

Insights: Alerts

Ninth Circuit Expands FCRA Disclosure Requirements

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Written by **Kendra C. Chapman** and **Susan W. Pangborn**

On January 29, 2019, the U.S. Court of Appeals for the Ninth Circuit held that disclosure documents given to job applicants pursuant to the federal Fair Credit Reporting Act (“FCRA”) prior to running background checks cannot contain any reference to comparable state laws without violating the FCRA’s requirement that disclosures be provided in a “standalone document” in a “clear and conspicuous” manner. The Ninth Circuit’s decision in *Gilberg v. California Check Cashing Stores LLC* thus greatly expands the scope of potential liability for employers who run background checks – particularly those in California or other states in the Ninth Circuit.

Gilberg v. California Check Cashing Stores LLC

The proposed class action lawsuit was filed by a former employee who argued that the state-law-specific disclosures included alongside those mandated by the FCRA in a disclosure document provided to applicants were confusing and violated the FCRA’s requirement that the document not contain extraneous information unrelated to the FCRA disclosures. The background check disclosure document that was provided to the employee and other applicants in this case contained required disclosures under FCRA and also similar disclosures required under various state laws, including California law.

The FCRA requires that disclosure documents (which must be provided to an applicant prior to running any background checks or similar investigative reports) be provided on a “clear and conspicuous disclosure...in a document that consists solely of the disclosure.” California’s Investigative Consumer Reporting Agencies Act (“ICRAA”) contains a very similar requirement. Relying on the 2017 Ninth Circuit decision in *Syed v. M-I LLC*, which held that a disclosure document containing a liability waiver was invalid under the FCRA, the employee in *Gilberg* argued that the state-law disclosures in the document provided to her and other applicants went against the FCRA’s requirement that the document contain no extraneous information, as well as the Ninth Circuit’s requirements as articulated in *Syed* and the intent of the federal and state law.

Writing for the unanimous three-judge panel, Circuit Judge Raymond C. Fisher offered two primary reasons for the conclusion that the disclosure document provided to the employee was not “clear” and thus violated the FCRA. First, the court held that the presence of the additional language in the forms “is as likely to confuse as it is to inform” because the combination of the state disclosures alongside those required under federal law could mislead the reader as to what laws apply to them and whether federal laws grant the same or additional rights as those established under state law. For example, a statement in the disclosure that applicants in Maine and

New York have the right to request copies of the background check report could incorrectly suggest to applicants in other states that federal law does not grant them the same right.

Second, the court held that the language used in the disclosure document was not written in language that was easy for the average reader to understand. For example, the disclosure referred to the notice and authorization as “all-encompassing,” yet did not explain how the all-encompassing nature of the authorization would actually affect the applicant's rights. The court also found that the disclosure contained sentences which lacked a subject, were incomplete, and/or which suggested that there might be some limits to the all-encompassing nature of the authorization without specifying what those limitations might be – all of which made the disclosure form unclear. The case was ultimately remanded to the district court for further proceedings.

Practical Implications and Key Takeaways

Although the Ninth Circuit's decision in *Gilberg* is notable and may influence federal courts in other jurisdictions addressing potential violations of the FCRA and similar state laws, its impact is likely to be felt the most in those states and territories within the Ninth Circuit's jurisdiction (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Mariana Islands). Employers who hire and conduct background checks on applicants within these states should immediately evaluate their background check forms – including those provided by third-party reporting agencies – to ensure that state-specific disclosures are not included in the required FCRA disclosure form.

Federal courts outside of the Ninth Circuit have not yet reached agreement or consensus regarding whether the inclusion of state-specific disclosure language in FCRA disclosure documents violates the FCRA. However, employers throughout the country should consider having their disclosure forms reviewed in light of the reasoning in *Gilberg* to ensure that the language contained in the disclosures is clear, conspicuous, and free of extraneous information. Importantly, employers should be careful to ensure that the language used in these documents can reasonably be understood by an average applicant. There has been an increase in proposed class action cases challenging FCRA disclosures provided to applicants throughout the country within the last several years. A thorough review of these forms will help mitigate the risk of litigation regardless of where you do business.

Related People



Kendra C. Chapman

t 415.273.4386

kchapman@ktslaw.com



Susan W. Pangborn

t 404.815.6305

spangborn@ktslaw.com



James Smith

t 415.273.4317

james.smith@ktslaw.com