

State of California

M E M O R A N D U M

Date: September 3, 1993

To: PERSONNEL MANAGEMENT LIAISONS Reference Code: 93-60

THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:

Personnel Officers

From: Department of Personnel Administration
Office of the Director

Subject: Guidelines for Conducting Employment Reference Checks

When selecting new employees, the quality and nature of a candidate's past work performance is always an important issue, whether the individual's work history has been in or out of State service. Reference checking has always been a key tool in this area and has become even more important for former State employees since the State has stopped using the "resignation-with-fault (S20)" designation. This memorandum reviews the reasons for discontinuing this designation and transmits reference checking guidelines for use by State supervisors and managers.

Discontinuance of S20

Prior to February 2, 1989, the State used an "S20" personnel transactions code which indicated that an individual had "resigned with fault, under unfavorable circumstances". Resignations were marked "with fault" when an employee had an unsatisfactory work record, resigned while punitive action was being considered, or resigned prior to the effective date of a formal adverse action.

As a result of an appeal hearing involving an employee whose resignation was designated "with fault" over his objections, the Department of Personnel Administration (DPA) determined that there was no statutory or regulatory authority to designate an employee's separation as a "resignation with fault," absent the agreement of the employee. DPA concluded that to take such action when the employee was not provided an opportunity for due process was unfair and illegal. The courts have also recognized that due process protections apply whenever the government takes an action that "stigmatizes" an employee or "seriously impairs" his or her opportunity to make a living, etc.

As a result, DPA notified State departments to discontinue designating resignations "with fault." The only exception is when the employee agrees in writing to the designation. For example, this could occur when the employee has been served with an adverse action and the employee and the department agree in a stipulated agreement (approved by the State Personnel Board) that the employee will be allowed to voluntarily resign with fault.

DPA reviewed, but decided, against reinstating the S20 code with rules that would provide the legally required due process. This decision is based on the

fact that while the "S20" code was intended to serve as a "red flag" to warn prospective employers that a former State employee had performance problems, the State agency contemplating the hire usually was not aware of the "with fault" designation until after the employee was reinstated and the agency gained access to the individual's computerized personal history data. The hiring agency was not aware of the unfavorable circumstances of the resignation at the crucial time when a hiring decision had to be made. Therefore, the code did not provide advance notification of a potential problem employee. In addition, DPA believes that the time required to provide the due process needed to continue the S20 code outweighs its benefits.

Reference Checking Guidelines

From a sound personnel management perspective, DPA believes that conducting thorough reference checks is a much better alternative than relying on a "with fault" designation to identify potential problem employees. The hiring supervisor should be taking steps during the interview and reference checking processes to acquire as much information as possible about the applicant's previous job performance in order to make an informed hiring decision.

Therefore, we have developed the attached guidelines to assist your supervisors and managers in conducting reference checks. These guidelines discuss various legal considerations and provide specific steps to assist them in conducting and responding to reference checks. If you have any questions regarding these guidelines, please contact Richard Leijonflycht, of the Policy Development Office, at (916) 324-9350 or CALNET 454-9350.

Wendell M. Coon, Chief
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Attachment

GUIDELINES FOR CONDUCTING EMPLOYMENT REFERENCE CHECKS

Prepared by the Policy Development Office
Department of Personnel Administration
August, 1993

One of the most valuable methods of gathering information about job applicants is reference checking. Supervisors have a dual role in the reference checking process. As a prospective employer, you must seek job-related information regarding job applicants in order to make an informed hiring decision. Conversely, as a current or previous supervisor you may be required to respond to reference check inquiries from prospective supervisors regarding your current or past employees.

Conducting thorough reference checks is a double-edged sword. A fine line separates thoroughly reviewing the applicant's background and invading his/her privacy. An overly intrusive investigation may violate an individual's privacy or legal rights. On the other hand, a half-hearted reference check raises the risk of hiring an incompetent or dishonest employee. The employee's right to privacy must be properly balanced with the employer's need to hire the most qualified candidate.

There is no approach that will guarantee that you will not be sued by a former employee because of information that was provided in a reference check. However, with the proper preparation and discretion, you should feel comfortable with giving both favorable and unfavorable references. You should also keep in mind that in the event of a lawsuit, the State will defend you if there was no malice involved.

The following guidelines will help you establish an approach to reference checking that will: (1) allow you to collect/give necessary information about an applicant's job performance; and (2) stay within applicable legal boundaries. The attachment discusses the legal doctrines that impact reference checking in more detail.

