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The Legal Case for Eliminating Performance Reviews

By Judith Droz Keyes

Who would have imagined that National Public Radio, the *Wall Street Journal* and *BusinessWeek* all would have carried stories on a subject as mundane as performance reviews? Who would have dreamed that a behavioral scientist in Boston, Charles S. Jacobs, and a management professor in Los Angeles, Samuel A. Culbert, would have published books within a year of each other that argue against performance reviews?

As a practitioner of management-side employment law who has been anti-performance review for many years, I am delighted. I never imagined that the debate would be so publicly engaged, or that the arguments for the elimination of this unproductive practice that consumes so much time and results in so much angst for so many would be so well-supported. In this article, I add my vote to the argument that performance reviews should be relegated to the recycling bin, and I offer the legal reasons why.

But to begin, it is helpful to examine briefly the reasons for having performance reviews. And I'll say right off that I disagree strongly with professor Culbert, who attributes their existence and persistence to insecure human resource professionals who regard them as, in effect, job security. In my experience, HR professionals are just as weary of this artifice as are any other members of management.

Why Have Performance Reviews?

Except some governmental and union employers, no employer is required by law to review employee performance. Various rules may require that governmental employers evaluate employee performance, and both governmental and private-sector employers with union contracts may have contractual obligations to do so.

Performance reviews are a recent phenomenon that I understand came into being with the best of intentions: to give employees an honest and accurate assessment of their job performance relative to the employer's standards and, perhaps, relative to the performance of other employees. In this way, performance reviews are intended to motivate improved performance and job success—and thereby improve employee morale and the company's bottom line.

Subsidiary purposes are to inform merit-based compensation, promotion and layoff decisions, and, in the case of poor performers, to forewarn them about the negative consequences of a failure to improve and to lay the groundwork for discipline or termination if they don't improve. All of these reasons are perfectly legal and laudable.

It also should be observed that performance reviews came into their own with the advent of nondiscrimination laws in the 1960s and 1970s. As employers and their lawyers learned that they could be called on to prove that an employment decision was based on legitimate considerations untainted by unlawful discrimination or retaliation, the performance review became one of the accepted pieces of evidence. After all, if all employees are evaluated at the same intervals according to the same criteria and standards, then decisions based on those evaluations should be unassailable, right? Once upon a time, we thought so. Now we know better.

So What's the Problem?

To begin with, performance reviews routinely fail to deliver on the stated purpose. Here are some reasons why:

Less-than-honest feedback is the norm. Performance reviews are usually written by first-line supervisors, subject to the review and editing of higher management and human resources. Supervisors are seldom experts in management technique, and even those who are may not be effective communicators or good judges of people or job performance. Supervisors have to work with their supervisees on a day-to-day basis and naturally are more concerned about collegiality than they are interested in confrontation. For better or worse, many of us were taught that, "If you can't say something nice, don't say anything at all." Our ability to function in the workplace may depend on building and maintaining positive relationships.

Supervisors are rarely evaluated on the quality of their performance reviews. They have little motivation to rock the boat by giving an employee, especially a long-term employee, a negative review even when warranted—especially if the supervisor has one foot out the door (or on the next rung of the corporate ladder). And now, behavioral scientist Jacobs confirms what supervisors have long known: Performance reviews are not likely to change behavior anyway, especially the behavior of a long-term employee.

All of these are realities. And all of them prevent candid, honest performance reviews.

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Lack of objective, timely feedback is the norm. Who among us can claim to be truly objective—to have eliminated all biases and personal preferences? Even as to criteria and circumstances that can be measured objectively, there are sometimes extenuating circumstances, real or imagined. ("She always got the easier cases, and I get the harder ones.") But the bigger problem with objectivity is consistency. It is rare when both the supervisor and the employee have been in their respective positions for the entire period of a long-term employee's tenure—and not at all uncommon for there to be a change in supervisors midway through a review period. Who has not heard of a new supervisor coming in and being convinced that his predecessor was too lenient? And what about other changes in an employee's job—changes in technology, product, measurement or expectation? Objectivity is an elusive concept.

