

References: Reducing the Stress

By Thomas J. Gorsky, Sherrard Kuzz LLP

Discussions about the *stress of termination of employment* tend to invariably focus on the plight of the employee. While this is understandable, the result is that the stress on you—the employer—is often unduly marginalized or even completely ignored. One of the most common types of employer stress arises when an employer is asked to give a reference for a former employee. Employers are often reluctant to offer a reference for fear of being held responsible for the information the reference contains.

As an employer you can reduce your stress by educating yourself about the practical and legal consequences of giving a reference.

The *Neutral* Reference

Many employers prefer the “neutral” refer-

ence (i.e. a description of the position held and the employee’s timelines with your organization). After all, we remember being taught as a child that if you can’t say something nice, don’t say anything at all.

Unfortunately, in certain circumstances, a neutral reference may cause you more stress than you bargained for. First, a neutral reference may be seen as contrary to your obligation to act in good faith when terminating employment. Second, the lack of a positive reference may damage the employee’s ability to find a new job quickly (i.e. mitigate)—the result of which could be a larger claim for wrongful dismissal.

Weighing one stress against the other, you may decide that the policy of neutral references is the best policy for your workplace. Certainly, a great many employers have adopted this approach. Alternatively, you may decide that the best approach is to provide a positive reference, at least where

the employee warrants such a reference. In a world where corporate responsibility is increasingly being raised as an aspiration in the contemporary business environment, this may be a motivating factor.

Ultimately, reducing your stress is the product of knowing and understanding your obligations as an employer and doing only what you feel comfortable doing.

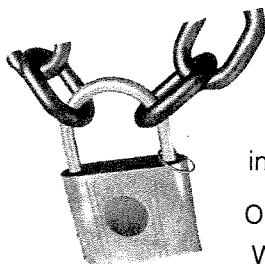
The *Not So Neutral* Reference

So you are considering giving a letter of reference, and your new stress is what happens if someone hires your former employee and concludes that the letter of reference unduly trumpeted the employee’s positive qualities. Are you going to face a lawsuit because of such a letter?

By the exercise of common sense, the chances of a lawsuit can be minimized. Lawsuits arising from a disputed reference have been rare and chiefly the result of recommendations given for employees who are known to have committed fraudulent acts. Obviously, any employee who was terminated for fraud, misconduct, or gross incompetence, should not be recommended out of expediency or sympathy. So long as the employer does not misstate objective facts, a third party’s complaint about an employer’s subjective assessment, is not a basis for a legitimate lawsuit.

If you find that you are conscientiously unable to give a generally positive reference, then you are best advised to give only a neutral reference. The former employee will not utilize the negative reference in any event, and you may find yourself in litigation over its negative content.

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Best Practice

At the end of the day, best practice seems to suggest the following reference-giving protocols. Whenever possible:

1. References should be in writing.
2. References should be reviewed by a member of senior management (which may include a senior human resources manager).
3. If there is concern about potential liability issues arising from a reference letter, legal counsel should be asked to review the letter in advance.
4. The content of a reference letter should be accurate, and neither under- nor over-state an employee's performance.
5. The departing employee should "sign off" on the reference, ideally within the context of an overall settlement and release.
6. Any verbal reference (i.e. a phone reference) should be consistent with, and directed to, the person who signed the written reference.
7. A reference giving protocol should be published within the workplace.

Ultimately, reducing your stress is the product of knowing and understanding your obligations as an employer and doing only what you feel comfortable doing.

Now that you have read this article, have a good night's sleep!

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