

# Beware of What You Say – and Don't Say – About Your Former Employees



The liability perils of post-employment references and how to avoid them.

When a fellow HR director asks you for a post-employment reference about a former employee, it puts you in a tough spot, especially when you don't have anything positive to say about the target of the inquiry. It may be tempting to warn your HR compatriot that the ex-employee is bad news and shouldn't be hired. But your professional side knows that bad-mouthing a former employee can get you into legal hot water. The last thing your company needs is to be sued for defamation. So, what **should you** say? The following analysis will help you answer that question.

## **Post-Employment References–Damned If You Do**

Why is saying negative things about a former employee so dangerous from a legal standpoint? In one word: Defamation. This is a legal term for a tort, or civil wrong, that involves saying something untrue and harmful about a person that harms their reputation and causes damage. That may include a negative reference about a former employee.

**Example:** An investment dealer with a great track record was fired without cause. His supervisor, who had always treated him badly, met with the dealer's former clients and suggested that the dealer might have misappropriated client funds, even though he had no evidence or reason to believe this. To make matters worse, the supervisor told a prospective employer that the dealer was under investigation by the government but failed to leave out a critical piece of information: the investigation was based on a customer complaint that the employer had already looked into and determined to be groundless. After he was forced to leave, the dealer sued. The Nova Scotia court found the supervisor guilty of defamation and awarded the dealer a double notice period, plus punitive damages [*Musgrave v. Levesque Securities Inc.*, [2000] N.S.J. No. 109].

To avoid defamation, some employers give all former employees positive reference, even if they don't deserve them. But that's a bad idea, especially if you fired the employee for theft, sexual abuse or violence. If the employee engages in similar conduct at the new job, you might be liable for the resulting injuries under a theory of negligent or fraudulent misrepresentation.

Other companies either provide minimum, factual information, like confirming the

dates of employment; or they say nothing at all. The problem is that they follow this speak-no-evil policy inconsistently. They clam up only when they're giving references about bad former employees. They're much more forthcoming when the former employee seeking the reference is somebody they can recommend. The resulting standard is no solution to the dilemma; it only makes it worse.

## Post-Employment References—Damned If You Don't

For these reasons, some employers refuse to give any references at all. After all, there's no law that says an employer must provide references for former employees. But a no-reference policy is also risky, warns a Toronto lawyer. Employers have an obligation to treat employees with good faith. This duty doesn't end when the employee leaves the company. "Courts sometimes consider an employer's refusal to provide a reference as bad faith conduct that can double a worker's damage award," the lawyer explains.

**Example:** During his 4 years at the company, a broker worked tirelessly for his employer and established a strong business following. But after the company was taken over by a financial giant, it fired him without warning or explanation. And it never gave him a letter of reference, even though he had always been a trustworthy, honest, and hardworking employee. Unable to find another job, he sued. The court awarded him almost \$600,000, including [Wallace damages](#) for bad faith termination, and blasted the employer for failing to provide a letter of reference, calling the failure a "callous disregard for his future" [[Barakett v. Levesque Beaubien Geoffrion Inc.](#), 2001 NSCA 157 (CanLII)].

## 6 Ways to Hold Employers Liable for Employee References

1. **Defamation.** Employers who give false references with the intent to injure a former employee's reputation can be liable for defamation, also known as slander (for oral statements) and libel (for written statements). The good news is that the employee won't win the lawsuit if you told the truth.
2. **Misrepresentation.** If you give a glowing reference for an employee who didn't deserve it, the employee's future employer can sue you for negligent or fraudulent misrepresentation. If it can show that it hired the employee based on your recommendation and it was injured by the employee's conduct, it may win.
3. **Interference with Contractual Relations.** Employees who lose a job based on your recommendation can argue that you interfered with a prospective employment or contractual relationship.

4. **Wrongful Termination.** If you dismiss an employee for just cause and then turn around and give them a great recommendation, they may be able to come back at you for wrongful dismissal.

5. **Privacy Violation.** Some privacy laws, such as Alberta's Freedom of Information and Protection of Privacy Act, prohibit employers from sharing certain employee information without written consent, especially if they're public employees.

6. **Wallace Damages.** Refusing to provide a reference or failing to provide an accurate one can put your company at risk of increased damages for bad faith conduct involved with a dismissal.

## Use Written Policy to Ensure Appropriate References

"Employers have nothing to fear from the provision of frank, honest and objective references," says an employment lawyer in Ontario. But doing this is a delicate procedure. You need to establish a policy and set of ground rules to ensure that you and your employees do it right. Like our the [Policy template](#) on the HR Insider website, your policy should do 6 things:

### 1. Designate Person to Be in Charge of References

Make sure your employees know that they shouldn't give references without approval by the HR manager. Better yet, give the HR director sole authority for creating reference letters. By putting a person who understands the risks in charge, you'll ensure that your employees don't make informal, unguarded remarks about an employee to a prospective employer. Plus, prospective employers will get the most current information.

### 2. Require Written Reference Requests

There have been cases where people have tried to obtain confidential employee information by posing as a prospective employer. If you give information to someone who isn't entitled to it, you could be sued. So, make sure that persons requesting references are legitimate by requiring them to put the request in writing.

### 3. Require Careful Wording of References

References must be truthful and based on the facts so that if you do get sued, you can prove they were true. Try to avoid opinions and subjective conclusions because they're hard to prove. Just deliver the raw facts and allow the prospective employer to draw its own conclusions about the former employee.

### 4. Require Employees to Sign Reference Consent Form

When employees leave your organization, have them sign a written consent form

that authorizes your company to disclose employment reference information about. Like the [Consent Form template](#) on the HR Insider website, make sure the form releases your company from liability related to the reference.

## **5. Ban Verbal References**

Most prospective employers will just call and ask what you know about former employees and whether you would rehire them. Experts agree that it's a bad idea to respond verbally. You can get caught saying something that you shouldn't say. Plus, you won't have a record of the reference which could help defend against a future lawsuit.

## **6. Require Consistency**

You must follow your policy and provide the same types of information for every former employee. Otherwise, your inconsistency could be branded as a breach of contract, which could lead to additional liability. This doesn't mean that each reference letter must be identical. But if your policy is to provide information about your employees' work habits, you'll need to do it across the board.