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## **Reference Guidance**

**December 2016 – December 2019**



## 1. Purpose

This Guidance Document provides updated guidance on providing a reference for an employee, or former employee, and requesting a reference for a potential new employee.

## 2. Overview:

Is There an Obligation to Provide a Reference?

Personal References, Employer References

Liability for the Content of References

Statutory Obligations in Respect of Content

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General Obligations

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Do's and Don'ts on the Provision of References

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Requesting a Reference on a Job Applicant

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Unsatisfactory References

## 3. Is There an Obligation to Provide a Reference?

3.1 Under English Law there is no legal obligation for an employer to provide a reference for either an existing or a former employee. However, it is custom and practice that schools and academies provide references for staff. As such a refusal to provide a reference may give rise to the following issues:

**Discrimination**, a failure to provide a reference because 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 or information in connection with such proceedings, made an allegation of unlawful discrimination or done anything else under or by reference to the discrimination legislation.



3.2 It is therefore advised that Governing Bodies and Academy Trusts 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.

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

#### **4. Personal References, Employer References**

4.1 There is a risk that a reference provided 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 Governing Body or Academy Trust. Any reference provided using the referee's job title or on the employer's headed note paper is likely to be seen as an employer's reference.

4.2 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.

4.3 As such, all staff should be clear as to whether they are or are not permitted to provide references on behalf of the Governing Body or Academy Trust, 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.

4.4 In no other circumstance should the referee's job title or school/academy headed paper be used without the explicit consent of the Governing Body or Academy Trust. All references provided by staff without delegated responsibility should also make it clear that the reference is given in a personal capacity and not on behalf of the school or academy.

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



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. So if, on receipt of an inaccurate reference, a job offer is withdrawn then the employer will be liable if this is the reason for the withdrawal of the offer.

5.3 Employers should be aware that where a reference has been agreed as part of a settlement agreement then it needs to ensure that when approached by a prospective employer this reference is provided and the terms of the settlement (previously known as 'compromise') agreement - as related to the provision of a reference – is 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 must not be dishonest or negligent, there is some information that must/must not be provided even when it is requested.

### 6.2 Allegations Relating to Safeguarding

The Keeping Children Safe in Education (KCSIE) September 2016, Part 4 'Allegations of abuse made against teachers and other staff' provides statutory guidance applicable to **all schools and academies**. It draws an important distinction between allegations relevant for internal record keeping and allegations relevant for references.

Paragraphs 108-111 covers employment history and references as follows:

*108. Employers should always ask for written information about previous employment history and check that information is not contradictory or incomplete. References should be sought on all short-listed candidates, including internal ones, before interview, so that any issues of concern they raise can be explored further with the referee, and taken up with the candidate at interview.*



*109. The purpose of seeking references is to obtain objective and factual information to support appointment decisions. References should always be obtained, scrutinised and any concerns resolved satisfactorily, before the appointment is confirmed. They should always be requested directly from the referee and employers should not rely on open references, for example in the form of 'to whom it may concern' testimonials. If a candidate for a teaching post is not currently employed as a teacher, it is also advisable to check with the school, college or local authority at which they were most recently employed, to confirm details of their employment and their reasons for leaving.*

*110. On receipt, references should be checked to ensure that all specific questions have been answered satisfactorily. The referee should be contacted to provide further clarification as appropriate: for example if the answers are vague. They should also be compared for consistency with the information provided by the candidate on their application form. Any discrepancies should be taken up with the candidate.*

*111. Any information about past disciplinary action or allegations should be considered carefully when assessing the applicant's suitability for the post (including information obtained from the Employer Access Online checks referred to previously).*

KCSIE refers to references sometimes agreed as part of settlement agreements used in some circumstances on termination of employment. It makes it clear that in some circumstances settlement agreements must not be used and references must not be agreed. Paragraph 31 states:

*170. '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 in cases of refusal to cooperate or resignation before the person's notice period expires. Such an agreement will not prevent a thorough police investigation where that is appropriate.*

Schools are not able to agree a reference with a member of staff as part of a settlement agreement which fails to disclose safeguarding allegations unless such allegation/s was/were proven to be unsubstantiated, unfounded or malicious.'

### 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 the work has already been offered to the member of staff and you have the express consent of the employee before disclosing the information since information relating to sickness absence, health or disability is



sensitive personal data under the Data Protection Act 1998. Once employment has been offered then an employer is often 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 it should exercise caution and seek consent from the employee. You are advised to show the employee the reference for the employee and ask him/her to verify the accuracy of the record and consent to its disclosure.

KCSIE refers to section 60 of The Equality Act 2010 under pre-appointment checks (paragraph 102). It states:

*When appointing new staff, schools and colleges must:*

*verify the candidate's mental and physical fitness to carry out their work responsibilities (footnote 41). 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 42)*

*[footnote 41 Education (Health Standards) (England) Regulations 2003 see also fitness to teach circular.  
Footnote 42 Section 60 of the Equality Act 2010.]*

The medical clearance requirement is often satisfied by the Occupational Health Provider pre-employment questionnaire and any medical following this.

#### 6.4 Teachers Subject to Capability Proceedings

With effect from **1st September 2012**, 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:

1. advise in writing whether or not that member of staff has, in the preceding two years, been the subject of the school's capability procedures, and if so:
2. provide written details of:

the concerns which gave rise to this  
the duration of the proceedings  
the outcome

6.5 A previous employer is under a legal obligation to provide information to a Job Seekers Plus Authorised Officer by the deadline specified. It is a criminal offence to delay, obstruct, refuse or neglect to comply with a requirement to allow access to electronic records or references or to neglect to answer any question or to furnish any information or produce documentation when required to do so. The maximum penalty is currently £1000 with a continuing penalty of £140 per day.



