

## Effectively Handling Employee Performance Issues

### Introduction

Improving employee performance has obvious business advantages — greater productivity, improved effectiveness, better morale, and, ultimately, better financial performance. Moreover, effectively dealing with performance issues has another significant impact with a real return on investment — avoiding employment litigation and, if litigation occurs, significantly enhancing the employer's ability to prevail.

Having defended hundreds of employee claims, we know that a poorly handled performance problem can result in litigation and a more challenging case to defend. This edition of the *Employment Law Advisor* offers practical guidance on dealing with performance issues.

### Why the performance improvement process is critical in employment litigation

Why is it so important to handle performance issues well? Experience tells us that employees who are surprised by unexpected discipline or termination are substantially more likely to file claims.

It seems that human nature explains this phenomenon — an employee who has little or no notice of performance problems and is then hit with a sudden termination may conclude that his or her discharge was the product of discrimination or other unlawful conduct by the employer unrelated to any of the employee's performance shortcomings.

Moreover, if an employee files a claim, it is substantially more difficult to defend a performance based termination if little or no documentation or other evidence exists to substantiate the alleged poor performance and notice of such issues to the employee. Indeed, judges, juries and administrative agencies expect employers to document performance problems.

In many cases, the absence of documentation can be used to make an employ-

What can employers do to protect themselves from litigation resulting from poorly handled employee performance issues?

- ✓ Train managers and supervisors
- ✓ Review and improve the evaluation process
- ✓ Make performance improvement a daily process

Read on for more tips...

er's assertion of poor performance appear contrived (*i.e.*, a pretext for discrimination or other unlawful conduct).

### What can employers do?

#### 1. Train managers and supervisors

Some managers and supervisors fail to carefully manage and document the performance improvement process, despite best efforts by the employer's human resource department. Some say they are too busy, while others think documentation is simply unnecessary. Still others fear (perhaps with good reason) that poor documentation by untrained managers is worse than none at all. Whatever the reason, training managers in this area should help.

This is particularly true if the training includes a session on general awareness of employment laws. Once managers understand the risk of failing to handle performance issues effectively they will be better motivated to deal with performance issues proactively.

#### 2. Review and improve the evaluation process

Performance reviews, like many school report cards, are subject to grade inflation. Managers are often uncomfortable telling employees they are just doing "OK", particularly when the employee otherwise is a hard worker and has a good attitude. Super-

visors may be concerned that honest assessments will discourage employees. However, inflating performance ratings ultimately is a disservice to employees — how can employees identify weaknesses and improve, if no one is willing to tell them? Moreover, undeserved favorable reviews often come back to haunt employers when legal disputes arise later.

To help solve this problem, we suggest several actions:

✓ *Revise reviews to provide a real range of performance categories.*

Often the range of numerical scores on performance reviews is too limited, such as: "1 - unsatisfactory, 2 - meets expectations, 3 - exceeds expectations, 4 - significantly exceeds expectations." As a result, the reviewer is forced to choose among categories that do not fit the performance, and many reviewers will choose a higher ranking.

We recommend providing reviewers with more ranking options (such as six), and options to reflect less than satisfactory but not horrendous performance (*e.g.*, occasionally fails to meet expectations).

Another solution is to impose a “bell curve” system on rankings under which the great majority of employees (60% - 70%) fall somewhere in the average range, and a more limited number (15% - 20% each) are deemed outstanding or unacceptable. This type of forced ranking reduces the grade inflation problem and should result in continuous performance improvement, as those who are deemed unsatisfactory either improve or are ultimately discharged.

✓ *Require constructive criticism on reviews.*

Reviewers are often reluctant to criticize employees in writing. To avoid this problem, employers should require constructive criticism and suggestions for performance improvement. Such criticism need not be heavy handed but should instead objectively point out areas of weakness and offer suggestions for improvement. This type of documentation can prove very useful if a dispute arises later.

### ***3. Make performance improvement a daily process.***

Many supervisors save their criticism for the review process and ignore issues during the interim period. We suggest making the performance evaluation process something that occurs on a continuous basis. Not only does this have the positive effect of addressing performance problems while they are ongoing (resulting in a better product, service, etc.), for litigation purposes it avoids lengthy gaps in the process should the employer need to take action between evaluations.

### ***4. Make documentation a habit.***

As management defense counsel, we have a saying regarding criticisms of employee performance — “if it is not in writing, it did not happen.” All too frequently

plaintiff employees deny that supervisors discussed performance problems with them.

To avoid this issue, employers should get supervisors in the habit of documenting their performance discussions with employees. In many workplaces, email makes a perfect vehicle for this because it is more informal than a memo, easy to draft, and also easy to maintain records of receipt. Employers should also remember that a written memo “to file” of a conversation regarding performance, although helpful, will not necessarily prove that the conversation occurred.

### ***5. Good documentation is great, but bad documentation is worse.***

Despite frequent headlines regarding employee lawsuits, some supervisors show poor judgement in what they put in writing. It is not entirely uncommon to see employee records such as “employee terminated due to health problems.” Although such a notation may well be legitimate (if, for example, the employee could not perform the essential functions of the job with or without accommodation) a plaintiff’s employment lawyer would argue that such a statement indicates unlawful discrimination on the basis of disability.

As such, it is important that supervisors receive training on EEO awareness so they have a better understanding of the issues and risks. Moreover, human resources personnel should carefully monitor what is recorded to ensure documentation is appropriate and clear.

### ***6. Identify the cause of the problem.***

Often performance issues are caused by factors outside of the employee’s control. The problem may be a lack of training, the wrong skill set, or a communication issue. When supervisors work with employees to recognize the source of the difficulty, the prospects for improvement should increase substantially. It is often more advantageous to improve the performance of an existing employee rather than hire a replacement.

The costs of recruiting, hiring and training a new employee are significant, and

any employee termination brings with it the risk of litigation, as well as the cost of unemployment compensation.

### ***7. Treat employees the way you would like to be treated.***

The “Golden Rule” is particularly appropriate when dealing with performance issues — treat employees the way you would like to be treated. By providing constructive criticism, offering appropriate assistance, and identifying ways to improve, supervisors give struggling employees a chance to succeed. We recognize, of course, that certain “problem employees” don’t respond to good management, and we can assist you in developing strategies to address these situations.

We often hear in depositions of plaintiffs that the plaintiff felt as if he or she was not given an opportunity to improve, or worse, was set up for failure. By taking proactive and constructive steps in the performance improvement process, supervisors (and employers) treat employees in a manner that is fair and appropriate, reducing the risk of litigation and claims.

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