

Addressing Impediments to Disclosure of Negative Information about Job Candidates

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Laws To Consider

- Privacy Rights
- Harassment and Discrimination Laws
 - Title VII
 - Age Discrimination in Employment Act
- Other state law claims (defamation)

What constitutes defamation?

- Varies by state.
- In general, defamation occurs when a person makes false written or oral statements that harm another person's reputation.
- For a former employee to prove a defamation case, that employee must prove that false statements were made, communicated to a third party and that injury occurred as a result of the false statement.

What constitutes defamation?

- Injury is usually a job opportunity lost because of reliance on the defamatory statement. Any less than satisfactory referral carries with it the threat of a defamation suit by the affected employee, as illustrated by *Noonan v. Staples Inc.*, 1st Cir., No. 07-2159 (Feb. 13, 2009). In this case, the First Circuit held that even factually accurate statements about a former employee can form the basis of a defamation suit if the plaintiff can prove malice.

Fact Verification versus Reference

- Many companies decline to give references, instead only providing certain factual information, usually:
 - Dates of Employment
 - Positions Held
 - Salary Information (only with written consent)

Fact Verification versus Reference

- ❑ A “reference” provides less concrete factual information such as job performance, opinions on personality traits and eligibility for rehire.
- ❑ While few employers provide “references”, much can be learned from fact checking.

Importance of Factual Verification

- ADP Screening and Selection Services found that 44% of applicants lied about their work histories, 41% lied about their education, and 23% falsified credentials.
- The importance of getting the correct factual information cannot be over stated.

Importance of Factual Verification

- **In the late 1980s, the Port Authority of New York took out want ads soliciting resumes from electricians with experience using Sontag conductors. Nearly a third of the respondents said they had experience using Sontags.**
- **There was no such thing as a Sontag conductor.**

Importance of Factual Verification

- **Newly hired Notre Dame football coach George O'Leary lost his job in 2001 — days after taking the post — when it was revealed that there were inaccuracies on his resume, including a master's degree from a non-existent institution.**

Importance of Factual Verification

- **Marilee Jones was dean of admissions at MIT for 28 years, until it was discovered that she had falsified educational information. She resigned.**

Importance of Factual Verification

- **Former RadioShack Corp. CEO David Edmondson resigned after the Fort Worth Star-Telegram reported he made up two degrees he never earned.**

Laws Encouraging Employers to Provide References

- **In response to employer concerns about liability for providing references, many states have enacted laws providing immunity for information given about former employees that is accurate.**

Laws Encouraging Employers to Provide References

- The laws vary widely by state.

Generally, they provide immunity from civil suit for providing the information so long as certain conditions are met.

Laws Encouraging Employers to Provide References

- Commonly, these laws require:
 - The information is job related, and
 - The employer is not acting maliciously.

- NEVER DISCLOSE MEDICAL INFORMATION.

Laws Encouraging Employers to Provide References

- The presumption of good faith can only be challenged if a current or former employee can show by clear and convincing evidence that information the employer disclosed was knowingly false, deliberately misleading, or made with reckless disregard for the truth.

Laws Encouraging Employers to Provide References

- Many questions arise in these situations.
 - What information was provided?
 - Was the information accurate?

Laws Encouraging Employers to Provide References

- If such references are going to be provided, in general or in specific situations, it is wise to:
 - Have policies and practices in place limiting who can provide such information
 - All information should be thoroughly considered before being provided
 - All information should be provided in written form to eliminate questions about what was conveyed

Laws Encouraging Employers to Provide References

- There have been lawsuits alleging negligence brought against employers who failed to provide negative information in response to a reference inquiry.
- Most of the cases have found that where a positive reference was given, there can be liability if the negative information was NOT provided. On the other hand, simply fact verifying was not a basis for liability. Do you know what your managers are doing?

Waivers/Consent forms – signed by job applicant

- It is also wise to require job applicants to sign a form that consents to the inquiry and waives any claims they may have against anyone providing job references. This may make prior employers more inclined to provide such information.
- This is also a good response when getting a reference inquiry – to ask for a consent and waiver from the former employee as to any information provided.