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When It Comes to Consumer Report Disclosures, Keep It Simple

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The Ninth Circuit's recent decision in a putative class action sent a clear message to employers: simplify your consumer report disclosures or risk exposure to lawsuits.

In *Gilberg v. Cal. Check Cashing Stores, LLC*, No. 17-16263, 2019 U.S. App. LEXIS 2940 (9th Cir. Jan. 29, 2019), the Ninth Circuit Court of Appeals ruled that to comply with the Fair Credit Reporting Act ("FCRA"), disclosure documents seeking authorization to obtain background reports cannot include any extraneous information.

The FCRA was enacted to protect consumers' privacy rights with respect to background checks completed by a third party background check vendor also referred to as a Consumer Reporting Agency ("CRA"). Under this federal statute, an employer who wishes to obtain a "consumer report" or an "investigative consumer report"¹ regarding a job applicant² or current employee must provide a "clear and conspicuous disclosure" to the individual and receive written authorization from the individual before obtaining any such report. See 15 U.S.C. § 1681b(b)(2)(A). The disclosure form must be a standalone document "consist[ing] solely of the disclosure" notice. *Id.*

Gilberg impacts virtually all employers in the Ninth Circuit and invites a new wave of FCRA-related litigation. Therefore, we strongly recommend that all such employers review and update their disclosure forms at the earliest opportunity as outlined below. In particular, the *Gilberg* decision requires employers to strip extraneous language from their FCRA disclosures, especially language pertaining to any disclosure requirements mandated by other states. In practice, this may require employers in the Ninth Circuit to cease using multi-state disclosure forms.

We describe below the court's holding and the steps that employers should take to bring their disclosures into compliance.

CASE SUMMARIES

Because the *Gilberg* opinion relies on the Ninth Circuit's decision in an earlier FCRA disclosure case, we examine both cases.

Syed v. M-I, LLC, 853 F.3d 492 (9th Cir. 2017), cert. denied M-I LLC v. Syed, 138 S. Ct. 447 (Nov. 13, 2017).

In *Syed*, the Ninth Circuit analyzed the FCRA's standalone document requirement and held that the disclosure document must consist solely of the disclosure. 853 F.3d at 496.



Syed involved a putative class action filed by Sarmad Syed, a job applicant who alleged that the disclosure form provided by a prospective employer was not FCRA-compliant. During his employment application process, M-I, LLC provided Syed with a disclosure document entitled “Pre-employment Disclosure Release,” that authorized M-I to procure Syed’s consumer report and that, upon Syed’s signing, also served as a broad liability release. Syed brought a class action lawsuit against M-I, alleging that the inclusion of the liability release in the disclosure violated the statutory requirement that the disclosure document consist “solely” of the federally-mandated disclosure. After the district court twice dismissed Syed’s complaint for failure to state a claim, Syed appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit rendered a decision of first impression, holding that M-I willfully violated the statute by including the liability release in the disclosure form.

- ***Including a liability release in an FCRA disclosure violates the statute’s standalone requirement.***

The Ninth Circuit emphasized that the statute unambiguously requires a document that “consists solely of the disclosure.” *Id.* at 500. The statute, however, permits an authorization clause to be provided on the same document as the disclosure. *Id.*; 15 U.S.C. § 1681b(b)(2)(A)(ii). The court held that the statutory allowance for the consumer’s signed authorization on the same document was an “express exception to the requirement that the document consist ‘solely of the disclosure.’” 853 F.3d at 500. Indeed, allowing an applicant to provide written authorization on the same document as the disclosure furthers the statute’s purpose because it focuses the applicant’s attention on privacy rights and the necessity of consenting to a background or credit check. *Id.* at 501.

In contrast, the statute does not explicitly or implicitly permit the inclusion of a liability release in a disclosure document. *Id.* at 501-02. The court noted that a liability release draws the consumer’s attention to the release of rights, and allows an applicant to conclude mistakenly that a signature confers consent to a general release of claims. *Id.* Thus, the inclusion of the release violated the FCRA’s requirement that the disclosure be a standalone document consisting solely of the disclosure.

The court pointed out that whether the disclosure itself satisfied the “clear and conspicuous” prong was independent of the analysis of the standalone document prong. *Id.* at 502-03. The court, however, noted that Syed had standing to bring the action only because “Syed was confused [about what he was signing] and would not have signed it had it contained a sufficiently clear disclosure.” *Id.* at 499.

Finally, the court found M-I’s violation was willful because M-I’s inclusion of the liability release was objectively unreasonable, given the statute’s unambiguous language. *Id.* at 505-06.

