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REPORT FROM COUNSEL

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EMPLOYEE REFERENCES: BE CAREFUL OF THE WORDS YOU SPEAK

By Jennifer R. Andrade, Esquire

Screening out poor performers or bad fits before they ever get on the payroll is a critical aspect of any successful hiring process. Particularly in a market where frequent changes in jobs have become common, obtaining meaningful references is an important aspect of any pre-hire screening. In a fluid market, it is just as important for a talented candidate to be confident that any prospective employer will be willing in the future to give a substantive reference that enhances later career advancement. Until recently, the law has often served as a barrier to this free flow of information.

Out of fear of having to defend lawsuits from disgruntled ex-employees, many employers have adopted a policy of confirming only dates of employment, job titles and perhaps salary when called upon by a prospective employer to give a reference. This fear has been validated most recently by a decision from the intermediate New Jersey Appellate Division in *Singer v. Beach Trading Co., Inc.*, 379 N.J. Super. 63, 876 A.2d 885 (App. Div. July 19, 2005).

Ms. Singer had been working at a company for less than two weeks when a manager began to question the veracity of the experience stated on her resume. In an effort to verify the contents of her resume, the manager contacted the defendant former employer.

Rather than asking to speak with the owner of Mr. Singer's former employer, or to a corporate representative to confirm or deny the employment history, the manager spoke with several representatives in the defendant's customer service department who gave erroneous information about the plaintiff's job title. Ms. Singer was allegedly fired based on that erroneous information. The Court dismissed plaintiff's claims for defamation and wrongful interference early in the case, but allowed her claim for negligent misrepresentation to go to the jury. Applying tort principles, the court determined that there were questions of fact of whether the factually incorrect statements to plaintiff's manager breached any duty and whether the current employer justifiably relied on those statements in terminating her.

Unfortunately, while a bare minimum approach (date of employment, last job title and salary) may seem to mitigate the possibility of liability for defamation, misrepresentation, or even retaliation, it creates as many problems as it cures. Former employees who made positive contributions are denied a good reference. In the case of a bad former employee, prospective employers are left to make hiring decisions without the ability to identify a potential "ticking bomb," with grave consequences to the workplace and even liability for negligent hiring. State legislatures have taken notice of the dilemma. Almost 40 states and jurisdictions shield employers from liability for harm to an ex-employee based on the contents of a job reference. In the majority of those jurisdictions, employers are immune from liability when they provide information about the employee's job performance at the request of a prospective employer.

Pennsylvania has recently enacted such legislation entitled "Employer Immunity from Liability for Disclosure of Information Regarding Former or Current Employees." Under this new legislation, the former employer who discloses information about an current or former employee's job performance at the request of a prospective employer, is presumed to be acting in good faith and is immune from civil liability for the disclosure or the consequences stemming from it. The statute provides that "the presumption of good faith may be rebutted only by clear and convincing evidence establishing that the employer disclosed information that:

- (1) the employer knew was false or in the exercise of due diligence should have known was false;
- (2) the employer knew was materially misleading;
- (3) was false and rendered with reckless disregard as to the truth or falsity of the information; or
- (4) was information the disclosure of which is prohibited by any contract, civil, common law or statutory right of the current or former employee."

Under this statute, the Pennsylvania courts will be left to interpret exactly the types of information that may be released under the good faith presumption. Arguably, the broad term "job performance" may be more advantageous to employers as it provides the

Pennsylvania courts with flexibility to determine whether a particular disclosure falls within the ambit of the statute's protection. In states such as Texas and Louisiana, employers may reveal such information as attendance, attitude, awards, demotions, duties, effort, knowledge, behaviors and skills. In Virginia, an employer can give information about a former employee's professional conduct, reasons for separation or job performance, including information contained in any written performance evaluations requested by a current or prospective employer. In other states, including Georgia, even employee actions that constitute a violation of law may be disclosed.

The Pennsylvania statute at the very least establishes a standard by which to disclose information. The statute provides some comfort to employers wrestling with whether they should disclose more than the bare minimum in a job reference. However, despite the enactment of job reference immunity statutes, employers should be ever mindful that these statutes are not a panacea. The possibility of having to defend lawsuits remains. Whether an employer's disclosures are cloaked with immunity will continue to be a largely factual determination by a judge or jury.

