

ALERTS

Employment Law News

FAIR CREDIT REPORTING ACT AND THIRD PARTY INVESTIGATIONS

Employment & Labor Practice Team

An employee commits an alleged act of misconduct. You, the employer, decide to have an outside firm investigate. The investigation should be conducted in accordance with the safe harbor provisions of the Fair Credit Reporting Act (FCRA) to avoid the advance consent and disclosure requirements of FCRA.

FCRA prohibits 'consumer reporting agencies' from supplying a 'consumer report' to an employer for employment purposes, unless the requirements of FCRA are met. Recent amendments, however, exclude from the definition of a 'consumer report' certain communications relating to an investigation of employee misconduct and an investigation into "compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization or any preexisting written policies of the employer," *but*, only if the investigation is conducted in accordance with FCRA's safe harbor provisions.

By following FCRA's safe harbor provisions, the employee who is the subject of the investigation does not have to be notified of and consent to the disclosure of the consumer report. The employee also does not have to receive a copy of the report if the report is used to support an 'adverse' action against the employee.

The key elements of FCRA's safe harbor provision are:

1. The disclosure of the investigative report must be handled in accordance with Section 1681a(x)(1)(D). FCRA restricts distribution in the corporate setting to "the employer or an agent of the employer."
2. If an adverse action is taken based on the report, the employer is required to disclose to the employee a summary "containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing the [report] ... need not be disclosed." FCRA does not require the summary provided be in writing.

If the employer ensures FCRA's safe harbor provisions are followed when employee misconduct is investigated by a third party investigator, the employer avoids these FCRA requirements:

- notify the employee of the investigation in advance of the investigation;
- seek consent from the employee;
- provide the employee with a copy of the investigation report, and
- wait a reasonable amount of time between giving the employee a copy of the report and taking adverse action.