

Personnel Dos and Don'ts: Limiting Liability Through Sound HR Practices



CONSULTANTS TO MANAGEMENT

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Introduction



- What is your largest expense?

EMPLOYEES

- An ounce of prevention is worth a pound of cure
- 5% of employees cause 95% of your problems
- Our people are our most important and expensive resource; however, employers continually neglect maintaining their human resource systems.

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Employment Laws

- At the Federal Level

- Age Discrimination in Employment Act
- Americans With Disabilities Act, as amended
- Brady Bill
- Civil Rights Act of 1866
- Civil Rights Act of 1871
- Civil Rights Act of 1964
- Civil Rights Act of 1968
- Civil Rights Remedies for Gender Motivated Violent Crime
- Family and Medical Leave Act
- Federal Merit System Standard
- Federal Water Pollution Control Act
- Federal Wiretapping Act
- GINA
- Hatch Act
- H.I.P.A.A.
- Veterans Reemployment
- Vietnam Era Veterans Readjustment Assistance Act
- Clean Air Act
- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
- Consumer Credit Protection Act
- Drug Free Workplace Act of 1988
- Employee Retirement Income Security Act of 1974
- Equal Pay Act of 1963
- Fair Credit Reporting Act
- Fair Labor Standards Act
- Immigration Control Reform Act
- Jury System Improvement Act
- Occupational Safety and Health Act
- Older Workers Benefit Protection Act
- Omnibus Transportation Employee Testing Act
- Rehabilitation Act of 1973
- Immigration Control Reform Act
- Violence Against Women Act of 1994

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Employment Laws

- At the State Level (sampling)

- R.C. 3.06
- R.C. 9.84
- R.C. 102.03
- R.C. 2921.42 (nepotism)
- R.C. 102.03(B)
- R.C. 102.09(E)
- R.C. 117.01
- R.C. 117.28
- R.C. 121.22 (open meetings law)
- R.C. 124.01-124.57 (civil service townships)
- R.C. 149.43 (public records)
- R.C. 153.59
- **R.C. 505.491 (township police discipline)**
- **R.C. 737.12 (suspension procedure)**
- R.C. 1333.81
- R.C. 2716.05
- R.C. 2744.02(C)
- R.C. 2744.03
- R.C. 2921.02, 03, 05, 13, 41, 42, 43, 431, 44, 45
- R.C. 2961.01
- R.C. 3517.092
- R.C. 3599.05
- R.C. 4112 (anti discrimination statutes)
- R.C. 4113.23
- R.C. 4113.52 (whistle blower protection)
- R.C. 4117 (collective bargaining)
- R.C. 5906 (military leave)

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Essential Terminology

- Exempt / Non-exempt / Non-Covered (FLSA)
- Exempt / Non-exempt (R.C. 4117)
- “At-Will”
- Civil Service (classified/unclassified)
 - “The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts of the state shall be divided into the unclassified service and the classified service” R.C. 124.11

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Limiting Liability

When do you start limiting your liability as an Employer?

- (a) When the employee is hired?
- (b) When the employee is fired?
- (c) During employment?
- (d) Before (a), (b), and (c)?

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Employment Applications

- **DO** use your application process to reduce the time lines for bringing adverse actions by applicants and employees
- **DON'T** ask unlawful questions on you application.
 - House Bill 56
- What is a “Thurman” clause and Why is it Important?

READ CAREFULLY BEFORE SIGNING. . .

I agree that any claim or lawsuit relating to my service with [DaimlerChrysler] or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

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Limiting Liability

- On the front end
 - *Thurman v. Daimler-Chrysler*
 - *Oswald v. BAE Industries*
- Going out the door
 - *Cole v. Temple Israel, et al.*
 - *Sampson v. Cuyahoga MHA*
 - *George v. Village of Newburgh Heights*

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Employee Handbooks/Policy Manuals



- Employee Handbook/Personnel Policy Manual
 - Employee Handbooks are also often called Personnel Policy and Procedures Manuals. The Handbook/Manual is a statement of the personnel policies of the Employer and how related business is to be conducted. These essential documents serve to set forth an Employer's expectations for its employees. It is important that your Handbook/Manual be clear and unambiguous as it can serve as "notice" when defending employment actions.
 - "Must Have" Policies
 - Disclosures/Disclaimers (e.g. at-will, no authority to bind, complete agreement); Discrimination/Harassment and Reporting Procedure; ADA/Reasonable Accommodation; Workplace Violence; FMLA; Discipline; BWC; Leave/Benefits; Internal Complaint; Drug Free.