Tips for Giving & Getting References

- * Be prodigious record-keepers of employees' job performances.
- * Consider obtaining waivers or releases from current employees and job applicants giving you their permission to give and get references. A waiver or release should hold the reference provider harmless for any results.
- * Consider obtaining credit or criminal histories.
- * When asked to give a reference, provide only relevant and factually accurate information.
- * Establish a clear policy to govern the way information is disclosed in a job reference and who may respond to the request for a reference, keeping in mind the laws of the states in which you have employees.
- * When seeking a reference for a prospective employee, ask for examples of positive traits, as well as less desirous traits, and document it. Also document what information a former employer would not give to you.
- * Be aware that your policies may vary depending on the employee and the circumstances.

Does your company's human resource department have an adequate record keeping system for documenting a good defense to a claim arising from giving a job reference? How does Pennsylvania's new legislation impact your company's hiring process? Should your company need advice or representation concerning former or prospective

employees, or if you have questions concerning Pennsylvania's new employer immunity legislation, please contact the author or Sherrard, German & Kelly, P.C.

About the Author

Jennifer R. Andrade is an associate attorney with the firm and is a member of the firm's Litigation Services Group. Her practice is concentrated in the areas of commercial litigation, employment and civil rights. Ms. Andrade is a 1995 graduate of Boston University and a 2003 graduate of the University of Pittsburgh School of Law.

HARKNESS FALLS: THE LEGISLATIVE REVERSAL OF THE COMMONWEALTH

By Samantha Chugh, Esquire

Employers in the Commonwealth all remember the decision in *Harkness v. Unemployment Compensation Board of Review (Federated Logistics t/a Macy's Department Store)*, No. 150 C.D. 2004, 2005 Pa. Commw. Lexis 48 (Pa. Commw. 2005). As reported in the Spring 2005 Issue of *Report From Counsel*, the decision halted the practice of utilizing employees or management, or engaging outside companies to represent an employer and, instead, required employers to be represented by legal counsel at unemployment compensation proceedings.

In response to the *Harkness* decision and strong opposition to its holding by employers, Senate Bill 464 was signed into law by Governor Ed Rendell on June 15, 2005. The Bill immediately amended the Unemployment Compensation Act to allow any party in any unemployment proceeding to be represented by an attorney or other representative.

Some have argued that the new law is unconstitutional as it is within the exclusive province of the Supreme Court to determine who may engage in the practice of law. The legislature, they argue, has appropriated this judicial power thus violating the doctrine of separation of powers. Others, like Judge Leadbetter, who authored a dissent to the *Harkness* decision, object to the idea that employer representatives engage in the practice of law at all.

Regardless of whether representing employers at unemployment compensation proceedings constitutes the unauthorized practice of law, Senate Bill 464 was passed with ease and is now the operative law in the Commonwealth. Thus, unless, and until, a constitutional challenge is launched, employers are at their discretion to choose a lawyer or non-lawyer to represent their interests at unemployment compensation proceedings.

The new law does not require employers to retain legal counsel for representation at unemployment compensation hearings. Nonetheless, unemployment compensation

matters can become involved and an employer may wish to procure legal representation. Should your company need advice or representation regarding an unemployment compensation matter or if you have any questions concerning how the new law affects your company, please contact the author or Sherrard, German & Kelly, P.C.

About the Author

Samantha J. Chugh is an associate attorney with the firm and is a member of the firm's Corporate and Financial Services Group. Prior to joining the firm, Ms. Chugh practiced in the area of insurance defense where she focused on all areas of workers' compensation law. Ms. Chugh is a graduate of the University of Pittsburgh School of Law.

RETIREMENT GUIDE

The Internal Revenue Service has created a free CD-ROM that is designed to help small businesses establish and maintain retirement plans for employees. Sections on setting up contributions, investments, and distributions have information not only from the IRS, but also from the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, and the Social Security Administration. Some of the contents of the CD-ROM include:

- * Rules for traditional and Roth IRAs, as well as other retirement plans;
- * Investing your IRA;
- * Publications and forms;
- * Retirement calculator;
- * Video clips on retirement planning;
- * Frequently asked questions;
- * Research material on IRAs; and
- * Links to more retirement information on government websites.

You can order the CD-ROM online at www.irs.gov/retirement or call toll-free 800-829-3676 and request Publication 4395.

