

Conducting Legal Performance Appraisals

Leader's Guide



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Conducting Legal Performance Appraisals Transcript

Narrator:

Conducting effective performance appraisals that are legally defensible is an essential responsibility of every manager. Performance appraisals not only need to drive an effective strategy for performance improvement but they also have to stand up to legal scrutiny in wrongful termination claims and to charges of EEO violations.

Fortunately, by following a series of sound, practical guidelines managers can develop a file of legally defensible documentation that will help them prevail in court and greatly reduce their chances of facing legal scrutiny in the first place. Performance appraisals should be free of bias and emotion and prepared with job related work performance only. This fair and consistent approach increases employee morale and results in better work performance throughout the organization.

Keep it job related

Narrator:

Any discussion of legally defensible performance appraisals must start with the simple yet vitally important phrase “keep it job related.” It’s the single most important guideline to remember in every aspect of the performance appraisal process. All verbal communication and all written documentation must be based on job related, observable facts. This applies to the performance appraisal itself and any documentation that is recorded at any time during the course of the year in between appraisals.

Let’s look at some examples:

Manager 1

“You don’t seem to care about your job at all and have been very irresponsible. I don’t know how we can expect to turn it around.”

Manager 2

“The official attendance records indicate that you were late for your shift 17 times and had 3 unexcused absences. In my notes, I found 2 verbal warnings for tardiness and one official written warning. An action plan is needed to correct this problem.”

Narrator:

Example 1 is both judgmental and emotional and could imply bias or discrimination. Example 2 is based on job related facts only and is backed up with documentation. Well documented facts

are a manager's best defense in court. Moreover, employees will respond much better to factual information free of emotion and judgment.

Job related, observable facts may come from a manager's direct observation or that of a third party. As long as the third party is documented as the source of the information, it may be used as part of the file.

Removing emotion and bias from the equation will increase the chance that performance appraisals are fair and accurate, and therefore legal.

Preparation

Narrator:

Every legal performance appraisal involves preparation and preparation starts with ongoing feedback. No successful appraisal is just a once-a-year event. Both employees and managers need continual, year round feedback to affect performance improvement and to ensure that both parties are completely clear on expectations.

Without feedback, terminated employees can claim that they were not given the resources to complete their jobs successfully and this could lead to charges of discrimination and/or wrongful termination.

Employee 1: (looking at camera)

"The job was a nightmare. I couldn't get anyone to teach me how to use the computers and every time I asked for help, I was just told to figure it out. After a few months I was shocked when they fired me! I sued them for wrongful termination and guess what? They settled out of court and I heard my manager was eventually fired for not following company guidelines on training and documentation."

Documentation:

Narrator:

All job related work records and relevant data should be placed in an employee's file in preparation for an appraisal. Some examples of relevant documentation include: disciplinary warnings, attendance records, sales records, customer complaints and commendations and any other tangible, measurable information that is critical to your organization and to the employee's job.

In addition, every manager should maintain a performance log. A performance log is an informal journal of day to day interactions and observations of a manager's employees. Logging the date and time of a verbal warning or the arrival time of a tardy employee are examples of appropriate journal entries. Not only will a journal make appraisals more meaningful, but it will also make them more accurate and therefore more legally defensible than those simply based on

recounting events from memory. This will drastically reduce mistakes that come from evaluating an employee on anything less than an entire year's performance.

Even though these notes are informal they must be free of judgement and bias because they will become part of an employee's formal record. Therefore, everything recorded in a performance log must be job related, observable facts. Statements like "Arrived at 8:44 AM" or "Employee was not wearing safety goggles on the shop floor and was given a verbal warning" are perfect examples of factual information appropriate for a journal. These statements are free of emotion and are based only on facts.

Documentation is the backbone of any legally defensible performance appraisal. Properly documented appraisals are more accurate and provide support for ratings with job related facts.

Job Analysis

Narrator:

Preparation should also include a thorough job analysis. A job description may have already been developed in the interviewing process, however for the appraisal to be legally defensible the actual job must be analyzed. It's quite common for the job duties of an employee to change with time and an analysis will uncover these changes and ensure that the appraisal covers accurate job criteria.

Manager

"Several years ago I hired an employee to perform administrative work, but over time her duties extended to occasionally working with customers. Luckily, I performed a job analysis. It turns out she was getting quite a few customer complaints. I added customer service to her job duties and rated it in her performance appraisal. Eventually, we had to terminate her employment for poor service and I had adequate documentation to support the decision."

