

Fact Sheet

Giving References



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There is a lot of “urban myth” surrounding what you can and can’t say in a reference - The **golden rule** is not to say anything which you cannot support with evidence, and not to give a misleading picture by leaving out information which is either damaging or advantageous.

Can I refuse to give a reference?

Yes. Contrary to popular belief, there is no legal obligation on an employer to provide a reference for a current or former employee, unless she/he has specifically agreed to do so, for example, as part of a termination agreement or legal settlement. Only employees who have been dismissed are legally entitled to receive written reasons for their dismissal, and these account for only a very small proportion of job applicants. While some organisations may enforce a policy never to give references, a refusal to do so may lead to the prospective employer assuming that the employee left under a cloud. It is therefore **usual practice** for employers to give references, even if they are only to confirm basic factual information such as dates and capacity in which employed.

Who should give a reference?

Individuals providing references should have access to files containing the factual information usually requested by the prospective employer to comply with the duty of care towards the employee. It can also be helpful to have a departing employee’s line manager complete a short termination report, which can be used subsequently for reference purposes. Never allow an individual who might bear any animosity towards the person to provide a reference, as this could risk the objectivity of the opinions provided.

What should I say when giving a reference and how honest should I be?

You should respond to a general request for a reference by providing factual information on issues such as dates of employment and capacity in which employed. If specific questions are asked about the person’s competence and character, you have a duty of care both to the person about whom the reference is being provided and to the prospective employer. These legal obligations are discussed more fully below.

When providing a reference, give facts, rather than subjective opinions. Always check the facts you are giving, referring to the individual’s file and other relevant documents, such as the termination report discussed above. Where you do provide opinions, these should be based on facts that are

sufficient to support them. The Rehabilitation of Offenders Act 1974 was introduced 'to rehabilitate offenders who have not been reconvicted of any serious offence for a period of years and to penalise the unauthorised disclosure of their previous convictions'. This means that an employer should not reveal their knowledge of an employee's 'spent' conviction in the course of giving a reference, except in the case of certain 'protected' occupations, which include accountancy, the legal profession, teaching, medicine and work that involves dealing with children.

Should I give references over the telephone or in writing?

Some managers believe that it is best to give references over the telephone to avoid subsequent claims for liability. However, you should be aware that the person on the other end of the telephone is probably taking notes, which may be discoverable in a subsequent court case. The need for care and objectivity is the same, irrespective of whether the reference is given verbally or in writing.

In addition, giving a reference verbally will not prevent the subject of the reference from taking action against the referee, if s/he considers that the content is untrue or slanderous. It is best not to give an instant reference over the telephone but to check all the facts first, make a note (for your file) of what you are going to say and then call back. This also helps to ensure that the person requesting the reference is who they say they are.

What are my legal obligations in giving references – to the employee?

When supplying a reference in respect of a current or former employee you owe a duty to that employee to take reasonable care to ensure that the reference is fair and accurate. If it is not fair and accurate and the employee suffers loss as a result, s/he can sue you for damages on the grounds of negligent misstatement. If you knowingly provide an inaccurate reference, which is either derogatory or contains false information and is designed to prevent the employee getting the job, the employee could have grounds to sue for defamation or malicious falsehood. If that suit is successful, you could be liable for substantial damages (there is currently no upper limit to the damages available in a High Court action).

What are my legal obligations in giving references to the prospective employer?

A referee also has a liability to the person to whom s/he provides a reference as s/he expects the recipient to rely on and act upon it. For example, if you state that a former employee is honest when you know they are not, then the new employer could sue you for any losses caused by the dishonesty of the employee in question. In such cases, there is no upper limit to the damages available.