SHAWE ROSENTHAL LLP

E-UPDATE

June 30, 2021

RECENT DEVELOPMENTS

Supreme Court Finds Employee's Misuse of Authorized Access Does Not Violate Computer Fraud and Abuse Act

In a criminal case with employment implications, the U.S. Supreme Court ruled that there is no violation of the Computer Fraud and Abuse Act (CFAA) when an employee misuses information obtained through their authorized computer access.

Background of the Case. The CFAA provides for civil and criminal penalties against someone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains...information from any protected computer." Employers have relied on this law as one means of addressing employee theft of trade secrets or other misuse of confidential information. However, as we discussed in our September 2020 E-Update, the federal appellate courts were split on the interpretation of "exceeds authorized access." The Second, Fourth, Sixth and Ninth Circuits have held misuse of information that is validly accessed is not a violation of the CFAA, while the First, Fifth, Seventh, Eighth and Eleventh Circuits have interpreted the language more broadly to prohibit the misuse of information that the employee was authorized to access.

In *Van Buren v. United States*, a police sergeant was paid by a third party to run a license plate search in a law enforcement database that he was authorized to access in violation of a departmental policy that prohibited obtaining database information for non-law enforcement purposes. He was convicted of a felony violation of the CFAA, and his conviction was affirmed by the U.S. Court of Appeals for the Eleventh Circuit. He then appealed to the Supreme Court.

The Supreme Court's Ruling. The Supreme Court overturned his conviction, finding that his misuse of information that he was authorized to access was not a violation of the CFAA. Rather, the Supreme Court held that an individual "exceeds authorized access" when they access a computer with authorization but then obtain information located in particular areas of the computer—such as files, folders, or databases— that are off-limits to them. But the CFAA "does not cover those who … have improper motives for obtaining information that is otherwise available to them."

The Supreme Court noted that employers commonly state that computers should be used only for business purposes. In rejecting the government's argument that a violation of a computer-use policy is also a violation of the CFAA, the Supreme Court somewhat wryly commented "then an employee who sends a personal e-mail or reads the news using her work computer has violated the CFAA" – a result that renders millions of otherwise law-abiding citizens to be criminals.

What This Means for Employers. Employers will not be able to invoke the CFAA against employees who misuse company confidential information that they are authorized to access for

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personal gain. But they may still be able to proceed against those employees under the federal Defend Trade Secrets Act, similar state trade secret laws and, if confidential information agreements exist, for breach of such agreements. This emphasizes the importance of confidential information agreements in situations where employers have significant confidential information that they need to protect against theft or disclosure by employees, as well as more technical safety measures to ensure that employees and others cannot access systems without authorization.

DOL Proposes to Reinstate 80/20 Rule for Tipped Employees Performing Untipped Work

The U.S. Department of Labor has issued proposed regulations that would reinstate the 80/20 rule applicable to the compensation of tipped employees. This rule has been the subject of great controversy over the years and had been eliminated by the Trump administration.

Tipped Employees and the Tip Credit. Under the FLSA, an employer of tipped employees can satisfy its obligation to pay those employees the federal minimum wage by paying those employees a lower direct cash wage (no less than $2.13 an hour) and counting a limited amount of its employees' tips (no more than $5.12 per hour) as a partial credit to satisfy the difference between the direct cash wage and the federal minimum wage. (Notably, many states have enacted higher minimum wage rates, including for tipped employees, or have eliminated the tipped rate altogether). This partial credit is known as the "tip credit." Tipped employees are those who customarily and regularly receive more than $30 per month in tips (including servers, bartenders, and nail technicians).

The 80/20 Rule's Tangled History. Prior to the Trump administration, the DOL took the position that an employer may not take a tip credit for time an employee spends on non-tip producing duties if the time spent on those duties exceeded 20% of the employee's workweek. This rule, known as the 80/20 rule, was rejected by the Trump DOL, which initially issued guidance, followed by formal regulations, providing that an employer may take a tip credit for any amount of time (without limitation) that an employee in a tipped occupation performs related non-tipped duties contemporaneously with their tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

A number of courts, however, rejected the Trump DOL's position and continued to enforce the 80/20 rule. And, immediately following the transition, the Biden DOL delayed the effective date of the Trump-era regulations. As discussed in our March 24, 2021 E-lert, it subsequently permitted parts of the new regulations to go into effect while further delaying other parts – including the provisions relevant to the 80/20 rule – for further consideration and possible revision.