And then there is timeliness—or the lack thereof. Most review cycles are annual, with employees throughout the company all being reviewed at the same time. While there are sometimes more-frequent mini-reviews, and supervisors are always encouraged to communicate

with employees about their performance much more frequently (although few do), the reality is that, except for the occasional standout event, reviews mostly address what happened most recently. Add to that the fact that reviews are usually completed and delivered to employees weeks, or even months, after the close of the time period that they ostensibly cover. This is a function of the system, busy supervisors, and a variety of workplace realities such as vacations, part-time schedules and leaves of absence. There is no way around it.

The law seemingly precludes honest, accurate feedback. Employers have learned that there are many aspects of an employee's performance that, from a business/management perspective, may be frustrating, disappointing, annoying, and contrary to the company's goals and bottom-line results—but that cannot be held against the employee or even mentioned in the performance review because the law says so. "Excessive absenteeism" that comes within the parameters of intermittent family leave and "unprofessional appearance" that is attributable to the employee's religion cannot be held against the employee and should not be mentioned in the performance review. Reviews must "factor out" disability accommodations and absences for a protected reason.

And even when the assessment is within fair territory, employers must always be on alert for situations that may suggest discrimination or retaliation.

Consider, for example, a supervisor evaluating an employee after the employee has accused the supervisor of sexually harassing him or her. Or the 30-year-old newly promoted supervisor who has to evaluate the 65-year-old employee with 25 years of service? It is a whole lot easier to give these employees falsely positive reviews than accurately negative ones. And besides, the performance of the 25-year employee is unlikely to change as a result of the review.

These realities all point in the direction of where I end up: convinced that, in addition to performance reviews being counterproductive and wasteful, there are legal reasons for getting rid of them.

The Legal Case

In 35 years of practicing employment law, I can count on one hand the number of times a performance review was of significant help to my employer-client in defending against an employee's legal challenge. Even in those few cases, the employer's position would likely have been just as strong without it.

Almost all the time, especially in the case of long-term employees, it's the opposite: The performance review is "Plaintiff's Exhibit #1," supporting the employee's position—and thus stands in the way of the employer's terminating the employment of at-will employees clearly unsuited to the job.

In writing this article, I did a simple word search for "performance evaluation" or "performance review" in published decisions only in the federal and state courts in California and only for a six-month period. There were 40 decisions where the performance review was cited by the court as a material fact in the case. In all but one of the cases, the review was cited not by the employer to support its defense but by the plaintiff-employee to prove his or her claim. In about half of these cases, a negative review was cited as proof of discrimination or retaliation; in slightly less than half, a positive review was cited as proof that the employee did not deserve a subsequent adverse employment action, such as termination or denial of a promotion. A few cases involved a challenge to the review itself, with the employee claiming that the review was illegitimate in some way.

A case in point is *Sandell v. Taylor-Listug Inc.*, 188 Cal. App. 4th 297 (2010). Because this case so clearly exemplifies the problem, I present it largely in the words of the court in its published opinion. I have no firsthand knowledge about the case, but I interject a few observations from my own experience along the way.

Background facts. In February 2004, Robert Sandell was hired by Taylor-Listug Inc., a guitar manufacturer, as its senior vice president of sales. With 30 years of experience in the music business, Sandell was recruited by the company's CEO, Kurt Listug. Sandell reported directly to Listug.

In August 2004, Sandell suffered a stroke requiring a leave of absence. He returned part time in October 2004 and full time in December 2004. He had to use a cane, and his speech was slower than it had been before the stroke. In October 2007, Sandell turned 60 years old.

A few days later, Listug decided to terminate Sandell's employment primarily for "lack of leadership in providing direction to the sales team and in producing satisfactory sales results."

In May 2008, Sandell sued for disability discrimination and age discrimination. In May 2009, the trial court ordered

summary judgment in favor of the company. Sandell appealed.

After examining the trial court record, which included all of Listug's reviews of Sandell's performance, the court of appeals reversed and sent the case back for trial on both claims.

Performance reviews. Listug reviewed Sandell's performance a total of three times. The first review covered performance from 2004 and was given to Sandell in January 2005 by Listug (who had taken a sabbatical from June 2004 through the end of the year and thus had worked personally with Sandell for only four months).

