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Navigating 9th Circ.'s Take On Background Check Disclosures

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Companies that conduct employee background checks should take special care to provide clear and stand-alone disclosures of the information required by the federal Fair Credit Reporting Act as well as California's parallel Investigative Consumer Reporting Agencies Act, or ICRAA.

These laws protect consumer privacy rights and regulate the collection, disclosure and use of consumer information. Both impose various disclosure requirements, and, in an effort to comply with the myriad requirements imposed by federal and state law, some employers rely on a single multistate form that provides the FCRA-mandated disclosures as well as various state-specific disclosures. It is not uncommon, for example, for national employers to provide an FCRA disclosure that is followed by separate paragraphs "For California Applicants Only," another disclosure for "New York and Maine Applicants Only," and so on.

In late January, the U.S. Court of Appeals for the Ninth Circuit held in Gilberg v. California Check Cashing Stores LLC[1] that this type of combined disclosure may violate both the FCRA and ICRAA. When Gilberg applied for a position with CheckSmart in California, she received a multistate FCRA disclosure and authorization form. As in the example above, it included both an FCRA disclosure and a number of state-mandated disclosures that applied to individuals from various states. After leaving the company, Gilberg brought a putative class action against CheckSmart for violations of the FCRA and ICRAA.

The trial court granted summary judgment in favor of CheckSmart, finding that it had complied with both statutes. On appeal, however, the Ninth Circuit not only reversed summary judgment, but found that CheckSmart had violated the FCRA and ICRAA's "stand-alone document" as well as the "clear and conspicuous" requirement. These rules prohibit an employer from obtaining a background check (more broadly termed a "consumer report") unless the employer first obtains written authorization after providing the employee or applicant with a "*clear and conspicuous disclosure*" regarding the report "*in a document that consists solely of the disclosure*."[2]

Although the court acknowledged the "legal sufficiency of the FCRA disclosure provided" by CheckSmart, it still found the disclosure violated the FCRA and ICRAA's "stand-alone document" requirements because the disclosure form referred "also to rights under state laws inapplicable to Gilberg and to extraneous documents that are not part of the FCRA-mandated disclosure" such as a "Notice Regarding Background

Investigation" and a "Summary of Your Rights Under the Fair Credit Reporting Act."

This ruling extended the court's 2017 decision in Syed v. M-I LLC[3] where the Ninth Circuit construed the FCRA's disclosure requirements strictly and found a violation where the employer included a liability waiver within its disclosure document. The court held that the inclusion of the waiver in the disclosure document violated the FCRA's requirement that the document "consists solely of the disclosure."

In Syed, however, the problematic surplusage was a liability waiver, which was described as "contrary to FCRA's purpose." A district court decision had distinguished such additions from disclosures of information "closely related" to the FCRA's disclosure requirements such as "similar consumer disclosures required under the laws of California and other states."[4]

Although the Ninth Circuit initially affirmed that district court ruling, in Gilbert, it held that the subsequent Syed decision "forecloses that approach." The court explained that while it was "especially" inappropriate to include a liability waiver in an FCRA disclosure, as in Syed, there is also no implied exception to the "standalone document requirement" for "other, state-mandated disclosure information," even if that information is similar to the FCRA's disclosure and "furthers rather than undermines FCRA's purpose."

In sum, because CheckSmart's disclosure form did not consist *solely* of the FCRA disclosure, it does not satisfy the stand-alone document requirement. And because the ICRAA's stand-alone document rule is identical, the form violated both federal and California law.

The court went on to find that, by including language beyond the FCRA's required disclosure and multiple state disclosures, SmartCheck's disclosure also violated the FCRA's "clear and conspicuous" requirement. The court held the text was not "reasonably understandable" because: (1) the disclosure's poor grammar and sentence structure were confusing and obfuscated the scope of the authorization; and (2) the extraneous state law disclosures would confuse a reader as to which disclosures applied.

The Ninth Circuit's strict interpretation of the FCRA is novel among the circuit courts. Nonetheless, given the potential for class litigation and significant statuary penalties for each violation, employers would be well-advised to ensure that their background check disclosure forms comply with this new and expansive interpretation of the stand-alone document rule.

Prudent steps to take include:

- **Ensure that, prior to any background check, all applicants and employees are provided an FCRA disclosure form that consists solely of the FCRA disclosure.** Certainly exclude liability waivers or other language seeking to limit the FCRA or ICRAA's impact. Place other employment-related acknowledgements (e.g., acknowledging at-will employment status) in a separate document. Even acknowledgments *related* to background checks should ideally be separated.

  Gilberg, for example, found fault with CheckSmart obtaining acknowledgement of receipt of a "Summary of Your Rights Under the Fair Credit Reporting Act." That document is published by the Federal Trade Commission (which enforces the FCRA) and the FCRA *requires* it be provided under certain circumstances.[5] The court nevertheless called it "extraneous information" that is "as likely to confuse as it is to inform," and said it "does not further FCRA's purpose." Obtaining acknowledgement of receipt of such documents separately may allow an employer to avoid such hypertechnical arguments.

- **Provide a similar stand-alone disclosure under the ICRAA for California employees.** Avoid including references to *other* state laws that do not apply to the recipient. A conservative approach would also provide *separate* federal and state disclosures to each employee, even if they are similar or identical.

- **Employers may include the signature block on the same form.** The FCRA's single express exception to the stand-alone document rule is that the employee/applicant may "authorize in writing" the procurement of the report in the same document as the disclosure.

- **The disclosure document(s) may be included as part of a packet of information.** In Gilberg, the court rejected the assertion that all documents provided to an applicant at the same time (in that case, "every form she filled out in the employment process") constituted the "document" to be evaluated. The court noted that this would make it "difficult to see how an employer could ever provide an applicant written application materials without violating the FCRA's standalone document requirement."

- **Ensure the disclosure is clear and easy to understand.** Use proper grammar and sentence structure phrasing in the disclosure, so that an average person can understand it.

- **Make the disclosure conspicuous.** Avoid small fonts and difficult-to-read formatting. Gilberg found the provision at issue *was* "conspicuous" because CheckSmart had "capitalized, bolded and underlined the headings for each section of the disclosure and labeled the form so an applicant could see what she was signing."

- **Review agency forms.** Employers who use FCRA disclosure forms provided by consumer reporting agencies should carefully review the documents before providing them to employees or applicants and ensure compliance with the FCRA/ICRAA's stand-alone document and clear and conspicuous disclosure rules.

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[1] 913 F.3d 1169 (9th Cir. 2019)

[2] 15 U.S.C. § 1681b(b)(2)(A) (FCRA); Cal. Civ. Code § 1786.16(a)(2)(B) & (C) (ICRAA).

[3] 853 F. 3d 492 (9th Cir. 2017)

[4] Noori v. Vivint, Inc., 2016 WL 9083368, at *1 (C.D. Cal. Sept. 6, 2016), aff'd, 726 F. App'x 624 (9th Cir. 2018).

[5] 15 U.S.C.A. § 1681g.