



Taking the Next Step in Employee Screening:

The "Why and How" for Conducting Post-Hire Criminal Record Checks and Related Investigations

WHITE PAPER

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Executive Summary

Employers have long been aware of the need for conducting **pre-employment** background checks of job applicants. Even if a company is not required by law to conduct applicant background checks, it is good business practice in order to reduce the possibility of workplace violence, employee theft and fraud and legal liability for negligent hiring. The next steps for employment background checks will focus on **post-hire** criminal record searches and related investigations. The “**why**” for conducting post-hire background checks rests on the growing realization in the private and public sectors that a significant proportion of employees may start out their employment with a clean record, but acquire criminal records post-hire - and all without the employer’s knowledge. While employers are familiar with the legal liability they may face for negligently hiring an applicant with a criminal record, they now are recognizing the equally significant liability they face for the negligent retention/supervision of an employee who acquires a criminal record post-hire.

The “**how**” of conducting post-hire criminal record checks and related investigations has become clearer due to the passage of the Fair and Accurate Credit Transactions Act of 2003 (the “FACT Act”), which amends the Fair Credit Reporting Act (the “FCRA”). One key enabling provision of the FCRA, as amended by the FACT Act (Section 603(d)(2)(D) and Section 603(x), entitled “Exclusion of Certain Communications for Employee Investigations” permits an employer to retain a third party consumer reporting agency to conduct post-hire investigations of its existing employees without having to comply with some of the key consent and disclosure requirements of the FCRA. These investigations need not be based on suspected employee misconduct, but rather can be based on a pre-existing, written policy of the employer designed to determine that the employer is in compliance with applicable U.S. Federal, state or local laws and regulations and/or the company’s own criminal conduct policy and other corporate policies. Effectively, this alternative basis can include post-hire investigations as part of the employer’s financial audits, IT audits, compliance audits and loss prevention audits.

Whether the investigation is based on suspected employee misconduct or is based on a pre-existing, written corporate compliance audit policy, the employer:

- Is not required to notify the employees in advance of the investigation
- Is not required obtain the consent of the employees in order to conduct the investigation
- Is only required give employees against whom adverse action is taken, based in whole or in part on the investigation, a summary of the nature and substance of the investigation report
- Is allowed to circulate the investigation report internally or to agents of the employer, to government agencies, to any relevant SRO having jurisdiction over the employer or the employees and as otherwise required by law

Employers wishing to avail themselves of the FACT Act “safe harbor” should work with their legal counsel to design a written compliance-oriented audit program that establishes the business necessity and job-related need for the conduct of periodic criminal record checks and related investigations of all of their existing employees. For example, a healthcare company might establish business necessity and job-related need as part of its HIPAA compliance audit program, while a mutual fund might justify its investigations based on its SEC Rule 38a-1 compliance program. This should significantly reduce the employer’s potential exposure to workplace violence, employee fraud and theft and legal liability for negligent retention.

This white paper explores the “Why and How” for conducting post-hire criminal record checks and related investigations. It also cites relevant primary and secondary legal resources, including representative state statutes and case law precedents supporting the use of post-hire criminal record checks. Finally, the white paper notes best practices that should be taken into account by the employer in its development of the written corporate policy implementing the FACT Act “safe harbor”.

Now that post-hire criminal record checks and related investigations can be conducted by consumer reporting agencies for employers under the FACT Act “safe harbor”, the potential liability to an employer for not acquiring the information (which is readily available in the marketplace) appears to be greater than the potential liability for obtaining the information.

Note: Nothing in this white paper is intended to be, or should be construed to be, legal advice. If you require legal advice with respect to the FCRA, the FACT Act or any other topic discussed herein, please consult your own legal counsel. This paper was published in April of 2005 and does not take into account any subsequent changes in laws or other events.

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Job Applicants Under the Microscope

Background checks of job applicants are the norm in today’s business environment. In some cases, employers are required by law to conduct criminal record checks of job applicants. For example, some banks are prohibited under Section 19 of the Federal Deposit Insurance Act from hiring or **retaining** job applicants with criminal records involving money laundering, among other banking-related offenses.¹ However, even if an employer is not required by a regulatory regime to conduct pre-employment background checks of applicants, the risks of workplace violence, employee theft and fraud and legal liability from negligent hiring make it a business requirement, if not a legal requirement, to do so.

