

EMPLOYEE REFERENCES: IF YOU CAN'T SAY ANYTHING NICE...

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What do you do when someone calls to ask for a reference on a former employee? Do you respond only with "name, rank and serial number?" Do you give your honest opinion of the employee, even if you fired the employee for poor performance? What if you don't have anything nice to say about the employee - is it best to say nothing at all? Giving out information about an employee, particularly a poor worker is risky. A former employee may try to sue you if your reference prevents his or her from getting a job. Employers can also be liable for defamation, claiming that the reference was false and damaging to the former employee's reputation.

Is providing no reference the answer? More and more businesses are refusing to provide references. At present, there is simply no duty to provide a reference or to warn a new employer about a "bad apple." A business-owner faces no risk of liability by providing no reference or a neutral reference (verifying only dates of employment, salary and positions held). As soon as you begin to provide a more detailed explanation, you increase the risk of a lawsuit by the former employee.

Employers have been liable for defamation when they have accused an employee of stealing or using drugs. An employer has a privilege in reporting such conduct to the police, but that privilege is lost when an employer informs third parties. You can fire an employee because you suspect the employee of stealing without having to meet any particular burdens of proof. Employees are "at will" and can be fired for any reason, or no reason at all. But when you label an employee a "thief," you had better be able to back it up with proof of a conviction. If you feel compelled to tell prospective employers about the reason for the discharge, then you should restrict your statement to your suspicion ("The employee was fired because we suspected him of stealing.").

In providing any reference, you must be able to back it up with facts. For example, saying that an employee had lousy attendance may be an exaggeration which could get you into trouble. It is better to say that the employee was fired because he missed 12 days of work during the last three month period. Or, that the employee was fired because he

violated the company's attendance policies. By sticking to the facts that you can prove, you can defend yourself in a defamation action. Defamation does not include pure opinion. A statement that an employee was a "lousy" worker is not defamatory. A statement that you thought the employee was "on drugs" is defamatory unless you have the objective facts to back it up.

Many legislatures have tried to remedy this situation by providing immunity for an employer who, in good faith, discloses information about an employee's job performance or reasons for termination. All in all, about 20 states (including Maryland) have adopted such immunity laws. While these statutes offer some protection, an employer may still find itself in court defending charges that its statements were "malicious."

Another risk in giving references is liability under Title VII of the Civil Rights Act of 1964, as amended. It is unlawful to give a negative job reference for a current or former employee, as a form of retaliation for an employee for filed a complaint of discrimination. Also, if you have a pattern of giving good references only to employees who fall into certain classes (i.e., members of a certain race, sex, age, etc.), you could face liability.

The following are some tips to consider when giving employment references:

1. Develop a consistent policy for job references.
2. Ask the person seeking the reference if the former employee has signed a consent form.
3. Be consistent and provide the same type of information for all former employees.
4. Be truthful and objective. Do not supply rumors or hearsay.
5. Do not volunteer any unfavorable

information.

6. Stick to job-related information.
7. Document your conversation to keep a record of who you spoke with and what information you provided.
8. Review the employee's personnel file before providing any information. Do not give information based on guesswork or memory.
9. Remember that nothing you say is "off-the-record."