

AVOIDING LIBEL AND SLANDER CLAIMS: WHAT YOU CAN AND CANNOT SAY ABOUT YOUR EMPLOYEES IN TODAY'S TIGHT JOB MARKET

I. INTRODUCTION

Perhaps your organization is contemplating a reduction-in-force or has recently gone through a round of lay-offs. You are getting pressure from your line managers to “do the right thing” and provide a good reference for those employees whose jobs will be or have been cut. You sit down at your computer with a cup of coffee and the best intentions and the only thing you can come up with is, “[Employee] worked for Company from [hire date] to [lay-off date], when a plant closure resulted in [his/her] lay-off. At the time of the lay-off, [Employee] held the title of [last position held].” Not exactly glowing. Should you say anything about performance or state that the employee was in good standing? Should you go further and say that, had the economy not gone south, the employee would still have a job with your company? Quite frankly, the answer to these questions depends on how risk-averse is your organization, and how conservative is your legal counsel.

The fact remains that employers are most often on the winning side in defamation cases. However, the real question is victory at what price? The cost to defend even the simplest lawsuit can reach \$100,000 or more if the case goes to trial. Many corporate employers, facing increasing legal claims brought by disgruntled former employees and unsuccessful job applicants, have adopted a “name, rank, and serial number” reference policy in an attempt to head off possible litigation. Whether this actually reduces exposure to litigation is debatable, especially in light of the emerging theory of “compelled self-disclosure.”

Although references admittedly provide significant exposure to potential litigation, informative references are indispensable. Research indicates that about a third of all job applicants lie on their resumes. If you fail to check a prospective employee's references, you may end up with a less experienced, less able employee than you thought you hired. Or you may end up hiring someone else's problem – maybe even a dangerous problem. If you didn't do everything you could to make sure your new employee was safe, you may be sued for negligent hiring when that time bomb explodes. Or, if you pass a dangerous employee off on an unsuspecting employer, you may be sued for failure to warn or negligent referral.

What is an employer to do? By understanding the potential liability and by implementing a well-planned reference policy, institutions can limit their exposure to libel and slander claims without resorting to a name, rank and serial number approach to references.

II. WHAT ARE THE RISKS?

Employers who are asked to provide employment references face at least three major dangers: defamation and compelled self-defamation, retaliation and negligent referral.

A. Defamation And Defenses

Defamation is a false statement tending to harm the reputation of another, communicated to a third party in a manner suggesting – at the very least – that the statement was negligently made.¹ Defamation may be either oral (slander) or written (libel). Some statements are so obviously harmful to one's reputation that proof that the statement harmed one's reputation is unnecessary. Such statements constitute defamation *per se*. One example of *per se* defamation is a false statement that a former employee is a convicted felon.

The defenses (or privileges) to a claim of defamation may be either absolute or qualified. Absolute defenses cannot be lost through abuse. This means they cannot be lost even if the defendant made the statement with “malice” (sometimes defined as “ill will”) or excessively published the statement (that is, made the statement to individuals who did not have a need to know the information).

Truth is an absolute defense to a claim for defamation; many states have enacted statutes that codify the defense.² Additionally, statements made in the context of a legislative, judicial, or administrative proceeding are also afforded an absolute defense.³ Thus, any statement made under oath during a trial is immune from a claim of defamation. In many states, statements made to the state unemployment compensation agency are also absolutely privileged.

Qualified privileges include the “qualified business privilege.” The privilege permits an employer “to publish defamatory material if the publication is reasonably necessary to the protection or furtherance of a legitimate business interest.”⁴ In order to enjoy the protection of this privilege, the statement must (1) be made in the good faith belief of its truthfulness; (2) serve a legitimate business need; (3) be limited to serving the business need; (4) be

¹ Restatement (Second) of Torts §§ 558, 559 (1977).

² E.g., Tex. Lab. Code § 52.031; Cal. Lab. Code § 1053.

³ E.g., Cal. Civ. Code § 47.

