Leading the News

Employee Rights

House Subcommittee Hears Testimony On Bill to Exempt Employer Investigations

Witnesses urged a House subcommittee May 4 to pass legislation to correct the unintended adverse effects on employer investigations of alleged employee wrongdoing caused by the 1996 amendments to the Fair Credit Reporting Act, but they disagreed about the extent of changes needed.

The Federal Trade Commission issued an opinion letter in April 1999 staring that outside investigators hired by employers to look into alleged employee misconduct may be considered consumer reporting agencies and that employers would have to notify accused employees before conducting an investigation, obtain their consent, and fully disclose investigative reports

(96 DLR A-13, E-1, 5/19/99).

Rep. Marge Roukema (R-N.J.), who chairs the Financial Institutions and Consumer Credit Subcommittee of the House Banking and Financial Services Committee, observed during the hearing that the FTC opinion letter "created significant concern from all sides." She said "[i]t is evident that a legislative change is necessary."

Rep. Pete Sessions (R-Texas) proposed the "Fair Credit Reporting Amendments Act" (H.R. 3408), which would amend the FCRA to exempt certain employer investigative reports from the definition of "consumer report." The bill would exclude reports prepared "solely for the purpose of investigating allegations of drug use or sales, violence, sexual harassment, employment discrimination, job safety or health violations, criminal activity including theft, embezzlement, sabotage, arson, patient or elder abuse, child abuse, or other violations of law." It would also exempt reports prepared for litigation, due diligence, investigation of insurance claims, civil and criminal fraud, or failure to pay child support.

Instead of requiring prior notice and consent, Sessions' bill would simply require employers, prior to taking an adverse employment action based on the report, to disclose "the nature and substance of information in the report." The legislation also directs that "the information in the report shall be available to the plaintiff under appropriate discovery procedures" if the investigated employee sues.

Rep. Janice D. Schakowsky (D-lll.) on May 3 introduced a bill (H.R. 4373) that she said would create a narrower exemption for disclosure of investigative reports of alleged illegal conduct by employees.

EEOC Chief Describes 'Unintended Consequences.' Ida L. Castro, chairwoman of the Equal Employment Opportunity Commission, acknowledged that "the FCRA provides important consumer protections." However, she said that "the FTC's conclusion that the FCRA's numerous and highly

specific requirements control third. party discrimination investigations has serious unintended consequences for the enforcement of the civil rights laws." She noted that the EEOC has received "numerous inquiries" about application of the FTC opinion letter.

U.S. Supreme Court decisions have made clear that employers are required to promptly investigate and correct employment discrimination, Castro pointed out.

"By significantly burdening the ability of employers to use outside entities to conduct timely and effective investigations of discriminatory conduct in appropriate cases, the FCRA will make it more difficult for them to comply with the civil tights laws," Castro said. She warned that the FCR.A requirements "will contribute to an increased incidence of workplace discrimination as employers are constrained in their compliance efforts" and suggested that discrimination claims will increase.

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Small employers often do not have the in-house resources "to conduct thorough and credible investigations" and instead hire outside attorneys, investigators, or consultants, Castro said. She observed that large companies also use outsiders "to enhance the objectivity and credibility of their investigations." Using an outside investigator "may be the only appropriate action where the person accused of wrongdoing is a high-ranking official or there are other conflicts of interest," she said.

In examining whether it is appropriate to apply FCRA requirements to employment discrimination

investigations, "it is important to keep in mind that the civil rights laws already incorporate the goal of assuring fair, objective, and careful investigations," Castro asserted.

Problems Raised by FCRA Rules. Castro identified several problems raised by the FCRA rules. Requiring employers to notify arid obtain prior consent from the target of an investigation can "give the employee accused of harassment or other discriminatory activities the ability to control whether the investigation will occur promptly or at all, Castro said. She pointed Out that providing advance notice can give the alleged wrongdoer the opportunity "to tailor his or her responses to avoid responsibility, influence the testimony of potential witnesses, or even destroy evidence."

Providing the investigation target with an unredacted copy of the report before taking an adverse action "will deter both victims of discrimination and witnesses from making complaints and participating in investigations," Castro said. She also referred to FCRA restrictions on the type of evidence that can be considered reliable. "[I]n a harassment case, there may not be any independent verification of the allegation or of a particular witness's statement. There also may not be a single 'best possible source of information,' but rather a variety of sources, all of which are important to pursue as part of a thorough investigation and to arrive at an appropriate conclusion," she said.

The FCRA allows for unlimited actual and punitive damages for certain violations, while damages in most employment discrimination cases under federal law are "strictly capped," Castro noted. "This imbalance sends the extremely troubling message that the rights of persons accused of discrimination are more valuable than those of their victims," she said.

However, Castro asserted that any FCRA amendments should protect employees targeted for investigation as a form of retaliation because they complained or testified about discrimination, engaged in union activity, or otherwise exercised employee rights. She also recommended that any legislative exemption "not protect reports which are made available to any entity other than the employer ... or

government agencies with enforcement responsibilities."

FTC Official Suggests Some Changes. Debra Valentine, general counsel of the FTC, asserted that FCRA amendments "to remove procedural requirements that unduly interfere with workplace investigations must also preserve the basic privacy safeguards for employees that Congress enacted in 1970 and significantly expanded in1996."

Opposing the "blanket exclusion" that would be created by the Sessions bill, Valentine said the bill would

"free workplace investigations not only from the FCRA

provisions that are widely agreed to be problematic as applied to them, but also ... eliminate a significant number of long-standing privacy and procedural protections that the FCRA traditionally has afforded to employees that are the target of such investigations."

Valentine said she favors removing the prior notice and consent requirements for employer investigations of alleged employee wrongdoing and dropping the rule that employers provide the employee with the report before taking adverse employment action. However, she recommended that employers, after taking adverse action against an employee based on an investigative report, be required to identify the investigator, provide notice of the right to obtain the report, and give the employee the opportunity to contest the accuracy of information in the report. She also suggested that Congress add a requirement that employers certify to the outside investigator:

> that the employer has a reasonable suspicion or has received an allegation of illegal misconduct by an employee;
>
> that confidentiality of the investigation is necessary to preserve evidence and to prevent the destruction of evidence relevant to the investigation; or
>
> there is reason to believe that [prior notice to the targeted employee" will result in the intimidation of a potential witness relevant to the investigation, or otherwise seriously jeopardize or unduly delay the investigation.

The subcommittee also heard testimony from representatives of the Society for Human Resource Management, the U.S. Chamber of Commerce, the Lawyers' Committee for Civil Rights Under Law, the National Consumer Law Center, the U.S. Public Interest Research Group, the AFL-CIO, and the National Council of Investigation and Security Services.

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