

## Employee Evaluation Practices Under Scrutiny

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[Currents](#)[LetterE](#)[Small](#)Recent weeks have seen employee evaluation practices in the news several times. For example, following an investigation into its employee review system, the federal Consumer Financial Protection Bureau announced in May of this year that it would completely eliminate performance ratings previously assigned to some employees. In addition, the Bureau decided to assign high performance ratings to employees who received certain lower ratings in the past two years and to provide pay raises to those employees. The Bureau had come under fire due to allegations of race discrimination in assigning ratings and had even been called to [testify before Congress regarding the allegations](#). The Bureau isn't the only employer facing allegations of discrimination in its evaluation and performance review practices. An African American employee recently brought a racial discrimination claim in the Southern District of New York against his employer Tiffany's, the luxury jeweler. The employee alleges his performance evaluation changed from a positive to negative rating when a new management team member asked him for a photo of himself. The case is in its initial stages. Finally, after nearly 5 years of litigation, in June of this year the Northern District of Illinois has issued somewhat of a split decision on an employer's motion for summary judgment. There, the claims brought against a large nonprofit included allegations of racial discrimination in performance evaluations and merit pay increases. Employee evaluations are certainly a powerful tool in defending a variety of employment claims. Juries and other decision makers expect some degree of fairness in employment decisions – it is expected that employee evaluations have given notice to an employee of ongoing performance issues, and be consistent with employment decisions that follow. On the other hand, these matters demonstrate that evaluation systems can be the basis of claims themselves. It is important that employers design evaluation systems to be consistent in their application, and have checks and balances to identify potential issues in the system internally before an aggrieved employee does it for you. While simply receiving a lower performance rating may not be considered an "adverse action" sufficient to form the basis of a discrimination claim, a bad evaluation can certainly support a court's finding of adverse action. For example in the Illinois case, the court determined that the employees had suffered material adverse actions, due to the fact that the performance evaluations were tied to annual salary increases. In short, we would rarely advise an employer not to have employee evaluations as a result of the types of issues flagged in these cases, but they are important legal documents and therefore should be created with the attention and care such documents warrant.

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