

# Performance Evaluations



Where everything checks out.

Managers and first line supervisors' day-to-day work involves the management of employees and their performance. Whether that performance is measured in clear and objective measures, or highly subjective criteria that might vary from manager to manager, there are many different ways to manage and evaluate employees' performance. This chapter will discuss best practices for managing and evaluating employee performance, with an emphasis on evaluations.

As an initial matter, neither New York nor federal law specify how employees should be managed or evaluated. In some union settings, however, the collective bargaining agreement will specify and require a specific process to be followed for managing, disciplining, and evaluating employees. Outside of the unionized employer context, for employers whose employees are not represented by a union, the employer has broad discretion in how it manages and evaluates its employees, so long as the process is not discriminative.

## EVALUATIONS GENERALLY

Employee evaluations have a negative connotation, but if properly and consistently done, they can be useful for both employers and employees.

Employee evaluations can help the employer make informed decisions regarding important employment matters such as compensation, transfers, promotions, layoffs and termination. They keep the employee informed regarding job performance, including areas where improvement is needed. Performance evaluations are also important in avoiding and defending against litigation from employees who may be subject to adverse employment action by the employer. A performance evaluation that creates a record of an employee's performance can help build an excellent defense to a wrongful termination claim, unemployment claim or an employment discrimination lawsuit.

On the other hand, inaccurate performance reviews or a performance evaluation system that is implemented inconsistently by management can result in poor employee morale or lowered employee performance and can give rise to lawsuits when employees are disciplined or terminated.

Managers and supervisors need to understand the importance of a performance evaluation. There are some common mistakes that managers make that can ruin the value of a performance evaluation. For instance, evaluators sometimes rate an employee's performance as "good" or "excellent," even though that employee deserved a lesser rating, such as "needs improvement," simply because they want to avoid upsetting the employee. It is difficult to give criticism, and managers are no different than the rest of the population who seek to avoid unnecessary

confrontations. However, managers need to appreciate that an evaluation serves very important purposes and goals of the business in which they work.

Similarly, evaluators sometimes use the same language on each employee's evaluation, suggesting that little time or effort was devoted to its completion. This type of an evaluation is of little value to the employee or the organization if it is not based in fact.

Some evaluators try to use the performance evaluation as a motivational tool or morale booster by giving the employee undeservedly high marks, which leads the employee to believe that their employment is secure or that a raise or promotion is deserved. Thoughtlessly evaluating the employee, using form language in the evaluation or giving the employee undeservedly high marks, defeats both the evaluative and litigation-defense purpose of employment evaluations.

Further, evaluators sometimes base their performance reviews on only the most recent time period without reflecting upon the employee's overall record during the entire time covered by the review, thus leading to a distorted or misleading result.

The performance evaluation process can sometimes be an uncomfortable experience for the evaluator and employee. However, when evaluations are done in a candid, consistent and open manner, they can benefit both parties.

## CONDUCTING SUPERVISOR TRAINING AND INSTRUCTION

Most supervisory level employees become managers not because of their excellent management skills, but because they are good at the substantive aspects of their job. In addition, telling another adult what to do is, for most people, not easy. Evaluating and providing a negative performance evaluation is even harder! For these reasons, it is essential for businesses to have a management training program (especially for newly-hired or appointed managers) that will review managers' management duties and responsibilities.

Initially, managers should undergo an "orientation" to their role when first appointed. Ideally, the employer will have a managers' manual that will describe the managers' personnel-related duties and obligations. This manual will probably address payroll and paid leave policies and procedures, but it needs to go beyond that. In today's litigious society, the manual must emphasize the importance of consistent, clear, and fair employment practices as a tool for risk mitigation and litigation avoidance.