⁴ See, e.g., *Vackar v. Package Machinery Co.*, 841 F. Supp. 310 (N.D. Cal. 1993); *Sigal Constr. Corp. v. Stanbury*, 586 A.2d 1204 (D.C. 1991).

made on the proper occasion; and (5) be published only to parties with a legitimate need to know the information.⁵

It is well established that expressions of opinion based on disclosed or assumed non-defamatory fact cannot form the basis for a claim for defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.⁶ An expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based is treated differently. The test is whether the statement in question can reasonably be read as fact. *Id.* The determination of whether or not a statement can reasonably be read as fact depends upon the nature of the statement, the context and the surrounding facts and circumstances under which it is made.⁷

1. What Can You Say?

What kinds of statements can you safely include on an employment reference? Obviously, you cannot make an unsubstantiated accusation of a crime without expecting some major fallout. But can you honestly evaluate an employee's performance without fear of retribution?

***Bishopp v. ABN-AMRO Servs. Co.* 2003 U.S. Dist. LEXIS 12368 (N.D. Ill. 2003).**

James Bishopp had risen through the ranks to the position of First Vice President at the time of his termination from ABN-AMRO Services Company, Inc. in May 2002. Despite his superior ratings on performance reviews and numerous promotions, Bishopp was terminated for having an "unsatisfactory audit." Bishopp sued his former employer and two former supervisors, alleging that they defamed him when each made statements relating to the reason ABN-AMRO terminated his employment. There were three alleged defamatory statements: (1) "John Bishopp received an unsatisfactory audit on the Lotus Notes project," (2) Bishopp was "terminated as a result of an unsatisfactory audit and for failing to make the required corrections pursuant to previous warnings," and (3) "John Bishopp had been terminated based on an unsatisfactory audit and because he failed to make corrections to Lotus Notes pursuant to prior warnings." *Id.* at *6.

Under Illinois law, statements are defamatory per se if they impute an inability to perform or want of integrity in the discharge of duties and/or they prejudice the subject or impute lack of ability in his trade, profession or business. Even if the statements are defamatory per se, however, recovery can still be precluded if the statement reasonably can

⁵ E.g., Cal. Civ. Code § 47(c); Restatement (Second) of Torts §§ 593, 595 (1977).

⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

be given an innocent construction. The Federal District Court for the Northern District of Illinois found that, even though the statements were indeed defamatory per se, Bishopp recovered nothing because the remarks, construed in context, were not defamatory because they could reasonably be construed as an assessment of Bishopp's failure to perform in that employer's particular job – not an inability to perform in future positions.

2. Do You Have To Say Anything?

Didn't your mama tell you that if you couldn't say anything nice, you shouldn't say anything at all? Many employers are refusing to comment on an employee's performance and the employee has little recourse. While keeping knowledge of a former employee's dangerous activities or temperament to yourself may expose you to a claim of negligent referral from a future employer, the former employee has no right to expect an employment reference.

***Raggio v. Parkland Memorial Hospital*, 1997 U.S. Dist. LEXIS 4818 (N.D. Tex. 1997)**

When defendant Anderson hired Dr. Tanya P. Raggio to be the Senior Vice President and Medical Director of Parkland's Community Oriented Primary Care Program, he believed her ethnic background, African American and Hispanic, would be valuable in dealing with the local community. But when she was involuntarily terminated because of her "demeaning and demoralizing" management style, Raggio claimed that she was discriminated against because of her race, gender and national origin.

After Raggio left Parkland and while her litigation was still pending, three prospective employers called Anderson to obtain job recommendations for Raggio. Anderson told the first caller that the plaintiff would be capable of handling a consultant position. On the advice of his attorney, he would only verify the dates of Raggio's employment for the second caller. When asked, however, he did provide the names of two other potential candidates. Anderson told the third caller only that Raggio could be a good teacher and clinician but gave no further information.

The plaintiff claimed that these three instances constituted tortious interference with her prospective relationship with these employers. In order to succeed in her claim, Raggio would have to show that she would have been hired except for the malicious and intentional action by the defendant and that she suffered actual harm as a result. The district court found that the plaintiff offered no evidence of Anderson's alleged malicious or intentional conduct since he provided no derogatory or untruthful information to any of the callers. Most importantly, Anderson cannot be successfully sued because he refused to comment on Raggio's administrative abilities: "The law imposes no duty on anyone to talk about a former employee – favorably or otherwise." *Id.* at *37 Thus the court granted summary judgment for the employer.

