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TOPIC:**COLLEGE AND UNIVERSITY EMPLOYEE REFERENCES****INTRODUCTION:**

Employment references present a difficult dilemma for educational institutions. As a matter of institutional culture, college and university faculty and administrators often want to provide references. Some wish to provide glowing references to deserving employees – or to those who they would rather see employed elsewhere. Others may wish to address every real or perceived flaw in an employee's performance. Favorable, unfavorable and neutral references can all carry risks. Institutions struggle with developing and enforcing policies designed to both limit the risk attendant to employee references and still permit reasonably candid references.

State law generally governs employment references, and applicable statutes and case law give employers varying protections and obligations. College and university counsel and administrators should understand the specific state laws applicable to their institutions.

This NACUANOTE summarizes the issues and risks associated with employee references and offers some practical suggestions on how best to address them.

THE RISKS:

Administrators and other college and university supervisors are often asked for references on good employees for whom they can readily offer favorable references. They may also receive inquiries about employees who have failed to meet job expectations or engaged in misconduct. Providing a generally favorable recommendation to a good employee poses little risk, although some institutions have been sued by employees who feel that recommendations were not favorable enough [1]. Substantial risks arise when the institution or an individual administrator responds to a reference request concerning an under-performing or problematic employee.

No Reference Policies. Policies that prohibit recommendations beyond confirmation of dates of employment, positions held, and salary information are tempting. However, failing to provide job recommendations may unfairly penalize (and sometimes embitter) deserving employees and jeopardize their employment prospects. A culture that prohibits references may encourage supervisors to withhold critical information from other supervisors in the same college or university, allowing bad employees to disrupt one department after another. Moreover, refusing to provide meaningful references has a reciprocal effect: the institution that declines to provide substantive references may find itself unable to obtain meaningful information from other employers about its own prospective employees.

Policies Permitting References--Potential Liability to Current or Former Employees. Responding to a request for a reference about an employee whose job performance did not meet expectations or who engaged in misconduct is challenging. Full disclosure of a former employee's work performance (or lack thereof) risks claims of defamation, invasion of privacy, misrepresentation, interference with prospective employment, intentional infliction of emotional distress and even retaliation. Many states provide, either by statute or at common law, a qualified privilege to employers to share information concerning an employee's job

performance [2]. Such privileges generally protect an employer's right to evaluate an employee's performance and share that information within and without the organization. The privilege applies only when the employer acts in good faith; it is generally lost if the reference is given with "actual malice" -- that is, if it is intentionally or recklessly injurious to the employee. Actual malice is a question of fact, generally for a jury, so while conditional privileges may provide employers with an effective defense, they do not prevent an unhappy applicant from filing and pursuing a lawsuit.

Policies Permitting References--Potential Liability to Third Parties. Providing a favorable reference that masks an employee's actual performance may, under limited circumstances, also be risky. For example, where a former employee *physically* injured a third party, an unconditionally favorable reference for that employee could subject the former employer to various claims, including misrepresentation. Some courts have held that, while an employer need not volunteer information about a former employee, if it elects to do so, it owes prospective employers and third parties a duty not to misrepresent facts about the qualifications and character of the former employee if that information reveals a substantial, foreseeable risk of *physical* injury [3]. Other courts have rejected arguments for such a duty or distinguished cases on their facts, finding that particular plaintiffs' injuries were not foreseeable to a former employer [4]. Where there is no evident risk of physical harm, courts have found that former employers generally have no *legal* obligation to provide candid evaluations [5]. Nevertheless, employers seeking to avoid litigation (and negative publicity) should exercise care that the information they provide -- if they choose to speak at all -- is not dangerously misleading. And as a matter of institutional integrity, institutions may well elect silence in lieu of any statements that would mislead a potential employer about any aspect of an applicant's qualifications or alternatively could involve the institution in litigation with the employee. In such cases silence is an appropriate middle ground.

What Should A College or University Consider When Developing a Reference Policy?