Industry statistics tell a compelling story in this regard:

- **Workplace Violence:** Workplace violence is one of the fastest-growing categories of murder in the United States.² Indeed, in an average week in U.S. workplaces, one employee is killed and at least 25 are seriously injured in violent assaults by current or former co-workers.³ Further, these statistics may not adequately reflect the prevalence and ultimate cost of workplace violence. The Bureau of Labor Statistics estimates that between 1.2 and 2 million workplace violence incidents occur each year. This number, however, may represent a 50% under-reporting of the actual number of incidents and the cost of a single homicide at work can cost over one million dollars when all costs are considered.⁴ In the face of this trend, public pressure is mounting for employers to conduct background checks of existing employees as well as of job applicants. For example, in connection with a pending South Carolina case involving allegations against a Wal-Mart employee later discovered to have three prior convictions for indecent exposure, it was reported that:

“The mother of a Richland County girl who alleges in the suit that a Wal-Mart employee fondled her in 2000 when she was 10 believes the company isn’t doing enough to protect children in its stores. **She said background checks should be done on all employees, not just new hires.**”⁵ [*emphasis added*]

It should be noted also that under the U.S. Occupational Safety and Health Administration’s (OSHA’s) “General Duty” clause, employers may be liable under OSHA for workplace violence by one employee against another employee. OSHA’s “General Duty” clause requires employers to furnish employees with a working environment free from a condition or activity in the workplace that (1) presents a hazard to employees, (2) is recognized by the employer or industry as hazardous, (3) has the potential for causing death or serious physical harm, and (4) can be eliminated or reduced by feasible means.⁶

- **Employee Theft and Fraud:** Employee theft and fraud cost U.S. retail businesses over \$50 billion each year. In addition, the average value of merchandise recovered from employee theft is \$1,525, nearly seven times that of the average shoplifter.⁷ In the banking industry, research conducted by the national white collar crime center indicates that three quarters of all employees have stolen from their employers at least once.⁸ Finally, a 2003 KPMG Forensic Practice Survey of executives at 459 public companies with revenues of more than \$250 million reported that 36% of the companies surveyed suffered fraud losses of \$1 million or more.⁹ This compared to only 21% of the companies surveyed in 1998 reporting such losses.
- **Negligent Hiring Liability:** Amazingly, it has been estimated that more than one in ten companies played Russian roulette with workplace security in 2003 by not checking applicants’ criminal records, verifying prior employment and/or by not contacting references.¹⁰ In a case

involving the healthcare industry, a patient suffering from cerebral palsy was murdered in his home by his visiting nurse.¹¹ In the ensuing wrongful death action, the jury awarded the family of the murdered man \$26.5 million (an award that included punitive damages) on the grounds that the nursing agency was negligent in not conducting a criminal record check on the male nurse. A routine background check would have revealed the existence of the nurse's six prior felony convictions and the fact that he had not attended nursing school as claimed in his employment application. This represents a classic case of an employer being liable for "negligent hiring" as a result of conducting an inadequate or no pre-employment criminal record background check.

Why Conduct a Post-Hire Check?

In light of the prevalence and costs associated with workplace violence, employee theft and fraud and the potential legal liability for negligent hiring, pre-employment criminal record checks and related investigations are clearly advisable, even if not a regulatory requirement for your business. *Why then should you also conduct post-hire criminal record checks and related investigations?* Statistical studies again paint a serious picture:

- A recent study for a major retail group showed that 7% of all employees who had started work with a clean record had, since commencement of their employment and without the employer's knowledge, acquired serious criminal records, including robbery and drug-related offences.¹²
- A 2002 KPMG Survey found that in 21% of all cases where employees were involved in fraud, their lifestyles changed to such an extent that the lifestyle change could have tipped the employer off to the likelihood of fraud had the employer been conducting regular post-hire investigations.¹³

From a legal viewpoint, just as employers are held liable under the theory of **negligent hiring** for failure to perform adequate pre-employment criminal record checks, courts have begun to find employers liable for failure to do post-hire checks under the theory of **negligent retention**. The distinction between negligent hiring and negligent retention has been explained by one attorney as follows:

