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Revisions to the Fair Credit Reporting Act Congress Addresses Employers' Concerns On Required Disclosure of Workplace Investigations

In 1998, a staff member of the Federal Trade Commission wrote an opinion letter interpreting the Fair Credit Reporting Act ("FCRA") as requiring full disclosure of information pertaining to workplace investigations conducted by certain third parties. This opinion letter, commonly referred to as the "Vail Letter," understandably caused great concern among employers using outside investigators to conduct workplace investigations. While a few Federal courts refused to follow the Vail Letter's interpretation of the FCRA and found that employers were not required to comply with the FCRA disclosure requirements when hiring third parties to conduct workplace investigations of suspected employee wrongdoing, the issue remained a concern.

This concern was addressed by the Fair and Accurate Credit Transactions Act of 2003 ("FACT") which was signed into law on December 4, 2003. Under FACT, employers need not comply with the FCRA disclosure requirements when hiring a third party to investigate suspected misconduct relating to employment. FACT also provides that employers do not have to comply with the FCRA disclosure requirements when hiring a third party to conduct investigations relating to compliance with applicable laws, the rules of a self-regulatory organization (such as the SEC), or the employer's preexisting written policies. These exclusions from the FCRA disclosure requirements apply only when the report or communication of the investigation results is not provided to any person except the employer or employer's agent; a governmental officer, agency or department; a self-regulatory organization; or as otherwise required by law.

However, if the employer takes any adverse action against an employee based in whole or in part on the report or communication of the results of the investigation, the employer must provide a summary of the report or communication to the affected employee. The summary provided to the affected employee need not disclose the source(s) of the information contained in the report.

Employers should consider their disclosure obligations under the FACT revisions to the FCRA when engaging a third party to conduct a workplace investigation.

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