
Is A Job Reference Really a Reference? Addressing Employer Name, Rank, and Serial Number Policies through Job Reference Immunity Legislation

**Bruce Elder and **Sara Gerdes*
University of Nebraska at Kearney and KPMG

Many employers are reluctant to provide detailed reference information about former employees because they fear being sued for defamation. To avoid liability, employers have implemented what are commonly known as name, rank, and serial number (NRS) policies that provide minimal information about former employees. This makes it very difficult for potential employers to obtain reliable and relevant information about past job performance of applicants. Forty states have recognized the detrimental effect this can have on employers and applicants alike, and have passed statutes granting immunity to employers who provide truthful, relevant information about a former employee and his/her job performance. This paper discusses the legal dilemma a former employer faces in providing a reference, analyzes common provisions of job reference immunity legislation, surveys which states have adopted such legislation, and examines the statutes' effectiveness.

Key Words: Job Reference, Qualified Immunity, Defamation

Introduction

Many employers are reluctant to provide detailed or specific information about current or former employees in references requested by potential employers because they fear being sued for defamation, invasion of privacy or retaliatory discharge. The past two decades have also brought an increasing number of lawsuits into the employment arena and have led to the practice of providing limited information about an applicant's past job performance. Some litigation has involved defamation lawsuits that have arisen from employers giving job references for former employees. About one-third of all defamation lawsuits have to do with employment issues (Ballam 2002). Usually, the plaintiff who received a negative reference claims that it contained false information and therefore injured his or her reputation (Cooper 2001). Publicity accompanying a series of successful defamation verdicts against employers based on job references in the 1980's caused employers to become very cautious about providing references (Cooper 2001). The problem has become such that many employers today have adopted policies known as name, rank, and serial number (NRS) reference

policies in an attempt to avoid costly litigation and/or damage awards. The result of these policies is that employers only give out the most basic information about an employee, such as dates worked and positions held, while withholding truly relevant information (Ballam 2002).

These NRS policies have turned out to be harmful in several ways. First, they prevent potential employers from obtaining information that would help gauge the ability of the applicant. Aside from honest job references, the hiring firm has no way of knowing a person until after the job applicant has been hired. Knowing someone's former position and dates of employment says very little about their ability on the job. Andler (2003) states "nothing predicts a person's future job performance more accurately than previous work habits." As a result of NRS policies, applicants can tell potential employers whatever they want without fear of being discounted by their former employer. One reference-checking firm estimated that thirty-three percent of resumes contain fraudulent statements (Ballam 2002), and Andler (2003) proffers that one-third of a company's

workforce got their jobs by “creatively presenting their backgrounds and capabilities.” Since applicants know that employers are reluctant to release reference information about their prior job performance, they are more likely to lie about their prior work history or criminal past (Schainblatt 2000, Andler 2003). Schainblatt (2000) goes on to point out another problem that results from this issue: “Once employees realize that their detailed work history does not follow them from job to job, they may have less incentive to refrain from unacceptable behavior in the workplace. Additionally, the lack of available information regarding an employee’s performance may lead some (employees) to assume a cavalier attitude toward their work.”

The policy of not giving full, relevant references also can hurt good employees. Since most employers who have adopted the NRS policy refuse to give out references even for their best employees, many workers who would benefit from an employer’s positive reference are deprived of that benefit. This can present a problem for good employees who lose their jobs due to downsizing. They get the same reference as a poor performer, which can hinder the good employee, making it difficult to find future employment (Andler 2003).

Another problem surrounding this issue is the fact that with workplace violence on the rise, obtaining relevant references becomes very important (Schainblatt 2000). Without complete references, the hiring process becomes more like a game of chance. This opens employers up to yet another liability: negligent hiring. NRS policies make it hard for employers to detect potential employees with violent tendencies. Since references typically disclose only objective information, ascertaining whether an applicant is potentially dangerous is rather difficult. Subjective information about the employee’s character, dependableness, and ability to work with others is difficult to come by. Ballam (2002) states:

If employers could obtain meaningful references for potential hires, they also possibly could weed out those who might exhibit violent tendencies at the workplace. A 1999 survey of the Fortune 1000 companies found that workplace violence had become the number one security threat in the workplace, moving up from number

two in the 1998 survey. Approximately 100 bosses and co-workers annually are murdered by employees, and thousands more are victims of workplace assaults. Murder is the number one cause of death for women in the workplace and the number two cause for men.