"Negligent hiring occurs when an employer places an unfit person in an employment situation that entails an unreasonable risk of harm to others. Negligent retention is closely related to negligent hiring, but these actions allege negligence after an employee is hired rather than at the time of hire. The tort of negligent retention, which was recognized first by the Florida Supreme Court in 1954, requires that the employer **become aware or should have been aware of problems** with an employee that indicated that employee's unfitness, and that the employer failed to take further action, such as investigating, discharge or reassignment. [*emphasis added*]"¹⁴

Many states now recognize a cause of action for negligent retention separate and apart from a cause of action for negligent hiring. For example, in an appeal involving an alleged assault by a janitor on a college student in which a lower court dismissed the student's claim of negligent retention by the employer of the janitor, the appellate court overruled the lower court's dismissal of the claim.¹⁵ The appellate court reinstated it as a viable claim under Virginia law separate and apart from any claim for negligent hiring. As one legal commentator concluded in a discussion of a landmark Florida negligent retention case:

"*Garcia v. Duffy* [492 So. 2d 435 (Fla. App.1986)] offers one of the most in-depth discussions of the modern negligent retention claim. The Florida Court of Appeal noted two questions that must be answered:

- To whom does an employer owe a duty to exercise care in hiring and retaining employees?
- How is that duty breached?

From these two questions the court next developed three elements necessary for establishing either a negligent hiring or retention claim, stating that the plaintiff must: (1) establish that the employer owed a legal duty to the plaintiff, with the plaintiff being 'within the zone of foreseeable risks created by the employment'; (2) show that the employee was unfit for the position held; and (3) show that the employer breached his or her duty to the public by using an inadequate standard of care in choosing or retaining the unfit employee...**With the rising number of negligent retention suits...employers can monitor and craft pre- and post-hire screening processes.** Pre-employment screening would ensure that employers are informed of all possible dangers that an employee could bring into the workplace, while post-hire programs would monitor employees at risk and alert employers to possible problems. [*emphasis added*]¹⁶

Liability for failure to conduct post-hire criminal record checks also can arise under certain regulatory regimes. For example, the New York Stock Exchange fined Charles Schwab \$250,000 for failing to obtain NYSE permission under NYSE Rule 346(f) before hiring a "statutorily disqualified individual" with a criminal record. Critically, the NYSE also criticized Charles Schwab for failing to do adequate criminal record checks of existing employees who had disclosed criminal records to their line supervisors.¹⁷

How Do I Conduct a Post-Hire Criminal Record Check?

The rationale for conducting post-hire criminal record checks and related investigations in order to reduce workplace violence, employee theft and fraud and legal liability for negligent retention is clear. But how does a company conduct such a post-hire check without becoming hopelessly bogged down in the immensely detailed consent and disclosure requirements of the Fair Credit Reporting Act (FCRA)?¹⁸ Isn't it true that under the FCRA, a consumer reporting agency (CRA), such as a background check vendor, is prohibited from furnishing "consumer reports"¹⁹ or "investigative consumer reports"²⁰ to employers for "employment purposes" unless the advance consent and disclosure requirements of FCRA are met?²¹ Doesn't the FCRA term "employment purposes" include not only the evaluation of an applicant for potential employment, but also the evaluation of an existing employee for promotion, reassignment or retention as an employee?²²

The above is, of course, all true. But it overlooks the importance and potential applicability of Title VI of the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act).²³ Title VI of the FACT Act (Section 611, effective March 31, 2004) overruled the U.S. Federal Trade Commission (FTC) "Vail" opinion letter.²⁴ The FTC "Vail" opinion letter advised that employee misconduct investigations conducted by third parties such as private investigators were subject to the consent and disclosure provisions of the FCRA. Accordingly, under the "Vail" opinion letter, if an employer was going to utilize a third party to do an investigation of an employee, the employer was supposed to (1) notify the accused employee of the investigation, (2) seek consent from the accused employee, (3) provide the accused employee with a copy of the report, or (4) wait a "reasonable" amount of time between giving the accused employee a copy of the report and taking adverse action.

