

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Division of Credit Practices  
Bureau of Consumer Protection

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Ronald G. Isaac  
Attorney

June 11, 1998

Re: Sections 604(b)(2), 604(b)(3), 606(a), and 606(b) of the Fair Credit Reporting Act

Dear Mr. Brisch:

This will respond to your letter requesting an opinion as to whether employers must comply with the requirements of Section 604(b) of the Fair Credit Reporting Act (AFCRA@), 15 U.S.C. ' 1681b(b), when obtaining consumer reports on current employees suspected of criminal or other workplace misconduct.

Section 604(b)(2) of the FCRA requires an employer who plans to obtain consumer reports for employment purposes to disclose this fact to each affected consumer and to obtain the consumer=s written authorization before procuring the report. Section 604(b)(3) requires the employer to provide the affected consumer with a copy of the report and the summary of consumer rights prescribed by the Federal Trade Commission before taking any adverse action based on information in the report. You express doubt that Congress intended for these requirements to apply to a situation where an employer suspects an employee of engaging in unlawful or inappropriate conduct, because it would hinder, and possibly thwart, the employer=s ability to discover such conduct and administer appropriate discipline.

The legislative history of the amendments to the FCRA indicates that Congress was indeed aware of the issue you raise yet decided not to adopt a provision exempting employers from the requirements of Section 604(b) when obtaining consumer reports on employees suspected of criminal activity. That legislative history also shows that Congress was Aconcerned that the ability of employers to obtain consumer reports on current and prospective employees may unreasonably harm employees if there are errors in their reports,@ and for that reason, enacted Section 604(b). Therefore, based on the language of the statute and the legislative history, employers obtaining consumer reports, regardless of the circumstances, must (1) get written authorization and provide the disclosure required by Section 604(b)(2), and (2) before taking adverse action, provide a copy of the report and the summary of consumer rights, as required by Section 604(b)(3).

There is an option, however, that would allow an employer to conduct its investigation confidentially without alerting the employee, at least, as you suggest, until the employer is prepared to confront the employee with its findings. Section 604(b)(2)(A) provides that the disclosure informing the employee that a consumer report may be obtained shall be given to the employee *Aat any time* before the report is procured or caused to be procured@

(emphasis added). Therefore, an employer may choose to provide a general disclosure in writing to all current employees and obtain their written authorizations at one time. Thus, should it later become necessary to obtain a consumer report on any individual employee, the disclosure will have already been given and the authorization already obtained, and the employee would not have to be told that a consumer report had been procured until the employer was prepared to take adverse action based on information in the report.

Giving a general disclosure to all employees and obtaining their prior written authorizations is also permissible where an Ainvestigative consumer report@ may later be obtained by the employer. However, Section 606 of the FCRA sets forth specific procedures that an employer or other user must follow when requesting an investigative consumer report, including notifying the subject employee that an investigative consumer report may be obtained. Inasmuch as such disclosure is likely to generate requests from employees for access to any investigative consumer report obtained on them, an employer should consider the value of prematurely disclosing that an investigative consumer report may be obtained when it has no present intention to order such a report.

This is an informal staff opinion and is not binding on the Commission.

Sincerely,

Ronald G. Isaac