

Ninth Circuit Re-affirms Fair Credit Reporting Act's Strict Disclosure Standards

Article By:

Labor and Preventive Practices

A disclosure form that included other, state-mandated disclosure information violated the Fair Credit Reporting Act's (FCRA) standalone document requirement, the Ninth Circuit held. *Gilberg v. Cal. Check Cashing Stores, LLC*, No. 17-16263 (9th Cir. Jan. 29, 2019). In doing so, the Ninth Circuit relied on *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), where the Court held the plain language of the FCRA requires that the disclosure be "in a document that consists solely of the disclosure," and that a disclosure form which included a liability waiver in the same document violated the "standalone document requirement."

The FCRA requires that employers provide job applicants with a "clear and conspicuous disclosure" that the employer may obtain a consumer report on the applicant.

The Court rejected the defendant's argument that the extraneous information in its form consisted "of other, state-mandated disclosure information, which furthers rather than undermines FCRA's purpose." The Ninth Circuit emphasized the FCRA clearly states that the disclosure must be in a document that consists *solely* of the disclosure and that no exceptions to this requirement should be implied into the statute. The Court also noted that the presence of the state-mandated disclosures did not further the FCRA's purpose as they were "as likely to confuse as . . . to inform."

The Ninth Circuit then held that the form also was not "clear and conspicuous." The Court quoted one section of the form which it held was unclear because a reasonable person would not understand the language:

The scope of this notice and authorization is all-encompassing; however, allowing CheckSmart Financial, LLC to obtain from any outside organization all manner of consumer reports and investigative consumer reports now and, if you are hired, throughout the course of your employment to the extent permitted by law.

The Court further held the disclosure was unclear because it combined both the FCRA and state-mandated disclosures, which could confuse a reasonable person.

Although the Court held that the disclosure was sufficiently "conspicuous" and noted with approval its use of capitalized, bolded, and underlined headers, it stressed that the form must be both

clear *and* conspicuous and, therefore, did not comply with the FCRA's "clear and conspicuous" requirement.

Given the Ninth Circuit's strict interpretation of the FCRA's "standalone document requirement" and emphasis on clarity, employers within that circuit should ensure that their disclosure forms: (1) do not contain any extraneous materials; and (2) are written in plain English and without any "legalese."

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