



Job references: What you say can be used against you

In today's economy, job references are even more important than they used to be. With so many people out of work, a positive job reference can really make a difference to the desperate job seeker. Conversely, a negative reference can doom even the most erstwhile job applicant. Contractors should note that job references can be a tricky area — both for the employer giving the reference and for the employer seeking one.

Frustrated job seekers having difficulty landing a new job are increasingly looking to sue former employers claiming that a bad reference is holding them back. And sometimes they're right. The legal theory is known as defamation but can sometimes be labeled slander or libel. Generally, slander is when someone makes incorrect verbal remarks that harm another's reputation. Libel is typically the same, but it occurs in writing.

In the context of a job reference, the plaintiff brings a defamation suit against the former employer alleging that the employer gave an incorrect, damaging reference that kept the claimant from getting a new job. Typically, the claimant seeks damages for wages while out of work, plus possible punitive damages for harm to his/her reputation. In most states, the claimant must prove that the statements were made with actual malice, i.e., an intent to harm the subject of the statement. In the job reference context, that can be very difficult and expensive to prove or defend, so it is almost always in your interest to take steps to avoid even the possibility of this kind of lawsuit if you can.

So what can you do?

Some employers take the position that they will simply not give out any job references. Others limit the information they give out to mere confirmation of dates of employment. Still others tell all. Naturally, there is a problem when the information flow is restricted because

other employers may be less likely to give you reference information when you need it. The best course is to be truthful in all references, but also be discreet. As a practical matter there are some steps you can take to reduce your risk and still ensure that reference information gets out accurately and safely.

First, be consistent. Make sure you adopt a clear policy about giving out reference information that is followed by all who might be contacted for a reference. A good policy should require that all reference requests be directed to the human resources or personnel department or office manager. Due to the possibility of a dispute over what may or may not have been said when providing references, ensure that your policy only permits written references. Litigation over a verbal reference is almost always more expensive and time-consuming, and it is often much more risky because the jury might not believe you.

Second, control the manner in which references are obtained. There is nothing wrong in asking for written confirmation of the request for a reference and something in writing from the subject of the job reference confirming that it is okay to release reference information. Document who made the request, their purpose and what you provided.

Third, limit the number of people who give out reference information. Naturally, this helps ensure that the information given is consistent with the policy, but it also prevents a front-line supervisor from inadvertently telling someone more than he or she should.

Fourth, when possible, get permission in advance from a departing employee. When someone leaves your workforce, make arrangements for how reference requests will be handled. Often, promising a neutral reference for someone you are firing is a good way to get their cooperation in returning items that belong to you. In some cases, a promise of a neutral

reference can be part of a release or severance agreement by which the person you are letting go agrees not to sue you. Sometimes, it is helpful to attach sample reference text to the agreement so that the individual knows what will be said or sent if a reference is requested.

Fifth, be careful what you say. For most employers, simply giving dates of employment, job title and ending pay will be enough to satisfy the request. Many employers also indicate whether or not the employee is eligible for rehire. You should never give out any potentially harmful information, such as the reason for a termination. Instead, simply repeat that the subject is not eligible for rehire.

Finally, stick to your policy. It is always tempting to go beyond your policy and say something positive about a good employee, or say something negative about a truly terrible one. This is how employers get sued. And you can't assume that the former employee won't find out because there are now scores of reference-checking companies on the Internet, offering to help job applicants find out what their old bosses are saying about them. Bending the rules will eventually catch up to you. ☐

Dave Whitlock is a partner at Elarbee Thompson, a labor and employment law firm in Atlanta, Ga. He has over 22 years experience in business immigration, compliance, employment counseling and training and is a frequent lecturer and presenter on best practices in employment-related topics. He can be reached at Whitlock@elarbeethompson.com

Read more "Legal Matters" articles at ConcreteContractorMag.com

