

Liability for false work references and reappraising social media

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Liability
Reference guidelines
Social media

Employers in Switzerland must provide work references that allow former employees to obtain new employment positions and may be liable for any false or overly negative work references that harm an employee's job search.

Liability

In April 1975 the Federal Court ruled on a bank director who had embezzled a considerable sum of money from his company, which dismissed the director and issued a certificate of employment. While the certificate attested to the company's full satisfaction with the director's work and recommended him in good faith, it made no mention of the embezzlement.

Shortly thereafter, the director misappropriated an even larger sum of money from his new employer and was sentenced to four years' imprisonment.

The new employer enforced in court that the previous employer, having issued the work reference, was liable for the financial loss.

While the duration of employment can affect a work reference, employers should always uphold the duty of truthfulness. Employers that issue favourable certificates of employment and thereby conceal relevant work-related information may be held liable for certificate forgery. New employers may trust the work references provided by prospective employees' former employers and are protected under good faith.

Employers should therefore acknowledge their potential liability for false positive testimonies and any exaggerated negative references. If an employee has no chance of finding a new position because of a negative reference, their employer may be obliged to compensate any damage incurred by the employee.

The crux of liability lies in the causality between work references and successful job offers, which is difficult to prove because the reference is one of many selection criteria.

Reference guidelines

To avoid liability, employers must ensure that work references are truthful (ie, the contents can be objectively verified) and do not unnecessarily affect an employee's chances of finding a new employer.

Therefore, negative facts must be mentioned only if they are relevant to the employee's overall assessment and minor one-off failures should be omitted. Employers should use words that are more favourable to employees, but should not exaggerate and risk making false statements.

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Negative matters that are considered significant to an employee's overall assessment include:

- illegal or discriminatory behaviour;
- forms of workplace harassment;
- unreliability;
- a persistent disregard of workplace policy; and
- the inability to work in a team.

Social media

In today's technology-driven market, many employers use social media sites such as LinkedIn to discover new employees. As reviews of potential candidates' online profiles are common, the question remains as to whether candidates and employers may be held liable for professional recommendations posted on (for example) LinkedIn.

LinkedIn recommendations are not authenticated references. Nevertheless, employers can have good faith in the person recommending a prospective employee because LinkedIn is considered a credible professional platform. This is especially true for recommendations from workers in the same or a similar industry.

As Swiss law considers the promotion of work qualities that are inconsistent with professional achievements as unfair competition, the attribution of specific abilities to a person lacking these abilities may be considered unfair competition. Offenders may be liable for related damages and may even face a prison sentence where a criminal infringement has been committed.

Workers should therefore think twice before providing recommendations for their colleagues on social media – even well-meaning statements could put them and their employer at risk.

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