



# Reference Checking in the U.S.: Stay Compliant, Hire Safely



**This guide explains the key concepts U.S. recruiters must understand: defamation vs. qualified privilege, negligent hiring, negligent referral, and the anti-discrimination rules enforced by the EEOC. It also outlines how to conduct reference checks in a compliant, fair, and consistent way.**

Hiring in the United States comes with unique legal risks, and reference checking is right at the center. Many employers fear defamation claims and respond by sharing as little as possible. But staying silent creates its own dangers, including costly negligent hiring lawsuits.

By focusing on job related behaviors and using standardized scoring, best practices supported by research, employers can protect themselves, reduce bias, and make safer hiring decisions.

## **The Fear of Defamation vs. Qualified Privilege**

The fear of defamation suits has led some employers to strictly limit the information they provide about former employees.<sup>1</sup> Legally, defamation is defined as a statement that injures a person's reputation.<sup>2</sup>

Because of this risk, many U.S. employers have adopted policies where they only provide a past employee's job title and dates of employment.<sup>1</sup>

However, research suggests this fear may be unjustified. Most U.S. states protect employers through a legal concept called qualified privilege.<sup>3</sup>

This means employers are generally protected against defamation suits if the information provided is:

- True, and
- Given without malicious intent.<sup>4</sup>

## **The High Cost of Silence: Negligent Hiring**

While employers worry about defamation, limiting information creates a new set of risks. Not providing meaningful information—or failing to ask for references—puts employers in a “no-win” situation where they can be sued either way.<sup>5</sup>

**Negligent Referral:** If an employer intentionally or negligently omits information about a past employee’s unfavorable characteristics, they may be guilty of negligent referral.

**Negligent Hiring:** If an employer fails to conduct a proper reference check and the new employee causes harm to others, the employer may be guilty of negligent hiring.<sup>5 6</sup>

The financial impact of inaction is substantial. Estimates suggest that the average verdict in a negligent hiring suit is \$2 million.<sup>6 7</sup>

## **Navigating Discrimination Laws (EEOC)**

The Equal Employment Opportunity Commission (EEOC) enforces laws that make discrimination illegal in the workplace.<sup>8</sup> According to the EEOC, it is illegal to give a negative reference—or refuse to provide one—based on a person’s:

- Race, color, or religion
- Sex (including gender identity, sexual orientation, and pregnancy)
- National origin
- Age (40 or older)
- Disability or genetic information

It is also illegal to base hiring decisions on stereotypes related to these factors.<sup>8</sup> To reduce these risks, the Uniform Guidelines for Employee Selection Procedures provide specific instructions.<sup>9</sup>

## ✓ How to Ensure Compliance

According to the Uniform Guidelines and academic research, there are two primary ways to mitigate discrimination and bias in your reference checks.

### 1. Measure Work-Related Behaviors

To minimize the risk of discrimination, the Uniform Guidelines recommend measuring work-related behaviors that are directly relevant to the job.<sup>9</sup>

By conducting a job analysis and asking behavioral-based questions, employers avoid gathering irrelevant personal information that could lead to discrimination claims.

Our Approach: Following these recommendations, the Refapp Insights questionnaires are based on job analyses and contain behavioral-based questions supported by scientific research.

### 2. Use Standardized Scoring

The Uniform Guidelines also recommend using standardized scoring for candidates.<sup>9</sup> Standardized scales minimize the risk that biased or subjective information will influence evaluations.

Research shows the danger of unstructured feedback. When references provide free-text evaluations, they tend to describe female candidates less favorably than male candidates.<sup>10 11</sup> . However, when structured numerical scales are used, candidate gender does not appear to influence reference ratings.<sup>12</sup>

Our Approach: To minimize bias and ensure fair, compliant hiring, the science-based questions in Refapp are answered using standardized numerical scales.

**We hope this article supports you in running compliant, secure, and high-quality reference checks! Curious about how Refapp can support your hiring process? Reach out anytime.**

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