The court first described the company's performance review form: "The Taylor-Listug performance review document includes 13 sections, or areas for review. For each of the first eight areas of review, the document asks the employee to rate himself in that area by marking a box next to 'must improve,' 'meets requirements,' and/or 'exceeds requirements.' Under these boxes, the form provides space for the employee to provide written comments to explain his or her self-evaluation. Under the employee's comments for each section, the supervisor is asked to rate the employee on the same scale, and to provide comments explaining the rating given. The final five sections—'strengths,' 'weaknesses,' 'challenges to overcome (how can I do a better job and provide more value),' 'goals for next period' and 'overall comments'—do not ask for a rating, but, rather, simply provide space for written comments by both the employee and the supervisor."

I pause to observe that the company's review form was, in my estimation, reasonably good. It invited employee comments, had only three levels of rating (as opposed to the problematic five levels) and was forward-looking, at least in part. But I am convinced that there is no perfect performance review format. Anyone who has been in a U.S. workplace will surely have had experience either trying to develop such a form or having to use such a form—or multiple forms over time—and will recognize the accuracy of this observation. Although some forms are decidedly better than others (for example, what really is the difference between "outstanding" and "exceeds expectations," and whose expectations are we talking about anyway?), there is no ideal form.

So, to continue with the story of Sandell, the court described his first review: "Sandell's written evaluation for 2004 indicated that Sandell was meeting or exceeding requirements in all of the areas in which he was reviewed, with the exception of one area entitled 'results.' In that area, Listug noted 'must improve.' However, in his comments under this section, Listug indicated that he felt he '[had] to say' that because sales had declined that year, for the first time in 20 years. Listug also took some of the blame for the poor sales by noting that Sandell had come into a sales department that was 'in some turmoil' after the departure of the previous vice president of sales. Listug indicated in his comments that Sandell had already introduced helpful new approaches for the sales department."

I pause to observe a natural tendency: Typically, if a supervisor says something "constructive" (i.e., negative) about an employee's performance, something positive is immediately added to balance it—or, actually, to contradict it. Naturally, the employee focuses on the negative at the time of the review. But later, in litigation, the employee is likely to accentuate the positive.

A year later, Sandell was given his second performance review. According to the court, "Sandell's 2005 review indicated that Sandell was meeting requirements across the board, and that he was exceeding requirements in some areas. However, in the written comments associated with some of the areas of review, Listug indicated some subjective concerns. For example, Listug said that while he agreed with Sandell's self-evaluation regarding his 'attitude,' Listug 'sure would like to see more enthusiasm from Robert.' Listug added, 'He frequently seems bored, or he at least comes across that way. It would be nice if Robert were more outgoing and friendly.' "

I pause to observe that these sorts of remarks are typical. For reasons better understood by behavioral scientists than by lawyers, supervisors often unhelpfully record what "would be nice" and what they would "like to see" instead of what is required. I am sure the supervisor thinks that this is more persuasive, or at least is better than saying nothing at all. Not really.

Back to Sandell, about whose third and final performance review the court went into greater detail: "In 2006, Listug rated Sandell's performance as meeting requirements in three areas. In three other areas, Listug rated Sandell's performance as needing improvement. For the final two areas of review, Listug marked both the 'must improve' and 'meets requirements' boxes. Listug also gave Sandell both positive and negative reviews on other subjective criteria. For example, under the area entitled 'teamwork,' Listug states, 'Robert has a stable good attitude. He usually has good constructive feedback or input. He's easy to work with, and doesn't politic. In this sense, he's earned the trust

of others. However, he does not provide enough leadership or drive to have the level of respect he should for the position he has.'

