

# EMPLOYMENT MATTERS

March-April 2014

## SHOULD EMPLOYERS PROVIDE REFERENCES FOR DEPARTING EMPLOYEES?

### What is the issue?

Our clients often ask whether they are required to provide references for their departing employees. The short answer is no. There is no legal requirement to provide references for departing employees. Having said that, there are pros and cons to consider before making that decision.

### Pros

If the termination is on a “without cause” basis, it can be quite beneficial to provide references for departing employees. Positive references assist departing employees to find new employment. The sooner they find new employment, the better. This means they generally have less time to engage in litigation against their former employers and, more importantly, they have mitigated their damages for common law purposes.

In addition, the provision of references forms part of the dismissal process. If the dismissal results in a claim before the Courts, every action taken by the employer during the dismissal process can be scrutinized. Providing a departing employee with a positive reference, if warranted, is viewed as an act of good faith and can go a long way in establishing credibility and good faith before the Courts. Conversely, if a departing employee suffers damages because his/her former employer refused to provide references (if warranted), the former employer can be held accountable for failing to provide references. Damages can flow from such a finding.

### Cons

If the termination was for just cause, or in circumstances where just cause could or might be alleged, employers should be extra cautious about providing references. If former employers provide references or offer to provide references to a departing employee in those circumstances, the provision of a reference or the offer to do so could negatively impact a just cause defence. As noted above, references form part of the dismissal process. If the substance of the former employer's reference is inconsistent with its defence, this could invalidate a good defence.

In addition, it is important to remember that prospective employers will rely on references when they make the decision to hire an employee or not. Thus, if the former employer provides a reference that is not accurate or that misrepresents the employee's skill set, and the prospective employer relies on that information to hire the employee, the former employer could be held liable for damages that flow from the reference.

### General Tips

Employers should be cautious about providing references. There are circumstances in which they are appropriate and there are circumstances in which they are not. As an employer, if you opt to provide a reference, make sure it is factual, accurate, and does not overstate the employee's skill set. However, if you are alleging cause or considering doing so, you are best served not to provide any references at all.



[Andrea M. Marsland](#)  
Partner  
[amarsland@foglers.com](mailto:amarsland@foglers.com)  
416-365-3703

Fogler, Rubinoff LLP  
Lawyers  
77 King Street West  
Suite 3000  
P.O. Box 95  
TD Centre North Tower  
Toronto, ON M5K 1G8  
Direct: 416.365.3703  
Main: 416.864.9700

**fogler**  
rubinoff