

Reference Checks 101



Where everything checks out.

REFERENCE CHECKS

At the very least, it is advisable that New York employers check the personal and prior employment references listed by an applicant in his/her application or letter of interest. If the employer is not able to reach references, the effort to contact them should be noted in the applicant's file. Of course, any reference statements provided should also be documented in the applicant's file.

A company may require some or all of its employees to provide references as a condition of the application process for a job or a promotion. Federal and state law do not prohibit an employer from requesting or requiring a reference.

While the law does not always require a written authorization from the applicant, obtaining an authorization before conducting these reference checks may streamline the process and reduce any potential risks. Additionally, employers might consider requesting a waiver from an applicant that releases former employers and the requesting employer from any claims relating to the reference check. Absent such a waiver, a former employer may be reluctant to supply information because New York law does not provide immunity for providing references on job performance. With a waiver in place, former employers may be more willing to provide relevant (and potentially negative) information about their former employees. An employer also should make sure it has a fully completed application and/or resume to use as a resource in the reference check, including past employment history, references, names of immediate supervisors and educational background.

When contacting references, prospective employers should request basic information such as: dates of employment, job duties, performance assessments, discipline record, tendency for violence, circumstances surrounding termination, and eligibility for rehire.

In January 2020, the Salary History Ban took effect in New York. As a result, New York employers cannot ask a job candidate (even an internal candidate) about the candidate's prior salary and the employer cannot ask a third party, such as a former employer, about the candidate's prior salary while working for that former employer. However, an employer may seek to confirm wage or salary history if an applicant voluntarily discloses such information. In either case, an employer is prohibited from relying on prior salary information to justify a pay difference between employees of different or various protected classes who are performing substantially similar work.

A former employer that is contacted by a new or prospective employer in regard to a reference may not be willing to respond to the inquiry. Many companies have imposed policies that allow managers to only confirm dates of employment of a former employee and the last position held by that former employee. For this reason, many professional reference checks can prove to be disappointing to an employer who is looking to find valuable information about a job applicant/candidate.

To bypass these potential roadblocks, as discussed above, the hiring employer may ask the candidate to execute a waiver and release, whereby the candidate promises not to sue any former employer who provides truthful information and opinions about the employee. If the hiring employer provides this release to any former employers, the former employer might be more likely to disclose something other than “surface” information about a candidate.

If none of these options work and the hiring employer does not obtain valuable information from former employers, the hiring employer may nonetheless shield itself from negligent hiring and subsequent negligent retention claims by asking appropriate questions during an interview and making notes of the responses given. In addition to asking relevant questions and listening closely to the answers, a prospective employer should take careful notes of information given by a reference, if any, as well as all unsuccessful attempts made to contact references.

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