States Patent and Trademark Office (“USPTO” or “Agency”) and the Patent Office Professional Association (“POPA” or “Union”) enter into this Memorandum of Understanding (“MOU”) regarding the performance management process for bargaining unit employees whose performance is unacceptable.

Section 1: Term Agreement

The parties agree their interests align to discuss the performance management process for employees whose performance is unacceptable outside of the term collective bargaining agreement (“CBA”). As such, the parties agree to the terms set forth below.

Section 2: Workplace Flexibilities

The Agency will provide all employees with information on the Agency’s existing workplace flexibilities. Appendix A (“Workplace Flexibilities Available to USPTO Patent Employees”) will be available to all Patents employees in writing and accessible on the intranet. The Agency will also prepare and post on the intranet topical computer-based trainings (“CBTs”) providing more information about workplace flexibilities, including the programs and options described in Appendix A. The Agency may update Appendix A and any related CBTs as necessary after any of the included flexibilities are changed or any relevant new flexibilities are implemented. The Agency will provide the Union with an opportunity to discuss such updates. This MOU does not waive any of the Union’s rights to receive notice of and to bargain the creation of or changes to the policies or programs described in Appendix A.

Section 3: Performance Management Process

- A. If an employee’s performance is unacceptable in any critical element, the employee may be placed on a Performance Improvement Period (“PIP”).
- B. The employee will be notified of the PIP in writing (delivered in person or via email). The PIP notice will contain the following information:
 1. Identification of the critical element(s) of the employee’s Performance Appraisal Plan (“PAP”) in which performance is unacceptable and the minimally acceptable performance standard, as set forth in the PAP, that must be achieved in order to successfully complete the PIP.
 2. Identification of the Agency’s performance expectations and the specific improvement needed to address the unacceptable performance.
 3. Statement of the length of time of the PIP, during which the employee has to bring performance up to at least the marginal performance level, including the circumstances under which a PIP will be extended.

4. An offer of assistance in improving the employee's unacceptable performance during the PIP.
 5. Identification of which supervisor or management official(s) will be overseeing the PIP and available to assist the employee during the PIP.
 6. Statement that unless the employee's performance in the critical element(s) improves to at least a minimally acceptable level (i.e., at least marginal) by the end of the PIP and is sustained for a period of one (1) year from the start of the PIP, the employee may be reduced in grade or removed.
 7. Statement that the employee may bring to the attention of their supervisor or management official(s) any hardships affecting their performance.
- C. The PIP will not begin until the first full pay period after the written notice has been issued.
- D. Meetings during the PIP may be conducted at the request of the employee or at the discretion of the supervisor. Regular meetings (at least biweekly) are encouraged between the supervisor or appropriate management official(s) and the employee to discuss the status of the employee's performance, continued expectations, and assistance requested by the employee.
- E. An employee must demonstrate at least marginal performance in the critical element(s) during the PIP.

Section 4: Performance Management Process for Patent Examiners

In addition to the procedures described in Section 3 above, the following procedures will also apply to patent examiners:

- A. To determine whether an examiner will be placed on a PIP, also referred to as a Written Warning, there will be three distinct performance evaluation periods within a fiscal year:
 - (1) The cumulative performance of quarter 1 and quarter 2;
 - (2) The cumulative performance of quarter 2 and quarter 3; and
 - (3) The cumulative performance of quarter 3 and quarter 4.

Except in the circumstances described in Section 5 below, a Written Warning will be issued when performance in one or more critical elements is unacceptable for any of these evaluation periods.

- B. The Written Warning will run for 7 bi-weeks with no automatic extensions. Extensions may be granted only at the discretion of the examiner's Technology Center Director.
- C. Examiners who successfully complete the Written Warning period will be evaluated at the conclusion of three distinct maintenance periods:

- (1) The 8th-14th bi-weeks after the start of the Written Warning period;
- (2) The 15th-20th bi-weeks after the start of the Written Warning period; and
- (3) The 21st-26th bi-weeks after the start of the Written Warning period.

The Written Warning letter will state the specific dates for these maintenance periods.