3. What If You Just Say Nothing? Compelled Self-Defamation

Ordinarily, when a person voluntarily discloses defamatory information to another, the speaker cannot recover for defamation. However, an exception to this general rule has developed, when a defendant knew or should have known that the plaintiff might be bound to repeat the statement. In that case, publication occurs at the repetition of the statement by the plaintiff, although the defendant has said nothing. For example, when an employer terminates an employee for a stated reason that is false and defamatory, the employee, upon seeking new employment, may be left without any reasonable alternative except to disclose to the prospective employer the false and defamatory reason for his or her termination. The originator of a defamatory statement can be held liable for future republications of the statement – even if the plaintiff herself was the only individual to repeat the statement – if the plaintiff was “compelled” to do so, and if the plaintiff’s need to repeat the statement was foreseeable to the originator. Thus, if the company has a bad, false, or flimsy reason for terminating an employee, it is not a shield against liability for defamation simply to refuse to say anything when asked for a reference.

The watershed case in the area is *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876 (Minn. 1986), decided by the Supreme Court of Minnesota in 1986. The plaintiffs in *Lewis* were terminated employees who had been required in job applications to disclose the reasons for leaving their previous jobs. Several stated that they had been “terminated.” In the subsequent job interviews, the interviewers asked these individuals to explain the termination, whereupon the employees claimed they were forced to disclose that they had been discharged for “gross insubordination,” an allegedly false charge. The court imposed liability for defamation upon the former employer even though there was no evidence that prospective employers had learned the information from the former employer. The employer had a policy “to give only the dates of employment and the final job title of a former employee unless specifically authorized in writing to release additional information,” and there was no evidence that the policy had been breached. The court’s theory was that the plaintiffs were effectively “compelled” to restate the reasons for their termination when asked, and such was foreseeable to the employer.

So far, at least ten states have recognized the doctrine, including California.⁸ However, it is still a minority view.⁹ An employer in a jurisdiction which recognizes compelled defamation can do the following to protect itself from claims in this area: Be sure of the facts and give the employee an honest and accurate reason for the termination.

⁸ See *McKinney v. Santa Clara County*, 110 Cal. App. 3d 787 (1980).

⁹ See, e.g., *Atkins v. Indus. Telecommunications Ass’n, Inc.*, 660 A.2d 885 (D.C. 1995) (noting that the theory is the minority view and would open a “Pandora’s box” of claims were it to be recognized in Virginia).

4. What If You Have Promised To Say Nothing?

The Supreme Judicial Court of New Haven, Connecticut succinctly stated the situation as follows:

An employer fires an employee. The employee gets an attorney, and the employee and the employer hammer out a contract in which it is agreed that the employee will be allowed to resign voluntarily and all references to involuntary termination in his personnel file will be expunged. Later, the employee applies for a job with a new potential employer. The new potential employer requires the employee to sign a preprinted authorization and release form authorizing previous employers to disclose information concerning his background and releasing employers who provide such information from liability. The new potential employer contacts the previous employer -- the very previous employer which agreed to expunge the termination information from its files -- and the previous employer spills the beans. Is there liability here?

Giannecchini v. Hosp. of St. Raphael, 780 A.2d 1006, 1007 (Conn. 2000).

In the *Giannecchini* case, the plaintiff worked for the hospital, first as a stock clerk and as a nurse after receiving his nursing degree. Giannecchini was terminated within a year of becoming a nurse due to several serious medication errors. He quickly retained an attorney who contacted the hospital and the parties resolved the dispute by settlement agreement. Giannecchini was allowed to voluntarily resign and his personnel file would be purged of any reference to an involuntary termination. The agreement also stated that the hospital would provide neutral employment information only, such as dates of service, title and position and salary information if requested by potential future employers.

