

Potential Liability Associated With New York Employers Providing Employment References

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Currently, most employers limit the type and amount of information they provide in job references in an effort to limit potential legal liability for defamation, intentional interference with contractual relations, negligent referral and retaliation. This white paper discusses the two greatest concerns associated with providing substantive references in New York -- defamation and retaliation -- and concludes with a discussion of reference check immunity statutes adopted by other states.

Defamation

New York employers generally overestimate the risk that they will be sued for defamation as a result of providing a negative reference. A 1997 national study of reported defamation claims found that the risk that an employee will file a defamation claim against a current or former employer is low and the risk of liability is even lower. A review of reported cases in New York corroborates this finding.

Defamation actions may arise if an employer discloses facts regarding why someone was fired or disciplined (*e.g.*, sexual harassment) to a third party. To establish defamation, a current or formerly employee is generally required to establish:

- the employer made a false and defamatory statement (either spoken [slander] or written [libel]) about the employee;
- the employer published the statement to a third party;

- the employer acted with some degree of fault, amounting at least to negligence, in making the false statements; and
- the employee suffered some form of injury.

In defending a defamation claim, a New York employer may be able to assert qualified or absolute immunity. Currently, New York employers have a qualified privilege defense available to them when they provide information regarding an employee or former employee's character. If the qualified privilege applies, the employer will not be found liable for alleged defamation.

However, employers may lose their qualified privilege if the employee can establish that the employer acted with malice. To do so, the employee must demonstrate the employer knowingly published false information about an employee, or acted recklessly regarding the truth or falsity of the information published. Employers may also lose the qualified privilege if they intentionally and excessively publish the defamatory statement to persons whom the employer should reasonably know are not entitled to receive it.

In very limited cases, New York employers may be able to assert an absolute privilege to alleged defamation. An absolute privilege will attach and the employer will avoid liability for any statements regarding an employee or past employee if:

- the statement is made in conjunction with a judicial, semi-judicial, or administrative proceeding;
- the statement relates to an issue pending before a governmental agency; and
- the statement about the employee was made to an agency authorized to receive such information.

For example, statements made to the State Department of Labor or State Division of Human Rights are protected by absolute immunity. Because the disclosure must be made in conjunction with a judicial, semi-judicial, or administrative proceeding, an employer would generally not have absolute immunity for statements made in an employment reference, even if made by or to a governmental entity.

Retaliation

In addition to potential defamation liability, employers who provide references may also find themselves subject to statutory liability for retaliation. For example, when an employer terminates an employee for performance issues or misconduct, and the employee then challenges his/her termination before the Division of Human Rights or the Equal Employment Opportunity Commission, any subsequent reference requests will present the employer with a difficult choice. If the employer gives a positive reference, it undermines its legitimate, nondiscriminatory reason for termination. If the employer gives an accurate, negative reference, the employee may allege the employer retaliated against him/her.

Reference Policies

As a result, employers are well-advised to establish an employment reference policy. This policy should specifically identify those individuals who are authorized to provide references and limit the scope of references to dates of employment and positions held. Of course, it is also essential that the employer consistently act in accordance with this policy.

Reference Check Immunity Laws

Currently, over thirty states have adopted reference check immunity laws. While these laws vary widely, they generally offer protection for employers who provide job references for current or former employees.

While New York has not adopted a reference check immunity law, New York employers generally enjoy the same protection afforded under such statutes -- qualified immunity from defamation actions.

It should also be noted that reference check immunity laws do not protect employers against claims that negative job references were given in retaliation for protected activity under discrimination laws. Consequently, even if New York adopted a reference check immunity law, employers would still be well advised to act with caution when providing reference checks to prospective employers, particularly when the employee is known to have engaged in protected activity.

The information contained in this column is not a substitute for professional counseling or advice.

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