Absences during the three maintenance periods will be treated as follows, with the number of duty hours prorated from 240 for examiners on a part-time schedule:

- If an examiner works fewer than 240 duty hours during the first maintenance period, performance for the first period will be considered cumulatively with the second maintenance period, and no assessment will be made solely on the first maintenance period.
- If an examiner works fewer than 240 duty hours during the second maintenance period, performance for the second period will be considered cumulatively with the third maintenance period, and no assessment will be made solely on the second maintenance period.
- If an examiner works fewer than 240 duty hours during the final/third maintenance period, performance during the final/third maintenance period will be considered cumulatively with the second maintenance period, and no assessment will be made solely on the final/third maintenance period.

If the Written Warning period is extended by the Technology Center Director, the examiner will be notified of any resulting adjustments to the maintenance periods. Each adjusted maintenance period will be at least six bi-weeks, and no maintenance period will extend beyond one year from the start of the Written Warning period.

- D. The Agency will provide training for all examiners on the performance management process and the factors that management will consider regarding hardships affecting an examiner's performance, as described in Section 5 below. The training will be recorded and made available online for examiners to review as needed. A link to the training will be added to the Written Warning letter.

Section 5: Hardships

The Agency has made the following determinations regarding how hardships will be taken into account by management in the performance management process for bargaining unit employees:

- A. When determining whether a particular evaluation period was suitable for assessing an employee's performance for purposes of placing the employee on a PIP, the supervisor or manager will consider any hardships of which they have been made aware. The supervisor or manager will make this determination after the completion of the evaluation period based on any information the employee has provided or of which they are aware at that time.

1. The type of hardships that will be considered by supervisors and managers include, but are not limited to:
 - i. A serious medical issue of the employee or a family member;
 - ii. A severe life event or severe work issue; or
 - iii. Inability of the employee to work for an extended period of time due to a weather event or a computer problem/outage.

2. The supervisor or manager will consider the totality of the circumstances of the employee's hardship(s) in determining whether the evaluation period is suitable. The factors that the supervisor or manager will consider include, but are not limited to:
 - i. The impact of the hardship(s) on the employee's performance;
 - ii. The timing of the hardship(s) relative to the evaluation period;
 - iii. The timing of the employee's notification to management about the hardship(s);
 - iv. The employee's past performance history (positive and negative);
 - v. The employee's performance at the time of notifying management about the hardship(s);
 - vi. Whether the employee took advantage of available workplace flexibilities; and
 - vii. Any assistance or support offered by the employee's supervisor after being notified of the hardship(s).

- B. The Agency will provide training on the assessment process described in this section to all supervisors and managers who are involved in the PIP process.

Section 6: Performance Information to the Union

- A. The Union will be provided annual data for each Technology Center and business area regarding performance-based actions. The data will include the number of:
 1. performance improvement periods (based on PAP element)
 2. proposed removals (based on PAP element)
 3. failed maintenance period(s)
 4. reductions-in-grade
 5. decisions on proposed removal (termination, rescission, abeyance agreement)

- B. Upon request by the Union, after the end of a fiscal year, the Agency will provide the Union with the following data about patent examiners from the Technology Centers starting with quarter 1 of fiscal year 2024:
 1. the number who performed at the unacceptable level in one or more critical elements at the end of the given evaluation period,

2. the number of Written Warnings not issued to those performing at the unacceptable level

Section 7: Duration

The USPTO agrees to maintain the performance management process described herein until the sooner of: (1) five years from the execution of this MOU; or (2) the end of the successor CBA's term.

Closing: The agreement contained herein, and policies referenced in this document, supersede portions of any agreements, memoranda of understanding, policies, or practices with which they conflict. If any portion of an agreement, memorandum, policy, or practice does not conflict with the provisions and policies set forth herein, that portion of the previous agreement, memorandum, policy, or practice shall remain in force.

Signatures:

FOR THE USPTO:

 _____	<u>12/17/24</u>
Vaishali Udupa Commissioner for Patents U.S. Patent and Trademark Office	Date

FOR THE PATENT OFFICE PROFESSIONAL ASSOCIATION:

<i>K. Duda</i> _____	<u>12/11/2024</u>
Kathleen Duda President Patent Office Professional Association	Date

Workplace Flexibilities Available to USPTO Patent Employees

The USPTO has a variety of programs, benefits, and work options that may help if an employee is dealing with a medical, family, or life hardship.

It is up to the employee to determine if they are interested in a particular benefit. For any program that the employee is interested in, the employee must take steps to contact the appropriate point of contact and/or apply for said benefit(s).

This document provides information about benefits available to patents employees.