Employers can be held liable for the criminal actions of their employees, even if the criminal act is not job related (Engleman and Kleiner 1998). Negligent hiring can expose an employer to liability for failing to reasonably investigate an applicant’s background if that individual is hired and subsequently injures another (Oliver 1999, Andler 2003).

To attempt to address these issues, in the early 1990’s various states began to adopt job reference immunity statutes (JRIS). The number of states with these statutes has increased substantially since then and currently a vast majority of states have adopted JRIS. For the handful of states that have not enacted reference immunity legislation, the common law provides similar protection. This article discusses the legal dilemma an employer faces when providing a reference for a former employee, how states have responded by enacting job reference immunity legislation, analyzes common provisions of the statutes and how they differ from the common law, surveys which states have adopted such statutes, and examines the statutes’ effectiveness.

Legal Dilemma for Employers

Employers are hesitant to provide information regarding former employees because they fear litigation brought by the former employee based on defamation, invasion of privacy or retaliation. Employers are afraid of both the costs of defending a suit and potential damage awards (Swemba 2002). They primarily fear potential litigation over defamation claims. While some scholars have argued and research appears to support the argument that these risks are small and their fear unfounded (Paetzold and Willborn 1992, Oliver 1999, Cooper 2001, Swemba 2002), candid references from former employers are now the exception, not the rule. It is common for employers to be advised by their attorney to limit the information provided about a former employee. For example, Ryan (2004) advises

companies to limit job reference information to dates of employment, last job title, and final pay rate.

The employer on the hiring end of the equation wants as much information as possible about a potential employee before making the hiring decision. An employer who fails to obtain appropriate background information could be subject to a negligent hiring claim if the new hire has a history of violence. Employers in every state have a duty to exercise reasonable care in hiring individuals who may present a “threat of injury to members of the public” (Ballam 2002). Thus it is not uncommon for an employer to seek substantial information from a former employer during the hiring process, yet refuse to provide any meaningful information about former employees. Andler (2003) argues that this is a bad management practice and “has led to paranoia in the hiring process.”

This area of the law is further complicated with the legal theory of either negligent or intentional misrepresentation. Employers are sometimes tempted to provide a positive reference in order to avoid any possible defamation claim. This can be a huge mistake on the part of the former employer. If the former employee has exhibited violent tendencies or other character flaws and the former employer is aware of these but provides a favorable recommendation to a potential employer, then the former employer could be held liable for misrepresentation if that individual is hired and subsequently injures someone. Currently the law places no duty on an employer to provide a reference for a former employee, although some commentators have suggested that such a duty to warn should be imposed on former employers who are aware of former employee’s “dangerous propensities” (Sayko 2004, Ashby 2004).

It is not hard to understand why employers are choosing to take the safe way out, by following NRS policies when it comes to references. In an attempt to assist employers with this dilemma and to promote the free flow of information between former and prospective employer, a majority of states have enacted job reference immunity legislation.

Job Reference Immunity Statutes

The purpose of JRIS is to encourage employers to provide candid, useful and relevant reference information to potential employers and to reduce the fear of a defamation suit based on a reference. In general, JRIS seek to “balance the competing interests of workers who need protection against arbitrary references, and employers who need to make informed hiring decisions” (Schainblatt 2000). The statutes protect employers by granting them qualified immunity as long as the employer acts in good faith. Typically the statutes presume that the employer acted in good faith when providing the reference. This greatly reduces the chances that a plaintiff could win a defamation case. To be successful, a plaintiff would have to show that the employer acted in bad faith. Bad faith exists when someone provides information about another person that they know to be false to intentionally harm that person. To win, the plaintiff in a case would have to show that the employer knew the information in the reference was false or the employer recklessly disregarded the truth. Florida, Idaho, Maine, Maryland, Minnesota, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, and Wisconsin even require that an employee must prove bad faith by showing “clear and convincing evidence” which is a higher standard than the normal “preponderance of the evidence” burden of proof requirement for civil cases in the remaining states.

