

Brown & Hofmeister, L.L.P.

Attorneys & Counselors

740 East Campbell Road, Suite 800

Richardson, Texas 75081

(214) 747-6100

www.bhlaw.net

The Legal Environment: Basics of Employment Law: Part Three

Terrence S. Welch

Interviews: The Do's And Don'ts

JOB APPLICATION FORMS AND INTERVIEW QUESTIONS

Federal and state laws prohibit certain questions, while even more questions are legally dangerous because they have been used to help prove discrimination. Most employment application forms, even those of large companies, violate the law or ask legally dangerous questions. In a national survey of 501 employment application forms during 1987, one employment law author found 500 to have dangerous questions, at least when judged against a strict national standard based on the statutes, regulations, and case decisions under all state and federal discrimination laws. Some forms had over a dozen illegal or unwise questions. Questions that are dangerous to ask on job application forms are also dangerous to ask in employment interviews or to obtain by other methods such as asking past employers or people listed as references.

Questions prohibited by individual state laws or regulations, or dangerous to ask under state fair employment laws and federal equal employment laws include, but are not limited to, questions concerning:

1. *Age*. No question concerning age is safe unless required under some specialized governmental regulations, or the question is limited to asking, "Are you 18 or older?" Some forms incorrectly ask if the applicant is 65 years of age or younger, or 70 years or younger.
2. *Race, sex, height or weight, color of eyes or hair, or skin complexion*. None of these characteristics relate to valid job requirements or bona fide occupational qualifications (BFOQs). The questions may be used in a disparate impact lawsuit where the plaintiff claims that use of the answers (1) impacted African-Americans or women differently from whites or men, and (2) they were not BFOQs. (In very limited instances height and weight may be valid criteria, such as a minimum height requirement for flight attendants so they can reach the overhead compartments on airplanes).
3. *National origin, place of birth, or type of employment authorization*. Some employers ask about these things in a misguided attempt to comply with the Immigration Reform and Control Act. The examination of work documents required by the Immigration & Naturalization Service and the completion of its I-9 Form need not be done until after a decision to hire the person is made. Therefore, employers should not require job applicants to prove their authorization to work in the United States. It

is legally permissible, however, to inform applicants of the I-9 requirements, or ask, "If hired, can you prove you are authorized to work in the United States?"

4. *Length of residence or home ownership.* These questions have nothing to do with an individual's ability to do a job, and statistically it often can be shown that the average length of residency or higher rate of ownership occurs with whites, as compared with African-Americans or Hispanics.
5. *Arrest records and misdemeanor convictions.* Statistically, it often can be proven that males and African-Americans have such records more often than females and whites. An arrest record proves nothing, for even innocent people are sometimes arrested, but the charges are dismissed later and the person is not charged with any offense. Misdemeanor convictions are not job-related in many types of jobs (*e.g.*, manual labor or factory work). Nevertheless, misdemeanor records concerning theft or drug convictions might be important in hiring people where extra trust or access to drugs is involved. Conviction records often can be asked about and checked.
6. *Type of military discharge.* Statistically, African-Americans have a disproportionate share of less than honorable discharges from the military, as compared with whites. A less than honorable discharge means little or nothing as to whether an applicant is qualified for the job, especially since it is alleged that many less than honorable discharges during the Vietnam War era were not based upon wrongdoing.
7. *Friends or relative already employed by the employer.* If an employer asks these questions, in a job application form or interview, it may be assumed, depending upon the facts, to be information used to deny a job under an anti-nepotism rule, or to give preference to those with friends or relatives already employed. Either set of facts could cause equal employment legal problems. If the current work force is not representative of the job applicant pool in terms of race or national origin, a disparate impact claim based upon race or national origin may occur. For example, if an employer's work force is 90 percent white while the pool of possible, qualified job applicants is 40 percent African-American, preference to friends and relatives of current workers (mainly white) has a disparate impact on African-Americans and is not justified by a business necessity. If the question is asked in furtherance

of an anti-nepotism rule and the employees are mostly males, it may have a disparate impact on females.

8. *How the applicant found out about the job (referral source).*

Many job application forms ask this; however, it may have a disparate impact based upon race or national origin, and it makes no difference whether the applicant is qualified (that is, it is not a BFOQ). If information is desired as to the effectiveness of various recruitment methods, job applicants should be asked to give this information on a separate form that does not include the applicant's name.

9. *Past bonding or security clearance problems, credit*

problems, personal bankruptcy, method of transportation, relative to notify in case of emergency, sexual orientation, family plans, living arrangements, and other personal questions. Most of these questions are not relevant to a specific job, and the answers might be proven to show a difference based upon race, sex, national origin, or disability. Past bonding problems, however, may be relevant and job-related when hiring bank tellers and others where bonds must be obtained. Questions about who to contact in case of emergency may be asked after each employee is hired.

