

Employment Practices Liability

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Ninth Circuit: FCRA Background Check Disclosure Cannot Include Liability Waiver

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Executive Summary: In a case of first impression, the Ninth Circuit Court of Appeals recently held that a background check disclosure that included a liability waiver violated the Fair Credit Reporting Act (FCRA). The Ninth Circuit is the first federal appeals court to decide this issue and definitively stated that the statute “unambiguously bars the inclusion of a liability waiver.”

Under the FCRA, an employer cannot procure a “consumer report” (e.g. a background report, credit report, etc.) on an employee or applicant without providing a clear and conspicuous disclosure in a document that consists solely of the disclosure. The statute does not define the term “solely” but provides an exception from this requirement for an authorization to procure the report. Much of the recent FCRA litigation has involved whether employers’ disclosure forms improperly included a release of liability or other “extraneous information” that rendered the disclosure invalid.

In *Syed v. M-I, LLC*, (9th Cir. Jan. 20, 2017), the Ninth Circuit agreed with the employee that the inclusion of waiver of liability language in the disclosure document violated the FCRA’s “solely” requirement. The court reasoned that because the statute provides an express exception for the inclusion of an authorization in the same document, Congress clearly intended to exclude any other implied exception. In other words, under the language of the statute, the FCRA disclosure requirements are not met where a document contains any language other than the disclosure and an authorization.

The court also considered the Supreme Court’s 2016 decision in *Spokeo, Inc. v. Robins*, but found that the employee had standing to bring the claim because he had alleged more than a “bare procedural violation” of the FCRA.

Notably, the court also found that the employer had willfully violated the FCRA. The employer argued that it acted on an objectively reasonable interpretation of the FCRA, given the lack of guidance from federal

courts and administrative agencies. The court concluded, however, that the employer’s interpretation of the statute was objectively *unreasonable* because no reasonable interpretation of the statute would allow any language besides a disclosure and authorization. The FCRA has been amended several times since its inception, and the Federal Trade Commission (FTC) has issued informal advisory opinions, including a 1998 opinion stating that the inclusion of a waiver in a disclosure form would violate the Act.

Bottom Line: This decision by the Ninth Circuit is just one example of the strict approach many courts have taken regarding the FCRA’s disclosure requirements. The Ninth Circuit’s determination that the inclusion of a liability waiver was a willful violation of the FCRA should be of particular concern to employers. The Act provides that willful violations can result in either actual damages or statutory damages, ranging from \$100 to \$1,000 per violation, which can result in significant potential liability in class action litigation. Additionally, there is the possibility that employers may be hit with punitive damages, as determined by the court, for willful violations.

Employers who obtain background checks from consumer reporting agencies must ensure their forms comply with the FCRA, as well as various state and local laws. Employers cannot rely on the disclosure and authorization forms provided to them by third-party vendors and must be aware that violations of the technical provisions of the FCRA have the potential to cause huge problems. Employers who conduct background or credit checks would be well served to review their hiring forms to ensure they comply with the FCRA.

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