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Employee Handbooks/Policy Manuals



- Employee Handbook/Personnel Policy Manual
 - Policies for Consideration
 - Social Media
 - Technology/Computer Use
 - Attendance/Tardy
 - Cell Phone
 - Use of Employer Vehicles
 - Travel/Reimbursement
 - No "Self-Help"

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Hiring the Wrong Person

- **DO** create an objective, consistent, and uniform hiring system
- **DON'T** let subjective factors control your hiring and selection process
- Hiring and Selection
 - A proper hiring and selection process can streamline all the documentation involved which can sometimes prove to be tedious. Uniform methods can also insulate an employer from possible discrimination claims. Because choosing the “right” candidate is so important in the public sector (hard to get rid of a public employee once they complete a probationary period), it can save money and time on the back end.
- Job Posting Policies – Standard policy for asking candidates to apply for jobs.
- Structured Interviews – Consistent, job-related questions asked to each applicant set (or sub-set).
- Validated Tests and Assessment Centers

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Probationary/Instructional Period

- **DO** use instructional periods to properly evaluate new employees
- **DON'T** believe an employee's best performance is to come
- A Probationary/Instructional period is an employee's chance to put his/her best foot forward. Behavior and conduct during these periods is the best that an employer can expect to ever get from that particular employee. Accordingly, don't fall victim to the myth that a probationary employee will improve.
- During probationary/instructional periods watch out for the following:
 - Resignation games
 - Probationary periods should apply to days worked not calendar days
 - You are not permitted to extend probationary periods (alternative option is to terminate employment unless employee signs last chance)

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Performance Evaluations

- **DO** objectively evaluate employees based on the specific functions of their job
- **DON'T** use a “one-size fits all” performance evaluation tool
- Most employers, at least in theory, conduct evaluations on an annual basis, but twice during a probationary period. If followed, this is probably sufficient; however, problems can arise where evaluations are delayed, missed, or where “special” evaluations are ordered.
- Proper Use:
 - Given consistently or pursuant to a performance improvement plan
 - Covers both positive and negative
- Improper Use:
 - Inconsistent or missed entirely (e.g. “special evaluations”)
 - Collins v. State of Illinois, 44 FEP 1549 (1987 – prima facie case of discrimination where employee showed “special” evaluations at 3, 6, 12, and 18 months where other employees only received annual evaluations

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Performance Evaluations

- An effective performance appraisal system must generally serve two (2) purposes:
 1. an evaluative role to let employees know where they stand; and
 2. a developmental role to provide specific information and direction so individuals can change (improve) their performance.

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Performance Evaluations



- A. Coach or Judge
- When the supervisor acts as or is perceived as a judge, he/she will more likely encounter hostility and defensiveness from the employee. A more desirable position is for the supervisor to assume the role and attitude of a coach. In the role of coach, the supervisor can devote his/her energy to improving the employee's performance.
 - Assume that any problems noted in the employee's performance are jointly held.
 - Once the problems have been isolated, the supervisor and the employee can jointly work out a formal or informal process of retraining or correction. If, however, the employee is argumentative or hostile, it may be necessary to take disciplinary action.
- B. Evaluations should not be a surprise

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Performance Evaluations



- Performance evaluations should be based upon objective standards.
- However, many employers include subjective standards in the evaluation process.

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Performance Evaluations



- Evaluations should NOT be based upon:
 1. Potential: What the employee seems capable of doing should not be rated.
 2. Attitude: Perceptions regarding the employee's attitude should not directly affect the rating. If "poor attitudes" have a negative impact on performance, then the performance itself should be so rated.
 3. Traits or ability level should not be rated — only the employee's actual performance should be evaluated.
 4. Personality should not be evaluated unless expressed in observable, job-related behavior. Personal characteristics, such as gender and race, should never enter into the process.
 5. Outside Factors: Those factors outside of the employee's control, such as faulty equipment or lack of materials, should not enter into the rating process.

