



Labor and Employment 2018 Symposium

Drab to Fab: Employee Evaluations Get a Makeover

Dorsey Speakers

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1. PowerPoint Presentation prepared by Dorsey & Whitney LLP

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Workplace law trends for today and beyond.
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Drab to Fab: Employee Evaluations Get a Makeover

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Employee Evaluation Basics

- **How does an employee evaluation benefit the employee?**
 - Decreases employee uncertainty about job requirements and management expectations
 - Opens the door for employee training and development opportunities
 - Opportunity to have a one-on-one conversation with management regarding any concerns
 - Opportunity to recognize and correct any performance deficiencies



Employee Evaluation Basics

- **How does an employee evaluation benefit the employer?**
 - Forces supervisors to take the time to think critically about the performance of their employees
 - Acts as documentation for any employment decisions – both positive (merit increase, promotion) and negative (PIP, termination)
 - Can encourage good performers and motivate poor performers
 - Provides information to future supervisors
 - Allows supervisors an opportunity to get feedback from their employees



Evaluation Goals

- **An evaluation – good or bad – should NEVER come as a surprise to the employee**
- **The evaluation should be a summary of the ongoing feedback the employee has received throughout the year**
- **Should not be completely retrospective – time should be spent talking about future goals for the employee and the organization**



Performance Evaluation Process

- Employee evaluation should be the LAST step in the performance management and appraisal process
- Supervisors should be gathering information on employees throughout the year
 - Keep separate supervisor files on each employee
 - Include direct and indirect observations
 - Keep email communications that reflect achievements or performance issues
 - Keep work results on employee projects throughout the year
 - Track employee progress on previously stated goals and/or performance improvement areas



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Communication is KEY

- If done right, evaluations can:

- Improve employee morale
- Build employee confidence
- Make employees feel valued and supported
- Make employees feel invested in the success of the organization



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Thinking Outside the “Meets Expectations” Box

- Alternatives to the traditional ratings system....



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Evaluation Communication Styles

Focus on Positive Feedback Characteristics

- Specific rather than Vague
- Honest rather than “Nice”
- Supportive rather than Accusatory
- Refrain from any comparisons to other employees



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Communicating Praise

- **Behavior:** What aspects of the employee's behavior is valuable?
- **Effect:** What positive effect does the behavior performance have for the organization, coworkers, clients?
- **Thank the employee for their contribution – let them know they are valued for their work**



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2-Way Conversation

- **Employee evaluations are also an important time for managers and supervisors to get feedback from their employees**
 - What's one thing I can do better for you?
 - How do you like being recognized when you do good work?
 - Do you feel you have been provided adequate training and support to successfully complete all of your assigned tasks?
 - Are there any inconsistencies you see between your job description and the work you actually perform (Annual reviews are a fantastic time to review job descriptions for accuracy!)



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Corrective Feedback for Problem Behavior

- **Behavior:** State the specific behavior that is unacceptable
- **Effect:** Explain why the behavior is not appropriate or unacceptable
- **Expectation:** How and when the behavior should change
- **Result:** What will happen if the behavior either continues or improves



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So....what can go wrong??

- Appraiser discomfort can lead to “nice” but dishonest results
- Individual biases and lack of objectivity can make their way into the evaluations
- Halo/horns effect
- Concentrating on recent behavior rather than behavior throughout the evaluation period
- Failure to properly calibrate process to ensure fairness and legal compliance
- Failure to keep proper documentation to back up evaluation



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Evaluations in Court...

Employee evaluations have primarily been used in three ways in employment litigation:

1. To show that an employee is qualified for a position;
2. To demonstrate that an employee was properly terminated for performance issues; and
3. To rebut an employer's claims of a legitimate, non-discriminatory reason for termination



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Evaluations in Court

- In *Connell v. Bank of Boston*, 924 F.2d 1169 (1st Cir. 1991), a 47 year old bank officer alleged that he was a victim of age discrimination when he was terminated from his position
- In order to meet his burden of establishing a viable claim for age discrimination, the employee had to show: (1) that he was within the protected age group; (2) that he was performing his job at a level that met his employer's legitimate expectations, and (3) he was replaced by a younger employee with similar qualifications



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Evaluations in Court

- In order to determine if the employee's performance met the bank's expectations the court looked to the employee's . . . wait for it . . . performance evaluations!
- Because the employee had always at least received a "3" performance rating, the court concluded that he must have been performing at a level that met the bank's legitimate expectations
- The employer was ultimately successful, but had the employee's evaluations accurately reflected his performance, the employee never would have been able to establish a *prima facie* case of age discrimination



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Evaluations in Court

- In *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1180 (10th Cir. 2006), a 51 year old employee claimed he was unlawfully let go in a RIF based on his age
- The employer argued that the employee was chosen to be part of the RIF based on his lengthy history of performance issues regarding communication and teamwork
- The employee's performance evaluations backed up the employer's claims (YAY!) – he had consistently been ranked in the bottom half of employees based on these short-comings
- Employer was granted summary judgment



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Evaluations in Court

- In *Back v. Hastings*, 365 F.3d 107 (2nd Cir. 2004), a school psychologist sued her former employer alleging she was unlawfully terminated based on gender
- The employee stated she was terminated because her supervisors did not believe that a mother could competently perform her job while raising her children
- The school argued that she was terminated for performance issues and parent complaints



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Evaluations in Court

- The court looked to the performance evaluations of the employee and noted that she had consistently received “superior” ratings until after she returned from maternity leave
- After the first discriminatory statements were alleged to have been made by the supervisors, the employee’s performance evaluation ratings changed drastically to “below average”
- The court concluded the employee had demonstrated that the employer’s alleged reason for the termination may have been pretext to cover gender discrimination



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Evaluations in Court - Takeaways

- Courts have primarily focused on the employee rating system in the evaluations
- As discussed earlier, make sure these ratings are accurate . . . Do not say someone is meeting expectations if they are not!
- Make sure evaluation forms give the supervisors flexibility in their responses – they should be able to break up behaviors and expectations in order to specify which expectations are being met and which are not



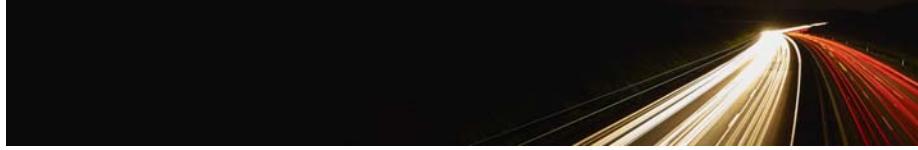
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Practical Tips for Supervisors

1. Gather information on employees throughout the year
2. Include both “small picture” and “big picture” critiques
3. Offer constructive feedback
4. Actively listen to any employee feedback
5. Remember that every employee is unique, and there is no one size fits all review....KNOW all of your employees BEFORE you begin their evaluation process



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Questions?