Return to the 80/20 Rule, v. 2.0. In the new proposed rule, the Biden DOL seeks to reinstate the 80/20 rule with some modification. The proposed rule provides that if an employee performs work that directly supports tip-producing work either exceeding 20 percent of all of the hours worked during the employee's workweek or (this is new) exceeding 30 continuous minutes, the employee is not performing labor that is part of the tipped occupation, and the employer may not take a tip credit for that time.

The DOL also provides examples of tipped and non-tipped work for three common categories of tipped employees:

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- Servers' tip-producing work includes waiting tables. Work directly supporting that work includes, for example, preparing items for tables or cleaning the tables to prepare for the next customers. It does not include, for example, cleaning the bathroom.

- Bartenders' tip-producing work includes making and serving drinks. Directly-supporting work includes slicing and pitting fruit for drinks, but not, for example, cleaning the dining room or preparing food.

- Nail technicians' work including performing manicures and pedicures. Directly-supporting work includes cleaning all the pedicure baths between customers, but not, for example, ordering supplies.

Next Steps. The DOL has set a 60-day period for public comment on its proposed Rule. Comments may be submitted here until August 23, 2021. Once the comment period has closed, the DOL will review the comments and may make revisions before issuing the Final Rule.

Supervisor's Statement Blaming Union for Leave Snafu Not Unlawful, says D.C. Circuit

The U.S. Circuit for D.C. vacated a National Labor Relations Board (NLRB or "the Board") order finding a supervisor's statement blaming the employees' union for a leave discrepancy violated the National Labor Relations Act (NLRA).

Facts: In *Trinity Services Group, Inc. v. NLRB*, an employee and a supervisor disagreed regarding the amount of paid leave the employee had accrued. The employee worked in a bargaining unit represented by a union. The union had negotiated a unique paid-leave plan different from the plan at the employer's other, non-union facilities. The supervisor blamed the unique paid-leave plan for the discrepancy. Undoubtedly frustrated by the differing paid-leave schemes, the supervisor stated that this was a "problem that the union created regarding [paid leave]," and that the employee "need[ed] to fix that with the union."

NLRB Decision: The Board, in a 2-1 decision, held that the remarks violated Section 8(a)(1) of the NLRA, which prohibits interference with employees' Section 7 rights under the NLRA to engage in union activity. The statements "had a reasonable tendency to interfere" with those employee rights, because there was "no objective basis for blaming the Union, rather than [the employer]" for the mix-up. Further, because the remarks were made during ongoing contract negotiations and grievance proceedings related to the paid-leave plan, the statements undermined the union's status and could cause an employee to "lose faith" in the union.

D.C. Circuit Decision: The D.C. Circuit denied enforcement of the Board's order, and held that the supervisor's remarks are permissible "opinion[s]" protected by Section 8(c) of the NLRA. Section 8(c) protects an employer's right to "express…any views, argument or opinion[.]" Further, unless an employer threatens reprisal or force, or promises benefits, such expressions "cannot be used as evidence of unfair labor practices." The D.C. Circuit found that the supervisor's statements contained no threats of reprisals or force, and a reasonable employee would not have viewed the statements as threats or promises. Perhaps more importantly, the D.C. Circuit rejected the argument that "materially false statements" lose the protection of Section 8(c). Indeed, the D.C. Circuit noted that "Section 8(c) does not require fairness or accuracy," and *any* views, argument, or opinion are

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protected provided they are not accompanied by threats or promises of benefits. Because the supervisor expressed an opinion containing no threat of reprisal or force or promise of benefit, the supervisor's statements were protected by Section 8(c) of the NLRA and the employer did not violate Section 8(a)(1) of the NLRA.