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Increasing Rater Accuracy

- **Memory Aids:** As the name implies, "memory aids" are intended to help supervisors remember specific aspects of employee job performance over time.
 - Supervisors should keep a "critical" diary or a critical-incident file to record an employee's behavior or outcomes that are related to his/her work performance.
 - A rater cannot remember all the things an employee may do (both good and bad) during an assessment period.
 - By keeping accurate records of both good and bad incidents throughout the period on an employee's performance, a rater can defend his/her evaluations.
 - The accuracy of the evaluation will be increased with proper and complete documentation.

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Increasing Rater Accuracy (continued)

- **Supervisory Accountability:** Those individuals who do performance evaluations should be held accountable for and evaluated on their ability to accurately evaluate employees.
 - Supervisors should be measured on the thoroughness, completeness, timeliness, and fairness of the evaluations they conduct.
 - In fact, supervisors' salary increases, promotions, and assignments to key positions should be based partly on their performance as raters.

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Increasing Rater Accuracy (continued)

- **Training of Raters:** To increase accuracy in evaluating employees, raters need to be trained. There are several critical errors and biases, outlined below, that tend to occur during the evaluation process. Through training, raters should be able to identify and avoid these errors:
 - a. **Halo and Horn:** The *halo* effect occurs when an employee receives a total evaluation based primarily on a single dimension or project that was so outstanding that it overshadowed other tasks or duties.
 - The spillover of success allows the rater to evaluate the employee similarly on all dimensions of performance.
 - The *horn* error occurs when a negative evaluation on one dimension or project supersedes any positive performance.
 - The halo or horn error can be avoided by proper documentation throughout the evaluation period.

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Increasing Rater Accuracy (continued)

- **Training of Raters (continued):**
 - b. **Leniency:** Leniency is often an intentional rating error. This error helps avoid conflict between a manager and employees. This error will usually occur when organizational sanctions against unqualified high ratings are lacking and/or when supervisors are not held accountable to ensure accurate and fair employee evaluations.
 - c. **Strictness:** This error occurs when employees are given unfavorable ratings regardless of job performance. Usually inexperienced raters or individuals with low self-esteem make this error.

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Increasing Rater Accuracy (continued)

- **Training of Raters (continued):**
 - d. Central Tendency: The theory of "*central tendency*" maintains that most employees will produce only average performance suggesting that a rater may be inclined to use a "play it safe" strategy. This error usually occurs when raters have a large number of employees to evaluate. Because the supervisor does not have time to readily observe each employee's performance, he/she "plays it safe" by not rating employees too high or too low.
 - e. Recency Effects: This happens when raters use recent information to evaluate employees. Evaluators tend to remember current events over events in the more distant past. Thus, if an employee has had several absences or problems with job performance in the weeks just prior to the performance evaluation, the evaluator may focus on these facts. Past performance, whether good or bad, is ignored. This error can be avoided by using memory aids and training for appraisers.

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Increasing Rater Accuracy (continued)

- **Training of Raters (continued):**
 - f. Contrast Effects: Contrast effects occur when a supervisor compares one employee's performance to another employee's performance. The result can produce an outstanding rating for an average employee when compared to a substandard employee. This can be avoided by establishing clear criteria for the performance evaluation system.
 - g. Escalation of Commitment: This can occur when managers personally hire employees. Research indicates that managers involved in the initial hiring decision of an employee are more likely to escalate commitment and investment in that employee longer than in other employees. The employee may be a poor performer, but the manager is willing to provide additional training to help that employee succeed. However, if the manager did not hire the employee whose performance is low, then a recommendation for termination is more likely. Training becomes essential for managers to avoid such errors.

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Conducting the Evaluation Interview

- **Careful planning is important**
 - Gather documentation supported by facts, incidences, situations, and cases.
 - Don't be overly influenced by atypical events or previous appraisals.
 - Don't expect employee's level or length of service to affect the current appraisal.
 - Don't be influenced by outside factors during the meeting such as compensation considerations for the employee's needs.
 - Be prepared to anticipate an employee's behavior in light of a substandard performance judgment.
 - Focus on the appraisal as constructive, not destructive, and be prepared with a constructive plan for improvement.

