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Performance Management Blunders

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November 2010
HR Magazine

Head off these seven common performance management missteps.

 Most employees are at-will. While we tell them in our handbooks how much we love them, we also remind them that we can terminate them at any time with or without prior notice.

When it comes to employment terminations, employers usually have not only a sound business rationale but also a lawful motivation. So why are there so many termination claims?

The answer is that, often for emotional reasons, there are flaws in the pre-termination and termination processes. These flaws may suggest an unlawful motivation, even when there wasn't one.

This article presents hypothetical examples to illustrate seven common performance management blunders that are likely to lead to litigation, as well as recommendations for minimizing these risks.

Over-Evaluation

First, consider Myles, whose performance is undeniably mediocre. All year, his supervisor, Sue, complains about his mediocre output, low-grade insubordination and habit of not feeling well on Fridays and Mondays.

However, in the weeks leading up to his evaluation, Myles' performance improves slightly. And, as the evaluation grows nearer, Sue worries that perhaps she is too demanding.

So, when it comes time to give Myles his evaluation, Sue's overall assessment of Myles is "meets expectations."

After the evaluation, Myles' performance declines and Sue's frustration increases. Ultimately, Myles' employment is appropriately terminated for poor performance.

Terminated at age 53, Myles learns that his replacement is 27 years old. Myles sues. He contends that the reason given for his termination—poor performance—was a pretext for age discrimination. His evidence? The evaluation that stated Myles' performance meets expectations.

Over-evaluation is deadly in litigation. It alone can be evidence of pretext, and pretext alone wins a case.

We all know the importance of training managers on the risk of over-evaluation. However, even with the training, over-evaluation persists.

Consider keeping a list of employees about whom supervisors express concern during the evaluation period. Reach out to all of them before the evaluation to remind them of the concerns they have raised with you and the importance of communicating those concerns to the employees. This should help combat the human but dangerous tendency toward over-evaluation.

Also consider including a comparator question on the evaluation: How does the employee's performance compare with that of his or her peers? Is it stronger? Essentially the same? Weaker? Not everyone can be stronger than his or her peers, and this type of question helps create distinctions among employees.

Delay in Implementation

Then there's Dan, whose performance continues to decline. The warnings his manager have given failed to result in the productivity increases required. It's time for a performance improvement plan, including a final warning.

However, Dan is an incredibly nice guy who has been through some very tough times. In particular, he recently went through an ugly and painful divorce after discovering his wife was cheating on him.

So Dan's supervisor, Greg, puts off meeting with Dan. Greg avoids Dan, and Dan is fully aware that he is being avoided. Dan tells his therapist how this makes him feel, and she refers Dan to a good lawyer to help him feel better.

A few weeks later, Greg sees Dan in the hallway. Dan asks to talk with Greg. Dan apologizes that his performance has been substandard but explains it is because he has had major depression as a result of the religious discrimination to which he has been subjected. He offers to provide more detail when he returns from his Family and Medical Leave Act leave for his depression.

In real estate, the operative words are "location, location, location." In retaliation case law, it is "timing, timing, timing." Delay creates a window of opportunity for an employee to make a protected complaint or disclosure that will make the adverse action that follows appear retaliatory.

Train managers on the risk of delay. Once a decision has been made, implement it.

However, there may be times when delay is inevitable. In that case, document in a discoverable e-mail the date on which the decision is made, the reason for it and the date on which it will be implemented. That way, if there is protected activity in the intervening period, you can demonstrate that your decision was made prior to and independent of it.

Be thoughtful. Be careful. But act.

Overkill

Jennifer supervises Tony, whose performance has been mediocre at best. Tired of the mediocrity, Jennifer requests permission to discharge Tony.

You check Tony's file. It contains no disciplinary warning of any kind.

You explain to Jennifer that, even though prior documentation is not required to terminate an at-will employee, the absence of documentation creates legal risk. In the absence of documentation, the employee is more likely to be surprised; surprised employees become angry employees, and angry employees sue.

Plus, before a court or commission, fairness always matters. The absence of due process makes most terminations appear unfair, and that is the starting point from which the judge, jury or investigator will determine whether the employer's motivation was lawful.

So you tell Jennifer "no go." Two weeks later, Jennifer comes back with an eight-page memo that she gave to Tony in the intervening week describing in detail all of his flaws over a one-week period. She hands you what she proposes to be his final warning.

A cluster of documentation in a short period after there was no documentation can be worse than no documentation. The problem is complicated to the extent the documentation appears to nickel-and-dime the employee on every conceivable deficiency.

It is clear that Jennifer is out to get Tony. The question is why.

The employer would argue that the supervisor simply was frustrated because she was told she could not get rid of a bad employee so she implemented "progressive discipline on steroids." A judge, jury or investigator may see Jennifer as trying to terminate Tony for an impermissible reason.