Takeaway: While the Board is not obligated to follow the D.C. Circuit's holding – the Board's decision in this case remains "good law" within the agency – this decision is encouraging for employers. The D.C. Circuit has jurisdiction to hear appeals of all NLRB orders in unfair labor practice cases, regardless of where in the country the dispute arises. Thus, employers can take comfort that the D.C. Circuit will not find that employer statements unlawful simply because they convey an opinion painting a union in a negative light, provided those statements do not contain threats or promises of benefits.

TAKE NOTE

Supreme Court Allows Transgender Bathroom Decision to Stand. The U.S. Supreme Court let stand a decision that enabled a transgender student to use the sex-segregated bathroom that corresponded to his gender identity. Although not an employment case, transgender bathroom access is an issue of interest to employers, and this case provides some guidance on the topic.

In *Gloucester County School Board v. Grimm*, a transgender male student sought to use the boys' bathrooms, while school policy would have required him to use either a single-stall bathroom or the one corresponding to his biological sex (female). The U.S. Court of Appeals for the Fourth Circuit found that the school policy constituted sex discrimination in violation of federal law, and that the student was entitled to use the bathroom that matched his gender identity.

Notably, the Fourth Circuit's opinion is mostly consistent with the approach taken by the Equal Employment Opportunity Commission, as articulated in its recently-issued technical assistance document (TAD) on Protections against Employment Discrimination Based on Sexual Orientation or Gender Identity (as discussed in our June 16, 2021 blog post). The EEOC specifically stated that employers must allow employees to use the bathrooms and locker rooms that correspond to their gender identity. As we noted, however, the EEOC did not address the question of whether transgender employees could be required to use a single-use facility rather than a sex-segregated facility. At least in the Fourth Circuit (which includes Maryland, Virginia, West Virginia and the Carolinas), the *Grimm* opinion would suggest that they could not.

An Assistant to Perform Essential Functions Is Not a Reasonable Accommodation. Under the Americans with Disabilities Act, an employer is not required to provide an assistant to perform an employee's essential job functions, as the U.S. Court of Appeals for the Fifth Circuit recently noted.

In *Thompson v. Microsoft Corporation*, the employee, who had Autism Spectrum Disorder, sought various accommodations, including an assistant to assist with translating/interpreting verbal information from the employee into the appropriate written format (e.g. email, powerpoint, etc.), to record meeting notes, and to assist with performing administrative tasks (e.g. travel booking, time and expense reporting, meeting scheduling, routine paperwork, monitoring timeliness and providing reminders). While some accommodations were provided, the employer refused to provide the assistant. Ultimately, the employee went on leave, did not return, and sued the employer for violations of the ADA, including failure to provide a reasonable accommodation.

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The Fifth Circuit found that there was no failure to accommodate, as the accommodation sought by the employee – a full-time assistant – was not reasonable. As reflected in the job description and articulated by the employer, the employee's job required direct and close working relationships with the client and others. The requested accommodation of an assistant would have interfered with the essential functions of communicating with the client and managing multiple complex projects in a fast-paced environment. In effect, the employee was seeking to have the assistant perform functions on which his role was expected to spend considerable time. Consequently, the Fifth Circuit found that the requested accommodation would inappropriately excuse the employee from performing his essential functions.

This is not to say that a full-time assistant of some sort is never reasonable. Some readers may recall the case of *Searls v. Johns Hopkins Hospital*, in which the court found that hiring a full-time sign language interpreter for a hearing-impaired nurse was a reasonable accommodation. The difference is that the sign language interpreter was not actually performing nursing duties, in contrast to the requested assistant in the current case, who would have been required to perform many of the employee's actual functions.

Lack of Consistency in Applicant Interview Criteria May Support a Discrimination Claim. Employers should be careful to ensure that their interview processes, including the interview criteria, are consistent, as the U.S. Court of Appeals for the First Circuit recently emphasized.

In *Taite v. Bridgewater State University*, an applicant sued the University for race discrimination and, in support of her claim, offered evidence that different interview criteria were applied to her than to the successful White applicant. Although evaluators were given the same evaluation form to apply to the candidates, it appeared that the candidates were given different instructions on what to address in their interviews/presentations, and that the Black applicant was scored negatively because she did not address topics that she had been instructed not to address.

