

## **TRUTH OR CONSEQUENCES**

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Employers often get calls requesting a reference for a former employee. Some of these calls are a pleasure to return because the employment relationship with your business and former employee was good. However, what risks do you face if the previous situation was unproductive or unpleasant? Can you, as a former employer, be held liable to the employee for “telling it like it is, or was”? Can you be held liable to the potential employer for failing to disclose the weaknesses or problems of the former employee?

In 1997, the North Carolina General Assembly tried to address the first question by passing a statute that provides in essence: an employer may disclose information about a current or former employee’s job history or job performance to a perspective employer upon request without being liable in civil damages for any consequences of that disclosure if the information is true. Job performance is defined in the statutes as the suitability of the employee for reemployment; the employee’s skills, abilities, and traits as they may relate to suitability for future employment; and in the case of a former employee, the reason for the employee’s separation from your business.

There is an entirely separate statute dealing with the “blacklisting” of employees which provides that it is a criminal offense for any person, agent, company, or corporation after having discharged any employee from its service to prevent that employee, by word or writing, from obtaining employment with any other person, company, or corporation. That statute goes on to say that it does not prohibit any employer from furnishing in writing, upon request, to any other person or company to whom that discharged employee has applied for employment, a truthful statement for the reason of such discharge. Generally speaking, the truth is a defense to any sort of defamation suit, including both libel and slander.

There have been a few cases filed by companies who hired employees after discussing them with their former employer. The theory of these cases generally has been that the former employer intentionally mislead the potential employer by failing to disclose important adverse information or made affirmative untrue statements about the employee’s suitability for employment that turned out to be false. If the statements about a former employee are true, then a former employer should incur no liability to a potential employer who is inquiring about the suitability of a former employee for a job.

We have come to the conclusion, based on current North Carolina law and experience with clients, that employers can reduce the risk of being sued under these circumstances by having one person in the business to whom all reference inquiries should be sent. The references should contain only factual information and not conclusions as to whether the employee will be suitable for employment in some other organization.