

The safe way to handle calls for references and recommendations

As the economy shrinks, unemployment is growing in New York and throughout the country. Chances are, the jobless rate will continue to rise for the next several months.

If your organization plans to lay off workers or already has, brace yourself. Lots of former employees are going to list you and your managers as references when they seek new jobs. That means it's time to make sure you have policies in place on how to handle reference-check calls. Start training managers about your policy now—before someone says something that invites a former employee to sue.

It's almost inevitable. With more applicants than job openings, many job seekers will be disappointed. A few will get angry, suspecting that the only reason they lost out on a new job is that someone at their former employer bad-mouthed them in some way.

Answering the call

When prospective employers of your former employees call, the safest policy is to provide only the basics: dates of employment, salary history and job title.

By standardizing the response, you minimize the risk of a successful retaliation or discrimination complaint. This approach also minimizes the risk of defamation suits.

To make this policy work, you must train supervisors to refer all inquiries to HR for an appropriate response. This applies to all references, whether the former employee was a good or bad performer, or eligible for rehire.

If you use this “no comment” response, you must do so for everyone or risk liability under New York law.

Prospective employers will often directly contact the former employee's supervisor or team leader for a reference. It's an effort to circumvent HR's no-comment policy. Supervisors need to understand that, as agents of

References: When you're doing the hiring

When you're the organization doing the hiring, you should get applicants' permission to check references.

Have them sign a broad release authorizing you and your agents to obtain prior employment information and authorizing former employers and their agents to give you such information. Document your efforts, successful and unsuccessful, to receive information from former employers and references.

Note: New York also has a new criminal-background-checks law that goes into effect Feb. 1, 2009. Contact your attorney for more information.

Final note: If you hire or retain someone with a criminal conviction, there is a new law you need to know about. An employee's convictions and jail time won't be held against you if the employee turns out to be dangerous—as long as you used good faith to evaluate whether the applicant would pose a danger.

the employer, they don't have the option of providing a “personal” reference for former employees.

Stop defamation claims

If you choose to ignore all the preceding good advice, know that you could expose your organization to defamation claims. Employers have a qualified or conditional privilege to share job-related information—even if negative and untrue—provided disclosure is made in good faith and without malice. However, the privilege is not absolute.

Follow these steps to preserve the privilege:

- Respond only to inquiries; do not volunteer information. If someone asks whether an employee had good attendance, don't say, “Yes, but we laid him off because we believed he had a drinking problem.” You'll lose the protection of the privilege if he didn't.
- Get the inquiry in writing to ensure the inquiry is legitimate.
- Disclose only job-related information such as performance, ability and duties. Be objective. Avoid personal opinions about personality, characteristics and attitude.
- Do not provide false, misleading or speculative information.
- Ask for a release from the former

employee before providing any information. Review the release carefully to ensure it releases former employers and their agents from liability for information disclosed. Such a release may provide an absolute privilege to provide information.

When your employees leave

When employees are laid off or otherwise terminated, they often ask for a good reference. Be wary of negotiating a promise to respond to inquiries from prospective employers in a certain manner as part of a severance, settlement agreement or a release. You will have to abide by whatever you promise.

If you must agree to such clauses, narrow them as much as possible.

Do not agree to provide a certain response on behalf of the entire organization, and never agree to a blanket nondisparagement clause. You cannot control everyone in your organization—from the CEO to the janitors—nor do you want to explain any settlement details to anyone who doesn't need to know.

Do not agree to provide false or misleading information in a reference letter, no matter how tempting it might be to help avoid or settle a complaint.