



# Best Practices for Employee Performance Management

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# Best Practices in Performance Management Starts with Hiring

# Position Description

- Defines expectations of the position for the employee and employer
- Provides baseline objective criteria for performance evaluation
- Defines essential functions of the position
- Defines minimum qualifications for a position
- Provides basis for determining categories for veterans preference 100-point competitive scale

# Position Description

- Essential functions
  - The fundamental duties of a position that the individual who holds the position must be able to perform unaided or with reasonable accommodation
- Reasons a function may be considered essential
  - Job exists to perform the function
  - Limited number of employees who can perform the function
  - Function is highly specialized and the person is hired for his or her expertise or ability to perform the function(s)

# Advertising

- No statute *per se* requiring that the position must be advertised
- Because of veterans preference and anti-discrimination laws, posting may be advisable/required
- If grant funded, grant may require

# Application

- Tennesen Notice (Minn. Stat. § 13.04)
  - Must provide whenever asking an individual to provide private data under the MDGPA
  - Must include:
    - The purpose and intended use of the data;
    - Whether the individual is legally required to provide the data;
    - Known consequences from either providing or refusing to provide the information; and
    - The identity of other persons and/or entities with statutorily authorized access to the data

# Criminal Record/History (Minn. Stat. § 364.021)

- Prohibits employers from inquiring into or considering the criminal record or history of a job applicant until the applicant is selected for an interview by the employer
  - Except positions for which employers have a statutory duty to consider criminal history or conduct a criminal background check when hiring, such as law enforcement
- May only disqualify applicants from consideration for a position on the basis of a past conviction unless the crime(s) are directly related to the position for which the applicant is applying



# Veterans Preference

- Minnesota Statutes, Sections 197.447, 197.455 and 197.46
  - Hiring
  - Discipline/Termination
- Who is a Veteran?: Review the DD214 Form

# Interviews

- When done by a quorum of the board, OML applies
- Standard set of questions should be asked of each applicant
- Questions and notes regarding answers should be maintained for at least 18 months

# Interview

- Make sure questions do not run afoul of anti-discrimination laws
- Can not ask questions soliciting information about protected classes
- Be careful of “casual conversations” that may bring up information related to protected classes

# Protected Class Categories

- Race
- Color
- Creed
- Religion
- National origin
- Sex
- Marital status
- Disability
- Public assistance
- Age
- Sexual orientation
- Local human rights commission activity
- Pregnancy
- Genetic information
- Familial status

## Avoid

- “How many children do you have?”
  - “Are you planning on starting a family/having more children?”
  - “What kind of childcare arrangements do you have?”
- “Are you married? Single? Widowed? Divorced?”
  - “Who is your spouse?”
  - “What is your maiden name?”
- “To which political party do you belong?”
  - “For whom did you vote in the last election?”

## Reason/Alternative

- Could be pregnancy, gender, familial status discrimination
  - Focus on availability to work, if this is the concern behind the question
- Could be marital status discrimination
  - It is best to avoid this type of question
- Could be discrimination based on First Amendment rights
  - It is best to avoid this type of question

# Reference Checks

- Part of due diligence in the hiring process
- May yield additional insight on the top applicants

# Google/Internet Reference Checks

- Using the Internet or social media to “check out” or evaluate an applicant for employment
- Consider whether the benefits outweigh the risks

# Discussing Personnel Issues

- Care must be taken not to share private personnel data with anyone not authorized to receive the data
- When seeking input from professional peers, discuss issues in general terms only
- Omitting the employee's name may not be enough if the other information provided can be used to identify the employee



# Performance Management

- Ongoing process
- Designed to improve the efficiency and effectiveness of the organization
  - Employees significantly affect the organization
- Requires work
  - Planning
  - Managing
  - Evaluating
- Document, document, document!

