

NSABB Public Consultation

Personnel Reliability Among Individuals with Access to Select Agents

Panel IV – Addressing impediments to disclosure of negative information about
job candidates



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What are the potential liabilities of passing on accurate but derogatory information?

- Claims of defamation
- Invasion of privacy
- Misrepresentation
- Interference with prospective employment
- Intentional infliction of emotional distress
- Discrimination claims
- Claims of Retaliation



What can or cannot be passed along?

“Stick to the facts and act in good faith”

- you made the statement in good faith.
- you and the person to whom you disclosed the information shared a common interest, and
- you limited your statement to this common interest.

In most states, employers are entitled to limited protection in defamation cases, even if the information they provide is false.

“Qualified Privilege”



Qualified Privilege

Qualified privilege is subject to “abuse” when...

- Known to be false or probably false
- Shared with person(s) who do not have a “need to know”
or
- If malice can be established



Withholding Information with foreseeable risk or danger - Liability

If in the judgment of the person giving the reference, the withholding of negative information could result in an uninformed hire that might lead to serious consequences.

Examples: Integrity with research, stewardship of funds, types of confirmed harassment, physical danger or untreated emotional/psychological issues that carry a level of risk.

Former employer knows of tendency towards, or history of, violence or sexual misconduct - obligation to disclose.



Potential Consequences & Liabilities

Intentional lies or intentionally withholding

Negligent Referral – when a person serving as a reference for a candidate for employment intentionally lies about the candidate or intentionally withholds information he/she knows to be true that causes injury to a third party.

The first party can be sued by the new employer as well as by any other employees of the new employer who suffered because of the person who was hired.



Defamation

Employees who feel maligned can sue for defamation – called slander if the statements were spoken or libel if they were written.

Former employee must prove that you gave out false information and that the information harmed his or her reputation. If you can prove that the information you gave out was true, the defamation lawsuit will be dismissed.

“Stick to the facts and act in good faith”



Defense for defamation claims

- Truth (absolute defense)
- Consent
 - Employee knowingly and voluntarily signed a release authorizing the former employer
- Qualified Privilege
 - Employer believed the information was true
 - Information served legitimate business purpose
 - Information provided to appropriate individual with legitimate business intent.



Strategies to alleviate the general reluctance to provide candid references

- At time of hire, have a policy regarding giving references (with signature acknowledgement)
 - What information will be provided
 - How it will be given
 - » By whom
 - » In what format

Policy should be flexible enough that you can evaluate individual cases that may raise particular issues.

Review and update the policy on a regular basis



Strategies continued

- Adopt policy to only respond to written requests and responses are only given in writing
 - » Time issue during hiring process
- Performance Management “best practices” – accurate records and supporting facts
 - » Regular basis
 - » Share with employee
 - » Remind employee of personnel record and use in future promotional or other employment opportunities – eliminate “unknown” and set expectations.



Strategies continued

- If reference is given by phone (as your policy allows), obtain name, title, and phone number of the person calling, what the position would be and their relationship in the hiring process; agree to call back.
 - » Verification of the person and employer
 - » Confirm that the person has a “right to know” this information
 - » Request in writing by fax or email



Strategies continued

- Consider only verifying information by employers requesting references rather than volunteering information.
- Obtain written release from previous employee.
- Consistency in the application of reference policy; train managers.
- Following all reference checks, prepare a statement of information provided, to whom it was provided, and in what form it was provided. A standard form is helpful for this with all letters of reference attached.



Important Reminders

You must talk from personal knowledge; not hearsay.

- Comments and observations need to be job related.
- Personnel record supports the facts given.
- Regular and documented performance management is essential.



Strategies for New Employer

Negligent Hiring – failure of the employer to use reasonable care in the selection and hiring of employees.

Know some key questions to ask

- Can you tell me why “X” left?
- Would you hire “X” again?
- And, if so, what position do you think he/she would be best suited for?
- Could “X” have stayed with your company if he/she had wanted to?
- Has “X” access ever been suspended? Why?
- Is there anything else about “X” that you think we should know that would pertain to his/her ability to be successful in the capacity of _____ ?



Listen Carefully

If by verbal communication...

- Was there hesitation in answering?
- Did the reference sound reluctant to answer?
- Did the reference only provide the basic – name, title, dates of employment?
- Or, did the reference decline to answer?

Be aware of “red flags”

Thank You



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