SEYFARTH SHAW
MANAGEMENT ALERT

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Using Experts to Investigate Workplace Misconduct - Including Claims of Harassment - Just Got Easier

The ability of employers to fully and fairly investigate incidents of employee misconduct became less onerous with the recent passage of the Fair and Accurate Credit Transactions Act (the "Fact Act"). After several years of intense effort by a coalition of business organizations, human resource professionals, private investigators and members of the security industry, counseled by attorneys from Seyfarth Shaw, President Bush signed the Fact Act into law on December 4, 2003, amending the Fair Credit Reporting Act ("FCRA" or the "Act"). Significantly for employers, the amendment makes it easier for companies to use outside experts to conduct workplace investigations for employment purposes.

The FCRA Prior to the Fact Act Amendment

In 1996, amendments to the FCRA imposed stringent notice requirements on employers who used reports from consumer reporting agencies ("CRAs") when making employment decisions. A CRA is defined as any person which, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.

The FCRA recognizes two different types of reports. Consumer reports are written or oral communications from a CRA which bear upon a consumer's credit worthiness, character, general reputation, personal characteristics, or mode of living, which is used as a factor in establishing eligibility for employment. Investigative consumer reports are reports prepared by a CRA including information on a consumer's character, general reputation, personal characteristics or mode of living obtained through personal interviews with neighbors, friends or associates of the consumer. The primary difference between these reports is that investigative consumer reports involve "personal interviews."

Prior to 1996, the FCRA only required that employers (in limited circumstances) provide notice to job applicants and/or employees that credit checks would be conducted with respect to their employment or application for employment. Effective September 30, 1997, however, employers who used CRAs to obtain background information, whether or not the CRA's report contained credit information, were required to first notify the applicant or employee that a consumer report may be obtained and then get the individual's permission to obtain the report. If any adverse action was taken based in whole or in part upon the report, the employer had to comply with a two-step process notifying the applicant or employee, including providing a complete copy of the report to the individual, and then waiting for a period of time before actually taking the adverse action.

The Vail Letter

The 1996 amendments to the FCRA made an employer's ability to investigate suspected workplace misconduct, such as allegations of sexual harassment, workplace theft, violence in the workplace, or other violations of company policies and procedures more difficult. In 1999, the Federal Trade Commission's ("FTC") legal staff issued an opinion letter in response to an attorney's inquiry about whether an outside attorney engaged to perform a sexual harassment investigation for a company is a consumer reporting agency for the purposes of the FCRA. The FTC's response, known as the Vail Letter, stated that "outside organizations utilized by employers to assist in their investigations of harassment claims are CRAs" and that oral or written reports resulting from the investigation "most likely" are investigative consumer reports.

The Vail Letter's interpretation of the FCRA created serious conflicts as well as practical problems for employers' with legal and ethical obligations to promptly investigate and take corrective action in cases of workplace misconduct. Many employers simply did not have the expertise or resources to conduct effective investigations in-house, and thus avoid the FCRA's notice requirements. But if an employer hired an outside entity to investigate a complaint of sexual harassment or other misconduct, it ran the risk of violating the FCRA if it failed to inform the alleged harasser ahead of time about the investigation, obtain his or her consent to proceed and, ultimately, disclose the complete investigation report to the subject of the investigation. Such steps effectively could chill or foreclose an investigation before it began. Further, the privacy rights (or, under some circumstances, safety interests) of victims and witnesses could be compromised if an employer adhered to the Act by disclosing the consumer report, including the names of those interviewed, to the targeted employee prior to imposing any adverse action.

The History of the Fact Act

Applying the FCRA to employment-related misconduct investigations always has been like trying to fit a square peg in a round hole. And doing so arguably is unnecessary as there already exist a multitude of federal, state, and local statutes, constitutions, regulations and/or common law designed to require investigators in the employment context to be fair with regard to confidentiality, accuracy, relevancy and proper utilization of information. Indeed,

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more than one court has disagreed with the FTC's Vail opinion letter, holding that workplace investigations by attorneys are not covered by the Act. The conflicts created for employers trying to comply both with the recommendations of the Vail Letter as well as their legal duties to promptly and fairly investigate workplace misconduct reinforced that a change to the FCRA was needed.

Soon after issuance of the Vail Letter, Seyfarth Shaw attorneys, along with a coalition of interested companies and organizations began working to draft and promote an amendment to the FCRA that would address the need for effective and efficient workplace investigations while still respecting the privacy rights of employees. The resulting Fact Act, which became effective on March 31, 2004, balances both interests.

Employers' Responsibilities Under the Amendment to the FCRA

The recently passed amendment specifically excludes from the definition of "consumer report" communications made to employers in connection with an investigation of: (1) suspected misconduct relating to employment; or (2) compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer. Employers thus are free to hire outside consultants, investigators, or law firms to investigate and report on a variety of workplace issues without having to first notify the target of the investigation or obtain his or her consent. The amendment is broad enough to include not only investigations regarding suspected violations of the law, but also covers violations of a company's written policies and procedures. However, if the investigation gathers information related to an individual's credit worthiness, credit standing, or credit capacity, the notice and consent provisions of the FCRA still apply.

The amendment also addresses the right to privacy of both the target of the investigation as well as potential victims and witnesses. First, any workplace investigation report generated only can be disclosed to the employer; federal, state or local officers, agencies or departments; any organization with regulatory authority over the employer; or as otherwise required by law. Additionally, if an employer takes adverse action based in whole or part on the report, it must disclose to the target of the investigation a summary of the communications upon which the adverse action is based. The summary must include the nature and substance of the communications, but need not include sources of information - such as the identity of individuals who have been interviewed.

Implications for Employers

The amendment to the FCRA goes a long way toward correcting some of the problems employers faced in trying to comply with competing legal obligations when investigating workplace misconduct. Employers who lack either the resources or expertise to conduct effective investigations in-house are now free to use outside experts for workplace investigations without having to choose between the risk of violating the FCRA or stalling the investigation by informing the target ahead of time. And although employers must continue to be vigilant about compliance with the FCRA in non-workplace investigation contexts (e.g., hiring) and where credit information is involved, the new exclusions to the definition of consumer report open the door to investigations being conducted by skilled, experienced and neutral investigators, consultants and attorneys with minimal administrative hassle.

Because the amendment to the FCRA is so new, the exact scope of the exclusion is not yet precisely defined. However, numerous kinds of common workplace investigations will be excluded from the definition of consumer report, and thus not subject to the notice and consent requirements of the FCRA. Investigations into: (1) complaints of sexual and other types of harassment or employment discrimination; (2) incidents of workplace theft, drug use or violence; (3) violations of workplace safety rules and regulations; and (4) workers' compensation claims most likely will be included in the new exclusions.

Employers are urged to consult with experienced employment counsel if they have questions about whether a planned workplace investigation falls under the new exceptions to the FCRA, and to obtain assistance in complying with the Act's requirements regarding the disclosure of the nature and substance of communications when adverse action is taken based upon a workplace investigation report.

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