Thereafter, Giannecchini applied for a position as a registered nurse with a nearby VA hospital. He listed the Hospital of St. Raphael as his former employer and requested that the VA contact the personnel department. Giannecchini also executed a form authorizing the persons listed on his application to release information to the VA. The form also contained language releasing the supplier of information from liability for doing so. The hospital provided a written reference in response to the VA's request. The reference contained the neutral information provided for in the settlement agreement as well as a rating of plaintiff's performance as average in attitude, personality and attendance and below average in ability and industry. The reference also stated that plaintiff was not eligible for re-hire. The credentialing specialist at the VA telephoned the human resources consultant who prepared the reference. When asked to explain the circumstances surrounding Giannecchini's termination, the consultant stated, "All I show here is several

serious medication errors.” Giannecchini did not get the job at the VA and he sued the hospital for breach of contract and defamation.

The court analyzed both the authorization and the release components of the form Giannecchini signed with the VA. The "authorization" must be read with Giannecchini's legitimate expectations in mind. In light of both the contract he had signed and the statutory provisions governing the removal and disclosure of information contained in personnel files, Giannecchini could legitimately expect that references to his involuntary termination would no longer be contained in his file. The court reasoned that Giannecchini “had the right both - - contractual and statutory -- to count on the hospital keeping its word.” For this reason, his "authorization" did not authorize the disclosure of references to his involuntary termination and the disclosures constituted a clear breach of contract. The next issue was whether Giannecchini's breach of contract claim was precluded by his “release.”

The court distinguished Giannecchini's case from the “typical” case in which the employee signing a release knows full well that, as a result of his authorization, his former employer will make an unlimited disclosure of information. Such an employee can hardly complain when his former employer does precisely what he has authorized it to do. In contrast, when Giannecchini signed the release at issue in this case, he did so against the backdrop of a contractual agreement with the hospital requiring removal of information from the hospital's files and a “highly articulated” statutory scheme that gave him legitimate reason to assume that "removed" information would not be disclosed pursuant to a subsequent "authorization."

The court concluded that the evidence submitted by the parties established as a matter of law that the hospital breached the contract executed by the parties and that the "release" signed by Giannecchini was not judicially enforceable in these circumstances.

***Courtright v. Wal-Mart Stores Inc.* 2001 U.S. Dist. LEXIS 11396 (E.D. Cal. 2001)**

Aaron Courtright sued Wal-Mart Stores for breach of contract, alleging that Wal-Mart released information regarding his work history in violation of a neutral reference clause in a settlement agreement. Courtright worked for Wal-Mart until he resigned after being told that he would be terminated for failure to meet sales goals.

He then filed suit against Wal-Mart for wrongful termination and defamation. That matter was resolved with the execution of a Confidential Settlement Agreement and General Release ("settlement agreement"). Included as a part of the settlement agreement was an attached reference letter listing Courtright's dates of employment, position title, job responsibilities, and final rate of pay. The settlement agreement provided that any third party inquiries regarding Courtright's employment with Wal-Mart should be directed to the personnel manager, who was to limit his or her comments to the information contained in the reference letter. The settlement agreement further provided that Wal-Mart would not release Courtright's personnel file without a subpoena or court order.

Between November 1996 and early 2000, Courtright applied for employment with five law enforcement agencies. As a part of the application process, Courtright executed a general release and request for information with each agency. By its terms and the context, the form was intended to be sent to Courtright's previous employers, such as Wal-Mart. The form not only authorized, but it directed, the employer to release all employment information, and it further released and discharged the employer from any liability for doing so. Courtright also provided each agency with the names of his supervisors at Wal-Mart, pursuant to instructions on the applications. Courtright was not hired by any of the agencies.

The Federal District Court for the Eastern District of California granted summary judgment for Wal-Mart on the grounds that the releases, executed by Courtright, extinguished any of Wal-Mart's obligations under the settlement agreement and, in any event, Courtright failed to present any admissible evidence of a link between his failure to get a position and the release of information by Wal-Mart. The court reasoned that, pursuant to the express language in all of the releases, Courtright authorized Wal-Mart to give to the agencies any and all information in Wal-Mart's possession, relating to plaintiff and his employment. The court concluded that:

More than just an authorization, these releases were formal requests for any and all information in defendant's possession, relating to plaintiff, to be given to the agencies. By executing these releases plaintiff waived those provisions of the prior settlement agreement that limited the information that defendant could relay to the agencies. Defendant not only had the right to rely on these requests as authorization to give out any and all information relating to the plaintiff, but indeed had a duty to comply with them. Consequently, defendant's obligations under the settlement agreement were extinguished, and plaintiff cannot now sue defendant for complying with his request.

