

Employment References — Best Practices

In today's litigious employment environment, responding to reference requests can expose an unwary employer to legal claims from former employees. Moreover, as a result of the potential for litigation, it has become difficult to check the references of potential new hires. This edition of the *Employment Law Advisor* outlines an employer's exposure to liability in this area, discusses best practices in handling reference requests, and offers suggestions on how to obtain reference information.

The Legal Landscape

Employers potentially can be held liable for defamation for having provided a negative reference. In order to prevail on such a claim, a former employee must show that his former employer intentionally or negligently "published" a false and defamatory statement of fact that caused damages to his or her reputation. "Published" means that the false statement was communicated orally (slander) or in writing (libel) to a person other than the plaintiff former employee. To be defamatory, the false statement must tend to "subject the plaintiff to contempt, ridicule or hatred, or discredit the plaintiff in the minds of any considerable and respectable class in the community." Generally, any false statement that discredits or disparages an individual in the conduct of his or her trade or profession will be considered defamatory.

Moreover, it is well-settled under state and federal employment anti-discrimination statutes that an employer can be held liable by a former employee for providing negative references that are discriminatory or retaliatory. Case law has made clear that even after the employment relationship has ended a

- ✓ Are you concerned about exposure to liability when responding to reference requests?
- ✓ Do you need to know how to respond to requests for references about former employees?
- ✓ Do you have problems obtaining information you need about potential hires when requesting reference information?

Read on to learn about best practices when providing, and requesting, reference information...

former employee may successfully sue his or her former employer if he or she can show that a negative reference was issued for discriminatory or retaliatory reasons.

Given the potential exposure to defamation, discrimination and retaliation claims, many employers are rightfully concerned that providing a negative reference will result in legal liability. The law, however, actually favors employers in this area. Employers have a "qualified privilege" to provide references, no matter how negative. This means that an employer cannot be held liable for providing a negative reference unless the employer knowingly and recklessly provided false information, acted out of "malice," or issued the negative information "excessively."

Of course, whether an employer knowingly and recklessly issued a false negative reference, acted out of malice, or issued the derogatory reference excessively, are often issues in cases dealing with negative references. Because issues of good faith, accuracy and truthfulness are fertile grounds

for litigation, the "qualified privilege" for providing references often means little to an employer if the employer has to spend thousands of dollars defending itself to establish that its reference was truthful and accurate.

Responding to Reference Requests

Given the potential liability, careful employers should develop a policy on how best to respond to reference requests. Whatever that policy may be, by implementing a uniform policy, the employer's response to reference requests will be more consistent. This consistency will help the employer avoid claims of disparate treatment in providing references (which would provide the basis for a discrimination or retaliation claim).

continued...



So, what should the policy be? Should the employer confirm only the position held and dates of employment (as is the policy of many employers), or should the employer provide additional information? The answer is not clear cut and generally will depend on the employer's employee relations policies and philosophy.

Perhaps it is obvious, but a policy that is consistently and uniformly applied and allows only for the provision of basic information, such as positions held and dates of employment, is the least risky course. If references are limited to only this information there is essentially no basis for a claim of defamation or discrimination. Given that such a policy is "safe," many employers have adopted this policy. In order to be effective, such a policy should clearly prohibit supervisors from providing any form of reference, and should further require that any requests for references be directed to the human resources department or a specific officer or manager for response. Otherwise, there is a risk that individual supervisors will respond to reference requests in an inconsistent manner.

Many employers, however, believe that it is not appropriate to limit references so severely. Generally, they believe that former employees who were successful deserve favorable references while employees who had less than stellar track records should not be able to hide their poor performance due to an overly conservative reference policy. As such, these employers are willing to assume additional risk and provide references, both positive and negative.

For those employers who are willing to provide additional information in response to reference requests, we offer the following suggestions:

- ✓ Limit who may respond to reference requests to a responsible human resources representative or a certain corporate officer or manager

- ✓ Obtain permission from the employee seeking a reference to release information, as well as a release of legal claims from such employee releasing the former employer from potential litigation in connection with the reference
- ✓ Be as truthful and accurate as possible; focus on objective facts in providing the reference ("Susie had an 80% attendance rate), not subjective characterizations ("Susie was a managerial issue")
- ✓ Provide verifiable information (for example, objective observations of performance gleaned from the former employee's most recent review).

Obtaining References

Given many employers' policies against providing substantive responses to reference requests, it has become difficult (if not impossible) to obtain meaningful reference responses. This policy of "silence" makes it hard for employers to obtain information about a potential new hire and sometimes can leave the employer guessing at whether the applicant is the right fit for the job. However, there are some steps an employer can take to obtain better responses.

Obtain a release from the applicant

If an applicant wishes to provide references, the hiring employer should have the applicant sign a form that grants the former employer permission to discuss the applicant and releases it from any liability for having done so. The hiring employer can then send the signed release to the former employer which should give the former employer some comfort that it can provide a reference (whether positive or not) with a lower risk of litigation.

Don't call HR

In many cases, a former employer's human resource department enforces a reference policy. Well-trained HR personnel will likely be less likely to provide any reference information. However, supervisors may not be as sophisticated in this area and are more likely to provide a potential new employer with information of substance.

Don't ask for a "reference"

If a potential employer calls an applicant's former employer and asks for a "reference," it raises a red flag (see discussion about liability, above). As such, it may be more effective to call and simply ask for "verification of employment." This may not put the former employer's personnel on guard as would a request for a reference.

Don't speak too much

In making calls to former employers, the potential new employer should not speak too much. Generally, in most conversations there is a dynamic of filling in "dead air." By not speaking too much, one encourages the other party in a conversation to speak. This technique has the potential to develop information about the applicant that might not have otherwise been obtained.

Training / Employment Law Audits

With a New Year just two months away, now is a good time to start planning for preventive employment law assistance.

Please [click here to visit our website](#) for more information on our training and employment law audit services.

The Morse, Barnes-Brown & Pendleton, PC, **Employment & Immigration Practice Group** provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 1000 companies.

Robert M. Shea – rshea@mbbp.com

Mark H. Burak – mburak@mbbp.com

Donald W. Parker – dparker@mbbp.com

John J. Gallini – jgallini@mbbp.com

Scott J. Connolly – sconnolly@mbbp.com



The law firm built for business.SM

Employment Law Advisor is intended as an information source for clients and friends of MBBP. It should not be construed as legal advice, and readers should not act upon information in this article without professional counsel.