Employers: No Time Like the Present to Scrutinize Background Check Forms

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Employers: No Time Like the Present to Scrutinize Background Check Forms

Written by Meredith S. Dante, Mark J. Furletti and Elliot I. Griffin.

The time to act is now. Employers should take a look at their background check forms in light of a recent ruling of the U.S. Court of Appeals for the Ninth Circuit that state disclosures cannot be combined with the disclosures required under the Fair Credit Reporting Act (FCRA).

Employers should not rely on background check companies to make the appropriate changes to their forms—a privileged review of background check processes and forms to ensure compliance and mitigate risk now should be in the game plan.

When it comes to background check forms, the FCRA has two fundamental requirements: The disclosure must be "clear and conspicuous" and in a document that consists solely of the disclosure (the standalone requirement). The disclosure in *Gilberg v. Cal. Check Cashing Stores, LLC*, failed on both points.

The court began with the "standalone" requirement and found that the disclosure at issue—which included state law disclosure requirements along with those required under the FCRA—violated the plain language of the FCRA. The court built upon its prior ruling in *Syed v. M-I, LLC*, where it held that the word "solely" in the FCRA means the disclosure must be in a standalone document, without extraneous information, like a liability waiver.

If it was not clear to employers before, it is clear now that the disclosure must be a standalone document without extraneous information, like state disclosures. The FCRA permits the authorization to be in the same document as the disclosure, but that is the only statutory exception to the standalone requirement. Background check forms should be reviewed to ensure any state disclosures are separated from the FCRA disclosure and authorization.

The court also examined the "clear and conspicuous" requirement. Although the disclosure was conspicuous—mainly because of the use of capitalized, bold, and underlined headings—the court found that it was not clear for two reasons. First, the court referenced the following sentence, which misused a semicolon:

"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."

Without the semicolon, the sentence might make sense. However, the incorrect grammar was enough for the court to find that the language would not be easily understood by a "reasonable person." Second, the court stated that "the disclosure would confuse a reasonable reader because it combines federal and state disclosures." Specifically pointing out the disclosure provided for New York and Maine, the court explained that applicants in other states might think they are not afforded the same rights as individuals in the listed states—which, in certain circumstances, is inaccurate. Citing this potential confusion, the court found the disclosure form was not clear and, therefore, not consistent with FCRA requirements.

The FCRA provides for statutory penalties, as well as attorneys' fees for violations, and this decision may be more fodder for the plaintiff's bar. Over the past several years, FCRA nationwide class actions have been prevalent and decisions like *Gilberg* may result in a spike in class actions, especially in the Ninth Circuit.

Ballard Spahr's Labor and Employment Group regularly advises employers on the hiring process and can assist in revising and updating disclosure forms to ensure compliance with the FCRA. The firm's Consumer Financial Services Group is nationally recognized for its guidance in structuring and documenting new consumer financial services products, its experience with the full range of federal and state consumer credit laws, and its skill in litigation defense and avoidance.

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