An employer may say something negative about a former employee, but unless it is untrue the employer would not be demonstrating a lack of good faith. This is why it is beneficial for employers to keep good records and document things such as when an employee has to be reprimanded. This type of information kept in a personnel file, protects an employer. It is very difficult for a plaintiff to carry the burden of proof that the reference information was provided in bad faith when work misconduct is documented.

In adopting JRIS, states are striving to maintain the delicate balance between protecting employees’ rights while attempting to increase the free flow of relevant information between employers. Employers who knowingly provide false information or are reckless in providing references do not receive qualified immunity under the statutes because they have acted in bad faith and are subject to liability based on defamation. Even though there is still

protection for an employee who can prove bad faith on the part of reference provider, JRIS make it extremely difficult for a plaintiff to succeed. A study done by Paetzold and Willborn (1992) before the advent of JRIS revealed that “employer exposure to liability for defamation has decreased, not increased over the past twenty years.” Since that study was done, a vast majority of states have now adopted JRIS, reducing the risk even further.

Even in states that have enacted a reference immunity statute, employers have still been reluctant to provide complete references. One of the reasons for this is because even though employers know they would probably win a lawsuit brought against them, they still do not want to bother with the time, money, and hassle involved with defending a suit. Currently there is no legal duty to provide reference information and most hiring administrators do not exchange reference information with their counterparts based on legal advice from their attorneys. Andler (2003) argues that using this defensive strategy aimed at avoiding potential defamation suits “is probably the least effective (and most costly) way to handle employment problems” and champions a new direction where employers would openly exchange reference information by providing an “honest, specific evaluation of a former employee’s work and abilities.” Jurisdictions that have adopted JRIS have recognized the need and societal benefit that truthful, candid and informative job references provide. JRIS exist in order to encourage employers to provide reference information and provide substantial protection to employers unless they intentionally or recklessly spread false information. JRIS tilts the playing field substantially in favor of the employer, and any risk that remains can be insured against like any other business risk.

Common Components of Job Reference Immunity Statutes

The wording of the reference immunity statutes varies by state, but many of them share common elements. Following is a discussion of the common elements and some important differences in the various state JRIS. It should be noted at the outset that it is important for the employer, human resource professional, or business owner to be familiar with the provisions of the JRIS that exists in their

particular state. Aligning one’s reference policies with the specifics of that state’s statutory requirements is a sound management practice and necessary to receive maximum legal protection. The information in this article is intended to provide a general discussion of the common provisions contained in the JRIS.

Most statutes presume the employer acted in good faith, but the good faith presumption can be overcome either by a preponderance of the evidence or the clear and convincing evidence standard (Long 1997). This places the burden on the plaintiff to show that the employer was acting in bad faith when providing the reference and clearly shifts the advantage in a reference defamation suit to the employer.

Information Covered by the Immunity

Most statutes protect an employer who discloses information related to job performance and work-related information. Some states define job performance specifically while other states do not seek to define it any further. For example, Arizona, Idaho, and Utah provide for “immunity for disclosure of information regarding job performance, professional conduct, or evaluation” (Cooper 2001), while Louisiana defines job performance as including “attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions” (Long 1997). In contrast, some states such as Florida do not even include the term “job performance” in the wording; they simply generalize by saying the immunity covers disclosure of “information” about an employee (Fla. Stat. 768.095). Covering a broad range of information can be dangerous, because it allows employers to comment on things unrelated to a person’s work habits. Even though the employer may believe something to be completely true, commenting on someone’s personal life may actually be an invasion of privacy. Employers should limit the information they provide in a reference to job performance or work-related conduct, and refrain from “disclosing information about an employee’s personal life, off-duty activities or character traits unrelated to the performance of the job” (Snitzer 2005).

