KATZ LAW GROUP, P.C.
FORWARD THINKING℠

Think Outside the Brief℠
A Publication of the Katz Law Group

PROTECTING THE COMPANY IN THE PERFORMANCE REVIEW PROCESS:
WHAT YOU NEED TO KNOW TO AVOID THE PITFALLS, PITBULLS AND A WORLD OF HURT

As the economy declines, employers throughout the country in every industry are tightening the purse strings. Even in relatively strong sectors of the economy, opportunities for promotion are limited, and bonus and salary pools have been substantially reduced, or even frozen. Often employers are being forced to lay off significant percentages of their workforces. Employees who are passed over for a promotion, who feel they are not being compensated fairly, or who are laid off may file a lawsuit alleging that the decision was discriminatory. Unfortunately, in a poor job market, laid-off employees may find it very difficult to locate another job, making them perhaps more likely to sue than they otherwise would be. Further complicating matters is the recently enacted federal Lilly Ledbetter Fair Pay Act. This act amended previous federal legislation so that allegations of pay discrimination can be brought at any time, regardless of when the pay decision was made, as long as the employee has received one paycheck that was affected by the decision during the statute of limitations period. What this simply means is that a manager could be required to defend the decision of the company to give one employee a raise over another five or even 10 years later.

Even where an employee asserts a claim soon after a decision is made, litigation is a notoriously slow process. It could easily be more than two years between a layoff, promotion or compensation decision and the manager's deposition in a given lawsuit brought by the employee. Without effective documentation, it may be very difficult for a manager to recall the specific rationale for a decision made years earlier. Moreover, the manager who made the decision at issue may no longer be employed by the company and may not be available to testify, leaving the written performance review as the only evidence which the employer can rely in defending the lawsuit. In today's current environment, more than ever, management needs to take great care in preparing performance reviews, documenting decisions and maintaining records. Failing to take performance reviews seriously, like employee discipline issues as we discussed in our last newsletter, could create a world of hurt for an employer.

The value of performance evaluations should not go underestimated. Failing to take the performance-management process seriously could create a significant risk of liability for the employer. It is, therefore, advisable for employers to impress upon managers the importance of performance evaluations and to train them how to conduct the performance reviews effectively. Here are some of the best practices in performance assessment:

1. Update Job Description. Job descriptions are often drafted when an employee is hired, never to be looked at again. As time passes and roles evolve in any given company, so should the job description. The job description needs to be an accurate account of what an employee is expected to do throughout the year and should be updated annually. A valid job description can serve as an effective outline for a future performance evaluation. This will also assist management in conducting a reduction in force and reorganize job functions accordingly.

112 Turnpike Road › Suite 104 › Westborough, MA › 01581-2859 › Telephone 508-836-5577 › Telefax 508-836-5570
Toll Free 866-307-5577 › Email: contact@katzlawgroup.com › Website Address: katzlawgroup.com

2. Record Significant Events during the year. All too often, management sees job performance reviews as either an annual or semiannual obligation. Managers should find a way to update the performance of any one employee when significant events occur. The manner in which this is done is not nearly as important as the fact that it is being done. Remember, at all times, we are working against management turnover and loss of memory with the passage of time, and, therefore, the constant need to memorialize events becomes critical. Maintaining ongoing records will also prove abundantly useful if the employer is required to make layoff decision outside of the ordinary performance review cycle.

3. Be consistent about being consistent. The measures of performance should be consistent across employees in the same or similar roles. If different employees performing basically the same jobs are evaluated based on different metrics, the performance review will not be useful in justifying why one employee was rewarded over another. Additionally, inconsistent reviewing methodology could spell trouble for the employer in the area of discrimination or retaliation.

4. Be objective. Identify specific projects and issues. Do not speak in generalities and whatever you do please do not editorialize about the employee. For example, if an employee deserves to have a review that indicates "exceeds expectations" than that should be their review. However, that same status should not be provided to every employee if the same is not warranted. Quite often, managers will have favorite employees who may not be the best employees. The manager must remain objective in order to maintain the integrity of the grading system.

5.Be specific. When completing these performance reviews, it is incumbent upon managers to be specific as to both positive and negative aspects of an employee's performance. Rather than say "employee does not keep me informed of the status of project" the better way would be to site examples of those projects about which the manager has not received the information. Such specifics will provide the employee with a clearer understanding of what worked and what did not. The details will also assist the manager in explaining the basis for decisions in the event of litigation.

6.Identify areas for development and improvement and set goals. For employees to maximize performance, mangers must identify the specific areas in which their performance needs to be improved or which skill set needs to be enhanced. It is crucial to provide employees with goals for growth and improvement by providing tangible benchmarks.

7 .Consider new performance metrics for new business imperatives. Layoff decisions should be based on objective criteria, one of which is performance. The ordinary performance review, even when conducted in an ideal manner, may not be enough to justify the selection made in a reduction in force.

The rapid and continuing collapse of the economy has forced many companies to reassess their business plans and to shift their focus. As a result, the relative value of different employee skills and knowledge sets may change. Employers must therefore consider whether to create new performance metrics to measure the employee's ability to meet their future needs, as opposed to just the employee's past performance. The hallmarks of good performance evaluations are consistency, objectivity, specificity and documentation. Just a little bit of extra attention to the performance review process on the front end will enhance employee productivity and save the manager and the employer a lot of time and money in the event of litigation.