

LEGAL FUNDAMENTALS OF EFFECTIVE PERFORMANCE APPRAISALS

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Abstract: *The appraisal system as a means of disciplinary or termination decisions support is a common target of legal disputes by employees involving charges of unfairness and bias. Since labor and employment laws do not mandate performance appraisals, the latter have become one of the most critical tools of risk management that subject an employer to various liabilities. The study provides comparative legal analysis of fundamentals of effective and fair personnel appraisals, concerning issues raised in determining universal core concepts and principles of performance appraisal to be used in formulation and implementation of performance appraisal in various national jurisdictions. This study was conducted as a part of the complex research project aimed at finding ways to improve legal provisions of personnel evaluation process in the public sector (scholars and lecturers at universities) under the state policy of improving the system of personnel certification in Russia with the financial support by the Ministry of Education and Science of the Russian Federation (project #29.114.2016/HM).*

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1. INTRODUCTION

Performance appraisal research over the last 15 years has begun to examine the social and legal context within which the performance appraisal process operates (Levy, Williams 2004). A lot of debate has happened over performance evaluation methods due to the rapidly changing requirements of the global economy, highly competitive market and lack of substantial government laws regulating the implementation of this critical and risky HR management tool.

Performance appraisals provide justification for salary increases, determine whether an employee will be promoted or even kept on staff and identify how the employees' goals merge with the company's business goals- (Mayhew 2016). Employers upgrade personnel evaluation process to maximize chances for getting the right fit between jobs and employees, to

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retain the most efficient ones and to dismiss those with poor performance. Proper performance appraisal methods are opted considering the job description to determine the performance standards an employee must achieve. Most companies evaluate personnel performance using rating and metrics addressing strengths and weaknesses, measuring work contribution, determining training needs, identifying poor performers. The methods of performance appraisal are supposed to be documented in Personnel Appraisal Manual (or the equivalent), a detailed description of how the company evaluates performance and why the certain rating system is used. The evaluation process is supposed to be properly recorded, too.

In Russia performance appraisal review must be fully registered to be used as the legal basis of a fair employment termination (Merkulov 2004). In the U.S. performance review documents can be used in defending employers against a lawsuit from employees' claims of discrimination complaints (EEOC). A performance appraisal itself may become the target of a lawsuit. While courts are cutting exceptions out of the old 'at-will' doctrine, employers are facing requirements to prove legitimacy of business reasons for personnel actions.

The observation of legal provisions of federal and state labor and employment acts showed there are no laws mandating performance appraisals (in Russia or the U.S), though there are some federal requirements related to some aspects of employees' evaluation.

In Russia they mainly refer to fair employment termination reasons and some protected groups that cannot be subject to any performance review process (Labor Code of the Russian Federation 2016). Besides there are more than 20 business field laws providing obligatory performance evaluation procedure in public sector but they fix different goals, principles, timing, documents, assessment procedures and techniques, so they lack a unified baseline (Orlovskiy, et al. 2010).

In the U.S. employment laws and regulations with implications for performance appraisals include:

Title VII of the Civil Rights Act,

Age Discrimination in Employment Act of 1967,

Title I of the Civil Rights Act of 1991,

Americans with Disabilities Act 1990 (U.S. Department of Labor 2000).

They focus on prohibiting unfair discrimination in all terms and conditions of employment based on race, color, religion, sex, national origin, age and disability.

Under the four-fifth rule established by the Equal Employment Opportunity Commission (EEOC) - 1964, there is a presumption of discrimination where the selection rate of the protected group is less than 80% of the non-protected group (disparate impact).

Uniform Guidelines on Employee Selection Procedures - 1978 provide a framework for employers to determine the proper use of tests and other selection procedures.

So, most of the laws and requirements stipulate that employers can only use personnel evaluation instruments that are unbiased and fair to all groups. Discriminating and not job-related testing and assessment is prohibited.

The study of Russian and the U.S. legal practice showed that there is a huge amount of court cases addressing the issues of performance appraisal. There is a steady annual 7% increase in cases of discrimination according to EEOC Report 2015.

Among different legal battlegrounds for performance appraisal in the U.S. and the Russian Federation (RF), there can be

- employer's negligence in conducting, or failure to conduct, a performance evaluation (e.g., *Schipani v Ford Motor Co.*; RF № 33-424/2011);
- non-constructive, abusing interviewer's behavior (e.g., *Jensen v Hewlett-Packard Company*; RF № 33-3682/2014);
- biased assessment methods (e.g., *Schipani v Ford Motor Co.*; RF № 33-639/2015);
- inadequate definitions of performance criteria (e.g., *Supra, Hoffman v MCA, Inc.*; RF № 33-631/2015);
- Inappropriate, harassing comments made to employees during the evaluation process (e.g., *Ton v. Information Resources, Inc.*; RF № 2-977/2014);
- defamation of performance reviews (e.g., *Foley v Interactive Data Corp.*; RF № 33-8582/2011).