Courtright, 2001 U.S. Dist. LEXIS at *10.

B. Negligent Referral: Is Silence The Simplest Form Of Fraud?

“Nothing that I never said ever did me any harm.” Calvin Coolidge.

While the majority of actions against an employer arising out of giving (or not giving) employment references are brought by former or current employees, the theory of negligent referral may expose former employers to liability on another front – from prospective employers. Because of the rise in actions for negligent hiring, many prospective employers are attempting to find out as much as they can about applicants. Despite their best effort, they are not always successful in rooting out the bad seeds. So, when they find themselves

embroiled in a negligent hiring claim, they naturally blame the former employer who did not warn them.

Under the theory of negligent referral, the current employer may charge that the former employer was negligent, not only for what it said, but also for what it did not say, about a former employee. By misstating or omitting facts about a former employee, the former employer may have created a risk of foreseeable injury. Under this theory, the former employer has an affirmative duty to warn future employers about a former employee's dangerous traits. Many jurisdictions have refused to acknowledge this relatively new basis for liability.¹⁰ In California, as the case of *Randi W. v. Muroc Joint Unified School District* shows, the courts have not only recognized the negligent referral doctrine but have extended it to apply to third parties.

***Randi W. v. Muroc Joint Unified School District*, 14 Cal. 4th 1066 (1997).**

Robert Gadams received his teaching credential from Fresno Pacific College and three of his former school district employers wrote glowing recommendations for the College to pass on to prospective employers. Because of these enthusiastic references, he was hired as the principal for Livingston Middle School. There, he cornered Randi W., a 13-year old girl, and molested her.

This was not the first time Gadams had been accused of sexual misconduct. Each of the authors of the recommendations knew that charges had been leveled against him while he was employed in their districts and yet they each whole-heartedly endorsed him "for any position without reservation or qualification." The plaintiff claimed that Gadams' former employers had a duty to warn prospective employers about his dangerous tendencies.

Defendants claimed that they owed no duty of care to Randi W. because they had no special relationship with her and had made no representations to her directly. The trial court agreed and entered a judgment of dismissal with prejudice. On appeal, the court relied on the Restatement of Torts sections 310 and 311 to impose liability for intentionally or negligently giving false information that results in injury to a third person. They found that the letters of recommendation contained misleading "half-truths" that constituted affirmative and material misrepresentations.

¹⁰ See *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990) (refusing to impose liability in a similar situation); *Cohen v. Wales*, 133 A.D.2d 94 (N.Y. 1987) (refusing to impose liability and stating that "[t]he mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring").

In resolving this question, the California Supreme Court looked to *Rowland v. Christian*, 69 Cal. 2d 108 (1968). *Rowland* establishes the criteria used to determine when the duty of care should be extended: “the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach and the availability, cost and prevalence of insurance for the risk involved.” *Randi W.*, 14 Cal. 4th at 1077 (quoting *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968)).

The Court found that the plaintiff’s injuries were a direct and proximate result of the defendants’ fraud and misrepresentation, that the defendants were morally blameworthy and that they had at least two alternative courses of action: **full disclosure or no comment**. Further, the Court found a strong public policy for the prevention of this very kind of harm: “One of society’s highest priorities is to protect children from sexual or physical abuse.” *Randi W.* at 1078.

The Court concluded that “the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third person. In the absence, however, of resulting physical injury, or some special relationship between the parties, the writer of a letter of recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees.” *Id.* at 1080.

Next, the Court determined that defendants’ failure to disclose information about Gadams’ prior sexual misconduct was true misrepresentation and not mere nondisclosure. The defendants claimed that their letters neither discussed nor denied Gadams’s impropriety but the Court followed Prosser and Keaton, The Law of Torts in observing that “half the truth may obviously amount to a lie, if it is understood to be the whole.” “[D]efendants, having undertaken to provide some information regarding Gadams’s teaching credentials and character, were obliged to disclose all other facts which ‘materially qualify’ the limited facts disclosed.” *Id.* at 1080.

