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Practical Advice for Resolving Performance and Disciplinary Issues

Making It Work When the Honeymoon is Over

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What We Will Discuss...

- Day to day performance management
- Performance Review Systems
- Best practices for conducting performance reviews and handling disciplinary matters
- Avoiding litigation in connection with employee discipline and workplace performance policies
- Pregnant Workers Fairness Act



Why Does Performance Management Matter?

- Employee retention
- Attract talent
- Avoid unionization
- Productivity
- Attendance
- Fewer lawsuits

What Matters to Employees?

- According to Gallup*, the elements of employee engagement that have declined the most since 2019 are:
 - Clarity of expectations
 - Connection to the mission or purpose of the company
 - Opportunities to learn and grow
 - Opportunities to do what employees do best
 - Feeling cared about at work
- In comparison to older workers, younger workers experienced more decline in:
 - Feeling cared about at work
 - Having someone who encourages their development
 - Opportunities to learn and grow
 - Their opinions counting
 - Having a best friend at work

*U.S. Employee Engagement Needs a Rebound in 2023 ([gallup.com](https://www.gallup.com))

Day to Day Performance Management

Scenario

- Pat is a retail associate. He has been with the store for about a year. He has great sales numbers and seems to get along with everyone. The store decides to promote Pat to assistant manager. Pat has never been in a management role before.
- The store assumes that Pat will figure it out as he goes. However, he has a difficult time addressing performance issues with coworkers. The store has also received complaints that Pat plays favorites and he is known to socialize with a few subordinate employees outside of work (i.e., happy hour, weekends, etc.).
- The store manager now feels that Pat isn't "management material."

Scenario

- What are some ways the store could have avoided the current situation with Pat?
- What should the store do now?

Scenario

- Jess is an external hire and will be responsible for managing a production facility. She is concerned about being viewed as “weak,” so she makes a point to learn and enforce the company rules on day 1. A long-term and well-respected employee tries to talk to Jess about employee concerns. Jess screams at the employee. This type of behavior occurs multiple times. When Jess’ boss finally learns about this problem, she decides to fire Jess.
- What steps could the company have taken to avoid this result?

Scenario

- Frank was convicted of possessing child pornography 15 years ago and is identified on the sex offender registry. The Company hired him 18 months ago in an administrative support position and has been an excellent employee in all responses. Recently, a co-worker discovered Frank on the registry and wants him terminated because it makes her feel uncomfortable. Now, other co-workers are starting to complain.
- What would you do?

Scenario



Scenario

- What was done poorly? What would a better message be?

Take aways

- Be thoughtful about who you put into management roles
 - Management/supervision requires different skills
- Provide training to help managers succeed
- Consider a “buddy” system while the manager is learning the ropes
- Solicit periodic feedback from employees about their supervisors
- Don’t forget to celebrate accomplishments
- Be creative – are there other ways to help (i.e., anger management, EAP?)

Best Practices For Conducting Performance Reviews

Performance Appraisals

Why is the performance review process valuable?

- Provides management with opportunity to assess employee strengths and needs
- Provides employee with necessary feedback (good or bad)
- Establishes a forum for documenting and discussing weak and strong performance



Implementing Performance Review Systems

Key Steps:

1. Set Standards
2. Train appraisers – managers and supervisors
3. Train employees
4. Check performance
5. Communicate results frequently
6. Take required action
7. Evaluate the system

Setting Standards

- Employees should be able to answer “yes” to the following questions about their performance reviews:
 1. Do you know the standards by which your supervisor evaluates your performance? And, expected results?
 2. Do you feel your contribution and performance are measured fairly?
 3. Has your supervisor assisted you in evaluating the strengths and weaknesses of your performance for future improvement and mobility?

Training Appraisers and Employees

- Opportunity to standardize system – ensure uniformity in the performance review process
- Opportunity to explain the purpose of performance review system to employees
 - Purpose
 - Mechanics
 - Communication of information to employees
 - Explain to employees and managers the ways in which performance review will affect matters like pay promotion retention

Performance Reviews— Things To Avoid

- Letting length of service affect the performance aspect of the evaluation
- **Rater Errors:** (from SAA “Stress-free Performance Appraisals”)
 - **The “Halo” effect:** letting one factor you like affect your overall assessment of performance
 - **The “Horn” effect:** letting one work factor or behavior you dislike taint your opinion of the others
 - **Central Tendency:** clustering everyone in the middle performance categories to avoid extremes of good or bad performance

Performance Reviews— Things To Avoid (Cont'd) . . .

