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Annual Evaluation Systems And Malpractice

Law360, New York (May 10, 2010) -- The Senior Vice President for Global Human Resources calls you into her office and asks you quietly how it is that you managed to forget that the FMLA was in the picture in a difficult situation involving a disabled employee. Chills run down your spine. And that's how it feels to a lawyer who hears: "You're committing malpractice."

About 20 years ago, I attended a program sponsored by the National Employment Lawyers Association. On the second morning, a prominent employment lawyer and speaker pronounced as follows: "If you're not telling your clients, right now, to require their existing employees and new hires to sign arbitration agreements, whether they like it or not, you're committing MALPRACTICE!"

The dreaded word. I looked around. Should I ask my neighbors at the table if they're doing it? If they are, and ask me if I am, what do I say, because I'M NOT DOING IT! Do I need to leave the room and call our malpractice carrier? Do I need to call all my non-union clients and tell them arbitration agreements are in the mail, and they had better get busy having them signed by every existing and incoming employee?

After fully analyzing the pushes and pulls, we conclude that, yes, it can be done, and that, for most employees, it should be done. Was it malpractice not to advise it? Not really; the pronouncement was a bit hysterical.[1]

Oblivious to this experience, I now offer the following pronouncement of my own: "If you're telling your clients to implement an annual evaluation system, you're committing MALPRACTICE." And if you're listening to your lawyer tell you that you should implement an annual evaluation system, you need to pause and reconsider.

I recently participated in a beauty contest sponsored by a large law firm looking for national employment counsel. During the interview, I offered my pronouncement. I admit that I was half-kidding and that this advice falls in the category of attention-getting, not true malpractice, but it's close, and it is indisputable that employers continue to self-destruct with their existing annual evaluation systems.

I have done nothing but employment law for three decades now. I have handled hundreds and hundreds of litigations, arbitrations and informal efforts to resolve employment disputes. An early request of the client, when the demand letter, charge or complaint comes in the door, is: "Please send over a copy of the employee's personnel file." When that file arrives, better than 75 percent of the time it contains annual evaluation forms, and better than 90 percent of the time those evaluation forms are going to be exhibits for the employee, not my client, the employer.

Sometimes an otherwise good idea crashes into immutable reality. Here's one immutable rule in our field I'm guessing all readers in the HR field will recognize — we can train supervisors and non-supervisors alike until we're blue in the face, but we are always going to have sexual harassment in the workplace. Seventeen percent of

marriages are between people who met at work, and sex and its permutations, including flirting, is a force of nature.[2]

That is not to say that employers should not have policies that prohibit sexual harassment, or that we should not train and train again. If the policies are good, and the training is effective, we will stem the tide and may even have a defense. But we will not eliminate the problem.

And, I submit, employers can also train supervisors to evaluate their employees honestly until they're blue in the face, but, the unfortunate truth is, they will not do it, and there are equally immutable forces of nature at work to explain why they won't.

I have a terrific secretary as I write this today. Martha's predecessor (pseudonym Pam) was awful. We have annual evaluations at our firm. (Who doesn't?) As many supervisors do, I put off doing the evaluations on my plate, including Pam's, as long as I could. I can almost guarantee that you, the reader, do the same with the evaluations you have to do. No one likes doing them for a couple of very powerful reasons.

So I'm sitting at my computer looking at the first page of Pam's blank application form on a Saturday morning, unable to put the evaluations off any longer. I do the associates first. Why? Because I'm pretty happy with their performance, and so it's easier and more pleasant for me to do. Already a hint of the trouble I'm in.

I then begin Pam's. "Carefulness and Attention to Detail." My range of options is from 1 to 5, 5 being really careful and attentive to detail. Pam is not careful or attentive to detail; certainly not as much as I would like. I stare at the screen. Five? No, that's easy; she's not even close to a 5. Four? She'll be unhappy, but I can justify it. Three is "acceptable." Two is "below firm standards." I give her a 2 and move on, completing my relatively honest evaluation.

Saturday goes by. Two things are rolling around in my head: (1) We're not going to terminate Pam. She's not great, but she's not awful either. Her phone manner is terrific. She's pleasant to be around. She is at least trying to do a decent job; and (2) Pam is going to be given a copy of my evaluation as part of the review process, it is going to affect her raise, and when she sees that 2, she's going to be very angry with me.

Sunday morning comes. I go back to the evaluation and change the 2 to a 3. She won't be happy with that either, but at least she won't be infuriated with me, and the last thing I want is for her to be giving me the cold shoulder for the next three months.

THIS IS THE THINKING PROCESS OF SOMEONE WHO HAS BEEN TRAINING AND PREACHING TO HR MANAGERS, LINE MANAGERS AND SUPERVISORS FOR 30 YEARS HOW CRITICAL IT IS TO DO HONEST EVALUATIONS, AND WHO LIVES DAILY WITH THE OFTEN DISASTROUS CONSEQUENCES TO EMPLOYERS HE REPRESENTS ARISING FROM THEIR FAILURE TO DO SO!

What to do? First, if you do not have an annual evaluation system, do not implement one. Human nature and factors beyond your control and your ability to train will defeat objectivity. It's immutable. Supervisors have not, cannot now, and will not evaluate their employees in the future honestly, at least not until they are so fed up that they do an evaluation that is so negative that it makes no contextual sense.

