How to Effectively Check Applicants’ References

One way to advance a company’s goal of hiring the best-qualified applicants while at the same time avoiding liability for negligent hiring is to require applicants to identify professional references as part of their job application. Once a job applicant has identified references, the key for the employer is to use that information effectively. Many employers are unaware how to effectively use this information. This month’s Sidebar discusses action steps to consider when checking the references provided on a job application by an applicant seeking employment with a company.

Many applicants identify their former employers as potential reference sources. The mistake employers make with this information is to simply contact the human resource department of the previous employer to confirm dates of employment and rate of pay. Calls to former employers listed as references should not be limited to the former employer’s human resource department. A human resource department may not have any information regarding the applicant’s work ethic or ability to get along well with others. Although it is important to speak with the human resources department to verify dates of employment and rates of pay, the employer will find more substantive information about the applicant’s job performance by speaking with his or her direct supervisor. When the employer speaks to an applicant’s former supervisor, they are more likely to get frank and candid information. After all, one key question they surely want answered by the supervisor is whether the supervisor would rehire the applicant.

Frank and candid information from a reference is the best kind of information the – more –
employer can get when checking an applicant’s references. However, some companies have instructed their management teams to avoid giving any information on former employees except for confirming dates of hire and rates of pay. A management team’s concern when refusing to discuss anything other than dates of employment and rate of pay is being served with a lawsuit filed by the former employee alleging slander. One way to address this concern is through a job application. The employee should be asked to execute either a release document releasing former employers from any claims arising out of providing information about the employee or asked to execute a document that expressly authorizes former employers to provide information about the applicant. The employer’s job application may even include the authorization language and release language. For example, an employer can consider adding the following to the application:

With my signature below, I hereby authorize the Company to contact all prior employers listed on this application for purposes of discussing my job duties, responsibilities, attendance and performance. The prior employers listed on this application are authorized to answer any and all questions the Company may have regarding my prior employment. I agree to indemnify and hold harmless all prior employers identified on this job application from any and all claims which arise out of the answering of any and all questions by the Company regarding my prior employment.

If an applicant agrees to this language, employers can provide the signed authorization and release form to those employers who otherwise only disclose dates of employment and rates of pay.

Most states actually give employers qualified immunity from liability for providing truthful statements about former employees. Those states with laws of general application are Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii,
Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and Wyoming. Generally, the laws in these states provide a rebuttable presumption that the information provided by references is provided in good faith.

Some states actually require employers to provide employees with a “service letter” at the time the employment relationship is terminated. The service letter is supposed to set forth the reasons for the termination of the employment relationship. The service letter may serve as a substitute to actually checking the applicant’s references.

Once the employer gets an applicant’s former employers to discuss that applicant’s job performance, thorough notes should be taken, keeping in mind that the company’s objective in checking references is two-fold. First, the employer wants to hire a qualified applicant but, given that the employees will be at the customers’ places of businesses, they want to avoid hiring anyone that is going to cause injury or damage to others, subjecting the company to a negligent-hiring claim. The employer’s notes should specifically list all questions asked of the reference and all responses given. If the reference refuses to answer a question, the employer should make a note of that response, too. This way, in the event the employer is hit with a negligent-hiring claim because the employee got into a fist fight with one of the customers, the employer can produce a copy of the notes indicating the employer asked whether the employee was involved in any physical confrontations but that they were told no information would be provided. In this instance, the employer would be able to show a court that an attempt was made to get
information showing whether the applicant had a violent background.

Although obtaining information from references may help employers avoid negligent-hiring claims, they will want to be sure not to ask the wrong questions or disseminate unfavorable information on an applicant that could subject the company to a discrimination claim. Those individuals at the company who will be speaking with an applicant’s references need to be trained not to inquire into the applicant’s sex, race, age, medical restrictions and other off-limit areas, such as marital status. It helps to create a document that lists all questions to ask of a reference. The employer may even want to consider sending each reference a written questionnaire for the reference to provide written responses. Steps should also be taken to ensure that only those with a “need to know” are told of unfavorable information coming from a reference.