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Providing and Requesting References for Employment



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1. Purpose

1.1. ACAS define that the purpose of an employment reference is to provide important information to a potential employer that helps them to decide if a job applicant is suitable.

1.2. This document provides guidance on providing a reference for an employee, or former employee, and requesting a reference for a potential new employee.

2. Is There an Obligation to Provide a Reference?

2.1. Under English Law there is no legal obligation for an employer to provide a reference for an existing or former employee, with the exception of industries regulated by the Financial Services Authority. As it is custom and practice in education to provide references for employees, a refusal to provide a reference may inaccurately suggest that the employee is unsuitable and may give rise to the following issues:

- **Discrimination, a failure to provide a reference because of one of the protected characteristics will entitle an employee/ex-employee to bring a claim for discrimination.**
- **A claim for breach of contract, for example, where it is custom and practice to provide a reference, it may become an implied contractual term that one will be provided for employees.**
- **A breach of the implied term of trust and confidence if an employer refuses to provide a reference for an employee.**
- **Victimisation, where the employee/ex-employee has previously brought discrimination proceedings against the employer, given evidence/information in connection with such proceedings, made an allegation of unlawful discrimination or done anything else under or by reference to the discrimination legislation.**

2.2. It is therefore advised that the organisation accept that they have a responsibility to provide references to potential employers, that they act consistently and have a clear policy in respect of both who can provide references and their content.

2.3. Those employees with delegated responsibility for writing references must understand what is/is not appropriate and legal to include in references and the legal liabilities which may arise.

3. Consent

3.1. In accordance with the Data Protection Bill 2018 and the UK General Data Protection Regulations (UK GDPR), it is best practice to have consent from a data subject before providing a reference about them. There are a number of ways to gain consent, some common examples are:

3.1.1 The employer proactively gains consent on cessation of employment/at an exit interview.

3.1.2 The prospective employer seeks to gain consent on their application forms, which can then be shared with the previous/current employer. We have updated our model application forms to include a consent declaration which can be used for this purpose.

3.1.3 Either the prospective or previous/current employer could contact the employee directly to seek consent.

3.2. The relevant Data Protection Regulations give a specific right to withdraw consent. Employers need to ensure that applicants are aware of their right to withdraw consent and offer them easy ways to do so at any time.

4. Personal References, Employer References

4.1. There is a risk that a reference written by an employee in what they perceive to be a personal capacity may actually be taken to be an employer reference provided on behalf of the organisation. Any reference provided using the referee's job title or on the employer's headed paper is likely to be seen as an employer's reference.

4.2. Therefore, employers should have a policy in place which makes clear whether or not employees are permitted to provide references on behalf of the organisation, and that the only circumstance in which a reference may be provided in this capacity is to a potential employer or, for example, to a training/education provider if the reference is for entry onto a professional course.

4.3. This applies not only to references for employment but also, for example, to character references that may be provided to a judge in respect of a defendant, or to another employer in respect of one of their employees facing disciplinary allegations. It also applies to references whether they are provided orally or in writing.

4.4. In no other circumstance should the referee's job title be used on headed paper without the explicit consent of the organisation.

4.5. If responsibility for providing references is delegated to any employee below the level of Headteacher, it is advised that the Headteacher authorises the content of any reference before it is issued.

5. Liability for the Content of References

5.1. Where a reference is provided, the employer has a duty of care, both to the subject and the recipient, to ensure that the reference is compiled accurately and honestly and is not discriminatory, negligent, malicious, defamatory or dishonest in any way. If an employer fails to comply with the duty of care, the subject or the recipient may have recourse to legal action against the employer.

5.2. The employer may also be held liable for the unlawful actions of a prospective employer on receipt of a reference, if it is 'evidentially foreseeable' that the prospective employer will react to the reference in a certain way, as a direct and natural consequence of the supply of the information. For example, if on receipt of an inaccurate reference a job offer is withdrawn then the employer will be liable if the content of the reference is the reason for the withdrawal of the offer.

5.3. Where a reference has been agreed as part of a Settlement Agreement, the employer must ensure that when approached by a prospective employer this reference is provided and the terms of the Settlement Agreement (as related to the provision of a reference) are followed. If a different reference (often less favourable to the employee) is provided outside the terms of the Settlement Agreement, the employer will be liable if the prospective employer withdraws the job offer based on this reference.

6. Statutory Obligations in Respect of Content

6.1. The following statutory obligations must be taken account of by referees in Schools and Academies. Whilst references must be accurate and fair and not be dishonest or negligent, there is some information that must or must not be provided even when it is requested.

