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Getting and Giving References: Safely and Effectively




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Part 1. Getting References



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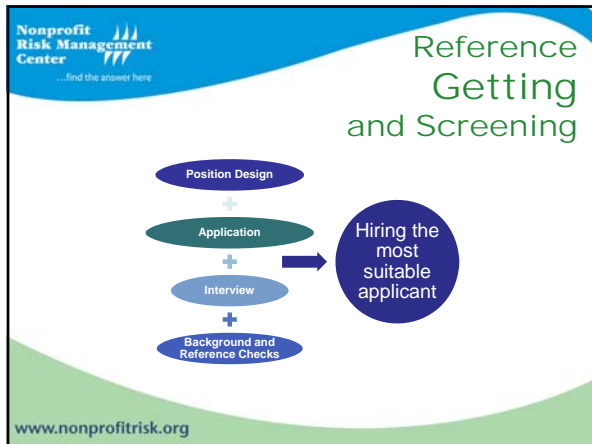
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What's the Risk?

- Big picture:
 - Hiring an unsuitable person for the job; and *conversely*
 - Missing a hidden talent



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Top Reasons to Check References

1. The mission of your nonprofit is worth the time required to find the most suitable applicant for a key position.
2. Sadly, many applicants lie about their past
 - Lying about getting a degree topped the list of common lies in a 2006 story at www.Forbes.com ("Most Common Resume Lies," by Kate DuBose Tomassi, 5.23.06).

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Featured in *The Complete Reference Checking Handbook*, by Edward C. Andler, 1998.

Edward Andler's Honesty/Competency Scale

Sees no need to lie		Ideal Candidate
Tells you what you want to hear	Poor Prospect	
Grossly dishonest		
	Poor performer	Excellent, Proven record
	Good abilities and strengths	

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3. An applicant's narrative descriptions of past experience and prior job titles tell an incomplete story.
4. "Many candidates, deliberately or unknowingly, describe themselves as the person they would like to be, rather than as they really are." — Edward C. Andler
5. To minimize risk of claims alleging **negligent hiring**, e.g., that you did not go far enough in your screening process and negligently hired someone who posed a danger

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6. What you don't know... CAN hurt you! Check references to reduce the chance of hiring someone who has a propensity to violence.
7. To increase productivity. If you believe that past performance is an indicator of future performance, then you need to find out how an applicant performed in his/her former role.
8. The 80-20 rule.

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Negligent Hiring "hoops"







- Employer had a duty to exercise care in selecting competent employees
- The employer knew, or reasonably should have known, that the employee s/he hired was dangerous or unfit
- The employee actually caused harm

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Reference Getting Challenges

- **The brick wall:** former employers who are unwilling to provide anything beyond a confirmation of dates of employment and final salary (“My attorney told us...”)
- **No apples to apples:** you wind up with a sketchy basis on which to consider an applicant; you need to grapple with how to weigh inconsistent reference information

Reference Checking Approaches

- In-person meetings - \$\$\$\$   
- Telephone calls - \$\$  
- Written reference forms – \$ 
- What's new? Web enabled reference checks — e.g. www.SkillSurvey.com – pre-employment “360 degree” assessment
 - Pros: turnaround, larger sample
 - Cons: no opportunity to pose probing questions

Risk Management Tips for Safe Reference Getting

- **Get permission to check references:** Use an authorization form on or at the time the applicant applies for a paid or volunteer position
- **Ask applicants if there is anyone they do not want you to contact...** and if so, WHY?

More Tips

- Always check references and verify information about education or past experience before making a final job offer.
- Follow up any discrepancies in information provided by the applicant.
- Obtain as many references as feasible.
- Be skeptical of silence or evasiveness by someone providing a reference and commit to investigate further.

- Insist that the candidate provide relevant references. If none are provided, either disqualify the candidate or check references that haven't been provided by tracking down the applicant's most recent supervisors.

Authorization for Employment Reference and Release of Information

To Whom It May Concern: I hereby authorize (Name of Nonprofit) to conduct a thorough background check on my qualifications for employment and I specifically authorize any representative of (Name of Nonprofit) to obtain information from my former employer(s), or other sources, pertaining to my qualifications for employment and employment history. I also authorize (Name of Nonprofit) to contact my current employer (Yes ___ No ___)

This authorization is executed with the full knowledge and understanding that the information is for use by (Name of Nonprofit) in evaluating my qualifications for employment.