Requests for Reference

Another characteristic commonly found in JRIS is the stipulation that employers have to first receive a request for a reference before they provide any information about an employee. This request can come from the prospective employer or the job applicant. For example, the Texas JRIS provides the employer with a qualified privilege when responding to a reference request from either the employee or prospective employer (Texas Labor Code 103.003). This requirement is good because, as Long (1997) points out, "By requiring employers to wait for requests for information, the statutes aid in preventing employers from maliciously attempting to ruin employees' chances for employment elsewhere, or publishing information about employees to those who have no legitimate interests in the employees' actions." While it is best for an employer to refrain from volunteering reference information to a prospective employer that is unsolicited, an exception to this rule would permit an employer to voluntarily disclose dangerous or violent workplace conduct (Cooper 2001).

Written vs. Oral References

A few states such as Kansas, Missouri, South Carolina, and South Dakota require written references in order for the immunity to apply, while most do not differentiate between written or oral references (Cooper 2001). While requiring the reference to be in writing reduces the potential for litigation (since there is a record of exactly what was said), it may have a negative effect in that it places an added burden on employers, who may decide not to provide a reference, believing the extra hassle is not worth it.

Colorado, Indiana, and South Dakota require that a copy of the reference be given to the former employee upon request. Minnesota and Missouri require copies of the reference be sent to the former employee automatically when providing the written reference. The rest of the states have no such requirement. While requiring that copies of the reference be made available to the former employee would encourage employers to make sure everything they say is completely honest, it may keep them from being as frank as they otherwise would have been. Also, providing the former employee with a copy

places an additional burden on the employer which provides an added incentive for the employer not to give the reference in the first place. Another approach for states considering future legislation on this matter is to require the employer to furnish a copy of the reference to the employee only if the employee requests one. This makes it easier for the employer to comply with the statute assuming it specifies that references must be in writing (Long 1997).

Attorney Fee-Shifting

Arizona and Ohio have attempted to lessen employers' reluctance to provide references for fear of being sued by placing a fee-shifting provision in their reference immunity statutes. This provision makes the person who loses the suit pay the prevailing party's attorney's fees. However, this would not make up for lost time, hassle, and bad press as a result of the suit. Although proponents of fee-shifting say it would discourage people from filing frivolous lawsuits, another side effect of having attorney fee-shifting in a statute may be that it would chill people's efforts to bring even worthwhile lawsuits (Kristensen 2005). Most plaintiffs would not have the money to pay for the defendant's attorney fees as well as their own, so the protection may turn out to be useless for the employer (Cooper 2001). Many states do not look favorably on attorney fee-shifting, so there is a slim chance that a reference immunity statute with a fee shifting provision in it would be passed in most states. This becomes evident when one considers the fact that forty states have passed a reference immunity statute, and so far only two states have included attorney fee shifting in the statute.

Survey of Existing Job Reference Immunity Statutes

Colorado and Florida were the first two states to have enacted reference immunity statutes in the early 1990's (Cooper 2001). By the end of 2004, thirty-eight states had reference immunity statutes on the books. Pennsylvania and Washington passed similar legislation in 2005 bringing the current count to 40 states that have some form of JRIS in place. The number of states either adopting or considering

reference immunity legislation continues to grow, as Alabama, Massachusetts, Nebraska, and New Jersey have had legislative bills proposed. Nebraska has considered the statute several times, but the proposed legislation has never made it out of committee. It has been argued that the legislation will not be adopted until a large defamation suit is won (Kristensen 2005). Job reference immunity legislation was proposed in Massachusetts after Michael McDermott killed seven co-workers at Edgewater Technology and it came to light afterwards that he had been terminated from a prior job for making threats. Edgewater never received this information from the prior employer (Cadrain 2004). Job Reference Immunity legislation was subsequently proposed in

response to the disaster but has not been enacted. Likewise, legislation was proposed in New Jersey after nurse Charles Cullen admitted to murdering 40 patients in New Jersey and Pennsylvania by administering lethal doses of medication to them. He had worked for several hospitals after having been terminated and reported to the state nursing board by one hospital, yet his nursing record remained clean (Kochman and Clare 2004). While these tragedies have led to proposed job reference immunity legislation, there is a sound public policy basis for the JRIS to exist, even without the impetus of such tragic events. Table 1 lists the states that have JRIS in place.

