Forward

Thank you for attending the Behavior Health Director’s Bootcamp. The materials in this reference manual are meant to be helpful and serve as a resource guide for some of the most common administrative challenges and questions you may encounter. It is by no means a comprehensive compilation of information. It is our hope that this reference manual will provide a basic overview for any new director and a quick reference for the more experienced. We also encourage each of you to contribute to it and share your knowledge over the course of your tenure at a Montana FQHC.

In the best tradition of “stealing shamelessly and sharing recklessly”, we have assembled the information herein from multiple sources. All the information is in the public domain. It was our intention to save you time and energy by assembling materials and information that we have found useful in our work as behavior health directors of FQHCs.

Earl Sutherland, Ph.D.

Lacey Alexander-Wind, L.C.S.W.

**History of FQHC**

Federally qualified health centers (FQHCs) are safety-net providers that offer outpatient services. FQHCs include community health centers, migrant health centers, health care for the homeless centers, public housing primary care centers, and health center service “lookalikes.”

<https://www.youtube.com/watch?v=aV9jJpX0PZI>

**America’s Health Centers** owe their existence to a remarkable turn of events in U.S. history, and to a number of determined community health and civil rights activists who fought more than 50 years ago to improve the lives of Americans living in deep poverty and in desperate need of health care.

Among those determined to change these conditions was [H. Jack Geiger](http://en.wikipedia.org/wiki/H._Jack_Geiger), then a young doctor and civil rights activist who, while studying in South Africa, witnessed how a unique community-based health care model had brought about astonishing health improvements for the poorest citizens of that country.

Moving on the opportunity presented by President Lyndon B. Johnson’s major [War on Poverty](http://en.wikipedia.org/wiki/War_on_Poverty) initiatives in the early 1960s, Dr. Geiger and other health care pioneers submitted proposals to the federal Office of Economic Opportunity to establish health centers in medically underserved inner-city and rural areas of the country based on the same health care model Geiger had studied in South Africa. Funding for the first two “Neighborhood Health Centers” (as they were then called) – one in Boston, Massachusetts, and the other in Mound Bayou, Mississippi – was approved in 1965, and the Community Health Centers Program was launched.

The health center model that emerged targeted the roots of poverty by combining the resources of local communities with federal funds to establish neighborhood clinics in both rural and urban areas around America. It was a formula that not only empowered communities to establish and direct health services at the local level via consumer-majority governing boards, but also generated compelling proof that affordable and accessible health care produced compounding benefits.

Today Community Health Centers serve as the primary medical home for [**over 30 million people in more than 13,000 rural and urban communities across America**](https://www.nachc.org/research-and-data/research-fact-sheets-and-infographics/americas-health-centers-2020-snapshot/).  These community-based “family doctors” enjoy longstanding bipartisan support by Administrations and policymakers at all levels, as well as in both the private and public sectors.

**Important Federal Organizations**

SAMHSA

https://www.samhsa.gov/

The Substance Abuse and Mental Health Services Administration (SAMHSA) is the agency within the U.S. Department of Health and Human Services (HHS) that leads public health efforts to advance the behavioral health of the nation and to improve the lives of individuals living with mental and substance use disorders, and their families.

**Vision**

To provide leadership and resources – programs, policies, information and data, funding, and personnel – advance mental and substance use disorder prevention, treatment, and recovery services in order to improve individual, community, and public health.

**Mission**

SAMHSA's mission is to reduce the impact of substance abuse and mental illness on America's communities.

* 1. HRSA https://www.hrsa.gov/

The Health Resources and Services Administration is an agency of the U.S. Department of Health and Human Services located in North Bethesda, Maryland. It is the primary federal agency for improving access to health care services for people who are uninsured, isolated or medically vulnerable. It is the primary funder for FQHCs.

* 1. UDS

The Uniform Data System (UDS) is **an annual reporting system** that provides standardized information about the performance and operation of health centers delivering health care services to underserved communities and vulnerable populations.

* 1. CMS https://www.cms.gov/

"The [Centers for Medicare & Medicaid Services](https://www.cms.gov/About-CMS/About-CMS) (CMS), is part of the Department of Health and Human Services (HHS)." The "CMS develops [Conditions of Participation (CoPs) and Conditions for Coverage (CfCs)](https://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs) that health care organizations must meet in order to begin and continue participating in the Medicare and Medicaid programs. These health and safety standards are the foundation for improving quality and protecting the health and safety of beneficiaries."

**FAQs**

What is a PPS Rate?

A Prospective Payment System (PPS) is a method of reimbursement in which Medicare payment is made based on a predetermined, fixed amount. The payment amount for a particular service is derived based on the classification system of that service (for example, diagnosis-related groups for inpatient hospital services).  CMS uses separate PPSs for reimbursement to acute inpatient hospitals, home health agencies, hospice, hospital outpatient, inpatient psychiatric facilities, inpatient rehabilitation facilities, long-term care hospitals, skilled nursing facilities, and Federally Qualified Health centers.

There is one national, unadjusted “base” prospective payment system (PPS) rate for the FQHC-approved qualifying visit codes for all FQHCs.

What is FTCA?

The Federal Tort Claims Act (FTCA) affords **Federally Qualified Health Centers** (FQHC) a significant benefit, substantially eliminating medical malpractice insurance expenses to cover their providers. FTCA coverage, in turn, improves health centers' ability to attract and retain medical providers.

What is Credentialing and Privileging?

Credentialing is "the process of assessing and confirming the license or certification, education, training, and other qualifications or a licensed or certified healthcare practitioner."

Privileging is "the process of authorizing a health care practitioner’s specific scope and content of patient care services."