The FACT Act overrules the "Vail" opinion letter and provides a type of "safe harbor" covering an employer's conduct of an employee investigation, such that it would be exempt from a number of the normal FCRA consent and disclosure requirements. Section 603(d)(2)(D) and

Section 603(x)²⁵ of the FCRA, as amended by the FACT Act, exclude from the definition of “consumer report” communications made to employers in connection with investigations of: “(i) suspected misconduct relating to employment; or (ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer.”²⁶ The rationale behind exempting the employer from providing the suspected employees with advance notice and disclosure is to minimize the risk that the suspected employees will intimidate witnesses or destroy evidence at the outset of the investigation.

The FACT Act “safe harbor” (from the normal FCRA consent and disclosure requirements) results in the following:

- The employer does not have to notify the employees in advance of the investigation
- The employer does not have to seek the consent of the suspected employees
- If adverse action is taken against the employee based in whole or in part on the report, the employee is entitled to a summary of the “nature and substance” of the report, although the sources of the information need not be disclosed²⁷
- The report’s circulation is restricted to the employer or an agent of the employer, to U.S. Federal, state and local government officials and agencies, any SRO having regulatory authority over the employer or employee and “as otherwise required by law”²⁸

The FACT Act “safe harbor” is obviously valuable as a means to support the conduct of an investigation of employees suspected of misconduct and remain exempt from normal FCRA consent and disclosure requirements. Much more important, however, is that although the FACT Act “safe harbor” permits an investigation on the basis of suspected employee misconduct related to employment,²⁹ the “safe harbor” also permits an investigation without any suspected employee misconduct if the investigation is conducted to determine the employer’s compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization or the employer’s own preexisting written policies.³⁰ As one law review article concluded:

“Under Title VI, no foundational requirements are imposed on employers for initiating investigations under FACT. For example, **there is no express requirement that the employer have a ‘reasonable suspicion’ of misconduct or that the destruction of evidence is likely to occur.** Although the FTC recommended such a requirement to Congress in connection with the amendments proposed in 1999, this recommendation was not incorporated into the bill. Moreover, 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.). Indeed, provided the investigation is being conducted pursuant to the ‘preexisting written policies of the employer’, there is no requirement that ‘misconduct’ be involved. **Likewise falling under the Title VI’s safe harbor provision are investigations into ‘compliance with Federal, State, or local laws and regulations’.** **Title VI thus would appear to protect financial audits, information technology audits, loss prevention audits, etc.** [*emphasis added*]³¹

One issue merits a comment: it is presently unclear as to whether or not an employer may conduct a workplace investigation under the FACT Act “safe harbor” with respect to independent contractors, agents and similar non-employees working for the employer. One law review article attempts to make the case for such a position, provided that the employer’s written policy makes express provision for investigations of such non-employees.³² In light of the paucity of case interpretation of the FACT Act, it is advisable to seek the advice of counsel in this regard.

The answer to the “How” to conduct post-hire criminal record checks and related investigation therefore is for the employer to formally adopt a written corporate policy authorizing the employer to conduct periodic (e.g., monthly or quarterly) criminal record checks of all existing employees. These periodic criminal record checks should not be characterized as regular “background checks” (which are still subject to FCRA notice and disclosure requirements).³³

The criminal record checks instead should be described as being part of an employee investigation under Sections 603(d)(2)(D) and 603(x)(1)(B)(ii) of the FCRA, as amended by the FACT Act, expressly designed to confirm that the employer is in compliance with U.S. Federal, state or local laws and regulations, the employer's own pre-existing, written criminal conduct policy and other corporate policies, and the rules of any relevant self-regulatory organization having authority over the employer or the employee.³⁴ The employer's written policy should state also that the investigations may take the form of financial audits, information technology audits and loss prevention audits, among other forms of audits. It would be helpful as well if the relevance of criminal record checks to the audit could be set forth in examples contained in the employer policy. For example, relating back to the Charles Schwab matter, the policy of a stock brokerage employer subject to NYSE rules would note the need to conduct periodic criminal record checks in order to remain in compliance with NYSE Rule 346(f), among other corporate and/or regulatory policies.