This case reminds employers to take care that all aspects of the application process are consistently and fairly applied to all applicants. This includes not only the formal written documents, but also the communications to the applicants regarding the interviews or other aspects of the recruiting process.

ADA Reasonable Accommodations Need Not Violate the Law. Confirming perhaps an obvious point, the U.S. Court of Appeals for the Second Circuit held that "a binding federal regulation presents a complete defense to an ADA [American with Disabilities Act] failure-to-accommodate claim."

In *Bey v. City of New York*, Black firefighters with a skin condition that causes pain and scarring with shaving sought an accommodation to the employer's grooming policy, requiring firefighters to be clean-shaven in areas where a respirator "seals" against the skin. The employer refused the accommodation request, citing a binding Occupational Safety and Health Act regulation prohibiting any facial hair between the sealing surface of the mask and the face in order to ensure the proper seal. The employees sued for failure to accommodate under the ADA.

The Second Circuit observed that "[a]t the heart of this appeal is a question about the interplay between federal safety regulations and the ADA's requirement that employers must offer reasonable accommodations to employees with disabilities." The Second Circuit found the regulation to be unambiguous in prohibiting any facial hair where the respirator seals against the face. Thus,

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according to the Second Circuit, "An accommodation is not reasonable within the meaning of the ADA if it is specifically prohibited by a binding safety regulation promulgated by a federal agency." This is the case even if the employer had previously permitted the requested accommodation, as it had done here.

Fourth Circuit Provides Guidance on Counting Employees for Purposes of WARN Act Coverage. During the past year, many employers have had to reduce or shut down operations. In some instances, this has triggered an obligation under the federal Worker Adjustment and Retraining Notification Act to provide 60-days' notice to employees experiencing job loss or reduction in hours. This past month, the U.S. Court of Appeals for the Fourth Circuit provided guidance on which employees must be counted for purposes of determining WARN Act coverage.

The WARN Act requires employers with 100 or more full-time employees to provide at least 60 calendar days advance written notice of a worksite closing affecting 50 or more employees, or a mass layoff affecting at least 50 employees and 1/3 of the worksite's total workforce or 500 or more employees at the single site of employment during any 90-day period. Workers who have less than 6 months on the job and workers who work fewer than 20 hours per week are not counted towards the 100-employee threshold for triggering WARN Act coverage.

In *Schmidt v. FCI Enterprises LLC*, the employer abruptly shut down on October 5, 2018, and 130 employees lost their jobs. 22 employees sued for violation of the WARN Act, on the grounds that they did not receive the requisite 60-days' notice. But, as the Fourth Circuit noted, whether an employer is covered by WARN is determined on the date that the notice should have been given, in this case on August 6, 2018. However, a significant number of employees – 48 – had been hired within the 6-month period prior to that date and should not have been included in the count towards the 100-employee threshold. Consequently, on August 6, 2018, fewer than 100 employees could be counted, and the employer was not covered by WARN.

This case is a good reminder to employers in the 100-employee range that it is worth spending the time to make sure that employees are correctly counted for WARN purposes. It may be beneficial to the employer if WARN Act notices are not required in the current economic circumstances.

Employers Need Not Tolerate Dangerous Misconduct, Even If Caused By Disability. As the U.S. Court of Appeals for the Eleventh Circuit stated, "The [Americans with Disabilities Act] does not require an employer to retain an employee who it believes behaved in a threatening and dangerous way—even if the employee's major depressive disorder is one reason or the sole reason, that the employee engaged in that behavior."

In *Todd v. Fayette County School District*, the school district chose not to renew the contract of a teacher who suffered from major depressive disorder, based on her alleged threats to kill herself and her son, her alleged threats against school administrators, and her alleged overuse of Xanax while at school. She sued the school district, claiming among other things that it discriminated against her based on her disability.

