



**PERFORMANCE APPRAISALS – TOP RATINGS FOR NEW TRENDS**



**Anne T. McKnight**

*“An employer who fails to appropriately evaluate its employees may face practical, not to mention legal, pitfalls.”*

Historically, employers have primarily relied on annual performance reviews to help address the strengths and weaknesses of their employees’ performance and to ultimately optimize productivity and overall job satisfaction. However, many companies have found these annual events to be ineffective and counterproductive forces in the workplace, especially when they are not properly conducted. An employer who fails to appropriately evaluate its employees may face practical, not to mention legal, pitfalls. Consequently, there seems to be a trend developing among many employers of eliminating annual performance reviews altogether, and instead relying on more continuous feedback throughout the year.

The Washington Post recently reported that studies have shown up to 10% of Fortune 500 employers have eliminated the annual performance review process, and that many more are likely to follow. The theory is that ongoing feedback on a quarterly, monthly or even weekly basis is proving to be more effective. Expedia, Gap, Microsoft, Deloitte, and Medtronic are just a few examples of companies who have remodeled the way in which they give employees feedback and evaluate their work.

**So Why the Shift? Problems with the Old Way.** Employers face a variety of challenges when it comes to carrying out the typical annual performance review process. Many of these challenges are simply due to the fact that the review generally occurs just once a year.

Performance reviews are helpful only if they are honest, consistent and well-documented. If an employee with chronic performance problems receives satisfactory performance reviews once each year or if the employer fails to otherwise document the employee’s ongoing performance problems, the employer may have a difficult time defending a subsequent disciplinary action. Further, if that employee is terminated by the employer for poor performance, the positive performance review will be the primary exhibit in the employee’s charge of discrimination or retaliation. Having regular reviews or conversations on a more frequent basis may help an employer address relevant issues on a consistent basis as they arise instead of sweeping them under the rug at the end of the year review.

It is also problematic to tell an employee one thing, but then document something else. Employees expect a straightforward assessment of their performance and being dishonest with the employee will lead to misunderstandings or worse later. Further, if a manager tells an employee that she has nothing to worry about, despite a bad written review, it greatly undermines the ability of the written appraisal to support any negative action the employer may take as to the employee in the future. When employers have the opportunity to address shortcomings with employees on a more frequent basis, the employee has more opportunities to understand and correct them.

Meeting with employees on a more frequent basis can also facilitate management’s ability to give more specific feedback as opposed to making general, vague statements about the employee’s performance at the end of the year. Addressing problems in bite-sized pieces over time seems to be an easier message to deliver than waiting until an arbitrary time to discuss a year’s worth of bad performance concerns. The more specific the feedback an employee receives, the better equipped the employee will be to fix issues and the more effective the manager will be in evaluating improvement.

**Avoiding the Tendency to Stereotype.** Many of the above errors with annual performance reviews occur due to stereotyping of some kind by a supervisor. Stereotyping is not always negative but rather can also occur due to bias such as favoritism. To avoid stereotyping, a manager should keep a clear, open mind, stick to the facts, and focus on the

Continued on page 4 ►►

*Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*



## CONCERNS ABOUT REFUSING TO HIRE OR DISCHARGING EMPLOYEES WHO PRESENT A NEW SOCIAL SECURITY NUMBER



**Susan S. Davis**

“[M]any employers may choose to think twice before immediately terminating employees coming forward with new names or Social Security numbers.”

There is a provision in the U.S. Citizenship and Immigration Services *Handbook for Employers, Guidance for Completing Form I-9*, which deals with a situation where an employee informs the employer that his or her identity is different from that previously used to complete Form I-9. The Guidance states: “In that circumstance, you should complete a new Form I-9. Write their original hire day in Section 2, and attach the new Form I-9 to the previously completed Form I-9 and include a written explanation. In cases where an employee has worked for you using a false identity but is currently work-authorized, the I-9 rules do not require termination of employment.”