The "CMS also ensures that the standards of accrediting organizations recognized by CMS (through a process called "deeming") meet or exceed the Medicare standards set forth in the [CoPs/CfCs](https://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs)." Health Care Organizations seeking CMS approval may choose to be surveyed either by an accrediting body, such as The Joint Commission (TJC), Healthcare Facilities Accreditation Program (HFAP) and DNV-GL; or by state surveyors on behalf of [CMS](https://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs). Types of Health Care Organizations to which the [CMS standards apply](https://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs) and also at which Privileging is typically applicable are Hospitals (including acute care, critical access and psychiatric), Surgery Centers, Mental or Behavioral Health Centers, and Federally Qualified Health Centers (FQHCs). This is not to say however, that there are not other Health Care Organization types that perform privileging, these are just the most common, and also the ones that typically have other Accreditation Standards (TJC, HFAP, DNV-GL, AAAHC, HRSA) related to Privileging that they must meet as well, in addition the CMS’s CoPs related to Privileging.

Administrative Policies you need to have/know:

* 1. Patient Documentation Requirements
	2. Performance Evaluation and Improvement Plans
	3. Administrative Structure of your clinic
	4. Administrative Supervision requirements of various staff
	5. Clinical Supervision requirements of various staff
	6. Policy and Procedures for Crisis Management
	7. Peer reviews vs record reviews

**Federally Qualified Health Center 'G' Codes**

FQHCs must use the codes below when submitting claims to Medicare under the FQHC PPS. Be sure to maintain records of the services and charges associated with each 'G' code.

**G0466** – FQHC visit, new patient

medically-necessary medical, or a qualified preventive health, face-to-face encounter (one-on-one) between a new patient, and a FQHC practitioner during which time one or more FQHC services are rendered and includes a typical bundle of Medicare-covered services that would be furnished per diem to a patient receiving a FQHC visit

**G0467** – FQHC visit, established patient

medically-necessary medical, or a qualifying preventive health, face-to-face encounter (one-on-one) between an established patient and a FQHC practitioner during which time one or more FQHC services are rendered and includes a typical bundle of Medicare-covered services that would be furnished per diem to a patient receiving a FQHC visit

**G0468** – FQHC visit, IPPE or AWV

FQHC visit that includes an initial preventive physical exam (IPPE) or annual wellness visit (AWV) and includes a typical bundle of Medicare-covered services that would be furnished per diem to a patient receiving an IPPE or AWV

**G0469**– FQHC visit, mental health, new patient

medically-necessary, face-to-face mental health encounter (one-on-one) between a new patient, and a FQHC practitioner during which time one or more FQHC services are rendered and includes a typical bundle of Medicare-covered services that would be furnished per diem to a patient receiving a mental health visit

**G0470** – FQHC visit, mental health, established patient

medically-necessary, face-to-face mental health encounter (one-on-one) between an established patient and an FQHC practitioner during which time one or more FQHC services are rendered and includes a typical bundle of Medicare-covered services that would be furnished per diem to a patient receiving a mental health visit.

**G0511** - General care management, 20 minutes or more of clinical staff time for chronic care management services or behavioral health integration services directly by an FQHC practitioner (physician, NP, PA, or CNM), per calendar month. **(Effective January 1, 2018)**

**G0512** - Psychiatric collaborative care model (psychiatric CoCM), 60 minutes or more of clinical staff time for psychiatric CoCM services directed by an FQHC practitioner (physician, NP, PA or CNM) and including service furnished by a behavioral health care manager and consultation with a psychiatric consultant, per calendar month. **(Effective January 1, 2018)**

**References**

Centers for Medicare & Medicaid Services, [Internet Only Manual, Publication 100-04, Claims Processing Manual, Chapter 9](https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c09.pdf)

[Medicare Learning Network (MLN) Matters Article, MM10175 - Care Coordination Services and Payment for Rural Health Clinics (RHCs) and Federally-Qualified Health Centers (FQHCs)](https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/MM10175.pdf)

When submitting a claim for a mental health visit furnished on the same day as a medical visit, FQHCs must report a specific payment code for a medical visit (G0466, G0467, or G0468) and a specific payment code for a mental health visit (G0470), and each specific payment code must be accompanied by a service line with a qualifying visit.

For example:

**Revenue Code**

0521

0521 0900

0900

**HCPCS code**

G0468 – FQHC Payment code
G0439 – Qualifying visit G0470 – FQHC Payment code

90832 -Qualifying visit

**Modifier**

**Service Date**

10/01

10/01 10/01

10/01

When submitting a claim for a subsequent illness or injury, the FQHCs reports G0467 for a medical visit), with modifier 59. A qualifying visit is still required when reporting modifier 59 with G0467.

**Revenue Code**

0521

0521 0521

0900

**HCPCS code Modifier**

G0468 – FQHC Payment
code
G0439 – Qualifying visit
G0467 – FQHC Payment 59 code

99211 -Qualifying visit

**Service Date**

10/01

10/01 10/01

10/01

FQHCs must report all services that occurred on the same day on one claim. FQHC may submit claims that span multiple days of service. However, for FQHCs transitioning to the PPS, a separate claim must be submitted for services subject to the PPS and services paid based on the AIR. MACs will reject claims with multiple dates of service that include both PPS and non-PPS dates, as determined based on the individual FQHC’s cost reporting period.

**Behavioural Health Billing and Coding - A review of coding and documentation**

Coding Definitions

* What is the difference between a CPT code and a HCPCS code?
* **HCPCS codes** are used for billing Medicare & Medicaid patients — The Healthcare Common Procedure Coding System (**HCPCS**) is a collection of **codes** that represent procedures, supplies, products and services which may be provided to Medicare beneficiaries and to individuals enrolled in private health insurance programs.
* **CPT** is a **code** set to describe medical, surgical, and diagnostic services; **HCPCS** are **codes** based on the **CPT** to provide standardized coding when healthcare is delivered.

CPT Codes

* CPT is [**a uniform coding system**](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3096340/) developed by the American Medical Association (AMA). The AMA first established this system in 1966 to standardize terminology and simplify record-keeping for physicians and staff. Since its development, CPT has undergone several changes. The most recent edition focuses on using CPT codes to report physician services.
* CPT codes describe medical procedures — such as tests, evaluations, surgeries, and other practices — [**performed by a physician on a patient**](https://www.medicalbillingandcoding.org/intro-to-cpt/)**.** For example, behavioral health CPT codes describe the length of a psychotherapy session with a client or a diagnostic interview. CPT codes are necessary to receive reimbursement from health insurance companies.

