



Critical Considerations for Compliance with the FCRA

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In 2017, the 9th Circuit ruled in *Syed v. M-I LLC* that an FCRA disclosure form that included a liability waiver did not meet the FCRA's requirement that the disclosure form "consist[] solely of the disclosure." The 9th Circuit further ruled that the employer's inclusion of the liability waiver in the FCRA disclosure, whether intentional or not, was "willful" under the FCRA, thus entitling the consumer to recover statutory damages ranging from \$100-\$1,000, plus punitive damages and attorneys' fees.

Then, earlier this year in *Gilberg v. California Check Cashing Stores*, the 9th Circuit further tightened the FCRA's disclosure requirements. In *Gilberg*, the plaintiff applied for a job and received a multistate disclosure form in connection with a background check request, which included the required FCRA disclosure and disclosures specific to residents of several different states. The district court entered summary judgment in favor of CheckSmart on the ground that the disclosure complied with the FCRA. But the 9th Circuit reversed the judgment on appeal, based on the bevy of federal and state disclosures in the disclosure form. Because the disclosure provided to Gilberg also contained disclosures specific to residents of six other states, the 9th Circuit held that a reasonable reader might think that only applicants from certain states could contact the consumer reporting agency to get a copy of the report, which is contrary to the FCRA. After *Gilberg*, the multistate FCRA disclosure forms used by companies all over the country could potentially lead to liability in the 9th Circuit.

Since the 9th Circuit issued its decision in *Gilberg* on January 29, 2019, we have seen a further uptick in new FCRA class actions filed against employers in the 9th Circuit. We expect this trend to continue, given the statutory damages available under the FCRA. The plaintiffs' bar also continues to attempt to further constrict the FCRA's disclosure requirements. For

example, in *Mitchell v. Winco Foods, LLC*, 2019 WL 2078766 (D. Id. May 9, 2019), the plaintiff brought a class action alleging that the disclosure of the “consumer report” violated the FCRA because the disclosure for the “consumer report” provided applicants with notice that the defendant would obtain both a consumer report and an investigative consumer report.¹ The court, citing *Gilberg*, denied the defendant’s motion to dismiss this claim, holding that plaintiff’s allegations stated a claim for violation of the FCRA’s “separate disclosure” requirement.

The stand-alone document rule has the potential to ensnare unwitting employers who provide state disclosures on the same form as the FCRA disclosure. But in such cases, the potential statutory liability is often entirely out of proportion to the actual harm (or lack thereof) caused by such technical violation. It is crucial to consider at the outset of FCRA litigation whether the plaintiff—or the class—has standing to bring an action under the FCRA. *Comp. Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017) (allegations of inaccurate reporting of information about marital status, age, education and employment history constituted harm sufficiently concrete to satisfy injury-in-fact requirement for standing), *with Dutta v. State Farm*, 895 F.3d 1166 (9th Cir. 2018) (alleged technical fault in pre-adverse action notice under the FCRA did not confer standing on plaintiff to bring action under the FCRA, given substance of information in credit report was indisputably accurate).

In sum, employers should take care to ensure that their background check disclosure forms strictly comply with the FCRA’s disclosure requirements. A simple review of basic disclosure forms can save a company the time, expense and pain of a class action lawsuit and significant resulting statutory damages.

¹ The FCRA provides for two different types of disclosures depending on the type of report being obtained. The disclosure required to obtain a “consumer report” must consist solely of the disclosure. The disclosure required to obtain a “consumer investigative report” (a report that includes information gathered from personal interviews) need not consist solely of the disclosure. Thus, the FCRA provides for different disclosure requirements depending upon whether the employer is seeking a consumer report or an investigative consumer report as those terms are defined in the FCRA.

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