

**TESTIMONY OF LEWIS L. MALTBY
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REGARDING EMPLOYEE INVESTIGATIONS
BEFORE THE HOUSE SUBCOMMITTEE ON FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT
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Introduction

My name is Lewis Maltby. I am president of the National Workrights Institute. The Institute is a not-for-profit research and education organization dedicated to advancing human rights in the American workplace.

Testimony

Pre-Hiring Investigations

The Institute is very concerned about the growth of employment investigations in America. There is nothing wrong with employment investigation. For employers to select the strongest applicant, they must screen out the other applicants. An employer who hired everyone who applied would quickly be bankrupt.

But there is much that is wrong with the way employment investigation is practiced today. Many employment screens are highly intrusive and invade people's privacy. Others are highly arbitrary and deny work to honest hard working people.

For example, many employers require all applicants to take a so-called honesty test. At least 2.5 million people are required to take such tests every year. There is nothing wrong with employers wanting to hire honest people. But honesty tests are notoriously unreliable. For every dishonest person they identify, at least four honest people are denied a job. Worse yet, honest people who fail one honesty test generally fail them all. In an industry where honesty tests are standard practice, many honest people are virtually unemployable.

Other employers require prospective employees to take personality tests. This also is not inherently wrong. Organizations, like people, have personalities. A person who would fit it well with an informal Silicon Valley company might have difficulties in a highly structured Wall Street firm. Companies that choose employees based on personality as well as ability can save both parties from the consequences of a bad decision.

But many personality tests are shockingly intrusive. The Minnesota Multiphasic Personality Inventory (MMPI) asks detailed questions about applicants' sex lives, religious beliefs, and bathroom habits. No one should have to reveal such intimate aspects of their personal lives just to get a job. The harm is all the worse because such information is irrelevant to job performance.

Relatively recently, employers have begun investigating employees' private lives. Approximately 6% of American employers inquire whether their employees smoke, drink, or engage in risky hobbies in their private lives. Twenty-nine states have enacted legislation that restricts this type of discrimination, often with the help of the Workrights Institute. But in the remaining 21 states, employers can and do deny people employment because they smoke or drink in their own homes on their own time.

In the wake of 9/11 the number of employers conducting criminal record checks has exploded. Companies supplying such reports report that their business has at least doubled in less than two years. Under certain circumstances, this is entirely proper, or even necessary. I have three children who ride the school bus every day. The youngest is 5 years old. I would be angry if my school district did not conduct record checks and screen out prospective drivers with DWI convictions.

But some employers use criminal records in irrational and unfair ways. Eli Lilly, for example, will not hire anyone who has ever been convicted for anything for any job, no matter what the circumstances, and no matter how long ago the offense. Kimberly Kelley lost her job as a pipe insulator at a Lilly contractor because, before starting this job, she had been convicted in absentia of passing a bad check for \$60.

Such "zero judgment" laws violate federal anti-discrimination law because of their disparate impact on minority groups. Eight states require that there be a nexus between the nature of the offense and the nature of the job. But many employers do not comply with these laws.

The worst aspect of such employee investigations is that they have taken over the hiring process. Instead of the result of the investigation being used as input to a human being who will consider it, along with all the other relevant information, the investigation results determine the outcome. Human judgment is eliminated. In most companies today, if you fail the honesty test, you are automatically dropped from the applicant pool. Even if the HR professional thinks the test is wrong, it makes no difference. If you smoke or drink (in certain companies) you are out, no matter how strong your job performance. If you have a criminal record, you are not hired, no matter what the circumstances.

It is unfair to employees and damaging to productivity and our standard of living for hiring decisions to be made in this manner. While it is impossible to legislate good judgment, there are steps that Congress could take that would improve the situation.

Fair Credit Reporting Act

Ironically, the area in which employee investigations are most needed is the one area where there are substantial legal restrictions. Under the Fair Credit Reporting Act (FCRA), when an employer commissions a third party to conduct a “consumer report” or “investigative consumer report”, the employer must notify the affected employee in advance and obtain their permission.

In general, this is a good rule. Such reports can be extremely revealing and people should not be forced into investigations against their will.

But the rule makes no sense in the context of employer investigation of employee misconduct. Telling the employee suspected of misconduct that an investigation is about to begin gives them the opportunity to alter their behavior, destroy evidence, and take other action to hide the truth. Even worse, the suspected employee can prevent the investigation by refusing to consent. This is so irrational as to border on the surreal. What kind of law enforcement system allows people who have broken the law to escape justice by refusing to let the authorities investigate their conduct?

As a human rights organization, the Institute is most concerned about the impact this law has on civil rights. Consider the situation in which a female employee complains to her boss that another employee has sexually harassed her. Assume that she identifies eyewitnesses to the harassment. The employer obviously needs to conduct an investigation. But it can't, because speaking to the witnesses falls under the definition of “investigative consumer report” in FCRA. The accused harasser can protect himself by refusing to consent to the investigation. This is obviously an intolerable result.

Legislation has been proposed that addresses this issue. Representative Sessions and other Members have introduced legislation, the Civil Rights and Employee Investigation Act (H.R. 1543), that would remove from the FCRA “investigation of suspected misconduct related to employment”. This is a step in the right direction, but not a complete solution. For example, not everyone suspected of sexual harassment or other workplace misconduct is guilty. The FCRA contains rights that help protect innocent people suspected of misconduct. H.R. 1543, standing alone, would eliminate these protections.

What is needed is for all concerned groups to work together to find a way to amend the FCRA that eliminates the impediments to legitimate workplace investigations without eliminating other important employee protection. The beginning of this dialogue has already taken place. The National Workrights Institute would be happy to help continue these discussions.

The Institute would also like to submit supplemental materials after the conclusion of the hearings.