AMERICANS WITH DISABILITIES ACT (ADA) RESTRICTIONS

In the past, many job application and interview questions were dangerous to ask because they might be used as part of the proof of discrimination in hiring, but the questions were not always illegal, in and of themselves. The ADA, however, has created an entire group of questions that are specifically prohibited. Under the ADA employers may not ask about job applicants' disabilities, health problems, medical history, workers' compensation claim history, or any other questions concerning past or present physical or mental impairments. When a job applicant's disability is obvious, or when an applicant voluntarily discloses the existence of a hidden disability such as diabetes, epilepsy, HIV infection, or cancer, the law still limits the types of questions that may be asked.

The following is a guide to what may and may not be asked of job applicants in these various situations.

1. Questions that may be asked of job applicants, whether disabled or not:

- ~(After explaining the physical and mental job tasks) Are you able to perform the duties of the job for which you

have applied, with or without reasonable accommodations?

Explain or demonstrate how you can perform the essential duties of the job (but allowed only if asked of all job applicants in any broad job category).

(After explaining the requirements) Can you meet our attendance requirements?

Do you have the necessary background or certifications for the job (*e.g.*, relevant training, experience, licenses)?

Do you need any accommodations to take a required entry test (such as a typing test or work performance test)?

Most other positive, obviously job-related questions may be asked. The key is to limit questions to those that judge the ability of the applicant to do the essential tasks of the job, with or without accommodations.

2. Examples of Questions That Must Not Be Asked of Any Job Applicants:

Have you ever been treated for any of the following diseases (with a list of diseases)?

Please list any conditions or diseases for which you have been treated during the past five years?

Have you ever been hospitalized?

Have you ever been treated by a psychiatrist or psychologist?

Have you ever had a mental illness?

Is there any health-related reason that might prevent you from performing the job?

Do you have any physical limitations or restrictions? Are you taking any prescription drugs?

Have you ever been treated for alcoholism or drug addiction?

Have you ever filed a workers' compensation claim?

How many days of work did you miss last year due to illness?

3. Questions Interviewers Can Ask if a Disability is Obvious or is Voluntarily Disclosed by the Applicant:

Are you able to perform the duties of the job for which you have applied, with or without reasonable accommodations?

(If the disability appears to cause a problem in performing the essential duties of the job in question, the following

can be asked, even if not asked of all job applicants.)

Please explain how you will perform the job duties.

(If the disability appears to cause a problem in performing the essential duties of the job in question, the following can be asked; even if not asked of all job applicants.)

Please demonstrate how you will perform the job duties.

(If applicants must take an oral, written, or job-performance test before being hired) Are there any accommodations you need to take the entrance or qualifying test(s)?

(After explaining the requirements) Can you meet our attendance requirements?

4. Examples of Questions That Must Not Be Asked, Even if Disability Is Known:

Does the disability restrict your activities?

How did it (the disability) happen?

How long have you been disabled?

What do the doctors think is wrong?

Is it permanent?

How will you get to work?

Do we have to do anything special to accommodate you?

(Negative approach)

Do you have to miss work for medical treatment?

Do you receive any disability benefits or government aid?

Information that may not be obtained during an interview cannot be obtained by other methods such as asking past employers or people listed as references nor can the information be requested in a credit report, workers' compensation claim history, or by any other methods (*e.g.*, via the Texas Open Records Act if the applicant is a former public employee).

The job applicant, or a social agency working with the job applicant, can voluntarily disclose a disability and/or ask for an accommodation. If a disability is known by the interviewer and the job applicant does not request an accommodation, the applicant should be asked if any accommodations are needed for required entry exams or on the job.

Interviewers may, and usually should, rely on the statement of an applicant that there is a disability; however, in cases where there is reason to believe the individual is not legally disabled—especially if an accommodation is expensive or disruptive—an employer may ask for a statement from a physician or other specialist indicating that a disability exists.

Performance Appraisals

ELEMENTS OF AN EFFECTIVE APPRAISAL SYSTEM

An effective performance appraisal system that accomplishes any organization's goals should have essentially four elements:

1. Objective performance criteria that should be based on some form of observable behavior that is related to the duties of the job. The criteria for evaluation are communicated to employees. Goals and objectives should be reached through consultation between the supervisor and employee.
2. Persons conducting the appraisals, usually immediate supervisors, are trained in how the system works and how to deliver effective feedback on performance.
3. Written guidelines for administering the appraisal system are used by raters.
4. Employees who disagree with a rating are given an opportunity to challenge the rating and have further explanation of how the rating was derived.

These broad guidelines provide the general elements that can be applied to any number of appraisal systems. Application of the guidelines can be applied on a decentralized and flexible basis that will allow various employee groups to adapt a performance appraisal to their own special needs. Clerical workers may be different from street personnel in terms of the feedback they want and the standards used to measure performance. Thus, the format of their appraisal systems may differ within the framework of the foregoing guidelines.

Objective standards for measuring performance are the cornerstone in any effective performance appraisal system. Once valid standards are set, however, many times an ineffective performance appraisal can be traced to the person who is conducting the appraisal—usually the immediate supervisor or manager.

There are several common reasons that supervisors do not conduct effective performance appraisals.

