

The Reference Checking Process

Prepared by:
Lester S. Rosen, Esq.
Employment Screening Resources® (ESR)

LORMAN®

Published on www.lorman.com - April 2020

The Reference Checking Process - Originally a chapter from the Safe Hiring Manual, published in 2017. Reprinted with permission.

©2020 Lorman Education Services. All Rights Reserved.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ **Unlimited Live Webinars** - 110+ live webinars added every month
- ✓ **Unlimited OnDemand and MP3 Downloads** - Over 3,800 courses available
- ✓ **Videos** - More than 1,900 available
- ✓ **Slide Decks** - More than 3,000 available
- ✓ **White Papers** - More than 1,900 available
- ✓ **Reports**
- ✓ **Articles**
- ✓ **... and much more!**

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

CHAPTER 4

The Reference Checking Process

Introduction

Before reading further, it is important to understand the distinction between certain terms:

1. **A Past Employment Verification** refers to verifying **factual or quantitative data** such as start date, end date, job title and salary if available. A verification is typically given by the human resources department or even through third party services, although in smaller firms the owner or bookkeeper may be the best source.
2. **A Reference Check** of past employment means obtaining **qualitative** information about the person's performance such as how well the person did or where improvements are needed or if the person would be rehired. A reference, by comparison, is typically given by someone who actually knew the applicant, such as a former supervisor.
3. **A Personal Reference** comes from someone familiar with the applicant in a context other than employment.

The first part of this chapter examines the importance and use of the verification as part of a Safe Hiring Program, and the legal and practical issue in obtaining employment verifications and references. The chapter also examines what to do when you are asked to provide a reference.

Verification Checks are Critical

Since what is past can often be prologue, an employer has a vested interest in finding out how the applicant performed in past positions. Many human resources professionals believe that how a person has performed in the past is the single best indicator of how they will perform for you at your business. It is always possible that a person's past performance may have been hampered by factors beyond their control, such as a dysfunctional team, lack of clear goals, or resources or a supervisor that micromanaged or mismanaged. However, a new perspective employer still needs to try to obtain as much information as possible about past performance.

You Need To Know

Trust But Verify Because Past Employment is a Critical Leading Edge Indicator of Future Performance

At the height of the Cold War, during negotiations with the Soviet Bloc on weapons reductions, a popular phrase was "Trust, but Verify." Good advice, especially today!

Value of Past Employment Verifications Even if You Cannot Get the 'Good Stuff'

Even if all an employer receives when contacting past employers is "name, rank, and serial number," it can be argued that verifying past employment is one of the most critical components an employer can undertake in the hiring process. In

84 The Safe Hiring Manual

fact, there are times when a past employment verification is just as important if not more important than a criminal record check. Ideally, these checks provide specifics about past job performance that could be used as likely predictors of future success. Unfortunately, some employers make the costly error of not bothering to call past employers because they know many organizations have policies against giving out detailed information about current or former employees. Employers might assume the effort is worthless because all they will get is “name, rank, and serial number,” if anything at all. However, here is the critical point:

Even if all you get is verification of dates of employment and job titles, past employer phone calls are still vital for safe hiring.

Why is this so important? There are actually five essential reasons why a Safe Hiring Program requires calling past employers regardless of whether the past employer limits the information to start date, end date, and job title.

1. Eliminates Unexplained Employment Gaps

If you do not know where a person has been, then you are hiring a stranger. If you hire a stranger, then you have a substantial risk of being the victim of the legal and economic fallout of a bad hire.

As explained in the previous chapter, if there are unexplained employment gaps in an application or resume, the employer cannot eliminate the possibility that the person’s “absence” from the workforce was involuntary, such as in being incarcerated for a criminal offense. By eliminating any gap in employment over the past five to ten years, it lessens the possibility the applicant spent time in custody for a significant criminal offense.

The issue is not whether a person has gaps in his or her employment, but whether any gaps are unexplained. Not everyone has an uninterrupted employment history where they leave one job on a Friday and start the new one the following Monday. Employment gaps can have very reasonable explanations, such as time off to go to school, for a sabbatical, or for personal and family reasons. Sometimes it can take a person time to find a new job. Gaps can indicate negative things too, such as a prison or jail stay.

2. Indicates Where to Search for Criminal Records

As reviewed in more detail in Chapter 9 on criminal records, there is no national database of criminal records that private employers can legally access. Criminal record searches must be conducted at each relevant courthouse, and there are over 10,000 courthouses covering some 3,500+ county, state, and federal jurisdictions, plus another 5,000 courts at the town and city level. However, when an employer knows where an applicant has been, then *the knowing where to look* increases the accuracy of a criminal search. If an employer does not know where to search, they can easily miss a court where an applicant had a significant criminal act, and thereby inadvertently hire a person with a serious criminal record.

3. Allows an Employer to Hire Based Upon Facts, Not Just Instinct

The pitfalls of using the warm body theory of hiring have been demonstrated in earlier chapters. Although the use of instinct is part of the hiring process, there is simply no substitute for factual verifications. Given the statistics that up to one-third of all resumes contain material falsehoods, the need to verify statements in a resume or application is critical. Just knowing with certainty that the applicant did, in fact, have the jobs and positions claimed goes a long way towards a solid hiring decision.

4. Allows an Employer to Demonstrate Due Diligence

Here is the critical point—if something goes wrong, an employer needs to be able to convince a jury that the **employer made reasonable efforts**, given the situation, to engage in safe hiring. Documentation for each person hired shows that an employer made reasonable steps by contacting past employers to confirm job information and to ask questions. This is powerful evidence an employer was not negligent. As stated before, an employer is not expected to be 100% successful in their hiring. No one is. Any employer is simply expected to act in good faith and to take diligent efforts to hire safe and qualified people. This cannot be done without demonstrating that the employer made the effort, which means documenting that he or she picked up the phone and tried.

What constitutes a reasonable effort? Taking reasonable care means attempting to obtain employer references and documenting those attempts. To a degree, the level of reasonable inquiry depends upon the nature of the job and the risk to third parties. A higher standard of care may be required for hiring an executive than a food service worker. Regardless, every employer has a legal obligation to exercise appropriate care in the selection and retention of employees. The law does not require that an employer be successful in obtaining references. It is clear that an employer must at least try.

5. Potential Employer May Receive Valuable Information

Many employers assume when they call a past employer they will get a “No comment,” or “We do not give references.” However, there is a significant percentage of time when both a verification and a reference is possible. Sometimes this occurs when a firm has not been strongly counseled by their employment attorney not to give a reference, such a smaller employers who may not have been trained by a lawyer not to give references. Also, the previous employer may feel morally obliged to give references. Successful reference calls can also occur when the person calling has excellent communication skills, is professional, and is able to start some dialogue. There are many HR and security professionals who have developed the ability to obtain references, even from the most reluctant sources. Techniques on how to obtain references are given later in this chapter.

Another Reason to Verify Past Employment – Resumes or Past Claims Are Not Always Accurate

A resume is essentially a marketing tool for an applicant. An applicant picks and chooses whatever information he or she wants to share. Many job hunters use a resume writing service. While there is nothing wrong with using a service to prepare a professional looking resume, the service typically will attempt to enhance the applicant’s experience. The service’s goal is to get the applicant to the interview stage.

Employers, however, need facts in order to make hiring decisions and there can be inherent dangers when using a resume within a Safe Hiring Program. In fact, some firms astutely reject resumes and return them to applicants. Job seekers are told they must fill out the company-approved application only and are increasingly told to use the employer’s online job portal, often powered by an Applicant Tracking System (ATS), as the exclusive means of applying for employment.