I hereby release (Name of Nonprofit), its directors, officers, and agents, and my current or former employer(s), including agents, officers, directors and employees of my current and former employer(s), both individually and collectively, from any and all claims of liability for damages of whatever kind, including, but not limited to, invasion of privacy, slander or defamation of character, which may at any time result to me, as a result of compliance with this Authorization for Employment Reference and Release of Information, or any attempt to comply with it.

Should there be any question about the validity of this authorization, you may contact me as indicated below.

This Authorization will continue in effect for 90 days from the date of signature. A photocopy of the authorization shall have the same force as the original.

Signature of applicant _____ Contact telephone: _____

Telephone Reference Checking Tips

- Listen “aggressively” – pay attention to what is being said plus how it is being said
- Use silence to your advantage
- Ask for other references to verify information provided
- Remember two steps: (1) verify information, then (2) inquire about performance and developmental issues
- Don’t “fill in the blanks” with assumptions
- If you don’t understand... say so

Sample Reference Checking Questions

- What is your business relationship with the candidate and how long have you known her?
- How did the applicant react in stressful situations?
- Are there any roles or situations in which you would avoid placing the applicant?
- If you could re-hire the applicant today, would you?
- What comments or suggestions would you have for the applicant’s new supervisor?


More Sample Questions

- How did the applicant’s last performance review go? What strengths were noted? What areas were identified as needing improvement?
- How effectively did the applicant supervise others?
- What other people in your organization can I call about the applicant?



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Part 2. Giving References



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Top Reasons to Give References

1. What goes around comes around – "...an employer who gives only minimal information is likely to meet similar roadblocks when the company's human resources officials seek references"
2. Our sector needs competent staff.
3. NOT giving references punishes competent staff. Giving references rewards good performance.

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4. NOT giving references may contribute to the "growth industry" of lying on one's resume.
5. The cost of hiring unsuitable candidates is arguably greater than the cost of defending your employment practices.
6. When you refuse to give a reference you may be exposed to claims alleging negligent failure to warn.



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- 7. To lower unemployment insurance costs. The sooner your former employees get back to work, the lower your tax rate will be...
- 8. Giving references is an inexpensive form of outplacement assistance.



Reference Giving Risks

- **Negligent Reference Giving** - An employer owes a former employee a duty to exercise reasonable care when communicating facts about his or her work history to a prospective employer. Employers can be held liable for providing *negligent references*, if they either:
 - > *share information* that results in harm to the former employee (which could result in the employee filing a defamation claim) or
 - > *withhold information* about a former employee's propensity for violence (when doing so results in harm to a third-party).

Reference Immunity Laws

You may be protected!

- > Thirty-five states have enacted legislation that creates an immunity shield to protect an employer who gives or receives employment history information about a candidate for employment.
- > In these states employees may not bring a lawsuit against their employer for providing negative employment history except in certain circumstances, as specified in the statute.

A Closer Look at One Statute

Maine - www.mainelegislature.org/legis/statutes/26/title26sec598.html

- **§598. Employment reference immunity**

An employer who discloses information about a former employee's job performance or work record to a prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. Clear and convincing evidence of lack of good faith means evidence that clearly shows the knowing disclosure, with malicious intent, of false or deliberately misleading information. This section is supplemental to and not in derogation of any claims available to the former employee that exist under state law and any protections that are already afforded employers under state law. [1995, c. 335, §1 (NEW).]

The screenshot shows the Colorado Department of Labor & Employment website. The main navigation bar includes: Wage and Hour Laws, Employment Eligibility Laws, Labor Relations & Union Issues, Youth Employment Laws, and Disputes. A search bar is also present. The 'Employer References' section is highlighted in the left sidebar. The main content area contains the following text:

Employer References

Colorado law states that any employer who provides information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure of any inaccuracies of the disclosure.

This immunity shall not apply when such employee shows by a preponderance of the evidence both of the following:

AND

The employer providing the information knew or reasonably should have known that the information was false.

Please contact an attorney for legal advice regarding application of this law to any specific situation.