Guilt. A performance appraisal is the most tangible exercise of managerial power over another person. The manager or supervisor is being asked to be the judge and jury over another person's performance. Often this can have adverse consequences for that person in terms of pay or job security. Many supervisors feel uncomfortable exercising this

power or they feel guilty about criticizing performance and hurting a subordinate's feelings.

For effective performance appraisal, however, the supervisor must ignore these emotions, or at least work through them; otherwise there is a tendency to give everyone a good or above average appraisal, which can lead to trouble for the employer when personnel decisions are challenged later. Many an age discrimination suit has been lost when an employee is fired for poor performance after years of good performance appraisals.

On an individual level, the supervisor's failure to be truthful about bad or disappointing performance is counterproductive to the purpose of improving performance. Hurt feelings are an unavoidable side effect of negative criticism, but it is often the first step to changing employee behavior and moving down the path to where criticism will not have to be heard again. Remember that the purpose of any performance appraisal should be to help both the local government and the employee.

Lack of accountability. Supervisors often conduct ineffective performance appraisals because they feel inadequate about giving feedback to their subordinates. Conducting effective performance appraisal should be written into a supervisor's job description. It should be clear that part of the supervisor's job duties and responsibilities is to set goals for employees and counsel them on performance relative to those goals.

Accountability for performance appraisals goes beyond merely filling out an appraisal form once a year and putting it in a personnel file. This is a form of report card mentality that defeats the purpose of continuing feedback designed to improve performance.

To conduct effective performance appraisal, supervisors should be coaches rather than judges. Accountability should be based on the supervisor's exercise of skill in coaching activities designed to develop people and improve their performance. Coaching skills fall into two categories: enabling skills and motivation skills. Enabling skills consist of activities that develop a subordinate's ability to perform the job. These include training, developing skills competence, providing necessary tools and equipment as well as removing any obstacles to performance. Motivation skills generally refer to giving positive feedback that recognizes or reinforces good performance, and giving constructive feedback to help employees improve in areas where they are able to do better.

Using effective coaching skills can reduce the guilt supervisors feel when having to provide negative feedback. By conducting frequent informal

feedback sessions, there is no surprise if a formal review produces an unfavorable rating.

Ineffective application of standards. Overrating also can be a problem in the evaluation process. This occurs, for example, when poor employees are rated as marginally competent, marginal employees are rated as satisfactory, satisfactory employees as above standard, and good employees are rated as excellent. If an employee is discharged for poor performance but has constantly been overrated as an average performer, past performance evaluations can be used against the employer. The employee can reasonably argue that for years his performance has been rated satisfactory, and suddenly he is being terminated. Obviously, it cannot be because of his performance because his evaluations have been satisfactory. Therefore, the employee assumes that it must be for some illegal reason. Supervisors who are rating all their employees as satisfactory are not making the tough performance distinctions required for an effective performance evaluation system. Supervisory training can be the key to effective performance appraisal. Performance appraisals need to set forth more than conclusory statements as to deficiencies or conduct. The appraisal should include supporting examples for any deficiency along with suggested action for improvement of performance. In that way, the supervisor is forced to evaluate more objectively the employee's total performance without the tendency to overrate.

How does a supervisor know when an employee has achieved preset goals? The answer lies partly in the way the goals are defined and the behavior needed to achieve those goals. Performance should be measured in terms of behavior or action that can be objectively seen. Performance appraisal systems fail when they are based on subjective opinions about how a person is performing. A supervisor should not base a performance appraisal on a person's attitude or what the supervisor thinks is going on inside the person's head.

Does this mean a person cannot be disciplined for a "bad attitude" or rewarded for a "good attitude?" Not at all. It does mean that behavioral examples of what constitutes a good or bad attitude should be spelled out.

Providing good customer service is a common goal upon which employees are evaluated. But it is not enough to state that a goal of an employee is good customer service. Effective performance evaluation requires that objective, observable behavior be spelled out that constitutes good customer service. Thus, good customer service might require that each customer be greeted within 10 seconds and thanked after every transaction. These are actions that can be observed.

Once behavior has been identified that amounts to good performance, different levels of performance can be established. For example, if the behavioral standard for a clerical staff member is to complete reports within three days with fewer than two errors, exceptional performance would be completion of reports in one day with no errors.

Typical comments found on performance evaluations indicate the difference between assessing performance based on observable behavior as opposed to subjective opinions about attitude. A statement that “Joe has lost interest in the job and shows no potential for advancement” is based on a subjective guess about what is going on inside Joe’s head. An appraisal based on observed behavior, however, might include a statement that “Joe is arriving at work late and is processing five fewer claims per week than at the same time last year.”

One exercise demonstrates the difference between observable behavior and speculation about what is inside a person’s head. Have someone walk into a room, pace slowly back and forth and frown while shaking his head. Then ask people what they saw. Subjective respondents will say they saw someone who was worried, pensive, contemplative or depressed. But the only real observable, objective behavior was a person pacing back and forth while frowning and shaking his head.

