

Checking applicant references: How to dig the dirt—legally

As part of the hiring process, supervisors are sometimes called on to check an applicant's references.

Those phone calls can help you accurately assess a person's strengths, weaknesses and past job performance. But checking references can also be challenging—and legally tricky.

Many past employers may provide only basic information about their ex-employees, such as salary and length of employment. *The goal:* They want to avoid lawsuits from former workers.

Here are six guidelines to help hiring managers solicit information without bumping into legal issues:

1. Provide brief and general background information on the job opening without using the words "reference," "strengths" and "weaknesses" because they could generate reluctance.

2. Keep the tone conversational, not interrogative. Listen to answers without interrupting. Request employment information in small chunks to avoid creating defensiveness.

3. Start with questions that solicit "yes" and "no" answers. Then probe with open-ended inquiries. *Example:*

- What was the salary at the beginning of employment? At the end?
- Please give me a general idea of the duties performed at the beginning of employment? What about at the end of employment?
- Was the candidate ever promoted? Why or why not?

4. Use information provided by the candidate. If a reference declines to answer basic performance questions, read back what the candidate wrote and ask if it's accurate. That'll give you a hint of the applicant's honesty, too.

5. Don't ask questions that require blatantly subjective answers. For example, don't ask a reference: "How do you think the candidate would perform in the job opening I described?" Such a question can inhibit references who are concerned about providing information.

5 smart questions to ask an applicant's references

1. Is "Jane" eligible to be rehired? If not, is this because your company has a general policy on rehiring employees, or is there another reason?
2. Would you enthusiastically recommend "Jane"?
3. What were "Jane's" primary job responsibilities?
4. How would you compare "Jane's" work habits with those of her co-workers?
5. What, if anything, distinguishes "Jane" from others who do the same type of job?

6. Avoid legally sensitive topics.

Never ask questions that relate to the applicant's age, marital status, race, color, age, sex, religion and national origin. If applicants are rejected, they use such questions as evidence to prove you discriminated against them in hiring.

Lesson from the court: Never disclose former employees' medical info

"Hi, this is Mike from XYZ Company. I'd like to ask you a few questions about a former employee that you used to manage."

At some point in managers' careers, they'll receive such a phone call from an ex-employee's prospective employer. *Be careful:* One simple mistake in a manager's response could trigger an expensive lawsuit.

Managers need to understand the organization's policy on reference calls about former employees. It's HR's duty to educate them.

Tell managers: Never disclose medical information about former employees—and that goes for current employees, too.

Disclosing a person's medical information to a third party can open

an employer to a lawsuit under the confidentiality provisions of the Americans with Disabilities Act (ADA). And people don't need to be technically "disabled" to file a lawsuit under that law.

This real-life court case illustrates this important point.

The case: Nora kept getting rejected when applying for jobs. She suspected her previous supervisor was giving out negative references. She hired an investigator, who posed as a prospective employer and called Nora's former boss for a reference. Her ex-supervisor gave a generally positive reference, but he also made a negative comment about her bad back, for which she had gone on disability leave.

Nora filed an ADA lawsuit, claiming the manager's back injury comment was an unauthorized disclosure of confidential medical information in violation of the ADA.

The decision: The court sided with Nora. It didn't matter, the court said, that Nora wasn't technically "disabled" under the ADA's definition of disability. That's because the ADA's confidentiality provision makes it illegal to disclose medical data about any employee, even if he or she is not disabled.

Plus, the law makes clear that former employees can sue after they've left a company. The court said the "need to protect this sensitive information does not end on the termination of employment."