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## REFERENCE CHECKS

by Laura K. Sitar

Too often California employers conduct cursory reference checks on applicants confirming only dates of prior employment under the mistaken belief that the law forbids former employers from providing anything more. And, on the flip side, employers consistently refuse to provide valuable feedback to prospective employers regarding the performance of former employees based on the same mistaken belief. Unfortunately, the long term care industry suffers when employers are unable to obtain critical information regarding applicants who should not be working in the industry.

In fact, California employers enjoy a qualified privilege when they provide reference information to prospective employers. An employer is immune from liability for defamation, as long as the employer provides the information to a prospective employer who requests it and acts without malice. [California Civil Code section 47\(c\)](#) specifically states that this protection extends to statements about **job performance, qualifications, and eligibility for rehire**. An employer is protected if its statements are based on credible evidence and made without malice. That protection disappears if the employer knows the statements are false or acts with reckless disregard for the truth or falsity. Further, there is no protection for statements about an employee's constitutionally protected speech or activities, or statements about an employee's union or other concerted activities.

[Labor Code section 1053](#) also affirmatively allows a former employer to provide "a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer." On the other hand [section 1050](#) makes it a misdemeanor for an employer to misrepresent facts in an attempt to prevent the employee from obtaining employment.

However, California case law subjects an employer to liability for not providing enough information about an employee, if the employer chooses to provide a detailed reference. For example, a school district provided a glowing letter of recommendation regarding an administrative employee who had in fact been accused of sexual misconduct. The reference provided unconditional praise for the employee, stating the district would not hesitate to recommend the individual for any position, despite having knowledge of the prior sexual misconduct. When the employee was hired by a new district and was again accused of sexual misconduct with a female student, her parents sued the former school district. Although the district was under no obligation to provide a reference for the employee in the first place, once it chose to do so, it had a duty not to misrepresent the facts. The court found that, "A statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all that facts stated were untrue."

Regardless of your policies regarding providing references concerning current or former employees, it is important to **always** seek reference on employees you consider for hire. Claims of negligent hiring are waiting in the wings for employers who fail to conduct reference checks on perspective employees. Following are tips for conducting effective reference checks:

1. Contact the candidate's former supervisors, not the human resources department or personal references.
2. Identify who you are and the nature of the position sought. Ask:
  - What was the individual's start and end date?
  - What was the individual's final pay rate?
  - Why did the individual resign?
  - Why was the individual fired?
  - How was the individual's attendance?
  - Was the individual ever disciplined for abuse?
  - Would you rehire the individual?
  - Is there anything else I should know about this individual?
3. Don't give up. Keep calling.
4. Document all your efforts including an employer's refusal to provide a reference.

If you provide references for your former employees, make sure you have a policy in place which identifies who may provide these reference and what information should be included. Make sure your policy is communicated throughout your organization. Consider the following when providing an employment reference:

1. Ask for a signed waiver from the former employee concerning whom the reference is sought.
2. Review the employee's file and be prepared to provide an accurate reference. This may require calling the hiring company back.
3. When providing a reference, explain your relationship to the employee, e.g. supervisor, upper management.
4. Make sure the reference is balanced, truthful, objective and made in good faith without malice.

The long term care industry will be stronger as a whole if employers share accurate job evaluations, qualifications, and rehire status about former employees to prospective employers when asked.

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**About the Author:**

A shareholder at Wroten & Associates, Laura Sitar defends medical malpractice, employment, and elder abuse cases. She litigates cases on behalf of doctors, dentists and long-term care facilities involving all types of employment actions including sexual harassment, wrongful termination, retaliation and wage and hour claims. She also provides employment related risk management services to help clients avoid litigation.

Ms. Sitar became an attorney after a 15-year career in corporate management where she directed the human resource function of a 2000 employee, \$100 million region. Since commencing a second career in law 10 years ago, she was a senior associate with a prestigious healthcare defense firm before joining Wroten & Associates, where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, where she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in the U.S. District Court for the Central District of California.

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