Resumes May Have Information an Employer Should Not Have

For some reason, job applicants often feel compelled to reveal things about themselves that an employer does not need or legally should not know. Resumes often reveal volunteer affiliations, hobbies, interests, or memberships in groups that reveal such prohibited information as race, religion, ethnicity, sexual orientation, or age. For example, a resume may reveal a person does volunteer time with a church or belongs to a group that is clearly associated with a particular race or nationality. The problem is the federal Equal Employment Opportunity Commission (EEOC) and equivalent sets of individual state’s rules prohibit an employer from obtaining or using such information. Having this information in the form of a resume in the employer’s file is not a good practice in the event the employer is ever the subject of civil litigation or a government investigation into their hiring practices. By using an application form, an applicant cannot volunteer irrelevant information an employer should not possess.

Resumes May Not Have Information an Employer Needs

Resumes may not give an employer all the information needed to make an informed hiring decision. Perhaps there are previous jobs an applicant would rather not mention or the applicant has hidden significant employment gaps. Also, job applicants typically do not self-reveal their criminal records in a resume, when this fact is significant to the job.

Spotting Six of the Biggest Job Applicant Lies

Although statistics vary widely, there is widespread agreement that a substantial number of resumes and applications belong in the fiction section of the bookstore. The rate of fraud can be as high as 40% and higher according to different sources. Applicants certainly have the right to put their best foot forward, and puffing their qualifications is an American tradition. But when puffing crosses the line into fabrication, an employer needs to be concerned. When you hire an applicant who uses lies and fabrication to get hired, the issue is that the same type of dishonesty will continue once they have the job. Below are six of the most common fabrications claimed by job applicants.

1. Claiming a Degree not Earned

Yes, believe it or not, applicants will make up a degree. Sometimes, they actually went to the school but never graduated. Some applicants may have had just a few credits to go and decided to award themselves the degree anyway. On some occasions, an applicant will claim a degree from a school they did not even attend. The best practice for an employer is to state clearly on the application form that the applicant should list any school they want the employer to consider. In that way, if an applicant lies, the employer can act on the lack of truthfulness regardless of whether the educational requirement is part of the job requirements.

2. Claiming a Diploma Mill or Fake Degree

A related issue to claiming an unearned degree is declaring a fake degree that can be purchased online from a Diploma Mill. Today one may obtain a degree simply by going online and using a credit card. There are even websites that will print out very convincing, fake degrees from nearly any school in America. In fact, the author obtained a degree for his dog in Business Administration from the University of Arizona—and the dog had been dead for ten years. A transcript was even obtained and the dog got a “B” in English! Some sites will even provide a phone number so an employer can call and verify the fake degree. Some of the degree mills even have fake accreditation agencies with names similar to real accreditation bodies, in order to give a fake accreditation for a fake school.

3. Previous Job Title

Applicants can easily give their career an artificial boost by “promoting” themselves to a supervisor position, even if they never managed anyone.

4. Claiming Knowledge, Skills, Abilities, or Experience They Do Not Possess

Employers normally hire based on a job description that will describe the knowledge, skills, and abilities (KSA) needed for a job as well as the experience required. These are exactly the areas, however, where employers often find a candidate has fibbed.

5. Dates of Employment

Another concern for employers is applicants who cover up dates of employment in order to hide employment gaps. For some applicants, it may be a seemingly innocent attempt to hide the fact that it has taken awhile to get a new job. In other cases, the date fabrication can be more sinister, such as a person that spent time in custody for a crime who may be trying to hide that fact.

One caveat—there can be times when the applicant is honestly mistaken about employment dates due to having started a position as a temporary worker on a staffing firm’s payroll. An applicant may have worked at a past employer for five years, but the first year was officially an employee of a staffing vendor. In the applicant’s mind, they were there for five years. However, the official records for the company may only show employment for four years.

6. Previous Compensation

A related issue is past salary. Applicants have been known to exaggerate compensation in order to have a better starting point when negotiating the salary for the new job. However, for many employers past salary is a sensitive area and some HR professionals will ask for a written release first.

You Need To Know

CareerBuilder Survey Finds 58% of Employers Caught Lies on Resume

A 2014 survey from CareerBuilder found 58 percent of hiring managers said they had caught a lie on a resume. The nationwide survey, which was conducted online by Harris Poll on behalf of CareerBuilder from May 13 to June 6, 2014, included a representative sample of 2,188 hiring managers and human resource professionals across industries and company sizes. According to employers, the most common lies they catch on resumes relate to:

- Embellished skill set – 57 percent
- Embellished responsibilities – 55 percent
- Dates of employment – 42 percent
- Job title – 34 percent
- Academic degree – 33 percent
- Companies worked for – 26 percent
- Accolades/awards – 18 percent

The survey also found that employers in the following industries caught resume lies more frequently than average:

- Financial Services – 73 percent
- Leisure and Hospitality – 71 percent
- Information Technology – 63 percent
- Health Care (More than 50 employees) – 63 percent
- Retail – 59 percent

The survey found that employers in the following industries catch resume lies more frequently than average:

- Financial Services – 73 percent
- Leisure and Hospitality – 71 percent
- Information Technology – 63 percent
- Health Care (More than 50 employees) – 63 percent
- Retail – 59 percent

Source:

www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=8%2F7%2F2014&iid=pr837&ed=12%2F31%2F2014.

How Far Back Should Reference Checks Go?

How many years back should one go when checking previous employers? The answer can depend upon the applicant's relevant work history, the sensitivity of the position, and the availability of information. Some applicants may only have had one employer in the past ten years. Others may have had a large number. If a person is an hourly worker, then it is possible the person has held numerous past jobs. A young worker may not have a work history to check.

As a general guideline, employers should go back a minimum of five years, although seven to ten is much better. If the employer is in an industry where there is a great deal of turnover, then it may not be practical to go back even five years, if the five-year span represents a large number of previous employers. Employers should utilize a **rule of reason**, but also

keep in mind that an employer should be internally consistent so that all similarly situated applicants are treated in a similar fashion. If an employer goes back five years for an administrative assistant, then all candidates who have reached the stage where references are conducted should also have their references checked going back five years.

Use Questions that are 100% Legal

Remember the same standards that apply to reference checking also apply to interview questions—all questions must be specifically job-related and non-discriminatory. Never ask any question of a reference you would not ask the candidate face-to-face or put on an application. Focus on skills and accomplishments as well as performance issues that apply specifically to your job opening, such as the ability to meet deadlines or to work well with others on a team project.

See the previous chapter for a list of questions that can and cannot be asked of an applicant in an interview. Again, these questions are also applicable when interviewing a past employer.

Procedures to Implement Quality Reference Checking

Operating a successful, in-house system of reference checking is certainly doable for employers. Here is a step-by-step process an employer can use for obtaining past references as part of a Safe Hiring Program (SHP).

1. Set up a physical system to make and track calls, and monitor your progress by using a Past Employment Worksheet.

Effective reference checking requires a system; otherwise, it is nearly impossible to track who has been called, the status of each call, and who else needs to be called.

This is especially true in a large company environment. In a typical large company reference-checking situation, a checker may be given a number of applicants to check references. Assume HR is given five applicants to check. Also assume that each applicant has on the average three past employers, making a total of 15 needed calls. The chances are that the percentage of successful first-time calls will be limited. A successful call means getting through to the right person and getting as much information as the person can give you. The reality is most calls will result in an “incomplete,” meaning that a call back is needed. Perhaps the caller had to leave a message on a voicemail, the phone number did not work or is busy, or the past employer needs “a release” from the applicant. All of these situations require that HR note the outcome and schedule a follow-up. As the HR person is calling on the third candidate, past employers may be calling back in response to earlier messages. Sometimes a round or two of “phone-tag” is involved. Obviously, a tracking system is a necessity. Here are suggestions to make the workflow easier:

- Have a prepared Past Employment Worksheet ready to go for each candidate. For each applicant, the reference checker needs to fill out the name and contact information for each past employer as well as any standard reference questions. A sample Past Employer Worksheet is found in the Appendix.
- Use the Past Employer Worksheet to track all phone calls, including who was called and the results. The information is worth its weight in gold should an employer ever be called upon to demonstrate due diligence in court. Even if the reference attempt was unsuccessful, a completed worksheet showing each call—including the date, time, phone number, person called, and the result—is the best possible proof that an employer exercised due diligence.
- In advance, it is helpful to place the essential information reported by the applicant on the Past Employment Worksheet. Now, during a call, the reference checker can write down what the past employer reports, providing an easy-to-read side-by-side comparison.
- If specific job-related questions are being asked relevant to the Knowledge, Skill, and Abilities (KSA) related to a particular position, then make sure those questions are ready. This may mean having the application easily accessible for a quick reference.