# Plan

- Performance management starts with the position description
- Should already be established per the hiring process

# Position Description

- Essential functions: The fundamental duties of a position that the individual who holds the position must be able to perform unaided or with reasonable accommodation
- Reasons a function may be considered essential
  - Job exists to perform the function
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# Position Description

- Knowledge, skills and abilities
  - Specific tasks
  - Understanding of specific subject areas
- Minimum training and experience
  - More general
  - Easier to identify

# Manage

- The process of working toward the performance expectations established in the planning phase and listed in the position description
- Observing
  - Direct: first-hand knowledge
  - Indirect: learning by reviewing work
- Coaching
  - Provide immediate positive reinforcement
  - Handle problems, deficiencies, trouble spots as they occur

# Manage

- Knowledge and skills to monitor
  - Conceptual: ability to see the “big picture,” set priorities
  - Perceptual: understanding mission, goals, structure
  - Interpersonal: ability to work with people
  - Technical: ability to use tools and concepts
  - Personal: ability to take action or responsibility

# Performance Evaluation Benefits

- Opens lines of communication regarding performance and expectations
- Provides employee feedback
- Increases morale
- Assists in managing talent

# Performance Evaluation Benefits (Continued)

- Assists in career development
- Identifies areas of needed training and improvement
- Provides documentation for making fair, objective, legal personnel decisions



# Provides Opportunity for Dialogue

- Employees can:
  - Analyze their performance and look for ways to improve
  - Develop their communication skills
  - Find role models
- Employers can:
  - Help employees identify strengths and areas of improvement
  - Provide resources, suggestions, opportunities

# Completing the Evaluation

- Do not allow personal biases to affect your judgment; be objective
  - Focus on concrete examples
- Do not use almost meaningless rating scales
- Do not rely on memory
  - Track both positive and negative examples

# Completing the Evaluation

- Avoid common rating errors
  - Recency effect
  - Horns effect
  - “Big surprise”
- Do not avoid tough issues

# Employee Development Plan

- Appropriate for all employees
- Address employee's strengths and weaknesses
- Establish employee's performance factors and goals for the next evaluation cycle

# Performance Goals

- Specific: not general
- Measurable: quantifiable
- Attainable: achievable in the context of present realities
- Realistic: capable given existing resources
- Timely: date by which the goal must be accomplished

# Conducting the Evaluation

- Establish meeting location, date and time well in advance of the meeting
- Prepare the employee for the meeting
  - Consider a self-evaluation
  - Consider providing a copy of your evaluation prior to the meeting
- Prepare yourself for the meeting

# Conducting the Evaluation

- Avoid phrases such as:
  - You're wrong
  - What was your problem
  - You did a really great job, but...
    - Negates compliment
  - I understand
    - Following an excuse for poor performance

# Conducting the Evaluation

- Review the job description with the incumbent
  - Identify the most important job functions
- Discuss performance standards
- Discuss performance goals



# Conducting the Performance Evaluation

- Listen to what the employee has to say
- Focus on the employee and keep your mind open
- Try not to interrupt
- Utilize nonverbal and verbal signals to show you are listening

# Performance Evaluations

- Should be written
- Signed by the employee
- Placed in the employee's personnel file

# Warning Signs of Systemic Performance Evaluation Issues

- Surprise ratings during review
- Inconsistent application of rating system
- Ratings don't reflect actual employee performance
- Productivity/Morale decreases during evaluation time

# DEALING WITH UNSATISFACTORY PERFORMANCE

Performance Management

# Options/Strategies

- Informal Coaching
- Formal Coaching
- Performance Evaluations
- Performance Improvement Plan ( PIP)
- Directives
- Discharge

# Performance Improvement Plan

- Can be initiated at any time
- Should be:
  - Written
  - Signed by the employee
  - Placed in the employee's personnel file

# Performance Improvement Plan

- Performance evaluation notations have been unsuccessful
- Problem is of a nature that it cannot be addressed properly in a performance evaluation
- Problem is serious and needs immediate attention

# Elements of a Performance Improvement Plan

- Identify the specific problem(s), including examples
- Explain why the employee's conduct/ performance is not acceptable
- Identify the specific areas to be improved
- Establish expectations for improvement including timeframe and date to revisit the issue



# Elements of a Performance Improvement Plan

- Include directives that are clear and concise
- State the consequences for failing to improve performance
- Provide the employee an opportunity to present ideas for coaching or training
- Offer and identify assistance/resources for employee to improve performance

# Elements of a Performance Improvement Plan

- State that you will assume the employee understands the PIP unless he or she seeks clarification
- Warn the employee, failure to follow through on PIP may be subject to discipline, up to and including discharge

