

## ***Investigating Current Employees***

Employee misconduct investigations can surface when the employer procures some or all of the information from a consumer reporting agency, such as LexisNexis® Authentication & Screening. Periodic or “rolling” background investigations – which are becoming increasingly common, especially for corporate officers – can also trigger compliance obligations. Employers must be mindful of their federal and state legal obligations in both regards.

### **Misconduct Investigations**

Thorough and impartial workplace investigations are indispensable in today’s legal and business climate. The amended Fair Credit Reporting Act gives employers more latitude concerning such investigations. Still, employers must heed the remaining scope limitations, particularly the restrictions on disclosure of any investigation reports, as well as new obligations regarding medical information.

### **Federal Law**

In December 2003, President Bush signed the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”). The final bill amended the Fair Credit Reporting Act (“FCRA”) in response to, among other things, the controversial *Vail* opinion letter from the Federal Trade Commission (“FTC”). The staff attorney who authored the *Vail* letter in 1999 reached the novel and surprising conclusion that the FCRA regulates workplace misconduct investigations conducted by third parties, such as private investigators. Title VI of the FACT Act effectively nullifies the *Vail* letter by excluding misconduct investigations from the FCRA’s more burdensome provisions, including the need for the accused’s advance consent to investigate. Specifically, Title VI of the FACT Act excludes from the definition of consumer reports misconduct investigation reports *and* investigation reports 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.” As a result, employers no longer have to (1) notify the accused of the investigation, (2) seek consent from the accused, (3) provide the accused with a copy of the report, or (4) wait a “reasonable” amount of time between giving the accused a copy of the report and taking adverse action.

How are investigations still regulated? If adverse action is taken against the accused based at least in part upon a report that otherwise would be a consumer or investigative consumer report, the accused is entitled to a summary of the “nature and substance” of the report. Title VI does not prescribe the amount of information that must be disclosed, but permits exclusion of “the sources of the information acquired solely for use in preparing [the report],” e.g., the names of any witnesses. Title VI leaves open whether the summary must be in writing (presumably, it does), and exactly how long after the adverse action is taken the summary must be provided to the subject of the report (presumably, not too long). Title VI also restricts circulation of the report to “the employer or an agent of the employer,” and

the exemption may be forfeited by making overbroad disclosures. (The report may be disclosed to government agencies and "as otherwise required by law.") Title VI also prohibits consumer reporting agencies from furnishing employment-related consumer reports containing medical information unless the information is "relevant to process or effect the employment transaction," and the consumer provides "specific written consent."

Is "reasonable suspicion" required by Title VI? No foundational requirements are imposed by the statute on employers for initiating investigations, for example, "reasonable suspicion" of misconduct or that evidence may be destroyed, etc. (The FTC had recommended such a requirement in its testimony before Congress in connection with the amendments proposed in 1999.) Moreover, the breadth of the exemption appears to be fairly expansive. Title VI does not limit the types of "misconduct" investigations that are exempted (e.g., threats of serious harm or violence, abuse of controlled substances, the loss of more than \$1,000 in cash or property, etc.). Title VI also extends to investigations into compliance with "any preexisting written policies" and may encompass financial audits, information technology audits, loss prevention audits, etc. On the other hand, the FACT Act's text suggests at least some substantive limitations. For example, the suspected misconduct must "relate to employment," and the policies must predate the investigation and be in writing.

### **State Law**

Title I of the FACT Act removed the January 2004 "Sunset Clause" from section 624 of the Fair Credit Reporting Act ("FCRA"), which preempts certain state legislation. Regardless, employers must become familiar with, and continue to monitor, the state laws where they do business. Some state laws have misconduct exemptions similar to the amended FCRA, including California. Other states do not.

### **Rolling Investigations**

Rolling background investigations attempt to monitor post-hire criminal activity in general, rather than in connection with suspected misconduct. The fair credit reporting laws regulate pre-hire and post-hire investigations alike. For example, unless the employer obtains prospective authorization from job applicants (i.e., authorization that is valid throughout the employment relationship, not just at the time of hire), further authorization is required. Also, if adverse action is taken (e.g., termination of employment, suspension, etc.), the employer must comply with the "adverse action" provisions of applicable law. As a related issue, employers must be mindful of employment laws restricting the use of criminal history information for employment purposes, particularly arrest-related information. Without careful consideration of these laws, the employer may wind up defending itself in a civil case even though the employee is the defendant in a criminal case.