Therefore, in terms of pre-employment and post-hire authorizing documents, employers should consult with counsel as to the viability of formalizing the following:

- **Employer Policy and Procedures/Employee Handbook** - overview of employer's periodic investigations (including employee criminal record checks and related investigations) to confirm compliance with U.S. Federal, state and local laws and regulations, compliance with the employer's own criminal conduct and other corporate policies and the rules of any SRO having regulatory authority over the employer or the employees
- **Pre-Hire Application Documentation** - notice to job applicants that the employer conducts post-hire background checks in accordance with employer policies and the employer's procedures/employee handbook
- **Contractor and Agent Agreements** - consents from contractors and agents to application of employer's investigation procedures to their employees, plus authorizations from all affected contractor and agent employees

If the proposed investigations would include information other than criminal record checks, business justifications and job-related needs should be confirmed for the additional information needed. In any event, the investigations should not include reports on the credit worthiness, credit standing or credit capacity of the employees, since that would invalidate the FACT Act Title VI "safe harbor" exemption.³⁵

While Title VI of the FACT Act provides a "safe harbor" for an employer's use of periodic criminal record checks of existing employees, it should be noted that other U.S. Federal and state laws might apply and should be taken into account. For example, Equal Employment Opportunity Commission (EEOC) decisions allow companies to consider a prior criminal record as long as it constitutes a business necessity and is not treated as an absolute bar to employment.³⁶ This same principle should be applied to the evaluation of criminal records discovered post-hire. Further, the EEOC takes the position that in harassment or discrimination investigations, the victim-complainant is entitled under Title VII of the Civil Rights Act of 1964 to know at least the results of the investigation. The employer relying on the FACT Act, Title VI "safe harbor" therefore should adopt a policy in cases of harassment or discrimination to provide a summary of the employee misconduct investigative report to the victim, in order to satisfy the EEOC requirement. In addition, the employer should confirm to its satisfaction that the federal privacy rights of the employees (including rights under the Americans with Disabilities Act (ADA), if applicable) are protected in the course of conducting the investigation.³⁷

State law also should be taken into account in designing the employer's written policy, since some states have adopted laws and regulations in this area that have not been preempted by the FCRA, as amended by the FACT Act.³⁸ While some state laws may restrict the applicability of the FCRA Title VI "safe harbor", case law in some states also can be found in support of post-hire screening. For example, in the Rhode Island case of *Henry v. J. Troy Earhart*,³⁹ the court upheld the right of the Rhode Island Department of Education to conduct post-hire criminal record checks of teachers against the teachers' claims that the post-hire checks

violated both the U.S. Constitution and the Rhode Island Constitution. The Court held that:

“The plaintiffs allege, without any supporting authority, that the regulations (1) violate the equal-protection clause of the Fourteenth Amendment and article 1, section 2, of the Rhode Island Constitution because there is no rational relationship between the prior offense and the disqualification; (2) violate the due-process clause because it imposes a presumption of guilt; and (3) violate the constitutional right to privacy and the search and seizure provision of the Fourth Amendment by requiring plaintiffs to undergo employment-history and criminal-record checks and fingerprinting by the Rhode Island State Police without requiring the Department of Education to show probable cause or to obtain a warrant. We disagree...The plaintiffs argue that defendant commissioner exceeded the scope of authority delegated to him by the General Assembly in §16-48.1-7 ‘to promulgate rules and regulations to carry out the intent of this chapter.’ The plaintiffs contend that chapter 48.1 covers only prospective operators and employees whereas the regulations cover present preschool operators and employees... Although the statute applies to those who are ‘seeking to operate or seeking employment’ and not to present employees, the Legislature specifically limited licensure of school programs to one year ‘which approval shall require renewal unless sooner revoked by said commissioner for cause.’ Section 16-48-2. **Since the commissioner can renew or revoke his approval of these programs ‘for cause,’ he clearly has the authority to subject present employees and operators to the regulations.**” *[emphasis added]*

Conclusion

Working within the “safe harbor” provided by Title VI of the FACT Act and taking into account key EEOC guidance and other relevant U.S. Federal and state laws, employers and their legal counsel should be able to craft written policies designed to utilize periodic employee criminal record checks and related investigations conducted by the third party consumer reporting agency on behalf of the employer to confirm (a) the employer’s compliance with applicable U.S. Federal, state and local laws and regulations, (b) the employees’ compliance with the employer’s own criminal conduct policy and other corporate policies, and (c) the employer’s compliance with any applicable industry self-regulatory organization rules. By taking the next step in employment screening so as to add post-hire checks to the existing pre-employment checks, the employer should significantly reduce its risk of workplace violence, employee theft and fraud and liability for negligent retention.