Why CPT Codes Are Essential for Clinicians

* CPT codes are essential parts of practice management for clinicians and health care staff because they determine compensation and the practice's overall success. To receive the correct reimbursement rates, clinicians must ensure the codes on insurance claim forms accurately reflect the services they provided before submitting the claims to insurance companies.

How Do CPT Codes Work?

* CPT coding tells insurance payers what you would like to get paid for. Along with the International Classification of Diseases codes, (Sometimes may use DSM) CPT codes paint a complete picture for health insurance companies, and you need both types for reimbursement.
* Need a description of the illness and a description of the treatment

How Do CPT Codes Work?

* The ICD code set describes the diagnosis and why the treatment was necessary, and the CPT code explains the services provided. Examples of [mental health ICD codes include](https://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16_197744.pdf) the following.
* F41.9: Anxiety disorder
* F31.31: Bipolar disorder, current episode depressed, mild
* F42: Obsessive-compulsive disorder
* F43.11: Post-traumatic stress disorder, acute
* For example, a social worker might use F41.9 with CPT code 90832, which is the code for [individual psychotherapy for 30 minutes](https://victims.ca.gov/docs/forms/providers/CPTCODES.pdf), to bill for a session with a client experiencing anxiety. You would include both codes on a health insurance claims form.

The Good!

* There are three categories of CPT codes. We only use one!
* There are modifiers for complexity – E/M codes. Only prescribers use those!!
* There are only a small number of BH codes!!!

The Most Common BH CPT Codes

* 90791: Psych Eval w/o medical services
* 90832: 30 minutes of individual psychotherapy
* 90834: 45 minutes of individual psychotherapy
* 90837: 60 minutes of individual psychotherapy
* 90846: 50 minutes of family psychotherapy without the client present
* 90847: 50 minutes of family psychotherapy with the client present
* 90849: Multiple-family group psychotherapy
* 90853: Group psychotherapy

Psychotherapy Crisis Codes

* 90839: First 60 minutes of psychotherapy for crisis
* 90840: Add-on code for each additional 30 minutes of psychotherapy for crisis
* 99050: Add-on code for [services provided when the office is usually closed](https://www.aappublications.org/news/2017/06/21/Coding062117)
* 99051: Add-on code for services provided during regularly scheduled hours on evenings, weekends, or holidays
* If a crisis session falls below 60 minutes, you will bill for a regular psychotherapy code, such as 90834.

Extended definitions

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Code | Type | Definition | Explanation | Documentation/ Requirements/Approx. Time Requirements  |
| 90791 | Assessment | Psychiatric diagnostic evaluation  | Assessment of patient’s psychosocial history, current mental status, review and ordering of any diagnostic studies and appropriate treatment recommendations  | Minimum 45 minutes, face to face |

90791

* No longer needs to be initial session for most payers.
* When the patient goes for a psychiatric diagnostic evaluation, report either 90791 (Psychiatric diagnosis evaluation) or 90792 (Psychiatric diagnostic evaluation with medical services).
* In the past, most payers would allow you to only report one unit of psychiatric diagnostic evaluation code per patient. Guidelines have been revised and payers will allow you to claim for more than one unit of 90791 if the initial psychiatric diagnostic evaluations extend beyond one session, if the sessions are on different dates. An example of this extended evaluation would be when the provider is evaluating a child and will see the child with parents and in another session, evaluate the child independently.
* When billing for Medicare, CMS will allow only one claim of 90791 or 90792 in a year. However, in some cases, depending on the medical necessity, Medicare might allow reimbursement for more than one unit of 90791 or 90792. A modifier is not allowed to override this relationship.

90791

* Does CPT Code 90791 Pay More Than A Standard Outpatient Session? - Usually
* Time Requirements For Using CPT Code 90791 at least 16 minutes and not more than 90 minutes in the designated session time, with 60-minutes being the typical standard.
* What Are The CPT Code 90791 Coding Requirements?
	+ A thorough mental status examination is performed
	+ The patient’s ability and capacity to respond to treatment is evaluated
	+ A complete medical and psychiatric history is collected and included
	+ The recommendations in the initial treatment plan
	+ Covered at the outset
	+ The evaluation is part of a face to face meeting between the new patient and the provider

Extended Definitions

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Code | Type | Definition | Explanation | Documentation/ Requirements/Approx. Time Requirements  |
| 90832 | Psychotherapy | Psychotherapy, 30 min with patient and/or family member (OMH minimum), 16-37 minutes without additional E/M service (CPT guidelines)  | **Psychotherapy** is the treatment of mental illness and behavioral disturbances in which the physician or other qualified health care professional, through definitive therapeutic communication, attempts to alleviate the emotional disturbances, reverse or change maladaptive patterns of behavior, and encourage personality growth and development | - Establish diagnosis via review of symptoms, standardized screening, etc. -Mental status exam -“Skilled” intervention -Next steps for care -Review progress towards goals -Minimum 16 minutes, face to face  |

90832, 34, 37

* Diagnoses for therapy – reason for treatment, time of therapy (in minutes) that is face-to-face, method of therapy, assessment of symptoms, summary of therapy, identified goals and objectives for the therapy and the patient status with these, identified plan for return, homework and follow up, treatment planning, supervision as required by licensure level.
* 90832: Standard 30 min (16 min-37 time frame)
* 90834: Standard 45 min (38 min- 52 time frame)
* 90834: 53 min or more

90839

* Psychotherapy for crisis is an urgent assessment and history of a crisis state, a mental status exam, and a disposition. The treatment includes psychotherapy, mobilization of resources to defuse the crisis and restore safety, and implementation of psychotherapeutic interventions to minimize the potential for psychological trauma.
* 60 mins recommended, (30 to 74 mins may vary by state payer)
* The presenting problem is typically life threatening or complex and requires immediate attention to a patient in high distress. All therapy services are time based and time must be documented within the record.

