



BALCH & BINGHAM LLP

Alabama • Mississippi • Washington, D.C.

LABOR AND EMPLOYMENT

BULLETIN February 21, 2004

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COAL AND NATURAL GAS
CONDEMNATION, LAND USE AND
WATER RIGHTS
CONSTRUCTION
CONSUMER FINANCIAL SERVICES
CORPORATE & SECURITIES
ECONOMIC DEVELOPMENT
INCENTIVES
EDUCATION
EMPLOYEE BENEFITS AND EXECUTIVE
COMPENSATION
ENERGY AND UTILITY LITIGATION
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MERGERS & ACQUISITIONS
FINANCIAL INSTITUTIONS
FINANCIAL PRODUCTS & SERVICES
FINANCIAL SERVICES LITIGATION
GAMING
HEALTHCARE
INSURANCE INDUSTRY LITIGATION
INSURANCE INDUSTRY REGULATION
INTELLECTUAL PROPERTY
LABOR & EMPLOYMENT
MERGERS & ACQUISITIONS
NUCLEAR ENERGY
PRODUCTS LIABILITY
PUBLIC FINANCE
REAL ESTATE
REAL PROPERTY/TITLE INSURANCE
LITIGATION
SPORTS AGENCY & REGULATION
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TELECOMMUNICATIONS
WILLS, TRUSTS, ESTATES AND
WEALTH MANAGEMENT

Employers Can Breathe Easier When Using Third-Party Investigators to Investigate Employee Misconduct

Employers sometimes call upon a third-party investigator, often a law firm or investigative service, when they need help investigating a particularly sticky personnel issue, such as a serious sexual harassment claim or allegations against a company officer or executive. However, as a result of a 1999 opinion issued by the Federal Trade Commission, many employers felt compelled to comply with the notice and consent requirements of the Fair Credit Report Act ("FCRA") prior to allowing a third party to conduct an investigation into an employee's alleged misconduct. Compliance with the FCRA's notice and consent requirements meant that the employer had to notify the employee accused of misconduct and obtain permission from him or her prior to allowing a third-party to investigate and create a "consumer report" regarding the employee's alleged misconduct. Fortunately, the recently enacted Fair and Accurate Credit Transactions Act of 2003 ("FACT") amends FCRA's definition of a "consumer report" to exclude communications made to an employer in connection with an investigation of suspected misconduct relating to employment or compliance with federal, state or local laws and regulations or pre-existing written employer policies. But, if any adverse employment action is taken as a result of the third party investigator's report, the employer is required to provide to the employee a summary consisting of the nature and substance of the report after taking the adverse action.

As a result of FACT, employers can breathe easier when using third-party investigators to investigate employee misconduct such as harassment, discrimination, or embezzlement. The use of a third-party to investigate often is advantageous because the investigator can provide expertise on a subject matter and generally has more training and experience in deciding which questions to ask, how to properly document the investigation, and how to make credibility decisions. The use of third-party investigators also provides for a level of impartiality that may be absent with an internal or in-house investigation and that may be persuasive to a jury deciding whether the employer responded appropriately to the matter.



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BALCH & BINGHAM LLP
LABOR AND EMPLOYMENT CONTACTS

BIRMINGHAM, AL

Edward S. Allen	ellen@balch.com	205.226.3413
Leslie M. Allen	lallen@balch.com	205.226.3484
Brent Cobb	bcobb@balch.com	205.226.3477
Aaron L. Dettling	adettling@balch.com	205.226.8723
Jenelle R. Evans	jevans@balch.com	205.226.8760
Monica G. Graveline	mgraveli@balch.com	205.226.8722
Douglas B. Kauffman	dkauffman@balch.com	205.226.8758
N. DeWayne Pope	dpope@balch.com	205.226.3421
Lisa J. Sharp	lsharp@balch.com	205.226.8714
T. Dwight Sloan	dsloan@balch.com	205.226.3447
M. Jefferson Starling	jstarling@balch.com	205.226.3406
Christopher T. Terrell	cterrell@balch.com	205.226.8734

HUNTSVILLE, AL

David B. Block	dblock@balch.com	256.512.0105
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JACKSON, MS

R. Pepper Crutcher, Jr.	pcrutcher@balch.com	601.965.8158
Armin J. Moeller, Jr.	amoeller@balch.com	601.965.8156
David M. Thomas, II	dthomas@balch.com	601.965.8157
Rusty Turner	rturner@balch.com	601.965.8159

ATLANTA, GA

Gregory A. Bailey	gbailey@balch.com	404.261.6020
Charles J. Gernazian	cgernazian@balch.com	404.261.6020
Cary Ichter	cichter@balch.com	404.261.6020

MONTGOMERY, AL

David R. Boyd	dboyd@balch.com	334.269.3132
William P. Cobb, II	pcobb@balch.com	334.269.3128
Charles B. Paterson	cpaterson@balch.com	334.269.3143
Dorman Walker	dwalker@balch.com	334.269.3138

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