The legal grounds of more than 300 court cases involving personnel appraisal process administration in Russia and the U.S. show that the main reason of unfair work practice is the absence of essential uniformed, valid and fair concepts, principles or criteria serving as legitimate fundamentals of effective personnel appraisals to be applied to various business environments.

In order to make formulation and implementation of performance appraisals effective and legally liable aligned with various national jurisdictions and beliefs, it should follow some universal fundamentals or core principles, which are fair and non-biased.

So a complex comparative legal research was aimed at identifying work the universal foundation principles to regulate effective personnel appraisals to help national and international employers minimize their exposure to liability for unfair terminations and related claims.

2. METHODOLOGY

The comparative method was used to identify common legal problems and solutions while comparing different legal systems, rules and regulations with implications for personnel performance appraisals. Some methods were used in the context of comparative research to identify the common core principles of regulation of effective personnel appraisals in different jurisdictions. They are the functional method and the structural method. The name of the method points out the specific feature of the approach, including its combination with other methods of legal research.

The idea in functionalism is to look at the way practical problems of solving conflicts of interest are dealt with in different societies according to different legal systems. The rules and concepts may be different, but most legal systems will eventually solve legal problems in a similar way (Van Hoecke 2015). The functional method was used to investigate such 'functional equivalents' at the level of the solutions that allowed to perceive the problem under the study independently from the doctrinal framework of each of the compared legal systems (Husa 2011). It proved to be true that there are relatively universal human attitudes and common legal solutions to the problem of building a system of fair and non-biased personnel evaluation in different legal and business environments.

The functional method was applied at the level of micro-comparison. From a broader perspective a more structural analysis of elements that form a system is needed, "this latter notion being characterized by the creative

interaction of the elements within a totality that can be identified as having frontiers and thus being independent” (Samuel 2014).

So to achieve the goal of the study the structural method was used to identify some comparative criteria for classifying common principles of personnel appraisals in different legal systems.

3. RESEARCH RESULTS

A personnel appraisal is viewed as systematic and formalized process of assessing an individual employee's job performance and productivity in relation to certain pre-established criteria based on liable universal principles and organizational standards.

The current comparative legal study resulted in the identification of four general principles that are fundamental and crucially important in understanding the legal context and governing the employment process with implication for conducting personnel appraisals in diverse global business environment.

The universal principles are:

- *equity and justice*, characterized in terms of prohibition of employment assessment discrimination,
- *consistency and objectiveness* expressed in terms of uniformed evaluation procedure, fair assessment techniques and employment decisions
- *regularity and timeliness*, facilitating a systematic, unbiased process within a fixed period of time applicable for every employee with the same job and position;
- *efficiency and transparency*, maintaining validity and reliability of ratings, alliance with corporate goals, pre-evaluation notification and constructive feedback.

These four basic principles are consistent with international legal, professional, ethical standards and can help develop fair, unbiased practice of personnel appraisal procedures in a company.

4. DISCUSSION

Basically, there are two main functional approaches to personnel appraisal:

- (a) to control performance which results in disciplinary decisions, mostly contract termination (is carried out by members of a specific commission);
- (b) to search better ways to improve personnel performance (is carried out by a line manager, or a direct supervisor in the form of constructive communication) (Jackson, Schuler, Werner 2012; Vesnin 2008).

Western employers tend to focus on the second approach, when organizations direct, assess and develop employees to perform at their best in order to accomplish goals and objectives that contribute to the success of that organization (Manju Abraham, et al. 2013). However, in Russia the first approach has mostly been exercised and regulated by law. According to p.3 Article 81 of the Labor Code of the Russian Federation low personal appraisal rating can be the reason to justify employee dismissal, if valid, properly organized and registered. An employer may dismiss an employee under this circumstance only if he or she checked the alternatives to the dismissal, i.e. if it is impossible to find another work/post for the employee or train/retrain the worker (Rubin 2011).

The law also provides special legal restriction against appraisal and dismissal procedures for certain categories of workers (employees' trade union representatives, older/younger workers, pregnant women and workers with family responsibilities, workers with disabilities, workers absent due to illness or injury, etc.) (Article 261 of the Labor Code of the Russian Federation).

There are, of course, major differences between the countries in regulation of particular questions in relation to performance appraisal strategies and the termination of employment under the reason of poor assessment results. So it is not practicable to provide an exhaustive analysis of the legal implications of performance appraisal as these often vary depending on the state or national jurisdiction, nevertheless there are principles of equity and fairness that should be upheld in any good employee evaluation process (North 2015).

It seems natural to distinguish four groups of basic principles of performance appraisal that help avoid conflicting social dialogue between employers and employees.

The *first group* includes a universal principle referring to the human rights protection doctrine - *the principle of equality and justice*, which establishes the equality of human rights and freedoms and prohibits

discrimination against employees regardless of race, religion, age, gender, disability, marital status, pregnancy, or sexual preference, etc. The content of law must be free from any ideological character, otherwise it can weaken its just and fair nature (Bugrov 1992).