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Insofar as employee evaluation is concerned, the manual (or instructions to the manager, if no manual is available) should give written instructions to supervisors and managers who evaluate employees regarding performance evaluations. The instructions should:

- outline the purpose and importance of performance evaluations, including the potential ramifications of a poorly administered evaluation;
- emphasize the importance of honesty, fairness, objectivity and consistency within the evaluation procedure;
- include information on how to deal with potential problems in an evaluation, such as incomplete information regarding the employee or factual disputes;
- provide definitions of key terms so that there is greater consistency in ratings across departments; and
- require that the supervisor review and, if necessary, update, the job description of the employee prior to the performance evaluation.

While not required, some companies have found it useful if managers who receive a copy of the written instructions also sign an acknowledgment that they have reviewed the performance evaluation instructions and that they agree to follow them. The acknowledgment also should indicate that the supervisor/manager will be held responsible for his or her evaluations. While not legally required, a written acknowledgment such as this from the manager could be helpful evidence to a company that might later have to defend itself against a lawsuit by an employee who might claim that the manager acted unlawfully. In such cases, the company will want to distance itself from the manager's actions and be able to show that the company had proper policies and procedures in place – which the manager acknowledged – but that the manager nonetheless acted unlawfully without the company's knowledge.

## THE SCOPE AND TONE OF EVALUATIONS

Performance evaluations should be job specific. A stock evaluation form, while consistent, may be insufficient to address the performance of a particular employee. The evaluation should be based on the tasks described in the job description of the employee, as well as on job-related skills that bear on the employee's performance.

Similarly, to the extent reasonably possible, an employer should use objective criteria in the evaluation process, as subjective criteria are difficult to verify and to apply uniformly throughout a company.

Evaluations should be based on job performance, not personality traits. For an evaluation to help an employee develop appropriately, the evaluation cannot be received as an attack on the employee's personality. Personal attacks on an employee during an evaluation can create several potential liabilities for the employer, including discrimination claims if the criticism is arguably based on a stereotype or some legally protected conduct such as leave under the Family and Medical Leave Act or New York Paid Family Leave Law. At the same time, an evaluation should not overlook negative behavior caused by an employee's personality. The evaluation should cite the behavior to be corrected, not the personality trait that caused it.

It is also important that the evaluation cover all aspects of the employee's job. An evaluation that does not cover all key functions of a job can make defending the corporation in a subsequent suit difficult. If the employee is fired because his or her poor performance in an area that is not covered by the performance evaluation, then the employer will have no record of the employee's poor performance. Even if the employer can show that the employee did a poor job in a specific area, it may be hard to show that the poor performance affected an important part of the employee's job.

## ENSURING OBJECTIVITY

To ensure against bias or stereotyping by an evaluator, an employer should create a system that monitors the evaluation process. The human resources department or a member of senior management should review all performance evaluations before they are presented to the employee. The evaluation should also be reviewed and approved by one of the evaluator's superiors, preferably one who is familiar with the person being evaluated or the job duties of that employee.

Additional levels of review decrease the likelihood of bias and reinforce the consistency and reliability of the evaluation. By having the evaluator's manager review the evaluations, the manager can in turn provide a performance appraisal of the evaluator's performance and whether the evaluator adhered to the company's requirements.

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## SELF-ASSESSMENTS

Many companies ask employees to perform a self-assessment as part of the evaluation process. Although this is not recommended for all job categories, it does provide several useful opportunities to improve management outcomes. First, it forces employees to think about their performance in the context of their own job description. Second, the information that employees offer in a self-evaluation can offer management insight into how to motivate a better job performance. Third, sometimes employees have a wholly unrealistic understanding of their work quality and value as an employee. By identifying this through a self-evaluation process, the employer can work to adjust expectations and guide an employee to a better understanding of what is expected. And, again, ensuring that an employee understands where they stand – from their managers' perspective – could also ensure that there are no surprises to that employee later on should he/she be disciplined or discharged due to poor performance.