State laws provide "qualified" or "conditional" immunity

- Immunity generally applies when the employer:
 - Acts in good faith;
 - Acts without malice or reckless disregard for the truth or falsity of the information;
 - Discloses accurate, job-related information for a legitimate purpose; and
 - Handles the information in a controlled and proper manner

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Defamation

- The language in many state statutes is consistent with the requirements for a successful claim alleging defamation.

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Defamation

Libel and Slander – What’s the Difference?

- **Defamation** = “the act of harming the reputation of another by making a false statement to a third person.” Source: Black’s Law Dictionary, 7th Edition
- Libel = written defamation
- Slander = oral defamation

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Elements of a Defamation Case

1. Defendant made a defamatory statement
2. Defendant published (or permitted to be published the statement of a defamatory statement to a third party (e.g., newsletter, website, etc.)
3. Publication results from intentional or negligent conduct
4. Actual damages result

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Qualified Privilege

Negative employment references may not be legally actionable if:

- the communication is based upon an evaluation of the person's work and ability.
- made by someone who has knowledge of the person's work and ability.
- the communication is limited to information which is job-specific.
- the communication is disclosed to prospective employers to satisfy legitimate business needs.
- the communication is not done out of malice or with intentional harm.
- the accuracy of the information provided is verified prior to its disclosure.

Source: www.naceweb.org/Legal/How_to_Write_Reference_Letters.aspx

Negative Reference Bolsters Retaliation Claim

- The Tenth Circuit Court of Appeals held in *Hillig v. Rumsfeld*, that a negative job reference, when shown to materially harm the employee's future employment prospects, could constitute an adverse employment action sufficient to support liability for a claim of retaliation. Hillig, who was a minority, had filed two EEO complaints for race discrimination at a prior employer. Both complaints were settled. She applied for a personnel clerk/assistant position and was told by an interviewer that she was a "perfect fit." A white female was awarded the position instead. An EEOC investigation revealed that the employer had received two negative references by supervisors with one providing very strong negative feedback including calling her a "(expletive) employee." The jury found that although the negative references weren't motivated by race bias they were made in retaliation for the prior EEO complaints. The jury awarded the plaintiff \$25,000 on her retaliation claim.

Risk Management Tips

1. Consider establishing a policy indicating: (a) your intent to provide references for former employees and (b) establishing consent as a condition of employment.
2. Use an authorization form that releases the nonprofit from liability for providing references, and keep signed copies of the form in your personnel files.
3. Make certain that ALL staff understand whether their positions PERMIT or PROHIBIT them from giving references.
4. Consider centralizing responsibility for reference giving.

More Tips

5. Train staff permitted to GIVE references so they understand what they can (e.g., truthful, verifiable information) say and what they can't say (e.g., repeating a rumor, perception, etc.).
6. Consider reading a document, such as a performance review, *verbatim* to the person requesting the reference.
7. Consider using an "approval to release employment information" form.

Sample Approval Language

I hereby authorize ABC Nonprofit to release confidential information concerning my employment record to prospective employers upon their legitimate request. I acknowledge that some information divulged may be negative or positive with respect to my performance. I release ABC Nonprofit, its agents, and employees from any and all liability for furnishing such information upon proper request.

Signature Date

I do not authorize ABC Nonprofit to reveal information about my past employment record to a prospective employer.

Signature Date

Our View

- With a thoughtful approach providing the backdrop for reference giving, nonprofit leaders can and should provide references for former employees.



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Reference Getting/Giving FAQs

- Is it legal to check references NOT provided by the applicant?
- Is it ever appropriate or worthwhile to check references that appear to be family members of the applicant?
- What should I do if the candidate doesn't want me to contact their current employer?

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Thank you!

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Great Resources

- ***The Complete Reference Checking Handbook***, by Edward C. Andler, 1998.
- *Taking the High Road: A Guide to Effective and Legal Employment Practices for Nonprofits*,
www.nonprofitrisk.org/store/pub_detail.asp
- *Staff Screening Tool Kit-3rd Edition*
www.nonprofitrisk.org/store/pub_detail.asp

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Next Month's Third Thursdays Webinar

- The Employee Handbook: Do's and Don'ts
- Thursday, February 17, 2011 – 2 pm Eastern