Table 1

States with a Reference Immunity Statute as of September 1, 2006	States without a Reference Immunity Statute as of September 1, 2006
Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming	Alabama, Connecticut, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New York, Vermont, West Virginia

Common Law

JRIS are derived from the common law legal principles applicable to defamation and qualified privilege. Thus, employers in states that do not have JRIS in place still have substantial protection under the common law. Practically speaking, the JRIS serve as a codification of existing common law. For example, in *Thomas v. Tampa Bay Downs, Inc.* (2000), the Florida court of appeals said Florida’s reference immunity statute was “the legislative codification of the common law of qualified privilege in defamation cases.” Where the common law differs from the reference immunity statutes is often hard to see. Cooper (2001) explains:

Under the common law, employers who provide job references benefit from a qualified or conditional privilege...The common law qualified privilege protects employers unless they abuse the privilege. An employer may abuse the privilege by

providing information that she knows is false, by acting in reckless disregard for the truth or falsity of the information, by communicating the statements to persons who are not within the purpose of the privilege, or by excessive publication.

The problem with the common law’s qualified privilege is that the standards are oftentimes unclear and the case usually goes to a jury for resolution. The common law is very fact-based, and litigation can be lengthy (Tanick 1997). So in effect, many employers feel there is little protection that is actually provided by this qualified privilege (Tanick 1997), although research shows that the actual risk of a reference defamation suit is quite small (Paetzold and Willborn 1992, Arneson, Fleenor and Blizinsky 1998) and the fear largely overblown (Andler 2003). On the other hand, JRIS provide more specificity and statutory clout to the qualified privilege. They raise the burden of proof standard in some states by requiring clear and convincing evidence and increase

the likelihood that a case can be dismissed before reaching trial.

At common law, there are several defenses to defamation claims. These defenses include consent to publication, lack of publication, opinion, and qualified privilege. Truth is always an absolute defense to defamation (Schainblatt 2000). As Ballam (2002) points out, "...even if the employer provides inaccurate information, as long as it was not done negligently, about an employee or former employee, the common law qualified privilege defense provides employers with immunity from defamation liability for giving references." This is contingent on there being no ill will or spite on the part of the employer (Ballam 2002). This is also defined as malice. An example of malice is when the employer knowingly provides false information or renders it with a malicious purpose.

There is also some confusion as to how the common law and the reference immunity statutes interact in a case. In many early cases interpreting JRIS, common law and statutory privileges have been applied to the same case (Cooper 2001). For those states that have not yet enacted immunity legislation, the common law of qualified privilege provides protection from defamation claims as long as the reference does not provide false information that injures the former employee. For those states that have passed immunity legislation, employers will have the benefit of protection from both the common law and the specific provisions of the JRIS.

JRIS reflect public policy and provide additional protection to employers by providing more certainty in the job reference arena, but the common law defense of "qualified privilege" is still available in those states that have not yet adopted this legislation.

Effectiveness of Reference Immunity Statutes

There is no conclusive evidence to date that JRIS have influenced any significant change in a firm's willingness to provide reference information. Employers receive no direct benefit from providing a reference, the laws are relatively new and many employers appear to be unwilling to put the statute to the test and have decided to stick to company NRS policies instead. Most employers would rather avoid litigation altogether. The protection afforded

them under the common law or a reference immunity statute may not be enough to motivate them to take on the risk of adopting a more open reference policy. NRS policies continue to exist, despite the ethical dilemma presented when the employer sits on the other side of the hiring equation and is the one seeking reference information. Another reason for employers' reluctance to change their reference policies may also be that employers are not aware their state has a JRIS or the extent of protection that it offers (Cooper 2001).

Ballam (2002) argues that the JRIS do not meaningfully address the employer's main fear of incurring legal expenses and proposes reform that would require employers to provide specific types of reference information.