GUIDELINES FOR THE REFERENCE PROVIDER

There are a number of steps that can be taken to help you stay within the applicable legal boundaries when responding to reference inquiries:

A. Verify That The Caller Has A Legitimate Need For The Information

You should verify the legitimacy of the caller. In some cases, you may be aware that the caller is legitimate (i.e., the caller is a State employee who you know or the employee has advised you that the person will be calling for a reference, etc.) and no further verification will be necessary. However, if the caller is not familiar to you, it would be advisable to use a "call-back" procedure. That is, you obtain a list of the questions or areas that you need to respond to and inform the caller that you will call him or her back once you have had an opportunity to review the employee's files. This approach will give you time to verify the legitimacy of the caller. If the caller is from outside State service, you may want to ask for additional verification such as a written request for the information prior to responding.

B. Limit Your Remarks to the Inquiry

Questions about the employee's work habits and conduct (timeliness, ability to get along with co-workers, etc.) and job performance should not require a detailed discussion on the employee's personal life, marital problems, etc. Even if it relates to job performance, reply only with descriptions of job performance examples; not, for example, personal problems which cause performance problems. The primary burden is on the supervisor seeking the reference to identify the work skills, knowledge, work habits, and personal characteristics necessary for the job and to ask specific questions to gather the appropriate job-related information about the applicant.

You must exercise good judgment in determining what negative information should be volunteered when the reference seeker does not ask you specific questions related to an area of deficiency or poor work. Whether or not to disclose the information would be contingent upon the nature and severity of the

problem and the job-relatedness to the position the employee is seeking. There are basically three different categories of negative information:

1. Information that is not job-related. For example, when the individual worked as a supervisor, he/she had difficulty in directing and motivating staff. The individual has applied for a research specialist position where he/she will not be supervising others and the person making the reference check does not ask questions about the individual's leadership style or interpersonal skills. In this situation it is not necessary for you to volunteer this negative information as these skills would not be critical to successfully performing the research specialist job. Another example might be the case of an account clerk who has interviewed for a secretary position. The fact that she/he made many arithmetical errors on the job may be unrelated to the duties of a secretary.

2. Information that is job-related but not critical to successful job performance. For example, you currently have a clerk-typist working for you. He/she occasionally takes a longer lunch than the hour allocated but makes arrangements with you to make up the time. He/she has interviewed for a position as a receptionist at a large office where the primary responsibility is providing phone coverage. Arrangements must be made for a backup to handle the phone calls whenever the receptionist is away from the office. This is not a problem that could result in other employees or clients being harmed by the employee and would not be something that you would need to volunteer if a specific question was not raised. If it became an issue at the new job, the supervisor would have to determine whether or not he/she could be accommodating to the individual given the working conditions of the job.

3. Information that is critical to the performance of the job. For example, a former employee has applied for a position as a school bus driver. On several occasions, the individual tested positive for cocaine use while employed as a heavy equipment operator, and adverse action was pending at the time that he/she left State service. This would be critical information for the prospective employer to have because if the person were hired and continued to use drugs, his/her actions could jeopardize and endanger the lives of others in the course of performing the bus driver duties. Another example, would be where the employee worked at a State hospital and had been charged with abusing patients at the time he/she resigned. If this person were to attempt to reinstate at a State developmental center in a position which required direct contact with patients, the prospective employer should be informed of the previous incident(s) in order to make an informed hiring decision.

C. Provide Truthful Information

If you make false statements during a reference check, former employees certainly will have a better case for claiming that your reference harmed their reputation or discouraged prospective employers from hiring them. Even when providing true information, you must be cautious of the way in which it is presented. Opinions about an employee's character ("he was unmotivated and lazy") are far more susceptible to legal actions than are objective measures of job performance ("he only completed half of his assignments on time").

D. When Giving Negative Information, Give Specific Facts Without Labeling Them Negative

For example, the employee was consistently late in turning in completed work and you have been asked during a reference check if he/she was able to meet work deadlines. In this situation you could respond by giving the standard (if ones

exist) and then explaining how the previous employee met the standard: "We had a 30-day turnaround time for completing an investigation, and he/she usually averaged 40 days to complete the investigation. The caller can then reach his/her own conclusions about the individual's performance.

E. Discuss Both the Positive and Negative Attributes of an Individual

You should not adopt a selective reference policy where you provide favorable references where warranted but decline to respond where negative comments would have to be made. The assumptions drawn by the caller as a result of your reluctance to discuss negative information could be worse than the actual facts.

