

PERFORMANCE EVALUATIONS

Performance evaluation systems allow an employer to review its employees' performance on a regular basis. In years past, evaluation systems were as informal as paying an annual increase in salary with a verbal evaluation by the individual supervisor to no specific evaluation given except for the payment of an increase in salary. In recent times these systems have usually become more formalized.

As employers started to realize that the formal monitoring of performance of the employees contributed to the success of their businesses, these periodic evaluations became more routine. In the 1970s and 1980s employers structured their systems to include a specific written format that supervisors were required to utilize when reviewing the employees working for them.

In addition to obtaining the best performance from their employees, these systems also may play an integral part in wrongful termination lawsuit. Performance evaluation can and will be an important aspect of the employer's case when defending wrongful terminations and/or layoffs. It is the evaluation that will show a continual trend of poor performance or behavior. For example, in the normal wrongful discharge case when the employer terminates an employee for performance, the evaluation system will probably be one of the most important parts of the employer's defense. When employees are laid off in a reduction in work force situation, performance evaluation might be the only employer defense to establish why certain employees were laid off.

In addition to utilizing evaluations to manage the work force and defend the company in wrongful discharge litigation, the evaluations are also very useful for employers when developing new programs. Such a system will be helpful in the monitoring of the work force and/or certain jobs to see if functions are being carried out in the prescribed manner. Employers can also monitor the supervision of their companies and make certain that supervisors are carrying out their duties and supervising and managing the employees in the most efficient manner.

DEVELOPING A PERFORMANCE EVALUATION SYSTEM THAT SUITS THE PARTICULAR EMPLOYER'S NEEDS

There are no specific formats or performance evaluation systems required by law. The courts have commented upon the systems in reduction in work force cases and in other specific wrongful termination cases under the legal theories of negligence and the Civil Rights Laws. Employers therefore should act in a reasonable manner and use good business judgment to develop systems that fit their particular needs, keeping in mind certain legal guidelines, which will be discussed herein.

Before establishing a specific performance evaluation system and procedure, an employer should evaluate its work force. Such an evaluation should include the analysis of the types of jobs and positions that the employer utilizes the seniority of its employees, how long each employee has been in his or her particular position, and the nature of the employer's operation. The employer should also consider whether a personnel department or another individual is going to monitor the process, if bonuses will be given for production and/or performance, and any other factors that dictate the need to evaluate employee performance.

This analysis enables the employer to define its needs. For example, a work force that works in a highly mechanized operation and carries out routine and repetitive job duties and functions would require a more systematic performance evaluation process. On the other hand, an employer who has a service business where employees use their own discretion would need a system that evaluates particular positions on a more individualized basis. In the latter case an open-ended format comparing the specific job duties and goals and the employee's performance would be appropriate. Further, the employer might want to have one particular system for exempt employees who carry out more routine function and a different system for non-exempt employees who exercise discretion. Lastly, an employer should evaluate its personnel function, that is, do they employ a full-time or part-time personnel manager?

DIFFERENT PERFORMANCE APPRAISAL FORMATS

There is no particular format for performance appraisal that is required by law. However, after conducting an analysis and determining the needs of a particular employer, it might become clear that one performance appraisal system could be utilized for similar positions. For example, many companies establish specific performance appraisal systems for their sales operations. Since sales representatives have similar jobs, the company can utilize a performance appraisal system that will deal specifically with the individual's sales responsibilities. Such a system can incorporate the company's desires, needs, and sales objectives.

Depending upon the employer's objectives, a more opened appraisal system can be utilized. Such a format generally sets forth the general job duties in one section and the performance of the individual with respect to these specific job duties is then analyzed. Such a format generally is better suited for positions that carry managerial and/or other professional

responsibilities as well as those utilizing a great deal of discretion. Such a form could be as simple as the following:

**JOB FUNCTIONS
AND GOALS**

**ACTUAL RESULTS AND
COMMENTS ON PERFORMANCE**

Many companies prefer to have one format to fit all employees and their positions. Such a format is generally appropriate in smaller companies with a limited number of employees. (See Appendix C).

Evaluation systems tend to differ substantially company by company. The evaluation procedure can be as basic as a blank sheet of paper to be filled in based upon an individual's duties, or it can be as complex as a system that includes numerous specifically worded questions and comments that leaves little room for creative appraisals. As discussed, the type of system or program used is usually based upon the needs of the individual business. However, there are some important aspects that every system should include:

1. An analysis of the job;
2. Performance measured against specific job elements;
3. Evaluation of the employee's strength and weaknesses;
4. Goals and objectives for the employee;
5. An opportunity for the employee to correct, comment or appeal;
6. Reasonable guidelines and training for the evaluator and several levels of review and approval; and
7. A monitoring system for the program.

