

FORENSIC RISK MANAGEMENT

Potential Liability Exposure of Third-Party Investigators Under the Fair Credit Reporting Act

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In early 1999, the Federal Trade Commission (FTC), a federal agency that interprets and enforces the Fair Credit Reporting Act (FCRA), indicated that various notice, disclosure, and consent requirements contained in the FCRA apply to many types of employee misconduct investigations undertaken by auditors, forensic accountants, lawyers, and other third parties. In fact, certain employee information contained in company personnel files may now be off-limits to third-party investigators without employee permission. Various FCRA requirements discourage companies and accounting firms from undertaking third-party investigations, may interfere with the effectiveness of such investigations and create potential liability exposure for third-party investigators and their clients for failure to comply with the FCRA. This result is in stark contrast with the mandate by the SEC and other federal agencies requiring firms to take action to curb internal wrongdoing.

We provide an overview of the FCRA and discuss how these requirements hamper the effectiveness of investigations. We also highlight penalties for violation of the FCRA and describe actions that investigators and clients can take to conduct effective investigations while complying with the FCRA.

Overview of the Fair Credit Reporting Act

The Fair Credit Reporting Act was enacted in 1971 to protect consumers from inaccurate or misleading credit reports and from unauthorized information disclosure. Consumer reports historically were used to evaluate and minimize the risk of loss in three kinds of decisions: credit, insurance, and employment. The reports utilized in credit decisions are usually confined to a person's credit history and information from public records, such as liens and judgments. Reports for insurers and employers usually contain data on an individual's personal characteristics, general reputation, character, lifestyle, criminal records, driving records and employment histories. The FCRA was generally assumed to be limited to credit-decision issues and remained unchanged until the late 1990s.

In 1996, Congress amended the FCRA by imposing significant procedural restrictions on employers' access to and use of consumer reports obtained from outside consumer reporting agencies. Since September 30, 1997, employers have been required to obtain written permission from an employee to procure a "consumer report" or "investigative consumer report" from any "consumer reporting agency."

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