90840

* Use add on code with 90839 for each additional 30 minutes beyond the first 74 minute
* The presenting problem is typically life threatening or complex and requires immediate attention to a patient in high distress. All therapy services are time based and time must be documented within the record.
* Can be in addition to therapy codes. This code is meant to add intensity, not time. Not a "difficult" patient but rather involves third parties such as correctional facilities, schools etc. Mandated reporting situations, nonverbal.

SBIRT



Mental Health Test and Assessment Codes

* **96105:** Aphasia assessment
* **96110:** Developmental screening
* **96112:** Developmental test administration with interpretation
* **96113:**Each additional 30 minutes of developmental test administration with interpretation
* **96116:** Neurobehavioral status exam, 60 minutes
* **96121:** Each additional hour of neurobehavioral status examination
* **96125:** Standardized cognitive performance testing, 60 minutes
* **96127:** Brief emotional or behavioral assessment
* **96130:** Psychological testing evaluation services provided by a physician or qualified health professional, 60 minutes
* **96131:**Each additional hour of psychological testing evaluation services performed
* **96132:**Neuropsychological testing services, 60 minutes
* **96133:** Each additional hour of neuropsychological testing services performed
* **96136:** Psychological or neuropsychological test administration and scoring by a physician or qualified health professional, 30 minutes
* **96137:**Each additional 30 minutes of neuropsychological test administration and scoring by a physician or qualified health professional
* **96138:**Psychological or neuropsychological test administration and scoring by a technician, 30 minutes
* **96139:** Each additional 30 minutes of neuropsychological test administration and scoring by a technician
* **96146:** Psychological or neuropsychological test administration via an electronic platform with automated results
* **96156:**[**Health assessment or reassessment**](https://www.apaservices.org/practice/reimbursement/health-codes/crosswalk.pdf)
* **96160:** Patient-focused health risk assessment
* **96161:** Caregiver-focused health risk assessment

The Bad

* MT Medicaid Health Behavior Assessment and Intervention Billing Codes
* Although Board of BH expanded LCSW scope to include “treatment of the perception of pain”, Medicaid does not reimburse LCSWs or LCPCs for any Health Behavior and Intervention codes.

MT Medicaid Health Behavior Assessment and Intervention Billing Codes

* Health behavior assessment and intervention services are used to identify and address the psychological, behavioral, emotional, cognitive, and interpersonal factors important to the assessment, treatment, or management of physical health problems. This means the member’s primary diagnosis must be physical in nature and the focus is on the factors complicating medical conditions and treatments. These codes describe assessments and interventions to improve the member’s health and well-being utilizing psychological and/or psychosocial interventions designed to ameliorate specific physical disease-related problems.

MT Medicaid Health Behavior Assessment and Intervention Billing Codes

* The health behavior assessment and intervention billing codes require a primary health diagnosis; therefore, these codes are only billable by the following licensed practitioners: psychologists, physicians, mid-level practitioners, and psychiatrists.
* CPT 96156 – Health behavior assessment or reassessment
* CPT 96158 – Health behavior intervention, individual, initial 30 minutes
* CPT 96159 – Each additional 15 minutes
* CPT 96160 – Administration of patient-focused health risk assessment
* CPT 96161 – Administration of caregiver-focused health risk assessment
* CPT 96164 – Health behavior intervention, group, initial 30 minutes
* CPT 96165 – Each additional 15 minutes
* CPT 96167 – Health behavior intervention, family with patient present, initial 30 minutes
* CPT 96168 – Each additional 15 minutes

The Ugly

* Documentation, Documentation, Documentation
* The patient’s medical record must support all Medicare claims. The medical record for covered services must:
	+ Be complete and legible
	+ Record start and stop times or total face-to-face time with the patient (because some codes are time-based)

For each patient encounter

* Document the patient’s progress, response to changes in treatment, and diagnosis revision
* Document the rationale for ordering diagnostic and other ancillary services or ensure it is easily inferred
* Document Assessment, clinical impression, and diagnosis
* Date and legible provider identity
* Physical examination findings and prior diagnostic test results
* Plan of care
* Reason for encounter and relevant history
* Identify appropriate health risk factors
* Make past and present diagnoses accessible for the treating and consulting physicians
* Sign all services furnished or ordered

And the Strange

* RHC and FQHC Reimbursement Methodology
* All RHC and FQHC services are reimbursed per visit. Services eligible for an encounter payment are reimbursed utilizing the facility-specific prospective payment system (PPS) rate.
* The PPS rate is a facility specific, predetermined rate, regardless of the allowable RHC or FQHC service. Since RHCs and FQHCs are reimbursed at their PPS rate for most services, they do not have their own fee schedule.
* RHCs and FQHCs utilize the Outpatient Prospective Payment System (OPPS) fee schedule for reimbursable codes, including allowable dental service codes. Please note, the OPPS fee schedule is for reference of allowable versus non-allowable codes only. A code appearing on the OPPS fee schedule does not indicate if the code is an RHC or FQHC service, or if the code is considered an incident to a core provider encounter.
* Certain services are deemed non-RHC or non-FQHC services and are paid at the appropriate fee schedule amount. The Department determines which non-FQHC and non-RHC services are eligible for reimbursement outside of PPS reimbursement.
* Non-RHC or non-FQHC services reimbursed outside of the PPS reimbursement methodology are not factored into the PPS rate. The list of services that are not calculated into the PPS rate includes:
* Peer support services
* Long acting reversable contraceptives (LARCs)
* Promising Pregnancy Care

Resources

* <https://medicaidprovider.mt.gov/>
* <https://www.cms.gov/medicare/medicare>
* <https://www.apaservices.org/practice/reimbursement/health-codes/testing/bill-multiple-days-providers?_ga=2.151240698.297531184.1668710567-966990224.1668710567>
* <https://www.apaservices.org/practice/reimbursement/health-codes/health-behavior/webinar>
* <https://www.apaservices.org/practice/reimbursement/health-codes/health-behavior/webinar>
* <https://www.bcbsmt.com/static/mt/provider/pdf/mt_telehealth_faq.pdf>

**What do the terms ‘exempt,’ ‘nonexempt,’ ‘salaried’ and ‘hourly’ mean?**

**Exempt:** An individual who is exempt from the overtime provisions of the Fair Labor Standards Act (FLSA) because he or she is classified as an executive, professional, administrative or outside sales employee, and meets the specific criteria for the exemption. Certain computer professionals may also be exempt. With some limited exceptions, exempt employees must be paid on a [salary basis](http://www.dol.gov/whd/overtime/fs17g_salary.pdf).

