



MODRALL SPERLING

LAWYERS



Employment Law Alert

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Employment Law at Modrall Sperring

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperring has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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An Employer's Dilemma in Providing a Recommendation for a Former Employee

As all employers can attest, it can be difficult to determine what information to provide in a verbal or written recommendation for departing employees. Indeed, some managers find themselves dreading a phone call from a prospective employer of a former employee. That sense of dread is driven by concerns about liability for saying something less than flattering about the former employee that will dash the prospects of employment on one hand, and saying something that is overly generous and misrepresents the talents or abilities of the former employee on the other. The purpose of this article is to give employers some guidance on how to avoid awkward and potentially actionable discussions with prospective employers of former employee.

The safest approach is to adopt a policy that restricts company representatives to simply providing dates of employment, job title and rates of pay (the so-called "neutral reference"). The beauty and the problem with a neutral reference are the same: it offers exactly no useful information concerning the former employee's abilities and talents. A prospective employer cannot ascertain whether the employee is flawed in some material respect and may interpret the neutral reference as a nod to the age-old advice that one who lacks nice things to say should refrain from saying anything at all. To make matters worse, if the former employee departed under circumstances giving rise to a potential employment dispute, a neutral reference may harm the former employer's interests by hindering the former employee's efforts to secure new employment, thereby potentially increasing the likelihood of damages in the employment dispute.

As human beings, we are frequently tempted to offer positive recommendations to former employees. Sometimes we genuinely like the former employee and we want to assist the him or her in

obtaining a new position, and sometimes we simply want to be rid of a former employee and to minimize the drama associated with his or her departure. However, it is important to recognize that there are risks associated with giving a glowing recommendation to a former employee, particularly if the former employee's performance was lacking in some respect. Consider a situation where the former employee quits in the wake of a series of negative performance evaluations or reprimands. If the former employer offers an effusive (or even marginally positive) recommendation to a future employer, the former employer may inadvertently bolster a future claim of discrimination or retaliation by an employee who capitalizes on the discrepancy between the negative content of the pre-separation reviews and the positive content of the recommendation.

There are also obvious risks associated with providing a prospective employer with negative information. Although many states, including New Mexico, provide statutory immunity to former employers who have offered accurate information about a former employee, there is plenty of room for disagreement between the former employer and a disgruntled employee about the accuracy of the information provided. That said, there may be situations where the former employer feels morally obligated to warn a future employer regarding serious safety concerns or criminal behavior of a former employee.

So what is a risk-adverse employer to do? Development of a clear policy concerning how the company plans to respond to requests for information about former employees is a crucial first step. The policy should specify that the employer generally will offer neutral statements concerning a former employee, except under

carefully described circumstances that warrant the disclosure of negative information (i.e., concerns about violence or sexual impropriety in the workplace). The policy should also designate the persons who are authorized to provide references on behalf of the company. Second, supporting the company's policy with periodic training for those individuals who have been designated to provide reference information on behalf of the company is a good practice. Training will help the designated individuals to confidently and consistently respond to inquiries from prospective employers and will assist the designated individuals in keeping the company's

policy on references in the forefront of their minds. Finally, providing all employees with a copy of the reference policy and seeking a signed authorization granting permission to share information with prospective employers is helpful in insulating the company against claims arising from circumstances where the company feels compelled to share negative information about a former employee.

For more information on this topic, please contact [Jennifer Anderson](mailto:jennifer.anderson@modrall.com) at jennifer.anderson@modrall.com or by calling 505-848-1800.

Social Media and the New Workplace: Is Your Brand and Reputation Protected?

Employers may be surprised to learn what their employees are posting about management, clients, or the company in general. Take an hour to learn more about what you can do to protect and preserve your company's online reputation.

We invite you to participate in an informative webinar on the topic. Due to Modrall Sperling's membership in Employment Law Alliance, a global employment law network, you may participate in a webinar, "*Social Media and the New Workplace: Is Your Brand and Reputation Protected?*" The webinar will be held Wednesday March 8 from 11:00 a.m. – noon MST and is free of charge to our readers.

During this webinar, experienced legal counsel will provide practical insight on how companies can prepare for and respond to these challenges.

Who Should Attend

The information presented will be of particular interest to:

- In-house Counsel
- Human Resources Professionals
- Corporate Executives and Business Owners

To register, please click [here](#).

Feel free to share this invitation with as many of your colleagues as you want and encourage them to register as well. A copy of the presentation slides and speaker biographical sketches will be sent to you in advance of the webinar by ELA. During the webinar, you can view the power point slides via your computer and may listen to the presentation either via your computer speakers or telephone.

If you have any questions about this webinar, please contact Mary Anne Creighton, ELA Member Relations at: mcreighton@employmentlawalliance.com.

Modrall Sperling's Recent Success for New Mexico Employer

Modrall employment attorneys [Jennifer Anderson](#) and [Elizabeth Martinez](#) recently obtained successful rulings on motions to dismiss directed at a client's former employee's claims associated with a workplace accident that resulted in the death of his co-worker. The former employee alleged a number of negligence claims, including a claim for negligent infliction of emotional distress.

The Court held that the former employee's negligence claims were barred by the exclusivity provisions of the Workers' Compensation Act, and that a co-worker cannot pursue a claim for negligent infliction of emotional distress arising out of an employment relationship.

Attorney Earns Two Statewide Appointments

[Megan Muirhead](#), Co-Chair of Modrall Sperling's employment practice group, has been elected to the Board of Directors of the Employment and Labor Law Section for the State Bar of New Mexico for 2017. During the most recent legislative session, Ms. Muirhead was also unanimously confirmed by the New Mexico Senate as a member of the New Mexico State Personnel Board, having been previously appointed by Governor Susana Martinez.