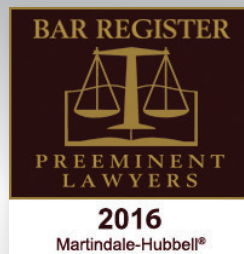
This provision was cited in a Technical Assistance Letter (TAL) issued on January 8, 2015, by the U.S. Department of Justice’s Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), which explained an employer’s responsibilities in this situation. The TAL states there is no violation when an employer consistently accepts documents that employees choose to present which reasonably appear to be genuine and relate to the individual, even if the employee admits the documents previously presented for employment eligibility verification were “not real.”

While many employers have consistently terminated employees who falsify their names and/or Social Security numbers for violation of company policy against falsification of information, the provision cited above have caused some employers to pause. The concern is whether such an employer has consistently followed a policy of terminating *all* employees who are determined to have provided false information, particularly since it appears common for employees to present documents that are falsified in some manner.

A new case creates additional concern for the employer when it terminates or refuses to hire an employee who has previously used a false name or Social Security Number but now presents documents that reasonably appear to be genuine and relate to the individual. *Guerrero v. California Department of Corrections and Rehabilitation*, 127 FEP Cases 1478 (N.D. Cal. September 28, 2015). In this case, the employer disqualified job applicants who admitted to having used Social Security numbers other than the one used on the application. A federal judge in California found that disqualifying an applicant for such reasons had a statistically significant disparate impact on Latinos, thus putting the burden of proof on the defendant employer to prove that its use of the question was a business necessity. The court applied the new EEOC *Enforcement Guidance on the Consideration of Arrests and Criminal Conviction Records*, and applied the EEOC factors (i.e., recency, relevancy and severity) in determining that the employer violated Title VII by failing to apply such guidelines in the case of a previously falsified Social Security number.

*Editor’s Note: Thus, in light of the developments in the Technical Assistance Letter issued January 8, 2015 by the OSC, the recent Guerrero case, and the possibility that the employer could be accused of inconsistently applying its work rules prohibiting falsification of company records, many employers may choose to think twice before immediately terminating employees coming forward with new names or Social Security numbers.*

**Wimberly  
Lawson  
celebrates its  
2016 Awards!**



**TO SUBSCRIBE** to our complimentary newsletter, please go to our website at [www.wimberlylawson.com](http://www.wimberlylawson.com) or email [LReeves@WimberlyLawson.com](mailto:LReeves@WimberlyLawson.com)



**Jerome D. Pinn....**

“[T]he question remains as to what is a required company uniform, as opposed to basic street clothing.”

## HOW THE MINIMUM WAGE IS AFFECTED WHEN EMPLOYEES ARE REQUIRED TO WEAR UNIFORMS

Some employers forget that minimum wage laws do not allow employers to charge employees for the purchase or rental of the uniforms and possibly cleaning if this will result in an employee’s pay to fall below minimum wage or statutory overtime. The situation particularly comes into play when employers charge employees a lump sum for uniforms rather than spreading the cost over several pay periods and for tipped employees who receive the minimum tipped amount of \$2.13 an hour. However, the question remains as to what is a required company uniform, as opposed to basic street clothing.

The U.S. Department of Labor (DOL) has general guidelines as to whether certain types of dress are considered uniforms. In general, where the employer requires a specific type and style of clothing to be worn at work, such as, a tuxedo or a shirt and blouse or jacket of a specific or distinctive style, color or quality, this clothing would be considered a uniform for purposes of the minimum wage laws. If the clothing has the employer’s logo is on it, the DOL’s Wage and Hour Division will classify that clothing as a uniform. On the other hand, if the clothing is a general type of basic street clothing with variations in details of dress, that is not considered a uniform for purpose of applying the minimum wage and overtime laws.

Unless the uniforms are “wash and wear” material that may be routinely washed and dried with other personal garments, and do not require ironing or other special treatment, the employer must pay minimum wage employees one hour of minimum wage to cover cleaning the uniforms.

If the employer pays more than minimum wage, the employer may deduct the cost of the uniforms from the employee’s pay so long as the deduction does not reduce the pay below minimum wages or come from overtime pay. For example, if an employer is paying \$.05 an hour more than minimum wage, the employer can deduct \$.05 times the hours worked that week up to 40 hours.