Narrator:

One of the most important parts of a thorough job analysis is employee agreement. Consulting with and then sharing your findings with the employees in that position ensures that they fully understand their job duties. As a result, there will be no surprises in your appraisal and this makes certain that you are appraising performance based on the correct job description. Basing an employee's performance review on tasks that are outdated or not part of the employee's current duties could lead to a wrongful termination suit.

Lastly, give employees a blank appraisal form about four weeks before the meeting and allow them to rate and comment on their own performances. The insight gained from learning things from their perspective not only allows managers to be effective coaches, but it could also catch potential legal issues. For instance, employee input may reveal important errors or omissions and allow for corrections prior to a manager finalizing an appraisal.

Appraisal Form

Narrator:

Standardize appraisal forms whenever possible. When evaluating employees with the same job duties or when evaluating a category such as attendance across an entire organization standardization is critical. Standardization helps legally protect organizations against charges of bias.

Explain every rating you give on an appraisal form in writing and attach all documentation used to support the rating. Forms should provide a spot for explanations, however if there is no spot or a more thorough account is needed, it should be added to the appraisal and attached with all other documentation. Keep in mind that performance appraisals can be used as evidence in court. Write explanations clearly so someone outside of your organization such as a judge or jury can understand them.

Remember, the explanation should include only job related, observable facts that are free of opinion or emotion. Judgments have no place in a performance appraisal. For example:

Manager:

“It’s obvious that you do not care about safety.”

Narrator:

That statement not only sounds subjective and emotional, it lacks evidence. Let’s try again.

Manager:

“You received 3 verbal warnings and 1 written warning to wear a safety helmet in the warehouse.”

Narrator:

Taking emotion out of the appraisal process and sticking to facts will make the employee less defensive and more amenable to improving performance.

Inaccurate Ratings

Narrator:

One of the most dangerous legal landmines in a performance appraisal is inaccurate ratings. While many inaccuracies are explained by poor preparation, this problem comes in several other forms as well.

Placing Too Much Emphasis on One Particular Job Duty

Manager

“My most talented employee in our accounting department has a difficult time with communication and his personal appearance (at the time) did not comply with company standards. He was such a good accountant, though, that I always rated him as “meeting expectations” in those areas. I was afraid of a confrontation that would result in losing him as an employee. Unfortunately, this was a huge mistake. He applied for a promotion to a management position and when he wasn’t hired because of appearance and communication, he threatened a lawsuit referring to his performance appraisals. We were forced to settle with him out of court. It was embarrassing for me and it’s a huge mistake on my personal record.

Now I’m always completely honest in my appraisals. I rate each category in my appraisals individually and never let very good or very bad performance in another job duty affect my ratings.”

The “like me” Syndrome

Manager:

Several years ago, management did an analysis of the performance appraisals I’ve conducted. The report showed that I consistently gave lower ratings to female employees, without documentation to support the discrepancy. I have never thought of myself as sexist, so this was a big surprise. Now, I’m extra careful to rate employees on job related facts only.”

Narrator:

All human beings have bias to some degree. However, in the employment world when these feelings bleed into actions, they can lead to charges of discrimination and result in EEO litigation. Most managers who inflate the ratings of employees who are “like them” do so unwittingly. However, it is crucial to do everything possible to eliminate bias and to give ratings based on objective, job related facts only.

When inaccurate ratings are not caused by poor preparation, they come down to one word – honesty. Honest appraisals are legally defensible appraisals.

Goal Setting

Narrator:

Goal setting is part of any effective appraisal because it leads to performance improvement; but did you know it is a critical part of a legal appraisal as well? By setting goals and working with employees to achieve them, managers are creating a legal trail of documentation detailing an effort to improve performance. Not only will this strengthen a case that a termination was justified, it may improve performance and make a termination unnecessary.

Goals and the steps to achieve those goals should be specific. Goals like “improve sales numbers” or “Be more conscientious about quality” are too generic and open to confusion.

Goals such as, “improve sales by 10%” or “improve quality ratings to above 90%” set clear expectations and provide legally defensible documentation to justify employment decisions.

