

FAIR CREDIT REPORTING ACT

Requirements for outside investigations relaxed

Third-party investigations of employee misconduct are no longer subject to the notice and consent requirements of the Fair Credit Reporting Act of 1970 (FCRA). On December 4, the President signed the "Fair and Accurate Credit Transactions Act of 2003," P.L. 108-159. Section 611 of the new law amends the FCRA's definition of "consumer report" to exclude communications made to an employer in connection with an investigation of (1) suspected misconduct relating to employment, or (2) compliance with federal, state or local laws and regulations or pre-existing written employer policies.

The 2003 FCRA amendments clarify that communications to an employer by outside third parties hired to investigate employee misconduct or compliance with the employer's pre-existing written policies will not be considered "consumer reports" and will not require advance notice or authorization.

If any adverse action is taken based on the communication, however, the employer generally will be required to disclose to the employee a summary containing the nature and substance of the communication.

Attorney and management professor James Morgan, who also conducts investigations for employers, thinks this is a good piece of legislation. "It creates a far more equitable delineation of rights between employers and employees," he said, "and employers will be more comfortable with the decision to use an outside investigator."

While most employers are mainly concerned about liability to the victim of misconduct, there is a growing trend among employees who are accused of and disciplined for misconduct to strike back and accuse their employers of violating their rights during the investigatory or disciplinary process, attorney Michael Johnson of Brightline Compliance observed. "As many as 40 to 50 percent of the persons attending our seminars on how to conduct investigations have used third-party investigators. For the past few years, many of them have felt restricted in their ability to engage outside investigators," he reported. "That concern is now eliminated."

INSIDE

How provisions of the Fair and Accurate Credit Transactions Act of 2003 affect investigations of employee misconduct is the subject of comments this month by:

■ **MICHAEL JOHNSON**, Managing Director of Brightline Compliance, LLC, a Washington, DC-based organization that provides employers with online and in-person training on preventing workplace harassment, conducting internal investigations, and other employment law topics. Johnson, a former civil rights attorney in the U.S. Department of Justice, where he litigated the Justice Department's first "pattern or practice" employment discrimination case focused on sexual harassment, has provided on-site investigative training on behalf of organizations such as the EEOC, the Department of Homeland Security, and the United Nations; and

■ **JAMES MORGAN**, attorney and Professor of Management, College of Business, California State University, Chico, and author of *Investigating Workplace Discrimination: The Impact of the Fair Credit Reporting Act*, 2 J. OF EMP. DISCRIMINATION L. 324 (2000). Morgan has conducted investigations for employers in the public and private sectors.

The text of the Fair Credit Reporting Act appears at ¶3635 of EMPLOYMENT PRACTICES GUIDE.

Background

Under the Fair Credit Reporting Act prior to its most recent amendment, a "consumer report," is any written, oral, or other communication of information by a consumer reporting agency used, among other things, for employment purposes. An "investigative consumer report" is a consumer report obtained through personal interviews with third parties. If an outside investigator is paid to prepare such reports, the investigator is a "consumer reporting agency."

In 1996, Congress amended the FCRA to specify that an employer could not obtain an employee's consumer report for employment purposes without written authorization from the employee. The amendments further stated that employers could not take adverse action based on a report without giving a copy of the report to the employee with a description of the employee's FCRA rights, such as the right to dispute any perceived inaccuracies in the report.

In 1999, the Federal Trade Commission issued an informal opinion letter concluding that outside organizations used by employers to assist in investigating harassment claims "assemble or evaluate" information and so were considered consumer reporting agencies involved in producing investigative

consumer reports. Thus, employers were required to provide written notice to employees that a consumer or investigative report might be obtained for subsequent employment purposes.

As described by Morgan, the news spread like “wild fire” among those who were aware of the letter. “To a large extent, most human resource professionals considered the opinion a pretty long reach from the 1996 amendment and wondered whether it should be taken seriously,” he said. “Within a short period of time, however, most realized that they needed to pay attention to the provisions of the FCRA.”

Harassment investigations. The FTC’s interpretation of provisions of the FCRA created a dilemma for employers who needed to investigate complaints of sexual harassment or other kinds of harassment or discrimination. “As a result of the Supreme Court’s 1998 decisions in *Ellerth* and *Faragher* [*Burlington Industries, Inc. v. Ellerth*, 73 Emp. Prac. Dec. (CCH) ¶45,340 and *Faragher v. City of Boca Raton*, 73 Emp. Prac. Dec. (CCH) ¶45,341] making it imperative for employers to conduct investigations of harassment allegations, employers were in the untenable position of having to attempt to comply with the requirements for a reasonable investigation while also complying with the FCRA requirements,” Morgan observed. Ultimately, many employers were discouraged from using outside investigators, he noted.

Nevertheless, a year or two ago, Morgan began to notice that many employment attorneys and human resource professionals had begun advising employers to pay more attention to conducting a reasonable investigation than worrying about avoiding the FCRA requirements. “There were some court decisions that pretty much dismissed the FTC opinion letter and follow-up opinions of the FTC General Counsel. Recent opinion has shifted toward using third party investigators, with or without full compliance with the FCRA, as interpreted,” Morgan noted.