Use of subjective language in performance evaluations may make it difficult to prove that a person who was discharged for poor performance was unqualified for the position. For example, an African American employee alleged that his discharge was racially motivated. The employer countered that performance evaluations established that the employee was unfit for the position. The court ruled that the employer’s subjective performance criteria did not establish that the employee was incapable of doing his job. Negative evaluations of the African American employee were couched in such terms as “lacks a sense of priorities” and “lacks initiative.” Noting that subjective evaluations are more susceptible of abuse and likely to mask pretext, the court found that the employer could not initially establish that the employee was unqualified for the job by using such performance evaluations.

Rating the performance of employees against preset goals requires the establishment of some scale that describes levels of performance. A five-level rating scale might contain the following levels of performance, ranging from substandard performance to excellent performance:

Marginal — Significant goals or objectives were not met. Performance is clearly below acceptable standards or has decreased over time.

Adequate — Most goals or objectives were met but with some shortfalls. Performance is below acceptable standards based on experience or level of skill. Performance could be improved through development or application of effort.

Skilled — All objectives and goals met. Sometimes produces beyond expectations.

Commendable — Performance consistently above set goals or objectives. Qualified to assume additional responsibilities. Objectives met and many exceeded.

Outstanding — Performance far exceeds set goals. Extraordinary accomplishment with measurable impact on overall objectives. Significant breakthroughs or achievements.

In the alternative, a three-level rating scale can be adopted as follows:

Needs Improvement — Work falls short of goals or is below an acceptable level for time in job and requirements of job.

Good — All performance goals met.

Best — Performance consistently exceeds goals.

A few points should be made about setting rating scales.

The mid point for setting rating scales should be that performance which is equal to a 100 percent achievement of goals and objectives. Thus, in the five-point rating scale above, the “skilled” rating would equal the organization's definition of 100 percent performance. The higher “commendable” or “outstanding” ratings should require the employee to exert extra effort beyond preset goals. There should be a stretch in performance that capitalizes on unforeseen events and makes a demonstrable impact on organization performance. For example, 100 percent performance might require a person to return citizen telephone calls within one day. The higher rating of commendable might be achieved by calling back citizens the same day while the top rating of outstanding might require the person to take some initiative in customer service that was unforeseen but in line with overall goals. Top level performance on the rating scale should be difficult to achieve and will not happen every day.

Having 100 percent performance as the midpoint of the rating scale does not mean employees at this level are “average.” The scale should avoid this label. After all, the organization does not strive to be average.

Employees who meet organization goals should be labeled as winners. Accordingly, the 100 percent employee might be labeled as “meeting high standards” or “valued employee” or “proficient.” In successful organizations with effective performance appraisal, most employees will be at this 100 percent level.

Any personnel action such as discipline or discharge may be defended from challenge if it was taken pursuant to a legitimate business justification. Poor performance is one such business justification. In any lawsuit that challenges an adverse personnel action, the first piece of evidence that a plaintiff’s attorney will request is the employee’s past performance appraisals. If the case goes to trial, those appraisals will be enlarged and put on display for a jury to scrutinize. The jurors also will take them back into the jury room. It is therefore essential that performance appraisal be done fairly and consistently.

Federal and state laws prohibiting employment discrimination are the main source of legal concern for performance appraisal. Employees may allege that a promotion denial, layoff, discharge or compensation action was illegally influenced by, for example, the employee's race, sex or age.

Employers typically will turn to past performance appraisals to justify the action. If performance appraisals are not well documented or inconsistently applied, however, the employer’s defense is weakened or destroyed.

A legally defensible performance appraisal system should contain the following elements:

- be in writing
- contain specific procedures
- include specific instructions for supervisors
- provide training for supervisors in how to evaluate employees
- use standardized forms for related groups of employees
- be thoroughly communicated to employees
- be given formally at least on an annual basis
- evaluate specific work behavior and not personal traits.

A review of performance appraisals by the next highest level of management is one way to ensure objectivity. The equal employment opportunity staff may also conduct random audits of appraisals for EEO compliance. If performance reviews impact adversely on one group of protected employees, an EEO audit can detect this.

THE CURRENT STATUS OF PERFORMANCE EVALUATIONS

A study presented in a 1992 *Journal of Management* article that consolidated recent surveys of hundreds of companies found that the average performance appraisal system is 11 years old, and that the typical system was designed by personnel specialists with little or no input from supervisors or employees. A Management-by-Objectives (MBO) approach is the most popular way of assessing executives, supervisors, and professional employees. An MBO approach usually has the employee and immediate supervisor agree on specific goals for the employee to achieve in the next year, and then measures success toward meeting the goals at the end of the year.

The surveys found that nonexempt (hourly) personnel are typically evaluated by assigning a standard term—such as excellent, good, average, poor, or bad—to traits such as attendance, quality of work, and other standardized factors; however, the surveys showed that executives and a sizable number of hourly workers often were not rated under any formal or announced format. The surveys also revealed that many evaluation forms asked for a mixture of quantitative and qualitative information. The most frequent quantitative measures for executives and managers were sales, profits, and costs, while the most frequent quantitative measures for hourly employees were attendance, number of rejects, and number of units of work produced.

