

LEGAL PITFALLS OF THE EMPLOYEE EVALUATION

by Phillip Perry MA



Evaluating employees the right way has never been a breeze. But in recent years it's become downright dangerous. Increasing numbers of fired workers are invoking the protections of new federal and state laws as weapons against former employers. To avoid costly wrongful discharge lawsuits down the road, managers need to document negative evaluations more carefully than in the past. However, documenting poor performance carries a danger. Employees can become easily demoralized if managers don't present critiques in a sensitive manner. How can you balance the letter of the law with the spirit of the workplace? Six experts on employee management show how you can avoid the most common, and costly, pitfalls in the employee evaluation:

1. Basing evaluations on personal opinions. Too often, experts say, managers evaluate employees in general terms that really amount to opinions. Common examples are: "needs to improve work habits" and "must improve interpersonal skills." Employees resent such statements and go on the defensive. "The only way you will make your point effectively is to talk specifics," says Don Schackne, an employee relations consultant based in Delaware, Ohio. "That gives you and the employee a handle to discuss performance problems." Here's an example. Suppose you have received lots of complaints from the family members of patients about an employee. You'll only cause the employee to balk if you say "You need to improve your bedside manner and your patient relationship skills." Instead, state "We received six

complaints from patients and patient family members about you during the past year." Then read the details of each complaint from written records. And how about that staffer who can't get along with co-workers? Describe recent work place arguments. "Do you remember an incident three weeks ago with Joe?" Suppose an employee needs to improve work habits. To get this point across, state specifics such as "spends a half hour leafing through paperwork every morning."

Use numbers when possible. How many times did the employee arrive late to work and by how many minutes? How many arguments were there? By what percentage was the employee under a required performance level? How many times did the employee take an extra 15 or 30 minutes for lunch?

All this doesn't mean personal characteristics can't be assessed, says Schackne. "You can rate abstract characteristics such as attitude, leadership, initiative, cooperation, interpersonal skills, and maturity. But when you do so, make your point with examples from the employee's performance record." Keep a work diary, from which you can obtain examples and numbers.

2. Not identifying causes of poor performance. Once the problems have been stated in specific terms, obtain feedback. Why didn't the employee perform as well as anticipated? Was it the fault of the worker, or were other reasons to blame?

"Sometimes there are legitimate reasons why an employee did not perform up to standard," says Christopher J. Hegarty, a consultant based in Novato, Calif. "Give the employee an opportunity to present them. Was there anything wrong with the procedures required of the employee? Were goals unrealistic, or were co-workers committing oversights? Clear up what the problem is." Managers often forget that soliciting feedback gets the employee involved in the evaluation process. That fosters cooperation which is crucial to improving workplace performance.

3. Not setting performance goals. It's not enough to delineate the good and bad points of the past year. Set specific goals for the coming 12 months. Managers often fail to be specific enough here.

"List a 'vital tasks' agenda in which every measurable high priority task is outlined," says Hegarty. "Indicate in what areas the employees are performing poorly, then work with them to set time tables for improvement." The time table is an important technique to avoid procrastination. The manager, too, needs to follow a schedule. One of the traditional failings of evaluations is lack of follow-up. Insure that follow-ups occur by marking the calendar at checkpoints which have been coordinated with the employee then meet with the employee on these dates.

Get the employee to set personal goals when you can. Sometimes your verbal prompts will be sufficient to stimulate the employee toward realizing what needs to be done. But you should also ask the employee for insight. What performance would bring the greatest personal satisfaction one year from now? What talents can be honed? "Setting precise objectives helps develop potential," Says Dr. Robert Filer, president of Psychological Consultants, Richmond, Va. "When people feel blocked from using their skills, they leave."



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4. Omitting tactics to reach the above goals. Leaving the employee without the tools to improve performance is a common error. "You should work out a development plan as part of the appraisal," says Carl Johnson, president of Princeton Employee Relations, Princeton, N.J. "First, ask how the employee plans to improve performance. Then ask what tools you can provide to help. Write down the specific steps the employee will take to solve problems. The employee might: Keep a diary of performance to track progress; Attend training seminars; Seek professional counseling; Read books; Participate in support groups.

