

# Legal Viability Checklist

## for personnel evaluations and personnel evaluation systems

March 2001

**By:** Daniel L. Stufflebeam, Western Michigan University, and Diana Pullin, Boston College

**Based on:** Stufflebeam, Daniel L., and Pullin, Diana (1998). Achieving legal viability in personnel evaluations. *Journal of Personnel Evaluation in Education*, 11(3), 215-230.

**Disclaimer:** *This checklist is designed to provide guidance to institutional leaders and evaluators in avoiding potential legal difficulties associated with personnel evaluations and personnel evaluation systems. This checklist does not provide legal advice concerning any particular situation or evaluation system. Individuals conducting evaluations with high-stakes consequences should obtain legal counsel to review their particular situation. The authors assume no liability for any legal action that may be brought as a result of implementing or failing to implement any or all of the following checkpoints.*

### PART A: POLICIES AND COLLECTIVE BARGAINING AGREEMENTS

A1. Standards	Assure that all personnel evaluations adhere to an officially adopted set of standards for personnel evaluation—e.g., Joint Committee on Standards for Educational Evaluation (1988). <i>The personnel evaluation standards</i> . Newbury Park, CA: Sage—or a locally developed set of standards.
A2. Laws	Assure that all personnel evaluations and evaluation systems are consistent with local, state, and federal laws.
A3. Criteria, Forms, and Procedures	Keep the specifics of personnel evaluation criteria, forms, and procedures out of collective bargaining agreements, so that the institution can expeditiously update and improve or replace the evaluation system as appropriate.
A4. Employee Rights and Responsibilities	Define clear personnel policies on such matters as equality of opportunity, affirmative action, and sexual harassment.
A5. Job Qualifications	Clearly state that job qualifications are a threshold requirement in the hiring process.
A6. Job Performance	Clearly identify fulfillment of job responsibilities as the foundation criteria for assessing job performance.
A7. Diversity Goals	Develop and regularly update institutional diversity goals to provide and maintain a staff that is representative of qualified women and minorities, qualified persons with disabilities, qualified veterans, and qualified members of other designated protected groups.
A8. Personnel Evaluation Files Control	Define requirements and prescribe means for storing personnel evaluation files and keeping them secure and confidential.
A9. Personnel Evaluation Files Access	Consistent with state law and institutional policies, define the limits and conditions for accessing personnel evaluation files.
A10. Evaluator Responsibilities and Rights	Stipulate evaluators' authority and responsibility to issue negative as well as positive evaluations, so long as they are fair and meet professional standards and legal requirements.
A11. Remedy and Dismissal Process	Define procedural and substantive due process requirements for documentation, notice, improvement assistance, and dismissal.
A12. Appeal Channels	Define appeal channels so that employees can request and obtain a third-party review of any evaluation activity or report deemed unfair or inaccurate.



<b>PART B: MAINTAINING EVALUATION SYSTEM INTEGRITY AND EFFECTIVENESS</b>	
B1. Equality of Opportunity	Meet equality of opportunity requirements by recruiting, hiring, training, promoting, transferring, or compensating individuals based solely on merit and qualification and without regard to race, national origin, color, religion, gender, disability, age (except where age ranges are legitimately prescribed), height and weight (except where appropriate applicable restrictions apply), political affiliation, or sexual orientation.
B2. Equity and Affirmative Action Balance	Uphold equality of opportunity rights in the process of meeting affirmative action goals.
B3. Bias Control	Regularly examine evaluation proceedings and consequences to ensure that evaluations are not de jure or de facto biased against members of any group.
B4. Even-Handed, Justifiable Issuing of Rewards	Reward employees based on job-related merit and do not tender special privilege to employees by allowing them to persist in deficient performance because of unusual talents, political connections, previous outstanding work, popularity, and so on.
B5. Defensible Candidate Job Pools	Assure that the institution's pools of candidates for positions appropriately reflect the institution's diversity goals.
B6. Institutional Control	Maintain institutional control over evaluation criteria, instruments, and procedures so that they are not vulnerable to political manipulation by interest groups.
B7. Criteria, Forms, and Procedures Generality	Keep model personnel evaluation criteria, forms, and procedures general, so that these can be customized to fit the different assignments of different employees.
B8. Objective and Subjective Information	As appropriate, employ subjective criteria and professional judgment as well as objective data in order to make evaluations clear and functional.
B9. Information for Dismissal Proceedings	As feasible, use all relevant information to inform and substantiate a dismissal decision, including valid evidence of beneficiaries' perceived or assessed outcomes that result from the employee's services.
B10. Documentation	Document all dismissal processes and other potentially controversial personnel evaluations, especially summative evaluations.
B11. Evaluation of and for All	Evaluate and pursue appropriate follow-up actions for tenured as well as untenured personnel.
B12. At-Will Terminations	Make at-will dismissal decisions consistent with both the law and requirements for professional integrity.
B13. Implement Needed Remedial or Dismissal Proceedings	Initiate needed, justifiable remedial or dismissal proceedings despite prospects for legal challenge.
B14. Reasonable Investment in Improvement	Limit the time and resources devoted to improving employees' performance, so that the success of the larger effort is not diminished or substantial funds wasted.
B15. Balanced Concern for Clients' Welfare and Employees' Improvement	Protect an employee's clients from harm while taking steps to improve a deficient staff member.
B16. Protection of An Employee's Future Clients	Counsel institutional officials against resolving personnel disputes with confidential settlement agreements, when doing so would jeopardize the health or safety of children or other clients in successive employment environments.
B17. Attorney Involvement	Consult an attorney early and prospectively in a problem situation or potential problem situation rather than waiting until a problem becomes serious.

