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**Mountain States
Employers Council, Inc.**

Serving Management Since 1939

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REFERENCE CHECKING

Providing References

Summary:

Colorado law protects employers who provide information about a current or former employee's job history or job performance. Nevertheless, giving references can expose an employer to costly risks if done improperly or carelessly. This material explains this protection and some of the risks associated with providing references and offers suggestions on effectively managing those risks.

Important Notice

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.

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I. Introduction

There are risks associated with providing references. While an employer may not be able to eliminate all of the risks associated with references, an employer can effectively manage those risks by controlling how the information is handled and the manner in which it is disclosed.

The information provided is based on Colorado law or otherwise general in nature. Because the laws vary from state to state, employers should review laws which may be applicable in their jurisdiction before providing references.

II. Colorado Law Regarding References¹

A. Colorado Anti-Blacklisting Statute

Colorado's Anti-Blacklisting Statute was amended in 1999 for the purpose of strengthening protections for employers. The statute provides the following:

1. Any employer who provides information about a current or former employee's job history or job performance to a prospective employer upon request is immune from civil liability for the disclosure or any consequences of the disclosure. "Job performance" means:
 - a. The suitability of the employee for reemployment;
 - b. The employee's work related skills, abilities, and habits as they may relate to suitability for future employment; and
 - c. In the case of a former employee, the reason for the employee's separation.
2. This immunity does not apply when an employee can show both of the following:
 - a. The information disclosed by the current or former employer was false; and
 - b. The employer providing the information knew or should have known that the information was false.
3. If the employer provides written information to a prospective employer about a current or a former employee, it must, upon the request of the current or former employee, send a copy of the written information to the last-known address of the current or former employee. The employee may also obtain the information from the employer by appearing at its place of business during normal working hours and requesting a copy. The employer can charge a reasonable administrative fee for multiple copies.

¹ C.R.S. § 8-2-114.

4. An exception to Colorado's anti-blacklisting prohibition exists for certain financial institutions.² Upon request from another bank, savings and loan association, credit card or travel and entertainment card company, industrial bank, trust company, credit union, or other state or federally chartered lending institution operating in Colorado, another such institution, when acting in good faith, may lawfully disclose any information about any involvement in a theft, embezzlement, misappropriation, or other defalcation by an employee or former employee. Institutions, officers, directors and employees are presumed to be acting in good faith and are immune from suit unless it is shown that the institution, officer, director, or employee intentionally or recklessly disclosed false information about the employee or former employee.
- B. To avoid potential negligence liability, it is recommended that employers investigate the background of any applicant who will work closely with the public or be in a position of trust. The following is a non-exhaustive list of employers whose employees may be subject to heightened scrutiny based on state statutes:
1. Educational institutions;
 2. Companies hiring security guards;
 3. The state department of institutions;
 4. Nursing homes;
 5. Licensed child care providers.

III. Is there a duty to disclose negative information?

- A. Several courts have held that once employers undertake to provide a reference they have a legal duty to provide a truthful and complete reference. Employers who give false information or who omit negative information which is material could, in some cases, be held liable for negligent misrepresentation or negligent referencing.
- B. The risks in providing misleading references or misrepresenting the facts in a reference may be substantial. For example, in Colorado, a former employer lost its motion to dismiss a claim brought by a current employer for negligent misrepresentation in a positive employment reference.³ The former employer told the current employer that their former bookkeeper had worked for it for three years and had been a "fine employee". Actually, the bookkeeper had been terminated for theft and convicted criminally for that theft. The current employer hired the bookkeeper who then embezzled funds. The court found that one who supplies false information

² C.R.S. § 8-2-111.5.

³ *Fluid Technology, Inc. v. CVJ Axles, Inc.*, 964 P.2d 614 (Colo. Ct. App. 1998).

to others in their business transactions could be liable for losses resulting from reliance on the information provided. As a result, the former employer was liable for funds embezzled from the current employer by its former employee.

- C. This is a developing area of the law. The next step may be to hold employers liable for failing to provide information. Members should consult with MSEC staff or other legal counsel when deciding whether to disclose negative information about an employee or former employee.