# Directives

- Directives to employee seek to change a certain behavior
  - You will arrive to work at X
  - You will follow directions given by your supervisor
  - You will not swear at work
- Typically address concrete concerns:
- Failure to abide by directives leads to discipline

# Notification

- Meet with the employee to discuss the PIP/Directives
- Have the employee sign the Notice
- Send a follow-up memo to the employee memorializing any verbal clarifications
- Place all documents in the employee's personnel file

# Note of Caution

- Do not issue letters or evaluations praising the employee for an improvement in performance immediately following a disciplinary incident or poor evaluation until a reasonable amount of time has passed

# Note of Caution

- Referring the employee to an employee assistance program (EAP) should only be done as an option and should not be made mandatory
- Never suggest to the employee that he or she may have a physical, mental or emotional problem that is affecting his or her work

# Discipline

- Consider any terms or conditions outlined in the organization's personnel policy or collective bargaining agreements
- Be wary of inconsistent application of rules

# Last Chance Agreement

- Often times agreement between employer and employee (often involving union) that says if employee violates agreement will be terminated



# Note of Caution

- Contract language or policies that mandate progressive discipline can adversely affect the employer's disciplinary plan
- Preserve the option to discharge an employee or skip steps for egregious conduct even when it is the first violation

# Note of Caution

- Do not agree to remove the discipline from the file after a specific period
- If removed, the employer will have to start over to develop the record and will have lost the ability to argue there is a continued pattern of misconduct or poor performance by the employee

# Areas of Increased Risk

- Discipline/Termination immediately after
  - Protected leave
  - Disclosure of a disability
  - Election/Protected first amendment conduct
  - Whistleblower Conduct
  - Worker's Comp report of injury
- Discipline/Termination may be warranted, but the file should warrant a legal review
- Investigate and document the actions that necessitate the discharge

# Areas of Risk-Investigation

- “Neutral” investigator
- Tennessen Notice/Garrity Warning
- Offering “confidentiality”
- Who may have access

# Discharge

- Provide the employee with due process
  - Notice of expectations and work rules
  - Notice of performance deficiencies
  - Notice of charges for egregious conduct justifying termination
- Conduct a Loudermill Hearing-
  - Prior to being discharged, a public employee has the right to an informal pre-termination meeting to respond to the allegations against him or her
  - The hearing is generally informal

# Best Practice

- Include a veterans preference notice with all discharge, layoff or demotion notices, regardless of whether you think that the person is a veteran

# Right to a Hearing

- The hearing is held before a neutral decisionmaker
- Public employer has the burden at the hearing to show that it acted reasonably and that there is just cause for the discharge or demotion
- Veterans covered by a CBA must choose between grievance procedure or Vets Pref hearing

# Nondisciplinary Layoff or Demotion

- Not considered removal when done by seniority and current position abolished
- Veteran can challenge if he or she believes the action is being used to avoid VPA rights
- Notice of right to challenge should be given in the layoff notice



# Peace Officer Discipline Procedures Act (Minn. Stat. 626.89)

Termination

# Peace Officer Discipline Procedures Act (PODPA)

- Establishes regulations when investigating allegations against a licensed peace officer and a formal statement is required of that officer.
  - Notice of formal statement must include:
    - Interview location
    - Written complaint signed by complainant
    - Witness list, upon request
    - Copies of witness statement or investigation report, upon request
    - Length of session
    - Electronic recording
    - Notice of use of admissions

# PODPA

- Requires CLEOs to have written procedures re: investigating complaints of misconduct
  - May result in disciplinary action
  - Investigation process
  - Imposition of sanctions
  - Appeal process
  - Notification of complainant
  - Effective date

# PERFORMANCE PROBLEMS INVOLVING DRUGS, ALCOHOL, CANNABIS OR MENTAL HEALTH ISSUES

Performance Management

# Handling Performance Problems

- Document the performance issues, not the disability
- Never assume to know what is affecting the employee's job performance
- Treat the employee like any other employee whose work fails to comply with the job description or to meet expectations
- Bring performance issues to the attention of the employee

# Handling Performance Problems

- Provide the employee the opportunity to correct his or her performance
- Never suggest to the employee that he or she may have a physical, mental or emotional problem that is affecting his or her work
- Be prepared to deal with employee misconduct or performance that does not improve

# Conclusion

- Have an effective performance management system
- Consult with legal counsel or labor/employment specialists