F. Do Not Be More Candid with Friends than You Would Be With Others.

You should maintain a consistent reference giving policy. You may be tempted to be more candid with a friend and divulge more information than you would under normal circumstances. You may believe that there is less legal risk in giving negative information to a friend because that person is less likely to divulge the source. However, you should keep in mind that under oath, even friends would be required to identify the source of the information.

GUIDELINES FOR SUPERVISORS SEEKING REFERENCE INFORMATION

A. Verify Information on the Application Form

A thorough background check begins with information an applicant provides on his/her application and/or resume. You should verify that the information on these documents is accurate. You should pay close attention to dates of employment to identify any discrepancies or gaps in employment history. These should be carefully discussed with the job applicant, and you should be satisfied as to the reasonableness of the explanation.

B. Ask Specific Job-Related Questions During the Interview and Reference Check

The questions asked of the applicant during the job interview and the former supervisor(s) during reference checking should relate directly to the job requirements, and should not be general questions requiring an opinion. It would be an excellent idea to develop a set of questions in advance of the interview that will be asked of all candidates to ensure consistency in the interview process and to keep the focus on job-related issues. Probing for personal and private details of the applicant's life can lead to trouble.

State and Federal discrimination laws prohibit employers from discriminating against applicants based on personal characteristics such as race, age, disability, marital status, etc. Inquiring about age or national origin is considered discriminatory whether you are asking the candidate directly or checking with a reference.

Prior to contacting former supervisors for a reference check, you should identify the factors that are most critical for successful performance of the job (i.e., meeting deadlines, good interpersonal and communication skills, flexibility, decision-making skills, accuracy, etc.) and gear your questions to these areas.

C. Be Cautious of References that are Extremely Positive or Negative

You should be wary of references who have only good things to say or extremely negative things to say. These references may be biased, especially if they are inconsistent with other references obtained. An extremely flattering review may be given by the current employer in an effort to ensure that a problem employee will be hired by another agency. Extremely negative ratings may result from a desire to retaliate against the person for attempting to leave the job or for personal reasons. You should evaluate these relative to all references received on the applicant and assign the appropriate weight.

D. Ask for Additional References

When an applicant lists references on his/her resume, the persons listed may be limited to individuals the applicant feels will provide a favorable reference. Therefore, you may want to ask the candidate to provide several additional names to ensure you do not get a one-sided or biased reference. This would be particularly important if current or recent supervisors were left off the applicant's reference list. Since the additional names provided will not be the applicant's first choice, they may provide a more complete assessment of his/her performance.

Attachment

REFERENCE CHECKING -- LEGAL CONSIDERATIONS

The legal doctrines discussed below impact the reference checking process. As a supervisor responding to a reference inquiry, the issues of defamation, qualified-privilege, and negligent referral must be considered. As a prospective employer seeking information about a job applicant, you must be aware of negligent hiring/negligent retention liability.

A. Defamation

During the past few years, the number of defamation lawsuits filed by job seekers who believe their employment chances have been hurt by former supervisors has been steadily increasing. Defamation is defined as an injury to the reputation or good name of another that tends to bring that person into disrepute. In order for defamation to occur, the following components must be present: (1) a false or malicious statement must be made; (2) the statement must be communicated either orally (slander) or in writing (libel) to a third party; and (3) the statement must damage the employee or his or her character/reputation.

In the employment arena, defamation claims arise most often from: (1) statements made as part of a request for a reference when the employee is seeking new employment; and (2) disseminating information, including the reasons the employee was terminated or voluntarily resigned to those who do not need to have the information.

B. Qualified Privilege

You should be aware that a supervisor can legally release employment information if it is done properly. An employer has a right (and a duty) to carefully inquire into a potential employee's work-related background. In responding to such inquiries, it can be legal to provide both positive and negative information about a current or former employee, as reference givers are protected under the legal doctrine of "qualified privilege." That is, an exchange of information between employers (who have a common interest in hiring qualified applicants) regarding previous work history of an employee made as part of a reference check is protected from suits for defamation if the statements regarding an applicant's previous work history are made in good faith to persons having a legitimate need to know.

The protection of qualified privilege exists only when the following conditions are met:

1. the information must be given in good faith. Unfounded suspicions about the employee should not be implied or specifically expressed. For example, if you thought that a former employee had stolen State property but you did not have solid evidence to support that suspicion, it would be inappropriate to mention this during a reference check.

