New Law Protects Employers From Liability For Giving Good Faith References

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Increasingly, employers are frustrated by the fact that when they try to check references on an applicant, former employers are unwilling to provide substantive information. Yet they themselves fear liability for giving such information to prospective employers of their former employees. This leads to a vicious cycle of employers passing on undesirable employees. Fortunately, the Washington Legislature recently passed legislation (HB 1625), that protects employers from reference liability and Governor Gregoire has signed it into law. This Note discusses the new law and provides practical tips to help employers benefit from its protections.

THE NEW LAW. When the new law takes effect on July 24, 2005, Washington will join the nearly 80% of states that have statutes protecting employers from liability for giving references. Employers that disclose information about former or current employees to prospective employers or employment agencies will be presumed to have acted in good faith, and will be immune from liability for such disclosures if certain conditions are met. The conditions include:

- **The disclosure cannot be unsolicited.** The law's good faith presumption does not apply if an employer discloses information without having been asked for it. Thus, to be protected, a disclosure must be made in response to a specific request by a prospective employer or employment agency. In practical terms, this means that a manager should not contact a friend at another company and say, "I heard you were considering hiring Jane Doe. Let me tell you about her."

- **The disclosed information must be related to the employee's job ability, job performance, or job duties.** The law only protects employers if the information they disclose is related to: (1) the employee's ability to perform his/her job; (2) the diligence, skill, or reliability with which the employee carries out his/her job duties; or (3) any illegal or wrongful acts that the employee committed, which related to his/her job duties. These limitations on the types of disclosures that are protected should not come as a surprise to employers. Just as employers should only ask job related questions during the hiring process, they should likewise only disclose job related information when giving references. Personal opinions about the employee's personality, honestly, character, and the like usually will not be protected.

- **Employers should retain a record of the disclosures.** Although the law uses the word "should" regarding record keeping, following its suggested approach will enable employers to take full advantage of the laws protections. The record should indicate: (1) the person to whom the disclosure was made, as well as the entity with which that person is associated; (2) the person making the disclosure and their position; (3) the date the disclosure was made; and (4) the information that was disclosed. The record should be retained in the employee's personnel files for at least two years from the date of disclosure. Former and current employees have a right, upon request to inspect disclosure records—along with the rest of their individual personnel file.

- **Higher standard of proof.** Employers won't be protected if they disclose information that is knowingly false, deliberately misleading, or made with reckless disregard for the truth. If there is a lawsuit, however, the employee has the burden of establishing, by "clear and convincing evidence," that a disclosure was false, misleading, or reckless. This is a tougher burden to meet than the usual "preponderance of evidence" standard.

PRACTICAL TIPS. What should employers do in light of the new law when giving and seeking references?

- ✓ **Create a centralized system for giving references.** Create a centralized system so that all references flow through a "gatekeeper" (*e.g.*, the human resource department or, in the case of small employers, a specific individual). Having such a gatekeeper simplifies compliance with the requirements of the law and increases the likelihood that only job-related references will be given. Inform all employees of the centralized system.
- ✓ **Train managers, supervisors, and other employees who may be asked for references.** Well-trained managers and supervisors are an employer's first line of defense in protecting itself from job reference liability. Managers and supervisors should know the company's centralized system for giving references, understand that only job-related information should be disclosed, and know not to provide unsolicited information.
- ✓ **Develop a standardized form.** Create a form that managers and supervisors can complete as they give references. The form should contain prompts for the statutory-required information (discussed above), information regarding permissible and impermissible disclosures, and instructions on what managers should do with the completed form. Employers seeking references may improve the quality of the information they receive by sending a form to former employers, which would simplify the former employer's record keeping.
- ✓ **Recognize special circumstances.** The new law does not protect employers from liability for breaches of employment-related agreements. Therefore, be sure specific references comply with the terms of any applicable agreements. For example, if a severance agreement exists in which an employer agreed to modify a terminated employee's personnel file to reflect a resignation rather than a termination, then a reference giver should not state that the employee was terminated.

The protection provided by the new law should go along way toward easing employer concerns over job reference liability. Cautious employers, however, may still wish to obtain releases from departing employees that release them from liability for giving information to prospective employers.

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