NEW TAX DEPOSIT RULES FOR SMALL BUSINESSES

As of January 1, 2005, the IRS increased the minimum threshold for Federal Unemployment Tax Act (FUTA) deposits. Under the previous rule, employers were required to make a quarterly deposit for unemployment taxes if the accumulated tax exceeded \$100. Now the threshold is \$500.

The IRS estimates that this change will lighten the load for more than 4 million small businesses. Assuming an employer makes timely state unemployment tax payments, the most that the IRS will collect from employers per employee is \$56 per year. Before the threshold was increased, most employers with two or more employees had to make at least one federal tax deposit a year. Now employers with eight employees or fewer will be freed from the requirement of making as many as four FUTA deposits per year.

PROTECT YOUR HOME WITH TITLE INSURANCE

When someone buys a home, in addition to the land, bricks, and wood, the buyer receives the legal title to the property. If the title is defective, it could interfere with enjoyment of the property and result in financial loss. When title insurance is purchased by a property owner, the insurer guarantees that the owner has clear title to the property, free of claims or encumbrances.

Title insurance begins with a search of land records tracing the property's "chain of title" back in time through previous owners. A title search should reveal any legal documents that do not clearly pass title, such as where incorrect names or notary acknowledgments appear, as well as outstanding mortgages, judgments, or tax liens. Even a thorough search by an experienced title examiner cannot be absolutely certain to detect every problem, however. Title insurance protects against the unseen hazards that may not surface until long after property is purchased. Some of the risks against which title insurance gives protection include: a forged deed that transfers no title to the property; previously undisclosed heirs with claims against the property; and a legal document executed under an invalid or expired power of attorney.

A title insurance policy protects the insured party, such as the home buyer or the buyer's mortgage lender, against losses suffered if the title is found to be defective, even after a search of land records suggests no problems. Lenders' title insurance decreases and eventually is discontinued as the loan is paid off. Owners' title insurance, issued in the amount of the purchase price, lasts as long as the insured has an interest in the property.

As with any other insurance policy, the fine print in a title insurance policy must be examined with care. Typically, there are exclusions or exceptions from coverage. For example, the effects of governmental laws, ordinances, and regulations are generally

excluded. You also should be aware of two other common policy provisions. The first is a standard arbitration clause, requiring binding arbitration to resolve any dispute under a specified dollar limit. The second provision, a "co-insurance" clause, states that the owner must obtain increased coverage if the insured property is improved in order to furnish the same level of protection.

Title insurance protection takes various forms. The insurer will negotiate with third parties about their claims against the insured property, pay for defending against an attack on the title, and pay claims if necessary. Title insurance also helps to make sure that a dream home will not become a legal nightmare for the home buyer.

FIRM ANNOUNCEMENTS

The firm is pleased to announce that **Kevin P. Dolan** has joined the firm as an associate in the firm's Litigation Services Group. Mr. Dolan's practice is focused on commercial litigation matters. Prior to joining the firm, Mr. Dolan was an associate in the litigation department of a Pittsburgh-based international law firm. Mr. Dolan received his law degree from the SUNY at Buffalo School of Law in 2001, where he served on the executive editorial board of the Buffalo Law Review and finished first in both the oral argument and brief writing portions of the Desmond Moot Court Competition. He received his bachelor of arts degree (cum laude) from the University of Notre Dame in 1996.

The firm is pleased to announce that **Sharon Menchyk** has joined the firm in its Litigation Services Group. She is currently focusing her practice on commercial litigation matters. Prior to joining Sherrard, German & Kelly, Ms. Menchyk practiced with a Pittsburgh litigation firm concentrating in the area of insurance defense. Ms. Menchyk received her law degree in 2000 from the University of Pittsburgh School of Law magna cum laude and her bachelor of science degree in 1994 from the University of Pittsburgh.

The firm is pleased to announce that **Samantha J. Chugh** has joined the firm as an associate in the firm's Corporate and Financial Services Group. Prior to joining Sherrard, German & Kelly, Ms. Chugh was employed by a Pittsburgh firm specializing in insurance defense. Her practice focused on all aspects of workers' compensation law. Ms. Chugh earned her Juris Doctorate in 2004 from the University of Pittsburgh School of Law and her Bachelor of Arts degree in 1998 from the State University of New York at Buffalo.