The Eleventh Circuit found that the teacher's contract had been appropriately terminated based on her misconduct – the threats against herself and others. The Eleventh Circuit noted that the school district had even sought to determine whether it could maintain protocols to prevent the teacher from engaging in similar behavior upon returning to work – although to no avail. Thus, it concluded that

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the ADA does not "require that employers countenance dangerous misconduct, even if that misconduct is the result of a disability."

This case supports the more general principle, set forth in long-standing EEOC guidance, that an employer need not excuse an employee from meeting conduct standards because of a disability – although they may need to provide reasonable accommodations to enable the employee to meet those standards. And, so long as the conduct standards are job-related and consistent with business necessity and other employees are held to those standards, the employee may be disciplined or even terminated for failing to meet the standards.

NLRB Says Solicitation of Mail Ballots is Objectionable Conduct, Could Negate Election Results. The National Labor Relations Board (NLRB or the Board) held that solicitation of mail ballots is objectionable conduct during a NLRB-conducted election. The Board further held that an election would be set aside if the evidence establishes that a party's ballot solicitation affected a determinative number of voters – i.e., a number of voters greater than or equal to the winning party's margin of victory.

In *Professional Transportation, Inc.*, the union won a mail-ballot election, 42-27, with five non-determinative challenged ballots. Following the election, the employer filed objections to the election. One of the objections alleged that union representatives called and texted two employees and offered to collect and mail their ballots. The Regional Director overruled the objections without an evidentiary hearing. The employer appealed to the Board.

It is established Board law that it is objectionable conduct for a party to "collect or otherwise handle" employee mail ballots. But, prior to this case, the Board had not reached whether the solicitation of mail ballots by party to an election constituted objectionable conduct. The Board reasoned that a party's solicitation of mail ballots creates the appearance of irregularity in the NLRB's election procedures. For example, by soliciting mail ballots a party effectively asks the voter to disregard the NLRB's instructions accompanying the mail ballot, which instruct the voter not to permit any party to handle or collect the ballot. Moreover, solicitation suggests to employees that the soliciting party is involved in running the election, which the Board has previously found to be incompatible with the agency's responsibility for assuring properly conducted elections.

But the Board further held that it will set aside the election results only where the evidence shows that a determinative number of voters were affected by the solicitation. Here, the employer's offer of proof, if credited at a hearing, would establish that the union's mail-ballot solicitation affected two voters – the employer did not suggest the union engaged in a pattern or practice of solicitation. Thus, the union's conduct could not have affected the outcome of the election in which the union prevailed by at least 10 votes – the 15-vote margin less the possibility that the five unresolved challenges were votes for the employer. Accordingly, the Board found that while the union engaged in objectionable conduct, the Regional Director was correct to overrule the employer's objections because the union's conduct did not affect the outcome of the election.

Takeaways: Employers can take a couple of lessons from this case. First, and most obviously, employer representatives should not offer employees with help to complete or collect their ballot. Second, though mail-ballot solicitation is objectionable conduct, the Board will only set aside the

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election results if it affected a sufficient number of voters – either through direct evidence or evidence of "pattern or practice" – to alter the outcome of the election.

A New Job-Sharing Arrangement Is Not a Required Reasonable Accommodation. Even if the incumbent employee is willing to share a full-time job, the employer is not required to permit such an arrangement as a reasonable accommodation, according to the U.S. Court of Appeals for the Fourth Circuit.

In *Perdue v. Sanofi-Aventis U.S., LLC*, the employee was unable to work full-time because of a disability. A fellow employee was willing to job-share her full-time position. However, the job-share proposal was denied. The employee was subsequently terminated after being unable to return from leave, and she sued for violation of her rights under the ADA, including for failure to accommodate.

The Fourth Circuit held that an employer does not have to provide a job-sharing opportunity with a willing partner as a reasonable accommodation. According to the Fourth Circuit, "If the job share in question did not exist at the time it was proposed as an accommodation, the ADA does not require the employer to create the new position to accommodate a disabled employee." Thus, if the job-share requires the employer's approval, the employee is not entitled to the job-share as an accommodation.