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In *Gilberg*, the Ninth Circuit went one step further, holding that any “extraneous” information in an FCRA disclosure violates the statute—even including information that pertains to disclosures mandated by inapplicable state and/or local law.

While applying for employment with CheckSmart Financial, LLC, Desiree Gilberg received an FCRA disclosure form that permitted CheckSmart to obtain a consumer report upon her signed authorization. The one-page disclosure document, entitled “Disclosure Regarding Background



Investigation,” contained information relating to the disclosure requirements of not only the FCRA and California’s ICRAA, but also to the disclosure requirements of several other states inapplicable to Gilberg. After Gilberg signed and returned the disclosure form, CheckSmart obtained a background report, confirmed that she had no criminal record, and subsequently hired her.

A few months later, Gilberg voluntarily terminated her employment and brought a putative class action against CheckSmart for alleged failure to make a proper disclosure under the FCRA and ICRAA.³ The district court entered summary judgment for CheckSmart. The Ninth Circuit reversed. In doing so, the court addressed two issues: (1) whether a disclosure containing extraneous information relating to various state disclosure requirements fulfills the “standalone document” requirement, and (2) whether the specific disclosure at issue satisfied the “clear and conspicuous” requirement.

- ***The standalone requirement precludes inclusion of state-mandated disclosures that are not applicable to the recipient.***

Guided by its earlier holding in *Syed*, the court held that the standalone requirement precluded inclusion of any extraneous information in the disclosure document apart from the express exception of a written authorization. *Id.* at *12-15. Accordingly, even inclusion of information required by other states’ laws violates the standalone requirement. *Id.* The court rejected CheckSmart’s contention that its disclosure form furthers the congressional purpose of the FCRA by helping consumers understand their state and federal rights. Rather, “purpose does not override plain meaning. . . . Because CheckSmart’s disclosure form does not consist solely of the FCRA disclosure, it does not satisfy FCRA’s standalone document requirement.” *Id.* at *13-14. Moreover, the court noted that “the presence of this extraneous information is as likely to confuse as it is to inform.” *Id.* at *14.

Also, because the standalone document provisions under the FCRA and ICRAA are identical, CheckSmart’s noncompliance with the former also violated the latter. *Id.* at *15.

- ***Grammatically sloppy and/or confusing language violates the statute’s “clear and conspicuous” requirement.***

The court further explained that compliance with the FCRA’s clear and conspicuous requirement demanded that a disclosure use reasonably understandable language and be readily noticeable to the consumer.

CheckSmart’s disclosure satisfied the “conspicuous” part of the requirement by sufficiently using capitalization, font emphasis, and headings to direct the applicant’s attention to the document’s purpose. *Id.* at *18-19. The disclosure form, however, failed to meet the clarity requirement for two independent reasons.

First, the disclosure contained imprecise and confusing language that a reasonable person would not understand as follows:

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.



Id. at *17. The court found this sentence did not adequately explain how the authorization was all-encompassing or how any limits were construed. *Id.* Further, the phrase following the semicolon “lacks a subject and is incomplete.” *Id.*

Second, the disclosure invited confusion by combining federal and state disclosures. For instance, one paragraph stated:

New York and Maine applicants or employees only: You have the right to inspect and receive a copy of any investigative consumer report requested by *CheckSmart Financial, LLC* by contacting the consumer reporting agency identified above directly.

Id. at *6, 18 (emphasis in original). The court noted that a “reasonable reader might think that only New York and Maine applicants could contact the consumer reporting agency to get a copy of the report”—an understanding contrary to both the FCRA and ICRAA. *Id.* at *18.

Thus, CheckSmart’s disclosure violated the FCRA requirements of a standalone disclosure document and clear language, prompting the court to vacate in part the district court’s judgment and remand.

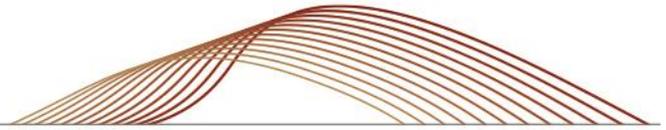
RECOMMENDATIONS FOR EMPLOYERS

With the *Gilberg* and *Syed* decisions, the Ninth Circuit Court of Appeals has signaled a rigorous interpretation of the standalone requirement that permits no extraneous information. In light of these decisions, employers in the Ninth Circuit who use multi-state disclosure forms, which frequently are used by nationwide employers, are at risk.⁴ Accordingly, employers should review their existing disclosures for compliance as soon as practicable to mitigate exposure.