**Nonexempt:** An individual who is not exempt from the overtime provisions of the FLSA and is therefore entitled to overtime pay for all hours worked beyond 40 in a workweek (as well as any state overtime provisions). Nonexempt employees may be paid on a salary, hourly or other basis.

**Salaried:** An individual who receives the same salary from week to week regardless of how many hours are worked. Exempt employees must be paid on a salary basis, as discussed above. Nonexempt employees may be paid on a salary basis for a fixed number of hours or under the [fluctuating workweek method](https://www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/fluctuating-workweek-method-and-belo-contract.aspx). Nonexempt employees paid a salary must still receive overtime in accordance with federal and state laws.

**Hourly**: An individual who receives an hourly wage for work performed. Generally, such individuals, because of the method of payment, are classified as nonexempt and are subject to the overtime provisions of the FLSA. Exempt computer professionals may also be paid on an hourly basis, as could those exempt under the professional exemption, such as teachers, lawyers, doctors, and still retain their exempt status.

Overtime laws in Montana and nationally are designed to prevent workers from being exploited by their employers, with hourly wage earners (particularly those in blue-collar indistries) being the primarily protected group. Because of the nature of the work environment and working hours required by certain careers, there are a wide variety of specific exemptions to Montana overtime eligibility. Out of an estimated 120 million workers in America, almost 50 million are exempt from overtime law.

Executives, administrators, and other professionals earning at least $455 per week do not have to be paid overtime under Section 13(a)(1) of the [Fair Labor Standards Act](https://www.minimum-wage.org/articles/fair-labor-standards-act).

External salespeople (who often set their own hours) are also exempted from MT overtime requirements, as are some types of computer-related workers. Independent contractors, who are not considered legal employees, are also exempt from overtime law. Other exempt positions include some transportation workers, certain agricultural and farm workers, and some live-in employees such as housekeepers.

In order to determine if a job is exempt from overtime, the FLSA provides a series of tests to determine the overtime eligibility of an employee based on pay rate, working conditions, skill level, and other factors.

**How to Use a Progressive Discipline System**

Progressive discipline is a method of discipline that uses graduated steps for dealing with problems related to an employee's conduct or performance that do not meet clearly defined standards and policies. The ultimate objective of progressive discipline is to help employees correct conduct problems and resolve performance issues in the earliest stages. Using a progressive discipline system:

* Provides a consistent, objective and fair process for disciplining.
* Promotes open communication between a supervisor and his or her employee.
* Improves employee productivity.
* Potentially increases employee retention by resolving issues.
* Provides important documentation should a termination become necessary.

If you are currently using a progressive discipline system or are considering developing one, it is prudent to review your steps with a trusted employment law attorney. The following are sample steps that may typically be included in a progressive discipline system:

**Step 1: Counseling**

For a first offense where the infraction is minor, an oral discussion characterized as "counseling" is usually appropriate. The employee's supervisor should inform the employee of the infraction and clearly advise the employee both of the conduct expected and that future infractions may result in more severe discipline. Counseling sessions are different from verbal warnings because counseling sessions are used as a pre-emptive measure before the problem becomes too serious.

**Step 2: Verbal Warning**

A verbal warning may be appropriate for a more serious offense where counseling is inadequate. It could also be a step following counseling. When issuing an oral warning, the employer should clearly advise the employee as to what is needed to remedy the employee's infraction and advise the employee that more severe disciplinary consequences will follow if the infraction is repeated.

Note: If your company provides for such a nonpunitive first step, the supervisor should nevertheless maintain a written record of the counseling or verbal warning in order to prove that it used progressive discipline in the event that the problem continues.

**Step 3: Written Warning**

The next step in a progressive discipline system is the written warning. A written warning usually follows an unsuccessful verbal warning, or new problems that have arisen. This document should clearly state the infraction and the consequences for a repeat offense. The written warning should be addressed to the employee and a copy placed in the employee's personnel file.

* **Second Written Warning**. An employer may wish to include a second written warning as part of its progressive discipline program, or the employer may move directly from the first written warning to the next step (demotion, suspension, etc.). The determination of how many steps should be in the policy and the details of each step will be informed in large part by the nature of the business and the nature of the disciplinary issues that generally arise in that environment.

**Step 4: Possible Next Courses of Action**

Depending on the nature or repetition of the offense, one or more of the following actions may be appropriate.

* **Transfer**. Employers may consider a transfer in lieu of termination or other severe discipline.
* **Withhold compensation increases**. An employee who has a pattern of misconduct may be denied a compensation increase.
* **Demotion**. It may be appropriate to demote an employee, perhaps to a level where the employee may better perform.
* **Suspension**. Another possible course of action would be a suspension without pay. The length of the suspension may vary from a day or two to a week or more, depending on the seriousness of the infraction.
* **Termination**. The decision to terminate an employee should be one made as the result of consultation by the employee's supervisor with one or more upper-level managers (as well as legal counsel, if appropriate). The decision should never be made by a single person. Consistency is important. An employer opens itself to various legal claims if one employee is discharged for an infraction while another employee is merely suspended for a few days for the same infraction.

