

THE IMPORTANCE OF PERFORMANCE EVALUATIONS IN A TIME OF LAY OFFS

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MAY 22, 2009

As a result of the struggling economy, employment lawyers are being asked by businesses on a daily basis, "how can we conduct a lay off within the limits of the law, and without creating future litigation expenses?" Inevitably, this conversation includes a discussion about employee performance evaluations. Performance evaluations are critical to the lay off analysis because employers generally want to base these decisions on a combination of objective factors (e.g, seniority, job classification, etc.) and subjective factors (e.g., performance). If an employer lacks a history of properly conducted performance evaluations, then "lay off" decisions based on performance are generally risky, and are, therefore, discouraged. In fact, any time an employer seeks to terminate an employee for poor performance without adequate evaluations, they are placing themselves at risk for future litigation. Below is a review of some of the frequently asked questions regarding performance evaluations.

What is a Performance Evaluation? Simply put, a performance evaluation is the periodic measure of an employee's performance and progress. In addition to aiding an employer's decisions regarding lay offs and other terminations, its outcome can help employers make appropriate decisions concerning salary adjustments, bonus compensation, promotions, reassignments, or transfers to different positions or departments.

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Are Employee Performance Evaluations Required by Law?

No, but as mentioned above, they are an effective tool for employee management, and may insulate an employer against wrongful discharge actions when properly conducted. For example, where an employee is terminated for poor performance and subsequently files litigation against the employer, jurors will be much more sympathetic to the employer if the employee was provided with notice and an opportunity for improvement.

Is There One Style Of Performance Evaluation That Is Best?

No, it is important for employers to develop a system that is tailored to the employer's workforce. Each evaluation system should include measurable, objective criteria directly related to the employees' job descriptions. To the extent an employer uses a rating system (e.g., 1 to 5), the employer should also include a descriptive narrative to accompany the rating with specific examples when possible.

Is Honesty Really the Best Policy? Yes, your mother was right (at least, in the context of performance evaluations). The evaluation must be honest and accurate, and should include not only the employee's accomplishments but his or her weaknesses and deficiencies. If honest and complete descriptions of an employee's performance or behavior are provided to him or her, the chances of his or her performance improving increases. Sometimes employees perform poorly simply because they do not fully understand what is expected of them. Additionally, as stated above, fair warning to an employee of deficiencies in his or her performance increases the odds that a subsequent termination of employment for failure to improve problem performance areas will survive a challenge in court.

In Addition to "Honesty," What are Some of the Other "Best Practices" for Conducting a Performance Evaluation?

Document the Evaluation: It is essential that all performance evaluations be documented carefully. The documentation should occur in the same way for all employees to show that the procedure is consistently applied. Evaluations should not be performed on an *ad hoc* basis, and should not be performed solely as a means of creating a paper trail. In addition, employers should take care as to what is written in performance evaluations. In employment litigation, performance evaluations are often a key exhibit. Therefore, employers should give careful consideration as to what to include/exclude from them.

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Be Neutral: It is important for the employee's supervisor to stay as neutral as possible when completing evaluations. Supervisors should avoid evaluating their friends more positively than their work supports. Similarly, allowing negative biases based on personal feelings to result in harsher evaluations than warranted should not be tolerated. To remain "neutral," supervisors should be instructed to tie criticisms to job functions, and not the employee's personality. Also, supervisors should be instructed to use verbs rather than adjectives to tell what action took place. Descriptions such as "bad attitude," "troublemaker," and similar terms characterize specific behaviors. It is those underlying behaviors that should be evaluated, discussed and documented.

Avoid Excessive Leniency/Harshness: While it is possible for a supervisor to be overly harsh in evaluating an employee, the more frequent problem is for a supervisor to be excessively lenient. Sometimes, supervisors do not want to confront an employee, or do not know how to fix the problem. However, an excessively lenient performance evaluation creates obvious problems during litigation for wrongful discharge. Supervisors should be trained to understand that the fear of telling an employee that he or she is doing poorly, which results in undeserved favorable evaluations, make it difficult, if not impossible, to explain to a jury why an apparently "good" employee was terminated.

Don't speculate: Do not speculate, generalize, characterize, infer, prejudge, or use secondhand information for documentation. As a general rule, employers should avoid starting sentences with "it seems," or "it appears." Instead, employers should stay focused on known facts and provide clear descriptions of what action the employee took or failed to take.

Set Goals: The performance evaluation process offers employers the opportunity to set goals for the employee to accomplish during the period of time before the next review. These goals can establish corrective steps for addressing problems that the employee has had in the past or can identify additional tasks that the supervisor would like the employee to complete. It is recommended that the employee and supervisor both agree on the goals.

Conduct Evaluations on a Regular Basis: Evaluations should be conducted at least annually, and more frequently where needed.



As a result of the uncertain economic forecast, it is more important than ever for businesses to take a close look at their performance evaluation procedure. A properly conducted evaluation may insulate employers from costly litigation resulting from disgruntled former employees. In addition, even if lay offs will be avoided, budgets today are too tight to support underperforming employees. Performance evaluations are a useful tool in maintaining and ensuring that a productive staff is efficient. If you have any questions about performance evaluations, or any of the topics raised in this article, please do not hesitate to contact any of the lawyers in Devine Millimet's Employment Law Practice Group.

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