## SUGGESTIONS TO MAXIMIZE THE VALUE OF EVALUATIONS

- Be honest. A review should be honest and candid. Resist the temptation to avoid the areas of the employee's performance that need improvement. While it is appropriate to point out the achievements and strengths of an employee, the evaluation must also cover the deficiencies. Provided that the statements made are true, even a harsh evaluation cannot give rise to a valid defamation claim against the employer. Harsh or cutting statements may, however, reflect poorly on the evaluator and may be used as evidence in a subsequent lawsuit to try to prove that the evaluator was biased against the employee. Remember that the performance evaluation procedure is designed to help employees know how they are doing in their jobs, as well as to serve as a tool for the employer in defense of litigation. If the performance evaluation does not deliver a straightforward, candid picture of the employee's performance, then neither of those goals is achieved.
- Avoid excessively favorable reviews. Evaluators are sometimes motivated to give excessively favorable reviews of employees. Some supervisors hope to avoid confrontation or an uncomfortable evaluation meeting with the employee. Other supervisors believe that an overly positive performance review is a good motivational tool to boost the morale of an employee. Still others give positive reviews because they do not want to see their direct reports receive lower salary

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increases compared to the direct reports of other managers who are known as “easy graders” in the evaluation process.

The employer should include controls in the employee review process to guard against overly favorable reviews. For instance, the design of the performance evaluation form, if done carefully, can be effective in preventing excessively favorable reviews. Also, requiring a group of managers or supervisors to evaluate their subordinates collectively can expose evaluators who might otherwise give overly favorable reviews. Finally, occasional refresher training of supervisors and managers regarding employment evaluations can be effective in preventing inflated reviews.

The employer should set expectations for the scale of evaluation ratings and communicate those expectations to the managers and supervisors. There must be room on the scale to distinguish exceptional employees and poor employees. Some companies accomplish this goal by rating satisfactory employees in the middle of the grading scale and reserving the highest grades for those who truly stand out from their peers.

- Skip the quota approach. Rigid mathematical quotas or bell curves requiring a certain percentage of employees in each evaluation category generally are not advised. Groups likely will have different numbers of outstanding, average or poor employees and mathematical quotas create an unequal evaluation system from group to group. Notice that setting a quota or curve is different from setting an expected evaluation range and communicating that range to supervisors and managers. While supervisors and managers need to be informed of the standards and expectations of the procedure, they should not be forced to make artificial categorizations based on a mathematical formula.
- Keep evaluations uniform. It is important that the rating scale of the performance evaluation be explained to supervisors and managers. The words "Poor" or "Satisfactory" may mean different things to different evaluators. Be sure that all evaluators have a consistent understanding of the forms, standards and terms that are used in the evaluations.
- Address strengths and weaknesses. Even when evaluating an employee with poor performance, evaluators should note any strengths the employee may have. It is also advisable to offer some type of constructive criticism in each evaluation. A discharged employee who brings a discrimination suit may allege that he or she was held to a different standard than other employees. Showing that this employee received some positive comments while other coworkers received criticisms in their evaluations can help defuse such an allegation. Including

honest criticism in performance evaluations also helps to establish a pattern for good employees whose performance deteriorates later on. If the employee is discharged because of poor performance, it can help to show that this problem existed in the past as well, though not acutely enough to warrant discipline or discharge. Such evidence is especially valuable in defending against retaliation claims.

Consider using a performance improvement plan to address any area of the evaluation that is less than satisfactory. Even though an employee may be an above-average performer, there may be some aspect of performance that is less than acceptable. Managers are often quick to pass over these deficient areas and just mark them as "meets expectations" or some similar category. Later, if that employee has lost favor in management's eyes, it is difficult to justify a termination by pointing to a continuation of behavior that was treated as acceptable in the past.

- Avoid criticisms of legally protected conduct. Evaluators can inadvertently create liability for the company if they rate an employee poorly because of some legally protected reason. For example, if the employee is rated as having an unsatisfactory attendance, the employee may have a valid claim if some of the absences were authorized under the Family and Medical Leave Act, the New York Paid Family Leave Law, the Americans with Disabilities Act or a local paid sick leave law. The manager who completes the performance appraisal may not be aware of the specific reason the employee was absent or whether it was legally protected. Having someone from human resources monitor all evaluations can provide a corrective lens before the evaluation is finalized and presented to the employee.