The large number of states adopting JRIS and numerous articles suggesting reforms make it clear that a serious problem exists. The reluctance to provide information in contrast to the substantial need for such information by employers has led to continuing attempts to address the problem. While obtaining meaningful references is difficult, there is some evidence that reference information about applicants is exchanged informally on a regular basis, despite what the employer's attorney has advised (Anderl 2003). Anderl (2003) reports that "more attorneys are now advising employers to release information with caution." Even though the common law provides protection to employers, the passage of JRIS clearly reflects the public policy of encouraging employers to provide truthful, candid references. JRIS also provide statutory guidance for firms in developing sound human resource practices in the area of providing reference information. Employers are protected when providing truthful information, making good record keeping essential. Documenting everything from promotions to disciplinary actions protects employers from later having difficulty proving what they said is true. In those states where JRIS are in place, there is less likelihood of a successful defamation lawsuit against the reference provider. The legal risks associated with providing reference information should not be the only factor determining company policy. Ethical considerations, sound human resource practices, and common risk management practices should also be taken into consideration by management when setting company reference disclosure policy.

Since the statutes are fairly recent, not many reported cases cite them. Cases from Louisiana, New Mexico, Tennessee, and Iowa exist where the courts mentioned and acknowledged the existence of JRIS in their jurisdictions. Courts in Florida, Indiana, Maryland, and California along with several federal courts have directly applied the JRIS. For example, in *Noel v. River Hills Wilsons, Inc.* (2003), the court applied the California JRIS when an employer negligently gave incorrect information about a former employee on a job reference. The employer was not held liable because the actions were not intentional or reckless.

The courts have recognized that the statutes require a higher level of proof to win in those states requiring clear and convincing evidence when compared to the common law. Also, Cooper (2001) reports that cases seem to show that the JRIS are helping employers dispose of cases earlier, without going to trial. While the case law is limited to date, the trends are encouraging and the statutes need to be given a chance to work. Change cannot be expected overnight, and as people become more aware of the statutes, reference policies may start to change. JRIS could make more of an impact if people were more aware of them and the protection they offer. Cooper (2001) states:

Notwithstanding flaws in the statutory scheme, legislation remains the centerpiece of efforts to reform job reference law, policies and practices. Using statutes as the sole mechanism for reform, however, is unlikely to result in meaningful changes in employers' approaches to references. Even a flawless statute, enacted in every state, would be unlikely to end the reference stalemate without public awareness of the law. Accordingly, the statutes should be part of a multi-pronged effort to educate and inform employers about the low risk of being sued, the existence of the immunity statutes, and the legal rules that apply to providing references.

Educating employers and human resource professionals is an important tool that has been missing in making the JRIS more effective. Employers need to be made aware of the statute in their state, how it can protect them, and the proper

way to provide a reference. Existence of a JRIS and a sound understanding of the JRIS provisions, coupled with conforming human resource practice should substantially reduce the risk of a reference based suit and lead to an increase in candid reference information exchanges.

Conclusion

Employers have overreacted to the threat of potential lawsuits from current or former employees based on information provided in job references. As a result, employers have been reluctant to provide job performance information pertaining to current or former employees in the form of a job reference. Society has recognized that this is a serious problem and legislation has been adopted in forty states which provides substantial protection to employers and greatly reduces the risk that an employer will incur liability based on a job reference. Past studies have shown that the risk of a defamation suit based on a job reference is quite small, and the subsequent adoption of JRIS has further decreased the risk of liability. Employers should review their current job reference policy and consider changes if currently employing a NRS policy. While the legal risks associated with giving job references should be taken into account, ethical principles, existence of sound human resource practices within the firm, existence of JRIS in the state and common law protections, and other common risk management practices should also be taken into consideration before adopting or continuing a NRS policy. Employers should be willing to take advantage of the protection the JRIS provide, and promote an increase in workplace efficiency for all firms within our society by providing truthful job performance information of current or former employees upon request.

**Bruce Elder, J.D. (University of Nebraska College of Law) is a professor of business at the University of Nebraska at Kearney where he teaches graduate and undergraduate courses in business, commercial and employment law.*

***Sara Gerdes is a graduate of the University of Nebraska at Kearney and is currently employed as an audit associate with KPMG LLP in their Omaha, Nebraska office.*

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