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Making a List, and Checking it Twice: The Importance of Accurate and Complete Employee Evaluations

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For many companies, year-end and/or shortly after the new year is a time set aside on the corporate calendar for annual evaluations. Employee evaluations should not only put employees on notice of performance problems and provide feedback for the employee's continued development and growth, but they should also demonstrate the employer's efforts to help low performers and challenge high performers. Failure to do so could result in the employer landing on the "naughty" list, specifically on the receiving end of a lawsuit. What, when, and how employers report information on employee evaluations becomes pivotal to the company's protection from legal liability.

A 2019 study found that 85 percent of employees would leave their job following an "unfair" evaluation, with a significant portion of the workforce having little tolerance for inaccurate performance reviews. Additionally, one-fourth of the survey respondents believe that they were overlooked for a promotion following an inaccurate performance review. These statistics demonstrate a heightened likelihood that an employer's failure to provide accurate and complete evaluations could lead to litigation.

The best evaluations can serve as evidence of an employer's defense against discrimination, wrongful termination, retaliation, or other employment-related litigation. In an age discrimination case, one court found that an employer's reasoning was pretextual when the employee's evaluations suddenly changed without any justification or explanation from the employer. In another case, where an employee filed a retaliatory discharge lawsuit, the court found the employer not only failed to notify the employee of his alleged unsatisfactory performance before termination, but also failed to document the unsatisfactory behavior while later citing poor performance and attitude as the reasons for termination. Both of these employers failed to maintain accurate and complete evaluations, resulting in denial of summary judgment for one employer and a finding that the employee had demonstrated a prima facie case of discrimination against the other employer.

Another court held that an employer's evaluation stating that "although [the employee] demonstrated strong technical capabilities, she failed to embrace a culture of teamwork and had poor working relationships with her team despite coaching," was excellent evidence during litigation that the employee was terminated for good reason rather than for the alleged discriminatory and retaliatory reasons cited by the employee. The employer had included sufficient detail in the evaluation to demonstrate the issues with the employee's performance that subsequently led to her termination. This case highlights the importance of maintaining a well-established history of accurate reporting and a complete record of performance issues in the evaluations.

To increase the accuracy and completeness of your employee evaluation process, consider the following list, and . . . make sure that you check it twice when it comes time for evaluations:

1. **Establish consistent evaluation periods.** Many employers have an annual evaluation. To keep a complete record and history of performance, consider increasing the frequency of your evaluations. Six-month or even quarterly evaluations may prove useful. More frequent feedback not only documents the record of performance, but also gives employees a better understanding of what is expected of them.

2. **Ensure evaluations are accurate.** Review your evaluation records to ensure that employees have an evaluation each year and that the information on the evaluations is complete and accurate. We often see evaluations with excellent ratings that lack substantive feedback or explanation, but then the employee is later terminated on claims they had been performing poorly for several years. It is critical to ensure all reviewers are making accurate and complete evaluations that, at a minimum, describe the performance expectations and goals, the employee's actual performance, the result of the performance behaviors noted (e.g., missed deadlines or faulty work product), and what is expected moving forward. You can also use the comments section of the evaluation to record what was discussed during the evaluation meeting and what both the employee and reviewer understand will happen next.
3. **Use effective descriptors.** Provide sufficient detail to demonstrate where the employee is excelling and where they have room for improvement. When doing so, it is important that reviewers use clear and succinct language that focuses on the behaviors, not the person. For example, provide an example of unsatisfactory behavior and what is expected to improve the behavior, rather than generally stating "needs improvement" or focusing on personal traits or making personal attacks. Also, try to include information about the employee's potential, as such information may keep them motivated to continue to improve, notwithstanding any constructive feedback. These changes are beneficial not only in defending against litigation, but also in creating a positive workplace culture.
4. **Conduct regular training.** Employers should train evaluators, providing feedback on recent evaluations they have completed and advice on how to have difficult performance conversations. Increasing training on employee evaluations and reporting will also reduce biased reviews, as well as increase the completeness and accuracy of employment records.
5. **Increase transparency in evaluations.** Employees should be allowed to review their evaluations. Having open, honest, and transparent communication with employees about their performance will increase their understanding of what is expected of them and reduce aggravation and feelings of favoritism that may lead to litigation.

Employers should be thoughtful of what they are writing on employee evaluations, double-checking that their reporting is accurate and complete. This time focusing on increasing engagement and overall employee performance will be time well-spent, much more than spending time and resources on defending litigation prompted by inaccurate or incomplete evaluations.