

FTC COMPLICATES THE USE OF OUTSIDE INVESTIGATORS

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Employment Law Reporter, Ervin Cohen & Jessup LLP

The Federal Trade Commission (FTC) has recently taken the position that the Fair Credit Reporting Act (FCRA) applies to workplace investigations. Specifically, the FTC has stated that attorneys or outside investigators who are paid to make inquiries into allegations of workplace misconduct are the equivalent of "consumer reporting agencies" and are therefore subject to the Act, which establishes detailed notice, authorization and disclosure requirements (see April 1996 *Employment Law Reporter*).

While no court has ruled on this issue, the FTC's position does create problems for employers who utilize outside investigators or attorneys to undertake investigations. To begin with, the FCRA and its California counterpart, the Consumer Credit Reporting Agencies Act (CCRAA), permit employees to bring actions against employers for violation of these laws. Employees can seek actual damages, which can include compensation for lost wages, and are further permitted to seek recovery of attorneys' fees and court costs. Where a violation is found to be willful, the employee may request punitive damages. Moreover, it is conceivable that creative plaintiffs' lawyers may argue that any termination resulting from an investigation which did not comply with these laws was wrongful.

Absent further clarification from the legislature or the courts, employers are advised to be careful when using an outsider to investigate workplace claims. Employers should keep in mind that an attorney who conducts the investigation may become a witness and that this may waive the attorney-client privilege which would otherwise protect any communications between the attorney and the employer. Investigators who are not attorneys must hold an investigator's license under California law. Employers can check on an investigator's license by contacting the California Department of Consumer Affairs at 916.322.4000.

Employers should obtain agreements in writing from all employees which authorize the employer to use, at its own discretion, attorneys or other outside experts to conduct investigations of work-related misconduct. This agreement should be obtained in advance by including appropriate language

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in a personnel handbook which the employee agrees, in a written acknowledgment, to read and abide by. The employer should also plan on disclosing the results of the investigation. Any written report should carefully set forth the good faith efforts which were made to gather information as well as the reasons for any decisions. As with any investigation, the accused should be given an opportunity to respond, and any information or explanation offered by the accused should be included in the report.

While the steps described above may not fully comply with the specific requirements of the FCRA or CCRAA, they will serve to illustrate that the employer acted within the spirit of the law. To ensure complete compliance, the employer should contact an attorney who can guide the employer through the specific requirements of these laws and further insulate the employer from any potential liability.