ANALYSIS OF THE JOB

An evaluation system must be based upon the employee's ability to perform the function of the position in question. The primary guide post for this analysis is the function of the job performed by the employee. An analysis of the job's functions includes an examination of the actual job duties the tasks the individual employee is expected to perform and the goals established for the individual or the position.

In many cases companies already have a job description which should be the first reference when analyzing the position. In addition, some systems provide a method for the employee and his or her supervisor to agree upon goals for a specific period of time. Progress toward these goals should be incorporated into the analysis.

Another commonly used method requires the employee to fill out his or her major job functions on a performance evaluation form. The form is then given to the supervisor who reviews and approves the key performance elements and comments on each element.

PERFORMANCE MEASURED AGAINST JOB ELEMENTS

Once the key job elements are established, the actual performance of the employee should be measured against these elements. The evaluation form can easily be designed with the levels of performance noted for each key job element. In some instances, the employer might want to give varying weights to each job element.

When determining levels of performance, it is recommended that the supervisor utilize, whenever possible, objective reasons and measurements in support of his or her conclusions. This analysis should involve reference to certain specific incidents or performance, especially when the employee is given a low rating.

It is important to note that an employee cannot always be evaluated on objective criteria. Although subjectivity cannot be totally removed, especially when evaluating the employee's personal characteristics, emphasis should be on objectivity when dealing with the performance of job duties and functions.

OPPORTUNITY FOR EMPLOYEE REVIEW AND APPEAL

The evaluation system must provide adequate opportunity for the employee to review and comment on the evaluation. The employee should be given an opportunity to question the job analysis. In addition, the employee should have an opportunity to study the evaluation and prepare for the review. In this regard, it is recommended that the employee be given a copy of the evaluation at least twenty-four (24) to forty-eight (48) hours prior to the review meeting. After the meeting, the employee should also be asked to sign the evaluation. At that time, the employee should be permitted to note his or her objections or comments on the evaluation form.

The evaluation system should allow an employee to appeal the evaluation to either a higher level of management or to the human resources department. The natural flow of an appeal is normally up through the ranks of the individual's department. For example, in a very large company, the appeal might need to be only one level over the supervisor. In a smaller company, the appeal might go as high as the president of the company.

The appeal process is an important safeguard and escape valve. It supports the contention that the system is equitable and permits due process. In addition, it can be an effective defense in future litigation when an employee claims he or she received an improper review. Thus, the failure of an employee to appeal an adverse evaluation, despite an effective appeal process, may be evidence that the employee agreed to the evaluation or, at least, conceded the appropriateness of the conclusion contained in the evaluation. Finally, it should be noted that contrary to some fears, as a practical matter the right of appeal does not generally slow down the evaluation process.

TRAINING EVALUATORS AND LEVELS OF REVIEW

The performance evaluation system is not effective unless the evaluator knows how to use it. It is, therefore, necessary that training and written instructions be given to the evaluator. Of course, the larger the company, the more difficult this process becomes. In some cases, it might be necessary to train only a select group of evaluators who are utilized throughout the company. In other circumstances, each supervisor from each individual department might have to be trained.

Written instructions should clearly define performance levels. There are generally three to five performance levels. The most common are:

1. Below standard;
2. Meets most expectations;
3. Meets all expectations;
4. Exceeds most expectations; and
5. Outstanding.

Regardless of the number of standards applied, the definitions need to be as clear as possible and should be communicated to all evaluators.

It must be impressed upon the evaluator that the evaluation has to be honest, and the evaluator should not be reluctant to give employees negative evaluation. Although the natural tendency is to praise an employee, evaluation systems should identify the employee's weaknesses as well as strengths to help the employee grow and develop in his or her career.

As noted, the evaluation should also be reviewed by a higher level of management. Two levels of review are typical. Multiple levels of review help protect against any bias that might conscientiously or unconscientiously affect the supervisor's rating.

MONITORING THE SYSTEM

Another important safeguard method is a method of centralized monitoring of the system. Monitoring can determine the effectiveness of the system as well as prevent bias, discrimination, or unequal treatment.

The evaluation program should produce a normal statistical curve. Evaluators have a tendency to rate employees higher than they should be, thus, an effective evaluation system should produce rankings with at least some part of the work force at the lower end of the performance spectrum and some portion at the higher end. Evaluators should be retrained when this does not occur.

Periodic monitoring is also important to determine whether protected groups are intentionally or unintentionally evaluated lower than non-protected groups. For example, if

females are consistently rated lower than males, a further analysis should be performed to ensure that sex is not a determining factor in the evaluation. This same analysis should be undertaken for each protected group --- *e.g.*, minorities, elderly, handicapped, etc. It is advisable to have this analysis be done by the company's legal department or outside counsel to protect the findings from discovery in case of litigation. Finally, monitoring of the program should determine if standards are being applied in a consistent and equal manner.