As a result of these risks, every institution should have a well-considered policy addressing how it will handle requests for references involving current and former employees. In reviewing or formulating that policy, the following factors should be considered:

- Determine what information you may be obligated to provide or not provide. In some states, employees have a statutory right to a service letter setting out certain information about the employee's service and the circumstances of its termination [6]. Some states also limit by statute or common law the disclosure of certain information, often requiring the employee's written authorization for certain releases [7].
- Ascertain whether your state provides for a conditional privilege or other immunity from liability for providing job references. If your state so provides, determine what actions are necessary to protect the privilege, and evaluate how to comply with state statutes or common law.
- Consider adopting a policy that prohibits references beyond dates of employment, titles, and salaries absent a release from the employee.
- Determine whether to obtain written authorizations from employees permitting disclosure of specific personnel information beyond name, position, and dates of service. Decide whether to require all employees to sign this written authorization upon hire. This may be an effective method of reducing the likelihood of later claims alleging unauthorized disclosure of information, as well as claims arising out of references provided to future employers.
- Determine how best to train supervisors to comply with applicable policies and how to avoid both gratuitously negative and inappropriately glowing recommendations. Explaining that such recommendations may result in personal as well as institutional liability may be helpful.

- Consider adopting more extensive restrictions on supervisors who have been accused of misconduct by former employees. Such supervisors may be well advised to let someone else, perhaps a Human Resources administrator, respond to requests for references regarding employees with whom they have had troublesome relationships. Alternatively, it may be appropriate for Human Resources or an attorney to vet draft references.
- Consider establishing a central institutional office to which supervisory personnel will send notice of reference requests. Determine how to document requests for references, including what information was requested and what information was provided.
- In cases where the institution is settling an individual lawsuit or claim, and the settlement includes a reference letter, be sure the parties agree upon the actual wording of the reference letter and any oral statements rather than simply have a general statement that a reference letter will be provided to prospective employers. Further, it is also useful in such situations to designate who will be the point of contact within the institution for reference inquiries from prospective employers.

CONCLUSION:

State law governs employment reference issues. College and university counsel should determine what laws are applicable in their jurisdictions and evaluate the potential risks of providing or declining to provide references for departing and former employees. Well-articulated employment reference policies and procedures, together with appropriate training, can help institutions avoid common reference-related claims and defend claims that do arise.

FOOTNOTES

RESOURCES FOR COUNSEL:

NACUA Resources:

- [Hiring and References: The Hiring Employer and the Former Employer, November 4, 1999, Frank C. Morris, Jr. and Robert H. Bernstein.](#)
- [Hear Today - Gone Tomorrow? Communicating Negative Information About Employees And Students, June 16-19, 1996, Stephen J. Hirschfeld.](#)
- [Employee Settlement Agreements, June 20-23, 2001, Susan Westover.](#)
- [A Little Libel, A Lot of Trouble: Defamation and Related Issues in Higher Education, June 16-19, 2004, Robert C. Clothier.](#)

Additional Resources:

- [Some Guidelines for Administrators and Faculty: Responding to Requests for Employment References.](#)

- *Cloud*, "Negligent Referral--What Can I Say?", 137 Ed. Law Rep. 851, (1999).
- *Hartmeister*, "Handling Requests for Employment References: Elevating Awareness Among the Pitfalls and Pendulums", 119 Ed. Law. Rep. 1 (1997).
- [Avoiding libel and slander claims: what you can and cannot say about your employees in today's tight job market](#), Jenny Shin, Curiale Dellaverson Hirschfeld Kraemer & Sloan, LLP for Employment Law Alliance, posted September 24, 2003.
- [References and the Defamation Trap](#), Michael L. Curricco, Modrall, Sperling, Roehl, Harris & Sisk, P.A., for Employment Law Alliance, posted March 1, 2000.

Policies:

- [Employee References, Arizona State University](#).
- [Employee References, Case Western Reserve University](#).
- [Release of Information Policy, CUNY Graduate Center, Office of Human Resources](#).
- [Guidelines for Responding to Employee-Reference Inquiries, Maricopa Community Colleges, Office of the General Counsel, Tempe AZ](#).
- [Employee References, University of Iowa, Iowa City IA](#).

Sample Forms:

- [Sample Authorization for Release of Information, Working with Faculty Search Committees: Training Issues in Hiring, March 2002 Workshop, Kristine Legler Kaplan, Minnesota State Colleges and Universities, St. Paul MN](#).
- [Sample Form Release, Hiring and References: The Hiring Employer and the Former Employer, November 4, 1999, Frank C. Morris, Jr. and Robert H. Bernstein, Epstein Becker & Green, P.C.](#)
- [Sample Release of Information Form, CUNY Graduate Center, Office of Human Resources](#).
- [Sample Employment Verification Form, CUNY Graduate Center, Office of Human Resources](#).
- [Sample Release Authorization Form, Jenny Shin, September 24, 2003](#).

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