

## LEGAL Q&A | REFERENCE LETTERS

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Employers in Germany should not underestimate the meaning of reference letters – the German *Arbeitszeugnis*. German employment law and employment practice provide employers with clear guidelines as to when and how they must issue a reference letter. Every employee in Germany is entitled to a reference letter according to Section 109 German Industrial Code (*Gewerbeordnung – GewO*) in line with German law requirements. An entitlement for a reference also arises for managing directors and trainees. Employers need to know the specifics on how to write reference letters and – equally important – how to analyze reference letters of candidates in the hiring process

### 1. What kind of reference letters can an employee ask for?

There are different kinds of reference letters an employee may request. While a so-called simple reference letter (*einfaches Arbeitszeugnis*) merely indicates the nature and duration of the employment relationship, a so-called qualified reference letter (*qualifiziertes Arbeitszeugnis*) is more detailed and evaluates the employee's conduct and performance during the employment relationship. The employee has the right to choose and in practice will regularly expect and demand a qualified reference letter. An employee may also ask for a so-called interim reference letter (*Zwischenzeugnis*) which from its form and content is very similar to the qualified reference letter. The only difference is that an interim reference letter is not issued upon termination of employment, but when the employee has a legitimate interest in it. A legitimate interest regularly exists when the employee changes his/her role or when notice has been given but the notice period has not yet expired, and the employee needs to apply for another job in the meantime. The requirements for the legitimate interest must not be set too high. Even the intention to look around the job market may justify the need for an interim reference letter.

### 2. What formal requirements have to be observed?

The reference letter must be issued on paper with a wet ink signature and should carry the date of the last day of employment. Digital forms such as DocuSign, PDF file or e-mail can be rejected by the employee. Depending on the company structure and employee's position, the reference letter should be signed by the company's representative, *i.e.*, the managing director, or by the employee's line manager. It should be issued on the company's letterhead and the outer form as well as the content should be proper and faultless. The employee can even request that the reference letter is free of errors and typos. Due to the importance a reference letter has for job applications in Germany, employees may not only dispute the content of a reference but also the outer form of the letter, such as quality and condition of the paper used, grammar and style as well as the language or whether it has been signed with a wet ink signature. An improper outer form may create a negative impression to the reader which may lead to the conclusion that the form of the letter shall reflect a rather negative experience with the employee.

### 3. What level of detail is required regarding the description of tasks and duties?

An employer does not have to specifically grade each single aspect of the employee's employment in a reference letter. The objective is to provide an overall picture of the employee's performance. Therefore, it may not only relate to specific periods of time during employment but needs to reflect the whole period of employment. If the employee's role and tasks changed during employment, this needs to be addressed, in particular where no interim reference was issued. The qualified reference letter should set out the employee's personal details correctly such as his/her qualification and/or university degree, the duration of the employment (including start and end dates), the position and role description and most importantly, it should address the employee's performance and behavior throughout the employment relationship. As the employee's manager or direct supervisor regularly has the best insight, he/she should add specificities or characteristics as individually appropriate.

#### 4. What is the scope of our obligations to provide a good reference?

The reference letter has the purpose to facilitate the employee's professional career. Therefore, labor courts have held that reference letters must be benevolent but also truthful and shall not hinder the employee's further professional advancement without good cause. In practice, unless there really was an issue with the employee's performance or behavior, in most cases employers will rather issue a good reference. Sometimes an employee will ask for the reasons for his/her departure to be included in the reference letter – in particular to include a phrase that the exit occurred on the employee's own decision. Despite all, employers are held to give correct information which is why such phrases should only be included if they match the reality. Quite often, employees will demand closing words which include thanking the employee for his/her contribution and constructive cooperation and wishing him/her well for the future. Such closing words have a positive indication for the reader, but employers are not legally obliged to use such wording if they do not feel that it would be appropriate.