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## 7. General Obligations

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 section 8 of the DPA 1998, and this could include references received from former employers or other referees, provided they amount to "personal data".

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, duties carried out, number of days absent. 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". The Information Commissioner has published [\*Data Protection Good Practice note: Subject access and employment references\*](#) which provides guidance on the application of the DPA 1998 to references and in particular the circumstances in which they can be disclosed to the employees they concern.

The Information Commissioner suggests that where it is unclear whether information contained in a reference is either known to the individual or confidential, the employer should contact the referee and enquire as to whether they object to the reference being provided to the employee. Even if a referee says that they do not want their comments disclosed an employer may be obliged to provide the reference if it is reasonable in all the circumstances to comply with the employee's request without the referee's consent. The employer must weigh the referee's interest in having their comments treated confidentially against the individual's interest in seeing what has been said about them. When considering whether it is reasonable in all the circumstances to comply with a request, the Information Commissioner recommends taking the following factors into account:

Any express assurance of confidentiality given to the referee.

Any relevant reasons the referee gives for withholding consent.

The potential or actual effect of the reference on the individual (for example, have they been prevented from taking up a provisional job offer).

The fact that a reference must be truthful and accurate and that without access to it the individual is not in a position to challenge its accuracy.



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That good employment practice suggests that an employee should have already been advised of any weaknesses.

Any risk to the referee (for example a realistic threat of violence or intimidation by the individual towards the referee).

The employer should consider whether it is possible to conceal the identity of the referee, although often an individual will have a good idea who has written the reference. If it is not reasonable in all of the circumstances to provide the information without the referee's consent, the employer should consider whether they can respond helpfully anyway (for example, by providing a summary of the content of the reference).

8.3 The DPA 1998 does not permit access to a reference provided by a current employer because of a specific exemption under paragraph 1 of Schedule 7 of the DPA 1998.

Employees can apply to the receiving organisation for a copy of that reference, but the receiving organisation is entitled to take steps to protect the identity of any individuals referred to in the reference, including the author of the reference, for example by redacting their names.

### **8.4 Dealing with Outstanding Disciplinary Matters (Non Safeguarding) in a Reference**

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 particularly 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.



DO check that all the information given is factually correct or is based on best knowledge - be prepared to provide evidence to support the information should any of the details be challenged.

DO include factual information relating to the individual's employment history.

DO make sure that any comments about performance or absence are not related to a disability.

DO ensure that comments on suitability for a new job are given with care because they will be more difficult to justify objectively.

DO ensure that all references are marked "Strictly Private and Confidential".

DO NOT include the employee's sickness absence record since this will be discriminatory under the Equality Act 2010 unless the job is already offered.

DO NOT provide a "glowing" reference for an employee who is presenting cause for concern as a means of enabling him/her to leave the school. This is both dishonest and unethical. It is not good management practice and may give rise to legal action by the recipient or subject.

DO NOT 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 individual and evidence of the concerns provided.

DO NOT expect information provided within a reference to be treated as confidential by a prospective employer.

DO NOT provide "to whom it may concern" references.

DO NOT 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.

## 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 an outside organisation where:

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

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 him/her 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 pdf email attachment as an urgent response and



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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

The Governing Body or Trust should decide whether it is providing “closed” or “open” references. Closed references are prepared in confidence and the employee is not aware of the contents. However, as indicated above, the employee may ask the recipient (prospective employer) for a copy of the reference. 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 at paragraph 109:

*[references] should always be requested directly from the referee and employers should not rely on open references, for example in the form of ‘to whom it may concern’ testimonials.’*

### 12. Requesting a Reference on a Job Applicant

12.1 All of the above information on providing reference is of course 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 KCSIE July 2015, it contained guidance on requesting a reference which should still be adhered to. See [Chapter 4 - Recruitment & Vetting Checks](#). 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 she/he 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. An EPM reference proforma\* can help achieve that;



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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 safety and welfare of children or young people, including any 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. Conditional Offers of Employment Subject to Two Satisfactory References**

13.1 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 it is at this time that, in order to be contractually binding, the employer must state that the offer of employment is conditional upon the receipt of two satisfactory references, that is, two references that are satisfactory to the employer. (Please see the EPM Model Offer Letter\*)

13.2 If an offer of employment (whether oral or in writing) is not made conditional upon receipt of a satisfactory reference 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 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.



14.1 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. If it does not state this, the employment commences and following this unsatisfactory references are received, the employer will have to give notice to terminate the contract and will be liable for the notice monies due under the contract. For teachers this is likely to be a term's salary. The employee may also claim that such decision was discriminatory and this may give rise to a claim depending on the circumstances and unsatisfactory reference terms. It is extremely inadvisable to allow employment to commence in school prior to receipt of satisfactory references.

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. However to avoid any uncertainty, a prospective employer should make the offer "subject to the receipt of references satisfactory to us".

14.3 References received should be kept secure on the employee's personnel file and retained in accordance with statutory requirements. There are no specific document retention periods provided in the Data Protection Act 1998, so it is for the employer to set its own time limits for the holding and deletion of employee records within the constraints of any other specific legislative and best practice requirements. See section K of the EPM website for further information on document retention (Appendix 1 of the Policy on personal information).

## **15. EPM Model Reference Forms, Invite & Offer Letters**

*EPM Model Reference Request Form Support November 2015*

*EPM Model Reference Request Form Teacher November 2015*

These documents, including model invite and offer letters, can be found in the Appointments area of the Documents section on [www.epm.co.uk](http://www.epm.co.uk).