"Under the portion of the review sheet where Listug was to identify Sandell's 'weaknesses,' Listug wrote, 'Robert does not have the drive that this position requires. ... Maybe he's never had to actually lead sales in other companies he's worked for, or inspire people to perform at a higher level, or put the fear of God in them if they don't. But he does not put anywhere near the amount of passion, life, energy or drive into leading sales.' Under 'goals for next period,' Listug indicated that he wanted Sandell to '[l]ead and manage [his] staff with [his] emotion and personality, and with inspiration and life.' Below that, however, in the 'overall comments' section, Listug wrote, 'Robert's a good man, and he's contributed positively to the company. He's provided stability to the sales area that was lacking. The sales staff like interacting with him, and respect his opinion and his experience. He's generally on top of what is happening in sales.' "

Termination and challenge. It was seven or eight months after this review that Taylor-Listug terminated

Sandell's employment, after which Sandell sued for disability and age discrimination. In defense, Taylor-Listug presented substantial evidence of declining sales figures and other legitimate nondiscriminatory reasons for its decision to let Sandell go.

Here is the way the court reacted to the company's position. It's lengthy, but I quote it in its entirety because it tells the tale:

"Sandell presents evidence that places in dispute the validity of the reasons that Taylor-Listug offers for its termination of Sandell's employment. For example, Taylor-Listug broadly asserts that 'all of [Sandell's] performance evaluations document multiple problems and concerns.' However, a review of the record does not support this assertion.

"Sandell's first performance review, January 2005, for the 2004 review period, shows that Listug rated Sandell's performance as '[m]eet[ing] [r]equirements' or '[e]xceed[ing] [r]equirements' in all areas except one. In that one area, entitled 'results,' Listug noted that Sandell's performance '[m]ust [i]mprove.' However, Listug's contemporaneous comments about this rating are telling: 'I have to say "must improve" because the company's sales declined in 2004 for the first time in more than 20 years. I can't in all honesty say this "meets requirements." Robert did accomplish the above [i.e., the positive results that Sandell had listed in his own review of his performance]. He came into a difficult situation, with [the prior vice president of sales] having just been terminated, and the sales department in some turmoil. He did a very good job of gaining people's trust, and was cognizant of not changing things that have been working. The territory quotas and MSA/BPI approach have been very helpful, and the territory reviews have become more thorough than they were before Robert joined us.'

"Sandell had been working at Taylor-Listug for only approximately six months before he suffered a stroke, and was not back working full time until December of that year. This fact, considered in the context of Listug's comment that the sales department had been 'in some turmoil' prior to Sandell's hiring, and evidence that Listug, himself, took a six-month sabbatical beginning in June 2004, could lead a reasonable fact finder to conclude that Listug's 'must improve' rating, and the lagging sales figures that year, were attributable to forces outside of Sandell's control and unrelated to his actual performance as vice president of sales. Further, one could reasonably conclude that this performance review was, overall, quite positive.

"Listug rated Sandell's performance as 'meet[ing] requirements' across the board in his 2005 review. It was only in Sandell's third and final performance review that Listug indicated that Sandell's performance 'must improve' in three of the eight performance areas.* Further, in light of the fact that Listug's complaints about Sandell's performance were often subjective, one could reasonably infer that these complaints, and the negative performance evaluation, were themselves motivated by discriminatory animus.

"* Listug rated Sandell as 'meet[ing] requirements' in three other areas. In two of the performance areas, Listug marked both the 'must improve' and 'meets requirements' boxes."

There was other evidence in the case to be sure, including comments allegedly made by Listug about employees' ages and about Sandell's needing a cane. But in ruling against the company's motion for summary judgment and in favor of Sandell's position that his claims should be tried by a jury, the court said:

"[A] fact finder could reasonably conclude that Sandell's performance reviews demonstrated that he completed his tasks and that he was generally performing satisfactorily. ... Although there may have been areas in which the company wanted to see improvement in Sandell's performance, there were other areas in which he exceeded expectations. In all, Sandell presented evidence that he was still qualified for his job at the time that Taylor-Listug terminated his employment, and that he was performing satisfactorily on objective measures."

So there it is. A clear example of what employers' lawyers see all too frequently: Performance reviews that no doubt took a lot of time to create, vet and deliver not only failed to improve the performance of this relatively short-term executive-level employee but also played a substantial role in his or her legal victory.

It's time to recognize performance reviews for what they really are: security blankets that serve no real purpose and that can actually be detrimental to the employer's position. It's time to give them up.

Without Performance Reviews, What?

Imagine that performance reviews were simply gone. What would this brave new workplace look like? The following ideas will require fine-tuning and individualized adaption to be sure, but let's get the conversation going.

