References for Ex-employees Are Still Risky In Spite of New Law

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Practice Area: Labor and Employment

Wisconsin employers who provide references at the request of a former employee or a prospective employer theoretically now enjoy enhanced protection against civil liability. Because of the persisting risk of litigation, however, former employers should think twice before providing any extraneous information to prospective employers.

The new statute, which applies to all references granted after July 8, 1996, states that an employer providing a statement about the job performance or qualifications of an employee is automatically presumed to have acted in good faith and is immune from civil liability except in limited circumstances.

Previously, Wisconsin employers faced at least two significant risks in granting a request for references. First, the former employer faced the risk of a defamation claim by the former employee if the reference was negative.

Second, the employer risked a negligent referral claim by the prospective employer if it was aware that the employee could cause harm and yet gave a positive or incomplete reference.

Although no court has yet decided a case under the new law, the statute theoretically reduces both types of liability.

First, the statute most obviously attempts to address the risks of defamation. The new law provides additional protection because the former employee must demonstrate, prior to proceeding with a claim, that the employer knowingly gave false information or that it maliciously gave the information.

Furthermore, the former employee must prove the employer's knowledge of falsity or malice by "clear and convincing" evidence. This standard requires more proof than the "more likely than not" standard commonly used in civil cases.

Second, the new statute appears to reduce the risk of a negligent referral claim, providing that the employer is immune from all civil liability for a reference unless lack of good faith is shown.

Despite these added protections, employers should still take care in providing references. Because the statute does not provide absolute protection, the former employer is still subject to the costs of defending negligible claims for defamation, negligent referral, or discrimination. The statute also raises unanswered questions such as what constitutes information regarding job performance or qualifications.

At the very least, a former employer should avoid making a positive or negative statement about an employer if there is any reason to believe that the statement might be false.

The safest approach is still for the employer to establish a uniform policy whereby a designated representative of the company is authorized to provide only the former employee's dates of employment, position, and pay rate at the time of separation.

Workers' Comp Covers Some Sexual Harassment Injuries

The Wisconsin Court of Appeals recently held that a claim for emotional injuries due to sexual harassment may be brought under the Workers' Compensation Act, thereby precluding action under other Wisconsin laws.

The WCA provides the exclusive remedy for certain mental or physical injuries sustained on the job by employees, guaranteed even if the employer does not act negligently or wrongfully. The employer's liability then is generally limited to the cost of treatment for the injury and lost wages.

In a prior case, the court had held that an employee's injuries must be "accidental" in order to be covered by the WCA. Therefore, the intentional acts of sexual harassment by the owner of a restaurant, which caused a waitress emotional injuries, were not covered by the WCA. The waitress was allowed to proceed with her tort action against the employer and request punitive damages.

In the recent decision, *Byers v. LIRC*, the plaintiff employee had been repeatedly harassed at work by a co-worker, rather than the owner. When she complained, the employer repeatedly spoke with the harassing co-worker but was unable to stop the harassment.

The plaintiff brought a sexual harassment action under the Wisconsin Fair Employment Act. The court, however, found that although the harassment was intentional, the emotional injuries sustained by the employee as a result of the harassment were not intended by the employer and were, therefore, covered by the WCA, barring action under the WFEA.

The court cautioned employers about an additional set of distinguishing circumstances. If sexual harassment does not result in physical or mental injuries that are compensable under the WCA, then action under the WFEA or other Wisconsin laws would still be allowed.