- Using a Past Employer Worksheet also ensures you are asking the same questions for similarly situated candidates. A critical function of a reference-checking program is to treat all candidates fairly. Treat similarly situated candidates the same way!

2. Independently confirm the existence and phone number for the past employer.

It may not happen very often, but many HR and Security Professionals have heard of situations where an applicant set-up a fake reference on a resume by providing a friend's telephone number, with the friend standing by to answer, posing as a past employer. When the prospective employer makes the phone call, the friend gives a glowing and professorial reference. Or, an applicant bent on a fake reference can use other alternatives such as setting up a voicemail service, leaving a message indicating the voice mailbox belongs to a supposed reference, and later have a friend return the call posing as a past supervisor. Cases are reported of applicants attempting to act as their own reference. With cell phones, call forwarding and internet phone services, such trickery is now easier than ever.

To avoid the possibility of a fake reference, it is recommended that a verifier independently establish the past employer is a legitimate company and to locate a valid phone number by use of an internet service or local phone book. The best way to determine if a company is legitimate is to check with the local Secretary of State office to confirm the business is legally formed and authorized to do business. If the business is a sole proprietorship and is not listed with the secretary of state, then a professional screening firm may use other due diligence techniques.

There are also a number of websites where phone numbers can be found very quickly. They typically have the same data that dialing *411 information* would have, except the internet services are free. Any legitimate firm will have a listed phone number. The chance of an applicant going to the trouble of creating a legal entity just to get a listed phone number is, well, not likely.

There may be times when a firm is not listed. That can happen if the firm has moved, merged, changed names, or gone out of business. In that situation, the new employer may well have to talk further with the applicant to find someone who can verify their past employment.

An employer or screening firm can go even further and verify the legitimacy of the past employer by looking up the employer on a secretary of state website's search of validly registered business entities, or do an online search of Fictitious Business Names sites. An employer can even use one of the commercial services, such as Dunn and Bradstreet, Hoovers, or Manta to name a few.

Of course, a verifier must also use good judgment. If the phone is not answered in a professional manner, or there are the sounds of traffic and children in the background, then something may not be right.

Finally, if there is any suspicion of a set-up or fake reference, it may be necessary to verify if the person giving the reference was, in fact, employed by the past employer. That may even require, in some situations, calling HR or payroll to make sure the person the verifier is talking with was in fact employed there.

Author Tip

Trusted Source

This is part of what the author refers to as the **trusted source** based on independent third-party verification. This approach is described in more detail in Chapter 22. The key point is that in order to combat identity fraud, it is critical to verify information about a person independent of the information an applicant provides. It is critical to not simply assume the applicant's statements about the existence of or contact information of a past employer is correct.

3. How to be careful when contacting an applicant's current employer.

A recurring issue in any past employment check is sensitivity about contacting the current employer. A current employer should NOT be contacted unless the applicant specifically gives permission.

The reason is there are some employers who, upon learning a current employee is looking to leave, will immediately take steps to terminate the employee. This is especially true for positions of greater responsibility where the applicant may have access to customer lists or trade secrets. In some industries, within minutes of learning an employee is actively looking for a new position, the current employer will have the Security Department box up the employee's personal items, confiscate all computers and disks, turn off all access to any computer systems, de-activate the parking permit and building access code, and have the person physically escorted off premises with a last paycheck.

If such a hasty departure is caused by a phone call by the prospective new employer, and the job offer does not come through, then the applicant can be left without a job and free to contemplate whether they should visit a lawyer. In order to avoid this, here is a simple two-step program:

- On the application, in large letters, make sure there is a box someplace asking an applicant "May we contact your current employer?"
- Do NOT call the current employer unless the applicant has clearly marked the "Yes" Box. If the applicant failed to check either box, then do not call until that is clarified. Anything other than a clear indication of YES can create problems.

If the employer still needs to verify current employment, there are three options for doing so:

- Ask the applicant for the name of a past supervisor or co-worker who is no longer working with the applicant at the current place of employment. Again, if there is any question about the authenticity of the supplied name, the employer can call and verify the ex-employee did in fact work at the current workplace.
- Ask the applicant to bring in W-2's for each year of work, or at least the full past year.
- Wait until after the employee is hired before calling the past employer; providing the new hire is subject to a written offer letter clearly stating "continued employment is conditional upon a background screening report that is satisfactory to the employer." Once the new employee is working, there can be a final phone call. By making current employment part of the written offer letter, an applicant has a powerful incentive to be accurate about the current employment situation, since any false or misleading statements or omissions will have serious consequences. It is important to include the phrase "satisfactory to the employer" in order to avoid a debate with an applicant/new hire about what is or is not a good screening report.

Although more complicated and time consuming, there are services where a consumer's past tax information can be obtained. However, that is typically not practical for an employment check.

4. Use *Soft Sell Techniques* if you hit a roadblock.

If a verifier faces resistance to a reference, the best approach is usually a soft sale. Here are some techniques that may help convince a past employer to give the information you need:

- Do not start right off asking for an employment reference. That can immediately make an employer defensive and create a barrier to effective communication.
- Explain the purpose and try to convince the past employer to be of assistance. How? By finding common ground. For example, explain that your applicant cannot be employed without some additional information, or that getting some information would be a great benefit.
- Start with a non-controversial request, such as start date, end date, or job title.
- Before asking reference questions, segue into the subject with non-controversial questions such as "What was the nature of that job?" If you are told the person's job title was "project manager," then ask the past employer what that job entails. It is then a short trip to ask "How did the applicant perform the job?"

- If your state has a statute that protects an employer who gives an employment reference, then you may explain that to a reference.
- Offer to send a release. A release gives a past employer a great comfort level. It demonstrates the new employer, in fact, has a valid business reason for requesting the information, and the past employer has permission to give it. Keep in mind, however, a release is not a blank check for the past employer to say anything they want. Even with a release, the past employer must be careful to limit the information to those items that are job-related and factual.

5. How to handle the *Eligible for Rehire* question.

If nothing else works, a firm can at least be asked if the previous employer would rehire the applicant, or whether the applicant is eligible for rehire. This has become a standard reference question. Even firms with a “name, rank, and serial number” policy are sometimes comfortable with answering this question. In reality, the past employer is being asked the ultimate question, which is “Knowing what you know about the person...”, and assuming you are also a highly trained, competent and motivated HR manager, “...would you want the person back?”

However, there are several problems with the Eligible for Rehire question. First, if a firm, in fact, has a no reference policy, then they are technically violating their policy if they answer. They are essentially giving a qualitative evaluation of the person. If they answer *no*, that potentially could be a form of defamation.

Second, a real issue with the question is that the answer can be meaningless. Suppose a past employer is called and asked about Eligibility for Rehire, and the past employer says *yes*, what does that mean? It could mean that technically the person is eligible to be rehired because there is no notation on the personnel file that indicates there is a prohibition against accepting that application. However, in truth and in fact, that past employer would never consider rehiring the person, but just won’t say so.

