

References: HR guide

Introduction

References can cause difficulties for employers. In this guide I set out some of the key issues to consider.

Seeking a reference

Generally, there is no legal obligation to request a **reference** for a prospective employee and businesses are free to employ someone without obtaining a **reference**. However, usually it is sensible to make a job offer conditional upon receipt of at least one satisfactory **reference**.

When an offer is conditional upon receiving a satisfactory **reference** and then a bad one is provided the employer could withdraw the offer even if the employee has started employment. If the offer was not conditional the employer would have to provide adequate notice.

If a candidate is carrying out certain functions for an organisation authorised by the Financial Conduct Authority ([FCA](#)) or Prudential Regulation Authority ([PRA](#)), the firm will be required to obtain **references** from previous employers. The information sought will depend on the type of role (see below).

Providing a reference

Generally, employers do not have a legal obligation to provide a **reference**. However, there are some exceptions.

Organisations must ensure that if no **reference** is provided they are not [discriminating](#) against a person because of protected characteristics (such as race, age, sex or disability). Any **reference** policy should be applied consistently. Also, if a person has made allegations of discrimination, brought discrimination proceedings or given evidence or other information they must not be victimised as a result.

In the case of FCA authorised firms recruiting people carrying out “controlled functions”, there is a

general duty on employers to provide relevant information to ensure that the person is fit and proper for the role.

In the case of FCA/PRA authorised firms recruiting persons in senior management positions and “significant harm” functions under the [certification regimes](#), there are more onerous obligations relating to requests and the provision of information. [These requirements came into effect on 7 March 2017.](#)

An employer may be under an obligation to provide an agreed **reference** as part of a [settlement agreement](#).

General duty when providing a reference

In many sectors it has become increasingly common to provide only basic factual **references**. The **reference** would include dates of employment and job title.

In terms of duty to the ex-employee, if a reference is given it must be true, accurate and fair and must not give a misleading impression. The ex-employee must also not be discriminated against.

In terms of duty to the recipient, if a **reference** is given it must not be misleading.

References and data protection

[The first data protection principle of the GDPR states that personal data must be processed lawfully, fairly and in a transparent manner. Data will only be processed lawfully if at least one of certain conditions is satisfied, one of the conditions being that the data subject has given consent to the processing of their personal data for one or more specific purposes. Consent needs to be freely given, specific and informed.](#)

The Information Commissioner's Office (ICO) has provided guidance stating that given the unequal bargaining power between the employer and the employee, employers will find it difficult to rely on consent. Although consent may suffice and should be obtained before providing a **reference**, businesses may also have to identify another legitimate basis for processing data, such as the processing being necessary for the purposes of the the legitimate interests of a third party.

Employers need to be aware of all the GDPR data protection principles and their obligations.

This guide is intended for guidance only and should not be relied upon for specific advice.

If you need any advice on **references** or have queries relating to other employment law issues please do not hesitate to [contact](#) me on [020 3797 1264](tel:02037971264).

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