

Terminations, Settlements, and the Reference Letter

In the context of terminating an employment relationship, and the related negotiations over the terms of the employee's departure, the topic of a reference letter is often of supreme importance to the departing individual.

It's easy, of course, to see why this is. Departing without a reference letter (and the employer's agreement to adhere to the spirit of that letter when receiving calls for verbal references) leaves a void in the individual's employment history. That can be a *substantial* barrier to the person finding new employment and, thus, a *substantial* barrier to concluding a settlement.

From the employer's perspective, especially when the relationship has been a troubled one or the circumstances leading to the cessation of the relationship were acrimonious, there can be a reluctance to provide a reference letter. It is equally easy to see why this is. The employer doesn't feel inclined to do the individual any favours on his/her way out the door, and it may also be concerned about potential liabilities involved in providing a reference.

I'm here to say that, in 99.9% of settlements, the employer *can and should* provide some form of a written reference.

The Importance of the Reference Letter

The importance of the reference letter to the departing employee cannot be overstated. Often, obtaining a reference letter is just as important to the individual as any other aspect of a proposed settlement structure, including money.

Obtaining a reference letter is an emotional touchstone for the departing employee and having one is viewed as a substantial leg up on the process of searching for new employment. Underestimating the importance of the reference letter to the prospect of a successful negotiation is not recommended – without one, a deal simply may not be achievable.

The Challenge of Assembling a Reference Letter

I often hear employer representatives say something to the effect of, "*There's no way we could write a reference letter for that person!!*"

Trust me, you can. In well over 20 years of handling dozens of termination scenarios every year, I have never once encountered a situation in which the provision of a reference letter was part of a negotiated structure but the employer couldn't manage to put something sufficient in writing.

In instances of employee misconduct or poor performance, we'll stick to a "just the facts" form of letter – period of service, positions held, duties performed, etc. but no subjective assessments and no well wishes for his/her "future endeavours".

In cases of extreme employee misconduct – theft, damage to property, etc. – a reference letter won't be offered (and, often, won't even be sought) so in those instances it really won't be an issue. But, those instances represent a very small percentage of scenarios overall.

Employer Liability for Giving Verbal References – A Myth?

I sometimes come across employers who refuse, as a matter of policy, to provide reference letters and verbal references. That's a challenge, for the reasons noted above. Such employers will occasionally justify their refusal on a liability avoidance basis.

While there is some risk that a former employee could sue for damages for defamation if his/her former employer issues false or otherwise slanderous references, such claims are few and very rarely ever reach the courts and, in my view, really aren't worth spending time worrying about.

If the employer's representative is being truthful about the facts of the employment relationship, then really only his/her subjective assessments of the individual have the potential for liability. If the person is offering factual, reasonable, and valid assessments, there is little to worry about.

Getting Permission To Provide Verbal References

Generally speaking, settlements relating to the cessation of employment don't contain specific language giving employers permission to provide verbal references. In part, that's because the provision of a reference letter implies that the employer will be contacted to provide verbal support.

If you have any concerns at all that the individual will later object to a verbal reference having been given, or if you wish to reserve the right to provide a wide-ranging reference including subjective assessments, written permission may be obtained from the departing employee. We can assist with providing a form of permission for that purpose.

This can be an effective measure to ward off complaints about disclosure of personal information and about the employer offering subjective assessments of the individual's performance and conduct. Keep in mind, however, that permission to provide a verbal reference isn't a licence to defame the individual.

Getting the Reference Letter on Paper

Often, once a settlement including the provision of a reference letter has been reached, I will suggest that the departing *employee* should prepare the first draft. This may seem counter-intuitive, but it usually quickly gets us to the point of an agreement between the parties on the letter's contents.

The reasons for this include... the employee is far more motivated to get moving on writing the reference letter than the employer, the employee is far more emotionally invested in the particular wording of the letter (and has a pre-conceived idea of how it will look), the employee will often be *less* demanding than expected when it comes to the letter's contents, and with the employee's draft in hand the employer usually can simply edit a few words in the proposed wording (deleting a few superlatives here and there) and, presto, the reference letter is complete.

This approach has a very high rate of success and I routinely suggest it to both employers and employees.

This item is provided for general information purposes only and is not intended to be relied upon as legal advice. Informed legal advice should always be obtained about your specific circumstances.

Smithson
Employment Law Corporation

306-1500 Hardy Street, Kelowna, B.C. V1Y 8H2 | Phone: 778-478-0150 | Fax: 778-478-0155
www.smithsonlaw.ca