In addition to the formal benefits identified in this document, employees that are enduring a hardship (medical, personal, or otherwise) should discuss these situations with their supervisor as soon as possible. Please note that information about the following benefits does not mean that the USPTO has made any conclusion that a hardship for an employee exists. This is for informational purposes. Raising the issues to your manager early allows your manager to offer additional assistance and to make more informed decisions about performance management. TC managers can provide additional help to employees, where they find it appropriate. Such help may include:

- Putting the employee in touch with a POC for relevant subject matter (e.g. DM, Production, HR specialists for specific programs, use of tools),
- Adjusting or finding alternatives for mandatory meetings/trainings to address conflicts with outside meetings or appointments, or
- Concluding that a particular evaluation period isn't a suitable evaluation period for an employee's entry into the performance management process due to the impact and timing of the hardship (thus potentially impacting whether or not a performance warning is warranted).

In order for managers to offer such assistance, employees must make them aware of hardships in sufficient detail for the managers to determine what assistance might be appropriate.

For leave programs, normal leave requesting procedures apply.

The information in this document is presented as follows:

1. Leave Benefits and Work Schedules
 - a. Annual Leave
 - b. Sick Leave
 - c. Compensatory time and credit hours
 - d. Family Medical Leave Act (FMLA)
 - i. Paid Parental Leave
 - e. Leave Sharing Programs
 - i. Voluntary Leave Bank Program
 - ii. Leave Transfer Program
 - f. Parental Bereavement Leave

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- g. Part Time Program
 - h. Work Schedules
2. Accommodations
- a. Reasonable Accommodation
 - b. Disability Retirement
3. Resources
- a. Employee Assistance Program
 - b. Ombudsman
 - c. Examiner Requested Transfer Form
 - d. Telework
 - e. Worksite Wellness

1. Leave Benefits and Work Schedules

a. Annual Leave

An employee may use annual leave for vacations, rest and relaxation, and personal business or emergencies. An employee has a right to take annual leave, subject to the right of the supervisor to schedule the time at which annual leave may be taken. An employee will receive a lump-sum payment for their annual leave balance when he or she separates from federal service or enters on active duty in the armed forces and elects to receive a lump-sum payment.

b. Sick Leave

A. An employee is entitled to use sick leave when they receive medical, dental, or optical examination or treatment; are incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth; or would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by their presence on the job because of exposure to a communicable disease. There is no limitation on the amount of accrued or accumulated sick leave that an employee can use for their own personal medical needs.

B. Fulltime employees may use up to a total of 104 hours (13 workdays) of sick leave (SL) each leave year to care for a family member¹ who is incapacitated as a result of physical or mental illness, injury, pregnancy, or childbirth; to provide care for a family member as a result of medical, dental, or optical examination or treatment; or to make arrangements necessitated by the death of a family member² or attend the funeral of a family member. Part-time employees and employees with uncommon tours of duty are also covered, and the amount of SL permitted for family care

¹ "Family member" for the purposes of using sick leave is defined as: spouse, and parents of the employee; children, including adopted children, and spouses thereof; parents; brothers and sisters, and spouses thereof; and any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. These definitions of a family member do not apply to the FMLA.

² "Family member" for the purposes of using sick leave is defined as: spouse, and parents of the employee; children, including adopted children, and spouses thereof; parents; brothers and sisters, and spouses thereof; and any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. These definitions of a family member do not apply to the FMLA.

and bereavement purposes is pro-rated in proportion to the average number of hours of work in the employee's scheduled tour of duty each week.

C. Employees may use a total of up to 12 administrative workweeks of sick leave each leave year to care for a family member with a serious health condition³. If an employee previously has used any portion of the 13 days of sick leave for general family care or bereavement purposes in a leave year, that amount must be subtracted from the 12-week entitlement. If an employee has already used 12 weeks of sick leave to care for a family member with a serious health condition, he or she cannot use an additional 13 days in the same leave year for general family care purposes. An employee is entitled to a total of 12 weeks of sick leave each year for *all* family care purposes. Part-time employees and employees with uncommon tour of duty are also covered, and the amount of sick leave for this purpose is pro-rated in proportion to the average number of hours of work in the employee's scheduled tour of duty each week.

c. Comp time/Credit hours

i. Compensatory Time Off

[Compensatory Time Off 2008.pdf \(sharepoint.com\)](#)

ii. Credit hours

This program is available to POPA bargaining unit full time employees, who are limited or barred from earning compensatory (comp) time due to the overtime pay cap. Employees covered under this section would be all those who cannot work 32 hours of overtime in a pay period because of pay cap regulations.