Conversely, a *no* answer could mean the particular employer has a policy against rehiring anyone who left, even though the applicant was the best worker they could ever hope for.

The most helpful wording of the question is the following: “Knowing what you know about Mr. Smith, if you were in a position to rehire him for the same job he left, would you want him back?”

In order to interpret that answer, the verifier must understand the assumptions being made. They are assuming that the person who is giving the answer has a similar interest to the new employer and is capable of making a meaningful judgment. In other words, in order to give the answer meaning, the verifier has to make assumptions about the knowledge and judgment of the person giving the information.

If an HR professional giving the information is someone who the verifier happens to know and the verifier has respect for the experience and judgment of this HR professional, then the answer is extremely valuable. If the verifier is talking to a stranger, then it is really a judgment call as to the value of the information. It really comes down to the old rule—information from a trusted source is the best information.

Author Tip

When You are Told NOT to Answer Reference Questions

If your organization has been instructed not to answer reference questions but to verify information only, then the “rehire question” is really a reference question. In fact, “Would you rehire?” is the ultimate reference question since Employer 1 is asking Employer 2’s ultimate judgment about whether a new employer should hire their former employee.

6. Send a faxed request or email—it is harder to ignore than voicemail.

Often times a verifier cannot get through to a live person and must leave a voicemail. As everyone knows in this busy world, it is easy to ignore voicemail. By the time the verifier leaves the third voicemail, it becomes less likely the past employer intends to respond. Assuming the verifier has verified that the reference person is not away, on leave, on vacation, and it is the right person, the verifier needs to find a way to get through.

Short of physically going over to the past employer's office and demanding time (not very practical, of course) the next best thing is to send a fax request or email. For some reasons, a piece of paper or an email demands attention—people feel they need to do something with a piece of paper or email, but they can ignore a voicemail. A fax or email to a former employer can also include the information to be verified, along with a return fax number or email, of course.

If all else fails, a faxed request at least shows a due diligence effort to get the information. The fax to the past employer should be maintained in the file as proof of the efforts made.

Another technique is to mail a written request. This technique is only effective for verification of factual information. How much meaning should be put on past employers answers to faxed, emailed, or mailed reference questions? That is difficult to say.

Author Tip

Devil Is In the Details

There is a trend for screening firms to send emails to past employers with a request to fill out information through an online response or portal. Although it may seem efficient at first glance, the **devil is in the details**.

First, a competent screening firm will follow the rule of independently verifying that the former company is legitimate and the email is to the right person. That is a necessary fraud prevention tool. Merely sending an email to an email address suggested by the applicant creates an opportunity for fraud. Secondly, privacy considerations are paramount. Whoever receives the email should be the only person able to log in with their full email. Under no circumstances should anyone at the previous place of employment be able to log in just under the employer's domain name and see what others have written. That would clearly be an invasion of privacy.

7. Use other sources such as former co-workers or supplied references.

Depending on the importance of the position and the time and resources available, the verifier may attempt to talk with a professional reference the applicant has supplied. This is known as a **supplied reference**.

One technique is to ask a supplied reference for another person who may know the applicant. This is known as talking with a **developed reference**. A developed reference is a source of information the verifier has developed on his or her own, without input from the candidate.

Talking to a developed reference can be a very valuable source of information. The verifier can get information from someone who was not told in advance he or she would be contacted, which increases the probability of a truly spontaneous and non-rehearsed conversation leading to additional insights about the candidate. Because it is a time consuming and labor intensive process, it is typically used for just very key positions.

8. Use professional networking when possible.

HR professionals can sometimes engage in **professional networking** to obtain reference information. Sometimes just reading between the lines can be of assistance. A previous employer may be unwilling to give specific information but may be willing to convey a sense about or opinion about the applicant or communicate in some other “unofficial” manner.

It should be noted, however, that in reality there is no such thing as an off the record comment. Should a matter ever go to litigation and a deposition is taken, an HR manager or employer would have a legal obligation to reveal all the details of a conversation if directly asked. Unlike a doctor/patient or spouse to spouse conversation, for example, where the law creates a privilege so that such a conversation can remain a secret, there is no such protection when HR professionals communicate with each other about applicants.

There is, however, an ethical issue to consider. If an HR or security professional knows that a colleague works at a firm that has a strict policy against giving references, then a request for information is really asking another professional to violate a firm's policy. The fact that such a conversation may be "off the record" may not help.

9. Procedures to use if the former employer is out of business, bankrupt, moved, merged, or cannot be located.

For a number of reasons, a previous employer may not be available for a past employment check. First, a verifier may have trouble obtaining contact information if a previous employer has merged, been acquired, or is no longer in business and no one can locate the personnel records. There can also be occasions where the past employment was an independent contractor assignment for a sole proprietorship and no one can be located to verify it.

In these types of situations, a verifier has two options. One is to contact the applicant to locate a former co-worker or supervisor; however, that requires the verifier to confirm the credibility of the former employee, since there would be no way to verify the source of information from the former employer. The second option is to contact the applicant and request a copy of the W-2 (if the applicant was on the payroll) or a 1099 (if the applicant was a contractor). To help confirm employment, an employer can look at secondary sources that may include using a search engine to see if there is a record of the applicant at a previous firm.

A verifier can also run into difficulties if given insufficient information about the past employer. It is critical to require any applicant to completely identify the past employer by name, city, and state in order to facilitate a telephone call. Using an applicant-supplied phone number can be a source of difficulty; not only must the verifier be alert to the possibility of a *fake or set-up reference*, but often, the phone number an applicant recalls was the number for a division or branch, not the number needed for that firm's past employment verifications. The employer or screening firm still needs to independently verify the existence of the past employer and develop a phone number independent of the applicant.

10. If a past employer says there is no record, then a verifier needs to go one step further.

What if a past employer tells a verifier there is no record of an applicant having worked there? Before jumping to the conclusion the applicant has lied, a verifier should dig deeper. There can be reasonable explanations for apparent discrepancies. An applicant may have worked at the previous company as a temporary worker, under contract, or was actually employed by a third-party employer organization.

Some companies utilize the services of a Professional Employer Organization (PEO) or other types of staffing vendors to act as the employer of record although the work is performed at the company workplace under the company's direction and control. In these situations, the previous company's records will show that no such person worked there, though their facility was the physical location where the applicant worked. Since the applicant physically worked at the firm's premises, the applicant may well report that business as the employer. The applicant may not be certain or recall the details of who actually issued the check.

It is also important to ask the employer to double-check their records under the applicant's Social Security number and any other names the applicant may have used.

11. Be prepared to send a written release or authorization if needed.

Some employers will want to see a written release or authorization before giving out information. This practice is seen as protection against defamation and a good privacy practice before releasing more sensitive information such as past salary.

However, keep in mind that this release is not a consent for a past employer to say anything they want. As discussed below, there must still be a factual basis for any past employment reference information provided.

**You Need
To Know**

A Case in Point

An applicant reported a two-year employment history. However, a telephone call to the past employer showed the applicant only worked there for a year and a half. On the surface, it looked like the applicant lied about the time period of employment. Since honesty and integrity are integral to any employment relationship, the employer was about to terminate the hiring process and rescind the offer. However, the employer could not believe that such a good prospect actually lied. The employer took the extra step of asking the applicant about the apparent discrepancy. Upon further investigation, it turned out the applicant started off working for the past employer as an unpaid intern for six months, then was hired full-time. From the applicant's point of view, he had worked there for two years—employment records for the company reflected only a year and a half. If the employer had not gone the extra step, then all of the time, energy, and expense of recruiting the prospect would have been wasted. On the other hand, if the person had lied, the extra time spent confirming the facts would also have protected the employer in the event of any adverse legal action.