Endnotes:

1. See Federal Deposit Insurance Act, Section 19 (“Penalty for Unauthorized Participation by Convicted Individual”), located at <http://www.fdic.gov/regulations/laws/rules/1000-2100.html>.
2. A. Baron, *Violence in the Workplace: A Prevention Management Guide for Businesses* (Pathfinder Publishing 1993).
3. S. Armour, “Stopping a Killer: Death in the Workplace,” *USA Today* (July 16, 2004).
4. Study, “The Financial Impact of Workplace Violence” (The National Institute For the Prevention of Workplace Violence), located at <http://www.workplaceviolence911.com>.
5. See R. Brundrett, “Judge Will Reconsider Wal-Mart Ruling”, *The State.com* (September 10, 2004), located at <http://www.thestate.com/mld/thestate/news/local/9625187.htm>.
6. See Occupational Safety and Health Act of 1970, Section 5(a)(1), 29 U.S.C. Section 654(a)(1); *Secretary of Labor v. Megawest Financial, Inc.*, No. 93-2879 1995 WL 383233 (O.S.H.R.C. June 19, 1995)
7. See Ernst & Young’ “Study of Retail Loss Prevention”, located at http://retailindustry.about.com/cs/lp_retailstore/a/bl_ey051303.htm.
8. See K. Krebsbach, “Security: The Inside Job”, *U S Banker* (September 2004).
9. See “KPMG Survey: More Organizations Detecting Fraud, Spurred by New Regulations and Investor Demands”, *DM Review* (December 5, 2003), located at http://www.dmreview.com/article_sub.cfm?articleId=7815.
10. See Article, “Are Your Background Checks Good Enough?”, *Security Directors Report* (July 2003).
11. See *Ward v. Visiting Nurses Association and Trusted Health Resources, Inc.*, No. 94-4297H (Suffolk Superior Court, MA), summarized at <http://www.securitymanagement.com/library/000527.html>.
12. See J. Reid, “Employee Screening Does Not Stop Once They Start Working”, located at http://www.ey.com/global/content.nsf/South_Africa/Forensic_Services_-_Know_Fraud_August_2004_-_Employee_screening.
13. See J. Reid, *supra*.
14. See R. Lienhard, “Negligent Retention of Employees: An Expanding Doctrine”, *Defense Counsel Journal* (July 1, 1996), located at <http://static.highbeam.com/d/defensecounseljournal/july011996/negligentretentionofemployeesanexpandingdoctrine>.
15. See *Blair v. Defender Services, Inc.*, 386 F. 3d 623 (4th Cir. 2004), located at <http://caselaw.lp.findlaw.com/data2/circs/4th/031280p.pdf>.
16. See R. Lienhard, *supra*.
17. See M. Goldstein, “Schwab Fined for Lax Employee Screening”, *TheStreet.com* (August 11, 2004), located at <http://www.thestreet.com/markets/matthewgoldstein/10177734.html>.
18. See, e.g., FTC Guide, “A Summary of Your Rights Under the Fair Credit Reporting Act”, located at <http://www.ftc.gov/os/2004/11/041119factaappf.pdf>.
19. A “consumer report” is defined in Section 603(d)(1) of the FCRA to mean any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for credit or insurance to be used primarily for personal, family, or household purposes; employment purposes; or any other purpose authorized under Section 604. For all citations herein to the FCRA, as amended by the FACT Act, see <http://www.ftc.gov/os/statutes/031224fcra.pdf>.
20. An “investigative consumer report” is defined in Section 603(e) of the FCRA to mean a consumer report or portion thereof in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning such items of information. However, such information shall not include specific factual information on a consumer’s credit record obtained directly from a creditor or the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.
21. See, e.g., Section 606 of the FCRA, as amended by the FACT Act.
22. See Section 603(h) of the FCRA, as amended by the FACT Act.
23. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified in various subsections of 15 U.S.C. Section 1681); see also <http://www.ftc.gov/os/statutes/031224fcra.pdf>.
24. See Letter from Christopher W. Keller, Attorney, Federal Trade Commission, to Judi Vail (April 5, 1999), located at <http://www.ftc.gov/os/statutes/fcra/vail.htm>.
25. FCRA Section 603(d)(2)(D) (“Definitions; rules of construction” [15 U.S.C. Section 1681a]) provides that “Except as provided in paragraph (3), the term ‘consumer report’ does not include...a communication described in subsection (o) or (x)”. Section 603(x) provides that “Exclusion of Certain Communications for Employee Investigations (1) A communication is described in this subsection if – (A)