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Position Descriptions and the ADA



- **DO** define job expectations and essential functions
- **DON'T** assume a job description is an accurate reflection of current essential functions
- A position description (PD) is a structured document assigning work to a specific position as it is expected to be performed after customary orientation and training. The PD should accurately and completely describe the essential functions that are assigned and performed
- Position Descriptions Updates/Analysis
 - Adding objective standards for performance (i.e. keystrokes; error rates; etc.)
 - Cutting of the expansion of claims based on:
 - “personality disorder”—ability to work with the public
 - “attention deficit disorder ”—ability to work in an area with traffic/distraction
 - Other questionable, nebulous claims
- A reasonable accommodation does not eliminate an “essential function.” *Reeves v. Swift Transportation*, 446 F.3d 6376

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Employee Handbook/Personnel Policy Manual



- **DO** have a written set of guidelines setting forth the policies and procedures of the employer
- **DON'T** “borrow” your neighbor’s manual
- Employee Handbooks are also often called Personnel Policy and Procedures Manuals. The Handbook/Manual is a statement of the personnel policies of the Employer and how related business is to be conducted. These essential documents serve to set forth an Employer’s expectations for its employees. It is important that your Handbook/Manual be clear and unambiguous as it can serve as “notice” when defending employment actions.
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 - Disclosures/Disclaimers (e.g. at-will, no authority to bind, complete agreement); Discrimination/Harassment and Reporting Procedure; ADA/Reasonable Accommodation; Workplace Violence; FMLA; Discipline; BWC; Leave/Benefits; Internal Complaint

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Discipline



- What is the most common EEOC charge among all bases under Title VII of the Civil Rights Act, Age Discrimination in Employment (ADEA), and the ADA?

Discharge and Discipline

- In other words wrongful termination and disparate treatment
- How do we avoid EEOC charges alleging wrongful termination or disparate treatment?

We can’t – but we can set ourselves up for a successful defense

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Discipline (continued)



Objectives of Progressive Discipline:

- To inform employee of what is expected
- To instruct employees on unacceptable conduct
- To interpret policies, rules, and regulations
- To ensure employees act in accordance with policies, rules, and regulations

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Wrongful Termination



- What reasons would make a termination wrongful?
 1. Gender
 2. Race
 3. National Origin
 4. Age
 5. Disability
 6. Military or Veteran Status
 7. Genetic Information
 8. Retaliation (Workers' Compensation, FMLA, whistleblower, etc.)
 9. Public Policy

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Just Cause



Seven Tests for Just Cause

1. Notice
2. Reasonableness of Rule
3. Investigation
4. Fairness
5. Evidence
6. Consistency
7. Appropriateness

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Conducting an Investigation



Defining the Investigation

- Purpose
- Timeframe
- Management Involvement and Notification
- Interviews
- Relevant Documents
- What Questions to Ask
- Maintenance of Information

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Conducting an Investigation (continued)



Garrity (385 U.S. 493 (1967))

An employee:

has the right to remain silent but can be disciplined for failure to answer questions that are material and relevant to his or her job duties

must understand that his or her answers or evidence gained through the answers would not be used against him or her in a criminal proceeding, except for perjury

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Public Sector Complexities



- Governments are subject to more constitutional restraints than are private sector businesses: 1st, 4th, 14th Amendments
- Must answer to an electorate
- RC 121.22 (opening meetings); RC 149.43 (public records)
- Many public sector employers fail to devote sufficient time and resources to discharge cases; particularly harassment

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Succession Planning



- Succession Planning can be defined as a purposeful and systematic effort made by an organization to ensure leadership continuity, retain and develop knowledge and intellectual capital for the future, and encourage individual employee growth and development.

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Succession Planning



- 70% of companies say they do some form of succession planning, yet
- 62% say they have too few internal candidates to meet their organizational needs.

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Succession Planning



Current State:

- If you had to grow your leadership team by 50% in 60 days, could you?
- Could you answer yes to this question: “I know exactly what it takes to be promoted in this Agency”?

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Succession Planning

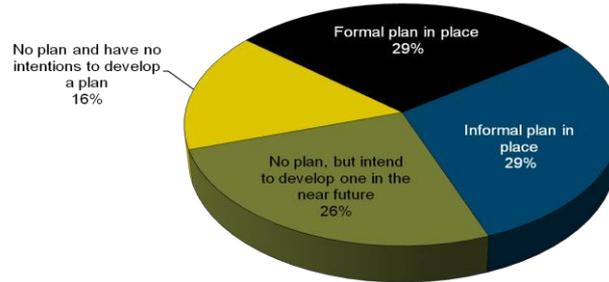


Why worry about it?

