

Safeguarding Guidance: Employment References

During recruitment, potential candidates should be asked to supply satisfactory references from previous employers. An employer, or ex-employer, owes a duty of care to both the requester, be they a current or ex-employee, and the recipient organisation for the content of a reference. Legally, the organisation receiving the request must provide a true, accurate and fair reference with information it believes to be correct and without malice.

When is the best time to collect references?

References should be collected prior to making an offer of employment to a candidate. However, the timing will depend on the role's responsibility and the amount of time spent recruiting. Going through a lengthy recruitment process to find out the preferred candidate's references don't reflect the organisation's values or expectations can be disappointing. On the other hand, obtaining references for short-listed candidate can be difficult and time-consuming.

Many employers leave reference checks until after the first-stage interviews when they have narrowed down the pool of potential candidates. A previous employer's opinion can be extremely useful at this stage to decide between candidates with similar experience or qualifications. Another approach is to conduct a two-stage reference checking process, with written requests to verify basic details made early on, followed by detailed telephone conversations later with previous line managers of the preferred candidates. Many organisations wait until after a conditional offer is made to the candidate to contact their current employer.

What's the best way to collect references?

References are a critical part of the selection process and shouldn't be an afterthought once the decision to hire someone is all but made. References should be collected before the final interviews have taken place. References are a form of investigation which you must gain permission to conduct. A potential employer must have a candidate's permission to collect references – either verbally or in written form. Ideally, these would be from the candidate's three most recent line managers. Any information gained without the candidate's consent i.e. information gained informally from 'those you know', cannot be used to inform the hiring decision. Where possible, verify the reference by speaking to the referee. Calling the referee on a landline, using a phone number published on a business website, is a good way to ensure the referee is who they say they are.

What should be asked in a reference?

Questions for basic written references include:

- Dates of employment
- Job title and main responsibilities
- Attendance record and number of days sick leave taken
- If they were reliable, honest, hardworking
- Are there any concluded disciplinary actions taken against them?
- Are there any reasons why they should not be employed?

Questions for more detailed telephone interviews include:

- What were the main responsibilities of the candidate in their last role?
- What are the candidate's greatest strengths?
- Do you think the candidate is qualified for this new role?

- What specific qualities does the candidate have that will help them fulfil these responsibilities?
- What kind of management style did the candidate respond best to?
- What sort of office environment did the candidate work best in?
- How well did the candidate handle a specific skill or situation?
- What was the candidate's reason for leaving?
- Would you rehire this candidate?¹

Other legal matters to consider

Employers and individuals have respective rights and obligations for the content of the reference, in terms of disputes, misconduct, data protection, confidentiality, disclaimers and victimisation. Detailed legal advice on these issues has been provided by an employment lawyer at Berwin Leighton Paisner, and should be strongly considered. Copied below for ease of access.²

Disputes, complaints and alleged misconduct

Employers often question whether they should refer to any alleged misconduct on the part of the employee during his/her employment. If there has been no investigation and/or conclusion of the matter then it would be unwise to comment on the alleged misconduct in the reference. Before doing so, an employer should have grounds for belief that misconduct has occurred, have carried out an investigation and have a genuine belief of the individual's guilt. Otherwise, the employee may have a claim for negligence and/or libel.

Occasionally, where there has been a dispute regarding the termination of employment and the employee has threatened to bring a claim then both employer and employee may consider entering into a compromise agreement in settlement of any potential claims. In these circumstances, an employee should always encourage the employer to provide a satisfactory reference as part of the agreement. It is best to agree the form of the reference in advance. An employer should consider the importance of providing a reference in such circumstances because this can be a powerful negotiating tool given that there is no obligation to provide a reference and a reference is of great value to the individual.

An employer should also be aware that if it has previously provided a good reference this could have an impact on a later attempt to justify a dismissal on the basis of performance or conduct. An employee could use such a reference as evidence to support a claim for unfair dismissal. Much will depend on the circumstances.

Data protection

Data Protection legislation gives an individual various rights relating to data held about him/her, including access to the data and the requirement to give consent before it is passed to a third party or outside the European Union (EU).

An employer must, on request, provide an employee with references that it holds and which have been supplied by a third party or concern on employment related matters. Before providing such information, any details identifying the third party should be removed. Where it is still possible to identify the third party after the removal of identifying names (as is likely with a reference) the employer should attempt to gain consent from the third party before disclosing the information.

¹ <https://www.tpp.co.uk/employers/recruitment-advice/general-recruitment/the-right-way-to-check-references>

² <https://www.michaelpage.co.uk/our-expertise/human-resources/references>

An employer should gain consent from the employee before disclosing sensitive personal information in a reference. This would include sickness details or any information regarding race.

An employee may request disclosure of references received from a third party, but references given by a current employer are exempt from the usual data protection rights. This is the case where the reference relates to jobs, education placements or the provision of services by an employee.

Confidentiality

A statement made in a reference is usually protected by "qualified privilege" if made in good faith and without malice because the current/ex employer and the prospective employer have a common interest in the content. This means that the parties must keep the reference confidential. If, however, the reference is passed to a third party then this confidentiality is lost. Accordingly, all references should be marked private and confidential so that all parties are aware of the confidential nature of the information.

Disclaimers

Employers usually wish to include disclaimers in a reference to exclude liability for errors, omissions or inaccuracies in the information provided and for any loss or damage resulting thereof. Whilst such disclaimers can always be included, they will only offer protection to the employer if they are reasonable. The following rules generally apply:

- An employer cannot exclude liability for errors or omissions in information provided, that would normally be within the knowledge of an employer.
- An employer can exclude liability for errors or omissions when giving an opinion (i.e. stating whether the employee is suitable for a particular role).
- An employer can qualify the reference by giving details of the writer's degree of knowledge of the employee.

Victimisation

If an employer chooses not to provide a reference or provides an inaccurate reference for an employee who has made a complaint under the legislation governing sex discrimination or has raised a grievance regarding alleged sex discrimination, such action/inaction could constitute 'victimisation' of the employee. This could result in liability for damages to the employee for a breach of the obligations placed upon the employer by virtue of the Sex Discrimination Act 1975. The same liability could arise in relation to any complaint or grievance raised regarding race discrimination. As such, it is good practice to provide a fair reference where complaints have been raised in relation to sex or race.

For further advice and support on professional references or HR matters, contact Christine Williamson: christine@dutyofcareinternational.co.uk