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News for School Clients

**EMPLOYEE INVESTIGATIONS EXEMPTED
FROM THE FAIR CREDIT
REPORTING ACT**

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Employee Investigations Exempted From The Fair Credit Reporting Act

On December 4, 2003, the President signed into law the Fair and Accurate Credit Transactions Act (“FACT Act”) (P.L. 108-159), which amended the Fair Credit Reporting Act (“FCRA”). The FACT Act reverses the effects of an opinion letter issued by the Federal Trade Commission in 1999, commonly known as the “Vail letter,” which brought employment harassment investigations conducted by outside organizations within the protections offered consumers with respect to credit investigations. In particular, when conducting investigations, employers were required to (1) notify the targeted employee before conducting an investigation, (2) obtain the employee’s consent prior to the investigation, and (3) fully disclose investigative reports which would qualify as investigative consumer reports before taking any adverse action against the employee. Now, with the enactment of the FACT Act, employers are provided with greater freedom from compliance with the FCRA when conducting employee investigations.

Enacted in 1971, the goal of the FCRA was to regulate consumer credit reporting agencies to insure that these agencies provided accurate information and protected

consumers’ rights to privacy. However, despite its emphasis on consumer credit reports and reporting agencies, the FCRA has been applied broadly to include application in the workplace. Specifically, employers are required to follow the FCRA requirements when they seek background information relating to prospective employees through a third party investigator.

Application of the law in the workplace broadened in 1999 when the FTC issued the Vail letter. In it, the FTC concluded that organizations that regularly investigated allegations of workplace sexual harassment were considered “consumer reporting agencies” under the FCRA and that, if an employer hired such an organization to conduct an investigation, both the employer and the organization must comply with the FCRA’s notice and disclosure requirements. Such organizations included private investigators, consultants, and law firms. Although the Vail letter only addressed whether the FCRA applied to sexual harassment investigations, a subsequent FTC opinion letter stated that the FCRA also applied to any investigation of employee misconduct.

Both management groups and employee rights groups criticized the Vail letter as hindering an employer's duty to conduct thorough investigations of workplace misconduct. Employers found themselves in a difficult position: either avoid using unbiased outside experts to thoroughly investigate a matter or comply with the FCRA, which often hampered investigations because the employee being investigated would have to be notified.

Under the FACT Act, almost all investigations covered by the Vail letter are now exempt from the requirements of the FCRA. Specifically, the law exempts from the FCRA's notice and disclosure provisions third party investigations into "suspected misconduct relating to employment" and any investigation of "compliance with Federal, State or local laws and regulations, the rules of a self-regulatory organization, or any pre-existing written policies of the employer." Any report made in connection with this investigation may not be provided to any person except to the employer or the agent of the employer or other limited exceptions. A report is not exempt, however, if "made for the purposes of

investigating a consumer's (or employee's or prospective employee's) credit worthiness, credit standing, or credit capacity." The effect of the FACT Act is that employers will no longer need to obtain consent from an employee before conducting an investigation and will no longer need to disclose details of the investigation to the employee. It remains unclear as to whether other reference and background checks are exempt from the FCRA requirements.

However, if the employer takes any adverse action against the employee based in whole or in part on a report from such a third party investigation, the employer must still disclose to the subject employee a summary containing the nature and substance of the investigation. Sources of information acquired solely for use in preparing the investigative report need not be disclosed. Under the FCRA, employers face unlimited damages for any violation of this provision.

The FACT Act does not contain an effective date for enactment. It will be determined by the FTC when it promulgates regulations, but no later than February 3, 2004.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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