#### 5. How can employers reflect the employee's performance in a reference letter?

Since the qualified reference letter must contain a performance and behavior evaluation, a certain standard "code language" has been established among German employers which should be known not only by the drafters of reference letters but also when reading references of candidates. There are several possibilities to reflect performance and behavior aspects without directly stating that the performance was poor or the behavior was not faultless – which is why employers should always take a closer look into the references of candidates. The codes are related to specific "grades". These grades generally are, in descending order: "very good", "good", "satisfactory", "non-satisfactory". For example, the phrase "constant efforts to meet the requirements" is regularly used as a code for insufficient performance. The phrase "he/she fulfilled any task to our fullest satisfaction" reflects a very good performance while "full satisfaction" would mean a good rather than very good performance.

#### 6. And what about the language? Must we issue a reference in German?

Generally, employees are only entitled to reference letters in German. However, if a foreign language had a significant meaning during the employment relationship, the employee may demand an English reference – the threshold for a significant meaning in that sense should not be set too low. Employees cannot claim both a German and an English reference letter at the same time, although many international companies do so voluntarily. If the employee has correctly requested and received a reference in English, the entitlement to a reference letter is fulfilled and the employer does not need to provide another one in German.



It should be noted that the differentiated and coded language developed in years of employment practice and case law can hardly be reproduced in any other language than German which is why reference letters in English might not have the same expressiveness as in German.

#### 7. What kind of information should not be included in reference letters?

Certain wording and information in the reference letter are prohibited even if provided discretely. The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz – AGG*) prohibits employers from disclosing certain personal information in a reference letter. For example, the employer's reference may not provide for any indication of membership of a particular religion, party or ethnicity. Times of absence should only be documented if they were considerable and if otherwise the impression would arise that the assessment in the reference letter is based on an actually performed work during the whole period of employment although the employee was on leave for a longer time period (e.g., parental leave, sabbatical, etc.).

#### 8. Can employers be held liable for "wrong" reference letters?

Employers often worry about their credibility and liability risk if employees ask for euphoric assessments in their reference. The drafting of reference letters can therefore be cumbersome. As regards possible liability, a current employer could bring a claim for damages against a former employer for issuing an (objectively) false reference letter, but these cases are very hard to prove and do hardly occur in practice. This would require that untrue information was given, and thereby, potential damage to the new employer was approvingly accepted. Such compensation claim mainly relates to cases where serious misconduct by the employee has not been included in the reference letter and the same behavior occurred again, causing a damage to the new employer, e.g., when the employer confirms "extreme reliability in a faithfully fulfilled position of trust" even though the employee has previously embezzled a large amount of money. On the other side, individual unfavorable incidents, which are not typical for the employee's behavior and performance, can also remain unmentioned (e.g., failure to pass an exam).

## 9. What processes do large companies use to manage their employees' request for references?

It is a frequent practice that HR departments have templates ready which only need to be customized for each individual and filled out and signed by the appropriate signatory. Depending on the company's employee structure, it might be appropriate to have different templates for the different roles and responsibilities in place, as content and extent will obviously vary between the references, e.g., for a six-months student internship in engineering or for a sales director with 20 years' experience. Although such templates can facilitate the drafting of references, employers need to bear in mind that each reference letter needs to be customized and the individual aspects of each employment relationship must be reflected in the reference letter.

## 10. What about reference letters issued based on a settlement?

In particular where the employer initiated the separation, the grade or even the wording of the reference is often agreed upon in a separation agreement or a settlement before court. We often see separation agreements or settlements according to which the employee may write his own reference from which the employer may only deviate for compelling reasons. In such cases, employees want to make sure future employers cannot tell how their last employment relationship ended from the wording of their reference. Employers on the other side tend to agree with issuing very good references if that is the condition for an amicable separation. However, because the obligation to reflect the truth also applies to the employee's proposal, the employer cannot commit itself to accept a proposal with wrong information and may also change proposals.

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