This case reinforces the principle that creating a new position is not a reasonable accommodation under the ADA, and that the modification of a full-time position into a job-sharing arrangement is, in fact, the creation of a new job.

NEWS AND EVENTS

Honor - *Best Lawyers in America*© has released its inaugural 2021 edition of *The Best Lawyers® Employment Law* Issue, which includes Shawe Rosenthal LLP and eleven of our partners – the most of any labor and employment firm in Maryland: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, Teresa D. Teare, Parker E. Thoeni, and Elizabeth Torphy-Donzella. Best Lawyers® is the oldest and most respected guide to the legal profession.

Webinar – "The "New Normal" of Remote Work? What Employers Need to Know." On Wednesday, July 20, 2021 at 1:00 p.m. Eastern, Fiona W. Ong and Lindsey A. White will present this complimentary webinar on behalf of hrsimple.com, the publisher of the Maryland Human Resources Manual and similar publications in other states. Fiona and Lindsey will discuss some common questions, such as when remote work may be required as an accommodation, when requests for remote work may be refused, and how to ensure compliance with employment laws, including wage-hour and workplace safety, for remote workers. They will also discuss the tricky question of what obligations employers take on when employees are working remotely from another state on a regular basis. You may register for the webinar here.

Webinar – Shawe Rosenthal is pleased to offer our clients the opportunity to participate in the Employment Law Alliance's complimentary webinar – **Welcome Back America! HR Considerations for the 2021 US Workplace –** on Thursday, July 15, 2021 at 2:00 p.m. Eastern. This session will focus on HR policy considerations for remote working – both in-state and

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out-out-state, returning to the office, vaccines, & promoting a safe work environment. You may register for the webinar here.

Media Mention – Fiona W. Ong was quoted in a May 28, 2021 article by Louise Esola, "Employers caught in confusion over CDC mask policy," for businessinsurance.com.

Presentation – Teresa D. Teare was a presenter for a June 10, 2021 panel discussion, "Pretext at Summary Judgment," at the Maryland State Bar Association's annual conference. Teresa currently serves as Chair-Elect of the Council for the MSBA's Labor and Employment Law Section.

Media Mention - Fiona W. Ong was quoted in a May 17, 2021 article by John Kingston, "Supreme Court won't hear Uber Black driver classification case," for FreightWaves, the largest online source of news and data for the trucking and freight sector.

TOP TIP: Supreme Court Case Reminds Employers to Comply with FCRA's Technical Requirements

In another non-employment case with employment impact, the U.S. Supreme Court reiterated that only a plaintiff who has suffered concrete harm may bring suit for damages under the Fair Credit Reporting Act (FCRA) – the federal law governing background checks, including for employment purposes. Nonetheless, this case serves to remind employers of the need to comply with the technical requirements of FCRA.

Under FCRA, if employers use a third-party provider to conduct a background check (i.e. consumer report or investigative consumer report), there are certain required notices and communications. Over the years, there have been numerous lawsuits against employers for failure to comply with FCRA's strict notice and/or disclosure requirements. In many instances, employees challenged technical violations – some on behalf of a class – even though no actual harm was experienced. This led to the Supreme Court's 2016 decision in *Spokeo Inc. v. Robins*, in which it held that, in order to sue under FCRA, a plaintiff must establish that they have suffered "concrete" harm – meaning real injury, and not simply a "bare procedural violation." The Supreme Court has now reiterated this position in the non-employment case of *TransUnion LLC v. Ramirez*.

Although it is good news for employers that they will avoid liability if there is no tangible harm (like economic or reputational damages), nonetheless they should still ensure compliance with FCRA's technical requirements in order to avoid the possibility of such liability – and also the aggravation and expense of defending against a lawsuit regardless of the merits. These requirements are as follows:

General Notice Requirements. Under FCRA, a "consumer report" is any communication containing information about an individual's credit history, character, general reputation, personal characteristics, or mode of living. An "investigative consumer report" is a consumer report in which information is obtained, at least in part, through personal interviews with neighbors, friends, or associates. These reports include credit checks, criminal background checks, reference checks, educational checks, driving records checks, and social media checks.

