

Briefing Note: Providing a Reference

An Introduction to the Briefing Note

This Briefing Note sets out the key issues your business should consider before providing a reference for an employee or former employee. This briefing note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Briefing Note
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**For detailed advice on all
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Types of reference

Your business is most likely to be asked to provide a reference for a prospective employer, although you could be asked to give one in other circumstances (for example, a financial reference for a mortgage application). References can be given on behalf of your business as a corporate reference or in a personal capacity.

Corporate references

Your business will be legally responsible for the contents of a corporate reference because it is provided on your company's behalf. You should implement a policy that states:

- Which employees or level of management can give a corporate reference
- What format the reference should be in (verbal or written)
- What information the reference can include

Personal references

A personal reference can refer to work undertaken for your business, but it must not be given on behalf of your business. There is always a danger that a personal reference is taken to be a corporate reference, so ensure it is not provided on headed notepaper and does not include the referee's job title.

Providing a reference

Generally, there is no legal obligation on your business to provide a reference for an employee or former employee and you are, therefore, generally entitled to refuse to provide one. However, your policy on references must be consistent or it could lead to allegations of discrimination. There are some limited exceptions to this rule as set out below.

Discrimination

You must ensure that a refusal to provide a reference is not discriminatory. Your business is not allowed to discriminate on the basis of any of the nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Having a clear policy in place about the circumstances in which references will be given will help in defending any allegations of discriminatory treatment.

Victimisation

A refusal to provide a reference may lead to a claim of victimisation if an employee or former employee has:

- Previously brought discrimination proceedings against your business.
- Given evidence or information in discrimination proceedings against your business.

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- Made an allegation of discrimination against your business (for example, under your grievance procedure).

Compromise agreements

Compromise agreements often include a term stating that, if requested, a reference will be provided in an agreed form, usually annexed to the agreement. Make sure you adhere to the agreed wording in these situations and that any oral reference provided does not go further than or deviate from the agreed wording. To avoid problems, ensure your standard wording in settlement agreements includes the phrase:

“Subject to any further information coming to our attention which we consider should be included in the reference, we agree to provide a reference in the following terms.”

What information should be included in a reference?

- Your business owes a duty of care to both the subject and recipient of any reference you provide. You must, therefore, take care to ensure the information it contains is true, accurate and fair. You are not obliged to provide any detail in the reference or for it to be comprehensive.
- A reference could simply provide brief factual details of the start and finish dates of employment and the roles performed and no more. However, you should include a statement in this type of reference that it is your company policy to provide only factual details, so it does not reflect badly on the employee in question.
- If you decide to provide a more comprehensive reference, you should include a disclaimer. Any disclaimer you include must be reasonable. A more detailed reference may include information on:
 - performance in the job
 - disciplinary record
 - honesty
 - time-keeping
 - absence record
 - reason for leaving

Duty owed to the subject of the reference

Discrimination

Your business must not provide a discriminatory reference. You should take particular care when making comments about performance, attendance or sickness absence where there is a risk that these comments may be discriminatory on the grounds of disability. A reference must also avoid victimising the subject (for example, if they have previously complained of discrimination).

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Defamation

- You must be able to justify and support any comments made in a reference and show that you honestly hold the views made in the reference to be true.
- Your business cannot be successfully sued for defamation for the contents of a reference (even if its contents are untrue), providing you believed the information in the reference was correct at the time it was provided and the contents were provided without malice.

Malicious falsehood

Your business could be sued for malicious falsehood if an individual can show that a reference you gave contained untrue words that were published maliciously (that is, the person who wrote the reference knew the words were untrue or did not care whether they were true or not).

Negligent misstatement

Your business could be sued for negligence if you provide an inaccurate reference.

Breach of contract

Your business could be sued for breach of contract if you do not give a reference when you have previously agreed to provide one (for example, in a contract of employment).

Dealing with outstanding allegations

If an employee leaves your business in circumstances where there are questions over their performance or conduct, you should disclose this information in the reference but make it clear that they have not been investigated and that no assumptions can be made.

Duty owed to the recipient of the reference

Negligent misstatement

You will usually be asked by a prospective employer for information about an ex-employee because you have specialist knowledge of that employee. If your business provides an inaccurate reference that the prospective employer relies on, you could be sued for negligence.

Deceit

If your business knowingly includes false information with the intention that the recipient will rely on it, your business could be sued by the recipient for deceit.

Data protection

- Your business must be careful when providing information in a reference about an employee's sick record or reasons for periods of absence, because information about health is regarded as sensitive personal data.
- It should be possible to provide information about how many days absence from work an employee has had during the last year without revealing any sensitive personal data.

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- If you are asked to provide information on the reasons for an employee's absence, you should exercise caution and seek consent from the employee. You should show the employee a draft response and seek their approval before disclosing it.

If you would like to know more about this topic or our other legal services, please contact Paul Maynard pcm@gabyhardwicke.co.uk

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