The main statements of this principle with implication to performance appraisal are:

1. All individuals must be provided equal employment opportunities and assessment based on job-related criteria. Discrimination in testing and assessment is prohibited. If an employee charges discrimination, the employer may defend the practice if it can be shown that the job requirement is a matter of business necessity or reasonable cause. Employers must have documented support for the argument they use as a defense (U.S. Department of Labor 2000).
2. The employer must not establish different assessment criteria related to the same job or position regarding sex, race, color, religion, political views, nationality, marital or social status, membership or non-membership of public associations, disability, genetic information or retaliation that work to the disadvantage of protected groups, unless justified.
3. The employer must provide employees equal opportunities for promotion, career development, additional training, or retraining or alternative activities based on fair, unbiased appraisal results.
4. An employee should have the opportunity to comment on their appraisal result, to express their agreement or otherwise, and to appeal the result or at least request a review by up-line supervisors (North 2015).

The *second group* of principles guiding the process of personnel appraisal is **consistency and objectiveness** expressed in terms of uniformed evaluation procedure, fair assessment techniques and employment decisions, which stipulates that:

1. Performance appraisal procedure and results should be fair, accurate and supported by evidence and examples. If an employee has poor interpersonal skills and low morale and group performance, the supervisor might keep a log of incidents. Co-workers may be interviewed and their views and reactions recorded (North 2015).
2. Employers must avoid subjectivity and incoherence by using reliable assessment tools which produce dependable, repeatable, and consistent

information about employees. It will help meaningfully interpret test scores and make useful employment or career-related decisions (Starilov 2001).

3. Appraisals results should not be used as the sole basis for promotion, remuneration or termination decisions. A broad range of information should be considered, in which the employee's appraisal results may be significant but not necessarily conclusive. An employee with poor job rating must be given an opportunity to improve his or her performance before adverse employment action is taken especially in case of pay increase denial or contract termination. This procedure establishes a record of objectivity and employer fairness, and is particularly advisable when the adversely affected employee being evaluated has many years of service (Van Bogaert 2005).
4. In case of negative job performance the employee under evaluation can charge retaliation. In fact the reason for appraisal failure can be caused by evaluators being subjective, critical or lenient (Van Bogaert 2005). To provide entire objectivity and consistency appraisal procedure must involve third parties and must be conducted by trained professionals and independent experts (Schur 2011).

The *third group* of performance appraisal principles is ***regularity and timeliness***, which is inferred in the following statements

1. An appraisal system can develop a greater degree of consistency by ensuring that managers and employees meet formally and regularly to discuss long/short-term performance, their potential and development needs (Watson 2007).
2. Regular, ongoing feedback is the greatest predictor of employee success and the most important component of the performance evaluation process. When you continually observe your employees, discuss how they are performing against their goals, and provide them with real time feedback, it should never come as a surprise to the employees (Manju Abraham, et al. 2013).
3. Regular evaluation allows managers to identify problems at an early stage to help employees achieve the desired results.
4. Employee appraisal should not be limited to a formal review once a year. The frequency of formal appraisals will depend on the nature of the organization and on the objectives of the system (ACAS 2014).

The *forth group* of principles which guide performance appraisals is *efficiency and transparency*, which is characterized by maintaining validity and reliability of ratings, alliance with corporate goals, pre-evaluation notification and constructive feedback.

1. The appraisal tool is appropriate only when it is valid for the specific purpose and job-relevant, or related to job qualifications and requirements linked to the organization's goals and competencies (Van Bogaert, Gross-Schaefer 2005). Then it helps avoid assessing character.
2. Reliable assessment tools produce dependable, repeatable, and consistent information about people and enhance more effective career-related decisions. Reliability of assessment tests can be indicated when an employee takes the test again and gets a similar rating (U.S. Department of Labor 2000).
3. Transparency of the appraisal procedure and availability of proper assessment standards and techniques back up a democratic nature of personnel appraisals (Starilov 2001). Clear personnel evaluation procedure raises personnel awareness and satisfaction, which significantly reduces cases of unfair behavior and helps avoid litigation.
4. When employees receive open and transparent timely feedback about their job performance it gives them a reasonable opportunity to improve in order to meet or even exceed goals (Manju Abraham, et al. 2013). A feedback conversation should be balanced, providing information about strong and weak points, avoiding inflammatory and emotive language (North 2015). The quality of the relationship employees have with their supervisors is positively associated with employee acceptance of performance appraisal (Kim, Holzer 2016).

5. CONCLUSION

Understanding legal context of personnel appraisal in an organization is of a great importance either for employers or employees as it has a positive influence on building strong partnership relations, avoiding employment conflicts and lawsuits.

Though national laws do not directly mandate the process of performance appraisals, there are some legal provisions and practices that could be considered as a valuable source in formulating core fundamental principles to be used in order to design and implement the system of fair and unbiased

performance appraisals, which can be applied to any business environment in various national jurisdictions.

The study showed that personnel appraisal system can be a useful and liable management tool if its regulation is based on the principles of equity and justice, consistency and objectiveness, regularity and timeliness, efficiency and transparency. When properly administered, it will help protect employment relations and minimize the employer's exposure to liability for unfair terminations and related claims.

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