2. the truth of the information can be substantiated. However, the truth is not an absolute defense to a charge of defamation if you have abused the privilege by acting with malice. That is, you communicated the information maliciously and with the intent to harm the individual.

3. the information should be limited to the inquiry. For example, if you are asked questions about the employee's absenteeism or tardiness, you should not mention that he or she has filed numerous grievances if these issues are unrelated to the question. When certain negative information is volunteered, the motive of the supervisor could be questioned or a case could possibly be made that personal malice was involved.

4. the information must be given during the proper time and in the proper manner. For example, it would be inappropriate for a supervisor to discuss the reasons for an employee's termination at an office Christmas party where spouses, etc., were present who did not have a business need to know this information.

5. the information must be communicated to the proper parties. Excessive publication of information will defeat the privilege. That is, discussing confidential information with those who have no reason to know takes the statement outside the protections of qualified privilege.

6. the requested information must be strictly related to the requirements of the job.

C. Negligent Hiring/Negligent Retention

When a current or former employer refuses to disclose or selectively discloses information about the qualifications of an applicant, it minimizes the chances of a defamation lawsuit for that employer. However, it forces prospective employers to make selection decisions based on incomplete or faulty information and exposes these employers to another type of liability -- negligent hiring and negligent retention.

If a prospective employer knew, or should have known, based on a reasonable inquiry into an applicant's background that the person was not suitable for the position and subsequently places a dangerous or unqualified individual in a position where he or she can harm co-workers or third parties, the employer can be held liable for the employee's acts. Common law holds that employers owe their employees a duty to provide a safe place in which to work. This duty was extended to providing safe employees because the courts have reasoned that a dangerous co-worker is comparable to a defective machine. However, the employer owes a duty of care only to those who are foreseeably at risk as a result of the conduct of a harmful employee. Employers are not responsible if there is no reason to foresee harm or if there is no relation between the employee's actions and the job.

The nature of the job would be critical to determining the extent of the employer's obligation. As the hiring supervisor, you should consider the level of exposure to clients and the general public. If an employee would have unusual impact on people or property, extra care should be given to conducting a thorough background inquiry.

D. Negligent Referral

An employer who refuses to provide references may believe that this is the safest approach to take with regard to reference checking. However, this approach is not risk-free because employers may now be held liable under an emerging legal theory of "negligent referral" by failing to disclose certain types of information. The nature of the position of the agency/company requesting the reference should be taken into consideration. Failing to provide negative information in response to specific questions could be grounds for substituting or transferring a company's liability to you. The legal argument could be easily made that had you provided the negative information when asked, the company would not have negligently hired the applicant. This argument would be especially convincing if the information withheld is so negative that the applicant would not have been hired had the other employer known about it.

E. State of California Laws and Regulations

The following statutes do not focus on State employees but provide guidance in reference checking and declares legislative intent in this area:

1. Information Practices Act

The Information Practices Act (IPA) places specific requirements on State agencies in the collection, use, maintenance, and dissemination of information relating to individuals. The IPA defines "personal information" as "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history." Article 6 of the IPA discusses permissible disclosures and states that disclosures of personal information regarding an individual are permissible between State agencies where the transfer is necessary for the receiving agency to perform its constitutional or statutory duties, and the intended use is compatible with a purpose for which the information was collected. The exchange of performance-related data between State employers meets the "compatible with a purpose" requirement as the use relates so closely to a declared purpose for which the information was collected and maintained that a reasonable person would foresee that this type of additional use might be made of the information. Disclosures of employment

information to employers outside the State service can also fall under the compatible purpose category.

2. California Labor Code

The following Labor Code Sections pertain to reemployment privileges:

Labor Code Section 1050 specifies that any person, or agent, who after having discharged an employee or after an employee has voluntarily left such service, by misrepresentation prevents the former employee from obtaining employment, is guilty of a misdemeanor. This section deals solely with misrepresentations, and a truthful response to an employment reference request by a supervisor would not be punishable under Labor Code Section 1050.

Section 1053 states that nothing shall prevent an employer from furnishing, upon special request therefor, a truthful statement concerning the reason for discharge of an employee or why an employee voluntarily left the service of the employer. If the information or statement was given without a special request, it shall be considered prima facie evidence of a violation of Sections 1050 to 1053.

Section 1054 states that in addition to and apart from the criminal penalties that may be imposed on any person or agent who violates Sections 1050 to 1052, a civil action for treble damages may be taken by the aggrieved party. The civil action may be brought without first establishing any criminal liability.