

PERFORMANCE REVIEWS

CRITIQUES, LEGAL IMPLICATIONS, AND TIPS FOR EFFECTIVE USE

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WHY TALK ABOUT PERFORMANCE REVIEWS?

- Movement to eliminate performance reviews
- How performance reviews impact employment litigation
- Effective performance reviews and alternatives

PERFORMANCE REVIEWS: ON THE CHOPPING BLOCK



“Uh, yes, I’m ready for my evaluation.”

A GROWING TREND

- “For most organizations in the United States, performance reviews are used to support decisions related to training and career development, compensation, transfers, promotions, and reductions-in-force or employment termination. . . . Recent trends, however, include a less formalized process focusing on more feedback and coaching, rather than a time-consuming paper trail.”¹
- Estimated that nearly 10 percent of Fortune 500 companies have abandoned annual ratings.²

¹ <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingemployeeperformance.aspx>

² https://www.washingtonpost.com/news/on-leadership/wp/2015/08/17/why-big-business-is-falling-out-of-love-with-annual-performance-reviews/?wpisrc=nl_headlines&wpmm=1

ELIMINATED PERFORMANCE REVIEWS

- Deloitte
- Adobe
- Accenture
- GE

CRITIQUES OF PERFORMANCE EVALUATIONS

- Time costs
- Difficult for supervisors
- Reviewer bias
- Not valued by employees

TIME COSTS

- Adobe spent 80,000 per year “on traditional performance evaluations”¹

¹ <https://www.adobe.com/content/dam/acom/en/aboutadobe/pdfs/death-to-the-performance-review.pdf>

SUPERVISORS FACE DIFFICULTIES

- How to assess employees
- Consistency
- Leniency
- Uncooperative or unhappy employees

BIAS IN REVIEWER JUDGMENT

- Recency Effect
 - More recent information is better remembered and receives greater weight in forming a judgment
- Implicit Bias
 - Fortune¹
 - 58.9% of the reviews received by men contained critical feedback
 - 87.9% of the reviews received by women contained critical feedback
 - HBR²
 - Women received more negative attributes
 - Analytical v. Compassionate and Arrogant v. Inept¹

¹ <https://fortune.com/2014/08/26/performance-review-gender-bias/>

² https://hbr.org/2018/05/the-different-words-we-use-to-describe-male-and-female-leaders?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202018-05-25%20HR%20Dive%20%5Bissue:15503%5D&utm_term=HR%20Dive/

BIAS IN REVIEWER JUDGMENT (CONT.)

- Primacy
- Mood
- Halo/Horns

EMPLOYEES DON'T VALUE THEM

- Employees don't feel the reviews improve performance: only 14% of employees polled strongly agreed that their performance reviews inspired them to improve ¹
- Over half of workers polled believe that reviews have no impact on how they do their job and are a needless HR requirement ²

¹ <https://www.gallup.com/workplace/249332/harm-good-truth-performance-reviews.aspx>

² <https://www.slideshare.net/adobe/full-study-performance-reviews-get-a-failing-grade/1>

ARE PERFORMANCE REVIEWS EVER REQUIRED?

- Employment “At-Will”
 - Either the employer or the employee can terminate their employment relationship at any time
- Caveats
 - Employment agreement
 - Unionized work force – always check CBA
 - Performance reviews can help establish elements of “just cause”

WHY HAVE PERFORMANCE REVIEWS?

- Employer expectation
- Goal setting
- Consistency
- Valuing employees
- Management decisions
- Employee improvement

REVIEWS AND EMPLOYMENT LITIGATION



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DOCUMENTARY EVIDENCE AND WITNESS TESTIMONY

- Both are admissible evidence
- Documentary evidence can carry more weight

MCDONNELL DOUGLAS BURDEN SHIFTING TEST

- Three parts:
 - *Prima facie* claim (plaintiff/employee)
 - “Legitimate, nondiscriminatory reasons” (defendant/employer)
 - “Mere pretext” for discrimination (plaintiff/employee)

STEP 1 - *PRIMA FACIE* DISCRIMINATION

- Plaintiff's burden
 - Member of a protected category
 - Suffered an adverse employment action (*what is that?*)
 - Inference of discrimination