Go into the interview with ideas about how the employee can solve a specific performance problem. Pass those ideas along. Says Johnson: "When you have a poor performer, it's your responsibility to counsel and coach that individual."

5. Skewing everyone's ratings high to curry favor. "Many managers avoid giving honest evaluations because they are afraid of confrontations," says Newel B. Knight, an attorney with Stephens, Knight & Edwards, Reno, Nevada. "Without proper input from the manager, the employee's performance does not improve, and the department suffers."

The manager's desire to avoid confrontation is ironic, adds Knight, because ratings that are artificially high can eventually spark a confrontation of the worst kind: a lawsuit for wrongful discharge when the employee is fired.

Suppose the employee belongs to a group that is protected by certain federal or state laws. Such groups are characterized by race, sex, national origin, religion, and age. If this employee is fired because of poor performance, your organization had better have a file of written performance evaluations that show the managers did their best to help the employee improve, and that the individual did not do so. Failing to have such a file leaves your organization open to a wrongful discharge lawsuit.

Other failings: Allowing one of the employee's prime qualities to create a "halo effect" that overrides other less favorable

characteristics, so that the overall rating is too high; Letting personal bias affect ratings; Allowing the purpose of the evaluation (to support a salary increase or a decision to terminate) affect the rating; Deciding in advance on a merit increase, and then working backwards to justify it with a rating.

6. Discussing pay and promotion. Don't make the common mistake of discussing salary increases or promotions during the evaluation. Those subjects can overwhelm the interview and keep the employee's mind on money instead of performance.

"When you tie money with the evaluation, employees are interested only in the last 40 seconds of the interview," warns Schackne. "They come into the room with the attitude that the decision about rewards is all that really matters."

Tell employees that salary will be tackled in a separate interview, at a predetermined time in the future. Schackne suggests a statement such as the following: "Let's talk about each performance area in detail, and so that you understand I am serious, I want to meet with you again in 30 days - mark it on your calendar. We aren't going to discuss salary until all these performance matters are corrected. That may be in 30 days... it may be never."

In some cases you may decide to give the employee three 30-day periods to improve. "Tell the employee that if the specified improvement is made during that time frame, then a salary and promotions review will take place. If no improvement occurs during that time, then the assessment process will begin again."

All this puts the monkey on the employee's back to show improvement. "The employee will realize that he doesn't get a raise just for showing up for 12 months," says Schackne.

7. Failing to record evaluations in writing. File the evaluations in your files. Give copies to employees.

"Without written evaluations, it's hard for an employee to remember everything you say a few weeks later," says Filer. Further, you need a record of performance appraisals to justify dismissals that might otherwise spark lawsuits for discrimination. The appraisals prove that the performance was substandard. "If you end up on the wrong side of a wrongful discharge case and you are in court and the judge asks on what basis did you discharge the employee, and there is nothing to support the discharge, the ex-employee will win the case," says Schackne.

Schackne also suggests giving the employee a copy of your notes. "It makes a big impact. Tearing off a carbon copy sends a message that you are not kidding about the points in the evaluation. And the employee can't say later that he forgot about them."

It's best to have the employees sign the evaluation forms. Have a sentence at the bottom of the sheet to the effect that the employee's signature does not necessarily mean agreement, but only that this interview did take place. If you end up in court, you can show the judge that the employee was aware of the negative performance evaluation.

What if the employee is angry at the evaluation and refuses to sign? Says Schackne: "Call in a secretary and have her write on the back of the form, 'employee refuses to sign this review,' then sign and date it. You want a third party to protect yourself."

Avoid the seven common traps detailed in this article and you'll go a long way toward protecting your organization from lawsuits, while motivating your employees to help your department succeed. Act now to open the communications with your staff.

Phillip Perry is a syndicated, award-winning management expert who appears regularly in FOCUS writing on management, workplace psychology and employment law issues. He completed his undergraduate work at the University of Notre Dame and holds an M.A. in the Humanities from California State University. He can be reached at phil@pmperry.com.