Rater Errors (cont):

- **Recency:** rating only recent performance, good or bad. Data should be representative of the entire review period
- **Favoritism:** overlooking the flaws of favored or “nice” employees, especially those whom everyone likes
- **Bias:** allowing bias to influence rating; bias can come from attitudes and opinions. Consideration of non-job related factors that could be discriminatory
- **Grouping:** excusing below standard performance because it is widespread (i.e., everyone does it)

Performance Reviews— Things To Avoid (Cont) . . .

Rater Errors (cont):

- **Guilt by Association:** rating someone on the basis of the company they keep, rather than on the work they do. Also watch out for the ‘halo’ version of this error
- **Holding a Grudge:** a dangerous luxury that may result in your ending up in court. Never try to make employees pay for past behavior
- **The Sunflower Effect:** rating everyone high, regardless of performance, to make yourself look good or to be able to give more compensation

Performance Reviews — Legal Impact

- Written reviews are often used in litigation to show performance deficiencies
 - Who is your primary audience?
- Supervisors must be trained to accurately document performance issues in reviews
- Inaccurate reviews or vague reviews can lead to litigation disputes later

Performance Review Meetings

Initial Preparation

- Give the employee plenty of advance notice
- Set aside enough time to devote your full attention to the employee and make sure you will not be interrupted
- Select private place for confidentiality
- Make sure all of your evaluations are not the same → should be unique and tailored to the individual

Performance Review Meetings

Final Preparation

- Consider which 2 or 3 points are the most important for you to communicate
- Consider potential reactions from employee and how best to respond
- Determine which issues will need special attention
- Make sure you will be able to support your rating with facts and specific examples
- Think ahead about possible correction action
- Try to approach the performance review process in a positive fashion – with the focus on what the employee did well and how to improve for the future

Performance Review Meetings

Discussion

- Ask employee to evaluate him/herself
- Review the positives first → show appreciation for past successes/point out specifics
- Discuss weaknesses and failures
- Encourage open dialogue
- Agree on objectives and plan follow-up
- End on a positive note



Performance Review Meetings

- Do:

- Be **specific**
- Ask thought-provoking, open-ended questions
- Listen!
- Talk about job results
- Summarize a plan for improvement
- Document any agreements and improvement plans

- Don't:

- Give insincere or excessive praise
- Place too much emphasis on personality traits
- Let length of service play too large a role
- Demonstrate a “condescending attitude”
- Be overly negative
- Dominate the conversation – 40% you, 60% employee

Performance Review Meetings

After the Review

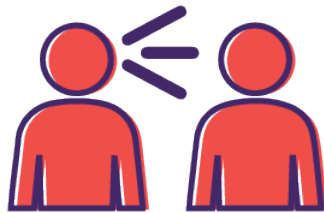
- Document the meeting (including any follow-up plan)
- Have employee sign the formal evaluation (or note that employee refused to sign)
- Note any follow-up plans
- Continue to monitor the employee's work
- Keep lines of communication open



FAIR EMPLOYMENT DECISIONS ARE DEFENSIBLE

Scenario

- Sally, a long-time employee, is very active in politics. She appears regularly on TV, newspapers and other media on controversial topics such as abortion, recreational marijuana and the death penalty. Many of her co-workers disagree with her positions and get into occasional arguments with her that escalate into “yelling matches.”
- What would you do?



Scenario

- Kristi and Mark are two key managers at your Company and well respected by both peers and subordinates alike. You find out from a credible source (yourself) that they are having an affair. They are both married to other people, one who works for the Company and one who does not.
- WHAT WOULD YOU DO?