Here's an example of what can happen when fed-up time comes and the employer went ahead with the termination based upon the final, negative evaluation:

Cross-examination in an age discrimination case —

Q. You evaluated Pam for 10 years, correct Mr. Wirtz?

A. Yes.

Q. And during those 10 years, you evaluated her on 10 occasions, correct?

A. Yes.

Q. And her 2008 evaluation was positive, isn't that correct?

A. Yes.

Q. And you evaluated her positively in 2007 as well, isn't that true?

A. Yes.

Q. Tell us about the 2006 evaluation please.

A. It was positive overall.

Q. Could you point out something you would describe as "negative."

A. [The witness peruses the document.] Not at this time, no.

Q. Would you like to take it home and come back tomorrow and point out what was negative to the jury?

A. Not that much, no.

Q. Take a look at Exhibit G, Pam's evaluation for 2005 please. How would you characterize that?

A. It's positive.

Q. And 2005?

A. 2005 what?

Q. 2005 was also a positive evaluation, no?

A. Yes.

Q. Look at Exhibits A through F, the evaluations for 1999, 2000, 2001, 2002, 2003 and 2004. All of these evaluations are also positive; in fact, very positive, wouldn't you agree?

A. I would agree, yes.

Q. And then suddenly, when Pam turned 50, you decided she was terrible, isn't that correct?

A. [The witness stares into space.]

Here are a couple of options for answers:

A. Yes, I decided she was terrible when she turned 50.

Perhaps that's true, but can you think of a worse answer? How about this instead —

A. No — she was mediocre from the date we hired her.

Q. Alright, Mr. Wirtz, please review Exhibits A through J and show me where in the evaluations you let Pam know that you had a problem with her performance. Actually let me withdraw that question and first ask you this. You would agree with me, wouldn't you, that, in fairness, an employer who thinks an employee is doing poorly has an obligation to let her know before she gets fired, wouldn't you?

Not pretty and not uncommon. Nonetheless, most employers have an annual evaluation system, and no employer I know (yet) is willing or able to eliminate it. These systems are the predicate for compensation decisions, promotion decisions, and presumably discipline and counseling for poor performers, and employers just cannot seem to contemplate giving them up. In the Business Section of the New York Times for Oct. 18, 2009, there is an interview with someone from a large and well-known company. She is quoted as saying: "If I had my way, I wouldn't do annual reviews ..."

If I had my way? The person quoted is the company's Chief Executive Officer, who obviously has at least something to say about how Yahoo operates, but her accurate concerns are overridden by the many other needs the evaluation system presumably serves, and she's far from alone.

So, as an old labor lawyer, I offer the following compromise. Years of personal experience working with evaluators and evaluation systems, including my own, and a pretty basic analysis of human nature tell me that asking supervisors to say that an employee was a poor performer for the entire preceding year (or even half-year) is asking too much; at least until they're so fed up that they're willing to take the underperforming employee and do whatever it takes to get rid of her, which triggers the kind of cross-examination set forth above.

Until then, supervisors can, and they will, err on the positive side on a numerical evaluation system, or even a pure narrative system, for reasons that you cannot do anything about. And in my experience they will do so even if you include a category on the evaluation form for supervisors, which requires the supervisors of supervisors to evaluate their direct reports on the honesty of their evaluations, because the same immutable rule continues to apply.

However, supervisors can be trained to address performance issues as they arise, and that leaves some room to maneuver. I edit a document by hand and give it to Pam. She inputs my changes in her fashion; i.e., she misses about 15 percent of them. Certainly the easiest and least confrontational option I have is to input the remaining 15 percent myself.

But it is only marginally more difficult to ask her to come in to my office, to point out the changes she has not made, and to tell her how important it is for me not to have to worry that she has input only some of my changes, because of the time pressure I'm under.

And, critically, it is not difficult at all for me to keep the original work product she gave me in a file in my desk. I can do this with every product that I'm unhappy with. If she gives me attitude about it when I return the poor product, I can make a two-line note about what happened, date it, and put it in that same file.

I can then pull out this file when it comes time to do Pam's annual evaluation. My file will recall for me how frustrated she has made me during the year, so that I am more likely to stick with the 2 on Carefulness and Attention to Detail I gave her in the first place.

And even if that does not happen, at least I will be in a position on cross-examination to say that, yes I gave her a 3, but at our firm employees get 3's unless their performance is catastrophically bad, and she knew that I had concerns about her accuracy and attention to detail, because I raised those concerns with her directly on X and Y occasion, and here are the work products that concerned me, and she gave me a bit of attitude about it on Y occasion. Not perfect, I grant you, but at least there will be something there for the defense lawyer to work with.

Can supervisors be trained to do these kinds of ad hoc evaluations? Yes. Will they do it? On balance, the answer is that they will if it's demanded of them, and it is beyond debate that they will do so far more frequently than they will fill out an annual evaluation honestly. Can this kind of ad hoc evaluation be used simultaneously with an annual evaluation system? Yes. Should it be done? Yes; at a minimum.

While I'm shouting MALPRACTICE, how about failing to advise your clients that personality tests now mean litigation with the EEOC if they catch you using them, and I don't care if they help you find people who are good at sales, or if your tests aren't pre-offer medical examinations within the meaning of the ADA, or if they're well-validated? I feel another article coming on.

--By David M. Wirtz, Littler Mendelson PC

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The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] And 20 years later, I'm on the verge of reconsidering arbitration as an alternative that my clients should consider. I thought that by this point there would be enough litigation over the enforceability of arbitration agreements to give us some basic ground rules that we could count on, so that they would not be spending money fighting over how they're going to litigate an employment dispute before they begin spending money on litigating the underlying dispute itself. This, combined with the costs of arbitration under agreements that have become increasingly complex in an effort to insulate them from attack as unconscionable, have made opting for arbitration agreements a much closer call than I expected.

[2] Go online to find your future spouse, New Scientist, Aug. 16, 2008.