STEP 2 - “LEGITIMATE, NON-DISCRIMINATORY” REASONS

- Defendant’s burden
 - Must provide a legitimate non-discriminatory reason for the adverse employment action
 - Examples:
 - Business reasons
 - Misconduct
 - Performance issues

STEP 3 - "PRETEXT" FOR DISCRIMINATION

- Burden shifts back to plaintiff
 - Employer's stated reason for its actions were "mere pretext" for discrimination



Photo by Wiley Price / St. Louis American¹

¹ http://www.stlamerican.com/news/local_news/gateway-arch-hosts-activist-percy-green-in-honor-of-historic/article_0fe01990-a751-11e9-80eb-fbce6a923232.html

HYPOTHETICALS



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HYPOTHETICAL NO. 1

- 20 year employee, historically has had good performance, late 50s
- Last two years work has steadily declined and is now unacceptable
- No performance reviews
- New supervisor hired, male in his early 30s
- Supervisor terminates employee within a few months

HYPOTHETICAL NO. 2

- 20 year employee, has had historically good performance, late 50s
- Last two years work has steadily declined and is now unacceptable
- Good but unwarranted performance reviews in recent years
- New supervisor hired, male in his early 30s
- Supervisor terminates employee within a few months

HYPOTHETICAL NO. 3

- Long time employee, average to below average performance
- Complains to supervisor about some perceived slight
- Complaint is investigated, nothing there
- Employee dissatisfied with result, holds a grudge, performance falls apart
- No performance reviews
- Employee terminated for poor performance several months later

HYPOTHETICAL NO. 4

- High performing employee
- Receives good performance reviews
- Caught falsifying expense reports over the course of the past year
- Terminated for misconduct

WHAT IS AN EMPLOYER'S LITIGATION EXPOSURE FOR A BAD PERFORMANCE REVIEW?

- Good news
 - Should not be an adverse employment action in a discrimination claim
- Bad news
 - Can be an adverse employment action in a retaliation claim
 - Can *support* a “hostile work environment” claim

A NOTE ABOUT PERFORMANCE REVIEW POLICIES

- Include disclaimers regarding “at-will” employment
- Unionized employees:
 - Check CBA
 - Mandatory subject of bargaining?

TIPS FOR EFFECTIVE PERFORMANCE REVIEWS



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BE SPECIFIC

- Do Not
 - Be vague
 - Use subjective or opinion phrases
- Do
 - Use facts
 - Provide examples
 - Provide dates

EVALUATE THE PERFORMANCE, NOT THE PERSON

- Do Not
 - Engage in personal or character attacks
- Do
 - Evaluate the employee's performance

EXPLAIN HOW TO IMPROVE

- Do Not
 - Simply critique
- Do
 - Couple each criticism with an explanation of how to improve

PROVIDE CONTEXT

- Do Not
 - Ignore *why* an issue is important
- Do
 - Provide enough context for a third party to understand

FOLLOW UP

- Do Not
 - Ignore issues after highlighted in evaluations
- Do
 - Follow-up/communicate with the employee after the review on problem areas

Work sucks.



A comedy from Mike Judge, creator of 'Beavis and Butt-head'
and co-creator of 'King of the Hill'

Office Space

Twentieth Century Fox presents a Mike Judge film "OFFICE SPACE"
RON LIVWISTON JENNIFER ANISTON STEPHEN ROOT GARY COLE "JOJO" FRIZZELL "DAVID" REINIE EDWARD MCAVOY
Presented by TWA Sohrstedt & S.C.       
Written by MICHAEL ROTENBERG DANIEL RAPPAPORT Directed by MIKE JUDGE www.officespace.com
FEBRUARY 19 ONLY IN THEATRES

ALTERNATIVES

- Document!
 - Email
 - Memo to employee/personnel file
- Follow the tips for effective reviews
 - Be specific
 - Provide avenue for improvement
 - Anyone should be able to understand
 - Follow up

HYPOTHETICAL NO. 1 *REVISITED*

- 20 year employee, historically good performance, late 50s
- Last two years work has steadily declined and is now unacceptable
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QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. Employers facing specific issues should seek the assistance of an attorney.

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