Investigating employee misconduct

Unfortunately, most employers lack formal guidelines for conducting investigations, Johnson observed. “Even worse, they don’t have persons who have been properly trained in how to conduct an investigation.”

Lack of training. “What often happens when the need for an investigation arises is the employer assigns a supervisor or manager, who may not have any skills or training in conducting investigations and how to make credibility determinations, to investigate. Even someone from human resources may not have the proper training.

Ability to document. “Whoever conducts the investigation must not only understand the legal rules and have the necessary practical skills for interviewing witnesses and determining credibility, he or she must also know how to properly document the findings so that the investigation will stand up later on in litigation under challenge by a plaintiff’s attorney,” he stressed.

Common mistakes. Johnson believes the biggest mistake many employers make occurs in a “he said/she said” case, such as a sexual harassment case, where there are no eye-witnesses. “Typically, the harassment has been going on for a long time and

an investigation is not started until it is too late. After interviewing the complainant and the accused, the employer fails to make a determination, throws up its hands and says there is nothing it can do. At most, the parties are warned to stay away from each other.

“If the investigator has been trained in how to make proper credibility determinations, he should determine whether the accused engaged in the behavior complained of. The employer should then proceed accordingly with any corrective action that may be necessary.

“Most employer investigators lack the skills and confidence to make those kinds of determinations. It is unfortunate because the smart harasser does not usually harass someone in the presence of witnesses, especially if the harassment is severe,” Johnson observed.

Prompt recognition and reporting. Once an employer learns that harassment may be occurring, it has a duty to look into it promptly, and if it is indeed happening take prompt action to stop it, Johnson explained. The EEOC says that the duty to look into an allegation of harassment is triggered whenever any supervisor learns that harassment may be occurring, which is why training supervisors is so important, he emphasized.

“Failing to train supervisors to recognize harassment and promptly report it when they learn that it is occurring is another mistake many employers frequently make. A supervisor may not do anything after learning about the harassment, especially when the alleged victim has asked the supervisor not to do anything about it. So, no action is taken to stop the harassment.

“Six months down the road, the victim, who has continued to be harassed, files a lawsuit. The employer can still be held liable for the harassment. It may be harder for the victim to win her case because she asked the employer not to do anything, but she can still win her case,” Johnson observed.

Third party investigations

Two situations most frequently prompt third party investigations, said Morgan. One he calls “reported situations” where someone reports alleged misconduct, such as harassment or discrimination, to the employer. The

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JAMES MORGAN

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EDITOR: Martha Pedrick, J.D.

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MICHAEL
JOHNSON

Lack of properly trained individuals to conduct the kind of investigation required in cases where the allegations are serious in nature and the stakes are high, such as a sexual assault, is also a good reason to use an outside investigator, Johnson added. "Generally, in-house investigations are conducted by human resources personnel, EEO officers if there are any, or in-house counsel. I always advise choosing the person who is most skilled in conducting these kinds of in-

other category he calls "employer-discovered" conduct, such as theft, embezzlement, or drug use, that the employer believes constitutes some type of wrongdoing. Morgan thinks third party investigations are very helpful in both types of situations.

Reasons for outsourcing investigations. Employers should consider using an outside investigator for four reasons, Morgan advised. One is promptness. "Despite the need to promptly investigate allegations of misconduct, I have observed that investigations are not always management's number one priority."

Second is thoroughness. "Outside investigators are specialists whose expertise results in a more thorough investigation, especially where the organization involved is a small one," he suggested.

vestigations and who is familiar with the topic he or she will be investigating.

"Although sometimes that is the attorney, employers should not automatically choose the attorney. In small and medium-sized corporations, many times in-house counsel comes from a corporate-level background. While they may have a lot of experience in contract matters, they may lack experience in litigation and investigation." In that case, the HR or EEO staff may have greater skills when it comes to conducting investigations, Johnson observed.

Third is impartiality. Although the employer hires the investigator, Morgan believes there still is the sense that the investigation is not an "inside" job. "Based on my experience conducting investigations, I believe people are more open and more willingly share more information with an outsider."

Johnson agreed, especially when the allegations are against a high-ranking individual in the organization. The objectivity of an internal investigation in that scenario is more easily questioned, he suggested.

"I was asked to do an investigation of a high ranking official in a company because the company had determined that no matter what the conclusion of an internal investigation and the action it took based on the investigation, it would be questioned either as a whitewash or as a pretext for firing the individual without breaching his contract," he said.

Fourth, and probably most important, is confidentiality. "There is a strong need for confidentiality for the persons who are asked to report what has happened," said Morgan. "They are often concerned about retribution, so the ability to offer a considerable blanket of protection is helpful. When I am hired to conduct an investigation, I want to know to what degree the comments I gather will be held in confidence by management," Morgan stressed.

