New Law Requires Employers To Give Disciplined Employees Summaries Of Third-Party Investigative Reports Regarding Workplace Misconduct

By Wilfred J. Benoit, Jr. and Christopher B. Kaczmarek

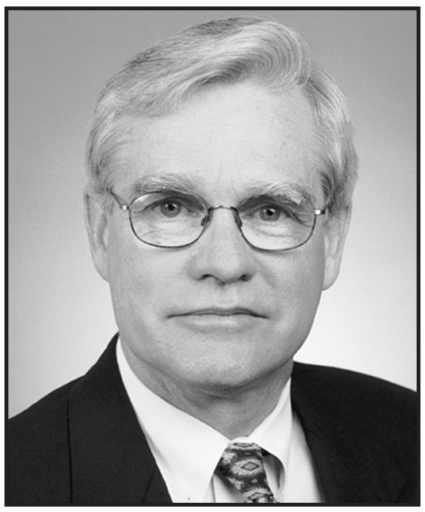
The Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act") became effective on March 31, 2004. The FACT Act amended the Fair Credit Reporting Act ("FCRA") to clarify the obligations imposed on employers who retain outside firms to investigate issues of workplace misconduct. The Federal Trade Commission had opined that reports issued by such investigators were subject to the FCRA. According to the FTC, an employer had to provide advance notice to, and obtain the prior written consent of, any employee whose alleged misconduct would be addressed by such an investigative report. Further, if the FTC's interpretation were followed, prior to making a personnel decision based on such a report, employers would have had to provide subject employees with a complete copy of the report.

The FTC's opinion was extremely controversial. Although it had been rejected by several courts, it caused considerable confusion among employers contemplating investigations by consultants, law firms or private investigators into workplace improprieties such as sexual harassment or embezzlement. The FACT Act overturns the FTC's interpretation of FCRA on this issue. The new law provides that employers need only provide employees subject to such investigations with a summary of the outside investigator's report, and they need not do so until after they have made a personnel decision based on that report.

The Fair Credit Reporting Act – Summary

The FCRA, 15 U.S.C. § 1681a et seq., imposes obligations on employers who obtain "consumer reports" and "investigative consumer reports" on current employees or applicants.[1] "Consumer reports" include reports obtained by employers from third parties if the employer pays a fee for the report and the report contains information on the applicant or employee's credit-worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. "Investigative consumer reports" are consumer reports based on personal interviews with neighbors, friends, or associates of the person who is the subject of the report, or with others with whom he or she is acquainted or who may have knowledge concerning such information.

The FCRA imposes different notice and disclosure requirements, depending on whether the employer seeks to obtain a consumer report or an investigative consumer report. Prior to obtaining a consumer report, an employer must provide the employee/applicant with a clear and conspicuous statement disclosing the employer's intent to procure such a report and obtain prior written consent from the employee/applicant. If an employer seeks to obtain an investigative consumer report, it also must: (1) provide the person with a notice of his or her right to obtain additional required disclosures and the written summary of consumer rights prepared by the Federal Trade Commission,[2] and (2) upon written request from the employee/applicant, make a complete, written disclosure of the nature and scope of the investigation requested.



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Before taking any adverse action against an employee or applicant based on a consumer report or an investigative consumer report, the employer is required to provide the affected person with a copy of the actual report that was used in the decision and a summary of consumer rights as prescribed by the FTC. Only after this information is provided may the employer take adverse action, such as declining to hire the applicant or firing, suspending or demoting the employee. The FTC has advised that employers should provide the employee/applicant with sufficient time to respond to the report prior to taking adverse action.

After taking adverse action, an employer must provide the employee/applicant with notice of such action, as well as the following information: (1) the name, address and telephone number of the agency that provided the report; (2) a statement that the reporting agency did not make the decision to take the adverse action and cannot provide the specific reasons why such action was taken; (3) a statement that the employee/applicant has the right to obtain a free copy of the report from the reporting agency by making a request within 60 days; and (4) a statement of the employee/applicant's right to dispute with the reporting agency the accuracy or completeness of any information in the report.[3]

The FTC's Controversial "Vail Letter"

In 1999, an FTC staff attorney issued a publicly available advisory letter in response to an inquiry by attorney Judi A. Vail. The Vail Letter, as it became known, advised that third-party investigators hired to perform investigations in the workplace, such as sexual harassment investigations, are "consumer reporting agencies," and, thus, any reports prepared by such investigators are likely to be deemed investigative consumer reports subject to FCRA.