When any consumer report or investigative consumer report is being procured for employment purposes, the employer is obliged to provide the following notices and certifications to the

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applicant/employee:

1. Provide the applicant/employee with a clear and conspicuous written advance disclosure in a stand-alone document, stating that a consumer report or investigative consumer report may be obtained for employment purposes.

2. Obtain the applicant's/employee's written authorization for the procurement of the consumer report or investigative consumer report, which may be combined with the stand-alone document referred to in the prior paragraph.

3. Certify, to the entity providing the report, that the company has complied with the above notice requirements and that the information from the report will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.

4. If the report is going to be used as the basis, in whole or in part, for any adverse employment action (such as a refusal to hire or a decision to terminate), provide the applicant/employee with a pre-adverse action notice letter, along with a copy of both the report and a copy of the Consumer Financial Protection Bureau ("CFPB") publication entitled "A Summary of Your Rights Under the Fair Credit Reporting Act" before taking the action.

5. After waiting a "reasonable" amount of time (not specified by the statute or the CFPB), advise the applicant/employee of the adverse employment action. We recommend at least 5 business days. The letter must explain the adverse action, provide the name and contact information for the consumer reporting agency, state that the consumer reporting agency did not make the decision to take the adverse action and will not be able to provide an explanation for the action, state that the individual has the right to request a free copy of the report from the agency within 60 days, and state that the individual has the right to dispute with the agency the accuracy or completeness of the information in the report.

Additional Requirements for Investigative Consumer Reports.

1. Sometime before but not later than three days after requesting a report, provide the applicant/employee with written disclosure that an investigative consumer report may be obtained. Note that this requirement is satisfied by the initial disclosure/authorization form referenced above, which is provided to the applicant/employee before requesting the report.

2. The disclosure must include a statement that the investigative consumer report may include information about the individual's character, general reputation, personal characteristics, or mode of living.

3. The disclosure must inform the applicant/employee of his/her right to request a complete and accurate disclosure of the nature and scope of the investigation.

4. The disclosure must also inform the individual that the employer is required to make a written disclosure of the nature and scope of the investigation within five days after receiving

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the individual's request for disclosure or the date the employer requests the investigative consumer report, whichever is later.

5. With the disclosure, provide a summary of rights as contained in the CFPB publication entitled "A Summary of Your Rights Under the Fair Credit Reporting Act."

6. Certify, to the entity providing the report that the Company has and will comply with all notice and disclosure requirements for investigative consumer reports, and further certify that the Company will disclose the nature and scope of the investigation to the individual upon request and within the required five-day period.

7. Upon written request by the applicant/employee made within a "reasonable time," provide complete written disclosure of the nature and scope of the investigation that was requested, within the five-day period noted above.

Special Rules for Employee Investigations. If an employer uses a third-party consumer reporting agency (such as a human resources consulting firm that regularly does investigations) to conduct an investigation into suspected employee misconduct, or compliance with laws, regulations or the employer's policies, the employer does not need to provide the notices and disclosures or obtain the authorization described above. However, the employer must provide a summary describing the nature and scope of the investigation to the employee if adverse action is taken based on the investigation.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Healthcare Employers Rejoice! OSHA Provides New Compliance Resources (Model Plan!) for Its Emergency Temporary Standard by Fiona W. Ong, June 23, 2021

- SOGI (Sexual Orientation and Gender Identity) Discrimination? The EEOC Offers Guidance by Fiona W. Ong, June 16, 2021

- OSHA's COVID-19 Emergency Temporary Standard for Healthcare Employers Contains Some (Unpleasant) Surprises by Fiona W. Ong, June 15, 2021

- OSHA's COVID-19 Updated Workplace Guidance – What Employers Need to Know by Fiona W. Ong, June 10, 2021

- UPDATED: Maryland Employers and Current COVID-19 Considerations: Workplace Safety Standards, Vaccinations, Masking, Paid Leave, and More by Fiona W. Ong, June 9, 2021

- Why Employers Shouldn't Dismiss Workplace Rumors and Gossip – Courts Aren't by Veronica Yu Welsh, June 3, 2021

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