**Progressive Discipline: Why the Process is Flawed and How to Improve Employee Performance**

By [Louis Imperatrice, NRP, NJ-MICP](https://www.jems.com/author/louis-imperatrice-nrp-nj-micp/) - 7.30.2020

Progressive discipline is a process that employers use to attempt to correct behaviors of employees for various violations of policies, values and codes of conduct. Another reason for an employer’s use of progressive discipline is for risk management. This allows and supports an organization’s position and decision to suspend, and possibly terminate an employee, by providing a complete and concise record of poor performance and attempts at remediation of unacceptable behaviors. According to attorney and nolo.com contributor Lisa Guerin, JD, the legal definition of progressive discipline is “an employee disciplinary system that provides a graduated range of responses to employee performance or conduct problems. Disciplinary measures range from mild to severe, depending on the nature and frequency of the problem.”

It has been used for several years in the workplace. Recently, many scholarly articles have begun to realize that progressive discipline is in fact an outdated and antiquated process that does not effectively improve employee performance or behaviors. Instead, it creates angry, hostile, underproductive and disengaged employees.

**What is Progressive Discipline?**

While each employer or organization may have his or her own specific progressive discipline processes, the basic understanding is that when an employee violates a policy or procedure, discipline is progressive and punitive in nature. Depending on the severity of the violation or behavior, an employee will receive a level of discipline accordingly. This could be in the way of a coaching, counseling, write up, suspension, termination or any other verbiage an individual employer may utilize.

Many progressive discipline policies in effect have verbiage that allows an employer to escalate the level of discipline based on the *suggested* seriousness of the infraction. This however, tends to be in most cases at the discretion of the employer, and most policies and procedures in place have a *“catch all”* phrase which usually reads in the likes of “management reserves the right to escalate discipline as they see fit based on the severity of the infraction or behavior” (this is just an example of many different types of language used to allow for complete discretion of management in progressive discipline use.)  For example, an employee who violates protected health information may have their discipline escalated to termination; whereas an employee who reports for work late or reaches a threshold of unexcused absences may receive a verbal counseling or a written coaching, with subsequent violations escalating to suspension or termination.

This verbiage however can become an issue for employers when management elects to escalate discipline of one employee and fails to follow precedent set by former employees. For example, an employee may post something questionable on social media in violation of an organization’s social media policy and receive the first level of the progressive discipline process for a first offense. A subsequent employee may post something questionable on social media in violation of the same social media policy, and the manager reviewing this incident may deem it serious enough to escalate to a greater level in the organizations progressive discipline policy. Failure by the organization to follow precedent can lead the organization to costly wrongful termination or discrimination lawsuits. This is a common problem with progressive discipline and the leniency given to management in its enforcement of progressive discipline within an organization.

The goal of employers using progressive discipline is to prevent the aforementioned behavior from occurring in the future. The questions we must ask ourselves however is, does this in fact work and effectively change or alter employee behavior?

In many instances of progressive discipline, the decision to discipline an employee rests on a front line supervisor.2 Frequently, the process at which the supervisor used to reach the decision on discipline is not provided to the employee, instead, the employee is informed that they violated a process or policy, issued discipline, asked to acknowledge it, and informed that future violations will result in escalated discipline. This leaves much room for debate.

**Due Process**

The law.com legal dictionary defines due process as the “fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts. All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result.”3

Progressive discipline circumvents due process in many ways. Frequently, more times than not, the fair and equal treatment of employees is absent in the progressive discipline process. Much interpretation is left up to the manager or leader who is issuing the progressive discipline to the employee. In some larger organizations, interpretation and discipline decisions are left to the expertise and discretion of human resource officers or organization attorneys and legal advisors. Many times, this is used to avoid potential wrongful termination litigation or to ensure an organization is in a position to defend itself should litigation be filed. Human resources and legal departments are often used to ensure that if a previous precedent was set as mentioned earlier, it is followed accordingly and not deviated from to ensure fair and equal treatment of all employees and avoid potential future issues in litigation.

An employer who has several frontline supervisors is at an exceptional disadvantage when it comes to due process. An employee who constantly arrives for work 10—15 minutes late may receive only an undocumented verbal “talking to” by their respective supervisor, whereas an employee in the same position who reports to a different frontline supervisor, may receive documented formal discipline by their supervisor for the same behavior, thus entering them into the formal progressive discipline process. Discussed later is the act of precedent being set by an employer in situations as such.

We must then ask ourselves, *is this fair*? The process of progressive discipline is often overly broad and allows for significant interpretation by individual supervisors. A behavior that one supervisor may view as minor may be viewed by another supervisor as detrimental and warranting of formal discipline. This completely circumvents due process on all levels. Employers must create policies that leave little to no room for individual interpretation and fair and equal treatment of all employees for similar behaviors in order for the process to be effective and fair across the board. Additionally, employers should allow for affected employees to have full access and disclosure of any investigation into an incident warranting discipline as well as being afforded access to complaints rendered. This dovetails into due process to afford the employee the opportunity to ensure the process was completed fairly and unbiased with all relevant facts.

**Why Progressive Discipline is Outdated and Ineffective**

In today’s modern world, employers need employees who are capable of performing their job on a daily basis, with limited supervision and the flexibility to make decisions freely. While there are policies and procedures in place to guide employees in their daily decision-making, all too often these policies and procedures do not cover and guide every possible situation that may arise.

When employers use progressive discipline as a threat, they create a work environment where employees are fearful to make decisions and may stifle their progress. Employees must “walk on eggshells” for fear of being disciplined which will slow productivity of the organization and its individual employees. Many times, employees who make a mistake made it as a result of a flaw in a policy or procedure. All too often, employers fail to implement a “just culture” and instead of recognizing the policy or procedure as the result of the employee behavior or mistake, employers place the blame on the employee and institute discipline. The employee is now put into a difficult situation; continue to attempt to be productive knowing that the policy in place prevents it, or fail to be productive for fear of violating a flawed policy or procedure? Was the progressive discipline of the employee effective? Is the progressive discipline issued to the employee now a direct result of a decrease in production in which the employee may then face a poor evaluation due to lack of productivity and an employer who fails to realize that their own process is flawed?

