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Performance Reviews: Why Bother?

Q&A human resources

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Question

Are performance reviews as necessary as they were years ago?

Answer

Yes, even more so today. First, however, let's understand what they are all about. Performance reviews give employees feedback on how they are doing. Imagine if you went bowling in the dark. Frame one — you throw the ball down the alley. You hear some noise. But because it is pitch black, you have no idea how many pins you hit. Ball returns. You throw it again. This time you hear nothing. You think, "I must have gotten a strike the first time!" This is exactly what employees think when they don't get feedback about their performance. They are in the dark and often conclude, "Since I haven't heard anything, I must be doing okay." Sometimes, this couldn't be further from the truth. For better or for worse, the impact of your employees' performance affects the revenues and growth of your business. So, for two reasons, performance is critical to manage through timely reviews.

Reason #1: Your Culture

A bowling coach gives the bowler feedback about the bowler's performance in relation to the 10 pins. Similarly, you are your employees' work coach. Your coaching must be focused on how employees are performing in relation to their job descriptions. Reviewing employees' performance is like flipping on the light switch at the bowling alley. Recognizing and praising their accomplishments will increase their company loyalty and keep them motivated. Addressing deficits along with providing strategies for improvements will help employees succeed at their jobs; in essence, it helps them make more strikes. Cultures committed to giving performance reviews retain and attract good talent. That, in turn, impacts your bottom line.

Reason #2: Building Legal Defenses to Defeat Costly Claims

What if a bowler only succeeds at knocking down two pins out of 10, though? That's a bad score. Let's say an employee is just doing the bare minimum to get by. You're happy to have a warm body in the position and too busy to give feedback. In the meantime, odds are high the employee will exercise his or her rights under any one of the plethora of expanding federal, state and local employment laws like the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), or even under any of the military, religion or pregnancy laws.

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Now you've locked on yourself the "handcuffs of liability." Why? Because now if you give an employee any negative feedback in a review, it can look as if you are unlawfully retaliating against that employee for exercising his or her legal rights. The U.S. Equal Employment Opportunity Commission (EEOC) and the courts may draw an inference that you set up the employee

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for termination because he or she became disabled or lawfully took leave to have a baby, care for a sick relative or observe their religion.

Retaliation claims have consistently topped the charts at the EEOC since the economic meltdown of 2008. When organizations have to let employees go for economic reasons, usually the first employees terminated are poor performers. Yet if there is no record of their only "two pins down" performance and they had exercised their legal rights in the past year under the ADA or FMLA, then they can cry retaliation and file a claim with the EEOC or your state's fair employment practices agency. And the odds are stacked against you that they will.

Let the statistics tell you all about your new exposure to liability. In the 2007 fiscal year, before the economy tanked, the EEOC received only 22,663 retaliation claims. In the 2008 fiscal year, when a swell of employees lost their jobs, the EEOC received a whopping increase of 10,000-plus retaliation claims when 32,690 complaints were filed. Retaliation claims have been steadily rising ever since. In the 2012 fiscal year, the EEOC received a new record high of 37,836 retaliation claims.

Question

Can I reduce our lengthy review form down to only three questions?

Answer

No. Not unless your employees only have to knock down three pins. Your performance review must be based on all elements of the employee's job description — all "10 pins," including all responsibilities listed in their job description. No short cuts. You'll need thorough documentation if you are dragged into litigation. And based upon the statistics above, the chances are pretty high you will be sued in today's climate.

Question

Are there any lessons learned from other banks delivering performance reviews?

Answer

Yes. Never set up employees to fail, and be careful how you deliver feedback.

One bank granted a 51-year-old facilities manager FMLA leave for migraines. The boss then wanted to issue the employee a written warning for poor performance and sent HR an email stating, "There's a lot of room for him to 'trip up' after this warning." The bank eventually fired the manager. The employee sued the bank for violating the Age Discrimination in Employment Act (ADEA) and interfering with his rights under the FMLA. The court ruled in favor of the employee and sent the case to the jury, noting that the employer set goals so high that the employee could not reach them. Lesson learned: Don't use performance reviews to set up employees to fail. (Phillips v. StellarOne Bank, W.D. Va., 7/16/12).

At another bank, a branch manager was concerned about an employee's communication skills at work. During a performance review she told him, "Be careful how you talk to your crew and customers. You are a big, black intimidating guy." Shortly thereafter, the employee was fired for allegedly violating a bank's policy. The employee sued the bank for race discrimination in violation of Title VII of the Civil Rights Act of 1964. The court ruled in favor of the employee and granted him a jury trial, observing that the bank "needs to watch what it says." Lesson learned: Focus only on the employee's performance based solely on the job description. (Jones v. U.S. Bank Nat'l Ass'n d/b/a U.S. Bank, D. Or., 7/11/11)

For business and legal reasons, keep shining the light on your employees' performance to avoid litigation, limit high turnover and even stop gutter balls.

Richard H. Chapman is a member of Clark Hill's Litigation Practice Group. He has more than 30 years of successful experience as a leading trial lawyer concentrating in business and employment litigation in federal, state and bankruptcy courts, as well as in arbitration, throughout the United States. Richard has litigated cases in Illinois state, federal and bankruptcy courts, as well as courts in California, Texas, North Carolina, Florida and Michigan. He has successfully prosecuted, argued and won appeals in the Illinois Appellate Court, the United States Courts of Appeals for the Seventh and Ninth Circuits, as well as the California Court of Appeals. **Contact him at: rchapman@clarkhill.com or 312-985-5904.**