6.2. Allegations relating to safeguarding

Keeping Children Safe in Education (KCSIE) explains; 'Allegations of abuse made against teachers and other staff, including supply teachers, volunteers and contractors' provides statutory guidance applicable to all Schools. It draws an important distinction between allegations relevant for internal record keeping and allegations relevant for references and states:

The purpose of seeking references is to allow employers to obtain factual information to support appointment decisions. Schools and colleges should obtain references before interview, where possible, this allows any concerns raised to be explored further with the referee and taken up with the candidate at interview.

Schools and colleges should:

- not accept open references e.g. to whom it may concern
- not rely on applicants to obtain their reference
- ensure any references are from the candidate's current employer and have been completed by a senior person with appropriate authority (if the referee is school or college based, the reference should be confirmed by the headteacher/principal as accurate in respect of any disciplinary investigations)
- obtain verification of the individual's most recent relevant period of employment where the applicant is not currently employed
- secure a reference from the relevant employer from the last time the applicant worked with children (if not currently working with children), if the applicant has never worked with children, then ensure a reference from their current employer
- always verify any information with the person who provided the reference
- ensure electronic references originate from a legitimate source
- contact referees to clarify content where information is vague or insufficient information is provided
- compare the information on the application form with that in the reference and take up any discrepancies with the candidate
- establish the reason for the candidate leaving their current or most recent post, and,
- ensure any concerns are resolved satisfactorily before appointment is confirmed.

When asked to provide references, schools and colleges should ensure the information confirms whether they are satisfied with the applicant's suitability to work with children and provide the facts (not opinions) of any substantiated safeguarding concerns/allegations that meet the harm threshold. They should not include information about concerns/allegations which are unsubstantiated, unfounded, false, or malicious. Further guidance on references, including on the position regarding low-level concerns, is set out in Part four.

References are an important part of the recruitment process and should be provided in a timely manner and not hold up proceedings.

Any repeated concerns or allegations which do not meet the harm threshold which have all been found to be false, unfounded, unsubstantiated or malicious should not be included in any reference.

Any information about past disciplinary action or allegations that are disclosed should be considered carefully when assessing the applicant's suitability for the post (including information obtained from the Teacher Services' checks referred to previously). Further help and advice can be found on the Advisory, Conciliation and Arbitration Service (ACAS) website.

KCSIE makes reference to employment references included in a Settlement Agreement. The guidance clearly states that in some circumstances Settlement Agreements must not be used and references must not be agreed. The document states:

‘Settlement agreements’ (sometimes referred to as compromise agreements), by which a person agrees to resign if the employer agrees not to pursue disciplinary action and both parties agree a form of words to be used in any future reference, should not be used, where there are allegations that indicate the person is a risk or poses a risk of harm to children or deemed not suitable to work with children. Such an agreement will not prevent a thorough police and/or school or college investigation where that is appropriate.

6.3 Health and disability

Sensitive Information Section 60 of the Equality Act 2010 prevents employers from asking applicants about their health before offering them work or including them in a pool of successful candidates to be offered work when it becomes available.

If a request for information relating to sickness absence, health or disability is received, you should not respond unless you have written evidence that employment has already been offered to the employee and you have the express consent of the employee before disclosing the information. This is because information relating to sickness absence, health or disability is sensitive personal data under the Data Protection Regulations. Once employment has been offered then an employer may be asked how many days absence from work an employee has had during the last year and it should be possible to provide this information without revealing any sensitive personal data. If, however, an employer is asked to provide information regarding the reasons for the employee's absence they should exercise caution and seek consent from the employee. You are advised to show the employee their reference and ask them to verify the accuracy of the record and consent to its disclosure in writing.

KCSIE refers to section 60 of The Equality Act 2010 under pre-appointment checks, which states:

Verify the candidate's mental and physical fitness to carry out their work responsibilities. (Footnote 68) A job applicant can be asked relevant questions about disability and health in order to establish whether they have the physical and mental capacity for the specific role;(footnote 69 70)' - Note this requirement is often satisfied by the Occupational Health Provider pre-employment questionnaire and any medical following this.

footnote 68 Education (Health Standards) (England) Regulations 2003 -see also fitness to teach circular.

footnote 69 Section 60 of the Equality Act 2010.

6.4. Teachers subject to capability proceedings

In accordance with the School Staffing (England) (Amendment) Regulations 2012 (as amended), all Maintained Schools must, at the request of a governing body or academy proprietor who is seeking a reference in respect of a teacher taking up a teaching post, advise in writing whether or not that employee has, in the preceding two years, been the subject of the School's capability procedures and, if so, provide written details of:

- **the concerns which gave rise to this**
- **the duration of the proceedings**
- **their outcome**

These provisions do not apply to Academies established before April 2013. However, funding agreements from April 2013 will include the requirement for Academies to also share this information. You should refer to your own funding agreement for confirmation.