While there are times when progressive discipline is warranted — such as pattern absenteeism, lateness, clear cut policy violation, etc. — it must be looked at from a “big picture” standpoint by the employer, and evaluated on a case by case basis. Leaders must ask themselves: will disciplining this employee increase production and change behaviors, or will disciplining this employee cause the employee to become angry, defensive and disengaged?

Another pivotal downfall of progressive discipline is the potential for managers and leaders to use it unfairly and biased to fast-track toward termination of an employee. Perhaps an employee may be vocal in expressing ideas that go against the status quo, participates in protected activity such as whistleblowing, or participates in union organization, to name a few. All of that is viewed as detrimental by corporate and senior leadership of an organization. Frontline managers may be directed by senior leaders or take it upon themselves to monitor these specific employees more closely than others and document any and all behaviors into the progressive discipline process, despite a past precedent of behavior that was never disciplined before. Employers may use age-old policies to unfairly and exponentially enter an employee into the progressive discipline process to reach an end goal of termination. The employer will have documented a history of progressive discipline for the employee, and in the absence of a union or right to work state, the employee stands helpless. This is even more prevalent in states where employees are “at-will” and can be terminated for any or no reason whatsoever.

Additionally, many progressive discipline programs allow for a “strike” or “incident” to fall off of an employee’s record after a predetermined amount of time.4 This is counterproductive and an ineffective way to improve employee behaviors. For example, an agency may allow for an employee to reach a threshold of five unexcused absences in a rolling year before entering the progressive discipline process. When the employee reaches their sixth absence, they are issued the first step in the progressive discipline process for attendance. Employees will then know that they can continue to have unexcused absences up to five, and know that an absence will essentially “fall off” after a year and can continue to maintain five unexcused absences without ever entering the progressive discipline process. What behavior has this process corrected? The employer now has an employee who can continue to be absent five times per year, and never once enter into the progressive discipline process. Additionally, an employee can know that when they were issued the first step in the progressive discipline process for their sixth absence, they will eventually have absences “fall off” and can now be absent again without entering into the progressive discipline process.

Instead of “ruling with an iron fist” and continually disciplining employees for being absent, employers should recognize that an employee is reaching the threshold of absences, reach out to the employee and attempt to offer a solution. Hypothetically speaking, perhaps the employee has an ill family member at home, or the employee is a single parent caring for a child who must be absent from school, causing the unexcused absence. The employer can show they value their employee and attempt to offer a solution to prevent the absences in the future. The employer can offer the employee Family Medical Leave (FMLA) or offer to adjust the schedule of the employee to prevent absence.

Perhaps a solution to allow the employee to work from home on days when they may be absent is an option. While this may not always be feasible, offering options and solutions allows for the employee to continue to be productive, shows the employee they are valued by their employer for the work they perform, and prevents the employee from having a tainted record and fear of consequences from the disciplinary process. It also will make the employee feel more valued by the organization. This same employee in the future may think twice about being absent for work for a minor issue, knowing that he or she is truly valued and cared for by their leadership.

**What is the Solution to Progressive Discipline?**

While there are behaviors that warrant severe and harsh discipline and those must be dealt with on an individual basis, there are many other solutions that offer a better outcome than progressive discipline.

Employers must allow managers flexibility when disciplining employees. Perhaps an employee who has a ten-year record of poor performance and continued policy violations should be treated differently than a ten-year employee with a perfect record who makes a single mistake. While the mistake made by each employee may be the same, it is obvious that the employee who made their first mistake in ten years does not warrant the same level of discipline, if any, that the employee with a track record of poor performance. This becomes a slippery slope for employers, as they must be cautious not to set an unwanted precedent.

Many employers also use progressive discipline as a record to terminate an employee. Termination of an employee is costly and opens up the door for possible costly litigation and poor public relations. Additionally, if an employee is terminated, the employer must now hire, train, and attempt to find a new employee to fill the gap caused by the termination. While there are absolutely reasons an employee should be terminated from employment, progressive discipline does not give employers leeway when it comes to termination decisions. A high performing employee who was entered into the progressive discipline process may find themselves terminated, because there is little leeway for management to deviate from the process. For example, an employee who has been with an organization for fifteen years who’s yearly evaluations have been stellar, is issued a write up for being late to work. They then receive the next level of discipline when they submit a project one day late due to an unforeseen circumstance and a progressive discipline policy that allows for little to no deviation. Six months later, the same employee forgets to lock their computer and is now terminated due to the previous progressive discipline they received. While none of these infractions or behaviors are detrimental whatsoever, due to the employee being in a rigid progressive discipline process, they find themselves terminated. The organization has now lost a high performing, tenured employee due to the progressive discipline process.

There also is the fact that all too much is left up to the discretion of management when it comes to escalating progressive discipline. Managers can escalate progressive discipline and attempt to justify behaviors to warrant termination, without going through the progressive process. This type of escalation frequently leads to costly and lengthy wrongful termination litigation. When an employee feels they may be biased or retaliated against by a leader and a minor behavior is escalated to termination, the process of progressive discipline is defeated and there is a complete lack of due process.

A solution to the progressive discipline problem is a type of behavior modification being used known as *performance coaching*.4 When an employee’s behavior is unwarranted or a policy or procedure is violated, instead of immediately issuing a level of progressive discipline, employers should meet with the employee and have a formal conversation as to why the behavior occurred or the policy was violated. Perhaps the employee was under extreme stress, ill, did not have the resources necessary available to them to perform effectively, or the policy was flawed. The system works more effectively by having a formal conversation with the employee, discussing the behavior and coming up with an action plan for improvement in the future. This is a pillar in an organization that implements *just culture*. Once again, have an employee who feels they are valued and the odds of them making the same mistake in the future are lessened.

Performance coaching is a non-punitive process which sets expectations between manager and employee for improved behavior in the future. Punitive discipline can be equated to the age old parenting adage. If you tell your child not to do something and provide no reason as to why they shouldn’t do it, the odds of them doing it are very high. The same goes for employees. When an employer punishes an employee for doing something and tells them not to do it again because they will be in for harsher punishment, but provides no reasoning or solution for the behavior, the odds of the employee making the same mistake again are increased.

