

Study: Employers, workers may benefit from employee reference pool

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With employers increasingly reluctant to supply references for former employees in order to avoid legal liability, the creation of a centralized reference pool for workers may make labor markets in the U.S. more efficient, a University of Illinois expert in labor and employment law says.

Law professor Matthew W. Finkin says that not only do employees face challenges when securing references from past employers, but employers also expose themselves to lawsuits when they provide a reference.

"Employees benefit from references, but there's nothing in it for employers, especially since they're exposed to potential liability," Finkin said. "There are laws that protect the dignitary interest of workers – specifically, defamation and invasion of privacy. So the question becomes, 'Why would any employer bother giving a reference in the first place?' "

Not only do a growing number of employers not give an ex-employee a reference, Finkin said companies also prohibit employees who might know the former co-worker from giving a reference.

"The reason companies do that is that they don't want to be held liable for what the current employee may say," he said. "We have created an informational asymmetry, one that's a problem for workers."

What the U.S. needs, according to Finkin, is a reference pool for

workers that's a legal safe harbor for employees but also allows workers access to the reference as well as recourse to challenge it through a neutral third party.

"In essence, we need to create a system that encourages the flow of accurate information with low transaction costs, where the parties are held harmless," he said.

According to Finkin, who studies comparative and international law at Illinois, a similar system exists in Germany, where employee references are legally mandated.

Finkin is quick to note that the German system, in which an employee is entitled to a written reference whether the employee quits or is fired, has generated a complex body of law, making such a system both logistically as well as politically impossible to transplant to the U.S.

"Although the German system is a tradition that goes back over a hundred years, there's no good reason why we shouldn't at least look to European law to show us there are alternate solutions to dealing with this problem," he said.

Although he doesn't recommend a wholesale adoption of a mandatory reference pool, Finkin says that adapting the German system to the business culture of the U.S. would enable a freer flow of accurate information in the labor market, thereby allowing companies to make more informed decisions about potential hires.

"As a country, we don't like mandates, so it would have to be a voluntary system," Finkin said. "It's also more government regulation, and in the U.S., we're living in a political environment where more regulation, even though it can make markets more efficient, isn't really appreciated."

The reference pool would be created at the state-level, and would be a voluntary system "so that if I put my references into the pool, I can draw references out," Finkin said.

"That would not only create a more efficient system for transmitting accurate information about candidates, it would also encourage the sharing of information while also insulating employers from liability, so long as the employee has the chance to determine that the reference is accurate and fair."

Although there's inherent risk in creating such a system – for example, employers dangling the promise of a reference in return for money – the reference pool would also provide recourse for employees to challenge the reference, including a hearing with an arbitrator to decide whether the reference is accurate and fair.

"This gives the employee an opportunity to clear their name," he said. "Labor arbitrators very commonly get cases involving entries into personnel files, so it should be a fast and inexpensive system."

While a number of states have crafted legislation to encourage employers to be more forthcoming about employee references, it's still far short of a mandate to provide references.

"What the states have done is essentially codify the existing law, and it's the existing law that creates the problem," Finkin said.

If businesses are hesitant to give references, then human resources departments are more likely to run background and credit checks on potential hires. Not only is the sleuthing into the private lives of workers more expensive for employers, and not to mention more invasive for workers, background and credit checks also suffer from inaccuracies that would expose employers to more potential legal liability, Finkin

said.

"There are now four states – Illinois is one of them – that limit the use of credit checks as a screen for [employment](#)," he said. "For workers, it's a Catch-22: They get into debt because their houses are underwater, and then when try to get a job they can't because they have bad credit. There has to be a relationship between the job and the credit reference."

Finkin says the conspicuous lack of an efficient, transparent system for employee references is slowing down the churn of the labor market – in other words, if workers can't secure references, they can't get a new job.

"The bigger the labor pool, the pickier employers can afford to be," he said. "When the labor market was flush in the '90s, the amount of drug testing declined radically.

"Employers didn't want to know what was in your body; they just wanted to get warm bodies into jobs. That trend has reversed in this economy, and employers can afford to be much more selective."

More information: The research was published in the *American Journal of Comparative Law*.

Provided by University of Illinois at Urbana-Champaign

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