Though performance evaluations can be helpful in improving employee performance and defending against litigation, they should not be used at all if certain elements of the procedure are missing. Remember, although an employee evaluation is a confidential document, it can still be used by the employee in a lawsuit. The following are examples of crucial omissions from the evaluation procedure that render the evaluation useless or even harmful to the employer:

- inconsistent performance reviews among employees
- poorly defined or non-job-related performance criteria
- non-documented performance evaluations
- unclear descriptions of employee deficiencies



- failure by the employer to follow up or enforce performance goals set in an evaluation

An employer that is not willing to devote the resources to a proper evaluation procedure may be ill served by adopting any procedure under the misimpression that it needs something more than a subjective appraisal. In the long run, a well-documented performance appraisal can be the employer's best friend in a lawsuit and a great tool for measuring and improving employee performance. If this is the goal, then the employer needs to take the process seriously.

## EMPLOYEE SIGN-OFF ON EVALUATIONS

Performance evaluations should be carefully documented. An evaluation is of little use if there is no documented record of it. A consistent system of documentation should be a fundamental step in any performance evaluation procedure.

The employee should have the opportunity to review the completed evaluation and comment on it. Allowing the employee to review the evaluation provides evidence of procedural fairness and can potentially alert the employer to additional problems with the employee. It can also expose problems in the way the job duties have been described, the training the employee has been given or the way that the manager has treated the evaluation process.

The employee should also have the opportunity to disagree or agree with the job criteria on which the evaluation is based. Jobs change over time and the job descriptions do not always remain current. If the employee disagrees with the duties being described, then it is important to resolve any disputes as early as possible. Before the evaluation process is complete, there should be a general agreement about the scope of the employee's duties and the relative weight that each is given in the evaluation of job performance. If the employee disagrees with the evaluation, then the employer has the opportunity to review the description of the job duties to ensure that the description accurately describes the job that the employer wants to have done. Often, this process results in having the employee undergo additional training to understand the requirements and expectations of the job.

The employee should sign an acknowledgment upon reading the evaluation. This prevents the employee from claiming ignorance as to the criteria or results of the evaluation. The employee should also be given the opportunity to write a response to the review. This improves communication between the employer and employee and creates a record of the employee's assent to the evaluation. If the employee refuses to sign the acknowledgment, the employer should note that on the form and have that witnessed. The form should indicate that signing for

receipt does not necessarily imply agreement. This kind of language minimizes the chance that an employee will refuse to sign.

To the extent that performance evaluations are used as an opportunity to motivate an employee to reach some stated goal, acknowledgment of that goal should also be made on the evaluation. If, for example, the supervisor and employee agree that the employee has frequently been late for work and that the employee must work harder to be on time, then the goal of better punctuality should be noted on the evaluation. The form can also identify training opportunities that the employee should pursue over the coming year.

## COMPENSATION EVALUATION POLICY

A compensation evaluation policy may be beneficial from the standpoint of creating reasonable employee expectations regarding the probable timing of compensation increases and communicating to employees those factors that may be considered in making wage increase determinations. If the employer chooses to include such a provision in its written policies, it should follow the schedule and procedures set forth in the policy. Some flexibility in the schedule should help to make this an achievable goal. Failure to do so may cause employees to feel slighted or to doubt the employer's commitment to its own policies.

## THE ROLE OF EVALUATIONS IN TRANSFERS AND PROMOTIONS

Unless otherwise required, the focus of any promotion and transfer policy should be upon candidates' qualification for the position in question, rather than criteria such as seniority. (Of course, in unionized workplaces, seniority may play a significant role, depending on the language of the collective bargaining agreement). Even if an employer generally intends to promote or transfer from within the company, it should nonetheless preserve the option to pursue an outside candidate in appropriate circumstances.

If the employer chooses to include a promotion policy, the policy should be followed consistently. Failure to do so may lead to employee mistrust or may cause a particular employee to feel that he or she was unfairly passed over for a promotion, thus undermining employee morale and potentially leading to a discrimination claim.

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