IV. Employer's Risks in Giving a Reference about a Former Employee

A. Defamation

1. Generally, to prove a claim of defamation, the employee must show:
 - a. the employer made an untrue statement regarding the employee;
 - b. the false statement was communicated to a third party;
 - c. the employer's statement was not privileged; and
 - d. the statement caused the employee injury.
2. Truth is a defense to a defamation claim. However, whether or not a statement is true is an issue that may have to be decided by a jury. Therefore, an employer should carefully consider whether any statements that are made are verifiable and supportable factual statements rather than subjective or conclusory statements. For example, stating that an employee's cash drawer was short on numerous occasions is different from saying that an employee is a thief. The second statement is factual only if the employee has been charged and convicted of theft.
3. Employers have a legal privilege which may protect them from claims based on the disclosed information. However, the privilege is "qualified," meaning that it can be overcome by showing of certain evidence such as: the employer acted with malice, knowledge of the falsity of the statement, or with reckless disregard for the truth.

B. Intentional Interference with Contractual Relations

1. To prove intentional interference with contractual relations, an employee must show that:
 - a. the former employer intentionally and improperly interfered with the prospective relationship between the employee and the potential employer;and

- b. the employer's interference prevented formation of a contract.

The intentional and interfering act is most likely defamation. Therefore, as with a defamation charge, truth may be a defense.

C. Outrageous Conduct

If the employee can show that the employer's statements were particularly egregious and outrageous, the employee may have a claim of outrageous conduct. Outrageous conduct is conduct so reprehensible that it shocks the sensibilities of a reasonable person and often results in emotional distress.

D. Invasion of Privacy

1. An employer may be liable for invasion of privacy if it conveys information to a third party which is highly personal and confidential.
2. The employee must show that the publicized information would be offensive to the reasonable person and the information is not of legitimate concern to the public.
3. The truthfulness of the information is not a defense to this claim.

E. Retaliation for Statutory Claims

1. Referring employers are advised to avoid telling potential employers that a current or former employee has filed a claim like a civil rights charge under Title VII of the Civil Rights Act. This is because the employee or former employee may have a claim for retaliation under the applicable law.
2. Examples of statutes which protect employees, and, in many cases, former employees, from retaliation include: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Occupational Safety and Health Act, the Bankruptcy Act, state civil rights statutes, and state workers' compensation laws.

Tips for Giving Employment References

- Adopt a uniform policy on giving employment references. Your policy will lose effectiveness if you deviate from it and give out references selectively or give more information for some workers than for others.
- Identify a limited number of authorized individuals to provide references. Make sure your employees know that only authorized individuals can give references.
- Make sure the former employee has given consent to disclose the information and releases the employer from any liability associated with the release of information. Obtain a copy of the signed consent and release form.
- Require a request for a reference in writing. Carefully consider whether you will respond in writing. In Colorado, any employer that gives a written reference about a current or a former employee must send a copy of the reference to the worker's last known address. If you choose to give a written reference, make sure it is marked "confidential" and is delivered only to the individual authorized to receive the information.
- Report only what is objective and accurate and only what is supported by documentation in your personnel files. Use objective responses, like "often late for work," rather than subjective comments, like "lazy" or "has a bad attitude."
- Don't disclose personal information regarding the employee's lifestyle choices such as living arrangements, marital status, or sexual preference. Limit your reference and your reference inquiries to job related information.
- Don't characterize former employees as "troublemakers" or "whistleblowers" and never disclose that the employee filed civil rights charges or other legally protected claims against the company.
- Don't volunteer references. Volunteering a negative reference may imply you have a malicious motive to provide the reference.
- Finally, always check the applicable federal, state and local laws before disclosing information. If you are in doubt about the type or extent of information to disclose, consult with MSEC staff.

REFERENCE RELEASE FOR EMPLOYEE

I authorize _____(Name of Company), as my current employer [or add “former” employer if the employee has already left the company], to respond to any reference inquiry by a prospective employer produced by my applying for employment by supplying information about my employment including but not limited to: my job performance, job history, and the reason for my separation from _____(Name of Company). I release _____(Name of Company) from any legal liability for providing this information.

Employee name (please print)

Employee signature

Date