

Two Recent Ninth Circuit Cases Provide Guidance on FCRA Disclosure and Authorization Form Requirements

Article By:

Ryan J. Evans

Robert T. Quackenboss

The Federal Reserve anticipates an approximate two percent reduction in unemployment by June 2021, envisioning rapid mass-hiring by employers once governments lift the more stifling COVID-19 restrictions. Businesses requiring pre-employment background checks may be uniquely exposed to liability under the Fair Credit Reporting Act (“FCRA”) if minor mistakes are amplified by mass-hiring events.

The FCRA requires, among other things, that an employer inform and obtain consent from an applicant regarding the employer’s intent to obtain a consumer report. Specifically, the employer must provide a “clear and conspicuous disclosure ... in writing ... in a document that consists solely of the disclosure.” Two recent Ninth Circuit cases further explicate this standard, and when it applies.

In *Walker v. Fred Meyer Inc.*, 953 F.3d 1082 (9th Cir. 2020), the court addressed the standalone disclosure, and found that an employer may provide a “concise explanation” of what the consumer report may be used for. The Court held that “beyond a plain statement disclosing ‘that a consumer report may be obtained for employment purposes,’ some concise explanation of what the phrase means may be included.” In other words, an employer may concisely explain to an applicant or employee what the report entails, how it will be obtained, and for which type of employment purposes it may be used.

In *Walker*, the relevant issue was whether the employer willfully violated the FCRA by providing an unclear disclosure form encumbered by extraneous information. Plaintiff Walker claimed the disclosure form was confusing because it included information rendering him “unable to meaningfully evaluate and understand the nature of the report.”

The *Walker* Court held that beyond a plain statement disclosing “that a consumer report may be obtained for employment purposes” an employer may include a concise explanation of what that phrase means without violating the FCRA’s “standalone” requirement. The Court found that a statement specifying the use of investigative reports did not violate the FCRA’s standalone requirement because investigative reports are a subcategory or specific type of consumer report.

However, the Court disapproved of two other portions of the employer's disclosure, which explained: how an applicant may inspect the Credit Reporting Agency's ("CRA") files, how the CRA will help the applicant understand the files, and if the CRA obtains any information by interview, that the applicant has the right to obtain a disclosure of the scope and nature of the investigation performed. The Court found these statements could pull an applicant's attention away from his privacy rights protected by the FCRA, were more than merely a 'concise statement' and therefore violated the FCRA's 'standalone' requirement.

The second case, *Luna v. Hansen & Adkins Auto Transport, Inc.*, No. 18-55804 (April 24, 2020), drew a distinction between the FCRA requirements applicable to a disclosure versus an authorization form. Plaintiff Luna alleged that Defendant-employer violated the FCRA by (among others) failing to place the FCRA *authorization* on a standalone document. There, the authorization appeared at the end of the employment application and included other notices, waivers, and agreements, unrelated to acquiring the consumer report.

The Court rejected Plaintiff's argument that, by including the authorization form within the employment application and among other waivers, the Defendant-employer violated the FCRA's 'standalone' requirement. Instead, the Court held that the "standalone" requirement only applies to the disclosure form, not the authorization.

In sum, employers should review the content of their disclosure forms, and ensure that no information is included beyond explaining what a consumer report entails, how it will be obtained, and for which type of employment purpose it may be used. Anything more may violate the FCRA. In the view of the Ninth Circuit, employers may, however, include FCRA authorizations within the employment application, which may facilitate more quickly expanding their workforce once the economic headwinds shift.

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