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RECENT DEVELOPMENT

Ninth Circuit Reinforces Prohibition Against "Extraneous" Information In Background Check Disclosures

By Rod M. Fliegel on March 21, 2020

On March 20, 2020, the Ninth Circuit issued its third opinion on the question of when an employer's background check disclosure satisfies the so-called "standalone" disclosure requirement in the Fair Credit Reporting Act (FCRA).[1] The new opinion, like the two prior ones (*Syed* and *Gilberg*), reads the text of the FCRA literally, but also provides some practical guidance for drafting such disclosures. Addressing a separate obligation that employers have to provide "pre-adverse" action notice when relying on background reports, the Ninth Circuit rejected the plaintiff's argument that the FCRA affords a right to discuss the report directly with the employer.

The Background Check Disclosure

Employers may order background reports for employment purposes, but must first disclose their intention to do so *and* obtain authorization. The disclosure must be "clear," "conspicuous," *and* presented in a "document" that consists "solely" of the disclosure –*i.e.*, it must be a standalone disclosure with no extraneous text. The Ninth Circuit's opinion discussed each paragraph of the employer's disclosure and ruled that most, but not all, of the text was part of the disclosure rather than impermissible "extraneous" material. Summarizing:

Text	Ruling	Caveats

Statement the employer will obtain consumer reports for employment purposes	Permissible	The employer's disclosure referred to consumer reports *and* investigative consumer reports, *i.e.*, reports obtained by personal interviews. The court ruled it is permissible to refer to both types of reports, but did not opine whether the employer's disclosure was still "clear" and "conspicuous."
Statement describing the possible employment purposes (*e.g.*, hiring, promotion, reassignment, etc.)	Permissible	The description must not be confusing so the disclosure is still "clear."
Statement the report will include information about the individual's "character, general reputation, personal characteristics, and mode of living."	Permissible	
Statement describing the types of searches the report will include.	Permissible	The description must not be confusing so the disclosure is still "clear."

Naming and providing contact information for the background check company.	Permissible	The description must not be confusing so the disclosure is still "clear."
Statement summarizing the rights applicants have to request and inspect their file from the background check company.	Extraneous	The court did not address whether including this extraneous text was a "willful" violation of the FCRA.

The plaintiff also argued the alleged defects in the employer's disclosure were "amplified" by the text of the separate document to authorize the background check. (The authorization can be combined with the disclosure, but does not have to be combined with the disclosure.) The court rejected that argument, ruling that whether the disclosure is compliant is determined from the disclosure document itself, and not by reading it together with other documents, such as an authorization.

The Pre-Adverse Action Notice

Before taking "adverse action" based, in whole or in part, on a background check, the employer must provide the applicant with a copy of the background report and the "summary of rights" document published by the Consumer Financial Protection Bureau (CFPB). Before taking the adverse action, the employer must afford the applicant a meaningful opportunity to receive and review the notice and enclosures. However, the Ninth Circuit rejected the plaintiff's argument that this right encompasses a further right to discuss the report directly with the employer. The FCRA affords a right to dispute the report with the background check company, but not directly with the employer.

Takeaways for Employers

It remains to be seen whether courts in other circuits will follow the Ninth Circuit's literal reading of the text of the FCRA. Several courts have refused to even allow such "technical" violation claims to proceed in federal court based on Article III of the U.S. Constitution. It also remains to

be seen when courts will find extraneous text to constitute "willful" violation of the FCRA, which is important, because most class action lawsuits seek to avoid individualized damages issues by requesting only statutory damages under the FCRA's remedy provision for willful violations.

Nonetheless, because of the spike in class action filings, prudent employers should use care when drafting background check disclosures and have their drafts reviewed by attorneys well versed in the FCRA *and* corresponding state laws. Employers also will want to continue to monitor the proliferation of the so-called "ban the box" laws and laws governing the use of credit reports for employment decisions. The pandemic is sure to slow things down, but if all goes well, hiring will resume in full force when the pandemic abates.

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[1] *Walker v. Fred Myer, Inc.*, 2020 U.S. App. LEXIS 8809 (9th Cir. Mar. 20, 2020).