

BUSINESS PERFORMANCE GUIDE

**LIMITING
LIABILITY:
THE DO'S
AND DON'TS
OF PERFORMANCE
REVIEWS**



Performance reviews are a great tool for mitigating employment liability. When handled properly, they provide a clear and detailed history of an employee's productivity, work habits and achievements within an organization. And should an employee be terminated, a well-written, accurate performance assessment can help support the company in case of legal action.

Discrimination and wrongful termination claims can net six-figure settlements, and the Equal Employment Opportunity Commission reports the average investigation and legal process can drag on for 182 days.

How well your performance review process is conducted determines whether it's your best witness or worst enemy in litigation.

Here are the do's and don'ts when it comes to performance reviews and their role in court:





Do keep open communication with employees



For a performance review process to hold up to legal scrutiny, job-related goals and standards must be objective, measurable and clearly stated. Employees must always be aware of these criteria and know where they stand within the appraisal process.

“A great way to achieve this is to use the S.M.A.R.T. goal methodology,” says Janet Flewelling, director of HR operations at Insperty. “Goals should be written so they are Specific, Measurable, Attainable, Relevant and Timely. This practice leaves little to the imagination and provides clear communication between the employee and supervisor.

“There should be no surprises when it comes time to rate the employee’s performance on meeting their goals.”

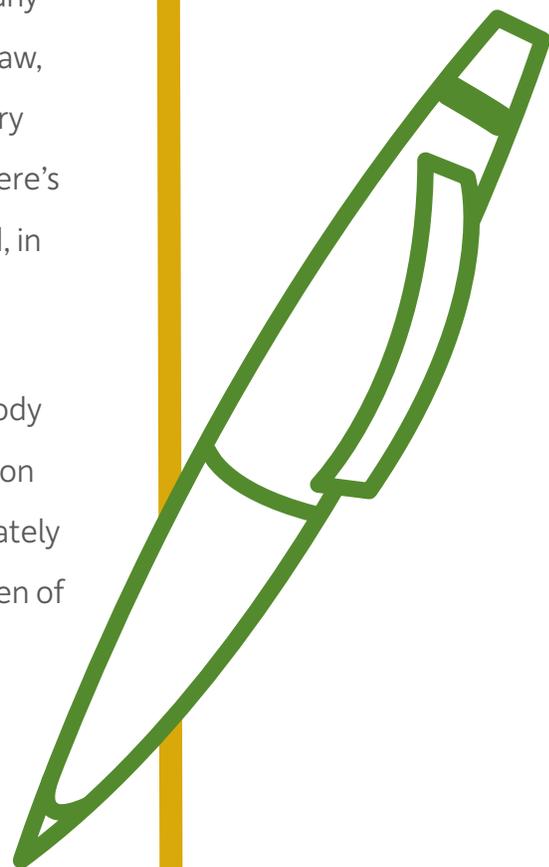
Remember: Effective communication goes both ways, so encourage employee feedback throughout the course of the performance review. This helps you reinforce the stated goals and standards. Additionally, it shows employees you have a vested interest in conducting a fair and constructive performance assessment.

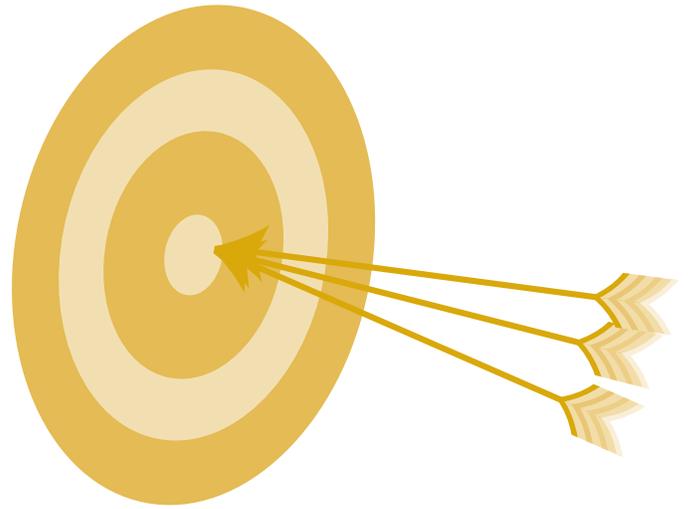


Do document diligently

Without proper documentation, your defense in almost any employment-related lawsuit has little merit, if any at all. To prove you acted within the bounds of the law, performance reviews should take into account every job-related detail, both good and bad. That way, there's no doubt actions taken are carefully calculated and, in the case of a wrongful termination claim, justified.

A jury might be prone to sympathizing with somebody who claims wrongful termination or discrimination on the part of a faceless organization. However, accurately recorded performance reviews help keep the burden of proof on the plaintiff.





Do maintain consistency

Not only should you document everything, you should do so in a consistent manner. Performance reviews are a chance not only to point out inadequacies, but to praise productivity. By recording both the positives and negatives regarding an employee's job performance, you ensure a balanced and consistent appraisal.

When you apply this standard to all employees, you bolster consistency, prevent bias and decrease your potential for liability. Get both sides of the coin and you'll get the whole story.

Don't discriminate

All employees must be treated fairly and uniformly. It is unlawful for a company to terminate an employee who is part of a protected class – e.g., age, sex, color, race, religion, nationality or disability – based solely on these characteristics.

With laws written to protect against discriminatory practices, a company will have a hard time defending itself without documentation to back up its disciplinary actions. On the other hand, not addressing an employee's subpar work practices because they belong to a protected class can also be seen as discrimination.

“Consistent treatment of all employees, regardless of their backgrounds or protected classifications, will help a company develop a highly productive workforce and keep it out of legal trouble,” says Flewelling.



Don't take it personally



It's natural for performance reviews to be viewed as highly personal processes. They are. You're essentially judging the way in which employees conduct themselves while completing their work, and you might be tempted to pull punches so as not to damage personal relationships or evoke pushback.

If an employee is coming up short, it's your job to let them know how to fix the problem. It's also your job to make sure employees are aware of the disciplinary actions that will be taken should inadequate performance continue.

Employees cannot improve their performance if they don't know it's unsatisfactory, so avoid just sending them back to work and hoping for miraculous improvement.



Don't wait too long between reviews



When performance appraisals are spread too far apart, you are less likely to correct problems or stimulate improvements. Additionally, you may be more prone to mistakes brought on by rushed or late evaluations.

The performance appraisal process is ongoing and should not be viewed as just an annual event. Grossly infrequent performance reviews open the door for sloppy and inconsistent documentation, which is perhaps the most damaging misstep when it comes to legal action.

“By keeping a log of events, both positive and negative, throughout the year and having regular performance discussions with your employees, writing the formal performance evaluation becomes an easy step in the process,” says Flewelling.



Keep in mind that performance reviews are designed to better your workforce and your business as a whole. Take them seriously, follow an ongoing performance cycle and conduct formal assessments on a regular basis. This way, you get the most out of the process itself and all the people involved.

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