

## E6. Reference Check Guidelines

### - UCSC Guidelines - Providing Employment References for Current or Former Staff Employees<sup>1</sup>

Prospective and former employers share a common interest in exchanging job reference information. A *prospective employer* seeks to validate the job performance and qualifications of an applicant prior to hiring. In addition, the prospective employer has a duty to protect its employees and customers from potential injuries caused by employees whom the employer knew or should have known posed a risk or harm to others. This duty is breached when an employer fails to seek references prior to making employment decisions, and the employer may be held liable for *negligent hiring*<sup>2</sup>.

A *former (or current) employer* provides employment references to assist former employees in obtaining future employment, and also does so in good faith with the hope that, in return, s/he will receive an honest evaluation from other employers when hiring new employees. The courts recognize that employers do not have any duty to disclose information about their employees. However, if an employer chooses to provide a reference or recommendation, the reference giver must include factual negative information that may be material to the applicant's fitness for employment *in addition* to any positive information. Campus managers and supervisors who provide employment references on current or former employees must be aware that untrue, incomplete, or misleading information may cause a different liability - *negligent referral*. The court in *Randi M. v. Livingston Union School District*, 1995 Cal. App. LEXIS 1230 (Dec. 15, 1995), found that, **"A statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue."**

***Review these guidelines before responding to a request for a reference. The same principles apply when providing either oral or written references.***

#### **When contacted to provide a reference, *first consider these primary points:***

- If you will provide a reference, determine whether you will first require a waiver to be signed (see below for further information).
- Don't give a reference if you're not prepared -- tell a requester that you need to review your records and will call back.
- Clarify the nature of your relationship with the applicant and the basis upon which you're assessing his/her performance (i.e., if you are/were not the supervisor, state whether you are/were a co-worker, fellow committee member, etc.)
- ***References should be balanced, truthful, free of subjective impressions that lack objective support, and should be given in good faith without malice.***

<sup>1</sup> These guidelines apply to student employees as well.

<sup>2</sup> Guidelines for *obtaining* references as part of the hiring process are included in "A Guide to Fair Hiring and the Recruitment Process".

### When should you give a reference?

- The University does not have an obligation to provide references on former and current employees but, under ordinary circumstances, it is our practice to respond to requests from prospective employers.
- If another UCSC unit (or other UC campus) calls for a reference, there is a community interest which gives rise to a greater obligation to respond. If the University unit calls for a reference on someone *currently* working for you, give a reference just as you would for any former employee.

### When should you not give a reference?

- If you feel that you **cannot give an objective reference** for any reason, you should decline and refer the requester to Payroll (x9-2488) for verification of employment<sup>3</sup>.
- If you **do not have sufficient knowledge** about an employee's job performance--i.e., if you did not supervise or work closely with the person -- tell the requester the nature of your relationship, that you do not have sufficient knowledge to give a meaningful reference, and refer her/him to Payroll (x9-2488) for verification of employment.
- If you have concerns about the applicant's past performance but **feel that you could not back up your statements with objective evidence if challenged**, or if there is something about the individual's employment history with you that makes you hesitant to provide information to any external employer, call your Staff Human Resources Analyst for advice. Options are to decline to give a reference, ask the job seeker to sign a waiver<sup>4</sup>, or ask the prospective employer to send you a waiver signed by the job seeker.
- You should **never** seek out a prospective employer to give an **unsolicited reference**. If challenged in court, there is more protection if the reference giver provided information in good faith upon the *request* of the job seeker or prospective employer.