The surveys also showed that supervisors and managers typically spend about seven hours per year evaluating the performance of high level employees, and about three hours per year in the evaluation of employees at lower levels. Many companies reported spending less than one hour per employee. Most companies claimed to conduct extensive evaluator training; however, much of it occurred only when a new system of performance evaluation was adopted. Many companies did little or no year-to-year training. Only one-fourth of the companies claimed they evaluated the evaluators or held them responsible for how well they conducted performance evaluations.

Almost all companies reported ratings in performance evaluations to be top heavy. For example, where a scale of five was used, it was common for 60-70 percent of all employees to be rated in the top two categories.

Seventy-five percent of the organizations claimed to have a dispute resolution process by which employees can contest their evaluations; however, only 25 percent reported that they have a formal appeal process.

Most companies admitted worrying about the fairness of their procedures. Many were concerned about performance evaluator's memory, with good reason. Evaluators conducting a once-a-year evaluation are too

likely to remember only the most recent performance—good or bad—rather than 12 months of job performance.

A 1990 *Business Horizons* article cited studies showing that managers often claim they perform annual performance evaluations, while their employees often say otherwise. In one study, 70 percent of managers said they did annual evaluations, but less than 30 percent of their employees said their performance was subject to annual review. The difference between responses—70 percent minus 30 percent appears to show that 40 percent of the employees were evaluated, but did not know it. Some employees reported that the only evaluation they ever received was during an exit interview upon termination of their employment.

PRACTICAL AND LEGAL PROBLEMS IN EVALUATIONS

Many performance evaluation systems now in use by employers are believed to be unfair by employees. Whether this is true or not, the belief increases the chance of an employment lawsuit eventually being filed. Once an employee or ex-employee files a complaint, the performance evaluations may be used to help prove employment-based legal claims. The problems with many performance evaluation forms, processes, and procedures giving rise to an increased chance of a lawsuit include:

- 1 .Appraisal forms that ask supervisors or raters to judge general personal characteristics, rather than job-related actions.
2. Performance evaluation procedures that ask supervisors or raters to judge highly subjective attributes such as personality or attitude.
- 3 .Lack of training for individuals who will conduct performance evaluations.
4. Lack of consistency among the various supervisors or raters in how they judge performance. Some are strict, others are lax, and still others always rate toward the middle.
5. Supervisors or raters who avoid being specific in their ratings of employee weaknesses and strengths in an attempt to just mechanically handle the required appraisal.
6. Supervisors or raters who actively avoid difficult subjects and controversy, or are afraid of creating a permanent record that might harm the employee in the future. Therefore, the lowest ratings given are fair or average, even when the employee is poor or terrible.

7. Supervisors or raters who desire to be considered nice, as well as avoid difficult situations, by overrating employees.
8. Supervisors or raters who hope that problem employees will somehow just go away, so they find no need to give honest, but poor, ratings.
9. Supervisors or raters who intentionally overrate employees they like or those who are their friends, while underrating other employees.
10. Supervisors or raters who discriminate based upon race, religion, sex, national origin, age, disability, or other illegal factors.
11. Supervisors, raters, or other managers who cannot, or will not, explain performance evaluation results to employees.
12. Performance appraisal systems that do not provide a procedure for employees to learn of their ratings and express disagreement with them.
13. Evaluation systems where there is no appeal, by grievance or otherwise, from an arbitrary, unfair, or discriminatory evaluation.
14. Appraisal procedures that do not include a systematic review to insure consistency and fairness.

DEVELOPING A SAFE, EFFECTIVE APPRAISAL SYSTEM

All employers engage in performance evaluations of employees. Those who claim they do not use—or have quit using—performance evaluations simply substitute a subjective, informal process for a more objective, formalized process.

Explicit, accurate performance appraisals convey the message that employees are accountable for their actions. The use of objective, job-related criteria applied in a consistent manner conveys the message that an employee is being treated fairly—a key method of avoiding legal action.

The development of actual performance evaluation systems and forms is beyond the scope of this training session; however, the following ideas are helpful in instituting an effective performance evaluation system that may prevent employee legal complaints, and help win lawsuits that might be filed:

1. *Adopt an official performance evaluation policy and procedure.* The recent trends in management in applying new programs such as Quality First, Self Directed Work Teams, or Deming Concepts sometimes result in discontinuing the use of formal performance evaluations. Some human resource managers go so far as to claim that the use of performance evaluations is outdated, thus they are not used by their companies; however, managers that claim that employees are not evaluated are deceiving themselves and their employees. Performance evaluation does occur. No company or governmental entity employs people regardless of job performance. Therefore, the lack of a formal system simply means that supervisors and their entities rely on an unwritten, unofficial system. These systems are unfair. Employees have a right to know how they are judged. Failure to grant this right may increase the chance of a lawsuit and the chance of losing the lawsuit.
2. *Do not copy existing generic evaluation forms.* Many of these forms simply ask the evaluator to rate employees as excellent, good, fair, poor, or bad—or similar terminology—based on a standardized list of characteristics such as attitude, attendance, ability, and dependability. Not only are these areas too subjective, but each company or governmental entity needs to tailor performance evaluations to its type of work force and needs.
3. *Develop job descriptions and coordinate evaluation forms with the descriptions.* To the degree possible, performance evaluations should measure employees' abilities to perform the specific, essential tasks of each job position. Good performance evaluations objectively measure exactly how well each employee performs the specific tasks of each job. Evaluation forms that are too general or subjective, or rate employees on factors not directly related to important job tasks, increase the chance of a successful lawsuit. For example, suppose a Hispanic lab technician is fired and sues for race discrimination. In defense, the employer produces his quarterly performance evaluations for the final 12 months of his employment that indicate he was rated poorly in the general categories of attitude, interpersonal skills, and overall performance. The discharged employee's attorney might find it rather easy to claim that the supervisor who did the rating discriminated against the individual because he was Hispanic; however, if each quarterly evaluation form