B18. Reporting on Previous Employees	When external parties request evaluative feedback on a previous employee, state only the facts of the employment that are part of the public record, such as beginning and ending employment dates, job title, job responsibilities, and awards; address other pertinent questions that your institution's personnel evaluation policies permit; however, do convey any institutionally held, validated information that proves that a former employee is dangerous to children or others.
<b>PART C: INDIVIDUAL PERSONNEL EVALUATIONS</b>	
C1. Communication of Bases for Evaluation	At the outset of an employee's employment and at the start of each evaluation cycle, insure that each employee is informed of the specific evaluation criteria and procedures that apply to her or his position.
C2. Intended Uses	Clearly define the intended uses of a set of personnel evaluation information, so that misuses are avoided and disputes about what information may be used in what ways can be settled by referring to the prior agreements.
C3. Privacy	Conduct all evaluation planning and reporting meetings in a private setting, with only authorized persons present.
C4. Focus	Key evaluations to up-to-date role definitions and any mandated improvement goals.
C5. Job Effectiveness Criteria	Emphasize fulfillment of job responsibilities rather than performance style or personality characteristics.
C6. Information Sources	Collect performance evaluation information from relevant multiple sources, such as the employee, coworkers, supervisor, clients, and special reviewers.
C7. Information Security	Be consistent with pertinent laws in keeping personnel evaluation information secure and confidential, and inform evaluatees of both the provisions for and limits of security from disclosure.
C8. Interim Evaluation	Regularly review the employee's progress and provide clear, constructive feedback, letting the employee know in a timely manner if there are deficiencies that must be corrected.
C9. Constructive Feedback	When providing constructive feedback, discuss reasons for deficient performance and give due consideration to mitigating circumstances, such as poor health, inadequate staff or mentor support, and so on, and take appropriate feasible steps to help the employee know clearly and in a timely manner if there are deficiencies that must be corrected.
<b>PART D: REMEDIAL AND TERMINATION PROCESSES</b>	
D1. Informal Notice and Assistance	Except in emergencies, such as health or safety threats, provide the employee whose performance is deficient with informal, constructive, verbal identification and discussion of problems; counseling as appropriate; and clear and fair directives and time lines to improve.
D2. Formal Notice to Remedy	If deficiencies are not corrected in response to informal, constructive warnings, provide the employee with a written notice to correct clearly identified deficiencies.
D3. Dismissal Process	Provide a publicly employed person under contract or with tenure with sufficient advanced notice of contemplated action and the decision-making criteria to be applied before enacting a dismissal process.
D4. Minimizing Embarrassment	To avoid any unnecessary embarrassment to the employee, limit the distribution of the notice to remedy and associated information as much as possible to those with a legitimate need to know.
D5. Correcting Deficiencies	Provide reasonable time and a clear deadline for an employee to correct deficient performance.

D6. Remedial Process	Ground the remedial process in an approved, written improvement plan, including scheduled progress reports and other forms of concrete evidence of progress.
D7. Assistance	Provide an employee involved in a remedial process with a reasonable level of assistance to help the process succeed.
D8. Communication	Review and assess progress a reasonable number of times during a remedial process.
D9. Progress Assessments	Gauge progress based on defensible evidence, not just discussion, reflecting the terms of the required improvement.
D10. Employee Input	Advise, but do not require, an employee placed on probation to write and share her or his notes or reactions on the progress review meetings.
D11. Documentation	Document the assessment meetings, data, and process from the supervisor's perspective.
D12. Third Party Perspective	Consider engaging an independent party to monitor and assess the disciplinary or dismissal process.
D13. Defensible Decisions	At the end of the improvement period, make a decision that can be defended based on the improvement process and the documented performance record.
D14. Dismissal Decision	Finalize the decision to dismiss an employee only after studying the relevant evidence and only after the decision is institutionally authorized.
D15. Concluding Notice	Notify the employee in writing and in person of the final results of the probationary evaluation.
D16. Alternative Employment	Before dismissing the employee, consider whether he or she might still be valuable to the organization and might succeed in a different, institutionally viable role, and act accordingly.
D17. Inform Officials of Personnel Action	Notify need-to-know officials about the facts of a termination, while limiting and guarding the information so as to avoid unnecessary embarrassment to the involved parties.
D18. Avoid Negative Side Effects	When dismissing an employee, provide fair treatment to her or his subordinates and clients who might be adversely affected by taking such steps as assuring them in writing of continued employment or service, promptly assigning and announcing a replacement employee, promptly working out and communicating the details of the transition process, and providing the replacement employee with adequate assistance and support.

*This checklist is being provided as a free service to the user. The provider of the checklist has not modified or adapted the checklist to fit the specific needs of the user and the user is executing his or her own discretion and judgment in using the checklist. The provider of the checklist makes no representations or warranties that this checklist is fit for the particular purpose contemplated by user and specifically disclaims any such warranties or representations.*