

Member's Quarterly

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Feature

Providing a Negative Reference

Employers beware



Members
Quarterly
Staff Writer

We all want to be honest and we certainly don't want to burden another employer with a 'problem' employee. But prudence and caution should prevail when it comes to giving less than glowing references to former or departing employees. That's because there is now a fair body of legal jurisprudence that suggests employers could be liable for a number of penalties and leave themselves open to lawsuits from disgruntled ex-employees.

Ontario is the Canadian province with the most experience with some of these situations, but most provinces and territories will have similar legislation and courts that might be perceived as leaning towards employees. In Ontario, the Employment Services Act (ESA) is designed to protect employees and set minimum standards for most workplaces in Ontario. Employers are prohibited from penalizing employees in any way for exercising their rights under the ESA.

It is important to note that the ESA doesn't outlaw negative job references entirely. But it does have a ban on reprisals. That means you can't punish an ex-employee by giving a negative reference to try and somehow get even with them. The courts take this matter very seriously. Organizations who are found guilty of reprisals against former employees can be reinstated or compensated for claims of lost wages or employment opportunities.

You can also be sued for defamation for some negative references if it can be proven you acted in bad faith or provided false, misleading or malicious information that prevented a person from gaining employment with another business or organization. That's why you can provide some negative information, as long as you have supporting or corroborating data that you can provide to document and show your case against the former employee. This would include things like attendance records or letters written on an employee's personnel file.

Some general suggestions for giving all employee references might include keeping them fact based, avoiding speculation and/or personal attacks, have the paperwork to back up your claims, and wherever possible, take a neutral approach and tone. Courts tend to react less than positively to opinion and that's why references should be primarily based on facts. It's safer and actually easier. Stay away from guessing about whether an employee might fit in another organization and avoid generalizations like stating that they have a poor attitude. Those kinds of statements can come back to haunt you later.

Here's a few more tips about how to avoid the pitfalls that negative references may create.

Stick to the Facts

As noted above, unless you can back it up, don't say it in an employee reference check. Avoid giving your personal opinions, particularly if they are the less than positive sort, but even positive ones, just because you might really like the person. Give your honest evaluation based on your experience and you should be fine. Whatever you say could have a tremendous impact on both an employee and their future employment prospects. Your personal belief is subjective and should likely be kept to yourself and remember that in a new situation, an employee could act completely different. When in doubt, stick to the facts, and keep your personal opinions, personal. If it's not documented, don't mention it.

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Don't Overplay Your Hand

Even if you have a strong urge to come right out and tell the reference checker to stay away from a certain employee, resist that urge, too. Sometimes, just by saying that you have nothing to say, other than to confirm their employment is enough of a statement to warn others off. Saying that you have nothing to say implies that you have nothing good to say. That may be good enough. The only exceptions to this suggestion might be if there are civil or criminal proceedings or an ongoing workplace investigation into harassment or workplace bullying. You need to give any prospective employer a heads up in these kinds of situations. But again, stick to what you have evidence of and avoid speculation of any kind.

Don't Overshare

There is a range of information that is off bounds in an employee reference scenario. This might include but is not limited to medical information or if they have taken certain kinds of leave or been off on disability. In fact, any of the prohibited grounds for a human rights complaint like their appearance, age, weight, gender, or sexual orientation would be similarly off limits. Check with your HR advisors or legal counsel if you are unsure about matter which might be appropriate in an employee reference check. The bottom line is that if you feel uncomfortable, don't answer the question and end the session as quickly as you can.

Centralize Your References

Your HR department should be the lead on all references. They have easy access to the documentation and can refer requests to the appropriate manager and provide them with support and suggestions. This will ensure that you have common language and approaches to providing references and limit your exposure to any supervisor or manager who is acting as your company's representative. Managers should be trained on what they can and should not say in employee references. This will help prevent sticky legal situations from arising in the future.

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