Supervisors would provide feedback to employees on an ongoing basis. There would be no annual trigger and no routinized supervisorial review process driven by HR. Instead, supervisors would be expected to talk with employees on an ongoing basis about successes and failures—and to take note of exceptional performance, good or bad. It would be a self-motivated, self-enforced practice. Those supervisors who were good at it would be more likely to have productive, positive employees than those who weren't. Supervisors would be evaluated on the quality of the result produced, not the process used. Training would be available.

HR quality assurance specialists would talk with supervisors and employees on a regular basis. Much as there are now specialists in recruiting and in benefits, within HR there would be quality assurance (QA) specialists. These specially trained HR professionals

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would be responsible for accomplishing what performance reviews are now supposed to accomplish but don't: communicating with employees with the goals of improving the quality of their and the company's performance by motivating them to achieve and succeed, and identifying employees who are in the wrong position or the wrong company and should move on.

It would be the job of the QA specialist to talk with supervisors and with employees, usually separately but sometimes together, on a regular basis—say, once per quarter. Goals and objective data would be available and reviewed, as would supervisors' and others' observations, before the conversation. There would be no written review, and the discussion would be both structured and informal.

For example, employees could be asked what barriers they perceive to achieving excellent performance, and what ideas they have for improvement of the department and the function. Conversations with supervisors would be more about their own performance and less about the

performance of the employees in their department. Conversations would be as confidential as performance reviews currently are, but no more so. Conversations could be documented by way of short summaries of any agreements reached or goals set, but there would be no numerical rating or bottom-line assessment, and the summaries would not be kept in employees' official personnel files at all or for very long.

Annual salary adjustments would be made between management and HR. A while back, merit-based salary increases supplanted annual cost-of-living adjustments (COLA)—at least in theory. The reality is, an annual across-the-board increase is usually a significant component of a salary adjustment. When no one at the company gets an increase, it is based on the company's financial situation, not merit. When everyone at the company gets an increase except those who are (or should be) on disciplinary action, it is based on a COLA-type consideration, not merit. When the norm is, say, a 2 percent increase with strong performers getting 3 percent and exceptional performers getting 4 percent, the 1 percent and 2 percent increments arguably are merit-based—but there are often other factors at play.

Regardless, it doesn't take a formal performance review to justify a compensation decision that truly is merit-based. Without performance reviews, at salary review time management simply would assess employees' relative contributions (factoring out prohibited considerations) and would provide the result and the rationale to HR, much as is done now under the guise of performance reviews.

What would be avoided is what now is all too common and unhelpful among employers: employees whose performance reviews reflect mediocre or even sub-standard performance being given "merit" increases.

Promotion or layoff decisions would be made based on "real-time" evaluations. In situations such as an employee's being considered for a promotion or the company's needing to

conduct a reduction in force, an evaluation of an employee's individual or relative competency is required. In these situations, the evaluation would be made between HR (including the QA specialist) and management with the specific situation and relevant criteria in mind.

An evaluation form could even be created for this purpose. This would be a significant improvement over the current practice of trying to fit "square peg" annual reviews into skills-based "round hole" decisions.

Discipline and termination decisions would be justified, and documented, by other means. Instead of waiting for the next annual review to respond to an employee's unacceptable conduct or performance failure, supervisors would have no incentive (or excuse) to postpone disciplining the employee or implementing a performance improvement plan. The response likely would be more prompt and, therefore, more impactful.

When termination of employment is being considered, the process would be much like it is now: Supervisors would document the problem and review with HR the history of communication with the employee about the problem (also known as "progressive discipline"). The only difference would be the absence of a contradictory history of "satisfactory" performance reviews and "merit" increases. The situation would be cleaner, and the company's legal case stronger.

Conclusion

There is nothing to be lost by eliminating performance reviews—certainly not a diminution of the role of HR. To the contrary, not only would huge amounts of otherwise wasted time be devoted to more productive activities, but the employer's legal position would be enhanced. In this economy and in this legal environment, it's time to rate performance reviews as "unsatisfactory" and for HR to "exceed expectations" by leading their companies along a different route to "excellent."

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