The performance coaching process also allows for the manager to delve into the reason for the mistake and evaluate if it was in fact a process flaw that needs to be changed or adjusted. It also allows managers to recognize that perhaps more resources are needed, or an employee needs more support to complete their tasks and avoid unwanted behaviors. Together, the manager and the employee can find a mutual solution for the situation and improve not only productivity for that individual employee, the working relationship between employee and manager, but also potentially identify ways to improve performance of other employees who may face the same situation in the future.4

Employees who receive discipline may in fact find ways to work around and avoid getting caught in policy or procedure violation in the future. These employees become difficult to manage and quickly learn the “ins and outs” of avoiding discipline and doing “just enough” to be effective yet steer clear of discipline. These employees are counterproductive and disengaged and detrimental to the organization.

Employers must also recognize that in using performance coaching, they must avoid the *“if this happens in the future”¦”* phrases and verbiage. This is threatening to the employee and defeats the purpose. Instead, the employee and employer should agree on what they both want the future outcome to be, and what the employer expects of the employee. Setting standards and informing the employee in a polite and non-threatening way that future behaviors in violation of the agreed upon solution can lead to unwanted employment outcomes. This can be accomplished by reminding the employee they are valued or by acknowledging their hard word — and through your understanding of human nature and the natural possibility of mistakes — while also emphasizing the need to improve upon the behavior in question.

**The Importance of Employee Handbooks**

Regardless of the type of discipline or behavior modifications an employer uses, the importance of an employee handbook is utmost. The employee handbook is quite possibly the most important aspect of an effective organization. Employees must be fully aware of what is expected of them by their employer. Employee handbooks are a resource where employers can put into clear and understandable verbiage what their policies, procedures, values, goals and codes of conduct are.5 These all must be clearly defined and communicated to employees. Annual refresher training on company policies, any applicable laws, and any new or altered policies must be provided and documented by an organization. An in-depth, detailed employee handbook gives employers leverage when instituting behavior modification to an employee. Without a clear and concise handbook, employers leave much room for interpretation of what is a poor or unacceptable behavior. This gives employees room to circumvent the system and find various flaws and loopholes to avoid unwanted outcomes when mistakes are made.

By having an employee handbook that clearly details the expectations of an employer, it gives leverage to the employer when instituting discipline, whether it be progressive or performance modification. An employee handbook must also detail the types of discipline the employer uses and a detailed process for grievance of such. It is inevitable that employers will make mistakes and issue unwarranted discipline. Employees must have an unbiased and fair avenue to grieve discipline when they feel that the behavior did not actually occur, the behavior did not warrant the level of discipline issued, and when an unfair process and/or lack of due process was the result of the discipline issued. All too often, grievance processes instituted by employers involve the first level of grievance to directly involve the supervisor who issued the discipline. It is very rare than a supervisor will overturn or alter discipline issues. Second steps in grievance usually involve a senior leader of the department and many times support of the frontline supervisor is provided and offers an unfair grievance process.

A proper grievance process would involve employees from outside departments who are absent of any bias toward the employee in question or issuer of the discipline process. Many organizations use their human resources department as a vehicle to provide employees with an option to appeal any discipline or employment action. Additionally, a strong corporate compliance program must be initiated, commonly through a third-party organization, to ensure compliance with all policies and procedures. This allows for an outside view of the behavior, an adequate, fair and unbiased evaluation of the situation at hand. It ultimately leads to a much fairer grievance process.

One issue that is common when it comes to grievance, or the lack of a formal grievance process, are organizations where employees are represented by a collective bargaining agreement or union. Often times in a nonunion organization, the grievance or appeals process is internal and is thought to be unfair by many employees. Union representation affords employees a third-party representative to act in their favor on all grievance or appeal issues. Many times, this process leads to an agreement between employer and employee to rectify the issue at hand.

Employers must also follow the guidelines of their employee handbook when investigation and issuing discipline to avoid setting undue precedent in discipline. If one employee was given a verbal coaching for a behavior and another employee suspended for the same behavior, the employer has set precedent for all future instances of that behavior. Following the detailed guidelines of the employee handbook by an employer is imperative if the employer wants to have an effective progressive discipline or behavior modification program. History has shown that when an employer has set precedent and litigation is brought by an employee, the courts will almost always rule in favor of the employee. This can be costly to an organization in many ways.

**Conclusion**

Employers must evaluate their discipline processes to determine if they are in fact changing the behaviors of employees or causing employees to become angry and disengaged. Employers must remember to value their employees and view each situation individually. Employers must be fair, consistent and incorporate due process when implementing discipline and avoid bias or unfair practices when it comes to behavior modification of employees and/or employee discipline grievances. Employers must avoid setting precedent in discipline and maintain an up to date and detailed employee handbook as a reference for both what is expected of employees and expected by leadership.

**References**

1. Guerin, L. G., JD. (n.d.). What Is Progressive Discipline for Employees? Retrieved April 16, 2020, from What Is Progressive Discipline for Employees?.

2. Falcone, P. F. (2017). 101 Sample Write-Ups for Documenting Employee Performance Problems: A Guide to Progressive Discipline & Termination (Third Edition). Retrieved from: <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/the-traditional-progressive-discipline-paradigm.aspx>.

3. Due Process. (n.d.). In *Law.Com Legal Dictionary*. Retrieved from: <https://dictionary.law.com/Default.aspx?selected=595>.

4. Bingham, S. B. (2019, October 30). Why progressive discipline doesn’t work (and what to do instead). *Fast Company*. Retrieved from: [https://www.fastcompany.com](https://www.fastcompany.com/).

5. Barnes, H. B. (2019). The Importance of Having an Employee Handbook. *Law Crossings*. Retrieved from: <https://www.lawcrossing.com/employers/article/pdf/8041.pdf>.