6.5. A previous employer is under a legal obligation to provide information to a Job Seekers plus authorised officer by the deadline specified. Employers must not delay, obstruct, refuse or neglect to comply with a requirement to allow access to electronic records, references or to neglect to answer any question or to furnish any information or produce documentation when required to do so.

7. General Obligations

7.1. A Court of Appeal judgement made three statements of general principle which are a guide to good practice:

- **There is a duty on employers to ensure that references are true, accurate and fair in substance.**
- **There is no duty on employers to be 'full and comprehensive'. This is imposing too high a burden. However, employers must not give a misleading impression through omission.**
- **Employers cannot break references down into individual sentences and state that each individual sentence was factually correct. References must be looked at as a whole.**

8. Data Protection and Access to References

8.1. Employees have extensive rights of access to personal information held by their employer. Under the Data Protection Act 2018, Schedule 11 (11) confidential references given or received for the purposes of employment or potential employment of a data subject are exempt from the disclosure provisions provided under the right of access. The employer is not required to provide a copy of any confidential references given or received in relation to potential employment in response to this request.

8.2. Much of the information contained in a reference will already be known to the employee about whom it is given. For example, it may refer to factual information such as employment dates, jobs held and duties carried out. However, references also commonly provide information about an employee's performance, from the perspective of the person authorised to give the reference and this may not have been discussed with the employee previously. Often the reference is expressed to have been given "in confidence". Further information can be found at [What other exemptions are there? | ICO](#)

9. Dealing with Outstanding Disciplinary Matters (Non-Safeguarding) in a Reference

9.1 In some cases, it is difficult for a referee to balance its duties to both the recipient and the subject of a reference. This may be the case where there is information that the referee suspects the subject of the reference would prefer not to be disclosed, such as their disciplinary record, but which the referee believes the recipient would consider relevant.

In *Bartholomew v London Borough of Hackney* [1999] IRLR 246 the Court of Appeal held that an employer was not in breach of its duty of care to an employee when it provided a reference giving details of disciplinary proceedings which were pending against the employee when they left its employment. The court held that if the employer had not included details of the disciplinary proceedings, it would have failed in its duty to the prospective employer to provide a reference that was not unfair or misleading. The Court of Appeal reached a similar decision in *Jackson v Liverpool City Council* [2011] IRLR 1009 where a reference referred to issues with the former employee's performance that had never been investigated, since they had only been discovered after he had left. The Court held that the referee had not breached its duty to the employee as the reference was true, accurate and fair.

10. Oral References

10.1. The Headteacher may be asked to provide an oral reference for an employee (or former employee), applying for a post with a School or another outside organisation where:

- **An interview is being held at short notice and an urgent response is required: or**
- **Clarification/confirmation of a written reference is being sought.**

10.2. What is said about an employee orally (i.e. face-to face or over the telephone), has the same status as what is said about them in a written reference and should, therefore, be treated with the same care and attention to detail.

10.3. Ensure that any oral reference provided is honest, factual and does not include any information about areas of concern that have not previously been discussed with the employee. If an oral reference is given because an urgent response is required, the reference should be confirmed in writing and should accurately reflect the oral statement. Wherever possible, supply a pdf email attachment as an urgent response and follow-up with a hard copy. In providing an oral reference, information that is "off the record" should not be given. Everything said should be confirmed in the written response.

10.4. If you are seeking an oral reference on a job applicant then the above points apply in reverse. You should always ensure that written confirmation of the oral reference is received before the appointment is confirmed.

11.Closed/Open References

11.1. The organisation should determine whether it is providing “closed” or “open” references. Closed references are prepared in confidence and the employee is not aware of the contents. An “open” reference means that the employee is aware of the contents. An “open testimonial” is addressed “To Whom it May Concern” and it is extremely inadvisable to provide or accept such testimonials in respect of work relating to children. KCSIE states:

ensure any references are from the candidate’s current employer and have been completed by a senior person with appropriate authority (if the referee is school or college based, the reference should be confirmed by the headteacher/principal as accurate in respect of any disciplinary investigations)

12.Requesting a Reference on a Job Applicant

12.1. All of the above information on providing references is also relevant to the reverse situation where a reference is being requested for a prospective job applicant. Although the document ‘Safeguarding Children and Safer Recruitment in Education’ has been replaced by, ‘Keeping Children Safe in Education’ (KCSIE), it contained guidance on requesting a reference which should still be adhered to.

