

FACTA Reduces Red Tape in Misconduct Investigations

Former FCRA Requirements Hindered Workplace Investigations

The Fair Credit Reporting Act (FCRA), which is enforced by the Federal Trade Commission (FTC), has stringent notice, consent, and disclosure requirements.

Typically, FCRA's applicability in the employment context is limited to when an employer uses a third party to conduct a background check on a job applicant or employee. Since 1999, however, the FTC has taken the position that FCRA also applies when employers use third parties — such as credit agencies, HR consultants, attorneys, accountants, or private investigators — to assist in the investigation of other matters, including sexual harassment, theft, and workplace violence.

Under the position taken by the FTC since 1999, when third parties conducted investigations, employers were required to, among other things:

- (1) obtain the accused employee's prior written consent;
- (2) provide the employee with a full copy of any oral or written report generated by the investigation, including the names of everyone who provided information during the investigation; and
- (3) give the employee advance notice of the employer's intent to take adverse action based on the report and provide the employee an opportunity to respond.

These requirements had the effect of hindering sensitive workplace investigations.

New FACTA Changes Will Help Employers

The Fair and Accurate Credit Transactions Act of 2003 (FACTA), which went into effect March 31, 2004, amends FCRA and provides that FCRA will no longer apply to most third-party investigations into employee misconduct.

FACTA adds a specific exclusion to FCRA for third-party investigations and reports that relate to compliance with (1) federal, state, or local laws, or (2) any pre-existing written policies of the employer.

If "adverse action" is taken against an employee based on the results of an investigation, FACTA still requires the employer to provide the employee a summary of the report. However, the summary does not have to identify the individuals interviewed or other sources of information.

New FACTA Changes Will Help Employers (cont.)

This means that employers may use third parties to conduct most workplace investigations without informing the accused of the investigation or getting his or her written consent. Likewise, the employer will no longer have to provide the accused with a full copy of the investigative report. These changes will make investigations more reliable and help ensure that those providing information will not be subject to intimidation or retaliation by the accused.

Investigations must still comply with discrimination and other laws and be conducted in a way that does not give rise to wrongful discharge, privacy, or harassment claims.

Also, **FCRA will still apply to background checks** – including criminal, educational, driving, credit, and employment checks – and employers must continue to comply with FCRA requirements related to such investigations. Penalties for FCRA violations remain severe.

In light of FACTA, employers should review workplace investigation procedures and make sure background checks comply with FCRA.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. If you would like to receive more detailed information about workplace investigations or FCRA compliance, please contact any of the attorneys listed below.

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