Supervisors need to be trained to come to HR professionals when they are mildly frustrated instead of waiting until they have made a decision. If they have made a decision, then the documentation appears dishonest and the employer will pay the price.

Sometimes the charging bull is from the C-suite. Be careful here. If a decision has been made, don't push for progressive discipline. False opportunities to improve are worse than no opportunities at all.

General Labels

Jesse has incredible technical skills. The problem is that he has a bad attitude. When the attitude continues after the final warning, he is fired.

Almost a year later, Jesse files a charge with the U.S. Equal Employment Opportunity Commission. He claims that his supervisor used "bad attitude" as a pretext for race discrimination.

In the meantime, Jesse's supervisor no longer is employed by the company. The commission reviews the documentation and questions the highly subjective "bad attitude" label.

All too often, disciplinary documentation includes general labels without providing specific examples. The absence of specific examples creates three issues:

The employee does not have adequate notice of what he or she is doing wrong and therefore has no chance to correct it.

The employer does not have a good foundation for its defense if the disciplinary action is challenged, particularly if the manager is no longer employed.

The label may be seen as a proxy for a stereotype. Just as "bad attitude" may be a proxy for racial bias, "too emotional" may be a proxy for gender bias, and "rigid" or "resistant to change" may be proxies for age bias.

HR professionals should work with supervisors to break down the labels into specific behaviors. Try the following questions: What did the employee do? What did the employee say? What didn't the employee do? What didn't he say?

Inconsistency

Jose has been employed by a company for almost 10 years. In that time period, his performance has been stellar.

Recently, Jose has been working on a large electronic record conversion project. He has been working six days a week, 12 hours a day, for several weeks.

Jose hits a grand slam on the project. At a meeting, Jose's manager publicly acknowledges Jose's accomplishment and then tells Jose that there is another record conversion project and he needs to "hit it out of the park again."

Beyond exhausted and feeling abused, Jose loses it. He states that he won't perform another "f---ing" conversion and storms out of the meeting.

Meanwhile, a few months ago Doreen was fired for insubordination. Her insubordination was private and included no profanity.

The employer doesn't want to fire Jose. But it also is aware that if it doesn't, it may be creating a comparator for Doreen to challenge her discharge.

The reality is that most discrimination claims happen not because of what we do but because of what we don't do. Taking into account the special circumstances of one employee may be seen as unfair favoritism or unlawful discrimination by another employee.

HR professionals sometimes preach consistency too consistently, with the result being that managers who believe there are special circumstances ignore inappropriate conduct for fear that if they raise the concerns, the HR professional will invoke the consistency mantra. When this happens, inconsistency happens but with no context to defend it.

Complete consistency is neither possible nor desirable. At times, there will be mitigating factors that can and should be considered.

Rather than ignoring this reality, HR professionals should embrace it. Consider having an exception protocol by which a supervisor seeks approval for an exception to what otherwise would be a rule. That way, the HR professional can determine if there are legitimate factors and document them to distinguish prior or subsequent cases that involve similar circumstances.

In this case, there are mitigating factors—length of employment, quality of performance and stress of the most recent project. If you document that these three factors together serve as the basis for giving Jose a final warning rather than terminating him, you should be able to distinguish Doreen or anyone else appropriately terminated for insubordination.

Focus on Disability

Lakesha used to be a superb employee who exceeded expectations. However, over the last year her performance has declined considerably. She now barely meets expectations.

Plus, you have noticed changes in her behavior. Formerly a positive contributor, she is now extremely negative about just about everything and everyone.

Her affect has changed, too. She used to smile. Now, she is one big frown.

Marla, her supervisor, talks with Lakesha about the decline in her performance and concerns about her behavior. Having struggled with depression herself, Marla asks Lakesha if she is depressed and reminds Lakesha of the company's employee assistance program.

Lakesha responds that she has been depressed but the depression is lifted now that she knows that she has a viable claim under the Americans with Disabilities Act.

Under amendments to the act, the circumstances under which an employee can bring a "regarded as" disability claim have been substantially expanded.

One of the unanticipated adverse consequences of the expansion of the "regarded as" prong of the definition of disability under the act is that caring has become riskier. Supervisors need to be trained to focus on the performance or behavior and to stay away from the perceived physical or mental cause. They also need to be trained that if employees raise physical or mental conditions in response to coaching, discipline or an evaluation, the supervisors should report the disclosure to an HR professional so that the HR professional can engage in an interactive dialogue to determine whether and how to provide an accommodation.

Disrespect

Employees who deserve to be fired sometimes are demeaned in the termination process through yelling and other abusive behaviors. When this occurs, the employee's failures cease to be the issue. The issue becomes how management handled the termination.

Of course, abusive behavior does not necessarily equal unlawful behavior. But employees who feel abused, particularly publicly, look to regain their self-esteem. That may be with the help of a lawyer.

The fact that an employee does not deserve to retain a job does not mean that the person forfeits the right to dignity and respect. Managers who fail to understand this may learn the lesson the hard way.

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