12. What if negative information is found by the screening firm?

If a screening firm is performing the past employment check, it is covered by the Federal Fair Credit Reporting Act (FCRA) which is covered more extensively in Chapter 5.

If the screening firm is asking reference (or qualitative questions), that is a special type of consumer report called an Investigative Consumer Report or ICR. What should a screening firm do if it gets negative information that would likely be adverse to the applicant, such as the applicant stole money, or did a very poor job?

In that case, before reporting adverse information from the reference check, FCRA section 606, the background firm must have followed reasonable procedures to obtain confirmation of the information, from an additional source that has independent and direct knowledge of the information or determine that the person interviewed is the best possible source of the information.

That is another reason why background firms are generally NOT used for reference questions, but as explained below, are best used to verify factual matters and leave the reference checking to the hiring manager or HR.

13. If more information is needed, should a screening firm be utilized to contact the applicant directly?

Some employers or recruiters want background firms to contact an applicant directly if there is a need to obtain additional information or to clarify information from an applicant in order to complete a reference check or some other credential. This can happen for example if there is an incomplete employment verification because the past employer has moved, merged, or gone out of business or will not call back. If the recruiter still needs a verification, then someone needs to contact the applicant and ask for things such as W-2's, or names of past supervisors.

There are some recruiters who ask their background screening firm to do this, even though it is the recruiter that has the most knowledge about the applicant and has direct contact. If this has ever crossed your mind as an employer or recruiter, you might want to reconsider.

It is generally not a recommended practice to have a background firms get in the middle of the special relationship between the Recruiter and the Applicant. It creates confusion, causes delays, and brings a background screening firm into

discussions with the applicant who may not even realize that a third party is involved. Background checks actually go much faster where the recruiter exclusively manages the direct applicant relationship and obtains additional information when needed.

Recruiters who review all applications for completeness, legibility, and accuracy with the candidates before sending the applications to a screening firm will find their report is completed much faster. If an employer is using an Applicant Tracking System and more information is needed, the ideal scenario is for the recruiter to obtain the additional information.

There are a number of complications that arise if the screening firm attempts to contact the applicant.

1. The applicant does not know the background screening firm, and is naturally reluctant to supply a Social Security Number or date of birth to a stranger over the phone, or send pay stubs to someone they do not know. That typically means the applicant will normally call the recruiter anyway to find out what the situation is all about, which, of course, delays the screening process further.
2. The background firm often has to engage in phone tag, requiring back and forth before the screening firm can connect with the applicant. Since the applicant has no relationship with the screening firm, an applicant does not always even realize it is important to call back, especially if the applicant is looking at several different job offers. On the other hand, if a recruiter is in hot pursuit of an applicant, or the applicant is focused on getting the job, it is likely that the recruiter will have a great deal less difficulty getting in touch with him/her to obtain the additional information or clarification.
3. The third issue is tracking. The screening firm needs to track the status of the additional calls to the applicants and to deal with multiple applicants instead of a single point of contact. Recruiters presumably already have an ATS or some other system to keep tabs on the progress of each job and each finalist (since typically only a finalist is getting screened).
4. The last and most important issue is when a screening firm calls the applicant, an applicant may now believe that the screening firm is somehow involved in the hiring decision. There have been applicants who have wanted to continue selling themselves to a background firm's clerical employee, whose only mission was to obtain some missing information and who knows nothing about the job. Or, if the applicant somehow feels that background employee did not give them the attention he or she deserved, the applicant may be left with a negative impression of the potential employer or complain about the contact.

For these reasons, many background firms typically prefer not to contact the applicant on behalf of the Recruiter or Employer. If an employer wants the screening firm to provide this service, the employer should be prepared to pay a premium since the background firm is performing additional work that normally the employer would perform.

Who Should Make the Past Employment Calls?

There are three different groups who can do past employment checks:

1. The actual hiring managers
2. Human Resources
3. An outsourced third party, such as a background firm

Here are the pros and cons of each group.

Hiring Manager

Advantages: The manager knows the job and knows what talents and skills are needed. Also, the hiring manager is the person who has to live with the decision. For sensitive or critical positions, the manager may want to receive input directly from previous employers. Even if the previous employer has a *no comment* policy, there may still be

96 The Safe Hiring Manual

an advantage in talking personally to the previous employer and attempting to glean what information is available *between the lines*.

Disadvantages: There is much less control over the process in terms of whether the hiring manager is asking legal questions or treating candidates in a similar fashion. Many hiring managers may be tempted to make fewer calls and settle for just one completed call before making a decision. Hiring managers may not be as concerned about the need to establish a full employment history or look for employment gaps. Although these drawbacks can be lessened with written procedures, training, and auditing of hiring files, they are still sources of concern.

Human Resources

Advantages: Any reference check done by human resources more likely will be done thoroughly, properly, and legally with proper documentation and consistency.

Disadvantages: The human resources department may not know the job requirements nearly as well as the hiring manager. In addition, even for a firm with a fully staffed Human Resources department, employment reference checking is a time consuming task. The difficulty with performing employment reference checks in-house is not the time the actual interview takes; it is the constant interruptions of returned phone calls throughout the day, tracking the progress of each candidate, and making repeated attempts when there is not a callback. It can also take time to locate former employers and phone numbers as well.

Background Checking Firm

Advantages: By outsourcing, a firm knows that nothing will fall through the cracks since a background screening firm can methodically contact all past employers. In addition, the fees charged by screening firms are typically very modest compared to the time and energy that HR would need to spend in-house.

Disadvantages: A verifier employed by a screening firm typically knows little about the employer or the job. Screening firms often do employment checks in high volume and are unlikely to have the personnel trained to ask in-depth, pertinent questions or do follow-up questions. Given the prices charged by screening firms, the verifiers performing the calls are not seasoned HR professionals but rather have skills that are closer to the needs of call centers. A screening firm is best utilized only for verification calls, and not for reference checks.

Author Tip

Using Automated Third Party Verification Services

Some employers utilize outsourced third party services to handle past employment verification calls. The third party service will download all employment information so that verifiers, such as employers or screening firms, call the third party service instead of the employer directly. This saves the employer time and money since they do not need to respond to phone calls, faxes, or emails. The verification is typically completed by the verifier online or through an interface. Examples are uConfirm or The Work Number, a part of Equifax. If there is concern about the accuracy of data about an individual applicant, these sites provide an email address for questions. One drawback is that the information is typically limited to dates, title, and possibly salary, and there is no one to talk to in order to locate additional information.

Who Makes the Call? – Conclusion

The answer is to recognize the difference between *reference checks used to determine if a person should be offered the position* in the first place and *due diligence verification checks of past employment* utilized to ensure an employer has confirmed dates and details of past employment and subjected all finalists to the same process.

In order to make sure nothing falls through the cracks, HR or a background screening firm may be called upon to do a verification check, just to make sure all the bases have been covered. The worst that can happen is some former employer may be called twice—once by the hiring manager and again by HR or a background screening firm.

Many organizations encourage the hiring manager to make whatever employment checks are needed to help decide if the person is a good fit—to form an opinion as to whether or not to make a job offer in the first place. Of course, employers are well advised to make sure a hiring manager is trained so that only legal and permissible questions are asked.

Author Tip

Trend of Using Screening Firms Only at the End of Hiring Process

The trend for employers is to use a screening firm at the end of the hiring process to perform factual verifications only. By the time an employer has decided to spend time and money on a background check, the decision has already been made that the applicant is a good fit for the job. Having a screening firm ask reference questions is very unlikely to help employers make the right decision. On the other hand, the screening industry has a great deal of experience in making the verification calls needed to substantiate the details of the applicant's employment history.

