September 13, 2022

|  |  |
| --- | --- |
| **VIA ELECTRONIC MAIL ONLY**  {{ text\_recipient\_first\_name }} {{ text\_recipient\_last\_name }}  {{ text\_company\_legal\_name }}  {{ text\_company\_address|street }}  {{ text\_company\_address|city\_state\_zip }}  *{{ text\_recipient\_email\_address }}* |  |

Re: *Proper Use and Development of Employee Performance Reviews*

Dear {{ text\_recipient\_first\_name }},

A well-designed and executed employee performance review form is a powerful tool for managing and evaluating the skills and productivity of an employer’s workforce, as well as in providing feedback to employees regarding their performance and standing at the company. Indeed, such documents can benefit employers by providing them with valuable information about a variety of things, including: (i) which employees are doing well and which might be struggling; (ii) which supervisors, managers, or departments are running successfully and which ones aren’t; and (iii) potential legal liabilities. As part of your business protection plan, I created an employee performance review form that you can use for {{ text\_company\_short\_name|possessive }} (“{{ text\_company\_short\_name }}”) annual employee reviews (“Performance Review(s)”).

The purpose of *this* letter is to serve as your primer on certain laws surrounding the proper use of the Performance Review that I prepared for {{ text\_company\_short\_name }}, including a discussion regarding the role that the Performance Review might play in the event that a current or former employee files a lawsuit and/or administrative complaint against {{ text\_company\_short\_name }}. And since I created {{ text\_company\_short\_name|possessive }} Performance Review as a fill-in-able PDF, you should have no problem using it for all of {{ text\_company\_short\_name|possessive }} employees from this point forward.

**How the Performance Review Can Help {{ text\_company\_short\_name }}**

Employees Undergoing Reviews

Perhaps the most obvious benefit of using a document like the Performance Review is that it provides an employer, like {{ text\_company\_short\_name }}, an opportunity to learn a good deal about each employee’s:

— individual performance during a given time period (including whether the employee met identified targets, etc.);

— strengths;

— weaknesses or underperforming areas (along with a look at whether such weaknesses result from a lack of required skills, or whether they can be resolved with additional training);

— attitude (including whether or not the employee’s attitude might be affecting the morale or performance of other employees);

— professional goals, aspirations, or concerns; and

— insight into how similarly situated employees view {{ text\_company\_short\_name }} and its management.

Consequently, the Performance Review constitutes a valuable tool in deciding whether to: (i) promote an employee; (ii) increase an employee’s compensation; (iii) provide an employee with additional incentives (e.g., a bonus); (iv) make additional training available; and/or (v) take adverse action against an employee (e.g., suspension, demotion, or termination).

Comparing Supervisors/Managers/Departments

As I implied above, {{ text\_company\_short\_name }} can also use the Performance Review to gain valuable information about {{ text\_company\_short\_name|possessive }} management, or where applicable, its different departments/divisions. For example, by comparing the performance of all the employees who report to a specific supervisor/manager, or who work in a specific department, you might be able to identify: (i) outstanding or underperforming employees; (ii) areas of focus for increased or enhanced training; (iii) whether recruitment strategies need to be adjusted; and/or (iv) good or bad supervisors and/or managers.

Highlighting Potential Legal Liabilities

In addition to providing a good deal of information of the type described above, the Performance Review can (and should) be used to help upper management recognize potential legal liabilities. Take the issue of *disparate treatment[[1]](#footnote-1)* as an example. {{ text\_company\_short\_name }} might notice that certain employees, who happen to be in a protected class (e.g., female or Jewish employees), and who all seem to work under a particular manager/supervisor, always seem to receive worse reviews than employees reviewed by the same individual who were not members of that protected class. Such a trend would not typically be obvious if {{ text\_company\_short\_name }} were not using the Performance Review—especially as your company acquires more employees.

