

# Legal Considerations of Conducting Effective Performance Reviews

Kenneth J. Rose and Robert H. Rose  
The Rose Group, APLC

# About The Rose Group, APLC



Kenneth J. Rose, Esq.



Robert H. Rose, Esq.

# Conducting Effective Performance Reviews

- ▶ Benefits and drawbacks of regular performance reviews
- ▶ Legal considerations to take into account
- ▶ Using reviews as a legal defense
- ▶ Best Practices in conducting performance reviews

# Why Conduct Performance Reviews?



# Why Conduct Performance Reviews?

- ▶ Management goals
  - ▶ Provide feedback to employees
  - ▶ Motivation
  - ▶ Charting employee's progress
- ▶ Creating a record
- ▶ Managing employee expectations
- ▶ Provide basis for adverse employment decisions

# Drawbacks of Performance Reviews?

- ▶ Stressful
- ▶ Time consuming
- ▶ If not done properly, can create unnecessary legal obligations and consequences for employers



# Legal Considerations—“At-Will”

- ▶ “At-will” definition
- ▶ Statements relating to performance reviews in Employee Handbook and other workplace policy documents
- ▶ Promises and statements made during reviews

# Legal Considerations—Pay increases

- ▶ Similar to concern with “at-will”
- ▶ Avoid promises that tie pay increases to performance reviews





# Legal Considerations—Discrimination

- ▶ If performance reviews are misused, can be evidence of employment discrimination
- ▶ Avoid comments which could be viewed as discriminatory
- ▶ Avoid criticism of employees for protected activities, such as taking normal lunch/rest breaks, FMLA and other types of leave, disability accommodation, etc.
- ▶ Avoid using reviews punitively
- ▶ Apply use of reviews uniformly to all employees

# Performance Reviews as Legal Defense

- ▶ Create record of employee performance
- ▶ Document misconduct
- ▶ Employee made aware of manager's concerns
  - ▶ Signed acknowledgment
- ▶ Drawback---history of positive reviews can be evidence that reasons for adverse employment action were pre-textual

# Performance Review Best Practices



# Performance Review Best Practices

- ▶ Give both positive and negative feedback to employees
- ▶ Encourage employee to participate in the review process
- ▶ Communicate clearly
- ▶ Apply use of performance reviews uniformly across staff
- ▶ Avoid making promises regarding continued employment or pay increases
- ▶ Avoid criticizing employees for certain protected activities
- ▶ DOCUMENT EVERYTHING!

*Thank you!*

- ▶ Contact information:
  - ▶ 619-822-1088
  - ▶ [krose@rosegroup.us](mailto:krose@rosegroup.us)
  - ▶ [rrose@rosegroup.us](mailto:rrose@rosegroup.us)