Other Effective Reference Techniques

The Appendix provides a list of sample reference questions. Some suggestions made by experts include:

- Use of questions showing behavior – e.g. “Can you give me a specific example of how he (or she) was a great team player?”
- Ask a targeted question – e.g. “The candidate states he (or she) implemented a sales training program. Can you tell me about their contribution?”
- Read the candidate's resume to the past employer and ask for a reaction to the resume content.
- Use open-ended questions to inspire narrative answers.

Human Resources consultant and expert on hiring and reference questions Wendy Bliss gives the following tips on effective reference techniques. More information on this topic is available in her book *Legal, Effective References: How to Give and Get them*, published by the Society for Human Resource Management in 2001.

Mission Possible: 10 Tips for Effective Telephone Reference Checks

By Wendy Bliss, J.D., SPHR, Author of *Legal, Effective References*

www.wendybliss.com

Due to the popularity of the “name, rank and serial number” approach to reference requests, it is often challenging to uncover useful, in-depth information about job applicants during telephone reference checks. However, it is by no means impossible! With practice and persistence, you can greatly increase the quantity and quality of information obtained in conversations with reference sources. On your next reference-checking mission, use the following tips:

1. **Create a powerful script.** Do not “wing it” when calling references. Develop a written outline that includes questions and comments that will enable you to: 1) establish rapport with reference contacts; 2) minimize potential opposition to your inquiries; 3) obtain relevant, detailed information about the applicant; and 4) follow up with the source as needed. Tips 2 through 9 below provide techniques for accomplishing each of these objectives. To build skill and consistency, use your reference check script for every reference check.

2. **Open the door for effective communication in the first sixty seconds.** When contacting a reference, your initial goal is to make a positive connection and set the stage for a candid conversation. Identify yourself by name and position. Share general information about your company and the specific opening there for which the applicant is being considered. Let the reference contact know that you have the applicant's permission to call, assuming that is the case. (If the applicant has not given your organization prior written consent to do so, it is inadvisable to conduct any reference checks.) After sharing this introductory information, making a complimentary statement about the source, such as "Betty made favorable comments about your guidance and supervision during her interviews with us," may predispose the source to sharing full and frank feedback with you.
3. **Avoid the "R" word.** The mere mention of the word "reference," particularly in the initial stage of a reference check call, may arouse worries about defamation and other legal claims in the mind of the person you have contacted. So, you should set the stage for cooperation. Explain the purpose for the call and the potential benefits of sharing candid information by taking a future focus. For instance, stating that "An important reason for my call is to gain information that will help our company most effectively supervise Richard in the event we hire him" emphasizes the developmental benefit of answering your questions fully.
4. **Ask the right questions, in the right order.** After establishing rapport with the source, climb the ladder of reference inquiries to gain a thorough understanding of the applicant's employment history, qualifications, job performance, and past problems on the job. Start by asking the most innocuous and easily answered questions first, including confirmation of dates of employment, positions held and salary history. Next, move up the ladder of inquiry to gather information about the applicant's job duties, performance, work habits, and his or her suitability for the open position at your company. Finally, inquire about the most sensitive topics including reasons for leaving, and incidents of misconduct or dangerous behaviors. This three-tiered approach to questioning—saving the toughest topics for last—usually leads to at least partial cooperation from reference sources.
5. **Ask open-ended questions, and give prompters.** Questions about the applicant that begin with the words "what," "how," or "why" invite detailed responses. Other phrases that encourage full and specific disclosure begin with phrases such as "Give me an example of the applicant's ability to . . .," or "Describe a time when the applicant . . ." Follow up questions or statements such as "Can you elaborate on that?" or "That's interesting. Please tell me more about that," to prompt the source to give more details.
6. **Listen carefully for vocal clues.** Many reference sources who are reluctant to share negative information will tip off reference checkers to potential problems with the applicant through a variety of signals. Is the source's tone of voice guarded? Does he or she sound cautious or reluctant to answer even basic fact verification questions? Reference checkers should also be on the alert for unusually long pauses, throat-clearing, or "umms" and "ahs" that may indicate hesitancy to give information candidly, particularly if these occur in response to a sensitive question.
7. **Dig deep when you get shallow responses.** When a reference source gives a vague answer, carefully rehearsed, or inconsistent, probe for more useful information. In such situations, politely ask for more details with remarks such as "I am not sure I understood what you meant when you said . . . Can you clarify that for me?" Another technique that may help you discover the truth when you are being stonewalled is to ask very direct questions that require a "yes" or "no" response. For example, ask "Was Pat fired?" or "Was Chris ever disciplined for poor performance or misconduct while employed at your company?" These pinpointed questions probe non-answers about an applicant's reasons for leaving a prior job, or provide clues about his or her performance and conduct with the previous employer.

8. **Be prepared for reluctant references.** While the above techniques will increase your overall success in obtaining useful information during reference checks, you will undoubtedly still encounter stiff resistance from some reference sources. When this occurs, offer to fax the source a copy of the reference authorization form signed by the applicant. This will be particularly helpful if your reference authorization form includes a waiver of liability that protects anyone who provides a reference about the applicant. You can also explain that the applicant will not be hired without satisfactory information about the applicant's performance in past jobs, which is an effective way to encourage sources having positive information about the applicant to go ahead and do the right thing. Additionally, you can inquire as to whether the source's unwillingness to share information about the applicant is an indication of problems with the applicant. If all else fails, contact a different source at the same organization – such as a higher level manager, another supervisor, or even a colleague – who worked directly with the applicant. It is very possible that a different source in the same organization will be willing to give you the information you seek.
9. **When closing a call, leave the door open to get more information.** At the end of your reference check discussions, thank the source for his or her time. Ask for permission to contact the source again if you have additional questions. Finally, ask if the source knows of any other people inside or outside the source's organization who would have knowledge of the applicant's background, job performance or other matters relevant to the applicant's suitability to work at your organization.
10. **Use good form in documenting calls.** All telephone reference check attempts and calls should be documented using a standardized form. This form can be developed internally, or can be obtained from books on reference checking such as my book *Legal Effective References: How to Give and Get Them*.

Legal Effective References: How to Give and Get Them by Wendy Bliss can be purchased online from the Society for Human Resource Management at www.shrm.org/shrmstore. © Wendy Bliss (2001). All rights reserved

Using Automated Reference Checks

Online automated reference checks and assessment tools are fairly new pre-hire resources. An example is the services offered by Checkster (www.Checkster.com), a company founded by a veteran in the talent management sector. Job candidates select references, such as former supervisors and co-workers, who then receive an email assessment request to fill out and return by email. This self-service eliminates time spent making phone calls and waiting for and tracking responses. The questionnaire itself is a scientifically designed assessment instrument designed to give a fresh look at the applicant and contains a number of state-of-the-art validation tools. The results are communicated back to a recruiter or hiring manager in a graphical and intuitive report. Although there are others competing in the same space, Checkster clearly has thought through and designed the process from both the assessment and talent management point of view.

The employer obtains a quick, candid assessment because the person giving the reference is advised that the actual scores are confidential. The email evaluations provide a scientific assessment of what is “under the candidate's hood” – thus increasing the employer's odds of making a job offer to the best candidate.

However, the question has arisen from some hiring managers: *Can services like Checkster replace the type of employment verifications performed by background firms?* The short answer is that Checkster type services are designed to be used earlier in the process than background checks to tell an employer who to consider. A background check is used at the point where a decision is being made to help an employer determine if there is any reason NOT to hire the person and to verify the applicant's factual history.

Traditional background checks and Checkster type services do complement each other, but they serve different purposes. Although services from firms such as Checkster are extremely valuable, they are different tools for different functions.