states the number of times the employee failed to complete lab assignments—for example an average of 43 times per quarter and the average rate for lab technicians is 5—the employer can easily prove that the stated reason for discharge, poor performance, was the real reason, and not a pretext for discrimination.

4. *Substitute objective measures of performance for subjective ones, where possible.* For example, do not have supervisors rate employees as excellent, good, poor, satisfactory, or unsatisfactory in attendance when you can have them record the exact number of absences in a given period. Do not ask evaluators to give a general rating as to work proficiency if they can record the number of times a job task was completed or not completed within an allocated time period. In the minds of many employees, courts, and juries, subjective factors imply discrimination.
5. *Train supervisors and other raters.* People who are to conduct evaluations must be trained as to the purpose of the employer's evaluation system, how to use the performance evaluation system, how to rate fairly and consistently, and how to obtain help if there are any questions or problems. One short training session when adopting a new evaluation system is not sufficient. New employee-evaluators should receive extensive training and older employee-evaluators need periodic updates in training. A key element of training should include education on how to discuss the evaluations with employees so employees clearly understand the conclusions reached, as well as needed changes in future employee performance. While many supervisors hate this area of their job and try to avoid even thinking about it, it is vital that they be trained how to conduct an evaluation meeting in a constructive, businesslike manner.
6. *Use an appraisal system that has at least one level of overview by a more senior supervisor.* This is of vital legal importance so that evaluations are checked for fairness and consistency among supervisors. Also consider asking a human resources supervisor or your attorney periodically to review performance evaluations to further insure consistency and correct documentation. Most successful lawsuits based upon performance evaluations are won by comparing the individual's ratings with the ratings of others and showing that the individual was treated more harshly than other employees.

7. *Require that all evaluations be discussed with the employee.*
All deficiencies in employee performance must be discussed in a specific, but positive, way so that employees have notice of the deficiencies and know what is needed to correct them. Otherwise, a later disciplinary action or discharge may result in a successful lawsuit.
8. *Give each employee a method of officially disputing evaluation conclusions.* This is best done by requiring that each employee sign and date the evaluation, stating that he or she has no objections to it, or in the alternative, summarizing disagreements with the ratings in writing.
9. *Provide a method of appealing evaluations.* Employees should be entitled to appeal the conclusions of a performance evaluation in a simple, but quick manner, and without fear of retaliation by the supervisor.
10. *Measure how well supervisors and other raters conduct performance reviews.* It makes little sense to give an employee a duty and not make him or her responsible for the performance of that duty. Yet many employers assign performance evaluation duties to supervisors without imposing personal responsibility to complete the evaluations in accordance with policy and general fairness. To avoid lawsuits, the primary decision as to how well the evaluators conduct performance evaluations should be judged on their fairness, consistency, and communication with the employee. Ability in rating subordinates should be a significant part of each supervisor's own performance evaluation.
11. *Establish an effective recordkeeping system.* Documents almost always carry more weight in court than does the testimony of the people involved in a dispute, for two reasons: First, they are written when memories are clearer. For example, a notation made at the end of the day that an event occurred is usually more accurate than trying to remember what happened months or years later. Second, they appear to be more honest. Judges and juries normally discount many statements made in preparation for a trial or during the course of the trial, believing (often correctly) that they reflect more what helps win the lawsuit, rather than what really happened. The same judges and juries give more credence to documents prepared before any lawsuit was filed. Therefore, all performance evaluations, notations of employee-supervisor discussions of the ratings, employee signatures and written objections, and any record of

appeals of ratings, as well as the results of the appeals, should be attached to or kept in the employee's personnel files.

12. *Remember that documentation occasionally can hurt, as well as help.* As a general rule, a written record will help defend against a plaintiff's lawsuit; however, documentation may sometimes lose a case. During the preparation of a lawsuit based on actions such as employment discrimination or wrongful discharge, the plaintiff's attorney may use extensive discovery procedures to examine a huge number of files, records, memos, and other materials. Even personal memos, electronic mail, voice mail, and other retained information may fall into the hands of the plaintiff's attorney. As a consequence, it must be insured, by training and supervision, that discriminatory or other incriminating statements are not made, stated, or kept in performance evaluations or other documents.
13. *Once prepared, use the performance evaluations.* Consult an employee's performance evaluations before making any major decisions affecting the employee. Pay raises, promotions, discharges, and other decisions must be consistent with the results of performance evaluations. If not, the employee is more likely to sue and may be more likely to win the lawsuit.

