

Employment Law Corner

Monthly Report



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Employment Law Corner:

The Elements of Effective Performance Management

Here is a familiar story: a manager can't stand another day with their problem employee. This employee is chronically late, they need way too much handholding despite years of experience, and just last week the manager had to speak with them again about being on their phone while on the job. The manager is pushing to move on from the problem employee, but there's an issue – the employee has no idea that they're on the verge of being fired. They've never been written up for being tardy, their performance reviews are consistently "exceeds expectations," and the employee is only at stage one of the company's three-step progressive discipline system after the warning for the phone issue.

Throw in a protected class or a request for FMLA, and this clear-cut termination could turn into a litigation nightmare. Legal is telling the manager to pump the breaks on termination while the manager is pulling her hair out over the prospect of having to keep the problem employee on for weeks or months. What should the manager have done differently?

Effective performance management could have saved the manager a lot of heartburn. As illustrated above, effective performance management serves both a practical and protective role. As a practical matter, your workers will not know that things need to change if they do not understand the expectations of their jobs and whether they are meeting those expectations. As a protective measure, well-documented performance management can be the difference between a clean end to the employment relationship and months or years of legal costs.

THE THREE Cs:

Clarity

Clarity, candor and consistency are essential elements of effective performance management. First, you want to make sure that your performance management is clear. This means clearly identifying the employee's essential job functions, as well as the metrics that will be used to judge the employee's performance. Your workers should understand their goals and expectations from the first day of work. It also means that when an employee breaks a work rule, there should be no ambiguity about whether the response is considered disciplinary action or where the employee stands on your progressive discipline program. Effective performance management should minimize surprises when an employee is denied a promotion or terminated for poor performance.

There are many tools you can employ to ensure that you are clearly communicating your expectations. You can ensure clarity with comprehensive job descriptions; a handbook that provides clear, understandable policies for your employee to follow; and well-written performance review and disciplinary forms that identify expectations and communicate what, if anything, needs to improve with the employee's work or conduct.

Candor

Second, it is essential for performance management to be candid. Giving everyone "exceeds expectations" on their performance review minimizes conflict, but it will be no help when you need to do something about a chronically underperforming employee. Again, the goal is to avoid surprises and ensure that employees know where they stand. Of course, performance management is not only about letting employees know when they're off track – it is equally important to give positive feedback, identify employee wins, and recognize hard work. Effective performance management should also be more than a box-checking exercise. A candid "meets expectations" review is not going to have much value if the employee is not given quality feedback that ensures the employee really understands what "meets expectations" means in relation to their work.

Candor should also go both ways. Employees should be able use performance reviews as an opportunity to raise concerns and identify goals for their own development. Promoting dialogue and listening to employee feedback is invaluable. Employees will have a different perspective on their job and the workplace as a whole that is useful to know. As a protective measure, employees who feel like they have a chance to be heard are much less likely to file a claim. Having an open dialogue can expose workplace issues before they have a chance to fester.

Consistency

Consistent performance management means that you are not just documenting performance issues for the first time in a termination notice or providing once-per-decade performance reviews. The best way to ensure consistency is to establish processes for performance feedback and disciplinary action. For example, it is best practice to perform quarterly or annual performance reviews to give feedback and identify forward-looking goals. It is also best practice to give prompt, consistent corrective actions when an employee breaks a work rule. Failing to act when a rule is violated can damage the workplace culture and make future enforcement actions more complicated and difficult. As a protective measure, consistent performance management will establish the documentation you need to minimize the cost and risk of litigation. Consistency will also avoid discrimination claims that could arise if the employer fails to correct one employee who breaks a work rule but later attempts to enforce the same rule against a different employee.

As always, when establishing or enforcing a rule, it is critical to enforce the rules evenly and consistently. Work rules should support the company's operations and minimize liability. If you find yourself making frequent exceptions, consider revising the rule so that you are comfortable applying it consistently!

Providing the Why

Effective performance confers another key protective measure worth mentioning here: it provides the why for an adverse action. Remember, our brains want to find a narrative: if you do not give an understandable, clear reason for your decision, the employee will probably find their own narrative. They may conclude that the real reason given was because of discrimination, which can lead to negative outcomes like workplace conflict and litigation. Clear, consistent, candid

performance management will help to improve performance and protect your organization.

If you are concerned that your performance management practice could be better, [we can help!](#) Our experienced team can provide policy reviews, performance review templates, training on effective performance management, and advice for working with problem employees. We can help you identify and implement the risk management tools you need to protect your organization.

Do You Have Questions?

We can help! Our **Employment Counsel On-Call Triage Service** is a perfect resource for employers of all sizes looking to receive guidance on employment law and HR-related questions. We work with clients day in, day out to help them navigate complex legal issues and implement best practices. We receive unique questions every day through the **On-Call Service** and are ready to tackle any issue where you need help!

Who We Are:

- We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.
- We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.
- We are not like other firms: Anyone can tell you what the law states and its limits. That is easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com).**

Meet Gregory Paal

Greg has experience advising employers on regulatory compliance, contract matters and employment-related litigation. Greg has worked with employers both large and small to meet various challenges, including implementing overtime and leave policies, drafting employment agreements and privacy policies, and resolving discrimination complaints! For more info, check out his full bio [here!](#)



Contact Us



www.foleylawpractice.com

info@foleylawpractice.com

(844) 204-0505