

Employment Law Alert

January 12, 2004

Congress Amends Employment Provisions Of Fair Credit Reporting Act

Since 1996, the Fair Credit Reporting Act (FCRA) has imposed a duty on employers who want to have background checks performed on applicants and other individuals for employment related purposes to disclose the nature of these checks to the subject individual and to obtain the individual's consent before conducting the investigation. Employers are then required to share the resulting investigative report with the individual. Employers are also obligated to provide information to that individual about challenging the findings of the report before the employer takes any adverse employment action against that individual (such as the denial of employment, or any decision that adversely affects current or future employment).

In 1999, the Federal Trade Commission (FTC), the administrative agency responsible for adopting regulations interpreting the FCRA, issued an opinion letter which broadly interpreted the FCRA and required employers to apply the same consent and disclosure requirements for background checks to investigation of employee wrongdoing. Needless to say, employers complained that the FTC interpretation was unreasonable and made it much more difficult for employers to investigate employee misconduct, including sexual harassment complaints, embezzlement and threats of violence.

Congress has finally heard those complaints and has acted. In the latest

amendments to FCRA, employers are given the freedom to conduct investigations of employee misconduct through outside investigators without giving pre-investigation disclosure or obtaining pre-investigation consent from the employee as required by the FTC opinion letter. The latest amendments also modify the disclosures required to be given to the employee at the time action is taken to discipline that employee for misconduct.

As the changes in the law continue to impose the prior disclosure and consent requirements of the 1996 law in many instances, and as the law will most definitely be subject to further interpretation by implementing regulations from the FTC, employers should assure themselves that their employment processes, including recruiting, hiring, promotion and discipline, conform to the new statutory and regulatory provisions.



Clients who wish to have their existing employment processes reviewed for compliance with these and other statutory requirements should contact John Schmidt (jschmidt@lindabury.com) or John Goemaat (jgoemaat@lindabury.com) at the firm.

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