The Vail Letter instantly provoked criticism from employers. If the FTC's position were adopted, then employers would have to provide advance notice and obtain written consent from employees whom an employer wished to investigate. An employee suspected of theft, for example, would have to give his or her consent prior to the employer's use of a private investigator. Moreover, even if such consent were obtained, witnesses might be reticent to come forward, given that the subject of the investigation would have the right to obtain an unredacted copy of the report, including any witness statements contained in it.

As noted above, several federal district courts rejected the interpretation set forth in the Vail Letter. Although these decisions provided some comfort to employers, in the absence of controlling precedent by the U.S. Courts of Appeal or U.S. Supreme Court, many employers were confused as to the precise nature of their obligations under the FCRA. As a result, many employers lobbied the FTC and Congress to amend the FCRA in response to the Vail Letter.

The FACT Act Provides New Rules For Third-Party Investigations Into Workplace Misconduct

In response, Congress enacted the FACT Act, Public Law No. 108-159. This new law amends the FCRA to address employers' concerns about the Vail Letter. Specifically, the FACT Act exempts from the definition of a consumer report/investigative consumer report any report that otherwise would fall within that definition if: (1) the communication is made to an employer in connection with an investigation of (a) suspected misconduct relating to employment, or (b) compliance with federal, state, or local law, the rules of a Self Regulatory Organization (such as the New York Stock Exchange or National Association of Securities Dealers), or any pre-existing written policies of the employer; (2) it is not made for the purpose of investigating creditworthiness; and (3) it is not provided to any person except (a) the employer or its agent, (b) the government, (c) an SRO, or (d) as required by law. Thus, employers seeking to utilize outside investigators to investigate workplace misconduct will no longer have to provide advance notice to an employee, obtain his or her prior consent, or disclose the contents of the investigator's report prior to taking adverse action.

The FACT Act, however, does require that after taking adverse action based in whole or part on such an investigative report, the employer must give the employee a summary of the nature and substance of the report. Sources of information need not be disclosed in the summary.

Conclusion And Comment

The FACT Act dispels the confusion generated by the Vail Letter. A few words of caution are in order, however. First, nothing in the FACT Act changes an employer's obligation under the FCRA to give notice to and obtain the prior consent of job applicants or current employees when it wishes to use an outside firm to conduct a background check. Second, employers should be careful to comply with the statute's new requirement that, after taking adverse action based on a report by an outside investigator concerning workplace misconduct, they must provide the affected employee with a summary containing the nature and substance of the report.

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[1] *Many states, including Massachusetts, have enacted statutes imposing similar notice and disclosure requirements on employers who obtain and use consumer reports or investigative consumer reports for employment purposes. For example, Massachusetts' Consumer Credit Reporting Law provides that an employer may not procure an investigative consumer report, or cause such a report to be prepared, unless and until: (1) the employer discloses to the employee the type of information generally included in such a report; (2) the employer informs the employee of (a) the "precise nature and scope of the investigation requested," and (b) the employee's right to receive a copy of the report upon request; and (3) the employee provides the employer with written permission to obtain such a report.*

[2] *According to an August 31, 1999 FTC opinion letter issued to Susan R. Meisenger of the Society for Human Resource Management, "the employee's consent to procurement of a consumer report . . . can be routinely obtained at the start of employment, thereby relieving the employer of the awkward prospect of having to ask a suspected wrongdoer for permission to allow a third party to provide an investigative . . . consumer report to the employer. . . ."*

[3] *For a more detailed discussion of the FCRA's requirements applicable to employers, please refer to the written materials from our February 2000 seminar entitled "Violence in the Workplace," which are available on our Web site at:* http://www.goodwinprocter.com/publications/LE_Workplace_Violence_02_00.pdf.