but for subsection (d)(2)(D), the communication would be a consumer report; (B) the communication is made to an employer in connection with an investigation of - (i) suspected misconduct related to employment; or (ii) compliance with Federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer; (C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and (D) the communication is not provided to any person except - (i) to the employer or an agent of the employer; (ii) to any Federal or state officer, agency, or department, or any officer, agency, or department of a unit of general local government; (iii) to any self-regulatory organization with regulatory authority over activities of the employer or employee; (iv) as otherwise required by law; or (v) pursuant to Section 608. (2) Subsequent disclosure. After taking an adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) an investigative consumer report need not be disclosed. (3) For purposes of this subsection, the term 'self-regulatory organization' includes any self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934), any entity established under title 1 of the Sarbanes-Oxley Act of 2002, any board of trade designated by the Commodities Futures Trading Commission, and any futures association registered with such Commission."; see <http://www.ftc.gov/os/statutes/fcra/vail.htm>.

26. See Section 603(x)(1)(B)(ii) of the FCRA, as amended by the FACT Act.
27. See Section 603(x)(2) of the FCRA, as amended by the FACT Act.
28. See Section 603(x)(1)(D) of the FCRA, as amended by the FACT Act.
29. See Section 603(x)(1)(B)(i) of the FCRA, as amended by the FACT Act.
30. See Section 603(x)(1)(B)(ii) of the FCRA, as amended by the FACT Act.
31. See R. Fliegel and R. Arena, "The Impact of the FACT Act on Employee Misconduct Investigations and Implications for FCRA and Title VI Compliance", *The Labor Lawyer* (Summer 2004 20:1 Issue), located at http://www.littler.com/publications/Art_fact.pdf.
32. See R. Fliegel and R. Arena, "The Impact of the FACT Act on Employee Misconduct Investigations and Implications for FCRA and Title VI Compliance", *The Labor Lawyer* (Summer 2004 20:1 Issue), located at http://www.littler.com/publications/Art_fact.pdf.
33. See, e.g., Ballard Spahr Andrews & Ingersoll LLP Newsletter (March 2004), located at <http://www.ballardspahr.com/press/article.asp?ID=920>.
34. Although the FACT Act "safe harbor" appears to exempt an investigation even if it seeks only to confirm compliance with the employer's own policies, the safer approach may be to base the periodic employee criminal record checks also on the confirmation of the employer's compliance with U.S. Federal, state and local laws and regulations and SRO rules; see, e.g., Baker & Hostetler Executive Alert (December 2003), located at http://www.bakerlaw.com/files/tbl_s47Details%5CFileUpload265%5C144%5Cnew%20law%20emp%20misconduct.pdf.
35. See Section 603(x)(1)(C) of the FCRA, as amended by the FACT Act.
36. See, e.g., *Green v. Missouri Pacific Railroad Company*, 549 F. 2d 1158 (8th Cir. 1977).
37. See, e.g., K. Dent and S. Sullivan, "Investigating Employee Wrongdoing and Workplace Misconduct: Navigating the Amended Fair Credit and Reporting Act," Davis, Wright Tremaine LLP Advisory Bulletin (February, 2004), located at http://www.dwt.com/practc/empservices/bulletins/02-04_FCRA.htm.
38. See, e.g., Section 625 ("Relation to State Laws") of the FCRA, as amended by the FACT Act..
39. See *Henry v. J. Troy Earhart*, 553 A. 2d 124 (Sup. Ct. R. I. 1989).