- Board concerns and directives
- Increased costs associated with external searches
- Increased turnover
- People who had been regarded as successors for key positions left by surprise
- High performers are leaving
- Managers complain that they have no one ready to fill vacancies
- Employees complain that promotion decisions are made unfairly
- Insufficient numbers of women and/minorities at senior levels

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Succession Planning



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Succession Planning



Step 1: What's Needed for Future Success

- What are the positions that are mission critical to your organization's future?
- What are the competencies needed to be successful in these roles?
- That is, what are the knowledge, skills, and abilities, that are needed for success in the position.

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Succession Planning

Example Competencies:

- **Accountant**
- **Knowledge - Professional** - Professional knowledge and skill in accounting and ability to keep current with developments and trends. Knowledge and ability to use applicable information technology and systems to meet work needs.
- **Financial Monitoring and Analysis** - Ability to monitor and collect data and to assess the accuracy and integrity of data. Ability to analyze data. Ability to ensure compliance with applicable standards, rules, regulations, and systems of internal control. Ability to interpret and evaluate results, prepare documentation, and create financial reports and/or presentations.
- **Decision Making and Problem Solving** - Ability to use effective approaches for choosing a course of action or developing appropriate solutions and/or reaching conclusions. Ability to take action consistent with available facts, constraints, and anticipated consequences.
- **Communication and Interpersonal Skills** - Ability to communicate information to individuals or groups and deliver presentations suited to the characteristics and needs of the audience. Ability to clearly and concisely convey information orally or in writing to individuals or groups to ensure that they understand the information and the message. Ability to listen and respond appropriately to others. Ability to establish effective working relationships that foster organizational success.
- **Supervision** - Ability to recruit, select, counsel, discipline, establish performance standards, and evaluate performance of employees to retain a diverse workforce. Ability to administer and ensure compliance with human resources policies and procedures. Ability to monitor and assess work, provide feedback, and provide technical supervision. Ability to develop knowledge, skills, and abilities of employees and plan for and support employees in career development opportunities.

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Succession Planning

Step 2: Assess your talent

- Inventory of your talent pool.
- Who are “high potential” people? “HiPo”
- Who are the “high performers”? “HiPer”
- How do you do that?

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Succession Planning



High Performance Low Potential	High Performance Medium Potential	High Performance High Potential
Medium Performance Low Potential	Medium Performance Medium Potential	Medium Performance High Potential
Low Performance Low Potential	Low Performance Medium Potential	Low Performance High Potential

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Succession Planning



<u>Valued Specialist</u> Continue in current role	<u>Emerging Potential</u>	<u>STAR – Top Talent</u>
<u>Emerging Specialist / Consistent Contributor</u> Improve in current role	<u>Valued Contributor</u>	<u>Rising Star</u>
<u>Underperformer - Questionable fit</u> New role or end employment in 3 – 6 months	<u>Misspent talent / At-risk</u> Improve in current role	<u>New to Role/Unrated</u> Anticipate high performance and potential

Prepare for
future role /
promotion

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Succession Planning



Step 3: What are the gaps?

- What are the gaps between what's needed for each job and the current competencies of the team member.
- What's needed to move the talent to the next level?
- Create the development plans for your HiPo and Hi Per staff members.

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Succession Planning



Step 4: Develop the Talent Pipeline

- Build new skills
- Development plans for targeted staff members
- Transfer the knowledge

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Succession Planning



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Succession Planning Best Practices



1. Top management involvement
2. Targeted processes to focus on clearly defined, specific goals
3. Comprehensive assessment programs based upon competencies
4. Creation of talent databases incorporating performance, assessment, demographic, education, experience, and career interests
5. Identification of future talent requirements
6. Structured and individualized development programs

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Comprehensive Assessment of Talent



1. Behaviorally defined competencies
 2. Learning agility and derailment factors
 3. Defining performance and potential
 4. Early identification of talent
 5. Multi-source methods
 6. On-going feedback processes
 7. Continuous re-assessment
 8. Test learning agility, development of competence and performance
-

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Creation of Talent Databases



1. Integration of data from multiple systems, including HRIS, Recruitment, Learning.. Etc..
 2. Definition of missing talent data elements
 3. Collection of missing talent data
 4. Education, competencies, experiences, career interests, mobility
 5. Reporting to facilitate decision making
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