Employee Input

Narrator:

Once the appraisal is finished, the next step is to allow employees to read, sign, comment on and appeal to a higher level of management if they disagree with the appraisal.

By signing the appraisal, employees are acknowledging that they have read and understand the content of the appraisal. This provides proof that poor performing employees were given adequate notice of their poor performance and an opportunity to improve upon it.

The comments you receive may provide valuable insight into how performance may be improved and may even provide a justifiable reason that you were unaware of for a poor score.

An appeal to a higher level of management may provide an extra level of support for the assessment and strengthen the appraisal legally. If an appeal is successful and uncovers a mistake or results in a different rating, it may prevent future legal action.

In Conclusion

Narrator:

While providing a legally defensible performance appraisal may seem complicated or daunting, it really comes down to several simple steps.

- Prepare for the appraisal with ongoing feedback and communication.
- Be sure to document all job related communication and records.
- Conduct a thorough job analysis to ensure you are evaluating employees on current job related tasks and skills.
- Allow employees to rate their own performance based on the job analysis prior to finalizing your appraisal.
- Take emotion and bias out of the appraisal by sticking to objective, job related behaviors and facts.
- Avoid legal pitfalls such as placing too much emphasis on one particular job duty or engaging in the “like me” syndrome.
- Provide a written explanation for ratings and include all pertinent documentation and communication relative to the rating with the appraisal.
- Set goals for and provide assistance to employees to improve performance.
- Allow employees to read, sign, comment and, if necessary, appeal all or part of an appraisal.

While no manager is immune to litigation, following these steps will provide a strong legal defense which will increase the odds of success in court. Taking the time to follow these steps may provide the largest return on investment in a manager’s career.

Questions for Discussion

1. List 5 job related observable facts that could strengthen an appraisal legally.
2. Explain why employee input is critical to a legally defensible performance appraisal.
3. Explain why putting too much emphasis on one particular job duty can get a manager into legal trouble.
4. Name 6 different types of job-related documents and records that make a performance appraisal more legally defensible?
5. Explain why goals and the steps to achieve those goals should be specific.

Employee Quiz

1. (True / False) By setting goals and working with employees to achieve them, managers are creating a legal trail of documentation detailing an effort to improve performance.
2. Which of the following statements is an appropriate comment on a performance appraisal form?
 - a) “You don’t seem to care about your job at all and have been very irresponsible. I don’t know how we can expect to turn it around.”
 - b) “The official attendance records indicate that you were late for your shift 17 times and had 3 unexcused absences. In my notes, I found 2 verbal warnings for tardiness and one official written warning. An action plan is needed to correct this problem.”
 - c) “It’s obvious that you don’t have any respect for management.”
 - d) “Your anger management issues tell me that there must be a problem at home.”
3. (True / False) Job related, observable facts must only come from a manager’s direct observation and never from a third party even if the third party is documented as the source of the information.
4. (True / False) Without continual, year round feedback, terminated employees can claim that they were not given the resources to complete their jobs successfully and this could lead to charges of discrimination and/or wrongful termination.
5. Performance logs are important for what reason:
 - a) They make appraisals more meaningful.
 - b) They make appraisals more accurate and therefore more legally defensible than those simply based on recounting events from memory.
 - c) They drastically reduce mistakes that come from evaluating an employee on anything less than an entire year’s performance.
 - d) All of the above.
6. Which of these statements about conducting a job analysis is the most true?
 - a) A job analysis reviews the workload of your employees and determines if they have too much or too little work.
 - b) Modern performance appraisals do not utilize a job analysis.
 - c) It’s common for the job duties of an employee to change over time and an analysis will uncover these changes and ensure that the appraisal covers accurate job criteria.
 - d) The job description used in the interviewing process is generally the best source for a list of accurate job duties.
7. (True / False) Basing an employee’s performance review on tasks that are outdated or not part of the employee’s current duties could lead to a wrongful termination suit.

8. (True / False) The “Like Me” syndrome occurs when managers inadvertently or deliberately rate employees with whom they share characteristics higher than employees with whom they do not share characteristics.
9. (True / False) Only explain ratings on an appraisal form when it is absolutely necessary. These explanations can be subpoenaed in a lawsuit and damage the organization’s legal defense.
10. (True / False) Never standardize appraisal forms for employees with the same job duties. It’s vital that each employee is treated as a unique individual.

For Preview Only

Employee Quiz Answer Key

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