### What information may be given in a reference?

- You may always verify dates of employment, job titles, descriptions of duties, and salary. You may also discuss the person's performance, attendance, conduct, and reason for termination of employment (e.g., release during probation, dismissal, or layoff, if applicable).
- If you give *any* information about an employee's job performance, you have an obligation to give a balanced picture. References should be truthful, free of subjective impressions that lack objective support, and should be given in good faith without malice. Omitting negative information that is relevant to a person's suitability for employment may be cause for court action. Review the file, stick to aspects of the person's performance that you know, and don't respond to questions about areas you don't know. Do not repeat rumors.
- An applicant may have rights of access to information provided in a reference. You, as the reference provider, should be able to back up your statements -- preferably with performance evaluations and other written documentation.
- It is not advisable to give negative information of which the employee is unaware. If, in order to give a full and fair evaluation, you need to include such negative information, and if the information is true, factual, and objectively supportable, mention that you had never discussed it with the employee.
- Do not reveal information which would violate the civil rights of the affected employee, e.g., involvement in labor organizing or other legally protected activities.
- Litigation and criminal convictions are matters of public record and may be discussed (consult with Labor Relations for advice first).
- **Do not** give any information about administrative grievances, settlement agreements, a Worker's Compensation claim, an employee's medical record, or disabilities - these are examples of confidential information. The presumption that a reference was provided in "good faith" may be lost if confidential information is disclosed.

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<sup>3</sup> Verification of Employment is limited to:

- Start and end date of employment
- Job title(s) held while a University employee
- Salary at time of separation

<sup>4</sup> You may copy and use the waiver form attached.

**Are you liable for the consequences of giving a reference?**

- California Civil Code § 47 (which deals with communication of privileged information) was recently revised to offer greater protection for employment references that are factual and given *without malice*; however, the new law has not yet been fully tested in the courts.
- If the job seeker signs a waiver, the degree of protection for an employer providing a reference is greatly increased.
- The University will represent its supervisors in a court action resulting from any good faith, non-malicious response to a reference check.
- Title VII of the Civil Rights Act of 1964 provides protection from discrimination on the basis of race, color, religion, national origin, or sex. Section 704(a) of Title VII makes it unlawful “for an employer to discriminate against any of his employees or applicants for employment” who have availed themselves of Title VII’s protection. Former employees can sue former employers for retaliation if their Title VII rights have been violated.
- Current employees applying for other UCSC jobs may have the right to challenge a supervisor’s reference through the administrative grievance process.

**Can prospective employers request documents related to a current or former employee?**

- You may not release any documents -- whether from the unit, service center, Staff Human Resources or Career Center personnel file -- to an *external* employer without a written release from the employee.

**Information about the waiver and when you should ask for one to be signed.**

- The waiver includes standard language used in various University of California legal matters. It requires the employee to legally waive all rights to file any claim, lawsuit, or action against the University and its employees relating to alleged unlawful conduct.
- If you have negative information to share about the job seeker’s performance but lack documented evidence, either don’t give a reference or require a signed waiver from the employee. Waivers balance the employee’s rights against a prospective employer’s right to know true, factual, objective information.
- The waiver is not necessary when providing an employment reference to another University of California employer.

**If you have any questions** about a giving a reference, call your Service Center representative.

## WAIVER AND GENERAL RELEASE<sup>5</sup>

I request that the University of California provide an assessment of my performance while an employee of the University of California to potential future employers who may request such a reference. I hereby release and forever discharge The Regents of the University of California, its officers, directors, agents, and employees from all charges, claims, and causes of action of every kind which I have had, or may in the future have, relating in any manner to the information provided regarding my employment with the University of California. I agree not to start, join, or cause to be started a lawsuit or any action arising from any alleged unlawful conduct relating to this reference provided by the University of California, in any forum. I understand and agree that the waivers in this release include any and all discrimination actions, including, but not limited to, actions for discrimination under the Immigration Reform and Control Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the California Fair Employment and Housing act, federal and state wage and hour laws, and under any other federal or state laws, the law of contract and tort, or common law.

I understand that this Waiver and General Release is designed to avoid any possible lawsuit or administrative complaint. I understand and agree that this Waiver and General Release is a full and final release applying to all unknown and unanticipated damages or losses resulting from or in any way related to the employment reference given by the University of California. I hereby waive the provisions of section 1542 of the California Civil Code, which states:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

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Print Employee Name

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Date

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Employee Signature

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<sup>5</sup> A separate waiver should be required for each reference requested by a job seeker, as required by the reference giver. It is recommended that the reference giver retain the waiver for a period of 10 years.