Likewise, a comparison might reveal that a particular employee is objectively outperforming other employees in his/her department (e.g., higher sales volume, etc.), but the employee received an unsatisfactory evaluation. Recognition of that trend would offer {{ text\_company\_short\_name }} an opportunity to determine whether or not the negative evaluation occurred as a result of bias on the reviewer’s part, or whether such a report was based on legitimate business concerns (e.g., employee exceeded goals but also had a history of insubordination).

**Danger Areas and Use of Reviews in Litigation**

Despite the fact that consistent use of the Performance Review can prove extremely helpful to {{ text\_company\_short\_name }}, there are risks associated with its use. And while the risks are low—especially in comparison to the loss of detailed data available if it’s used correctly—I feel obligated to provide you with the information so that you can make an informed decision.

On the one hand, using the Performance Review can help {{ text\_company\_short\_name }} establish an objective record of a poor employee’s performance at the company. Unsatisfactory performance is one of the most common reasons that employers terminate employees. For that reason, employers involved in litigation with former employees frequently use documents like the Performance Review as evidence to prove a terminated employee’s unsatisfactory performance. Indeed, such documents often represent an employer’s best (or only) formal and written communication to the employee about that employee’s job performance. Although much of what the employee or company remembers about the employee’s job performance may be in dispute, a document like the Performance Review would represent a recorded and concrete statement from {{ text\_company\_short\_name }} about a troublesome employee’s performance—one likely generated prior to the start of any litigation.

On the other hand, such documents can, in some cases, be used *against* the employer. For example, a terminated employee might try to use his/her prior positive review(s) to prove that his/her “for cause” termination was actually a pretext for an illegal firing (e.g., because of, say, a recent request for an accommodation due to a new disability). Such an employee might try to show that based on several positive reviews in the past, a recent negative review that happened to coincide with the employee’s request for an accommodation evidenced the pretextual nature of the termination. As I said, however, the odds of such a document being used against {{ text\_company\_short\_name }} in that manner are slim.

**How to Effectively Use Performance Reviews**

So, how should {{ text\_company\_short\_name }} use the Performance Review? There are a variety of practices that {{ text\_company\_short\_name }} can adopt to maximize the utility of the Performance Review, such as:

— training the evaluators (i.e., the ones who will be filling them out) regarding the proper use and purpose of the Performance Reviews, including how to avoid subjectivity, ambiguity, and inaccuracy;

— encouraging evaluators to provide sufficient details in the portions of the evaluation that permit such additional information;

— encouraging complete candor and honesty in all the assessments; and

— either providing employees with copies of their evaluations, or otherwise letting underperforming employees know precisely what they need to improve upon.

Train the Performance Evaluators

Evaluators should be able to conduct the reviews objectively, clearly, and accurately. To accomplish that, evaluators should be trained to effectively convey {{ text\_company\_short\_name|possessive }} expectations, maintain consistency in their scoring amongst a variety of employees, confront an employee with a negative review when appropriate, and be able to respond to common questions regarding the review, including those relating to compensation and opportunities for advancement.

And finally, to further ensure such objectivity, clarity, and accuracy from your evaluators—thus maximizing the effectiveness of the Performance Review—{{ text\_company\_short\_name|possessive }} evaluators should also receive training regarding how to avoid consideration of certain prohibited factors (e.g., sex, age, race, religion, etc.), or otherwise violate employees’ federal and state privacy rights.

Be Honest and Direct

Straightforward and honest reviews give employees the information needed to improve their performance. Although it may be easier to avoid confronting an employee who is underperforming, failing to provide constructive criticism does a disservice to both the employer and the employee. For example, reviewers may disregard or inflate an employee’s performance in a particular aspect of the employee’s job, failing to give the employee clear information about how to improve their performance, or a warning that such improvement is necessary.

As long as the review is accurate and objective, it is critical that it also be honest and direct. Make sure, therefore, that {{ text\_company\_short\_name|possessive }} evaluators understand this point.