Additional information can be found at this link:

[Credit hour program for POPA Employees.PDF \(sharepoint.com\)](#)

d. Family Medical Leave Act (FMLA)

The FMLA⁴ allows employees to use up to a total of twelve (12) weeks (480 hours) of leave without pay and/or accrued sick or annual leave for their own serious health condition, for the birth of a child, or the care of a spouse, son, daughter, or parent who has a serious health condition. A serious health condition includes such conditions as cancer, heart attacks, strokes, diabetes, clinical depression, severe injuries, Alzheimer's disease, pregnancy, and childbirth. Employees must submit medical documentation from a physician or health care provider to their supervisors. The USPTO will use this medical documentation to determine whether the employee or the employee's family member has a serious medical condition that qualifies for FMLA coverage. Forms that an employee's physician or health care provider may use can also be found [here](#).

³ The term "serious health condition" has the same meaning as used in OPM's regulations for administering the Family and Medical Leave Act of 1993 (FMLA). That definition includes such conditions as cancer, heart attacks, strokes, severe injuries, Alzheimer's disease, pregnancy, and childbirth. The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. The common cold, the flu, earaches, upset stomach, headaches (other than migraines), routine dental or orthodontia problems, etc., are not serious health conditions unless complications arise. Supervisors should require medical certification of a serious health condition.

⁴ An employee must have completed twelve (12) months of Federal civil service (at any time) to be qualified to request FMLA and/or Paid Parental Leave coverage.

The USPTO can provisionally approve FMLA leave for up to twelve (12) weeks (480 hours)⁵ in a twelve (12) month period of time, pending submission of medical documentation that supports either incapacitation for duty for the period(s) of leave or for a family member's serious health condition. An employee can invoke FMLA leave and use it before the employee provides medical documentation. However, to do so, the employee must submit sufficient medical documentation within fifteen (15) days of invocation and first use of leave under the FMLA.⁶ It is not necessary to undergo a new medical examination for this purpose. A health care provider can complete the enclosed form based on the most recent evaluation.

Additional information about FMLA can be found [here](#).

For questions regarding the Family and Medical Leave Act (FMLA), contact an Employee Relations Specialist at FMLAQuestions@uspto.gov.

i. Paid Parental Leave

Eligible employees may use up to 12 administrative weeks of paid parental leave in connection with the birth, adoption, or foster care placement of a child for employees covered by FMLA provisions. Part-time employees are also covered. The amount of Paid Parental Leave (PPL) permitted for birth or placement of a child purposes is pro-rated in proportion to the average number of hours of work in the employee's scheduled tour of duty of each week. Questions about PPL can be forwarded to MatPat_PPL@uspto.gov or OHR at (571) 272-6000.

e. Leave Sharing Programs

The Agency's Leave Sharing Programs include the Voluntary Leave Bank Program (VLBP) and the Leave Transfer Program (LTP). These programs are managed by the Compensation and Benefits Division (CBD) which can be reached at (571) 272-6209.

i. Voluntary Leave Bank Program (VLBP)

Under VLBP an employee may voluntarily join and contribute annual leave for use by leave bank members who need such leave because of a personal or family member's medical emergency. Questions about the VLBP can be forwarded to VoluntaryLeaveBankProgram@uspto.gov.

<https://ptoweb.uspto.gov/ptointranet/ohr/employees/benefits/vlbp/index.htm>

http://ptoweb.uspto.gov/ptointranet/ohr/faqs/faqs_vlbp.htm

ii. Leave Transfer Program (LTP)

⁵ 480 hours is for a full-time employee. For a part-time employee, the FMLA leave is prorated and the hours are derived by multiplying 6 times the number of hours in the employee's scheduled tour of duty over a biweekly pay period. For example, if an employee has a part-time schedule tour of duty that consists of 40 hours in a biweekly pay period, the amount would be 240 hours.

⁶ Per 5 CFR § 630.1203, "[a]n employee may not retroactively invoke his or her entitlement to FMLA."

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The LTP allows employees to donate annual leave to another Federal employee who is an approved recipient of the LTP. The recipient is an employee who has a personal or family medical emergency (including pregnancy) and who has exhausted his or her available paid leave, or is expected to be without paid leave for at least twenty-four (24) work hours. Questions regarding LTP can be forwarded to VLTP@uspto.gov.