Making Fair Employment Decisions

Basic Guidelines:

- Communicate expectations clearly
- Enforce expectations evenly
- Notify employees if they fail to meet expectations
- Provide the tools necessary to improve
- Provide meaningful opportunities to improve
- Make employment decisions with good reason



Making Fair Employment Decisions

Preparing Effective Performance Counseling Documentation



Making Fair Employment Decisions

- Goals of effective performance counseling documentation:
 - Is contemporaneous, timely
 - Records important facts, not just conclusions, clearly and plainly
 - Memorializes the basis for employment decisions
 - Conveys information in clear, logical way
 - Demonstrates that the employee was treated fairly

Making Fair Employment Decisions

The ten elements of good performance documents:

1. Identify the rule/policy that was violated
2. State the legitimate business reason for the rule/policy
3. State how and when the rule was communicated to the employee (NOTICE)



Making Fair Employment Decisions (Cont'd)

4. Describe any previous counseling or discipline
5. Describe how the employee violated or failed to follow the rule
6. Describe the effect the employee's action had on the business

Making Fair Employment Decisions

7. Clearly state employer's expectations for the future.
8. State the consequences for any additional or continued violation.



Making Fair Employment Decisions

9. State your willingness to help the employee meet expectations:

- Document assistance and resources offered
- Training
- Accommodations

10. Preserve at will employment status

- Be sure to make no guarantee of continued employment



Making Fair Employment Decisions

- **Documents provide evidence:**
 - State your case in performance documents
- **Be consistent:**
 - Has this problem arisen in the past?
 - How was it handled?
- **Preserve confidentiality:**
 - Documents should only be shared with those who have a “need to know”
 - Do not inadvertently waive any attorney-client privilege



Pregnant Worker Fairness Act

Current Federal Protections for Pregnancy

- The Pregnancy Discrimination Act (PDA) prohibits employment discrimination on the basis of pregnancy, childbirth, or related medical conditions. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.
- But, no independent duty to accommodate.

Pregnant Workers Fairness Act

- Signed on Dec. 29, 2022, as part of the Consolidated Appropriations Act, 2023.
- Applies to employers with 15 or more employees.
- Borrows from concepts under Title VII and the ADA and require accommodations for pregnancy/related conditions.



PWFA Prohibitions

- Makes it an unlawful employment practice to:
 - Not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can show undue hardship;
 - Require a qualified employee affected by pregnancy, childbirth or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process; and
 - Deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to pregnancy, childbirth or related medical conditions of the qualified employee

PWFA Prohibitions

- Makes it an unlawful employment practice to:
 - Require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
 - Take adverse action in the terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation.

PWFA Prohibitions

- No Retaliation
 - Prohibits discrimination against an employee for opposing any act or practice made unlawful by the PWFA or because such employee made a charge, testified, assisted or participated in any manner in an investigation, proceedings, or hearing under the PWFA;
 - Makes it unlawful to coerce, intimidate, threaten or interfere with any individual (1) in the exercise or enjoyment of their rights under the PWFA, (2) for having enjoyed/exercised their rights under the PWFA, and (3) having aided or encouraged any other individual in the exercise or enjoyment of their rights under the PWFA.

PWFA Definitions

- Qualified employee: an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if:
 - Any inability to perform an essential function is for a temporary period;
 - The essential function could be performed in the near future; and
 - The inability to perform the essential function can be reasonably accommodated.

PWFA Definitions

- “Known limitations” means the physical or mental condition related to, affect by, or arising out of pregnancy, childbirth or related medical conditions that the employee or employee’s representative has communicated to the employer whether or not such condition meets the definition of disability under the ADA
- “Reasonable accommodation” and “undue hardship” are defined the same as under the ADA.

PWFA Damages

- Damages track with Title VII/ADA
 - Back pay, compensatory damages (past/future emotional distress), punitive damages, attorneys' fees, and costs.
 - Damage caps for punitive and compensatory damages based on employer size:
 - 15-100 employees - \$50,000
 - 101-200 employees - \$100,000
 - 201-500 employees - \$200,000
 - 501+ employees - \$300,000

PWFA Damages

- Damages limitation
 - An employer has a defense to punitive and compensatory damages for a claim involving reasonable accommodation if the employer shows good faith efforts, **in consultation with the employee** who has informed the employer that accommodation is needed, to identify and make a reasonable accommodation that would provide the employee with an equally effective opportunity and would not cause an undue hardship.

- Takes effect on June 27, 2023 and EEOC to issue regulations by December 29, 2023
- Pregnancy accommodation will likely be similar to ADA
- Important to engage in the interactive process – even if it seems futile
- Undue hardship is a high burden, and will be more difficult given temporary nature of pregnancy and related conditions
- Leave is the last resort if employee is able to continue working
- Protections don't end at birth (limitations related to childbirth also protected)

PWFA take aways

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Thank **you.**