12.2. In summary the key points are:

- **Take references very seriously and use them as an integral part of the vetting of candidates.**
- **Obtain two written references from employment or education. One must be from the current or last employer. If this employment has only been for a short period of time you should seek a reference from the employer before that.**
- **One of the references should be from employment involving direct or indirect access to children. If this has not been provided but the candidate has previously worked in such employment then they should be informed that you intend to take up a reference from that employer.**
- **Employment references must be on headed paper and signed by a senior line manager.**
- **Referees should ideally have first-hand knowledge of a candidate’s work involving direct, or indirect, access to children.**
- **All requests for references should seek objective, verifiable information and not subjective opinion. EPM provides model reference requests templates which can be found in the “Guidance and Advice Section> Recruitment and Induction> Recruitment” section of the website.**
- **The referee should be asked whether they are completely satisfied that the candidate is suitable to work with children and, if not, for specific details of the referee’s concerns and the reasons why the referee believes the person might be unsuitable.**
- **Referees should be contacted by telephone to follow up information or clarify their validity. Where possible this should be done before the interview.**

- Referees should be asked to provide details of any disciplinary procedures, allegations or concerns which the applicant has been subject to involving issues related to the safety and welfare of children or young people, including those where the disciplinary sanction may have expired. Referees should be asked to provide details of the allegations investigated, the conclusion and how the matter was resolved. (NB Cases in which an allegation was proven to be unsubstantiated, unfounded or malicious should not be included in employer references).
- When the applicant has worked through an agency, references should be taken up with the last place of employment, not just with the agency.
- Do not accept referees who are personal friends or relations.

13.Offers of Employment

13.1. KCSIE guidance states that the references should be taken up for all shortlisted candidates prior to interview. If a candidate is interviewed for a vacant post and the employer wishes to make an offer of employment to that person immediately at the conclusion of the interview then the employer must ensure that they are in receipt of two satisfactory references. The EPM Model Offer Letter can be found in the "Guidance and Advice Section> Recruitment and Induction> Recruitment" section of the website.

13.2. If an offer of employment (whether oral or in writing) is not made conditional upon receipt of two satisfactory references then the offer cannot be withdrawn without breaching the contract if the employer subsequently receives an unsatisfactory reference. If the job offer (whether oral or in writing) states that the offer is conditional on receipt of satisfactory references then as long as the employment has not started there is no contractual relationship until the satisfactory reference is received.

13.3. Some employers will only provide the minimum of detail even when asked for more. There is little that can be done if this happens as there is no legal obligation to comply with a reference request. This makes it all the more important that the other areas of the recruitment process are robust.

14.Unsatisfactory References

14.1. Should there be concerns on receipt of references, this should be clarified with the referee and taken up with the candidate at interview (KCSIE). The job offer and/or contract of employment should state that the employer may terminate the employment if it receives references that are unsatisfactory to it.

14.2. It is for the employer to decide if a reference is "satisfactory". In *Wishart v National Association of Citizens' Advice Bureaux* [1990] IRLR 393, the Court of Appeal held that only the employer could judge whether a reference was satisfactory and the court appeared to be unwilling to interfere with an employer's decision on this point.

14.3. References received should be kept secure on the employee's personnel file and retained for the duration of their employment. Retention of references following the end of the employment contract should be in accordance with the organisations data retention policy.

Summary of Dos and Don'ts on the Provision of References

Do	Don't
Check that all the information given is factually correct or is based on best knowledge.	Include the employee's sickness absence record as this is discriminatory under the Equality Act 2010 unless the job is already offered.
Be prepared to provide evidence to support the information should any of the details be challenged.	Provide a "glowing" reference for an employee who is presenting cause for concern as a means of enabling them to leave the organisation. This may be considered to be dishonest and unethical. It is not good management practice and may give rise to legal action by the recipient or subject.
Include factual information relating to the employee's employment history.	Avoid giving an honest reference in respect of an employee who is presenting cause for concern. However, the matter to be referred to in the reference should have previously been discussed with the employee and evidence of the concerns provided.
Make sure that any comments about performance or absence are not related to a disability.	Expect information provided within a reference to be treated as confidential by a prospective employer.
Ensure that comments on suitability for a new job are given with care because they will be more difficult to justify objectively.	Provide "to whom it may concern" references.
Ensure that all references are marked "Strictly Private and Confidential".	Provide information about an employee/ex-employee by email or verbally on the basis of additional information which is not intended to be a reference. A High Court case found employers may be liable for negligent misstatements about ex-employees, even if those statements are not contained in a reference.

EPM Model Reference Forms, Invite & Offer Letters

- [EPM Model Reference Request Form Support](#)
- [EPM Model Reference Request Form Teacher](#)
- [EPM Model Invitation to Interview Letter and Checklist](#)
- [EPM Model Offer of Employment Letter](#)

These documents can be found on the EPM Customer Hub in the "Guidance and Advice Section> Recruitment and Induction> Recruitment" section.