Provide Sufficient Detail

Although it is difficult and time consuming to conduct detailed employee reviews, vague assessments are neither helpful to employers nor to their employees. Evaluators, therefore, should carve out an adequate amount of time to focus on the Performance Reviews and devote thoughtful consideration to various aspects of each employee’s job performance and other criteria considered as part of the evaluation. Case in point: the Performance Review that I prepared for {{ text\_company\_short\_name }} will provide your employees with concrete examples, both positive and negative, relating to their job performance. Likewise, it will provide your employees with clear and concise information on what they need to improve upon, if anything, along with specific information regarding {{ text\_company\_short\_name|possessive }} expectations, strategies, and timeframes within which to meet the company’s goals.

Avoid Subjectivity, Ambiguity, and Inaccuracy

a.

Subjectivity

Employee evaluations should be based on objective, not subjective, criteria. For example, sales representatives should be evaluated based on achieving specified targets (such as $1 million in new sales revenue in each quarter) instead of asking the reviewer to indicate whether the sales representative is *generally* effective or ineffective. By avoiding the latter, an employer is much more likely to get consistent and objective reviews across the board, regardless of who the evaluators are.

On the flip side, employee evaluations based on subjective criteria can increase {{ text\_company\_short\_name|possessive }} litigation risk and exposure to liability. For example, a subjective performance review can play into an employee’s belief that the reviewing supervisor is treating him/her unfairly, singling him/her out, or otherwise engaging in discrimination. Such an employee might look at the evaluation as merely another example of his/her supervisor’s bias rather than as an opportunity for both parties to review the employee’s actual performance. If the employee’s belief is justified, the supervisor giving a subjective evaluation will likely assess the employee’s performance differently than other employees. This can lead to legal and financial exposure, especially if the evaluation impacts compensation or serves later as the basis for an adverse employment action against the employer.

Similarly, evaluations based on subjective criteria allow individual supervisors to evaluate employees against different standards, making the reviews incomparable. For example, employees subject to a more rigorous review may appear as underperformers when compared to employees subject to a more lenient review, even though objective criteria may show that they are equivalent or better performers.

b.

Ambiguity

Employee evaluations should be clear and specific. Employees who receive evaluations that are riddled with ambiguity or that contain blanket statements about an employee’s performance are less likely to improve because the employer’s expectations are unclear. Employees need specific, bright line markers to rely upon. In addition, judges and juries are less likely to believe an employee was terminated for poor performance when a review is deemed ambiguous, or otherwise made it difficult for an employee to figure out an employer’s expectations.

c.

Inaccuracy

It is not unusual for an evaluation to inaccurately reflect what the reviewer or supervisor actually considered to be the employee’s level of performance. Common causes of inaccurate performance evaluations include the evaluator’s desire not to hurt an employee’s feelings, lack of sufficient time to adequately take/complete the review, or fear that an employee might react strongly to a negative review.

Although these reasons for inaccuracies are understandable, {{ text\_company\_short\_name }} should not allow them to translate into inaccurate evaluations. Like the other pitfalls, inaccurate reviews:

— fail to let the employee know what needs to be done to improve performance;

— do not put an employee on notice that he/she needs to improve; and

— will not help {{ text\_company\_short\_name }} avoid an argument of discrimination or pretext.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I think you’ll agree that if you use the Performance Review properly and consistently, it will prove to be a valuable tool for {{ text\_company\_short\_name }} to measure the performance and productivity of its employees. If you have any questions regarding the foregoing, please don’t hesitate to ask.

Sincerely yours,

/s/

{{ text\_kc\_attorney\_name }}

<!-- attach pdf='performance review (fill-in).pdf' -->

1. Disparate treatment is most easily defined as *discrimination*. Disparate treatment occurs when an employer treats certain otherwise similarly situated employees differently as a result of some common factor (e.g., race, religion, gender, sexual orientation, etc.). [↑](#footnote-ref-1)