PERFORMANCE EVALUATION IS A YEAR-LONG PROCESS

In addition to the regular annual evaluation, it is recommended that managers continually evaluate their employees on a regular basis. This makes the final evaluation process more legally defensible. It is most important that the evaluator plan for the year-end evaluation. This plan would commence at the beginning of the performance year and would carry through that year until the actual appraisal.

At the beginning of each performance year the manager would review the particular jobs of his or her subordinates and define their responsibilities and expectations. This is especially true for management, professional, and other positions that involve the use of discretion. In addition to the job description, the manager should define specific goals or the employee's performance during the upcoming year. These goals could include (1) results to be accomplished, with targeted dates, numerical measures, and other quantifies that are appropriate, (2) corrective measures, if the responsibilities involve preventing problems or containing exposures, (3) how the manager will evaluate performance, especially in areas without clear measurements, and (4) growth or improvement of activities and goals for employees.

The development of future expectations or goals for the reviewing year can also be determined by answering "What, When, and How Well". "What" is a goal and/or result to be achieved; "When" can be a simple completion date; and "How Well" can be expressed in numeric terms or with specific project goals.

After determining the above goals and expectations, the manager should discuss them with the employee to determine if the employee agrees with the goals and expectations. Such a process will ensure that the employee feels a sense of ownership regarding these expectations. The managers should in every way encourage the employee's participation in creating the goals and expectations through a complete discussion with the employee. After this meeting, it is recommended that the goals for the upcoming year should be put in writing. After the written document is prepared, a copy should be given to the employee to make certain he or she agrees with the goals.

During the appraisal year the manager should meet with the employee periodically to obtain feedback on how the employee is performing toward the stated objectives. Such discussion will also identify development needs and provide a plan for improvement. By utilizing this procedure, the manager will be completely involved with the employee's performance throughout the year and make his/her evaluation a more realistic and reasonable one

at the end of the year. Further, if the manager is involved and has specific examples of good and poor performance when evaluating the employee at the year-end formal process, it is more likely that the evaluation will be accepted by a court or jury in a wrongful termination or layoff case. In addition, the above performance planning program makes good sense from a management point of view and establishes a framework to accomplish the employee's individual goals as well as the company's objectives. Lastly, an ongoing performance appraisal system can become an effective communication vehicle between the manager and the employee.

LEGAL ASPECTS OF EVALUATIONS

Most of the contractual theories of implied-in-fact and implied-in-law covenants discussed are equally applicable to performance evaluation systems. Additionally, an employer must be mindful of the dangers in negligently administering performance evaluation systems. As noted in *Chamberlain v. Bissell, Inc.*, the court found that an employer negligently administered its evaluation system when it failed to inform an employee during the evaluation that the company was considering his discharge and, in fact, later discharged him. The court required some advance notice of the discharge, notwithstanding the lack of such required notice in the company's evaluation policy. The court stated that the company negligently performed its contractual duty to conduct annual evaluations when it did not notify the plaintiff that it was considering discharge if he did not correct his problems, and when, without prior warning or notice, it discharged him.

The court's decision in *Chamberlain* has had less impact than expected. Tort-based liability for negligent evaluation is isolated phenomenon. Subsequent cases have rejected the legal doctrine on which *Chamberlain* is based that a contract can create the duty to use reasonable care and have found that a duty of care must be created by law or statute and not by contract.

In most cases therefore, contract law governs claims that an employer did not properly administer an evaluation system. These cases stress that job security is created by contractual promises not by tort-based duties of care. Thus, a number of decisions have held that evaluation procedures do not create a reasonable expectation that the employment contract would only be ended by just cause. Of course, courts have ordered a trial when the particular facts of the case indicate that the evaluation process did create a legitimate expectation of job security.

For example, in *Quinones v. United States*, the Third Circuit reviewed an employee's performance and work record under the Federal Tort Claims Act where the employee maintained that the employer did not accurately evaluate his performance and work record. The plaintiff also claimed that the government did not follow its own manual when dealing with personnel records and that his work records were inaccurate and caused adverse reaction by prospective employers. The court rules that the Federal Tort Claims Act creates a duty to use reasonable care in maintaining the accuracy of records. In addition, under the Pennsylvania common law, the court noted that the employer "assumes to render a service and obligates himself to care". For breach of that duty, the court held that the plaintiff may have a cause of action if he is injured thereby and if the defendant's breach is the proximate cause of his injury.

A lesson to learn from this decision is that a performance appraisal system is established, the performance appraisals must be administered with due care and with an absence of negligence.

In sum, as a preventive measure an employer must ensure that its evaluation system: (1) is based on objectively stated criteria, (2) is being administered fairly and consistently, and (3) provides adequate notice and due process for affected employees. An employer must also be confident that the system is applied as it is written.