The court’s holding is fairly limited although it may eventually be extended. For now, one is only liable if misrepresentations are likely to create a substantial and foreseeable risk of physical harm. Nothing in this decision requires employers to provide an employment reference and, as long as the employee did not engage in conduct that might pose a future risk of physical injury to others, one may recommend him or her without mentioning any negative aspect such as poor performance. The decision may, however, require employers to disclose information about unproven accusations if the accusations involve potential physical injury. The decision repeatedly refers to the defendants’ “alleged knowledge”

without citing to any actual finding of impropriety or affording any due process investigation to the accused.

C. Post-Employment Retaliation

The anti-retaliation provisions of the Title VII protect those who exercise their rights under the law from the wrath of their employers. Employers may not retaliate against employees who complain about discrimination by firing or suspending them, reducing their pay or by providing negative job references. The United States Supreme Court extended the prohibition to cover former employees.

***Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997)**

After he was fired by Shell Oil, Charles Robinson filed an EEOC complaint alleging that he was terminated because of his race. When a prospective employer asked Shell for a recommendation and Robinson was not offered the job, he sued under Title VII, claiming that Shell had given him a bad reference in retaliation for his earlier EEOC complaint. The federal trial court dismissed the case because Robinson was not a Shell employee at the time the bad reference was given. The appeals court affirmed, finding that the anti-retaliation provision of Title VII only protects current employees. The Supreme Court reversed, holding that a failure to include former employees among the class of persons covered by the retaliation provisions would defeat the entire purpose of the statute. In his opinion, Justice Thomas agreed with the EEOC that “exclusion of former employee from the protection of §704(a) would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.” *Id.* at 849.

Allowing employers to retaliate with impunity against anyone who was wrongfully terminated because of race, gender, or religion, would violate the anti-retaliation provisions purpose of providing “unfettered access to statutory remedial mechanisms.” *Id.* at 849.

***Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997)**

During her tenure as a Budget Analyst with the Navy, Barbara Hashimoto had a turbulent relationship with her supervisors who were both white males, leading to her filing of an administrative complaint of discrimination. Shortly thereafter, she was terminated as part of a reduction-in-force and she filed a second administrative complaint alleging that she had received a negative job reference (to the Army) from her supervisor in retaliation for filing her initial complaint. The District Court concluded that “a negative job reference is an actionable personnel action under Title VII” and that the negative reference was motivated by unlawful retaliatory animus. 870 F. Supp. 1544, 1557 (D. Haw. 1994). Defendants claimed that the job reference didn’t matter because she wouldn’t have been hired by the Army anyway. But the Ninth Circuit rejected the government’s “no harm, no foul” approach. Even if the Navy’s

negative reference did not prevent the Army from hiring Hashimoto, other employees might be dissuaded from complaining about discrimination because they feared such retaliation. Therefore, the court concluded that “the retaliatory dissemination of a negative employment reference violates Title VII even if the negative reference does not affect the prospective employer’s decision not to hire the victim of the discriminatory action.” *Hashimoto* at *676.

III. HOW CAN YOU PROTECT YOURSELF?

There are a number of steps an employer can take that will either significantly reduce the likelihood of a workplace defamation suit or reduce the magnitude of any defamation award. Although the specifics of each employer's policies will depend upon the statutory and case law of the state or states in which the employer operates, as well as the organization's corporate culture, the following guidelines are general enough to be nearly universally acceptable.

A. Release Of Liability Clauses

One of the most effective means of reducing liability is to require that employees sign a waiver providing a release of liability from claims associated with the provision or verification of employment information. An employer may find it desirable to obtain a release of claims clause not only for itself, but also on behalf of those employers contacted for references – this will help ensure that former employers are candid when they discuss an employee's performance. Samples of the forms have been provided.

B. An Effective Employment Reference Policy

1. Providing References

Considering the concerns with respect to the stifling of substantive employment information, "no-comment" policies are not ideal. Is there a preferable approach? We believe that there is. It involves a few key considerations: channeling requests, documenting information provided, and consistently applying whatever policy is adopted. Specifically, we believe that employers should:

- Require that requests for references be made in writing on business stationery;
- Direct requests for references to its personnel or human resources department, and let all who might be approached for references know about that procedure;
- Authorize certain individuals within these departments to provide references;

- Obtain written consent from existing or departing employees who want you to provide references;
- Limit references to job-related information and any known dangerous tendencies;
- Limit comments to verifiable information; provide specific examples and illustrations to support opinions;
- Do not speculate on an employee's performance or reasons for leaving your company;
- Avoid providing universally positive references, as this may create problems in a case of negligent referral or wrongful termination; and
- Provide the reference in writing.