CHECKLIST OF SUGGESTIONS WHEN COMPLETING YOUR EMPLOYEES' PERFORMANCE EVALUATIONS

1. Clearly define the deficiency or problem.
2. Refer to a specific situation or course of conduct.
3. Be constructive.
4. Invite the employee's help for a solution.
5. Explain the importance to the City.
6. State the consequences to the employee of a failure to improve.
7. Summarize past discussions and note employee agreement.
8. Note concurrence by other levels of management, if any.
9. Offer assistance, but clearly place the responsibility for improvement on the employee.
10. Express serious concern and, if appropriate, disappointment.
11. Provide time limits.

ADDITIONAL DOCUMENTATION GUIDELINES

- 1 .Whatever you do, be consistent.
- 2.If you are going to record an event, do it in a timely manner while it is fresh in your mind.
- 3 .Date every piece of written documentation, including the year.
- 4.Whenever possible, discuss the incident with the employee and have the employee sign and date the documentation, indicating he or she has read it. If the employee refuses to sign, make a note to that effect on the documentation and give the employee a copy.
- 5 .Be sure the recording follows proper internal policies and procedures. Do not skip any steps unless it is deemed necessary to do so.
- 6.Beware of “notes to the file.” While they may be very useful in compiling a chronology of events, they are less helpful in defending against a charge if they were never discussed with employee.
- 7.Avoid any emotional content. This applies whether you are drafting a written reprimand or simply making an entry into your diary.
- 8.Do not include any “legal” opinions.
- 9.Do not include mental impressions. (Example: The way Mary came tearing in here today, she must have had another fight with her husband).
10. State the facts of what happened. (Mary arrived at work ten minutes late. This was the third time this week. She threw her purse onto her desk and when I asked how she was, she stated in a loud voice, “I feel like , if you really need to know!” Also present were Ed, Sally and Mike).
11. Avoid self-serving narratives. Above all, keep in mind the possibility that you may one day find yourself reading this to a jury. As you record events, ask yourself how it would sound to an impartial third party unfamiliar with the situation and the parties.

Discipline

A POSITIVE, PROGRESSIVE DISCIPLINE SYSTEM

1. *Employees are given advance notice of the rules and penalties for rule violations.* To be legally effective, an employee handbook or some other method of written communication of the basic disciplinary rules, procedures, and penalties must be distributed to employees. Requiring employees to attest they have read the policies or handbook by signing a statement to that effect and placing it in each employee’s personnel file

Brown & Hofmeister, L.L.P.

helps prove that the employer is serious about the issue. It also prevents an employee from later claiming in court that he or she was unaware of the rules.

2. *Supervisor First Notices Work Performance Problem or Minor Rules Infraction.* The supervisor speaks informally to the employee. To insure a positive approach that increases the chance of remedying the problem, supervisors must be informed of the various employee assistance programs that may be available to help employees.

3. *First Incident of Misconduct, or Failure to Improve Performance or Stop Minor Rules Infractions.* A verbal warning is given. This should be a more formal meeting between employee and supervisor where the supervisor reminds the employee of the employer's expectation of performance or behavior and the employee's responsibility for meeting the expectation. An informal discussion of the cause(s) of the problem and possible solutions should be discussed in a friendly, positive manner. The supervisor should place a memo about the meeting in the supervisor's own files noting the problem, expected remedy, and date. The original copy of the memo should be given to the employee and a copy forwarded to the Human Resources Division.

4. *Subsequent, Continued Poor Performance or Misconduct.* Give a *written warning*. During the written warning stage, the supervisor holds a formal meeting in which the employee is given the reasons why the behavior cannot continue. A major attempt is made to get the employee to actually agree to certain steps necessary for improvement, rather than the supervisor simply dictating the required steps. These steps are written out and the employee is asked to sign an agreement promising to take the listed steps. The employee is also given a chance to object or explain. Whether signed by the employee or not, the employee is told the memo will go into the employee's Human Resources file. The memo should be dated and filed. The purpose of the documentation is to

- a. eliminate misunderstandings between the supervisor and the employee;
- b. ensure that the employee is given notice of unacceptable conduct in time to permit improvement; and
- c. ensure that documentation is available to justify the action taken in the event of alleged discrimination charges.

5. *The Problem(s) Continue.* At this point in the disciplinary process, most employers give a final warning, suspend without pay, or place the employee on probation; however, *a one-day leave of absence* for the

employee to decide if he or she wants to resign or change his or her behavior may be more effective. The supervisor informs the employee before the leave of the improvements that will be expected if the employee decides not to resign. The notice should be written. A suspension becomes a permanent part of the employee's Human Resources file.

6. *Return From Suspension.* If the employee does not resign, the employee and the supervisor meet upon the employee's return to work to establish a written, clearly stated, set of *improvement objectives*. The improvement objectives should be based upon the changes discussed during the suspension meeting, and any promises made by the employee upon returning from the suspension. The employee should be required to sign an agreement promising to meet the new improvement objectives. If the employee refuses to agree to the needed improvements, the employee is terminated. Employees who agree to meet the improvement objectives are informed that failure to meet them will result in termination. Often the employee is also given a right to appeal the issuance or terms of the improvement objectives. A copy of the improvement objectives is placed in the employee's personnel file.