More information can be found at the following link:

https://ptoweb.uspto.gov/ptointranet/ohr/employees/benefits/leave_transfer.htm

f. Parental Bereavement Leave

Parental Bereavement Leave allows eligible employees two workweeks of paid leave in connection with the death of a qualifying child. The death of an employee's child triggers the one-time entitlement to two workweeks of parental bereavement leave in connection with that death, which must be used within the single 12-month period that is linked to the given child's death. Additional information about parental bereavement leave can be found at the following link:

https://ptoweb.uspto.gov/ptointranet/ohr/policies_and_procedures/policies/parental_bereavement_leave_guidance.htm

g. Part Time Program

The POPA part-time program is available to POPA-covered patent employees who want to work part-time. A part-time schedule may be requested for reasons such as childcare/eldercare, retention, and personal hardship. Eligibility requirements apply for the childcare/eldercare and retention components. More information, including a link to the automated request form, can be found at this link: [POPA Part-Time Program](#)

h. Work Schedules

Links to information on:

[Increased Flexitime Program](#).

[USPTO Work Schedules](#).

2. Accommodations

a. Reasonable Accommodation

An employee who is a qualified individual with a disability may be eligible for a reasonable accommodation. A qualified individual with a disability is one who has an impairment that substantially limits a major life activity. Major life activities mean functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning. A reasonable accommodation is any change to an employee's job, work environment, or the way

things are usually done, that allows an individual with a disability to perform the job functions. Examples of reasonable accommodations may include:

- Work at home
- Leave, including leave without pay
- Modified work schedules
- Restructuring jobs (e.g., removing non-essential functions)
- Reassignment to a vacant, funded position
- Ergonomic office furniture and computer equipment (e.g., mouse, monitor stands)
- Assistive technology (e.g., voice activated software).

A reasonable accommodation does not include modification to performance standards for the employee's position.

Find more information about and apply for a reason accommodation through this link: [OEEOD Reasonable Accommodation page](#), or contact the Office of Equal Employment Opportunity and Diversity:

Email: oeod@uspto.gov
Phone: 571-272-8292

b. Disability Retirement

Disability retirement is a type of federal retirement based on a medical condition that cannot be accommodated by the Agency and is expected to last at least one year. All eligibility requirements must be met. Contact the Compensation and Benefits Division in the Office of Human Resources for further information, or talk to a Benefits Specialist (571) 272-6209.

3. Resources

a. Employee Assistance Program

Federal Occupational Health (FOH) provides the Employee Assistance Program (EAP) to help employees cope with problems that negatively affect their emotional well-being or their work performance or conduct. These problems may be marital, family, legal, or financial and may include substance abuse, emotional difficulties, health or behavioral issues, or child and elder care issues. The EAP provides assessment, counseling, referral, training and consultation to USPTO employees and their family members. Counselors are available Monday — Friday upon request by contacting 1-800-222-0364 or visiting:

http://ptoweb.uspto.gov/ptointranet/ohr/employees/eap/employee_home.htm

or

<https://ptoweb.uspto.gov/worksitewellness/EAP.html>.

b. Office of the Ombudsman

The Office of the Ombudsman is an independent, informal, confidential, and impartial resource serving all USPTO employees, including supervisors, on any workplace issue or concern. The

Ombudsman advocates for a fair process, rather than any party to a dispute, and seeks to address workplace concerns at the lowest level possible by offering coaching, facilitation, shuttle diplomacy, feedback, resource options, and other informal assistance. To make an appointment call 571-270-3140 or email Officeoftheombudsman@uspto.gov. More information can be found at this link: <http://ptoweb.uspto.gov/ombudsman/>

c. Examiner Requested Transfer Form

Requests will be evaluated using the factors listed below: – Transfers may be used to correct a mismatch in art area based on educational or experience background, to resolve personality conflicts, or as a retention tool.

Link to the [Examiner Requested Transfer Form](#).

d. Telecommuting

Information on Patent's Telework Programs may be found at this site:
[Patents Telework Resources \(uspto.gov\)](#)

e. Worksite Wellness

The Worksite Wellness Website is designed as a one-stop shop for wellness. Here you can find information on a variety of wellness services, resources and advice for maintaining a healthy lifestyle. You will also find other Work/Life sites to assist with finding everything you need to manage you and your family's health.

[USPTO Worksite Wellness One-Stop Website](#)