100 The Safe Hiring Manual

Automated reference checks occur in the talent sourcing and selection stages to help eliminate some preliminary candidates from consideration and to focus in on candidates who should be finalists. By comparison, background checks occur AFTER a tentative decision has been reached. In other words, automated type services are used to decide who to focus on out of a pool of candidates, while a background check seeks to assist an employer in exercising due diligence by examining if there is any reason NOT to hire someone that an employer has potentially targeted for employment. Thus there is a fundamental difference between an email-based reference service and the role of a background firm.

A huge advantage for an employer utilizing traditional background checking techniques is in the event of a lawsuit for negligent hiring the employer has a powerful argument in front of a jury that they exercised due diligence. The whole idea behind due diligence as a legal defense is independent factual verification. For example, background firms do not take the applicant's word for whether the past employer even existed. A background screening firm will typically independently verify that the past employer existed as well as verify the phone number is real, independent of what the applicant contends. Even if past references are contacted for evaluation purposes by email, the task of verifying the truthfulness and accuracy of the employment history still requires a screening firm to independently obtain information from past employers, one of the most important and powerful due diligence tools in the employment process.

There is also the possibility of a fake or set-up reference or an applicant creating a fake identity and having the bogus ones verified. Automated reference checking services take steps to minimize the possibility of fraud through analysis of the results. However, in the final analysis, there is no substitute for the hand work of manual background checks. By manually verifying the existence of past employers, and verifying dates of employment to reveal gaps in employment, an employer is taking the final due diligence steps needed for making a hiring decision final.

There are also potential FCRA complications that may prevent a background check firm from offering this type of service. These services encourage responses by telling reference sources that all replies are aggregated and that applicants will not know which particular person gave which score. However, if the use of these tools triggers the FCRA, then such promises of anonymity could not be kept since the FCRA requires transparency and individual scoring would likely need to be revealed at some point.

The bottom-line conclusion is risk management. Although these email assessment tools are an excellent means of providing an in-depth assessment of a candidate during the decision-making stage, the traditional background check complements them for the final candidates and provides the demonstrable due diligence that can be used as a legal defense if there is a negligent hiring lawsuit.

Author Tip

Why Not Just Use LinkedIn, Facebook & Social Media Sites or Similar Sites?

Although business connection sites such as LinkedIn and social media sites are extremely valuable for many purposes, they have limitations if using them to verify an applicant's past employment history. The main problem with LinkedIn is that anyone can say anything they want, and there is no mechanism for anyone to correct or comment on any errors or outright falsehoods. Social media sites are addressed in more detail in Chapters 12 and 14.

The Reason Why Employers Won't Give References

Even though everyone agrees that past employment checking is an essential part of the hiring process, many employers, on the advice of legal counsel, have a *no comment policy*, allowing only verification of basic information such as start and end dates and job title. Some companies will not even release salary information—salaries coming under the heading of competitive intelligence, thus protected—even when presented with a signed release.

Why won't employers give references? Quite simply it is **the fear of being sued**.

Employers who give negative references are concerned about being sued for defamation. When the defamation is in oral form (over the phone), it is called slander. When in written form (such as a negative letter of recommendation) it is called libel.

For example, what if an applicant had a history with previous employers that showed he was often late, did not get along with others, was not productive, did not meet goals, or was disciplined for inappropriate workplace conduct? These are all critical items of information a new employer would want and need to know.

Yet, few former employers are willing to convey this information. Labor lawyers repeatedly instruct employers NOT to give out anything but “name, rank, and serial number.”

If there is no question that misconduct occurred, such as a criminal conviction, then the former employer is probably on safer grounds. However, in situations where the former employee can dispute the accusation, an employer may be concerned about a lawsuit. Suppose a former employee was accused of harassment, and an internal company investigation indicated the harassment did occur. If the company reveals this about the applicant to the new employer, the previous employer could still face a lawsuit. An internal company investigation does not carry weight of law, thus it may form the basis for a defamation lawsuit.

To make matters even worse, employers can be sued, believe it or not, by giving a POSITIVE reference. This can happen where the employer gave a good reference letter but withheld negative information for fear of being sued for defamation. If the resulting recommendation created a false impression, and as the result of the misrepresentation it is foreseeable that someone can be injured, the past employer can be sued. And why not? They lied. Below is a true life example.

Liability for a False Positive Reference – the School District Case

In a 1997 California case, the State Supreme Court ruled that a school district could be liable for damages when it gave a very positive job recommendation and left out important negative information. A school administrator was accused of inappropriate sexual misconduct towards a 13-year-old girl. The named victim not only sued the administrator, but also sued former schools that gave him favorable employment recommendations even though the former schools were aware of similar allegations of sexual misconduct at previous schools. The favorable recommendations included statements such as:

- He had “genuine concern” for students and had “outstanding rapport” with everyone.
- “I wouldn’t hesitate to recommend (him) for any position.”
- He was “an upbeat, enthusiastic administrator who related well to the students.”
- He was “in a large part” responsible for making the school “a safe, orderly and clean environment for students and staff.”

The Court ruled that a former employer providing a recommendation owes a duty to protect employers and third parties, and cannot misrepresent the qualifications and character of an ex-employee where there is a substantial risk of physical injury. In other words, an employer could not portray a former employee in a false light by only giving the good and not the bad. Having written a letter that they knew would be used to gain employment at other schools where there were potential victims, the schools had an obligation tell the whole truth. See *Randi W vs. Muroc Joint Unified School District*, (14 Cal.4th 1066)(1997)

So, here is the situation. If a past employer gives a negative reference, the past employer can potentially be sued for defamation by the applicant. If the employer gives a positive reference, a victim of misconduct can potentially sue the past employer for giving a false reference if negative information is left out.

102 The Safe Hiring Manual

The law arguably places employers who give recommendations in a Catch-22. If an employer fails to disclose an accusation because of insufficient credible evidence, then the employer risks being sued by third party victims. However, if the employer does mention an accusation, the ex-employee can arguably sue for defamation by the former employer.

The argument is made that the threat of defamation lawsuits is exaggerated since there are few reported cases. However, most cases get settled so the number of appellate cases is not a good yardstick. In addition, even if something is statistically unlikely, it does not mean that an employer wants to take unnecessary risks.

A hesitation to give references exists despite protection given under many state laws. At least forty states have some sort of employer immunity statute. These statutes are designed to promote good faith communication of job related information between employers. For example, California Civil Code Section 47(c) was amended in 1994 to add a section to protect employers from defamation lawsuits when giving an employment reference to another employer. The code states:

This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant, to and upon request of the prospective employer.

What does this mean in plain English? Essentially it means that if a new prospective employer contacts a former employer, the former employer has a “qualified privilege” to give information, as long as the information is:

1. Job related;
2. Based upon credible evidence; and
3. Made without malice.

Unfortunately, it is difficult to gauge whether these laws have actually encouraged employers to free up the flow of necessary information. For the most part, these laws merely put into a statute what has already been the case law, or “common law,” in most jurisdictions—that good faith communication between interested parties has some protection. However, even with this protection, many legal sources argue that the risk of a defamation claim outweighs any benefit to an employer from giving reference information. For one thing, applicants can still sue for defamation if they contend the reference was given in bad faith. Further, what constitutes *credible evidence* or what is *job related* can be open to interpretation.

One more consideration must be added to the mix. Generally, an employer has no obligation to say anything at all. If a firm was considering the application of Jack the Ripper and called up a past employer, that past employer can legally say “No comment.” In other words, past employers have no duty to warn. The exception, of course, may be if the employer only gives the “good stuff” and leaves out the bad, as in the California School case above.

If employers had a duty to warn, it would potentially put an impossible task on employers. Why? Because employers could be placed in the untenable position of being sued every time one of their ex-employees gets a new job. It would create an incredible burden if every time an employer was called up for a reference, they had to choose between being sued by the applicant for defamation or being sued by the new employer or a victim for failure to warn or for giving a negligent reference.