7. *The Employee Fails to Meet Improvement Objectives.* The employee is terminated.

THE TOOLS OF A PROGRESSIVE DISCIPLINARY SYSTEM

Progressive discipline usually entails the following steps or procedures. These steps are not and should not be rigid nor is it imperative that a documented verbal reprimand be the first step. Based on the severity of the infraction, any step listed below may be the first step. For example, if an employee is tardy three days in a row, then a documented verbal reprimand may be appropriate; however, if that same employee comes to the workplace with a sawed off shotgun, then termination would be appropriate, regardless whether this was a first offense.

The Documented Verbal Reprimand

The documented verbal reprimand (or oral reprimand or employee counseling) is best suited for a minor rule infraction or incident of substandard performance. It should identify violations and indicate areas needing improvement. A written record of the warning should be maintained. Often these warnings are kept in departmental files and not the City's "formal" personnel files.

The Written Reprimand

A written reprimand is a formal warning of an infraction that may result in suspension, demotion or termination should the violation recur. Prior to the issuance of a written reprimand, a disciplining supervisor should confer with his immediate supervisor regarding the proposed discipline. Both the disciplining supervisor and the employee should sign the written reprimand. Included in the written reprimand should be a statement of what changes in behavior are expected, when the next evaluation will be held and the penalty that will be imposed if no changes are made by the employee. The written reprimand usually is placed in the employee's permanent personnel file. An appeal may be allowed, depending upon the City's personnel rules.

Suspension

A suspension is to bring about a change in behavior and results in time off without pay. The employee is encouraged to reflect on his behavior during the suspension and determine whether he wishes to correct the offending behavior or terminate his employment. Usually a suspension of more than ten (10) days requires the written approval of the City Manager. An appeal may be allowed.

Demotion

An employee may be demoted for a disregard or violation of the City's personnel rules or for repeated refusal or inability to improve performance. Demotions may be for a short period of time or permanent, depending upon the circumstances. In all cases a reduction in salary results. An appeal may be allowed.

Termination

When all else fails, termination of employment may be necessary. As referenced in this chapter, it should be well documented and steps taken to insure that the termination proceeding is handled professionally.

TERMINATION PROCEDURES

Once the decision to terminate an employee is being seriously considered, the following guidelines should be followed.

1. The Termination Decision Meeting. The supervisor (and department head or other designated individual, if applicable), a Human Resources representative and an attorney, if needed, meet to determine the following matters:

A. Is there a reasonable basis for immediate discharge or, if not, has the progressive discipline system been followed?

[NOTE: Rarely is immediate discharge advisable. It should be considered only in those situations where there are threats to persons or illegal activities. Examples where immediate termination is or may be appropriate are as follows: Damage to property, theft of property, physical assault at work, possession or sale of illegal drugs or alcohol at work, possession of a weapon at work, falsification or destruction of records.]

B. Is there complete documentation that “proves” the charges?

C. What should be the exact, stated grounds for termination?

D. Are the stated reasons for the termination consistent with problems that previously have been discussed with the employee?

E. Does the termination appear to violate any state or federal laws or does the termination look like discrimination or retaliation?

F. Is the termination of the employee consistent with the manner in which other employees have been treated?

G. Are there any facts such as a personal dispute between the employee and supervisor, statements about the employee’s age, sex, race, etc., or past inconsistencies in the treatment of the employee that may assist the employee in proving discriminatory treatment by the City?

H. Are there any provisions in the City’s Policies and Procedures Manual that may protect the employee from being terminated under the present circumstances?

I. Should the employee be given the option of resigning?

2. The Termination Meeting with an Employee. The meeting at which the employee is given notice that he or she will be terminated should be:

A. held in a location where confidentiality may be maintained;

B. generally not held immediately before or after a holiday, vacation or other special event (the employee’s birthday, for example);

C. held with a witness present (usually a Human Resources representative);

D. may be tape recorded;

E. conducted in a professional manner without emotion (if possible) and the supervisor should be careful about statements made during the interview;

F. very brief; and

G. to the greatest extent possible, kept confidential (*i.e.*, the supervisor should not return to his office and immediately call everyone he knows and say “guess what, old Bill has been fired at last”).

ADDITIONAL REQUIREMENTS OF A GOOD SYSTEM

Some additional requirements that help in creating an effective disciplinary system that reduces legal complaints and lawsuits, and may win those that are filed, include:

- 1 .All meetings should be held at the end of a weekday that does not precede a holiday, if feasible.
- 2.All steps and meetings should be conducted in private. Starting with the oral reprimand, employee privacy should be respected, even if by just finding a quiet corner of the workplace where co-workers cannot hear the discussion.
- 3 .All actions, starting with the oral reprimand, must be documented in writing. All documents beginning with the written reprimand generally should be attached or added to the employee’s personnel file, depending upon the severity of the discipline.