The most important point with respect to the policy is consistency in its application. Once you establish a specific procedure for obtaining references, do not accept references that do not conform to the procedure established for provision of references. Such situations may later be used in litigation as evidence of the reference-provider's improper motives. For example, if your company's policy is to only respond to written employment reference requests, do not give references over the phone. Deviation for a particular employee may lead to an argument that the employer acted with "ill will" towards that employee. Additionally, a "no comment" policy must be strongly enforced. If references are required to be provided in writing by a designated individual, an employer should repeatedly (and probably ad nauseam) caution employees not to provide informal references over the phone to colleagues in other companies.

A sample policy, provided in the form of an insert to an employee handbook, has been included.

2. Checking Employment References

In verifying employment references, the employer should be sure to:

- Obtain a waiver from the applicant releasing from liability both the provider of information (i.e., the former employer), and the prospective employer verifying the information;
- If possible, request references in writing;
- Check all references thoroughly;
- Create a checklist for certain important information;

- Note all attempts to obtain employment-related information, even if unsuccessful (this may provide a shield against a "negligent hiring" claim);
- Ask former employers the "catch-all" question – "Is there anything else you think I should know about this person?";
- Discuss only job-related information with prospective employees; and
- Not discuss negative references with the prospective employee.

(Sample 1: Authorization to Have Former Employer Release Information)

DISCLOSURE AUTHORIZATION AND RELEASE

As an applicant for a position with [Employer], I have been requested to furnish information for use in determining my qualifications. To that end, I hereby authorize the release and full disclosure of any information that you may have concerning my employment with your company. I authorize you to release such employment information to those employees and agents of [Employer] who require such information in order to make a decision with respect to any matter pertaining to my status as an employee. This information may be provided either verbally or in writing.

In addition to authorizing the disclosure and release of any information regarding my employment, I hereby fully waive any rights or claims I have or may have against [leave a space for the former employer to fill in its name], its agents, employees, and representatives for providing such information, and fully release them from any and all liability, claims, or damages that may directly or indirectly result from the use, disclosure or release of any such employment information, whether such information is favorable or unfavorable to me.

I acknowledge that I have read this authorization and release, fully understand it, and voluntarily agree to its provisions. This release will expire one (1) year after the date signed.

Applicant Signature

Date

Name (printed or typed)

(Sample 2: Authorization for Current Employer to Release Information)

DISCLOSURE AUTHORIZATION AND RELEASE

I hereby authorize [Employer] and its employees and representatives to provide any pertinent information they deem appropriate, including any information regarding my employment, job performance, and related matters, to prospective employers [or leave a blank space to fill in a specific name] and any of their employees, representatives and agents. This information may be provided either verbally or in writing.

In addition to authorizing the disclosure and release of any information regarding my employment, I hereby fully waive any rights or claims I have or may have against [Employer], its agents, employees, and representatives for providing such information, and fully release them from any and all liability, claims, or damages that may directly or indirectly result from the use, disclosure or release of any such employment information, whether such information is favorable or unfavorable to me.

I acknowledge that I have read this authorization and release, fully understand it, and voluntarily agree to its provisions.

Employee Signature

Date

Name (printed or typed)

(Sample 3: Policy regarding Outside Inquiries/Employment References)

All outside inquiries regarding employment references for current or former [Employer] employees must be directed to the Human Resources Department. Only employees of the Human Resources Department are authorized to provide information of any kind regarding current or former employees. **"Off the record" comments are strictly prohibited.**

The [Employer] will release only an employee's job title, salary and dates of employment to third parties unless the employee signs a written authorization to disclose further information about his/her employment. Upon request, the Human Resources Department will provide the employee with an authorization form.

All media inquiries regarding the [Employer] should be referred to the [Employer] President. All employees are expected to strictly abide by the terms and procedures of this policy. Employees who violate this policy may be subject to discipline up to and including termination.