Employers need also to be mindful of the potential application of certain state laws. Some states, such as California, require employers to pay the cost of all required uniforms, not just those that affect the minimum wage or statutory overtime.



## PLEASE JOIN US IN WELCOMING ELLIE BOLES!

ELLIE S. BOLES is an associate in the Cookeville, Tennessee, office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in 2015. Ellie received her Bachelor of Science degree in Journalism from Tennessee Technological University, graduating magna cum laude. She received her Doctor of Jurisprudence with a concentration in advocacy from the University of Tennessee. While in law school, Ellie served as a student attorney in both the University of Tennessee Advocacy Clinic and the University of Tennessee Education Law Practicum. She also served on the U.T. Law Women Executive Board and was a member of the Moot Court Board. As a law student, Ellie received the Award for Excellence in Legal Process as well as the 2013 Advocates’ Prize Moot Court Award for Best Brief. Additionally, Ellie was the recipient of the Summers & Wyatt Award for Trial Advocacy.



Wimberly Lawson Wright Daves & Jones, PLLC, is the exclusive Tennessee member of the **National Workers’ Compensation Defense Network**, a nationwide network of AV-rated law firms providing employers and insurers with access to the highest quality representation, education, expertise, counsel and advice in workers’ compensation and related employer liability fields.



employee’s actual performance. This is easier to accomplish when those facts are fresh in the manager’s mind.

The *halo/horn* effect is one type of stereotyping that refers to the tendency to over or underrate a favored or less favored employee. This effect may also occur when a manager gives an employee the same rating as the employee’s previous performance review simply based on bias from the prior year’s performance, or based on the employee’s demeanor or a shared interest. A supervisor must remain objective by focusing on differences rather than similarities and by looking at each performance factor. Just because an employee performs poorly or, on the other hand, outstanding in one area does not mean the employee’s performance will be the same across the board. Focusing on specific instances can help an evaluating manager avoid this mistake.

*Recency error* occurs when a supervisor lets recent events or performance, whether outstanding or unsatisfactory, closely preceding the review counterbalance an entire year’s worth of performance. For example, an employee who does a stellar job the week before the review meeting can offset mediocre performance over the prior months. Meeting on a more frequent basis helps counteract this type as the manager is better able to address good or bad performance as it occurs.

The *cookie cutter effect* occurs when a supervisor does not focus on individual specific performance and rates all employees, or groups of employees the same. This can occur in a team setting when a manager ranks an employee’s performance relatively high or low, based on an entire group’s performance, when the employee may have been a high contributor or low contributor to the overall success. To avoid the cookie cutter effect, a manager should assign individual ratings based on individual job performance. Again, this is easier to accomplish when each individual’s performance is fresh on the manager’s mind.

Employers who are eliminating or modifying performance review processes are motivated to do so not only to avoid the problems mentioned above, but also in an effort to develop their employees faster and to accommodate the ever-changing nature of the work to be performed. What is applicable and relevant in January may be much different than what is needed in December. Employers are continuing to look for ways to stay more in-tune with their workforce in order to meet those evolving needs and goals.

## **REGISTER NOW!!**

**for our 37th annual  
Wimberly Lawson  
LABOR & EMPLOYMENT  
LAW UPDATE CONFERENCE**

**Knoxville, Tennessee  
November 3 - 4, 2016**



### **Accreditations:**

- HCRI (for PHR, SPHR and GPHR) and SHRM (for PDCs) recertification credit hours will be requested
- Attorney CLE credit hours for TN, GA, VA and KY will be requested

### **Comments From Last Year:**

*“Always great information, great guest speaker  
— never disappointed!”*

*“Legal updates were informative and fun.”*

*“The coverage we get in 1 1/2 days is great!”*

*“All the attorneys are fantastic!”*

**For more information or to register, please contact  
Laura Reeves at (865) 546-1000, email  
Laura Reeves at [LReeves@wimberlylawson.com](mailto:LReeves@wimberlylawson.com),  
or register on-line at [www.wimberlylawson.com](http://www.wimberlylawson.com).**

**SPECIAL EARLY, EARLY  
BIRD RATES NOW AVAILABLE!**