It is critical that employers provide FCRA disclosures that are clear, standalone documents, whether paper or electronic. Language should be clear, precise, and easily understood under a reasonable person standard. Employers are advised to simplify disclosures and remove all extraneous information that is not required in the FCRA disclosure.

In updating disclosure and authorization forms, employers should review and consider the following:

- Identify the states and local jurisdictions where the employer obtains background reports on candidates for employment and determine whether any require additional specific disclosures or special notices or summaries of rights under applicable state or local laws. For example, California, Maryland, Massachusetts, Montana, Minnesota, New Jersey, New York, Oklahoma, Washington State, and San Francisco currently have disclosure and/or notice requirements beyond those of the FCRA.
- Determine whether “investigative consumer reports” are being requested about candidates as defined under the FCRA in footnote 1 below. If so, additional disclosures are required under the FCRA and additional state-specific disclosures also may be required. If currently requested, consider whether investigative consumer reports that require “personal interviews” as set forth in the FCRA are necessary or can be eliminated in order to avoid many of the state-specific disclosure requirements.
- Determine whether credit reports are being requested on any candidates and the applicable states where such credit reports are requested. Some states and local jurisdictions prohibit credit reports, except for specific categories of positions and may require special disclosures and/or notices (*e.g.*, currently in California, Colorado, Connecticut, Hawaii, Illinois, Maryland,



Nevada, Oregon, Vermont, Washington, D.C., and Washington State as well as the cities of Chicago (and Cook County), Philadelphia, New York City, and Madison, Wisconsin).

- Confirm with the CRA the specific scope of the investigation requested by the employer and that the nature and scope of the investigation is accurately described in any disclosure forms where required under applicable state law.
- If utilizing a CRA's web-based platform to electronically present required disclosures and obtain appropriate authorizations, determine whether there are any functional limitations of the website that create potential issues in presenting standalone documents and work with the CRA to insure that the documents being provided to candidates are in full compliance with all applicable laws. Remember that the obligation to provide compliant disclosure and authorization forms and any required notices or summary of rights is the employer's responsibility under applicable law.
- Consider whether provisions that may be arguably extraneous and/or unclear as drafted should be revised or removed. For example, the provision providing for background checks throughout employment found to be unclear in *Gilberg* may not be necessary for all employers. If an employer's need for background checks on current employees is limited to misconduct investigations, such a provision may not be required in the disclosure. Both the FCRA and California law expressly permit a background report to be obtained in connection with misconduct investigations without providing advance disclosures and obtaining a written authorization, subject to other requirements.

Paul Hastings recommends keeping the disclosure as short and simple as possible, using a "less is better" approach to information included in disclosure forms. The key: *When in doubt, leave it out.*



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Los Angeles lawyers:

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- ¹ Under the FCRA, a “consumer report” generally includes credit reports, criminal history reports, and other information relating to a consumer’s “character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes” 15 U.S.C. § 1681a(d)(1). Under the federal statute, an “investigative consumer report” is a type of consumer report “in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through **personal interviews** [with persons] who may have knowledge concerning any such items of information.” 15 U.S.C. § 1681a(e) (emphasis added). California’s Investigative Consumer Reporting Agencies Act (“ICRAA”) generally refers to all background reports as “investigative consumer reports,” except for consumer credit reports, which are governed by the California Consumer Credit Reporting Agencies Act (“CCRAA”). Cal. Civ. Code § 1786.2(c); Cal. Civ. Code § 1785.1 *et seq.*
 - ² Numerous states and local jurisdictions across the country prohibit employers from making criminal record inquiries until after a conditional offer is made. *See, e.g.,* Cal. Gov’t Code § 12952(a)(1) and (2). In addition, California’s law, effective January 1, 2018, requires employers to conduct an individualized assessment to determine whether the criminal conviction is directly job related to the position sought prior to taking any adverse action and also requires additional specific provisions be included in the pre-adverse and adverse action letters sent to candidates by the employer. *Id.* at § 12952(c).
 - ³ The relevant provisions requiring a “clear and conspicuous” disclosure in a standalone document “consist[ing] solely of the disclosure” are the same under the FCRA and the ICRAA.
 - ⁴ State-specific notices not applicable to the applicant also have been found to be extraneous information in other jurisdictions outside the Ninth Circuit. *See, e.g., Robrinzine v. Big Lots Stores, Inc.*, 156 F. Supp. 3d 920, 927 (N.D. Ill. 2016); *Jones v. Halstead Mgmt. Co., LLC*, 81 F. Supp. 3d 324, 333-35 (S.D.N.Y. 2015).

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