



Why it Makes “Cents” for Employers to Evaluate Their Performance Review Practices

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“Wrongful termination lawsuits brought by former employees may be bolstered by evidence trails laid by subjective performance reviews not grounded in facts.”

Soon it will be that time of year again; time to prepare annual performance reviews. A common problem for employers that is frequently unaddressed, is how to effectively write those reviews. Although many supervisors and human resource professionals have no problem giving verbal feedback, when the time comes to translating and transmitting the feedback into a written, constructive evaluation, they often find themselves at a loss for words. That loss has a variety of sources, including neglecting to record feedback given throughout the year, not wanting to hurt an individual’s feelings, and feeling overwhelmed by not knowing how to write an effective review because of lack of training. Ineffectively written performance evaluations can impact an employer’s bottom line since evaluations often play a significant role in determining employer liability and mitigating damages should a disgruntled employee decide to sue.

For example, an employee receiving an unfavorable performance evaluation may claim that the evaluation is a pretext for discrimination. Circumstantial evidence derived

from a performance review to support that claim may take the form of recent reviews showing a dramatic, yet unexplained, change from earlier reviews, statements which contradict prior reviews or poor word choices, all of which may suggest bias or discriminatory intent where none existed. Inappropriate observations and unjustifiable criticisms made to an employee during the assessment can also form the basis for harassment, discrimination, and defamation claims. In addition, performance reviews are commonly used as evidence in fair labor standards and wage and hour actions to establish whether the employee had supervisory responsibilities, functioned as a manager, and whether the employee commonly worked hours beyond those minimally required to perform his or her job. The foregoing information is critical to determine whether an employee is exempt from overtime requirements. Employers with an informal evaluation program are particularly vulnerable to these types of pretext arguments and wage claims.

Following these practice tips will help improve the quality of your evaluations and strengthen your defenses to a termination should a former employee cry foul.

Preparing the Written Review

1. Maintain a Clear Policy: A clearly written policy addressing the timing, scope and purpose for conducting performance evaluations should be set forth in your employee manual. How an evaluation is used by the employer may vary, depending on the type of employee being reviewed. For example, if an employee is subject to a written employment contract, the employer may be limited in how the review can be used to affect the employee’s compensation and job status. By contrast, an employer of an “at will” employee (meaning he or she can be terminated at any time for no reason) may use the review for any purpose, including changes in compensation, demotion, transfer or discipline. Employers should also consider which workers should be reviewed, because the act of evaluating a consultant’s performance may be used as evidence that an employment relationship exists between the employer and that consultant.

2. Keep a Dedicated File for Performance Notes: Preparing performance evaluations should be an on-going process

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of gathering feedback from supervisors and managers. Supervisors and human resource professionals should keep notes on employees so they can quickly record when an employee has an achievement or falls short of an important objective. Such notes should include the date and how the action benefited the employer or hampered productivity. Performance notes should indicate whether the employee is satisfying the qualifications of his/her job. If a disgruntled employee claims that the reason he/she was not promoted is for some discriminatory reason, the employer should be able to rely upon an updated file of performance notes to support its decision.

3. Be Consistent: Consider prior performance evaluations; if the current review procedure is more stringent than that previously utilized, explain why there has been a change and update the employee handbook to reflect it. This becomes particularly important in the case of an employee returning from a family or medical leave. An employee who is subjected to a more rigorous review process without explanation upon his/her return may have a claim that he/she has not returned to a comparable position or that he/she is being retaliated against for having taken a leave. Consistency is also important because reviews often provide the basis for compensation decisions. For example, if an employee received a favorable review,

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but no raise due to undocumented performance deficiencies, the employer would be hard pressed to argue in litigation that the employee was not eligible for a raise or was not qualified for her job. For this reason, reviews should provide ample information to which the employer can cite to explain why a raise was given or denied.

4. Stick to the Facts: Giving employees constructive feedback is fundamental to ensuring a company's smooth operation. Avoid subjective descriptions and vague terms such as "good." Explain why/how a behavior or course of action rendered positive results or why it didn't. Include measurable terms that describe how the employee's performance measured up to the employer's expectations; use words such as "surpassed," "excelled," "achieved," "exceeded" and "disappointed."

5. Distinguish Between Performance and Personality: Efforts should be taken to describe performance deficiencies using examples that are related to preferred practices and are couched in professional, rather than personal or emotional terms. If an employee's personality impacts his/her performance, it should be addressed

objectively by linking his/her personality to specific incidents.

6. Avoid Stand-Alone Rating Scales and Checklists: Checking a box "good" or "fair" does little to assess an employee's performance, let alone provide constructive feedback. A good rule of thumb is that if the evaluation form takes less than 5 minutes to complete, the form is either too simplistic or the reviewer has not provided adequate information. Checking a box that an employee did a "great job" is meaningless without telling the employee "why" he/she did a great job. For example, was there one stellar incident or a series of positive outcomes? Discuss how that achievement impacted the department or company and how the employee should build on that achievement going forward.

7. Take Time to Think it Through: An effective evaluation conveys enough information for the employer to assess the value that employee brings to the company. A fair review generally requires multiple drafts to tighten language, revisit word choices and add examples.

Meeting with Employees

1. The Setting and the Procedure: Select a quiet office where the review will not be interrupted and the meeting will not be on display, rendering the meeting fodder for office gossip. Provide ample time for the employee to read the evaluation and to discuss it, but, at the outset, be clear about what time the meeting will end. An employee need not be provided a copy of the evaluation. The employee should be asked to sign the evaluation at the conclusion of the meeting. The employee should be told that signing the evaluation does not mean that the employee agrees with its content, only that the employee confirms that she read it and had the opportunity to ask questions about it.

2. How to Begin: Refer to the employer's objectives and goals and what role the employee has played in helping the employer achieve them. Address each area in which the employee has been involved and connect the employee's performance and the employer's bigger picture.

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3. Be Fair: Although the reviewer should take care to avoid criticizing an employee in general, the reviewer should not sugar-coat any problems. Employers must be upfront about areas that need improvement in a manner that lets the employee feel respected, even if the employee is a poor performer. An employer's best defense to a claim of discrimination involving a negative performance evaluation is sufficient evidence of poor performance.

4. Set Performance Objectives and Goals: Discuss areas that need improvement by offering strategies to improve performance and set concrete goals. Institute a monitoring process that focuses on specific future outcomes so that the employer is not waiting a year to find out whether the employee's work habits have improved or whether the employee used the assessment to address problem areas.

In sum, taking the time to write detailed performance evaluations may help to build the paper trail that can be the key to defending a wrongful employment claim. If your process for reviewing employee performance needs an overhaul, an employment law specialist should be your first call to help make your annual reviews the constructive process they are intended to be. ■



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