A Tale of Two References – One Makes You Liable for Damages and the Other Does Not

In a 2008 federal appeals case, *Kadlec Medical vs. Lakeview*, 527 F.3d 412 (5th Cir. 2008), two past medical employers gave past employment information for the same anesthesiologist. After the anesthesiologist had moved on to yet another hospital, he botched a routine 15 minute procedure, leaving a patient in a permanent vegetative state allegedly due to the anesthesiologist’s own addiction to drugs.

The new hospital and its insurance company settled with the victim and in turn sued the previous two medical organizations for misrepresentations in the past employment information given to the new hospital.

The allegation was based upon misrepresentations since the new hospital claimed it hired the anesthesiologist because the defendants did not give accurate information by withholding information about misconduct and drug use.

The first defendant was a medical group that was fully aware that the anesthesiologist had a drug abuse issue. After giving the anesthesiologist a second chance, he continued to misuse drugs. The anesthesiologist was terminated for that reason.’ However, the first defendant gave the anesthesiologist a glowing recommendation. The court noted that:

...if an employer makes a misleading statement in a referral letter about the performance of its former employees, the former employer may be liable for its statements if the facts and circumstances warrant. Here, defendants (medical group) were recommending an anesthesiologist, who had the lives of patients in his hands every day. Policy considerations dictate that the defendants had a duty to avoid misrepresentations in their referral letters if they mislead plaintiffs into thinking that (the anesthesiologist) was an excellent anesthesiologist, where they had information that he was a drug addict.

The situation with the second defendant, the hospital, however, was more complicated. The hospital knew that the anesthesiologist was a potential danger, but yet chose to say nothing, hiding behind a claim that they were too busy to provide more details.

The Court noted that it found no Louisiana case, or cases outside of Louisiana, that imposed a requirement that a past employer reveal negative past information, absent a situation where the past employer made some sort of affirmative misrepresentation. In other words, the first hospital did not have a legal duty to voluntarily step up and give negative information, as long as it limited its report to just factual employment data such as dates and job title. The court noted:

And although the (hospital) might have had an ethical obligation to disclose their knowledge of (the anesthesiologist’s) drug problems, they were also rightly concerned about a possible defamation claim if they communicated negative information about (the anesthesiologist).

The Court noted that if such an obligation were imposed upon employers, there would not only be privacy concerns, but it would create a burden if employers had to investigate each time if negative matters about a past employee were the type that had to be disclosed. As a result, the employer that gave a glowing recommendation where it was obviously not true could be liable. The employer that kept its mouth shut was not liable, even though it knew the truth and kept it to itself. The bottom line: if an employer limits itself to just dates of employment and job title, it has no obligation to warn of future dangerousness, provided the employer did not falsely mislead the new employer.

That is why so many employers choose to not say anything either way and limit verifications to dates of employment and job title. A practice has developed essentially that if you do not have something good to say, then don’t say anything at all. Another interesting aspect to this story is that some 40 states have laws that give employers some variation of immunity for statements about past employers that are made in good faith in response to a request from a potential new employer, and are factual and non-malicious. Even with this protection, labor lawyers still often caution employers to stick to the facts only (name and dates of employment) since it can still be murky as to what is factual.

A Conclusion about Past Employer References

Because of these complications, and the fact that an employer has no obligation to give a reference, many lawyers advise the “no comment” policy. That is the reason why many employers will only give “name, rank, and serial number.”

104 The Safe Hiring Manual

Unfortunately, if everyone followed this policy, then all companies would be placed in jeopardy because it becomes very difficult to know whom you are hiring.

Suggestions on How to Deal with Requests for References

Employers concerned about obtaining references will undoubtedly find themselves in the position of being asked for references. Employers and Human Resource professionals have responded in various ways, as we have outlined. So what are the best ways to handle incoming calls for reference checks?

Guidelines to Consider When Responding to Requests for Reference Information

1. A firm should have a written policy and procedure for giving references.
2. All information should go through a central source. This gives a firm consistency and reduces the chances that a manager may give out information that is contrary to company policy. As a practical matter, many organizations understand that even though there may be such a policy, there is, in reality, a practice of individual managers giving information. When that is the case, an alternative policy is to allow managers to do so under a strict program with procedures, training, and consequences for failing to follow procedures.
3. Clearly document who is requesting the information, for what purpose, and exactly what is provided. Former employees have been known to have friends or paid “reference checkers” contact previous employers.
4. Clearly document who in the company is giving the information because this can be important in order to trace who-exactly-said-what in a reference check. Keep in mind that staff members may leave a company and, without a written record, an employer may not be able to defend their reference actions.
5. If the information requested goes beyond dates and job title, a company may ask for a copy of a written release. This also provides some protection against defamation lawsuits.
6. If an ex-employee has a pending claim against the employer such as a worker’s compensation claim or has filed a discrimination charge or lawsuit against the company, then the past employer needs to be very careful about what information is given. No information should be given beyond job dates and job title without contacting your legal department. That is because an employer needs to be very concerned about allegations of retaliation against an ex-employee for filing a claim.

If the employer intends to give negative information, the following may be helpful:

1. Remember that employees most often seek the advice of an attorney when they are surprised, or feel that they have been fundamentally disrespected or demeaned as a human being. Imagine an applicant’s surprise when he or she hears for the first time from some new potential employer they are getting a negative reference from a past employer. If negative references may be an issue, what the past employer that intends to say should be handled and documented at the time the employee leaves during the exit interview so there are no surprises.
2. Disclose only factual information. Make sure everything has been documented. For example, if the former employee was convicted of a crime, a past employer can simply report the public record. A past employer’s performance evaluations can be a good source of information. The employee has already seen the performance evaluations and in most cases signed them.
3. Avoid conclusions and give facts instead. For example, avoid saying a former employee “had a bad attitude.” Instead, convey facts showing a failure to get along with team members. Let the facts speak for themselves.
4. Include favorable facts about the employee. That demonstrates an employer is even-handed.
5. Make sure the personnel file is factually correct. That is something HR may do when an employee leaves.

Author Tip**Private Reference Checking Services for Job Applicants**

There is another reason to be very careful about giving references. There are a number of firms that offer private reference checking services on behalf of job applicants who want to find out if a past employer is giving a negative reference. In fact, there is one firm that hires court reporters to call past employers on behalf of job applicants. The court reporters transcribe the conversation exactly as it occurs. In many states a tape recording would be illegal, but a court always accepts a court reporter's transcript as accurate. The court reporter calls a past employer and tells them they are doing an employment reference. They just don't happen to mention that it is on behalf of the past employee fishing for material for a defamation lawsuit.

Believe It Or Not—Website Sells Job Applicants Fake Credentials to Get Real Jobs

The website of a company that calls itself a “*Reference Answering Service*” – www.careerexcuse.com – promises to help “*disadvantaged job applicants*” with gaps in their resumes, bad job references, and too many part-time jobs. The company website even proudly boasts that they are “*the Internet's only site committed to the development of truly customized, fake job references!*”

The company acts as their current or past employer and having reference providers give great (but fake) job references for people who sign up for the service. The company can create powerful (but false) resumes with faked professional references that they claim pass through online job screening portals to employers.

They offer subscriptions for both Entry Level Blue Collar positions and Tech/Management White Collar positions. These subscriptions contain live reference providers with company emails, local company numbers in requested areas, professionally located company addresses in requested cities and states, and multi-page company websites. Of course, these subscriptions are not free.

While it is true some job seekers will stop at nothing to land a job, providing false past employment reference information is not the best way for a prospective employee to begin a business relationship with a potential employer. When job seekers offer false past employment information to employers, they may end up being hired for jobs they are too unfit, unqualified, dishonest, or dangerous to complete. Meanwhile, honest job seekers are overlooked for being more truthful with their references.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.