Witness vs. advocate. Another consideration when deciding whether to utilize an outside investigator—even though in-house counsel is skilled in conducting investigations—is that generally he or she can not be both a witness and an advocate

Deciding whether to use an outside investigator

Now that employers are relieved of some of the notice and disclosure requirements of the Fair Credit Reporting Act when investigating allegations of misconduct, they may want to consider some of the following advantages to bringing in an outside investigator.

- Knowing that he or she will not have to "live" with either the accused or the accuser after the investigation may help the investigator remain impartial.
- The outside investigator has no previous experience with any of the parties involved and so comes to the investigation without the kinds of prejudices that arise from knowing someone's past performance or history.
- Witnesses may be more forthcoming with an outsider, not having to fear that what they tell the per-

son may someday become "conversation around the water cooler."

- Using someone from an outside investigation firm may benefit the investigation as he or she could be familiar with the type of investigation needed and have questions to ask or tools to use that might not have been thought of internally.
- The outside investigator will be brought in specifically for the purpose of carrying out the investigation and will not require that someone from the organization find time in his or her schedule to do the work.

Source: Hackerott, Rosen, *HR HOW-TO: INTERNAL INVESTIGATIONS* (CCH Incorporated 2003)

for a party at trial, Johnson observed. "Whoever does the investigation will be an important witness if the case goes to trial. There are also important attorney-client privilege issues with in-house investigations when litigation is involved," he noted.

After the investigation

The 2003 amendments provide that after taking any adverse action based in whole or in part on an investigation of suspected misconduct relating to employment or compliance with federal, state, or local laws and regulations or any of the employer's preexisting written policies, the employer must disclose to the individual a summary containing the nature and substance of the communication upon which the adverse action is based. The sources of information acquired solely for use in preparing an investigative consumer report need not be disclosed.

How should an employer connect the results of an investigation to its progressive discipline system? Once you conclude that harassment or discrimination has occurred, there are five factors the EEOC recommends the employer consider in determining appropriate disciplinary action, Johnson noted. "The bottom line is that the discipline must be designed to stop the misconduct and deter future misconduct. It must also be proportional to the offense."

The five factors to consider are:

- Severity of the conduct;
- Frequency of the conduct;
- Position of the accused; supervisors may be disciplined more harshly than nonsupervisory personnel;
- Past misconduct; and
- Employer's own disciplinary policies.

Caveat. Do the recent FCRA amendments take all third party investigations out of the scope of the FCRA? Not entirely, Morgan cautioned. "The recent amendments require an employer who uses a third party investigator's report as a basis for taking disciplinary action to provide the employee with a summary of the report. Employers must also be aware, however, that any investigation of an employee's credit will trigger some, if not a majority, of the requirements of the FCRA.

"Second, the exclusion from most aspects of the FCRA applies only where the report from a third party investigator is provided either to an employer or a governmental agency," he explained.

Effective date. In December, the FTC and the Federal Reserve System issued a notice of proposed rulemaking that would set effective dates for certain provisions of the amendments for which effective dates were not specified. Under the proposed rule, those provisions of the amendments, including Section 611, that clarify or address rights or requirements under the FCRA that are self-effectuating but that do not require significant changes to business procedures become effective on March 31, 2004. Those sections that will require changes in systems, disclosure forms or practices or implementing regulations to be administered effectively would not take effect until December 1, 2004. Comments on the proposal were due on January 12. The final rule is expected by February 4.

In the meantime, how might ongoing investigations be affected? Morgan thinks the overwhelming vote in favor of the legislation will make it very difficult for the FTC to engage in any kind of enforcement activity in this area. "I am more interested in seeing what any forthcoming FTC guidance will say. While it does not have the force of law, it will no doubt be very helpful to employers." ■

The importance of training

The failure to make proper credibility determinations is one of the biggest mistakes made in investigations of employee misconduct, said Michael Johnson, Managing Director of Brightline Compliance, a Washington, DC-based organization that provides employers online and in-person training on preventing workplace harassment, conducting internal investigations, and other employment law topics.

According to Johnson, individuals who are well trained in how to make proper credibility determinations should be able to determine whether the accused engaged in the behavior complained of after interviewing the parties. How does he train people to make credibility determinations?

Johnson listed the four factors the EEOC recommends that employers consider:

- Inherent plausibility of each person's story. Were there logical inconsistencies in any person's story?

- Corroboration, such as by other individuals with whom the individual spoke about the incident shortly after it occurred.
- Past misconduct.
- Demeanor. What was it about the types of answers given or the person's body language that made the investigator suspicious?

Brightline Compliance will provide its seminar, *7 Steps to Investigate Allegations of Employee Misconduct*, this Spring in Atlanta, Anaheim, Chicago, Dallas, Houston, Los Angeles, Minneapolis, New Jersey, New York, Philadelphia, San Francisco, Seattle, St. Louis, and Washington, DC. To learn more about the content, dates, and locations of this seminar, visit www.brightlinecompliance.com.