

## What Can a Former Employer Say During a Background Check?

As an employer you need to know what you legally can and can't say about past employees when people are calling for an authorized employment screening background check.

This is an area where you can't afford to make a mistake or worse yet, let opinions get in the way. Company policies are usually made in accordance with the particular state's labor laws. For more information on your state's laws you can contact the Department of Labor.

As a general rule, the human resources department typically handles all employment verification calls, or if you are a small company, someone who is appointed and properly trained. It's acceptable practice to give standard answers for all verifications including information such as the exact dates a person was employed, what their title was and in some cases their final salary.

California law prohibits employers from intentionally interfering with former employees' attempts to find jobs by giving out false or misleading references. (California Labor Code §1050)

Under California law and the laws of many other states, employees have a right to review their own personnel files and make copies of documents they have signed. If you are a state or federal employee, your personnel file is protected under the California Information Practices Act or the federal Privacy Act of 1974 and can only be disclosed under limited circumstances. (California Civil Code §56.20; California Labor Code §§432, 1198.5; 5 USC §552a)

Jobs such as truck driver positions fall under regulations of the federal Department of Transportation. Employers are required to accurately respond to an inquiry from a prospective employer about whether you took a drug test, refused a drug test, or tested positive in a drug test with the former or current employer. (49 CFR §40.25, 49 CFR §382.413.  
[www.fmcsa.dot.gov/rulesregs/fmcsrhome.htm](http://www.fmcsa.dot.gov/rulesregs/fmcsrhome.htm)

Here are a few general rules of thumb to stick to:

- Don't say anything at all unless you have a signed release from the former employee. Most employers include legal jargon in their job application that includes releasing authorization to the employer to run a background check and to provide references and give any and all information concerning previous employment. Be sure to ask for a faxed copy of this signed release before you tell them anything.
- Only provide the facts. If for example you have a written result of a drug test that shows an employer was found positive, you can say, "That employee was fired for a positive drug or alcohol test." If it's your opinion only, keep it to yourself.

- Use only one person in the company to speak for the company. Never let every supervisor give out references. Use your central HR person and even if the call comes in to the immediate supervisor, forward the request to Human Resources. Then train your HR people to ask for the appropriate written releases and how to disseminate the important facts only. If you handle references this way, you will have a much less chance of discrimination or slander lawsuits being filed against your company.

- There is no legal duty to respond to reference requests particularly on the issue of eligibility for rehire. If you say nothing, you won't be liable for any potential defamation, so just create a strict rule of never answering this question and write it into your policy procedures.

Go online and search these words for further information on how to handle referencing: Risky Business: A Guide to Providing References.